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SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
BEARDY'S & OKEMASIS BAND #96 AND #97 Claimant	Ron Maurice, Steven Carey and Bill Henderson, for the Claimant
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent	Lauri Miller and David Smith, for the Respondent
– and –	
ATIKAMEKW D'OPITCIWAN FIRST NATION Intervenor	Paul Dionne (submissions presented in writing), for the Intervenor
– and –	
JAMES SMITH CREE NATION ON BEHALF OF THE CHAKASTAYPASIN BAND OF THE CREE NATION, LITTLE PINE FIRST NATION, LUCKY MAN FIRST NATION, MOSQUITO GRIZZLY BEAR'S HEAD LEAN MAN FIRST NATION, MUSKEG LAKE CREE NATION, ONE ARROW FIRST NATION, ONION LAKE CREE NATION,	Ron Maurice, Steven Carey (no representations made), for the Intervenors

POUNDMAKER CREE NATION, RED PHEASANT FIRST NATION, SWEETGRASS CREE NATION, YOUNG CHIPPEWAYAN FIRST NATION, THUNDERCHILD FIRST NATION

Intervenors

HEARD: June 12-13, 2012, June 12-13, 2013, March 10-14, 2014 and September 16-19, 2014

REASONS FOR DECISION

Honourable Harry Slade, Chairperson

NOTE: This document is subject to editorial revision before its reproduction in final form.

Cases Cited:

R v Marshall, [1999] 3 SCR 456, 177 DLR (4th) 513; *Ahousaht Indian Band v Canada (AG)*, 2009 BCSC 1494, [2010] 1 CNLR 1; *Canada v Kitselas First Nation*, 2014 FCA 150, [2014] 4 CNLR 6; *Quebec (AG) v Moses*, 2010 SCC 17, [2010] 1 SCR 557; *Canadian Imperial Bank of Commerce v Canada*, [2000] 254 NR 77, 2 CTC 269; *Soldier v Canada (AG)*, 2009 MBCA 12, [2009] 2 CNLR 362; *Moulton Contracting Ltd v British Columbia*, 2013 SCC 26, [2013] 2 SCR 227; *Band Council of the Abenakis of Odanak v Canada (Minister of Indian Affairs and Northern Development)*, 2008 FCA 126, 295 DLR (4th) 339; *R v Badger*, [1996] 1 SCR 771, 133 DLR (4th) 324; *Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 623.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, ss 2, 14, 17.
Indian Act, SC 1880, c 28.
War Measures Act, SC 1914, c 2, as repealed by *Emergencies Act*, SC 1985, c 22.
Indian Act, SC 1911, c 14, s 3.

Government Documents:

Canada, Department of Indian and Northern Affairs and Northern Development, *Outstanding Business: A Native Claims Policy* (Ottawa: Supply and Services Canada, 1982).

Authors Cited:

Charles P Mulvaney, *The History of the North-West Rebellion of 1885* (Toronto: A H Hovey, 1886).

Black's Law Dictionary, 10th ed, *sub verbo* "tangible property."

Leonard I Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the Sparrow Justificatory Test" (1997) 36 Alta L Rev 149.

Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Toronto: Butterworths Canada, 1994).

Headnote:

Aboriginal Law – Specific Claim – Specific Claims Tribunal Act – Tribunal Jurisdiction – Statutory Interpretation – Treaty Annuities – Treaty Payments – Cash As Tangible Property – Collective Treaty Interests – Government Policy –Treaty Interpretation – Breaches of Treaty – Justification of Treaty Breach – Indian Participation in North-West Rebellion – Government Motive in Withholding Treaty Annuities – Royal Prerogative – War Measures Act

This specific claim arises out of the Crown's non-payment of Treaty 6 payments to members of the Beardy's & Okemasis First Nation between 1885 and 1888, in the wake of the North-West Rebellion. The Claimant First Nation seeks compensation based on sub-section 14(1)(*a*) of the *Specific Claims Tribunal Act* ("*SCTA*") for "failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty."

The Respondent brought an Application to Strike the Claim under sub-section 17(*a*) of the *SCTA*, arguing that because "asset" is defined as "tangible property" in section 2 of the *SCTA* and "annuities" are not "tangible property," treaty payments therefore are not "other assets" covered by sub-section 14(1)(*a*). As the term "annuity" appears nowhere in the text of Treaty 6, its use as a term of convenience does not limit the legal analysis to the legal nature of an annuity as an intangible. The interpretation of treaty terms calls for the application of the law pertaining to aboriginal matters. In the sense in which the signatories to the treaty would naturally have understood it, cash, like a cow or plow, is an asset. Absent the application of treaty law, the object of the treaty promise, the cash, had a physical existence; in the hands of the Indian Agent, it was tangible property, an asset of the band, like a cow or plow.

The Respondent also argues in its Application to Strike that treaty payments are individual in nature and non-payment cannot be the subject of compensation to a First Nation for "its losses" under section 14(1) of the *SCTA*. As reflected in the definition of "band" in the *Indian Act*, a collective has no legal identity distinct from its membership, and is in fact and law the aggregate of its members. That the Indian interest in the annuities was a collective interest

was plainly the understanding of the government officials of the legal effect of the treaty promise, as all band members were deprived of the benefit due to the alleged actions of a few in the North-West Rebellion. The annual payment was made as partial consideration for the cession of a collective interest in the land. The failure to pay the required money to an entitled individual is a loss to the collective. The interpretation of the term "asset" to include treaty payments and of the phrase "its losses" to include losses relating to non-payment of treaty obligations ensures the achievement of the *SCTA*'s purpose and legislative intent.

The Respondent also argues that the eligibility of claims under the *SCTA* must "fit" with the policy as administered by the government specific claims process, which did not accept so-called "annuity" claims based on internal assessment standards ("*Internal Policy*"). The unpublished *Internal Policy* was neither transparent nor fair, and is irrelevant to the interpretation of terms in the *SCTA*. The purpose of the *Internal Policy* was to avoid treaty interpretation, which the Tribunal must deal with under the *SCTA*. The Claim was eligible under the policy in place at the time the Claim was filed, Outstanding Business, and it was not intended that claims would no longer be eligible under the revised policy and the *SCTA*. Any other interpretation of the *SCTA* would bring dishonour upon the Crown.

Finally, the Respondent argues that if the Tribunal finds that it has jurisdiction, the participation of members of Beardy's & Okemasis in the Rebellion amounted to disloyalty and a breach of its treaty obligations, and the withholding of annuities was justified by the exercise of the Royal Prerogative or, in the alternative, the application of the *War Measures Act*. The evidence does not support the theory that this community of Cree people or their leaders were disloyal or acted wilfully in contravention of treaty. The evidence, considered as a whole, supports the Claimant's characterization of the motives at play: the government seized on the Rebellion to justify measures designed to bring the Cree under its control. The Crown had no legal authority to withhold treaty payments, and there was, in the circumstances, no honourable ground on which the Crown could exercise such a power even if it did exist.

Held: The Tribunal has jurisdiction to determine the Claim and the Crown breached its legal obligation to pay treaty annuities to the Claimant.

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I. PROLOGUE

[1] Sir John A. Macdonald ("Macdonald") on the occasion of the execution of eight Cree Indians after the North-West Rebellion ("Rebellion") was quelled:

> The executions...ought to convince the Red Man that the White Man governs.

II. THE CLAIM

[2] This specific claim arises out of the Crown's non-payment of Treaty 6 payments to members of the Beardy's & Okemasis Band #96 & #97 ("Claimant") between 1885 and 1888, in the wake of the Rebellion.

A. Procedural History

[3] The Claimant filed the Claim with the Specific Claims Branch ("SCB") of the Department of Indian Affairs and Northern Development ("DIAND" or, now, "AANDC") on December 6, 2001.

[4] The SCB advised the Claimant that it was conducting its review of the Claim in a letter dated July 4, 2005. On June 17, 2008, the Claimant was advised by the SCB that Canada took the position that the Claim fell outside the scope of the Specific Claims Policy. The Claimant was advised on December 17, 2008 that the Minister did not accept the Claim for negotiation.

[5] The Claimant filed a Declaration of Claim with the Tribunal on July 11, 2011, asserting as grounds section 14(1)(*a*) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*] which provides:

> **14.** (1) Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:
>
> (*a*) a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;…

[6] The Respondent, Her Majesty the Queen in Right of Canada, filed a Response on August 19, 2011.

[7] On May 15, 2012, the Respondent brought an Application to Strike the Claim under sub-

section 17(*a*) of the *SCTA* as, "on its face, not admissible under sections 14 to 16" of the *SCTA.*

[8] The Respondent argues that treaty payments are individual in nature and non-payment cannot be the subject of compensation to a First Nation for "its losses" under section 14(1) of the *SCTA* and that in any event "annuities" are not "tangible property" and therefore not within the sub-section 14(1)(*a*) ground of "failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty...."

[9] The use of the term "annuities" requires explanation. The documents and the expert reports use the term to describe the right. The term "annuities" does not appear in Treaty 6. The promise is that:

> And further, that Her Majesty's Commissioners shall, as soon as possible after the execution of this treaty, cause to be taken an accurate census of all the Indians inhabiting the tract above described, distributing them in families, and shall, in every year ensuing the date hereof, at some period in each year, to be duly notified to the Indians, and at a place or places to be appointed for that purpose within the territory ceded, pay to each Indian person the sum of $5 per head yearly. [Treaty 6] [emphasis added]

[10] The term "annuities" came into common usage to refer to money payable in cash, annually, to each member of the collectivities that entered treaty and thus came within the definition of the term "band" in the *Indian Act*, SC 1880, c 28 [*Indian Act*, 1880].

[11] As the individual/collective nature of treaty payments may be a matter for treaty interpretation, and may turn on the evidence, it was ordered that the Application to Strike the Claim would be decided upon a hearing of the Claim on its merits.

III. THE ISSUES

[12] The issues are as follows:

1. Issue #1: Does the Tribunal have jurisdiction to hear claims for the non-payment of treaty "annuities"?

    Sub-issue 1.1: Are treaty payments "tangible property" and thus "assets" under the *SCTA*?

    Sub-issue 1.2: If so, are the treaty "annuities" assets of the First Nation?

2. Issue #2: Did the Beardy's & Okemasis First Nation fail to honour its treaty obligations?

3. Issue #3: If so, was the Crown justified in withholding treaty payments from members of the Beardy's & Okemasis Band in the wake of the Rebellion?

IV. POSITION OF THE PARTIES

A. Respondent

[13] The Respondent does not deny that the withholding of treaty annuities was, on the face of it, contrary to the terms of Treaty 6.

[14] The Respondent argues that claims based on the withholding of treaty annuities may not be considered by the Tribunal on two bases. First, annuities are not tangible assets. Second, as treaty annuities are payable to individuals, non-payment does not constitute a loss to the First Nation.

[15] The Respondent says if the Tribunal finds that it has jurisdiction, the participation of members of Beardy's & Okemasis in the Rebellion amounted to disloyalty and the withdrawal of annuities was justified and not contrary to law.

[16] The Respondent says that the Beardy's & Okemasis First Nation contravened the requirements of the Treaty to keep the peace, be of good behaviour, and uphold the law. This, says the Respondent, violated the vow of loyalty to the Crown that is central to the treaty relationship, and justified the withholding of annuities by the exercise of the Royal Prerogative and, in the alternative, the application of the *War Measures Act*, SC 1914, c 2, as repealed by *Emergencies Act*, SC 1985, c 22 [*War Measures Act*].

B. Claimant

[17] The Claimant argues that the question whether the provision of annual payments to band members is within the meaning of the term "asset" in section 14 of the *SCTA*, and whether the loss is "its losses" within the meaning of that section are matters for interpretation. It is contended that the answer to both is in the affirmative.

[18] The Claimant argues that, although there is evidence of participation in the Rebellion by some band members, the evidence does not support an inference that Chiefs Beardy and Okemasis directly or indirectly participated in or influenced members of the community to join the Rebellion or that the band did in fact do so.

[19] The Claimant says that the evidence reveals the wilful misrepresentation by government officials, including Prime Minister Sir John A. Macdonald, of the extent of Cree Indian involvement in support of Louis Riel. Their purpose was to justify measures taken to accomplish their pre-Rebellion objective to eliminate the tribal system and bring the Indians both individually and collectively under the control of government officials.

C. The Evidence and the Issues

[20] The historical evidence is relevant to both the jurisdictional and substantive issues.

[21] The interpretation of the legal nature of treaty promises may take account of circumstances surrounding the entry of the Respondent and an Indian Nation into a treaty relationship. Contemporaneous documents and oral history may assist toward an understanding of the true intention of the Parties, and inform the analysis of the treaty right to annuities as collective, individual, or both. Extraneous evidence may also assist in a determination of the legal nature of treaty annuities.

[22] Evidence of events subsequent to entry of the treaty, in particular concerns raised shortly before the Rebellion by chiefs throughout Treaty 6 territory that treaty promises were not honoured by the Crown, and the official reaction to these concerns, are relevant to the Claimant's position concerning the motives behind the impugned post-Rebellion actions of the government.

[23] The Claimant does not raise pre-Rebellion concerns of the chiefs to justify the actions of those from their communities who did join Riel's troops. However, tension over Crown performance of treaty obligations is part of the context in which events unfolded as they did, and may assist in understanding the actions of those involved.

V. EVIDENCE

[24] The evidence includes historical documents, oral history and tradition and expert

opinions.

A. Documents

[25] The record contains over 700 documents from 1830-1949. Most were written by government officials. Others were written at the direction of chiefs in Council in their tribal system. Newspaper articles written at the time of the events are also in evidence.

B. Oral History

[26] In a hearing held in the Claimant's community, Claimant's counsel called three witnesses who shared information conveyed to them through oral history and tradition. Mr. Angus Esperance and Mr. Kenneth Seesequasis testified on June 12, 2013. Mrs. Therese Seesequasis testified the following day.

C. Expert Opinion

[27] The Claimant introduced three initial expert reports, one responding report and one supplementary report:

1. Dr. Bill Waiser Expert Report
   April 15, 2013

2. Legal Opinion Prepared by: Bryan P. Schwartz
   Opinion re: Beardy and Okemasis Bands Case ("Annuities Claim")
   April 30, 2013 (filed May 31, 2013)
   (Amended in accordance with the Reasons on Application dated July 5, 2013)

3. Supplementary Expert Report re: Beardy and Okemasis Bands Case ("Annuities Claim")
   Prepared by: Bryan P. Schwartz
   April 29, 2013 (filed September 16, 2014)

4. Research Report: The Origin, Use, and Purpose of Treaty Annuities
   By: Robert Metcs, Havlik Metcs Limited
   April 2013 (Books 1 - 10)

5. Response to the Dr. Clint Evans' Assessment of Waiser Report

6. By: Dr. Bill Waiser

7. January 31, 2014

[28] The Respondent introduced three expert reports, two of which respond to initial reports introduced by the Claimant, and one of which comments on a list of documents and related excerpts from the Claimant's Memorandum of Fact and Law. They are:

1. A Response to Dr. Bill Waiser's 2013 "Expert Report"
   By: Dr. Clint Evans
   July 20, 2013

2. Treaty Annuity Payments – An Analysis of the Metcs Report
   By: Alexander von Gernet, Ph.D.
   January 2014

3. Comments Regarding a List of Documents Filed by the Claimant and Related Excerpts from the Claimant's Memorandum of Fact and Law
   By: Dr. Clint Evans
   August 22, 2014

D. Topics Canvassed by the Experts

1. Introduction

[29] Dr. Waiser's report responds to 16 questions posed by counsel for the Claimant, as follows:

> 1. Why did the Crown enter into Treaty 6 with the signatory bands?
>
> 2. What was the relationship between the Crown and the leadership of the Treaty 6 Bands generally and the Beardy's & Okemasis Band (the "BOFN") in particular in the period leading up to the signing of Treaty 6?
>
> 3. What were the socio-economic conditions for the Treaty 6 Bands generally and the BOFN in particular in the period leading up to the signing of Treaty 6?

> 4. What was the relationship between the Crown and the leadership of the BOFN in the period between the signing of Treaty 6 and the outbreak of the 1885 Northwest Rebellion (the "Rebellion")?
>
> 5. What were socio-economic conditions for BOFN reserve in the lead up to the Rebellion?
>
> 6. Is there any evidence respecting the nature and extent of the Crown's fulfillment of its promises under Treaty 6 between the signing of the treaty and the outbreak of the Rebellion?
>
> 7. What was the nature of the relationship between the leaders of the Treaty 6 Bands generally and the BOFN in particular with the leaders of the Métis in the lead up to the Rebellion?
>
> 8. What was the nature and extent of Indian involvement in the Rebellion, if any, generally?
>
> 9. What was the nature and extent of involvement in the Rebellion, if any, by the leaders and members of the BOFN in particular?
>
> 10. What were the reasons for Indian participation or non-participation in the rebellion?
>
> 11. Were any Treaty 6 Indians generally and/or any members of the BOFN in particular charged criminally in connection with any alleged participation in the Rebellion? If so, were any such individuals convicted? If so, explain?
>
> 12. Were any Treaty 6 Indians generally and/or any members of the BOFN in particular sued civilly for any reparations in connection with any alleged participation in the Rebellion? If so, were any such individuals held liable? If so, explain?
>
> 13. What was the Crown's response to the alleged participation of Indians in the Rebellion?
>
> 14. What was the relationship between the Crown and the leadership of the Treaty 6 Bands generally and the BOFN in particular in the period following the Rebellion?
>
> 15. What were the socio-economic conditions for the Treaty 6 Bands generally and the BOFN in particular in period following the Rebellion?
>
> 16. What were the lasting effects of the Rebellion, if any, on the Treaty 6 Bands generally and the BOFN in particular?

[30] Waiser refers at length to the documentary record and secondary sources on which he relied to form his opinions concerning the conduct of Chief Beardy and government officials before, during, and after the onset and resolution of the Rebellion. He relies to a great extent on

secondary sources.

[31] Dr. Evans' report responds to Waiser's opinions in response to questions numbered 4, 5, 7, 9, 11, 13 and 15. He agrees with Waiser to some extent, but his opinion on most facts in issue conflict with those offered by Waiser.

[32] The Havlik Metcs report ("Metcs Report") reviews the history of treaty making before and after Confederation and offers, for consideration, tentative conclusions on the nature of the right under Treaty 6 to "annuities." This goes to the issue whether the right is personal to the cash recipient or a right of the collectivity, or both.

[33] Dr. Alexander Von Gernet's report responds to the contents of the Metcs Report.

[34] Dr. Bryan Schwartz's report relates to the discussion of the terms of the *SCTA* between government officials and representatives of the Assembly of First Nations. This goes to the question whether the Tribunal has jurisdiction to hear claims based on the withholding of "annuities" ("annuity claims"). Although titled "Legal Opinion" the report is more directed to the history and development of the revision of Canada's *Outstanding Business* policy and the *SCTA*. It has not been relied on for any opinions on the legal issues it may contain.

[35] Finally, a Crown witness, Audrey Stewart, provided an affidavit. It is not an expert report. It sets out the basis for the rejection of the Claim by the Minister after review by the SCB, and purports to set out the policy of the government governing the consideration of annuity claims. This was filed as an exhibit in the *voir dire* on which the evidence of Ms. Stewart was taken.

[36] The Tribunal's findings based on historical events arise from the Respondent raising justification as a defence to this Claim, thereby putting the loyalty of the ancestors of the Claimant in issue. The Waiser and Evans reports are directed primarily to this issue.

2. Expert Reports: Reliance on Primary and Secondary Sources

[37] Much has been written by historians and anthropologists about the position of the Cree bands at the onset of, and throughout, the Rebellion, and government actions affecting the bands in the aftermath. Their views often conflict.

[38] Waiser and Evans differ sharply on the subjects of both Cree involvement and the reasons for actions later taken by government. Waiser relies to some extent on primary sources, namely contemporaneous documents, and to a large extent on secondary sources, namely published works of academic authors. Evans relies almost entirely on primary sources.

