

SPECIFIC CLAIMS TRIBUNAL

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F I L E D	February 15, 2012
Guillaume Phaneuf	
Ottawa, ON	5

BETWEEN:

MAKWA SAHGAIEHCAN 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

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: MAKWA SAHGAIEHCAN FIRST NATION
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I. Status of Claim (R. 42(a))

1. The Claimant, the Makwa Sahgaiehcan First Nation (“First Nation”) submitted six claims to the Minister as follows:
 - a. October 1999 – (i) regarding the 1938 surrender and lease of one acre of Indian Reserve 129B (IR 129B) to the Church of England, and

(ii) the surrender and sale of 2.17 acres of IR 129B to the Loon Lake Hospital Association;
 - b. October 1998 –regarding the surrender of a portion of IR 129B for a town site in 1932 and expropriation of a portion of IR 129B for the Canadian National Railways (“CN”) right of way in 1933;
 - c. January 2000 –regarding the surrender of a portion of IR 129B in 1939 for a town site expansion;
 - d. January 2001 – regarding the administration and sale of IR 129B lands surrendered for the town site in 1932 and 1939, including lots occupied by Dr. Grandy, J. Craig and the Royal Canadian Legion; and
 - e. January 2001 – regarding the transfer of 100 acres of IR 129B to Saskatchewan in 1958 pursuant to s. 35 of the *Indian Act*.
2. The Minister notified the First Nation in writing that its claims outlined in 1.b - e had not been accepted for negotiation on December 24, 2010, July 18, 2008, December 13, 2010, and October 22, 2009, respectively.
3. The claim outlined in 1.a. was, in accordance with the *Specific Claims Tribunal Act*, filed with the Minister of Aboriginal Affairs and Northern Development on October 16, 2008. The Minister accepted the claim for negotiation and notified the First Nation of his decision on April 9, 2009. The claim is in negotiation and, therefore, cannot be filed with the Specific Claims Tribunal in accordance with s. 16(1)(d) of the *Specific Claims Tribunal Act*.

4. The Minister notified the First Nation on July 18, 2008, of his decision to not accept the claim outlined in 1.c for negotiation, prior to the coming into force of the *Act*. Therefore, it has not been filed previously with the Minister as required by s. 16(1) of the *Act* and cannot be filed with the Specific Claims Tribunal pursuant to s. 43 of the *Act*.

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

5. The Crown does not take a position on validity of the claims outlined in 1.a which appear to be included in the Declaration of Claim for information only and not for a decision by the Tribunal.
6. The Crown submits that the Tribunal does not have jurisdiction over the claim outlined in 1.c. In the alternative, if the Tribunal has jurisdiction to hear this claim, the Crown does not accept its validity.
7. The Crown does not accept the validity of any of the remainder of the claims set out in the Declaration of Claim.

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

8. The Crown, unless hereinafter expressly admitted, denies each and every fact alleged in the Declaration of Claim and puts the Claimant to the strict proof thereof. Further, and without limiting the generality of the foregoing, the Crown specifically denies the facts contained in the following paragraphs of the Declaration of Claim: 21, 22, 56 to 66.
9. The Crown admits the facts in paragraphs 1 to 3, 5 to 7, 9 to 19, 23 to 25, 27 to 31, 33, 34, 36, 37, 41 to 51, and 55 of the Declaration of Claim.
10. The Crown has no knowledge of the facts set out in paragraphs 8, 38 and 39 of the Declaration of Claim.
11. The Crown admits the facts contained in paragraph 4 of the Declaration of Claim except that the Minister notified the First Nation in writing that its claim regarding

the surrender of a portion of IR 129B in 1939 for a town site expansion had not been accepted for negotiation on July 18, 2008, not 2009.

