

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

CARRY THE KETTLE

Claimant

v

HIS MAJESTY THE KING IN RIGHT OF CANADA
as represented by the Minister of Crown-Indigenous Relations

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*.

February 6, 2024

Date

Susie Thorsley

Registry Officer

TO: HIS MAJESTY THE KING IN RIGHT OF CANADA, as represented by the Department of Indigenous and Northern Affairs Canada

c/o Attorney General of Canada
Office of the Deputy Attorney General of Canada
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I. Claimant

1. The Claimant, Carry the Kettle (the “First Nation” or “Carry the Kettle Nakoda Nation” or “the Band”) is a First Nation within the meaning of section 2(a) of the *Specific Claims Tribunal Act*, RSC 1985, c I-5 and is the successor to an Aboriginal group adherent to Treaty No. 4 (“Treaty 4”). Carry the Kettle’s reserve lands are known as Assiniboine Indian Reserve No. 76 (“IR 76” or “the First Nation’s reserve lands”) and are located south of the town of Indian Head, Saskatchewan.

II. Conditions Precedent

2. The following conditions precedent as set out in section 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 decision not to negotiate the claim, in whole or in part; ...

3. The First Nation filed a specific claim on or about June 28, 2023, alleging His Majesty the King in right of Canada (“Canada” or “the Crown”) breached its statutory, fiduciary duties and the Honour of the Crown by failing to protect the interest of the First Nation in granting approval of, and advising the First Nation in regards to, the on-reserve pipelines, on-reserve cathodic protection systems, subsequent lease renewals, and the First Nation’s right to tax or otherwise levy fees with industry stakeholders, all of which amounted to a foolish, improvident, and exploitative transactions (the “Claims”).
4. Canada sent a letter to the Carry the Kettle on December 18, 2023, which acknowledged Canada’s receipt of the Claims on July 6, 2023. The effect of Canada’s decision is the refusal to further assess the Claim in compliance with its obligations under the *Specific Claims Tribunal Act* and the Specific Claims Policy and Process Guide and to decline any possibility to negotiate the within proceeding, in whole or in part.

III. Claim Limit (Act, s. 20(1)(b))

5. Each transaction set out in this Declaration of Claim is a separate specific claim under the *Specific Claims Tribunal Act*. The First Nation does not seek compensation in excess of \$150 million for each Claim herein, namely each approval, renewal, assignment, amendment, and taxation or grant in lieu thereof for the pipeline right-of-way and related project easements referred to herein as:

- a) TCPL Natural Gas Pipeline 100-1, 1955,
- b) PTC Natural Gas Pipeline, 1964,
- c) TCPL Natural Gas Pipeline 100-2, 1967,
- d) TCPL Natural Gas Pipeline 100-3, 1970,
- e) TCPL Natural Gas Pipeline 100-4, 1972,
- f) Cathodic Protection Systems,
- g) TCPL Natural Gas Pipeline 100-5, 1981-82,
- h) TCPL Natural Gas Pipeline 100-6, 1994, and
- i) TCPL Natural Gas Pipeline 100-7, 1997.

IV. Grounds of the Specific Claim (Act, s. 14(1)(a))

6. The First Nation submits that the Claims fall within section 14(1)(a) of the *Specific Claims Tribunal Act* which states:

14(1) Subject 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;

(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.

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

(a) *Treaty 4 and Carry the Kettle Nakoda Nation*

7. In 1877, The Man Who Took the Coat and Long Lodge each signed adhesion to Treaty 4. In 1884, Chief Long Lodge died and the members of his band were amalgamated with The Man Who Took the Coat's Band. Carry the Kettle Nakoda Nation is the successor First Nation. In 1891, The Man Who Took the Coat died, and his brother Carry the Kettle became Chief of Carry the Kettle Nakoda Nation.

(b) *Carry the Kettle's Reserve Lands*

8. IR 76 was surveyed in June 1885 by Dominion Land Surveyor John C. Nelson, which contained 73.21 square miles. The reserve was confirmed by Order-in-Council 1151 on May 17, 1889, and removed from the operation of the *Dominion Lands Act* by Order-in-Council (O.C.P.C. 1674/1893) on June 12, 1893.

(c) *Development of Hydrocarbon Transmission Pipelines*

9. In the late 19th and early 20th centuries, the Crown sought to settle the western Canadian provinces and exploit their abundant natural resources. Importantly, this

included the exploration for and extraction of oil and gas resources for the benefit of the oil and gas industry, and the provincial and federal Crowns.

10. Canada's first major natural gas pipeline was championed by a predecessor to what was eventually TransCanada Pipelines Limited, today known as TC Energy Corporation ("TCPL"). From its inception, TCPL lobbied to achieve its grand vision of a natural gas pipeline spanning from Alberta over the prairie provinces, through the Canadian Shield, and around the Great Lakes to the eastern provinces.
11. On March 21, 1951, TCPL was incorporated by an Act of Parliament granting the company general and special powers for the transmission and transportation of gaseous and/or liquid products within or outside Canada.

(d) Canada's Control over Hydrocarbon Transmission Lines

12. The Government of Canada first affirmed its jurisdiction over oil and gas pipelines crossing interprovincial and international borders through the passing of the *Pipe Lines Act*, 1949, c 20 (*Pipe Lines Act*). Under this Act, the Board of Transport Commissioners for Canada was designated as the administrative body responsible for the approval and regulation of both international and interprovincial pipelines.
13. Under this legislative scheme, the pipeline proponent company would apply to the Board for an order granting leave to construct a line. The application would include "a map showing the general location of the proposed line, the termini, and all cities, towns, villages, railways and navigable waters through, under or across which the line" would pass. Upon such application, the Board was required to consider all factors it deemed relevant including objections raised and the public interest.
14. In 1959, the passing of the *National Energy Board Act*, 1958, c-46, (*NEB Act*) delegated the responsibility of approval and regulation of both international and interprovincial pipelines to the more independent National Energy Board.
15. Under the *Pipe Lines Act and the NEB Act*, the Crown possessed the authority to approve, regulate, and oversee the location, construction, and operation of

international and interprovincial pipelines in Canada. In addition, when either the Board of Transportation Commissioners for Canada or the National Energy Board recommended the approval of an interprovincial pipeline, the consent of the Governor-in-Council was required to provide for the approval for the taking of any lands within an Indian reserve desired for a proposed interprovincial pipeline.

(e) *Interprovincial Pipelines Passing Through IR 76*

16. From the outset, and at all material times, the Crown consistently favoured the interest of industry stakeholders, in negotiating and approving the location, construction, development, maintenance, operation, and renewal of interprovincial pipelines through IR 76.
17. At all material times, unless otherwise expressly stated, the Crown failed to consider, explore, and advise the First Nation of reasonable alternatives to avoid the expropriation of the First Nation's IR 76 lands. Such reasonable alternatives ought to have included expropriating off-reserve locations, restricting the interests conveyed to the industry stakeholders, or surrendering the lands in question and securing replacement reserve lands elsewhere.
18. At all material times, unless otherwise expressly stated, the Crown failed to consult with the First Nation regarding the ongoing and cumulative impacts of the interprovincial pipelines and potential future projects and uphold its duty to minimally impair the First Nation's interests in IR 76, but rather consistently advised the First Nation of, and relied on its statutory authority to expropriate Indian reserve lands on IR 76 pursuant to section 35 of the *Indian Act* and the relevant interprovincial pipeline legislation.
19. From the outset and at all material times, unless otherwise expressly stated, the Crown failed to advise the First Nation on the ongoing and cumulative impacts of the pipeline project under consideration (and potential future pipeline projects) on the First Nation.

20. From the outset and at all material times, unless otherwise expressly stated, the Crown failed to advise the First Nation on the impact of the right-of-way easements being granted in favour of the pipeline companies on the First Nation's ability or right to tax or otherwise levy fees against the pipeline company's property situated thereon.
21. As further set out herein, the Crown failed, at all material times, to assess the adequacy of compensation provided to the First Nation, which ought to have included consideration of the *sui generis* nature of the First Nation's interest in its IR 76 lands, including the inalienability of the IR 76 lands except to the Crown and the First Nation's lack of unilateral authority to add replacement reserve lands. Furthermore, the Crown did not assess the lands based upon the overall valuation of the land to the project under consideration or to the construction of potential pipeline projects into the future.
22. Against the express reservations of the First Nation, the Crown provided its consent to industry stakeholders to expropriate lands from IR 76 in order to construct, maintain, and operate several interprovincial pipelines and related projects throughout the latter half of the 20th and early 21st century.

i. TCPL Natural Gas Pipeline 100-1, 1955, 72.85 Acres

23. On May 5, 1955, an Order-in-Council (O.C.P.C. 1955-640) was passed, which authorized the expropriation of (and grant of a right-of-way easement to TCPL over) 72.85 acres of IR 76 lands as described within the March 3, 1955, agreement between TCPL and the Crown. O.C.P.C. 1955-640 was granted pursuant section 35 of the *Indian Act*, RSC 1953, c 149 and section 22 of the *Pipe Lines Act*, 1949, c 20.
24. Neither the Crown nor TCPL consulted with the First Nation regarding the proposed TransCanada Pipeline or any related project that would cross and encumber IR 76 until after the decision was made to expropriate the First Nation's reserve lands. Once the decision was made to encumber the First Nation's reserve

lands the Crown approached the First Nation in an attempt to secure necessary Band Council Resolutions.

25. On or about September 29, 1954, the Crown was in receipt of a Band Council Resolution (BCR) dated September 10, 1954, which purported to authorize the Minister of Citizenship and Immigration to grant an undefined proprietary interest in certain IR 76 lands to TCPL for the purposes of a compressor station for its TransCanada Pipeline. No statutory authority which would allow the Crown to grant the proprietary interest to TCPL was cited. The total compensation was to be \$3,200.00 for the entire area or a rate of \$40.00 per acre for any portion of the area required.
26. On or about September 29, 1954, Canada communicated to TCPL that a proposed “irrevocable option ... to purchase 80 acres on this Reserve” could not be authorized as “the effect of course is to alienate a part of the Reserve if the option is exercised”, which would have required a formal surrender pursuant section 39 of the *Indian Act*, RSC 1953, c 149. Canada described to TCPL the general requirements of obtaining a surrender from the First Nation, including the minimum threshold attendance of a majority of those Band members entitled to vote and that the vote itself would need a majority vote in favour of the surrender.
27. As an alternative, Canada indicated it would instead authorize the irrevocable option pursuant the authority to unilaterally expropriate Indian reserve lands pursuant Section 35 of the *Indian Act* given the Band Council had “recommended approval of the sale”.
28. On December 8, 1954, N.J. McLeod, Superintendent of the File Hills Qu’Appelle Agency, provided TCPL’s agent company responsible for the construction of the pipeline with the “legal description of the entire area within the Reservation in question” in order to assist the company in planning its route through IR 76.

29. The BCR dated January 14, 1955, requests that the Crown enter into an agreement with TCPL “for the construction of a Gas Pipeline” through IR 76 in exchange for compensation paid in the amount of \$20.00 per acre.
30. At no time did the Crown provide the First Nation with information or records indicating whether there was an opportunity renegotiate compensation at a future date, how the amount of compensation was arrived at, if it was fair market value, or that the Crown considered the overall value of the lands to the project under consideration (or to the construction of potential pipeline projects into the future), and the *sui generis* nature of the First Nation’s interest in its IR 76 lands.
31. At no time did the Crown advise the First Nation on the impact of the right of way being granted in favour of TCPL on the First Nation’s ability or right to tax or otherwise levy fees against TCPL.
32. Furthermore, the Crown did not advise the First Nation on the ongoing and cumulative impacts of the project under consideration (and potential future pipeline projects) on the First Nation. On or about January 14, 1955, N.J. McLeod attended a meeting between Chief and Council and TCPL “for the purpose of advising the Indians the amount of compensation and damages they could receive from the construction”. In his January 18, 1955, letter to his superior at the Department of Indian Affairs, McLeod provided details of the January 14 meeting, including:
 - a. TCPL estimated the total area involved to be “80 to 90 acres” across IR 76, being the calculated acreage of an area “65 feet in width and approximately 9 miles in length”,
 - b. TCPL calculated the “fair rate” of compensation at \$20.00 per acre based upon “approximately 60% of the sale value of the lands within the particular area” which was determined to be “largely uncultivated”,
 - c. Carry the Kettle had communicated that it “felt they should receive a higher rate”, but indicated that Chief and Council had agreed to “abide by rates

applicable to all white landowners in the area who held uncultivated lands and who were entering into agreements with the Pipeline Company”, and

- d. In exchange for the rate of \$20.00 acre, the Band would “merely permit a strip of land 65 feet in width being kept cleared of all brush or wood and trees and the strip would be cultivated where possible and where not, such as through pasture or hay lands, the firm would assure that after the pipe was laid, the top soil would be seeded to grass or hay grasses.”
33. In his January 18 letter, McLeod also provided the following specifics regarding the proposed pipeline:
- a. TCPL would “dig a trench four feet in width and six feet in depth” which would be kept green or in a cultivated state,
 - b. The pipeline would be covered by three feet of topsoil and in this manner, the depth would permit all farming operations to be carried out without danger to the pipeline,
 - c. Carry the Kettle members could not build homes along the pipeline route or attempt to dig wells within the 65’ width,
 - d. TCPL had the right to enter onto the line at any time to repair leaks or damage to the pipe, and
 - e. Any damage “to crops or personal property by such operations would be paid by the company.”
34. On January 15, 1955, McLeod again assisted TCPL by providing a list of non-Indian status tenants on the lands, who all held “share crop or Agricultural leases” in the area where the proposed pipeline would cross IR 76. A cheque for \$827.80 dated August 26, 1957, was issued for compensation payable to “J.T. Stoppler and A.&R. Perra”.

