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September 29, 2016

To Chief and Council,

Further to my various telephone conversations with the Wahta Council and my review of further new information and case law, I am writing, as requested, to provide a summary of our discussions, all of which have resulted with the decision to not pursue the proposed challenge to the Land Claim Agreement (ie. the "Agreement").

As to have the kind of success that has been asserted in the present claim we would have to successfully challenge the process that was followed that resulted with the surrender and the settlement, I will start with what evidence I have been provided with in connection with that.

Specifically, I'm referring to the evidence in connection with the fact that two votes were held where the Agreement was not ratified because a majority of electors were not present when the vote occurred; and the fact that there was a third vote, called pursuant to section 39 of the Act, where the decision was made to surrender and ratify not by a majority of the electors of the Band but by a majority of electors who attended on the third vote and voted.

The first point I'll raise is the fact that evidence that I have now seen confirms that at the time that there was a vote in the regular meetings (ie where surrender and ratification did not occur) the large majority of those that voted were in favour.

For example, in the second regular meeting that occurred in June 2002, where there was a turnout of just over 180 voters, 85 per cent of those that did vote were in favour.

Also, it is of note that, as the vote turnout above confirms, many did not vote in the regular meetings but that the votes which were cast in those meetings were, particularly given the number that did not vote, just short of the majority which would have been required at a regular meeting to ratify and surrender.

That means that only a small portion of those who did not show up at a regular meeting voting in favour would have resulted with ratification and surrender.

Finally, there is the fact that, as has been confirmed for me, a vote turnout of 180 to 190 is not at all unusual.

What this evidence, in my view, demonstrates, or at least strongly suggests, is that at the time these issues were brought before the community there was a significant amount of support for ratification of the Agreement and surrender.

That appears, based upon what I have seen, to have always been the case.

In other words this does not appear to be a case where a minority were trying to subdue the will of a majority, as was the impression I had.

A second point about the evidence I have in connection with the process is that I cannot find any sort of legal misstep taken by the then Chief and Council or their counsel with respect to the section 39 meeting where the Agreement was ratified and the land surrendered.

While I will note that, (ie. although I am of course aware that ratification and surrender at the section 39 vote occurred), I do not have the vote summary of the section 39 meeting, based upon the evidence made available to me, it appears that all proper notices informing the members, including what they were voting on and the fact that the third vote would be a section 39 vote, were provided for the third meeting where the surrender and Agreement was approved.

This point is important because of the case law about section 39, which confirms that where at a section 39 meeting all proper notices were provided and a majority of those who attend vote in favour, the vote will be valid, even if those that did not attend outnumbered those that did attend and vote in favour.

For example, in a case involving the Iroquois Confederacy called Hill v Canada (1998) F. C. J. No 1150, where a proper section 39 meeting was called and a vote in favour of a surrender was made, a challenge by a group of traditional Chiefs who brought with them a petition against the surrender signed by more than those who voted in favour at the section 39 meeting (ie in that case, 280 voted in favour and 300 signed the petition) was not allowed. In fact, the section 39 vote was also upheld even though there were 4,000 eligible voters.

In another case called Logan v Styres, 20 D. L. R (2d) 416, two surrender votes were upheld where there were 3600 eligible voters and only 37 and 30 voted in favour of the surrenders at the section 39 meeting.

These votes therefore were upheld because all proper procedures for the occurrence of the section 39 meeting and vote were followed and because the votes made at the meeting constituted a majority; and, unless there is more evidence and in particular some evidence from those who were directly involved, the evidence I do have giving rise to these points would make our challenge more difficult, both for the surrender and the settlement.

Considering the process, I also had regard for the fact that there was a No Vote Campaign in the community which I have been told kept people away from the meetings where a vote for ratification was sought.

It was suggested that this may be a basis for avoiding the effect of the section 39 vote.

Unfortunately, the case law suggests that evidence of a No Vote Campaign will not assist us.

For example, in the Logan case, even though there was other evidence the Court accepted confirming that the electors stayed away by choice, (ie. and again, in that case, we are dealing

with two surrenders where only 37 and 30 voters of 3600 eligible voters cast a vote in favour), a challenge to the surrenders was denied.

I therefore do not see this evidence of much assistance.

In fact, as I intimated above, I would not expect the Court to necessarily accept that the No Vote Campaign was the reason why the voters who did not attend and therefore vote at the regular meetings or section 39 meeting stayed away.

The point is the Courts have given great weight to this kind of evidence.

When dealing with challenges where the Government can:

a) rely on a section 39 vote properly called;
b) contend, as I now believe it can contend in our case, that this was not a case where a minority was attempting to subdue the will of the majority; and
c) argue, as I now believe it can argue in our case, that the Wahta people knew exactly what they were doing when they surrendered and ratified;

the battle is usually an uphill battle.

The problem that arises in such situations (ie. where the evidence appears to strongly support the contention that a First Nation expressed a free, voluntary, and fully informed collective intention to ratify and surrender, which was held according to proper procedures), is that the Courts have been treating the First Nation as being held to its vote or consent and places upon the First Nation the responsibility to come up with some explanation why the position of the majority at the time should not prevail.

Another problem that arises in connection with the above, and as I also advised, is the problem that arises from the fact that the community is still split on these issues.

As you know from our last proposed pleading, I have been hopeful that those who do not support the claim, and in particular, those most intimately involved, would support us or would at least contend that they were misled through misrepresentations about the settlement.

