

*May 10 - 11
hearing*

Court of Queen's Bench
Clerk of the Court

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September 14, 2004

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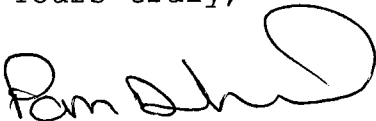
R. S. Maurice & SCM Folkins
Maurice Law

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.

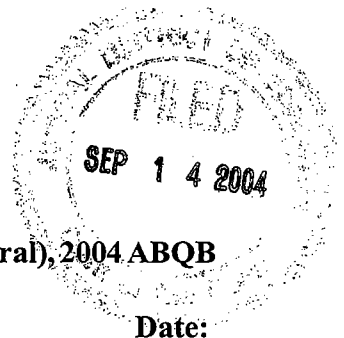
Yours truly,



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,

