Court File No.: T-2153-00

FEDERAL COURT

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

Court File No.: T-2155-00

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

MEMORANDUM OF FACT AND LAW OF OCHAPOWACE FIRST NATION

Phillips & Co.
Barristers & Solicitors
2100 Scarth Street
Regina, Saskatchewan S4P 2H6
T: (306) 569-0811
F: (306) 565-3434
Email: mervinphillips@phillipsco.ca
Lawyer in charge of file: Mervin C. Phillips

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PART I. INTRODUCTION

1. These submissions are filed on behalf of Ochapowace First Nation ("Ochapowace") with respect to the above noted actions, namely Court File No. T-2153-00 (the "Watson action"), and Court File No. T-2155-00 (the "Bear action"). Ochapowace is a Defendant and Plaintiff by Counterclaim in both of these actions.

2. The Kakisiwew Indian Band and the Chacachas Indian Band are Treaty bands and signed Treaty No. 4. There are Crown Constitutional obligations which flow from this relationship to which the Crown has unilaterally breached.

3. Ochapowace is an involuntary trustee on behalf of all of the Treaty members compelled to membership in Ochapowace and is seeking fulfillment of the Crown Constitutional obligations.

4. The Order of Justice Hugessen made on March 13, 2008 ("Hugessen Order") sets out the issues to be determined by this Honourable Court as part of the Phase I Trial, and it is the task of this court to examine these issues in the proper legal context of Honour of the Crown utilizing lay, expert and oral traditional evidence.

5. The Crown has admitted that Ochapowace was created as an *Indian Act* band.[1] The position advanced by the Crown to date in these proceedings until Trial has been that there was no specific date that the two bands became one other than when the Order in Council (OIC) was passed in 1889,[2] but has also held that the only conduct on behalf of the First Nation between 1882 to 1922 was the failure to object where there is a common paylist, and secondly to indicate disagreement with Indian Agent McDonald.[3] The Crown has admitted that the only relevant time period is between 1882 and 1889 as to Ochapowace coming into existence.[4] The Crown could also not point to any 'collective conduct' prior to 1951 which suggested a new band existed.[5] In fact, it has been the Crown's position since at least 1911 that Kakisiwew and Chacachas own IR 71 reserve jointly.[6] There has been no surrenders of the original reserves obtained nor consent by either Kakisiwew or Chacachas to resurvey of their reserves,[7] despite the Crown becoming aware of the issue contrary to previous

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[1] Ex 21, Tab A Reinard Kohls, pages 8-26 and 152
[2] *Ibid*.
[3] *Ibid* at pgs. 52-53.
[4] *Ibid* at pg. 152.
[5] *Ibid* at pgs. 158-159 and Undertaking 16.
[6] *Ibid*, Undertakings 11 and 12.
[7] Testimony of Robert Nestor, TT Vol 8 at pg 64.

precedent in other cases with other bands, and having extensive documentation on other issues of band transfers and surrenders with Ochapowace just immediately following these events.[8]

6. It the Crown's closing submissions at Trial, a "failing band" theory was asserted for the first time. Namely that Chacachas' people sought protection from Kakisiwew and all that was required was for them to stand behind him to become a member of that band. The Crown then questioned whether this could constitute the amalgamation of two bands. It is submitted that this theory had never previously been advanced by the Crown[9] and should not be permitted. Additionally, there is considerable oral traditional evidence and in the Crown record which establishes that there was a forced election to elect a new Chief, even withholding annuity payments until same occurred. This speculation at the eleventh hour is not established by the evidence and should not be accepted by this Honorable Court.

7. It is submitted that the conduct of the Crown prior to 1884 supports the conclusion that it was the result of Crown conduct that there was the forced combination of the two bands and creation of an *Indian Act* band, Ochapowace. This conduct did not conform to Treaty and included the change in survey, as well as survey of joint reserve in 1881, lack of surrender of Aboriginal Title for the two originally surveyed reserves, the payment of Chacachas band members under the Kakisiwew paylist in 1882 and 1884 and then the forced election of a new Chief, not permitting each band to elect their own Chief. Ochapowace has been an involuntary trustee on behalf of both Kakisiwew and Chacachas since this time.

8. Since this period of time until the material facts became known during research for the TLE and Solider Settlement Claims, the Crown has been in control through various legislative enactments, including but not limited to the starvation policy, pass system, Indian residential schools, restrictions on obtaining legal representation to advance claims against the Crown, removal and denial of governance leaders, third party amongst various other restrictions which impacted and controlled the day to day lives of band members, band governance and financial business of Ochapowace which has handicapped and restricted the ability of Ochapowace in that involuntary

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[8] *Ibid* at TT Vol 8 at pg 84 and 89, 106-107; Expert Report of Robert Nestor Ex 12 at pgs. 31-32.
[9] As confirmed by the pleadings, namely the Crown's Statements of Defence.

trustee role to take steps to obtain recognition of Treaty rights. To date there is no definition of recognized Treaty bands in the *Indian Act*.

9. These steps were small but were important over time as the Crown practiced deferment of the recognition of its constitutional obligations. The action by the Crown was to reject and intimidate with respect to Neff—the first expressed advocacy. The Government of Canada enacted an amendment to the *Indian Act* prohibiting use of legal counsel to First Nations which effectively nullified and intimidated First Nations people for a significant period of time.

10. The first significant negotiation for recognizing Treaty rights of any kind was after the TLE commencement research of the 1970s. In all of the reports prepared for TLE, and then for Specific Claims, only a recognized band could participate and make a claim. In 1992, all of the historical record speaks of forced amalgamation in respect of both TLE and Specific Claims. The Crown practiced deferment of the forced amalgamation issue beginning in 1985. The Crown permitted claims by its policy which met the criteria in TLE and Specific Claims policies. But, did not include the ability to utilize those negotiations in recognition of bands. Only a recognized band could participate and make claim. Further the actual evidence was the Crown's suggestion was to deal with the land entitlement and return of lost lands first which was done and resulted in the purchase of the Chacachas lands with the Crown's consent. The Crown continued per the evidence of its negotiator to say that the resolution of the forced amalgamation issue would await the conclusion of the specific claims agreement.

11. Both of the agreements (Specific Claims and TLE agreements) did not require sign off of the Treaty bands issue even though it was known to the Crown. Further court steps were taken to give effect to the agreement with the Crown that resolution would be by rule of law with the court from 1994 forward to settle these constitutional issues. Ochapowace as an involuntary trustee contained members. To suggest their forced membership in Ochapowace which permitted limited exercise of treaty and inherent rights should now be a bar to the resolution of the Treaty band issues is to allow the dishonourable conduct of the Crown to go without remedy. Ochapowace, pursuant to the oral traditional evidence, specifically its governing persons have participated in all aspects of their limited exercise of Inherent and

Treaty rights to produce accountability for the Crown's dishonourable conduct. Repeatedly it has asserted that it is their obligation to all members to allow their self-determination in resolution and reconciliation of the Crown's dishonourable conduct.

12. The Crown suggests that the Honour of the Crown is not breached and therefore all other breaches of Crown obligation lead to the conclusion time limit, delay, acquiescence may be asserted against the Chacachas and Kakisiwew members. Fundamentally the Crown denies its dishonourable conduct and asserts it can define reconciliation of that conduct must occur in a forum other than in this Honourable Court. The historical record discloses the significant dishonor of the Crown in such a position.

PART II. FACTS

Procedural History

13. The original action of Ochapowace began in 1991 in T-2463-91, and has been in existence for over 28 years. The Order of Justice Campbell dated November 29, 2010 stayed T-2463-91 until the within actions are settled. The Hugessen Order provides for the Trial sets out the following Phase I issues to be determined as part of this Trial.

14. An Order by Justice Fothergill dated March 28, 2017 largely dismissed the Crown's application for Summary Judgment except as set out in paras 4-5.

Oral Traditional Evidence

15. The Trial began with several Elders from the community providing Oral Traditional evidence and a special sitting of the court occurred at Ochapowace to hear that evidence in the community.

16. Ross Allary was tendered by Ochapowace Chief and Council to be qualified as an Elder to provide oral history testimony.[10] Compliance with the Oral History Protocol was extensive by the feather (to tell the truth),[11] by tobacco (you cannot refuse),[12] by language[13] and sources of receipt of that oral traditional knowledge.[14]

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[10] Elder Ross Allary TT Vol 2 at pg 101 at line 10-16; pg. 106 at lines 24-26; pg. 107 at lines 7-13; pg. 125 at line 17 to pg. 126 at line 1

[11] Elder Ross Allary TT Vol 2 at pg 100 line 20 to pg. 101 at line 9.

[12] Elder Ross Allary TT Vol 2 at pg 101 line 19 to 28; Elder Sharon Bear TT Vol 1 at pg 123 lines 7-14; Elder Sam Isaac TT Vol 2 at pg 75 lines 19-28 and pg. 76 at lines 1-5 and lines 13-16; TT Vol 2 at pg 86 lines 2-6.

[13] Elder Ross Allary TT Vol 2 at pg 102 lines 3-12; TT Vol 2 at pg 103 lines 15-20; Elder Sharon Bear TT Vol 1 at pg 88 lines 2-5; Elder Sam Isaac TT Vol 2 at pg 73 lines 20-24, TT Vol 2 at pg 38 lines 1-4 and 9-15.

[14] Elder Ross Allary: TT Vol 2 at pg 108 at line 8 to pg. 109 at line 1; TT Vol 2 at pg 109 at lines 13-24

17. To properly understand the First Nation's perspectives on Treaty and Treaty recognition of Kakisiwew and Chacachas, extensive testimony on honour of the Crown from the indigenous perspective was provided. No more important concept of the treaty making and interpretation arises from the aboriginal title of the Ochapowace First Nation.[15]

18. The existence of oral traditional knowledge as to the survey and existence upon and after treaty of Kakisiwew and Chacachas was provided.[16]

19. An overview of testimony of pervasive Crown actions established Breach of Honour of the Crown occurred and the reasons for fear of the Indian agent.[17]

20. A focused examination of the Kakisiwew and Chacachas relationship was reviewed in the oral traditional knowledge.[18]

21. Specific evidence in relation to the consent to merger of lands or bands was extensively provided.[19] The Crown enforced steps to control governance and prevent assertion of treaty was provided.[20]

22. The oral traditional evidence about struggle in respect of breaches of honour of the Crown, including the farm instructor book story and 'Neff' oral history, was provided.[21] The history of Ochapowace as an intermediary and the Crown's continued refusal to recognize and respect treaty recognition was also provided, despite the

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TT Vol 2 at pg 135 at lines 15-19; TT Vol 2 at pg 112 at lines 3-10; TT Vol 2 at pg 113 at lines 1-8; TT Vol 2 at pg 114 line 21 to pg. 115 at line 2; TT Vol 3 at pg 11 line 24-28 and pg. 12 at lines 1-4; TT Vol 2 at pg 117 lines 20-27; TT Vol 2 at pg 119 line 24 to pg. 121 at line 6; TT Vol 2 at pg 113 lines 3-25; Elder Sharon Bear: TT Vol 1 at pg 99 lines 17-28; TT Vol 1 at pg 109 lines 7-15; TT Vol 1 at pg 110 at lines 10-13; Elder Sam Isaac: TT Vol 2 at pg 44 lines 6-8 and 13-22.

[15] Elder Ross Allary:TT Vol 3 at pg 6 lines 3-8 and pg. 8 at line 14.

[16] Elder Ross Allary: TT Vol 3 at pg 8 line 12 to pg. 10 at line 28; TT Vol 3 at pg 34 lines 1-7; Elder Sharon Bear: TT Vol 1 at pg 100 lines 17-23; TT Vol 1 at pg 103 lines 13-19.

[17] Elder Ross Allary: TT Vol 3 at pg 19 lines 18 to pg. 20 at line 28; TT Vol 3 at pg 22 lines 14-25; TT Vol 2 at pg 120 at lines 27-28 and pg. 121 at lines 1 to 12; TT Vol 3 at pg 25 lines 2-18; Elder Sharon Bear: TT Vol 1 at pg 108 lines 18-27; Elder Sam Isaac: TT Vol 2 at pg 55 lines 21 to pg. 56 at line 27; TT Vol 2 at pg 67 lines 9-15.

[18] Elder Ross Allary: TT Vol 3 at pg 137 line 4 to pg. 138 at line 4; TT Vol 3 at pg 115 lines 14-19; TT Vol 3 at pg 13 lines 3-28.

[19] Elder Ross Allary: TT Vol 3 at pg 14 lines 2 to 5; TT Vol 3 at pg 14 lines 19-23; TT Vol 3 at pg 36 lines 15-22; TT Vol 3 at pg 27 line 14 to pg. 28 at line 4; Elder Sharon Bear: TT Vol 1 at pg 101 lines 15-18; TT Vol 1 at pg 105 lines 1-2; TT Vol 1 at pg 107 lines 23-28; Elder Sam Isaac: TT Vol 2 at pg 46 line 20 to pg. 47 at line 12; TT Vol 2 at pg 51 line 21 to pg. 52 at line 12; TT Vol 2 at pg 49 line 21 to pg. 50 at line 2.

[20] Elder Ross Allary: TT Vol 3 at pg 17 line 2 to Pg. 18 at line 17.

[21] Elder Ross Allary: TT Vol 3 at pg 11 line 21 to pg 12 at line 28; TT Vol 2 at pg 136 lines 2-28; TT Vol 2 at pg 134 line 24 to pg. 135 at line 3; TT Vol 3 at pg 23 lines 18-24; TT Vol 3 at pg 24 lines 2-7; Elder Sharon Bear: TT Vol 1 at pg 100 lines 24-27; TT Vol 1 at pg 109 line 22 to pg. 110 at line 13.

continued existence of aboriginal title interest by Kakisiwew and Chacachas and their separate existence on the Ochapowace.

