

**SPECIFIC CLAIMS TRIBUNAL**

BETWEEN:

F I L E D	SPECIFIC CLAIMS TRIBUNAL TRIBUNAL DES REVENDICATIONS PARTICULIÈRES	D É P O S É
	September 7, 2012  Amy Clark	
Ottawa, ON		5

WAYWAYSEECAPPO FIRST NATION

Claimant

v.

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

As represented by the Minister of Aboriginal Affairs and Northern Development Canada

Respondent

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**RESPONSE**

**Pursuant to Rule 42 of the**

***Specific Claims Tribunal Rules of Practice and Procedure***

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

TO: Waywayscecapo First Nation  
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## **I. Status of Claim (R. 42(a))**

1. Waywayseecappo First Nation (“the First Nation”) submitted a specific claim to the Minister of Indian Affairs and Northern Development (“the Minister”) on September 20, 1995. The claim remained inactive due to insufficiency of research. The First Nation provided research and resubmitted the Claim to the Specific Claims Branch in October 2004. The Claim alleged that the 1881 surrender of 30 square miles of Indian Reserve No. 62 was illegal and that the Crown breached the *Indian Act* and its treaty and fiduciary obligations to the First Nation.

2. The Minister accepted the Claim for negotiation on January 3, 2007 and the Claim was deemed to have been accepted on October 16, 2008, pursuant to section 42(1) of the *Specific Claims Tribunal Act*. The Crown says except for this fact, the contents of paragraph 4 are without prejudice communications, privileged and irrelevant to the Claim, as is the phrase “including the three compensation criteria” at the end of the first sentence of paragraph 5 and the contents of paragraphs, 6, 7, 8 and 9 of the Declaration of Claim.

3. The Crown further states that paragraphs 5, 6, 7, 8, 9, 12 and 13 render the claim to be based in part on recent events that occurred after the claim was filed with the Minister and are invalid pursuant to sections 15(1)(a) and 16 of the *Specific Claims Tribunal Act*.

4. The Claim remains unresolved.

5. The Crown states that the proper legal name of the Respondent is “Her Majesty the Queen in Right of Canada, as represented by the Minister of Indian Affairs and Northern Development.”

## **II. Validity (R. 42(b) and (c))**

6. The Crown denies the validity of the First Nation’s Specific Claim and that the First Nation has suffered any losses or damages resulting from the 1881 surrender. Specifically the Crown denies:

- a. that the surrender was illegal;
- b. any breach of Treaty, the *Indian Act* or obligations arising from the Crown's fiduciary duties; and
- c. that there are any consequential losses or damages.

7. The Crown says if the Tribunal finds the Claim to be valid in that the 1881 surrender was illegal, pursuant to Section 20(3) of the *Act*, the Crown is entitled to a set-off for the value of lands received by the First Nation or its predecessors in exchange for the lands surrendered.

### **III. Allegations of Fact – Declaration of Claim (R. 41(e)): Acceptance, denial or no knowledge (R. 42(d))**

8. Unless expressly admitted, the Crown denies each and every allegation of fact or law in the Claim and puts the Claimant to the strict proof thereof.

9. The Crown admits the facts set out in paragraphs 1, 10, 11, 14, 16, 17, and 29 of the Claim.

10. The Crown also admits to the facts set out in paragraph 2, although the word “agreement” was omitted at the end of the direct quotation from section 16(1)(d) of the *Specific Claims Tribunal Act*.

11. The Crown denies the allegations in paragraphs 3, 21, 22, 25, 28, 32, 33 and 34, of the Claim.

12. In response to paragraphs 18, 19, 20, 21 and 22, the Crown denies that Joseph Sharman's purchase of lands in the Waywayseecappo reserve and Mr. Sharman's subsequent actions were the sole causes for the Crown's decision to seek a surrender of 32 square miles of land from the Waywayseecappo reserve.

13. The Crown admits the facts set out in paragraph 18. However, Sharman paid for the land by tendering Metis Scrip.

14. The Crown admits the facts set out in the first three sentences of paragraph 20 of the Claim, but states that Joseph Sharman's letter was addressed to the Minister of the Interior. Sir John A. McDonald was also the Minister of the Interior at the time. Mr. Sharman expressed regret for the difficulty with his family's choice of the land selected but indicated that his family "were not desirous that any precedent be established in copying the American plan (too often adopting of urging Indians to give up their claim)". With respect to the last sentence of the paragraph, Sharman was advised that he would be allowed to relocate with certain restrictions. He was accorded the privilege of purchasing, to an equal extent, lands elsewhere "wherever they may be vacant in the North West Territory, exclusive of the Hudson's Bay Company and school sections."

