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Callihoo v. Canada (Minister of Indian Affairs and Northern Development), 2006 ABQB 1 (CanLII)

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Court of Queen's Bench of Alberta

Citation: Callihoo v. Canada (Minister of Indian Affairs and Northern Development), 2006 ABQB 1

Date: 20060104
Docket: 0103 05606
Registry: Edmonton

Between:

Dennis Callihoo and Rosalind Callihoo, acting on their own behalf and on behalf of all members of the Michel First Nation, and on behalf of all members of the former Michel Indian Band No. 472 and the Descendants of Members of the former Michel Indian Band No. 472

Plaintiffs
(Respondents)

- and -

Her Majesty the Queen in Right of Canada, as represented by the Minister of Indian Affairs and Northern Development
and **Her Majesty the Queen in Right of Alberta**

Defendants
(Applicants)

Reasons for Judgment
of the
Honourable Mr. Justice S.D. Hillier

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A. INTRODUCTION

[1] At the heart of this lawsuit is an assertion of rights on behalf of members and descendants of the former Michel Indian Band No. 472. The problem for this group is that the former Michel Band is no longer recognized as an entity under the *Indian Act*, R.S.C. 1985, c. I-5. The parties agree that an enfranchisement was completed in 1958 to allow Band members to take individual titles to Reserve lands. The dispute concerns the effect of that Enfranchisement and the timeliness of asserting legal claims against Canada and Alberta over 40 years later.

[2] The Plaintiffs' claims can be divided into three general categories with consequent remedies: interests in land held by the Crown in right of Canada and Alberta, confirmation of residual rights and status, and contravention of constitutional rights.

[3] The interests in land claimed include interests in beds and shores of Lake Gladue, interests in mines and minerals, and interests in road allowances. These land interests were transferred to Alberta by Canada, and the Plaintiffs argue that the transfer was subject to their unsurrendered and continuing interest in these lands. Further, they seek a declaration that lands surrendered in 1911 were wrongfully taken from the Michel First Nation without its consent and contrary to the terms of Treaty 6 and the Federal Crown's fiduciary obligations. As well, they seek an accounting by the Federal and Provincial Crown of all lands, interest in lands, and property retained by the Defendants from the former Michel Reserve and a declaration that this property is held for the use and benefit of, or in trust for, the Plaintiffs.

[4] In terms of rights and status, the Plaintiffs seek declarations that the Michel First Nation is an "Indian band" under the *Indian Act*, and that they are entitled to benefits under Treaty 6. They also seek a declaration that the honour of the Crown obliges the Federal Crown to reinstate the rights of the Plaintiffs to Band membership and their collective Treaty and statutory rights as a band and First Nation.

[5] Constitutionally, they attack s. 11 of the *Indian Act*, amended in 1985 to restore band status to individual claimants whose Bands continued to exist; they seek a declaration that the amendments were under-inclusive and violate ss. 15 and 35 of the *Charter*, as do the specific claims policy and/or the Federal Crown's exercise of discretion under the specific claims policy.

[6] In 2003 Canada applied unsuccessfully to strike the Statement of Claim in its entirety. (***Callihoo v. Canada (Indian Affairs and Northern Development)***, 2003 ABQB 1044 (CanLII), [2003] A.J. No. 1587, 2003 ABQB 1044). In early 2005, the Court allowed the Plaintiffs to amend and narrow the Statement of Claim in the face of pending applications by both Defendants for summary judgment. (***Callihoo v. Canada (Minister of Indian Affairs and Northern Development),*** 2005 ABQB 307 (CanLII), [2005] A.J. No. 461 , 2005 ABQB 307).

[7] Canada and Alberta now seek summary judgment against the whole of the amended claims. A brief background as well as some limited but significant matters of agreement will provide context to a very robust dispute over the materials upon which the parties purport to rely in these applications.

B. FACTS

1. Background

[8] As noted in both prior decisions, upon adhesion to Treaty 6 in 1878 signed by Chief Michel Callihoo, the Michel Band 472 was established on Reserve 132, under authority of the *An Act Respecting Indians*, S.C. 1897, 31 Vict., c. 42, as amended S.C. 1869, 32-33 Vict. c. 6, now referenced as the *Indian Act*, R S.C. 1985 c. I-5.Over the next 80 years, a number of Michel Band 472 members left the Reserve and were "enfranchised" in various ways. In 1958, a process was completed in which all remaining members of Michel Band were enfranchised under the *Indian Act*. Assets were transferred according to an Enfranchisement Plan approved by the Minister of Citizenship and Immigration responsible for the Indian Affairs Branch. Under the terms of the Enfranchisement Plan, all rights to hold and administer Reserve mines and minerals in unsold Reserve land were assigned and transferred to Michel Investments Ltd. (the Company) for the benefit of former band members.

[9] Bill C-31 was passed in 1985 to address sexual discrimination, restoration of status under the *Indian Act*, involuntary removal from the *Indian Act*, non-forfeiture of rights under the *Indian Act*, and the rights of First Nations to determine membership. As a result of the 1985 amendments, numerous members of the former Michel Band were reinstated with Indian status, but because the former Michel Band had ceased to exist after the Band Enfranchisement in 1958, former Michel Band members were registered on the general list without link to any band.

[10] Overall, the Plaintiffs assert that Canada has breached its treaty, statutory, fiduciary/trust and constitutional obligations as affecting the rights of descendants of the former Michel Band. The Plaintiffs assert that Alberta has breached trust-like and fiduciary obligations, allegedly exercising its discretion to the detriment of the Plaintiffs. Fundamentally the Plaintiffs claim they are entitled to be recognized as a band and they seek various relief for the breaches of their rights.

2. Additional Agreed Facts

[11] First, the Plaintiffs have formally acknowledged the truth of the contents of three Orders in Council which are relevant to the issues. The terms of Order in Council P.C. 1958-375 dated March 18, 1958 are especially key and reproduced in full as an Appendix to this decision. They reflect that the Michel Band applied for enfranchisement and a committee appointed under s. 112 of the *Indian Act* rendered a report on the desirability of enfranchising the Band. That report (Kohan Affidavit, Ex. A), dated January 11, 1957, expressed the opinion that the Band was capable of managing its own affairs as a municipality or part of a municipality and advised that it was desirable that the Band should be enfranchised, subject to a 12-month coverage by the Government of Canada for the cost of relief and education for members of the Band who would have been eligible for such benefits if Enfranchisement had not taken place.

[12] Under Schedule B to Order in Council P.C. 1958-375, the Enfranchisement Plan was approved as set out and the list of Band members set out in Schedule C became enfranchised effective March 31, 1958.

[13] The terms of the Enfranchisement Plan may be generally summarized as follows:

(a) Adult members, in lawful possession of Reserve land, were to receive a quarter section of land. The Plan also contained specific terms addressing marriage, excess possession and estate issues. Surveyed road allowances were to be transferred to Alberta. All remaining land was to be offered for sale, with any land unsold after two

years to be transferred to a new company in which all Band members would hold shares.

(b) The net proceeds that were credited to the Band were to be distributed equally amongst Band members, subject to protection of the interests of minors.

(c) The Company, incorporated with equal shares to all Band members, would administer the mines and minerals on unsold lands, as well as specified gravel-bearing lands.

[14] The Plaintiffs have withdrawn their challenge to Canada's good faith in pursuing the enfranchisement process. However, the Plaintiffs continue to assert that, notwithstanding Enfranchisement, the Defendant Canada at all material times owed trust, trust-like and fiduciary obligations to the Plaintiffs as set out below.

[15] Secondly the Plaintiffs formally acknowledge Order in Council P.C. 1958-1229, dated September 4, 1958, which transferred the administration and control of the road allowances in Michel Indian Reserve No. 132 to the Province of Alberta.

[16] Thirdly, the Plaintiffs formally acknowledge Order in Council P.C. 1973-3571 for the truth of its contents. Specifically, they concede that the Order in Council sets out a schedule of the bodies of Indians declared by Canada to be bands for the purposes of the *Indian Act*, although they challenge the exclusion of any reference to a Michel Band and seek a political or historical context for the list to support restoration of their band status.

3. Specific Allegations

[17] Originally, the claims of the Plaintiffs challenged surrenders of land from the Michel Indian Reserve No. 132 and claimed compensation in particular for the surrenders in 1903 and 1906, as well as enfranchisement of 10 families in 1928.

[18] The Amended Statement of Claim now alleges:

A. Breach of fiduciary, trust, trust-like, and constitutional obligations arising out of

(i) the historical relationship between the Crown and First Nations in Canada;
(ii) the undertakings of the federal Crown to First Nations as confirmed by the Royal Proclamation of 1763;
(iii) the undertakings of the Crown in Treaty 6;
(iv) the setting aside of Reserve lands in trust for the Plaintiffs;
(v) the provisions of the *Indian Act*;
(vi) the vulnerability of the Plaintiffs to the unilateral discretion, authority and control which both Canada and Alberta have exercised and continue to exercise over the legal and practical interests of the Plaintiffs, including their lands.

B. Alienation of lands December 10, 1911 without consent, surrender or compensation as a wrongful deprivation of Reserve lands.

C. Having reinstated Indian status pursuant to amendments in 1985, refusal to restore

membership in the Michel Band or to recognize membership in the Michel First Nation.

D. Denial of collective Treaty rights, including education, health care, economic development, rights of self-government and other Treaty benefits.

E. Refusal of access to the benefit of a negotiated settlement of their historical claims under the Specific Claims Policy contrary to ss. 15 and 35 of the *Constitution Act, 1982*.

F. Trust obligations to continue to hold title in road allowances, precious metals and beds and shores of water bodies; title held by Federal or Provincial Crown to various interests in the former Reserve, including the road allowances, precious metals and beds and shores of water bodies, which interests, including royalties from the sale of some of the precious metals are held in trust for the use and benefit of the Plaintiffs.

C. SUMMARY JUDGMENT

1. Test and Burden

[19] An application for summary dismissal requires that a defendant attack the entire merit of the plaintiff's claim. Rules 159(2) and (3) of the *Alberta Rules of Court* prescribe that:

> **(2)** A defendant may, after delivering a statement of defence, on the ground that there is no merit to a claim or part of a claim or that the only genuine issue is as to amount, apply to the court for a judgment on an affidavit sworn by him or some other person who can swear positively to the facts, stating that there is no merit to the whole or part of the claim or that the only genuine issue is as to amount and that the deponent knows of no facts that would substantiate the claim or any part of it.
>
> **(3)** On hearing the motion, if the court is satisfied that there is no genuine issue for trial with respect to any claim, the court may give summary judgment against the plaintiff or a defendant.

[20] The test applied by the case law is whether it is plain and obvious that the action cannot succeed. The pleadings and evidence on the motion must show that the claim has no reasonable prospect of success:

> ***Boudreault v. Barrett et al*** 1998 ABCA 232 (CanLII), (1998), 219 A.R. 67, 1998 ABCA 232 (C.A.) at para. 9);
> ***Prefontaine v. Veale*** (2003), 339 A.R. 340; 2003 A.J. No. 1536 (C.A.) at para. 9;
> ***DeShazo v. Nations Engergy Co.***,2005 ABCA 241 (CanLII), [2005] A.J. No. 856, 2005 ABCA 241 (C.A.)at para. 17;
> See also: ***Papaschase Indian Band (Descendants of) v. Canada (A.G.)*** 2004 ABQB 655 (CanLII), (2004), 365 A.R. 1, 2004 ABQB 655 at para. 52 and cases cited therein.

