

FEDERAL COURT OF APPEAL

BETWEEN:

CARRY THE KETTLE NAKODA NATION

and

**HIS MAJESTY THE KING IN RIGHT OF CANADA (MINISTER OF
CROWN-INDIGENOUS RELATIONS) as represented by the ATTORNEY
GENERAL OF CANADA**

Respondent

APPLICATION UNDER sections 18(1), 28(1)(r), 28(2), and s.44 of the *Federal
Courts Act*, RSC 1985, c. F-7

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
FILED	1-Sep-2023
A. GREENSPOON	
OTTAWA, ON	1
Applicant	

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Ottawa, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: _____

Issued by: _____
(Registry Officer)

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TO: **ATTORNEY GENERAL OF CANADA**

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AND TO: **DEPUTY ATTORNEY GENERAL OF CANADA**

Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8

APPLICATION

This is an application for judicial review in respect of the decision of the Minister of Crown-Indigenous Relations to refuse to execute the *Carry the Kettle Nakoda Nation 1905 Assiniboine Surrender Claim Settlement Agreement* and pay the Compensation owing to the Applicant in relation to a full and final settlement of Specific Claims Tribunal File No. SCT-5002-15 (“Decision”).

The Applicant seeks an order for *mandamus* under sections 18(1), 28(1)(r), s.28(2), or, alternatively, section 44 of the *Federal Courts Act*, RSC 1985, c F-7, requiring the Minister of Crown-Indigenous Relations to execute the *Carry the Kettle Nakoda Nation 1905 Assiniboine Surrender Claim Settlement Agreement*.

RELIEF AND ORDER SOUGHT

1. The Applicant seeks:
 - (a) An order for mandamus requiring the Minister of Crown-Indigenous Relations to execute the Carry the Kettle Nakoda Nation 1905 Assiniboine Surrender Claim Settlement Agreement.
 - (b) Costs on a solicitor-client basis or as otherwise deemed appropriate by this Honourable Court.
 - (c) Such further or other relief as this Honourable Court may deem appropriate.

GROUND FOR THE APPLICATION

Background

Carry the Kettle Nakoda Nation

2. Carry the Kettle Nakoda Nation is a First Nation with its primary reserve, Assiniboine Indian Reserve No. 76, located approximately 80 kilometres east of Regina. Carry the Kettle’s total registered population is 3,085 members. 1,068 members live on-reserve, and 2,017 members live off-reserve.

3. Carry the Kettle is governed by its duly elected Chief and Council pursuant to section 42 of the *First Nations Election Act*, SC 2014, c 5, and the *CEGAKIN Nakoda Oyade Band Custom Election Act*, which enshrines Carry the Kettle’s traditional electoral and governance practices (hereinafter “Carry the Kettle” or “Chief and Council”)

The Minister of Crown-Indigenous Relations and its Agents

4. The Honourable Gary Anandasangaree, MP is the Minister of Crown-Indigenous Relations appointed to and holding office by Great Seal and under section 4 of the *Department of Crown-Indigenous Relations and Northern Affairs Act* (the “*CIRNAC Act*”). The *CIRNAC Act* also establishes the Department of Crown-Indigenous Relations and Northern Affairs Canada (“CIRNAC”).
5. The Minister of Crown-Indigenous Relations is responsible for His Majesty the King’s and the Government of Canada’s relations with Indigenous peoples.
6. Section 6 of the *CIRNAC Act* provides that “[t]he Minister’s powers, duties and functions extend to and include all matters over which Parliament has jurisdiction — and that are not by law assigned to any other department, board or agency of the Government of Canada — relating to relations with Indigenous peoples.”
7. Additionally, under Section 7 of the *CIRNAC Act*, the Minister of Crown-Indigenous Relations is responsible for:
 - (a) exercising leadership within the Government of Canada in relation to the affirmation and implementation of the rights of Indigenous peoples recognized and affirmed by section 35 of the Constitution Act, 1982 and the implementation of treaties and other agreements with Indigenous peoples;
 - (b) negotiating treaties and other agreements to advance the self-determination of Indigenous peoples; and
 - (c) advancing reconciliation with Indigenous peoples, in collaboration with Indigenous peoples and through renewed nation-to-nation, government-to-government and Inuit-Crown relationships.

8. The Minister of Crown-Indigenous Relations is also the minister responsible for the administration of the *Specific Claims Tribunal Act*, S.C. 2008, c. 22 (the “SCT Act”).
9. The Minister of Crown-Indigenous Relations and its agents acted on behalf of His Majesty the King in Right of Canada and the Government of Canada (all together, the “Minister”) in relation to the issues at bar.