Expert Evidence

Dr. Alexander Von Gernet

23. Dr. Von Gernet was qualified as an expert to provide evidence on account of the oral traditional knowledge to be considered at Trial. Inexplicably his evidence was limited by instruction of the Crown. He confined his focus to find documents on the claim in will says that there was no consultation.[22] Furthermore he confirmed no knowledge Mr. Justice Hugessen's Order[23] or the events post 1882.[24] Specifically no opinion was being expressed with respect to the issue of amalgamation.[25] His testimony confirmed limitation by virtue of non-exposure or instruction with respect to the Denton George transcript evidence,[26] Ross Allary lay transcript,[27] transfer or surrender documents.[28]

24. His testimony focused on three documents, 1) January 1881 document from McDonald, 2) January 1882 report of Nelson and 3) January 1882 report of McDonald.[29] He indicated surprise in relation to the July 1882 document of McDonald's report being missing.[30] His report is based on speculation of the interpretation of the three documents,[31] which are beyond the purpose of his testimony as expert.

25. He did admit that this focus was on consultation and not on consent.[32] In conclusion, he could only offer the following of value to the court, "…but my testimony is, is that, you know, there was some—obviously some kind of meetings that took place, some consultation took place. We don't know much more than that."[33]

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[22] Testimony of Dr. Alexander Von Gernet, TT 16 at pgs 64 and 68.
[23] Ibid, TT 16 at pg 65.
[24] Ibid, TT 16 at pg 67.
[25] Ibid, TT 16 at pg 69.
[26] Ibid, TT 16 at pgs 70-71.
[27] Ibid, TT 16 at pg 73.
[28] Ibid, TT 16 at pg 74.
[29] Ibid, TT 16 at pgs 68-69.
[30] Ibid, TT 16 at pg 70 at lines 8-13 and pgs 75-76.
[31] Ibid, TT 16 at pgs 73-74 and 82.
[32] Ibid, TT 16 at pg 64.
[33] Ibid, TT 16 at pg 82.

26. In terms of the oral traditional knowledge, he indicated no review of Dr. Miller's transcript of evidence or response to his report. He did offer corroboration was not necessary for the three stories.[34] He did offer corroboration is sometimes necessary but could not provide rational criteria other than analysis on a case by case basis.[35]

27. He did agree that context is necessary and that the McDonald and Chacachas animosity was a relevant factor to be considered.[36] He did deal with the Neff testimony, although only indirectly by suggesting that the Crown probably did not understand the events being related by Neff.[37]

Dr. Bruce Miller

28. Dr. Miller was necessary to confirm the approach which was being offered by Dr. Von Gernet did not conform to proper practice in relation to the receipt and consideration of oral traditional knowledge.[38] Dr. Miller's evidence was that there was nothing to suggest in the current case oral traditional knowledge in full form provided should result in feedback or corroboration issues.[39] Internal system protections by Elders of Indigenous knowledge protections such as bracketing were the subject of evidence.[40] There is a difference in analysis of oral traditional knowledge—and he suggests the "oral tradition can be viewed as a coherent open-ended system for constructing and transmitting knowledge" and adopts Cruikshank's conclusion "that oral traditional anchors the present in the past".[41]

29. The foregoing aspects were all present in the oral traditional knowledge in support of its use to assess the historical context and unilateral steps by Crown with a hardship being experienced by the First Nation. All of the Elders were properly qualified, complied with protocol of the Federal Court and the First Nation.

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[34] Ibid, TT 16 at pgs 6-8.
[35] Ibid, TT 16 at pg 89.
[36] Ibid, TT 16 at pgs 77-78 and 83.
[37] Ibid, TT 16 at pgs 36-37.
[38] Transcript of Dr. Bruce Miller, TT 9 at pg 33, pg 37 at lines 21-25, pg 38 at lines 15-22, pg 39 at lines 6-8, pg 42, pg 45 at lines 6-16, pgs 47-49, pgs 51-53, pgs 57-63, pg 82 at lines 18-28 and pg 83 at lines 1-16.
[39] Ibid, TT 9 at pg 98 at lines 9-14, pg 91 at lines 6-22, pg 94 at lines 14-20, pg 97 at lines 21-26, pg 98 at lines 21-28 and pg 99 at lines 8-11.
[40] Ibid.
[41] Ibid, TT 9 at pg 42.

Robert Nestor

30. Cree Custom involved movement of individuals or families among the bands for several reasons including because of marriage, band leadership (TT Vol 8 at pg 48, Ex 12 pages 3-4). In pre-Treaty context, no evidence that one Cree Band would just be absorbed by another band or that two Cree Bands joined together (TT Vol 8 at pg 51, Ex 12 pages 3-4). Amalgamation is not a concept familiar to Kakisiwew or Chacachas people in the pre-Treaty or just post Treaty (TT Vol 8 at pg 52, Ex 12 pages 3-4). Amalgamation does not appear in the *Indian Act* until 1951 (TT Vol 8 at pg 75, Ex 12 page 29).

31. While Whitehouse-Strong questioned the use of the term 'band' and raised other examples of amalgamation of bands such as following the death of Long Lodge in December 1884, The Man Who Took the Coat and Long Lodge Bands amalgamated into a single band (Ex 29 at page 7). In his response Nestor described the problematic nature of comparing indigenous groups, which in this case was comparing Assiniboine with the Cree (TT Vol 8 at pg 114-115).

32. Under the terms of Treaty 4, a conference was to occur with each Band as to selection of their reserve. This occurred and reserves were set aside for each of Kakisiwew and Chacachas (Ex 12 pages 6, and 15-16).

33. In October 1876, Indian Agent Angus McKay indicated in his detailed report that Chacachas and Kakisiwew had both been consulted and selected their reserves (Ex 12 pages 17-18). In 1876, the Chacachas and Kakisiwew reserves had been surveyed (TT Vol 8 at pg 89).

34. The 1877 schedule confirms reserves set apart for each of Kakishiway and Cha-ca-chas (TT Vol 8 at pg 63 and 94, Ex 12 pages 18-19). Wagner was paid for the survey of ten reserves in 1878, including those of Chacachas and Kakisiwew numbered 54 and 62 respectfully (Ex 12 page 22).

35. In 1877, Kakisiwew requested to have a reserve surveyed for him in Moose Mountain for the reason that he wanted to be there with several of his friends who were to have their reserves surveyed there in the autumn of that year (TT Vol 8 at pg 61, Ex 12 page 19).

36. In 1878, Wagner seeks permission from Laird to see if this could happen, and the Surveyor General (Dennis) did not want to set the precedent and such request was

denied by the Surveyor General and the Superintendent of Indian Affairs (TT Vol 8 at pg 61).

37. Kakisiwew receives both seed and implements in the spring of 1879, receiving give bushels of seed potatoes, one axe, three hoes and two spades (TT Vol 8 at pg 62). Chacachas did not receive any implements or seed at that time (TT Vol 8 at pg 62).

38. On July 21, 1879, McDonald wrote to the Acting Superintendent and stated Chacachas had a reserve (Ex 12 page 37).

39. On January 3, 1881 a letter from Indian Agent McDonald to Indian Commissioner Dewdney[42] indicates that there were a number of bands whose reserves had not had the surveys completed (TV8 at pgs. 62-63, Ex 12 pages 20-21). This list included Loudvoice (Kakisiwew) and Chakachas (Chacachas). Nestor says this is a 'mistaken view' because the 1877 schedule says that those reserved were surveyed by Wagner for Kakishiway and Cha-ca-chas (TT Vol 8 at pg 63 and 95, Ex 12 pages 18-19).

40. There was no evidence of a vote either around the surrender of those reserves or the idea to amalgamate the two bands (TT Vol 8 at pg 64). During the relevant period in question, an OIC is not necessary to legally create a reserve (TT Vol 8 at pg 68-75, Ex 12 pages 21-36). "At the time of the survey of the Chacachas and Kakisiwew Reserves an OIC was clearly not the norm nor was it the expectation" and "the requisites for reserve creation were all met". (Ex 12 page 29)

41. In a similar situation, it was reported in 1888 that Little Bone Band had "amalgamated with Sakimay and other bands". Reserves had been set aside for both bands and a vote of members had not taken agreeing to the amalgamation. However unlike the present case, after it had been realized that nothing formal had taken place, in 1907 the Department of Indian Affairs recommended a formal amalgamation as well as a surrender of the Little Bone reserve and this actually took place (TT Vol 8 at pg 84-88 and 98, Ex 12 pages 33-35).

42. The *Snake v the Queen*,[43] and *Montana v HMTQ*[44] decisions provide clarification to the issue of amalgamation and transfer of band members. The 1895 *Indian Act* and wording prior to required the consent of the Band for the transfer of band members; so to amalgamate two Bands into one would need the official consent of the Band for

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[42] Footnote 46 to the Report of Robert Nestor contains the letter dated January 3rd, 1881.
[43] 2001 FCT 858 at para 52, 209 FTR 211, aff'd in *Kingfisher v. Canada*, 2002 FCA 221, 226 FTR 94.
[44] 2006 FC 261.

that to happen (TT Vol 8 at pg 84 and 89, Ex 12 page 31-32). Where there is lack of consent to transfer of Band members, any surrender would also be invalid (Ex 12 page 31).

43. Policy then became legislation. In 1906, the Indian Act was amended to deal with the issue of movement between bands and stressed the need for the majority vote of a Band (Ex 12 pages 35-36).

44. The 1881 Annual Report suggested that the reason for the relocation of the reserves was "little dissatisfaction and jealousy among the Chiefs on the choice of the reserves at the Crooked and Round Lakes" and also the lack of timber for building and fencing to move them to the south side (Ex 12 page 37). Nestor cited this was not correct as Kakisiwew reserve was on the north side and Chacachas reserve was on the south side already so the timber argument does not appear to be valid. Nestor notes that the denial of request by Kakisiwew to move his reserve in 1877 to Moose Mountain to be close to his friends, does not appear to support the asserted reason for the relocation being "dissatisfaction and jealousy" many years prior to the relocation actually taking place (TT Vol 8 at pg 90-94, Ex 12 page 37).

45. Whitehouse-Strong improperly quotes McDonald that it was the reserves on the north side of the Qu'Appelle River that wanted to relocate wanting timber for building and fencing purposes, and so thought it advisable to move to the south side and to also resurvey all of the reserves on the south side (Ex 29 at pages 32 and 43). Nestor also notes in response that Whitehouse-Strong failed to consider that there was no request from the Bands to have one reserve surveyed for them or to be amalgamated into one Band, nor was it even a request for a new reserve (joint or separate) or a demand for amalgamation (TT Vol 8 at pg 128-135).

46. Additionally, the report of Surveyor Nelson from January 10, 1882 indicating "the Indians there having desired a change in the position of the reserves already surveyed…" is not recorded in the Crown records when in the other examples of a desired change it has always been documented as to whether the change came from the Band or government (TT Vol 8 at pg 93-94, Ex 12 page 38).

47. The 1883 Annual Report of McDonald suggests that the 1882 Annual Report should have contained the resignation of Chief Chacachas, as well as the fact that "he and the few members of the band amalgamated with Kah-kee-shee-way. The

newcomers objected to this, and claim that they are entitled to a separate reserve and chief. If that be granted they will take the west side of the present [first surveyed Chacachas] reserve where Cha-ca-cahs has commenced farming". (TT Vol 8 at pg 95-96, Ex 12 page 40).

48. Nestor notes several difficulties with the statements of McDonald, one of which is that the position of Chief was not an elected one in the Cree band custom, but rather Cree Chiefs remained Chiefs for life, and if there was a Chief who was going to cease to serve in that capacity, there would have been someone groomed to take on this position instead of leaving the group without leadership (TT Vol 8 at pg 96-97, Ex 12 page 40).

49. The independence of each Band was noted with the groups occupying different portions of the Ochapowace reserve, and that if separate reserves were granted, Chacachas should be located on the west side (Ex 12 pages 40-41).

50. The report by McDonald on September 12, 1884 of the forced election of a leader and the altercation that occurred around this cannot be said to be a formal amalgamation (TT Vol 8 at pg 97-100, Ex 12 page 41). The assertion that "these two bands are now one under the Chieftainship of 'O-cha-pe-we-yas'…", clearly suggests that the pivotal event of asserting the amalgamation was the election of a single leader.

51. The 1884 Annual Report dated September 16, 1884 also alludes to the actions by the Crown that "his Indians were put in Loud Voice's band" as a result of Chief Chacachas having resigned two years previously (TT Vol 8 at pg 99-100, Ex 12 page 41). The paylists from 1885 onwards confirm the Crown's position that they have put these two Bands into one as Ochapowace despite there being no formal amalgamation occurring (TT Vol 8 at pg 102-103).

52. Despite asserting that the two bands were now one, the government continued to recognize the Bands as separate both internally and by government officials including McDonald (TT Vol 8 at pg 100-102, Ex 12 page 42).

53. The Department of Indian Affairs failed to take the necessary steps to amalgamate and take the reserves for Chacachas and Kakisiwew out of existence (Ex 12 page 43). They failed to follow its own legislation and policies with respect to amalgamation, transfer and the administration of Indian lands, especially in comparison to other

Bands (TT Vol 8 at pg 105-107, Ex 12 page 43).

54. On March 1928, Ostrander informed the Department of several inquiries from Indians regarding the original reserve said to have ajoined the present day Ochapowace reserve on the east side. Nestor and Whitehouse-Strong acknowledged the information not to be accurate but that this took place.

55. Between May 13, 1932 and September 19, 1932 a series of correspondence was exchanged between Garnett Neff and the Department about the issue of the original reserves and bands. The correspondence effectively ended with the Department stating the reserves were never legally constituted and therefore required no abandonment, meeting or vote. At this time it was illegal under the Indian Act for a lawyer to be hired by a Band for money (Ex 12 pages 11-14). Neff's actions at this time were unprecedented at that time, but effectively ended by the response(s) of the Department.

56. Nestor confirmed that the Departments documentary records at or just following the events in question with respect to all aspects of surrenders and transfers of band membership were extensive,[45] and would have expected that the Department would have had records on the issues of surrender of the original reserves, consent to amalgamation and transfers of membership (TT Vol 8 at pg 106-107). Whitehouse-Strong's assertion that it was not uncommon for there to be little or no record of what transpired because records were not required to be kept before 1914, and example to the 1905 Carry the Kettle surrender is therefore not much assistance (Ex 19 at page 19).

