

SPECIFIC CLAIMS TRIBUNAL

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TRIBUNAL DES REVENDICATIONS PARTICULIÈRES	
December 18, 2012	
Amy Clark	
Ottawa, ON	5

BETWEEN:

BLOOD TRIBE, also known as
Kainaiwa or Kainai First Nation or the Blood Indian Band,
as represented by the Chief and Councillors of the Blood Tribe

Claimant

v.

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

Respondent

RESPONSE

**Pursuant to Rule 42 of the
*Specific Claims Tribunal Rules of Practice and Procedure***

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

TO: Blood Tribe
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1. This is the Response of Her Majesty the Queen in Right of Canada, as represented by the Minister of Indian Affairs and Northern Development Canada (“The Crown”) to the Declaration of Claim (“The Claim”) filed by the Blood Tribe (“First Nation”) with the Specific Claims Tribunal (“The Tribunal”) on September 18, 2012 pursuant to the *Specific Claims Tribunal Act* (“The Act”).

I. Status of Claim (R. 42(a))

2. The First Nation submitted its claim (the *Blood Tribe Treaty Entitlement Cattle Claim*) to the Minister on May 7, 1998, which was filed with the Minister on October 16, 2008, alleging that the Crown failed to fulfill a legal and fiduciary obligation to provide cattle to the First Nation as promised in Treaty 7.
3. On September 20, 2011 Patrick Borbey, Senior Assistant Deputy Minister, Indian Affairs and Northern Development Canada, notified the First Nation in writing that its specific claim had not been accepted for negotiation.
4. The First Nation’s declaration of claim does not satisfy the requirement in Rule 41(a) of the *Specific Claims Tribunal Rules of Practice and Procedure* to identify the First Nation and the paragraph of the definition of “First Nation”, in section 2 of the *Act*, that applies to the First Nation.

II. Validity (R. 42(b) and (c))

5. The Crown denies the validity of the First Nation’s Specific Claim, as set out in the Declaration of Claim, and denies that the First Nation has suffered any losses or damages resulting from breaches of treaty and fiduciary obligations as alleged or at all. Specifically the Crown denies:
 - a. that any obligation to provide cattle to the First Nation was unfulfilled;
 - b. any breach of Treaty 7, the *Indian Act* or obligations arising from the Crown’s fiduciary duties; and

c. that there are any consequential losses or damages.

6. The Crown says if the Tribunal finds the Claim to be valid in that the Crown did not meet its Treaty 7 or fiduciary obligations, pursuant to S. 20(3) of the *Act*, the Crown is entitled to a set-off for the value of all cattle supplied by the Crown to the First Nation and other related financial and economic supports provided by the Crown to the First Nation from the date of Treaty 7.

III. Allegations of Fact – Declaration of Claim (R. 41(e)): Acceptance, denial or no knowledge (R. 42(d))

7. Unless expressly admitted, the Crown denies each and every allegation of fact or law in the Claim and puts the Claimant to the strict proof thereof.

8. The Crown admits the facts set out in paragraphs 26, 29, 36, 39, 42, 50, and 53 of the Claim.

9. In response to the style of cause and paragraph 1, the Crown denies that any of the Kainaiwa, the Kainai First Nation, the Blood Tribe or the Blood Indian Band are the names of a Band within the meaning of the *Indian Act* as recorded with the Department of Indian Affairs and Northern Development Canada. The Crown says that “Blood” is the recorded name of a Band within the meaning of the *Indian Act* and if this is a claim of “Blood” it should be plead using that name and in accordance with Rule 41(a) of the *Specific Claims Tribunal Rules of Practice and Procedure* and paragraph (a) of the definition of “First Nation” in the *Act*.

10. In response to paragraph 2, the Crown admits that the Minister has notified the Blood Tribe in writing of his decision not to negotiate the claim, in whole or in part, by letter of September 20, 2011 but denies that the Minister notified the First Nation in writing of his decision not to negotiate the claim, in whole or in part by letter of January 9, 2012.

