

May 17, 2019

Isabelle Bourassa

F  
I  
L  
E  
DD  
É  
P  
O  
S  
É

Ottawa, ON

1

## SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

LUCKY MAN CREE NATION

Claimant

v.

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

Respondent

**DECLARATION OF CLAIM**

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

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*.

May 17, 2019

Date

Isabelle Bourassa

Registry Officer

TO: Assistant Deputy Attorney General, Litigation, Justice Canada  
Bank of Canada Building 234 Wellington Street East Tower  
Ottawa, Ontario K1A 0H8  
Fax: (613) 954-1920

## **I. Claimant (R. 41(a))**

1. The Claimant, the Lucky Man Cree Nation (the “Claimant” or “First Nation”), is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, SC 2008, c 22, by virtue of being a “band” within the meaning of the *Indian Act*, RSC 1985, c 1-5, as amended, and within the meaning of Treaty No. 6 (“Treaty 6”). The First Nation is located in the Province of Saskatchewan.

## **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) A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister and

- (a) the Minister has notified the First Nation in writing of his or her decision not to negotiate the claim, in whole or in part; ...
3. The First Nation and Canada entered into The Lucky Man Band of Indians Treaty Land Entitlement Settlement Agreement, dated November 23, 1989 (the “Settlement Agreement”), whereby the Claimant accepted 7,680 acres near Meeting Lake, Saskatchewan, in partial settlement of Canada’s outstanding treaty land entitlement (“TLE”) obligation to the Claimant.
  4. Article 3(A) of the Settlement Agreement contains a release clause that fully discharges Canada from further claims, undertakings, and promises under Treaty 6 with respect to a land quantum up to 7,680 acres.
  5. Article 3(B), however, stipulates that the release set out in Article 3(A) is without prejudice to any further claims the First Nation may have:
    - (a) to compensation for allegedly being denied the privileges for the full use and benefit of Reserve lands to which the Band had Treaty Entitlement.
    - (b) to compensation in lieu of land should it be determined at some future date that the Band had a greater Treaty Land Entitlement than the quantum of the land set aside as the Band’s Reserve as such lands are more particularly described in Schedule “A” hereto.
  6. In 1995, pursuant to Article 3(B), the First Nation submitted a claim with the Minister of Indian Affairs and Northern Development in relation to an outstanding TLE owed under Treaty 6 (the “Claim”), based on the Band’s 1880, 1882, or 1883 population. The Respondent (“Canada” or the “Crown”) rejected the Claim on July 7, 1995, and the First Nation requested that the Indian Claims Commission (“ICC”) hold an inquiry into the Claim.
  7. In March 1997, the ICC issued its first report, “Inquiry into the Treaty Land Entitlement Claim of the Lucky Man Cree Nation”. The ICC recommended that the 1887 DOFS be used to calculate the Band’s TLE and that the parties carry out further treaty payroll analysis to determine the Band’s actual population for that year. The ICC further suggested that if

the parties could not reach an agreement as to who should be counted they could come back to the Commission for a ruling.

8. In 1997, Canada concluded that there was no shortfall and rejected the Claim. In June 2002, after several years of research, the First Nation issued a response to Canada, concluding that under applicable membership criteria the Band's 1887 population should be adjusted from 62 members to 258. In November 2003, Canada advised the First Nation that nothing in the First Nation's response would cause Canada to amend its conclusion. The First Nation subsequently requested the ICC hold a further inquiry into the DOFS population.
9. In February of 2008, the ICC issued its second report, the "Lucky Man Cree Nation Treaty Land Entitlement Phase II Inquiry", finding that Canada had an outstanding TLE obligation with a shortfall of at least two people, recommending the Claim be accepted for negotiation and that the parties conduct an additional payroll analysis to determine the population of the Band in 1887.
10. On May 13, 2010, the First Nation submitted a separate loss of use claim to the Department. In a letter to the First Nation dated July 22, 2010, Canada indicated the loss of use claim submission did not meet the Minimum Standard set out in the *Specific Claims Policy and Process Guide*. As a result, that claim was not filed with the Minister. Notwithstanding that, the Claimant's position is that loss of use is not a separate claim at all; rather, loss of use is a key component in the assessment of compensation for this Claim as it relates to an outstanding TLE obligation owed by Canada to the Claimant. This position is consistent with Article 3(B) of the Settlement Agreement, which contemplates that the First Nation may bring an additional claim against the Crown for loss of use *and* in relation to any outstanding TLE owed to the First Nation.
11. In a letter dated August 16, 2010, Canada informed the First Nation that, after a review of the ICC's Phase II Report released in February 2008, the Department decided to reject the ICC's recommendations.
12. Canada closed its file on the Claim on August 17, 2010, according to the Government of Canada's online Reporting Centre on Specific Claims.