[39] In *R v Marshall*, [1999] 3 SCR 456 at paras 36-37, 177 DLR (4th) 513, Binnie J. acknowledged some academic criticism by professional historians of the judicial treatment of historical evidence. He commented:

> The courts have attracted a certain amount of criticism from professional historians for what these historians see as an occasional tendency on the part of judges to assemble a "cut and paste" version of history: G. M. Dickinson and R. D. Gidney, "History and Advocacy: Some Reflections on the Historian's Role in Litigation", *Canadian Historical Review*, LXVIII (1987), 576; D. J. Bourgeois, "The Role of the Historian in the Litigation Process", *Canadian Historical Review*, LXVII (1986), 195; R. Fisher, "Judging History: Reflections on the Reasons for Judgment in Delgamuukw v. B.C.", B.C. Studies, XCV (1992), 43; A. J. Ray, "Creating the Image of the Savage in Defence of the Crown: The Ethnohistorian in Court", Native Studies Review, VI (1990), 13.
>
> While the tone of some of this criticism strikes the non-professional historian as intemperate, the basic objection, as I understand it, is that the judicial selection of facts and quotations is not always up to the standard demanded of the professional historian, which is said to be more nuanced. Experts, it is argued, are trained to read the various historical records together with the benefit of a protracted study of the period, and an appreciation of the frailties of the various sources. The law sees a finality of interpretation of historical events where finality, according to the professional historian, is not possible. The reality, of course, is that the courts are handed disputes that require for their resolution the finding of certain historical facts. The litigating parties cannot await the possibility of a stable academic consensus. The judicial process must do as best it can. [emphasis added]

[40] In *Ahousaht Indian Band v Canada* (AG), 2009 BCSC 1494 at paras 76-78, [2010] 1 CNLR 1 [*Ahousaht*], Garson J. discussed the use by experts of secondary and primary sources of evidence:

> Regardless of the stage of publication of the various Explorer Records, I will refer to them in these Reasons as primary documents. As I explained in my earlier ruling concerning the admissibility of the Explorer Records, those records are not stand-alone evidence. In order to assess their reliability and the weight they should be accorded, it is necessary that I consider the expert evidence as to the provenance of each. I heard, for instance, much testimony from the experts as to which of the different edited versions of Captain Cook's journals is the most authoritative. (I explain this controversy in more detail below.)

> With respect to secondary evidence, all of the experts relied on the scholarly work of other archaeologists, anthropologists, ethnographers, ethnohistorians, and historians, at least in part, to support their opinions. The experts who testified often disagreed on the interpretation of a particular piece of primary evidence, and each sought support for his or her interpretation from the work of other scholars or authors who had studied the subject matter. In addition, many scholarly opinions were put to the experts in cross-examination.
>
> In accordance with *R. v. Marquard*, [1993] 4 S.C.R. 223, the opinions of scholars who did not testify only became evidence if they were adopted by the experts as authoritative and thereby read into the body of evidence, or were relied upon by the experts in their own opinions. In other words, these scholarly works were not admitted as stand-alone evidence. Where I refer in these Reasons to scholars who did not testify but whose work was relied upon, I will endeavour to indicate the particular expert(s) whose opinion incorporated the work of the non-witness scholar.

[41] In *Ahousaht*, Garson J.'s focus was on the court gaining an understanding of the matters underscored in the following passage:

> In the present case, plaintiffs' counsel, in particular, expressed some reservations about the Court examining the historical documents independently of the experts and drawing conclusions from that examination, possibly unsupported by expert evidence. I agree that experts provide helpful, and at times essential, interpretative evidence with respect to historical documents. Their evidence is often helpful in order to understand, for instance, the historical context in which a statement was made, a custom of the time, a geographic reference and a host of other facts that may be relevant. At the end of the day, however, it is the Court which must make the necessary findings of fact and, at times, it may be appropriate and necessary for the Court to independently examine a historical document and make those findings of fact. I would, nevertheless, add that the Court should be cautious in approaching the historical evidence without the support of an expert opinion. [emphasis added; at para 83]

[42] It is difficult to assess the weight to accord to opinions from secondary sources relied on by an expert witness to ground his own opinion. The court relies on the secondary source being authoritative if it adheres to the standards of the discipline of the author. Ultimately the weight of each piece of evidence is open to scrutiny by the court.

[43] Where, as here, there are conflicting opinions in the academic literature which may apply in respect of secondary sources, the assessment of the weight accorded to an expert opinion is made with greater confidence when the opinion is supported by primary sources.

3. Inferences Drawn from Facts supported by Evidence

[44] There are no live witnesses to the events of the Rebellion. It is difficult to test the veracity of the author of a historical document or the reliability of its contents. Inferences of colourable conduct on the part of the historical actors should only be drawn where there is reliable evidence in support or no other plausible explanation for their actions.

[45] Both Waiser and Evans draw inferences of colourable conduct from the evidence. In Waiser's opinion, government officials conspired to discredit the Cree chiefs. In Evan's opinion, Beardy's actions before and during the Rebellion were "transgressions," as they were perceived as such by officials.

[46] The following review of the evidence includes commentary on related conclusions made by Waiser and Evans and findings with respect to those conclusions.

VI. EVIDENCE REVIEW AND DISCUSSION

A. The Cree enter Treaty 6

[47] Several factors were in play when treaty negotiations commenced between government and the Cree Indians. The ability of the Indians to sustain themselves by the bison hunt was rapidly coming to an end. Métis settlements had been established in Cree territories, resulting in competition for resources. Pressure was developing for the in-migration of white settlers.

[48] Waiser's responses to questions 1 - 3 are not challenged by Evans. These set the context in which the Cree peoples of the region entered the treaty and the material events leading to its execution. The Metcs Report adds further context and insight. The following paragraphs relate key events and identify participants in the discussions leading to the entry of Treaty 6. Some are verbatim from the expert reports, others summarize.

[49] In making treaties with the Western Indians, Canada was following a British tradition that had been established by the Royal Proclamation of 1763. Recognizing the important role that Indians had played as allies in the military struggle between Great Britain and France, the British promised not to allow agricultural settlement of Indian territory until title had been surrendered to the Crown by means of treaties.

[50] British military officials had been anxious to secure and maintain Indian allies in their struggle with an expansionary United States in the late eighteenth and early nineteenth centuries. Canadian civil authorities now wanted to avoid costly Indian wars over western lands.

[51] The Metcs Report adopts the views of authors who have studied the changes over time in the state/indigenous relationship:

> Prior to and during the War of 1812, the British government thought of Aboriginal people almost exclusively in military terms, cultivating them as potential allies in war and seeking to keep them contented in case they should disturb the peace. During the post-war period, however, government policies took new factors into account. The steady growth of the white population put increased pressure on Indian lands, which, from the colonists' point of view, were not being used efficiently. As more land was taken up for settlement, the ability of First Nations to pursue their traditional livelihoods decreased and authorities feared they would become a burden on the public purse. In order to clear the way for unimpeded development of Upper Canada and prevent Indian indigence, British Indian policy focused on the "extinguishment of Indian land title and the location of Indians in specified villages or reserves." In western Upper Canada the government particularly wanted land upon which to settle loyal subjects as the allegiance of residents had been questioned during the war. [footnote omitted]

[52] There was more to the Canadian undertaking than westward expansion. The indigenous peoples were, in the opinion of government officials, to be lifted up by being taught the values, beliefs and ways of the European colonists. Treaty Commissioner Alexander Morris summed up this thinking in his closing remarks to his 1880 book on the treaties. "Let us have Christianity and civilization to leaven the mass of heathenism and paganism among the Indian tribes;" he invoked. "[L]et us have a wise and paternal Government...doing its utmost to help and elevate the Indian population, who have been cast upon our care;..."

[53] In the West, word of the entry of treaties with the Indian Nations to the East had spread. Cree chiefs had been asking to meet with Canadian representatives since 1870, following the transfer of Rupert's Land and the North-Western Territory from the Hudson's Bay Company to Canada. Ottawa, however, had no immediate plans to negotiate treaties with tribes located west of the new province of Manitoba.

[54] In 1875, a prominent chief, Mistawasis, had his men stop a construction crew from building a telegraph line through Cree territory, and turned back a Geological Survey of Canada

party that was working in the area. A Methodist missionary, George McDougall, reported that the Cree were determined, "to oppose the running of lines, or the making of roads through their country, until a settlement between the Government and them had been effected."

[55] In the fall of 1875, George McDougall brought news that Alexander Morris, the Lieutenant Governor of Manitoba, would meet with the Cree in the following August.

[56] The proposed treaty area covered some 120,000 square miles in present-day central Saskatchewan. The cession of indigenous title was crucial to Prime Minister John A. Macdonald's national policy of western settlement and development.

[57] The Cree had emerged in the late eighteenth and early nineteenth centuries as one of the great bison hunting societies of the prairie parkland. By the middle of the nineteenth century their circumstances had changed. Decades of intertribal warfare with the Blackfoot tribes, and diseases such as smallpox, measles, and whooping cough, had taken their toll on the population. The bison, once numbered in the millions, were now rarely seen north of the North Saskatchewan River. With their sudden disappearance, leaders like Mistawasis and Ahtahkakoop realize that they may face starvation unless they reached an agreement with the British Crown to help them adapt to a new agricultural way of life.

[58] The Cree saw themselves as equals in their dealings with the Crown and were prepared to negotiate in order to guarantee their future security and well being in the region as an independent people. They recognized, though, that the demise of the bison placed a severe if not unbearable strain on their remaining resources and that they had to convert to agriculture in order to compete with newcomers.

[59] When Mistawasis and Ahtahkakoop, the leading Cree chiefs of the Fort Carleton District, learned of the impending arrival of the treaty commissioners, they hired a mixed-blood Cree, Peter Erasmus, to serve as their translator.

[60] It was arranged that Morris would meet with Cree leaders at Carlton.

[61] Chief Beardy, leader of the Willow Cree, who inhabited the area along the Saskatchewan River south of Prince Albert, also wanted to enter into treaty with the Crown. He intercepted the

Canadian representatives before they reached Carlton and asked that negotiations with his group to be held near Duck Lake. A Spiritualist, Beardy had a vision urging him to sign the treaty atop a local hill. Morris refused Beardy's request and continued on to Carlton. Beardy did not attend the meeting.

[62] What transpired at the Carlton meeting is based largely on accounts left by Commissioner Morris and translator Erasmus.

[63] On meeting, Morris tried to assure the Cree that the Queen was concerned about their welfare and future well being: "My Indian brothers...I have shaken hands with a few of you, I shake hands with all of you in my heart." he stated. "God has given us a good day, I trust his eye is upon us, and that what we do will be for the benefit of his children. You are, like me and my friends who are with me, children of the Queen. We are of the same blood, the same God made us and the same Queen rules over us." He then explained how the government was there to help them and implored them to take his words seriously and to think of the future: "what I will promise, and what I believe and hope you will take, is to last as long as that sun shines and yonder river flows."

[64] On the following day, Morris reassured the Indians that the Queen did not intend to interfere with their traditional form of living by hunting, fishing, and gathering. These activities would be guaranteed for future generations. He pointed out that wild game was disappearing and that the Indians would have to learn how to grow food from the soil if they were to provide for their children and their children's children. To facilitate this transition to farming, the government would set aside reserve lands for each band to the extent of one square mile for each family of five.

[65] Morris advised the Indians that thousands of prospective homesteaders would soon invade the country and that the reserves would be held in trust by the Queen. He listed the agricultural items, tools, implements, animals and seeds that would be given to the bands to help them become farmers. He also emphasized the cash payment that every man, woman, and child could expect to receive for the life of the treaty. He promised special gifts for the chiefs and headman, including symbols of the new order: treaty forms, silver medals, and a British flag: "I hold out my hand to you full of the Queen's bounty and I hope you will not put it back...act for

the good of your people."

[66] Mistawasis clasped the governor's hand, and remarked, "We have heard all he has told us, but I want to tell him how it is with us as well; when a thing is thought of quietly, probably that is the best way. I ask this much from him this day that we go and think of his words."

[67] The Cree leaders held a special caucus, observed by Erasmus, to ensure that all concerns were heard and that they reach a consensus on how to proceed with the treaty discussions. They listened to the concerns of the objectors, including Poundmaker from Red Pheasant's band and the Badger, from the John Smith band. These speakers placed little faith in agriculture as the Cree were hunters and warriors. The detractors lamented the loss of pride and dignity if they entered treaty.

[68] Mistawasis challenged the opposition: "Have you anything better to offer our people? I ask again, can you suggest anything that will bring these things back for tomorrow and all the tomorrows that face our people?" He admitted that the past glory would not feed his people and that his days of fighting were over: "the prairies have not been darkened by the blood of our white brothers in our time. Let this always be so. I for one will take the hand that is offered."

[69] Ahtahkakoop also voiced his support. He spoke of the Cree's weakened state and their powerlessness to keep the white man from entering the region. He implored: "Let us show our wisdom by choosing the right path now while we yet have a choice." The "right path" was the only path offered by Crown officials, namely sustenance through agriculture.

[70] The chiefs and councillors agreed among themselves to proceed with the treaty discussions, but at their own pace. They would question the commissioners directly about specific matters, and would present a list of counter-demands.

[71] On the resumption of negotiations, Poundmaker broached the subject of famine relief. While his people were anxious to make a living for themselves, he wanted assurances that they would receive help when needed. Morris demurred: "I cannot promise,...that the Government will feed and support all the Indians; you are many, and if we were to try to do it, it would take a great deal of money, and some of you would never do anything for yourselves."

[72] The Badger clarified their motives: “We want to think of our children; we do not want to be too greedy; when we commence to settle down on the reserves that we select, it is there we want your aid, when we cannot help ourselves and in case of troubles seen and unforeseen in the future.” Morris countered that the Cree had to trust the Queen’s generosity. The Badger responded: “I do not want you to feed me every day; you must not understand that from what I have said. When we commenced to settle down on the ground to make there our own living, it is then that we want your help...”

[73] Mistawasis added: “...it is in the case of any extremity, and from the ignorance of the Indian in commencing to settle that we thus speak;...this is not a trivial matter for us.”

[74] When the meeting reconvened the interpreter read the chiefs’ list of demands. These included additional tools, implements, and livestock, a supply of medicines, exemption from war service, the banning of alcohol, and the provision of schools and teachers on the reserve. They insisted that the traditional hunting practices be guaranteed, as well as the earlier request for provisions during the transition to farming and to guard against famine.

[75] Morris acceded to most of the new demands. He agreed to add a clause to the treaty providing famine assistance.

[76] The majority of the Cree chiefs and headmen were prepared to accept the treaty, believing it was the best strategy for survival. They recognized the need to adjust to the new conditions. With assurances that the “great mother” and her representatives would keep a “watchful eye and sympathetic hand” on them some 50 men, led by Mistawasis and Ahtahkakoop, affixed their mark to the document after the commissioners’ signatures.

[77] Morris then sent a message to the Willow Cree, inviting them to meet with the treaty commissioners at a site halfway between Fort Carlton and Duck Lake on August 28.

[78] On meeting, Chief Beardy complained that the assistance promised at Fort Carlton would be inadequate in the circumstance of the disappearance of the bison; “On account of the Buffalo I am getting anxious.” Morris told Beardy that the Willow Cree would receive the same farming assistance that had been promised at Fort Carlton and that any special help would be restricted to times of famine and sickness.

[79] Chief Beardy, and fellow Chiefs Cut Nose and One Arrow, affixed their marks to Treaty 6. Morris dismissed as superstition Beardy's request to have treaty payments made at the site envisaged in his dream.

[80] The commissioners' next stop was Fort Pitt, 150 miles farther west on the North Saskatchewan River, midway between Forts Carlton and Edmonton.

[81] Little Hunter, a Plains Cree chief who had observed the negotiations at Carlton, gave the Cree there a favorable account of the agreement, as did Erasmus. Sweetgrass, the senior chief among the river people, addressed the council: "Mistawasis and Ahtahkakoop I consider far wiser than I am; therefore, if they have accepted this treaty for their people after many days of talk and careful thought, then I am prepared to accept for my people." The other chiefs concurred.

[82] The treaty commissioners attended on September 7, 1876. Morris explained how other Indians were content under the Queen and that they too could enjoy her protective care: "I see the Queen's Councillors taking the Indian by the hand saying we are brothers, we will lift you up, we will teach you...the cunning of the white man." Morris offered the terms agreed upon at Carlton.

[83] After a day spent in deliberation, the two sides reconvened. Sweetgrass came forward and acknowledged that the days of the bison hunt were numbered and that he was prepared to turn to farming: "I am thankful." he said "May this earth here never see the white man's blood spilt on it. ... When I hold your hands and touch your heart, as I do now, let us be as one. Use your utmost to help me and help my children, so that they may prosper." The leaders then affixed their mark to the document, and were presented with the medals and flags.

[84] Morris returned to Fort Garry in the late fall. In his report to the Mackenzie government he cautioned that even though the Indians were willing, if not anxious, to embark on the agricultural way of life, it was essential that they receive adequate assistance and instruction as soon as possible.

B. Post Treaty Developments

1. Reserve Creation and Agriculture

[85] The pressure for adaptation to an agricultural economy grew rapidly in the period following the adhesion to Treaty 6 of the Cree Indian groups. By 1879 the bison no longer migrated to their territories. There was an urgent need to establish the reserves called for by the terms of the Treaty in order that the Indians could sustain themselves through agricultural production.

[86] The Treaty provides that, for farming, "...reserves shall not exceed in all one square mile for each family of five..." This formula was carried forward from earlier treaties. There is no evidence that the formula was arrived at by an assessment of its adequacy to support the Indian population at the time, or by a process of negotiation. It was part of an existing template put forward by the Crown.

[87] Reserves were established for a number of Cree communities in the year following the entry of the Treaty. The Mistawasis and Ahtahkakoop bands, located north of Fort Carlton, produced crops soon after their reserves were established. However, there were delays in producing flour as milling facilities were a considerable distance away. There was also no local market for their surplus production. Conditions were even more difficult for the reserves that had been established in the Battleford and Fort Pitt areas to the North.

2. A Reserve at Duck Lake

[88] Chiefs Beardy and Cut Nose did not accept a reserve until 1880. As Cut Nose had continued his lifestyle as a hunter, his headman, Okemasis attended to local band interests. Beardy dealt with government officials in relation to reserve selection.

[89] By 1877, Chief Beardy had built a home and a garden at Duck Lake, the area inhabited by his band at the time they entered treaty. According to a newspaper report, he had caused the erection of a fence across the Carlton Trail between Duck Lake and Fort Carlton, although he had previously informed the treaty commissioner that he wanted a reserve established 40 km to the northeast.

[90] In January 1878, Chief Beardy wrote to the Governor General to demand the recognition

of his claim to the area around Duck Lake. He complained about newcomers settling in the area. The area claimed included the site of a small, predominantly Métis settlement.

[91] In September 1878, Chief Beardy and his band refused to accept their treaty annuities, despite compliance with his demand that the venue of the payments be moved from Fort Carlton to Duck Lake. He and other Willow Cree chiefs refused to discuss the matter of reserves with Indian Superintendent David Laird, who attended the Fort Carlton area for that purpose. Several months later, Laird informed the Minister of the Interior that Beardy had made some "absurd demands" and that he and his leading man persisted in refusing their treaty annuities.

[92] In January 1879, there were newspaper reports that Chief Beardy and his headman had threatened local settlers, store owners, and missionaries in an effort to have them abandon the settlement at Duck Lake. There were also reports in the newspaper of threats to take supplies from Fort Carlton and the trading post at Duck Lake. These actions resulted in the North-West Mounted Police ("NWMP") establishing a three-officer detachment at Duck Lake.

[93] In February 1879, after meeting with NWMP Inspector Walker, Chief Beardy agreed to accept treaty annuities and exclude the settlement at Duck Lake from the reserve. However, when the Dominion lands surveyor arrived in April 1879 to survey a reserve, he reported that the Chief continued to claim all the land within two miles of Duck Lake, including the Métis settlement.

[94] In August 1879, NWMP Inspector Walker reported that there was great destitution among the Indians throughout the area due to the disappearance of the buffalo. On attending at Fort Carlton for payment of annuities, the chiefs told him that their need for provisions was so great that their ability to take care of their crops was hampered by hunger.

[95] Conditions in 1879 were such that Laird reported to the Minister of the Interior that the government had three choices: "to help the Indians to farm and raise stock, to feed them, or to fight them."

[96] Chief Beardy, who had not yet accepted a reserve, threatened to take supplies from Duck Lake stores to feed his band. In 1880, he erected a toll gate on the Carlton trail. That summer, amidst ongoing shortages of food, Chiefs Beardy, Cut Nose, and One Arrow were charged with

ordering band members to kill several cattle intended for rations at annuity payment events in Duck Lake and Prince Albert. Beardy and Cut Nose were acquitted by the jury.

[97] In September 1879, the Indian agent for the Fort Carlton district, Clarke, was able to persuade the Duck Lake Indians to accept their treaty payments by refusing to supply any provisions until they had. Clarke then distributed 2,400 pounds of beef to the Cree at Duck Lake.

