

**SPECIFIC CLAIMS TRIBUNAL**

BETWEEN:

**BROKENHEAD OJIBWAY FIRST NATION**

SPECIFIC CLAIMS TRIBUNAL		
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES		
F I L E D	November 15, 2012	D E P O S É
Guillaume Phaneuf		
Ottawa, ON	1	

**Claimant**

v.

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

**Respondent**

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**DECLARATION OF CLAIM**  
**Pursuant to Rule 41 of the**  
***Specific Claims Tribunal Rules of Practice and Procedure***

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

November 15, 2012

Guillaume Phaneuf

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(Registry Officer)

TO: Assistant Deputy Attorney General, Litigation, Justice Canada  
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**I. Claimant (R. 41(a))**

1. The Claimant, Brokenhead Ojibway First Nation ("Brokenhead") confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, located in the Province of Manitoba.

**II. Conditions Precedent (R. 41(c))**

2. The following conditions precedent as set out in s. 16(1) of the *Specific Claims Tribunal Act*, have been fulfilled:

16(1) Brokenhead has filed a claim with the Minister.

16(1)(a) The Minister has notified Brokenhead in writing of his decision not to negotiate the claim, in whole or in part.

3. This claim relates to the conduct of Canada, between December 1949 and February 1952, in granting a right-of-way easement for an electric power transmission line over 55.97 acres of Brokenhead's Reserve Land.
4. Brokenhead submitted its Hydro Transmission Line Right-of-Way claim to the Minister prior to the coming into force of the *Specific Claims Tribunal Act*, and the claim, having met the minimum requirements set out in s. 16(2) of the *Specific Claims Tribunal Act*, was deemed to be filed with the Minister as of October 16, 2008, in accordance with s. 42(1) of the *Specific Claims Tribunal Act*.
5. In a letter dated September 28, 2011, Brokenhead was advised by the Respondent that it was the decision of the Minister not to accept the claim for negotiation.
6. Brokenhead specifically relies upon the claim submitted to the Minister, and upon all documentation submitted therewith, including the parallel research conducted by Canada and submitted to the Minister for his consideration in respect of the assessment of the claim.

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

7. For the purposes of this claim, Brokenhead does not seek compensation in excess of \$150 million.

**IV. Grounds (Act, s. 14(1))**

8. The following are the grounds for the specific claim, as provided for in s. 14 of the *Specific Claims Tribunal Act*:

- (b) a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation of Canada pertaining to Indians and lands reserved for Indians.
- (c) a breach of a legal obligation arising from the Crown's administration of Reserve Lands, Indian moneys or other assets of the First Nation.
- (e) a failure to provide adequate compensation for Reserve Lands taken by the Crown or any of its agencies under legal authority.

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

9. On February 15, 1916, Order in Council PC #289 confirmed the boundaries of the Brokenhead Indian Reserve, containing an area of 13,720 acres, more or less, less the area covered by the waters of the Brokenhead River.
10. On December 1, 1949, the Province of Manitoba through the Lands Branch of the Department of Mines and Natural Resources ("DMNR") registered an abstract of Plan #4284 at the Manitoba Land Titles Office, demonstrating its intention to build a transmission line corridor through the Brokenhead Indian Reserve for the purpose of the construction of an electric power transmission line by the Manitoba Hydro Electric Board ("Hydro").
11. On December 16, 1949, R.W. Gyles, Director of Lands, DMNR, Winnipeg, notified D.J. Allan, Superintendent, Reserves and Trusts, Indian Affairs Branch

("IAB"), Ottawa, of its intention to build a transmission line across the Brokenhead Indian Reserve and provided a preliminary plan of the right-of-way required.

