TD Court No. T-2153-00

FEDERAL COURT

BETWEEN:

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

Plaintiffs

- and -

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

Defendants

Court File No.: T-2155-00

BETWEEN:

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

Plaintiffs

AND:

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

Defendants

MEMORANDUM OF FACT AND LAW

ON BEHALF OF THE PLAINTIFFS, PETER WATSON, SHARON BEAR, CHARLIE BEAR, WINSTON BEAR and SHELDON WATSON

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MEMORANDUM OF FACT AND LAW

Overview

1. This memorandum is submitted on behalf of the Plaintiffs in the action, Peter Watson et al. v. Her Majesty the Queen in right of Canada and the Ochapowace First Nation, Federal Court File No. T-2153-00 (the Plaintiffs).

2. The matter before the Court represents a phase one trial of the action in which the Court has been asked to consider a series of questions outlined in an Order issued by Justice Hugessen, as amended by Orders dated April 28, 2008 and February 25, 2011. The questions were agreed to by the parties and confirmed through orders of the Court. The questions to be answered are as follows:

i) Was there an Indian band led by Chief Chacachas in 1874?

ii) Was there an Indian band led by Chief Kakisiwew in 1874?

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

iv) 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?

v) If Chacachas and Kakisiwew exist as distinct treaty bands, what is their legal status?

vi) Are the named plaintiffs in actions T-2153-00 and T-2155-00 members of either the Chacachas or Kakisiwew bands or are they members of the Ochapowace Indian Band? Do the named plaintiffs properly represent the individuals who are members of either the Chacachas or Kakisiwew band?

vii) 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?[1]

3. This action and the action Wesley Bear et al v. Her Majesty the Queen in right of Canada and the Ochapowace First Nation, Federal Court File No. T-2155-00, were consolidated and were to be heard together to determine the issues for phase one pursuant to the Order of the Court dated January 8, 2018.[2]

I. FACTS

4. Treaty 4 was entered into on September 15, 1874 by Treaty Commissioner Alexander Morris, as representative of the Crown, with a number of Cree and Saulteaux Indian Bands. The Treaty was signed by Chief Kakisiwew, also known as Loud Voice, on behalf of his Band, the Kakisiwew Indian Band, and by Chief Chacachas on behalf of his Band, the Chacachas Indian Band.[3]

5. The Treaty outlined obligations on the part of both the Crown and the Indians Bands. Numerous Supreme Court decisions have recognized the Treaties as an exchange of sacred promises.[4]

6. This view is consistent with evidence given by Elder Ross Allary during the course of the Trial.[5]

7. Among the promises exchanged were the following:

i) Canada agreed with the First Nation to create reserves for each Band, such reserves to be selected by officers of Her Majesty's Government ... appointed for that purpose, after conference with each band of the Indians". The Treaty further stated that reserve

[1] See Amended Trial Record, Tabs 1 and 2.
[2] See Amended Trial Record, Tab 5.
[3] JB-00003.
[4] See, for example, *R v Badger*, [1996] 1 SCR 771 at 796, 133 DLR (4th) 324; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 28 [*Mikisew Cree*].
[5] Evidence of Elder Ross Allary transcript vol. 2, p. 136, lines 17-20, and transcript vol. 3, p. 8, lines 4-11.

lands could only be sold or disposed of "for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained."[6]

ii) The Crown recognized the right of each Band "to pursue their avocations of hunting, trapping and fishing" throughout the land covered by the Treaty.[7]

iii) The Crown agreed to provide agricultural assistance for Bands in developing the practice of agriculture.[8]

iv) The Crown agreed to provide a school for each Reserve.[9]

v) The Crown agreed to make annual payments to the Chief, Councillors and members of each Band.[10]

8. In return for the Crown's promises, Indian Band's signing the Treaty agreed, among other things, "to strictly observe" the Treaty and "behave themselves as good and loyal subjects of Her Majesty the Queen", to "obey the law" and to "maintain peace and good order".[11] According to the words found in the Treaty, the Indian Bands agreed to "cede, release and surrender" to the Crown a vast tract of land extending from what is now the Province of Manitoba west, into Alberta and from the US-Canada border north to the Saskatchewan River.[12]

9. The evidence is clear that in the years following the signing of the Treaty, Chief Chacachas and his Band continued to exercise their right to pursue their traditional way of life; hunting buffalo on the Western Plains.[13]

10. Canada did not immediately begin the process of establishing Reserves, but did, by Order in Council dated July 9, 1875, direct Commissioner

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[6] JB-00003_0005.
[7] JB-00003_0006.
[8] JB-00003_0006.
[9] JB-00003_0006.
[10] JB-00003_0006.
[11] JB-00003_0006 to JB-00003_0007.
[12] JB-00003_0005.
[13] Exhibit 8, Tab B, lines 906-09, lines 940-43, lines 2358-59, lines 2517-19, lines 2596-99, lines 3765-67, and lines 4225-30.

William Christie to establish Reserves, “each reserve to be selected as provided by the Treaty after conference with the Band of Indians interested therein.”[14]

11. In a memorandum dated July 13, 1875, the Surveyor General recommended the appointment of William Wagner to survey reserves. Part of that memorandum stated that the survey was to be done “as soon as possible after the location of the Reserves in question may be decided upon between the Commissioner and the Indians.”[15]

12. By letter dated September 16, 1875, Commissioner Christie directed Surveyor Wagner to “proceed to survey and lay out the reserves of such Bands as are ready and have expressed a desire to have their Reserves laid out this fall.”[16]

13. Following receipt of instructions, Wagner and Indian Agent Angus McKay met with a number of Chiefs in the Round Lake area. This included Chief Chacachas and Chief Kakisiwew. In a report dated October 7, 1875, Commissioner Christie reported that some Indian Bands, including Chacachas, had no desire to commence farming, but it is clear that, after meeting with the Chiefs, Wagner surveyed a series of reserves.[17] The Reserve for the Chacachas Band was surveyed on the south side of the Qu’Appelle River; the Qu’Appelle River being the area specifically associated with the Band in the language of Treaty 4.[18] The Kakisiwew Reserve was located on the north side of the Qu’Appelle River. A map showing the reserves surveyed by Wagner is found in the report of Dr. Storey.[19]

14. It is clear that in the fall of 1876 Wagner completed his survey, and was thereafter paid for his work in 1878. The Chacachas Reserve was among the list of Reserves surveyed which he reported on by letter dated January 2, 1877.[20] Wagner’s field notes described the Reserve in the following fashion:

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[14] JB-00016_0003.
[15] JB-00018_0001 to JB-00018_0002.
[16] JB-00028_0001.
[17] JB-00030_0004.
[18] JB-00030_0004.
[19] JB-00033.
[20] JB-00052.

> The South part of this Reserve has very good land, well supplied with meadows and woods, - the Northern portion of the Reserve is more broken and at last falls in a rugged manner to the River Qu'Appelle. The face of their Hills along the Valley of River has a great abundance of good timber for building and other purposes.[21]

15. Situated along the Qu'Appelle River with timber and good land for cultivation, the Chacachas Reserve met all of the characteristics which the Surveyor General had suggested on July 13, 1975, in a memorandum to the Deputy Minister of the Department of the Interior.[22] This was a Reserve well suited for the purposes of the Chacachas Band, within its traditional territory, containing characteristics which, even to this day, are important to Band members.[23]

16. The Chacachas Reserve was described as a "Reserve" in reports published by Canada on January 30, 1877, and on a listing of Reserves published by the Surveyor General in May, 1880.[24]

17. Agent Allan McDonald replaced Agent McKay in 1878. Reports by Agent McDonald indicate he was aware of the Chacachas Reserve and, in fact, he ordered oxen for the Reserve in 1879.[25] He specified that only two Chiefs had not taken up their Reserves in a letter dated January 3, 1881.[26]

18. Historical evidence confirmed the view that the Chacachas people had occupied the Reserve surveyed by Wagner, even if a significant portion of the members of the Band continued to pursue their traditional ways as provided for in Treaty 4.[27]

19. In a letter dated January 3, 1881, Agent McDonald provided a list of survey projects that were "to be completed".[28] The Chacachas and Kakisiwew Reserves appeared on the list. There is no explanation for this statement or its

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[21] JB-00046_0050.
[22] JB-00018_0005 to JB-00018_0006.
[23] Evidence of Elder Sharon Bear, transcript vol. 1, p. 103, lines 13-28 and p. 104, lines 1-19.
[24] Exhibit 8, Tab B, p. 61, line 1430, lines 1481-84; JB-00053_0023; and JB-00106_0002.
[25] JB-00092_0002.
[26] JB-00118.
[27] Evidence of Elder Sharon Bear transcript vol. 1, p. 93, lines 8-10, and p. 105, line 17 to p. 107, line 5.
[28] JB-00118.

contradiction with records maintained by the Crown. There was no material tendered by the Crown to provide background as to how this letter came about although it is anticipated that the Crown will refer to McDonald's year-end report in 1881, where he indicated:

> There appeared at one time a little dissatisfaction and jealousy among the chiefs on the choice of the reserves at Crooked and Round Lakes; I was able to effect an amicable understanding amongst them, and when Mr. Nelson, D.L.S., the gentleman instructed to locate the reserves, proceeded to work, he had no difficulty in satisfying each band as to their boundaries.
>
> I may here state that in 1877 these bands had been allotted Reserves on the north side of the Qu'Appelle River; owing to the want of timber for building and fencing purposes, it was considered advisable to move them to the south side.[29]

Which specific Chiefs had indicated dissatisfaction is not specified in the report. However, the Chacachas Reserve was located on the south side of the Qu'Appelle River, and Wagner's field notes indicated that the Chacachas Reserve he had surveyed was well supplied with timber.

20. No evidence was tendered to suggest that Chief Chacachas had requested his reserve be re-located and, in fact, during the period that followed McDonald's letter in January, 1881 and the subsequent survey, Chief Chacachas and a majority of his Indian Band were not present when key events occurred.

21. Curiously, the re-location of the reserves occurs after a request by Chief Kakisiwew to have the location of his reserve changed to be closer to his friends had been refused in 1878.[30] The consideration of this request clearly demonstrates the existence of the Kakisiwew Reserve.

22. As a result of McDonald's initiative, Surveyor John Nelson was dispatched by Dewdney to survey reserves for a number of Indian Bands including both the Kakisiwew and Chacachas Bands.[31] Nelson was given instructions from Assistant Indian Commissioner Galt who advised the Superintendent General that

[29] JB-00140_0002.
[30] JB-00062 and JB-00069.
[31] JB-00130.

Nelson was to proceed first to Moose Mountain to lay out reserves for two Bands. He also instructed Nelson to "include in the Reservations only a limited quantity of wood-lands, but in every other respect to try and meet the views of the ~~agents~~ Indians,"[32] (an instruction somewhat inconsistent with the stated reason for relocating the reserves). Nelson was also told he would thereafter receive instructions from McDonald on where to go next.

23. When Nelson arrived at Fort Ellice on June 18, 1881, he was given instructions from McDonald to survey reserves for five Indian Bands at Crooked Lakes on the south side of the Qu'Appelle River. Nelson notes in his report of January 10, 1882 that after examining the frontage of the Qu'Appelle River, he "communicated with Colonel McDonald, Indian Agent at Qu'Appelle, some of the Indian chiefs being there at the time."[33]

24. There is no mention in Nelson's report of the co-location of the Chacachas and Kakisiwew Reserves or when the new co-located reserve was chosen or surveyed. On August 14, 1881, Nelson reported that he completed surveying a Reserve for Ka-kee-shee-way and Cha-cha-Chas, and provided a sketch of the four reserves he surveyed south of the Qu'Appelle River dated August 20, 1881.[34] The sketch showed a combined reserve for Kakisiwew and Chacachas south of the Qu'Appelle River and Round Lake. Although Crown officials would later suggest otherwise, the combined acreage of the co-located reserve was less than the acreage of the two original reserves.

