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

FEDERAL COURT

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

FINAL ARGUMENT OF THE DEFENDANT, HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Department of Justice Canada
Prairie Region, Saskatoon Office
123 – 2nd Avenue South, 10th Floor
Saskatoon, SK S7K 7E6

Contents

I. OVERVIEW

1. Reconciliation is an ongoing process through which Indigenous peoples and the Crown must work cooperatively to establish and maintain a mutually respectful framework for living together. Reconciliation requires recognition of rights and that we all acknowledge the wrongs of the past and work together.

2. In 1993, the Ochapowace band, as successor to two historic bands, Chacachas and Kakisiwew, asserted the collective's treaty land entitlement (TLE) rights and negotiated a settlement with Canada totalling $16,222,134.12. The plaintiffs were involved with the TLE negotiations, ratified the TLE agreement, and received the benefits of the TLE settlement proceeds. The Ochapowace TLE Settlement Agreement contains negotiated terms and warranties that contradict the plaintiffs' position in these actions.

3. The plaintiffs now ask this court to find that they are not members of the Ochapowace band and declare that their entitlement to reserve lands remains outstanding despite the 1993 TLE settlement. The historic record, modern documents, and testimony elicited at trial do not support the plaintiffs' position.

4. After signing Treaty 4 in 1874, Chief Chacachas' band was fragmented with many members absenting themselves for significant periods of time. The oral tradition evidence suggests there was an agreement between the chiefs of the Chacachas and Kakisiwew bands and that Chacachas members eventually went to the United States and stayed there or joined other Canadian bands, including the Kakisiwew band.

5. Canada's servants consulted the historic bands prior to relocating their reserves and surveying a joint reserve in 1881. The oral tradition evidence provided no facts to contradict the historic record. Federal officials deemed the Kakisiwew band and a portion of the Chacachas band to have amalgamated in 1884, at a time when no

legislation governed amalgamations. The historic record and modern documents show that the plaintiffs' and their ancestors thereafter conducted their affairs as members of the amalgamated Ochapowace band regardless of their historic affiliations.

6. The evidence in this trial clearly demonstrates the plaintiffs' continuous knowledge of the facts underlying these claims. The plaintiffs have obtained their treaty land allotment and too much time has passed to allow these claims to continue. Modern agreements negotiated in good faith must be respected in order to achieve reconciliation for Indigenous and non-Indigenous people.

II. ISSUES

Historic Issues

(1) The 1876 surveyed lands did not require surrenders

7. The lands surveyed for Chacachas and Kakisiwew in 1876 never became reserves under the *Indian Act*. Accordingly, surrenders were not required under the *Indian Act*.

8. Historically, the Crown has used a variety of methods, formal and informal, to create reserves. The mechanisms by which it set apart reserves varied depending on the particular moment in history and the geographical location in question.[1] Accordingly, there is no single test to determine if and when a reserve has been created. Each case has to be decided in its particular context on its specific facts.[2] The Supreme Court of Canada (SCC) set out the common requirements for reserve creation in *Ross River Dena Council v. Canada*. The Crown must have an intention to create a reserve; the intention must be possessed by Crown agents holding sufficient authority to bind the Crown; steps must be taken to set land apart for the benefit of

[1] *Ross River Dena Council v Canada*, 2002 SCC 54 at paras 43-46, [2002] 2 SCR 816 (Ross River).
[2] *Ross River* at para 67.

the Indigenous group; and the Indigenous group must have accepted the setting apart and begun making use of the land set apart.[3]

9. Reserve creation is a process often met with challenges. A survey alone does not make a reserve. After a survey, there were a number of steps that had to be taken to complete the reserve, including the acceptance and use of the land by the plaintiffs. In this case, the documentary record suggests that the plaintiffs did not accept the 1876 surveyed lands. Both Kakisiwew and Chacachas were slow to identify their preferred reserve locations. In 1875, Kakisiwew's band was not prepared to settle on reserves immediately; they had hinted at a desired location, but were uncertain and wished to see the site first. In 1875, Chacachas' band expressed no interest in settling on a reserve, selecting a specific reserve location, or taking up farming.[4]

10. The documentary record suggests that neither the Kakisiwew or Chacachas band had a particular attachment to the lands surveyed in 1876 and neither engaged in any meaningful use of those lands. In 1877, Kakisiwew asked to have his reserve re-located.[5] It is likely that the lands surveyed for Kakisiwew in 1876 lacked timber[6] which both Dr. Storey and Dr. Whitehouse-Strong agree was a necessary element for a successful agricultural enterprise. By mid-1879 neither Kakisiwew nor Chacachas had gone onto the lands surveyed in 1876 or shown any indication of making a beginning.[7] The Treaty pay-lists indicate that Chacachas and many members of his band were absent from the area on multiple occasions.[8] Indian Agent McDonald's 1881 report states that there was "dissatisfaction and jealousy among the chiefs on the choice of the reserves at Crooked and Round Lakes".

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[3] *Ross River* at para 67; See also *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 13, [2002] 4 SCR 245
(*Wewaykum*).
[4] Ex 1 - JB-00030, JB-00031 (typed transcription)
[5] Ex 1 - JB-00061
[6] Ex 1 - JB-00147
[7] Ex 1 - JB-00091, JB-00092 (typed)
[8] Ex 1 – JB-00618

11. While an Order-in-Council is not required to find that a reserve was created, it is instructive that an Order-in-Council was used to set apart the 1881 reserve, but not the 1876 lands.

(2) The 1881 Survey was not affected by the Homestead Syndicate

12. The documentary record indicates that a decision was made, sometime between mid-1879 and the end of 1880, that it was necessary to re-survey all of the reserves in the Crooked Lake area.[9] Assistant Indian Commissioner Galt's instructions regarding how surveyor Nelson was to approach the 1881 surveys[10] suggests that the decision to re-survey was likely made by departmental officials in Ottawa. Unfortunately, the full details and rationale for this decision have been lost with the passage of time.

13. The plaintiffs allege that Agent McDonald's and Surveyor Nelson's participation in a syndicate created for the purpose of applying for homesteads (the homestead syndicate) meant that they were dishonest and that they unilaterally decided to move the reserves in 1881 for their personal benefit. The documentary record shows that the homestead syndicate was probably created after the 1881 re-surveys.[11] McDonald's involvement with the syndicate occurred several months after the 1881 re-survey. Nelson's involvement occurred even later. The documentary record shows McDonald took positive steps, possibly risking his own career, to protect Ochapowace's and other band's interests in their lands. These actions are inconsistent with the plaintiffs' allegations regarding McDonald's character.

14. There is no evidence connecting the homestead syndicate to the 1881 re-survey or to indicate that the homestead syndicate affected any reserve lands. Mr. Nestor's land title searches regarding the lands in issue have unearthed no evidence showing that any syndicate members obtained an interest in any of the lands surveyed in 1876.

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[9] Ex 1- JB-00118
[10] Ex 6 - CROWN-00026, Ex 1 - JB-00147
[11] Ex 1 – JB-00637 p. 4

15. The Court should refuse to consider the allegations regarding McDonald and Nelson's character because they offend the character evidence rule. The character evidence rule is a general exclusionary rule that prohibits a party from adducing evidence of bad character of another party to prove or disprove a fact in issue when that person's character is not an issue in the proceeding.[12] The similar fact exception to the character evidence rule does not apply in these circumstances. The burden is on the party seeking to admit the evidence. There is no evidence before this Court to show that the homestead syndicate was factually connected to the events surrounding the 1881 survey in order to meet the test for admission of these allegations.[13]

16. The plaintiffs assert that the scant document collection is evidence of Agent McDonald's attempt to conceal his actions and is evidence that the relocation and amalgamation was irregular. However, the Court heard testimony that it is normal for documents from this era to be missing. Dr. Whitehouse-Strong's research revealed that it was not uncommon for information and correspondence related to key historic events to be absent from the historical record.[14] Dr. von Gernet stated that, in his experience, it is not particularly unusual for documents to be missing from 19th and early 20th century historic records.[15] The courts have also recognized the risk of documents being lost with the passage of time. This is one of the factors cited as the policy rationale for the application of the doctrine of laches and limitations legislation. [16]

(3) Canada did not incur any fiduciary obligations

17. Canada acknowledges that the relationship between the Crown and Indigenous peoples is fiduciary in nature. However, that relationship itself does not result in a generalized or overarching duty upon the Crown. As such, not every legal claim

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[12] The Law of Evidence, at 666; citing R v T (JA)(2012), 288 CCC(3d)1
[13] *R* v *Handy*, [2002] 2 SCR 908; applied in civil proceedings The Law of Evidence at 805
[14] Whitehouse-Strong Response to Storey p. 68, Ex 6 CROWN-00178
[15] von Gernet Report p. 42 [Ex 28 Tab 2]
[16] *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 121

arising out of this context gives rise to a claim for breach of fiduciary duty: [h]owever, not all dealings between parties in a fiduciary relationship are governed by fiduciary obligations". [17] Any fiduciary duty owed by the Crown does not exist at large, but only in relation to specific interest. There are two tests for establishing a fiduciary duty in the Crown-Aboriginal context:

a. First, a fiduciary obligation may arise out of the "sui generis" relationship between the Crown and Indigenous peoples where two elements are present: (a) a specific or cognizable Aboriginal interest; and (b) a Crown undertaking or assumption of discretionary control over that interest in a way that invokes responsibility in the nature of a private law duty.
b. Second, a fiduciary obligation may arise where the general conditions for a private law ad hoc fiduciary relationship are satisfied – that is, where the Crown has undertaken to act in the best interests of a defined beneficiary who is vulnerable to the Crown's exercise of discretion, and whose legal or substantial practical interests stand to be adversely affected.

18. Prior to reserve creation, the Crown exercises a public law function under the *Indian Act* – which is subject to supervision by the courts which may order public law remedies. In *Manitoba Metis Federation*, the SCC held that an "Aboriginal interest in land giving rise to a fiduciary duty cannot be established by treaty, or, by extension, legislation."[18] This is because treaty making is an exercise of the Royal Prerogative and as such an act of the executive and a public law duty. Similarly, in *Williams Lake* the SCC stated that "[i]f there is no Aboriginal interest sufficiently independent of the Crown's executive and legislative functions to give rise to "responsibility 'in the nature of a private law duty'", then no fiduciary duties arise – only public law duties…"[19]

[17] *MMF* at para 48.
[18] *MMF* at para 58.
[19] *Williams Lake* SCC at para 52.

19. Canada was acting pursuant to a treaty obligation when it created the joint reserve for the benefit of the Chacachas and Kakisiwew peoples. Accordingly, no fiduciary duty applies with respect to the creation of the 1881 reserve. While government officials were not operating pursuant to the requirements of a specific fiduciary duty, the Crown was required to meet its obligations under Treaty No. 4. The honour of the Crown governs treaty-making, as well as its implementation, and requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Indigenous peoples.[20]

20. Canada's actions in the reserve creation context must be evaluated on the basis of whether it acted honourably in fulfilling the solemn promises in Treaty 4, not whether it met a fiduciary obligation. The documentary record does not contain an explanation for the re-survey of the Chacachas reserve or the reasons for surveying a joint reserve. However, it is logical that Chacachas' extended absences, Chacachas' resignation as chief, and Kakisiwew's guardianship over some of the Chacachas band's members were factors contributing to the decision to survey a joint reserve. Treaty 4 does not prohibit the assignment of joint reserves, stating only that the reserves are to be selected by officers appointed for that purpose after conference with each Indian band.

(4) Consultation occurred regarding the 1881 re-survey

21. The plaintiffs allege that Canada failed to consult with their ancestors regarding the relocation and 1881 survey of the joint reserve. However, Dr. von Gernet and Dr. Whitehouse-Strong both concluded that the documentary record indicates that Canada's agents consulted regarding the placement of the 1881 reserve.[21]

22. Assistant Indian Commissioner Galt provided Surveyor Nelson with general instructions regarding the required features of the reserves he was to survey and

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[20] *Badger* at para 41; *MMF* at para 73.
[21] Whitehouse-Strong response to Storey p. 35 [Ex 29, Tab 2], and von Gernet Report p. 40-41 [Ex 28, Tab 2]

further instructed him "to meet the views of the Indians" in every other respect.[22] Subsequent documents are consistent with Nelson proceeding according to Galt's instructions.

23. In his annual report, Nelson[23]states that he was instructed to survey the Crooked Lake reserves, made a reconnaissance of that part of the Qu'Appelle Valley, and prior to undertaking the surveys communicated with Indian Agent McDonald in the presence of some Indian Chiefs. Nelson's report indicates that he then "engaged in some planning" regarding the best manner to adjust these reserves.

24. In his 1881 annual report, Indian Agent McDonald states that he was "able to effect an amicable understanding amongst" the bands regarding the 1881 surveys and that he "had no difficulty in satisfying each band as to their boundaries".

25. The historic record also contains correspondence between Surveyor Nelson and contract surveyor Captain Dawson. The correspondence deals with complaints from several bands to Indian Agent McDonald, at some time before August 19, 1881, about "outline surveyors" entering reserves to complete surveys of the township immediately south of the Crooked Lake reserves. Dr. Whitehouse-Strong's conclusion, based upon the locations referenced in the documents, is that members of the joint Kakisiwew/ Chacachas reserve were amongst those who likely complained to McDonald about the outline surveyors trespassing on their lands.[24]

26. Kakisiwew, his headmen, and half of Chacachas's headmen were present while Nelson was surveying.[25]The documentary record contains no suggestion that anyone objected to the surveyed areas in 1881.

