

SPECIFIC CLAIMS TRIBUNAL		
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES		
F I L E D	August 26, 2019	D É P O S É
Isabelle Bourassa		
Ottawa, ON	1	

**SCT File No.: SCT - 5008-19**

**SPECIFIC CLAIMS TRIBUNAL**

**B E T W E E N:**

**WATERHEN 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

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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 27, 2019

\_\_\_\_\_  
Date

\_\_\_\_\_  
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**

1. The Claimant, the Waterhen Lake First Nation (the “First Nation” or “Waterhen Lake” or “the Band”) is a First Nation within the meaning of subsection 2(a) of the *Specific Claims Tribunal Act*, SC 2008, c. 22, by virtue of being a “band” within the meaning of the *Indian Act*, RSC 1985, c. I-5 and within the meaning of Treaty No. 6 (“Treaty 6”). The First Nation is located in west-central Saskatchewan.

**II. Conditions Precedent**

2. The following condition precedent set out in subsection 16(1)(a) 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 submitted a specific claim in 2008 alleging various breaches by Canada relating to the setting aside of reserve lands, including lands for timber, when the First Nation signed an adhesion to Treaty 6 in 1921 (“the Claim”). The reserve was subsequently reduced in size by Canada without legal authority and in breach of Canada’s treaty, statutory, fiduciary and honourable obligations.
4. The Specific Claims Branch notified the First Nation on January 21, 2010, that the Claim was not accepted for negotiation on the basis that there was no outstanding lawful obligation on the part of the Government of Canada.

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

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

**IV. Grounds of the Specific Claim (Act, s. 14(1))**

6. The First Nation submits that the Claim falls within s. 14(1) of the *Specific Claims Tribunal Act* which states:

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

(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; ...

## **V. Statement of Facts**

7. In August and September 1876, the Crown and the Plains and Wood Cree Indians in what is now central Saskatchewan and Alberta entered into Treaty 6. The Crown obtained certain benefits to approximately 121,000 square miles of land in exchange for various promises and benefits to be provided to the First Nation signatories.
8. The Waterhen Lake Band lived in the area surrounding Waterhen Lake for many generations.
9. Since at least 1910, Canada made efforts to persuade the Waterhen Lake Band to adhere to Treaty 6. Indian Agent Sibbald of the Onion Lake Agency was sent to the Waterhen Lake area in 1910 to explain the advantages of joining Treaty 6 to the Band, but to no avail.
10. In late 1912, the Waterhen Lake Band objected to the survey of townships in the Waterhen Lake area on the lands they occupied. On April 17, 1913, Department of Indian Affairs (“DIA”) Secretary McLean requested Inspector of Indian Agencies Chisholm to go to Waterhen Lake and arrange for the Band to sign treaty. McLean stated that the reserve would be selected according to the Band’s request, and the township plans would be used to define the boundaries of the reserve lands.

### ***The 1914 Reserve Lands***

11. In August 1913, Indian Inspector Chisholm reported that the Waterhen Lake Band claimed the entire district around Waterhen Lake. In particular, they wanted their reserve to the south and southeast of Waterhen Lake, including the lands west of the mouth of Island River to the Waterhen River outlet.
12. On November 7, 1913, DIA Secretary McLean erroneously reported that the Waterhen Lake Band had adhered to Treaty 6.

13. On June 26, 1914, Chisholm identified lands to be reserved for the Waterhen Lake Band, and the DIA Secretary informed the Surveyor General of these lands.

***The 1917 Reserve Lands***

14. In 1916, Canada renewed efforts to have the Waterhen Lake Band adhere to Treaty 6. In May 1916, DIA Secretary McLean wrote to Inspector of Indian Agencies Chisholm that the way to induce the Band to sign Treaty 6 was to select its reserve lands.
15. Chisholm met with the Waterhen Lake Band in April 1917. Running Around, later appointed Chief, requested reserve lands fronting on Waterhen Lake and “no less than eight miles in length, running north and south, and six miles wide, east and west”, near the Hudson’s Bay post and including the lands east of the Narrows. He also asked for lands for timber and hay. Inspector of Indian Agencies Crombie advised the DIA to send a surveyor as soon as possible to locate the reserve, and the Band would then adhere to treaty. No surveyor was sent.
16. On April 25, 1917, Chief Surveyor Bray wrote to Deputy Superintendent General of Indian Affairs Duncan C. Scott, recommending that all of Townships 63 and 64, Range 16, the South half of Township 63, Range 17 and the North half of Township 62, Range 17 be withheld from disposition until the reserve could be surveyed.
17. On June 21, 1917, the DIA Secretary informed Inspector of Indian Agencies Crombie that a temporary reservation had been made for the Waterhen Lake Band. The lands were those identified on April 25, 1917, with the exception of sections 25 to 36 of Township 64, Range 16. These lands were identified as heavily timbered and therefore not to be reserved for the Band.

