

SPECIFIC CLAIMS TRIBUNAL

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TRIBUNAL DES REVENDICATIONS PARTICULIÈRES		
F I L E D	July 4, 2012	D E P O S É
Guillaume Phaneuf		
Ottawa, ON	1	

BETWEEN:

WAYWAYSEECAPPO FIRST NATION

Claimant

v.

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

Respondent

DECLARATION OF CLAIM
Pursuant to Rule 41 of the
Specific Claims Tribunal Rules of Practice and Procedure

This Declaration of Claim is filed under the provisions of the *Specific Claims Tribunal Act* and the *Specific Claims Tribunal Rules of Practice and Procedure*.

July 4, 2012

Guillaume Phaneuf

(Registry Officer)

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I. Claimant (R. 41(a))

1. The Claimant, WAYWAYSEECAPPO FIRST NATION confirms that it is a First Nation within the meaning of s. 2 (a) of the *Specific Claims Tribunal Act*, in the Province of MANITOBA.

II. Conditions Precedent (R. 41(c))

2. The following conditions precedent as set out in s. 16(1) of the *Specific Claims Tribunal Act*, have been fulfilled:

16(1) A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister and

...

(d) three years have elapsed after the day on which the Minister has notified the First Nation in writing of the Minister's decision to negotiate the claim, in whole or in part, and the claim has not been resolved by a final settlement.

3. The Claimant originally filed a specific land claim with the Respondent regarding the illegal surrender of thirty (30) square miles of Indian Reserve #62 (the "Illegal Surrender Claim") in or about October 2004.
4. By letter dated January 3, 2007, the Respondent formally accepted the Illegal Surrender Claim for negotiation and set out the three compensation criteria from *Outstanding Business: Native Claims Policy* (the "Policy"), namely Criterion 1, 3 and 7, and requested that the Claimant provide the Respondent with a band council resolution agreeing to the terms of their January 3, 2007 letter (the "Acceptance Letter").
5. On March 12, 2007, the Claimant passed a band council resolution agreeing to the terms of the Acceptance Letter, including the three compensation criteria. The said

band council resolution was received by the Respondent on or about March 19, 2007.

6. By letter dated April 4, 2007, the Respondent attempted to renege on the agreement to move forward with negotiations by claiming that it had to conduct additional research concerning the Illegal Surrender Claim with regard to other beneficiary interests, clarification of the Illegal Surrender Claim and the compensation criteria.
7. By letter dated October 24, 2007, the Respondent informed the Claimant that its request for negotiation loan funding for the Illegal Surrender Claim had not been approved since the Respondent now wanted to undertake further research.
8. By letter dated January 22, 2008, the Respondent informed the Claimant that there were no other beneficiary First Nations, but the Respondent was requiring that an additional compensation criteria from the Policy, namely Criterion 9, form part of the Illegal Surrender Claim negotiations. The Respondent required the Claimant to agree to the application of the additional compensation criteria before it would engage in any negotiations.
9. The Claimant refused and continued to refuse to the addition of Criterion 9 and the Respondent refused to negotiate until the Claimant agrees to the addition of Criterion 9.
10. On October 16, 2008, the *Specific Claims Tribunal Act* came into force.
11. By letter dated January 5, 2009, the Respondent notified the Claimant under s.42(2)(c) of the *Specific Claims Tribunal Act* that the Illegal Surrender Claim met the minimum requirements established by the Minister and was deemed to have been accepted for negotiation on October 16, 2008. The Status Report on Specific Claims on the Aboriginal Affairs and Northern

Development Canada website (as of June 6, 2012) states that the Respondent offered to negotiate the Illegal Surrender Claim on October 16, 2008.

12. On July 15, 2009, the Claimant filed a Notice of Application in the Federal Court of Canada (Federal Court File No. T-1142-09) requesting declarations that the Respondent was required to negotiate in good faith and an order of mandamus compelling the Respondent to negotiate in accordance with the Acceptance Letter.
13. On September 30, 2011, the hearing in Federal Court File No. T-1142-09 was discontinued by consent of both the Claimant and the Respondent on a without costs basis in order that the Claimant would be able to file a Declaration of Claim with the Specific Claims Tribunal with regard to the Illegal Surrender Claim.
14. No final settlement agreement has been reached as of October 16, 2011.

