

CANADA / JUDGMENT

Powder v. Canada

2024 FC 1912

COURT

Federal Court

DECIDED

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Powder v. Canada

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T-1601-12, T-165-01, T-436-15, T-809-17

Decision Content

Date:

20241128

Dockets: T-436-15

T-1601-12

T-809-17

T-165-01

Citation: 2024 FC 1912

Ottawa, Ontario ,

November 28, 2024

PRESENT: Madam Justice McDonald

Docket: T-436-15

BETWEEN:

JEAN POWDER, ELMER CREE, FLORA POWDER, ALLAN AND FLOYD POWDER AND THEIR CHILDREN AND THE CHILDREN OF LILA POWDER LAFONTAINE, ALL OF THE LIVING MEMBERS OF THE PAUL CREE BAND (ALSO CALLED THE CLEARWATER RIVER BAND #175)

Plaintiffs

and

HIS MAJESTY THE KING IN RIGHT OF CANADA AND HIS MAJESTY THE KING IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT AND FORT MCMURRAY FIRST NATION

Defendants

Docket: T-1601-12

AND BETWEEN:

JOHN MALCOLM, CAROLINE MALCOLM, CELENA MALCOLM, LORRAINE MALCOLM, JANE MALCOLM, HARRY MALCOLM AND WALTER MALCOLM

Plaintiffs

and

HIS MAJESTY THE KING IN RIGHT OF CANADA AND HIS MAJESTY THE KING IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

Defendants

REPRESENTATIVE PROCEEDING

Docket: T-809-17

AND BETWEEN:

CHIEF BERNADETTE DUMAIS, AUGUST CREE AND DAVID CREE ON BEHALF OF ALL LIVING MEMBERS OF THE PAUL CREE BAND NO. 175 (ALSO KNOWN AS THE CLEARWATER BAND)

Plaintiffs

and

HIS MAJESTY THE KING AND FORT MCMURRAY #468 FIRST NATION

Defendants

Docket: T-165-01

AND BETWEEN:

JOHN MALCOLM, “ACTING ON HIS OWN BEHALF AND ON BEHALF OF HIS BROTHERS AND SISTERS, CHILDREN OF WALTER JEAN MALCOLM, SON OF CAROLINE THOMPSON”

Plaintiffs

and

HIS MAJESTY THE KING IN RIGHT OF CANADA AND HIS MAJESTY THE KING IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

Defendants

JUDGMENT AND REASONS

Index

JUDGMENT AND REASONS 4

I. Overview 6

II. Procedural background 10

III. Motions before the Court 10

IV. Historical context 11

A. Jones’ reports 12

B. Treaty 8 14

C. Treaty 8 claims in these actions 16

V. Issues 17

VI. Analysis 18

A. Preliminary matters 18

(1) The evidence 18

(a) Evidence adduced by Canada 19

(b) Canada’s expert reports 23

(c) Objections to Malcolm and Powder evidence 25

(d) Objections to Dumais evidence 27

(i) Carol Hodgson reports 27

(ii) Objections to Bernadette Dumais Affidavit 31

(iii) Traditional Land Use study	31
(iv) August Cree Affidavit	33
(v) Oral history evidence	34
(2) Are the claims barred by a limitation period?	34
(3) Does the Federal Court have jurisdiction?	42
B. Motions for Standing	43
(1) Overview	43
(2) Powder and Malcolm Plaintiffs Standing Motion	44
(a) Is the issue of standing res judicata?	45
(b) Do the Powder and Malcolm Plaintiffs satisfy Rule 114?	47
(c) Do the Plaintiffs have public interest standing?	51
(3) Dumais Plaintiffs Standing Motion	52
(a) Rule 114–application of the test for Representative Proceedings	55
(i) Criteria 1 & 2 - is there a collective with common interests?	55
(ii) Criteria 3 & 4 - are the representative plaintiffs authorized and can they fairly and adequately represent the collective?	57
(iii) Criteria 5 - is this the just, most efficient and least costly manner of proceeding?	57
(b) Do the Plaintiffs have public interest standing?	58
(4) Conclusion on Standing Motions	59
C. Summary Judgment Motions	60
(1) General principles–Summary Judgment Motions	61
(2) Canada’s Motion for Summary Judgment in T-165-01 (Malcolm registration claim)	63
(3) Canada and FMFN Motions for Summary Judgment in T-1601-12 and T-436-15	66
(4) Canada and FMFN Motion for Summary Judgment in T-809-17 (Dumais claim)	73
(5) Malcolm and Powder Plaintiffs Motions for Summary Judgment	79
(6) Conclusion on Summary Judgment Motions	86
VII. Costs	87
JUDGMENT IN T-436-15, T-1601-12, T-809-17, and T-165-01	88

SOLICITORS OF RECORD 90

I. Overview [1] These are the Reasons on a series of Motions for Summary Judgment and Motions for Standing brought by the parties in these four longstanding actions. The Motions were heard together because a common issue among the Plaintiffs was whether (1) there is evidence to support their claim that there once existed a Paul Cree Band or Clearwater Band in the area that is now Fort McMurray First Nation (FMFN); and (2), if so, whether that collective has rights separate and distinct from FMFN under Treaty 8. Treaty 8 was entered in 1899 by Adam Boucher as Chipewyan Headman and Seopotakinum Cree as Cree Headman for “the Chipewyan and Cree Indians of Fort McMurray and the country thereabouts”.

[2] For clarity, throughout these Reasons, the reference to Paul Cree Band or Clearwater Band is a reference to the same Band. The parties use these descriptions interchangeably and I will do the same unless the context requires otherwise.

[3] Below is a brief description of the four actions. For ease of reference, I will refer to the actions by either the Court file number or the description of the claim advanced in the action as noted in the brackets below:

T-165-01 - John Malcolm and his siblings seeks registration under the Indian Act, RSC, 1985, c I-5 (Malcolm registration action)

T-1601-12 - John Malcolm and his siblings claim land in severalty and a trapline as Treaty 8 entitlements on behalf of Harry Malcolm (Malcolm property action)

T-436-15 - the representative Powder Plaintiffs seek Treaty 8 entitlements to Clearwater Indian Reserve No. 175 [IR 175], damages, and loss of Treaty benefits (Powder action)

T-890-17 - the representative Dumais Plaintiffs seek a declaration that the Paul Cree Band No. 175 or Clearwater Band is a “band” within the meaning of Treaty 8, and they seek “band” recognition under the Indian Act (Dumais action)

[4] Canada is a named Defendant in each of these actions, and while FMFN is not a named Defendant in all actions, their interests are directly engaged in light of the relief claimed. Generally, Canada’s position is that FMFN is its Treaty 8 partner, and FMFN is therefore the only party in these actions to whom it owes any obligations under Treaty 8. FMFN has four reserves, three of which are referred to as Gregoire Lake (176, 176A and 176B) and the fourth reserve is IR 175, referred to as the Clearwater reserve.

[5] In the Powder action (T-436-15) and the Dumais action (T-890-17), the determinative threshold issue is whether the evidence establishes that Paul Cree Band is a separate and distinct band from FMFN. The issues of Paul Cree Band membership, the return of IR 175 from FMFN, and Treaty 8 benefits are all secondary to the primary determinative question: does the evidence support the existence of a separate and distinct Paul Cree Band at the time of Treaty 8?

- [6] There is no reference to a Paul Cree Band as an independent signatory to Treaty 8. Rather, the collective signatory to Treaty 8 is “the Chipewyan and Cree Indians of Fort McMurray and the country thereabouts”.
- [7] The Plaintiffs rely upon references to Paul Cree and Clearwater Band in historical record. Those records relate to the land surveying work undertaken pursuant to the land section and surveying provisions of Treaty 8. A 1921 Order in Council (OIC)—a key document relied upon by the Plaintiffs—sets aside IR 175 “for the Department of Indian Affairs for the purposes and uses of the Indians of the Clearwater Reserve No 175” and the preamble to this OIC refers to the “Paul Cree’s Band of Indians”. For the reasons outlined below, I do not read this as conferring Treaty 8 band status on a Paul Cree Band of Indians. Rather, I interpret the 1921 OIC as setting aside land for “the Chipewyan and Cree Indians of Fort McMurray and the country thereabouts” who entered Treaty 8.
- [8] The records from 1951 when the Chipewyan and Cree Indians of Fort McMurray who entered Treaty 8 were divided into Fort McMurray First Nation and Fort McKay First Nation makes no reference to a Paul Cree Band or Clearwater Band.
- [9] On the competing Motions for standing filed by the proposed representative Plaintiffs in T-436-15 (Powder) and T-890-17 (Dumais), I have determined that neither the Powder Plaintiffs nor the Dumais Plaintiffs meet the test for standing. Although they seek standing under Rule 114 of the Federal Courts Rules, SOR/98-106 [Rules], to advance a claim on behalf of a collective who seeks recognition as Paul Cree Band or Clearwater Band, I find that they are not authorized to represent a collective with a common interest. In essence, both groups are advancing individual or family claims. I have also concluded that in actions T-1601-12 and T-165-01 John Malcolm does not have standing to represent his siblings.
- [10] On the Motions for Summary Judgment, I have determined that the evidence does not support a finding that there was a distinct band known as Paul Cree Band separate from “the Chipewyan and Cree Indians of Fort McMurray and the country thereabouts” who entered Treaty 8. Further, I agree with Canada and FMFN that the actions cannot succeed as they have been brought long after any applicable limitation period. In addition, some of the claims advanced, such as registration under the Indian Act, are not within the jurisdiction of the Federal Court.
- [11] For the reasons detailed below, I am granting the Summary Judgment Motions of Canada in all four actions, and I am granting the Summary Judgment Motions of FMFN in T-436-15, T-890-17 and T-1601-12. These actions are dismissed. Consequently, I am dismissing the Malcolm and Powder Plaintiffs’ Motions for Summary Judgment in T-436-15, T-1601-12, T-165-01.

[12] In summary, I am granting the Defendants' Motions for Summary Judgment and dismissing these actions in their entirety as I have concluded that dismissal of the actions on a summary basis is the proportionate, most expeditious, and less expensive means to achieve a just result.

II. Procedural background [13] By Order dated March 30, 2022, the Motions in T-436-15, T-1601-12, and T-809-17 were ordered to be heard together because of the common issues, and the Plaintiffs were granted intervenor status in the other claims.

[14] On November 23, 2022, a Confidentiality Order provided that certain materials were to be treated as confidential; however, it is not necessary for me to address any confidential material in these Reasons.

[15] On April 20, 2023, a Bifurcation Order was issued providing that the compensation claims of the Powder and Malcolm Plaintiffs in T-436-15, T-1601-12 and T-165-01 would be determined separately and, if necessary, after the final determination of the Summary Judgment Motions and Standing Motions. Accordingly, these Reasons will not address any of the compensation claims or the evidence filed in support of these claims.

III. Motions before the Court [16] On the Summary Judgment Motions, the parties seek as follows:

In T-436-15, T-1601-12, T-165-01 - the Malcolm and Powder Plaintiffs seek summary judgment against Canada and FMFN.

In T-436-15, T-1601-12, T-809-17, T-165-01 - Canada seeks summary judgment dismissing all the actions.

In T-436-15, T-890-17 and T-1601-12 - FMFN seeks summary judgment dismissing the actions.

[17] The Dumais Plaintiffs (T-809-17) are the only group who do not seek summary judgment. However, they argue that the Motions for Summary Judgment of Canada and FMFN should be dismissed as they claim there are genuine issues for trial.

[18] On the Standing Motions, both the Powder Plaintiffs in T-436-15 (Powder) and the Dumais Plaintiffs in T-890-17 (Dumais) have filed representative actions and on their Motions, they seek standing to represent the interests of the asserted Paul Cree Band.

[19] Finally, in actions T-1601-12 and T-165-01 John Malcolm seeks standing to represent his siblings.

IV. Historical context [20] Before I address the issues arising on these Motions, it is helpful to provide some historical context as the claims relate to events going back over 100 years.

[21] For the historical context, I rely largely on the reports prepared by Gwynneth C. D. Jones, an expert retained by Canada. Ms. Jones is an Historian who has been qualified as an expert on several occasions before the Federal Court. Her reports were not challenged by the other parties. Ms. Jones reports provide a review of the relevant history and development in Fort McMurray. The only competing expert report is that of Carol Hodgson, an expert retained by

the Dumais Plaintiffs who provides a different version of the history. The Hodgson reports focus on demonstrating the existence of the Paul Cree Band. Canada and FMFN raised objections to the Hodgson reports which will be addressed later in these reasons; however, for the purpose of some historical background, I prefer Ms. Jones' reports and, in particular, the executive summary in her revised report of October 20, 2022.

A. Jones' reports [22] Ms. Jones notes that the Treaty 8 commissioners were "at liberty to undertake to set [Indian Reserves] aside" "or to offer a "severalty" option if that was preferred". This severalty option allowed an individual family to take land for themselves. This would be instead of sharing in the Indian Reserve of a larger band. This option was included based on advice from Treaty commissioners that the potential treaty 8 adherents in this area:

act rather as individuals than as a nation, and that any tribal organization which may exist is very slight. They live by hunting, and by individual effort, very much as the halfbreeds in that country live. They are averse to living on reserves, and as that country is not one that will ever be settled extensively for agricultural purposes it is questionable whether it would be good policy to even suggest grouping them in the future....

[23] The Treaty commissioners also note:

The conditions in [future Treaty] country are altogether different from those which prevailed here on the plains when the treaty [the earlier number Treaties] were made. They are very small bands or families and can make a good livelihood by hunting and fishing for many years to come.

[24] According to Ms. Jones, the records indicate that the "Metis" were to be compensated for their rights in the territory at the same time the treaty was signed with "Indians". Each Metis resident was to receive a certificate or scrip, for 240 acres of Dominion homestead lands or \$240 worth of Dominion homestead lands which were priced at one dollar per acre as well as a patent for any lands of which they were in possession of 260 acres.

[25] On June 21, 1899 Treaty 8 was signed with representatives from Lesser Slave Lake.

[26] On August 4, 1899 Adam Boucher as Chipewyan Headman and Seopotakinum Cree as Cree Headman adhered to Treaty 8 at Fort McMurray. The records note that the two headmen and 130 Indigenous people were paid as "Indians" on the payroll for the Cree Chipewyan Band at Fort McMurray. The Treaty commissioners paid out a gratuity of \$12 each (more for chiefs and headman) creating paylists for each stop on their itinerary.