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[22] Ex 6 – CROWN-00026, Ex 1 JB-00147
[23] Ex 1 – JB-00120 p. 38 of the pdf (p. 130 of the report)
[24] Whitehouse-Strong Response to Storey, p. 30-31 [Ex 29, Tab 2] and Ex 1 – JB-00120 p. 14 of the pdf (no page no. in report)
[25] Whitehouse-Strong Response to Storey p. 35 [Ex 29, Tab 2]

27. Review of the documentary record and Indian Claims Commission decisions regarding the relocation of other bands indicates that the government was aware that band agreement was required for relocation to proceed.[26]

28. There is a common law presumption that public officials have regularly performed their official duties.[27] LeBlanc J., in *Monaghan v Joyce*, defined the presumption of regularity in connection with the legal principle *maxim omnia praesumuntur rite esse acta*, which stands for the proposition that the regularity of acts by public officials are presumed until the contrary is proven. [28] The Federal Court affirmed that the party trying to rebut the presumption bears the onus of proof on a balance of probabilities and must tender evidence to prove an irregularity occurred. [29]

29. A party challenging the presumption must also discharge a preliminary or provisional burden to produce evidence sufficient to raise the issue of whether the presumption applies. In this regard, a mere challenge to the applicability of the presumption does not constitute evidence, nor does impermissible speculation. [30]

30. In *LeCaine v Canada (Registrar of Indian Affairs)*, Whitmore J. applied the presumption of regularity in deciding that, without evidence to the contrary, the court

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[26] Whitehouse-Strong Response to Storey, p. 42-51[Ex 29, Tab 2] and Ex 6 – CROWN -00038; Ex 6 – CROWN-00040; Ex 6 CROWN-00047; Ex 6 – CROWN-00057; Ex 6 – CROWN-00059; Ex 6 – CROWN-00034; Ex 6 – CROWN-00039; Ex 6 – CROWN-00036; Ex 6 – CROWN-00037; Ex 6 – CROWN-00058; Ex 6 – CROWN-00041; Ex 6 – CROWN-00042; Ex 6 – CROWN-00050; Ex 6 – CROWN-00045; Ex 6 – CROWN-00043; Ex 6 – CROWN-00046; Ex 6 – CROWN-00049; Ex 6 – CROWN-00048; Ex 6 – CROWN-00033; Ex 6 – CROWN-00063; Ex 6 – CROWN-00044; Ex 6 – CROWN-00051; Ex 1 – JB-00152; Ex 6 CROWN-00052; Ex 1 – JB-00154; Ex 1 – JB-00100; Ex 1 – JB-00154; Ex 6 – CROWN-00060; Ex 6 – CROWN-00023; Ex 6 – CROWN-00053; Ex 6 – CROWN-00064; Ex 6 – CROWN-00066; Ex 6 – CROWN-00069; Ex 6 – CROWN-00070; Ex 6 – CROWN-00068; Ex 6 – CROWN-00067

[27] Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence*, 5th ed (Toronto: Lexis Nexus Canada Inc, 2018) at 171, 4.64.

[28] *Monaghan v Joyce*, 2004 NLSCTD 42, 235 Nfld. & P.E.I.R. 130, at para 46 (N.L. T.D.)

[29] *Martselos v Salt River First Nation 195*, 2008 FC 8, 2008 CF 8, at para 26-28. See also Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence*, 5th ed (Toronto: Lexis Nexus Canada Inc, 2018) at 173, 4.66; citing *R v Morton (1992)*, 7 OR (3d) 625, [1992] OJ No 179, aff'd (1993), 15 OR (3d) 320, [1993] OJ No 4105 (Ont CA).

[30]Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence*, 5th ed (Toronto: Lexis Nexus Canada Inc, 2018) at 173, 4.66; citing *R v De Boerr (2013)*, 10 MPLR (5th) 336, [2013] OJ No 2268 (Ont SCJ), aff'd 2016 ONCA 634, [2016] OJ No 4345 (Ont CA).

may presume that the Wood Mountain First Nation followed the requirement to post a band list under section14.3 of the *Indian Act*. The court found no evidence that "the Registrar failed to send a Band List… to the Wood Mountain Council… [or that] the council did not post the list in a conspicuous place." Therefore, the appellants did not succeed in displacing the presumption of regularity. [31]

31. In *Peter Ballantyne Cree Nation v Canada (Attorney General)*, the First Nation argued that SaskPower did not receive a license to build a dam as statutorily required. The Saskatchewan Court of Appeal held that the presumption of regularity applied to presume the government provided the necessary consent. Absent corroborating evidence, the court found that to presume otherwise would mean the Minister was either unaware or turned a blind eye to the large construction project, or that SaskPower conducted the project contrary to the Minister's objections. [32]

32. Correspondence from Garnet Neff, the lawyer hired by former residents of the Chacachas reserve, indicates that the 1876 Chacachas reserve was "properly alienated by them and subsequently sold" and that his clients "claim they were present at the meeting of the tribe" when they "took up the other land".[33]

33. The plaintiffs' and Ochapowace's oral tradition witnesses stated there was no consultation but offered no evidence to substantiate this conclusion. They provided no details concerning the agreement between the two chiefs or about the meeting of the tribe. Dr. von Gernet[34] stated he has no doubt, based on the documentary record, that some kind of consultation took place and offered possible reasons that might account for the divergence between the documentary record and the conclusions offered by the oral tradition witnesses. The conclusion about a lack of consultation may be drawn from an opinion or belief about the prior existence of a "reserve" and inferred as a result of having no further knowledge regarding the specific historic

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[31] *LeCaine v Canada (Registrar of Indian Affairs)*, 2013 SKQB 253 at para 64, aff'd 2015 SKCA 43, SCC ref'd leave to appeal on January 14, 2016).
[32] *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2016 SKCA 124, at para 175 (SKCA), SCC ref'd leave to appeal on June 22, 2017.
[33] Ex 1 – JB-00460, Ex 1 – JB-00461
[34] Trial Transcript Rough Draft, December 10, 2018, p. 144

events. Alternatively, the conclusion may derive from a source who was not present during the consultations or who lost pertinent memories during the intervening years.

(5) The amalgamation was likely consensual

34. In the 1880's, the *Indian Act* did not address dissolution or amalgamation of bands. By choice or circumstance, bands could cease to exist.[35] Until 1889, the Indian Agent's discretion governed transfers of individuals between bands. Legislation regarding transfers followed in 1895.[36] Where all members left a band or where a band divided, the successor band or bands received the collective rights of the predecessor.[37] A merged band could be recognized by the Crown without a meeting, vote, or agreement of one or both of the bands.[38] In any event, the evidence does not show that the amalgamation was forced. Band membership amongst the Plains Cree was flexible and could be shaped through family connections or "simply by living with a group for a period of time".[39]

35. Ross Allary testified that "those two chiefs made an agreement" which lead to his and the late Chief Denton George's belief that Ochapowace had an obligation to look after the Chacachas people.[40] This statement indicates that there was some discussion between Chiefs Kakisiwew and Chacachas. Neither the plaintiffs, nor Ochapowace, provided any evidence regarding the contents of the agreement. However, Andrew George's story in the Kehte-ayak collection of elder's stories published by the Ochapowace First Nation in 2009[41] may shed some light:

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[35] *Montana* (FC) at para 456; See also: *Papaschase Indian Band No 136 v Canada (AG)*, 2004 ABQB 655 (sub nom Lameman v Canada (AG)), 365 AR 1 (Alta QB); rev'd in part, 2006 ABCA 392; appeal allowed, 2008 SCC 14, [2008] 1 SCR 372, CLA Vol 2, Part A, Tab 9.
[36] *Montana* (FC) at para 508.
[37] *Montana* (FC) at para 524 and 525, *Blueberry River Indian Band v. Canada*, 2001 FCA 67 at para 26, [2001] 4 FCR 451.
[38] *Papaschase* (ABQB) at para 92.
[39] Whitehouse Strong Response to Nestor p. 5 [Ex 29, Tab 1] and Ex 1 – JB-00612, Ex 1 – JB-00491, Ex 1 – JB-00614
[40] Trial Transcript Rough Draft, November 27, 2018 p. 34, line 10
[41] Ex 1 – JB-00603, p. 57

> My father told us is that when Chacachas moved his following, his followers to the states, before leaving he told Kak "I give you my land to put on top of yours. In exchange you look after my people, the band that wished to remain behind."

36. It is logical to infer that by providing land, Chacachas would have intended the agreement to be permanent as opposed to temporary. This suggests there was a consensual amalgamation of a portion of Chacachas's band with Kakisiwew while the remainder of Chacachas's band either went to the United States or to other Saskatchewan bands such as Sweetgrass.[42] The division of Chacachas's band into groups that either went to the United States or joined one of several Canadian bands challenges the plaintiffs' assertion that the historic events involve the forced amalgamation of two entire bands. Dr. Whitehouse-Strong concluded that "the picture presented by the document collection is one of a divided former Chacachas Band and a much more unified former Kakisiwew band dealing with turmoil that culminated in the election of Ochapowace and the relocation of Chacachas and a large number of his former band."

37. The evidence also points to a belief that Ochapowace is essentially the modern version of the historic Kakisiwew band. Ross Allary told the Court that there is no difference between Kakisiwew and Ochapowace[43]Wesley George, the deponent for the Bear plaintiffs stated that Kakisiwew and Ochapowace are "one and the same essentially".[44]The Ochapowace Chief and Council signed and submitted a band council resolution asking Indian Affairs to change the bands name from Ochapowace to Kakisiwew.[45]

38. The members of the modern Ochapowace band are fully integrated regardless of their ancestors' band affiliation. Many current Ochapowace members trace their lineage from both Kakisiwew and Chacachas while other members cannot trace their lineage to either historic band. Many members of the *Watson* family, a prominent group currently

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[42] Trial Transcript Rough Draft, November 28, 2018 p. 12.
[43] Trial Transcript Rough Draft, November 28, 2018, p. 85-86
[44] Wesley George on January 20, 2004, Q/A 20 & 31. [Ex 30, Tab 5]
[45] Ex 1 – JB-00590

claiming Chacachas descent have held the office of Chief of Ochapowace. Members of Cameron Watson's family were Chief for 15 of the 25 years between 1953 and 1979.[46]Morley Watson testified that he was Chief of Ochapowace from 1983 to 1987 and currently Vice-Chief of Federation of Sovereign Indian Nations (FSIN) as the designated member from Ochapowace. [47] Ochapowace's witnesses Chief Margaret Bear and Ross Allary testified that they identified as descendants of the Kakisiwew band.

(6) Defining Indian bands

39. The plaintiffs seek declarations that Chacachas and Kakisiwew are independent Indian bands within the meaning of Treaty No. 4 and the *Indian Act*. The *Bear* plaintiffs also ask this Honorable Court for a declaration that the joint reserve is reserved for the use and benefit of the Kakisiwew and Chacachas Indian bands. While bands exist and may be party to a treaty, the effect of sovereignty is that the laws of Canada apply with respect to First Nations. Canada has the authority to legislate in relation to Indians and lands reserved for the Indians, and subject to constitutional compliance, the *Indian Act* governs. There is a difference between a band recognized under the *Act* and Indigenous groups not recognized as bands under the *Act*. The courts have held that it is inappropriate to issue declarations where alternative remedies exist.[48]

40. The Ochapowace band's members may request recognition of one or more independent Indian bands, under section 17 of the *Indian Act*. Section 17 authorizes the Minister to constitute new *Indian Act* bands with their own band lists established from existing Band Lists. The process is guided by a written policy and, like most executive powers, is subject to scrutiny under judicial review. Members of the Ochapowace Band were provided with information about the section 17 policy and process.[49] While the Ochapowace Chief and Council did file a band council resolution to support the re-

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[46] Ex 1 – JB-00609
[47] Trial Transcript Rough Draft, November 13, 2018, p. 77-78
[48] *Daniels* v *Canada*, 2016 SCC 12 at para 11; *Campbell* v *Canada* (AG), 2018 FC 683 at paras 15-17
[49] Trial Transcript Rough Draft, December 5, 2018 p. 7-8 and p. 13 Ex 1 – JB-00588

establishment of Chacachas,[50] they did not pursue the necessary steps regarding division of band assets.[51]

41. The onus on pursuing band division lies with the members of the affected Band. Requiring Canada to drive the initiative and divide a band's membership or assets, in these circumstances, is impractical and would be viewed as high-handed and paternalistic. The assertions that the Ochapowace band did not want to utilize the section 17 process because of its perceived inflexibility must be measured against their objectives for this litigation. The pleadings show that the plaintiffs' primary goal is significant monetary redress which would be unavailable under the section 17 process.

Canada did not breach any obligations

(7) The Crown did not breach trust or fiduciary obligations regarding the Homestead Syndicate's activities

42. The *Bear* plaintiffs seek a declaration that the Crown breached its trust or fiduciary obligations to the Kakisiwew Indian band relating to the activities of the Qu'Appelle Syndicate. The plaintiffs brought no evidence to connect their alleged loss or damage to that private syndicate's activities. Further, the Homestead Syndicate's activities were beyond the scope of employment of Canada's servants, and as such there is no basis in law to find Canada liable. Even if characterized as a public work, Canada is immune from the act, omission, or transaction of employees occurring before 1887 when the *Exchequer Court Act*, S.C. 1887, c. 16, section 16 first provided for liability of Crown employees.

