INDIAN CLAIMS COMMISSION

THE YOUNG CHIPEEWAYAN INQUIRY

into the Claim Regarding
Stoney Knoll Indian Reserve No. 107

PANEL

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PART I

THE COMMISSION MANDATE AND SPECIFIC CLAIMS POLICY

THE MANDATE OF THE INDIAN CLAIMS COMMISSION

The Indian Claims Commission was established on September 1, 1992, at which time a Commission[1] was issued under the Great Seal setting out the mandate. The mandate of the Commission includes:

> that our Commissioners on the basis of Canada's Specific Claims Policy . . . inquire into and report upon:
>
> (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; . . .

This is an Inquiry into a claim that was rejected by the Minister of Indian Affairs in 1985. The claimants[2] refer to themselves collectively as the Young Chipeewayan Band. Their claim relates to the process surrounding the transfer of administration and control of the Stoney Knoll Indian Reserve No. 107, which once existed in central Saskatchewan, and which they allege was taken in 1897 without a surrender or other lawful authority. Map 1 depicts Stoney Knoll Reserve and other First Nations in the area.[3]

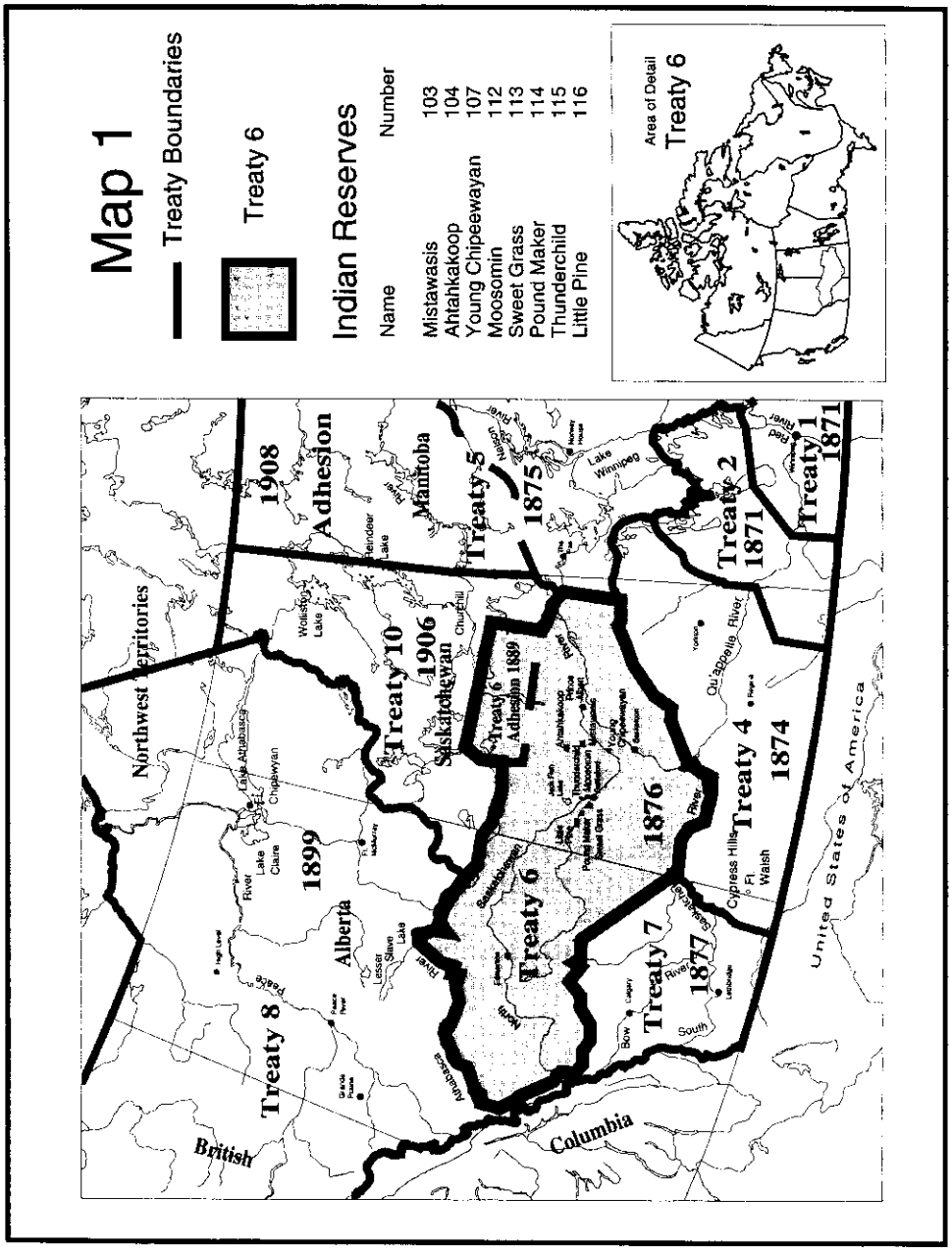
On June 17, 1982, "Chief Alfred Snake," on behalf of the Young Chipeewayan Band[4] and the other claimants, wrote to John Munro, then Minister of Indian

[1] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991 (ICC Exhibit 1).

[2] The individual claimants are Alfred Snake, Lola Okeeweehow, Benjamin Weenie, Leslie Angus, Don Higgins, and Larry Chickness. Appendix C provides a detailed analysis of the relevant treaty paylists and oral testimony on the issue of descendancy.

[3] Compilation of data from Dominion of Canada Map Showing Indian Reserves, published in the 1891 Department of Indian Affairs Annual Report, and Canada Indian Treaties, published by the Department of Energy, Mines, and Resources, *The National Atlas of Canada*, 5th ed. (Ottawa 1991), MCR - 4162.

[4] The spelling of "Chipeewayan" has changed since 1876. The claimants currently spell the name as "Chipeewayan"; therefore, this spelling will be used throughout this report.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1871
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1906
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Adhesion 1889
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1876
Treaty 4
1874
Treaty 6
Treaty 7
1877
Treaty 8
British
Columbia
United States of America
Lake Winnipeg
Lake Athabasca
Lake Claire
Wollaston Lake
Reindeer Lake
Churchill
Qu'appelle River
Cypress Hills
Ft. Walsh
Peace River
Athabasca River
Bow River
South Saskatchewan River

and Northern Affairs, requesting that he examine this specific claim.[5] The claim was rejected on September 11, 1985; David Crombie, Minister of Indian Affairs, wrote to Chief Alfred Snake advising that, according to the legal opinion from the Department of Justice, "there is no legal basis for your claim alleging an illegal disposition of I.R. 107."[6]

The Commission has also been provided with a draft letter dated March 25, 1985, from Richard Berg, senior claims analyst of the Department of Indian Affairs' Specific Claims Branch, to James Griffin, counsel for the claimants, in which Canada's reasoning appears to be set out:

> I am writing to confirm that we have obtained a legal opinion from the Department of Justice in the Young Chipeewayan claim. They have carefully reviewed the evidence and the arguments submitted by you and are of the view that Canada has no outstanding lawful obligations in this matter.
>
> Very briefly we have been advised by the Department of Justice, that it is its view on the basis of the facts presented, that the Young Chipeewayan Band had entirely ceased to exist by the 1889 annuity payments at the latest. They advise that interest in an Indian reserve is a communal interest, not an individual interest. In order to have an interest in a particular reserve, an individual must be a member of the band interested in that reserve. If the band ceases to exist, the communal interest ceases to exist and as a result there is no longer a reserve, as described by the *Indian Act*. . .[7]

On March 15, 1985, the claimants filed a statement of claim in the Federal Court of Canada, Trial Division, seeking, among other things, an order declaring that Canada owed a fiduciary duty to them and that Canada had breached that duty, as well as damages. In the alternative, an order was sought declaring that the purported surrender of the Stoney Knoll[8] Indian Reserve No. 107 was void *ab initio*. On January 17, 1992, the Government of Canada filed a statement of defence denying that the claimants are descendants of Band members of the original Young Chipeewayan Band. That action is currently being held in abeyance.

On February 23, 1993, James Griffin, on behalf of the claimants, wrote to the Indian Claims Commission requesting as "comprehensive and thorough examination as in the opinion of the Indian Claims Commission is necessary to reveal

[5] Alfred Snake to John Munro, Minister of Indian and Northern Affairs, June 17, 1982 (ICC Documents, p. 722).
[6] David Crombie, Minister of Indian Affairs and Northern Development, to Alfred Snake, September 11, 1985 (ICC Documents, p. 823).
[7] Richard Berg, Senior Claims Analyst, Specific Claims Branch, Department of Indian and Northern Affairs, to James Griffin, Counsel for the Claimants, March 25, 1985 (ICC Documents, p. 818).
[8] The claimants currently spell the name "Stoney Knoll"; therefore, this spelling has been used throughout this report.

all relevant circumstances."[9] On June 30, 1993, Harry S. LaForme, then Chief Commissioner of the Indian Claims Commission, wrote to Alfred Snake, advising that the Commissioners had agreed to conduct an Inquiry into this rejected claim.[10]

Outstanding Business

This Commission is bound to follow the provisions of the Specific Claims Policy as defined in the 1982 booklet entitled Outstanding Business. The policy recognizes specific land claims disclosing a "lawful obligation":

> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
>
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
>
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
>
> iv) An illegal disposition of Indian land.[11]

ISSUES

This Commission was asked to inquire into and report on whether the Government of Canada owes an outstanding lawful obligation, as defined in *Outstanding Business*, to the group of individuals who today consider themselves to be the "Young Chipeewayan Band." Specifically, the claimants allege that in 1897 their reserve was taken without a lawful surrender, as required by section 38 of the *Indian Act*, RSC 1886, c. 43. The parties defined the issues to be addressed in the Inquiry as follows:

1 Are any of the claimants descendants of the original Young Chipeewayan Band?

2 If so, are the claimants entitled to bring this claim on behalf of the Young Chipeewayan Band?

   a) Who constitutes the Young Chipeewayan Band?

9 James Griffin to Indian Claims Commission, February 23, 1993 (ICC Exhibit 2).
10 Harry S. LaForme, Chief Commissioner of the Indian Claims Commission, to Alfred Snake, Chief of the Young Chipeewayan Band, June 30, 1993 (ICC Exhibit 3).
11 Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy, Specific Claims* (Ottawa: DIAND, 1982) [hereinafter *Outstanding Business*], 20.

b) Does the Young Chipeewayan Band exist today?
c) If no, when did it cease to exist?

3 Is the 1897 Order in Council valid?

a) Was it necessary to obtain a surrender from the Young Chipeewayan Band?

4 Would participation in recent Treaty Land Entitlement settlements disentitle the claimants from raising this claim?

THE INQUIRY

On June 30, 1993, the then Chief Commissioner Harry S. LaForme sent notices of the Inquiry to the parties.[12] On January 18 and 19, 1994, a community session was held in Saskatoon, Saskatchewan, where the Commission heard 15 witnesses from various communities in the vicinity. Oral submissions were heard from counsel for the parties on February 24, 1994, in Saskatoon.

The relevant historical evidence examined by the Commission included information gathered at the community session at Saskatoon; the documentation submitted by the parties; the parties' written and oral submissions; and the balance of the record of this Inquiry. Some 1200 pages of documents have been reviewed by this Commission. The summary of the details of the process and the formal record is attached as appendices A and B to this report.

GENERAL HISTORY

The Treaty

On August 23, 1876, Chief Chipeewayan and four headmen (Naa-poo-chee-chees, Wah-wis, Kah-pah-pah-mah-chatik-way, and Kee-yeu-ah-tiah-pim-waht) signed Treaty 6 at Fort Carlton, on behalf of the Chipeewayan Band. The population of the Chipeewayan Band was then 84 people, comprising 19 families. By Treaty 6, some 121,000 square miles of land was acquired by the Government of Canada and, in exchange, Canada agreed to certain terms, including the obligation to set aside reserves according to the formula set out in the treaty. Treaty 6 states, in part:

> 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; provided, all such reserves

[12] Harry S. LaForme, Chief Commissioner of the Indian Claims Commission, to Alfred Snake, June 30, 1993 (ICC Exhibit 3).

shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say: that the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them.

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any Band as She shall deem fit, and also that 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; and with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians, She hereby, through Her Commissioners, makes them a present of twelve dollars for each man, woman and child belonging to the Bands here represented, in extinguishment of all claims heretofore preferred.[13]

The treaty also provided for measures to ease the transition to an agriculturally based economy, including assistance in times of famine or pestilence:

It is further agreed between Her Majesty and the said Indians, that the following articles shall be supplied to any Band of the said Indians who are now cultivating the soil, or who shall hereafter commence to cultivate the land, that is to say: Four hoes for every family actually cultivating; also, two spades per family as aforesaid; one plough for every three families, as aforesaid; one harrow for every three families, as aforesaid; two scythes and one whetstone, and two hay forks and two reaping hooks, for every family as aforesaid, and also two axes; and also one cross-cut saw, one hand-saw, one pit-saw, the necessary files, one grindstone and one auger for each Band; and also for each Chief for the use of his Band, one chest of ordinary carpenter's tools; also, for each Band, enough of wheat, barley, potatoes and oats to plant the land actually broken up for cultivation by such Band; also for each Band four oxen, one bull and six cows; also, one boar and two sows, and one hand-mill when any Band shall raise sufficient grain therefor. . . .

It is further agreed between Her Majesty and the said Indians . . . [t]hat in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by Her Indian Agent or Agents, will grant to the Indians assistance of such character and to such extent as Her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them.[14]

The Band

In 1876, the Chipeewayan Band received, pursuant to the treaty, a $12 payment for each man, woman, and child. A reserve was surveyed three years later in

[13] Treaty 6, p. 3, August 23, 1876 (ICC Documents, p. 492).
[14] Treaty 6, p. 4, August 23, 1876 (ICC Documents, p. 492).

1879 by George Simpson, Dominion Land Surveyor.[15] When Chief Chipeewayan passed away in 1877, his son, Young Chipeewayan, became the hereditary Chief of that First Nation. Consequently, the First Nation and the Department of Indian Affairs adopted the son's name as the proper name for the First Nation.

The 1870s, 1880s, and 1890s, however, were difficult years. The Chipeewayan Band was one of many bands not able to sustain themselves while awaiting the implementation of treaty assistance during their economic and cultural transition to farming. The rapid disappearance of the buffalo,[16] disease,[17] and climatic hardship[18] forced them to move continually in their search for sustenance. The circumstances under which the Chipeewayan Band originally left Stoney Knoll were described by Albert Snake in 1955 at a meeting convened specifically to record his recollections of the events surrounding the loss of the reserve. The summary[19] of that meeting reveals the circumstances facing the Band during that period, and the Band's subsequent attempt to return to the reserve. It states in part:

> My grandfather, Chief O'chippeywan and his people left their reserve because he was afraid they would have a hard winter with nothing to eat. They were not getting provisions as promised by the treaty, and the same to be given by the Indian Agent. When my grandfather signed the treaty, he was promised . . . a new way of life and that was to know how to farm and to receive a grant of farming implements. This would help his people to get started on farming. Food was also promised to my grandfather while his people were on a process of learning how to farm for their living. My grandfather waited for all this and there was no sign of any coming when we left our reserve. My grandfather wanted to pursue his old way of making his living and that was by hunting. It was about towards fall that we left our reserve. We started our journey along the Saskatchewan River and on to the prairies. We went as far as to the United States border, but we never crossed the line. I remember that hunting was successful and we had lots to eat. We moved on to the place called Maple Creek and there we stayed for the winter. I remember also that my grandfather and the men did some trapping of fur bearing animals and did well on that. . . . So we didn't starve that

15 George A. Simpson, Dominion Land Surveyor, to Lindsay Russell, Surveyor General, 5 February 1880, Canada, Parliament, *Sessional Papers*, 1880, No. 4, "Report of the Department of Interior for the year ended 30 June 1879," App. No. 9. Simpson's report read in part: "On the 18th of September I began the survey of a Reserve at the Stone Indian Knoll, ten miles south-west of Carlton House, and upon its completion left for Winnipeg. . . . (ICC Documents, p. 527).

16 See footnote 53, below.

17 See footnote 54, below.

18 James F. MacLeod, "North-West Mounted Police Force – Commissioner's Report, 1879," Canada, Parliament, *Sessional Papers*, 1880, No. 4, Part III (ICC Documents, p. 1173A).

19 The summary further explains that it was in the spring that Chief Chipeewayan and the mother of Albert Snake passed away. Since the 1877 Chipeewayan treaty paylist discloses that Chief Chipeewayan had passed away sometime before, we can assume that the above recollection relates to 1877.

winter. It was . . . towards spring when sickness came upon us and quite a few passed away, one of them was my grandfather the chief. My mother was one of the women who passed away. Her name was O-ma-mees.[20]

The minutes then go on to describe the original attempt to return to Stoney Knoll Reserve:

I asked him if he can remember when winter was over if there was an effort made by the people of his grandfather to come back to their reserve, Stoney Knoll Indian Reserve #107. His answer, "All I can remember [is that] it was only [the] two of us, I and my grandmother . . . my father - [Espim-hic-cakitoot] left the encampment before we left for the reserve, but I didn't know where he went until I heard after I was about 18 years old that he was living with [the] Thunderchild people on their reserve, and he remarried there." [I then asked him w]hat happened to the rest of your grandfather's people and why was [it] that they didn't go back to your reserve like you and your grandmother did? His answer, "I heard my grandmother say that they didn't want to go back to the reserve because they [no longer had] . . . a leader." . . . [H]e and his grandmother went back to their reserve, but due to extreme hardship they had to go somewhere else. His story as follows - "I and my grandmother left our encampment at Maple Creek with a hope that others would follow, but they never came. We were travelling with two horses . . . We made it back on the reserve, but of course nobody was there. My grandmother decided that we would go where we can find Indians . . . so that we can get help. . . . We went around by Fort Carlton, [and] there we met a métis by the name of Arcand. . . . [He] told my grandmother that my sister and her husband, whose last name was Cardinal, were living at the place called Snake Plain, within the vicinity of Mistawasis and Attakacoop Indian reserves. The métis man also told my grandmother that there was a fight between the police and mixed with métis and Indians, which to my child-ish mind I understood that there was a fist fight or some kind of struggle between the two parties. It was quite some time later that I heard there was much blood shed and many were killed. . . . My grandmother upon hearing . . . where we can locate my sister . . . changed her mind and so we went along with the métis man, to go to my sister for the help we needed so much, instead of going to some other Indians."[21]

The minutes then describe Albert's attempts to regain control of Stoney Knoll Reserve many years later:

[Albert] was about 21 years old when he rode . . . back to . . . see his reserve, and that was about in the spring while seed planting was in full swing. He found white people working and farming his reserve. When he went back to Snake Plain, he asked some elderly men

20 Minutes taken at the Sandy Lake Reserve, February 12, 1955. Present were Baptiste Gaudry, Mrs. B. Gaudry, John Snake, Albert Snake, Harry Bighead, and Alfred Snake. All were related to Albert Snake, either by marriage or blood, except Harry Bighead (ICC Documents, pp. 663-65).