***The 1921 Treaty Adhesion and Reserve Lands***

18. On September 6, 1921, DIA Assistant Deputy and Secretary MacKenzie sent Indian Agent Taylor to Waterhen Lake to secure the adhesion of the Waterhen Lake Band to Treaty 6. Taylor was instructed to select the lands for a reserve from those temporarily reserved in 1917.
19. The Waterhen Lake Band adhered to Treaty 6 on November 8, 1921. The adhesion was confirmed by Order in Council P.C. 4512 on December 1, 1921.
20. On November 15, 1921, Indian Agent Taylor’s report of the Treaty adhesion identified the lands chosen for the reserve. As instructed, the lands were within the townships temporarily reserved in 1917, but he also set aside an additional 12 sections of land in Township 62, Range 16. The Band requested a timber reserve, and Taylor reported this would be arranged with the surveyor. The Band population was expected to substantially increase as more members joined Treaty. Taylor advised this increase was accounted for when surveying the reserve.

21. Taylor did not include in the reserve the two sections of land in Township 61, Range 16 that DIA Secretary McLean had identified on April 13, 1921 as “especially required” for the Waterhen Reserve as hay lands.
22. In a reply on March 7, 1922 to a letter from DIA Secretary, Taylor explained his rationale for the land selection for the Waterhen Lake Reserve. He chose the lands in Township 62 Range 16 because “the Indians urgently asked for this, that they might have some timber on their reserve,” although the timber on that land was not valuable. He also recommended the addition of other lands to the reserve.
23. From 1921 to 1926, Canada referred to the lands set aside for the Waterhen Lake Band as Waterhen Lake Indian Reserve Number 130. There is extensive correspondence relating to the Band’s reserve lands, replacement lands for school lands within the reserve, use of the reserve, and the removal of squatters on the reserve lands.
24. On October 24, 1923, the Department of the Interior recommended that once the exchange of lands for the school lands within the Waterhen reserve was done, “the lands finally selected by the Department of Indian Affairs comprising an area of 29187.40 acre, more or less, shown coloured pink on sketch No. 2 beneath, be set apart by Order in Council as an Indian Reserve.” Sketch No.2 showed the lands described by Taylor in 1921, as well as two additional sections of land in Township 63 Range 17.
25. By Order in Council on November 17, 1924, the DIA acquired the sections reserved for school lands within the Waterhen Lake Indian Reserve.
26. Once the school lands were acquired, on November 3, 1925, the Department of Indian Affairs prepared an Order in Council to confirm Waterhen Lake Indian Reserve Number 130 and withdraw the lands from the operation of the *Dominion Lands Act*. The reserve was 29,187.40 acres in size and was described and demarcated on the survey plans of the townships in which the lands were located. These townships had been approved and confirmed by the Surveyor General of Dominion Lands.
27. On November 28, 1925, DIA Secretary McLean stated that it was doubtful enough Indians would join Treaty 6 to justify a reserve of this size for the Waterhen Lake Band. He recommended delaying the confirmation of the Waterhen Lake reserve.
28. In 1926, the Department of the Interior wrote to McLean and proposed to remove the reserve designation from the lands at Waterhen Lake. McLean replied that a reserve of approximately 11,000 acres was needed for the Waterhen Lake Band, in addition to another 10,000 acres for members of the Band expected to join Treaty.
29. On July 24, 1926, McLean instructed Land Surveyor Fairchild to select lands for the Waterhen Lake Band. On November 30, 1926, Fairchild reported that he

advised the Band “agree to have the lands selected by me constitute their reserve.” The lands were identified by their legal descriptions on the township plans. No survey was conducted.