57. The Public History Report (Ex 15) dated November 17, 2008 confirms that government officials continued to refer to Chacachas and Kakisiwew into the early 1900s; and that there was evidence of division of Ochapowace in the 1940s to 1990s believing it to be tied to the fact that no formal amalgamation took place (TT Vol 8 at pg 138-143)

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[45] Ochap 1-021(003), Ochap 1-019(025), Ochap 1-021(002), Ochap 1-021(004)-v2, Ochap 1-021(006), Ochap 1-021(007), Ochap 1-021(008), Ochap 1-021(011), Ochap 1-021(012), Ochap 1-021(013), Ochap 1-021(009), Ochap 1-021(014), Ochap 1-021(015), Ochap 1-021(017), Ochap 1-021(001), Ochap 1-021(005), Ochap 1-021(010), Ochap 1-019(045), Ochap 1-021(018), Ochap 1-019(053), Ochap 1-019(058), Ochap 1-019(088), Ochap 1-016(030), Ochap 1-016(034), Ochap 1-016(042), Ochap 1-016(044), Ochap 1-016(048), Ochap 1-016(051), Ochap 1-016(054), Ochap 1-016(055), Ochap 1-016(056), Ochap 1-016(057), Ochap 1-016(060), Ochap 1-016(061), Ochap 1-016(085), Ochap 1-016(222), Ochap 1-016(162) and Ochap 1-001(049)

Kenton Storey

58. Kenton Storey is a historian in the area of Canada First Nations with particular regard to colonialism and treaty making who thoroughly reviewed the documentary record and even discovered new records pertaining to this matter.

59. Chief Kakisiwew and Chief Chacachas were Cree leaders who signed Treaty 4 on September 15, 1874 on behalf of their respective Bands (Ex 8 at page 5). Chief Kakisiwew was called 'Loud Voice' and had been a prominent and influential leader of the Qu'Appelle Cree from the 1860s until his death in 1884 (Ex 8 at page 12-15 and 18-19). Chief Kakisiwew was recognized by Treaty Commissioner Alexander Morris as the "principal chief" (Ex 8 at page 19-22). Chief Kakisiwew was the first Chief to sign Treaty 4 (Ex 8 at page 23).

60. One Treaty 4 promise was that the Cree and Saulteaux signatories were to receive reserves set aside for each band with the reserve size based upon the band's population, being one square mile for each family of five, or in that proportion for larger or smaller families (Ex 8 at page 25-26). Reserves were to be assigned only after conference with each band of Indians and agricultural implements were to be distributed to each family that had begun to take up faring on reserve (Ex 8 at page 26, 75). With the signing of Treaty, it also provided the Indians the freedom of movement throughout district to carry on traditional hunting, and economic activities (TT Vol 7 at pg 96

61. A significant factor in the entering into Treaty 4 by Indian bands was the scarcity of bison and the treat of starvation (Ex 8 at page 28). The significant events of reserve assignments (1876 and 1881), the co-location of Kakisiwew and Chacachas bands (1881) and forced amalgamation of the two bands (1882-1884) occurred during this transitional phase from hunting to an agricultural way of life (Ex 8 at page 28). It was a gradual shift especially considering after Treaty 4 was signed in 1874, it took until 1876 for the Crown to provide reserves with the first opportunity for agriculture being the spring of 1877, with significant challenges also existed in clearing the land and raising the first crop (Ex 8 at page 28-37).

62. On September 17, 1875, Christie provided Wagner with the first list of reserves to be surveyed. On October 7, 1875, Kakisiwew had been identified as not being prepared to settle on reserve immediately but as having selected the desired location

of their reserve. Chacachas was identified as having indicated no reserve site preference or any desire to take up farming (Ex 8 at page 52-53).

63. In 1876 there is a report of Kakisiwew expressing a desire to go on his reserve at an early date and the geographical location of his reserve as adjoining the east side of Star Blanket's reservation and front on the Crooked Lakes extending Northward (Ex 8 at page 56). In contrast at this time the Chacachas band is said to be "still inclined to follow the chase", however were persuaded to go to their new reserve the following year (Ex 8 at page 57).

64. In 1876, Indian Agent Angus McKay and Surveyor Wagner consulted with Kakisiwew and Chacachas concerning the sites for their respective reserves (Ex 8 at page 54-55). That fall, Wagner completed the formal surveys of both reserves pursuant to instructions from superiors Laird, Christie, Meredith and Dennis (Ex 8 at page 5, 48-51).

65. The field notes from Wagner's survey of the Kakisiwew reserve confirm that as of November 1876, there was a lack of "any good Building timber" with the north side of the Qu'Appelle River having small bluffs which will be useful wood for fuel and fencing should there not be any interference from fire. At this time there was fire regulations which encouraged Wagner that the bluffs of young popular trees would grow (Ex 8 at page 58). In the same breath, McKay stated to Laird in October 1876 that the reserve set apart for Chacachas was "in point of quality and appearance very much the same as that of the last mentioned locality [Kakisiwew]" (Ex 8 at page 56). The "land that had been designated for the original reserves was identified by several surveyors as being high quality land" (TT Vol 7 at pg 83).

66. In January 1877, Wagner's surveys (IR62) for Kakisiwew) and (IR54) for Chacachas) were recorded and subsequently published in the 1877 Schedule Describing Various Indian Reserves (Ex 8 at page 5-6 and 58-62). By May 7, 1878 Wagner completed his report on the Chacachas survey and on June 22, 1878 his report on the Kakisiwew survey (Ex 8 at page 62-63). Wagner was paid on June 30, 1878 for his work which included Kakisiwew IR43 and Chacachas IR54 (Ex 8 at page 63). The reserves were subsequently included on "the May 1880 Surveyor General's list is strong evidence that both reserves were considered by the Crown to be duly and properly constituted" (Ex 8 at page 64).

67. In 1880, the farm instructor John Setter arrived to become the Crooked Lakes district farm instructor to Kakisiwew and Chacachas bands (Ex 8 at page 37), with the government records confirming the presence of Chacachas and Kakisiwew bands on their respective reserves from 1880 on (Ex 8 at page 37-38).

68. The annuity payment records confirm that a significant number of Chacachas band members being paid at Fort Walsh year repeatedly and being more inclined to live in the Cypress Hills area to pursue bison than Kakisiwew's band at annuity time (Ex 8 at page 40). For example, in 1878 the entire Chacachas band was paid at Old Women's Creek but this effectively ended in 1882 when the government insisted that bands be paid on their reserves (Ex 8 at page 40-41).

69. On January 3, 1881, McDonald inaccurately reported that the reserves for Kakisiwew and Chacachas were yet to be completed and as such Dewdney informed Nelson to survey reserves identified by McDonald in the Treaty 4 district (Ex 8 at page 5 and 65-67).

70. In the 1879 Annual Report, McDonald recorded the Kakisiwew band receiving five bushels of seed potatoes and farm implements which suggests that they likely may have begun farming as early as 1878 (Ex 8 at page 102).

71. In a letter dated July 21, 1879, McDonald had previously made an explicit reference to the "Kakwistahaw and Chakachas" bands stating that two yoke of oxen were purchased for them but they have not gone onto their reserves. This suggests that McDonald understood they had been designed reserve lands but not settled on but that he makes a decision to relocate all the Crooked Lake reserves which appears to have helped "implement Indian Department policy rather than just to respond to the wishes of the affected bands" (Ex 8 at page 67-70). Rather when it suited the government to resist alterations to reserves, such as Chief Kakisiwew's request to have his reserve relocated in 1877 to Moose Mountain to be closer to his friends but was denied on the basis of concern that it would set a precedent is one such example (Ex 8 at page 70).

72. While there was instructions from Galt to Nelson to include in the reserves only a limited quantity of woodlands, but in every other respect to try and meet the views of the Indians. Subsequent instructions were to be provided from McDonald to Nelson on where next to go, and Nelson then subsequently completed twelve surveys during

1881, four of which included reserves at Crooked Lakes (Ex 8 at page 72-74). The instructions to Nelson have never been located neither has Nelson's notes on the co-location of the Chacachas and Kakisiwew reserves, how and when the new reserve was chosen and survey completed (Ex 8 at page 74).

73. Nelsons' survey of the co-located Chacachas and Kakisiwew IR71 is dated August 20, 1881 (Ex 8 at page 74).

74. In 1875, the Minister of the Interior (Meredith) was clear that bands had to consent to have co-location of their reserves (Ex 8 at page 75). The only support for the consent was McDonald's account in the 1881 Annual Report that he reached "an amicable understanding amongst them" and that Nelson satisfied "each band as to their boundaries" (Ex 8 at page 75-76).

75. It is unlikely that consultations occurred alongside annuity payments at Fort Qu'Appelle in 1881 given McDonald was not present according to Wadsworth report. It is very unlikely that there was consultation with Chacachas given his absence and the absence of two other headman who were likely away hunting (Ex 8 at page 75-77). The evidence also supports that the consultation process involved Nelson and McDonald alone (Ex 8 at page 78).

76. There is a lack of consultation and consent when McDonald and Nelson shifted the Chacachas and Kakisiwew reserves, co-locating the two bands on a single reserve in 1881 (Ex 8 at page 6-7, 49, 75-86). These events occurred alongside the imprisonment and alleged resignation of Chief Chacachas (Ex 8 at page 107-109). This together with the policy that band members must join their proper chiefs before they receive any more annuity money is a difficult position for Chacachas band members left without a Chief especially when they so heavily relied upon annuity payments to survive (Ex 8 at page 108-109). Additionally there were so few band members in 1882 that were present at Qu'Appelle for annuity payments that year and thus it cannot be said that a majority of the band consented to the amalgamation that year (Ex 8 at page 109).

77. Under the Indian Act and Treaty 4, Storey determined consent of members of band as a whole is required to change location of reserve (TT Vol 7 at pg 98).

78. It had been McDonald's practice to provide headquarters with a full report regarding the selection of a reserve by Indian Bands however in 1881 there was none.

In the July 18, 1882 report regarding the selection of a reserve for the Piapot band, McDonald noted that he had despatched "a full Report on the Crooked Lakes Reserves" dated July 12, 1882 but this document's existence cannot be confirmed or located (Ex 8 at page 97).

79. In 1883, when previously absent Chacachas Band members returned to Crooked Lakes and learned of the amalgamation, McDonald reports that they objected to this and claimed they were entitled to a separate reserve and Chief (Ex 8 at page 110). In 1883, the members who were previously paid with Kakisiwew were paid with Chacachas, with the exception of one family who was not paid with either band (Ex 8 at page 110).

80. In early 1884, Chief Kakisiwew died (Ex 8 at page 47-48). The purported amalgamation was only confirmed following his death, and following a forced election of one Chief to combine both bands during the payment of annuities (Ex 8 at page 113).

81. McDonald and Nelson were active as land speculators in the Qu'Appelle district as part of the Qu'Appelle Land Syndicate (Ex 8 at page 97-99). While there is no direct evidence that McDonald and/or Nelson took any personal benefit from the relocation or co-location of Kakisiwew or Chacachas (Ex 8 at page 100), it is an area of concern.

82. In the years following, references continued to be made to separate bands of Kakisiwew and Chacachas by government officials and the band members. Difficult conditions existed on the Ochapowace reserve, and with policy implementations such as the pass system and starvation policy (Ex 8 at page 116-130).

83. Chacachas leaves to Maple Creek but his return is forced in 1886. He leaves in 1887 and he dies sometime later (Ex 8 at page 125-128).

84. It appears that the relationship between Chief Chacachas and McDonald had difficulties since 1879 when Chief Chacachas had rejected McDonald's authority by seizing government supplies at Fort Qu'Appelle to feed his starving band. Storey noted that "in the aftermath of the incident, it would appear that Chacachas viewed Agent McDonald with hostility and maligned his character to First Nations leaders at Fort Walsh", and suggests a connection should be drawn between the charges against him for horse stealing, his purported resignation while in prison and ensuing

amalgamation of his band with Kakisiwew, especially since the only record of Chief Chacachas' resignation is that of McDonald (Ex 8 at page 102-104). Storey also noted the "ongoing friction" between McDonald and Chacachas in the 1886 annuity payments report and the basis for same (Ex 8 at page 118-119 and 124). Whitehouse-Strong acknowledges there is an "existent history of animosity" and that it is possible that this related to the missing records of McDonald but that there was no definitive conclusion that could be made with respect to this (TT Vol 16 at pg 77-78)

85. The Crown interference in Ochapowace governance is prominent such as with the deposition of Chief Walter Ochapowace by order of the Privy Council on September 11, 1917 (Ex 8 at page 132)

86. The relations between the department and Ochapowace were poor between the 1880s and 1930s, but from at least 1911 to 1932, Ochapowace made attempts to inquire and obtain resolution as to the lost reserve lands. Specifically in 1911, a delegation of Indians travelled to Ottawa (JB-00419). The Deputy Minister upon recommendation of the Surveyor General Bray (JB-00420) represented that the Ochapowace Reserve No. 71 was jointly owned by the Kakisiwew and Chacachas bands (JB-00421). In 1932, lawyer Garnet Neff wrote on behalf of a few former residents of the reserve but his inquiry was not successful at resolving the issue and as Indians could not hire lawyers at that time, and Neff was receiving pressure as a result of the inquiries it went no further (Ex 8 at page 131-140)

87. Several explanations are provided for the lack of record keeping by government officials such as McDonald and this included the heavy workload that he had during 1880-82 period, his poor heath which could have also explain his failure to consult (Ex 8 at page 180-182 and 194). It is evident that a persistent theme is that there is a lack of documentary historical evidence and Storey suggests that there should be some inferences drawn from the fact there is a lack of documents on a topic such as that he consulted with a particular Chief (TT Vol 7 at pg 85-88, Ex 8 at page 182-185)

88. When questioned about the expectations of record keeping of government representatives in this field in the 1870s and 1880s, Storey held that Department of Indian Affairs demanded highest quality record keeping from Indian Agent. When small errors such as paying family from another district they were corrected and centured. When any funds spent and were considered to be inappropriate they were

rebuked by Indian Affairs. High standard for record keeping during this period.

