

RETURNING THE LAND: THE ISLAND LAKE BAND MINISTIKWAN CLAIM

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Abstract/Resume

An Indian Band in northern Saskatchewan lost some Reserve land improperly in 1916. In 1980 Canada and Saskatchewan began working with the Island Lake Band to restore the land to Reserve Status. Following detailed negotiations, a settlement was achieved in 1991. The process illustrates the intricacies of specific claims.

Une bande indienne du nord de la Saskatchewan perdit d'une manière malséante quelque terrain de Réserve en 1916. En 1980, le gouvernement du Canada et la Saskatchewan ont commencé à travailler avec la Bande Island Lake afin de restituer au terrain le titre de Réserve. On a résolu le problème en 1991 après des négociations détaillées. Le procédé fait remarquer les complexités des revendications précises.

Introduction: the Context

In western Canada, Indian matters have primarily been federal matters. Indian land claims are no exception. Provincial involvement with Treaty land entitlements has been significant, but other Indian land claims have generally been a federal concern.¹

A number of western Indian Bands have not yet obtained all the land they are owed under the treaties; as a result, those Bands have outstanding "Treaty land entitlements." The prairie provinces, along with the federal government, have a significant role to play in these Treaty land entitlements because of the Natural Resources Transfer Agreements concluded in 1929 (Manitoba and Alberta) and 1930 (Saskatchewan).

Prior to 1930, the federal government owned all Crown land and resources in the three prairie provinces. The Transfer Agreements,² which provided for the transfer of the bulk of this land to the respective provincial governments, also enabled Canada to request unoccupied provincial Crown land from those governments if required to fulfil the Treaties.

Treaty land entitlements have occupied the bulk of the Government of Saskatchewan's attention in the land claims area since 1930. This is not surprising given the unique provincial obligation prescribed by the 1930 Transfer Agreement.

Apart from Treaty land entitlements, the Province of Saskatchewan has typically played little part in the settlement of Indian land claims. Most of these claims have arisen from past, improper federal action. As the party giving rise to the claims, the federal government has borne the onus to resolve them.

Many specific claims in Saskatchewan centre on previous federal attempts to remove land from Reserve Status. In some instances, efforts to alienate Reserve land were ineffective, although that was not known at the time. In addition, instead of being sold to private parties, the land was thought to have been transferred to the Province along with other federal Crown land and resources in 1930. The Province subsequently administered the land in good faith, issuing dispositions on the assumption it owned the land. With this category of claim, the Province is an important, though often initially unwitting, party.

On October 6, 1980, the Honourable John Munro, then Minister of Indian Affairs and Northern Development, informed Saskatchewan of a well-founded claim of this type. This was the Ministikwan claim which had been submitted to the federal government for validation by the Island Lake Band in September, 1979. The Ministikwan claim was the first such claim involving the Saskatchewan Government in

provincial corporate memory, and it took the government some time to determine its response.

Since 1980, however, comparable claims have been advanced, and others can be expected in the future. (Two James Smith Band claims have similarities to the Ministikwan claim; Indian Affairs indicates a number of other surrender claims will be forthcoming.) As a result, the lessons learned in the Ministikwan case may have a broader application in the future.

The Origin of the Ministikwan Claim

The Ministikwan claim had its origin in the establishment in the early twentieth century of a Reserve for the Island Lake Band at Ministikwan Lake, located approximately 70 kilometres west of Meadow Lake, Saskatchewan, not far from the Alberta border. The preference of Indian Affairs at the time was to have a single Reserve for the Indian people living at Ministikwan Lake and at two other communities in the area. In 1911, the federal government set aside a Reserve sufficient for 250 persons at Ministikwan Lake. 250 was the combined population of the three communities.

After the Reserve was created, however, the 80 Indian people not residing at Ministikwan Lake refused to move there. Instead, they wanted separate Reserves created in their own communities.

