

February 5, 2020

Dragisa Adzic

SCT File No.: SCT-6001-19

Ottawa, ON

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SPECIFIC CLAIMS TRIBUNAL

B E T W E E N :

ENOCH CREE NATION #440

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

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

TO: Maurice Law  
Barristers & Solicitors  
**Attention: Ron S. Maurice,  
Ryan M. Lake & Anjalika Rogers**  
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Counsel for the Claimant  
Enoch Cree Nation #440

## I. Overview

1. The Respondent, Her Majesty the Queen in right of Canada (“Canada”), is committed to reconciliation and a renewed nation-to-nation relationship with Indigenous peoples based on recognition of rights, respect, cooperation and partnership. Canada acknowledges these principles as it attempts to assist the Specific Claims Tribunal (“Tribunal”) in adjudicating matters brought before it.
2. Canada favours resolving claims made by Indigenous peoples through negotiation and settlement.
3. Canada acknowledges that the Enoch Cree Nation #440 (“Enoch Cree Nation”) is an adherent to Treaty No. 6, is a “band” within the meaning of section 2(1) of the *Indian Act*, and is a “First Nation” within the meaning of section 2 of the *Specific Claims Tribunal Act*, SC 2008, c 22 (“SCTA”).
4. This claim relates to whether Canada breached its obligations under Treaty No. 6, as well as its statutory and fiduciary duties, by expending certain monies on medical expenses for members of the Enoch Cree Nation during the period of 1909 to 1938.
5. Treaty No. 6 contains both a Relief clause and a Medicine Chest clause, both of which are set out in the Declaration of Claim.
6. Canada acknowledges that it expended monies from Indian Trust Fund Account No. 120, maintained by the Department of Indian Affairs for the Enoch Cree Nation (“Trust Account”), during the period of 1909 to 1938. Canada used these monies to pay for medicine and medical services provided to members of the Enoch Cree Nation.

7. At all material times, the *Indian Act* provided the Superintendent General of Indian Affairs with the authority to access the Trust Account of the Enoch Cree Nation for the relief of sick, disabled, aged or destitute members of the Enoch Cree Nation.
8. In the circumstances, the Department of Indian Affairs acted properly in accessing funds from the Trust Account in order to provide medicine and medical services to the members of the Enoch Cree Nation. There was no breach of the *Indian Act* since the *Indian Act* authorized the expenditure of monies from the Trust Account.
9. In addition, the 1908 Surrender (as described below) authorized the expenditure of monies from the Trust Account.
10. Furthermore, in expending monies from the Trust Account, Canada did not breach Treaty No. 6 or any fiduciary duties.

## **II. Status of Claim (R. 42(a))**

11. Canada admits that the requirements in section 16(1)(a) of the *SCTA* are satisfied as pleaded in paragraphs 2 to 4 of the Declaration of Claim. The particulars are as follows:
  - a. Enoch Cree Nation filed its specific claim with the Minister of Indian Affairs and Northern Development, now the Minister of Crown-Indigenous Relations (“Minister”), on July 15, 2010.
  - b. On August 28, 2012, Canada informed the Enoch Cree Nation that the Minister had decided not to accept the specific claim for negotiation. Canada acknowledges that this decision by the Minister satisfies the requirements of section 16(1)(a) of the *SCTA*.

### **III. Canada's Position Regarding the Validity of the Claim (R. 42(b) and (c))**

#### ***Limits on Jurisdiction – Section 14(1) of SCTA***

12. At paragraph 6 of the Declaration of Claim, the Enoch Cree Nation has relied upon sections 14(1)(a) and (c) of the *SCTA* as the statutory basis for its claim.
13. In response to the Enoch Cree Nation's reliance upon sections 14(1)(a) and (c) of the *SCTA*, Canada states:
  - a. The Declaration of Claim alleges, in part, a breach by Canada of its duty to fulfil the terms and conditions of Treaty No. 6 and, in particular, the Medicine Chest clause.
  - b. There are jurisdictional limits, however, on the types of breach of treaty that a claimant can pursue in a claim before the Tribunal.
  - c. Section 14(1)(a) of the *SCTA* allows a claimant to advance a claim for compensation based upon a failure by Canada to fulfil a legal obligation to provide lands or "other assets" under a treaty.
  - d. Pursuant to section 2 of the *SCTA*, the term "asset" means "tangible property".
  - e. Thus, to the extent that the Declaration of Claim is asserting that there was a breach of Treaty No. 6 due to a failure by Canada to provide medical-related treaty obligations to members of the Enoch Cree Nation, then Canada states that:
    - i. the medical-related treaty obligations do not constitute "assets";
    - ii. therefore, such medical-related treaty obligations do not fall within the scope of section 14(1)(a) of the *SCTA*.

