Court of Queen's Bench of Alberta

Citation: Papaschase Indian Band (Descendants of) v. Canada (Attorney General), 2004 ABQB 655

Date: 20040914
Docket: 0103 03088
Registry: Edmonton

Between:

Rose Lameman, Francis Saulteaux, Nora Alook, Samuel Waskewitch, and Elsie Gladue on Their Own Behalf and on Behalf of All Descendants of the Papaschase Indian Band No. 136

Plaintiffs

- and -

Attorney General of Canada

Defendant

- and -

Her Majesty the Queen In Right of Alberta

Third Party

Reasons for Judgment
of the
Honourable Mr. Justice Frans F. Slatter

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[1] This action asserts Aboriginal rights on behalf of the descendants of the Papaschase Indian Band. The main rights in question arise out of the allegedly wrongful surrender of the Papaschase Reserve in 1888. There are presently three applications before the Court:

(a) An application by the Plaintiffs to have this proceeding declared to be a representative action, brought on behalf of all of the descendants of the Papaschase Indian Band;

(b) An application by the Defendant to strike all or a portion of the Statement of Claim as disclosing no cause of action; and

(c) An application by the Defendant for summary judgment on various grounds, including the expiry of limitation periods.

The Record

[2] Since the events underlying this litigation occurred more than 100 years ago, it is not surprising that the application proceeded almost entirely on a paper record. None of the persons involved in the events in question is still alive. The affidavits relied on by both parties mostly do no more than attach historical documents extracted from various archives.

[3] The Plaintiffs rely on:

(a) an affidavit of the Plaintiff Rose Lameman, in which she sets out her personal identity as a Papaschase Descendant, explains the origins of the Papaschase Descendants Council, and undertakes to prosecute this representative action.

(b) an affidavit of the proposed representative Plaintiff Calvin Bruneau, parallelling the Lameman Affidavit.

(c) an affidavit of Camie Augustus, a historical researcher with a particular interest in aboriginal history and archival records. This affidavit attached numerous historical documents as exhibits. Included as Exhibit 8 is an extract from an expert report of Dr. Carl Beal (filed in unrelated litigation) outlining the hardships faced by the Plains Indians as a result of the disappearance of the buffalo in the late 1870's. The text of the affidavit very concisely draws and supports inferences said to arise from the exhibits.

(d) three affidavits of Geraldine Harris, also a historian and records analyst. Attached to the first Harris Affidavit as Exhibit B is a detailed genealogical study entitled "Lineage Analysis of Rose Lameman and Calvin Bruneau". Ms. Harris concludes that both Rose Lameman and Calvin Bruneau are descendants of Chief Papaschase.

[4] The Defendant as well relies on a number of affidavits, including three affidavits of Stephen Kohan, an employee of the Department of Indian Affairs and Northern Development. Mr. Kohan deposes that he believes there is no merit to the claim and that he knows of no facts that would support it, to comply with Rule 159(2). These affidavits also attach a large number of historical and other documents. The affidavits identify the documents, and describe where they were found, but by and large do not draw any inferences from the documents. Mr. Kohan was examined on his first affidavit.

[5] Of particular importance is Exhibit B to the first Kohan affidavit, which is entitled "Report on the Origin and Dissolution of the Papaschase Band" ("the Evans Report"). This document was prepared by Dr. Clint Evans, a historical consultant retained by the Defendant to assist in this matter. The Evans Report consists of a detailed narrative history of the Papaschase Band, and other facts that are relevant to this application. Dr. Evans identifies and discusses the contents of the various historical documents that have been located, and suggests inferences that should be drawn from them. Dr. Evans also prepared a second report entitled "Commentary on the Affidavit of Geraldine Harris" (Exhibit A to the third Kohan affidavit), and a third report entitled "Commentary on the Affidavit of Camie Augustus" (Exhibit B to the third Kohan Affidavit). While he did not swear an affidavit, Dr. Evans was produced for cross-examination on his reports, and accordingly they are sworn evidence even though they were initially only attached as exhibits to other affidavits.

[6] Attached to the first Kohan affidavit is a Master's thesis (the "Tyler Thesis") entitled *A Tax Eating Proposition: The History of the Papaschase Indian Reserve* (Kohan Affidavit, Exhibit X), written by Kenneth James Tyler in 1979. The truth of the contents of the Tyler Thesis has not been sworn to in these proceedings, and it is introduced by the Defendant only to show the discoverability of the claim for limitations purposes. While it is not sworn to, I have referred to it to see if it contains information which, if sworn to, might raise a genuine issue for

trial: ***Re Indian Residential Schools*** (2002), 9 Alta. L.R. (4th) 84, at para. 70. Where it confirms the Evans Report, and primarily just quotes from historical documents, I have included cross-references to it, while recognizing that it is not evidence. To reiterate, the conclusions in the Evans Report are sworn to and are evidence, in many cases uncontradicted evidence.

[7] The Defendant also relies on an affidavit of Jamie Neeves, a paralegal at the Department of Justice. This affidavit lists and attaches (in seven large volumes) all of the historical documents referred to in the Evans Report. Finally, the Defendant relies on the affidavit of Pierrette Galley, a public servant, who deposes that she searched the government files and was unable to find a 1951 Papaschase Band membership list (see *infra*, paras. 199-200).

The Plaintiffs

[8] The Plaintiffs allege they are, and appear to be, descendants of the original members of the Papaschase Indian Band. For example, the Plaintiff Rose Lameman is the great-great granddaughter of Chief Papaschase. The individual Plaintiffs are also status Indians, and they are members of the following Bands:

(a) Rose Lameman and Samuel Waskewitch are members of the Onion Lake Band.

(b) Francis Saulteaux is a member of the Ermineskin Band;

(c) Nora Alook is a member of the Big Stone/Wabasca Band; and

(d) Elsie Gladue is a member of the Big Stone Band.

The proposed representative Plaintiff Calvin Bruneau is not a registered Indian, and is described as a non-status individual associated with the Kehewin Band.

[9] The Papaschase Indian Band was known and recognized in the 1880's, but it has long since become moribund. It does not appear to have existed in any organized sense since about 1887. The Plaintiffs plead that they were elected by about 500 descendants of the Papaschase Indian Band to be the Chief and Councillors of the Papaschase Descendants Council, a recently formed unincorporated organization. The Plaintiffs plead that the Council has authorized them to commence this action.

[10] The name of the Papaschase Band is variously spelled on the record: Pah-pas-tay-o (“Big Woodpecker” in Cree), Pas-pas-chase (“Little Woodpecker”), Passpasschase, and other variations (Evans Report, pg. 6). This judgment uses the spelling selected by the Plaintiffs.

Outline of the Facts

[11] On July 15, 1870 the Hudson’s Bay Company surrendered the Prairies to Canada. In August and September of 1876 Canada entered into Treaty No. 6 with a number of Plain and

Wood Cree Indians in what is now Alberta and Saskatchewan (Augustus Affidavit, Exhibit 21). The Treaty provided for the surrender of the land traditionally occupied by the Indians, in return for which the Indians would receive certain benefits. The benefits included the creation of Reserves for the various Bands, which Reserves were not to exceed in size one square mile for each family of five.

[12] There were Cree people in the Edmonton area at the time, including a community that was organized around Chief Papaschase and his brothers. The Papaschase Band did not sign the original Treaty No. 6, but did adhere to the treaty on August 21, 1877. Both Chief Papaschase and his brother Tahkoots placed their marks on the adhesion (Augustus Affidavit, Exhibit 21).

[13] The Evans Report (pp. 44-46) indicates that in the late 1870s and early 1880s Chief Papaschase's extended family accounted for about one-third of the Band's population. The Papaschase family was a tightly-knit social group that had been living in the Edmonton area since at least 1870. As Hudson's Bay Company Chief Factor Richard Hardisty wrote in 1885 in a summary description of the Bands in the area (Neeves Affidavit, Exhibit B, Tab 14, pg. 192):

> The Edmonton Crees at Edmonton under one Chief, for same reasons as above were only partially dependent on the Buffalo. Until about 1855 they lived at Lesser Slave Lake, whence they were engaged as tripmen to man the boats in Summer between Edmonton and York Factory. Gradually they settled near Edmonton and have settled down, building houses and cultivating farms. Several of them still require aid of ammunitions and twine for their winter hunts.

The other members of the Band did not share a common place of origin, either with the Papaschase family or each other, and had congregated in the Edmonton area from all over the Northwest Territories. When they came to the Edmonton area they aligned themselves with the Papaschase family (Evans Report, pp. 78-81; Tyler Thesis, pp. 31-33). Dr. Evans agrees with the assessment of Chief Factor Hardisty in 1885 (Neeves Affidavit, Exhibit B, Tab 14, pg. 196; Evans Report, pg. 9) that:

> the main tie...which binds the Cree band [in the Edmonton District] is residential juxtaposition of individuals at the time the band was formed. Most of its members might with equal propriety belong to any band other than that with which they are actually connected. They form a heterogeneous assemblage.

Outside the Papaschase family there was a high rate of turnover in Band membership (Evans Report, pp. 45-47).

[14] The survey of the Papaschase Indian Reserve called for by Treaty 6 was conducted in 1880 and 1884. After some uncertainty about the size of the Band, a Reserve of 40 square miles was laid out, based on a membership of 189 persons. This issue is discussed in further detail, *infra*, paras. 17-22. The Reserve was subsequently designated as Indian Reserve No. 136 ("I.R. 136"). It was located in what is now southeast Edmonton.

[15] In July of 1886, Chief Papaschase, his brothers, and their families, all applied to withdraw from the Treaty and accept Metis scrip. With the withdrawal of its core membership, the Papaschase Band disintegrated. Many other members also applied for Metis scrip. Some appear to have relocated to other areas, and some joined the Enoch Band just west of Edmonton. These events are discussed in further detail, *infra*, paras. 23-31.

[16] In 1888 the Defendant obtained a surrender of I.R. 136 from the remaining members of the Papaschase Band. This issue is discussed further, *infra*, paras. 32-40. The surrendered Reserve lands were to be sold, and the proceeds were to be placed in trust. In their Amended Statement of Claim the Plaintiffs allege that the Defendant failed to realize the full fair value of the Reserve lands when they were sold, and failed to properly deal with the proceeds that were obtained. At the time of the surrender it was contemplated that the remaining members of the Papaschase Band would join the Enoch Band, and a number of Papaschase Band members did so. The proceeds of the sale of I.R. 136 were eventually applied for the benefit of the Enoch Band (see paras. 41-47, *infra*).

Reserve Size

[17] One of the allegations in the Amended Statement of Claim is that the Papaschase Band did not receive its full allocation of Reserve land. Treaty 6 called for Reserves which "shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families".

[18] On the date of the Adhesion to Treaty 6 in 1877, the Papaschase Band had about 204 members, forty-two (or 20%) of whom were members of the Papaschase family. The rest included twenty-two other families, single men and women (some with families) and twenty-five "orphans from St. Albert's Mission". This would have given a reserve entitlement of 40.8 square miles. (Evans Report, pp. 38-9)

[19] Between 1878 and 1885 the core membership of the Papaschase Band (i.e., the families of Chief Papaschase and other headmen) was relatively stable, and represented about 20% to 33% of the membership. During this time the total Band membership increased slightly, due largely to the inclusion on the Papaschase list of the "Edmonton Stragglers", a group described in an 1880 Treaty pay list as "Stragglers being around Edmonton having no recognized Chief" (Augustus Affidavit, Exhibit 8, pg. 109). However, a number of families on the original 1877 list withdrew. Some joined the Enoch, or other Bands (see *infra*, paras. 36-7). By 1880 the St. Albert orphans were no longer on the list. Although overall numbers increased, there was limited continuity of membership outside the Papaschase family itself. (Evans Report, pp. 44-47)

[20] In 1880 the survey of I.R. 136 began. Chief Papaschase asked for sixty square miles, but was told by the surveyor that the Band would only be entitled to forty-eight square miles under the formula in Treaty 6. This area was based on the Band having 241 members in 1879. However in 1880 only 189 members were shown on the pay list, in part because of the removal of the Edmonton Stragglers. As a result the Indian Inspector directed that the Reserve contain forty

square miles, the area corresponding to a membership of 200. (Evans Report, pp. 51-2; Amended Statement of Claim, paras. 10-12)

[21] When Chief Papaschase found out that the Reserve was being reduced from 48 to 40 square miles he protested, and stopped the survey (Evans Report, pp. 52-3; Amended Statement of Claim, para. 13). The protest delayed the completion of the survey by four years, to 1884. In the end the government refused to change its original decision and I.R. 136 was only 40 square miles in size.

[22] By 1886 an issue arose as to whether a Band's entitlement under a Treaty would be reduced if some members took scrip: Augustus Affidavit, Exhibit 26. However, since I.R. 136 had been surveyed by 1884 this debate had no effect on the Papaschase Band, or the size of its Reserve.

The Taking of Metis Scrip

[23] As previously mentioned, Chief Papaschase, many members of his family, and a number of other members of the Band took Metis scrip in 1886 and withdrew from Treaty. This process was authorized by the *Indian Act*, 1880, S.C. 1880, c. 28, sec. 14 as amended by the *Indian Act Amendment Act*, S.C. 1884, c. 27, sec. 4 (carried forward as s. 13 of the *Indian Act*, R.S.C. 1886, c. 43):

> No half-breed in Manitoba who has shared in the distribution of half-breed lands shall be accounted an Indian; and no half-breed head of a family, except the widow of an Indian, or a half-breed who has already been admitted into a treaty, shall, unless under very special circumstances, which shall be determined by the Superintendent General or his agent, be accounted an Indian, or entitled to be admitted into any Indian treaty, *and any half-breed who has been admitted into a treaty shall be allowed to withdraw therefrom on signifying in writing his desire so to do*, – which signification in writing shall be signed by him in the presence of two witnesses, who shall certify the same on oath before some person authorized by law to administer the same.

In 1888, after Chief Papaschase and his family had withdrawn from Treaty, the statute was amended to require the consent of the Indian Commissioner to withdraw from Treaty: *An Act to Further Amend the Indian Act*, S.C. 1888, c. 22, s. 1.

[24] While the statute gave an unconditional right to withdraw from Treaty, in fact most persons withdrew in return for scrip. There were two kinds: money scrip and land scrip. Land scrip was authorized by s. 90(f) of the *Dominion Lands Act*, R.S.C. 1886, c. 54, which permitted the granting of lands:

> . . . in satisfaction of any claims existing in connection with the extinguishment of the Indian title, preferred by half-breeds resident in the North-West Territories,

> outside of the limits of Manitoba, previous to the fifteenth day of July, one thousand eight hundred and seventy, to such persons, to such extent, and on such terms and conditions as are deemed expedient.

The exact terms "deemed expedient" were set out in various Orders in Council, such as P.C. #688 of March 30, 1885 (Kohan Affidavit #2, Exhibit F). This Order in Council confirmed the appointment of Scrip Commissioners, and recited that the Minister of the Interior "is of the opinion that it is expedient" to grant scrip to those entitled, including that:

> . . . in the case of each half breed head of a family residing in the North-West Territories, previous to the 15th day of July, one thousand eight hundred and seventy, who is not at present in *bona fide* occupation of any land, scrip be issued, redeemable in land, to the extent of one hundred and sixty dollars.

A head of family was thus entitled to land scrip for 160 acres, or money scrip for $160.00, if he met the conditions of the Order in Council. These were essentially that he be a half-breed, and was resident in the Northwest Territories on the date the Hudson's Bay Company surrendered its lands to Canada. Initially it appears that land scrip and money scrip were of equal value, but because of the increase in the value of land, by 1885 land scrip was apparently worth double that of money scrip (Tyler Thesis, pg. 80). While the Order in Council did not expressly say so, it was also a condition that a half-breed who had entered a Treaty, withdraw from the Treaty, as one could not take both Treaty benefits and scrip. Special efforts were made to warn those taking scrip that they would have to leave the Reserve (*infra*, paras. 28, 99; Evans Transcript, pp. 63-4; Tyler Thesis, pp. 86, 88-89).

[25] The North West Half-Breed Commission first visited Edmonton in 1885, but only a very few members of the Papaschase Band took scrip (seven heads of families, representing eleven people in total). But when the Commissioners returned the next year (1886) about 100 Papaschase Band members applied for scrip and were discharged from Treaty. Dr. Evans concludes (Evans Report, pg 63):

> This number represents a loss of well over half of the band since the last annuity payments in 1885, and more importantly, it included Chief Papaschase, all four of the band's headmen, and their families. No less than sixty-eight of the withdrawals belonged to this core leadership group, a loss that would cripple any community let alone a band marked by a high degree of turnover within its membership.

(See also Tyler Thesis, pp. 101-2). This taking of scrip in 1886 marked the beginning of the end of the Papaschase Band: Evans Transcript, pg. 72, l. 24 to pg. 73, l. 9.

[26] The Scrip Commissioners were faced with this flood of requests to withdraw from Treaty in 1886 partly because of the promotion of the idea by scrip buyers. According to Dr. Evans (Evans Report, pg. 64, note 213):

> Scrip buyers were merchants and bankers and other people of that ilk who followed the Half-Breed Commissions on their rounds and offered cash for money scrip (land scrip could only be transferred through a notarized conveyance) at a percentage of its face value. Two articles in the *Edmonton Bulletin* indicate that scrip was selling for 70 to 80 cents on the dollar around the time that Papaschase and his brothers received scrip.

The speculators promoted money scrip because it was easier to transfer, even though it was of lower value to the Metis (Tyler Thesis, pg. 83). The Indian Commissioner was so concerned about the large number of applications for scrip in 1886 that a temporary halt was put on the granting of scrip. The application of Chief Papaschase to take scrip was initially refused (Neeves Affidavit, Exhibit B, Tab 212).

[27] On July 7, 1886, Indian Agency Inspector Wadsworth wrote to Indian Commissioner Dewdney (Augustus Affidavit, Exhibit 64, pg. 2):

> Papaschase Band, as a band wish to withdraw, their object is to homestead their present holdings on the reserve, now Sir you are well aware how largely this band is made up of widows, old people, and children, they cannot possibly make their own living: the Chief and his brothers are undoubtedly half breeds and might scratch along, but even they have each two wives and numbers of children.
>
> . . . if more (Indians) are forced to remain in Treaty by the action of the Agent it will not increase his influence or popularity among them, we know that it will be for their ultimate good, but the Indians look at it from a ready money stand point.

That same day Edmonton Indian Agent Anderson sent a telegram to Wadsworth (Neeves Affidavit, Exhibit B, Tab 216):

> Pass Chase Band make application for Discharge from treaty alleging themselves to be half-breeds—Enoch's contemplate the same what action am I to take. Answer quick.

The particular concern was with persons who were (or claimed to be) of mixed blood, but who followed a more or less traditional Indian lifestyle. Apart from the effect that wholesale withdrawals would have on the Bands, the Indian agents were concerned that these persons would not be able to support themselves if they withdrew from Treaty. (Evans Report, pp. 64-67; Letters to the Superintendent General of Indian Affairs, April 3, 1886 and July 7, 1886, Augustus Affidavit, Exhibits 22, 31, 64 and 65).

[28] Chief Papaschase was not pleased that his application for scrip had been refused, or at least put on hold. On July 9th, 1886 Hudson's Bay Company Chief Factor Richard Hardisty telegrammed Commissioner Dewdney (Neeves Affidavit, Exhibit B, Tab 20):

> Pass-pass-chase of Edmonton with his five brothers most anxious to get discharge from treaty[.] Known to all that they are half breeds would recommend the Government to grant them their Discharge.

Dr. Evans draws the logical inference that this telegram was sent at the instigation of Chief Papaschase himself. Six days later, on July 15, 1886, Chief Papaschase himself sent a telegram to the Prime Minister, Sir John A. Macdonald (Neeves Affidavit, Exhibit B, Tab 223):

> Why cant we get same as Peace Hills half breeds taking treaty we want our Scrip.

On July 26, 1886, Deputy Commissioner Read wrote to Sir John A. Macdonald, the Superintendent General of Indian Affairs, summarizing the correspondence on the issue:

> . . . On the matter being laid before the Superintendent General here, he directed that the following telegram be sent Mr. Goulet:
>
> > Superintendent General instructs me to say that Treaty Half Breeds who clearly show that they are Half Breeds and who do not lead the same mode of life as Indians should be allowed to withdraw from Treaty. Others should not be allowed. Every person accepting discharge should be informed at the time that he forfeits all Indian rights, that he must leave the Reserve and give up house and all other improvements without compensation and also cattle and implements given to him as belonging to the Band . . . .
>
> The following telegram was then received from Mr. Wadsworth:
>
> > Your telegram to Goulet reads Half Breeds who do not live the same mode of life as Indians. Please define this. All Indians are engaged more or less in Agriculture. Are Chief Pass-pass-chase and brothers to be granted discharges, they farm, some live in lodges in summer, houses in winter . . . .
>
> in answer to which the Commissioner telegraphed:
>
> > I think Pass-pass-chase and brothers might be granted discharges . . . .

(Neeves Affidavit, Exhibit B, Tab 220; Augustus Affidavit, Exhibit 66; Tyler Thesis, pp. 93-96). Shortly thereafter Papaschase and his brothers did take scrip and withdrew from Treaty.

[29] The description given of Chief Papaschase's lifestyle in this correspondence can be contrasted with the description of the Band some two years earlier, when Dewdney reported (Augustus Affidavit, Exhibit 63):

> At Edmonton I met Pas-pas-chases's band . . . they were all painted up in regular Indian style and were more Indian in action and appearance than any I have seen for some time.

Dewdney did note in contrast that Bateau (or Batteaux), one of Chief Papaschase's brothers, did not attend the meeting, and that he "has a very good farm, a comfortable house and good building".

[30] Discharges from Treaty were effected by the swearing of a standard form document. The discharge for Chief Papaschase was signed on July 31, 1886, in the name of John Quinne Gladu, a name he sometimes used. It recites that "John Quinne Gladu, a Half-Breed, has proven to my satisfaction that he was residing in the North West Territories previous to the 15th day of July, 1870, now ceded by the Indians . . . is entitled at this date to Scrip to the amount of $160." The document has attached some genealogical data, together with a statutory declaration sworn by Chief Papaschase stating that the information in the document is true, and stating it had been translated into Cree before he placed his mark on it. In other documents he acknowledged he "hereby forfeits all Indian rights", and he was discharged from Treaty. (Neeves Affidavit, Exhibit B, Tab 23). Dr. Evans concludes (Evans Report, pg. 68) that Chief Papaschase's family would have been entitled to a total of about $4,000 in scrip. By way of comparison, the salaries of ordinary Indian Agency employees at the time were between $600 - 750 per year.

[31] Despite having surrendered his Treaty rights, it appears that Chief Papaschase did not leave the Reserve: Augustus Affidavit, Exhibits 33, 34 and 60; Tyler Thesis, pp. 103-4. He at first denied having signed the surrender, but when confronted with the document he instead claimed compensation for the buildings he had constructed on the Reserve. The government resolved to enforce the terms under which scrip was given, and Chief Papaschase eventually did leave. There is no evidence on what happened to him thereafter, but the Plaintiffs suggest the scrip money was spent quickly, leaving him and his family destitute and landless.

The Surrender of I.R. 136

[32] At the relevant time the surrender of Indian Reserve lands was governed by the provisions of the *Indian Act*, R.S.C. 1886, Chapter 43:

> **39.** No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, except on the following conditions: –
>
> > (a) The release or surrender shall be assented to by a majority of the male members of the band, of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General; but no Indian shall be entitled

> to vote or be present at such council *unless he habitually resides on or near and is interested in the reserve in question*;
>
> (b) The fact that such release or surrender has been assented to by the band at such council or meeting, shall be certified on oath before some judge of a superior, county or district court, or stipendiary magistrate, by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some one of the chiefs or principal men present there at and entitled to vote; and when such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal. (emphasis added)

Shortly put, the Act required that a surrender be approved by a majority of the male members of the Band over the age of 21 years who "habitually resided" on or near the Reserve. The surrender was to be approved at a meeting of the eligible voters, although the required quorum is unclear.

[33] When Chief Papaschase and his family took Metis scrip, and the Papaschase Band dispersed, pressure grew to obtain a surrender of I.R. 136, and to open the lands for settlement. The record supports the Plaintiffs' contention that the European settlers in the Edmonton area were never happy with the location of I.R. 136, as the lands in question were regarded as being prime settlement lands, close to the Edmonton settlement. The government had earlier rejected a petition to have the Reserve moved 20 miles away, saying this would be a "breach of faith" with the Band. There was a significant amount of political lobbying to have the Reserve surrendered once the Papaschase Band disbanded. (Augustus Affidavit, Exhibits 35 to 42 and 57, 59 and 61; Evans Report, pp. 54-58; Tyler Thesis, pp. 41-3, 51-5).

[34] On September 20, 1887 the Indian Commissioner in Regina wrote to the Indian Agent at Edmonton (Augustus Affidavit, Exhibit 43):

> In reference to the proposed surrender of their Reserve by the portion of Pahpastao's Band who have not left Treaty, and their amalgamation with that of Enoch, I beg to enclose two forms of surrender and to specially authorize you to summon a council of the first named Band and bring the matter before them, and, if they consent by a vote of the majority of the voting male members of 21 years and over to have a surrender of their lands, to obtain their signatures duly witnessed among others by a competent interpreter.
>
> . . . It should be explained to the Band that the government will take over the land and either sell or lease as may appear in the best interests of the Indians. They will then become part of Enoch's Band . . .