21 See footnote 20 (ICC Documents, pp. 665 - 67).

what he should do to get his reserve back. One of [them] told him that his reserve was given to him and his grandfather's people by the terms of Indian treaty, and it's still an Indian reserve. I asked him if he tried to make an effort in retaining his reserve. His answer, "I tried everything I could. I went over [to] Thunderchild reserve, to see my father Espim-ik-caki-toot, and have tried to get him to support me in getting our reserve back, but he was not interested. He liked it better [on] Thunderchild reserve. To see Indian Agents was useless. I [got] nowhere with them. How can I get them to help me since they were the people to give my reserve to the white people?" . . . I asked him . . . about his age, if he was . . . about 9 years old when his grandfather and his people left their reserve . . . his answer, "I could have been a little younger, about 8 years old."[22]

The treaty paylists provide support for this conclusion regarding the movement of the Young Chipeewayan Band members, in that the remaining Young Chipeewayan Band members received their annuity payments in separate locations from year to year. For instance, in 1877, 162 Indians from 28 families collected their annuities under the Chipeewayan treaty paylist. The list shows that sickness was then prevalent in the Indian communities in this part of Saskatchewan and that, during the spring of that year, Chief Chipeewayan was among the many Indians who passed away.[23]

The treaty paylists for the Young Chipeewayan Band from 1879 to 1885 disclose two significant facts. First, the Indians were paid annuities at one of Battleford, Fort Walsh (Maple Creek), or Jack Fish Creek. Second, the number of Indians paid under the Young Chipeewayan treaty paylists dwindled from 52 Indians from 25 families in 1879 to 18 Indians from two families in 1885.

By 1883, it was becoming clear to departmental officials that the Young Chipeewayan Band had not settled on the Stoney Knoll Reserve[24] and that they were continuing to search for food elsewhere. In a letter dated November 15, 1883, L. Vankoughnet, Deputy Superintendent General of the Department of Indian Affairs, wrote to Sir John A. Macdonald, Superintendent of Indian Affairs and Prime Minister of Canada, advising him of this fact:

At Fish Creek there are three Reserves belonging respectively to Moosimin, Thunderchild, and Young Chippewayan. None of these except Moosimin appear to be settled on their own Reserves. Thunderchild 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

22 See footnote 20 (ICC Documents, pp. 669-71).
23 1877 Chipeewayan's Band treaty paylist (ICC Documents, p. 26).
24 Indians are not required by law to settle on the reserve surveyed for them.

themselves so to the undersigned. Thunderchild stating that he considered the work he did on Moosimin's Reserve of no value to himself or Band, as it was on another Chief's land. . . .[25]

The Riel rebellion occurred in 1885, and at the time the Young Chipeewayan Band was considered to have taken some part in that insurrection. Harsh measures were launched against those nations participating, or suspected of participating, in the 1885 Rebellion by the Department of Indian Affairs. Annuity payments were withheld to offset the damages caused by the rebellion, and the Young Chipeewayan Band did not receive annuity payments for 1885. Some evidence was presented by counsel for the claimants disputing their alleged participation in the rebellion. Canada did not challenge this evidence.

By 1888, the Department of Indian Affairs no longer identified the Young Chipeewayan Band as a separate band. No separate treaty paylist was maintained for the Young Chipeewayan Band, and, although the 1888 Thunderchild treaty paylist identified Young Chipeewayan himself as being from the Young Chipeewayan Band,[26] the paylist also notes that he was no longer paid in his capacity as Chief.[27] Keeyewwahkapimwaht, however, was paid at Poundmaker's Reserve in his capacity as headman of the Young Chipeewayan Band until 1888.[28]

The Transfer of Stoney Knoll Reserve

In 1888, it was discovered that the surveying and subdividing of townships in Saskatchewan in 1883[29] had not even taken into account the existence of Stoney Knoll Reserve. Consequently, in order to identify the reserve on township maps, Stoney Knoll Indian Reserve No. 107 was located and resurveyed.[30] On May 17, 1889, the reserve was confirmed by Order in Council PC 1153.[31]

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25 L. Vankoughnet, Deputy Superintendent General, Department of Indian Affairs, to Sir John A. Macdonald, Superintendent of Indian Affairs, November 15, 1883, National Archives of Canada [hereinafter NA], RG 10, vol. 3664, file 9834 (ICC Documents, pp. 528-32).

26 He is identified as such until 1889.

27 1888 Thunderchild Band treaty paylist (ICC Documents, p. 37).

28 1888 Poundmaker's Band treaty paylist (ICC Documents, p. 157).

29 Topographical Surveys Branch, Department of the Interior, to E. Deville, Surveyor General, December 10, 1897, NA, RG 15, vol. 724, file 390906 (ICC Documents, p. 602).

30 "Annual Report of the Department of Indian Affairs for the year ended 31st December 1888," Canada, Parliament, *Sessional Papers*, 1889, No. 16, Part I, pp. 189-90 (ICC Documents, pp. 1180c-80d), includes the report by John C. Nelson, surveyor, to the Superintendent General, dated July 10, 1888. The report states, in part:

> The reserve was surveyed in 1879 and posts were planted at the corners. Some years after, when the sub-division of townships was extended to this district, the reserve appears to have been overlooked, and passed into the sub-divided lands.
>
> The survey of this reserve is level to undulating, and slopes slightly towards the Saskatchewan. The portion near the river is watered by several small creeks; but in the southern part, water is found only in a few ponds. The soil is of first class quality. There are no large hay meadows, but on the uplands, the herbage is rich. The principal topographical feature is Stony Knoll, a prairie elevation, wooded on the northern slopes, and situated in the centre of the reserve. Along the river-front the banks are well wooded with poplar, and a few hummocks of spruce occur in the ravines.

31 ICC Documents, p. 540.

Canada's increasing desire to settle the west put good-quality agricultural land in high demand. On October 12, 1895, the Dominion Lands Office wrote to the Minister of the Interior, advising that Stoney Knoll Indian Reserve No. 107 would make prime land for settlement:

> Re Indian Reserve of Chief "Young" "Chippewayan" - near Carlton and of "Chakastapasin" on South branch of Saskatchewan
>
> As instructed by you on the occasion of your visit here, I have the honour to draw your attention to the desirability of taking immediate steps towards opening out for settlement the very fine tracts of land covered by these Reserves, as they have never been occupied by the Indians for whom they were set apart. With reference to the first mentioned Reserve no trouble or expense need be incurred in opening it out for settlement other than is incidental to the selection of another reserve in lieu thereof, as it was originally subdivided into Sections and included in townships 43 and 44, Range 5 West of the 3rd Meridian.[32]

The subsequent correspondence between the Departments of Indian Affairs and the Interior focused on the procedure to be adopted and the legal conditions they had to meet. On November 9, 1895, Hayter Reed, Deputy Superintendent General of Indian Affairs, wrote to A.H. Burgess, Deputy Minister of the Interior, outlining the position they intended to adopt. The letter referred to the necessity of procuring a surrender from the Young Chipeewayan Band and states in part:

> With regard to the Indians of Young Chippewayan Reserve, the question presents itself as to whether the fact of their having been rebels in 1885, and having left the Country after the rebellion would not afford sufficient and reasonable grounds for dispossessing them of such rights as they originally had to the Reserve. As to such of them as have since returned they are in the same position as the Indians of Chekastapasin Band in so much as they have all become amalgamated with or merged in other Bands with the members of which they enjoy equal privileges. If the matter can be dealt with by Order in Council, there are reasons which would seem to make the adoption of that method preferable to an endeavour to obtain surrender.[33]

On December 18, 1895, John Hall, Secretary, Department of the Interior, replied to Reed's letter, advising that the Minister of the Interior for his part did not wish the Department of Indian Affairs to obtain a surrender from the Indians, since he was of the opinion that one was not required under the circumstances.

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[32] J. McTaggart, Agent, Dominion Lands Office, to Thomas Daly, Minister of the Interior, October 12, 1895, NA, RG 15, vol. 724, file 390906 (ICC Documents, p. 554).

[33] H. Reed, Deputy Superintendent General of Indian Affairs, to A.H. Burgess, Deputy Minister of the Interior, November 9, 1895, NA, RG 10, vol. 6663, file 109A-3-1 (ICC Documents, pp. 557, 558).

On February 3, 1896, A.E. Forget, Indian Commissioner, wrote to Hayter Reed, raising the issue of attempting to trace the Young Chipeewayan members in order to transfer the members formally to other bands pursuant to the recently enacted section 140 of the *Indian Act*. The letter refers to the fact that:

> the few remaining members of the Band had dispersed throughout the Battleford Reserves and that it would be a most difficult matter to trace them, and that further – their title to land in the Reserve originally surveyed for the "Young Chippewayan" was practically extinguished by their claims to land in the Reserves of other Bands with whom they had since amalgamated, having been duly recognized.
>
> In view of this fact and that the difficulty which presented itself in 1884 of tracing these persons must necessarily have been greatly augmented by the passage of a further period of eleven years, I would ask whether the Department regards it as absolutely necessary that the enquiry be proceeded with and *formal transfers obtained*.[34]

Hayter Reed responded on February 8, 1896, that "under the circumstances it is probably hardly worth while to make any great exertion to trace the members of the Band of Young Chippewayan."[35]

The issue of transferring administration and control of the Young Chipeewayan Reserve to the Department of the Interior was raised by A.E. Forget, Indian Commissioner, in a memorandum to Sir Clifford Sifton, Superintendent General of Indian Affairs, on April 3, 1897, in an attempt to finally resolve this question. The memorandum states, in part:

> . . .
>
> The undersigned, however, is unable to show that such transfers to other bands in any way obviates the necessity for taking a surrender as required by Sec. 38 of the Indian Act, as enacted by Sec. I Chap. 35, 58, 59. Vic.
>
> As to Stoney Knoll Reserve generally known as Young Chippeiweyan's reserve, number 107, I think nothing should hinder its being thrown open for settlement . . . Although set aside for the use of Indians it was never then settled by them. The members took part in the rebellion in '85 and most of them left the country at the time and such who remained in the country or returned since, have amalgamated themselves with other bands.[36]

Finally, on May 3, 1897, Sir Clifford Sifton, Superintendent General of Indian Affairs, wrote to the Governor General in Council requesting his authority in

34 A.E. Forget, Indian Commissioner, to H. Reed, Deputy Superintendent General of Indian Affairs, February 3, 1896 (ICC Documents, p. 566). Emphasis added.

35 H. Reed, Deputy Superintendent General of Indian Affairs, to A. Forget, Indian Commissioner, February 8, 1896 (ICC Documents, p. 567).

36 A.E. Forget, Indian Commissioner, to Sir Clifford Sifton, Superintendent General of Indian Affairs, April 3, 1897 (ICC Documents, p. 580).

"relinquishing title" to the reserve and "restoring" it to the Department of the Interior. The request was honoured and on May 11, 1897, Order in Council PC 1155[37] was issued transferring control of the Stoney Knoll Indian Reserve No. 107 from the Department of Indian Affairs to the Department of the Interior. The grounds which Sifton had cited in his report for transferring control of the reserve were simply incorporated into the Order in Council:

> EXTRACT from a Report of the Committee of the Honourable the Privy Council, approved by His Excellency on the 11th May, 1897.
>
> On a Report, dated 3rd May, 1897, from the Superintendent General of Indian Affairs stating that the Indian Reserve 107, containing thirty square miles, situated at Stony Knoll . . . set apart by Order-in-Council of 17th May 1889 for Chief Young Chippewayan and his band, has never been taken possession of nor occupied by them.
>
> The Minister further states that the members of the Band took part in the rebellion of 1885, and for the most part left the country thereafter, while such as remained or have since returned have become amalgamated with other Bands.
>
> The Minister, therefore, recommends that authority be granted for the relinquishment by the Department of Indian Affairs, and resumption by the Department of the Interior of the control of the lands comprising the said Reserve No. 107.
>
> The Committee advise that the requisite authority be granted.[38]

In a letter dated April 14, 1897, J.D. McLean, Acting Secretary of the Department of Indian Affairs, wrote to the Department of Justice to inquire as to the legal implications of the transfer of the Stoney Knoll reserve.[39] The response came three days after the Order in Council. On May 14, 1897, E.L. Newcombe, Deputy Minister of Justice, responded to McLean, on the legal implications of transferring the reserve. The legal opinion touches upon the very issues before this Commission. The letter states, in part:

> you asked for an opinion as to whether or not the Crown can resume possession and dispose of a certain Indian Reserve in the North West Territories without first obtaining a surrender from the Indians under section 38 of the Indian Act (57-58 Vic. c. 32, s.3), the circumstances of the case being that the reserve has for a good many years past been abandoned by the members of the band for which it was set apart, and that such members, or as many of them as can be traced, have been formerly transferred at their own request to other bands which have consented to receive them into membership.

37 ICC Documents, p. 585.
38 Order in Council PC 1185 (ICC Documents, p. 585).
39 J.D. McLean, Acting Secretary, Department of Indian Affairs, to the Department of Justice, April 14, 1897, NA, RG 10, vol. 6663, file 109A-3-1 (ICC Documents, p. 581).

As at present advised I do not think that the land in question can, in view of the provisions of the sections referred to, be sold or otherwise alienated until the same has been released or surrendered in the manner provided by the Act. The section positively forbids, subject to certain exceptions, which have no application to the present case, the sale, alienation or lease of any reserve or portion of a reserve without such release or surrender.

There does not appear from your statement of the facts to have been anything amounting to a dissolution of the band. As to the members said to have been transferred to other bands, I do not find any express authority for such transfer in the Statutes, and there may be some question as to the legal effect of what has taken place, but in the absence of further information on the subject, I do not think that the lands in the reserve are relieved in the hands of the Crown from the trust in favour of the band, so far as these members are concerned, or that the Crown is dispensed as to them from compliances with Section 38 before disposing of such lands. Then it seems from your statement that there are other members of the band who have been traced, and therefore [may not have] been transferred to other bands.[40]

It is clear that none of the people associated with Stoney Knoll Reserve, whether members, former members, or their descendants, were consulted with respect to the transfer of the reserve. Over the next few years, the land formerly comprising Stoney Knoll Indian Reserve No. 107 was deeded out to private purchasers.

Transfers to Other Bands

In the years between 1876 and 1897 the individuals who had been members of the Young Chipeewayan Band lost touch with one another. In fact, several of their descendants testified that they had not met until this claim was initiated. Although the historical record before the Commission was not complete, it would appear that most Young Chipeewayan Band members joined other bands. It is unclear to the Commission what happened to the others, but it seems likely that some migrated to the United States.

Those who migrated to other bands were greeted in some cases with general acceptance and in others by mere tolerance. In one instance, Albert Angus asked the interpreter to explain the meaning of a Cree word in order to illustrate that not all the Young Chipeewayan people were met with full acceptance:

I wonder if you could ask the interpreter how he would interpret the word "pukositaw" which is the word Mrs. Gaudry used as the nature of her relationship with Sandy Lake Band.

– Albert Angus

[40] E.L. Newcombe, Deputy Minister of Justice, to J.D. McLean, Acting Secretary, Department of Indian Affairs, May 14, 1897 (ICC Documents, pp. 586-87). For section 38 of the *Indian Act*, see footnote 46. Section 38 permitted Canada to lease reserve land without a release or surrender only in the case where it was for the benefit of the Indians. In 1898, the *Indian Act* was further amended to allow Canada to dispose of wildgrass and dead or fallen timber on reserves without first obtaining consent from the Indians.

> Pukositaw would be surviving according to the generosity of that community. That would be my interpretation, and that was the nature of her relationship, to clarify that. She said they survived by the goodwill of the people in the community, you could say.[41]
>
> – Mr. Fine Day

Albert Snake described his relationship with the Ahtakakoop Band in the summary recorded at the February 12, 1955, meeting.

> I asked him then how come [it] is that he is now a member of Ahtakakoop Band. His answer, "I remember one day there was a treaty day for Mistawasis and Ahtakakoop Indians. My grandmother and myself were called up at the table where Indian Agents and a police were sitting. Indian Agent, whose name I don't remember, told my grandmother that we both can stay on Ahtakakoop reserve and since then I have been living in Ahtakakoop reserve.
>
> I have never been admitted by the Ahtakakoop Indians to join them in their band membership. Many remarks have been made by them that I don't belong in their membership and I don't blame them. Indian Agents forced me and my grandmother to live on Ahtakakoop reserve.[42]

Others were voted into membership and accepted. At the Inquiry, Eugene Weenie's experiences were related as follows:

> He says that he was never confronted by anybody about his residency there but it was a well-known fact that his father had been voted into the band membership. When he was 18 years old he was voted into membership in the Sweetgrass Band.[43]
>
> – Eugene Weenie

For some, there were degrees of acceptance:

> A lot of the people from Young Chipeewayan Band went to different reserves and some of us were fortunate that we got accepted and we were able to – as people from Young Chipeewayan, we were able to get in the council and vote and, you know, become regular members. But there was always a background, back – come election the subject was brought up, this person doesn't really belong on this reserve. So it was used in politics . . . like you have to prove . . . that you are a member from the reserve.[44]
>
> – Leslie Angus

41 ICC Transcripts, vol. 1, pp. 72-73 (Mr. Albert Angus and Mr. Fine Day).
42 Minutes taken at the Sandy Lake Reserve on February 12, 1955 (ICC Documents, pp. 662-71).
43 ICC Transcripts, vol. 1, pp. 110-11 (Eugene Weenie).
44 ICC Transcripts, vol. 1, p. 161 (Leslie Angus).