[98] In February 1880, Clarke reported that Chief Beardy had abandoned the claim to two miles around Duck Lake and accepted a reserve that had been set apart and surveyed for his band in the previous year.

3. Chief Beardy's Actions

[99] Viewed from the perspective of local officials, Chief Beardy's actions up to the creation of the reserve at Duck Lake were erratic and at times confrontational. Of course the objectives of the government were clear and the actions and views of government officials were recorded. From their perspective, Beardy was irrational and resistant by his nature to advancing the implementation of the terms of Treaty 6. His demands for a reserve exceeded the area provided for based on the treaty formula of one square mile for a family of five. In the time before the allotment of the reserve at Duck Lake, he and other band members refused on occasion to accept treaty annuities.

[100] Chief Beardy's actions must be understood in the context of conditions at the time, as must the actions of government officials.

[101] Chief Beardy, other Cree chiefs and headmen, and their people had by 1870 lived through population decline due to introduced diseases, the disappearance of the bison, and the influx of a foreign population into their territories. They had not previously relied on agriculture to sustain themselves, yet accepted that this was their future rather than fighting against the tide. Uncertain of their survival while developing a new economy, or, if crops failed, they sought and obtained a promise in Treaty 6 of support in times of need.

[102] Chief Beardy held out for a reserve much larger than offered. It is unlikely that Beardy's demands for a large reserve were arbitrary and driven by a contrary disposition. His actions

suggest a concern that the reserve allotment formula would not provide sufficient land for his band to sustain themselves. While his refusal to accept annuities seems irrational in a time of shortage and need, it is consistent with skepticism that the treaty would provide the means for survival of his people. One does not affirm that which is denied.

[103] Chief Beardy's thoughts, unlike those of Canadian officials, went unrecorded. But what can be taken from his actions after entering treaty up to acceptance of a reserve? His actions reveal his dissatisfaction with the terms of the treaty as adequate to ensure the future of his community. He, like other Cree chiefs, were disturbed by the idea that Métis' and new settlers' claims for land would trump theirs, and that the peoples who had always occupied the territory recognized by the government as theirs were to be "given" land as reserves.

[104] Chief Beardy persisted in his demands for the removal of the settlement at Duck Lake and a reserve surrounding it to the extent of two miles until 1880. Then the bison were gone, the people of the region were destitute.

[105] Chief Beardy also persisted in his refusal to accept annuity payments until threatened in September 1879 with the withholding of meat supplies. In February 1880, knowing that without a reserve there would be no agriculture, he dropped his demand for a larger reserve and accepted the land "offered" by the government.

4. Conditions Affecting the Treaty 6 Bands

[106] Without the buffalo, meat was in short supply. Some was provided by local Indian agents. Although some bands accepted reserves shortly after taking treaty in 1876, agricultural production, although increasing, was not adequate to sustain them.

[107] In 1877, Ottawa created the North-West Superintendency to administer the interests of the 17,000 treaty Indians living in a 200,000 square mile area from the present location of the Manitoba border to the Rocky Mountains. Laird, a former federal Cabinet Minister and son of a farmer, was appointed Indian Superintendent.

[108] In December 1879, Laird advised Ottawa to provide for the Indians during seeding time, and engage experienced farmers to assist them in putting in crops. The response was that more

than enough had been done. Not content with this, Laird informed the Minister of the Interior that the government had three options, namely "to help the Indians to farm and raise stock, to feed them, or to fight them."

[109] Some bands, notably those of Mistawasis and Ahtahkakoop, had made progress with agriculture in the years immediately following the creation of their reserves. However, destitution followed the disappearance in 1879 of the buffalo.

[110] Relief expenditures increased in 1879, continued to increase in 1880, then were reduced in the 81-82 fiscal year.

[111] In 1881 the Governor General, the Marquis of Lorne, visited. Forewarned of Cree grievances, he informed the gathered chiefs, "I have not come to alter the treaties but to meet the red children of the Great Queen and to see how by keeping the treaties I can help them to live." Mistawasis complained of a lack of animals and implements. He and Beardy affirmed their reliance on the treaty.

[112] The poor economic condition of the Indians was raised in the House of Commons in May 1883. Macdonald, now Prime Minister, defended the government's Indian policy: the Indians, he said "...will always grumble" and "they will never profess to be satisfied." He maintained that "We have kept faith with them, and they have received large supplies...if there is an error, it is in an excessive supply being furnished to the Indians." This, however, did not accord with the first-hand observations of officials on the ground.

[113] Indian Commissioner Dewdney described Mistawasis and Ahtahkakoop as among "our best Indians" when he reported their anger toward the government for its failure to respond to the crisis by providing sufficient rations and more assistance with farming.

[114] In September 1883, Macdonald instructed Dewdney to cut Indian expenditures wherever possible, despite reports from local officials that in some areas crop failures had left bands completely destitute.

5. Events Following Acceptance of a Reserve at Duck Lake

[115] In October 1880, Clarke's successor, Indian Agent Rae, reported that inhabitants of the

Duck Lake reserve had planted crops, that Beardy's band had worked well, and "although provisions have been very short I have had no trouble in managing any of them." Two months later he reported that "the Indians on the Duck Lake reserve have done capitally this winter" and that band members had worked at cutting fence rails, skidding house logs, and sawing lumber in exchange for provisions of which they had a "large stock."

[116] In the fall of 1881, Wadsworth, Inspector of Indian Agencies, noted that the inhabitants of the Beardy's & Okemasis reserve had increased the acreage plowed and ready for seed in the spring. In November 1881, Rae reported the greatest improvements on the reserves of Mistawasis, Ahtahkakoop, Okemasis and Beardy. Chief Beardy received special recognition.

[117] Beardy's & Okemasis doubled to over 300 acres the land sown or planted to wheat in 1882. Inspector of Indian Agencies, Wadsworth, attributed this to the efforts of both, and the advantage the band enjoyed over other bands in having ready access to a thresher and a flour mill. Demand for meat remained high due to the slow rate of increase in reserve livestock.

[118] Dewdney reported on the band's achievement in 1883 of self -sufficiency in grain production to the Superintendent General of Indian Affairs, John A. Macdonald, noting that they "should require little or no help in the future so far as food is concerned."

[119] Chief Cut Nose, however, did not find favor with government officials, in particular assistant Indian Commissioner Hayter Reed, who set about to depose him and elevate Okemasis to the position of chief. On February 25, 1884, the Governor General approved an Order in Council which removed Cut Nose and appointed Okemasis in his stead on the authority of a provision of the *Indian Act* that empowered the government to depose a chief for, from the colonial perspective, "incompetence."

[120] Riel returned from the United States in July 1884. This coincided with Cree discontent with Canada's performance of the terms of Treaty 6, in particular the promise of support in the transition to agriculture. In most regions the Cree tribes were unable to capitalize on successful crops due to the lack of local threshing and milling equipment, for which no provision was made in the Treaty. There were also no accessible markets for their grain. They experienced crop failures due to weather conditions. Despite increased government support, food shortages

persisted.

[121] Beardy's reserve fared better than others due to the more temperate local climate and ready access to needed equipment. A government agent reported in November 1884, that every family had a fair supply of food.

[122] Although local conditions varied among the Cree communities, all called on government for greater support as called for by the Treaty. As members of a pre-existing and continuing tribal system, Beardy and Okemasis would have known about the more desperate conditions in other Cree communities.

[123] Big Bear, chief of the Cree community of Frog Lake near what is now the Saskatchewan-Alberta border, founded and led a movement among the Cree communities to seek revisions to the treaty.

[124] In July 1884, Chief Beardy called a council of Cree chiefs to discuss grievances. The council convened at Duck Lake on July 31, and Macrae was present. The chiefs raised concerns that the government had failed to implement Treaty promises, including a failure to provide relief in times of distress. Their shared grievances were put in writing and delivered to government officials in August 1884.

6. The Petition of the Cree Chiefs

[125] The petition set out 18 concerns, recorded by Indian Agent Macrae. A summary of his report follows:

> *Sir*
>
> *[Several paragraphs detailing how agent Macrae heard about the council at Duck Lake, went to meet the chiefs, and persuaded them to convene at Carlton instead. He met with them there with an interpreter, and summarized their grievances as follows.]*
>
> *1. Work [?] – The cattle given them are insufficient for them to gain their livelihood with; that wild oxen have been given to them, and in some instances have died, or been killed, because they were so intractable that they could not be cared for. These should be replaced.*
>
> *2. Cows – Many of the cows supplied were wild, and as they could not be stabled, died of cold and exposure. These should also be replaced.*

3. Horses – Some of the horses given them were too wild for them to use. This was bad faith on the part of the Government, as the Commissioners who made the treaty promised them well broken beasts. These therefore should be replaced.

4. Wagons – The wagons supplied were of poor make, and now the Chief had to travel on foot. As they are old now [?], means of conveyance should be given them.

5. Conveyance for chiefs – for the same reason ... horses well as vehicles [?] should be given to all the Chiefs – not excepting those who got good gifts under the treaty.

6. Emergency [?] aid – The promise made to them at the time of their treaty was that when they were destitute liberal assistance would be given to them. That the crops are now poor, rats are scarce, and other game is likely to be so, and they look forward with the greatest fear to the approaching winter. In view of the above mentioned promise they claim that the government should give them their liberal treatment during that season for having disposed of all of the property that they owned before the treaty, in order to tide over time of distress since, they are now reduced to absolute and complete dependence upon what relief is extended to them. With the […] amount of assistance they cannot work effectively on their reserves, and it should be increased.

7. Clothing – It was promised by Mr. Commissioner Morris that they should not be short of clothing, yet they never received any and it is feared that this winter some of them will be unable to leave their houses without freezing to death.

8. Schools – That schools were promised to them, but have not been established on all the reserves. They want these, and desire the government to fulfill its promise entirely by putting up school houses and maintaining them in repairs.

9. Machinery – That they were told that they would see how the white man lived and would be taught to live like him. It is seen that he has threshing mills, […], reapers and rakes. As the Government pledged itself to put them in the same position as the white man, it should give them these things.

10. Requests – That requests for redress of these grievances have been again and again made without effect. They are glad that the young men have not resorted to violent measures to gain it. That it is almost too hard for them to bear the treatment received at the hands of the government, after its "sweet promises" made in order to get their country from them. They now fear that they are going to be cheated. They will wait until next summer to see if this Council has the desired effect, failing which they will take measures to get what they desire. (The professed "measures" could not be elicited, but a suggestion of the idea of war was repudiated.)

11. […] - That all […] things, implements, and tools, as well as stock should be replaced by gifts of better articles [?].

12. Insufficiency of government assistance – That many are forced to wander from their reserves, who desires to settle, as there is not enough of anything supplied to them to enable all to farm. Although a living by agriculture was promised to them.

13. Lack of confidence in the Government – That at the time of making the treaty they were comparatively well off, they were deceived by the sweet promises of the Commissioners, and now are "full of fear" for they believe that the government which pretended to be friendly is going to cheat them. They blame not the Queen, but the Government at Ottawa.

14. Medicines – That they were promised medicine chests for each reserve, but have never received them. Many live among or near them who could administer drugs beneficially but as they have […], they suffer from complaints that might be cured.

15. Beef – That they want to have beef at all payments.

16. Effect of not fulfilling promises. That had the treaty promises been carried out all would have been well, instead of the present feeling existing.

17. Maps of reserves: That every Chief should be given a map of his reserve in order he may not be robbed of it.

18. Harness – That harness should be given them for all their cattle, and that when oxen are given to them the harness should be on them.

Joseph Badger an Indian of the South Branch spoke very plainly on the alleged grievances, and warned the Government that it must redress them, to escape the Measures that may be taken.

Big Bear asked permission to address me, and received it. He said that the chiefs should be given what they asked for, that all treaty promises should be fulfilled. A year ago, he stood alone in making these demands; now the whole of the Indians are with him. That the Mounted Police treated him very [well?] after a disturbance was created at Battleford. That he avoided any serious results at that place, by his efforts as a peacemaker.

After hearing the above, which is submitted to you under headings suggested by the subjects of their complaints, I broke up the Council and gave them some food with which to reach home. An answer in detail is expected by the Council, which declare itself to be a representative one of the Battleford as well as the Carlton Crees. No doubt need be entertained that the Indians regard it as such.

[signed by Agent Macrae] [emphasis added]

[126] Dewdney sent his assistant, Reed, to investigate. Waiser says that Reed reported that Indian dissention was exaggerated and that "judicious management on our part" would make them forget their childish protest. Waiser appears to have taken some licence with the contents of

Reed's report as nowhere does it say or infer that the concerns of the chiefs were "childish."

[127] Reed reported his findings to Dewdney on January 23, 1885. He was able to verify with some chiefs that livestock, wagons and implements had been provided. Some were acknowledged to be of poor quality. Some had been replaced.

[128] Reed offers generalizations about Indians:

> 4. I cannot say for a matter of fact that the wagons supplied were of the very best but I remember seeing some of those first issued and they appeared to be good – of course owing to the hard usage anything in the hands of the Indians receives an article has to be more than ordinarily good to withstand the wear and tear –
>
> None of the Indians of the Carlton district [now] have the light wagons and horses originally given them.
>
> 5. All the Chiefs who attended the meeting, except James Smith, received the horses and wagons to which they were entitled under Treaty, and with regard to him I have not assured myself whether he received a wagon or not but I think he must have.
>
> Indians are inclined to say whenever anything given them breaks, no matter how good it may have been, that it was bad and should be replaced.
>
> …
>
> 12. It has been the practice to issue out to the Indians tools and implements in such quantities as the Agent thought might be used to advantage and not in the number often demanded by the Indians themselves, for if the latter course had been practised everything they were entitled to receive would be broken or lost long before the band knew how to handle them properly. The stipulation of the treaty I think in so far as plows, harrows, hoes, scythes & go, will cover all their reasonable requirements until they become well enough advanced to look after themselves. [emphasis added]

[129] Not all the chiefs were consulted:

> I am confident many of the Indians although they have endorsed the list of complaints formulated on their behalf would not, if closely questioned by an official, feel inclined to assert that all these were real grounds of grievances.

[130] Although Reed acknowledged recent crop failures, extra supplies were not to be provided lest it become a pretext for the "lazy" Indians to demand additional supplies:

> The Indians during the past summer suffered naturally from bad crops – this fact would naturally alarm the better conducted ones, but the ill-disposed and lazy

> were only too glad of such a pretext to urge upon the authorities a grant of extra aid in the way of food supplies and matters not looking so bright for the well-conducted portion of the Indian community as no doubt they were led to believe in their innocence at the time of the making of the Treaty they would be, they are therefore only too prone to be lead away by the more designing ones. [emphasis added]

[131] Agitators were responsible, including Riel:

> There are Indian as well as white agitators and the hard times make one and all, good and bad, only too prone to give any assistance they can toward procuring more from the authorities without having to work for it.
>
> Riel's movement has a great deal to do with the demands of the Indians and there is no possible doubt but that they as well as the Halfbreeds are beginning to look up to him as one who will be the means of curing all their ills and obtaining for them all they demand.

[132] Reed acknowledged the shortage of food. But it would send the wrong message to provide supplies to those that needed and deserved assistance, as the "ill-disposed and lazy" would then lack the incentive to work to support themselves.

[133] Rae and NWMP Superintendent Crozier, both with firsthand knowledge of local conditions, urged the Indian department to adopt a more conciliatory approach. The agent: "It is nonsense to say to them that they must work or starve." Judge C. B. Rouleau of Battleford reported on the dire Indian need for food and clothing, and urged Dewdney to provide more in the interests of "the Government and the Country."

[134] No sound reason was offered by the government for the dismissal of the concerns of the chiefs. On the face of it, the concerns were well founded, as they were shared among all. It defies common sense to suggest that concerns over the quality of equipment and livestock were invented. If it were not so, there would be no such complaint. The same is the case for schools, machinery and medicine. Reed, who investigated, did not say that all of these had been provided. Credible local officials reported on the inadequacy of the emergency aid provided.

[135] The complaints included the lack of agricultural equipment needed to harvest and mill the grain grown by the efforts of the Mistawasis and Ahtahkakoop bands, considered by local officials to be "our best Indians." These were needed to succeed in agriculture, but were not expressly provided for in Treaty 6. The need would not have been apparent to the Cree on

entering treaty. Their later experience revealed the need, justifying the claim for treaty revision.

[136] In these circumstances, said the chiefs: *"... it is almost too hard for them to bear the treatment received at the hands of the Government after its "sweet promises" made in order to get the country from them."*

[137] The chiefs cautioned of the potential for violence: a concern, not a threat.

[138] The Rebellion intervened. Some Cree fought alongside Riel's forces.

C. The Cree Petition, and the North-West Rebellion

1. Treaty Revision, the Métis Rights Movement, a Government Conspiracy?

[139] Riel returned to Canada from the United States in July 1884, and settled at Duck Lake.

[140] The sharpest conflict between the opinions of Waiser and Evans appear around events following Riel's return. They agree that the chief's council at Duck Lake, hosted by Chief Beardy, was convened with Riel's involvement and that Riel attended. But the petition that resulted gives no hint of influence from Riel. The grievances were current long before Riel's return.

[141] Evans agrees with Waiser's opinion that the Métis rights movement and the Cree movement for treaty revision were two separate things, and that, while Riel attempted to forge closer ties between the two, the Cree, including Chief Beardy, had their own agenda and consistently rebuffed Riel's overtures. Despite this, Evans concludes by inference that Beardy was complicit with Riel in the Rebellion. He sets out several examples of Beardy's contact with Riel and his proximity to the several battles in which Cree, including men from Beardy's band, were seen amongst Riel's forces.

[142] In November 1884, Dewdney knew from a report from his agent, Peter Ballendine, that Cree leaders had rejected Riel's efforts to align them with his cause against the government. Dewdney dismissed the notion of an alliance in his post-Rebellion annual report. Yet Dewdney is said by Dr. Waiser to have, in late 1884, "...deliberately created the idea of an Indian-Métis alliance as a way to undermine the Cree treaty rights movement and move against the Cree

leadership" and going so far as, with Macdonald's concurrence, "arresting Indian leaders."

[143] Evans takes strong exception to Waiser's theory as an "...ideology driven approach," not supported by the documentary record. Evans does not elaborate on Waiser's alleged "ideology."

[144] Waiser relies on a November 20, 1884, letter to Dewdney from his agent, Ballendine, and a letter from Macdonald to Dewdney dated February 3, 1885, to ground his conspiracy theory. To this extent, Evans is correct: The contents of these letters fall well short of establishing that Dewdney and Macdonald fabricated an Indian-Métis alliance to justify the arrest of Indian leaders.

[145] In November 1884, Dewdney's agent, Ballendine, attended a meeting of Cree chiefs Mistawasis, Ahtahkakoop and Poundmaker. He reported to Dewdney by letter dated November 20, 1884. It was reported that Chief Beardy's messenger, Chicicum, was travelling to Indian "camps." His purpose, and presumably Beardy's, was to "find out their intentions." To that end, Chiefs Big Bear and Beardy intended to hold a "thirst dance" attended by the Cree chiefs. It was reported that another chief, Badger, went to the Mistawasis and Ahtahkakoop reserves on behalf of Riel to ask if Riel could speak to them. He was refused, as they wanted no part of it. Badger, apparently chastened, later said he had made a mistake and was sorry.

[146] Chief Poundmaker said that there were many Indians going about and he was concerned that they would make trouble. He promised to tell Ballendine everything he heard. Ballendine recommended that "some of these leading men be put in the lockup to make an example of them." This was plainly not directed to the chiefs present. Nor does it seem to include Chief Beardy.

[147] Macdonald wrote to Dewdney in February 1885, to encourage the arrest of "Indians who incite others to be disorderly...." Contrary to Waiser's assertion, there is no suggestion of a plot to arrest Cree chiefs on a pretext.

[148] As for Evans, nowhere does he acknowledge that the Cree chiefs' complaints recorded by Macrae and corroborated in some respects by local officials had merit. He cites reports of somewhat better conditions on Chief Beardy's reserve than others to imply that, as Beardy had no stake in the grievances of other chiefs, his communication with Riel is evidence that he had

been won over to Riel's cause. This overlooks the fact that the chiefs were of an ancient tribal system and were further joined by participation in a common treaty with the Crown. Moreover, while the Beardy's & Okemasis Band may not have needed to draw on the treaty promise of relief to the same extent as the other bands, the grievances were held by all and not addressed.