[21] The Court must conduct a careful review of the pleadings and evidence in order to determine whether there are undisputed facts which are sufficient to dispose of the matter even in a

complex action: ***DeShazo v. Nations Engergy Co.*** at para. 18 , citing with approval from ***Jagar Industries Inc. v. Canadian Occidental Petroleum Ltd.*** 2000 ABQB 592 (CanLII), (2000), 273 A.R. 1; 2000 ABQB 592 at para 22.

[22] In terms of the burden of proof, the Supreme Court of Canada in ***Hercules Managements Ltd. v. Ernst & Young***, 1997 CanLII 345 (S.C.C.), [1997] 2 S.C.R. 165 (S.C.C.), at para. 15, adopted the approach of the Manitoba Court of Appeal in ***Fidkalo v. Levin*** 1992 CanLII 4017 (MB C.A.), (1992), 76 Man. R. (2d) 267 (CA) which stated (at para. 2):

> . . . Although a defendant who seeks dismissal of an action has an initial burden of showing that the case is one in which the existence of a genuine issue for trial is a proper question for consideration, it is the plaintiff who must then, according to the rule establish his claim as being one with a real chance of success.

[23] This interpretation of the Manitoba Rule for summary judgment has been applied to the Alberta Rule: ***Western Canadian Place Ltd. v. Con-Force Products Ltd.*** (1997), 34 C.L.R. (2d) 139; 208 A.R. 179(Q.B.); ***Jagar Industries Inc***., and ***Papaschase*** at para. 52.

2. Canada's Material

[24] In support of its application for summary judgment, Canada has filed the affidavit of Stephen Kohan, dated May 30, 2005. Mr. Kohan states that he is the assigned litigation project manager for this action and has personal knowledge of matters deposed to except where stated otherwise. He asserts that he has coordinated the records research and collection activities for Canada as conveyed by employees and contractors assigned to research relevant departmental files.

[25] The Kohan affidavit attaches extensive supplementary material on the Enfranchisement process between 1956 and 1958, including:

(a) the report of a Committee chaired by His Honour Chief Judge N.V. Buchanan to The Honourable J.W. Pickersgill, a Minister of Citizenship and Immigration; and

(b) correspondence between the Department, the Chief and Councillors of Michel Band and the Superintendent, Edmonton Indian Agency. See a copy of the Order in Council P.C. 1958-375.

[26] After attaching Order in Council P.C. 1973-3571 (which excludes reference to the Michel Band in the list of recognized bands) together with correspondence between May 1992 and June 1995, Mr. Kohan deposes that a request by Chief Gilbert Anderson, to have the former Michel Band recognized under *The Indian Act*, was denied by Minister Ronald A. Irwin and that Mr. Kohan is unaware of any current record of Canada to acknowledge any existing Michel Band.

[27] The Kohan affidavit further attaches material in respect of the disposal of lands upon Enfranchisement, including surrender of road allowances and transferring administration and control of road allowances in Michel Indian Reserve No. 132 to the Province of Alberta. After attaching correspondence between May 25, 1886 and August 5, 1909 respecting the grant of land to the Estate of L'Hirondelle in 1911, Mr. Kohan identifies correspondence from legal counsel to Indian and Norther Affairs Canada dated December 18, 1995 enclosing a statement of claim in relation to an alleged wrongful surrender and taking of approximately 41 acres of Reserve land by the Department

from the Michel Indian Reserve in 1911.

[28] Mr. Kohan's affidavit further attaches material in respect of the disposal of lands upon enfranchisement, including road allowances transferred from, as well as the land grant to the Estate of L'Hirondelle in 1911.

[29] In connection with Bill C-31, the Kohan affidavit identifies correspondence between January 22, 1996 and September 10, 1996, together with legal proceedings filed in the Federal Court of Canada seeking to quash the September 10, 1996 decision of the Minister which denied recognition of the claimants by descendancy from the Michel Indian Band No. 132.

[30] Other materials enclosed in the Kohan affidavit include requests and responses for information concerning the 1958 Enfranchisement, as exchanged in April 1975, as well as a Statement of Claim forwarded by legal counsel to the Department on February 11, 1985. As a result of reviewing all these materials Mr. Kohan deposes his belief that people purporting to represent the interests of descendants of members of the former Michel Band had researched issues and retained legal counsel to review the claims including:

(a) the 1911 grant to the Estate of L'Hirondelle;

(b) the 1958 Enfranchisement of the former Michel Band;

(c) the restoration of full treaty status to descendants of members of the former Michel Band; and

(d) that land be set aside for the Michel Reserve No. 132 more than 15 years before the Statement of Claim commencing this action was filed by the Plaintiffs.

[31] Mr. Kohan specifically asserts his belief based on his review of the material that

(1) there is no merit to the claims and it cannot succeed;
(2) he is not aware of any facts that would substantiate the action.

3. Alberta's Materials

[32] In support of its application for summary judgment, Alberta has filed the affidavit of Mark Graham dated July 14, 2005. Mr. Graham states that he is employed as a research coordinator by Alberta, with personal knowledge of the matters, except where stated otherwise. He asserts that he has organized and coordinated research of the records of Alberta and the collection of those records, including the documents disclosed in the Affidavits of Records of all parties, as well as Mr. Kohan's affidavit.

[33] Mr. Graham assembled a volume of materials under topical headings "Mines and Minerals", "Road Allowances", and "Beds and Shores of Lake Gladue."

[34] Based on the Enfranchisement March 31, 1958 and the transfer to the Company of the rights to all mines and minerals underlying the former Reserve of Michel Band 472, Mr. Graham notes that the Plaintiffs had made no claim against Alberta arising from the facts and matters alleged in this

action, before the Statement of Claim in this action was served in March of 2001.

[35] Mr. Graham then fulfills technical compliance, deposing that, based upon his review of materials, he believes there is no merit to the whole or any part of the Plaintiffs' claim against Alberta and is aware of no facts that would substantiate the claims.

[36] The Plaintiffs have not submitted any contrary materials, arguing that the materials are all within the power and control of the Defendants, although they have had copies of certain material for a considerable period of time. Remarkably, they urge the Court to consider documents allegedly from the records of Canada attached to the Plaintiff's legal brief. I am unable to consider such material as evidence and address this strategy below (see para. 56).

4. Plaintiffs' Preliminary Objections

i. Critique of Defendants' Affidavits

[37] The Plaintiffs stridently assert that the affidavits of both Defendants fail to meet the requirements of Rules 159 and 305 of the Alberta *Rules of Court* because the deponents are unable to swear positively to the facts and the documents are inadmissible hearsay.

[38] To support the critiques of both affidavit, the Plaintiffs rely on the following points:

(a) Mr. Kohan and Mr. Graham are unable from their own knowledge to swear positively to the facts, nor are they senior officers with any direct knowledge of, or experience with the circumstances: ***First Investors Corporation Ltd. and Associated Investors of Canada Ltd. v. Quinpak Development Ltd.,***[1985] A.J. No. 711, 37 Alta. L.R. (2d) 331; (Q.B.) at para 14-16;

(b) Mr. Kohan makes no assertion that the records were kept and drawn from files in the custody and archives of Canada or otherwise prepared in the ordinary course of Canada's business;

(c) Mr. Graham relies in part upon Canada's records as to the Enfranchisement and has no basis for being able to rely on those documents;

(d) Neither deponent asserts having read all available documents and provides no explanation of the criteria used for selection of documents from the volumes disclosed in the Affidavits of Records, much less what might otherwise be available from their respective files;

(e) The deponents do not give any basis in the affidavits for relying upon documents tendered for the truth of their content as evidence to support summary judgment.

[39] The Plaintiffs argue that the Defendants' affidavits are flawed because they:

(a) Do not comply with the requirements of Rules 159 and 305 that the deponent must swear positively to facts within their knowledge. Failure is fatal to the applications: ***Yellowbird v. Samson Cree No.444*** (2003), 349 A.R. 208, 2003 ABQB 535 at paras.15-18;

(b) Cannot come within the common law tests for admission of non-compliant evidence because such tests do not apply to the legislative requirements of the *Rules of Court*: ***Mikisew Cree First Nation v. Canada*** 2002 ABCA 110 (CanLII), (2002), 303 A.R. 43, 2002 ABCA 110 at para. 14;

(c) Do not meet the tests of necessity or reliability.

ii Burden of Proof

[40] Plaintiffs next argue that even if the Affidavits meet the technical requirements of the *Rules of Court* for consideration of summary judgment, the Defendants' evidence would not be acceptable at trial to prove beyond doubt that the Plaintiffs' claims are hopeless in all elements.

[41] Since Canada created and control most of the critical records, the Plaintiffs complain that they are unable to tender material in reply because they lack first hand knowledge of creation, completeness, and truth of content of these documents.

[42] Finally the Plaintiffs assert that, absent a case to be met on these applications, they decided not cross examine or to file any contrary affidavit evidence. In oral argument about the risks of such a strategy, counsel expressed concern that any contrary documents attached in response by the Plaintiffs from Canada's disclosure would not be admissible upon information and belief.

iii Ruling on Preliminary Objections to Affidavits

[43] I have concluded that both the Kohan and Graham affidavits comply sufficiently with the *Rules of Court* for consideration in summary judgment applications. I start with the absence of any challenge to the authenticity of the documents taken from Canada's Affidavit of Records by the Plaintiffs under Rule 192. Reliance on that rule does not deem the contents of the documents to be true but it opens the opportunity for the court to consider whether to admit and rely upon them according to common law tests of admissibility.

[44] Many of the documents have been available to the Plaintiffs for extended periods and were included in other proceedings in front of the Indian Claims Commission. The parties have relied upon these records in adjudicating related issues without objection to the authenticity, custody, or content of the documents. Even assuming the Plaintiffs may lack firsthand knowledge of documents, that does not justify a failure to cross-examine or make any evidentiary reply.

[45] Dealing more generally with the Plaintiffs' objections to attaching documents and the requirements of Rule 159, although the Rules of Court are approved pursuant to the *Judicature Act*, RSA 2000 c. J-2, as amended by *Justice Statutes Amendment Act*, 2004 S.A. 2004, c. 11, s. 3(4), the Court retains authority to interpret and apply the Rules using a functional and pragmatic approach. For summary judgment applications, case decisions have interpreted the standards of compliance appropriate to the circumstances of various types of litigation.

[46] On debt and foreclosure matters, Plaintiffs seeking summary judgment are required to prove every term of the agreement:

Bank of Montreal v. Kalin, [1992]A.J. No. 1045; 131 A.R. 397 (ABCA);
First Investors Corporation Ltd et al. .

[47] In cases where a party is quite obviously selecting a deponent with no personal knowledge for strategic purposes— someone who accords no real opportunity to examine substantive knowledge of fairly recent events and documents — strict compliance has been invoked:

Yellowbird v. Samson Cree Nation No. 444 at paras. 16-18;
see also ***Mikisew*** at paras. 10-11.

[48] Affidavits which attach relevant documents from production of records have been admitted in various circumstances, including cases dependent on public documents and historical records:

Papaschase at para 61 and cases cited therein.

[49] The test applied for accepting such evidence accords with the requirements at trial i.e. proof of necessity and reliability, recognizing that the court will not seek to reconcile conflicting evidence upon an application for summary judgment:

Alberta (Treasury Branches) v. Leahy et al 1999 ABQB 185 (CanLII), (1999), 234 A.R. 201, 1999 ABQB 185 at para 73.