The treaty paylists disclose that, in 1888, one of the headmen, Shooting Eagle, was the last Indian to be identified as a member of the historical Young Chipeewayan Band. Thus, by 1889, all the individuals who had ever received treaty payments as a member of the Young Chipeewayan Band had either died, been transferred to the treaty paylists of other First Nations, or had disappeared. It is also evident that the Young Chipeewayan Band did not at any time use or occupy Stoney Knoll Reserve in any meaningful way. It is difficult to fault the members of the Young Chipeewayan Band for these facts, given the tragic circumstances of the times.

It should be noted that all the "transfers" of the Young Chipeewayan Band members to other bands were "informal," in the sense that the members were simply moved from one treaty paylist to another, since it was not until 1895 that the *Indian Act* was amended, by the addition of section 140, to permit formal transfers of members from one band to another.

ANALYSIS AND CONCLUSIONS

The Nature of the Claim

Counsel for the claimants submit that the provisions of Treaty 6,[45] together with sections 38 and 39 of the relevant *Indian Act*,[46] required the consent of the Young Chipeewayan Band as a precondition to the disposition of the Stoney Knoll Indian Reserve No. 107 by Canada. Therefore, it is argued, when Canada transferred control of that reserve from the Department of Indian Affairs to the Department of the Interior, the government breached both the treaty and the *Indian Act*. As a result, the claimants submit, Indian Reserve No. 107, or its value, continues to be held for the benefit of the members of the Young Chipeewayan

[45] See footnote 13.

[46] Section 1 of the *Indian Act*, SC 1895, c. 35, amended section 38 of the Indian Act, RSC 1886, c. 43, to state:

> No reserve or portion of a reserve shall be sold, alienated or leased until the same has been released or surrendered to the Crown for the purposes of this Act; provided that the superintendent general may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without the same being released or surrendered.

Section 39 of the *Indian Act*, RSC 1886, c. 43, states:

> 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: . . .

Band. As support for this argument, the claimants refer to the opinion contained in the May 14, 1897, letter from E.L. Newcombe, Deputy Minister of Justice, to J.D. McLean, Acting Secretary, Department of Indian Affairs, cited above.[47]

Counsel for Canada does not dispute that the government transferred administration and control of Indian Reserve No. 107 without a surrender in 1897. However, Canada argues that the Young Chipeewayan Band had ceased to exist as a collective entity before 1897. Therefore, it is submitted that the government was free to transfer and dispose of the land without the necessity of obtaining a surrender pursuant to the *Indian Act*.

Issue 1: Are Any of the Claimants Descendants?

1 Are any of the claimants descendants of the original Young Chipeewayan Band?

This first issue was conceded by Canada at the outset of the community session on January 18, 1994. At that time Canada agreed that the Higgins and Chickness families are in fact descendants of members of the original Young Chipeewayan Band:

> It is Canada's position that two families among the Claimants can establish that they are descended from individuals who are members of the Young Chipeewayan Band, being those Claimants whom are lineal descendants of Kee yew wah ka pim waht (Chickness family), and Oo see che kwahn (Higgins family). Canada denies that any of the other Claimants are descended from anyone who was ever a member of the Young Chipeewayan Band.[48]

The Commission heard a great deal of evidence from the claimants regarding the descendancy of the remaining families. Given the other findings that we make, and the fact that Canada has conceded Issue 1, we do not find it necessary to make further findings with respect to descendancy.

Issue 2: Are the Claimants Entitled to Bring This Claim?

2 If so, are the claimants entitled to bring this claim on behalf of the Young Chipeewayan Band?
- *a) Who constitutes the Young Chipeewayan Band?*
- *b) Does the Young Chipeewayan Band exist today?*
- *c) If no, when did it cease to exist?*

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47 E.L. Newcombe, Deputy Minister of Justice, to J.D. McLean, Acting Secretary, Department of Indian Affairs, May 14, 1897 (ICC Documents, pp. 586-87).

48 ICC, Submissions on Behalf of the Government of Canada, February 17, 1994, p. 4.

We observe that the Specific Claims Policy clearly contemplates claims by a band or bands, and not claims by individuals. Guidelines 1 and 2 of the Policy state:

> Guidelines for the submission and assessment of specific claims may be summarized as follows:
>
> 1) Specific claims shall be submitted by the claimant band to the Minister of Indian Affairs and Northern Development.
>
> 2) The claimant bringing the claim shall be the band suffering the alleged grievance, or a group of bands, if all are bringing the same claim.[49]

Therefore it is our view that the claimant must be a "band" in order to advance a claim under the Specific Claims Policy.

Are the Claimants a Band?

The fundamental determination for this issue is whether the claimants are a band as that term is used within the Specific Claims Policy. As set out above, *Outstanding Business* clearly requires that the claimant be a band or a group of bands. The Policy does not afford individuals or groups of individuals redress unless they are a "band" within the meaning of the Policy.

Canada argues that the crucial question is whether the claimants are a "band" within the meaning of the *Indian Act*. Canada argues that this group of claimants are not a band. Mr. Becker summarizes the Specific Claims Policy as follows:

> The Specific Claims Policy as set out in Outstanding Business is replete with references to "band" claims, and claims by individuals are not mentioned nor, in our submission, contemplated.[50]

Claimants' counsel argue that the historical Young Chipeewayan Band continues to exist and that these claimants today represent that "band." This argument is advanced on two bases. First, it is submitted that the claimants are all descendants of the original members of the Young Chipeewayan Band and that they therefore constitute the Band today. Second, it is submitted that a traditional form of band membership continues to survive among the claimants and that, quite apart from whatever status these individuals may or may not have under the *Indian Act*, they continue to constitute a band at common law. It is also asserted that Alfred Snake is recognized by the claimants as the hereditary Chief of this "band."

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[49] *Outstanding Business*, 30.
[50] ICC, Submissions on Behalf of the Government of Canada, February 17, 1994, p. 2.

In support of their argument, counsel for the claimants rely upon treaty paylists and oral history to establish descendance of the claimants. All claimants also asserted that they recognize Alfred Snake as their hereditary Chief.[51]

The Indian Act

In our view, it is the definition of a "band" under the *Indian Act* that is most relevant to the Specific Claims Policy. Since 1876 the various *Indian Acts* in place have, from time to time, prescribed comprehensive legislative regimes which have applied, *inter alia*, to the administration of Indian reserve lands and moneys. It is clear from a reading of *Outstanding Business* that this legislative framework is the foundation upon which the Specific Claims Policy is constructed.

Between the time that the first comprehensive *Indian Act* was enacted in 1876 and 1951, the statutory definition of "band" and "Indian" remained relatively consistent in the legislation. The relevant sections of the *Indian Act*, SC 1876, c. 18, are:

1. The term "band" means *any tribe, band or body of Indians* who own or are interested in a reserve or in Indian lands in common, of which the legal title is vested in the Crown, or who share alike in the distribution of any annuities or interest moneys for which the Government of Canada is responsible: the term "the band" means the band to which the context relates; and the term "band," when action is being taken by the band as such, means the band in council. [Emphasis added.]

2. The term "Indian" means –
   First Any male person of Indian blood reputed to belong to a particular band;
   Secondly, Any child of such person;
   Thirdly; Any woman who is or was lawfully married to such person: . . .

These definitions remained intact, without substantial amendment, until 1951. The 1951 *Indian Act*, SC, c. 29, introduced a significant new feature to the administration of the Department of Indian Affairs. While treaty paylists had previously been used to identify band members, in 1951 band lists were introduced. The clear objective was to maintain a comprehensive register of all band members. Rules were defined relating to how Indians were to be registered.

In 1982 the Canadian Charter of Rights and Freedoms was enacted, and as a result the *Indian Act* was amended to reflect the intent and wording of the Canadian Charter. Although the definitions of "band" and "Indian" remained unchanged, those entitled to be registered as such underwent significant legislative

[51] Appendix C provides a detailed analysis of the relevant treaty paylists and oral testimony on the issues of the descendants and whom they recognize as the hereditary Chief.

amendment in 1985. We do not believe that any of these amendments affect the determination of this issue.

The legislative regime of the current *Indian Act* recognizes bands as structured legal entities, with the ability to elect officials and act through them. Once elected, the Chief and band councils may exercise administrative[52] and quasi-judicial[53] powers in specific areas associated with the band's members, property, and funds.

In common parlance the words "band," "tribe," and "body" all imply a group living as a community, a communal group. A glance into a dictionary or an encyclopedia confirms this usage. For example, the *Canadian Encyclopedia* states: "A band is the term used to describe a community of Indians residing on one or more reserves, but some Indian bands have no reserves," and, "[i]n the NWT and the Yukon, where a few reserves have been established, the bands have been gathered into communities known as settlements . . ."[54]

"Tribe" is defined in the *Oxford American Dictionary* as "a racial group (especially in a primitive or nomadic culture) living as a community." The Shorter *Oxford* defines it as: "Tribe, a group of people forming a community and descent from a common ancestor." "Body" is defined by the *Oxford American Dictionary* as a "group or quantity of people . . . regarded as a unit." The *Shorter Oxford* says "a collective mass of persons or things."

In our view the term "band" within the meaning of the *Indian Act* clearly refers to a body of Indians who live as a collective community under the auspices of that legislation. Descendancy alone is not sufficient to give rise to the legal existence of a "band." We would observe that it is not possible to prescribe rigid *indicia* which need always be present for a group of individuals to constitute a "band," as the factors relevant to this question may vary from case to case.

It is, however, extremely clear to us that the claimants who seek redress before this Commission are not a "band" within the meaning of the *Indian Act* or the 1982 Specific Claims Policy. Today, the only *indicia* that link these individuals as a "band" are descendancy and the subject matter of this specific claim. In our view, these are not sufficient.

It is also clear that the genealogical or descendance argument itself has significant limitations. The extensive genealogical data put before us make evident that two of the claimant families are direct descendants of Young Chipeewayan Band members. As set out under Issue 1, those two families, Higgins and Chickness,

52 Section 81 illustrates the administration powers, in that it lists specific areas that band councils may regulate and monitor.

53 Section 81(r) provides that a band council may enact provisions imposing fines where its members contravene its by-laws.

54 Harvey A. McCue, "Indian Reserve," *The Canadian Encyclopedia* (Edmonton: Hurtig Publishers, 1985), 871.

are acknowledged by Canada to be direct descendants of Young Chipeewayan Band members. However, it is also clear that all the claimant families, except the Higgins family, have intermarried with members of other Saskatchewan bands, so that today it must fairly be acknowledged that they are equally the descendants (and in some cases at present members) of other bands.

The history of the dispersal of the Young Chipeewayan Band was chronicled before this Commission in considerable detail. As a result of disease, climatic hardship, and the rapid disappearance of the buffalo, the membership of the Band diminished owing to death and to the migration of individuals and families to larger, established bands elsewhere in Saskatchewan. This historical pattern was not restricted to the Young Chipeewayan Band. At the Inquiry, the following exchange occurred between James Griffin and expert witness Professor James Miller:

> Q. And dealing with that period of time, 1876, immediately before and after, what are you able to tell us of the situation particularly as it related to the Indians of the Fort Carlton area?
>
> A. It was . . . a very difficult time for the Aboriginal peoples in this region . . . The imminent collapse of the buffalo economy, upon which they depended so heavily, greatly worried them and indeed was a major factor in bringing them to support the making of treaty.[55]

At the Inquiry, Professor Miller responded to Commissioner Corcoran's question relating to the reasons for a band's movement:

> A. There are a couple of general or environmental factors that have to be taken into account. I think they are extremely important. One I've referred to several times, and that is the rapidly diminishing resource base, food resources. The other to which I haven't referred here to is fairly widespread and destructive disease. Even diseases which were not necessarily fatal amongst Euro-Canadians, such as measles, were tremendously devastating in the Plains region in the 1880s and 1890s, and generally throughout the annual reports of Indian Affairs and the Mounted Police reports in these years there are many references to very severe loss of life in the region, generally through disease and especially measles. That's another general reason for moving.[56]

55 ICC Transcripts, vol. 2, pp. 275-76. These remarks are also supported in the "Report of the Department of the Interior for the year ended June 30, 1878," Canada, Parliament, *Sessional Papers*, 1879, No. 4 (ICC Documents, p. 1173G).

56 ICC Transcripts, vol. 2, pp. 291-92. This evidence is further supported by the minutes taken at the Sandy Lake Reserve, February 12, 1955 (ICC Documents, pp. 662, 663, 664, 665).

This view is corroborated by the Young Chipeewayan treaty paylists from 1879 to 1885. As discussed earlier, the paylists disclose that the number of Indians annually paid annuities dwindled from 52 Indians in 25 families to 18 Indians in two families. By 1889 no one is identified as a Young Chipeewayan Band member.

In determining whether these claimants can bring a claim pursuant to the Policy, the threshold question is whether or not the Young Chipeewayan Band members ceased to function as a collectivity – as a "tribe," "band," or "body of Indians." This is a very difficult question to answer. As the historical review indicates, the dissolution of the Band occurred gradually over a period of several years and not as a single decisive act. There is evidence of dispersion of Young Chipeewayan Band members even at the time of treaty signing in 1876. Certainly, by 1889 the Band had ceased to exist in fact, and had also ceased to have any legal existence under the *Indian Act.*

The Common Law

Are the claimants assisted by the common law meaning of a "band"? Neither the parties, nor Commission counsel, have been able to point us to any Canadian authority that would assist us in understanding whether a "band" can have a common law existence, separate and distinct from the licensure of the *Indian Act.* Jack Woodward, in *Native Law*, indicates that the origin of the *Indian Act* concept of a "band" flows from a recognition that "when the settlers came, the land was already occupied by self-governing aboriginal people. Each of the original self-governing groups became a band."[57] Furthermore, Woodward points out that these bands were pre-existing political and social entities that were not merely "creatures of statute." Although bands are regulated by the *Indian Act* regime, they do not necessarily owe their existence to that legislation. Woodward goes on to suggest that the question of whether a body of Indians is a "band" is a question of fact that must be determined prior to the determination of other substantive issues in a lawsuit. In this case it is a question of fact that must be resolved with respect to the particular history of the Plains Cree.

Band membership was often based upon a loose association of families, and it was not uncommon for families to migrate and to join other bands. David Mandelbaum's *The Plains* Cree provides this account of the basis for band divisions:

> The Bands of the Plains Cree were loose, shifting units usually named for the territory they occupied . . . Individuals, and even whole families, might separate from their group to follow another chief.

57 Jack Woodward, *Native Law* (Toronto: Carswell, 1990).

> The most important consideration in the demarcation of band divisions was that all the members of a band lived in the same general territory. The prestige and power of the leading chief was also an important factor in the cohesiveness of a band. An influential leader attracted more families and held their allegiance better than a weaker man . . . [Chiefs Black Bear and *Tcimaskos*, or Poundmaker, were cited as examples of influential chiefs.]
>
> Kinship ties were operative in the transfer of band allegiance. A family which, for some reason, was dissatisfied with its neighbours, went to camp with relatives in another band. Young men travelled among the various bands a good deal and often married into and settled with a group distant from their own. *But every band had a stable nucleus composed of the close relatives of the chief, who would not ordinarily leave his group.*
>
> Acceptance into band membership was a simple matter. Any person who lived in the encampment for some time and who travelled with the group soon came to be known as one of its members. Newcomers were ordinarily able to trace kinship with several people in the band and so established their status. When kinship ties were tenuous or non-existent, marriage into the band usually furnished an immigrant with the social alliances necessary for adjustment to the course of communal life. *Thus the numbers of each band were constantly augmented by recruits from other bands of Plains Cree, or from other tribes.*[58]

In the case of Young Chipeewayan, the disappearance of the buffalo, the influx of settlers, and the onset of disease were all factors contributing to the migration of the Young Chipeewayan Band members to other bands. Furthermore, there is also evidence to suggest that the death of Chief Chipeewayan, Young Chipeewayan's father, was contemporaneous with the migration of members to other bands. It is possible that kinship ties with other bands and Young Chipeewayan's leadership qualities were also factors which led to the mass migration.

A recent Australian case law is of some guidance in this matter. In *Mabo v. Queensland* the plaintiffs asserted that when the Crown assumed sovereignty over certain islands in 1879, aboriginal title over those islands continued to survive. In arriving at his decision, Justice Brennan attempted to provide some guidance regarding native title. Brennan J stated:

> Secondly, Native title, being recognized by the common law (though not as a common law tenure), may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence, whether proprietary or personal and usufructuary in nature and whether possessed by a community, a group or an individual. . . . Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. *But so long as the people remain as an identifiable community living under its laws and customs*, the

[58] David Mandelbaum, *The Plains Cree: An Ethnographic, Historical, and Comparative Study*, Canadian Plains Studies 9 (Regina: Canadian Plains Research Center, University of Regina, 1979), 105-6. Emphasis added.

> communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed.[59]

The significance of this passage for our purposes is that it recognizes a tribe as a collective, cohesive, and identifiable community. In our view a "band," as that term is used in common law, is a body of individuals who exist as a collective, cohesive, and identifiable community. Once again, however, for the reasons noted previously, the evidence put before us falls far short of establishing that *these claimants* are an identifiable community living today, or indeed at any time previous, as a collectivity.

When one considers the customs and traditions of the Plains Cree people and the particular facts of this claim, it would appear that Young Chipeewayan ceased to constitute a band in any real sense of the word by 1889. The facts seem to suggest that by 1889 everyone from Young Chipeewayan had either transferred to other bands in the area (and were paid treaty on the paylists of those bands) or had moved to the United States. To use the terminology adopted by Mandelbaum, there was an absence of any "stable nucleus" of the Chief and his relatives, which would lend credence to the view that the Young Chipeewayan Band continued to exist by 1889. Had the majority of the Young Chipeewayan Band transferred to another band and continued to maintain their identity as a community under the leadership of their chief, we might have reached a different conclusion.

Conclusions

On the basis of the above analysis, based on the *Indian Act* and the common law, the claimants are not a Band. Therefore, under the Policy, they are not entitled to submit a specific claim. Even though the Policy has been administered correctly with respect to *this* claim, we feel compelled to make further suggestions and recommendations, dealing with Issues 3 and 4, based upon what has become known as our "supplementary mandate."

59 *Mabo v. Queensland* [1992] 5 CNLR 1 (Aust. HC) at 51. Emphasis added.

