Court File No. T-2155-00

FEDERAL COURT – TRIAL DIVISION

BETWEEN:

WESLEY BEAR, FREIDA SPARVIER, JANET HENRY, FREDA ALLARY, ROBERT GEORGE, AUDREY ISAAC, SHIRLEY FLAMONT, KELLY MANHAS, MAVIS BEAR and **MICHAEL KENNY,** on their own behalf and on behalf of all other members of the **KAKISIWEW INDIAN BAND,**

Plaintiffs,

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, as represented by THE MINISTER OF INDIAN AND NORTHERN AFFAIRS and THE OCHAPOWACE INDIAN BAND NO. 71,

Defendants.

Court File No.: T-2153-00

FEDERAL COURT – TRIAL DIVISION

BETWEEN:

PETER WATSON, SHARON BEAR, CHARLIE BEAR, WINSTON BEAR and **SHELDON WATSON**, being the Heads of Family of the direct descendants of the Chacachas Indian Band, representing themselves and all other members of the **CHACACHAS INDIAN BAND,**

Plaintiffs,

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, as represented by **THE MINISTER OF INDIAN AND NORTHERN AFFAIRS CANADA** and **THE OCHAPOWACE FIRST NATION,**

Defendants.

FINAL WRITTEN REPRESENTATIONS
On behalf of the Plaintiffs Wesley Bear et al.

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OVERVIEW

1. This final submission is provided on behalf of the Plaintiffs Wesley Bear et al. (the "Bear" or "Kakisiwew" plaintiffs) in Court Action T-2155-00.

2. The Kakisiwew Indian Band was a recognized Band under Treaty 4 and the *Indian Act*, (1876). Chief Kakisiwew was the first to put his mark on Treaty 4 on September 15, 1874. As a result, the Kakisiwew Band had treaty rights, a reserve, members listed on Treaty Annuity Paylists (maintained by the Crown defendant) and a communal Cree identity. The Kakisiwew Band's history and entitlements to treaty was deliberately broken up and dissolved by the Crown due to the wrongdoing of Crown officials and a series of improper acts and omissions, including, but not limited to:

    i. Loss of the Original Kakisiwew Reserve;
    ii. Failure to obtain a surrender for the Original Reserve;
    iii. Co-locating the Kakisiwew Band and the Chacachas Band on what would become Indian Reserve #71;
    iv. Lack of legal basis for a joint reserve for the Kakisiwew Band and the Chacachas Band; and
    v. Failure to obtain any amalgamation agreement between the Kakisiwew Band and the Chacachas Band.

    Amended Trial Record ("ATR") Kakisiwew Second Amended Statement of Claim Tab 6, at paras.15, 16, 17, 21, 22, 24

3. When one considers the evidence properly before the court, the evidence in support of the Bear Plaintiffs clearly establishes the connection of the Kakisiwew Band to its original reserve as surveyed in 1876 (the "Original Reserve"). The concomitant rights in relation to Treaty 4 and the Original Reserve clearly demonstrated the legal entitlement of the Bear plaintiffs to assert breaches of trust, honour of the Crown, fiduciary duty, and treaty rights *inter alia*.

PART I FACTS

4. In 1874 through what became known as Treaty 4, the Kakisiwew Band shared their lands subject to the provisions of the Treaty and assurances of Queen Victoria that they would be entitled to continue to carry on their economic and social activities as they had done since time immemorial.

5. The principles upon which treaties between sovereign First Nations and the Crown are founded, and which form the basis for their *sui generis* relationship in what is now known as Canada, were first articulated in the *Royal Proclamation* of 1763.

These fundamental principles have been enshrined in Treaties, the *Indian Act*, and the *Constitution Act, 1982*.

Bear Book of Authorities *Royal Proclamation, 1763* R.S.C., 1985, App. II, No. 1, Tab 9
Joint Book of Documents ("JBD") Treaty 4, JB Vol 2-00003;
Bear Book of Authorities *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, C. 11 (U.K.) reprinted in R.S.C., 1985, App. II, No. 44 Tab 2

6. Treaty 4 was executed on September 15, 1874 by Treaty Commissioners authorized to negotiate and sign the Treaty on behalf of the Crown, and by certain Chiefs and Headmen authorized by the sovereign Cree and Saulteaux Nations to negotiate and sign Treaty 4 on their behalf. Acting upon his inherent right, Chief Kakisiwew (also known as "Ka-ki-shi-way" or "Loud Voice") signed on behalf of the Kakisiwew Indian Band and its members. The Crown defendant has admitted the truth of the fact that that Chief Kakisiwew signed Treaty 4 on September 15, 1874 on behalf of the Kakisiwew Indian Band.

ATR Tab 6, paras. 7 and 8
Crown Response to Request to Admit, Oct. 1, 2018 at para. 1

7. Treaty 4 enunciated constitutional obligations, one such obligation provided that the Indians and bands party to the Treaty would receive treaty land, among other benefits and obligations – the treaty right to land provision required that one square mile for each family of five be set apart; and that such reserve land may not be sold, leased or otherwise disposed of unless the consent of the Indians entitled thereto was first had and obtained.

ATR Tab 6, at para. 10;
Treaty 4 JBD Vol 2-00003-0005

8. P.C. No. 1332 of November 4, 1876 approved Treaty 4 which also outlined several of the principal conditions of the Treaty, including condition number 6, which stated:

> 6th Reserves to be selected of the same extent in proportion to the numbers of the Bands, and on the same conditions as in the previous Treaty.

JBD Vol 2-00003-0003

9. On July 9, 1875 P.C. 702 recommended that W.M. Christie be appointed to select the reserves pursuant to Treaty 4 and to pay treaty annuities. On July 13, 1875 Surveyor General J.S. Dennis recommended that William Wagner, DLS be employed to assist in the selection and survey of Indian reserves to be set apart under Treaty 4 in order to assist W. M. Christie. The J.S. Dennis correspondence also instructed that William Wagner, DLS be employed to survey reserves to be set apart. In or about November 1876, and pursuant to Treaty 4, Wagner surveyed a reserve of 42,724 acres for the exclusive use and benefit of the Kakisiwew Indian

Band (the "Original Reserve"). A map (Natural Resources Canada, Legal Surveys Division, Plan B968) of the Original Reserve as Surveyed by Wagner, DLS and the Reserve surveyed for the Chacachas Band in 1876 which said reserve contained 24,298.5 acres are within the Joint Book of Documents. A regional map of the Indian Reserves at Crooked and Round Lakes surveyed by Wagner, DLS in 1876 can be seen at page 69 of the Expert Report by Dr. Storey.

JBD Vol 2-00015 and JBD Vol 2-00016;
ATR Tab 6, para. 11;
ATR Tab 8 Chacachas Second Amended Statement of Claim, para. 16
Ka-Ki-Shee-Way Loud Voice Reserve JBD Vol 3-00048_0015
Exhibit 8 Map of Chacachas Reserve in Expert Report by Dr. Storey at p. 60
Exhibit 8 Regional map in Expert Report by Dr. Storey at p. 69

10. On April 12, 1875, an Order in Council of the Privy Council approved and adopted a recommendation from the Minister of the Interior to change the location of the Reserve for the Riding Mountain Indians. On April 23, 1875 as a result of the Privy Council Order noted herein, Surveyor General Dennis directed the Inspector of Surveys to instruct a Dominion Land Surveyor ("DLS") to accompany the Indian Commissioner to lay out the land upon receiving notice.

JBD Vol 2-00010 and 00011

11. In a July 13, 1875 Memorandum, J.S. Dennis, Surveyor General, in dealing with the reserves to be surveyed for Treaty 4, indicated that in setting apart reserves, the interests of the Indians should be considered so as to give them all the necessary frontage upon a river or lake, to include an abundance of land for farming purposes and also to include a fair share of land for other purposes such as hunting.

JBD Vol 2-00018-0005 and 0006

12. In an October 7, 1876 Report, M.G. Dickieson outlined that should the buffalo become extinct, it is not to be expected that the starving Indians will refrain from helping themselves to the supplies to be found at the Hudson's Bay Company and compelled by hunger, outrages might be committed which would result in an Indian War.

JBD Vol 2-00043-0006

13. Indian Agent Angus McKay accompanied William Wagner, DLS who surveyed the Kakisiwew Reserve, and the Chacachas Reserve among other Treaty 4 reserves, in 1876. McKay October 14, 1876 report noted that the "Indians were very much satisfied with Mr. Wagner and that he managed to impress them with confidence" recommending that DLS Wagner be given further surveys of reserves on the

Saskatchewan. Concerning Chief Kakisiwew, McKay noted that he expressed a desire to go onto his reserve at an early date, and that their reserve should be on the east side of the Star Blanket Reserve fronting the Crooked Lake (should be Round Lake) extending northward. McKay further stated that these reserves should be surveyed before the end of the month of October.

JBD Vol 2-00044-0027 and 0037-0038

14. On February 19, 1877 Wagner, DLS reported that he had met with several Chiefs and their headmen, and Agent McKay who translated, and explained the projection of their reserves to their full satisfaction. Included in the report was the accompanying plan that had shown the 12 reserves surveyed, including Kakisheeway (Loud Voice) east of Star Blanket and Cheekechas, east of Kawestahaw.

JBD Vol 3-00054-0005 – 0006 and 0008

15. On September 25, 1877 Wagner, DLS wrote to the Minister of Interior indicating that Chief Kakisiwew requested his reserve be moved to Moose Mountain, approximately forty miles distant, where several of his friends were. The purpose of the letter was to seek permission and authority from the Minister to change the location of the reserve. According to the evidence of the Crown's expert witness Dr. Whitehouse-Strong, Chief Kakisiwew did not express dissatisfaction with the Original Reserve as surveyed in 1876.

JBD Vol 3-00061/00062
Trial Transcript Vol. 17 p. 105 Lines 22-27 Tab 72

16. Surveyor General Dennis, in a memorandum dated April 8, 1878, outright rejected the September 25, 1877 request from Wagner, DLS to change the location of the Kakisiwew Reserve. The Surveyor General based the rejection on the facts that considerable expense was made for surveying at the point first selected by the Chief, and that since the Indians were in constant communication, that any changes in reserve locations once surveyed would be questionable policy and create an inconvenient precedent. The April 30, 1878 rejection letter to Wagner, noted that "the Surveyor general is of the opinion, in which the Superintendent General also concurs, that if the request of the Chief was complied with, a precedent would be created, which might prove very inconvenient in the future, and therefore without

good sufficient reasons for the change being given, the application cannot be considered."

JBD Vol 3-00068/00070
JBD Vol. 3-000788

17. On May 11, 1877 Order in Council 436 provided that Allan McDonald be provisionally appointed as Indian Agent for the Indian Bands on the Qu'Appelle Lakes included in Treaty 4. On February 12, 1979 OIC 231 permanently appointed McDonald as Indian Agent to this region for Treaty 4.

Bear Book of Authorities Crown's Reply to Undertakings on Examination of R. Kohls, September 18, 2003. U/T No. 4 from Mr. Phillips Tab 62

18. M.G. Dickieson wrote on April 2, 1878, concerning the plains Indians of Treaty 4, that last winter the Indians were very poorly off, starving in fact, and the next winter they will be much worse. Dickieson closed that the government should help the Indians liberally. On August 6, 1879 J.S. Dennis, Deputy Minister of the Interior warned of the calamity of famine and that if the Indians possibly see their wives and little ones die from starvation there cannot be any certainty of peace.

JBD Vol 3-00067-0006 and 0007
JBD Vol 4-00093-0001 and 0003

19. On May 30, 1878 Wagner, DLS reported to Surveyor General Dennis that Wagner had laid out seventeen reserves in 1876 and 1877, with the Loud Voice Reserve listed as number seven and the Chacatas Reserve as number nine.

JBD Vol 3-00072

20. Wagner DLS was paid $3,700.19 for surveying ten reserves of Treaty 4, which included payment for the Loud Voice Reserve (#43) and Chacatas Reserve (#54).

JBD Vol 3-00078

21. J.S. Dennis, Surveyor General for the Department of the Interior, Dominion Lands Branch prepared a "Schedule Describing Various Indian Reserves in Manitoba, Keewatin and the North West Territories" and accompanying memorandum to the Minister of Interior, where it explained that the Schedule embodied a description of various Reserves **set apart** for Indians under Treaties one to five. Included in this Schedule was the Ka-ki-shi-way or Loud Voice Reserve listed as #43 and the Chacachas Reserve listed as #54. Canada's expert historian Dr. Whitehouse-Strong confirmed that the 1876 Original Reserves were accepted by the federal government as reserves.

JBD Vol 3-00053-0002; 00053-0020; 00053-0023
Trial Transcript Vol 17 p. 102 Lines 10-13 Tab 73

22. An excerpt from Annual Report for the Department of Interior 1878, shows that as of June 30, 1878 the Kakisiwew Band received hoes, spades and two oxen. On July 21, 1879 Indian Agent McDonald reported he provided seed potatoes and implements to the Kakeesheway Band. An excerpt from the Annual Report for the Department of the Interior 1879 shows that in the spring of 1879 the Kakisiwew Band received seed potatoes as well as agricultural implements. This evidence supports the fact that the Kakisiwew Band's Original Reserve was actively used and settled for their benefit. The ability for First Nations to become agriculturists was contingent upon the reserves being set apart and the provisioning of necessary supplies by the Crown.

JBD Vol 3-00077
JBD Vol 4-00086
JBD Vol 4-00091-0006 and 0007
Exhibit 8 Expert Report by Dr. Storey at p. 29

23. Indian Agent McDonald's Annual Report dated September 12, 1880 for Treaty 4 outlined that he had carried out his various duties, which included administration of farming operations and distribution of agricultural equipment on reserves as part of the fulfillment of treaty promises. Agent McDonald also provided agricultural implements and seeds in 1878 and 1879.