35. In the fall of 1957, McLeod acknowledged additional compensation was provided by TCPL for “individual Indians” and that a “lump sum” for seeding the right-of-way the following spring was payable to the account of the First Nation.
36. An agreement between the Department of Citizenship and Immigration and TCPL signed March 13, 1957 granted TCPL an easement to “operate, maintain, inspect and patrol a natural gas pipe line and all works or appurtenances useful in connection with or incidental to the construction, operation or maintenance of such natural gas pipe line on or in that part of the said lands” for so long as the lands were needed for the purposes of the natural gas right-of-way. Among its other terms, the easement agreement specified:
 - a. Total consideration of \$1,457, was provided by TCPL,
 - b. The easement totaled 72.85 acres of land as illustrated in the appended Canada Survey Lands Records (CLSR) plans M39057 and M39058,
 - c. TCPL was responsible for payment of “all charges, taxes, rates and assessments whatsoever” that may be charged or payable on the lands,
 - d. TCPL was prohibited from assigning its right granted therein without the written consent of the Minister, and
 - e. TCPL was to allow “free access to and use of the said lands except for building purposes”.
37. Construction of TCPL’s proposed “TransCanada Pipeline” began in 1956 and was operational by 1958, completing the longest natural gas pipeline in the world.

ii. PTC Natural Gas Pipeline, 1964, 67.22 Acres

38. On or about March 7, 1963, H.A. Matthews, the Superintendent of File Hills-Qu’Appelle Agency was informed that the Petroleum Transmission Company (PTC) desired a right-of-way easement across the First Nation’s Reserve Lands.

39. Neither the Crown nor PTC consulted with the First Nation regarding the proposed PTC pipeline or any related project that would cross and encumber IR 76 until after the decision was made to expropriate the First Nation's reserve lands. Once the decision was made to encumber the First Nation's reserve lands the Crown approached the First Nation in an attempt to secure necessary Band Council Resolutions.
40. On or about April 4, 1963, H.A. Matthews attended a meeting between Chief and Council and PTC to discuss the company's proposal for "an easement of 60 feet adjacent" to TCPL Natural Gas Pipeline 100-1 for the purposes of constructing a natural gas pipeline across IR 76. According to H.A. Matthews, PTC's proposal at this meeting included the following:
 - a. The easement would be 67.27 acres, with 58 acres being held by the First Nation and the remaining 9.27 acres being held by individual claims,
 - b. \$35.00 per acre would be paid to the First Nation for the entire easement,
 - c. Damages would be paid at \$20.00 per acre for the 58 acres held by the First Nation, and the remaining 9.27 acres being held by individual claims were to be dealt with separately, and
 - d. \$10.00 per acre would be paid to the First Nation for seeding the disturbed ground.
41. In response to PTC's proposal, H.A. Matthews reported that Chief and Council asked for payment equal to what was received from the previous dealing with TCPL and remarked that this was "roughly double that offered by the Petroleum Transmission Company." PTC refused their agreement and adjourned the meeting.
42. Following the meeting, H.A. Matthews encouraged the First Nation to accept PTC's proposal as stated. He reiterated PTC's belief that compensation was adequate as the pipeline would be smaller, laid in a narrower trench, and

- constructed upon a smaller easement. He asserted that the proposal of “almost \$55.00 per acre” was more than the “saleable value of the land” and was a fair offer.
43. On April 8, 1963, PTC provided H.A. Matthews with a copy of their Grant of Easement form. That same day, H.A. Matthews reported that he believed Chief and Council “will decide to accept” PTC’s offer at a “meeting to be held on April 18th”.
 44. At no time did the Crown provide the First Nation with information or records indicating whether there was an opportunity renegotiate compensation at a future date, how the amount of compensation was arrived at, if it was fair market value, or that the Crown considered the overall value of the lands to the project under consideration (or to the construction of potential pipeline projects into the future), and the *sui generis* nature of the First Nation’s interest in its IR 76 lands.
 45. At no time did the Crown advise the First Nation on the impact of the right-of-way being granted in favour of TCPL on the First Nation’s ability or right to tax or otherwise levy fees against TCPL.
 46. Furthermore, the Crown did not advise the First Nation on the ongoing and cumulative impacts of the project under consideration (and potential future pipeline projects) on the First Nation.
 47. The BCR dated April 18, 1963, indicates a request that the Crown grant PTC a pipeline right of way across IR 76 involving 67.27 acres for a total compensation of \$4,000, being the total sum of \$35.00 per acre (\$2,344.35) and consideration of \$1,655.55 for losses, damages, and inconvenience over the entire easement.
 48. On April 19, 1963, H.A. Matthews forwarded this BCR to the Regional Supervisor of Saskatchewan with a recommendation for approval, but noted that the “location of the proposed line is vague” and only stated that it would be placed “[a]djacent to the Trans Canada Pipeline Right-of-Way.” However, he understood PTC was requesting construction on the south side of the existing line and recommended, should this option be granted, that TCPL be allowed to use 30 feet of this right-of-way “for working space when constructing their second line.”

49. It is not clear when or how TCPL or the Crown first notified Carry the Kettle Nakoda Nation that TCPL intended to construct a second line.
50. H.A. Matthews also forwarded the BCR to PTC and stated that “a grant of easement for a pipeline right-of-way on the Assiniboine Reserve will be made following payment of compensation and the provision of a survey plan acceptable to the Surveyor General of Canada” and that “[n]o survey should be commenced until your land surveyor has secured instructions from the Surveyor General.”
51. On May 15, 1963, PTC sent a letter to H.A. Matthews with cheques enclosed totaling \$4,000 for the total consideration and damages. PTC sent a further cheque of \$580.00 on or about October 29, 1963, as payment for reseeded.
52. On December 18, 1963, H.A. Matthews informed the Indian Affairs Branch and PTC that the Surveyor General had approved the Plan of Survey for the right-of-way and the Grant of Easement should be completed in the near future.
53. An agreement between the Department of Citizenship and Immigration and PTC signed February 13, 1964 granted PTC an easement over IR 76 to “construct, operate, maintain, inspect and patrol a natural gas pipe line and all works or appurtenances useful in connection with or incidental to the construction, operation or maintenance of such natural gas pipe line” for so long as the lands were needed for the purposes of the natural gas right-of-way. Among its other terms, the agreement specified:
 - a. Total consideration of \$4,000 was provided by PTC,
 - b. The right-of-way easement totaled 67.22 acres of land as illustrated in the appended CLSR plans 51681 and 51682,
 - c. PTC was responsible for payment of “all charges, taxes, rates and assessments whatsoever” that may be charged or payable on the lands,
 - d. PTC was prohibited from assigning its right granted therein without the written consent of the Minister,

- e. PTC was to allow “free access to and use of the said lands except for building purposes and insofar as it may be necessary for the Grantee to use the same for the purpose of excavating for, laying down, maintaining and patrolling the said natural gas pipeline”, and
 - f. PTC was permitted to “construct, operate and maintain a second natural gas pipeline in the said lands”.
54. It is not clear if the “second natural gas pipeline” referred to was the second TCPL natural gas pipeline that H.A. Matthews acknowledged would be constructed.
55. No Order-in-Council has been located which authorized the expropriation of (and grant of a right-of-way easement to PTC over) 67.22 acres of IR 76 lands as described within the February 13, 1964, agreement between PTC and the Crown as was required pursuant section 35 of the *Indian Act*, RSC 1953, c 149 and section 67 of the *National Energy Board Act*, 1959, c 46.
56. On September 10, 1964, the Minister of Citizenship and Immigration released a consent for the PTC to assign to the Montreal Trust Company “all its right, title, interest and privileges under a pipeline Right of Way Agreement made between the Minister and Petroleum Transmission Company, dated the 13th day of February 1964.”
57. On December 17, 1999, the Crown notified PTC that it had come to their attention “that the pipeline is in the process of being sold” which required the consent of the Crown.
58. On or about January 19, 2000, the Crown notified Chief and Council that PTC desired to meet to discuss “their impending sale to Conoco.” There is no record of such a meeting taking place.
59. On or about March 1, 2000, the Department of Indian and Northern Affairs was informed that PTC’s pipeline running through IR 76 would “become an asset of Conoco Canada Limited effective as of January 1, 2000,” and that the new owner

intended to maintain the pipeline in the name of PTC. Again, the Crown failed to consult with the First Nation regarding the assignment. In consenting to the assignment of PTC's interest to third parties, the Crown failed to consider whether the assignment of the easement on its then current terms would be in the best interest of the First Nation.

iii. TCPL Natural Gas Pipeline 100-2, 1965, 72.85 Acres

60. Neither the Crown nor TCPL consulted with the First Nation regarding the second proposed TCPL pipeline or any related project that would cross and encumber IR 76 until after the decision was made to expropriate the First Nation's reserve lands. Once the decision was made to encumber the First Nation's reserve lands the Crown approached the First Nation in an attempt to secure necessary Band Council Resolutions.
61. On April 8, 1965, an Order-in-Council (O.C.P.C. 1965-632) was passed, which authorized the expropriation of (and grant of a right-of-way easement to TCPL over) 72.85 acres of IR 76 lands plus a further 30-foot strip for temporary working space on the south side of its existing easement as is described within an April 14, 1965, agreement between TCPL and the Crown. O.C.P.C. 1965-632 was granted pursuant section 35 of the *Indian Act* and section 67 of the *National Energy Board Act*.
62. The BCR dated March 14, 1963, indicates a request that the Crown enter into an agreement with TCPL "to survey, construct, operate and maintain an additional pipe line in their existing right of way" across 73 acres of IR 76. Among other items, the BCR resolved:
 - a. The Crown is to "grant a temporary easement to Trans Canada Pipe Lines to an additional (30) feet adjoining the south side of the existing right of way for working space during construction period only",

- b. Compensation was payable at \$25.00 per acre over 73 acres, totalling \$1,825.00, and
 - c. Damages were payable by lump sum of \$5,095.00 “for damages on existing sixty-five (65) feet and additional thirty (30) feet right of way”.
63. On April 14, 1965, the Minister of Citizenship and Immigration entered into an easement agreement granting an easement from the Crown to TCPL to “lay down, construct, operate, maintain, inspect and patrol a second natural gas pipe line and all works or appurtenances useful in connection with or incidental to the laying down, construction, operation or maintenance” of the pipeline for so long as the lands were needed for the purposes of the natural gas pipeline right-of-way. Among its other terms, the easement agreement specified:
- a. Total consideration of \$1,825 was paid by TCPL,
 - b. The easement totaled 72.85 acres of land as shown in red on CLSR plans M39057 and M39058,
 - c. TCPL was responsible for payment of “all charges, taxes, rates and assessments whatsoever” that may be charged or payable on the lands,
 - d. TCPL was prohibited from assigning its right granted therein without the written consent of the Minister,
 - e. TCPL was to allow “free access to and use of the said lands except for building purposes”, and
 - f. All “natural gas pipe line and all works and appurtenances” constructed within the easement granted under TCPL Natural Gas Pipeline 100-1 remained the property of TCPL.
64. At no time did the Crown provide the First Nation with information or records indicating whether there was an opportunity to renegotiate compensation at a future date, how the amount of compensation was arrived at, if it was fair market value,

or that the Crown considered the overall value of the lands to the project under consideration (or to the construction of potential pipeline projects into the future), and the *sui generis* nature of the First Nation's interest in its IR 76 lands.

65. At no time did the Crown advise the First Nation on the impact of the right of way being granted in favour of TCPL on the First Nation's ability or right to tax or otherwise levy fees against TCPL.
66. Furthermore, the Crown did not advise the First Nation on the ongoing and cumulative impacts of the project under consideration (and potential future pipeline projects) on the First Nation.

iv. TCPL Natural Gas Pipeline 100-3, 1970, 100.83 Acres

67. Neither the Crown nor TCPL consulted with the First Nation regarding the third proposed TCPL pipeline or any related project that would cross and encumber IR 76 until after the decision was made to expropriate the First Nation's reserve lands. Once the decision was made to encumber the First Nation's reserve lands the Crown approached the First Nation in an attempt to secure necessary Band Council Resolutions.
68. On March 3, 1970, an Order-in-Council (O.C.P.C. 1970-376) was passed, which authorized the expropriation of (and grant of a right-of-way easement to TCPL over) 100.83 acres of IR 76 lands plus a further 30-foot strip for temporary working space on the south side of its existing easement as is described within a March 17, 1970, agreement between TCPL and the Crown. O.C.P.C. 1970-376 was granted pursuant section 35 of the *Indian Act* and section 67 of the *National Energy Board Act*, RSC, 1970, c. N-6.
69. The BCR dated October 4, 1967, indicates that TCPL is permitted to "carry out a survey of additional land" required for a right-of-way 90 feet wide along the south side of the existing TCPL 100-1 pipeline. Only permission for the survey was purported to be granted as negotiations for the easement would be conducted separately.

