

SPECIFIC CLAIMS TRIBUNAL

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F I L E D	December 21, 2016	D E P O S E
David Burnside		
Ottawa, ON	1	

BETWEEN:

BIG GRASSY (MISHKOSIIMIINIIZIIBING) 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

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*.

December 21, 2016

David Burnside

(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 Claimants, Ojibways of Onigaming First Nation and Big Grassy (Mishkosiimiiniiziibing) First Nation confirm that they are First Nations within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, in the Province of Ontario.

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:

The condition precedent in s.16(1), subsection (a) has been fulfilled.

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

3. For the purposes of the claim, the Claimants do not seek compensation in excess of \$150 million.

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

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

- i failure of the Crown to fulfil a legal obligation to provide lands under a treaty, and
- ii breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, or its administration of reserve lands;

contrary to s.14(1), subsections (a) and (c).

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

5. The Claimants were formerly one "band" of Indians, known as the Assabaska Band.

6. On October 3 1873 the part of the Anishinaabe Nation to which the Assabaska Band belonged made a treaty with the Crown, known as “Treaty 3”. One of the terms of Treaty 3 was that reserves of land would be set aside. This was to be done by the Crown as soon as possible after the Treaty, and was to involve consultation with the applicable band, followed by a survey of the land.
7. Another term of Treaty 3 respecting the reserves was that “any interest or right thereon or appurtenant thereto may be leased sold or otherwise disposed of” by the Crown, but only “with the consent of the Indians entitled thereto first had and obtained”.
8. Beginning shortly following the treaty, First Nation representatives repeatedly pressed Canada to get the reserves set aside, lest they be trespassed on by non-Indians.
9. Lands now known as “Windy Point”, located on the southeastern shoreline of Lake of the Woods, now in the District of Rainy River, Province of Ontario, had been used and occupied by the Assabaska Band since time immemorial. These lands were used for resource harvesting, ceremonial, residential and other purposes
10. On June 26 1874 Canada and Ontario entered into an agreement setting a provisional western boundary for the province, and providing that the two governments would confirm land titles given by the other if the final boundary turned out to be different. This agreement was enlarged in 1878 so as to include all leases and licenses, and continued in effect until 1883.
11. In 1878 an arbitration decision placed the Ontario provincial boundary considerably west of the provisional boundary. The revised boundary would enclose much of the territory covered by Treaty 3 including the Assabaska Band’s reserves, which had not yet been surveyed.

12. The more westerly Ontario boundary displeased Canada. It also created ambiguity regarding land rights in the large additional area that would fall within Ontario. This part of what is now Northwestern Ontario became known as the “disputed territory”.
13. In 1879 surveyor A.F. Miles, D.L.S., acting on behalf of Canada, met with Assabaska Band representatives regarding their treaty reserves, and surveyed several of them. In his surveyor’s return, dated March 1, 1880 Miles recommended to Canada that there be a 640 acre reserve at Windy Point, and provided the following description:

“One square mile at the point called Kach-gueway-angus-sah-tabgun consisting (approximately) of parts of Sections 21, 22 and 23 Twp.1 South, Range XXII East.”

14. This description meant a reserve comprised of a low-lying sandy peninsula that at the time extended into Lake of the Woods, and also land at the base of the peninsula, to make up one square mile or 640 acres.
15. Miles’ recommendation was approved by the Surveyor General of Canada and by the Deputy Minister of Indian Affairs on March 18, 1890.
16. The above description for the reserve was added on the face of Miles’ plan of survey for the nearby Reserve 35G, following a preface that states:

“the lands set apart for May-suah-ash, on Mar. 18th 1880, a Councillor Band 35”

17. The said plan of survey with the added preface and description is deposited in the Indian Affairs Survey Records as no. 98.
18. The said lands were designated by the Department of Indian Affairs as “Indian Reserve 35E2” (and variations of the same), and were also referred to as the “Windy Point reserve”.