JBD Vol 4-00110
Trial Transcript Vol 17 p. 102 Lines 14-28 and p. 103 Lines 1-28 Tab 74

24. On January 10, 1881 Indian Agent McDonald wrote to L. Vankoughnet, Deputy Superintendent General of Indian Affairs ("DSGIA"), concerning permission that was granted to change the location of the Chief Daystar's Reserve, a Treaty 4 Band in the Touchwood Hills. In the same letter Agent McDonald makes a similar request by Chief Gordon (Gordon's Band, a Treaty 4 band) to exchange a portion of his reserve. Chief Gordon made the request due to a lack of prairie land. The DSGIA responded that a surveyor be instructed to make the alterations at Chief Daystar's Reserve based on a letter from the Surveyor General on the subject. Lindsey Russell, Surveyor General wrote to Agent McDonald on March 8, 1881 seeking information on the characteristics of the land sought in exchange so that a better position to judge what action would be best in the general public interest.

JBD Vol 5-00121; JBD Vol 5 00124; JBD Vol 5-127

25. The Day Star Reserve was surveyed by Wagner, DLS and is listed in the Schedule Describing Various of Indian Reserves in Manitoba, Keewatin and the North West

Territories of 1877. The same can be said for the George Gordon Reserve. As noted in the previous paragraph Indian Agent McDonald sought permission to change the location of Chief Daystar's Reserve and exchange a portion of Chief Gordon's Reserve.

JBD Vol 3-00053-0022 and 00053-0024
Trial Transcript Vol 17 p. 110 Lines 2-6 Tab 75

26. If the Day Star and Gordon Reserves, which were both surveyed by Wagner, DLS and formed part of the Schedule of Indian Reserves of 1877 – which was also the exact same circumstances for the original Kakisiwew Reserve and the Chacachas Reserve, why is there no such similar correspondence from Indian Agent McDonald seeking permission to relocate the two plaintiff Bands onto a co-located reserve? Just as importantly, why is the Crown defendant still holding onto its myth about the Original Reserves not being set apart, especially when the Day Star and Gordon Reserves were treated as such by the Indian Agent in question?

27. The 1880 *Indian Act*, at section 37 outlined the statutory requirements for a surrender of a portion of or the whole of an Indian Reserve.

JBD Vol 4 -00102-0013

28. Treaty 4 also provides for the treaty requirement in order to dispose of treaty reserve land "with the consent of the Indians entitled thereto first had an obtained…" as one criterion in order to affect a surrender.

JBD Vol 2-00003-0005
ATR Tab 6, para. 10

29. On February 28, 1881 Agent McDonald wrote to the DSGIA enclosing the proceedings of a Council meeting of the Waywayseecappo Band (Treaty 4 Band) where an alleged surrender for exchange for a portion of the Bird Tail Creek Indian Reserve occurred. In addition to the alleged surrender, there was an affidavit and subsequent Order-in-Council accepting the said alleged surrender.

JBD Vol 5-00123; JBD-00125; JBD-00126

30. Tom Kains, DLS wrote on September 7, 1881 that "all the Indian Reserves had been done away with north of Qu'Appelle River in the neighbourhood of Ranges 3 and 4…". Further, on November 30, 1881 Kains, DLS wrote that, with respect to land north of the Qu'Appelle River, "This part of the country was formerly Indian Reserve and although not instructed to outline it, I considered it advisable to do so, first because Mr. Nelson [DLS] cancelled it as a reserve…"

JBD Vol 5-00135 and JBD-00138

31. On or around December 19, 1881, the earliest evidence of a meeting occurred, consisting of a group of individuals who formed the Qu'Appelle Land Syndicate (the "Syndicate") whose membership included Allan McDonald (Indian Agent Treaty 4), Samuel Steele (NWMP Inspector), Arthur Griesbach (NWMP inspector), John C. Nelson (DLS), Walker R. Johnston (DLS) among others. The objective of the Syndicate was to acquire real estate for land speculation in the Qu'Appelle Valley region of the North West Territories. The members also agreed to keep the object and purpose of the Syndicate, as well as the locations of real estate interests secret. Since the locations of the real estate interests were to be kept secret one can fairly conclude that the members would not have reported such land holdings to their respective Crown superiors.

JBD Vol 17-00637
Trial Transcript Vol 7 p. 101- Lines 4-28 and p. 102 Lines 5-12 and 17-25 Tab 76

32. On January 20, 1882 Indian Agent McDonald wrote, on behalf of the Syndicate, to a Mr. J.J. C. Abbott in Montreal, soliciting inside information asking where the CPR Railway line would be located in the North West and the proposed important stations and the crossing of the north Saskatchewan River. Agent McDonald wrote, indicating that a "good deal of money will be made in this country the next few years, but unless a person has friends in the East it is uphill work".

JBD Vol 17-00637-0030 to 0032

33. Based upon the 1883 Articles of Agreement for the Syndicate, Indian Agent McDonald, John C. Nelson, DLS and Samuel Steele, NWMP Inspector, agreed to use their personal and professional influences and services for the objective of the Syndicate.

JBD Vol 17-00636-0030 and 0032

34. On December 7, 1882 L. Vankoughnet wrote to Edgar Dewdney, concerning starving Indians in Treaty 4, that Sir John is of the opinion that it is bad policy to feed them well and that they are to be kept on starvation allowances.

Exhibit 8 footnote 430 in Storey Report pp. 117-118

35. During this time during a transition to a sedentary, agrarian lifestyle sought for the Indians by the Crown partially through treaty, endemic starvation was commonplace among Treaty 4 bands as reported in 1878. M.G. Dickieson wrote to the DSGIA Lawrence Vankoughnet on February 26, 1879 about his apprehension about the possibility of an Indian outbreak. So much so that due to duress, Chief Chacachas

demanded that extra rations be provided. Lawrence Vankoughnet (DSGIA), wrote in 1882 about the starvation policy employed by the Crown, indicating to Edgar Dewdney (Indian Commissioner) that the Indians were to be kept on "starvation allowances;…" As well, Indian Commissioner Dewdney wrote to The Right Honourable Superintendent General of Indian Affairs on August 5, 1882 indicating that Indian Agent McDonald had been instructed to "…issue as little rations as possible…"

JBD Vol 4-00088-0001
JBD Vol 5-00156-001
Exhibit 8 Expert Report by Dr. Storey at pp. 117-18

36. Dr. O.C. Edwards, on May 13, 1884 wrote to Indian Agent McDonald, concerning the Indians at Treaty 4, after visiting the Chiefs Piapot, Long Lodge and Jack. Dr. Edwards recommended fresh meat and rice be kept at each agency. He reported that many Indians who have died this winter died from absolute starvation.

JBD Vol. 6-00175-0002

37. Mr. A.F. Irvine wrote to Fred White, Comptroller of the NWMP on May 18, 1884 indicating that Piapot had left his reserve because they could not endure the stench that emanated from the dead bodies of unburied Indians.

Exhibit 8 - Footnotes 637 – 641 of Storey Report at p. 191

38. On September 12, 1884 Indian Agent McDonald reported that prior to paying treaty annuities to the Ka-Ki-She-Way Band and the Chacachas Band he directed them to "elect" a Chief since Chief Kakisiwew had died earlier in the year. McDonald reported that

> …they did but not till after a great deal of altercation. These two Bands are now one under the Chieftainship of O-Cha-pe-was" a son of the late Chief Kee Kee She Way or Loud Voice – by this step the band in place of four Head Men will be shown to have seven and will only diminish be resigning or death until the number is reduced to four as other bands. …"

The evidence was that there was no reference whatsoever to an amalgamation agreement between the two Bands at that time. The purported amalgamation of the Kakisiwew Band and the Chacachas Band was not conducted with the proper consent from the members of both Bands.

JBD Vol 6-00184-0005
ATR, Tab 6, para. 16-17
Trial Transcript Vol 17 p. 106 Lines 5-14 Tab 77

39. Crown Expert Dr. Whitehouse-Strong agreed that in the Treaty 4 circumstances, that before receiving treaty annuities, the Indians had to move onto their reserves.

This suggested a form of coercion before annuities would be paid, contrary to Treaty 4.

Exhibit 29 Dr. Whitehouse-Strong Response to Dr. Storey Expert Report at p. 55

40. The first instance in which the term "amalgamation" is applied within the *Indian Act* is that section 17(1)(b) of the 1951 *Indian Act* is the first reference therein to band amalgamation, stating,

> The Minister may whenever he considers it desirable amalgamate bands that by a vote of the majority of their electors, request to be amalgamated.

Bear Book of Authorities *The Indian Act, 1951* S.C. c. 29, ss. 17(1)(b) at Tab 8

41. The Kakisiwew Band members did not disperse, nor were they melded into another existing Indian Band. Nor did the "core" of the Kakisiwew Band take scrip and enfranchise. Likewise, neither did they leave the Kakisiwew Band to join another band. There was no clear and plain intent by the Crown to extinguish the treaty rights of the Kakisiwew Band. The evidence that the Crown has relied upon is the omnibus OIC P.C. 1151 of May 17, 1889, which only establishes reserve lands.

Kakisiwew Book of Documents Tab 22 Phillips examination of R. Kohls September 18, 2003 U/T No. 8 Tab 67

42. In response to an undertaking to provide any documentation where Agent McDonald asked for permission to amalgamate the two Treaty bands, the Crown was unable to provide any evidence that Indian Agent McDonald sought permission to amalgamate the Kakisiwew Band and the Chacachas Band. In response to a similar undertaking, when the election of Chief Ochapowace occurred, there was no indication that the Crown explained to the members of the Kakisiwew Band and the Chacachas Band that they would be treated as one band with Ochapowace as their chief. Dr. Storey confirmed that there was no evidence of a formal vote to amalgamate between the two Bands.

Bear Transcript Read-ins Crown's Reply to Undertakings on Examination of R. Kohls, September 18, 2003. U/T No. 16 from Mr. Phillips Tab 59
Trial Transcript Volume 6, p. 14, lines 19-23 Tab 78
Trial Transcript Vol 17, p. 110 Line 28 and p. 111 Lines 1-6 Tab 79

43. Indian Agent McDonald, in conjunction with John C. Nelson, DLS, surveyed and selected what Nelson described as a "joint reserve" for the Kakisiwew Band and Chacachas Band in July and August 1881, the new reserve is known as the Ochapowace Reserve #71 originally containing 52,864 acres. Based on the acreages of the Original Reserves for the Kakisiwew Band and the Chacachas Band, they were shortchanged by 14,158.5 acres when the Ochapowace Reserve #71 was surveyed and set apart. What is fascinating is that the Ochapowace

Reserve is situated where the original Kahkewistahaw Reserve was located. This begs the question, why utilize lands that were supposedly inferior for the Kahkewistahaw Band? There was no logic whatsoever in the reasoning of the Crown for such a decision.

ATR Tab 6, paras. 13 and 14
Trial Transcript Vol 6 p. 95 Lines 14-28 and p. 96 Lines 1-5 Tab 80

44. The defendant Crown further conceded that the reason for the Kakisiwew-Chacachas joint survey is unclear.

Second Supplementary Trial Record - Applicants MR Vol 4, Memorandum of Fact & Law, para. 9(h) Tab 2

45. The Crown has failed to acknowledge that the Schedule of Indian Reserves included Reserves for Day Star and George Gordon First Nations and that these two Bands were procedurally dealt with when it came to reserve land exchanges. Also, the Waywayseecappo First Nation allegedly underwent a surrender for exchange in 1881 under the auspices of Indian Agent McDonald. These three Indian Bands were Treaty 4 signatories and had their respective reserves surveyed by William Wagner, DLS and administered by Indian Agent McDonald.

JBD Vol 7 – 00261

46. The Crown removed the original 1876 Loud Voice Reserve from reserve status and unlawfully converted that reserve for its own use. There was no surrender vote by the male members of the Kakisiwew Band, as required by the *Indian Act*, 1880, nor consent first had and obtained by the Indians affected, pursuant to Treaty 4.

ATR Tab 6, paras. 21 to 24
Trial Transcript Vol 6 p. 14 Lines 19-23 Tab 78

47. In a memorandum for the Deputy Minister, dated January 27, 1911 it is stated that both the Chacachas and Kakeesheway Bands own reserve #71 jointly, indicating further that the reserve had never been subdivided between the two bands. In a memorandum of the Department of Indian Affairs dated January 30, 1911, there is reference to the Chacachas and Kakeesheway Bands owning Reserve #71 jointly.

JBD Vol 9-00420 and JBD Vol 9-00421-0010

48. The Ochapowace Band was without leadership for extended periods of time. From 1892 to 1911 the Ochapowace Band was without a Chief. The Department of Indian Affairs confirmed the appointment of Walter Ochapowace as Chief in January 1912. By 1917 the Department was unsatisfied with Chief Walter Ochapowace and deposed him. There was no Chief for Ochapowace from 1918-1919. On May 2, 1922 Indian Commissioner W.M. Graham wrote to the Secretary, Department of

Indian Affairs in response to a request from Jacob Bear of Ochapowace who desired that the Band be allowed a Chief. Graham's response was that it would not be in the best interests of the Band to have a Chief, underscoring the patriarchal attitude of the Crown towards these Treaty Indians. This letter further suggests that the Ochapowace people were without a Chief for a period beyond 1919.

Kakisiwew Book of Documents Tab 21 Phillips U/T No. 7 from Examination of R. Kohls, September 18, 2003 Tab 66
JBD Vol 9-00444

49. Based on this evidence there was no Chief or Council in place at Ochapowace from 1917 to 1933.

JBD Vol 16-00609

PART II POINTS IN ISSUE

50. The following points in issue will be considered:

i. The Bear Plaintiffs have standing and representation to bring this action to trial;

ii. There was a breach of trust and fraudulent concealment

iii. Breach of honour of the Crown

iv. The limitation period/POPA does not apply; and

v. There was no acquiescence or delay in bringing this action.

Part III SUBMISSIONS

Standing and Representative Action

51. As mentioned herein, the Kakisiwew Band, through Chief Kakisiwew was signatory to Treaty, executed on September 15, 1874, establishing that the Kakisiwew Band was a Treaty Band. The *Indian Act 1876*, provided a definition of a Band:

> 3.1 the term "band" means any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common, of which legal title is vested in the Crown, or who share alike in the distribution of any annuities or interest moneys for which the Government of Canada is responsible; the term "band" means the band to the context relates; and the term "band" when action is being taken by the band as such, means the band in council.

