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SPECIFIC CLAIMS TRIBUNAL

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September 30, 2016

David Burnside

Ottawa, ON | 1

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

KEESEEKOOSE FIRST NATION

Claimant

v.

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

Respondent

DECLARATION OF CLAIM

Pursuant to Rule 41 of the
Specific Claims Tribunal Rules of Practice and Procedure

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.*

September 30, 2016
Date

David Burnside
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 Keeseekoose First Nation (hereinafter also referred to as the "First Nation" or "Band" depending on the context), 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 Keeseekoose Indian Reserve ("IR") 66 is located south of Fort Pelly in the Province of Saskatchewan, close to the Manitoba border.

2. The Claimant is the successor in interest to the Saulteaux Band that signed an adhesion to Treaty 4 at Swan Lake, Manitoba on September 24, 1875, under the leadership of Chief Kii-shi-kouse (Keeseekoose).

II. CONDITIONS PRECEDENT (R. 41(C))

3. The following conditions precedent as set out in paragraph 16(1)(d) 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 in September 1999, asserting firstly, that the surrender of 7,600 acres of land from IR 66 in 1909 (the "Claim Lands") was invalid due to various breaches of Canada's statutory and fiduciary obligations in relation to the surrender process, and secondly, that the sale of the Claim Lands and the mismanagement of the proceeds of such sale were also in breach of the Crown's fiduciary, trust and statutory duties (hereinafter referred to as the "1909 Surrender" or "Claim").

5. On October 16, 2008, Canada offered to accept part of the Claim for negotiation under the Specific Claims Policy. The First Nation declined Canada's offer to negotiate only part of the Claim. The Department of Indian Affairs and Northern Development closed its file in relation to the Claim on May 27, 2014.

6. 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, PARAGRAPH 20(1)(B))

7. The First Nation does not seek compensation in excess of $150 million for the 1909 Surrender Claim.

IV. GROUNDS (ACT, SS. 14(1))

8. 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 Keeseekoose Indian Reserve 66

9. In September 1874, the Crown and the Cree, Saulteaux, and other Indians signed Treaty 4 at Qu'Appelle and Fort Ellice. Among other things, the treaty provided for the surrender of aboriginal title to approximately 195,000 square kilometres of land in what is now primarily southern Saskatchewan, in exchange for various promises and benefits to be provided by the Crown, including the provision of reserve lands.

10. On September 24, 1875, Chief Kii-shi-kouse (Keeseekoose) met with Commissioners W. J. Christie and M. G. Dickieson at Swan Lake near the mouth of the Shoal River in what is now the Province of Manitoba, and signed an adhesion to Treaty 4 on behalf of his Band.

11. In 1880, members of the Keeseekoose Band under Chief Keeseekoose, relocated from the reserve set aside at Swan Lake to an area about 90 miles southwest in the Fort Pelly District in what is now southeastern Saskatchewan.

12. In July of 1883, A.W. Ponton conducted a preliminary survey of IR 66 for Keeseekoose's Band adjacent to Cote IR 64 on the east side of the Assiniboine River. Surveyor J. C. Nelson completed the survey in January 1884. IR 66, containing 28.6 square miles or 18,304 acres, was confirmed by Order in Council PC 1151 on May 17, 1889.

(b) Federal Indian Policies and Pressure on Indians to Surrender Reserve Lands

13. Between 1896 and 1911, approximately 21% of the lands reserved for prairie First Nations were surrendered back to the Crown at the instigation of Department of Indian Affairs officials and the Liberal government of Wilfred Laurier. During this period, the Crown introduced a number of policies and legislative amendments to the *Indian Act* that were specifically designed to induce Indian bands on the prairies to surrender their reserve lands. Additionally, the Department of Indian Affairs worked in concert with the Department of the Interior under a single Minister (who also served as Superintendent General of Indian Affairs), to pursue an aggressive policy of obtaining the surrender of Indian reserve lands.