2. Dr. Evans on Beardy's "Transgressions"

[149] The somewhat better conditions on the Beardy reserve than on others, together with Chief Beardy's "unrealistic demands," "mercurial" disposition, "superstitious notions," and a litany of other "transgressions," before and after the Rebellion combine in Evan's view to support an inference of disloyalty.

[150] Evans draws an inference that Chief Beardy was predisposed to join in the rebels' cause as, from the perspective of government officials, his behaviour was at times confrontational and in their view irrational. He makes no effort to examine the forces at work in the region before or during the conflict that may provide an alternate rational explanation for Beardy's actions.

[151] For "transgressions" prior to the Rebellion, Evans relies on the records kept by government officials, who were frustrated by Chief Beardy's actions as not conforming to their views on implementation of the Treaty. But his actions, whether effective or not, seem rationally connected to his objective to improve upon the 'bargain' of Treaty 6.

[152] While Riel may have had a role in the organization of the council at Duck Lake in July 1884, he had no voice in the matters raised by the chiefs. Their dissatisfaction with the implementation of the Treaty, including the provision for relief, had been festering for several years.

[153] It is clear from the historical record that Riel tried to bring the Cree into the fold. His early contact was with Beardy, the leader of the Cree community at Duck Lake. Riel and his family settled there on their return from Montana. From this, no more can be said than that they met by chance due to location.

[154] Evans makes much of Chief Beardy's emergence as a political leader after Riel's return. The evidence does not support the idea that he became influential, beyond hosting the Duck Lake

council in support of the treaty revision movement headed by Big Bear.

[155] Events were shaping up for an initial confrontation between the rebels and Canadian forces in the vicinity of Duck Lake. The exposure of Beardy's people to the mustering of Riel's forces was immediate. Riel's men were pressing the Cree to join them, and in some instances used threats, intimidation and conscription.

[156] Riel had sent armed patrols to seize provisions and take as prisoners government officers, merchants and settlers, and to incite the Indians to take up arms and rebel against authority.

[157] Chief Beardy would naturally want to know where the more remote communities stood on the eve of the conflict. To that end, in November 1884, he enlisted Chicicum to determine the intentions of other Cree tribes. Evans makes much of the fact that Chicicum later became a messenger for Riel and a devotee to his cause. To Evans, this implicates Beardy in Riel's undertaking. There is, however, no evidence that Chicicum served Riel at Beardy's behest.

[158] More curious yet is Evan's firm conviction that Big Bear, leader of the treaty revision movement, did not attend the meeting Riel attended at Duck Lake because he had been briefed of Riel's views by Beardy. There is no evidence that Riel had briefed Beardy prior to the meeting at Duck Lake. Nevertheless, Evans says that this is the only reasonable explanation for Big Bear's absence. There could be many reasons for Big Bear's absence. The lack of an explanation does not reduce the possibilities to one.

[159] Evans draws inferences from Beardy's presence close to the scenes of battles between Canadian and Métis forces. But, as Evans notes, "...the North-West Territories were a very small place in the mid-1880's..." Small indeed, the first battle took place on the Beardy's & Okemasis reserve at Duck Lake on March 26, 1885.

3. Battles at Duck Lake and Batoche

a) The Rapid Lead-Up to Rebellion

[160] A week before the battle, Crozier anticipated a rebel attack on Fort Carlton and asked for reinforcements. On March 17, he reported to his superiors that matters had since quieted.

[161] On March 17, Indian Agent Lash had reported to the Indian Commissioner that "the

Indians are all quiet and not interfering with the half-breeds movement."

[162] On March 18, Lash heard that "...some half-breeds were tampering with the Indians on One Arrow's reserve," and investigated. The tampering consisted of an invitation from Gabriel Dumont to the Chief to attend a meeting the next day. Chief One Arrow assured Lash of his band's loyalty.

[163] Lash and four others were taken prisoner by Riel and Dumont while on their way back to Fort Carlton.

[164] On March 19, a Batoche storekeeper found his store ransacked of all goods.

[165] On March 19, Crozier learned of Lash's capture, and that the Métis had seized the stores at Batoche. His sources also informed him that the One Arrow band and many of Beardy's members had joined the rebels.

[166] On March 19, Hudson Bay Company ("HBC") Chief Factor Lawrence Clarke, having heard of events at Batoche, spoke with three local chiefs and was assured by them of their loyalty. He then spoke with Mistawasis and Ahtahkakoop, whose houses had been robbed and their cattle killed by the rebels, and received the same assurances. Another band, the Pettyquawky, were reported to have been driven by the rebels to their camp and forced to join them.

[167] HBC Chief Factor Lawrence Clarke sent a messenger to the chiefs at Duck Lake, who returned with news that "...these Indians had left their reserves and gone over to Riel's camp."

[168] Lash, Riel's prisoner at Batoche, reported that the bands of Beardy's & Okemasis remained neutral for a few days then, through the "...influence of the half breeds..." and the provision to them of supplies plundered at Batoche, were persuaded to join the rebels.

[169] On March 25, Crozier sent scouts, Astley and Ross, from Fort Carlton to monitor Riel's progress.

[170] Unbeknownst to Crozier, rebels numbering 80-100, under the command of Dumont, were already quartered at Duck Lake. Astley and Ross were captured by a rebel patrol and taken to the

settlement at Duck Lake.

[171] On March 26, Crozier dispatched a "foraging party" of 17 police and several volunteers under command of Sergeant Alexander Stewart to secure the provisions and ammunition from the store at Duck Lake. Thomas McKay, a Métis, was their guide and interpreter.

[172] When three to four miles from Duck Lake, McKay saw people, who he took to be Indians, lying in the snow and apparently sending a signal to others. When the foraging party was within 1.5 miles of Duck Lake, their advance scouts appeared from the direction of Duck Lake with a party of rebels in pursuit.

[173] Stewart's party then encountered a group led by Dumont. Some were Indians, said by a correspondent to the *Saskatchewan Herald*, who was present, to be members of the Beardy's band. After a brief and heated encounter, but no bloodshed, the foraging party retreated. Stewart sent a messenger to Fort Carlton to warn Crozier of the rebels' presence at Duck Lake.

[174] Crozier, informed by Stewart's messenger that there were around 100 men in the rebel force, set out with a like number for Duck Lake. He was not aware that more of Riel's forces had arrived from Batoche on that very day.

[175] Ross, still captive at Duck Lake, estimated that between 75-100 of the full contingent at Duck Lake were Indians. William Tompkins, an assistant farm instructor who held by the rebel force with his cousin Peter, estimated that half of the newly arrived 300 men were Indians.

[176] The combined able bodied male membership of the Beardy's, Okemasis and One Arrow Bands was 66. If account is taken of the unlikelihood that all of the able-bodied men would have joined the rebels, members of these bands made up few of the 150 Indians estimated by William Tompkins to be among the rebels.

[177] Lash and the Tompkins, who had been held at Batoche, were taken to Duck Lake by armed guard on March 26. Word came that the police were coming from Carlton. They witnessed the departure of a body of Riel's men toward Fort Carlton and their return from the victory at Duck Lake. Among those returning was Chief One Arrow who, along with some members of his band, Lash had seen at Batoche.

[178] Crozier's party met and clashed with a rebel force estimated at as many as 350 men, along the Carlton Trail on the Beardy & Okemasis reserve, some 2.5 kilometers from the settlement.

[179] Evans states with certainty that Chief Beardy knew on March 26 that Riel had over 300 men under his command and, although presented with the opportunity, failed to warn Crozier.

b) Conflict at Duck Lake: Beardy's Whereabouts

[180] Evans refers to a report from a teamster, Montgrand, who had been informed by his contacts within the rebel camp that Chiefs Beardy, Okemasis and One Arrow and other leading men smoked with Riel's agents before the fight at the Duck Lake reserve. This, says Evans, fixes Beardy with knowledge of the size of the rebel force facing Crozier. Montgrand's contacts said Beardy was a mile away while the fight was in progress, "looking for the approach of Irvine [NWMP Commissioner Irvine...with reinforcements...]" and, "...After the fight Beardy and his braves came up and had a big smoke with the half-breeds."

[181] Stewart, scouting in advance of Crozier's forces, sighted two men driving cattle on the Carlton road. He reported this to Crozier who returned with him, spoke with the two men, then returned to his troops. Next, said Stewart, he saw two men outside a house by the road, and reported this to Crozier. Then, says Evans, "Major Crozier and his bodyguard rode over, and it happened to be CHIEF BEARDY'S HOUSE. He was at home...."

[182] Evans concludes that Chief Beardy knew that Crozier was about to face a numerically superior force from the Métis camp at Duck Lake.

[183] There is no evidence of Chief Beardy's presence at the camp when Riel and reinforcements arrived there on March 26.

[184] The Duck Lake battle took place two kilometers from the settlement occupied by the rebels. For Chief Beardy to know about the approach of Riel's force and its strength he would have to have been informed of Riel's arrival at Duck Lake mid-day on March 26, before their immediate departure toward Fort Carlton to face Crozier and his men. Beardy may have heard about the stand-off earlier in the day between the foraging party and Dumont. It is unlikely that

Beardy knew that Crozier was on his way to Duck Lake until Crozier appeared at his doorstep. Beardy's home was several miles distant from the place where the rebels had mobilized. It is unlikely that he knew that many more rebels had arrived at the settlement on March 26, and that a large force of rebels had immediately departed for Fort Carlton.

[185] The 'clincher,' according to Evans, is the rumour that came to Montgrand from "contacts" placing Chief Beardy among the rebels at Duck Lake before and after the battle. Unless this happened between Riel's arrival with many more men at Duck Lake and their departure for Fort Carlton, Beardy would not have known the rebel's number and that they had left Duck Lake. In the unlikely event that he did, he would have to somehow have gotten well ahead of Riel's forces to be home when Crozier passed by on his way toward the settlement at Duck Lake. Possible, but improbable.

c) The Battle Commenced

[186] The oral history has it that Assiyiwin, an elder headman of the Beardy's band, while returning home from visiting a friend at Duck Lake, happened upon Crozier's forces on the reserve. His arrival coincided with an exchange of gunfire between government and rebel forces. Assiyiwin, half-blind, was shot dead.

[187] There are numerous eyewitness accounts of the event that sparked the exchange of gunfire. These differ considerably, and there are significant inconsistencies among them which cannot now be reconciled.

[188] Several versions report a struggle between an unarmed Cree who was not affiliated with either side, and Crozier's translator, Joe McKay, who was armed. The gun discharged while in McKay's hand, and Dumont's brother, Isidore, and the Cree individual both received fatal wounds.

[189] The firefight commenced. After 30 to 40 minutes the outnumbered Crozier ordered a retreat, which ended the battle. Eighteen lives were lost: nine Prince Albert volunteers, three police officers, and six from Riel's forces.

[190] The rebels helped themselves to stores from the post at Duck Lake. "Government cattle"

on the reserve were slaughtered for food.

[191] Evans says that the Duck Lake fight "...did not mark the end of the Beardy's and Okemasis Band's involvement in the North-West Rebellion nor was it the only incident that suggests a degree of complicity on the part of Chiefs Beardy and Okemasis." He notes that Okemasis participated in the pillaging of Fort Carlton a few days after it was abandoned by the NWMP on March 28, 1885.

[192] On April 2, 1885, Riel's secretary sent a letter to his brother, the rebel in charge of the Fort Carlton mission, to ask that he "…receive all Indians from the Beardy's band and see about rations for them?" and to "Lend them horses and cattle, if possible, to help them get to Carlton."

[193] On May 1, 1885, a government scout informed NWMP Commissioner Irvine "that he had been up to Duck Lake and saw no one there; all the buildings, with a few exceptions, were burned; he saw no one on Beardy's reserve."

[194] Relying on a secondary source, Evans says that Riel ordered Okemasis back to Batoche from Carlton. He says that Beardy also went "over to Batoche's."

[195] In Evan's opinion the movement of the Beardy's band members to the rebel camp could only be explained by their willingness to support the Rebellion. Another perspective on their motive is discussed after the conclusion of my narration of events through to the end of the hostilities.

d) "Siege" of Battleford, Murders at Frog Lake, and the Battle at Batoche

[196] Waiser states that after hearing of the Duck Lake battle, Chiefs Little Pine and Poundmaker led a delegation to Fort Battleford "…to confirm their allegiance to the Crown and secure rations for their hungry bands." On arrival, March 30, they found that the 500 residents had taken refuge in the police stockade. The chiefs waited for the Indian agent. When he did not show up, some of the members looted the abandoned homes and stores. They returned home that night.

[197] Waiser reports that, on April 2, some members of the Big Bear band took the residents of

Frog Lake prisoner and took "much-needed rations." Big Bear, who Waiser says had been deposed by the warrior society led by Wandering Spirit, was not present. On his return Big Bear discovered nine of the prisoners dead, including the farm instructor, the Indian agent, and two Catholic priests. Neither Beardy nor men from his band were implicated in this tragic event.

[198] Major General Middleton, the commander of the Canadian militia, organized and led the forces against Riel. His focus was on Batoche.

[199] Lash and scout Astley had been taken from Duck Lake to Batoche. Lash was imprisoned in a cellar. Astley was used to deliver messages from Riel to Middleton. Astley saw Willow Creek Chief One Arrow and a band member, Left Hand, among the 40-50 Cree firing on the troops. Lash later estimated the number of rebels assembled at Batoche at 400, including 150 Indians. Among them were members of the One Arrow, Beardy's & Okemasis bands, and the White Cap band of Sioux, "renegades of the Minnesota and Custer 'massacres.'" There is a considerable body of evidence that puts men from the Beardy's reserve among the rebels who fought at Batoche.

[200] Beardy, Okemasis, and Okemasis' sons watched the battle from the other side of the Saskatchewan River.

e) Arrests of Big Bear and Poundmaker

[201] After returning to the reserve from Battleford, Poundmaker and his people settled near Cut Knife Hill. On May 2, they fought off a column of Middleton's men that he had sent to Battleford under Colonel Otter. Waiser reports that Riel's men later forced Poundmaker to accompany the rebels to Batoche. When just south of Battleford, news came of Riel's defeat at Batoche and the initiative was abandoned. Poundmaker and his people submitted to Middleton on May 26.

[202] Wandering Spirit and his warriors took hostages at Fort Pitt shortly after the slayings at Frog Lake. On May 28, they were attacked by an Alberta force under Major-General Strange. The Cree fled to Makwae, a force of NWMP arrived, the Cree scattered, and the hostages were freed. Middleton's forces undertook a manhunt, but came up empty. In time, some of the fugitives gave themselves up, others fled to the United States. Big Bear surrendered on July 2,

1885.

f) Beardy and Okemasis meet Middleton

[203] After Batoche, Middleton marched to Prince Albert before "…proceeding South to Carlton and Duck Lake cleaning out & punishing the Indians in the pines …"

[204] On May 19, an interpreter sent to Duck Lake by NWMP Commissioner Irvine reported that he had spoken with Chief Beardy and his counsellors, who would attend at Prince Albert the following day.

[205] Beardy, Okemasis, and their headmen arrived at Prince Albert on May 20 as promised. Middleton was waiting for them.

[206] The interview was attended by media reporters. An account is set out in a book written by Charles P Mulvaney entitled *The History of the North-West Rebellion of 1885* (Toronto: A H Hovey, 1886):

> The name of Beardy, the troublesome Indian chief, whose reserve is near Duck Lake, has become familiar to Eastern people, not only from the prominent part he has taken in the present trouble, but for his chronic cussedness and continual "kicking" for years past, and general desire to emulate the mule. Beardy, consequently, has gained a reputation for ferocity and boldness, that is, amongst those who don't know him. Those who are acquainted with him, however, say that he is a craven fraud. Be that as it may, he was submissive and cowed enough when he appeared before General Middleton this morning in response to a peremptory demand to come in at once. Beardy is an insignificant looking fellow, with a scattered grayish beard, from which he takes his name, and his chief men are not the typical braves of whom Fenimore Cooper writes. They all squatted on their haunches, and looked as abject specimens of humanity as one would see in a month's journey. Beardy opened the confab by saying he first meant to speak the truth. He was glad to see so many around him. If his children, who came with him, had done anything amiss he hoped it would be overlooked. He was sorry for what had been done in joining the rebels. As true as he stood there at the present time, he wished to live in peace. He would like to go home and tell his people there was peace. Then he held out his hand and took the General's, shaking it heartily, and said he did so with all his heart, and he asked the General to speak his mind. Continuing, Beardy said he had held out for some time, but his people forced him into the trouble. He had only about forty men in his band.
>
> <u>General Middleton asked, through the interpreter, why his braves joined in the fight against the whites.</u>
>
> <u>Beardy – All children are cowards, and my children were frightened into it.</u>

The General – Did you join yourself?

Beardy – No; I sat still, and told my men to sit still. All my talk was to keep quiet. They mastered me.

The General – Were your intentions good towards the whites?

Beardy (emphatically) – Yes.

The General – When the police marched to Duck Lake, and you knew the Indians and Half-breeds were lying in ambush, why did you not tell them, if you were friendly?

Beardy – I thought I was stopping them enough when I prayed my people to keep still, and telling my head men not to take any white man's life.

The General – Why did you go over to Batoche's?

Beardy – Of course, as I said before, when children are young they are cowards. I was afraid and had to go.

The General – It's very lucky you came here, for if you hadn't I should have sent troops to your reserve and burned everything that's there.

Beardy bowed his head upon hearing this, and hypocritically sniffled: – I suppose it was God who put it in my heart to obey.

The General – If you are not able to command your young braves you are not fit to be chief, and I shall recommend that you be no longer acknowledged as one. It is a matter for consideration if your reserve is not taken away; it all depends upon how you behave yourself. Where is the telegraph wire broken?

Beardy – I cannot say.

The General – Well, I am going to send down a party to repair it, and if one man is fired at I will send a force and destroy everything – not shot merely, but if a man is even fired at.

Beardy bowed assent.

The General then asked if Little Chief, who was one of the first to join the rebels, wanted to say anything.

Beardy whined that they were forced into the trouble; but Okamesis was here and could speak for himself, which he did at some length, first uncovering his head. He said that when staying at his own house word of trouble came, and he hitched his horse and went towards Duck Lake, but his horse became played out. His brother was with him. He saw the priest and the farm instructor (Tompkins), who asked him if he was going to go. He replied that he was, but that his horse was played out and he was unable to go. The instructor said it was better for him to go, and lent him a horse, asking him to find out whether his (Tompkins') son had

been taken prisoner or not. He consented to go with the horse, and on arriving saw that the Half-breeds had taken the Duck Lake stores. He saw three Half-breeds and they told him he couldn't go home without seeing their leaders. He said, "Never mind"; but to let his brother go home with the horse, and he would see the rebel leaders. They consented, and he went down where the head men were, and saw that Tompkins was a prisoner. The rebels told him that no one was allowed to go back, and that they would shoot anyone leaving without their knowledge. "I was a coward," he said, as if it were an extenuating fact. "The whole crowd left and went to Duck Lake. I was with them, and we had on a fire and were cooking, when I heard the police were coming. While I was eating I heard shots fired, but I ate on. The shots went on, and I ran to see what was going on. When I got up the ridge the bullets were coming pretty close, so I withdrew and went round by another way. The trail crossed the ridge, and I went there, and heard a shout: "They are running back!" At the place on the ridge I went to I saw the body of a man; it was my own brother lying dead. I was afraid. From there I saw people lying dead all around. The Half-breeds told me to fetch my family in. I then took horses and went. I brought some families in, and was told to live in the farm instructors house, which we did. While living at Duck Lake a party went to Carleton. I was not with the first party, but was set out with the second. We got word from Riel to come back to Duck Lake. Then all broke camp, and went to Batoche's, camping on the river about two miles up on the west side. Word was sent to come, and camp closer. We came a mile nearer. They (the rebels) were not then satisfied, and told us to come nearer still, when we again moved camp, but still they were not satisfied, and ordered us to come right at Crossing (Batoche's). While living here, I heard that a party had gone up the country, and all at once heard big guns, after which the party came back. The next we heard was that there were soldiers coming. When fighting commenced (at Batoche's) I went up to the top of the hill. My sons were with me, watching everything while they were fighting. Every day I did that while the shooting was going on. I had a gun too, but not to kill anyone with, because I am too big a coward to kill anyone. I carried it just for fear. Not for any evil did I do what I did. My intentions were to make a living for my wife and children.

The General – That's enough. It is evident you are not fit for a chief either, armed as you are. You can all go now, but you must give up your medals; they are meant for good men only. There are no presents for you, no tobacco, no tea or meat, no flour for those who are fighting against us.