Bear Book of Authorities, *Indian Act*, S.C. 1876, c. 18 Tab 4

52. The same *Indian Act* (1876) defines a reserve as,

> 3.6 The term "reserve" means any tract or tracts of land set apart by treaty or otherwise for the use and benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered, and includes all the trees, wood, timber, soil, stone, minerals, metals, or other valuables thereon or therein. (emphasis added)

Bear Book of Authorities *Indian Act*, S.C. 1876, c. 18 Tab 4

53. Although an *Indian Act* band is a creature of statute, the 1876 Act acknowledges that reserve lands are set apart by treaty for the use and benefit of a particular band. In the case at bar, the Kakisiwew Band, through signing Treaty 4 in 1874, was established as a Treaty band so that it can have reserve lands set apart for its use and benefit. It follows that the 1876 Act then would consider the Kakisiwew Band as a Treaty 4 Band.

54. The Federal Court of Appeal in the *Kingfisher* decision, DeCary, J.A. noted that rights claimed in that case (breaches of trust, treaty, fiduciary et al.) can be asserted if they have established that their ancestors were members of the Band in question at one time, and that they have also established that their ancestors did not cease to exist to be members by virtue of any provision of the *Indian Act*. The appeal of the First Nation claimants was dismissed.

Bear Book of Authorities *Chief Chipeewayan Band v. R.*, 2002 FCA 221, para. 7 Tab 20

55. At the trial level of the *Kingfisher* decision, Justice Gibson disagreed with the defendant Crown's presumption that as members of the Band dispersed, they became members of other bands, or their names appeared on other treaty paylists for a different band. Gibson J. was not satisfied that this constituted evidence that they became members of those bands, but interpreted this as evidence of nothing more than an administrative convenience accomplished by those charged with distributing annuities. This aspect of Justice Gibson's decision was left undisturbed by the appellate court.

Bear Book of Authorities *Chief Chipeewayan Band v. R.*, 2001 FCT 858, ("*Kingfisher*") paras. 100 Tab 19

56. Justice Fothergill also found that "there would be circularity in the Crown's position if no litigant could assert a claim relating to the continuance of the Chacachas Band and the Kakisiwew Band" further citing from *Lameman v. Canada (A.G.)*, 2006 ABCA 932, rev'd 2008 SCC 14, and it is noted that these aspects of the *Lameman* decision were left undisturbed,

> [132] Were it the case that no living individual satisfied the criteria as refined, restated and adopted by the chambers judge, it is correct that the very abolition of the reserve created the hole in standing. Such a conclusion would preclude an eventual adjudication of the merits of the claims I have otherwise found triable, and be a bar to the appellants. That could raise a further issue. Would it be just on the facts here to deny the appellants a forum in which they can claim the rights that this Court has found triable? Then on the unique facts here, notably that the reserve was abolished, should the criteria for standing be as defined by the chambers judge? Should the plaintiffs in that event be considered to have standing on the basis of being a descendant of an original band member? If this were not

> the case, would there be circularity in the Crown's position and no litigant to assert the claim of improper cancellation of the reserve?

ATR, Tab 3 at para. 37

57. A key distinguishing factor from the *Kingfisher* trial is that in the *Kingfisher* case, the action was commenced "on behalf of the descendants of the Chief Chipeewayan Band. Meanwhile, in the present matter, the Plaintiffs have commenced this action "on their own behalf and on behalf of all those Indians who are members of or are entitled to membership in the Kakisiwew Indian Band". (emphasis added)

ATR, Tab 6 at para. 3

58. Elder Sam Isaac's will say statement informs that he is great-grandson of Chief Kakisiwew.

Trial Transcript Vol 2 p. 37 Lines 7-19 Tab 81

59. Elder Isaac has learnt from his ancestors that the alleged amalgamation of the two Treaty Bands created challenges, informing that the Old People had warned Indian Affairs that this was wrong, putting two bands with hereditary Chiefs together. Indian Affairs officials did not understand this and refused to listen to the Old People. The decision of Indian Affairs has since caused much distress.

60. Elder Wesley Bear, a named plaintiff in this action, is also the great-grandson of Jacob Bear, who was present at the signing of Treaty 4.

Trial Transcript Vol 2 p. 7 Lines 18-25 and p. 8 Lines 10-16 Tab 82

61. Ms. Audrey Isaac, who has introduced the two Kakisiwew Elders and also a named plaintiff, has traced her patrilineal ancestry:

i. Father, Albert Isaac;
ii. Grandfather, Martin Isaac;
iii. Great-Grandfather, Walter Ochapowace;
iv. Great-Great Grandfather, Chief Kakisiwew.

Second Supplementary Trial Record - Kakisiwew (Applicants) Motion Record, dated April 25, 2007
Affidavit of Robert George sworn April 24, 2007, Exhibit "A" at p. 9 Tab 1

62. Ms. Freda Allary, a named plaintiff, has traced her lineage through her Kakisiwew ancestry:

i. Father, Ronald Allary;
ii. Grandfather, Alexander Allary; and
iii. Great-Grandfather, Thomas Allary/Henry.

Second Supplementary Trial Record - Kakisiwew (Applicants) Motion Record, dated April 25, 2007
Affidavit of Robert George sworn April 24, 2007, Exhibit "A" at p. 11 Tab 1

63. Ms. Freida Sparvier, a named plaintiff, has traced her lineage through her Kakisiwew/Chacachas ancestry:

i. Father, Sam Watson;
ii. Grandfather, Pacatowashyn/Peter Watson;

iii. Great-Grandfather, Two Voice.

Second Supplementary Trial Record - Kakisiwew (Applicants) Motion Record, dated April 25, 2007 Affidavit of Robert George sworn April 24, 2007, Exhibit "A" at p. 13 Tab 1

64. Ms. Mavis Bear, a named plaintiff, has traced her linage through her Kakisiwew ancestry:

i. Father, Henry Bear;
ii. Grandfather, Joseph Bear;
iii. Great-Grandfather, Henry Bear;
iv. Great-Great Grandfather, Jacob Bear.

Second Supplementary Trial Record - Kakisiwew (Applicants) Motion Record, dated April 25, 2007 Affidavit of Robert George sworn April 24, 2007, Exhibit "A" at p. 17 Tab 1

65. Michael Kenny, a named plaintiff has traced his lineage through his Kakisiwew ancestry:

i. Father, Steve Wasacase;
ii. Grandfather, Kenneth Shesheep;
iii. Great-Grandfather, Tom Shesheep,
iv. Great-Great Grandfather, Sam Isaac.

Second Supplementary Trial Record - Kakisiwew (Applicants) Motion Record, dated April 25, 2007 Affidavit of Robert George sworn April 24, 2007, Exhibit "A" at p. 19 Tab 1

66. Shirley Flamont, a named plaintiff has traced her lineage through her Kakisiwew ancestry:

i. Father, Solomon Still,
ii. Grandfather, Joseph Still/Kapayakoot;
iii. Great-Grandfather, Kahpaykeyash and George Nahwahkekapow;
iv. Great-Great Grandfather, Katekinocoos and Chimmeas;
v. Great-Great-Great Grandfather, Chief Kakisiwew.

Second Supplementary Trial Record - Kakisiwew (Applicants) Motion Record, dated April 25, 2007 Affidavit of Robert George sworn April 24, 2007, Exhibit "A" at p. 23 Tab 1

67. The *Kingfisher* decision found that the plaintiffs in that case were unable to trace their ancestry back to Chief Chipeewayan. Unlike the case at bar, several of the plaintiffs can trace their ancestral roots back to Chief Kakisiwew or original members of the Band. Another distinguishing fact is that the Chief Chipeewayan and his people did not settle on their Indian Reserve. Whereas, Chief Kakisiwew was instrumental in persuading other chiefs to sign Treaty 4 and was the first signatory to Treaty 4 and he and his people settled on their Original Reserve shortly after it was constituted.

68. Justice Gibson noted that there were no statutory provisions relating to the transfer of membership from one band to another in the era in question – but that admission to a band required the consent of a band, and that there was no evidence of consent before Justice Gibson at trial in the *Kingfisher* case. The material facts in the case

at bar confirm that there was no request by the Kakisiwew Band members to be admitted into another Band, nor any request to amalgamate with another Band, nor did they consent to any aspect mentioned herein, nor did they disperse. Last, there was no provision in the *Indian Act* of the time for amalgamation of Bands.

Bear Book of Authorities *Kingfisher at* paras. 93+95 Tab 19
Bear Book of Authorities *Chief Chipeewayan Band v. R.*, 2002 CAF 221, 2002 FCA 221 at para. 7 Tab 20
Trial Transcript Vol 6 p. 14 Lines 19-23 Tab 78
Trial Transcript Vol 17 p. 106 Lines 10-14 Tab 77

69. In the *Kingfisher* case, the facts outlined indicated that there was substantial movement of members from the Chief Chipeewayan Band to other bands or being paid as stragglers along with other bands. In the present case, leading up to the forced amalgamation, the Kakisiwew Band had always been paid their treaty annuities with regularity as part of the Kakisiwew Band and not necessarily under other band paylists.

Bear Book of Authorities *Kingfisher* at paras. 5-10 Tab 19

Representative Action

70. The *shishalh tl'extl'ax-min v. Bell Pole* ("*Bell Pole*") decision outlined the test for class proceedings, even though in that case it was not necessarily pled as one, and applied the test in that case, relying on the SCC's *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 where four factors were outlined:

i. The class plaintiffs must be capable of clear definition;
ii. There must be issues of fact or law common to all class members;
iii. Success for one class member on the common issues means success for all; and
iv. The class representative must adequately represent the class and the court should be satisfied that the proposed representative will vigorously and capably prosecute the interests of the class.

Bear Book of Authorities *shishalh tl'extl'ax-min v. Bell Pole*, 2013 BCSC 892 ("*Bell Pole*") at para. 19 Tab 53

71. The class of plaintiffs in this case are the members of the Kakisiwew Indian Band. The issues of fact and law are common to all in this class and success for one would mean success for all. The class representative has diligently put their best foot forward in the best interests of the class. The *Bell Pole* decision instructs that the class proceedings criteria can be applied in cases dealing with First Nation claims.

Bear Book of Authorities, *Bell Pole* at para. 19 Tab 53

72. The Kakisiwew plaintiffs have properly pled that they claim on their own behalf, and on behalf of all who are members of or are entitled to membership in the Kakisiwew Indian Band. The plaintiffs have established the facts that they have such ability

bring such a claim forward based on their rights that flow from Treaty 4 in addition to statutory rights.

73. The Crown defendant likely would rely upon the finding in the *Montana* decision, wherein that decision considers when an *Indian Act* band ceases to exist. Justice Hansen in *Montana* noted that an *Indian Act* band could cease to exist if all members died without issue; if all surviving members enfranchised; or if all band members transferred to another band – the facts clearly indicate that none of the criteria described by Justice Hansen occurred for the Kakisiwew Band, a Treaty 4 Band which was established prior to the first enactment of the *Indian Act* in 1876.

Bear Book of Authorities *Montana Band v. R.*, 2006 FC 261 ("Montana") at para. 456 Tab 34

74. The Kakisiwew Band was a Treaty band which also met the Indian Act "band" definition on the facts. Justice Slatter, in *Papaschase*, noted that, given the definition, there was nothing the Crown can directly do to make a Band disappear. As long as there was a reserve and a body of Indians with a common interest in that reserve there was nothing the federal Crown could do. According to Slatter, J., the only way a band could cease to exist is (i) if the commonly held lands cease to exist (via lawful surrender) or; (ii) if there is no longer a body of Indians, which might happen if all members joined other bands, or if the band simply died out. The material facts confirm that neither of these two criteria were met in the present case.

Book of Authorities *Papaschase Indian Band No. 136 v. Canada (A.G.)*, 2004 ABQB 655 ("*Papaschase*") at para. 171 Tab 38

75. The evidence clearly indicates that the Kakisiwew members did not, either formerly or informally, assume membership in another band, namely the Ochapowace Band. The evidence also shows that neither the Kakisiwew Band nor the Chacachas Band consented to, nor requested , nor voted for an amalgamation.

Trial Transcript Vol 2 p. 47 Lines 2-12 Tab 83

76. In referring to the *MMF* decision, the Supreme Court of Canada granted a declaration because the Metis had no alternative means by which to have their claims resolved. The SCC stated,

> …A declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or not any consequential relief is available… (emphasis added)

Bear Book of Authorities *MMF Inc v. Canada*, 2013 SCC 14 at para. 143 ("*MMF*") Tab 33

77. In the *Peepeekisis* decision, Appeal Justice Mainville suggested that the Band in that case had an alternative recourse under the *Specific Claims Tribunal Act*.

However, because the Kakisiwew Band does not qualify as a "band" through the current *Indian Act* and under the SCTA, they cannot bring their claim to this forum. Therefore, from the *MMF* decision, it follows that the Kakisiwew Band's claims and declaration related to the honour of the Crown should be heard.

Bear Book of Authorities at, *Peepeekisis First Nation v. Canada (Minister of Indian Affairs and Northern Development)*, 2013 FCA 191 ("*Peepeekisis*") at para. 62 Tab 39

78. The defendant Crown previously alleged that the May 17, 1889 OIC 1151 is evidence that the Ochapowace Band was constituted. Madam Justice Hansen, in *Montana Band v. R.*, gave treatment to this OIC. Madam Justice Hansen held that the OIC simply confirmed that particular lands have been set apart as reserve lands and that it did not confirm the existence of Indian Bands. In examination on questions dealing with the same OIC, Crown deponent Reinhard Kohls confirmed that this particular OIC does not create an Indian Band.

