SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES
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Isabelle Bourassa
Ottawa, ON | 1

SCT File No.: SCT - **6001-20**

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

ENOCH CREE NATION

Claimant

v.

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Crown-Indigenous Relations

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.*

May 8, 2020

Isabelle Bourassa
Registry Officer

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I. Claimant (R. 41(a))

1. The Claimant, Enoch Cree Nation ("Enoch" or "the First Nation"), confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, by virtue of being a "band" within the meaning of the *Indian Act,* R.S.C. 1985, c. 1-5, as amended.

2. The First Nation is located in the Province of Alberta on the Stony Plain Indian Reserve ("IR") 135.

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

3. 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
>
> (*a*) the Minister has notified the First Nation in writing of his or her decision not to negotiate the claim, in whole or in part; …

4. The First Nation originally filed a claim with the Minister of Indian Affairs on or about January 21, 2007, alleging that the Crown owed an outstanding lawful obligation to the First Nation in relation to the 1902 surrender because it was contrary to the mandatory surrender provisions of the 1886 *Indian Act* and to the fiduciary obligations of the Crown to the First Nation, and improperly withdrew money from the Enoch capital account pursuant to this transaction in violation of both the Crown's statutory and common law obligations to the First Nation.

5. In a letter dated September 13, 2011, the Specific Claims Branch informed the First Nation that it was the decision of the Minister to not accept the Claim for negotiation under the Specific Claims Policy on the basis that there was no outstanding lawful obligation on the part of Canada.

III. Claim Limit (R. 41(f))

6. The First Nation does not seek compensation in excess of $150 million for the purpose of the specific claim.

7. Grounds (R. 41(d))

8. The following are the grounds for the Claim, as provided for in s. 14(1) 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:
>
> (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;
>
> (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;

(c) a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;

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

(e) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority; or

(f) fraud by employees or agents of the Crown in connection with the acquisition, leasing or disposition of reserve lands.

IV. ALLEGATIONS OF FACT (R. 41(e))

Treaty 6 and the Survey of Enoch Indian Reserve 135

9. The ancestors of Enoch Cree Nation, descendants of the Strongwood Cree, resided in the Beaver Hills area near modern-day Edmonton since the 17th century, traditionally living as hunters and trappers. In 1883, Canada formally recognized Chief Tommy LaPotac as leader of the Enoch Band under Treaty 6.

10. IR 135 was surveyed for the Enoch Band in 1884 and consisted of 44.5 square miles, situated on the left bank of the Saskatchewan River some six miles south west of Edmonton. It was confirmed by Order in Council on May 17, 1889.

11. IR 135 included some of the finest agricultural land in the district, and Enoch had early and increasing success in agriculture.

12. Enoch was formally amalgamated with the Papaschase band in 1894, and the proceeds from the sales of Papaschase reserve 136 were applied to the Enoch capital account. The Enoch capital account exceeded $40,000 by 1902.

Federal Indian Policies and Pressures on Bands to Surrender Reserve Lands

13. In 1896, the Liberal Laurier government was elected and introduced a new policy for the development of the North West Territory. The new government focussed on "immigration" to the North West and sought the reduction of reserve lands. Between 1896 and 1911, reserve lands were reduced by 21%.

14. In this period, the Department of Indian Affairs worked in concert with the Department of the Interior, under a single Minister of Interior and Superintendent General of Indian Affairs, to pursue an aggressive policy of obtaining the surrender of Indian reserve lands. The Ferguson Commission of Inquiry in 1915 revealed evidence of widespread graft, corruption, and speculation in the sale of surrendered reserve lands by key government officials, including some of the those involved in Enoch's surrender in 1902, such as James Smart, Deputy Minister of the Interior, and Frank Pedley, the Deputy Superintendent General of Indian Affairs.

15. Frank Oliver, who would go on to become the Superintendent General of Indian Affairs during the time period investigated by the Ferguson Commission, was elected as Member

of Parliament in 1896. Before that election, Oliver had been a vocal proponent of the surrender and opening of reserve lands in his writing for the *Edmonton Bulletin*, which he also owned. After his election, Oliver continued to advocate for obtaining a full surrender of IR 135.

