

SCT File No.:

**SPECIFIC CLAIMS TRIBUNAL**

B E T W E E N:

**CARRY THE KETTLE BAND # 378**

SPECIFIC CLAIMS TRIBUNAL		
F	TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES	D
I	November 26, 2015	P
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Ottawa, ON		1

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*.

November 26, 2015

\_\_\_\_\_  
Date

Amy Clark

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Registry Officer

TO: Assistant Deputy Attorney General, Litigation, Justice Canada  
Bank of Canada Building 234 Wellington Street East Tower  
Ottawa, Ontario K1A 0H8  
Fax: (613) 954-1920

**I. CLAIMANT (R. 41(A))**

1. The Claimant, the Carry The Kettle Band # 378 (hereinafter also referred to as the “First Nation” or “Band” depending on the context), 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. I-5, as amended, and within the meaning of *Treaty No. 4* (hereinafter “Treaty 4”). The First Nation is located approximately 80 kilometres east of Regina in the Province of Saskatchewan.
2. The Claimant is the successor in interest to the Assiniboine Band which signed an adhesion to Treaty 4 at Fort Walsh on September 25, 1877 under the leadership of Chiefs The Man Who Took The Coat and Long Lodge.

**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

...

(d) three years have elapsed after the day on which the Minister has notified the First Nation in writing of the Minister’s decision to negotiate the claim, in whole or in part, and the claim has not been resolved by a final settlement agreement.

4. The First Nation originally filed a claim with the Minister of Indian Affairs on December 16, 1988 asserting that the surrender of 5,760 acres of land from Carry the Kettle Indian Reserve #76 in 1905 (the “Claim Lands”) was null and void and asserting various breaches of Canada’s treaty, legal, trust, fiduciary and equitable obligations (hereinafter referred to as the “1905 Surrender” or “Claim”).
5. A letter dated May 24, 1994 from the Specific Claims Branch to the First Nation advised that the Claim would not be accepted for negotiation under the Specific Claims Policy.
6. In December 1994, the Indian Claims Commission agreed to conduct an inquiry into the Claim at the request of the First Nation. The inquiry was placed in abeyance until 2004 pending the outcome of another specific claim by the First Nation. On December 1, 2008, the Indian Claims Commission issued its report and recommendations.
7. In a letter dated May 28, 2009 to the First Nation, former Minister of Indian Affairs Chuck Strahl stated that Canada did not accept the Claim relating to the validity of the 1905 surrender but offered to accept a claim for negotiation on the specific grounds that Canada had misdirected one payment of \$5,537.03 of the sale proceeds from the 1905 surrender and had failed to correct this deposit.
8. On July 20, 2011, by letter from the Specific Claims Branch to the First Nation, Canada made an offer of compensation to the First Nation for the misdirected surrender proceeds payment. If accepted by the First Nation, Canada would require a full and final release and indemnity of the entire Claim. The offer was valid for 120 days. The First Nation did not accept the offer.

9. The provisions of paragraph 16(1)(d) of the *Specific Claims Tribunal Act* have been met because more than three years have elapsed since the date when the Minister informed the First Nation of its decision to negotiate this Claim in part, and the Claim has not been resolved by a final settlement agreement.

**III. CLAIM LIMIT (ACT, S. 20(1)(B))**

10. The First Nation does not seek compensation in excess of \$150 million for the 1905 Surrender Claim.

**IV. GROUNDS (ACT, S. 14(1))**

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

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

(a) a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;

(b) a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation — pertaining to Indians or lands reserved for Indians — of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;

(c) a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;

(d) an illegal lease or disposition by the Crown of reserve lands;

(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.

