

SPECIFIC CLAIMS TRIBUNAL

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April 28, 2016		
David Burnside		
Ottawa, ON		7

B E T W E E N:

COTE FIRST NATION

Claimant

v.

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Indian Affairs and Northern Development

Respondent

AMENDED DECLARATION OF CLAIM
Pursuant to Rule 41 of the
Specific Claims Tribunal Rules of Practice and Procedure

This Amended Declaration of Claim is filed under the provisions of the *Specific Claims Tribunal Act* and the *Specific Claims Tribunal Rules of Practice and Procedure*.

Original Filed: September 4, 2014

Amended: April 28, 2016

Registry Officer

TO: Assistant Deputy Attorney General, Litigation, Justice Canada
Bank of Canada Building, 234 Wellington Street East Tower
Ottawa, Ontario K1A 0H8
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I. Claimant (R. 41(a))

1. The Claimant, the Cote First Nation (hereinafter also referred to as the “First Nation” or “Band”) 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, and within the meaning of Treaty No. 4 (hereafter “Treaty 4”). The First Nation lies east of the Assiniboine River in southeastern Saskatchewan.

II. Conditions Precedent (R. 41(c))

2. 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; ...

3. The First Nation originally filed a claim with the Minister of Indian Affairs on July 8, 2009, respecting Canada’s failure to comply with the surrender provisions of the 1886 *Indian Act* and its corresponding breach of fiduciary duties in relation to the surrender of land from the Cote Indian Reserve No. 64 (“IR 64”) in 1904 for the purposes of railway station grounds and a town site (hereinafter referred to as the “Claim”).
4. The Specific Claims Branch notified the First Nation in writing on June 26, 2012, that the Claim was not accepted for negotiation on the basis that there is no outstanding lawful obligation on the part of the Government of Canada.

III. Claim Limit (R. 41(f))

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

IV. Grounds (R. 41(d))

6. The following are the grounds for the specific Claim, as provided for in s. 14(1) 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:

...

(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;

...

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

V. Allegations of Fact (R. 41(e))

7. Cote Indian Reserve No. 64 was surveyed and set apart pursuant to the terms of Treaty 4 in 1877 for the Cote people. As originally constituted, IR 64 contained 36,160 acres of land and is situated on the east side of the Assiniboine River in southeastern Saskatchewan.
8. On July 14, 1903, an Order-in-Council authorized the sale of 44.56 acres of Cote Reserve land to CNR for a railway right-of-way. By the end of 1903, the issue of compensation owed to the Cote Band members whose property was damaged in the building of such right-of-way was still being discussed, but had not yet been paid to those members. On April 12, 1905, Letters Patent were issued to the CNR for the 44.56 acres for the railway right-of-way.
9. In September of 1903, after the Order-in-Council approved the taking of the railway right-of-way, but before final payment had been made and the patent issued, the CNR applied for additional land for a townsite and railway station grounds (sometimes referred in the correspondence as the divisional point or siding).
10. Munson & Allan, the solicitors representing CNR's construction subsidiary, Mackenzie, Mann & Co. (the "Company"), forwarded a blueprint to the Indian Commissioner David Laird in Winnipeg showing 574.46 acres was required for a

divisional point and asked the Department of Indian Affairs (“DIA”) to consider the matter and inform them of the price at which the land would be sold.

11. Indian Commissioner Laird replied that the acreage was too extensive to be expropriated under the *Railway Act* and that the company should explain its need for the land "to satisfy the Indians that they should surrender the land".
12. At this same time, Indian Agent Carruthers also informed DIA headquarters in Ottawa that the Company had requested an additional 2.2 acres of reserve land for a four-track siding, claiming they had already made a deposit. The additional land required was in fact part of the land being requested for the station grounds and townsite.
13. At the end of October, 1903, J.A.J. McKenna, the Assistant Indian Commissioner at Winnipeg, met with the Indian Agent, Chief Joseph Cote and Cote Band members. McKenna submitted a written report on the meeting to Indian Agent Carruthers and to DIA headquarters in Ottawa. McKenna also reported the substance of the meeting to the CNR in a letter dated October 29, 1903.
14. McKenna reported that the land requested for the divisional point was to consist of a siding and a townsite of approximately 574.46 acres, though the Company later admitted that they required only 99 acres for the station grounds.
15. McKenna also reported Chief Joseph Cote’s purported position on the proposed taking, namely:
 - a. the First Nation was “not anxious to have a town site upon the Reserve” and that “[t]hey consider 99 acres an altogether excessive acreage for station grounds, and insist that the amount of land for such purposes be fixed by the proper authority which amount they consider should be no larger than could under the law be expropriated were the land outside an Indian Reserve”;