The 1905 Surrender Claim

10. In December 1988, Carry the Kettle submitted a claim under the federal Specific Claims Policy challenging the validity of the 1905 surrender of approximately 5,760 acres of lands from the Assiniboine Indian Reserve No.76. A parallel action was also filed in Federal Court Action T-72-93 in 1993. In 1994, the Specific Claims Branch of the Department of Indian Affairs rejected the claim. The First Nation then applied to the now defunct Indian Claims Commission to conduct a public inquiry into its rejected claim. Unfortunately, this long-outstanding claim would not be resolved through this non-binding dispute resolution process.
11. On November 26, 2015, Carry the Kettle filed a Declaration of Claim at the Specific Claims Tribunal (the “Tribunal”). The claim arises from alleged breaches of Canada’s treaty, legal, fiduciary, and equitable duties in relation to the unlawful surrender and sale of treaty land from Indian Reserve No. 76 in 1905, as well as Canada’s misadministration of land sales (the “1905 Surrender Claim”).
12. On June 18, 2019, under an Agreement on Validity Phase, the Minister admitted:
 - (a) that Canada breached a pre-surrender fiduciary obligation to Carry the Kettle in relation to the 1905 surrender of 5,760 acres from Indian Reserve No. 76 (IR 76);
and
 - (b) that Canada failed to credit the amount of \$5,537.03 from the sale and collection of sale proceeds to Carry the Kettle on January 31, 1920.

13. On July 31, 2019, the Honourable Justice Paul Mayer of the Tribunal issued an order on consent finding that the above claims are valid and directing that the 1905 Surrender Claim proceed to a determination of compensation owed to Carry the Kettle.
14. On August 8, 2019, the Minister offered to negotiate the 1905 Surrender Claim.
15. On September 10, 2019. Carry the Kettle passed a Band Council Resolution agreeing to negotiate with the Minister, and formally accepted the Minister's Offer to Negotiate on September 11, 2019.
16. On September 20, 2019, the Minister and Carry the Kettle executed the "Negotiation Protocol Agreement Concerning the Carry the Kettle Band #378 1905 Surrender Specific Claim."
17. On November 19, 2019, the Honourable Justice Paul Mayer ordered, *inter alia*, that the Tribunal proceeding be stayed for six (6) months to allow the Minister and Carry the Kettle to negotiate a settlement. The Honourable Justice Paul Mayer made the order pursuant to the Minister and Carry the Kettle's Joint Application for Stay Proceedings. The Federal Court action was also held in abeyance since it was filed in 1993 pending a resolution of the matter by the Specific Claims Tribunal.
18. On May 21, 2020, the Honourable Justice Paul Mayer extended the stay of proceedings for a further six (6) months to allow the parties to continue to negotiate.
19. On November 30, 2020, the Honourable Justice Paul Mayer granted an additional six (6) month stay of proceedings, following which, the Minister and Carry the Kettle would report to the Tribunal on the status of expert reports, the presentation of a settlement offer, and the status of negotiations.

20. On May 6, 2021, the Minister and Carry the Kettle submitted a Joint Application for Stay of Proceedings to the Tribunal providing the following information regarding the status of negotiations:
- (a) “The parties have agreed to the joint retention of experts.
 - (b) The parties agreed to terms of reference to retain an expert to evaluate the current loss of use. The Terms of Reference were signed at the end of September 2020. The parties are currently waiting to receive a draft of this report, which they intend to review upon receipt.
 - (c) The parties agree to Terms of Reference to retain an expert to evaluate the current unimproved market value. The Terms of Reference were executed on November 1, 2020. The parties received a draft of his report on April 23, 2021 and are currently reviewing the report.
 - (d) No obvious contentious issues have arisen that might hinder the expedient and cost-effective resolution of the Claim.”
21. On November 2, 2021, Carry the Kettle advised the Tribunal that it tabled a formal settlement proposal with the Minister on October 1, 2021.
22. On January 4, 2022, Carry the Kettle advised the Tribunal that, despite repeated requests, the Minister did not respond to the settlement proposal. Further, Carry the Kettle advised the Tribunal that Carry the Kettle wished to resume the Tribunal proceeding and set down a date for the compensation hearing.
23. That same day, the Minister responded to the Tribunal advising that due to internal delays the Minister required a further three (3) months stay of proceedings. The Minister also confirmed its preference to resolve the 1905 Surrender Claim through a negotiated settlement. Consequently, the Tribunal granted the three (3) months stay.
24. On May 2, 2022, the Tribunal issued an order confirming that the Minister and Carry the Kettle had reached a tentative settlement agreement and providing for a further three (3) months stay of proceedings.

25. Thereafter, the Minister and Carry the Kettle worked towards mutual terms to resolve the 1905 Surrender Claim with their respective legal counsel, including drafting a settlement agreement.