- f. In response to the reliance upon section 14(1)(c) of the *SCTA*, Canada states that, in substance, the Enoch Cree Nation is pursuing a claim for medical-related treaty obligations. As such, this type of claim does not fall within the scope of this provision, and is not within the jurisdiction of the Tribunal.

***Limits on Jurisdiction – Section 15(1)(d) of SCTA***

14. Section 15(1)(d) of the *SCTA* provides:

**15. (1)** A First Nation may not file with the Tribunal a claim that

...

(d) concerns the delivery or funding of programs or services related to policing, regulatory enforcement, corrections, education, health, child protection or social assistance, or any similar programs or services;

15. To the extent that the Declaration of Claim is asserting that there was a failure by Canada to provide medicine or medical services to the members of the Enoch Cree Nation, then, this falls within the ambit of section 15(1)(d) of the *SCTA*. Thus, section 15(1)(d) of the *SCTA* prohibits the Enoch Cree Nation from filing such a claim with the Tribunal. Likewise, this statutory provision prohibits the Tribunal from hearing such a claim.

***Limits on Jurisdiction – Section 15(1)(g) of SCTA***

16. Section 15(1)(g) of the *SCTA* provides:

**15. (1)** A First Nation may not file with the Tribunal a claim that

...

(g) is based on treaty rights related to activities of an ongoing and variable nature, such as harvesting rights;

17. To the extent that the Declaration of Claim is asserting that there was a breach of Treaty No. 6 due to a failure by Canada to provide medicine or medical services to the members of the Enoch Cree Nation, then, this falls within the ambit of section 15(1)(g) of the *SCTA*. Thus, section 15(1)(g) of the *SCTA* precludes the Enoch Cree Nation from filing such a claim with the Tribunal. Likewise, this statutory provision prohibits the Tribunal from hearing such a claim.

*Merits*

18. Canada cannot agree that the facts establish a valid claim under the *SCTA*.
19. While Canada admits that it expended monies from the Trust Account, Canada states that the *Indian Acts*, in force at the relevant times, permitted such expenditures. In particular, Canada pleads and relies upon section 92(d) of the *Indian Act*, RSC 1906, c 81 ("*1906 Indian Act*"), and section 95(d) of the *Indian Act*, RSC 1927, c 98 ("*1927 Indian Act*").
20. Canada further states that the 1908 Surrender (as described below) authorized the expenditure of monies from the Trust Account.
21. Canada denies that it breached Treaty No. 6 or any statutory or fiduciary duties by expending monies from the Trust Account for medical expenses.
22. If the Tribunal should find that the claim of the Enoch Cree Nation is valid, Canada states that:
  - a. Sections 20(1)(a) to (c) of the *SCTA* may provide the basis for the Tribunal to award compensation.
  - b. This would be subject, however, to any applicable deduction or set-off from such compensation calculated in accordance with section 20(3) of the *SCTA*.

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

*Treaty No. 6*

23. In response to paragraph 7 of the Declaration of Claim, Canada admits that, in 1876, it entered into Treaty No. 6 with certain “Plain and Wood Cree and other Tribes of Indians” in what is now central Saskatchewan and Alberta.
24. In further response to paragraph 7 of the Declaration of Claim, Canada states that while the Enoch Cree Nation did not formally adhere to Treaty No. 6, Canada accepts that the Enoch Cree Nation adhered to Treaty No. 6 by way of its conduct. Canada also refers to its responses under heading, “V. Statements of Fact (R. 42(a))”, set out below.
25. In response to paragraph 8 of the Declaration of Claim, Canada admits that Treaty No. 6 contains a Relief clause and a Medicine Chest clause as quoted therein.
26. In response to paragraph 9 of the Declaration of Claim, Canada admits that, aside from Treaty No. 6, none of the other numbered treaties contains an express Relief clause or Medicine Chest clause. Canada further admits that the Relief clause and Medicine Chest clause were the result of the negotiations amongst the parties to Treaty No. 6.
27. In response to paragraph 10 of the Declaration of Claim, Canada states as follows:
  - a. Canada admits that treaty negotiations in relation to Treaty No. 6 took place, in part, at or near Fort Carlton in August 1876.

