# MUSKEG LAKE CREE NATION
# 1919 SOLDIER SETTLEMENT BOARD
# SURRENDER IR 102 SPECIFIC CLAIM TRUST

## Information related to the Certificate of Independent Financial Advice

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**Date: January/February 2022**

**MUSKEG LAKE CREE NATION**

**1919 SOLDIER SETTLEMENT BOARD**

**SURRENDER IR 102 SPECIFIC CLAIM TRUST**

**Proposal**

Muskeg Lake Cree Nation (MLCN) and Canada have negotiated a settlement of the MLCN's specific claim relating to the alleged surrender of 8,960 acres of the MLCN's Reserve in 1919.

Canada agreed to pay MLCN $127,874,961 less loan funding (the "Compensation Balance").

MLCN is to establish a trust to receive the Compensation Balance.

This trust is to hold and invest the Trust Property (assets) for the long term use and benefit of the Beneficiary which is Muskeg Lake Cree Nation acting through Council. MLCN is also the Settlor.

A Trustee is to administer the Compensation Balance (Trust Property) in accordance with the Trust Agreement.

The Trust Agreement must be ratified by the Electors (Members who are 18 years of age).

**INDEPENDENT FINANCIAL ADVICE WITH RESPECT TO THE SETTLEMENT**

MNP LLP was retained to provide independent financial advice of the kind included in the practice of public accounting (which does not include investment counseling) to Muskeg Lake Cree Nation (the "MLCN") with respect to the terms of the 1919 Soldier Settlement Board Surrender IR 102 Specific Claim Trust Agreement (the "Trust Agreement") including dealing with the deposit of the Compensation Balance and the subsequent safe custody, preservation of capital, management, process for investment, disbursement and use of the Compensation Balance.

Also, MNP LLP will provided independent financial advice to the Council of the kind included in the practice of public accounting (which does not include investment counseling) with respect to the financial aspects of the Trust Agreement, and the Compensation Balance being deposited into the Trust Account rather than into an account managed by Canada for the MLCN pursuant to the Indian Act, without limitation, financial advice with respect to the potential rates of return and potential investment risks (the "Financial Issues").

This section of the report discusses the subsequent safe custody, preservation of capital, management, process for investment, disbursement and use of the Compensation Balance and Financial Issues.

Please see the 1919 Soldier Settlement Board Surrender IR 102 Specific Claim Trust Agreement for more details. This report only discusses the above.

**Safe Custody of Trust Property**

MLCN has to appoint a Trustee (a trust company duly incorporated, validly existing and authorized to carry on business as a trustee in the Province of Saskatchewan) to receive the Compensation Balance, and hold it in trust, manage, invest and distribute the Trust Property (the assets of the Trust) for the use and benefit of the Beneficiary in accordance with the Trust Agreement and the Trustee Services Agreement.

**Preservation of Capital**

Once the Compensation Balance is deposited into the Trust Account, it is no longer considered Indian Monies, and are not governed by the *Indian Act*.

To help safeguard capital, the Trustee will only allow the transfers of funds from the Trust Account if they are in accordance with the Trust Agreement.

Areas in the Trust Agreement that could impact the preservation of capital are as follows:

**Authorized Investments (Article 9 of the Trust Agreement)**

The Trust Agreement is designed so that the all monies, securities, property and other assets (the "Trust Property"), contributed to or settled on the Trust by the Settlor net of any authorized distributions made in accordance with the Trust Agreement, can only be invested in Authorized Investments which are investments that a reasonable and prudent investor would be permitted to invest under Section 24 of the *Trustee Act*, provided that all investments are in accordance with the Trust Agreement, Investment Policy and the Investment Management Agreement.

