

**SPECIFIC CLAIMS TRIBUNAL**

**BETWEEN:**

**LITTLE BLACK BEAR FIRST NATION, BAND #84**

SPECIFIC CLAIMS TRIBUNAL		
F I L E D	TRIBUNAL DES REVENDICATIONS PARTICULIÈRES	D É P O S É
	August 23, 2013	
	Guillaume Phaneuf	
Ottawa, ON		1

**Claimant**

and

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

**Respondent**

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**DECLARATION OF CLAIM**  
**Pursuant to Rule 41 of the**  
*Specific Claims Tribunal Rules of Practice and Procedure*

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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*.

August 23, 2013

Guillaume Phaneuf

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(Registry Officer)

**TO:** Assistant Deputy Attorney General, Litigation, Justice Canada  
Bank of Canada Building  
234 Wellington Street East Tower  
Ottawa, ON K1A 0H8  
Fax: (613) 954-1920

**I. Claimant (R. 41(a))**

1. The Claimant, Little Black Bear 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, and within the meaning of Treaty 4. The First Nation is located in the Province of Saskatchewan.

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

2. The following condition precedent as set out in s. 16(1) of the *Specific Claims Tribunal Act*, has been fulfilled:
  - 16(1)(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
3. On November 23, 1987, the Band submitted a claim under Canada’s Specific Claims Policy. On September 23, 1994, Canada accepted in part the Band’s claim for negotiation under this policy. Canada and the Band entered a settlement agreement relating to certain claim elements on April 9, 1996, and the electors of the Band ratified it on May 17, 1996. It was agreed that six claim elements that were not included in the settlement agreement (set out at paragraph 11 of the agreement) would be subject to immediate future negotiations between Canada and the Band.
4. The Band submitted its second claim, comprising these six outstanding issues, to Indian and Northern Affairs Canada in October 1997. By letter dated November 17, 2005 from Michel Roy, Assistant Deputy Minister, Claims and Indian Government, Canada rejected the claim.
5. Under cover of a letter dated June 20, 2007 from the First Nation’s legal counsel, the claim was submitted to the Indian Claims Commission and had yet to be considered by the Commission when the *Specific Claims Tribunal Act* came into force on October 16, 2008.

6. The Minister has provided a letter to the Band dated November 24, 2008 indicating that its claim has met the minimum standards for acceptance under the Act.

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

7. For the purposes of the claim, the Claimant does not seek compensation in excess of \$150 million.

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

8. The following are the grounds for the specific claim, as provided for in s. 14 of the *Specific Claims Tribunal Act*:

- (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;

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

9. The claim elements that were excepted from the 1996 settlement agreement and that comprise what has been called the "Second Claim" are:

- A. the lawfulness of the surrender;
- B. Canada's failure to provide compensation for road allowances;
- C. Canada's failure to provide compensation for over 53 acres taken in excess;
- D. Canada's failure to provide compensation for hay lands surrendered;
- E. The lawfulness of Canada's taking of minerals with the land; and

- F. Canada's breach of lawful obligation respecting the deposit of sale proceeds into the Band Fund Account and its failure to pay interest on funds on the Band Fund Account at appropriate rates.
10. The Band would like issue F to be excepted from this claim due to lack of resources to undertake a technical audit and lack of both legal guidelines and factual documentation for trust fund research, whether on general policy or on the Band's specific trust account.
11. It is, therefore, issues A to E above that are addressed in this claim.

### **Introduction**

12. On June 30, 1928, the Band purportedly surrendered 12,408 acres of its reserve to the Crown to make the land available for purchase. Numerous circumstances call into question the validity of the surrender, which the Band claims was invalid.

### **Inherent rights**

13. The Band had and continues to have inherent rights in the land comprising its traditional territory ("the land"), which rights include the authority and obligation of stewardship of the land, sovereignty, and government over reserve land and over the land the Band agreed to share.

### **Treaty rights**

14. By means of Treaty 4, entered into in 1874 with the utmost gravity, some land was reserved for the exclusive use of the Band while the rest of the land was to be shared. The Band agreed to share the land "to the depth of one plough share" but did not share any mineral rights. First Nations' unique, spiritual link with the natural world had to be maintained, and could never be given up, extinguished or sold off. The reserve was surveyed from 1880 to 1884 and totalled approximately 29,760 acres.
15. All minerals in the original 29,760-acre Treaty Reserve, as an interest in land, were reserved to the Band by the creation of the Reserve. The mineral rights were never ceded by Treaty and are protected by s. 35 of the *Constitution Act, 1982*.

