Federal Court  Cour fédérale

Date: 20170328

Dockets: T-2153-00
T-2155-00

Citation: 2017 FC 321

Ottawa, Ontario, March 28, 2017

PRESENT: The Honourable Mr. Justice Fothergill

Docket: T-2153-00

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

Docket: T-2155-00

AND 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
OCHAPOWACE INDIAN BAND NO. 71**

Respondents

ORDER AND REASONS

I. Overview

[1] The Attorney General of Canada, on behalf of Her Majesty the Queen in right of Canada [the Crown], has brought motions under Rule 75 of the *Federal Courts Rules*, SOR/98-106 to amend its Statements of Defence, and under Rules 214 and 215 for summary judgment dismissing the Plaintiffs' actions.

[2] The Plaintiffs' claims are virtually identical. They allege that: (a) conversion of the proposed 1867 reserves by the Crown amounts to breaches of treaty, trust and fiduciary duties; (b) amalgamation of the Chacacha Band and the Kakisiwew Band amounts to breaches of trust, fiduciary duty and the *Indian Act*, RSC 1985, c I-5; (c) the Chacachas Band and the Kakisiwew Band continue to exist; (d) the 1919 surrender of land amounts to breaches of treaty, trust, fiduciary duty and the *Indian Act*; and (e) the Chacachas Band and the Kakisiwew Band are both entitled to land under Treaty 4.

[3] The Plaintiffs and the Ochapowace Band consent to the Crown's motions to amend its Statements of Defence to plead s 2(1) of the Saskatchewan *Public Officers' Protection Act*, RSS 1978, c P-40 provided that the Crown does not rely on these amendments to support the motions for summary judgment presently before the Court. The Crown agrees to this condition. The motions are granted accordingly.

[4] For the reasons that follow, the Crown's motions for summary judgment are allowed in part. The Plaintiffs are estopped from advancing claims for land or other compensation with respect to the factual and legal matters that are addressed in the Treaty Land Entitlement [TLE] Settlement Agreement dated October 22, 1993 and the 1919 Surrender Settlement Agreement dated December 8, 1994.

[5] There is a triable issue with respect to whether the Plaintiffs have standing to seek declarations regarding the legal status of the Chacachas Band, the Kakisiwew Band, the Ochapowace Band and their respective memberships. In addition, there are a number of factual

and legal disputes between the parties respecting the Crown's defences of limitations, laches and acquiescence which are not apt for determination on a motion for summary judgment.

II. Background

[6] Treaty 4 was executed on September 15, 1874. Chief Kakisiwew signed on behalf of the Kakisiwew Band and its members. Chief Chacachas signed on behalf of the Chacachas Band and its members.

[7] Treaty 4 promised 640 acres to each eligible family of five, or 128 acres per person. The size of a band's reserve was determined by multiplying the band population at the date of the first land survey by 128 acres. Errors and omissions in assessing band populations and multiple land survey dates led to uncertainty regarding the applicable date to determine a band's population. Bands have alleged that they did not receive sufficient treaty land from the Crown since the 1930s. These claims are commonly referred to as TLE claims.

[8] In the 1980s, the Ochapowace Band, together with three other bands, filed a Statement of Claim respecting TLE claims. The action was settled, and resulted in the 1992 TLE Framework Agreement for Saskatchewan. The Ochapowace Band signed the framework agreement on September 22, 1992, together with 24 other bands.

[9] On October 22, 1993, the Ochapowace Band entered into a specific settlement agreement with the Crown valued at approximately $16 million in satisfaction of its TLE claims [the TLE Settlement Agreement]. The TLE Settlement Agreement was ratified by a majority of the

Ochapowace Band's membership. Out of 549 eligible voters, 379 cast votes. 364 were in favour of and 15 were against the settlement agreement.

[10] In 1985, the Ochapowace Band applied under the specific claims policy known as "Outstanding Business" for compensation for the 1919 surrender of 18,240 acres of land that was transferred to the Soldier Settlement Board. In 1991, the Ochapowace Band filed a Statement of Claim against the Crown (Court File No. T-2463-91). The Specific Claims submission and the Statement of Claim both asserted that the Ochapowace Band was created from an amalgamation of two separate bands formerly led by Chief Chacachas and Chief Kakisiwew.

[11] The Ochapowace Band entered into a specific claim settlement agreement dated December 8, 1994 [the 1919 Surrender Settlement Agreement]. The 1919 Surrender Settlement Agreement provided for payment of $13 million to the Ochapowace Band, and for an additional 18,223.4 acres of land to be set aside as reserve land. The 1919 Surrender Settlement Agreement was ratified by a majority of the Ochapowace Band's membership. Out of 576 eligible voters, 372 cast votes. 357 were in favour of and 15 were against the settlement agreement.

[12] The present actions were commenced in 2000. The Crown filed its most recent Amended Statement of Defence on June 2, 2016.

[13] In these reasons, a reference to the Plaintiffs encompasses the Plaintiffs in both actions. Where necessary, I refer to the Plaintiffs in T-2153-00 as the Watson Plaintiffs, and the Plaintiffs in T-2155-00 as the Bear Plaintiffs.