70. On March 5, 1969, J.H. MacAdam inquired with the Regional Director of Saskatchewan as to whether negotiations for this pipeline had been initiated or if an amount of compensation had been agreed upon and put into a new BCR. MacAdam also noted the simultaneous correspondence of arranging both the construction of a new pipeline and a cathodic protection system would require careful consideration to avoid confusion between the two separate transactions. Details regarding the corresponding cathodic protection system are discussed in more detail below.
71. On March 11, 1969, F.A. Clark, Regional Director of Saskatchewan, forwarded MacAdam's memorandum to Superintendent Matthews and requested to be informed if negotiations had been initiated for the pipeline. In response, Matthews explained that no further negotiations were carried out between TCPL and the First Nation as he was informed that TCPL did not intend to construct the pipeline "as quickly as anticipated" but that the reserve section would proceed in 1969.
72. On August 5, 1969, J.H. MacAdam wrote to Matthews detailing a July 31, 1969, phone call he had with TCPL, where TCPL indicated their intention to proceed "with a pipeline approximately 10 miles in length" through IR 76 and that they "wished to discuss the proposal with the Band Council."
73. Although it was not apparent to MacAdam whether this proposal was regarding the same lands surveyed in 1967, he advised that he "... would be happy to recommend the grant of an easement to be authorized by Order-in-Council" as had been done before but noted that a new Crown policy regarding pipelines was developed since these prior agreements were made. This new policy limited the negotiated compensation to a maximum period of twenty years, meaning compensation for subsequent periods would need to be re-negotiated for subsequent 20-year periods.
74. On August 15, 1969, H.A. Matthews informed Carry the Kettle Nakoda Nation Chief Alberta Eashappie that TCPL officials desired to meet with Council "to arrange for compensation for the proposed addition to the present right-of-way"

and that there was a new compensation policy as was detailed in the August 5, 1969, letter.

75. The same day, TCPL wrote E.A. Moore, Supervisor of Minerals of DIAND, requesting a meeting with Carry the Kettle “to negotiate the terms of a new easement” and attached prints of a “legal survey showing the 90-foot strip of land across the reserve” for the proposed a right-of-way “for the purpose of constructing, operating and maintaining one or more [natural gas] pipe lines.”
76. The BCR dated September 4, 1969, indicates a request that the Crown enter into an agreement with TCPL to “to survey, construct, operate and maintain an additional pipe line, or lines” across a new right of way within a 90 foot wide strip of land “adjoining the south side of their existing right of way”. Among other items, the BCR purportedly resolved:
 - a. The Crown was requested to “grant a temporary easement to Trans Canada Pipe Lines to an additional (30) feet adjoining the south side of the existing right of way for working space during construction period only”,
 - b. Compensation was payable at \$125.00 per acre over 101.33 acres, totalling \$2,666.25,
 - c. Damages were payable at \$50.00 per acre over 101.33 acres, totalling \$5,066.50,
 - d. \$17,732.75 in total included “the provision of approximately one-half acre” where TCPL would “erect a corrosion bed”,
 - e. The agreement was in perpetuity with compensation renegotiated every twenty years from the date of the agreement, and
 - f. TCPL would “supply cost of grass seed and labour for seeding right of way where required after construction”.

77. On September 5, 1969, H.A. Matthews forwarded the BCR to TCPL and the Regional Director of Saskatchewan in separate correspondences. Matthews recommended the matter for approval to the Regional Director and noted that “[i]f another line or lines are built in the right of way at a future date, additional compensation will be paid for damage at that time”.
78. On December 5, 1969, TCPL wrote to J.A. MacDonald, Deputy Minister of DIAND informing him of the company’s formal application for a right-of-way and corrosion bed easement.
79. Confusion within the Crown regarding the details of TCPL’s proposed pipeline continued to persist due to the delay between the 1967 survey, the lack of finalized agreement for the corrosion bed originally proposed in 1967, and discrepancies regarding the total acreage of the easement required (originally surveyed as 100.83 acres but referred to as 101.33 in the BCR), and the lack of clear indication of the final location the cathodic protection system therein.
80. In response to the Crown’s inquiries related to the above-noted confusion, TCPL wrote to J.A. MacDonald, Deputy Minister on January 13, 1970, and explained as that the discrepancy in acreage was due to the inclusion of a corrosion bed in the BCR dated September 4, 1969, which amounted to 0.5 acres. In its correspondence, TCPL also enclosed a cheque of \$17,645.25 to pay for the easement consideration (\$12,603.75) and damages on the right-of-way (\$5,041.50). The amount given was \$87.50 smaller than what was laid out in the BCR, due to omitting payment for the corrosion bed until the exact acreage of that parcel was known.
81. On January 14, 1970, J.H. MacAdam wrote to the Superintendent Matthews and recommended they proceed with applying for the necessary Order-in-Council to grant the right-of-way for the pipeline and that the corrosion bed be dealt with in a separate transaction once the lands were surveyed.
82. On March 17, 1970, the Crown executed an agreement with TCPL which granted an easement of 100.83 acres over IR 76 for so long as the lands were needed for the

- purposes of one or more natural gas pipelines. However, a condition was included that the rentals be renegotiated every 20-year period. Total compensation payable for the initial 20-year period beginning January 1, 1970, up to December 31, 1989, was set at \$17,645.25. The agreement was executed by TCPL and returned to the Regional Director's office on April 24, 1970.
83. The agreement did not provide for compensation for reseeded of the right-of-way. The reseeded work was completed by Carry the Kettle Nakoda Nation Band member W.S. Thomson as of July 12, 1971, however, there is no record of payment for this work being received.
 84. On July 30, 1970, the National Energy Board approved the TCPL pipeline in Order No. GP-119-70. This order was forwarded to Chief and Council on August 27, 1970.
 85. The BCR dated November 17, 1993, indicates an acceptance of "TransCanada Pipelines offer for the 20-year period for the easement dated March 17, 1970" of \$12,603.75 for the next "20 year period commencing January 1, 1990 until December 31, 2009." By cheque dated September 12, 1994, TCPL sent \$13,486.01 to the Crown as payment.
 86. On August 19, 2010, TCPL issued a cheque for \$13,428.37 for the payment of 20-year period on "TC easement."
 87. At no time did the Crown provide the First Nation with information or records indicating how the amount of compensation for the initial easement period or its renewals were arrived at, if it was fair market value, or that the Crown considered the overall value of the lands to the project under consideration (or to the construction of potential pipeline projects into the future), and the *sui generis* nature of Carry the Kettle's interest in its IR 76 lands.
 88. At no time did the Crown advise the First Nation on the impact of the right of way being granted in favour of TCPL on the First Nation's ability or right to tax or otherwise levy fees against TCPL.

89. Furthermore, the Crown did not advise the First Nation on the ongoing and cumulative impacts of the project under consideration (and potential future pipeline projects) on the First Nation.

v. TCPL Natural Gas Pipeline 100-4, 1972, 100.83 Acres

90. On February 24, 1972, TCPL informed the Crown that it intended to construct a 42-inch pipeline through its existing right-of-way authorized on March 3, 1970, by Order-in-Council (O.C.P.C. 1970-376). The new pipeline would be constructed parallel to the existing line approximately 30 feet south of the existing line.
91. Neither the Crown nor TCPL consulted with the First Nation regarding the fourth proposed TCPL pipeline or any related project that would cross and encumber IR 76 until after the decision was made to authorize TCPL's further pipeline within the existing right-of-way easement through the IR 76 lands. Once the decision was made to further encumber the First Nation's reserve lands the Crown approached the First Nation in an attempt to secure necessary Band Council Resolutions.
92. The BCR dated March 21, 1972, indicates that Carry the Kettle was aware of the TCPL's intention to construct a further pipeline. The BCR stipulates that "all roads used in the course of construction... be re-graded and kept to the same standards and conditions as they appear prior to the commencement of construction" and further requested written acceptance of that stipulation before construction.
93. Despite no clear answer to concerns raised by the Head of Land Transactions, W.V. Lowry's office regarding the preconditions for its approval, including "the repair of any damage done to the road by hauling pipes over same", the pipeline was approved on September 14, 1972, by the Nation Energy Board (Order No. GP-200-72).
94. On October 12, 1972, Chief Jessie Saulteaux wrote to Homer Sawering, Senior Department Officer of the Department of Indian Affairs, requesting that he

approach TCPL “with the view to having the Highway through Carry the Kettle Reserve repaired” describing that “considerable damage” has been done to the road by the hauling of heavy pipes through the reserve. Chief Saulteaux cited the “original agreement with the Company,” which called for “repair of any damage done to the road by hauling pipes over same.” This letter was forwarded to TCPL on October 16, 1972.

95. On or around November 22, 1972, TCPL provided a cheque for \$2,120.00 for “construction damages.” There is no record indicating whether the \$2,120.00 was intended as compensation for damages to the roads as indicated by Chief Jessie Saulteaux or whether it was for damages to the subject easement lands.
96. The Crown failed to provide any information or records to the First Nation indicating how the construction damages were calculated including or whether any payment received was inclusive of all damages to the subject right-of-way easement lands and assessed at fair market value.
97. At no time did the Crown provide the First Nation with information or records indicating that the Crown considered the ongoing and cumulative impacts of the project under consideration (and potential future pipeline projects) on the *sui generis* nature of the First Nation’s interest in its IR 76 lands.
98. At no time did the Crown advise the First Nation on the impact of the decision to approve a further TCPL pipeline on the First Nation’s ability or right to tax or otherwise levy fees against TCPL.

vii. Cathodic Protection Systems

a. *Cathodic Protection Site, 1967, 1.58 Acres*

99. Neither the Crown nor TCPL consulted with the First Nation regarding the proposed 1967 cathodic protection site or any related project that would encumber IR 76 until after the decision was made to expropriate the First Nation’s reserve lands. Once the decision was made to encumber the First Nation’s reserve lands the

Crown approached the First Nation in an attempt to secure necessary Band Council Resolutions.

100. On November 10, 1967, an Order-in-Council (O.C.P.C. No. 1967-2151) was passed, which authorized the expropriation of (and grant of a right-of-way easement to TCPL over) 1.58 acres of IR 76 lands for the purpose of the construction and maintenance of a Cathodic Protection System. O.C.P.C. No. 1967-2151 was granted pursuant section 35 of the *Indian Act* and section 67 of the *National Energy Board Act*.
101. On February 8, 1966, the Crown suggested that the First Nation had requested “that an easement be granted to the Saskatchewan Power Corporation to construct a power line to the Cathodic Protection System on their reserve.” According to the Regional Director of Indian Affairs, K.J. Gavi, the Band did not request compensation for the easement “as the construction will result in reduced cost when they electrify the reserve in the near future.”
102. The BCR dated September 1, 1966, indicates a request that the Crown grant TCPL a “right to survey, construct, operate and maintain a Cathodic Protection System in a forty foot [sic] wide strip” according to an attached sketch map. Compensation for the easement was set at \$150.00. A letter dated October 4, 1967, confirmed that the compensation of \$150.00 had been received from TCPL in September 1966.
103. On September 6, 1966, H.A. Matthews described his understanding that the easement would be approximately 1.54 acres and construction would be “buried at least three feet underground” with the exception of one power pole.
104. The Crown confirmed to TCPL that the requested “permit to construct, operate and maintain a Cathodic Protection System” on IR 76 had been approved by the First Nation, but that the formal permit required a survey plan of the site provided at the expense of TCPL.

105. On or about February 6, 1967, the Crown understood the cathodic protection system to be constructed by TCPL was the same system which the Saskatchewan Power Corporation would be constructing a power line.
106. On November 24, 1967, the Acting Director of the Indian-Eskimo Economic Development Branch executed an easement agreement granting an easement to TCPL to “construct, operate, repair, maintain and inspect a Cathodic Protection System, and all works or appurtenances useful in connection with such a system” of the pipeline for so long as the lands were needed for the purposes of the cathodic protection system. Among its other terms, the easement agreement specified:
 - a. Total consideration of \$150 was paid by TCPL,
 - b. The easement totaled 1.58 acres of land as shown on CLSR plan 53366,
 - c. TCPL was responsible for payment of “all charges, taxes, rates and assessments whatsoever” that may be charged or payable on the lands,
 - d. TCPL was prohibited from assigning its right granted therein without the written consent of the Minister,
 - e. TCPL was to allow “free access to and use of the said lands except for building purposes”, and
 - f. All “pipe or other materials laid on or in the said land and all other works and appurtenances” within the easement remained the property of TCPL.
107. Despite the Crown’s repeated requests to TCPL for a copy of the easement agreement executed on their part, no such executed copy was ever produced.
108. On August 12, 1968, J.H. MacAdam, Administrator of Lands, wrote to the Regional Director of Saskatchewan regarding the desire to receive an executed copy of the easement agreement for the cathodic protection system and stated that “it is desirable that this transaction be completed prior to the issue of agreements related to the survey of the most recent extension of the pipeline area” on IR 76.

109. By March 2, 1970, the cathodic protection easement agreement still had not been executed as Superintendent Matthews forwarded a correspondence from TCPL which indicated that “the original certified copy of the Order in Council attached to this indenture has been mislaid.”
110. On or about October 18, 2001, the Crown understood that renewal payment for this project was due January 1, 1990, but it is not clear whether payment was received. At this time, TCPL requested an extension to the term due January 1, 1990, to January 1, 2002, with payment of \$78.75.
111. At no time did the Crown provide the First Nation with information or records indicating how the amount of compensation for the initial easement period or its renewals were arrived at, if it was fair market value, or that the Crown considered the overall value of the lands to the project under consideration (or to the construction of potential pipeline projects into the future), and the *sui generis* nature of Carry the First Nation’s interest in its IR 76 lands.
112. At no time did the Crown advise the First Nation on the impact of the right of way being granted in favour of TCPL on the First Nation’s ability or right to tax or otherwise levy fees against TCPL.
113. Furthermore, the Crown did not advise the First Nation on the ongoing and cumulative impacts of the project under consideration (and potential future pipeline projects) on the First Nation.

b. Cathodic Protection Site, 1970, 0.45 Acres

114. Neither the Crown nor TCPL consulted with the First Nation regarding the proposed 1970 cathodic protection site or any related project that would encumber IR 76 until after the decision was made to expropriate the First Nation’s reserve lands. Once the decision was made to encumber the First Nation’s reserve lands the Crown approached the First Nation in an attempt to secure necessary Band Council Resolutions.

