

March 9, 2020

Dragisa Adzic

SCT File No.: SCT-6003-19

Ottawa, ON

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## SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

ENOCH CREE NATION #440

Claimant

v.

HER MAJESTY THE QUEEN IN RIGHT OF CANADA  
As represented by the Minister of Crown-Indigenous Relations

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 & Melanie Webber**  
300, 602 – 12<sup>th</sup> Avenue SW  
Calgary, Alberta T2R 1J3  
Tel: 403-266-1201  
Fax: 403-266-2701  
Email: [rmaurice@mauricelaw.com](mailto:rmaurice@mauricelaw.com) / [rlake@mauricelaw.com](mailto:rlake@mauricelaw.com) /  
[mwebber@mauricelaw.com](mailto:mwebber@mauricelaw.com)

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. Canada is open to using the processes of the Tribunal to facilitate the resolution of issues and to narrow the matters for determination.
3. Canada acknowledges that the Enoch Cree Nation #440 (“Enoch Cree Nation”) is an adherent to Treaty No. 6.
4. The Enoch Cree Nation’s Declaration of Claim relates to whether Canada breached its obligations under Treaty No. 6, as well as its fiduciary duties, by failing to provide the Enoch Cree Nation with its full entitlement of reserve land.
5. Treaty No. 6 entitles the Enoch Cree Nation to an amount of reserve land based upon one square mile for each family of five, or in that proportion for larger or smaller families. This amounts to a Treaty Land Entitlement (“TLE”) calculation of 128 acres per person.
6. The Enoch Cree Nation’s TLE is calculated having regard, in part, for its population on the date of first survey (“DOFS”) which, in this case, was September 1884.
7. The amount of reserve land set aside for the use and benefit of the Enoch Cree Nation actually exceeded the amount that it was entitled to receive under Treaty No. 6 as of the DOFS. Consequently, Canada is of the view that there is no TLE shortfall, nor any breach of Treaty No. 6 or any fiduciary duties owed to the Enoch Cree Nation.

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

8. Canada admits that the requirements in section 16(1)(a) of the *Specific Claims Tribunal Act*, SC 2008, c 22 (“*SCTA*”) are satisfied as pleaded in paragraphs 2 to 4 of the Declaration of Claim. The particulars are:
  - a. Enoch Cree Nation’s TLE Shortfall Claim was received by the Minister of Indian Affairs and Northern Development, now the Minister of Crown-Indigenous Relations (“Minister”), on March 23, 2010.
  - b. Enoch Cree Nation’s TLE Shortfall Claim was filed with the Minister on May 5, 2010.
  - c. On April 2, 2013, Canada advised the Enoch Cree Nation that its TLE Shortfall Claim did not disclose a TLE shortfall. 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))**

9. Canada does not accept the validity of the claim set out in the Declaration of Claim.
10. Canada denies that it breached Treaty No. 6 or any fiduciary duties in the setting apart of reserve land for the use and benefit of the Enoch Cree Nation. Canada has fully satisfied its Treaty obligation to set aside reserve land for the use and benefit of the Enoch Cree Nation.
11. 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 is 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))**

***Pleading of Evidence***

- 12. In response to the whole of the Declaration of Claim, and to paragraphs 8 – 13 in particular, Canada states that the Enoch Cree Nation has pleaded evidence contrary to Rule 39 of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119. Despite this, Canada has attempted to respond to the Declaration of Claim in a substantive manner.

***Enoch Cree Nation***

- 13. In response to paragraph 1 of the Declaration of Claim, Canada acknowledges that the Enoch Cree Nation is an adherent to Treaty No. 6, is a “band” within the meaning of section 2(1) of the *Indian Act*, RSC 1985, c I-5, and is a “First Nation” within the meaning of section 2 of the *SCTA*.
- 14. In further response to paragraph 1 of the Declaration of Claim:
  - a. Canada acknowledges and accepts that the Enoch Cree Nation adhered to Treaty No. 6 by way of its conduct.
  - b. Thus, the Enoch Cree Nation is an adherent to Treaty No. 6 even though it was not present at the negotiations of Treaty No. 6 in 1876, and did not formally adhere to Treaty No. 6 (by signing onto Treaty No. 6) at any point thereafter.

*Treaty No. 6*

15. In response to paragraph 7 of the Declaration of Claim, Canada acknowledges that:
- a. In 1876, Canada entered into Treaty No. 6 with certain “Plain and Wood Cree and the other Tribes of Indians” in what is now central Saskatchewan and Alberta.
  - b. Treaty No. 6 provided for the yielding up of Aboriginal title to approximately 121,000 square miles of land in exchange for certain promises and benefits. These included reserve lands being set apart for the signatories and adherents to Treaty No. 6 in the amount of one square mile for each family of five, or in that proportion for larger or smaller families. Canada acknowledges that this amounts to 128 acres per person.