III. Issues

[14] The Crown's motions to amend its Statements of Defence and for summary judgment dismissing the Plaintiffs' claims raise the following issues:

A. Should the Crown be permitted to amend its Statements of Defence?

B. What is the test for summary judgment under Rules 214 and 215 of the *Federal Courts Rules*?

C. Do the Plaintiffs have standing to advance the claims alleged in the Statements of Claim?

D. Are the Plaintiffs estopped from advancing the claims alleged in the Statements of Claim due to the TLE Settlement Agreement or the 1919 Surrender Settlement Agreement?

E. Are the Plaintiffs barred from advancing the claims alleged in the Statements of Claim due to limitations, laches or acquiescence?

IV. Analysis

A. *Should the Crown be permitted to amend its Statements of Defence?*

[15] The Crown seeks to amend its Statements of Defence to plead s 2(1) of the Saskatchewan *Public Officers' Protection Act*, which provides as follows:

> 2(1) No action, prosecution or other proceedings shall lie or be instituted against any person for an act done in pursuance or

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

[16] Rule 75 of the *Federal Courts Rules* states:

> Amendments with leave
>
> 75(1) Subject to subsection (2) and rule 76, the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.
>
> Limitation
>
> (2) No amendment shall be allowed under subsection (1) during or after a hearing unless
>
> (a) the purpose is to make the document accord with the issues at the hearing;
>
> (b) a new hearing is ordered; or
>
> (c) the other parties are given an opportunity for any preparation necessary to meet any new or amended allegations.
>
> Modifications avec autorisation
>
> 75(1) Sous réserve du paragraphe (2) et de la règle 76, la Cour peut à tout moment, sur requête, autoriser une partie à modifier un document, aux conditions qui permettent de protéger les droits de toutes les parties.
>
> Conditions
>
> (2) L'autorisation visée au paragraphe (1) ne peut être accordée pendant ou après une audience que si, selon le cas :
>
> a) l'objet de la modification est de faire concorder le document avec les questions en litige à l'audience;
>
> b) une nouvelle audience est ordonnée;
>
> c) les autres parties se voient accorder l'occasion de prendre les mesures préparatoires nécessaires pour donner suite aux prétentions nouvelles ou révisées.

[17] The test on a motion under Rule 75 is whether it is in the interests of justice to permit the amendment (*Janssen Inc v Abbvie Corp*, 2014 FCA 242 at para 3 [*Janssen*]). The following factors must be considered: (a) the timeliness of the motion; (b) the extent to which the proposed amendments would delay the expeditious trial of the matter; (c) the extent to which a position taken originally by one party has led another party to follow a course of action in the litigation which it would be difficult or impossible to alter; and (d) whether the amendments sought will facilitate the court's consideration of the substance of the dispute on its merits (*Janssen* at para 3; see also *Continental Bank Leasing Corp v R*, [1993] TCJ No 18 at para 23 (TCC)). A further question is whether the amendment raises a triable issue (*Merck & Co Inc v Apotex Inc*, 2003 FCA 488 at para 39). The purpose of weighing these factors is to ensure fairness and justice. No single factor is determinative.

[18] The parties agree that it would be unfair to permit the Crown to amend its Statements of Defence to plead the *Public Officers' Protection Act*, and then immediately rely on the amendments to support its motions for summary judgment dismissing the Plaintiffs' claims on the ground that they are barred by limitations legislation. Provided that the Crown does not rely on the proposed amendments to support the motions for summary judgment presently before the Court, the Plaintiffs and the Ochapowace Band consent to the amendments sought.

[19] Given the positions taken by the parties, and considering the applicable factors, I am satisfied that it is in the interests of justice to grant the Crown leave to amend its Statements of Defence to plead s 2(1) of the *Public Officers' Protection Act*. However, the Crown may not rely on these amendments to support the motions for summary judgment presently before the Court.

B. *What is the test for summary judgment under Rules 214 and 215 of the Federal Courts Rules?*

[20] Rules 214 and 215 of the *Federal Courts Rules* provide as follows:

Summary Judgment	Jugement sommaire
Facts and evidence required	Faits et éléments de preuve nécessaires
214 A response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings. It must set out specific facts and adduce the evidence showing that there is a genuine issue for trial.	214 La réponse à une requête en jugement sommaire ne peut être fondée sur un élément qui pourrait être produit ultérieurement en preuve dans l'instance. Elle doit énoncer les faits précis et produire les éléments de preuve démontrant l'existence d'une véritable question litigieuse.
If no genuine issue for trial	Absence de véritable question litigieuse
215 (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.	215 (1) Si, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.
Genuine issue of amount or question of law	Somme d'argent ou point de droit
(2) If the Court is satisfied that the only genuine issue is	(2) Si la Cour est convaincue que la seule véritable question litigieuse est :
(a) the amount to which the moving party is entitled, the Court may order a trial of that issue or grant summary judgment with a reference under rule 153 to determine the amount; or	a) la somme à laquelle le requérant a droit, elle peut ordonner l'instruction de cette question ou rendre un jugement sommaire assorti d'un renvoi pour détermination de la somme conformément à la règle 153;
(b) a question of law, the Court may determine the question and grant summary judgment accordingly.	b) un point de droit, elle peut statuer sur celui-ci et rendre un jugement sommaire en conséquence.
Powers of Court	Pouvoirs de la Cour
(3) If the Court is satisfied that there is a genuine issue of fact or law for trial with respect to a claim or a defence, the	(3) Si la Cour est convaincue qu'il existe une véritable question de fait ou

