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"Without Prejudice"

April 25, 2016

Department of Justice Canada
Prairie Region, Winnipeg Office
301 – 310 Broadway
Winnipeg, Manitoba R3C 0S6

Attention: Paul Anderson

Via Email: Paul.Anderson@justice.gc.ca

Dear Mr. Anderson:

RE: Black River First Nation v. HMTQ (Federal Court Action T-1242-07)
Our File: 115.01

We wrote to you on February 3, 2015, to propose a resolution of this matter. It concerns the glaring disparity between reserve lands allotted to Black River and those under the numbered treaties that immediately preceded it and all those that followed and the lack of free and informed consent by Black River to this disparity at the time of the adhesion document.

We kindly request a response to our proposal before proceeding with next steps in the action.

We would request that the Crown have a serious look at the settlement proposal in light of the many developments in the year that has followed. We ask that Canada now finally meet with us in earnest to resolve this matter.

The new Prime Minister's instructions to the Minister of Justice and Attorney General of Canada include a "different style of leadership" including "identifying ways to solve problems and avoid escalating conflicts unnecessarily". The Minister is directed to take "early decisions to end appeals or positions that are not consistent with our commitments, the Charter or our values". The Prime Minister has stated that "no relationship is more important to me and to Canada than the one with Indigenous Peoples".

The mandate for the Minister of Indigenous and Northern Affairs includes "to support the work of reconciliation, and continue the necessary process of truth telling and healing, work with provinces and territories, and with First Nations, the Metis Nation, and Inuit, to implement recommendations of the Truth and Reconciliation Commission, starting with the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*". Section 28 of the Declaration includes the right to redress in respect of "lands, territories or resources which they have traditionally owned or occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent".

The Review of Specific Claims, released in May 2015 by the Independent Expert Panel, reports the perception among First Nations that Canada has instead been engaged in an "unfair war of attrition" with respect to claims filed with the government.

We invite you to consider that this litigation has been escalating, rather than moving to resolution and reconciliation.

Black River has amended its pleading to make it clear that its requested relief includes a declaration that the surrender is invalid. Canada has responded by inviting the Court to consider the whole question of whether there was pre-existing aboriginal title – even though Black River does not consider it necessary or appropriate to determine that point in this litigation, and that it would be sufficient to recognize that Black River had a "cognizable interest".

Canada also further articulated its position on time-related defences. Black River has responded by making it clear that it will advance a previously untested argument that impugns the whole basis for Canada's approach - which is to seek to avoid responsibility as a federal government, and indeed effectively extinguish claims, by invoking statutes of limitations based on varying provincial standards. This results in an incoherent, absurd, and illegal result whereby the federal government has effectively delegated its exclusive jurisdiction over "Indians and Indian lands" to each province which is enacting general limitation statutes which purport to extinguish Aboriginal and treaty rights. Relying on such statutes in an attempt to extinguish the Aboriginal and Treaty rights of the Black River First Nation through the "back door" of provincial legislation, is not only wrong in law because it does not constitute a "clear and plain" intention of the federal government but it also calls into question the "honour of the Crown" which is "always at stake in its dealing with Indian people".

Such an approach would only promote an escalation of the litigation and increase the expense and delay to both sides along with the scope and risks to the Crown of a precedent that could have broad and sweeping implications.

Black River is firmly and irrevocably resolved and equipped to pursue this claim, no matter how long and difficult the road. But rather than use up resources on fighting in the courts, with the potential loss of a large fraction of the value of this claim, Chief Sheldon Kent and his Council would much rather see this matter resolved quickly and in a spirit of reconciliation.

Canada has sought to achieve reconciliation and clarity by resolving aboriginal title issues through the entering into modern treaties. This case could lead to the opposite result: replacing a historic treaty with an unresolved aboriginal title.

Black River's challenge to Canada's use of provincial limitation periods, if successful, would throw that whole line of defence into disarray.

Black River has submitted a detailed claims position and now a settlement offer. In this letter, we will attempt to further place these issues in their overall historical and current context.

This historic grievance begins with a group of First Nations in extraordinarily difficult circumstances. These were the result of the impact of settlement. Smallpox and other illness for which there was no inherited immunity decimated populations. The western Canadian economy was further devastated by the decline of the North American buffalo herds – due to factors such as European hunting technologies and the disruptive taking up of land for other purposes. The

introduction of steamer travel on Lake Winnipeg eliminated hundreds of jobs in the trading economy. Famine became a real concern.

Canada knew well the conditions with which Treaty 5 First Nations were faced. The honour of the Crown and its fiduciary duties required it to treat Treaty 5 First Nations fairly, and in a reasonably comparable manner to other First Nations.

Instead, Canada took advantage of the situation and imposed on Treaty 5 First Nations worse terms than offered to any First Nation from Treaty 3 to the end of the numbered treaties. Treaty 5 First Nations were afforded only a quarter of the reserve land allocated to the rest.

