

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES	
F I L E D	January 23, 2017
David Burnside	
Ottawa, ON	4

SCT File No.: SCT – 3001-16

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

**BIG GRASSY (MISHKOSIMIINIIZIIBING) FIRST NATION (INDIAN BAND) and
OJIBWAYS OF ONIGAMING FIRST NATION (INDIAN BAND)**

Claimants

v.

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

Respondent

RESPONSE

**Pursuant to Rule 42 of the
*Specific Claims Tribunal Rules of Practice and Procedure***

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

TO: Big Grassy First Nation
as represented by:
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Overview

Big Grassy (Mishkosiminiiziibing) First Nation and Ojibways of Onigaming First Nation (Indian Band) (the Claimants) allege that the Crown had a legal obligation to set aside as reserve lands the land known as Windy Point (site 35-E2). The Crown denies any legal obligation to set aside these lands and denies that the lands ever had reserve status. Windy Point (site 35-E2) was under Ontario jurisdiction and Ontario never transferred the lands to Canada. If there is any legal

liability, it lies with Ontario. Moreover, the Claimants have already been fully compensated by Ontario for the lands at Windy Point and are not entitled to further compensation.

I. Status of Claim (R. 42(a))

1. The Big Grassy (Mishkosiimiiniiziibing) First Nation's Windy Point Claim was filed with the Minister on May 27, 2010. The Ojibways of Onigaming First Nation's Windy Point Claim was filed with the Minister on July 15, 2010.
2. In December 28, 2012 letters, the Minister notified the Big Grassy First Nation and the Ojibways of Onigaming First Nation that their Claims had not been accepted for negotiation.
3. On December 21, 2016, Big Grassy First Nation and Ojibways of Onigaming First Nation filed a joint Declaration of Claim with the Specific Claims Tribunal.

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

4. The Crown denies the validity of the Claimants' Claim, including, but not limited to:
 - a) That the Crown had a legal obligation to provide Windy Point lands under Treaty 3, or any other legal obligation;
 - b) That there was the necessary requisite intention for reserve creation at Windy Point and that Windy Point ever had reserve status;
 - c) That Windy Point was subject to Canada's administration;
 - d) That Canada did not deal effectively and in a reasonable time with the "disputed territory" issues with Ontario and that the Crown's actions exposed the Claimants' land interests to loss;
 - e) That Canada had a Treaty, or any legal obligation, to have Windy Point surveyed;
 - f) That Canada had any obligation to intervene when Ontario conducted itself as if the land was not an Indian reserve; and
 - g) That Canada's actions led to the land being effectively lost to the Claimants or that Canada breached its fiduciary duty or acted contrary to the honour of the Crown or breached the terms of Treaty 3.

5. Alternatively, the Crown says if the Tribunal finds the Specific Claim to be valid, liability lies in whole or in part with the Province of Ontario, and any compensation awarded should be reduced accordingly, pursuant to s. 20(1)(i) of the *Act*.

6. Alternatively, the Crown says if the Tribunal finds the Specific Claim to be valid, pursuant to s. 20(3) of the *Act*, the Crown is entitled to a setoff.

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

7. The Crown denies all of the facts and law in the manner alleged by the Claimants. The Crown says the facts and law are as follows under Section IV.

IV. Statements of Fact (R. 42(e))

The Claimants

8. The Claimants are members Saulteaux Tribe of Ojibway Indians. At the relevant times, they made up the Assabaska Band. In 1964 they split into their respective current Bands.

Treaty 3 Reserve Selection

9. Treaty 3 was concluded on October 3, 1873, between Her Majesty The Queen and the Saulteaux Tribe of Ojibway Indians. Pursuant to Treaty 3, the Saulteaux Tribe surrendered their interest in a 55,000 square mile tract of land described in the Treaty. As consideration, Treaty 3 provided, among other things, for the creation of reserves.