In November 1887 William de Balinhard, the Indian Agent at Edmonton, wrote that

> . . . there is at present only one Indian man of Pahpastayos Band now on Stoney Plain Agency and one out hunting this with three or four who have joined the Peace Hills Agency [ie. Hobbema] are all that remain of the Band . . .

(Neeves Affidavit, Exhibit B, Tab 243). On March 30, 1888 William de Balinhard reported:

> . . . I beg to state that I find it impossible to get a council of these men together. I have only three men on this reserve. There are three more at Peace Hills, two at Beaver Lake and two no one knows anything about making 10 altogether. As we cannot get a council of more than three would it be as well to get the signatures of each man separately and then taking Manitowais as the head man get the deed executed before the stipendiary magistrate . . .?

(Augustus Affidavit, Exhibits 43 and 44.) The tone of this last letter, and the passage of seven months since he got his instructions, suggest that de Balinhard had been trying to call a meeting but had been unsuccessful.

[35] There is no reply to this correspondence on the record. On November 19, 1888 a deed of surrender was signed by Napasis, James Stoney, and Antoine (Augustus Affidavit, Exhibit 45). De Balinhard reported they were the "only men of the Band now remaining and located on Enoch's Reserve." (Neeves Affidavit, Exhibit B, Tab 246). The recital to the deed states that they are the "principal men of Passpasschase Band of Indians No. 136"; they are conspicuously not described as chiefs or headmen, the word "Chief" on the standard form having been crossed out. The deed provided that the lands would be sold or leased, with the net proceeds to be "placed at interest, and that the interest money accruing from such investment shall be paid annually or semiannually to us and our descendants forever." On May 22, 1889 de Balinhard and Napasis appeared before the Honourable Mr. Justice Rouleau (as required by the *Act*), and jointly swore that the release was assented to by a majority of the male members of the Band over the age of 21 who were entitled to vote. They deposed that the surrender was agreed to at a meeting called for that purpose, and that they were present at the meeting. It appears that the three signatories were the only ones present at the meeting, but other than on the issue of voting eligibility there is no evidence that the declaration sworn before Justice Rouleau was in any respect untrue.

[36] The Plaintiffs plead that the surrender was not approved by a majority of the male members of the Band over the age of 21. The Plaintiffs plead that although de Balinhard stated that there were only two adult males of the Papaschase Band on the Enoch Reserve in November of 1888, in August of that year he had paid Treaty annuities to at least 10 such men. The Plaintiffs argue that de Balinhard should have known that there were other Papaschase men living within 50 miles of Edmonton, and that a proper meeting should have been held. De Balinhard's own letter identifies ten members of the Band, but the Plaintiffs allege that there were perhaps 12 or 13. The Plaintiffs however provide no evidence that the additional men "habitually resided" at or near the Reserve, as required by the *Act* if they were to vote. The report of Dr. Beal (Augustus Affidavit, Exhibit 8, pp. 115, 116) shows some Papaschase families and

stragglers transferring to the Samson and Muddy Bull Bands. Others had moved to Enoch's Reserve. In 1888 de Balinhard reported "only three men on this reserve", a reference to the Enoch Reserve. The Tyler Thesis concludes (pg. 126) that after 1887 "there was no one living on the [Papaschase] reserve".

[37] The last Papaschase Band Treaty pay list is for 1886. Exhibit G to the second Harris affidavit shows that all Papaschase members were on other Band pay lists by 1888. Many of them appeared on those other Band lists even before the taking of scrip by Chief Papaschase in 1886. Ms. Harris identified 22 possible Papaschase voting members after 1886. Ten males over 21 were paid on the last Papaschase list in 1886, and they mostly collected annuities with the Enoch Band in 1887. In 1888 one collected annuities with the Samson Band, six with the Enoch Band, one with the Ermineskin Band, and two with the Alexander Band.

No.	Name	Paid in 1888	Duration
11	James Stoney	Enoch	1887-1900
51	Omachisis	Samson	1888-92
65	Thomas	Alexander	1887-91
74	Red Deer	Enoch	1887-91
83	Napasis	Enoch	1887-92
84	Manitonasis	Alexander	1888-91
88	Squanick	Ermineskin	1888-89
89	Antoine	Enoch	1887-1900
95	Whitehead	Enoch	1887-89
98	Pierre	Enoch	1887-1902

(Reference: Harris Affidavit, Exhibit G; Evans Transcript, pp. 78-84. All these members except Thomas were paid on the Enoch list in 1887. There is some question whether No. 98 "Pierre" was over 21.)

Even the signatories of the surrender are on other lists: James Stoney is shown on the Enoch list from 1887 to 1900, Antoine is shown on the Enoch list from 1887 to 1900, and Napasis is shown on the Enoch list from 1887 to 1892.

[38] During the cross-examination counsel for the Plaintiffs suggested, and Dr. Evans agreed with some reservations, that it was reasonable to infer that a person was habitually resident

where he or she received his or her annuity payments, although there might well be exceptions (Evans Transcript, pg. 89, l. 6-14; pg. 92, l. 12-26). The inference is stronger if the person is paid with a particular Band over a number of years, as opposed to if the person is paid with a Band in a single year. For example, Thomas was paid with the Alexander Band from 1887 to 1891, which raises a strong inference that he was habitually resident at Alexander during those five years. There is nothing on the record to rebut this logical inference. Dr. Evans testified (Evans Transcript, pp. 40-44) that while the Plains Cree were highly nomadic, they did have territories, and also home bases, particularly after the buffalo disappeared. All of the various Reserves mentioned are within 65 kilometres of the Papaschase Reserve, but in 1888 that would have represented a significant trip taking several days (Evans Transcript, pg. 42). There are numerous references on the historical record to members of the Papaschase Band travelling to the Edmonton Settlement to meet with the Indian Agent, so clearly the members of the Band were able to travel around. However, there is a difference between being able to travel to a place, and being "habitually resident" in that place. At the time the Enoch Reserve and the Papaschase Reserve were distinct places, and to be habitually resident on the former, precluded being also habitually resident "on or near" the latter. There is no direct evidence on the record that any Papaschase Band member was habitually resident on I.R. 136 at the time of the surrender, and no evidence from which a reasonable inference to that effect could be drawn. The Plaintiffs argue that there is evidence that there were 10 or 11 eligible voters at the time of the surrender, and that this raises a genuine issue for trial, but the evidence does not support that conclusion. The evidence is that there was nobody habitually resident on I.R. 136, and in the technical sense no one was eligible to vote for the surrender.

[39] The surrender was approved by the Governor General in Council on October 12, 1889. Steps were then taken to sell the land. It appears that some of the lands were sold at auction on April 18, 1891. The Agent in charge wrote that despite a late snowfall "I consider that we got fair prices for the land sold" in comparison to C.P.R. lands for sale in the area. There was some concern that the lands would fall into the hands of speculators, and steps were taken to ensure that the buyers had a *bona fide* intention of living on the lands:

> . . . as soon as any sign of speculating appeared, feeling that if it would pay speculators to hold, it would be equally advisable for the Department to do so, and knowing that to let lands into their hands would be prejudicial to the value of other on the Reserve, and the town here, I stopped the sale and postponed it indefinitely.

(Augustus Affidavit, Exhibit 49). Further sales of the lands continued up to the 1930s. (Tyler states all the land was sold by 1902, that most patents were issued by 1908, but that a few sales were not completed until 1930: Tyler Thesis, pg. 143). The proceeds were initially held in trust for the Band.

[40] The Plaintiffs allege that the land was sold at an undervalue. Apart from the expressed opinion of the Agent that full value was realized, there is evidence that buyers paid $4.10 per acre for 154 acres, when C.P.R. lands were offered at $3.00 per acre (Augustus Affidavit,

Exhibits 49 and 52). The Tyler Thesis concludes (at pg. 144) that the average sale price was $3.87 per acre. When further land was sold in 1894 the prices were set:

> . . . by the addition of 25 cts. to the upset prices determined on for the auction sale last held, and after comparison between them and those actually obtained . . . [and] a consideration of all the circumstances, including the fact that the maximum price at which the Calgary and Edmonton Railway lands in the vicinity are held, is Three Dollars per acre, dictates the recommendation now made.

(Augustus Affidavit, Exhibit 50). Apart from the evidence that the weather kept some buyers away from the first auction, there is simply no evidence provided that the lands were worth more than what they were sold for. For example, there is no evidence that the lands were immediately resold at a higher value. Proof of sale at an undervalue would appear to be central to the Plaintiffs' claim. If the Plaintiffs succeed the damages would presumably be the fair market value of the lands when sold, minus the proceeds actually received, plus interest on the difference. If I.R. 136 was sold for fair value, there would appear to be no loss even if the surrender was invalid.

The Merger with the Enoch Band

[41] The taking of scrip by Chief Papaschase and his family left the Band with just 82 members: 10 adult men, 25 women, 45 children, and two other relatives. By 1887 the Papaschase Band annual Treaty pay list shows that no members of the Band were paid, because they had all been "transferred to Enoch's". The Enoch Band pay list for 1887 shows many of the former Papaschase members as having been transferred in, and in that year they were paid with Enoch's Band (Evans Report, pp. 69-70; Harris Affidavit, Exhibit G).

[42] The Enoch Band had been formed when Indian Commissioner Dewdney promised Tommy Lapotach "that should he collect a large number of Indians, at that time living about Edmonton claiming no chief, I would recommend that he be placed in charge of them and given a Reserve" (Augustus Affidavit, Exhibit 6). The identification of "stragglers" with a headman for the purposes of allocation of a Reserve or making Treaty payments seems to have been relatively common: see the report of Dr. Beal, Augustus Affidavit, Exhibit 8, pg. 107. Tommy Lapotach did gather together a group of what were known as the "Edmonton Stragglers". Since there had been a lot of movement between Enoch's Band, the Papaschase Band, and the Edmonton Stragglers, and because of the geographical proximity of Enoch's Reserve and the Papaschase Reserve (about 20 kilometres), it is not surprising that the two Bands eventually came together.

[43] In 1886 Indian Agent Anderson wrote to Commissioner Dewdney indicating that the balance of the Papaschase Band wished to join Enoch's Band, because "there are too few men left on the Reserve to work to advantage." This state of affairs is acknowledged in paragraph 22 of the Amended Statement of Claim. He also reported that Enoch's Band were requesting that the Papaschase Band be allowed to join. (Neeves Affidavit, Exhibit B, Tab 236). The Tyler Thesis (pp. 119-20) casts doubt on the real source of the desire to amalgamate, but acknowledges the factual premise on which it was based. It appears from the record that Indian Affairs policy at

the time was that a Band should not be removed from their Reserve except with their full consent. On April 9, 1887 Dewdney wrote (Augustus Affidavit, Exhibit 55):

> . . . with reference to the proposed amalgamation of Passpasschase's and Enoch's Bands, Passpasschase's Band should not be removed from their Reserve, except with their consent, and until they have agreed to make a surrender of the same, to be sold for their benefit . . . and since it is absolutely necessary that only such promises as will be literally fulfilled should be made to them, I will be glad to learn from the Department that [they] may be given to understand that, whatever may be realized from the sale . . . will be applied to the benefit of them and their heirs exclusively; and in requesting this information, I would ask the Department to bear in mind that, should the proposal be carried into effect the remainder of Passpasschase's Band will receive their share in another Reserve, at the expense of Enoch's Band.

The handwritten notation on the letter, apparently placed by the Superintendent at Ottawa, reads:

> . . . the proceeds of the sale of the land surrendered will belong to Passpasschase's Band but if they and the members of Enoch's Band [merge] that the latter shall share in the same . . .

This arrangement would somewhat vary the provisions of the surrender document that the proceeds would "be placed at interest, and that the interest money . . . shall be paid . . . to us and our descendants forever" (*supra*, para. 35). The formal merger agreement of 1894 (*infra*, para. 47) did follow the recommended arrangement.

[44] On August 22, 1887 Assistant Commissioner Hayter Reed wrote "While at Edmonton the Indians of Pahpastao's band, that is, those who were living on the Reserve – agreed with me to leave the Reserve and join Enoch's band, where the Headquarters of the Agency would hereafterwards be": Augustus Affidavit, Exhibit 34, pg. 3. While the historical record is not definitive, Dr. Evans concludes that the remnants of the Papaschase Band, recognizing that they were not a viable unit anymore, joined the Enoch Band voluntarily (Evans Report, pp. 71-72). In my view this is the logical inference to draw from this record.

[45] On September 7, 1887 Inspector Wadsworth visited the Edmonton Agency and sent a long report to Commissioner Dewdney (Augustus Affidavit, Exhibit 16). The letter is an "audit report", and the bulk of it is taken up with a report on the books and records of the Agency, and particularly whether the inventory of stores corresponded with the books. The letter does however comment briefly on some of the Bands, and it states on pp. 23-4:

> Passpasschase Band
>
> > The Chief Headmen and most of the members of this band having taken their discharge from treaty and received scrip, the band has been wiped out by

> removing the few remaining members to the reserve of Enoch's band at Stoney Plain. As before mentioned their cattle were also sent there.

The Plaintiffs argue that the words "wiped out by removing" justify an inference that the Defendant was engaged in a deliberate plan to undermine the Papaschase Band, motivated by lobbying of the Edmonton settlement. In the context of the whole record, the better inference is that the taking of scrip by the core membership (reluctantly agreed to by the Department) was the main source of the Band's demise (Evans Transcript, pp. 67-69). While Wadsworth was perhaps unsympathetic to the Band, he did not have authority to move a Band (Evans Transcript, pp. 68-9), and the record does not contain any correspondence confirming such a decision by the senior officers of the Department. To the contrary, the record shows that such moves required the consent of the band.

[46] In 1891 it was again being suggested that the funds derived from the sale of I.R. 136 be used for the benefit of Enoch's Band, and that the two Bands "be regarded as amalgamated in all respects and interests." It seems clear that in part the Department was motivated by a desire to have both Bands become self-supporting, but the correspondence discloses no resistance to the concept by either Band. The Department appears to have believed the merger was in their interests "provided the Remnant of Passpasschase's Band are given a joint interest in Enoch's Reserve" (Augustus Affidavit, Exhibit 48).

[47] In an agreement dated January 4, 1894, James Stoney and Antoine signed an agreement as "Principal men" (Napasis having died since the surrender) on behalf of "the owners of the Pass-Pass-Chase Indian Reserve No. 136 . . . in the non-existence of Chief or headmen" which provided in part that they would join the Enoch Band and as members thereof:

> . . . to have hold and possess forever, an undivided interest in all Land and other privileges now possessed and enjoyed, or which may at any time hereafter be possessed or enjoyed, by the said Band . . .

In return, the Enoch Band was given:

> . . . a joint and undivided interest in all benefits which have accrued or may at any time hereafter accrue from the sale of the lands of the Passpasschase Indian Reserve, No. 136, as aforesaid, which has been surrendered . . .

Following the execution of this agreement, the Defendant applied the proceeds of the surrender of I.R. 136 to the benefit of the Enoch Band.

Summary of the Claim

[48] The Amended Statement of Claim is lengthy and detailed, but the following is a summary of the relief now claimed on behalf of all of the present descendants of the Papaschase Band:

(a) The Papaschase Band did not receive all the land it was entitled to when I.R. 136 was laid out, and the Papaschase Band is entitled to 9.9 more square miles of land.

(b) The surrender of I.R. 136 was invalid because the proper surrender procedures were not followed.

(c) The Defendant was in breach of its fiduciary and other responsibilities in permitting the improvident surrender of the land, specifically by allowing itself to be influenced by the lobbying of the Edmonton settlement, and by pressuring the Band to surrender the Reserve.

(d) The Plaintiffs are entitled to title to any part of the Papaschase Reserve still held by the Defendant.

(e) The Defendant mismanaged the sale of I.R. 136, and did not properly manage the proceeds that were received from the sale.

(f) The Defendant has not properly accounted for the proceeds of the sale of I.R. 136, and specifically should not have applied those proceeds for the benefit of the Enoch Band.

(g) The Defendant should

i) not have permitted Chief Papaschase and the other members of the Band to accept Metis scrip, or

ii) not have permitted Papaschase Band members to join other Bands, or

iii) have better advised the Papaschase Band members of the consequences of taking scrip,

and the descendants of all these departing Band members are entitled to be readmitted to the Papaschase Band.

(h) Representatives of the Defendant artificially reduced the membership in the Papaschase Band, and through various breaches of duty caused the dissolution of the Papaschase Band, and enticed the members of the Papaschase Band to join the Enoch Band.

(i) A declaration that the Papaschase Band never ceased to exist and should now be reinstated or recognized by the Defendant.

The Amended Statement of Claim includes other recitations of mistreatment or hardships faced by the Papaschase Band:

> (j) The Defendant was in breach of its Treaty obligations in
>
> i) failing to establish the Reserve in a timely way,
>
> ii) failing to provide relief in times of famine,
>
> iii) failure to provide farming implements and farming instruction to enable the Band to make the transition to a farming life.
>
> (k) The Defendant was in breach of duty by failing to protect the Reserve from trespassers.

While no relief is claimed directly for these incidents, they are included in the proposed list of common issues to be tried.

[49] The Defendant's response is that some of the Plaintiffs' claims do not disclose a cause of action, and the Defendant seeks to strike them out under Rule 129. In the alternative, the Defendant asserts that the Plaintiffs' claims are bound to fail, and that there is no genuine issue for trial, and accordingly the Defendant seeks summary judgment under Rule 159. In particular, the Defendant argues that the applicable limitation periods for advancing these claims have long since expired. In the further alternative, the Defendant argues that even if some of the claims do disclose a genuine issue for trial, this is not an appropriate proceeding for a class or representative action.

[50] All the events underlying this action occurred well before 1982, and no constitutional or *Charter* issues are raised. No notices of constitutional questions have been delivered, and there are no statutes whose constitutionality has been challenged in these proceedings. Specifically, there is no constitutional challenge to any limitation statute. The Plaintiffs from time to time noted that Aboriginal rights and treaty rights are now protected by the Constitution, but those protections cannot be used to invalidate actions of government officials that occurred in the 19th century. The *Charter of Rights and Freedoms* does not have retroactive operation, or revive rights that were extinguished before 1982: ***R. v. Sparrow***, [1990] 1 S.C.R. 1075, at para. 23. At the time of these events, the concept of Parliamentary supremacy was firmly in place, and Parliament was able to vary Aboriginal or Treaty rights if it chose.

Summary Judgment

[51] The Defendant applies for summary dismissal of the claim, alleging that there is no genuine issue for trial. The Defendant argues that there is no merit to the claim on the facts, but that in any event the claim is blocked by the passage of the limitation periods.

Test for Summary Dismissal

[52] The test to be applied when a Defendant applies for summary judgment has been stated in various ways in the cases:

(a) Is it plain and obvious that the action cannot succeed? ***German v. Major*** (1985), 39 Alta. L.R. (2d) 270 at 276, 20 D.L.R. (4th) 703, 62 A.R. 2 (C.A.);

(b) Does the material clearly demonstrate that the action is bound to fail or is it clear that the action has no prospect of success? ***Zebroski v. Jehovah's Witnesses*** (1988), 87 A.R. 229, 30 C.P.C. (2d) 197 (C.A.);

(c) Is it established that there is no merit to the claim, in the sense that it does not raise a genuine issue for trial? ***Allied Signal Inc. v. Dome Petroleum Ltd.*** (1991), 81 Alta. L.R. (2d) 307 at 319, rev'd other grounds (1992), 3 Alta. L.R. (3d) 155 (C.A.); Is there a genuine issue of material fact requiring a trial?: ***Guarantee Co. of North America v. Gordon Capital Corp.***, [1999] 3 S.C.R. 423, at para. 27.

Once the defendant establishes that there is a real doubt about the claim, the onus shifts to the plaintiff to show there is a genuine issue for trial: ***Hercules Management Ltd. v. Ernst & Young***, [1997] 2 S.C.R. 165 at para. 15. The test is a strict one, and if the record raises any genuine issue for trial, then summary judgment cannot be granted. It is not appropriate to attempt to resolve conflicting allegations in the affidavits unless it is clear that the claim is truly hopeless.

[53] Trials are usually held to resolve issues of fact. If the facts are well known, but raise legal issues, that is an appropriate situation for summary determination of the legal issues. Occasionally a legal issue is so unsettled or complex and nuanced that it should not be decided on a paper record, and a trial may be required to provide a proper foundation for the decision: ***Wilson v. Medicine Hat (City)*** (2000), 87 Alta. L.R. (3d) 25 (C.A.); ***Farm Credit Corp. v. Miller*** (1992), 126 A.R. 335 at paras. 43-44; ***Northland Bank (Liquidation) v. Hongkong Bank of Canada*** (1991), 120 A.R. 296 (C.A.); ***Dawson v. Rexcraft Storage and Warehouse Inc.*** (1998), 111 O.A.C. 201 (C.A.) at paras. 13-20. In this case, most of the facts are undisputed; many of the key facts are actually recited in the Amended Statement of Claim. Both parties essentially rely on the same archival record, and both seek to draw inferences from it on these applications. The dispute of the parties was more with respect to the inferences that might be drawn from the record, as well as the legal consequences of the facts found on the record. Where there is a dispute about inferences that might be drawn from a paper record, a trial is sometimes helpful, and caution should be exercised in granting summary judgment. If a plaintiff can show that a competing inference on a material point might be drawn from a document, that might well raise a genuine issue for trial. However, as I have indicated, in this case all of the witnesses who might testify as to the meaning of or the context surrounding the paper record are long since deceased.

It seems pointless to direct a trial of an issue when it is unlikely that anything will be advanced by that lengthy and expensive process. This is something that can be considered in deciding if the claim "is bound to fail".

[54] The Amended Statement of Claim pleads that many of the acts and decisions of the Crown employees were done or made wilfully and maliciously. Words such as "bad faith", "equitable fraud", "maliciously and arbitrarily", "intended to . . . undermine the influence and authority of Chief Papaschase", "made false statements", "without relevant information", "yielded to pressure", "fraudulent misrepresentations", "undue influence, coercion and duress" and the like are used. The Plaintiffs offer no evidence in support of these allegations, not even the modest amount required to raise a genuine issue for trial. In most instances there is nothing in the historical paper record to support the allegations of impropriety. An inference of misconduct is not warranted by this record, and the application for summary judgment must be decided on the basis that these allegations amount to no more than bare speculation.

[55] While the test for summary dismissal is strict, it is still based on the evidence and the record. A plaintiff responding to a summary dismissal application cannot simply rely on its pleadings and bare allegations of a cause of action, or argue that evidence might turn up later: ***Jager Industries Inc. v. Canadian Occidental Petroleum Ltd.*** (2000), 84 Alta. L.R. (3d) 353 at paras. 21-23; ***Wilson v. Medicine Hat (City)*** (2000), 87 Alta. L.R. (3d) 25 (C.A.) at para. 15; ***Brown v. Northey and Killian's Restaurant (1987) Ltd.*** (1991), 115 A.R. 321 (C.A.) at para. 11; ***Suncor Inc. v. Canada Wire and Cable Ltd.*** (1993), 7 Alta. L.R. (3d) 182; ***Ghermezian v. Corey Developments Ltd.*** (2001), 10 Alta. L.R. (4th) 231, at para. 66. Specifically, it is no response to an application for summary dismissal that traditional oral evidence might be found. Some evidence must be brought to court to show that a "genuine issue" exists that justifies a trial: ***Grossman Holdings Ltd. v. York Condominium Corp. No. 75*** (1999), 124 O.A.C. 318 at para. 7; ***Dawson v. Rexcraft Storage and Warehouse Inc.***, *supra*, at para. 17; ***Alberta Treasury Branches v. Wenley Enterprises & Sales Ltd.*** (1985), 66 A.R. 232 (M.) at para. 51; ***Watts Estate v. Contact Canada Tourism Services Ltd.*** (2000), 261 A.R. 66 at para. 86. The motions judge is entitled to assume that all the evidence that will be produced at trial is on the record: ***Dawson v. Rexcraft***, *supra*, at para. 17.

[56] In this action no one directly swears that there is merit to the Plaintiffs' claims. The Augustus Affidavit says only that there are or are not "indications in the documents" that things happened, and suggests that inference should be drawn from the historical documents. Such evidence was held inadequate even to support amending a pleading in ***Mikisew Cree First Nation v. Canada*** (2002), 2 Alta. L.R. (4th) (C.A.) at paras. 7-10. This affidavit goes on to conclude that "it is my opinion that there are numerous factual issues in dispute that require determination by the Court at trial". Such conclusory statements are not sufficient to raise a genuine issue for trial: ***Advance Rumley Thresher Co. v. Leclair***, [1917] 1 W.W.R. 875 (Alta. S.C., App. Div.). Some of the supporting exhibits have no relation to the issues, or are not probative (see paras. 86, 106, *infra*, for examples). The Plaintiffs' evidence overall is weak. Their response to the summary dismissal application depends on the identification of a document that supports a realistic inference that a particular claim has merit.