The mineral rights could not be surrendered for sale to another party except by explicit consent of the Band.

**Circumstances leading up to the purported surrender**

16. In 1928, there was a general demand in the Little Black Bear area for land to be opened up for settlement.
17. In 1928, Commissioner William Morris Graham approached members of the Band and told them that the Band was struggling financially and needed money for housing. He advised them to surrender some of their reserve land to get money. He did not advise them that the federal Crown had a responsibility to alleviate problems in housing and living conditions as part of its Treaty obligations.
18. Band members were not in need in 1928. Band Elders recall that, while Band members were not living in the lap of luxury, they were quite comfortable in terms of their housing and living conditions, commensurate with the standards of the time.
19. Graham did not discuss with Band members the possibility of leasing rather than selling the land. In February 1922, Deputy Superintendent General Duncan Campbell Scott advised Graham that the practice of leasing Reserve lands to white farmers was to be abandoned, and the policy to seek the surrender of “surplus Indian lands” and to sell them to settlers was to be pursued more aggressively.
20. Graham did not arrange for the Band to receive independent legal advice regarding the surrender as a whole, and s. 141 of the 1927 *Indian Act* prohibited the Band from hiring a lawyer itself.
21. In a letter dated May 8, 1928, Graham advised his superiors that the Band had approached him to surrender a portion of their reserve, and over 75% of the Band’s 36 members were old “not going to last very long”. He stated that they could certainly afford to surrender some of their reserve land, and that “They should receive some benefits from their land before they pass out”.

22. Many of the details of this letter are incorrect or otherwise inaccurate. Some 60% of the Band members were under 45. The number of Band members in 1928 was artificially low because between 1904 and 1922, Graham transferred half of the working-age population of the Band out to the experimental File Hills Colony, without the consent of the individuals affected. Young women were married out to colonists, or to off-reserve settlers, including Métis.

**The surrender process and documents**

23. A surrender meeting was held. There were 11 voting members, 10 of whom apparently voted in favour of the surrender. The remaining member was absent.
24. Pursuant to the surrender documents dated June 30, 1928, a total of 12,408 acres was surrendered for sale by public auction. The surrender documents made no mention of mineral rights.
25. The surrender (form 65) was to be signed by the Chief and Principal men. One copy is apparently<sup>1</sup> signed by Otterskin, Peekutch, Money Bird, Alex Bellegarde, Pierre LaCree, Akapew, Comes to See the Sky, John Bellegarde, Robert Akapew, Sammy Money Bird and Pat Lacree. Another copy is apparently signed by Otterskin, Peekutch, Money Bird, Alex Bellegarde, Pierre LaCree, Akapew, Comes to See the Sky and Pat Lacree.
26. The affidavit attesting to the validity of surrender (form 66) makes reference to the Chief and/or principal men. The affidavit, sworn by Graham and apparently Otterskin, Peekutch, Money Bird and Alex Bellegarde, wrongly identifies the four individuals as the “principal men” of the Band. The Band did not have a Chief from 1885 to 1952, and did not have any Headmen or Principal men during the period 1925 to 1952.<sup>2</sup> During this time, the federal government’s explicit policy

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<sup>1</sup> It is clear that most of the named individuals did not sign their names, as there is an “X” mark beside many of the names. It is not clear whether the individuals actually made the mark, as all of the marks appear to be in the same hand.

<sup>2</sup> Little Black Bear’s Band entered Treaty under Chief Little Black Bear and six Headmen: Long Lodge, Man Who Took the Coat, Rook, Ties the Knot, Big Sky, and Smoking Old Man. The Chief passed away in 1885. Long Lodge and Man Who took the Coat left the Band in 1877 to form their own and settle on the Carry the Kettle Reserve. Rook passed away in 1893, Ties the Knot in 1916, Big Sky in 1920, and Smoking Old Man in 1925. The only effort to replace the Band’s Chief and Headmen upon their passing was made by Chief Little Black Bear himself. Just before his death on January 29, 1885,

was assimilation, and its objective was to get rid of the “Indian problem” by getting rid of the Indians. Assimilation was most likely to occur when a band had no chief, as chiefs were generally seen as being resistant to “progress”. Chiefs and councils disappeared on many reserves by 1900 because Ottawa preferred to have a white authority be the only person to whom the individual Indian should look to as a leader or spokesman.