11. In response to paragraph 5, the Crown admits the first sentence of this paragraph, and admits the first part of the second sentence that Treaty 7 was signed in 1877 but has no knowledge of the rest of the allegations in the paragraph.
12. In response to paragraph 8, the Crown admits that David Laird (“Laird”), Lieutenant-Governor of the North-West Territories, and Colonel Macleod (“MacLeod”), Commissioner of the North-West Mounted Police were appointed Treaty commissioners. The Crown states that the quotation in this paragraph is a correct quotation from Treaty 7, but the Crown denies the remainder of the paragraph.
13. In response to paragraph 9, the Crown admits that Laird authored part of the Annual Report of the Department of Indian Affairs for the year ended December 31, 1877, which documented the Treaty 7 negotiations of September 1877, but denies the remainder of the paragraph.
14. In response to paragraph 10, the Crown admits this paragraph but states that when Macleod authored his report on Treaty Seven for the Annual Report of the Department of Indian Affairs for the year ending December 31, 1878 the First Nation was not in a position to receive cattle as Macleod states in his report “all of the different tribes of Blackfeet show a decided disinclination to receive them at present, fearing that on account of their wandering habits they would not be able to take care of them”.
15. In response to paragraph 11, the Crown admits the existence of the Annual Report of the Department of Indian Affairs for the year ended December 31, 1879 authored by E. Dewdney (“Dewdney”), Indian Commissioner for the North West Territories which indicates that Dewdney inspected the cattle, but denies the remainder of the paragraph.
16. In response to paragraph 12, the Crown admits that a portion of cattle was distributed to the Peigan and Stoneys but denies the sentence “What is known for certain is that none of that herd was received by the Blood”.

17. In response to paragraph 13, the Crown admits that it was anticipated that the buffalo would probably become extinct in the future but has no knowledge of when the buffalo became extinct.
18. In response to paragraph 14, the Crown admits that farming was introduced on the Blood Tribe Reserve in the early years following the making of Treaty 7. However, the Crown has no knowledge of whether the First Nation used the crops for the purpose of cattle feed, and admits that the First Nation began to settle their Reserve but states that the settlement was at the junction of the Belly and Kootenay Rivers. The Crown has no knowledge of whether one of the first activities undertaken was the breaking of a small piece of land for spring seeding but the Crown is aware that there was “breaking land... in preparatory for the spring seeding”.
19. In response to paragraph 15, the Crown admits the memorandum dated Dec. 7, 1883 from J. McGirr, Clerk of Statistics, Indian Affairs, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, and the Crown states that the document indicates that with regard to Treaty 7, it is declared that 801 cows and 42 bulls have been distributed. The Crown denies the remainder of the paragraph and states that the document does not indicate what each band received by June 30, 1882.
20. In response to paragraph 16, the Crown admits that the Report indicates that there “are 3,146 souls upon the ration list”.
21. In response to paragraph 17, the Crown states that the Annual Report of the Department of Indian Affairs for the year ended December 31, 1882 states that the First Nation members “number 3,400” and that their “lands were well fenced” but denies the remainder of this paragraph.
22. In response to paragraph 19, the Crown admits that the Annual Report of the Department of Indian Affairs for the year ended December 31, 1890 was authored by W. Pocklington (“Pocklington”), Indian Agent, Blood Agency and states that “Chief Red Crow built

himself a good stable and put up twenty tons of excellent hay” but denies the remainder of the paragraph.

23. In response to paragraph 20, the Crown denies the paragraph, but admits that there was correspondence from Indian Commissioner A.E. Forget (“Forget”), to Pocklington between 1888 and 1892.
24. In response to paragraph 21, the Crown admits that a circular titled “Re: a certain stipulation in the treaty as to cattle and certain assistance given in agricultural implements” existed but the Crown states that this paragraph refers to a letter of January 16, 1890 from Pocklington to Forget, acknowledging the receipt of the circular.
25. In response to paragraph 22, Canada admits that on January 14, 1892 a letter was sent by Pocklington to Forget indicating that “the Blood have not received any cattle from the Government” but denies the remainder of the paragraph.
26. In response to paragraph 23, Canada admits a letter was written by Pocklington to Forget on June 22, 1892 which stated “as to date no cattle have been permanently in the hands of Indians”, but the Crown states that it is unclear if this letter explicitly applies to the Blood Tribe.
27. In response to paragraph 24, the Crown admits that J. Wilson (“Wilson”), Indian Agent, Blood Agency wrote a letter on November 22, 1893 to Hayter Reed (“Reed”), Deputy Superintendent General of Indian Affairs reporting on discussions held with Red Crow, Blackfoot Old Woman, Crop Ear Wolf and Sleeps on Top regarding “trading off a number of their horses for two year old heifers”. The letter states that Red Crow, Blackfoot Old Woman and Crop Ear Wolf, “said they would like to take 20 head of cattle each” and “Sleeps on Top said 10 head, in all 70 head”. The letter indicates that Crop Ear Wolf “said that he had been trying for years to get cattle for horses” and that “once this first exchange is made there will be no difficulty in getting them to trade off the larger portion of their ponies for cattle”. The Crown denies the remainder of this paragraph.