[57] The Plaintiffs argue that it is "manifestly unfair" to "force the Plaintiffs to prove their claim" before examinations for discovery and full document discovery. Such a result might well be unfair, but that is not the effect of a summary judgment application. A respondent to a summary judgment application need not "prove its case". It need only raise a "genuine issue for trial", which is a significantly lower standard. If a respondent cannot even produce enough evidence to show a genuine issue, there is no unfairness in granting summary judgment. The respondent is not without weapons, as it is allowed to cross-examine on the applicant's affidavit, and file a conflicting affidavit. That is often enough to raise a genuine issue for trial. There may be cases where the applicant is in such complete control of the records that it would be unfair not to have it discover documents before the application is heard, but that is not the case here, particularly on the limitations issue. There is no basis for postponing a summary judgment application until after discoveries are complete: ***Jager Industries Inc. v. Canadian Occidental Petroleum Ltd.***, *supra*, at para. 26; ***Re Indian Residential Schools*** (2002), 9 Alta. L.R. (4th) 84 at para. 45.

[58] If the Plaintiffs can show a "genuine issue for trial", they are of course entitled to their trial. Usually trials are held so that more extensive evidence can be led, and so that witnesses can be examined viva voce to assess their credibility. The successful defence of a summary judgment application also usually leads to examinations for discovery. In this case one must wonder whether a trial judge will be any better positioned to decide the issues presented. As in ***Re Indian Residential Schools***, *supra*, at para. 38, it is clear that no witnesses to the events can be called. The experts could perhaps expand on their reports, and could be cross-examined on the inferences and conclusions they draw from the historical record. It is possible that the parties might uncover more documents, but given the extensive record already compiled, it seems unlikely that a document of critical importance remains to be uncovered. Counsel for the Plaintiffs did suggest that traditional oral evidence might be available, but he frankly conceded that no attempt had yet been made to see if such evidence exists. Given the dispersal of the Papaschase Band for over a century, it would be surprising if any oral history of the Band has survived. In any event, as previously noted, a plaintiff cannot resist a summary judgment application by arguing that "evidence might turn up later". All of these factors can be considered in deciding if the case is "hopeless", or if there is a "genuine" issue for trial.

The Quality of the Evidence

[59] The Plaintiffs point out that the Defendant has brought an application for summary judgment, which is not an "interlocutory motion" within the meaning of Rule 305(3). Accordingly, affidavits containing statements as to information and belief are not admissible; in accordance with Rule 305(1) "affidavits shall be confined to the statement of facts within the knowledge of the deponent." Rule 159(2) similarly entitles a Defendant to apply for summary dismissal based on "an affidavit sworn by him or some other person who can swear positively to the facts". The Plaintiffs argue that some of the Defendant's evidence is not "within the knowledge" of the various deponents.

[60] Rule 305, if read literally, could prevent an application for summary judgment in some types of case. For example, in large organizations there is often no one person who has sufficient knowledge of all of the facts to swear an affidavit in support of summary judgment based on personal knowledge. In some cases a multitude of affidavits from different representatives of the organization would be required. In other cases even this would not suffice, because it is necessary to extract the required information from the business records of the organization. Read literally, Rule 305 would prevent the use for summary judgment of information contained in records kept in the ordinary course of business, but such evidence is allowed on summary judgment applications: ***J.H. Ashdown Hardware Co. v. Singer*** (1951), 3 W.W.R. (N.S.) 145 (Alta. S.C., App. Div.) at pp. 148-9, affirmed on other grounds [1953] 1 S.C.R. 252; ***Bank of Montreal v. Beacon Industrial Development Corp.*** (1986), 70 A.R. 218 (M.) at para. 18; ***Pathé Frères Cinema Ltd. v. United Electric Theatres Ltd.***, [1914] 3 K.B. 1253 (C.A.).

[61] The rules have been interpreted to avoid unnecessarily restricting the evidence that can be used on applications for summary judgment. For example, affidavits that merely attach and place on the court record relevant documents have been held to be admissible; ***Kin Franchising Ltd. v. Donco Ltd.*** (1993), 7 Alta. L.R. (3d) 313 (C.A.), at para. 6; ***Alberta Treasury Branches v. Leahy*** (1999), 234 A.R. 201 at paras. 51-66; ***Re Indian Residential Schools*** (2002), 9 Alta. L.R. (4^{th}) 84 at para. 36. This is so even though the deponent did not create the particular documents, and can sometimes offer little more information than the place in which the document was found. The court can determine the inherent reliability of the documents from the way they were made and kept. The court is then left to draw its own inferences from the contents of the documents.

[62] The Defendant filed a lengthy Affidavit of Records listing all of the historical documents relied on in this application. That brings into play Rule 192:

> **192.(1)** A party on whose behalf an affidavit of records is made under this Division, and a party on whom an affidavit of records is served under this Division, are both deemed to admit that
>
> *(a)* the records specified or referred to in the affidavit are authentic, and
>
> *(b)* if a copy of a letter, memorandum or other message purports or appears to have been sent, the original was sent and received by the addressee.

No objection to the authenticity of the documents was served under R. 192(3), and they are deemed to be authentic, although Rule 192 does not deem the contents of the documents to be true: ***Mikisew Cree First Nation v. Canada***, *supra*, at. para. 22. The contents only become evidence under the business records rule previously mentioned, or if otherwise sworn to. Where an affidavit of records is filed, it provides another reason for a court considering summary judgment to rely to some extent on affidavits that merely attach documents.

[63] Some of the affidavits tendered, particularly the Neeves Affidavit and the Augustus Affidavit, would fall into the exception for affidavits that merely place documents on the record before the Court. The Evans Report and the Harris Affidavits to some extent also merely identify documents, although they do offer interpretations of some of those documents, and suggest ways that the various documents should be linked together. The Augustus Affidavit likewise draws some inferences from the records, although to a lesser extent.

[64] Another problem area on summary judgment applications is swearing to negatives. For example, the Galley Affidavit deposes that a search was done and concludes that no band membership list for the Papaschase Band was posted in 1951. The first Kohan affidavit deposes that employees and researchers have searched diligently and that there is not "any current record of the Government of Canada that . . . acknowledges that there is an existing Papaschase band." In the literal sense no one can "swear positively" based on "personal knowledge" that something does not exist. It is also obvious that Mr. Kohan did not (and no one person could) examine every document held by the Government of Canada. There is however nothing objectionable to this type of affidavit being used on a summary dismissal application: ***Kin Franchising Ltd. v. Donco***, *supra*, at paras. 4 and 13. The deponent sets out what is known, and draws an inference of non-existence that the Court can accept or reject. This approach is actually invited by Rule 159(2) which requires an affidavit that "the deponent knows of no facts that would substantiate the claim."

[65] Rule 305 has the potential to place another limitation on summary judgment applications. Read literally it could prevent the use of expert evidence in many cases. While some classes of expert witnesses, such as doctors, do rely on their personal observations, this is not always the case. Many experts simply provide opinions, which are inferences they draw from facts which they are told to assume, or which they extract from the paper record.

[66] In my view the rule should not be interpreted so as to prevent the use of expert evidence on summary judgment applications. This case provides a good example. Dr. Evans has prepared a lengthy report in which he relies almost exclusively on historical documents that he has found in various archives, and that are on the record. He played no role whatsoever in the creation of those documents, nor in the events that form the basis of this litigation. Neither he nor anyone else has personal knowledge that the documents were prepared and sent when and by the persons who purported to sign them, although this is deemed admitted under Rule 192(1). In some cases he merely identifies the content of the various documents. In other cases he suggests inferences that the Court might draw from individual documents, or from several documents read together. In yet other instances he draws on his expertise as a historian, and offers opinions and context for the Court. The general process is discussed in detail in the Evans Transcript, pp. 93-100. In my view there is nothing objectionable to this evidence; a sworn expert's opinion of this kind is "within the knowledge of the deponent".

[67] If the matter went to trial, and Dr. Evans testified, he would be entitled to give all of this evidence, which is one test for admissibility: ***Westhill Leasing Corp. v. McMillan***, [1980] A.J. No. 498 (M.). To the extent that he just draws the attention of the Court to various documents, he

adds little to the record other than efficiency. Where he suggests that inferences can be drawn from various documents, the Court can examine the document in question and decide whether the inference should or should not be drawn, or whether there is a genuine issue for trial. From his expert knowledge he can also speak to the likely truth of the contents of the document. To the extent that he offers expert opinions, he can be cross-examined on those opinions, or the Respondent to the summary judgment application could introduce competing opinions. All of this evidence can be used to decide if there is a genuine issue for trial.

[68] The Plaintiffs argued that it was unsafe to rely on the Evans Report, because Dr. Evans admitted that he did not review every document contained in the Defendant's affidavit of records. Since Dr. Evans had not reviewed all of the records, the Plaintiffs argued that it would be unsafe to conclude at this point that there is no genuine issue for trial. I do not accept this argument. Dr. Evans testified (Evans Transcript, pp. 10-12) about how he conducted his research. He did not start with the documents produced in the litigation, because in his view someone else had screened those documents for relevance. Rather Dr. Evans chose to go back to the primary archival sources, review the original documents himself, and make his own decisions about relevance. While Dr. Evans conceded that research is never "final", because one could continue researching forever, he was nevertheless satisfied that he had reviewed enough of the primary historical documents to form the opinions set out in the Evans Report. That is sufficient to cast an evidentiary burden on the Plaintiffs to show that there remain genuine issues for trial. The Plaintiffs in fact brought forward a number of historical documents which they argued raised genuine issues for trial, and they were entitled to go into the Defendants' affidavit of records to find more such documents. It is not however a sufficient response to an application for summary dismissal to say that the Defendant's affiants might have done more work, or that more evidence may turn up. The Defendant is only required to place on the record sufficient evidence to demonstrate that the claim has no reasonable prospect of success. It is then up to the Plaintiffs to bring forward at least some small amount of evidence to show that there is a genuine issue for trial.

[69] In his report Dr. Evans drew certain inferences from the historical record. During his cross-examination he conceded on several occasions that it was "possible" that someone else might draw a different inference. It is trite that "possibilities" are not "probabilities". It is easy to speculate, and Dr. Evans' concession does not turn speculation into evidence. These portions of the Evans Transcript do not generate genuine issues for trial unless there is some evidence on the record to support the competing inferences.

[70] As previously noted the burden of proof on a summary dismissal application is high: the applicant must prove that there is no genuine issue for trial. On the other side, the respondent need not at this stage "prove its case". It is only necessary for the respondent to show that there is a genuine issue for trial, which is a much lower burden than proving the case on a balance of probabilities. As a result there is no inherent unfairness in relying on expert evidence on a summary judgment application. As long as the respondent can raise a genuine issue for trial, the matter will not be decided summarily. In this case the Plaintiffs have simply left large parts of the Evans Report uncontradicted.

[71] There is a different aspect to this evidentiary issue when summary dismissal is applied for based on the expiry of a limitation period. In those cases it is necessary to determine when the claim was "discovered" or "discoverable" (*infra*, paras. 135-6). To make that determination it is not necessary to decide if past declarations or assertions of a claim were true or not, and such statements are not admitted for the truth of their contents. If a party declared that it had a right, or that it had been wronged, that shows discovery of the claim. It is not necessary for a deponent to have personal knowledge that the facts alleged in support of the claim are true, just that the claim was asserted. Where an affidavit in support of a summary dismissal application merely attaches documents that show that a claim was asserted at some point in the past, that does not violate the rule against hearsay affidavits: ***Kin Franchising Ltd. v. Donco***, *supra*, at para. 6.

[72] The purpose of Rule 305 is obvious. Since the summary judgment rules are a shortcut to judgment, the rule is designed to force the applicant to bring the "best evidence" to the Court: ***J.H. Ashdown Hardware Co. v. Singer***, *supra*, at pg. 149. Hearsay evidence is to be avoided, and the applicant is required to bring forward the affiant with the most direct knowledge of the situation. The purpose of the rule must be kept in mind in deciding what evidence can be admitted. In a case like this, which relies primarily on historical materials, there is less opportunity for unfairness. No one who actually participated in the events which are the subject of this litigation is available to testify; they have all been dead for many years. The trial judge is going to have to draw inferences from the documents, and will probably be in no better position than a chambers judge on a summary judgment application. The quality and reliability of expert evidence in a case like this will not be materially different at trial, as compared to a chambers application. In my view, considering these factors, the Defendant has not tendered evidence that violates Rule 305 or Rule 159.

Genuine Issues for Trial

[73] After a careful review of the material placed on the record, I have come to the conclusion that the Plaintiffs can show a genuine issue for trial on some issues, albeit that the evidence presently in support of some of those issues is quite weak. Whether these issues can survive the limitation defence is dealt with in the next section of this judgment. On other issues, the Plaintiffs have not brought forth enough evidence to show a genuine issue for trial, not even the modicum of evidence that is required to show a genuine issue for trial under the Rules. Some of the issues have been discussed already, and a summary of the disposition of each claim (listed *supra*, para. 48) is as follows.

The Size of the Reserve

[74] There appears to have been some uncertainty as to exactly how many members of the Papaschase Band there were, and accordingly what size the Reserve should have been under the terms of the Treaty. There is also an issue as to whether one should use the number of members as at the date of adhesion in 1877, or as of the date of the first survey in 1880, or as of the date of the completion of the survey in 1884. There is a triable issue on this point.

The Validity of the Surrender of the Papaschase Reserve

[75] The Plaintiffs argue that the surrender of the Reserve raises many triable issues. First of all, they say that a meeting was not called "according to the rules of a band". There is however no evidence that the Band had any such rules, or even that the Band traditionally made decisions in a meeting of the whole. What evidence there is on the record suggests that Chief Papaschase felt free to make decisions on his own, perhaps in consultation with the other headmen. In the absence of any Band rules, the Departmental officials were entitled to call and conduct the meeting in any fair way. Absent any evidence whatsoever that there were such Band rules, this argument does not raise a genuine issue for trial.

[76] The statute clearly contemplates the approval of a surrender of a Reserve by a majority of the voting members of the Band. The policy behind this provision is to prevent the exploitation of Indians in dealing with Reserve lands, and can be traced back even before the Royal Proclamation of 1763, which was described in ***Guerin v. The Queen***, [1984] 2 S.C.R. 335 at pg. 383:

> The Royal Proclamation of 1763 provided that no private person could purchase from the Indians any lands that the Proclamation had reserved to them, and provided further that all purchases had to be by and in the name of the Crown, in a public assembly of the Indians held by the governor or commander-in-chief of the colony in which the lands in question lay. As Lord Watson pointed out in *St. Catherine's Milling*, *supra*, at p. 54, this policy with respect to the sale or transfer of the Indians' interest in land has been continuously maintained by the British Crown, by the governments of the colonies when they became responsible for the administration of Indian affairs, and, after 1867, by the federal government of Canada. Successive federal statutes, predecessors to the present *Indian Act*, have all provided for the general inalienability of Indian reserve land except upon surrender to the Crown, the relevant provisions in the present Act being ss. 37-41.

See also, ***Chippewas of Sarnia Band v. Canada (Attorney General)*** , [1999] O.J. No. 1406 at paras. 344-365, rev'd on other grounds (2000), 195 D.L.R. (4th) 135 (Ont. C.A.), at paras. 186-201. While the Plaintiffs can demonstrate on this record that in 1888 there were more than three male members of the Band over the age of 21, there is absolutely no evidence on the record that any were "habitually resident" on the Reserve at the time of the surrender (*supra*, paras. 37-8). The record discloses that the other members of the Band were residing in other places, particularly Enoch's Reserve and at Peace Hills (Hobbema). Having examined the record carefully, I can find no evidence of "habitual residents" on I.R. 136 to raise a genuine material factual issue for trial. The *Act* is silent on what to do in the absence of voting members; there is a gap in the statutory provision. There are a number of possible ways of dealing with that gap. One possible interpretation is that in these circumstances no surrender of a Reserve is possible, no matter how prudent and consistent with the interests of the Band that may be.

[77] There are other possible interpretations. In ***Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development***), [1995] 4 S.C.R. 344, a portion of the Reserve was surrendered, but no one certified on oath that a proper meeting had been held. This was held at paras. 41-43 not to be fatal to the validity of the surrender. The true object of the provisions is to ensure that the Band had consented to the sale, and it was clear that a valid consent had been given. In the present case the opposite problem presents itself: there is a certification under oath that a proper meeting was held, but it appears that in fact there were no eligible voters in existence. In ***Blueberry River***, the Court pointed out the inconvenience that would arise if surrenders could be challenged long after they had occurred. One possible interpretation of the *Act* to avoid this result is that where the certification is made before a superior court judge, the surrender is thereafter incontrovertible. One can assume that the superior court judge would have made suitable inquiries as to the circumstances, and given the importance of bringing finality to the surrender process, the certification should be accepted at face value.

[78] The better interpretation of the *Act* however appears to be that its provisions apply when there are some persons still habitually resident on the Reserve, and therefore some eligible voters. When there are no habitual residents the federal Crown has a residual discretion to deal with the surrender of the Reserve, arising from the prerogative nature of Crown control over Indian lands: ***Chippewas of Sarnia Band***, *supra*, at paras. 379-80, 389, 391-2. That residual discretion can be traced back to the historic policy reflected in the Royal Proclamation of 1763, discussed *supra*, para. 76, which is carried forward in the general empowering provisions in the *Act*, discussed *infra*, para. 90. Here, as in ***Blueberry River***, it appears that consent in substance was obtained. Three interested persons were asked to and did consent to the surrender on behalf of the remnants of the Papaschase Band. There is no indication that they were unauthorized to do so, that their act did not represent the consensus of the members, or that any other interested party later objected to what had been done. While the three members who signed the surrender deed were not eligible to vote, neither were any of the other seven Papaschase members who might have objected. There is nothing on the record to indicate that there was no consent in fact. In those circumstances it is not a significant extension of the reasoning in ***Blueberry River Indian Band*** to conclude that the surrender of I.R. 136 should be recognized as legally valid. Since I have concluded that the limitation statutes prevent a challenge to the surrender at this late date in any event, I need not explore these issues further. It is not necessary, in any event, to have a trial in order to determine the legal consequences of what appear to be the undisputed facts. It seems clear that there were no Papaschase members habitually resident on the Reserve, and that three members residing at Enoch approved the surrender. The legal consequences are determinable without a trial.

[79] The Plaintiffs also note that de Balinhard was instructed to obtain the surrender of I.R. 136 in September of 1887 but that he did not complete the task until November of 1888. This does not appear to be of any legal significance. The basic premise of the Plaintiffs' claim is that the Reserve should never have been sold at all, so it is inconsequential if it was sold slightly later than it might have been. There is no evidence that land prices were falling, so that the Band would have realized a higher return if de Balinhard had acted more quickly, and indeed the

opposite is true. The bulk of the land was not sold until about 1902 in any event, and any delay in getting the surrender does not seem to have caused any loss to the Band. Even if de Balinhard had acted promptly, by the fall of 1887 most of the Papaschase Band members were being paid on the Enoch pay list, and were resident at Enoch, and so the delay would not have affected the number of potential voters.

[80] The Plaintiffs also argue that there was no quorum present at the meeting: there were ten possible voting members, and only three signed the deed of surrender. Since I have concluded that there were no eligible voting members at all, this argument is somewhat moot. The words "a majority . . . at a meeting . . ." found in the statute could mean a majority of Band members at the meeting, or a majority of all the Band members. In ***Enoch Band of Stony Plain Indian Reserve No. 135 v. Canada***, [1982] 1 S.C.R. 508 the Court concluded that the proper interpretation is that there must be a quorum present of a majority of the members, and that a majority of those present must approve the surrender. The real problem is that no notice of a meeting was given, thereby giving voters a chance to attend and be counted. However, this is also a moot point given the absence of any eligible voters.

[81] In summary, there are some legal issues outstanding on the consequences of how the surrender was obtained. However what happened is clear so there is no genuine factual issue for trial.

Breach of Fiduciary and Other Duties in
Permitting the Surrender of the Reserve

[82] Apart from the validity of the surrender process, the Supreme Court of Canada has held that the Defendant has an overriding obligation not to permit an improvident surrender of Reserve lands. This obligation arises from Section 39 of the *Indian Act* of 1886, which requires that the Governor General in Council approve any surrenders. The records from the time indicate that once the core leadership group withdrew from Treaty, the Department and the remnants of the Papaschase Band were all of the view that the only prudent course was to merge with the Enoch Band. The evidence is that there were no longer sufficient adult members of the Papaschase Band to work the Reserve. By 1887 all of the Band members had moved to the Enoch Band, and the Reserve was vacant. As a similar situation was described in the ***Blueberry River Band*** case, *supra*, at para. 9, the Reserve was virtually useless to the Band at the time. There is simply no evidence on this record to suggest that it was viable, sensible, or practical for the Band to retain I.R. 136 and remain on it. The Plaintiffs' main argument is that the Defendant should have foreseen that the lands would become very valuable in the future as part of the larger City of Edmonton. However, the potential prospects of the land would have been reflected in its market value at the time, and there is no evidence to suggest that the Defendant should somehow have realized that the land had intrinsic value not recognized by the marketplace. The Defendant's fiduciary duty is to prevent any exploitative bargains with respect to the Reserve, and there is no evidence that the sale of the Reserve, combined with the subsequent admission of the Papaschase remnants into the Enoch Band, was exploitative in any sense. The Plaintiffs have failed to provide sufficient evidence to raise a triable issue on this point.

[83] That the Reserve may not have been surrendered strictly in accordance with the provisions of the *Indian Act* does not necessarily mean there was a breach of fiduciary duty. Breach of fiduciary duty is fault based: ***K.L.B. v. British Columbia***, [2003] 2 S.C.R. 403 at para. 45. The surrender may have been the most reasonable thing to do, and may have clearly been in the best interests of the Band. It may also possibly have been a breach of statute, but there is no civil cause of action arising directly from a breach of statute: ***Canada v. Saskatchewan Wheat Pool***, [1983] 1 S.C.R. 205; ***Odhavji Estate v. Woodhouse***, [2003] 3 S.C.R. 263 at para. 31; ***Frame v. Smith***, [1987] 2 S.C.R. 99 at paras. 14 and 17; ***Guerin v. The Queen***, [1984] 2 S.C.R. 335 at pg. 385. As the Court held in ***Wewaykum Indian Band*** at para. 43 ". . . in dealing with the Indian interest in reserves, 'we must ensure that form not trump substance' . . .", and at para. 86 ". . . the Crown's fiduciary duty . . . does not provide a general indemnity." To succeed with the claim for breach of fiduciary duty the Plaintiffs must show that the Defendant acted in an unconscionable or unreasonable way inconsistent with the interests of the Band: ***Guerin***, *supra*, at pp. 349, 383; ***Wewaykum Indian Band***, *supra*, at paras. 86, 100. Merely showing a breach of statute, or even negligence, is not enough to show a breach of fiduciary duty. There is no evidence on this record to show a triable issue on this point.

[84] The Amended Statement of Claim (para. 14) and the record contain several references to the lobbying by the Edmonton settlement to have the Papaschase Reserve located further away from the town. The Department was entitled to consider their views. As the Court held in ***Wewaykum Indian Band***, *supra*, at para. 96:

> In resolving the dispute between Campbell River Band members and the non-Indian settlers named Nunns, for example, the Crown was not solely concerned with the band interest, nor should it have been. The Indians were "vulnerable" to the adverse exercise of the government's discretion, but so too were the settlers, and each looked to the Crown for a fair resolution of their dispute. At that stage, <u>prior to reserve creation</u>, the Court cannot ignore the reality of the conflicting demands confronting the government, asserted both by the competing bands themselves and by non-Indians. (emphasis in original).

Prior to reserve creation, there was nothing wrong with the lobbying. After the Band dispersed, the Edmonton Settlement lobbied to have the Reserve sold. At this point the Department was obliged to place the interests of the Papaschase Band first, but there is no indication it did otherwise. There is no evidence on the record that the Department was influenced by the lobbying of the Edmonton settlement to open I.R. 136 up for sale. Even Tyler, who is sympathetic to the Band's claims, concludes (Tyler Thesis, at pp. 54, 147) that "there is nothing in the stand maintained by the officials of the Department of Indian Affairs which encouraged the Edmontonians.". In order to show a genuine issue for trial the Plaintiffs must bring some evidence into court. The mere fact the Reserve was sold is not enough. There is no evidence the Department was improperly influenced by the Edmonton settlement, and no genuine issue for trial.

<u>Land Still Held by the Defendant</u>

[85] There is no evidence on the record that the Defendant still holds title to any portions of I.R. 136. The uncontradicted evidence is that the last of the land was conveyed by 1930. Given the long passage of time, and the fact that I.R. 136 has now been completely developed, it would not be safe to infer that there are still parts of I.R. 136 in the name of the Defendant. Land Titles records in Alberta are public and the Plaintiffs could easily show if any portions of I.R. 136 are still in the name of the Defendant or the Third Party. The Plaintiffs have brought no evidence to raise a genuine issue for trial.

The Sale of the Lands at an Undervalue

[86] There is simply no evidence on the record that the Papaschase Reserve was sold at an undervalue. This issue is discussed *supra*, at para. 40. The only evidence on this point is found in the affidavit of Cammie Augustus:

> 14. The archival documents regarding the sale and administration of surrendered Papaschase lands indicate that the Department of Indian Affairs *may have* conducted the sale in a haphazard fashion which *may have* resulted in the sale of these lands at less than fair market value. Attached hereto as Exhibits 46, 47, 48, 49, and 50 to this my Affidavit are the supporting documents.
>
> 15. *Questions arise* as to the administration of the land sales proceeds following the 1888 Surrender. Archival documents *suggest* a mismanagement of accounting and delays in collecting payments on sold lands. Attached here to as Exhibits 51, 52, 53, and 54 to this my Affidavit are the supporting documents. (emphasis added).

