Snake v. The Queen, 2001 FCT 858 (CanLII)

Date: 2001-08-08
Docket: T-518-85
Parallel citations: (2001), 209 F.T.R. 211
URL: http://www.canlii.org/en/ca/fct/doc/2001/2001fct858/2001fct858.html
Noteup: Search for decisions citing this decision

Date: 20010808

Docket: T-518-85

Neutral Citation: 2001 FCT 858

BETWEEN:

GEORGE KINGFISHER, BEN WEENIE,

LESLIE ANGUS, LARRY CHICKNESS,

LOLA OKEEWEEHOW and DONALD HIGGINS

for themselves and on behalf of the Descendants

of the Chief Chipeewayan Band

Plaintiffs

- and -

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT

GIBSON J.:

INTRODUCTION

[1] These reasons arise out of the trial of an action commenced by Statement of Claim filed the 15th of March, 1985 in which the plaintiffs claim the following reliefs:

a) an Order declaring the defendant owed a fiduciary duty to the plaintiffs and that there was a breach of that duty;

b) damages;

c) in the alternative, an order declaring that the purported surrender of the Stony Knoll Indian Reserve No. 107 was void *ab initio*;

d) such additional or alternative relief as is deemed equitable; and

e) the costs of the action.

[2] In a document entitled "Trial Brief of the Plaintiffs" provided to the Court during the course of the hearing of this matter, under the heading "What is the relief sought?", the reliefs sought are amplified in the following terms:

1) A declaration that there has been no lawful surrender of I.R 107 ("Stony Knoll Reserve") and that Order in Council P.C. 1155 [1897] is ultra vires and of no lawful effect by reason of the mandatory surrender requirement under the *Indian Act*;

2) A declaration that the Defendant owed a pre-surrender fiduciary duty to all Indians having an interest in I.R. 107;

3) A declaration that the Defendant breached its pre-surrender fiduciary obligation by purporting to pass Order in Council P.C. 1155 [1897] and by subsequently transferring possession and title to the lands comprised in I.R. 107 to third parties;

4) A declaration that one or more of the Plaintiffs have standing to bring this action;

5) An Order reserving the issue of damages arising from the breach of the Defendant's fiduciary duty for a future hearing before the Court;

6) An Order directing the Defendant in the interim to provide the Plaintiffs with reasonable funding to prepare and present an assessment of the nature and quantum of damages to be awarded;

7) An Order directing the Defendant to provide an accounting of the disposition of I.R. 107 including full particulars of the terms upon which possession and title were transferred by the Crown.

8) Costs to be spoken to.

BACKGROUND

[3] On the 23rd of August, 1876, at Fort Carleton in what was then part of the Northwest Territories, Chief Chipeewayan and four councillors signed Treaty No. 6 on behalf of themselves and other members of the Chief Chipeewayan Band (the "Band").

[4] By Treaty No. 6, the Government of Canada acquired from the seven bands whose representatives signed the Treaty on the 23rd of August, 1876, and from others who signed the Treaty later, the "independent pre-existing legal title" to 121,000 square miles of land. In return, the Government of Canada promised, in the 13th paragraph of Treaty No. 6, "to lay aside reserves for farming lands... and other reserves for the benefit of the said Indians" and "that the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserve for each Band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them".

[5] Stony Knoll Indian Reserve No. 107 on the south bank of the North Saskatchewan river, ten miles southwest of Carlton House, was determined, surveyed and set apart for the Band in 1879 by Dominion Land Surveyor George A. Simpson and in July, 1888 by Dominion Land Surveyor John C. Nelson. On the 17th of May, 1889, Stony Knoll Reserve was confirmed by Order in Council P.C. 1151/1889. The Reserve consisted of some 30

square miles.

[6] Stony Knoll Reserve was never settled by the Band.[1]

[7] In 1878, members of the Band received their annuity payments pursuant to Treaty No. 6 in the Battleford District. Annuity paylists indicate that at that time the Band consisted of 69 individuals in 19 families. The Band remained in the Battleford District through 1879. Annuity paylists for that year indicate that the Band consisted of 52 individuals in 14 families.

[8] During the early years after the signing of Treaty No. 6, there was a great deal of movement of families between bands. Most of the bands to which Treaty No. 6 extended continued to pursue their traditional ways of hunting and fishing and therefore led a nomadic existence. Once reserves were surveyed for the various bands in the treaty area, members of the bands began to settle but it was a gradual process hampered by the lack of experience in farming of members of the bands, their reluctance to leave behind their nomadic way of life and what can conservatively be described as less than ideal understanding and support from the Government of Canada.

[9] The Band had returned to the Fort Carlton area by 1880 and received annuity payments there. Paylists indicate that the Band then consisted of 46 people in 10 families.

[10] In 1881, members of the Band were among the large group of "Battleford Indians" who travelled to the south. Six families of the Band were paid at Fort Walsh as "stragglers". Two families were paid at Fort Walsh with the Piapot Band.

[11] Only four families returned to the Battleford District with the then Chief, Young Chipeewayan, and received their annuity payments there in 1882. Two families remained in the South and were paid as "stragglers" at Fort Walsh. One family was paid with the Piapot Band.

[12] By 1883, according to pay lists, only two families were paid as members of the Band. Other families that were at one time or another paid as members of the Band, were paid under other band pay lists.

[13] The following is an extract from a memorandum by the Deputy Superintendent of Indian Affairs dated the 15th of November, 1883:

At Fish Creek there are three Reserves belonging respectively to Moosimin, Thunder Child, and Young Chippewayan. None of these except Moosimin appear to be settled on their own reserve, Thunder Child and Young Chippewayan being also on Moosimin's Reserve: the two latter having recently returned from the South with their followers. The Commissioner thought it better to put them upon Moosimin's Reserve, but both are dissatisfied and expressed themselves so to the undersigned, Thunder Child stating that he considered the work he did on Moosimin's Reserve of no value to himself or Band, as it was on this Chiefs' land and that he wanted to set to work and improve his own Reserve. The character given this Chief by the Instructor was a very good one. He is described as very industrious and setting a good example to the other Indians. Moosimin objects very strongly to these Indian Bands being located on his Reserve, and they have no right there strictly speaking, as the Treaty provides a Reserve for each Chief.[2]

As earlier noted, when the above was written, no reserve had been formally confirmed in favour of the Band.

[14] In response to a request for information regarding the Band and its members, the same writer wrote on the 8th of July, 1884 that:

...it would be a most difficult matter to trace them, & efforts are being made to have the few who are still his [Chief Young Chipeewayan's] followers join other bands, as they are a worthless lot.[3]

[15] When members of the Band received their annuity payments on the 17th of October, 1884, they were on the Thunder Child Reserve. They compromised 18 individuals in two families. Other persons who were apparently members of the Band were paid as "stragglers" at other reserves.

[16] In 1885, after the rebellion of that year, despite what immediately follows, members of the Band were listed as "rebels" and did not receive annuity payments. The two families then considered to constitute the Band were living on the Thunder Child Reserve. Neither they nor members of the Thunder Child Band were considered to have taken a direct part in the rebellion. Similarly, other persons more generally considered to be "members" of the Band were not considered to have taken a direct part in the rebellion.

[17] The Band was listed as being on the Thunder Child Reserve for 1886 and 1887.

[18] Annuity payments were reinstated for members of the Band in 1888. Once again, members of the Band were found to be on the Thunder Child Reserve and their annuity payments were made there. The Band was considered to then consist of two families made up of women and children.

[19] When Stony Knoll Reserve was confirmed by Order in Council in May, 1989, as previously noted, the Band was then considered to consist of three women and nine children, in two families, living on the Thunder Child Reserve. Annuity payments for 1889 were made to members of the two families as part of the Thunder Child Band.

[20] No individual was paid an annuity payment, as a member of the Band, after 1889.

[21] By Order in Council P.C. 1155/1897[4], apparently without prior consultation with members of the Band and without efforts being made to identify members of the Band for purposes of consultation, authority was granted "...for the relinquishment by the Department of Indian Affairs, ... of the control of the lands comprising ..." Stony Knoll Reserve. Control passed to the Department of the Interior. In effect, Stony Knoll Reserve ceased to exist as a Reserve for the Band or any other band. No compensation was paid to or otherwise provided for any member of the Band.

EVIDENCE

1) Expert Genealogical Evidence

[22] Two expert reports tracing the genealogy of the plaintiffs and others were filed. On behalf of the plaintiffs, a report prepared by "Four Arrows" and dated the 20th of June, 1995 was filed on the 26th of August, 1999. It is entitled: "The Cree Nation of Chipeewayan: Its Lands and Its People From 1876 to 1995. The History of a Dispersed People Who Reunited. The Genealogy Report." The second report, in two volumes, was prepared on behalf of the defendant by Barbara Shanahan of Shanahan Research Associates Inc., Ottawa and is dated the 15th of January, 1992. A third volume, an addendum to the report, is dated the 31st of January, 1992. The three volumes were received by the Court on the 23rd of December 1999. The defendant's expert report is entitled "Report on the Descendants of the Young Chipeewayan Band as Particularized in the Statement of Claim in the case of *Alfred Snake et al* v. *The Queen*[5]. Both reports are very extensive.

[23] During the course of the trial, on the 11th of January, 2000, a third report, prepared by Alexander Dietz and entitled "Alfred Snake v. the Queen - Historical Facts asserted by the Shanahan Report and by the Four Arrows Report" (the "Dietz Summary") was received as an exhibit filed on consent on behalf of both parties. This last report, consisting of only four pages, is described by the author in the following terms:

This summary outlines the historical facts asserted by the Shanahan Report and by the Four Arrows Report in so far as these facts relate to the ancestors of the specific plaintiffs.

[24] None of the authors of the three reports was called as an expert witness at the trial of this matter, this, apparently, by agreement between counsel. Counsel further agreed that the Court could rely on the Dietz summary as accurately reflecting the relevant evidence to be drawn from the Four Arrows and Shanahan Reports regarding the genealogy of each of the plaintiffs.[6]

[25] The substance of the Dietz summary is in the following terms:

Alfred Snake

Shanahan and Four Arrows Reports agree on the following facts:

1. Ispimikkakeetoot (Young Chipeewayan) appear[s] in the annuity paylists of the Band from 1876 to 1886.

2. The annuity paylists in 1876 and 1877 of the Young Chipeewayan Band do not list any sons were [sic] among the children of Ispimikkakeetoot and the paylists for the period 1876 to 1886 inclusive show that no son of Ispimikkakeetoot moved out of the family unit.

3. Starting in 1888, Ispimikkakeetoot himself and one child are paid as members of the Thunderchild Band, and in 1889 they are joined by the rest of his family. The family remains on the paylists of the Thunderchild Band thereafter.

4. A woman named Emma Snake appears for the first time in 1885 on the annuity paylists for the Mistawasis Band (as no. 118), the agent's notation reading "not paid last year, very old with grandson, from the Plains".

5. Albert Snake is given his own annuity ticket no. 133 in 1889, but this time being recorded as Emma Snake's son.

6. In 1890 Albert Snake is transferred to the Ahtahkakoops Band where he is given treaty no. 126 and where [he] remains thereafter.

7. Alfred Snake is the son of Albert Snake.

The Shanahan report makes the following assertions of fact:

8. The paylists for the period 1876 to 1886 inclusive show conclusively that no son of Ispimikkakeetoot moved out of the Band.

9. There is no evidence to support the contention of Alfred Snake that he is the grandson of Ispimikkakeetoot (Young Chipeewayan) and Omamees.

The Four Arrows report makes the following assertions of fact:

10. If Albert Snake is a son of Ispimikkakeetoot (Young Chipeewayan), he must have left his father's household prior to 1876.

Ben Weenie

Shanahan and Four Arrows agree on the following facts;

11. Mahchahchekoos appears on the Young Chipeewayan annuity paylist in the year 1882 under ticket no. 11, where the agent notes that he had been paid at Fort Walsh in 1881.

12. Mahchahchekoos is recorded on the 1883 annuity paylists of the Strike Him on the Back Band (as no.

76).

13. Mahchahchekoos appears on the annuity paylist of the Little Pine Band in 1884 (as no. 78) and remains with that Band until his death in 1892.

14. Winnie Manon is a child of Mahchahchekoos and received his own treaty number no. 159 in 1891.

15. Winnie Manon, together with his family, was transferred to the Poundmaker Band in 1903 (as no. 147), where he remained until his death in 1914.

16. Ben Weenie is a direct descendant of Winnie Manow [sic].

The Shanahan report makes the following assertions of fact:

17. Mahchahchekoos was not admitted to Treaty as a member of the Young Chipeewayan Band, was not a member of the Band when the reserve was surveyed for the Band in 1879, and appears on the paylist of the Band only for one year (i.e. in 1882).

The Four Arrows report makes the following assertions of fact:

18. Mahchahchekoos may be identical to Mahahtikoos whose family is admitted to Treaty with the Young Chipeewayan Band in 1876 and appears continuously on the paylist of that Band until 1880.

19. Mahchahchekoos of the Young Chipeewayan Band appears as Mahchahchecoose (Bad Antelope) in the 1881 annuity paylist for the Lucky Man Band, paid at Fort Walsh (as no. 115).

Leslie Angus

Shanahan and Four Arrows Reports agree on the following facts;

20. Pahpahmootaywin took treaty with the Young Chipeewayan Band in 1877.

21. Pahpahmootaywin appears on the annuity paylists of the Young Chipeewayan Band for the first and last time in 1877.

The Shanahan report makes the following assertions of fact:

22. The annuity paylists of the Bands and stragglers in the records which were examined, did not yield any information as to the whereabouts of Pahpahmootaywin after 1877.

23. There is no recorded evidence whatsoever to show the connection between Pahpahmootaywin and Eliza Watchusk.

The Four Arrows report makes the following assertion of fact:

24. Pahpahmootayin [sic] is likely identical to The Man Who is Walking About (also known as Paymotaywein) who received treaty annuities with the Little Pine Band in 1884 (as no. 2) and continued to be listed with that Band until his death about in 1887. His widow (Keheoquimick) continued to be listed or paid annuities with the Little Pine Band until 1890.

Larry Chickness

Shanahan and Four Arrows Reports agree on the following facts:

25. Keeyewwahkapimwaht (Shooting Eagle) was admitted to Treaty, as a Headman, with the Young Chipeewayan Band in 1876 and received his annuities with the Band until 1882.

26. Keeyewwahkapimwaht was paid as a Headman of the Young Chipeewayan Band in the annuity paylists of the Poundmaker Band for the years 1883 (as no. 66) and 1884 (as no. 67).

27. In 1888 and thereafter, Keeyewwahkapimwaht (also known as David Keokapamot) continued to receive his annuities as a member of the Poundmaker Band (as no. 67).

28. In 1889 one of the daughters of Keeyewwahkapimwaht married Kasokwayo (Sahsookoowayo) of the Poundmaker Band (no. 9) with whom she reportedly went to the United States in 1893, Kasokwayo returning in 1916 to Canada without his wife and children and being transferred to the Sweetgrass Band.

29. In 1896 a second daughter of Keeyewwahkapimwaht married Harry Chickness of the Poundmaker Band (No. 124).

30. Larry Chickness is a direct descendant of Harry Chickness.

Lola Okeeweehow

Shanahan and Four Arrows Reports agree on the following facts:

31. Ookeewahow and his wife were admitted to Treaty with the Young Chipeewayan Band in 1876, and are paid with that Band until 1879 when the addition of one boy is noted.

32. In 1885 a man named Ookeewahow appears as no. 121 in the annuity paylist of the Piapot Band and it is noted that he "drew with no. 43 in ‘84, draws now with his mother widow of the Magpie no. 153 pay sheet 1883".

33. In 1906 annuity paylist of the Piapot Band contains the notation "last paid in 1902, been living at Maple Creek till death of wife is Piapot's son".

34. In 1917 Ookeewahaw was transferred to the Muscowpetung Band (as no. 98).

The Shanahan report makes the following assertions of fact:

35. There is no plausible or compelling reason to think that Okeewahaw of the Young Chipeewayan Band, being a married person with a child paid under his own number as a member of the Band until 1879, would have any reason to spend the next six years of his life as a member of Piapot's Band and to be paid under the annuity number of his father, The Magpie.

36. There is no evidence to suggest that the Ookeewahaw referred to in the annuity paylists of the Piapot Band was at any time paid with the Young Chipeewayan Band or connected in any way to that Band.

Higgins Family

Shanahan and Four Arrows Reports agree on the following facts:

37. Ooseechekwahn (Moving Stone) (also known as Oostiquan) and his wife were admitted to Treaty with the Young Chipeewayan Band in 1876 (as no. 18) and that he continued to be paid or listed on the annuity paylists of the Young Chipeewayan until 1886.

38. Ooseechekwahn died about 1886 and that his widow and family were transferred in 1888 to the Thunderchild Band (as no. 111).

39. A daughter of Ooseechekwahn, named Emma Apistatim, withdrew from Treaty in 1890 after her marriage to Peter Higgins.

[26] As noted in footnote 5 to these reasons, Alfred Snake was one of the original plaintiffs in this action. At the time of trial, Alfred Snake was deceased. By Court Order, Alfred Snake's son, George Kingfisher was

substituted as a plaintiff. Counsel agreed that the portion of the foregoing summary report relating to Alfred Snake applies fully to George Kingfisher.

2) Testimony at Trial

a) George Kingfisher

[27] In his testimony before the Court, George Kingfisher identified his position on the "Chipewayan Snake Alexander Family Group Chart"[7] and confirmed that the children named on that Chart as his are his. He then corrected the chart, noting that Alfred Snake and Eva Kingfisher were his parents and Albert Snake and Jemima Starblanket were his grandparents.

[28] George Kingfisher related conversations he had as a teenager with his grandfather, Albert Snake. During these conversations, Albert Snake had spoken of a "reserve they had lost" named Stony Knoll, of going "south on a hunting trip," and of how "times were hard" during his own childhood. He related how his great, great grandfather, Chief Chipeewayan, and other band members including Albert and his grandmother, Chief Chipeewayan's wife, had gone south from the Fort Carlton area to hunt buffalo because the Indian Affairs agency had given them meat that was "unfit to eat". It was on this trip that Chief Chipeewayan passed away, around Maple Creek. The remaining band members then moved back to the Fort Carlton area, but their land was already settled when they arrived, and so they scattered. According to Albert Snake, his grandmother had looked after him on this trip.

[29] George Kingfisher testified that he is registered at the One Arrow Reserve, his mother's reserve, and that he had lived there for some ten (10) months in the early 1980's. He also confirmed that he had lived on the Sandy Lake Reserve[8] for some time, as did his father, Alfred Snake, and his grandfather, Albert Snake, but he did not think either was registered there. He related how his grandfather, Albert Snake, did a little farming and had haying grounds, but that the then Chief, Alan Ahenakew, took the haying grounds, saying that Albert Snake "didn't belong from there". George Kingfisher testified to a similar personal experience when he was young, when he was refused assistance by the Chief of the Sandy Lake Reserve on the ground that he "didn't belong from there".

