

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS
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July 23, 2019

Isabelle Bourassa

SCT File No.: SCT - 5006-19

SPECIFIC CLAIMS TRIBUNAL

Ottawa, ON

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B E T W E E N:

WITCHEKAN LAKE FIRST NATION

Claimant

v.

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

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*.

July 23, 2019

Isabelle Bourassa

(Registry Officer)

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

I. Claimant (R. 41(a))

1. The Claimant, Witchekan Lake First Nation, confirms that it is a First Nation within the meaning of paragraph 2(a) of the *Specific Claims Tribunal Act*, SC 2008, c 22 (the “Act”), in the Province of Saskatchewan.

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

2. The following conditions precedent as set out in s. 16(1) of the *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

...

(b) three years have elapsed after the day on which the claim was filed with the Minister and the Minister has not notified the First Nation in writing of his decision on whether to negotiate the claim.

3. On December 23, 2015, the First Nation submitted claim submission with the Minister of Indian Affairs and Northern Development (the “Minister”) in relation to the unlawful alienation in 1918 and 1919 of 16,577 acres which comprised the Witchekan Lake Reserve or, alternatively, in relation to the unlawful altering of the surveyed boundaries during the reserve creation process thereby reducing the land size by 16,577 acres (the “Claim”). The Claim was deemed filed with the Minister on May 25, 2016.

4. Three years have elapsed after the day on which the Claim was filed with the Minister and the Minister has not notified the First Nation in writing of her decision on whether to negotiate the Claim.

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

5. The Claimant does not seek compensation in excess of \$150 million.

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

6. The following are the grounds for the Claim, as provided for in s. 14(1) of the *Act*:
 - (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))

7. Treaty No. 6 was signed on August 23, 1876 with the Plains and Wood Cree Indians and others at Fort Carlton. The Witchehan Lake Indians, part of the larger Saulteaux tribe, did not adhere to Treaty at that time.

8. In 1909, the Saulteaux Reserve No. 159 at Jackfish Lake was the first reserve allocated to the Saulteaux Tribe. The reserve contained 14.13 square miles or 9045 acres. The Department of Indian Affairs acknowledged that additional land was still required for the remainder of Saulteaux tribe residing at Stinking Lake (later known as Witchehan Lake).

9. On June 7, 1911, Indian Agent J.P.G. Day petitioned on behalf of the non-Treaty “Saulteaux Bands” for a reserve to be located around Stinking Lake based on the remaining land still owed to approximately 235 Saulteaux Indians who had not yet adhered to Treaty. Later that year, seven “Indian Shacks” were reported to be located around the shores of Witchehan Lake.

10. In January of 1912, Indian Agent Day again informed J.D. McLean, Assistant Deputy and Secretary of the Department of Indian Affairs, that the Witchekan Lake Indians requested that the “remainder of the land be set aside for them in the vicinity of Stinking Lake, in Townships 52/55-Ranges 12/13, West of 3rd Meridian.” Day added that the Indians had lived near Stinking Lake “for over twenty years” and were concerned about the influx of settlers to the region.

11. On February 2, 1912, McLean informed the Department of the Interior of the request for a reserve at Stinking Lake, indicating that 44.47 square miles was owed to the Saulteaux Indians. McLean asked the Secretary of the Department of the Interior whether there was any objection to the setting aside of the reserve in Tps. 52-55, Rgs. 12-13, W3M. On October 20, 1912, Chief Kawkaykeesick sent a letter from Witchekan Lake to James McKay, Member of Parliament for Prince Albert, requesting his assistance to procure a reserve for his non-Treaty Band. According to the Chief, the Band had lived at Witchekan Lake for forty years and were concerned about the increased settlement in the area.

12. Deputy Minister of the Interior W.W. Cory reported to N.O. Cote of the Lands Patents Branch Affairs on November 22, 1912, that the Department of Indian Affairs “should submit a more definite selection” of land at Witchekan Lake before “any reservation of land could be made.”

13. In February of 1913, D.C. Scott, the Deputy Superintendent General of Indian Affairs, requested a full report from the Surveys Branch regarding Chief Kawkaykeesick’s request for a reserve at Witchekan Lake. In response, Chief Surveyor Samuel Bray calculated that the remaining 222 members of the Saulteaux Band required 44 sections of land under the terms of Treaty 6.

14. On February 20, 1913, J.D. McLean, Assistant Deputy and Secretary of the Department of Indian Affairs replied to Chief Kawkaykeesick stating that it was decided “some time ago to send a surveyor to the vicinity of Witchekan Lake to lay out a reserve for the Saulteaux Indians who make that point their home.”

15. On April 2, 1913, McLean further informed the Department of the Interior that the survey of the reserve would be undertaken “during the present season” and requested that the Department of the Interior not confirm surveys of townships in the immediate vicinity of Witchekan Lake until the Department of Indian Affairs could select the lands required for the reserve.