12. On February 11, 1950, Superintendent Allan, Reserves and Trusts, IAB, sent a letter to Director Gyles, DMNR, in which he discussed the fact that the lands to be taken were agricultural in nature, and also documented the provision, by Canada, of *de facto* authorization for Hydro to proceed with the clearing of the right of way notwithstanding that the formalities required by section 48 of the *Indian Act*, R.S.C. 1927, c.98 (the "1927 *Indian Act*"), relating to the taking of reserve lands for public purposes, had not, as of yet, been accomplished. In particular, he stated:

"The proposed right of way can of course be made available to the Province of Manitoba under Section 48 of the Indian Act without the necessity of any surrender being taken from the Brokenhead Band of Indians, and it is assumed that an easement for transmission line purposes would amply meet your requirements.

The question of what compensation should be paid for the easement is one that is within the determination of this Department, but in practice, we customarily seek the advice of the Council of the Indian Band concerned, and I am therefore asking our Superintendent, Mr. Olson to discuss the problem with Brokenhead Band Council and report at the earliest possible date.

We have extensive plans for the agricultural developments of this Reserve commencing this year, which will result in a large area at the south end being cleared and broken, and from the preliminary plan you have forwarded, it appears that the transmission line will cut across this farming area...

...

As mentioned previously, we are quite prepared to make the right of way available to you, and the only point requiring determination is the actual compensation payable. It is not assumed there will be

any difficulty in reaching an agreed price, and we therefore have no objection to your proceeding immediately to the clearing of the transmission line right of way." [emphasis added]

13. In a letter from Director Gyles, DMNR to Superintendent Allan, IAB, dated February 23, 1950, Director Gyles indicated that the Land Acquisition Committee preferred a purchase of the right-of-way as opposed to an easement, as they were purchasing the balance of the right-of-way and wanted to include the portion that crossed through Brokenhead's Reserve. He also indicated: "With regard to extensive plans for agricultural development I do not think that the sale of the right-of-way for transmission line purposes will hinder in any way the use of the surface for agriculture."
14. On December 4, 1950, Director Gyles, DMNR, requested Superintendent Allan, IAB, to advise on: "...the compensation required as we are anxious to make payment so that title to the land may be arranged."
15. On May 11, 1951, Mr. MacKay, Director, IAB, Ottawa, sent a letter to Director Gyles, DMNR, in which he indicated that an agreement would have to be reached as to the price per acre and also advised that it was the policy of IAB: "...to grant easements for so long as the land is required for the desired purpose rather than give outright grants, for the simple reason that if at any time the land ceases to be used for the purpose for which the easement is granted, title remains in the Reserve...".
16. In an inter-departmental memorandum addressed to Director Gyles, DMNR, and dated May 11, 1951, J.G. Cowan, Assistant Deputy Minister, DMNR, recorded his meeting with Mr. Brown, assistant to Superintendent Allan, IAB, Ottawa, regarding the proposed transmission line which would cross the Brokenhead

Indian Reserve. Mr. Cowan noted that it was explained to him that it was the IAB's policy, when dealing with Indian Reserves, to grant an easement as opposed to selling the land outright. He further noted: "...They would have no objection to our Inspector meeting the Council and obtaining from the Council an offer in respect of the land required for the right-of-way. Apparently the consent of the Band is not absolutely necessary but they prefer to have such consent in order to prevent disputes at a later date."

17. On May 16, 1951, Superintendent Allan, Reserves and Trusts, IAB, wrote to R.S. Davis, Regional Supervisor of Indian Agencies, Winnipeg, to inform him about the meeting with Assistant Deputy Minister Cowan, DMNR, in regards to a proposed Hydro transmission line across the Brokenhead Indian Reserve. Superintendent Allan wrote:

"It is our understanding that the rate to be offered for the right of way will be that rate being paid to White owners of land in the vicinity of the Reserve. Mr. Cowan did not recall what such rate had been, but undoubtedly it varies, depending on the type of land affected. Certainly, we are of the opinion that the rate should not be less than \$25.00 per acre; and if cultivated land is involved, the rate might go up as high as \$50.00 per acre. There should be no difficulty on reaching a price that the Indians can agree on; and we would ask you to arrange for the necessary meeting of the Band Council on hearing from Mr. Cowan." [emphasis added]

18. On June 20, 1951, the revisions to the 1927 *Indian Act* received royal assent, and Section 48 thereof relating to "Lands taken for Public Purposes" was amended. Thereafter, Section 35 of the *Indian Act*, R.S.C. 1951, c.29 ("1951 Indian Act") was the operative provision.
19. While the provisions remained similar, the 1951 *Indian Act* permitted Canada to grant the interest in land to the authority or corporation which had expropriating

power, whereas the 1927 *Indian Act* required the authority to go through the formal expropriation process in Manitoba, with the consent of Canada. Under the 1951 *Indian Act*, Canada was still in a position where it could dictate the terms and conditions upon which the consent to the taking of the Reserve Lands for public purposes would be provided.