14. Ultimately, 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 7,600 Acres of Keeseekoose IR 66 in 1909

15. On March 1, 1893, the Government passed Order in Council PC 574, setting aside haylands for the Indians of the Fort Pelly District, immediately west of the Cote and Keeseekoose reserves. Through the use of these haylands, the Keeseekoose Band quickly demonstrated its proficiency in cattle raising. Around this time, the Fort Pelly region saw increased settlement, and demand for land from speculators and the railways.

16. On May 15, 1899, a portion of the haylands recently set aside for the Indians was reserved for the exclusive use of the Doukhobor settlers by Order in Council PC 503, despite protests from both the Cote and the Keeseekoose Bands, and their Indian Agent, W. E. Jones. What remained of the haylands was insufficient for the needs of the Keeseekoose Band, let alone the needs of all three Pelly Bands that relied on the haylands.

17. Without the Pelly Haylands, the Cote and Keeseekoose Bands came forward with proposals regarding the possibility of exchanging portions of their reserve lands for additional haylands. In 1903, Indian Commissioner David Laird told the Bands the haylands were not available for exchange.

18. In a letter dated July 16, 1907, Chief Kitchemonia and Headman Kekekaway indicated to David Laird that some of their people were trying to make a deal in regard to their land. They told Laird that if a deal were to be arranged, all of their people would have to be involved.

19. Nine days later, J. A. J. McKenna instructed Indian Agent W. G. Blewett to inform Chief Kitchemonia that, prior to any surrender, the Department required the consent of the

majority of the male Band members 21 years and older, and that the consent had to be formally given to a duly authorized Indian Affairs official.

20. On January 21, 1909, W. M. Graham, Inspector of Indian Agencies, informed Deputy Superintendent of Indian Affairs Frank Pedley that, two days earlier, he met with a "large group" of Keeseekoose Indians who wanted to sell 6,000 acres from the northeast section of the reserve. Graham reported that, by the end of their meeting, the Indians agreed to the proposed surrender and sale of 8,000 acres, or approximately 44% of their land base, at a price of $15 per acre.

21. He further advised that, although the Indians had initially requested a down payment of $6 per acre, they ultimately agreed to accept a down payment of $85 per person. Graham enclosed a map in his correspondence with Pedley, and stated that he had inspected the land, which was "very fair" and "will sell at a good figure in the near future."

22. A week later, Department officials recommended the proposed surrender to Pedley.

23. On February 1, 1909, Samuel Bray, Head of the Surveys Branch, prepared a description of 7,600 acres, or approximately 42% of IR 66 to be surrendered.

24. On February 3, Pedley authorized Graham to take the surrender in accordance with the *Indian Act*.

25. On February 8, 1909, eight Keeseekoose Band members, including Headman Kekekaway, wrote to Indian Commissioner Laird and informed him that that they lived on the proposed surrender lands and opposed the surrender proposal. The writers stated that the Band members did not want to sell *any* reserve land, but particularly not "all the good land that there is on the Reserve, as is proposed." In a written reply two days later, Laird stated he was unaware of any surrender proposal and confirmed that all surrenders required the assent of a majority of the voting members of a Band.

26. On February 25, Headman Kekekaway informed Laird that a majority of the Band opposed surrendering all of the best reserve land, but did not object to selling *some* of the best land along with land in another part of the reserve in order to "buy necessary power + implements to farm the land as that is now the only way we see at making a living."

27. The next day, Graham wrote to Pedley, acknowledging receipt of the surrender authorization and surrender forms, and requested $11,470 to pay the Indians upon signing.

28. On February 27, Laird wrote to Kekekaway, confirming that no reserve land could be surrendered without a majority vote by eligible members of the Band, and that if the

Band wanted to proceed with a surrender, it should apply to him, the local agent, or Inspector Graham to do so.

