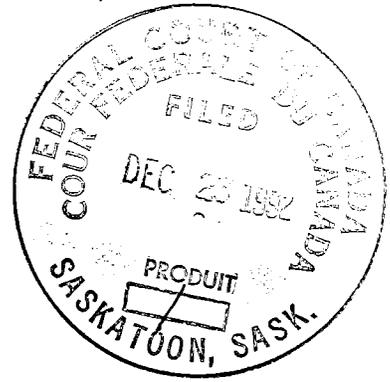


T-72-93



IN THE FEDERAL COURT OF CANADA  
TRIAL DIVISION

BETWEEN:

CHIEF JAMES O'WATCH, ART ADAMS, JOEL ASHDOHONK,  
JEFFREY EASHAPPIE, CLINT HAYWAHE, BERNICE  
SAULTEAUX AND PHYILLIS THOMSON, CHIEF AND  
COUNCILLORS OF THE CARRY THE KETTLE BAND NO. 76,  
SUING ON THEIR OWN BEHALF AND ON BEHALF OF ALL  
OTHER MEMBERS OF THE CARRY THE KETTLE BAND,

Plaintiffs

- A N D -

HER MAJESTY IN RIGHT OF CANADA AND TOM SIDDON,  
MINISTER OF THE DEPARTMENT OF INDIAN AFFAIRS AND  
NORTHERN DEVELOPMENT,

Defendants

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STATEMENT OF CLAIM

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Lawyers in charge of file: William J. Pillipow  
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File No. 21.004

IN THE FEDERAL COURT OF CANADA  
TRIAL DIVISION

BETWEEN:

CHIEF JAMES O'WATCH, ART ADAMS, JOEL ASHDOHONK,  
JEFFREY EASHAPPIE, CLINT HAYWAHE, BERNICE  
SAULTEAUX AND PHYLLIS THOMSON, CHIEF AND  
COUNCILLORS OF THE CARRY THE KETTLE BAND NO. 76,  
suing on their own behalf and on behalf of all other members  
of the Carry The Kettle Band,

Plaintiffs

- A N D -

HER MAJESTY IN RIGHT OF CANADA AND TOM SIDDON,  
MINISTER OF THE DEPARTMENT OF INDIAN AFFAIRS AND  
NORTHERN DEVELOPMENT,

Defendants.

STATEMENT OF CLAIM

Filed on the 23 day of December, 1992.

1. The Plaintiffs are the Chief and Councillors of the Carry The Kettle Band which is a band of Indians, in the Province of Saskatchewan, within the meaning of the Indian Act, R.S.C.1985 c. I-5, and within the meaning of Treaty No. 4, (hereinafter referred to as the "Band"), who bring this action on their own behalf and on behalf of all other members of the Band.
2. The Defendant, Her Majesty in Right of Canada, (hereinafter referred to as the "Crown") is the head of the Government of Canada and is seized with jurisdiction over Indians and land reserved for the Indians, pursuant to Section 91(24) of the Constitution Act, 1982, previously referred to as the British North America Act, 1867.
3. The Defendant, Tom Siddon, is the Minister of the Department of Indian Affairs and Northern Development (hereinafter referred to as the "Department") and has the responsibility to administer the provisions of the Indian Act and is charged with a trust and/or fiduciary responsibility for Indians and lands reserved for Indians.
4. On September 15, 1874, Her Majesty Queen Victoria in Right of Canada, through her Commissioners, Lieutenant Governor Alexander Morris, the Honourable

David Laird and the Honourable William Christie, entered into Treaty No. 4 with certain Cree, Saulteaux and other Indian bands residing in the North West Territories.

5. The said Treaty No. 4 was approved by Federal Order in Council P.C. No. 1332/1874 on November 4, 1874. Treaty No. 4 provided *inter alia*:

"And Her Majesty the Queen hereby agrees through the said Commissioners to assign reserves for the said Indians, such reserves to be selected by officers of Her Majesty's government of the Dominion of Canada appointed for that purpose, after conference with each band of Indians and to be of sufficient area to allow one square mile for each family of five (5) or in that portion for larger or smaller families."

6. On September 25, 1877, Chief The Man Who Took the Coat and Chief Long Lodge adhered to Treaty No. 4 at Fort Walsh in the presence of Mr. James M. Walsh.

7. In March of 1885, the band of the late Chief Long Lodge amalgamated with the Band of Chief The Man Who Took the Coat to form the Band.