This type of equivocal evidence is not sufficient to raise a genuine issue for trial. Ms. Augustus is not qualified to give opinion evidence on fair market value, or the commercial reasonableness of the transactions. The "supporting documents" document the sales, but they disclose no patent mismanagement. One document (Exhibit 47) is an extract from a debate in the House of Commons questioning the extent of the advertising of the lands, but the point is answered by Mr. Dewdney. In any event the speaker expects the land is worth "a dollar an acre" when in fact it sold for more. The concerns expressed by this speaker about speculators and the immediate sale of the whole block were, so far as this record goes, dealt with. In addition, debates in the House must be taken for what they are, and this document raises no genuine issues. The balance of the Exhibits are quite innocuous.

[87] The Plaintiffs further claim that the lands should not have been sold at all, but should have been leased out. They also allege that the mineral titles should not have been sold at all. They allege that the Defendant was negligent in collecting the sale price of the lands from some of the purchasers who defaulted on their obligations. No evidence is provided on the record to prove these allegations or raise a genuine issue for trial. These claims do not rise above mere speculation. There is no evidence that the lands could have been leased; given that large areas of land were being opened for homesteading it is not obvious that anyone would want to lease and

improve someone else's unbroken land. There is no evidence that the mineral titles had or have any separate value.

[88] There is no evidence on the record that the Department mismanaged the collection of the sale proceeds of the lands. While some buyers did not pay cash for the land, there is no evidence that they were all in default. The records do show "arrears" but the Department charged interest, and the records also show the dates of "installments due" (Augustus Affidavit, Exhibits 51 and 53), which implies that arrangements were made for payments over time. There are some references to specific defaults (Augustus Affidavit, Exhibit 51), but no evidence that the Department did not deal with them in a commercially reasonable manner. The Crown's fiduciary duty does not create a general indemnity for the Band: ***Wewaykum Indian Band***, *supra*, at para. 86(1). The Department cannot be expected to have guaranteed the payment of the purchase price by the purchasers, and there is no evidence that the Department did not make reasonable efforts to collect all sums owing.

The Validity of the Agreement to Share the Proceeds of the Sale of I.R. 136 with the Enoch Band.

[89] The original terms of the surrender were that the proceeds of the sale of I.R. 136 would be held in trust for the Papaschase Band. When the Papaschase Band merged with Enoch's Band, the trust was essentially amended. The bargain was that in return for sharing the communal property of the Enoch Band, the Papaschase Band would share its communal property as well. There is no indication that either the Enoch Band or the Papaschase Band were unjustly enriched by this arrangement, or that the merger was in any sense an "exploitative bargain" (see ***Wewaykum Indian Band***, *supra*, at paras. 98-100). There is no issue for trial of the facts that led to the amalgamation of the two bands; what happened is set out in the record and is not seriously contested by either party. There are some legal issues arising from those facts.

[90] The Plaintiffs argue that because there was no statutory authority in 1894 to amalgamate bands, that the merger of the Enoch and Papaschase Bands is "void". In my view that is not the correct legal conclusion. The federal Crown has an overriding constitutional and fiduciary jurisdiction over Indians and Indian lands. There must be many things (of greater or lesser import) that are not specifically dealt with in the statutes, yet decisions must be made on them. If the statute is silent on a particular point, then the matter falls under the Crown prerogative, and the federal Crown can make such decisions as it feels are consistent with its duties to the aboriginal peoples. The *Indian Act*, R.S.C. 1886, c. 43, contained the following provisions that confirm the residual plenary powers of the Defendant:

> **4.** The Minister of the Interior, or the head of any other department appointed for that purpose by the Governor in Council, shall be the Superintendent General of Indian Affairs, and shall, as such, have the control and management of the lands and property of the Indians in Canada.
>
> **6.** The Department of Indian Affairs shall have the management, charge and direction of Indian Affairs.

I reject the concept that the Crown cannot act without a specific statutory power authorizing the act: ***Blueberry River Indian Band***, [1995] 4 S.C.R. 344 at para. 4.

[91] The Plaintiffs argue there was no authority to use the proceeds for the benefit of the Enoch Band. As just noted, the Minister at the time had broad general powers to deal with Indian property. The *Act to Further Amend the Indian Act*, S.C. 1895, c. 35 (which modified similar wording in the 1886 statute) gave more specific powers as well:

> 70. The Governor in Council may, subject to the provisions of this Act, direct how, and in what manner, and by whom, the moneys arising from the disposal of Indian lands, or of property held or to be held in trust for Indians . . . shall be invested, from time to time, and how *the payments or assistance to which the Indians are entitled shall be made or given*; and may provide for the general management of such moneys. . . . (Emphasis added)

Given that many members of the Papaschase Band had effectively joined the Enoch Band, and given that at least some leaders of the former had agreed, there is no obvious reason why the Defendant could not have applied the proceeds of the sale of I.R. 136 as it did, whether or not there was any legally valid "merger" of the Bands. Absent some evidence the transaction was unconscionable or exploitative, there is no reason to set it aside. As noted, the Papaschase Band got as good as they gave in the transaction. It would be an unusual result if the Papaschase descendants could claim back the money from the sale of I.R. 136 without bringing into account the benefits received from the occupation of the Enoch Reserve.

[92] A related issue is whether the federal Crown could recognize the merged Band without a meeting, or a vote, or the agreement of one or both Bands. While such a meeting might have been advisable, it was not a legal necessity. There was no statute requiring a meeting or consent, as there was for example if reserve land was to be surrendered (*supra*, para. 32). Decisions made by the leaders of First Nations can be binding on the Band without any general meeting, as happened in ***Wewaykum Indian Band v. Canada***, [2002] 4 S.C.R. 245 at para. 33. The definition of "Band" in the *Act* is not dependent on a meeting, a vote, or a consensus. Therefore the absence of a meeting or vote does not render invalid the *de facto* merger of the two Bands in about 1887, and their legal merger in 1894.

[93] The agreement between the Enoch Band and the Papaschase Remnants was an agreement between two First Nations. Of such an agreement the Court said in ***Wewaykum Indian Band***, at para. 102:

> The Cape Mudge forbears, whose conduct is now complained of, were autonomous actors, apparently fully informed, who intended in good faith to resolve a "difference of opinion" with a sister band. They were not dealing with non-Indian third parties (*Guerin*, at p. 382). It is patronizing to suggest, on the basis of the evidentiary record, that they did not know what they were doing, or to reject their evaluation of a fair outcome. Taken in context, and looking at the

> substance rather than the form of what was intended, the 1907 Resolution was not in the least exploitative.

By 1894 the Papaschase remnants would have been well aware of the Enoch Band and the Enoch Reserve, having lived there for seven years. They would also have been well aware of their own membership, resources, and viability as a band. There is nothing obviously exploitative about the agreement to join the Enoch Band, and thereby gain a common interest in the Enoch Reserve, in exchange for sharing their own resources.

[94] There is an issue as to the eventual fate of the proceeds of the sale of the Papaschase Reserve. At the hearing counsel were unable to state whether there remains a capital sum arising from the sale of the Papaschase Reserve, or whether the entire sum was disbursed to the Enoch Band at some time in the past. This raises a triable issue that might be dealt with summarily if a better record was produced, but at the moment it is an outstanding issue.

The Taking of Metis Scrip

[95] The allegations in the Amended Statement of Claim about Metis scrip present two themes. The first theme is that Metis scrip was a bad idea generally, and that the government should never have implemented such a scheme. As the Amended Statement of Claim alleges in para. 23(i) “The issuing of scrip to Treaty Métis served no legitimate public purpose.” The second theme is that the taking of Metis scrip by members of the Papaschase Band was a bad idea for them personally, and that the Defendant owed a fiduciary duty to dissuade them from that course of action. In my view the record does not show a genuine issue for trial with respect to either issue.

[96] The general challenge to the issuance of Metis scrip as bad public policy cannot succeed because of the doctrine of the supremacy of Parliament. Whatever the merits of the policy, it was authorized by Parliament. The courts have no ability to examine legislation in the pre-*Charter* era to see if it is good policy or bad. Such issues are simply not justiciable: L. M. Sossin, *The Boundaries of Judicial Review: The Law of Justiciability in Canada:* Toronto, Carswell, 1999, at pp. 164-67. As previously noted, the *Dominion Lands Act* authorized the issue of scrip. The *Indian Act* before 1888 gave any half-breed an absolute right to withdraw from Treaty. The policies implicit in these statutes were implemented by the appointment of Scrip Commissioners, and there is no basis for attacking the validity of Order in Council P.C. #688 (*supra*, para. 39). Even if the scrip policy was, as the Plaintiffs argue, contrary to Treaty, Parliament had the power to override treaty rights. The merits of this policy not being justiciable, it raises no genuine issue for trial.

[97] The allegation that Chief Papaschase and the other members of the Band should have been dissuaded from taking scrip is met by related arguments. Chief Papaschase had an absolute right under the *Indian Act* to withdraw from Treaty. Under the terms of P.C. #688 he had an absolute right to take scrip for 160 acres. The correspondence previously quoted makes it clear that the Indian Agents in the Northwest Territories were concerned about the implication of this

policy and were attempting to persuade Metis not to take scrip, but the Metis did not accept this advice (see Tyler Thesis, pg. 100; Neeves Affidavit, Exhibit B, Tab 212). The Agents at the time recognized that, given the wording of the statute and the Order in Council, they had no discretion to refuse applications for scrip (Augustus Affidavit, Exhibit 64; Tyler Thesis, pg. 97). Chief Papaschase actively lobbied to have scrip issued to him; he correctly sensed that he had a right to scrip, and that it could not be denied to him. If he had (hypothetically) commenced an action for *mandamus* to compel the issuance of scrip to him, the Department would have had some difficulty in answering his claim. In all of these circumstances Chief Papaschase was entitled to scrip, he demanded it, and there is no genuine issue for trial on the subject. I agree with the inference drawn by Dr. Evans (Evans Report, pp. 55, 68, 80, 81) that on this record there is no evidence that Chief Papaschase was incapable of making informed decisions on these issues. As the Court held in ***Wewaykum Indian Band***, *supra*, at para. 102 "it is patronizing to suggest . . . that they did not know what they were doing . . .". After 1888, when the statute was amended to give the Department the discretion over the withdrawal from Treaty, there may have been some responsibility on the Defendant, but that was not the case in 1886.

[98] The Plaintiffs argued that Chief Papaschase was not really living a Metis lifestyle (*supra*, paras. 28-9), and was more properly considered an Indian, and so should not have been allowed to take scrip. It is true that the Department officials tried to dissuade those who lived a traditional Indian life from taking scrip, and in some cases they even refused such persons scrip (Evans transcript, pp. 32-36). At this time "living an Indian mode of life" partly defined who was entitled to be recognized as a "non-treaty Indian" (see *infra*, para. 167), so it would have been a term of art to the Department officials. But the "lifestyle" of the applicant was not one of the legal preconditions of the right to take scrip, or to withdraw from Treaty. Whether Chief Papaschase and his family led such life is not legally relevant. They were clearly of mixed blood, and entitled to withdraw from Treaty. As Dr. Evans points out (Evans Transcript, pp. 36-37) the Aboriginal people were allowed to self-identify as Indians or Metis when it came to entering Treaty, and the statutes in force at the relevant time gave them the same right to self-identify when it came time to withdraw from Treaty. The Plaintiffs suggest that some Papaschase members of pure Indian blood were allowed to take scrip, but there is no evidence to support that contention.

[99] The Plaintiffs complain that the Papaschase members were not given independent legal advice before they accepted scrip. They argue that the Papaschase members should have been advised of all of the consequences before they were allowed to withdraw from treaty. To talk about anyone getting "independent legal advice" in the Edmonton area of the Northwest Territories in the 1880's is a completely artificial concept. This is an attempt to apply 21st Century standards to 19th Century transactions, and it is one of the reasons we have limitation statutes to prevent the prosecution of stale claims: see ***Wewaykum Indian Band v. Canada***, [2002] 4 S.C.R. 245, at para. 121. In any event the record is clear that the Band members did receive some advice; in fact the Indian Agents at first refused to process the scrip applications of the Band. Chief Papaschase was not pleased with this (supra, para. 28), and the only inference that can be drawn is that there would have been discussions at the time in which the Agents indicated their concerns about the effect the taking of scrip would have on the Band and the

Indians (see Evans Transcript, pp. 63-65). The only possible inference is that the Band members were told not to take scrip, but they persisted. Further, the standard set of scrip documents contained the following waiver:

> I hereby forfeit all Indian rights. I agree to leave the reserve, to give up my house and all other improvements which I may have on the reserve without compensation, also any cattle or implements received by me as an individual or as a member of the Band.

(Neeves Affidavit, Exhibits 13, 23-28, 29). The documents all state that they were explained to the Band member signing the document, and there is no evidence on the record to suggest that they were not. There is no evidence to suggest that if the Band members had received "independent legal advice" they would have acted differently. In short, the Papaschase members did receive advice about taking scrip; they just chose not to follow it.

[100] The Plaintiffs also point out that the exact motivation behind the taking of scrip is unknown. The correspondence of the time suggests that the Papaschase Band members were motivated by the prospect of receiving a sum of money immediately, and they did not fully consider the long-term implications of their actions. The Plaintiffs suggest that there might have been other motivations. They argue that the Defendant failed to provide the farming implements and other benefits called for by the Treaty, thereby causing the Papaschase Band to fail to establish itself as a farming community. The Plaintiffs argue that the Defendant did not properly help the Papaschase Band to make the transition from a hunting to a farming economy. It is suggested that the disappearance of the buffalo and the resulting hardships and starvation left the Papaschase Band with little choice. Another contributing factor is said to be the failure to survey the Reserve. The Plaintiffs argue that the Defendant should have given or explained other options available to the Papaschase Band, before allowing them to accept scrip. The Plaintiffs argue that all of these factors combined together represent a breach of the fiduciary obligation of the Defendant towards the Papaschase Band. (See Evans Transcript, pp. 56-65). The Plaintiffs argue that the fact that the Papaschase members who took scrip appear to have been broke by 1887 is convincing evidence of this breach of fiduciary duty. These arguments are subject to the same response. To the extent they argue that the scrip policy was misconceived the issue is not justiciable. Otherwise, there was an absolute right to withdraw from Treaty, regardless of the motivation. There is no evidence on this record of misrepresentation, duress or other misconduct that would vitiate the decisions to take scrip. Speculation about possible motivations for taking scrip, without some evidence, is not sufficient. No triable issue has been shown.

The Claim that the Defendant Deliberately Set Out to Dissolve the Papaschase Band

[101] The Plaintiffs suggest there was a scheme by the Department of Indian Affairs, motivated by the lobbying of the Edmonton Settlement, to undermine the Papaschase Band so that the Reserve would be sold off for settlement. There is no direct evidence of this, but the Plaintiffs suggest the record raises a triable issue on the point. The Plaintiffs point to the reference to the Band being "wiped out" by moving them to Enoch (*supra*, para. 45), but as I have previously

stated, taken in context this single reference over a year after Chief Papaschase took scrip does not support an inference there was a plan to take over the Reserve. They note that the Papaschase Reserve was surveyed into quarter sections even though it was to be a reserve, implying that this was done to facilitate its sale; Dr. Evans testified (Evans transcript, pp. 14-19) that this was a common and innocent occurrence, and there is no evidence on the record to contradict that. The Plaintiffs note that the Papaschase members suffered great hardships when the buffalo did not return, and allege that the Defendant did not give them all the benefits promised by the Treaty, thereby preventing the Papaschase Band from becoming self supporting. This, it is argued, was one cause of the Papaschase members taking scrip. Undoubtedly the changing environment on the prairies at that time had something to do with the signing of the Treaties by the Indians in the first place, and also with their subsequent desire to withdraw from Treaty, but there is no evidence that there was any sort of plan to evict the Papaschase Band by withholding supplies. While their record was not perfect, the local Agents tried to distribute supplies when they could, often receiving criticism from their superiors for being too generous. On occasion food may have been refused to Indians who would not work (*infra*, para. 106) but there is little evidence this was even done to the Papaschase Band, much less that it was done to undermine the Band. Any issue raised by these facts does not raise any "genuine" issue for trial; the Plaintiffs have not produced any evidence to raise the matter above a bare allegation.

[102] The Defendant has produced important pieces of evidence that suggest that there was no such scheme. Although all communications at the time were in writing, and a surprising number of documents have survived, there is no written reference to such a plan. There are several places on the record when the Department simply stood up to the Edmonton settlement (and the Dominion Lands Office) and supported the claims of the Band. If there was such a plan to undermine the Band, it must have been formulated after 1880, because if the plan was in existence before that there is no explanation why the Reserve was sited where it was in 1880. The Edmonton settlement was already lobbying against the location of the Reserve then, and if the Department was motivated by that pressure, one would have expected the Department would simply have put the Reserve somewhere else. Further, the Papaschase Band was valued and rewarded by the government because it did not join the Northwest Rebellion (Evans Report, pp. 58-60; Tyler Thesis, pg. 73), and it therefore seems unlikely that the government would have conspired to disband it. Most importantly, if there was a plan to undermine the Papaschase Band the Department missed its best opportunity. When the Papaschase Band members applied en mass to take scrip, the easiest thing to do would have been to accept all the applications. The initial refusal of the local Agents to do so despite the pressure from the Band members is completely inconsistent with a secret agenda to make the Reserve available for European settlement. In short, there is nothing on the record to suggest that there is a genuine issue for trial on the theory that there was a deliberate plan or agenda to deprive the Papaschase Band of its Reserve.

[103] In summary there is no evidence on the record to support the Plaintiffs' theory. The sole comment in the September 7, 1887 report to the Band being "wiped out by removing" is not sufficient to raise a genuine issue for trial. This letter was written over a year after Chief Papaschase took scrip and withdrew from Treaty. The evidence is overwhelming that the

withdrawal of the core leadership group from Treaty is what led to the demise of the Band, and that the merger with Enoch's Band was seen as a viable solution to that problem. The merger with Enoch's Band was the effect of taking scrip, and not the implementation of a grand plan to undermine the Papaschase Band.

Existence of the Papaschase Band

[104] In my view there is no genuine issue for trial on the continued existence of the Papaschase Band. What happened to the Band, its Reserve, and its members is well established on this record. Whether in law the Band continues to exist can be determined without the necessity of a trial (see *infra*, paras. 188-92).

Breaches of Treaty

[105] The record clearly shows that in the 1880s the Plains Cree were exposed to particular hardships arising from the disappearance of the buffalo and the adjustment to the new reality of Reserve life. The Plaintiffs allege that the Papaschase Band was exposed to starvation at this time, although Dr. Evans questioned whether this was a fair description of the level of hardship (Amended Statement of Claim, paras. 17, 20, 23(a); Evans Transcript, pg. 60). The Plaintiffs allege that the hardships, however they be characterized, were caused or contributed to by the failure of the Defendant to discharge its obligations under Treaty No. 6. Specifically, it is alleged that the Defendant did not provide the necessary farming implements and farm training. It is also alleged that the Defendant failed to provide provisions to the Band in times of famine, as specifically promised in Treaty No. 6.

[106] The Plaintiffs' evidence in support of these allegations is particularly weak and unsatisfactory. For example, the affidavit of Cammie Augustus reads as follows:

> 6. The historical documents relating to the issuing and administration of rations for the purposes of providing relief to Indians in destitute conditions in the Edmonton agency, particularly during the 1880's, suggest that such rations did not reach the Papaschase Band, and that these shortages were not accounted for nor explained in a satisfactory manner.

Ms. Augustus attaches a number of exhibits which she deposes are "the supporting documents". A number of these documents would correctly be categorized as "audit letters". They have to do with the ability (or inability) of the clerks to keep proper records of their inventory. Many of them seem to have little bearing at all on whether appropriate supplies were given to the Papaschase Band. Some of the other exhibits are newspaper clippings and extracts from the debates in the House of Commons, neither of which can be taken to be strong evidence of the truth of their contents. The Augustus Affidavit goes on to say:

> 7. There are indications in the historical records that government officials may have withheld the provision of rations to Indians in the Edmonton agency either as a cost cutting measure or as a means of punishment and control.

Again, exhibits are attached. Exhibit 18 is an extract from the supply debates in the House of Commons in 1882, six years before the surrender of I.R. 136. The debate laments the large amount of money being spent on Treaty annuities, discusses the possibility of fraudulent claims for Treaty annuities, and discusses whether Canadian-made ploughs are as good as American-made ploughs. In response to a suggestion that the Indians were becoming overly dependent on the government, Sir John A. MacDonald is quoted as saying: "I have reason to believe that the Agents as a whole, and I am sure it is the case with the Commissioner, are doing all they can, by refusing food until the Indians are on the verge of starvation, to reduce the expense . . .", but he also stated: "It will occasionally happen that the agents will issue food too liberally . . .". There is no mention whatsoever of the Papaschase Band or the Edmonton area. This document provides scant evidence in support of the claim. Exhibit 19 is an 1883 letter from the Commissioner in Regina to Sir John A. MacDonald in Ottawa. It contains the statement: "At present the only means of compelling labour in most cases is by withholding food supplies and even where it is given to the hard workers the lazy ones must suffer and consequently beg from their more energetic friends." Again, there is no reference to the Papaschase Band. Exhibit 20 appears to be an 1884 letter from the Department of Indian Affairs in Ottawa to the Comptroller of the Northwest Mounted Police in Ottawa. It asks that police officers be sent to certain reserves, and there is a reference to "their rations are stopped on their leaving their reserves, or on their refusing to work." The letter mentions a number of reserves, but not the Papaschase Reserve or the Edmonton area. In short, the evidence in support of these allegations is particularly flimsy, general in nature, and barely probative of the claim. There are occasional references to the Papaschase Band, and overall there is probably enough uncertainty on the historical record to justify the trial of an issue. As I have determined that this claim is barred by the limitations statute and the non-existence of the Papaschase Band, I need not consider this matter further.

Prevention of Trespass

[107] The Plaintiffs allege that the Defendant failed to prevent trespasses on the Reserve. There is no evidence on the record to support these allegations that would raise a genuine issue for trial. The historical record does demonstrate that before the Reserve was finally surveyed in 1884, the Dominion Lands Office granted some neighbouring settlers the right to cut firewood and timber on what was to become I.R. 136. The Department of Indian Affairs took this matter up, and a small amount of money was eventually transferred from the one Department to the other to resolve this dispute. There is no evidence to suggest that this minor point was anything more than a difference of opinion, or that it was not resolved in a satisfactory manner. There is no genuine issue for trial.

Summary

[108] In summary, the Plaintiffs have brought forward sufficient evidence to raise a genuine issue for trial at a factual level on a few of the claims: Reserve size, the disposition of the proceeds of sale of I.R. 136, and withholding of food supplies from the Indians. On the other claims the Defendant has produced sufficient evidence to support its application for summary dismissal, and the Plaintiffs have failed to meet the evidentiary burden that falls on them. Although at a factual level a genuine issue for trial exists with respect to the issues just mentioned, that is not the end of the analysis. It is still necessary to determine whether the claims are barred by the passage of time, and if not whether the Plaintiffs have standing to pursue the claims.

Statutes of Limitation

[109] The Defendants argue that even if there are some genuine issues for trial at a factual level, all possible claims have long since been barred by the passage of time. Indeed, given that the events in question took place over 100 years ago, it would be somewhat surprising for the claims to survive the statutes of limitations. In order to test this submission it is necessary to determine what statutes of limitation were in force at the time, their applicability to the federal Crown, and finally their applicability to the particular causes of action alleged.

[110] There are sound policy reasons for statutes of limitations. ***Wewaykum Indian Band v. Canada***, [2002] 4 S.C.R. 245, at para. 121, discusses the problems with prosecuting stale claims:

> . . . Witnesses are no longer available, historical documents are lost and difficult to contexturalize, and expectations of fair practices change. Evolving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today.

This decision also confirms the applicability of statutes of limitations to aboriginal claims, and specifically (at paras. 119-20) to claims arising from the surrender of Reserve lands. On this point it overrules cases like ***Chippewas of Sarnia Band v. Canada (Attorney General)***, [1999] O.J. 1406. The Plaintiffs' argument that aboriginal claims are immune from limitation defences must fail.

[111] As explained later, there were no limitations statutes in force in the 1880s that would cover all of the claims presented in this action. However, limitations statutes were enacted later on. When a new limitations statute is enacted without any specific transitional provisions, it can have one of two possible effects on causes of action existing as of the effective date of the statute. On the one hand, the new limitation statute could be interpreted as applying to all existing causes of action, with the result that the new statute might bar some older causes of action on the very date of enactment: ***Wewaykum Indian Band***, *supra*, at paras. 125-27, 131 (new limitations statute; effect of transitional provisions); ***L'Office Cherifien Des Phosphates v. Yamashita - Shinnon Steamship Co. Ltd.***, [1994] 1 A.C. 488 (H.L.) (new limitation period has

retrospective effect); ***McGrath v. Scriven and McLeod***, [1921] 1 W.W.R. 1075 (S.C.C.) (limitation shortened to three months from six months); ***Pegler v. Railway Executive***, [1948] A.C. 332 (H.L.) (new limitation barred action the day it came into effect); ***Demas v. Manitoba Labour Board***, [1977] 3 W.W.R. 716 (Man. Q.B.) (new limitation, action out of time); ***Beattie v. Dorosz***, [1932] 2 W.W.R. 289 (Sask. C.A.) (new limitation). On the other hand, the new limitations statute might be interpreted so that time only begins to run against existing causes of action as of the date the new enactment comes into effect: see ***Petersen v. Kupnicki*** (1996), 44 Alta. L.R. (3d) 68 (C.A.). In this particular case it does not matter which interpretation one places on the new limitation statutes; so much time has passed that the causes of action brought forward by the Plaintiffs would be barred under either interpretation.

