Federal Court  Cour fédérale

Date: 20200128

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

Citation: 2020 FC 129

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 THE OCHAPOWACE INDIAN BAND NO. 71

Defendants

REASONS FOR JUDGMENT

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PHELAN J.

I. Overview

A. *Introduction*

[1] The central issue in this case is whether two separate treaty signatory bands were wrongfully amalgamated by Canada. The subsidiary issue is whether the events of the past 135 years during which Canada treated the two bands as one, prevent these bands from seeking

remedies from the Court if the amalgamation was unlawful. These actions are largely driven by those who identify as members of the Chacachas Band seeking to revert back to that Band in some undefined manner.

[2] Treaties are often described as “sacred promises”. Whether sacred or profane, they are promises made and are to be fulfilled. In amalgamating two *Treaty 4* bands, the Chacachas Band and the Kakisiwew Band, without their consent, the Crown breached its fiduciary obligations owed to the two bands and failed to honourably fulfill and uphold the promises in *Treaty 4* in accordance with the principle of the honour of the Crown. By causing the two bands to share a reserve, receive treaty annuities together and share a band governance structure without consent, the Crown prevented the bands from exercising their treaty rights as separate rights-bearing collectives.

B. *Background*

[3] Chief Chacachas and Chief Kakisiwew each fixed their mark on *Treaty No 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at the Qu’Appelle and Fort Ellice*, 15 September 1874 [*Treaty 4*] on behalf of their respective bands and their members on September 15, 1874. The promises of *Treaty 4* included, among other matters, a promise of a reserve for each band as well as farming implements and treaty annuity payments.

[4] I will refer to the historic band led by Chief Chacachas as the Chacachas Band and the historic band led by Chief Kakisiwew as the Kakisiwew Band [collectively, "Historic Bands"].[1]

[5] In 1876, separate lands were surveyed for the Chacachas and Kakisiwew Bands in the area of the Qu'Appelle River and Crooked Lakes in Southern Saskatchewan. Whether these lands became reserves is a matter of dispute in this action, given the limited documented use of the lands by the Historic Bands between 1876 and 1881.

[6] In 1881, a joint reserve was surveyed for the Kakisiwew and Chacachas Bands. The lands surveyed in 1876 were no longer treated by Canada as reserves for Kakisiwew and Chacachas. The Kakisiwew and Chacachas Bands were combined into one band in 1884, when Chief Ochapowace was elected as Chief of the amalgamated band. This band then became known as the Ochapowace Band.

[7] Whether the Kakisiwew and Chacachas Bands agreed to move on to a joint reserve and become one amalgamated band is the primary historical fact in dispute in this action.

[8] The ability of the Kakisiwew and Chacachas Bands to claim separate reserves under *Treaty 4* is also impacted by two settlement agreements entered into by the Ochapowace Band with Canada in the 1990s: an agreement that settled the Ochapowace Band's claim to land entitlement under *Treaty 4* [TLE Settlement Agreement] and a specific claims agreement, which

[1] The names of these bands are occasionally spelled differently or incorrectly in parts of the historical documents cited. The passages are copied verbatim.

settled the Ochapowace Band's claim to an alleged improper surrender of lands in 1919 [1919 Surrender Settlement Agreement].

[9] These reasons address the first phase of a consolidated action brought by the Plaintiffs in T-2153-00 [Watson Plaintiffs] and the Plaintiffs in T-2155-00 [Bear Plaintiffs] to answer the following questions set out by Justice Hugessen in 2008 and amended in 2011:

1. Was there an Indian band led by Chief Chacachas in 1874?

2. Was there an Indian band led by 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?

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?

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?

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?

[10] I have attempted to focus on the issues that must be addressed in answering the seven questions set out by Justice Hugessen. However, addressing these questions still requires some consideration of the potential next phases of trial. In this first phase, the only relief that is sought is declaratory relief and findings that might support further phases of trial, but I am mindful that the Plaintiffs' Statements of Claim indicate that they plan to make claims for compensation

flowing from breaches of fiduciary duties, breaches of trust, breaches of treaty, and conversion in the next phases of trial.

[11] The parties have agreed to the answers to the first two questions set out by Justice Hugessen that (1) there was a band led by Chief Chacachas and (2) there was a band led by Chief Kakisiwew in 1874, when both chiefs signed *Treaty 4*.

[12] Overall, I have found that the Plaintiffs are entitled to a declaration that the Historic Bands were unlawfully amalgamated. However, I have declined to make a declaration at this time as to the legal status of the Chacachas, Kakisiwew, and Ochapowace Bands because of the lack of a suitable record as discussed later in these Reasons. That issue will be part of the next phase of this litigation.

II. Parties

[13] The Watson Plaintiffs, Peter Watson, Sharon Bear, Charlie Bear, Winston Bear, and Sheldon Watson, bring their claim as the heads of family of the direct descendants of the historic Chacachas Band, representing themselves and all other members of the Chacachas Band.

[14] The Bear Plaintiffs, Wesley Bear, Freida Sparvier, Janet Henry, Freda Allary, Robert George, Audrey Isaac, Shirley Flamont, Kelly Manhas, Mavis Bear, and Michael Kenny, bring their claim on their own behalf and on behalf of all other members of the historic Kakisiwew Band.

[15] The Ochapowace Indian Band [Ochapowace] is a co-Defendant and Plaintiff in Counterclaim. Ochapowace is the existing band under the *Indian Act*, RSC 1985, c I-5 [*Indian Act*] recognized by Canada to be the successor band to both Kakisiwew and Chacachas. Ochapowace has a reserve, Ochapowace Reserve No. 71 [Ochapowace Reserve], south of the Qu'Appelle River in Saskatchewan. All the named Watson and Bear Plaintiffs are members of the Ochapowace Indian Band.

[16] Ochapowace claims it is in the position of involuntary trustee for the members of the Chacachas and Kakisiwew Bands through a constructive trust formed as a result of unilateral Crown action to amalgamate the Chacachas and Kakisiwew Bands. Ochapowace's counterclaim against Canada seeks full and complete indemnification for damages and costs arising from this action, as well as losses and damages and costs as a result of acting as trustee and which flow from the TLE Settlement Agreement referred to later in these Reasons. These were not issues addressed in the first phase of trial.

[17] Her Majesty the Queen in right of Canada [Canada or Crown], as represented by the Minister of Indian and Northern Affairs Canada, is a co-Defendant and the Defendant in Counterclaim.

III. Witnesses

A. *Oral History Evidence*

[18] Four Elders provided oral evidence regarding the history of Kakisiwew, Chacachas and Ochapowace following the signing of *Treaty 4* in 1874: Sharon Bear, Wesley Bear, Sam Isaac, and Ross Allary. The examination for discovery transcript of the late Cameron Watson from 2004 was entered into evidence and also contained some oral history.

[19] The oral history testimony was heard on the Ochapowace Reserve in the first week of trial.

[20] Each Elder was introduced by a community member who described how the Elder was recognized in the community. Canada conducted restrained cross-examination on the oral history testimony.

[21] A book recording the stories of Ochapowace Elders, called *Kehte-ayak,* was also entered into evidence. The book was not created for the purpose of litigation or as a historical record. The Court puts less weight on these stories in the book when determining what happened regarding the amalgamation, given that there was live testimony from Elders which allowed the Court to assess the reliability of the oral history. It is more difficult to assess the reliability of the oral history recorded in the book, especially where the oral history was not necessarily told to create a historical record.

(1) Sharon Bear

[22] Sharon Bear shared her oral history knowledge as a Chacachas Elder. She is also a named Watson Plaintiff. She was introduced by Morley Watson who described the qualities and importance of Elders and oral history in the Chacachas community. Sharon Bear shared her knowledge of the role of Elders, the protocols for sharing oral history, and the history of the Chacachas and Kakisiwew Bands from stories passed down to her from her Elders. She described how her paternal great-grandfather was Kanawashqahum, who was associated with the Kakisiwew Band. She identified as a member of Chacachas because her parents identified as Chacachas through their connection to Sharon's maternal great-grandfather, Little Assiniboine/Wasimosis [phonetic], who was a headman for Chacachas at the signing of *Treaty 4*.

[23] She described how Elders told her the Chacachas reserve was selected, occupied by the Chacachas people, and then taken from the Chacachas Band without consultation. She told the story of a woman named Kanipatit who was the last person to live on the Chacachas reserve with her baby when the Chacachas Band was moved to the joint reserve. She outlined how Chief Chacachas continued to be recognized as Chief after his title of Chief was removed following his arrest and incarceration. She described how community members had sent a delegation to ask a lawyer named Garnet Neff in Grenfell for help obtaining this land back, but that Neff discontinued his work for the band after being told that he would be disbarred for assisting the Chacachas delegation.

[24] An issue was raised later in trial when it was discovered that Sharon Bear was recorded discussing the evidence she wanted to give with her family members and others during a break near the end of her oral history testimony. Although the discussions were ill advised, the recorded discussions did not suggest anything that would undermine Sharon Bear's credibility as an Elder.

[25] Sharon Bear named the Elders who had told her stories about the Chacachas reserve and re-location. She described how she learned oral histories from Elders by listening to their songs and stories, often when people would stop over at her parents' house. When people would stop over at her parents' house, they would often be given tobacco, which is part of the Chacachas oral history protocol when asking someone to share their knowledge.

(2) Wesley Bear

[26] Wesley Bear was called to share oral history as a Kakisiwew Elder. He was introduced by current Ochapowace Headwoman, Audrey Isaac. He is also a named Bear Plaintiff.

[27] He explained how he was descended from Jacob Bear, who became a member of the Kakisiwew Band and acted as a translator during *Treaty 4* negotiations. Wesley learned about Chacachas and Kakisiwew from Cameron Watson and Chief Denton George once he was on Ochapowace Council. His evidence primarily confirmed that Elders told him that there had been two reserves set aside for Chacachas and Kakisiwew.

(3) Sam Isaac

[28] Sam Isaac was called as a Kakisiwew Elder to give oral history evidence. Sam described how his mother's family descended from Chief Kakisiwew and his father's family came from Kahkewistahaw (a neighbouring First Nation). He described how someone became an Elder and how he believed he started learning oral history from when his mother was pregnant with him. He explained the nature of hereditary chiefs in Plains Cree culture.

[29] He explained that his uncle had told him that Chief Chacachas left the reserve to get the Chacachas people to come back to Canada, but he died in the United States. He described how the government did not consult with the people before putting Chacachas on the Kakisiwew reserve. He also described oral history told to him about the hardships suffered by the Band from the pass system, the withholding of rations, and Indian Agents' abusive conduct.

(4) Ross Allary

[30] Ross Allary testified as an Ochapowace Elder and shared the oral history passed down to him by his Elders. He was introduced by Petra Belanger, a current Ochapowace Headwoman. Ross Allary described his family history and identified himself as a Kakisiwew member, although he also has relatives descended from Chacachas.

[31] He was told by Elders, especially Ivan Watson and Arthur George, about *Treaty 4* and the original Chacachas and Kakisiwew reserves. Ross Allary was able to mark on a map where Elder Ivan Watson had taken him to show him where the original Chacachas and Kakisiwew reserves

were located. Ross Allary described how Chief Chacachas had asked Chief Kakisiwew to look after his people when he went looking for the rest of the Chacachas people who had moved away, but Chief Chacachas never came home. When the Ochapowace people later asked what had happened to the Chacachas reserve, the farm instructor had explained it to the band by putting one book on top of another to explain how the Kakisiwew and Chacachas reserves were put together. In the context of this case, the Court understands this to be symbolic of amalgamation.

[32] Ross Allary also described how the lawyer, Garnet Neff, who was hired by Ochapowace members, was told by the government to stop acting on behalf of the former Chacachas members or risk losing his licence. The work performed by Neff occurred at a time when a lawyer could not charge fees to an Indian without the consent of the federal government.

(5) Cameron Watson

[33] Cameron Watson was examined for discovery on January 19-20, 2004 and his entire transcript was admitted into evidence. In the examination for discovery, he described his understanding of the history of Chacachas, which originated from a mix of stories from Elders and his historical research into the documents. In his account of history, Chief Chacachas and Chief Kakisiwew had each been promised a separate reserve under *Treaty 4*. The Kakisiwew Band moved to a more southern reserve because they did not have enough timber. However, the Chacachas Band never agreed to amalgamate and never stopped recognizing Chief Chacachas as chief.

B. *Lay Witnesses*

(1) Plaintiffs' Witnesses

[34] The Watson Plaintiffs called three lay witnesses: Morley Watson, Sharon Bear, and Sheldon Watson. The examination for discovery transcript of Cameron Watson was admitted into evidence and also contained some relevant information. The Bear Plaintiffs did not call any lay witnesses, other than the oral history witnesses described above.

[35] Morley Watson described his understanding of the TLE Settlement Agreement negotiations that began when he was Chief of Ochapowace from 1983 to 1987 – in broad terms a means to compensate for land wrongly taken by federal/provincial governments. He also described his understanding of how the Chacachas/Kakisiwew issue was treated by Chief and Council over the recent years. Morley was elected as the spokesperson of Chacachas in 2017 for this litigation.

[36] Sharon Bear testified as a lay witness based on her own actions and knowledge separate from her oral history testimony. She spoke to her involvement with Cameron Watson in the 1990s in seeking recognition of the Chacachas Band. She was part of the Chacachas group that formed to advocate for recognition. She also was a trustee for the Treaty Land Entitlement [TLE] Land Trust, which purchased some of the original Chacachas reserve lands with the funds from the Ochapowace TLE Settlement Agreement. She spoke to her view that Chacachas membership would be based on a combination of descendancy from an original Chacachas member and members' choice.

[37] Sheldon Watson testified as a self-identified member of the Chacachas First Nation and a named plaintiff in the Watson action. He is currently an elected headman of the Chacachas Band. He described the steps taken in the 1990s to have Chacachas recognized by the Ochapowace Band and the Department of Indian and Northern Affairs. He explained why the creation of the Chacachas Band under the *Indian Act* was not desirable for the Chacachas group.

[38] In Cameron Watson's examination for discovery, he described the commencement of the litigation in the late 1990s and his views on how the memberships of the Chacachas Band and Kakisiwew Band should be based on members' ancestral connection to people on the original Kakisiwew and Chacachas Band Lists. He also identified which members of the Chiefs and Councils between 1912 to 2004 belonged to Kakisiwew, Chacachas, or to a newer group of members of Ochapowace, not tied to the Historical Bands in his view. He acknowledged that the essential facts about the two bands and their involuntary amalgamation were known to band members throughout the 20th century.

(2) Ochapowace's Lay Witnesses

[39] Ochapowace called three lay witnesses: Petra Belanger, Ross Allary, and Chief Margaret Bear. The examination for discovery transcript of the late Chief Denton George was also admitted into evidence.

[40] Petra Belanger holds the Administration, Finance, and Justice Portfolio as a headwoman on Ochapowace Band Council. She spoke about the Ochapowace Band's finances before and after the settlement agreements including the use of settlement funds to purchase land. She also

spoke about her own understanding of the settlement agreements and membership in the Historic Bands. She did not identify as a member of Chacachas or Kakisiwew, but took the position that she should be able to determine her band membership later if the Historic Bands were to split from Ochapowace.

[41] Ross Allary testified as to events in his lifetime as both a resident of the Ochapowace Reserve and as a member of Ochapowace Council during the time of negotiations of the settlement agreements in the 1990s. He testified as to the process of negotiating the TLE Framework Agreement, the Band-Specific TLE Surrender Agreement, and the 1919 Surrender Settlement Agreement. He stated that the Ochapowace Band would not divide according to the Department's band division policy because this policy would not recognize that the Kakisiwew and Chacachas were Treaty bands and because of the "no costs" nature of the policy. He did not accept Cameron Watson's descendancy-focussed determination of band membership. Parts of Ross Allary's testimony about his understanding of the settlement agreement became unclear, especially as he refused to speak about what Ochapowace was seeking in the second phase of litigation.

[42] Chief Margaret Bear described her experience working with the Department of Indian Affairs [Department][2] while on Ochapowace Council, first as a councillor and then later as Chief. She described how she learned about the historic treaty bands issue. She had some general knowledge of the negotiation of the settlement agreements in the 1990s. She indicated that she thought that membership in the Historic Bands and Ochapowace should be determined by the

[2] As this litigation spans more than a century, the name of the federal department responsible for relations with Indigenous peoples has changed considerably. The term "the Department" is used for consistency.

individual choice of band members, She identifies as a Kakisiwew member. She also generally described her knowledge of the Ochapowace Band finances and investments, although she became evasive when questions were asked about band finances and plans for the Ochapowace Band's future as had Ross Allary.

[43] The late Chief Denton George was examined for discovery in 2004. His whole discovery transcript was admitted into evidence. He was examined mostly on his knowledge of the TLE and Specific Claims settlement agreement negotiations as Chief during this period. He was able to identify and explain several of the letters that were sent between Ochapowace and the Department in the time leading up to and following the Settlement Agreements.

(3) Canada's Lay Witnesses

[44] Canada called four lay witnesses: Graham MacDonald, Alois Gross, Violet Kayseass, and Andrew Doraty.

[45] Graham MacDonald is a senior policy advisor at Crown-Indigenous Relations and Northern Affairs, working on Specific Claims Tribunal files and providing policy advice on the application of the 1998 TLE Policy. He provided useful background information on TLE and the various arrangements negotiated with different First Nations over the years. He provided no specific evidence on the impact of the TLE Settlement Agreement on Ochapowace, Chacachas or Kakisiwew.

[46] Alois Gross retired in 1996, but worked at the Department of Indian Affairs for approximately 30 years. He worked as the Chief Negotiator for Canada in the Saskatchewan TLE Framework Agreement and the 1919 Surrender Settlement Agreement as well as being an advisor during the negotiations of the TLE Settlement Agreement. He described the process of negotiating the TLE Framework Agreement and the Soldier Settlement Board Settlement Agreement. Gross understood the issue of the Kakisiwew and Chacachas amalgamation to have been set to the side during TLE and Soldier Settlement negotiations.

[47] Violet Kayseass is an employee of Indigenous Services Canada and has worked in the Department since 1995. She testified regarding the Department's New Bands/Band Amalgamation policy, which allows for the creation of new bands or the division of bands under section 17 of the *Indian Act* if certain criteria are met.

[48] Andrew Doraty works in the Office of the Indian Registrar within Indigenous Services Canada. He has worked for the Department for 30 years. He provided background information on the Office of the Indian Registrar. He had overseen research into the Indian Register and found that no protests were filed by Ochapowace, Kakisiwew or Chacachas members in 1951 when the Indian Register was established.

C. *Expert Witnesses*

[49] The parties put forward a total of five expert witnesses who addressed aspects of the historical record and oral history evidence. I have summarized their qualifications and areas of

comment here, but will address more substantively the experts' evidence throughout my analysis of the historical background of this case.

(1) Dr. Kenton Storey

[50] Dr. Storey was called by the Plaintiffs and Ochapowace and was qualified as an expert in the research and analysis of historical documents with particular emphasis on events in Western Canada during the time periods relevant to the action. He has a PhD in History, has worked as a historic researcher, and has taught western Canadian history at Brandon University as a sessional instructor. His academic research has primarily focussed on Aboriginal title and treaties in New Zealand and British Columbia, but he has written a few articles on the history of the prairies. This was his first time writing an expert report and testifying as an expert in Court.

[51] He testified that the Chacachas and Kakisiwew Bands had likely accepted their original 1876 reserves. Dr. Storey found there was likely no consultation of the Kakisiwew and Chacachas Bands with respect to the re-survey of their reserves, their co-location, or amalgamation. He also found it unlikely that the Chacachas Band would have consented to a re-survey and co-location when Chief Chacachas and two headmen were not present.

[52] Although some of Dr. Storey's speculation went too far, I overall found him a credible witness whose conclusions were well-explained and are consistent with other evidence.

(2) Mr. Robert Nestor

[53] Mr. Nestor was also called as an expert historian by the Plaintiffs and Ochapowace and qualified as an expert historian to answer questions related to Plains Cree protocols for movement between bands, the recognition of Chacachas and Kakisiwew Bands, the government policy and legislation regarding reserve creation, surrender, amalgamation, and band transfer, and what occurred with the re-survey and amalgamation of Chacachas and Kakisiwew. He has a Master's Degree in Canadian Plains Studies, but has not completed his PhD. He has taught as a sessional instructor for 22 years in Indigenous Studies at a variety of institutions in Western Canada and has worked as a contract researcher, including for Ochapowace in other litigation.

[54] Mr. Nestor concluded that there was no consultation with the Historic Bands about the re-survey, co-location, or amalgamation. Importantly, he found that the practice of the government in the 1880s was to seek the consent of bands for transfer of membership as well as amalgamation. He also concluded that no Order in Council was required to create a reserve at the relevant time.

[55] Although some of Mr. Nestor's evidence regarding historical policies and legislation was helpful, some of it also bordered on legal conclusions or argument. His conclusions and attention to the details of the historical documents appeared to have less depth than Dr. Storey or the expert called by Canada, Dr. Whitehouse-Strong. As a consequence, I have tended to put less weight on Mr. Nestor's opinion.

(3) Dr. Bruce Miller

[56] Ochapowace called Dr. Bruce Miller as a reply expert to Dr. von Gernet, the expert called by Canada to provide an opinion on the oral history evidence received in trial. Dr. Miller was qualified as an expert in the ethnography and ethnohistory of Indigenous peoples in North America and oral history, theory, and methods. Dr. Miller has a PhD in anthropology and is a Professor at the University of British Columbia. He authored a book on the use of oral history in Canadian courts where he critiqued Dr. von Gernet's previous work as an expert. He has previously written expert reports or testified as an expert in a number of courts.

[57] Dr. Miller critiqued Dr. von Gernet's lack of fieldwork experience and lack of appreciation of the cultural lens through which oral history should be assessed. He disagreed that "feedback" - the effect of external sources on the telling of Indigenous oral history - provided a significant problem in oral histories because Indigenous oral historians can separate out knowledge they gain from within their communities from knowledge from external sources. He also took issue with viewing oral histories merely as repositories of facts to be assessed only on their "facticity"; he encouraged a more holistic approach that looked for the core of stories when determining what to draw from oral histories.

[58] Although some of Dr. Miller's points about the need to appreciate cultural context of an oral history were helpful, most of his evidence was not that helpful to the Court as neither he nor Dr. von Gernet had specific knowledge of Qu'Appelle Cree stories or oral history traditions. Dr. Miller and Dr. von Gernet's evidence functioned more as a display of academic theoretical

disagreement rather than anything helpful to the Court in interpreting the oral histories presented by the Elder witnesses.

(4) Dr. Derek Whitehouse-Strong

[59] Dr. Whitehouse-Strong was called by Canada and was qualified as an expert historian and independent research consultant with extensive expertise in the areas of historical research, research methodologies, First Nation, Metis, and Canadian history, government-Indigenous relations, treaties, settlement on the prairies, and Aboriginal claims and rights on the prairies. He has a PhD in History, which focussed on religious organizations and Indigenous Peoples in Western Canada. He has worked as a sessional instructor and has written published articles on the negotiation of the numbered treaties.

[60] Dr. Whitehouse-Strong responded to both Dr. Storey and Mr. Nestor's expert reports. He differed mostly in his interpretation of the historical record regarding whether there was 1) evidence of dissatisfaction or non-acceptance of the Chacachas and Kakisiwew reserves in 1876 and 2) evidence of consultation with the Chacachas and Kakisiwew Bands during re-location, co-location, and amalgamation.

[61] I found Dr. Whitehouse-Strong to be a credible expert witness, although like Dr. Storey I found some of his theories to be speculative. I approached each of their disagreements on an issue by issue basis, and have favoured each of their opinions in different parts of this judgment.

(5) Dr. Alexander von Gernet

[62] Dr. von Gernet was called as an expert by Canada and was qualified as an expert in the area of anthropology and ethnohistory, specializing in the use of archaeological data, written documentation and oral evidence to reconstruct the past cultures of Indigenous Peoples, as well as the history of contact between Indigenous Peoples and European newcomers throughout Canada and parts of the United States. He has a PhD in the ethnohistory and archaeology of Indigenous Peoples in North America with a focus on the use of tobacco. He has taught courses on Indigenous history and culture at the University of Toronto. He has previously been qualified as an expert witness on a methodology for approaching oral history evidence in Court. He has primarily written expert reports for the federal or provincial Crowns.

[63] Dr. von Gernet described his skeptical case by case approach to oral history evidence, which focussed on assessing the "historicity" of an oral history, or the ability of an oral history to reflect the actual past. He noted some of the risks of oral history evidence: they may reflect a current reflection of the past rather than the past itself, they may arise out of communities filling in gaps in their understanding of history, and some may not be independent sources of information because they may draw from external sources, such as the historical written record. Dr. von Gernet suggested that the archival record provides a baseline with which to assess the historicity of oral evidence. Dr. von Gernet also offered his own limited interpretation of the historical written record. Dr. von Gernet concluded that the historical record indicated that the Historic Bands were likely consulted regarding the re-location of their reserves and amalgamation, contrary to the oral history evidence.

[64] I found Dr. von Gernet's evidence generally unhelpful. Dr. von Gernet did little to describe what went into a skeptical case by case approach, which is already the Court's approach to oral history evidence (see *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 87, 153 DLR (4th) 193 [*Delgamuukw*]). Dr. von Gernet's concerns about the potential for oral histories to reflect present views, rather than the past, were merely helpful reminders. However, I am concerned about Dr. von Gernet's idea that the archival record provides a baseline from which to assess oral history. The idea of an archival record providing a historical "baseline" is problematic because the Court is to place oral history and documentary evidence on equal footing (*Delgamuukw* at para 87). If the Court accepted the premise that one type of evidence can provide a baseline for another, it would assume without proof in the particular instance, that the baseline evidence is inherently better or more reliable. His near insistence on corroborating documentary evidence is not workable or consistent with the law.

[65] Such a premise, particularly in aboriginal litigation, would tend to undermine the history of a people who relied on oral rather than documentary communications. The task of the Court is to take the multiple sources of evidence and reach conclusions from the whole of the evidence.

[66] In addition, Dr. von Gernet's review of the historical evidence was based on a narrow selection of documents that could not capture the complicated history and contradictions within the full documentary record, which was more fully addressed by both Dr. Storey and Dr. Whitehouse-Strong.

IV. Approach to Oral History Evidence

[67] Prior to summarizing my factual findings based on the documentary, expert, and oral history evidence provided at trial, I will explain my approach to oral history evidence, based partially on the comments made by Drs. Miller and von Gernet, as well as case law.