25. The evidence related to whether consultation occurred prior to the joint reserve being surveyed is scarce. McDonald mentioned in his Year-End Report for 1881 that he reached "an amicable understanding amongst them," and that Nelson satisfied "each band as to their boundaries."[35] However, there are many facts negating this vague statement regarding consultation including:

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[32] Exhibit 3, Tab 18.
[33] JB-00145_0002.
[34] Exhibit 3, Tab 20 and JB-00134.
[35] JB-00140_0002.

i) At no point did Nelson mention the names of the specific chiefs he consulted with at Crooked Lakes, unlike what he did with other chiefs in Treaty 4 for whom he surveyed reserves that year.[36]

ii) The paylists of Chacachas show that Chief Chacachas, two of the band's four headmen, and approximately two-thirds of his band were absent from Qu'Appelle in early August during 1881 annuity payments.[37]

iii) Agent McDonald was not present for annuity payments at Qu'Appelle in 1881 when such consultation would likely have taken place.[38]

iv) There is no indication that Nelson was present at Qu'Appelle for annuity payments or met with chiefs at that time.[39]

v) Agent McDonald was unwell and overwhelmed by his heavy workload during 1881-82. Specifically, it was noted by Dewdney to be "impossible for Mr. McDonald to attend to all these Reserves satisfactorily" and that McDonald's "health is giving way".[40] McDonald also mentioned his illness rendering him unable to complete annuity payments in a letter dated November 11, 1882.[41]

26. Of relevance in determining the rationale for a co-located reserve is that by the time the second survey commenced in August 1881, there were already township surveys underway in the Crooked Lakes area, limiting the area that could be used for reserve land. In 1881 the co-located Chacachas and Kakisiwew reserve was conveniently surveyed on the same land as the former

[36] JB-00120.
[37] JB-00618.
[38] Exhibit 8, Tab B, lines 1757-65.
[39] Exhibit 8, Tab B, lines 1767-82.
[40] JB-00132.
[41] JB-00159.

Kahkewistahaw Reserve, with the southern boundary modified to make the reserve larger for the two Bands.[42]

27. Further, it is relevant that both McDonald and Nelson were members of the Qu'Appelle Land Syndicate, whose intention was to take up homestead claims then sell them for a profit once the minimum improvements were completed.[43] Although there is no direct evidence as to when the Qu'Appelle Land Syndicate was formed, we have written records pertaining to its activities starting December 19, 1881, implying it began pursuing its objectives prior to that date.[44]

28. The purported amalgamation of the two Bands into Ochapowace likely began to be implemented in 1882, when 38 Chacachas members took annuities with the Kakisiwew Band, and ended in 1884 with the election of Chief Ochapowace. In 1882, the remaining three-quarters of the Chacachas band were absent from the Qu'Appelle area.[45]

29. Further, Chief Chacachas was absent from Qu'Appelle for annuities in 1881 and 1882. On May 12, 1882, Chief Chacachas was arrested by the North-West Mounted Police and pleaded guilty to bringing stolen horses and mules into Canada on October 9, 1882. He was then sentenced to 30 days imprisonment with hard labour.[46] The arrest of Chief Chacachas was noted in a report by McDonald dated July 29, 1882.[47]

30. Despite mentioning the arrest of Chief Chacachas in 1882, the first mention of his resignation and the amalgamation of the two Bands is actually found in McDonald's 1883 year-end report where he states that he "omitted" to mention in his previous annual report that Chief Chacachas had resigned and "he and the few members of the band amalgamated with Kah-kee-she-way".[48]

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[42] Exhibit 8, Tab B, lines 2060-72 and JB-00134.
[43] Exhibit 8, Tab B, lines 2074-2100, and JB-00134.
[44] JB-00637_0010.
[45] Exhibit 8, Tab B, lines 2420-23 and lines 2511-19.
[46] Exhibit 8, Tab B, lines 2426-31.
[47] JB-00154.
[48] JB-00164_0005.

31. There is no evidence that the Chacachas band consented to the amalgamation in 1882 and, in fact, McDonald recorded on July 6, 1883 that when previously absent members of the band returned in 1883 and learned of the amalgamation, they objected to it and claimed they were "entitled to a separate reserve and chief."[49] McDonald also noted that, if they were entitled to a separate reserve, the Chacachas Band would take up the west side of the reserve where they had begun to farm. Later, on October 9, 1883, it was recorded that 105 members of the Chacachas Band were paid their annuities separately from the Kakisiwew Band, including those 38 members who had taken annuities with Kakisiwew in 1882.[50]

32. In McDonald's year-end report of 1884 he indicates that Chief Kakisiwew died in early 1884 and that Kakisiwew's son Ochapowace was elected chief during annuity payments on July 29, 1884.[51] McDonald briefly described the events: "Chief Cha-ka-chas having resigned his chieftainship two years ago, his Indians were put in Loud Voice's band and they took part in the election of the new Chief" [Emphasis added].[52]

33. In a report provided four days earlier, McDonald describes the controversial election process in more detail:

> I have to report that previous to paying the late Chief 'Kakeesheeway's' and 'Chakaches' Bands I directed them to elect a Chief, which they did but not till after a great deal of altercation. These two Bands are now one under the Chieftainship of 'O-cha-pe-we-yas' a son of the late Chief Kee kee she way or Loud Voice—by this step the band in place of four Head men will be shown to have seven and will only diminish by resigning or death until the number is reduced to four as other bands.[53]

34. Note that McDonald refers to two Bands and appears to equate a decision to elect a single Chief, at his direction, as an amalgamation. A reasonable interpretation of the language used in McDonald's description of the events is that the election was both objected to and came about as a result of coercion on the

[49] JB-00164_0005.
[50] JB-00618_0059.
[51] JB-00186_0002.
[52] JB-00186_0002.
[53] JB-00184_0005.

part of McDonald since he required the election to take place before he made annual Treaty payments. This was done at a time when receipt of Treaty payments were of "tremendous significance" to the Indians.[54]

35. Following the election of Chief Ochapowace, the Crown appears to have administered the two Bands as a single Band.

36. Notwithstanding the Crown's administrative approach, there is evidence that the two Bands continued to function separately on the same reserve and continued to be referred to as separate Bands by Crown officials.

37. There is also evidence Chacachas continued to be identified as a leader of his people when he returned to the reserve in approximately 1884 until leaving the reserve for Montana on April 11, 1887.

38. In a letter dated May 14, 1884, McDonald reported that the only men present on the reserve were Chacachas since the Kakisiwew followers had gone to Indian Head in following the Plains Cree custom to leave their location for a period of time following the death of a prominent leader.[55] In Inspector Wadsworth's year-end report dated October 25, 1884, he noted that "'Cha-ka-chas' with a few followers" had settled on the reserve and were breaking new land as a community.[56] In 1885, Chief Chacachas did not receive his annuities with the Ochapowace Band.[57]

39. At the 1886 annuity payments McDonald reported that the payments took four days and that "Cha-ca-chas and his party at the end had to accept their annuities at the Farm house on their reserve."[58] In January of 1887, McDonald also referred to the group as "Cha-ca chas party" in detailing a number of their agricultural activities.[59]

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[54] Evidence of Dr. Storey, transcript vol. 6, p. 22, lines 17-21. See also evidence of Dr. Whitehouse-Strong, transcript vol. 17, p. 96, lines 11-20, wherein he states the "Treaty annuity payments were very important…"
[55] JB-00176.
[56] JB-00188.
[57] JB-00618_0070 to JB-00618_0073.
[58] JB-00229.
[59] JB-00233_0002.

40. The next mention of Chief Chacachas is in a report of Peter Hourie, who notes that he encountered a group of stragglers in Swift Current that included Chief Chacachas and his followers who were on their way to join Front Man at Maple Creek. Hourie compelled Chief Chacachas and his following onto a train with their horses returning Chacachas and fifty-two others to the Qu'Appelle district.[60] Upon their return, Chacachas and his party were visited often by McDonald who identified the group as the Cha-ca-chas party in letters dated January 13, 1887 and February 10, 1887.[61]

41. In June 1887, Inspector McGibbon reported that "Cha ca chas and party of Reserve No. 71 in all 41 souls, left their reserve at midnight of the 11th April 1887 supposed to have gone to Turtle Mountain Dakota U.S."[62] Thereafter, 65 of the 93 former Chacachas band members disappeared from the Ochapowace paylist permanently, including three of the four Chacachas headmen who were paid annuities in 1884.[63]

42. There was apparent confusion in the Indian Department about what occurred with the Chacachas band evidenced in the paylist records, as well as subsequent correspondence. In a memorandum dated January 24, 1911, a member of the Ochapowace Band asked the department whether Chacachas was joined together with Kakisiwew.[64] Surveyor General S. Bray then wrote to the Deputy Minister:

> Chacachas and Kake-sheway bands own Reserve No. 71 jointly. The reserve has never been subdivided between these bands.[65]

43. Again in 1928 inquiries regarding the lost reserve lands prompted Indian Agent Ostrander to write to the Department of Indian Affairs the following:

> Sir,
>
> Several times recently the Indians of the Ochapowace Band have made inquiries regarding a small Reserve which they say was given them

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60 JB-00224.
61 JB-00233 and JB-00235.
62 JB-00239.
63 Exhibit 8, Tab B, lines 2919-35.
64 JB-00419.
65 JB-00420.

> at the time of the original treaty, and which they say joined the present Ochapowace Reserve on the east side…at present time there are a number of white farmers located on this land, which the Indians say was never surrendered by them.
>
> From the inquiries which I have made it appears that the old Chief, Chacachase, and a number of Indians who were his followers were living on this land at the time of treaty…I can find no reference to the Reserve in question in the old maps and presume there must be some misunderstanding with regard to the land, but I would be glad if the matter could be investigated in order that I may give the Indians an answer, and the matter settled.[66]

The reply of the Department was that the Ochapowace Band received their full allotment of land in 1881.[67]

44. In 1931, the issue of the lost reserve was brought to Commissioner Graham's attention. Graham then wrote the following to the Secretary of Indian Affairs:

> [T]he Headmen took up with me again the matter of correspondence which has passed between the Agent and the Department regarding additional lands claimed by them. The matter is not yet clear in their minds.
>
> It appears that a special reserve was set aside on the East side of the present Ochapowace reserve. This was thrown open for settlement and they claim that additional lands were not added to their reserve. If we could get a map of the original reserve, and show where the additional lands had been added it might make it clear to the Indians. At the present time they are quite perturbed about the matter, and I think we should take a little trouble and try to have it made clear to them. They do not appear to be satisfied with the information contained in Department Letter to the Agent dated the 19th. April, 1928.[68]

45. The reply from Secretary MacKenzie more than three months later claimed that the co-located reserve was surveyed at the request of both Bands who were not satisfied with Wagner's surveys and that the co-located reserve was considerably larger than the sum of the two reserves previously surveyed by Wagner, a statement that was untrue.[69]

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[66] JB-00446.
[67] JB-00453.
[68] JB-00455.
[69] JB-00456.

46. The last historic line of inquiry into the circumstances surrounding the co-located reserve relates to the correspondence between lawyer, Garnet Neff and the Department of Indian Affairs in 1932. Neff wrote on behalf of "some former residents" of the "Jaketas Indian Reserve" stating that their reserve was now occupied by settlors but that they had never received any settlement or land money for the reserve.[70] As the correspondence between Neff and the Department of Indian Affairs continued, Neff was provided inconsistent explanations of what occurred with the Chacachas Reserve.