[27] Ms. Jones writes at page 11 of her October 22, 2022 report:

- c) It appears that the information provided to the Treaty Commissioners, including that sent by the North West Mounted Police, the HBC [the Hudson's Bay Company] and the Geological Survey, identified Indigenous people only by the HBC trading post that claimed them as trading partners, or by places where they could be met by Europeans, without attempting any further identification of constant family groups or other relationships.

- d) Taken together, the records of the Hudson's Bay Company prior to and immediately after the treaty described two major categories in the clients of the post: Cree and Chipewyan speaking people. These two collectivities were not completely airtight, but clearly frequented different areas within reach of the post. Within these two groups, members of different nuclear family sometimes camped or travelled together, but were recorded more frequently as camping and travelling separately. Prior to the Treaty, post employees did not describe hierarchical distinctions among these families or recognize individuals as having authority, leadership or representation over their family heads. The information about the Cree and Chipewyan peoples recorded by post employees in the Fort McMurray and Fort McKay post journals seems to accord with the information given to the Treaty Commissioners before and during their Treaty travels, to the effect that "the Indians there act rather as individuals than as a nation, and that any tribal organization which may exist is very slight." If the paylists are understood simply as documents recording the names of people who took Treaty benefits at each trading post rather than extensively-researched anthropological documents, it is plausible that a paylist could contain several smaller groups.

B. Treaty 8 [28] Relevant here are the following Treaty 8 provisions regarding chiefs and headmen and the setting aside reserves or lands in severalty:

AND WHEREAS, the Indians of the said tract, duly convened in council at the respective points named hereunder, and being requested by Her Majesty's 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 the faithful performance by their respective bands of such obligations as shall be assumed by them, the said Indians have therefore acknowledged for that purpose the several Chiefs and Headmen who have subscribed hereto.

...

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands in severalty, to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.

Et considérant que les indiens de la dite étendue du pays se sont dûment réunis en conseil aux différents endroits ci-après nommés, et qu'étant requis par les Commissaires de Sa Majesté de présenter leurs chefs, sous-chefs ou conseillers, qui seraient autorisés en leur nom, à conduire ces négociations et à signer un traité d'après elles, et à devenir responsables envers Sa Majesté du fidèle accomplissement de la part de ces bandes des obligations qu'elles contracteront, les dits indiens ont en conséquence nommé à cette fin les divers chefs et conseillers qui y ont apposé leur nom;

...

Et Sa Majesté la Reine par les présentes convient et s'oblige de mettre à part des réserves pour les bandes qui en désireront, pourvu que ces réserves n'excèdent pas en tout un mille carré pour chaque famille de cinq personnes pour tel nombre de familles qui désireront habiter sur des réseves, ou dans la même proportion pour des familles plus ou moins nombreuses ou petites; et pour les familles ou les indiens particuliers qui préféreront vivre séparément des réserves des bandes, Sa Majesté s'engage de fournir une terre en particulier de 160 acres à chaque indien, la terre devant être cédée avec une restriction quant à l'inaliénation sans le consentement du Gouverneur général du Canada en conseil, le choix de ces réserves et terres en particulier devant se faire de la manière suivante, savoir: le Surintendant général des Affaires indiennes devra députer et envoyer une personne compétente pour déterminer et assigner ces réserves et terres après s'être consulté avec les indiens intéressés quant à la localité que l'on pourra trouver convenable et disponible pour le choix.

[29] On the same date as Treaty 8 was entered (August 4, 1899), a playlist was created for the “Cree-Chipewyan Band at Fort McMurray”. This playlist notes Seopotakinum Cree as Cree Headman and Adam Boucher as Chipewyan Headman. Paul Cree is not listed as a Headman.

C. Treaty 8 claims in these actions [30] Treaty 8 is a central historical event in these claims; however, the issues raised by the Plaintiffs do not require the Court to interpret the provisions of Treaty 8. To be clear, the claims advanced in these actions are not in relation to the exercise of Treaty 8 rights such as hunting, trapping, or fishing as was the case in *R v Badger*, [1996] 1 SCR 771 [Badger]. Nor are the claims for the allocation of additional band lands under Treaty 8—the lands claimed by the Plaintiffs (IR 175) are currently held by FMFN.

[31] As well, with the one exception of the Plaintiff John Malcolm, the claims are not for recognition of Indian status. The Plaintiffs in all of the actions have status as Indians and have been or are current members of FMFN. As such, they have received Treaty 8 entitlements through FMFN.

[32] There is separate and ongoing litigation between Canada and FMFN regarding Treaty 8 entitlements and a partial settlement of this litigation was reached in 2017. In that settlement, August Cree, one of the named Plaintiffs in the Dumais action, acted on a FMFN committee to determine how the settlement funds should be used by FMFN.

[33] Taking into account this historical and contextual background, I will now move to the issues for consideration on these Motions.

V. Issues [34] These Motions raise numerous issues for consideration, to avoid overlap and repetition, I will address the issues as follows:

A. Preliminary matters

- (1) The evidence
 - (a) Evidence adduced by Canada
 - (b) Canada's expert reports
 - (c) Objections to Malcolm and Powder evidence
 - (d) Objections to Dumais evidence
 - (i) Carol Hodgson reports
 - (ii) Objections to Bernadette Dumais Affidavit
 - (iii) Traditional Land Use study
 - (iv) August Cree Affidavit
 - (v) Oral history evidence
- (2) Are the claims barred by a limitation period?
- (3) Does the Federal Court have jurisdiction?

B. Motions for Standing

- (1) Overview
- (2) Powder and Malcolm Plaintiffs Standing Motion
 - (a) Is the issue of standing res judicata?
 - (b) Do the Powder and Malcolm Plaintiffs satisfy Rule 114?
 - (c) Do the Plaintiffs have public interest standing?
- (3) Dumais Plaintiffs Standing Motion
 - (a) Rule 114-application of the test for Representative Proceedings
 - (i) Criteria 1 & 2 - is there a collective with common interests?
 - (ii) Criteria 3 & 4 - are the representative plaintiffs authorized and can they fairly and adequately represent the collective?
 - (iii) Criteria 5 - is this the just, most efficient and least costly manner of proceeding?

(b) Do the Plaintiffs have public interest standing?

(4) Conclusion on Standing Motions

C. Summary Judgment Motions

(1) General principles–Summary Judgment Motions

(2) Canada's Motion for Summary Judgment in T-165-01 (Malcolm registration claim)

(3) Canada and FMFN Motions for Summary Judgment in T-1601-12 and T-436-15

(4) Canada and FMFN Motion for Summary Judgment in T-809-17 (Dumais Claim)

(5) Malcolm and Powder Plaintiffs Motions for Summary Judgment

(6) Conclusion on Summary Judgment Motions

VI. Analysis A. Preliminary matters (1) The evidence [35] The parties helpfully prepared a joint book of documents for the assistance of the Court, and they filed extensive records containing affidavit evidence and supporting documentation.

[36] Canada has provided an extensive historical record. The Plaintiffs do not contest the reliability of the documents in this record, and they did not conduct cross examinations disputing the historical record adduced by Canada. Similarly, the Plaintiffs have not identified any gaps in the evidence produced by Canada. To the extent that the Plaintiffs advance positions that are contradicted by the historical record produced by Canada, I rely on the historical record as providing an accurate record.

[37] I will summarize some of the historical record produced by Canada, followed by a consideration of the evidentiary issues raised.

(a) Evidence adduced by Canada [38] Canada relies upon the following Affidavits with corresponding exhibits to establish the historical record related to these actions:

Affidavits of Jean Pierre Morin, sworn on March 30, 2021 and June 28, 2021, respectively. Morin was a departmental historian in the Historic and Policy Research unit of the Strategic Policy Directorate at Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC). Attached to Mr. Morin's Affidavit are official historical government documents including a 1915 land survey report prepared by Donald Robertson DLS, historical band paylists, and census documents related to the now-FMFN land.

Affidavit of Chander Avasthi, affirmed on April 7, 2021. Avasthi was an Indians Moneys Officer, Indian Monies, Estates and Treaty Annuities, Regional Operations, Alberta Region of the Department of Indigenous Services Canada, responsible for recording election results and analysis of Band Council Resolution requests received from First Nations in Treaty 8. Exhibits to Avasthi's Affidavit included a copy of a Band Council History Report dated March 29, 2021, for Fort McMurray #468 First Nation (FMFN) listing, among other information, the dates of FMFN elections and the names of elected Chief and Council for the years 1991 to present.

Affidavits of Kierra Tyo, sworn on March 31, 2021 and April 8, 2021, respectively. Tyo was a Litigation Case Manager at the Office of the Indian Registrar (OIR). Attached to Tyo's Affidavit are records in possession of OIR pertaining to the Malcolm, Powder, and Dumais Plaintiffs registration under the Indian Act.

Affidavit of Jennifer O'Neill, sworn on May 17, 2021. O'Neill was a Manager, Federal Negotiations in the Specific Claims Branch of the Department of Crown-Indigenous Relations and Northern Affairs (CIRNA). O'Neill was assigned as federal negotiator for treaty land entitlements specifically the claim of FMFN regarding Treaty 8. O'Neill attached several exhibits, some of which are confidential. These exhibits include documentation between Robert Cree and Government officials demonstrating Robert Cree's intent to establish Paul Cree Band as a band separate from FMFN as early as 1991, and Robert Cree's acknowledgement that Government officials had not recognized the Paul Cree Band as separate and distinct from FMFN. These exhibits also established that R. Peter Newton of Campbell & Company was retained in 1994 to support research related to a land claim presentation from the Paul Cree Indian Group in the Fort McMurray region.

Affidavit of Michelle Nouch, sworn on June 23, 2021. Nouch was a paralegal employed by the Department of Justice Canada, Prairie region, in the Edmonton Regional Office. Nouch attached as exhibits to her Affidavit several land-related documents from the Indian Land Registry System (ILRS Report), demonstrating historical record of official documents including Privy Council Orders, Orders in Council, permits, leases, and assignments related to Clearwater IR 175 spanning from 1921 to 1977.

Affidavit of Kevin Payne, affirmed June 28, 2021. Payne was employed as a Band Moneys Advisor with the Trust Moneys, Estates and Treaty Annuities team, Indigenous Services Canada (ISC). Payne attached as exhibits to his Affidavit several historical documents within the possession of ISC including Orders in Council, Treasury Board Minutes, and Manuals relating to Clearwater IR 175. These documents span from 1917 to the 1990's.

[39] I will also refer to some of the key historical documents relied upon by the Plaintiffs.

[40] In a document dated January 2, 1914, addressed to A. Norquay, Agent Dom. Lands, Edmonton, Alberta, Paul Cree makes the following request:

I am the Cree Indian Paul Cree who writes. I am writing to ask you about the place I have been living on at the Pembina River for the last twenty years.

I would like very much to have a place there for myself and my two boys name Alexis and Raphael, ages 25 and 18 years old.

I have lived so long at this place now I would not like to go away, and I promise never to draw any more treaty money from now on if I get this place...

[41] The May 12, 1921 Governor General In Council Order states:

WHEREAS the Minister of the Interior reports that the Department of Indian Affairs has applied for the setting apart of a tract of land surveyed and known as Clearwater Indian Reserve No. 175 at the junction of the Clearwater and Christina Rivers...selected by the Department of Indian Affairs for Paul Cree's Band of Indians under the provisions of Treaty 8;

...

THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Minister of the Interior, is pleased to order and it is hereby ordered that the above tract of land containing 2,261.80 acres more or less be set apart for the Department of Indian affairs for the purposes and uses of the Indians of the Clearwater Indian Reserve No. 175.

[42] On October 29, 1957, W.C. Bethune, the Superintendent, Reserves and Trusts sends a letter to G.S. Lapp, Esq. who is the Superintendent, Indian Agency stating:

The Clearwater I.R. was set aside in 1921 by P.C. 1570 dated May 12th, 1921. The Order in Council sets aside this reserve for the Paul Cree's Band of Indians under the provision of Treaty No. 8.

A careful review was made of the Treaty Pay Lists and also of the correspondence dealing with the request submitted to the Department of Interior in setting apart these reserves for the Indians. We find very little information from our correspondence here that would indicate precisely the Band for whom each of these reserves were set apart. We do think that Gregoire Lake Indian Reserves offers little difficulty, however, we are not too clear with respect to Clearwater Indian Reserve because when a request was made to set this apart for a reserve, the correspondence on file here makes reference to the Paul Cree Band consisting of Paul Cree and his sons, Alexis and Raphael.

[43] The Plaintiffs also rely upon a letter dated December 17, 1957, from J.W. Stewart, Superintendent stating:

I note in the list of reserves that the Clearwater Reserve was named for Paul Cree Band and why it was never kept that way is a mystery.

(b) Canada's expert reports [44] Canada also relies on the reports of the following experts who have sworn affidavits and prepared reports.

Nicole Marion Patola holds a PhD, History, from Carleton University, a Master of Arts, History, from the University of Ottawa, and a Bachelor of Arts, History, from Carleton University. She works as a Research Director with Know History in Calgary and is responsible for genealogical and archival research. She states that from February 2018 to March 2021 she completed 2,230 hours of genealogical work. She has developed two custom genealogical databases for Indigenous clients, which has data for over 175,000 individuals, and nearly 175,000 documents. Dr. Patola prepared a report dated September 17, 2021, titled "Historic and Contemporary Ancestral, Marital, and Kinship Relationships Related to the Powder, Malcolm, and Dumais actions". On August 31, 2022, she prepared a Sur-Reply report.

Gwynneth C. D. Jones holds a Master of Arts (History), York University, a Master of Public Administration, Queen's University and a Bachelor of Arts (History, First Class Hons.) from Queen's University. She is a self-employed Historian. Since 1996, she has been engaged in research for First Nations, Crown and other Indigenous clients on a range of issues relating to Indigenous claims to recognition, land, natural resources, rights and moneys. She conducts original historical research in primary sources, analyzes historical documents and data, and writes reports providing an exposition and analysis of the historical record as requested and provides copies of all supporting documents. She has been qualified as an expert witness on nine occasions in the Federal Court and Provincial courts. Ms. Jones prepared a report dated September 7, 2022. An edited report was prepared on October 20, 2022.