(8) No evidence that the Crown's policy regarding rations affected the plaintiffs

43. The *Bear* plaintiffs amended their statement of Claim in April 2017 to seek a declaration that the Crown breached its trust or fiduciary obligations to the Kakisiwew

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[50] Ex 1 – JB-00590

[51] Trial Transcript Rough Draft, December 5, 2018, p. 5 & p. 8-9; Trial Transcript Rough Draft, November 16, 2018, p. 2-16

Indian band resulting from an alleged "starvation policy". Examinations for discovery were completed in 2014, so the Crown's administration of the rations policy was not a topic for examination. The plaintiffs have not grounded their allegations in an applicable Crown action involving them. Although the expert reports of Dr. Miller and Dr. Whitehouse-Strong briefly reference the distribution of rations, no evidence was adduced regarding how the collective rights of the plaintiffs' or their ancestors were specifically affected. Further, policies are not amenable to examination by a court.[52]

(9) The Honour of the Crown is not a cause of action

44. The plaintiffs seek declarations that the Crown's actions represented a violation of the Honour of the Crown for which the plaintiffs are entitled to be compensated. The honour of the Crown is always at stake in Canada's dealings with Indigenous peoples.[53] It is not a cause of action itself; rather, it speaks to *how* obligations that attract it must be fulfilled.[54] Treaty obligations already attract the honour of the Crown. There is no basis for invoking the honour of the Crown as a separate head of declaratory relief requiring compensation in this claim.

Estoppel by Representation and have no standing

(10) The plaintiffs are estopped by representation

45. Through this litigation, the plaintiffs seek damages for the wrongful surrender of lands surveyed in 1876 to which they claim they are entitled under Treaty No. 4. However, Canada has already reconciled the plaintiffs' collective treaty right to land as members of Ochapowace, the successor to the historic Treaty bands. The within "land surrender" claims are an attempt to obtain treaty lands in excess of the quantum set out in Treaty 4.

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[52] *Operation Dismantle* v *The Queen*, [1985] 1 SCR 441; *Knight* v *Imperial Tobacco Canada Limited*, 2011 SCC 42 at paras 71-90
[53] *R v Badger*, [1996] 1 SCR 771 at para 41, [1996] SCJ No 39 (QL).
[54] *MMF* at para 73.

46. Ochapowace was one of four bands that commenced litigation against Canada in the 1980's to press the issue of Treaty land entitlement. Settlement of that action resulted in the 1992 Treaty Land Entitlement Settlement Framework Agreement for Saskatchewan (TLEFA),[55] Ochapowace authorized Chief Denton George to sign the TLEFA[56]which he did on September 22, 1992.[57] On October 22, 1993, the Ochapowace band entered into a band-specific TLE settlement agreement for $16,222,134.12 in full satisfaction of its TLE claim (Ochapowace TLE).[58]

47. Ochapowace's participation in the TLE process was voluntary.[59] The documents show that Ochapowace had, since 1990 actively advanced its entitlement to treaty lands on the basis of the combined historic bands' populations. [60] Ochapowace was represented by legal counsel and other experts. Indian and Northern Affairs Canada shared all of the relevant information [61]The TLEFA provided the participating First Nations with benefits in excess of the legal obligation. [62] The Office of the Treaty Commissioner (OTC) conducted research into the First Nations' adjusted date of first survey (ADOFS) populations. [63]

48. The evidence shows that the Ochapowace Chief and Council and Land Claims committee actively engaged in negotiations with the OTC and were able to substantially increase Ochapowace's ADOFS population. Ochapowace's ADOFS was ultimately based upon the pre-amalgamation 1879 pay-lists for both the Kakisiwew and Chacachas bands.[64] In the course of the OTC's research, any "benefit of the doubt" always went to the First Nations.[65] There is a suggestion in the documents that the "unique circumstances of the band" refers to Ochapowace being

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[55] Ex 6 – CROWN-00127
[56] Ex 1 – JB-00514
[57] Ex 6 – CROWN-00127 p. 137 (or p. 145 of pdf)
[58] Ex 1 – JB-00525
[59] Trial Transcript Rough Draft, December 3, 2018, p. 46 & 55
[60] Ex 6 – CROWN-00118
[61] Trial Transcript Rough Draft, December 3, 2018, p. 47
[62] Trial Transcript Rough Draft, December 3, 2018, p. 48
[63] Trial Transcript Rough Draft, December 3, 2018, p. 52-53
[64] Trial Transcript Rough Draft, December 3, 2018, p. 61 and Gross Document Bundle [Ex 24]
[65] Trial Transcript Rough Draft, December 3, 2018 p. 53

the successor of the two historic bands, and lead the OTC to add approximately 40 further individuals to Ochapowace's ADOFS numbers.[66] Ross Allary testified that they used the individuals who transferred into the band after 1884 to build up their TLE numbers. [67]

49. The TLE settlement agreement dated October 22, 1993 discloses:

a. The Ochapowace band duly authorized Chief Denton George to sign the Saskatchewan TLE framework agreement on behalf of the band on the understanding that the framework agreement would be of no force and effect until a band specific agreement was ratified by members;

b. The Ochapowace band negotiated the band specific agreement to give effect to the terms of the framework agreement;

c. By the ratification vote dated October 15, 1993, a majority of band members consented to and ratified the TLE agreement. They also authorized and consented to the chief and councillors signing the agreement;

d. Article 1.02(10) defines "band" as the Ochapowace band;

e. Article 1.02(42) defines "Member" as a member of the Ochapowace band within the meaning of the *Indian Act* and shall include all registered Indians recorded on the department's Indian register in respect of the Ochapowace band;

f. Ochapowace band members were able to apply to the ratification officer to add or remove names from the voters list for the ratification vote;

g. Cameron Watson witnessed the signatures of chief and council on the settlement agreement; and

h. The TLE Ochapowace trust agreement defines beneficiary as the Ochapowace band and Ochapowace band members. Both Wesley Bear and Wesley George are listed as trustees (*Bear* plaintiffs), Florence

[66] Ex 6 – CROWN-00126
[67] Trial Transcript Rough Draft, November 27, 2018, p. 87-90

> Watson is also listed as a trustee (*Watson* plaintiffs), and Cameron *Watson* witnesses the signatures on the trust agreement.[68]

50. Members of the Ochapowace band ratified the Ochapowace TLE. The plaintiffs have admitted that all of the people they claim to represent were the age of majority at the time of the ratification vote were entitled to vote [69]and most of the named plaintiffs cast ballots. The plaintiffs also admit that no judicial review was brought to challenge the 1993 Ochapowace TLE settlement ratification vote.[70]Ochapowace has received and spent the $16,222,134.12 in settlement monies and has achieved its shortfall of reserve lands.[71]

51. The amount of land the band agreed that it had received prior to 1955 was subject to negotiation in the Ochapowace TLE.[72] The parties agreed that this negotiated number represented all of the land the First Nation had ever received under Treaty irrespective of whether or not a portion of the lands had been subsequently surrendered.[73] It is significant that Ochapowace agreed that it had received only 52,864 acres of Treaty land prior to 1955.[74] This is the amount of land surveyed for the joint reserve in 1881, before 18,240 acres were surrendered to the Soldier Settlement Board in 1919.[75] This assertion contradicts the plaintiffs' position in these actions that the 1876 lands acquired reserve status. Significant compensation was provided to the Ochapowace band members as a result of these assertions. Had the 70,500 acres[76] surveyed for Kakisiwew and Chacachas in 1876 been included (which the plaintiffs now claim was wrongfully surrendered) Ochapowace would

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[68] Ochapowace Treaty Land Entitlement Settlement Agreement dated October 22, 1993 at 1, 2, 3, 6, 86 & 88; Schedule 3 at p 5; Schedule 5 at 3, 31, 32, 36 & 37 [Ex 1 – JB-00525]; Voters List for Ochapowace First Nation current to March 21, 2007 re: Florence Watson at 14 [Ex 1 JB-00600].
[69] Canada's Read-Ins, Wesley Bear on October 29, 2014, p. 81 [Ex 30, Tab 13] and Canada's Read-Ins, Sheldon Watson on October 28-29, 2014, p. 318-320 [Ex 30, Tab 9]
[70] Request to Admit Fact – Response #62-83 [Ex 25]
[71] Trial Transcript Rough Draft, December 10, 2018 p. 12-13 & p. 20, 25-26
[72] Trial Transcript Rough Draft, December 3, 2018 p. 134
[73] Trial Transcript Rough Draft, December 3, 2018 p. 134
[74] Ochapowace TLE Settlement Agreement dated October 22, 1993@ p. 14 [Ex 1 – JB-00525]
[75] Trial Transcript Rough Draft, Ross Allary, November 29, 2018 p. 22 & Ex 1 – JB-00439, Ex 1 – JB-00440, Ex 1 – JB-00442, Ex 1 – JB-00438, Ex 1 – JB-00441
[76] Ex 1 – JB-00049, Ex 6 – CROWN-00018

have received 128,864 acres before 1955. Based on their ADOFS population, they would not have been entitled to receive any compensation for treaty land entitlement under the equity formula and terms of the TLEFA.

52. In 1985, the Ochapowace Indian band applied for compensation under Canada's specific claims policy, seeking compensation for the 1919 surrender of 18,240 acres from the original 52,864 acres of Ochapowace Indian Reserve 71 (IR 71) for transfer to the Soldier Settlement Board (SSB). The claim was brought on behalf of the present members of the Ochapowace band.[77] The Ochapowace band issued a statement of claim in 1991 (T-2463-91) in relation to the same issues as the specific claim. Both the specific claim submission and the statement of claim assert that the Ochapowace band was the result of an amalgamation of bands led by Chief Chacachas and Chief Kakisiwew.[78] Ross Allary testified that everyone - "we was all involved" - provided their legal counsel with the information advanced in those legal documents. [79]

53. The Ochapowace band entered into a settlement agreement dated December 8, 1994 for $13,000,000.00 that allowed for an additional 18,233.4 acres to be set aside as reserve lands (the SSB agreement). Members of the Ochapowace band ratified the SSB agreement. The plaintiffs have admitted that all of the plaintiffs who were the age of majority at the time of the ratification vote were entitled to vote[80] and most of them did in fact cast ballots. The plaintiffs also admit that no judicial review was brought to challenge the SSB agreement ratification vote.[81] Ochapowace received the full settlement monies and has expended all but $4,000,000.00 to purchase lands and other investments.[82]

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[77] Ochapowace Book of Documents, 1-002(002), Tab 6 [Ex 5]
[78] Ochapowace Book of Documents, 1-002(003), Tab 7 [Ex 5], Ex 1 – JB-00510
[79] Trial Transcript Rough Draft, November 28, 2018, p. 29
[80] Sheldon Watson, October 28-29, 2014, p. 318-319 [Ex 30, Tab 9] and Wesley Bear, October 29, 2014, p. 81 [Ex 30, Tab 13].
[81] Request to Admit Facts – Response #84-109 [Ex 25]
[82] Trial Transcript Rough Draft, December 10, 2018, p. 26

54. Ochapowace's conduct, in bringing the SSB Claim and the 1991 action, in negotiating the SSB agreement and concluding a ratification process acknowledges that Ochapowace IR 71 belongs to all current members of Ochapowace regardless of their historic affiliations. The SSB settlement agreement dated February 22, 1995 discloses:

a. "Band" is defined as Ochapowace Indian band;

b. "Voter" means a member of the band who is 18 years old;

c. The band provides a release and indemnity to Canada;

d. Band members were able to apply to the ratification officer to add or remove voters; and,

e. Chief Denton George swore that notice of the voters list for the ratification vote was posted.[83]

(11) The settlement agreement includes a binding release

55. As members of Ochapowace band, the plaintiffs carry the specific obligations of the TLE settlement agreement and the SSB settlement agreement along with their band. Both settlement agreements include release and indemnity provisions. The current actions contravene these legal obligations. The *Watson* and *Bear* plaintiffs' argue that the settlement agreements should not preclude their legal actions based on their subjective understanding of the settlement agreements, Canada's knowledge of the amalgamation issue, and their own legal advice. The settlement agreements should be interpreted by applying objective legal tests and principles. Canada's knowledge of Ochapowace's amalgamation is not relevant to how the settlement agreements are interpreted. Canada is not responsible for the nature or quality of legal advice that the plaintiffs or Ochapowace received.

56. Article 15.01 of the TLE settlement agreement states that the Ochapowace band and its members release Canada from all claims under Treaty relating to land entitlement. Article 15.02 states that the Ochapowace band will save Canada harmless and indemnify Canada from claims for land entitlement under Treaty.

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[83] Specific Claims Settlement Agreement dated December 8, 1994 at 1, 4, & 8-9; Schedule 3 at 2-4; Appendix G, Ex 1 – JB-00529

57. Similarly, the Ochapowace band releases Canada with respect to the surrender claim in Article 18 of the SSB settlement agreement. The claim is broadly defined to include all facts and issues, direct and indirect, arising from the band's 1985 specific claims submission, including the surrender lands, road allowances within the surrender lands, mines and minerals of the surrendered lands, and loss of use of whatever kind in relation to the surrendered lands. In Article 19 of the SSB settlement agreement, the Ochapowace band agrees to indemnify Canada for any claim brought by any person in relation to the surrendered lands.