47. The first explanation given was that the Reserve had been "surrendered as being unsuitable" prior to the selection of the co-located reserve and that they had already been given other reserve lands instead.[71]

48. The second explanation provided by Secretary MacKenzie was that he was mistaken in stating the reserve was surrendered. Instead, he wrote "the lands first selected by the surveyor were never constituted a reserve and, consequently, there was not any actual abandonment or surrender by the Indians."[72]

49. Neff persisted in his inquiry regarding the reserve noting in his final letter the fact that no consent of the Indians was given to the change in Reserve:

> The fact does still remain, however, that the Indians that have consulted the writer take the position that a certain area was allotted to the Jaketas Band, and while it is very evident from your correspondence that this area was changed and consolidated in another Reserve, yet, it was done without the consent of the Indians involved, or, in other words, without the Act being complied with. The records surely should show whether there actually was a meeting held at which these Indians were represented and how the vote went. It seems this is the crux of the matter. If a change was made without the consent of the Indians taken in a proper way, it would look as if they had a legitimate claim. On the other hand, if the change was made and the Act strictly complied with, the Indians would appear to have no ground for their present contention.[73]

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[70] JB-00460.
[71] JB-00462.
[72] JB-00464.
[73] JB-00471.

50. In reply MacInnes, the Acting Secretary of Indian Affairs, explained that since the lands surveyed by Wagner never legally constituted a reserve, there was no need for a formal surrender and no record of any meeting or vote on the matter.[74]

51. The evidence of several Elders at trial is that Neff discontinued his representation of the former Chacachas members because he was told that if he continued to assist the Indians in trying to get their land back he would be disbarred as a lawyer.[75] The evidence provided by the Elders is consistent with the fact that the *Indian Act* in effect at the time made it an offence for lawyers to work for Indians for money without the consent of the Government.[76]

52. We note that in other cases of band amalgamation the Department of Indian Affairs, once fully aware of controversy over the amalgamation, proceeded to go back to the Bands and, following a vote of the Bands effected, completed an amalgamation agreement to legally confirm the amalgamation. The amalgamation of the Sakimay and Little Bone Bands of the Treaty 4 area was discussed in the Expert Report of Mr. Rob Nestor.[77] This amalgamation had occurred under the authority of the Department of Indian Affairs in 1887, but the amalgamation and surrender of the original reserves was not voted on and consented to by the Bands until July of 1907. Despite the Government being fully aware of controversy over the amalgamation of the Kakisiwew and Chacachas Band, as well as the surrender of their original reserves, there is no evidence the Government made similar attempts to gain the consent of the Bands at a later date.

53. Although the Government continued to consider the Bands to be amalgamated, the Chacachas and Kakisiwew people continued to maintain separate communities on the Reserve. Elder Ross Allary provided evidence that the Chacachas people settled on the east side of the joint Reserve, while the

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[74] JB-00472.
[75] Evidence of Elder Sharon Bear, transcript vol.1, p. 109, line 22 to p. 110, line 9; and Elder Ross Allary, transcript vol. 3, p. 26, lines 7-13.
[76] *Indian Act,* RSC 1927, c 98, s 141.
[77] Exhibit 12, Affidavit of Rob Nestor, Exhibit A, p. 33-35; JB-00396_0002; and JB-00413.

Kakisiwew people settled on the west.[78] Affirming this evidence are documents describing the two Bands taking up agriculture separately on the joint Reserve[79] and taking their annuity payments separately.[80] Further context describing the ongoing division between the Bands is explained in Exhibit 15, the *Bear and Watson v. Canada Claim: Historical Report* on pages 118-23.

II. POINTS IN ISSUE

(1) Review of Evidence

(2) Were there Indian Bands led by Chief Chacachas and Chief Kakisiwew in 1874?

(3) Were Chief Chacachas' Band and Chief Kakisiwew's Band amalgamated, consolidated or otherwise joined together? If yes, was it properly done?

(a) The Honour of the Crown

(4) If no, are the Chacachas band and Kakisiwew band entitled to be recognized as distinct treaty bands? If so, are the Chacachas band and the Kakisiwew band estopped or otherwise prevented from asserting that they are distinct treaty bands?

(a) Declaratory Relief

(b) Laches, Acquiescence, Estoppel and Other Equitable Defences

(c) *Indian Act, 1951*

(5) If Chacachas and Kakisiwew exist as distinct treaty bands, what is their legal status?

(6) Are the named plaintiffs in actions T-2153-00 and T-2155-00 members of either the Chacachas or Kakisiwew bands or are they members of the Ochapowace Indian Band? Do the named plaintiffs properly represent the individuals who are members of either the Chacachas or Kakisiwew band?

[78] Transcript vol. 3, p. 36, lines 15-25.
[79] JB-00187 and JB-00229.
[80] JB-00229.

(7) Does the Ochapowace Indian Band No. 71 recognized by the Crown, continue to exist as a treaty band notwithstanding the determination of issues 1 through 6 above?

III. SUBMISSIONS

(1) Review of Evidence

54. Over the course of the trial the Court has heard evidence from a number of witnesses, has received a number of expert reports (reserving on their weight or use) and has had a large number of documents filed.

55. The Court may find, upon reviewing the evidence, that there is little conflicting evidence. Much of the evidence provided by witnesses does not appear to involve significant issues of credibility. The Court's main task may be to determine what conclusions to draw from the testimony and the documents that have been filed.

56. During the course of the trial, the Court heard from a total of 17 witnesses. This included 4 Elders, 2 of whom were recalled as part of 10 lay witnesses, and 5 individuals whose evidence was accepted by the Court as experts.

(a) Elder Evidence

57. The Court heard from 4 Elders during the sittings at the Ochapowace Reserve. Elder Sharon Bear gave evidence on behalf of the Chacachas Band. Elders Wesley Bear and Sam Isaac spoke as representatives of the Kakisiwew Band, and Elder Ross Allary spoke on behalf of the Ochapowace Indian Band. Each of the Elders was introduced by a prominent member of their community who had known the Elder for many years.

58. In the case of Elder Sharon Bear, she continues as part of a long line of individuals steeped in the traditions of her people. One who not only speaks her

traditional language and continues its practices, but one who also teaches those traditions to others.

59. There appeared to be little objection taken by the Crown to the evidence being provided by the Elders, although the Crown did reserve its right to argue the weight to be given to the evidence as part of its final argument.

60. When the Court reviews the oral history evidence, it will conclude all of the Elders called to give evidence have received the oral history of their people and are individuals who are able to relay that history to the Court.

61. The Crown's focus seemed to be on specific protocols that it believes should be honoured before the knowledge passed on could be relied upon. The evidence of Elders indicated that many Elders would share their knowledge without specific protocols taking place.[81] Most of the knowledge that has been passed on to the Elders who testified at trial started when they were children and the Elders explained it was part of their culture to sit, listen and learn.[82]

62. Elders have identified the sources of their knowledge which is, in most cases, no more than two generations removed from actual events. In most cases, the oral histories were passed on to these Elders by respected Elders based upon knowledge passed to those Elders by individuals who were living at the time that events occurred. In the case of Sharon Bear, much of the information communicated to her came from her great-grandfather, Little Assiniboine, through her mother, Margaret Bear, an individual who had cared for him during his later years. Little Assiniboine, had been a headman of the Chacachas Indian Band at the time the Treaty was signed and would have been present when many of the events described in the testimony of the Elders actually occurred.

[81] Evidence of Elder Sharon Bear, transcript vol. 1, p. 125, lines 14-21; Evidence of Elder Sam Isaac, transcript vol. 2, p. 86, line 14 to p. 87, line 1; Evidence of Elder Ross Allary, transcript vol. 2, p. 115, lines 20-28.
[82] Evidence of Elder Sharon Bear, transcript vol. 1, p. 98, lines 12-22; Evidence of Elder Sam Isaac, transcript vol. 2, p. 42, lines 4-12; Evidence of Elder Ross Allary, transcript vol. 2, p. 115, lines 14-19).

63. The stories told by the Elders were consistent in key respects including the existence of the two original Reserves surveyed by Wagner, the fact that there was no agreement to leave the Reserves, the influence of the Indian Agent, and the efforts to involve a lawyer in the 1930's. Each Elder had at least one story of a specific incident from the past that added to her or his credibility such as the story by Elder Sharon Bear of the last person to reside on the original Chacachas Reserve; a widow and her baby.[83] Elder Ross Allary described an incident with a farm instructor placing one book on top of another is of similar import.[84] Elder Ross Allary also recalled being shown the mounds of the original reserves by his Uncle Ivan Watson.[85]

64. The expert called by the Crown to provide comments on Elders' testimony, Dr. von Gernet, did not suggest that the Court should reject any of the evidence provided by the Elders. Indeed, although his general opinion was that evidence of Elder's should be verified by other evidence, he found some of the evidence credible in itself with no requirement for independent verification.[86]

65. Dr. von Gernet relies upon older precedents in his criticism of the reliability of Elder evidence, without taking into account recent developments in the law.

66. On the issue of independent verification, the Court will have to determine if or when this might be appropriate. However, we note the following difficulties in determining when independent verification should be required:

(a) Dr. von Gernet seemed unable to suggest a specific basis or rationale as to when independent verification should be sought, leaving the Court with no factors upon which to assess when this independent verification may be required;[87]

[83] Transcript vol. 1, p. 106, lines 1-20.
[84] Transcript vol. 2, p. 114, line 21 to p. 115, line 2.
[85] Transcript vol. 2, p. 112, line 3 to p. 113, line 8.
[86] Transcript vol. 15, p. 153 line 15 to p. 154, line 14.
[87] Transcript vol. 16, p. 7, line 14 to p. 8, line 26.

(b) If independent verification of the Elder's evidence is required, the Crown's own records confirm most, if not all, of the key elements of the Elder evidence. The Crown's records show that the two original Reserves were surveyed, they were accepted as Reserves by the Crown, and significantly, they were occupied by members of the two historic Bands. There is no record of a vote to join the two First Nations together, nor is there even a record as to how the Crown came to a decision to combine the two Bands. There is also evidence in the material tendered by the Crown that the two historic Bands have remained separate since the Indian Agent took action to join them together. In fact, with respect to all of these points, there appears to be no evidence to the contrary located by any of the Experts who gave evidence.

(b) <u>Lay Witnesses</u>

67. After providing Elder evidence, Sharon Bear was recalled as a lay witness. In her evidence, she outlined steps taken in the 1990's to obtain recognition for the Chacachas Band as a separate Band.

68. Her evidence also confirmed that today the Chacachas Indian Band is recognized as a separate entity among not only the Ochapowace First Nation, but among First Nation's organizations including the Federation of Sovereign Indigenous Nations (formerly the Federation of Saskatchewan Indian Nations).[88]

69. Morley Watson had introduced Sharon Bear as an Elder. He was recalled to give evidence relating to early negotiations with the Crown on the issue of Treaty Land Entitlement. Morley Watson had been Chief of the Ochapowace Indian Band when some of these negotiations occurred. His involvement pre-dated the development of the Treaty Land Entitlement Framework Agreement signed in September, 1992.

[88] Transcript vol. 3, p. 72, lines 5-13.

70. In his evidence, Morley Watson testified that as Chief of the Ochapowace Indian Band, he and his Council only had authority to make decisions for the Ochapowace Indian Band. They would have had to seek the approval of the Chacachas and Kakisiwew people if an issue involving their rights arose.[89]

71. Both Sharon Bear and Morley Watson described steps taken by Chacachas descendants to re-establish the Chacachas Band in the 1990's. They explained that meetings were called and correspondence was exchanged with the Crown to formalize the structure of the Chacachas Band. At discovery, Cameron Watson also described the steps taken to reorganize the Band, including seeking assistance from the Office of the Treaty Commissioner and the Department of Indian Affairs.[90] However, their efforts to gain recognition from the Crown failed. While the Crown may argue that these steps were taken long after a cause of action was known, they were simply required to evidence, in a more formal way, the continued existence of the Chacachas Band.