29. On March 31, Agent Blewett reported that, with respect to farm tools, "These Indians are well supplied with necessary implements, and are annually purchasing all new ones wanted."

30. Nearly three weeks later, on April 19, Agent Blewett reported anxiety among the Key and Keeseekoose Indians about whether or not the Department sanctioned a surrender and, if so, when the surrender would take place. He suggested that the surrender occur before the breaking season started on May 20, 1909, to allow the Indians to purchase oxen to begin farming early in the season.

31. On April 28, Graham reported to Assistant Deputy and Secretary of Indian Affairs J. D. McLean that he would leave for the Fort Pelly Agency within 10 days to conduct the Keeseekoose surrender. He requested $11,475 to distribute to the Band and $1,500 to compensate those who had made improvements on the surrendered land. On May 10, McLean sent $11,300 to Graham for the surrender, informing him that this was all the Department had available for that purpose.

32. On May 13, 1909, Inspector Graham arrived at the Fort Pelly Agency and allegedly notified the Keeseekoose Band about a surrender meeting that was to take place a day and a half later. There is no evidence with respect to the form or sufficiency of notice other than Graham's bare assertion that notice was provided. There is no independent evidence the surrender meeting was called in accordance with the rules of the Band. There is no indication that the Indian Agent was provided with any instructions surrounding the surrender meeting or the surrender.

33. Evidence of what happened at the May 15 surrender meeting is scant. There are no minutes of the meeting, voters lists, or record of how the vote took place. There is no evidence that an interpreter explained the terms of surrender to Band members at the meeting (no interpreter was assigned to the Pelly Indian Agency). There is no indication that eligible voters were provided with information regarding the terms of the proposed surrender, options and the foreseeable consequences of those options. There is no evidence the Band received any legal or technical advice in relation to the surrender.

34. The surrender document itself provided for:

    1) the immediate distribution of $85 per Band member;

    2) the public auctioning off of surrendered land to the highest bidder;

    3) compensation to owners of improved land and buildings according to Inspector Graham's valuation;

4) the Department's funding of interest monies for Indian children between the ages of twelve and eighteen; and

5) the allowance that Indians use proceeds from the sale of their land to purchase implements, wagons, machinery, harness, and stock for farming.

35. Graham reported that, of the 134 Indians present, four Band members were not paid at the meeting due to his having insufficient funds. Of these four members, three were paid soon after the signing, while the fourth resided in a mental institution in Brandon, Manitoba, so the Department funded his money.

36. On May 19, 1909, Graham and Chief Kitchemonia signed the Surrender Affidavit before a Justice of the Peace, with Chief Kitchemonia's signature indicated by an "X". On June 3, Chief Accountant D. C. Scott of Indian Affairs noticed an error with the Affidavit. The name of the Key, not Kitchemonia, appeared as the deponent for the Keeseekoose Band surrender. On June 7, McLean instructed Graham to make a correction. On June 18, 1909, Graham submitted an amended Affidavit of Surrender.

37. On July 6, 1909, Order in Council PC 1524 authorized the surrender for sale of 7,600 acres of Keeseekoose Reserve land. The Order in Council stated that the land would be sold without reference to the *Regulations for the Disposal of Indian Lands* of 1888 (the "*Regulations*"). The *Regulations* limited each purchaser to a maximum of one section of land, required payment of interest at 6%, set a minimum residency requirement of three years on purchased lands, and set mandatory improvement conditions.

(d) Crown's Post-Surrender Conduct Prior to the Sale of the Claim Lands

38. On December 10, 1909, Graham wrote to McLean requesting $755 to pay eight band members for improvements they made to the surrendered land, ranging from building a house to plowing fields. McLean subsequently sent a cheque in that amount to Indian Agent Blewett to compensate those eight members.

39. In May 1910, Surveyor J. L. Reid subdivided the surrendered land and valued the acreage in each lot from $5 to $10.75 per acre. Reid's valuation of the improvements was much lower that of Graham's. Reid itemized seven houses or stables, assessing their value at $310. He did not itemize a value for plowed fields.