- b. if the land was absolutely necessary for railway purposes, the First Nation would be willing to sell at \$25.00 per acre;
 - c. a surrender for sale at \$50.00 per acre would be considered for a further amount of land required for railway purposes on the condition that it would be used exclusively for railway purposes;
 - d. a request was made for \$100.00 per acre for townsite lands, but an alternative arrangement could be made whereby the land would be surrendered for subdivision into town lots for subsequent sale by the Company for townsite purposes upon payment down at the rate of \$25.00 per acre; the First Nation to share equally in the proceeds of the sale of the town lots less the amount of the advance at \$20.00 per acre, the Company to bear the expense of subdivision, sale, etc.; and
 - e. all of the money derived from the immediate payment by CNR should be used to provide agricultural implements to certain Cote members and any members not so assisted were to receive a per capita payment.
16. The CNR made a counter-proposal on December 11, 1903. The Indian Agent was instructed by the Indian Commissioner's office to present it to the First Nation, drawing attention to the fact that the CNR was asking for the lands for the station grounds and extra track free of charge, but this was balanced by the higher rates being offered for the townsite. Furthermore, the First Nation was to be reminded that under the *Railway Act* the company could obtain the station grounds through expropriation, in which case the rate paid for the right-of-way would likely be applied (the right-of-way was sold for \$8 per acre).
17. The First Nation met again on January 14, 1904 to consider the Company's counter offer. At that time, the First Nation reportedly presented three alternate sets of terms, each proposing the sale of different amounts of land at different rates. One option offered the sale of 400 acres of land for a townsite at \$25 per acre, \$10,000 to be paid at the time of the sale with a provision for sharing equally

the proceeds from the sale of the town lots once the Company had recouped its initial \$10,000 payment.

18. In the meantime, the Superintendent General of Indian Affairs (“SGIA”) at the time, Clifford Sifton, refused to allow townsites to be established on Indian reserves. This decision resulted in a series of letters which addressed the anticipated economic and social impact of a proposed townsite on the Cote Reserve. Indian Agent Carruthers strongly supported the townsite, as he thought it would benefit the First Nation and encourage settlement in the area. Carruthers was particularly committed to using the surrender to finance the development of stock raising and farming on the Cote Reserve.
19. Despite his decision, the SGIA requested an opinion from McKenna as to the wisdom of allowing a townsite on the reserve. McKenna resumed talks with CNR resulting in CNR presenting a new proposal to McKenna.
20. After conferring with McKenna on the new offer, Carruthers called a meeting with the First Nation towards the end of March, 1904. According to Carruthers, the Cote Band agreed to the Company's latest offer, which included the sale of 272 acres for station grounds and a townsite for which the Company would pay \$10 per acre. After recouping a specified amount in land sales receipts, the Company and the First Nation would then share equally in the proceeds of sale. It is apparent from Carruthers' letter that the First Nation wanted \$2,720 from the sale to be applied to agricultural equipment and stock and wanted the transaction to be completed as soon as possible to be ready for spring planting. McKenna warned Carruthers that the DIA would have to approve both the proposed surrender and the advance expenditure of funds before any further action could be taken.
21. McKenna's letter to DIA headquarters advocating the surrender indicated that he believed the proposed station grounds and townsite on the Cote Reserve would benefit the settlers and general development of the west, as well as the Cote Band,

in that it would facilitate their integration into the settler economy and society. Furthermore, McKenna considered the Company's offer to be fair.