Court may (a) nevertheless determine that issue by way of summary trial and make any order necessary for the conduct of the summary trial; or (b) dismiss the motion in whole or in part and order that the action, or the issues in the action not disposed of by summary judgment, proceed to trial or that the action be conducted as a specially managed proceeding.	de droit litigieuse à l'égard d'une déclaration ou d'une défense, elle peut : a) néanmoins trancher cette question par voie de procès sommaire et rendre toute ordonnance nécessaire pour le déroulement de ce procès; b) rejeter la requête en tout ou en partie et ordonner que l'action ou toute question litigieuse non tranchée par jugement sommaire soit instruite ou que l'action se poursuive à titre d'instance à gestion spéciale.

[21] The Supreme Court of Canada explained the purpose of the summary judgment rule in *Canada (Attorney General) v Lameman*, 2008 SCC 14 at paragraph 10 [*Lameman*]:

> The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

[22] In a motion for summary judgment, the moving party must establish that there is no genuine issue for trial (*Federal Courts Rules*, Rule 214). This is a heavy burden. Summary judgment will be granted only in the "clearest of cases" (*Pinder v Canada*, 2015 FC 1376 at para 61, aff'd 2016 FCA 317). While the burden falls on the moving party, both parties must put their best foot forward (*Samson First Nation v Canada*, 2015 FC 836 at paras 94-99, aff'd 2016 FCA 223 [*Samson First Nation*]; *Lameman* at para 11).

[23] The Ochapowace Band raises a preliminary objection to the motions for summary judgment. It argues that the use of oral tradition evidence is necessarily circumscribed in motions for summary judgment, contrary to this Court's *Practice Guidelines for Aboriginal Law Proceedings* and contrary to the customs of the Ochapowace Band. The Ochapowace Band says that this is a sufficient basis on which to dismiss the motions for summary judgment. I disagree. Rule 214 provides that a response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings, but must set out specific facts and adduce the evidence showing that there is a genuine issue for trial. The Court has flexibility in accepting oral history and tradition as evidence, should the parties choose to adduce it (*Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 87 [*Delgamuukw*]). Here, the Ochapowace Band has presented some oral tradition evidence in the affidavit of Ross Allary.

[24] The Bear Plaintiffs and the Ochapowace Band also argue that the Crown's motion for summary judgment should be dismissed because the Crown has sought to cross-examine an expert witness (citing *Urea Casale SA v Stamicarbon BV*, 2002 FCA 10 at paras 26-27 [*Urea Casale*]). In my view, this reading of *Urea Casale* is over-broad. The passage cited stands only for the proposition that where there is competing expert testimony, this may be an indication of a genuine issue for trial.

[25] In summary, the Crown bears a heavy burden to demonstrate that the Plaintiffs' claims do not raise genuine issues for trial. Motions for summary judgment will succeed only in the clearest of cases. Nevertheless, all parties must put their best foot forward. The motions must be

decided based upon the evidence adduced, not on what might be presented at a later stage in the proceedings.

C. *Do the Plaintiffs have standing to advance the claims alleged in the Statements of Claim?*

[26] The Crown says that the Plaintiffs are members of the Ochapowace Band, and cannot therefore also be members of the Chacachas Band or the Kakisiwew Band. The *Indian Act* does not permit individuals to be members of more than one band (*Montana Band v Canada*, 2006 FC 261 at paras 515-520, aff'd 2007 FCA 218). All but one of the Watson Plaintiffs and all of the Bear Plaintiffs were on the voters' lists for ratification of the TLE Settlement Agreement and the 1919 Surrender Settlement Agreement as members of the Ochapowace Band.

[27] Furthermore, the Crown asserts that the Chacachas Band and the Kakisiwew Band have ceased to exist. A band under the *Indian Act* is a creature of statute. The Ochapowace Band is the only "band" within the meaning of the *Indian Act* identified in the Plaintiffs' Statements of Claim. The Crown says that the Ochapowace Band, in its capacity as successor to the Chacachas Band and the Kakisiwew Band, properly entered into the TLE Settlement Agreement and the 1919 Land Surrender Agreement on behalf of its members. Band membership, rather than ancestry, creates entitlement to reserve lands (*Blueberry River Indian Band v Canada*, 2001 FCA 67 at paras 13-27 [*Blueberry River Indian Band*]; *Kingfisher v Canada*, 2002 FCA 221 at para 7).