58. Settlement under the TLE framework agreement ultimately yielded a more favourable result than litigation. The TLE equity formula considers the then current band population (1991) in determining compensation (shortfall percentage x 128 acres x 1991 population x $262.19 per acre). In the judicial context, treaty land entitlement under those treaties which defer precise reserve descriptions to a later date is based on band population at the date of first survey adjusted for late adherents. The Saskatchewan Court of Appeal in *Lac La Ronge*[84] determined that Treaty No. 6 and the numbered treaties did not support an interpretation using band population at a date subsequent to the date of first survey for TLE calculation.

59. Settlement agreements negotiated in good faith must be respected. Otherwise, adjudication is the only mechanism to achieve lasting resolution. The individuals who comprise the *Watson* and *Bear* plaintiffs have, in their capacity as members of Ochapowace, released Canada from the very claims they purport to advance.

60. The plaintiffs suggest that the Ochapowace TLE agreement does not apply to them by operation of the release provisions contained in Article 15.10:

> 15.10 NO EFFECT ON NON-MEMBERS
>
> In accordance with Section 17.01 and for greater certainty, the band is only releasing and indemnifying Canada from its Treaty Land Entitlement

[84] *Lac La Ronge Indian Band* v *Canada*, 2001 SKCA 109

> obligations to Members of the Band in accordance with Sections 15.01 and 15.02, and such release and indemnity shall not apply to individuals who are not or who were never Members of the Band and who were never counted for the purposes of this Agreement.[85]

61. The class of individuals specifically contemplated in Article 15.10 are the descendants of the historic bands that were never counted in the Ochapowace TLE agreement. The July 2, 1993 letter to Chief Denton George from Myler Savill, Regional Director General of INAC[86] makes this clear:

> Canada is not seeking a release from the Ochapowace band for claims coming from other bands that may be established, provided the individuals from the other bands were not counted toward the Ochapowace settlement (emphasis added).

Individuals who seek exemption on the basis of Article 15.10 would need to show that they have never been included on the Ochapowace band list and that their ancestors were not listed on either the Chacachas or Kakisiwew 1879 pay-lists or included in Ochapowace's ADOFS population figures as a late transfer. The *Watson* and *Bear* plaintiffs have always been Ochapowace members and as such were entitled to vote, and did vote, in the 1993 TLE ratification vote.[87]

62. The Ochapowace band, or segments of that band, cannot now challenge the Ochapowace band's vested authority to enter into the TLE and SSB settlement agreements. Settlement of these historical grievances was negotiated in good faith. The *Watson* and *Bear* plaintiffs, as members of Ochapowace band, have benefited from these agreements. The plaintiffs are estopped by the representations of the Ochapowace band council and Land Claims committee in the negotiation of the settlement agreements, and by ratification of the settlement agreements by the Ochapowace band's membership. The elements of estoppel by representation are straight-forward:

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[85] Ochapowace Treaty Land Entitlement Settlement Agreement dated October 22, 1993 at 82, Ex 1 – JB-00525

[86] Letter from Myler Savill to Chief Denton George dated July 2, 2993 [Ex 24, p. 39]

[87] Request to Admit Facts – Response #62-82 [Ex 25], and Crown's Read-ins, Cameron Watson Documents, Undertaking 2 [Ex 30, Tab 4, p. 3-20]

a. A representation, or conduct amounting to a representation, intended to induce a course of conduct on the part of a person to whom the representation is made;

b. An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made; and,

c. Detriment to such person as a consequence of the act or omission.[88]

63. By negotiation, execution, and ratification of the settlement agreements, including receipt and expenditure of the settlement proceeds, the Ochapowace band's leadership and membership represented to Canada that the Ochapowace band was the appropriate party to settle the outstanding TLE and SSB claims. The Ochapowace band advanced the TLE and SSB claims as the successor band to Chacachas and Kakisiwew. Canada's negotiator believed he was negotiating with the Ochapowace band on behalf of all of their members: "all those people who were counted in the date of first survey…all the people of both of those Bands were counted.".[89] Canada entered into the TLE and the SSB settlement agreements in good faith. Canada acted to its detriment in paying the Ochapowace membership over 29 million dollars.

64. Estoppel operates to prevent litigation on the substance of valid agreements in the absence of appropriate grounds. No appropriate grounds are pleaded in these actions. The actions do not directly challenge the TLE or SSB settlement agreements. Nor do these actions challenge the ratification of the agreements by Ochapowace's membership. No irregularities have ever been alleged regarding conduct of the referendums that would offend the *Indian Referendum Regulations*.[90]

65. The *Watson* and the *Bear* plaintiffs all received the benefits of the TLE and SSB settlement agreements. They are bound by these settlement agreements. Their claims relating to treaty lands should be dismissed.

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[88] *Blueberry River Indian Band v. Canada*, 2001 FCA 67 at para 51, [2001] 4 FCR 451; *Ryan v Moore*, 2005 SCC 38 at para 5, [2005] 2 SCR 53.
[89] Trial Transcript Rough Draft, December 3, 2018, p. 79-80
[90] CRC 1978, c 957, as am.

(12) The plaintiffs lack standing

66. Standing requires the proper party to commence and to continue an action. The *Watson* plaintiffs and the *Bear* plaintiffs lack standing to advance their claims for three reasons. First, the plaintiffs seek to litigate collective rights that are vested in the Ochapowace, the successor band. Second, the plaintiffs are members of the Ochapowace band, which precludes the plaintiffs from membership in any other band. Third, as discussed above, the terms of the TLE and the SSB settlement agreements preclude members of the Ochapowace band from advancing claims based on the same facts.

(a) Collective rights claims must be asserted by Ochapowace

67. The plaintiffs who are all members of Ochapowace and descendants of either Chacachas and Kakisiwew (or both) lack standing to pursue collective rights. Collective rights reside with bands. They are not held by individuals. They belong to the community as a whole, as it exists from time to time.[91] Standing to bring a claim to enforce collective rights vests in a band itself, and can only be asserted by that band or those individuals authorized by the band.[92]

68. The Ochapowace band was fully alive to this reality. Councilor Ross Allary acknowledged as much on examination for discovery. When questioned on the affidavit of former *Bear* legal counsel, Alison Mitchell[93], Ross Allary (Ochapowace band) testified:

> Q Can I direct you, Ross, to paragraph 14? It's the second full sentence and it says, Ross Allary, a councillor for the Ochapowace band,

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[91] *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at para 33.
[92] *Beattie v Canada* (2000), 197 FTR 209 at paras 1-21; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*,171 FTR 91 at paras 16-23; aff'd 4 FCA 451.
[93] Alison Mitchell affidavit, para 14 [Ex 1 – JB-00602]

> said that I should just ignore any potential or perceived conflict of interest and carry on. Is that -- I guess did you say that to her?
>
> A Well, I told her to do her work and – if she needed anything, like, we would supply that. Well, we meaning Phillips' office would supply the information. That's what I was getting at, and she said that's a conflict. I guess she figures a conflict, but I can't see how the hell it could be a conflict. You can't take these individually, Kakisiwew or Chacachas, and you know it, can't make a claim like this. A known band is the only one that can do that, and that's Ochapowace, so there's no damn conflict, unless you're making it a conflict.[94]

69. An *Indian Act* band, as such, is a creature of statute.[95] Section 3.1 of the *Indian Act, 1876* first defined the term "band": [96]

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

70. Whether a band existed in the 1880's is a factual inquiry applying the criteria of the legislative definition.[97] The definition of a band under the *Indian Act, 1876* means an aggregate of individuals or a group regarded as a single entity who meet the "reserve interest" criterion or who share alike in the distribution of any annuities or interest money that are the responsibility of the Crown.[98] In the 1880's, the *Indian Act* did not address dissolution of bands or amalgamation of bands. By choice or circumstance,

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[94] Ross Allary on October 29, 2014 at p 189, line 20 – p 190, line 17 [Ex 30, Tab 11]
[95] *Blueberry River Indian Band v. Canada*, 2001 FCA 67 at paras 14-15, [2001] 4 FCR 451; *Kingfisher v. Canada*, 2002 FCA 221 at para 7, 291 NR 314, leave to appeal to SCC dismissed with costs, 29308 (February 13, 2003).
[96] S.C 1876, c. 18.
[97] *Papaschase Indian Band No 136 v Canada (AG)*, 2004 ABQB 655 (sub nom *Lameman* v *Canada* (AG)), 365 AR 1 (Alta QB); rev'd in part, 2006 ABCA 392; appeal allowed, 2008 SCC 14, [2008] 1 SCR 372, CLA Vol 2, Part A, Tab 9.
[98] *Montana Band v. Canada*, 2006 FC 261 at para 454, 287 FTR 159; aff'd, 2007 FCA 218.

Indian Act bands could cease to exist.[99] Until 1889, the Indian agent's discretion governed transfers of individuals between bands. Legislation regarding transfers followed in 1895.[100] Where all members left a band or where a band divided, the successor band or bands received the collective rights of the predecessor.[101] A merged band could be recognized by the Crown without a meeting, vote or agreement of one or both of the bands.[102]

71. The Ochapowace Indian band is the only "band" within the meaning of the *Indian Act* in the *Watson* and *Bear* actions. The bands led by Chief Chacachas and Chief Kakisiwew ceased to exist many years ago:

a. There was an agreement between the two chiefs.[103]

b. The Indian agent used his discretion to amalgamate members of the Kakisiwew and Chacachas bands in the 1880s.[104]

c. Only Ochapowace had a pay list from 1885 to 1951.[105]

d. Under the 1951 amendments to the *Indian Act*, the Ochapowace band list was posted on both the Ochapowace reserve and at the Agency Office in Broadview. [106] The presumption of regularity discussed in paragraphs 28-31, infra also applies in the circumstances of posting the band list in the two locations. Protests were permitted for wrongful inclusion or omission by the band council, any 10 electors, and any individual considering his/her name wrongfully included or excluded from the band list. No protests were made under the *Indian Act* in

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[99] *Montana* (FC) at para 456; See also: *Papaschase Indian Band No 136 v Canada (AG)*, 2004 ABQB 655 (sub nom *Lameman* v *Canada* (AG)), 365 AR 1 (Alta QB); rev'd in part, 2006 ABCA 392; appeal allowed, 2008 SCC 14, [2008] 1 SCR 372, CLA Vol 2, Part A, Tab 9.
[100] *Montana* (FC) at para 508.
[101] *Montana* (FC) at para 524 and 525, *Blueberry River Indian Band v. Can**ada***, 2001 FCA 67 at para 26, [2001] 4 FCR 451.
[102] *Papaschase* (ABQB) at para 92.
[103] Trial Transcript Rough Draft, Dr. von Gernet, December 11, 2018 p. 26-27 and Trial Transcript Rough Draft, Dr. Whitehouse-Strong, December 13, 2018, p. 2 and Ex 1 – JB-00186
[104] Letter – A. McDonald, Indian Agent to the Indian Commissioner dated September 12, 1884 [Ex 1 – JB-00184]
[105] 1885 Treaty pay list for the Ochapowace band [Ex 1 – JB-00203], 1951 Treaty pay list for the Ochapowace band [Ex 1 – JB-00481]
[106] Letter dated September 12, 1951 [Ex 26]

relation to the Ochapowace band list. Neither the Chacachas nor the Kakisiwew band lists existed in 1951 [107]

e. On November 13, 1973, Canada issued an Order in Council declaring all existing bands under section 2 of the *Indian Act*. The Ochapowace band is listed in the Order in Council. Chacachas and Kakisiwew are not listed.[108]

72. As a successor band, the Ochapowace Indian band properly settled its TLE and SSB claims. Where a legal successor to a band exists, descendants of the predecessor band do not have standing to advance collective rights transferred to the successor band. Band membership, not ancestry, creates entitlement to reserve lands.[109]

(b) The *Watson* and *Bear* plaintiffs are members of Ochapowace Band

73. The *Watson* and the *Bear* plaintiffs purport to be descendants of predecessor bands led by Chiefs Chacachas and Kakisiwew, while at the same time acknowledging that they are members of the Ochapowace Indian band.[110] However, membership in a band is singular. Dual membership is not possible under the *Indian Act*.[111] Descendants cannot self-identify as an *Indian Act* band. They may be a First Nation, but are not a band within the meaning of the *Indian Act*.[112] Chacachas and Kakisiwew are not bands within the meaning of the *Indian Act*. The *Watson* plaintiffs may be descendants of Chacachas, but not members of an existing Chacachas band under the *Indian Act*:

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[107] Ochapowace Band List dated June 30, 1951 [Ex 1 – JB-00483] and Trial Transcript Rough Draft, December 5, 2018 p. 38-43
[108] Order in Council dated November 13, 1973 [Ex 1 – JB-00487]
[109] *Blueberry River Indian Band v. Canada*, 2001 FCA 67 at para 13-27, [2001] 4 FCR 451; *Kingfisher v. Canada*, 2002 FCA 221 at para 7, 291 NR 314, leave to appeal to SCC dismissed with costs, 29308 (February 13, 2003); *Papaschase Indian Band No 136 v Canada (AG),* 2004 ABQB 655 (sub nom *Lameman* v *Canada* (AG)), 365 AR 1 (Alta QB); rev'd in part, 2006 ABCA 392; appeal allowed, 2008 SCC 14, [2008] 1 SCR 372, CLA Vol 2, Part A, Tab 9.
[110] Crown's Read-Ins, Cameron Watson Documents, Undertaking 2 [Ex 30, Tab 4, p. 3-20]
[111] *Montana Band v. Canada*, 2006 FC 261 AT paras 515-520, 287 FTR 159, aff'd 2007 FCA 218.
[112] *Papaschase* (ABQB) at para 191.