- b. Canada admits that the Honourable Alexander Morris, Lieutenant-Governor of the Province of Manitoba and the North-West Territories and one of the Treaty Commissioners (“Commissioner Morris”), arrived at Fort Carlton on or about August 15, 1876, and that the negotiations pertaining to Treaty No. 6 commenced at some point thereafter.
  - c. Canada further states, however, that Commissioner Morris and the other Treaty Commissioners (the Honourable James McKay and the Honourable William Joseph Christie) left Fort Carlton on or about August 31, 1876 and arrived at Fort Pitt on or about September 5, 1876. There were other negotiations pertaining to Treaty No. 6 at or near Fort Pitt and Battle River in September 1876.
  - d. Canada admits that the Cree Chiefs sought a treaty, at least in part, to transition to an agricultural way of life.
  - e. Canada states that its purposes for entering into Treaty No. 6 are set out in the text of the treaty itself, and include opening up land for settlement, ensuring peace, and obtaining a cession of land in exchange for various benefits, including entitlement to reserve lands.
28. In response to paragraph 11 of the Declaration of Claim, Canada acknowledges that Treaty No. 6 contemplates a solemn exchange of promises made by Canada and the various First Nation signatories and adherents to it, including, the Enoch Cree Nation.
29. In response to paragraphs 12 – 13 of the Declaration of Claim, Canada states that during the negotiations concerning Treaty No. 6:

- a. The representatives of the First Nations in attendance requested changes, in writing, to the initial offer made by the Treaty Commissioners. In part, the representatives of the First Nations sought some provision for the poor, unfortunate, blind and lame, and for a free supply of medicines or medicines free of cost.
- b. In terms of Relief:
  - i. “The Badger” is noted as requesting aid “when we cannot help ourselves and in case of troubles seen and unseen”;
  - ii. Mis-tah-wah-sis (also known as Mistawasis or Chief Big Child) indicated that they were not requesting food for every day, but “in case of famine or calamity”;
- c. In response, on the matter of Relief:
  - i. Commissioner Morris noted that he could not undertake the responsibility of promising provision for the poor, blind and lame. He noted that there are people in unfortunate circumstances in all parts of the Crown’s dominions. He further noted, “they must be left to the charity and kind hearts of the people. If you are prosperous yourselves, you can help your unfortunate brothers.”
  - ii. However, Commissioner Morris also noted that “some great sickness or famine stands as a special case.”
  - iii. Commissioner Morris explained that it was only in the case of a national famine or pestilence that the Crown would intervene.

- iv. Commissioner Morris noted that in “unforeseen circumstances” or “extraordinary circumstances”, they should trust in the generosity of the Queen.
  - v. Commissioner Morris indicated that, “if any great sickness or general famine overtook you, that on the Queen being informed of it by her Indian agent, she in her goodness would give such help as she thought the Indians needed.”
- d. In response to the request for a free supply of medicines, Commissioner Morris noted that, “[a] medicine chest will be kept at the house of each Indian Agent, in case of sickness amongst you.”
30. In response to paragraph 14 of the Declaration of Claim, Canada acknowledges that Commissioner Morris stated that a medicine chest would be kept at the house of each Indian agent.

***Events from 1909 to 1938***

31. In response to paragraph 15 of the Declaration of Claim, Canada acknowledges that various incidents of illness occurred over the period in question.

***Expenditure of Funds from the Trust Account of Enoch Cree Nation: 1909 to 1938***

32. In response to paragraph 16 of the Declaration of Claim:
- a. Canada admits that it expended approximately \$41,871.11 from the Trust Account on medicine and medical services between 1909 and 1938, and further states that such medicine and medical services were provided to members of the Enoch Cree Nation.

- b. Of this overall figure (of approximately \$41,871.11), the amount expended on medicine was \$5,459.66, with the balance being expended on medical services or other matters.
33. In response to paragraph 17 of the Declaration of Claim, Canada states as follows:
- a. On or about May 13, 1908, the Enoch Cree Nation surrendered for sale 6,300 acres on Indian Reserve No. 135 being composed of all of that area of land lying within Township 52, Range 25, West of the 4<sup>th</sup> Meridian (“1908 Surrender”).
  - b. The Governor in Council accepted the 1908 Surrender by Order in Council P.C. 1611 dated July 21, 1908.
  - c. The land sales resulting from the 1908 Surrender yielded approximately \$142,201.03 in principal and interest.
  - d. The terms of the 1908 Surrender are sufficiently broad to permit the payment of medical expenses (including medicine and medical services) from the Trust Account for the period of 1909 to 1938.
  - e. Similarly, the amount of income raised from the land sales (following the 1908 Surrender) was more than sufficient to cover the cost of the medical expenses (including medicine and medical services) during the period of 1909 to 1938.
34. In response to paragraph 18 of the Declaration of Claim, Canada acknowledges that, during the relevant period, the Department of Indian Affairs issued general instructions to Indian Agents from time to time. In addition, as a general matter, the Department of Indian Affairs sought to promote self-support among Indigenous persons. Canada denies the last sentence of paragraph 18 of the Declaration of Claim.

