

**SPECIFIC CLAIMS TRIBUNAL**

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TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES		
F I L E D	April 17, 2014	D É P O S É
Nicholas Young		
Ottawa, ON	1	

B E T W E E N:

**MOSQUITO GRIZZLY BEAR'S HEAD LEAN MAN 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*.

April 17 , 2014

Nicholas Young

Registry Officer

TO: Assistant Deputy Attorney General, Litigation, Justice Canada  
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**I. CLAIMANT (R. 41(a))**

1. The Claimant, Mosquito Grizzly Bear's Head Lean Man First Nation confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, by virtue of being a "band" within the meaning of the *Indian Act*, R.S.C. 1985, c. 1-5, as amended.
2. The Claimant is the successor in interest to the historic Mosquito, Grizzly Bear's Head, and Lean Man Bands, which were three separate Bands at the time the claim arose (referred to hereinafter as the "First Nation", "Band", or "Bands" depending on the context). The First Nation is located in the Province of Saskatchewan on three reserves set apart for the three Bands: the Mosquito Indian Reserve ("IR") 109 and the Grizzly Bear's Head-Lean Man Indian Reserves 110/111.

**II. CONDITIONS PRECEDENT (R. 41(c))**

3. The following conditions precedent as set out in s. 16(1) of the *Specific Claims Tribunal Act* have 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; ...

4. The First Nation originally filed a claim with the Minister of Indian Affairs on or about February 23, 1995 (hereinafter referred to as the "Claim"), alleging that the Crown owed an outstanding lawful obligation to the First Nation in relation to the 1905 surrender because it was contrary to the mandatory surrender provisions of the 1886 *Indian Act* and the Crown also breached its trust and fiduciary obligations to the Bands in obtaining the alleged surrender on terms that were not in the best interests of the Bands.
5. The First Nation filed a Supplemental Specific Claim Submission dated May 24, 2009 to the Specific Claims Branch for consideration under the Specific Claims Policy.
6. On September 13, 2011, Patrick Boreby, Senior Assistant Deputy Minister of the Department of Indian and Northern Affairs Canada, wrote to then Chief Noel Stone Jr. stating that "based on the analysis of evidence documented by the First Nation and the Specific Claims Branch, and pursuant to *The Specific Claims Policy and Process Guide*, it is the decision of the Minister of Aboriginal Affairs and Northern Development not to accept the 1905 Surrender specific claim for negotiation on the basis that there is no outstanding lawful obligation on the part of the Government of Canada."

**7. CLAIM LIMIT (R. 41(f))**

8. The First Nation does not seek compensation in excess of \$150 million for the purpose of the specific claim.

**III. GROUNDS (R. 41(d))**

9. The following are the grounds for the Claim, as provided for in s. 14(1) of the *Specific Claims Tribunal Act*:

(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;

(e) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority; or

(f) fraud by employees or agents of the Crown in connection with the acquisition, leasing or disposition of reserve lands.

**IV. ALLEGATIONS OF FACT (R. 41(e))**

***Survey of Indian Reserves for the Mosquito, Lean Man and Grizzly Bear’s Head Bands***

10. Chief Lean Man executed an adhesion to Treaty 4 on behalf of the Lean Man Band at Fort Walsh on September 25, 1877. The Grizzly Bear’s Head Band did not sign an adhesion to Treaty 4 but a payroll was created by the Department of Indian Affairs (“Indian Affairs”) for payment of annuities under Treaty 4 to a band led by Chief Bear’s Head in 1880.

11. Chief Misketo (Mosquito) executed an adhesion to Treaty 6 on behalf of the Mosquito Band at Battleford on August 29, 1878.

12. Mosquito IR 109 was surveyed for the Mosquito Band in 1879 and consisted of 36 sections. The Mosquito Band settled on IR 109 in the fall of 1880.

13. Chief Lean Man and Chief Bear’s Head were pressured to leave a large reserve set apart near Cypress Hills for several Assiniboine bands and to instead move from the Treaty 4 area and accept a reserve near Battleford in the Treaty 6 area. In the summer of 1884, Indian Affairs surveyed the Grizzly Bear’s Head-Lean Man Indian Reserves 110 and 111 (described as “Indian Reserves 110/111”). A total area of 36.2 sections (approximately 23,168 acres) was surveyed as a single, undivided block for the Grizzly Bear’s Head Band and Lean Man Band.