22. After some consideration of the terms of the proposed surrender and the way in which the money would be expended, DIA headquarters approved of a surrender being taken under certain conditions.
23. The terms approved by the SGIA were outlined in a letter to Indian Commissioner Laird dated May 20, 1904. The surrender was to be unconditional – the First Nation was not permitted to stipulate any conditions regarding the expenditure of the proceeds. A total of 272 acres were to be surrendered for an immediate payment of \$10 per acre. After CNR received \$5,000 from the sale of the townsite property, the Company and First Nation were to share equally in the proceeds of the sales. In addition, the DIA was to approve the valuation of the lots. Forms of surrender and a letter of instruction authorizing Indian Agent Carruthers to seek the surrender were sent to the Indian Commissioner in Winnipeg in June, 1904.
24. The surrender meeting took place on June 21, 1904. The surrender document was signed by Chief Joseph Cote and thirteen Cote Band members, including headmen Singuish and Charles Kesick, and witnessed by Indian Agent Carruthers and Fred Fischer, the clerk and interpreter. No documentation has survived that indicates how and when the meeting was called or what transpired at the meeting. No record of a vote for the surrender has been found. Fourteen men signed the surrender document, however the number present at the meeting is not known. There were 55 adult males in the Cote Band in 1904.
25. The surrender document purported to release two separate tracts of land from the Cote Reserve. First, two strips on either side of the CNR right-of-way through the projected northeast quarter of section 34 and the west half of section 35, said to contain 30.06 acres, to be used for the railway station grounds. Second, consisted of a portion in the north half of projected section 34 within the reserve and the west half of the northwest quarter of projected section 35, along with the projected road allowance between the sections and excepting out CNR's right-of-

way and the land for the station grounds, containing a total of 242 acres. Both tracts were in township 29, range 32.

26. The surrender document did not contain any specifics regarding the amount or terms of payment, but contained the standard clause "in trust to dispose of the same to such person or persons and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people". The standard clause regarding deductions for expenses of management had been struck out of the printed copy.
27. The 1904 surrender was made under section 39 of the 1886 *Indian Act*, which stipulated that the surrender had to be assented to by the majority of the male members of the band of the full age of twenty-one years at a meeting or council summoned for that purpose, according to the rules of the band, and held in the presence of the SGIA, or an officer duly authorized to attend such council by the Governor in Council or by the SGIA. Furthermore, no Indian was entitled to vote or be present at the meeting unless he habitually resided on or near the reserve.
28. Because of the lack of documentation, it is not possible to determine whether the meeting was properly called, whether a majority assented to the surrender, or if all voters had a right to vote.
29. Indian Agent Carruthers transmitted the surrender document to Indian Commissioner Laird on June 29, 1904. Carruthers had changed the date on the surrender document from June 21 to June 29, explaining that while the Indians signed the surrender document on June 21, he could not get it sworn by a Commissioner until June 29. The affidavit attesting to the surrender was signed by Chief Joseph Cote, Agent Carruthers, Fred Fischer and J. C. Murray at the Cote Indian Office on June 29, 1904.
30. DIA headquarters returned the surrender to Indian Commissioner Laird on July 8, 1904, requesting that it be made before a Judge, Magistrate or Justice of the Peace as per the *Indian Act*. The amended affidavit was attested to on July 18, 1904 by

a Justice of the Peace and forwarded to DIA headquarters. The amended affidavit was the same document that had been sworn previously. The place, date and commissioner for oaths was struck out and the new date (July 18), place (Fort Pelly) and commissioner (E. Challer Clark, J.P.) written in.

31. The surrender was formally submitted to the Governor General in Council over two months later on September 13, 1904, and accepted by Order-in-Council on September 28, 1904. The accepting Order-in-Council specified that the 30.06 acres was "to be used by the said Railway Company for the purposes of a Station ground." The purpose of the townsite lands was not specified, nor was the amount or method of compensation.
32. A second submission to the Governor General in Council was made on September 14, 1904 and accepted by Order-in-Council on September 28, 1904. This submission outlined the terms of compensation for both the station grounds and townsite, now described as consisting of 241.94 acres.
33. A disagreement ensued over the way in which proceeds of sale, (ie. either net or gross), would be divided. When the CNR sent two cheques totalling \$2,720 (\$300.60 plus \$2,419.40), the DIA objected to the accompanying statement that the total sum was in full payment for the surrendered 272 acres. CNR then issued new cheques representing payment for 30.06 acres for the station grounds (\$300.60) and \$2,419.40 "on account" of the land required for townsite purposes (241.94 acres). These amounts were deposited to the First Nation's trust account in August 1904. The usual 10% (\$272.30) was deducted for expenses of management fees, even though this standard clause had been struck from the original surrender document.
34. DIA refused to forward patents for the land to Mackenzie, Mann & Co., recommending instead a system of issuing Crown patents to town lot purchasers upon completion of individual purchases. The controversy over the issuing of patents was tied to the disagreement over the division of the proceeds of sale. By withholding patents until the land was paid for by the individual purchasers rather

than issuing a patent to Mackenzie, Mann & Co., who had purchased the townsite, the DIA believed it was achieving some assurance that the First Nation would receive its share of the proceeds of sale.