[30] Mr. Kingfisher and his children live off-reserve. He could not remember there being a process in 1951, when he was about six years of age, whereby band lists were posted on the reserves and Indian people were registered.

b) Harry Michael

[31] Harry Michael[9] confirmed that he witnessed statements by Albert Snake and Alfred Snake.[10] Harry Michael indicated that he had many conversations with Albert Snake about the "land they have lost" and testified that everyone knew that "something went wrong with that reserve that was taken away". He expressed the belief that young Chipeewayan was Albert Snake's father and Maria Standingwater was Alfred Snake's cousin, apparently having been told this by Albert Snake himself. Mr. Michael also testified to an event that occurred when he was Chief of Beardys Reserve, sometime between 1951 and 1954, when Albert Snake apparently met with the Prime Minister of Canada, the Right Honourable Mr. Diefenbaker and told him, "I am the chief".[11]

[32] Harry Michael could not remember there being a process in 1951 whereby band lists were posted on the reserves and Indian people were registered.

c) Doris Chickness

[33] In her testimony before the Court, Doris Chickness identified her position on the "Chickness Family Group Chart"[12] and confirmed that the children and grandchildren named are hers and that the plaintiff Larry Chickness is her nephew, is shown on the Chart merely as "Larry", and is the son of her brother Alphonse and his

wife Hazel Brown. She testified that John and Louisa Weenie were her parents and Harry Chickness and Ashlee, listed as "Second Daughter of Kee Yew Wah Ka Pim Waht", were her grandparents. She identified Harry and Ashlee in a family photo.[13] Doris Chickness testified that she stayed with her grandparents "off and on" when she was about 7 or 8 years of age. She indicated that her grandfather, Harry Chickness, was from the Poundmaker Reserve, and her grandmother, Ashlee's father, was Shooting Eagle or Kee-Yew-Wah-Ka-Pim-Waht.[14]

[34] Doris Chickness could not remember there being a process in 1951 whereby band lists were posted on the reserves and Indian people were registered.

d) Jimmy Myo

[35] Jimmy Myo, a Cree elder from Saskatchewan, related some of his understanding of the marriage custom in the late 1800's and early 1900's, which he had learned from conversations with his parents, aunts, and uncles. There was no formal marriage ceremony, though, in many areas there would be a feast, and the parents would give the young couple a new tent or teepee or other possessions to aid in their living. Jimmy Myo attested that couples were quite free to live where they wanted, according to their circumstances. Although frequently the new husband would go off to the area of residence of the new bride, sometimes they would go back to the husband's reserve, as was the case in respect of Jimmy Myo's parents and of Doris Chickness' grandparents.[15]

e) Leslie Angus

[36] In his testimony before the Court, Leslie Angus identified his position on the "Angus Family Group Chart"[16] and confirmed his relationship with the siblings, children, and grandchildren named. He attested that Julia Tootoosis and Harry Angus were his parents and that Mary Louise Favel and John Tootoosis were his grandparents. Leslie Angus' mother told him that he had been born on the Poundmaker reserve and that his great grandmother's name was Eliza Watchusk, or "Muskrat" in Cree,[17] and his great grandfather's name was Basil Favel. The witness attested that his mother also used to tell him since he was a child, about his uncle, John Tootoosis,[18] who used to "wander around" just like Leslie Angus' great great grandfather, Pah Pah Mootawin which, in Cree, apparently means "Walking Man". He attested that his mother used to tell him that he was related to Pah Pah Mootawin on her side of the family.

[37] The family of Leslie Angus' father was originally from Beardys, but one family member had married a woman from the Thunder Child Band. He attested that his family on his mother's side, both grandparents and great grandparents, were from Poundmaker. He recalled how his family was not always welcome on the Thunder Child reserve. For example, on one occasion, some people on the reserve collected names for a petition to have his family leave. More recently, Leslie Angus was asked to write a letter explaining whether he planned to stay on the reserve "...because [his] descendants were not originally from Thunder Child."[19]

[38] Leslie Angus testified about how he learned of the claim to the Stony Knoll Reserve. He referred to his brother, who was articling with a Regina law firm, and to old provincial maps which showed the old reserve. Moreover, he related how everyone spoke about the situation, because there were "...quite a few families from Thunder Child that are from Young Chipeewayan Band" and "...Young Chipeewayan is buried in ThunderChild".[20] These stories came down through his parents, uncles, and his grandfather Joe Angus, or after soccer games and such when "...the old people would sit together...".[21] According to Leslie Angus, it was common knowledge on the reserve who was related to whom. "Like, Old Alfred Snake used to come and visit Mrs. Standingwater. That was her relative".[22]

f) Ben Weenie

[39] In his testimony before the Court, Ben Weenie identified his position on the "Weenie Family Group Chart"[23] and confirmed his relationship with the siblings and children named, as well as with Doris Chickness,

who is his father's cousin. He attested that Charles Weenie and Emma Paskimin are his parents and Ada Atcheynum and John Weenie are his grandparents, who, together with his grandparents on his mother's side, had helped raise him. Ben Weenie's grandfather, John Weenie, told him stories of the lost reserve or land claim and of traditional teachings and relationships. John Weenie, who was admitted to the Sweetgrass reserve in 1918, told him of the fear that many had of being ousted from a reserve that was not traditionally theirs, and how they would hide their origins to protect themselves. A struggle developed between traditional treaty Indians on their reserve, descended from treaty signatories, and others called "squatters". Ben Weenie's family on his grandfather's side was not from the Sweetgrass traditional group, but had come from a different area, though his grandmother was a traditional member of the Sweetgrass Band. He mentioned "talk" about his family not being allowed to be in the leadership at Sweetgrass because they belonged, traditionally, to a different Band.

[40] Ben Weenie testified that he learned from his grandfather that he was a descendent of a member of the Chief Chipeewayan Band, through Mah Chah Che Koos, or "Big Caribou",[24] and believed that he was the "...fifth descendent in a male line of the name". He further testified that his great grandfather, Weenie Mahon, and great grandmother, Betsy Chatsees, resided on the Poundmaker reserve.

[41] Ben Weenie had no direct memory of the process in 1951 whereby band lists were posted on the reserves and Indian people were registered. However, he later learned of this process, which he described as "housecleaning".

g) Joanne Gude

[42] In her testimony before the Court, Joanne Gude indicated that she considered herself a part of the Okeeweehow family group and identified her position on the "Okeeweehow Family Group Chart"[25]. She confirmed her relationship with the siblings, children, and grandchildren named on the chart and stated that Lola Gabriella Okeweehow, known as "Louise-Anne Larose", and Frank Larose were her parents and Lola Gabriella Dubois and Norman Okeeweehow were her maternal grandparents.

[43] Joanne Gude related some of the things that her mother Louise-Anne had told her. When Louise-Anne was four and a half years old, she had witnessed the funeral of her grandfather, who was identified to her as "moosum Okeeweehow". Louise-Anne remembered the people who were at the funeral and apparently helped direct traffic. When she was older, about 12 or 13, Louise-Anne learned from her own mother, Lola Gabriella, that "moosum had land up north".

[44] Joanne Gude attested that her grandfather, Norman Okeeweehow, was born at Maple Creek but moved to the Piapot Reserve because there was no more land up north. Later, he married Lola Gabriella Dubois from the Musquopeeting Reserve, and so he moved to that reserve with his father.

h) Donald Higgins

[45] In his testimony before the Court, Donald Higgins identified his position on the "Higgins Family Group Chart"[26] and stated that Harris Colin Leonard Higgins was his father and Emma Apistatim was his grandmother. He expressed the belief that his grandfather, Peter A. Higgins, was in the Northwest Mounted Police, his grandmother was a member of the Chief Chipeewayan Band, and that they were married sometime in the 1880s. Thereafter, his grandmother was taken off the treaty list and worked around a residential school, where she was later buried.[27] Donald Higgins attested that he learned much of this information from a Mr. Bullard, an elderly historian, who owned a museum in Battleford. Mr. Higgins attested that he also met Alfred Snake, sometime in the 1970's, who gave him more information and filled in some of the "gaps", though "not to a great extent".

i) Joseph Albert Angus

[46] Joseph Albert Angus, Barrister and Solicitor and a member of the Saskatchewan Bar, is a brother of

Leslie Angus. He grew up on the Thunder Child Reserve and studied at the University of Saskatchewan and the University of Winnipeg. Mr. Angus testified that, while he was articling with Griffin, Beke, Thorson and Maddigan in Regina in February 1984, a delegation came to the law firm's offices seeking legal representation concerning a Stony Knoll Reserve claim. Apparently, they had previously attempted to negotiate with the Government of Canada, but were told that they had no provable claim. Thus, having no alternative, they sought legal representation to proceed before this Court and this action followed.

j) Sidney Fineday

[47] Sidney Fineday, who was approaching 76 years of age at the time he testified, and lived on the Sweetgrass Reserve, attested to his association with the elders of his "group" since he was about 17 years of age. By reference to the example of his grandfather, who married in or about 1885, he described the marriage customs of that time and how the usual practice was for the new husband to live with the group of the bride. "The usual exercise of that, after the initiation of the marriage was that the bride be left with her parents, her brothers, her sisters", he testified.[28] It seems that this practice developed in part because the husband would leave to hunt, or as a warrior, and the wife would be able to stay with her own family while he was away. He agreed that this practice might be different if the husband was not "a gatherer" of food or a warrior. However, he indicated that, of 1500 people on the Sweetgrass Reserve at the time of the trial of this matter, only four (4) were viable farmers, and the rest were required to wander and to take up trades and leave the reserve to survive.

[48] Sidney Fineday described the place of children in the community, saying that they "...were the most valued possession of the band..." and that they "...represented the future and success of that particular band or camp...". The band would care for the children regardless of who their parents were.[29]

[49] Sidney Fineday spoke about his grandmother, Emma, who died and was buried at Battleford at the industrial school. He testified that she was the grandmother of Donald Higgins.

THE ISSUES

[50] The following statement of issues is drawn largely from the defendant's written submissions although it overlaps very substantially with the issues as identified in written submissions on behalf of the plaintiffs. The reference in the first issue question to descendants "...in an unbroken line..." was not used by counsel at trial, in evidence or in written submissions, although the concept was alluded to throughout submissions on behalf of the defendant.

1) On the evidence before the Court, have the plaintiffs, or any of them, established that they are descendants in an unbroken line of members of the Chief Chipeewayan Band?

2) If so, are the plaintiffs, or any of them, entitled to bring this action, not only on behalf of themselves, but also on behalf of those described in the style of cause as "...the Descendants of the Chief Chipeewayan Band?