Indian Affairs officials of the day ultimately decided to reduce the Ministikwan Reserve to a size warranted by the number of people who were resident on that Reserve. The Island Lake Band members at Ministikwan Lake opposed the reduction. As one official at the time complained, "The Indians actually living at Ministikwan refused to understand that this Reserve was laid out for the Makwa Lake and Lac des Isles Indians as well as for themselves and made strong objection to its being reduced" (Robertson, 1915).

Despite the negative Indian reaction, a federal Order-in-Council was passed in 1916 to remove 10,279 acres from the Reserve. The remaining, smaller Reserve was consistent with the Treaty requirement for the 170 Band members who were living at Ministikwan Lake in 1911 when the original Reserve was created.

The 1916 Order-in-Council reducing the Reserve was approved without the prior surrender required under the *Indian Act, 1906*. All parties now agree that the Order-in-Council was null and void as a result of that omission. However, this fact was not confirmed in a final settlement agreement until over a decade after John Munro first notified the Province about the claim.

Factors Prolonging the Settlement Process

Progress on the claim was hampered by a lack of continuity in officials responsible for the file. The settlement process from 1980 to 1991 saw two provincial elections, one resulting in a change of government and the other a change in Minister. Provincial officials were replaced following the accession of the Conservative administration to power in 1982, and they were changed again several times in subsequent years.

Several different federal officials dealt with the claim in the same period.³ Both federally and provincially, there was invariably a time lag as new persons responsible for the claim became familiar with it. The complexity and the novelty of many of the issues that arose with the claim also help to explain the time taken to resolve it.

Following the apparent alienation of the land in 1916, a number of interests were gradually established. Dealing with these interests and other issues related to the claim took time and creativity.

Initial Positions

The Band goals in advancing the claim were straightforward: return of the land and damages for loss of use from 1916 to the present (Munro, 1980b). After validating the claim, the federal government had no hesitation agreeing that the land should regain Reserve Status. Loss of use compensation, however, caused more problems.

As Minister Munro notified Chief Ernest Crookedneck of the Island Lake Band:

I am informed by the Department of Justice that if the lands can be fully restored to reserve status, in their view there can be no basis to pay damages for loss of use (*Ibid.*).

The Minister did add, as a more positive note, that the Band might be entitled to any revenues earned from the land since 1916 (*Ibid.*).

The federal Minister wrote to the Honourable Ted Bowerman, Saskatchewan Minister of the Environment (and Minister Responsible for Treaty Land Entitlement), about the claim on October 6, 1980, and informed him that the claim was valid. In the federal view, the land had not been alienated in 1916 and did not pass to the Province in 1930 (Munro, 1980a).

Saskatchewan's initial response was prompt and instinctive: "surrender claims are a matter that must be resolved exclusively between the Bands and the federal government" (Bowerman). After further reflection, the Province altered that position. While

Saskatchewan may have viewed past surrenders as a federal responsibility, this was apparently not an effective surrender. As the party purporting to own and administer the land, the Province could not avoid being involved in the claim.

Phase 1, 1980-1985: Establishing a Negotiation Framework

The five-year period from 1980 to 1985 was not a period of negotiations; instead, a framework for negotiations was established.

As Saskatchewan began to examine the claim in depth, it was entering uncharted territory with little related experience on which it could draw. A first focus was the legal situation. Successive internal legal opinions moved from casting doubt on the validity of the claim to accepting the federal conclusion that the land alienation attempted in 1916 had not been effective.

The Province disagreed, however, with Canada's view that revenue collected for the claim area since 1916, which the Province received since 1930, should be paid to the Band. A repayment of revenue could be seen as an alternate form of loss of past use compensation. The Province concluded that, since the claim was based entirely on improper federal action, the responsibility to pay any costs of settling the claim was entirely federal as well. In any event, the amount of revenue from the claim area, based on lease fees, was not large.