14. Pursuant to the Crown’s obligations under Treaties 4 and 6, reserves were surveyed for the Grizzly Bear’s Head Band, the Lean Man Band, and the Mosquito Band. The three Bands and their reserves were separately numbered, indicating that the Crown recognized and treated them as three separate Bands.

***Federal Indian Policies and Pressures on Bands to Surrender Reserve Lands***

15. Following the Northwest Rebellion of 1885, the federal government introduced a number of coercive measures and punishments of bands, like the Mosquito, Grizzly Bear's Head, and Lean Man Bands, that were deemed to be "disloyal" to the Crown for their alleged participation in the events of the Rebellion. One such measure was to break up and amalgamate some bands and abolish the tribal system by "doing away with Chiefs & Councillors".
16. During the period between 1896 and 1911, several surrenders of reserve land were procured from Indian bands on the prairies at the instigation of the Department of Indian Affairs. During this period, the Crown introduced a number of policies and legislative amendments to the *Indian Act* that were designed to encourage and induce Indian Bands on the prairies to surrender some or all of their reserve lands for sale to non-Indian settlers.
17. The Department of Indian Affairs worked in concert with the Department of the Interior, under a single Minister of Interior and Superintendent General of Indian Affairs, to pursue an aggressive policy of obtaining the surrender of Indian reserve lands. The Ferguson Commission of Inquiry in 1915 revealed evidence of widespread graft, corruption, and speculation in the sale of surrendered reserve lands by key government officials such as James Smart, Deputy Minister of the Interior, Frank Pedley, the Deputy Superintendent General of Indian Affairs, and even the Minister of Interior and Superintendent General of Indian Affairs, Frank Oliver.

***1905 Surrender of 14,400 Acres of the Grizzly Bear's Head / Lean Man Indian Reserves 110/111***

18. On May 19, 1905, approximately 14,400 acres, or 22.5 sections, of Indian Reserves 110/111 were purportedly surrendered by the "Stony Band" to the Crown (the "Claim Lands"). This represented more than half of the original reserve set apart for the Grizzly Bear's Head and Lean Man Bands.
19. On February 6, 1905, Indian Agent J.P.G. Day wrote to Indian Commissioner David Laird claiming that the "Indians of the three Stony Bands" had requested a surrender of 22.5 sections of land. Agent Day supported the surrender because the population of the Bands had declined and they "are to all intents and purposes one Band." Agent Day misrepresented that members of the three bands lived together and, if the surrender were approved, they would all live together on the Mosquito Reserve.
20. On February 22, 1905, Assistant Surveyor J.K. McLean forwarded a plan of subdivision showing a proposed surrender of approximately the western two-thirds of IRs 110/111. Indian Affairs officials had already instructed Dominion Land Surveyor Lestock Reid to undertake a subdivision of IRs 110/111 as early as 1903 which confirms that the Crown itself sought the surrender of these reserve lands and considered the surrender to be *a fait accompli* long before Indian Agent Day claimed to have received a "petition from the Stony Bands".