III. Claim Limit (Act, s. 20(1)(b))

15. The Claimant does not seek compensation in excess of \$150 million for the Illegal Surrender Claim.

IV. Grounds (Act, s. 14(1))

16. The following are the grounds for the specific claim, as provided for in s. 14 of the *Specific Claims Tribunal Act*:

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:

(b) a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation — pertaining to Indians or lands reserved for

Indians — of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;

...

(d) an illegal lease or disposition by the Crown of reserve lands;

V. Allegations of Fact (R. 41(e))

17. The claimant's reserve lands (the "Reserve"), Waywayseecappo Indian Reserve No. 62, was established in 1877 in the province of Manitoba. The Reserve was rectangular and comprised of 45,869 acres or 71.67 square miles of land. This Reserve included land that was to the east of Bird Tail Creek.
18. In or about 1879 Joseph Sharman ("Sharman") applied to the Respondent to purchase seven sections of land (hereinafter referred to as the "Sharman Lands"). On or about June 24th, 1879 the price of Sharman Lands was paid in full and receipt of that payment was forwarded to Sharman on or about July 4, 1879 by the Respondent.
19. In or about 1880 it had come to the knowledge of the Respondent that some of the Sharman Lands were within the boundaries of the Reserve, therefore the sale would have been illegal; as such, the patents for the Sharman Lands were not immediately assigned to Sharman.
20. On or about April 20, 1880 Sharman wrote to Prime Minister Sir John A. MacDonald asking for an arrangement to be made allowing him to purchase the Sharman Lands. In the alternative, Sharman asked for the option of relocating on seven sections, en bloc, elsewhere. Sharman requested that these seven sections would have no restriction as to location, and further requested that the Sharman Lands be held for him while he searched for new land. On or about April 28, 1880 Sharman was advised that he would be allowed to relocate.

21. In or about January 1881 the Respondent became aware that Sharman and his family were taking advantage of the privilege granted to them on or about April 28, 1880 and were selecting lands that were exceptionally valuable.
22. Due to the actions of Sharman in selecting valuable lands, in or about February 1881, the Respondent made the decision to attempt to obtain a surrender from the Claimant for thirty-two (32) square miles of land, this surrender was to specifically include the Sharman Lands.

Surrender Meeting

23. On or about February 24, 1881 an alleged surrender meeting ("Surrender Meeting") was called by an Agent acting on behalf of the Respondent. According to the Agent who called the Surrender Meeting, twenty-three (23) men from the Claimant were present at the Surrender Meeting. According to the Agent these men were all twenty one (21) years of age and were present members of the Claimant.
24. *The Indian Act*, 1880 specifies certain requirements for a Surrender Meeting to be held and for a surrender vote to be considered legal and valid. Specifically, section 36 of *The Indian Act*, 1880 stated:

No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any Band or of any individual Indian, shall be valid or binding, except on the following conditions: 1) the release or surrender shall be assented to by a majority of the male members of the Band of the full age of 21 years, and a meeting or council therefore summoned for that purpose according to their rules, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council by the Governor in Council or by the Superintendent General; provided, that no Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near and is interested in the reserve in question....

25. In order for quorum to be met and for the surrender vote to be valid, a majority of the male population of the Band who were twenty-one (21) years of age or older and who resided on or near Waywayseecappo First Nation had to vote. Of the men attending the Surrender Meeting, ten were not eligible to be included in any determination of quorum, to be present at the meeting or to vote on the surrender being proposed. These ten individuals were not eligible to vote the following reasons:

a) two individuals on the voter list were indicated to be boys in 1881 by the records of treaty annuity payment made to the Claimant;

b) two individuals on the voter list were Rolling River (South Quill) people who were never members of the Claimant; and

c) band affiliations in relation to the six other individuals on the voter list cannot be determined.

26. At the time of the Surrender Meeting the Claimant had approximately seventy (70) male members who were twenty-one (21) years of age or older. Quorum requirements would necessitate that at least thirty-six (36) male members twenty-one (21) years of age or older were needed to meet quorum. The Respondent's Agent who was present at the meeting recorded only twenty-three (23) voters as being in attendance. Of those present, ten (10) men were not eligible to vote, which leaves only thirteen (13) eligible voters, quorum was not met at the Surrender Meeting.