Whitehouse-Strong

89. His graduate degrees focused on religious organizations however acknowledged that this has not impacted his opinion on this matter. This was his first time testifying in a Federal Court, but has stated he has testified previously before a Tribunal. He has completed research for government, FNs and private law firms largely pertaining to agricultural benefits issues and residential schools.

90. Whitehouse-Strong prepared two rebuttal reports to respond to the report of Nestor and the report of Storey. The findings of Whitehouse-Strong are addressed within the Nestor summary of evidence. With respect to the Storey report, Whitehouse-Strong disagreed with a number of key conclusions as to whether consultations occurred with respect to the co-location of Chacachas and Kakisiwew bands on the reserve and also made the finding that both bands had rejected their original reserves (TT Vol 16 at pg 55).

91. Whitehouse-Strong largely adopts and agrees with Storey's report however the following are the differing conclusions that Whitehouse-Strong seeks to make (Ex 29 at pg 5):

1. Both bands requested removal to different locations
2. Federal officials engaged with representatives from both Bands prior to laying out the co-located reserve
3. Acknowledges there was disagreement concerning the election of Ochapowace but that he was elected and that an inference should be drawn that Chacachas and Kakisiwew bands consented to their amalgamation on this basis

92. However even within his own report, Whitehouse-Strong references only Kakisiwew request to relocate and that was to go to Moose Mountain to be close to his friends (Ex 29 at pg 19). There was no indication of dissatisfaction by either Chacachas or Kakisiwew with their respective reserves and the evidence actually indicated otherwise. Acknowledged that First Nations were reluctant to settle because of other economic activities and then suggested that when "became imperative they did settle down, the reserve was ill suited to settle agricultural pursuits" (TT Vol 16 at pgs 129-130).

93. In support of the suggestion that federal officials engaged with representatives from both Bands prior to laying out co-located reserve, Whitehouse-Strong relies

upon Galt's instruction "to try and meet the views of the Indians" and McDonald's response comment that he had been "able to effect an amicable understanding" amongst the bands, and "had no difficulty in satisfying each band as to their boundaries" (Ex 29 at pg 25). Whitehouse-Strong seeks for several conclusions to be drawn that because a few headman were present and more time had passed since Treaty was signed, that they would be more comfortable in making decisions about their reserve without the presence of Chief Chacachas, the other two headman and the majority of members of the Band (Ex 29 at pgs 25-26).

94. Whitehouse-Strong challenges Storey's conclusion that McDonald was not likely part of those consultations given Wadsworth statement, instead suggesting that Wadsworth erred in his statement and relying upon the document collection (Ex 29 at pg 35). While the evidence about the presence of McDonald for the consultations may be inconclusive, Whitehouse-Strong acknowledges that the statement by McDonald is just a "broader general statement of the Bands being satisfied" and does not specifically identify Chacachas or Kakisiwew as having been consulted (TT Vol 16 at pg 146).

95. Whitehouse-Strong attempts to challenge Storey's suggestion that Chacachas members were placed in a difficult position in 1882 with receiving annuities because Chacachas was incarcerated at the time and Dewdney had stated that for band members to receive annuities they had to re-join their proper Chiefs. Whitehouse-Strong suggests that the reason was for the ease of tracing those payments, not that they would not receive their annuities (TT Vol 16 at pgs 26-28, Ex 29 at pg. 55-56). However this is not what Dewdney stated and further the payments did not occur under Chacachas band in 1882, but rather the paylist confirms the payments occurred under Kakisiwew suggesting that Storey's interpretation is correct.

96. Whitehouse-Strong suggests that the amalgamation process began with the resignation of Chief Chacachas and concluded with the election of Ochapowace by members of both bands but does not place much consideration on the fact that McDonald reported that it involved "a great deal of altercation" (Ex 29 at pgs 56 and 79-80), except under in his testimony stating "the document collection notes that there was a considerable degree of altercation surrounding" (TT Vol 17 at pgs 60, 142-144, 149). He even agreed with Storey that the document collection supports that

Chacachas and some of his former band members were not satisfied with the joint reserve Nelson served for them in 1881 or the amalgamation (Ex 29 at pg 71).

Read-In Evidence

Reinard Kohls

97. While Ochapowace was not a signatory to Treaty its' predecessor Bands were (pg. 7). Ochapowace is an a Band within the meaning of the Indian Act (pg. 8). Asserted there was no specific date that the two bands became one band other than when the omnibus OIC was passed (pg. 10). Ochapowace came into existence between 1882 and 1889 and the events following 1889 are not relevant (pg. 152). Admitted that there was no regulation or delegation from the Privy Council to anyone saying they had authority to recognize Ochapowace as a band (pg. 11)

98. Asserted that First Nations peoples were being dealt with on "almost an ad hoc basis" as it was very early days in the history of Canada (pg. 12).

99. The OCPC1151 dated May 17, 1889 does not recognize or reference Ochapowace nor does it set aside a reserve for Ochapowace (pg. 17-18), but rather it assigns a reserve to Kakisiwew and Chacachas (pg. 19-20)

100. The OCPC1151 does not create a band (pg. 22), nor does any other document such as an OIC or Ministerial Order (pgs. 23-24)

101. McDonald did not have authority or instructions to "deem or create a band" (pgs. 25-26), or alter Treaty (pgs. 33-35). Any rights and obligations of the Treaty would flow to the individuals whether they are members of the historic Band or the Ochapowace Band and any collective rights would flow to the newly created Ochapowace that they might have been entitled to had they remained as historic bands" (pg. 156)

102. It is the Government of Canada's position that "Treaties are not to be amended, period" (pgs 30-31) either by Canada or by Indians (pg. 35).

103. Chiefs Kakisiwew and Chacachas were signatories to Treaty, and their bands were bands within the meaning of Treaty (pg. 34). Peaceful co-existence of their band was one Treaty promise (pg. 34).

104. There was interruption to governance for Ochapowace from 1893 to 1919 with Walter Ochapowace as being the only Chief listed from 1912-1917 (pg. 46-47 and Undertaking 7), but this was not because of the community's lack of want of

leadership, with a letter being sent from the Loudvoice Reserve dated January 18, 1911 requesting leadership (pg. 96).

105. The Crown could point to no 'collective conduct' prior to 1951 suggesting that a new Band existed (pgs. 158-159, Undertaking 16). Similarly no document existed prior to the Minister responding about TLE that Ochapowace has the authority to deal with the historic band claims (pg. 184-185, Undertaking 21).

106. The First Nation conduct the Crown asserts amounts to merger between 1882 to 1911 is 1) when there is a common paylist the failure to object, 2) to indicate disagreement with Indian Agent McDonald (pg. 52-53)

107. The Crown's position has been since at least 1911 that "These Bands own Reserve Number 71 jointly (Undertakings 11 and 12). No division of the Reserve has been made between these Bands" (pgs. 99-101, 109-114). No action has occurred since this time to provide any correction and should there have been an error, steps would have been taken to correct any error (pg. 114).

108. No application occurred for division by the band pursuant because that would have been an admission that they are one band (pg. 129)

109. The claim of the band for Specific Claim was accepted on the basis of unfair compensation, "DOJ" recommended acceptance of the claim in July 1991 on the basis that the Band may not have received fair market value for the lands" (pg. 207-211)

110. The Crown as a matter of principle confirmed it would not "include or count any periods of time during which negotiations were going on under the specific claims policy" for the analysis of limitations (pg. 213), Undertaking 24.

111. Proper officer of the Crown (pg. 6). With the exception of Question 802, Huges adopts the discovery of Alois Gross (pgs. 186-213, Ltr DOJ dated Sept 16, 2003)

Alois Gross

112. Voluntary attended the discovery but answers adopted by Kohls and Hughes

113. At the time of his discovery he was retired but still working under contract with the Department and so still familiar with policy and procedures of settlements or claims (pg. 309-310). In 1990/1991 he moved to claims branch but previously was the director of lands, revenue and trust for the BC region until he retired in 1996 (pg. 311-312). Acknowledged he "dealt with several tough problems" within the Department (pg. 313).

114. Negotiated the Saskatchewan Framework Agreement (pg. 314). Generally First Nations operated in a way that their lawyer was also the negotiator (pgs. 314-322). The Kawacatoose claim was the first Solider Settlement claim settlement for roughly $3 million dollars (pg. 319). Acknowledged knew at the time of the Kawacatoose settlement in 1991 that the Pillipow office was also representing Ochapowace and Piapot as the discussions for settlement were "running concurrently" (pgs. 321-323). Piapot settled in 1993 for $12 million (pg. 327). All three cases were unfair compensation cases (pg. 328), but the Piapot case involved an invalid surrender as well (pgs. 329-330)

115. Was surprised that any other basis other than unfair compensation was the basis of acceptance of the claim for negotiation internally within the department (pgs. 334-335), namely that "In 1991, the Department of Justice recommended acceptance of the claim on the basis that the Crown was in a position of conflict of interest and the band did not receive fair market value for land or improvements" (pg. 334). Acknowledged that the documentation from the Department BAW-0647A was copied to him and confirms the claim was accepted also on the basis of the Crown being in a position of conflict of interest (pg. 337).

116. BAW-00721A is the letter of acceptance sent by the department to the band that is relied upon by him with respect to the basis of acceptance of the claim (pgs. 335-336), which only provides the basis of acceptance being the "lawful obligation that arises out of the surrender" (pg. 336). Acknowledges that the band was never informed there was a broader acceptance on the basis of conflict of interest (pgs. 337-338, and 341-345)

117. Acknowledged that in 1992, Pillipow was clearly outlining there was a concern with respect to the forced amalgamation as reflected in document BAW-00796, and that it was not an issue for negotiation as part of the claim that was to be discussed and negotiated (pgs. 338-339 and 349).

118. Acknowledged that the 'Phin Lease' and 'trust mismanagement' claims were part of the loss of use claims that involved breach of fiduciary duty which was dropped from the final package, which is reflected in the release (pgs. 339-340). Gross explained that they did not consider the management of trust funds as an area that they were negotiating and it would not be fair to ask the First Nation to release

Canada from any of their obligations they may or may not have around trust fund management so it was left aside (pgs. 340-341 and 345).

119. A letter dated April 19, 1984 from Munro to Dutchak enclosing a letter to Chief Morley Watson of Ochapowace requests the matters of the two-band claim and original surveyed reserves be set aside. Gross confirmed that agreement did occur to set it aside and settle the claim (pg. 346-348).

120. Gross was aware that there was correspondence about the issue with the Saskatchewan Regional office in December 1984 confirming they were aware of the issue (pg. 348), but that with TLE it was set aside, and when it came to the Specific Claim it still remained an outstanding issue discussed at the negotiation table but again it was set aside as an issue to be dealt with in the future (pgs. 348-349).

121. His understanding was that what was not contained in the release would be left open, and this meant that if the conflict of interest issue was not contained in the release it was not included. The settlement document only included unfair compensation and road allowances (pgs. 351-352).

122. Full disclosure is very important to resolution of claims, especially if there is a particular vulnerability on the part of the First Nation to ensure the Honour of the Crown is upheld (pg. 354).

123. Gross has negotiated other wrongful amalgamation cases and took sets to ensure all parties were treated fairly, but in this case he acknowledged that he simply set the issue aside and settled the claim instead of taking any special precaution to ensure the negotiation would be fair (pgs. 356-357).

Jack Hughes

124. McDonald did not seek permission to resurvey from anyone senior to himself (pg. 22, Undertaking 4). Confirmed that the paylist would not show consent or acquiescence (pg. 56)

125. Prior to 1895, approval was required from Government also from both bands involved in the transfer (Undertaking 8). During the 1870s and early 1880s letters were sufficient to effect a transfer however “an application to transfer” was utilized as early as 1882. As of 1889, a form entitled ‘Consent of Band to Transfer’ was utilized which had to be certified by the Indian Agent (pg. 69-71, Undertaking 8). Confirmed there was no evidence that there were resolutions by Chacachas or Kakisiwew to

effect the transfer of members (pgs. 68-69)

126. Following the death of Ochapowace in 1891 until 1911, the Band was without a Chief. Interruption of band governance is further confirmed in Undertaking 14, when a Chief was elected in 1911 but not approved by the Indian Agent to the Department. Another election was held and Walter Ochapowace was elected, and he was confirmed as Chief on June 14, 1912 but then subsequent removed by the Department in 1917. Following this event, on May 2, 1922, a band member requested that the band be allotted a Chief but the response by the Department was that it was not in the best interest of the band to have a Chief (pg. 113-114, Undertaking 14).

127. Continuation as proper officer on behalf of Crown. Adopted Alois Gross' testimony that in 2003, his understanding was that it was agreed that if the amalgamation issue was going to be dealt with, that it would be dealt with after the fact and not part of TLE (pg. 103-104)

Denton George

128. Was on council from 1975 until 1989 when became Chief of Ochapowace and held this position until his death in 2009 (Ex 22, Transcript at pg 5-7). He was a strong believer in Treaty and the promises made to their people (Ex 22, Transcript at pg 44), wanting to see the Crown honour its commitments including the establishment of Chacachas and Kakisiwew (Ex 22, Transcript at pg 44, 62-63, 98-99). He acknowledged growing up with the knowledge of the two bands Chacachas and Kakisiwew (Ex 22, Transcript at pg 38).

129. Directly involved in the negotiations for the specific claim for 1919 Solider Settlement Surrender and also with TLE (Ex 22, Transcript at pg 13). Mr. Pillipow was the lawyer that acted as the lawyer throughout the presentation and negotiation of both of these claims (Ex 22, Transcript at pg 13, 54)

130. MOPS claim was already filed in 1989 with Federal Government and it sought to uphold a Treaty right to land (Ex 22, Transcript at pg 14)

131. Statement made by Chief Kenny to Bill McKnight dated April 6, 1988 regarding the reserve being surveyed for the bands of Chief Kakisiwew and Chief Chacachas and being amalgamated under Chief Ochapowace in 1884 is inaccurate as it does not reflect what the Elders told him which was that Chacachas did not have the authority to give his people or land away (Ex 22, Transcript at pg 18-19).