40. On September 29, Chief Surveyor Samuel Bray submitted Reid's field notes and valuations to the Assistant Deputy Minister. The next week, W. A. Orr reported that 6,853 acres of Keeseekoose surrendered land could be sold at public auction. Some 131.34 acres of surrendered lands covered by ponds and sloughs were not included for sale.

41. On October 11, McLean submitted an advertisement for the surrendered land sale to the King's Printer, identifying the sale date as December 1, 1910. The auction was advertised in *The Times* (Kamsack, Saskatchewan), *The Times* (Yorkton, Saskatchewan),

The Recorder (Saltcoats, Saskatchewan), *The Manitoba Free Press* (Winnipeg, Manitoba), *The Leader* (Regina, Saskatchewan), and *The Globe* (Toronto, Ontario).

42. Prior to the auction, the Department received public inquiries requesting a description of the land for sale, the upset prices, information on the terms of sale, and information regarding prospective purchasers. The Department declined to provide that information to the general public. On October 31, 1910, however, Graham requested that McLean send a blue print and list of upset prices concerning the lands for sale to eight interested individuals and companies in Ontario, Manitoba, and Saskatchewan, which the Department did.

43. Presided over by Graham, the public auction took place December 1, 1910, in Kamsack, which saw the initial sale of 55 parcels of the surrendered Keeseekoose lands. The terms of sale provided that purchasers pay 10% down at time of sale and the balance owing in nine annual installments at 5% interest. The Keeseekoose Land Sales Book provides that the total acreage for the lands purchased at the auction amounted to 6,390 acres and the sale price was $69,314.45. The average sale price was $10.03 per acre.

44. The public auction included surrendered lands from both Keeseekoose IR 66 as well as lands from the nearby the Key IR 65. In one misstep, a buyer intending to buy lands surrendered by the Keeseekoose Band erroneously purchased a parcel of lands surrendered from the Key IR 65. The Department allowed the cancellation of the purchase and, thinking the land was from the surrendered portion of IR 66, refunded the buyer's money using money from the Keeseekoose Band account. The Department did not fix this error, despite Graham bringing the mistake to the Department's attention.

45. Once Keeseekoose's surrendered lands were sold at auction in 1910, the buyers' information was forwarded to the Department, as well as the initial payment, which was deposited into the Band's trust fund account.

46. Six months after the auction, the Chiefs and Headmen of Keeseekoose and the Key asked Indian Agent Blewett when they would receive interest payments from the sales. Blewett indicated they would start receiving the payments when the buyers made their first annual payments on December 1, 1911.

47. On December 5, 1911, Agent Blewett informed McLean that the Bands were again inquiring about when they would receive their interest monies.

48. On December 28, 1912, the Bands again made the same inquiry.

(e) Sales and Administration of the Claim Lands

49. The surrendered Keeseekoose lands, which Graham referred to as "very fine," were located in the northeast corner of IR 66. Of the total 7,600 acres surrendered, 6,390 acres were sold at the 1910 auction. Of the total, 131.34 acres were withheld from sale

because they were lake beds. 964.23 acres were unsold or unlisted. In 1916, the Band exchanged 401 acres of the unsold surrendered lands for a 348-acre strip of land along the eastern boundary of IR 66.

50. At the auction, Crescent Realty Co. Ltd. of Yorkton, Saskatchewan bought five quarter sections. The company had close ties with Bradbrooke Bros., Investment Brokers, Insurance and Financial Agents and the law firm of Patrick Doherty & Co., both also of Yorkton.

51. M. F. Steinberg of Canora, Saskatchewan bought two quarter sections, and immediately assigned them to Pelly's John Madison, a machinery dealer, who also purchased three quarter sections at the auction.

52. J. R. Dixon of Kamsack, Saskatchewan bought four quarter sections at the auction before eventually moving to Seattle.