Bear Book of Authorities *Montana Band v. R.*, 2006 FC 261 at para. 514 Tab 34
Ochapowace Read-ins from Examination of R. Kohls, September 18, 2003 by Mr. Phillips, p. 22, line 23-26

79. The Crown will likely allege that a merged Band could be recognized by the Crown without a vote, meeting or agreement of one or both bands. The Crown would likely base this allegation on Justice Slatter's Alberta Court of Queen's Bench from the *Lameman* decision. What the Crown fails to inform from its basis is that Justice Slatter required decisions to be made by leaders of First Nations in order for such decision to be binding. The facts in this case indicate that there was no decision made by the Kakisiwew Band nor the Chacachas Band to merge or amalgamate and no decision to surrender their respective reserve lands as originally set apart. There was no autonomous act by way of agreement from the leadership of either the Kakisiwew Band or the Chacachas Band to merge, amalgamate or otherwise combine.

Kakisiwew Book of Documents Tab 22 Phillips U/T #8 from Examination of R. Kohls Sept. 18, 2003 at Tab 67
Bear Book of Authorities, *Papaschase Indian Band No. 136 v. Canada (A.G.)*, 2004 ABQB 655, para. 92 ("*Lameman*") Tab 38

80. The two historic Treaty 4 Bands were not fully informed of Agent McDonald's decision and there was no good faith consultation by the Crown concerning the decision to amalgamate and co-locate on a new reserve location. There was no opportunity to evaluate for a fair outcome. Just as important, there was no decision from the two respective Plaintiff bands to cause the two historic Bands to cease to exist. Importantly, Agent McDonald withheld his involvement in the Syndicate as

well – based on its mandate to operate in secret. As a result, the whole of the process should be considered as exploitative. During this time, Chief Kakisiwew was blind and very old, with Canada's expert Dr. von Gernet agreeing that it would have been difficult, if Chief Kakisiwew was present, to view any sketches drawn by DLS Nelson. As a result, any purported consultation argued by the Crown would certainly have been challenging, notwithstanding the Chief's advanced age. Did the Crown take advantage of his advanced age, weakness and blindness to co-locate and amalgamate the two bands? If so, how honourable would that conduct have been?

Trial Transcript Vol 16 p. 57 Lines 5-7 Tab 84

81. Furthermore, the court has recognized that there is a need for unrecognized collectives to seek recognition of collective, pre-existing and unextinguished rights. Justice Willcock, in the *Campbell* decision, quoting Justice Slatter in *Lameman* at para. 181,

> …In exceptional circumstances a derivative claim might be permitted to advance a Band right. If the Band is not a legal entity, like an unincorporated association, then the Band (and not an individual member) can sue to enforce those rights, but only by a derivative action by representative plaintiffs…

Bear Book of Authorities, *Campbell v. British Columbia (Min. of Forests and Range)*, 2011 BCSC 448 at para. 106 (*"Campbell"*) Tab 16

82. The TLE settlement and 1919 Settlement Claims between the Ochapowace Band and Canada did not release any claims relating to the alleged amalgamation of the Kakisiwew Band and the Chacachas Band. Canada's negotiator, upon cross-examination acknowledged that the historic band amalgamation issue was a live issue and that the two settlement claims noted herein did not provide to Canada a release of the claims related to unlawful amalgamation.

Ochapowace Transcript Read-ins Examination for Discovery of Alois James Gross, July 31, 2003 at pp. 338-339 Q/A 844, 349-352 Q/A 878-880 and 357 Q/A 900

83. Related to this live issue, was a letter from Minister John Munro to Chief Morley Watson, Ochapowace Band, dated April 19, 1984. This letter discusses the TLE claim for Ochapowace, and the Minister suggests that in order for the Band to receive its full allotment of TLE, a surrender of the Original Reserve as surveyed in 1876 be taken. This evidence further suggests that the Crown was attempting to limit its liability related to the 1876 Original Reserve. Further, the letter suggests that this subsequent acknowledgement of the interest in the 1876 Original Reserves that any limitation period and acquiescence were not in play if such a request was made.

In addition, Canada agreed to suspend operation of the limitation period between 1985 to 1995. With the present action being commenced in 2000, it is submitted that the claim falls within the limitation period. Alternatively, the fraudulent breach of trust and discoverability arguments discussed herein also apply.

Kakisiwew Book of Documents at Tab 14
Ochapowace Compendium of Oral Argument, Crown Undertaking No. 24

84. The TLE Claim does not provide any release to Canada that prohibits the Treaty Bands (both Kakisiwew and Chacachas Bands) from seeking recognition.

JBD Vol 13-00525-0084, TLE Agreement October 22, 1993, Article 17.01

85. What the evidence proves is that Indian Agent McDonald, for administrative convenience unilaterally placed both Bands together on a co-located reserve without either band's consent or request. What is even more egregious is that the evidence also points to Indian Agent McDonald and DLS John Nelson's involvement with the Qu'Appelle Land Syndicate so that these Crown agents made decisions in order to profit from them, to the potential detriment of the Kakisiwew Band and the Chacachas Band. Whereas, in the *Lameman* case there was an agreement between the Enoch Band and the Papaschase remnants to amalgamate where the Enoch Band made the request for such agreement, in the case at bar no such agreement to amalgamate, merge or otherwise co-locate onto the same reserve existed or was contemplated.

Bear Book of Authorities, ***Lameman*** at paras. 43, 47 Tab 38

86. Given the circumstances that the Ochapowace Indian Band serves as an involuntary trustee, it was only through utilizing Ochapowace's recognition as an *Indian Act* band that both the TLE and Surrender claims could move forward, pursuant to the *Outstanding Business* policy of Canada. This was the only venue within which the Kakisiwew members could express their rights related to these two claims at the time. During the negotiations of these two claims, the historic bands issue was deferred.

Breach of Trust and Fraudulent Concealment

87. The *Constitution Act, 1930* makes reference to Indian Reserves as vested in Canada and held in trust for Indians. The *Constitution Act, 1930* provided, in the transfer of public lands generally from the federal Crown to the Province (either of Manitoba, Saskatchewan, Alberta or British Columbia) would now belong to the

Province, subject to any trusts existing in respect thereof. Section 10 of the Saskatchewan Natural Resources Transfer Agreement (which formed part of the *Constitution Act, 1930*) indicated that all lands included in Indian reserves in the Province, continue to be vested in the federal Crown. The British Columbia agreement adds clarity indicating that "…said reserves shall continue to be vested in Canada in trust for the Indians…"

Bear Book of Authorities *Constitution Act, 1930*, Saskatchewan NRTA at s. 10; BC NRTA at s. 13 Tab 3
Bear Book of Authorities Canadian Encyclopedic Digest, Aboriginal Law II.1(d).(i). s.33 Tab 60

88. Section 15 of the 1880 *Indian Act* noted that reserves for Indians also contemplates those parcels as held in trust.

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89. The trust attached to reserve lands as mentioned above, which also flows from Treaty 4, and subsection 91(24) of the *Constitution Act, 1867*, deems that, based on the principles of statutory interpretation, this entails discerning its meaning in the terms of the entire context in its grammatical and ordinary sense in harmony with the *Constitution Act, 1930*. Having been enacted under the authority of the federal Parliament, the *Constitution Act, 1930* and its trust principle in respect of Indian Reserves must be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

Bear Book of Authorities *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. at para. 24 (*"Rizzo"*) Tab 43

90. The *Meyers* decision informs about the presumption of coherence. When statutes are interpreted, the courts presume that the legislative provisions are intended to work together as a whole, also known as the presumption against internal conflict. The reasoning in *Meyers* relied upon Ruth Sullivan in *Driedger on the Construction of Statutes*, (3d) ed. (Toronto: Butterworths, 1994), at p. 176 which she described this presumption as:

> …It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable without coming into conflict with any other…
>
> Where two provisions are applicable to the same facts, the courts attempt to apply both. If the provisions are not in conflict, and conflict for this purpose is narrowly defined, then it is presumed that both provisions are meant to apply in accordance with their terms…

Bear Book of Authorities *Meyers v. Humboldt (Town of)*, 1996 CanLII 6948 (SK QB) (*"Meyers"*) Tab 30

91. The *Constitution Act, 1930* underscores that the transfer of administration and control of Crown lands was subject to any trust existing in respect thereof. Recall that the British Columbia Natural Resources Transfer Agreement, which forms a

constituent of the *Constitution Act, 1930*, states Indian Reserve lands were vested in Canada and held in trust for the Indians. Thus, the principles enunciated in *Rizzo* and *Meyers* along with Sullivan's outline on the presumption against internal conflict, sanction the fact that lands reserved for Indians are vested in Canada in trust for the Indians as outlined in the *Constitution Act, 1930*, further confirming that this trust principle applies as a result of this Constitutional document. Therefore, if Indian reserve lands in British Columbia were held in trust by Canada, but not held in trust by Canada in Saskatchewan, this would run contrary to the presumption of coherence.

92. In the seminal *Guerin* decision, Justice Dickson, for the majority (panel of four) wrote:

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.

Bear Book of Authorities CLA, Vol.2, Part A, Tab 18 at p. 376 ("*Guerin*") Tab 27

93. Note that the *Guerin* decision dealt primarily with section 18 of the *Indian Act* and a conditional surrendering of a portion of reserve lands and whether that particular section created a trust as pled by the plaintiffs in that case. What the majority also noted was that the nature of Indian interest is characterized by its general inalienability, coupled with the Crown being under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. The Indian interest in land is an independent legal interest that is neither a creation of the legislative or executive branches of government. This entails that the Crown's obligation to Indians with respect to that interest is not a private or public law duty, but is a *sui generis* relationship that is in the nature of a private law duty. In the majority's opinion, the quantum of damages was determined by analogy with the principles of trust law.

Bear Book of Authorities *Guerin* at pp. 382, 385, 390 Tab 27

94. In considering the discretion of the Crown related to section 18(1) of the *Indian Act*, the majority in *Guerin* noted that an express trust nor an implied trust does not arise upon surrender. The Crown's fiduciary obligation to the Indians was found not to be a trust, but that the obligation was trust-like in character. The obligation is subject to

the principles similar to those that govern the law of trusts. In essence, the majority treated the issue as a trust issue but declined to say that it was. Meanwhile, the minority panel of three would have ruled the issue as a trust issue upon the surrender of reserve land. The Original Reserve as a whole was lost via conversion in the case at bar – not a portion of reserve as dealt with in *Guerin*.

Bear MR Book of Authorities *Guerin* at pp. 355, 386-87 Tab 27

95. The Court in *Guerin* noted that

> …It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. …

Bear Book of Authorities *Guerin* at p. 382 Tab 27

96. In *Houle v. Canada*, which was a decision that dealt with amendments to a statement of claim dealing with petroleum and mineral rights on Indian reserve lands, there it was held that the obligations, duties and powers of the Crown are as a trustee and a fiduciary.

Bear Book of Authorities *Houle v. Canada*, [2001] 1 FCR 102 at para. 39 Tab 29

97. Whereas, in the *Whitebear* decision, the Federal Court of Appeal noted that the Minister of Indian and Northern Affairs has a duty to avoid conflicts of interest and to act without his own regard, as a basic principle of trust law, quoting Donovan Waters, ed., *Waters Law of Trusts in Canada*, 3d Ed. (Toronto: Thomson Canada Limited, 2005) at p. 877:

> … it is a fundamental principle of every developed legal system that one who undertakes a task on behalf of another must act exclusively for the benefit of the other, putting his own interests completely aside.

Bear Book of Authorities *Whitebear First Nation v. Canada (Minister of Indian Affairs & Northern Development*, 2012 FCA 224 at para. 29 ("*Whitebear*") Tab 57

The above ratios confirm that a trust relationship can be concluded based upon the facts as presented between the Kakisiwew Band as beneficiary and the defendant Crown as trustee.

Fraudulent Concealment

98. In support of the fraudulent breach of trust, it is submitted that there was fraudulent concealment by the Crown. Justice La Forest, in the 1992 *M. (K.) v. M.(H.)* decision

expounded upon the doctrine of fraudulent concealment. In that decision, La Forest J. noted the factual basis for fraudulent concealment,

> … is described in *Halsbury's*, 4th ed. Vol. 29, para. 919 at p. 413, in this way:
>
> > It is not necessary, in order to constitute fraudulent concealment of a right of action, that there should be active concealment of the right of action after it has arisen; the *fraudulent concealment may arise from the manner in which the act gives rise to the right of action is performed*. [emphasis in original]

Bear Book of Authorities *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 at para. 64 Tab 32

99. In order to constitute fraudulent concealment, there needs to be a tortious act with the rightful owner being ignorant of his right as well as some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts. Once these are established, the case can be taken out of the statute of limitations.

Bear Book of Authorities *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, para. 65 Tab 32

100. Applying the facts of this case to the law as outlined in the 1992 *M. (K.) v. M.(H.)* decision, Indian Agent McDonald

i. was aware that the Original Reserve was set apart for the Kakisiwew Band;

ii. was aware of the statutory requirements to surrender Indian Reserve lands;

iii. had previously sought permission from his superiors to change the location of the Day Star Reserve (January 1881);

iv. had previously sought permission to exchange a portion of the George Gordon Indian Reserve lands (January 1881);

v. had undertaken a surrender for exchange for the Waywayseecappo Band (February 1881); and

vi. these three Bands are Treaty 4 Bands and had their respective reserves surveyed by William Wagner DLS.

101. With respect to the Kakisiwew Indian Reserve and the Chacachas Indian Reserve, both of which were surveyed by Wagner, DLS and set apart as Indian Reserves, McDonald:

i. Failed to inform the Kakisiwew Band about the statutory rights to surrender reserve lands under the *Indian Act* and the *Royal Proclamation, 1763*;

ii. Failed to inform about the Treaty 4 consent requirements to alienate Indian Reserve lands;

iii. Failed to inform the Kakisiwew Band that Indian Reserve lands could only be alienated to the federal Crown;

iv. Failed to inform the Kakisiwew Band about McDonald's involvement with the Qu'Appelle Land Syndicate;

v. Failed to obtain permission from his superiors to obtain a surrender of the Kakisiwew Reserve;

vi. Failed to seek the consent of the Kakisiwew Band to surrender their Original Reserve;

vii. Failed to seek the consent and agreement of both the Kakisiwew Band and the Chacachas Band to amalgamate;

viii. Failed to seek the consent and agreement of both the Kakisiwew Band and the Chacachas Band to co-locate on the same reserve lands;

ix. Unlawfully and contrary to Treaty 4, created the joint reserve known as the Ochapowace Reserve #71; and

x. Created an involuntary trust and governance structure that had removed the leadership regimes of both the Kakisiwew Band and the Chacachas Band.