72. Sheldon Watson was also called to give evidence. His evidence also dealt with efforts to gain recognition and the current leadership of the Chacachas Indian Band as well as providing evidence relating to his ancestry. He, like, Sharon Bear, is a descendant of a headman of the historic Chacachas First Nation. He testified that the Chacachas First Nation has also been recognized by the Assembly of First Nations (the AFN), the National organization of First Nation people.[91]

73. Evidence provided by witnesses called on behalf of the Chacachas Band, as well as witnesses on behalf of the Ochapowace Indian Band, confirmed that a significant portion of the lands within the historic Chacachas Reserve have been purchased using funds provided as part of the Treaty Land Entitlement Settlement Agreement and these lands are now being administered by Chacachas. While it is expected that the Crown will, in some fashion, argue the use of the settlement funds for this purpose should prevent this claim for

[89] Transcript vol. 3, p. 101, line 10 to p. 102, line 7.
[90] Exhibit 23, Tab A, p. 64-65.
[91] Transcript vol. 4, p. 46, line 28 to p. 47, line 9.

recognition, the Plaintiffs dispute this position. The use of some of the proceeds from the Treaty Land Entitlement settlement to purchase historic Chacachas Reserve land simply demonstrates the ongoing view of the First Nations that the historic Bands continue to exist and need to be recognized. If anything, use of these funds will provide a benefit to the Crown during phase 2 of this action.

74. The Ochapowace Indian Band called 3 lay witnesses. Elder Ross Allary was recalled, followed by Chief Margaret Bear and then Headperson Petra Belanger. Their evidence included information on the settlement of the Ochapowace Treaty Land Entitlement claim and a claim related to land taken in connection with the Solider Settlement program after World War I, confirming that neither settlement was intended to deal with the recognition of the two historic Bands.[92] Their evidence also confirmed that the Ochapowace Band Council has assisted the two historic Bands in obtaining recognition and has supported both Plaintiffs' claims.[93]

75. In its defense, the Crown called 4 witnesses.

76. First to be called was Alois (Al) Gross, the Federal Negotiator on the TLE Framework Agreement. From the perspective of the Plaintiffs, his evidence should remove any doubt that releases provided in connection with the TLE Framework Agreement did not deal with the issue currently before the Court. From his evidence we can conclude that the membership numbers for the two historic Bands were factors in the amount Canada was prepared to offer for acreage and compensation, but in no way did it resolve the issue of the existence of the two historic Bands.[94]

77. Treaty Land Entitlement represented a series of negotiations undertaken between Canada with specific First Nations that Canada recognized should receive additional land under Treaty.[95] These settlements contained a

[92] Transcript vol. 10, p. 41, lines 24-27 and p. 57, line 28 to p. 58, line 12.
[93] Transcript vol. 10, p. 106, lines 4-26; transcript vol. 11, p. 94, lines 9-12; and transcript vol. 12, p. 26, lines 3-17.
[94] Transcript vol. 13, p. 95, line 15 to p. 96, line 6 and p. 116, lines 6-22.
[95] Transcript vol. 13, p. 33, line 26 to p. 34, line 3.

formula providing both compensation and a process to add land to reserves.[96] The recognition of First Nations that had not been recognized by the Crown to that point was not part of those negotiations nor was it part of the settlement agreements that came about as a result of the negotiations. This view was confirmed in the evidence of Graham MacDonald, a person employed in the Specific Claims Branch of Crown and Indigenous Relations Canada.[97]

78. The Crown also called Andrew Doraty, an individual who is currently the administrator for the Indian Registration System at Indigenous Services Canada. His evidence was directed to events related to amendments to the *Indian Act* in 1951 and the fact that there was no record of Chacachas members at that time.[98] His evidence suggested that instructions had been issued to post membership lists at Ochapowace as part of the registry process included in the *Indian Act* amendments and suggested that there was no record of membership protests being filed by members of Ochapowace.[99]

79. Among the points agreed to by Mr. Doraty during cross examination was the fact that the lists being used were based on the department's previous records – a continuation of existing policy.[100] More significantly, he acknowledged that there was no process in the *Indian Act* for Bands not recognized by the Crown to seek re-establishment.[101]

80. The final lay witness called by the Crown was Violet Kayseass. Her evidence was directed toward the s. 17 *Indian Act*[102] band amalgamation/new band policy. She described the policy as a "no cost" policy, meaning no cost to the government.[103] She testified that the First Nations that want to divide under the policy must also divide their existing land base and existing funding and infrastructure.[104] Of note, the creation of a band under this policy is within the

[96] Exhibit 6, CROWN-00127.
[97] Transcript vol. 13, p. 35, line 26 to p. 36, line 24.
[98] Transcript vol. 14, p. 47, line 25 to p. 48, line 8.
[99] Transcript vol. 14, p. 46, lines 13-19.
[100] Transcript vol. 14, p. 57, line 26 to p. 58, line 6.
[101] Transcript vol. 14, p. 58, line 7-14.
[102] RSC 1985, c I-5.
[103] Transcript vol. 14, p. 18, lines 24-28.
[104] Transcript vol. 14, p. 9, lines 15-20.

absolute discretion of the Minister and his officials.[105] The new band/band amalgamation policy does not involve the exercise or recognition of First Nation rights and has no connection to Treaty.

(c) Expert Evidence

81. The Court accepted written reports and evidence from five individuals as Experts. In each case, the issue of what weight was to be assigned to their evidence was reserved for later argument.

82. In allowing evidence to be given by the Experts, the Court appears to have accepted that the reports and evidence meet the initial threshold requirements set out by the Supreme Court of Canada in *R. v. Mohan*,[106] being relevance, necessity, the absence of an exclusionary rule, and a properly qualified expert. The *Mohan* decision set out a second part to the test recognizing that the Court has a residual discretion to exclude evidence using its gatekeeping function. In that respect, it appears this Court may consider the issue of weight to be given to expert evidence if the Court has concerns about the expert's independence and impartiality.[107]

83. Dr. Kenton Storey provided a comprehensive historical report dealing with a number of issues which we believe will assist the Court in reaching its decision.[108] The Crown provided two written reports in response to Dr. Storey's report. Both of the written reports suggest that the research done by Dr. Storey is comprehensive.[109]

84. The evidence provided by the Crown experts expressed views similar to Dr. Storey's in many respects, describing Dr. Storey's report as "overall

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[105] Transcript vol. 14, p. 10, lines 16-27.
[106] [1994] 2 SCR 9, 114 DLR (4th) 419 [*Mohan*].
[107] *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para 54, 383 DLR (4th) 429.
[108] Exhibit 8, Tab B.
[109] Report of Dr. Whitehouse-Strong, Exhibit 29, p. 5 and Report of Dr. Von Gernet, Exhibit 28, p. 37.

a solid report", "competent", "the database that he uncovered ... is very valuable" and "for the most part his analysis of the database is competent as well".[110]

85. In fact, Dr. von Gernet found the research so complete that he did not feel it necessary to do further research.[111]

86. In its submission regarding Dr. Storey's expertise, the Crown suggested that Dr. Storey's "lack of direct knowledge of the subject matter go to its weight".[112] The Plaintiffs submit Dr. Storey's "direct knowledge of the subject matter" is no different than any of the experts given that the events under consideration took place before any of the experts were born and neither of the experts called by the Crown have undertaken any specific research with regard to Treaty 4 Bands. Based upon the testimony of the Crown's own expert witnesses, Dr. Storey has demonstrated that he is well qualified as a researcher and that his report should be given full consideration by the Court.

87. There appear to be some areas where Dr. Storey has come to different conclusions than did the Crown's witnesses. These appear to relate primarily to three areas.

88. First, there is the issue of whether Chief Chacachas had requested that his Reserve be moved. The Crown's position that a move had been requested stems from the report of Agent McDonald dated January 19, 1882 and quoted on p. 67, line 1538-1547 of Dr. Storey's Report:

> There appeared at one time a little dissatisfaction and jealousy among the chiefs on the choice of the reserves at Crooked and Round Lakes; I was able to effect an amicable understanding amongst them, and when Mr. Nelson, D.L.S., the gentleman instructed to locate the reserves, proceeded to work, he had no difficulty in satisfying each band as to their boundaries.
>
> I may here state that in 1877 these bands had been allotted reserves on the north side of the Qu'Appelle River; owing to the want of

[110] Transcript vol. 16, p. 13, line 13 to p. 14, line 4 and transcript vol. 17, p. 61, line 23 to p. 62, line 8.
[111] Transcript, Vol. 16, p. 13, lines 13-18.
[112] Transcript Vol. 5, p. 47, lines 17 -21.

> timber for building and fencing purposes, it was considered advisable to move them to the south side.[113]

However, a reading of the actual words in the letter leads to the conclusion advanced by Dr. Storey, that Chief Chacachas could not have been one of the Chiefs referred to in this letter since his reserve was on the south side of the Qu'Appelle River and had no shortage of wood.

89. Second, there is the issue as to whether Agent McDonald had been present for Treaty payments in 1881 when consultation regarding a new reserve could have occurred. Dr. Storey concluded that Agent McDonald had not been present. His conclusion was based upon the report of Inspector Wadsworth who had spoken directly to McDonald at Fort Walsh later in the year and indicated that "Mr. Agent McDonald was absent from his headquarters during his Spring's inspection of the Reservations and Farms then at the payments".[114] Dr. Whitehouse-Strong suggested that Wadsworth had been mistaken based largely on the fact that Commissioner Dewdney had directed that McDonald attend to Treaty payments before going to Fort Walsh.[115] There is simply no basis to disregard Wadsworth's report and the conclusion drawn by Dr. Storey that McDonald was not present for the Chacachas and Kakisiwew annuity payments in 1881.

90. In any event, even if McDonald had been present for the annuity payments, this does not establish that consultation took place. The 1881 annuity pay list clearly establishes that Chief Chacachas and approximately two thirds of his band were not at Qu'Appelle to receive their annuity payment, and therefore could not be consulted by McDonald or Nelson as to their reserve.

91. The issue of consultation is the third area of disagreement among the experts. The Crown's experts took the position that consultation on relocation of the Chacachas Reserve did take place in the summer of 1881. Clearly, Chief Chacachas and two of his headmen were not involved in that process, as they did

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[113] Exhibit 8, Tab B and JB-00147.
[114] Exhibit 3, Tab 22.
[115] JB-00132.

not accept annuities at Qu'Appelle in August, 1881. There was some reference to the fact that a Chacachas headman had been present to receive Treaty payments in 1881 and consultation could have occurred with this headman. However, when Surveyor Nelson reports on meetings with Indians to work out the location of the new reserves, his report notes "some of the Indian Chiefs being there at the time".[116] He makes no reference to any headmen being part of the consultation process. Further, there is no evidence before the Court to suggest that a headman could speak on behalf of his band in the selection of a reserve location, particularly when a majority of the band and leadership were absent.

92. Later, in Nelson's report he notes that sometime between August 19th and August 26th he "met most of the chiefs and headmen of the Bands whose reserves were yet unsurveyed, and with them and the agent discussed and fixed upon locations for them".[117] However, according to a previous report by Nelson, the co-located reserve was completed by August 14, 1881, with a map of the reserve sent to the Department of Indian Affairs on August 20, 1881.[118]

93. The final area of disagreement appears to relate to the events surrounding the election of Chief Ochapowace. Dr. Storey concludes that the election of Ochapowace was both controversial and the final mechanism for completing the amalgamation of the two Bands.[119] Dr. Storey's conclusion appears consistent with the actual wording of the reports written at the time.[120]

94. The Crown's witnesses emphasized that record keeping by Crown officials at the time may have been poor or less than accurate. The Crown then invites the Court to draw conclusions favouring its position from the absence of records or the fact that records are ambiguous. The Plaintiffs' ancestors played no role in the creation or maintenance of these records. If the records are ambiguous or uncertain, ambiguities should be resolved in favour of the Plaintiffs.

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116 JB-00145_0002.
117 JB-00145_0003.
118 Exhibit 3, Tab 20 and JB-00134.
119 Exhibit 8, Tab B, lines 2532-2559.
120 JB-00184 and JB-00186.