a. Cameron Watson, his grandfather (Peter); his father (Ivan); his uncle (Sam); his brother (Morley) and another family member, Jack Watson, were all former chiefs of Ochapowace band.[113]

b. Cameron Watson and others wrote to Roy Bird, Regional Director General of Indian and Northern Affairs by letter dated December 1, 1998 advising that the descendants of Chief Chacachas "…have begun organizing to reestablish this Treaty Band." They further advised that a delegation of Chacachas descendants had a discussion with Ochapowace's chief and council regarding the Chacachas claim, and agreed to resolve the matter when the band acquired sufficient acres to satisfy the Chacachas claim from TLE funds.[114]

c. The *Watson* plaintiffs use the Ochapowace's voters list to identify who Cameron Watson believes are eligible for membership in Chacachas.[115]

d. All of the named *Watson* plaintiffs are on the TLE and SSB voters lists for ratification of the settlement agreements by Ochapowace, [116] except Cameron Watson's son, Peter, who was too young to vote at the time.[117]

e. Sheldon Watson acknowledged that all Chacachas' members were entitled to vote on the settlement ratification votes for the TLE and SSB settlement agreements, subject to age of the majority.[118]

f. Sheldon Watson testified that his family participated in the TLE process because they were band members from Ochapowace. [119]

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[113] Ochapowace Band Councils 1912-1965 [Ex 1 – JB-00609], Genealogy Questions re Cameron Watson [Ex 1 – JB-00635], Cameron Watson on January 19, 2004, Q/A 19 & 347 [Ex 30, Tab 3].
[114] Letter – Chacachas Committee members to Roy Bird dated December 1, 1998 [Ex 1 - JB-00567].
[115] Letter – T.J. Waller, Q.C. to M. Kindrachuk, Q.C. dated September 24, 2007 with attached Voters List for Ochapowace First Nation current to March 21, 2007 [Ex 1 – JB-00600]
[116] Treaty Land Entitlement Settlement Official List of Voters for Ochapowace band dated September 1, 1993 [Ex 1 – JB-00521], Official List of Voters for Ochapowace band dated February 9, 1995 [Ex 1 – JB-00533].
[117] Request to Admit Response #67-82, #93-108 [Ex 25] (Peter Watson was substituted for his deceased father, Cameron Watson, as a plaintiff by Order dated May 19, 2011).
[118] Crown's Read-Ins, Sheldon Watson on October 28, 2016, p. 318, Line 6, p. 320, Line 17 [Ex 30, Tab 9]
[119] Trial Transcript Rough Draft, November 16, 2018 p. 44-45

74. The *Bear* plaintiffs' claim to a separate band existence is equally unsustainable:

a. Wesley George acknowledged on discovery that the Ochapowace band and Kakisiwew are essentially the same First Nation.[120]

b. Ross Allary agreed that there is no difference between Kakisiwew and Ochapowace. [121]

c. Wesley Bear agreed that all descendants of Kakisiwew were entitled to vote on the ratification of the TLE and SSB settlement agreements.[122]

d. The named *Bear* plaintiffs are listed on the voters lists for ratification of the TLE and the SSB settlement agreements.[123]

e. The affidavit of former *Bear* counsel, Alison T. Mitchell, demonstrates the *Bear* plaintiffs' lack of independence from the Ochapowace band. Ross Allary, speaking for Ochapowace during examinations for discovery said Ms. Mitchell was not a team player and Ochapowace "…had to do a lot of work for her".[124]

75. The *Watson* and *Bear* plaintiffs are unable to articulate precisely who they represent, and unable to meet the test in either *Papaschase* or *Kingfisher* to "…potentially claim to have a right…" to be placed on a band list if it existed.[125] On October 15, 2004, Chief Denton George denied the need for any genealogical link for membership in either Chacachas or Kakisiwew. Chief George viewed membership as a matter of choice.[126] Sharon Bear (*Watson* plaintiffs) identifies with Chacachas despite a

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[120] Crown's Read-Ins, Wesley George on January 20, 2004, Q/A 20 [Ex 30, Tab 5]
[121] Trial Transcript Rough Draft, November 28, 2018, p. 85, lines 18-21
[122] Crown's Read-Ins, Wesley Bear on October 20, 2014, p. 81, Lines 15-24 [Ex 30, Tab 13]
[123] Treaty Land Entitlement Settlement Official List of Voters for Ochapowace band dated September 1, 1993 [Ex 1 – JB-00521]; Official List of Voters for Ochapowace band dated February 9, 1995 [Ex 1 – JB-00533].
[124] Alison Mitchell affidavit [Ex 1 – JB-00602]; Crown's Read-Ins, Ross Allary on October 29, 2014 at p 187, line 13 – p 190, line 20 [Ex 30, Tab 11].
[125] *Papaschase Indian Band No 136 v Canada (AG)*, 2004 ABQB 655 (sub nom *Lameman* v *Canada* (AG)), 365 AR 1 (Alta QB); rev'd in part, 2006 ABCA 392; appeal allowed, 2008 SCC 14, [2008] 1 SCR 372, CLA Vol 2, Part A, Tab 9; *Kingfisher v. Canada*, 2001 FCT 858 at para 82, aff'd on appeal, 2002 FCA 221, 291 NR 314, leave to appeal to SCC dismissed with costs, 29308 (February 13, 2003).
[126] Letter from Chief George to Merv Phillips dated October 15, 2004. [Ex 1 – JB-00599]

direct paternal link to Kakisiwew,[127] confirming affiliation with a historic band is a matter of choice. The financing of the *Watson* and *Bear* litigation by the Ochapowace band, including a joint contingency agreement and the *Bear* plaintiffs' lack of independence, is further evidence of a lack of standing.[128]

76. Absent authorization from the Ochapowace band, which cannot be provided by virtue of the releases it signed, the *Watson* and *Bear* plaintiffs have no standing to bring actions for collective rights vested in the successor band. The Ochapowace band has already resolved these claims against Canada by agreement and bound band members to the settlement agreements. Far from authorizing the plaintiffs to proceed on its behalf, the Ochapowace band is a co-defendant in both actions. These claims by the *Watson* and *Bear* plaintiffs, who are all currently members of the Ochapowace band, are not permitted by law and should be dismissed.[129]

Laches and Limitations

(13) Laches and acquiescence apply

77. The *Watson* and *Bear* claims should be dismissed through the application of *laches* and acquiescence. The equitable doctrine of laches requires a claimant in equity to prosecute his claim without undue delay. It does not fix a specific limit, but considers the circumstances of each case.[130] The application of the doctrine of laches and acquiescence is applicable to bar Aboriginal claims in appropriate circumstances. In determining whether there has been delay that amounts to laches, the main considerations are acquiescence on the claimant's part; and any change of position

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[127] Trial Transcript Rough Draft, Sharon Bear, November 13, 2018, p. 115
[128] Contingency Fee Agreement [Ex 1 – JB-00598], Alison T. Mitchell affidavit, paras 1-9 [Ex 1 – JB-00602]; Crown's Read-Ins, Ross Allary on October 29, 2014 at p 189, lines 6-13 [Ex 30, Tab 11].
[129] *Papaschase Indian Band No 136 v Canada (AG)*, 2004 ABQB 655 (sub nom *Lameman* v *Canada* (AG)), 365 AR 1 (Alta QB); rev'd in part, 2006 ABCA 392; appeal allowed, 2008 SCC 14, [2008] 1 SCR 372, CLA Vol 2, Part A, Tab 9. *Ryan et al v Harold Leighton et al*, 2006 BCSC 278 at paras 16-18, 20; *Quinn v. Bell Pole*, 2013 BCSC 892 at para 32, *Te Kiapilanoq v British Columbia*, 2008 BCSC 54 at para 25, see also *Campbell v. British Columbia (Forest Range)*, 2011 BCSC 448 at paras 160-161.
[130] *Manitoba Metis* at para 145.

that has occurred on the defendant's part that arose from reasonable reliance on the claimant's acceptance of the status quo. [131]

78. Acquiescence is found in the declaration, representations and failure to assert "rights" in circumstances that require assertion.[132] In negotiating and executing the TLE and 1919 settlements, the Ochapowace band and its membership, represented to Canada that the Ochapowace band is the successor of Chacachas and Kakisiwew.

79. Canada's position changed in paying the Ochapowace membership, as successor to the Chacachas and Kakisiwew bands, over 29 million dollars, in final settlement of claims to treaty lands. In these circumstances, allowing the *Bear* and *Watson* plaintiffs' to pursue these claims is unjust, and the claims ought to be barred by laches.

(14) Oral History Evidence

80. The plaintiffs' and Ochapowace's oral history evidence confirms knowledge, since the events occurred, of all of the material facts. The plaintiffs rely on this very evidence, and the fact that it has always been known and has been properly preserved, to prove their case. The evidence includes knowledge of: Chacachas and Kakisiwew; the 1876 surveys; the joint reserve in 1881; the amalgamation of the bands in the 1880 "without consultation;" a lack of formalities or compensation in relation to the 1876 surveys; and the lawyer Neff's involvement in the 1930s.[133] Elder Sharon Bear also testified that the Chacachas and Kakisiwew always thought that Canada's actions in relation to these events were "illegal."[134] Elder Ross Allary

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[131] *Manitoba Metis* at para 145; *M.(K.) v M.(H.)*, [1992] 3 SCR 6 at pp. 76 – 80.
[132] *Wewaykum* at para 111.
[133] Trial Transcript Rough Draft, November 13, 2018, testimony of Sharon Bear, at pages 99 - 103, 106 – 109; Trial Transcript Rough Draft, November 14, 2018, testimony of Sammy Issac, at pages 43 – 44, 48 – 50, 61 – 64; Trial Transcript Rough Draft, November 14, 2018, testimony of Ross Allary at pages 109 -111, 118 – 120, 126 – 127, 134 – 135; Trial Transcript Rough Draft, November 15, 2018, testimony of Ross Allary at pages 5 – 7, 11, 17, 19 – 22, 24.
[134] Trial Transcript Rough Draft, November 13, 2018, testimony of Sharon Bear, at page 99, line 27 to page 100 line 3;

testified that he worked on these files for thirty years[135]and that they were trying to make the Chacachas reserve "way before Cameron was even born". [136] Sharon Bear testified that she was always involved in the claim ever since she was on Ochapowace council in the early 1970's. [137]

(15) Documentary Record

81. The documentary record shows the plaintiffs' ancestors made inquires of the government regarding the material facts in 1911 and again in 1928:

a) In 1911, an Indian delegation went to Ottawa to air grievances. A representative of Kakisiwew (Loud Voice) raised the issue of the amalgamation of the predecessor bands, Kakisiwew and Chacachas.[138]

b) On March 9, 1928, Indian agent Ostrander reports that Ochapowace band members made inquiries about Chacachas survey area, and told Ostrander that they were former members of Chacachas before the bands amalgamated.[139]

82. The documentary record shows that the plaintiffs consulted a lawyer in 1932. The correspondence between the lawyer, Garnet C. Neff, and the Department of Indian Affairs shows that the plaintiffs had an understanding of the material facts,[140]

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[135] Trial Transcript Rough Draft, November 14, 2018, testimony of Ross Allary, at pages 119 – 120 and Trial Transcript Rough Draft, November 14, 2018, testimony of Ross Allary at page 38.
[136] Trial Transcript Rough Draft, November 28, 2018, p. 33
[137] Trial Transcript Rough Draft, November 15, 2018, p. 71
[138] Memorandum from the Department of Indian Affairs dated January 30, 1911 [JB-00421].
[139] Letter – J.B. Ostrander, Indian Agent to The Secretary, Department of Indian Affairs dated March 9, 1928 [JB-00446].
[140] Letter – G.C. Neff, Barrister & Solicitor to Department of Indian Affairs dated May 13, 1932 [JB-00461];

- Letter – A.F. MacKenzie, Secretary to G.C. Neff, Barrister & Solicitor dated May 19, 1932 [JB-00462];
- Letter – G.C. Neff, Barristers & Solicitor to Department of Indian Affairs dated May 23, 1932 [JB-00463];
- Letter – A.F. MacKenzie, Secretary to G.C. Neff, Barrister dated May 31, 1932 [JB-00464];
- Letter – G.C. Neff, Barrister & Solicitor to Department of Indian Affairs dated June 4, 1932 [JB-00466];
- Letter – G.C. Neff, Barrister & Solicitor to Department of Indian Affairs dated June 17, 1932 [JB-00467];

and were asserting a legal claim.[141]

83. The documentary record also shows that there was extensive historical research covering the material facts of these claim in the 1970's. April 26, 1974, John Tobias prepared a report that discusses: the stability of Kakisiwew in 1874, the 1876 surveys for Chacachas and Kakisiwew, the chiefs' lack of satisfaction with the 1876 surveys, the 1881 survey, the official reserve status in 1889, the amalgamation of the predecessor bands and other historic events concerning the Ochapowace Indian band.[142] In November 1978, Arien Heath prepared a report that discusses the history of the Ochapowace Indian band including the amalgamation of the predecessor bands, the 1881 re-survey of the proposed reserves laid out by William Wagner in 1876, the events leading to the 1919 surrender of a portion of Ochapowace IR 71, the understanding that the two bands did not agree with the amalgamation, and that Ochapowace members consulted a lawyer in 1932 to seek compensation for the loss of the 1876 lands.[143]

(16) Examination for discovery evidence

84. The examination for discovery evidence submitted at trial,[144] also confirms knowledge of the facts underlying the claims:

a) Cameron Watson (deponent for the *Watson* plaintiffs) spoke about:

- Letter – A.F. MacKenzie, Secretary to G.C. Neff, Barrister dated August 11, 1932 [JB-00468];
- Letter – G.C. Neff, Barrister & Solicitor to Department of Indian Affairs dated August 24, 1932 [JB-00469];
- Letter – G.C. Neff, Barrister & Solicitor to Department of Indian Affairs dated September 12, 1932 [JB-00471];
- Letter – A.F. MacKenzie, Secretary to G.C. Neff, Barrister dated September 19, 1932 [JB-00472].