The Settlement Agreement

26. The Carry the Kettle Nakoda Nation 1905 Assiniboine Surrender Claim Settlement Agreement (the “Settlement Agreement”) was the product of a lengthy negotiation and drafting process by Carry the Kettle and the Minister. The negotiation and drafting of the Settlement Agreement proceeded pursuant to the *Specific Claims Tribunal Act, Indian Act* and its *Regulations*, the *Rules of the Specific Claims Tribunal*, together with specific modifications subsequently required by the Minister as detailed below. This Settlement Agreement provided for payment of \$81.75 million to Carry the Kettle as Compensation for the loss of its reserve lands and to bring an end to protracted and expensive litigation before the Specific Claims Tribunal and the Federal Court.
27. On January 20, 2023, Carry the Kettle and the Minister agreed to the Settlement Agreement. Carry the Kettle and the Minister each initialed all pages of the Settlement Agreement approving its terms.

Conditions Precedent to Execution by the Minister

28. Article 8 of the Settlement Agreement, “Conditions to Execution by Canada”, contains several conditions precedent that Carry the Kettle is required to fulfill prior to the Minister’s execution of the Settlement Agreement. Section 8 also contains two internal conditions that the Minister must satisfy *on its own* prior to executing the Settlement Agreement. There is no requirement for Carry the Kettle to take any action for the Minister to satisfy those terms. Carry the Kettle’s conditions precedent and the Minister’s conditions contained in Article 8.1 of the Settlement Agreement are as follows:

8.1 The following conditions must be fulfilled before Canada will consider executing this Settlement Agreement:

- (a) the First Nation ratifies and approves the terms of this Settlement Agreement and the Trust Agreement in accordance with Article 7.0;

- (b) the First Nation provides an executed Band Council Resolution substantially in the form attached as Schedule 6 approving and assenting to the terms and conditions of this Settlement Agreement in accordance with Article 7.0;
- (c) the First Nation provides a Certification of Vote Results and Appeals executed by the ratification officer responsible for the Ratification Vote, substantially in the form attached as Schedule 8;
- (d) the Minister is authorized to sign this Settlement Agreement;
- (e) Canada approves and appropriates the funds for the payment of the Compensation;
- (f) the First Nation provides the information required by Canada to deposit moneys into the Trust Account;
- (g) the First Nation provides the Band Council Resolution for payment and Direction to Pay substantially in the forms attached as Schedule 5;
- (h) First Nation's legal counsel provides a Solicitor's Certificate, which is Schedule 1 of this Settlement Agreement, dated on or after the date of execution of this Settlement Agreement by the First Nation; and) the First Nation's financial advisor provides a Financial Advisor's Certificate, substantially in the form attached as Schedule 2 of this Settlement Agreement, dated on or after the date of execution of this Settlement Agreement by the First Nation.

The Minister Directs That Band Council Resolutions and the Settlement Agreement Must Be Signed by At Least Four of Seven Chief and Councillors Elected at the April 2022 Council Election

29. On February 15, 2023, the Minister wrote to Carry the Kettle's Chief and Council regarding the manner in which the Minister interpreted a Federal Court decision regarding a dispute over the removal of two members of Council for Carry the Kettle in *Bellegarde v. Carry the Kettle First Nation*, 2023 FC 129. The Minister advised that it interpreted the decision to mean that "all of the councillors elected in April 2022 remain the duly elected councillors until told otherwise by the court".

30. Consequently, the Minister advised that the Minister “will expect any BCRs to be signed by at least four (4) of the seven Councillors elected in April 2022 (sic) election, and the settlement agreement would need to be signed by at least four (4) of the seven Councillors in the April 2022 election.”
31. On February 28, 2023, the Minister wrote to Chief and Council of Carry the Kettle First Nation advising that “[t]he recently initialled settlement agreement that would conclude this complex and high-value historical grievance through community information sessions and a ratification vote by your membership, which you have set for Friday, March 3, 2023.”
32. The Minister additionally advised that it was in receipt of correspondence “in relation to issues of internal governance within the Carry the Kettle Nakoda Nation, which are the subject of a Federal Court proceeding.” The Federal Court proceeding being *Bellegarde v. Carry the Kettle First Nation*, 2023 FC 129.
33. The Minister also wished Council “the best at the Ratification Vote”.
34. The Minister, for the second time, also advised Carry the Kettle that the Minister requires that all Band Council Resolutions related to the Settlement Agreement, and the Settlement Agreement itself must be signed by at least four of seven Councillors elected in the April 2022 election.
35. Those seven Chief and Councillors are:
 - (a) Chief Scott Eashappie
 - (b) Councillor Tamara Thomson
 - (c) Councillor Lucy Musqua
 - (d) Councillor Shawn Spencer
 - (e) Councillor Dwayne (Cliff) Thompson
 - (f) Councillor Terrina Ashdohonk-Bellegarde

(g) Councillor Joellen Haywahe

36. Carry the Kettle First Nation accepted the Minister's direction and proceeded on that basis.

The Minister Directs Carry the Kettle to Amend the Voting Guidelines Under the Settlement Agreement

37. On February 9, 2023, counsel for the Minister, wrote to counsel for Carry the Kettle stating that the Minister required Carry the Kettle to agree to delete section 13.2(f) of the Voting Guidelines of the Settlement Agreement. Counsel for the Minister advised that the Minister would not sign the Settlement Agreement unless section 13.2(f) was removed. Section 13.2(f) read as follows:

13.2 A request for a review of a Ratification Vote shall be made by a Voter by providing a written request containing the following information to Council within 7 days after the date of the Ratification Vote:

...