[50] In the specific circumstances of this case, the materials filed by the deponents selected by each Defendant do meet the requirements for the standards of evidence on a summary judgment application respecting matters of historical record. The test of necessity is met in that it is unreasonable to expect any deponent to speak except from historical records concerning matters which transpired between 1900 and 1958. The Plaintiffs do not impugn the accuracy of any of the documents, nor do they assert that anyone living has greater knowledge of that time period than the deponents as might taint their selection. More recent events will require tighter scrutiny as to reliability but necessity is measured on practicality and convenience: ***Sherritt Gordon Ltd. v. Dresser Canada Inc. et al.,***[1994] A.J. No. 1114, 20 Alta. L.R. (3d) 407 (Q.B.)

[51] Moreover, the Plaintiffs' argument that the Crown has control of the records ignores the fact that the records have been disclosed in the Affidavit of Records, and that as case management judge I have ordered specific, liberal access to documents characterized by Defence counsel as irrelevant but listed for Plaintiffs' consideration. I also note that the Plaintiffs participated in legal hearings by the Indian Claims Commission in the mid 1980's, and would have been familiar with numerous documents in the Crown's possession since that time.

[52] Similarly, the Plaintiffs' concerns regarding reliability ring hollow when neither deponent was cross-examined about any alleged incompleteness of the records, any lack of authenticity, or other evidentiary deficiencies. From my review, none of the documents related to Enfranchisement are inconsistent with the terms of Order in Council P.C. 1958-375. The Plaintiffs asserted many months ago that experts may be called on matters of historical records, but that was before the pleadings which challenged the Enfranchisement and other surrenders were withdrawn. The Plaintiffs do not assert any inaccuracies, much less submit any contrary evidence, against the records filed by Canada concerning events up to Enfranchisement.

[53] The deponents are not mere para-legals; their roles on behalf of the two levels of government are responsive to the work involved in responding to this type of litigation. Because they were not cross-examined in any way, the court has no basis to assume that: they are unfamiliar

with other relevant records; they have been unfairly selective in what they have attached; or they lack a basis for relying on the material submitted. In the absence of any cross examination to undermine the records presented, it is pure speculation whether an incumbent Registrar who keeps records and determines Band registration is any more reliable a source for what Band names are currently maintained. Similarly, even a marginal uncertainty ought to be asserted to support the need for a Lands Reserves and Trust Officer to provide greater reliability to the evidence concerning land interests.

[54] While the standards for receipt of evidence on a summary judgment must remain stringent, I am satisfied that the court is entitled to consider each of these applications on the merits.

[55] As concerns the burden of proof, a respondent is not obliged to file any material if the applicant's materials are shown to be deficient: ***Jason Development Corporation v. Robertoria Properties Ltd*** **,** [1980] A.J. No. 846, 42 A.R. 369 (QB). However, as expressed by Clackson, J. in ***Condominium Plan 9421549 v. Main Street Developments Ltd*** 2004 ABQB 962 (CanLII), (2004), 365 A.R. 162, 2004 ABQB 962 at para 18:

> Depending on the nature of that evidence, however, there may be a practical burden on the [respondent] to either lead evidence or to point to evidence led by others to support its position in order to avoid the danger of having its action dismissed.

[56] Regardless of any concerns about the propriety of attaching the Defendants' documents to its own affidavit on information and belief, the Plaintiffs could easily have cross-examined Mr. Kohan and/or Mr. Graham and put the "unincluded" documents to either of them so the Court would have proper access to evidence against the motions. It is quite improper to waive a right to cross examine on affidavit, decline to file a counter-affidavit, then attach documents to a legal brief and expect the Court to assess thereby whether the test for summary dismissal has been met. That is not what was contemplated by ***Hercules Management*** for situations where the burden does shift to establish that the claim has a real chance of success. Equally, such a strategy cannot be used to taint the assessment of whether the Defendants have met their strict burden. The strengths of these applications will be weighed on the evidence filed by the Defendants, measured against the pleadings and the standards to be met for summary judgment.

D. SUBSTANTIVE REVIEW OF APPLICATIONS

[57] Canada and Alberta both rely on various grounds to support their claims for summary judgment**,** but their positions are not the same. I will focus on the differences as part of the assessment of major points used to support the applications and any consequences for the parties, but will not necessarily attribute source to the grounds raised.

[58] Speaking generally, it is fair to note that the bulk of the Plaintiffs' breach of duty allegations and consequential relief are sought against Canada. The inclusion of Alberta has more to do with remedies that may affect accounting for interests in lands, i.e. beds and shores, mines and minerals and road allowances than with any specific conduct or omission attributed to Alberta.

[59] The Defendants argue that only a band is entitled to claim the collective rights being sought under the terms of the *Indian Act*. After the 1958 Enfranchisement the Band and its reserve ceased to exist. They rely on ***Blueberry River Indian Band v. Canada(Department of Indian Affairs and Northern Development)***, [1999] FCJ No. 452, 171 F.T.R. 91 (FCTD) at para 26;upheld

2001 FCA 309 (CanLII), [2001] 274 N.R. 352, 2001 FCA 309:

> The rights of the Beaver Band in Indian reserve 172 were collective rights enjoyed by the members for the time being of that Band. When that Band ceased to exist those rights passed to the members of the two successor Bands, the Blueberry River and the Doig River Bands. Since those rights were collective and not individual rights, they could neither be exercised by nor transmitted to individuals. The breach of fiduciary duty which has been established in this case was owed to the Beaver Band and the right of action which resulted therefrom was transmitted to the successor Bands. That right was equally a collective right, which belonged and still belongs collectively and not individually to the members for the time being of those Bands. It is membership and not ancestry, which determines entitlement to reserve lands and, in consequence, to the damages flowing from any breach of fiduciary duty in relation to those lands. Therefore, descendants who are not Band members can have no share in the proceeds of judgment.
>
> See also ***Chief Chipeewayan Indian Band v. Canada (Kingfisher)*** (2002), 291 N.R. 314 (F.C.A.) at para. 6.

[60] As noted earlier, the amended Claim no longer challenges the 1958 Enfranchisement, at least not directly. Instead, Plaintiffs allege entitlement to band status, with attendant rights, privileges and remedies based on two considerations. The first relates to alleged interests in land held on their behalf by either Canada or Alberta under fiduciary or trust-like obligations. More specifically the Plaintiffs allege that the Michel Band surrendered reserve lands at various points leading up to 1958 and that one or the other Defendants either continues to hold title on their behalf or else disposed of these interests to third parties without account. Alternatively, and in any event, the Plaintiffs assert that they do not require recognition as a band *per se* to claim treaty or aboriginal rights.

1. The Enfranchisement Process

[61] The relevant sections of the *Indian Act* under which the Enfranchisement Plan was ultimately approved are:

> Section 109: A person with respect to whom an order for enfranchisement is made under this Act shall, from the date thereof, or from the date of enfranchisement provided for therein, be deemed not to be an Indian within the meaning of this Act of any other statute or law.
>
> Section 111(1): Where the Minister reports that a band has applied for enfranchisement, and has submitted a plan for the disposal or division of the funds of the band and the lands in the reserve, and in his opinion the band is capable of managing its own affairs as a municipality or part of a municipality, the Governor in Council may by order approve the plan, declare that all the members of the band are enfranchised ...
>
> Section 112(1): The Minister may appoint a committee to inquire into and report upon the desirability of enfranchising within the meaning of this Act an

Indian or a band, whether or not the Indian or the band has applied for enfranchisement.

> (3) Where the committee or a majority thereof reports...
> (b).in the case of a band, that in the opinion of the committee the band is capable of managing its own affairs as a municipality or part of a municipality, and the committee has submitted a plan for the disposal or division of funds of the band and the lands in the reserve, and
> (c).that it is desirable that the Indian or the band , as the case may be, should be enfranchised,
> the report, if approved by the Minister, shall be deemed to be an application for enfranchisement by the Indian or by the band and shall be dealt with as such in accordance with this Act...
>
> (4) An Indian or the members of a band shall not be enfranchised under this section contrary to the terms of any treaty, agreement or undertaking between a band and Her Majesty that is applicable.

[62] The Michel Band formally applied for enfranchisement in 1954, and ultimately a committee was appointed under s. 112 of the *Indian Act*. The Report of the Committee, chaired by Chief Judge Buchanan dated January 11, 1957 (Kohan Affidavit Ex. A), was prepared for the Minister of Citizenship and Immigration and it notes earlier attempts of the Michel Band to enfranchise:

> The Michel Band has been interested in enfranchisement for many years and the recent application is not the first it has made. As early as 1913, members of the Band petitioned to become enfranchised, they have made similar requests on a number of occasions since that date. While the Board convened to consider a similar petition in 1928, recommended against the enfranchisement of the Band, it suggested that some of the better qualified members be permitted to enfranchise with their land on their individual applications with the result that ten families comprising forty-two members of the Band were enfranchised and were given title to their lands which comprised the most southerly six sections of the Reserve.
>
> The present application is therefore only the most recent indication of the desire of this Band to achieve enfranchisement and differs from previous applications only in the fact that in this instance the Band on its own initiative employed solicitors to advise it in the preparation of a plan for the disposal of the lands and moneys of the Band to accompany the formal application for enfranchisement.
>
> Kohan Affidavit Ex. A.

[63] The Buchanan Committee further considered the attitude of Members expressed at hearings, as well as by outside groups including the Municipal District of Sturgeon River. It examined the economics as part of a risks and benefits analysis. The recommendation for enfranchisement was accompanied by a Plan for disposal of band funds and reserve lands, with additional recommendations affecting dependants, temporary welfare, hospital and education assistance, as well as commentary on the incorporation of a company:

> The plan submitted by the Band with its formal application for enfranchisement provided for the incorporation of a private company under the Alberta Companies Act to hold the mineral rights underlying the Reserve lands on behalf of the enfranchised members, all members of the Band to receive an equal number of shares

in the company.

> The Committee agrees that such a plan for the management of the mineral rights is reasonable but does not consider its members are qualified to assess the merits of the "Memorandum of Incorporation" which accompanied the Band plan nor does it conceive that its terms of reference were such as to enable it to seek independent legal advice. The Committee, while proposing in Part (C) of Appendix A herewith that a company be incorporated for the purposes mentioned, recommends that well qualified legal advice be sought as to the type of incorporation best suited to the requirements of the case.

[64] By the terms of the Enfranchisement Plan and the 1958 Orders in Council, the parties expressed an intention that lands be apportioned to members and that all unallocated assets of Michel Band be transferred and held by a company on behalf of the former members of the Band. From the records submitted, it may be arguable that not all assets were formally transferred to the Company. In particular, it is unclear to what extent the parties specifically addressed Crown holdings from prior surrenders dating back to 1903, as well as prior road allowances.

[65] The Enfranchisement Plan expressly provided that the title to the road allowances on the Reserve would be transferred from the Crown in right of Canada to the Crown in right of Alberta without charge, and there was no indication that Alberta would hold title in trust or otherwise burdened as a fiduciary. Therefore, I can identify no basis for any claim against Alberta.