21. On March 23, 1905, the Deputy Superintendent General of Indian Affairs Frank Pedley recommended to Prime Minister Laurier, who was also the Acting Superintendent General of Indian Affairs, that 22.5 sections of IRs 110/111 should be surrendered and sold “for the benefit of the Indians of the Stony Band”. Pursuant to approval from Prime Minister Laurier himself, Agent Day was instructed to seek a surrender from “the Band” in accordance with section 39 of the *Indian Act*.
22. The validity of the petition claimed to have been received by Indian Agent Day and whether the surrender can be relied on as an expression of the Bands’ true understanding and intention are both called into question because a number of key officials in the Department of Indian Affairs who promoted the surrender of Indian Reserves were involved in speculating in Indian reserve land. As a result of the Ferguson commission of inquiry and report in 1915, Frank Pedley was forced to resign from office after the report detailed widespread frauds and abuses on the part of Pedley and other government officials relating to the purchase and speculation in surrendered lands. The wife of Indian Agent J.P.G. Day also purchased some of the Claim Lands.
23. On May 19, 1905, a meeting was allegedly held to consider a proposal to surrender 22.5 sections of land from IRs 110/111. Neither Indian Agent Day nor any other Crown official properly documented the surrender process, including what information was provided to the Bands, the proposed terms of the surrender and sale, or who was eligible to vote on a surrender of IRs 110/111. Consequently, there is no independent evidence of how many members of these bands were present, nor how many voted for or against the surrender.
24. Indian Agent Day later supplied the Indian Commissioner’s office with a document which purports to have been signed by ten members of the Mosquito, Grizzly Bear’s Head and Lean Man Bands at a meeting held on May 19, 1905. The document approved the surrender of 22.5 square miles of IRs 110/111 by the “Stony Band of Indians” to the Crown for sale with the proceeds to be credited to the Stony Band. The surrender states that interest from the sale of the Claim Lands was to be paid to members of the Stony Band annually or semi-annually at the discretion of the Crown.
25. Ten members of the three Bands purportedly attended the May 19, 1905 meeting and signed the surrender as follows:

<b>Band</b>	<b>Name</b>	<b>Band Number</b>
Grizzly Bear’s Head	Jack Peayscouth	75
	Okunbehegia	65
	Stenchiaco	80
Lean Man	Tibiyohi [if Tibiyohi was “Tibio”]	1
Mosquito	Mosquito	1
	Wahoban	50
	Hoobookookos	70
	Sheena Saffe	13
	Pahasic Sheeha	8
	Tabangascat	63

26. There were at least 2 other male adult members of the Grizzly Bear's Head Band who were paid annuities in 1905, and therefore eligible to vote on the surrender: Bostoogon, #82 and Moosomin, #107.
27. The Mosquito Band, Grizzly Bear's Head Band, and Lean Man Band were separate bands at the time of the purported surrender. Yet members of all three Bands were present at the meeting and allowed to vote on the surrender of the Claim Lands set apart only for the Grizzly Bear's Head and Lean Man Bands. The majority of the people present at the meeting, and who purportedly voted on the surrender, were members of the Mosquito Band who were not ordinarily resident on or interested in IRs 110/111 set apart for the use and benefit of the Grizzly Bear's Head and Lean Man Bands.
28. Contrary to both the *Indian Act* surrender provisions and the fiduciary duties of the Crown, Agent Day and other officials misrepresented that the Mosquito, Grizzly Bear's Head, Lean Man Bands were a single band referred to as the "Stony Band" in order to allow all of the adult male members from the three bands to vote on the proposed surrender and sale of a portion of IRs 110/111. A "ruling" from the Departmental Legal Advisor, W.M. Cory, dated July 5, 1949 confirmed that the Mosquito, Grizzly Bear's Head and Lean Man Bands had not been legally amalgamated at the time of the 1905 surrender.
29. Prior to 1951, a process for the amalgamation of Indian bands was not expressly set out in the *Indian Act*. The department's practice and policy at the time required joint meetings, the execution of formal documents, and ministerial approval to effect an amalgamation. The jurisprudence also indicates that the consent of a majority of each band's electors is required to substantially alter the collective treaty rights of the bands, particularly where it would have the effect of extinguishing the status of the Grizzly Bear's Head and Lean Man as separate "bands" with collective rights and entitlements under the terms of Treaty 4.
30. On September 21, 1949, a meeting was convened by Superintendent Bell of the Department of Indian Affairs at which the adult male members of the Mosquito, Grizzly Bear's Head, and Lean Man Bands voted in favour of an amalgamation of the three Bands and to change the name of Indian Reserves 109, 110, 111 to the Mosquito-Grizzly Bear's Head Reserve.
31. In the alternative, if there was a *de facto* amalgamation of the three Bands by 1905 and members of the Mosquito were entitled to vote on the surrender of IRs 110/111 (which is denied), there were at least 12 other members of the Mosquito Band paid as adult members of the Band in 1905 who would have been eligible to vote on the surrender: Norbox-Neesowasis (Two Child), #3; Weboxin (One Mocassin), #4; Askayshe (Shortman), #15; Oshire (Child), #36; Oxinohatyo, #38; Tatonson (Bull), #41; Choyakshe (Frenchman), #76; Whonnie, #83; Tuskasapao KeeChee (Black), #88; Enyennyjap, #99; Eutahab, #100; and Eyahkitayahkok, #101.
32. If members of the Mosquito Band were eligible to vote on the surrender of the Grizzly Bear's Head-Lean Man Reserves 110-111 in 1905, the Claimant submits that the total