The Investment Policy sets out the objectives, strategies, framework and procedures governing the investment of the Trust Property as developed, approved and executed by Council, the Advisory Committee and the Trustee with advice from the Investment Manager(s). An Investment Manager(s) is a firm engaged in the discretionary management of investment portfolios. The Investment Manager(s) is approved by the Trustee, Council and the Advisory Committee. The Investment Manager(s) must be independent from the Trustee. The Trustee must regularly monitor the Investment Manager(s) to make sure Authorized Investments are in accordance with the Investment Policy and the Trust Agreement. Also, the Trustee must regularly monitor and evaluate the performance of the Investment Manager(s).

MLCN or the Trustee may engage an Investment Consultant to provide them with independent financial advice. The Investment Consultant means an individual with a chartered financial analyst designation or a firm of chartered financial analysts, or any successor designation, that is in good standing and licensed to carry on a chartered financial analyst practice in the Province of Saskatchewan, who is independent of MLCN, the Advisory Committee, the Trustee and the Investment Manager(s).

**Band Development Purposes and Per Capita Distributions (Article 5 of the Trust Agreement)**

Up to $15,000,000 for Community Infrastructure, Development and Investment Purpose.

Up to $3,000,000 for Community Initiative Purpose.

Up to $3,000,000 for Emergency Purpose.

Up to $20,000,000 for Land Acquisition Purpose.

The Trust Agreement sets out additional rules regarding the use of the Trust Property for the above Band Development Purposes. For example:

Only up to $5,000,000, in aggregate, may be used for the above Band Development Purposes (other than the Land Acquisition Purpose) in any given Fiscal Year.

No payments can be made if they would reduce the fair market value of the Trust Property below the Trust Capital Threshold, which is the greater of:

> $100,000,000 and the face value of any Authorized Loans and Authorized Loan Guarantees; and
>
> 75% of the fair market value of the Trust Property as of December 31 of the immediately preceding Fiscal Year and the face value of any Authorized Loans and Authorized Loan Guarantees.

Before the Trustee can make any payments for the above Band Development Purposes, Council and the Advisory Committee must pass resolutions requesting payment.

After these payments have been made by the Trust, and the fair market value of the Trust Property exceeds $100,000,000, adjusted for CPI (inflation), the Trust can distribute to MLCN up to $20,000,000 for Band Development Purposes.

The Trustee shall be entitled to make payments from the Trust Account in accordance with Section 5.5 of the Trust Agreement in an amount equal to the Muskeg Lake Per Capita Distribution. For greater certainly, these payments shall be made notwithstanding that the fair market value of the Trust Property may be reduced below the Trust Capital Threshold.

### Annual Payment (Articles 7 and 8 of the Trust Agreement)

Subject to certain exceptions, an Annual Payment from the Trust can be made to MLCN equal to the greater of 3% of the fair market value of the Trust Property; and the Net Annual Income less certain amounts (for tax purposes and loan payments).

### Authorized Expenses (Article 8 of the Trust Agreement)

The Trustee is allowed to pay Authorized Expenses which are expenses reasonably incurred or payable by the Trustee and MCLN in carrying out the terms of the Trust Agreement.

### Security/Collateral (Article 10 of the Trust Agreement)

The Trust Property may be used as security or collateral for an Authorized Loan or an Authorized Loan Guarantee for Band Development Purposes but shall not exceed $10,000,000.

Authorized Loans means a loan for one or more Band Development Purposes made by a Financial Institution or the First Nations Finance Authority, as applicable, to MLCN as borrower, the proceeds of which are to be deposited into the Revenue Account, and that is approved by Council and the Advisory Committee.

Authorized Loan Guarantee means a loan guarantee for one or more Band Development Purposes made by the Trustee on behalf of the Trust to a Financial Institution or the First Nations Finance Authority, as applicable, whereby the Trustee pledges all or a portion of the Trust Property as security for an Authorized Loan, and that is approved by Council and the Advisory Committee.

### Amendments to the Trust Agreement (Articles 15 and 16 of the Trust Agreement)

The Trust Agreement allows Council to amend the Trust Agreement for administrative or procedural issues, but these changes must not materially alter the purpose of the Trust. Also, Council can change the Trust Agreement due to changes in law, or to ensure the Trust is not subject to income tax. In some instances, Council will have to get advice from a professional advisor and the approval from the Advisory Committee. If changes to the Trust Agreement materially alter the Trust Agreement, there is a requirement for a positive vote from the Electors.