**V. ALLEGATIONS OF FACT (R. 41(E))**

**(a) *Treaty 4 and the Creation of Assiniboine Indian Reserve 76 in 1885***

12. In September 1874, the Crown and the Cree, Saulteaux, and Assiniboine Indians signed Treaty 4 at Qu'Appelle and Fort Ellice. Among other things, the Crown promised to provide certain benefits, including reserve lands for each band based on one square mile per family of five.
13. On September 25, 1877, the Assiniboine Chiefs The Man Who Took The Coat (also known as The One That Fetched the Coat), Long Lodge and The Poor Man signed an adhesion to Treaty 4 at Fort Walsh.
14. In June 1880, Canada surveyed a reserve for the Assiniboine Bands north of Cypress Hills. In 1882, the Bands were urged by the Department of Indian Affairs to leave the Cypress Hills Reserve and to accept another reserve surveyed near Indian Head.

15. In March 1885, two Assiniboine bands under The Man Who Took The Coat and Long Lodge were amalgamated and became known as the Assiniboine Band. The Man Who Took The Coat served as Chief of the Band until his death in 1891 when he was succeeded by his brother Carry the Kettle.
  16. In June 1885, a reserve of 73.2 square miles (46,854 acres) near Indian Head, Saskatchewan was surveyed by Dominion Land Surveyor John Nelson for Chief The Man Who Took The Coat and his Band, pursuant to the terms of Treaty 4. Assiniboine Indian Reserve Number 76 ("IR 76") was confirmed by Order-in-Council P.C. 1151/1889 on May 17, 1889 and removed from the operation of the *Dominion Lands Act* by Order-in-Council P.C. 1674/1893 on June 12, 1893. Assiniboine IR 76 is also known as Carry the Kettle Indian Reserve.
- (b) *Federal Indian Policies and Pressure on Indians to Surrender Reserve Lands***
17. Settlement of the area surrounding IR 76 started in or around 1882. The Department of the Interior completed the Dominion Lands Survey in the Indian Head district in 1882 and, later that year, the Canadian Pacific Railway completed construction of its main line through the area.
  18. The town of Indian Head located on the CPR line north of IR 76 was a hub for the transportation of grain for farms in the area. The settlement of Montmartre, located south and west of IR 76 near Wolseley, was established in 1893 by the Foncier Society of Canada, a Paris-based colonization company, with the support of a Cabinet minister under the Liberal government of Prime Minister Wilfred Laurier.
  19. 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 and the Laurier government. 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.
  20. The Department of Indian Affairs worked in concert with the Department of the Interior, under a single Minister of Interior who also served as 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 exposed evidence of widespread graft, corruption, and speculation in the surrender and sale of Indian reserve lands by key government officials, including the Deputy Minister of the Interior James Smart, the Deputy Superintendent General of Indian Affairs Frank Pedley, and the Minister of Interior and Superintendent General of Indian Affairs Frank Oliver.
- (c) *Surrender of 5,760 Acres of Assiniboine IR 76 in 1905***
21. After the survey of IR 76 in 1885, the Band took up agriculture and generally enjoyed success in mixed farming, cattle raising, the sale of hay, wood, and fence pickets, hide tanning, and working for local settlers. The Indian Agent reports over the years indicate that the band made gradual improvements to their houses and stables and used income to