[28] According to the Crown, the claims advanced in the Statements of Claim have previously been settled by the Ochapowace Band. All members of the Ochapowace Band, including the

Plaintiffs in the present actions, are bound by the settlement agreements. The Crown says that claims brought by dissatisfied members of the Ochapowace band are not permitted by law (*Ryan et al v Harold Leighton et al*, 2006 BCSC 278 at paras 16-18, 20; *Quinn v Bell Pole*, 2013 BCSC 892 at para 32; *Te Kiapilanoq v British Columbia*, 2008 BCSC 54 at para 25; *Campbell v British Columbia (Forest and Range)*, 2011 BCSC 448 at paras 160-61).

[29] Finally, the Crown argues that descendants of members of the Chacachas Band and the Kakisiwew Band lack standing to pursue collective rights that are vested in the Ochapowace Band. Collective rights belong to the community as a whole, as it exists from time to time (*Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 33). Standing to bring a claim to enforce collective rights may be asserted only by a band or individuals authorized by a band (*Beattie v Canada*, [2000] FCJ No 1920 at paras 1-21 (TD), aff'd 2001 FCA 309; *Blueberry River Indian Band v Canada (Indian Affairs and Northern Development)*, [1999] FCJ No 452 at paras 16-23 (TD), aff'd 2001 FCA 67).

[30] The Plaintiffs deny that band membership is to be determined solely in accordance with the *Indian Act*. The Crown, for administrative purposes, may consider the Chacachas Band and the Kakisiwew Band to be defunct. If the Crown considers the Plaintiffs to be members of the Ochapowace Band, this is only because there is no other option under the *Indian Act*.

[31] In the alternative, the Plaintiffs say that if a band under the *Indian Act* is a creature of statute, then the Chacachas Band and the Kakisiwew Band were both established as bands by virtue of signing Treaty 4 in 1874. The *Indian Act* of 1876 acknowledged that reserve lands were

set apart by treaty for the use and benefit of particular bands, which included the Chacachas Band and the Kakisiwew Band.

[32] The Plaintiffs rely upon the Order of Justice Hugessen in Court File No. T-2463-91 dated March 13, 2008, which identified the issues to be determined in the first phase of the trial. The Plaintiffs note that the Crown agreed to the Order, and say that it is dishonourable for the Crown to attempt to renege on its terms by seeking to dismiss their claims before the issues have been determined at trial.

[33] The Order of Justice Hugessen dated March 13, 2008 provides as follows:

> As particularized and informed by the pleadings, the issues for phase one of the trial are as follows:
>
> > Was there an Indian band led by Chief Chacachas in 1874?
> >
> > Was there an Indian band led by Chief Kakisiwew in 1874?
> >
> > Were Chief Chacachas' band and Chief Kakisiwew's band amalgamated, consolidated or otherwise joined together? If yes, was it properly done?
> >
> > 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 listing treaty bands?
> >
> > If Chacachas and Kakisiwew exist as distinct treaty bands, what is their legal status?
> >
> > Are the named plaintiffs in 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 and Kakisiwew band?
>
> 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?

[34] In 2010, the Crown brought a motion for summary judgment to dismiss the action in Court File No. T-2463-91. Justice Campbell adjourned the motion *sine die* pending the disposition of the present actions. Although the Order of Justice Hugessen was issued in Court File No. T-2463-91, all parties to the motions presently before the Court accept that it also applies to Court File Nos. T-2153-00 and T-2155-00.

[35] The honour of the Crown gives rise to different duties in different circumstances (*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 18 [*Haida*]). It does not generally constrain the Crown in the conduct of litigation (*Canada v Stoney Band*, 2005 FCA 15 at para 22). The fiduciary duty imposed on the Crown does not exist at large (*Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 81 [*Wewaykum*]).

[36] It is not necessary for the purposes of the present motions to decide whether the honour of the Crown is engaged by its decision to depart from Justice Hugessen's Order and seek summary judgment dismissing the Plaintiffs' claims. The Order identifies preliminary issues that are appropriate for determination during the first phase of the litigation. At a minimum, whether the Plaintiffs have sufficient standing to advance the aspects of their claims that are described in

Justice Hugessen's Order dated March 13, 2008 raises a triable issue. None of these preliminary issues concern TLE claims or the pursuit of other collective rights. They are concerned only with declaratory relief.

[37] As the Alberta Court of Appeal found in *Lameman v Canada (Attorney General)*, 2006 ABCA 392, rev'd 2008 SCC 14, there would be circularity in the Crown's position if no litigant could assert a claim relating to the continued existence of the Chacachas Band and the Kakisiwew Band (at paras 132 and 133):

> [132] Were it the case that no living individual satisfied the criteria as refined, restated and adopted by the chambers judge, it is correct that the very abolition of the reserve created the hole in standing. Such a conclusion would preclude an eventual adjudication of the merits of the claims I have otherwise found triable, and be a bar to the appellants. That could raise a further issue. Would it be just on the facts here to deny the appellants a forum in which they can claim the rights that this Court has found triable? Then on the unique facts here, notably that the reserve was abolished, should the criteria for standing be as defined by the chambers judge? Should the plaintiffs in that event be considered to have standing on the basis of being a descendant of an original band member? If this were not the case, would there be circularity in the Crown's position and no litigant to assert the claim of improper cancellation of the reserve?
>
> [133] That also is arguable and so a triable issue.