[66] What is also clear is that the parties did not intend to leave any assets in the hands of either Canada or Alberta to be administered on behalf of a band or former members of a band. In addition to the application for enfranchisement, the Buchanan Report and the terms of OC 1958-375 itself, the documents exchanged by various parties leading up to Enfranchisement reflect a plan for comprehensive disposition:

> (a) ...we (Indian Affairs) are anxious to clear up any legal obstacles that may stand in the way of affording the Indians of that Province (Alberta) an opportunity to integrate with their non-Indian neighbours and achieve full citizenship through the enfranchisement provisions of the Indian Act. To achieve that end for any Band will require co-operation between the Federal Government and that of the Province in question and it therefore seems desirable that this troublesome legal problem (whether proceeds from prior sale of reserve lands may be payable to a Province on enfranchisement) be clarified at an early date.
>
> (Letter from H.M. Jones Director Indian Affairs to R.F. Battle Regional Supervisor of Indian Agencies Calgary March 31, 1955 Graham Affidavit AB 00003)
>
> (b) If the mineral rights are to be held for the benefit of the group, they must be held by someone or some company and Section 1 of Part C proposes that a company be incorporated for the purpose of receiving title to the mineral rights and administering them for the members. It will be noted that the section provides that the company shall also be given title to the surface rights of any gravel-bearing quarter sections as well as any land that remains unsold two years after the enfranchisement of the band. (undated Commentary on Appendix A of the Michel Band Enfranchisement Committee Report Graham Affidavit AB 00137)

(c) Under the Enfranchisement Plan all the road allowances within the present boundaries of the Michel Reserve and the road allowances in the portions surrendered formerly will be transferred to the Province of Alberta by Order in Council. A description covering such road allowances is required also... The transfer to the company will include the mineral rights underlying the present reserve lands, all road allowances in the present reserve and all road allowances in original reserve which have been surrendered and sold. (Letter from L.L. Brown Special Assistant Indian Affairs to R. Thistlewaite Surveyor General December 20, 1957 Graham Affidavit AB 00161).

[67] The Plaintiffs argue that I do not have sufficient evidence to determine that the Company was ever incorporated. I disagree. In addition to the Articles of Incorporation acknowledged as part of the evidence, the following documents support that incorporation was completed as a key component of the Enfranchisement:

(a) Letter March 10, 1958 from T.A. Edwards counsel for Michel Band to Indian Affairs setting out initial shareholding (Graham Affidavit AB 00137)

(b) Memorandum April 13, 1978 from K. Bowles to J. Aikenhead Manager of Ondian Minerals (Oil and Gas) which states at p. 2 “Upon incorporation, Michel Investments Limited, acquired title to mines and minerals under Letters Patent No. 155657, within 11,423 acres of the former reserve. The company also received title (surface) to certain gravel bearing formations and another quarter-section per Letters Patent 156857 and 156656 (1276 acres) with follow up memorandum dated May 3, 1978 (Graham Affidavit AB 00044-00047)

(c) Grant of Title June 20, 1958 on designated property in favour of Michel Investments issued by Deputy Minister of Citizenship and Immigration (Graham Affidavit AB 00251)

(d) Certificate of Title November 4, 1960 on designated property in favour of Michel Investments issued by North Alberta Land Registration District (Graham Affidavit AB 00264)

(e) Letter November 16, 1988 from Indian and Northern Affairs to Richard G. Wheatley referring to “...your client, Michel Investments Ltd”(Kohan Affidavit, Exhibit SS).

[68] I spend time on this point because it may be open for the Company to advance claims in respect of any untransferred assets otherwise held by either Defendants at the time of Enfranchisement. I make no finding in that regard but the incorporation of the Company as contemplated reflects the presence of an entity to receive and deal with residual assets from the date of Enfranchisement. In dealing with the issues raised on the applications for summary judgment, the parties are agreed that the Company, Michel Investments Ltd is not currently a party.

2. Land interests post-Enfranchisement

i. How are these Plaintiffs affected by the Enfranchisement?

[69] The land interests concern mines and minerals, road allowances, as well as the beds and shores of Gladue Lake. The Plaintiffs urge that a court at full trial ought to superimpose the honour

of the Crown to require that any band interest or entitlement not dealt with expressly by the terms of the Enfranchisement remains extant and attributable in some form to descendants, regardless of the intention of the parties at the time of Enfranchisement.

[70] The Defendants contend that any residual rights are only exercisable by a band as defined by the *Indian Act*. Secondly they argue that the Enfranchisement Plan can not be subverted by these Plaintiffs now second-guessing decisions made by members of the former Band collectively pursuant to collective rights accorded the Band under the *Indian Act*.

[71] Irrespective of the Company's status, the Plaintiffs argue that the holdings by the Crown (whether in the name of Canada or Alberta) may include property interests that would meet the definition of "designated lands" surrendered from the original reserve. From this, the Plaintiffs argue the Crown continued to hold Indian land interests after the Enfranchisement that would enable the Plaintiffs to claim an ongoing entitlement to status as a band, based on the definition of a "band" under the *Indian Act*:

> Section 2: ...a body of Indians (a) for whose use and benefit in common, lands, the legal title to which is vested in her Majesty, have been set apart before, on or after September 5, 1951, (b) for whose use and benefit in common, monies are held by Her Majesty, or (c) declared by the Governor in Council to be a band for the purposes of this Act;

[72] To support this position, the Plaintiffs propose to rely on minority reasons by McLachlin J. in ***Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development),*** 1995 CanLII 50 (S.C.C.), [1995] 4 S.C.R.344 ("***Aspassin***") to the effect that a prior surrender of mineral rights cannot be subsumed by a subsequent surrender of the entire property interest. However, that reasoning was clearly rejected by the majority as an imposition of

> ... technical land transfer requirements embodied in the common law [that would] frustrate the intention of the parties, and in particular, the Band, in relation to their dealings with [the land]... An intention -based approach offers a significant advantage in my view. As McLachlin J. [for the minority] observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their Lands, and for this reason, their decisions must be respected and honoured. (Paras. 6-7)

[73] This emphasis on the true intent of aboriginal peoples was used as the basis for summary judgment upholding surrender of lands in ***Chippewas of Kettle and Stony Point v. Canada,*** 1996 CanLII 753 (ON C.A.), [1996] O.J. No. 4188, 141 D.L.R. (4th) 1 (C.A.); affirmed 1998 CanLII 824 (S.C.C.), [1998] 1 S.C.R. 756, 163 D.L.R. (4th) 189. Laskin JA points out (pages 7-8) that both the majority and minority reasons in ***Aspassin*** emphasize that the clear intention of a band to dispose of its land should be recognized and the Crown's obligation is limited to preventing exploitative bargains.

[74] It is true that trust-like obligations may arise and continue for the benefit of a band, particularly in negotiating for the sale or lease of land to third parties: ***Guerin et al v. Canada.***, 1984 CanLII 25 (S.C.C.), [1984] 2 S.C.R. 335. But, as noted in ***Wewaykum Indian Band v. Canada***, 2002 SCC 79 (CanLII), [2002] 4 S.C.R. 245 at paras. 81 and 83:

> ... the fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests... It is necessary, then, to focus on the particular obligation or

> interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.

[75] In all events, no case authority exists to support the proposition that a trust-like fiduciary obligation may survive and continue to a band which, by its own voluntary terms, ceased to exist after full Band Enfranchisement. No issue of exploitation arises or is even alleged on the facts here. The evidence is unequivocal that the members of Michel Band expressed a clear and sustained determination as a band to distribute their lands to their own people and sought legal advice to, among other matters, set up a holding company to deal with residual interests upon Enfranchisement.

[76] I reiterate that not one piece of evidence, even if I had accepted the material improperly attached to the Plaintiffs' brief, supports any inference: that the members of the Michel Band lacked a full understanding of enfranchisement; that they did not intend the consequences which were implemented; that they failed to acquire the benefits specified by the Enfranchisement; or that they were in any way exploited by the Enfranchisement process initiated by them.

[77] The Plaintiffs' use of terminology such as "honour of the Crown" neither creates nor enhances an arguable case on this point. That doctrine, if it is one, cannot modify or reverse the rights freely exercised by — as distinct from denied to — band members under the *Indian Act*.

[78] The Plaintiffs further base their claim of land interests on a narrow interpretation of the method by which an Indian Band may dispose of its land. The court is urged to consider that the only methods are surrender or expropriation, neither of which were invoked as part of the Enfranchisement Plan. The *Indian Act* provides that:

> 37. Except where this Act otherwise provides, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of, until they have been surrendered to Her Majesty by the Band for whose use and benefit in common the reserve was set apart.

[79] In my opinion, it is absolutely clear that enfranchisement is a separate and self-standing method under the *Indian Act* by which a band may dispose of its land. Not even the most paternalistic interpretation of these sections would require that the voting process for "surrender" be superimposed as a secondary approval process, before a band could disburse land to its own members by enfranchisement. It would be totally illogical.

[80] Canada and Alberta do not question the descendancy of the Plaintiffs; they do challenge their right to second-guess the decision of their ancestors to enfranchise. In addition to the significant impediments set out in ***Papaschase*** respecting derivative, collective and combined claims (paragraphs 176 –187), these Plaintiffs have failed to reconcile their status against the rights and responsibilities of the Company as set out in its Articles of Association.

[81] Accordingly, I find no support for a court to superimpose an on-going fiduciary or trust-like duty on the Defendants in respect of matters which pre-date the Enfranchisement. I express no opinion on whether Canada may be obliged to reconcile any property interests that might otherwise have been transferable to the Company as the entity contemplated to hold residual interests for the benefit of shareholders from the former Band. The Enfranchisement Plan was not merely a plan for disposal; it approved and administered the transfer of land interests without the need for any duplicative surrender vote.

ii. Are Treaty Rights Extinguished by Enfranchisement?

[82] The second major basis by which the Plaintiffs alleges status to claim relief is predicated on the collective rights of aboriginal peoples. This point arises as well in connection with the claims under s. 35 of the *Charter*. While the amended Claim refers to aboriginal rights and *Royal Proclamation of 1763*, no such rights are engaged and the submissions of the Plaintiffs deal only with treaty rights.

[83] Stated briefly, the Plaintiffs assert that O.C. 1958-375 makes no mention of treaty rights, nor is there any evidence that the members of the Michel Band gave their consent, informed or otherwise to the termination of their treaty rights. The treaty rights claimed in their brief "include an implied right to membership and federal recognition as a Band, and a right to programs and services that Canada provides to other First Nations with whom it has a treaty relationship."

[84] Relying on decisions of American courts that various *Termination Acts* had no effect on treaty rights or tribal property, the Plaintiffs urge that these treaty claims be allowed to proceed to trial. Such a position ignores the fundamental difference between a statutory declaration by government that purports to annul legislative protections, as distinct from a legislative mechanism for voluntary alteration of status and landholding exercisable by aboriginal peoples.

[85] The imposition of an implied term for Band recognition under Treaty 6 is a question of law and does not require a full trial. Even by the most generous interpretation of the purpose of Treaty 6, it does not contemplate that Band membership and recognition under federal legislation would remain inalienable. Any argument that Treaty 6 may sustain implied rights to equal recognition with other First Nations can only be asserted, if at all, in the context of the *Charter*, which I address separately.

[86] In dealing with aboriginal rights ***Pasco et al. v. Canadian National Railway Co. et al.; Oregon Jack Creek Indian Band v. Canadian National Railway Co*** 1989 CanLII 249 (BC C.A.), (1989), 56 D.L.R.(4th) 404 (at p. 411), aff'd reflex, (1989) 63 D.L.R. (4th) 607 noted that

> The appellants submit that in both cases the court found that the plaintiffs' ancestors had been an organized society when British sovereignty had been asserted. That was sufficient to establish aboriginal title, which continued in their descendants until lawfully extinguished. The appellants submit that the state of the organization of the plaintiffs at the expense of the writ is not relevant to whether title has been extinguished or whether the plaintiffs still hold it today.