3) Does participation in recent treaty land entitlement settlement agreements affect the right of the plaintiffs, or any of them, to claim the relief sought in this action?

4) Is the claim by the plaintiffs barred by *The Limitation of Actions Act*[30] or by laches?

5) Is Order in Council P.C. 1155 of 1897, which purported to transfer the administration of the lands comprising Stony Knoll Reserve, valid?

ANALYSIS

1) On the evidence before the Court, have the plaintiffs, or any of them, established that they are descendants in an unbroken line of members of the Chief Chipeewayan Band?

a) Evidentiary Concerns - Proving Aboriginal Rights

[51] In *Squamish Indian Band* v. *Canada*[31], my colleague Madame Justice Simpson summarized in the following terms in paragraphs 29 to 34 of her reasons the guidance that had been provided by the Supreme Court of Canada, at the time she wrote her reasons, on the issue of oral history evidence:

In *Delgamuukw* v. *British Columbia*, ... ("*Delgamuukw"*), at para. 80, the Supreme Court of Canada repeated a direction it had given in *R.* v. *Van der Peet*, 1996 CanLII 216 (S.C.C.), [1996] 2 S.C.R. 507 at para. 68. There, the Court said:

In determining whether an aboriginal claimant has produced **evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition** integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the **evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in.** The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.

In *Delgamuukw*, the court described oral history by making reference to the Report of the Royal Commission on Aboriginal Peoples ... where oral history was said to comprise "...legends, stories and accounts handed down through the generations in oral form". As well, the Supreme Court referred ... to Dickson J.'s description of oral history in *Kruger* v. *The Queen* ... . There he said that oral history consisted of "out of court statements, passed on through an unbroken chain across the generations of a particular aboriginal nation to the present day".

The Supreme Court in *Delgamuukw* indicated that oral history evidence of this description is to be placed on an equal footing with other types of historical evidence in reaching a determination about an historical truth. This, the Court said, is to be the case even though the oral history evidence may not meet the requirements of an exception to the rule against hearsay, may not be historically accurate, may lack detail, and may only be verified by the community which tenders it as evidence.

Accordingly, in spite of its potential failings, oral history relating to pre-sovereignty practice, customs and traditions has been accepted of necessity because it is the only evidence Indian plaintiffs have been able to offer in litigation which profoundly affects their interests. This acceptance was entirely reasonable in cases such as *Delgamuukw* in which the issues or historical truths being addressed were broad questions which covered a long period of time. In *Delgamuukw*, the historical truths sought were answers to questions about which bands used and occupied lands, about the internal boundaries between the bands' lands, and about the Indians' land tenure practices prior to and at the assertion of British sovereignty.

In *R.* v. *Marshall*, ... ("*Marshall"*) and *R.* v. *Badger* ... (*"Badger"*), the Supreme Court of Canada considered oral history evidence relating to historical truths in post-contact and post-sovereignty times. In both cases, the truth sought was information about the historical or cultural context in which treaties were negotiated and signed (in 1760-61 and 1899 respectively). Oral history evidence on those topics was accepted to enable the court to reach conclusions about the intention of the Indians. The evidence was directed to the situation before and at the date the treaties were signed. The subject matter concerned long-standing customs and practices.

In contrast to cases such as *Marshall*, *Badger* and *Delgamuukw*, precise historical accuracy is important in this case. ... [emphasis added, citations omitted]

[52] As in the case before Madame Justice Simpson, precise historical accuracy is important in this case where the ability of the plaintiffs to succeed is contingent upon their establishing, on a balance of probabilities, that they are descendants in unbroken lines of members of the Band.

[53] As Madame Justice Simpson noted in paragraph 39 of her reasons, "...the historical truths sought in this

case are narrow, specific questions." Such is also the case here.

[54] More recently, in *Mitchell* v. *Canada (Minister of National Revenue - M.N.R.)*[32], Chief Justice McLachlin revisited the issue of evidentiary concerns in proving aboriginal claims. She wrote at paragraphs 27 and 28:

Aboriginal right claims give rise to unique and inherent evidentiary difficulties. Claimants are called upon to demonstrate features of their pre-contact society, across a gulf of centuries and without the aid of written records. Recognizing these difficulties, this Court has cautioned that the rights protected under s. 35(1) [of the *Canadian Charter of Rights and Freedoms*] should not be rendered illusory by imposing an impossible burden of proof on those claiming this protection (*Simon* v. *The Queen*, ...). Thus in *Van der Peet*, ... the majority of this Court stated that "a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in ... .

This guideline applies both to the admissibility of evidence and weighing of aboriginal oral history ... .
[emphasis added, citations omitted]

[55] On the issue of admissibility, Chief Justice McLachlin wrote at paragraphs 29 *et seq.:*

Courts render decisions on the basis of evidence. This fundamental principle applies to aboriginal claims as much as to any other claim. *Van der Peet* and *Delgamuukw* affirm the continued applicability of the rules of evidence, while cautioning that these rules must be applied flexibly, in a manner commensurate with the inherent difficulties posed by such claims and the promise of reconciliation embodied in s. 35(1). This flexible application of the rules of evidence permits, for example, the admissibility of evidence of post-contact activities to prove continuity with pre-contact practices, customs and traditions (*Van der Peet*, ...) and the meaningful consideration of various forms of oral history (*Delgamuukw*,...).

The flexible adaptation of traditional rules of evidence to the challenge of doing justice in aboriginal claims is but an application of the time-honoured principle that the rules of evidence are not "cast in stone, nor are they enacted in a vacuum" (*R.* v. *Levogiannis*, ... Rather, they are animated by broad, flexible principles, applied purposively to promote truth-finding and fairness. The rules of evidence should facilitate justice, not stand in its way. Underlying the diverse rules on the admissibility of evidence are three simple ideas. First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. Second, the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it. Third, even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.

In *Delgamuukw*, mindful of these principles, the majority of this Court held that the rules of evidence must be adapted to accommodate oral histories, but did not mandate the blanket admissibility of such evidence or the weight it should be accorded by the trier of fact; rather, it emphasized that admissibility must be determined on a case-by-case basis ... . Oral histories are admissible as evidence where they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge.

Aboriginal oral histories may meet the test of usefulness on two grounds. First they may offer evidence of ancestral practices and their significance that would not otherwise be available. No other means of obtaining the same evidence may exist, given the absence of contemporaneous records. Second, oral histories may provide the aboriginal perspective on the right claimed. ...
[emphasis added, citations omitted]

As to reliability as a factor in determining admissibility, Chief Justice McLachlin continued at paragraphs 33 and 34:

The second factor that must be considered in determining the admissibility of evidence in aboriginal cases is reliability: does the witness represent a reasonably reliable source of the particular people's history? The trial judge need not go so far as to find a special guarantee of reliability. However, inquiries as to the witness's ability to know and testify to orally transmitted aboriginal traditions and history may be appropriate both on the question of

admissibility and the weight to be assigned the evidence if admitted.

In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions. Oral histories reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective. Thus, *Delgamuukw* cautions against facilely rejecting oral histories simply because they do not convey "historical" truth, contain elements that may be classified as mythology, lack precise detail, embody material tangential to the judicial process, or are confined to the community whose history is being recounted.

[56] Chief Justice McLachlin then turned to the issue of the interpretation and weighing of evidence in support of aboriginal claims, assuming the threshold of admissibility to have been met. In this regard, she wrote at paragraphs 36 to 39:

The second facet of the *Van der Peet* approach to evidence, and the more contentious issue in the present case, relates to the interpretation and weighing of evidence in support of aboriginal claims once it has cleared the threshold for admission. For the most part, the rules of evidence are concerned with issues of admissibility and the means by which facts may be proved. As J. Sopinka and S.N. Lederman observe, "[t]he value to be given to such facts does not ... lend itself as readily to precise rules. Accordingly, there are no absolute principles which govern the assessment of evidence by the trial judge" ... . This Court has not attempted to set out "precise rules" or "absolute principles" governing the interpretation or weighing of evidence in aboriginal claims. This reticence is appropriate, as this process is generally the domain of the trial judge, who is best situated to assess the evidence as it is presented, and is consequently accorded significant latitude in this regard. Moreover, weighing evidence is an exercise inherently specific to the case at hand.

Nonetheless, the present case requires us to clarify the general principles laid down in *Van der Peet* and *Delgamuukw* regarding the assessment of evidence in aboriginal right claims. The requirement that courts interpret and weigh the evidence with a consciousness of the special nature of aboriginal claims is critical to the meaningful protection of s. 35(1) rights. As Lamer C.J. observed in *Delgamuukw*, the admission of oral histories represents a hollow recognition of the aboriginal perspective where this evidence is then systematically and consistently undervalued or deprived of all independent weight ... . Thus, it is imperative that the laws of evidence operate to ensure that the aboriginal perspective is "given due weight by the courts" ... .

Again, however, it must be emphasized that a consciousness of the special nature of aboriginal claims does not negate the operation of general evidentiary principles. While evidence adduced in support of aboriginal claims must not be undervalued, neither should it be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law, which, as they relate to the valuing of evidence, are often synonymous with the "general principles of common sense"... . As Lamer C. J. emphasized in *Delgamuukw*, ...:

[A]boriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. However, that accommodation must be done in a manner which does not strain "the Canadian legal and constitutional structure" ... . Both the principles laid down in *Van der Peet* - first, that trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, and second, that trial courts must interpret that evidence in the same spirit - must be understood against this background. ...