Robert Irwin holds a PhD, History from the University of Alberta, an MA in History from the University of Saskatchewan and a BA (Hon) in History also from the University of Saskatchewan. Currently he is an Associate Professor of History at MacEwan University in Edmonton, Alberta where he teaches courses on Alberta history, First Nations and Canada, and Historical Method and Theory. He has published scholarly papers, presented papers at academic conferences, and given expert historical opinion in court on the history of the Athabasca district prior to treaty, the making of Treaty 8, treaty hunting and fishing rights, and the surrender of Indian Reserves. Dr. Irwin prepared a report dated June 23, 2021 and a Sur-Reply report dated September 8, 2022.

(c) Objections to Malcolm and Powder evidence [45] Canada and FMFN made objections to the evidence adduced by the Plaintiffs in support of their Standing Motions and the Summary Judgment Motions in T-436-15, T-1601-12 and T-165-01. Specifically, they object to documents included in the Amended Motion Record and to various statements made and exhibits attached to the Affidavit of John Malcolm.

[46] I will first address the objections to the Affidavit of John Malcolm sworn on October 24, 2020, on the grounds that many of the statements made in this Affidavit are not within his personal knowledge as required by Rule 81.1(1).

[47] Mr. Malcolm's Affidavit recounts events that took place well over 100 years ago. This is obviously not information within his personal knowledge. Although he claims to have informed himself based upon review of "books and articles on the area and its history" that is not a proper manner by which to introduce historical information. I accept that he has personal knowledge of his own family history, however the information he includes on other family groups, the fur trade settlement, Hudson Bay records, paylists, and actions of the government in the early 1900s is not information within his personal knowledge. Furthermore, his statements and the exhibits attached to his Affidavit relating to oil and gas resources at IR 175 is not information within Mr. Malcolm's personal knowledge and will, therefore, be disregarded.

- [48] Exhibit 32 to the Affidavit of John Malcolm consist of the transcript of an interview with Raphael Cree and Exhibit 36 is a report prepared by lawyers Campbell & Company in 1995 titled The Clearwater Indian Reserve No. 175 or the Paul Cree Reserve. This report was prepared for the Department and Indian Affairs and Northern Development. These are not documents prepared by Mr. Malcolm or prepared for him and they are, therefore, not within his personal knowledge. Although legal counsel for Mr. Malcolm urged the Court to use these documents as a proxy for “oral history evidence”, they are not evidence of oral history and this is not the appropriate manner to introduce oral history evidence.
- [49] In various paragraphs throughout his Affidavit, Mr. Malcolm provides his opinion on various matters. It is well accepted that lay witnesses may not give opinion evidence but may only testify to facts within their knowledge, observation, and experience (*Choudhry v Canada (Attorney General)*, 2023 FC 1085 at para 39 citing *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at para 14). Mr. Malcolm’s opinion evidence will be disregarded.
- [50] Generally, the Defendants object to documents that have been attached to Mr. Malcolm’s Affidavit as an attempt to enter the documents as evidence. I agree with their objection that a document does not become “evidence” by the mere act of attaching it to an Affidavit. At best, that demonstrates that the document exists, but it does not establish the truth of the contents of the document. Further, it is not appropriate for Mr. Malcolm to repeat the evidence of another witness and adopt that evidence as his own—he attempts to do that in a number of paragraphs of his Affidavit.
- [51] I have not addressed each of the objections made to the evidence put forward by John Malcolm, but I have determined that much of the evidence both in his Affidavit and the exhibits attached to his Affidavit is evidence that is not within Mr. Malcolm’s personal knowledge. It will, therefore, be given little evidentiary weight.
- [52] Finally, it is inappropriate for counsel to attempt to introduce documents as evidence by attaching them to the Motion record or to the written submissions without otherwise formally entering them into evidence through an affidavit. Accordingly, I will disregard the documents attached to the Powder and Malcolm Record on Motion and written submissions.
- (d) Objections to Dumais evidence [53] Canada and FMFN object to evidence tendered by the Dumais Plaintiffs in T-809-17. I will address objections to their expert reports first.
- (i) Carol Hodgson reports [54] In a pre-hearing Motion, Canada sought to exclude the Hodgson expert reports on the grounds that Ms. Hodgson was not a properly qualified expert and that her research had been influenced by legal counsel. In my decision of December 15, 2023, I declined to strike the reports noting that the reliability of the Hodgson’s interpretation of historical record was a question of weight rather than admissibility.
- [55] At the hearing of these Motions, Canada reiterated its objection to the reports of Carol Hodgson.

[56] Ms. Hodgson is a research analyst retained by the Dumais Plaintiffs to prepare an expert report regarding the history and existence of the Clearwater First Nation. She prepared a report titled “Clearwater First Nation Historical Report”. Canada argues that as a “research analyst” Ms. Hodgson is not properly qualified to give opinion evidence. They also argue that she narrowed and limited the historical record considered in her research. They point to the fact that she focuses on the existence of Paul Cree’s Band only from 1899-1915, without exploring other possibilities such as the band may have been just a family group.

[57] Ms. Hodgson prepared two reports. First the “Clearwater First Nation Historical Report” dated July 2019, and second a report dated February 2022 in reply to the Canada’s expert reports. Her key conclusions are:

the Hudson’s Bay Company (HBC) trading journal for the Fort McMurray trading post in the pre-treaty period from 1877-1892 document various family groups using the land around Fort McMurray. Hodgson opines that the HBC journals reference to “Baptiste” was one of Seopotakinum’s two sons and that Baptiste Cree was documented as travelling and hunting with Paul Cree. It is also her opinion that at the time of the adherence to Treaty 8, there were four groups which were Fort McKay, Willow Lake (also known as Gregoire Lake), Pembina River (now known as Christina River), and Janvier Band.

Seopotakinum and Paul Cree headed an independent 1899 Indian band when Treaty 8 was signed at Fort McMurray that included IR 175.

The first survey for IR 175 was in July 1915 and counted 17 people.

In 1921 an Order in Council confirmed that Clearwater Reserve was set aside for “Paul Cree’s Band of Indians”.

Jean Baptiste Cree was the son of Seopotakinum Cree, to whom August Cree and Bernadette Dumais are directly descended from.

[58] Dr. Robert Irwin, an Associate Professor of History at MacEwan University, was retained by Canada to review the Hodgson reports. Dr. Irwin notes that the Hodgson reports are grounded on an unfounded premise that the “Clearwater Band” exists. In his report of June 23, 2021, he states as follows at page 7 regarding the initial Hodgson research report:

It is a useful report. It is a report, however, that is focused upon a specific premise and driven by a particular purpose. In addressing the scope and purpose of her report, she notes that the research is founded in the premise that “there is a group of members of the recognized Fort McMurray first nation who identify as members of a group called the Clearwater first nation.”... By establishing the premise that a Clearwater band exists, and then searching for evidence to justify its existence, her report selectively reports and prioritizes evidence. And her effort to discover and establish a connection between Jean Baptiste Cree, [Seopotikinum], and Paul Cree in particular leads Ms. Hodgson to make a deliberate effort to identify a local band, led by [Seopotikinum] Cree, and to connect that local band to a “Paul Cree band” as identified in the report of Department of Indian affairs surveyor Donald Robertson. As will be illustrated in the

detailed commentary, that effort caused her to emphasize certain evidence, disregard or downplay other evidence, and to misrepresent the scholarly literature.

[59] Dr. Irwin goes on at page 8 of his report to note that Hodgson builds an argument that Jean Baptiste Cree, who she claims is a grandson of Seopotakinum Cree, was a member of the Paul Cree Band. However Dr. Irwin notes that she does not “acknowledge that she found no evidence in the documentary record to support a residential linkage of Jean Baptiste Cree to Indian Reserve 175.”

[60] Dr. Irwin identifies certain conclusions made by Hodgson that are not supported by the evidence for example:

Pg 26 - her conclusion that Seopotakinum leads a band resident at the Clearwater River and that a separate alternative band including the families of Chewchum, Gregoire Hainault, and John Malcolm were resident at Gregoire Lake is not supported by the evidence in the Fort McMurray for trade journal

P 27 - I could find no references in the Fort McMurray journals to either Seopotakinum or old Cree. Together, this information suggests that Paul Cree’s residence in the area that would be set aside as the Clearwater reserve after 1891 was restricted to his family rather than a larger decision by the members of the regional band

[61] In Dr. Irwin’s Sur-Reply report, he addresses the references in Surveyor Robertson’s diary relied upon by the Plaintiffs to support their contention that Clearwater IR 175 was set aside for the “Paul Cree Band” as follows at page 22:

At no point in the diary does Robertson mentioned whom he may have consulted regarding the surveying of the Clearwater reserve nor discuss the composition of what he described as “the Paul Cree band”. Both reports that he subsequently prepared are similarly silent on the issue of whom he might have consulted and only the report dated 5 January 1916 indicates the reserve was allocated for 17 people.

[62] Having now considered the Hodgson reports in the context of the historical record before me, I have determined that I will afford the Hodgson reports low evidentiary weight for the following reasons. First I agree with Canada that as a research analyst, and not as a historian or an anthropologist, Hodgson’s “opinions” on the formation of bands is not within her expertise. Further, she purposely narrowed her research to finding evidence of the existence of the Paul Cree Band between 1899-1915 and does not consider the broader historical context. She also relies heavily on the Nistawayaw: “Where Three Rivers Meet” (TLU study) which is a report that the Plaintiff Bernadette Dumais commissioned. For reasons addressed below, the TLU study is not a reliable source in support of the conclusions which Hodgson makes from the TLU study.

[63] Where there is a conflict in the interpretation of the historical evidence, I prefer to rely on the opinions of the experts retained by Canada over the opinions of Carol Hodgson.

(ii) Objections to Bernadette Dumais Affidavit [64] The Defendants object to statements made and the documents relied upon in the Affidavit of Bernadette Dumais sworn on December 18, 2020. I will address this in more detail below.

(iii) Traditional Land Use study [65] Ms. Dumais attaches to her Affidavit the April 2006 traditional land use study Nistawayaw: “Where Three Rivers Meet” (TLU study) which was commissioned by FMFN. Bernadette Dumais was the project coordinator of this study and she relies heavily on the TLU study in her Affidavit. As noted above, Carol Hodgson also relies heavily upon the TLU study.

[66] Dr. Irwin in his report of June 23, 2021, considers the TLU study and its historical value to the issues in these actions. He notes that Bernadette Dumais was among the primary researcher and writer for this report (p 8). He notes that the TLU study acknowledges that the indigenous people in the vicinity of Fort McMurray belong to a larger regional networks of Cree, Beaver, and Chipewyan people (pp 8-9) but this fact is not noted in the Hodgson report. At page 6 of his report, Dr. Irwin states as follows regarding the TLU study:

Nistawayaw is primarily based upon the oral history of the Fort McMurray elders with contextual examination of selected academic works. It contains interesting perspectives regarding the way in which the community used the landscapes. When used critically and in association with the documentary record, a resource such as Nistawayaw may contribute to an understanding of the social organization of the community. Ms. Dumais however relies uncritically upon this resource.

[67] Dr. Irwin notes how several elements of the story relayed by Eva Cree included in the TLU study are difficult to reconcile with the historical record. Dr. Irwin further contends that Bernadette Dumais relies upon the TLU study “uncritically and selectively” (p 6). He also notes that Ms. Dumais relies upon the quotations from Raphael Cree to establish the identity of the residents on IR 175. However, Dr. Irwin notes that the information relied upon from Raphael Cree is sourced from two interviews done by a law firm 18 months apart. As noted by Dr. Irwin:

The account in Nistawayaw also fails to place Raphael Cree’s memory in historical context by failing to acknowledge that his memory included errors in fact including the date of the survey, listing marriages that had not yet occurred, and children not yet born. Such errors, of course, are not surprising since he was approximately 100 years old at the time of the interview and memories often conflate historical events over time.

[68] Based upon the above, I do not consider the contents of the TLU study to be reliable evidence for the purpose of the issues raised in these actions and this Court will exercise caution in any weight afforded to the information in the TLU study.

(iv) August Cree Affidavit [69] The Dumais Plaintiffs also rely upon the Affidavit of August Cree sworn November 18, 2020. August Cree is one of the named Plaintiffs. He claims to be the great-great-grandson of Seopotakinum Cree and a member and Elder of the Paul Cree Band. Dr. Irwin was asked to provide an opinion on the reliability of the August Cree Affidavit. This Affidavit is relied upon by Ms. Hodgson to support the historical conclusions reached in the Hodgson report. At page 5, Dr. Irwin states:

Beyond his personal memories, August Cree asserts that his mother Eva Cree, daughter of Jean Baptiste Cree, was born on Indian reserve and O. 175 in 1926. He provides no evidentiary foundation in support of this claim and there is no documentary evidence in the historical document production that effectively substantiates this assertion. In fact, there is almost no documentary records identifying a residence for Jean Baptiste Cree, but those few that do exist establish his residence at Indian reserve No. 176.

[70] This contradiction raises questions on the reliability of the August Cree Affidavit, and I therefore exercise caution in any weight afforded to the information contained in the August Cree Affidavit.

(v) Oral history evidence [71] In her Affidavit, Bernadette Dumais notes: “some of the history of the Clearwater Band is not documented. Importantly, however, there is an oral history tradition specific to Clearwater First Nation. To the extent I am able, I rely on this oral history as it has been handed down to me.”

[72] In their Motion materials, the Dumais Plaintiffs did not take any steps to have “oral history evidence” introduced through elders or an historian at the hearing of these Motions. Dumais’ own expert, Carol Hodgson, did not herself interview any elders.

[73] Based on the above, although I am not striking out this evidence, I will afford it low evidentiary weight in assessing the historical record and events relating to the claims advanced by the Dumais Plaintiffs.

(2) Are the claims barred by a limitation period? [74] Canada and FMFN argue that the claims should be dismissed as they have been brought well beyond any applicable limitation period.

[75] Following the hearings of these Motions, the Supreme Court of Canada issued its decision in *Shot Both Sides v Canada*, 2024 SCC 12 [Shot Both Sides] and the parties were granted leave to provide written submissions. Based upon *Shot Both Sides*, I am satisfied that statutory limitation periods apply to these actions. Further, the Supreme Court confirmed that the rules on limitation periods apply to Aboriginal and treaty rights claims (para 60).