16. Oliver immediately attempted to remove the Indian Agent for Enoch, Charles de Cazes. In late 1896 and early 1897, Oliver sent letters to then-Superintendent General of Indian Affairs, Clifford Sifton, conveying "complaints" about Indian Agent de Cazes. Lt. Col. McDonald was appointed to investigate the complaints in the summer of 1897. On September 8, 1897, he concluded that the complaints were largely groundless and recommended against the sale of any portion of the Enoch reserve

17. Indian Agent Charles de Cazes passed away in 1898. Oliver successfully lobbied for his friend, local Liberal organizer, and liquor trader James Gibbons to replace de Cazes over the concerns of senior officials at the Department of Indian Affairs over his lack of education and record of liquor trafficking to Indians. James Gibbons would be instrumental in the 1902 surrender described subsequently.

1902 Surrender

18. Edmonton settlers started petitioning for a road through IR 135 as early as 1892. In 1898, MP Frank Oliver requested a full surrender of the reserve from then-Superintendent General of Indian Affairs, Clifford Sifton, or, in the alternative, a surrender of the northern two strips of the reserve for a road allowance. The Department agreed to the latter request and sent Indian Agent de Cazes surrender forms to obtain the First Nation's consent in March 1898.

19. Indian Agent de Cazes informed Enoch of the surrender request, provided them time for deliberation, and scheduled a meeting to vote on the surrender. In April 1898, Enoch rejected it. A witnessed statement signed by 25 male members of the First Nation stated:

> We do not want to sell any portion of our reserve because it will bring the white settlement nearer our own settlement, also because there are some graves all over the reserves which would be disturbed if any of the reserve was sold, and we want to live and die on the reserve as it is. We do not say this because we have any bad feeling against the white people.

20. In conveying the results of the surrender vote, Indian Agent de Cazes also indicated that a surrender was not required to secure settlers' passage through the reserve.

21. James Gibbons became Indian Agent after de Cazes' passing in the summer of 1898 and would obtain ostensible approval from the First Nation for the same transaction a mere four years later.

22. Early in Gibbons' time as Indian Agent, in November 1898, settlers again petitioned for access to IR 135 in the form of a roadway. Gibbons supported the petition. Government officials again agreed with this request, this time determining to proceed with taking a road right of way. Oliver again proposed taking a surrender, suggesting that Gibbons may be able to obtain a different result than de Cazes had mere months earlier:

> …the matter was submitted to the Indians by their late agent, and they decided not to sell. **It might be that if the new agent made the proposition to them, they would agree to it**.

23. Oliver did not provide reasons as to why Gibbons might have more success. Regardless, the Department rejected the idea of a surrender and ordered the survey of a road, which proceeded in the summer of 1899.

24. The road was left largely unused in the following years. Local settlers continued to lobby for a surrender of IR 135.

25. In 1900, government officials proposed fencing the reserve. Gibbons procured a declaration by the band in February 1901 agreeing to pay for the wire for the fencing out of the interest accrued in its capital account.

26. Fencing and the right of way – and particularly how to fence the right of way and who should cover the cost – became the pretext on which the government decided to proceed with a surrender of IR 135. In the wake of correspondence between the Dominion and Territorial governments proposing different ways of dealing with this issue, in December 1901 Indian Agent Gibbons proposed taking a surrender of the portion of the IR 135 north of the proposed road and fencing the remainder of the reserve. In doing so, he contradicted his own positive assessments of the First Nation's agricultural progress and suggested the land to be surrendered was not being productively used.

27. The Department of Indian Affairs accepted Gibbons' proposal as a means of solving the fencing issue and of appeasing local settler agitations to throw open the reserve. It also accepted Gibbons' suggestion of offering to outfit members of the First Nation with agricultural supplies. In January 1902, Departmental officials forwarded surrender forms to Gibbons for 9,113 acres along the northern strips of IR 135.

28. On January 20, 1902, a meeting was allegedly held to consider a proposal to surrender 9,113 acres of land from IR 135. Neither Indian Agent Gibbons nor any other Crown official properly documented the surrender process, including how the meeting was called, what information was provided to the Bands, the proposed terms of the surrender and sale, who was eligible to vote on the surrender, who attended the meeting and who ultimately voted. Consequently, there is no independent evidence of how many members of these bands were present, nor how many voted for or against the surrender.

29. Indian Agent Gibbons later supplied the Department with a document which purports to have been signed by 14 members of Enoch at a meeting held on January 20, 1902. The document approved the surrender of 9,113 acres of IR 135 to the Crown for sale with the proceeds to be credited to the Enoch Band. The surrender states that interest from the sale of the surrendered lands was to be paid to Enoch annually or semi-annually. Census and paylist from that timeframe indicate there were between 35 and 37 eligible voters in the First Nation.