20. A Band Council meeting was held on June 30, 1951, at which meeting Inspector Westcott, the representative of Hydro, in the company of the Superintendent Olson, Clandeboye Agency, Department of Citizenship and Immigration, was able to secure a Band Council Resolution dated June 30, 1951, whereby Brokenhead agreed: "to lease to the Manitoba Hydro Development Board "right-of-way" for Power Transmission Line through the Brokenhead Indian Reserve on terms agreeable to the Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, Ontario". [emphasis added]
21. As the June 1951 BCR contained no mention of a rate of compensation to be paid, on July 18, 1951, Regional Supervisor Davis wrote to Superintendent Olson, Clandeboye Agency, requesting the price agreed to by the Indians and Hydro for the land requested as he: "...would like some definite price. We would like the Indians to be satisfied with what they are getting after all it is their own land."
22. Superintendent Olson, Clandeboye Agency, responded to Regional Supervisor Davis on July 19, 1951, indicating "...I would advise that Mr. Westcott attended two meetings with the Band and the land required for power-line purposes through the Reserve is approximately 58 acres, which will be taken on lease rather

than purchase, for which the Manitoba Hydro Development Board will pay \$3.00 per acre."

23. Regional Supervisor Davis, concerned about the amount of compensation proposed for the lease of land for the right-of-way, wrote to Director Gyles, DMNR, on July 24, 1951 to request a meeting to discuss these concerns:

"Mr. Olson has advised me that the Provincial [sic] only want to lease the land at \$3.00 an acre. In this connection I would like to have a talk with you. If the land was leased for an indefinite period it would be more or less of a sale at \$3.00 per acre. In my opinion it would be better for you to purchase this land outright or pay a yearly rental. Please advise me so I can advise the Department."

24. Superintendent Allan, IAB, wrote to Superintendent Olson, Clandeboye Agency, on July 24, 1951, to request clarification on the compensation for the proposed Hydro right-of-way. He stated:

"We have a letter from the Lands Branch, Department of Mines and Natural Resources, Manitoba, advising that, at a meeting of the Band Council on June 30th, last, the Council approved granting the Manitoba Hydro-Electric Board an Easement for their power line across this Reserve for a consideration of \$3.00 per acre.

Unless this is an annual charge, we are of the opinion that it is rather low. However, we would like to have your report, together with a signed copy of the Resolution for our file." [emphasis added]

25. Superintendent Olson, Clandeboye Agency, wrote to Superintendent Allan, IAB, on July 25, 1951 in regards to the proposed payment for the land, stating:

"A fee of \$3.00 per acres is payable, only once, and the land is leased, not bought. To me this charge is small but Mr. Westcott, Representative of the Manitoba Hydro Development Board, informed the Band meeting that where they bought land from the Manitoba Crown the Commission only paid \$4.00 per acre and in

cases where land was bought from individual farmers the price paid varied from \$15.00 to as high as \$45.00 per acre. The argument used by Mr. Westcott was that where the land was bought no costs would be paid for damage to crops during repair to power line, whereas, on a lease rental basis this would apply. Brokenhead Band Members favour leasing rather than selling although they claim that the fee being offered [sic] is very low." [emphasis added]