[76] Aside from the applicability of limitation periods, I would note that the facts of Shot Both Sides are very different from those in these claims. In Shot Both Sides the Blood Tribe was a named signatory to Treaty 7 and they advanced their claims as recognized in the rights-bearing collective. There was no issue that the Blood Tribe had treaty rights and there was no challenge to the standing of the Blood Tribe to advance the claims.

[77] That is not the case here where, based upon the evidentiary record before the Court, I am not satisfied that the Plaintiffs can prove that a Paul Cree Band existed separate and distinct from FMFN. We know for certain that Paul Cree Band was not an independent signatory to Treaty 8. There is also the issue of standing which I will address below. Suffice it to say, the facts before me do not align with those in Shot Both Sides.

[78] Here, the applicable provincial legislation is the Alberta Limitations Act RSA 2000, c L-12 by operation of 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 (Wewaykum Indian Band v Canada, 2002 SCC 79 [Wewaykum] at para 114).

[79] The relevant sections of the Alberta Limitations Act provide:

2(1) This Act applies where a claimant seeks a remedial order in a proceeding commenced on or after March 1, 1999, whether the claim arises before, on or after March 1, 1999.

(2) Subject to sections 11 and 13, if, before March 1, 1999, the claimant knew, or in the circumstances ought to have known, of a claim and the claimant has not sought a remedial order before the earlier of

(a) the time provided by the Limitation of Actions Act, RSA 1980 cL-15, that would have been applicable but for this Act, or

(b) two years after the Limitations Act, SA 1996 cL-15.1, came into force, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

...

13 An action brought on or after March 1, 1999 by an aboriginal people against the Crown based on a breach of a fiduciary duty alleged to be owed by the Crown to those people is governed by the law on limitation of actions as if the Limitation of Actions Act, RSA 1980 cL-15, had not been repealed and this Act were not in force.

[No translation available]

[80] Paragraphs 4(1)(e) and (g) of the Alberta Limitation of Actions Act are applicable to these actions to the extent that the Plaintiffs' claims for breach of fiduciary duty and breach of treaty respectively:

4(1) The following actions shall be commenced within and not after the time respectively hereinafter mentioned:

...

- (e) actions grounded on accident, mistake or other equitable ground of relief not hereinbefore specifically dealt with, within 6 years from the discovery of the cause of action;

...

- (g) any other action not in this Act or any other Act specifically provided for, within 6 years after the cause of action therein arose.

[No translation available]

- [81] Under the Limitation of Actions Act and in the context of historic Aboriginal and treaty rights claims, courts have generally assessed limitation periods as starting to run where there is evidence of band members knowing the material facts to bring a claim (Wewaykum at para 123; Canada (Attorney General) v Lameman, 2008 SCC 14 at para 17 [Lameman]). 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 First Nation v Canada 2013 FCA 191 at para 49).
- [82] In this case, as the underlying events common to these actions occurred more than 100 years ago, the onus lies on the Plaintiffs to show late discovery of the claims (Papaschase Indian Band No 136 v Canada (Attorney General), 2004 ABQB 655 at para 144). Otherwise, any limitation periods ran out a long time ago.
- [83] The evidence demonstrates that the Plaintiffs knew or ought to have known of their claims prior to March 1, 1999, and did not commence their actions before the expiry of the applicable time provided in the Limitation of Actions Act. There were several points in time where it would be clear to members of the asserted Paul Cree Band (regardless of who has standing to represent them) that Canada did not, and had never, recognized the legal existence of a Paul Cree Band under Treaty 8.
- [84] In 1951, at the time of posting of Band Lists, it would have been obvious that Paul Cree Band was not listed. In the 1960s, Elmer Cree and others who participated as FMFN Council members who approved the development of the Gregoire Lake reserves, would have been aware that Canada did not consider there to be a Paul Cree Band with IR 175 as its reserve. In the early 1970s, members of FMFN talked about splitting the band into two groups without any reference to a Paul Cree Band.
- [85] Then in 1992, Robert Cree and others wrote to Canada on behalf of "Paul Cree Band" asking about the creation of a new band stating they wished to pursue the establishment of a separate band. They did not seek recognition as an historical band. Those supporting this request included the Plaintiffs Jean Powder and Elmer Cree and they relied upon the OIC establishing the Clearwater reserve. The group was also represented by legal counsel.

- [86] An important event for the Plaintiffs was in 1994 when a group of FMFN members marched from Fort McMurray to Edmonton to ask for band status. In cross examination, Ms. Dumais confirmed that it was in 1994 that she formed the belief that she was the member of a separate band. Notwithstanding this, the Dumais claim was not filed until 2017.
- [87] In their submissions, the Powder and Malcolm Plaintiffs claim that the filing date of their action is June 1997 because it is related to an action commenced in T-1343-97. They claim that a consolidation of four older actions became T-165-01. Be that as it may, the claims advanced in T-165-01 are that the Plaintiffs are entitled to be registered as Indians under the Indian Act. Although there is a reference to Paul Cree Band (para 26a), this action does not seek recognition of the Paul Cree Band. That claim is first made in action T-436-15 which was not filed until March 2015.
- [88] The claim made by the Malcolm Plaintiffs in T-1601-12 is for an interest in land allegedly used by Harry Malcolm. The evidence is that Harry Malcolm signed a release concerning lands in IR 175 (Clearwater). The Plaintiffs have not established any basis for the Court to disregard the release. Further, Harry Malcolm passed away in 1953 and the action for recovery of this land was not filed until 2012. This claim cannot succeed because it is either statute-barred or because of the Release executed by Harry Malcolm.
- [89] In summary, if the Court applies a 2-year, 6-year limitation period based upon discoverability, there are a number of events that can be used as benchmarks upon which to calculate the limitation period. In either scenario, these actions have been filed long after any applicable limitation period.
- [90] The Dumais Plaintiffs assert that the limitation periods do not apply because they seek only declaratory relief. They rely upon *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 [Manitoba Metis], where the court confirmed that constitutional declaratory relief provides a narrow exception to the limitation period. However, the court in *Manitoba Metis* also notes that the exception does not apply to “personal” or “coercive” claims. The relief claimed by the Dumais Plaintiffs is coercive relief as it seeks “return of reserve lands” which directly impacts FMFN as the land sought (IR 175) is held by FMFN. Thus, the exception in *Manitoba Metis* does not apply to the claims advanced by the Dumais Plaintiffs (paras 140-143).
- [91] Relatedly, to the extent that all Plaintiffs are in effect challenging decisions made by Canada and FMFN as noted by the Alberta Court of Appeal in *Athabasca Chipewyan First Nation v Alberta (Minister of Energy)*, 2011 ABCA 29 at paragraphs 17–25, a plaintiff cannot use declaratory relief as a means to effectively seek to set aside decisions that were not otherwise challenged within the limitation period.
- [92] The Dumais Plaintiffs also argue that limitation periods should not apply as the declaratory relief they seek serves the purpose of reconciliation. A similar argument was made in *Wesley v Alberta*, 2024 ABCA 276 where the Alberta Court of Appeal noted:

43 The Stoney Nakoda Nations argue that the defendants' reliance on a limitations defence is inconsistent with reconciliation. This is not a principle of law, because "reconciliation" is a constitutionally based policy objective. It is a framework used to interpret and apply the law and assess the conduct of the Crown. "Reconciliation" is not a freestanding source of legal rights and cannot be asserted at large to create an exception to statutory provisions like the Limitations Act: *Watson v Canada*, 2020 FC 129 at para. 352; *Jim Shot Both Sides* (FCA) at para. 229.

- [93] Similarly, here the Dumais Plaintiffs raise "reconciliation" as a defence to avoid the application of limitation periods to the claims they advance, without first establishing an evidentiary legal basis to advance the claim.
- [94] *Shot Both Sides* confirms statutorily prescribed limitation periods apply in Aboriginal law cases. Based upon the evidence, it is clear that the Plaintiffs knew or ought to have known, of their respective claims long before the applicable limitation periods ran out. As such, there is no genuine issue for trial and the claims can be summarily dismissed solely on this ground.
- [95] In summary, I find that each action was brought long after the application statutory limitation period expired and is, therefore, statute-barred.
- [96] It is unnecessary to address the equitable defences of laches and acquiescence raised by Canada and FMFN, as the limitation periods finding is determinative and warrants summary judgment in favour of the Defendants. There is no genuine issue for trial in a statute-barred action.
- (3) Does the Federal Court have jurisdiction? [97] Canada argues that the claim made by the Malcolm Plaintiffs in action T-165-01 for registration under the Indian Act is not within the jurisdiction of the Federal Court. They make the same argument on the claim advanced by the Dumais Plaintiffs in T-809-17 asking that the Clearwater Band be recognized and reinstated by the Minister of Indigenous Affairs as a "band" under section 17 of the Indian Act.
- [98] In determining jurisdiction, the Court must assess the true nature or essence of the claim (*Windsor (City) v Canadian Transit Co*, 2016 SCC 54 at para 26). That is a straightforward exercise here, as the true nature of the claim made is for relief under the Indian Act.
- [99] The registration provisions of the Indian Act are a complete code that include the right to protest a decision made under the Act and the right to appeal a refusal to a provincial superior court—not to the Federal Court (*Callihoo v Canada (Minister of Indian Affairs and Northern Development)*, 2004 FC 1312 at paras 11–17 [Callihoo]; affirmed in 2008 FCA 368). This is a clear grant of jurisdiction to the provincial superior courts.

[100] Despite Callihoo, the Plaintiffs offer no grounds to demonstrate that this Court has the jurisdiction to consider their requests for registration under the Indian Act. This is not a case where registration claims were made and were refused—in which case a remedy is already provided for under the Indian Act. Rather, the Plaintiffs seek this relief directly from this Court.

[101] On the requests for relief under the Indian Act made in T-165-01 (Malcolm registration action) and in T-809-17 (Dumais action), I conclude that this Court does not have jurisdiction.

B. Motions for Standing (1) Overview [102] Motions for standing were filed in T-436-15 (Powder) and T-890-17 (Dumais) where the Powder and Dumais Plaintiffs, in each of their respective actions, seek standing to bring representative claims on behalf of members of an unrecognized band referred to as the “Paul Cree Band” or the “Clearwater Band”. These are competing Motions to the extent they each purport to represent the same group, but they have different approaches on who would be considered members of their groups. Both groups seek to have Paul Cree Band or the Clearwater Band recognized as a Band, they claim Treaty 8 rights and benefits, and they lay claim to the land known as IR 175.

[103] In addition, the Plaintiffs in T-165-01 and T-1601-12 seek standing to represent the interests of the family of Harry Malcolm.

[104] On the issue of standing, I have determined, albeit for different reasons, that neither the Powder Plaintiffs nor the Dumais Plaintiffs can establish standing to assert these representative claims pursuant to Rule 114 as neither group can satisfy the test that they have a collective interest to proceed in a representative capacity. I have also determined that John Malcolm does not have standing to represent his family group.

[105] My analysis for the two competing groups is outlined below.

(2) Powder and Malcolm Plaintiffs Standing Motion [106] The Powder and Malcolm Plaintiffs filed one Motion for standing in 3 separate actions. In their Notice of Motion, they seek the following:

...Determination of the Issue of Standing of the Plaintiffs in Federal Court Actions Nos. T-165-01, T-1601-12, and T-436-15 on the basis that standing has already been determined by the Federal Court and therefore this matter is res judicata, although it has been raised on many occasions by Canada.

[107] I would characterize the issues in the Powder and Malcolm standing Motions as follows:

- (a) is the issue of standing res judicata?
- (b) do the Powder and Malcolm Plaintiffs satisfy Rule 114?
- (c) do the Plaintiffs have public interest standing?

(a) Is the issue of standing res judicata? [108] The Plaintiffs argue that because of previous Orders issued during the case management process, they have already been recognized as having standing to bring these claims on behalf of the asserted band; therefore, the issue is res judicata.

[109] For the principle of res judicata to apply, the Plaintiffs must establish that the issue has been decided directly, and not as an issue that arose collaterally or incidentally at an earlier stage of the proceedings. The test for res judicata is:

- (1) the same question has been decided;
- (2) the judicial decision which is said to create the estoppel was final; and
- (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies. *Angle v Minister of National Revenue*, [1975] 2 SCR 248 [Angle]

[110] With this test in mind, I will turn to consider the Orders relied upon by the Malcolm and Powder Plaintiffs to argue that standing has already been determined.

[111] In T-165-01 (Malcolm registration claim), on February 7, 2005, Prothonotary Hargrave addressed if the new class proceedings rules should apply given the (then) repeal of Rule 114, he ordered as follows:

By virtue of Rule 55 this consolidated action, commenced as a representative action pursuant to former Rule 114, shall proceed as a representative action.

The case management judge or prothonotary may make such further orders or provide such directions as may be reasonably necessary to provide for the most just, expeditious and least expensive determination of this proceeding, which may include adjusting the style of cause to reflect the present number of persons represented by each set of plaintiffs; authorizing the claim; and reporting progress to those represented.

[112] The 2005 Hargrave Order is purely a procedural Order and does not address whether the Plaintiffs have the authority to bring the action on behalf of the asserted group. Furthermore, while the Malcolm Plaintiffs also rely upon this 2005 Order to establish standing in the T-1601-12, given that the action in T-1601-12 was only filed in 2012, the 2005 Order cannot be relied upon on this issue of standing.

[113] The Malcolm Plaintiffs also rely upon the Order of Prothonotary Lafrenière (as he then was) on August 2, 2012 to support their argument that standing has been established. This Order required the Plaintiffs to designate a single representative and to provide signed authorizations. This Order does not support the Plaintiffs' position that their representative claim has been recognized.