number of eligible voters was 24. Since only 10 individuals marked the surrender document, it is alleged that the surrender was contrary to the 1886 *Indian Act* because there is no independent evidence that a majority of the eligible voters (13) attended the meeting on May 19, 1905 and cast votes on the proposed surrender.

33. There are also a number of irregularities with respect to the documentation which further calls into question the validity of the surrender:
- (a) the marks on the surrender document were witnessed by Indian Agent Day, Farm Instructor R. Jefferson, teacher M. Leffler and Agency Interpreter William Venne, with the notable exception of the last mark by Stenchiaco, a member of Grizzly Bear's Head Band who was nearly blind and could not read or speak English or Cree;
  - (b) Stenchiaco did not attend the alleged meeting on May 19, 1905 and, if he did sign the surrender document, it was subsequent to the date of the surrender meeting. This is corroborated by the application of a seal beside Stenchiaco's mark which is clearly different from the seal used beside each of the nine marks preceding it. In addition, while all of the other marks are witnessed by the same witnesses (Day, Jefferson, Leffler and Venne), Stenchiaco's mark is witnessed separately by Day, Venne, C.J. Johnson and the Agency Clerk);
  - (c) On June 6, 1905, about 3 weeks after the purported vote, Indian Agent Day swore the "oath" required of him pursuant to subsection 39(b) of the *Indian Act*. Day swore, *inter alia*, that the surrender was approved by a majority of eligible voters at a meeting he attended and that no ineligible Indians were present at the meeting. Day altered the form of the prescribed oath to reflect the circumstances of the May 19, 1905 vote, swearing the same oath twice rather than having an oath sworn by a member of the Bands as required by the *Indian Act* because the Department of Indian Affairs did not recognize any chief or headman of the "Stony Band" in 1905;
  - (d) the oaths were rejected by Indian Commissioner David Laird, who returned them 11 days later. Laird directed that a second oath was necessary and instructed Day to have a "principal man" of the Grizzly Bear's Head or Lean Man Band (not the Mosquito Band) complete the second oath;
  - (e) on July 10, 1905, Day attempted to submit the oaths which were again rejected because they were sworn improperly before a Notary Public;
  - (f) Indian Agent Day made a third attempt to submit the oath on July 24, 1905 (over two months after the purported meeting took place), having an identical oath sworn by Stenchiaco, who was described as a "principal man" of the Grizzly Bear's Head Band. This third oath was accepted by the Department, and on August 4, 1905 the Indian Commissioner forwarded the surrender documents to the Secretary of Indian Affairs.

34. Only 5 days later, in a memorandum dated August 9, 1905, the Superintendent General of Indian Affairs Frank Oliver recommended that Cabinet accept the surrender by the “Stony Band of Indians”. By Order in Council OCPC 1920 dated November 3, 1905, Cabinet accepted and approved the surrender on the terms recommended by Oliver and also removed the Claim Lands from the 1888 *Regulations for the Disposal of Surrendered Indian Lands*.