26. Superintendent Allan, IAB, prepared a draft form of letter to Director Gyles, DMNR, dated August 2, 1951, which expressed Canada's concerns regarding the proposed compensation offered by Hydro. On August 7, 1951, he sent a copy of the draft letter to Regional Supervisor Davis for his review and comments and asked whether Regional Supervisor Davis had contacted the officials of the Lands Branch.
27. On August 24, 1951, Regional Supervisor Davis advised IAB of his attempts to contact Director Gyles, DMNR, and indicated that he was still awaiting a response. He also indicated that he agreed with contents of the draft letter dated August 2, 1951 and that he considered \$3.00 per acre to be "far out of line".
28. In a letter dated August 28, 1951 to Director Gyles, DMNR, Superintendent Allan, IAB, after referring to the June 1951 BCR, stated:

"Three dollars (\$3.00) is very much out of line, in comparison with other power line rights-of-way granted through Indian Reserves, and it is felt that the Indians were not fully informed as to the nature of the right to be granted, and we are not prepared to approve the recommendation of the Band Council.

Your representative apparently classed Indian Reserve lands with Provincial Crown lands. You are aware that Indian Reserve Lands are not Crown lands, in the sense that this term is ordinarily used. While legal title thereto is in the Crown, the land is held for the benefit of a particular Band of Indians under a solemn Treaty which, in effect, creates a Trust.

When this matter was first considered, we had in mind at least \$25.00 for the uncultivated land, and \$50.00 an acre for any improved land. This was to be the minimum figure, anticipating that the Band Council would probably ask more. In addition, of course, compensation is to be paid for any damages to improved lands....

You will understand that it is our duty to look after the interests of the Indians, and the price of \$3.00 per acre is considered entirely too low for a nuisance that this power line will be to this Reserve in perpetuity. [emphasis added]

29. On November 5, 1951, Superintendent Olson, Clandeboye Agency, wrote a letter to Regional Supervisor Davis, in which he confirmed that at the previous Band Council meeting, the members "...definitely preferred the lease angle to out-right sale." Superintendent Olson went on to state:

"Regarding value of land per acre in the area I think it would be quite correct to indicate from \$15.00 to \$50.00 per acre, as you know the power-line goes over areas that are low in places, some that is average hay land, with other areas of excellent farming land.

The Manitoba Hydro Commission actually did pay to some farmers in the neighboring [sic] district of the reserve prices ranging from \$10.00 to \$15.00 per acre up to as high as \$50.00 per acre.

I see no point in discussing the matter further with the Indians unless a definite proposal can be submitted. The Indians have agreed to \$3.00 per acre reluctantly and obviously any deal better than this will be acceptable if approved by the Indian Affairs Branch as stated in the Band Resolution of June 30<sup>th</sup>. [emphasis added]

30. On November 27, 1951, in a letter from the Chairman and General Manager of Hydro to Superintendent Allan, IAB, Hydro proposed settlement by compensation as follows:

"20 acres of Swamp land @ \$4.00 per acre -	\$80.00
35.97 acres of Scrub land @ \$25.00 per acre -	<u>\$899.25</u>
Total	\$979.25

This quotation is based on prices paid by the Board for similar types of land adjacent to the Reserve. It should be noted that no cultivated land in the Reserve is affected by construction of this Transmission Line. [emphasis added]

31. Notwithstanding that this proposal inaccurately described the nature and quality of the land that would be affected by the easement and was inconsistent with the minimum values earlier dictated by Superintendent Allan, IAB, and commented upon by Superintendent Olson, Clandeboye Agency, Superintendent Allan, IAB, wrote to Hydro on December 1, 1951 stating: "It will be necessary to have the Band Council accept this offer. However, I may say that it seems to be quite reasonable and we fully expect that it will be acceptable."
32. In the meantime, by a letter dated November 29, 1951, Regional Supervisor Davis had instructed Superintendent Olson, Clandeboye Agency, to arrange for a meeting to secure Band Council approval of the offer. Regional Supervisor Davis indicated that DMNR did not regard the June 1951 BCR, whereby the Band Council had agreed to lease the land for a right of way, as satisfactory. In this instructing letter, Regional Supervisor Davis set out the terms of the offer:

"The land in this case would be an outright sale to the Manitoba Power Commission. The land required is 55.97 acres, and the prices offered are as follows:

"20 acres of Swamp land @ \$4.00 per acre -	\$80.00
35.97 acres of Scrub land @ \$25.00 per acre -	<u>\$899.25</u>
Total -	\$979.25

The quotation is based on prices paid by the Board for similar types of land adjacent to the reserve. Apparently there is no cultivated land in the reserve affected by the construction of this

transmission line. It is hoped that you will have this resolution signed by the Chief and Councillors and duly witnessed where the individual signs with an 'X'. [emphasis added]

33. There is no indication that Superintendent Olson, Clandeboye Agency, took any issue with the statements in the instructing letter he received from Regional Supervisor Davis, notwithstanding his earlier comments with respect to the nature and quality of the land being traversed by the right of way and his concerns with respect to the adequacy of the compensation offered and the stated preference of Brokenhead for a lease and annual payments for the taking of the land.
34. In a letter dated December 6, 1951, Superintendent Olson, Clandeboye Agency, wrote to Regional Supervisor Davis, wherein he indicated that a Band Council meeting was held on December 1, 1951 and stated:

A new band resolution was submitted for the consideration of the Band, embodying proposal contained in the above noted letter. Some band members, but the Chief in particular, did not approve an out-right sale of acreage involved in power transmission line through the reserve. They much preferred the land to be leased, as was the arrangement in the band resolution of June 30<sup>th</sup>. They also preferred annual payment on a lease rental basis.

Another request they made was to include in any agreement the stipulation that in case power-line blew down and created fire on the reserve, damaging property and buildings, that the Manitoba Power Commission be responsible.

I agreed to forward their objections for your consideration and arranged a band meeting for Saturday, December 15<sup>th</sup>, at which time I would be pleased if either you, or Mr. Waite, would join me to finalize this transaction." [emphasis added]

35. A further Band Council meeting was held on December 20, 1951, and was reported on by Superintendent Olson, Clandeboye Agency, in his letter to Regional Supervisor Davis dated December 21, 1951. Superintendent Olson

noted that the proposal in the November 29, 1951 letter was approved and enclosed a Band Council Resolution dated December 20, 1951, which stated, in part:

"... agree to an out-right sale of 55.97 acres of reserve land to the Manitoba Power Commission, at the following prices;

20 acres of Swamp land @ \$4.00 per acre -	\$80.00
35.97 acres of Scrub land @ \$25.00 per acre -	<u>\$899.25</u>
Total -	\$979.25

Providing said terms are acceptable to the Indian Affairs Branch, Dept. of Citizenship & Immigration, Ottawa, Ontario." [emphasis added]

36. On February 12, 1952, a Federal Order-in-Council granting Hydro a right of way for the purpose of an electric power transmission line, for the sum of \$979.25, was issued.
37. An Easement Agreement dated February 12, 1952 was executed by Canada, whereby certain rights over the land were granted to Hydro for the purpose of an electric power transmission line.
38. Today, the same transmission line corridor still crosses through Brokenhead's Reserve.

**VI. The Basis in Law on Which the Crown is said to have failed to meet or otherwise breached a lawful obligation:**

39. Brokenhead's Claim is based on Canada's failure, in granting a right-of-way easement to Manitoba Hydro for the purpose of an electric power transmission line over 55.97 acres of the Brokenhead's Reserve Land, to fulfill its duties and obligations, fiduciary, statutory or otherwise, owed by Canada to the First Nation,

in relation to the interests of Brokenhead in such a taking of Reserve Land and in the obtaining of compensation in respect of same.