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

13. The First Nation does not seek compensation in excess of \$150 million in relation to the Claim.

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

14. The Claim is filed under the following ground, as provided for in s. 14(a) of the *Specific Claims Tribunal Act*: "a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown."

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

**(a) Treaty 6 and the Crown's Promise to Provide Reserve Land**

15. In 1876, the Plains and Woods Cree Indians in what is now central Saskatchewan entered into Treaty 6 with the Crown. Among other things, the treaty provided for (what the Crown viewed as) the surrender of aboriginal title to 121,000 square miles of land in exchange for various promises and benefits to be provided by the Crown, including reserve lands to be set aside for each band in the amount of one square mile for each family of five (approximately equal to 128 acres per person).
16. In July 1879, Lucky Man broke away from Chief Big Bear's camp and signed an adhesion to Treaty 6 along with almost 470 followers in order to obtain rations and treaty annuities in the face of starvation. This group, led by Lucky Man, became known as the Lucky Man Band, and Lucky Man was recognized by Treaty Commissioners as a Chief. The Claimant is the successor in interest to the Lucky Man Band that became a party to, and is therefore entitled to, benefits under Treaty 6.
17. The reserve land provision in Treaty 6 mandated that government officials send a suitable person to set apart reserves for each band after consulting with each band as to where they preferred to have their reserves.
18. The 1879 adhesion that Chief Lucky Man signed expressly provided that the Band did: "hereby agree to accept the several benefits, payments, and reserves promised to Indians adhering to the said treaty at Carlton and Fort Pitt on the date above mentioned." (Emphasis added.)

**(b) The Crown's Failure to Set Aside a Reserve for the Band, 1880-1884**

19. Until May 7, 1880, Indian Affairs was a branch of the Department of the Interior and authorization and approval of reserve location and surveying was the responsibility of the Surveyor General.
20. After the Department of Indian Affairs was created in 1880, it would take over responsibility for reserve land surveys. However, the Surveyor General continued to survey Indian reserves under the direction of the Indian Commissioner until 1882 when the new Department of Indian Affairs had established its surveys branch.
21. In 1880, the year immediately following Lucky Man's adhesion to Treaty 6, Chiefs Lucky Man, Little Pine, and Piapot met with Indian Agent Allen at Fort Walsh to discuss the selection of reserves. Chief Lucky Man informed Agent Allen that his Band, which then numbered 754 members, wished to have a reserve "in the neighbourhood of Battleford."
22. Lucky Man's request did not prompt any reaction from Crown officials in either department.
23. In 1880, there was only one active surveyor in the Treaty 6 territory, George Simpson. Simpson completed surveys for just three reserves that year, before wintering at Battleford in 1880-1881.