However even ancestral aboriginal titles, hunting or fishing rights would only continue "...in their descendants until lawfully extinguished".(emphasis added). Treaty rights, whether express or implied, cannot have stronger protection from extinguishment.

[87] The point was expressed somewhat differently but with similar consequence in ***Kingfisher***: (at para. 6):

> We have some doubt that the appellants can assert the rights they claim on an individual basis at all when there is no relevant band in existence. However, we need

> not express an opinion on that issue. In the present case, it is sufficient to say that such rights may not be asserted by the appellants unless they have established that their ancestors were members of the Chipeewayan Band within the meaning of the *Indian Act*, or, where they have established that their ancestors were members of that band at one time, unless they have also established that their ancestors did not cease to be members by virtue of any provision of the *Indian Act*.

[88] The existence of a statutory power to declare a body of Indians to be a band pursuant to P.C. 1973-3571 is of no assistance, in the absence of any legal obligation to confer such status on a particular First Nation. The formation of the Friends of Michel Band "does not enhance the legal position of the Plaintiffs" because they do not meet the criteria of a band at law: ***Papaschase*** (para. 191). In short, nothing supports an interpretation that treaty rights may be indefinitely suspended and then unilaterally reactivated by descendant assertions.

iii. Challenge to the 1911 Surrender

[89] In 1911 the Crown surrendered a portion of the Michel Reserve, allegedly without consent or adequate compensation. The Plaintiffs seek a declaration that the land was wrongfully taken without consent and contrary to Treaty 6 and in breach of Canada's fiduciary obligations. They also seek a declaration that they are entitled to compensation for the taking of the lands in 1911.

[90] Canada argues that the land was, in fact, alienated according to the terms of Treaty 6, since the Treaty provides that her Majesty has the right to deal with any settlers within the bounds of any lands reserved for any band as she deems fit. The land had been settled on Mr. Janvier L'Hirondelle before the survey of the Michel Reserve boundary lines, and therefore was dealt with according to the terms of the treaty. Further, the evidence demonstrates that the Band was paid $9.00 for the land after a prolonged dispute.

[91] Moreover, Canada argues that since the Michel Band ceased to exist in 1958, there is no one with capacity to bring an action on behalf of the Band. These Plaintiffs in particular cannot establish a right to bring an action on behalf of the Band.

[92] The Plaintiffs argue that although the terms of Treaty 6 provide that Her Majesty may deal with any settlers as she deems fit, the Treaty also provides that reserve land may be sold or disposed of "for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained." therefore, they argue, the correct interpretation of the Treaty is that the Crown could deal with the settlers as long as no reserve land was alienated without the Band's consent.

[93] I have concluded that this claim cannot succeed. These Plaintiffs cannot demonstrate a claim on behalf of the Michel Band, since it no longer exists. Secondly, even if the Plaintiffs could demonstrate a claim under the Treaty, an action to recover land or for compensation for taking the land is statute barred, as discussed separately.

3. Summary re Land Interests

[94] In summary, then, the Plaintiffs' claims in relation to land interests are bound to fail, because as asserted by the Defendants, any residual rights to the land are collective rights belonging to a "band" as defined in the *Indian Act*. The Plaintiffs do not meet this definition. Moreover, the

Michel Band voluntarily, and with full understanding, evidenced by the fact that it had its own legal representation, chose to become enfranchised. It was their intention to terminate the existence of the Band and transfer all residual interests to the Company. None of the evidence detracts in any material way from that intention or its consequences.

[95] No fiduciary obligations can survive enfranchisement to be asserted by descendants of former band members. Further, a claim to treaty rights under Treaty 6 must be considered within the context of the *Charter,* as there is nothing in the treaty itself that provides that band membership and recognition under the *Indian Act* are inalienable.

[96] The claims dealing with interests in land cannot succeed against either Defendant.

E. CONSTITUTIONAL ISSUES

[97] The Plaintiffs raise two broad claims based on Sections 15 and 35 of the *Constitution Act*, 1982 :

(a) The 1985 amendments to the *Indian Act* (specifically Sections 6 and 11) are contrary to s. 15 of the *Charter* because they do not provide "equal benefit of the law" to a category of persons who have suffered enfranchisement, albeit not individually but as part of a group of 56.

(b) The Federal Crown is obliged under s. 35 of the *Constitution* to reinstate band membership, to honour the terms of Treaty 6 and to extend the same programs and services to the Plaintiffs as other First Nations.

[98] In addition the Plaintiffs seek relief under the *Charter* to be allowed access to Canada's Specific Claims Policy which raises rather separate points for consideration. None of these allegations engages, nor may any remedy be applied against, the interests of Alberta.

[99] In dealing with *Charter* and Constitutional challenges it is important to have as full an appreciation of the facts as possible. Courts are reluctant to make such decisions without a full opportunity to receive and review the full record of evidence: ***MacKay v. Manitoba***, 1989 CanLII 26 (S.C.C.), [1989] 2 S.C.R. 357 at paras 8-11; ***Danson v. Ontario (Attorney General)***, 1990 CanLII 93 (S.C.C.), [1990] 2 S.C.R. 1086 at para. 26; ***Reference re Same-Sex Marriage***, 2004 SCC 79 (CanLII), [2004] 3 S.C.R. 698.

[100] The records which have been assembled for this application are quite sufficient to assess the merits of the issues affecting the history up to, and including, the 1958 Enfranchisement. For events from and after the 1973 introduction of the Specific Claims Policy, the 1985 *Indian Act* amendments, and the subsequent dealings between Canada and the Plaintiffs, at least two distinctions from the historical claims are apparent:

(a) the issues have only just recently been redefined by the amended Claim to narrow the focus away from most of the historical surrenders, to emphasize more recent events, and to include references to s. 35 and the honour of the Crown;

(b) witnesses are available to speak to these more recent events and to provide better context concerning whether lack of band status imposes personal characteristics

> which may substantively relate to analogous grounds; the status of the Plaintiffs as a cohesive or disparate community; as well as comparisons or contrasts with other aboriginal communities. Each of these conditions may informa s. 15 analysis.

[101] Despite reticence to deal with *Charter* or constitutional matters upon the records submitted for summary judgment, the court must not simply defer a decision now against the possibility that evidence could conceivably surface to support these claims: ***Jagar Industries Inc.*** at para 21 The Court must still assess whether the claims against Canada are without merit and destined to fail.

1. Section 15

[102] The Plaintiffs contend that the 1985 amendments were intended to remedy discrimination against a racial minority, but fail to accord them "equal benefit of the law". Citing ***Corbiere v. Canada (Minister of Indian and Northern Affairs),*** 1999 CanLII 687 (S.C.C.), [1999] 2 S.C.R. 203 at pp.268-269, they seek to extend the analogous ground of "aboriginality-residence" by which off-reserve members who became enfranchised lost community membership as well as reserve residence:

> The enfranchisement provisions of the *Indian Act* were designed to encourage Aboriginal people to renounce their heritage and identity, and to force them to do so if they wished to take a full part in Canadian society. In order to vote or hold Canadian citizenship, status Indians had to "voluntarily" enfranchise. They were then given a portion of the former reserve land in fee simple, and they lost their Indian status...
>
> This history shows that Aboriginal policy, in the past, often led to the denial of status and the severing of connections between band members and the band. It helps show why the interest in feeling and maintaining a sense of belonging to the band free from barriers imposed by Parliament is an important one for all band members, and especially for those who constitute a significant portion of the group affected, who have been directly affected by these policies and are now living away from reserves, in part, because of them.
> (***Corbiere*** *at* paras. 88-89*)*

[103] As to the status of individuals to claim a denial of community rights, the Plaintiffs again refer to ***Oregon Jack*** at p. 410, as well as ***Misquadis v. Canada,***2002 FCT 1058 (CanLII), [2003] 2 F.C. 350, (2002) 223 F.T.R. 161, [2003] 1 C.N.L.R. 67 at p. 68, aff'd 2003 FCA 473 (CanLII), [2004] 2 F.C.R. 108, 2003 FCA 473.

[104] Canada responds that the reason the Plaintiffs do not qualify under the 1985 amendments is because of their enfranchisement and not due to any discrimination. In testing for a breach of the equal protection and equal benefit provisions of s. 15 of the *Charter*, certain questions must be addressed:

> First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on

> the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage?
> ***Law v. Canada (Minister of Employment and Immigration),***
> 1999 CanLII 675 (S.C.C.), [1999] 1 SCR 497 at para. 39.

[105] Section 11 of the *Indian Act* provides:

> Section 11(1) Commencing on April 17, 1985, a person is entitled to have his name entered in a Band List maintained by the Department for a band if:
>
> (a) the name of that person was entered in the Band List for that band, or that person was entitled to have its entered in the Band List for that band, immediately prior to April 17, 1985;
>
> (b) that person is entitled to be registered under paragraph 6(1) (b) as a member of that band;
>
> (c) That person is entitled to be registered under paragraph 6(1) (c) and ceased to be a member of that banned by reason of the circumstances, set out in that paragraph; or .
>
> (d) that person was born on or after April 17, 1985 and is entitled to be registered. Under peer graph 6(1) (f) and both parents of that person, are entitled to have their names entered in the Band List or, if no longer living, were at the time of death entitled to have their names entered in the Band List.

[106] What distinguishes the Plaintiffs according to Canada, if anything, is not the restricted application of 1985 Amendments to recognized bands; rather it is the voluntary Enfranchisement from 1958 which authorized the former Band members to pursue their own objectives. Canada argues this does not amount to *Charter* discrimination.

[107] Analysis of the allegations under s. 15 involves the three step process set out in ***Law*** as applied in ***Corbiere*** in which the Court is asked to determine: distinctions based on personal characteristics, differential treatment on enumerated or analogous grounds, and factual discrimination that violates equality.

[108] Central to the claims of discrimination is whether the 1985 Amendments draw a formal distinction between one or more Plaintiffs and others on the basis of one or more personal characteristics. In this case, it appears that the distinction that the claimants allege to be discriminatory is between enfranchised Indians whose Band still exists and Indians who no longer have a Band in existence. The former had both their Indian status and band membership reinstated, while the claimants were only reinstated to Indian status, thus being deprived on benefits that would have accrued as Band members under Treaty.

[109] Justice l'Heureux-Dubé commented in ***Corbiere*** that caution must be exercised when

analysing a claim that could involve conflicting interests of minority groups. She emphasized the importance of taking into account their realities and experiences, and the values, history and identity. At para. 67 she states:

> Thus, in the case of equality rights affecting Aboriginal people and communities, the legislation in question must be evaluated with special attention to the rights of Aboriginal peoples, the protection of the Aboriginal and treaty rights guaranteed in the Constitution, the history of Aboriginal people in Canada, and with respect for and consideration of the cultural attachment and background of all Aboriginal women and men. It must also always be remembered that s. 15(1) provides for the "unremitting protection" of the right to equality, in whatever context the analysis takes place, whether there is one disadvantaged or minority group affected or more than one.