**V. Statements of Fact (R. 42(a))**

35. The Enoch Cree Nation was not present at the negotiations of Treaty No. 6 in 1876, and did not formally adhere to Treaty No. 6 at any point thereafter.
36. However, in or about 1880, Edgar Dewdney, Commissioner of Indian Affairs (“Commissioner Dewdney”), made arrangements with Tommy le Potac, also referred to as Tommy La Potac (“Tommy le Potac”) that: (i) if he could gather together a large number of Indians living around Edmonton, and claiming no Chief; (ii) then, Commissioner Dewdney would recommend that Tommy le Potac be placed in charge of this group, and this group would be given a reserve.
37. In or about August 1883, the Acting Deputy of the Superintendent General of Indian Affairs reported to the Superintendent General of Indian Affairs that:
  - a. Commissioner Dewdney was satisfied with the manner in which Tommy le Potac had carried out his share of the arrangement; and
  - b. Commissioner Dewdney recommended that the lands chosen by Tommy le Potac be set apart as a reserve.
38. In response, the Department of Indian Affairs agreed that the reserve should be surveyed.
39. In September 1884, J.C. Nelson, a Dominion Land Surveyor, completed a survey of 44.5 square miles of land located about six miles south-west of Edmonton on the trail to Stony Plain. These lands were confirmed as Indian Reserve No. 135 set aside for the Enoch Cree Nation by Order in Council P.C. 1151 dated May 17, 1889.
40. In accepting reserve lands and the other benefits of Treaty No. 6, Canada states that the Enoch Cree Nation adhered to Treaty No. 6 by way of its conduct.

41. Section 92(d) of the *1906 Indian Act* and section 95(d) of the *1927 Indian Act* provided that the Superintendent General of Indian Affairs may “whenever sick or disabled, or aged or destitute Indians are not provided for by the band of which they are members, furnish sufficient aid from the funds of the band for the relief of such sick, disabled, aged or destitute Indians.”
42. Section 92(d) of the *1906 Indian Act* was in effect from January 31, 1907 to February 1, 1928 (when the *1906 Indian Act* was repealed and replaced by the *1927 Indian Act*). Section 95(d) of the *1927 Indian Act* was in effect from February 1, 1928 to September 4, 1951. As a result, either section 92(d) of the *1906 Indian Act* or section 95(d) of the *1927 Indian Act* were in effect at all relevant times (i.e., from 1909 to 1938). These provisions provided the Superintendent General of Indian Affairs with the authority to access the Trust Account of the Enoch Cree Nation for the relief of sick, disabled, aged or destitute members of the Enoch Cree Nation.

## **VI. Relief (R. 42(f))**

43. Canada seeks the following relief:
  - a. Dismissal of the claim in its entirety (including the claim for solicitor-client costs of this proceeding, and the costs incurred in the Specific Claims process);
  - b. In the alternative, if the Tribunal finds Canada liable to pay compensation to the Enoch Cree Nation as alleged, or at all, then Canada relies upon section 20(3) of the *SCTA* in order to claim a deduction or set-off of the value of any benefit received by the Enoch Cree Nation from such compensation deemed to be owed;
  - c. Costs; and
  - d. Such further relief as Canada may request and this Tribunal deems just.

**VII. Communication (R. 42(g))**

44. Canada's address for the service of documents is:

Department of Justice Canada  
Prairie Region (Edmonton Office)  
300 EPCOR Tower, 10423 – 101 Street  
Edmonton, Alberta T5H 0E7  
Attention: Shaun Mellen / Tanya Knobloch

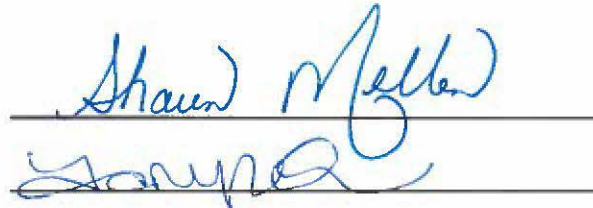
45. The facsimile number for service of documents on Canada is 780-495-2964.

46. The e-mail addresses for the service of documents on Canada are:

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**DATED** at the City of Edmonton, in the Province of Alberta, this 5th day of February 2020.

The image shows two handwritten signatures in blue ink. The top signature is "Shaun Mellen" and the bottom signature is "Tanya Knobloch". Each signature is written above a horizontal line.

**ATTORNEY GENERAL OF CANADA**

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