10. Although Treaty 3 did not itself create particular reserves for the various bands, it provided a procedure for doing so. The salient portions of Treaty 3 provided that reserves, whether for farming or other purposes, would be:

- “selected and set aside”
- “by the officers of the said Government appointed for that purpose”
- “after conference with the Indians.”

11. Although not explicitly indicated in the wording of Treaty 3, there was a clear understanding between representatives of the Crown and the Bands that the process of reserve creation would include surveys, or a measuring of the land. Additionally, an Order-in-Council (OIC) of 1875 stipulated that reserve selection would be subject to confirmation by OIC, and only upon completion of a survey.

12. In a report of January 28, 1875, Treaty 3 Commissioner, Simon J. Dawson wrote that the Commissioners met with bands at Lake of the Woods and at the North-West Angle, and that they were careful to inform them that any selections made would not be final, until confirmed by the Governor General in Council.

Ontario Boundary Dispute

13. The process for creation of Treaty 3 reserves in Ontario was complicated by issues regarding the location of Ontario's boundaries, its jurisdiction over lands and its role in confirming Treaty 3 reserves. In 1870, the Dominion purchased Rupert's Land from the United Kingdom. Discussions ensued between Canada and Ontario regarding the precise location of Ontario's northern and western boundaries with Rupert's Land. On June 26, 1874, Canada and Ontario signed a "*Memorandum of Agreement for Provisional Boundary in Respect of Patents of Lands*" pursuant to which the two governments provisionally agreed to northern and western boundaries of Ontario, and to a system for regulating the sale of lands and disputed rights in the territory claimed by both governments. In 1884, the Judicial Committee of the Privy Council (JCPC) decided the correct position of the northwestern boundary of Ontario, and ordered that this be implemented. In 1889, the boundary was confirmed by legislation. Within the new provincial boundaries of Ontario, lay a portion of the lands covered by Treaty 3, including the lands at Windy Point.

14. In 1888, *St. Catherine's Milling and Lumber Co. v The Queen* was decided. The JCPC held that upon surrender of the lands in Treaty 3, the beneficial interest in that portion of the surrendered lands situated in Ontario was held by the Province, subject only to the legislative power of the Dominion over lands reserved for the Indians.

15. As some Treaty 3 reserves were selected and identified prior to resolution of the above boundary issue in 1889, Canada and Ontario each passed virtually identical legislation in 1891 authorizing the two governments to conclude a formal agreement regarding the administration of Indian reserves in Ontario. On April 16, 1894, Canada and Ontario concluded such an agreement (the *1894 Agreement*), which was set out in reciprocal legislation. The recital to the *1894 Agreement* states that since the conclusion of Treaty 3, the true boundaries of Ontario had been ascertained, that these included part of the territory covered by Treaty 3; that prior to the definition of the boundary, Canada had selected and set aside certain reserves in accordance with Treaty 3, but that Ontario had neither been involved in nor concurred with such selections. The *1894 Agreement* acknowledged that Ontario's concurrence in reserve creation was necessary. It outlined a process for obtaining such concurrence, and provided that full inquiry would be made by the Province in order to avoid dissatisfaction among the Indians.

16. In 1903, the JCPC decided another important case regarding federal-provincial jurisdiction concerning Indian reserves. In *Ontario Mining Co. v Seybold*, the Court referred to its earlier decision in *St. Catherine's*, and held that provincial involvement was necessary in the creation of reserves in Ontario.

17. In December 1913, Canada and Ontario agreed that Ontario would confirm most of the reserves previously set aside by Canada, subject to certain conditions. One condition was that Canada pay Ontario for what the latter felt was an amount of reserve land in excess of what it was legally obligated to provide. Canada agreed in principle to pay for the "excess" acreage at a reasonable rate, and discussions ensued in order to determine the excess acreage and the amount to be paid.

18. In 1915, by *An Act to Confirm the Title of the Government of Canada to Certain Lands and Indian Lands*, (the *1915 Act*) Ontario transferred to Canada the lands that had been laid aside for the Indians by the Government of Canada. According to the *1915 Act*, the lands transferred to Canada were those in relation to which plans of survey had been produced and had been deposited by Canada in the Department of Lands, Forests and Mines Ontario.