There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, "[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse" ... . In particular, the *Van der Peet* approach does not operate to amplify the cogency of evidence adduced in support of an aboriginal claim. Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. Placing "due weight" on the aboriginal perspective, or ensuring its supporting evidence an "equal footing" with more familiar forms of evidence, means precisely what these phrases suggest: equal and due treatment. While the evidence presented by aboriginal claimants should not

be undervalued "simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case" ... , neither should it be artificially strained to carry more weight than it can reasonably support. If this is an obvious proposition, it must nonetheless be stated.
[citations omitted; a reference to added emphasis is also omitted]

[57] Against the foregoing guidance, I am satisfied that the oral history evidence adduced before me by and on behalf of the plaintiffs, other than Donald Higgins, regarding their ancestry, as well as the additional oral history evidence provided by Sidney Fineday and Jimmy Myo, should be admitted. It is indeed useful to the determination of the "narrow, specific questions" here at issue, particularly in light of the fact that the authors of the expert reports as to the lineage of each of the plaintiffs did not appear before me and I was therefore not in any position to evaluate, in the light of cross-examination, the respective merits of the conflicting conclusions adopted by the authors of those reports. Further, having had an opportunity to observe the demeanour of the witnesses who appeared before me as they gave their testimony and were subjected to reasonable and respectful cross-examination, I am satisfied that their evidence was reasonably reliable and of probative value in the sense that it was, in each case, an honest recalling of recollections of conversation and events, invariably of many years ago, and in respect of which written records are sparse or, more often, nonexistent.

[58] Elements of the testimony of Donald Higgins are of a different character. He acknowledged before the Court that he learned much of the information about his family history that he attested to from an elderly historian, the owner of a museum in Battleford. The expertise of that individual was not established. He was not before the Court so the reliability of the information that he passed on to Mr. Higgins could not be evaluated. There was no indication before the Court that he himself was an Indian with first hand knowledge from oral history sources of Mr. Higgins' family history, particularly as it related to Mr. Higgins' grandmother, Emma Apistatim and her heritage. In the circumstances, I conclude that elements of Mr. Higgins testimony regarding his family history should not be admitted, albeit that I am satisfied that that conclusion has little if any impact on the outcome of his claim.

[59] In the words of Chief Justice McLachlin, the more contentious issue, and certainly the more difficult, relates to the interpretation and weighing of the totality of the evidence in support of the claim by each of the plaintiffs and whether he or she is a descendant, in an unbroken line, of a member of the Band. I now turn to that issue.

b) Weighing of the Evidence

[60] George Kingfisher, the first of the plaintiffs to testify, asserted a direct line to Chief Chipeewayan through his father, Alfred Snake, his grandfather, Albert Snake, and Young Chipeewayan, the son of Chief Chipeewayan. His oral history testimony was entirely consistent with the acknowledged itinerant life of the members of the Band, both before and following the signing of Treaty No. 6, with the common theme and the documentary evidence regarding a lost reserve, and with the dispersal of members of the Band in the face of terrible difficulties and troubling, if not disorienting, circumstances for the Plains Indians in the last part of the of the 19th century. That being said, he was quick to acknowledge a significant error on the face of the "Chipewayan Snake Alexander Family Group Chart", Schedule 1, in his own family line. Further, the elements of the Shanahan report and the Four Arrows report on which the Dietz report indicates there is agreement, cast a very significant doubt on his assertion that Young Chipeewayan was the father of his grandfather, Albert Snake.

[61] The most favourable of those reports to Mr. Kingfisher's claim, the Four Arrows report, acknowledges that, if Albert Snake is a son of Young Chipeewayan, in the words of the Dietz report, Albert "...must have left his father's household prior to 1876." The Chipewayan Snake Alexander Family Chart indicates that Mr. Kingfisher's grandfather, Albert Snake, was born in 1872. If Albert were to have left his father's household prior to 1876, he would have left by the time he was four (4) years of age. There was simply no evidence before me to establish other than by pure speculation how or why this might have been accomplished. Testimony regarding the broad

acceptance of community responsibility for the children of members of the community might have made such a departure from Young Chipeewayan's household possible and this alone could provide the basis for speculation. The testimony of Harry Michael tended to corroborate George Kingfisher's claim, but only in the most general of terms. Once again, his knowledge derived from Albert Snake and was no more helpful with regard to the link between Albert Snake and Young Chipeewayan then was the evidence of Mr. Kingfisher himself. I am not prepared to speculate with regard to what I conclude is a fatal break in the chain.

[62] Given the onus on Mr. Kingfisher in this matter, on a standard of a balance of probabilities, I cannot conclude that Albert Snake, Mr. Kingfisher's grandfather, and that much I am prepared to accept, is himself a son of Young Chipeewayan. In the result, Mr. Kingfisher's claim to be a direct descendant in an unbroken line of a member of the Band has not been established.

[63] Doris Chickness was quite tentative in her testimony. Counsel for the plaintiffs led her in her testimony to a substantial degree. That being said, she clearly and unequivocally identified the plaintiff Larry Chickness on the Chickness Family Group Chart, Schedule 2, where he is identified merely as "Larry". She further identified her parents and her grandparents on the Chart where her grandmother is identified simply as "second daughter". In response to counsel's question:

Your grandmother, where did she come from?

Ms. Chickness answered:

I don't know. That's all I know, that his dad - - her dad, Shooting Eagle, they must have met somewhere, and she married to my grandfather. That's all I know.

Counsel persisted and the following exchange took place:

Q You mentioned her dad. Could you tell me that again, that her dad was ...?

A Shooting Eagle.

Q Shooting Eagle?

A Yes.

Q That was a name which your grandmother's dad had, was Shooting Eagle; is that right?

A Yes.

Q Did that have another name in Cree? If you said Shooting Eagle in Cree, would it have a name?

A Yes. Kee-Yeu-Ah -Tiah-Pim-Waht.

Q Well, I will show you again [the Family Chart, Schedule 2] from the agreed statement of documents. There is a name up here, Kee-Yeu-Ah-Tiah-Pim-Waht.

A Yes. That's the name. Yes.

Q Your grandmother said that that was her father?

A Yes.[33]

[64] According to the "Dietz Summary", the Shanahan and Four Arrows reports are in agreement that Larry Chickness is a direct descendant of Harry Chickness, that a second daughter of Shooting Eagle or Kee-Yeu-Wah-Ka-Pim-Waht married Harry Chickness of the Poundmaker Band in 1896 and that Shooting Eagle was admitted to

Treaty as a Headman with the Chief Chipeewayan Band in 1876 and received his annuities with the Band until 1882. While his name appeared on the annuity paylists of the Poundmaker Band for 1883 and 1884, he continued to be paid as a Headman of the Chief Chipeewayan Band. Thereafter, he received annuity payments as a member of the Poundmaker Band.

[65] I turn then, to the impact of relevant law following the marriage of Shooting Eagle's second daughter to Harry Chickness in 1896. Chapter 18 of the *Statutes of Canada, 1876*, entitled "An Act to amend and consolidate the laws respecting Indians", provided in paragraph 3(d) as follows:

(*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:

This provision or a substantially similar provision remained applicable when Shooting Eagle's second daughter married Harry Chickness, who was acknowledged then to be a member of the Poundmaker Band. By reason of her marriage, by law, Shooting Eagle's second daughter ceased to be a member of the Chief Chipeewayan Band and became a member of the Poundmaker Band. In the result, the chain between Larry Chickness and the Band was broken, albeit that, on the evidence before me, I am satisfied that he is a direct descendant of a member of the Band. He is not a descendant in an unbroken line.

[66] Against the foregoing, on a standard of a balance of probabilities, I am satisfied that Larry Chickness has failed to establish that, in law, he is a direct descendant in an unbroken line of a member of the Band.

[67] The testimony provided by the plaintiff Leslie Angus was straightforward and direct with regard to his relationships to his siblings, children and grandchildren as shown on the "Angus Family Group Chart", Schedule 3, and was equally direct with regard to his relationships to his parents and grandparents. Beyond that, his testimony became somewhat vague and convoluted and I find my difficulty in that regard to be contributed to by the fact that the Family Group Chart is substantially incomplete. In particular, the evidence regarding the relationship between the witnesses' great grandmother, Eliza Watchusk, and the person shown to be Eliza Watchusk's father, Pah Pah Mootawin, was vague. The Dietz report indicates that the Shanahan and Four Arrows reports agree that Pah Pah Mootawin took Treaty with the Band in 1877 and did not appear on paylists of the Band after that time. The Shanahan report asserts that there is no recorded evidence whatsoever to show a connection between Pah Pah Mootawin and Eliza Watchusk. According to the Dietz report, the Four Arrows report does not contest the Shanahan report finding regarding the lack of evidence of a parent/child relationship between Pah Pah Mootawin and Eliza Watchusk.

[68] Given my concern about the testimony of Mr. Angus and given the Shanahan report's assertion that the chain of relationship between Leslie Angus and a member of the Band may be broken between Eliza Watchusk and Pah Pah Mootawin, I conclude that, on the basis of a standard of a balance of probabilities, Mr. Angus has failed to establish that he is a direct descendant of a member of the Band. Even if I were wrong in this, all of Mr. Angus' great grandmother, grandmother and mother married outside the Band, in the first two cases to members of the Poundmaker Band and in the case of his mother, to a member of the Thunder Child Band. On the basis of the reasoning above regarding Larry Chickness, Mr. Angus has further failed to establish an unbroken chain of relationship to a member of the Band.

[69] Ben Weenie was very open and forthright about the difficulties that his grandparents and persons like them had living on a reserve where they were not regarded as traditional Treaty Indians entitled to residency on that reserve but rather as "squatters". He testified as to information that his grandfather, John Weenie, passed on to him about his ancestry and relationship to the Band. However, when it came to detailing that ancestry, he became very vague and was critical of the portion of the Weenie Family Group Chart, Schedule 4, that identifies the family's ancestor within the Band as Mah Chah Che Koos.

[70] With respect to Mr. Weenie, the Dietz report indicates that the Shanahan and Four Arrows reports are in agreement that Mah Chah Che Koos appeared on the Band annuity paylists in the year 1882, under ticket no. 11,

where the agent noted that Mah Chah Che Koos had been paid at Fort Walsh in 1881. Mah Chah Che Koos does not again appear on the Band paylists.