15. In response to paragraph 23, the Crown admits the fact there was a surrender meeting and there were 23 men all over twenty-years of age present at the meeting but denies that the meeting was called by an Agent on behalf of Crown.

16. The Crown admits the 1880 *Indian Act* specifies the requirements for release or surrender of a reserve or portion of a reserve but denies that the provision referenced in paragraph 24 is found in section 36 of the 1880 *Indian Act*.

17. The Crown admits only the facts set out in the third sentence of paragraph 26. The Crown denies the allegations in the rest of the paragraph.

18. In response to paragraph 27, the Crown admits only that the Council held on February 24, 1881 continued to February 25, 1881 and that Chief Waywayseecappo proposed giving up 3 miles on the west side of the reserve from north to south which the Indian Agent rejected. The Crown denies all remaining allegations in the paragraph.

19. In response to paragraph 30, the Crown denies the alleged cause of “an unofficial split” in the Waywayseecappo band. With respect to the second sentence of the paragraph, the Crown admits only that the Silver Creek Indian Reserve No 63 was surveyed and created for the Gambler and his followers in 1883. With respect to the third sentence the Crown admits only that the Gambler and a majority of his followers returned to the Waywayseccappo Reserve in 1887.

20. In response to paragraph 31 the Crown says its contents are argument and conjecture which the Crown is not required to admit or deny.

21. In response to paragraph 35 of the Declaration, the Crown specifically denies that the Crown breached the *Indian Act*, Treaty No. 4 and the Crown’s fiduciary obligations at common law relating to the surrender of IR 62 lands.

22. In response to paragraph 36, the Crown specifically denies that the Claimant is entitled to damages, compensation or equitable interest related to the surrender of 30 square miles of IR No. 62.

#### **IV. Statements of Fact (R. 42(a))**

23. On September 15, 1874 the Crown entered into Treaty No. 4 with the Cree and Saulteaux Tribes of Indians at Qu'Appelle Lakes. In exchange for lands surrendered to Her Majesty in Right of Canada, Treaty 4 provided for the setting aside of reserves for the signatory bands,

such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families.

24. On September 21, 1874 at Fort Ellice, Manitoba, a group of Saulteaux Indians known as the Fort Ellice Group and comprised of five groups - Waywayseecappo, Gambler, Rattlesnake, Mosquito and South Quill - adhered to Treaty 4. Chief Waywayseecappo and his Headman

signed on behalf of himself and members of his band. The band consisted of 58 families, 7 of whom lived at Round and Crooked Lakes.

25. In July 1877 Lizard Point (IR 62) was surveyed and set aside for the Fort Ellice Groups, also known as Waywayseeccappo's band. The reserve contained 45,869 acres (71.67 square miles).

26. The *1876 Indian Act* defines "reserve" as any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered, and includes all the trees wood, timber, soil, stone, minerals, metals or other valuables thereon or therein.

#### The Sharman Sale/Purchase

27. In April 1879 Joseph Sharman, a non-Indian and settler, applied to the Department of the Interior to purchase seven sections of land along the Birdtail Creek. On July 24, 1879, he paid for the lands by tendering Metis Scrip.

28. On or about March 23, 1880 the Department of the Interior became aware that the lands purchased by the Sharman family were within the boundaries of an Indian reserve.

29. By letter dated April 10, 1880 Joseph Sharman proposed to the Minister of the Interior that he be allowed to locate another area of seven sections en bloc in any township or locality without restrictions.

30. By a letter dated April 12, 1880 the Surveyor General instructed A.E. Fisher, Local Agent Dominion Lands, to cancel the sale made to the Sharman family in the Birdtail Creek Indian reserve. He subsequently instructed Fisher not to cancel the sale without further notice.

31. On April 28, 1880 the Minister of the Interior accorded Joseph Sharman, in lieu of the Indian lands withdrawn from his purchase, the privilege of purchasing an equal extent of lands

elsewhere in one bloc or otherwise wherever they may be vacant in the North West Territories, exclusive of the Hudson's Bay Company and School lands.