PART II

THE COMMISSION'S SUPPLEMENTARY MANDATE

The Commission's mandate was broadened in a letter dated October 13, 1993, by the Minister of Indian Affairs, Pauline Browes, to the then Chief Commissioner, Harry LaForme. The letter states, in part:

> I would make three observations on the federal government's proposed approach to recommendations made by the commission. Briefly, (1) I expect to accept the commission's recommendations where they fall within the Specific Claims Policy; (2) I would welcome the commission's recommendations on how to proceed in cases where the commission concluded that the policy had been implemented correctly *but the outcome was nevertheless unfair* . . .[60]

This broader mandate was previously recognized by Tom Siddon, Minister of Indian Affairs and Northern Development, in a letter to Ovide Mercredi, National Chief of the Assembly of First Nations, dated November 22, 1991:

> If, in carrying out its review, the Commission concludes that the policy was implemented correctly *but the outcome is nonetheless unfair*, I would again welcome its recommendations on how to proceed.[61]

In our view, this is precisely the type of circumstance which necessitates additional comment by this Commission with respect to Issues 3 and 4.

ISSUE 3: THE VALIDITY OF THE 1897 ORDER IN COUNCIL

3 Is the 1897 Order in Council valid?
a) Was it necessary to obtain a surrender from the Young Chipeewayan Band?

[60] See Appendix D. Emphasis added.
[61] See Appendix E. Emphasis added.

We feel that it is necessary to examine this issue from two distinct perspectives:

1 Was it necessary to obtain a surrender under the *Indian Act*?
2 Was it necessary to obtain the consent of the Indians under Treaty 6?

Indian Act

As we found under Issue 2, the Young Chipeewayan Band had effectively dispersed and disbanded by 1889 or earlier. Although the Band ceased to exist in any real sense of the word, it still remains to be considered whether a surrender was required under the *Indian Act*, and, if so, from whom?

Prior to Canada's transferring control of the reserve in 1897, government officials considered the necessity of procuring a surrender and reasoned that, since all the remaining Young Chipeewayan Band members had transferred to surrounding bands, or moved to the United States, a surrender was not legally necessary.[62] Counsel for the claimants asserted that Canada acted improperly in transferring the reserve without taking a surrender, and that it had two alternatives open to it. First, Canada could have traced the former members of the Young Chipeewayan Band by using the treaty paylists and by procuring a surrender from each of them. In support of this option, counsel refers to the procedure adopted by Canada in the case of the Chekastapasin Band. Second, it is submitted that, in the event that tracing the former Young Chipeewayan Band members was impossible, Canada could have amended the legislation specifically to permit a transfer without a surrender on these facts. Counsel for the claimants argued strenuously that, given the absence of a formal process enabling Canada to resume control of Indian Reserve No. 107, Canada had no lawful authority to transfer control of the reserve.

In this matter Canada appeared to be relying on a newly enacted provision of the *Indian Act*. During the late 19th century, the Department of Indian Affairs used treaty paylists as an instrument to transfer all the historical Young Chipeewayan Band members from the Young Chipeewayan treaty paylist onto other bands' treaty paylists. No legal authority existed at that time authorizing the Department of Indian Affairs to transfer Indians from one band to another. In 1895, the *Indian Act* was amended to deal with the issue of such transfers for the first time. Section 140 provided that an Indian could be transferred to another

[62] H. Reed, Deputy Superintendent General of Indian Affairs, to A. Forget, Indian Commissioner, February 8, 1896 (ICC Documents, p. 567).

band, if the absorbing band and the Superintendent General of Indian Affairs formally assented to the transfer. Section 140 of the *Indian Act* states:

> 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.

The provisions of the 1886 *Indian Act* as set out in section 39(a) provide that only residents of the reserve or persons interested in the reserve are eligible to vote at a meeting where the government is seeking to obtain a surrender of a reserve. If all the members of a band had been *formally* transferred to other bands pursuant to section 140, then no one would be left with an interest in the reserve and, therefore, no surrender would be possible under the *Indian Act.*

The members of the Young Chipeewayan Band had been informally transferred to other bands, prior to section 140 coming into force in 1895, by Indian Affairs officials simply putting their names on the treaty paylists of the bands with which they were residing. There is no evidence before us that Canada ever did effect formal transfers of the members of Young Chipeewayan. Indeed, the real issue to the Department of Indian Affairs at the time was not whether a *surrender* was required (they believed it was not), but, rather, whether it was necessary to effect *formal transfers* of the former Band members prior to transferring control of the reserve to the Department of the Interior.

A.E. Forget, the Indian Commissioner in Regina, wrote to the Deputy Superintendent General in Ottawa, Hayter Reed, on February 3, 1896, seeking instructions on this point:

> the few remaining members of the Band had dispersed throughout the Battleford Reserves . . . it would be a most difficult matter to trace them, and . . . further – their title to the land in the Reserve originally surveyed for the "Young Chippewayan" was practically extinguished by their claims to land in the Reserves of other Bands with whom they since amalgamated, having been duly recognized.

> In view of this fact and that the difficulty which presented itself in 1884 of tracing these persons must necessarily have been greatly augmented by the passage of a further period of eleven years, *I would ask whether the Department regards it as absolutely necessary that the enquiry be proceeded with and formal transfers obtained.*[63]

Reed responded five days later:

> under the circumstances it is probably hardly worth while to make any great exertion to trace the members of the Band of Young Chippewayan . . .[64]

The following letter from Reed to the Superintendent General, dated January 26, 1897, dealing primarily with the Chekastapasin Band, suggested that a surrender was unnecessary because the Band members had abandoned the reserve to take up membership in other bands:

> I beg to state that, the Indian owners having abandoned the reserve some ten or twelve years ago, the late Minister decided the control thereof should revert to the Department of the Interior, holding that, by the *formal transfer* of the Indians concerned to other bands where they enjoy equal privileges and rights, including that to share in the reserve as the original owners, they had ceased to be members of the Chekastapaysin Band; and consequently that no necessity existed for getting a surrender from them, which would otherwise be required to enable the reserve, including the timber thereon, to be disposed of by the Crown. Nonetheless, to prevent the possibility of dissatisfaction on the part of the original members, or of trouble arising as to title, it was thought advisable to ask them for a surrender . . . [65]

In April 1897 this issue had been presented to the Minister of Indian Affairs for a decision.[66] To assist in this regard, J.D. McLean, the Acting Secretary of the Department of Indian Affairs, sought a legal opinion from the Department of Justice with respect to Young Chipeewayan and another reserve, Chekastapasin, which Indian Affairs also hoped to transfer to the Department of the Interior without taking a surrender.[67]

Having concluded that it would be "difficult" to trace the members of Young Chipeewayan to effect formal transfers, Canada decided to transfer control of the

63 A. Forget, Indian Commissioner, to H. Reed, Deputy Superintendent of Indian Affairs, February 3, 1896, NA, RG 10, vol. 6663, file 109A-3-1 (ICC Documents, p. 566). Emphasis added.
64 H. Reed, Deputy Superintendent General of Indian Affairs, to A. Forget, Indian Commissioner, February 8, 1896 (ICC Documents, p. 567).
65 H. Reed, Deputy Superintendent General of Indian Affairs, to the Superintendent General, January 26, 1897 (ICC Documents, p. 575). Emphasis added.
66 Acting Secretary of Indian Affairs to Minister of Indian Affairs, April 1897, NA, RG 10, vol. 6663, file 109A-3-1 (ICC Documents, pp. 581-82).
67 Acting Secretary of Indian Affairs to Deputy Minister of Justice (ICC Documents, p. 583).

reserve to the Department of the Interior by way of Order in Council PC 1155 on May 11, 1897, without formal transfers in place, and without the benefit of the legal opinion from the Department of Justice.

The legal opinion from E.L. Newcombe, the Deputy Minister of the Department of Justice, is dated three days after the Order in Council transferring Stoney Knoll Reserve, and would appear to be directed primarily to the facts of Chekastapasin:

> As at present advised I do not think that the land in question can, in view of the provisions of the sections referred to, be sold or otherwise alienated until the same has been released or surrendered in the manner provided by the Act. The section positively forbids, subject to certain exceptions, which have no application to the present case, the sale, alienation or lease of any reserve or portion of a reserve without such release or surrender.
>
> There does not appear from your statement of the facts to have been anything amounting in a dissolution of the band. *As to the members said to have been transferred to other bands, I do not find any express authority for which such transfer in the Statutes*, and there may be some question as to the legal effect of what has taken place, but in the absence of further information on the subject, I do not think that the lands in the reserve are relieved in the hands of the Crown from the trust in favour of the band, so far as these members are concerned, or that the Crown is dispensed as to them from compliances with Section 38 before disposing of such lands. Then it seems from your statement that there are other members of the band who have been traced, and therefore [may not have] been transferred to other bands.[68]

The legal opinion would appear to be inaccurate with respect to the lack of authority to transfer members to other bands, since section 140 had been enacted in 1895 to provide precisely such authority.

It is interesting to note that Canada did obtain a surrender from the "original" members of the Chekastapasin Band. It would appear that it did so because the members of Chekastapasin were more easily traced and because of receiving this legal opinion from the Department of Justice. It may also be because members of the Chekastapasin Band refused to be transferred formally pursuant to section 140 if it meant giving up their claim to their reserve.[69] It should also be noted that the actions of Canada with respect to the Chekastapasin Band are at present the subject matter of litigation and a specific claim.

Having found that the Young Chipeewayan Band ceased to exist as a "band" for the purposes of the *Indian Act* or in the common law by 1889 at the latest, we must consider the question of whether Canada was still obligated, pursuant

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68 E.L. Newcombe, Deputy Minister of Justice, to J.D. McLean, Acting Secretary, Department of Indian Affairs, May 14, 1897 (ICC Documents, pp. 586-87). Emphasis added.

69 R.S. McKenzie, Indian Agent, to A.E. Forget, Indian Commissioner, May 18, 1896, NA, RG 10, vol. 6663, file 109A-3-1, pt. 1 (ICC Documents, pp. 570-71.

to the *Indian Act,* to trace the former members of the Band to obtain a surrender from them.

We find that Canada could not have complied strictly with the surrender provisions of the *Indian Act,* even if it had chosen to follow this course of action. Section 39(a) of the *Indian Act,* RSC 1886, c. 43, provides that only Indians habitually residing on or near and interested in the reserve are eligible to vote at a meeting where the government is seeking to obtain a surrender of a reserve.

> 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.]

As the Band had ceased to exist by 1897, it is difficult to see how Canada could have complied with the surrender provisions of the *Indian Act,* because no one was entitled to vote at the Band meeting by virtue of the residency requirements. There is no provision that allows Canada to trace former band members and include them in the voting process, and it is arguable that, even if Canada had invoked such a process, the surrender would have been deemed invalid by virtue of the residency requirements.

The *Indian Act* is silent with respect to the legal consequences of a factual dissolution of a band. Section 140 is of no assistance in this case, as Canada chose not to utilize it by not seeking formal transfers. In particular, the *Indian Act* gives no guidance on what to do when a reserve has been set aside for a particular band and that band has ceased to exist under these peculiar circumstances. However, Treaty 6 does provide guidance on this issue.

Treaty 6

The relevant provisions of Treaty 6, which deal with the setting aside of reserve lands and the subsequent sale thereof, are as follows:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands . . . 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 . . . that

> the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof . . .
>
> Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any Band as She shall deem fit, and also that 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* . . . [70]

Treaty 6 clearly requires the prior consent "of the said Indians entitled thereto," before reserve lands "may be sold or otherwise disposed of." It warrants emphasis that it is *not* the consent of the "band" that is required under the treaty. The issue then becomes: Who were "the Indians entitled thereto" with respect to Stoney Knoll Reserve No. 107 when Canada unilaterally transferred administration and control of the reserve to the Department of the Interior in 1897?

The Commission is of the opinion that all former members of the Young Chippewayan Band alive in 1897 were the Indians *entitled under the treaty* to Stoney Knoll Reserve No. 107. Chief Chipeewayan and four headmen signed Treaty 6 at Fort Carlton on August 23, 1876, on behalf of the Chipeewayan Band. The treaty contains an undertaking from Her Majesty the Queen to set aside reserves for the Indians who signed the treaty. This undertaking was fulfilled with respect to the Chipeewayan Band when an Order in Council was passed on May 17, 1889, setting aside Indian Reserve No. 107.[71] This reserve was set aside pursuant to the treaty for these Indians. The treaty is clear that the reserve land so set aside cannot be "sold or otherwise disposed of" without their consent. The treaty makes no mention of the effect of a dispersal of the band or the effect of a treaty Indian residing on a reserve set aside for other treaty Indians. The requirement of consent is absolute and unqualified.

As a result, the consent of the former Band members was required *under the treaty* for the transfer of Stoney Knoll Reserve No. 107. Notwithstanding the provisions of the *Indian Act*, the treaty required that their consent be "first had and obtained."

This finding is supported by the decision of the Federal Court of Canada, Trial Division, in *The Queen v. Blackfoot Band of Indians et al.* In that case the court had to determine who were the parties to Treaty 7 in order to determine how

[70] See footnote 14. Emphasis added.
[71] Order in Council PC 1151 (ICC Documents, p. 540).

distributions were to be made under the ammunition clause. The wording of Treaty 7 is similar to the wording of Treaty 6. The court found:

> It is clear from the preamble that the intention was to make an agreement between Her Majesty and all Indian inhabitants of the particular geographic area, whether those Indians were members of the five bands or not. The chiefs and councillors of the five bands were represented and recognized as having authority to treat for all those individual Indians. The Treaty was made with people, not organizations.
>
> . . . It was Indians, not bands, who ceded the territory to Her Majesty . . . and it was to Indians, not bands, that the ongoing right to hunt was extended . . . . The cash settlement . . . and treaty money . . . were payable to individual Indians, not to bands. The reserves . . . were established for bands, and the agricultural assistance . . . envisaged band action, but its population determined the size of its reserve and amount of assistance.[72]

On the facts of this case, we are of the opinion that the transfer of Stoney Knoll Reserve No. 107 was done in contravention of the terms of Treaty 6. Not only does Treaty 6 require the consent of "the Indians entitled thereto" before a reserve can be sold, it also requires that if the land is sold, or otherwise disposed of, then it be done "for the use and benefit of the Indians entitled thereto." In our view, there is, therefore, a lawful obligation owing under the treaty to account for the proceeds of the disposition of the reserve.

Accounting for the Proceeds of Disposition

As set out above, the *Indian Act* is silent with respect to the facts of this Inquiry, in that it gives no guidance with respect to a reserve that has been set aside for a band that has subsequently dispersed. We have found that Canada could not have complied with the surrender provisions of the *Indian Act*, owing to the technical residency requirements, but that alone does not determine the issue before us. The consent of the Indians "entitled thereto" was required, under the terms of the treaty, before a reserve could be sold or otherwise disposed of. Canada, therefore, breached the terms of Treaty 6 by transferring Stoney Knoll Reserve No. 107 to the Department of the Interior without first obtaining the consent of the surviving former members of the Young Chipeewayan Band. There is no conflict between the Indian Act and the treaty on this point. Although the *Indian Act* is silent, the treaty is quite specific about first obtaining the consent of the Indians "entitled thereto."

72 [1982] 3 CNLR 53, [1982] 4 WWR 230.

The treaty also imposes an obligation that the lands be sold for the use and benefit of the Indians entitled thereto. This did not happen in this case. There is no evidence to support the proposition that either the former members of Young Chipeewayan Band or the absorbing bands received any benefit whatsoever from the sale of Stoney Knoll Reserve No. 107.

In our view Canada had a lawful obligation to account for the proceeds of disposition in one of two ways: (1) to ensure that the absorbing bands received additional reserve lands based on the treaty formula with respect to the number of members absorbed; or (2) to ensure that the absorbing bands received a pro rata distribution of the proceeds of the sale of Stoney Knoll Reserve No. 107. The evidence is clear that a pro rata distribution did not take place. The evidence is not clear if any of the absorbing bands received additional reserve lands as a result of absorbing the Young Chipeewayan members.

With respect to (2) above, after 1895 the Superintendent General of Indian Affairs had a discretion under section 140 of the *Indian Act* to pay a per capita share of a former band's capital to the band that had taken in the new member. It is not apparent from the historical record why the Department of Indian Affairs declined to exercise this discretion in favour of the absorbing bands with respect to the Young Chipeewayan Band members who were transferred, other than that it would have been "difficult" to do so and that the transfers were "informal."

By transferring control of the lands, Canada was unjustly enriched, the First Nations of Saskatchewan were disadvantaged, and the terms of Treaty 6 were not fulfilled, if Canada did not account for the proceeds of disposition in one of the two ways set out above.

Treaty 6 provided, among other things, that the Crown would set aside one square mile of reserve lands for each family of five for the mutual use and benefit of the band. There can be no doubt that the Crown originally satisfied this condition of the treaty with respect to the Young Chipeewayan Band. However, Canada's subsequent conduct involving a unilateral decision to transfer Stoney Knoll Reserve No. 107 without consent or compensation was a breach of Treaty 6.

In *R. v. Taylor and Williams*, the Ontario Court of Appeal made the following comments regarding the nature and extent of treaty rights:

> In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved . . . Mr. Justice Cartwright emphasized this in his dissenting reasons in R. *v.* George . . . where he said:
>
> > We should, I think endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such manner that the

> honour of the Sovereign may be upheld and Parliament *not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty.*[73]

The language employed by the court has been quoted with approval by many courts, including the Supreme Court of Canada in *R. v. Sparrow*:

> In our opinion *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, [1981] 3 C.N.L.R. 114, ground a general guiding principle for s. 35 (1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[74]

RECONSTITUTING THE YOUNG CHIPEEWAYAN BAND

Although the possibility of reconstituting the Young Chipeewayan Band has not been formally raised before this Commission, this would certainly represent an alternative which could be explored. We would ask Canada, the absorbing bands, and the claimants to consider whether it is practical to reconstitute the Band pursuant to section 2(1)(c) of the *Indian Act*, RSC 1985, c. I-5.[75] Throughout the past century, some Indian bands were no longer recognized[76] by Canada as sustaining themselves as a collective and identifiable entity. Consequently, where Canada caused[77] or found that band members had generally dispersed,[78] amalgamated with other bands,[79] or enfranchised,[80] it deleted the band from its records.

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73 *R. v. Taylor and Williams* (1981), 34 OR (2d) 360 at 367 (Ont. CA). Emphasis added.

74 [1990] 1 SCR 1075, 70 DLR (4th) 385, [1990] CNLR 160.

75 Section 2(1)(c) states:

> 2(1) In this Act,
> "band" means a body of Indians
>
> . . .
>
> (c) declared by the Governor in Council to be a band for the purposes of this Act; . . .