132. Chief Denton goes on to say, "…And when I asked one of our Elders, Mrs. Margaret Bear who was a direct descendant of little Assiniboine, a Chacachas citizen, she told me that Chacachas didn't have the authority to give his people away or his land, he didn't have the authority to give his land away. When I talk about the sacredness of land, it's not something—Indian people view our land as our mother, and I'm not sure in your culture if you would give your mother away, so that's why our people say that…" (Ex 22, Transcript at pg 19)

133. The negotiated TLE numbers for band populations of Chacachas and Kakisiwew from 1879 to 1992 were used to calculate entitlement. There was "nothing before and nothing after" (Ex 22, Transcript at pg 22, 54-56, 61-63)

134. Several letters that were written during the time he was Chief were written by their lawyer, Mr. Pillipow with some occasions not reading the letter but having it explained to him and he would just ask for his signature (Ex 22, Transcript at pg 26-30, 60). On other occasions, others such as Cameron Watson would also draft letters for him (Ex 22, Transcript at pg 45-46).

135. The letter of request dated May 6, 1991 from Cameron Watson for the reestablishment or recognition of Chacachas Band was not the first time he had heard of it (pgs. 37, 99). The request was accompanied by a letter from those who state they were direct descendants of Chacachas (Ex 22, Transcript at pg 40-42). The Crown indicated that the reestablishment of both reserves could not occur through the TLE process, which is what Ochapowace was trying to do (Ex 22, Transcript at pg 56-59).

136. His understanding on the release clause to the TLE agreement was that it only provided a release to Canada prior to 1879 or after 1992 (Ex 22, Transcript at pg 63)

137. Chief Denton stated he had contact almost on a daily basis between August 4 and September 18, 1992 with Ross, Cameron or Morley that led to the acceptance of the 1879 date of first survey (Ex 22, Transcript at pg 63-64). Part of the reason was to leave room for those who might have been in the United States or anywhere in the world if they can provide that they had a legitimate claim for land (Ex 22, Transcript at pg 63)

138. Canada had put forward a paragraph in a letter dated February 25, 1993, which was reproduced in a letter from Pillipow in a letter dated March 19, 1993 which sought to deal with the amalgamation issue which was not accepted (Ex 22,

Transcript at pg 65-69).

139. A letter was written by Chief Denton on August 31, 1993 sent out to band members setting out the information of the history of the negotiations, framework agreement and the steps being taken (Ex 22, Transcript at pg 70).

140. In 1991, a Federal Court Action was commenced (JB-00510). This claim was instructed by Chief and Council but not reviewed, and only became aware of the error in the claim while being examined at discovery (Ex 22, Transcript at pg 84-85). The claim had errors in it for example such as stating the bands never occupied their original surveyed reserves (Ex 22, Transcript at pg 85-87)

1948: Petition and correspondence from legal counsel on behalf of east end farmers

141. Chacachas and Kakisiwew have longstanding divisions which retain the aspect of the Treaty Bands in their joint life on the reserve. One example: Ochap 1-017(189)

1951: Band lists following amendments to the Indian Act – no impact upon Kakisiwew and Chacachas

142. Andrew Patrick Doraty testified as to the nature of the 1951 amendments to the *Indian Act*, in relation to which Band lists were created: TT Vol 14 at pg 41. The Ochapowace 1951 Band list is JB-00483, with the notice posted respecting same being JB-00482. He testified that there is no evidence indicating that a meeting actually occurred with the Indian agent explaining the amendments to the *Indian Act* in 1951 to Ochapowace: page 65. He testified that there were no Band lists established for Chacachas or Kakisiwew, and consequently he did not search for protests respecting Chacachas or Kakisiwew: page 46-47. Furthermore, when the Band list was established in 1951, there was no historical research done and the Band lists were simply created from the Treaty annuity pay lists: page 57-58. In particular, there were no Treaty annuity pay lists for Chacachas or Kakisiwew, as the 1951 pay list was in the name of Ochapowace: JB-00481.

143. Andrew Patrick Doraty further testified that there is no mechanism in the Indian Act for a group of Indians to argue that they should be recognized as a separate Band: TT Vol 14 at pg 58.

144. Ross Allary testified that: TT Vol 10 at pg 105

> Q All right. Now, we know that the Department of Indian Affairs administered the people on Ochapowace as a single Band. To your knowledge, what choice did individuals on Ochapowace have to dispute that or to not agree with it?

A Well, most of the time it fell on deaf ears till now, we have a voice now, this day at least brought us a voice.

1960s: First occasion upon which discrepancies respecting treaty land entitlement were sought to be resolved by any First Nation in Saskatchewan

145. Graham Macondald testified: TT Vol 13 at pg 13.

Q …What can you tell us generally about earlier initial attempts in that period of time to resolve the TLE issue that had now been, as you say, flagged by communities and recognized by the government in that -- governments in that agreement?

A M-hm. So prior to the 1930s, I'm not aware of there being a general approach to resolving all of it. My understanding is that certain First Nations did -- have complaints or concerns about the lands that were set aside. I'm not aware of any coherent steps to rectify that at the time. The earliest I'm aware of an attempt to come up with a plan to try to reserve that -- address that was for the Lac La Ronge First Nation. That was in the 1960s where there were discussions about how to best try to address the discrepancies.

…

1973: Order in Council pursuant to the Indian Act containing a non-exhaustive list of bands recognized by Canada

146. In 1973, an OIC was passed declaring certain bands to recognized for the purpose of the *Indian Act*: JB-00487. There is no OIC or Ministerial Order which explicitly extinguishes the Treaty bands Chacachas and/or Kakisiwew.[46]

1951-1985: Ochapowace experiences financial challenges, including as a result of the 1951 amendments to the Indian Act

147. Members of Chief and Council between 1912 and 1965: Ochap 1-009b(002).

148. Ochapowace did not have funds necessary to conduct research necessary to address the issue of Chacachas and Kakisiwew until the late 1970s and early 1980s: TT Vol 3 at pg 117-118.

149. Ochapowace was not able to act without the farm instructor or Indian agent present on reserve until the mid-1960s: TT Vol 3 at pg 116-117.

150. After describing the pass system and fear of the Indian Agent, their authority to put Indians in jail, and being without housing for 10 years following the Indian Agent's refusal to give a permit or housing, Ross Allary testified: TT Vol 10 at pg 24; and then also with respect to the 1970s and 1980s, he testified: TT Vol 10 at pg 29

151. Petra Bellanger testified that in the 1980s, an in particular prior to settlement of TLE and Solider Settlement, the only sole source revenue was derived from Ochapowace Community Pasture. The only other investment that Ochapowace had by

[46] See also Read In of Reinard Kohls with respect to lack of Ministerial Order or OIC creating a band called Ochapowace at pgs 21-24.

the late 1980s was Lonesome Prairie Sand and Gravel, however it did not generate revenue. Subsequent to settlement of TLE and Solider Settlement in the mid-1990s, neither of these two investments generated own revenue or it was minimal and did not flow to the Ochapowace. While Ochapowace White Tail Hunt generated some profit, that was not until the late 1990s. With respect to the Landmark Inn, it was purchased on loan and it was liquidated with a loss in the late 1990s: TT Vol 15 at pg 11-14.

1978-1985: Research by Canada and Ochapowace through FSIN respecting TLE

152. Ross Allary testified that significant research was conducted by Ochapowace as part of the TLE process which resulted in a document collection, which involved travelling to and obtaining documents from Ottawa,[47] which led to knowledge of the facts forming the basis for the claims in these proceedings.

1984: In demanding a surrender of the 1876 reserve lands, Canada acknowledged a claim

153. On April 19, 1984, Minister Munro wrote to Chief Morley Watson, Ochapowace, which letter included the following: Ochap 1-019(276) and TT Vol 3 at pg 100-101

> …In order to put the matter to rest and to enable the matter of outstanding treaty land entitlement to be satisfied, your band will be required to surrender any interest it may have in the 1876 survey. …I propose that the band indicate that it has no interest or claim to the lands surveyed in 1876. This might be most conveniently accomplished by a band surrender…

154. On December 10, 1984, then Minister Crombie referred to the letter of Minister Munro and again imposed a requirement of surrender of the 1876 lands surveyed for Chacachas and Kakisiwew: Ochap 1-018(031) On October 8, 1985, INAC again provided its letter of April 19, 1984: Ochap 1-019(277).

1985-1995: Canada agreed to suspend operation of limitation periods

155. Canada agreed that the period between Sept 11, 1985, and March 16, 1995, "should not be counted for the purpose of limitations": Crown Undertaking No. 24.

1991: Statement of Claim issued

156. In 1991, Ochapowace commenced legal action against Canada: JB-00510. Ross Allary testified that "amalgamation" was not a term used by them and that the first time that he learned of that term was when Mr. Pillipow plead "amalgamation" on behalf of Ochapowace in the claim: TT Vol 10 at pg 30.

157. Errors were discovered in the claim by Ross Allary and others: TT Vol 10 at pg

[47] TT Vol 10 at pgs. 96-104.

35-36. In particular, paragraphs 6 and 7 of the Statement of Claim which suggested amalgamation of Chacachas and Kakisiwew, and that neither of them had occupied their reserves surveyed in 1876.

1991-1995: The common intention and understanding of the parties respecting settlement of TLE and Soldier Settlement was that the forced amalgamation of Kakisiwew and Chacachas was not included and that it would be addressed subsequently

158. Ochapowace had no authority to deal with the 1876 reserve lands or make decisions on behalf of either Chacachas or Kakisiwew: TT Vol 3 at pg 112.

159. Graham Macondald, Senior Policy Adviser within the Specific Claims branch and the most senior official to testify on behalf of Canada, testified that the TLE settlements do bind any band not a party thereto, do not constitute a release with respect to any claim for recognition of a band, nor could such a claim be adjudicated by the specific claims branch: TT Vol 13 at pg 36-37, and 39-40

> Q All right. And specifically, can we agree that there's nothing in the framework agreement that releases Canada from a claim for recognition of a Band? That's not a subject that's dealt with in the framework agreement?
> A If -- so if a group wanted recognition to become a First Nation, then they could apply to that. It wouldn't fall within Treaty land -- no, it wouldn't fall within this.
> Q Right.
> A It wouldn't fall within Specific Claims either.
> Q You would agree that –
> A It's a different area of the department would deal with such an issue.

160. Alois James Gross was the chief federal negotiator: TT Vol 13 at pg 46-47, and 87. He finalized more than 50 settlements on behalf of Canada: 102. He testified at pg 95-96 that the TLE agreements do not constitute a release with respect to any claim for recognition of a band:

161. Q And similarly, if a First Nation brought an action seeking recognition, this release would not cover that circumstance?

162. A That's my understanding as well, yeah.

163. Both former Chief Ross Allary and Chief Margaret Bear were personally involved in their capacity on Band Council.[48] Ross Allary testified that the issue of the forced amalgamation of Chacachas and Kakisiwew was not part of the settlement of TLE or Solider Settlement, nor was Ochapowace asked to give a release respecting

[48] Although Margaret Bear took a leave of absence for parenting between 1993 and 1995: TT Vol 11 at pg 136

same: TT Vol 10 at pg 41-42, 58, and 63. Chief Margaret Bear's testimony is consistent, namely the settlements respecting TLE and Soldier Settlement had nothing to do with the issue of forced amalgamation of Chacachas and Kakisiwew: TT Vol 11 at pg 132.

164. The read-in respecting discovery of Alois James Gross confirms that the parties were alive to the issue of amalgamation, however it was not included within the negotiation respecting TLE and Solider Settlement: Ex 21, Tab B, page 339

165. In particular, there was "an agreement among the parties in the negotiations to set it aside, conclude the Soldier Settlement file, conclude that, and that issue would be dealt with in the future. That's the way we worked…": Ex 21, Tab B, page 349 See also Ex 21, Tab B, pages 304-359 with referenced documents, and the adoption of same by Canada: Ex 21, Tab A, pages 184-213.

166. At trial, Alois James Gross further testified TT Vol 13 at pg 82-83 (see also 84, 96, 98, and 116)

> A With the Ochapowace First Nation, there was an issue about two Bands joining historically and we did not deal with that in this negotiation. We set that aside. Our view was to do the negotiation. If the First Nations wanted to split into two Bands at a later date, that would be up to the First Nation and their people, and the assets could be divided. So the issue, the two-Band issue was around, but it was not part of this Specific Claims negotiation.
> Q And why wasn't it part of this Specific Claims negotiation?
> A It was outside of the mandate. The mandate I had was to negotiate the claim on the basis of the legal acceptance, the legal view that Justice provided for acceptance with the shortfall compensation.
> …
> Q And what was your understanding when you said that you set the issue aside? What did you understand would happen after that?
> A The settlement, the releases that we required on those agreements would have no impact on that issue. That I don't know whether you want to use the word neutral, but it had no impact on it, so that issue was there before we settled. It was there after. And it was there on the same basis after it was before we settled.

167. Furthermore, the independent legal advice that was received respecting settlement of TLE and Solider Settlement did not include the amalgamation issue, nor did the meetings for ratification of those settlements: TT Vol 10 at pg 57-58.

1997-2012: Ochapowace exercises Treaty rights, as a result of which Canada imposes third party management

168. Ross Allary testified that in the 1990s, there was animosity between Canada and Ochapowace as a result of the GST litigation: TT Vol 11 at pg 102-103.

169. Petra Bellanger testified that for a period of 12 years commencing in 1998, Ochapowace was in third party management: TT Vol 15 at pg 10-11. Margaret Bear testified that third party management was 13 years and ended in 2012: TT Vol 11 at pg 124-129 and at TT Vol 11 at pg 146-147.