Beardy sullenly gave up his medals, but it was evident that the severest punishment was the withholding of food. Several clergymen who were present spoke to the General of the hungry condition of the band, but the General was obdurate. The impression was the General Middleton was even too lenient as it was, and that if he had strung Mr. Beardy up by the thumbs he would have been only meting out justice to this wretched old humbug. [emphasis added]

[207] George Ham, a reporter from Winnipeg, attended the interview. According to Ham,

Beardy opened the confab by saying he first meant to speak the truth" and by stating that he "was sorry for what had been done in joining the rebels...Beardy said he had held out for some time, but his people forced him into the trouble."

> Beardy continued on in this vein for some time before Middleton informed him that he was "not fit to be a chief." The General then asked Okemasis if he had anything to say and, after listening to the Okemasis's description of his activities and explanation for his behaviour, the General concluded the entire interview by stating, that's enough. It is evident you are not fit for a chief either, armed as you are. You can all go now, but you must give up your medals; they are meant for good men only. There are no presents for you, no tobacco, no tea or meat, no flour for those who are fighting against us. [footnote omitted]

[208] Ham reported that Chief Beardy was concerned about "the withholding of food," and that a number of clergy "spoke to the General of the hungry condition of the band, but the General was obdurate...".

[209] A reporter from the Toronto *Globe* reported that Middleton's harsh words and refusal to supply provisions left the "Indians...much crestfallen," and that Beardy, Okemasis, "and 4 principal men...professed great regret at being led into participation with the rebels, saying they did not fire at the police." He reported that "Beardy's statement that he held out as long as he could" had been "corroborated by others."

[210] Evans cites the absence of statements from Chiefs Beardy and Okemasis, when they met with Middleton, that their bands had been coerced into fighting alongside the rebels as evidence that they were not. There is, however, a record of Beardy's explanation to Middleton, and that offered by Okemasis, which reveals that both came under pressure and threats from the Métis.

g) News of the Fall of Batoche

[211] The *Brandon Sun* reported on May 20, 1885, that Poundmaker decided to surrender to Middleton. This was prompted by "news of Riel's defeat," apparently "received from Indians at Duck Lake" four days after Riel's capture. To Evans, this establishes that Chicicum (who by then worked for Riel) was not the only emissary from the Beardy's reserve "trying to induce all the Indians to join the Rebels" at distances as far as 400 kilometers from Duck Lake. Evans posits that, if Poundmaker heard of Riel's defeat from a messenger from Duck Lake, the "logical candidate" for the identity of this runner is the same one who earlier promoted insurrection over a large territory. *Ergo,* Chief Beardy was behind attempts to incite other Cree tribes to rebellion.

[212] It is a long stretch to say the Duck Lake Indian bearer of this news to Poundmaker must have been the person who had earlier tried to induce the more distant Indians to join the rebels. It

was no secret that Riel had been defeated; many would be spreading the news.

h) Dewdney's Assessment of Cree Involvement in the Rebellion

[213] In November 1884, the Cree chiefs, including Chief Beardy, had pledged their loyalty, but cautioned government officials of their concern that the young men may resort to violence if treaty promises were not honoured by the government.

[214] The Métis aligned with Riel employed persuasion, supplies of food, and duress to induce the Cree to fight alongside them. Riel arrived at Duck Lake in July, 1884. In August, Reed observed: "Half-breeds could do any amount of mischief with them, and they are not idle even now. Indians at Duck Lake are surrounded by some of the worst half-breeds in the country."

[215] The day before the battle at Duck Lake, Dewdney told the Prime Minister that every reserve had been tampered with. Vankoughnet, the Deputy Superintendent of Indian Affairs, warned the government to not act rashly and believe the Cree were involved in the rebellion as they had nothing to gain thereby and everything to lose.

[216] There is no reason to think that the Métis would have spared the Willow Cree bands from the methods they had used elsewhere.

[217] That Beardy's band came under pressure from the Métis is revealed in Beardy's statements to Middleton on May 20, 1885. As reported by Ham of the *Globe*, Beardy said he had held out for some time, but his people forced him into the trouble. He had not joined, but could not restrain his young men, who he described as "cowards." The rebels told Okemasis that he would be shot if he tried to leave the camp.

[218] After the Rebellion was quashed, Dewdney, in his Annual Report, noted that officials were well aware of much that "passed" between "Riel and certain Indians from shortly after the time that the former arrived in the country, or about July, 1884," and that the "Indians" were adamant that they "did not entertain an intention of joining the half-breeds in agitation." He acknowledged that most of those who did participate in the Rebellion were dragged into the conflict by a "few Indian discontents" and some young hotheads who "commenced raiding" and, in doing so, committed the rest "to association with the rebels...to gain the necessities of life and

protection against individual white men, which the law at the moment was unable to afford" (emphasis added).

[219] Dewdney acknowledged the vulnerability of the Cree, who had rejected an alliance with Riel, to coercion by both the rebels and some of their own. His statement of a purpose "...to gain the necessities of life..." reflects the reality behind the involvement of the Cree in taking goods from the stores seized by the Métis. The rebels had taken their animals and stores of food. While it is likely that some band members joined the rebels of their own volition, some, including their leaders, remained in the presence of the rebels under duress. The government was unable to protect them.

i) Post-Rebellion Legal Proceedings

[220] Dewdney appointed Reed to investigate Indian participation in the Rebellion and make recommendations for their future treatment. This is an excerpt from his recommendations:

> It is therefore suggested that all leading Indian rebels whom it is found possible to convict of particular crimes, such as instigating and citing to treason, felony, arson, larceny, murder, etc., be dealt with in as severe a manner as the law will allow and that no offences of their most prominent men be overlooked.

[221] Eighty-one Indians were charged with offences ranging from theft of livestock, larceny, felony-treason, to murder. Most of those charged were from the Fort Pitt and Battleford areas.

[222] One man from Duck Lake was charged with theft of a horse. It was apparently a crime of opportunity, as he was not implicated in the Rebellion.

[223] Chicicum would likely have faced the law due to his services for Riel. He is believed to have made his way to the United States.

[224] In November 1885, Dewdney directed his Indian agents to assure the bands throughout the territory that only the ringleaders of the insurrection and any who have committed murder need fear arrest.

[225] One Arrow, chief of the Willow Cree, Chief Big Bear and Chief Poundmaker were charged and convicted of felony-treason and received sentences of three years in prison.

[226] Of those arrested, forty-four received sentences of six months or more, and eleven were convicted of murder and sentenced to death. Of the latter, the sentences of three were commuted.

[227] Neither Chief Beardy nor Chief Okemasis were charged with felony-treason or any other offence. This was the case despite the thorough investigation conducted by Dewdney's subordinate, Reed, to identify the individuals and bands who remained "loyal," and those which were "disloyal."

[228] Reed was aware of Riel's presence at the council of chiefs seeking the revision and performance of the terms of Treaty 6, the Beardy band's move after the Duck Lake battle to Batoche, and Chicicum's role as a messenger for Chief Beardy then later for Riel.

[229] In short, the government officials did not consider Chief Beardy or Chief Okemasis "ringleaders of the insurrection." Nor apparently did Middleton. He was a military man, high in a chain of command system. He considered their offence to be their failure, as leaders, to control the members of their community.

[230] Waiser comments:

> In assessing Chief Beardy's action during the rebellion itself, it is important to understand the nature of Cree leadership and not impose Euro-Canadian values on the situation. Unlike Euro-Canadian leaders who enjoyed considerable authority and control, Cree chiefs had to lead by consensus and persuasion. They could not force any of their followers to do something against their wishes, and if they lost the confidence of the band, then they would be replaced by another leader who would be subject to the same responsibilities and limitations on his authority as chief.

[231] Middleton imposed his own penalty, namely the confiscation of the medals that had been presented with great solemnity on behalf of the Queen of England and Canada to the Cree chiefs and headmen on their adhesion to Treaty 6.

D. Punishment, Rewards and Control

1. Sir John A. Macdonald

[232] Macdonald's 1885 dismissal of the Cree chiefs' complaints of the shortage of supplies, despite independent confirmation of the conditions of many of their people by local officials, is noted above. Rather than considering the information he was provided, Macdonald attributed to

the Cree a quality he would apply to Indians generally: The Indians, "will always grumble" and "they will never profess to be satisfied." This appears to reflect the belief of government officials that Indians were, by nature, ill-disposed to provide for themselves.

[233] This notion is revealed in Morris' words to the Cree chiefs at the time of treaty adhesion. The "elevation" of the Indian population that had been "cast upon our (the paternal Government(s)) care" called for measures to address their perceived trait of laziness: "You are many, and if we were to try to do it, it would take a great deal of money, and some of you would never do anything for yourselves."

[234] Perhaps the government officials of the time had lost sight of the fact that the Cree had managed to sustain themselves over the millennia.

[235] The chiefs had made it clear at the time the treaty was negotiated that the promise of relief was to see their people through times of hardship in the transition from a hunting and gathering to an unfamiliar agricultural economy.

[236] The 1884 petition of the Cree chiefs was the product of consensus by many leaders with years of shared experiences and concerns over implementation of the terms of Treaty 6. Here again, local officials had reported to their superiors on the poor conditions faced by many Cree communities. These reports were dismissed by Dewdney's assistant, Reed.

[237] Dewdney again assigned Reed, whose attitude toward Indians may be inferred from his dismissal of the chiefs' 1884 petition, the task of investigating Cree involvement in the Rebellion. Reed assembled a list of Cree communities considered loyal and disloyal. Although charges were brought against individuals known to be involved, he also recommended measures to punish the "disloyal" bands.

[238] Although the danger had passed, the recommendations called for the destruction of the tribal system to prevent collective action by the Cree chiefs. It will be recalled that the petition of the chiefs came about through the tribal connection of the Cree communities. This and other of Reed's recommendations were passed from Dewdney to Macdonald and approved for implementation.

[239] Reed's recommendations reflect in part the colonial perspective summarized by Morris. The Indians needed to be controlled and, due to their tendency to rely on government aid rather than work, aid was withheld although they were starving and there was no work to be had. Parsimony in the delivery of the relief promised in the Treaty was justified by the official perception of Indians as indolent. In this regard, Dr. Waiser's opinion is supported by the record.

[240] The recommendations:

> Memorandum for the Honourable the Indian Commissioner relative to the future management of Indians
>
> 1. All Indians who have not during the late troubles been disloyal or troublesome should be treated as heretofore; as they have not disturbed our treaty relations, and our treatment in the past has been productive of progress and good results.
>
> 2. As the rebellious Indians expected to have been treated with severity as soon as overpowered, a reaction of feeling must be guarded against. They were led to believe that they would be shot down, and harshly treated. Though humanity of course forbids this, unless severe examples are made of the more prominent participators in the rebellion much difficulty will be met with in their future management, and future turbulence may be feared. It is therefore suggested that all leading Indian rebels whom it is found possible to convict of particular crimes, such as instigating and citing to treason, felony, arson, larceny, murder, etc., be dealt with in as severe a manner as the law will allow and that no offences of their most prominent men be overlooked.
>
> 3. That other offenders, both Halfbreed and Indians, who have been guilty of such serious offences as those above mentioned should be punished for their crimes in order to deter them from rebellious movements in the future.
>
> 4. That the tribal system should be abolished in so far as is compatible with the treaty, i.e., in all cases in which the treaty has been broken by rebel tribes; by doing away with chiefs and councillors, depriving them of medals and other appurtenances of their offices. Our instructors and employees will not then be hampered by Indian consultations and interferences, but will administer direct orders and instructions to individuals; besides by the action and careful repression of those that become prominent amongst them by counselling, medicine dances, and so on, a further obstacle will be thrown in the way of future united rebellious movements.
>
> 5. No annuity money should be now paid any bands that rebelled, or any individuals that left well disposed bands and joined the insurgents. As the Treaty expressly stipulated for peace and good will, as well as an observance of law and order, it has been entirely abrogated by the rebellion. Besides this fact, such suggestion is made because in the past the annuity money which should have been expended wholly in necessaries has to a great extent been wasted upon articles more or less useless and in purchasing necessaries at exorbitant prices,

entailing upon the Department a greater expenditure in providing articles of clothing, food and implements, not called for by the terms of the Treaty, than need have been entailed if the whole of annuity money had been well and economically applied to the purchase of such necessaries. All future grants should be regarded as concessions of favour, *not of right*, and the rebel Indians be made to understand that they have forfeited every claim as "matter of right."

6. Disarm all rebels, but to those rebel Indians north of the North Saskatchewan who have heretofore mainly existed by hunting, return shotguns (retaining the rifles) branding them as I.D. property and keeping lists of those whom arms are lent. Those to whom arms are thus supplied if left to their own resources—under careful supervision—would suffer great hardship and doubtlessly be benefited by experiencing the fact that they cannot live after their old methods. They would soon incline to settlement and be less likely to again risk losing the chance of settling down.

7. No rebel Indians should be allowed off the reserves without a pass signed by an I.D. official. The danger of complications with whitemen will thus be lessened, and by preserving a knowledge of individual movements any inclination to petty depredations may be checked by the facility of apprehending those who committed the first of such offences.

8. The leaders of the Teton Sioux who fought against the troops should be hanged, and the rest be sent out of the country, as there are certain of the settlers who are greatly inclined to shoot them on sight; and the settlements are more in fear of such marauders as these than of anything else.

9. Big Bear's Band should either be broken up and scattered amongst other bands or be given a reserve adjacent to that at Onion Lake. The action in this regard could be decided better when it is known, after their surrender, the number that will have to be dealt with. If the band is kept intact and settled as suggested the Instructor stationed at Onion Lake would be sufficient for the two bands.

10. One Arrow's band should be joined with that of Beardy and Okemasis and their present reserve be surrendered. Chacastapasin's band should be broken up and its reserve surrendered; the band being treated as suggested with One Arrow's. Neither of these bands are large enough to render it desirable to maintain instructors permanently with them, and as they are constituted of bad and lazy Indians nothing can be done without constant supervision for them. The action suggested therefore would have been wise in any case, their rebellion justifies its pursuit.

11. All halfbreeds, members of rebel bands, although not shewn to have taken any active part in the rebellion, should have their names erased from the paysheets, and if this suggestion is not approved of, by directing that all belonging to any bands should reside on the reserves. Most of these halfbreeds would desire to be released from the terms of the treaty. It is desirable however that the communication between such people and the Indians be entirely severed as it is never productive of aught but bad results.

> 12. There are one or two Canadians, not possessed of Indian blood, on the paysheets; these should be struck off.
>
> 13. James Seenum's band especially should receive substantial recognition of its loyalty, and all Indians like Mistawasis and Ahtahkakoop and other bands that have held aloof from the rebellion should receive some mark of the government's appreciation of their conduct. If such a mark is conferred carefully it will at once confirm them in their loyalty and assist in ensuring it in future, whilst increasing the contrast between their treatment and that of those who have acted differently; without leading them to believe that it is for the purchase of good behavior, an effect to be guarded against.
>
> 14. Agents should be particularly strict in seeing that each and every Indian now works for every pound of provision given to him, and I would urge that so soon as possible directions be given to treat Indians that receive assistance in provisions and clothing in excess of treaty stipulations, as coming under the Masters and Servants Act, until such time as they become self-dependent. Unwilling ones can then be made to give value for what they receive, a policy heretofore most difficult to carry out.
>
> 15. Horses of rebel Indians should be confiscated, sold, and cattle or other necessaries be purchased with the proceeds of such sale. This action would cripple them for future rebellious movements; and they do not require ponies if made to stop on reserves, and adhere to agricultural pursuits. They would be retained on reserves too, with greater ease, if the means of travelling expeditiously, are taken from them. In view of the desirability of keeping them from wandering, where confiscation is impossible, endeavours might be made to induce a voluntary exchange of ponies for cattle, etc.
>
> Hayter Reed Asst. Comm.
>
> Regina July 20th/85 [emphasis added]

[241] Dewdney found the measures recommended by Reed "very desirable" and passed them on to Macdonald on August 1, 1885.

[242] Waiser comments:

> Prime Minister Macdonald's reaction to Reed's "management of Indians" recommendations was overwhelmingly positive, as seen by the prime minister's repeated notation, "approved", followed by his initials, on an earlier briefing document that Vankoughnet had prepared for his consideration. Macdonald agreed that the tribal system should be abolished where possible, that annuity payments to rebel bands and individuals be suspended, that able-bodied Indians be required to work for any provisions, and that guns and horses be turned in on a voluntary basis. He also sanctioned the abolition of Big Bear's band, one of the largest Plains Cree groups at one time. What was particularly revealing, however, were those instances where Macdonald, at Vankoughnet's urging, took Reed's suggestions one step further. For example, he directed Dewdney to treat any

> Indian who had been implicated in the troubles as a rebel. He also ordered, despite qualms about its legality, that the proposed pass system be applied as soon as possible to all Indians, including those who had been loyal.

[243] Three weeks later, Dewdney provided a table designating nearly 80 bands as either loyal or disloyal. Of these, 28 bands, including Beardy's, were branded disloyal.

[244] Poundmaker and Badger were, it appeared, prescient in their concern, upon entering treaty, over a loss of dignity. On Reed's recommendation, even "loyal" Indians were not to enjoy their personal sovereignty to roam over a territory that was once theirs alone.

[245] Macdonald's embrace of the measures recommended by Reed are difficult to reconcile with his earlier characterization of recent events to Governor General Lansdowne as a form of domestic trouble, but short of a rebellion. Hearing this, Lansdowne reacted: "We cannot now reduce it to the rank of a common riot. If the movement had been at once stamped out by the NWM Police the case would have been different, but we were within a breath of an Indian war."

[246] Lansdowne, the local manifestation of the Queen's presence in Canada, held an opinion that was not shared by Canadian officials. The official understanding of Indian involvement in the Rebellion is set out in an 1886 publication of the Indian Affairs department entitled *The Facts Respecting Indian Administration in the North-West:* "… everybody knows, the Indians did not rebel; but a very small number of them joined in the insurrection."

[247] Macdonald's response to Lansdowne: "We have certainly made it assume large proportions in the public eye. This has been done however for our own purposes, and I think wisely done."

[248] This response reveals a motive for the implementation of the Reed-Dewdney recommendations unrelated to the punishment of individuals who participated in the uprising.

[249] Macdonald's 1883 characterization of Indians as chronic complainers will be recalled by the reader, as will Reed's dismissal of the petition of the Cree chiefs as influenced by others and trivial. The same theme resounds in Dewdney's 1886 Departmental Report: "It is a peculiarity of their race, to be extremely susceptible to influence, to care little for the morrow if the day satisfies their wants."

[250] The Claimant maintains that the "own purposes" adverted to by Macdonald without elaboration, was the justification in the wake of the Rebellion for measures to increase government control over indigenous peoples generally. This theory has credence when it is taken into account that the pass system and other measures were taken after the danger had passed, and despite the fact that the Indian involvement was, by the governments own account, isolated, unorganized, and influenced by others.

[251] There is evidence that the official intention to control and subjugate the Indians went from the top down.

[252] Eleven Indians were convicted of capital offences and sentenced to death. Three sentences were commuted to life imprisonment. Eight were executed at a gallows built at Battleford for a public execution, although these had previously been banned. Waiser reports that Indians in the area were required to attend. One week before the hangings Sir John A. Macdonald, Prime Minister, mused in a letter to the Indian Commissioner, "The executions...ought to convince the Red Man that the White Man governs."

2. Reed's Recommendations Apply to not only "Rebel" Bands

[253] The Claimant says that Reed's recommendations, to which Macdonald endorsed his approval, reveal a motive to control the Indian's in their enjoyment of the benefits assured by the Treaty.

[254] Reed's allegations of Indian waste of annuity payments set out in recommendation number five is directed at the bands generally, not just those whose members, or some of them, participated. All were, in the official view, wastrels taking advantage of government largesse. For the "rebel bands," there was to be no recognition of a treaty right to annuities due to their abrogation of the treaty commitment of loyalty.

[255] There is nothing in the Treaty that empowers the government to dictate the use that may be made by Indians of their money.

[256] The recommendation for the breakup of the tribal system also reveals the motive to exercise control by the destruction of indigenous institutions of governance over their own

affairs. This goes far beyond collective punishment of tribes considered disloyal as it applies to all of the treaty communities, whether "loyal" or "disloyal."

[257] The utterances of government officials of the time from the top down reveal an attitude of disrespect, even contempt, for indigenous peoples both individually and collectively.

3. The Official reason for Withholding Annuities

[258] In late October 1885, Deputy Superintendent of Indian Affairs Vankoughnet instructed Dewdney that "annuities of rebellious Bands who committed depredations upon the property of the Department or on that of other parties, or who made away with the property of the Band which was given them at the expense of the Government should be charged with the cost of the same until the whole expense...has been repaid to the Government."