12. In response to paragraph 20 of the Declaration of Claim, the Crown only admits that on March 22, 1932, in response to departmental correspondence advising CN of the surrender and need for Order in Council approval, CN wrote the Department that the program of construction was unknown and asked that submission of the surrender for Order in Council approval be withheld and the reservation be extended in the meantime. The Department agreed on March 29, 1932, to put the matter in abeyance for the time being.
13. The Crown admits the facts in paragraph 26 of the Declaration of Claim, except 14, not 15, of the 78 lots were occupied prior to the February 9, 1932 surrender.
14. In response to paragraph 31 of the Declaration of Claim, the Crown admits only that the Indian Agent reported on November 19, 1934, that he had obtained the First Nation's unanimous vote in favour of the surrender of one acre adjoining the town site, after 3 previous attempts over 15 months, which did not result in a majority in favour because the First Nation had been dissatisfied with the "townsite and railway situation."
15. The Crown admits the facts in paragraph 32 of the Declaration of Claim, except that the valuation was dated January 29, 1935, not 1934, and the index noted 14 not 15 lots occupied before February 9, 1932.
16. The Crown admits the facts in paragraph 35 of the Declaration of Claim except the date of Inspector Murison's telegraph to the Department was March 23, 1935, not March 22, 1935.
17. In response to paragraph 40 of the Declaration of Claim, the Crown denies that the Church leased the surrendered land in perpetuity and says that one acre of surrendered land was leased to the Church for as long as the Church used the said lands for Church purposes. Further, this paragraph is irrelevant to the Declaration of Claim.

18. In response to paragraph 41 of the Declaration of Claim, the Crown admits the facts but says they are irrelevant to the Declaration of Claim.
19. In response to paragraph 52 of the Declaration of Claim, the Crown admits there were 74, not 73, eligible voters and of the 23 members attending the June 5, 1957, surrender meeting, 19 voted in favour. The remainder of the facts in paragraph 52 involving a new school site are irrelevant to the Declaration of Claim.
20. The Crown admits the facts in paragraph 53 of the Declaration of Claim except the date Agent Gavigan reported the results of the meeting was June 11, 1957, not June 13, 1957.
21. The Crown admits the facts in paragraph 54 of the Declaration of Claim except the date of the Director of Indian Affairs Memorandum to the Deputy Minister was June 24, 1957, not June 25, 1957.

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

22. On August 5, 1930, Order in Council P.C. 1776 withdrew 9247.3 acres from the operation of the *Dominion Lands Act* and set them apart for the use of the Indians as Makwa Lake Indian Reserve No. 129B (IR 129B).

Transfer of IR 129B Lands to CN for Right of Way and Station Grounds

23. The Crown fulfilled its fiduciary duty to the First Nation regarding the 1933 taking for the CN right of way;
24. In July of 1929, Order in Council O.C.P.C. 1184 passed, indicating that CN had furnished a plan showing the location of a proposed branch line from St. Walburg, Saskatchewan, to Bonnyville, Alberta, and citing authorization for the expenditure for the project. Construction of the line began in August 1929.
25. Band Councillor Peepeekoot wrote to the Department in August 1931 and again in January 1932, about the possibility of a railway being constructed through reserve land. The Department instructed the Indian Agent to tell Peepeekoot that

the CN could take whatever land was required, but it would have to pay compensation to the First Nation and also the CN could be compelled to put up fencing.

26. In response to the Department's request for payment from the CN, the CN informed the Department on March 22, 1932, that construction of the railway line was uncertain and asked that submission of the surrender for Governor in Council approval be withheld.
27. On March 31, 1932, CN sent the Department a copy of a registered plan for the railway right of way entered in the Land Titles Office at Battleford, Saskatchewan, in relation to 24.07 acres (part of the acreage required) and a cheque for \$192.56, requesting the grant of the 24.07 acres. The Department replied that it would not take further action until CN indicated the entire right of way required in the reserve on one plan and indicated on the deposited plan the roads and lands required for the town site. The CN paid the remainder of the compensation on November 3, 1932, in the amount of \$113. On April 11, 1933, CN again requested patents to be issued.
28. Order in Council O.C.P.C. 1913-916, dated May 10, 1933, ordered the transfer of 46.67 acres to the CN for a right of way and station grounds for which \$305.56 compensation had been received.