170. 1993-2018: Efforts at recognition and resolution of the Kakisiwew and Chacachas issue

171. Letter of Recognition for Chacachas, December 14, 1993: JB-00526 Sharon Bear testified as to the intent of same: TT Vol 3 at pg 64: "…was to have the Chacachas Reserve re-established and to recognize the obligation to the Government of Canada to re-establish our Reserve.

172. Following same, Chacachas researched and traced its membership for approximately three years. However, it lacked resources to conduct that research: TT Vol 3 at pg 64-65

173. Chacachas thereafter sought and received the assistance of Ochapowace through Chief Denton George. Ochapowace responded favorably, and was willing to assist in any way requested: TT Vol 3 at pg 66-67, and TT Vol 10 at pg 78. On October 15, 1998, Chief Denton George formally recognized Chacachas and requested that INAC assist with recognition thereof through the interim committee of Chacachas comprised of Sharon Bear, Eileen Farkas, Lynda Gatrell, and Cameron Watson: JB-00547. On October 19, 1998, the interim committee formally requested recognition from INAC: JB-00551 and TT Vol 3 at pg 69. On November 26, 1998, Ochapowace enacted the following Band Council Resolution: JB-00565

174. Canada failed to act on the said BCR in favour of the request for Ochapowace: TT Vol 11 at pg 142. On or about November 23, 1998, INAC provided Chief Denton George with excerpts from Chapter 11 of the New Bands/Bands Amalgamations policy (copy of which is Ex 27): JB-00560. On December 1, 1998, the interim committee again formally requested recognition from INAC and sought to further the process thereof: JB-00567 and TT Vol 3 at pg 71.

175. Chacachas obtained recognition as a First Nation from the Federation of Saskatchewan Indian Nations (currently known as the Federation of Sovereign Indigenous Nations or FSIN): TT Vol 3 at pg 72. Chacachas also obtained recognition as a First Nation from the Assembly of First Nations: TT Vol 4 at pg 47.

176. In April and July, 1999, Canada acknowledged a claim respecting Kakisiwew and Chacachas. In particular, INAC met with Chacachas and represented that it "would be willing to assist us, assist us in any way they could": TT Vol 4 at pg 10-11

177. On September 30, 1999, on behalf of Ochapowace, Chief Denton George again formally recognized Chacachas and Kakisiwew and requested that INAC assist with recognition and re-establishment of Chacachas and Kakisiwew: JB-00572.

178. On November 10, 1999, Ochapowace enacted the following Band Council Resolution: JB-00590. There was no response from INAC: TT Vol 10 at pg 87-88.

179. On April 17, 2000, Chacachas summarized Canada's contradictory positions over time and again formally requested re-establishment and recognition through a comprehensive and well-researched memorandum: JB-00595

180. There was no response to April 17, 2000, formal request of Chacachas: TT Vol 4 at pg 46.

Single alternative to this litigation proposed by Canada is section 17 of the Indian Act

181. Violet Kayseass testified that prior to the above noted November 10, 1999, Band Council Resolution requesting a "name change", INAC met with Chief Denton George and presented him with one option, namely the New Bands/Bands Amalgamations policy (Ex 27): TT Vol 14 at pg 11-13.

182. Violet Kayseass testified that pursuant to s.17 of the *Indian Act* and the New Bands/Bands Amalgamations policy (Ex 27), the discretionary approval of the Minister is necessary following a ratification vote of an absolute majority of all electors of the First Nation (as distinguished from a majority of only those electors that vote): TT Vol 14 at pg 10-11, 19-20 and 25.

183. Violet Kayseass further testified that while three First Nations have sought division pursuant to s.17 of the *Indian Act* and the New Bands/Bands Amalgamations policy (Ex 27), James Smith Cree Nation and White Bear First Nation are "complicated" and part of an negotiated settlement following litigation between the First Nation and Canada. With respect to Nekaneet First Nation, that was not actually a division pursuant to s.17 of the *Indian Act*: TT Vol 14 at pg 20-24.

184. Alois James Gross testified that he joined Specific Claims in 1991, and that he became the chief federal negotiator in 1991 or 1992. He further testified that Canada prioritized settlement of claims, including the Saskatchewan TLE (TT Vol 13 at pg

102-103). He further testified that while the two band issue was set aside and not addressed by the TLE and Solider Settlement settlements, the only option that was presented to address the two band issue was the New Bands/Bands Amalgamations policy. However, he also testified that while it was referred to, the policy was not discussed: TT Vol 13 at pg 84 (see also 107)

> Q And did you have any -- what discussions did you have about that in the context of the negotiation with respect to that policy?
> A I don't recall any discussions about the policy. Other than that we are not discussing -- no, we are not negotiating Band split. We are going to set these releases up and these agreements, that they had no impact on it, and the policies are out there to pursue. So I don't discuss -- I don't recall ever discussing the details of those policies other than to say there is -- that's how the issue is going to be -- could be handled, if they wanted to go that way.

185. As noted above, that testimony is buttressed by the testimony of Graham Macondald that the TLE settlements do not constitute a release with respect to any claim for recognition of a band, nor could such a claim be adjudicated by the specific claims branch: TT Vol 13 at pg 36-37

186. Ex 18 is the letter of INAC that followed the foregoing September 30, 1999, letter of Chief Denton George. INAC required adherence to the New Bands/Bands Amalgamations policy (Ex 27), an agreement between Ochapowace, Chacachas and Kakisiwew and their membership, and the was ultimately subject to the consideration and approval of INAC regionally and nationally:

> …any Band separation or division would have to be done in accordance with the New Bands/Band Amalgamations Policy, and that for the Ochapowace First Nation, the proposed separation or division would fall under the "No Cost" provision of the Policy. The Policy also requires that agreements be reached with the full consent of the Band membership and the community in how the existing land base, assets and liabilities would be divided, and how programs and services would be delivered.
> …initiating a joint request and a proposal does not mean approval. Any consideration of a Band separation or division is subject to a number of discussions, reviews and approvals, both regionally and nationally.

187. That letter and insistence upon its policy was the last letter from Canada or attempt by it to resolve the issue of Chacachas and Kakisiwew. Litigation was understood as the only alternative: TT Vol 11 at pg 38-40. Chief Margaret Bear characterized the Ex 18 response from INAC: TT Vol 11 at pg 143

> A It wasn't a favourable response. And in that we were advised that we would need to -- or this matter would need to follow their -- their policy, New Bands/Band Amalgamation Policy, and that there would be no cost provision, and

> so I would see it as do it my way, again there we go with the control and the non-support of a Treaty matter in that they tell us to do it their way.

188. In discovery, Canada described the process required by its policy: Ex 21, Tab A, pages 126-129

> …my experience has been that when Bands started looking into that, I mean, it's easy to say you want to divide, it's even tougher than a divorce in terms of the two individuals, because when you say you want to divide a Band, I mean, you're getting into a division of assets, you're getting into division of families, you're getting into all kinds of problems, but if anybody wants to go there, you're welcome to it.
> …
> …probably, the Department would even today tend to see whether or not there are ways and means of overcoming that issue as opposed to going the final step with respect to division. … Because as I say, that is a very – division is a divisive issue.

189. Canada has also described its attitude as "splitting of the Band **would** only be done under the exceptional circumstances as outlined in the [policy]": JB-00570 (Mr. Koback and Ms. Cawood are both INAC officials: TT Vol 10 at pg 75, and TT Vol 13 at pg 122-123).

190. Canada then conceded that by in following INAC's policy, Chacachas and Kakisiwew would be admitting that there was only one Band, in particular Ochapowace: Ex 21, Tab A, pages 129 at questions 275-276.

191. Sheldon Watson testified that division pursuant to the policy was not tenable: TT Vol 4 at pg 50-51

> Q And if the government's policy allows for the establishment of a Band through the order of a minister under the Indian Act, how is that viewed by Chacachas?
> …A Well, it's not viewed very favourably by any of us. I would feel confident certainly and I would go out on a limb to say that that's not something that we would agree to or certainly consider.
> Q And why is it not something that's satisfactory?
> A Because we are a Treaty Band, sir. We are Treaty. We are descendants of our forefathers who signed Treaty, Chief Chacachas. He signed Treaty September 15th, 1874, in Fort Qu'Appelle. This is a Treaty issue, sir. We are a Treaty Band. We have maintained all along that we are a separate and independent First Nation, one who signed Treaty.

192. Ross Allary testified in support of Treaty recognition of Chacachas and Kakisiwew, rather than creation or recognition pursuant to the Indian Act. Furthermore, adherence to the policy would be at no cost to Canada, which cost would be placed upon Ochapowace, Chacachas and Kakisiwew: TT Vol 11 at pg 101-102. Violet Kayseass testified that the policy only applies to First Nations recognized by Canada, and that the "no cost" provision means "no cost to the government [of

Canada]": TT Vol 14 at pg 18-19.

193. Ross Allary testified that Ochapowace had "tried everything else we could think of, but I [understood] the only way to settle this is by court": TT Vol 10 at pg 84-85. In particular: TT Vol 10 at pg 86

> Q …were they prepared to offer anything beyond their policy and settlement?
> A No. They refused, so we left it for today.

194. Chief Margaret Bear testified: TT Vol 11 at pg 133

> Q And as you speak with your members, what do they ask for in terms of their role in relation to these -- the outcome of these proceedings? What do they want?
> A One of the things that we all have is inherent rights, and those are rights that we are born with. One of those rights is self-determination. Very important. They will self-determine where they will live. That was always the key message of Chief George, self-determination.

Implementation of TLE and Solider Settlement Agreements: the original reserve lands have been acquired and are administered by Chacachas and Kakisiwew

195. Most members from Chacachas continue to reside on the east side of Ochapowace, while the members from Kakisiwew continue to reside on the west: TT Vol 10 at pg 104-105. Ochapowace has acquired lands in satisfaction of the settlements of TLE and Solider Settlement, which lands are adjacent to Ochapowace and selected as they formed part of the original reserve of Chacachas. Those lands have been or are in the process of being converted to reserve status: TT Vol 15 at pg 16-18. 18,000 acres of which have been set aside for Chacachas in the vicinity of the original lands that were surveyed in 1876. Those lands are currently occupied by Chacachas and considered its territory: TT Vol 3 at pg 78-79 and Ex 2, and TT Vol 10 at pg 108. Chacachas administers those lands: TT Vol 4 at pg 51-52 and TT Vol 10 at pg 105-106.

196. Ochapowace has also acquired TLE lands and converted them to reserve status in the vicinity of the original lands that were surveyed in 1876 for Kakisiwew: TT Vol 3 at pg 81-82.

Crown Research concluding that the amalgamation was forced

197. April 9, 1998: JB-00538

198. November 30, 1998: JB-00563.

PART III. POINTS IN ISSUE

199. Ochapowace submits the following are the responses to each of the questions based upon the evidence to be advanced at Trial in these proceedings:

> ***Were the Chacachas Band and Kakisiwew Band separate signatory nations to Treaty 4?*** **YES**
>
> ***Did the Chacachas Band and Kakisiwew Band amalgamate, and if so was it proper?*** **NO**
>
> ***Should this Honourable Court grant a constitutional declaration?*** **YES**
>
> ***Does a constitutional declaration impact upon the status of Ochapowace First Nation?*** **NO**
>
> ***Should there be any reason for the relief sought not to occur? NO***

PART IV. SUBMISSIONS

Were the Chacachas Band and Kakisiwew Band separate signatory nations to Treaty 4? YES

200. Canada has conceded that there were Indian Bands led by each of Chief Chacachas and Chief Kakisiwew in 1874, and that each of those Bands were separate signatory nations to Treaty 4 when the Crown entered into same.

201. In *Beckman v Little Salmon/Carmacks First Nation*,[49] the Supreme Court of Canada stated the following with respect to the nature of the relationship grounding the relationships between the Crown and Aboriginal peoples:

> Historically, treaties were the means by which the Crown sought to reconcile the Aboriginal inhabitants of what is now Canada to the assertion of European sovereignty over the territories traditionally occupied by First Nations. The objective was not only to build alliances with First Nations but to keep the peace and to open up the major part of those territories to colonization and settlement…The modern [1973] treaties…attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities.

202. A Treaty is an exchange of solemn promises between the Crown and Indigenous peoples.[50] It is an agreement which is 'sacred' and "often formed the basis for peace and the expansion of European settlement".[51] In fulfillment of Treaty, reserves were created for each of Chacachas and Kakisiwew.

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[49] 2010 SCC 53.
[50] See discussion in *R v Badger*, [1996] 1 SCR 771 (SCC) ["Badger"].
[51] *Ibid* and also see *R v Sundown*, 1999 1 SCR 393.

203. In *Ross River Dena Council v Canada*,[52] LeBel J. recognized that there was a presumption that the reserve creation process engages the Crown's fiduciary duty (at para 68).

204. In *Wewaykum Indian Band v Canada*,[53] the Supreme Court of Canada set out the principles with respect to reserve creation and fiduciary duties. It was held that the Crown has fiduciary obligations during the reserve creation process. At paragraph 86, Binnie J. set out the legal principles as to reserve creation and the Crown's fiduciary duties then stated "the content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected. It does not provide a general indemnity".[54] The fiduciary duty is different before and after reserve creation: "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".[55] See also *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*,[56] for the fiduciary obligation principles as they apply to reserve creation.

205. A fiduciary obligation exists where one possesses unilateral power or discretion on a matter affecting a second particularly vulnerable party. The notion at heart in the fiduciary relationship is that the party who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care.[57] Strict standards of conduct govern the exercise of that discretion to ensure the obligation is fulfilled.[58] The standard of care required of a fiduciary with respect to the administration and care of another's property, "is that of a man of ordinary prudence in managing his own affairs",[59] of "ordinary diligence".[60]

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[52] 2002 SCC 54 ["*Ross River*"].
[53] 2002 SCC 79 ["*Wewaykum*"].
[54] Ibid at para 87.
[55] Ibid at para 97.
[56] 2018 SCC 4 at paras 55-88 ["*Williams Lake*"]
[57] *Blueberry River Indian Band v Canada (Department of Indian Affairs & Northern Development)* 1995 4 SCR 344 ["Blueberry River"].
[58] *Guerin v The Queen*, 1984 2 SCR 335 ["*Guerin*"].
[59] *Fales v Canada Permanent Trust Co.*, 1977 2 SCR 302; *Blueberry River Indian Band*, supra note 57; *Wewaykum*, supra note 53; and *Ermineskin Indian Band & Nation v Canada* 2009 SCC 9 ["*Ermineskin*"].
[60] *Wewaykum*, supra note 53.