76 The *Indian Act* provides no express authority defining a process or method by which a band may be dissolved. Also, the common law provides no assistance in this regard.

77 We make no comment on the extent of Canada's liability where it can be demonstrated that the band did not voluntarily consent to its demise.

78 The plight of the Young Chipeewayan Band is an excellent illustration of this point.

79 Throughout the late 19th century, in an effort to homestead the west, Canada actively procured surrenders from bands and amalgamated them into one band. This point can be illustrated by citing two examples: (1) during the 1890s to 1900s, two Assiniboine Bands, Pheasant Rump and Ocean Man, were amalgamated with a Cree Band, White Bear. They were collectively known as the Moose Mountain Bands; (2) Chief Luckyman signed Treaty 6 and a reserve was never confirmed for that Band. They were placed onto the Little Pine Band reserve.

80 The Mitchell Band in Alberta illustrates this point. During the late 1950s, the adult members of the Mitchell Band entirely enfranchised. Their reserve was subdivided and title to each parcel of land was assigned to the families of the Band. A corporation was created and held the mineral rights, in trust, for the benefit of the enfranchised Band members.

Since then, however, many of those bands have reassembled and asserted their identity as separate and distinct bands to Canada. For various reasons, many of those bands have been relisted as bands by Canada.

There are at least two known examples of reassembled bands in Saskatchewan: the Moose Mountain Bands and the Luckyman Band. On November 23, 1989, the Luckyman Band and Canada entered into an agreement that would confirm a reserve for the Luckyman Band. On January 30-31, 1986, the White Bear First Nation and Canada entered into an agreement, reconstituting three historical bands and allocating funding to them for the purpose of purchasing lands to be reinstated as reserve lands.

CONCLUSIONS

It is our view Canada was obligated to obtain the consent of the former members of Young Chipeewayan, pursuant to Treaty 6, before transferring control of Stoney Knoll Indian Reserve No. 107 to the Department of the Interior.

To allow the lands contained in Stoney Knoll Indian Reserve No. 107 to be sold by Canada, without providing the absorbing bands with some form of compensation in terms of lands or money for the additional members received, would be to allow an injustice by way of unjust enrichment. Such a result would lead to the situation contemplated by the Supreme Court of Canada in *Mitchell v. Peguis Indian Band*, where the court said:

> it would be highly incongruous if the Crown, given the tenor of its treaty commitments, were permitted . . . to diminish in significant measure the ostensible value of the rights conferred.[81]

Issue 4: The Treaty Land Entitlement Agreement

4 Would participation in recent Treaty Land Entitlement settlements disentitle the claimants from raising this claim?

With respect to Issue 4, we note that Canada, the Province of Saskatchewan, and many Saskatchewan First Nations entered into a comprehensive Treaty Land Entitlement Agreement in 1992. There was little evidence led with respect to this issue and not much given by way of oral argument. In our view, those bands able to establish a historical shortfall of land, as a result of absorbing former Young Chipeewayan Band members, should pursue those claims within the 1992

[81] [1990] 2 SCR 85 at 136, 71 DLR [4th] 193 at 230, [1990] 3 CNLR 46 at 60 [La Forest J].

Treaty Land Entitlement Agreement. If any such bands are not signatory to the 1992 agreement, a separate specific claim, based on treaty land entitlement, may still exist.

The question of whether any of the absorbing bands today have an outstanding treaty land entitlement claim to reserve land necessarily depends upon the particular facts and circumstances relative to each band. That task is beyond the scope of this Inquiry.

PART III

FINDINGS AND RECOMMENDATIONS

The parties framed the issues before this Commission as set out in Part II of this Report. Issue 1, dealing with descendancy, was conceded by Canada at the outset of this Inquiry. Therefore we have not dealt with this issue in depth and make no findings with respect to descendancy other than to note that Canada concedes that the claimants from the Higgins and Chickness families are descendants of members of the historical Young Chipeewayan Band. Details of the genealogy of the claimants as presented to this Commission are set out in Appendix C.

Issue 2 was restated by us as a threshold question: Are the claimants a Band? This Commission is bound to follow the provisions of the Specific Claims Policy as defined in the 1982 booklet entitled *Outstanding Business*. That Policy clearly contemplates claims by a band or a group of bands, and not claims by individuals.

We have found these claimants are not a "band" within the meaning of the *Indian Act*. Today the only *indicia* that link these individuals as a "band" are descendancy and the subject matter of this specific claim. It is evident from the extensive genealogical evidence put before us, and it has also been acknowledged by Canada, that the Higgins and Chickness families are direct descendants of Young Chipeewayan Band members. However, it is also clear that all the claimants, save and except for the Higgins family, have intermarried with members of other Saskatchewan Bands, such that today it must fairly be acknowledged that they are equally the descendants of members of other bands.

We have found the Young Chipeewayan Band ceased to function as a collectivity, or as a "tribe," "band," or "body of Indians," at least by 1889, when the last individual was paid treaty under the Young Chipeewayan paylist. In our view, the historical evidence indicates that the Young Chipeewayan Band members began dispersing soon after the date of the signing of Treaty 6, and that the treaty paylists disclose that the dissolution of the Band occurred gradually over time and not as a single decisive act.

No Canadian authority was proffered by counsel as to the common law meaning of a "band." However, a recent Australian case makes passing reference

to the indicia of a "tribe." In *Mabo v. Queensland* [1992] 5 CNLR (Aust. HC), Brennan J referred to the beneficiaries entitled to assert native title when he was defining native title. He recognized a "tribe" as a collective, cohesive, and identifiable community. We find *these claimants* are not an identifiable community living today, or indeed at any time previous, as a collectivity.

Based on the above findings, we make the following recommendation:

RECOMMENDATION 1

The Policy does not allow for the validation of this claim brought by these claimants, as they are not a Band.

As set out in Part II, the mandate of this Commission includes what we refer to as "The Commission's Supplementary Mandate." We have been invited by the Government of Canada to make recommendations on how to proceed where the Commission finds that the Policy was implemented correctly, but the outcome was nonetheless unfair. In our view, this is precisely the type of circumstance which necessitates additional comments by this Commission.

As we found in Part II, although Canada could not have complied with the surrender provisions contained in the *Indian Act* at the time, Canada failed to comply with the terms of Treaty 6, by failing to secure the consent of the former Young Chipeewayan Band members prior to transferring Stoney Knoll Reserve No. 107 to the Department of the Interior by Order in Council in 1897. This results in a lawful obligation on the part of Canada to account for the proceeds of disposition of that reserve to those Bands that absorbed the former members of Young Chipeewayan between the signing of Treaty 6 in 1876 and the transfer of the reserve in 1897.

In our view, to the extent that the bands absorbing former Young Chipeewayan Band members suffered a treaty land entitlement shortfall, Canada could be obligated to recalculate the reserve land allotment, for those absorbing bands, to conform with the formula embodied in Treaty 6. Alternatively, it may well be Canada's obligation under Treaty 6 to allocate that total land comprising Indian Reserve No. 107, on a pro rata basis, to the absorbing bands. The evidence is clear that a pro rata distribution did not take place. The evidence is not clear if any of the absorbing bands received additional reserve lands as a result of absorbing the Young Chipeewayan members.

We note that Canada, the Province of Saskatchewan, and many Saskatchewan First Nations entered into a comprehensive Treaty Land Entitlement Agreement in 1992. In our view, those bands able to establish a historical shortfall of land, as a result of absorbing former Young Chipeewayan Band members, should pursue those claims within the 1992 Treaty Land Entitlement Agreement. If any such bands are not signatory to the 1992 agreement, a separate specific claim, based on treaty land entitlement, may still exist.

Regardless of how this matter is approached and finally resolved, we are firmly of the opinion that Canada should not be unjustly enriched as a result of the misfortune of the Young Chipeewayan Band and the generosity of those bands that absorbed the Young Chipeewayan members. It is contrary to the spirit, intent, and wording of Treaty 6, which promised that reserve lands would only be taken for the benefit of treaty Indians, not for the benefit of Canada.

RECOMMENDATION 2

The issues surrounding the transfer of Young Chipeewayan Band members to the treaty paylists of other First Nations need to be explored in detail by Canada and the various First Nations that absorbed members of the Young Chipeewayan Band, on a case-by-case basis, including the effects, if any, of the 1992 Treaty Land Entitlement Agreement, to ensure that the provisions of Treaty 6 are honoured.

For the Indian Claims Commission

Carole T. Corcoran Commissioner	Daniel Bellegarde Commissioner	James Prentice, QC Commissioner

December 1994

APPENDIX A

YOUNG CHIPEEWAYAN INQUIRY

1 **Commissioner's acceptance to conduct Inquiry** June 30, 1993

2 **Notice sent to parties** June 30, 1993

3 **Planning conference** October 15, 1993

The planning conference was held in Toronto, Ontario. Representatives from the alleged Young Chipeewayan Band, Canada, and the Indian Claims Commission were invited and attended on October 15, 1993. The issues discussed included: the mandate of the Commission, hearing dates, translation, consolidation of documents, procedural and evidentiary rules, the scope of the Inquiry, legal argument, and other matters related to the conduct of the Inquiry.

4 **Community session** Saskatoon, Saskatchewan January 18-19, 1994

On January 18 the Commissioners heard from 15 witnesses from various communities in the vicinity. They were:

Chief Alfred Snake
Harry Michael
Elizabeth Gaudry
Lola (Louise) Gabriella Okeeweehow
Joanne Mary Gude
Benjamin Johnson Weenie
Eugene Weenie
Kelly Chickness
Amy Standingwater
Elizabeth Standingwater
Chief Barry Ahenakew
Chief Eugene Anaquod
Douglas Bird
Leslie Angus
Joseph Albert Angus

On January 19 the Commissioners heard from two expert witnesses: Barbara Shanahan and Professor James Miller.

5 **Oral submissions:** Saskatoon, Saskatchewan February 24, 1994

6 **Formal record**

The formal record in the Young Chipeewayan Inquiry consists of the following materials:

- Documentary record (5 volumes of documents, 1 addendum, 1 index)
- Young Chipeewayan transcripts from the community session (2 volumes)
- Written submission of counsel for the claimants and Canada
- Transcripts of oral submissions (1 volume dated February 24, 1994)
- Book of authorities
- Exhibits tendered at the Inquiry
- Report of the Commission.

The above represents the complete formal record of this Inquiry.

APPENDIX B

PROCEDURES OF THE YOUNG CHIPEEWAYAN INQUIRY

Carole T. Corcoran, chairperson, called the session to order and invited an elder to open the meeting with a prayer. Benjamin Weenie made some introductory comments. Commissioner Corcoran briefly explained the role of the Commission and the scope of the Inquiry. Commission counsel tendered copies of documents relating to the mandate of the Commission into the formal record. A Cree interpreter, Wesley Fine Day, was provided to enable the elders to give information and to follow the proceedings in their own language.

Witnesses from surrounding communities were called and assisted by Commission counsel. They were not sworn in or asked to affirm their evidence under oath. All questions of them were asked through Commission counsel, with the Commissioners reserving the right to interject at any time. Other counsel who wished to raise questions were asked to put them in writing. The questions were given to Commission counsel, who would then direct the questions to the witness. Witnesses were not subject to cross-examination.

Direct questioning of expert witnesses was conducted by the counsel calling the witness. The witnesses were not sworn in or asked to affirm their evidence on oath. They were briefly asked to provide their qualifications to give opinion evidence. The other counsel were given an opportunity to cross-examine.

The Commissioners did not adopt any formal rules of evidence in relation to the community information or documents they were prepared to consider.

APPENDIX C

EVIDENCE ON ISSUES OF DESCENDANCY AND CHIEFTAINSHIP

CHIEFTAINS OF THE YOUNG CHIPEEWAYAN BAND

Chief Chipeewayan and Young Chipeewayan

Alfred Snake claims: (1) that he is a descendant of Chief Young Chipeewayan; (2) that Young Chipeewayan was a band member of the Young Chipeewayan Band; and (3) that he is entitled to bring this claim. A genealogical chart for the Snake and Standingwater families was filed as exhibit 4 at the inquiry. A revised copy is attached as figure 1.

On August 24, 1876, the Chipeewayan Band received its first treaty annuity payments.[1] The 1876 treaty paylist reveals that Chief Chipeewayan was paid $73, comprising a one-time payment of $12 for each member of his family for taking treaty, and $25 for himself as chief. At that time, the treaty paylists indicated that he had two wives and one son.

In 1877 Chief Chipeewayan passed away, and it is not disputed that he was succeeded by his son, Is-pim-ik kah-kee-toot[2] or Young Chipeewayan.[3] The 1877 treaty paylist reveals Young Chipeewayan was paid for two wives and two girls,[4] and by 1878 Young Chipeewayan was Chief and was paid for having three wives and three children.[5]

In 1879 the Chipeewayan Band was paid at Battleford. The 1879 treaty paylist[6] shows a woman has left Young Chipeewayan and he was paid $55: $25 as Chief and $5 each for two wives, one son, and three daughters. The treaty paylist says

[1] 1876 treaty annuity paylist for Chipeewayan's Band: 1 Chief, 4 headmen, and 79 Indians were paid (ICC Documents, p. 25).
[2] The spelling of Is-pim-ik kah-kee-toot has changed since 1876. This spelling is the one currently used by the First Nation and therefore will be used throughout this report.
[3] Since Alfred Snake is claiming to be the descendant of Young Chipeewayan, the remaining descendants of Chief Chipeewayan are irrelevant for the purposes of establishing lineal descent and consequently will not be explored at this time.
[4] 1877 Chipeewayan's Band treaty paylist (ICC Documents, p. 26).
[5] 1878 Chipeewayan's Band treaty paylist (ICC Documents, p. 27).
[6] 1879 Chipeewayan's Band treaty paylist (ICC Documents, p. 28).

nothing about what happened to the woman who left Young Chipeewayan. There is no evidence to determine what happened to her and whether she took with her any children. From 1880 to 1887,[7] the treaty paylists show no significant changes in the Young Chipeewayan family except two births and a death. In 1885 the treaty paylist[8] does not show where the Band was paid, but it does indicate Band members were paid.

In 1888 the Young Chipeewayan Band was no longer paid under a separate entry, rather members were paid under other treaty paylists. In 1888 Young Chipeewayan was paid as number 102 under the Thunderchild treaty paylist.[9] From 1888 to 1908, Young Chipeewayan was paid as number 102 under the Thunderchild Band. Young Chipeewayan was not paid in the capacity as Chief of a Band, and during that time the size of his family fluctuates.[10]

In 1899 Young Chipeewayan was paid $15: $5 for himself, one boy, and a girl. The notation in the remarks column of the 1899 treaty paylist for the Thunderchild Band states "Boy to man and paid as No. 146 this Band."[11] Number 146 has not been identified.

The Thunderchild treaty paylist records no significant changes to Young Chipeewayan's family from 1900 to 1908. Two notations in the remarks column of the 1905 and 1908 paylist explain the reason for a reduction in his family. The 1905 paylist states: "Boy to man & paid as No. 152 this Band."[12] Number 152 has not been identified. The 1908 paylist states: "Girl to woman & paid with her husband as No. 148 this Band."[13] Number 148 has not been identified.

To summarize, Chief Chipeewayan and his three headmen signed Treaty 6 in 1876. In 1877 Chief Chipeewayan passed away and was succeeded by his son, Is-pim-ik kah-kee-toot or Young Chipeewayan. There are two significant

7 In 1887 the treaty paylist discloses that one of his daughters married a man from the Thunderchild reserve. The notation in the remarks column for the Young Chipeewayan Band states: "1 daughter married No. 86 Thunderchild."

8 1885 Young Chipeewayan's Band treaty paylist (ICC Documents, p. 34).

9 1888 Thunderchild Band treaty paylist (ICC Documents, p. 37).

10 In 1897 there is no explanation why Young Chipeewayan's wife was no longer accounted for. However, there is an explanation for the reduction in the number of girls. The notation in the remarks column of the 1897 treaty paylist for the Thunderchild Band states: "Girl married to number 86." Number 86 has not been identified.

11 1899 Thunderchild Band treaty paylist (ICC Documents, p. 48). Generally, treaty annuity numbers were given to Indian children at the discretion of the Indian agent. The generally accepted rule was that Indian children were paid annuities under their family number until they were married or reached the age of majority, at which time they received their own number. While the age of majority varied from province to province, it was generally accepted that the age of majority was 21 years old. In the case of an orphan, he or she would receive their treaty annuity number at an earlier age. See Bennett McCardle, *Indian History and Claims: A Research Handbook*, 2 vols. (Ottawa: Indian and Northern Affairs Canada, 1983), I: *Research Projects*, 149.

12 1905 Thunderchild Band treaty paylist (ICC Documents, p. 54).

13 1908 Thunderchild Band treaty paylist (ICC Documents, p. 57).

revelations relating to Young Chipeewayan and the treaty paylists. First, $25 was paid to the individual recognized as Chief. Second, a written record reveals some characteristics regarding the family history of treaty band members.

With regard to Chieftainship, the treaty paylists demonstrate that Young Chipeewayan was paid in his capacity as Chief until 1888. From that year forward, the Young Chipeewayan Band members were no longer paid under a separate entry but rather were paid under other treaty paylists. Young Chipeewayan was paid as number 102 under the Thunderchild treaty paylist from 1888 to 1908.

With regard to family history, the 1879 treaty paylist for Chipeewayan's Band reveals that a woman left Young Chipeewayan. There is no indication of what happened to her and whether she kept any children she had with Young Chipeewayan. Although there are deaths and births in Young Chipeewayan's family, no son or daughter becomes old enough to receive a treaty number until 1897. In 1897 Young Chipeewayan's daughter marries number 86 of the Thunderchild Band. The 1899 and 1905 Thunderchild treaty paylists expressly identify male children of Young Chipeewayan. However, the paylists submitted do not identify the children by name.

Albert Snake

There is no dispute that Chief Alfred Snake[14] is the son of Albert Snake. To simplify matters, Albert Snake's history will be examined. The disputed issue is whether Albert Snake was the son of Young Chipeewayan. The treaty paylists for the Young Chipeewayan and Thunderchild Bands do not reveal a lineage from Young Chipeewayan to Albert Snake.[15]

On February 12, 1955, a meeting was held with six individuals present.[16] The purpose of the meeting was to reduce to writing the oral history of Albert Snake. Harry Bighead[17] took the minutes of the meeting. In that document, Albert Snake states his relationship to Chief Chipeewayan and Young Chipeewayan. He states:

> I was about nine years old when my grandfather, Ochippeywan, the Chief, advised his people to leave the reserve for the winter.
>
> . . .