[68] Justice Zinn in *Jim Shot Both Sides v Canada*, 2019 FC 789 at para 94 [*Shot Both Sides*] recently summarized the difficulties a First Nation faces in presenting oral history evidence:

> The challenge a Band has in presenting oral history evidence in matters such as that before the Court is obvious. Those with memory of the Band's history are not first-hand observers; often their stories are third or fourth-hand recitations of events that occurred more than a century earlier. The challenge for the Court is how to assess and assign weight to such evidence. In *R v Van Der Peet*, [1996] 2 SCR 507, Chief Justice Lamar [*sic*] at paragraph 68 recognized these difficulties and instructed courts that these difficulties cannot prevent the acceptance of and reliance on oral history evidence:
>
> > In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.

[69] Oral history evidence is to be accommodated and placed on an equal footing with historical documentary evidence, which means that it can be given independent weight even if not corroborated by other historical or archaeological sources: *Delgamuukw* at paras 87, 98. The Court therefore cannot accept Dr. von Gernet's opinion that documentary historical evidence can provide a baseline from which to assess the ability of oral history to describe the past, as a general approach.

[70] In *Mitchell v MNR*, 2001 SCC 33 at paras 30-35, [2001] 1 SCR 911, the Supreme Court of Canada stated that oral histories are admissible when they are useful and reliable, and where the probative value is not outweighed by its prejudicial effects. Oral histories will be useful when they offer evidence of ancestral practices and their significance or provide Indigenous perspectives on rights and historical events. Reliability is assessed by considering how a witness came to know and recount oral history and traditions.

[71] In the case at bar, the oral history evidence provided the Historic Band members' perspectives on the re-location, co-location, amalgamation, and post-amalgamation issues . In terms of reliability, each of the Elders were able to provide some information about the people from whom they had learned their history. The introduction of the Elders by Band members confirmed that each of the Elders hold a respected position within their community.

[72] Sharon Bear, Sam Isaac, and Ross Allary were able to name the Elders who had told them stories. Although most of the stories they received appeared to have been told in an informal setting, I would find their oral history testimony generally reliable. Each of their stories

shared common themes, including the lack of consultation regarding the surrender and amalgamation of the Bands, that Chief Chacachas at one point asked Chief Kakisiwew to look after his remaining people while Chief Chacachas went south looking for other Chacachas members, and that a lawyer hired by the Chacachas descendants in the 1930s, Garnet Neff, had stopped acting for the Chacachas descendants because of a fear that he would lose his licence.

[73] I would put less weight on the oral history provided by Wesley Bear's testimony. This is not a finding of a lack of credibility, rather Wesley Bear emphasized that he had learned about Chacachas and Kakisiwew from Cameron Watson and Denton George, whose transcripts were entered into evidence. In addition, he appeared to have learned the majority of his oral history from when he was a councillor, and therefore in a political role. This contrasts with other Elders who had received knowledge from their Elders as part of their training to be keepers of history, which started from childhood.

[74] I also put less weight on the oral history provided in Cameron Watson's transcript given that he admittedly had learned the history through a mix of oral history and studying archival documents. In the form of the transcript it is difficult to determine the sources of particular histories told by Cameron Watson.

[75] I therefore consider the oral history evidence as part of the body of evidence to draw on in this case. Although Canada has questioned some of the veracity of the oral history evidence, it has also relied on it in part for its arguments, such as for limitation periods.

[76] Justice Zinn's comments in *Shot Both Sides* at paragraph 96 again provide a helpful summary of a general approach to oral history and one which I have adopted in this case, although I note that assessment of oral history continues on a case by case basis:

> The assessment of the value of the oral history evidence comes down to the weight given it. In assessing that evidence, I am guided by the following. Where oral history evidence is supported by, or is consistent with written records, I give it significant weight. Where the oral history evidence is uncontradicted, I generally give it significant weight. Where the oral history evidence rings true in the context of events at the time, I generally give it significant weight. Where the oral history evidence reflects common sense, I generally give it significant weight.

[77] In the present case there is significant consistency between the oral history and other historical evidence. I would add to these comments that when documentary evidence is supported by oral history, it deserves considerable weight. Where documentary evidence is internally inconsistent or rings inconsistent with the times, it deserves less weight. And where it is uncontradicted, it must be assessed as any document would including the position and interests of the authors – as discussed later.

[78] Given the lack of precise chronology in the oral history evidence, the stories have to be viewed in the context of all other historical information. Primarily, the oral history evidence supports the conclusion that the Chacachas Band was not consulted about its re-location, co-location, or amalgamation with the Kakisiwew Band.

V. *Contra Proferentem* and the Presumption of Regularity

[79] As summarized in the Historical Evidence section below, some of the relevant archival evidence is unclear at best and contradictory at worst. The parties have each suggested that the Court apply opposing presumptions to interpret gaps in the historical record: the rule of *contra proferentem* and the presumption of regularity. Although I have applied these presumptions in a limited fashion, I have refused to adopt the presumptions as broadly as proposed by the parties. Instead, I have focussed on the meaning of documents based on the likely common intention of the parties and the historical context, aided by the expert witnesses.

[80] The Watson Plaintiffs suggested that the Court apply a *contra proferentem*-like rule, usually applicable in contractual interpretation, to interpret ambiguities in the documentary record in favour of the Indigenous Plaintiffs. However, the *contra proferentem* rule is not meant to interpret every ambiguity in every Crown-held document in favour of a First Nation.

[81] A *contra proferentem*-like rule does apply to the interpretation of historic treaties and statutes affecting Aboriginal or treaty rights. In the context of historic treaties, the purpose of this rule is to account for the fact that the Crown had a superior bargaining position in negotiating treaties; treaties were drafted in a non-Indigenous language, and treaties incorporated legal principles with which Indigenous signatories were not familiar: *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 117, 110 NR 241; *R v Badger*, [1996] 1 SCR 771 at para 52, 133 DLR (4th) 324 [*Badger*]. Statutory provisions that may be interpreted to limit treaty rights, such as through

the surrender of lands, also are construed narrowly with the requirement that the Crown show a clear and plain intention to extinguish treaty rights (*Badger* at para 41).

[82] When interpreting historical documents maintained by the Crown as a whole, the Court is first to look at the historic context and should consider that written records were primarily maintained by Europeans (see *Ahousaht Indian Band v Canada (Attorney General)*, 2009 BCSC 1494 at para 62, 182 ACWS (3d) 501, var'd by 2013 BCCA 300; *Shot Both Sides* at para 57).

[83] However, this does not mean that gaps or ambiguities in all archival documents will be interpreted to favour an Indigenous perspective. For example, where an expected government document is missing in the historical record, courts have tended to find that the document likely never existed. This can work in favour of the Indigenous group, as in *Chippewas of Sarnia Band v Canada (Attorney General)*, 1999 CarswellOnt 1244 at para 76, 88 ACWS (3d) 728 (Sup Ct J), rev'd in (2000), 51 OR (3d) 641 (CA), where the Ontario Superior Court of Justice accepted that a surrender document never existed because there was no surrender document found in the historical record. However, this can also work against an Indigenous group's interest as in *Benoit v Canada*, 2003 FCA 236 at paras 40-41, 228 DLR (4th) 1, where the Federal Court of Appeal found that the silence of historical affidavits on an alleged treaty promise could be evidence that there was no treaty promise made.

[84] I also find that the presumption of regularity cannot be generally applied in this case to interpret gaps in the record. The presumption is based on the premise that a public official can be presumed to fulfill a prescribed procedural requirement where there is no evidence to the

contrary (see e.g. *Martselos v Salt River First Nation 195*, 2008 FC 8 at paras 26-28, 163 ACWS (3d) 331 citing *Irvine v Canada (Restrictive Trade Practices Commission)*, [1987] 1 SCR 181 at para 38, 41 DLR (4th) 429).

[85] Canada appears to suggest that the presumption should apply when determining whether the Historic Bands consented to the re-location of their reserve lands and were consulted regarding the amalgamation.

[86] As described below, the historical record is arguably unclear as to whether the lands set aside for the Chacachas and Kakisiwew Bands were even reserves - a position government officials took from time to time. In this context, it does not follow that the Court could assume that public officials did whatever they were supposed to do when the nature of their obligations appears to be unclear. In addition, there was no clear or established policy or practice for the amalgamation of bands in the 1880s. Therefore, the Court cannot presume that government officials followed any prescribed process for amalgamation when no process had been established.

VI. Historical Evidence

A. *Introduction to Historical Figures*

[87] As an aid to the summary of the historical evidence, I have briefly described some of the key individuals involved in the making of *Treaty 4*, the amalgamation of Kakisiwew and Chacachas, and the business of the Ochapowace Band in the early 20th century.

[88] Chief Chacachas was a *Treaty 4* signatory and Chief of the Chacachas Band. He resigned as Chief in 1882 following his arrest and incarceration for offences related to stolen horses. He died in the United States in 1889.

[89] Chief Kakisiwew was a *Treaty 4* signatory and Chief of the Kakisiwew Band, a Qu'Appelle Cree band, until his death in 1884. He was recognized as a well-respected leader of the Plains Cree who were involved in the negotiation of *Treaty 4.*

[90] Chief Ochapowace was the son of Chief Kakisiwew. He was elected Chief of the Ochapowace Band in 1884.

[91] W.J. Christie [Christie] was a former Factor for the Hudson's Bay Company and was appointed as a Treaty Commissioner for *Treaty 4.* Following the signing of *Treaty 4*, Christie was appointed to oversee the selection of reserves and payment of treaty annuities for *Treaty 4.*

[92] M.G. Dickieson [Dickieson] was the Treaty Commissioner Secretary during *Treaty 4* negotiations. He was appointed to oversee the selection of reserves and annuity payments for *Treaty 4* with Christie.

[93] W. M. Graham [Graham] was the Inspector of Indian Agencies from 1904 to 1920 and Indian Commissioner between 1920 and 1932.

[94] A.F. MacKenzie [MacKenzie] was the Secretary of the Department of Indian Affairs in 1932.

[95] T.R.L. MacInnes [MacInnes] was the Acting Secretary of the Department of Indian Affairs in 1932.

[96] Allan McDonald [McDonald] was the Indian Agent for *Treaty 4* from 1877 to 1897. He oversaw the re-location, co-location, and amalgamation of the Chacachas and Kakisiwew Bands between 1881 and 1884. He played an important role in the issues of this case.

[97] Angus McKay [McKay] was the Indian Agent for *Treaty 4* in 1876 who was involved in the initial surveys of the reserves for Chacachas and Kakisiwew.

[98] Garnet Neff [Neff] was a lawyer and agent for members of the former Chacachas Band in 1932 who had a series of correspondence with Department of Indian Affairs officials regarding the existence and surrender of the Chacachas Reserve. His role in questioning government showed both that the Chacachas Band had never accepted amalgamation and showed the inconsistent, contradictory and confused position of the federal Crown. A feature which has run throughout the relevant period.

[99] John C. Nelson [Nelson] was a Dominion Land Surveyor who surveyed the 1881 joint reserve for Chacachas and Kakisiwew Bands, which later became the Ochapowace Reserve.

[100] J.P.B. Ostrander [Ostrander] was the Indian Agent in the Crooked Lakes Area in 1928.

[101] Lawrence Vankoughnet [Vankoughnet] was the Deputy Superintendent General of the Department of Indian Affairs from 1874 to 1893.

[102] William Wagner [Wagner] was the Dominion Land Surveyor who surveyed the lands in 1876 for the Chacachas and Kakisiwew Bands.

B. *Historic Bands as Signatories to Treaty 4*

[103] *Treaty 4* was negotiated from September 8 to 15, 1874 at Fort Qu'Appelle between the Crown and Cree and Saulteaux Chiefs. The treaty was negotiated and signed in the context of the decline of the bison populations, the risk of hunger for Plains First Nations, and a threat to their way of life by the arrival of numbers of settlers in the area. Chief Kakisiwew took a leadership role for the Cree in facilitating the agreement. Chief Kakisiwew was the first Chief to fix his mark to *Treaty 4* on September 15, 1874. Chief Chacachas was the third to last Chief to fix his mark to *Treaty 4*. *Treaty 4* was approved by Order in Council PC No. 1332/1874 on November 4, 1874.

[104] The preamble of *Treaty 4* recognizes both Chief Kakisiwew and Chief Chacachas as leaders authorized to conduct negotiations and responsible for the obligations of their bands under the treaty:

> And whereas the Indians of the said tract, duly convened in Council as aforesaid, and being requested by Her Majesty's said Commissioners to name certain Chiefs and Headmen, who should

> be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for their faithful performance by their respective bands of such obligations as shall be assumed by them the said Indians, have thereupon named the following persons for that purpose, that is to say: Ka-ki-shi-way, or "Loud Voice," (Qu'Appelle River); Pis-qua, or "The Plain" (Leech Lake); Ka-wey-ance, or "The Little Boy" (Leech Lake); Ka-kee-na-wup, or "One that sits like an Eagle" (Upper Qu'Appelle Lakes); Kus-kee-tew-mus-coo-mus-qua, or "Little Black Bear" (Cypress Hills); Ka-ne-on-us-ka-tew, or "One that walks on four claws" (Little Touchwood Hills); Cau-ah-ha-cha-pew, or "Making ready the Bow" (South side of the South Branch of the Saskatchewan); Kii-si-caw-ah-chuck, or "Day-Star" (South side of the South Branch of the Saskatchewan); Ka-na-ca-toose, "The Poor Man" (Touchwood Hills and Qu'Appelle Lakes); Ka-kii-wis-ta-haw, or "Him that flies around" (towards the Cypress Hills); Cha-ca-chas (Qu'Appelle River); Wah-pii-moose-too-siis, or "The White Calf" (or Pus-coos) (Qu'Appelle River); Gabriel Cote, or Mee-may, or "The Pigeon" (Fort Pelly).
>
> And thereupon in open council the different bands, having presented the men of their choice to the said Commissioners as the Chiefs and Headmen, for the purpose aforesaid, of the respective bands of Indians inhabiting the said district hereinafter described.
>
> …
>
> [Emphasis added]

[105] Under *Treaty 4*, the signatory Bands ceded all rights, title and privileges to the applicable lands in present-day southern Saskatchewan in exchange for a number of promises including reserves for each band, one-time and annual payments to the Chief, Headmen, and members, agricultural supplies to any band cultivating the soil, clothing for each Chief and Headman (four to a band) every three years, annual distribution of gunpowder, shot, ball and twine, a school on the reserve, a ban on the sale of alcohol on reserves, and the right to hunt, trap, and fish throughout the surrendered lands subject to regulations from the government and excepting certain lands that may be taken up with permission of the Crown.

[106] According to *Treaty 4*, reserves could only be set aside "after conference with each band" and could only be disposed of by the government for the use and benefit of the Indians "with the consent of the Indians entitled thereto first had and obtained":

> And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families; provided, however, that it be understood that, if at the time of the selection of any reserves, as aforesaid, there are any settlers within the bounds of the lands reserved for any band, Her Majesty retains the right to deal with such settlers as She shall deem just, so as not to diminish the extent of land allotted to the Indians; and provided, further, that the aforesaid reserves of land, or any part thereof, or any interest or right therein, or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained, but in no wise shall the said Indians, or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves.
>
> [Emphasis added]

[107] The reserve size requirement of one square mile of land for a family of five works out to a requirement of 128 acres of reserve land per band member.

C. *Reserve Creation in 1876*

[108] The reserve creation process for *Treaty 4* began on July 9, 1875 with Cabinet's approval of Order in Council PC 1875-0702, which approved the selection of reserves for *Treaty 4* generally and appointed Christie and one other person to select reserves, pay treaty annuities, distribute clothing and secure adhesions of additional bands living within *Treaty 4* territory.

[109] Surveyor General John Dennis and Deputy Minister Edmund Meredith issued instructions to Christie, which were approved by the Interior Minister David Laird. They also appointed Dickieson to assist Christie and appointed Wagner to survey the reserve lands. The instructions from the Surveyor General advised Dickieson and Christie on the location of reserves that balanced settlement and railway interests with the land requirements of the bands. The Deputy Minister added two key instructions to the Surveyor General`s instructions:

> Each reserve should be selected as the Treaty requires, after conference with the Band of Indians interested, and should, of course, be of the area provided by the Treaty.
>
> The Minister thinks that the Reserves should not be too numerous, and that, so far as may be practicable, as many of the Chiefs of Bands speaking one language, as will consent, should be grouped together on one Reserve.

[110] In the context of *Treaty 4*, these instructions appear to be the first time that putting bands together on the same reserve was proposed. No part of *Treaty 4* indicated that bands could be combined or share reserves.

[111] By 1876, the Chacachas and Kakisiwew Bands had identified their preferred reserve locations. Indian Agent McKay and Surveyor Wagner consulted with Chiefs and paid treaty annuities at Fort Qu'Appelle in August and September 1876. Although Agent McKay did not specifically report when he met with Chief Chacachas and Chief Kakisiwew, Drs. Storey and Whitehouse-Strong agreed that Agent McKay and Surveyor Wagner likely consulted with Chief Chacachas and Chief Kakisiwew because Agent McKay reported on information he received from Chief Kakisiwew and Chief Chacachas presumably during these consultations.

[112] Agent McKay reported that Chief Kakisiwew desired to go on to his reserve and had specified that the Kakisiwew Band wanted a reserve joining the east side of the Star Blanket reserve and extending north from Crooked Lake.

[113] Agent McKay stated that only part of the Chacachas Band expressed a desire to settle on their reserve. He described the Chacachas reserve as on the Qu'Appelle River between the 102 meridian and the Kahkewistahaw reserve.

[114] Sometime in November 1876, Surveyor Wagner surveyed the Kakisiwew Reserve and Chacachas Reserve. Figure 1 shows the location of these reserves as surveyed by Wagner in 1876 and recreated in Dr. Storey's report:

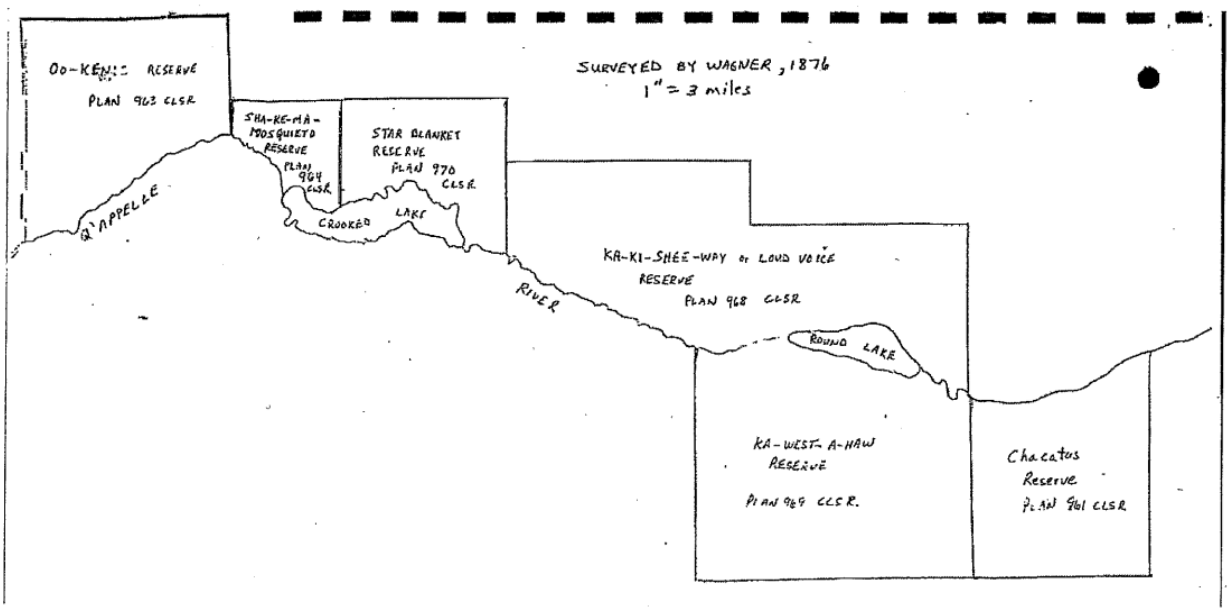

Figure 1: Reserves surveyed by William Wagner, 1876. The reserve marked "Ka-ki-shee-way or Loud Voice Reserve" is the Kakisiwew Reserve. The reserve marked "Chacatas Reserve" refers to the Chacachas Reserve.

[115] The Kakisiwew Reserve was located north of Round Lake, adjacent to the Star Blanket Reserve. The Kakisiwew Reserve was 42,774 acres, with about 40,000 acres suitable for settlement. Wagner described the Kakisiwew Reserve as having good agricultural potential, but lacking in timber:

> The soil in this Reserve is an average good one when situated in any other locality it would very soon be taken up and cultivated. It has good but only few large Hay marshes and the water is sweet. The only Drawback in this Reserve is the total absence of any good Building timber. The North side of the Qu'Appelle River has no timber to any extent except small bluffs which when the fire would not interfere soon give useful wood for fuel and fencing.

[116] The Chacachas Reserve was surveyed by Wagner east of the Kahkewistahaw Reserve (referred to as "Ka-west-a-haw Reserve" in Figure 1). The Chacachas reserve was 24, 298 acres. Wagner described the Chacachas reserve as having agricultural potential and timber:

> The South part of this Reserve has very good Land, well supplied with Meadows & 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.

[117] The government recognized the reserves surveyed by Wagner as "set apart". In 1877, the Department of the Interior published a Schedule of Indian Reserves, which described "the various Reserves set apart for Indians under the several Treaties Nos. one to five". The Schedule listed Kakisiwew and Chacachas Reserves surveyed by Wagner as "Kaki-shi-way or Loud Voice" No. 43 and "Cha-ca-chas" No. 54. In 1880, the office of the Surveyor General also listed both "No. 43 Qu'Appelle River and Round Lake" (likely referring to the Kakisiwew reserve) and "No. 54 Cha-ca-tas Band Qu'Appelle River" as completed reserve surveys.

D. *Use of the 1876 Reserves*

[118] Whether the Chacachas and Kakisiwew Bands actually used and accepted their original reserves surveyed by Wagner was the first major point of divergence for the expert historians. Dr. Storey and Dr. Whitehouse-Strong agreed that there is little documentary evidence describing use of the Chacachas or Kakisiwew reserves by band members prior to 1878. They agreed that the Chacachas Band had not settled on the Chacachas Reserve by mid-1879. While Dr. Whitehouse-Strong and Dr. Storey appeared to agree that at least parts of the Chacachas and Kakisiwew Bands had settled and the Bands started to use their reserves prior to 1881, Dr. Whitehouse-Strong indicated that this did not mean that either band accepted their reserve.

[119] Both experts accepted that the government was primarily interested in recording only permanent settlement and agricultural land use at the time and therefore did not keep an exhaustive record of other land use by bands. The tabular statements from Indian Affairs annual reports are also of limited help because the records only exist for the Crooked Lakes Bands starting in 1879. Dr. Storey demonstrated that these tabular statements were inconsistent and not an accurate record of the populations of either Chacachas or Kakisiwew.

[120] Based on the agricultural record, it is more likely that the Kakisiwew Band had at least periodically used its reserve by 1879, as they received a modest distribution of agricultural implements, livestock, and seed potatoes in both 1878 and 1879 that would have supported gardening on the reserve. Although Chief Kakisiwew requested re-location of the reserve to Moose Mountain in 1877, which was denied in 1878, the fact that the Kakisiwew Band

continued to receive agricultural implements on the reserve after Chief Kakisiwew's request was denied, shows that the band had some degree of acceptance of the Kakisiwew Reserve inasmuch as they continued to live on it and to receive grants in respect to it.

[121] Although the Chacachas Band had not settled on the reserve by mid-1879, it also is more likely that part of the Chacachas Band had started using the reserve prior to 1881.

[122] The Historical Bands were not required to settle on their reserves in this time period although it was government policy to effect settlement as soon as possible.

[123] There is little documentary evidence describing the Chacachas Band's use of its reserve, partially because records focussed on agricultural activities and the majority of the Chacachas Band had continued to hunt bison off of the reserve. On July 21, 1879, Agent McDonald reported that Chacachas had not yet gone on their reserve although the Band had been provided with oxen:

> Two yoke of oxen were purchased for Kakwistahaw and Chakachas, but they have not gone on their reserves, and as yet do not show any indications in making a beginning.

[124] McDonald then indicated that the oxen were given to other bands as neither Chacachas nor Kahkewistahaw had settled on their reserves.

[125] Although Dr. Storey pointed to other documentation that he interpreted to indicate that the Chacachas Band had settled on their reserve prior to 1881, I am not convinced that there is any clear documentary evidence to indicate that the Chacachas Band had settled on the reserve.

However, having acknowledged the weakness of these documentary records, it is especially important to consider the oral history evidence.

[126] Sharon Bear's story of Kanipatit, the last woman living on the Chacachas reserve, supports that at least some Chacachas band members had started to reside on the Chacachas reserve prior to 1881:

> There was one lady and her husband that stayed back and they refused to leave Chacachas and they were going to stay there. The husband ended up dying, going out on a hunt, and not returning, but the woman stayed there with her baby and tried to live there and actually lived there for the winter.
>
> She maintained herself and her baby and she was almost starving and -- but she switched from her rabbit diet to other wild games, such as partridges and prairie chickens and which provided more nourishment for her and her baby. Her name was Kanipatit [phonetic], which meant night traveller or woman that travels at night.
>
> She ended up staying there till in the spring, she came over to Ochapowace, over here to Ochapowace. She had to move because she was having a hard life.

[127] The full extent of the use of the reserves surveyed by Wagner remains a question likely lost to history. However, I have concluded that part of the Chacachas Band had used the Chacachas Reserve prior to 1881, even though the majority of the band continued to hunt bison off of the reserve. This conclusion fits with the findings of the experts and the oral history.

E. *Re-survey and Co-location*

[128] In 1881, Surveyor Nelson surveyed a shared reserve [Joint Reserve] for both Kakisiwew and Chacachas south of the Qu'Appelle River. The Joint Reserve was 52,864 acres, and

therefore was significantly smaller than the combined size of the Kakisiwew and Chacachas Reserves surveyed in 1876 (67,072 acres).

[129] How and why this re-survey and co-location (in effect, a joint reserve) occurred was a major point of contention between the expert historians. There is no documentation showing that the reserves surveyed by Wagner for the Chacachas and Kakisiwew Bands were formally surrendered according to the requirements of the *Indian Act, 1880,* SC 1880, c 28, s 37 prior to the re-location and co-location of the reserve.

[130] I find that the Chacachas Band was likely not consulted on the re-location and co-location of their reserve. The Kakisiwew Band may have been consulted on and even agreed to the re-location of their reserve, but there is no evidence that they formally surrendered their reserve or agreed to be co-located with the Chacachas Band.