[110] In that light, it may be argued that the 1985 Amendments, in seeking to redress some forms of discrimination including gender, have failed to take into account the claimants' already disadvantaged position within Canadian society. If so, then it may be possible to demonstrate substantially differential treatment between the claimants and others, on the basis of one or more personal characteristics and analogous grounds, recognizing that the third test from ***Law*** still requires separate examination of substantial proof of discrimination:

> To say that a ground of distinction is an analogous ground is merely to identify a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality. Like distinctions made on enumerated grounds, distinctions made on analogous grounds may well not be discriminatory. But this does not mean that they are not analogous grounds or that they are analogous grounds only in some circumstances. Just as we do not speak of enumerated grounds existing in one circumstance and not another, we should not speak of analogous grounds existing in one circumstance and not another. The enumerated and analogous grounds stand as constant markers of suspect decision making or potential discrimination. What varies is whether they amount to discrimination in the particular circumstances of the case. ***Corbiere*** at para. 8.

[111] The question in such circumstances is whether any differential treatment may be shown to amount to discrimination in a substantial sense, so as to engage the purpose of s. 15 (1) of the *Charter* in remedying such ills as prejudice, stereotyping and historical disadvantage. Although a great deal remains to be proven, the materials submitted are not sufficient to foreclose the point. Recognizing that it is not for this court to say whether these arguments are likely to succeed, I can not conclude at this stage that the matter is beyond doubt and destined to fail.

2. Section 35

[112] The alleged Treaty 6 rights for which the Plaintiffs seek enforcement include: the right to determine membership and other indicia of self-government, to appoint or elect leaders and have them duly recognized by the Crown, to be treated as other First Nations under Treaty 6, and to maintain their culture and identity. They seek the opportunity to call historical and anthropological expert evidence on the nature and scope of these treaty rights.

[113] The Amended Statement of Claim also alleges that the 1985 amendments to the *Indian Act* violate s. 35, but nothing was said about that in Plaintiffs' brief or the oral argument.

[114] Canada again contends that these claims must be summarily dismissed because the Plaintiffs have failed to meet even preliminary proof requirements:

> (a) whether the Plaintiffs were acting pursuant to an aboriginal or treaty right;
>
> (b) whether that right has been extinguished;
>
> (c) whether that right has been infringed;
>
> (d) whether that infringement is justified;
>
> ***R. v. Van der Peet,*** 1996 CanLII 216 (S.C.C.), [1996] 2 S.C.R. 507 at para. 2.

[115] Moreover, Canada urges that the *Constitution Act 1982* does not have retroactive application to revive treaty or aboriginal rights that were extinguished long before 1982:

> ***R. v. Sparrow,*** 1990 CanLII 104 (S.C.C.), [1990] 1 SCR 1075 at p 1091.

[116] Central to this aspect of the Plaintiffs' claim is whether, having enfranchised, the descendants of a Band formerly recognized under the *Indian Act* may now assert Constitutional protection of existing collective rights of recognition. In this context, a claim of aboriginal or first nation status must find support independent from any rights of recognition as a band.

> (see ***Papaschase*** para. 191).

[117] The wording of Treaty 6 itself does not address self-government, recognition or treatment as would directly support the maintenance of culture and identity. Nor is it clear that treaty rights can survive enfranchisement. However, courts are urged to interpret the purpose and scope of treaties in a large and liberal manner, ***Nowegijick v. The Queen,*** 1983 CanLII 18 (S.C.C.), [1983] 1 S.C.R. 29, at p. 36; ***Sparrow,*** at para. 60. Further, as expressed in ***Haida Nation v. British Columbia (Minister of Forests),*** 2004 SCC 73 (CanLII), [2004] 3 S.C.R. 511**,** 2004 SCC 73 at paras 20 and 25:

> Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act* ..... It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests...
>
> [Where rights are not settled by Treaty) The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

[118] The evidence before me suggests that by at least May of 1992, Chief Gilbert Anderson purported to represent 369 Registered Indians (Kohan Affidavit Ex. G). A General meeting May 29, 1988 had approved the formation of a Society (that was initially a named Plaintiff in this action). And, in addition, as I will consider further under *Limitations of Actions*, legal counsel submitted claims on behalf of descendants dating back to 1985. However no evidence, expert or otherwise, has been tendered concerning the structure, activities or other cultural identifiers of this group as an

aboriginal or First Nations community at any time since 1958.

[119] At this point the Plaintiffs can point to very little that would fall within the traditional scope of existing aboriginal rights which have been recognized pursuant to s. 35. Nor can it be measured whether Canada has breached any duty that may stand independent of its obligations under the *Indian Act.* Nevertheless, the scope of potential recognition may be fairly broad:

> Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery's expression in "Understanding Aboriginal Rights," *supra,* at p. 782, the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour". Clearly , then, an approach to the constitutional guarantee embodied in s. 35 (1) which would incorporate "frozen rights" must be rejected.
>
> ***R. v. Sparrow*** at p. 1093

[120] Again, having regard to the high standard to be met for summary judgment, I am not satisfied that the claim against Canada related to treaty or aboriginal rights under s. 35 ought to be dismissed.

3. Specific Claims Policy

[121] As part of their arguments of constitutional breach, the Plaintiffs assert that they have been denied relief pursuant to a Specific Claims Policy adopted by Canada in 1973. The evidence is clear that the Plaintiffs have been denied access to the Specific Claims Policy despite the findings and recommendations of the Indian Claims Commission issued March 27, 1988 that Canada should grant standing to the Plaintiffs to submit claims for negotiation. Specifically the Plaintiffs claim that the 1985 amendments were unconstitutional because they were under-inclusive, as they did not reinstate eligibility for Indian status and Band membership to persons enfranchised in 1958 but extended this benefit to all other enfranchisees.

[122] At a minimum, the Plaintiffs assert that Canada has a duty of honourable dealing pursuant to which the Plaintiffs are entitled to access the Specific Claims Policy to resolve outstanding claims and grievances with Canada: ***Haida Nation v. B.C. (Minister of Forests),*** 2002 BCCA 462 (CanLII), 2002 BCCA 462**.**

[123] Canada's response fundamentally is that access to the Specific Claims Policy is not engaged by the amended pleadings or facts presented. The Indian Claims Commission did look at the 1958 Enfranchisement in its special hearing; it recommended that the Friends of Michel Society be given special standing to pursue a specific claim with respect to 1903 and 1906 Surrenders. The amended Statement of Claim no longer pursues these matters. Canada further contends that:

(a) Section 15 discrimination remains unsustainable because only the collective interests of a band can access the Specific Claims Policy; ***Edmonton Journal v. Alberta (Attorney -General),*** 1989 CanLII 20 (S.C.C.), [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577 at 604-5;

(b) Section 35 protection of aboriginal or treaty rights are not engaged by a restricted access to a dispute resolution mechanism; ***Chippewas of Nawash First Nation v. Canada (Minister of Indian and Northern Affairs)*** (1999), 251 N.R. 220 (FCA) at para 8;

(c) The Honour of the Crown does not apply in the absence of a specific aboriginal interest over which Canada has discretionary control: ***Stoney Band v. Canada***, 2005 FCA 15 (CanLII), [2005] 249 D.L.R. (4th) 274 (F.C.A.).

[124] As disclosed in my reasons dismissing the Plaintiffs' claims of an historical and on going trust-like duty, nothing in the evidence even hints that the Enfranchisement Plan was factually coercive, exploitative, or unfair in any way. As concerns the refusal of access to the Specific Claims Policy, the matter is not so clear. Much will depend on the scope of evidence which is not dependent only on historical records.

[125] Certainly a court hearing this case would not be adjudicating the 1903 and 1906 Surrenders as these were withdrawn in the Amended Claim. However the court might agree to hear evidence that these issues were disclosed in a special hearing of the Indian Claims Commission in 1997, which may inform whether any declaratory remedy may be appropriate. Factors which may conceivably support an argument that denial of access was tainted could include: the decision of the Indian Claims Commission to recommend that special status be granted to present specific claims with respect to the 1903 and 1906 Surrenders; Canada's inordinate and unexplained delay in responding negatively to the recommendation; the unique circumstances of the former Michel Band as the only Band in Canada to be totally enfranchised under s. 112 of the *Indian Act* (minimizing the risk of precedent for claims from other non-Band entities).

[126] Canada has not met the standard for summary judgment in relation to these claims. However, the Plaintiffs have not demonstrated that there is any chance of success for its claims against Alberta under either s. 15 or s. 35 of the *Charter*.

F. LIMITATIONS OF ACTION

1. General

[127] I have concluded that the claims in regards to interests in land have no chance of success and should be struck. I will, however, analyse whether they are also statute barred by limitation periods. Further, I have found that the constitutional arguments of the Plaintiffs may proceed to trial; there are no limitation periods in relation to declarations as to constitutional rights.

[128] The original Statement of Claim was filed February 27, 2001. The Defendants both argue that the claims by the Plaintiffs are time barred.

[129] The Supreme Court of Canada has identified three rationales for limitation provisions in ***Peixeiro v. Haberman***, 1997 CanLII 325 (S.C.C.), [1997] 3 S.C.R. 549 at para. 34 (citing with approval ***M.(K.) v. M.(H.)***, 1992 CanLII 31 (S.C.C.), [1992] 3 S.C.R. 6 at 29-30):

> There are three, and they may be described as the certainty, evidentiary, and diligence rationales ...

> Statutes of limitations have long been said to be statutes of repose ... The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations ... The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim.
>
> Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion.

[130] Slattter J., dealing with similar timing considerations in ***Papaschase*** discussed which Act applied, the *Limitations of Actions Act*, R.S.A. 1980 or the *Limitations Act*, S.A. 1996, c. L-15.1 (see paras. 129-130). The latter repealed the former as of March 1, 1999, but the transition provisions provide that claims discoverable before March 1, 1999 are subject to the *Limitations of Actions Act*. The transition provisions are stated to be subject to ss. 11 and 13:

> 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 c. L-15, that would have been applicable but for this Act, or
>
> (b) two years after the *Limitations Act*, SA 1996 c. L-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.

[131] Further, in relation to aboriginal claims, s. 13 provides:

> 13. An action brought on or after March 1, 1999 by an aboriginal people against the Crown based on a breach of a fiduciary duty alleged to be owed by the Crown to those people is governed by the law on limitation of actions as if the Limitations of Actions Act, R.S.A. 1980, c. L-15 had not been repealed and this Act were not in force.

[132] Therefore, the *Limitation of Actions Act* governs the claims in this action, having been discoverable before March 1, 1999.

[133] Next it is necessary to identify the nature of the claims. As noted at the outset of this decision, the claims can be divided into three general categories: interests in land, declaratory relief as to status and entitlement under Treaty 6, and the constitutional challenges which are asserted.

2. Interests in land

[134] The claims in relation to land allege that:

(a) The Michel Band's interests in the Michel Reserve #12, including beneficial interests in the surface rights, the beds and shores of water bodies, and mines and minerals, including precious metals, were wrongfully disposed of as follows:

1. December 10, 1911 alienation of 40.92 acres to L'Hirondelle estate for $9.00;

2. 1958 Enfranshisement Plan did not transfer the road allowances, precious metals, and beds and shores of water bodies;

3. The Crown in right of Canada or Alberta continues to hold interests inroad allowances, precious metals, and beds and shores of water bodies in trust for the Michel Band.

(b) The Federal and Provincial Crown have breached their fiduciary duties to the Michel Band by the above wrongful disposal of lands and other interests and by the surrender of reserve lands.