- [114] Finally, they point to the Order of Justice McVeigh of August 16, 2016 in action T-436-15, in response to a Motion to strike filed by Canada where she found that “Paul Cree Band’s Statement of Claim in the Second Action does disclose a reasonable cause of action...”. Canada’s Motion to strike the Powder Plaintiffs’ action was not granted. However, Justice McVeigh also notes in her decision that the “merits of this action need to be determined.” Thus, the issue of standing was not considered by Justice McVeigh, and she clearly notes that the issue of the merits of the actions have yet to be determined.
- [115] Contrary to the Plaintiffs’ submissions, the issue of standing has not been addressed in any of the above-noted Orders. There has been no consideration of the merits of, or the validity of the grounds upon which the Malcolm and Powder Plaintiffs claim to have the right to bring the claims forward on behalf of a collective group. There has been no final decision which has created an estoppel. Accordingly, res judicata does not apply to establish standing.
- (b) Do the Powder and Malcolm Plaintiffs satisfy Rule 114? [116] The test for a representative proceeding for an unrecognized rights-bearing collective under Rule 114 was described in *Watson v Canada*, 2020 FC 129 [Watson] at paragraph 412 as follows:
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.
- [117] The Powder Plaintiffs rely upon references in the evidence to support their position that Paul Cree Band is a rights-bearing group. They point to the language in Treaty 8 relating to land selection. They rely heavily on Privy Council Order 1570 dated May 12, 1921 which states that the Clearwater IR 175 is “comprising of 2,261.80 acres, selected by the Department of Indian Affairs for Paul Cree’s Band of Indians under the provisions of Treaty 8” and that the “tract of land containing 2,2261.80 more or less be set apart for the Department of Indian Affairs for the purposes and uses of the Indians of the Clearwater Indian Reserve No. 157.”
- [118] The Plaintiffs also rely upon a letter dated December 17, 1957, from J.W. Stewart, Superintendent stating:

I note in the list of reserves that the Clearwater Reserve was named for Paul Cree Band and why it was never kept that way is a mystery.

- [119] To draw a connection to Paul Cree himself, they rely upon Jean Powder's examination on March 20, 2018. She testified that she was born in 1929, that Paul Cree was her grandfather, and that Raphael Cree was her father. She also testified that she lived at Clearwater reserve and recalls there being 3 houses on the reserve: hers, Julien Cree's and Alex Cree's (also know as Alexis Cree).
- [120] While Canada concedes that the Powder Plaintiffs—with the exception of John Malcolm—are descendants of Paul Cree, they note that Paul Cree never adhered to Treaty 8 as a headman of the asserted Paul Cree Band.
- [121] In his Affidavit, John Malcolm states that his grandmother, Caroline Thompson, married Alexis Cree and after his death in 1912, she married Harry Malcolm. Harry Malcolm is John Malcolm's grandfather. John Malcolm states that Harry was "either Cree or mixed European-Indian." He relies upon the Affidavit of Arthur Deep who states that Harry and Walter Malcolm were "Indians or part Indians." It is not clear if John Malcolm claims a connection to Seopotakinum Cree or to the Paul Cree Band.
- [122] Further, the Powder and Malcolm Plaintiffs do not explain how membership in their proposed "Paul Cree Band" would be determined. This is a factor for consideration when a claim is brought on a representative basis. As noted in Watson at paragraph 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...

- [123] At best, the Plaintiffs appear to be relying upon a family connection to Paul Cree to assert the existence of that Band. This is similar to the circumstances in *Hwilitsum First Nation v Canada (Attorney General)*, 2017 BCSC 475 affirmed by 2018 BCCA 276 [Hwilitsum] where the court noted the plaintiffs' attempted to "construct a First Nation out of one family" and the membership criteria was "more akin to those of a private members' club" instead of "proving membership in a recognized collective" (Hwilitsum at paras 105, 108 and 109).
- [124] The inability to objectively determine who would be a member of the Paul Cree Band as asserted by the Plaintiffs is fatal to the Plaintiffs' request for representative authority for this group. At best, it appears the Plaintiffs are relying upon family membership to assess Paul Cree Band membership; however, ancestry is not sufficient. As noted in *Blueberry River Indian Band v Canada (Indian Affairs and Northern Development)*, 2001 FCA 67 [Blueberry River], it is band membership, not ancestry, that determines entitlement to the use and benefit of reserve lands and any attendant cause of action (Blueberry River at para 22).

- [125] The final Rule 114 criteria for consideration is if the representative plaintiffs can demonstrate that they are authorized to act on behalf of the represented collective group. The Powder Plaintiffs filed their claim in 2015. They rely upon authorizations that were provided to Maryann Powder to act in a representative capacity to advance the claims related to the Clearwater/Paul Cree Band. However, Maryann Powder later withdrew from the litigation after advising that her name was added to the litigation without her knowledge or approval and she also advised that the real person pursuing the claim was John Malcolm. No evidence was presented that the current representative Plaintiffs obtained replacement authorizations. There is no evidence that the current Plaintiffs have authority to act on behalf of the purported members of the plaintiff group.
- [126] In actions T-1601-12 and T-165-01, although John Malcolm claims to bring the actions on behalf of his siblings, there is no evidence that he is authorized by them to act in that capacity.
- [127] In conclusion, the Malcolm and Powder Plaintiffs do not meet the requirements of Rule 114 to advance a claim on behalf of a collective group. Even if they can establish an ancestral link to Seopotakimum Cree, who adhered to Treaty 8, that fact alone is not sufficient to grant standing. At best, the Powder and Malcolm Plaintiffs have established family groups, but that does not satisfy the test for standing where a collective interest must be established. Finally, the Plaintiffs do not have any evidence that they are authorized to act on behalf of the collective.
- (c) Do the Plaintiffs have public interest standing? [128] As an alternative argument, the Powder and Malcolm Plaintiffs claim to have public interest standing to advance the claims on behalf of those who make up the Paul Cree Band or Clearwater Band. In support of their public interest standing arguments, they argue that serious issues were identified by Justice McVeigh's Order in 2016 for T-436-15 and Prothonotary Hargraves's Order of 2005 for T-1601-12 and T-165-01. I have addressed these Orders above, and conclude that there are no findings in those Orders that support this contention.
- [129] The test for public interest standing requires the Court to consider three factors, from *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at paragraph 37 [Downtown Eastside] as follows:
- (1) whether there is a serious justiciable issue raised.
 - (2) whether the plaintiff has a real stake or a genuine interest in it; and
 - (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts...
- [130] The Powder and Malcolm Plaintiffs make no submissions and offer no evidence to satisfy the Downtown Eastside considerations for public interest standing.

- (3) Dumais Plaintiffs Standing Motion [131] In their Notice of Motion for standing, the Dumais Plaintiffs asks for the following relief:

An Order granting the Applicants standing to act as representative plaintiffs and seek the relief pled in Federal Court Action T-809-17

[132] In support of this Motion, they rely upon the following evidence:

The Affidavits of Bernadette Dumais of December 18, 2020, December 20, 2021 and September 15, 2022;

The Affidavit of August Cree sworn December 18, 2020;

The Affidavits of Carol Hodgson of July 17, 2019, February 16, 2021; and March 4, 2022;

[133] The named Dumais Plaintiffs are siblings and are all members of FMFN. Bernadette Dumais has held the position as Chief of FMFN from April 26, 2002 to April 25, 2005 and was a Councillor from April 26, 2007 to April 25, 2010.

[134] The evidence relied upon by the Dumais Plaintiffs in support of their position that there is an appropriate collective to advance a claim on behalf of Paul Cree or Clearwater Band are as follows:

- Expert reports of Carol Hodgson
- The Excerpts of Survey Diary, by Donald Robertson, dated June 5 to July 24, 1915 in which Surveyor Robertson said the “reserve for Paul Cree’s band at the confluence of the Clearwater find Christina River was selected and surveyed;”
- The TLU study explaining that the Clearwater people (Cree family) were forced away from their reserve in the 1930s and 1940s to live in Waterways.
- The TLU study that describes that the Cree-Chipewyan Band split between the Fort McKay and Fort McMurray Band starting in 1948.
- The Dumais Plaintiffs submit that Canada wrongfully amalgamated the Clearwater Band with Gregoire Lake to create Fort McMurray First Nation.
- Raphael Cree’s Interview Transcript from January 4, 1993 where he says he recalls four bands at Fort McMurray: Willow Lake (now known as Gregoire Lake), the Chipewyan Prairie (now known as Janvier Band), Fort MacKay Band, and Clearwater.
- Affidavit of Bernadette Dumais sworn December 18, 2020 attaching a February 5, 2013 FMFN Band Council Resolution [BCR] showing FMFN’s desire to support the Clearwater Band’s right to recognition and desire to deal with the forced amalgamation issue while negotiating the Treaty Land Entitlement.

- Fort McMurray #468 First Nation Meeting of May 16, 2013 Agenda regarding the BCR that administered to the Clearwater (Paul Cree Band) which recounts that: Members of the FMFN (whether descended from the Gregoire Lake population or the Clearwater River population) believe that the governance and other challenges with which FMFN has struggled over the past decades in a result of Canada's decisions not to provide housing, infrastructure, or services on the Clearwater Reserve #175 and to compel Clearwater descendants to reside on the Gregoire Lake Reserves to receive housing or services. All members of FMFN (not only Clearwater descendants) have suffered as a result of those decisions by Canada.
- Bernadette Dumais' Affidavit on the structure of the non-profit organization, the Clearwater First Nation of which Bernadette Dumais is the Chief. The Clearwater First Nation approved a Custom Council Election Code in March 2014. The Code provides membership requirements such that the members were, are, or are eligible to become members of FMFN. Chief Dumais
- Affidavit of August Cree

[135] Earlier I addressed the evidentiary weight that I am according to the expert reports of Carol Hodgson, the TLU study, and the Affidavit of August Cree above. To the extent that Bernadette Dumais relies upon these documents, her Affidavit is, likewise, given low evidentiary weight.

- (a) Rule 114—application of the test for Representative Proceedings [136] On the application of the Rule 114 criteria, the Dumais Plaintiffs say they have defined the collective with an ancestral connection, there is no conflict among the collective and they have the necessary authorizations despite the attempts of FMFN to prevent some people from claiming membership in the Clearwater Band.

[137] As outlined above, the applicable test for a representative proceeding for an unrecognized rights-bearing collective under Rule 114 is outlined in Watson.

- (i) Criteria 1 & 2 - is there a collective with common interests? [138] In support of the common interest of the collective, the Plaintiffs rely upon the evidence included in Bernadette Dumais' Affidavit. They allege this evidence demonstrates attempts to have Clearwater Band recognized, including a 1994 march to Edmonton, the 2003 TLU study, and 2013 Band Council Resolution. In support of the claim to the existence of a Paul Cree Band, they rely upon the reports of their expert, Carol Hodgson, to provide the historical and genealogical evidence. As noted above, I have concerns with the reliability of the Hodgson reports.

[139] On the question of 'if the Plaintiffs have a common link', the better question is 'if the Dumais Plaintiffs can draw a link to Seopotakinum', either through an ancestral connection or a familial connection. As noted in Watson, an unbroken line of ancestry is no longer necessary and some evidence is sufficient for the purposes of finding that connection.

[140] The link to Seopotakinum Cree is challenged by Ms. Patola who, in her report of September 17, 2021, concludes at page 8 “There is no consistent ancestral or kinship connection... between all Dumais plaintiffs and either Paul Cree or Seopotakinum Cree.” Further, Ms. Patola finds (page 9) that “Know History has been unable to locate documentation to verify an ancestral or kinship connection for any of the following Dumais plaintiffs to either Paul Cree or Seopotakinum Cree: named Dumais plaintiffs Bernadette Dumais (nee Cree), David Cree and August Cree and...”. This finding undermines the premise upon which the Dumais Plaintiffs rely to advance this claim on behalf of a collective of descendants who claim a link to Seopotakinum Cree. This does not support their claim that there is a collective with a common link.

[141] The relief or the “common interest” they claim is to Treaty 8 benefits and possession of Clearwater IR 175. However, as noted, the Plaintiffs are all current members of FMFN. There is also separate litigation between Canada and FMFN in relation to Treaty 8. As well, the land claimed as Clearwater is held by FMFN for the benefit of all members of the community. Accordingly, I am satisfied that all Plaintiffs’ Treaty 8 interests and their rights in relation to the Clearwater land are recognized and represented through their membership in FMFN.

(ii) Criteria 3 & 4 - are the representative plaintiffs authorized and can they fairly and adequately represent the collective? [142] In her Affidavit, Ms. Dumais details the steps undertaken to create the not-for-profit organization known as the Clearwater First Nation. She notes that this body has a membership code and an election code which provides predictability on who the members are. She also notes that she has received 36 signed authorizations to advance this action on behalf of Clearwater First Nation.

[143] In reality, the Paul Cree or Clearwater Band who the Dumais Plaintiffs’ claim to represent, is in fact a corporate entity created by them. In these circumstances, where the Plaintiffs seek recognition of the existence of an historic “band”, it is not sufficient to create a modern corporation and rely upon that entity as a vehicle through which to advance an historic claim. That is at best, self-serving evidence.

[144] To the extent that authorizations were provided as part of the same process, I do not accept them as authorization to act on behalf of the purported collective.

(iii) Criteria 5 - is this the just, most efficient and least costly manner of proceeding? [145] The final criteria for consideration is whether or not the proposed representative proceeding is the just, most efficient and least costly manner of proceeding. The efforts, to have Paul Cree Band and Clearwater reserve land recognized, have been ongoing for many years. The evidence is clear that the FMFN community does not support the recognition of Clearwater Band as a separate first nation. Accordingly, I am not satisfied that this is the most effective manner of proceeding; especially, considering that the interests the Dumais Plaintiffs purport to represent a group that are already represented by FMFN.

(b) Do the Plaintiffs have public interest standing? [146] As an alternative argument, the Plaintiffs claim to have public interest standing.

[147] The test for public interest standing requires that the Court considers three factors from Downtown Eastside outlined above. As a starting point, I would note that here, unlike Downtown Eastside, the Plaintiffs are not challenging legislation. Rather, they seek recognition as a collective to pursue Treaty 8 benefits. But as the Plaintiffs are members of the FMFN, they receive Treaty 8 benefits in that capacity. Any justiciable issues related to Treaty 8 benefits are being addressed in separate litigation between Canada and FMFN.

[148] On the second part of the test, whether the plaintiffs have a real stake or genuine interest in the matter, as previously noted the Plaintiffs are members of FMFN and as such their Treaty 8 interests are represented. Finally on the third consideration, whether this is an effective way to bring the issue before the Court, as also noted the matter is already the subject of an active separate litigation. Whether or not the Plaintiffs agree with how that litigation is being addressed is a whole separate consideration from whether they have public interest standing in the context of the claims made in this litigation.