27. Graham was known among First Nations people as being harsh, and he exerted a tremendous amount of control over various aspects of the lives of the members of the File Hills bands. He persuaded people to surrender land when they truly did not want to, sometimes displaying a stack of cash to entice them to surrender, and then paying out on the spot. He earned a raise from Ottawa in 1908 by successfully negotiating numerous surrenders.
28. Band Elders understand that Graham sought this surrender, his last, because he was intent on amalgamating the Band with the File Hills Colony. It also appears that Graham intended the surrender to be a significant career move. By zealously pursuing the policy of assimilation by means of the surrender, Graham would have helped to neutralize both his involvement in a 1924-28 scandal<sup>3</sup> and an attempt of the local Indian leadership to have him removed from office<sup>4</sup>, thus supporting his bid for promotion to Deputy Superintendent General.<sup>5</sup>

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he called his Headmen to his side and in the Cree tradition appointed his son, Keepeasooatamoo or Thunder Breath (later known as Pikitch), as his replacement. Indian Affairs never recognized him as Chief but considered him a Headman until 1900 when Graham had him removed.

<sup>3</sup> This is known as the Antapa Affair. In 1924, the Antapa Shooting Club, of which Graham was a member, attempted to lease part of Pasqua Reserve for duck hunting at the rate of \$150 per year, but the lease was not properly executed and the Indians had not signed. In 1925, another group attempted to lease the land for \$550 per year. It appears that Scott refused to approve the lease because he knew Graham wanted it; Scott then provided a copy of the proposed lease to the Antapa Shooting Club and advised them to increase their offer. Local politicians decried the manoeuvre. Further, it was discovered that the lease allowed the club to serve alcohol, in direct violation of the *Indian Act* ban of alcohol on reserves.

<sup>4</sup> In 1928, a group of Chiefs from the Qu'Appelle, File Hills, Broadview and Pelly areas traveled to Ottawa to demand that Graham be fired. They were joined there by members of a national Indian political organization which was formed eight years before by decorated veterans of the First World War. The Minister promised that he would immediately consider the matter.

<sup>5</sup> Graham was ambitious, and by 1928, it appeared that Graham would be the natural successor to Scott as Deputy Superintendant General. Graham's ambition relied in part on his personal connection to Arthur Meighan, a prominent politician, who had been Superintendant General and went on to be Prime Minister twice; Meighan's aunt was Graham's wife, and his cousin was Graham's secretary.

29. Privy Council Order-in-Council 1928-1378, dated August 1, 1928 authorized Canada to take an area “containing by admeasurement approximately twelve thousand four hundred and eight acres”. This surrendered land was surveyed into sections and road allowances in 1928; using the perimeter boundary measurements from this plan, the area of the land actually surrendered totals 12,461.482 acres, which is 53.482 acres more than was authorized. The term “approximately” in the Order-in-Council is only intended to cover those surveying discrepancies resulting from margins of error inherent in the measuring process; this error is not a result of the measuring process and is not rectified by the use of the term “approximately”. Canada has acknowledged this error by agreeing in the 1996 settlement agreement that the Band is entitled to recover an additional 54 acres of lost Treaty Reservation land beyond the amount specified in the Order-in-Council.

**Following the surrender**

30. The hay lands half-section was part of the 12,408 acres allegedly surrendered by the Band, but Canada’s agents withheld this parcel from the second auction sale in May 1929 and kept it for the benefit of the Agency. From 1928 to 1942, Canada’s agents did not pay rent to the Band for the Department’s use of the hay lands half-section. Canada’s agents then sold the half-section privately, not by public auction, in contravention of the Order-in-Council, at a price \$1800 below the highest offer.
31. Canada dedicated 445.5 acres of the surrendered land as road allowances and transferred 294 acres of that total to the Province of Saskatchewan without legal authority in the Order-in-Council or applicable legislation and without charge.
32. Band Elders recall that the proceeds of the surrender did not change the lives of their families or themselves in any way. Band records do not show any expenditures to provide food, shelter or clothing to anyone. Any money spent on food was for the elderly and was paid out of Band funds instead of out of federal

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Graham had his wife and secretary remind Meghan from time to time that Graham was waiting for his promotion.

funds as it should have been. Any money spent on housing was on a repayable loan basis and only for homes for those transferring back into the Band from the File Hills Colony.