(f) a \$10,000 deposit, refundable upon a successful review.

38. Carry the Kettle raised concerns with the deletion of section 13.2(f) because it could undermine the ratification process and potentially delay payment of Compensation by increasing the likelihood of frivolous and vexatious appeals.

39. The Minister proposed the following amendment:

13.2 A request for a review of a Ratification Vote shall be made by a Voter by providing a written request containing the following information to Council within 7 days after the date of the Ratification Vote:

(f) a \$1,000 deposit, refundable upon a successful review.

40. On February 25, 2023, Carry the Kettle agreed to amend Article 13.2(f) at the Minister's request, notwithstanding that the Notice of Vote had already been posted to the members of

Carry the Kettle. Carry the Kettle then approved the amendment by a Band Council Resolution, duly executed by the quorum of 4 out of 7 Chief and Councillors elected at the April 2022, election.

41. After confirming that the Band Council Resolution was signed by a quorum of 4 out of 7 Councillors elected at the April 2022 election, the Minister re-initialed the Settlement Agreement confirming the amendment.

Carry the Kettle Ratifies the Settlement Agreement

42. Article 8.1(a) of the Settlement Agreement requires that Carry the Kettle First Nation (not Council) ratify and approve the terms of this Settlement Agreement and the Trust Agreement in accordance with Article 7.0. Article 7.0 reads as follows:

7.0 RATIFICATION

7.1 The First Nation:

- (a) agrees to all of the terms and conditions of this Settlement Agreement and the Trust Agreement; and
- (b) authorizes and directs the Council to execute this Settlement Agreement and the Trust Agreement

if, at the Ratification Vote, a majority (over 50%) of the Voters vote and a majority (over 50%) of the votes cast by the Voters are in favour of this Settlement Agreement and the Trust Agreement.

7.2 If, at a Ratification Vote held pursuant to Article 7.1, a majority (over 50%) of the Voters do not vote, but a majority (over 50%) of the votes cast are in favour of this Settlement Agreement and the Trust Agreement, then the Council may at its discretion cause a second Ratification Vote to be conducted.

7.3 If a second Ratification Vote is held pursuant to Article 7.2, the First Nation:

- (a) agrees to all the terms and conditions of this Settlement Agreement and the Trust Agreement; and

(b) authorizes and directs the Council to execute this Settlement Agreement and the Trust Agreement

if, at the second Ratification Vote, a majority (over 50%) of the votes cast by the Voters are in favour of the Settlement Agreement and the Trust Agreement.

7.4 For greater certainty, if the required approval and assent pursuant to Article 7.1 or Article 7.3, as applicable, is not obtained from the First Nation, this Settlement Agreement is void and of no force or effect.

43. Carry the Kettle fulfilled all required steps under Article 7.

The First Ratification Vote

44. On February 1, 2023, a Band Council Resolution, signed by a quorum of 4 out of 7 Councillors elected at the April 2022 election approved a Ratification Vote on terms provided for by the *Carry the Kettle Nakoda Nation 1905 Specific Claim Settlement Agreement Voting Guidelines* attached as Schedule 7 to the Settlement Agreement, as agreed to and directed by the Minister and Carry the Kettle (the “Voting Guidelines”).
45. On February 1, 2023, Carry the Kettle posted a Notice of Vote, online and in-person, including the Settlement Agreement and Trust Agreement, notifying all Eligible Voters of the Ratification Vote. Additionally, the Notice of Vote, included the Information Package for Membership. The Notice of Vote fulfilled the requirements of Articles 4.1 to 4.4 of the Voting Guidelines.
46. The Notice of Vote also contained the Ballot Question that was put forward to Carry the Kettle’s membership. The Minister approved the Ballot Question, and it is contained in Schedule 3 of the Settlement Agreement. The Ballot Question is:

As a Voter of the First Nation, do you:

- (a) **agree** to all of the terms and conditions of the Carry the Kettle Nakoda Nation 1905 Assiniboine Surrender Claim Settlement Agreement initialled by the negotiators for the First Nation and Canada, which settles and releases the 1905 Assiniboine Surrender Claim, and the Trust Agreement;

and

- (b) **authorize and direct** the Council of the First Nation to sign all documents and do everything necessary to give effect to the 1905 Assiniboine Surrender Claim Settlement Agreement, and the Trust Agreement, including the amendments to the Trust Agreement?