Surrender of IR 129B Land for a Town Site in 1932

29. The Crown obtained the 1932 surrender of land for a town site in accordance with the relevant legislation and with the Crown's fiduciary obligations to the First Nation, including obtaining informed consent of the First Nation.
30. In October of 1931, the CN requested approximately 25 acres near the right of way within IR 129B for the purpose of establishing a town site to adjoin the railway right of way. The Department responded that a town site and a right of way were two separate matters and if land were required for "other than strictly railway purposes," it would be necessary to obtain a surrender for the purposes of sale.

31. The Department advised the Indian Agent on January 7, 1932, that the CN had made application to purchase a right of way through IR 129B and for a town site in the Reserve. The letter enclosed surrender forms for “submission to the members of the Makwa Lake Band at a meeting to be called for the purpose of considering this application.” The Indian Agent was asked to “gather the members of the Band together for this purpose” at the earliest date possible.
32. On February 9, 1932, Acting Indian Agent J.T. Hill took a surrender for 28.29 acres of land on IR129B for the establishment of a town site. Hill noted in his report that the surrender had been passed unanimously at a meeting of all the Band members.
33. In March 1932 the CN advised the Department that construction of the railway line was uncertain.
34. In September 1932 the Department advised the CN that a thriving village was in existence on the surrendered town site. On October 8, 1933, Indian Agent J.T. Hill reported that he had visited the location and found numerous homes and businesses and a population of 146 individuals.
35. On October 28, 1933, the Department Secretary wrote to the CN regarding the illegal occupation by squatters of the town site property which had taken place without Departmental authorization or compensation to the First Nation. The Secretary demanded to know the intention of the CN regarding town site development, otherwise the Department would assume full control and supervision.
36. In March 1935 the CN relinquished its interest in the town site in favour of the Department.

1939 Surrender for Town Site Expansion and Land Sales Administration

37. The Crown obtained the 1939 surrender of land for a town site in accordance with the relevant legislation and with the Crown’s fiduciary obligations to the First Nation, including obtaining informed consent of the First Nation. The Crown acted

in accordance with its fiduciary duty in fulfilling the terms of the 1932 and 1939 surrenders.

38. In January 1935 the Department Inspector valued the town site lots. Business lots were \$100 for corner lots and \$75 for others. Residential lots were \$75 for corners and \$50 for others. He noted that all the lots were occupied by original squatters or someone who had taken over the lot from the original squatter. The Inspector considered the valuations fair and within the means of the occupants. He took into consideration that the town site was 34 miles by road from the nearest railway point and the chances of the railway extending to the town were remote but there were prospects of the town becoming a popular tourist destination because of the beautiful lake close by.
39. The total of 70 sales were made for \$5800 plus interest; 58 of the sales took place January 1, 1935, and the remaining between June 1936 and July 1942. The terms of sale were 1/5 cash, balance due in 3 years and 5% interest.
40. Of the 70 sales, 35 were cash sales, or the purchaser paid the principal plus interest within the specified time period, or the purchaser made regular principal and interest payments over 5 years. In almost all cases where payments extended past 3 years, Treasury Board sent numerous letters demanding payment and threatening cancellations of the sales. Twelve sales were cancelled for lack of payment. In 5 cases the lot was resold and in 7 cases, the cancellation was revoked and the purchaser paid for the lot. Eventually all lots were paid for in full with interest.
41. In March 1939 the Loon Lake Board of Trade requested additional lands for a town site expansion noting "dire need" and that few lots were available or suitable within the town site boundaries. The Board's letter indicated that the Board of Trade had spoken to the First Nation and "they are willing to surrender any land necessary for such an expansion."
42. On August 17, 1939, the First Nation consented to a surrender of an additional 17.08 acres for sale for purposes of an expansion to the town site. The Surrender Document contained a legal description of the parcel of lands and bore

the signatures of Chief Peepeekoot and Bear Boy. The Affidavit of Surrender, sworn by Chief Peepeekoot and Bear Boy on August 17, 1939, states there was a meeting for the purpose of considering the surrender and assent was given by a “a majority of the male members of the said band of Indians of the full age of twenty-one years entitled to vote, all of whom were present at the meeting or council.” It also states the terms of the said surrender were interpreted to the Indians by a qualified interpreter. A Complete List of Voters dated August 17, 1939, lists 24 eligible members, 21 of whom were present and voted in favour of the surrender.