[71] While I am satisfied on the basis of Mr. Weenie's testimony, the Weenie Family Group Chart and the Dietz report that Ben Weenie is most likely a direct descendant of Mah Chah Che Koos, I am not prepared to accept the speculation recorded in the Dietz report from the Four Arrows report that Mah Chah Che Koos might be identical to an individual of another name whose family was admitted to Treaty with the Band in 1876 and appeared continuously on the paylists of that Band until 1880.

[72] On a standard of a balance of probabilities, I conclude that Ben Weenie has failed to establish that he is a direct descendant of a member of the Band.

[73] Joanne Gude testified on behalf of the Okeeweehow family represented in this action by the plaintiff Lola Okeeweehow. As earlier indicated in these reasons, Ms. Gude identified her position on the "Okeeweehow Family Group Chart", Schedule 5, and confirmed her relationship with her siblings and the children and grandchildren named on the 0Chart. She identified Lola Gabriella Okeeweehow and Frank Larose as her parents and further identified Lola Gabriella Dubois and Norman Okeeweehow as her maternal grandparents.

[74] Ms. Gude testified as to her remembrance of her great grandfather's funeral, when she was a very young girl, and identified her great grandfather as the Oo Kee Wa Haw identified at the top of the Okeeweehow Family Group Chart. She also testified that her grandmother had referred in a very general way in front of her to Ms. Gude's great grandfather, having had "...land up north". Ms. Gude did not testify that her great grandfather had been identified to her as a member of the Band.

[75] The Dietz report indicates that the Shanahan and Four Arrows reports agree that Oo Kee Wa Haw and his wife were admitted to Treaty with the Band in 1876 and were paid with the Band until 1879 when records indicate that a son had been born to Oo Kee Wa Haw and his wife. It is most unlikely that that son was Ms. Gude's grandfather given that her grandfather is indicated on the Okeeweehow Family Group Chart as having been born in 1898.

[76] The Dietz report indicates that the Shanahan report asserts that subsequent appearances of a person named Oo Kee Wa Haw on annuity paylists of the Piapot Band should not be relied upon for a conclusion that the two Oo Kee Wa Haws are the same person.

[77] Given the apparent disappearance of the Oo Kee Wa Haw identified on the Okeeweehow Family Group Chart well before the birth of Ms. Gude's grandfather as recorded on that Chart, which recorded date of birth would appear to be reasonably consistent with the reported date of marriage of her grandfather, as also shown on that Chart, once again I conclude that the chain of succession from the plaintiff, Lola Okeeweehow, to an identified member of the Band is broken between the father of Lola Okeeweehow and the identified member of the Band, Oo Kee Wa Haw. In the result, against a standard of a balance of probabilities, I conclude that the plaintiff Lola Okeeweehow has failed to establish that she is a direct descendant of a member of the Band.

[78] Finally, Donald Higgins testified by reference to the Higgins Family Group Chart, Schedule 6. He identified his parents on the Chart and, allowing for some confusion in his testimony, he also identified his grandparents on that Chart. He attested to having himself done a considerable amount of family history research with the result that I am satisfied that his testimony based on that research of records could not be regarded as a recitation of oral history that had come down to him in a cultural milieu where written records were essentially non-existent. That being said, he clearly identified his grandmother, Emma Apistatim, as a direct descendant of a member of the Band who, according to the Dietz report, both the Shanahan report and the Four Arrows report agree was admitted with his wife to Treaty with the Band in 1876 and who continued to be paid or listed on the annuity paylists of the Band until 1886. Thus, but for one significant impediment, I am satisfied that his testimony, without reference to what he was told by a museum operator, and the documentary evidence establish a direct and unbroken chain from Mr. Higgins to a member of the Band.

[79] The significant impediment is this. Once again, the Dietz report records that the Shanahan and Four Arrows reports agree that Emma Apistatim withdrew from Treaty in 1890 after her marriage to Mr. Higgins' grandfather, Peter A. Higgins. Mr. Higgins acknowledged this in the following terms:

I believe that she - - when she married my grandfather, she was taken off the Treaty list, and I believe she worked around the school, if I am not mistaken. She worked around the school.[34]

[80] Section 11 of the *Indian Act*[35], which was in force at the time Emma Apistatim married Peter Higgins, read as follows:

Any Indian woman who marries any person other than an Indian, or a non-treaty Indian, shall cease to be an Indian in every respect within the meaning of this Act, except that she shall be entitled to share equally with the members of the band to which she formerly belonged, in the annual or semi-annual distribution of their annuities, interest moneys and rents; but such income may be commuted to her at any time at ten years' purchase, with the consent of the band.

[81] I am satisfied that whether Emma Apistatim "withdrew from Treaty", as the Shanahan and Four Arrows reports indicate, or was "taken off the Treaty list", presumably by reason of the foregoing legislative provision, the result is the same, the chain was broken. When Donald Higgins was born, while he was in a direct line of descent, through his grandmother, from an identified member of the Band, he could not claim to be a descendant of a member of the Band due to his grandmother's withdrawal or removal from the Band following her marriage to Mr. Higgins' grandfather.

c) Conclusion with respect to issue question 1

[82] Based on the foregoing, I conclude that, on the evidence before the Court, none of the plaintiffs has established that he or she is a descendant in an unbroken line of a member of the Young Chipeewayan Band. In some cases, an unbroken line of ascendancy from a plaintiff to a member of the Band is simply not established. In one case, a line of ascendancy is broken by a voluntary withdrawal from Treaty or by reason of a female antecedent of the plaintiff being "taken off" the Treaty list by operation of law. In other cases, female persons in a line of ascendancy ceased to be members of the Band by operation of law alone. In each case, the result is that, if a line of ascendancy was established, at some point in that line it is broken by reason of the fact that a member of the Band became a member of another band, or ceased to be a status Indian, and thus the plaintiff in question traced his or her line through another band or through a person not a status Indian and in each case the plaintiff's right to claim in this action was extinguished.

[83] The foregoing conclusion is sufficient to dispose of this action. However, on the chance that there might be an appeal with respect to that conclusion and my conclusion might be reversed, I will go on to deal with certain of the other issue questions.

2) Is any plaintiff found to be a descendant in an unbroken line of a member of the Chief Chipeewayan Band entitled to bring this action on his or her own behalf and on behalf of those described in the style of cause as "...the Descendants of the Chief Chipeewayan Band"?

[84] In *R.* v. *Marshall*[36], Mr. Justice Binnie, for the majority, commented on Treaty interpretation. At paragraphs 11 and 12, he wrote:

... even in the context of a treaty document that purports to contain all of the terms, this Court has made clear in recent cases that extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty. MacKinnon A.C.J.O. laid down the principle in *Taylor and Williams*,...:

...if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms.

The proposition is cited with approval in *Delgamuukw* v. *British Columbia*... and *R.* v. *Sioui*... .

Thirdly, where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms, *per* Dickson J. (as he then was) in *Guerin* v. *The Queen* ... . Dickson J. stated for the majority ...:

Nonetheless, the Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the Band understood would be embodied in the lease. The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown's agents had induced the Band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms.
[citations omitted]

[85] Mr. Justice Binnie continued at paragraph 14:

Subsequent cases have distanced themselves from a "strict" rule of treaty interpretation, as more recently discussed by Cory J., in *Badger*... at para. 52:

...when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement: see Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (1880), ... *Sioui* ..., Report of the Aboriginal Justice Inquiry of Manitoba (1991); Jean Friesen, Grant me Wherewith to Make my Living (1985). The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. [Emphasis added]

"Generous" rules of interpretation should not be confused with a vague sense of after-the-fact largesse.
[citations omitted]

[86] Against the foregoing, and in relation to the Treaty here at issue, being Treaty No. 6, signed on behalf of the Band and other Bands and the Government of Canada at Fort Carlton on the 23rd of August, 1876, the following extracts from the Alexander Morris text referred to by Justice Cory are relevant.[37] At page 202, Governor Morris is recorded as advising the assembly of Indians at the close of the first day of discussion, the 18th of August, 1876:

What I trust and hope we will do is not for today or tomorrow only; what I will promise, and what I believe and hope you will take, is to last as long as that sun shines and yonder river flows. You have to think of those who will come after you... .

On the following day, Governor Morris is recorded as having provided the following assurance to the Indians, which appears at page 205 of the text:

But understand me, once the reserve is set aside, it could not be sold unless with the consent of the Queen and the Indians; as long as the Indians wish, it will stand there for their good... .

Governor Morris is recorded as having declared at the conclusion of the same day, and this is recorded at page 209 of the text, the following:

This is a great day for us all. I have proposed on behalf of the Queen what I believe to be for your good, and not

for yours only, but for that of your children's children, and when you go away think of my words.

[87] On the 9th of September, 1876, while at Fort Pit, Governor Morris is recorded in the text as having told the Indians:

...The years will pass away and we with them, but the work we have done today will stand as the hills ... . my promises at Carlton have been written down and cannot be rubbed out... .

[88] Against the foregoing, I find it not the least surprising that the plaintiffs, on behalf of their claimed ancestors as well as generations to come, are troubled by the manner of disposition of the Stony Knoll Reserve in 1897 and that, in the result, however belatedly, they have brought this action to trial. Paraphrasing the closing words of Justice Dickson, as he then was, as quoted by Justice Binnie in *R.* v. *Marshall* and repeated above, it must be seen by the plaintiffs to be unconscionable to permit the Crown simply to ignore the foregoing pronouncements of Governor Morris. I agree with any such perception, but that is not the issue on which I am satisfied this matter must turn.

[89] It is not disputed that the Band never settled Stony Knoll Reserve. Further, I regard the evidence before me as conclusive of the fact that the Band dispersed during the 1880's and that sometime during the last years of that decade there ceased to be a paylist for members of the Band though persons who had been members of the Band or, as the plaintiffs would prefer, who continued to be members of the Band, appeared on paylists of other Bands.