28. In response to paragraph 25, the Crown admits that the distribution of cattle to individual Indians on the Blackfoot, Blood and Peigan reserves had commenced at that time but denies the remainder of this paragraph and the Crown states that this paragraph refers to a letter of December 18, 1893 from Wilson, to Forget, stating “that the only cattle in the hands of Indians on this Agency are a few work oxen”.
29. In response to paragraph 27, the Crown denies the first sentence of the paragraph. The Crown admits that on May 7, 1894, Wilson, wrote a letter to Forget, asking “when and where the cattle are to be purchased which it is arranged are to be exchanged for Indian horses this spring” and that “the Indians have been asking for some time back”.
30. In response to paragraph 28, the Crown has no knowledge of the phrase “Failing to get a response from the Indian Commissioner”, but the Crown admits that a telegram dated May 23 or May 28, 1894 was sent from Wilson to Reed, which stated “Indians very anxious about cattle. Hope you will supply them during this financial year”.
31. In response to paragraph 30, the Crown admits that Wilson wrote a letter to Forget on June 18, 1894 “authorizing the purchase of fifty head of heifers” but Canada denies the remainder of this paragraph.
32. In response to paragraph 31, the Crown denies this paragraph and the Crown states that Wilson authored 5 various communications regarding the exchange of horses for cattle between February 26, 1894 and June 18, 1894.
33. In response to paragraph 32, the Crown admits the paragraph and states that Wilson wrote a letter to Forget, on April 2, 1895 to “ask for the authority to kill seven head of work oxen belonging to the department. These cattle have been here since 1885 and are now old... Should you grant me authority to kill these animals I would ask you to be good enough to allow me to apply the money for the purchase of breeding stock instead of work cattle”.

34. In response to paragraph 34, the Crown admits the Annual Report of the Department of Indian Affairs for the year ended June 30, 1895 by Alex McGibbon, Inspector of Indian Agencies and Reserves (“McGibbon”) that recounts the annual inspection of the Blood Agency. The Crown states that the Report indicates that some of the Band members are anxious to have cattle, that Chief Red Crow was in possession of 23 “cows, heifers and calves” and he “would like to exchange some ponies for some heifers” and that there were 74 head of cattle on the Reserve. The Crown denies the remainder of the paragraph.
35. In response to paragraph 35, the Crown denies the allegations in the first sentence with respect to the number of bulls and states that the Annual Report of the Department of Indian Affairs for the year ended June 30, 1895, Tabular statement titled “Agricultural and Industrial Statistics” lists the Blood as having “62 cows, 25 oxen, 2 bulls and 130 young stock”. The Crown also denies the allegations in the second sentence as the Stony Tribe in Treaty 7 had a similar number of cows, oxen, bulls and young stock, and the Crown denies that the other Treaty 7 First Nations, “had 500 to 700 head each” as the Report does not indicate those numbers. The Crown also states that “young stock” also includes horses.
36. In response to paragraph 37, the Crown states that the Annual Report of the Department of Indian Affairs for the year ended June 30, 1896 authored by Forget, states that in Treaty 7, 447 individuals own 2,107 cattle. The Crown states that the report indicates that on the Blood Reserve “there have been more applications for heifers to be taken in exchange for Indian ponies, as has been done in the past, than it has been possible to meet, with the very limited sum placed at the disposal of the department each year for this purpose”. The Crown states that the report indicates that “one hundred and eighteen head of cows, heifers and yearlings, to the Indians of the Blood Reserve, Treaty No. 7” have been supplied to the First Nation from government herds. The Crown denies the rest of this paragraph.

37. In response to paragraph 38, the Crown admits this paragraph but states that the 1896 Annual Report was authored by Hayter Reed, Deputy Superintendent of Indian Affairs and not **Haythe Reed**.
38. In response to paragraph 40, the Crown denies this paragraph with the exception of the second sentence and states that Forget in the Annual Report of the Department of Indian Affairs for the year ended June 30, 1897 stated “The herds on the Stony, Blood and Piegan Reserves continue to increase in a satisfactory degree, as does the desire of the Indians to secure an interest in what they have... There is noticeable an interesting willingness on the part of the Southern Alberta Indians to convert the possessions in “horse-flesh” into cash, or, the more profitable cattle”.
39. In response to paragraph 41, the Crown admits that J. A. Smart, Deputy Superintendent General of Indian Affairs authored the Annual Report of the Department of Indian Affairs for the year ended June 30, 1897 and that Report stated “Even among the several tribes of the Blackfoot nation, there is a fast increasing demand for stock, and willingness to part with their ponies in exchange for cattle when such can be effected” but the Crown denies the remainder of the paragraph.
40. In response to paragraph 43, the Crown admits the first sentence of this paragraph and denies the second sentence of this paragraph.
41. In response to paragraph 44, the Crown denies the first sentence of this paragraph and admits the remainder of the paragraph.
42. In response to paragraph 45, the Crown admits the first, second and fourth sentence of this paragraph but denies the third sentence of this paragraph as this sentence could not be verified in the documentation.
43. In response to paragraph 46, the Crown has no knowledge of the first sentence that “Reports and correspondence indicate that individual Blood Tribe cattle owners were

