

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

MAKWA SAHGAIEHCAN FIRST NATION

SPECIFIC CLAIMS TRIBUNAL		
F I L E D	TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES	D É P O S É
January 12, 2017		
David Burnside		
Ottawa, ON	53	

Claimant

v.

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

Respondent

AMENDED DECLARATION OF CLAIM

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

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

January 11, 2017

(Registry Officer)

To: Assistant Deputy Attorney General, Litigation, Justice, Canada
Bank of Canada Building
234 Wellington Street East Tower
Ottawa, ON K1A 0H3
Fax: (613) 954-1920

I. Claimant (R.41(a))

1. The Claimant, the Makwa Sahgaiehcan First Nation (the “First Nation”) confirms it is a First Nation, in the Province of Saskatchewan, within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*.

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) The First Nation has filed the claim with the Minister.
 - 16(1)(a) The Minister has notified the First Nation in writing of his decision not to negotiate the claim, in whole or in part.
3. The First Nation submitted the 1932 Townsite Surrender and 1933 Railway Right of Way Expropriation Claim, involving 28.29 acres of IR 129B, in October 1999, which was not accepted for negotiation on December 24, 2010.
4. The First Nation submitted the 1939 Townsite Expansion Surrender claim, involving 17.08 acres of IR 129B, in January 2000, which was not accepted for negotiation on July 18, 2009.
5. The First Nation submitted the 1958 Townsite Expansion Exchange claim, involving 100 acres of IR 129B, in July 2000, which was not accepted for negotiation on October 22, 2009.
6. The First Nation submitted the Townsite Land Sales claim in September 2000, which was not accepted for negotiation on December 13, 2010.
- ~~7. The submission by the First Nation, in October of 1999, of the 1935 surrender and lease of one acre of IR 129B for \$1 to the Church of England and the 1938 surrender and sale of 2.17 acres of IR 129B sold to the Loon Lake Hospital Association (Red Cross Hospital) for \$1—both properties adjacent to or eventually as part of the Loon Lake townsite—was accepted for negotiation by Canada on April 9, 2009.~~

7. The 1939 Townsite Expansion Surrender Claim was re-submitted on December 21, 2012. On August 25, 2014, Mr. Wild, Senior Assistant Deputy Minister, Aboriginal Affairs and Northern Development, advised Chief Richard Ben that the Minister did not accept the claim for negotiation on the basis that there was no outstanding obligation on the part of Canada.

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

8. Although the First Nation is uncertain what the potential compensation might be and understand it might be over \$150 million, for the purposes of these proceedings, the First Nation does not seek compensation in excess of \$150 million for each claim.

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

9. The following are the grounds for the specific claims, as provided for in s. 14 of the *Specific Claims Tribunal Act*:
 - (b) breach of a legal obligation of the Crown under the *Indian Act* or any other legislation of Canada pertaining to Indians and lands reserved for Indians.
 - (c) breach of a legal obligation arising from the Crown's 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) failure to provide adequate compensation for reserve lands taken by the Crown or any of its agencies under legal authority.

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

10. In August 1915 reserves 129 and 129A, containing 4,491 acres and 638 acres respectively, were surveyed for the First Nation, which was confirmed by Order in Council on February 18, 1919. Order in Council 1776 in 1930 confirmed the establishment of reserve 129B containing 9,243.7 acres.
11. In 1929 the Canadian National Railway (CN) was authorized to construct a branch line from St. Walburg, Saskatchewan, to Bonneyville, Alberta passing through IR 129B, with a completion date of August 31, 1934.
12. In October, 1930 CN advised the Department of Indian Affairs (“the Department”) that the contemplated railway right of way would pass through part of IR 129B, to which the Department responded that compensation would be required for any acreage acquired, presumably under s. 48 of the *Indian Act*, R.S.C. 1927, c. 98.
13. On August 10, 1931, Councillor Peepeekoot wrote the Department seeking clarification on the status of the IR 129B and the passage of the railway through it, to which the Department responded that the lands had been set aside for the First Nation.
14. In October 1931 CN informed the Department they wanted land for a townsite in addition to the lands for the right of way, estimating this requirement to be around 25 acres from IR 129B “in order to take care of the Settlers in the Loon Lake District”.
15. The Department responded by advising CN the valuations applicable to the right of way across IR 129B did not necessarily apply to the townsite and a surrender of the reserve for townsite purposes would be required.
16. On January 7, 1932, the Department wrote the Indian Agent that CN had made application for a right of way and townsite in IR 129B comprising 28.29 acres with compensation yet to be determined. Attached to the letter were surrender forms and instructions.