35. While the dispute over the exact terms of payment was underway, the Order-in-Council based on the Submission to Council of September 14th was passed on September 28, 1904. The Order-in-Council stated that the First Nation would share in the equal distribution of the proceeds after the CNR "had recouped itself \$5,000.00 made up of the \$2419.40 advance and the cost of laying out of the townsite, dedicating streets etc."
36. The Order-in-Council also approved of patents being issued to individual purchasers when the purchase of lots was completed, and stipulated that the plan of subdivision of the townsite be placed on record in the local Land Titles Office. There was no signed agreement between representatives of the railway company and government officials regarding the terms of payment.
37. On November 11, 1904, the CNR's solicitors requested that an Order-in-Council be passed authorizing the issue of a patent for the railway station grounds, stating that they did not concur with the terms of the agreement as expressed in the September 28, 1904 Order-in-Council. Ultimately the townsite appears to have been sold as specified in the Order-in-Council.
38. The patent for the 30.06 acres of land for the station grounds was issued on April 11, 1905. No mention of minerals was made.
39. Townsite lots were sold beginning on September 7, 1904. A total of 423 Kamsack townsite sales were completed by the mid-1920s, covering most of the land that had been surrendered for the townsite. By 1951 all remaining lots had been sold, making a total of 432 sales.

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

40. This Claim is brought on the grounds that the Respondent breached its statutory and fiduciary duties to the Cote First Nation in the context of this taking of Cote Reserve land by:

- a. failing to summon the surrender meeting in accordance with the rules of the Band or, in the absence of evidence regarding such rules, by failing to provide reasonable and adequate notice of the meeting to discuss the proposed surrender;
- b. failing to provide the members of the Band with legal or technical advice or to conduct the surrender meeting in accordance with the spirit and intent of the *Indian Act* so that the members of the Band would be afforded an opportunity to provide informed consent to the surrender proposal;
- c. failing to prepare a voter's list and to properly oversee the voting procedures to ensure that only eligible voters could participate in the vote and that accurate records were kept;
- d. failing to ensure and document in each case that a quorum of voters participated (to validate the surrender meeting), and that a majority of the eligible voters actually voted in favour of the surrender (to validate the surrender);
- e. failing to take steps to ensure that the Band understood the surrender;
- f. taking active steps and withholding information to ensure that the surrender would be executed, despite being contrary to the best interests of the Band; and

- g. failing to minimize the taking by expressly reserving mines and minerals, considering the leasing option, or simply taking less than the acreage actually surrendered and sold; ~~and~~
- h. failing to withhold its consent to the taking of Cote Reserve land as the transaction was foolish, improvident and exploitative; ~~and~~
- i. in the alternative, if no statutory breach is found, breach of fiduciary duty to obtain adequate compensation for the taking of Cote Reserve lands.

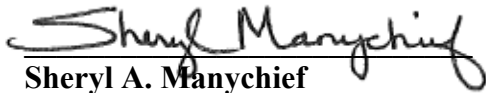
VII. Relief Sought

41. In light of the foregoing, the Cote First Nation seeks the following relief:
- a. compensation for the current, unimproved value of the lands in lieu of restoring the land to reserve status;
 - b. compensation for damages suffered by the First Nation as a result of the loss of use of the surrendered lands during the period in which the lands were removed from its use and benefit, subject to a set-off in favour of the Respondent for any land sale proceeds collected by the DIA and credited to the Band;
 - c. an award of solicitor-client costs pursuant to the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119, section 110(2) in relation to the specific claim and this proceeding; and
 - d. such other relief as this Honourable Tribunal deems just.

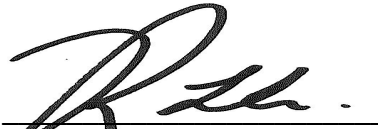
Original Declaration of Claim filed on the ~~Dated this~~ 4th day of September, 2014 at the City of Calgary, in the Province of Alberta.

Amended Declaration of Claim filed April 28th, 2016, at the City of Calgary, in the Province of Alberta.

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