[38] By the same token, there is an arguable and triable issue with respect to whether the Plaintiffs have standing to seek declarations regarding the legal status of the Chacachas Band, the Kakisiwew Band, the Ochapowace Band and their respective memberships. Whether the Plaintiffs have standing to advance collective rights on behalf of any or all of these entities may be determined only once these threshold questions have been answered.

D. *Are the Plaintiffs estopped from advancing the claims alleged in the Statements of Claim due to the TLE Settlement Agreement or the 1919 Surrender Settlement Agreement?*

[39] As a preliminary issue, the Crown questions the *bona fides* of the Watson Plaintiffs and the Bear Plaintiffs. There is a joint contingency agreement between the Plaintiffs and the Ochapowace Band which (a) describes a collective client group and a collective counsel group; (b) provides that the Ochapowace Band is entitled to recovery against both the Crown and itself; (c) provides that the Ochapowace Band's counsel are entitled to preferential payment; (d) acknowledges that the Ochapowace Band is funding the Plaintiffs' litigation against the Crown and itself; and (e) requires the Plaintiffs and the Ochapowace Band to cooperate in the conduct of the litigation in the best interests of all parties.

[40] The Crown says that the Ochpowace Band is prohibited by article 15.02 of the TLE Settlement Agreement and article 19 of the 1919 Surrender Settlement Agreement from advancing further claims against the Crown pertaining to the subject-matter of those agreements. The Crown argues that, by virtue of the joint contingency agreement, they are doing precisely this – albeit indirectly. However, the Crown has not asked this Court to prohibit the Ochapowace Band from continuing to fund the Plaintiffs' litigation.

[41] The Plaintiffs and the Ochapowace Band reply that the Ochapowace Band is an "involuntary trustee" for the Plaintiffs in these actions, and it has an obligation to act in the Plaintiffs' best interests. The contingency agreement merely provides a mechanism whereby funding can be made available to the Plaintiffs. The Ochapowace Band's potential recovery is limited to advances of legal fees. The Ochapowace Band says that there is nothing in the

settlement agreements to prevent it from asserting the inherent Aboriginal and treaty rights of its involuntary members.

[42] In my view, questions pertaining to the legitimacy of the joint contingency agreement are inextricably tied to the broader question of estoppel raised by the Crown's motion for summary judgment, *i.e.*, whether the Plaintiffs are precluded from advancing the claims alleged in the Statements of Claim by the release provisions of the TLE Settlement Agreement or the 1919 Surrender Settlement Agreement.

[43] The Crown says that all members of the Ochapowace Band, including the Watson Plaintiffs and the Bear Plaintiffs, benefited from the TLE Settlement Agreement and the 1919 Surrender Settlement Agreements, and are bound by the terms of those agreements. The Crown argues that the Plaintiffs' attempt to revisit the matters addressed in those agreements under a different guise undermines the objectives of negotiation and the goal of reconciliation (citing *Mikisew Cree First Nation v Canada (AG)*, 2016 ABQB 191 at para 45). The Supreme Court of Canada has recognized that: (a) negotiation is the preferable path to reconcile Aboriginal and Crown interests; (b) both parties must make good faith efforts to understand each other's concerns; (c) balance and compromise are inherent in the notion of reconciliation; and (d) settlements negotiated in good faith achieve reconciliation (*Haida* at paras 14, 49 and 50; *Delgamuukw* at para 186).

[44] The release provision of the TLE Settlement Agreement reads as follows:

> 15.01 RELEASE OF CANADA BY THE BAND:

Subject to the provisions of section 15.06 and 15.08, the Band agrees, for and on behalf of each Member of the Band, that forthwith upon the ratification, execution and delivery of this Agreement, the Band does hereby;

(a) cede, relinquish and abandon unto Canada and forever discharge and release Canada, Her servants, agents and successors from all claims, rights, title and interest of the Band under Treaty relating to land entitlement, and all obligations imposed on, and all promises, undertakings or representations made by Canada under or relating to Treaty land entitlement to the Band, or its predecessors in title, and shall further waive any right, action or cause of action, claim, demand, damage, cost, expense, liability and entitlement of whatever nature and kind, whether known or unknown, which the Band or any of its Members, whether past, present or future (including their respective heirs, administrators, executors, successors and assigns) ever had, now have, or may hereafter have against Canada by reason of, or in any way arising out, of such Treaty land entitlement.

(b) agree, wherever applicable, to forthwith abandon and formally discontinue any legal proceeding commenced against Canada or Saskatchewan and not to assert any cause of action, action for declaration, Claim, or demand of whatsoever kind or nature which the Band or any of its Members, whether past, present or future (including their respective heirs, administrators, executors, successors and assigns) ever had, now have or may hereafter have against Canada or Saskatchewan relating to or arising from any Treaty land entitlement and in particular agree, subject to section 15.09, in respect of any action or claim for outstanding Treaty land entitlement, to forthwith file a Notice of Discontinuance in respect of any legal proceeding taken by the Band or any Member thereof for relief, annexing thereto a copy of this Agreement as Minutes of Settlement of the action and, upon discontinuance of such proceedings, the Band agrees that each party shall bear their own costs of the action; and

