

*May 10 - 11
hearing*

Court of Queen's Bench
Clerk of the Court

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September 14, 2004

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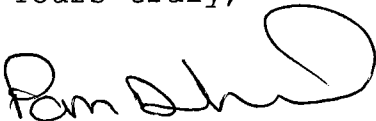
R. S. Maurice & SCM Folkins
Maurice Law

Dear Sir/Madam:

RE: File: 0103 03088
ROSE LAMEMEN, FRANCIS SAULTEAUX, NORA ALOOK et al
VS.
ATTORNEY GENERAL OF CANADA

Attached is a copy of the Reasons for Judgment in relation to the above action.

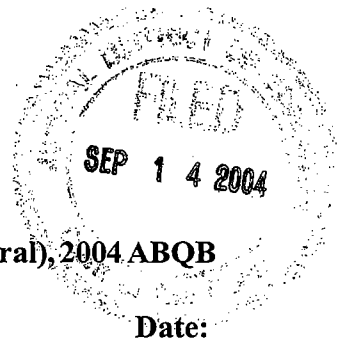
Yours truly,



For Joanne Fredericks
For Clerk of the Court

Encl.

Court of Queen's Bench of Alberta



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

Date:

Docket: 0103 03088

Registry: Edmonton

Between:

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

Plaintiffs

- and -

Attorney General of Canada

Defendant

- and -

Her Majesty the Queen In Right of Alberta

Third Party

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

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

- (a) An application by the Plaintiffs to have this proceeding declared to be a representative action, brought on behalf of all of the descendants of the Papaschase Indian Band;
- (b) An application by the Defendant to strike all or a portion of the Statement of Claim as disclosing no cause of action; and
- (c) An application by the Defendant for summary judgment on various grounds, including the expiry of limitation periods.

The Record

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

[3] The Plaintiffs rely on:

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

- (b) an affidavit of the proposed representative Plaintiff Calvin Bruneau, paralleling the Lameman Affidavit.
- (c) an affidavit of Camie Augustus, a historical researcher with a particular interest in aboriginal history and archival records. This affidavit attached numerous historical documents as exhibits. Included as Exhibit 8 is an extract from an expert report of Dr. Carl Beal (filed in unrelated litigation) outlining the hardships faced by the Plains Indians as a result of the disappearance of the buffalo in the late 1870's. The text of the affidavit very concisely draws and supports inferences said to arise from the exhibits.
- (d) three affidavits of Geraldine Harris, also a historian and records analyst. Attached to the first Harris Affidavit as Exhibit B is a detailed genealogical study entitled "Lineage Analysis of Rose Lameman and Calvin Bruneau". Ms. Harris concludes that both Rose Lameman and Calvin Bruneau are descendants of Chief Papaschase.

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

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

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

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

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

The Plaintiffs

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

- (a) Rose Lameman and Samuel Waskewitch are members of the Onion Lake Band.
- (b) Francis Saulteaux is a member of the Ermineskin Band;
- (c) Nora Alook is a member of the Big Stone/Wabasca Band; and
- (d) Elsie Gladue is a member of the Big Stone Band.

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

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

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

Outline of the Facts

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

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

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

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

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

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

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

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

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

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

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

Reserve Size

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

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

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

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

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

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

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

The Taking of Metis Scrip

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Papaschase Band, as a band wish to withdraw, their object is to homestead their present holdings on the reserve, now Sir you are well aware how largely this band is made up of widows, old people, and children, they cannot possibly make their own living: the Chief and his brothers are undoubtedly half breeds and might scratch along, but even they have each two wives and numbers of children.

... if more (Indians) are forced to remain in Treaty by the action of the Agent it will not increase his influence or popularity among them, we know that it will be for their ultimate good, but the Indians look at it from a ready money stand point.

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

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

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

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

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

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

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

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

. . . On the matter being laid before the Superintendent General here, he directed that the following telegram be sent Mr. Goulet:

Superintendent General instructs me to say that Treaty Half Breeds who clearly show that they are Half Breeds and who do not lead the same mode of life as Indians should be allowed to withdraw from Treaty. Others should not be allowed. Every person accepting discharge should be informed at the time that he forfeits all Indian rights, that he must leave the Reserve and give up house and all other improvements without compensation and also cattle and implements given to him as belonging to the Band

The following telegram was then received from Mr. Wadsworth:

Your telegram to Goulet reads Half Breeds who do not live the same mode of life as Indians. Please define this. All Indians are engaged more or less in Agriculture. Are Chief Pass-pass-chase and brothers to be granted discharges, they farm, some live in lodges in summer, houses in winter

in answer to which the Commissioner telegraphed:

I think Pass-pass-chase and brothers might be granted discharges
. . . .

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

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

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

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

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

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

The Surrender of I.R. 136

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

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

- (a) The release or surrender shall be assented to by a majority of the male members of the band, of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General,

or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General; but no Indian shall be entitled to vote or be present at such council *unless he habitually resides on or near and is interested in the reserve in question;*

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

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

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

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

In reference to the proposed surrender of their Reserve by the portion of Pahpastao’s Band who have not left Treaty, and their amalgamation with that of Enoch, I beg to enclose two forms of surrender and to specially authorize you to summon a council of the first named Band and bring the matter before them, and, if they consent by a vote of the majority of the voting male members of 21 years and over to have a surrender of their lands, to obtain their signatures duly witnessed among others by a competent interpreter.

. . . It should be explained to the Band that the government will take over the land and either sell or lease as may appear in the best interests of the Indians. They will then become part of Enoch’s Band . . .

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

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

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

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

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

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

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

Reserve. In 1888 de Balinhard reported “only three men on this reserve”, a reference to the Enoch Reserve. The Tyler Thesis concludes (pg. 126) that after 1887 “there was no one living on the [Papaschase] reserve”.

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

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

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

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

[38] During the cross-examination counsel for the Plaintiffs suggested, and Dr. Evans agreed with some reservations, that it was reasonable to infer that a person was habitually resident where he or she received his or her annuity payments, although there might well be exceptions (Evans Transcript, pg. 89, l. 6-14; pg. 92, l. 12-26). The inference is stronger if the person is paid with a particular Band over a number of years, as opposed to if the person is paid with a Band in a

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

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

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

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

[40] The Plaintiffs allege that the land was sold at an undervalue. Apart from the expressed opinion of the Agent that full value was realized, there is evidence that buyers paid \$4.10 per acre for 154 acres, when C.P.R. lands were offered at \$3.00 per acre (Augustus Affidavit, Exhibits 49 and 52). The Tyler Thesis concludes (at pg. 144) that the average sale price was \$3.87 per acre. When further land was sold in 1894 the prices were set:

