

SPECIFIC CLAIMS TRIBUNAL

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F I L E D	July 24, 2014	D E P O S E
Amy Clark		
Ottawa, ON	1	

B E T W E E N:

SAGKEENG 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 24, 2014

Date

Amy Clark

Registry Officer

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I. Claimant (R. 41(a))

1. The Claimant, Sagkeeng First Nation (the “First Nation” or “Sagkeeng”), formerly the Fort Alexander Band No. 262, confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act* and a “band” within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, as amended. The First Nation is located in the Province of Manitoba.

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

2. The following conditions precedent as set out in s. 16(1) of the *Specific Claims Tribunal Act*, has 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

(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. The First Nation initially filed a claim submission with the Minister through the Specific Claims Branch in 2000 alleging an outstanding entitlement to reserve land under the terms of Treaty No. 1 (“Treaty 1”). Following an invitation by Mr. Don Boswell, Acting Senior Claims Analyst, on April 4, 2008, to provide further legal arguments on the TLE shortfall, Sagkeeng filed with the Minister a supplementary submission dated August 17, 2010 (collectively, the “TLE Claim”). The 2010 supplementary submission focused on the issue of whether privately held lands were to be excluded from the calculation of reserve entitlement for Bands that are signatories to Treaty 1, and specifically the Fort Alexander Band.
4. In a letter dated September 20, 2013, the Assistant Deputy Minister of Indian Affairs and Northern Development, Ms. Gina Wilson, informed Chief Donovan Fontaine of the Sagkeeng First Nation of the Minister’s decision not to accept the TLE Claim on the basis that Canada did not have an outstanding lawful obligation.

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

5. The First Nation does not seek compensation in excess of \$150 million for the TLE Claim.

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

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

14(1) Subject to sections 15 and 16, a First Nation may file with the Tribunal based on any of the following grounds, for compensation for its losses arising from those grounds:

(a) a failure to fulfill 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; ...
7. In particular, the Crown has failed to fulfill its legal obligation to provide a sufficient quantum of land to the Fort Alexander Indian Band in accordance with its obligations under Treaty 1.
- V. Allegations of Fact (R. 41(e))**
- (a) *Treaty 1 Negotiations Regarding Reserve Lands and Pre-Treaty Lots***
8. The Fort Alexander Indian Band is a signatory to Treaty 1 dated August 3, 1871, which provides, *inter alia*, that those Bands that entered into Treaty 1 were entitled to receive lands to be set aside by the Crown for their exclusive use and occupation.
9. The “Reserve Clause” in Treaty 1 provides that Her Majesty the Queen “hereby agrees and undertakes to lay aside and reserve for the sole and exclusive use of the Indians” reserve lands for each of the bands. The amount of land to be set apart for each band was to be based on 160 acres for each family of five, or 32 acres per person.
10. Prior to the treaty making process in Manitoba, many individual Indians had taken up land, built houses, undertook agriculture and improved land for other purposes. This was the case with the Fort Alexander Band, where the local custom was for members to apply to Chief Kakekapanais to obtain grants of 144 acre lots along the shores of the Winnipeg River and Lake Winnipeg.
11. The written text of Treaty 1 did not reflect all of the promises made by the Treaty Commissioners on behalf of the Crown, including the manner in which lands held or improved by Indians were to be treated. A number of oral promises were never incorporated into the written text of Treaty 1, but were later confirmed by Canada’s officials in written correspondence, and became known as the “Outside Promises”.
12. One such promise was that the Crown would exclude privately held lots from the calculation of the Band’s entitlement to reserve land. The issue of private land holdings by Indians was raised by Chief Henry Prince of the St. Peter’s Band (now Peguis First Nation) in a full assembly of the bands before Treaty Commissioners. Molyneaux St. John, one of the Dominion Government’s negotiating party during Treaties 1 and 2 and later Assistant Indian Commissioner, later provided the following account of the treaty negotiations:

I remember the Indians asking the question whether the amount of land set apart for each family; that is 160 acres for every family of five; was meant to include the land already occupied by them.

The answer was that the allotment now provided for was irrespective of and in addition to their holdings on the river.

13. Between 1873 and 1875, various Crown officials corroborated the commitments made to the Indians to exclude private interests in land.

(b) *The Survey of Indian Reserve Lands for the Fort Alexander Band*

14. The first official survey for the Fort Alexander Band's reserve was completed by J.W. Harris in February 1874 ("1874 Survey"). According to the 1874 Survey, the external reserve boundaries encompassed 25,000 acres, however, the beds and shores of the Winnipeg River or Lake Winnipeg covered 1,750 acres, and an additional 5,750 acres were allocated to satisfy the claims of the Hudson's Bay Co., English Mission, and non-Indian and Métis settlers. The residual land of 17,500 acres was set aside and reserved for the Fort Alexander Band. Harris' field notes compiled during the preparation of the survey omitted a census of the population of Fort Alexander Band upon which the survey was based.
15. In an appendix to Harris' Field Book that accompanied the 1874 Survey, Harris noted 83 private interests in land held privately by Indians, "Half breeds" and non-Indians. No single document exists that clearly identifies the number of river lots granted by Chief Kakekopenais to Indians of the Fort Alexander Band prior to Treaty 1 for the Fort Alexander Band, however, Harris' Field Book, appendix and survey plan, along with expert reports and the documentary record provide evidence that 57 river lots (comprising a total of 8,208 acres of land) were improved and privately occupied by Indians of the Fort Alexander Band at the time the 1874 Survey was conducted.
16. Following the 1874 Survey, additional lands were surveyed and set apart as additions to the Indian Reserve for the Fort Alexander Band as follows:
 - (a) Between September 18, 1905 and November 13, 1905, the Fort Alexander Reserve was re-surveyed by J. Reid, which resulted in the addition of 3,780 acres to the reserve and confirmed by OCPC 1404, dated June 14, 1930;
 - (b) In 1957, an additional 575 acres from Lot 6 were further added to the reserve, confirmed by OCPC 1957-27;
 - (c) Finally, in 1970 Canada added 144 acres of Lot 11 to the Fort Alexander Reserve, confirmed by OCPC 1970-419.
17. The total amount of the reserve land allocated to the Fort Alexander Band was 21,999 acres.

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

18. The TLE Claim is brought on the grounds that the Crown breached its treaty and fiduciary obligations to the First Nation by failing to satisfy the Band's full entitlement to

reserve land under the terms of Treaty 1. Canada's lawful obligation remains outstanding to the present.

19. Sagkeeng pleads and specifically relies upon the established principles of treaty interpretation and the Honour of the Crown, including but not limited to those enunciated by the Supreme Court of Canada in *R. v. Marshall*, 2005 S.C.C. 43, to the effect that treaties must apply the historical and cultural context in which the treaty was negotiated, specifically incorporate the oral terms agreed to by Crown officials and Indian representatives during the negotiation of the treaty, and give effect to the treaty as naturally understood by the Indians at the time of signing the treaty.
20. The oral term of Treaty 1 relied upon by Sagkeeng is the Crown's commitment to exclude the river lots held privately by individual members of the Fort Alexander Band from the reserve land allocation made for the collective use of the Band.
21. The Crown's failure to exclude the river lots privately held by 57 members of the Fort Alexander Band from the collective treaty land entitlement calculation results in a breach of the oral and written terms of Treaty 1, and a corresponding breach of the Crown's legal, honourable, equitable and fiduciary duties to the Fort Alexander Band.

(a) *The 1998 Historic Treaty Land Entitlement Shortfall Policy*

22. In October 1998, Canada adopted the Adjusted Date of First Survey approach as outlined in the *Historic Treaty Land Entitlement Shortfall Policy* (the "1998 Historic TLE Shortfall Policy"). The 1998 Historic TLE Shortfall Policy sets out the criteria used to determine a First Nation's treaty land entitlement. The First Nation has an outstanding shortfall of reserve land provided under Treaty 1 based on an application of legal principles and the criteria set out in the 1998 Historic TLE Shortfall Policy.

(b) *Date of First Survey for the Fort Alexander Band*

23. The first survey of reserve land for the Fort Alexander Band was completed in January, 1874 by Dominion Land Surveyor J.W. Harris, thus making 1874 the Date of First Survey ("DOFS") for the Fort Alexander Band.

(c) *Quantum of Reserve Land Set Aside for the Fort Alexander Band*

24. A total of 21,999 acres were surveyed and set aside for the Fort Alexander Band.
25. The 57 river lots privately held by Fort Alexander Indians prior to the 1874 Survey totalled 8,208 acres of land. These river lots were not deducted from the reserve land allocation contrary to the oral terms of Treaty 1. When these privately held river lots are deducted from the Fort Alexander Band's reserve allocation in accordance with the oral term of Treaty 1, the total amount of reserve land set apart for the collective use and benefit of the Fort Alexander Band was only 13,791 acres.

(d) *The Band's Population for Treaty Land Entitlement Purposes*

26. The 1998 Historic TLE Shortfall Policy provides that it is necessary to "Determine the population used to assess a band's TLE, including the DOFS population and "late

additions” as defined under the policy.” The 1998 Historic TLE Shortfall Policy sets out the following categories of individuals which may be counted in determining the population of a band for treaty land entitlement purposes:

- the number of Indians appearing on DOFS payroll;
- those individuals who remained with the band for a short time at DOFS (unless there is stronger evidence that they were members of another band);
- arrears: those absent at DOFS but who appear on subsequent paylists and are paid arrears for the DOFS payroll;
- absentees: those individuals absent at DOFS payroll but present in paylists before and after demonstrating that they were band members at DOFS;
- late additions: Indians bound by and eligible to receive the benefits of treaty but who had not yet appeared on any band’s payroll or been included in any TLE and treaty Indians who were originally members of a landless band.

27. The above criteria are substantially in accord with *Lac La Ronge Indian Band v. Canada* [2001] SKCA 109 where the Saskatchewan Court of Appeal identified the “overriding principle” inherent in a treaty that “each living Indian will be counted once for the purpose of the land entitlement.”
28. Because the Harris survey was not accompanied by a population census for the Fort Alexander Band, the Band’s population at the Date of First Survey and the Adjusted Date of First Survey (“ADOFS”) has been the subject of several treaty annuity payroll analyses and reports by both Canada and Sagkeeng to determine how much reserve land the Fort Alexander Band was entitled to pursuant to Treaty 1. Based on an analysis of treaty annuity paylists and other documentary sources, we submit the Fort Alexander Band had an entitlement population of 574 members comprised of 475 band members at DOFS plus 99 members who are eligible to be included as short stays, arrears, absentees, and late additions.
29. Based on a population of 574 members, the Fort Alexander Band was entitled to 18,368 acres under the terms of Treaty 1. Since only 13,791 acres were set aside for the collective use and benefit of the Fort Alexander Band at the Date of First Survey in 1874, this leaves an outstanding treaty land entitlement shortfall of 4,577 acres.

VII. Relief Sought

30. In light of the foregoing, the Claimant seeks the following relief:
- (a) an order that the Claimant has established a shortfall of 4,577 acres of reserve land owing under Treaty 1 or such other amount as may be proven at a hearing before this Honourable Tribunal;
 - (b) in lieu of an order for specific performance of the treaty obligation, the payment of equitable compensation for Canada’s breach of its treaty, honourable, fiduciary

and equitable duties and failure to satisfy the Claimant's full treaty land entitlement in a fair and timely manner;

- (c) damages for loss of use of lands that should have been set apart for the use and benefit of the Claimant by the Crown from 1874 to the present;
- (d) equitable interest or restitution on historical losses suffered by the Claimant;
- (e) such other damages or compensation as this Honourable Tribunal deems just; and
- (f) an award of solicitor-client costs pursuant to the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119, section 110(2) in relation to the specific claim and this proceeding; and
- (g) such other relief as this Honourable Tribunal deems appropriate.

Dated this 24th day of July, 2014 at the City of Calgary in the Province of Alberta.



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