17. On January 17, 1932 Councillor Peepeekoot wrote the Department expressing concern that a railway was “*going through our new land. We do not understand this. The Treaty Indians do not want it to go through or mean to let this land go for the Rail Road.*” He mentioned that this land was going to be used for a ranch, which was why the First Nation didn’t want a railroad passing through it.
18. In response, on February 3, 1932 the Department instructed Agent Turnor to advise Councillor Peepeekoot of the railway’s power to expropriate without consent and that the Department would undertake to put some fencing up which the Department felt might “*possibly relieve some objections which might otherwise hinder the taking of the surrender...*”
19. On February 9, 1932 the alleged surrender of 28.29 acres of IR 129B was taken on the condition that the Crown hold these lands “*forever in trust to sell the same to such person or persons and upon such terms as the government of the dominion of Canada may deem conducive to our welfare and that of our people.*”
20. On March 22, 1932, in response to departmental correspondence advising CN of the alleged surrender and need for Order in Council approval, CN wrote the Department it had decided to halt construction of the railway due to economic circumstances. The railway was uncertain when construction might resume but requested that the submission of the surrender for Order in Council approval be withheld but the reservation be extended in the meantime; which the Department agreed to.
21. Despite the decision not to proceed with the townsite, on May 18, 1932 CN’s Regional Counsel Hair sent a cheque for \$192.56 for 24.07 acres of section 23 of IR 129B “*to provide for getting title to land at one time proposed to be acquired for townsite*”. On November 3, 1932 CN sent another cheque in the amount of \$133 as compensation for 22.6 acres required for the right of way through sections 26 and 37 of IR 129B.

22. Despite acknowledgement by CN and the Department that plans for the townsite were suspended, on September 1, 1932 the Department informed CN a village had sprung up composed of 200 people.
23. On May 10, 1933 the Order in Council was passed transferring 46.67 acres to the CN for \$305.56 received in compensation.
24. In September 1933 Agent Hill was instructed to report on the occupants in the townsite, including the nature of the improvements.
25. On October 10, 1933, Agent Hill reported that, by the summer of 1933, the townsite “*is practically covered with buildings (business and residential). The population of this new town is 146, and the buildings have a conservative value of \$69,402.*”
26. It was noted in a report on specific holdings and valuation of the lots held by the squatters, prepared on January 29, 1935 by Inspector of Indian Agencies Murison, that 15 of the 78 lots were occupied prior to the February 9, 1932 alleged surrender.
27. By October 25, 1933 the Department realized, through a report from the Chief Surveyor Robertson, that by oversight, the townsite had been offered to CN at \$8 per acre, the value assessed for the right of way. Robertson also reported that, given the information the Department had, “*it is difficult to understand why he [the Indian Agent] did not notify the Department of the survey and building operations which were proceeding on Indian reserve lands.*” It was also noted some of the reserve lands were occupied that had not been surrendered.
28. On October 28, 1933 Secretary MacKenzie sought clarification from CN Regional Solicitor on the status of the townsite noting that in previous correspondence the townsite had been abandoned but that the townsite was occupied and construction had taken place without Departmental authorization or compensation.

29. Subsequent correspondence with CN confirmed it no longer required the land for townsite purposes. These lands were not placed on the market nor were the squatters authorized to take the lots. Under the circumstances the Department informed CN it decided to administer the townsite resulting in the transfer of the townsite plans to the Department on June 25, 1934 *“on the understanding that you will accept the plans for registration and developing the townsite generally, releasing the Canadian National Realities Limited and the Canadian National Railway Company from all claims...”* The Department confirmed this understanding on March 22, 1935.
30. In 1934 it was noted the 1932 alleged surrender of 28.29 acres of IR 129B had not been approved by Order in Council and on July 4, 1934 the Superintendent General recommended that such Order be obtained *“in order that the land surrendered may be sold for townsite purposes.”* The Order in Council was passed confirming the alleged surrender on July 18, 1934.
31. There was evidence the First Nation was dissatisfied with the alleged surrender and townsite developments. During the time the Department was seeking a surrender of reserve land for lease to the Anglican Church in November, 1934 the Agent reported *“During the last fifteen months I have consulted the Indians on at least three occasions with respect to the matter (surrender of land for the Church), but a majority were not in favour of surrendering any more land for any purpose – they were dissatisfied with the townsite and railway situation.”*
- ~~32. After consultation with the Province of Saskatchewan, on February 14, 1935 an Order in Council was passed transferring all streets, lanes and roads in the Loon Lake town plot to the province without any compensation.~~
32. On January 29, 1934 Inspector Murison reported on the lots occupied or claimed by the squatters placing a value on the corner lots at \$100 each and on the other at \$75 with some residential lots for \$50, recommending these valuations be confirmed as *“they are fair and within the means of the*

occupants.” He included an index of 78 squatters, noting 15 of the lots had been occupied prior to the surrender and noted three buildings were on unsurrendered reserve land but “*in close proximity to the town ...*”