102. The above represent failures and concealment that has led to the breach of Treaty 4 and the *Indian Act*. The Crown purported to consolidate the two historic Treaty 4 Bands into the Ochapowace Indian Band and did so illegally by unilateral and arbitrary action. All of this was to the detriment of, against the wishes of, and to the prejudice of members of both Treaty 4 Bands.

103. As part of the inducement to enter treaty in 1874, the Crown promised the Kakisiwew Band that they cannot lose their reserve lands unless Treaty 4 provisions were met. Shortly thereafter, statutory provisions for surrendering reserve lands was enacted in the *Indian Act*. The *Royal Proclamation of 1763* also afforded similar protections. These authorities dictate that the Crown cannot simply ignore treaty promises and statutory requirements to the Bear plaintiffs detriment. This was a clear breach of the trust placed in the treaty relationship and the Crown must now make good on the losses suffered.

104. The defined term “reserve” noted above from the 1876 *Indian Act* does not specify that an Order in Council was required for reserve establishment. At that time, all that was required was approval from the Minister of Interior or Superintendent General of Indian Affairs. In a letter dated August 12, 1876 to the Department of Interior from Deputy Minister of Justice Z. Lash, dealing with the question as to whether an OIC was required for reserve establishment, stated

> …The undersigned leans to the opinion that the survey and setting out of the reserve having been done with the express consent + approval of the Indians + having since been acquiesced on by them, no Order in Council is necessary;…

The 1877 Schedule of Indian Reserves confirmed that the Minister of Interior approved and set apart the Kakisiwew “Loud Voice” Reserve and the Chacachas Reserve as surveyed in 1876 by Wagner. Further, S. Stewart, Assistant Secretary wrote to the law firm Heap & Heap on August 3, 1903 confirming that the 1871 St. Peter’s Reserve was approved by the Minister of the Interior and that was “to be all that was necessary” and that an Order in Council was not passed.

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105. The majority in the SCC *Ross River Dena* decision held that there may be no single procedure for creating reserves, but the Crown must show an intention to create a reserve (i.e. through treaty); the intention must be possessed by Crown agents holding sufficient authority to bind the Crown (July 9, 1875 OIC giving authority to William Christie appointed to select reserves in Treaty 4); steps taken to set apart the land as reserve for the benefit of the Indians (1876 surveys by William Wagner DLS); and the Band concerned must have started to make use of the lands set apart (seed potatoes, agricultural equipment provided to Chief Kakisiwew and his Band in 1878-79). These criteria were met for the Original Reserve surveyed in 1876. Regarding the Ochapowace Reserve #71, neither Agent McDonald nor Surveyor Nelson obtained or had the authority to bind the Crown in the establishment of this reserve.

Bear Book of Authorities, *Ross River Dena Band Council v. Canada*, 2002 SCC 54 at para. 67CLA Vol 2 Part A Tab 39 (“*Ross River Dena*”) Tab 47

106. The *Ross River Dena* case also held that the setting a part of a tract of land for reserve status implies both an action and an intention. The Crown must do certain things to set the land apart, but it must also have an intention of doing these acts to create the reserve. This decision stated that

> …For example, the signing of a treaty **or** the issuing of an Order-in-Council are of such authoritative nature that the mental requirement or intention would be implicit or presumptive. (emphasis added)

Bear Book of Authorities *Ross River Dena*, at para. 50 Tab 47

107. In 1876, in accordance with Treaty 4, the original Kakisiwew Reserve was established and set apart, this fact is evidenced by Canada's Schedule of Indian Reserves from 1877. Several years later, without any authority such as an Order-in-Council, Indian Agent McDonald and Mr. Nelson, DLS conspired to have a new reserve set apart. Agent McDonald, well aware of the statutory surrender provisions of the 1880 *Indian Act* failed to obtain a surrender of the original Kakisiwew Reserve and also failed to meet the requirements of Treaty 4 and the protection of reserve lands the treaty afforded. Not only that but Agent McDonald also concealed from the Kakisiwew Band the Band's statutory and treaty rights related to reserve land protection.

108. In addition, Agent McDonald and Surveyor Nelson, amongst others, colluded to operate the Qu'Appelle Land Syndicate, operating in secrecy. This collusion by two Crown agents involvement in the Syndicate was a clear breach in terms of a conflict of interest and trust.

109. Furthermore, there has been no trust accounting whatsoever related to the conversion of the Original Reserve as surveyed in 1876 which had been set apart for the Kakisiwew Band.

110. The facts of the case support the charge for fraudulent breach of trust and fraudulent concealment by the Crown. Moreover, the Supreme Court of Canada has held that wording of the treaties must "be given a just, broad and liberal construction" and that "doubtful expressions [be] resolved in favour of [First Nations]". Unfortunately, the Crown's actions were unconscionable and contrary to the Honour of the Crown.

Bear Book of Authorities CLA, Vol. 2, Part A, Tab 44 at p. 1036 (*"Sioui"*) Tab 45
Bear Book of Authorities CLA, Vol. 2, Part A, Tab 32 at p. 36 (*"Nowegijick"*) Tab 37

Honour of the Crown

111. The plaintiffs herein have properly pled that through the signing of Treaty 4 by Chief Kakisiwew, the honour of the Crown was invoked in future dealings with the Crown. Furthermore, the honour of the Crown is implicit within the structure and context of the pleadings.

Bear Book of Authorities *MMF* at para. 89 Tab 33

112. The honour of the Crown has been in play at least since the time of signing of Treaty 4. Madam Justice Hennesey held that the honour of the Crown "…has been a principle animating Crown conduct since the *Royal* Proclamation of 1763…". As a result of entering into Treaty 4, the Crown took on a solemn obligation to set apart reserve land for Chief Kakisiwew and his Band in accordance with the Treaty, and such honour was engaged. The *MMF* decision considers that the honour of the Crown refers to the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign. Here, Crown conduct in the implementation of the Treaty obligations, especially as it related to the Original Reserves, breached the duty that arises out of the honour of the Crown.

Bear Book of Authorities *MMF* at paras. 9, 66, 67 and 86 Tab 33
Bear Book of Authorities *Restoule v. Canada (AG)* 2018 ONSC 7701 at para. 479 ("*Restoule*") Tab 46

113. The honour of the Crown is engaged by an explicit obligation that is enshrined in the Constitution to a First Nation. The Constitution is the document in which the Crown asserted its sovereignty in the face prior Indigenous occupation – this is at the root of the honour of the Crown. An explicit obligation to a First Nation placed therein engages the honour of the Crown at its core.

Bear Book of Authorities *MMF* at para. 70 Tab 33

114. The *MMF* decision informs even further stating that in relation to treaty promises an intention to create obligations attaches a certain element of solemnity. This type of promise was made for the overarching purpose of reconciling First Nation interests with that of the Crown's asserted sovereignty. The Supreme Court of Canada (the "SCC") further espouses that the honour of the Crown governs treaty-making and implementation leading to honourable negotiation and the avoidance of the appearance of sharp dealing. The honour of the Crown requires the Crown to act in a way that achieves the intended purposes of treaty and statutory grants to First Nations.

Bear Book of Authorities *MMF* at paras. 71 and 73 Tab 33
Bear Book of Authorities *Restoule* at para. 481 Tab 46

115. As a result of how the SCC majority in the *MMF* decision has laid out the honour of the Crown and how it relates to the principles governing this honourable conduct, it held that when the issue is implementation of a constitutional obligation to a First Nation people occurs, the honour of the Crown requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it.

Bear Book of Authorities *MMF* at paras. 75 Tab 33

116. The majority in the SCC's *MMF* decision has noted that the second principle concerning the honour of the Crown has largely arisen in the treaty context where the Crown's honour is pledged to diligently carry out its promises. To fulfill this duty Crown servants must perform the obligation in a way that achieves the purpose behind the promise and not leaving the First Nation claimant with an empty shell of a promise.

Bear Book of Authorities *MMF* at paras. 79 and 80 Tab 33

117. Most recently, Justice Karakatsanis summarized these key aspects of honour of the Crown stating,

> …This Court has repeatedly found that the honour of the Crown governs treaty making and implementation, and requires the Crown to act in a way that accomplishes the intended purposes of treaties and solemn promises it makes to Aboriginal peoples (*Manitoba Metis*, at paras. 73 and 75; *Mikisew Cree*, at para. 51; *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 44; *Badger,* at paras. 41 and 47). Treaty agreements are sacred; it is always assumed that the Crown intends to fulfill its promises. No appearance of "sharp dealing" will be permitted (*Badger*, at para. 41).

Bear Book of Authorities *Mikisew Cree Nation v. Canada (Governor General in Council)*, 2018 SCC 40 at para. 28 Tab 31

118. The *Restoule* decision laid out four categories of duties that flow from the honour of the Crown:

1. A fiduciary duty when the Crown assumes discretionary control over a specific or cognizable Aboriginal interest;
2. A duty to consult, and where appropriate to accommodate, when the Crown contemplates an action that will affect either a claimed but as yet unproven Aboriginal interest or an established treaty right;
3. A duty of honourable treaty-making and implementation, including a duty to act in a way that accomplishes the intended purposes of the treaty; and
4. A duty to take a broad purposive approach to the interpretation of the treaty promise in conjunction with a duty to act diligently to fulfil that promise.

The duties most relevant in the case at bar are 1, 3 and 4. In addition, legally enforceable duties flow from the honour of the Crown. Interestingly, Hennessy, S.C.J. noted that treaty promise clauses have the status of a legal and constitutional right, vulnerable to the Crown's discretionary control under the fiduciary duty.

Bear Book of Authorities *Restoule* at paras. 483, 496 and 523 Tab 46

119. Treaty 4 set out many solemn promises owed to the Treaty 4 beneficiaries, central among them was the treaty right to land in the form of a reserve pursuant to a per capita calculation of acreage. This fundamental treaty promise is a solemn one that engages the honour of the Crown. The former Minister of Justice, Jody Wilson-Raybould provided Litigation Guideline Directives for the discharge of litigation duties on behalf of the federal government. Litigation Guideline #9 notes that:

> Similarly, all communications, pleadings, and submissions must reflect the special relationship between the Crown and Indigenous peoples. The honour of the Crown is reflected not just in the substance of the positions taken, but in how those positions are expressed.

Bear Book of Authorities *MMF* at para. 92 Tab 33
Bear Book of Authorities The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples at p. 14 Tab 70

120. The questions that arises out of the Crown's conduct are many and can be characterized as "did the Crown act honourably in failing to obtain a surrender of the Original Reserve for the Kakisiwew Indian Band? Did the Crown act honourably in failing to meet the obligations of the surrender provisions of the *Indian Act*, 1880? Were the Crown actions, through Indian Agent McDonald and Dominion Land Surveyor Nelson honourable even though the Original Reserve for the Kakisiwew Indian Band was already set apart?" Did the Crown conduct, viewed as a whole, and in proper context, meet the standard of the honour of the Crown?

Bear Book of Authorities *MMF* at paras. 97 Tab 33

121. The SCC in *Clyde River* noted that when the honour of the Crown is engaged, it does not predispose a certain outcome, but instead promotes reconciliation by imposing obligations on the manner and approach of government. In applying the honour of the Crown, the SCC has informed that it requires the Crown to act in a way that accomplishes the intended purpose of treaty and statutory grants to First Nations and to make sense of the result of treaty negotiations. The SCC in *Haida Nation* also stated that the honour of the Crown also infuses treaty making and interpretation, that when implementing treaties, the Crown must act with honour and

integrity. In the case at bar, it is submitted that such actions were dishonourable on the part of the Crown.

Bear Book of Authorities *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, 2017 CSC 40 ("*Clyde River*") at para. 41 Tab 21
Bear Book of Authorities CLA, Vol. 2, Part A, Tab 18 at para. 19 ("*Haida Nation*") Tab 28

Discoverability

122. The discoverability rule informs that a cause of action arises, for the purposes of a limitation period when material facts on which it has been based has been discovered or ought to have been discovered upon reasonable due diligence.

Bear Book of Authorities *Ryan v. Moore*, 2005 SCC 38 at para. 2 referring to *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (SCC) at p. 224 Tab 48

123. Trials are held so that more extensive evidence can be led, witnesses can be examined, experts could expand upon reports or that parties may have uncovered more documents. In the present case, material facts have been recently located (in 2015) which speak to Agent McDonald's involvement with the Qu'Appelle Land Syndicate. Agent McDonald was not the only Crown actor involved, John C. Nelson, DLS and Samuel Steele, Inspector for the NWMP, among other Crown agents were involved in the Syndicate. This recent discovery postpones the running of the limitations period based on the discoverability rule.

Bear Book of Authorities *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at p. 224 Tab 18

124. Both Plaintiffs in the Bear and Watson actions jointly and diligently engaged historians to prepare a report which was titled, *Historical Narrative of the Chacachas and Kakisiwew Bands, prepared in relation to FC Action T-2155-00 and T-2153-00* (the "Historical Report). The historian uncovered documents from the personal collection of Indian Agent McDonald which provide material evidence of his involvement in the Qu'Appelle Land Syndicate. These documents were subsequently shared with the defendants via supplementary affidavit of documents by both plaintiff parties.

125. The SCC in *Peixeiro* held that discoverability is a general rule applied to avoid the injustice of precluding an action before the person is able to raise it. The new material documents raise several questions of fact and law, one of which deals with the honour of the Crown, while others relate to breach of trust and fraudulent concealment. *Peixeiro* also stands for the fact that the discoverability rule is an interpretive tool that assists in construing limitations statutes when raised as an

issue. As well, *Peixeiro* states that this principle applies to all statutory limitation provisions unless there is clear legislative language in place to displace the rule. Further the Federal Court in *Samson Indian Nation and Band v. Canada*, stated,

> …The use of legal advisors by an Indian Band is a significant factor in determining discoverability: *Wewaykum*, above, at paras. 57; *Kruger*, above at para. 90; *Lameman*, ABQB above at para. 139.