Federal Ministers, like provincial Ministers, changed in the initial five-year period. On January 1, 1985, a new Minister of Indian Affairs and Northern Development, the Honourable David Crombie, outlined a revised federal position:

- Canada would pay any damages for loss of use;
- revenues from the land since 1930 should be paid by Saskatchewan to Canada;
- Saskatchewan should pay for any rights-of-way it required;
- third party interests should be properly addressed; and
- compensation to the Province for improvements, a point raised by Saskatchewan in a previous meeting, would have to be given careful consideration (Crombie, 1985).

On August 30, 1985, the Honourable Sid Dutchak, then Minister of Indian and Native Affairs for Saskatchewan, finally provided the provincial position that had been outstanding since Ted Bowerman's initial response in 1980. Minister Dutchak affirmed Saskatchewan's willingness to negotiate a return of the land to Reserve Status. His offer, which opened the way to negotiations, was subject to three conditions:

- Saskatchewan must not pay compensation;
- a right-of-way for a highway through the claim area must be provided at no cost; and
- third party interests must be fully protected or compensated.

Saskatchewan also reserved the right to claim compensation for improvements (Dutchak, 1985).

Saskatchewan's insistence on not paying compensation and on the right to claim compensation for improvements was consistent with its view that Canada should pay all costs of settlement. The justification for demanding a highway right-of-way at no cost is less obvious. If there had never been an attempt to alienate the Reserve land, compensation would have been required in order to obtain a right-of-way. On the other hand, one highway and certain roads were constructed in the claim area in ignorance of the true legal situation. Canada's improper attempt to alienate the Reserve land was the root of that problem.

The Province was also concerned about third parties. Possible provincial liability for issuing ineffective dispositions, even if done in honest error, may have influenced Dutchak's position. At least as important, any third party dissatisfaction with a settlement would inevitably be directed to the Province, rather than the more distant federal government, regardless of the rights and wrongs of the situation. It is not surprising that Saskatchewan insisted on the full protection or compensation of third party interests.

Compensation for Loss of Past Use

Minister Dutchak's August 30, 1985 letter led to three-party negotiations later that year. The aim, consistent with the Band's primary objective, was to return the land to Reserve status. The second demand of the Band, damages for loss of past use, was given less attention.

The Honourable David Crombie accepted the idea in 1985, but later federal negotiators showed little willingness to include this compensation in a settlement package. In this, they were consistent with the position taken by John Munro in 1980 with his conclusion that compensation would not be required if the land were returned to Reserve status.

Equally important, compensation also appeared to be less important to the Band than having the land regain Reserve status as soon as possible. It became increasingly evident through the decade that the claim area had considerable natural gas potential, and this was something the Band was anxious to exploit (Meekins, 1991).

In January, 1989, the Island Lake Band passed a Band Council

Resolution offering to forgo any loss of past use compensation in exchange for a settlement within 18 months. This removed a difficult issue from the negotiation agenda and expedited a successful conclusion. In recognition of the Band's position, Saskatchewan agreed it would not seek compensation for improvements.

Phase 2, 1985-1991: Negotiations and Settlement

The loss of past use issue was a distinct matter affecting the Band. That issue aside, the general approach in negotiations from 1985 was to determine how to deal with existing provincial and third party interests and, once they were satisfactorily addressed, to proceed to recreate the Reserve.

Provincial Interests

Provincial interests were dealt with as a first order of business because, unless they could be accommodated, there would be little point beginning discussions with third parties. The provincial interests were varied:

- location of the claim area in Fur Block 49;
- legislative inclusion of the claim area in the Provincial Forest;
- statutory road allowances;
- water beds and water rights;
- a SaskTel telephone cable in the claim area;
- designation of 6 1/2 sections of land as Critical Wildlife Habitat under *The Critical Wildlife Habitat Protection Act*; and
- a SaskPower electric distribution line.

Some provincial interests were readily accommodated. Relevant parts of the claim area would have to be withdrawn from the Provincial Forest and Critical Wildlife Habitat designations. While the entire claim area would also have to be excluded from the Fur Block, this would be an uncomplicated procedure.