33. On February 25, 1935 the Deputy Superintendent General wrote Inspector Murison approving his valuations and for him to deal with the occupants directly on the basis of “*cash payments in full should be requested, but in no case should an agreement be entered into involving less than 50% cash down payment with not more than one year to pay the balance.*”
34. On March 22, 1935 Murison telegraphed the Department that the majority of the occupants were unable to pay half the cash for the lots and inquired whether 10% down, with accrued interest to June 1, 1935, with the balance in thirds by October 31, 1935, 1936 and 1937 would be acceptable.
35. The Department responded the next day that the Department would insist on 20% down with the balance in thirds as per the March 22nd letter.
36. Correspondence between the Treasury Department and the Department over the next few years shows that the Department was having great difficulty in collecting on the terms agreed to with the purchasers. In 1937 it was reported “*the majority of these sales show considerable arrears*”. In 1938, “*you will note that the total indebtedness on the majority of sales is all in arrears*” and that, unless payments were made, “*the sales be cancelled.*” In 1939 Treasury reported the “*majority of these sales show considerable arrears*” and if payment were not made “*the sales will be cancelled.*” In 1940 again, the “*majority of these sales show considerable arrears*” and if payments were not immediate, “*the sales will be cancelled.*”
37. In a confidential memo from Deputy Superintendent General McGill to the Superintendent on July 8, 1935, he stated “*Throughout the conduct of land operation, especially with regard to collections, there was manifested a slacking and inertia that might almost be considered culpable.*” With respect to the Department’s current policy on collections, “*I might state that where*

the purchaser is on the land and trying to make a living, the Department has been lenient and refrained from making cancellations; but where land is being held on a purely speculative basis, the Department has taken a firm attitude.”

38. Only 11 of the 58 sales in March 1935 were paid off on or before the due date of October 31, 1937. Of the remaining 47 sales only 11 were cancelled for non-payment. In several instances, sales made in 1935 were not paid until the 1940s; there were 13 lots not sold by 1940 which were sold in subsequent years with the last in 1950.
- ~~39. The application by the Church of England for a mission site on IR 129B and surrender for same was initially rejected in 1934 because of the First Nation's dissatisfaction with the townsite surrender and railway right of way expropriation. However, on July 16, 1935 the surrender of 1 acre was obtained for the mission site and leased in perpetuity to the Church for \$1.~~
40. Shortly after the lots were put up for sale in 1935, the local Ratepayers Association wrote to the Department requesting an addition to the townsite from IR 129B which would require another surrender. The surrender documents were forwarding in July 1939 and the surrender of 17,098 acres of IR 129B was obtained on August 17, 1939 but only confirmed by Order in Council in 1958.
- ~~41. By January 1931 the community of Loon Lake had built the Red Cross Hospital on reserve land and an extension was constructed in 1935. It was not until 1938 that the department sought and obtained a surrender on October 15, 1938 involving 2.17 acres, which was then sold to the Loon Lake Hospital Association for \$1,00.~~
42. Shortly after the lots were put up for sale in 1935, the local Ratepayers Association wrote to the Department requesting an addition to the townsite from IR 129B which would require another surrender. Agent Hill approved the surrender since it would address the needs of the townsite for a long time.

43. In March, 1939, another request for townsite expansion was made by the Loon Lake Board of Trade.
44. The surrender documents were forwarded in July 1939 and the alleged surrender of 17.098 acres of IR 129B was obtained on August 17, 1939 but only confirmed by Order in Council in 1958.
45. Following the 1939 surrender informal leasing arrangements were made between Agent Hill and Dr. Grandy, the Canadian Legion and Dr. Graig. The Department notified the Indian Agent that these arrangements were without proper authority.
45. In the fall of 1949 the Department was made aware of an inquiry by the local Member of Parliament Harrison, for Meadow Lake, indicating the town of Loon Lake had grown to such an extent that it needed to expand and, for such expansion, it needed more reserve land. Was an exchange of federal land for provincial land possible, based on an estimate of \$5 per acre for reserve land?
46. Superintendent Allen responded to MP Harrison, in the summer of 1950, stating Department would do nothing until the Village submitted an offer that was more reasonable considering the value of the land.
47. In 1952, when a surrender for exchange was considered again, Superintendent of Reserves and Trusts Vogt pointed out a surrender would require a vote by the whole membership 21 years and older, both male and female.
48. When in March 1954 the Band Council, Loon Lake Village Council and Superintendent of Indian Affairs considered the surrender and sale of 67.65 acres of IR 129B for \$50 per acre, the Superintendent noted that, although *“all the male members of the band appear to be in favour of this sale, they will not allow their women to vote”* and without the women’s vote the 50% approval would be impossible.
49. Although the Department insisted the Superintendent ensure the women participate in the vote, when the surrender meeting took place on November 27, 1954 for 67.60 acres of IR 129B, the Superintendent reported that the male