**Mineral rights surrender**

33. In 1950, the Band surrendered the minerals in the Reserve for lease. The 1950 surrender explicitly deals with the entire Reserve as originally surveyed, including the portion that was purportedly surrendered in 1928. This indicates that in 1950 the Band and Canada both believed that the 1928 surrender had not affected the Band's mineral rights to the subject land.
34. However, when Canada sold the lands subject to the purported 1928 surrender, the purchasers also gained the mineral rights associated with those lands. The purchasers have since leased out the mineral rights. The income from the mineral rights associated with the surrendered land has never come to the Band.
35. The federal government policy at that time was to retain the mineral rights for the benefit of the Band. In addition, even in the absence of such a policy, a prudent fiduciary would not sell mineral rights with the surface rights since there is no cost to retaining ownership of them

**VI. The Basis in Law on Which the Crown is said to have failed to meet or otherwise breached a lawful obligation:**

36. The bases in law on which the Crown failed to meet or otherwise breached a lawful obligation are as follows:
  - A. in relation to the 1928 surrender,
    - i. during the surrender process, the Crown breached its fiduciary duty and the honour of the Crown by persuading the Band to surrender for an improper purpose, by failing to ensure that the Band received independent legal advice, by promoting the surrender where an outright sale of the land was not in the Band's best interest, breached its treaty obligation to preserve the land for the Band and its future generations, and breached the *Indian Act*

- requirements for surrender by proceeding in the absence of a free and informed consent;
- ii. following the surrender, the Crown breached its fiduciary duty by failing to deal prudently with the Band's land, and by failing to protect the Band from the pressures of market forces;
- B. in relation to the land given to the Province for road allowances without charge, the Crown breached its fiduciary duty, especially as the surrender's stated purpose was to raise money;
- C. in relation to the almost 54 acres taken in excess of what was authorized, the Crown breached its fiduciary duty;
- D. in relation to the hay lands, the Crown acted contrary to the Order-in-Council, which directed land to be sold at public auction, breached its fiduciary duty by using this land for its own benefit without paying rent, and breached its fiduciary duty by accepting a lower price than what was offered when the land was finally sold; and
- E. in relation to the minerals, the Crown breached the treaty by purporting to take from the Band what was not given, breached the statute in that where a surrender was silent as to minerals, the mineral rights were not transferred, and breached its fiduciary duty as set out in *Apsassin* by failing to keep the mineral rights and then failing to correct its error regarding mineral rights.

**VII. Relief sought:**

37. The relief sought is as follows:
- A. Damages in the amount of the 1928 market value of the 12,408 acres, calculated in current dollars, plus interest;<sup>6</sup>

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<sup>6</sup> Beginning with Starblanket's entitlement of 2,752 acres, and adjusting it to Little Black Bear's lost acreage and the year of loss, the nominal value of the rental foregone by the Little Black Bear Band for the period 1928 to 1989 is approximately \$2,906,418, which has a value in 1989 dollars of \$7,905,457, and a 1989 compounded value of \$17,990,727. Projected to 1996, the final compounded value would be near \$36,000,000 in lost use, and this amount will have to be updated to the date of the Tribunal's decision. On top of that, the Band would still have possession of land worth approximately \$5,000,000 in 1996. Cost of living increases and pre-judgment interest from 1997 should also taken into account.

- B. Damages for foregone lease income;
- C. Compensation for Canada's breaches of the *Indian Act*, the Order-in-Council, Treaty 4, other legislation, fiduciary duty and honour of the Crown;
- D. Equitable interest;
- E. Compensation for unauthorized sale of mineral rights and/or income from lease of mineral rights, breach of fiduciary duty; and
- F. Such other damages or compensation as this Honourable Tribunal deems just.

Dated this 19th day of August, 2013.



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Signature of Solicitor

This document was delivered by:

Rasmussen Rasmussen & Charowsky  
Legal Professional Corporation  
Barristers and Solicitors  
3301 College Avenue  
Regina, SK S4T 1W3

and the address for service is the same

Lawyer in charge: Merrilee Rasmussen, Q.C.  
Telephone No: (306) 525-8911  
Fax No: (306) 525-8912  
email: rasmussen@sasktel.net