The Fur Block involved third party members, but these were exclusively from the Island Lake Band. Withdrawal from Critical Wildlife Habitat designation, in contrast, raised the possibility of opposition from the Saskatchewan Wildlife Federation. However, there was little real choice with any of these de-designations; given the underlying legal status of the land, the designations were ineffective in any event.

The SaskTel telephone cable and SaskPower line also did not pose problems. These types of interests have been addressed without difficulty in Treaty land entitlements and on existing Reserves with permits under Section 28(2) of the *Indian Act*.⁴ The same mechanism was employed in the Ministikwan settlement.

Road Allowances

Regular road allowances are set aside by legislation in the surveyed part of Saskatchewan; the ownership of these road allowances in the Ministikwan case was not clear. The Province and the federal government took contrary positions, and it became apparent the matter could only be decided by the courts.

Recourse to the courts, on this or any other issue, was something the negotiation process was intended to avoid. As an alternative, the parties finally agreed to disagree on the road allowance issue. The settlement agreement was not to alter the existing ownership of the road allowances, except to the extent that the ownership was based upon the validity of the 1916 Order-in-Council purporting to reduce the size of the Reserve.

Water Issues

The water issue had many parallels to the road situation. A similar solution was adopted for water as well, but only after considerable discussion internal to the Province and with the other parties.

The ownership of water beds and water rights was at issue. These are important concerns in Saskatchewan where, in the southern part of the Province at least, water is often in short supply. The priority that the Province placed upon water management was evident in the creation of the Saskatchewan Water Corporation on July 1, 1984. This is a Crown corporation with the mandate to manage water as a provincial resource on behalf of all Saskatchewan residents.

Not far into the active negotiation of the claim, the Saskatchewan Water Corporation stated its position: water rights in the claim area belonged to the Province and should be retained. Also, the bed and shore of one river in the claim area should be excluded from the planned transfer because that water body was important to water management.

The legal situation was unclear. Either the Province owned the water rights and beds and could retain them as it chose, or the federal government and the Band were in effect being asked to concede Saskatchewan ownership as part of the settlement. Understandably, the Island Lake Band was not willing to give up any water bed or water right ownership that it might have. Indian Affairs supported the Band position.

The current ownership of the water rights and water beds depends upon the status of the ownership when the Reserve was created. Saskatchewan suggested that the *North-West Irrigation Act*,

1898, had the effect of excluding watercourses from the Ministikwan Reserve when it was established in 1911. Canada did not agree. To resolve the impasse, the road allowance solution, to agree to disagree, was adopted. As a result, the settlement agreement was not to alter any ownership of water rights or water beds that was not dependent upon the 1916 Order-in-Council.

If the Province owned the water beds and rights despite the ineffective Order-in-Council, provincial aims would be met. If not, it had to accept the fact it would not gain this ownership through the settlement of the claim.

The "Agreement to Disagree" Approach

The way in which the water and road issues were addressed, ie. leaving certain legal issues unresolved while not altering the *status quo* (whatever it might be), may merit consideration as a conflict resolution mechanism in other jurisdictions. In Saskatchewan, this approach was also used to good effect in 1989 in the Lucky Man Band Treaty entitlement settlement, where water rights were at issue. If practical issues arise in the future, they can be dealt with by the courts or further negotiation at that time. In the meantime, neither party is any worse off, and the settlement can proceed.

Third Party Interests

Like the provincial interests, third parties in the Ministikwan claim were of different types. They also varied over time. Originally, interested third parties were the following:

- 3 agricultural lessees;
- 1 agricultural permittee;
- a Ducks Unlimited project;
- Meadow Lake Sawmill Company Forest Management License Agreement; and
- the Rural Municipality of Loon Lake with tax loss and road concerns, and a quarrying lease.

With these third party interests, the passage of time and a provincial freeze on new dispositions improved the situation. The Province placed the area under a freeze against new mineral dispositions in 1980. In 1984, the freeze was extended to other relevant provincial departments, and in 1987 the continued application of the freeze by those departments was confirmed.