members would not permit the women to vote. Nevertheless he recommended the surrender be approved.

50. The Director of Indian Affairs pointed out the *Indian Act* was quite clear “*that a surrender is void unless it is assented to by a majority of the electors*”.

However, he advised that, if on the other hand, “*the practice of not allowing the women any say in Band matters is one of long standing and the women who evidence that they are not concerned in this matter and are content to let the men have complete authority over Band business, the Minister may favourably consider a recommendation for a second meeting.*”

51. The Superintendent suggested another surrender meeting which was taken on July 6, 1955. However, of the eight voters present all voted against the surrender.

52. During the fall of 1956 discussion and correspondence took place between departmental officials, MP Harrison and the Village Council on how to resolve the impasse between the desires of the Village for an exchange and the Band Council’s decision to only sell; their unwillingness to trade 190 acres of IR 129B for 360 acres from the province but their willingness to sell 190 acres for \$75 per acre. Expropriation was considered at least for the school site.

53. Despite the First Nation’s position and despite the surrender instructions on May 27, 1957 to present two surrender options (either 67.60 acres or 70.685 acres at \$75 per acre covering different parcels) when the surrender meeting took place on June 5, 1957 the minutes read,

Mr Gavigan opened the meeting by introducing the officials and explaining the purpose of the meeting which was to trade or sell 100 acres of Indian Reserve land to the village of Loon Lake. The exchange would consist of three quarter sections of farm land for 100 acres of Reserve Land.

54. When the vote was taken, of the 23 members in attendance, out of 73 eligible voters, 19 voted in favour and 4 against with a Band Council

Resolution passed approving the sale to the Meadow Lake Larger School Unit of 6 acres – not included in the exchange – for the school site at \$75 per acre. An expropriation under s.53 of the *Saskatchewan School Board Act* had taken place previously and been approved by Order in Council with registration in May 1958.

55. On June 13, 1957 Agent Gavigan reported the results of the meeting explaining the reason he didn't present the two options was because he had previously discussed the exchange with the Council and, while they did not approve the land proposed, they would not object to other land being considered. However, he pointed out a majority of eligible voters had not approved the surrender but "*that the results of this vote be accepted by our branch as it is a substantial majority of the male members. It will be a few years before the women of this band will even be allowed to vote.*"
56. On June 24, 1957 the Superintendent of Reserves and Trusts noted the problem with the vote since a majority had not approved the surrender. However, on June 25, 1957 the Director of Indian Affairs, while acknowledging a majority had not approved the surrender for exchange, suggested "*that as the Province had authority to take land without the consent of the owner the exchange be concluded by invoking the provisions of Section 35 of the Indian Act.*" The Deputy Minister approved the procedure on the basis that "*a vote was taken which resulted in nineteen voting in favour of such exchange and four against.*"
57. Once a description of the 100 acres of IR 129B was completed, on June 26, 1958 an Order in Council was passed transferring the 100 acres to the Province.

AND WHEREAS the electors of the Loon Lake Band of Indians, for whose use and benefit the said Reserve has been set apart, by a vote taken at a meeting of the Band on June 11, 1957, recommended approval of the

application and agreed to accept in payment therefore four hundred and eighty acres of land from the province...

THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Minister of Citizenship and Immigration, pursuant to Section 35 of the Indian Act, is pleased hereby to consent to the taking of the lands described in the Schedule hereto, and to transfer the administration and control thereof to Her Majesty in right of the Province of Saskatchewan.