[259] There had been looting and burning of stores, houses and the telegraph office at the small village of Duck Lake. There was little damage at the Duck Lake reserve and the nearby agency farm, but there was extensive looting.

[260] Lash valued five hundred bushels of wheat, one hundred and fifty bushels of barley, three hundred and fifty bushels of potatoes and ten bushels of turnips that had gone missing at $1250.00. The greatest loss was 24 government-owned work oxen valued at nearly $3000.00. Other stock including bulls, cows, steers, heifers, bull calves, steers and pigs for an additional loss of 38 animals was noted. These, plus a few tools, implements and tack, were valued all in at $5,815.19.

[261] The sum total of withheld annuities amounted to $4,750.00.

[262] By the end of 1886, the value of replaced implements and livestock provided to the Beardy's & Okemasis bands totalled approximately $3000.00. Oxen were acquired for the Indians of the Carlton agency (which included One Arrow) at a cost of $1100.00.

[263] Lash had been working with the bands since immediately after the fall of Batoche. He reported that the Beardy's & Okemasis bands had, within a few days, put in crops with the limited means at their disposal; a government yoke of oxen and a few ponies. He advised his superiors that "[w]ith the above exception" (i.e. the oxen and ponies) "...& the cows given under

Treaty, the remainder of the stock on their Reserves had been killed by the rebels."

[264] It is obvious that the stores of grain, potatoes, turnips etc. and the oxen and livestock lost during the Rebellion could not have been consumed by the members of the bands in the period from the battle at Duck Lake on March 27, 1885 and the fall of Batoche on May 12, 1885.

[265] The Métis under Riel and Dumont were encamped at Duck Lake some time after Riel's return in July 1884 and were provisioning themselves by appropriating stores for their own use wherever they could be found. Lash's attribution of responsibility to "rebels" for killing the stock on the band's reserves is plainly directed at the Métis.

[266] It was not the actions of the bands that resulted in the loss of property of the bands and the government, but they paid the price.

VII. DOES THE TRIBUNAL HAVE JURISDICTION TO HEAR CLAIMS FOR THE NON-PAYEMENT OF TREATY "ANNUITIES"?

A. The Application to Strike the Claim

[267] The Respondent filed an Application to Strike the Claim pursuant to sub-section 17(*a*) of the *SCTA*, which provides:

> **17.** On application by a party to a specific claim, the Tribunal may, at any time, order that the claim be struck out in whole or in part, with or without leave to amend, on the ground that it
>
> *(a)* is, on its face, not admissible under sections 14 to 16;
>
> *(b)* has not been filed by a First Nation;
>
> *(c)* is frivolous, vexatious or premature; or
>
> *(d)* may not be continued under section 37. [emphasis added]

[268] The Respondent relies on sub-section 14(1)(*a*) of the *SCTA* which provides for claims based on "a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty..." The term "asset" is defined in section 2 of the *SCTA* as "tangible property."

[269] The argument is that money is not tangible property and therefore not an asset.

[270] The Respondent also relies on section 14(1) of the *SCTA* which provides for claims by

First Nations seeking "...compensation for its losses..." (emphasis added). Here, the argument is that, as the treaty provides for payments to individual members of the band, the Claimant has not suffered a loss.

[271] The Respondent further says that the Minister, on the advice of the SCB, does not accept claims based on the failure to pay treaty "annuities." This, it is said, applies a policy of the SCB that excludes such claims from consideration. The argument is that eligibility of claims, based on the grounds enunciated in section 14 under the *SCTA* must "fit" with the policy as administered by the SCB.

B. Applicability of Sub-Section 17(*a*) of the *SCTA*

[272] Sub-section 17(*a*) of the *SCTA* applies only where "on its face" the claim does not come within section 14 to 16. The starting point for analysis cannot rest on assumptions about the meaning of the terms.

[273] The issues raised by the Respondent call for the interpretation of the terms "asset" and "its losses." Both call for the analysis of terms in the *SCTA* in the context of a claim that the Crown has failed to perform treaty obligations. Interpretation of the terms "asset" and "its losses" call for treaty interpretation. Treaties are sui generis. Whether a sum of money to be paid annually is an asset (defined in section 2 of the *SCTA* as "tangible property"), and whether a broken promise to make such payments to individual band members (which is admitted) cannot ground a claim by the First Nation, requires interpretation of the *SCTA* and the treaty.

C. Are Treaty Payments "Tangible Property"?

1. Position of Respondent

[274] The Respondent argues that the Tribunal does not have jurisdiction to consider the Claim, as annuities are incorporeal, merely an intangible chose in action.

[275] The Respondent's argument rests on sub-section 14(1)(*a*) of the *SCTA*, which allows for claims based on a failure to provide "lands or other assets under a treaty" (emphasis added). Section 2 of the *SCTA* defines assets as "tangible property."

[276] The Respondent says that that the common law precludes consideration of a promise to

pay as anything but intangible or incorporeal property. Texts cite annuities as one of the ten incorporeal hereditaments. Others, citing *Blackstone, Commentaries*, vol. ii c. iii are advowsons, tithes, commons, ways, offices, dignities, franchises, corodies (a right to receive victuals for one's maintenance), and rents; *Burn, Cheshire's Modern Law of Real Property (11th) (London: Butterworths, 1972).* Others, more contemporary, would be some types of intellectual property.

2. Position of Claimant

[277] The Claimant does not frame the Claim as a breach of a promise to do something in the future. The Claim is grounded in the past failure of the Crown to honour its treaty obligation between 1885 and 1888 to make a payment *in specie*, in the form of a five-dollar banknote, to each member of the band. Cash has been held to be a tangible asset. As the term "annuity" appears nowhere in the text of Treaty 6, its use as a term of convenience does not limit the legal analysis to the legal nature of an annuity as an intangible.

3. Evidence

[278] The treaty promise is that Her Majesty's Commissioners:

> ...shall, in every year ensuing the date hereof, at some period in each year, to be duly notified to the Indians, and at a place or places to be appointed for that purpose within the territory ceded, pay to each Indian person the sum of $5 per head yearly.

[279] There was no need for an appropriation to establish a fund from which to deliver the object of the duty, a five-dollar note for each band member. It was confirmed in 1911 that the obligation was a charge on the *Consolidated Revenue Fund*, per section 171 of the *Indian Act*, 1911:

> The annuities payable to Indians in pursuance of the conditions of any treaty expressed to have been entered into on behalf of His Majesty or His predecessors, and for the payment of which the Government of Canada is responsible, shall be a charge upon the *Consolidated Revenue Fund of Canada*, and be payable out of any unappropriated moneys forming part thereof. [SC 1911, c 14, s 3, emphasis added]

[280] In practice, payment was made to each member on the paylist by delivery of a $5.00 note to each band member. The Indian agent arrived with the cash. The difference between 1885 and

1888 was that the Indian agent had the cash, but did not put it in the hands of the rightful owners.

[281] In a document prepared by the Indian agent entitled "Approximate Amounts of Annuity Moneys for payment in Carlton to Rebel Bands," an amount is entered for each band, of which Beardy's & Okemasis are two. This notation appears: "To Cash held for expenditures to replace damage done on Reserve by Rebels" (emphasis added).

4. Federal Common Law and Treaties

[282] The lawful obligation asserted by the Claimant is grounded in a treaty. The subject matter of the Claim is an annual payment of cash. This was one of several items promised by Treaty 6. Others included land, livestock and agricultural implements. All were consideration for the cession of an interest in 120,000 square miles of land. The promised assets are the consideration, the "promise" is the covenant to deliver the assets.

[283] The term "annuity" came into common usage to describe the Crown obligation. It does not appear in the document. It is a term of convenience, not art. Where used in this decision it is likewise for convenience only.

[284] The difference between the treaty promise to pay a cash sum and the other treaty promises is that the former provides for repeated cash payments in perpetuity; the others noted above do not. This, argues the Respondent, assigns to it (the promise) the legal attributes of a commitment contained in a financial instrument, an annuity, of the kind issued by banks and insurance companies. As such, says the Respondent, the promise of payment is intangible, incorporeal, a chose in action.

[285] The Tribunal applies federal common law in determining whether the Crown has failed to fulfil its lawful obligations. In *Canada v Kitselas First Nation*, 2014 FCA 150 at para 28, [2014] 4 CNLR 6, the Federal Court of Appeal confirmed the role of the Tribunal as a quasi-judicial body bound to apply the common law as applicable to aboriginal matters:

> The validity of a claim must be determined in accordance with general legal principles, notably the principles of fiduciary law as applicable to the Crown-aboriginal relationship: paragraph 14(1)(c) of the *SCT Act*. The *SCT Act* does not establish a code of liability with respect to specific claims, which are rather

> adjudicated in accordance with the general principles of the federal common law pertaining to aboriginal matters.

[286] The interpretation of treaty terms calls for the application of the law pertaining to aboriginal matters. The principles applicable to the interpretation of treaties and the promises they contain are summarized in the Supreme Court of Canada decision in *Quebec (AG) v Moses*, 2010 SCC 17 at para 107, [2010] 1 SCR 557 [*Moses*]:

> This Court has stated many times that Aboriginal treaties are to be interpreted broadly, flexibly and generously (*R. v. Badger*, [1996] 1 S.C.R. 771 , at paras. 76-78; *R. v. Sundown*, [1999] 1 S.C.R. 393 , at para. 24; *Sioui*, at p. 1043; *Simon*, at p. 404, see also Sullivan, at p. 513). In *Marshall (1999*), McLachlin J. (as she then was), dissenting but not on this point, provided what is now the most frequently cited summary of the relevant interpretive principles, as they have been developed by this Court (at para. 78):…

[287] The following principles apply to the issue at hand:

> [287] The following principles apply to the issue at hand:
>
> 1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 24*; R. v. Badger*, [1996] 1 S.C.R. 771, at para. 78; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1043; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 404. See also: J. [Sákéj] Youngblood Henderson, "Interpreting Sui Generis Treaties" (1997), 36 Alta. L. Rev. 46; L. I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the Sparrow Justificatory Test" (1997), 36 Alta. L. Rev. 149.
>
> …
>
> 6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time: *Badger, supra*, at paras. 53 et seq.; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36.
>
> 7. A technical or contractual interpretation of treaty wording should be avoided: *Badger, supra*; *Horseman, supra; Nowegijick, supra*. [*Moses* at para 107]

[288] It is unlikely that the chiefs and headmen who negotiated and signed Treaty 6 would have understood the promise to pay five dollars annually would have the sense that this was any different than the promises to provide land, livestock and agricultural implements. Their concern was with the subject matter of the promises, cash, land, cows and plows. All are assets, to be delivered as promised.

[289] In the sense in which the signatories to the treaty would naturally have understood it,

cash, like a cow or plow, is an asset. This applies to both parties to Treaty 6.

[290] The attribution to a treaty promise of the legal characteristics of an annuity (incorporeal) is to give it a technical meaning beyond the comprehension of all except bankers, insurers, their lawyers and mystics.

5. Cash as Tangible Property

[291] There is another principle of treaty interpretation that may apply:

> 8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" [page 616] or realistic: Badger, supra, at para. 76; Sioui, supra, at p. 1069; Horseman, supra, at p. 908. [*Moses* at para 107]

[292] The task at hand is the interpretation of the term "asset" (tangible property) in the *SCTA*. If it is correct in law that principles of treaty interpretation apply where the primary task is to interpret a term in a statute that applies to Indian interests, this principle may also apply.

[293] If applicable, the question is whether the law may consider cash tangible. In some circumstances the law does.

[294] The cash had a physical existence. It was in the hands of the Indian agent, as were other assets promised by the treaty before delivery to the band.

[295] The term "tangible property" means: "Property that has physical form and characteristics." Things that can be seen or touched, or otherwise perceptible to the senses, are tangible personal property [*Black's Law Dictionary*, 10th ed, *sub verbo* "tangible property"].

[296] In *Canadian Imperial Bank of Commerce v Canada*, [2000] 254 NR 77 para 34, 2 CTC 269, the Federal Court of Appeal found that foreign banknotes were tangible property:

> Foreign currency is property, and is capable of being touched, bought and sold. Its value depends solely upon its physical existence. It has no value once destroyed, which distinguishes it from something that is merely a chose in action or evidence of a chose in action, like a promissory note, share or debenture that can be destroyed without affecting the legal rights and obligations it represents.

[297] Canadian currency has long shared these qualities.

6. Absent the Application of Treaty Law, Cash as Tangible Property

[298] If only the *SCTA* may be considered on interpretation of the term "asset" (tangible property), cash is nevertheless, on the foregoing analysis, tangible property. The cash in the hands of the Indian agent was tangible property, an asset of the band, like a cow or plow.

[299] If the asset, cash, can be tangible in one context and intangible in another, and the present circumstances leave it unclear as to which, the rules of interpretation governing enactments that deal with Indian interests apply such that it is, for the purposes of sub-section 14(1)(*a*) of the *SCTA*, tangible.

7. Conclusion

[300] The object of the promise in issue is "tangible property" and thus an "asset," within the meaning of the term in the *SCTA*, sub-section 14(1)(*a*).

D. Are "Annuities" Assets of a First Nation?

[301] The Respondent says that the Tribunal lacks jurisdiction to receive the Claim as annuities are on the terms of Treaty 6, payable to individual members of the band. Therefore, the Claim is not brought by the First Nation for compensation for its losses, as provided for in the *SCTA*, section 14(1).

1. The Indigenous Group, and the *Indian Act*

[302] The ancestors of the Beardy's & Okemasis First Nation entered Treaty 6 as a collectivity. They did not present themselves as a legally distinct corporate or statutory body. As required by the Treaty, the group was allotted a reserve.

[303] As of 1885, the Cree collectivity at Duck Lake came within the *Indian Act* definition of a band.

[304] The *Indian Act*, 1880, section 2(1) defines the term "band" to mean "...any tribe, band or body of Indians who...are interested in a reserve...or who share alike in the distribution of any annuities...." The references to "tribe" and "band" were mere tautology at the time. The essence of the term "band" is a body of Indians, a collectivity. The *Indian Act*, 1880, does not establish, but rather recognizes the collective nature of indigenous groups.

[305] As a collective has no legal identity distinct from its membership, and is in fact and law the aggregate of its members, the payment of an annual sum in cash to each member is in effect a payment to the collective. This is reflected in the definition of "band" in the *Indian Act*, 1880 as a "body of Indians...who share alike in the distribution of any annuities..." (emphasis added).

[306] The phrase "share alike" contemplates the existence of a common asset, cash, delivered annually and distributed in equal portions to each member of the body of Indians. Under Treaty 6, the cash amount is determined annually by multiplying the number of band members by $5.00. The treaty mechanism for the performance of the Crown's obligation to the collective is the delivery of a $5.00 banknote to each of the individuals that comprise the collective.

[307] The Metcs Report traces the evolution of annuity provisions in treaties. In some earlier treaties, payment was made to the Nation based on the number of members. The express obligation was to the collective. Treaty 6 provides for a payment to each band member, in partial consideration for the cession of the collective title. The mechanics of payment does not alter the nature of the right.

2. Recognition of the Collective Interest

[308] As for the "rebel bands," the withholding of annuities was imposed on all members. This is of particular significance to the question whether the withholding of annuities can ground a claim by a First Nation for compensation for its losses (*SCTA*, section 14(1)).

[309] That the Indian interest in the annuities was a collective interest was plainly the understanding of the government officials of the legal effect of the treaty promise, as all band members were to be deprived of the benefit due to the actions of a few. If the right to annuity payments was considered the right of the individual members, only the offenders would have been required to suffer that punishment.

3. Jurisprudence

[310] *Soldier v Canada (AG)*, 2009 MBCA 12, [2009] 2 CNLR 362 [*Soldier*], is sometimes cited as an authority finding that an action for non-payment of annuities may only be brought by entitled individuals.

[311] *Soldier* was an application to certify a class action. The chambers judge dismissed the application on the grounds that several of the requirements for certification had not been met. The Court of Appeal found that she had erred in finding that only the band had standing to bring the action:

> The comments of Hugessen J. in *Shubenacadie Indian Band v. Canada (Attorney General)* et al., 2001 FCT 181, 202 F.T.R. 30, aff'd 2002 FCA 255, 291 N.R. 393, are apt here (at para. 5):
>
> > … [I]t is only in the very clearest of cases that the Court should strike out the Statement of Claim. This, in my view, is especially the case in this field, that is the field of aboriginal law, which in recent years in Canada has been in a state of rapid evolution and change. Claims which might have been considered outlandish or outrageous only a few years ago are now being accepted.
>
> Given that low threshold, I believe the judge erred when she held that the plaintiffs had no standing because entitlement to the annuity under Treaties No. 1 and 2 is a collective right for which an individual may not sue. Quite simply, the law in this area is not sufficiently clear to conclude that it is beyond doubt that the action could not succeed at trial. [*Soldier* at paras 45-46]

[312] The finding of the Court of Appeal is not determinative of the issue at hand. The finding reflects the low threshold for the part of the test for certification at the application stage. It does not rank as a precedent on the collective or individual nature of a right to an annuity.

[313] In *Moulton Contracting Ltd v British Columbia*, 2013 SCC 26 at para 33, [2013] 2 SCR 227, the Supreme Court of Canada affirmed that treaty rights are collective rights. Although collective in nature, they can have both collective and individual aspects:

> The Crown argues that claims in relation to treaty rights must be brought by, or on behalf of, the Aboriginal community. This general proposition is too narrow. It is true that Aboriginal and treaty rights are collective in nature: see *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1112; *Delgamuukkw*, at para. 115; *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 36; *R. v. Marshall v. Canada*, [1999] 3 S.C.R. 533, at paras. 17 and 37; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686, at para. 31; *Beckman*, at para. 35. However, certain rights, despite being held by the Aboriginal community, are nonetheless exercised by individual members or assigned to them. These rights may therefore have both collective and individual aspects. Individual members of a community may have a vested interest in the protection of these rights. It may well be that, in appropriate circumstances, individual members can assert certain Aboriginal or treaty rights, as some of the interveners have proposed.

[314] Treaty 6 provides for annual payments to all future generations of members of the

collective. This could not be a promise to the unborn. They do not exist, at least in the corporeal sense. It is a promise to the collective comprised of the members, collectively, as it is constituted at every moment in time.

[315] The entitlement to the payment ceases when a member of the collective is removed from the band list. While an individual who is no longer on the band list may remain a *de facto* member of the community, he or she would no longer be recognized by the government as a member of the band constituted under the *Indian Act*, 1880. Under the system of administration and governance imposed on indigenous peoples by the *Indian Act*, 1880, the entitlement of the individual to the annual payment is lost, as it is not owed to the individual but to the collective as then constituted.

[316] The annual payment sustains the collective by providing cash, meagre as it is, to each member. This is the intent of the provision for the annual payment required by Treaty 6 as partial consideration for the cession of a collective interest in the land. The failure to pay the required money to an entitled individual is a loss to the collective.

4. Conclusion: A Collective Loss

[317] The Claimant, a band under the *Indian Act*, 1880, and a First Nation within the definition of the term in the *SCTA*, is the present incarnation of the collective that suffered the loss between 1885 and 1889. The loss between 1885 and 1889 is "its" loss within the meaning of the *SCTA*, section 14(1).

VIII. SPECIFIC CLAIMS BRANCH POLICY AND THE *SCTA*

A. Crown Position

[318] The Respondent contends that the Minister, on the advice of the SCB, does not accept claims based on the failure to pay treaty "annuities." This, it is said, applies a policy of the SCB that excludes such claims from consideration. The argument is that eligibility of claims under the *SCTA* must "fit" with the policy as administered by the SCB.

[319] As the Tribunal is the forum in which First Nations may bring claims when they have not been accepted for negotiation, it makes sense that the grounds for claims under the policy, entitled *Outstanding Business* (Canada, Department of Indian and Northern Affairs and Northern

Development, *Outstanding Business*: *A Native Claims Policy* (Ottawa: Supply and Services Canada, 1982)), be the same as provided for in the *SCTA.*

1. Evidence of Audrey Stewart

[320] The Respondent relies on the affidavit of Audrey Stewart. She was the Director General of the SCB from 2001 to 2007. This evidence is presented to support the challenge to the Tribunal's jurisdiction on the ground that treaty payments are the right of individual band members only, and in any case not tangible property under the *SCTA.*

[321] Stewart testified.