8. In June 1885, surveyor John Nelson surveyed a Reserve consisting of 73.2 square miles for the Band (hereinafter referred to as the "Reserve"). The Reserve was confirmed by Order-in-Council P.C. No. 1151/1889 on May 17, 1889, as the Assinboine Reserve No. 76 and the land was removed from the operation of the Dominion Lands Act by Order-in-Council P.C. No. 1674/1893 on June 12, 1893.

9. In the early 1900's, there was constant pressure on the Crown and the Minister of the Interior to open up Indian Reserves, by way of a surrender, for white settlers.

10. The matter of the surrender of the southern portion of the Reserve first arose in January, 1911, when a local resident wrote to his Member of Parliament indicating that Indians from the Reserve had more wood on the Reserve than was required for their own use and that non-Indian residents of the area were desperate for it. He urged the Government to "... serve the interest of white men before Indians ..." and to have this land surrendered.

11. The Department considered this query but was of the opinion that the Band would object to any portion of its land being surrendered for the purpose of aiding settlers in the area.

12. Despite this, the Department investigated the possibility of a surrender with the local farming instructor, Thomas Aspdin. The question was whether the southern portion of the Reserve could be surrendered and settled without affecting the Indians' interests and, in particular, whether hay and wood could be obtained from these lands either by sale or by the acquisition of the land itself.

13. Thomas Aspdin responded to these inquiries on February 21, 1911, by indicating that the Band members were categorically opposed to surrendering any of the Reserve. The Band stressed, as he did, that in the future its members would require all of its Reserve to help provide for future generations. The Band members further requested the Federal Government to assist in opposing any attempt by settlers to obtain more Indian land. Mr. Aspdin reported that all of the Reserve was being put to use and that it would " . . . in my opinion be suicidal to the cattle industry to part with any of this land ...".

14. During the period prior to 1905, the members of the Band enjoyed success in their various occupations and were making gradual improvements to their houses, stables and farming operations. The Band was considered to be almost self-supporting in the years preceding the Alleged Surrender of 1905.

15. In the early 1900's, the Band was almost free of debt, except for debts incurred to the Department for the purchase of a thrashing machine in 1903 and of wire to fence pasture in 1904. Both of these improvements were considered to be of great benefit to the Band. In 1904, the Band had already made substantial repayment of the money advanced by the Department.

16. Almost four years later, it appeared that the Band's attitude to a surrender had changed due to the debt the Band incurred to the Department for the purchase of the thrashing machine in 1903 and the pasture fencing in 1904 and the pressure being exerted by the Department upon the Band to repay the debt. On December 16, 1904, Thomas Aspdin wrote to Ottawa indicating that the Band members were now willing to part with some of their Reserve, on the condition that the Department not press the Band for the money owing for the thrashing outfit and for the fencing and that the Department advance them enough money to pay the difference between the thrashing engine they had and a new engine.

17. W. M. Graham, Inspector of Indian Agencies in Saskatchewan, supported the proposed surrender and detailed for the Department the conditions upon which the Band was willing to surrender a portion of their Reserve. They wanted the debt of \$1,200.00 against the thrashing outfit paid off, the money advanced to purchase the wire for the pasture fence repaid to the Department, a second-hand engine replaced with a new engine, a shed built to house the thrashing machine and engine, certain Indians be compensated for improvements made to the land proposed to be surrendered and the balance of the money be managed by the Department as it saw fit.

18. On April 12, 1905, the Deputy Superintendent General of Indian Affairs conveyed to Inspector Graham that Thomas Aspdin was authorized to take the surrender of 5,760 acres of land from the Reserve in accordance with the provisions of the Indian Act.

19. On April 26, 1905, the alleged surrender of 5,760 acres of the Reserve was taken in the presence of Indian Agent Aspdin (hereinafter referred to as the "Alleged Surrender of 1905"). Mr. Aspdin hired Archie Thomson to go around the Reserve to summon people to the meeting and Daniel Kennedy to serve as an interpreter.

20. Chief Carry The Kettle and three Headmen were reported to have signed the surrender document. An Affidavit attesting to the Alleged Surrender of 1905 was allegedly sworn by Chief Carry The Kettle and Indian Agent Aspdin on May 3, 1905, before A. D. Ferguson, a Justice of the Peace in Woolsey, Saskatchewan.