27. Despite quorum not being met, the Surrender Meeting was conducted. As quorum was not met, the Surrender Meeting was conducted illegally. The Illegal Surrender Meeting began on February 24, 1881 and ended on February 25, 1881. The Agent eventually proposed surrendering the southernmost thirty (30) square miles of the Reserve. When this proposal was presented to those from Waywayseecappo, it was summarily rejected. Chief Waywayseecappo seemed willing to exchange thirty-four (34) sections of land on the west side

of the Reserve from north to south. But this would not have solved the federal problems arising from the sales of Reserve lands made to non-Indians. Chief Waywayseecappo's proposal was rejected by the Agent.

28. During the course of the Illegal Surrender Meeting, there was no release of any particular portions, either in the north half or south half of the Reserve given at that time. What did occur at the Illegal Surrender Meeting was that Waywayseecappo members would, in due course (when a vote was to eventually be called concerning the matter), release the Waywayseecappo interest in land east of Bird Tail Creek and in some lands, or others, within the "north half". However, no subsequent vote was ever taken concerning this matter.

29. On March 7, 1881 a surrender document was signed which stated:

all that portion of the said reserve, as it now exists and is defined, lying to the eastward of Bird Tail Creek, extending from its southern boundary, northwards to a point from which a line drawn east and west will intersect the southern boundary of school section eleven of township twenty, range twenty-five, west of the principal Meridian, and also so much of the northerly part of the said reserve, across the same, as, with the portion thereof hereinbefore described, will when surveyed and measured, contain all thirty square miles.

30. The illegal surrender precipitated an unofficial split in the Waywayseecappo Band, reducing in size the Bird Tail Creek Indian Reserve Number 62 by 30 square miles. The Silver Creek Indian Reserve Number 63, was surveyed and created for the Gambler and his followers in 1883, who had all remained as members of the Waywayseecappo Band. In 1887, and thereafter, due to their dissatisfaction with the Silver Creek Reserve, Gambler and the majority of his followers returned to the Waywayseecappo Reserve, now called the Lizard Point Reserve No. 62.

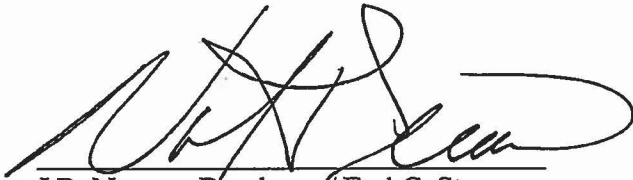
31. It is noteworthy that neither the Waywayseecappo leadership nor its membership, nor the followers of Gambler, objected to the relocation of people living at Bird Tail Creek I.R. #62 to I.R. 63, or objected to their return, from time to time, which suggested a local understanding that both reserves were selected and established for one community, in accord with the terms of the alleged surrender agreement of 1881. Indian Reserves #62 and #63 should be regarded as two reserves established for the use and benefit of the Waywayseecappo First Nation.
32. The Respondent did not act in the benefit of the Claimant. Rather the Respondent acted for its own benefit and for the benefit of Sharman.
33. Further, at no time did the Respondent explain to the Claimant that the Respondent had an ulterior motive for requesting the surrender of thirty (30) square miles of the Reserve.
34. Regardless of whether the Claimant received land elsewhere in exchange for the land surrendered, the Surrender Meeting was conducted illegally and the Crown breached its fiduciary obligations in its negotiations with the Claimant; therefore the surrender of thirty square miles was illegal and should not have occurred.

VI. The Basis in Law on Which the Crown is said to have failed to meet or otherwise breached a lawful obligation:

35. The Illegal Surrender Claim is based upon the Respondent's breaches of the *Indian Act*, Treaty No. 4, and of the Crown's fiduciary obligations at common law relating to the Illegal Surrender Claim.
36. The Claimant seeks compensation from the Respondent for:
 - a) damages for the illegal surrender of 30 square miles of Indian Reserve #62;

- b) compensation for the Respondent's breach of its treaty, trust, fiduciary and equitable duties;
- c) equitable interest;
- d) costs; and
- e) such other damages and compensation as this Honourable Tribunal deems just.

Dated this 4th day of July, 2012



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