Bear Book of Authorities *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 at paras. 36, 37 and 38 Tab 40
Bear Book of Authorities *Samson Indian Nation and Band v. Canada*, 2015 FC 836 at para. 31 Tab 50

Limitations

126. The Bear plaintiffs submit that the policy reasons underlying limitation periods are not applicable in the context of this action and is contrary to the goals of reconciliation and the honour of the Crown. To allow the federal Crown to rely upon laws of their own making to avoid scrutiny for their historical wrongdoings impedes these two principles. Madam Justice McLachlin, as she then was and speaking from a contemporary perspective, discussed the characteristics of limitations statutes:

> …They are intended to: (1) define a time at which potential defendants may be free of ancient obligations, (2) prevent the bringing of claims where the evidence may have been lost to the passage of time, (3) provide an incentive for plaintiffs to bring suits in a timely fashion, and (4) account for the plaintiff's own circumstances assessed through a subjective/objective lens, when assessing whether a claim should be barred by the passage of time. To the extent they are reflected in the particular words and structure of the statute in question, the best interpretation of a limitations statute seeks to give effect to each of these characteristics.

Bear Book of Authorities *Novak v. Bond*, [1999] 1 S.C.R. 808 at para. 67 Tab 36

127. Madam Justice McLachlin, as she then was, added that limitations statutes seek to balance conventional rationales which orient towards protecting the defendant, with the need to treat plaintiffs fairly, having regard to their specific circumstances. (emphasis added)

Bear Book of Authorities *Novak v. Bond*, [1999] 1 S.C.R. 808 at para. 66 Tab 36

128. The SCC in the MMF case has explicitly stated that reconciliation must be considered when balancing the policy reasons underlying limitation periods, stating:

> Furthermore, many of the policy rationales underlying limitations statutes simply do not apply in an Aboriginal context such as this. Contemporary limitations statutes seek to balance protection of the defendant with fairness to the plaintiffs: *Novak v. Bond*, [1999] 1 S.C.R. 808, at para. 66, *per* McLachlin J. In the Aboriginal context, reconciliation must weigh heavily in the balance. As noted by Harley Schachter:
>
> > The various rationales for limitations are still clearly relevant, but it is the writer's view that the goal of reconciliation is a far more

> important consideration and ought to be given more weight in the analysis. Arguments that provincial limitations apply of their own force, or can be incorporated as valid federal law, miss the point when aboriginal and treaty rights are at issue. They ignore the real analysis that ought to be undertaken, which is one of reconciliation and justification. (citations omitted)
>
> Schachter was writing in the context of Aboriginal rights, but the argument applies with equal force here. Leonard I. Rotman goes even farther, pointing out that to allow the Crown to shield its unconstitutional actions with the effects of its own legislation appears fundamentally unjust: (citations omitted)
>
> The point is that despite the legitimate policy rationales in favour of statutory limitations periods, in the Aboriginal context, there are unique rationales that must sometimes prevail.

Bear Book of Authorities, *MMF*, at paras. 41-42 Tab 33

129. It its acknowledged that the SCC has indicated that limitation periods for historic claims of wrongdoing against Indigenous peoples may be applied. For instance, the SCC in *Wewaykum v. Canada* and *Canada (A.G.) v. Lameman* support the application of limitation periods to Indigenous claims.

Bear Book of Authorities, *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 121 Tab 56
Bear Book of Authorities, *Canada v. Lameman*, 2008 SCC 14 at para. 13 Tab 17

130. The Crown defendant relies upon the *Limitations Act*, S.S. 2004 (the "LAA") and its predecessor legislation in its pleadings stating that this legislation applies in the case at bar. Section 12 of the current Saskatchewan limitation statute instructs that claims based on fraudulent breach of trust are postponed and do not begin to run against the beneficiary until fully aware of such breach. In the case at bar, recent material facts came to light which underscores that Crown actors acted fraudulently and willfully failed to disclose interests in their land speculation endeavors, as well as failed to disclose the treaty and statutory rights held in favour of the plaintiffs. Therefore, the Bear plaintiffs only became fully aware at that time upon the discovery of new documents noted above.

Bear Book of Authorities *The Limitations Act*, S.S. 2004 C. L-16.1, s. 12 Tab 11

131. As predecessor legislation, the *Limitations of Actions Act,* R.S.S. ch. L-15 at section 4 informs that when the existence of a cause of action has been concealed by the fraud of the person relying upon the limitations defence, the cause of action shall be deemed to have arisen when the fraud was first discovered. In this case, once the personal papers of Agent McDonald came to light, fraudulent concealment only

came to be known, which reinforces aspects of breach of trust and breach of honour the Crown which suspends the limitations issue in this matter.

Bear Book of Authorities, *The Limitations of Action Act*, R.S.S. ch. L-15 at s. 4 Tab 10

132. Limitation periods recognize that when the cause of action has been concealed by the fraud of the person relying on the limitation period, the cause of action will be deemed to have arisen when the fraud was first known or discovered.

> Limitations Act, 2004:
> *Certain claims against trustees*
> 12(1) This section applies to claims: (a) based on fraudulent breach of trust to which a trustee was a party or privy; or (b) to recover from a trustee trust property, or the proceeds from trust property, that are in the possession of the trustee, or that were previously received by the trustee and converted to the trustee's own use. (2) The limitation periods established by this Act that are applicable to a claim described in subsection (1) are postponed and do not begin to run against a beneficiary until that beneficiary becomes fully aware of the fraudulent breach of trust, conversion, or other act of the trustee on which the claim is based.
> …
> *Concealment*
> 17 The limitation periods established by this Act or any other Act or regulation are suspended during any time in which the person against whom the claim is made:
>
> (a) willfully conceals from the claimant the fact that injury, loss or damage has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was that of the person against whom the claim is made; or
> (b) willfully misleads the claimant as to the appropriateness of a proceeding as a means of remedying the injury, loss or damage.
>
> *Limitations of Actions Act*, 1975:
> *Fraudulent concealment*
> 4. When the existence of a cause of action has been concealed by the fraud of the person setting up this Part or Part II as a defence, the cause of action shall be deemed to have arisen when the fraud was first known or discovered.
> …
> *Concealed fraud*
> 31(1) In every case of concealed fraud by:
>
> (a) the person setting up this Part as a defence; or
> (b) some other person through whom the first mentioned person claims; the right of a person to bring an action for the recovery of land of which he or a person through whom he claims may have been deprived by the fraud, shall be deemed to have first accrued at and not before the time at which the fraud was or with reasonable diligence might have been first known or discovered.

Bear Book of Authorities *Limitations Act*, S.S. 2004, c. L-16.1 ss 12(1), 17 Tab 11
Bear Book of Authorities *The Limitations of Actions Act*, R.S.S. 1978, c. L-15 ss 4, 31(1) Tab 10

133. The policy reasons underlying the proposition that fraudulent concealment bars any limitations defenses are equitable in nature and is aimed at preventing a limitation period from acting as an instrument of injustice. The underlying rationale is grounded

in the well-established principal that equity will not permit a statute to be used as an instrument of fraud.

Bear Book of Authorities *Giroux Estate v. Trillium Health Centre*, 2005 CarswellOnt 241 at para 28-29 Tab 26

134. Fraudulent concealment essentially stops the clock until the plaintiff has discovered that fraud, or until the time the plaintiff ought to discovered it with reasonable diligence.

Bear Book of Authorities *Guerin* at p. 390 Tab 27

135. "Fraud" in this context does not need to amount to deceit or common law fraud. Rather, as stated in Guerin, it is equitable fraud which is conduct that is unconscionable considering the special relationship between the parties:

> …The fraudulent concealment necessary to toll or suspend the operation of the statute need not amount to deceit or common law fraud. Equitable fraud, defined in *Kitchen v. Royal Air Force Association et al*, [1958] 1 W.L.R. 563, as "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other", is sufficient. I agree with the trial judge that the conduct of the Indian Affairs Branch toward the band amounted to equitable fraud. Although the Branch officials did not act dishonestly or for improper motives in concealing the terms of the lease from the band, in my view their conduct was nevertheless unconscionable, having regard to the fiduciary relationship between the Branch and the band. The limitations period did not therefore start to run until March 1970. The action was thus timely when filed on December 22, 1975.

Bear Book of Authorities *Guerin* at p. 390 Tab 27

136. This description of fraud has also been outlined in *M. (K.) v. M. (H.)* as follows:

> …The leading modern authority on the meaning of fraudulent concealment is *Kitchen v. Royal Air Forces Assn*., [1958] 2 All E.R. 241 (C.A.), where Lord Evershed, M.R., stated, at p. 249: It is now clear ... that the word "fraud" in s. 26(b) of the Limitation Act, 1939 , is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in Beaman v. A.R.T.S., Ltd., [1949] 1 All E.R. 465 , that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, **having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other.**
>
> **…**
>
> The factual basis for fraudulent concealment is described in Halsbury's , 4th ed., vol. 28, para. 919, at p. 413, in this way: It is not necessary, in order to constitute fraudulent concealment of a right of action, that there should be active concealment of the right of action after it has arisen; **the fraudulent concealment may arise from the manner in which *the act which gives rise to the right of action is performed*.**
>
> There is an important restriction to the scope of fraudulent concealment, which Halsbury's , 4th ed., vol. 28, para. 919, at p. 413, describes as

> follows: In order to constitute such a fraudulent concealment as would, in equity, take a case out of the effect of the statute of limitation, it was not enough that there should be merely a tortious act unknown to the injured party, or enjoyment of property without title, while the rightful owner was ignorant of his right; **there had to be some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts. …** (emphasis added)

Bear Book of Authorities *M.(K.) v. M.(H.)*, [1992] 3 SCR 6 at paras 63-65 Tab 32

137. In *Ambrozic*, the Alberta Court of Appeal established a three-part test to determine whether there had been fraudulent concealment which would suspend the limitation period. This case was cited and relied upon by the Federal Court in *Samson Indian Nation and Band v. Canada*, 2015 FC 836. *Ambrozic* held that:

> Fraudulent concealment that suspends a limitation period requires three findings: (1) that the defendant perpetuated some kind of fraud; (2) that the fraud concealed a material fact; and (3) that the plaintiff exercised reasonable diligence to discover the fraud (citations excluded).

Bear Book of Authorities, *Ambrozic v. Burcevski*, 2008 ABCA 194 ("*Ambrozic*") at para. 21 Tab 14

138. Fraudulent concealment required conduct which, having regard to some special relationship between the two parties is concerned, is an unconscionable thing for one to do unto the other. In addition, elements of unconscionability, some abuse of a confidential position, some intentional imposition or some deliberate concealment of facts are other factors. Indian Agent McDonald's failures as outlined at paragraphs 100 and 101 herein firmly establish and meet the requirements for fraudulent concealment.

Bear Book of Authorities *Ambrozic*, at para. 23 Tab 14

139. The second requirement that the fraud must have concealed some material fact which the plaintiff has to prove at trial to succeed. The concealment can include the possibility of a cause of action. In this instance, Indian Agent McDonald concealed his association with the Qu'Appelle Land Syndicate, the Treaty 4 rights of the two historic Bands where consent was required in order to alienate their respective reserve lands, as well as concealing the statutory rights under the *Indian Act* for surrendering Indian reserve lands, *inter alia*. We note that Dr. Storey confirmed that the amalgamation process occurred from 1882-1884

Bear Book of Authorities *Ambrozic* at para. 24 Tab 14
Trial Transcript Vol 6 p. 11 Lines 14 – 19 Tab 85

140. The third component looks at the plaintiff's conduct. This criterion incorporates the doctrine of discoverability. The Alberta Court of Appeal noted that the limitation period will not be suspended if the plaintiff could have uncovered the fraud but did

not make reasonable inquiries. Again, the personal papers of Indian Agent McDonald were not uncovered until 2015. Historically, there were intermittent inquiries concerning the Original Reserves. In 1911 a delegation of Treaty 4 Indians made their way to Ottawa where there was discussion on division of the Ochapowace Reserve. Indian Agent Ostrander wrote his superiors concerning the inquiries of Ochapowace Indians about the former Chacachas Reserve during 1928. Shortly thereafter in the early 1930's, Garnet Neff, a lawyer from Grenfell made several correspondences with Indian Affairs officials in Ottawa inquiring about the status of the Chacachas Reserve. Just as important, there were substantial periods when there was no leadership in place for the two Bands and the Ochapowace Band. None of these inquiries found out or uncovered Agent McDonald's activities related to the Syndicate.

Bear Book of Authorities *Ambrozic* at para. 25 Tab 14
JBD Vol. 9-00421-0010
JBD Vol. 9-00446; 00453;00454
JBD Vol 9-00460 to 00472
Kakisiwew Book of Documents Tab 21 Phillips U/T No. 7 from Examination of R. Kohls, September 18, 2003 Tab 66

141. As mentioned herein, during the course of negotiations for the TLE Settlement Agreement and the 1919 Surrender Agreement for the Ochapowace Band, within the context of those discussions, Canada's negotiator acknowledged that the historic Bands amalgamation was a live issue and that it would be dealt with at a future date. To the two historic Band's detriment, Canada is resiling from that position. With the occurrences of seeking some level of justice for the loss of the Original Reserves as well as interference with the governance of the two historic Treaty 4 Bands, there was reasonable inquiry as required by the third component of the fraudulent concealment test. As mentioned herein, Minister John Munro wrote to Ochapowace Chief Morley Watson in April 1984 suggesting that Ochapowace members vote to surrender their interests in their Original Reserve.

Bear Book of Authorities *Ambrozic* at para. 25 Tab 14

142. It has been submitted that a breach of trust has been pled and the evidence and authorities tendered lead to this conclusion. *The Limitations Act*, Ch. L-16 S.S. 2004 at section 12 states:

> 12(1) This section applies to claims:
> (a) Based on fraudulent breach of trust to which a trustee was a party or privy; or

(b) To recover from a trustee trust property, or the proceeds from trust property, that are in the possession of the trustee, or that were previously received by the trustee and converted to the trustee's own use.