21. Mr. Aspdin reported to Inspector Graham that a "most decided majority" of those present were in favour of the surrender being taken and that a number of people who were not in attendance were known to also support the surrender. Mr. Aspdin, however, did not provide a list of those Band members present at the meeting or the actual number of eligible voters present at the meeting.

22. The Alleged Surrender of 1905 was accepted by Order-in-Council P.C. No. 940/1905, dated May 23, 1905.

23. Section 39 of the Indian Act, R.S.C. 1885, c. 43, as amended by Section 2 and Section 3 of S.C. 1898, c. 34, provides as follows:

"39. No release or surrender of a reserve or portion of a reserve held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, except on the following conditions:

(a) The release or surrender shall be assented to by a majority of the male members of the band, of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General; but no Indian shall be entitled to vote or be present at such council unless he habitually resides on or near and is interested in the reserve in question;

(b) The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some one of the chiefs or principal men present thereat and entitled to vote, before some judge of a superior, county or district court, stipendiary magistrate or Justice of the peace, or in the case of reserves in Manitoba or the North-west Territories, before the Indian Commissioner for Manitoba and the North-west Territories, and in the case of reserves in British Columbia, before the visiting Indian Superintendent for British Columbia, or, in either case, before some other person or officer specially thereunto authorized by the Governor in Council; and when such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal."

24. The Plaintiffs state that there is no evidence of any express notice of the surrender meeting being posted or of the meeting being summoned according to rules of the band as required by the Indian Act then in force.

25. The Plaintiffs state that a valid surrender meeting with the attendance of the majority of the voting members of the Band did not take place as required by the Indian Act then in force.

26. The Plaintiffs state that Thomas Aspdin was not properly authorized by the Governor-in-Council or the Superintendent General of Indian Affairs, to take the Alleged Surrender of 1905, as required by the Indian Act then in force.

27. The Plaintiffs state that at the meeting at which the Alleged Surrender of 1905 was taken by Thomas Aspdin, an Agent and Employee of the Crown, the members of the Band were induced to vote in favour of the Alleged Surrender of 1905 by Agent

Aspdin representing to them that the people on the Reserve who did not raise cattle or grain would receive a pro-rata share of the proceeds of the sale of the land.

28. The Plaintiffs state that the Band was practically self-sufficient and had no need to surrender any of their Reserve in 1905. The Plaintiffs state that all of their land was required to provide for future generations and it was detrimental to the Band's cattle industry to surrender and sell their land.

29. The Plaintiffs state that the Crown left the Band members with the impression that through the surrender of a portion of their Reserve for sale, they could alleviate certain alleged debts that had arisen as a result of the purchase of a thrashing machine and materials to fence a portion of the Reserve. The Plaintiffs further state that the Crown was obligated to provide such items to the Band pursuant to the terms of Treaty No. 4 and the Alleged Surrender of 1905 was therefore not necessary and not in the best interests of the Band.

30. The Plaintiffs state that the Alleged Surrender of 1905 is null and void and is of no legal effect because:

- (a) The Department failed to conduct a proper meeting as was required by the Indian Act;
- (b) The Alleged Surrender of 1905 was not held in the presence of the Superintendent General or of an officer duly authorized to attend such meeting by the Governor-in-Council or by the Superintendent General;
- (c) Express notice was not given to all the voting members of the Band, as was required by the Indian Act;
- (d) The Alleged Surrender of 1905 was not assented to by a majority of the male members of the Band of the full age of twenty-one years, who habitually resided on or near or were interested in the Reserve in question;
- (e) The Crown failed to summon the meeting in accordance with the rules of the Band.

31. The Plaintiffs state that the Alleged Surrender of 1905 is null and void and is of no legal effect as having been obtained under duress and by undue influence. The following, without limiting the generality of the foregoing, suggests that the obtaining of the Alleged Surrender of 1905 was obtained under duress and by undue influence:

- (a) The Crown occupied a position of confidence and influence over the Band, which relationship raises the presumption of undue influence;
- (b) The recognition by the Crown that the Band members were not sophisticated or knowledgeable in matters such as the surrender and sale of land and the failure of the Crown to take steps to compensate for such a lack of sophistication and knowledge;
- (c) The failure by the Crown to provide the Band members with independent legal counsel or advice;
- (d) The failure of the Crown to recognize that the Band members, who were admittedly naive, ill-informed and inexperienced in a commercial sense, who were without economic foresight and did not speak or understand English, required special protection and advice and to take steps to compensate for the same;
- (e) The Band was practically self-sufficient and had no need to surrender a portion of their Reserve in 1905 especially when this land was required for future generations of the Band;
- (f) The fact that the Band had categorically refused to surrender any of its land in the past and that, in the opinion of the Indian Agent, it would be suicidal to the Band's cattle industry for any part of the Reserve to be surrendered; and,
- (g) Pressure brought to bear upon the Band to repay certain alleged debts that had arisen when such alleged debts had no basis in law or which could not be enforced against the Band. Because of this pressure, the Band was left with no alternative but to consider surrendering a portion of its Reserve.