53. A. B. Allard of Regina's North-West Mounted Police ("NWMP") bought one quarter section at the auction, and George Jennings, also of the NWMP at Regina, purchased three quarter sections.

54. Many of the interests in parcels sold at the auction were assigned, few of the sales were completed on time, and several were ultimately cancelled and repossessed by the Department. Two parcels that were the subject of cancelled sales were ultimately reclaimed by Keeseekoose for inclusion in its community farm in 1948.

55. Generally, a purchaser could assign an interest in Indian land before paying off the entire sale price by registering a quit claim deed with the Department. Assignments were accepted if the account was up to date and the assignment was unconditional. In the case of the Keeseekoose lands, however, some purchasers assigned land without registering quit claim deeds with the Department.

56. The Department was responsible for collecting payments on Indian land sold at public auction. Up until 1919, the Lands and Timber Branch of the Department of Indian Affairs directed the collection of payments, which consisted primarily of sending annual notices of payments due. There was little or no follow-up to requests for payment and the local Indian Agents were not used to assist in collections. The threat of cancellation was used quite late in the sale as an attempt to collect on delinquent accounts.

57. By the 1930s, the built-up arrears, poor economic conditions exacerbated by poor weather conditions meant most Prairie farmers were unable to pay down their debt. In many cases, the Department arranged crop sharing plans whereby the Indian Agent was employed to encourage and collect payment.

58. In 1934, the Treasury Board took over the collection of payments due on Indian land sales, and elevated the role of the Indian Agent in the collections process, requiring Agents to produce collections reports for the Department.

59. In the late 1950s, the Department agreed to two three-year Crop Share Leases, each involving 160 acres.

60. A 1975 Canada Land Surveys Records plan indicates that, as of that date, section 26 as well as fractional southwest ¼ of section 25 were surrendered and unsold. Section 26 totals 597 acres, and the fractional portion of section 25 amounts to 38.7 acres. Furthermore, the plan shows that 38.8 acres of fractional northeast ¼ of section 21 remained surrendered and unsold.

61. The Keeseekoose Land Sales Book suggests the total amount of principal paid between the years 1910 and 1946 (the date of final payment) amounted to $67,632.81, with the total amount of interest paid at $25,167.60, totaling $92,791.41 for the surrender.

62. Between 1911 and 1948-49, per capita distributions to Band members resulting from the payment of capital and interest for the purchased lands amounted to $6.91. The total amount distributed to Keeseekoose Band members in these years was $46,245.

63. There is no evidence indicating that the Department funded interest money for children between the ages of 12 and 18 as required in the terms of surrender.

64. Between 1911 and 1948-49, the Band spent $24,544.65 on agricultural implements, cattle, horses, and seed.

(f) Eastern Boundary of IR 66

65. In October 1911, the Band contacted the Department about its concern over Reid's retracing of the eastern boundary of IR 66, conducted at the same time as the surrendered parcel. In November 1911, McLean recommended no changes to Reid's survey line.

66. Following repeated requests by the Band, in 1916, the Keeseekoose Band was allowed to exchange 401 acres of the unsold surrendered lands for a 348-acre strip of land along the eastern boundary of the reserve by Order in Council PC 718. The Band, however, had previously stipulated that the exchange would be for an equivalent acreage.

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

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

1) The Crown failed to comply with the surrender provisions of the *Indian Act* of 1906 in breach of its statutory duties. In particular:

i. adequate and proper notice was not given of the surrender meeting in accordance with the rules of the Band in breach of subsection 49(1);

ii. there is no independent evidence that a quorum of eligible 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; and

iii. Graham was not properly certified to convene or attend the surrender meeting in accordance with the provisions of subsection 49(1);

2) The Crown breached its pre-surrender fiduciary duties owed to the Keeseekoose Band by failing to reject a surrender that:

i. was clearly so foolish, improvident and expansive as to amount to exploitation of the Keeseekoose Band;

ii. was secured through dealings tainted by the conduct of Crown officials to the extent that the surrender cannot be relied upon as a true expression of the will of the Keeseekoose Band; and

iii. represented the will of the Crown as opposed to the will of the Band which had ceded and abnegated its decision making authority.