(1) Summary of the historical record on re-location and co-location

[131] The process of re-location and co-location began with Indian Agent McDonald writing a letter dated January 3, 1881 stating that the Chacachas and Kakisiwew Reserves, as well as reserves for a number of other Crooked Lakes bands, were “yet to be surveyed and completed”. There is no evidence that any higher-ranking government official gave McDonald instructions or approved the change in location of the Kakisiwew and Chacachas reserves.

[132] In reports from 1882, after the re-location and co-location had occurred, McDonald and Nelson each shed some light on the rationale and process for re-locating and co-locating the bands.

[133] Nelson's report of January 10, 1882 described his timeline, instructions, and process of surveying the reserves. In this report, he indicated that he completed surveying the Crooked Lakes reserves, including the Joint Reserve, between August 14 to August 20, 1881. Nelson offered the following explanation for the change in reserve location for the Crooked Lakes bands:

> The Indians there having desired a change in the position of the reserves already surveyed, I was instructed to survey suitable reserves on the south side of the valley for the bands of Mosquito, O'Soup, Ka-kee-wis-ta-haw, Ka-kee-she-way and Cha-ca-chas, and to reduce the length of the frontage of the reserves already surveyed for them on the River Qu'Appelle.

[134] After describing the river frontage of the previous reserves and his reconnaissance work, Nelson describes his communication with Agent McDonald:

> …I communicated with Colonel McDonald, Indian Agent at Qu'Appelle, some of the Indian Chiefs being there at the time.

[135] After communicating with township surveyors to ensure they did not conduct township surveys through the new reserves, Nelson reported the following:

> I left my party to finish a line between two of the reserves at Round Lake, and proceeded to Fort Qu'Appelle, and as you are aware received further instructions.
>
> While at Qu'Appelle I met most of the Chiefs and Head men of the bands, whose reserves were yet unsurveyed, and with them and the Indian Agent discussed and fixed upon locations for them.

[136] On January 19, 1882, Agent McDonald reported his activities connected with *Treaty 4* during the previous year, explaining:

> There appeared at one time a little dissatisfaction and jealousy among the chiefs on the choice of the reserves at the 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.

[137] The primary reason for changing the reserve location according to Agent McDonald was the lack of timber in the north. Notably, this would have applied to the Kakisiwew Reserve, but would not have applied to the Chacachas Reserve, which was south of the Qu'Appelle River and had timber. In addition, there is no explanation in either of these reports as to why the Chacachas and Kakisiwew Bands were placed on a joint reserve.

[138] The annuity paylists certified by McDonald also provide some important details about who was present at the time when Nelson and McDonald would have been consulting with Chiefs and conducting reserve surveys in 1881. The annuity paylist for 1881 shows that Chief Kakisiwew, three headmen, and 148 other Kakisiwew members were paid treaty annuities at Fort Qu'Appelle on August 5, 1881. Of the Chacachas band, only two headmen and 41 other members received treaty annuities at Fort Qu'Appelle - meaning that Chief Chacachas, two headmen, and approximately two-thirds of the band membership were not present.

[139] The expert witnesses, Dr. Storey, Mr. Nestor, Dr. Whitehouse-Strong, and Dr. von Gernet each provided their interpretation of the above documents to find the rationale for the re-survey and co-location of the reserves. I put the most weight on the interpretations of Drs. Storey and Whitehouse-Strong as they appeared to have most holistically considered the historical record. Dr. von Gernet reviewed too narrow a set of documents to be particularly helpful in this analysis. Mr. Nestor's conclusions were largely similar to Dr. Storey's conclusions, but with less detailed analysis.

[140] Before describing my findings regarding the rationale and consultation regarding the reserves in 1881, there were a number of theories put forward by the parties that I have not found particularly relevant to interpreting the historical documents.

[141] First, the Plaintiffs tendered evidence of Agent McDonald's and Surveyor Nelson's involvement in the Qu'Appelle Land Syndicate, an organization that appears to have been speculating on lands prior to the building of the railway. The members of the organization included senior federal officials in the area and they appear to be aware that their activities were to be hidden.

[142] While Agent McDonald and Surveyor Nelson certainly appear to be involved in the morally and legally questionable Qu'Appelle Land Syndicate starting sometime between 1881 and 1882, there is no evidence that would allow the Court to link the Qu'Appelle Land Syndicate with the re-location of the Kakisiwew and Chacachas reserves. The Plaintiffs have not shown

that any member of the Qu'Appelle Land Syndicate benefitted from the reserve re-location. I can put little weight on this evidence in interpreting the record.

[143] Second, I also put little weight on Dr. Whitehouse-Strong's opinion that Nelson and McDonald had a tendency to act in the Bands' best interests when interpreting the historical record. McDonald's efforts to protect the Ochapowace Band's reserve interests in later years are not relevant to determining what happened to the Kakisiwew and Chacachas reserves in the 1880s. I have concluded that Agent McDonald's behaviour in the 1882 re-location of three other bands, which was characterized differently by each expert, to be of little assistance in interpreting the record before the Court regarding the re-location of the Chacachas and Kakisiwew Bands.

[144] Third, Dr. Storey theorized that Agent McDonald was not present during annuity payments in 1881 and therefore could not have consulted with any of the Chiefs at Fort Qu'Appelle. This was based on a report of Inspector Wadsworth who had spoken to Agent McDonald in the fall of 1881 and stated that McDonald had not been in Fort Qu'Appelle during annuity payments. However, all other evidence points to Agent McDonald having been present at Fort Qu'Appelle around the time of annuity payments, including Nelson's account that refers to McDonald's consultation with chiefs at Fort Qu'Appelle as well as McDonald's certification of the annuity payments. Dr. Storey agreed that the evidence indicated that McDonald was present sometime prior to annuity payments in late July or early August; he disagreed that McDonald was present precisely on August 5th, the day of annuity payments. I find that Agent

McDonald was likely present at Fort Qu'Appelle during treaty annuity payments in 1881, and Inspector Wadsworth's report was likely mistaken.

(2) Conclusions on the Kakisiwew Reserve Re-location

[145] I have concluded that the Kakisiwew Band was likely re-located, at least in part, because of the lack of timber on the 1876 Kakisiwew Reserve and the band's dissatisfaction with the reserve. The Kakisiwew Band was likely consulted at least on the re-location of the reserve, although likely not on their co-location with Chacachas.

[146] McDonald's statements about jealousy and dissatisfaction of the chiefs focusses solely on the bands with reserves that were north of the Qu'Appelle River and bands whose leadership would have been present at Fort Qu'Appelle when they were satisfied with the boundaries of their new reserves. Based on what we know of the historical context from the expert historians, Chief Kakisiwew and his band would have likely been consulted because they met both of these criteria.

[147] The archival record indicates that the Kakisiwew Reserve lacked timber. Surveyor Wagner noted this lack of timber in his 1876 survey. It is logical that McDonald was referring to Kakisiwew as one of the bands that had expressed dissatisfaction with their reserve given that it would have been one of the bands that had a reserve on the north side of the Qu'Appelle River and lacked timber.

[148] In addition, the Kakisiwew Band was likely one of the bands with which McDonald was consulting while he was at Fort Qu'Appelle. The majority of Kakisiwew Band leadership was present at Fort Qu'Appelle during annuity payments, around the time when Nelson reported that McDonald was at Fort Qu'Appelle with some chiefs.

[149] I put little significance on the evidence that Chief Kakisiwew had previously requested that his reserve be moved to Moose Mountain in 1877. This request was clearly rejected by government officials in 1878. Requesting to be moved to a different area for a different reason at a different time does not provide any indication of whether Chief Kakisiwew requested that his reserve be moved to the south side of the Qu'Appelle River for lack of timber in 1881.

[150] Based on the weight of the evidence, I would conclude that the Kakisiwew Band was likely consulted on the change in location for their reserve in 1881. While there was no evidence of Kakisiwew members protesting the change in reserve location, consultation does not equate with informed consent. It is impossible to ignore the power imbalance in the dealings between the Chief and the responsible government officials.

[151] However, there is no evidence that the Kakisiwew Reserve was formally surrendered through a vote of the majority of the adult male Band members, nor was there a requisite certification under oath of the vote in front of a judge or magistrate.

(3) Conclusions on the Chacachas Reserve Re-location

[152] There is no explanation for the re-location of the Chacachas Reserve in the historical record, nor is there any evidence to support that the Chacachas Band could have been fairly consulted, much less consented, regarding the change in reserve location.

[153] McDonald's statement on the dissatisfaction and jealousy of the Crooked Lakes Chiefs likely did not include the Chacachas Band.

[154] There is no rationale in the historical record explaining why the Chacachas Reserve was moved, except if it is assumed that Chief Chacachas was one of the chiefs expressing "dissatisfaction and jealousy". Unlike the Kakisiwew Reserve, the Chacachas Reserve did not lack timber. McDonald's reference to the bands on the north side of the river that had been dissatisfied with their reserves could not have applied to the Chacachas Band whose reserve was on the south side.

[155] The Chacachas Band was likely not consulted on reserve re-location. Chief Chacachas, two headmen, and two thirds of the Chacachas Band were not present at treaty annuity payments in 1881 and could not have been consulted with the other chiefs during treaty annuities. This 1881 annuity payment meeting grounds the historical evidence that the Kakisiwew Band were at least consulted – a situation not applicable to the Chacachas Band.

[156] Although the two remaining Chacachas headmen could have been consulted during treaty annuity payments, there is no evidence to indicate that they would have been authorized by the Chacachas Band to consult on their behalf or agree to relocate the reserve. Although Dr. Whitehouse-Strong presented some evidence of a headman in *Treaty 6*, Moosomin, having acted separately from the Chief to direct his band's adherence to the treaty and its settlement on the reserve, there is no evidence that something similar happened in the Chacachas Band. Moosomin also went on to lead his own band. In contrast, there is no evidence that either of the two Chacachas headmen present at the 1881 annuity payments intended to challenge Chief Chacachas as chief.

[157] McDonald and Nelson's own accounts emphasize the importance of chiefs being the key decision-makers, as chiefs are referenced as having raised the issues of dissatisfaction and jealousy among the bands, and were noted as having met with McDonald around the time of treaty annuities. Although Nelson met with some chiefs and headmen after completing the surveys for the Crooked Lakes Bands, Dr. Storey and Dr. Whitehouse-Strong agreed that Nelson was likely not referring to chiefs or headmen from the Crooked Lakes bands.

[158] Lastly, according to McDonald's 1883 Annual Report, the Chacachas "newcomers" who returned to the Qu'Appelle Valley sometime between 1882 and July 1883 demanded their own reserve and chief. This further supports the conclusion that the Chacachas Band was not consulted on the re-location and co-location of their reserve with Kakisiwew.

[159] There is also no record of a formal surrender of the Chacachas Reserve. Given that Chief Chacachas and the majority of the band were not present on the reserve in 1881, a majority vote approving surrender could not have occurred, nor could Chief Chacachas have approved the surrender by himself. There is also no record that the Chacachas members who were living on the reserve in 1881 had any vote regarding re-location and co-location of the reserve.

[160] The oral history evidence further supports the lack of consultation with Chacachas. Notably, all Elders emphasized the loss of the Chacachas Reserve as a major event over the loss of the original north side Kakisiwew Reserve.

F. *Amalgamation*

[161] According to Dr. Storey and Dr. Whitehouse-Strong, the process of amalgamating the Historic Bands into the Ochapowace Band began with the co-location of the bands on the joint reserve in 1881 and ended with the election of Chief Ochapowace in 1884. There is limited documentary evidence on the amalgamation and there is no evidence that either Band sought to be amalgamated.

[162] The key pieces of documentary evidence for the amalgamation are the annuity paylists for 1882, 1883, and 1884, Agent McDonald's report of July 6, 1883, his letter of September 12, 1884, and his report of September 16, 1884. Another potentially important report on the Crooked Lakes Bands written by McDonald on July 12, 1882 is missing from the historical record.

[163] The above-listed available pieces of evidence reveal the following:

- Chief Chacachas resigned from his position as chief of the Chacachas Band sometime in 1882. Chief Chacachas had been arrested for transporting stolen horses across the border and was in jail from May to October 1882.
- McDonald reported that the few Chacachas members present in Fort Qu'Appelle were amalgamated with the Kakisiwew Band in 1882. They were paid treaty annuities under the Kakisiwew Band list.
- The majority of Chacachas Band members returning sometime between treaty annuities in 1882 and 1883 objected to the amalgamation of Chacachas with Kakisiwew and claimed they were entitled to a separate reserve and chief. Chacachas and Kakisiwew members were paid their treaty annuities separately in 1883.
- Following Chief Kakisiwew's death in 1884, Chief Ochapowace was elected Chief of the amalgamated band on July 29, 1884 after a “great deal of altercation” following McDonald's direction to the two bands to elect a single chief. The amalgamated band was initially allowed to have seven headmen rather than the usual four headmen provided for under Treaty 4. The Band members were not paid annuities until after the election under the Kakisiwew paylist.
- The amalgamated Band was first referred to as “Ochapowace's Band” in the 1885 paylist.

[164] Based on this documentary evidence, as well as the context provided by Dr. Storey, Dr. Whitehouse-Strong, and the oral history evidence, I find that the Historic Bands did not agree to be amalgamated. The Chacachas Band appears to have objected to amalgamation in 1883 and then was forced to elect a single chief with Kakisiwew in 1884.

[165] Although it is unknown who caused the “great deal of altercation” during the election of Chief Ochapowace, the resistance of Chacachas members to amalgamation in 1883 and following the election indicates that they likely did not agree to be amalgamated.

[166] The evidence suggests that following the return of the majority of the Chacachas Band from the United States in 1883, the Chacachas Band continued to function as a separate group even after the election of Chief Ochapowace. For example, when Chief Kakisiwew died in 1884, the Kakisiwew members left the joint reserve in mourning, but the Chacachas members continued to follow Chief Chacachas (after his resignation as Chief) and stayed on the reserve.

[167] Following the election of Chief Ochapowace, Chief Chacachas (although he was no longer recognized as chief by Canada) and a number of Chacachas members left the reserve until they were forced to return in 1886. When they returned, they farmed separately from the Kakisiwew Band and they had to be compelled to accept annuities on the joint reserve. They left the reserve again on April 11, 1887. Chief Chacachas never returned as he died in the United States in 1889.

[168] As an aside, there was some suggestion by Dr. Storey and Mr. Nestor that Chief Chacachas's resignation in 1882 should be treated as suspicious because McDonald and Chief Chacachas had a negative relationship and because it was not a part of Cree custom for a Chief to resign. Similar to McDonald and Nelson's involvement in the Qu'Appelle Land Syndicate, it is not sufficient that the resignation is suspicious to ground a finding that Chief Chacachas did not voluntarily resign as Chief. While Chief Chacachas likely resigned voluntarily, that did not end his involvement in Band affairs.

[169] I find that Chief Chacachas continued to play a leadership role for at least a portion of the former Chacachas Band members, given that they continued to follow him when he left the reserve, returned, and left again.

[170] The Court also heard evidence from the expert historians and Elders on Plains Cree customs of hereditary chiefs and membership around the time of *Treaty 4*. This evidence was directed at encouraging the Court to infer that it was more or less likely that the amalgamation of the Bands was voluntary. However, I find that this evidence was relatively unspecific to the situation and does not address the main question, which is the extent to which the bands consented or agreed to co-location and amalgamation. Given the upheaval caused by the collapse of bison at the time, the move to settlement, the settlers' arrival, railway building and other such factors, the traditional ways were challenging and being challenged.

[171] I cannot find that the amalgamation was consensual. Whatever Kakisiwew Band may have consented to, Chacachas Band did not consent to either co-location or amalgamation. The reality is that the Chacachas Band considered themselves separate from the Kakisiwew Band – a view that has continued in some members through to the present.

G. *Bands after Amalgamation*

[172] On May 17, 1889, the Privy Council approved PC 1889-1151, which was an omnibus Order in Council listing and describing reserves in Manitoba and the Northwest Territories. The Order in Council included the Joint Reserve as "Ochapowace Indian Reserve No. 71" and noted

that the Chief for the reserve was Chief Ochapowace, but formerly had been Chiefs Kakisiwew and Chacachas.

[173] After Chief Ochapowace's death in 1891, the Ochapowace Band had long periods without a Chief due to actions (inactions) by the government. The Ochapowace Band did not have a Chief for about twenty years until Walter Ochapowace was elected in 1912. He was deposed in 1917 and the Ochapowace Band again had no Chief from 1917 to 1933. Requests to have a Chief in 1911 and 1922 were denied by the Department of Indian Affairs.

[174] Following the amalgamation, some people transferred into the Ochapowace Band from other bands with the approval of the Ochapowace Band. One of these people, Jacob Bear, transferred into the band in 1892 and is an ancestor of a number of the named Plaintiffs, such as Sharon Bear and Wesley Bear.

[175] Between 1904 and 1907, there were four instances recorded where government officials continued to use the names Kakisiwew or Chacachas to refer to the Ochapowace Band.

[176] In 1911, someone from a delegation sent from the Crooked Lakes Bands was recorded asking how the Kakisiwew and Chacachas Bands were joined. The government response was that Kakisiwew and Chacachas owned the reserve jointly.

[177] It is evident that the amalgamation and how it occurred was a continuing issue particularly for those who identified with the Chacachas Band.

[178] Between 1928 to 1932, former members of the Chacachas Band again raised questions about the former Chacachas Reserve and the lack of proper surrender.

[179] In 1928, Indian Agent Ostrander wrote to Secretary MacKenzie reporting that some Ochapowace Band members were saying that they had never surrendered a reserve set aside for Chief Chacachas and his followers. Secretary MacKenzie responded saying that the band was relocated and given its full allotment in 1881.

[180] In 1931, Indian Commissioner Graham wrote to Secretary Mackenzie twice because of questions from Ochapowace Band members about a reserve set aside for them. Secretary MacKenzie responded that the 1876 lands had never been Indian lands and that the 1881 reserve was surveyed because the Indians desired a change.

[181] This was part of the continuing shift in government explanations of what transpired.

[182] In 1932, some former Chacachas Band members engaged a lawyer, Garnet Neff. Neff corresponded with Secretary MacKenzie and then Acting Secretary MacInnes between May and September 1932. From these letters, which include the views of Chacachas members filtered through Neff, I draw the following conclusions:

- Neff thought the main issue was the lack of proper legal surrender of the Chacachas Reserve. He initially said that the problem with the surrender was the lack of compensation, but then he later said that there had been no surrender or consultation regarding the surrender.
- Neff was told by his Chacachas clients that there had been a “meeting of the tribe” at the time of the surrender where they had understood they would be paid

for the land. The letter does not say whether "meeting of the tribe" included any consultation or consent to the surrender.

- There was confusion by responding government officials about what had happened to the reserve. Secretary MacKenzie first responded that the reserve had been surrendered because it was unsuitable and the Band was compensated with land. About 10 days later, MacKenzie corrected himself and said that the Chacachas reserve was never properly set apart and that there was no need for a formal surrender of the lands.

[183] Neff's correspondence ended with a request for records showing the consent of the band to the surrender of the reserve, to which MacInnes responded that there would not be any records because the lands were never constituted as a reserve.

[184] I put little weight or credence on these letters regarding the details of the surrender and amalgamation process. What it shows generally is that Chacachas members continued to raise issues regarding the loss of their reserve lands and that they were able to consult a lawyer in 1932. Dr. Storey emphasized that Neff was communicating on behalf of Chacachas members to the government and therefore would have likely been injecting his understanding of the Crown's obligations in the 1930s regarding surrenders with what the Chacachas members were telling him. Neff's description of a "meeting of the tribe" regarding the surrender of land does not reconcile with either the government's narrative that no surrender was necessary, nor is it supported by the oral history. Given that Neff's narrative regarding the surrender changed throughout his letters, there is little the Court can draw from his account.

[185] According to the oral history evidence of Ross Allary and Sharon Bear, Neff stopped representing the Band because of a concern that his representation was illegal under section 141 of the *Indian Act*, RSC 1927, c 98, which prohibited a lawyer from accepting band funds to

prosecute a claim on behalf of the band. Bands were again allowed to hire lawyers in 1951, when section 141 was repealed (*Indian Act*, SC 1950-51 (3rd Sess), c 29, s 123 [*Indian Act, 1951*]).

[186] Ochapowace was recorded as continuing to have two "groups" in 1947 and two "factions" in 1962. Given the continuity of the division, the Court infers that the division was between the members identifying as Chacachas and those identifying as Kakisiwew. The division is consistent with the non-acceptance of the co-location and amalgamation, both in principle and in fact.

H. *Creation of the Indian Registry in 1951*

[187] The *Indian Act, 1951* created the Indian Register, which was intended to create a list of every person entitled to be registered as an Indian under the *Indian Act*. There were two types of lists, Band Lists which contained all members of a particular band, and a General List, which listed all people entitled to be registered Indians, but who were not members of a band.

[188] The process of creating the Indian Register required band lists to be posted to allow for individuals or bands to protest the inclusion or exclusion of members on the list.

[189] The Ochapowace Band list was recorded as being posted at the Indian Agency Office and the Assistant Indian Agency Office on September 1, 1951. There is no reason to doubt this occurred, and this is a circumstance where the presumption of regularity applies because there was an established procedure akin to the principle of the ordinary course of business records. The

Assistant Indian Agency Office was likely the farm instructor's house on the Ochapowace Reserve.

[190] According to Mr. Andy Doraty who examined the Department's records, no protests from the Ochapowace band regarding the list were recorded. No Kakisiwew or Chacachas lists were posted, nor were there any protests of individuals seeking to be included on a Kakisiwew or Chacachas list. The Ochapowace list would have been based off of the most recent treaty paylist for Ochapowace in 1951.

I. *Order in Council in 1973*

[191] On November 12, 1973, the Governor in Council issued PC 1973-3571 declaring a list of bands that were recognized as a "band" under paragraph 2(1)(c) of the *Indian Act*. This list included Ochapowace, but not Chacachas or Kakisiwew. This was not the exclusive list of bands, as bands could also exist without being declared if they had reserve lands vested in the Crown or moneys held by the Crown for the band's use and benefit in common, according to the definition of "band" in the *Indian Act*. Canada refers to this Order in Council to argue that the Chacachas Band and the Kakisiwew Band cannot assert that they are bands. Since there is no evidence that the list of bands is exclusive, the absence of those Bands is not conclusive of their lawful amalgamation.

J. *Historic Laws, Policies, and Practices*

[192] The parties provided evidence on Canada's historic practices, policies and laws regarding reserve creation, surrenders, membership transfer, and amalgamation, as well as "starvation policies" and mobility restrictions that impacted the bands.

(1) Reserve creation

[193] *Treaty 4* promised reserves for each of the signatory bands based on a minimum of 128 acres per capita, but it did not set out a process for reserve creation. Consultation with the bands was emphasized in the treaty as well as in correspondence given to Wagner in 1876. The selection of a reserve could only occur after consultation with the relevant band.

[194] An Order in Council was not required to set apart a reserve. Following the coming into force of the *Indian Act, 1876,* Acting Deputy Minister of Justice Lash concluded that an Order in Council was preferable, but not required, to set apart a reserve. A reserve could be set apart if "Indians themselves & the government are satisfied with the laying out of the reserve and have treated it as properly laid out & reserved under the provisions of the treaty…".

(2) Reserve surrender and change in location

[195] Under *Treaty 4*, surrender of a reserve required consent of the band. Section 37 of the *Indian Act, 1880,* SC 1880, c 28 also required a majority vote of adult male Band members at a

meeting who habitually resided on the reserve. The vote had to be certified under oath in front of a judge or magistrate by a government official and a chief or headman present at the vote.

[196] Between 1875 and 1881, examples of other reserve re-locations in the *Treaty 4* and *Treaty 2* areas showed that changes in reserve location were taken seriously by the Department and required agreement by a band and approval by senior Department officials. This was reflected by the Surveyor General's denial of Chief Kakisiwew's request to change his reserve location in 1878.

[197] In the late 1880s to 1890s, surrenders for road allowances on Crooked Lakes reserves similarly required formal surrenders by the bands according to instructions issued by the Indian Commissioner.

[198] None of the procedures were followed with respect to the Chacachas Band being co-located with the Kakisiwew Band. Particularly while the Kakisiwew Band may have been consulted, the Chacachas Band was not. No formal steps within the Bands were taken.

(3) Transfer of members and amalgamation

[199] Although there was a practice of consulting and seeking consent of bands prior to amalgamation, there was no formal policy or legislation regarding amalgamation between 1881 and 1884.

[200] The Plaintiffs' experts stated that the practice and policy of the Department as of the 1880s required agreement of the bands to membership transfer, which, by analogy, meant that amalgamation also required band agreement as amalgamation was essentially a transfer in membership of an entire band.

[201] In practice, there were examples where the Department sought bands' agreement prior to amalgamation, such as the amalgamation of Long Lodge and The Man Who Took The Coat bands in 1885, the Manitowahpah amalgamation in 1898, and the James Smith and Cumberland No 100A Bands in 1902.

[202] The Department also corrected an amalgamation between Sakimay and Little Bone by seeking a formal surrender and amalgamation vote several years after the initial band amalgamation. Sakimay and Little Bone Band were reportedly amalgamated without a formal amalgamation process in 1888. In 1907, the Little Bone Band formally surrendered its reserve and amalgamated with Sakimay through a vote and agreement between the bands.

[203] However, there were no formal policies or law on band transfer and amalgamation in place until after the amalgamation of Chacachas and Kakisiwew in 1884. In 1889, Department of Indian Affairs introduced guidelines for band membership transfer, which required consent from both bands for individual members to transfer from one band to another. Following the issuance of these guidelines, members transferring into the Ochapowace Band were approved by a majority of band members at a meeting in the presence of an Indian Agent. This requirement was incorporated into the *Indian Act* in 1895 (SC 1895, c 35, s 8).

[204] The amalgamation of bands was not addressed in statute until the *Indian Act, 1951* when the *Indian Act* was amended to explicitly give the Minister the discretion to amalgamate bands where a majority of their electors requested to be amalgamated. Prior to 1951, the Minister of Justice in 1947 had concluded that band amalgamations should be treated similarly to membership transfers, by requiring a majority vote.

[205] Unlike the above instances, there was no prior or subsequent agreement or consent of both Bands to the amalgamation.

(4) General evidence of conditions of starvation and restrictions on mobility

[206] The Plaintiffs and Ochapowace also submitted evidence regarding the "starvation policy" and pass system in place during the 1880s. It is relevant evidence as to the power imbalance and dependency of the Bands which colours any suggestion of implied acceptance or acquiescence.