32. The Plaintiffs state that the Alleged Surrender of 1905 is null and void and has no legal effect as, having regard to all the circumstances, it was unconscionable. The following, without limiting the generality of the foregoing, suggests that the obtaining of the Alleged Surrender of 1905 and the subsequent sale of the land, was unconscionable:

- (a) There was an inequality of bargaining power between the Crown and the Band;
- (b) The recognition by the Crown that the Band members were not sophisticated or knowledgeable in matters such as the surrender and

sale of land and the failure of the Crown to take steps to compensate for such lack of sophistication and knowledge;

- (c) The failure to provide the Band members with independent legal counsel or advice;
- (d) The failure of the Crown to recognize that the Band members, who were admittedly naive, ill-informed and inexperienced in a commercial sense, who were without economic foresight and did not speak or understand English, required special protection and advice and to take steps to compensate for the same;
- (e) The surrender was unnecessary and not in the best interests of the Band;
- (f) The Band was practically self-sufficient and had no need to surrender a portion of their Reserve in 1905, especially when this land was required for future generations of the Band;
- (g) The fact that the Band had categorically refused to surrender any of its land in the past and that in the opinion of the Indian Agent it would be suicidal to the Band's cattle industry for any portion of the Reserve to be surrendered; and,
- (h) Pressure brought to bear upon the Band to repay certain alleged debts that had arisen when such alleged debts had no basis in law. Because of this pressure, the Band was left with no alternative but to consider surrendering a portion of its Reserve.

33. The Plaintiffs state that the Alleged Surrender of 1905 is null and void and is of no legal effect as it was obtained by negligent misrepresentation. The following, without limiting the generality of the foregoing, suggests that the obtaining of the Alleged Surrender of 1905 and the subsequent sale of the land was obtained by negligent misrepresentation:

- (a) Two years before the Surrender, the Band was practically self-supporting and had categorically refused to surrender any portion of its Reserve;
- (b) The failure of the Department to advise the Band members that they did not need to surrender a portion of their Reserve in order to obtain the necessary improvements to their agriculture equipment and the failure by the Crown to disclose its motive for obtaining the Alleged Surrender of 1905 as being for colonization purposes.

34. The Plaintiffs state that the Crown breached its trust-like or fiduciary obligations to the Band in obtaining the Alleged Surrender. The following, without limiting the generality of the foregoing, suggests that the Crown breached its trust-like and/or fiduciary obligation owed to the Band:

- (a) By recommending, promoting and encouraging the Alleged Surrender of 1905, which surrender was not in the best interest of the Band;
- (b) By recommending, promoting and encouraging the Alleged Surrender of 1905, when such a surrender was designed primarily to assist the Band in alleviating a debt which it was not legally responsible for, rather than for the purpose of a primary and significant benefit to the Band;
- (c) The undue influence and pressure brought to bear upon the Band and its members by the Crown to surrender and sell a portion of the Reserve for the purposes of paying alleged debts;
- (d) The failure of the Crown to take steps to compensate the Band for the lack of sophistication and knowledge of the Band on matters regarding the surrender and sale of land; and,
- (e) The failure of the Crown to provide the Band with independent legal counsel and advice.

35. An auction of the surrendered land was held on February 14, 1906. At this auction sale, 34 of 36 quarter sections of land were sold.

36. The terms of sale required that one-fifth of the sale price be paid as a down payment while the remainder of the sale price was to be paid in equal annual instalments over the next four years with interest at five (5%) percent per annum. The proceeds of the sale were used to pay off the alleged debts of the Band and the balance was placed in the Band's Trust Account.

37. The Plaintiffs state that the Crown breached its trust-like or fiduciary obligation to the Band as the Department did not administer the sale of the allegedly surrendered land properly. In many cases payments were long overdue and interest was not collected on the overdue amounts. Further, the Plaintiffs state that the allegedly surrendered land which was not sold remained unsold for 18 years after the Alleged Surrender of 1905. This land, which remained unsold, was not made available for use by Band members who were interested in cultivating it.