3) In the alternative to (a) and (b), the Crown breached its fiduciary and trust obligations to the Keeseekoose 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 and manage 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 1906 Indian Act

68. The purported surrender of 7,600 acres, or approximately 42% of Keeseekoose IR 66 on May 15, 1909 was contrary to the surrender requirements of section 49 of the *Indian Act,* R.S.C. 1906, c. 81. Section 49 provides as follows:

> (1) Except as in this Part otherwise provides, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless a release or surrender shall be assented to by 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 duty authorized to attend such council, by the Governor in Council or by the Superintendent General.

> (2) 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.
>
> (3) The fact that such release or surrender has been assented to by the band at such a council or meeting shall be certified on oath by the Superintendent General or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before some judge of a superior, county or district court, stipendiary magistrate or justice of the peace, or, in the case of reserves in the province of Manitoba, Saskatchewan or Alberta, or the Territories, before the Indian commissioner and in the case of reserve in British Columbia, or in either case, before some other person or officer specially there to authorize by the Governor in Council
>
> (4) 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.

69. The 1909 Surrender was not taken in accordance with the statutory requirements for a valid surrender. There were neither proper nor sufficient notice of the surrender meeting, as required under subsection 49(1).

70. Further, the historical record is clear that Laird, the Superintendent General of Indian Affairs, was not aware of the surrender until after the fact. As such, Graham was not "an officer duly authorized" to convene or attend the surrender meeting, which also results in a breach of the mandatory requirements of subsection 49(1). In this regard, there is also no evidence that Graham was authorized by the Governor in Council to convene or attend the 1909 surrender meeting.

71. The only evidence that is available is a surrender document and an altered affidavit in support of this surrender. There are no minutes of the meeting, voters list, or record of how the vote took place. There is evidence suggesting that only weeks before the surrender, a majority of Band members opposed the surrender.

72. In the absence of evidence that at least a majority of the eligible voters attended the surrender meeting and cast ballots in favour of the surrender, 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

73. The Crown breached specific and enforceable fiduciary duties that it owed to the Keeseekoose Band prior to the surrender of the Claim Lands.

Where the Band's Decision to Surrender Amounts to Exploitation

74. The Governor in Council breached its fiduciary duty to the Band by failing to withhold consent to the surrender that was so foolish, improvident, and expansive as to amount to exploitation of the Keeseekoose Band. Particulars of this allegation are as follows:

    1) The terms of the surrender were completely inimical to its stated purpose, to the effect that, regardless of whether examined on its face or from the perspective

of the Band at the time, the 1909 Surrender was clearly so foolish and improvident as to amount to exploitation of the Keeseekoose Band in breach of the Crown's fiduciary duty.

2) The Crown failed to minimize the extent of the surrender or consider any other more limited options than to surrender approximately 42% of the Band's prime land to achieve this purpose, to the effect that the Crown breached its fiduciary to the Band.

3) There is evidence that the impetus underlying the surrender was the opening of Indian reserve lands on the prairies for settlement or speculation, which is in opposition to the best interests of the Band to the effect that the surrender is prima facie so foolish, improvident and expansive as to amount to exploitation of the Keeseekoose Band in breach of the Crown's fiduciary duty.