supplying beef to the Department of Indian Affairs for rationing purposes”, and the portion of the second sentence that states “This research does not fully document how the individuals were compensated for supplying beef”. The Crown denies the phrase and conclusion in the second sentence “it is known that portions of the money owing for slaughtered animals were funded to cover future ranching expenses”.

44. In response to paragraph 48, the Crown admits that a letter was sent by J.A. Markle, Inspector of Indian Agencies and Reserves to Wilson, on March 9, 1901 and admits the quotation in this paragraph. The Crown denies the first sentence of this paragraph and states that this letter and quotation, are taken out of context and do not properly reflect the views of senior officials in the Department, and that the letter is inconsistent with how the Treaty obligations were being fulfilled to the First Nation at that time as evidenced by subsequent documentation.

45. In response to paragraph 49, the Crown denies this paragraph but admits that a letter was written by Wilson, on March 27, 1903 “regarding proposed change in the system of rationing” and the Crown admits the quotation cited in the third sentence of this paragraph is accurate. However, this was not the view of the Crown as evidenced by Laird’s communications on October 22, 1904 to the Superintendent General of Indian Affairs (“S.G.I.A”) with reference to the Department having completed the Treaty obligation to the First Nation in respect of cattle:

Last year 900 heifers were supplied to the Blood Indians to complete the number of cattle which the treaty provided should be supplied to them, but which were not given for the reason that many Indians refused to take cattle. These men, seeing the advance made by the cattle-holders, have changed their minds.

46. In response to paragraph 54, the Crown denies this paragraph and states that the written notification was provided to the First Nation on September 20, 2011 and not January 9, 2012.

47. In response to paragraph 55, the fact that the Minister notified the First Nation in writing of his decision not to accept the claim for negotiation is admitted in paragraph 3 above.

Beyond the fact of rejection, the contents of the letter of September 20, 2011 are irrelevant to this proceeding. If they are relevant to a matter in issue, then Canada asserts that the contents of the letter are privileged.

48. In response to paragraph 56, the Crown admits the first sentence of this paragraph but denies the remainder of the paragraph.
49. In response to paragraph 62, the Crown admits that it is the position of the Crown that the First Nation's entitlement to cattle was triggered in 1893 when Chief Red Crow and other leading men requested to exchange horses for cattle and that the cattle supplied through the pony/cattle exchange system and the loan system satisfied the Treaty 7 entitlement to cattle for the Blood Tribe.
50. In response to paragraph 64, the Crown denies the first sentence of this paragraph, and admits the quotation referred in the second sentence of the paragraph. The Crown states that this quotation is taken out of context and does not properly reflect the views of senior officials in the Department, and is inconsistent with how the Treaty obligations were being fulfilled to the First Nation at that time as evidenced by documentation at that time and subsequently.
51. In response to paragraph 66, the Crown denies that the First Nation has suffered any damages whatsoever due to the failure of Canada to provide cattle as promised.
52. The Crown denies paragraphs 4, 6, 7, 18, 33, 47, 51, 52, 57, 58, 59, 60, 61, 63, 65, 67, 68 and 69 of the Claim.

IV. **Statements of Fact (R. 42(e))**

Signing of Treaty 7

53. Ancestors of the First Nation were signatories of Treaty 7 which was entered into on September 22, 1877 between the Crown and five Indian bands.

Treaty 7 Terms – Cattle Provision

54. Treaty 7 provides for the supply of cows and bulls for raising stock after any Band had made "due application":

And further, Her Majesty agrees that the said Indians shall be supplied as soon as convenient, after any Band shall make due application therefor, with the following cattle for raising stock, that is to say: for every family of five persons, and under, two cows; for every family of more than five persons, and less than ten persons, three cows; for every family of over ten persons, four cows; and every Head and Minor Chief, and every Stony Chief, for the use of their Bands, one bull; but if any band desire to cultivate the soil as well as raise stock, each family of such band shall receive one cow less than the above mentioned number, and in lieu thereof, when settled on their reserves and prepared to break up the soil, two hoes, one spade, one scythe, and two hay forks, and for every three families, one plough and one harrow, and for each band, enough potatoes, barley, oats, and wheat (if such seeds be suited for the locality of their reserves) to plant the land actually broken up. All the aforesaid articles to be given, once for all, for the encouragement of the practice of agriculture among the Indians.