38. The Plaintiffs further state that there was no valid surrender of the road allowances within the allegedly surrendered portion of the Reserve. In the alternative, if the road allowances were included in the Alleged Surrender of 1905, which is not admitted but expressly denied, then the Band has never received compensation for such road allowances.

39. The Plaintiffs specifically plead *Res Ipsa Loquitur*.

40. The Plaintiffs propose that the trial in this action take place at the City of Saskatoon in the Province of Saskatchewan.

41. The Plaintiffs claim as follows:

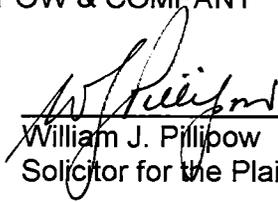
- (a) A declaration that the Alleged Surrender of 1905 of 5,760 acres was invalid, illegal and of no effect;
- (b) A declaration that the Alleged Surrender of 1905 of 5,760 acres was null and void as having been obtained under duress and by the use of undue influence;
- (c) A declaration that the Alleged Surrender of 1905 of 5,760 acres was null and void as having been taken under unconscionable circumstances;
- (d) A declaration that the Alleged Surrender of 1905 of 5,760 acres was obtained by the use of negligent misrepresentation and is therefore null and void;
- (e) A declaration that the Crown in obtaining the alleged Surrender of 1905 breached its trust-like and/or fiduciary obligations owed to the Band;
- (f) A declaration that the Crown breached its trust-like and/or fiduciary obligation owed to the Band by its handling of the subsequent sale of the surrendered land;
- (g) A declaration that the road allowances were not included in the Alleged Surrender of 1905 or, in the alternative, a declaration that the Plaintiffs are entitled to damages for the loss of the road allowances;
- (h) Damages for breach of trust and/or fiduciary obligations owed to the Band, together with interest thereon in an amount exceeding Fifty Million (\$50,000,000.00) Dollars;
- (i) Damages for the loss of their allegedly surrendered lands and loss of mineral rights together with interest thereon in an amount to be determined and proved at the trial of this action;

- (j) Costs of this action; and
- (k) Such further and other relief as Counsel may request and this Honourable Court may allow.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 23<sup>rd</sup> day of December, 1992.

PILLIPOW & COMPANY

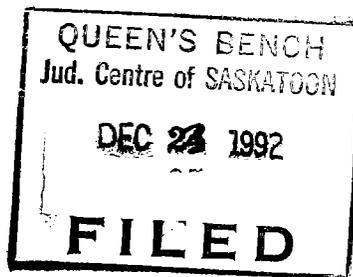
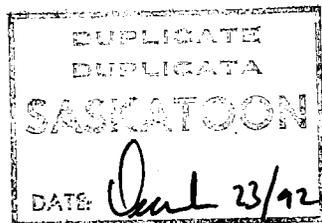
Per:

  
William J. Pillipow  
Solicitor for the Plaintiffs

This document was delivered by:

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File: T-72-93

BETWEEN:

CHIEF JAMES O'WATCH, ART  
ADAMS, JOEL ASHDOHONK,  
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COUNCILLORS OF THE CARRY THE  
KETTLE BAND NO. 76, suing on their  
own behalf and on behalf of all other  
members of the Carry The Kettle Band,

NOTICE TO THE DEFENDANTS

Plaintiffs

You are required to file in the Registry of the Federal Court of Canada, at the city of Ottawa or at the local office of the Court, your defence to the within statement of claim within 30 days (or such other time as may be fixed by an order for service *ex juris* or other special order) from the service hereof in accordance with the Rules of Court.

If you fail to file your defence within the time above limited, you will be subject to have such Judgement given against you as the Court may think just upon the Plaintiffs' own showing.

Note:

(1) Copies of the Rules of Court, information concerning the local office of the Court, and other necessary information may be obtained upon application to the Registry of this Court at Ottawa - telephone (613) 922-4238 - or at any local office thereof;

(2) This Statement of Claim or declaration is filed by Pillipow & Company, Saskatoon, Saskatchewan, solicitors for the Plaintiffs.

- A N D -

HER MAJESTY IN RIGHT OF CANADA  
AND TOM SIDDON, MINISTER OF  
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DEVELOPMENT,

Defendants

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