40. Canada owed a fiduciary duty to Brokenhead in respect of the taking of Brokenhead's Reserve Lands for public purposes pursuant to the relevant authorities, section 48 of the 1927 *Indian Act* and section 35 of the 1951 *Indian Act*.
41. Section 35 of the 1951 *Indian Act*, and Section 48 of the 1927 *Indian Act* that preceded it, provided protections for a First Nation in respect of the expropriation of Reserve Lands for public purposes.
42. As canvassed by the Supreme Court of Canada in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, the *sui generis* nature of a First Nation's interest in Reserve Lands, and the framework of the statutory scheme established for disposition of Reserve Lands, places an equitable obligation, or fiduciary duty, upon the Crown to deal with the land for the benefit of the First Nation.
43. In *Osoyoos Indian Band v. Oliver*, [2002] 1 CNLR 273, the Supreme Court of Canada specifically extended the fiduciary duty upon Canada to takings of Reserve Land under Section 35 of the *Indian Act* R.S.C. 1952, c. 149 (which provision is identical to Section 35 of the 1951 *Indian Act* save for the substitution of "Her Majesty" for "His Majesty"). The Supreme Court held that, once it is determined that an expropriation of Reserve Lands is in the public interest, a fiduciary duty arises on the part of the Crown to expropriate or grant only the minimum interest required in order to fulfill the public purpose, while preserving the First Nation's interest in the land to the greatest extent practicable. This

fiduciary duty includes the general obligation to protect the continued use and enjoyment of the First Nation's interest where appropriate.

44. Prior to the Supreme Court of Canada's decision in *Osoyoos*, the decision of the Federal Court of Appeal in *Kruger v. The Queen*, [1986] 1 F.C. 3 (C.A.), the dissent of McLachlin J. (as she then was) of the Supreme Court of Canada in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, the decision of the Federal Court of Canada in *Fairford First Nation v. Canada (Attorney General)* [1999] 2 F.C. 48, the decision of the Supreme Court of Canada in *Opetchesah Indian Band v. Canada*, [1997] 2 S.C.R. 119, and the decision of the Supreme Court of Canada in *Wewaykum Indian Band v. Canada* [2002] 4 S.C.R. 245, 2002 SCC 79 all considered the conduct of Canada in the taking of Reserve Lands. From these authorities, the following principles have emerged:

- (a) Canada's necessary involvement in the taking of Reserve Lands for a public purpose gives rise to a fiduciary duty upon Canada to ensure that the best interests of the First Nation were protected insofar as Canada's unilateral discretion with respect to the transaction was concerned. (See *Fairford* and *Kruger*);
- (b) The relationship between Canada and the First Nations respecting their lands and rights is governed by the twin policies of autonomy and protection. Depending upon the significance of the rights at issue, different levels of protection and autonomy may apply. (See *Fairford*);
- (c) Even though there is protection afforded by the *Indian Act*, aboriginal peoples are to be treated as autonomous actors whose decisions must be respected and honoured. Canada's role arises with respect to the carrying out of the policy of protection. (See *Fairford*);
- (d) Upon the creation of a Reserve, the fiduciary duty upon Canada expands to include the protection and preservation of a First Nation's interests from exploitation. (See *Wewaykum*);

- (e) At the time of the disposition of Reserve Lands, the content of the fiduciary duty may change to include, for example, the wishes of the Band members of the First Nation (See *Wewaykum* and see *Blueberry River*);
- (f) If the decision of Band members of a First Nation to dispose of Reserve Lands was foolish or improvident – a decision that constituted exploitation – Canada could refuse to consent. Canada is under a duty to prevent exploitative bargains. (See *Wewaykum* and see *Blueberry River*); and
- (g) Prior to any disposition of Reserve Lands, Canada has a fiduciary obligation to protect and preserve the First Nation's interests from invasion or destruction. The interests to be protected are legal interests, and the threat to their existence is the exploitative bargain. Ordinary diligence must be used by Canada to avoid invasion or destruction of the First Nation's quasi-property interests by an exploitative bargain with third parties or, indeed, with Canada itself. (See *Wewaykum*).

45. The Indian Claims Commission, in its report on "*Alexis First Nation Inquiry: TransAlta Utilities Rights of Way Claim*" (2004) 17 ICCP 21 made recommendations in respect of an expanded fiduciary duty upon Canada in respect of Section 35 Expropriations. The Panel of the ICC in *Alexis* made findings, based upon the evidence, about the vulnerability of the First Nation in question, its reliance upon Canada to represent its interests in respect of the negotiations with respect to the transmission line and the significant power and influence of Canada's representatives over the members of the First Nation. A review of the *Alexis* decision of the ICC would be helpful in supporting the additional protections which ought to have been afforded by Canada to Brokenhead in the present case.