19. Surveyor Miles did not complete all of his assignments from the Crown for 1879 and 1880. He did not draw a plan of survey for the reserve at Windy Point.
20. From at least 1890 through 1915, this land appeared as one of the reserves for the Assabaska Band on officially published lists and maps of Indian reserves under Treaty 3. One such map, from 1886, entered in the Canada Land Survey Records as no. 89, shows the peninsula, as well as a block of land at the base of the peninsula, covering approximately 640 acres, coloured as an Indian reserve.
21. The disputed territory matter referred to in paragraph 11 herein caused 40 years of intra-Crown conflict, including:
 - a. Litigation regarding Canada's ability if any to grant land rights within the disputed territory after the provisional boundary agreement ended, which did not conclude until Canada lost in court in 1888 (the "*St. Catherines Milling case*"). In this case Canada wanted the revenue from timber cut under its licences in the disputed territory.
 - b. Litigation regarding Canada's right to sell Indian reserve land that had been surrendered for sale, which did not conclude until Canada lost in court in 1902 (the "*Seybold case*"). In this case Canada wanted private parties to whom it had made grants to have the title including mineral rights in surrendered Indian reserve land.
 - c. A monetary claim by Canada against Ontario first in arbitration then in litigation, which was not concluded until Canada finally lost in court in 1910 (the "*Treaty 3 annuities case*"). In this case Canada wanted reimbursement from Ontario of Crown costs incurred in connection with the making and implementing of Treaty 3.
22. Ontario respected the 1874 provisional boundary agreement to the extent of adopting land surveys made by Canada and honouring land rights given by Canada to non-Indians

during the term of the agreement, but it questioned the Indian reserves that had been set aside by Canada during the same period.

23. In 1890 surveyor A.W. Ponton D.L.S. was instructed by Canada to carry out various surveys for Indian reserves, including Reserve 35E2, which he was to survey according to Miles' 1880 description as set out above at paragraph 12. He completed some of the assignments, but did not survey Reserve 35E2.
24. In connection with the disputed territory matter Canada provided Ontario with lists of reserves under Treaty 3. Commencing in Reserve 35E2 was included in these lists.
25. In 1891, because of the disputed territory matter, Canada discontinued surveys of Treaty 3 reserves.
26. In May 1891 Ontario and in July 1891 Canada enacted reciprocal and substantially identical legislation (S.C. 54-55 Victoria, c. 5, S.O. 54 Victoria c. 3) dealing with the Indian reserves that Canada had set aside within the recently clarified boundaries of Ontario. The Acts called for Ontario to make full enquiry and either acquiesce in the reserves, or a commission or commissions would be established to settle disagreements.
27. Following this legislation Canada continued to administer the Treaty 3 reserves under the *Indian Act*, as it had been doing previously.
28. In 1893 Ontario expressed dissatisfaction to Canada about the location of Reserve 35E2. The provincial township grid for Spohn Township had been surveyed by Ontario without regard to the reserve. Canada replied that the reserve had been properly set aside, but took no further steps.
29. Commencing in 1906 Ontario issued grants of title to the land at Windy Point to non-Indian private parties.
30. In 1915, Ontario acquiesced in and confirmed most of the Treaty 3 reserves, as called for in the 1891 legislation, and transferred the underlying title to Canada. Reserve 35E2 was

on the list of reserves provided by Canada to Ontario in connection with the legislation. Its 640 acres were included in the acreage and dollar calculations for Canada's payment to Ontario for transferring Crown title to the Treaty 3 reserve land within the province.

31. In 1931 Canada advised Ontario that it had decided to "relinquish" Reserve 35E2. No notice of this was ever given by Canada to the Assabaska Band.
32. At no time was a surrender of Reserve 35E2 or any part of it given by the Assabaska Band or its successors, nor was it expropriated by a competent authority. Neither the Assabaska Band nor its successors gave to the Crown any consent to resile from the Crown's commitment to create an Indian Reserve on 640 acres of land at Windy Point.
33. The Assabaska Band divided into the two Claimant First Nations in or about the year 1964.