[322] The *SCTA,* she said, "...affirms the importance of maintaining a proper 'fit' between the type of claims accepted as specific claims and the mechanisms provided to deal with them. The *SCTA* continues to reflect the operational imperatives which require specific claims to be '*clear, countable* and *communal."'*

[323] Clarity is explained:

> Sufficiently *clear* such that there is an outstanding treaty obligation that is readily identifiable and that does not require a significant amount of treaty interpretation to achieve settlement.

[324] Countability is explained:

> Countable in the sense that the failure to fulfill the obligation can be quantified and compensation calculated, drawing on the components available through the program, leading to a final settlement.

[325] Communality:

> *Communal* in that it was submitted by a First Nation, representing damages experienced by that First Nation, and is capable of an effective release by that First Nation.

[326] Stewart says annuity claims do "...not meet the formal requirement for *communality* under *Outstanding Business.*" Such claims, she testified, did not represent a loss that the "band" had "incurred" or damages "it" had "suffered." Further: "The indicia of *clarity* also arose from *Outstanding Business* and in particular the prohibition against the renegotiation of the Treaties."

[327] Finally: "...the requirement for *countability* arose from the fact that the only remedies that

could be provided by the Specific Claims Branch were a lump sum monetary payment or, in certain circumstances, reserve land. A treaty claim therefore had to be capable of being quantified in terms of money or land."

[328] Stewart testified that the claimant community was not informed of these "operational imperatives" ("*Internal Policy*"), but recalled having said in meetings that she did not think that annuity claims were provided for by *Outstanding Business*. When, and to whom, is not in evidence.

2. Reliance on the "Requirements": Clarity, Countability and Communality

[329] The Respondent does not rely on Stewart's evidence as informing Parliament's intention in construing the term "assets" in sub-section 14(1)(*a*). The Respondent argues that the provisions of the *SCTA* must be interpreted as consistent with the application of the policy. Therefore, the argument goes, as the policy does not provide for acceptance of a claim based on a failure to pay "annuities," neither does the *SCTA*.

[330] The Claimant objects to the introduction of this evidence in the proceeding as irrelevant. The *SCTA*, it is said, establishes the jurisdiction of the Tribunal, not an internal and unpublished policy by which claims are analyzed for "*clarity, countability and communality*."

[331] I would sustain the Claimant's objection. These "requirements" are neither set out in the original *Outstanding Business* or its present iteration. An internal, unpublished, standard by which claims presented on proper grounds are assessed based on "operational imperatives" is irrelevant to interpretation of terms in the *SCTA*.

[332] I will nevertheless address the premise, based on Stewart's evidence, that a finding that the Tribunal has jurisdiction would produce inconsistency between the grounds for a specific claim under the current policy, *Outstanding Business*, as revised and published in 2009 (the "*2009 Policy*") and the *SCTA*. My purpose in doing so is to determine whether the Respondent's position that the Tribunal does not have jurisdiction over the Claim can, in the circumstances in which the *SCTA* came to exist, be reconciled with the Respondent's positions on statutory interpretation and the core precept of the honour of the Crown in matters affecting aboriginal

interests.

B. Policy Overview

1. Policy at Date Claim Filed with the Minister

[333] The thrust of the Stewart affidavit is that annuity claims have never come within the grounds for claims provided for in *Outstanding Business*. The Respondent relies on this to argue that the *SCTA* was not intended to confer the Tribunal with jurisdiction over "annuity" claims.

[334] The Claimant filed the Claim with the SCB on December 6, 2001. The policy in place at the time was *Outstanding Business*, which made specific references to treaty annuities. The introduction to the policy referred specifically to annuities as a feature "common to many of the Western treaties as one of the considerations for the cession of Indian lands."

[335] The reference in the introduction to annuities reveals that claims of failure to pay were considered to be treaty promises giving rise to a lawful obligation. Under the heading "Recent History," *Outstanding Business* recited that: "In 1969 the Government of Canada stated as public policy that its lawful obligations to Indians, including the fulfillment of treaty entitlements, must be recognized."

[336] If the policy made no specific mention of treaty annuities, it would still establish a failure to pay annuities as the non-fulfillment of a treaty. The policy provided as grounds, "...claims by Indian Bands which disclose an outstanding 'lawful obligation'..." in circumstances of "[t]he non-fulfillment of a treaty or agreement between Indians and the Crown." Treaty 6 was made between the Indians and the Crown. Payment by the Crown of annuities is a lawful obligation. The Claimant is an Indian Band, and as such is, on the face of the policy, the proper Claimant.

[337] The SCB advised the Claimant that it was conducting its review of the Claim in a letter dated July 4, 2005. The Claimant was told in June 2008, that the Claim did not come within the policy, *Outstanding Business*. It is apparent that the *Internal Policy* explained by Stewart was developed some time after July 2005. If it were in place earlier, the Claim would surely have already been rejected.

[338] The Claimant was told on December 17, 2008 that the Minister did not accept the Claim

for negotiation.

2. Provenance of the *SCTA*

[339] The bill introducing the *SCTA* was tabled for first reading in June 2008. It came into force in October 2008. The ground for claims based on the failure to perform treaty obligations is "a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty..." (sub-section 14(1)(*a*)).

[340] The *SCTA* reflects a recommendation made by the Senate Standing Committee on Aboriginal Peoples in December 2006, commitments made in the government's *Justice at Last* initiative and a "Political Agreement" made between the Minister of AANDC and the Assembly of First Nations (AFN) in November 2007. The latter affirmed the role of the AFN in the development of the revised policy and the *SCTA*.

[341] The Minister's message in *Justice at Last*, in part:

> Recognizing that tinkering around the edges of the process is not enough, we are proposing major reforms that will fundamentally alter the way specific claims are handled. Our approach builds on the lessons learned from years of study and past consultations and responds to major concerns expressed by First Nations. The *Specific Claims Action Plan* will ensure impartiality and fairness, greater transparency, faster processing and better access to mediation. It is a critical first step in bringing the specific claims program into the 21st century to deal with the existing backlog once and for all.
>
> The purpose of this document is to provide the historical context for specific claims and outline the key changes being introduced to improve the process. It describes our plan to create an independent claims tribunal and highlights the key elements of the legislation we intend to introduce in Fall 2007 following discussions with First Nations over the summer.
>
> The Honourable Jim Prentice, PC, QC, MP

[342] Under the heading "Foundations of the Specific Claims Policy":

> A "specific claim" is a claim made by a First Nation against the federal government relating to the non-fulfillment of an historic treaty or the mismanagement of First Nation land or other assets. Only claims submitted by First Nations are covered by this policy. <u>The government recognizes that a specific claim exists when a First Nation establishes that the Crown has a lawful obligation because it has:</u>

> • failed to uphold a treaty or other agreement between First Nations and the Government of Canada
>
> • breached the *Indian Act* or other statutory responsibility
>
> • mismanaged First Nation funds or other assets
>
> • illegally sold or otherwise disposed of First Nation land [emphasis added]

[343] This affirms it that treaty breaches may be claimed by First Nations based on failure to uphold a treaty. There is no hint that annuity claims are to be excluded.

[344] Schwartz was the AFN legal counsel in the process of establishing the policy and legislation required to implement the *Justice at Last* commitments made by the Minister on behalf of the government.

[345] Schwartz testified that there was no suggestion that the revised specific claims policy would limit claims for the non-fulfillment of treaty terms based on the legal nature of the promised asset. Although aware of the changes to the definition of grounds for claims, the definition of "asset" as "tangible property" was not understood to exclude claims related to annuities.

[346] The following are extracts from his report:

> In December, 2006, a Senate Committee released *Negotiation or Confrontation: It's Canada's Choice*. It advocated for a new system for resolving claims, including access to an independent Tribunal, and identified "moral", "economic", "historic" and "legal" imperatives for doing so. In 2007, extolling the benefits of reform in similar terms to the Senate Report, the Minister of Indian and Northern Affairs released *Justice at Last*, its action plan to reform the specific claims system. The document called for improved processing of claims within the federal system and the creation of an Independent Claims Tribunal. There is no indication of any intent to narrow the categories of claims that can be filed. The definition of "specific claim" offered is in the same broad terms as *Outstanding Business.*
>
> "Foundations of the Specific Claims Policy:
>
> A "specific claim" is a claim made by a First Nation against the federal government relating to the non-fulfillment of an historic treaty or the mismanagement of First Nation land or other assets. Only claims submitted by First Nations are covered by this policy. The government recognizes that a

specific claim exists when a First Nation establishes that the Crown has a lawful obligation because it has:

• failed to uphold a treaty or other agreement between First Nations and the Government of Canada;

• breached the Indian Act or other statutory responsibility;

• mismanaged First Nation funds or other assets

• illegally sold or otherwise disposed of First Nation land."

Included is the concept that only a First Nation is eligible to bring a claim, an idea already contained in *Outstanding Business*, but nowhere does *Justice at Last* engage in any discussion of such issues as whether certain breaches of treaty rights should be seen as infringements of individual rather than collective rights. Rather than indicating a more restrictive approach, *Justice at Last* characterizes its purposes as "taking action on *Outstanding Business*" and states that "While these major changes will dramatically improve the specific claims process, the fundamental principles of the Specific Claims Policy will not change."

Canada re-engaged with the AFN to develop language for an act to establish the new independent Tribunal. The AFN had to work with the "pillars" established by *Justice at Last*, such as accepting a cap ($150 million) on claims that could access the Tribunal and foregoing the creation of a Commission (as proposed by the 1998 Joint Task Force Report) to oversee "stage one" of the system, the pre-Tribunal process in which Canada assesses and in some cases negotiates claims. Working within those constraints, there was close collaboration on working out the specifics of the new legislation. In fact, the preamble of the SCTA states:

"The Assembly of First Nations and the Government of Canada have worked together on a legislative proposal from the Government of Canada culminating in the introduction of this Act".

[347] And, in conclusion:

The historical review of the development of the SCTA, in the context of the policies, court decisions and legislation that precedes it, does not reveal any record of Canada, or its chief partner in legislative development, the AFN, specifically turning their minds to the issue of whether there is a category of treaty breaches concerning annuities in some treaties that are outside of the category of 'treaty breach' claims that can be filed under the system. The concept that a band may claim compensation in relation to its losses is not new to the SCTA, but carried forward linguistically from the SCRA, which in turn is conceptually consistent with the 1998 Joint Task Force Report. There is no evidence that the author of this report can find that suggests that the drafting of this language of the SCTA in any way reflects a specific concern to exclude some annuity claims from entry to the system. As noted above, the 1998 Joint Task Force Report indicates that the AFN participants were generally opposed to narrowing the category of claims that can be brought under the category of breaches of lawful obligations.

3. Revisions to *Outstanding Business*

[348] In 2009, after the SCTA came into force, *Outstanding Business* was revised (the *2009 Policy)*. The Introduction reads:

> In 1982, the federal government released *Outstanding Business: A Native Claims Policy*, which set out the policy on specific claims and guidelines for the assessment of claims and negotiations. Important amendments were made to the Specific Claims Policy in the early 1990s.
>
> On June 12, 2007, the Prime Minister announced *Justice at Last: Specific Claims Action Plan*, which outlined plans to accelerate the resolution of specific claims in order to provide justice for First Nation claimants and certainty for government, industry and all Canadians. The Action Plan is intended to ensure impartiality and fairness, greater transparency, faster processing and better access to mediation.
>
> A key feature of the *Action Plan* is the *Specific Claims Tribunal Act*, which came into force on October 16, 2008. Pursuant to the *Act*, First Nations may choose to file claims with the independent Tribunal that are not accepted for negotiation or that are not resolved through a negotiated settlement agreement within a specified time frame.
>
> The fundamental principles of the Specific Claims Policy as articulated in *Outstanding Business:* A Native Claims Policy have not changed. These principles are: an outstanding lawful obligation must be confirmed, valid claims will be compensated in accordance with legal principles and any settlement reached must represent the final resolution of the grievance. The purpose of this document is to set out an updated policy statement and process guide that reflects the foregoing developments and ensures consistency of language between the Specific Claims Policy and the *Act.* [emphasis added]

[349] The grounds:

> **Grounds for a Claim**
>
> A First Nation may submit a claim seeking compensation for its losses based on any of the following grounds:
>
> a) a failure to fulfil a legal obligation of the Crown* to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown*;
>
> *This term is defined in the Glossary.

[350] The revised policy and *SCTA* emanated from the solemn assurances of *Justice at Last*.

[351] The enumerated grounds in the previous and current policies recognize treaty-based

claims. The earlier expression was "non-fulfillment of a treaty," the latter is "a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty..." In both cases the source of the lawful obligation is a treaty, in the present Claim, Treaty 6.

[352] Although aware of the apparently innocuous changes to the definition of grounds for claims, Schwartz said the definition of "asset" as "tangible property" was not understood to preclude claims related to annuities. This makes sense, as *Justice at Last* gives no hint of an intention to make specific claims policy more restrictive than formerly. The promise was to remedy the shortcomings of the claims process and create an independent adjudicator.

[353] The key statements in the Introduction to the *2009 Policy* are discussed below.

a) Important Amendments to the Policy in Early 90s

[354] There is no evidence of changes to Outstanding Business in the 90s, or at any time up to the 2009 revision, that changed the policy in a way that would exclude treaty annuity claims. Nothing in *Justice at Last* suggests such a change was up for consideration.

b) The Intent of the Action Plan

[355] As stated: "The *Action Plan* is intended to ensure impartiality and fairness, *greater transparency*, faster processing and better access to mediation." [Emphasis added]. This conforms with the assurances in *Justice at Last*.

[356] The assurance of greater transparency eliminates any consideration of the *Internal Policy* as part of the *2009 Policy*.

c) An Inconsistency

[357] Contrary to the assertion in the Introduction, there is an inconsistency between the language of the *2009 Policy* and the *SCTA*.

[358] Claims related to "...assets under a treaty..." are provided for under both the 2009 Policy and the *SCTA*. However, the term "asset" is defined in the *SCTA* (in section 2 "asset" means "tangible property"), but not in the *2009 Policy*.

[359] The Respondent relies on the definition of "asset" in the *SCTA* in its argument on both

jurisdiction and statutory interpretation.

d) A Fundamental Change

[360] The Introduction to the *2009 Policy* asserts that: "The fundamental principles of the Specific Claims Policy as articulated in *Outstanding Business: A Native Claims Policy* have not changed."

[361] The Respondent's position that the *2009 Policy*, and therefore the *SCTA*, does not provide for annuity based claims would, if correct in law, belie the truth of this statement. *Outstanding Business* cannot fairly be read as excluding annuity claims.

[362] As discussed above, treaty annuity claims could plainly be brought under Outstanding Business, the policy in effect when the Claim was presented to the Minister in 2001. The removal of this as a ground would, unless the unpublished Internal Policy of the SCB could be considered part of *Outstanding Business*, be at the least a significant if not a fundamental change.

4. *Internal Policy* and Dr. Shwartz's Evidence

[363] Stewart attested that the SCB had an "expectation" of clarity, countability and communality for specific claims, as attested as follows:

> ...for a treaty based claim to be eligible under the 1982 Policy, 'Outstanding Business' Policy, a claim would be expected to be *clear*, *countable* and *communal*. [emphasis added]

[364] Stewart testified that these three elements of the SCB's "operational imperative" were not made public.

[365] The Claimant filed a supplementary report authored by Schwartz. This addresses the SCB's "expectation" of clarity, countability and communality.

[366] Schwartz's notes:

> There might also be different vantage points from which expectations are formed. The *perspective of federal officials* on what claims they thought they should or could settle within the system in which they were operating might have been different from what *First Nations or the public might have expected*. It is uncertain to me as a reader which vantage point the Stewart Affidavit is relying upon in characterizing "expectations".

[367] On "clarity":

> The word **"clear"** does not appear as part of any existing or proposed eligibility criteria for specific claims in any of the documents reviewed in my original report – from Outstanding Business, The 1998 Joint Task Force Report, the *Specific Claims Resolution Act, Justice at Last, the Specific Claims Tribunal Act* and the Specific Claims Policy and Process Guide. As an academic and practitioner in the area, to the best of my recollection, I have never before heard or read "clear" (or the other two proposed criteria, "countable" and "communal") proposed as an eligibility requirement.

[368] On "countability":

> The word **"countable"** also does not, as far as I can determine, appear in any of the policy or legislative documents referred to in my original report.

[369] On "communality":

> The word **"communal",** as far as I can determine, appears nowhere in an eligibility requirement in any of the legislative or policy enactments or proposals reviewed in my original report, including the current federal legislation and policy.
>
> As my original report submitted, all such enactments and proposals in modern times:
>
> - have indeed expressly required that a claim, including those based on treaty breaches, be brought by a group, not an individual;
> - have not expressly addressed whether some treaty rights are excluded because they are supposedly of an individual rather than "communal" nature;
> - have not in particular expressly addressed the issue of annuities.

C. ROLE OF THE CROWN'S *INTERNAL POLICY*

1. Impetus for the Development of the Internal Policy

[370] The present Claim was rejected by the Minister in December 2008. The rejection was said to be on policy grounds, which were not disclosed. It is now known, due to the present proceeding under the *SCTA*, that the policy was the *Internal Policy* of the SCB. *The Internal Policy* did not see the light of day until 2014, when it was introduced as evidence in this proceeding.

[371] The *Internal Policy* appears to have been crafted as a result of the presentation of the

Claim to the Minister in 2001, in the time that elapsed between the presentation of the Claim and June 2008, when the Claimant was told that the Claim did not come within *Outstanding Business.* It was formally rejected after the *SCTA* came into force in October 2008. By then, the definition of "asset" as "tangible property" had appeared in the *SCTA*, but not in the *2009 Policy*.

[372] The Claim, when filed in 2001, fell within one of the grounds of *Outstanding Business*, which referred to annuities, and remained so until at least the introduction of the *2009 Policy*. Stewart testified that the SCB was aware of other potential claims on the same grounds. Indeed, the evidence in this proceeding reveals the potential for many similar claims. With knowledge that there was the potential for numerous claims due to the withholding of annuities in the aftermath of the Rebellion, the SCB established the Internal Policy, designed to avoid coming to grips with issues of treaty interpretation.

[373] There is no evidence of a connection between the *Internal Policy*, which remained undisclosed until it surfaced in this proceeding, the *2009 Policy*, and the *SCTA*. It is, however, the *Internal Policy* that is relied on by the Respondent as the basis for its position that the Tribunal does not have jurisdiction in respect of the Claim.

[374] The "requirements" of *clarity, countability* and *communality* are not set out in either the previous or current policy. Neither the Claimant nor other First Nations were notified of these putative qualifications. In the circumstances, these "requirements" are not requirements at all. They amount to nothing more than internal guidelines for assessment of claims filed for consideration by the Minister.

[375] The *Internal Policy* was neither transparent nor fair. It was not consistent with the promise of *Outstanding Business*, and not made public. It resulted in the rejection of the Claim. It is relied on by the Respondent as informing the interpretation of the *SCTA*. It is of no relevance to the task.

2. *SCTA* and Treaty Interpretation

[376] Stewart testified that in applying the *Outstanding Business* policy as it was up until the 2009 revision, the SCB interpreted the express prohibition against renegotiation it contained as militating against claims that required a significant amount of treaty interpretation. This, says the

Respondent, is supported by the 1990 Standing Commons Committee Report, *"Unfinished Business"* which she says acknowledges that significant questions of treaty interpretation cannot be adequately dealt with under the Specific Claims Policy:

> The specific claims policy encompasses claims based on outstanding treaty obligations but is considered by many to be too narrow in scope to be able to deal with the level of political and legal rights being claimed by treaty people. Many treaty rights disputes involve questions of interpretation that cannot be adequately dealt with by the specific claims policy. [emphasis added]

[377] There is, however, no evidence that the policy in place in 1990, or at any subsequent time, qualified the grounds on which claims may be brought to exclude claims involving questions of treaty interpretation on the basis of the Standing Committee Report, or at all. This is not surprising, as Claimants are required to base their claims on a breach of a lawful obligation. The interpretation of treaty provisions is unavoidable.

[378] The imposition of the guidelines *of clarity, countability* and *communality* avoided the need for the SCB to come to grips with questions of interpretation of the very kind that the Tribunal must deal with under the *SCTA*. This was their purpose, as explained by Stewart.

[379] Taken to its logical conclusion, the position of the Respondent would, if correct, mean that the Tribunal has no jurisdiction over claims that call for treaty interpretation.

[380] The notion that the *SCTA* is designed to "fit" with an administrative measure implemented to make life less complicated for the SCB, and that this has any bearing on the jurisdiction of the Tribunal to consider claims that require analysis of the legal nature of treaty obligations, must be rejected.