- purchase farm equipment, wire fencing, and other items of value to the Band and its development. By 1900, the Band was free of debt.
22. In 1900, the Farmer In Charge Thomas Aspdin (who was promoted to Indian Agent in 1901) wrote Indian Commissioner Laird to request that the boundaries of IR 76 be resurveyed because settlers were trespassing and stealing wood from the reserve. On December 29, 1900, four settlers were prosecuted for trespass on IR 76.
  23. In January 1901, A.H. de Tremaudan, who was convicted and fined for trespassing in December 1900, wrote to his local Member of Parliament proposing the surrender of 18 sections (11,520 acres) of IR 76 for purchase by white settlers in the nearby colony of Montmartre. The settlers had been taking wood and hay from IR 76 for about eight years and complained that if they did not take hay and wood from IR 76, they had to travel eight miles to find other hay and wood. Tremaudan urged that “the government should be anxious to help white settlers before Indians...”
  24. This proposal was forwarded to James A. Smart, the Deputy Superintendent General of Indian Affairs, who raised it with the Secretary of Indian Affairs J.D. McLean. Smart acknowledged the “Indians would decidedly object to any portion of the Reserve being cut off and hand[ed] over to the settlers.” McLean nevertheless instructed Thomas Aspdin on February 12, 1901 to inquire if the Band would be open to selling its wood or the land itself based on the pretence that the Indians had not settled on those lands, the wood and hay was being spoiled by the Indians, and the settlers could ill afford to pay 50 cents per ton to purchase hay from the Band.
  25. On February 25, 1901, Aspdin reported that he consulted with the Chief, Headmen, and many Band members about the proposed surrender. Aspdin’s detailed letter states the matter was discussed with the Band “on the whole most intelligently and the unanimous opinion expressed was that not one acre should be sold...” The Band also asked for “the protection of the Government against the white settlers, who are trying to get their land.”
  26. Indian Agent Aspdin agreed with the Band’s decision and refuted the reasons cited by McLean as justification for a surrender. According to Aspdin, the Band required all of the wood available and the land was being used to supply hay to their growing cattle herds. The Band herd currently numbered 100 but Aspdin expected the herd to increase in a short time to 400 or 500 head so it would be “suicidal to the cattle industry” of the Band to surrender any part of its reserve.
  27. In 1901, the Department reported that the crops were splendid and the Band had a “successful year” overall. Chief Carry the Kettle [Joseph Jack], The Saulteaux, Geegus, Medicine Rope, and Chas. Rider received special mention as men who made substantial improvements to their homes and stables, owned cattle, and had grown good crops. Most of these men would later support the surrender and were personally paid compensation for improvements they made on the Claim Lands.
  28. The Annual Report for 1902 was positive and the Band was praised for their energetic efforts, improvements to homes, bountiful crops, breaking 225 new acres of land, and the

purchase of over \$1,310 in goods from the proceeds of their various industries. Indian Commissioner David Laird reported that the Assiniboine Agency was among only four agencies that year which were generally self-supporting and supplying its own flour and vegetables, and most of its own beef. In October 1902, the Band requested a threshing machine (comprised of a thresher, engine and a separator) which was purchased by the Indian Agent from Massey Harris for \$820 as a loan from the Department to be repaid by the Band.

29. By January 1903, the Department had collected money from Band members for the threshing machine. Aspdin supported the purchase of a threshing machine as the Band was expecting the largest crop ever in 1903. Aspdin reported that the cattle herd had doubled in size to over 200 head. In October 1903, the Department reported the engine on the threshing machine was unsatisfactory. Although the engine was purchased under a guarantee, the Department did not press Massey Harris to replace the engine under the guarantee but instead paid for repairs to the engine with the Band's money.
30. The Annual Report for 1903 was positive in terms of the industry and progress of the Band with 23 heads of families engaged in farming and 19 families also raising cattle. Despite this positive news, Indian Agent Aspdin reported in April 1904 that poor crops might prevent the Band from keeping up with regular payments on the threshing machine and asked whether livestock could be sold to pay for it. Aspdin stated that \$300 was paid toward the threshing machine in 1902-1903 and another \$220 was paid in 1903-1904.
31. In 1904, the Department loaned \$500 to the Band for pasture fencing which permitted their cattle to feed overnight without having to herd them. The Department rejected Aspdin's recommendation that the \$500 loan for fencing be repaid at the rate of \$100 per year, instead insisting that it be repaid in 2 years at 3% interest. Aspdin reported that the Band had already made a substantial repayment of the monies borrowed from the Department by August 1904.
32. On December 16, 1904, Indian Agent Aspdin reported to the Secretary of Indian Affairs that the Chief and headmen along with other members of the Band requested that the Department sell the nine southernmost sections of IR 76 so that "the Department do not press them for the money owing for the threshing outfit and also for the pasture made last summer but that these liabilities be paid out of the sale of these lands..." The Band indicated that it wished to use some of the proceeds from the sale of the Claim Lands to purchase a new modern engine to replace the engine purchased from Massey Harris just one year earlier and wished to use the balance to form a fund and distribute the interest every year for the benefit of the Band, including the aged and sick.
33. Aspdin's opinion was that a low estimate of the land value was \$5.00 per acre but it would increase in value because the Canadian National Railway line from Manitoba to Regina would pass within two or three miles of the Claim Lands. Aspdin expected the sale of nine sections of IR 76 would realize around \$30,000.
34. William H. Graham, Inspector of Indian Agencies, supported the proposed surrender and sale and reported in March 1905 that he had met with members of the Band and most, with

one or two exceptions, were in favour of a surrender and sale of nine sections of IR 76 on the following conditions:

That the present indebtedness on the threshing outfit of about \$1200.00 be paid off at the earliest possible date, out of the proceeds of the sale.

That the Department be paid for the money advanced to purchase wire for the pasture fence, from the proceeds of the sale.

That lumber etc. be purchased to build a suitable shed to house the threshing machine and engine, out of the proceeds of the sale of land.

That the present engine, which was a second-hand one when purchased, be exchanged for a new engine and the difference be paid out of the proceeds of the sale of the land.

That Daniel Kennedy and one or two other Indians be paid compensation for any ploughing that should happen to be on the strip of land that it is proposed to surrender, out of the proceeds of the sale.

That the balance of the money be funded and managed by the Department as it sees fit.

35. On April 12, 1905, Deputy Superintendent General of Indian Affairs Frank Pedley, sent Inspector Graham surrender forms to be forwarded to Indian Agent Aspdin for taking a surrender of 5,760 acres of IR 76 and reported to Superintendent General of Indian Affairs, Frank Oliver, that Aspdin had been authorized to take the surrender.
36. Indian Agent Aspdin received no instructions whatsoever regarding the procedures to be followed under the *Indian Act* even though he had not previously been involved with a surrender of reserve land.
37. On April 26, 1905, Indian Agent Aspdin reported that he convened a meeting of the Band to consider the proposed surrender. Aspdin paid a band member, Archie Thomson, to go around the reserve and call band members to the meeting and he paid Daniel Kennedy to act as interpreter. Aspdin reported that "there was a most decided majority" in favour of the surrender and there were "a number of absentees whom it is known are favourable." Aspdin provided no details regarding how much notice was provided in advance of the meeting, the number of eligible voters of the Band, how many attended the meeting, or how many voted in favour or against the proposed surrender.
38. The Indian Commissioner and Assistant Indian Commissioner had no knowledge that a surrender of IR 76 was being considered, and only learned of the surrender months after the alleged meeting on April 26, 1905.
39. The surrender document states that it was a surrender for sale of 5,760 acres (nine sections) from IR 76. The document was signed by Indian Agent Aspdin and had the "x" marks of Chief Carry the Kettle and three Headmen, identified as Broken Arm, Chas. Rider, and The Sauteaux. No other band members signed the document. The surrender document set out the following conditions for the disposition of the monies received from the sales:

- (i) \$1200 owed on the threshing outfit be paid at the earliest possible date;
  - (ii) The Department be paid for the money advanced to purchase wire for pasture fences;
  - (iii) Lumber be purchased to build a shed to house the threshing machine and engine;
  - (iv) The present second hand engine be exchanged for a new engine and the difference paid;
  - (v) Daniel Kennedy and one or two other Indians be paid compensation for any ploughing that had been done on the surrendered land; and
  - (vi) The balance of the monies be used for the Band's benefit and managed by the Department as it deemed best in the Band's interests.
40. The surrender affidavit was sworn by Indian Agent Aspdin and Chief Carry the Kettle on May 3, 1905, before a Justice of the Peace in the town of Wolseley. The surrender was submitted to the Governor General in Council on May 11, 1905, and approved by Order in Council P.C. 940 dated May 23, 1905.
- (d) ***Breach of the Crown's Fiduciary Duty to Prevent the Surrender and Sale of the Claim Lands on Foolish, Improvident and Exploitative Terms***
41. Surveyor J.K. McLean surveyed and subdivided the Claim Lands in September 1905. Of the 36 quarter sections, 22 were graded as first class with values between \$7.00 and \$8.10 per acre, 7 quarters as second class with values between \$5.00 and \$6.00 per acre, and 4 as third class lands with values between \$4.00 and \$5.00 per acre. Given the price for nearby farming lands which produced fine crops, he expected the Claim Lands to sell for more than his valuations.
42. Surveyor J.K. McLean recommended that the auction take place in November 1905 at either Wolseley or Indian Head because local farmers had a good crop in 1905, and many were looking for more land. Despite McLean's recommendation, and the recommendation of W.A. Orr, In Charge of Timber and Lands Branch, that the auction take place on November 2, 1905 at Indian Head, this did not happen. Instead, the auction did not take place until February 1906, and in the smaller village of Sintaluta.
43. Notice of the sale was released on December 28, 1905. Canada received a number of enquiries regarding payment terms and land quality of the Claim Lands, including an inquiry from James Smart of Montreal. James Smart was the Deputy Minister of Interior and was implicated in the Ferguson Inquiry along with Frank Pedley, the Deputy Superintendent General of Indian Affairs, for speculating and profiting illegally from the surrender and sale of Moose Mountain Indian reserve lands in 1901.
44. The auction of the Claim Lands was held at noon in Sintaluta on February 14, 1906. Of the 36 quarter sections offered for sale, 34 quarter sections were sold, 25 at the upset price, and 9 above the upset price. The Claim Lands sold for a total of \$35,345.45 (an average of



- \$6.50 per acre), however, only \$7,069.09 was collected at the time of sale because the purchasers were required to pay only 20% of the sale price with the balance payable in 4 annual instalments plus 5% annual interest.
45. The attendance at the auction was very low. The temperature in nearby Indian Head that day was between -20 and -30 degrees Celsius.
  46. Apart from just one quarter section bought by a local farmer, the remaining 33 quarter sections were bought by 4 individuals who did not farm or reside in the area: Samuel Clarke, a merchant from Cobourg, Ontario, purchased 13 quarter sections; Peter C. Mitchell, a merchant from Brandon, Manitoba, purchased 10 quarter sections; W.A. Matheson, a grain dealer from Winnipeg, Manitoba, purchased 8 quarter sections; and J.S. Matheson, occupation unknown, purchased 2 sections. Inspector William Graham offered to purchase the two unsold sections for \$4.00 per acre but the Department would not sell to him for less than the upset price of \$7.00 per acre. The Department did not sell the last two quarters until almost 18 years later.
  47. Immediately following the 1906 auction, \$6,680.34 was deposited to the Band's Capital Account held in trust by the Crown and \$388.75 was deposited to its Interest Account. In total, \$47,965.16 was collected by the Department of Indian Affairs from the sale of the Claim Lands, however, only \$42,428.13 was credited to the Band's Trust Account. The \$5,537.03 difference represents a payment made by Samuel Clarke in January 1920 which was not credited to the Band's Trust Account.
  48. Approximately \$2,800 of the surrender proceeds were paid to the Crown for a thresher, the purchase of a new engine, and materials for a shed. In addition, three band members—Joseph Jack (Chief Carry the Kettle), The Saulteaux, and Daniel Kennedy—were paid approximately \$389 for improvements, based on \$5 per acre for land they had broken and cultivated within the Claim Lands. Daniel Kennedy received the largest payment in the amount of \$233.40.
  49. There was considerable confusion and misunderstanding after the surrender regarding the terms of the surrender and distribution of proceeds from the sale of the Claim Lands. Between 1907 and 1917, the Band sent at least five petitions to the Crown requesting annual per capita payments on the basis that the Band was led to believe that it was to receive annual interest of 3% on the capital from the sale of the Claim Lands to be distributed equally on a per capita basis to the Band every year, on the same basis as their Treaty money. The requests in 1907 and 1909 were denied.
  50. According to the terms of sale, consideration for all purchases was to have been paid in full by February 14, 1910. By that time, however, only six sales had been completed. Collections of principal and interest owing by purchasers of the Claim Lands continued for many years, as sales were often in default. Very few sales were ever cancelled by the Department of Indian Affairs.