***Breach of the Crown’s Fiduciary Duty to Prevent the Surrender and Sale of the Claim Lands on Foolish, Improvident and Exploitative Terms***

June 1906 Auction

35. On October 18, 1905, J.K. McLean, D.L.S. completed a subdivision and submitted a description and valuation of the Claim Lands to Deputy Superintendent General of Indian Affairs Frank Pedley in Ottawa, valuing the land at between \$2.50 and \$5.00 per acre, and recommending it be sold by tender.
36. Despite recommendations that the Claim Lands be sold by tender, Pedley directed the sale be done by public auction. In either late March or in April 1906, advertisements for the sale in Battleford appear to have been run only in those newspapers that were “Approved if on Patronage List”. The sale was not advertised in the newspaper for Battleford itself, nor in the Saskatoon Phoenix.
37. M.J. Kane of Kane Land Co. wrote to Agent Day on April 19, 1906, offering \$7.00 per acre for all the Claim Lands in the surrendered tract. Day forwarded this letter to Ottawa on April 21, 1906, but the Department ignored the offer and instead sold the Claim Lands at public auction even though it knew the parcels were likely to sell for much less by auction than what Kane offered to pay for all of the Claim Lands.
38. S.S. Simpson of real estate firm Champagne, Speers & Simpson, a Battleford man with connections to Day and the Department of the Interior, was appointed as auctioneer. Day did not receive instructions from Pedley to conduct the sale and particulars of the auction until 10:00 a.m. on the day of the proposed auction on June 13, 1906. As a result, he did not have time to do anything more than secure a place for the auction and have a few handbills made up and distributed in Battleford. Attendance was limited due to inadequate advertisement and notice of the auction.
39. A second auction – or a continuation of the first – was held the following day on June 14, 1906. This second auction was not generally advertised. Only 59 of the 90 quarter sections available were sold to 15 purchasers at an average sale price of \$4.01 per acre – slightly above the \$3.83 per acre upset price – for a total of \$38,240.42. Particulars with respect to the purchasers set out below indicate that most of the Claim Lands were sold to government officials and individuals with patronage ties to the Liberal government at prices much lower than the \$7.00 per acre offered by Kane in April 1906:
  - (a) E.H. White purchased 18 quarter sections, the largest quantity of the Claim Lands. E.H. White was a real estate agent from Battleford, and a member of White Land Co. with his father, W.J. White, a government official with ties to the Liberal

government of the day and who was implicated in the speculation of Indian reserve lands in the Ferguson Inquiry of 1915;

- (b) R.J. Speers purchased 12 quarter sections “in trust for a small syndicate at Battleford,” including the auctioneer S.S. Simpson;
  - (c) E. Bourassa purchased 8 quarter sections which later passed through the hands of W.V. Bennett and W.H. White, who as mentioned above were both implicated in the Ferguson Inquiry of 1915 for speculating in Indian reserve lands at the same time that they were employed as federal public servants; and
  - (d) The remaining purchasers – including Agent Day’s wife M.J. Day – bought either one or two quarter sections apiece.
40. In October 1906, the Bands requested that they be provided with some of the money from the sale of the Claim Lands to purchase wagons and asked whether the remaining 31 quarter sections had been sold.

*November 1908 Auction*

41. Almost two years later, in May 1908, Indian Agent Day wrote to the Department that the Stony Indians had asked that the balance of the ceded land be sold because they were “being kept out of the money which otherwise they have the use of.”
42. The Department decided that the balance of the unsold Claim Lands should be sold by auction. On August 24, 1908, J.D. McLean advised Day that the parcels would be sold in early November 1908 and directed Day to prepare a valuation of each quarter section to be sold. The quarter sections were re-valued at prices from \$3.00 to \$4.25 per acre. Thomas Lecky of Battleford, who appears to have been an employee of Champagne, Speers & Simpson, was appointed as auctioneer.
43. Very few people attended the November 4, 1908 auction. Day adjourned the sale and reopened it on November 20, at which time 12 quarter sections were sold for a total of \$7,552.97 (an average of \$3.93 per acre).
44. At the second sale, A.M. Speers – likely a relation of R.J. Speers – purchased 2 quarter sections. This land was assigned to Schiebel, Shephard and Bennett and paid for by Bennett. F.W.D. Thompson and E.H. White together purchased 7 quarter sections which were later assigned to Schiebel, Shephard and Bennett and was paid for by Bennett. In total, at least 9 of the 12 quarter sections sold in November 1908 were assigned to Bennett’s firm and paid for by Bennett, who was connected with E.H. White.