- 47. On February 13, 14, and 15, 2023, Carry the Kettle held several Information Meetings pursuant to the ratification process explaining the Settlement Offer, the Settlement Agreement, and the Trust Agreement which the community would vote to either accept or reject in the Ratification Vote. The meetings were held in Winnipeg, Regina, and Calgary. These Information Meetings fulfilled the requirements of Articles 6.1 to 6.4 of the Voting Guidelines.
- 48. On March 3, 2023, pursuant to Article 7.1 of the Settlement Agreement, the membership of Carry the Kettle held the ratification vote (the “First Ratification Vote”).
- 49. On March 6, 2023, Nicholas Ternes, Ratification Officer of Carry the Kettle, reported the results of the First Ratification Vote. Thereafter, on May 11, 2023, certified the First Ratification Vote by solemnly declaring the Form of Certification of Vote Results & Appeals required by the Settlement Agreement. The results of the First Ratification Vote were as follows:
 - (a) the number of Voters whose names were recorded on the list of Votes was 1732;
 - (b) 323 in-person ballots were cast;
 - (c) 352 electronic ballots were cast ;
 - (d) 2 ballots were spoiled, but were entered in the ballot box;
 - (e) 0 ballots were rejected;
 - (f) 0 ballots were cancelled;
 - (g) 288 ballots were marked “YES” for the Ballot Question;

- (h) 33 ballots were marked “NO” for the Ballot Question;
 - (i) there were NO appeals received during the appeal period; and
 - (j) the Settlement Agreement was majority APPROVED by the Votes but the Vote did not meet the minimum 50% of Eligible Voters for Quorum.
50. Fewer than 50% of the Eligible Voters voted in the First Ratification Vote, however, of those Eligible Voters who cast a vote in the First Ratification Vote, 88% voted to approve the Settlement Agreement and Trust Agreement.
51. Carry the Kettle then delivered the Certification of Votes Results & Appeals to Canada pursuant to Article 8.1(c) of the Settlement Agreement.

The Second Ratification Vote

52. As a result of the First Ratification Vote, Carry the Kettle arranged to hold a second Ratification Vote pursuant to Article 7.2 of the Settlement Agreement. Article 7.2 only requires that a majority (over 50%) of the votes cast by the Voters are in favour of the Settlement Agreement and the Trust Agreement. There is no requirement that a majority (over 50%) of Eligible Voters vote.
53. On March 7, 2023, a Band Council Resolution, signed by a quorum of 4 out of 7 Councillors elected at the April 2022 election was approved and authorized a second Ratification Vote on the same terms as the First Ratification Vote, and in accordance with the Voting Guidelines (the “Second Ratification Vote”).
54. On March 7, 2023, Carry the Kettle posted a Second Notice of Vote, online and in-person, including the Settlement Agreement and Trust Agreement, notifying all Eligible Votes of the Second Ratification Vote. Additionally, the Second Notice of Vote, included the Information Package for Membership approved by the Minister. The Second Notice of Vote fulfilled the requirements of Articles 4.1 to 4.3 and Article 12.2 of the Voting Guidelines.

55. On March 16, 2023, Carry the Kettle held an Information Meeting with respect to the Second Ratification Vote. This Information Meeting fulfilled the requirements of Articles 6.1 to 6.4 of the Voting Guidelines.
56. On March 21, 2023, Carry the Kettle held the Second Ratification Vote.
57. On May 10, 2023, Shelly Lloyd Atkinson, Ratification Officer of Carry the Kettle, certified the Second Ratification Vote by solemnly declaring the Form of Certification of Vote Results Following Appeal Period required by the Settlement Agreement. The Form of Certification of Vote Results Following Appeal Period certifies that the Second Ratification Vote fulfilled the terms of the Voting Guidelines.
58. The results of the Second Ratification Vote were as follows:
 - (a) the number of Voters whose names were recorded on the list of Votes was 1936;
 - (b) 175 in-person ballots were cast;
 - (c) 637 electronic ballots were cast ;
 - (d) 1 ballot was spoiled;
 - (e) 0 ballots were rejected;
 - (f) 0 ballots were cancelled;
 - (g) 729 ballots were marked “YES” for the Ballot Question;
 - (h) 82 ballots were marked “NO” for the Ballot Question;
 - (i) the Settlement Agreement was APPROVED by the Voters; and
 - (j) there were NO appeals received during the appeal period.
59. 89.9% of the Voters approved the Settlement Agreement and the Trust Agreement fulfilling Article 7.3 of the Settlement Agreement.

60. Carry the Kettle delivered the Form of Certification of Vote Results Following Appeal Period with respect to the Second Ratification Vote to the Minister satisfying the condition precedent contained in Article 8.1(c) of the Settlement Agreement.