95. Rather than allowing the Crown to take advantage of omissions or ambiguities in the records maintained by its agents, this may be an appropriate case to apply the principle of interpretation, the *contra proferentem* rule, that ambiguities in documents should be resolved in favour of the party that did not draft the document. While the approach is most often applied in cases involving contractual interpretations, common sense would suggest that it ought to be applied to cases where one party has maintained the written record of events, but now seeks to take advantage of ambiguities in those records.[121]

(2) Were there Indian Bands led by Chief Chacachas and Chief Kakisiwew in 1874?

96. The Crown has conceded these issues. This is appropriate given the irrefutable evidence that Canada recognized the existence of the two Bands in 1874 when it entered into Treaty with the two Bands under the signature of their respective Chiefs.

97. The fact that Canada chose to enter into Treaty with the two Bands represents the overriding context in which this action should be considered. Each party provided promises to the other. History has shown that Canada has taken great advantage of the promises made by the Indian Bands. The disappearance of the buffalo allowed Canada to assume greater control over the lives of Indian people. However, Canada should not be allowed to disregard the promises which it made under through the Treaty process.

98. Indeed, in recent years, concepts such as the honour of the Crown and the principle of reconciliation reflect the growing recognition that the Crown's Treaty promises must be fulfilled.

[121] See, for example, *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 SCR 129 at para 53, 161 DLR (4th) 1.

(3) Were Chief Chacachas' Band and Chief Kakisiwew's Band amalgamated, consolidated or otherwise joined together? If yes, was it properly done?

99. There can be no doubt that since 1883, the Chacachas and Kakisiwew Bands have resided on what has become known as the Ochapowace Reserve. However, the question of where they have resided is a different question than whether they were amalgamated, consolidated or otherwise joined together.

100. The process toward amalgamation may actually have its origins in 1881 when Agent McDonald suggests that surveys for the Chacachas Indian Band was yet to be completed. When he initially writes to that effect in January, 1881, he must have been aware that a reserve was surveyed for the Chacachas Band.[122] He should have been aware that reports by the Crown referred to the land surveyed by Wagner as a reserve and he had, in fact, been involved in the administration of the reserve. At this time, some members of the Band resided on the reserve although the Chief and a majority of the Band were exercising their Treaty right to maintain their traditional way of life.

101. All of the conditions for a Reserve set out in the Treaty and subsequently in the *Indian Act* had been met. At that point, it was incumbent upon the Crown to follow the procedural requirements in the Treaty and the *Indian Act*. The formality of obtaining the agreement of the Band was required for any amalgamation or Reserve surrender. There is no evidence of any discussion involving Chief Chacachas prior to McDonald's suggestion that there was a need to survey a reserve for Chacachas in January, 1881. Given that Chief Chacachas and a majority of his Band were not at Qu'Appelle in 1881, there could have been no consultation with him. Even if some form of discussion took place, there was still personal steps required to be taken to obtain a surrender of the original Reserves.

[122] JB-00118.

102. When the direction was given to Surveyor Nelson to survey a joint reserve, this represented the first step in joining the Bands together and it was taken before any consultation with the Chacachas Band.

(a) The Honour of the Crown

103. The honour of the Crown is at stake in its dealings with Treaty Bands. It must keep the promises that it gave as part of the Treaty. A promise that is foundational to the Treaty is the promise by the Crown to recognize the existence of the Bands with whom it signed Treaty.

104. The concept of the honour of the Crown is now well established in Canada. The concept has most recently been described in *Mikisew Cree First Nation v Canada (Governor General in Council)*.[123] The Crown has recognized its obligations to act honourably, to meet its Treaty obligations and to achieve the related concept of reconciliation in adopting the Principles Respecting the Government of Canada's Relationship with Indigenous Peoples[124] and in the adoption of the United Nations Declaration on the Rights of Indigenous Peoples [United Nations Declaration].[125]

105. These documents did not exist when the Treaty was signed. They do not, in themselves, create additional rights for First Nations but, in the case of the Principles, they are a recognition of the importance of rights under Treaty and they provide guidance in how the obligations of the Crown should be interpreted in a modern context.

106. The United Nations Declaration, for example, provides in Article 8, Paragraph 2 that "States shall provide effective mechanisms for ... redress" to First Nations for the impact of various actions including those "depriving them of their integrity as distinct peoples", "dispossessing them of their land, territories or resources", and for "any form of forced population transfer" or "any form of forced

[123] 2018 SCC 40 at paras 23-24 [*Mikisew Cree*].
[124] Exhibit 3, Tab 35, Principles 01 – 03.
[125] Appendix B.

assimilation or integration". Having been adopted by Canada, these principles should be considered when looking at the application of technical defences such as limitation periods and laches if the application of those defences would have the effect of removing the ability of the First Nation to obtain redress.

107. The evidence is clear. There is no record of a meeting being called to consider the issue of amalgamation involving either of the two Bands. It is also clear that there is no record of a vote or formal decision of the Bands on the subject. Finally, unlike the situation in other cases, there is no amalgamation agreement setting out the terms of the amalgamation or providing for the surrender of their original reserve lands.

108. Canada suggests that there was a decision of the two Bands to amalgamate or join together. The documentary evidence suggests otherwise.

109. There are two documents that relate to the issue of amalgamation. The first of these is found as part of McDonald's report for 1883, dated July 6, 1883.[126] In this report McDonald suggests that he had "omitted" to mention in his previous annual report that Chief Chacachas had resigned as Chief the previous year and that he and his people "amalgamated with Kah-kee-she-way". This curiously casual reference to significant events appears unexplained. There are also no details provided as to how this amalgamation took place.

110. Of note, however, is that McDonald's report goes on to state "the newcomers objected to this, and claim they are entitled to a separate reserve and chief".[127] The background to the purported resignation of Chief Chacachas is that in May of 1882 Chief Chacachas had been arrested when returning to Canada. He was then in jail when that year's annuity payments were administered. The majority of the Chacachas Band had been absent from Canada with Chief Chacachas following the hunt until their return in May of 1882. Only 38 members of the band were paid annuities that year on September 22, 1882 with the Kakisiwew band, when the purported amalgamation occurred. When the majority of the Chacachas

[126] JB-00164_0005.
[127] JB-00164_0005.

Band returned to Crooked Lakes in 1883 they expressed their dissatisfaction of the joint reserve and the loss of their separate existence as a band.

111. There is a further report by McDonald touching on the purported amalgamation. In a letter dated September 16, 1884, McDonald states:

> I have to report that previous to paying the late Chief Kakeeshuways and ChaKachas Bands I directed them to elect a Chief, which they did but not till after a great deal of altercation. These two Bands are now one under the Chieftainship of "O-Cha-pe-wayas.[128]

There are 2 important points in this report. First, we note the reference to there being <u>two</u> Bands even though his earlier report had suggested an amalgamation had occurred. Second, it was a direction from McDonald prior to Treaty payments being administered that led to the election of a single Chief in spite of the objections being raised.

112. In the same document, McDonald reported as follows:

> During the payment of annuities, Loud Voice's son, On-cha-pow-how-wace was elected Chief in his father's stead, and the election now awaits confirmation.
>
> Chief Chacachas having resigned his Chieftainship, two years ago, his Indians were put in Loud Voice's Band and they took part in the election.[129]

113. Use of the word "put" is significant. The word does not indicate a willing decision on the part of Chacachas members. In fact, the English Oxford Dictionary defines the term, when used as a verb, "to move something into a particular place or position", "to cause something/somebody to go to a particular place", or "to attach or to fix something to something else". The word suggests a unilateral and purposeful action by the Crown when read in conjunction with the other report by McDonald.

114. These are the only records produced by the Crown that relate to the amalgamation of the two Bands. They do not suggest either a voluntary or specific

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[128] JB-00186_0002.
[129] JB-00186_0002.

decision by members of the two Bands to either amalgamate or elect only one chief. In contrast, Elder evidence suggests that there was no agreement by Band members, and, it should be noted, when a majority of the Chacachas Band did return to the Qu'Appelle area, McDonald's report suggested that they objected to an amalgamation. McDonald also suggests that if Chacachas are granted a Chief as desired, they would settle on the west side of the joint Reserve. The Chacachas, in fact, settled on the east side of the joint reserve even though no Chief was appointed for them.

115. In the report dated September 16, 1884, McDonald was asking for confirmation of the election of Chief Ochapowace. This is clearly a decision that was taken out of the hands of the Indian people and was simply the exercise of authority assumed by the Crown.

116. The actions of the Crown and documentary evidence of the amalgamation should be viewed in the context of what happened to the Chacachas Reserve. As a result of McDonald's actions in 1881, the Chacachas Reserve had disappeared. When Chacachas band members returned in 1882, their original Reserve was gone. In practical terms, it appears the effect of the Crown's actions meant that the only place for returning Chacachas members to be located was on the joint reserve, a reserve that they had not requested, been consulted on, or consented to.

117. There is no explanation as to why McDonald took the actions he did in 1881 to combine the two Reserves. It is possible he did not expect Chief Chacachas and his band to return, but there is no evidence that Chacachas and his band agreed to relocate their Reserve or amalgamate with Kakisiwew. Chief Chacachas and a majority of his Band members were absent from Canada exercising hunting rights protected under Treaty 4 when these actions occurred. When they returned in 1882, they were not only faced with the disappearance of their traditional way of life, but their Reserve had also disappeared and they were "put" with the Kakisiwew Band.

118. Effectively, all there is to suggest a decision to amalgamate the two Bands is the reports of McDonald. We know, through evidence of McDonald's participation in the Qu'Appelle Land Syndicate, that McDonald paid scant attention to the law. He paid even less attention to the Crown's obligations under Treaty. This evidence represents a revelation of McDonald's character and leads to the conclusion that little faith should be put in his reports. To the extent that his reports conflict with other evidence, including the evidence of Elders, McDonald's version of events should be rejected.

119. There is no evidence of a voluntary decision by the two Bands to an amalgamation, consolidation or joining together of the two Bands. The Chacachas Indian Band had been recognized by the Crown at the time the Treaty was signed. It could not be amalgamated with another band without its consent.

120. During the period when McDonald purported to amalgamate the two Bands there was no statutory authority in the applicable *Indian Act* giving the Crown control over membership (except to the extent of disenfranchising women who married non-Indians). Similarly, nothing in the Treaty ceded to the Crown the right to assign membership in a Treaty Band.

121. There being no agreement by the Chacachas Band to any amalgamation, merger or joining together of the two Bands, the action was, at law, void, meaning something lacking validity and, therefore, without legal force.

122. In the area of Indigenous law, the term void *ab initio* has been applied by Courts largely when dealing with leases of First Nations lands and procedural requirements. Whether the term used is "void" or "void *ab initio*," the present case simply involves a case where the required consent was never obtained.

123. In oral representations at trial, the Crown proposed an alternate theory of what happened to the Chacachas Band: that the Chacachas Band had split and ceased to exist as a distinct and cohesive Band. This theory is not consistent with the Crown's Third Amended Statement of Defence.[130] To assert

[130] See Amended Trial Record, Tab 11, paras 5 and 20.

this theory at the end of trial is prejudicial to the Plaintiffs. There was no opportunity to cross-examine the Crown witnesses on this theory. There was no opportunity to present evidence to rebut this theory through the discovery process. As a result, this argument should not be considered by this Court.

124. Even if the Court does entertain the band split argument, the theory does not align with the evidence which has been presented. It is not disputed that large portions of the Band travelled away from the Crooked Lakes area and original Chacachas Reserve between 1876 until their eventual return in 1883. However, when approximately two thirds of the Chacachas Band did return to the joint Reserve with Chief Chacachas in 1883, the evidence is that they resided as a cohesive group on the east portion of the Reserve and farmed the land as a community under the leadership of Chief Chacachas. This activity continued after Chief Chacachas and some Band members left in 1887. The evidence of the Elders confirmed that the Band continued to exist on the joint Reserve as a separate community and that they continue to do so today.