*June 16, 1909 Attempted Sale*

45. Despite Day’s recommendation that the remaining 19 quarter sections be sold through his office, Pedley directed that the Claim Lands be sold by auction in June 1909. The sale was advertised in various newspapers in April, and was to be held in North Battleford.

46. On April 19, 1909, the Kane Land Company offered \$4.00 per acre for the balance of the surrendered tract. The Department ignored the offer.
47. In May it was decided to hold the auction in old Battleford instead. The auctioneer was of the view that the remaining parcels could be sold for \$2.75 per acre. Only three or four people attended the sale on June 16, 1909 and none of them bid on the Claim Lands.

Distribution of Interest Payments to the Bands

48. In November 1909, the Department issued the first cash distribution to all three Bands, including the Mosquito Band, in a total amount of \$180.00. From that time forward, interest was to be paid every fall, but the Department made it clear that the distribution of interest money would result in a proportional reduction of Government assistance which would leave the Bands with no net benefit as a result of the sale of the Claim Lands.

June 1, 1910 Sale

49. Another auction was held on June 1, 1910. While little information remains on the record in regard to this sale, virtually all the parcels were sold for an average of \$3.87 per acre (27 cents above the upset price) for a total of \$11,656.75.
50. Of the 19 quarter sections available, it appears that six were purchased by E.H. White and nine by M.A. Simpson. E.H. White assigned all of his land to Sadie C. Bennett, the wife of W.V. Bennett. M.A. Simpson appears to have been the wife of S.S. Simpson of Champagne, Speers & Simpson – who acted as auctioneer for the June 1906 land sales. The second instalment for M.A. Simpson's land was paid for by Agent Day. Eventually, all of this land was assigned to Mary Jefferson, who was a teacher in the Battleford Indian Agency and the wife of the Battleford Agency farm instructor.

Collection and Distribution of Monies From Sales of the Claim Lands

51. The surrender agreement stipulated that the Crown was to hold all monies from the sale of the Claim Lands in trust for the benefit of the Grizzly Bear's Head Band and Lean Man Band and their members' descendants. Pursuant to this agreement the Crown agreed to pay to members of the two Bands and their descendants interest on these capital monies on an annual or semi-annual basis.
52. Contrary to the express trust condition set out in the surrender, the monies owing on the sales were distributed to the Mosquito Band, in addition to the Grizzly Bear's Head Band and Lean Man Band.
53. Collections on the sales continued for many years, as sales were often in default. Very few sales were ever cancelled.

**V. THE BASIS IN LAW ON WHICH THE CROWN IS SAID TO HAVE FAILED TO MEET OR OTHERWISE BREACHED A LAWFUL OBLIGATION:**

54. The Claim is brought on the following grounds in law:

- (a) The Crown failed to comply with the surrender provisions of the *Indian Act* of 1886; and
- (b) The Crown breached its fiduciary and trust duties to the Bands both prior to and following the surrender.

**(a) Breach of the Surrender Provisions of the 1886 Indian Act**

55. The purported surrender of 14,400 acres of IR 110 and IR 111 on May 19, 1905 was invalid, illegal and *void ab initio* as a result of the Crown's failure to comply with the surrender requirements of section 39 of the *Indian Act*, R.S.C. 1886, c. 43. Section 39 provides as follows:

No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, except on the following conditions:-

(a.) The release or surrender shall be assented to by a majority of the male members of the band, of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General; but no Indian shall be entitled to vote or be present at such council unless he habitually resides on or near and is interested in the reserve in question;

(b.) The fact that such release or surrender has been assented to by the band at such council or meeting, shall be certified on oath before some judge of a superior, county or district court, or stipendiary magistrate, by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some one of the chiefs or principal men present thereat and entitled to vote; and when such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.