(c) notwithstanding subsections (a) and (b) above, but for greater certainty, nothing herein is intended nor shall it be construed as affecting any right, action or claim of the Band (other than in respect of outstanding Treaty land entitlement) including any right, claim or action in

> respect of any improper, surrender, alienation, or other disposition by Canada of Reserve lands, claims relating to traditional Indian Lands (unrelated to outstanding Treaty land entitlement) or any other right, action or claim (unrelated to outstanding Treaty land entitlement) which may now exist or hereafter arise. Provided, however, nothing in this section shall be interpreted as any admission or denial by Canada respecting the validity of any such claims or actions.
>
> […]
>
> 15.04 FULL AND FINAL SATISFACTION:
>
> Subject to sections 15.08 and 15.0B, the Band agrees that this Agreement and the Framework Agreement, jointly, are intended to and do give effect to the full and final satisfaction of any and all obligations or undertakings of Canada relating to Treaty land entitlement in respect of the Band including, without limitation, all manner or costs, legal fees, travel expenses and other costs incurred by the Band or its representatives in negotiations relating to this Agreement or otherwise and that Canada, by carrying out its obligations pursuant to this Agreement and the Framework Agreement, shall be deemed to have completely fulfilled, and thereby concluded, the Treaty land entitlement rights of the Band, and the Treaty land entitlement obligations of Canada to the Band.
>
> 15.05 FINALITY – CANADA AND THE BAND:
>
> Subject to subsection 15.01(c) and section 15.08, and subject to and conditional upon ratification, execution and delivery by the Band of this Agreement, the Band agrees that this Agreement and the Framework Agreement, jointly, set forth, in a full and complete manner, the actions necessary to implement and fulfill the terms of the Treaty in respect of land entitlement for the Band and its Members and, by carrying out its obligations under this Agreement and the Framework Agreement, Canada's Treaty land entitlement obligations shall be fulfilled.

[45] The release provision of the 1919 Surrender Settlement Agreement reads as follows:

> 18. In consideration of the Compensation paid by Canada to the Band and the mutual promises in this Settlement Agreement, the Band agrees to:

(a) forever release and discharge Canada and any of its Ministers, officials, servants, agents, successors and assigns from any action, cause of action, suit, claim or demand whatsoever, whether known or unknown, and whether in law, in equity or otherwise, which the Band and the members of the Band and any of their prospective heirs, descendants, legal representatives, successors and assigns, past, present and future, may ever have had, may now have or may hereafter have against Canada and any of its Ministers, officials, servants, agents, successors and assigns with respect to the Claim;

(b) abandon, by filing a consent dismissal order, any legal proceedings commenced against Canada and any of its Ministers, officials, servants, agents, successors and assigns with respect to the Claim;

(c) not assert any action, cause of action, suit, claim or demand whatsoever, whether in law, in equity or otherwise, which the Band and the members of the Band and any of their respective heirs, descendants, legal representatives, successors and assigns, past, present and future, may ever have had, may now have or may hereafter have against Canada and any of its Ministers, officials, servants, agents, successors and assigns with respect to:

(i) the Claim;

(ii) the procedures resulting in the execution of this Settlement Agreement by the Band;

(iii) the deposit or the Compensation Paid In Trust on the Band's authority and direction into the Trust Account and the deposit, withdrawal, use, management or any other dealings by the Trustees to the Trust Agreement with respect to the Compensation Paid In Trust;

(iv) any land use restrictions, restrictive covenants, reversionary rights and third party interests on the Proposed Reserve

> Lands which exist on the day the lands are set apart as reserve; and
>
> (v) the environmental condition of the Proposed Reserve Lands as it exists on the day that the Proposed Reserve Lands are transferred to Canada; and
>
> (d) for greater certainty, the Band is not prevented from bring any action, cause of action, suit, claim or demand whatsoever, whether in law, in equity or otherwise, which the Band may ever have had, may now have or may hereafter have, on any matter not specifically set out in paragraphs 18(a), (b) and (c).

[46] Pursuant to article 15.01 of the TLE Settlement Agreement, the Ochapowace Band and its members, including the Plaintiffs in the present actions, have released Canada from all claims under Treaty relating to land entitlement. Article 15.02 states that the Ochapowace Band will save Canada harmless and indemnify Canada from claims for land entitlement under Treaty.

[47] Pursuant to article 18 of the 1919 Surrender Settlement Agreement, the Ochapowace Band and its members, including the Plaintiffs in the present actions, have released Canada with respect to all claims based upon facts and issues, direct and indirect, arising from the band's 1985 specific claims submission, including the surrender lands, road allowances within the surrender lands, mines and minerals of the surrender lands, and loss of use of whatever kind in relation to the surrender lands. In article 19 of the 1919 Surrender Settlement Agreement, the Ochapowace Band agrees to indemnify Canada for any claim brought by any person in relation to the surrender lands.

[48] There are three conditions of estoppel by representation: (a) a representation, or conduct amounting to a representation, intended to induce a course of conduct on the part of a person to whom the representation is made; (b) an act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made; and (c) detriment to such person as a consequence of the act or omission (*Blueberry River Indian Band* at para 51).