[90] Counsel for the defendant, in his written submissions, urges that the evidence demonstrates that the Band was never a truly cohesive group; that various families and individuals joined and left the Band at various times; that the population of the Band dwindled sharply after its adhesion to Treaty 6; that the Band consisted of nineteen families with a total population of 84 individuals at the time of adhesion, while its population was down to fifteen or sixteen individuals by 1884. I am satisfied that with one inconsequential exception relating to individuals joining the Band from time to time, the foregoing submissions accord with the evidence before me.

[91] From the foregoing, counsel for the defendant urged that, as the members of the Band dispersed, they became members of other bands. I have greater difficulty with this submission. While, as previously noted, the names of members of the Band began to appear on the paylists of other bands, I am not satisfied that that constitutes evidence that they became members of those bands. Rather, I would prefer to interpret this reality as evidence of nothing more than an administrative convenience accomplished by, and for the benefit of, those charged with distributing annuities.

[92] I am assured that there was no statutory provision relating to the transfer of membership from one band to another before 1895, except as previously noted, on marriage. Transfers, if they took place, were achieved informally, largely based upon physical relocation of an individual or a family. Physical relocation was entirely consistent with the history of the Plains Indians. That being said, physical relocation of an individual or family onto the reserve of a band of which those relocating were not traditional members was not, on the evidence before me, consistent with assumption of membership in the band to which the reserve had been dedicated or with granting or acknowledgement of membership in that band by its members. The evidence before me is all to the effect that persons migrating onto the reserve of a band of which they were not traditional members were not fully accepted by traditional members of the band, did not receive all the rights and privileges in respect of the reserve of traditional members of the band and were, both in their own eyes and the eyes of traditional members of the band regarded as something equivalent to "squatters". The evidence of several of the witnesses who appeared before me indicates that this tradition continued to the time of the trial in this matter.

[93] In 1895, a section was added to the *Indian Act* in the following terms:

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.[38]

The foregoing would appear to be consistent with a tradition that admission to a band required the consent of the band. There was absolutely no evidence before me of consent to admission into other bands of persons who were members the Band and nonetheless settled on the reserves of other bands.

[94] The same statute amending the *Indian Act* added to that Act a provision which has, in its substance, been carried forward into the current *Indian Act*[39]. The current provision, subsection 16(2), reads as follows:

(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 moneys held by Her Majesty on behalf of the former band, but is entitled to the same interest in common in lands and moneys held by Her Majesty on behalf of the latter band as other members of that band.

(2) Une personne qui cesse de faire partie d'une bande du fait qu'elle est devenue membre d'une autre bande n'a aucun droit sur les terres ou sommes d'argent détenues par Sa Majesté au nom de la bande dont elle faisait partie, mais elle jouit des mêmes droits en commun, sur les terres et les sommes d'argent détenues par Sa Majesté au nom de l'autre bande, que les membres de cette dernière.

[95] I am satisfied that the foregoing has no application to certain of the plaintiffs in this action since, as earlier indicated, I find no evidence before me, save in respect of certain female ancestors of certain of the plaintiffs who married members of other bands, that any ancestor of a plaintiff became a member of another band.

[96] The evidence before me is certainly consistent with a conclusion that the Band became leaderless during the course of the 1880's.[40] I am satisfied on the evidence before me that that fact, together with conditions that prevailed on the Prairies for members of the Band and others at the relevant time, alone accounted for dispersal of the members of the Band. On the evidence before me, and subject to what follows, I conclude that the members of the Band to whom the plaintiffs claim a family relationship did not, except by operation of law, either formally or informally, assume membership in other bands.

[97] Counsel for the defendant notes that, in 1951, the *Indian Act* was amended[41] to add a definition of "Band members", to provide for the establishment of band lists and general lists, and to provide a mechanism under which an individual or a band could protest the inclusion of persons on a band list or general list. Brief reference to this process is made in a number of the summaries of testimony on behalf of the plaintiffs which appear earlier in these reasons.

[98] It is worthy of note that none of the plaintiffs adduced evidence before me to establish that, as a result of the 1951 amendment process, he or she or one of his or her direct ancestors was not determined by that process to be a member of a band other than the Chief Chipeewayan Band. In the absence of such evidence, I can only assume that those of the plaintiffs who are status Indians thereby were included, either directly or through one of their ancestors, on a band list for a band other than the Chief Chipeewayan Band, or a general list, failed to protest in respect of that inclusion, and, therefore, at that time, lost any claim to membership in the Chief Chipeewayan Band.

[99] But for the process referred to in the two preceding paragraphs and the assumptions that I draw in relation to it from the evidence, or more properly the lack of evidence, before me, I conclude that, if any of the plaintiffs other than Donald Angus had established to the satisfaction of the Court that he or she was a descendant in an unbroken line of a member of the Chief Chipeewayan Band, he or she would be entitled to bring this action

on his or her own behalf.

[100] As to whether or not any of the named plaintiffs who might be found to be entitled to bring this action on his or her own behalf would be entitled to also bring the action on behalf of those described in the style of cause as "...the Descendants of the Chief Chipeewayan Band", I conclude that any individual plaintiff so entitled would be equally entitled to bring the action on behalf of the described class.[42] If a technical amendment to the style of cause and a related technical addition to the statement of claim herein were required in order to achieve this result, notwithstanding the lateness with which such amendments might be proposed, I would be inclined to grant leave to make the required amendment or amendments.

3) Does participation in recent Treaty land entitlement settlement agreements affect the right of the plaintiffs, or any of them, to claim the reliefs sought in this action? and

4) Is the claim by the plaintiffs barred by *The Limitation of Actions Act* or by laches?

[101] As these issue questions are interrelated, I will deal with them together, and that very briefly. Each of the two issue questions presupposes a right of the plaintiffs, or one or more of them, to claim relief. They then address the issue of the right to relief, or certain forms of relief.

[102] The remedies sought on behalf of the plaintiffs in this action, as referred to earlier in these reasons, clearly contemplate a further stage or stages in this action if the plaintiffs or any of them are found entitled to bring the action and potentially to some form of relief against the defendant. Given that reality and the conclusions that I have reached to this point as reflected in these reasons, and given the limited evidence and submissions before me that bear on these two issue questions, I decline to deal with them in substance, at least at this stage. I am satisfied that they would be better dealt with in the context of a resumption of proceedings in this action following a finding, if there were to be such a finding, of some form of liability to the plaintiffs or any of them on the part of the defendant, subject only to some form of bar to relief, as contemplated by these issue questions.

5) Is Order in Council P.C. 1155 of 1897, which purported to transfer the administration of the lands comprising Stony Knoll Reserve valid?

[103] The declarations of the Honourable Alexander Morris, P.C., made in the context of the negotiations that led to Treaty No. 6 among others, are not in dispute. Nor is it in dispute that Treaty No. 6 included the following provisions:

...And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, ...

...the aforesaid reserves of land or any interest therein may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained;
[emphasis added]

[104] The *Indian Act*, as it read at the relevant time,[43] included the following provision:

39. No release or surrender of a reserve, or portion of a reserve, held for the use and benefit 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.

[emphasis added]

...

[105] Counsel for the defendant urges that none of the declarations given in the course of negotiations of Treaty No. 6, the cited extracts from Treaty No. 6 or section 39 of the *Indian Act* as it read at the relevant time has any relevance to the purported release or surrender of the Stony Knoll Reserve since, at the time of that release or surrender, the Band had ceased to exist. Since, as previously discussed, I am not satisfied on the evidence before me that the Band had ceased to exist at the relevant time, I reject counsel's submission.

[106] In the light of my conclusion that the evidence before me does not establish that the Band had ceased to exist at the time of the purported release or surrender, and I am satisfied that the onus was on the defendant in this regard since it is the defendant that alleges the action of the Governor in Council was justified, and in the light of the declarations earlier cited, the terms of Treaty No. 6 above-quoted and section 39 of the *Indian Act*, also above quoted, and further in the light of the fact that the evidence before me discloses that no efforts were made at consultation with members of the Band regarding the release or surrender and, in the result, no assent of any kind to the release or surrender was obtained from the Band, if I were required to do so, and I am not, I would find the Order in Council purporting to transfer the administration of the lands comprising Stony Knoll Reserve to be invalid.

[107] The question would then arise, what would be the implications of the invalidity of the transfer of administration of the lands comprising the Reserve, in the absence of any other considerations?

[108] In *Semiahmoo Indian Band* v. *Canada*[44], Chief Justice Isaac as he then was, for the Court, wrote at paragraphs 33 *et seq*:

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 authorities indicate that the surrender requirement is the source of the Crown's fiduciary obligation. In *Guerin et al. v. The Queen et al*., Dickson J. (as he then was) stated that "[t]he purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited."

In *Apsassin*, Madam McLachlin J. elaborates upon Dickson J.'s use of the word "exploited" in *Guerin* in order to refine the scope of the Crown's fiduciary obligation. She states:

It follows that under the *Indian Act*, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident-a decision that constituted exploitation- the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains. [Emphasis added]

Applying the ratio in *Guerin* and *Apsassin* to this case, it follows that the respondent owed a fiduciary duty to the Band to avoid an exploitative bargain in the 1951 surrender.
[citations omitted]

On the facts of this matter, and to paraphrase the last foregoing quoted paragraph, I am satisfied that the reasoning in *Guerin* and *Apsassin*, when applied to this case, imposed on the defendant a fiduciary duty to the Band not to implement a release or surrender of the Stony Knoll Reserve without clear and convincing proof, in the absence of any decision by the Band to surrender the Reserve, that the Band had ceased to exist. As earlier noted, I am satisfied that no such clear and convincing proof could have been before the defendant.

[109] Under the heading "Law on Fiduciary Duties", then Chief Justice Isaac continued at paragraphs 37 to 40 of *Semiahmoo*:

The authorities on fiduciary duties establish that courts must assess the specific relationship between the parties in order to determine whether or not it gives rise to a fiduciary duty and, if yes, to determine the nature and scope of that duty. This approach applies equally in the context of the fiduciary duty owed to Indian bands when they surrender reserve land. In my view, while the statutory surrender requirement triggers the Crown's fiduciary obligation, the Court must examine the specific relationship between the Crown and the Indian band in question in order to define the nature and scope of that obligation.