### Termination of the Trust (Article 17 of the Trust Agreement)

If the Trust is terminated, the Trustee must transfer the remaining Trust Property to MLCN to be resettled in a new trust where the sole beneficiary is MLCN.

## Management of the Trust

The management of the Trust will be in accordance with the Trust Agreement administered by the Trustee in accordance with the Trust Agreement. (Article 11 of the Trust Agreement).

Council also has a role in management with regards to the purchase of Land (Article 6 of the Trust Agreement); working with the Trustee, Advisory Committee and Investment Manager(s) to develop the Investment Policy (Article 9 of the Trust Agreement); approving Band Development Purposes with the assistance of the Advisory Committee (Article 5 of the Trust Agreement); Membership Meetings and reviewing financial statements and other reports. (Several Articles of the Trust Agreement).

On an annual basis the Advisory Committee is required to engage the services of an Auditor who is a Chartered Professional Accountant or a firm of Chartered Professional Accountants to audit the financial statements of the Trust. The Revenue Account is part of MLCN's operations and will be audited in conjunction with their audit. The Revenue Account is established by Council to receive certain monies as required by the Trust Agreement. (Articles 5, 7, 10 and 12 of the Trust Agreement).

On an annual basis Council is required to report to the Members of the MLCN on the operation of the Trust. (Article 12 of the Trust Agreement).

MLCN must contribute 30% of the Annual Payment to the Trust on an annual basis to grow the Trust. MLCN must make this payment from own source/other revenues. (Article 3 of the Trust Agreement).

The Trust Agreement is designed to provide guidance to assist Council and the Trustee in the selection of qualified and experienced people (Trustee (after selected by Council), Auditor, Investment Consultant and Investment Manager(s)) which will enable the Trust to be managed effectively and to ensure there is transparency and accountability.

## Investment of Trust Property

The Trust Agreement is designed so that Trust Property can only be used to purchase Authorized Investments which are investments that a reasonable and prudent investor would be permitted to invest in under Section 24 of the *Trustee Act*, provided that all investments are in accordance with the Trust Agreement, Investment Policy and Investment Management Agreement. (Article 9 of the Trust Agreement).

## Distribution and Use of Trust Property

The only distributions and uses allowed for Trust Property are as follows:

Band Development Purposes and Muskeg Lake Per Capita Distribution (Article 5 of the Trust Agreement).

Purchase of Land, Minerals and improvements for Reserve Creation. (Article 6 of the Trust Agreement).

Annual Payment to the Revenue Account which is an account of MLCN and governed by its laws and policies. (Article 7 of the Trust Agreement).

The Trustee is allowed to pay Authorized Expenses which are expenses reasonably incurred or payable by the Trustee and MCLN in carrying out the terms of the Trust Agreement. (Article 8 of the Trust Agreement)

Authorized Loan Payments if required (Article 10 of the Trust Agreement).

**Potential rates of return and risks:**

As stated earlier, the Trust Agreement states that the Trustee and Council with the assistance of the Advisory Committee and Investment Manager(s) must develop an Investment Policy that determines the types of investments the Trust can purchase. The Trust may engage the services of an Investment Consultant who is independent of the Trust for advice. The Investment Manager(s) and Investment Consultant must have the necessary qualifications as defined in the Trust Agreement.

The actual return and risks will depend on the Investment Policy, the world economy and the skill of the Investment Manager(s).