(4) If no, are the Chacachas band and Kakisiwew band entitled to be recognized as distinct treaty bands? If so, are the Chacachas band and the Kakisiwew band estopped or otherwise prevented from asserting that they are distinct treaty bands?

(a) Declaratory Relief

125. The Plaintiffs submit that the Chacachas band is entitled to a declaration that they are a distinct Treaty band.

126. Declaratory relief may be granted by this Honourable Court provided the following three requirements are established:

i) The court has jurisdiction to hear the issue;
ii) The dispute before the court is real and not theoretical; and

iii) The party raising the issue has a genuine interest in its resolution.[131]

127. The Supreme Court has described circumstances in which declaratory relief would be appropriate. In *Manitoba Metis Federation v Canada (Attorney General),*[132] the eight panel majority stated that declaratory relief is available without a cause of action and whether or not any consequential relief is available. The majority also affirmed that a declaration can be used to give effect to the honour of the Crown or ensure that constitutionally protected rights are fulfilled.

128. In our case, the right to be protected is the right to exist, the most basic of Treaty rights.

129. The Crown's position is based upon the fact that it has administered the members of the Ochapowace Band, including those of the two historic Bands, as a single entity. For administrative purposes, all individuals who are part of the larger group have been considered members of a single Band. However, the people have maintained their Treaty right to exist as part of a separate entity recognized under Treaty. The Crown's administrative actions cannot eliminate their right to do so.

130. Most recently, the Supreme Court has commented on declaratory relief and its relation to the honour of the Crown in *Mikisew Cree.*[133] Karatkatsanis J., writing for Wagner J. and Gascon J., describes the honour of the Crown as follows:

> [23] The honour of the Crown is always at stake in its dealings with Aboriginal peoples (*R. v. Badger*, 1996 CanLII 236 (SCC), [1996] 1 S.C.R. 771, at para. 41; *Manitoba Metis*, at paras. 68-72). As it emerges from the Crown's assertion of sovereignty, it binds the Crown qua sovereign. Indeed, it has been found to apply when the Crown acts either through legislation or executive conduct (see *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075, at pp. 1110 and 1114; *R. v. Van der Peet*,

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131 *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 11, 395 DLR (4th) 381 [*Daniels*].
132 2013 SCC 14 at para 143 [*Manitoba Metis*].
133 *Mikisew Cree*.

> 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507, at para. 231, per McLachlin J., as she then was, dissenting; *Haida Nation*; *Manitoba Metis,* at para. 69).
>
> [24] As this Court stated in *Haida Nation*, the honour of the Crown "is not a mere incantation, but rather a core precept that finds its application in concrete practices" and "gives rise to different duties in different circumstances" (paras. 16 and 18). When engaged, it imposes "a heavy obligation" on the Crown (*Manitoba Metis*, at para. 68). Indeed, because of the close relationship between the honour of the Crown and s. 35, the honour of the Crown has been described as a "constitutional principle" (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 (CanLII), [2010] 3 S.C.R. 103, at para. 42). That said, this Court has made clear that the duties that flow from the honour of the Crown will vary with the situations in which it is engaged (*Manitoba Metis*, at para. 74). Determining what constitutes honourable dealing, and what specific obligations are imposed by the honour of the Crown, depends heavily on the circumstances (*Haida Nation*, at para. 38; *Taku River*, at para. 25; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 (CanLII), [2010] 2 S.C.R. 650, at paras. 36-37).

131. Also in *Mikisew Cree,* Abella J., also writing for Martin J., stated that the honour of the Crown imposes a "duty on the Crown to purposively and diligently fulfill constitutional obligations" and declaratory relief is an appropriate remedy where the Crown failed to fulfil this duty.[134]

132. Limitation periods do not apply to a claim for a declaration of constitutionality. In *Manitoba Metis* the majority of the Supreme Court determined that applicable limitation periods do not apply to such declarations, noting that the principle of reconciliation between Canada and Indigenous groups demands that constitutional declarations not be statutorily barred.[135] Further, the majority determined that it would be difficult to conceive of a situation where the court could apply an equitable doctrine, such as laches and acquiescence, to defeat a claim for a declaration that a constitutional obligation has not been fulfilled as demanded by the honour of the Crown.[136] This position was affirmed by this Court in *Calwell Fishing Ltd. v Canada.*[137]

133. There are also some restrictions to declaratory relief, which have been articulated by our Supreme Court. In *Daniels*, the Court stated that

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[134] *Mikisew Cree,* at para 97.
[135] *Manitoba Metis*, at paras 143-44.
[136] *Manitoba Metis*, at para 153.
[137] 2016 FC 312, at para 126.

declaratory relief cannot be granted unless it will have practical utility in settling the dispute between the parties.[138] In *Ewert v. Canada*, the Supreme Court noted that, absent exceptional circumstances, a declaration should not be awarded where adequate statutory mechanisms exist to resolve the dispute in question.[139]

134. The Chacachas Band seeks several declarations in relation to this action regarding the Crown's violations of its duties pursuant to Treaty, as well as the failure to uphold the honour of the Crown. Specifically the declarations sought are as follows:

i) A declaration that the Chacachas Band continues to exist as a Treaty band;
ii) A declaration that the Chacachas Reserve No. 54, the reserve surveyed by Wagner in 1876, was wrongfully converted by the Crown; and
iii) A declaration that Chacachas is entitled to have a reserve set aside for it in accordance with Treaty No. 4.

For the purposes of Phase I of the trial, only the first of these three proposed declarations are in issue.

135. With regard to the legal requirements to granting the declaratory relief sought, the first requirement, being that the Court has jurisdiction to hear the issues is satisfied. The Federal Court of Canada has the jurisdiction to hear issues regarding the Crown's fulfillment of treaty obligations and has the jurisdiction to award declaratory remedies. Subsection 2(1) of the *Federal Courts Act* defines relief and includes relief by way of declaration.[140] Further, Rule 64 of the *Federal Courts Rules* provides that declaratory relief is available whether or not any consequential relief is or can be claimed.[141]

136. Turning to the second requirement, that the dispute before the court is real and not theoretical, we submit the dispute herein is real and of great

[138] *Daniels*, at para 11.
[139] 2018 SCC 30, at para 83.
[140] RSC, 1985, c F-7.
[141] SOR/98-106.

significance to the Plaintiffs. The dispute involves the Crown's failure to uphold its obligations and fiduciary duties pursuant to Treaty, more specifically its duties to recognize Treaty signatories as distinct First Nations, to assign a reserve to each Treaty band, and to not sell or dispose of that reserve without first obtaining the consent of the band. This dispute invokes the honour of the Crown in fulfilling these Treaty promises as a means of reconciliation with the Chacachas Band.

137. With regard to the third requirement, the Plaintiffs have a genuine interest in having the issues herein resolved. The Plaintiffs are direct descendants of the Chacachas First Nation, being one of the Bands who entered into Treaty No. 4 with the expectation that the sacred treaty promises would be honoured by the Crown. Further, with the signing of Treaty, the Chacachas band was recognized by Canada as a distinct nation. It could not be extinguished by unilateral action of the Crown. The Plaintiffs seek declaratory relief as a way to reconcile the past actions taken by the Crown and the defined constitutional and Treaty obligations they are owed as a Treaty signatory.

138. Declaratory relief would have practical utility in this matter. There is no adequate statutory mechanisms to attain the declarations sought in this action. The Plaintiffs are not able to move on to Phase II of this trial until there is a determination of whether they continue to exist as a Treaty band. A declaration to this effect would mean the Crown and the Plaintiffs could thereafter determine how to resolve any past Treaty breaches.

139. We anticipate the Crown will suggest the Indigenous Services Canada New Band/Band Amalgamation Policy is an adequate statutory mechanism to recognize the Chacachas people as a distinct *Indian Act* band. However, this Policy cannot effectively fulfill the objectives sought by the Plaintiffs since it would not recognize the band as a Treaty Band that is owed the benefits and promises of Treaty 4. Further, any band division using this Policy requires the discretionary approval of the Minister of Crown–Indigenous Relations and Northern Affairs according to both s. 17(1) of the *Indian Act*[142] and the evidence

[142] RSC 1985, c I-5.

provided by Violet Kayseass.[143] Due to the discretionary nature of the policy and the fact it would not recognize the Chacachas people as a Treaty band, there is no statutory mechanism to ensure the within declaration can be attained.

140. Access to remedies under the *Specific Claims Tribunal Act*[144], are also not available to the Plaintiffs or to the Chacachas Band since access is limited to First Nations as defined in section 2, and the Chacachas Band does not fit within this definition.

141. To the extent that the Crown seeks to rely upon provincial limitations legislation, specifically *The Public Officers' Protection Act,*[145] declaratory relief should be available on the same basis as applied to arguments relating to limitation periods.

(b) Laches, Acquiescence, Estoppel and Other Equitable Defences

142. Laches, acquiescence and estoppel are defences founded in equity. Courts have a discretion to apply these equitable defences as a method of ensuring that justice is achieved. Given the nature of the issues raised in these actions, their application would lead to injustice and, on that basis, they should not be applied. This is, fundamentally, the basis of the Supreme Court's decisions, such as the *Manitoba Metis* case.[146]

143. With regard to laches, the Supreme Court has stated that the two main considerations are (1) acquiescence on the claimant's part; and (2) any change of position that has occurred on the defendant's part that arose from reasonable reliance on the claimant's acceptance of the status quo.[147] Further, the Court wrote that "delay by itself cannot be interpreted as some clear act by the claimants which amounts to acquiescence or waiver" and that "a court exercising equitable jurisdiction must always consider the conscionability of the behaviour of

[143] Transcript vol. 14, p. 10, lines 16-27.
[144] SC 2008, c 22, s 2, "First Nation".
[145] RSS 1978, c P-40.
[146] *Manitoba Metis*, at para 153.
[147] *Manitoba Metis*, at para 145.

both parties".[148] Lastly, we submit this Court must place great emphasis on the following statement of the Supreme Court:

> [153] It is difficult to see how a court, in its role as guardian of the Constitution, could apply an equitable doctrine to defeat a claim for a declaration that a provision of the Constitution has not been fulfilled as required by the honour of the Crown. We note that, in *Ontario Hydro v. Ontario (Labour Relations Board)*, 1993 CanLII 72 (SCC), [1993] 3 S.C.R. 327, at p. 357, Lamer C.J. noted that the doctrine of laches does not apply to a constitutional division of powers question. (See also *Attorney General of Manitoba v. Forest,* 1979 CanLII 242 (SCC), [1979] 2 S.C.R. 1032.) The Constitution is the supreme law of our country, and it demands that courts be empowered to protect its substance and uphold its promises.[149]

144. The Plaintiffs submit that they have not acquiesced in bringing this claim. Numerous attempts to resolve the issue of the amalgamation and loss of their Reserve land have been made including objections in 1883, inquiries in 1911 and 1928, hiring a lawyer in 1932, and forming a committee and Council in the 1990's to pursue recognition.

145. The Crown's position with regard to the recognition of Chacachas as a distinct Treaty Band has not changed due to any delay in the Plaintiffs bringing their claim. The Crown has refused to recognize Chacachas as a distinct Treaty Band and continues do so, contrary to the honour of the Crown and the constitutional rights of the Plaintiffs. The Treaty rights of the Chacachas people, including the right to exist as a distinct Treaty Band, is a right enshrined in the Constitution and cannot be defeated by an equitable principle.

146. With regard to the equitable doctrine of estoppel, the elements associated with estoppel are not present in this case. If the Crown suggests that the Plaintiffs are estopped from bringing this action because the Ochapowace Band has entered into settlement agreements with Canada and some of the named Plaintiffs voted to ratify the settlements, this suggestion should not be accepted by this Court.

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[148] *Manitoba Metis*, at para 147.
[149] *Manitoba Metis*.