[207] As described by Dr. Whitehouse-Strong and Dr. Storey, there were several elements to the starvation policy: 1) the Work for Rations Program, 2) limiting rations to get bands to leave certain areas (as in Fort Walsh), and 3) the provision of substandard rations. All these practices appear to have started around the same time in the Prairies following the collapse of the bison hunt.

[208] According to the evidence received in trial, the Work for Rations policy appears to have started around 1878 with the commencement of the Home Farm program, which provided limited rations assistance in exchange for work on home farms. Generally, the policy appeared

after the collapse of the bison hunt, which occurred between 1878 and 1879. A letter from Deputy Superintendent General VanKoughnet in 1882 reported that Prime Minister John A. Macdonald said that it was bad policy to feed bands well, in support of the continued provision of starvation allowances. Agent McDonald was specifically instructed to give as little rations as possible to able bodied Indians who would not or were not at work in the Crooked Lakes area in 1882. Dr. Storey gave evidence of the limited rations provided in the Work for Rations program between 1882 to 1885, including a record of limited rations being provided on Ochapowace in 1885.

[209] Another policy, the pass system, restricted the mobility of First Nations on the prairies after 1885. In 1886, following the Northwest Rebellion, the pass system was implemented across the prairies, which required Indians to obtain permission from the local Indian Agent to leave their reserve for any reason. Vankoughnet recommended implementing the pass system across the prairies. The informal policy appears to have affected Chief Chacachas when he was caught and brought back to the joint reserve in 1886. Little evidence was presented at trial regarding when the pass system ended on the Ochapowace Reserve, although it was likely sometime before the 1930s (see Laurie Barron, "The Indian Pass System in the Canadian West, 1882-1935," *Prairie Forum* 13:1 (Spring 1988) at 38-39).

[210] The evidence of these policies provides context to the Court regarding the conditions on the reserves during the relevant period of re-location, co-location and amalgamation. The pass system helps explain why it was difficult for Band members to leave the reserve either to hunt or to protest amalgamation.

VII. Modern Era

A. *Treaty Land Entitlement and Surrender Settlement Agreements*

[211] In the 1990s, the Ochapowace Band and Canada settled Ochapowace's claims regarding insufficient treaty land entitlement and the alleged improper surrender of land in 1919.

[212] The TLE settlement process began in Saskatchewan in the late 1970s with the negotiation and agreement of Saskatchewan, Canada, and the Federation of Saskatchewan Indians [FSI] to what was called the "Saskatchewan Formula".

[213] Ochapowace received some funding to pursue its TLE claim under the Saskatchewan Formula in the late 1970s or early 1980s. The FSI conducted research in these early stages of the TLE process, including commissioning two reports that summarized the history of the Ochapowace reserve in 1974 and 1978. These reports concluded that the Historic Bands had not settled on their 1876 reserves and that the Historic Bands had wanted to have their reserves re-located. However, the 1978 report documented the resistance of Chacachas to amalgamation and stated that there was no evidence explaining why the two Bands were placed on the same reserve in 1881.

[214] Ochapowace filed a claim along with three other bands in the 1980s, referred to as the "MOPS" claim, when Canada withdrew from the Saskatchewan Formula. This eventually resulted in the negotiation and finalization of the TLE Settlement Framework Agreement with a number of bands across Saskatchewan, including Ochapowace, in 1992.

[215] In 1993, Ochapowace entered into and ratified a Band-Specific TLE Settlement Agreement, which provided approximately $16 million in full satisfaction of the Ochapowace claim for treaty land. Ochapowace was represented by legal counsel from the 1980s throughout the settlement agreement process.

[216] Canada agreed that limitation periods were suspended between September 11, 1985 and March 16, 1995, during settlement negotiations.

[217] The existence of the two bands was raised several times during the negotiation of the TLE Agreement.

[218] In 1984, correspondence between the Minister of Indian and Northern Affairs and then Chief Morley Watson regarding a TLE Settlement under the Saskatchewan Formula indicated that the Minister was not willing to consider the 1876 lands surveyed for Chacachas and Kakisiwew as reserves set aside for Ochapowace. The Minister proposed that the Band would surrender any claimed interest in 1876 to “put the matter to rest” as part of the TLE Settlement.

[219] Between 1991 and 1992, while TLE negotiations were ongoing, Cameron Watson and others raised the re-establishment of the Chacachas and Kakisiwew Bands as a TLE issue with Ochapowace Council, the Office of the Treaty Commissioner, and the Department of Indian Affairs.

[220] The existence and amalgamation of the two bands was considered during the negotiation of the TLE Settlement Agreement under the 1992 Framework. The parties negotiated the date of first survey, which would determine the population on which TLE would be based, and settled on 1879. By settling on 1879, the date of first survey population was based on the combined number of people listed on the Chacachas and Kakisiwew paylists in 1879.

[221] Importantly, Canada confirmed during negotiations that the release in the TLE Settlement Agreement would not affect descendants of Chacachas and Kakisiwew who were not counted in the TLE Settlement Agreement. This implies that the TLE Settlement Agreement would affect Chacachas and Kakisiwew descendants who were counted in the date of first survey population numbers for the TLE settlement.

[222] Mr. Alois Gross, Canada's Chief Negotiator for the Framework Agreement and the 1919 Surrender Settlement Agreement, stated that he understood historic band amalgamation to remain a live issue that was not released in the settlement agreements. He understood that it would be treated as a band division or an internal band matter with the assets from the TLE Settlement Agreement.

[223] The Ochapowace Land Claims Committee, which guided the research and negotiation of the settlement agreements for the Ochapowace Band, consisted of a mix of people who identified as Chacachas, Kakisiwew, and Ochapowace. Cameron Watson (Chacachas), Ross Allary (Ochapowace/Kakisiwew), Wesley George (Kakisiwew) and Chief Denton George (Ochapowace) all sat on the Land Claims Committee.

[224] On October 22, 1993, the Ochapowace Band entered into the TLE Settlement Agreement with Canada following the approval and ratification of a majority of the members of the band on October 15, 1993. In this TLE Agreement, the Ochapowace Band, on behalf of its membership, released and indemnified Canada from all claims, and claims of its predecessors, under *Treaty 4* relating to treaty land entitlement under Articles 15.01 and 15.02 of the TLE Settlement Agreement. Under Article 15.10, the release did not apply to non-members who were not counted for the purposes of the Agreement.

[225] The 1919 Surrender Settlement Agreement was approved and ratified on March 14, 1995 and similarly released and indemnified Canada for claims arising from the 1919 Surrender.

B. *Recognition for the Historic Bands*

[226] Following the approval of the TLE Settlement Agreement, members of the self-identified Chacachas group, including Cameron Watson and Sharon Bear, sent a letter to Ochapowace Council and the Department of Indian Affairs seeking to re-establish the Chacachas Band and reserve on December 14, 1993.

[227] Sharon Bear and Cameron Watson continued to research and discuss with Elders to try to establish a band list based on the Ochapowace members who had descended from Chacachas members. They advised and educated members about what happened to Chacachas and Kakisiwew.

[228] Between 1998 to 1999, the Chacachas group organized meetings for Chacachas descendants and put out notices of these meetings to the community. A group of people who attended a meeting during this time elected Cameron Watson, Sharon Bear, Eileen Farkas, and Lynda Gattrell to represent them as the Chacachas Interim Committee. A notice of a meeting held on January 16, 1999 was put into evidence, but it was not stated how this notice had been distributed. According to the minutes of this meeting, the three families in attendance selected family heads and confirmed Cameron Watson as chief by consensus. The minutes also demonstrated that the convened group discussed and supported the bringing of a claim to re-establish the Chacachas Band and reserve.

[229] A Kakisiwew Family Representative Committee [Kakisiwew Committee], which was also called the Ochapowace-Kakisiwew Family Representative Committee by the Kakisiwew deponent, Wesley George, was established sometime between 1992 and 1997. According to Wesley Bear, who testified at trial, there were 11 family representatives identified to form the Kakisiwew Committee. The Bear Plaintiffs did not provide any further information regarding how the Kakisiwew Committee was established or sought out members.

[230] Between 1998 and 2000, the Chacachas Interim Committee wrote to then Chief Denton George and the Department several times for support in re-establishing the Chacachas Band. Chief George, Ochapowace Council, and the Kakisiwew Committee supported the re-establishment of Chacachas.

[231] On December 1, 1998, the Chacachas Interim Committee wrote to the Department stating that they had met with Ochapowace Council prior to negotiations with the Office of the Treaty Commissioner and agreed that the Chacachas re-establishment would occur when the band acquired sufficient acres to satisfy the Chacachas claim.

[232] In 1999, the Chacachas group declared itself reconstituted and passed a resolution authorizing Cameron Watson to be a spokesperson at the Federation of Sovereign Indigenous Nations [FSIN], after the FSIN recognized the Chacachas Band as a participating member.

[233] On November 10, 1999, the Ochapowace Council passed a Band Council Resolution [BCR] to change the name of Ochapowace to Kakisiwew and to recognize Chacachas as a separate band. This BCR was not approved by the Department. Throughout this period, the Department had advised Chief Denton George that any separation or division of the Ochapowace Band would have to be done according to the New Bands/Band Amalgamation Policy and section 17 of the *Indian Act*.

[234] Ochapowace Council used a portion of the TLE Settlement funds to purchase some of the lands where the original Chacachas reserve was located with the goal that the lands would be administered by the Chacachas people. These lands are now part of Ochapowace reserve lands. It was unclear in the evidence provided at trial whether the Chacachas descendants continue to manage and administer these lands.

C. *Section 17 and New Bands/Band Amalgamation Policy*

[235] The New Band/Band Amalgamation Policy [NBBA Policy] is a national policy that has been in place in its current version since 1991, although there was also a policy in effect prior to 1991. Versions of the NBBA Policy appear to have existed since at least 1978. The NBBA Policy provides guidelines for assessing proposals to create new bands or amalgamate bands under section 17 of the *Indian Act*, which gives the Minister the discretion to divide or amalgamate bands upon their request.

[236] As stated above, the NBBA Policy was provided to Chief George when Ochapowace Council sought to re-establish the Chacachas Band.

[237] Under the NBBA Policy, where a group of band members wish to separate from their parent band, the Department has a number of requirements prior to issuing a recommendation to the Minister to divide an existing band. Most significantly, the new band must have a land base and an agreement with the existing band to divide the existing band's resources. The divided resources must permit the existing and proposed band to provide standard programs and services to their members. A land base for a southern First Nation requires a release of reserve land from the existing band at no cost to the Department. The Department will also consider the impact of the proposal on other federal departments and third parties.

[238] The NBBA Policy also states that the Minister will approve the creation of a new band to meet an outstanding legal obligation such as a court order or commitments created pursuant to treaty or claims settlement.

[239] The NBBA Policy sets out the following procedure for Band Divisions:

1. The group seeking to form the new band must provide a formal written request indicating the reasons for band division and the alternatives considered. Where the resources involved and number of band members proposing to separate are significant, parent bands are required to submit band council resolutions to indicate that the band council agrees to the creation of the new band and any proposed transfer of assets. The existing band and proposed band group are recommended to form a joint committee to negotiate resources and assets.

2. District or regional employees of the Department analyse the proposal and submit report and recommendation to the Associate Deputy Minister of Lands, Revenues and Trusts.

3. The Headquarters Additions Committee reviews the proposal and submits recommendation to the Deputy Minister for Approval in Principle.

4. The Deputy Minister can then reject, approve in principle, or approve in principle with conditions that must be met before finalization of the new band. This approval in principle is not binding on the Minister.

5. The members comprising of the new band must be consulted, as well as the membership of the existing band if a large number of members are leaving or significant resources are being transferred to the new band. Consultation can occur through plebiscite or through customs of the relevant band membership. New band members must file statements of intention to indicate their intention to transfer membership to the new band to provide a basis for the membership list and list of electors.

6. Once the approval of the affected electorate has been obtained, a land base has been secured, and any conditions attached to the approval in principle have been fulfilled, the Ministerial Order will be prepared for Minister to sign. The order may also set aside existing reserve land for the use and benefit of the new band.

D. *Plaintiffs' Connection to Chacachas and Kakisiwew*

[240] The Watson Plaintiffs are related to original Chacachas members as follows:

- Sheldon Watson's great-great grandfather was Napitapeasew, a Chacachas headman when *Treaty 4* was signed. Sheldon Watson's paternal grandfather was named Peter Watson. Peter Watson's mother was the daughter of Napitapeasew.
- Peter Watson (different from Sheldon Watson's grandfather, Peter Watson) is the son of Cameron Watson who was Sheldon Watson's brother. Peter Watson's great-great-great grandfather was therefore Napitaseawew.
- Sharon Bear's great grandfather was Little Assiniboine/Wasimosis [phonetic] who was a Chacachas Headman when *Treaty 4* was signed.
- Charlie Bear (also known as Carey Bear) is Sharon Bear's son. Therefore his great-great grandfather was Little Assiniboine/Wasimosis.
- Winston Bear's great-great grandfather was also Little Assiniboine/Wasimosis. Sharon Bear is his aunt.

[241] Although Sharon Bear identifies as a member of Chacachas, she also is related through her father to Kanawashqahum, who was a member of the Kakisiwew Band. As her son, Charlie Bear would also be related to the Kakisiwew Band.

[242] Although the Watson Family consider themselves as members of Chacachas, a number of them have served on the Ochapowace Council, including as Chief.

[243] Cameron Watson developed a prospective band list for Chacachas in 2007 from the Ochapowace voters' list. The list was actually comprised of three lists. The first list included only those individuals who consented for their names to be disclosed as part of the Chacachas First Nation. The second list identified individuals from the Ochapowace voters' list who Cameron Watson believed were eligible for membership in the Chacachas First Nation applying

a definition provided to Canada. Unfortunately the definition provided to Canada does not appear to have been provided to the Court. The third list identified individuals from the Ochapowace voters' list who Cameron Watson believed were eligible for membership in the Kakisiwew First Nation, applying his same definition as used to identify Chacachas members. Some Ochapowace members were noted as eligible to join Kakisiwew or Chacachas, while other members were not eligible to join either.

[244] According to Sheldon Watson, this list was not definitive, nor was it created or vetted by any kind of Elders' committee. The list has not been updated since 2007.

[245] The Bear Plaintiffs claim they are related to the Kakisiwew Band as follows:

- Sam Isaac is the great-great grandson of Chief Kakisiwew. His maternal grandfather was Walter Ochapowace. Walter Ochapowace's father was Chief Ochapowace. Chief Ochapowace was the son of Chief Kakisiwew. Sam Isaac testified that Walter Ochapowace was the son of Chief Kakisiwew, but all other evidence indicates that Walter Ochapowace was the grandson of Chief Kakisiwew.

- Wesley Bear is the great-grandson of Jacob Bear. Jacob Bear was a translator during the signing of *Treaty 4* and later became a member of Kakisiwew. He was included on the Kakisiwew paylist in 1876. According to Cameron Watson, Jacob Bear had not transferred fully to Ochapowace until 1890. Wesley Bear is also related to Chacachas headman Little Assiniboine as he is a cousin of Sharon Bear.

- Audrey Isaac's great-great-great grandfather is Chief Kakisiwew. She is the niece of Sam Isaac, and is similarly related to Chief Kakisiwew.

- Freda Allary's great-grandfather is Thomas Allary/Henry. Cameron Watson described the Henry/Allary family as coming from Cowessess in 1896. Ross Allary said that his father, Alexander Allary (who is also named as Freda Allary's grandfather) was the son of Louis Henry, not Thomas Allary/Henry.

- Freida Sparvier's great grandfather is "Two Voice". Her grandfather was Peter Watson/Pacatowashyn.

- Mavis Bear's great-great grandfather was Jacob Bear. As described above for Wesley Bear, the timing of Jacob Bear's membership in Kakisiwew or Ochapowace is not clear.
- Michael Kenny's great-great grandfather was Sam Isaac.
- Shirley Flamont's great-great-great grandfather was Chief Kakisiwew.

[246] Except for Sam Isaac, Wesley Bear, and Audrey Isaac, the other Kakisiwew Plaintiffs did not provide evidence at trial regarding their ancestral connection to the Kakisiwew Band. Instead, the Bear Plaintiffs provided evidence of their descendancy through an affidavit from Robert George, a member of the Kakisiwew Committee, that was attached to a motion record from 2007 and tendered in trial as part of a supplementary trial record. Unfortunately, this motion record is not very clear in explaining who each of the named ancestors were in relation to Kakisiwew.

[247] For the purpose of this case, I accept that Sam Isaac and Audrey Isaac have shown they are ancestrally connected to the Kakisiwew Band. Wesley Bear has shown he is ancestrally connected to Jacob Bear, whose membership in Kakisiwew is not clear, given that he was listed on the Kakisiwew paylist in 1876, but evidence provided by Ochapowace indicates that Jacob Bear did not transfer into Ochapowace formally until 1892.

[248] Wesley George, the Kakisiwew deponent, and late Chief Denton George stated in examination for discovery that the Ochapowace Band is the same entity as the historic Kakisiwew Band. Ross Allary, a witness for Ochapowace, confirmed that he also believed Ochapowace and Kakisiwew to be essentially the same.

[249] The interrelationships within and between the three groups (Chacachas, Kakisiwew and Ochapowace) make the settling of some of the remedies difficult. The remedies need to be fashioned in a practical but sensitive manner taking account of these complex relationships.

VIII. Procedural History

[250] The Watson and Bear Plaintiffs each commenced their actions on November 16, 2000. The Crown filed its first Statement of Defence on January 30, 2001. Ochapowace filed its initial Statement of Defence and Counterclaim against the Crown on March 7, 2001. All pleadings have been subsequently amended at least once.

[251] In 2008, and subsequently amended by an order in 2011, Justice Hugessen set out the questions to be determined in this first phase of trial, as described in paragraph 8 [First Phase Order].

[252] Justice Fothergill in *Watson v Canada*, 2017 FC 321, 290 ACWS (3d) 452 [*Watson*], granted the Crown's motion for summary dismissal in part. He concluded that the Plaintiffs were estopped from advancing claims for land or other compensation with respect to factual and legal matters addressed in the TLE Settlement Agreement and 1919 Surrender Agreement. He found that there was a triable issue regarding whether the release provisions of the Settlement Agreements preclude the Plaintiffs from pursuing actions for declarations that the Chacachas and Kakisiwew Bands continue to exist. Justice Fothergill also determined that issues of standing, limitation periods, and laches raised triable issues that could not be suitably dealt with on a motion for summary judgment.

[253] On January 8, 2018, Justice Lafreniere consolidated these two actions (T-2153-00 and T-2155-00) to be heard together to determine the issues for phase one of the trial as contemplated by the amended First Phase Order.

IX. Issues

[254] The Court has set out the facts in some detail as there has been an absence of written history of key events in the lives of the Historical Bands. This decision will form a small part of the record of the people now and for the future.

[255] The issues to be decided in this First Phase of trial are framed by questions in the First Phase Order. Answers to questions 1 and 2 of the First Phase Order have been agreed to by the parties - the Chacachas and Kakisiwew Bands existed as Indian bands in 1874 when *Treaty 4* was signed. I have addressed the issues with reference to the First Phase Order, but I have combined, separated, and re-ordered the questions where appropriate for my analysis.

[256] In order to answer the questions set out in the First Phase Order, the issues to be decided are as follows:

1. Were Chief Chacachas' band and Chief Kakisiwew's band amalgamated, consolidated, or otherwise joined together? If yes, was it properly done?
2. Can the Chacachas Band and Kakisiwew Band continue to assert and exercise their treaty rights as distinct treaty bands?
3. Are the Chacachas and Kakisiwew Bands prevented from asserting they are distinct treaty bands by estoppel, statutory limitation periods, or laches and acquiescence?
4. Do the named plaintiffs have standing to bring these claims?

5. If the Historic Bands were unlawfully amalgamated, what is the legal status of Chacachas, Kakisiwew and Ochapowace?

6. Is declaratory relief available for any of these questions if compensatory relief is barred by limitations periods?

X. Analysis

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

[257] I have already provided my assessment of the historical factual process of amalgamation above. There is no doubt about the existence of a purported amalgamation, at least in the eyes of the Crown. I now address whether the Crown met its obligations regarding the amalgamation of the Historic Bands.

[258] The parties' arguments raise three situations that may create Crown obligations: 1) initial reserve creation, 2) surrender of the initial reserves and creation of the joint reserve; and 3) amalgamation of bands. The Plaintiffs and Ochapowace claim breaches of trust, fiduciary obligations and treaty as a result of the process of re-location, co-location, and amalgamation of the Historic Bands. For the purpose of this phase of trial, the Crown's obligations regarding the amalgamation of bands are most relevant, but it is also helpful to review the Crown's obligations regarding reserve creation and surrender.

[259] I have concluded that the Crown breached its fiduciary obligations owed to the Historic Bands and its obligations under *Treaty 4* by failing to obtain the agreement of the bands to amalgamation.

[260] Although tangential to the issue of amalgamation, the Court also finds that the Crown breached its fiduciary duty to the Chacachas Band by failing to protect and preserve their reserve interest.

[261] Prior to determining the Crown's obligations in this case, it is necessary first to review the relationship between the Crown's broader fiduciary relationship with Indigenous peoples, its specific fiduciary duties, and the honour of the Crown. This puts some further context around key matters in this specific litigation.

[262] The relationship between the Crown and Indigenous peoples is generally fiduciary in nature. This relationship is grounded in the assertion of Crown sovereignty, but not all dealings of parties in a fiduciary relationship are governed by fiduciary obligations (*Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4 at para 43, [2018] 1 SCR 83 [*Williams Lake*]).

[263] This general fiduciary relationship is linked with the honour of the Crown (*Williams Lake* at para 43). As confirmed by the Supreme Court of Canada in *Manitoba Metis Federation Inc v Canada (Attorney General),* 2013 SCC 14 at para 73, [2013] 1 SCR 623 [*Manitoba Metis*], the honour of the Crown gives rise to the Crown's *sui generis* fiduciary duties.

[264] A specific fiduciary duty arises between the Crown and an Indigenous group in two ways:

A. A *sui generis* obligation arises where there is a specific or cognizable Aboriginal interest and a Crown undertaking or assumption of discretionary control over that interest in the nature of a private law duty (*Williams Lake* at para 44; *Guerin v The Queen*, [1984] 2 SCR 335 at para 100, 13 DLR (4th) 321 [*Guerin*]).

B. A private law *ad hoc* fiduciary duty where the Crown has undertaken to act in the best interests of a defined beneficiary who is vulnerable to the Crown's exercise of discretion and whose legal or substantial practical interests would be adversely affected (*Williams Lake* at para 44; *Manitoba Metis* at para 50). This type of duty only arises where the Crown has undertaken to uphold a duty of loyalty to only the beneficiary, which is rare as the Crown is generally acting in the public interest (see *Manitoba Metis* at paras 61-63). Pertinent to this case, it can arise where the Crown makes an affirmative Treaty promise and owes no other group a duty of loyalty in implementing that promise (*Restoule v Canada (Attorney General)*, 2018 ONSC 7701 at paras 520-528, 300 ACWS (3d) 226).

[265] In addition to giving rise to specific fiduciary duties, the honour of the Crown also informs how the Crown makes treaties, implements treaties, and must act in accomplishing the intended purposes of treaties (*Manitoba Metis* at para 73). The honour of the Crown requires that the Crown purposively interpret its treaty promises and act diligently to fulfill them (*Manitoba Metis* at para 75).

[266] The honour of the Crown is not a cause of action, but directs how the Crown is to fulfill obligations. In this case, the honour of the Crown informs what rights and obligations flowed

from *Treaty 4*, in addition to giving rise to its *sui generis* fiduciary duties. It is a constitutional principle with the ultimate purpose of the reconciliation of pre-existing Indigenous societies with the assertion of Crown sovereignty (*Manitoba Metis* at para 66; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 42, [2010] 3 SCR 103 [*Little Salmon*]).

(1) Creation of 1876 Reserves

[267] In determining the impact of the survey of reserve lands in 1876 on Crown obligations in this case, it is first necessary to assess whether lands surveyed ever legally became reserves set apart for the use and benefit of the Chacachas and Kakisiwew Bands respectively.

[268] Whether a reserve was created is a context-specific inquiry, but the Supreme Court of Canada in *Ross River Dene Council Band v Canada*, 2002 SCC 54 at para 67, [2002] 2 SCR 816 [*Ross River*] set out four general requirements that apply to the creation of reserves: 1) the Crown had an intention to create a reserve, 2) the intention is possessed by Crown agents with sufficient binding authority, 3) steps are taken to set apart the land as reserve lands for the benefit of the Indians, and 4) the relevant band must have accepted the reserve lands and started to use the lands set apart. Although the Supreme Court of Canada in *Ross River* emphasized that reserve creation in Canada has been varied and inconsistent, this four part test has now been accepted as the general reserve creation test (see *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 13, [2002] 4 SCR 245 [*Wewaykum*]; *Montana Band v R*, 2006 FC 261 at paras 649-650, 148 ACWS (3d) 507 [*Montana*]).

[269] The first three criteria are clearly met in this case, as shown by the fact that senior government officials sent Surveyor Wagner out with the purpose of surveying reserves for *Treaty 4* and the Chacachas and Kakisiwew Reserves were then listed as reserves that were "set apart" in an 1877 Schedule of Reserves. Dr. Whitehouse-Strong and Dr. Storey agreed that the government had likely intended to set apart the reserves.

[270] The main point of contention between the experts is the fourth criterion, whether the reserves in question were used and accepted by the Historic Bands.

[271] As concluded above at paragraphs 118-127, at least parts of the Kakisiwew Band and Chacachas Band used their reserves to some extent prior to 1881. The Kakisiwew Band is better documented as having started to farm their reserve by 1878, but part of the Chacachas Band also appeared to have started using their reserve sometime between 1879 and 1881.

[272] Given that the government only recorded agricultural use of reserve lands, the oral history evidence is helpful in providing additional evidence of other land use by the Chacachas Band. Specifically the story of Kanipatit from Sharon Bear supports that at least some members of Chacachas lived and hunted on the reserve land and used it as their own until 1881.

[273] I do not take the criterion of "accepted" to be the same as acceptance in contract law nor that acceptance is a waiver of any claims that the reserve was not properly created. Acceptance in the context of use connotes a degree of permanence and attachment to the land akin to

"occupation" in conjunction with use. To hold otherwise is to impose an unduly narrow and technical definition.

[274] In this initial reserve creation process, the Crown was exercising a public law function under the *Indian Act* to set aside reserves (*Wewaykum* at para 86). In creating the reserves, the Crown had a general obligation of loyalty, good faith, appropriate full disclosure, and acting with ordinary prudence (*Wewaykum* at para 86).