**The next page highlights the Flow of Funds to and from the Trust which are in accordance with the Trust Agreement, and the related Articles of the Trust Agreement.**

# Proposed Muskeg Lake Cree Nation (MLCN)
# 1919 Soldier Settlement Board Surrender IR Specific Claim Trust
# FLOW OF FUNDS

## TRUSTEE RESPONSIBILITY

### TRUST ACCOUNT

Contributions from MLCN
(Compensation Balance and annual contribution)

| Authorized Investments | Authorized Expenses | Distributions to Nation (Deposited into the Revenue Account) | Purchase Land, Mineral and Improvements | Annual Payment/ Payment Amount |
|---|---|---|---|---|
| Invest the Trust Property<br><br>Article 9 | Pay Authorized Expenses<br><br>Article 8 | Band Development Purposes and Per Capita Distributions (Community Infrastructure, Development and Investment Purpose, Community Initiatives Purpose, Emergency Purpose and Land Acquisition Purpose<br><br>Article 5 | Purchase of Land to convert to MLCN Reserve<br><br>Article 6 | Payment to the Nation<br><br>Articles 7 and 8 |

## MLCN RESPONSIBILITY

### REVENUE ACCOUNT

### First Nation Uses

Band Development Purpose and Per Capita Distribution

Article 7

**MLCN is allowed to use Trust Property as collateral (Article 10).**

This section of the report explains the options Council considered for the deposit of the Compensation Balance. **Council has decided to deposit the Compensation Balance into a Trust Account rather than into an account managed by Canada.**

**It should be clearly noted that the Balance Compensation placed in the Trust Account administered by a Trustee and the Nation is not considered to be "Indian moneys" and therefore, Canada is not responsible or accountable for this Compensation Balance.**

**<u>Options for the deposit of the Compensation Balance (the “Compensation’)</u>**

Muskeg Lake Cree Nation (MLCN) has two options with regards to the deposit and administration of the Compensation received pursuant to the settlement of this Claim, which are as follows:

1. Place the Compensation into the Consolidated Revenue Fund (CRF), which is administered by Canada pursuant to the *Indian Act.* As part of the Consolidated Revenue Fund (CRF), the MLCN has an account for capital moneys and an account for revenue moneys. To access funds from these accounts Council must follow the *Indian Act.* The rules to access funds from the Capital Account are more stringent than the Revenue Account especially if MLCN is a Section 69 Band under the *Indian Act. Muskeg Lake Cree* Nation is a Section 69 Band; and

2. Place the Compensation in a Trust Account administered by a Trustee and the Muskeg Lake Cree Nation in accordance with the terms of the Trust Agreement that will be voted upon by the eligible Members of the MLCN as part of the ratification vote.

**1. <u>Consolidated Revenue Fund Option</u>**

Based on the Manual for the Administration of Band Moneys, Canada is able to segregate settlement monies within the Consolidated Revenue Fund and it can layer separate trust conditions on these segregated funds. It is uncertain, however, whether these trust conditions would prevail in the face of a request from a subsequent Council of MLCN to utilize the monies in a manner that contravened these trust conditions. If the Compensation is deposited into the Capital Account, the provisions of s.64(l) of the *Indian Act* apply, which are as follows:

64. (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band as follows:

(a) to distribute per capita to the members of the band an amount not exceeding fifty per cent of the capital moneys of the band derived from the sale of surrendered lands;

(b) to construct and maintain roads, bridges, ditches and watercourses on reserves or on surrendered lands;

(c) to construct and maintain outer boundary fences on reserve;

(d) to purchase land for use by the band as a reserve or as an addition to a reserve;

(e) to purchase for the band the interest of a member of the band in lands on a reserve;

(f) to purchase livestock and farm implements, farm equipment or machinery for the band;

(g) to construct and maintain on or in connection with a reserve such permanent improvements or works as in the opinion of the Minister will be of permanent value to the band or will constitute a capital investment**;**

(h) to make members of the band, for the purpose of promoting the welfare of the band, loans not exceeding one-half of the total value of:

  (i) the chattels owned by the borrower, and

  (ii) the land with respect to which he holds or is eligible to receive a Certificate of Possession, and may charge interest and take security therefore;

(i) to pay expenses necessarily incidental to the management of lands on a reserve, surrendered lands and any band property;

(j) to construct houses for members of the band, to make loans to members of the band for building purposes with or without security and to provide for the guarantee of loans made to members of the band for building purposes; and

(k) for any other purpose that in the opinion of the Minister is for the benefit of the band.