14 Treaty No. 286 of the Sandy Lake Band (ICC Exhibit 5).

15 In fact, the treaty paylists for the Young Chipeewayan and Thunderchild bands do not disclose or refer to Albert Snake as either being paid annuity payments, or transferred to or from another reserve.

16 Minutes taken at the Sandy Lake Reserve, February 12, 1955. Present were Baptiste Gaudry, Mrs. B. Gaudry, John Snake, Albert Snake, Harry Bighead, and Alfred Snake. Except Harry Bighead, everyone was related to Albert Snake by either marriage or blood. (ICC Documents, p. 671).

17 Harry Bighead and Harry Michael are the same person. Michael is his father's given name.

> It was about towards spring when sickness came upon us and quite a few passed away, one of them was grandfather, the Chief. My mother was one of the women who passed away. Her name was O-ma-mees. . . . My father's name was Espim-hic-cak-itoot. To translate this from cree to english, 'somebody who calls from the sky.'[18]

His explanation for the distinction between his surname and Chipeewayan was due to Cree culture and religious administration. The 1955 minutes state, in part:

> It was during the summer when I and my grandmother were called up for baptism by Reverend Hines and were both baptised on the same day. They gave her the name, Emma, while mine was Albert. . . . It may sound silly to you, but it has been and I think is still the same with some Indians even in this generation that no mother-in-law will name her son-in-law at any time for the respect of her son-in-law and the son-in-law will do the same at any time. Therefore, when my grandmother was asked the name of my father, she refused to name him. But I had to have a last name and so Reverend Hines and others who were in attendance of mine and my grandmother's baptism gave me a name – Snake, because at the time I was living at Snake Plain and so they thought of naming me after that place, but they made it shorter just Snake.[19]

Counsel for the claimant submitted two certificates of baptism, one for Albert Snake[20] and one for his grandmother, Emma Snake.[21] On August 10, 1884, the Reverend John Hines baptised an orphan[22] by the name of Albert and his grandmother, Emma, at St Mark's Church, Asissippi Mission. The certificate of baptism for Albert Snake shows his date of birth as 1875.[23]

The first mention of Emma Snake on the treaty paylists found by Ms Shanahan,[24] the researcher retained by Canada in this matter, was on that for 1885. In that year Emma was paid as number 118 with the Mistawasis Band at Snake Plain.[25] A notation in the remarks column of the 1885 Mistawasis treaty paylist states: "Not paid last year very old with grandson from Plain."[26] There are no changes noted in the Mistawasis treaty paylists until 1889[27] when the grandson had become old enough[28] to receive his own treaty number.

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18 Minutes taken at the Sandy Lake Reserve, February 12, 1955 (ICC Documents, pp. 662, 663, 664, 665).
19 Minutes taken at the Sandy Lake Reserve, February 12, 1955 (ICC Documents, pp. 668, 669).
20 Certificate of baptism for Albert Snake from Diocese of Saskatchewan (ICC Exhibit 6).
21 Certificate of baptism for Emma Snake from Diocese of Saskatchewan (ICC Exhibit 7).
22 He was baptized as an orphan and the names of his parents were not recorded.
23 The date is further corroborated in the 1955 minutes.
24 Barbara Shanahan was trained as a clinical psychologist and worked in the area of psychological research. Since 1989 she has been carrying out social and historical research.
25 1885 Mistawasis Band treaty paylist (ICC Documents, p. 59).
26 Ibid.
27 1889 Mistawasis Band treaty paylist (ICC Documents, p. 63). In 1889 the remarks column of the Mistawasis treaty paylist notes: "Boy draws under No. 133."
28 See footnote 11, above.

The 1890 Mistawasis treaty paylist[29] discloses that Emma Snake had passed away and that Albert Snake received his treaty annuity payment. In that year, Albert was paid on the Ahtahkakoop treaty paylist[30] as number 126. There are no changes to the Ahtahkakoop treaty paylist regarding Albert Snake until 1894 when he married. For the period 1894-1916, the Ahtahkakoop treaty paylist reveals that Albert Snake had one wife and that there were some births and deaths in his family. In 1916 the Ahtahkakoop treaty paylist identified the name "Alfred" as a newborn boy.[31] In 1916, Albert Snake had one wife,[32] two boys, and one girl. The older boy has not been identified. At the Inquiry, Alfred Snake gave evidence that his older brother passed away without leaving any offspring.[33] The older girl has been identified as Elizabeth Gaudry.[34]

Currently, each claimant recognizes Alfred Snake as the hereditary Chief. Although some expressed their reasons in terms not normally characteristic of "hereditary chieftainship," others gave their reasons on the basis of a blood line.

Q. Who do you recognize as being the hereditary chief?
A. Alfred. Mr. Alfred Snake.
Q. Could you tell the Commissioners why you recognize him as being hereditary chief of *the Young Chipeewayan Band?*
A. Well I believe he deserves it and I think he's all right to be our chief. I'm having no complaints.
Q. Are you aware of anyone else claiming to be the hereditary chief of the Young Chipeewayan Band, other than Alfred Snake?
A. Not really.[35]

– Lola Okeeweehow

Q. Who do you recognize as being the hereditary chief of the Young Chipeewayan Band?
A. Alfred Snake.
Q. Could you tell the Commissioners why?
A. That's what a lawyer had told me.

29 1890 Mistawasis Band treaty paylist (ICC Documents, p. 64). The notation in the remarks column is: "To Ticket No. 126 Ahtahkakoop."
30 1890 Ahtahkakoop treaty paylist (ICC Documents, p. 67). The notation in the remarks column of the 1890 Ahtahkakoop treaty paylist states: "From Ticket No. 133 Mistawasis."
31 1916 Ahtahkakoop treaty paylist (ICC Documents, p. 90). In the remarks column is found the notation: "Alfred born Feb. 7."
32 After his first wife passed away, Albert Snake married Rose Bird. There were no offspring as a result of that marriage; Rose Bird brought some children into the marriage (ICC Transcripts, vol. 1, p. 138).
33 ICC Transcripts, vol. 1, p. 27.
34 At the Inquiry, Elizabeth Gaudry gave evidence she was 91 years of age (ICC Transcripts, vol. 1, p. 65).
35 ICC Transcripts, vol. 1, pp. 78, 79 (Lola Okeeweehow).

Q. Are you aware of anyone else claiming to be the hereditary chief of the Young Chipeewayan Band?
A. No.[36]

– Kelly Chickness

Q. Who do you recognize as being the hereditary chief of Young Chip?
A. She says Alfred is probably the – in her understanding the current leader is Alfred.
Q. Are you aware of anyone else claiming to be the hereditary chief of the Young Chipeewayan Band?
A. No.[37]

– Elizabeth Gaudry

Q. Who do you recognize as being the hereditary chief?
A. Well we signed that affidavit stating that Alfred Snake was the hereditary chief, back in '85, and put it into court.
Q. Why do you recognize him as being the hereditary chief?
A. Well he established this line of our family that in our customs and traditions we still go by that, we don't go by the Indian Act. And that he was his direct descendant or his descendancy comes from the direct line of the chiefs and that's the way we had it in '84.[38]

– Benjamin Weenie

Q. Who do you recognize as being the hereditary chief and why?
A. Alfred Snake, because since I know him he's been working on this Chipeewayan Reserve. He used to come over there at the reserve to see my mother about it, talk to her about it.
Q. Are you aware of anyone else claiming to be the hereditary chief of the Young Chipeewayan Band?
A. No, just Alfred.[39]

– Amy Standingwater

In summary, there is no dispute that Chief Alfred Snake is the son of Albert Snake. The disputed issue is whether Albert Snake was the son of Young Chipeewayan.

BAND MEMBERS

General

The remaining claimants belong to five families. Each family's Band membership is being challenged on one or more of three grounds: (1) that of descendancy; (2) that the alleged original ancestor was not a Young Chipeewayan Band

36 ICC Transcripts, vol. 1, p. 117 (Kelly Chickness).
37 ICC Transcripts, vol. 1, p. 67 (Elizabeth Gaudry).
38 ICC Transcripts, vol. 1, p. 95 (Benjamin Weenie).
39 ICC Transcripts, vol. 1, p. 121 (Amy Standingwater).

member; and (3) that an ancestor had acted in such a manner that he or she became disentitled to claim membership to the Young Chipeewayan Band. Families that Canada challenges on the basis of descendancy include Okeeweehow and Angus. The family being challenged on the basis that the alleged original ancestor was not a Young Chipeewayan Band member is Weenie. All the families are being challenged on the basis that their ancestor acted in such a way as to disentitle them to be Young Chipeewayan Band members.

Lineage

Okeeweehow

Lola Gabriella Okeeweehow claims: (1) that she is a descendant of Okeeweehow; (2) that she was a member of the Young Chipeewayan Band; and (3) that she is entitled to bring this claim. A genealogical chart for the Okeeweehow family was filed as exhibit 15 at the Inquiry. A revised copy is attached as figure 2.

The 1876 Chipeewayan treaty paylist shows Ookeewahaw and a woman were admitted to treaty with the Chipeewayan Band. In that year he was paid $24 as number 11,[40] a one-time $12 payment[41] for himself and for the woman. Ookeewahaw was paid $10 with the Chipeewayan Band until 1879. In each year there were minor changes to his name: the spelling of the name changes from Ookeewahaw in 1876, to Ookeeweehow in 1878, to Ookeewehow in 1879 on the Chipeewayan treaty paylist. The 1879 Chipeewayan treaty paylist[42] reveals Ookeewahow was paid, as number 12, the sum of $15: $5 for himself, his wife, and a boy child. The 1879 Chipeewayan treaty paylist was the last entry for Okeewahow. No record has been located of Okeewahaw's movements for the years 1880, 1881, 1882, 1883, and 1884.

In 1885 the name "Okewehow" appears on a Piapot treaty paylist.[43] He was paid $10 as number 121: $5 for each of himself and his mother, wife of "the Magpie." A notation in the remarks column of the 1885 Piapot treaty paylist for Okewehow states: "Drew with No. 43 in /84 draws now with his mother widow of the Magpie No. 153 paysheet 1883."[44] Again there are minor changes to the

40 1876 Chipeewayan treaty paylist (ICC Documents, p. 234).
41 The $12 payment relates to the terms agreed to in Treaty 4.
42 1879 Chipeewayan treaty paylist (ICC Documents, p. 237).
43 1885 Piapot treaty paylist (ICC Documents, p. 245).
44 1885 Piapot treaty paylist (ICC Documents, p. 245). The 1884 Piapot treaty paylist for number 43 identifies the payee as Maud, "The woman who went through." The notation in the remarks column reads: "Married Okeeweehow of this Band. She formerly belonged to the Chacachess Band No. 18." The 1883 Piapot treaty paylist for number 153 identifies the payee as Little Magpie. Little Magpie was initially paid in 1881 with the Piapot Band. The notation in the remarks column for Little Magpie states: "Balance of Family on Prairie."

name Okeeweehow. The spelling of the name changes from Okewehow in 1885, to Okeweehow in 1899, to Okeeweehow in 1920.

The factual issue in dispute is whether Ookeewahaw of the Chipeewayan Band in 1879 is one and the same person as Okewehow on the 1885 Piapot treaty paylist. There is no dispute that Okewehow of the Piapot Band is the father of Joseph Norman Okeeweehow[45] and that Lola Gabriella Okeeweehow[46] is his daughter from his marriage to Gabriella Dubois.[47]

Although Lola Gabriella Okeeweehow testified at the inquiry that she knew her grandfather, Okeeweehow, she was not able to provide information germane to the disputed issue:

> Q. Did you know your grandfather?
> A. Yes, I did.
> Q. How old were you when he passed away?
> A. Five years old . . . He was a tall man, very tall and very nice man.
> Q. The spelling of Okeeweehow changes in the records, is Norman Okeeweehow the son of OoKeewahaw, could you clarify that?
> A. I don't know . . . [48]
>
> – Lola Okeeweehow

Ms Barbara Shanahan was retained by Canada to confirm or deny the genealogical history asserted by the claimants. Ms Shanahan tendered a report[49] of her analysis and conclusions which was based solely upon treaty paylist research, concluding as follows:

> On the documentary evidence there is no rational basis to believe that the Oo kee wa haw who was admitted to treaty with the Young Chipeewayan Band with his wife in 1876 is one and the same person bearing the same name who died on the reserve of the Musquopeeting Band in 1933 as a member of that Band. There is no plausible or compelling reason to think that the Oo kee wa haw 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 want 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. Therefore it must follow there existed two different persons bearing the same name.

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45 1928 birth certificate of Lola Gabriella Okeeweehow (ICC Documents, p. 894). Norman Okeeweehow was born around 1898 at Maple Creek, Saskatchewan. The certificate lists father as Norman Joseph Okeeweehow, residing at the Muskewpetung Indian Reserve. The certificate identifies him as Cree, 30 years old, and born at Maple Creek, Saskatchewan. This information is consistent with the 1898 Piapot treaty paylist (ICC Documents, p. 258). It shows that two boys were born to Okewehow and one survived.

46 Treaty number 645 of the Muskowpetung Band.

47 1922 marriage certificate of Joseph Norman Okeeweehow and Gabriella Dubois (ICC Documents, p. 1071).

48 ICC Transcripts, vol. 1, p. 76 (Lola Okeeweehow).

49 Filed as Exhibits 30 and 31 at the Inquiry (ICC Documents, pp. 1-488).

On this basis Lola Okeeweehow cannot be said to be a descendant of a member of the Young Chipeewayan Band.

Further, and in any event, even if the Oo kee wa haw in question was, as claimed by the Plaintiffs, a member of the Young Chipeewayan Band, he ceased to be a member of that Band when he joined Piapot's Band. By 1897 he had been a member of Piapot's Band for at least 12 years during when he accepted to be paid, and was paid, under his father's ticket in the annuity lists of the latter Band.[50]

At the Inquiry, Ms Shanahan specified that, *based upon the treaty paylists, no established connection* existed between Ookeewahaw of the 1879 Chipeewayan Band and Okewehow on the 1885 Piapot treaty paylist. She conceded that her conclusions were based solely on the treaty paylists and she did not carry out any further research, for example, in church records.[51]

Angus

Leslie Angus claims: (1) that he is a descendant of Pahpahmootaywin; (2) that Pahpahmootaywin was a member of the Chipeewayan Band; and (3) that he is entitled to bring this claim. A genealogical chart for the Angus family was filed as exhibit 22 at the Inquiry. A revised copy is attached as figure 3.

The 1876 Chipeewayan treaty paylist does not include the name "Pahpahmootaywin." It was not until 1877 that this name first appears on the paylist, as number 22.[52] In that year he was paid $68: a one-time payment of $12 each for taking treaty, and a $5 annuity payment each for himself, a wife, and two boys. However, the 1878 and 1879 the Chipeewayan treaty paylists[53] do not include the name Pahpahmootaywin, nor does a search of the treaty paylists for reserves in close proximity to the Chipeewayan Band disclose the name. No documents were submitted demonstrating the descendancy of Pahpahmootaywin to the Angus family.

At the Inquiry, Leslie Angus[54] testified that his parents were Harry Angus and Julia Tootoosis. They were married 56 years ago and both are still alive.[55] Harry Angus has always lived on the Thunderchild reserve; Julia Tootoosis is currently 89 years of age. Leslie Angus also testified that Julia's parents were John Tootoosis and Mary Louise Favel and that both had lived on the Poundmaker reserve.

50 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*, January 15, 1992 (ICC Documents, p. 21, 22).
51 ICC Transcripts, vol. 2, pp. 221-22 (Barbara Shanahan).
52 1877 Chipeewayan treaty paylist (ICC Documents, p. 142).
53 1878 and 1879 Chipeewayan treaty paylist (ICC Documents, p. 27, 28).
54 Treaty number 371 of the Thunderchild Band.
55 ICC Transcripts, vol. 1, p. 143 (Leslie Angus).

Joseph Albert Angus[56] testified that Mary Louise Favel's father was Basil Favel, Jr, but that her mother's name was unknown. Basil Favel Jr's father was Basil Favel Sr, and his mother was Watchusk. Joseph Albert Angus further testified that Watchusk's father was Pahpahmootaywin; her mother's name was unknown.

Joseph Albert Angus accepted that exhibit 22 was factually correct in that Pahpahmootaywin had three daughters. However, the 1877 Chipeewayan treaty paylist shows Pahpahmootaywin as having two sons. Commissioner Bellegarde questioned Joseph Albert Angus:

> Q. Just referring to . . . 1877 Chipeewayan Band pay list. Pahpahmootaywin is number 22 on this list and it seems that he has, of course, himself, his wife and two boys, and no girls are mentioned on the pay list. And yet at the ancestral line and living descendants there are three daughters and no mention of any boys?
>
> A. Right. I did have the occasion to research this and I have not completed my research in this area, but I traced Basil Favel as to when he married Watchusk, Basil Favel, Senior, that is. And he was formerly a member of the Bob Tail Band before moving to Little Pine and then, subsequently, to Poundmaker. Now in 1878, the first time I was able to locate him, he already had a wife so at that extent of my research it did not yet say that his wife, when he started getting paid with her, came from which band, so there is still some research for me to do in this respect. I'm aware of that.[57]

The disputed issues are whether Pahpahmootaywin was a member of the Chipeewayan Band, whether Pahpahmootaywin had a daughter Watchusk, and whether Watchusk had children.

Albert Angus also gave evidence regarding Young Chipeewayan's definition of its membership:

> I can only answer that from my knowledge of custom in the Cree tradition, as opposed to what the specific definition might have been with respect to the Chipeewayan Band. I had the occasion to speak with my late uncle, John Tootoosis, (John Tootoosis is the brother of my mother, Julia.) From as a young man he was my mentor about family history, tradition and politics. . . . [O]n . . . one occasion I travelled with him to Frog Lake from Poundmaker Reserve . . . And I took the occasion to ask him questions about Indian tradition. Initially, it was not a discussion with respect to definition of bands . . . it started off with a discussion if there was such a thing as capital punishment in the tradition of our culture and he said there was. There was, and he gave me an example of the kind of crime against a nation it would be where capital punishment might be invited. He said that it was with respect to violation of Indian law concerning band membership and on an occasion where people left the reserve without the permission of the warrior society, as would be sanctioned by the chief, they would be immediately chased and the warriors would have the authority to try

56 Treaty number 424 of the Thunderchild Band. He is Leslie Angus's younger brother.
57 ICC Transcripts, vol. 1, p. 154 (Joseph Albert Angus).