This approach was not fair.

When dealing with a people under duress, faced with severe threats to their way of life, means of subsistence and health, contending with a language and legal concepts unfamiliar to them, Canada's duty was to offer just terms to Treaty 5 First Nations. In dealing with Treaty 4, by contrast, Canada emphasized that it was acting "liberally" and "justly" and that it was providing for more in the treaty than the First Nations had even asked.

It makes no sense to say that Canada's harsh treatment with respect to the amount of reserve land reflected the poor agricultural quality of the land. Canada itself wrote into the treaty that it wanted Treaty 5 people to pursue agriculture. Black River and other First Nations were in fact turning to cultivation to try to survive. If land is difficult to cultivate, potential farmers need more of it, not less.

Furthermore, a fair deal must be evaluated by what it is worth to the buyer, not only the "seller". Canada acquired for itself 100,000 square miles of land in the Treaty 5 area. Moreover, Canada understood that whether or not land was well suited for agriculture, it was good for purposes that Canada wanted, such as extracting minerals, logging and transportation routes.

Canada's approach was also discriminatory. Even-handed treatment among those to whom fiduciary duties are owed is a core, ancient and abiding principle of equity. Canada itself repeatedly informed First Nations that it must treat all of her First Nations' children in a reasonably equal manner. Canada certainly invoked this principle as a basis for not expanding benefits.

The basis of comparison with other treaties must begin with the Treaty 3 model. Canada's own pre-eminent treaty negotiator, Alexander Morris, stated in a public report that it would shape the later treaties. Canada itself repeatedly invoked the Treaty 3 model in later treaty negotiations. The Treaty 3 reserve land provisions – of one square mile per family of five - were applied to all subsequent numbered treaties – except Treaty 5.

The reserve land provisions of Treaties 1 and 2 were not used as the general model for later treaties. There were many good reasons for that. Both treaties were negotiated in a manner that was sufficiently problematic that Canada had to go back and amend these treaties to reflect the non-inclusion of the "outside promises".

Treaty 3, the general model, in fact reflects the condition of the lands in the Treaty 5 area. As J.R. Miller, Professor and Canada Research Chair, has written "why lands equally inhospitable to agriculture in northwestern Ontario were handed out at a rate four times that of Treaty 5 was

not obvious, unless the explanation was that the Saulteaux and Cree of Treaty 3 were harder bargainers".

Canada in its pleadings seems to suggest that the consent of Treaty 5 First Nations absolves Canada from the unfairness and discriminatory nature of its conduct. Black River does not agree. In the context of the duress and lack of understanding of settler law faced by Treaty 5 First Nations, and the unfair and discriminatory negotiating tactics used by Canada, the Crown is not excused from remedying its exploitative terms with respect to reserve lands.

The Supreme Court of Canada has made it clear that once the Crown has made an error in carrying out its duty to a First Nation, it has a legal duty to redress it. Instead, Canada here seeks in many ways to compound and exploit injustices:

- A people's way of life, indeed survival, is jeopardized by new arrivals; instead of forthrightly protecting that people, its government exploits their vulnerability to obtain an unfair bargain;

- Equal treatment among First Nations is now invoked by the Crown to reject requests for reasonably comparable treatment - even though at the time of the treaties the Crown relied on the principle of non-discriminatory treatment among First Nations, insisting that some earlier treaty placed a ceiling on what could be agreed upon in a later one;

- A people who need more land to cultivate because much of it is not fertile are now told by the Crown that therefore they should obtain less of it;

- With Treaty 5, unlike other treaties, the Crown dictated that reserve land cannot be discussed until other issues are disposed of; yet now the Crown pleads that Treaty 5 First Nations were more interested in issues besides reserve lands;

- The Crown argues that the consent of the Treaty 5 First Nations absolves the Crown of securing harsh and discriminatory terms, even though that consent was secured through harsh and discriminatory negotiating tactics. Unlike earlier treaties, where First Nations could meet, deliberate, and bargain as a group, the Crown adopted a divide and conquer strategy securing signatures from isolated groups one at a time. Rather than engage in the protracted (by the standards of the time) negotiations as with other groups, the Crown spent no more than a day on each encounter;

- The Crown in its pleadings makes argument about what Treaty 5 First Nations understood or should have understood at the time of the treaty negotiations. Yet, unlike with other Treaties, the Crown did not maintain a written record of the content of the treaty discussions.