30. On May 2, 1930, Order in Council P.C. 917 confirmed 19,772.80 acres of land as Waterhen Indian Reserve Number 130. The lands were described in relation to the township plans. Two sections in Township 61, Range 16 were included as reserve lands, and had been identified as essential haylands on April 13, 1921 by DIA Secretary McLean.
31. The acreage confirmed by the 1930 Order in Council was a 33% reduction in the size of the reserve which had been selected and demarcated on township plans by the Crown and the First Nation at the time of adhesion to Treaty 6 in 1921.
32. A map for illustrative purposes is attached as a Schedule showing the lands reserved for the First Nation in 1921 and the lands that were confirmed by the 1930 Order in Council.

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

33. After repeated attempts by Canada, the First Nation adhered to Treaty 6 on the basis that its reserve lands were identified on the survey plans of the townships and the Indian Agent was authorized to set aside those lands as reserve at the time of Treaty adhesion. A reserve under the *Indian Act* for the First Nation was created when the First Nation and the Indian Agents signed an adhesion to Treaty 6 on November 8, 1921.
34. The reserve for the Waterhen Lake Band was identified on the official township plans. The lands were selected and confirmed by a duly authorized Crown official in consultation with the Band; the lands were described and demarcated on official survey plans of six townships (Townships 61, 62, 63, and 64, Range 16; and Townships 63 and 64, Range 17, both West of the Third Meridian) around and near Waterhen Lake; and the Band had made use of and lived on those lands for generations. The location of the 29,187.40 acres was accepted by Canada and the Band. Once those criteria have been met, a reserve as defined by treaty and the *Indian Act* has been created. No further steps were necessary.
35. Once a reserve is created, it can only be alienated or disposed of in accordance with the provisions of the *Indian Act*. There was no surrender or expropriation of these reserve lands.
36. An Order in Council is not a requirement to create a reserve. At most an Order in Council is an administrative tool to confirm a reserve that has already been created.

37. The Crown's unilateral action in 1930 to confirm only 19,772.80 acres as a reserve for the Waterhen Lake Band was done without valid legal authority and was an unlawful alienation of 9,414.60 acres from the reserve created in 1921.
38. If Canada takes the position that the First Nation's reserve was limited to the 19,772.80 acres described in the 1930 Order in Council, Canada breached its Treaty, fiduciary and honourable obligations when it alienated and failed to recognize 9,414.60 acres that had been set aside and understood by the Crown and the First Nation to be reserve lands at the time of the First Nation's adherence to Treaty 6. These lands had been promised to the First Nation by the Crown representatives at the time of adherence to Treaty and were used as an inducement to sign the Treaty.
39. Canada further breached its Treaty, fiduciary and honourable obligations when it failed to set aside lands for timber for the First Nation as was promised to the First Nation at the time of adherence to Treaty 6.
40. In summary, the Waterhen Lake First Nation submits that:
  - (a) A reserve of 29,187.40 acres under the *Indian Act* was created for the Waterhen Lake Band by no later than November 1921;
  - (b) The Crown acted without valid legal authority when it unlawfully alienated 9,414.60 acres of the reserve in 1930; and
  - (c) The Crown breached its Treaty, statutory, fiduciary and honourable obligations to the First Nation when it failed to recognize 9,414.60 acres as part of the First Nation's reserve and when it failed to set aside lands for timber purposes.

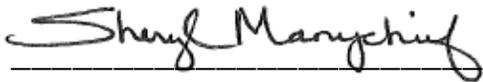
## **VII. Relief Sought**

41. The First Nation seeks the following relief:
  - (a) Equitable compensation for Canada's unlawful alienation of 9,414.60 acres from the First Nation's reserve lands in 1930 without legal authority, including current unimproved market value of those lands, loss of use of those lands and interest thereon;
  - (b) Equitable compensation for Canada's breach of the terms of Treaty 6 and breach of its fiduciary and honorable obligations in unlawfully reducing the size of the First Nation's reserve and failing to set aside lands for timber;
  - (c) Equitable interest calculated from the date of the breach to the date of the judgment or award;

- (d) 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
- (e) such other relief as this Honourable Tribunal deems just.

Dated this 26<sup>th</sup> day of August, 2019, at the City of Calgary, in the Province of Alberta.

**MAURICE LAW**



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**Schedule – Waterhen Lake First Nation Reserve Lands**  
 (land markings are an approximation for illustrative purposes)