206. A failure to follow statutory provisions, such as surrender provisions in the *Indian Act* is a *prima facie* establish a breach of the fiduciary obligation.[61] By its very nature, Indigenous interests in land are inalienable and cannot be surrendered except with the Crown's consent.[62] Because of this, the Crown assumed a fiduciary obligation to ensure that any surrender is not exploitive.[63]

207. The content of the Crown's fiduciary duty towards Indigenous peoples varies with the nature and importance of the interest to be protected,[64] and with the amount of discretionary control the Crown has over the interest.[65] Creating Indian reserves for Indian bands that do not have them,[66] protecting recognized Indigenous interests in land both before and after Confederation,[67] dealing with competing interests of different First Nations,[68] and dealing with surrenders in reserve lands or dealing with surrendered land or proceeds thereof[69] have all been held to ground different fiduciary obligations.

208. The obligation of the Crown is to "act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with 'ordinary' diligence in what it reasonably regarded as the best interest of the [First Nation] beneficiaries."[70] Where there are conflicting demands between more than one beneficiary, the Crown's duty is to be "even-handed towards and among" them.[71] Ochapowace has properly acted as involuntary trustee in the context of this breach of fiduciary obligation by the Crown.

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[61] *Guerin*, *supra* note 58; *Ermineskin*, *supra* note 59; and *Lac Seul First Nation v Canada*, 2009 FC 481.
[62] *Semiahmoo Indian Band v Canada* (1997), 148 DLR (4th) 523 (FCA) ["*Semiahmoo*"]; *Blueberry River*, supra note 57.
[63] *Ibid*; also see *Guerin*, supra note 58.
[64] *Wewaykum*, supra note 53.
[65] *Williams Lake*, supra note 56.
[66] *Ross River Dena Council*, supra note 52; *Wewaykum Indian Band*, supra note 53.
[67] *Williams Lake*, supra note 56.
[68] *Wewaykum*, supra note 53; *White Bear First Nations v Canada (Minister of Indian Affairs & Northern Development)* 2012 FCA 224.
[69] *Semiahmoo*, *supra* note 62; *Blueberry River Indian Band*, supra note 57; and *Guerin*, supra note 58.
[70] *Wewaykum*, supra note 53.
[71] *Ibid*.

Did the Chacachas Band and Kakisiwew Band amalgamate, and if so was it proper? NO

209. With respect, the presumption of regularity is inapplicable. At paragraph 11-23 of *R. v. Molina*, 2008 ONCA 212 at para 12, the Ontario Court of Appeal considered the presumption of regularity and endorsed the following articulation by Wigmore of four conditions to its application:

> . . . first, that the matter is more or less in the past, and incapable of easily procured evidence; secondly, that it involves a mere formality, or detail of required procedure, in the routine of a litigation or of a public officer's action; next, that it involves to some extent the security of apparently vested rights, so that the presumption will serve to prevent an unwholesome uncertainty; and finally, that the circumstances of the particular case add some element of probability.

210. Firstly, if "Informing an offender about the penal consequences of a breach is not simply a routine formality or procedural detail." (*R. v. Molina* at paragraph 23), with respect, it is difficult to accept that the issue of constitutional consultation and consent respecting the continued independent existence of Kakisiwew Band and Chacachas Band is "mere formality".

211. Secondly, the presumption of regularity is merely an evidentiary presumption. As noted in *Powell v. Cockburn*, [1977] 2 S.C.R. 218 at paragraphs 14-15, "…Their only effect is to impose a duty on the party against whom they operate to adduce some evidence…" Upon the receipt of evidence on the issue in respect of which the presumption of regularity is asserted, proof on the ordinary balance of probabilities pertains: *R. v. Molina*, 2008 ONCA 212 at para 20. Even if the presumption of regularity is appropriate, evidence has in fact led that displaces it. As such, the presumption is displaced as is the evidentiary burden.

212. Finally, the presumption would neither "prevent an unwholesome uncertainty" nor "add some element of probability".

213. The Crown breached its duty of Honour when it stopped recognizing the Treaty bands of Chacachas and Kakisiwew, instead recognizing a new Indian Band Ochapowace. The breach strikes to the heart of the Treaty relationship and the Aboriginal Title confirmed by said relationship. The Crown read-ins confirm their position McDonald could eliminate the Aboriginal Title to land by McDonald's administrative act and create a new band merging Treaty bands without consent or compliance with then legislation, Indian Act 1880. This position of necessity implies the Crown could cease to recognize the Treaty bands both as to land and existence by

executive or administrative act only. This is a fundamental legal error.[72]

214. The oral traditional knowledge confirms these administrative acts were combined with other breaches of Honour of the Crown making objection impossible. Starvation policy, the pass system, residential schools, and interruption of band governance were in evidence. The complete de facto control and fear of the Indian Agent confirmed the administrative act of a paylist and alleged non-objection are not proper arguments. In sum, the oral traditional knowledge confirms no consent or consultation to the unilateral actions of the Crown. When objection did occur, either in the 1911 or Neff circumstances, both were dealt with by non-action on the part of the Crown to correct its breach. The Crown had acted to correct its breach in other circumstances such as in Little Bone. Expert historical findings confirm the characterization of administrative acts done by McDonald which are described in the context of a specific conflict with Chacachas as indicated in the Storey historical report and in the context of the conflict documented by Nestor (1882 to 1884) between members and McDonald. The band has persisted in division between Chacachas and Kakisiwew, and other members of Ochapowace not affiliated or not part of those two original bands. The Crown suggests actions since 1951 changed the character of their previous breaches. Chacachas and Kakisiwew bands were never amalgamated, merged or otherwise joined. A simple administrative act of McDonald to create a new band is the sole and improper justification offered by the Crown. The Crown speaks to relieve responsibility for same by pointing to legislation in 1951, OIC in 1973 and TLE and Solider Settlement agreements—none of those matters affect the Constitutional obligation existent to the two Treaty bands and those Treaty band members remaining as part of Ochapowace.

215. Ochapowace submits that the issues in these proceedings must be assessed in its entire historical context having regard to the Honour of the Crown. This analysis is largely a fact driven exercise on case-by-case basis. The Honour of the Crown must be assessed in its entire historical context. Pursuant to the *Constitution Act*, s. 35 the existing aboriginal and treaty rights of aboriginal peoples of Canada are recognized and affirmed.

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[72] McNeil, Kent, The Source, Nature and Content of the Crown's Underlying Title to Aboriginal Title Lands. The Canadian Bar Review; 2018, v.96, no. 2.

216. In *Marshall v Canada*,[73] the Supreme Court of Canada stated that the honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples. In this decision the court cited *R v Badger*,[74] at para 41 which states, "the honour of the Crown is always at stake in its dealing with Indian people…It is always assumed that the Crown intends to fulfill its promises. No appearance of "sharp dealing" will be sanctioned". [75] Additionally the court stated Crown servants must seek to perform the obligation on a way that pursues the purpose behind the promise and the Aboriginal group must not be left "with an empty shell of a treaty promise".[76]

217. Ochapowace submits the following should be considered by this Honourable Court in determining whether a constitutional declaration is appropriate:

218. Through the signing of Treaty 4 by Chief Kakisiwew and Chief Chacachas, the Honour of the Crown was invoked in future dealings with the Crown. The Crown took on a solemn obligation to create a Treaty paylist which led to the numbers which led to the set apart reserve land for each of Kakisiwew and Chacachas bands. In accordance with Treaty 4, such honour was engaged.

219. The conduct of the Crown in the implementation of the Treaty obligations, especially as it related to the reserves was fundamental breached way by the purported resurvey of the lands and the purported forced election.

220. Subsequent breaches included implementation of the oppressive practices by the Crown as against Aboriginal people and specific conduct as against the members of Chacachas and Kakisiwew to prevent and remove Chiefs and leadership. Governance was denied to Chacachas and Kakisiwew—as well as Ochapowace. Initial advocacy by Ochapowace as involuntary trustee to challenge the actions of the Crown resulted in the denial of the Crown to account for previous breaches and stop future accountability to continue to deny legal counsel. Control of the governance and finances of the First Nation by the Crown would continue through at least until the period of time in which TLE settlement occurred which permitted Ochapowace the financial ability through own source revenue to challenge the breaches of the Treaty

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[73] *Marshall v Canada*, [1999] 4 CNLR 161 (SCC).
[74] [1996] 1 SCR 771 (SCC).
[75] Also see Royal Proclamation, 1763, see RSC 1985, App. II (No. 1)
[76] *Ibid* at para 52.

by the Crown.

221. Subsequently the Crown had the opportunity to address the breaches of Honour of the Crown and deliberately acted to prevent accountability and reconciliation by reliance on the 1951 amendments which did not pertain to Treaty bands. Further in 1973, the OIC was a demonstration of further sharp dealings by the Crown to determine *Indian Act* band existence.

222. The Crown in deferring the involuntary membership issue and not addressing same concurrently with or as part of the Soldier Settlement and TLE agreements suggest there are special obligations on the Crown with respect to the two band issue within the Honour of the Crown.

223. The Honour of the Crown is an obligation on behalf of the Crown to purposively and diligently discharge constitutional obligations that are owed specifically to Aboriginal peoples.[77] Further the majority decision stated that the key question in circumstances where the duty is engaged, is whether or not the Crown acted "with diligence to pursue the fulfilment of the purpose of the obligation" and "in a way that would achieve its objectives".[78]

224. 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.[79] Not every mistake or negligent act when implementing a Crown obligation brings dishonour to the Crown. But a persistent pattern of errors and indifference that substantially frustrates the purpose of a solemn promise could amount to a betrayal of the Crown's duty to act honourably.[80]

225. What constitutes honourable conduct will vary according to the context. The majority stated that this duty "varies with the situation in which it is engaged" and that "what constitutes honourable conduct" in any given situation will also vary depending on context.[81]

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[77] *Ibid*, at para 9 and 79.
[78] *Ibid*, at para 97.
[79] *Ibid* at para 75.
[80] *Ibid* at para 82.
[81] *Ibid* at para 74.

226. The Supreme Court in *First Nation of Nacho Nyak Dun v Yukon*,[82] recently cited *Manitoba Metis Federation* stating that Yukon could only depart from positions it had taken in the past in good faith and in accordance with the honour of the Crown.[83] They went on state that when exercising rights and fulfilling obligations pursuant to Treaty, (in that case a modern Treaty), the Crown must always conduct itself in accordance with s. 35 of the Constitution Act, 1982.[84]

Should this Honourable Court grant a constitutional declaration? YES

227. While a declaration is discretionary, it is available regardless of the existence of a cause of action provided there is jurisdiction, the issues are amenable to determination on their merits, and there exists no other "adequate alternative statutory mechanism to resolve the dispute or to protect the rights in question": *Ewert v Canada*, 2018 SCC 30 at paras 81 and 83

> [81] A declaration is a narrow remedy but one that is available without a cause of action and whether or not any consequential relief is available…A court may, in its discretion, grant a declaration where it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought…

228. With respect, Phase 1 is exclusively declaratory in nature upon consideration of the specific issues directed for determination by the Honourable Mr. Justice Hugessen. Ultimately, the single constitutional declaration sought in Phase 1 is narrow: each of the Chacachas Band and the Kakisiwew Band continue to exist as Treaty Bands. Consequently, consideration of limitations periods is circumscribed to Phase 2 should same proceed.

229. A declaration ensures that the "right…to constitutional behaviour" may be vindicated, with constitutional issues "always justiciable": *Manitoba Métis Federation Inc. v Canada (Attorney General)*, at para 134.[85] In particular:

> [135] Thus, this Court has found that limitations of actions statutes cannot prevent the courts, as guardians of the Constitution, from issuing declarations on the constitutionality of legislation. By extension, **limitations acts cannot prevent the courts from issuing a declaration on the constitutionality of the Crown's conduct**.
> …

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[82] 2017 SCC 58.
[83] Ibid at para 52.
[84] Ibid.
[85] 2013 SCC 14 [*Manitoba Metis*]; See also *Calwell Fishing Ltd. v Canada*, 2016 FC 312 at para 126 and in particular 140.

> [140] …The courts are the guardians of the Constitution and…cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less…[Emphasis added]

230. In the unique circumstances with which Chacachas Band, Kakisiwew Band, and Ochapowace have been confronted for well over a century, "declaratory relief may be the only way to give effect to the honour of the Crown": *Manitoba Métis* at para 143.

231. The Crown has suggested two alternative statutory mechanisms, namely the Specific Claims Tribunal, and s. 17 of the *Indian Act* and the New Bands/Bands Amalgamations policy (Ex 27). There are several relevant consideration when evaluating same: *Strickland v Canada (Attorney General)*, at paras 40-45,[86] and in particular:

> [42] The cases identify a number of considerations relevant to deciding whether an alternative remedy or forum is adequate so as to justify a discretionary refusal to hear a judicial review application. These considerations include the convenience of the alternative remedy; the nature of the error alleged; the nature of the other forum which could deal with the issue, including its remedial capacity; the existence of adequate and effective recourse in the forum in which litigation is already taking place; expeditiousness; the relative expertise of the alternative decision-maker; economical use of judicial resources; and cost… In order for an alternative forum or remedy to be adequate, neither the process nor the remedy need be identical to those available on judicial review. As Brown and Evans put it, "in each context the reviewing court applies the same basic test: is the alternative remedy adequate in all the circumstances to address the applicant's grievance?"…

232. With respect, the nature of the constitutional concerns brought before this Honourable Court by Chacachas Band, Kakisiwew Band, and Ochapowace in furtherance of reconciliation following over a century of disregard by the Crown warrant impartial consideration and determination through judicial process. With respect, the Crown's suggestion that its Minister is capable of acting as an impartial arbiter of these concerns with constitutional important is insincere. In *Brass v Key Band First Nation*,[87] the Minister was similarly identified as having a "direct interest in the result", and "several other interests": para 24. In *Brass*, this Honourable Court concluded that the importance of the issue, the nature of the allegations, and the procedural limitations implicated rendered judicial consideration appropriate notwithstanding the existence of an alternative statutory mechanism: paras 24-25. Of particular relevance, judicial consideration was a "more direct and clear challenge"

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[86] 2015 SCC 37; See also *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 SCR 3 at para 37
[87] 2007 FC 581.

and that it "unfiltered by the exercise of Ministerial judgment": para 27.