[275] The Crown did not have a specific fiduciary obligation with respect to the land prior to reserve creation, even where a treaty included a promise of land to the band, as it is the use and occupation of land that gives rise to a specific Aboriginal interest in land (*Manitoba Metis* at para 58).

[276] The Crown had an obligation under *Treaty 4* to consult the Chacachas and Kakisiwew Bands about the location of their reserves and set apart a reserve for each band according to the formula for reserve size set out in *Treaty 4.* These obligations appear to have been met as the Historic Bands were on balance consulted on the initial reserve locations and the reserves were accordingly surveyed and set apart.

[277] The evidence establishes that the 1876 reserves were created for the respective Historic Bands.

(2) Surrender of initial reserves and creation of the Joint Reserve

[278] Because I have concluded that the 1876 reserves were created, the Historic Bands had to consent to the surrender of their reserves. The weight of the evidence confirms that the Chacachas Band did not consent to the surrender of their reserve, although the Kakisiwew Band did and to the re-location of their reserve. However, neither band formally surrendered their original 1876 reserves.

[279] Once a reserve is created, the Crown has a fiduciary duty to use ordinary diligence to protect and preserve the Band's interest in reserve lands from invasion or destruction by third parties or the Crown itself (*Wewaykum* at para 100). As long as there are remaining band members for which the reserve was set aside – which there were, the Crown is obligated to preserve and protect their reserve interest (*Montana Band* at para 495).

[280] Under *Treaty 4*, the Crown was required to obtain the consent of a band prior to surrender of a reserve. Section 37 of the *Indian Act, 1880*, SC 1880, c 28 required a majority vote by those members who were habitually resident on the reserve. The *Indian Act, 1880* required that a representative of the Superintendent General and a Chief or principal man present at the band's vote then certify under oath of the band's assent to release or surrender.

[281] A surrender that does not strictly follow the provisions of the *Indian Act* will not necessarily mean there was a breach of a fiduciary duty, unless Canada acted in an unconscionable or unreasonable way inconsistent with the bands' interests (*Papaschase Indian*

Band No 136 v Canada (Attorney General), 2004 ABQB 655 at para 83, 365 AR 1 [*Papaschase ABQB*], rev'd in part *Papaschase Indian Band No 136 v Canada (Attorney General),* 2006 ABCA 392, 404 AR 349 [*Papaschase ABCA*], aff'd on other grounds *Canada (Attorney General) v Lameman*, 2008 SCC 14, [2008] 1 SCR 372 [*Lameman*]).

[282] However, the absence of a breach of fiduciary duty does not create a valid surrender of lands or regularize a breach of the statutory requirements.

[283] Given that I have concluded that the 1876 reserves were properly set apart, there is no evidence that the Chacachas Band formally surrendered its reserve. There is no evidence that the Chacachas members who continued to reside on the reserve had any type of vote in support of the surrender. In addition, there is no evidence to indicate that the two Chacachas headmen present in the Qu'Appelle area in 1881 would have or could have bound the entire band to the surrender when the chief, the other two headmen, and two thirds of the members were not present. This is further supported by the recorded protests of the band members who returned to find their band co-located on a reserve with Kakisiwew.

[284] As a fiduciary, Canada acted unreasonably and inconsistently with the Chacachas Band's interests by re-locating its reserve when the leadership and most of the membership of the band was away from the reserve. The Crown failed to protect and preserve the Chacachas band members' reserve interests by not obtaining the consent of the Band or its members to the surrender of their reserve land.

[285] In contrast, I find that the Kakisiwew Band leadership consulted with its members regarding the change in reserve location. This fact plus the viable reason for re-location due to the lack of timber on the initial reserve, indicates that the Crown likely did not breach its fiduciary duty in re-locating the reserve, even if there is no record of a formal surrender. The re-location of the Kakisiwew Reserve does not appear to be unconscionable or unreasonable.

[286] The Bear Plaintiffs have argued that this failure to protect and preserve the reserves of the Historic Bands is a breach of trust. Although these fiduciary obligations are "trust-like", reserve land is not held in trust nor does a trust relationship arise upon surrender of a reserve, as explained by Justice Dickson in *Guerin* at 386-387.

(3) Amalgamation

[287] As said in the Overview, but which deserves repeating here, in amalgamating the Historic Bands without their consent, the Crown breached its fiduciary obligations owed to the Historic Bands and failed to honourably fulfill and uphold the promises in *Treaty 4* according to the honour of the Crown. By causing the Historic Bands to share a reserve, receive treaty annuities together, and share a band governance structure, without their consent, the Crown prevented the bands from exercising their treaty rights as separate rights-bearing collectives.

[288] The term "amalgamation" refers to when the two bands, initially recognized by the Crown as distinct bands under *Treaty 4* and the *Indian Act*, became one band under the *Indian Act*. This was an administrative action by the Crown to treat the Bands as one band. Based on the definition of "band" under subsection 2(1) of the *Indian Act, 1880*, a band must have a reserve

interest or share alike in the distribution of annuities or interest moneys for which the federal government is responsible (*Montana* at paras 444-446). In *Montana* at para 454, the Federal Court confirmed that treaty annuities were included in distributions from the Crown in which bands shared alike. Therefore, the Bands would have been considered as amalgamated under the *Indian Act* once they no longer had separate reserve interests or separate treaty annuity paylists.

[289] In this case, the two Historic Bands shared a reserve interest as of 1881, but remained separate bands under the *Indian Act* until they started consistently receiving treaty annuities together on one paylist in 1884 (they also received treaty annuities together in 1882, but then received them separately in 1883). In addition, they had the same Band Council as of 1884. By 1884, the Historic Bands became one band under the *Indian Act*.

(a) *Fiduciary Obligations regarding Amalgamation*

[290] Although the process of reserve creation is generally part of the Crown's public duties, the amalgamation of the Historic Bands involved the exercise of the Crown's significant discretionary control over band membership, treaty annuities, and reserve lands following the setting apart of the Joint Reserve. The process of amalgamating the bands was more than merely creating a reserve, as it also required that the Crown combine the membership of the bands, paid their annuities on one treaty paylist, and only recognize one band government.

[291] As there was no statutory authority to amalgamate bands under the *Indian Act*, the Crown's authority to amalgamate bands comes from its discretionary authority under the Crown prerogative to make decisions consistent with its duties to Aboriginal peoples (*Papaschase*

ABQB at para 90). In exercising its discretionary power over band membership and reserve lands to combine the bands, the Crown had a *sui generis* obligation to act in the Historic Bands' best interests (*Peepeekisis Band v Canada (Minister of Indian Affairs and Northern Development),* 2013 FCA 191 at paras 40-41, 232 ACWS (3d) 1 [*Peepeekisis FCA*]).

[292] Given that the combination of bands fundamentally affected the ability of the Historic Bands to the use and benefit from their own reserve lands, I have determined the Crown had a duty to consult with the Historic Bands prior to combining the bands' membership and reserve interests as part of its fiduciary obligations to the Bands. This Court has previously found that the Crown has a duty to consult in matters involving land that varies with the circumstances (see *Fairford First Nation v Canada (Attorney General) (1998),* [1999] 2 FC 48 at paras 197-199, 156 FTR 1 (TD)).

[293] By not consulting with Chacachas particularly regarding the amalgamation of the Bands, especially given the recorded protests of the returning Chacachas members in 1883, the Crown breached the fiduciary obligations it owed to Chacachas.

(b) *Treaty Obligations and the Honour of the Crown*

[294] I also find that the Crown failed to honourably carry out its treaty obligations by failing to obtain the consent of the Historic Bands to amalgamation. As the honour of the Crown informs treaty-making and implementation, it impacts how the Crown could treat the two Historic Bands when implementing the promises of *Treaty 4*. Although the setting aside of reserves for bands and the recognition of bands which occurred was impacted by the *Indian Act*, the acts of setting

aside reserves and payment of treaty annuities for Chacachas and Kakisiwew were based in the promises of *Treaty 4*. Therefore, administrative actions taken under the *Indian Act* in this case impacted the implementation of treaty promises.

[295] In determining what *Treaty 4* and the honour of the Crown required to lawfully combine bands, one must look to the words of *Treaty 4* to assess the nature of the promises made and then determine whether the Crown's actions were honourable in implementing and achieving the intended purposes of *Treaty 4*.

[296] The Watson Plaintiffs argued that an underlying promise of *Treaty 4* is "to recognize the existence of the Bands with whom it signed Treaty". As I interpret the gist of the argument from the Plaintiffs' perspective, the promise is inherent in the treaty process itself by accepting the Historic Bands' signature and making commitments to them, recognition and preservation is a fundamental term of the Treaty. Unfortunately, the Plaintiffs have not argued clearly how to interpret the treaty to find this promise.

[297] I have therefore applied the following rules of treaty interpretation, as summarized by Justice McLachlin (as she then was) in dissent in *R v Marshall*, [1999] 3 SCR 456 at para 78, 177 DLR (4th) 513 [*Marshall 1*]:

> 1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation.
>
> 2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories.
>
> 3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention

> the one which best reconciles the interests of both parties at the time the treaty was signed.
>
> 4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed.
>
> 5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties.
>
> 6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time.
>
> 7. A technical or contractual interpretation of treaty wording should be avoided.
>
> 8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic.
>
> 9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context.
>
> [Citations omitted.]

[298] In interpreting treaties, the Court can imply a term on the basis of the presumed intentions of the parties where it is necessary for the efficacy of the treaty (*Marshall 1* at para 43).

[299] Under *Treaty 4*, bands represented by their signatory chiefs were the units through which many treaty benefits flow. Treaty benefits to bands included reserves, payments to band leadership, a school, and agricultural supplies. These rights are collectively held by the signatory band or its successor. Implicit and necessarily incidental to each of these promises is the continued existence of the band as an entity able to exercise its collective rights. Adopting the same analysis as in *Marshall 1* at para 43, if a bystander to the treaty negotiations had asked "is

the Crown allowed to unilaterally combine signatory bands?", the answer with regard to the honour of the Crown would be "of course not" as the continuity of the bands was fundamental to their ability to obtain the treaty promises that had been made specifically to each band.

[300] In addition, *Treaty 4* emphasized the requirement for consultation with each band prior to reserve creation and consent of the band prior to reserve surrender. If the Crown was able to unilaterally amalgamate bands without their consent, this would undermine the bands' ability to be consulted on reserve creation or consent to any reserve surrender as their members' views would be diluted by the members of the other band with which they were combined.

[301] The instructions of the Deputy Minister to Surveyor Wagner in 1875, less than a year after *Treaty 4* was concluded, also indicate that placing bands together on a reserve required their consent:

> The Minister thinks that the Reserves should not be too numerous, and that, so far as may be practicable, as many of the Chiefs of Bands speaking one language, as will consent, should be grouped together on one Reserve. [Emphasis added]

[302] This supports a conclusion that the parties to *Treaty 4* had a common intention to ensure that each band would remain separate from one another unless they consented to amalgamation. The Crown cannot resile from the intention and implied commitment.

[303] Interpreting *Treaty 4* to allow for the Crown to unilaterally amalgamate signatory bands would leave bands "with an empty shell of a treaty promise" (*Marshall 1* at para 52).

Amalgamating bands meant that bands would no longer be independently governed nor would they have their own reserve land.

[304] The Court's conclusion that the Crown did not have the unilateral authority to amalgamate these bands does not address, nor should it at this stage, the matter of the bands' respective governance or composition.

[305] Canada argued that the Crown did not have an obligation to hold a meeting or vote, or ensure agreement of the bands to amalgamation, citing *Papaschase ABQB* at para 92. In *Papaschase ABQB*, the Alberta Court of Queen's Bench found that there were no statutory requirements for merging bands in the 1880s. The Crown prerogative allowed the Crown to make decisions consistent with its duties to Aboriginal peoples, even where it had no specific statutory power under the *Indian Act* (*Papaschase ABQB* at para 90).

[306] The *Papaschase ABQB* decision does not resolve the issue before this Court. A key conclusion in *Papaschase ABQB* is that the Crown had to make decisions consistent with its duties to Aboriginal peoples when exercising the Crown prerogative.

[307] In *Papaschase ABQB* and the important distinction with this case is that the leaders of the bands had agreed to the amalgamation, although there was no general band meeting or vote in support of the amalgamation. Therefore, the issue in *Papaschase ABQB* was focussed on whether a certain procedure was required for amalgamation, whereas in this present case the issue is whether the Crown could combine two treaty signatory bands without any evidence of

consent from the leadership or the general membership of the bands, particularly the Chacachas Band.

[308] By failing to seek agreement of the bands to amalgamation, despite recorded protests of the Chacachas Band members to their co-location and loss of their chief, the Crown breached its treaty promises and failed to uphold the honour of the Crown by amalgamating the Historic Bands. The Historic Bands were therefore unlawfully amalgamated from the very beginning and it has continued to be an unlawful amalgamation.

[309] The Crown has also argued that the Court should find that the Chacachas Band was a dwindling band that joined the Kakisiwew Band to survive. Canada has argued that the oral history, which referred to Chief Chacachas having asked Chief Kakisiwew to look after his people when Chief Chacachas left the reserve, indicates that the Chacachas Band amalgamated with the Kakisiwew Band.

[310] If this was the case, then my findings on the nature of the amalgamation might be different but not necessarily so. If the Crown through other improper actions or omissions created the circumstances that force a “caretaker” role, the analysis would be different but perhaps not the result.

[311] However, there is little support for this theory in the expert’s reports or the documentary record. The oral history was not clear as to whether Chief Chacachas asked Chief Kakisiwew to look after his people before or after co-location of the bands. In addition, it is difficult to find that

the oral histories might support that the Chacachas Band consented to consultation when the consistent theme of all the oral history told was that neither Historic Band, and particularly the Chacachas, agreed to be combined in any permanent way.

B. *Can the Chacachas Band and Kakisiwew Band continue to assert and exercise their treaty rights as distinct treaty bands?*

[312] If the Historic Bands were unlawfully amalgamated, the question still remains regarding whether the Historic Bands can assert their treaty rights as continuing "treaty bands" and whether their status as "treaty bands" translates into any legal status.

[313] The question in the First Phase Order has worded this issue slightly differently, focussing on whether the bands are "entitled to be recognized as distinct treaty bands". As explained below, it is not entirely clear what it means to be recognized as a distinct treaty band, given that this is not the same as recognition under the *Indian Act.* I have interpreted this question as determining whether the Historic Bands have a continuing ability to assert treaty rights as separate collectives.

(1) Distinction between an *Indian Act* band and a "treaty band"

[314] It is important here to distinguish between *Indian Act* bands and what have been referred to in this litigation as "treaty bands". Canada has argued that there is no difference between a treaty band and an *Indian Act* band, as all bands are creatures of statute. The Plaintiffs and Ochapowace appear to suggest that there is a distinction, but that finding that the Historic Bands are treaty bands should mean that they are also bands under the *Indian Act*.

[315] This distinction was referred to by the Federal Court in *Montana* at paras 315-322 as the difference between "Big B" Bands (bands under the *Indian Act*) and "small b" bands (also referred to as anthropological bands or "bands in fact"). However, the Court in *Montana* then focussed on the rights and status of *Indian Act* bands to reserve land set aside under the *Indian Act* and did not discuss what rights might be held by so-called "small b" bands.

[316] The term "treaty band" is not a defined term in any statute. In this litigation, it refers to bands that were signatories to *Treaty 4* and therefore held collective treaty rights on behalf of their members. A treaty band, like any pre-existing Aboriginal collective, does not need to be a "band" under the *Indian Act* or recognized by the Crown in order to exist or hold treaty rights (see e.g. *Kwicksutaineuk Ah-Kwa-Mish First Nation v Canada (Attorney General),* 2012 FC 517 at para 91, 217 ACWS (3d) 751; *Perron v Canada (Attorney General),* [2003] OJ No 1348 at para 22, 121 ACWS (3d) 588 (Sup Ct J)).

[317] It is to these treaty bands, or their successor collectives, that the Crown owes treaty obligations. Treaty rights held by bands would include the rights to a reserve of a size determined by the per capita formula in the treaty, but would not include rights to specific reserve lands if the location of these lands are not identified in the treaty.

[318] At the time of signing of *Treaty 4* in 1874, the signatory bands were not bands under the *Indian Act.* The *Indian Act* was not in force until 1876, and it introduced the statutory definition of "band".

[319] In contrast, an *Indian Act* band is a "creature of statute" that is regulated by and exercises its powers in accordance with the *Indian Act* (*Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development*, 2001 FCA 67 at para 14, [2001] 4 FC 451 [*Blueberry River FCA*]). An *Indian Act* band therefore is a special statutory status for a pre-existing community, such as a treaty band.

[320] The status of being an *Indian Act* band brings with it additional rights set out in statute, such as rights to the specific reserve set aside for the band's use and benefit (*Blueberry River FCA* at paras 15, 27). The rights that flow from the setting apart of a reserve and the surrender of a reserve are held by an *Indian Act* band.

[321] Therefore the relationship between an *Indian Act* band and treaty band is complex. The *Indian Act* in some ways was an administrative vehicle used by the Crown to implement treaty obligations by facilitating the setting apart and surrender of reserve lands that had been promised by treaties. A treaty band held the status of an *Indian Act* band when a reserve was set apart for the band or when band members received treaty annuities.

(2) Status of Chacachas and Kakisiwew as "distinct treaty bands"

[322] Given that there is no legal meaning of "distinct treaty band", the Historic Bands cannot be entitled to have this status. What I understand to be truly sought with this "distinct treaty band" status is a finding that the Chacachas and Kakisiwew Bands as they currently exist are entitled to the treaty benefits owed to them by the Crown as separate signatories to *Treaty 4* as these would be the rights owed to them as "treaty bands".

[323] In order to assert a treaty right, a group must establish that the terms of the treaty promised that right, that the group asserting the right is the legal successor of the treaty signatory, and that the right has not been extinguished (*Badger*; *Marshall 1; R v Marshall*, [1999] 3 SCR 533 at para 17, 179 DLR (4th) 193 [*Marshall 2*]).

[324] I have concluded above that Chacachas and Kakisiwew were both signatories of *Treaty 4* and therefore had collective treaty rights that flow to the successor collective of each band. The Historic Bands had a treaty right to not be amalgamated without their consent, or conversely had a right to exercise their treaty rights as two separate entities. The Crown failed to honourably implement *Treaty 4* by treating the Historic Bands as a singular band under the *Indian Act.*

[325] I have also addressed below whether the Plaintiffs are the legal successors to the treaty signatories in the section on standing (see paras 414-443). I have found that the Watson Plaintiffs have sufficient continuity with the historic Chacachas Band to assert continuing collective treaty rights. However, the Bear Plaintiffs have not shown sufficient continuity with the historic Kakisiwew Band to assert collective treaty rights separately from the Ochapowace Band. The Ochapowace Band appears to be the successor to the Kakisiwew Band.

[326] Therefore, the remaining question regarding the ability of the bands to exercise continuing treaty rights is whether the Historic Bands' right to exist as separate bands under *Treaty 4* was extinguished by Crown action prior to 1982.

(3) Impact of the *Indian Act* on treaty rights

[327] The regulation of bands by the *Indian Act* has not extinguished the treaty rights of Chacachas or Kakisiwew. Extinguishment of rights prior to 1982 can only occur where the Crown shows strict proof of extinguishment and evidence of the government's clear and plain intent to extinguish treaty rights (*Badger* at para 41).

[328] Although Canada has not explicitly argued extinguishment, this is implied by Canada's argument that the Historic Bands are creatures of statute under the *Indian Act* and therefore they have no right to receive treaty benefits as separate signatories to *Treaty 4*. Although Canada takes the position on the facts that the Historic Bands agreed to amalgamation, Canada also appears to argue that the Indian Agent and other Crown officials could properly amalgamate bands even without their consent.

[329] Although I agree that the Crown under the *Indian Act* regulates the administration and management of bands, the *Indian Act* until 1951 did not have any provisions regarding amalgamation or the dissolution of bands. The definition of "band" on its own does not clearly or plainly extinguish the rights of a treaty signatory to remain as a separate band. As described above, this definition is meant to provide a statutory status to an Indigenous community, not to extinguish any underlying rights of that community. There is no clear and plain intent in the *Indian Act* to allow for the amalgamation of bands without their consent.

[330] Therefore, the rights of the Historic Bands to receive treaty benefits as separate bands were not extinguished by the regulation of bands by the *Indian Act*.

C. *Are the Chacachas and Kakisiwew Bands prevented from asserting they are distinct treaty bands by statutory limitation periods, laches and acquiescence, or estoppel?*

[331] The Watson Plaintiffs and the Bear Plaintiffs are not prevented from seeking a declaration that they are distinct treaty bands by statutory limitation periods, laches and acquiescence, or estoppel by representation. However, they are prevented from seeking any personal relief or rights to treaty land as a result of statutory limitation periods and estoppel.

(1) Estoppel by Representation

[332] The Chacachas and Kakisiwew Bands are not estopped from asserting they are distinct treaty bands, but they are prevented from claiming any further treaty land entitlement from Canada as a result of the TLE Settlement Agreement. Estoppel does not prevent either Historic Band from seeking land from Ochapowace. Although claims for land are not being determined in this first phase of trial, clarifying this limit on relief now is important in determining the effect of any declaration issued in this phase of trial.

[333] The three elements for estoppel by representation were set out in *Blueberry River FCA* at para 51, citing the House of Lords in *Greenwood v Martins Bank Limited*, [1933] AC 51 at 57: 1) 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; 2) An act or omission

resulting from the representation, whether actual or by conduct, by the person to whom the representation is made; and 3) Detriment to such person as a consequence of the act or omission.

[334] Canada argues that the Plaintiffs' claims for treaty lands should be dismissed on the basis that the Plaintiffs are estopped from making claims for treaty lands as a result of the TLE and 1919 Surrender Settlement Agreements that were made and ratified by the Ochapowace Band and its members.

[335] The Plaintiffs and Ochapowace argue that the Plaintiffs are not estopped by the Settlement Agreements since the agreements do not contain a release from the Chacachas or Kakisiwew Bands. The Watson Plaintiffs suggested that, at most, estoppel might limit the relief available in the next phase of trial.

[336] Estoppel has different effects between the right of Chacachas and Kakisiwew to seek recognition as distinct treaty bands – the first right - and their right to seek additional treaty land from Canada – the second right. The first right is the only one that the Court has to address in this phase of trial. The second right is to be litigated in a later phase. However, given that this Court has heard considerable evidence regarding the negotiation and ratification of the TLE and 1919 Surrender Settlement Agreements, I have addressed the effect of estoppel on both rights now in order to be able to assess the appropriateness of any declaration that may issue from this phase.

[337] The Ochapowace Band leadership and members represented to the Crown that the Ochapowace Band was the appropriate party to settle the treaty land entitlement claims, as well as the 1919 Surrender claims. Under Article 15.01 of the TLE Settlement Agreement, the Ochapowace Band released Canada on behalf of every Ochapowace Band member for all claims, rights, title and interest of the Band relating to TLE claims of the Ochapowace Band, or its predecessors in title. In Article 15.02, the Ochapowace Band also agreed to indemnify Canada for any claims from Ochapowace Band members that arise out of treaty land entitlement. This means that the Watson and Bear Plaintiffs are prevented from claiming treaty land from Canada, but not necessarily from Ochapowace.

[338] The Ochapowace Band and Canada intended to include the treaty land entitlement of Chacachas and Kakisiwew within the TLE Settlement Agreement. The Ochapowace Land Claims Committee, which included representatives identifying as Chacachas, Kakisiwew, and Ochapowace, led the research and negotiation of the TLE Settlement Agreement for the Ochapowace Band. The Committee agreed to base the TLE population numbers on Chacachas and Kakisiwew populations as of 1879. This 1879 population is included in Schedule 1 of the TLE Agreement.

[339] The use of the Chacachas and Kakisiwew population numbers from 1879 for the calculation of Ochapowace TLE is particularly salient. In doing so, the Ochapowace Band and its members represented to Canada that Ochapowace was the successor to Kakisiwew and Chacachas regarding their rights to land under *Treaty 4.* All descendants of Kakisiwew and Chacachas members counted in the TLE Agreement are estopped from making further TLE

claims against Canada on behalf of Kakisiwew, Chacachas or Ochapowace. All the Watson and Bear Plaintiffs who were of age in 1993 voted in the ratification election, and none of them challenged the validity of the agreement following its ratification.

[340] The Crown's awareness that amalgamation continued to be an issue during TLE negotiations does not mean that the Chacachas or Kakisiwew Bands, if re-established, can seek any more treaty land entitlement from Canada. Canada throughout negotiations maintained the position that the Historic Bands or Ochapowace did not have any claims to the 1876 reserves. The fact that the relevant Minister had suggested that the TLE Agreement include a surrender of the 1876 reserves in 1984 was clearly made in the context that Canada was wanting to "put the matter to rest", and was not acknowledging that the Historic Bands had a claim to the reserves. In addition, following 1984, the negotiations in the 1990s ended up concluding that the Ochapowace population would be based on the combined population of the Historic Bands in 1879. These negotiations overrode any past negotiations regarding the 1876 reserves.

[341] Therefore, the Watson and Bear Plaintiffs are estopped from seeking further TLE from Canada on behalf of the Kakisiwew and Chacachas Bands. The Plaintiffs are all members of the Ochapowace Band which represented to Canada that it was the right band with which to negotiate TLE. This induced Canada to act, to its detriment, by awarding Ochapowace membership significant amounts of land and financial compensation in the TLE Settlement Agreement. The Watson and Bear Plaintiffs have all benefitted from this settlement.

[342] In addition, the Ochapowace Band then used some of the TLE settlement funds to purchase and set aside reserve lands for the use of Chacachas members. This further indicates that the Ochapowace Band understood that the TLE Settlement Agreement settled the issue of treaty land entitlement for the Kakisiwew and Chacachas.

[343] However, the Watson and Bear Plaintiffs are not estopped from seeking a declaration that the Chacachas and Kakisiwew Bands were improperly amalgamated and are entitled to exist as separate bands.

[344] When interpreting a contract, like the TLE Settlement Agreement, the Court is to look at the words of the written contract in light of the factual matrix with an overriding concern for the intent of the parties and the scope of their understanding (*Creston Moly Corp v Sattva Capital Corp*, 2014 SCC 53 at paras 46-50, [2014] 2 SCR 633).

[345] A key part of this factual matrix was that both parties understood that the issue of the improper amalgamation of Kakisiwew and Chacachas was set aside during negotiations of the TLE Agreement. Canada's chief negotiator, Mr. Gross, understood that the Historic Bands could still seek band division through policy or as an internal band matter following the TLE Settlement Agreement. The parties to the agreement had the common intention that the TLE Settlement Agreement would not be the last word on the amalgamation. As there is nothing in the wording of the TLE Settlement Agreement that speaks to the assertion of other treaty rights apart from treaty land, there is nothing that stops Ochapowace members as representatives of the

Kakisiwew and Chacachas groups from bringing a claim for the establishment of the separate bands.