(2) The limitation period established by this Act that are applicable to a claim described in subsection (1) are postponed and do not begin to run against a beneficiary until that beneficiary becomes fully aware of the fraudulent breach of trust, conversion or other act of the trustee on which the claim is based.

143. With the fraudulent breach of trust described above, Justice Rothstein, for the Court has outlined in *Ermineskin Indian Band and Nation v. Canada* that,

> [72] …I see no reason why the duties of a common law trustee cannot be applied to any other fiduciary relationship if the nature of the relationship requires it. ….
>
> [73] If a situation is such that a fiduciary is in a position similar to that of a trustee, even though the situation cannot necessarily be categorized as a "common law trust", I do not see why the common law duties of a trustee cannot be applied to that fiduciary if that is what the particular situation warrants…
>
> [74] In my view, therefore, the relationship between the Crown and the bands is a fiduciary relationship that is trust-like in nature. The Crown possesses a discretionary power to act in the best interests of the bands, and the bands are vulnerable to the Crown's exercise of that discretion. … (emphasis added)

Bear Book of Authorities *Ermineskin Indian Band and Nation v. Canada*, [2009] 1 SCR 222, 2009 SCC 9 at paras. 72-74 Tab 23

144. The pleading of fraudulent breach of trust then brings into play section 12 of the Limitations of Actions Act. In *Shade v. Canadian Pacific Railway Limited*, stated that where trust obligations arise by construction or implication of law, as is the case here, requires that a claim be founded on a fraudulent breach of trust to which the trustee was a party or privy. It requires the constructive trustee commit a fraudulent breach of trust and the *Limitations of Actions Act* would not apply.

Bear Book of Authorities *Shade v. Canadian Pacific Railway Limited*, 2017 ABQB 292 at para. 105 Tab 52

Acquiescence and Laches

145. The Kakisiwew Band has not acquiesced in any manner to suggest that it was a predecessor band to the Ochapowace Band. What has occurred as a result of the unilateral conversion of the Original Reserve by the Federal Crown is that the Ochapowace Band has now become an involuntary trustee on behalf of both the Kakisiwew Band and the Chacachas Band. Moreover, the patriarchal attitude of the defendant Crown disentitled the Kakisiwew Band from moving claims forward.

146. In a 1911 memorandum, the DSGIA wrote that both the Chacachas and Kakisiwew Bands own reserve #71 jointly and no division of the reserve has been made between these two bands. Governmental recognition of the two bands was ongoing.

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147. The 1951 *Indian Act* amendments were band membership lists were created by this statute does not evince the requisite clear and plain intention of the Crown to extinguish the treaty rights of the Kakisiwew Indian Band and a "band" and signatory to Treaty 4.

148. The 1951 *Indian Act* amendments merely served as a mechanism for individuals to challenge the inclusion or exclusion of others from "membership" lists. This was not a mechanism for band recognition nor an accurate reflection of the existence of Treaty Bands. Buchanan, C.J.D.C. in *Re Samson Indian Band*, in considering membership protests under the 1951 *Indian Act*, indicated that the posting of a band list for the purpose of protest had to meet the strict requirements of the Act. There is no evidence that the defendant Crown met these strict requirements in the present case, only that the band list was posted. There was no evidence suggesting that the Indian Agent met with the Indians to explain the posting of the Band list.

Bear Book of Authorities *Samson Indian Band, Re* 1957 CarswellAlta 28 Alta. Dist. Ct., at para. 37 Tab 49
Trial Transcript Vol 14, p. 51 Lines 12-18 Tab 86

149. The facts militate toward the Bear plaintiffs not having delayed or acquiesced. Unless and until the plaintiff has knowledge of all pertinent facts that supports a claim in equity, and knows or ought to have reasonably known, that those rights give rise to such a claim. There is no equitable acquiescence in breach of obligations derived from honour of the Crown before courts identified honour of the Crown as a source of enforceable obligations. We refer again to the Crown agents' involvement in the Syndicate activities and that withholding of information relating to the Crown's statutory and treaty obligations when done away with the Original Reserves.

Bear Book of Authorities *MMF* Tab 33

150. The Attorney General's Directive on Civil Litigation Involving Indigenous Peoples at Litigation Guideline #14 indicates that when considering laches and acquiescence, these defences should only be pleaded where there is a principled basis and evidence to support the defence. In the case at bar, the principle of the honour of the Crown determines that there is no principled basis for the use of this technical defence. Moreover, the position to be expressed by the Crown must reflect this constitutional obligation as well, again militating towards the non-application of this defence.

Bear Book of Authorities The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples at p. 19 Tab 70

151. Taking into consideration that there has been a dearth of caselaw since the earliest days of confederation in terms of dealing with First Nation land rights. We only witness land claims being primarily litigated since the seminal *Calder* decision. The 1950 *St. Ann's Island Shooting & Fishing Club* SCC decision noted that Indians were still being considered as wards of the state whose care and welfare was a political trust of the highest obligation – maintaining the racist attitude since the first enactment of the *Indian Act* in 1876. As a ward of the state, one can only imagine how challenging it would be to attempt to prosecute a land claim on behalf of your Band. Any application of the technical defences is unprincipled, unsustainable and contrary to the honour of the Crown when applied in this case, especially when taken into consideration along with the vulnerabilities noted below.

Bear Book of Authorities *St. Ann's Island Shooting & Fishing Club v. HMTK* [1950] SCR 211 at para. 29 Tab 54

152. There were not many decisions by Canada's highest courts dealing with Indian interests in lands until the second half of the twentieth century. During this era in almost all reported cases affecting such rights, First Nations were not party to the proceedings – meaning their evidence was not heard and they were not represented. Coyle further reported that First Nations had very limited access to the records relating to their treaties and land transactions because these records were kept by the Federal Government on the basis that the Indians were not capable of handling such responsibility. Coyle further suggested:

> Another historical obstacle for First Nations that wished to press claims was that they generally did not have access to lawyers who could bring their case to the courts if the government did not act. … Further, until the 1960's, federal "Indian agents" supervised all significant First Nation activities, including Band Council meetings. Federal officials regularly declined to approve the hiring of lawyers – apparently to protect First Nations from exaggerated expectations and from the payment of excessive legal fees…

Bear Book of Authorities Michael Coyle, *Addressing Aboriginal Land Rights in Ontario: An Analysis of Past Policies and Options for the Future -Part 1*, Queen's Law Journal (2005) at paras. 28 and 30, Tab 61

153. One can only imagine the consequences of an Indian in the 1880's attempting to obtain a pass from the Indian Agent for permission to file a claim against the Crown. Imagine further the consequences of the justice of the peace powers of an Indian Agent and how that would negatively influence an Indian from seeking such permission for a pass, bearing in mind this would occur during the advent of the residential school era.

154. The *Badger* decision reinforced that treaty rights represented solemn promises between the Crown and various Indian Nations which agreement is considered sacred. There must be strict proof of extinguishment and evidence of a clear and plain intention on part of the government to extinguish treaty rights. In the present case, there was no authority provided to Indian Agent McDonald to forcibly amalgamate the Kakisiwew Band and the Chacachas Band. There was no clear and plain intention on part of the Federal Crown to eliminate the Treaty right to land vis-à-vis the Original Reserve, nor any clear or plain intention to eliminate the governance structure of the Kakisiwew Indian Band as a Treaty Band. Finally, there was no consent given or sought and the Kakisiwew members have never waived their right to move forward as a separate and distinct First Nation.

Bear Book of Authorities CLA Vol. 2, part A, Tab 2, *R. Badger*, [1996] 1 S.C.R. at pp. 793-794; 796-797 Tab 44

Public Officers Protection Act

155. The Defendant Crown argues that the *Public Officers Protection Act* ("POPA") protects the actions of Crown agents in this case. The facts bear out that Agent McDonald and Surveyor Nelson, conspired and participated in the Qu'Appelle Land Syndicate, undertaking private actions not covered by the POPA. In furtherance of their scheme, they unilaterally converted the Original Reserve and established the Ochapowace Reserve #71 without statutory authority and contrary to Treaty 4. Actions and omissions of a public defendant that have contributed to injuries of the plaintiff that are not "statutory and public duties" would not be covered by the protective limitation period of POPA.

Bear Book of Authorities *Berardinelli v. Ont. Housing Corp.* [1979] 1 S.C.R. 275 at p. 286 Tab 15

156. Subsection 2(1) of *POPA*, which was in force in Saskatchewan from 1923 to 2005, provided for the following:

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

Bear Book of Authorities *The Public Officer's Protection Act*, SS 1923, c. 19 s. 2(1); RSS 1978, c P-40, as repealed by SS 2004, c L-16.1 at Tab 12

157. This provision generally limits to twelve months the time within which an action may be instituted against a person, including the Crown, acting in furtherance of a public duty of authority.

Bear Book of Authorities *Peepeekisis First Nation v. Canada*, 2013 FCA 191 Tab 39
Bear Book of Authorities *Gardypie v. Canada (Attorney General)*, 2004 SKCA 102 at para 6 Tab 25

158. Provisions of the *POPA,* such as subsection 2(1), are to be read restrictively and in favour of the person whose right is being shortened by the limitation period.

Bear Book of Authorities *Des Champs v. Prescott-Russell (Conseil des écoles séparées catholiques de langue française)*, [1999] 3 S.C.R. 281 at para 49 ("*Des Champs*") Tab 22
Bear Book of Authorities *Peepeekisis First Nation v. Canada*, 2013 FCA 191, at para 34 Tab 39

159. The fundamental issue to determine when considering such a provision is whether the power or duty relied on as part of the cause of action can be properly classified as a "public duty or authority" having a public aspect or connotation as opposed to a private administrative or subordinate aspect or a predominantly private aspect.

Bear Book of Authorities *Des Champs*, at para 50 Tab 22
Bear Book of Authorities *Peepeekisis First Nation v. Canada*, 2013 FCA 191, at para 34 Tab 39

160. *Des Champs* outlines a 5 step approach to determine whether the action was public or private:

> A court confronted with a pleading under s. 7 of the Act or similarly worded limitations statutes may wish to proceed as follows:
>
> 1) Is the defendant a public authority within the class of entities or individuals for whom the limitation protection was intended? While most public authorities will satisfy the requirements, *Schnurr, supra*, illustrates problems that may arise.
> 2) What was the public authority doing, and pursuant to what duty or power was it doing it? This information will generally appear from the pleadings. In this case, the necessary information appears on the face of the Board's resolutions.
> 3) Is the power or duty relied on as part of the plaintiff's cause of action properly classified as entailing "a public aspect or connotation" or on the other hand, is it more readily classifiable as "private executive or private administrative . . . or . . . subordinate in nature" (*per* Estey J. in *Berardinelli*, at p. 283)?
> 4) Is the activity of the defendant public authority that is the subject matter of the complaint "inherently of a public nature" or is it more of "an internal or operational nature having a predominantly private aspect" (*per* Estey J. in *Berardinelli*, at p. 284 (emphasis deleted))?
> 5) Looking at it from the plaintiff's perspective, does the plaintiff's claim or alleged right "correlate" to the exercise by the defendant public authority of a public power or duty or does it relate to the breach of a public duty or does it complain about an activity of a public character, thus classified?
>
> If the answer to question five is in the affirmative, the limitation period applies.

Bear Book of Authorities *Des Champs*, at paras 50 and 51 Tab 22

161. The Crown's fiduciary duty in the management of reserve land and other band assets is a *sui generis* obligation that cannot be properly classified as a "public duty". In the seminal case of *Guerin v. R,* Dickson J. stated the following at p. 385:

> …The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty.

Bear Book of Authorities *Guerin* at p. 385 Tab 27

162. The Federal Court of Appeal in *Peepeekisis* held that the creation of a reserve can be characterized as a public law duty whereas the management of the land within a reserve which has already been created generally falls within private law type duties, especially where the land is expropriated by the Crown or where the Crown assumes a discretionary power over its management.

Bear Book of Authorities *Peepeekisis First Nation v. Canada*, 2013 FCA 191, at para 39 Tab 39

163. By pleading *POPA* the Crown argues that the actions undertaken by Indian Agent McDonald fall within the category of reserve creation which has been characterized as a public duty. However, when Indian Agent McDonald amalgamated the two historic Bands, he did so without any lawful authority. Indian Agent McDonald and DLS Nelson created the Ochapowace Reserve #71 without treaty and statutory authority. In these instances no public duty can attach to these actions.

Bear Book of Authorities *Plotnikoff v. Saskatchewan*, 2004 SKCA 59 at para 53 Tab 41

164. If the court did determine the plaintiff's cause of action was of a public law nature and fell within the gambit of s. 2(a) of the *POPA*, the plaintiffs rely on the exception within s. 2(b) of the act. Section 2(b) of the *POPA* is an equitable provision, the purpose of which lies in relieving against the injustices that limitation periods can sometimes bring about.

165. In *Popowich* the trial judge held that the three factors which must be taken into account when deciding whether to grant the equitable relief provided for by section 2(b) of the *POPA* is (i) Whether the plaintiff has demonstrated a *prima facie* case; (ii) whether the plaintiff has a reasonable explanation for the delay; and (iii) whether there will be no prejudice to the defendant if the claim is allowed to continue. The finding at trial was upheld in the Saskatchewan Court of Appeal.

Bear Book of Authorities *Popowich v. Saskatchewan*, 2001 SKQB 148 upheld by 2001 SKCA 103 ("*Popowich*") at para 39 Tab 42

166. In respect to whether the plaintiff has a reasonable explanation for the delay, the plaintiff must provide enough evidence during the period in which the plaintiff didn't bring the claim, to explain why the delay is reasonable. The court must be satisfied that the plaintiff could not have brought the claim at an earlier date. The submissions responding to the limitations argument advanced by the Crown defendants are applicable in this instance as well. Furthermore, the Bear plaintiffs suffered from a significant level of vulnerability, as will be discussed below. These provide sufficient answer to the requirements from *Popowich* as well.