The application of the freeze gradually reduced the number of third party interests. After 1985, the quarrying lease lapsed and was not reissued. The Meadow Lake Sawmill Company Forest Management License Agreement (FMLA) was replaced by the

NorSask FMLA. As a result of the freeze, the claim area was excluded from the new FMLA. This eliminated a difficult third party interest. Finally, when the agricultural permittee abandoned his disposition in 1986, no new disposition was issued because of the freeze.

The Ducks Unlimited interest was also easily addressed. After detailed examination, it was determined the interest did not impact on the claim area, contrary to what had previously been assumed.

The remaining third party interests, the agricultural lessees and the Rural Municipality, posed more difficulties. The problem was not lack of agreement on the goal. The aim, supported by all parties, was to deal fairly with third party interests and, ideally, to develop a final settlement with which those third parties would be content. The Band, while not sacrificing its own objectives, fully recognized the value of treating its neighbours fairly; the cooperative attitude displayed by the Band did much to ensure a final happy result.

With the agricultural lessees, there was early agreement among the two governments and the Band on the optimal approach. The lessees would be offered replacement leases issued by the federal government under the *Indian Act*. Canada would pay compensation if necessary.

Through the negotiations, Canada, the Band and Saskatchewan had to refine their understanding of the terms to be offered to the lessees. The provincial policy of automatically renewing leases upon expiry complicated the development of comparable federal lease options. The need to compensate lessees for improvements when a lease was given up or expired also required detailed discussion.

The Rural Municipality of Loon Lake, where the claim was located, wanted to ensure roads would be open to the public and would be maintained. It would also experience an ongoing tax loss when the claim area was taken out of its tax base with the re-creation of the Reserve.

The Sensitive Nature of Third Party Interests

A more difficult aspect, particularly for provincial negotiators, was uncertainty about the length to which the parties would have to go to ensure that third party interests not only were treated equitably, but also were satisfied with the treatment they received. Stated another way, did third parties have a veto on the settlement if they were not content with the terms they were offered?

This may appear to be a strange question given the federal/provincial/Band consensus that the land, at bottom, remained Reserve land. It could be argued that third parties should be content with whatever reasonable accommodation they were offered,

because a court determination of the status of the land might offer them much less. The August 30, 1985 Dutchak agreement to negotiate the claim was conditional on the full protection or compensation of third party interests, however, and this remained an important provincial government concern.

The provincial sensitivity about third party interests owed much to events in the early 1980s when a number of stormy public meetings were held on Treaty land entitlement selections. The hostile reaction of pasture patrons and others made an impression upon the government that assumed office in 1982. Significantly, the entitlement issue had been a volatile one in the Meadow Lake constituency where the Ministikwan claim was located.

In December, 1986, provincial Ministers were updated about the status of the claim and the plan to proceed to contact third parties. This resulted in a lengthy Ministerial and Cabinet review of the claim and, in particular, the third party dimension. In May, 1988, authorization was given to proceed, on the assumption that an arrangement satisfactory to third parties could be negotiated.

In the end, the issue of whether or not third parties effectively had a veto did not have to be resolved because the third parties were all satisfied through arrangements suited to their circumstances. Varying components, including a substitute lease, compensation for improvements and alternate land off the claim area to develop, were used to satisfy the agricultural lessees.

The road concerns of the Rural Municipality of Loon Lake were readily resolved. Rights-of-way for public roads were to be provided under Section 35 of the *Indian Act*, and the R.M. agreed to continue to maintain them.

The tax loss issue, affecting the Rural Municipality of Loon Lake, has been a local concern in Saskatchewan for several years as a result of Treaty land entitlements and the 1986 settlement of the White Bear claim. (In the White Bear claim, two former Bands were reconstituted. The settlement provided money for the purchase of Reserve land for the two Bands. Once purchased land gains Reserve status, however, it is removed from the local municipal tax base. Rural municipalities affected by the White Bear land purchases argued strongly for tax loss compensation from the federal government, but, aside from compensation provided for one parcel, the rural municipality concerns in that claim have not been satisfied.) The Saskatchewan Association of Rural Municipalities, while supporting the settlement of claims and Treaty land entitlements, has vocally argued that the cost of settlements should be borne by Canada rather than by local taxpayers.