56. It is alleged that the surrender was contrary to section 39(a) of the 1886 *Indian Act* and of no force or effect for the following reasons:

- (a) the Crown failed to obtain assent from a majority of the male members of the Grizzly Bear's Head and Lean Man Bands of the full age of 21 years;
- (b) the Crown failed to conduct the surrender vote at a meeting called for that specific purpose and according to the rules of the band;
- (c) the Crown failed to hold a properly constituted vote in the presence of the officer required;
- (d) the Crown failed to ensure that only qualified voters were present at the meeting for the surrender and allowed Mosquito Band members to be present at and vote on the proposed surrender;
- (e) the Crown failed to conduct a vote only by Indians entitled to vote, namely Indians who were habitually resident on or near and interested in IRs 110/111;

- (f) the Crown failed to certify the surrender, before a judge or magistrate, by way of the oath of both the representative of the Crown and a chief or principal man present and entitled to vote at the meeting;
- (g) the Crown forged documents or otherwise failed to properly document the surrender process and the consent of the Grizzly Bear's Head Band and Lean Man Bands necessary for the surrender to be effective.

**(b) Breach of Pre-Surrender Fiduciary Duties by the Crown**

57. In addition to or in the alternative to the allegation that the surrender was contrary to section 39 of the *Indian Act*, R.S.C. 1886, c. 43, the Claimant submits the Crown breached specific and enforceable fiduciary duties that it owed to the Grizzly Bear's Head and Lean Man Bands prior to the surrender of the Claim Lands and during the reserve surrender process.

*Where a Band's Understanding is Inadequate or the Dealings are Tainted*

58. It is submitted that the 1905 surrender of the Claim Lands was invalid because the understanding of the Grizzly Bear's Head and Lean Man Bands was inadequate and the tainted conduct of the Crown makes it unsafe to rely on the surrender as an expression of the Bands' true understanding and intention. The Claimant's assert that it is unsafe to rely on the purported surrender as a reliable expression of the Grizzly Bear's Head and Lean Man Bands for the following reasons:
- (a) There is evidence of tainted conduct on the part of Crown officials who promoted and procured the surrender of IRs 110/111 and were later implicated for their involvement in a fraudulent scheme to purchase Indian reserve lands for less than fair market value, including the purchase of some of the Claim Lands by these individuals and their associates;
  - (b) There is no independent evidence that a surrender meeting was properly called by the Crown in accordance with the rules of the Grizzly Bear's Head and Lean Man Bands or that eligible voters were provided with sufficient information regarding the terms of the proposed surrender, options and the foreseeable consequences of those options to make a free and informed decision with respect to the surrender of 22 ½ sections of IRs 110/111;
  - (c) Crown officials misrepresented that the Mosquito Band, Grizzly Bear's Head Band and Lean Man Band were a single band in order to allow members of the Mosquito Band, which outnumbered the other two bands, to vote on the surrender and receive benefits from the sale of the Claim Lands;
  - (d) Members of the Mosquito Band who were not habitually resident on or interested in IRs 110/111 were allowed to be present at and vote at the surrender meeting;
  - (e) A quorum of the Grizzly Bear's Head and Lean Man Bands was not present because the evidence supports an inference that Stenchiaco was not actually

present at the surrender meeting given that his mark was witnessed separately and his seal differed from all of the other signatories on the surrender document;

- (f) Indian Agent Day attempted to certify the surrender with two improper oaths, followed by a third oath that was not sworn by a Chief or Headman.

Where the Band has Effectively Ceded or Abnegated its Power to Decide

59. We submit that the Grizzly Bear's Head and Lean Man Bands effectively ceded or abnegated their power to make a decision with respect to the proposed surrender of its reserve lands and the Crown breached its fiduciary duty by failing to exercise this discretion in a manner that was in the best interests of the Grizzly Bear's Head and Lean Man Bands. A summary of the grounds for this allegation are as follows:

- (a) The Crown initiated and promoted the surrender given that the Crown instructed a Dominion Land Surveyor to subdivide the reserve lands for surrender and sale in 1903 at least one year before Agent Day claims to have received a petition from the Stony Band in 1905;
- (b) The Crown controlled the surrender process throughout and misrepresented that the three Bands were one band, namely the Stony Band, thereby allowing members of the Mosquito Band to vote on the surrender of reserve lands set aside for the Grizzly Bear's Head and Lean Man Bands;
- (c) The bands were deprived by the Crown of their right to select a Chief and Headmen and lacked leadership to protect and advance their own interests. The Crown did not recognize any Chief or Headman of the three Bands at the time of the surrender so members of the Bands were dependant on the Department of Indian Affairs for information and advice with respect to the proposed surrender of the reserve;
- (d) The bands, especially Grizzly Bear's Head and Lean Man Band, were ill-equipped to protect their own interests. The populations of the bands were very low at the time of the surrender, a fact acknowledged by Indian Agent Day to rationalize the surrender.