(2) Statutory Limitation Periods

[346] Statutory limitation periods bar the Plaintiffs' claims for compensatory damages arising from the improper amalgamation of the bands, but they do not bar a claim for declaratory relief that falls under the narrow exception for constitutional declarations described in *Manitoba Metis* at paras 133-140. I have addressed the application of limitation periods to the Plaintiffs' claims generally in this section and have addressed the application of limitation periods to a stand-alone declaration starting at paragraph 486.

[347] The Plaintiffs have made compensatory claims based on breach of trust, breach of fiduciary duty, breach of treaty, and conversion of the 1876 reserve lands. The primary causes of action relevant to this phase of trial are the claims for breaches of trust, fiduciary duty and treaty. While the Plaintiffs have not clearly described their claim of conversion of the reserve interest as a cause of action, I have had to consider how this claim would be affected by limitation periods in order to fully address the issues of limitation periods.

[348] Prior to issuing any of the declarations sought in this stage of trial, the Court must ensure that a declaration is not merely a "work around" for claims that are barred by statutory limitation periods (Lazar Sarna, *The Law of Declaratory Judgments*, 4th ed (Toronto: Thomson Reuters, 2016) at 8 [*Sarna on Declaratory Judgments*]).

(a) *Application of Limitation Periods to Aboriginal Law Cases*

[349] There is no question that statutory limitation periods can apply to cases involving Aboriginal and treaty rights (see *Wewaykum* at para 121; *Lameman* at para 13).

[350] The Watson Plaintiffs raised the issue of whether the Court should consider Article 8(2) of the *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UN GAOR, 61st Sess, Supp No 49 Vol III, UN Doc A/61/49 (2007) [*UNDRIP*] and Canada's recent adoption of the "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples" [Principles] when applying technical defences such as limitation periods and laches.

[351] Although Canada's endorsement of *UNDRIP* and the Principles may be perceived as a positive public policy step towards reconciliation, neither *UNDRIP* or the Principles can change or overturn limitation periods set out in statute. Currently, *UNDRIP* is a non-binding United Nations resolution supported by Canada as a political commitment. The Principles are not legally binding on the Crown. Although *UNDRIP* and the Principles might be able to aid in the interpretation of Canadian domestic law, the Watson Plaintiffs have not pointed to any area of limitations statutes where either would be a relevant interpretive aid (*Nunatukavut Community Council Inc v Canada (Attorney General)*, 2015 FC 981 at paras 103-106, 260 ACWS (3d) 651).

[352] Although the Supreme Court of Canada in *Manitoba Metis* at para 141 indicated that reconciliation must "weigh heavily in the balance" when applying limitation periods, it only

carved out a narrow exception to limitation periods for constitutional declarations. The Supreme Court did not indicate that the Court could ignore applicable statutory limitation periods generally for the purpose of furthering reconciliation.

(b) *Application of Saskatchewan Limitations Statutes*

[353] The Saskatchewan limitations statutes in force as of the filing of the claims on November 16, 2000 apply. Subsection 39(1) of the *Federal Courts Act,* RSC 1985, c F-7, and section 32 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, effectively incorporate applicable provincial limitations legislation into actions brought against the Crown in Federal Court (*Wewaykum* at para 114; *Tacan v Canada*, 2005 FC 385 at para 25, 261 FTR 161 [*Tacan*]).

[354] Therefore, the now-repealed Saskatchewan *Limitation of Actions Act,* RSS 1978, c L-15 [*LAA*] and *Public Officers' Protection Act*, RSS 1978, c P-40 [*POPA*] in force on November 16, 2000 apply.

[355] Although the Bear Plaintiffs have stated that the Saskatchewan *Limitations Act,* SS 2004, L-16.1 (in force as of May 1, 2005) applies, the relevant limitation statutes are those that set the limitation periods prior to or at the commencement of proceedings. The new legislation came into force after the claim was filed. In addition, paragraph 3(2)(c) of the current statute provides that previously in force limitations statutes apply for Aboriginal and treaty rights issues, which further confirms that the *LAA* and *POPA* apply to this case.

[356] When determining whether the *POPA* or *LAA* bar any claims arising from a finding that the bands were improperly amalgamated, it is important to identify what exactly the Plaintiffs claim. This is obfuscated by the division of this trial into multiple phases. Therefore, I have considered the application of limitation periods to all causes of action raised in the Statement of Claim.

[357] It is not critically important to determine whether the *POPA* applies in this case. Although I have found that the general statutory limitation periods in the *LAA* apply rather than the *POPA*, I have still found that all of the Plaintiffs' compensatory claims are barred by limitation periods. The *LAA* was Saskatchewan's general limitations statute, while the *POPA* set out a specific shorter limitation period for actions against a person acting under a public duty or authority. If it applies, the *POPA* would override the *LAA* as it is a more specific statute (*McGillivray v Popowich*, 2001 SKCA 103 at para 3, 213 Sask R 282).

[358] Paragraph 2(1)(a) of the *POPA* creates a 12 month limitation period for actions against a person acting in a public duty or authority. The Court has discretion to extend this limitation period under paragraph 2(1)(b) where the Plaintiffs have a *prima facie* case, a reasonable explanation for the delay, and where there is no prejudice to the Defendants.

[359] The *POPA* only applies where the person is a public authority acting according to a public duty (*Des Champs v Conseil des écoles séparées catholiques de langue française de Prescott-Russell*, [1999] 3 SCR 281 at para 50, 245 NR 201). The Federal Court of Appeal in *Peepeekisis FCA* at para 37 found that the management of reserve lands and band assets, such as

the surrender or taking of discretionary control over reserve lands, are quasi-proprietary *sui generis* obligations of the Crown that cannot be classified as public duties. Where a claim is based in the Crown's extraordinary discretionary control over band membership and allocation of land, this would also be a claim based on a duty more akin to a private law duty (*Peepeekisis FCA* at para 42). In contrast, the *POPA* applies to claims arising from the Crown's creation of reserves, as the Crown performs a public duty in creating reserves.

[360] The claims of the Plaintiffs are based on the *sui generis* obligations of the Crown, which are more akin to private law duties than public law duties, as in *Peepeekisis FCA*. The claims relating to breaches of fiduciary duty therefore are not covered by *POPA.* The Crown's fiduciary and treaty obligations with regard to the amalgamation of the Bands were not public law obligations. The Crown's amalgamation of the bands did not flow from any statutory duty nor were Crown actors having to balance their obligations with any other public duties. Rather the amalgamation was based on the Crown prerogative and the Crown's discretion to act in the best interests of the band (*Papaschase ABQB* at para 90). This would be more akin to a private law duty than a public law duty. Therefore, *POPA* would not bar these claims.

[361] I note that if *POPA* does apply, I would not find that the Court should exercise its discretion under paragraph 2(1)(b) to extend the limitation period. Given the negotiation of the TLE Settlement Agreement, there is no reasonable explanation for the delay in bringing a claim for any compensation regarding reserve land and Canada has acted in its detriment by paying settlement funds to Ochapowace.

[362] Section 3 of the *LAA* creates general limitation periods including six (6) year limitation periods for actions based in trespass or conversion (s 3(1)(e)), equitable grounds of relief (s 3(1)(h)) and any other actions not specifically provided for in statute (s 3(1)(j)). An action based in equitable grounds of relief includes claims for breaches of fiduciary duties (*Manitoba Metis* at para 138).

[363] Although I have found that the Plaintiffs cannot assert a breach of trust as a result of the loss of the reserve or amalgamation, sections 40 to 42 of the *LAA* confirm that the general 6 year limitation period will apply to claims for breaches of trust as well, unless the claim is founded on a fraudulent breach of trust or if the claim is to recover trust property still retained or used by the trustee (see the analysis of the equivalent Alberta provisions in *Papaschase ABQB* at para 126; *Samson First Nation v Canada*, 2015 FC 836 at para 28, 255 ACWS (3d) 1037 [*Samson First Nation*]).

[364] The maximum limitation period is a ten (10) year period under section 12 of the *LAA* for a claim to recover any rent charge or legacy. Although Canada has suggested this might apply, no one has made a convincing argument as to why this ten year limitation period would apply. It is not applicable to any claim flowing from a declaration that the bands were unlawfully amalgamated. The Federal Court of Appeal in *Peepeekisis FCA* at para 46 found that the six year limitation period applied to a claim for breach of fiduciary duty and loss of use of reserve land, rather than this ten year limitation period. The applicable limitation is therefore six years, subject to the following discussion.

(c) *Discoverability*

[365] Limitation periods do not start to run until the Plaintiffs knew or ought to have known the material facts for the causes of action. For claims for breach of fiduciary duty, as claims based in equitable grounds of relief under paragraph 3(1)(h) of the *LAA*, the six year limitation period does not start to run until the Plaintiffs actually discovered the material facts (*Lameman* at para 16).

[366] As these events occurred more than 135 years ago, the onus then lies on the Plaintiff to show late discovery of the claim (*Papaschase ABQB* at para 144). Otherwise, any limitation periods ran out a long time ago.

[367] In the months between trial and the writing of this judgment, Justice Zinn in *Shot Both Sides* at paras 500-505 addressed the application of limitation periods for breach of treaty claims. He found that limitation periods on a breach of treaty claim could not run until after April 17, 1982, when the cause of action for a breach of treaty rights arose through the coming into force of section 35 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*]. Adopting the reasoning of this case would mean that the limitation periods for breach of treaty claims would not start to run similarly until 1982.

[368] Given the suspension of the limitation period between September 11, 1985 and March 16, 1995 in this case, the claims would have been brought too late if the Plaintiffs knew the material

facts of the causes of action prior to 1984. Therefore, *Shot Both Sides* has little impact on the application of limitation periods in this case.

[369] The Chacachas and Kakisiwew Band members would have known many of the material facts of this claim in 1884. Most importantly they would have known that they did not consent to be co-located and amalgamated as soon as these events occurred. However, it is not necessary to go that far back to find that the Plaintiffs, or their ancestors, knew the material facts to bring the claims on behalf of the Kakisiwew and Chacachas Bands prior to 1984.

[370] Courts have generally not assessed limitation periods as starting to run in the context of historic Aboriginal and treaty rights claims until there is evidence of band members in the 20th century knowing all the material facts and choosing not to bring a case at that time (see *Wewaykum* at para 123; *Lameman* at para 17). It is the band members directly affected by the claim who must be aware of the material facts; all band members do not need to know the material facts (*Peepeekisis FCA* at para 49).

[371] The Plaintiffs do not need to have perfect knowledge of all facts, the law or the legal duties resulting from the material facts for limitation periods to start to run (*Samson First Nation* at paras 168, 175-176; *Ermineskin Indian Band and Nation v Canada*, 2006 FCA 415 at para 334, [2007] 3 FC 245). Although First Nations may have had difficulty bringing a case for breach of fiduciary duty prior to the *Guerin* case in 1984, limitation periods continue to run from the discoverability of the material facts, not from when an area of law was favourably clarified

(*Peepeekisis FCA* at para 50). The exception to this is if the cause of action did not exist, as was found in *Shot Both Sides.*

[372] Overall, I find that the Plaintiffs knew all the material facts to bring the claims regarding the loss of the initial reserves and the wrongful amalgamation prior to 1984. The material facts were that the Chacachas and Kakisiwew Bands were separate Treaty signatories, who were promised separate reserves under *Treaty 4*, never formally surrendered their initial reserves, and then were placed on a joint reserve and amalgamated without their consent. The Band members had knowledge of the material facts at least since the 1930s as shown by their inquiries and engagement of legal representation. By the 1950s, the Ochapowace Band could legally hire a lawyer to prosecute their claim. Cameron Watson confirmed that Chacachas descendants could have brought their claim in the 1950s.

[373] By the 1970s, the reports commissioned by the FSIN in 1974 and 1978 about the Ochapowace Band provided the supporting information needed for representatives of the Historic Bands to bring a claim. Although these reports may have interpreted the historical documents differently from the Watson and Bear Plaintiffs, they provided additional support to the oral history already held by the Plaintiffs that would have allowed them to know all material facts of the claim. The fact that the historical record is still unclear and subject to interpretation does not prevent the limitation period from running. The Plaintiffs have not established that any material facts were not known until after 1984.

(d) *Continuing Breach*

[374] The Watson Plaintiffs argue that the continued failure of Canada to recognize the existence of the Historic Bands is a continuing breach of Crown obligations. There is no merit to this argument.

[375] The Supreme Court of Canada in *Wewaykum* at para 135 stated that a continuing breach of fiduciary duty or Crown obligations will rarely be recognized because it would defeat the legislative purpose of limitation periods. A continuing breach of fiduciary obligations requires repeated or fresh damage that leads to both a continuing breach and a continuing obligation. A claim of breach of fiduciary duty as well as a failure to honourably implement treaties refers to some breach specific in time, even if the effects of the initial breach continue (see *Tacan* at para 70; *Samson First Nation* at paras 185-187; *Peter Ballantyne Cree Nation v Canada (Attorney General),* 2016 SKCA 124 at para 93, 272 ACWS (3d) 83). The breach of the Crown's obligation to honourably implement the Treaty occurred when it amalgamated the Bands in 1884.

(e) *Fraudulent Breach of Trust or Fraudulent Concealment*

[376] The Bear Plaintiffs argue that fraudulent concealment and fraudulent breach of trust by Agent McDonald suspended the applicable statutory limitation periods until the fraud was first discovered according to sections 4 and 43(2) of the *LAA.* Because Agent McDonald's involvement in the Qu'Appelle Land Syndicate was not known until 2015, they argue that this must suspend the limitation periods.

[377] There is no merit in the Bear Plaintiffs' argument that concealment of Agent McDonald's involvement in the Qu'Appelle Land Syndicate suspended the limitation periods until 2015. Suspension of the limitation period until after the Plaintiffs made a claim is illogical - the Plaintiffs could not have made a claim regarding the unlawful amalgamation in 2000 if they did not know the material facts to support that claim.

[378] The three part test for fraudulent concealment was set out by the Alberta Court of Appeal in *Ambrozic v Burcevski*, 2008 ABCA 194 at para 21, 433 AR 25 [*Ambrozic*]. First, the defendant must have perpetuated some kind of fraud. Second, the fraud must have concealed a material fact. Third, the plaintiff must have exercised reasonable diligence to discover the fraud.

[379] The Bear Plaintiffs have not shown that the first or second step of the *Ambrozic* test are met. The only fact that the Bear Plaintiffs were unaware of until 2015 was that Agent McDonald was involved in the Qu'Appelle Land Syndicate. All other facts that the Bear Plaintiffs allege were concealed by Agent McDonald, such as the treaty and statutory rights of the Kakisiwew Band, were known or available to the Kakisiwew Band prior to 2015.

[380] There is no question that the circumstances of the Qu'Appelle Land Syndicate are offensive, both by today's and at the time's standards. The involvement of senior departmental officials, police officers and surveyors and their apparent knowledge that they were to use their influence in Ottawa but to keep the matters secret reflects adversely on the participants. It may cause historians and the courts to severely scrutinize historical notations made by McDonald.

However, there must be a relationship between these nefarious motives and the amalgamation of the Historic Bands.

[381] Despite the colourful circumstances, the Bear Plaintiffs have not shown that McDonald's involvement in the Qu'Appelle Land Syndicate had any relationship to the co-location and amalgamation of the Historic Bands. Merely the existence of the Land Syndicate without any connection to the specific Bands or their reserve lands does not establish equitable fraud or unconscionable conduct towards the Bands, nor did it reveal an additional cause of action or a material fact with respect to the previously plead causes of action.

(3) Laches and Acquiescence

[382] The equitable doctrine of laches and acquiescence does not bar the Plaintiffs' claims for declaratory relief regarding the forced amalgamation of the Historic Bands and the continued existence of the Chacachas and Kakisiwew Bands for this first phase of trial. Given that the Plaintiffs are estopped from making claims for treaty land entitlement and are barred from making compensatory claims by virtue of statutory limitation periods, it is only necessary to consider whether declaratory relief regarding the unlawful amalgamation of the Historic Bands may also be barred by laches.

[383] As a declaration is an equitable remedy, it requires equitable conduct (*Wewaykum* at para 107). The equitable doctrine of laches requires the Plaintiffs to prosecute their equitable claims without undue delay (*Manitoba Metis* at para 145).

[384] The doctrine of laches and acquiescence will apply in two circumstances, as summarized by the Supreme Court of Canada in *Wewaykum* at para 111, citing *M(K) v M(H)*, [1992] 3 SCR 6 at 76, 78, 96 DLR (4th) 289 [*M(K)*]:

> …(i) where "the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver", and (ii) such conduct "results in circumstances that make the prosecution of the action unreasonable" [Citations omitted.]

[385] The length of the delay and the actions of the Plaintiffs in that time are important, as mere delay will not establish laches and acquiescence (*M(K)* at 76-78).

[386] In addition, the Supreme Court of Canada in *Manitoba Metis* at para 147 emphasized that "[a]cquiescence depends on knowledge, capacity, and freedom". Therefore, the Court can also consider the historical injustices suffered by the Indigenous plaintiff group, the imbalance of power between Indigenous groups and the Crown after the assertion of Crown sovereignty, other negative consequences flowing from Crown actions, and the rapidly evolving nature of the law regarding Aboriginal and treaty rights. Generally, the Court in *Manitoba Metis* found that a claim for a declaration that the Crown failed to fulfill constitutional obligations according to the honour of the Crown would likely not be barred by laches.

[387] Canada argues that the doctrine of laches and acquiescence bars the Plaintiffs' claims because of the negotiation and execution of the TLE and 1919 Surrender Settlement Agreements by the Ochapowace Band and its members. Canada submits that the Plaintiffs' conduct during the negotiation and execution of the TLE and 1919 Surrender Settlement Agreements can satisfy both branches of laches and acquiescence. First, the Plaintiffs acquiesced to the representation of

the Ochapowace Band that the band was the legal successor of Chacachas and Kakisiwew and failed to assert their rights when the settlement agreements were negotiated and ratified. Second, prosecution of this claim would be unjust because Canada acted in its detriment by paying the Ochapowace Band and members to settle claims to treaty lands.

[388] Similar to the estoppel by representation argument, I agree that the Plaintiffs acquiesced to the representation of the Ochapowace Band and its members that the Ochapowace Band was able to exercise the Historic Bands' claims to land under *Treaty 4.* Canada acted to its detriment by relying on this representation and therefore the Plaintiffs are barred from making claims for additional treaty land entitlement from Canada, whether on behalf of the Ochapowace Band or the Historic Bands.

[389] However, laches do not bar the claim for a declaration regarding the unlawful amalgamation and continued existence of the two Historic Bands as distinct treaty bands. As stated above, the TLE negotiators on both sides were aware that the amalgamation issue was "set to one side" to be dealt with later. The representation to Canada in the TLE Settlement Agreement was that Ochapowace was accepting the TLE on behalf of Chacachas and Kakisiwew descendants, but this did not mean that Chacachas and Kakisiwew could not otherwise seek redress for the amalgamation.

[390] Aside from the impacts of the TLE Settlement Agreement, it would not be in the interests of justice to bar the claim on the basis of laches for declarations that the amalgamation was unlawful and the Historic Bands' continuing right to seek re-establishment. The Crown's

interference with band governance started with the amalgamation of the bands and then continued throughout the first half of the 20th century. This, in addition to the impacts of other adverse Crown actions on the Ochapowace Band, would make it unfair to bar a claim for declaratory relief regarding the constitutionality of Crown conduct on the basis of laches and acquiescence.

D. *Do the Plaintiffs have standing to bring these claims?*

[391] In analyzing whether either the Bear Plaintiffs or the Watson Plaintiffs have standing to bring these claims on behalf of the Historic Bands, the basic premise must be that someone should be able to enforce collective treaty rights for unrecognized Indigenous collectives (*Campbell v British Columbia (Minister of Forests and Range),* 2011 BCSC 448 at para 106, 201 ACWS (3d) 316 [*Campbell*]). If a band unlawfully lost its reserve and was amalgamated with another band, some group of people representing that historic band must be able to have standing to bring a claim to assert the community's collective rights.

[392] Therefore the test for standing for unrecognized Indigenous collectives should not be so circular so as to prevent a collective from seeking redress for a wrong where the asserted historical wrong caused the difficulties in standing. The issue with this type of circular standing argument was noted by the Alberta Court of Appeal in *Papaschase ABCA* at para 132, and reiterated in the summary judgment decision of this case in *Watson* at para 37.

[393] The purpose of determining standing is to ensure that parties have a right to make a claim or to seek judicial enforcement of a claim (*Soldier v Canada (Attorney General),* 2009 MBCA

12 at para 29, 174 ACWS (3d) 946 [*Soldier*]). It is to keep out interlopers and those who have no legitimate interest in the subject matter.

[394] Although standing is distinct from the merits of a case, the issue of standing especially in Aboriginal law cases is often difficult to distinguish from the substantive issues (*Soldier* at para 29). For example, in this case, the issue of whether the Plaintiffs represent modern collectives capable of asserting the collective treaty rights of Historic Bands is a question of standing but also substantively affects the existence of continuing treaty rights.

[395] The rights to receive treaty benefits as separate bands are held by the historic Chacachas and Kakisiwew Bands as collective treaty rights. These rights could not have passed to Ochapowace and could not be enforced by Ochapowace, given that the Historic Bands were not lawfully amalgamated. Therefore, the claims must be advanced on behalf of the Chacachas and Kakisiwew Band members, as derivative actions by representatives of the modern Chacachas and Kakisiwew groups.

[396] The Watson Plaintiffs have demonstrated that they have standing to bring a claim on behalf of the Chacachas Band to assert its collective rights. I find that the Bear Plaintiffs have not demonstrated that they have standing to bring a representative proceeding solely on behalf of the Kakisiwew Band.

(1) Standing to seek declaratory relief

[397] The Plaintiffs have only asked for a declaration in this first phase. Although the test for standing to seek declaratory relief may be somewhat more flexible than other forms of relief, the Court still must determine whether the Plaintiffs meet the test for standing to bring a representative proceeding where the declaration sought is regarding collectively held rights. As declarations will only issue if they have some utility or practical effect, the Court must be shown that the claim is brought by plaintiffs capable and authorized to assert those collective rights. These are rights that cannot be asserted by an individual (*Sarna on Declaratory Judgments* at 35).

(2) Plaintiffs' membership in the Ochapowace Band

[398] I reject Canada's arguments that the Plaintiffs lack standing because they are asserting collective rights vested in the Ochapowace Band or that the Plaintiffs' membership in Ochapowace prevents them from having standing to seek recognition of the Historic Bands.

[399] The Crown's failure to obtain the agreement of the Historic Bands to amalgamation meant that the Chacachas and Kakisiwew collectives continued to hold treaty rights within the Ochapowace Band. The fact that the Ochapowace Band is the only band recognized for the administrative purposes of the Crown does not mean that the Chacachas and Kakisiwew collectives are unable to assert rights held by those collectives.

[400] Canada has argued that the Watson and Bear Plaintiffs cannot be members in the Historic Bands because they are all members of the Ochapowace Band. The Federal Court has previously found that a person can only be a member in one band under the *Indian Act* (*Montana* at paras 515-516). In addition, plaintiffs cannot represent self-identified bands because groups cannot self-identify as bands under the *Indian Act* (see *Papaschase ABQB* at para 191).

[401] These arguments cannot be upheld because when the Plaintiffs are seeking the recognition of Chacachas and Kakisiwew as distinct treaty bands (Court emphasis), they are asserting treaty rights that are held by the successor groups to the treaty signatories. The claim for treaty rights as a separate treaty signatory is not a claim that flows from a band's status under the *Indian Act*, but as a collective holding treaty rights. If the Chacachas and Kakisiwew Bands had agreed to amalgamation, then all of their treaty rights would be exercised by the Ochapowace Band as the successor collective and the Historic Bands would have ceased to exist - but this did not occur.

[402] I would find that membership of the Plaintiffs in Ochapowace does prevent them from asserting the collective rights of Chacachas and Kakisiwew as *Indian Act* bands. This would mean that the Plaintiffs as separate collectives do not have standing to assert claims flowing from the loss of the initial reserve lands set aside in 1876. Although the Plaintiffs did not initially become members of Ochapowace when the Historic Bands were first amalgamated, the fact that none of the members protested their inclusion on the Ochapowace band list in 1951 bars the Plaintiffs from asserting that they are not members of Ochapowace as an *Indian Act* band (*Kingfisher v Canada*, 2001 FCT 858 at paras 98-100, 107 ACWS (3d) 540 [*Kingfisher FC*],

aff'd 2002 FCA 221). The Plaintiffs further demonstrated their membership in Ochapowace when they participated in the ratification votes for the TLE and 1919 Surrender Settlement Agreements.

[403] However, their membership in the Ochapowace Band under the *Indian Act* does not prevent them from having standing as representatives of the Chacachas and Kakisiwew Bands to assert collective treaty rights.

(3) Test for Representative Proceedings

[404] In order to assert the collective rights of the Historic Bands, the Plaintiffs have brought an action on behalf of the Historic Band members, as a representative claim. Although they have not specifically identified the proceeding as a "Representative Proceeding" in their pleadings as required by Rule 114(5) of the *Federal Courts Rules*, SOR/98-106 all parties have shown through their arguments that they understand that the claims are advanced on a representative basis.

[405] Rule 114 of the *Federal Courts Rules* governs representative proceedings in this Court. A version of Rule 114 allowing representative actions was in force when this proceeding was commenced and then was repealed in 2002. The Rule was re-introduced in 2007 primarily to better allow for a process for the assertion of collective Aboriginal and Treaty rights (*Enge v Canada (Indigenous and Northern Affairs*, 2017 FC 932 at paras 95-96, 284 ACWS (3d) 480):

114 (1) Despite rule 302, a proceeding, other than a proceeding referred to in	**114 (1)** Malgré la règle 302, une instance — autre qu'une instance visée aux articles 27

section 27 or 28 of the Act, may be brought by or against a person acting as a representative on behalf of one or more other persons on the condition that	ou 28 de la Loi — peut être introduite par ou contre une personne agissant à titre de représentant d'une ou plusieurs autres personnes, si les conditions suivantes sont réunies :
(a) the issues asserted by or against the representative and the represented persons	**a)** les points de droit et de fait soulevés, selon le cas :
(i) are common issues of law and fact and there are no issues affecting only some of those persons, or	**(i)** sont communs au représentant et aux personnes représentées, sans viser de façon particulière seulement certaines de celles-ci,
(ii) relate to a collective interest shared by those persons;	**(ii)** visent l'intérêt collectif de ces personnes;
(b) the representative is authorized to act on behalf of the represented persons;	**b)** le représentant est autorisé à agir au nom des personnes représentées;
(c) the representative can fairly and adequately represent the interests of the represented persons; and	**c)** il peut représenter leurs intérêts de façon équitable et adéquate;
(d) the use of a representative proceeding is the just, most efficient and least costly manner of proceeding.	**d)** l'instance par représentation constitue la façon juste de procéder, la plus efficace et la moins onéreuse.