[149] In the end, the Dumais Plaintiffs have not established that they have public interest standing to pursue this matter.

(4) Conclusion on Standing Motions [150] Both Plaintiff groups rely on establishing an ancestral link to Seopotakinum Cree who adhered to Treaty 8 as a basis for a collective to make a claim. However, even if that link can be established, that alone is not a sufficient basis upon which to bring a claim on behalf of a group. The evidence is that the Plaintiffs are, at best, family groups but that alone does not satisfy the test for standing where a collective interest, beyond family, must be established.

[151] I acknowledge there has been a long-standing desire on the part of several individuals/groups/families to have the Paul Cree /Clearwater Band recognized. However, a desire does not translate to a legal right when no evidence is offered to support the claim advanced. While I accept that there is reference in some of the historical records to Paul Cree Band; there is no supporting evidence that there was an intention to create a Paul Cree Band or a Clearwater Band. There is no evidence that Paul Cree Band existed as a group that considered themselves members of that collective. The driving force behind these claims is the reference in the historical records to Paul Cree and Clearwater Band. This does not amount to the actual creation of a Paul Cree Band or Clearwater Band under Treaty 8.

[152] In conclusion, neither the Powder Plaintiffs nor the Dumais Plaintiffs have established that they have standing to advance a claim on behalf of a representative group. Neither group can establish a collective interest or demonstrate that they are authorized to action on behalf of the collective.

C. Summary Judgment Motions [153] The question on summary judgment is if there are genuine issues for trial. As outlined above, I have concluded that the claims are statute-barred. I have found that the relief claimed in T-165-01 and T-809-17 under the Indian Act, is not within the jurisdiction of the Federal Court. I have also determined that neither the Malcolm, Powder, nor Dumais Plaintiffs can satisfy the test for representative proceeding standing to bring forward such claims on behalf of a collective. These findings are sufficient to dismiss each of these claims. I will, nonetheless, address the Motions for Summary Judgment. In doing so and recognizing that there is significant overlap in the arguments and the evidence, I will endeavour not to repeat the evidence when possible.

[154] The Plaintiffs in actions T-165-01 (Malcolm registration claim), T-1601-12 (Malcolm property claim) and T-436-15 (Powder claim) seek summary judgment against Canada and FMFN.

[155] Likewise, the Defendants Canada and FMFN seek summary judgment dismissing each of the 4 actions pursuant to Rules 213, 214 and 215. Canada and FMFN argue that there is no genuine issue for trial in any of the actions based upon the extensive evidentiary record that has been compiled. They argue that summary judgment is appropriate as there is no additional evidence that can be called at a trial, meaning the evidentiary record is as complete as it can be recognizing these claims relate to events that occurred many decades ago. The Dumais Plaintiffs speculate that evidence might be called at a trial to identify the original 17 inhabitants of IR 175 via “elder” evidence. However, they did not indicate from who, or explain why such evidence was not called in response to the Summary Judgment Motions. This is, therefore, no defence to the Summary Judgment Motions as parties must put their best case forward and call upon the necessary evidence.

[156] Canada and FMFN argue that, when the claims are considered in its totality, there is no evidence to support the Plaintiffs’ contentions that there is a separate rights-bearing collective known as Paul Cree Band or Clearwater Band that has rights under Treaty 8. They also argue that there is no evidence that the Paul Cree Band existed or exists as a legal entity. Thus, there is no genuine issue for trial.

(1) General principles–Summary Judgment Motions [157] I will begin by outlining the legal principles on summary judgment that apply to all the Motions. As explained by the Supreme Court in *Lameman* at paragraph 10:

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

[158] Rule 215 provides that the Court shall grant Summary Judgment Motion if it “is satisfied that there is no genuine issue for trial with respect to a claim or defence.” Rule 215 is to be applied together with Rule 3 to “secure the just, most expeditious and least expensive outcome of every proceeding” in a proportionate manner accounting for the proceeding’s complexity, importance of issues, and amount in dispute (*Saskatchewan (Attorney General) v Witchehan Lake First Nation*, 2023 FCA 105 at para 30 [*Witchehan Lake*]). As noted in *Witchehan Lake*:

[23] The bar to be met by the moving party on a motion for summary judgment is high (*Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372 at para. 11 [*Lameman*]). It must show that no genuine issue for trial exists (*CanMar Foods Ltd. v. TA Foods Ltd.*, 2021 FCA 7, [2021] 1 F.C.R. 799 at para. 27 [*CanMar*]). If the moving party meets this threshold, then “the evidentiary burden falls on the responding party, who cannot rest on its pleadings and must come up with specific facts showing that there is a genuine issue for trial” (*CanMar* at para. 27). While both parties must “put [their] best foot forward” in establishing that no genuine issue for trial exists (*Lameman* at para. 11), a responding party may do so by identifying gaps in the moving party’s evidence that can only be addressed by evidence at trial (*Apotex Inc. v. Merck & Co. Inc.*, 2004 FC 314, 248 F.T.R. 82 at para. 28 [*Apotex FC*], *aff’d* 2004 FCA 298).

...

[38] ...The legal issues in dispute and their associated evidentiary requirements must be identified. The factual issues in dispute must then be extracted and assessed in light of their relevancy to the legal issues. Only when these questions have been answered can the sufficiency of the motion record be assessed....

[159] There is no genuine issue for trial where the Court can make necessary findings of fact, apply the law to the facts, and where summary judgment is a proportionate, more expeditious, and less expensive means to achieve a just result (*Witchehan Lake* at para 31; *Hryniak v Mauldin*, 2014 SCC 7 at paras 49 and 66).

[160] The onus is on the moving party to establish there is no genuine issue that requires a trial, and the responding party is required to put their best foot forward. It is not a response to a Summary Judgment Motion to say evidence might be adduced later. Summary Judgment Motions should be decided based on the evidence on the actual record and not on the basis of potential evidence that may exist or might be called at a trial (*Gemak Trust v Jempak Corporation*, 2022 FCA 141 at para 67; *CanMar Foods Ltd v TA Foods Ltd*, 2021 FCA 7 at para 27; *Lameman* at para 19; *Witchehan Lake* at para 44).

(2) Canada’s Motion for Summary Judgment in T-165-01 (Malcolm registration claim) [161] Firstly, I will address Canada’s Motion for Summary Judgment in T-165-01 since Canada is the only named Defendant in that action.

- [162] The Statement of Claim was filed in 2001 and has undergone various amendments. The Plaintiffs are listed as John Malcolm, acting on his own and on behalf of his brothers, Walter and Harry; and on behalf of his sisters, Caroline, Selena, Lorraine, and Jane, all of whom are children of Walter Jean Malcolm, the son of Caroline Thompson. They claim to be “Indians” within the meaning of the Constitution Act 1867 and “aboriginal peoples” within the meaning of the Constitution Act 1982 as the descendants of Indians who lived in Treaty 8 territory. They claim to be entitled to registration under the Indian Act and entitled to Treaty 8 benefits. They seek declarations that: (i) Canada has failed to maintain the names of their ancestors on the Indian Register; (ii) they are entitled to registration as Indians under the Indian Act; (iii) the scrip certificates issued in 1900 are null and void. They also claim equitable damages for “breach of treaty, international law, the law of nations, constitutional law, trust, breach of fiduciary duty, abuse of their position, duress, undue influence, fraud, bribery and non est factum.”
- [163] In its Statement of Defence to T-165-01, Canada denies that the Plaintiffs’ ancestors were “Indians” and denies that they are entitled to be registered under the Indian Act. Canada argues that receipt of scrip by the Plaintiffs’ ancestors extinguished any treaty rights they may have had under the Indian Act. Canada also argues that the Federal Court has no jurisdiction to grant registration under the Indian Act.
- [164] As noted above, I have determined that John Malcolm does not have standing to represent his siblings. As well, the claim for registration under the Indian Act is relief that is beyond the jurisdiction of the Federal Court. I have also found that this claim has been filed well past any applicable limitation periods. Finally, while the Plaintiffs frame their relief as “declaratory relief”—calling it declaratory when what is sought is a coercive remedy—is not sufficient to detract from the true nature of the relief sought.
- [165] A comment is merited on the claims for equitable damages for “breach of treaty, international law, the law of nations, constitutional law, trust, breach of fiduciary duty, abuse of their position, duress, undue influence, fraud, bribery and non est factum” is merited. While these are serious claims, they are completely unsupported by any material facts or evidence. The Plaintiffs claim that equitable fraud arises from Canada’s failure to recognize their treaty rights and they claim that Canada has not respected the treaty interpretation principles from *Badger* (para 41). The principles from *Badger* are clear, however it is not sufficient to simply claim they apply but offer no evidence in support. These claims amount to bald assertions unsupported by any facts.
- [166] In sum, the claims advanced in action T-165-01 are poorly articulated and no evidence was led to substantiate the conclusory claims made. At best, the action contains bare assertions which have not been supported by any evidence or facts. In addition, there is no indication that Mr. Malcolm’s siblings, as referenced in paragraph 1 of the Statement of Claim, have authorized him to act on their behalf. As well, while at paragraph 27, he claims that he and his brothers and sisters are entitled to be registered under the Indian Act, the evidence is that at least some of his brothers and sisters are in fact already registered. Overall, it is

difficult to clearly understand the claim advanced by Mr. Malcolm as the claim is poorly framed and outlined (Canada v Benoit, 2003 FCA 236 paras 23-25). Even on a generous reading of the Amended Statement of Claim, the claims advanced are: out of time, there is no established right to claim treaty entitlement; and/or the claims are beyond the jurisdiction of this Court.

[167] I cannot discern any genuine issue for trial in this claim. I am granting Canada's Motion and dismissing this action as there is no genuine issue for trial.

(3) Canada and FMFN Motions for Summary Judgment in T-1601-12 and T-436-15 [168] I will now consider Canada and FMFN Motions for Summary Judgment to dismiss both of these actions.

[169] In T-1601-12 the Plaintiffs are listed as "John Malcolm, Caroline Malcolm, Celena Malcolm, Lorraine Malcolm, Jane Malcolm, Harry Malcolm and Walter Malcolm." The Amended Statement of Claim in T-1601-12 claims:

- that the Malcolm Plaintiffs are entitled to compensation for lands in severalty section of Treaty 8.
- that Harry Malcolm had a trapline on what became Clearwater Indian Reserve
- Caroline Thompson was a "Treaty No. 8 Indian."
- that the Malcolm Plaintiffs are "Indian" as John, Walter, Harry, Caroline, Celena, Lorraine and Jane are the children of Walter Jean Malcolm who is the son of Caroline Thompson and Harry Malcolm.
- Compensation (loss of a chance damages) for the failure to record the lands in Range 9
- that Lands in Severalty resulting in the taking or expropriation of these lands

[170] The Plaintiffs claim that from 1910 onwards Harry Malcolm homesteaded land on the edge of the Clearwater Indian Reserve. They claim that prior to Treaty 8 Caroline Thompson held these lands in severalty with Harry. They state that in August 1915 this land was wrongfully taken and used to establish IR 175. They state that Caroline and Harry were entitled to remain on this land. They claim that Harry Malcolm applied for lands in what is now FMFN and they seek compensation for failure to record the lands in severalty. They seek return of these lands or compensation for the wrongful taking of the land.

[171] In its Statement of Defence in T-1601-12, Canada denies that the Plaintiffs' ancestors ever had a legal title or any form of property interest/entitlement in the lands; therefore, no title or interest was wrongfully taken from them. They claim that if Harry Malcolm carried out any agricultural activities on the land in question, he did so as a "squatter" with no legal entitlement. They also deny that Caroline Thompson held the land "in severalty" or at all and that such a pleading is contrary to the claim that Harry and Caroline had "been homesteading." Canada notes that in 1915 Harry Malcolm voluntarily executed releases of

any claim to land he may have acquired and applied for homestead.

[172] In T-436-15 the claim is made on behalf of the named Powder family members and “all the living members of the Paul Cree Band (also called the Clearwater Band # 175).” They claim the members of the Paul Cree Band own Clearwater IR 175. The Powder Plaintiffs trace their lineage to Paul Cree through his son, Raphael Cree. They claim Paul Cree, his wives, and two children Alexis and Raphael Cree, made up the original Paul Cree Band and are entitled to Clearwater IR 175 by virtue of Privy Council Order 1570. They claim the following relief:

- a. A Declaration for the return of their Reserve Lands of the Clearwater Indian Reserve No. 175 wrongfully taken from them;
- b. A Declaration of recognition of the Paul Cree Band (Clearwater River Band) as a separate Band from the Fort McMurray First Nation and to record the Clearwater Indian Reserve No. 175 as the Reserve of the Paul Cree Band (Clearwater River Band);
- c. An Order correcting the records of Aboriginal Affairs Canada (now Indigenous Services Canada) to restore the Band List for the Paul Cree Band (Clearwater River Band) composed of A Jean Cree Powder and her children, Lila Powder Lafontaine (deceased), for her children and grandchildren, Allan Powder and his children and grandchildren, A, Floyd Powder and his children and grandchildren, and Flora Powder and her children and grandchildren.
- d. And Order directing Aboriginal Affairs Canada (now Indigenous Services Canada) to restore the graveyard on the Clearwater Indian Reserve No. 175;
- e. Damages of \$25,000,000.00 for the invalid surrender of the petroleum and natural gas and mines and minerals including gravel, of the Clearwater Reserve No. 175 and for activities carried out on that Reserve since 1948;
- f. Damages for breaches of Treaty No. 8 in the amount of \$100,000,000.00 in failing to fulfill its terms for 94 years;
- g. Damages of \$10,000,000.00 for loss of funding from Aboriginal (Indian) Affairs Canada [now Indigenous Services Canada];

[173] Canada and FMFN deny that Paul Cree Band is a “Band” under subsection 2(1) of the Indian Act. They note that it was the “Chipewyan and Cree Indians of Fort McMurray and the country thereabouts” who entered Treaty 8.

[174] In 1963, the Cree Chipewyan Band changed its name to the Fort McMurray Band and in 1992 it changed its name to Fort McMurray #468 First Nation. Under the Indian Act the names of Bands on the list prior to April 17, 1985, constitute the recognized Band. As of that time, Paul Cree is not listed as a “Band” and there is no record of any complaint by the Plaintiffs and their ancestors for failure to list the Paul Cree Band. Clearwater IR 175 is one of the seven Reserves set aside for members of the Cree Chipewyan Band, and any right, title, interest, or claim to that land is now vested in FMFN.