115. On October 21, 1970, an Order-in-Council (O.C.P.C. No. 1970-1820) was passed, which authorized the expropriation of (and grant of a right-of-way easement to TCPL over) 0.45 acres of IR 76 lands the purpose of construction, operation, and maintenance of a corrosion bed “in connection with their natural gas transmission pipeline.” O.C.P.C. No. 1970-1820 was granted pursuant section 35 of the *Indian Act* and section 67 of the *National Energy Board Act*.
116. As indicated previously, the simultaneous correspondence in and around 1969 regarding the arrangement of both the construction of TCPL’s new pipeline and a cathodic protection system caused confusion between the two separate transactions.
117. The BCR dated September 4, 1969, which included approval of \$17,732.75 in total compensation was inclusive of “the provision of approximately one-half acre” where TCPL would “erect a corrosion bed”. Again, this agreement was to be made in perpetuity with compensation renegotiated every twenty years from the date of the agreement, and TCPL would “supply cost of grass seed and labour for seeding right of way where required after construction”.
118. On September 5, 1969, H.A. Matthews wrote to the Regional Director and indicated the construction of TCPLs proposed corrosion bed required a $\frac{3}{4}$ mile power line. He attached an authorization BCR and asserted that due to the “small length of line involved” the Band did not require compensation for the easement.
119. On October 30, 1970, the Crown executed an agreement with TCPL which granted a right of way for the purpose of construction, operation, and maintenance of a corrosion bed. However, due to the Department of Justice objecting to certain provisions and wording included in the agreement a revised draft was sent to TCPL. The amended agreement, signed by TCPL, was returned to J.H. MacAdam on January 4, 1971.
120. On January 13, 1970, TCPL wrote to J.A. MacDonald, Deputy Minister and enclosed a cheque of \$17,645.25 to pay for the easement consideration (\$12,603.75) and damages on the right of way (\$5,041.50). The amount given was

- \$87.50 smaller than what was laid out in the BCR, due to omitting payment for the corrosion bed until the exact acreage of that parcel was known.
121. On January 29, 1969, J.H. MacAdam received a “provisional print” of the corrosion bed which he had deemed “suitable for the purpose intended” and forwarded it to Superintendent Matthews. By April 3, 1970, CLSR 55925, a plan for a corrosion bed on IR 76 was completed, indicating a total area of 0.45 acres.
 122. On September 4, 1970, Superintendent R.T. Smith requested from TCPL the \$78.75 as compensation for damages due to the corrosion bed, which was then received and “credited to the Carry The Kettle Band Revenue account” by September 22, 1970. However, as of March 26, 1971, the Crown still had not received compensation for the rentals from TCPL.
 123. On December 7, 1998, Keith Walls wrote to W. Burnett, Senior Right of Way Agent at TCPL, informing him that review of files had caused Walls’ office to notice that twenty-year payments for two of the previous cathodic protection agreements “came due in 1989 and 1992.” He informed Burnett that CTK’s legal counsel would be contacting them regarding arranging these payments.
 124. At no time did the Crown provide the First Nation with information or records indicating how the amount of compensation for the initial easement period or its renewals were arrived at, if it was fair market value, or that the Crown considered the overall value of the lands to the project under consideration (or to the construction of potential pipeline projects into the future), and the *sui generis* nature of the First Nation’s interest in its IR 76 lands.
 125. At no time did the Crown advise the First Nation on the impact of the easement being granted in favour of TCPL on the First Nation’s ability or right to tax or otherwise levy fees against TCPL.
 126. Furthermore, the Crown did not advise the First Nation on the ongoing and cumulative impacts of the project under consideration (and potential future pipeline projects) on the First Nation.

c. Three Cathodic Protection Sites, 1974, 1.93 Acres

127. Neither the Crown nor TCPL consulted with the First Nation regarding the proposed 1974 cathodic protection site or any related project that would encumber IR 76 until after the decision was made to expropriate the First Nation's reserve lands. Once the decision was made to encumber the First Nation's reserve lands the Crown approached the First Nation in an attempt to secure necessary Band Council Resolutions.
128. On January 8, 1974, an Order-in-Council (O.C.P.C. No. 1974-23) was passed, which authorized the expropriation of (and grant of right-of-way easement to TCPL over) 1.93 acres of IR 76 lands to TCPL for the purpose of construction, operation, and maintenance of a corrosion bed in connection with their natural gas transmission line. O.C.P.C. No. 1974-23 was granted pursuant section 35 of the *Indian Act* and section 67 of the *National Energy Board Act*.
129. The Order-in-Council describes the lands as 1.93 acres of land as set out in CLSR Plan 58171, with compensation of \$300 to be paid for a term of 20 years up to August 16, 1992, paid in advance by TCPL. The corresponding agreement between the Crown and TCPL for the "construction of three Cathodic Protection Systems" was executed on February 14, 1974.
130. The BCR dated August 17, 1972, includes a request that DIAND grant an easement to TCPL "for the purpose of installing three cathodic protective systems along the existing pipelines" for a total compensation of \$100.00 per site, for a total of \$300.00, with TCPL also compensating for any damages caused by construction.
131. On August 22, 1972, TCPL advised the District Supervisor of Touchwood File Hills Qu'Appelle that they had met with the First Nation regarding the proposed cathodic protection systems and provided sketches of their proposed locations.
132. In response to TCPL, the Crown understood there was "a degree of urgency" in installing these systems but noted they were unable to determine "whether the proposal and the compensation offered is in the best interests" of the First Nation

- based off the information provided. The office of W.V. Lowry, Head of Land Transaction Section requested the opinion of the District Supervisor, and, if positive, would “give consideration to the issue of a temporary permit for a term not in excess of one year” until a final survey was completed.
133. The BCR dated September 9, 1972, includes a request that DIAND grant an easement to Saskatchewan Power Corporation “for the purpose of constructing electrical transmission lines to serve the rectifier systems or corrosion beds” for a total compensation of \$ \$400.00, based on \$6.00 per pole and \$8.00 per anchor.
 134. By May 1, 1973, survey of the three cathodic protection sites was completed and submitted to the District Supervisor for review and approval. On August 24, 1973, N.J. Bowering, Sr. Development Officer, confirmed the Bands’ approval of the “the plan and field notes showing right of way for cathodic protection ground beds.”
 135. On or about October 18, 2001, the Crown understood that payment on two of the three sites under this agreement were due August 17, 1992, but it is not clear whether they were received. At this time, TCPL requested an extension to the term due August 17, 1992, to January 1, 2002, with payment of \$300.00.
 136. On September 16, 1986, TCPL indicated to the Crown that there was to be an amendment to the August 17, 1972, BCR due to the fact that under the corresponding survey plan (No. 73R-42198) “the easement was [illegible] to show the new acreages created by title provision”.
 137. The figure of 1.93 acres was written in as a correction to the Order-in-Council’s attached schedule in one archival copy, and other copies of this order list 1.83 acres as the area involved.
 138. On December 7, 1998, Keith Walls wrote to W. Burnett, Senior Right of Way Agent at TCPL, informing him that review of files had caused Walls’ office to notice that twenty-year payments for two of the previous cathodic protection agreements “came due in 1989 and 1992.” He informed Burnett that CTK’s legal counsel would be contacting them regarding arranging these payments.

139. At no time did the Crown provide the First Nation with information or records indicating how the amount of compensation for the initial easement period or its renewals were arrived at, if it was fair market value, or that the Crown considered the overall value of the lands to the project under consideration (or to the construction of potential pipeline projects into the future), and the *sui generis* nature of the First Nation's interest in its IR 76 lands.
140. At no time did the Crown advise the First Nation on the impact of the easement being granted in favour of TCPL on the First Nation's ability or right to tax or otherwise levy fees against TCPL.
141. Furthermore, the Crown did not advise the First Nation on the ongoing and cumulative impacts of the project under consideration (and potential future pipeline projects) on the First Nation.

d. Five Cathodic Protection Sites, 1975-1982, 0.135 Acres

142. Between 1975 and 1982, five sites related to the cathodic protection system were developed on IR 76 without BCR, Order-in-Council, or formal agreement.
143. Neither the Crown nor TCPL consulted with the First Nation regarding the five cathodic protection sites or any related project that would encumber IR 76.
144. On June 18, 1982, an agreement was made between TCPL and Chief Tony Ashdohonk, referred to as a Cathodic Protection Option for Easement. According to the agreement, Carry the Kettle was paid \$100.00 and gave TCPL an option to "purchase an unencumbered easement in perpetuity for itself, its successors and assigns, to construct, operate and maintain a cathodic protection ground [sic] bed... through a strip of the said lands not to exceed 12.000m in width." On July 20, 1982, TCPL wrote to Chief Ashdohonk and indicated it would be exercising its option therein.

145. On January 20, 1983, W.F. Bernhardt, A/Director, Reserves and Trusts, Saskatchewan Region acknowledged that section 28(1) of the *Indian Act* voids the June 18, 1982, agreement. In order to remedy the agreement, he advised the District Manager that he required a legal description of the right of way, a BCR approving the transaction, details regarding compensation and other terms and conditions, and any documentation required by TCPL.
146. On July 6, 1984, four damage releases were made with TCPL for compensation for lands affected by the construction of pipelines or appurtenant works. On May 13, 1985, TCPL issued a cheque for \$500.00 for a “work permit” on SW1/4 10-16-12, SE ¼ 10-16-12, SW ¼ 11-16-12, NW ¼ 2-16-12, and NW ¼ 1-16-12. Another cheque for \$500.00 given for “damage release... 1985 corrosion” was made on January 14, 1986.
147. On October 18, 2001, an agent of TCPL described these locations in a memo to the Crown. The locations are purported to have been consented to by “the Band and/or the Band Manager”, with a “TCPL work permit” being signed, compensation being paid for the installation and damages, but also that “[n]o formal agreement was applied for.”
148. The first four areas correspond with a BCR dated April 28, 1976, which indicates an approval of a plan and field notes related to survey of installations along TCPL’s right-of-way within NE ¼-6-16-11 & S1/2-10-16-12 on IR 76 between December 29 and 31, 1975. These locations, described as having “No Agreement in Place” are further particularized within the October 18, 2001, memo as follows:
 - a. “Cable to connect to existing powerpole” within SW 10-16-12-W2, totalling 0.024 acres,
 - b. “Cable to connect to existing powerpole” within SE 10-16-12-W2, totalling 0.0239 acres,
 - c. “In Conoco Right-of-Way (PetroCanada)” within NE 6-16-11-W2, totalling 0.0278 acres, and

- d. “Cable to connect to existing powerpole” within NE 6-16-11-W2, totalling 0.0215 acres.
149. The fifth area corresponds with a survey conducted in 1983 by an apparent agent of TCPL regarding “an appurtenance to the existing pipeline right of way”. This location, described as having “No Agreement in Place” is further particularized within the October 18, 2001, memo as “Extension added in 1982” within NW 1-16-12-W2, totalling 0.037 acres.
150. On September 16, 1986, TCPL indicated to the Crown that a BCR was “to be issued which will enable Indian and Northern Affairs to grant easements” for power service and unit extension over these five areas. On December 23, 1986, W.F. Bernhardt, Manager of Lands, Revenues and Trusts for the Saskatchewan Region responded to this letter and agreed that “easement documentation” and a “BCR are required before we can proceed.”
151. There is no record of an Order-in-Council as was required to authorize a grant of right-of-way easement under section 35 of the *Indian Act*, nor the requisite BCR and easement agreement.
152. At no time did the Crown provide the First Nation with information or records indicating how potential compensation for the initial easement period or their renewals would be arrived at, if it was fair market value, or that the Crown considered the overall value of the lands to the project under consideration (or to the construction of potential pipeline projects into the future), and the *sui generis* nature of the First Nation’s interest in its IR 76 lands.
153. At no time did the Crown advise the First Nation on the impact of the potential easement being granted in favour of TCPL on the First Nation’s ability or right to tax or otherwise levy fees against TCPL.
154. Furthermore, the Crown did not advise the First Nation on the ongoing and cumulative impacts of the project under consideration (and potential future pipeline projects) on the First Nation.

f. Consolidation of Cathodic Protection Sites, 2001-2007

155. Neither the Crown nor TCPL consulted with the First Nation regarding the proposed consolidation of cathodic protection sites or any related project that would encumber IR 76 until after the decision was made to expropriate the First Nation's reserve lands. Once the decision was made to encumber the First Nation's reserve lands the Crown approached the First Nation in an attempt to secure necessary Band Council Resolutions.
156. On October 18, 2001, TCPL requested "a section 35 easement for all C.P. systems" for a payment of \$2,870.00.
157. On November 29, 2001, an agent of TCPL wrote to the First Nation as follow-up to a meeting held on November 8, 2001 "to clarify the situation for all the cathodic protection easements on the reserve" stating that "I believe our decision to consolidate all of the cathodic beds into one agreement will simplify the process for all parties." In addition, the letter provided suggested "wording require in the Band Council Resolution for the cathodic beds."
158. The BCR dated September 12, 2007, indicates a to request that DIAND "grant a section 35 easement including the right to immediately access, construct, operate, repair, and maintain eleven (11) cathodic protection ground beds" to TCPL for a compensation of \$2899.54. A cheque for \$3,073.51 was sent by TCPL on September 21, 2007 for "consideration fees – sec 35 easement (11)."
159. No Order-in-Council required to authorize a grant of right-of-way easement under section 35 of the *Indian Act* nor the corresponding easement agreement have been produced by the Crown. At no time did the Crown provide the First Nation with information or records indicating how the amount of compensation the initial easement period or their renewals would be arrived at, if it was fair market value, or that the Crown considered the overall value of the lands to the project under consideration (or to the construction of potential pipeline projects into the future), and the *sui generis* nature of the First Nation's interest in its IR 76 lands.