[112] The *Northwest Territories Act*, R.S.C. 1886, c. 50, deemed the laws of England existing on July 15, 1870 to be in force in the Northwest Territories. The effective date is of course the same date that the Hudson's Bay Company surrendered those territories to Canada. Thereafter, new statutes of limitation were enacted from time to time.

Statutes of Limitation for *Certiorari*

[113] The laws of England had long had a six month limitation period for an application for *certiorari*. The original English statutes only applied to *certiorari* against the decisions of Justices of the Peace, and they have no application to these proceedings, even if they did become a part of the law of the Northwest Territories: ***Ostrowski v. Saskatchewan (Beef Stabilization Board)*** (1993), 109 Sask. R. 40, 101 D.L.R. (4th) 511 (C.A.). By 1968 (at the latest) Alberta Rule 742 applied the six-month limitation period to all applications for *certiorari*, regardless of the decision-maker being impugned. Accordingly, by 1968 at the latest, time would have run with respect to any of the decisions in question. The provisions of the new *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), transferring the jurisdiction to review the decisions of federal decision-makers to the Federal Court, did not come into effect until 1970, at which time the limitation period under the provincial Rules of Court (which previously applied to the review of federal decisions) would already have expired.

[114] The Applicants in this case have not applied for *certiorari*, although they have applied for declarations that the various decisions they challenge are void. Some case law holds that the six-month limitation period for *certiorari* cannot be evaded by simply asking for a declaration of invalidity instead: ***Krawec v. Workers Compensation Board*** (1988), 233 A.R. 110; ***Simlote v. The Queen***, [1989] A.U.D. 673, 69 Alta. L.R. (2d) 401 (C.A.); ***Re Babiub*** (1992), 133 A.R. 21, 4 Alberta L.R. (3d) 390; ***Boyd v. Alberta*** (2000), 278 A.R. 341, aff'd 299 A.R. 198 (C.A.). Other cases suggest that time limitations do not apply to decisions that are characterized as "void", or that the time limitation on a motion to quash does not apply to a declaration that the decision is void: see ***United Taxi Drivers Fellowship of Southern Alberta v. Calgary (City)*** (2002), 3 Alta. L.R. (4th) 211 (C.A.) at para. 162, reversed on other grounds (2004), 236 D.L.R. (4th) 385, 2004 SCC 19. ***Alberta Union of Provincial Employees v. Alberta*** (2002), 310 A.R. 240 at paras. 39-40; ***Urban Development Institute v. Rocky View (M.D. #44)*** (2002), 8 Alta. L.R. (4th) 273 at para. 12. In my view the better interpretation is that the limitation period prevents all challenges

to the decision, including the ability to challenge the alleged voidness of the decision. In the end, this is largely a matter of statutory interpretation: when the Legislature enacted the limitation period, did it intend to apply it only to errors of law on the face of the record, or also to jurisdictional errors? The purpose of the limitation period is to bring certainty to administrative decisions, and there is no obvious reason why the Legislature would exempt a large body of decisions from the rule. In Alberta the issue is in my view answered by Rule 753.05 which reads:

> **753.05** Subject to Rule 753.11, where the applicant on an application for judicial review is entitled to a declaration that a decision or act is unauthorized or invalid, the court may, instead of making a declaration, set aside the decision or act.

While not expressly addressing the issue, this rule clearly contemplates that no distinction is to be drawn between a motion to quash and a declaration. It specifically states that it is "subject to Rule 753.11" which is the six-month limitation period. I accordingly conclude that seeking a declaration is not an effective strategy to avoid the six-month limitation period for quashing a decision. I note also that public law remedies are discretionary and can be denied for delay in prosecution: ***Chippewas of Sarnia Band v. Canada (Attorney General)***, (2000), 195 D.L.R. (4th) 135 (Ont. C.A.) at paras. 262 *ff*. They can also be denied when they provide no effective remedy. Declaring a decision to be invalid when there is no way to avoid its consequences is pointless.

[115] The limitation period for obtaining a writ of *certiorari* would potentially block any direct challenge to a number of the key decisions made in this case:

(a) The Order in Council of October 12, 1889 approving the surrender of I.R. 136.

(b) The Order in Council of March 30, 1885 setting the terms for the issuance of Scrip.

(c) The decision of the Department to allow Chief Papaschase to take scrip.

(d) The decision to amalgamate the Papaschase and Enoch Bands.

(e) The decision to apply the proceeds of the sale of I.R. 136 for the benefit of the combined Enoch Band.

Some of these decisions may be legislative in nature, or may in any event for other reasons not be amenable to *certiorari*. However, on the assumption that they are amenable to *certiorari*, the time to challenge them has expired.

General Statutes of Limitation

[116] There was no comprehensive limitations statute in force in the Northwest Territories prior to the creation of Alberta and Saskatchewan in 1905, and subsequently there was no

comprehensive limitation statute in effect in Alberta until the passage of the *Limitation of Actions Act*, 1935, S.A. 1935, c. 8. The 1935 statute was the result of the work of the Uniformity Commissioners, and it was intended to provide a comprehensive, modern and consistent approach to the subject. The 1935 provisions were carried forward to the *Limitation of Actions Act*, R.S.A. 1980, c. L-15 which contained the following provisions of interest in this action:

> **4(1)** The following actions shall be commenced within and not after the time respectively hereinafter mentioned:
>
> (c) actions
>
> (i) for the recovery of money, other than a debt charged on land, whether recoverable as a debt or damages or otherwise, and whether on a recognizance, bond, covenant or other specialty or on a simple contract, express or implied, or
>
> (ii) for an account or for not accounting,
>
> within 6 years after the cause of action arose;
>
> (e) actions grounded on accident, mistake or other equitable ground of relief not hereinbefore specifically dealt with, within six 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 six years after the cause of action therein arose.

Virtually all of the claims advanced by the Plaintiffs can be encompassed in one of these three provisions. Accordingly, subject to the issue of discoverability, discussed *infra*, paras. 135 *ff*, most of the causes of action advanced by the Plaintiffs became statute barred six years after these provisions were first enacted, that is in 1941.

Limitations Protecting Fiduciaries

[117] The process of surrendering Reserve lands does not create a trust, although it does give rise to fiduciary obligations: ***Guerin v. The Queen***, [1984] 2 S.C.R. 335 at pp. 349, 355, 386; ***Wewaykum Indian Band***, *supra*, at paras. 99-100. The subsequent dealings with the proceeds of sale may create a formal trust; the deed of surrender of I.R. 136 does use the word “trust”: see ***Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)***, [1995] 4 S.C.R. 344 at para. 13. Trustees were traditionally given less protection from statutes of limitation than other defendants. Many of the relevant statutes were held to extend beyond express trustees and to cover other equitable actors: ***Soar v. Ashwell***, [1893] 2 Q.B. 390; ***Re Sharpe***, [1892] 1 Ch. 160; ***Taylor v. Davies***, [1920] A.C. 636 (P.C., Ont.).

Accordingly, the Plaintiffs' best position in this litigation would arise if the Defendant's obligations are equitable in origin.

[118] Equity generally followed the common law when it came to limitation periods: a person could not sue in equity just to avoid a limitation period that would block a common law claim. However, this did not apply to claims between a trustee and the beneficiary of a trust, because equity took the view that there was a unity of interest between the trustee and the beneficiary. As a result, the courts of equity did not recognize any common law time limitation on the ability of a beneficiary to sue a trustee for breach of trust: D.W.M. Waters, *Law of Trusts in Canada*, (2d. ed., 1984) at pp. 1014-1021; *Darby and Bosanquet on the Statute of Limitations*, (2d. ed., 1893) at pp. 234-38, 245-47, 263-5; H. Godefroi, *The Law Relating to Trusts and Trustees* (3d. ed., 1907) at pp. 847-49, 859-60, 868-870. Equity however had separate rules on delay and laches that could be used to bar stale claims (see *infra*, paras. 131-3). That was the state of the law when English law was received into the Northwest Territories. When the common law courts and the courts of equity were merged in England (after English law was received in the Northwest Territories), this principle was carried forward in the *Judicature Act, 1873*, 36 & 37 Vict., c. 66, s. 25(2):

> No claim of a cestui que trust against his trustee for any property held on an express trust or in respect of any breach of such trust shall be held to be barred by any statute of limitations.

Similar provisions were subsequently enacted in the Northwest Territories and Alberta, specifically in the *Judicature Ordinance*, R.O. N.W.T. 1888, c. 58, s. 9(1), which was carried forward to the *Judicature Act*, S.A. 1919, c. 3, s. 37(1), eventually R.S.A. 1980, c. J-1, s. 14, and which remained in force until it was repealed by the *Limitations Act*, S.A. 1996, c. L-15.1 effective March 1, 1999.

[119] On July 15, 1870 when English law was received into the Northwest Territories, the general presumption was thus that no limitation period applied to breaches of trust. There were however exceptions, specifically the *Real Property Limitation Act* of 1833:

> XXIV. And be it further enacted, That after the said Thirty-first Day of December One thousand eight hundred and thirty-three no Person claiming any Land or Rent *in Equity* shall bring any Suit to recover the same but within the Period [*twenty years*] during which by virtue of the Provisions herein-before contained he might have made an Entry or distress or brought an Action to recover the same respectively if he had been entitled at Law to such Estate, Interest, or Right in or to the same as he shall claim therein in Equity.
>
> XXV. Provided always, and be it further enacted, That *when any Land or Rent shall be vested in a Trustee upon any express Trust*, the Right of the Cestuique Trust, or any Person claiming through him, to bring a Suit against the Trustee, or any Person claiming through him, to recover such Land or Rent, shall be deemed

> to have first accrued, according to the Meaning of this Act, at and not before the Time at which such Land or Rent shall have been conveyed to a Purchaser for a valuable Consideration, and *shall then be deemed to have accrued only as against such Purchaser* and any Person claiming through him.
>
> XXVI. [Exception for concealed fraud]
>
> XXVII. Provided always, and be it further enacted, That nothing in this Act contained shall be deemed to interfere with any Rule or Jurisdiction of Courts of Equity in refusing Relief on the Ground of Acquiescence or otherwise to any Person whose Right to bring a Suit may not be barred by virtue of this Act.
>
> (emphasis added)

Since this statute of general application was in force in England in 1870, it became a part of the law of the Northwest Territories. The English *Real Property Limitation Act, 1874*, 37 & 38 Vict., c. 57 was specifically adopted in the Northwest Territories by *An Ordinance Respecting the Limitation of Actions Relating to Real Property*, O.N.W.T. 1893, c. 28, s. 1. It amended the 1833 *Act* by reducing the limitation period to twelve years, and effectively confirmed that the 1833 *Act* was a part of the law of the Northwest Territories.

[120] The *Act* of 1833 did not operate in favour of the trustee. It only operated in favour of the purchaser, because the section specified that time commenced to run "only as against such purchaser". The effect of the statute was therefore to quiet titles of purchasers for value who had obtained the title from a trustee. Prior to the *Act* of 1833, such titles were vulnerable if it turned out the trustee had acted in breach of trust. After the expiration of the limitation period in the *Act* of 1833, the beneficiaries would only have a remedy against the trustee, and not against the land or the subsequent purchasers. Section 17 of the *Limitation of Actions Act* carried this concept forward in Alberta in a limited form until it was repealed in 1999. The effect in this case would be that purchasers of the lands formerly a part of I.R. 136 would have an unassailable title once the limitation period expired, even if I.R. 136 was surrendered in breach of trust. If the last of I.R. 136 was sold in 1930, the last limitation would have expired against a subsequent purchaser in the 1940s.

[121] In 1888 a new *Trustee Act, 1888*, 51 & 52 Vict., c. 59, was passed in England, and it provided some general protection for trustees. The text of the 1888 statute is virtually identical to the provisions of the Alberta *Limitation of Actions Act*, and is obviously the source of Alberta law as it stood up to 1999. The text, as continued by R.S.A. 1980, is:

PART 7
TRUSTS AND TRUSTEES

> 40 *Subject to the other provisions of this Part*, no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of a breach of the trust, shall be held to be barred by this Act.
>
> 41(1) In this section, "trustee" includes an executor, an administrator, and a trustee whose trust arises by construction or implication of law as well as an express trustee, and also includes a joint trustee.
>
> (2) In an action against a trustee or a person claiming through him,
>
> (a) rights and privileges conferred by this Act shall be enjoyed *in the like manner and to the like extent* as they would have been enjoyed in the action if the trustee or person claiming through him had not been a trustee or person claiming through a trustee, and
>
> (b) if the action is brought to recover money or other property and is one to which no limitation provision of this Act applies, the trustee or person claiming through him is entitled to the benefit of and is at liberty to plead the lapse of time as a bar to the action in the like manner and to the same extent as if the claim had been against him in an action for money had and received,
>
> except when the claim is founded on a fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use.
>
> (emphasis added)

Section 41 of the statute was first contained in *The Trustee Ordinance*, O.N.W.T. 1903 (2d. Sess.), c. 11, s. 55, and was moved to the *Limitation of Actions Act* in 1935. When the English *Trustee Act* of 1888 was replicated in Alberta, the general principle that limitations did not benefit trustees (already found in the *Judicature Ordinance*; see *supra*, para. 118) was repeated as subsection 55(1) of the new *Trustee Ordinance* of 1903, and eventually found its way to s. 40 of the *Limitation of Actions Act*. The general principle now contained the proviso that it was subject to the specific provisions in favour of trustees then being enacted.

[122] The parallel existence of s. 40 of the *Limitation of Actions Act* and s. 14 of the *Judicature Act* on their face produce unusual results for express trustees. The provision in the *Judicature Act* is unconditional, and states that express trustees do not benefit from limitation statutes, whereas the provision in the *Limitation of Actions Act* is said to be "subject to the other provisions of this Part". Literally read, s. 14 of the *Judicature Act* takes away from express trustees any benefits that might have been found in s. 41 of the *Limitation of Actions Act*, even though s. 41(1)

specifically includes express trustees. The original answer to the problem was possibly found in the words of the statutes themselves. The *Judicature Act* provision specifically refers to "statutes of limitations". The *Trustee Ordinance* of 1903 was no such thing; it was in fact a "Trustee Act", not a statute of limitations. On this strict reading the two statutes could exist concurrently. The better argument though is that the *Judicature Ordinance* was intended only to be a general statement of principles, subject to specific exceptions found in more specific statutes. This was entirely consistent with the purposes of the *Judicature Act*, which was to state the principles on which the new merged superior court, with both common law and equitable jurisdiction, would operate. The general principle after the merger was that in cases of conflict the principles of equity would prevail over those of the common law, and the *Judicature Act* contains many general statements of principle designed to accomplish that end: ***Re Cross, Harston v. Tenison*** (1882), 20 L.R. Ch. Div. 109 (C.A.) at pg. 121. The original provision on the non-application of limitations to trustees in the 1888 *Judicature Ordinance* was included in a section that listed a number of such general principles. The *Judicature Ordinance* also generally preserved the equitable defences such as laches. On the better interpretation, the general statement of principle in the *Judicature Ordinance* would yield to the provisions of more specific statutes, like the *Act* of 1833 and the *Trustee Ordinance* of 1903.

[123] To summarize, the English law was generally carried forward into Alberta. The general proviso on the non-application of limitations to express trustees in the English *Judicature Act* of 1873 was carried forward into the *Judicature Ordinance* of 1888. The provisions of the English *Trustee Act of 1888* were carried forward into the *Trustee Ordinance* of 1903. There were no obvious conflicts between the two statutes until 1935, as long as the *Judicature Act* is held to apply to "statutes of limitation" strictly speaking. This state of affairs broke down in 1935 when the provisions previously in the *Trustee Act* were moved to the new *Limitation of Actions Act.* It was perhaps not noticed that the new 1935 *Limitation of Actions Act* was clearly a "statute of limitations" within the words of the *Judicature Act*. If s. 14 of the *Judicature Act* of Alberta is read literally, it essentially makes meaningless Part 7 of the *Limitation of Actions Act*. The English equivalent would have made meaningless the *Trustee Act, 1888*. That is not a sensible interpretation. In my view s. 14 of the *Judicature Act* should continue to be read as a general statement of the principles that guided the courts of equity in applying statutes of limitation. It must yield to more specific enactments, particularly Part 7 of the *Limitation of Actions Act*. Accordingly, from and after 1903 the provisions eventually found in Part 7 of the *Limitation of Actions Act* of 1980 have essentially governed actions against trustees in the province.

[124] Even if the general provision in the *Judicature Act* is read literally the same result will obtain in this case. Firstly, s. 14 of the *Judicature Act* was repealed in 1999, two years before this action was started. Secondly, a bare fiduciary is not an "express trustee", so the contradiction in the wording does not affect all aspects of this claim. Thirdly, so long as the *Judicature Act* is limited to "statutes of limitation" strictly speaking there would be no conflict until 1935. By the time the limitation provisions respecting trustees were moved from the *Trustee Act* to the *Limitation of Actions Act* in 1935, the limitations governing the actions in this case would all have expired. Almost all the key events occurred before 1900, and they would have been statute-barred well before the amendments in 1935. Unless the statute specifically provides for revival,

changes to limitation statutes do not revive actions that have previously been barred: *Interpretation* Act, R.S.A. 2000, c. I-8, s. 35(1)(c); **D.D.S. *v.* *R. H.*** (1993), 10 Alta. L.R. (3d) 225 (C.A.).

[125] It follows that the law respecting limitation periods to which trustees could historically resort was as follows:

(a) Between 1870 and 1903 the law in the Northwest Territories was the equitable law of England, namely that as a general rule trustees could not take the benefits of statutes of limitation to defeat claims made by their beneficiaries. After 1888 this principle was specifically stated in the *Judicature Ordinance*. The *Real Property Limitations Act* of 1833 was also a part of the law of the Northwest Territories, but it did not protect trustees.

(b) From 1903 until 1999 the law was as eventually stated in s. 41 of the *Limitation of Actions Act*. Between 1903 and 1935 the relevant provision was contained in the *Trustee Ordinance* or *Act*, but the text of the provision did not change when it was moved in 1935 to the *Limitation of Actions Act*.

(c) In a related rule, the purchaser from a trustee was protected by limitation defences starting with the *Act* of 1833, eventually carried forward in one aspect into s. 17 of the *Limitation of Actions Act*.

(d) After 1999 actions against trustees are governed by the general rules found in the *Limitations Act*. There are no longer special rules for limitations on actions against trustees and other equitable actors.

[126] The overall effect of the statutes protecting trustees between 1903 and 1999 is the following:

(a) Under a combined reading of ss. 40 and 42(2)(a), trustees are entitled to take the benefit of limitation periods, subject to certain exceptions.

(b) The particular exceptions are that:

(i) under the proviso in s. 41(2), there is no limitation on fraudulent breaches of trust by any kind of trustee, and

(ii) under the proviso to s. 41(2), there is no limitation on any claim to recover trust property or the proceeds thereof still in the possession of the trustee, or converted to his own use by the trustee. By its terms, this proviso can only apply to those types of fiduciaries who hold property.

(c) Section 41(2)(b) enacts a default limitation of 6 years, essentially confirming that ss. 4(1)(c) and (g) apply to trustees: see ***Wewaykum Indian Band***, *supra*, at para. 131; ***Fairford First Nation v. Canada (Attorney General)***, [1999] 2 C.N.L.R. 60 (F.C.T.D.), at para. 287.

These provisions applied equally to true trustees and many fiduciaries: s. 41(1); ***Wewaykum Indian Band***, *supra*.

[127] The specific provisions for the limited non-application of limitation periods to trustees have an application in this action. When I.R. 136 was sold, there was an express provision that the proceeds would be held in trust. In that respect the Defendant was likely an "express trustee" (*supra*, para. 117) and there would appear to be no limitation period against the claim by the Plaintiffs for an accounting for the proceeds of the sale of I.R. 136, so long as the Defendant is still in possession of some of those proceeds. If the Defendant is no longer in possession of any of the proceeds of the trust property, then the time would have run six years after the Defendant last had possession of such property. It is not clear from the record whether the Defendant still holds any funds in trust as a result of the sale of the Papaschase Reserve. Counsel for the Defendant appeared to be under the impression that there is no such trust fund in existence, although counsel could give no absolute assurances to that end. Accordingly, if the Plaintiffs can establish that the Defendant still holds any proceeds of the trust, then the limitation period has not expired with respect to those proceeds. If however the Defendant disposed of the last of the proceeds of the trust more than six years before the action was started, then this claim would be barred.

[128] Subject to the issue of discoverability, all other equitable claims in this action would have been barred in 1909, that is six years after s. 41 was first enacted.

The *Limitations Act*

[129] The *Limitation of Actions Act* was repealed by the *Limitations Act*, S.A. 1996, c. L-15.1, effective as of March 1, 1999. The *Limitations Act* also repealed s. 14 of the *Judicature Act*. It would therefore follow that from and after March 1, 1999 a trustee would be entitled to claim the benefits of any statute of limitation, like any other ordinary litigant. The present action was commenced on February 9, 2001, within the transitional two-year period found in the new *Limitations Act*. The claims were all discoverable before March 1, 1999, and accordingly this case generally must be decided under the old *Limitation of Actions Act*, and the new *Act* is not of importance.

[130] The provision in the new *Limitations Act* that claims discoverable before March 1, 1999 are subject to the former *Act* is stated to be "subject to ss. 11 and 13". The latter section reads as follows:

> 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 Limitations of Actions Act, R.S.A. 1980, c. L-15 had not been repealed and this Act were not in force.

This section also refers back to the former *Act*, giving the same result in this litigation. Section 13 does not say that there is no limitation period on aboriginal claims, it just preserves the old law for those claims indefinitely. There is an interesting question whether s. 13 is a limitation provision "between subject and subject" (see *infra*, para. 134) so that it would apply to the federal Crown at all. The philosophy of the *Crown Liability and Proceedings Act* seems to be that the federal Crown does not expect to be treated any better than ordinary subjects when it comes to limitations, but it does not expect to be treated any worse either. It is one thing for Parliament to adopt provincial limitations legislation of general application, but quite another to allow the provinces to enact limitation provisions that bind the Crown only. However, since the provisions of the former *Act* apply to this litigation in any event, I need not explore this issue further.

Laches and Acquiescence

[131] While equity did not recognize any limitation periods in a claim by a beneficiary against a trustee, equity had its own rules to prevent the prosecution of stale claims. A trustee, and any other defendant in an equitable suit, could raise the defences of laches and acquiescence. Although the various *Judicature Acts* and *Ordinances* preserved the equitable rule that trustees could not benefit from statutes of limitation, they also preserved all of the equitable defences. When specific statutes of limitation were enacted, similar provisions were often included, an example being s. 27 of the *Act* of 1833, *supra*. The *Limitation of Actions Act*, R.S.A. 1980, c. L-15, s. 3, specifically preserved the equitable defences of laches and acquiescence. So too does the *Limitations Act*, S.A. 1996, c. L-15.1, s. 10.

[132] In ***Wewaykum Indian Band***, *supra*, at paras. 107-112, the Supreme Court specifically confirmed that the equitable defences of laches and acquiescence apply to Aboriginal claims. The Court stated at para. 108:

> Equity has developed a number of defences that are available to a defendant facing an equitable claim such as a claim for breach of fiduciary duty. One of them, the doctrine of laches and acquiescence, is particularly applicable here. This equitable doctrine applies even if a claim is not barred by statute. . . .

The Court held that the mere passage of time is not sufficient to make out the defence. The conduct of the claimant must be such that it "constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable". In the circumstances in ***Wewaykum Indian Band***, the Court held that the prosecution of the claims several decades after the underlying events occurred was unreasonable.

[133] In my view this doctrine is engaged by the facts of this case, even if one accepts the validity of all of the claims of the Plaintiffs. It is clear that a number of Papaschase Band members joined the Enoch Band in 1887, and they and their descendants have lived as members of the Enoch Band for over a century. They have enjoyed the interest in the Enoch Band's Reserve given to them by the merger agreement of 1894. The Defendant sold off I.R. 136, and subsequently applied the proceeds of that sale to the benefit of the newly merged Enoch Band. By not making a claim for over 100 years, the Plaintiffs have allowed a *status quo* to develop both as against the Defendant, and as against the Enoch Band. Further, none of the witnesses to the various events and challenged decisions survive. In my view it would clearly be unreasonable to allow this action to proceed at this time, even assuming the Plaintiffs can make out their claim on the facts.

Limitations of Actions Against the Federal Crown

[134] Generally speaking the federal Crown can raise any limitation period available to any other litigant. The present provisions are contained in the *Crown Liability and Proceedings Act*, as amended, R.S.C. 1985, c. C-50, s. 32:

> 32. Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province *between subject and subject* apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within 6 years after the cause of action arose.