[49] By negotiating, executing and ratifying the settlement agreements, and receiving the settlement proceeds, the Ochapowace Band's leadership and membership represented to the Crown that the Ochapowace Band was the appropriate party to settle the outstanding TLE and 1919 surrender claims. This was not contradicted by the Plaintiffs in the present actions, all of whom, save one who was not of voting age at the time, were eligible to vote on the terms of the settlement agreements. Some of the Plaintiffs were principal signatories or witnesses. The Crown entered into the TLE Settlement Agreement and the 1919 Surrender Settlement Agreement in good faith. Canada acted to its detriment in awarding the Ochapowace membership significant amounts of land and financial compensation.

[50] The Plaintiffs all received the benefits of the TLE and 1919 surrender settlement agreements. They do not seek to set aside either of the agreements, and they are today bound by them. It is therefore plain and obvious that the Plaintiffs are estopped from advancing claims for land or other compensation with respect to the factual and legal matters that are addressed in the TLE Settlement Agreement and the 1919 Surrender Settlement Agreement.

[51] However, this does resolve all of the issues raised by the Crown's motions for summary judgment. In the course of argument, counsel representing the Crown fairly conceded that "perhaps the estoppel argument does not entirely cover off the matter".

[52] The Watson Plaintiffs argue that the principal remedy they seek is recognition of the Chacachas Band. Neither of the settlement agreements relied upon by the Crown contains a release by the Chacachas Band. The Watson Plaintiffs maintain that the Ochapowace Band and the Crown entered into the settlement agreements knowing that members of the Chacachas Band considered themselves to be a separate entity. They therefore argue that the release provisions do not preclude an action to confirm the existence of the Chacachas Band.

[53] The Bear Plaintiffs note that the TLE Settlement Agreement and 1919 Surrender Settlement Agreement did not release any claims relating to the alleged amalgamation of the Kakisiwew Band and the Chacachas Band. Canada's negotiator, upon cross-examination, acknowledged that the historic band amalgamation remained a live issue.

[54] The written submissions of the Watson Plaintiffs include the following statement:

> The Plaintiffs do not deny that the settlement of the Treaty Land Entitlement Claim will have an impact on the issue of compensation at an appropriate future time. That is an issue that cannot foreclose the ability of the Chacachas Band to obtain redress for the Crown's failure of its obligation to recognize the Chacachas Band.

[55] In the course of argument, counsel for the Watson Plaintiffs acknowledged that the TLE Settlement Agreement and the 1919 Surrender Settlement Agreement may preclude claims for

further land or compensation based on the facts and issues that gave rise to the settlement agreements. Counsel for the Bear Plaintiffs insisted that the claims advanced in his clients' Statement of Claim are not TLE claims, and are instead concerned with a declaration that the Kakisiwew Band exists.

[56] I am satisfied that there is a triable issue with respect to whether the release provisions of the TLE Settlement Agreement and the 1919 Surrender Settlement Agreement preclude the Plaintiffs from pursuing actions for declarations that the Chacachas Band and the Kakisiwew Band continue to exist. It is arguable that the Plaintiffs are not estopped from advancing claims that pertain to the issues identified in the Order of Justice Hugessen in Court File No. T-2463-91 dated March 13, 2008.

E. *Are the Plaintiffs barred from advancing the claims alleged in the Statements of Claim due to limitations, laches and acquiescence?*

[57] The Crown says that the claims alleged in the Plaintiffs' Statements of Claim are barred by limitations, laches and acquiescence, citing s 39(1) of the *Federal Courts Act*, RSC 1985, c F-7; s 32 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50; the *Public Officers' Protection Act*; the *Limitation of Actions Act*, RSS 1978, c L-15 in force in Saskatchewan at the material time; *Peepeekisis Band v Canada (Indian Affairs and Northern Development)*, 2013 FCA 191 at paragraph 30; and *Lameman* at paragraph 13. As discussed above, the Crown does not rely on the *Public Officers' Protection Act* in the present motions for summary judgment.

[58] The doctrine of laches and acquiescence may bar Aboriginal claims in appropriate circumstances. A defence of laches and acquiescence may arise where (a) the party has, by his

conduct, done that which might fairly be regarded as equivalent to a waiver, and (b) such conduct results in circumstances that make the prosecution of the action unreasonable (*Wewaykum* at para 111; *M (K) v M (H)*, [1992] 3 SCR 6 at 76, 78 and 79).

[59] Questions of limitations, laches and acquiescence may be decided on a motion for summary judgment if the facts that establish the defences are not in dispute or can be inferred (*Buffalo v Canada*, 2016 FCA 223 at paras 22-24). If the facts are contested, or depend on an assessment of credibility, then they are not generally suitable for summary disposition.

[60] In *Samson First Nation* at paragraphs 197-208, Justice Russell found that the evidence before him established that the plaintiffs were aware of all facts needed to commence their claims within the limitations period, that they had been represented by counsel and briefed on the options available to them, that there would be no political solution to the issues placed before them, and that the plaintiffs had chosen to pursue legal action at the appropriate time. Justice Russell stated:

> [T]he evidence provided to the Court is more than sufficient to apply the law to the facts […] because, given the historical nature of the available evidence, a trial judge would be in no better position than I am to make the necessary findings of fact [and] the Plaintiffs have not suggested any way in which the relevant evidentiary record could improve between now and trial.