Carry the Kettle Satisfies the Remaining Conditions Precedent under Article 8.1 of the Settlement Agreement

61. On May 15, 2023, the Settlement Agreement was signed by five of seven Chief and Councillors elected April 2022, those Chief and Councillors being:

- (a) Chief Scott Eashappie
- (b) Councillor Tamara Thomson
- (c) Councillor Lucy Musqua
- (d) Councillor Shawn Spencer
- (e) Councillor Dwayne (Cliff) Thompson

62. On June 2, 2023, counsel for Carry the Kettle delivered a complete settlement package including the Settlement Agreement and Schedules (the “Settlement Package”) to the Minister. The Settlement Package including:

- (a) the Settlement Agreement duly executed by Chief and Council;
- (b) an executed Band Council Resolution
- (c) substantially in the form attached as Schedule 6 approving and assenting to the terms and conditions of this Settlement Agreement in accordance with Article 7.0 of the Settlement Agreement;
- (d) the Certification of Vote Results and Appeals executed by the ratification officers responsible for the First and Second Ratification Vote, substantially in the form attached to the Settlement Agreement as Schedule 8;
- (e) the information required by Canada to deposit moneys into the Trust Account;

- (f) a Band Council Resolution for payment and Direction to Pay substantially in the forms attached as Schedule 5 to the Settlement Agreement;
 - (g) a Solicitor’s Certificate, Schedule 1 of the Settlement Agreement, dated May 15, 2023, executed by Ryan Lake, Partner, Maurice Law;
 - (h) a Financial Advisor’s Certificate, in the form attached as Schedule 2 to the Settlement Agreement, dated May 15, 2023, executed by Youssef Zohny, Managing Partner, Zohny Group of Graystone Consulting at Morgan Stanley Wealth Management.
63. On June 8, 2023, counsel for the Minister confirmed receipt of the Settlement Package on the Minister’s behalf.
64. Consequently, Carry the Kettle First Nation satisfied all its conditions precedent contained in the Settlement Agreement. Carry the Kettle fully ratified the Settlement Agreement and Trust Agreement. At this point, only the Minister’s obligations remained.

The Decision and Grounds for Review

The Minister Has a Public Legal Duty to Act

65. Section 6 of the *CIRNAC Act* provides “that Minister’s powers, duties and functions extend to and include all matters over which Parliament has jurisdiction — and that are not by law assigned to any other department, board or agency of the Government of Canada — relating to relations with Indigenous peoples.”
66. Section 7 of the *CIRNAC Act* provides that the Minister is responsible for exercising leadership within the Government of Canada relating to affirmation and implementation of the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and the implementation of agreements with Indigenous peoples.
67. Section 7 also provides that the Minister is responsible for advancing reconciliation with Indigenous peoples, in collaboration with Indigenous peoples and through renewed nation-to-nation relationships.

68. The Settlement Agreement is between the Minister and Carry the Kettle. Therefore, the Settlement Agreement is an agreement between the Government of Canada and Indigenous peoples under section 7 of the *CIRNAC Act*. It is the Minister's responsibility to sign the Settlement Agreement and the Minister has a public legal duty to sign the Settlement Agreement.
69. Additionally, the purpose of the Tribunal and its processes, including negotiation and settlement, is "to promote reconciliation between First Nations and the Crown and the development and self-sufficiency of First Nations". The resolution and settlement of Tribunal claims advances and falls within the Minister's public legal duties under section 6 and 7 of the *CIRNAC Act*.
70. The honour of the Crown requires the Minister to act honourably when resolving claims and implementing treaties, which includes a requirement to act honourably in the resolution of the 1905 Surrender Claim and the negotiation and execution of the Settlement Agreement.
71. By virtue of the *CIRNAC Act*, the *SCT Act*, and principles of reconciliation and the honour of the Crown the Minister has a public legal duty to sign and implement the Settlement Agreement.

The Minister Owes a Public Legal Duty to Carry the Kettle to Execute the Settlement Agreement

72. Carry the Kettle has fulfilled all the conditions precedent contained in the Settlement Agreement and has fulfilled all the Minister's additional directions and requirements.
73. Carry the Kettle cannot take any further action under the Settlement Agreement, the *Rules of the Specific Claims Tribunal*, the *SCT Act*, or any other relevant agreement, legislation, or regulation.
74. There are only two conditions that the Minister must satisfy under Article 8.1 of the Settlement Agreement:

- (a) the Minister is authorized to sign this Settlement Agreement;
- and

(b) Canada approves and appropriates the funds for the payment of the Compensation.

75. The Minister is inherently authorized to sign the Settlement Agreement by virtue of sections 4, 6 and 7 of the *CIRNAC Act*.
76. Canada has approved and appropriated the funds for the payment of the compensation.
77. The condition that “the Minister is authorized to sign this Settlement Agreement” is self-serving and of no legal consequence. Section 4 of the *CIRNAC Act* provides that the Minister holds office during pleasure and has the management and direction of CIRNAC. The Minister is inherently authorized to sign the Settlement Agreement by virtue of sections 4, 6 and 7 of the *CIRNAC Act*.
78. All conditions under Article 8 of the Settlement Agreement are satisfied and the Minister owes Carry the Kettle the public legal duty to sign and implement the Settlement Agreement.