This particular provision has been in force since 1992, but provisions to the same effect have been in force for various types of claims since the *Petitions of Right Act*, R.S.C. 1886, c. 136, s. 8, the *Federal Court Act*, R.S.C. 1970 (2nd supp.) c. 10, s. 38(2), and the *Crown Liability Act*, S.C. 1952-53, c. 30, s. 19. These provisions make provincial limitation statutes effective federal law in claims against the federal Crown: ***Wewaykum Indian Band***, *supra*, at paras. 115-120.

Discoverability of the Claims

[135] The common law presumes that limitation periods begin to run when the claim might reasonably have been discovered. This is a rule of statutory interpretation that must yield to the exact wording of the statute: ***Peixeiro v. Haberman***, [1997] 3 S.C.R. 549, at para. 37. Some statutes (like the *Limitations Act*) adopt the same standard. However, some other statutes adopt the test of "actual discovery" of the cause of action (see for example s. 4(e) of the *Limitation of Actions Act*). It is accordingly necessary to examine the causes of action advanced by the Plaintiffs both with respect to actual discovery, and with respect to the reasonable prospect of discoverability.

[136] The principle of discoverability is that time under a limitation statute does not begin to run until the claimant knew, or with reasonable diligence should have discovered the material

facts on which the cause of action is based: ***Central Trust Co. v. Rafuse***, [1986] 2 S.C.R. 147, at para. 77; ***Kamloops (City of) v. Nielson***, [1984] 2 S.C.R. 2; ***Peixeiro v. Haberman***, *supra*. What must be discoverable is the facts underlying the claim; ignorance of the law or subsequent discovery that a cause of action exists at law does not extend the limitation: ***Cunningham v. Irvine-Adams*** (2001), 88 Alta. L.R. (3d) 1 (C.A.); ***Wewaykum Indian Band***, *supra*, at para. 124. Subsequent clarification or evolution of the law does not postpone the discovery of the material facts so as to extend the limitation period. Asserting a claim is conclusive proof of discovery and discoverability: ***K.L.B. v. British Columbia***, [2003] 2 S.C.R. 403 at paras. 55-57; ***Sioui v. Nation Huronne-Wendat***, [2003] 2 C.N.L.R. 364 (Que. S. Ct.) at para. 47. The onus of disproving discovery rests on the plaintiff when the defendant raises a limitation period: ***Luscar Ltd. v. Pembina Resources Ltd.*** (1994), 24 Alta. L.R. (3d) 305 (C.A.) at para. 133; ***Mikisew Cree First Nation v. Canada*** (2002), 2 Alta. L.R. (4th) 1 (C.A.) at para. 83; ***Stell v. Obedkoff*** (1999), 45 O.R. (3d) 120.

[137] When an action is commenced very shortly after a limitation period has expired, it is often necessary to examine the issue of actual discovery, or reasonable discoverability, with considerable precision. In some cases a difference of a few days or weeks is crucial. In those cases it is often necessary to have a trial of an issue to determine exactly when the cause of action was discovered or could have been discovered. The same does not hold true in actions like the present one where the events underlying the cause of action occurred over a century ago. Here the record either demonstrates when the cause of action was discovered, or sufficiently precise inferences can be drawn from the record to be sure that time has long since run out. Even if the actual discovery or discoverability of a claim can be ascertained within a few years or even a few decades, that is sufficiently precise to determine the issue. In a very old case, determining whether the action is sufficiently "hopeless" to grant an application for summary dismissal does not require the same degree of precision, and the inferences that the court can draw about discovery or discoverability without resorting to a trial are much wider. This is particularly so when it is remembered that the burden of proving lack of discovery and a genuine issue for trial is on the Plaintiffs.

[138] There are advantages to deciding limitation issues before trial when the facts are clear: ***Mikisew Cree First Nation v. Canada***, *supra*, at paras. 83-88; ***Madill v. Alexander Consulting Group Ltd.*** (1999), 71 Alta. L.R. (3d) 50 (C.A.) at paras. 47-50. Where reasonable inferences from the record show that a limitation period has expired, summary dismissal of the claim is appropriate: ***Guarantee Co. of North America v. Gordon Capital Corp.***, [1999] 3 S.C.R. 423, at paras. 28-35. In this case the record discloses, or raises strong inferences, that the causes of action were discovered many decades ago. As mentioned, the burden of proving lack of discovery is on the Plaintiffs, and they have filed no evidence on that point. There is no burden on the Defendant, as the Plaintiffs argued, to prove when the Plaintiffs discovered the material facts.

[139] There is some evidence on the record of the actual discovery of the claims. In 1974 and 1975 James C. Robb, a lawyer practising in Edmonton, wrote to the Defendant indicating that he had been retained "to explore the possibility of a land claim on behalf of certain descendants of

the Papaschase Band". In a letter dated July 4, 1974, the Defendant's Office of Claims Negotiation replied to Mr. Robb (Kohan affidavit, Exhibit S):

> As you may know, Enoch's Band of Winterburn, Alberta, has already submitted a claim with respect to the 1888 surrender of Passpasschase's Reserve #136. You may wish to explore with the Band the possibility of making a joint claim.

The letter included some documentation relating to the 1888 surrender, and provided information on where other documents could be located. The letter noted that the Enoch Band had "done extensive archival research". The letter went on to state:

> In your letter you say you represent "certain descendants" of the Passpasschase Band. The question of who would have been entitled in 1888 to share in the proceeds of the sale of the Reserve is presently undergoing review in this office. It would materially aid our assessment if you could identify your clients and provide us with any information you may have which demonstrates their descent from the original Passpasschase Band members as well as the individuals to whom they were related.

Mr. Robb replied that a joint claim with the Enoch Band would not be possible, and that "we will in the near future then be submitting a claim on behalf of the descendants of the Papaschase Band alone." There was clearly actual knowledge of some of the claims being advanced as early as this time. There is no indication that the matter was taken further by Mr. Robb. I note that Mr. Robb still practices in Edmonton and he could have been examined by the Plaintiffs under Rule 266.

[140] In 1979 Kenneth James Tyler wrote the Tyler Thesis (Kohan Affidavit, Exhibit X). Significantly, Mr. Tyler acknowledges that his research was financed by the Enoch Band, and he acknowledges the invaluable contribution made by a number of members and elders of that Band (pp. vi-vii). Footnote 5 on pg. 149 of the Tyler Thesis reads:

> In 1973, the Enoch's Band made a presentation to the Indian Claims Commissioner, Dr. Lloyd Barber, arguing that the Passpasschase surrender was invalid. The claim has not, as of 1978, been pursued in the courts, however.

Mr. Tyler discussed a number of the issues that arise in this litigation, including the intense lobbying by the European settlers in Edmonton to have the Papaschase Reserve located further away from the Settlement, as well as their subsequent satisfaction when the Reserve was surrendered and sold off. He reported in detail the circumstances under which I.R. 136 came to contain only 40 square miles (pp. 47-48). He discussed in detail the issues surrounding Indians taking Metis scrip and withdrawing from treaty (Chapter III). He specifically discussed the taking of scrip by the core of the Papaschase Band (pp. 90-5). The surrender of I.R. 136 is discussed in detail, as is the amalgamation of the Papaschase and Enoch Bands (Chapter IV). The Tyler Thesis points out (pp. 137-41) many of the aspects of the surrender that are challenged

in this litigation, and concludes (at p. 149) that "they have cast doubt upon the validity of the entire procedure". The Plaintiffs argue that it is not clear that the Tyler Thesis became a public document immediately upon its creation, but that is not really the point. The point is that if Tyler could discover the facts he discusses, and thereby become aware of the potential claims now advanced, then any other interested party who was reasonably diligent could do the same. This Thesis shows that by 1979, at the latest, most of the claims were discoverable. In addition, since the Thesis was funded in part by the Enoch Band, and since one of the primary sources of the Thesis was interviews with Enoch Band Elders, one must infer that members of the Enoch Band (at least) would have been actually aware of Tyler's conclusions. Certainly Mr. Robb appears to have been aware of the same information from some source. Significantly, no Plaintiff has sworn an affidavit that the claim was not known at this time.

[141] Other researchers have examined the issue over the years. Wayne Osmond prepared papers entitled "Pappaschase Band" and "Pappaschase Claim" (Exhibits V and W to the first Kohan Affidavit). These papers discuss some of the issues forming the basis of the present claim, but they are undated and so not that helpful. Osmond does indicate that he is corresponding with Mr. Robb, which supports an inference that the research was done in the early 1970s.

[142] On September 9, 1995 the Confederacy of Treaty 6 First Nations passed a resolution in support of the descendants of the Papaschase First Nation. The resolution recites that as a result of extensive research, numerous irregularities have been discovered in the surrender of the Reserve. The purpose of the resolution was to support a claim for funding to allow the research to be completed. The resolution was passed less than six years before the Statement of Claim was issued on February 9, 2001, so it is not conclusive to a finding of actual discovery of the claim. It does however show a general awareness of issues at a critical point in time.

[143] The problems created by the issue of Metis scrip, the effect it had on the Aboriginal peoples, the role of scrip speculators, and other similar issues have been a matter of public discussion for some years. In 1981 the Metis Association of Alberta published a document entitled Metis Land Rights in Alberta: A Political History. From this time at least many of the complaints presently advanced about Metis scrip were well known. This work documents the economic and social conditions faced by the Metis when they took scrip, the role of the scrip speculators, and the general factual and legal background of the scrip system.

[144] I note again that where a defendant raises a limitation period, the burden of proof of showing a late discovery of the claim is on the plaintiff (*supra*, para. 136). In the face of this clear evidence that many people knew of these claims more than twenty years before this action was commenced, the Plaintiffs have provided no evidence at all that they did not discover the material facts until more recently.

[145] With that background, an analysis of when each of the claims summarized in para. 48, *supra*, was discovered or discoverable is as follows.

[146] The claim that I.R. 136 was smaller than the Treaty provided for was discovered immediately. When Chief Papaschase discovered in 1880 that the Reserve was only going to be 40 square miles, he objected and immediately stopped the survey, and it was not completed until 1884 as a result. Accordingly, this cause of action was known as soon as it arose.

[147] The claim that I.R. 136 had been improperly surrendered was also discoverable at the time it happened. Assuming that there were members of the Band "habitually resident" on the Reserve who were not advised of the surrender meeting, they must have returned to the Reserve within a few months. They would undoubtedly have discovered that the Reserve had been surrendered, and that they had not been given notice of any surrender meeting. They certainly would have discovered that by the time the first auction of the Reserve lands took place in 1891, when settlers started to move onto the lands. In any event all the material facts were known by the time of the Tyler Thesis in 1979 and the Robb letters in 1974-5.

[148] It is a little more difficult to pin down precisely when it would have been discovered that the Defendant was potentially in breach of its fiduciary obligation in permitting the surrender of the Reserve. If the surrender was improvident and exploitative, and did subject the descendants of the Papaschase Band to a life of destitution, that must have been known within a few years of the events. The lobbying by the Edmonton settlement was a matter of public record, and was extensively discussed in the local newspaper. There is some evidence on the record that some persons who withdrew from Treaty discovered that they had made a mistake; by the late 1880s some of them had applied to be readmitted to Treaty: Augustus Affidavit, Exhibit 61. There is no evidence on this record that any members of the Papaschase Band made any actual complaint about having withdrawn from Treaty; perhaps they were content with their decision. However, if they were dissatisfied it seems likely that the dissatisfaction would have become apparent within a few years. Again, all of the material facts were known by the time of the Tyler Thesis and the Osmond research in the 1970s.

[149] As previously discussed (*supra*, para. 127), there is no limitation on the claim for any part of the Papaschase Reserve still held by the Defendant. However, on the evidence there is no such land remaining.

[150] The claims about the improvident sale of the Reserve lands would have been discoverable immediately. The terms under which the lands were sold were carefully recorded, and are a matter of public record at the Land Titles Office. Some of the lands were sold at public auction. Others were publicly listed at the Dominion Lands Office. The fact that the lands had been sold and not leased would have been apparent. Sale of the mineral titles was a matter of public record. Again this claim was discoverable immediately after the events. By the time of the Tyler Thesis at the latest, the claims were actually discovered.

[151] The same can be said of the claim that the trust funds that arose from the sale of the lands were not properly accounted for, or were mismanaged. Certainly by 1894 the Papaschase Band had actual knowledge that the funds were being applied for the benefit of Enoch's Band. Since they had signed the agreement themselves, they must have known of the facts underlying the

cause of action. Since the record is not clear as to the eventual fate of these funds, it is difficult to pin down a time when the Papaschase Band should have been aware that they had not received a proper accounting of the funds. However it seems clear that no member of the Papaschase Band has received any interest for over a century. The cause of action was known as soon as the first semi-annual payment was missed.

[152] With respect to the complaints about the taking of Metis scrip, all of the facts surrounding this claim were known immediately upon the applications for scrip having been accepted. If the applicants for scrip were not really half-breeds, or were living an Indian mode of life, or were otherwise arguably not eligible for scrip, the material facts would have been known to them at once. If the taking of scrip was improvident, such that all the scrip money was gone within a year or two, that would have been known by the late 1880's. Assuming those taking scrip were left with the mistaken impression that they could remain on the Reserve, they would have discovered the error by about 1887 when they were forced to leave. Further, all of the general facts surrounding the taking of scrip were actually known by the time of the publication of the study by the Metis Association of Alberta. The specific circumstances surrounding the taking of scrip by the Papaschase Band were known at the very latest by the time of the Tyler Thesis in 1979.

[153] With respect to the claim that the Defendant took steps to artificially reduce the size of the Papaschase Band, thereby leading to its dissolution, again these facts must have been well known by 1894 when the Papaschase Band merged with the Enoch Band. The hardships from the demise of the buffalo, the failure to provide farming implements and assistance, and the failure to provide food in times of famine would have been immediately known. Again, the lobbying of the Edmonton Settlement was a matter of public record. The removal of some members, such as the Edmonton Stragglers, from the Papaschase pay list was also well known. If the Defendant did in fact improperly pressure the remnants of the Papaschase Band to join the Enoch Band, that too would have been known to those being pressured. The limitation period with respect to this claim has long since passed.

[154] The Plaintiffs seek a declaration that the Papaschase Band still exists. It is an interesting question whether a statute of limitations can ever block a declaration of status; s. 1(i)(i) of the *Limitations Act* excludes such declarations from its operation. In many cases a declaration of status will be an empty remedy, because the time for getting any affirmative remedy will have passed. For example, a declaration today that a proper surrender meeting for I.R. 136 was not held is an empty remedy absent some way of getting the land back, or getting damages in lieu. The statute may not prevent the declaration of a right or duty, but it does prevent the enforcement of that right or duty: Alberta Law Reform Institute *Limitations,* Report For Discussion No. 4, paras. 3.16-3.18. It should be noted however that arguments about matters of status being a continuing cause of action on which a limitation never operates can render a limitation statute meaningless: see ***Wewaykum Indian Band***, *supra*, at paras. 134-137. Since I have concluded (*infra*, paras. 188 *ff*) that this claim should be summarily dismissed without resort to the limitation defence, no further discussion is necessary at this point.

[155] The Plaintiffs' claims that there were breaches of Treaty 6 must have been known immediately at the time of the breach: at the time they knew of the covenant, and they knew of the material facts that amounted to a breach (***Luscar Ltd. v. Pembina Resources Ltd.***, *supra*, at para. 131). While a treaty is not in all respects like a contract, breaches of their provisions are arguably covered by the limitation periods on contracts, to which the principle of discoverability does not apply: ***Luscar Ltd. v. Pembina Resources Ltd.***, *supra*. Time would therefore run from the moment of breach. In any event, if the Defendant failed to establish the Reserve in a timely way, failed to provide relief in times of famine, failed to provide farming implements required under the Treaty, and was otherwise in breach of the Treaty, the Papaschase Band must have known of those breaches immediately. Again the limitation period has long since expired.

[156] The final claim is that the Defendant failed to protect the Reserve from trespassers. The only evidence of trespassers on this record is potentially of those settlers who received permission to cut wood on I.R. 136, and also those settlers who purchased and then occupied I.R. 136 (assuming the surrender was invalid). The presence of these trespassers and the failure of the Defendant to prevent the trespasses would have been known or discoverable immediately. The limitation has long since run.

[157] In summary, with one exception, all of the claims of the Plaintiffs are barred by the passage of time. The one exception is the claim that the Defendant account for the proceeds of the sale of I.R. 136. That claim is not barred by statute to the extent that the Defendant is still in possession of some of those proceeds. Otherwise the claims are bound to fail and should be summarily dismissed. It is undoubtedly true that if a full trial were held greater precision could be brought to the exact moment when each cause of action arose, and when it became barred by statute. In some cases it might be possible to narrow down the commencement of the cause of action to a particular month, or perhaps to a particular day. But since the limitation periods have expired many decades ago, this sort of precision is unnecessary to dispose of the application for summary dismissal. Even if the inferences I have drawn from the record are out by a decade or two, the result will be the same. To use the language of the cases, the claim is bound to fail, has no prospect of success, and does not raise any genuine issue for trial. If an excessively cautious approach were taken to an application for summary dismissal, one could undoubtedly send the limitations issue to trial. However, a review of this record confirms that an expenditure of extensive resources on such a trial would inevitably lead to the same result, namely a dismissal of the action. While there may be theoretical issues for trial, there is no "genuine" issue for trial left.

Voidness

[158] The Plaintiffs allege that if a proper vote was not held, then the surrender of I.R. 136 was not properly authorized, and is "*void ab initio*" and of no legal effect. The Plaintiffs argue that the passage of time cannot give the surrender validity. "Voidness" is a legal concept which just means that a particular act was not authorized, was beyond the power of the party doing it, or was done without all the legal preconditions being met. It does not mean, as the Plaintiffs' argument might imply, that the act never happened. For example, it is common knowledge and

notorious that the former Papaschase Reserve is now in southeast Edmonton, that it is fully built up, and that it is occupied by thousands of residences and businesses. The surrender clearly worked on the ground. The Plaintiffs advise that they do not wish to displace all these people or disturb their titles, and that they simply want damages from the Defendant. The question is whether this is any concession by the Plaintiffs, or whether they are in any position to displace the present owners of the lands. As previously discussed, the *Limitation of Actions Act* protected the title of a bona fide purchaser, even where that title was obtained from a trustee in breach of trust, and this protection can be traced back as far as 1833 (*supra*, paras. 119-20 is of no consequence that somewhere in the root of title the Plaintiffs can point to some act that was legally "void". Once the limitation runs, the Plaintiffs lose the very right to claim that it is void. So whatever voidness means, it ceases to have that meaning once any effective legal remedy is blocked. The acknowledgment by the Plaintiffs that they will not challenge the titles of the existing owners is no concession by them.

[159] The concept of voidness is a sometimes useful legal tool for the analysis of the effectiveness of transactions and decisions, but it must not be taken too far. As Professor Wade notes (*Administrative Law*, 8th ed., 2000) at pp. 307-8:

> . . . A common case where an order, however void, becomes valid for practical purposes is where a statutory time limit expires after which its validity cannot be questioned. The statute does not say that the void order shall be valid; but by cutting off legal remedies it produces that result. . . . The truth is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. . . .

While these comments are specifically made with respect to "orders", they are even more applicable to challenged decisions and transactions. A transaction that is invalid because a precondition was not met is less offensive to the rule of law than an order made by an official with no authority to make it. In ***Children's Aid Society of Toronto v. Lyttle***, [1973] S.C.R. 568 Laskin, J. for the majority wrote at pp. 576-7:

> Of course, to say that an order is a nullity has no effect *per se* unless proceedings are taken, by a person with standing, to have it so declared or quashed or set aside or otherwise superseded by relief against its operation. As has been aptly said, "it makes no sense to speak of an act being void unless there is some person to whom the law gives a remedy": [citing Wade]. . . . I do not refer to timely appeal or review when I speak of lateness because, in my opinion, a nullity gains no validity merely because time has run in respect of procedures prescribed for challenging it. By lateness here I have in mind supervening events which may reasonable be taken to preclude a direct or collateral attack.

In discussing the "mere passage of time" being insufficient, Laskin, J. gave as an example an order that had been fully implemented, precluding any attack on its validity. The analogy here would be to an irregular surrender fully implemented over a century ago. In any event the

comment that the mere passage of time would not block the remedy probably does not survive the movement of administrative law to a functional and pragmatic paradigm. Collateral attack no longer depends on concepts of "jurisdiction" and " voidness": ***Consolidated Maybrun Mines Ltd. v. The Queen***, [1998] 1 S.C.R. 706 at paras. 41, 47-50. An argument that the surrender of I.R. 136 was "void" does not allow the Plaintiffs to escape the effect of the statutes of limitation.

[160] In ***Chippewas of Sarnia Band v. Canada (Attorney General)*** (2000), 195 D.L.R. (4th) 135 (Ont. C.A.) reserve land was surrendered without proper procedures being followed. In a decision involving third-party purchasers of the land (and not the Crown) the Court held that under Ontario law no limitations statute blocked the claim for the land. The Court however refused to grant a discretionary remedy quashing the surrender, preferring to take a purposive approach:

> 270 While we do not doubt the importance of a proper formal surrender, as appears from our review of the facts, from a purposive perspective, many elements of a formal surrender were in fact accomplished. Although there was no formal meeting to consider a surrender, the transaction was discussed on more than one occasion at Band meetings. . . .
>
> 272 There is every indication that the Crown officials intended to follow the usual practice and obtain a formal surrender. As the motions judge found, the failure to obtain a proper surrender did not result from any fraud or advantage taken of the Chippewas or from any attempt to deny or override their rights: "It appears that the officials of the day thought the price was fair, thought they were getting a good enough deal from the Chippewas, and simply neglected to secure a surrender because it fell through the cracks in a dysfunctional bureaucracy" (para. 752). In our view, the courts have a discretion to refuse a remedy with respect to the inadvertent error of a dysfunctional bureaucracy that has been relied on for 150 years by innocent third parties. . . .
>
> 274 The failure to obtain a formal surrender renders the Cameron patent subject to judicial review, but the fact that it appears not to have been the perceived source of any mischief or prejudice at the time the Chippewas gave up their land in exchange for a monetary payment and was not the source of complaint for over 150 years is relevant to the question of remedy. For almost 150 years, third party purchasers have relied on the Cameron patent as a valid source of title to the lands. Property has been bought and sold and millions of dollars have been spent on improvements. It is difficult to imagine a stronger case of innocent third parties reliance than that presented by the landowners.

The Court declined to take the formalistic view that the surrender was "void" notwithstanding its defects. The problems with the Papaschase surrender can fairly be described as being in the nature of bureaucratic error, and logistical difficulties in calling a meeting in the Northwest Territories in the 1880s. There was consultation with the apparent leadership of the Band, there

was no apparent opposition, and there was no exploitative element to the transaction. As in the ***Chippewas of Sarnia*** case, there is no reason to deprive the Papaschase surrender of any legal effect at all.

[161] ***Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development***), [1995] 4 S.C.R. 344 also concerned defects in the surrender process. The majority held at para. 7:

> An intention-based approach offers a significant advantage, in my view. As McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured. It is therefore preferable to rely on the understanding and intention of the Band members in 1945, as opposed to concluding that regardless of their intention, good fortune in the guise of technical land transfer rules and procedures rendered the 1945 surrender of mineral rights null and void.

This reasoning is inconsistent with the argument that defective surrenders are "nullities" with no legal effect.

[162] What of the claim for damages from the Defendant? Can the surrender be effective in regard to some persons (the third-party purchasers), but a legal nullity against another (the Crown)? The claim is that the Defendant is liable because it took and resold surrendered land that was not properly surrendered. The surrender was "void", and having dealt with the land the Defendant must pay damages. But again the real question is whether there remains any effective legal remedy. Against an ordinary person the remedy would be in tort, but the Crown was not even liable for torts until the *Crown Liability Act*, S.C. 1952-3, c. 30, was passed in 1953. The remedy must accordingly be for breach of trust or breach of fiduciary duty, but as previously discussed (*supra*, para. 83) not every breach of statute is a breach of fiduciary duty, and even a fiduciary is entitled to the protection of the limitations statutes, subject to some exceptions (*supra*, para. 126). It makes no difference if the act of the fiduciary is described as "void" because it was unauthorized; the voidness argument must itself be made within the time limited. Even if one relies on an independent cause of action of dealing with surrendered land in breach of statute, that would be caught by the residual six year limitation period in s. 4(1)(g). Any claim for damages arising from dealing with the land or its proceeds subsequent to a "void" surrender is also barred.

[163] However theoretically pure the voidness argument may be, it does not mean that the Plaintiffs have a present enforceable claim to the land. This is similar to the argument presented in ***Wewaykum Indian Band*** (at paras. 134-7) that the Band was still dispossessed, and so a new cause of action accrued every day. As the Court pointed out, that would make the statute of limitations meaningless. Here the titles of the purchasers for value of the former I.R. 136 are clearly unassailable. The Plaintiffs have no further remedy against the land. Their relief in damages against the Defendant is barred by the *Limitation of Actions Act* once the Defendant is

no longer in possession of any proceeds of the sale of I.R. 136. The claim has effectively been extinguished by the passage of time.