[135] The Alberta Court of Appeal recently held in ***DeShazo*** that the "principle of discoverability does not require perfect knowledge" (at para. 31). ***DeShazo*** involved the *Limitations Act*, which statutorily defines discoverability: ***James H. Meek Jr. Trust v. San Juan Resourcs Inc.*** 2005 ABCA 448 (CanLII), 2005 ABCA 448, but the Court of Appeal reached a similar conclusion in ***Hill v. Alberta (South Alberta Land Registration District)*** 1993 CanLII 3418 (AB C.A.), (1993), 100 D.L.R. (4th) 331 at 336 (Alta. C.A.) (leave to appeal to S.C.C. denied) dealing with the common law test:

> It [the discoverability rule of limitations] does not require discovery at all: it says something else will do instead. It suffices that "the material facts on which [the cause of action] is based ... ought to have been discovered by the plaintiff by the exercise of reasonable diligence...": ***Central Trust v. Rafuse***... . If the plaintiff is told a fact by someone who is likely to know, surely that makes the fact known or discoverable, even if someone else disputes the fact. Very few people who sue have perfect certainty (at p. 336).

[136] The following are key facts known or discoverable by the Plaintiffs:

1. The circumstances of the 1911 land grant were known to the Michel Band prior to and including 1911, when Canada purported to resolve the issue with the L'Hirondelle Estate pursuant to residual rights under Treaty 6 to deal with settlers; (Kohan Affidavit, Ex. T, V and Y)

2. In April 1975 the Metis Association of Alberta inquired about the interests of the youth of former Michel Band, and what procedure to go through to obtain any funds that may be left over from Enfranchisement; (Kohan Affidavit, Ex. JJ)

3. At least as early as 1985, descendants of the former members of the Michel Band had retained legal counsel. A lawyer on their behalf sent an unfiled and unserved

Statement of Claim to the Office of Native Claims, including a claim in regards to the 1911 Land Grant, and sought restoration of full treaty status to the descendants; (Kohan Affidavit, Ex. LL and MM)

4. In 1995, another lawyer acting for the Friends of Michel Society (consisting of 500 persons claiming descent from the former Michel Band members) sent a Statement of Claim to the Specific Claims Branch (formerly the Office of Native Claims) with allegations in regards to the 1911 land transfer; (Kohan Affidavit, Ex. Z and AA)

5. Some of the individual Plaintiffs in this action have, in the past, been involved in pursuing claims on behalf of the Michel Band and descendants of the former members of the Band. (Kohan Affidavit, Ex. RR, G, H, and I)

[137] Thus the evidence reveals that there was actual discovery of the 1911 claim immediately upon the transaction, and of the claim in regards to the discontinuance of the Michel Band upon Enfranchisement in 1958. Further, the evidence shows that there was knowledge of the claims in the 1970's and in 1985, based on the activity on behalf of the Michel Band descendants. At the very least, this evidence demonstrates that the claims were discoverable with reasonable diligence at that time. Further, there is evidence that the Michel Band was considering legal action and further research in 1988. Therefore all of the facts relevant to the claims regarding the December 10, 1911 alienation of land, the failure of the *1985 Indian Act* amendments to restore membership and status to the Band, and the denial of Treaty benefits, arising from that failure, were all known by 1988.

[138] All of these claims are older than even the longest limitation period in the *Limitation of Actions Act*, so this analysis might end here, but for three points. The first is that the Plaintiffs have alleged a breach of fiduciary duty in which the Crown continues to hold property in trust, secondly they have sought declaratory relief; and the third closely related to the second, they have sought a declaration as to title of property.

[139] As noted by Slatter J. in ***Papaschase***, limitation periods in equity did not protect a trustee who continued to hold property in trust for a beneficiary; various statutory revisions altered this proposition. Slatter J. reviewed the historical development of the rule that limitation periods did not protect express trustees, and concluded (at para. 126):

The overall effect of the statutes protecting trustees between 1903 and 1999 is the following:

(a) Under a combined reading of ss. 40 and 42(2)(a), trustees are entitled to take the benefit of limitation periods, subject to certain exceptions.

(b) The particular exceptions are that:

(i) under the proviso in s. 41(2), there is no limitation on fraudulent breaches of trust by any kind of trustee, and
(ii) under the proviso to s. 41(2), there is no limitation on any claim to recover trust property or the proceeds thereof still in the possession of the trustee, or converted to his own use by the trustee. By its terms, this proviso can only apply to those types of fiduciaries who hold property.

(c) Section 41(2)(b) enacts a default limitation of 6 years, essentially confirming that ss. 4(1)(c) and (g) apply to trustees: see ***Wewaykum Indian Band***, at para. 131; ***Fairford***

> ***First Nation v. Canada (Attorney General)***, 1998 CanLII 9112 (F.C.), [1999] 2 C.N.L.R. 60 (F.C.T.D.), at para. 287.
>
> These provisions have been applied equally to true trustees and many fiduciaries: s. 41(1); ***Wewaykum Indian Band***.

[140] Therefore the Plaintiffs' claims for breach of fiduciary duty in relation to land interests that were transferred – to L'Hirondelle and Alberta – are barred by the limitations period, but no limitations may apply if property remains in the hands of Canada for the benefit of the Band.

3. Declaratory relief

[141] The Plaintiffs also seek declaratory relief and argue that under s. 11 of the *Judicature Act* R.S.A. 2000, c. J-2declarations can be made whether or not a claimant has a cause of action: ***Roy v. Kloepfer***, [1952] 2 S.C.R. 465.

> 11. No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

[142] In my opinion, the decision in ***Roy v. Kloepfer*** is not analogous. It dealt with anticipatory breach of a contract, in which the Supreme Court held that upon repudiation of a contract of sale by a vendor before the date of performance, the purchaser can at once bring a declaratory action as to the enforceability of the contract and seek specific performance in that action. In ***Drager v. Allison***, [1959] S.C.R. 661 the principle was reaffirmed, again in regards to whether an action can be brought in relation to a anticipatory breach arising when one party repudiates an agreement before it is due. In both cases, the issue was concerned not with the availability of declaratory relief in the face of a limitations defence, but with the issuance of a claim before the rights in question had crystallized.

[143] There was no express provision in regards to declarations under the *Limitation of Actions Act*, but s. 4(1)(g) reads:

> The following actions shall be commenced within and not after the time respectively hereinafter mentioned
>
> ...
>
> (g) Any other action not in this Act or any other Act specifically provided for, within 6 years after the cause of action therein arose.

[144] In ***Wewaykum Indian Band*** the Supreme Court held that the virtually identical British Columbia provision barred the plaintiffs' claims for breach of fiduciary duty and for declaration as to the title to property by a person that is not in possession of it (para. 131). This suggests that six year limitation would apply to the causes of action not otherwise specified.

[145] However, in Alberta it has long been the law that limitation periods play no role in an action for a declaration of title: ***C.P.R. and Imperial Oil Ltd. v. Turta***, [1954] S.C.R. 427; ***King Estate v. Buckle***, 1999 ABCA 343 (CanLII), [1999] A.J. No. 1393, 1999 ABCA 343. In ***Turta*** the Supreme Court held that as long as there had been no physical workings or physical disturbance on the land in question, the action was not one for recovery of land but to have incorrect entries on title expunged,

and that such a declaration as to title was not subject to limitation periods.

[146] On this reasoning, if the declarations sought relate to lands where there had been no "legal or physical disturbance of that possession," such a limited declaration would not be statute barred. But, most, if not all, of the declaratory relief sought deals with land and interests in land that have changed possession, therefore this would not be of assistance to the Plaintiffs.

[147] Moreau J. in ***Huang v. Telus Corp. Pension Plan (Trustees of)***, 2005 ABQB 40 (CanLII), [2005] A.J. No. 50, 2005 ABQB 40 discussed the state of the law in Alberta dealing with the availability of declaratory relief in the face of a limitations defence. The decisions she reviewed dealt with the new *Limitations Act*, and so are relevant only if the principles in both Acts can be said to be analogous.

[148] The primary difference between the two limitations statutes is that the earlier limitation legislation set different limitation periods based on the nature of the various causes of action. In this case, there are actions for compensation arising from wrongful taking of land, for breaches of fiduciary and fiduciary-like duties, for accounting, and for breach of Treaty and constitutional rights.

[149] The present Act provides limitation periods based on the nature of the order sought. Limitations apply for any claimant who seeks a "remedial order," which is expressly defined as excluding"a declaration of rights and duties, legal relations or personal status" (s.1(i)(i)). A remedial order is one that requires a defendant to comply either with an affirmative duty to do something, or with a negative duty to refrain from doing something.

[150] In my opinion, whether a limitation applies based on the nature of the cause of action (the *Limitation of Actions Act*) or the nature of the relief sought (the *Limitations Act*), the rationale is the same – to protect potential defendants from the prejudicial risks of stale evidence, to guard them from economic costs, to ensure that legal decisions are based on current socioeconomic values, and to enable potential defendants look forward to eventual repose. A declaration of rights that does not require a defendant to do anything or refrain from doing anything meets this rationale, and therefore the reasoning in ***Huang*** may be applicable to situations under the *Limitation of Actions Act*.

[151] The gist of the cases cited by Moreau J. is to examine the true thrust of the claim to determine if the relief sought will result in an order to do, or not do something, including paying a money judgment or requiring remedial action.

[152] In ***Blair v. Desharnais*** (2003), 336 A.R. 174 2003 ABQB 657, aff'd (2005), 371 A.R. 196, 2005 ABCA 272, Watson J. held that the claim, which sought a declaration as to the amount owing under a mortgage and for an order of foreclosure and possession, was, in effect, seeking a money judgment, and he dismissed the claim as time barred. Similarly, in ***Daniels v. Mitchell***, 2004 ABQB 177 (CanLII), [2004] A.J. No. 284, 2004 ABQB 177, (aff'd [2005] A.J. No. 992, 2005 ABCA 271) Rowbotham J. dismissed an application for foreclosure, finding it was subject to limitation periods. She quoted L. Sarna in *Declaratory Judgments*, 2nd ed. (Toronto: Carswell, 1988):

> A declaratory judgment is a "judicial statement confirming or denying a legal right of the applicant. Unlike most rulings, the declaratory judgment merely declares and **goes no further in providing relief to the applicant than stating his rights**."
>
> (Emphasis added)

[153] In ***Brennenstuhl v. Trynchy***, [2002] A.J. No. 582 Murray J. allowed an application for a declaration that the parties were in a mortgagor/mortgagee relationship, concluding that the declaration would have the effect of describing the true relationship between the parties. The Court of Appeal explained Murray J's decision in ***Daniels v. Mitchell,*** [2005] A.J. No. 992, 2005 ABCA 271, noting:

> That case required a determination of whether the relationship between the parties was one of mortgagor and mortgagee. Arguably, no limitation period could begin to run until that question was answered, since until then the plaintiff would not know that he had a claim, as required by s. 2(2) of the New Act.

[154] In ***Yellowbird***, the plaintiff sought a declaration that she was a member of the Sampson Cree Nation and damages for loss of benefits as a member. On appeal by the Band from the Master's decision refusing to dismiss the plaintiff's action, Gallant J. refused the appeal on other grounds, but discussed the application of a limitation period to the plaintiff's claim. He concluded that the plaintiff was primarily seeking a determination of her status, which would lead to consequential relief, but the underlying application was restricted to a declaration.