- [175] I am granting the Defendants' request for summary judgment and dismissing these actions as the evidence demonstrates that there is no genuine issue for trial in these matters.
- [176] The historical records do not support the claim that a separate Paul Cree or Clearwater Band entered into Treaty 8. The signatories to Treaty 8 were Seopotakinum Cree and Adam Boucher. Canada administered the Cree Chipewyan group as one group until 1951, when Canada divided the Cree Chipewyan Band into two "separate bands", one being the FMFN and one being Fort McKay First Nation. No "Paul Cree" or "Clearwater" Band was referred to, created, or otherwise considered during this process.
- [177] On August 7, 1899, Caroline Thompson, applied for scrip land and received 2 scrip certificates for 240 acres. In 1912, Caroline Thompson married Harry Malcolm. Caroline Thompson and Harry Malcolm are the grandparents of the Plaintiff, John Malcolm. Regarding scrip, it is important to note that the Metis scrip commission accompanied the Treaty 8 commission. According to Dr. Irwin, the government originally intended to have the Metis population adhere to the treaty, but it soon became apparent that the Metis people were opposed to being dealt with as First Nations and were actively working to have the treaty rejected. As a result, all Indigenous people in Treaty 8 territory were given the option of choosing to take treaty as First Nation or accepting scrip as Metis.
- [178] I accept the evidence that Caroline Thompson received scrip. On the claim to land, once used for trapping by Harry Malcolm, the evidence shows that on July 21, 1915, Harry Malcolm signed a release giving up a claim to land on what became IR 175. Although the Plaintiffs speculate about the circumstances under which the release was signed, they offer no evidence to challenge the legal impact of the release. In my view, acceptance of scrip and the signing of the release is a full answer to any claim relating to these lands.
- [179] On the claims of a "Paul Cree Band", the evidence is that on January 2, 1914, Paul Cree himself, made a request for land for himself and his sons. In this request, he did not assert that his family was a "band", nor did he claim to be a Chief or Headman. Shortly after this request, the words "Paul Cree Band" appear for the first time in the Robertson Survey of 1915. It is possible that the request by Paul Cree for land for himself and his two sons caused the surveyor to make the entry Paul Cree Band. At this point, we will never know.
- [180] The core piece of evidence relied upon to pursue a claim for the recognition of "Paul Cree Band" is the reference in the preamble to the 1921 OIC to "Paul Cree's Band". The Plaintiffs say that this is recognition of, or the creation of, a new band. However, when considered in the historical context, and when the OIC is read in full, the land being set aside was for the Cree who entered into Treaty 8, and who later became FMFN. Treaty 8 contemplated consultation with Indians as to the location of their desired lands and reserves. The work of the surveyor, in consulting with the Indians in the areas being surveyed, is consistent with this consultation process of allocating lands. Further there is no evidence to support the proposition that a surveyor dispatched to survey lands under Treaty 8 had the authority to recognize an Indian Band separate and apart from those who entered Treaty 8. This would

suggest that the Crown delegated its right to enter treaty to those retained to survey the lands covered by the treaty. This proposition is not borne out by the evidence.

- [181] The asserted Paul Cree Band cannot bring itself within the definition of “band” as the evidence is that following Treaty 8 there was a single annuity payroll until 1950. Paul Cree was never identified or paid as a headman on the payroll and there is no evidence of a trust account for Paul Cree or Clearwater Band. As noted in *Montana Band v Canada*, 2006 FC 261 (paras 321 and 454) [Montana], the definition of band is an aggregate of individuals, or a group regarded as a single entity who share alike in the distribution of any annuities. The Court in *Montana* accepted this interpretation applied to the 1880, 1886, and 1906 Indian Acts. In this case, there is no evidence that the asserted Paul Cree Band was regarded as a single entity who shared the distribution of any annuities in those timeframes.
- [182] In 1951, changes to the Indian Act resulted in band lists being published. There was no Paul Cree Band named on any band list and there were no protests lodged. Furthermore, the Plaintiffs or their predecessors were listed as members of the Cree Chipewyan Band, and there is no record of any protests.
- [183] In the 1970s there were discussions within FMFN about subdividing into two bands, those discussions did not result in any changes. In 1992, Robert Cree wrote to Canada on behalf of “Paul Cree Band” asking about the creation of a new band and stating a wish to “pursue their establishment of a separate band.”
- [184] In 2013, the FMFN adopted a revised membership code. This code provides procedures for individuals to be added to FMFN’s band list and for members to be removed from the FMFN band list and transferred to other bands. This code also provides steps for an appeal process if a member is improperly added to the FMFN’s band list. As noted by FMFN, these procedures have not been used by the Plaintiffs to assert that they were incorrectly included on FMFN’s band list instead of the creation of “Paul Cree” or “Clearwater” Band.
- [185] Additionally, the Powder Plaintiffs who are members of FMFN have obtained benefits from the FMFN including housing, per capita payments, daycare services, healthcare services, and education funding. Some of the Powder Plaintiffs received compensation as part of a litigation between FMFN and Canada in relation to Treaty 8 benefits—this is an implicit acknowledgement that they are members of FMFN.
- [186] On the property claim advanced in T-1601-12, even disregarding my finding that the action is barred by limitation periods, the Malcolm Plaintiffs offer no evidence or explanation as to why the Court should disregard the evidence that Harry Malcolm signed a release with respect to the lands now claimed on his behalf.
- [187] On the claims advanced in the Powder action in T-436-15, I have concluded that the Plaintiffs do not have standing to bring these claims and that the actions are statute barred. Aside from those findings, the claim that there was a Paul Cree Band, which was separate and distinct from what is now known as FMFN, does not withstand scrutiny.

- [188] In summary, there is no genuine issues for trial in action T-436-15 or in action T-1601-12 and I am granting the Motions to dismiss these actions.
- (4) Canada and FMFN Motion for Summary Judgment in T-809-17 (Dumais claim) [189] Canada and FMFN have filed Summary Judgment Motions requesting that this claim be dismissed. As outlined above, I had found that the limitation-period issues and the lack of status to bring a representative proceeding pursuant to Rule 114 are determinative of this action. I will, nonetheless, address the merits of Canada and FMFN Summary Judgment Motion.
- [190] In T-809-17 Chief Bernadette Dumais claims on behalf of “all living members of the Paul Cree Band No. 175.” The Amended Statement of Claim alleges that Paul Cree assumed leadership of the group of “Indians” living at Clearwater in 1912 after the death of Seopotakinum Cree. By way of relief, they claim:
- (a) A declaration that the Paul Cree Band No. 175 (also known as the Clearwater Band) is, and has never ceased to be, a “band” within the meaning of Treaty No. 8, the Indian Act RSC 1985, c. I-5, and at common law;
- (b) A declaration that the Clearwater Band is entitled to be recognized and reinstated by the Minister of Indigenous Affairs as a “band” under section 17 of the Indian Act;
- [191] Canada raises the same defences to this claim as raised in response to the Powder Malcolm claims. Namely, that it was the Cree Chipewyan Band who adhered to Treaty 8 and a single annuity payroll was created; and under the Indian Act (1951), band lists were posted for the Cree Chipewyan Band and the Fort McKay Band—no band list was posted for a Paul Cree Band. Further, the Cree Chipewyan band list included the names of Raphael Cree, Alexis Cree, Leon Cheecham and their families. No protests were made by the Plaintiffs or any descendants of a Paul Cree Band protesting their inclusion on other band lists or protesting the failure to include them as a member of a Paul Cree Band.
- [192] The Dumais Plaintiffs trace their connection to Paul Cree and IR 175 through Jean Baptiste Cree (also known as John Napisis). The evidence, however, demonstrates that Jean Baptiste Cree and his family (including Victor and Eva Cree) were recorded as residing on one of the Gregoire Lake reserves in 1926 and 1931. Furthermore, several of the Dumais Plaintiffs were, at one time, members of the Beaver Lake Band and, thus, ceased their membership in the FMFN and, by extension, the asserted Paul Cree Band (Blueberry River at paras 17-18).
- [193] The Plaintiffs rely heavily on the preamble to the 1921 OIC setting apart the Clearwater reserve where it states that land was “selected by the Department of Indian Affairs for Paul Cree’s Band of Indians under the provisions of Treaty number 8”. However, the operative clause of this OIC states that the Clearwater reserve was set apart for “the Department of Indian affairs for the purposes and uses of the Indians of Clearwater Indian reserve and No. 175”. Further, when the full context of the surveying work is taken into consideration, this reference does not support the Plaintiffs’ position that it is proof of the existence of a Paul

Cree Band.

- [194] Surveyor Robertson was instructed by the Department of Indian Affairs “to undertake the survey of reserves in the vicinity of Fort McMurray for the Indians of that district.” Surveyor Robertson’s plans for both the Clearwater and Gregoire Lake reserves indicate that the surveys were for the “Indians of the Cree band” situated in the area of each reserve. This is consistent with IR 175 being set apart for the Indians who adhered to Treaty 8. Also relevant for context is the fact that prior to the survey of Clearwater reserve, Paul Cree had written to the Department of Interior requesting land for himself and his sons only. The request of Paul Cree is inconsistent with the Plaintiffs’ position that Paul Cree was the Chief of a band that existed separate and apart from the broader Paul Cree Band.
- [195] The Plaintiffs argue that the work of Surveyor Robertson establishes that a Paul Cree Band was recognized, and that Clearwater was set aside for the Paul Cree Band. To accept this proposition, I would have to accept that Surveyor Robertson had the authority to recognize an Indian band separate and apart from those who entered into Treaty 8 and that he was authorized to allocate land to this band. There is no evidence to support the proposition that surveyors had authority to recognize “Bands”.
- [196] Surveyor Robertson’s plans state there are surveys “for the Indians of the Cree band” at Gregoire Lake and at Clearwater. It is possible that the references to Paul Cree Band by Surveyor Robertson relate to the request of Paul Cree for land for him and his sons in the area being surveyed. The survey plan for Clearwater IR 175 was delayed because of an error with one of the boundary lines. Following the correction of the boundary lines, Surveyor McLean wrote in 1916 that IR 175 had been omitted from the earlier OIC and requested an order in council accordingly. The OIC set apart the land for “the Department of Indian affairs for the purposes and uses of the Indians of Clearwater Indian reserve No. 175”. The assignment of land to groups living together is consistent with the text of Treaty 8 “to lay aside reserves for such bands as desire reserves...or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves”. Considered in context, I conclude that the Clearwater Indian Reserve was set aside for the benefit of the broader group of Cree Indians who adhered to Treaty 8.
- [197] With changes to the Indian Act, in September 1951, band lists were published and did not include a Paul Cree Band but did include the Plaintiffs’ ancestors as members of the Cree Chipewyan band list. The inclusion of the names of the Plaintiffs’ predecessors in the Cree Chipewyan band list and the lack of any protest on the inclusion of their names in that capacity is evidence that they were members of the Cree Chipewyan Band. In other words, in 1951 the Plaintiffs did not consider themselves separate and distinct from the Cree Chipewyan Band.
- [198] In 1963, the Cree Chipewyan Band changed its name to the Fort McMurray Band and then in 1992 changed its name to Fort McMurray #468 First Nation. Some or all of the Plaintiffs are members of FMFN.

- [199] FMFN argues that, at its core, the Dumais claim is grounded in a dissatisfaction with decisions made by the elected leaders of FMFN. In 2013, when Bernadette Dumais was on the FMFN Council, the FMFN Council expressed a willingness to negotiate the creation of a Clearwater First Nation as part of the settlement of its Treaty Land Entitlement Claim. However, the terms of the agreement were not adhered to and FMFN advised that it was no longer willing to negotiate any type of division. The FMFN later passed a resolution confirming that it was “unalterably opposed to any effort to divide FMFN or its assets”.
- [200] The Dumais Plaintiffs argue that summary judgment is not appropriate in this case because there are differing interpretations with regard to the Paul Cree Band membership and there are multiple theories of the identity of the 17 people identified by Surveyor Robertson at Clearwater. They argue that these issues should be assessed at a full trial where the Court would have the benefit of oral history evidence.
- [201] The determinative issue for the Dumais Plaintiffs is if there is evidence of the existence of a Paul Cree Band. The members of the asserted band and the land occupied by this asserted band are secondary issues. On the determinative issue, I have concluded that there is no evidence to support the existence of a Paul Cree Band in the first place. Further, I would note that as the responding party to a Summary Judgment Motion, the Plaintiffs have an obligation to present all evidence in support of their claim. It is not sufficient to suggest that “oral history evidence” may be called upon at a trial. There was no request to present oral history evidence on these Motions. The Dumais Plaintiffs have not identified any evidence that is missing or omitted from the extensive documentary record compiled by Canada.
- [202] The Dumais Plaintiffs also assert that the Paul Cree Band was amalgamated. They rely upon Watson in support of this position. However, the facts of Watson are very different. In Watson, the two plaintiff groups were identified as bands when their chiefs signed Treaty 4 and the chiefs were named in the preamble to the Treaty. Furthermore, in Watson, it was agreed that the pre-treaty bands had been amalgamated prior to the enactment of the 1951 Indian Act. The issue in Watson was the legality of the amalgamation given that there was no statutory authority before 1951 to amalgamate bands. Those facts are not present in this case. Here, the Cree Chipewyan Band signatories to Treaty 8 were Seopotakinum Cree and Adam Boucher. The Cree Chipewyan Band continued until 1951 when the two bands were formally separated into two bands: FMFN and Fort McKay. Treaty 8 makes no reference to Paul Cree Band or Paul Cree as a headman. Watson is of no assistance to the Plaintiffs.
- [203] In conclusion, I will grant the summary judgment requests of Canada and FMFN and dismiss the Dumais Plaintiffs’ action.
- (5) Malcolm and Powder Plaintiffs Motions for Summary Judgment [204] As noted above, I am granting the Summary Judgment Motions of Canada and FMFN dismissing all the actions. Nonetheless, for the sake of completeness, I will address the Plaintiffs’ Motions for Summary Judgment in action T-165-01 (Malcolm registration), action T-1601-12 (Malcolm property) and action T-436-15 (Powder action).