233. The Crown has conceded that it would only accede to a request to divide under "exceptional circumstances": JB-00570. While the Minister's exercise of discretion pursuant to s.17 of the *Indian Act* and the New Bands/Bands Amalgamations policy (Ex 27) would be ultimately subject to judicial review, with respect the focus should be upon an unfiltered and direct examination of the constitutionally impugned conduct of the Crown. With respect, the core concern of Chacachas Band, Kakisiwew Band, and Ochapowace would remain unresolved should they be directed to s. 17 of the *Indian Act* and the Policy. In particular, the Crown has conceded that by following INAC's policy, Chacachas and Kakisiwew would be admitting that there was only one Band, in particular Ochapowace: Ex 21, Tab A, pages 129 at questions 275-276.

234. With respect, dignity is inseparable from self-determination. Recognition of Chacachas Band and Kakisiwew Band through constitutional declaration is the only way redress a historic wrong, and to promote healing through reconciliation. Sheldon Watson testified that recognition pursuant to the *Indian Act* is inadequate: TT Vol 4 at pg 50-51

> Q And if the government's policy allows for the establishment of a Band through the order of a minister under the Indian Act, how is that viewed by Chacachas?
> …A Well, it's not viewed very favourably by any of us. I would feel confident certainly and I would go out on a limb to say that that's not something that we would agree to or certainly consider.
> Q And why is it not something that's satisfactory?
> A Because we are a Treaty Band, sir. We are Treaty. We are descendants of our forefathers who signed Treaty, Chief Chacachas. He signed Treaty September 15th, 1874, in Fort Qu'Appelle. This is a Treaty issue, sir. We are a Treaty Band. We have maintained all along that we are a separate and independent First Nation, one who signed Treaty.

235. Chief Margaret Bear also testified: TT Vol 11 at pg 133

> Q And as you speak with your members, what do they ask for in terms of their role in relation to these -- the outcome of these proceedings? What do they want?
> A One of the things that we all have is inherent rights, and those are rights that we are born with. One of those rights is self-determination. Very important. They will self-determine where they will live. That was always the key message of Chief George, self-determination.

236. Of particular note, subsections 17(1)(b) and (3) of the *Indian Act* stipulate that the Minister will establish the band lists, and that no protest to those band lists may be

made where a division is accomplished pursuant to section 17.[88] With respect, the right to individual and collective self-determination is inconsistent with the Minister's discretionary imposition of authority immune to judicial review respecting who may or may not be a member of Chacachas Band and Kakisiwew Band.

237. It is significant that in *Manitoba Métis* at para 137, the Court specifically approved of the grant of a constitutional declaration in circumstances where it is sought "in order to assist…in extra-judicial negotiations with the Crown in pursuit of the overarching constitutional goal of reconciliation that is reflected in s. 35 of the *Constitution Act, 1982*." Of the only three examples cited by Violet Kayseass, both of the First Nations that sought division pursuant to s. 17 of the *Indian Act* and the New Bands/Bands Amalgamations policy (Ex 27) were "complicated" and part of an negotiated settlement following litigation between the First Nation and Canada: TT Vol 14 at pg 20-24. With respect, it is appropriate for this Honourable Court to grant the constitutional declaration sought in furtherance of reconciliation of sovereignty of the Crown with its Treaty partners Chacachas Band and Kakisiwew Band.

238. The existence of the Specific Claims Tribunal barred the grant of declaratory relief in *Peepeekisis Band v Canada*,[89] at paras 59-62, it is statutorily precluded from granting the relief sought here: recognition as a Treaty Band. In particular, pursuant to ss 20(1)(a) of the *Specific Claims Tribunal Act*,[90] it may only grant monetary compensation. Additionally, pursuant to s.2, Chacachas and Kakisiwew cannot be a "claimant" as they are not recognized as a Band pursuant to the *Indian Act*.

239. With respect to the Crown's suggestion that the constitutional declaration sought should be denied on the basis of laches, with respect three considerations are determinative. There has been no acquiescence on the part of Chacachas, Kakisiwew, and Ochapowace in the context of palpable disparity in "knowledge, capacity and freedom" as between themselves and the Crown, and "the imbalance in power that followed Crown sovereignty": *Manitoba Métis* at para 147.

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[88] For example, see *McArthur v. Canada (Department of Indian Affairs and Northern Development)*, 1992 CanLII 8090 (SKQB) at paras 20-22, and *Medeiros v. Ginoogaming First Nation*, 2001 FCT 1318 at para 108

[89] 2013 FCA 191.

[90] S.C. 2008, c. 22.

240. The second consideration is that that the Crown has not changed its position as a result of any asserted delay that "arose from reasonable reliance on the claimant's acceptance of the status quo", much less changed its position at the invitation of Chacachas, Kakisiwew, or Ochapowace in a manner that would make determination upon the merits untenable or unreasonable: *Manitoba Métis* at paras 145 and 152. In particular, the evidence is clear throughout: at no point did Chacachas, Kakisiwew, or Ochapowace "accept the *status quo*". At best, the Crown has suggested that the settlements of TLE and Solider Settlement indicate that the Crown changed its position. However, the evidence of both Ross Allary and Alois James Gross is consistent that the common intention and understanding of everyone was that the forced amalgamation of Kakisiwew and Chacachas was a live issue, that it was not included in either of the settlements, and that it would be addressed subsequently. For the same reason, Kakisiwew and Chacachas cannot be estopped or contractually precluded: this Honourable Court must go beyond the four corners of the written terms within which the Solider Settlement and TLE settlement agreements were expressed, to ascertain the "the intent of the parties and the scope of their understanding": *Ter Keurs Bros. Inc. v Last Mountain Valley (Rural Municipality)*,[91] and in particular para 52, citing *Sattva Capital Corp. v Creston Moly Corp.*.[92] Everyone viewed the issue of Chacachas and Kakisiwew as being deferred for resolution subsequently.

241. Finally, it is significant that in *Manitoba Métis* at para 153, the Court expressly called from the constrained application of the equitable doctrine of laches in the context of a constitutional declaration:

> [153] …It is difficult to see how a court, in its role as guardian of the Constitution, could apply an equitable doctrine to defeat a claim for a declaration that a provision of the Constitution has not been fulfilled as required by the honour of the Crown. …The Constitution is the supreme law of our country, and it demands that courts be empowered to protect its substance and uphold its promises.

[91] 2019 SKCA 10.
[92] 2014 SCC 53.

Does a constitutional declaration impact upon the status of Ochapowace First Nation? NO

242. Should the declaration be granted, Ochapowace submits that a constitutional declaration would not impact the status of Ochapowace and that members should be permitted to self-determine their membership as submitted in paragraph 11 above, and reflected in the positions of past and present leaders of Ochapowace.

Should there be any reason for the relief sought not to occur? NO

243. Ochapowace submits that it will not provide submissions directly on the issues of standing and relies upon the submissions of Kakisiwew and Chacachas with respect to same.

244. Ochapowace submits that there no other basis in which the relief sought should not occur.

PART V. RELIEF

245. Ochapowace therefore respectfully requests the answers as contained in our opening written submissions occur in response to the issues ordered for Phase I Trial by the Honourable Justice Hugessen:

1) Was there an Indian band led by Chief Chacachas in 1874? **Yes**
2) Was there an Indian band led by Chief Kakisiwew in 1874? **Yes**
3) Were Chief Chacachas' band and Chief Kakisiwew's band amalgamated, consolidated or otherwise joined together? If yes, was it properly done? **Ochapowace was created as an *Indian Act* band and all the actions of the Ochapowace did not constitute amalgamation, consolidation or otherwise joining of the Chacachas and Kakisiwew bands. In the alternative, if it did constitute a joining, it was not properly done.**
4) If no, are the Chacachas band and Kakisiwew band entitled to be recognized as distinct treaty bands? If so, are the Chacachas band and the Kakisiwew band estopped or otherwise prevented from asserting that they are distinct treaty bands? **Yes Chacachas and Kakisiwew bands are entitled to be recognized as distinct Treaty bands, and the Honour of the Crown provides that no justification is present to deny these Treaty bands the benefit of their status as distinct Treaty bands.**
5) If Chacachas and Kakisiwew exist as distinct treaty bands, what is their legal status? **Chacachas and Kakisiwew continue to exist and have not been extinguished. Within Honour of the Crown the membership of those bands shall be entitled to self-determine their future.**

6) Are the named plaintiffs in actions T-2153-00 and T-2155-00 members of either the Chacachas or Kakisiwew bands or are they members of the Ochapowace Indian Band? Do the named plaintiffs properly represent the individuals who are members of either the Chacachas or Kakisiwew band? **The named plaintiffs in actions T-2153-00 and T-2155-00 are involuntary members of the Ochapowace, and are members of Chacachas and Kakisiwew respectively who properly represent the membership of Chacachas and Kakisiwew Indian Bands**.

7) Does the Ochapowace Indian Band No. 71 recognized by the Crown, continue to exist as a treaty band notwithstanding the determination of issues 1 through 6 above? **Yes Ochapowace continues to exist, and the future of Ochapowace will follow the declaration as respectively outlined above in 1 through 6 above**. **Members of Ochapowace who self-determine to exercise their Treaty rights as members of Ochapowace will exercise self-determination about the future of Ochapowace Indian Band No. 71**.

DATED at Regina, Saskatchewan, this 31st day of January, 2019.

PHILLIPS & CO.

Per: _____
Mervin C. Phillips,
Solicitors for Ochapowace First Nation

PART VI. AUTHORITIES

Legislation

Constitution Act, 1982, enacted as Schedule B to the *Canada Act 1982*, 1982, c 11 (UK), which came into force on April 17, 1982.

Federal Court Rules, SOR/98-106.

Federal Court Practice Guidelines for Aboriginal Law Proceedings, April 2016.

Indian Act, SC 1894, c 32, s 11.

Indian Act, RSC 1927, c 98, s 141.

Indian Act, SC 1951, c 29, ss 5-17.

Royal Proclamation, 1763, see RSC 1985, App. II (No. 1).

Specific Claims Tribunal Act, SC 2008, c 22.

Case Law

Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53
Blueberry River Indian Band v Canada (Department of Indian Affairs & Northern Development), 1995 4 SCR 344
Brass v. Key Band First Nation, 2007 FC 581
Calwell Fishing Ltd. v Canada, 2016 FC 312
Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 SCR 3
Ermineskin Indian Band & Nation v Canada, 2009 SCC 9
Ewert v Canada, 2018 SCC 30
Fales v Canada Permanent Trust Co., 1977 2 SCR 302
First Nation of Nacho Nyak Dun v. Yukon, 2017 SCC 58
Guerin v The Queen, 1984 2 SCR 335
Kingfisher v. Canada, 2002 FCA 221
Lac Seul First Nation v Canada, 2009 FC 481
Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14
Marshall v Canada, [1999] 4 CNLR 161 (SCC)
McArthur v. Canada (Department of Indian Affairs and Northern Development), 1992 CanLII 8090 (SK QB)
Medeiros v. Ginoogaming First Nation, 2001 FCT 1318
Montana Band v. Canada, 2006 FC 261
Peepeekisis First Nation v. Canada, 2013 FCA 191
Powell v. Cockburn, [1977] 2 S.C.R. 218
R v Sundown, 1999 1 SCR 393
R. v. Badger, [1996] 1 SCR 771
R. v. Molina, 2008 ONCA 212
Ross River Dena Council Band v. Canada, 2002 SCC 54

Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53
Semiahmoo Indian Band v Canada (1997), 148 DLR (4th) 523 (FCA)
Snake v. The Queen, 2001 FCT 858
Strickland v. Canada (Attorney General), 2015 SCC 37
Ter Keurs Bros. Inc. v Last Mountain Valley (Rural Municipality), 2019 SKCA 10
Wewaykum Indian Band v. Canada, 2002 SCC 79
White Bear First Nations v Canada (Minister of Indian Affairs & Northern Development), 2012 FCA 224
Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development), 2018 SCC 4

Other Authorities

McNeil, Kent, The Source, Nature and Content of the Crown's Underlying Title to Aboriginal Title Lands. The Canadian Bar Review; 2018, v.96, no. 2

Phillips & Co.
Barristers & Solicitors
2100 Scarth Street
Regina, Saskatchewan S4P 2H6
T: (306) 569-0811
F: (306) 565-3434
Email: mervinphillips@phillipsco.ca
Lawyer in charge of file: Mervin C. Phillips

TO: The Registrar
Federal Court of Canada

AND TO: Karen Jones
Justice Canada
Prairie Region, Saskatoon Office
123 – 2nd Avenue South, 10th Floor
Saskatoon, Saskatchewan S7K 7E6
Telephone: (306) 975-5898
Facsimile: (306) 975-5013
Solicitor for the Defendants, Her Majesty the Queen in Right of Canada

AND TO: Thomas J. Waller, Q.C.
Olive Waller Zinkhan & Waller
Barristers and Solicitors
Suite 1000, 2002 Victoria Avenue
Regina, Saskatchewan S4P 0R7

Telephone: (306) 359-1888
Facsimile: (306) 352-0771
Solicitor for the Plaintiffs, Watson et al

AND TO: Norman Boudreau
Boudreau Law
Barristers and Solicitors
3 St. Anne's Road
Winnipeg, MB R2M 2X9

Telephone: (204) 318-2681
Facsimile: (204) 231-2628
Solicitor for the Plaintiffs, Bear et al