First Nation Application for Cattle

55. Prior to November, 22, 1893, the First Nation expressed no desire to have their cattle delivered to them. The First Nation was still nomadic and following the buffalo, was starting to learn and practice agricultural pursuits, was receiving rations of meat and flour regularly and was not in a position to receive cattle.
56. Prior to November 22, 1893, the First Nation had not made a request for cattle. In order for the entitlement to be triggered, Treaty 7 required a band to make “due application” to obtain their cattle from the Crown.
57. On November 22, 1893 the Crown met with Chief Red Crow and three other leading men regarding trading off their horses for two-year old heifers. The First Nation’s entitlement to cattle was triggered at this time as this meeting constituted “due application” in accordance with provisions of Treaty 7.

Cattle First Issued to the First Nation in 1894 – Pony Trading Phase

58. In 1894, the Crown commenced supplying cattle to the First Nation in exchange for horses. Under this system, horses would be traded on a one for one basis for cattle. On June 2, 1894, Wilson wrote to Forget acknowledging the receipt of a telegram authorizing the purchase of 50 heifers and on June 18, 1894, Wilson again wrote to Forget to advise that 50 head of 2 and 3 year old heifers have been purchased at a price of \$21.50 a head and were distributed to four members of the First Nation who gave many good horses in exchange and that Wilson now had 50 head of Blood horses.
59. The Annual Report of the Department of Indian Affairs for the year ended June 30, 1895 authored by McGibbon indicates that the First Nation has 74 head of cattle which he notes “speaks well for the enterprise of these Indians”.
60. The revenue the Crown obtained from the sale of the horses was applied towards the purchase of cattle and the balance was deposited into a trust account for the benefit of the band. The First Nation derived a financial benefit from the sale of their horses.

61. The exchange system between the Crown and the First Nation was beneficial to the First Nation and partially fulfilled the obligations of the Crown under Treaty 7 regarding cattle. As the First Nation ceased their nomadic lifestyle hunting the buffalo and began to participate in agriculture, the horses were no longer needed by the First Nation. The horses would also jeopardize the transition to an agricultural lifestyle because of the tendency of the horses to eat crops. The Annual Report of the Department of Indian Affairs for the year ended June 30, 1897 observes “that a fairly profitable market for these ponies has arisen out of the demand for pack horses for the Edmonton-Yukon route to the gold fields. Efforts are being made to further the demand for these ponies as far as possible and to meet the greatly increased demand which the prospective rush to the Klondike next season will create”.
62. From 1894 to 1898, 596 heifers were traded to the First Nation for an equal number of Indian horses.

Loan System Begins in 1901

63. In 1901, the Crown replaced the exchange system by introducing the loan system as a method for providing cattle to the First Nation.
64. The loan system provided for the lending of one or two animals to band members of the First Nation upon the condition that an equal number were returned to the Crown after the expiration of the stipulated period. The First Nation, at the end of the agreement, was permitted to keep as their private property the progeny of the “loaned” cattle.
65. On October 22, 1904, Laird wrote to the S.G.I.A. and referred to the Crown having completed the Treaty obligation to the First Nation in respect to cattle:

Last year 900 heifers were supplied to the Blood Indians to complete the number of cattle which the treaty provided should be supplied to them, but which were not given for the reason that many Indians refused to take cattle. These men, seeing the advance made by the cattle-holders, have changed their minds.

66. The Crown states that the cattle provided under both the pony/cattle exchange system and the loan system were provided to assist and encourage the practice of agriculture among the First Nation and fully satisfied the treaty entitlement to cattle of the First Nation under Treaty 7.

V. Relief (R. 42(f))

67. The Crown seeks dismissal of the claim.

68. To the extent that the Crown may be found liable to pay compensation for losses incurred by the Claimant as a result of any failure to provide cattle pursuant to Treaty 7 or any related breach of fiduciary obligations, which is not admitted, the Crown seeks an offset pursuant to s. 20 (3) of the *Act* for any such losses, taking into account all cattle that were supplied by the Crown to the First Nation and other related financial and economic supports provided by the Crown to the First Nation from the date to Treaty 7.

69. The Crown seeks costs in these proceedings.

70. Such other relief as this Honourable Tribunal deems just.

VI. Communication (R. 42(g))

The Respondent's address for service is:

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Dated: December 18, 2012


Signature of Representative/Solicitor

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