[155] Here, the essential thrust of the claims in regard to land interests, treaty rights, and breach of fiduciary obligations in relation to the land, is not aimed at declaratory relief, but at judgment, and therefore those claims would have been subject to limitation periods.

[156] On the other hand, claims in relation to status and the applicability of the Specific Claims Policy are appropriate claims for declaratory relief and, had I not found that these claims were bound to fail, they would not have been subject to limitation periods.

G. LACHES and ACQUIESCENCE

[157] As with the limitations issue, having dismissed the claim on other grounds, it is not necessary to deal with laches and acquiescence except as a matter of completeness. The equitable doctrines of laches and acquiescence can apply to aboriginal claims, including those for breach of fiduciary duty: ***Wewaykum Indian Band*** at para. 108. Mere delay is not sufficient to trigger laches; the plaintiff's delay must either constitute acquiescence or the delay must result in circumstances that make the prosecution of the claim unreasonable: ***M.(K.) v. M.(H.)*** at p. 77-78.

[158] The alleged breach of fiduciary duty is of a duty to the collective. In my opinion, the collective – the Band – acquiesced to many of the actions by Canada and Alberta that are alleged to form the basis of the various claims. The Band voluntarily chose to terminate its membership and distribute Band property among its members in a fashion those members agreed was appropriate.

[159] Moreover, the evidence demonstrates that the Plaintiffs, as descendants, were well aware of the allegations related to the land interests since at least 1985. The Plaintiffs argue that laches does not apply since they were pursuing non-litigation strategies. The formal claims prepared, and in one instance filed, speak against this interpretation. Counsel for the Plaintiffs asserts that declarations will suffice as a basis to engage in further negotiations with Canada. I do not find this to be a legitimate use of the court process to the circumstances in dispute. On these facts delay was unreasonable, and it would be unjust to permit the non-constitutional claims to proceed.

[160] For its part on this ground, Alberta further asserts that it would be unjust to proceed against it in regard to the road allowances, as it took title and assumed all liability and maintenance requirements related to it for the 43 years before the Statement of Claim was issued. Had it been necessary to make a decision, I would have found little evidence of detrimental reliance, as the Alberta Crown's evidence in regard to road allowances dealt mainly with the cost of acquisition and did not touch on maintenance or liability, nor demonstrate that it was induced to take over responsibility for roads that it would not have otherwise. Although the evidence does not show detrimental reliance, it does demonstrate that the Alberta took over the roads in good faith, following negotiations, believing that all parties intended that a transfer of the road allowances be effected. In these circumstances, Alberta correctly argues that it would be totally unreasonable to now assert a claim against it.

H. DISPOSITION

[161] In summary, I find that:

(a) the materials filed in support of these applications for summary judgment comply with the requirements of the *Rules of Court* and may be properly considered;

(b) the material attached to the Plaintiffs' brief is not proper evidence in the form presented;

(c) the Plaintiffs' claims in relation to land interests are bound to fail;

(d) the Plaintiff's claims in relation to declarations as to the status of the Michel First Nation, their entitlements under Treaty 6, and their rights to Band membership and collective Treaty and statutory rights are bound to fail;

(e) the Plaintiffs claims pursuant to s. 15 and 35 of the *Canadian Charter of Rights and Freedoms* in relation to Alberta are bound to fail; and

(f) the Plaintiffs' claims pursuant to s. 15 and 35 of the *Canadian Charter of Rights and Freedoms* relation to Canada are not bound to fail.

[162] I therefore grant Alberta's application and dismiss all claims as against it. I grant Canada's application as it relates to all claims, except for those related to breaches of ss. 15 and 35 of the *Canadian Charter of Rights and Freedoms.*

[163] The parties may speak to costs within 30 days of receipt of these reasons.

Heard at the City of Edmonton, Alberta on the 8th and 9th days of September, 2005.
Dated at the City of Edmonton, Alberta this 3rd day of January, 2006.

S.D. Hillier
J.C.Q.B.A.

Appearances:

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Appendix

Order in Council P.C. 1958-375

WHEREAS, following an application for enfranchisement made by the Michel Band of Indians in the Province of Alberta, a committee was appointed pursuant to Section 112 of the Indian Act to inquire into and report on the desirability of enfranchising the Band;

AND WHEREAS the committee, under date of 11th January, 1957, reported to the Minister of Citizenship and Immigration, expressing the opinion that the Michel Band of Indians is capable of managing its own affairs as a municipality or part of a municipality and advising that it is desirable that the Band should be enfranchised;

AND WHEREAS the committee recommended, for the reasons outlined in their report, that the Government of Canada assume, for a period of up to 12 months following the enfranchisement of the Band, the cost of relief and education for those members of the Band who would be eligible for same if enfranchisement did not take place;

AND WHEREAS the committee submitted a plan for the disposal or division of the funds of the Michel Band of Indians and the lands in the Michel Indian Reserve which plan is Schedule “B” hereto;

AND WHEREAS the Acting Minister of Citizenship and Immigration has approved the committee’s report and is of the opinion that the Michel Band of Indians is capable of managing its own affairs as a municipality or part of a municipality;

THEREFORE, His Excellency the Governor General in Council, pursuant to subsection (1) of Section 111 of the Indian Act, is pleased hereby to approve the plan attached hereto as Schedule “B” and to declare that the members of the Michel Band of Indians (whose names appear on the list attached hereto as Schedule “C”) are enfranchised as of the 31st day of March, 1958.

His Excellency in Council, pursuant to subsection (3) of Section 111 of the said Act is hereby further pleased to authorize the Acting Minister of Citizenship and Immigration to enter into any agreement with the Province of Alberta or the municipality in which the Reserve lands will be included

(a) to provide at the expense of the Government of Canada relief assistance for the 12-month period ending March 31, 1959 to those persons whose names appear in the list attached hereto as Schedule “C” who, if they had not been enfranchised, would have been eligible to receive such assistance; and

(b) whereby the Government of Canada will continue to pay the costs of education for the balance of the current school year, of those persons whose names appear on the list attached hereto as Schedule “C” who are now being educated at the expense of the Government of Canada.

Schedule “B” reads as follows:

PLAN FOR THE DISPOSAL OF THE FUNDS OF THE MICHEL BAND
AND THE LANDS OF THE MICHEL INDIAN RESERVE NO. 132

(A) LANDS:

(1) (a) Each adult or married member of the Band who is in lawful possession of the land in the Reserve shall receive title to one surveyed quarter section of land.

(b) A married couple in lawful possession of lands in the Reserve shall receive title to one surveyed half section provided, however, that where their land comprises a fractional one-half section, in lieu of additional land they shall be paid compensation at the ratio of $113.00 *(only partially legible)* per acre for the difference between the area of their land and a one-half section.

(c) Where a married couple are living together, title to their land shall be granted to them as joint tenants and not as tenants in common unless they otherwise request in writing.

(d) A widow or widower in lawful possession of lands on the Reserve in excess of the entitlement under Clause (a) shall receive title to such excess acreage up to a maximum of 160 acres.

(e) Lands in possession of single members of the Band in excess of their entitlement under Clause (a) shall revert to the ownership of the Michel Band subject to the member in possession receiving compensation for loss of improvements at their appraised value provided, however that in the case of the Harry Breland property and where a minimum of one-third of the arable acreage of the excess land has been cultivated, broken or cleared, a member in possession, within thirty days after being given notice to do so, shall elect in writing to purchase the excess land at its appraised value less the appraised value of the improvements of allow it to revert to the ownership of the Michel Band as aforementioned.

(f) No provision in Part (A) shall be construed as limiting in any way the right of the heirs of a member of the Band, who died on or after July 1, 1956 to receive title to the land in lawful possession of the deceased or his estate.

(g) Title to all surveyed road allowances standing in the name of the Crown Canada and forming part of the Michel Indian Reserve, as shown on the original plan of survey of the Reserve shall be transferred to the Crown in right of the Province of Alberta without charge.

(2) Each adult or married member of the Band not in lawful possession of lands in the Reserve shall receive a payment in cash equivalent to the average unimproved value of those quarter sections of land within the Reserve which will be offered for sale to the public.

(3) All lands not granted in accordance with Clause (1) of this part or Clause 3 (b) of Part (C) shall be sold either for cash or on a minimum three-year time basis.

(4) All lands unsold after two years from the date of enfranchisement shall be transferred to the company referred to in Part (C) hereof.

(5) Notice to members under this part shall be given by single registered mail to the address contained in the records of the Indian Affairs Branch.

(6) All valuations of land or improvements shall be made by a competent appraiser.

(7) The former day school property and building shall be sold with priority of purchase being given to persons who were members of the Michel Band at the date of the Band's enfranchisement.

(B) MONIES

(1) After collection of all accounts receivable by the Band and the settlement of all Band obligations, including payment to members in lieu of land, as provided in Clause (2) of Part (A), all monies standing to the credit of a Band shall be distributed on a per capita basis among the members of the Michel Band provided

(a) that the shares of all unmarried minors shall be paid to the Public Trustee of Alberta to be held in trust for them, and

(b) that the Minister in his discretion prior to such payment may apply portions of the shares of minor children for the purpose which he believes is for the advancement of the family of the said minor child.

(2) All moneys owing to any member

(a) to the Band or to the Department;

(b) to other members of the Band if pursuant to an agreement recorded with the Department,

shall be deducted from the shares of Band funds payable to such member.

(3) All moneys received from the sale of land in accordance with Clause (3) of Part (A) shall be distributed on a per capita basis to the members of the Band.

(4) For the purpose of Part (B) the phrase "member of the Band" shall include all persons who names appeared on the Membership Roll of the Michel Band at the date of its enfranchisement; any person who before the distribution of moneys, made pursuant to Clause (1) of this part, is shown to have been entitled to be registered as a member of a Band prior to the date of the Band's

enfranchisement; all legitimate children born to the registered members of the Band up to midnight on the date of the Band's enfranchisement, and the Estate of any registered Band member who dies within thirty days prior to the date of enfranchisement.

(C) MINES AND MINERALS

(1) A company shall be incorporated for the purpose of administering the mines and minerals and underlying Reserve lands and waters, certain gravel bearing portions of the Reserve and such other lands as may be transferred to the company in accordance with Clause (4) of Part (A).

(2) The constitution of the company shall be that best suited to the accomplishment of its objects and shall in any event provide

(a) that on the initial allotment of shares each member of the Band shall receive an equal number of shares in the company,

(b) that the initial allotment of shares shall be confined to members of the Band, and

(c) that shareholders of the company shall be given priority in the purchase of any shares offered for sale by the company or by shareholders.

(3) Upon its incorporation there shall be transferred to the company

(a) mineral rights underlying all the Reserve lands, and

(b) the gravel-bearing lands as follows: southwest quarter of section 2; southeast quarter of section 3; west half of section 10; southeast quarter of section 10; northwest quarter of section 11; southwest quarter of section 14, and southeast quarter of section 15, all in Township 54, Range 27 W. of the 4^{th} M.

(4) For the purposes of Part (C) the phrase "member of the Band" shall include all persons whose names appeared on the Membership Roll of the Michel Band at the date of its enfranchisement; the Estate of any registered Band member who died on or after July 1, 1956; any person who before the distribution of moneys, may pursuant to Clause (1) of Part (B) is shown to have been entitled to be registered as a member of the Band prior to the date of the Band's enfranchisement, and all legitimate children born to registered members of the Band up to midnight on the date of the Band's enfranchisement.

[Schedule "C" then enumerates a list of 42 individuals or families enfranchised]

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