What I am particularly concerned about now though, having been advised that there will be no support coming from the other side of the community, is that those who support the Agreement and surrender will not only not support the claim but will be called by the Government to support its position.

They could do this in various ways.

For example, because the Government would, if we moved to strike the terms of the Agreement, be entitled to rely on its previously pled position (ie. such as the fact that all of the lands were not properly classified as reserve lands because only those lands which were actually used or settled

were intended to become reserve lands), we could be facing members of our community who were prepared to testify that this was a significant concern and a reason why concessions needed to be made.

In other words, their evidence could be used to support the fairness of the bargain.

The concerns about how the ratification and/or the surrender gives rise to other case law including case law relevant to the unfair bargain argument.

The first is the Chippewas of Kettle and Stony Point v Canada decision.

This is a case where it was held that the presence of an unfair bargain, unconscionability, or economic duress, do not affect the validity of a vote for the surrender of land, but that that itself does not preclude an action against the Crown for breach of fiduciary duty for alleged bribes and improper conduct.

That means unless we can identify a problem with the process used, the surrender will be upheld.

A second decision is the case Assassin v Canada.

This is a case where a surrender was challenged on the basis of a breach of fiduciary duty.

The Court however denied the challenge.

It held that that the Crown, by making band members aware of the consequences of surrendering the land before the consent to surrender was given, met it's fiduciary duty.

A third case is again the Logan decision because in that case a challenge was denied even though the Court appeared to conclude that the bargain for the First Nation was not a good one.

It held, when commenting on the effect of the vote that “it is difficult to see what advantage would accrue to the Six Nation Indians"

While of course all of these cases turn on the factual situations presented and will not necessarily represent the principles upon which any claim brought by the Wahta would be determined, they do raise a concern and could be used to address arguments that we intended to advance.

Finally, and this relates to the heart of the matter which we would be raising, I have now reviewed some evidence of the value of the land that was released.

Although this appraisal evidence does not value the land as of 2002 or 2003 (ie. when the Agreement was prepared and subsequently ratified), it does not come close to supporting the contention that the value of the surrendered lands was anywhere near what it was suggested to me was its worth. (approximately $300 to $400 million).

The only evidence I have seen values the acreage as of 1986 and 1994 and has the land value at a high mark of approximately $2,000 per acre at that time and so, if one was to extrapolate in a generous fashion from that to 2003 we would be looking at valuations for the surrendered lands of approximately $15 million.

In conclusion therefore, arising from the evidence I've been reviewing and some of the cases connected to that evidence, there are other factors involved in this case that will make it more difficult to succeed and would work against us.

On the one hand we have the unfair bargain argument as a possible basis for establishing a breach of the duty.

However, the evidence that I have now reviewed diminishes the possible success of that argument substantially.

On the other we have the fact that the proper procedure appears (ie. based on what I've been provided) to have been followed, the fact that the Court could rely on that alone to uphold the vote, the cases where that occurred which appear to diminish the role played by fairness (in other words cases where the Courts are considering the process opposite the unfair bargain position) and our having to come up with an explanation why the majority always seemed in favour and were ultimately in favour.

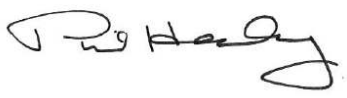
As I also advised I now believe that to succeed we would probably need the support of those who were most intimately involved, which I have been hoping for but have been told is not forthcoming (ie. evidence of bribes, misrepresentations or other improper conduct to go with the unfair argument position).

The question therefore is whether the Wahta are prepared to forfeit what they were provided in the settlement to make that challenge and possibly renegotiate.

I trust that the above properly summarizes our discussions and the basis for the decision.

Accordingly, unless I am advised otherwise, I will advise the Crown that we will not be pursuing the claim.

Yours truly,



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Chronological No.	2016/2017-32
File Reference No.	2016-03.28

Mohawk Council Resolution

The words "from our Band Funds" "Capital" or "Revenue" whichever is the case must appear in all resolutions requesting expenditures from Band Funds

		Cash Free Balance
The Council of the Wahta Mohawks		Capital Account $_____
Date of Duly Convened Meeting: September 28, 2016	In the Province of Ontario Ontario	Revenue Account $_____

Whereas the Wahta Mohawks council of 2011-14 engaged the law firm of Aird Berlis (Phil Healey) who had determined that Wahta Mohawks Land Claim should be reopened due to a breach of fiduciary duty by the Crown, improper referendum process and undervaluation of property on Gibson Lake among other issues that would be considered for research within the documentation from Blaney, McMurtry LLP that handled the claim settlement in 2002.

Whereas Mr. Healey (currently Healey and Associates) provided an opinion letter (see attached Appendix "A") stating that there was a strong case to submit a new statement of claim and reopen the land claim. Chief and Council approved the preparation and submission of a new statement of claim to the courts based on a financial contingency agreement, the mandate of the membership and the opinion of Mr. Healey at that time.

Whereas Hr. Healey has recently provided an updated opinion letter (See appendix "B") outlining his new legal opinion that the land claim should not move forward due to the lack of legal merit and the potential for legal ramifications that pose a risk to our current land settlement including costs.

Therefore it be resolved that Chief & Council do hereby resolve to advise Mr. Healey to remove the Statement of Claim, advise the Federal and provincial governments that this claim is now closed and the current settlement should be finalized as soon as possible.

Effective: October 12, 2016

Quorum: Three

Chief Philip Franks

Councillor Lawrence Schell

Councillor Michael Decaire

Councillor Stuart Lane

Councillor Teresa Greasley

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