147. In order to prove estoppel by representation, three conditions must be satisfied:

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

ii) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made.

iii) Detriment to such person as a consequence of the act or omission.[150]

148. This Phase One trial involves recognition of the Chacachas Band. Neither of the Agreements entered into by Canada and the Ochapowace First Nation contain specific language in which a release is either sought from nor given by the Chacachas Band. More significantly, the releases contained in the Agreements do not bar a claim for recognition of the Chacachas Band as has been admitted by the Crown's own witnesses.

149. On the issue of the Plaintiffs having participated in the vote to approve settlement Agreements, the parties to these Agreements, the Ochapowace Band and the Crown, proceeded with the settlements having full knowledge that members of Chacachas considered themselves a separate entity. This was confirmed by evidence presented at trial by both Crown and Plaintiff witnesses.[151] The fact that these parties chose to use pay sheets involving Chacachas members does not impact the ability of Chacachas, as a Band, to seek recognition. At most, the settlements will have a potential impact in a Phase Two hearing.

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[150] *Blueberry River Indian Band v. Canada (Indian Affairs and Northern Development)*, 2001 FCA 67 at para 51, [2001] 4 FC 451.

[151] See specifically transcript vol. 13, p. 96, lines 7-22, p. 100, lines 3-8, and p. 116, lines 6-22; and transcript vol. 4, p. 49, lines 17-23).

150. In any event, the Crown has not acted to their detriment by entering into the Agreements with the Ochapowace Band as the Agreements were in relation to obligations recognized by the Crown.

(c) *Indian Act, 1951*

151. In the interpretation of statutes, Courts have long held that legislation which limits or abrogates First Nation rights should be strictly construed.[152] Any argument suggesting that the *Indian Act, 1951,* should somehow repeal the recognition of the existence of the Chacachas Band under Treaty would not be consistent with this principle.

152. The Crown has suggested that 1951 amendments to the *Indian Act*,[153] presented an opportunity for members of the Chacachas Band to obtain recognition of their Band.

153. The legislation introduced a revised system for the registration of Indians under the *Indian Act, 1951.*[154] The starting point was however, based upon band lists then in existence and was therefore a continuation of what had gone on before, subject to a system where protests could be filed by a Band Council or by individuals.[155]

154. Evidence was introduced suggesting that the lists of members were posted. Whether the lists that had existed prior to 1951 were posted did not affect the Plaintiffs rights to sue in 2000. The *Indian Act, 1951,* simply provided a mechanism for Councils or individuals to challenge individual membership in Bands recognized by Canada at the time.

155. There was nothing in the *Indian Act, 1951,* that provided a mechanism for a band not recognized by the Crown to obtain recognition through

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[152] See, for example, *Simon v The Queen*, [1985] 2 SCR 387 at para 38, 24 DLR (4th) 390; *R v Sundown*, [1997] 8 WWR 379, 158 Sask R 53 (CA), aff'd [1999] 1 SCR 393, 70 DLR (4th) 385 at 399, *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 145, 71 DLR (4th) 193.
[153] SC 1951, c 29 [*Indian Act, 1951*]. See Appendix A.
[154] Appendix A, ss. 5-13.
[155] Appendix A, s. 8.

the appeal mechanism.[156] In fact, the Crown was not a party to appeals from decisions to include or exclude individuals on Band lists.[157]

156. The *Indian Act, 1951* simply contained a system for the registration of individuals in Bands recognized by the Crown. It did not deal with or purport to deal with the recognition of Bands recognized by the Crown under Treaty.

157. The Crown has also made mention of an Order in Council, P.C. 1973-3571.[158] The Order in Council simply listed Bands that the Crown recognized under the *Indian Act.* It did not deal with Bands that the Crown should have recognized.

(d) Continuing Tort

158. If this Court were to determine that the right of the Chacachas Band to exist is not a constitutionally protected right, limitation legislation would still not apply since the Crown's conduct can properly be viewed as a continuing breach.

159. The Crown attracted a perpetual duty to act honourably in all its dealings with the Chacachas Band when it entered into Treaty and set aside reserve land. In this sense, Canada breaches the honour of the Crown whenever it interferes with the Chacachas Band's Treaty rights.

160. This argument is consistent with the treatment of claims related to continuing breaches of contract. The Ontario Court of Appeal held in *Brown v Belleville (City)*, that a municipality who committed itself to perpetually maintain and repair a sewer system attracted a contractual duty which was not "a finite or terminable obligation."[159] As a result, the non-breaching party obtained the right to enforce the indefinite term contract on a perpetual basis.[160] The non-breaching party's affirmation of the contract after the Municipality's breach was essential, as it entitled the non-breaching party to avoid the purportedly applicable limitation

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[156] Evidence of Andrew Doraty, transcript vol. 14, p. 58, lines 7-14.
[157] See, for example, *Reference Re Section 9 of The Indian Act, Re Certain Members of the Samson Indian Band*, 7 DLR (2nd) 745 at 746, 21 WWR (ns) 455 (ABQB).
[158] JB-00487.
[159] 2013 ONCA 148 at paras 19, 36, and 39, 359 DLR (4th) 658 [*Brown*].
[160] *Brown*, at para 64.

periods, as well as recover damages in relation to past and current breaches of the agreement.[161]

161. Superior Courts have routinely endorsed such reasoning.[162] Federal Courts have not, to date, adopted this reasoning in the Indigenous context, most notably in relation to arguments regarding continuing breaches of a fiduciary duty.[163] Commentators have taken note on this anomalous aspect of Canadian law. Anthony Duggan, Jacob S. Ziegel, and Jassmin Girgis write in their article "Problems of Interpreting Statutes of Limitations in Cases of Continuing Breach of Contract", that the apparent disagreement between the Superior Courts and the Federal Courts is an inconsistency in law which ought to be resolved.[164]

162. The reasoning of the Superior Courts is directly applicable to the Chacachas Band's claim. The Chacachas Band was, and still is, owed a perpetual obligation from the Crown to act honourably in respect of ongoing Treaty obligations. The Crown violated these obligations in the past by unilaterally amalgamating the Chacachas Band into the Ochapowace Band without seeking or obtaining the consent of the Chacahcas Band. The Crown also violates these obligations in recent times by continually denying the Chacachas Band's Treaty rights, which erodes the Band's ability to enforce those rights and access their entitlements. Finally, the Chacachas Band has repeatedly affirmed the Treaty agreement while the Crown has unlawfully repudiated their ongoing obligations. This affords the Chacachas Band with the legal standing to enforce the Crown's Treaty obligations on an ongoing basis.

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[161] *Brown*, at para 42.
[162] *Guarantee Co. of North America v Gordon Capital Corp*, [1999] 3 SCR 423, 178 DLR (4th) 1; *Germain v Clement*, [2008] OJ No 1441 (QL), 2008 CanLII 16065 (ON SC) (CanLII); *Sungard Availability Services v ICON Funding ULC*, 2011 ONSC 7367.
[163] *McCallum v Canada (Attorney General)*, 2010 SKQB 42, 353 Sask R 269; *Peepeekisis First Nation v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FCA 191, 448 NR 202; *Semiahmoo Indian Band v Canada*, [1998] 1 FC 3, 148 DLR (4th) 523; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245.
[164] Anthony Duggan, Anthony; Ziegel, Jacob S; & Girgis, Jassmin, *Problems of Interpreting Statutes of Limitations in Cases of Continuing Breach of Contract* (2013), 54 *Canadian Business Law Journal* 411.

(5) If Chacachas and Kakisiwew exist as distinct treaty bands, what is their legal status?

163. There is no question that Chacachas, under the leadership of Chief Chacachas, signed Treaty. Chacachas exists today as an Indian Band. It has members and it has provided this Court with a listing of individuals who may, if they so choose, become members. It has an elected governing Council and is recognized as a Band in the First Nation Community.

164. It is only through the ongoing administrative actions of the Crown that the Chacachas Band is not recognized. The legal status of the Chacachas First Nation should be that of a Treaty Band and an Indian Band under the *Indian Act.*[165] This includes all the rights and promises that were exchanged in Treaty 4, as well as the constitutional protection of s. 35.[166]

(6) Are the named plaintiffs in actions T-2153-00 and T-2155-00 members of either the Chacachas or Kakisiwew bands or are they members of the Ochapowace Indian Band? Do the named plaintiffs properly represent the individuals who are members of either the Chacachas or Kakisiwew band?

165. The Plaintiffs submit that they properly represent the individuals who are members of the Chacachas Band. Each of the Plaintiffs named in the within action are direct descendants of original Chacachas members living at the time Treaty 4 was signed.

166. Sheldon Watson explained his ancestry during trial. He is the son of Ivan Watson and Jeanette Watson. His paternal grandfather was Peter Watson, whose mother was Napitapeasew. Napitapeasew was a Chacachas Headman who was a member of the Chacachas Band when Treaty 4 was signed.[167]

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[165] RSC 1985, c I-5.
[166] *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[167] Transcript vol. 4, p. 36, line 11 to p. 37, line 14.

167. Peter Watson is the son of Cameron Watson, one of the original Plaintiffs named in this action, now deceased. Cameron Watson was Sheldon's brother, whose ancestry has already been explained.

168. Sharon Bear is also a direct descendant of a Chacachas Headman. Her mother was Margaret Assiniboine, who was the daughter of Charlie Assiniboine. Charlie Assiniboine was the son of Little Assniboine, who was a Chacachas Headman at the signing of Treaty.[168] Charlie Bear is Sharon Bear's son.

169. Winston Bear is also a descendant of Little Assiniboine. His parents were Andrew Farkas and Eileen Bear. Eileen was the daughter of Margaret Assiniboine, the granddaughter of Little Assiniboine.[169]

170. In *Snake v The Queen*,[170] the Court notes that the ability of the plaintiffs to bring an action on behalf of the descendants of a First Nation must prove "on a balance of probabilities, that they are descendants in unbroken lines of members of the Band." It is submitted that the evidence that the Plaintiffs are direct descendants of members of the Chacachas Band is uncontroverted and should prove to this Court that they are the proper representatives to bring the within action on behalf of all descendants of the Chacachas Band.

171. In *Campbell v British Columbia (Forest and Range)*, the Court dealt with the issue of the ability of a representative group to bring an action. The Court recognized that "it is settled law that the definition of "Indians" and "bands" in the *Indian Act* is not an exhaustive definition of the aboriginals who may assert rights that are protected by s 35 of the Constitution Act..."[171] This decision and others noted in it are not based on rights under Treaty, but affirms that definitions in the *Indian Act* are not exhaustive.

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[168] Transcript vol. 1, p. 92, lines 5-13.
[169] Exhibit 23, Tab B14(c).
[170] 2001 FCT 858 at para 52, 209 FTR 211, aff'd in *Kingfisher v. Canada*, 2002 FCA 221, 226 FTR 94.
[171] 2011 BCSC 448, at para 96.

(7) Does the Ochapowace Indian Band No. 71 recognized by the Crown, continue to exist as a treaty band notwithstanding the determination of issues 1 through 6 above?

172. The Plaintiffs submit that Ochapowace Indian Band No. 71 continues to exist as a Treaty Band notwithstanding the existence of the Chacachas and Kakisiwew Bands. The Ochapowace Band would consist of those members who choose to remain in the Band through their right of self-determination. Evidence provided by Sharon Bear is that there are some members of Ochapowace who are not descendants of either the Chacachas or Kakisiwew Bands.[172]

173. Further, the evidence provided by Ross Allary affirmed that he considers himself to be a member of the Ochapowace Band and that his entire family is from Ochapowace.[173] Petra Belanger also affirmed herself as a member of Ochapowace.[174] Given the evidence that there are individuals who have determined themselves to be members of the Ochapowace Band alone, we submit that Ochapowace Indian Band No. 71 must continue to exist as a distinct Treaty Band even if the Court declares that the Chacachas and Kakisiwew Bands continue to exist.