> and persuade him to come back to the band and, if that person refused, they would then shred all their clothes, and if they still refused, kill their means of transportation, which was usually horses, and if they still refused they would just shoot him on the spot. Now I asked him why this was so. He said that was the law of membership, that the only exceptions there would be if people were to leave for the purposes of hunting and there had to be permission to leave band membership.[58]

Mr. Angus advised that this information was corroborated in the book entitled *Voices of the Plains Cree* by Edward Ahenakew. The relevant portions of the book were filed as exhibit 23 at the Inquiry.

Weenie

Benjamin and Eugene Weenie claim: (1) that they are descendants of Mahchanchekoss; 2) that Mahchanchekoss was a member of the original Chipeewayan Band; and (3) that they are entitled to bring this claim. A genealogical chart for the Weenie family was filed as exhibit 18 at the Inquiry. A revised copy is attached as figure 4.

It is not until 1882 that the name "Mahchanchekoss" appears in the Young Chipeewayan treaty paylist.[59] A notation in the remarks column of the 1882 Chipeewayan treaty paylist list states: "Paid at Walsh in '81." However, the 1881 Fort Walsh treaty paylist[60] for the Chipeewayan Band members does not include the name "Mahchanchekoss."

The name does appear on the 1883 treaty paylist for Strike Him on the Back Band. In that year he was paid $10 as number 76: a $5 annuity payment each for himself and a boy. In 1884 Mahchanchekoss was recorded as number 78 with the Little Pine Band and he remained with them until his death in 1892. For the years 1886-88, the Little Pine Band treaty lists reveal that one boy and two girls of Mahchanchekoss's five children moved to the United States. No historical evidence was submitted identifying the three children or where they live today. The remaining two children have been identified as Mary or Betty, and Weenie Manon. There is no dispute that Benjamin and Eugene Weenie are descendants of Weenie Manon, and that he was a descendant of Mahchanchekoss.[61] The disputed issue is whether "Mahchanchekoss" was a member of the Chipeewayan Band.

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58 ICC Transcripts, vol. 1, pp. 145-47 (Joseph Albert Angus).

59 1882 Young Chipeewayan treaty paylist (ICC Documents, p. 93). He was paid $20 as number 11: a $5 annuity payment for each of himself, his wife, one boy, and one girl.

60 In 1881 the Young Chipeewayan Band was paid at Fort Walsh as "stragglers" (ICC Documents, p. 30).

61 At the Inquiry, the following exchange occurred between Mr. Griffin and Barbara Shanahan (ICC, Transcripts, vol. 2, p. 260):
Q. I see. So it is acknowledged that he's the ancestor of the Weenies?
A. Yes.

Higgins

Donald Higgins claims: (1) that he is a descendant of Ooseechekwahn; (2) that Ooseechekwahn was a member of the original Chipeewayan Band; and (3) that he is entitled to bring this claim. A genealogical chart for the Higgins family was filed as exhibit 28 at the Inquiry. A revised copy is attached as figure 5. Mr. Higgins was not present to give evidence at the Inquiry. However, treaty paylists were filed with the Commission and his genealogy can be traced.

The 1876 Chipeewayan treaty paylist shows that Ooseechekwahn and a woman were admitted to treaty with the Chipeewayan Band. In that year he was paid $24 as number 18:[62] a one-time payment of $12 for taking treaty, for each of himself and his wife. He continued to be paid annuity payments as a member of the Chipeewayan Band until his death in 1886.[63]

In 1886, 1887, and 1888 his widow and six children were paid under his annuity number with the Young Chipeewayan Band.[64] In 1889 Ooseechekwahn's widow was paid as number 111 of the Thunderchild Band. She was paid $25: a $5 annuity payment for each of herself, one boy, and three women. The notation in the remarks column states: "10 Young Chipeewayan. 2 boys dead. 3 girls women."[65] From 1889 until she passed away in 1896, Ooseechekwahn's widow was paid with the Thunderchild Band as number 111.

The Thunderchild treaty paylist for 1890 contains the following notation in the remarks column: "1 woman 'Emma Apistatim' withdrawn."[66] There is no dispute that Emma Apistatim married Peter Higgin in that year.[67]

The disputed issue is whether "Ooseechekwahn's widow" continued to remain a member of the Chipeewayan Band despite having been paid with the Thunderchild Band from 1889 to 1896. Further, Canada submits that Emma

62 1876 Chipeewayan treaty paylist (ICC Documents, p. 387).

63 1886 Young Chipeewayan treaty paylist (ICC Documents, p. 397). The 1886 Young Chipeewayan treaty paylist shows that Ooseechekwahn's widow was paid $35: a $5 annuity payment for each of herself, three boys, and three girls.

64 1886, 1887, and 1888 Young Chipeewayan treaty paylists (ICC Documents, pp. 397-99).

65 1889 Thunderchild treaty paylist (ICC Documents, p. 400).

66 1890 Thunderchild treaty paylist (ICC Documents, p. 401).

67 At the Inquiry, the following exchange occurred between Mr. Griffin and Barbara Shanahan (ICC Transcripts, vol. 2, p. 227):

A. My genealogical work concurs with the band's geneology. It – the woman Emma Apistatim who married Peter Higgins . . . was the daughter of Oo See Che Kwahn, Moving Stone, who was a member of the Young Chipeewayan Band.

Apistatim withdrew from treaty and consequently lost her membership. There is no dispute that Donald Higgins is a descendant of Ooseechekwahn.[68]

Chickness

The Chickness family claims: (1) that they are descendants of Keeyewwahkapimwaht; (2) that Keeyewwahkapimwaht was a member of the original Chipeewayan Band; and (3) that they are entitled to bring this claim. A genealogical chart for the Chickness family was filed as exhibit 19 at the Inquiry. A revised copy is attached as figure 6.

Keeyewwahkapimwaht signed Treaty 6 in his capacity as headman of the Young Chipeewayan Band. The 1876 Chipeewayan treaty paylist shows that Keeyewwahkapimwaht was paid $99 as number 5: $15 in his capacity as headman and a one-time $12 payment for taking treaty for each of his wife, two boys, and four girls. He received annuity payments with the Chipeewayan Band until 1880. Although in 1881 Keeyewwahkapimwaht was paid as number 172 of the Piapot Band, a remark in Piapot's treaty paylist shows that he was recognized as a headman of the Chipeewayan Band, and in 1882 Keeyewwahkapimwaht was again paid under the Young Chipeewayan treaty paylist, this time as number 2.

During the years 1883-87 he[69] appears on the Poundmaker treaty paylist under the name Shooting Eagle, and was paid under numbers 66 and 67, in his capacity as a headman of the Young Chipeewayan Band. In 1885 Shooting Eagle was not paid because he was considered a rebel.

In 1888 "Keokapamot" was paid as number 67 of Poundmaker's Band. The treaty paylist shows he was paid $30: $15 in his capacity as headman, and a $5 annuity payment for each of his wife and two girls.

In 1889 Keokapamot was again paid as number 67 of Poundmaker's Band but this time he was only paid $15: a $5 annuity payment for each of himself, a wife, and one girl. (The remarks column shows one girl has married number 149.)

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68 At the Inquiry, the following exchange occurred between Mr. Griffin and Barbara Shanahan (ICC Transcripts, vol. 2, p. 241):

Q. Yes. So that with regard to these various groups of people, I take it it's established at the outset that the Chickness family and the Higgins family are descendants?

A. They are descendants, yes.

Q. Yes. And, of course, that involves the numbers which are shown on the family trees which you have looked at?

A. Yes.

69 The parties agree that Keeyewwahkapimwaht, Shooting Eagle, and Keokapamot refer to the same person.

The significance of this entry is that Keokapamot was no longer paid in his capacity as headman. The treaty paylist for Poundmaker's Band reflects no significant changes to Keokapamot until 1896. In 1896 a girl married number 124. There is no dispute that number 124 is Harry Chickness. Further, there is no dispute that the Chickness family are descendants from Harry Chickness and Keokapamot's second daughter.[70] The disputed issue is whether Keeyewwahkapimwaht's daughter continued to remain a member of the Chipeewayan Band following her marriage to number 124 of the Poundmaker Band.

[70] At the Inquiry, the following exchange occurred between Mr. Griffin and Barbara Shanahan (ICC Transcripts, vol. 2, p. 241):

Q. Yes. So that with regard to these various groups of people, I take it it's established at the outset that the Chickness family and the Higgins family are descendants?

A. They are descendants, yes.

Q. Yes. And, of course, that involves the numbers which are shown on the family trees which you have looked at?

A. Yes.

Figure 1
DESCENDANTS OF CHIEF CHIPEEWAYAN

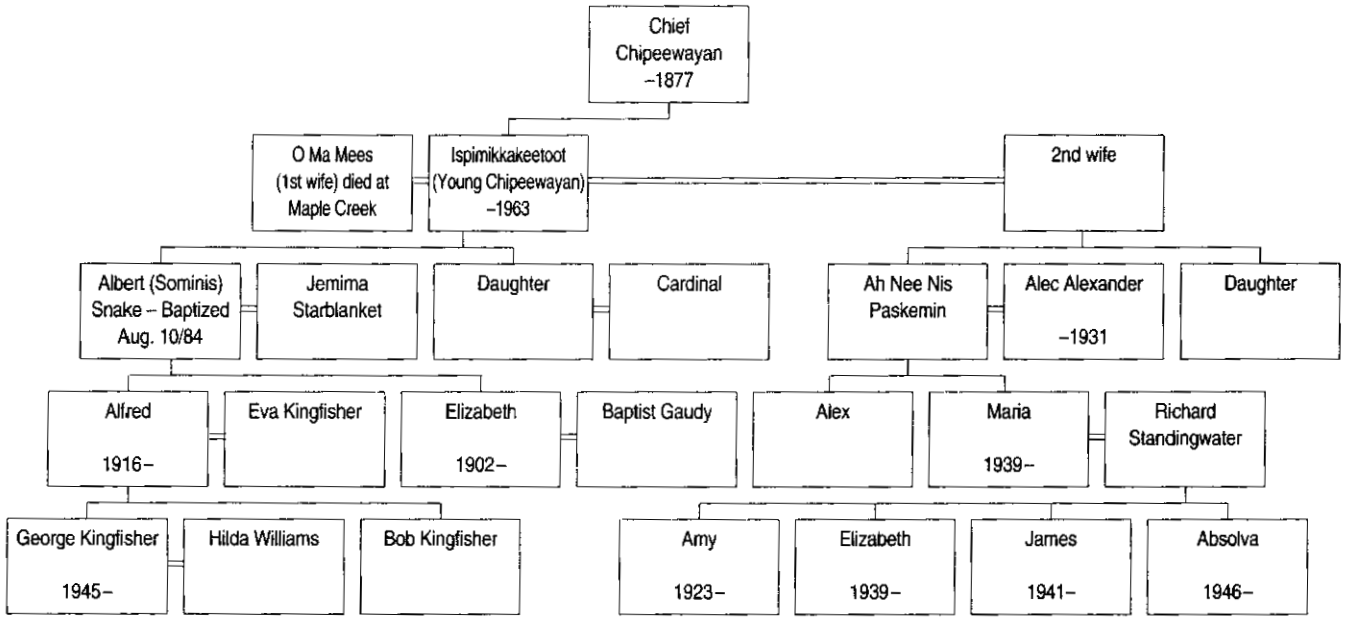


Figure 2
DESCENDANTS OF OO KEE WA HAW

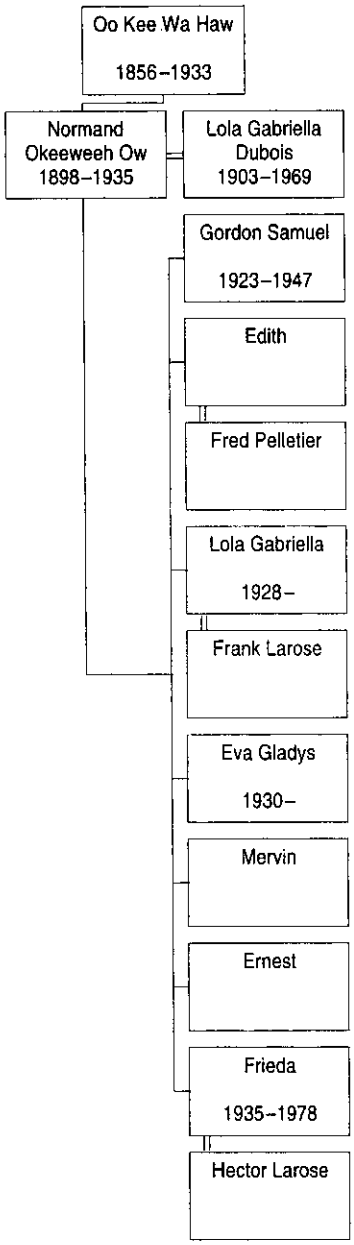


Figure 3
DESCENDANTS OF PAH PAH MOO TAYWIN #22 (WALKING MAN)

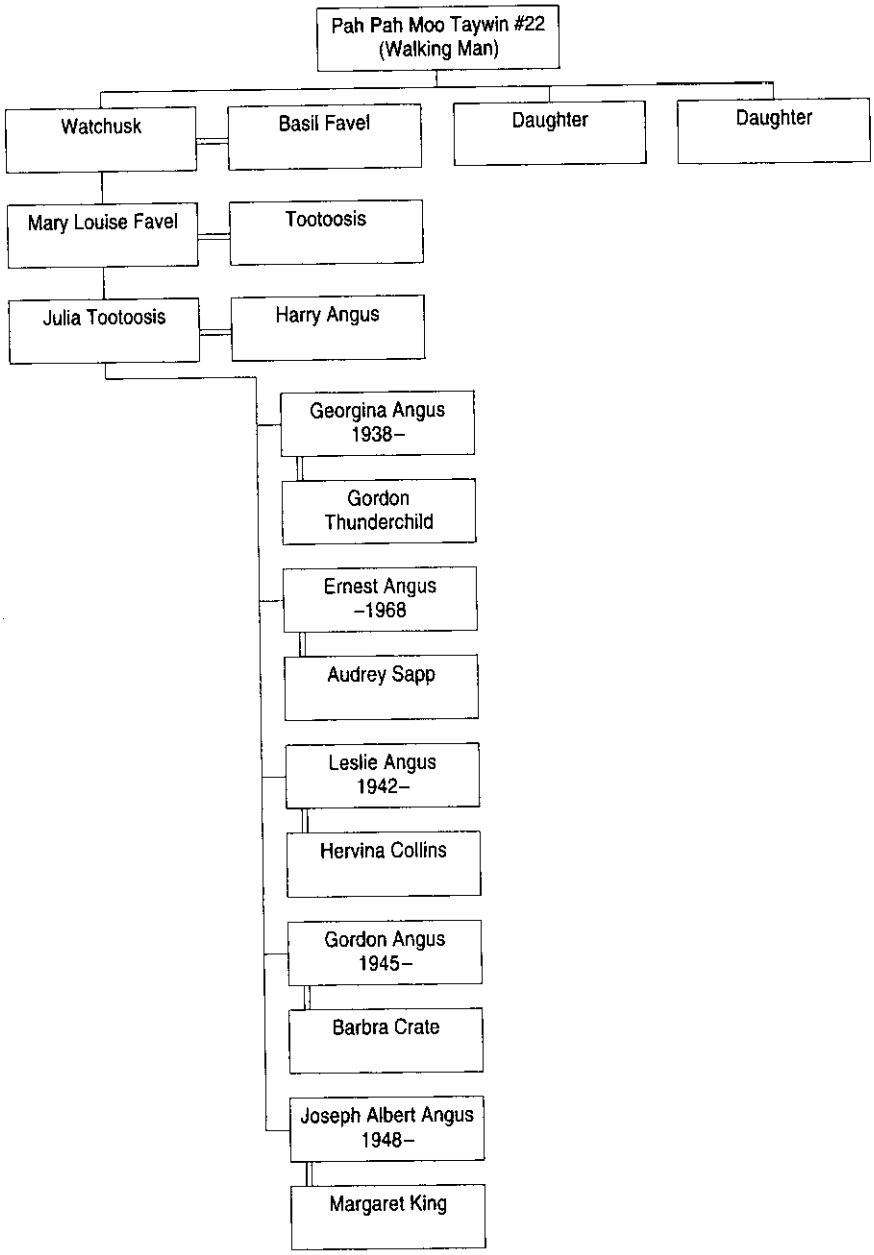


Figure 4
DESCENDANTS OF MAH CHAN CHE KOSS (THE ANTELOPE)