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

51. 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. In particular, adequate and proper notice was not given of the surrender meeting in accordance with the rules of the band, and there is no independent evidence that a quorum of voters was in attendance at the surrender meeting or that a majority of the eligible voters assented to a surrender. Without evidence that a quorum of eligible voters was in attendance at a properly called surrender meeting, valid assent to the surrender in accordance with the requirements of the *Indian Act* was not obtained;
- (b) The Crown breached its fiduciary duties to the Band prior to the surrender by engaging in tainted dealings, by failing to ensure that the Band's full, free and informed consent was given to the terms of the proposed surrender, and by consenting to a surrender bargain that was foolish, improvident and exploitative. Furthermore, the Crown's actions in pursuing this surrender were contrary to the Honour of the Crown; and
- (c) In the alternative to (a) and (b), the Crown breached its fiduciary and trust obligations to the Carry the Kettle Band following the surrender when it did not properly determine the upset price for the Claim Lands, did not conduct the sales in a manner consistent with the best interests of the Band, and did not act to dispose of the Claim Lands and collect the sale proceeds in a reasonable and prudent manner and in the best interests of the Band.

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

52. The purported surrender of 5,760 acres of Assiniboine IR 76 on April 26, 1905 was contrary to 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.

53. The April 26, 1905 surrender was not taken in accordance with the statutory requirements for a valid surrender. The surrender meeting was not called in accordance with the rules of the band. Further, there is insufficient evidence that a quorum of eligible voters was present at the surrender meeting. Consequently, the surrender was invalid because it was not assented to by the requisite majority of eligible voters.
  54. There was not proper and sufficient notice of the surrender meeting. Despite Indian Agent Aspdin's lack of experience, he was not given any instructions on how to conduct a proper surrender vote. Nor were the Indian Commissioner or Assistant Indian Commissioner informed of the proposed surrender to ensure that it was conducted properly and in accordance with the requirements of the *Indian Act*. On April 12, 1905, just two weeks before the surrender on April 26, 1905, the Deputy Superintendent General of Indian Affairs sent the proposed surrender forms to the Inspector of Indian Agencies, in turn to be passed on to Indian Agent Aspdin. This provided very little time for proper notice and was insufficient to meet the overall purpose of providing proper and adequate notice for a surrender meeting in accordance with the rules of the Band.
  55. A majority of the eligible voters did not attend the surrender meeting. The surrender affidavit, attesting to the validity of the surrender, affirmed only that the vote was assented to by a majority of the voting members "then present" at the surrender meeting. The surrender document itself was signed only by the Chief and three headmen, most of whom received an improper inducement and compensation in the amount of \$5 per acre for improvements on the Claim Lands. Archie Thomson, a band member who received the largest payment for improvements in the amount of \$233.40, was hired to go from house to house on reserve and inform band members of a meeting but oral history evidence indicates that only a handful of people attended a meeting at the Indian Agent's office.
  56. The report by Indian Agent Aspdin that "there was a most decided majority in favour of the sale" at the meeting speaks only to a majority of those present, and says nothing about whether a majority of eligible voters were in fact present. Aspdin's statement that there were "a number of absentees whom it is known are favorable" supports an adverse inference that the requisite quorum of voters were not present at the surrender meeting. Aspdin's statement that a number of absentees were "in favour" is speculative and irrelevant if they did not attend the surrender meeting and vote.
  57. There were between 36 and 38 eligible voters of the Carry the Kettle Band in 1905. In the absence of evidence that at least a majority of the eligible voters (19 or more) attended the surrender meeting and cast ballots, there is insufficient evidence that the surrender was assented to by the requisite majority of eligible voters and was, therefore, invalid as contrary to the *Indian Act*.
- (b) *Compliance with the Crown's Fiduciary Duties Prior to a Surrender***
58. 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 Crown breached specific and enforceable fiduciary duties that it owed to the Carry the Kettle Band 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