16. In July 1913, McLean indicated to the Department of the Interior that it would be “some time” before lands at Witchekan Lake could be selected and requested that the Department prevent any “sale, occupation or alienation of any of the lands in Townships 51 and 52, Range 11, W-3-M.” At this time, McLean informed the Indian Agent at Battleford, J.A Rowland, that, “the lands required for an Indian Reserve at Witchekan Lake should be selected at as early a date as may be conveniently possible.” Rowland responded on August 6, 1913, noting that he would be at Witchekan Lake “in a few days, for the purpose of selecting the 44 Sections.” McLean subsequently informed Rowland that Surveyor I.J. Steele had been appointed to make the selection of land at Witchekan Lake.

17. Surveyor Steele was appointed in June 1913 to undertake the survey at Witchekan Lake. On October 7, 1913, Steele informed the Department of Indian Affairs that all townships in the vicinity of Witchekan Lake had been “opened for homesteading for a year or more” and that many of the quarter sections were already occupied. He requested that the Department of the Interior temporarily withdraw Townships 50-53, Ranges 10-12 from further homestead entry until the reserve was selected.

18. On October 13, 1913, the Land Patents Branch of the Department of Interior informed the Department of Indian Affairs that there was not enough land to create a reserve of 44.47 square miles using Townships 51-52, Range 11 because 30 homestead entries had been recorded.

19. On October 15, 1913, the Department of Indian Affairs reiterated its request to N.O. Cote, Controller of the Lands Patents Branch, to halt the granting of further entries for homesteading in Townships 50-53, Ranges 10-12, and informed the Department of

the Interior that Surveyor Steele was instructed to proceed with the survey but to not include lands already disposed of.

20. Steele completed the survey and posting of the reserve boundaries on October 18, 1913, with the assistance of Witchekan Lake Band members.

21. Steele submitted his report of the survey to Indians Affairs on November 8, 1913, describing the land as “about 32 square miles exclusive of Witchekan Lake and almost entirely surrounds it.” This is a total area of approximately 20,814 acres. He acknowledged that he did not select a reserve of 44 square miles as it appeared to him there were only 80 Indians permanently living there.

22. In November of 1913, J.D. McLean, Secretary of the Department of Indian Affairs, informed Surveyor Steele and the Indian Agent Rowland that all the lands surveyed would constitute the Witchekan Lake Reserve except for the northeast quarter of Section 16, Township 52, Range 11, and the northwest quarter of Section 18, Township 51, Range 11 because they were disposed of.

23. The Department of Indian Affairs informed the Department of the Interior of the lands selected for the Indian Reserve at Witchekan Lake on October 23, 1913. On October 29, 1913, N.O. Cote, Controller, wrote to W.W. Cory, the Deputy Minister of the Interior, regarding the selection of the reserve at Witchekan Lake. The letter was forwarded to the Minister of the Interior W.J. Roche by Cory who, in a marginal note, stated that “Do you think it advisable to grant the Indians complete control of the lake? Would it not be better to confine them to one side of the lake only?”

24. On November 18, 1913, J.D. McLean asked the Department of the Interior that additional lands be reserved from settlement until the Department could fully ascertain whether other Indians “will finally decide to settle at Witchekan Lake.”

25. On December 2, 1913, W.W. Cory of the Department of the Interior wrote to D.C. Scott, the Deputy Superintendent General of Indian Affairs, asking if the selection of

lands around Witchekan Lake could be amended in order to “leave a larger part of the Lake front available for white settlement.”

26. On December 20, 1913, a petition signed by 37 settlers was sent to the Minister of the Interior protesting the granting of lands for the Witchekan Lake Reserve. This petition was forwarded to the Department of Indian Affairs.

27. Deputy Superintendent General of Indian Affairs D.C. Scott replied to the Department of the Interior on December 22, 1913, indicating that the limits for the reserve would be “reconsidered with the view of leaving a considerable portion of the lake shore not in the reserve.” On that same day, Indian Agent Rowland was instructed to look into the matter “with the view of having eliminated from the reserve the lands along a considerable portion of the lake and to select other lands in their stead contiguous to the reserve.”

28. On January 15, 1914, Chief Kawkaykeesick wrote to the Department of Indian Affairs regarding the confirmation of his reserve. The Chief expressed concerned as settlers had informed him that he would not “get the Reserve.” J.D. McLean responded on January 22, 1914, noting that the Department has been unable to “definitely settle what lands will be included in your reserve.”

29. On July 20, 1914, McLean requested a report from Indian Agent Rowland about whether he had “been able to attend to the matter of eliminating a large portion of the front of Lake Witchekan from the proposed Indian Reserve at that point.” On October 26, 1914, Agent Rowland provided a report regarding his recommendations for the reserve, stating that the land selected was the best hayland he had ever seen and that “these Indians are not entitled to so much hayland.” He recommended that the reserve be reduced from approximately 20,814 acres to 4,121 acres, down to about 20% of its former size.

30. After receiving Rowland’s recommendations, McLean provided the Department of the Interior the proposed changes to the reserve, acknowledging that it was a “very

much smaller area.” He requested an Order in Council confirming the lands as the Witchekan Lake Indian Reserve No. 168.