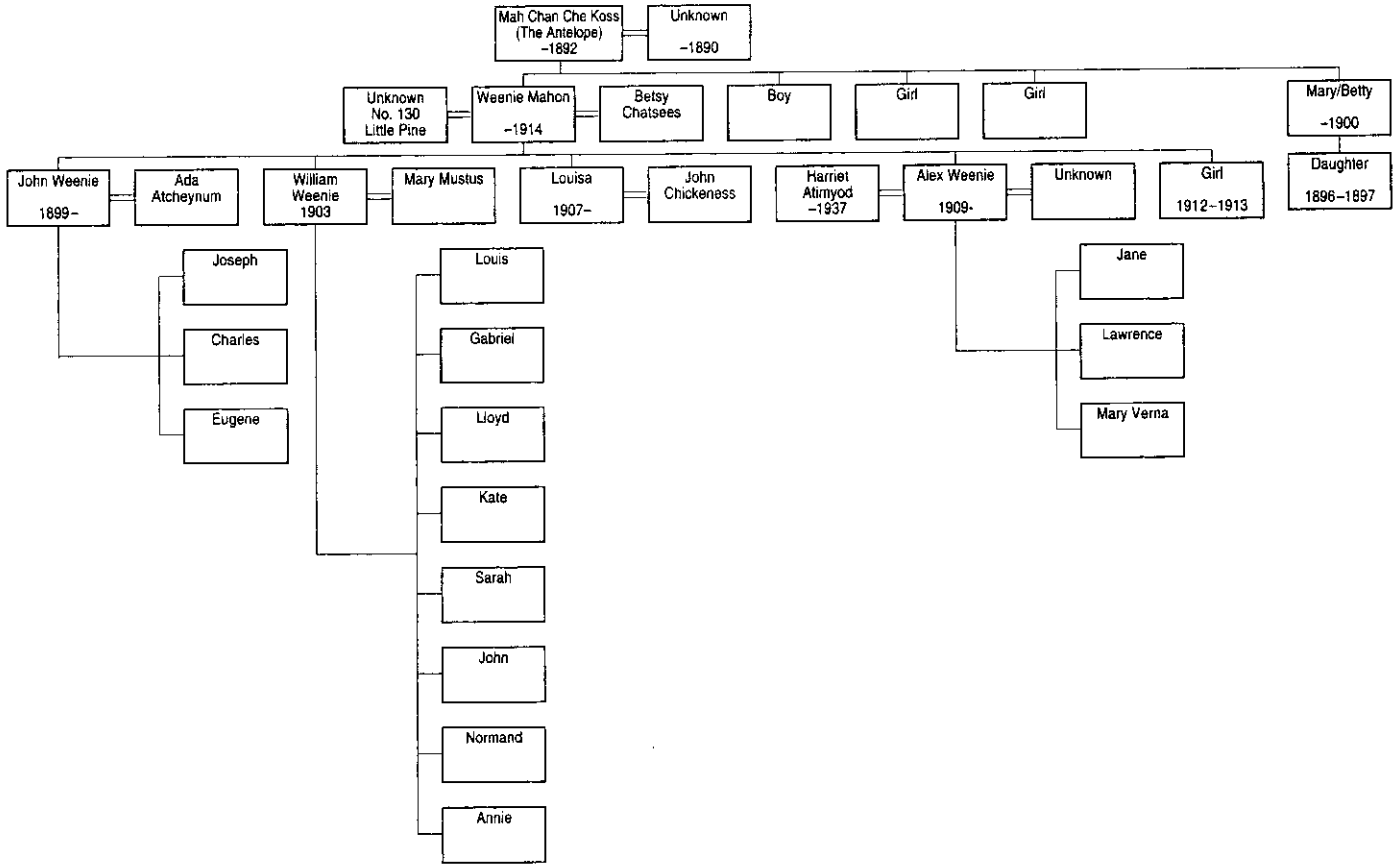


Figure 5
ANCESTORS OF HIGGINS

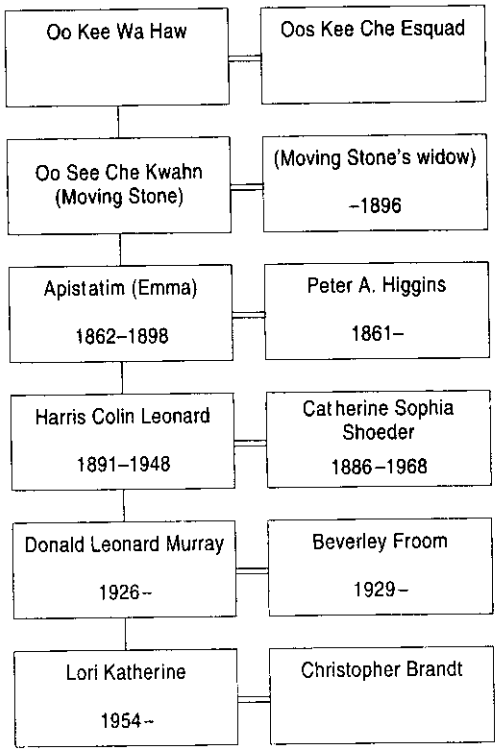
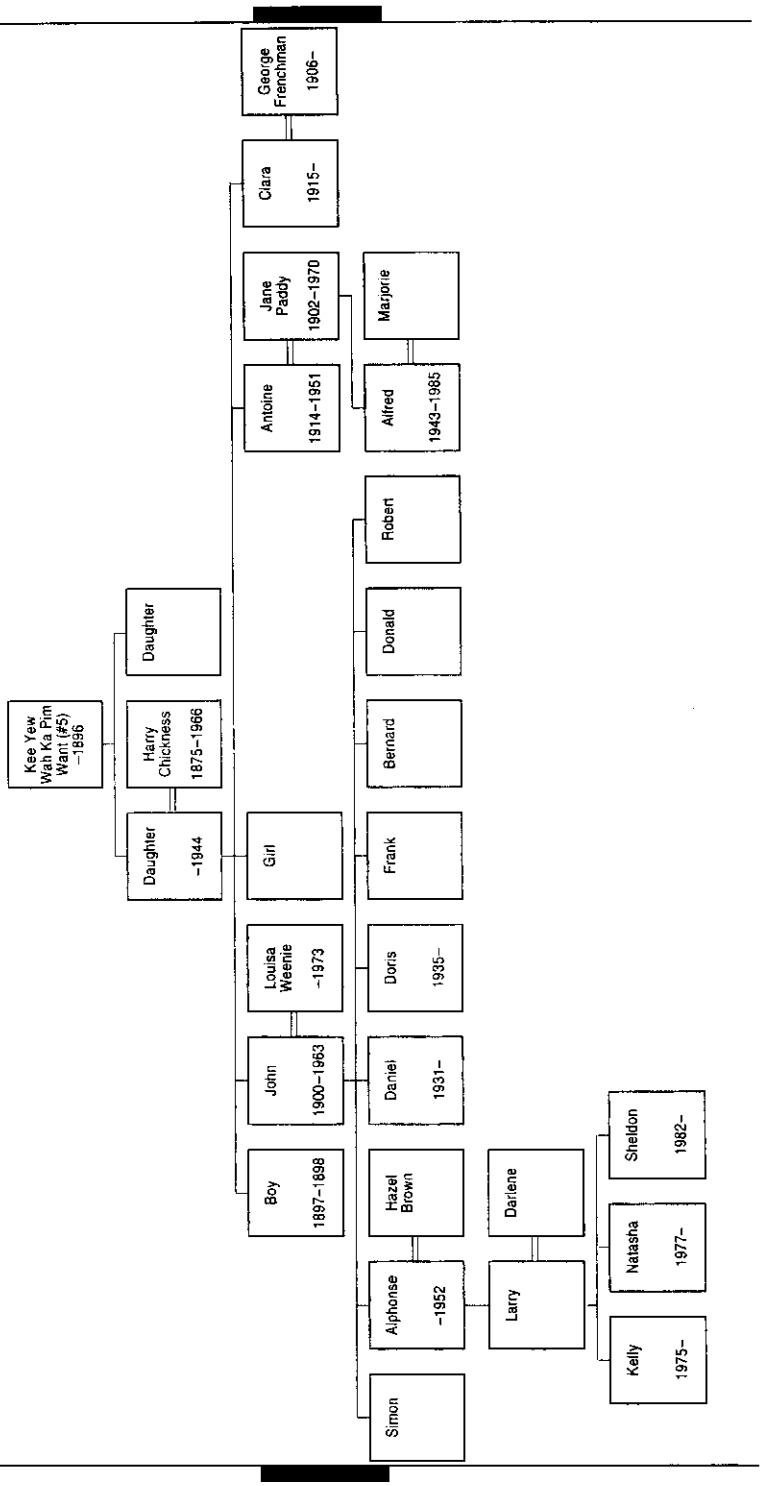


Figure 6
DESCENDANTS OF KEE YEW WAH KA PIM WANT #5 CHIPEEWAYAN BAND



APPENDIX D

C52749

OCT 13 1993

Mr. Harry S. LaForme
Chief Commissioner
Indian Claims Commission
1702 - 110 Yonge Street
Toronto, Ontario
M5C 1T4

Dear Mr. LaForme,

Thank you for your letter of August 16, 1993 and the Indian Claims Commission report entitled: "Primrose Lake Air Weapons Range".

As Minister of Indian Affairs and Northern Development, it is my pleasure to respond to your report on behalf of the Government of Canada.

I would like to make three observations on the federal government's proposed approach to recommendations made by the commission. Briefly, (1) I expect to accept the commission's recommendations where they fall within the Specific Claims Policy; (2) I would welcome the commission's recommendations on how to proceed in cases where the commission concluded that the policy had been implemented correctly but the outcome was nevertheless unfair; and (3) I would expect to refer to the Joint First Nations/Government Working Group on Specific Claims, those recommendations where follow-up would require a change in the existing Specific Claims Policy. This is the approach of the Government of Canada.

.../2

As you note in your letter, in preparing the report, the commission reviewed over 6,600 pages of documents, 12 volumes of transcript, as well as other studies and reports over a 10-month period. The commission's report is now the subject of active study within the federal government. Given the importance of the case, I have asked that a formal reply to the report be made available for my review within the next two to three months.

I share the satisfaction you and your fellow commissioners must feel about the release of this important first report.

Yours sincerely,

Original signed by
PAULINE BROWES
A signé l'original

Pauline Browes

c.c. The Honourable Pierre Blais, P.C., M.P.
c.c. The Honourable Tom Siddon, P.C., M.P.
c.c. The Honourable Jean Corbeil, P.C., M.P.

APPENDIX E

MIN. CHRONO
DM CHRONO
DM PENDING
SR. ADM CHRONO
SR. ADM PENDING
PA
SCB CHRONO
SCB PENDING
WESTLAND

NOV 2 2 1991

Mr. Ovide Mercredi
National Chief
Assembly of First Nations
47 Clarence Street
Suite 300 - Atrium Building
OTTAWA, Ontario
K1N 9K1

Dear Chief Mercredi:

As you will know, I met on November 12, 1991 in Vancouver with Mr. LaForme and Chiefs Wendy Grant and Clarence Jules to discuss matters arising from meetings of the Chiefs Committee on Specific Claims in Winnipeg on November 6 and 7. It was unfortunate that you were unable to attend but, since the issues dealt with there were ones which you have raised in your correspondence with the Government of Canada, I am writing directly to you.

I want to deal with three issues: the wording of the Order-in-Council establishing the Specific Claims Commission and its terms of reference, the role of the Commission in fulfilling its mandate and in relation to the Order-in-Council, and, finally, future changes to the policy and the involvement of the Joint Working Group in those changes.

First, it is quite correct to say that the elaboration of policy criteria in the Order-in-Council does not use the exact wording set out in the policy booklet Outstanding Business. I have attached our comparison of the expressions set out in the two documents.

In our view the adjustments to the wording in the Order-in-Council served to reduce the Policy to precise terms of reference for the Commission. While I could elaborate here, my preference is to have you or your officers arrange to meet with officials from my department to discuss any

...2

particular concerns. I suggest that your office contact Mr. Rem Westland, Director General, Specific Claims Branch, to arrange a convenient time for such a discussion if that is your wish. I would add that these matters speak to the day-to-day operations of the Commission, and would therefore welcome its participation in a meeting of this sort.

The policy as set out in that Order-in-Council is essentially the pre-existing policy but with some important adjustments which were proposed following discussions with Chiefs. These changes included removal of the bar against pre-Confederation claims and creation of the Indian Specific Claims Commission. Significant additional funding was provided as part of the same change in policy but this does not properly belong as part of the Order-in-Council. Other important changes are likely in future, a subject to which I will return below.

With reference to the second issue, in fulfilling its mandate, I expect the Commission will examine cases referred to it and recommend whether a correct implementation of the current Specific Claims Policy would have led to the outcome proposed by the Specific Claims Branch officials. I have said previously and will say again that I expect to accept the Commission's recommendations within the Policy.

If, in carrying out its review, the Commission concludes that the policy was implemented correctly but the outcome is nonetheless unfair, I would again welcome its recommendations on how to proceed. If the implementation of the Commission's recommendations would require a change to the existing Specific Claims Policy, I assume that the question would be referred to the Joint Working Group.

This leads directly to the third issue. It is not my expectation that the existing policy will be fully satisfactory and I am concerned that when we set out to further amend it, we do so on the basis of solid experience and full consultation.

My hope is that the Joint Working Group will now be the body which provides much of the advice to the Government of Canada on what further changes are required. I hope it will do so not just in the abstract, but also with regard to the particular examples of claims which cannot be dealt with under the Specific Claims Policy as it exists.

...3

In concluding I want to be very clear that what the Joint Working Group might advise and conclude is entirely up to its members. I assure you that the government representatives will be there with an open mind about how the Specific Claims Policy could be improved upon, replaced, or supplemented. I want to stress, furthermore, that I believe the initiatives we have already launched have every potential to improve the implementation of the existing Specific Claims Policy without compromising in any way the objective of reviewing the policy so that it better meets the goals of Indian people and bands.

It is important, however, to get moving on all the new initiatives as soon as possible. I hope my comments in this letter will help to ease your concerns and those of some of the chiefs with whom you are consulting.

Yours sincerely,

Original signed by/
Original signé par
TOM SIDDON

Tom Siddon, P.C., M.P.

GENERAL\WESTLAND\018\ma

ANNEX

EXISTING SCB POLICY VALIDATION CRITERIA	ORDER-IN-COUNCIL P.C. 1991-1329
1. The non-fulfilment of a treaty or agreement between Indians and the Crown;	1.1 non-fulfilment of a treaty or agreement between Indians and the Crown;
2. A breach of an obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.	1.2 breach of an obligation arising [illegible] the Indian Act or [illegible] other statutes [illegible] Indians or the regulations thereunder;
3. A breach of an obligation arising out of government administration of Indian funds or other assets.	1.3 breach of an obligation arising [illegible] administration of Indian funds or other assets;
4. An illegal disposition of Indian land.	1.4 illegal disposition of Indian land;
5. Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority;	1.5 failure to provide compensation for reserve lands taken or damaged by the [illegible] or any of its agencies [illegible]; and
6. Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.	1.6 fraud in connection with the acquisition or disposition or Indian reserve land by employees or agents of the [illegible] in cases where [illegible] a fraud can be clearly demonstrated.

EXISTING SCB POLICY COMPENSATION CRITERIA	ORDER-IN-COUNCIL P.C. 1991-1329
1. As a general rule, a claimant band shall be compensated for the loss it has incurred and the damages it has suffered as a consequence of the breach by the federal government of its lawful obligations. This compensation will be based on legal principles.	2.1 as a general rule, a claimant band shall be compensated for the losses it has incurred and the damages it has suffered as a consequence [redacted] based on legal principles;
2. Where a claimant band can establish that certain of its reserve lands were taken or damaged under legal authority, but that no compensation was ever paid, the band shall be compensated by the payment of the value of these lands at the time of the taking or the amount of the damage done, whichever is the case.	2.2 where a claimant band can establish that certain of its reserve lands were taken or damaged [redacted] to legal authority, but that no compensation was ever paid, the band shall be compensated by the payment of the value of these lands at the time of the taking or the amount of the damage done, whichever is the case;

EXISTING SCB POLICY COMPENSATION CRITERIA		ORDER-IN-COUNCIL P.C. 1991-1329	
3. (i)	Where a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority, the band shall be compensated either by the return of these lands or by payment of the current, unimproved value of the lands.	2.3 a)	where a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority, the band shall be compensated [redacted] by the return of these lands or by payment of the current, unimproved value of the lands, and
3. (ii)	Compensation may include an amount based on the loss of use of the lands in question, where it can be established that the claimants did in fact suffer such a loss. In every case the loss shall be the net loss.	b)	compensation may include an amount based on the loss of use of the lands in question, where it can be established that the claimants did in fact suffer such a loss [redacted] in every case the loss shall be the net loss;

EXISTING SCB POLICY COMPENSATION CRITERIA	ORDER-IN-COUNCIL P.C. 1991-1329
4. Compensation shall not include any additional amount based on "special value to owner", unless it can be established that the land in question had a special economic value to the claimant band, over and above its market value.	2.4 compensation shall not include any additional amount based on "special value to owner", unless it can be established that the land in question had a special economic value to the claimant band, over and above its market value;
5. Compensation shall not include any additional amount for the forcible taking of land.	2.5 compensation shall not include any amount for forcible taking of land;
6. Where compensation received is to be used for the purchase of other lands, such compensation may include reasonable acquisition costs, but these must not exceed 10% of the appraised value of the lands to be acquired.	2.6 where compensation received is to be used for the purchase of other lands, such compensation may include reasonable acquisitions costs, but these must not exceed 10% of the appraised value of the lands to be acquired;
7. Where it can be justified, a reasonable portion of the costs of negotiation may be added to the compensation paid. Legal fees included in these costs will be subject to the approval of the Department of Justice.	2.7 where it can be justified a reasonable portion of the costs of negotiation may be added to the compensation [redacted]

EXISTING SCB POLICY COMPENSATION CRITERIA	ORDER-IN-COUNCIL P.C. 1991-1329
8. In any settlement of specific native claims the government will take third party interests into account. As a general rule, the government will not accept any settlement which will lead to third parties being dispossessed.	2.8 in any settlement of specific [redacted] claims the [redacted] will take into account third party interests and as a general rule, the [redacted] will not accept any settlement which will lead to third parties being dispossessed;
9. Any compensation paid in respect to a claim shall take into account any previous expenditure already paid to the claimant in respect to the same claim.	2.9 any compensation paid in respect to a claim shall take into account any previous expenditure already paid to the claimant in respect of the same claim;
10. Where a claim is based on the failure of the Governor-in-Council to approve a surrender or the taking of land under the Indian Act, compensation shall not be based on the current unimproved value of the land but on any damage that the claimant might have suffered between the period of the said surrender or forcible taking and the approval of the Govenor-in-Council and by reason of such delay.	2.10 where a claim is based on the failure of the Governor in Council to approve a surrender or the taking of land under the Indian Act, compensation shall not be based on the current unimproved value of the land, but [redacted] on any damage that the claimant might have suffered between the period of the said surrender or forcible taking and the approval of the Governor in Council and by reason of such delay;

EXISITING SCB POLICY COMPENSATION CRITERIA	ORDER-IN-COUNCIL P.C. 1991-1329
11. The criteria set out above are general in nature and the actual amount which the claimant is offered will depend on the extent to which the claimant has established a valid claim, the burden of which rests with the claimant. As an example, where there is doubt that the lands in question were ever reserve land, the degree of doubt will be reflected in the compensation offered.	2.11 the criteria set out above are general in nature and the actual amount [redacted] offered will depend on the extent to which the claimant has established a valid claim, the burden of which rests with the claimant, as for example, where there is a [redacted] of doubt that lands [redacted] reserve lands, the degree of doubt will be reflected in the compensation offered;