Where the Band's Understanding is Inadequate or the Dealings Are Tainted

75. The 1909 Surrender of the Claim Lands was invalid because the understanding of the Keeseekoose 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:

1) There is evidence of tainted conduct on the part of Crown officials who promoted and procured the surrender of approximately 42% of IR 66 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, who initiated the surrender process and inquired into the purchase of the Claim Lands;

2) There is evidence that Graham met with Band members for the express purpose of convincing them to surrender more "very fair" land than they had originally proposed on terms less favourable to the Band;

3) Further, there is evidence that the Band believed the surrender covered lands of a different quality than was actually covered by the surrender;

4) There is no evidence that a surrender meeting was properly called by the Crown in accordance with the rules of the Band or that the Crown made any effort to determine what the rules of Band were;

5) There is no evidence that the Crown provided eligible voters 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, despite the Band's reliance on the Crown for relevant information and advice, given its inability to retain technical or legal advisors on its own;

6) Despite the Crown being in control of the surrender process, there is no evidence that a quorum of the Band was present because there is no voters list from the surrender meeting and the surrender document was executed by only the Chief, two Headmen, and four Band members; and

7) Subsequent to the surrender, requests from the Band to the Crown—in particular, the three petitions from Band members regarding interest payments between 1910 and 1912—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.

76. Furthermore, the Crown's conduct in relation to the 1909 Surrender was not in keeping with the Honour of the Crown.

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

77. The Keeseekoose Band effectively ceded or abnegated its power to make the decision with respect to the proposed surrender of its reserve lands to the extent that the surrender represented the will of the Crown as opposed to the will of the Band. In proceeding with the surrender, the Crown breached its fiduciary duty by failing to act in a manner that represented the best interests of the Keeseekoose Band. A summary of the grounds for this allegation are as follows:

1) The Crown and its officials initiated and procured the surrender of IR 66 ostensibly 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;

2) The Crown controlled the surrender process throughout and failed to act in a reasonable manner with respect to recording sufficient information regarding the surrender process in breach of its fiduciary duty. Specifically, the Crown failed to:

   i. prepare voter lists;

   ii. record the number of eligible voters;

   iii. record how many eligible voters attended the surrender meeting;

   iv. record what was discussed; and

   v. record whether the requisite majority voted in favour of the proposed surrender;

3) The Chief and other Band members repeatedly engaged with Crown officials to voice concerns with the terms of the surrender, stating that the majority of eligible voters objected to the surrender. In addition, the Band, notoriously reliant on raising cattle,

made clear in its correspondence with Crown officials that it did not wish to give up all its most valuable land. The Crown's failure to respond to the Band's repeated concerns about surrendering its most valuable land tainted the surrender bargain and suggests the Band did not participate in determining the terms and conditions of the surrender, and did not understand them.

78. 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 breaches of the Crown's fiduciary duty.

79. The above facts also support a finding of fraud or equitable fraud. The Crown's actions were unconscionable and contrary to the Honour of the Crown.

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

80. In the alternative to the arguments in (a) and (b) above, the Claimant submits 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 failed to collect and properly account for the full proceeds from the sale of the Claim Lands.

81. 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 by failing to invest interest monies for children aged twelve to eighteen belonging to the Keeseekoose Band.

VII. Relief Sought

82. In light of the foregoing, the First Nation seeks the following relief:

1) 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 May 15, 1909 was contrary to the provisions of the 1906 *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 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. Further, the Crown breached its fiduciary duty regarding the management of trust monies.

2) Damages and equitable compensation based on the current fair market value of the Claim Lands plus loss of use of the Claim Lands from May 15, 1909 to the date of judgment;

3) Costs of this proceeding, and in the Specific Claims Process, on a substantial indemnity basis;

4) Such other damages or compensation as this Honourable Tribunal deems just.

Dated this 30th day of September, 2016 at the City of Calgary in the Province of Alberta.

MAURICE LAW

Per: _____ **Per:** _____

Ron S. Maurice **Steven W. Carey**

~~Per:~~ For: _____

Amy Barrington

Maurice Law Barristers & Solicitors
300, 602–12th Ave SW
Calgary, Alberta T2R 1J3
Phone: (403) 266-1201
Fax: (403) 266-2701
Our File: 409.01