30. Indian Agent Gibbons drafted a report regarding the surrender, dated January 23, 1902, listing the conditions on which the surrender was granted. The conditions included that the

remainder of the reserve would be fenced, that "working members" would be given farming "outfits" and that the elderly provided with warm clothes. The conditions also revealed that Enoch's best farmer resided on the surrendered land and would be provided with $200 in compensation for moving.

31. The only other near-contemporaneous account of the 1902 surrender is a report prepared by Fr. Vegreville, the Oblate missionary stationed on the Enoch reserve. He did not attend the surrender meeting but reported on January 26, 1902 that "several Indians" believed they would receive highly inflated prices as well as animals and farming implements after the surrender.

32. The surrender conditions were satisfied with expenditures from Enoch's capital account. Materials for the fencing of the reserve, such as wire, staples, and augurs, were purchased in March and April of 1902, and charged to the capital account of the Band.

33. Regarding the agricultural equipment, Gibbons attached to his report a list of supplies that would make up the farming "outfits," which included horses and various agricultural machinery or tools. He obtained the approval of the Department to purchase these supplies from the capital account prior to the sale of the surrendered lands. On or about February 13, 1902, he obtained a document purportedly signed by 17 members of Enoch authorizing the expenditure of $10,000 from its capital account for the supplies.

34. Gibbons had underestimated the number of "working members," however, and thus the list was inadequate to fulfill the condition of the surrender. On or about June 6, 1902, he sought permission from the Department to purchase additional items, which was granted only to the extent it could be satisfied by the original $10,000 budget.

35. The Department of Indian Affairs accepted the conditions of the surrender on February 5, 1902. A surrender affidavit attesting to the compliance of the surrender with the voting requirements of the *Indian Act* was sworn before a Justice of the Peace on February 14, 1902. The surrender was accepted by Order in Council P.C. 515 on April 5, 1902. The OIC conveyed the motivations behind the surrender as the need for a road allowance and pressures from local settlers, accepting the surrender:

> in consequence of an application from the North-West Government for a grant of a road allowance through the said reserve and owing to the Department of Indian Affairs being urged to throw open this portion of the reserve for sale to settlers.

36. The surrendered lands were sold by tender, closing December 3, 1902. Mineral rights were not reserved in the land sales.

37. James Smart, Deputy Minister of the Interior, as well as the future Deputy Superintendent General of Indian Affairs, Frank Pedley, were at this time involved in a profit-making scheme to acquire surrendered Indian lands using insider knowledge gained from their respective positions as Deputy Ministers. This scheme and the involvement of Smart and Pedley was exposed in a parliamentary investigation which took place in 1914 and 1915. The investigation was carried out by a Royal Commission headed by Thomas Roberts

Ferguson, a Winnipeg barrister appointed by the Borden government to investigate government corruption in the disposition of Dominion lands, including Indian lands.

38. James Smart and Frank Pedley had their hands in the Enoch transaction as well. James Smart waived the Indian Land Sales Regulations, deciding to dispense with the surrendered land by way of tender rather than an auction. This was the practice followed in the fraudulent Chakastaypasin and Moose Mountain reserve land sales indicted by the Ferguson Commission. Similarly, public advertising was limited, and government officials including Smart obtained insider pricing information.

39. Smart and Pedley's associate, George Angus, bid on 16 lots, but was outbid on all except one. Ultimately, A. McDougall and Richard Secord, who were Liberal businessmen and friends of Frank Oliver, acquired some 70 percent of the land offered for sale. This was possible only due to the waiver of the Indian Land Sales Regulations, which contained protections against speculation. Thus, speculators close to the Liberal party started to resell the land in 1906-7 for considerable profit

V. THE BASIS IN LAW ON WHICH THE CROWN IS SAID TO HAVE FAILED TO MEET OR OTHERWISE BREACHED A LAWFUL OBLIGATION:

40. The Claim is brought on the following grounds in law:

    (a) The Crown failed to comply with the surrender provisions of the *Indian Act* of 1886;

    (b) The Crown breached its fiduciary and trust duties to Enoch in the surrender transaction; and

    (c) The Crown breached its statutory and common law duties to Enoch in its expenditures from the Enoch capital account.