The annual tax loss of the Rural Municipality of Loon Lake as a result of the re-establishment of the Reserve was not estimated to be large (approximately \$600). The Ministikwan negotiations were complicated, however, by the broader perspective. The federal government contemplated the Band paying compensation to the Rural Municipality in one payment of approximately ten times the annual tax loss. In the Treaty land entitlement context, the Saskatchewan Association of Rural Municipalities was arguing for a much higher level of compensation.

The Ministikwan case was different than Treaty land entitlements, where Bands are entitled to a specific amount of land, but not to any particular parcel of land. Similarly, Ministikwan differed from the White Bear specific claim in which the reconstituted Bands were given money to buy land, but there was no subsisting claim to any specific parcel of land.

In the Ministikwan claim, a defined area of land effectively had Reserve status that had gone unrecognized for a number of years. Here the Rural Municipality claim to tax loss compensation was not compelling. In addition, the Saskatchewan Association of Rural Municipalities respected the right of each member municipality to decide the terms satisfactory to it. The Rural Municipality of Loon Lake agreed with the Band that a one-time payment of \$6,000 was sufficient. The money for the tax loss compensation was included in federal funding to the Band for the settlement.

The Method of Restoring Reserve Status

With provincial and third party interests satisfied, the way was clear to return the land to Reserve status. Initially, all parties thought in terms of a transfer of administration and control from the Province to the federal government to allow the Reserve to be re-created. That approach was not consistent, however, with the legal status of the land, which, not having been alienated from the Reserve in 1916, had never lost its Reserve status and had not been transferred to Saskatchewan in 1930. Equally important, a transfer from Saskatchewan would have been problematic because provincial legislation did not allow the transfer of mineral rights except for Treaty land entitlements.

To overcome this obstacle, Saskatchewan proposed that the settlement agreement simply recognize that the land was federal and that Saskatchewan had no more claim to it than it would have had if the 1916 Order-in-Council had never been passed. After close examination and further development by legal counsels, this solution was adopted and proved effective.

Conclusion

On July 19, 1991, politicians and officials gathered with the Island Lake Band at the Ministikwan Reserve to sign the settlement agreement for this longstanding claim.

Representatives of the Rural Municipality of Loon Lake and the lessees were present to share in the celebration; this underlined the success of the negotiations in accommodating all present-day interests in the course of righting a past wrong.

For the Island Lake Band, the settlement of this claim was a vindication of the opposition of their ancestors to the attempt in 1916 to reduce the size of the Reserve. It opened up the way for the Band to exploit the potential of the new Reserve area. For the federal government and Saskatchewan, this settlement provided a number of lessons, approaches and solutions that, it is to be hoped, will help to expedite similar claims in the future.

Notes

1. The opinions and interpretations presented in this paper are solely those of the author. The author was provincial negotiator for the claim from mid-1987 to its conclusion.
2. Separate, but similar, Transfer Agreements were concluded by the federal government with each of the three prairie provinces. All three agreements were enshrined in legislation in 1930, and are now part of the Canadian Constitution.
3. Of the officials dealing with the claim, the late Derek W. Dawson, federal negotiator for the claim from 1986 to 1990, deserves special recognition. Mr. Dawson was indefatigable in pursuing the resolution of the claim and, during his time as negotiator, most of the important understandings among the parties were reached.
4. Depending on the type of line, rights-of-way under Section 35 of the *Indian Act* are also commonly employed.

References

(Note: All sources cited, with the exception of Meekins [1991] are correspondence located in the files of the Saskatchewan Indian and Métis Affairs Secretariat.)

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