[406] Under Rule 114(2), the Court has the discretion to determine whether the conditions for a representative proceeding are satisfied at any time, require that notice be given to the represented persons, and replace the representative if unable to represent the represented persons fairly and adequately.

[407] The parties did not refer to Rule 114 in their submissions, and the Plaintiffs have instead made submissions on standing in representative actions based on decisions determined in provincial superior courts, specifically courts in British Columbia. There is little case law specific to the application of Rule 114, so the British Columbia case law is persuasive, but is not binding on this Court nor is it based on an identical procedural rule. Primarily, the Court must assess standing for this representative proceeding based on its own procedural rule.

[408] The Court in *Wesley v Canada*, 2017 FC 725 at paras 19-20, 282 ACWS (3d) 781, considered the factors in British Columbia jurisprudence when determining whether the plaintiff was an appropriate representative of the class. The Court noted that representative proceedings were inappropriate where members had conflicting interests or where success for some will not be success for others.

[409] The BC Supreme Court has consistently stated its test for representative actions (see *Campbell*; *Quinn v Bell Pole*, 2013 BCSC 892 at para 19, 228 ACWS (3d) 966). This test was recently confirmed by the BC Court of Appeal in *Hwlitsum First Nation v Canada (Attorney General)*, 2018 BCCA 276 at para 8, 296 ACWS (3d) 737, leave to appeal to SCC refused, 38325 (29 March 2019) [*Hwlitsum*]:

> 1. whether the collective of rights-bearers on behalf of whom they [the plaintiffs] purport to act is capable of clear definition;
>
> 2. whether there are issues of law or fact common to all members of the collective so defined;
>
> 3. whether success on the petition means success for the whole collective so defined; and

4. whether the proposed representatives adequately represents the interests of the collective.

[410] Overall, Rule 114 has similar requirements to those set out in British Columbia jurisprudence. Rule 114 also requires that the collective is adequately defined in order to be able to determine whether the collective shares common interests or issues and whether the proposed representatives adequately represent the interests of the collective.

[411] In the case law on proceedings brought on behalf of unrecognized Indigenous collectives, courts have not always clearly stated the test that the plaintiffs have to meet, which has the effect of creating a moving target for representative plaintiffs. For example, in *Kingfisher FC* at para 59, the court primarily focussed on whether the plaintiffs could establish their descendancy in an unbroken line from the historic community. In *Papaschase ABQB,* the court found that descendancy was not enough to advance the rights of a historic collective and that the group had to also continue to exist as an *Indian Act* band and as an Aboriginal community to assert their rights to a reserve. In *Campbell,* the court confirmed that unrecognized historic collectives should be able to advance claims for collective rights, but would have to define membership in their collective by objective criteria beyond showing general descendancy from the historic collective.

[412] Therefore, I find it useful to summarize what is required for bringing a representative proceeding for an unrecognized rights-bearing collective under Rule 114. The Plaintiffs must:

1. define the collective with enough clarity to allow for the Court to determine whether the other requirements for representative proceedings are met;

2. show that the collective shares a collective interest or common issues, which includes showing that the representative plaintiffs have a connection to the rights-bearing collective;

3. demonstrate that the representative plaintiffs are authorized to act on behalf of the represented collective;

4. show that the representative plaintiffs are capable of fairly and adequately representing the collective; and

5. demonstrate that a representative proceeding is the preferable procedure to bring the claim.

(4) Application of the Test for Representative Proceedings

[413] Against these requirements, the Watson Plaintiffs have standing to assert the collective rights of the Chacachas Band, but the Bear Plaintiffs have not adequately shown that they have standing to assert the collective rights of the Kakisiwew Band.

(a) *Standing of Watson Plaintiffs*

[414] The Watson Plaintiffs have brought their claims as heads of family of the direct descendants of the historic Chacachas Band on behalf of all members of the Chacachas Band. Although the Watson Plaintiffs have not fully defined membership in the collective, the Watson Plaintiffs have shown that they have standing to bring a claim for declaratory relief regarding the improper amalgamation of the Historic Bands.

[415] Membership in the Chacachas Band is not currently objectively defined. There is evidence that Cameron Watson's band membership list from 2007 might be contested, given that other witnesses indicated that they did not feel that band membership should be based on

ancestry. In addition, the list identifies several Chacachas members with equal rights to assert their membership in the Kakisiwew Band. According to Sharon Bear, this would allow for members to choose their membership.

[416] However, Cameron Watson's proposed band list offers some criteria for Chacachas Band membership: 1) some ancestral link to a Chacachas Band member at the time of *Treaty 4,* 2) current membership in the Ochapowace Band, and 3) a willingness and interest in joining the Chacachas Band.

[417] The Court does not need to be able to determine who belongs to an Aboriginal collective itself, but must understand how the community objectively determines membership, in order to assess whether there are conflicts in the representative proceedings and to ensure that the named representative plaintiffs are appropriate (*Campbell* at para 154). In *Campbell* at paras 140-145 and also in *Hwlitsum,* the courts denied standing for a lack of objectively defined band membership. In *Campbell,* the plaintiffs had argued that membership would be determined by broad ancestral connection, without describing the level or type of ancestral connection required. In *Hwlitsum,* the plaintiffs only represented a part of the collective and could not represent the whole collective.

[418] Similarly, the Watson Plaintiffs have not described a threshold for ancestral connection to the Chacachas Band. Primarily, the Watson Plaintiffs have shown that they represent a group of Ochapowace members who have some ancestral link to the Chacachas Band members and recognize each other as part of the continuing Chacachas community. This is an inadequate

definition for the Watson Plaintiffs to be able to bring a claim for the division of the Ochapowace Band and its assets, as members may have conflicts of interests if they are entitled to Chacachas and Kakisiwew membership, or neither.

[419] However, I find that this type of definition for the collective is sufficient in this case to bring a claim in this first phase of trial for a declaration that the amalgamation was unlawful. The Watson Plaintiffs appropriately represent a subset of Ochapowace Band members who have continued to seek recognition as the Chacachas Band. The full impact of the definitional issue may be one of the subjects of the second phase but that issue is not a bar to at least address the issue of unlawful amalgamation.

[420] Unlike in cases such as *Campbell*, the Watson Plaintiffs represent a rights-bearing group that is currently subsumed in the Ochapowace Band due to unlawful amalgamation. Members of the Ochapowace Band are defined, therefore membership in Chacachas is not completely open.

[421] The fact that the unlawful amalgamation led to the difficulties in separating out membership in the Historic Bands and Ochapowace cannot be ignored. Therefore, this flexibility in providing standing to seek declaratory relief is necessary otherwise Canada at least could benefit from its unlawful actions to the detriment of members of the Historic Bands.

[422] There is no conflict of interest within this group in bringing a claim for a declaration that the Historic Bands were improperly amalgamated. This is supported by the fact that the elected council representing all Ochapowace members also supports a declaration regarding the

improper amalgamation of the Historic Bands. The fact that some Chacachas members may also have a claim to membership in Kakisiwew does not result in a conflict of interest in seeking a declaration regarding improper amalgamation. Conflicts of interest may arise between members of Ochapowace, Kakisiwew, and Chacachas in any other declaration reconstituting the Historic Bands or dividing the assets and membership of Bands. Therefore I do not find that the Watson Plaintiffs have standing to bring any other part of this claim without further evidence regarding membership in the Chacachas Band.

[423] The Watson Plaintiffs meet the other requirements of the test for bringing a representative proceeding described in para 412.

[424] The collective shares a common interest in the collective rights of the historic Chacachas Band. To assert the collective rights of the historic community, the Watson Plaintiffs must represent a contemporary community that has continuity with the historic rights-bearing community (*Campbell* at para 120).

[425] The Watson Plaintiffs have shown this continuity by demonstrating that the representative plaintiffs have some ancestral connection with the original Chacachas Band members and showing that self-identified Chacachas members continued to raise issues regarding their amalgamation in the 1880s, 1911, and the 1930s. In addition, the fact that Sharon Bear, as a Chacachas elder, had stories specific to the Chacachas reserve demonstrates that Chacachas descendants continued to hold and tell stories separate from Ochapowace. Divisions

reported in the band in the 1940s and 1960s further indicate that the Chacachas community continued to operate as a distinct group within the Ochapowace Band.

[426] The requirement that a rights-bearing collective must show some continuity with the original treaty signatory is flexible and should not require perfection. In *R v Van der Peet,* [1996] 2 SCR 507 at para 65, the Supreme Court of Canada stated that the requirement of continuity to assert aboriginal rights does not require an unbroken chain of continuity. Comparably, the assertion of treaty rights requires that a collective have continuity with the original collective, but should not require perfect continuity.

[427] Canada has argued that the Court should consider that there is no clear division in the bands because several Watson Plaintiffs and their family members have served as chiefs of Ochapowace and participated in negotiations on behalf of Ochapowace.

[428] I do not find this sufficiently breaks continuity with the historic Chacachas Band. Given that the creation of Ochapowace was the result of improper amalgamation, it would be unfair to punish Chacachas members for attempting to participate politically in the only band that was recognized by Canada.

[429] The witnesses from the Watson Plaintiffs, Bear Plaintiffs, and Ochapowace appeared to all agree that Chacachas was a separate group, even though Chacachas members had held leadership positions in the Ochapowace Band and intermarried with Kakisiwew members. The

recognition of Chacachas by the Ochapowace Band and the FSIN further supports that Chacachas as a continuing distinct group.

[430] I also conclude that the Watson Plaintiffs have sufficient authorization on behalf of the collective to bring this claim.

[431] The Watson Plaintiffs presented evidence regarding the selection of the Chacachas Interim Committee, which led to the initiation of this litigation and the selection of the representative plaintiffs. They provided evidence of meeting minutes, agendas, and notices provided to Ochapowace Band members. They had continued correspondence with the Ochapowace Council and received their support. Although more evidence on the notice issue would have been helpful, the Court is satisfied that the Watson Plaintiffs showed that they are authorized to bring this claim on behalf of members who self-identify as Chacachas Band members and who have some ancestral connection to a member of the Chacachas Band at the time of *Treaty 4.*

[432] Further, I find that the Watson Plaintiffs have shown they can fairly and adequately represent the collective.

[433] The Watson Plaintiffs have shown on a balance of probabilities that the named Plaintiffs each have an unbroken line of descent from members of the Chacachas Band prior to amalgamation, specifically Napitaseawew [phonetic] and Little Assiniboine. Two of the five

named Plaintiffs testified as to their own genealogy and other evidence supported that the other plaintiffs were similarly related to Napitaseawew and Little Assiniboine.

[434] Canada appears to suggest that the Court should question whether someone's ancestral connection is sufficient if they also have a connection to Kakisiwew or if their connection to Chacachas is through their maternal lines.

[435] The Court disagrees. The purpose of requiring some ancestral connection is to show that the Plaintiffs have continuity with the historic collective and can assert the rights of the collective. As collective treaty rights pass only to collectives, not individuals, it is more important that the group has continuity with the historic band and has accepted the representative plaintiffs as members.

[436] The overlap in membership between Chacachas and Kakisiwew will not prevent the Watson Plaintiffs from bringing a claim for declaratory relief regarding the improper amalgamation of the Historic Bands.

(b) *Standing of Bear Plaintiffs*

[437] However, despite the above finding regarding the Watson Plaintiffs, I would find that the Bear Plaintiffs have not shown that they have standing to advance the claim to collective rights of the historic Kakisiwew Band.

[438] First, the Bear Plaintiffs have not offered any evidence of a definition of membership in the Kakisiwew Band collective. Instead, they have left membership to be discussed in the second phase of trial. Although, as above, I do not think this is fatal to seeking declaratory relief in this first phase, it will not be enough for any later phase of trial.

[439] More importantly, second, the Bear Plaintiffs have not shown that they represent a collective that is continuous with the historic Kakisiwew Band. This is necessary to be able to assert collective rights of the Kakisiwew Band. Unlike the Chacachas Band, there is little evidence to show that the Kakisiwew Band has functioned as a community separate from the Ochapowace Band as a whole. This was confirmed by Ross Allary and the transcripts of Wesley George and Denton George, who agreed that Ochapowace and Kakisiwew were one and the same. The fact that the Ochapowace Band Council passed a resolution to change its name to the Kakisiwew Band further indicates that the Kakisiwew Band was seen to be indistinguishable from the Ochapowace Band.

The critical aspect is that there is little evidence demonstrating that the Kakisiwew Band is a collective separate from Ochapowace.

[440] Third, the Bear Plaintiffs provided insufficient evidence of authorization to bring this action on behalf of the collective. Wesley Bear confirmed that a Kakisiwew Family Representative Committee had formed based on 11 selected family representatives. However, no other information regarding how meetings were held or decisions made on behalf of the community was provided.

[441] Fourth, the Bear Plaintiffs have only shown that three out of eight representative plaintiffs have an unbroken ancestral line with original members of the Kakisiwew Band. Although this might be sufficient if the Bear Plaintiffs had met the other elements required for representative proceedings, this lack of evidence further contributes to problems with standing.

[442] I would find that only Sam Isaac, Wesley Bear, and Audrey Isaac have provided sufficient evidence to show that they descend in a sufficiently unbroken line from the Kakisiwew Band. The rest of the evidence on the Bear Plaintiffs' ancestral connection originated from an affidavit attached to a motion from 2007, which was entered into evidence at trial through a supplementary trial record. Even in considering this evidence, it was unclear how the representative plaintiffs had an unbroken link with original Kakisiwew members.

[443] Overall, I find that the Bear Plaintiffs have not shown that they have standing to bring a claim regarding the collective rights of the Kakisiwew Band, as there is no evidence to indicate that they represent a continuing community of Kakisiwew members separate from Ochapowace. The Ochapowace Band appears to be the successor collective of the Kakisiwew Band. In addition, the Bear Plaintiffs have not shown sufficient authority or definition of the collective to advance this claim.

E. *If the Historic Bands were unlawfully amalgamated, what is the legal status of Chacachas, Kakisiwew and Ochapowace?*

[444] I have found that the Historic Bands were unlawfully amalgamated and that the Chacachas Band has a continuing right to exercise its treaty benefits as a separate band from

Ochapowace. However, the Plaintiffs are estopped from seeking any additional treaty land entitlement from Canada as a result of the TLE Agreement. In addition, they are barred by limitations periods from claiming any compensatory relief as a result of the surrender of the reserve or amalgamation of the Bands.

[445] The next question set out in the First Phase Order is what "legal status" the bands might have. I interpret this question as asking whether the Chacachas, Kakisiwew, or Ochapowace Bands would be bands under the *Indian Act* if the Court finds that the Historic Bands were improperly amalgamated.

[446] The Plaintiffs and Ochapowace have argued that finding that the Historic Bands were improperly amalgamated should result in a declaration that the Historic Bands as well as the Ochapowace Band each are distinct treaty bands and bands under the *Indian Act.*

[447] Canada states that Ochapowace is the only *Indian Act* band and exercises collective treaty rights as the legal successor to Chacachas and Kakisiwew. Chacachas and Kakisiwew therefore would have no legal status as separate collectives or bands under the *Indian Act*.

[448] Prior to the amalgamation, the Chacachas and Kakisiwew Bands were bands under the *Indian Act* as well as treaty bands. After the amalgamation, only the Ochapowace Band was a band under the *Indian Act* as it was the only entity that met the statutory definition for a band. The amalgamation prevented Kakisiwew and Chacachas from being bands under the *Indian Act, 1880* definition as they no longer held separate reserves or received separate treaty annuities. I do

not find that the Court can declare that the Kakisiwew or Chacachas Bands are bands under the *Indian Act,* even if their amalgamation was unlawful.

[449] Unlike pre-existing First Nation communities, *Indian Act* bands as statutory entities can cease to exist when they no longer meet the statutory definition of a band. As stated by Justice Hugessen in *Montana* at para 456:

> Although there were no provisions in the *Indian Act* that expressly addressed the dissolution of a band during the period in issue, it would appear from the jurisprudence that bands at that time, whether by choice or circumstance, could cease to exist within the meaning of the Act...

[450] Once a band no longer had an identifiable group of members or lands vested in the Crown or annuities for which the Crown was responsible on the band's behalf, it no longer was factually or legally a band under the *Indian Act* (*Montana* at para 456; *Papaschase ABQB* at para 168).

[451] I have found that the Chacachas Band did have a reserve set apart for it in 1876 for its use and benefit in common and had treaty annuities held for the Band in common. However, after 1881, the Chacachas Band no longer had its own reserve, and after 1884, members were paid treaty annuities as members of the Ochapowace Band. Currently, the Chacachas Band does not meet the requirements to be a band under the *Indian Act* although it has continued to be a somewhat identifiable group.

[452] The Kakisiwew Band similarly had a reserve set apart for its use in 1876 and had treaty annuities distributed to the band. It no longer has its own reserve and is not paid treaty annuities

separately, nor does it have a group that is identifiable separate from the Ochapowace Band membership.

[453] In addition, given that the Historic Bands have ceased to meet the statutory requirements as *Indian Act* bands, the Court cannot declare or order Canada to declare that the Chacachas Band exists as an *Indian Act* band under the third prong of the definition outside the context of judicial review (see *Côté c R*, 2016 FC 296 at paras 15-16, 265 ACWS (3d) 277). Although the *Indian Act* now includes a power of the Crown to declare a body of Indians to be a band, the Crown has no statutory duty under the *Indian Act* to do so. No collective has any right under the *Indian Act* to be recognized as a band (*Papaschase ABQB* at para 172).

[454] As it stands now, Ochapowace is the only *Indian Act* band. Ochapowace is the only band with a reserve set aside for its members' use and benefit. Ochapowace has received all treaty entitlement lands and monies owed to both Kakisiwew and Chacachas under *Treaty 4.*

[455] The Watson Plaintiffs have asserted that if the Court finds that the amalgamation was improper, then the amalgamation is "void *ab initio*". They argue that this means that the bands would revert back to their status prior to 1881. If the effect of the "void" amalgamation was to truly return things to how they were before the amalgamation, then the Kakisiwew and Chacachas Bands would be bands recognized under the *Indian Act* because they would still have their own 1876 reserves and would be paid treaty annuities separately.

[456] It is difficult to see how one can rewrite history. At best courts can attempt to remediate wrongful acts. The assertion of "void" is not a rewrite of history.

[457] The Alberta Court of Queen's Bench in *Papaschase ABQB* at paragraphs 158-163 discussed the nature of finding an action void in the context of an improper surrender of a reserve. The court determined that voidness means that an act was not authorised, but it does not mean that the act did not happen. It means that once a limitation period runs on the "void" decision, it becomes valid for practical purposes.

[458] In this case, I have found that the limitation periods have run on the breaches of fiduciary duty and treaty that occurred when the Historic Bands lost their initial reserves and were amalgamated without consultation or agreement. This means that the surrender of the reserve and the amalgamation of the bands under the *Indian Act* became valid for practical purposes. Therefore the "voidness" of the amalgamation does not mean that the Historic Bands will automatically become bands under the *Indian Act,* as this would require the Court to find that the Historic Bands continue to either have reserves or monies set aside for their use and benefit. A declaration that the Historic Bands continue to be bands under the *Indian Act* because of the void amalgamation would essentially allow for the bands to get around the estoppel and limitation periods that bar compensatory relief in this case.

[459] The situation in this case demonstrates the problems with finding that an action would be void more than 135 years after the decision was made - however unlawful it was. To find the amalgamation was void would also have to result in the disappearance of the Ochapowace Band

and the division of lands and assets between the Kakisiwew and Chacachas Bands. This would fail to recognize the impact of such a declaration on the members who transferred to the Ochapowace Band after amalgamation. These "new" members joined a band which was a combination of Chacachas and Kakisiwew; they did not join only Kakisiwew or only Chacachas. If the creation of the Ochapowace Band as an *Indian Act* band was void, then these "new" members would not clearly belong to either band.

[460] A band member that transfers from one band to another forfeits the rights of one band and exercises the collective rights of the band they join, as collective rights pass by membership not ancestry (*Blueberry River FCA* at paras 17-18). Therefore, all members including "new" members, Chacachas descendants, and Kakisiwew descendants have rights as a whole to the collective rights of Ochapowace, such as rights in the current Ochapowace reserve and assets. These "new" Ochapowace members have also exercised treaty rights flowing from Kakisiwew and Chacachas as treaty signatories. The "new" members whose ancestors transferred from other bands did so with the understanding that they would continue to enjoy treaty rights as part of the Ochapowace Band.

[461] When the Supreme Court in *Manitoba Metis* issued its declaration regarding the constitutionality of the Crown's conduct, it noted that the declaration would not have an effect on any third party. Somewhat like a third party purchaser, the "new" Ochapowace Band members are third parties who rely on the continued existence of Ochapowace as a band under the *Indian Act* that exercises collective treaty rights on behalf of all band members.

[462] As the Watson Plaintiffs have not clearly defined membership in Chacachas, the Court is unable to go much farther in determining the legal status of Chacachas, Kakisiwew, and Ochapowace. There are potential conflicts of interest within the representative actions depending on who is a member of which group.

[463] For all of these reasons, I do not find that either the Chacachas or the Kakisiwew Band is an *Indian Act* band, nor can the Court declare that either is an *Indian Act* band.

[464] The Plaintiffs and Ochapowace have also suggested that the Ochapowace Band should be treated as an "involuntary trustee" of the Chacachas and Kakisiwew Bands. Unfortunately, they have not provided any support in case law for what it means for the Ochapowace Band to be an involuntary trustee of the Historic Bands. It is not clear what the trust property would be or what it means to be an "involuntary" trustee. It appears that the Plaintiffs and Ochapowace are suggesting that Ochapowace owes a fiduciary duty to Chacachas and Kakisiwew members, but that Canada should pay for any obligations owed by Ochapowace. The Plaintiffs have not made it clear how this would work, especially in the context of the TLE Settlement Agreement where Ochapowace indemnified Canada for any further claims of Ochapowace Band members.

[465] Without further evidence and argument, the Court is not prepared to make further findings on this issue, given that the nature of this finding could significantly impact the assets and resources of Ochapowace and its members. This may be an issue for the next phase in the case. At this point, further relief is premature.

[466] The Plaintiffs and particularly Ochapowace have been reluctant to explain to the Court what they envisage are the next steps after a determination of the lawfulness of the amalgamation.

[467] It is the Court's hope and expectation that the declaration as to the amalgamation will allow the Plaintiffs and Ochapowace, with or without the cooperation of Canada, to fashion a view of their future as communities.

F. *Declaratory Relief*

[468] The Plaintiffs and Ochapowace seek declarations that the Chacachas and Kakisiwew Bands continue to exist as "Treaty bands" in this first phase of trial. This is not strictly part of the seven questions set out in the First Phase Order. However, it flows from the findings of this first phase of trial. Given my findings on limitation periods and estoppel, declaratory relief is likely the only relief available in this action.

[469] The availability of this type of declaratory relief is based primarily on whether the relief sought is analogous to the declaratory relief granted by the Supreme Court of Canada in *Manitoba Metis.* In *Manitoba Metis* at para 139, the Supreme Court of Canada found that limitations statutes could not bar a claim for a declaration that the Crown did not act honourably in implementing a constitutional obligation in the *Manitoba Act, 1870*, SC 1870, c 3, a constitutional statute.

[470] The Plaintiffs argue that the declaration sought in this phase of trial - that the Historic Bands continue to have a right to exist as treaty bands - is analogous to the declaration sought in *Manitoba Metis.* They reason that it is declaratory relief based on the honour of the Crown. Therefore, limitation periods should not apply to prevent a declaration from issuing.

[471] Canada argues that the declaration, like the other relief, is barred by limitation periods because the exception in *Manitoba Metis* does not apply. First, the Plaintiffs are also seeking damages or other compensation for their claims, unlike in *Manitoba Metis.* Second, the declarations sought are not merely declarations regarding the legal relationship between the parties, but are declarations sought for the purpose of obtaining damages in the second phase of trial. Third, the declarations sought are based in fiduciary and treaty rights rather than a constitutional statute. Fourth, alternative means are available for all the elements of relief sought by the Plaintiffs, which means that a declaration is not the only option for the Plaintiffs.

[472] The Court concludes that declaratory relief is available to the Plaintiffs, but not worded in the way sought by the Plaintiffs.

[473] I would grant the following declaration:

> That the amalgamation of the Chacachas and Kakisiwew Bands was unlawful by virtue of the failure of the federal Crown to implement the promises of *Treaty 4* in accordance with the honour of the Crown.

[474] This declaration is available although limitation periods have run on the claims as it is a declaration regarding the constitutionality of the Crown's conduct and is sufficiently analogous to *Manitoba Metis*.

[475] The declaration sought by the Plaintiffs regarding the continued existence of the Chacachas and Kakisiwew Bands as "Treaty bands" lacks the clarity required by a declaration. As described above, neither band has provided enough information to allow the Court to determine how the Bands will determine membership if reconstituted or to assess the effect of a declaration re-establishing the bands on the status and assets of the Historic Bands and Ochapowace.

[476] Absent such evidence, the Plaintiffs are seeking a bar declaration, not of the type consistent with *Manitoba Metis*. The Supreme Court has discouraged bar declarations except in unusual instances; see *Ewert v Canada*, 2018 SCC 30, [2018] 2 SCR 165 [*Ewert*].

[477] In addition, although I have found that the Chacachas Band has continuing collective treaty rights, it is barred from claiming compensation for land by estoppel and limitation periods. Therefore, a finding of Chacachas as a "Treaty band" would also appear to be ancillary to their claims for treaty land, which as found above, they are estopped from claiming as well as barred by limitations periods.

[478] In contrast, the declaration stated in paragraph 473 addresses historical wrongs and states that the Historic Bands were merged unlawfully. This is not merely ancillary to compensatory

relief as it does not automatically lead to any compensation or damages. Instead, it recognizes the unlawful action that happened more than 135 years ago and will hopefully provide a foundation for negotiation to determine how to address the issue within the community.

(1) Availability of Declaratory Relief

[479] A declaration is a statement of the court regarding the legal relationship between parties without an order of enforcement or execution (*Sarna on Declaratory Judgments* at 6).