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

34. Under Treaty 3, reserves were to be selected and set aside by Canada in consultation with the applicable First Nations. Canada also obligated itself to carry out surveys of the reserves. Canada intended to do this for the Windy Point reserve, and in 1890 instructed surveyor Ponton, but the survey was not carried out. Canada then cancelled surveys for Treaty 3 reserves and the Windy Point reserve was never surveyed.
35. In the course of the intra-Crown conflicts associated with the disputed territory matter, referred to in paragraph 21 herein, Canada had internal advice that it was putting Indian rights at risk and that it would be better to not press weak claims in court. In particular, after the 1891 legislation referred to in paragraph 26 herein Canada had advice that it should not pursue the claim but instead complete the process of obtaining Ontario's acquiescence in the Treaty 3 reserves. Despite this the *Treaty 3 annuities* case continued. It was under the direction of the Department of Finance, which successfully imposed its

agenda of attempting to obtain money from Ontario over that of the Department of Indian Affairs which wanted to complete the reserves process.

36. If Canada had acted promptly, diligently and in the interests of the Assabaska Band, instead of advancing its own ill-founded money claims against Ontario, and worked in a reasonable time with Ontario to obtain acquiescence in the reserves, the reserve at Windy Point would not have remained unsurveyed and subject to usurpation by Ontario.

37. During the intra-Crown conflicts associated with the disputed territory matter, the First Nations under Treaty 3 were neither informed nor consulted, nor were they provided with access to independent advice. In this period the reserves lingered in an ambiguous status for approximately 40 years, exposing the First Nations to loss, which in the case of the Windy Point reserve occurred when Ontario included the land within its township surveys and then issued patents.

38. The Claimants say that:
 - a. Canada's failure to deal effectively and in a reasonable time with the consequences its "disputed territory" issues with Ontario, and in particular Canada's pursuit of its own monetary interests so as to expose the Claimant's land interests to loss,

 - b. Canada's failure to diligently follow up and implement the selection of a reserve at Windy Point, by having it surveyed, as required by Treaty 3, and

 - c. Canada's failure to intervene when Ontario conducted itself as if the land was not an Indian reserve,

led to the land being effectively lost to the Claimants. This constituted breach of fiduciary duty and was contrary to the honour of the Crown. It was also a breach of the term of Treaty 3 referred to in paragraph 7 herein.

39. The fiduciary relationship between the Crown and First Nations serves as a guiding principle for assessing the appropriateness of Crown conduct. Treaty 3 clothed the Crown with discretion to deal with the treaty land free of Aboriginal interests. Canada assumed and exercised power respecting the rights of First Nations to have their reserves created, including completion of land surveys and dealing with the provincial government, and thus had a fiduciary duty to the Assabaska Band.
40. When land at Windy Point was selected in 1879 and 1880 the Assabaska Band gained a distinct cognizable interest in the land. It was incumbent upon Canada to act reasonably and with diligence in the best interest of the Band to protect this interest but Canada instead committed the failures stated in paragraph 38 herein and at all relevant times failed to consult with the Assabaska Band.
41. Due to extensive losses and damages to its land and resource rights in its traditional territory the Assabaska Band was reduced to destitution and penury in the latter part of the 19th and early part of the 20th century. Its population declined and was weakened by hunger, disease, and want.
42. The Claimants say that the purpose of reserves under Treaty 3, as discussed in the treaty negotiations, was to assure availability of land capable of providing for economic growth and cultural survival. Each 640 acres of reserve land would be available to provide for one family of 5. The Windy Point reserve was not, however, available to them due to Canada's failures as stated above.
43. The Claimants have settled all claims in relation to the matters herein that they may have had against the Province of Ontario, and have released Ontario from all claims relating thereto.
44. The Claimants claim
 - a. the present value of the lost reasonable livelihood for a family of 5 from 1887 to the date of the Order of this Tribunal, and

b. the value to them of the land,

estimated as \$12,000,000 in total.

45. Alternatively, the Claimants claim

a. the present value of their loss of income and income equivalents from being unable to use and enjoy the fruits and benefits of the land at Windy Point, including for resource harvesting, from 1887 to the date of the Order of this Tribunal, and

b. the value to them of the land,

estimated as \$12,000,000 in total.

46. The Claimants also claim their costs.

Dated: December 21, 2016



Donald R. Colborne
Barrister and Solicitor
1125 Fort Street
Victoria BC V8V 3K9
Telephone 250-386-6628
Fax 250-386-6638
Email: drcolborne@shaw.ca