160. At no time did the Crown advise the First Nation on the impact of the potential easement being granted in favour of TCPL on the First Nation's ability or right to tax or otherwise levy fees against TCPL.
161. Furthermore, the Crown did not advise the First Nation on the ongoing and cumulative impacts of the project under consideration (and potential future pipeline projects) on the First Nation.

viii. TCPL Natural Gas Pipeline 100-5, 1981-82

162. Neither the Crown nor TCPL consulted with the First Nation regarding the fifth proposed TCPL pipeline or any related project that would cross and encumber IR 76 until after the decision was made to authorize TCPLs further pipeline within an existing right-of-way easement through the IR 76 lands. Once the decision was made to further encumber the First Nation's reserve lands the Crown approached the First Nation in an attempt to secure necessary Band Council Resolutions.
163. Two BCRs dated August 12, 1981, purport to (1) approve a "work permit of 65 feet of temporary workspace" to the south of the existing TCPL easement, and (2) authorize the National Energy Board and TCPL to "cross all roads, road allowances, irrigation and drainage ditches, and all other utilities under" the Band's jurisdiction.
164. On September 9, 1981, the National Energy Board passed Order No. GP-135-81, which approved TCPL's April 20, 1981, application for an additional pipeline 1219mm in diameter.
165. On January 8, 1982, N. Best, District Lands Administration Officer, wrote to Chief Tony Ashdohonk noting that "no other information was provided" with the received National Energy Board Order and requested to the Band supply him with "any information you have such as a Band Council Resolution etc. which concerns the addition."

166. On March 15, 1982, F.J. Singleton, Director of Lands Branch, wrote to the Regional Director General of Indian and Inuit Affairs concerning a lack of clarity regarding which IR 76 lands would “be affected by the proposed addition to the pipeline”. Singleton suggested that TCPL be approached for a description of the land on IR 76 which they require, and “details regarding the proposed use of this land and the type of document required by the company.”
167. Singleton further suggested contacting the Band Council to “let them know what exactly the company requires” and noted that the “Band may wish to negotiate... regarding compensation for the land to be used by the company.” He further noted that “[w]e should have a resolution from the Band Council agreeing to the grant of an easement or permit to Trans-Canada Pipelines and describing the land involved in the transaction as well as compensation expected.”
168. On August 12, 1982, two damage releases were signed, acknowledging that the signatories had received compensation of \$400.00 and \$1,800.00 from TCPL for damages “caused by the construction of a pipeline and appurtenant works” in Saskatchewan, one of which indicated damages “due to construction [in] 1981.”
169. On August 25, 2010, TCPL paid the Crown \$12,603.75 (plus GST and interest) for a further 20-year extension of the easement from January 1, 2010, to December 31, 2029.
170. At no time did the Crown provide the First Nation with information or records indicating how the amount of compensation for the initial period or their renewals would be arrived at, if it was fair market value, or that the Crown considered the overall value of the lands to the project under consideration (or to the construction of potential pipeline projects into the future), and the *sui generis* nature of the First Nation’s interest in its IR 76 lands.
171. At no time did the Crown provide the First Nation with information or records indicating that the Crown considered the ongoing and cumulative impacts of the

project under consideration (and potential future pipeline projects) on the *sui generis* nature of the First Nation's interest in its IR 76 lands.

172. At no time did the Crown advise the First Nation on the impact of the decision to approve a further TCPL pipeline on the First Nation's ability or right to tax or otherwise levy fees against TCPL.

ix. TCPL Natural Gas Pipeline 100-6, 1994, 73.48 Acres

173. Neither the Crown nor TCPL consulted with the First Nation regarding the sixth proposed TCPL pipeline or any related project that would cross and encumber IR 76 until after the decision was made to expropriate the First Nation's reserve lands. Once the decision was made to encumber the First Nation's reserve lands the Crown approached the First Nation in an attempt to secure necessary Band Council Resolutions.
174. On September 29, 1994, two Orders-in-Council (O.C.P.C. 1994-1625 and O.C.P.C. 1994-1626) were passed, which authorized the expropriation of (and grant of right-of-way easement to TCPL) over 73.58 acres of IR 76 lands as described within an August 23, 1994, agreement between TCPL and the Crown. O.C.P.C. 1994-1625 was granted pursuant section 35 of the *Indian Act* and section 78 of the *National Energy Board Act*, RSC 1985, c N-7.
175. The Orders-in-Council describe the easement as 73.58 acres of land directly parallel and adjacent to the southern boundary of CLSR plans 53681 and 55158 for the purposes of a natural gas pipeline, with a total compensation of \$36,740.
176. On March 22, 1991, TCPL wrote to Indian and Northern Affairs, indicating its intention to construct a new pipeline in the area of IR 76 beginning in 1992. TCPL indicated that the new pipeline would be within or immediately adjacent to existing easements, but that additional easements may be required.
177. The BCR dated October 21, 1991, indicates an authorization of TCPL to enter IR 76 "to perform the necessary inspection and work required to determine the location

for the placement of line 100-6 on the south side of [TCPL's] existing right-of-way."

178. On July 14, 1993, TCPL wrote to Chief Joe O'Watch explaining that TCPL sought Council's approval "to construct an additional pipeline (line 6) adjacent to our existing pipelines across your reserve lands." TCPL further explained that the company required a "new easement, 20 meters in width, on the south side of the existing easement" as well as 20 meters of "temporary workspace adjacent to the new easement to be used only during the time of construction and clean-up."
179. A "Notice Pursuant to Section 87(1)" was enclosed which detailed "the approximate lands required" and the compensation offered by TCPL. In addition, TCPL stated that "TransCanada will further compensate for the use of the temporary workspace and for any damages or loss of crops as a result of construction." The construction was planned to begin in "Spring of 1994."
180. The BCR dated August 13, 1993, indicates TCPL is authorized to "use a work area 20 metres in width parallel and adjacent to the existing pipeline right-of-way on the south side, for the purposes of construction of line 100-6."
181. On August 17, 1993, Ken Acoose, Lands Officer, sent Clifford Star a copy of an environmental assessment provided by TCPL which was "conducted to address the construction and operation of a new pipeline adjacent to the existing five pipelines". Acoose commented that this assessment was already "found acceptable by both the National Energy Board of Canada and the provincial Department of the Environment and Public Safety."
182. On August 25, 1993, TCPL issued two cheques to the Receiver General in the amount of \$1761.22 and \$1763.36 for "work permit 1994 Const Line 100-6".
183. The BCR dated April 14, 1994, indicates an authorization of the taking of the lands pursuant section 35 of the *Indian Act* by TCPL and requested "that an easement be issued for the purpose of constructing, operating and maintaining a natural gas transmission pipeline" through IR 76. The BCR described the lands as 20 metres in

- width totalling 73.48 acres along the southern boundary of the existing right of way. The total compensation paid by TCPL was to be \$36,740.00.
184. The BCR dated June 7, 1994, stated that Chief and Council had “examined the route of the pipeline as shown on drawings BSK-9-793” and had no objection to the location of the pipeline or the type of construction to be conducted.
 185. On August 11, 1994, an additional BCR was passed which requested that “a work permit be issued under Section 28(2) of the Indian Act to TransCanada Pipelines Limited... to install a Gas Pipeline” on IR 76 “as shown on CLSR Plan Nos. 76282, 76283 and 76284.” Compensation was to be \$14,868.00.
 186. On August 23, 1994, the Minister of Indian Affairs and Northern Development entered into an agreement with TCPL, granting the company a permit of work area in IR 76 for “the purpose establishing a natural gas transmission pipeline.” The company paid as compensation \$14,868.00 (\$15,908.76 after GST).
 187. On October 27, 1994, the Crown executed an “Easement for a Natural Gas Transmission Pipeline” with TCPL, which granted the right “to use and occupy a portion of the Reserve as a right-of-way for a Natural Gas Transmission Pipeline.”
 188. On November 29, 1994, TCPL sent a cheque for \$39,311.80 as “full compensation for the pipeline easement for TransCanada Line 100-6 plus G.S.T.”
 189. On April 10, 1995, an Instrument of Grant for Pipeline Easement was executed by the Minister of Indian Affairs and Northern Development as well as the Minister of Justice, which gave TCPL “an easement... to lay down, install, construct, operate, maintain, inspect, patrol (including aerial patrol), alter, remove, replace, reconstruct, use and repair one or more pipelines for the carriage, conveyance, transportation storage and handling of natural and artificial gas and other gaseous or liquid hydrocarbons and any product or by-product thereof.” A revised Instrument of Grant was issued on May 14, 1998, due to the April 10, 1995, Instrument containing “an erroneous time limitation for the right and interest

granted”, originally for a period of 21 years but changed to so long as the lands were required for the purposes of the pipeline.

190. At no time did the Crown provide the First Nation with information or records indicating how the amount of compensation for the initial easement period or its renewals were arrived at, if it was fair market value, or that the Crown considered the overall value of the lands to the project under consideration (or to the construction of potential pipeline projects into the future), and the *sui generis* nature of the First Nation’s interest in its IR 76 lands.
191. At no time did the Crown advise the First Nation on the impact of the easement being granted in favour of TCPL on the First Nation’s ability or right to tax or otherwise levy fees against TCPL.
192. Furthermore, the Crown did not advise the First Nation on the ongoing and cumulative impacts of the project under consideration (and potential future pipeline projects) on the First Nation.

ix. Proposed TCPL Natural Gas Pipeline 100-7, 1997, 73.49 acres

193. On March 7, 1997, TCPL informed Kenneth Acoose of Indian Affairs and Northern Development that TCPL was “considering the construction of additional pipeline and/or compression facilities in 1998 or later.” Once the proposed route had been determined, landowners would be notified.
194. On May 22, 1998, TCPL sent a “Notice Pursuant to Section 87(1)” to Carry the Kettle and various landowners of quarter sections within the reserve. The notice informed these parties that TCPL planned on constructing a pipeline through lands in which they had interest and offered compensation of a lump sum of \$51,440.55 for the area of 73.49 acres, or annual payments of \$5,658.46 over 10 years.
195. On the same day, TCPL wrote to the Carry the Kettle indicating that the company plans to “construct Line 100-7, a 1219mm O.D. pipeline, within a new 20m easement located immediately adjacent to the south boundary of the existing

- easements for Lines 100-1 to 100-6” through IR 76’s reserve lands. The company required an easement of 73.49 acres, which they offered compensation of \$51,440.00, and 73.49 acres of temporary workspace, which they offered compensation of \$18,373.00.
196. On June 16, July 28 and August 19, 1998, Carry the Kettle, TCPL, and the Crown met again regarding the proposed expansion of the TCPL pipeline. At these meetings, the First Nation communicated its dissatisfaction with its historic and ongoing arrangements it had between the Crown and third-party companies like TCPL due to inadequacy of the protections was afforded and the compensation it received.
 197. The First Nation’s dissatisfaction regarding adequate protection included the Crown’s failure to adequately consider the injurious affection to its lands, including habitat and ecosystems. Further, the First Nation expressed its dissatisfaction that the value of the lands to the overall project were not considered.
 198. The First Nation also expressed its desire to exercise its taxation jurisdiction over its IR 76 lands, which TCPL dismissed as a viable option. In response to the dismissal of the First Nations ability or right to tax TCPL, the Crown offered no assistance or support.
 199. The First Nation requested a full accounting of previous easement agreements, including “pertinent dates, compensation paid etc. and also [an indication whether] the agreements can be opened/renegotiated.”
 200. On May 25, 1999, TCPL wrote to Chief O’Watch in follow-up to a meeting that took place on May 13, 1999 between the First Nation, TCPL, and the Crown. TCPL attempted to address “serious apprehension about section 35 easements” which “arose from misinformation” concerning TCPL’s legal interest in the First Nation’s reserve lands. TCPL noted that Canada had corrected this “erroneous information” in that “the existing pipeline easements were granted under section 35 of the *Indian Act*, that TransCanada does not thereby ‘own’ the land, and that the interest that

- TransCanada does hold is limited to the construction, operation and maintenance of buried pipelines within a portion of the Reserve. The strip of land was not removed from the Reserve lands, and accordingly, ‘surrender’ is not applicable.”
201. At no time did the Crown assist the First Nation in negotiating compensation for the potential initial easement period or its renewals, which ought to have included fair market value, the overall value of the lands to the project under consideration (or to the construction of potential pipeline projects into the future), and the *sui generis* nature of the First Nation’s interest in its IR 76 lands.
 202. At no time did the Crown assist the First Nation in assessing the impact of the easement being granted in favour of TCPL on the First Nation’s ability or right to tax or otherwise levy fees against TCPL.
 203. Furthermore, the Crown did not advise the First Nation on the ongoing and cumulative impacts of the project under consideration (and potential future pipeline projects) on the First Nation.

x. Grant in Lieu of Taxes

204. On or about November 20, 1961, the Crown was aware that Carry the Kettle desired to exercise its jurisdiction to impose taxes over easement agreements encumbering its IR 76 lands. In the four years prior, the Municipality of Indian Head had already collected \$1,500 per year from TCPL for “the section of pipe line” on IR 76.
205. On November 29, 1961, W.C. Bethune, Chief of Reserves and Trusts indicated his view that only the Municipality of Indian Head was entitled to assess and levy taxes on the pipeline right-of-way. Bethune determined that “it is probable the revenue is applied by the Municipality toward the provision of services of some benefit to the Indians such as the maintenance of municipal roads.” Bethune further explained that the Crown’s agreement with TCPL only contemplated a lump-sum payment of \$1,457, but even if it had included annual rentals, \$1,500 would be unfair to TCPL.