[141] Letter – G.C. Neff, Barrister & Solicitor to Department of Indian Affairs dated June 4, 1932 [JB – 00466]

[142] Memo from J.L. Tobias to A. Campbell dated April 26, 1974 and attached report, "The Government of Canada and Ochapowace Band. 1870-1933." at 9, 10, 13, 14, 15, 18-20, 23-25, 33 [Ex 1 - JB-00488 and Ex 1 -JB-00489].

[143] Report on the Treaty Land Entitlement of the Ochapowace Band prepared by Tyler & Wright Research Consultants Limited in November 1978 at 2, 4-10, 17, 22, 23 [Ex 1 - JB-00490].

[144] Crown's Read-Ins [Ex 30, Tab 3, Tab 9 and Tab 7]

i. Growing up in a political family listening to stories about ancestry;

ii. Always knowing about Kakisiwew and Chacachas;

iii. Knowing about the two predecessor bands since 1950; and

iv. Knowing about the amalgamation, well known in the 1950s, 1930s and 1911, a "long standing thing".[145]

b) Sheldon Watson (deponent for the *Watson* plaintiffs) acknowledged:

i. The two band history, the amalgamation, and the original 1876 surveys;

ii. Knowing about the Chacachas survey and the story of Chacachas;

iii. "We all knew it all along".[146]

c) Chief Denton George (deponent for Ochapowace co-defendant) acknowledged that he and a good number of people grew up knowing about Chacachas and Kakisiwew. He personally knew about it since the 1960s.[147]

d) When questioned as to when he became involved in the statement of claim initiating this action, Ross Allary responded "always." When he was elected to council in the early 1970s, "it was one of our goals to re-establish the reserve."[148]

(17) Limitations legislation bars the claims advanced by the Watson and Bear plaintiffs

85. The *Watson* and *Bear* claims are statute barred by limitation legislation. The plaintiffs have been aware of the facts underlying their respective claims for decades. Regardless of the other grounds, these actions should be dismissed by application of limitation legislation.

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[145] Cameron Watson on January 19, 2004, Q/A 72-73 [Ex 23, Tab A].
[146] Sheldon Watson on October 28-29, 2014 at p 286, line 22 – p 287, line 19 [Ex 30, Tab 9].
[147] Denton George on January 21, 2004, Q/A 66-70 [Ex 30, Tab 7].
[148] Trial Transcript Rough Draft, Ross Allary, November 15, 2018 p. 71

(18) The Applicable Statues

86. The *Watson* and *Bear* claims are specifically barred by application of *The Public Officers' Protection Act (POPA)*[149] and *The Limitation of Actions Act (LAA)*[150] in force in Saskatchewan at the material time. Subsection 39(1) of the *Federal Courts Act*[151] and section 32 of the *Crown Liability and Proceedings Act*[152] provide that provincial limitations legislation applies to any proceeding against the Federal Crown, including those commenced in Federal Court.[153]

87. The current legislation in Saskatchewan is the *Limitations Act*, which provides in section 3 that proceedings based on existing Aboriginal and Treaty rights are governed by the laws respecting limitations of actions that would have been in force had the Act not been passed. *The LAA* would have been in force had the *Limitations Act* not been passed. *POPA* was also in force.

(19) Limitation periods apply to Aboriginal claims

88. The jurisprudence holds that limitation periods apply to Aboriginal claims, "even where the rights at stake are constitutionally-protected treaty and Aboriginal rights," and "apply to Aboriginal claims for the same policy reasons as they apply to other claims."[154] Limitation periods do not extinguish rights, which may still be invoked in future matters in a timely way. Rather, they bar stale claims for relief based on those rights.[155]

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[149] *The Public Officers' Protection Act*, SS 1923, c. 19; RSS 1978, c P-40, as repealed by SS 2004, c L-16.1.
[150] *The Limitation of Actions Act*, RSS 1978, c L-15, as repealed by SS 2004, c L-16.1.
[151] RSC 1985, c F-7.
[152] RSC 1985, c C-50.
[153] See *Peepeekisis Band v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FCA 191 at para 30.
[154] *Samson Indian Nation and Band v Canada* at paras 117-118, *Wawaykum* at paras 110 & 121, *Lameman*, at para 13, Manitoba Metis at paras 138 & 137;
[155] *Samson Indian Nation and Band v Canada*, 2015 FC 836 at para 112 – 115; *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 121; *Canada (Attorney General) v Lameman*, 2008 SCC 14 at para 13; and *Manitoba Metis Federation v Canada (Attorney General)*, 2013 SCC 14.

89. In *Wewaykum*, the SCC unanimously dismissed a claim against Canada for breach of fiduciary duty. The court held that it was neither unconstitutional, nor was it an injustice, to apply limitation periods to claims in the Indigenous context. The SCC specifically addressed and rejected arguments that applying limitation periods in Aboriginal cases is too harsh or unfair.

90. In *Lameman*, the SCC applied Alberta's *Limitation of Actions Act* and cited the reasoning in *Wewaykum* to summarily dismiss claims for additional reserve lands, equipment and other benefits based on a band's treaty rights.[156] In dismissing the claim, the SCC emphasized certain policy rationales for limitation periods, namely, to strike a balance between protecting the defendant's entitlement to organize his or her affairs without fearing a suit, and treating the plaintiff fairly with regard to his or her circumstances. The SCC held that the policy applies as much to Aboriginal claims as to other claims.[157]

(20) Manitoba Métis is distinguishable

91. In *Manitoba Métis*, the SCC confirmed that limitation periods apply to Aboriginal claims for breach of fiduciary duty and claims for personal remedies. However, the SCC found that the limitation period did not apply to a declaration that "the federal Crown failed to implement the land grant provision set out in section 31 of the Manitoba Act, 1870 in accordance with the honour of the Crown."[158] The SCC placed significant emphasis on the unique nature of the claim, with the factual circumstances being characterized as "extraordinary."[159]

92. With respect to the application of the limitations legislation, the SCC's decision turned on the facts that the plaintiffs: (1) were seeking a declaration that (2) a

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[156] *Lameman* at para 13.
[157] *Lameman* at para 13.
[158] *Manitoba Métis* at para 154.
[159] *Manitoba Métis* at para 81 wherein the court stated that "[i]t is a narrow and circumscribed duty, which is engaged by the extraordinary facts before us."

provision of an act of constitutional authority (3) had been implemented in a manner contrary to a constitutional principle (the honour of the Crown), (4) with no personal relief being sought, and (5) the plaintiffs were pursuing the overarching constitutional goal of reconciliation that is reflected in section 35 of the *Constitution Act*, 1982.[160]

93. The *Watson* and *Bear* claims are not analogous to the *Manitoba Métis* claim for the reasons that follow.

(21) The plaintiffs are seeking personal and remedial relief

94. In *Manitoba Métis* the SCC said "[w]ere the Métis in this action seeking personal remedies, the reasoning set out here would not be available."[161] The SCC also pointed out that "the Métis seek no personal relief and make no claim for damages or for land."[162]

95. In *Peter Ballantyne Cree Nation v Canada (Attorney General)* and *Samson Indian Nation and Band v Canada* the Saskatchewan Court of Appeal and the Federal Court (respectively) found that the *Manitoba Métis* approach to limitations was inapplicable where personal relief was sought, despite the fact that the plaintiffs also sought declarations.[163]

96. In these actions, the plaintiffs seek remedies that go beyond declarations, which are personal and remedial in nature, including:

a. Damages / equitable compensation / an accounting for loss of Chacachas and Kakisiwew Reserves;

b. Damages for the amalgamation of the Chacachas and Kakisiwew Indian bands;

c. Damages for breach of the honour of the Crown;

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[160] *Manitoba Métis* at paras 136 and 137.
[161] *Manitoba Métis* at para 143.
[162] *Manitoba Métis* at para 137.
[163] *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2016 SKCA 124 at para 52; *Goodswimmer v Canada (Attorney General*), 2017 ABCA 365 at para 123.

d. Damages / equitable compensation for breach of fiduciary duty;

e. Damages for breach of treaty; and

f. Exemplary or punitive damages.

Accordingly, the *Watson* and *Bear* plaintiffs' claims are not analogous to *Manitoba Métis*.

(22) The declarations sought are not true declarations

97. The "declarations" sought by the *Watson* and *Bear* plaintiffs are not true declarations of the type issued in *Manitoba Métis.* A true declaratory judgement is "a declaration, confirmation, pronouncement, recognition, witness and judicial support to the legal relationship between parties without an order of enforcement or execution."[164] The "declarations" sought by the *Watson* and *Bear* plaintiffs are findings of mixed fact and law, in relation to breaches of fiduciary duty and treaty, sought for the purpose of obtaining damages. These "declarations" are findings which courts make in a great many actions in the course of determining liability to pay money for damages. [165] As such, what is sought by the *Watson* and *Bear* plaintiffs goes well beyond a true declaration.

98. Of further assistance is the body of case law that has developed interpreting limitation statutes which exempt true declarations from limitation periods. These decisions stand for the principle that, "[i]f a declaration is merely ancillary to consequential relief which is statute barred, the entire recourse is considered as consequential relief and will fall."[166] A declaration should be construed narrowly, to discourage litigants from claiming declaratory relief merely to avoid limitation periods.[167]

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[164] Lazar Sarna, *The Law of Declaratory Judgements*, 3rd ed (Toronto: Carswell, 2007) at 3.
[165] See *The Law of Declaratory Judgements* at 4.
[166] *The Law of Declaratory Judgements* at 4.
[167] See *Joarcam, LLC v Plains Midstream Canada ULC*, 2013 ABCA 118 at para 7.

99. These claims have been divided into two phases. The very fact that a second "damages" phase is contemplated shows that the declarations are merely ancillary to the personal relief sought. In *Manitoba Métis* the SCC specifically noted that the declaration issued was sought for "extra-judicial" negotiations, not for the purpose of seeking damages.[168]

(23) The plaintiffs seek declarations that are not of the same constitutional nature as issued in Manitoba Métis

100. To the extent that any of the declarations sought by the *Watson* and *Bear* plaintiffs could be characterized as true declarations, they are not of the same constitutional character as the declaration issued in *Manitoba Métis.* The declarations sought by the *Watson* and *Bear* plaintiffs are based on fiduciary and treaty rights and obligations. In *Wewaykum* and *Lameman* the SCC was clear that limitations defenses apply to actions involving constitutionally protected Aboriginal and treaty rights. This was affirmed by the SCC in *Manitoba Metis.*[169] The SCC distinguished the Métis' claim from *Wewaykum* and *Lameman* based on the fact that the Manitoba Act was given constitutional authority by the *Constitution Act*, 1871.[170] In *Samson Indian Nation and Band v Canada*, the Federal Court confirmed that *Manitoba Métis* did not create an exception for constitutionally derived treaty and Aboriginal claims.[171]

101. By way of amendments to their original statements of claim, the plaintiffs seek declarations regarding the honour of the Crown. However, these declarations are very different than the declaration regarding honour of the Crown issued in *Manitoba Metis*. The declarations sought by the *Watson* and *Bear* plaintiffs relate to fulfilling treaty obligations, not fulfilling a promise analogous to the constitutional nature of the *Manitoba Act*. Moreover, the declarations sought by the *Watson* and *Bear*

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[168] *Manitoba Métis* at para 137.
[169] *Manitoba Métis* at paras 269-271.
[170] *Manitoba Métis* at para 136.
[171] *Samson* at para 33.

plaintiffs are for a finding that the plaintiffs are entitled to compensation for violating the honour of the Crown. Thus, they go beyond true declarations.

(24) Alternative remedies exist

102. In *Manitoba Métis* the SCC emphasized that in some cases, declaratory relief might be the only way to give effect to the honour of the Crown.[172] In *Peepeekisis*, the Federal Court of Appeal held that as alternative effective recourse existed at the Specific Claims Tribunal, the *Manitoba Métis* approach to limitations was inapplicable.[173] There are alternative means for seeking all aspects of the relief claimed by the *Watson* and *Bear* plaintiffs. Accordingly, to the extent that the honour of the Crown and the goal of reconciliation may be at play in these claims, there are ways of addressing them. Therefore, the *Manitoba Métis* approach to limitations is inapplicable.