59. It is submitted that the 1905 surrender of the Claim Lands was invalid because the understanding of the Carry the Kettle Band was inadequate and the tainted conduct of the Crown makes it unsafe to rely on the surrender as an expression of the Band's true understanding and intention. Particulars of this allegation are as follows:
- (a) There is evidence of tainted conduct on the part of Crown officials who promoted and procured the surrender of IR 76 and were implicated by a Royal Commission of Inquiry for their involvement in a fraudulent scheme to purchase Indian reserve lands for less than fair market value, including Frank Pedley and James Smart who initiated the surrender process and inquired into the purchase of the Claim Lands;
  - (b) There is no independent evidence that a surrender meeting was properly called by the Crown in accordance with the rules of the Band 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 proposed surrender of 5,760 acres of IR 76;
  - (c) A quorum of the Band was not present at a properly called surrender meeting because only a handful of members attended the surrender meeting and the surrender document was executed by only the Chief and three Headmen who were offered an improper inducement and substantial compensation to support the surrender;
  - (d) With respect to those Band members that supported the surrender, many were induced to support the surrender through a misrepresentation of the proposed surrender terms by Crown officials who led the Band to believe that the sale of the Claim Lands would generate approximately \$35,000 in capital and the Band would receive annual interest of 3% to be distributed equally among all members;
  - (e) Subsequent to the surrender, requests from the Band to the government—in particular, the five petitions from band members regarding interest payments between 1907 and 1917—confirm that the Band did not have an adequate understanding of the terms of the proposed surrender, especially regarding terms of payments to Band members.
60. Furthermore, the Crown's conduct in relation to the 1905 surrender was not in keeping with the Honour of the Crown, some particulars of which include the haste of the surrender, the lack of adequate instructions to the Indian Agent, the absence of any record of the surrender, the lack of information to the Band, the absence of any independent legal or technical advice, and allowing the sale to be conducted contrary to the 1888 *Regulations for the Disposal of Surrendered Indian Lands* resulting in almost all of the land being purchased by speculators.

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

61. The Carry the Kettle Band effectively ceded or abnegated its power to make the decision with respect to the proposed surrender of its reserve lands and the Crown breached its fiduciary duty by failing to exercise its discretion in a manner that was in the best interests of the Band. A summary of the grounds for this allegation are as follows:
- (a) The Crown and its officials initiated and procured the surrender of IR 76 to advance the interests of local settlers over the interests of the Band and also promoted the surrender, in part, to carry out a fraudulent scheme to purchase Indian reserve lands for less than fair market value and to sell these lands for profit;
  - (b) The Crown controlled the surrender process and failed to prepare voters lists, record the number of eligible voters of the Band, how many attended the surrender meeting, what was discussed, and whether the requisite majority voted in favour of the proposed surrender;
  - (c) The Band was ill-equipped to protect its own interests because the population was very low at the time of the surrender, a fact acknowledged by the Department of Indian Affairs to rationalize the surrender;
  - (d) At least some of the Band members questioned the terms of the surrender and the fact that only those Band members involved in agriculture would benefit. These members requested compensation to offset the amounts to be paid to those involved in farming, the Crown did not include this term in the written surrender document and instead retained absolute discretion over the use of monies held in trust from sale of the Claim Lands. Inspector Graham's subsequent rejection of this term tainted the surrender bargain and suggests the Band did not understand the terms and conditions of the surrender. There was also ongoing confusion regarding whether the surrender was to lease or sell the Claim Lands. It is submitted that the discussion regarding the surrender terms, their exclusion from the surrender document, and the lack of clarity regarding what interest in the reserve land was being surrendered, all suggest that the Band's decision-making power was effectively ceded or abnegated to the Crown.