Bear Book of Authorities *M.(S.) v. Canada (Attorney General),* 2005 SKQB 395 at para 24. Tab 35

Vulnerability

167. The historical record has outlined that the Treaty 4 Bands, when making the transition from a primarily buffalo hunting economy to one of a sedentary, agricultural economy was a difficult shift. The facts above have sketched out that starvation was a major problem associated with this transition.

Trial Transcript Vol 17, p. 97 Lines 7-16 and p. 112 Lines 10-19 Tab 87

168. In addition, there were extended periods where the Ochapowace Band, as involuntary trustee to the two historic Treaty 4 Bands, did not have a Chief in place. This lack of effective leadership placed great susceptibility upon them from actions of the Crown. It is a fact that the 1919 Surrender of the southern portions of the Ochapowace Reserve occurred when there was no Chief in place.

i. 1889-1892 Ochapowace (No. 4) listed as Chief;
ii. 1893-1911 – no Chief;
iii. 1912-1917 Walter Ochapowace (No. 127) listed as Chief (deposed);
iv. 1918-1933 no Chief;
v. Jack Ochapowace listed as Chief 1933 – 1949 (resigned);
vi. Roderick Henry listed as Chief 1949-1953;
vii. Peter Watson listed as Chief 1953-1955;
viii. Fred Bear listed as Chief 1955-1959;
ix. Ivan Watson listed as Chief 1959-1961;
x. Fred Bear listed as Chief 1961-1963
xi. Sam Watson listed as Chief 1963 -

Kakisiwew Book of Documents Tab 21 Phillips U/T No. 7 from Examination of R. Kohls, September 18, 2003 Tab 66

169. Further, Indian Commissioner Graham wrote, on May 2, 1922, regarding a request by Jacob Bear that the Ochapowace Band be allowed a Chief, Graham stated:

> In reply I would say that the Ochapowace Reserve is one of the most backward Reserves in Saskatchewan if not the most backward. The Indians are difficult to handle, and have

> made little or no progress, while the Chiefs they have had in the past have been more of a detriment than an advantage to them. Experience has shown that the greatest progress has been made among Indians who have no Chiefs, as the Indians idea of a Chief is a man who will advocate the continuance of their old customs and traditions in place of the introduction of modern ideas and customs. I would therefore, advise that it is not in the best interests of the Band to have a Chief.

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170. The direct reference by Indian Commissioner Graham indicating that the Band have no Chief is extremely telling concerning the vulnerability of the plaintiffs when it came to not even having a leadership expounded on through a Chief. Not only was Graham's characterization of the Indians perverse, it was also patriarchal and racist. Jacob Bear's attempt to overcome aspects of this vulnerability was rejected by Indian Commissioner Graham. Clearly, the honour of the Crown was not maintained in any sense of the understanding of that Constitutional principle in this circumstance.

171. Since the Crown has considerable power over Indian Reserve lands, this makes the Indian Band particularly vulnerable to the influence of the Crown. This vulnerability is only enhanced when the Crown has deposed of the Indian Band's leadership, creating a leadership void.

Bear Book of Authorities *Semiahmoo Indian Band v. Canada*, 1997 CarswellNat 1316 at para. 38-39 Tab 51

172. Madam Justice Wilson, in the *Frame v. Smith* case, described vulnerability as an inability of a beneficiary to prevent the injurious exercise of power combined with inadequacy or absence of legal or practical remedies.

Bear Book of Authorities *Frame v. Smith*, [1987] 2 S.C.R. 99 at p. 137 Tab 24

173. The patriarchal attitude by the Crown has been evidenced since the enactment of the *Indian Act* in 1876. LaForme, J.A. provides insight into the intention of the 1876 Act, quoting the "Report of the Minister of the Interior for the year ended June, 1876,

> Our Indian legislation generally rests on the principle that the aborigines are to be kept in a condition of tutelage and treated as wards of the State….

It was further stated that the legal status of Indians is that of minors. Laforme, J.A. goes on to reason that the 1876 Act implied that the purpose was to create a status of Indians who were legal wards of the state and being under the authority of their guardian, the Government of Canada. The 1876 *Indian Act* quickly undermined the Treaty 4 relationship of two years prior. As a result, could a minor bring an action against the Government? The answer for that colonial era question is "likely not".

Bear Book of Authorities *Tyendinaga Mohawk Council v. Brant*, 2014 ONCA 565 at paras. 67-69 Tab 55

174. This paternalistic attitude persisted and permeated the Supreme Court of Canada as late as in 1950. Justice Rand noted that "…the accepted view that these aborigines are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation." Moreover, it is common knowledge that First Nations people did not obtain the right to vote Federally until 1960. As non-constituents with no political power prior to this time, First Nation issues would have received very little thought by politicians.

Bear Book of Authorities *St. Ann's Island Shooting & Fishing Club v. HMTK* [1950] SCR 211 at paras. 29 Tab 54

175. Professor Kent McNeil noted that in the *R. v. St. Catherine's Milling & Lumber Co.* (1885), 10 O.R. 196 at pp. 211, 227-28*)* trial decision from Chancellor Boyd, he described Indigenous people as "wild", "primitive", "untaught", "uncivilized", "rude" and "degraded" without evidence for such assessment. McNeil further noted that Chancellor Boyd admitted that there was little known about the people in this region but concluded that they were "more than usually degraded Indian type".

Bear Book of Authorities Kent McNeil, *Indigenous Rights, Litigation, Legal History, and the Role of Experts*, (2014), 77 Sask L Review pp 173-203 at p. 18 footnote 83 Tab 68

176. The Truth and Reconciliation Commission of Canada (the "TRC") concluded that colonialism had rendered Indigenous people especially vulnerable to epidemics by disrupting their relationship to the environment. The poor living conditions often associated with colonialism not only left people prey to epidemics but also made it far more difficult for Indigenous people to recover. The TRC stated

> …One of the most extensively studied examples of this process is the health experience of people in the Qu'Appelle and File Hills reserves in what is now Saskatchewan. Prior to 1880, tuberculosis among the First Nations people of this region was rare. However, with the collapse of the buffalo hunt and the forced settlement of people in cramped housing on reserves, people's vulnerability to tuberculosis grew, infections increased, and the death rate soared. On the Qu'Appelle Reserve, the tuberculosis death rate reached 9,000 deaths per 100,000 people in 1886. One history of tuberculosis has identified this as one of the highest tuberculosis death rates ever recorded. It is forty-five times higher than the peak death rates for the cities of Montréal and Toronto (200 deaths per 100,000 people), which were reached in 1880. The rate began to fall in the Qu'Appelle area in the 1890s. By 1901, the rate was 2,000 per 100,000, dropping to1,000 per 100,000 by 1907. By 1926, the death rate had declined to 800 per 100,000. This rate was still almost ten times higher than the 1926 national tuberculosis death rate: 84 deaths per 100,000. (p 384-385)

> …When the hunt failed, they had to turn to the government for relief. The cost of that assistance was over half a million dollars in 1882. While John A. Macdonald defended the expense, saying it was cheaper to feed the First Nations people than to fight them, the reality

> was that in the 1880s, the threat of starvation became an instrument of government policy.125 In 1883, the federal government reduced the Indian Affairs budget, leading to a reduction in relief payments. Not satisfied with the level of control that threats of starvation gave him, Indian Commissioner Edgar Dewdney attempted to implement a policy of what he called "sheer compulsion," using the Mounted Police to arrest First Nations leaders and disrupt Aboriginal government. … The impact of famine and disease was devastating. According to one contemporary estimate, between 1880 and1885, the First Nations population on the Prairies dropped by more than a third – from 32,000 to 20,000.
>
> The requirement that First Nations people receive the Indian agent's approval to sell their produce off-reserve was a demeaning restriction that hindered economic development. Put in place in the 1880s, it was still operative in the 1920s, when, according to Eleanor Brass, the agent on the File Hill reserve "handled all the finances of the reserve and we couldn't sell a bushel of grain, a cow or a horse without getting a permit first."[156] Edward Ahenakew recalled in his memoirs how a First Nations farmer might have to spend a day or two, which he might otherwise be using to farm, in hunting down the Indian agent on another reserve in order to receive permission to sell a load of hay to feed his family, a frustrating and humiliating process.

Bear Book of Authorities Truth and Reconciliation Commission of Canada. (2015) *Canada's Residential Schools: The History, Part 1, Origins to 1939: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 1.* McGill-Queen's University Press, pp. 13, 123-24, 128, 384-85 at Tab 71

177. To conclude on this point, the Crown's paternalistic attitude and outright racism created a culture of vulnerability upon the Kakisiwew Band since the first enactment of the *Indian Act* in 1876. The Indigenous autonomy reflected in Treaty 4 was quickly eradicated. The legal status of First Nation "land rights in Canada remained an open question until all doubt was removed in 1973 by the Supreme Court's acknowledgement of the legality of these rights in *Calder v. British Columbia*. The common law has acknowledged and perpetuated this lack of human decency over the years. Having these obstacles to overcome, as well as the technical challenges applied by the Crown creates an uneven playing field as well and certainly does not reflect the Constitutional principle of the honour of the Crown. Professor McNeil summarized aspects of the historical challenges faced by First Nations who wished to advance claims related to their land rights,

> …Or, as where Indigenous land rights are concerned, the people who might have asserted the rights in court were unable to do so because they did not understand the legal system, did not have the financial resources to hire lawyers, or were legally prevented from litigating, either by Crown immunity from suit, or by discriminatory laws such as the section of the Canadian Indian Act enacted in 1927 that made it an offence, absent written permission from the Superintendent General of Indian Affairs, for anyone to solicit or receive funds from Indians to pursue any of their claims…

Bear Book of Authorities Kent McNeil, *Indigenous Rights, Litigation, Legal History, and the Role of Experts*, (2014), 77 Sask L Review pp 173-203 at para. 8 and 9 Tab 68

178. The Royal Commission on Aboriginal Peoples noted that,

> Even where Aboriginal people might have wanted to go to court, many obstacles were put in their way. For example, after 1880 the *Indian Act* required federal government approval for Indian people to have access to their own band funds. This made it difficult for bands

> to organize, since they would require the approval of the Indian Agent to get access to sufficient funds to travel and meet among themselves [which was discouraged]. There is considerable evidence of the extent to which Indian affairs officials used their control over band funds deliberately to impede Indian people from meeting for these purposes.
> …
> …the courts did not play a positive role in the struggle of Aboriginal peoples to assert and defend their rights until relatively recently.

Bear Book of Authorities, Royal Commission on Aboriginal Peoples: Vol. 1 Looking Forward, Looking Back, Part One, The Relationship in Historical Perspective – The Role of the Courts at p. 200-201 at Tab 69

Duty to Protect

179. In conjunction with the vulnerability of the historic Bands, there was also a duty to protect the Original Reserve interests in land. It is settled law that the relationship between the Crown and Indigenous peoples is fiduciary in nature and arises from the assertion of Crown sovereignty over Indigenous peoples.

Bear Book of Authorities *Wewaykum* CLA Vol. 2, Tab 50 at paras. 78-79 citing R. v. Sparrow, [1990] 1 S.C.R. 1075 at para. 108 Tab 56
Bear Book of Authorities *Williams Lake Indian Band v. Canada (Aboriginal Affairs & Northern Development)*, ("*Williams Lake*") 2018 SCC 4 at para 43 Tab 58

180. In order to fulfill the fiduciary duty to act with loyalty, and with good faith, the Crown has a duty to preserve a band's legal interest in their lands. In *Wewaykum,* the court held that even though the two First Nations in question did not have complete legal interest in the reserve lands at the time of the alleged breach, the Crown still had a duty to preserve and protect each band's interest in their reserve land.

Bear Book of Authorities *Wewaykum* at para 104 Tab 56

181. Once a reserve is created, the content of the fiduciary duty expands to include the **protection and preservation** of the band's interest from exploitation. This is because the band has acquired a "legal interest" in its reserve, even if the reserve is created on non-s. 35(1) lands.

Bear Book of Authorities *Wewaykum* at para. 98 Tab 56

182. As was mentioned earlier, since the Original Reserves were lawfully constituted, the Crown had the duty to preserve and protect that reserve land. This obligation was breached.

Conclusion

183. The indisputable fact is that the 1876 Original Reserve for the Kakisiwew Band was set apart for the use and benefit of the Kakisiwew Band, pursuant to Treaty 4.

184. The facts confirm that no surrender or surrender for exchange for the 1876 Original Kakisiwew Reserve ever occurred, contrary to Treaty 4 and the *Indian Act*, 1880. The facts bear out that Agent McDonald was willfully blind to these requirements when he unilaterally decided to create the new Ochapowace Reserve #71. Minister

Munro in 1984 indicated a surrender of the Original Reserve in relation to Treaty Land Entitlement for the Ochapowace Band, clear recognition of the live interests related to the Original Reserve.

185. Neither Chief Kakisiwew nor Chief Chacachas or members of their respective bands requested to be amalgamated. Nor did these bands request to be co-located on the same reserve lands. Finally, there was no decision made by the Kakisiwew Band to merge, amalgamate or join with another band.

186. There was no clear and plain intent on behalf of the Crown to eliminate Kakisiwew treaty rights when the Original Reserve was unlawfully converted.

PART IV ORDER SOUGHT

187. The Bear Plaintiffs respectfully request that the claim as outlined at paragraph 40 of the Second Amended Statement of Claim be ordered by this Honourable Court.

ATR at para. 40 Tab 6

ALL OF WHICH IS RESPECTFULLY SUBMITTED

January 31, 2019

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PART V LIST OF AUTHORITIES

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15. *Berardinelli v. Ontario Housing Corp.* [1979] 1 S.C.R. 275
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28. *Haida Nation v. British Columbia (Min. of Forests)*, [2004] 3 SCR 511, 2004 SCC 73 CLA, Vol. 2 Part A Tab 18
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38. *Papaschase Indian Band No. 136 v. Canada (A.G.)*, 2004 ABQB 655
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