Carry the Kettle Demanded That the Minister Sign the Settlement Agreement

79. Carry the Kettle requested an update or demanded that the Minister sign the Settlement Agreement on several occasions.
80. On June 19, 2023, counsel for Carry the Kettle, requested that counsel for the Minister provide an update on the status of the Minister’s review of the Settlement Package executed by Carry the Kettle.
81. On June 22, 2023, counsel for Carry the Kettle, further requested that the Minister provide an update on the status its review of the Settlement Package executed by Carry the Kettle.
82. On June 23, 2023, counsel for the Minister stated that she would be able to make her final recommendation to the Minister by mid-July.

83. That same day, counsel for Carry the Kettle responded advising that counsel required more transparency on the status of the Minister's review, and that the delay in the Minister's review was causing Carry the Kettle concern.
84. Counsel for the Minister then responded advising that the Minister would call Mr. Lake to discuss the Minister's review of the Settlement Package on June 27, 2023.
85. On June 27, 2023, Mr. Lake and the Minister spoke by telephone. The Minister advised Mr. Lake that the Minister refused to sign the agreement unless Chief and Council hold an additional meeting with all seven Chief and Councillors to re-execute the Settlement Agreement. The Minister further stated that it would seek to attend the meeting to monitor this process.
86. Mr. Lake advised the Minister that its request was inappropriate, unprecedented in his experience undermined Carry the Kettle governance structure and ran contrary to all long-established precedent and customs in the Treaty 4 relationship with Canada.
87. Mr. Lake again requested that the Minister sign the Settlement Agreement in accordance with its legal obligation to do so.

The Minister Continues to Refuse to Sign the Settlement Agreement

88. To date, the Minister has refused to sign the Settlement Agreement. The Minister's execution of the Settlement Agreement is unreasonably delayed.
89. On August 4, 2023, the Minister filed a Respondent's Status Report in 1905 Surrender Claim at the Tribunal. The Minister advised:

“The Respondent requires clarification from the Federal Court on the proper constitution of Carry the Kettle First Nation's Band Council prior to entering into a settlement agreement with the First Nation. As such, the Respondent requests an additional stay of proceedings for nine-months so that it may assess the Federal Court's judicial review progress before proceeding accordingly.”

90. The Minister's request for a stay of proceedings for nine-months is an express refusal from the Minister to execute the Settlement Agreement. Alternatively, the Minister's request for a stay of proceedings worsens the unreasonable delay already caused by the Minister.

The Minister's Conduct is Unfair, Oppressive and Demonstrates Flagrant Impropriety and Bad Faith

91. The Minister's decision to refuse to sign the Settlement Agreement is unfair and oppressive to Carry the Kettle.
92. Carry the Kettle complied with all the terms of the Settlement Agreement and discharged its conditions precedent under Article 8.1. Equally, as aforementioned, the Minister's conditions under Article 8.1 are satisfied.
93. Carry the Kettle complied with all the specific directions from the Minister concerning the Minister's requirement for Carry the Kettle to obtain four of seven Chief and Councillor's signatures as elected at April 2022 for the Settlement Agreement and all Band Council Resolutions related to the Settlement Agreement. The Minister now, on the eve of consummation, renegeing on its end of the bargain constitutes bad faith.
94. The Minister's decision is oppressive to the community members of Carry the Kettle. Carry the Kettle's membership overwhelmingly voted in favour of approving the Settlement Agreement. By refusing to execute the Settlement Agreement, the Minister is depriving Carry Kettle's membership of the benefit of the funds due under the Settlement Agreement.
95. Additionally, by refusing to sign the Settlement Agreement, the Minister is depriving Carry the Kettle of the ability to govern its own processes and its right to self-governance. This is squarely opposed to the Minister's responsibilities under the *CIRNAC Act*.
96. For greater certainty, the Minister's decision only serves one purpose, to deprive Carry the Kettle's membership of the benefit of the Settlement Agreement. The Minister's conduct does not concord with the principle of the honour of the Crown.