206. It was not until 1972 that the Crown acknowledged the First Nation's right to exercise its taxation jurisdiction over its own IR 76 lands.
207. Despite the explicit provision for the collection of taxation within the relevant easement agreements entered into previously with TCPL and PTC, the Crown not only failed to advise the First Nation on the impact of the easements being granted in favour of TCPL and PTC on the First Nation's ability or right to tax or otherwise levy fees against TCPL and PTC, but actively denied the First Nation's right or ability to tax or otherwise levy fees against TCPL and PTC until 1972.
208. At no time did the Crown advise the First Nation on the First Nation's ability or right to tax or otherwise levy fees against TCPL and PTC up to 1972, which ought to have included fair market value of the lands and improvements on the lands for all TCPL and PTC projects encumbering IR 76 lands to date, and the *sui generis* nature of the First Nation's interest in its IR 76 lands.

a. Grant in Lieu of Taxes, 1971-1974

209. Two BCRs dated November 20, 1972, indicate a request that the Crown arrange a grant in lieu of taxes using a mill rate of 22.8 (1) for TCPL "covering their pipeline running through our reserve in the amount of \$12,621.52 for the years 1971 and 1972", and (2) for PTC "covering their pipeline running through our reserve in the amount of \$861.38 for the years 1971 and 1972". Both BCRs requested that the Crown "arrange for this grant in subsequent years."
210. On December 6, 1972, R.B. Kohls, District Supervisor of the Touchwood File Hills Qu'Appelle District, wrote to PTC and TCPL explaining the First Nation's request for a grant in lieu of taxes equivalent to the mill rate levied by the neighbouring Municipality.
211. Kohls provided his understanding the change was reflective of legislative changes in the Province of Saskatchewan which had removed the authority of Rural Municipalities to levy taxes on an Indian Reserve and that, although the First Nation had "not passed a by-law to legally impose such taxation", the First Nation "felt

- they should be in a position to receive revenue in relation to such capital installations on the same basis as neighbouring Municipalities.”
212. On January 2, 1973, a receipt voucher was made, noting that \$12,021.52 had been received from TCPL for “Grant in lieu of taxes – Carry the Kettle Band.”
 213. By March 2, 1973, the Crown indicated there was difficulty “to collect the grants” from PTC and suggested that the First Nation may need to prepare a taxation by-law pursuant Section 83 of the *Indian Act*. The Crown’s opinion in this respect was not communicated to the First Nation.
 214. By April 19, 1973, a receipt voucher was made noting the receipt of \$861.38 from PTC for “Grant in Lieu of Taxes.”
 215. For the 1973 year, TCPL owed \$8,166.00 and PTC \$430.69 for their respective grants in lieu of taxes. A cheque dated March 6, 1974, was received from PTC for \$430.69 for “grant in lieu of taxes.” There is no record indicating that the \$8,166.00 owed by TCPL was received.
 216. On August 29, 1974, the Crown’s indicated the assessed valuation of the three TCPL pipelines was \$358,190.00 and the PTC’s pipeline at \$18,910.00, with the mill rate being 30 mills for 1974. There is no record indicating that TCPL paid its grant in lieu of taxes for 1974.
 217. On October 8, 1974, PTC provided a cheque for “grant in lieu of taxes for pipeline situated on Assiniboian Indian Reserve #76 for 1974” for \$567.30.
 218. At no time did the Crown advise the First Nation on the First Nation’s ability or right to tax or otherwise levy fees against TCPL and PTC from 1971 to 1974, which ought to have included fair market value of the lands and improvements on the lands for all TCPL and PTC projects encumbering IR 76 lands to date, and the *sui generis* nature of the First Nation’s interest in its IR 76 lands. Furthermore, the Crown also failed to collect the full amount of grants in lieu of taxes as levied by the First Nation for 1971 to 1974.

b. Grant in Lieu of Taxes, 1975

219. On December 18, 1975, the Crown informed TCPL that for the year 1975, the “anticipated grant based on an assessment of \$358,190.00 amounts to \$14,287.60.” There is no record indicating that TCPL paid its grant in lieu of taxes for 1975.
220. There is no record indicating that what the amount of the 1975 grant in lieu of taxes owed by PTC was. On January 20, 1976, a receipt voucher was made that noted \$754.40 had been received from PTC.
221. At no time did the Crown advise the First Nation on the First Nation’s ability or right to tax or otherwise levy fees against TCPL and PTC in 1975, which ought to have included fair market value of the lands and improvements on the lands for all TCPL and PTC projects encumbering IR 76 lands to date, and the *sui generis* nature of the First Nation’s interest in its IR 76 lands. Furthermore, the Crown also failed to collect the full amount of grants in lieu of taxes as levied by the First Nation for 1975.

c. Grant in Lieu of Taxes, 1976

222. On February 18, 1977, the Crown wrote to TCPL enclosing an invoice indicating that the mill rate increased to 50 mills for 1976, making a total due of \$17,909.50. There is no record indicating that TCPL paid its grant in lieu of taxes for 1976.
223. On the same day the Crown wrote to PTC enclosing an invoice with a total due of \$945.50. A receipt voucher dated March 17, 1977, indicated PTC paid \$945.50 for “Grant in lieu of taxes payable to Assiniboine Indian Reserve.”
224. At no time did the Crown advise the First Nation on the First Nation’s ability or right to tax or otherwise levy fees against TCPL and PTC in 1976, which ought to have included fair market value of the lands and improvements on the lands for all TCPL and PTC projects encumbering IR 76 lands to date, and the *sui generis* nature of the First Nation’s interest in its IR 76 lands. Furthermore, the Crown also failed

to collect the full amount of grants in lieu of taxes as levied by the First Nation for 1976.

d. Grant in Lieu of Taxes, 1977

225. On December 1, 1977, the Crown sent an invoice a grant in lieu of taxes for “the lines passing through” IR 76 to TCPL. The mill rate increased to 57 mills for that year, and the total due was \$20,416.83.
226. The same day the Crown wrote to PTC, who owed \$10,721.70 for 1977. In response, PTC noted that the calculation for what the PTC owed was incorrect, and that the company actually owed \$1,072.17 for that year.
227. On December 20, 1977, receipt vouchers were made noting that \$20,416.83 was received from TCPL and \$1,072.17 was received from PTC, both for grants in lieu of taxes to the Carry the Kettle.
228. At no time did the Crown advise the First Nation on the First Nation’s ability or right to tax or otherwise levy fees against TCPL and PTC in 1977, which ought to have included fair market value of the lands and improvements on the lands for all TCPL and PTC projects encumbering IR 76 lands to date, and the *sui generis* nature of the First Nation’s interest in its IR 76 lands.

e. Grant in Lieu of Taxes, 1978

229. On November 28, 1978, the Crown informed TCPL that the mill rate for 1978 was 59 mills for that year, and that TCPL owed \$21,133.21. This amount was paid by TCPL in and around February 1979.
230. The same day a letter was sent to PTC, who owed \$1,109.79 for 1978. A receipt voucher dated January 5, 1979 showed that the company paid \$1,109.79 for a grant in lieu of taxes to the Carry the Kettle.
231. At no time did the Crown advise the First Nation on the First Nation’s ability or right to tax or otherwise levy fees against TCPL and PTC in 1978, which ought to

have included fair market value of the lands and improvements on the lands for all TCPL and PTC projects encumbering IR 76 lands to date, and the *sui generis* nature of the First Nation's interest in its IR 76 lands.

f. Grant in Lieu of Taxes, 1979

232. On December 3, 1979, the Crown informed TCPL that the mill rate for 1979 was 65 mills and the company owed \$23,282.50. PTC was notified that they owed \$1,222.65 on the same day.
233. A receipt voucher indicated that PTC payment of \$1,222.65 was received on December 28, 1979. There is no record indicating that TCPL paid its grant in lieu of taxes for 1979.
234. At no time did the Crown advise the First Nation on the First Nation's ability or right to tax or otherwise levy fees against TCPL and PTC in 1979, which ought to have included fair market value of the lands and improvements on the lands for all TCPL and PTC projects encumbering IR 76 lands to date, and the *sui generis* nature of the First Nation's interest in its IR 76 lands. Furthermore, the Crown also failed to collect the full amount of grants in lieu of taxes as levied by the First Nation for 1979.

g. Grant in Lieu of Taxes, 1980

235. On December 3, 1980, the Crown informed PTC that \$1,316.70 was due for the 1980 grant in lieu of taxes, determined by a mill rate of 70 mills. A cheque from PTC was received on January 8, 1981, for \$1,316.70.
236. There is no record indicating that what the amount of the 1980 the grant in lieu of taxes owed by TCPL was or that it was paid.
237. At no time did the Crown advise the First Nation on the First Nation's ability or right to tax or otherwise levy fees against TCPL and PTC in 1980, which ought to have included fair market value of the lands and improvements on the lands for all TCPL and PTC projects encumbering IR 76 lands to date, and the *sui generis* nature

of the First Nation's interest in its IR 76 lands. Furthermore, the Crown also failed to collect the full amount of grants in lieu of taxes as levied by the First Nation for 1980.

h. Grant in Lieu of Taxes, 1981

238. On December 16, 1981, the Crown informed PTC that \$1,504.80 was due for its grant in lieu of taxes, determined by a mill rate of 80 mills for 1981. On February 4, 1982, a cheque was received for \$1,504.80 by PTC for "grant in lieu of taxes."
239. There is no record indicating what the amount of the 1981 the grant in lieu of taxes owed by TCPL was or that it was paid.
240. At no time did the Crown advise the First Nation on the First Nation's ability or right to tax or otherwise levy fees against TCPL and PTC in 1981, which ought to have included fair market value of the lands and improvements on the lands for all TCPL and PTC projects encumbering IR 76 lands to date, and the *sui generis* nature of the First Nation's interest in its IR 76 lands. Furthermore, the Crown also failed to collect the full amount of grants in lieu of taxes as levied by the First Nation for 1981.

i. Grant in Lieu of Taxes, 1982

241. On December 17, 1982, the Crown informed TCPL that their grant in lieu of taxes due was \$28,655.20 for that year, determined by a mill rate of 90 mills. The same day PTC was informed they owed a grant of \$1,692.90 for 1982.
242. A cheque dated February 9, 1983 was made by PTC for \$1,692.90 for "grant in lieu of taxes".
243. On December 24, 1982, the Crown informed TCPL that there was an error in calculation and the company actually owed \$32,237.10 for that year. There is no record indicating that TCPL paid its grant in lieu of taxes for 1982.

244. At no time did the Crown advise the First Nation on the First Nation's ability or right to tax or otherwise levy fees against TCPL and PTC in 1982, which ought to have included fair market value of the lands and improvements on the lands for all TCPL and PTC projects encumbering IR 76 lands to date, and the *sui generis* nature of the First Nation's interest in its IR 76 lands. Furthermore, the Crown also failed to collect the full amount of grants in lieu of taxes as levied by the First Nation for 1982.

j. Grant in Lieu of Taxes, 1983

245. The BCR dated October 6, 1983, states that a new agreement was to be entered into with TCPL such that TCPLs grant in lieu of taxes "be calculated at the Mill rate of 80 mills based on the old level assessment of \$466,095.000 for the next five years" until 1987. An enclosing letter stated that TCPL had proposed these rates.

246. On December 8, 1983, the Crown informed PTC that they owed a total of \$1,692.90 for 1983, determined at a rate of 90 mills.

247. There is no record indicating that PTC or TCPL paid their grant in lieu of taxes for 1983.

248. At no time did the Crown advise the First Nation on the First Nation's ability or right to tax or otherwise levy fees against TCPL and PTC in 1983, which ought to have included fair market value of the lands and improvements on the lands for all TCPL and PTC projects encumbering IR 76 lands to date, and the *sui generis* nature of the First Nation's interest in its IR 76 lands. Furthermore, the Crown also failed to collect the full amount of grants in lieu of taxes as levied by the First Nation for 1983.

k. Grant in Lieu of Taxes, 1984

249. There is no record indicating what the amount of the grant in lieu of taxes owed by TCPL was in 1984. On November 21, 1984, a receipt was made that noted \$37,287.60 was received from TCPL for "grant in lieu of taxes."