VI. The Basis in Law on which the Crown is Said to Have Failed to Meet or Otherwise Breached a Legal Obligation

A. Railway Right of Way Expropriation and 1932 Land Surrender

58. Canada breached its legal obligations by proceeding with an expropriation of IR 129B when it was no longer required for a railway right of way or station grounds or in the best interest of the Makwa Sahgaiehcan First Nation.
59. Canada breached its legal obligation by proceeding with an alleged surrender in 1932 by failing to strictly comply with the provisions under s. 51(1) of the 1927 Indian Act and without the informed consent of the First Nation.
60. Canada breached its fiduciary obligation by obtaining the alleged 1932 surrender of Makwa Reserve 129B for a townsite which was not in the best interests of the First Nation nor required as part of the construction of the railway.
61. Canada breached its fiduciary and legal obligation under s.48 of the *Indian Act*, RSC 1927, c. 98 by approving the transfer of lands on IR 129 B to the

Canadian National Railway (CNR) for purposes railway right of way or station grounds when the CNR, by 1933, had no statutory basis under the *Railway Act*, RSC 1927, c. 170 and the *Canadian National Railway Act*, RSC 1927, c. 172, as amended by the *CNRA*, SC 1929, c.10 to expropriate reserve land.

62. Canada breached its fiduciary obligation in approving the transfer of lands on IR 129B to the CNR when these lands were not longer required for public purposes.

B. 1939 Townsite Expansion

63. Canada breached its legal and fiduciary obligations by obtaining the 1939 surrender of 17.08 acres of IR 129B without the informed consent of the First Nation.

64. Canada pursued the 1939 surrender in a manner which was exploitative, unnecessary and not in the best interests of the First Nation.

65. Canada breached its legal obligations by leasing lands from IR 129B to Dr. Grandy, J. Craig and the Canadian Legion without compliance with the surrender and leasing provisions under s. 50 of the *Indian Act*, RSC 1927, c.98.

C. 1958 Surrender and Exchange

66. Canada breached a fiduciary and legal obligations by failing, in 1958, to strictly comply with the surrender instructions and surrender provisions under s. 39 of the *Indian Act*, SC 1951, c.29 but instead proceeding with an exchange of 100 acres of IR 129B pursuant to s. 35 of the *Indian Act*.

67. Canada breached its fiduciary obligations by proceeding with an alleged surrender in 1958 and exchange of 100 acres of IR 1929B that was contrary to the instructions of the First Nation that any surrender be for sale.
68. Canada breached its fiduciary obligations by proceeding with an exchange of reserve land that did not preserve the subsurface mineral rights in the lands received in exchange.
69. Canada breached its fiduciary and legal obligations by proceeding with the sale of 6 acres of reserve land to the Meadow Lake School Unit in 1957 by way of a Band Council Resolution rather than through the surrender provisions under s. 39 of the *Indian Act*, SC 1951.

D. Townsite Land Sales

70. Canada breached its fiduciary and legal obligations arising out of its administration of the townsite lots and the townsite land sales after the alleged surrenders in 1932 and 1939 on the following grounds:
 - a) by failing to appropriately deal with squatters who were trespassing on IR 129B or adequately collect compensation from squatters both before and after the alleged surrenders in 1932 and 1939 alleged surrenders;
 - b) by failing to collect interest on lots from the date of occupancy, including the date of occupancy by squatters, rather than from the dates sold;
 - c) by failing to collect in a timely manner the payments due according to terms agreed to which were seriously in arrears;
 - d) by failing to consult with the First Nation once the Department became aware that squatters were occupying the reserve and the townsite without proper authorization and without paying compensation;
 - e) by failing to consult with and seek advice from the First Nation on how to proceed with lots sales that were seriously in arrears;

- f) by failing to regularize the unauthorized occupation of the reserve and to permit the informal lease arrangements to continue, contrary to provisions in the *Indian Act* and their own directives;
 - g) by failing to adjust the purchase price retroactively for those squatters who had occupied reserve lands both before and after the alleged surrenders and before they were available for sale;
 - h) by failing to proceed with the sale of lots following the alleged surrenders based on the values place on these lands by a qualified surveyor but instead proceeded with sales at lower values determined by unqualified agents of the Crown who were responding to complaints by third parties; and,
 - i) by failing to consult with the First Nation about the change in asking price for the lots, or to consult with them at any time about the appropriate value placed on the lots.
70. Canada breached its legal obligations arising out of the *Indian Act* when the Department entered into informal arrangements to lease reserve land without formal compliance with the surrender provisions of the *Act*.
71. Canada breached its fiduciary obligations by failing to consider the merits or need for a surrender of additional reserve land for townsite purposes that was not in the bands interests but primarily those of the townsite residents and proceeding with an unnecessary surrender considering the townsite lots either unsold or seriously in arrears.

Dated this 11th day of January, 2017.



Signature of Solicitor

David Knoll

Knoll & Co. Law Corp.
201-1678 128th St.
Surrey, B.C. V4A 3V3
Tel. (604) 538-9893
Fax: (604) 538-9848
dknoll@knollandco.com