In *Guerin*, Dickson J. notes the following explanation of the source of fiduciary obligations by Professor Ernest Weinrib: "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion. Elaborating on this approach to fiduciary duties in *Frame v. Smith*, Wilson J. proposed the following indicia of a fiduciary relationship:

Relationships in which a fiduciary obligation have [sic] been imposed seem to possess three general characteristics:

(1) The fiduciary has scope for the exercise of some discretion or power.

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

In virtually all cases dealing with reserve land, the Crown has considerable power over the affected Indian band by virtue of the surrender requirement. In this case, however, the Band was particularly vulnerable to the influence of the Crown. The evidence indicates that land had been taken from the Band by expropriation before and that, prior to the 1951 surrender, Public Works was considering expropriation as a means of obtaining the reserve land at issue in this case. It is clear from the reasons of the Trial Judge that the Band's discretion to give or to withhold their consent to the 1951 surrender was significantly influenced by their knowledge that, regardless of their decision on the issue of surrender, there was a risk that they would lose their land through expropriation in any event.

It is in the context of these findings that the Trial Judge defined the respondent's pre-surrender fiduciary duty, and then concluded that this duty was breached in the 1951 surrender. The Trial Judge described the nature and scope of the respondent's duty as follows:

When land is taken in this way and it is not known what, if any, use will be made of it, or whether the land is going to be used for government purposes, I think there is an obligation on the fiduciary to condition the taking by a reversionary provision, or ensure by some other mechanism that the least possible impairment of the plaintiffs' rights occurs. I am persuaded there was a breach of the fiduciary duty owed to the plaintiffs.

[citations omitted]

[110] Once again as in *Semiahmoo*, I am satisfied that the Band was, at the relevant time, "particularly vulnerable", not simply to the influence of the Crown, but, because of its leaderless and dispersed condition, to exploitation by the Crown itself.

[111] Finally, in *Semiahmoo* under the heading "Did the respondent breach its pre-surrender fiduciary duty?", Chief Justice Isaac wrote at paragraph 41:

Having regard to the circumstances of this case, I am in respectful agreement with the Trial Judge's characterization of the respondent's [here the defendant's] pre-surrender fiduciary duty. I also agree with the Trial

Judge's conclusion, based on the facts, that the respondent breached this duty when it consented to the 1951 surrender. ...

If required, I would reach a similar conclusion here.

TO WHAT REMEDY WOULD THE PLAINTIFFS OR ANY OF THEM BE ENTITLED IF THEY WERE FOUND TO BE ENTITLED TO BRING THIS ACTION?

[112] In addition to a range of declaratory reliefs, the plaintiffs seek an Order reserving the issue of damages arising from the breach of the defendant's fiduciary duty for a future hearing before the Court. In anticipation of such a relief, the plaintiffs also seek an Order directing the defendant, prior to such future hearing, to provide the plaintiffs with reasonable funding to prepare and present an assessment of the nature and quantum of damages to be awarded, along with an accounting by the defendant of the disposition of Stony Knoll Reserve, including full particulars of the terms upon which possession and title were transferred by the Crown.

[113] In light of my foregoing conclusions, I decline to comment on the "second stage" proposal regarding this action.

DISPOSITION

[114] In light of all the foregoing, this action will be dismissed.

COSTS

[115] In the normal course of things, costs follow the event and thus, given my disposition, the defendant would normally be entitled to her costs and, indeed, she expresses her demand for costs in her amended statement of defence filed the 4th of February, 1993. The issue of costs was not addressed in any substantive way at the close of the trial nor is it addressed, once again in any substantive way, in written briefs provided by counsel.

[116] The only reference to costs during the trial was in the following terms:

The Court: I take it that it is too early at this stage to speak to the question of costs.

Counsel for the plaintiffs: I would think so, my lord.

The Court: What I would propose to do in that regard, then, is develop my reasons and my draft judgment and distribute those to counsel, and ask counsel at that stage how they wish to address the issue of costs in light of the outcome.[45]

[117] These reasons will be signed and distributed, together with a draft judgment. Counsel are invited to contact the Court, within thirty (30) days of the date of reasons, to arrange for the issue of costs to be spoken to, unless agreement between counsel can be reached. If agreement is reached, the Court should be so advised, without delay.

_____

J. F.C.C.

Ottawa, Ontario

August 8, 2001

SCHEDULE 1

SCHEDULE 2

SCHEDULE 3

SCHEDULE 4

SCHEDULE 5

SCHEDULE 6

---

[1] The failure to settle the reserve and what follows in these reasons that is specific to the Band is drawn from document 67 in an "Agreed Statement of Facts", more accurately subtitled "a collection of some of the relevant material contained in the Shanahan and Four Arrows Genealogy Reports ...and other selected documents from historical records", filed on behalf of the parties the 22nd day of December, 1999. Document 67 is described in the Index to the Agreed Statement of Facts as "Appendix 1; Membership in the Young Chipeewayan Band 1876 - 1897". The Shanahan and Four Arrows Genealogy Reports were filed in this matter as expert reports on behalf of the parties. (See paragraphs [22] and following of these reasons).

[2] Agreed Statement of Facts, Document 67, page 3.

[3] Document 67, page 4.

[4] Agreed Statement of Facts, Document 63.

[5] Alfred Snake, one of the original plaintiffs in this action, was deceased at the time the action came on for trial. By Consent Order dated the 20th day of January, 2000, the late Mr. Snake was struck as a plaintiff and replaced by his son, George Kingfisher.

[6] Rule 279 of the *Federal Court Rules, 1998* makes inadmissible evidence in chief of an expert witness at the trial of an action in respect of any issue unless certain conditions are met, those including that the expert witness is available at the trial for cross-examination. Rule 279 provides that the Court may otherwise order. With the consent of counsel, of its own motion, the Court here otherwise ordered with the result that the evidence in chief reflected in the reports described in these reasons became admissible at trial in respect of the issues to which they relate.

[7] Agreed Statement of Facts, Document 18, schedule 1 to these reasons.

[8] Also known as Attakacoop.

[9] Harry Michael went by the name of Harry Bighead until about 1971.

[10] Copies of these statements are Documents 8, 9 and 15 in the Agreed Statement of Facts. Document 8 shows a date of February 17, 1955, rather than 1954 as stated in Court.

[11] Or Alfred Snake - the questions and answers are not quite clear on who actually met Mr. Diefenbaker, Albert or Alfred Snake. Equally, the date of the meeting is questionable. Mr. Diefenbaker became Prime Minister on June 21, 1957 and remained in that office to April 22, 1963.

[12] Agreed Statement of Facts, Document 27, schedule 2 to these reasons, admitted to only in part on behalf of the defendant. Admitted portions are italicized.

[13] Plaintiffs' Exhibit 1.

[14] Transcript, vol. 1, page 55.

Q Well, I will show you again Number 27 from the agreed statement of documents. There is a name up here, Kee-Yeu-Ah-Tiah-Pim-Waht.

A Yes. That's the name. Yes.

Q Your grandmother said that that was her father?

A Yes.

[15] Harry Chickness and Mrs. Chickness (known as "Ashlee").

[16] Agreed Statement of Facts, Document 25, schedule 3 to these reasons, admitted to on behalf of the defendant only in part. Admitted portions are italicized.

[17] The witness attested that this was told to him during the evenings when his mother would skin muskrats that his father had caught while trapping.

[18] Note that Leslie Angus' grandfather and uncle both had the same name, John Tootoosis.

[19] Transcript, vol. 1, page 74.

[20] Transcript, vol. 1, pages 79 and 81.

[21] Transcript, vol. 1, page 80.

[22] Transcript, vol. 1, page 80.

[23] Agreed Statement of Facts, Document 23, schedule 4 to these reasons, admitted to on behalf of the defendant only in part. Admitted portions are italicized.

[24] Ben Weenie disagreed with the spelling and translation of the name "Mah Chah Che Koos" in the Agreed Statement of Facts, Document 23, suggesting that it means "Big Caribou" rather than " the Antelope".

[25] Agreed Statement of Facts, Document 33, schedule 5 to these reasons, admitted to on behalf of the defendant only in part. Admitted portions are italicized.

[26] Agreed Statement of Facts, Document 39, schedule 6 to these reasons, admitted to on behalf of the defendant only in part. Admitted portions are italicized.

[27] Relevant photographs are in the Agreed Statement of Facts, Document 36.

[28] Transcript, vol. 1, page 127.

[29] Transcript, vol. 1, page 128.

[30] R.S.S. 1978, c. L-15.

[31] [2000] F.C.J. No. 1568, (F.C.T.D.) online: QL (FCC), not cited before me.

[32] 2001 SCC 33 (CanLII), [2001] S.C.J. No. 33, 2001 SCC 33, online: QL (SCC), not cited before me.

[33] Transcript, vol. 1, page 55.

[34] Transcript, vol. 1, page 115.

[35] R.S.C. 1886, c. 43.

[36] 1999 CanLII 665 (S.C.C.), [1999] 3 S.C.R. 456.

[37] Morris, Alexander. The Treaties of Canada with the Indians of Manitoba and the North-West Territories. Toronto: Belfords, Clarke, 1880.

[38] S. C. 1895, c. 35, s. 8.

[39] R.S.C. 1985, c. I-5.

[40] See, for example, Agreed Statement of Facts, Document 8, page 5.

[41] S.C. 1951, c. 29.

[42] See *Twinn* v. *Canada* reflex, [1987] 2 F.C. 450 (F.C.T.D.) and more particularly, the discussion with regard to "Motion (2)" therein that commences at page 461.

[43] R.S.C. 1886, c. 43.

[44] 1997 CanLII 6347 (F.C.A.), [1998] 1 F.C. 3 (C.A.).

[45] Transcript, vol. 2, page 253.