Where the Band's Decision to Surrender is Foolish, Improvident or Exploitative

60. The Governor-in-Council breached its fiduciary duty to the Claimants by failing to withhold consent to the surrender on terms that were considered foolish, improvident or amounted to exploitation. Particulars of this are as follows:

- (a) At the time the surrender was approved, the Crown waived the protection of the 1888 *Regulations for the Disposal of Surrendered Indian Lands* which allowed the Indian Agent and other Crown officials and their friends and relatives to participate in a fraudulent scheme to purchase reserve lands at less than fair market value and sell them for personal profit;

- (b) The Crown rejected offers from third parties to purchase the Claim Lands and ultimately sold the lands through public auctions for less than the amounts offered. Some of the Claim Lands were purchased for less than fair market value by the Indian Agent, Crown officials, friends, and relatives, and even the auctioneer hired by the Crown;
  - (c) The Crown failed to conduct arm's-length sales, selling instead to a number of individuals with close ties to the Department of Indian Affairs and Liberal government;
  - (d) The Crown failed to advertise and give appropriate notice of the auctions;
  - (e) The Crown discouraged attendance at the auctions by switching locations without appropriate notice;
  - (f) The Crown failed to maximize the value of the Claim Lands and allowed them to be sold at less than fair market value and what was offered by other third parties.
61. The above facts also support a finding of fraud or equitable fraud. Whether or not Crown officials actually intended to mislead the Bands, the Crown's actions were unconscionable given its fiduciary responsibility to the Bands. Moreover, there is a direct link between the actions of the Crown before and after the surrender, which form a unified series of actions depriving the Bands of their reserve lands and transferring them to individuals connected with the Department and Liberal government.
- (c) *Breach of Fiduciary and Trust Duties Post-Surrender***
62. In the alternative to the arguments in (a) and (b) above, it is submitted that if the surrender was valid, which is denied, the Crown allowed the Claim Lands to be sold for less than fair market value in breach of its fiduciary duty to the Claimant and by failing to collect and properly account for the full proceeds from the sale of the Claim Lands.
63. The Crown breached the terms of the trust agreement and fiduciary duty with regards to the payment of trust monies.
64. In violation of the terms of the trust created in the surrender document, monies were paid to members of the Mosquito Band. Further, capital monies have been paid out of the trust account and ultimately depleted contrary to the terms of the trust, which provided that only interest was to be paid out.

## **VI. RELIEF SOUGHT**

65. In light of the foregoing, the First Nation seeks the following remedies:
- (a) Declarations that:
    - i. the surrender of IRs 110 and 111 on May 19, 1905 was contrary to the provisions of the 1886 *Indian Act*;

- ii. the surrender was unlawful on the grounds that the Crown breached its pre-surrender fiduciary duties to the Bands;
  - iii. the Crown committed fraud or equitable fraud against the Bands by waiving the 1888 *Regulations for the Disposal of Surrendered Indian Lands* and allowing the Indian Agent and other Crown officials and their friends and relatives to participate in a fraudulent scheme to purchase reserve lands at less than fair market value and sell them for personal profit; and
  - iv. in the alternative to (i)-(iii) above, the Crown breached its post-surrender fiduciary duties to the Band by allowing the Claim Lands to be sold for less than fair market value and failing to collect and properly account for the full proceeds from the sale of the Claim Lands.
- (b) Damages and equitable compensation based on the current fair market value of the surrendered lands plus loss of use of the Claim Lands from May 19, 1905 to the present;
  - (c) Costs of this proceeding, and in the Specific Claims Process, on a substantial indemnity basis;
  - (d) Such other damages or compensation as this Honourable Tribunal deems just.

Dated this 17<sup>th</sup> day of April, 2014 at the City of Calgary in the Province of Alberta.

**MAURICE LAW**



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