19. The effect of *St. Catherine's, Seybold* and the *1915 Act*, is that land selected as reserve land in the disputed area, later confirmed to be within the boundaries of Ontario, did not receive reserve status until surveyed and confirmed by Ontario and transferred to Canada in 1915.

Windy Point Lands (site 35-E2)

20. On August 7, 1875, John S. Dennis, Surveyor General of Canada, was directed by E. A. Meredith, Deputy Minister of the Interior, to complete the selection of reserves in the Treaty 3 lands. In February, 1880, Dominion Land Surveyor C.F. Miles was given instructions to survey the sites. The lands identified for the Assabaska First Nation under Treaty 3 were surveyed by Miles who, in July 1879, submitted field notes and plans for eight of the nine sites he was instructed to survey. All were subsequently registered in Canada Lands Survey Records (CLSR). The surveyed lands did not include Windy Point.

21. On March 1, 1880, Miles suggested that additional land be set aside as reserve, (supplemental to his original survey) for the Assabaska First Nation, which included one square mile for Windy Point. The Surveyor General of Canada, Lindsay Russell, advised Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, that there were no objections to Miles' proposal. Vankoughnet sent a letter to Russell asking him to carry out Miles' suggestions.

22. However, the lands were never surveyed. There are a variety of reports and maps that make reference to research and plans concerning Windy Point (site 35-E2), which all confirm that it had not been surveyed, including:

- January 1890 Schedule of Indian Reserve in Treaty 3, which noted Windy Point (site 3-E2) had not been surveyed or defined on the ground;
- September 1890 Vankoughnet's lands schedule, which showed certain lands for Indians in Treaty 3, including Windy Point, that "require to be definitely located and surveyed";
- December 1890 letter from Simon Bray, Surveyor for the Department of Indian Affairs to Vankoughnet, which attached an outline of reserve acreage that noted Windy Point (site 35-E2) was not surveyed; and

- June 1981 Schedule (signed by Vankoughnet) noted Windy Point (site 35-E2) as un-surveyed.

23. The lands at Windy Point remained under Ontario jurisdiction and were never confirmed as reserve and transferred to Canada by Ontario under the *1915 Act*. This is confirmed by the notation made at the bottom of a plan of IR35G containing Miles' written description of lands at Windy Point. Miles' description of the lands at Windy Point is crossed out with an "x" and text located to the left of that description states in part "... not confirmed, relinquished 1931."

24. As Windy Point had never been confirmed as a reserve, the *Indian Act* provisions never applied to the lands.

25. Canada dealt effectively and in a reasonable time with the disputed territory issues with Ontario.

26. At no time did the Claimants have any rights or interests with respect to the lands at Windy Point.

27. At no time did Canada have any obligation to survey the lands at Windy Point.

28. Canada's conduct was not a breach of fiduciary duty and was not contrary to the honour of the Crown, nor did it breach the terms of Treaty 3.

29. The Claimants have settled all claims in relation to Windy Point with the Province of Ontario and so have been fully compensated and are entitled to no further compensation.

V. Relief (R. 42(f))

30. The Crown seeks dismissal of the Claim.

31. To the extent that the Tribunal may find this Claim to be valid, liability lies in whole or in part with the Province of Ontario, and any compensation awarded should be reduced accordingly, pursuant to s. 20(1)(i) of the *Act*.

32. To the extent that the Crown may be found liable to pay any compensation for losses incurred by the Claimants as a result of this Claim, the Crown seeks an offset pursuant to s. 20(3) of the *Act*.

33. The Crown seeks costs in these proceedings.

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

VI. Communication (R. 42(g))

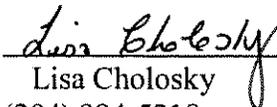
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Dated: January 23, 2017

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