[205] In support of their Summary Judgment Motions, the Plaintiffs rely upon the following evidence included in their Record on Motion:

Affidavit of Allan Powder sworn on October 5, 2020.

Written cross examination of Allan Powder

Affidavit of Arthur Deep sworn on September 28, 2020.

Affidavits of John Malcolm sworn on October 24, 2020 and December 4, 2020.

The transcript of John Malcolm's cross-examination on September 27, 2022

Transcript of hearing for Jean Powder

Cross examination of August Cree

[206] The objections to the Affidavit of John Malcolm and the contents of the Motion record are addressed above. I accept that Mr. Malcolm can attest to his family history. In that regard, he claims to be a descendant of Paul Cree (brother of Seopotakinum Cree the Cree Headman who adhered to Treaty 8) through his grandmother Caroline Thompson. Caroline Thompson married Alexis Cree in 1903—it is claimed that Alexis Cree was the brother or stepbrother of Paul Cree. Alexis Cree died in 1910 or 1911. In 1912, Caroline Thompson married Harry Malcolm, the grandfather of John Malcolm. John Malcolm claims that his grandfather, Harry Malcolm, was either "Cree or mixed European-Indian".

[207] The Plaintiffs claim there were 17 original members of the Paul Cree Band, as noted by Surveyor Robertson. Although the identity of all 17 people is unknown, the Plaintiffs claim that Paul Cree, Alexis Cree and Raphael Cree were living at Clearwater in 1915. The Plaintiffs also rely upon the evidence of Jean Cree (taken in March 2018) who states that her grandfather was Paul Cree and that she lived on Clearwater reserve until she married. In support of their claim of the existence of a Paul Cree Band and its location, the Plaintiffs rely heavily upon the survey work of Surveyor Robertson undertaken following the signing of Treaty 8.

[208] In the action filed in T-1601-12, John Malcolm and his siblings claim that Harry Malcolm ran traplines in Moccasin flats. They rely on a July 1915 survey of Clearwater and claim that Harry Malcolm applied for the lands where his traplines were located. However, the following document appears to support Canada's position that Harry Malcolm gave up any claim to land. The March 23, 1916, letter states :

Regarding the claim of one H. Malcolm, I beg to state that this man had no legal claim on the S.E. of Section 27. However to avoid difficulties, our surveyor entered into an agreement with him, a copy of said agreement is attached herewith

[209] The Plaintiffs rely upon a letter dated April 27, 1916 which states:

...a description by sections of the lands reserved for the Indian Paul Cree and his sons at Ft. McMurray. This reserve will be known as Clearwater River and contains the following lands...

[210] They also rely upon the May 12, 1921, Governor In Council Order which refers to “setting apart of a tract of land surveyed and known as Clearwater Indian Reserve No. 175...for Paul Cree’s Band of Indians under the provisions of Treaty 8”.

[211] Also relied upon is the October 29, 1957 letter from W.C. Bethune, the Superintendent, Reserves and Trusts to G.S. Lapp, the Superintendent, Indian Agency stating:

The Clearwater I.R. was set aside in 1921 by P.C. 1570 dated May 12th, 1921. The Order in Council sets aside this reserve for the Paul Cree’s Band of Indians under the provision of Treaty No. 8.

A careful review was made of the Treaty Pay Lists and also of the correspondence dealing with the request submitted to the Department of Interior in setting apart these reserves for the Indians. We find very little information from our correspondence here that would indicate precisely the Band for whom each of these reserves were set apart. We do think that Gregoire Lake Indian Reserves offers* little difficulty, however, we are not too clear with respect to Clearwater Indian Reserve because when a request was made to set this apart for a reserve, the correspondence on file here makes reference to the Paul Cree Band consisting of Paul Cree and his sons, Alexis and Raphael.

[212] The Plaintiffs also rely on a letter of December 17, 1957 from J.W. Stewart, Superintendent stating:

I note in the list of reserves that the Clearwater Reserve was named for Paul Cree Band and why it was never kept that way is a mystery.

[213] Cumulatively, the Plaintiffs argue that these documents referred to above establish that the Paul Cree Band exists separately and distinct from the FMFN. They claim that following the signing of Treaty 8, Surveyor Robertson was designated pursuant to the wording of Treaty 8, as the “suitable person to determine and set apart such reserves and lands” and, therefore, authorized to set aside reserve lands for the Paul Cree Band.

[214] In 1916, there are a series of documents from the Department of Interior Canada Lands Patents Branch regarding the survey of what is described as N.E. 27-88-7 W.4.M. and S.E.27-88-7 W.4.M. The Plaintiffs rely upon these documents as demonstrating the recognition of the “Paul Cree Band” and demonstrating that lands were allocated for the “Paul Cree Band”. These documents make reference to Paul Cree, Alec (assumed to be Alexis) Cree and Raphael Cree as “a Treaty Indian and a member of the Paul Cree Band.”

[215] Despite these documents, the name Paul Cree is not referenced in Treaty 8 itself or in any of the annuity paylists created for the Cree Chipewyan Band. The paylists of August 4, 1899, August 10, 1900, and June 10, 1910, record Seopotakinum Cree as the Cree Headman and he is paid as a headman. Paul Cree is listed as having received payment, but he is not listed as a headman nor is he paid as a headman. Following the death of Seopotakinum Cree (in 1911

or 1912), the paylists of June 2, 1915, and June 12, 1917, still do not list Paul Cree Band and do not list or record payments to Paul Cree as a Headman.

- [216] Additionally, in 1914 the evidence is that Paul Cree sought a division of land for himself and his sons. In this request, Paul Cree does not identify himself as a chief of the Paul Cree Band, and he is not asking that land be set aside for the Paul Cree Band. Rather, he asks for land for his own use and the use of his sons.
- [217] The historical records demonstrate that between 1914-1921 various steps are undertaken by surveyors including references made regarding surveying steps in the Fort McMurray area. Canada's submissions provide a compressive review of these steps. Suffice it to say, these records do not support the claim to the recognition of a Paul Cree Band for whom the land at Clearwater 175 was allocated.
- [218] The documentary evidence demonstrates that until 1950 there was only one payroll for the Cree Chipewyan Band. Following which, the Chipewyan Band becomes Fort McKay and the Cree Band became FMFN.
- [219] In 1963, the Cree Chipewyan Band changed its name to the Fort McMurray Band. In 1992, its name changed again to Fort McMurray #468 First Nation. Clearwater IR 175 is part of the reserve lands set aside for members of the Cree Chipewyan Band which is now FMFN.
- [220] In 1971, there was interest expressed in splitting FMFN into two bands. In the August 4, 1971 letter from the supervisor of Indian Minerals, it is noted that "...the Band is strongly considering splitting into two separate bands." However, in a letter of August 25, 1971 from the Department of Indian Affairs and Northern Development, it states:

Thank you for your memorandum of August 4, 1971, pertaining to membership of the Clearwater and Gregoire Lake Reserves.

Your points have been brought to the attention of the Band concerned; and for the present atleast, they have decision not to separate.

- [221] The claims advanced by the Plaintiffs with respect to oil and gas royalties are without any evidentiary foundation. As noted in the Affidavit of Kevin Payne, there is no evidence that Paul Cree or a Clearwater Band were entitled to oil and gas royalties. Any such royalties were paid to FMFN.
- [222] In summary, while there are historical documents that refer to Paul Cree Band, these documents are not rights-conferring documents and they do not serve to confirm the existence of a collective that is separate and distinct from the FMFN. Nor would these documents override the wording of Treaty 8. If there was a group that identified themselves as Paul Cree Band, they were most likely a family group of the otherwise larger collective identified in Treaty 8. It was recognized by the Treaty commissioners that those within Treaty 8 were not airtight groups but were groups who frequented different areas and members of different nuclear family who sometimes camped or travelled together but were

also recorded more frequently as camping and travelling separately. The Treaty commissioners also note “the Indians there act rather as individuals then as a nation, and that any tribal organization which may exist is very slight.”

- [223] The Plaintiffs rely upon discrete references to “Paul Cree Indians” in survey work, completed after Treaty 8, as proof of the existence of the band. There is, however, no support for the proposition that surveyors had authority to designate groups as Indian bands or to designate lands for Indian bands. The surveyors, in carrying out their work, were instructed “to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection”. In keeping with this mandate, it was expected that the surveyors would consult as lands were being identified and set aside. The act of setting aside lands is not the same as designating an Indian band.
- [224] The 1921 OIC is the primary evidence relied upon in support of the claim. I do not accept that the references to the Paul Cree Band in the preamble to this OIC had the effect of recognizing the Paul Cree Band, when the operative portion of the OIC notes that the land is being set aside for the Cree Chipewyan Band. This is consistent with the wording of Treaty 8. Further, there is a complete lack of any evidence after this OIC that the alleged Paul Cree Band was functional as a band and recognized as such.
- [225] Finally, I wish to comment on the claims advanced by Mr. Malcolm. These claims have been ongoing for many years and, as a result of various amendments to the pleadings, the claims have evolved. Both on the status of John Malcolm either as a native or non-native and the precise parcel of land over which he claims an interest. As well, whether he is making a claim for the lands in severalty, or a homestead claim has changed with amendments to the pleadings. ‘Severalty’ is language used in Treaty 8, whereas ‘homestead’ is not language that appears in Treaty 8. It is unclear precisely what the Malcolm Plaintiffs are claiming; but in any event, there is no evidence to support the land claims made by Mr. Malcolm. In fact, the evidence supports the theory that any claim to land that his predecessors may have had was in fact released by Harry Malcolm. Finally, the claim for oil and gas royalties, payments for the removal of gravel and timber, and the cancellation of lease 50 off IR 175 are without evidentiary foundation. Although these claims relate more specifically to the damages which have been bifurcated, based upon the evidence adduced by Canada, these claims are without merit.
- [226] I am denying the Powder and Malcolm Plaintiffs’ Motions for Summary Judgment against Canada and FMFN. The Plaintiffs have not met their burden of proof on Summary Judgment Motions to establish, that their case on a balance of probabilities, the existence of a Paul Cree Band. I am not satisfied that there is evidence to support such a finding.
- (6) Conclusion on Summary Judgment Motions [227] I have denied the Powder and Malcolm Plaintiffs’ Motions for Summary Judgment against Canada and FMFN.

[228] In action T-165-01 Malcolm registration claim, I have found that there is no genuine issue for trial and that Canada's Motion for Summary Judgment is granted.

[229] I have also concluded that there are no genuine issues for trial in action T-436-15 and action T-1601-12 and that I am granting the Motions of Canada and FMFN that these actions be dismissed.

[230] Finally, I am also granting the summary judgment requests of Canada and FMFN against the Dumais Plaintiffs in T-809-17.

VII. Costs [231] As the successful parties, Canada and FMFN, are entitled to their costs payable by the Plaintiffs as follows:

(a) Two thirds ($\frac{2}{3}$) of costs to be paid by the Powder and Malcolm Plaintiffs in T-165-01, T-436-15 and T-1601-12 actions; and

(b) One third ($\frac{1}{3}$) of costs by the Dumais Plaintiffs in T-809-17 action.

JUDGMENT IN T-436-15, T-1601-12, T-809-17, and T-165-01

THIS COURT'S JUDGMENT is that :

The Plaintiffs' Motions for Standing in actions T-165-01, T-1601-12 and T-436-15 are denied.

The Plaintiffs' Motions for Standing in action T-809-17 is denied.

The Plaintiffs' Motions for Summary Judgment in actions T-436-15, T-1601-12, and T-165-01 are dismissed.

The Defendant Canada's Motions for Summary Judgment in all four actions T-436-15, T-1601-12, T-809-17 and T-165-01 are granted.

The Defendant Fort McMurray First Nation's Motions for Summary Judgment in actions T-436-15, T-1601-12 and T-809-17 are granted.

The actions brought in T-436-15, T-1601-12, T-809-17 and T-165-01 are dismissed in their entirety.

The Defendants Canada and FMFN are entitled to costs payable by the Plaintiffs as follows:

(a) Two thirds ($\frac{2}{3}$) of costs to be paid by the Powder and Malcolm Plaintiffs in T-165-01, T-436-15 and T-1601-12 actions; and

(b) One third ($\frac{1}{3}$) of costs by the Dumais Plaintiffs in T-809-17 action.

blank

"Ann Marie McDonald"

blank

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:

T-436-15

STYLE OF CAUSE:

JEAN POWDER, ELMER CREE, FLORA POWDER, ALLAN AND FLOYD POWDER AND THEIR CHILDREN AND THE CHILDREN OF LILA POWDER LAFONTAINE, ALL OF THE LIVING MEMBERS OF THE PAUL CREE BAND, (ALSO CALLED THE CLEARWATER RIVER BAND #175) v HIS MAJESTY THE KING IN RIGHT OF CANADA AND HIS MAJESTY THE KING IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT AND, FORT MCMURRAY FIRST NATION

AND DOCKET:

T-1601-12

STYLE OF CAUSE:

JOHN MALCOLM, CAROLINE MALCOLM, CELENA MALCOLM, LORRAINE MALCOLM, JANE MALCOLM, HARRY MALCOLM AND WALTER MALCOLM v HIS MAJESTY THE KING IN RIGHT OF CANADA AND HIS MAJESTY THE KING IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

AND DOCKET:

T-809-17

STYLE OF CAUSE:

CHIEF BERNADETTE DUMAIS, AUGUST CREE AND DAVID CREE ON BEHALF OF ALL LIVING MEMBERS OF THE PAUL CREE BAND NO. 175 (ALSO KNOWN AS THE CLEARWATER BAND) v HIS MAJESTY THE KING AND FORT MCMURRAY #468 FIRST NATION

AND DOCKET:

T-165-01

STYLE OF CAUSE:

JOHN MALCOLM, "ACTING ON HIS OWN BEHALF AND ON BEHALF OF HIS BROTHERS AND SISTERS, CHILDREN OF WALTER JEAN MALCOLM, SON OF CAROLINE THOMPSON" v HIS MAJESTY THE KING IN RIGHT OF CANADA AND HIS MAJESTY THE KING IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

PLACE OF HEARINGPLACE OF HEARING :

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LAST SUBMISSIONS:

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january 22 to 26, 2024

january 29 and 30, 2024

April 30, 2024

JUDGMENT and REASONS:

McDonald J.

DATED:

November 28, 2024

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CANADA

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