[381] There is no evidence that Crown officials brought the *Internal Policy* forward in discussions with the AFN concerning the *2009 Policy* or the *SCTA*. There is evidence to the contrary.

3. The Honour of the Crown

[382] The precept of the honour of the Crown has been found applicable to legislation affecting aboriginal interests in circumstances that do not engage rights under the *Constitution Act*, section 35(1). In *Band Council of the Abenakis of Odanak v Canada (Minister of Indian Affairs and*

Northern Development), 2008 FCA 126 at para 45, 295 DLR (4th) 339 the court found:

> The honour of the Crown requires that it ensure the proper operation of the *Indian Act*. In *Haida Nation v. British Columbia (Minister of Forests*), 2004 SCC 73, paragraphs 16-19, McLachlin C.J. wrote that the honour of the Crown is always at stake in its dealings with Aboriginal peoples (paragraph 16). The Chief Justice added that this core precept (paragraph 16) also infuses the processes of treaty making and treaty interpretation (paragraph 19). In my view, this core precept extends to the effective application of section 10 of the Act, which the Minister of Indian Affairs and Northern Development stated in 1985 was the beginning of a process aimed at total political autonomy for Indians. [emphasis added]

[383] The statutory provisions in the present matter do not have a direct impact on treaty rights. They do, however, impact the availability of a statute based forum for the determination of claims for past breaches of treaty rights. There is a reconciliatory aspect to the mandate of the Tribunal, as expressed in the preamble to the *SCTA*.

[384] It was held in *R v Badger*, [1996] 1 SCR 771 at para 41, 133 DLR (4th) 324 , that the honour of the Crown is at stake in the construction of terms used in a statute:

> Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfill its promises. No appearances of "sharp dealing" will be sanctioned.

[385] The *SCTA* provides an alternative to the courts as a forum for determination of Crown for non-fulfillment of treaty promises. In the present case, there was a *prima facie* failure to fulfil the promise. The substantive issue is over the existence of a lawful obligation in circumstances that the Respondent argues justifies the non-performance.

[386] The Respondent argues that the *SCTA* does not establish Tribunal jurisdiction over annuity claims due to the definition of "asset" as "tangible property." If correct, there is no remedy under the *SCTA* where, as here, a claim is rejected despite plainly coming within the grounds in *Outstanding Business*, the earlier iteration of the *2009 Policy*.

[387] The Respondent relies on another change in the wording of the grounds for claims from *Outstanding Business* to the *2009 Policy*. Under *Outstanding Business*, an Indian band could bring a claim based on "The non-fulfillment of a treaty or agreement between Indians and the Crown." Under the *2009 Policy* a band can bring a claim "seeking compensation for its losses

based on and of the following grounds … a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown."

[388] The Respondent says that the phrase "its losses" bars a claim by the collective in respect of treaty annuities, as these are individual entitlements. If correct, this is another significant change.

[389] *Justice at Last* gave First Nations the assurance of improvements to the specific claims process and access to an independent tribunal. It was not intended that claims provided for by Outstanding Business would no longer be provided for in the revised *2009 Policy*, and hence the *SCTA.*

[390] These interpretations, if accepted, would bring dishonour upon the Crown.

[391] If the evidence supports an inference of an intention by government officials to incorporate the *Internal Policy*, and by doing so to exclude treaty annuity claims from the *2009 Policy* and the *SCTA*, the taint is more serious. It would suggest the finessing of the language of both in order to support an argument that treaty annuity claims are not within the grounds for claims. If this was the objective, the honour of the Crown in the circumstances of the objective of *Justice at Last* would require it to have been disclosed. To fail to do so would be sharp practice. Accordingly, I decline to draw such an inference.

[392] It is no answer to say that the AFN and its legal counsel knew of the changes in wording to the policy and proposed terms of the bill that became the *SCTA*. They could not have divined their purpose.

[393] My findings on interpretation of "tangible property" and "its losses" have the incidental effect of leaving the Honour of the Crown untarnished.

D. Note to Crown Counsel and Witness

[394] Finally, a few words about the participants in the process before the Tribunal. My concern with respect to the honour of the Crown has nothing to do with the role played by Crown Counsel or the integrity of the Crown witness, Audrey Stewart.

[395] Counsel served with skill, respect for witnesses, and in accordance with the ethical standards of their profession throughout. Stewart, a dedicated public servant, was forthright about the challenges inherent to the role of officials of the SCB in coming to grips with and of sincere efforts to make the process work when faced with complex matters of history and law.

IX. "ANNUITIES" AND TANGIBLE PROPERTY RE-VISITED

A. Factual Setting

[396] The factual setting of a statute is a further relevant consideration when interpreting a word or phrase in a statute: *ECG Canada Inc v MNR*, [1987] 2 FC 415, as cited in Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Toronto: Butterworths Canada, 1994), at 4.

[397] The evidence going to the development of the 2009 Policy under the auspices of *Justice at Last* establishes the factual setting of the *SCTA*.

[398] On a plain reading, the policy in effect when the Claim was presented to the Minister in 2001, *Outstanding Business*, allowed for annuity claims grounded in non-fulfilment of the terms of a treaty. The *2009 Policy* does not exclude annuity claims but rather provides for them on essentially the same ground, namely the failure of the Crown to provide assets under a treaty. To say otherwise is contrary to the assertion in the *2009 Policy* that there has been no fundamental change.

[399] The *SCTA* is the product of a collaboration between the federal government and the AFN. It was enacted to provide recourse for First Nations when a claim is not accepted for negotiation by the Minister. This is the factual setting for its enactment. My interpretation of the term "asset," defined as "tangible property" and the application in the present matter of the phrase "its losses," ensures the achievement of the enactment's purpose.

B. Alternative Remedy

[400] The factual setting of the *SCTA* is also relevant to the analysis of the Respondent's argument that there is an alternative remedy in the courts for redress of treaty annuity claims.

[401] The Respondent says that the proper remedy for failure to make treaty payments is a representative action brought on behalf of all individuals who were denied payment.

[402] A representative action is unnecessary where, as here, there has been a breach of a lawful obligation, and a statute establishing the right of a defined entity, the First Nation, to pursue a remedy.

[403] If recourse could only be had by representative action, the Claim would be statute barred. Recourse to the courts offers no realistic hope of a remedy for a claim on the present grounds.

[404] The *SCTA* establishes the Tribunal as an alternative to the courts for redress of the historical claims of aboriginal peoples. It is available for the just determination of claims whether or not a claim may be statute barred.

[405] The *SCTA* bars defences based on the passage of time. This affirms Parliament's intention that there be a forum for the just redress of treaty breaches where there is no access to the courts.

[406] If, due to limitations, the failure of the Crown to make treaty payments cannot be a ground for a claim due to the definition of "asset" as "tangible property," the Claimant would likewise have no remedy in the courts. The *SCTA* lists, in section 15(1), the categories of potential claims that may not be brought before the Tribunal. To create another exclusion based on the definition of "asset" in sub-section 14(1)(*a*) in the factual setting of its enactment is, to use an analogy, like entering a birthday party through the front door with a present, then sneaking in the back door to take the present back.

[407] This was manifestly not Parliament's intention.

X. DID THE BAND FAIL TO HONOUR ITS TREATY OBLIGATIONS?

A. Were Beardy and Okemasis Disloyal?

[408] There is no evidence that the presence of the rebel forces at the Beardy's & Okemasis reserve at Duck Lake was due to anything but a coincidence of location.

[409] The Métis were an armed force among the small number of Indians at the reserve, where there was but a small group of able-bodied men. The Métis were exercising all methods of persuasion, including force, to enlist the Indians to their cause. The band lacked the means to protect themselves, their livestock and their supplies.

[410] Some of the young men joined the rebels. Some probably did so voluntarily. The chiefs had warned the officials of this possibility due to frustration over the failure to deliver on the treaty promises as understood by their leaders.

[411] The notion that the chiefs and the members joined *en masse* is not supported by the evidence. Their move to the rebel camp was, more likely than not, out of concern for their own safety and survival.

[412] Chiefs Beardy's and Okemasis' explanations to Middleton were through a translator. Although disjointed, at least as recorded by unsympathetic observers, they convey the essence of the circumstances in which they and their members found themselves. They were caught in the middle with no apparent option but to remain among the rebels. Their narratives contain references to threats from the rebels, and fear. Other evidence explains why this would be so. Their version of events is, on the whole of the evidence, well corroborated.

[413] The evidence does not support the Respondent's theory that this community of Cree people or their leaders were disloyal. The inference drawn by Evans that Chief Beardy and the band were disloyal fails to take account of the circumstances in which, through no fault of theirs, they found themselves. There are alternative and reasonable explanations for their actions.

B. Finding

[414] Chiefs Beardy and Okemasis were not disloyal. The members of the band were not disloyal. Some joined the rebels in the battles. There is no evidence that these few were aligned politically with Riel or ideologically motivated. If their participation was untrue to the allegiance with Canada memorialized by Treaty 6, it did not warrant the branding of the collective as disloyal.

C. Did Beardy and Okemasis Fail to Perform Specific Treaty Obligations?

[415] The band, as a collective, were bound by the treaty to the following:

> They promise and engage that they will in all respects obey and abide by the law, and they will maintain peace and good order between each other, and also between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians or whites, now inhabiting or hereafter to inhabit any part of the said ceded tracts, and that they will not molest

> the person or property of any inhabitant of such ceded tracts, or the property of Her Majesty the Queen, or interfere with or trouble any person passing or travelling through the said tracts, or any part thereof, and that they will aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded.

[416] The Respondent argues that the band was in breach of its covenant not to "molest the person or property of any inhabitant of such ceded tracts, or the property of Her Majesty the Queen...."

[417] There is evidence that band members participated in the looting of stores that the rebels had broken into at Duck Lake and Fort Carlton. The rebels had appropriated the band's livestock and other goods to their own use.

[418] As Dewdney later observed, most of those who did participate in the Rebellion were dragged into the conflict by a "few Indian discontents" and some young hotheads who "commenced raiding" and, in doing so, committed the rest "to association with the rebels...to gain the necessities of life and protection against individual white men, which the law at the moment was unable to afford."

[419] The band's reserve is at Duck Lake, where the rebel forces were camped. Lash would later report that it was the rebels that killed the livestock. While some band members are said to have helped themselves to some pots and pans from the store at Duck Lake, this could hardly be considered a wilful act in contravention of the treaty in all the circumstances. These may have been replacements for the necessities of life taken by the rebels. The "pillaging" of the store at Fort Carlton, if band members participated, would have been necessary to feed themselves when the government was unable to assist them.

[420] Lash reported that the government cattle were killed by the rebels.

[421] The Indians were obligated by the treaty to assist Her Majesty's officers to bring to justice any Indian offending against the stipulations of the treaty or infringing the laws of the country. They, as Dewdney said, lacked the protection of the law. They could hardly be expected to enforce the law when the government was unable to do so. Moreover, there is no evidence, and it is unlikely, that the Crown asked Chiefs Beardy or Okemasis to, in the words of the

Treaty, to "aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded."

[422] The extent of charges against members of the band was one charge of horse theft. If that is all the government could muster, what was the band to do about Indians who violated the country's laws?

XI. WERE THE CROWN'S ACTIONS LAWFUL?

A. Denial of Treaty Rights

[423] The precept of Crown honour in dealings with aboriginal interests did not originate with constitutional recognition and affirmation of aboriginal and treaty rights. In *Manitoba Métis Federation Inc v Canada (AG),* 2013 SCC 14 at para 66, [2013] 1 SCR 623, the Supreme Court of Canada said:

> The honour of the Crown arises "from the Crown's assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people": Haida Nation, at para. 32. In Aboriginal law, the honour of the Crown goes back to the Royal Proclamation of 1763, which made reference to "the several Nations or Tribes of Indians, with whom We are connected, and who live under our Protection": see *Beckman v. Little Salmon/Carmacks First Nation,* 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 42… [emphasis added]

[424] If Aboriginal rights could, prior to the enactment of the *Constitution Act*, 1982, have been extinguished by competent legislation, this is not the case for treaty rights. Professor Leonard Rotman explains:

> Since Aboriginal rights are inherent and do not depend upon Crown recognition or affirmation, the Crown accepted them in their full form when it assumed its position of power in Canada. Under the Doctrine of Continuity, the Crown was deemed, under its own laws, to have explicitly accepted all local laws and pre-existing rights of the Aboriginal peoples that it did not explicitly nullify or supercede at the time of its "acquisition" or assertion of sovereignty. The same principles which underlie the Doctrine of Continuity would have allowed the Crown to eliminate pre-existing Aboriginal rights entirely through executive action, such as the passing of legislation or the issuing of a royal proclamation. Treaty rights, however, are quite different, since they are entirely the product of negotiations between the parties.

> Since treaties are negotiated instruments which the Crown has pledged its honour to uphold, it would be unseemly to allow those negotiated rights to be unilaterally altered by Crown legislation. As Gwynne J. explained in *St. Catherine's Milling and Lumber Co. v. The Queen:*
>
> > Now it is to be observed, that the faith of Her Majesty is solemnly pledged to the faithful observance of this treaty, and the government of the Dominion of Canada is made the instrument by which the obligations contained in it, which are incurred by and on behalf of Her Majesty, are to be fulfilled.
>
> The Crown is under a fiduciary duty to uphold the integrity of treaty rights that it has guaranteed and protected under its name. The strict nature of the Crown's duty suggests that it be able to infringe upon treaty rights only under the most urgent of circumstances. On those occasions where it is able to derogate from its guarantee of treaty rights to Native peoples, the Crown must act in accordance with fiduciary obligations of the highest order.
>
> If treaty rights are subject to alteration at the whim of the Crown, the solemn nature of the treaties in which they are contained is necessarily ignored, the Crown's fiduciary duty breached, and its honour tarnished. Judicial recognition of the solemn nature of treaties between the Crown and Aboriginal peoples has resulted in the promulgation of special canons of treaty interpretation that apply to the compacts between the Crown and Native peoples. The Supreme Court of Canada has demonstrated its recognition of the solemn nature of treaties when it held that treaty rights could only be deemed to have been extinguished by strict proof thereof and then only with the consent of the Aboriginal signatories. ("Defining Parameters: Aboriginal Rights, Treaty Rights, and the Sparrow Justificatory Test" (1997) 36 Alta L Rev 149, as it appears in the Claimant's Memorandum of Fact and Law at para 379 [emphasis added]).

[425] If treaty rights could have been abrogated legislatively in 1885, this was not done in any event. Parliament did not legislate a power to withhold treaty annuities. Neither was there an order of the Governor in Council. This was an administrative action.

[426] Crown fiduciary duties derive from the precept of the honour of the Crown. Where, as in the present circumstances, there is a cognizable Indian interest that the Crown is honour bound to uphold, failure to do so amounts to a breach of fiduciary duty.

B. Royal Prerogative and the *War Measures Act*

[427] It is likely that some of the combatants on the rebel side were members of the band. It is plain that the band, that is the members as a whole or even a substantial number of them, did not join in the fray.

[428] Assuming that the treaty could lawfully have been abrogated by administrative action, the authorities relied on by the Respondent for the exercise of the Royal Prerogative have no application. They do not support the expropriation of property except in the case of a riot, insurrection or emergency of a like nature.

[429] The conflict ended well before the penalty was imposed on the band. There was no present threat to the country of an "Indian War," nor had there, despite Lansdowne's fears, ever been. Even if there was, the withholding of annuities had nothing to do with preserving the peace. If the prerogative was available to restore government property destroyed in the insurrection, its exercise against the band was an abuse of the power as government officials knew that the rebels, not the band, had taken the supplies and livestock.

[430] The *War Measures Act* had, on the face of it, no application to the events of 1885.

C. Indirect Motive

[431] There was, in the circumstances, no honourable ground on which the Crown could exercise a legal power to withhold treaty payments even if it possessed that power.

[432] The evidence, considered as a whole, supports the Claimant's characterization of the motives of government officials in the wake of the Rebellion. The government seized on the Rebellion to justify measures designed to bring the Cree under its control. The purpose was to destroy their tribal system, restrain individual mobility, and strengthen the controlling hand of local officials.

[433] The pre-Rebellion superior attitude of officials toward indigenous peoples in general, as evinced by measures to depose leaders who did not meet with their approval, refusal to examine the adequacy of the assets promised by the Treaty to achieve self sufficiency through agriculture, and dismissal of their concerns over the implementation of Treaty 6 are reflected in measures taken in the aftermath.

[434] The measures taken were believed necessary based on colonial attitudes reflected in the words of Treaty Commissioner Morris'; "Let us have Christianity and civilization to leaven the mass of heathenism and paganism among the Indian tribes; let us have a wise and paternal

Government...doing its utmost to help and elevate the Indian population, who have been cast upon our care,..."

[435] Imbedded with this attitude was the belief that innate qualities of shiftlessness and lassitude had to be overcome lest the "burden" of their care fall to the emerging Canadian Nation. The proof was the insistence of the chiefs that the terms of the treaty be honoured, in particular the promise of relief in times of distress. This is no proof at all. It holds government to a promise of relief in times of shortages, an exigent circumstance at the time. Such beliefs were held and promoted by no less than the Prime Minister. Control was the means by which these "qualities" could be suppressed and eradicated.

XII. EPILOGUE: THE WHITE MAN GOVERNS

[436] Elder Angus Esperance testified that Indian Affairs did not permit the Beardy's & Okemasis Band to have a chief until 1936, a period of 48 years:

> When Chief Beardy died on April 16, 1889, from then on Beardy's Okemasis First Nation didn't have no chief, headmen for 48 years, from 1889 till 1936. This is where a recognized chief was first elected under the *Indian* -- *Indian Act* system. Chief Walter Little Pine was our -- was the first chief in 1936. And in between, in 48 years, Indian agents were the sole leaders, torturing Beardy's band members.
>
> Even Beardy's band members, any band member couldn't even step a foot outside of the reserve without permission. Any band member needed permission to leave the reserve to go to town shopping, to go and see medical people for health and wellness purposes. They needed permission, a permit, like if any band member wanted to leave one day, one week, one month, one year for that purpose, for that matter. This is how Indian agents really had the full control because they had too much power, too much authority as being a public servant for Department of Indian Affairs Canada and supposed to be looking after Beardy's First Nation band members, but the torture was there and this is where -- where the … annuities were. We were cut off by Indian agent.

XIII. DISPOSITION

[437] For the reasons above, I find that the Tribunal has jurisdiction to determine the Claim of the Beardy's & Okemasis First Nation on the ground of the failure to provide "lands or other assets under a treaty" (*SCTA*, sub-section 14(1)(*a*)).

[438] Further, I find the Crown breached its lawful obligation to pay treaty annuities to the

Beardy's & Okemasis First Nation.

HARRY SLADE

Honourable Harry Slade, Chairperson

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20150506

File No.: SCT-5001-11

OTTAWA, ONTARIO May 06, 2015

PRESENT: Honourable Harry Slade

BETWEEN:

BEARDY'S & OKEMASIS BAND #96 AND #97

Claimant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Indian Affairs and Northern Development

Respondent

and

ATIKAMEKW D'OPITCIWAN FIRST NATION

Intervenor

and

JAMES SMITH CREE NATION ON BEHALF OF THE CHAKASTAYPASIN BAND OF THE CREE NATION, LITTLE PINE FIRST NATION, LUCKY MAN FIRST NATION, MOSQUITO GRIZZLY BEAR'S HEAD LEAN MAN FIRST NATION, MUSKEG LAKE CREE NATION, ONE ARROW FIRST NATION, ONION LAKE CREE NATION,

POUNDMAKER CREE NATION, RED PHEASANT FIRST NATION, SWEETGRASS CREE NATION, YOUNG CHIPPEWAYAN FIRST NATION, THUNDERCHILD FIRST NATION

Intervenors

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AND TO: **Counsel for the Intervenors JAMES SMITH CREE NATION ON BEHALF OF THE CHAKASTAYPASIN BAND OF THE CREE NATION, LITTLE PINE FIRST NATION, LUCKY MAN FIRST NATION, MOSQUITO GRIZZLY BEAR'S HEAD LEAN MAN FIRST NATION, MUSKEG LAKE CREE NATION, ONE ARROW FIRST NATION, ONION LAKE CREE NATION, POUNDMAKER CREE NATION, RED PHEASANT FIRST NATION, SWEETGRASS CREE NATION, YOUNG CHIPPEWAYAN FIRST NATION, THUNDERCHILD FIRST NATION**
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