103. It is open to the plaintiffs to pursue damages for the amalgamation and relocation of the reserve under the *Specific Claims Tribunal Act* (*SCTA*), which bars application of limitation defenses.[174] The fact that claimants must be *Indian Act* bands to proceed under the *SCTA* does not bar this claim. The Ochapowace band could bring the claim under the *SCTA*. All of the plaintiffs are members of the Ochapowace band and any collective rights that were originally held by Chacachas and Kakisiwew are now vested in the successor Ochapowace band.

104. The plaintiffs also seek declarations that the Chacachas and Kakisiwew Indian bands remain validly constituted and recognized, separate and independent Indian bands. However, the plaintiffs can achieve this status under subsection 17(1)(a) of the *Indian Act*, and by following the policy established thereunder, whereby the Minister may constitute new bands if requested to do so by persons proposing to form

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[172] *Manitoba Métis* at para 143.
[173] *Peepeekisis Band* v *Canada*, 2013 FCA 191 at paras 59 and 60.
[174] *Specific Claims Tribunal Act*, S.C. 2008, c.22, at section 19.

the new bands. The plaintiffs do not require a declaration to enable them to proceed under the section 17 process. Judicial review is available in the event the Minister were to refuse any reasonable and proper request to form new bands.

105. The evidence shows that the Ochapowace band started the section 17 process in 1999 by sending a BCR requesting the re-establishment of Chacachas and that the Ochapowace band's name be changed to Kakisiwew[175]. However, Ochapowace did not provide the supporting documentation regarding the division of the band's assets required under the policy. Canada's representative testified that she contacted the Ochapowace band to discuss what was required but the Ochapowace band chose not to pursue the section 17 process further. [176]

(25) The Public Officers' Protection Act applies

106. In applying statutes of limitations, the specific applies over the general. *POPA*, as specific legislation regarding public authorities, must be considered first in these actions. If *POPA* does not apply to a particular cause of action, then the Court must consider whether the general limitations statute, *LAA*, should bar the action.[177]

107. *POPA* bars claims brought more than twelve months after the impugned action of a public officer. In the *Watson* and *Bear* actions, the impugned historical events occurred between 1874 and 1889. To the extent the plaintiffs' claims can be characterized as a breach of public law duties, *POPA* bars the claims regarding the 1876 original surveys, the survey of the joint reserve in 1881, the amalgamation of the predecessor bands in 1884, and the confirmation of the Ochapowace IR 71 in 1889, one year after each event. Section 2 of *POPA* provides:

> No action, prosecution or other proceedings shall lie or be instituted against any person for an act done in pursuance or execution or intended execution of

[175] Band Council Resolution dated November 10, 1999 [Ex 1, JB-00590]
[176] Trial Transcript Rough Draft, December 5, 2018, p. 8-9 and p. 13-14; Handwritten Note dated April 5, 2000 [Ex 1, JB-00591]
[177] Popowich v Saskatchewan, 2001 SKCA 103 at para 3

> a statute, or of a public duty or authority, or in respect of an alleged neglect or default in the execution of a statute, public duty or authority, unless it is commenced:
>
> (a) within twelve months next after the act, neglect or default complaint of or, in the case of a continuance of injury or damage, within twelve months after it ceases; or
>
> (b) within such further time as the court or a judge may allow.

108. *POPA* was enacted in 1923 and remained in force until 2005. Despite the repeal of *POPA*, Canada's right to rely on the Act crystalized before the repeal, so *POPA* remains applicable to the *Watson* and *Bear* actions.[178]

109. The Supreme Court of Canada describes the importance of limitation legislation for public authorities in *Des Champs v. Prescott-Russell (Conseil des écoles séparées catholiques de langue francaise)*:

> Many, if not most, public authorities in this country are shielded from litigants to some extent by special statutory limitation periods. The public policy underlying these limitations is that public authorities ought not to be unduly prejudiced by the passage of time. Timely notice will promote the timely investigation and disposition of claims in the public interest. After the expiry of a limitation period, the public authority can consider itself free of the threat of legal action, and need not preserve or seek out pertinent evidence. Its fiscal planning can proceed free of the disrupting effect of unresolved claims against the public purse. Historically, limitation statutes were referred to as "statutes of repose" or "statutes of peace" … (cites omitted)[179]

110. In order to engage the protection of *POPA*, the impugned acts or omissions must stem from public law duties, as opposed to duties of a private nature. *Des Champs* guides the analysis under *POPA*:

> a. Is the defendant a public authority within the class of entities or individuals for whom the limitation protection was intended?

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[178] *RJG v. Canada (AG)*, 2004 SKCA 102 at para 15, 249, leave to appeal to SCC refused 337 NR 194; *Interpretation Act*, RSC 1985, c. I-21, section 43(c).
[179] *Des Champs v Prescott-Russell (Conseil des écoles séparées catholiques de langue francaise)*, [1999] 3 SCR 281 at para 1, 245 NR 201.

b. What was the public authority doing, and pursuant to what duty or power was it doing it? This information will generally appear from the pleadings.

c. Is the power or duty relied on as part of the plaintiff's cause of action properly classified as entailing "a public aspect or connotation"?

d. Is the activity of the defendant public authority that is the subject matter of the complaint "inherently of a public nature"?

e. Looking at it from the plaintiff's perspective, does the plaintiff's claim or alleged right "correlate" to the exercise by the defendant public authority of a public power or duty?

If the answer to question 5 is in the affirmative, the one-year limitation period applies.[180]

111. The *Watson* and *Bear* allegations are grounded in an era of reserve creation. The survey of Ochapowace IR 71 in 1881 occurred after the abandonment of the 1876 surveys since those original surveys were not acceptable to the chiefs in the area.[181] Chief Kakisiwew, in particular, was dissatisfied with the 1876 survey.[182] The 1880s were essentially reserve creation years as evidenced by the listing in the Order in Council confirming the Ochapowace IR 71 along with over seventy other reserves listed. Reserve creation falls within Canada's public law duties in the Aboriginal realm, such that *POPA* applies. By contrast, Canada's administrative powers or duties, like the administration of a reserve, fall within Canada's private law-type duties that attract application of the *LAA*.[183] Applying *POPA* to these claims, the limitation expired one year after each impugned event.

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[180] *Des Champs v Prescott-Russell (Conseil des écoles séparées catholiques de langue francaise)*, [1999] 3 SCR 281 at paras 50-51, 245 NR 201; *FP v Saskatchewan*, 2004 SKCA 59 at para 50.
[181] Surveyed by Wagner, 1876 [JB-00033]; Sketch Showing Indian Reserves on Crooked and Round Lakes dated August 20, 1881 [JB-00134]; Progress Report of John Nelson dated January 10, 1882 [JB-00145]; Letter – A. McDonald, Indian Agent to The Superintendent-General of Indian Affairs dated January 19, 1882 [JB-00147].
[182] Letter – William Wagner, Dominion Land Surveyor to the Department of Interior dated September 25, 1877 [JB-00061].
[183] *Peepeekisis Band v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FCA 191 at paras 38-41 & paras 45-52, 448 NR 202.

(26) POPA exception does not apply

112. The plaintiffs' actions are barred by *POPA* after one year, unless they can bring themselves within the exception in subsection 2(b) of the *Act*. In order to engage the exception, the plaintiffs must prove:

a) A prima facie case;
b) A reasonable explanation for the delay; and
c) No prejudice to the defendant if the claim is allowed to continue.

113. In view of the legislative criteria, an exception under subsection 2(b) is not applicable to these actions on the facts. The plaintiffs admit to knowledge of the underlying facts for decades, but have offered no reasonable explanation for the delay in bringing their action. Canada relied on the representations of the Ochapowace band and its members in negotiating both settlement agreements. Canada is prejudiced by payment of over 29 million dollars to the Ochapowace Indian band for the very issues disputed by the *Watson* and *Bear* plaintiffs. Canada is also prejudiced by the passage of time (approximately 120 years), the loss of relevant documents, and the death of all of the witnesses to the material events. No exception under subsection 2(b) of *POPA* ought to be granted. *POPA* bars the plaintiffs' actions.

(27) The Limitation of Actions Act applies

114. If the Court deems *POPA* inapplicable to the *Watson* and *Bear* claims, the *LAA* also bars these claims. The plaintiffs knew or ought to have known the material facts underlying their claims by 1951. They had previously asserted a legal claim (add ref) and, as at 1951, had the ability to retain a lawyer with band funds. The *Watson* and *Bear* plaintiffs did not commence their actions until November 16, 2000.

115. Canada agreed that the limitation period would not run between September 11, 1985 and March 16, 1995.[184]

[184] Ochapowace Read-Ins, A-Reinard Kohls by Mervin Phillips September 18, 2003, Undertaking No 24 [Ex 21].

116. Subparagraphs 3(1)(e),(f),(g),(h),(j) and 12 of the *LAA* are all potentially applicable to the plaintiffs' claim depending on how it is framed. The longest time limit provided by these sections is ten years.[185]

117. The principle of discoverability is applicable to limitations under the *LAA*. When the material facts of a cause of action are discovered or ought to have been discovered by a plaintiff by the exercise of reasonable diligence, a cause of action arises for limitation purposes and the clock begins to run.[186] Plaintiffs are expected to act diligently and promptly pursue their rights.[187] The evidence shows that the plaintiffs had knowledge of the material facts of the claims throughout the Ochapowace band's history.

(28) Discoverability

118. The onus of disproving discoverability rests on the plaintiffs.[188] The plaintiffs adduce very little evidence to explain their lack of action in view of the ample record of knowledge on the part of both plaintiff groups.

119. In the 1930s, lawyer, Garnet C. Neff made inquiries regarding the original Chacachas survey on behalf of former members, which shows that the plaintiffs knew of their causes of action at that time. By letter dated June 4, 1932, Neff indicated that the plaintiffs thought they had "a legal claim to recount in connection with the lands

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[185] *The Limitations of Actions Act*, R.S.S. 1978, c. L-15, as am., s 3 sub-paras (1)(e), (1)(f), (1)(g), (1)(h), (1)(j), s 12. Similar sections exist in *The Limitation of Actions Act*, 1965 SS, c 84, s 3 sub-paras (1)(e), (1)(f), (1)(g), (1)(h), (1)(j), s 12; *The Limitation of Actions Act*, RSS 1953 c 76, s 3 sub-paras (1)(e), (1)(f), (1)(g), (1)(h), (1)(j), s 12; *The Limitation of Actions Act*, 1940 RSS c 70, s 3 sub-paras (1)(e), (1)(f), (1)(g), (1)(h), (1)(j), s 12; *The Limitation of Actions Act*, SS 1932, c 18, s 3 sub-paras (1)(e), (1)(f), (1)(g), (1)(h), (1)(j), s 12.

[186] *City of Kamloops v Nielsen*, [1984] 2 SCR 2 at para 40; *Central Trust Co v Rafuse*, [1986] 2 SCR 147 at para 77; M(K) v M(H), [1992] 3 SCR 6 at paras 27-28; *Murphy v Welsh; Stoddard v Watson*, [1993] 2 SCR 1069 at para 11; *Novak v Bond*, [1999] 1 SCR 808 at para 65; *Peixeiro v Haberman*, [1997] 3 SCR 549 at para 36; *Ryan v Moore*, 2005 SCC 38 at paras 21-24; *Canada (AG) v Lameman*, 2008 SCC 14 at para 16, CLA Vol 2, Part A, Tab 9.

[187] *M(K) v M(H)* (SCC) at para 24; *Novak* (SCC) at para 90.

[188] *Langenburg (Town) v. Gamey*, 2010 SKCA 11 at 34.

of the old Band that were sold."[189] In *KLB v British Columbia* the SCC determined that asserting a claim is conclusive proof of discovery and discoverability.[190]

120. In order to explain a lack of further action, the plaintiffs point to section 141 of the *Indian Act*, RSC 1927, c. 98 and suggest that Mr. Neff was threatened by Indian Affairs.[191] The content of the correspondence between Indian Affairs and Mr. Neff does not support threats against Mr. Neff. The intention of section 141 of the *Indian Act* was to protect Indian interests, not to insulate Indian Affairs or prevent legitimate claims.[192] Regardless, the provision was repealed in 1951.

121. Lack of knowledge about the law does not extend the application of limitations legislation.[193] Similarly, subsequent clarification or evolution of the law does not postpone the discovery of material facts so as to extend a limitation period.[194] The application of limitation periods does not turn on whether new counsel can formulate new arguments.[195]

122. The evidence consistently shows that the plaintiffs always had knowledge of the material facts underlying their claim. If the limitation period did not start running immediately after the relocation of the reserves and the amalgamation, then it started either in 1932 when the plaintiffs consulted a lawyer and asserted a claim or in 1951 with the change of legislation allowing them to pay for legal counsel with band funds.