31. In a follow-up letter dated February 25, 1915 to N.O. Cote Controller, Lands Patent Branch, J.D. McLean asked for the Witchekan Lake Indian Reserve to be numbered “117” rather than “168”, as he had previously requested.

32. Witchekan Lake Indian Reserve No. 117 (“IR 117”) was initially confirmed by Order in Council on September 30, 1918. However, the description and plan of the reserve accompanying the Order in Council were found to have errors. This Order in Council mistakenly included the northeast quarter of Section 20 and the northeast quarter of Section 30 but did not include the southeast quarter of Section 20. The name of the reserve was also spelled incorrectly and the description of the boundary of IR 117 on the western shore of Witchekan Lake was unclear.

33. As a result, in December of 1918, the Department of Indian Affairs sought clarification as to whether IR 117 included “all land down to the water’s edge.” Surveyor General E. Deville subsequently recommended that because the shores of the lake were “not suitable as a land boundary,” the “Order in Council be amended and all references to the bank of the lake removed.”

34. The Department of Indian Affairs prepared a new description of IR 117 on January 20, 1919. The Department of the Interior rejected this description, as it again made reference to the bank of the lake. N.O. Cote, the Controller of the Lands Patents Branch, subsequently prepared an amended description of IR 117.

35. On April 2, 1919, the Minister of the Interior submitted a new memorandum to Council outlining the errors in the previous Order in Council and recommended that it be amended with the new description of IR 117 to say the reserve would *include* parcels along the shore of the lake, as well as the southeast quarter of Section 20, Township 52, Range 11, and *would not* include the northeast quarters of Sections 20 and 30, Township 52, Range 11.

36. The corrected description and plan of IR 117 was confirmed by Order in Council P.C. 790 on April 9, 1919, and consisted of 4,237 acres.

37. Chief Tepowewe wrote to Indian Affairs on September 19, 1919, protesting the boundaries of the reserve and the encroachment by white settlers. He indicated the Band should be allowed to sell surplus hay to support itself.

38. A petition from the settlers in the area sent to C.C. Davies, Member of Parliament for North Battleford, was forwarded to the Department of Indian Affairs on March 2, 1923. The petitioners argued that IR 117 should be opened for homestead entry, stating that the Indians had control of “splendid agricultural land” and were “making practically no use of it all.” J.C. Caldwell, in charge of Land and Timber Branch for the Department of Indian Affairs denied the request of the settlers as the Band would have to agree to a surrender.

39. Between 1925 and 1937, there were repeated requests to open up the lands along Witchekan Lake. The Band refused to surrender any portions of IR 117. During this time, confusion within the Department of Indian Affairs remained over the exact boundaries of the Witchekan Lake Reserve.

40. On July 13, 1949, N.J. McLeod, Superintendent for the Duck Lake Agency, reported on a meeting with Chief “Tipewin” and 12 members of the Band. The discussions included whether the Band would consider moving away from their present reserve but the members of the Band refused. However, it was reported that 8 out of the 12 present at the meeting were willing to accept Treaty.

41. The Witchekan Lake Band adhered to Treaty 6 on November 21, 1950.

42. The Band’s complaints regarding trespass by settlers resurfaced in the 1960s. There were also disputes regarding hay permits given to settlers and whether the Band had a claim to the lands that used to be covered by the waters of Witchekan Lake.

43. In the mid-1970s, the Band protested the size of IR 117 and questioned why there were plans showing IR 117 with a much larger area than what was confirmed by Order in Council P.C. 790 on April 9, 1919. Surveyor Zeldenhurt was “at a loss” to explain. Indian Affairs confirmed in the 1980s that a larger reserve had been surveyed and agreed to conduct research on the issue.

VI. The basis in law on which the Crown is said to have failed to meet or otherwise breached a lawful obligation:

44. The Claimant submits that IR 117 was created in 1913. The Crown breached its fiduciary, statutory, and honourable obligations to the Band by unlawfully alienating 16,577 acres that comprised IR 117 without regard to the surrender provisions of the *Indian Act* or the best interest of the Band, and without adequate (or any) compensation.

45. Alternatively, if this honourable Tribunal determines IR 117 was created at a later date, the Crown breached its fiduciary and honourable duties to the Band by:

- i. altering the surveyed boundaries during the reserve creation process, thereby reducing the land size by 16,577 acres, without adequate consultation of the Band; and
- ii. failing to act with reasonable diligence and care with regard to the best interest of the Band during the reserve creation process.

VII. Relief Sought

46. In light of the foregoing, the First Nation seeks the following relief:

- i. equitable compensation for the unlawful alienation of 16,577 acres of reserve land surveyed in 1913, as well as the loss of use of these lands;
- ii. Costs on a solicitor-client basis in relation to the specific claim and this proceeding; and
- iii. Such other compensation as this honourable Tribunal deems just.

Dated this 22nd day of July, 2019.



Ryan M. Lake
Amy Barrington

Lawyers for the Claimant

Maurice Law Barristers & Solicitors

300, 602-12th Ave. SW

Calgary, Alberta T2R 1J3

Phone: (403) 266-1201

Fax: (403) 266-2701

Email: rlake@mauricelaw.com

abarrington@mauricelaw.com