**There is a concern that a request pursuant to s.64(1) of the *Indian Act* would prevail over any trust conditions that a Nation and Canada agreed to apply to the Compensation if deposited into the CRF because federal legislation cannot be amended or revoked by the agreement of a Nation and Canada unless such agreement is enacted into new federal legislation.**

If the Compensation is deposited into the Revenue Account, and since MLCN is a s.69 Band, a Council Resolution is all that is required along with Canada's consent to access funds from the Revenue Account.

Based on discussions with Canada it is uncertain into which account the Compensation would be deposited.

**At present,** there are some advantages and disadvantages to MLCN for depositing the Compensation into either of the above noted options. This report will address the more significant advantages and disadvantages of the above two options, and are as follows:

### A. Rates of Return:

1. Consolidated Revenue Fund

   The rate earned on funds deposited into the Consolidated Revenue Fund (CRF) is pursuant to an Order in Council and is based on the quarterly average of month-end balances on deposit in the account using weekly market yields published by the Bank of Canada on Government of Canada Bonds issues having a maturity of 10 years or over. Interest earned is credited to the account semi-annually.

2. Trust Account

   The rate earned on funds deposited into the Trust Account administered by the Trustee will vary depending on the investments that the Trustee makes. If the Trustee invests in instruments such as 5-year Guaranteed Investment Certificates, it is not likely that they will earn a better return than if the Compensation was left in the CRF. However, with prudent investing in equities and other appropriate investments it is possible that the Trust will earn a better return. This will require accepting more risk in the type of investments that are made. It is possible that if the Compensation is deposited into the Trust Account, it will earn a lower return than if it was deposited into the CRF.

## B. Investment Risk:

1. Consolidated Revenue Fund

The funds on deposit in the Consolidated Revenue Fund (CRF) are guaranteed by the Government of Canada and therefore are essentially risk free.

2. Trust Account

The risk of loss of funds deposited into the Trust Account will depend on the type of investments that the Trustee makes. To get a better return than the one that can be earned in the Consolidated Revenue Fund, the Trustee will have to invest in equities and other appropriate investments. Equities and other appropriate investments will have a higher risk of loss than investing in Government of Canada Bonds.

## C1. Taxation — Income taxes

1. Consolidated Revenue Fund

Income earned on funds deposited in the Consolidated Revenue Fund is not subject to Canadian or Provincial income taxation. Canada Revenue Agency has never assessed income tax on income earned on these funds. In order for the Government to tax the income earned on these funds, it might be necessary for the Government to pass new legislation.

2. Trust Account

If the Compensation is deposited into a Trust Account, there is some risk that the income earned could be subject to income taxes.

From the perspective of the *Income Tax Act,* the Trust is a separate entity from the Trustee and is not eligible for any exemptions. However, a Trust may deduct, in calculating its income for tax purposes, any portion of the income which has been paid or is payable to a beneficiary under 104(6) of the *Income Tax Act.* In addition, most expenses to operate the Trust are deductible from taxable income. The Trustee will have to issue a T3 Supplementary Slip to the beneficiaries and prepare a T3 Trust Information Return and file with Canada Revenue Agency (CRA) within 90 days after the end of each calendar year.

In order for the income earned in the Trust that was paid out to MLCN to not be subject to income taxes MLCN must be exempt from income tax. It appears MLCN would qualify, as a public body performing a function of government under paragraph 149(1)(c) of the *Income Tax Act* and would therefore be exempt from income tax.

Canada Revenue Agency issued a technical interpretation 2000-0036443, dated October 3, 2000 which can be understood to say, if subsection 75(2) of the *Income tax Act* applies to the trust property, then all of the income and taxable capital gains realized from the trust property are deemed to be income of the settlor, without any payment of that income to the settlor.