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[189] Letter – G.C. Neff, Barrister & Solicitor to Department of Indian Affairs dated June 4, 1932 [JB – 00466]
[190] *KLB v British Columbia*, 2003 SCC 51 at para 55.
[191] Trial Transcript Rough Draft, Sharon Bear, November 13, 2018 p. 108-109, Trial Transcript Rough Draft, Ross Allary, November 14, 2018 p. 132, Trial Transcript Rough Draft, Ross Allary, November 15, 2018, p. 20-21
[192] *House of Commons Debates*, 16th Parl, 1st session, (15 February 1927) at 324. *House of Commons Debates*, 16th Parl, 1st session (1927) at 86.
[193] *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 124, [2002] 4 SCR 245, CLA Vol 2, Part A, Tab 50; *Samson Indian Nation and Band v Canada*, 2015 FC 836 at para 169 and 181, aff'd 2016 FCA 223.
[194] *KLB v British Columbia*, 2003 SCC 51 at paras 55-57.
[195] *Samson* at para 176; *Goodswimmer v Canada*, 2016 ABQB 384 at paras 472-474 (under appeal).

123. In any event, the ten year limitation period expired long before the statement of claim was filed in 2000.

(29) There is no continuing breach

124. Courts have held that for a claim to be "continuing", such that the limitation period is effected, the action or omission must be repetitive.[196] The actions at issue in this claim are that of moving the reserve and amalgamating the bands. These are not repetitive actions. They are singular actions that occurred over 100 years ago. The fact that a plaintiff may continue to feel the effects of an alleged breach, does not effect the application of limitation periods. Similarly, there is no merit to the argument that every day the plaintiffs are denied a remedy, a new breach occurs. As noted by the courts, if these arguments were accepted, there would be no limit to when plaintiffs could bring their claim and the notion of limitation of actions would be rendered meaningless.[197]

(30) Equitable fraud is not in issue

125. The plaintiffs argue that the principle of equitable fraud applies and the limitation period should not start running until 2015, when their research revealed Agent McDonald's participation in a secret land syndicate.

126. In this context, equitable fraud means the concealment of information that a cause of action exists.[198] The fact that the plaintiffs were unaware that Agent McDonald participated in a syndicate is not *concealment of information that a cause of action exists*. When the plaintiffs' research revealed the existence of the syndicate,

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[196] *RVB Management LTD. v Rocky Mountain House (Town*), 2015 ABCA 188 at para 19; *Corbett v Ainley*, 2007 MBCA 140 at para 34 & 38.

[197] *Wewaykum* at paras 134 – 137; *Semiahmoo Indian Band v Canada*, [1998] 1 FC 3 (FCA at para 63; *McCallum v Canada* (Attorney General), 2010 SKQB 42 at paras 28 – 49; *Peepeekisis Band v Canada (Minister of Indian Affairs and Northern Development)*, 2012 FC 915 at paras 93 – 95; upheld in *Peepeekisis Band v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FCA 191 at para 51.

[198] *Peepeekisis Band v Canada (Minister of Indian Affairs and Northern Development)*, 2012 FC 915 upheld in *Peepeekisis Band v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FCA 191.

Authorson (Litigation Administrator of) v Canada (Attorney General), 2007 ONCA 501; *Guerin v R.*, [1984] 2 SCR 335 at para 390.

they had already filed their statement of claim for their pre-existing causes of action; namely, the relocation and amalgamation. This new information did not substantively change their claim, nor is it a material fact. Although Canada thinks it is irrelevant and inadmissible, at best, the fact that Agent McDonald participated in the syndicate adds context to the plaintiff's pre-existing cause of action.

III. RESPONSES TO PHASE ONE TRIAL ISSUES

Issue one: Was there an Indian band led by Chief Chacachas in 1874?

The evidence shows that there was an Indian band led by Chief Chacachas in 1874.

Issue two: Was there an Indian band led by Chief Kakisiwew in 1874?

The evidence shows that there was an Indian band led by Chief Kakisiwew in 1874.

Issue three: Were Chief Chacachas' band and Chief Kakisiwew's band amalgamated, consolidated or otherwise joined together? If yes, was it properly done?

The evidence shows that several members of Chief Chacachas' band and Chief Kakisiwew's band amalgamated. The plaintiffs have not shown on a balance of probabilities that it was done improperly. The available evidence suggests that a portion of Chacachas' band voluntarily joined Kakisiwew's band.

Issue four: 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?

Chacachas and Kakisiwew were historic bands whose Chiefs signed Treaty No. 4. The Ochapowace band is the successor to the Chacachas and Kakisiwew bands. Ochapowace has properly asserted the treaty rights which flowed to it from Chacachas and Kakisiwew.

Issue five: If Chacachas and Kakisiwew exist as distinct treaty bands, what is their legal status?

Chacachas and Kakisiwew do not now exist as distinct treaty bands. Their treaty rights reside with the successor band, Ochapowace. Ochapowace's membership may choose to divide the Ochapowace band and its property and request the establishment of additional Indian bands pursuant to section 17 of the *Indian Act*. The established bands would have the same rights enjoyed by other Treaty No. 4 bands.

Issue six: Are the named plaintiffs in actions T-2153-00 and T-2155-00 members of either the Chacachas or Kakisiwew band 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?

All of the named plaintiffs are currently listed on the Ochapowace band list and accordingly, they are members of the Ochapowace Indian band. Based on their earlier conduct and assertions that they were members of Ochapowace, all of the named plaintiffs and all of the Ochapowace membership generally, have obtained the benefits from Ochapowace's settlement of historic grievances. The Chacachas and Kakisiwew bands do not currently exist, and accordingly cannot have members.

Issue seven: 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?

The Ochapowace Indian band, as the successor band, currently exercises the treaty rights and receives the treaty benefits of the historic bands.

IV. CONCLUSION AND ORDER SOUGHT

Canada respectfully submits that the actions be dismissed.

ALL OF WHICH IS RESPECTUFLLY SUBMITTED

Signed in the City of Saskatoon in the Province of Saskatchewan this 30th day of January, 2019.

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V. LIST OF AUTHORITIES

Legislation

1. *Constitution Act, 1982*
2. *Crown Liability Act (SC 1952-53, c. 30 s. 3)*
3. *Crown Liability and Proceedings Act*
4. *Exchequer Court Act, S.C. 1887, c. 16, s. 16*
5. *Federal Courts Act*
6. *Indian Act, 1876*
7. *Interpretation Act, RSC 1985, c. I-21, s. 43(c).*
8. *Specific Claims Tribunal Act, S.C. 2008, c.22, at s. 19.*
9. *The Limitation of Actions Act, RSS 1978, c L-15, as repealed by SS 2004, c L-16.1.*
10. *The Limitations of Actions Act, R.S.S. 1978, c. L-15, as am., s 3 sub-paras (1)(e), (1)(f), (1)(g), (1)(h), (1)(j), s 12. Similar sections exist in The Limitation of Actions Act, 1965 SS, c 84, s 3 sub-paras (1)(e), (1)(f), (1)(g), (1)(h), (1)(j), s 12; The Limitation of Actions Act, RSS 1953 c 76, s 3 sub-paras (1)(e), (1)(f), (1)(g), (1)(h), (1)(j), s 12; The Limitation of Actions Act, 1940 RSS c 70, s 3 sub-paras (1)(e), (1)(f), (1)(g), (1)(h), (1)(j), s 12; The Limitation of Actions Act, SS 1932, c 18, s 3 sub-paras (1)(e), (1)(f), (1)(g), (1)(h), (1)(j), s 12.*
11. *The Public Officers' Protection Act, SS 1923, c. 19; RSS 1978, c P-40, as repealed by SS 2004, c L-16.1.*

Case Law

12. *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261
13. *Authorson (Litigation Administrator of) v Canada (Attorney General), 2007 ONCA 501*
14. *Beattie v Canada* (2000), 197 FTR 209
15. *Behn v Moulton Contracting Ltd.*, 2013 SCC 26

16. *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1999] 171 FTR 91, aff'd 2001 FCA 67, [2001] 4 FCA 451
17. *Blueberry River Indian Band v Canada*, 2001 FCA 67, [2001] 4 FCR 451
18. *Campbell v British Columbia (Forest Range)*, 2011 BCSC 448
19. *Campbell* v *Canada* (AG), 2018 FC 683
20. *Canada (AG) v Lameman*, 2008 SCC 14, [2008] 1 SCR 372, CLA Vol 2, Part A, Tab 9
21. *Central Trust Co. v Rafuse*, [1986] 2 SCR 147
22. *City of Kamloops v Nielsen*, [1984] 2 SCR 2
23. *Corbett v Ainley*, *2007 MBCA 140*
24. *Daniels* v *Canada*, 2016 SCC 12
25. *Des Champs v Conseil des écoles séparées catholiques de langue francaise de Prescott-Russell*, [1999] 3 SCR 281, 245 NR 201
26. *FP v Saskatchewan*, 2004 SKCA 59, 249 Sask R 42. (sub nom *Plotnikoff v Saskatchewan*)
27. *Goodswimmer v Canada*, 2017 ABCA 365
28. *Guerin v R.*, *[1984] 2 SCR 335*
29. *Joarcam, LLC v Plains Midstream Canada ULC*, 2013 ABCA 118
30. *K.L.B. v British Columbia*, [2003] 2 SCR 403, 2003 SCC 51
31. *Knight* v *Imperial Tobacco Canada Limited*, 2011 SCC 42
32. *Kingfisher v Canada*, *2001 FCT 858 at para 82, aff'd on appeal, 2002 FCA 221, 291 NR 314, leave to appeal to SCC dismissed with costs, 29308 (February 13, 2003)*
33. *Kingfisher v Canada*, *2002 FCA 221 at para 7, 291 NR 314, leave to appeal to SCC dismissed with costs, 29308 (February 13, 2003)*
34. *Lac La Ronge Indian Band* v *Canada*, 2001 SKCA 109
35. *Langenburg (Town)* v *Gamey*, 2010 SKCA 11
36. *LeCaine v Canada (Registrar of Indian Affairs)*, *2013 SKQB 253 at para 64, aff'd 2015 SKCA 43, SCC ref'd leave to appeal on January 14, 2016)*
37. *M(K) v M(H)*, [1992] 3 SCR 6

38. *Manitoba Metis Federation Inc. v Canada (Attorney General)*, *2013 SCC 14*, *[2013] 1 SCR 623 (MMF)*
39. *Martselos v Salt River First Nation 195*, *2008 FC 8*
40. *McCallum v Canada (Attorney General)*, *2010 SKQB 42*
41. *Monaghan v. Joyce*, *2004 NLSCTD 42*, *235 Nfld. & P.E.I.R. 130, at para 46 (N.L. T.D.)*
42. *Montana Band v Canada*, 2006 FC 261, 287 FTR 159, aff'd 2007 FCA 218
43. *Novak v Bond*, [1999] 1 SCR 808
44. *Operation Dismantle* v *The Queen*, [1985] 1 SCR 441
45. *Papaschase Indian Band No 136 v Canada (AG)*, 2004 ABQB 655 (sub nom *Lameman v Canada (AG)*), 365 AR 1 (Alta QB); rev'd in part, 2006 ABCA 392; appeal allowed, 2008 SCC 14, [2008] 1 SCR 372, CLA Vol 2, Part A, Tab 9
46. *Peepeekisis Band v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FCA 191, 448 NR 202
47. *Peepeekisis Band v Canada (Minister of Indian Affairs and Northern Development)*, *2012 FC 915 at paras 93 – 95; upheld in Peepeekisis Band v Canada (Minister of Indian Affairs and Northern Development), 2013 FCA 191*
48. *Peixeiro v Haberman*, [1997] 3 SCR 549
49. *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2016 SKCA 124, (SKCA), SCC ref'd leave to appeal on June 22, 2017
50. *Peter Ballantyne Cree Nation v Canada (Attorney General)*, *2016 SKCA 124*
51. *Quinn v. Bell Pole*, 2013 BCSC 892
52. *R v Badger*, [1996] 1 SCR 771, [1996] SCJ No 39 (QL)
53. *R* v *Handy*, [2002] 2 SCR 908
54. *RJG v Canada (AG)*, 2004 SKCA 102, 249 Sask R 244, leave to appeal to SCC refused 337 NR 194
55. *Ross River Dena Council v Canada*, 2002 SCC 54, [2002] 2 SCR 816
56. *RVB Management LTD. v Rocky Mountain House (Town)*, *2015 ABCA 188*
57. *Ryan et al v Harold Leighton et al*, 2006 BCSC 278
58. *Ryan v Moore*, 2005 SCC 38, [2005] 2 SCR 53

59. *Samson Indian Nation and Band* v. *Canada*, 2015 FC 836. (aff'd 2016 FCA 223, (SCC leave to appeal refused on March 9, 2017, SCC refusal to reconsider rehearing June 22, 2017; sub nom *Ernineskin Indian Band v Canada*)
60. *Semiahmoo Indian Band v Canada, [1998] 1 FC 3 FCA*
61. *Murphy v Welsh; Stoddard v Watson*, [1993] 2 SCR 1069
62. *Te Kiapilanoq v British Columbia*, 2008 BCSC 54
63. *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245, CLA Vol 2, Part A, Tab 50
64. *Williams Lake Indian Band v Canada*, 2018 SCC 4

Other Sources

65. *The Law of Evidence, at 666; citing R v T (JA)(2012), 288 CCC(3d)1*
66. *Lazar Sarna, The Law of Declaratory Judgements, 3rd ed (Toronto: Carswell, 2007)*
67. *House of Commons Debates, 16th Parl, 1st session, (15 February 1927) at 324.*
    House of Commons Debates, 16th Parl, 1st session (1927) at 86.