[61] This may be contrasted with the present proceedings, in which the Plaintiffs do suggest that the relevant evidentiary record may improve between now and trial. The Plaintiffs have brought a motion to amend their Statements of Claim to plead additional facts that bear on the Crown's limitations defences and implicate the conduct of the Crown's agents and employees.

The motion is addressed in a separate Order and Reasons issued together with this Order and Reasons.

[62] The Watson Plaintiffs assert that the Supreme Court has made it clear in *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 that limitation periods, statutory or otherwise, "cannot prevent the courts from issuing a declaration of the constitutionality of the Crown's conduct" (at para 135). According to the Watson Plaintiffs, while the application of limitations may bar a monetary remedy, it will not bar a declaration that the Crown failed to act honourably in implementing obligations it assumed under Treaty.

[63] More generally, the Watson Plaintiffs argue that the Crown relies on a "formalistic and technical application" of provincial limitations statutes (citing *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2016 SKCA 124 at para 29). They say that, in any event, their claims involve a continuing breach of the honour of the Crown, which is not barred by limitation periods. They advance similar arguments for the non-application of the doctrine of laches and acquiescence.

[64] The Bear Plaintiffs say that, pursuant to s 12 of the *Limitations Act*, SS 2004, c L-16.1, the limitation period for claims based on fraudulent breach of trust does not begin to run against a beneficiary until it is aware of a breach. In their motion to amend their pleadings, the Plaintiffs maintain that recently discovered facts demonstrate that the Crown's agents and employees acted fraudulently, and willfully failed to disclose their interests in land speculation endeavours. They argue that the existence of this cause of action was concealed by fraud, and was discoverable

only when it became known. They say that the concept of laches does not apply because the Kakisiwew Band never acquiesced in the fraud.

[65] There are a number of factual and legal disputes between the parties respecting the Crown's defences of limitations, laches and acquiescence. These include the application of federal and provincial limitations statutes; whether limitations statutes apply to actions for declaratory relief pertaining to constitutional rights; whether the claims involve continuing breaches of the duties or honour of the Crown; and whether fraudulent concealment may extend the applicable limitations period. These complex factual and legal questions are not apt for determination on a motion for summary judgment.

ORDER

THIS COURT ORDERS that:

1. The Crown's motions to amend its Statements of Defence to plead s 2(1) of the Saskatchewan *Public Officers' Protection Act* are granted.

2. The Crown's motions for summary judgment are allowed in part. The Plaintiffs are estopped from advancing claims for land or other compensation with respect to the factual and legal matters that are addressed in the TLE Settlement Agreement and the 1919 Surrender Settlement Agreement. The Plaintiffs shall amend their Statement of Claims accordingly.

3. Costs of the motions shall be in the cause.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-2153-00 AND T-2155-00
DOCKET:	T-2153-00
STYLE OF CAUSE:	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 v HER MAJESTY THE QUEEN IN RIGHT OF CANADA, AS REPRESENTED BY THE MINISTER OF INDIAN, AND NORTHERN AFFAIRS CANADA, AND THE OCHAPOWACE FIRST NATION
AND DOCKET:	T-2155-00
STYLE OF CAUSE:	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 v HER MAJESTY THE QUEEN IN RIGHT OF CANADA, AS REPRESENTED BY THE MINISTER OF INDIAN AND NORTHERN AFFAIRS AND OCHAPOWACE INDIAN BAND NO. 71
PLACE OF HEARING:	REGINA, SASKATCHEWAN
DATE OF HEARING:	NOVEMBER 8, 2016
JUDGMENT AND REASONS:	FOTHERGILL J.
DATED:	MARCH 28, 2017

APPEARANCES:

Thomas Waller	FOR THE PLAINTIFFS PETER WATSON ET AL
J. R. Norman Boudreau Earl Stevenson	FOR THE PLAINTIFFS WESLEY BEAR ET AL
Thor Kristiansen Karen Jones	FOR THE DEFENDENTS HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIAN AND NORTHERN AFFAIRS CANADA
Mervin Phillips Leanne Phillips	FOR THE DEFENDANTS THE OCHAPOWACE FIRST NATION OCHAPOWACE INDIAN BAND NO. 71

SOLICITORS OF RECORD:

Olive Waller Zinkhan & Waller LLP Barristers and Solicitors Regina, Saskatchewan	FOR THE PLAINTIFFS PETER WATSON ET AL
Boudreau Law Barristers and Solicitors Winnipeg, Manitoba	FOR THE PLAINTIFFS WESLEY BEAR ET AL
William F. Pentney, Q.C. Deputy Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDENTS HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIAN AND NORTHERN AFFAIRS CANADA
Phillips & Co. Barristers and Solicitors Regina, Saskatchewan	FOR THE DEFENDANTS THE OCHAPOWACE FIRST NATION AND OCHAPOWACE INDIAN BAND NO. 71