24. Given the Crown's failure to respond to its obligation under Treaty 6 to survey a reserve, Lucky Man and his followers spent another winter (1880-1881) hunting bison in the United States, returning to Fort Walsh in the spring of 1881. In February 1881, Commissioner Dewdney instructed the new Inspector of Indian Agencies in the North West Territories, T.P. Wadsworth, to "bring about" the settlement of Little Pine, Piapot, and Lucky Man on reserves that year. Dewdney failed to acknowledge that Lucky Man had already requested a reserve near Battleford.
25. In the same letter, Commissioner Dewdney instructed Wadsworth to fulfill a commitment to Lucky Man to take the Chief on a tour of reserves so that he could see first-hand those who had already settled. This did not occur.
26. Lucky Man and his followers remained by Fort Walsh in the Cypress Hills area until the fall of 1881, at which point they returned to the United States to hunt bison for the winter. In the spring of 1882 when Lucky Man and his followers returned, some 3,000 Indians had assembled at Fort Walsh near the Cypress Hills seeking rations. This gathering prompted Commissioner Dewdney to instruct Indian Agents to encourage the Cree chiefs to move north, away from the Cypress Hills region.
27. By 1882, the DIA had established its own surveys branch to set aside reserve lands. The Department of the Interior had the mandate to administer the Crown domain under the *Dominion Lands Act*. Thus, two departments were responsible for different aspects of surveying Dominion Lands, and struggled to coordinate and communicate in their work. The Department of the Interior's Chief Inspector of Surveys acknowledged this problem to his superiors in September 1884, and suggested centralizing approval of reserves, which is what ultimately happened.
28. In September 1882, Chief Lucky Man again requested a reserve, this time 30 miles from Fort Walsh on Big Lake in Treaty 4 territory. At the time of the 1882 request, the treaty payroll indicates that Lucky Man's Band had 872 members.
29. Not a single reserve in Treaty 6 territory was surveyed in 1882, while only one reserve in Treaty 4 territory was surveyed that year.
30. Lucky Man's request for a reserve was unilaterally denied by NWMP Commissioner Irvine, as Department policy was to deny requests from the northern Cree for reserves in the Cypress Hills region. Instead, Commissioner Irvine attempted to starve the Fort Walsh Cree, so they would move north.
31. Lucky Man's Band and some other Cree bands remained in the Cypress Hills region into 1883. In the spring of 1883, Lucky Man and the other Cree Chiefs were informed that they were required to move north towards Battleford, where Lucky Man had originally requested a reserve in 1880. In order to coerce Lucky Man and the other Cree Chiefs to move to Battleford, Commissioners informed the Chiefs that treaty promises, additional rations and additional implements would only be supplied to them if they continued north. Aid had been refused to those who remained in the Cypress Hills region, and it was made clear by the Department that aid would only be provided in Battleford region. Lucky Man

was threatened with arrest if he “did not return with his entire camp to *his reservation*” according to the 1883 Report of the Commissioner of the North-West Mounted Police Force (emphasis added).

32. The Lucky Man and Big Bear Bands were escorted north to their reserves near Battleford in July 1883. The 1883 treaty payroll indicates that Lucky Man’s Band had 366 members that year, but for reasons unknown, Lucky Man is not listed as “Chief” on the 1883 payroll.
33. For the remainder of 1883, the Lucky Man Band remained camped in the Battleford area.
34. At this time, 117 was assigned to the Lucky Man Band as an Indian Reserve (“IR”) number. However, since 1918, IR 117, which is located approximately 116 kilometres northeast of Battleford, has denoted land set aside for the Witchehan Lake Band (now the Witchehan Lake First Nation). There is no indication as to whether IR 117 was ever associated with the site Lucky Man chose for settlement.
35. The Department’s 1883 Annual Report indicated that Lucky Man’s band “... may be considered as virtually settled, as they are being kept working in the neighborhood of Battleford prior to moving to Reserve, being adjacent.” Records indicate that by the end of 1883, Lucky Man had chosen a reserve and was considered by Department officials to be settled on his own reserve. The Department made numerous policy decisions in order to restrict Lucky Man and his Band to *their reserve*.
36. This understanding that Lucky Man had chosen a reserve by the end of 1883 is also reflected in the record from 1884. In April 1884, Agent Rae advised Assistant Commissioner Hayter Reed that Little Pine’s and Lucky Man’s Bands started from Battleford to go to *their reserves as per agreement* but, by the end of spring in 1884, there was still no formal survey for a reserve for Lucky Man. Despite this lack of survey, Lucky Man was apparently deemed settled enough to receive agricultural assistance, as the 1883 Report of the Commissioner of the North West Mounted Police indicates that Lucky Man had been given buck boards and carts to facilitate his agricultural pursuits.
37. The record indicates a common understanding and agreement that Lucky Man had chosen a reserve somewhere in the Battleford region by 1883 in accordance with government policy at the time. As such, the reserve should have been surveyed in 1883 because there was an agreement as to the location, in Battleford, and the Band indicated that it was prepared to settle there and had accepted agricultural implements. Notwithstanding this, the Crown failed to call on a surveyor to formally mark off lands for his Band. Importantly, not a single reserve was surveyed in Treaty 6 that whole year.
38. By the fall of 1884, neither the Lucky Man nor Little Pine reserve had been surveyed, while eight other surveys in Treaty 6 were completed that year. In 1884, the Lucky Man Band was still identified as an independent band of 366 members. The 1884 Lucky Man payroll identified Lucky Man as “ex-Chief” and he was paid as a member of the Big Bear Band at Fort Pitt in October 1884.
39. The failure by the Crown to set aside a reserve for the Lucky Man Band in 1883 constitutes a failure to uphold the terms of Treaty 6, which clearly states that the signatory bands could

select land for their reserve in a “locality which may be found to be the most suitable for them.”