The Minister Relied on Irrelevant Considerations When They Made Their Decision

97. The Minister relied on the outstanding Applications for Judicial Review with respect to Councillor Joellen Haywahe and Councillor Terrina Ashdohonk-Bellegarde when making his decision to refuse to sign the Settlement Agreement.
98. The outcome of the Applications for Judicial Review have no effect on the validity of the Ratification of the Settlement Agreement. The Ratification Vote and the will of Carry the Kettle's Membership governs.
99. The Second Ratification Vote authorizes and directs the Council to execute the Settlement Agreement and Trust Agreement. Council is required to sign the Settlement Agreement and all other documents to give effect to the Settlement Agreement. Council has no discretion to refuse to sign the Band Council Resolution approving the Settlement Agreement and executing same. Council must take all necessary steps to give effect to the Settlement Agreement as authorized and directed by Carry the Kettle's membership.
100. Chief and Council's "decision" to sign and execute the Settlement Agreement and Band Council Resolution approving same is not a "decision" at all. The "decision" is not subject to judicial review. Council has no discretion to ignore the authorization and direction of Carry the Kettle's membership to sign and execute the Settlement Agreement. Council powers are expressly limited by Sections 81 to 86 of the *Indian Act*, RSC 1985, c I-5.
101. Moreover, the Application for Judicial Review related to the Band Council Resolution approving the Settlement Agreement and executing same is out of time.
102. Councillor Joellen Haywahe and Councillor Terrina Ashdohonk-Bellegarde filed the Application for Judicial Review on July 21, 2023. The "decision" to execute the Band Council Resolution and Settlement Agreement was communicated to Councillor Terrina Ashdohonk-Bellegarde and Councillor Joellen Haywahe on May 11, 2023. The period in which an Application for Judicial Review can be brought, thirty days after the "decision" was made, expired on June 10, 2023.

103. Equally, the Minister's insistence that it physically observe Chief and Council hold a meeting to execute the Settlement Agreement is a wholly irrelevant and inappropriate consideration. Moreover, it is directly contrary to the Minister's responsibility to negotiate other agreements to advance the self-determination of Indigenous peoples and to advance reconciliation with indigenous peoples, in collaboration with Indigenous peoples and through renewed nation-to-nation relationships under sections 6 and 7 of the *CIRNAC ACT*, respectively.
104. In sum, the Minister relied on irrelevant considerations refusing to sign and implement the Settlement Agreement.

There is No Other Adequate Remedy Available to Carry the Kettle

105. Carry the Kettle has no other adequate remedy to require that the Minister sign and implement the Settlement Agreement.

The Order Sought Will Finalize and Implement the Settlement and Will be of Practical Value or Effect

106. Requiring the Minister to sign the Settlement Agreement is of great practical value and effect.
107. Carry the Kettle's original claim with respect to the surrendered lands was filed in the Federal Court in 1992. Consummating the Settlement Agreement represents the closure of over 30 years of litigation.
108. Additionally, consummating the Settlement Agreement will require Canada to compensate Carry the Kettle First Nation for the historical wrongs, which the Minister has admitted liability to, at issue in the Specific Claims Tribunal claim.
109. Conversely, refusing to execute the Settlement Agreement only furthers extremely protracted litigation and denies Carry the Kettle's membership the benefit of the funds under the Settlement Agreement. There is no practical value or effect in refusing to sign the Settlement Agreement.

The Balance of Convenience Strongly Favours Carry the Kettle

110. The balance of convenience strongly favours Carry the Kettle. If the requested order is granted, Carry the Kettle will obtain the fruits that it bargained for under the Settlement Agreement. If the requested order is refused, the Minister will be relieved from the terms of the Settlement Agreement that it agreed to.
111. Additionally, the Minister's and Canada's interest in reconciliation is advanced if the Settlement Agreement is signed and implemented. There is a benefit to the Minister and Canada if the requested order is granted.
112. Concurrently, the Minister's refusal to sign and execute the Settlement Agreement has influenced Indigenous Services Canada decision to seize control of Carry the Kettle's trust and source revenue assets. Carry the Kettle is not only deprived of the funds due under the Settlement Agreement but is deprived of its funds due from Indigenous Services Canada. Without reliable funding, Carry the Kettle's members continue to suffer.
113. Therefore, this Court should issue an order for *mandamus* under sections 18(1), 28(1)(r), and 28(2) of the *Federal Courts Act*, RSC 1985, c F-7, requiring the Minister of Crown-Indigenous Relations to execute the "Carry the Kettle Nakoda Nation 1905 Assiniboine Surrender Claim Settlement Agreement" arising from Specific Claims Tribunal File No. SCT-5002-

Alternative Relief Under Section 44 of the Federal Courts Act

114. In the alternative, for the reasons set out above, and because it is just and convenient to do so, this Court should issue an order for *mandamus* under section 44 of the *Federal Courts Act*, RSC 1985, c F-7, requiring the Minister of Crown-Indigenous Relations to execute the "Carry the Kettle Nakoda Nation 1905 Assiniboine Surrender Claim Settlement Agreement" arising from Specific Claims Tribunal File No. SCT-5002-15.

SUPPORTING MATERIAL

This application will be supported by the following materials:

- a. an Affidavit of Chief Scott Eashappie to be sworn; and
- b. such affidavits and further materials as counsel may advise and this Honourable Court may permit.

Dated September 1, 2023

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