43. The 17.08 acres were surveyed into lots in 1940. Surveyor Donnelly valued the lots in a report dated August 18, 1941, between \$115 and \$400. He considered the development of the town, services, business activity, and tourism and noted the valuations as “extremely reasonable.”
44. In January 1942 Indian Agent Cameron noted general consternation that the prices were so much higher than the old lots. Shortly after, a Member of Parliament referred the Department to a petition from Loon Lake complaining about lot prices. In November the Superintendent General of Indian Agencies Christiansen investigated lot valuations. He recommended a range of \$50 to \$85 for reasons that Loon Lake was “a small hamlet secluded in the bush” far from the railway and connected to it only by a dirt road, people from the town appeared uninterested in buying the lots, business activity was not very high because grain had to be trucked to the nearest town where people then purchased their supplies.
45. In November 1942 Superintendent Allen, after careful consideration of both valuations, recommended adoption of the valuations of “our men in the field.” For cash sales, Christiansen’s valuations were used; for other sales, the Department implemented a figure between the two men’s valuations.
46. There were 43 sales, 33 of which were made in 1943 and 1944 and the remainder in 1945 and 1946. One was made in 1950. There were 30 cash sales,

all paid in full with interest within the specified time. One sale was cancelled after 3 years for non-payment. Prices fell within the range of \$50 to \$175 per lot.

Unauthorized Occupation of Reserve Lands

47. The First Nation alleges that Canada leased lands to Dr. Grandy, J. Craig and the Royal Canadian Legion without compliance with the surrender and leasing provisions under s. 50 of the *Indian Act*.
48. There is no evidence of written leases for these lands and no record of any First Nation's complaints to the Crown about these 3 occupants.
49. Dr. Grandy, J. Craig and the Royal Canadian Legion took up their occupation, as early as 1933, when these were unsurrendered Indian lands.
50. On August 17, 1939, the First Nation consented to a surrender of an additional 17.08 acres for sale for purposes of an expansion to the town site, which included the lands occupied by Grandy, Craig and the Royal Canadian Legion.
51. The 3 occupiers paid an annual amount for their occupation. The money was generally paid to the First Nation for extra food supplies, but in 1940 there was a change in Indian Agents. Indian Agent Cameron collected \$33.00 from the occupants and sent it to the Department Secretary to be placed in a trust account for the First Nation.
52. The Secretary wrote Cameron that none of the 3 occupants were covered by any permit or lease and "action should at once be taken to have the matter regularized in such manner."
53. In August 1940 Cameron noted that the properties were within the proposed addition to the town site and all 3 occupiers intended to purchase the properties as soon as the lots were on the market.
54. In 1943 Dr. Grandy and the Royal Canadian Legion each purchased their lots for \$175.