(c) *Aftermath of the 1885 North West Rebellion*

40. In March 1885, the North West Rebellion (the “Rebellion”) broke out when Métis leader Louis Riel declared a provisional government at Batoche. Lucky Man and several of his followers had fled to the United States, fearing persecution.
41. In the immediate aftermath of the Rebellion, the Department identified a list of those bands it considered to be disloyal during the Rebellion, which included the Lucky Man Band. The Department then imposed a suite of harsh and illegal measures designed to stamp out the burgeoning treaty rights movement and break up the tribal system. These punitive measures included the withholding of treaty annuities and treaty salaries, the imposition of the pass system, and the confiscation of arms, ammunition, and horses.
42. Fearing persecution following the events of the Rebellion, and in spite of his innocence and peaceful approach to the Rebellion, Lucky Man and a group of his followers fled to the United States in late June 1885, where he faced an uncertain future.
43. Once in Montana, Lucky Man and about 75 other “Canadian” Cree settled at Fort Assiniboine. However, some members of his Band remained in Canada but splintered off where they remained without a reserve, leading to confusion among Department officials about the existence of the Band. The majority of Lucky Man’s followers must have remained in Canada however, as the 1883 payroll (the year in which an agreement was reached between Lucky Man and the Department regarding reserve selection), indicates the Band’s population was 366 people. If only 75 members fled with Lucky Man, this indicates that roughly 80% of the Band remained, likely in the Battleford region.
44. Although Lucky Man had fled to Montana and Chief Little Pine had died in 1885, the Department sent a surveyor to the Battleford area to survey a reserve for the leaderless members of Little Pine’s Band and Lucky Man’s Band in 1887. This reserve, recorded as IR 116, comprised 25 square miles, which, under the terms of Treaty 6, was sufficient land for a population of 125 people. The reserve was confirmed by Order in Council in 1889. The survey plan and the description of IR 116 indicated that the reserve was set aside for the Bands of Lucky Man and Little Pine.
45. After 11 years of “exile” in the United States, Lucky Man was returned to Canada in 1896 by American authorities and was arrested at the border for his alleged participation in the Rebellion. He was released by Canadian officials in June 1896 after charges against him were dismissed for lack of evidence. Lucky Man then set out for the Hobbema Agency in Alberta to meet members of his party, where he settled on the abandoned Bobtail IR 139. Although it is unclear what occurred after 1896, the record suggests that he eventually returned to Montana where he died in 1901.
46. The events of the Rebellion and Lucky Man’s resulting escape to the United States effectively ended his tenure as leader. Some of his followers fled to the United States with

him in 1885, with those remaining behind largely moving into other bands or remaining on IR 116. Lucky Man received no salary as Chief between 1885 and his death in 1901.