The Status and Standing of the Plaintiffs

[164] The Plaintiffs apply to be recognized as representative plaintiffs in this action. They allege they:

> . . . were elected by descendants of the Papaschase Indian Band as the Chief and Councillors of the Papaschase Descendants Council and authorized to commence this action on their own behalf and on behalf of all status and non-status Indians who are descendants of the Papaschase Band.

This puts in issue their status and authority to represent the Papaschase descendants, and to advance the claims set out in the Amended Statement of Claim. The Defendant has applied to strike the claims, partly on the basis that the Plaintiffs have insufficient status or authority to assert them. The overlapping arguments raise issues about the nature of Aboriginal communities, Aboriginal rights and Aboriginal status.

The Legal Status of Aboriginal Communities

[165] It is self-evident that the Aboriginal peoples of Western Canada lived in communities well before the arrival of the European settlers, and that those communities continued to exist after settlement. These Aboriginal communities have been described by various names from time to time: Bands, Tribes, Confederacies, Clans, First Nations, etc. Some of these Aboriginal communities were probably more structured than others, and some had more fluid membership than others. However, they all to some extent lived off the land in common; they exercised "rights" over the land, and those rights were "collective rights". Eventually the *Indian Act* recognized a particular kind of Aboriginal community described as a "Band", which term was given a statutory definition.

[166] There remains some doubt as to whether a Band has the capacity to sue in its own name: ***Oregon Jack Creek Indian Band v. Canadian National Railway*** (1989), 56 D.L.R. (4th) 404 (B.C.C.A.) at pp. 409-10; ***Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)***, [2001] 4 F.C. 451 (C.A.) at para. 15; ***Sawridge Band v. Canada***, [2003] 3 C.N.L.R. 358 (F.C.T.D.) at paras. 9-10. Given that uncertainty, it is customary for the Chief and Councillors to sue in a representative capacity on behalf of a Band. They usually plead that they are "representatives of all of the members of the Band", advancing a representative or class proceeding. This is something of a misnomer, as the claim is really "on behalf of the Band" not its individual members. The law has now evolved to the point where it is increasingly recognized that a Band does have the capacity to sue and be sued, at least with respect to aboriginal rights: ***Wewaykum Indian Band v. Wewayakai Indian Band***, [1991] 3 F.C. 420; ***Montana Band v. Canada***, [1998] 2 F.C. 4. If a band has a sufficient existence to sign a treaty, why can it not sue to enforce the treaty? Nevertheless, old habits die hard, and it is still

the custom to describe the Band in litigation by naming the Chief and Councillors, and indicating that they sue on behalf of the Band and all of its members; ***Montana Band v. Canada***, *supra*. This is something of an anachronism, and in my view the better practice is now just to name the Band as the plaintiff. It should now be accepted that Bands have a sufficient statutory existence to sue to protect the rights that are clearly Band rights. In this case both parties proceeded on the assumption that a band cannot sue in its own name, and I will do likewise, although in this case the result would be the same either way.

"Bands"

[167] The term "Band" has long been defined by statute. The relevant definitions in the *Indian Act, 1876,* S.C. 1876, c. 18, s. 3 were:

> 1. The term "band" means any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common, of which the legal title is vested in the Crown, or who share alike in the distribution of any annuities or interest moneys for which the Government of Canada is responsible; the term "the band" means the band to which the context relates; and the term "band," when action is being taken by the band as such, means the band in council.
>
> 2. The term "irregular band" means any tribe, band or body of persons of Indian blood who own no interest in any reserve or lands of which the legal title is vested in the Crown, who possess no common fund managed by the Government of Canada, or who have not had any treaty relations with the Crown.
>
> 3. The term "Indian" means
>
> *First*. Any male person of Indian blood reputed to belong to a particular band;
>
> *Secondly*. Any child of such person;
>
> *Thirdly*. Any woman who is or was lawfully married to such person: . . .
>
> 4. The term "non-treaty Indian" means any person of Indian blood who is reputed to belong to an irregular band, or who follows the Indian mode of life, even though such person be only a temporary resident in Canada.

These definitions remained largely unchanged into the first half of the 20th Century. The equivalent provisions today, in the *Indian Act*, R.S.C. 1985, c. I-5, s. 2 are:

> "band" means a body of Indians

> (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,
>
> (b) for whose use and benefit in common, moneys are held by Her Majesty, or
>
> (c) declared by the Governor in Council to be a band for the purposes of this Act;
>
> "Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.

While the wording has changed, the substantive definition of a band is the same, except for the inclusion after 1951 of the power to "declare" a band to exist, and the abolition of the concept of an "irregular band". Changes to the definition of an "Indian" are discussed *infra*, paras. 197 *ff*.

[168] An examination of the provisions in force in the 1880s shows that the identification of a "band" was factually based. This identification required the existence of one of two things: land vested in the Crown, or annuities or interest money for which the Crown was responsible. If either of these factual preconditions was met, it was also necessary to have a "body of Indians" with a common interest in either the lands or the annuities. If all the conditions were met, then there was a band for the purposes of the *Act*. Specifically, there was no process of incorporation, or registration, or issuance of letters patent, or the happening of any other act of official recognition that did or could constitute a band. If the statutory conditions were not met, there was no band, and the Crown could not simply declare a body of Indians to be a band whenever it chose to do so. There was also no process by which a group of Indians could come together and self-identify as a band. Thus the Papaschase Band was potentially a band so long as it had a Reserve, and after the Reserve was sold it was potentially a band so long as there was a sum of money for which the Defendant was responsible. Once those two preconditions ceased to exist, the Papaschase Band was not legally a band. The Plaintiffs speak in terms of the Papaschase community being "recognized" by the Defendant as a band, but whether the Defendant recognized the Papaschase Band or not was of no significance (before 1951) to whether the Band existed in law.

[169] There is an important consequence of this definition of a Band. Most Bands will exist because they are associated with a Reserve. Thus the identity of a Band is very closely linked to its Reserve, and a Reserve is very closely linked to a Band. On many subjects it is not possible to talk about the one without the other. Thus, in a legal sense and in a very real sense, when a Reserve is lost, it is likely that a Band will be lost as well, and the opposite is true. The Papaschase Band is a good example, because once the Band itself dissipated, and the Reserve became vacant, it was probably only a matter of time before the Reserve was converted to other uses.

[170] The Plaintiffs argue that there are collective or communal aboriginal rights that vest in aboriginal communities other than Bands, citing ***Ontario (Attorney General) v. Bear Island Foundation*** (1984), 15 D.L.R. (4th) 321 (Ont. H. Ct.) at pg. 332. I need not express an opinion on that point, for no such rights are involved here. All the claims arise from Treaty 6, the Papaschase Band and its Reserve No. 136. While there may be other types of aboriginal communities, it is "Bands" that have interests in "Reserves".

[171] The fact-based definition of a Band has other implications for the arguments of the Plaintiffs. Given the definition, there is nothing that the federal Crown can directly do to cause a band to disappear. As long as there is a Reserve or property, and a body of Indians with a common interest in that land or property, then there is a band, and there is nothing that the Defendant can do about it. The only way that a band can cease to exist is (i) if the commonly held lands or property ceases to exist, or (ii) if there is no longer a "body of Indians", which might happen if all the members of a band joined other bands, or if the band simply died out. The Plaintiffs' argument that the Defendant somehow contrived to bring about the non-existence of the Papaschase Band must be analyzed in that context.

[172] The present *Act* differs significantly from the *Act* in force up to 1951 in that it now includes a general power to declare a body of Indians to be a band. The power to declare bands to be in existence was used in 1973 to declare a large number of Aboriginal communities to be bands (P.C. 1973-3571, Kohan Affidavit, Exhibit E). Many of these bands were probably "bands" under the normal definition, and were included in the list for convenience. The list appears to name every band in Canada, and significantly does not include the Papaschase Band. There have also been other isolated declarations of band status. While the statute gives the Governor in Council a power to issue a declaration of band status, the *Act* does not impose any duty on it to do so in any particular circumstances. The exercise of this power is merely a matter of administrative or political convenience. No body of Indians has any right to be declared a band, no matter how cohesive and durable the body might be. While the Plaintiffs seek an order requiring the Defendant to exercise the power to declare the Papaschase Descendants to be a band, this is not relief available in law to any body of Indians.

Collective and Individual Rights

[173] The aboriginal communities and their collective rights did not fit neatly into the Anglo-Canadian law that was introduced into the West. The aboriginal communities could not be readily identified with any class of "person" that was recognized as a legal person capable of suing and being sued. Likewise, the collective rights shared by the aboriginal communities did not fit neatly into the categories of private law rights that the law was used to dealing with. As a result, there was some uncertainty when aboriginal communities first pursued their rights in the courts. "Aboriginal rights" are not the same kind of rights as private law rights. Private law rights, such as the right to property, or the right to a chose in action, including a cause of action, vest in individuals. When those individuals die, the private law rights devolve to their personal representatives, and they are then distributed under the deceased's will or on intestacy. The

persons who receive these private law rights from the estate are thereafter the “owners” of the rights.

[174] Aboriginal law rights are different in some important respects. First of all, many Aboriginal rights are not owned by individuals at all, but are collectively owned by the community as a whole. Since they do not vest in any particular individual, they cannot be sold or transferred, and they do not devolve on descendants under wills or by intestacy. They are owned by and enjoyed by the community as it exists from time to time. Entitlement to collective rights that are given by statute (i.e. those that relate to “Bands” or “Reserves”) accrue to those who are current members of the Band, and not simply to those who are descendants or heirs of previous members. If members leave the community, they do not take these rights with them, and if non-members join the community, they are entitled to enjoy those rights in common with the other members of the community.

[175] There are personal or private rights of an aboriginal nature. For example, the right to be a member of a particular First Nation is such a personal right, and it could be enforced by an individual claiming membership. This type of Aboriginal right would pass by ancestry, in the sense that if a person gained or lost band membership, that would have an effect on the membership status of his or her descendants. This type of right could not be transferred or sold, and it could not be distributed in a will. A second type of personal aboriginal right is exemplified by the right to receive annual payments under a Treaty. If this sum was not paid, the individual band member could sue for it, and the right to collect it would pass to his or her heirs. Other personal aboriginal rights, such as the right to occupy a particular part of a Reserve, could be left by will, subject to some statutory restrictions: *Indian Act*, ss. 59-60. A third type of personal right is the right to hunt, which is collectively held, but which could be raised as a defence by an individual charged with illegal hunting.

Derivative, Collective and Combined Claims

[176] In discussing the enforcement of aboriginal claims, a distinction can also usefully be drawn between derivative claims, collective claims, and combined claims. A derivative claim arises when one member of a collective organization tries to assert a right that belongs to the collective. The classic case is the decision in ***Foss v. Harbottle*** (1843), 2 Hare 189 where a shareholder tried to enforce a right belonging to the corporation. Other examples would be if a Band member tried to enforce a claim belonging to the Band, or if one member tried to enforce a right belonging to an unincorporated organization. There is a general prohibition against derivative claims (***Prudential Assurance Co. Ltd. v. Newman Industries***, [1982] 1 Ch. 204 (C.A.) at pg. 210), but there are exceptions, for example where the collective is for some reason itself incapable of suing. The most common reason a collective entity is incapable of suing is because it is not a legal person, but this may occur as well if the entity lacks a controlling mind, or the proposed defendant is that controlling mind. Purported representative actions by members of a band seeking to enforce collective rights owned by the band are a form of derivative claim not allowed unless one of the exceptions to the rule against such claims is engaged. If the band exists in a viable form, the band itself should sue through its representative leaders. It is for this

reason that actions by “the Chief and Councillors on behalf of all the members of the band” are a misnomer, as they are really derivative claims on behalf of the band, not on behalf of the individual members.

[177] Collective claims arise out of collective rights. Band rights are classic collective rights. There are two broad categories of “collectives”: those that have the right to sue in their own names and those that do not. The best example of the former group is the corporation, a type of collective entity recognized as a legal person. The best example of the latter group is an unincorporated organization, whose rights belong to the group as a whole and not to any one member, or even severally to all the members. Such rights can only be enforced by the group as a whole. Where the collective entity does not itself have the legal capacity to sue in its own name (as with a Band), then collective claims must be asserted by some individual members suing in a representative capacity. This is a type of derivative claim brought by some members of the collective entity, but on behalf of the entity: ***Oregon Jack Creek Indian Band v. Canadian National Railway Co.*** (1989), 56 D.L.R. (4th) 404 (B.C.C.A.) at pg. 408 (which uses the term “derivative” in the strict sense of a claim on behalf of another legal entity) affirmed on other grounds [1989] 2 S.C.R. 1070. Any remedies obtained belong to the collective entity, not the representative plaintiffs. If the collective entity has the legal capacity to sue (as with a corporation), then collective claims do not raise the same issues, because the entity as a legal person can enforce those rights itself.

[178] Combined claims are claims that belong to one person only, and can be fully enforced by that person alone, but are joined together for procedural reasons. Several claims joined together in one action are an example. The better example is a class action where many persons with similar claims join together to sue through the mechanism of representative plaintiffs.

[179] From this analysis it can be seen that there are two quite different types of class or representative actions: ***Oregon Jack Creek Indian Band v. C.N.R.***, *supra*, at para. 408. The first arises when there is a collective claim by an organization that does not have legal standing to sue, such as an unincorporated organization. Such a claim must be advanced by representative plaintiffs, and is derivative in nature, because the collective cannot directly sue on the claim and neither can any individual member of the collective. The second type is the modern class action where, for procedural reasons only, representative plaintiffs sue on behalf of numerous claimants. The underlying rights are not collective rights, and any member of the class could sue alone, because each member is a person with legal status to sue and the rights belong to the individuals severally, and not the class.

[180] The new *Class Proceedings Act*, R.S.A. 2000, c. C-16.5, (which does not apply to this litigation) allows one member of a class to commence proceeding on behalf of all members of the class. Section 5(1)(c) requires that the “claims of the prospective class members raise a common issue”. This wording contemplates individual claims vested in each class member, which are being prosecuted in common. It does not readily accommodate the type of derivative claim where some members of a group are pursuing a collective cause of action on behalf of the

group. This action was commenced prior to the proclamation of the *Class Proceedings Act*, and it is governed by Rule 42 which reads:

> **42.** Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the court to defend on behalf of or for the benefit of all.

This wording is more general. It can accommodate the situation where numerous plaintiffs have individual but similar causes of action. It can also accommodate the pursuit of a collective claim by representative members of the collective, where "numerous persons have a common interest" in the subject of the action.

[181] Claims by Indian Bands are usually collective claims; they generally assert rights that belong to the Band as a whole, and not to any individual member: ***Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*** (1999), 171 F.T.R. 91 aff'd [2001] 4 F.C. 451 (C.A.) at para. 26 (T.D.) and paras. 16-18, 22 (C.A.). Sometimes they assert claims that belong to an Aboriginal community that is not a band: ***Oregon Jack Creek Indian Band v. C.N.R.***, *supra*. Specifically, they are not combined claims, that is they are not a number of individual claims joined together for procedural reasons. How true Band claims can be asserted is entirely a function of the legal status of the Band. If a Band is a recognized legal entity, like a corporation, then the Band (and only the Band) can sue to enforce the rights in its own name. In exceptional circumstances a derivative claim might be permitted to advance a Band right. If the Band is not a legal entity, like an unincorporated association, then the Band (and not any individual member) can sue to enforce those rights, but only by a derivative action by representative plaintiffs. Of course if the right in question is not a Band right at all, but rather a right of an individual member of the Band, then the individual member could sue alone, or could combine with other members to form a class and sue in a class action. Where the members of such a class include the whole of the Band, this type of class action might look very similar to a representative action to enforce a collective Band right, but the two types of action are fundamentally different. The present action by the Papaschase Descendants includes in it both types of claims.

[182] In this particular case the Plaintiffs claim to be descendants of members of the original Papaschase Band, and therefore claim to be entitled to pursue the rights they assert in the Amended Statement of Claim. However, mere ancestry does not entitle them to prosecute the purely private rights owned by original Papaschase members, because private law rights are transferred from generation to generation by the law of succession, and not merely through ancestry: ***Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*** (*supra*) at para. 25 (T.D.). Likewise, they are not entitled to pursue the Band's collective aboriginal rights, because those rights belong to the Band in Council, and only that collective entity can pursue those rights. Those rights do not belong to individual members of the Papaschase Band, nor do they belong to individual descendants of the Papaschase Band. They are collective rights that vest in the Aboriginal community once known as the Papaschase Band. They arise either from original Aboriginal rights, or collective Treaty rights, or rights given by

the *Indian Act* to "Bands". The issue is therefore what type of Aboriginal rights the present Amended Statement of Claim asserts, and whether the present Plaintiffs can pursue those rights.

[183] To summarize, the issue is which of the following claims the present Plaintiffs are advancing, and are entitled to advance:

(a) Band Claims: claims on behalf of the Papaschase Band, which would be representative derivative claims to enforce collective Band rights.

(b) Papaschase Descendants' Claims: claims on behalf of the Papaschase Descendants. This group is an "unincorporated association" formed in 1999, but it is clear that the rights asserted are not collective rights acquired in common by that association. The rights in question arose over 100 years earlier. There are no collective rights owned by the "Papaschase Descendants" organization.

(c) Private Claims: private claims prosecuted by means of a class action by a number of individuals owning claims that raise common issues of fact and law. In this category the Plaintiffs may only prosecute claims "owned" by the class members. Some of these, like the right to membership in the Band, may accrue to the class by ancestry. Others they may have acquired by inheritance or purchase.

The Claims in This Action

[184] Because of the rule against derivative claims, the Papaschase Band is the only entity that can sue to enforce true Papaschase Band claims. Assuming the Band lacks capacity to sue in its own name, such claims would be advanced by representative plaintiffs authorized by the Band, usually the Chief and Council, but on behalf of the band. Such Papaschase Band claims present in this action are:

(a) The claim that the Defendant did not provide all the benefits to the Band called for by the Treaty;

(b) The claim that the Reserve is undersize;

(c) The claim of breach of fiduciary duty in allowing the surrender of the Reserve to go forward;

(d) The claim of breach of fiduciary duty in causing the Band to dissolve;

(e) The claim that the Defendant wrongly dealt with the Reserve lands without a legally valid surrender, and mismanaged the sale process.

In the above respects the present claim is a derivative claim by the Papaschase Descendants, who attempt to assert Band claims. They have no express authority to advance those claims, but since

the Papaschase Band no longer exists in any functional sense, this type of derivative claim is probably within the exceptions to the general prohibition against derivative claims. An analogy could be made to a corporation with no directors or management, or a corporation whose existence is the very subject of the suit. In such cases, suitable representatives would be allowed to assert the derivative claim. However, they would not be suing "on behalf of all Papaschase Descendants" but rather on behalf of "the Papaschase Band itself". If the action was allowed to proceed, this misdescription of the nature of the action would have to be corrected. The present Plaintiffs in this respect are seeking the Court's approval to be derivative representative plaintiffs for the collective claims advanced in this action. I am satisfied that Rule 42 is wide enough to grant this relief, but the availability of that relief depends on the continued existence of the Papaschase Band, discussed *infra*, paras. 188 *ff*.

[185] As for the proceeds of the sale of I.R. 136, the surrender document directed that the income from these proceeds be paid to "us and our descendants forever". In my view this was an intention to confer the benefits of the trust on the Papaschase Band collectively, and not severally. So long as there was a "body of Indians", this sum of money would have kept that body of Indians within the definition of a Band. The reference to "us and our descendants" is a reference to that "body of Indians". No individual descendant of the Papaschase Band can claim any severable interest in the trust or the income: ***Sabattis v. Oromocto Indian Band***, [1989] 2 C.N.L.R. 158 (N.B. Q.B.) at pg. 163. It creates collective rights, which only the Papaschase Band can enforce. The benefits belong to the members of the Band from time to time. Therefore the claim for an accounting of these funds is also a derivative claim to enforce a Band right.

[186] Other claims in this action arise from individual rights. These are rights that do not belong to the Band as a collective, but rather to individual members of the Band. For such claims an individual member can sue alone to enforce his or her rights, and the present action would therefore be a true class action. It would be in that respect an action in which numerous claimants assert individual several claims that raise common issues of fact or law. For procedural reasons they wish to be joined together as a class, and be represented by representative plaintiffs. There are two subcategories of claims based on private rights:

(a) Claims based on a wrong to an original band member, for example the claim that an ancestor was allowed to take scrip in breach of a duty to that ancestor; or that misrepresentations induced him to take Scrip;

(b) Claims based on a wrong to a present day descendant of an original Band member, for example the claim that a present day descendant is entitled to be a member of the Papaschase Band.

Obviously the two types of claims are linked. If, for example, Chief Papaschase had decided in the 1890s to challenge his withdrawal from Treaty, that would have been a claim personal to him. He could have personally sued for breach of fiduciary duty or misrepresentation. If he had died, his personal representatives could possibly have pursued his claim. Success for Chief Papaschase would have had implications for his descendants: if he could establish his status as a

Papaschase Band member, then all of his descendants would benefit from that status. This is no different from any other common law action to establish "status". For example, if a litigant successfully establishes paternity or a right to a hereditary title or honour, then the descendants of that litigant benefit from the success. This leads into the second subcategory of claim, namely the claim to present membership in the Band. This is a personal claim to the Plaintiffs themselves, although it depends to some extent on the status of their ancestors. In part the success of their claim depends on their being able to establish the entitlement of their ancestors to membership. However, the claim itself is personal to the present Plaintiffs, and only they can assert it, not the Band and not the Papaschase Descendants as an organization. To the extent that the Plaintiffs seek to prosecute these claims in a class action, they are suing "on behalf of the class of individual Papaschase Descendants". They are not however entitled to directly advance the claim of their ancestors (i.e. subcategory (a) above) merely because of ancestry; to assert those claims they would have to demonstrate that they are the personal representatives of their ancestors.

[187] As previously mentioned (*supra*, para. 183(b)), none of the present claims is based on collective rights belonging to the group or organization described as the "Papaschase Descendants". Unlike in ***Oregon Jack Creek Indian Band v. C.N.R.***, *supra*, the rights asserted are Band rights, not pre-existing Aboriginal rights. In this respect the Defendant's challenge to the status of the Plaintiffs is well founded.

Does the Papaschase Band Exist?

[188] The parties to this action presented arguments on whether the Papaschase Band does or does not exist today. From a legal point of view the answer is quite simple: the preconditions for the existence of a Band are missing. The Papaschase community became a "Band" when they adhered to Treaty 6 and were entitled to receive annuities from the Crown. They remained a Band, at least potentially, until the last of the proceeds of the sale of I.R. 136 were distributed. However, at some time in the late 19th century there were no members of the Papaschase Band, and accordingly no "body of Indians" that would meet the definition in the statute (see *infra*, paras. 206-9). This may have occurred as early as 1887 when all of the Papaschase members joined other bands, principally the Enoch Band. Alternatively, it may have happened in 1894 when the Enoch Band formally admitted the Papaschase remnants to its Band. When there was no longer any person who was a member of the Papaschase Band, or entitled to claim membership, then there would no longer have been a "body of Indians", and accordingly there would not have been any Papaschase Band. The Governor in Council has not made any declaration that the Papaschase Band is a band, which would be the only other method of constituting a band.

[189] In a community or sociological sense, the record is also quite clear that the Band does not exist. Dr. Evans is of the view that the Band ceased to exist in any sort of recognizable form in 1886, when Chief Papaschase and his family took scrip, and the rest of the members became aligned with the Enoch Band (Evans Report, pg. 5, note 8). Certainly by the time of the formal

merger of the two Bands in 1894, the Papaschase Band was no longer identifiable as a community.

[190] In August of 1999 a number of descendants of the Papaschase Band held a meeting at which they elected a Chief and Council. They ratified a Custom Council Election Code (Lameman Affidavit, Exhibit B). In order to belong to this unincorporated organization, a person must show that he or she is a direct lineal descendant of someone who was a member of the Papaschase Indian Band between 1877 and 1888. The Plaintiff Rose Lameman was elected Chief of the Papaschase Descendants Council, and she was re-elected Chief in 2001. The Chief and Council have been instructed and authorized to commence these proceedings.

[191] I have concluded that the formation of the Papaschase Descendants Council does not enhance the legal position of the Plaintiffs or the group of Papaschase descendants. They are not a "band", much less the Papaschase Band. As I have previously indicated, there is no mechanism by which a body of Indians can self-identify as a band, and became a band at law. The only way to become a band is to satisfy the preconditions previously discussed, and the Papaschase Descendants Council does not qualify. A body of Indians that lives together in community, and shares a language and other cultural ties, might well be described as a First Nation or as an Aboriginal community, but they would not be a "band": ***Blueberry River Indian Band***, *supra*, at para. 27 (F.C.T.D.). Such a band might have been an "irregular band" under the 19th century definitions, but that concept no longer exists. As a matter of fact, it is also clear that the Papaschase Descendants do not exist as a community. They do not live in common, and there is nothing about the Papaschase Descendants Council which sets them apart from the balance of the community. While they all share common ancestors, they do not live "in community". They are not a sufficiently cohesive "body of Indians" to be capable of being a "band".