1958 Transfer of 100 Acres of IR 129B to Saskatchewan for Town Site Expansion

55. The First Nation alleges Canada failed to strictly comply with surrender provisions of the *Indian Act* regarding an exchange of 100 acres of IR 129B.
56. The Village of Loon Lake required 100 acres of IR 129B for development purposes. The need was initially raised in 1949. It was not until 1958 that 100 acres of IR 129B were taken for the town development, not surrendered as alleged. The Crown complied with the statutory requirements of s. 35 of the *Indian Act*. No surrender requirement applied.
57. In 1954 a Band Council Resolution authorized the sale of 67.65 acres for \$50 per acre. At a surrender vote on November 27, 1954, 20 male Band members voted in favour of the surrender and sale. No female Band members voted, and Department officials were unable to convince the Band members that women should be allowed to vote. Consequently, the Department considered the surrender vote void. A second surrender meeting was held July 6, 1955; only 8 male Band members were present and none of them voted for the sale of the land.
58. On May 9, 1956, the town expansion was raised again. The Department held a meeting on July 11, 1956, with the Chief and Council and other Band members. The Band indicated it was not in favour of a land exchange, as proposed by the Province of Saskatchewan, but the Band would agree to a sale of 190 acres at a price of \$75 per acre.
59. In early 1957 the Department received another proposal from the Province of Saskatchewan for a land exchange of 100 acres of reserve land for vacant provincial land. At a meeting with the Department on May 1, 1957, the Band indicated it was in favour of a land exchange but did not want the particular land offered.
60. At a surrender vote on June 5, 1957, the majority voted for exchanging 100 acres of reserve land for some farm land. Indian Agent Gavigan discussed with the

Band Council which 100 acres of reserve land they would agree to exchange. Again, only male members had voted and the Department would not approve the surrender.

61. On June 26, 1958, OIC PC 1958-886 consented to the Province of Saskatchewan taking the surface rights of 100 acres of IR 129B pursuant to s. 35 of the *Indian Act*.

V. Relief (R. 42(f))

62. The Crown seeks to have the Declaration of Claim dismissed in its entirety as:
- a. The Tribunal does not have jurisdiction to hear the 1935 surrender and lease to the Church of England and surrender and sale to the Loon Lake Hospital Association claims.
 - b. The Crown obtained the 1932 surrender of land for a town site in accordance with the relevant legislation and with the Crown's fiduciary obligations to the First Nation;
 - c. The Crown fulfilled its fiduciary duty to the First Nation regarding the 1933 taking for the CN right of way;
 - d. The Tribunal does not have jurisdiction to hear the 1939 surrender claim under the *Specific Claims Tribunal Act*. Further, and in the alternative, if the Tribunal has jurisdiction to hear this claim, the Crown obtained the 1939 surrender of land for a town site in accordance with the relevant legislation and with the Crown's fiduciary obligations to the First Nation;
 - e. The Crown acted in accordance with its fiduciary duty in fulfilling the terms of the 1932 and 1939 surrenders regarding the administration of land sales;
 - f. The Crown did not lease surrendered lands to Dr. Grandy, J. Craig or the Royal Canadian Legion. Further and in the alternative, if the Crown did

lease these lands without compliance with the *Indian Act*, the First Nation received compensation and suffered no damages; and,

- g. There was no surrender and exchange of 100 acres of IR 129B. In 1958 there was a statutory taking by the Province, consented to by the Crown. The Crown complied with the statutory requirements of s. 35 of the *Indian Act*, and surrender requirements did not apply.

63. The Crown seeks its costs in the proceedings.

64. Such further relief as this Honourable Tribunal deems just.

VI. Communication (R. 42(g))

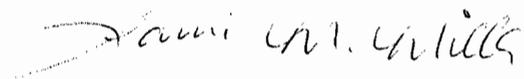
65. Respondent's address for service of documents:

Department of Justice (Canada)
Prairies Regional Office (Saskatoon)
10th Floor, 123 – 2nd Avenue South
Saskatoon, SK S7K 7E6
Attention: Lauri Miller

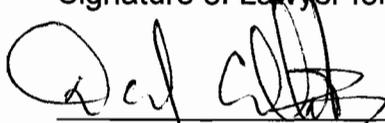
66. Facsimile number address for service: (306) 975-6499

67. E-mail address for service: saskSCT-5003-11-makwa@justice.gc.ca

Dated: February 15, 2012



Lauri Miller, Crown Counsel
Signature of Lawyer for the Respondent



David Culleton, Crown Counsel
Signature of Lawyer for the Respondent

Myles Kirvan,
Deputy Attorney General
Per: Lauri Miller and David Culleton
Department of Justice
Prairies Regional Office (Saskatoon)