(a) Breach of the Surrender Provisions of the 1886 Indian Act

41. The purported surrender of 9,113 acres of IR 135 on January 20, 1902 was invalid, illegal and *void ab initio* as a result of the Crown's failure to comply with the surrender requirements of section 39 of the *Indian Act*, R.S.C. 1886, c. 43. Section 39 provides as follows:

> 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:
>
> (a.) The release or surrender shall be assented to by a majority of the male members of the band, of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General; but no Indian shall be entitled to vote or be present at such council unless he habitually resides on or near and is interested in the reserve in question;
>
> (b.) The fact that such release or surrender has been assented to by the band at such council or meeting, shall be certified on oath before some judge of a superior, county or district court, or stipendiary magistrate, by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some one of the chiefs or principal men present thereat and entitled

> to vote; and when such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.

42. It is alleged that the surrender was contrary to section 39(a) of the 1886 *Indian Act* and of no force or effect for the following reasons:

    (a) the Crown failed to give adequate or any notice of the surrender meeting in accordance with its legal obligations;

    (b) the Crown failed to ensure that a majority of the eligible voters attended the surrender meeting; and

    (c) the Crown failed to ensure that a majority of the eligible Enoch Band voters attending a valid surrender meeting consented to the surrender.

(b) Breach of Pre-Surrender Fiduciary Duties by the Crown

43. In addition to or in the alternative to the allegation that the surrender was contrary to section 39 of the *Indian Act*, R.S.C. 1886, c. 43, Enoch submits the Crown breached specific and enforceable fiduciary duties that it owed to the Enoch Cree Nation in the 1902 surrender.

Where the Band's Decision to Surrender is Foolish, Improvident or Exploitative

44. The Governor-in-Council breached its fiduciary duty to Enoch by failing to withhold consent to the surrender on terms that were considered foolish, improvident and/or amounted to exploitation. The improvidence of the surrender is clear from the following:

    (a) Despite acknowledging Enoch's commitment to or, at a minimum, interest in farming, the Crown allowed the surrender of 32% of the reserve, consisting of agricultural land that was already being productively farmed;

    (b) In light of Enoch's large capital account, the value of the proceeds of the sales of the surrendered lands was marginal at best, and was certainly not required for the purchase of the items on which the surrender was conditioned;

    (c) Just four years earlier, Enoch considered and rejected the surrender as contrary to its interests in keeping its land, protecting its burial sites and maintaining distance from settlers in the only unambiguous expression of its perspective regarding the transaction;

    (d) The Crown itself, on the few occasions when it considered the band's interests, also understood that a surrender would be improvident and recommended against it in the decade prior to the surrender;

    (e) The Crown was solely motivated by pressures other than Enoch's interests, such as the need to fence the reserve and assuage the agitations of the local settler population, as acknowledged in the Order in Council approving the surrender; and

(f) The surrender was unnecessary, as a roadway could have been established across the reserve without surrendering almost a third of it.

The Crown Tainted the Transaction

45. Fiduciary obligations require that the Crown not engage in "tainted dealings" that would make it improper to rely on the band's understanding or intention with respect to the surrender. In the 1902 surrender, the Crown did not act honourably or in a way that requires trust in the band's purported intention in the lead-up to the surrender, and it is unsafe to rely on the purported surrender as a reliable expression of Enoch's intent for the following reasons:

(a) There is no independent evidence that a surrender meeting was properly called by the Crown in accordance with the *Indian Act* or that eligible voters were provided with sufficient information regarding the terms of the proposed surrender, options and the foreseeable consequences of those options to make a free and informed decision with respect to the surrender of 9,113 acres of IR 135;

(b) There is a very clear record concerning the rejection of the same transaction a mere four years earlier, which was unanimous and explained in writing, and nothing in the record that shows why that explanation changed and what prompted Enoch's – or at least, those 14 voters' – change of mind;

(c) It is possible to infer that Crown officials did not intend to and did not conduct itself honourably and in consideration of Enoch's interests in the surrender transaction due to their suggestion, very shortly after the rejection of the proposed surrender in 1898, that new Indian Agent Gibbons may be able to obtain a different vote from the band if he were permitted the opportunity;

(d) The one near-contemporaneous account from a third party, Father Vegreville, suggests that wild promises or at least misinformation was provided at the surrender meeting;

(e) Crown officials offered material goods in the form of individual agricultural supplies to voting members of Enoch in order to induce the surrender; and

(f) Several of the Crown officials who procured the surrender of IR 135 were later implicated for their involvement in a fraudulent scheme to purchase Indian reserve lands for less than fair market value.