[192] I accordingly conclude that, in fact and in law, the Papaschase Band does not exist. In fact, it ceased to exist at some time between 1887 and 1894 when the members of the Papaschase Band moved away to live with other Bands, particularly the Enoch Band. In law it most likely ceased to exist when there was no longer a body of Indians with a common interest in the proceeds of the Reserve lands. Assuming there was still a body of Indians in recognizable form, the Band would have ceased to exist when the last of the proceeds of the sale of I.R. 136 were distributed, which may have been as late as 1930.

Dual Membership

[193] The Plaintiffs claim a right to be members of the Papaschase Band, and claim that the Defendant has a duty to recognize the Papaschase Band. I have previously concluded (*supra*, para. 172) that such relief is not available, as the Defendant has no obligation to declare any body of Indians to be a Band. In the absence of such a declaration the Papaschase Descendants do not meet the criteria to constitute a band. There is however another aspect to this issue. While the Papaschase Descendants claim to be members or potential members of the Papaschase Band, a great many of them are already members of another Band. This raises the issue of whether a

person can be a member of two Bands at once, or in other words whether an Indian can have "dual citizenship" in two Bands.

[194] The most obvious potential source of dual membership would arise in the case of a member of one Band marrying a member of another. But as early as the *Indian Act, 1876*, S.C. 1876, c. 18, the *Act* read:

> (d) Provided that any Indian woman marrying an Indian of any other band, or a non-treaty Indian shall cease to be a member of the band to which she formerly belonged, and become a member of the band or irregular band of which her husband is a member.

Under the general definition in the *Act*, a child of that marriage would become a member of his or her father's band. Inter-band marriage was therefore not a source of dual citizenship.

[195] Apart from inter-band marriage, it is difficult to think of situations under which a person could found a claim for membership in two bands at the same time. It is possible that someone was a member of two bands before Treaty. The only other possibility would appear to be if a member of one band was voluntarily admitted to a second band, and both bands allowed that person to retain membership in the original band. That person would have an interest in the collective property of both bands, which seems to be inconsistent with the scheme of the *Act*.

[196] Before 1985 the *Indian Act* did not contain a clear prohibition against a person being a member of two Bands at the same time; there was no express prohibition on "dual membership". However, there were a number of provisions that contemplated that a person could be a member of only one Band at a time. The *Act Further to Amend the Indian Act*, S.C. 1895, c. 35 added the following provision:

> **140.** When by a majority vote of a band, or the council of a band, an Indian of one band is admitted into membership in another band, and his admission thereinto is assented to by the superintendent general, *such Indian shall cease to have any interest in the lands or moneys of the band of which he was formerly a member*, and shall be entitled to share in the lands and moneys of the band to which he is so admitted; but the superintendent general may cause to be deducted from the capital of the band of which such Indian was formerly a member his *per capita* share of such capital and place the same to the credit of the capital of the band into membership in which he had been admitted in the manner aforesaid. (Emphasis added)

This section contemplated the movement of persons from one band to another, but it also clearly provided that the person ceased to be a member of his original band. Dual membership was not contemplated. The present version of this provision is found in s. 16(2) which reads:

> **(2)** A person who ceases to be a member of one band by reason of becoming a member of another band is not entitled to any interest in the lands or monies held by Her Majesty on behalf of the former band, but is entitled to the same interest in common in lands and monies held by Her Majesty on behalf of the latter band as other members of that band.

To the extent the Plaintiffs are descendants of Papaschase members who joined the Enoch or other bands after 1895 they would be covered by these provisions. Therefore, even if those Plaintiffs can claim to be members of the Papaschase First Nation, they cannot claim any interest in the monies or Reserve lands of the Papaschase Band.

[197] The method of defining who was an Indian (see *supra*, para. 167) was significantly revised by the *Indian Act*, S.C. 1951, c. 29. For the first time the Department would keep official lists of Indians, and henceforth an "Indian" was defined as a person on one of the lists. Sections 2(1)(g) and 6 of the 1951 *Act* read:

> **2(1)*(g)*** "Indian" means a person who persuant [sic] to this Act is registered as an Indian or is entitled to be registered as an Indian;
>
> **6.** The name of every person who is a member of a band and is entitled to be registered shall be entered in the Band List for that band, and the name of every person who is not a member of a band and is entitled to be registered shall be entered in a General List.

The concept of irregular Bands was abolished, and a non-treaty Indian now became a person named on the General List. Section 11 of the *Act* of 1951 defined who was entitled to be entered on a list, and s. 12 defined who was not so entitled. Significantly, s. 12 excluded from entitlement any descendant of a person who received half-breed scrip. Section 16(2) of the *Act* (see *supra*, para. 196) dealt with the financial consequences of movement from one Band to another. While the statute did not specifically state that no one could be named on more than one list, that seems to be the only interpretation consistent with the scheme. Section 6 clearly implied that a person could not be included on a Band list, and also on the General List. The use of the phrases "that Band" and "a Band" are strongly suggestive of an interpretation that a person could not be a member of more than one Band, although that is not expressly stated.

[198] Section 13 dealt with the movement from one list to another:

> **13(1)** Subject to the approval of the Minister, a person whose name appears on a General List may be admitted in membership of a band with the consent of the band or the council of the band.
>
> **(2)** Subject to the approval of the Minister, a member of band may be admitted into membership of another band with the consent of the latter band or the council of that band.

The next section went on to confirm that a woman who married a member of another Band ceased to be a member of her original Band, and became a member of her husband's Band. Again, while there is no express prohibition against dual membership, that seems to be the implication.

[199] Prior to the amendments in 1951, the Department had kept informal lists of Band members. Section 8 of the 1951 statute required that these lists be posted in conspicuous places. Section 9 provided that within six months of this posting, certain interested persons could object to the inclusion or omission of any name from the lists. Section 9 also provided for an appeal to the Registrar, and thereafter to a judge of the superior court, at the end of which the decision was "final and conclusive". Thus within six months of the posting of the lists in 1951, the membership in the various Bands became incontrovertible. This has several implications for this action. First of all, since no list was posted for the Papaschase Band (Galley Affidavit), the legal position is that there were no members of the Papaschase Band in 1951. Any potential candidates were either on the General List, on another Band list, or not on any list at all, and not having been included on a Papaschase Band list, they have no further claim to membership. Secondly, since membership in bands after 1951 is primarily by descent from those who were members in 1951, it follows that there are no potential Papaschase members in existence today.

[200] The Plaintiffs argue that since no list of members for the Papaschase Band was published in 1951, then the provisions of the statute simply do not apply and have no effect. That however cannot be the proper interpretation of the *Act*. The statute was clearly designed to bring some finality to the question of who was an Indian, and who belonged to which Band. The publication of a list for a Band was clear evidence that the Band existed, and the failure to publish a list for a Band must likewise have been taken to be a declaration that no such Band existed. Absent any members, there is no "body of Indians" to constitute a Band. Furthermore, any potential Papaschase Band member who was on the General List, or on another Band list, or on no list, had an opportunity to protest that he or she was on the wrong list or not on any list. I am satisfied that the proper interpretation of the *Act* of 1951 is that the failure to publish a list of members meant that there were no members recognized in law.

[201] It is of course theoretically possible that one of the Plaintiffs or their ancestors was actually misled by the failure to produce a Papaschase Band list. For example, there might theoretically have been someone who was still a member of the Papaschase Band. If that person's name was placed on the list of another Band, and posted in a location where that theoretical member would not be expected to see it, or possibly was placed on the General List, then that person might have cause for complaint. An inquiry would have to be made into the circumstances, as for example why that person did not notice that his or her name was not on an appropriate list. One would have to examine when that theoretical member obtained actual knowledge that he or she was on any particular list, or when he or she might reasonably have discovered that. However, there is no evidence on this record that any such person existed, or that any such person was actively misled. No evidence exists of any Plaintiff who could claim to be on a Papaschase list, or who was wrongly placed on the list of another Band. Accordingly this theoretical possibility is not enough to resist an application for summary dismissal of the claim.

[202] These same issues were discussed in ***Chief Chipeewayan Indian Band (Kingfisher) v. Canada*** (2001), 209 F.T.R. 211, affirmed (2002), 291 N.R. 314 (F.C.A.). That action concerned the surrender of Stony Knoll Indian Reserve No. 107, also a Reserve set aside under Treaty 6. The Chief Chipeewayan Band never settled on its Reserve, and many members left to join other Bands. By 1889 there were only two families identified with the Band, and neither of them actually lived on the Reserve. In 1897 an Order in Council was passed surrendering the Reserve, without any meeting of the Band or other consultation with the Band. No compensation was paid to any member of the Band as a result. A group of descendants of Chief Chipeewayan commenced an action to recover the Reserve or damages for its value.

[203] The Court in the ***Chief Chipeewayan*** case examined whether the plaintiffs could prove that they were descendants in an unbroken line from the original members of the Band. Some of them could not do so at a factual level; they simply could not prove who their ancestors were. Others could prove a factual genealogical link, but the link was interrupted in some way. For example, some of the plaintiffs could establish a genealogical link through the maternal line, but one of their maternal ancestors had married a member of another Band, and by the law in force at the time had become a member of her husband's Band. This was held to interrupt the line of descent from the original Band. Other maternal ancestors had married non-Indians and withdrawn from Treaty, to the same effect. None of the proposed plaintiffs appeared to have claimed to be descended from Band members who had taken scrip, so the Court did not have to discuss that issue. In the end the Court concluded that none of the plaintiffs could continue to claim to be a member of the Chief Chipeewayan Band. The Federal Court of Appeal, in brief reasons, confirmed the approach and the conclusion of the trial judge. As will be apparent, I have come to the same conclusion on the law as the ***Chief Chipeewayan*** decision.

[204] The learned trial judge in the ***Chief Chipeewayan*** case went on to consider whether the 1951 list posting process would have had any effect on the status of the plaintiffs. (It is not clear from the decision whether a list for the Chief Chipeewayan Band was posted in 1951.) He concluded (at paras. 98-9) that even if one of the plaintiffs had been able to show that he or she was a descendant from an original member of the Band, the 1951 list posting process would have disentitled them to any claim that they were still a part of the Chief Chipeewayan Band. My interpretation of the statute is to the same effect, but in any event the 1985 amendments (discussed next) render the issue moot.

[205] The 1951 scheme stayed in effect in the *Indian Act*, R.S.C. 1970, c. I-6 and the *Indian Act*, R.S.C. 1985, c. I-5. However, no provision was made for the republication of the Band lists; Band membership continued to be based on the lists as they existed in 1951. Major changes were brought about by an *Act to Amend the Indian Act*, R.S.C. 1985 (1st Supp.), c. 32. The primary purpose of this statute was to reverse the historical rule that an Indian woman who married a non-Indian lost her status. The *Act* however made other changes. Firstly, the *Act* now provided that the Indian Registers in force on April 17, 1985 would form the basis of Band membership. No provision was made to republish these lists, and thereby open them up to protest at large. However, s. 14.1 did allow a protest of an "omission" from the list if made within three years, that is before April 17, 1988 in the case of these Plaintiffs, a time which is now passed. Any

person who was entitled to be on the list immediately prior to April 17, 1985, was entitled to remain on the list, which essentially preserved the 1951 lists as the basis for Indian status. The *Act* went on to provide that a Band could take control of its own list, and set up its own membership rules. However, in the event that the Department continued to be responsible for the Band List, s. 13 provided:

> **13.** Notwithstanding sections 11 and 12, no person is entitled to have his name entered at the same time in more than one Band List maintained in the Department.

The inference is that a Band could set up its own private membership rules which would allow dual membership, but that no dual membership would be allowed on the Departmental lists. Since the Department would have been in control of all lists as of April 17, 1985, it follows that no person on that date was entitled to be a member of more than one Band. Therefore, even if the Papaschase list should have existed as a matter of law in 1985, no person on another Band List could claim a right to be on it. Thereafter, if a Band took control of its own list, some person might theoretically become entitled to dual membership. However since the Papaschase Band has not existed after 1985, it is not possible for it to have created membership rules that would allow the Plaintiffs to have dual membership in the Papaschase Band and another band.

[206] Based on my analysis of the statutes, the only person who could potentially claim to have a right to go on the Papaschase Band list (if it existed) would be a claimant who meets each of the following criteria:

> (a) that claimant is a descendant of an original Papaschase band member, and
>
> (b) that original Papaschase band member and his or her descendants in the direct line
>
> (i) did not take scrip, and
>
> (ii) did not join another band, and
>
> (c) the claimant was on, or is a descendant of a person who was on the General List in 1951 and 1985, and accordingly would be on the Indian Register today.

Counsel for the Plaintiffs candidly acknowledged to the Court that he was not aware of any individual who would meet this description.

[207] The combined effect of all of these provisions is of great importance to the status of the Plaintiffs in this action. The Plaintiff Rose Lameman, for example, is clearly not on any Papaschase Band list, because no such list exists. Furthermore, it is undisputed that she is a member of the Onion Lake Band. Section 13 of the 1985 *Act* makes it quite clear that she is not entitled to be a member of any other Band, thereby precluding her from claiming a right to be a member of the Papaschase Band, even if a list for that Band should exist. Furthermore, she bases

her status to bring this claim from the fact that she is a direct descendant of Chief Papaschase. However, Chief Papaschase was a half-breed who took scrip, and by virtue of s. 12 of the 1951 *Act* his descendants were not entitled to be included in any Band list, be it the Papaschase Band list or any other list. Accordingly, Ms. Lameman has no basis to claim to be a member or potential member of the Papaschase Band.

[208] The other proposed Representative Plaintiff, Calvin Bruneau, is in a similar position. He is said to be "a non-status individual associated with the Kehewin Band", which I assume means he is not on the Indian Register, formerly known as the General Register, or any Band List. He is not therefore caught by s. 13 of the *Act*. If there was a Papaschase Band list, he theoretically could apply to be added to that list. However, besides not having Indian status, he cannot show that one of his ancestors was on the Papaschase Band list in 1951, and accordingly he has no basis to claim to be added to any such list. Furthermore, he too claims his status as a descendant of Chief Papaschase, and accordingly he too is precluded from Band membership by s. 12 of the 1951 *Act* by reason of being the descendant of a half-breed who took scrip.

[209] The Plaintiffs did not necessarily challenge the proposition that one could not be a member of two Bands at the same time. They however expressed a right to assert a contingent membership in the Papaschase Band. If and when the Papaschase Band is reconstituted by order of the Court or otherwise, the Plaintiffs asserted the right to then elect whether to remain with their existing Band, or to join the Papaschase Band. This decision would presumably be influenced by the level of success the Plaintiffs achieved in having the surrendered I.R. 136 restored to the Papaschase Band. In my view the *Act* simply does not contemplate any such contingent membership. If nothing else, this argument flies in the face of s. 13. I note that the definition of "Indian" includes not only those who are registered, but those "entitled to be registered." The prohibition in s. 13 on dual membership must therefore extend to contingent dual membership as well. However, even apart from that it would not appear that any existing member of another Band would qualify for entry on the Papaschase Band list, should it ever be restored. Any such person would have to show that immediately prior to April 17, 1985 they were entitled to be on the Papaschase list. That in turn would require that they show an ancestor who was entitled to be on the Papaschase list in 1951. There do not appear to be any persons in that category. Therefore, none of the existing Plaintiffs can validly assert a contingent right to go on the Papaschase list.

Summary on Status of the Plaintiffs

[210] Most of the claims in the Amended Statement of Claim belong to the Papaschase Band. The Plaintiffs do not purport to sue on behalf of the Band; they sue on behalf of the Papaschase Descendants, who cannot claim for themselves the Band's rights and who have no collective rights themselves. Since the Papaschase Band no longer exists in a functional form a derivative claim by individual Band members (if there were any) on behalf of the Band might be permitted; the Amended Statement of Claim would have to be amended accordingly. A derivative claim to confirm the status of the Band might be permitted, but there is no genuine issue for trial on that point; the Band ceased to exist many years ago. Further, there are no members or potential

members of the Papaschase Band. It is therefore inappropriate to allow the other potential derivative claims to proceed.

[211] Some of the claims, particularly the claim to present membership in the Papaschase Band are personal in nature. They could be pursued by the Plaintiffs, individually or in a class proceeding. However, no person has shown any genuine basis on which he or she could claim membership. The Amended Statement of Claim names five potential representative Plaintiffs. At the hearing, the named Plaintiff Rose Lameman was put forward as a representative Plaintiff, to be joined (presumably by amendment) by Calvin Bruneau. For the reasons given, I have concluded that neither of these proposed representative Plaintiffs has any claim to be a member of the Papaschase Band today. They cannot establish an unbroken line of descent from a Papaschase member. The other four named representative Plaintiffs did not press their claims, but since they are all members of other bands, they too cannot claim membership in the Papaschase Band. No other potential member has been identified.

[212] The Plaintiffs lack sufficient status to prosecute these claims, and the claims in the Amended Statement of Claim should be dismissed.

No Cause of Action

[213] In addition to the application for summary judgment, the Defendant brought an application to strike out certain portions of the Amended Statement of Claim on the basis that those portions disclose no cause of action. A pleading should not be struck out for failing to disclose a cause of action unless it is clear and beyond doubt that there is no cause of action: ***Hunt v. Carey Canada Inc.***, [1990] 2 S.C.R. 959. On such an application the Court assumes that the facts as pleaded are true.

[214] The main basis upon which the Defendant sought to strike the pleading was that the Plaintiffs have no status or standing to pursue this action. This topic has been separately discussed, *supra*, paras. 164 *ff*. In addition, the Defendant challenged other specific portions of the pleading that might more accurately be termed “particulars” than a full cause of action. Since most of them are subsumed by the application for summary judgment, only a brief discussion is called for.

[215] I have determined that the following portions of the Amended Statement of Claim do not disclose a cause of action or are legally irrelevant:

(a) there is no legal entitlement to an order compelling the Defendant to declare the Papaschase Band to be a “band” under the *Indian Act* (*supra*, para. 172).

(b) whether Chief Papaschase lived an “Indian mode of life” is not legally relevant (*supra*, para.98).

(c) whether the issuance of Metis scrip was bad public policy is not justiciable (*supra*, para. 96).

(d) the delay by the Indian Agent in obtaining the surrender is not of legal significance (*supra*, para. 79).

(e) the Plaintiffs note that Commissioner Dewdney had directed (*supra*, para. 43) that the Papaschase Band not be moved to Enoch until they had surrendered their Reserve, but that his instructions were not followed. There was no legal requirement for this administrative direction, and the failure to follow it is not *per se* of any legal significance. The order in which things were done in effect meant that there were no voting members left at the time of the surrender, as previously discussed, but there was no legally enforceable duty to keep the band on the Reserve until it was surrendered.

(f) the Plaintiffs have no capacity to prosecute private claims that would have devolved on the personal representatives of their ancestors, as opposed to claims that descended to them merely by ancestry (*supra*, para. 182).

(g) there is no cause of action against the Crown for a tort that occurred prior to 1953: *Crown Liability Act*, 1953, S.C. 1953, c. 60; ***Mikisew Cree First Nation v. Canada*** (2002), 303 A.R. 43 (C.A.) at para. 80.

(h) a mere breach of statute does not create a cause of action, and is not necessarily a tort or a breach of fiduciary duty (*supra*, para. 83).

The Defendant also applied to strike out some of the pleadings on the basis that they were scandalous, frivolous, or vexatious. The arguments overlapped with others already dealt with, and no further discussion is necessary.

The Representative Action

[216] Having concluded that the action should be dismissed summarily, it is not strictly necessary to address the Plaintiffs' application to be appointed representative Plaintiffs. Since the matter was fully argued, I will deal with it briefly. A number of the issues that arise have already been discussed in other contexts.

[217] The test for a representative action is found in Rule 42:

> **42.** Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

In ***Western Canadian Shopping Centres Inc. v. Dutton***, [2001] 2 S.C.R. 534, the Court set out a five-part test:

1. The class must be capable of clear definition.

2. There must be issues of fact or law common to all class members.

3. With regard to the common issues, success for one class member must mean success for all. In other words, there should be no conflicts of interests between the members of a class.

4. The class representatives must adequately represent the class.

5. Even when the above four presumptive factors are present, there must be no countervailing factors that make a class proceeding inappropriate.

These five factors obviously contemplate a combined action of individual claims, not a derivative representative collective claim.

[218] To the extent that this is a true class action, I am satisfied that the proposed class would be capable of clear definition. The appropriate class would encompass by some suitable description those descendants of the Papaschase Band who remain eligible for membership in the Band. However, as I have previously indicated (*supra*, paras. 206-8), there appear to be no potential members of the class in existence. In many respects the action is really a derivative action on behalf of the Papaschase Band itself, and for the reasons given (*supra*, para. 184) it would have been appropriate to allow the derivative portions of the action to proceed, (upon the necessary amendments being made), but for the fact the Papaschase Band no longer exists.

[219] It is also clear that there are numerous common issues of fact or law raised by these proceedings. The questions surrounding the surrender of I.R. 136, the subsequent amalgamation with the Enoch Band, and the taking of Metis scrip, would all raise common issues of fact and law which would appropriately be determined in representative proceedings.

[220] Generally speaking, success for one class member would mean success for all. As I discussed in ***Metera v. Financial Planning Group***, 12 Alta. L.R. (4th) 120, 332 A.R. 244, 2003 ABQB 326, at paras. 52-59, the real issue here is whether there are any conflicts of interest between the members of the class. In my view there would be a potential conflict between those members of the class who claim from an original Papaschase member who took Metis scrip, and those members of the class who claim through another line of descent. There might be another sub-class of descendants of those who left the Band voluntarily. However, if the matter were to proceed this problem could be dealt with by identifying sub-classes, and appointing separate counsel as necessary.

[221] The fourth requirement is that the class representatives must adequately represent the class. In this respect there are concerns, because the two proposed representative Plaintiffs are not members of the class (*supra*, paras. 207-8). It might occasionally be appropriate to allow non-members of the class to be representative Plaintiffs, but this would be an unusual situation. If members of the class exist, it is appropriate for them to be the representative Plaintiffs, or otherwise specific evidence should be brought forward to show why those persons are not capable of being representative Plaintiffs.

[222] The final question is whether there are countervailing factors that make a class proceeding inappropriate. The most important countervailing factor in this case is that the action has no reasonable prospect of success. As discussed at length, most of the claim cannot survive the application for summary dismissal, and there is no point in allowing it to proceed. Further, it has not been shown that any member of the class exists. In addition, the Enoch Band is not at present a party to this action. Given that the merger of the Papaschase Band with the Enoch Band is being challenged, and given that the proceeds of I.R. 136 were apparently turned over to the Enoch Band at some time in the past, and that the remaining Papaschase members joined the Enoch Band, it would be inappropriate for this action to proceed any further without the Enoch Band being added as a plaintiff or a defendant. This, however, is a matter that could be cured by amendment.

[223] In summary, it is not appropriate to appoint the Plaintiffs as representative Plaintiffs because they are not members of the class, there do not appear to be any members of the class existing, and because the action cannot survive the application for summary dismissal.

Conclusion

[224] In this action the Plaintiffs have come forward, in good faith, raising questions about transactions that happened over 100 years ago. They seek relief from the Court arising out of decisions that were made in the distant past. Some of those decisions were made by their ancestors, such as the decision by Chief Papaschase to take Metis scrip, and the decision by the remaining leaders of the Papaschase Band to join the Enoch Band. Others of the decisions were made by the Department of Indian Affairs, such as the decision to accept the surrender of I.R. 136 based on the consent of the three remaining headmen of the Papaschase Band, and the subsequent decision to turn the proceeds of the sale of the Reserve over to the Enoch Band. With hindsight it is easy to second-guess these decisions, to suggest that they were not prudent, and to speculate about what might have happened if those decisions had not been taken. However, over a century later, everyone has moved on. Most of the Plaintiffs' ancestors joined other Bands, and moved off to other places. A number of those ancestors joined the Enoch Band, and have benefitted from that membership. It appears that no one alive today can claim entitlement to belong to the Papaschase Band, and the Papaschase Band no longer exists in fact or in law. I.R. 136 was bought by third parties in good faith, and they have occupied, developed and resold the lands ever since. The Defendant has proceeded on the basis that the Papaschase Band no longer exists, and has dealt with the Plaintiffs as members of other Bands. It is for these reasons that the law requires that claims be pursued in a timely manner; it is simply not possible or appropriate to

try and unravel transactions so long after they occurred. For the reasons I have given, the application for summary dismissal of the claim must be allowed. On many of the points the Plaintiffs have failed to show a genuine issue for trial. However, even if a genuine issue for trial could be shown, almost all the claims have long since been barred by the statutes of limitation. No plaintiff with the necessary standing has come forward. In the circumstances, there is no reason to permit the Plaintiffs to commence a representative action as proposed.

[225] There is one exception which relates to the possible continued possession by the Defendant of some of the proceeds of the sale of I.R. 136. The *Limitation of Actions Act* does not bar a claim to any such proceeds (*supra*, para. 127). The Defendant did not bring forward any evidence to show that there is no genuine issue for trial on this claim (*supra*, para. 94). If a plaintiff came forward who is a descendant of the Papaschase Band, other than through a former member who took scrip, he or she might be entitled to pursue this claim. The Defendant could then argue the equitable defence of laches. The parties may apply for further relief on this point.

[226] I acknowledge the excellent briefs prepared by counsel, and the professional way the case was presented.

Heard on the 11th day of May, 2004.
Dated at Edmonton, Alberta this 13th day of September, 2004.

Frans F. Slatter
J.C.Q.B.A.

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