[480] As referred to earlier, the Supreme Court of Canada in *Ewert* recently summarized the test for declaratory relief:

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

[481] Therefore, issuance of a declaration requires 1) jurisdiction of the Court, 2) a real dispute, 3) a genuine interest in its resolution by the Plaintiffs, and 4) an interest by the Defendants to oppose the declaration.

[482] The Federal Court has concurrent jurisdiction over claims regarding the Federal Crown's fulfillment of treaty obligations where relief, including declaratory relief, is claimed against the Federal Crown according to subsections 2(1) and 17(1) of the *Federal Courts Act*. Two sources

of federal law are at play in this case, the *Indian Act* and the *sui generis relationship* between the Crown and Indigenous peoples that engages the honour of the Crown (see *Gottfriedson v Canada (Attorney General)*, 2013 FC 546 at paras 26-28, 362 DLR (4th) 493).

[483] A declaration providing that the Historic Bands were unlawfully amalgamated would have practical utility in allowing the Crown, Ochapowace, and the Plaintiffs to negotiate how to resolve past treaty breaches. It would resolve the first part of the dispute by declaring that the amalgamation of the two bands was unlawful in circumstances where the historical events have been in dispute for more than a century.

[484] Further, the Watson Plaintiffs have a genuine interest in the resolution of the controversy, as descendants of Chacachas and having been recognized by the Ochapowace Band as representatives of the current Chacachas collective. Although this might not be enough to establish standing to bring other claims of compensation or for the Court to assess how the Ochapowace Band may be divided, the Plaintiffs have provided evidence of a genuine interest in the controversy through their representation of a modern group of Chacachas descendants that allows the Court to issue a declaration regarding the improper amalgamation.

[485] Finally, Canada as Defendant is interested in opposing the application. As co-Defendant, Ochapowace has not opposed a declaration of this type, although it might be impacted if it results in the division of its assets between Chacachas and Ochapowace.

(2) Limitations statutes do not bar the declaration

[486] The exception in *Manitoba Metis* applies in this case to grant a narrow declaration regarding the honour of the Crown in implementing treaties in the interests of reconciliation between the Crown and the descendants of the Historic Bands.

[487] In *Manitoba Metis,* the Supreme Court of Canada found that a declaration could issue regarding the constitutionality of the Crown's conduct where 1) the plaintiffs were seeking a declaration based on an obligation set out in a constitutional statute, 2) the constitutional obligation had not been implemented according to the honour of the Crown, a constitutional principle, 3) the plaintiffs were not seeking personal relief or any compensation, 4) the declaration was pursued in the interest of reconciliation between the Crown and Aboriginal peoples, and 5) there were no adequate alternative remedies available.

[488] Canada argues that all of these elements are essential to the application of the *Manitoba Metis* exception and that they are missing in this case.

[489] I accept that this case is not identical to the situation in *Manitoba Metis.* The Plaintiffs in this case are also seeking monetary relief including damages for breaches of the honour of the Crown, fiduciary duties, treaty rights, and loss of reserve land. Although this is not the relief that the Plaintiffs are seeking in this first phase of trial, the Court cannot ignore what the Plaintiffs wrote in their Statements of Claim and would seek if this trial proceeded to the next phase of

trial. In addition, in this case, the relevant Crown obligations arose from *Treaty 4*, instead of from a constitutional statute.

[490] However, I do not accept that *Manitoba Metis* should be interpreted as narrowly as suggested by Canada. I do not find that an exception is barred merely because the Plaintiffs also seek compensatory relief or because Crown obligations arise from a treaty rather than a constitutional statute.

[491] The Supreme Court of Canada in *Manitoba Metis* found that personal remedies from an unconstitutional Crown conduct are barred by limitations statutes, but that declarations regarding the constitutionality of Crown conduct would not be barred:

> [134] This Court has held that although claims for personal remedies flowing from the striking down of an unconstitutional statute are barred by the running of a limitation period, courts retain the power to rule on the constitutionality of the underlying statute…
>
> …
>
> [137] Furthermore, the Métis seek no personal relief and make no claim for damages or for land. Nor do they seek restoration of the title their descendants might have inherited had the Crown acted honourably. Rather, they seek a declaration that a specific obligation set out in the Constitution was not fulfilled in the manner demanded by the Crown's honour. They seek this declaratory relief in order to assist them in extra-judicial negotiations with the Crown in pursuit of the overarching constitutional goal of reconciliation that is reflected in s. 35 of the *Constitution Act, 1982*.
>
> …
>
> [143] Furthermore, the remedy available under this analysis is of a limited nature. A declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or not any consequential relief is available. As argued by the

> intervener the Assembly of First Nations, it is not awarded against the defendant in the same sense as coercive relief. In some cases, declaratory relief may be the only way to give effect to the honour of the Crown. Were the Métis in this action seeking personal remedies, the reasoning set out here would not be available. However, as acknowledged by Canada, the remedy sought here is clearly not a personal one. The principle of reconciliation demands that such declarations not be barred.
>
> [Citations omitted.]

[492] In interpreting this part of *Manitoba Metis,* Justice Russell in *Samson First Nation* at para 126 found that the Supreme Court of Canada had "made it very clear" that the exception would not be available to an Indigenous group seeking personal remedies. In *Samson First Nation,* the plaintiffs were arguing that the exception in *Manitoba Metis* would allow them to also seek compensation for a breach of trust or fiduciary duty that was otherwise time-barred because it was accompanied by a claim for a declaration. In this context, Justice Russell found that a constitutional declaration could not open the door to personal remedies.

[493] The Supreme Court of Canada certainly made it clear that the exception in *Manitoba Metis* could not lead to compensation that was otherwise barred by limitation periods. Declaratory relief cannot be merely ancillary or used to get around limitation periods in order to seek compensation. However, I do not read *Manitoba Metis* or *Samson First Nation* as saying that declaratory relief is not available merely because the parties also happen to be seeking personal relief barred by limitation periods, even if the declaratory relief can be issued separately and independently from a claim for compensation.

[494] I interpret this to mean that any constitutional declaration under the *Manitoba Metis* exception must be able to have a practical effect without requiring compensation that is otherwise barred by limitation periods. This essentially restates the general principle that declarations must be narrowly drafted to prevent litigants from using declarations to avoid limitation periods for consequential relief (*Sarna on Declaratory Judgments* at 8).

[495] The Court therefore must be wary in issuing a declaration where the personal relief sought is barred by limitation periods. However, in this case, the effect of a declaration of improper amalgamation is not merely ancillary to the Plaintiffs' claim for damages. Instead, the purpose of the declaration is to provide a basis for the Plaintiffs, Ochapowace, and the Minister to negotiate or determine how Chacachas can separate, with the understanding that the Chacachas group has a right to exist independently from Ochapowace and was historically wronged when they were amalgamated. A declaration that the bands were improperly amalgamated does not automatically mean that damages or another form of compensation is available.

[496] Those forms of relief which cannot or ought not be granted can be severed from that which the Court can and ought to grant.

[497] Further, I disagree that the *Manitoba Metis* exception cannot be applied to a declaration regarding the honour of the Crown in the fulfillment and implementation of its treaty promises. The Federal Court of Appeal in *Peepeekisis FCA* at para 62 noted in *obiter* that this type of declaration "remains an open question" for a breach of treaty where there is no adequate

alternative recourse. It is certainly not clear in *Manitoba Metis* whether declarations based in the honour of the Crown are limited only to the fulfillment of promises made to Indigenous peoples in constitutional statutes, or whether declarations can also be issued where the constitutionality of the Crown's conduct is based on its implementation and fulfillment of treaty promises.

[498] The exception for declaratory relief in *Manitoba Metis* is drawn from the ability of the courts to rule on the constitutionality of statutes, even where personal remedies may be barred by the running of limitation periods. "By extension, limitations acts cannot prevent the courts from issuing a declaration on the constitutionality of the Crown's conduct" (*Manitoba Metis* at para 135). The impugned Crown conduct in *Manitoba Metis* was its failure to implement a provision of a constitutional statute according to the honour of the Crown, a constitutional principle. The Court emphasized that the declaration sought was a "matter of national and constitutional import" with the "goal of reconciliation and constitutional harmony" recognized in section 35 of the *Constitution Act, 1982* and underlying the *Manitoba Act.*

[499] In order to find that the *Manitoba Metis* exception could only apply to the Crown's conduct in implementing constitutional statutes, but not treaties, one would have to read the reasons of the Supreme Court as saying that the constitutionality of the Crown's conduct is only at issue if a constitutional principle is engaged by a constitutional statute. Instead, the Supreme Court found that the honour of the Crown was engaged by section 31 of the *Manitoba Act* because it was analogous to a treaty promise:

> [71] An analogy may be drawn between such a constitutional obligation and a treaty promise. An "intention to create obligations" and a "certain measure of solemnity" should attach to both. Moreover, both types of promises are made for the

> overarching purpose of reconciling Aboriginal interests with the Crown's sovereignty. Constitutional obligations may even be arrived at after a course of consultation similar to treaty negotiation.
>
> …
>
> [78] Second, the honour of the Crown requires it to act diligently in pursuit of its solemn obligations and the honourable reconciliation of Crown and Aboriginal interests.
>
> [79] This duty has arisen largely in the treaty context, where the Crown's honour is pledged to diligently carrying out its promises. In its most basic iteration, the law assumes that the Crown always intends to fulfill its solemn promises, including constitutional obligations: … This duty applies whether the obligation arises in a treaty, as in the precedents outlined above, or in the Constitution, as here.
>
> [80] To fulfill this duty, Crown servants must seek to perform the obligation in a way that pursues the purpose behind the promise. The Aboriginal group must not be left "with an empty shell of a treaty promise".
>
> [Citations omitted].

[500] Therefore, the declaration in *Manitoba Metis* was issued because the constitutional obligations in the *Manitoba Act* were similar to the solemn treaty promises that engage the honour of the Crown. The honour of the Crown, a constitutional principle, requires that solemn treaty promises and constitutional obligations in statute are implemented purposively and diligently. Treaty rights are recognized and affirmed by section 35 of the *Constitution Act, 1982.* It is difficult to see how the Crown's conduct would be characterized as unconstitutional if it failed to implement promises made under a treaty-like constitutional statute, but not if it failed to give effect to constitutionally protected treaty rights according to the honour of the Crown.

[501] I accept that any declaration issued in this case differs from *Manitoba Metis* in terms of scope, but this should not prevent the declaratory relief sought. In *Manitoba Metis* at para 140, the Supreme Court found that an unfulfilled promise made to all Métis people in Manitoba had caused a "rift in the national fabric". A declaration would impact only people who identify as Chacachas, Kakisiwew and Ochapowace. It therefore does not have the same national scope.

[502] However, reconciliation will not only happen in broad strokes. The Supreme Court of Canada in *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1, [2005] 3 SCR 388, emphasized that small localized grievances have been just as "destructive of the process of reconciliation as some of the larger and more explosive controversies." Each of the treaties negotiated with Indigenous peoples across the country were part of the process of reconciliation, and each promise made and enshrined in section 35 is to be given meaning.

[503] This does not mean that every breach of treaty claim allows for a constitutional declaration regarding the honour of the Crown when compensation is barred by limitations statutes. Many treaty and fiduciary duty claims are directly related to compensation or lands and any declaration issued with regard to these claims would be ancillary to compensatory relief and would not be appropriate.

[504] This is an extraordinary situation where a treaty signatory has been prevented from existing as a separate band and has been unable to re-establish itself for decades as a result of unlawful acts of the Crown more than 135 years ago. The amalgamation issue was one that was

put off by the parties during TLE Settlement negotiations and where the historical record has been subject to a number of competing interpretations. Without some declaration by the Court on this issue it appears that this community will continue to be divided with no legal findings on which to move forward. It is an appropriate time to end the debate and allow the communities to move forward.

(3) Existence of Adequate Alternatives

[505] As declaratory relief is a discretionary remedy, declaratory relief will also generally not be granted if there is "an adequate alternative statutory mechanism to resolve the dispute or to protect the rights in question": *Ewert* at para 83. The Federal Court of Appeal has refused to issue declarations regarding the constitutionality of the Crown's conduct in Aboriginal cases because of the existence of alternative mechanisms (*Peepeekisis FCA* at para 59). The alternative does not need to be identical to the remedy available at the Court, it merely needs to adequately address the grievance (*Strickland v Canada (Attorney General)*, 2015 SCC 37 at para 42, [2015] 2 SCR 713 [*Strickland*]).

[506] According to the Supreme Court of Canada in *Strickland* at para 42, when assessing the adequacy of an alternative remedy, the Court can consider:

> …the convenience of the alternative remedy; the nature of the error alleged; the nature of the other forum which could deal with the issue, including its remedial capacity; the existence of adequate and effective recourse in the forum in which litigation is already taking place; expeditiousness; the relative expertise of the alternative decision-maker; economical use of judicial resources; and cost.
>
> [Citations omitted].

[507] Although the Court was assessing the adequacy of alternatives in the context of judicial review, the Court equated the discretion involved in declarations of right whether made in a judicial review or an action (*Strickland* at para 37).

[508] In order to establish an adequate alternative remedy in this case, the alternative remedy would have to be able to recognize the unlawful amalgamation of the bands, their treaty rights to continue to exist, and allow for the bands to divide accordingly. In addition, it would need the capacity to hear and assess the large amount of historical evidence necessary to make the finding that amalgamation was improper, in order to allow for band division to occur on the proper factual basis.

[509] Canada has raised two alternatives: 1) remedies through the process established by the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*] and 2) band division under section 17 of the *Indian Act* guided by the NBBA Policy.

[510] Canada argues that the Specific Claims Tribunal process would allow for the Ochapowace Band to pursue damages for the amalgamation and re-location of the reserve.

[511] The Plaintiffs argue that they could not bring a claim to the Specific Claims Tribunal because neither Kakisiwew nor Chacachas are recognized as “claimants” under the *SCTA* because they are not recognized as *Indian Act* bands. In addition, Ochapowace argues that the Specific Claims Tribunal is limited to only hearing claims for monetary compensation and therefore could not make declarations.

[512] In my view, the Specific Claims Tribunal does not offer an adequate alternative mechanism to resolve the dispute in this first phase of trial as the Tribunal does not have the jurisdiction to create or recognize bands like the Historical Bands in this case., Importantly, the Tribunal can only award monetary compensation under sections 15(4) and 20(1)(a) of the *SCTA*, which would not adequately address this dispute, and which is primarily focussed on the improper amalgamation of the Historic Bands. Unlike in *Peepeekisis FCA*, where the band was able to bring a specific claim, the Plaintiffs as representatives of the Historic Bands would not have standing at the Tribunal to bring a claim as they are not a First Nation "claimant" under section 2 of the *SCTA.*

[513] In addition, the Ochapowace Band could not bring a specific claim on behalf of the Chacachas and Kakisiwew Bands because it is barred from making further treaty entitlement claims on behalf of itself or its successors under Article 15.01 of the TLE Agreement.

[514] Canada also argues that section 17 of the *Indian Act* and the NBBA Policy provides an adequate statutory alternative because it would allow Ochapowace members to request that the Minister recognize the Chacachas and/or Kakisiwew Bands as bands. Any rights under *Treaty 4* held by Ochapowace would flow to whichever bands are created following division. A refusal of the Minister under section 17 could be judicially reviewed. Canada alleges that the only reason this has not been done by the Plaintiffs is because they seek significant compensation, which would not be available under section 17.

[515] The Plaintiffs and Ochapowace argue that section 17 does not provide an adequate statutory mechanism because it cannot recognize the continued existence of the Historic Bands as First Nations with treaty rights. In addition, section 17 is entirely a discretionary remedy. Any review of the Minister's decision would be assessed on the basis of reasonableness, which prevents a direct and clear challenge. Lastly, Ochapowace alleges that the Minister is not capable of acting as an impartial arbiter, as was found in *Brass v Key Band First Nation*, 2007 FC 581 at para 24, 158 ACWS (3d) 171.

[516] I find that section 17 does not provide an adequate alternative that should prevent the Court from issuing a declaration regarding the unlawful amalgamation of the Historic Bands.

[517] Contrary to the Plaintiffs' and Ochapowace's arguments, band division under section 17 would not prevent the Chacachas and Kakisiwew Bands as *Indian Act* bands from holding treaty rights. Given that the Crown currently recognizes Ochapowace as holding treaty rights, the division of the band would merely result in two, rather than one, collective rights holders. If the Plaintiffs wish to have the rights afforded a band under the *Indian Act*, then they would have to be recognized to be a band by the Minister through section 17.

[518] However, in the context of this action, I do not agree that section 17 alone provides an adequate alternative that should prevent the issuance of a declaration regarding the improper amalgamation of the Historic Bands. The Ministerial discretion in section 17, as well as the lack of information on how the bands would define membership, prevents the Court from issuing a declaration regarding the legal status of the Chacachas or Kakisiwew Bands. However, this does

not prevent the Court from issuing a declaration regarding the failure of the Crown to act honourably in implementing *Treaty 4*, which resulted in the improper amalgamation of the Historic Bands. The Bands can then choose to use this declaration to proceed with the second phase of litigation or to further justify band division under section 17 of the *Indian Act.*

[519] I find that issuing a declaration regarding the unlawful amalgamation of the Historic Bands to create the Ochapowace Indian Band is the only way to give effect to the honour of the Crown. The declaration which will issue is a declaration regarding the constitutionality of the Crown's conduct towards the Chacachas and Kakisiwew Bands under *Treaty 4* and will further the objective of reconciliation between aboriginal peoples and non-aboriginal peoples. It will also allow the parties to move on to a practical determination of what the members of the Bands wish to do.

[520] This declaration is analogous to the declaration issued in *Manitoba Metis*. This is a similar grievance about the Crown's conduct pursuant to a constitutional principle going back about 135 years. It is not merely about whether the Ochapowace Band can now divide into two bands, but it is about recognizing that there were two treaty signatories whose rights under *Treaty 4* were not honourably upheld by the Crown. The Court heard extensive evidence on the history of the re-location, co-location, and amalgamation of the Historic Bands, which would not have been heard in a section 17 band division process.

[521] Lastly, the NBBA Policy specifically states that the Minister is to approve the creation of a new band to meet an outstanding legal obligation such as a court order or commitments created

pursuant to treaty or claims settlement. The NBBA Policy therefore supports a finding of the Court regarding the obligations of the Crown to recognize historic bands. Although the Minister will still ultimately have the discretion to divide the bands, the declaration of this Court after hearing and reading extensive historical evidence will move this case forward in a way that would not happen if left to the section 17 process.

G. *Summary*

[522] Therefore, the following is a summary of my conclusions for the questions set out in the First Phase Order:

1. Was there an Indian band led by Chief Chacachas in 1874?

   Yes, Chief Chacachas fixed his mark to *Treaty 4* on behalf of the Chacachas Band.

2. Was there an Indian band led by Chief Kakisiwew in 1874?

   Yes, Chief Kakisiwew fixed his mark to *Treaty 4* on behalf of the Kakisiwew Band

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

   The two bands were amalgamated into one band under the *Indian Act* in 1884, but without the consent of the bands. By amalgamating the bands without consultation or agreement of the Historic Bands, the Crown breached its fiduciary duties to the Historic Bands and failed to implement and fulfill its treaty obligations according to the honour of the Crown.

4. (a) If no, are the Chacachas Band and Kakisiwew Band entitled to be recognized as distinct treaty bands?

   The Chacachas Band has continued as a distinct rights-bearing collective, even if not a band under the *Indian Act*. To this extent, the Chacachas Band continues as a "distinct treaty band" and it is entitled to assert treaty rights under *Treaty 4* as a separate rights-bearing collective.

The Kakisiwew Band has not continued as a distinct rights-bearing collective. The Ochapowace Band is the legal successor of the Kakisiwew Band and is the collective that exercises the treaty rights of Kakisiwew.

(b) If so, are the Chacachas Band and the Kakisiwew Band estopped or otherwise prevented from asserting that they are distinct treaty bands?

The Chacachas and Kakisiwew Bands are estopped from seeking further treaty land entitlement from Canada because of the settlement agreements between Ochapowace and Canada. They are not otherwise prevented from seeking a declaration regarding the improper amalgamation of the bands, nor are they prevented from asserting their right to divide from Ochapowace.

Limitation periods bar any compensation that may flow out of the loss of the reserves and unlawful amalgamation of the bands. However, limitation periods and laches will not bar a declaration regarding the constitutionality of the Crown's conduct.

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

Neither the Chacachas or Kakisiwew Bands are bands under the *Indian Act*. The Ochapowace Band is the band under the *Indian Act*. The Court cannot declare *Indian Act* bands to exist as this is exclusively at the discretion of the Minister under the *Indian Act*.

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 Bands?

The named plaintiffs are members of the Ochapowace Band under the *Indian Act*. The Kakisiwew and Chacachas Bands do not currently exist as bands under the *Indian Act*, and the Plaintiffs do not have standing to assert rights of the Kakisiwew and Chacachas Bands that arise from the *Indian Act*.

However, the Watson Plaintiffs have standing as representative plaintiffs to assert the collective treaty rights of the Chacachas Band, as a group that was unlawfully amalgamated with Ochapowace counter to the honour of the Crown. The Bear Plaintiffs have not shown that they have standing to assert the collective treaty rights of the Kakisiwew Band separate from the Ochapowace Band.

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?

> The Ochapowace Band continues to exist as the only *Indian Act* band. The members of the Ochapowace Band collectively exercise rights under *Treaty 4* as successors to the Kakisiwew Band and as members who transferred into the Ochapowace Band after amalgamation.

[523] These conclusions should not be characterized as declarations. Rather, they are findings as required in the First Phase Order.

[524] The Watson Plaintiffs are also entitled to the following declaration:

> That the amalgamation of the Chacachas and Kakisiwew Bands was unlawful by virtue of the failure of the federal Crown to implement the promises of *Treaty 4* in accordance with the honour of the Crown.

XI. Costs

[525] Only the Watson Plaintiffs have sought costs. However, it is the Court's view that costs can be awarded even where not specifically requested in accordance with the principle of "costs follow the cause".

[526] It is appreciated that it may take some time for the parties to digest the decision and consider its impact. Therefore, the parties are to contact the Court within 90 days of the issuance of the Judgment and Reasons to establish a process to consider costs.

XII. Second Phase

[527] The parties are to contact the Court within the same 90 day period to outline the next phase of this trial.

[528] The Court remains seized of this matter and it remains under the Court's case management regime.

"Michael L. Phelan"
Judge

Ottawa, Ontario
January 28, 2020

Appendix 1

Indian Act, 1880, SC 1880, c 28

2. The following terms contained in this Act shall be held to have the meaning hereinafter assigned to them, unless such meaning be repugnant to the subject or inconsistent with the context:	**2.** Les expressions qui suivent, employées dans le présent acte, seront censées avoir la signification qui leur est ci-dessous attribuée, à moins qu'elle ne soit inconciliable avec le sujet ou incompatible avec le contexte : --
1.The term "band" means any tribe, band or body of Indians who own, or are interested in a reserve or in Indian lands in common, of which the legal title is vested in the Crown, or who share alike in the distribution of any annuities or interest moneys for which the Government of Canada is responsible; the term "the band" means the band to which the context relates; and the term "band" when action is being taken by the band, as such, mean the band in council.	1. L'expression " bande " signifie une tribu, une peuplade ou un corps de Sauvages qui possèdent une réserve ou des terres en commun, ou ont un intérêt commun dans une réserve ou terres dont le titre légal est attribuée à la Couronne, ou qui participent également à la distribution d'annuités ou d'intérêts dont le gouvernement du Canada est responsable ; et l'expression " bande " signifie la bande à laquelle le contexte se rapporte ; et l'expression " la bande " lorsque quelque décision est prise par elle, signifie la bande en conseil.
…	[…]
6. The term "reserve" means any tract or traces of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which legal title is in the Crown, but which is unsurrendered, and includes all the trees, wood, timber, soil, stone, minerals, metals, or	**6.** L'expression " réserve " signifie toute étendue ou toutes étendues de terres mises à part, par traité ou autrement, pour l'usage ou le profit d'une bande particulière de Sauvages, ou concédées à cette bande et dont le titre légal appartient à la Couronne, mais dont celle-ci n'a pas reçu

other valuables thereon or therein.

abandon ; elle comprend les arbres, le bois, la terre, la pierre, les minéraux ou autres choses de valeur qui se trouvent à la surface or à l'intérieur du sol.

…

[…]

37. No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band or of any individual Indian, shall be valid or binding, except on the following conditions: --

37. Nulle cession ou abandon d'une réserve ou d'une partie de réserve à l'usage d'une bande, ou de tout Sauvage individuel ne sera valide ou obligatoire s'il n'est fait aux conditions suivantes :--

1.The release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose according to their rules, and held in the presence of the Superintendent-General, or of an officer duly authorized to attend each council by the Governor in Council or by the Superintendent-General; Provided, that no Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near and is interested in the reserve in question;

1. La cession ou abandon sers ratifié par la majorité des hommes de la bande qui auront attient l'âge de vingt et un ans révolus, à une assemblée ou conseil convoqué à cette fin conformément aux usages de la bande, et tenu en présence du Surintendant-Général, ou d'un officier régulièrement autorisé par le Gouverneur en conseil or le Surintendant- Général à y assister ; mais nul Sauvage ne pourra voter ou assister à ce conseil s'il ne réside habituellement sur la réserve en question ou près de cette réserve, et s'il n'y a un intérêt :

2.The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath before some judge of a superior, county, or district court, or stipendiary magistrate, by the Superintendent-General or by the officer authorized by him

2. Le fait que la cession ou abandon a été consenti par la bande à ce conseil or assemblée devra être attesté sous serment devant un juge d'une cour supérieure, cour de comté ou de district, ou devant un magistrat stipendiaire, par le Surintendant-Général or par l'officier autorisé par lui à

to attend such council or meeting, and by some one of the chiefs or principal men present thereat and entitled to vote, and when certified as aforesaid shall be submitted to the Governor in Council for acceptance or approval;

assister à ce conseil or assemblée, et par l'un des chefs or principaux ayants-droit de vote qui y aura assisté ; et après que le dit fait aura été ainsi certifié, le consentement sera soumis an Gouverneur en conseil, pour qu'il l'accepte ou le refuse.

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 THE OCHAPOWACE INDIAN BAND NO. 71
PLACE OF HEARING:	OCHAPOWACE RESERVE AND REGINA, SASKATCHEWAN
DATE OF HEARING:	NOVEMBER 13-16, 19-22, AND 26-29, 2018, DECEMBER 3, 5, 10-13 AND 17, 2018
REASONS FOR JUDGMENT:	PHELAN J.
DATED:	JANUARY 28, 2020

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