*(d) Lucky Man Paylists Following the Rebellion*

47. Following the Rebellion, the Crown began the practice of completing multiple and sometimes conflicting paylists to account for the non-payment of annuities to “rebel” bands, whose annuities were denied from 1885 to 1888.
48. Treaty 6 paylists from 1885 to 1889 often included artificial population numbers. This was particularly the case for the Lucky Man Band, whose membership scattered during the Rebellion. As stated above, some members fled to Montana with Lucky Man, while others remained in Canada with the Little Pine Band or integrated into other Bands in the Battleford district. Essentially, the Department neglected to keep accurate records of the actual population of the Lucky Man Band between 1885 and 1890.
49. According to the 1884 Lucky Man payroll, prior to the Rebellion, 82 members of the Lucky Man Band were paid “at Reserve”. The 1885 payroll mirrors the 1884 payroll identically, with the exception of the added comment “not paid with rebel Indians” beside the name of each member. Whether there were in fact 82 members of the Lucky Man Band in 1885 is impossible to determine, as the 1885 “dummy” payroll is the only payroll publicly available.
50. From 1880 to 1887, the population of Lucky Man’s Band fluctuated greatly. The relevant years are as follows:
  - In 1880, 754 people were paid annuities with the Lucky Man Band;
  - In 1882, 872 people were paid annuities with the Lucky Man Band;
  - In 1883, 366 people were paid annuities with the Lucky Man Band;
  - In 1884, 82 people were paid annuities with the Lucky Man Band;
  - In 1885 and 1886, the paylists indicate that 82 Lucky Man Band members who remained at the area set aside for Little Pine’s reserve were considered disloyal, and were not paid annuities;
  - In 1887, the payroll indicates that the population of the Lucky Man Band was 62 and was paid at “Little Pine’s reserve”. Notations on the payroll indicate that 37 members had gone “south”;
  - In 1890, the names of the Band members who fled to the United States after the 1885 Rebellion were struck from the treaty annuity paylists.

**VI. The basis in law on which the Crown is said to have failed to meet or otherwise breached a lawful obligation**

51. The Crown breached its treaty and fiduciary obligations to the First Nation by failing to satisfy the Band’s full TLE under the terms of Treaty 6 when Lucky Man chose a reserve in 1883.

52. Despite the Settlement Agreement, which releases Canada from any outstanding lawful obligation to the Claimant in failing to set aside up to 7,680 acres pursuant to the terms of Treaty 6, Canada's lawful obligation remains outstanding.
53. Using the 1887 DOFS for the purposes of determining TLE is manifestly unfair in the present case. Despite a clear agreement in 1883 to have a reserve set aside, the Crown failed to uphold its obligation to the Band under Treaty 6 and set aside a reserve at that time.
54. The Crown had a duty under the written and oral terms of Treaty 6 to set aside reserves for the Lucky Man Band in a fair and timely manner after the location of a reserve was agreed to between the Band and the Crown in 1883.
55. In 1883, the Crown acknowledged the Band was "virtually settled" near Battleford, yet still failed to formalize the survey.
56. The Crown's failure to uphold the terms of Treaty 6 in surveying lands for the Band in a fair and timely manner in 1883 resulted in the Band never receiving any reserve at all, at least not until 1887 when the Band was effectively shattered. The Rebellion was an intervening event completely beyond the control of the Band, and the Crown's egregious response to those events forced the members to scatter and, in some cases, flee to the United States.
57. In consideration of these unique circumstances, it would be manifestly unfair to ignore the Band's agreement to select a reserve near Battleford in 1883 when the Band's population was substantially more robust, in favour of an approach that would calculate the Band's TLE using an inaccurate payroll two years after many members of the Band had fled to escape the Crown's policy of subjugation.

## **VII. Relief Sought**

58. In light of the foregoing, the Claimant seeks:
  - i. A determination that Canada owes an outstanding lawful obligation to the Claimant in relation to a TLE shortfall owing under Treaty 6;
  - ii. Equitable compensation for Canada's breach of its treaty, fiduciary, and honourable obligations by failing to set aside sufficient TLE for the Claimant in a fair and timely manner in 1883;
  - iii. Equitable compensation for the Claimant's loss of use of lands that should have been set aside for its use and benefit from the date on which the lands ought to have been set aside to the present;
  - iv. Such other damages, compensation or interest as this Honourable Tribunal deems just;
  - v. Solicitor and client costs.

Dated this 16<sup>th</sup> day of May, 2019 at the City of Calgary in the Province of Alberta.

**MAURICE LAW**

A handwritten signature in blue ink, appearing to be 'Steven W. Carey and Amy Barrington', written over a horizontal line.

**Steven W. Carey and Amy Barrington**  
Counsel for the Claimant

**Maurice Law Barristers & Solicitors**

#300, 602 12<sup>th</sup> Ave SW

Calgary, Alberta T2R 1J3

Phone: (403) 266-1201

Fax: (403) 266-2701

Email: [scarey@mauricelaw.com](mailto:scarey@mauricelaw.com), [abarrington@mauricelaw.com](mailto:abarrington@mauricelaw.com)