46. Brokenhead submits that Canada breached its legal and/or fiduciary obligations to Brokenhead, or in the alternative, was negligent by:

- (a) failing to act with reasonable care as a fiduciary in protecting the interests of Brokenhead;

- (b) failing to adequately consult with, and fully inform, Brokenhead in respect of the options available in respect of the taking of the Reserve Lands;
- (c) failing to act in a manner consistent with the wishes of Brokenhead to receive annual payments in respect of the taking of the Reserve Lands;
- (d) failing to secure adequate compensation for the taking of the Reserve Lands.

47. Particulars of the breaches by Canada of its duties, fiduciary, statutory, or otherwise, and of its negligence, include Canada's approval of and grant to Hydro of a right of way for the purpose of an electric power transmission line on Brokenhead's Reserve Lands, for a one-time payment of the sum of \$979.25, notwithstanding the fact that:

- (a) the use of the words "out-right sale" in the December 1951 BCR demonstrated that there was some confusion or lack of understanding on the part of Brokenhead in respect of the options available and in respect of the nature of the transaction;
- (b) the easement ultimately granted to Hydro was inconsistent with the terms of the December 1951 BCR;
- (c) there is no indication in the historical records that the true nature of the transaction was ever explained to Brokenhead;
- (d) Brokenhead had repeatedly, from the outset, stated a preference for a lease and the generation of annual rental payments in respect of the lands to be taken for the purpose of the electric power transmission line;
- (e) Brokenhead was vulnerable and dependent upon the IAB officials for counsel and ongoing guidance in respect of the transaction;
- (f) there was an inequality in bargaining power as between Hydro and Brokenhead, and as between Brokenhead and the IAB, such that the ability of Brokenhead to negotiate with Hydro and the IAB was essentially non-existent;
- (g) the December 1951 BCR still contained wording which left the issue of the acceptability of the terms of the agreement to the discretion of the IAB, and that the IAB knew or ought to have known that the transaction was unjust and not in Brokenhead's best interests, that Brokenhead was

relying upon it to ensure that the transaction was acceptable, and that its representatives exerted a tremendous influence over Brokenhead;

- (h) Canada was at all material times aware that the compensation offered by Hydro for the lands taken was "out of line" with compensation provided for other transmission line rights-of way granted through Indian Reserves;
- (i) Canada had throughout expressed concerns about the propriety of the bargain, the extent to which Brokenhead had been informed about the nature of the right being granted, and the compensation being offered for the use of the land;
- (j) the compensation offered was unfair and improvident, given the nature and quality of the land that would be affected by the easement;
- (k) Canada had the absolute authority and discretion, pursuant to section 35 of the 1951 *Indian Act*, to dictate the terms and conditions upon which the consent to the taking of the Reserve lands for public purposes would be provided, and a fiduciary obligation to ensure that Brokenhead's interests were protected, to obtain adequate compensation for the benefit of Brokenhead in respect of the land, and to minimize the loss of land of Brokenhead; and
- (l) the lease and annual payments requested throughout by Brokenhead could have been dealt with as a part of the Easement Agreement, and that leases and annual payments for electric power transmission line right-of-way corridors were becoming more commonplace, such that Brokenhead and Canada was aware that this option existed.

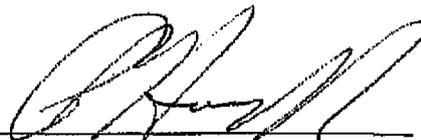
**VII. Relief Sought:**

48. Brokenhead seeks compensation from Canada for:

- (a) Compensation for Canada's breach of its duties and obligations, statutory, fiduciary or otherwise;
- (b) Interest;

- (c) Such other damages or compensation as this Honourable Tribunal deems just.

Dated this 14<sup>th</sup> day of November, 2012.



Signature of Representative/Solicitor

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