What records do exist by the Crown establish all of Black River's key points. The most senior negotiator, Alexander Morris, in his chronicles of the Treaties of Manitoba and the Northwest Territories, acknowledges the following:

- The Crown assured other First Nations of its desire to deal with First Nations "fairly and frankly" (p. 30) and "to make good offers" (p. 106); that the Queen "acts in daylight" and that the Crown only had the First Nation's "good at heart" (p. 109); that the Crown has a "heart that loves the Indian people" (p. 5) and "would do all that men who love their Indian brothers can do" (p. 117);

- The Crown assured other First Nations that it would do what was "right and just"; that "we should do everything to help you by giving you the means to grow some food, so if it is a bad year for fishing and hunting, you many have something for your children at home. If you had not asked it the Government would have done it all the same, although I had not said so before" (p. 70);

- The Crown informed the public after securing the signatures that Treaty 5 lands included valuable timber, fish, that there were indications of mineral resources (p. 139), and was needed for transportation (143);

- The Crown further acknowledged to the public, after securing the signatures, that the Treaty 5 First Nations were faced with a disruption of the means of living, and needed farm land, among other means, to subsist;

- Treaty 3 "shaped the terms of all the Treaties four, five, six and seven" (p. 45). In later years, Treaties 8, 9, 10 and 11 were negotiated and every single one of them adopted the reserve land formula of a square mile per family, regardless of the extent to which the land was easily cultivatable;

- The Crown invoked the principle of non-discriminatory treatment among First Nations to reject requests, using language such as "we were trying to do what was just between you and the Queen, and other Indians who would say that we had treated you better than we had treated them" (p. 9) and "we know no difference between Cree and Ojibway" even though the Cree had arrived in a particular area earlier (p. 109);

- The Crown further admitted that the Treaty 5 First Nations obtained far less reserve land per family than Treaty 3 and 4 First Nations (p.145);

- The Crown's negotiating tactics included "severing the question of treaty from reserves" (p. 149);

- Instead of offering "just terms" or "more than you asked" or non-discriminatory terms, as in other treaties, Morris reported of Treaty 5 negotiations that "every arrangement was made to serve the utmost economy in effecting the treaty, and yet to give satisfaction to the Indians concerned" (p. 151).

The egregious departure of Treaty 5 from the principles stated and observed by the Crown, both in substance and negotiation tactics, is the historic context for considering Black River's claim. Even within that envelope of Treaty 5 First Nations, the historic treatment of the Black River situation is stark. The evidence is that the leaders who signed the Black River adhesion were not, according to Canada's own records, the chief and councillors of the time. If Canada wishes to resolve this claim, it can do so without pre-committing to the larger issue of Treaty 5 redress.

In modern times, Eastside First Nations in Manitoba continue to suffer from exceptionally high levels of poverty, unemployment, illness and suicide. Part of the path to reconciliation and self-sufficiency is to redress historic grievances. Black River wishes to resolve the past and move forward in partnership with Canada towards cooperation and self-sufficiency.

We conclude this letter where it began. The Prime Minister's instructions propose problem solving – not escalation of litigation – and reconciliation and respect for Fist Nations. The *Tsilhqot'in* case illustrates how an earlier Crown refusal to resolve an issue can result in its escalation, protracted litigation, and ultimately the establishment of aboriginal title over a large area of land. Black River has already taken an initiative in this matter to instead achieve a timely resolution. It has proposed reasonable terms of settlement that would spare both sides litigation and the accompanying cost and fostering of adversarial actions and feelings; that would resolve legal uncertainty and not adversely affect third party interests acquired in the aftermath of the unjust treaty of Black River; that would not set the stage for an unravelling of treaties and the return to aboriginal title claims, when Canada has spent decades trying to secure the reverse; that would be a model act of reconciliation and partnership in this new era, rather than a continuation of a past that First Nations have come to regard as engaging in an unfair war of attrition, rather than reconciliation.

We look forward to your response. If Canada is interested in a just, reasonable and timely resolution, you will find willing partners.

Sincerely,

MAURICE LAW

Per: _____

Ron S. Maurice

cc. **Chief Sheldon Kent and Council, Black River First Nation**

Nation - Treaty 5 Disparity

DRAFT FOR DISCUSSION PURPOSES ONLY

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RECENT SPECIFIC CLAIM SETTLEMENTS *note I have not included any claims of less than $20 million which skew figures

	KAHKEWISTAKAW	PELLY HAYLANDS	ALEXANDER	SIKSIKA	COTE	MUSCOWPETUNG
	1907 Surrender	Unlawful Taking	1905 Surrender	Acreage Discrpncy	Surrenders	Flooding
T AMOUNT	$94,050,000	$73,500,000	$63,000,000	$82,400,000	$130,400,000	$30,643,418
	33,281	12,800	9,518	12,543	15,724	1,139
	1907	1899-1905	1905	1910	1905	1942
	2002	2004	2002	2003	2012	2013
m to settlement	95	105	97	93	102	71
ACRE PER YEAR	1907-2002	1899-2004	1905-2002	1910-2003	1910-2012	1942-2013
	$29.75	$54.69	$68.24	$70.64	$81.30	$378.93
RIVER TREATY 5 DISPARITY - 6,000 ACRES x 140 years (1875) Gross Settlement incl. land value)	$24,987,229.95	$45,937,500.00	$57,319,500.98	$59,337,473.65	$68,295,748.72	$318,298,372.92