### The Land Exchange Proposal

32. By mid 1880 a portion of the members of the Waywayseecappo band (followers of the Gambler) asked to have a reserve of their own away from the current reserve, and the Waywayseecappo band would agree to cede from the reserve a corresponding area. The Indian Agent raised with the Sharman family the possibility of making an exchange with the Waywayseecappo band.

33. By letter dated November 21, 1880 Indian Agent McDonald advised L. Vankoughnet, Deputy Superintendent General of Indian Affairs ("DSGIA") that about thirty families from the Waywayseecappo band had applied to be allowed to part from the band and take a reserve 6 miles by 5, sixty-five miles North of Ellice, East of the Assiniboine. There were no settlers on the land but the Gambler and his party had built six houses on it. Agent McDonald recommended the change as it would not only settle the Sharman claim but also settle the minds of "discontented Indians".

34. Surveyor-General, Lindsay Russell, supported the proposed exchange as desirable to meet the wishes of the members of the Waywayseecappo band in this matter. He recommended that the seceding portion of the band be granted a reserve at Shell River.

35. On February 2, 1881, Indian Commissioner, E. Dewdney, recommended to the Minister of the Interior that Indian Agent McDonald be instructed to obtain, if possible, a surrender of the southern portion of the Waywayseecappo reserve, the northern boundaries of the part surrendered being the centre line of sections 35 & 36 Range 24 – Sections 31, 32, 33 and 34 Range 25. The Commissioner concluded that by this arrangement the Indians "will not be disturbed in their improvements and the land selected by the Sharmans will be surrendered".

36. By telegram on February 2, 1881 DSGIA, L. Vankoughnet, instructed Agent McDonald to obtain the surrender of 32 square miles and informed him of the approval of a “reserve of same area Shell River in Range.”

### The 1881 Surrender

#### *The Requirements for a Valid Surrender*

37. Under Section 37 of the *1880 Indian Act* a valid release or surrender of a reserve or portion of a reserve must be assented to by a majority of male members of the band of the full age of 21 years at a meeting or council of the band summoned for that purpose according to their rules and held in the presence of the Superintendent-General or of an officer duly authorised to attend such council by the Governor in Council or by the Superintendent-General.

38. Those entitled to vote or be present at the meeting must have resided habitually on or near the reserve and be interested in the reserve.

39. The fact that the surrender had been assented to by the band had to be certified on oath before a judge or stipendiary magistrate by the Superintendent-General or by an officer authorized to attend the meeting and one of the chiefs or principal men who were present at the meeting and entitled to vote.

#### *The Record of Proceedings of the Surrender Meeting*

40. On February 24, 1881 a Council of the Waywayseecappo band was convened by Chief Waywayseecappo on the reserve at Birdtail Creek. 23 male members over the full age of 21 years were present, including Chief Waywayseecappo and Headman Gambler. Peter Hourie, an interpreter, was also present at the Council.

41. Agent McDonald’s February 28, 1881 report on proceedings of the Council indicates that Chief Waywayseecappo had invited him and whatever Councillors and Indians of the Waywayseecappo band were at Ellicc to attend the Council. Chief Waywayseecappo stated that

the object of the meeting was that he had heard that the Gambler and other members of the band desired to give up part of their reserve and wished to take another reserve.

42. Agent McDonald confirmed that at the request of the Gambler and others, he had applied to the authorities in Ottawa to allow them what they asked for, viz: the surrender of 32 square miles of the south end of their reserve and be allowed the same area on the east side of the Assiniboine River.

43. The Gambler did not dispute that he had made the request but raised his discontent with the shape and location selected for the current reserve and his and others' dissatisfaction with Chief Waywayseecappo. He confirmed that he had asked the Indian Agent about getting another reserve for himself and his followers. He expressed his willingness to give up to the government 32 square miles of the south end of the Waywayseecappo reserve.

44. Chief Waywayseecappo confirmed that the Gambler had raised those issues with him earlier and an August 23, 1877 report by DLS Wagner to the Minister records soon after the Waywayseecappo boundary was surveyed in July 1877, the Gambler had asked for different reserve boundaries.

During this time, an Indian belonging to the Fort Ellice band, the Gambler, came to me and asked me to resurvey the reserve.... he wished it to be 4 x 18 miles and shifted 3 miles more east.