250. On January 28, 1985, the Crown informed PTC that they owed \$1,786.95, calculated by a 95-mill rate. PTC paid this amount by cheque on February 14, 1985.
251. At no time did the Crown advise the First Nation on the First Nation's ability or right to tax or otherwise levy fees against TCPL and PTC in 1984, which ought to have included fair market value of the lands and improvements on the lands for all TCPL and PTC projects encumbering IR 76 lands to date, and the *sui generis* nature of the First Nation's interest in its IR 76 lands.

l. Grant in Lieu of Taxes, 1985

252. On October 24, 1985, the Crown notified TCPL that they owed \$37,287.60 as a grant in lieu of taxes for 1985. A receipt dated November 19, 1985, noted this amount as received.
253. On March 21, 1986, the Crown informed PTC that they owed \$2,587.02 as a grant for the year 1985. This amount was sent by cheque on April 11, 1986.
254. At no time did the Crown advise the First Nation on the First Nation's ability or right to tax or otherwise levy fees against TCPL and PTC in 1985, which ought to have included fair market value of the lands and improvements on the lands for all TCPL and PTC projects encumbering IR 76 lands to date, and the *sui generis* nature of the First Nation's interest in its IR 76 lands.

m. Grant in Lieu of Taxes, 1986

255. On February 25, 1986, R.A. Hart, Property Management Consultant, sent to Dwight Hewitt, A/District Manager of the Touchwood File Hills Qu'Appelle District an assessment report prepared by T.J. Consulting which gave assessed values and mill rates for TCPL and PTC. The report recommended that TCPL pay \$55,359.66 and PTC pay \$2,715.41 for 1986.
256. On October 24, 1986, the Crown informed TCPL that the company owed \$37,287.60 for "grant in lieu of taxes for 1986 on the Assiniboine Indian Reserve."

A receipt dated November 26, 1986, noted that this amount was received from TCPL.

257. On December 3, 1986, PTC. was informed that they owed \$2,728.24 based off a mill rate of 42.5. These funds were received by December 24, 1986.
258. At no time did the Crown advise the First Nation on the First Nation's ability or right to tax or otherwise levy fees against TCPL and PTC in 1986 as set out in the report prepared by T.J. Consulting. Furthermore, there is no record that this assessment included consideration fair market value of the lands and improvements on the lands for all TCPL and PTC projects encumbering IR 76 lands to date, and the *sui generis* nature of the First Nation's interest in its IR 76 lands. Furthermore, the Crown also failed to collect the full amount of grants in lieu of taxes for 1986 as as recommended in the report prepared by T.J. Consulting.

n. Grant in Lieu of Taxes, 1987

259. On December 14, 1987, the Crown notified TCPL that the company owed \$37,287.60 for 1987. This was paid by cheque on December 24, 1987.
260. On December 22, 1987, PTC was informed that they owed \$2,728.24 for that year, which was paid on January 8, 1988.
261. At no time did the Crown advise the First Nation on the First Nation's ability or right to tax or otherwise levy fees against TCPL and PTC in 1987, which ought to have included fair market value of the lands and improvements on the lands for all TCPL and PTC projects encumbering IR 76 lands to date, and the *sui generis* nature of the First Nation's interest in its IR 76 lands.

o. Grant in Lieu of Taxes, 1988

262. The BCR dated December 8, 1988, includes an acceptance of a grant in lieu of taxes from TCPL in the amount of \$52,350.00 to be paid annually or the years 1988-1992, and requested that DIAND "execute the Memorandum of Agreement on behalf of the Band."

263. On the same day, Clifford S. Starr, Director of Lands, Revenues and Trusts, enclosed a memorandum of agreement to Therell Johnston of TJ Consulting for his review and requested to be advised “if this transaction provides fair and equitable compensation to the Band.”
264. On December 29, 1988, Johnston wrote to Bill Bernhardt, Head of Land Transactions, stating that, following his review, the “mileage, number of lines, diameters and assessments all remain unchanged from my previous evaluation of January 7, 1986.” He deemed the mill rate of 40 mills proposed by TCPL to be “fair and reasonable” and suggested they also be used to “calculate the grant in lieu of taxes for the PetroCanada pipeline.” By this mill rate, TCPL would owe \$52,349.56 and PetroCanada would owe \$2,567.76. Johnston further noted that “the annual increase in Municipal mill rates is minimal, because Rural Municipality councils are attempting to ‘hold the line’ on tax increases.”
265. On December 19, 1988, the Crown informed TCPL that they owed \$52,350.00 for 1988, which was received on December 28, 1988. There is no record indicating that this amount was received.
266. On June 28, 1989, the Crown informed PTC that they owed \$2,567.76 as a grant in lieu of taxes for 1988. There is no record indicating that this amount was received.
267. At no time did the Crown advise the First Nation on the First Nation’s ability or right to tax or otherwise levy fees against TCPL and PTC in 1988, which ought to have included fair market value of the lands and improvements on the lands for all TCPL and PTC projects encumbering IR 76 lands to date, and the *sui generis* nature of the First Nation’s interest in its IR 76 lands. Furthermore, the Crown also failed to collect the full amount of grants in lieu of taxes as levied by the First Nation for 1988.

p. Grant in Lieu of Taxes, 1989

268. On April 6, 1989, a memorandum of agreement was made with TCPL with the aim “[t]o formalize a procedure for calculating a tax base for determination of an annual

grant payment in lieu of taxes for pipeline installations located on the Assiniboine Indian Reserve No. 76.”

269. On December 6, 1989, the Crown informed TCPL that they owed \$52,350.00 as a grant in lieu of taxes for 1989, which was later paid on December 15, 1989.
270. There is no record indicating what the amount of the 1989 the grant in lieu of taxes owed by PTC was or whether it was paid.
271. At no time did the Crown advise the First Nation on the First Nation’s ability or right to tax or otherwise levy fees against TCPL and PTC in 1989, which ought to have included fair market value of the lands and improvements on the lands for all TCPL and PTC projects encumbering IR 76 lands to date, and the *sui generis* nature of the First Nation’s interest in its IR 76 lands. Furthermore, the Crown also failed to collect the full amount of grants in lieu of taxes as levied by the First Nation for 1989.

q. Grant in Lieu of Taxes, 1990-1992

272. There is no record indicating what the amount of the grants in lieu of taxes owed by TCPL and PTC for the period of 1990 to 1992 was or whether these amounts were paid.
273. At no time did the Crown advise the First Nation on the First Nation’s ability or right to tax or otherwise levy fees against TCPL and PTC from 1990 to 1992, which ought to have included fair market value of the lands and improvements on the lands for all TCPL and PTC projects encumbering IR 76 lands to date, and the *sui generis* nature of the First Nation’s interest in its IR 76 lands. Furthermore, the Crown also failed to collect the full amount of grants in lieu of taxes as levied by the First Nation from 1990 to 1992.

r. Grant in Lieu of Taxes from 1993-1998

274. There is no record indicating what the amount of the grants in lieu of taxes levied by the First Nation against TCPL or PTC were for the period from 1993 to 1998.

275. As of July 30, 1993, the Crown understood that TCPL had sent a new proposal “for the Grant in Lieu of Taxes on the existing easement” on July 20, 1993.
276. A receipt dated July 4, 1994, showed that TCPL paid \$54,970.00 for “1993 Grant in Lieu of taxes.” Another receipt dated July 29, 1994, showed that TCPL paid another \$54,970.00 for “1994 Grant in lieu of taxes.”
277. On July 19, 1995, TCPL wrote to Ken Acoose informing him that TCPL had not received a Statement of Account 1995 and noted that “our new line of 48” diameter size is also in service as of January 1st, 1995, and therefore should be added for an additional levy for the 1995 calendar year.” TCPL recalculated its own grant in lieu of taxes for 1995 as a \$65,570.00. A receipt dated December 22, 1995 noted that this amount was received by TCPL for “95 grant in lieu of taxes.”
278. On September 12, 1996, TCPL sent a cheque for \$65,570.00 for “1996 Grant in lieu of taxes.”
279. On December 8, 1997, TCPL sent a cheque for \$65,570.00 for “1997 Grant in Lieu of Tax.”

u. Grants in Lieu of Taxes After 1998 and Reassessment of Compensation

280. On July 17, 1998, the Crown indicated that it was awaiting an appraisal of TCPLs pipeline before requesting payment from TCPL for 1998 and that the additional payment of \$36,000 for 1997 had not been requested for the same reason.
281. On July 20, 1998, the Crown understood that funds were not available to issue a contract to TJ Consulting until the 98-99 fiscal year, and Therell Johnston had until August 31, 1998 to complete the work.
282. On August 13, 1998, a meeting was held between Chief and Council and the Crown. The purpose of the meeting was to review TCPL’s prior easements and the grant in lieu of taxes that had been applied on IR 76 since 1971.

283. At this meeting, Chief and Council had raised concerns regarding the lack of a grant in lieu of taxes prior to 1971. Further, they noted that there was a lack of clarity on whether the Crown had failed to collect grants from PTC or TCPL in years prior.
284. On August 31, 1998, Therell Johnston completed his report on “Installation Compensation for Cathodic Protection Sites” which suggested new compensation for the 20-year terms related to Order in Councils P.C. 1970-1820 (\$382.50) and P.C. 1974-23 (\$1,649.00).
285. On November 23, 1998, a further meeting was held between Chief and Council and the Crown, during which grants from TCPL and PTC were discussed. TCPL had offered an additional \$36,670.69 for the Grant in Lieu for the year 1997 “because of Provincial reassessment.”
286. For the 1998-2002 payment period, Chief and Council desired to negotiate with TCPL using a figure of \$129,612.35 and planned to negotiate with the PTC with a figure of \$2,922.78 for the same period. An additional \$14,090.60 plus interest was to be requested from the latter company for the years 1993 to 1997.
287. Two days later, Keith Walls, Manager of Lands Advisory Services at DIAND wrote to TCPL accepting the company’s offer of a payment of \$36,670.69 for the 1997 Grant in Lieu of Taxes. TCPL sent a cheque for \$36,670.69 for “municipal taxes” on December 15, 1998, which was received by INAC on December 16, 1998, as payment for “97 Grant in Lieu of Tax.”
288. There is no record indicating what the amount of the grants in lieu of taxes levied by the First Nation against TCPL were from 1998 onward or whether these amounts were received.
289. On August 4, 1999, a draft memorandum of agreement was made between the Minister of Indian Affairs and Northern Development and PTC with the purpose of formalizing “a procedure for calculating a tax base for determination of an annual grant in lieu of tax payment for pipeline installations located on the Assiniboine Indian Reserve No. 76.” The agreement stated that PTC shall pay \$14,090.60 with

- interest as payment “in full for the years 1993 to 1997” and \$5,845.56 with interest “as payment in full for the years 1998 and 1999.” Annual payments of \$2,922.78 would be made for the period of 2000 to 2002, and payments for 5-year periods shall be renegotiated in the future. This draft was given band council approval on October 29, 1999.
290. On November 10, 1999, the Crown wrote to PTC, enclosing the memorandum of agreement and informing that the company owed a total of \$22,858.94, including the grant in lieu for the year 2000, and an additional \$9,356.83 in interest payments for the years 1993 to 1999.
291. On December 17, 1999, the Crown followed up with PTC, noting that the “Carry the Kettle First Nation would like to bring to a close this long outstanding matter before the transfer of ownership takes place.”
292. On January 11, 2000, PTC sent a cheque for \$32,215.77, which the Crown acknowledged to the First Nation “as full payment for permit fees and interest owed from 1993 to 2000”.
293. The memorandum of agreement with PTC was finalized and signed on January, 24 2000. On November 10, 2000, the Crown informed PTC (at that time Conoco Inc.), that the company owed \$2,922.78 “as payment for the Grant in Lieu for the year 2001.” This amount was sent by cheque on December 21, 2000.
294. On January 3, 2002, the Crown informed PTC that their company owed \$2,922.78 as a grant in lieu of tax for the year 2002. This amount was sent by cheque on January 8, 2002.
295. There is no record indicating what the amount of the grants in lieu of taxes levied by the First Nation against PTC were from 2003 onward or whether these amounts were received.
296. On January 9, 2003, Chief Berry Kennedy wrote to Gail Bohme, Senior Lands Officer at INAC, notifying him that “a property assessment and taxation bylaw is

to be implemented by the First Nation” and that all “assessable interests in land located on Reserve lands will be liable to a property tax commencing in the 2003 year and forward.