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

62. The Governor-in-Council breached its fiduciary duty to the Band 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) Just four years earlier, in 1901 the Band was vehemently opposed to a surrender of even a single acre of IR 76 and Thomas Aspdin concurred with the Band's decision, stating that it would be "suicidal" to the Band's cattle industry to surrender any land;
  - (b) The Crown loaned money to the Band to purchase a threshing machine and fencing for its pasture lands and then applied undue pressure on the Band to repay the loan in full within a period of 2 years by acquiescing to a surrender of 9 sections of its

reserve to repay the debt owing to the Crown. The debt was less than \$3,000 in total but the Crown promoted a surrender of nine sections of land, worth more than ten times the amount owed to the Crown. It is submitted that the bargain—a surrender of tenfold the amount of land necessary to achieve the Band’s goal—was exploitative and primarily served the interests of settlers, Crown officials, and speculators in Indian lands;

- (c) The debt to be paid was a debt to the Crown, and directly benefitted the Crown, both in terms of the debt repayment and relieving the Crown from having to meet its treaty obligation to the Band to provide agricultural benefits and support for the elderly and destitute;
  - (d) The Crown offered improper inducements and substantial compensation to the Chief and Headmen, Dan Kennedy, and a handful of other band members who were engaged in farming on the Claim Lands in order to gain their support and to promote the surrender. The majority of the Band members did not receive any benefit from the surrender at all. The surrender for sale of such a large portion of the reserve to benefit only a few individuals, was an exploitation of the Band’s collective treaty right to reserve land;
  - (e) Of those few that supported the surrender, they were induced to support the surrender through a misrepresentation of the proposed surrender by Crown officials who led the Band to believe that the sale of the Claim Lands would generate approximately \$35,000 in capital and the Band would receive annual interest of 3% to be distributed equally among all members of the Band;
  - (f) At the time the surrender was approved, the Crown waived the protection of the 1888 *Regulations for the Disposal of Surrendered Indian Lands* which limited each purchaser to a maximum of one section of land that could be purchased and required payment of interest at 6% not 5% as per the terms of the surrender. This gave Crown officials and their associates the opportunity to participate in a fraudulent scheme to purchase the Claim Lands at less than fair market value and sell them for personal profit;
  - (g) Although the Crown applied undue pressure on the Band to repay the loan for the threshing machine and fencing within a maximum of 2 years, the Crown allowed speculators to purchase 32 of 34 sections at less than fair market value and did not take reasonable steps to ensure the timely payment of principal and interest owing by the purchasers to the detriment of the Band.
63. The above facts also support a finding of fraud or equitable fraud. Whether or not Crown officials actually intended to mislead the Band, the Crown’s actions were unconscionable and contrary to the Honour of the Crown.
64. In summary, the Crown breached its pre-surrender fiduciary duty owed to the Band by consenting to a surrender bargain that was exploitative, as well as engaging in tainted dealings which called into question the Band’s understanding and intention regarding the

surrender. The legal effect of this breach is that the surrender would not have been approved but for the conduct of the Crown.

**(c) *Breach of Fiduciary and Trust Duties Following the Surrender***

65. 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 Band and by failing to collect and properly account for the full proceeds from the sale of the Claim Lands.
66. The Crown breached the terms of the trust created in the surrender document and its fiduciary duty with regards to the management of trust monies.

**VII. Relief Sought**

67. In light of the foregoing, the First Nation seeks the following relief:
- (a) Compensation for the following breaches of the Crown's treaty, fiduciary, honourable and other legal duties, specifically:
- i. the surrender of the Claim Lands on April 26, 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 Band;
  - iii. the Crown committed fraud or equitable fraud by waiving the 1888 *Regulations for the Disposal of Surrendered Indian Lands* and allowing the Claim Lands to be sold to land speculators and others pursuant to 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 Claim Lands plus loss of use of the Claim Lands from April 26, 1905 to the date of judgment;
- (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 26<sup>th</sup> day of November, 2015 at the City of Calgary in the Province of Alberta.

**MAURICE LAW**

A handwritten signature in black ink, appearing to read 'Ron S. Maurice', is written over a horizontal line.

**Ron S. Maurice**  
Counsel for the Claimant

**Maurice Law Barristers & Solicitors**  
300, 602-12th Ave SW  
Calgary, Alberta T2R 1J3  
Phone: (403) 266-1201  
Fax: (403) 266-2701  
Email: [rmaurice@mauricelaw.com](mailto:rmaurice@mauricelaw.com)  
Our File: 287.01