IV. ORDER SOUGHT

174. The Plaintiffs seek a declaration of this Honourable Court answering the questions posed for this Phase One trial as follows:

i) Was there an Indian band led by Chief Chacachas in 1874?

Answer: Yes.

ii) Was there an Indian band led by Chief Kakisiwew in 1874?

[172] Transcript vol. 3, p. 84, lines 18-28.
[173] Transcript vol. 2, p. 106, lines 24-26.
[174] Transcript vol. 15, p. 31, lines 5-7.

Answer: Yes.

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

Answer: There was no lawful amalgamation, consolidation, or joining together of the two Bands.

iv) 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?

Answer: The Chacachas Band is entitled to be recognized as a distinct Treaty and Indian Band. The Band is neither estopped nor prevented from asserting that it is a distinct Treaty Band.

v) If Chacachas and Kakisiwew exist as distinct treaty bands, what is their legal status?

Answer: The Chacachas Band is entitled to all of the rights flowing to a Band under Treaty and to recognition as a Band under the *Indian Act*.

vi) Are the named plaintiffs in actions T-2153-00 and T-2155-00 members of either the Chacachas or Kakisiwew bands or are they members of the Ochapowace Indian Band? Do the named plaintiffs properly represent the individuals who are members of either the Chacachas or Kakisiwew band?

Answer: The Plaintiffs are entitled to be recognized as members of the Chacachas Band and properly represent individuals who are members of the Band.

vii) 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?

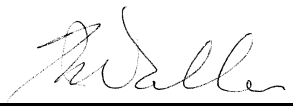
Answer: The Ochapowace Indian Band No. 71 continues to exist as a Treaty Band notwithstanding the foregoing determinations.

175. The Plaintiffs are entitled to their costs throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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

OLIVE WALLER ZINKHAN & WALLER LLP

Per: 

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V. LIST OF AUTHORITIES

Legislation

1) The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.
2) *Federal Courts Act*, RSC 1985, c F-7, s 2.
3) *Federal Courts Rules*, SOR/98-106, r 64.
4) *Indian Act*, RSC 1927, c 98, s 141.
5) *Indian Act*, SC 1951, c 29.
6) *Indian Act*, RSC 1985, c I-5.
7) *The Public Officers' Protection Act*, SS 1923, c 19, RSS 1978, c P-40, as repealed by SS 2004, c L-16.1.
8) *Specific Claims Tribunal Act,* SC 2008, c 22, s 2, "*First Nation*".

Case Law

1) *Blueberry River Indian Band v Canada*, 2001 FCA 67, [2001] 4 FCR 451.
2) *Brown v Belleville (City),* 2013 ONCA 148, 359 DLR (4th) 658.
3) *Calwell Fishing Ltd. v Canada*, 2016 FC 312.
4) *Campbell v British Columbia (Forest Range)*, 2011 BCSC 448.
5) *Daniels v Canada (Indian Affairs and Northern Development),* 2016 SCC 12, 395 DLR (4th) 381.
6) *Eli Lilly & Co. v Novopharm Ltd.,* [1998] 2 SCR 129, 161 DLR (4th) 1.
7) *Ewert v Canada*, 2018 SCC 30.
8) *Germain v Clement*, [2008] OJ No 1441 (QL), 2008 CanLII 16065 (ON SC) (CanLII).
9) *Guarantee Co. of North America v Gordon Capital Corp.,* [1999] 3 SCR 423, 178 DLR (4th) 1.
10) *Kingfisher v Canada*, 2002 FCA 221, 291 NR 314; leave to appeal dismissed [2001] SCCA No. 647.
11) *Manitoba Metis Federation v Canada (Attorney General),* 2013 SCC 14, [2013] 1 SCR 623.
12) *McCallum v Canada (Attorney General),* 2010 SKQB 42, 353 Sask R 269.
13) *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40.
14) *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, 71 DLR (4th) 193.

15) *Peepeekisis First Nation v Canada (Minister of Indian Affairs and Northern Development),* 2013 FCA 191, 448 NR 202.

16) *R v Badger*, [1996] 1 SCR 771, 133 DLR (4th) 324.

17) *R v Mohan*, [1994] 2 SCR 9, 114 DLR (4th) 419.

18) *R v Sundown*, [1997] 8 WWR 379, 158 Sask R 53 (CA), aff'd [1999] 1 SCR 393, 70 DLR (4th) 385.

19) *Reference Re Section 9 of The Indian Act, Re Certain Members of the Samson Indian Band*, 7 DLR (2nd) 745, 21 WWR (ns) 455 (ABQB).

20) *Semiahmoo Indian Band v Canada*, [1998] 1 FC 3, 148 DLR (4th) 523.

21) *Simon v The Queen*, [1985] 2 SCR 387, 24 DLR (4th) 390.

22) *Snake v The Queen*, 2001 FCT 858, 209 FTR 211.

23) *Sungard Availability Services v ICON Funding ULC*, 2011 ONSC 7367.

24) *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245.

25) *White Burgess Langille Inman v Abbott and Haliburton Co.,* 2015 SCC 23, 383 DLR (4th) 429.

Other Sources

1) Anthony Duggan, Anthony; Ziegel, Jacob S; & Girgis, Jassmin, *Problems of Interpreting Statutes of Limitations in Cases of Continuing Breach of Contract* (2013), 54 Canadian Business Law Journal 411

2) United Nations Declaration on the Rights of Indigenous Peoples

APPENDIX A

1) *Federal Courts Act*, RSC 1985, c F-7, s 2.

relief includes every species of relief, whether by way of damages, payment of money, injunction, declaration, restitution of an incorporeal right, return of land or chattels or otherwise; (réparation)

2) *Federal Courts Rules*, SOR/98-106, r 64.

64 No proceeding is subject to challenge on the ground that only a declaratory order is sought, and the Court may make a binding declaration of right in a proceeding whether or not any consequential relief is or can be claimed.

3) *Indian Act*, SC 1951, c 29, ss 5-13.

5. An Indian Register shall be maintained in the Department, which shall consist of Band Lists and General Lists and in which shall be recorded the name of every person who is entitled to be registered as an Indian.

6. The name of every person who is a member of a band and is entitled to be registered shall be entered in the Band List for that band, and the name of every person who is not a member of a band and is entitled to be registered shall be entered in a General List.

7. (1) The Registrar may at any time add to or delete from a Band List or a General List the name of any person who, in accordance with the provisions of this Act, is entitled or not entitled, as the case may be, to have his name included in that List.

(2) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom.

8. Upon the coming into force of this Act, the band lists then in existence in the Department shall constitute the Indian Register, and the applicable lists shall be posted in a conspicuous place in the superintendent's office that serves the band or persons to whom the list relates and in all other places where band notices are ordinarily displayed.

9. (1) within six months after a list has been posited in accordance with section eight or within three months after the name of a person has been added to or deleted from a Band List or a General List pursuant to section seven

(a) in the case of a Band List, the council of the band, any ten electors of the band, or any three electors if there are less than ten electors in the band,
(b) in the case of a posted portion of a General List, any adult person whose name appears on that posted portion, and
(c) the person whose name was included in or omitted from the list referred to in section eight, or whose name was added to or deleted form a Band List or a General List,

may, by notice in writing to the Registrar, containing a brief statement of the grounds therefor, protest the inclusion, omission, addition, or deletion, as the case may be, of the name of that person.

(2) Where a protest is made to the Registrar under this section he shall cause an investigation to be made into the matter and shall render a decision, and subject to a reference under subsection three, the decision of the Registrar is final and conclusive.

(3) Within three months form the date of a decision of the Registrar under this section

(a) the council of the band affected by the Registrar's decision, or

(b) the person by or in respect of whom the protest made was,

may, by notice in writing, request the Registrar to refer the decision to a judge, for review, and thereupon the Registrar shall refer the decision, together with all material considered by the Registrar in making his decision, to the judge of the country or district court of the county or district in which the band is situated or in which the person in respect of whom the protest was made resides, or such other county or district as the Minister may designate, or in the Province of Quebec, to the judge of the Superior Court for the district in which the band is situated or in which the person in respect of whom the protest was made resides, or such other district as the Minister may designate.

(4) The judge of the county, district or Superior Court, as the case may be, shall inquire into the correctness of the Registrar's decision, and for such purposes may exercise all the powers of a commissioner under Part I of the *Inquiries Act;* the judge shall decide whether the person in respect of whom the protest was made is, in accordance with the provisions of this Act, entitled or not entitled, as the case may be, to have his name included in the Indian Register, and the decision of the judge is final and conclusive.

10. Where the name of a male person is included in, omitted from, added to or deleted from a Band List or a General List, the names of his wife and his minor children shall also be included, omitted, added or deleted, as the case may be.

11. Subject to section twelve, a person is entitled to be registered if that person

(a) on the twenty-sixth day of May, eighteen hundred and seventy-four, was, for the purposes of *an Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands,* chapter forty-two of the statues of 1868, as amended by section six of chapter six of the statutes of 1869, and section eight of chapter twenty-one of the statutes of 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada,

(b) is a member of a band

(i) for whose use and benefit, in common, lands have been set apart or since the twenty-sixth day of May, eighteen hundred and seventy-four have been agreed by treaty to be set apart, or

(ii) that has been declared by the Governor in Council to be a band for the purposes of this Act,

(c) is a male person who is a direct descendant in the male line of a male person described in paragraph (a) or (b),

(d) is the legitimate child of

(i) a male person described in paragraph (a) or (b), or

(ii) a person described in paragraph (c),

(e) is the illegitimate child of a female person described in paragraph (a), (b) or (d), unless the Registrar is satisfied that the father of the child was not an Indian and the Registrar has declared that the child is not entitled to be registered, or

(f) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (a), (b), (c), (d) or (e).

12. (1) The following persons are not entitled to be registered, namely,

(a) a person who

(i) has received or has been allotted half-breed lands or money scrip,

(ii) is a descendant of a person described in sub-paragraph (i),

(iii) is enfranchised, or

(iv) is a person born of a marriage entered into after the coming into force of this Act and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph (a), (b), (d), or entitled to be registered by virtue of paragraph (e) of section eleven, unless, being a woman, that person is the wife or widow of a person described in section eleven, and

(b) a woman who is married to a person who is not an Indian.

(2) the Minister may issue to any Indian to whom this Act ceases to apply, a certificate to that effect.

13. (1) Subject to the approval of the Minister, a person whose name appears on a General List may be admitted into membership of a band with the consent of the band or the council of the band.

(2) Subject to the approval of the Minister, a member of a band may be admitted into membership of another band with the consent of the latter band or the council of that band.

4) *Indian Act,* RSC 1927, c 98, s 141.

141. Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from any Indian any payment or contribution or promise of any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offence and liable upon summary conviction for each such offence to a penalty not exceeding two hundred dollars and not less than fifty dollars or to imprisonment for any term not exceeding two months.

5) *Specific Claims Tribunal Act*, SC 2008, c 22, s 2, "*First Nation*".

First Nation means

(a) a band as defined in subsection 2(1) of the *Indian Act*;

(b) a group of persons that was, but is no longer, a band within the meaning of paragraph (a) and that has, under a land claims agreement, retained the right to bring a specific claim; and

(c) a group of persons that was a band within the meaning of paragraph (a), that is no longer a band by virtue of an Act or agreement mentioned in the schedule and that has not released its right to bring a specific claim. (*première nation*)

APPENDIX B

1) United Nations Declaration on the Rights of Indigenous Peoples

Resolution adopted by the General Assembly on 13 September 2007

[*without reference to a Main Committee (A/61/L.67 and Add.1)*]

61/295. United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006, by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

107th plenary meeting
13 September 2007

Annex

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights,2 as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law, *Convinced* that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

(*a*) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(*b*) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(*c*) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(*d*) Any form of forced assimilation or integration;

(*e*) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate

discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their

own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements

concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.