297. At no time did the Crown advise the First Nation on the First Nation’s ability or right to tax or otherwise levy fees against TCPL and PTC from 1993 onward, which ought to have included fair market value of the lands and improvements on the lands for all TCPL and PTC projects encumbering IR 76 lands to date, and the *sui generis* nature of the First Nation’s interest in its IR 76 lands. Furthermore, the Crown also failed to collect the full amount of grants in lieu of taxes as levied by the First Nation from 1993 onward.

xi. Changes to TCPL Easement Agreements

298. On December 12, 2008, Order-in-Council (O.C.P.C. 2008-1911) was passed which surrendered TCPL’s previous right-of-way easements in Line 100-1 and 100-2 and authorized the granting of a replacement easement over the 72.85 acres of land as amended in the annexed agreement. The survey details of this project use the same lands as set out under CLSR plans M39057 and M39058. O.C.P.C. 2008-1911 was granted pursuant section 35 of the *Indian Act* and section 78 of the *National Energy Board Act*, RSC 1985, c N-7.
299. The BCR dated April 21, 2006, indicates an approval of a request by TCPL for lines 100-1 and 100-2, previously only permitted to transport natural gas, to be permitted to “transport natural gas, crude oil and any gaseous or liquid hydrocarbons and any product or by-product thereof” and a new easement be issued to enable this. Compensation given would be \$500 per acre, for a total of \$36,425.00.
300. On November 23, 2006, TCPL sent a cheque for \$36,425.00 to the Crown as payment “for the changes to the easement agreement.”
301. The supporting agreement dated January 28, 2009, states that its purpose is to allow for the change in substance from natural gas to oil and allows for the maintenance and replacement of the pipelines and cathodic protection systems. Total initial

- compensation payable to the Crown for the benefit of the First Nation was \$36,425 plus GST.
302. In granting the surrendered TCPL's previous right-of-way easements in Line 100-1 and 100-2 and authorizing the granting of a replacement easement to transport new hydrocarbon substance, the Crown failed to consider whether it would be in the best interest of the First Nation given the ongoing and cumulative impacts of the project under consideration (and potential future pipeline projects) on the First Nation.
303. At no time did the Crown provide the First Nation with information or records indicating how the amount of compensation for the initial easement period or its renewals were arrived at, if it was fair market value, or that the Crown considered the overall value of the lands to the project under consideration (or to the construction of potential pipeline projects into the future), and the *sui generis* nature of Carry the First Nation's interest in its IR 76 lands.
304. At no time did the Crown advise the First Nation on the impact of the right of way being granted in favour of TCPL on the First Nation's ability or right to tax or otherwise levy fees against TCPL.
305. The BCR dated February 18, 2016, states that it approves a new easement be entered into with TCPL to permit Line 100-3, Line 100-4, and Line 100-5 to transfer substances including "natural gas, crude oil and any gaseous or liquid hydrocarbons and any product or by-product thereof."
- (f) Crown's Fiduciary Duties in Relation to Granting Right-of-way Easements for Pipelines and Cathodic Protection Systems over Reserve Lands***
306. At all material times the Crown owed a fiduciary duty to the First Nation to consider, explore, and advise the First Nation of reasonable alternatives to avoid the expropriation of the First Nation's IR 76 lands altogether. Such reasonable alternatives ought to have included expropriating off-reserve locations, restricting

- the interests conveyed to the industry stakeholders, or surrendering the lands in question and securing replacement reserve lands elsewhere.
307. Further and in the alternative, a general fiduciary relationship existed between the Crown and the Carry the Kettle Nakoda Nation at all material times in relation to the expropriation of reserve land. The nature of the Crown's relationship with the Carry the Kettle Nakoda Nation was such that the First Nation depended on and remained vulnerable to the Crown's exercise of its power and discretion at all material times.
 308. The Crown owed certain fiduciary duties to the First Nation when it exercised its discretionary control over the First Nation's reserve lands and directed and approved the expropriation of and granting of easements over IR 76 lands in favor of industry stakeholders, as set out herein. These fiduciary duties continued throughout all subsequent renewals and issuance of grants in lieu of taxation.
 309. The historical responsibility undertaken by the Crown to protect the cognizable interests of the Treaty 4 Indians triggered a fiduciary duty on the part of the Crown that included the basic obligations of loyalty, good faith, and providing full disclosure appropriate to the impairment of the First Nation's interest.
 310. Once the Crown exercised its discretionary control to expropriate the First Nation's IR 76 lands in favour of industry stakeholders, the Crown at all material times owed a fiduciary duty to the First Nation to ensure the expropriation minimally impaired the First Nation's interest in its IR 76 lands.
 311. The Crown was also obligated at all material times to adhere to and followed all proper authorities and procedures in expropriating the lands. Further, the Crown failed to comply with statutory requirements, including the *Indian Act* and the relevant interprovincial pipeline legislation regarding the TCPL and PTC transactions set out herein, and thus are null and void.
 312. Further, at all material times the Crown owed a fiduciary duty to the First Nation to protect it from assenting to the expropriation of its IR 76 lands in exchange for

compensation that would otherwise amount to a foolish, improvident, and exploitative transaction.

313. In recent years, despite having worked exclusively with project proponents to advance the construction of these interprovincial pipelines through IR 76, the Crown has refused to acknowledge any responsibility in helping resolve the concerns of the First Nation with the project proponents and operators. Instead, the Crown has abdicated its role and now insists that the First Nation is on its own in dealing with ongoing negotiations with the holders of these easements.

(g) *Duties of Loyalty, Good Faith, Full Disclosure, and Minimal Impairment*

314. The Crown breached its duty of minimal impairment to the First Nation when it failed to consider, explore, and advise the First Nation of reasonable alternatives to avoid the expropriation of the First Nation's IR 76 lands for the purposes of the TCPL Line 100-1, 1955, 72.85 acres easement. Such reasonable alternatives ought to have included expropriating off-reserve locations, restricting the interests conveyed to the industry stakeholders, or surrendering the lands in question and securing replacement reserve lands elsewhere.

315. The Crown breached its duties of loyalty, good faith, and full disclosure to the First Nation when it withheld from the First Nation that it had indicated to TCPL the intention to negotiate the terms of surrender with the band for an irrevocable sale of the land. Instead, given the purported willingness of Chief and Council to sell a portion of IR 76 as indicated in the BCR dated September 10, 1954, the Crown went on to propose an expropriation of a choice portion of the IR 76 land without the opportunity to select and secure replacement reserve lands.

316. The Crown breached its duties of loyalty, good faith, full disclosure, and minimal impairment when it failed to advise the First Nation on the impact of the pipeline right-of-way easements and related projects on the First Nation's ability or right to tax or otherwise levy fees the industry stakeholders.

317. Despite the explicit provision for the collection of taxation within the relevant easement agreements, the Crown not only failed to advise the First Nation on the impact of the easements on the First Nation's ability or right to tax or otherwise levy fees against TCPL and PTC, but actively denied the First Nation's right or ability to tax or otherwise levy fees against TCPL and PTC until 1972.
318. From the outset and at all material times, the Crown failed to conduct adequate analysis to determine if the easements encumbered more land that was necessary or if the injurious affection of the project would be limited to achieving the parameters of the public purpose it sought to achieve and as such failed in its fiduciary duties and honor of the crown to minimally impair the First Nation's interest in IR 76.
319. The Crown also breached its duties of loyalty, good faith, and full disclosure when it failed to advise the First Nation that the impact of the location of the TCPL 100-1 right-of-way easement would be much broader than the proposed 72.85 acres.
320. The Crown should have advised the First Nation that the location of any pipeline on IR 76 would result in even further expropriation of IR 76 lands for the purposes of constructing, operating, and maintaining future pipeline projects far into the future. Over the proceeding decades, a cascade of additional pipelines and cathodic protection system projects were proposed, approved, and constructed over IR 76. These interprovincial pipelines and related projects continue to encumber and limit the use of the First Nation's reserve lands.
321. The Crown should have meaningfully informed the First Nation of the long-term injurious affection to their use of IR 76 lands beyond the area of land as described within pipeline right-of-way and related project easements. The cumulative impacts of these projects continue to disrupt and endanger the health and well-being of the First Nation. These cumulative impacts include, but are not limited to:
 - a. Restrictions on land use and developments opportunities in the locality of the interprovincial pipeline easements, including those restrictions due to

the federal Crown's authority to apply federal land use regulation over lands adjacent to interprovincial pipelines and related projects,

- b. Contamination of and inability to access subsurface water sources utilized by the First Nation for drinking water,
- c. Contamination of surface water and vegetation in the locality of the right-of-way easements,
- d. Contamination of wild game dependant on access to surface water and vegetation in the locality of the right-of-way easements,
- e. Disruptions and psychological impacts to band members due to ongoing maintenance and reclamation efforts, and
- f. Ongoing health and safety risks of potential failure and hydrocarbon escape from the interprovincial pipelines.

322. At all material times, the Crown failed to assess the current, ongoing, and future injurious affection to the First Nation when it exercised its authority to expropriate IR 76 lands or authorize the renewal, amendment, or assignment of its agreements for the benefit of industry stakeholders. These cumulative impacts have not been compensated and as such, the Crown has outstanding statutory, fiduciary and honourable obligations to the First Nation as further set out below.

(h) *The Duty to Withhold Consent to Foolish, Improvident, and Exploitative Transactions*

323. From the outset, and despite the express reservations of the First Nation, the Crown worked exclusively with project proponents to assess and advance the construction, operation, maintenance, and renewal of these interprovincial pipeline projects through IR 76. Given the bi-lateral nature of an expropriation under section 35 of the *Indian Act*, which does not require to consent of the First Nation (as compared to the tri-lateral nature of a surrender), the First Nation remained vulnerable to the Crown's exercise of its power and discretion at all material times.

324. Eventually, the duly elected representatives of the First Nation through Chief and Council would meet with the Crown to discuss the position of the project proponents.
325. The evidence shows that, at all material times, the Department of Indian Affairs did not act as “articulate spokespersons” on behalf the First Nation. The Crown failed to conduct an independent valuation of the lands expropriated for the right-of-way easements, nor did it advise the First Nation of the opportunity to have legal counsel present at each of these meetings and/or seek independent evaluation.
326. Throughout each of these discussions, the Crown did not entertain the possibility of negotiating better terms for the First Nation, contrary to its fiduciary duties and the Honour of the Crown. Further, the Crown reminded Carry the Kettle Nakoda Nation of its unilateral power of the Crown to expropriate their lands under the *Indian Act* and the relevant interprovincial hydrocarbon pipeline legislation.
327. Realizing the Crown would exercise its authority despite their express objections, the First Nation reluctantly agreed to the terms presented by the Crown. In so doing, the First Nation relied on what the Crown represented as a fair market value for what was purported as a temporary use of their lands.
328. The Crown stood in a conflicting position. Its obligations owed to the First Nation pursuant to Treaty, honour of the Crown, the *Indian Act* and the Constitution, and its policy in favour of the public interest, to be a proponent of infrastructure for the promotion of settlement and economic development across the country. The Crown chose the interest of third-party proponents over the interests of the First Nation.
329. Where the Crown’s actions are coloured by the appearance of a conflict of interest, and the Crown assumed complete control of the decision-making process, the Crown was required to conduct a valuation of the land, or provide the First Nation with an opportunity to obtain an independent evaluation to ensure that proper information and advice was provided to the First Nation and proper compensation was paid for their reserve lands.

330. The Crown breached its fiduciary duty to ensure that proper compensation was paid for their reserve lands that were sought to be expropriated. The Crown failed to undertake an independent valuation of the Carry the Kettle's IR 76 lands, to advise the First Nation of such valuation, or advised the First Nation of its right to seek independent evaluation to assess whether the terms of the Crown's agreement with the project proponents or the compensation paid thereunder were, at the very least, comparable with industry, provincial government, and private landholder standards. Thus, the Crown failed to exercise its discretion honestly, prudently, and for the benefit of the First Nation.
331. Further, in breach of its statutory and fiduciary duties and the Honour of the Crown, the Crown failed to obtain adequate compensation for the benefit of the First Nation for each approval, renewal, assignment, and amendment of the pipeline right-of-way and related project easement as set out herein. The Crown's failure to incorporate relevant considerations include, but are not limited to:
- a. Consideration of the *sui generis* nature of the First Nation's interest in its IR 76 lands, including
 - i. the inalienability of the IR 76 lands except to the Crown, and
 - ii. the First Nation's lack of unilateral authority to add replacement reserve lands;
 - b. An assessment of the overall valuation of the lands to the project under consideration and to the construction of potential pipeline projects into the future; and
 - c. Compensation for the current, ongoing, and long-term cumulative impacts of the pipeline projects on the First Nation's reserve lands.
332. The Crown breached further statutory and fiduciary duties and the Honour of the Crown by failing to provide express renegotiation provisions for the encumbrances on First Nation's lands until TCPL's Natural Gas Pipeline 100-3, approved in 1970.

The Crown continued to be in breach of its statutory and fiduciary duties and the Honour of the Crown by only including re-negotiating clauses on compensation every 20 years, which is an unreasonably long time and caused a loss to the First Nation.

333. The terms agreed to by the Crown in its granting of each approval, renewal, assignment, and amendment of the pipeline right-of-way and related project easements as set out herein would otherwise amount to a foolish, improvident, and exploitative transaction, and therefore were a breach of the Crown's fiduciary duty.
334. Further, the Crown failed to advise the First Nation on the First Nation's ability or right to tax or otherwise levy fees against those lands and improvements within the pipeline right-of-way and related project easements, thereby causing the First Nation damages, in an amount to be proven at a hearing of this Claim.

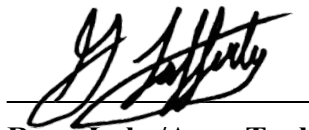
VI. Relief Sought

335. Carry the Kettle seeks the following relief:
 - a. A determination that the Crown breached its duty based on the honour of the Crown to protect the rights and interests of Carry the Kettle in retaining control of the IR 76 lands against the imposition of third-party interests, thereby causing harm to the First Nation;
 - b. A determination that the Crown breached its fiduciary duty owed to the First Nation in the exercise of its discretionary power to authorize the location, construction, maintenance, and operation of interprovincial hydrocarbon transmission pipelines and related projects on IR 76, thereby causing harm to the First Nation;
 - c. A determination that the Crown breached its fiduciary duty owed to the First Nation in the exercise of its discretionary power to authorize the terms of the indentures, permits, and/or agreements between the Crown and third-parties for the purposes of interprovincial pipelines and related projects on IR 76, including the compensation paid to the Crown held in trust for the First Nation, thereby causing harm to the First Nation;

- d. Compensation for the current unimproved market value and loss of use of the Claim lands;
- e. Compensation for the cost to remediate damaged Claim lands and/or the cost of replacement lands;
- f. Compensation for damages for injurious affection;
- g. Compensation for the loss of taxation;
- h. Compensation for failure to provide adequate compensation for the Claims;
- i. Compensation for the failure to include re-negotiation clauses until the approval of TCPL Natural Gas Pipeline 100-3 in 1970 and thereafter failure to include adequate re-negotiation clauses respecting the First Nation's reserve lands encumbered in these Claims;
- j. Equitable interest;
- k. 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
- l. Such other relief as this Honourable Tribunal deems just.

Dated this 5th day of February, 2024, at the City of Calgary in the Province of Alberta.

MAURICE LAW



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