Second generation income (or income earned on income) and active business income do not qualify for the reversionary treatment under 75(2). In any event, if the income is paid to MLCN under 104(6) and/or the trust's expenses are in excess of taxable income, then the trust would not pay income tax.

**Taxation of Trust Income if not Exempt**

If a Trust has income for tax purposes that is not exempt from taxation, then it would be taxed pursuant to the normal trust rules of the *Income Tax Act.* A trust formed from a settlement claim is an inter vivos trust since it was created while the settlor is alive. Pursuant to s.104(2) of the *Income Tax Act,* tax is imposed on a trust as if that trust were an individual. Thus, a trust calculates its income like any other taxpayer. In the case of an inter vivos trust, the *Income Tax Act* specifies that it will be taxed at the top personal tax bracket (s.122).

## C2. Taxation — PST/GST

1. Consolidated Revenue Fund

The Settlement Agreement does not promise any special relief from PST/GST. However, if the Compensation is deposited in the Consolidated Revenue Fund, expenses should be exempt from the payment of PST/GST on the purchase of goods and services incurred by Canada and MLCN.

2. Trust Account

The Settlement Agreement does not promise any special relief from PST/GST. A trust is not considered to be a "band-empowered entity" and as a result a trust would be subject to GST on goods and services.

## D. Cost to Administer

1. Consolidated Revenue Fund

   MLCN will still incur certain costs to administer and access the Compensation.

2. Trust Account

   The cost to administer the Trust, if the Compensation is deposited into a Trust Account, will be more significant than if the funds are deposited into the Consolidated Revenue Account. There will be additional costs for such items as per diems, professional fees (trustee, investment managers, advisors, lawyers and auditors), travel, office costs, meeting costs and salaries.

## E. Indian Moneys

1. Consolidated Revenue Fund

   Funds on deposit in the Consolidated Revenue Fund will still be considered Indian moneys and Canada is responsible for these funds while they are on deposit. Indian moneys are a debt obligation of the federal government.

2. Trust Account

   Once the Compensation is deposited in the Trust Account, Canada has no further responsibilities for the use, administration and management of these funds. The use, administration and management of the Compensation is the responsibility of the Trustee and MLCN. The Trustee in discharging its responsibilities must follow the Trust Agreement.

## F. Training, Knowledge and Education

1. Consolidated Revenue Fund

   Since the Compensation is administered by Canada, MLCN develops very little knowledge and expertise in the administration and management of these funds.

2. Trust Account

   If the Compensation is deposited into a Trust Account to be administered by a Trustee and MLCN, it will be the Members of MLCN who will become knowledgeable and experienced with regards to administering and investing the Compensation. Generally speaking, Nations who administer their own Compensation are more sophisticated financially than those Nations who do not manage their own funds.

## G. Membership Involvement

1. Consolidated Revenue Fund

   If the Compensation is deposited into the Consolidated Revenue Fund, Members of MLCN will have limited involvement as the funds are administered by Canada and the Council pursuant to the *Indian Act.*

2. Trust Account

   If the Compensation is deposited into the Trust Account, the Members will have more involvement as to how the funds are administered through membership meetings and other reporting requirements per the Trust Agreement.

## H. Control of Compensation

1. Consolidated Revenue Fund

   If the Compensation is deposited into the Consolidated Revenue Fund, Canada and the Council will control the funds pursuant to the *Indian Act.*

2. Trust Account

   If the Compensation is deposited into the Trust Account, Canada cannot dictate what MLCN can do with the funds. The Trustee and the Council pursuant to the Trust Agreement will control the Compensation. The Members of MLCN must ratify the Trust Agreement.

## I. Use of Compensation for Collateral

1. Consolidated Revenue Fund

   If the Compensation is deposited into the Consolidated Revenue Fund, Canada will manage the funds pursuant to the *Indian Act* and the *Indian Act* will dictate the use of the Compensation for collateral.

2. Trust Account

   If the Trustee is allowed to use the trust property as collateral, the Trust Agreement will set out procedures on how the trust property can be used for collateral.