The Crown Failed to Ensure Full Understanding

46. The Crown's fiduciary duty requires that it disclose or, at a minimum, not conceal relevant material information in a surrender transaction. Enoch relied on Crown officials for information concerning the surrender and its consequences, and its provision of advice. The Crown was aware of the band's reliance on its agents for information and guidance.

47. The Crown breached its obligation in failing to disclose to Enoch that it could fund agricultural outfits and clothing from its capital account without surrendering any more land. There was simply no reason for the band to agree to the surrender. Its capital account exceeded $42,000, more than the band needed for the promised goods, and the amount that accrued from the additional land sales were a marginal addition.

The Crown Failed to Minimally Impair Enoch's Interests

48. Where a surrender or expropriation of reserve land is contemplated, the Crown's fiduciary obligations require it to grant only the minimum interest required. A surrender or expropriation that fails to minimally impair the interests of the First Nation will be exploitative and, as such, the Crown will owe a duty to scrutinise and refuse the transaction.

49. The 1902 Surrender was initiated by the need for a road allowance and fencing the reserve. Neither required an absolute surrender of reserve land.

50. The Crown understood that a surrender was not required to satisfy access and fencing needs. In 1898, Indian Agent de Cazes explicitly stated that a right of way could be provided without unduly impairing Enoch's interests, and a right of way was surveyed in 1899.

51. Further, there was no need to give away the mineral rights in the reserve. The Crown routinely reserved mineral rights in non-reserve Dominion lands from 1887 onwards. However, it failed to act to protect these rights and potential benefits when acting on behalf of First Nations.

52. The unconditional surrender of *all* rights in almost a third of IR 135 did not minimally impair Enoch's interests. The taking of a surrender was excessive, driven by the interests of others and did not follow the Crown's practices in dealing with its own land. It cannot be considered compliant with the Crown's fiduciary obligations.

(c) Breach of Statutory and Common Law Duties in the Management of the Trust Account

53. In addition to its breaches with respect to the surrender, the Crown also breached its own statutory rules and common law obligations with respect to the use Enoch's capital account to purchase agricultural outfits for individual band members and fencing supplies.

The Crown Breached the Indian Act Provisions Concerning Expenditures from Capital Accounts

54. Section 70 of the *Indian Act*, R.S.C. 1886, c. 43 as amended restricts expenditures from a band's capital account to those expressly enumerated therein. Section 139 further limited Crown discretion with respect to expenditures from a capital account, authorizing expenditures for real property or permanent improvements subject to band approval.

55. Nothing in these sections authorize the expenditure of a quarter of the capital account on agricultural "outfits." The "outfits" clearly do not fall into one of the enumerated categories, and were also not part of a capital or permanent improvement. They were also not communal in nature, as the other acceptable expenditures were, and benefitted only individual members who could vote.

56. The expenditures related to fencing also run afoul of the statutory provisions of the *Indian Act*. Fencing does not constitute a "permanent improvement" as envisioned by the *Act*.

The Crown Breached its Common Law Obligations Concerning Expenditures from Capital Accounts

57. The Crown owes the First Nation a fiduciary duty with respect to the money received from surrendered reserve lands. As fiduciary, the Crown has a duty of utmost loyalty, is prohibited from self-dealing and must act solely in the best interests of the beneficiary band. The fiduciary duty is owed to band as a whole.

58. The Crown breached this fiduciary duty to Enoch by rewarding individual voting members with agricultural outfits as an inducement to surrender. There was no assessment of the band's needs or any indication that the band stood to benefit from these gifts.

59. Utmost loyalty requires the sole and exclusive consideration of the band's best interests, to the exclusion of others. Here, expenditures for individual short-term benefit were offered as a means of extracting a surrender. The band's best interests were given no consideration.

VI. RELIEF SOUGHT

60. In light of the foregoing, the First Nation seeks the following remedies:

(a) Damages and equitable compensation based on the current fair market value of the surrendered lands, including subsurface rights, plus loss of use from January 20, 1902 to the present;

(b) Equitable compensation for the illegal expenditures from the Enoch capital account, beginning with money taken for fencing supplies and agricultural outfits in 1902;

(c) Costs of this proceeding, and in the Specific Claims Process, on a substantial indemnity basis;

(d) Such other damages or compensation as this Honourable Tribunal deems just.

Dated this 7th day of May 2020 at the City of Calgary in the Province of Alberta.

MAURICE LAW

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