45. Agent McDonald's record of the proceeding of the surrender meeting shows that members voted against giving up the south end of the reserve by a majority of one. The Chief then proposed giving up three (3) miles on the west side from North to South but the Agent said he could not allow it because the Chief's proposal would destroy their reserve.

46. Agent McDonald then proposed that the band surrender:

that portion of the reserve east of Birdtail Creek from the south Boundary to within a mile or so of the Agency farm. Whatever more is required to make up 32 square miles is to be

taken from the north end of the reserve, but not farther south than the northern boundary of the Agency farm, and should there be more required, then from the south end.

47. According to Agent McDonald's record of the proceedings:

After some talk amongst themselves, the Chief rose and said, the whole thing was settled. He and all the band members surrender what I have proposed and that he and his Head man would sign the papers whenever required to do so.

*The technical requirements of the surrender were met*

48. The surrender document was signed on March 7, 1881 - by Agent McDonald, Chief Wawa-se-capow, Headman Oo-ta-ka-wenin, and Headman Sauvage and witnessed by Stipendiary Magistrate Hugh Richardson. It was first read over and interpreted in the Saulteaux language. Pcter Hourie, the interpreter who was at the surrender meeting was present at signing.

49. The land to be surrendered was described as:

all that portion of the said reserve, as it now exists and is defined, lying to the eastward of the Birdtail Creek, extending from its southern boundary, northwards to a point from which a line is 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 be surveyed and measured, contain in all thirty square miles.

50. The March 7, 1881 document indicates that in lieu of the lands surrendered, other lands of equal extent will be assigned to the Waywayseecappo band.

51. The affidavit requirements of section 37 of the *1880 Indian Act* were met on the same day that the surrender deed was signed. Stipendiary Magistrate Hugh Richardson swore an affidavit attesting to the fact Agent McDonald and Chief Waywayseecappo appeared before him and swore that the surrender had been assented to by the band as set out in the said surrender. Agent McDonald and Chief Waywayseecappo also signed the document.

The surrender was accepted

52. The Minister's April 21, 1881 report to the Privy Council on the surrender notes that the Chief and members of the Waywayseecappo Band had surrendered 30 sections of their reserve on Birdtail Creek in consideration of another reserve of equal area to be assigned them at a more suitable point.

53. The Governor in Council accepted the surrender by Order-In-Council P.C 654 dated April 27, 1881.

54. According to a report by DLS, A.W. Ponton, to J.C. Nelson, dated February 15, 1884 when he was resurveying the Waywayseecappo Reserve in 1883, he interviewed Chief Waywayseecappo, his Headman and several others of the band. The Chief and his followers believed that they had surrendered more land east of the Birdtail Creek, than was calculated in the earlier survey by DLS Dumais. The fact that there had been a surrender was not disputed.

Survey for Gambler and Resurvey of the Waywayseecappo Reserve.

55. Order in Council PC 1151, dated May 17, 1889 confirmed a number of reserves in Manitoba and the North West Territories. In June 1883, DLS, A.W. Ponton surveyed IR 63 for 44 families under the Gambler and those who wished to follow him. The reserve contained 30 square miles located on the east side of the Assiniboine River at Silver Creek, nine miles north of Fort Ellice. On July 13, 1883 DLS A.W. Ponton completed the resurvey of the Waywayseecappo reserve.

**V. Relief (R 42(f))**

56. The Crown seeks dismissal of the claim as it relates to the validity of the surrender and compensation.

57. To the extent that the Crown may be found liable to pay compensation for losses incurred by the Claimant as a result of the 1881 surrender, the Crown seeks an offset pursuant to s.20(3) for any such losses, because the Claimant was provided with the same amount of lands in exchange for the lands surrendered.

58. The Crown seeks costs in these proceedings.

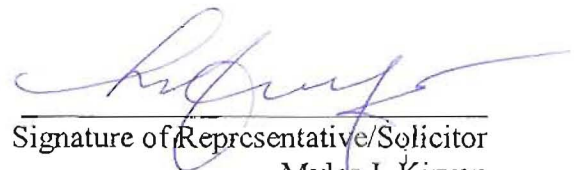
59. Such other relief as this Honourable Tribunal deems just.

**Communication (R. 42(g))**

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Dated: September 7<sup>th</sup> 2012



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