*Indian Reserve No. 135*

16. In response to paragraph 8 of the Declaration of Claim, Canada admits that:
- a. In or about 1881, certain individuals - who later became members of the Enoch Cree Nation – received annuities, pursuant to Treaty No. 6, as stragglers.
  - b. In or about September 1882, these individuals received annuities, pursuant to Treaty No. 6, under the “Tommy LePotac Band” (later known as the Enoch Cree Nation).
  - c. The 1881 Annual Report of the Department of Indian Affairs listed “Tommy la Potack” under Farm No. 17.

- d. In response to the remainder of paragraph 8 of the Declaration of Claim, Canada states that the reference in the 1881 Annual Report to “1 dwelling, 1 granary, 2 stables, 1 large root house” relates to “Mah-mah-nah-wah-tow”, and not to “Tommy la Potack”.
17. In response to paragraphs 9 to 11 of the Declaration of Claim, Canada states that:
- a. In or about 1880, Edgar Dewdney, Commissioner of Indian Affairs (“Commissioner Dewdney”), made arrangements with Tommy le Potac, also referred to at various times as “Tommy LePotac”, “Tommy La Potac”, and “Tommy la Potack” (collectively, “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.
  - b. In or about July 1883, the Department of Indian Affairs inspected the lands upon which Tommy le Potac and others had settled, and prepared a report on the nature of the lands, the improvements which had been made and cultivation undertaken, the extent of timber and hay on the lands, and the approximate number of heads of families who might settle upon the lands once they had been set apart as reserve lands (“July 1883 Report”).
  - c. In or about August 1883, Commissioner Dewdney forwarded the July 1883 Report to the Office of the Superintendent General of Indian Affairs, along with his written recommendation that the lands upon which Tommy le Potac had settled be set apart as a reserve.
  - d. In or about August 1883, the Acting Deputy of the Superintendent General of Indian Affairs recommended to the Superintendent General of Indian Affairs that he exercise his authority to bring Commissioner Dewdney’s recommendation into effect.

- e. In or about September 1883, the Superintendent General of Indian Affairs indicated that a survey of a reserve for “Tommy le Potac’s Band” should proceed at once.
18. In response to paragraph 12 of the Declaration of Claim, Canada admits that this paragraph is generally accurate in summarizing and quoting from a letter written by John C. Nelson, the Dominion Land Surveyor, to Samuel Lucas, Dominion Land Surveyor, dated September 30, 1883.
19. In further response to paragraph 12 of the Declaration of Claim, and in partial response to paragraph 13 of the Declaration of Claim:
- a. Canada states that the ultimate survey of land for the Enoch Cree Nation, as described in more detail below, was not limited to 10.2 square miles or 6,528 acres.
  - b. Canada admits that:
    - i. If a reserve consisting of 6,528 acres had been surveyed for the Enoch Cree Nation in or about 1883, this would have been sufficient land for 51 individuals (having regard for the reserve land clause in Treaty No. 6); and
    - ii. The population of the Enoch Cree Nation in 1883 exceeded 51 individuals.
  - c. Canada states, however, that the survey of reserve land for the Enoch Cree Nation was not carried out in 1883.

20. In response to paragraphs 13 and 14 of the Declaration of Claim, and in partial response to paragraph 23 of the Declaration of Claim, Canada admits that:
- a. In or about September 1884, John C. Nelson, Dominion Land Surveyor, surveyed a reserve of 44.5 square miles (or approximately 28,480 acres) for the Enoch Cree Nation.
  - b. Based upon 128 acres per person, this reserve amounted to land for 222 persons.
  - c. This reserve was designated as Indian Reserve No. 135 (“I.R. No. 135”) and was confirmed by Order in Council P.C. No. 1151 dated May 17, 1889.

*Indian Reserve No. 135A*

21. In response to paragraph 15 of the Declaration of Claim, and in partial response to paragraph 23 of the Declaration of Claim:
- a. Canada admits that:
    - i. Additional lands were set apart as reserve lands for the use and benefit of the Enoch Cree Nation; and
    - ii. These reserve lands have been designated as Indian Reserve No. 135A (“I.R. No. 135A”).
  - b. Canada states, however, that I.R. No. 135A was set apart by Order in Council P.C. No. 1995-226 dated February 14, 1995, and not “1895”.
  - c. Further, in terms of its quantum of land, I.R. No. 135A consists of 5 acres, more or less.

*Passpasschase Indian Reserve No. 136 / Amalgamation Agreement*

22. In response to paragraph 16 of the Declaration of Claim, Canada states that:
- a. Passpasschase, also known by a number of different variants, including, Pahs-Pahs-Chase and Papaschase (“Passpasschase”), adhered to Treaty No. 6 on August 21, 1877 at Fort Edmonton.
  - b. In or about September 1884, John C. Nelson, Dominion Land Surveyor, surveyed a reserve of approximately 39.9 square miles for the Passpasschase First Nation.
  - c. This reserve was designated Indian Reserve No. 136 (“I.R. No. 136”) and was confirmed by Order in Council P.C. No. 1151 dated May 17, 1889.
23. In response to paragraphs 17 to 19 of the Declaration of Claim:
- a. Canada admits that, between 1885 and 1886, 114 members of the Passpasschase First Nation, including Chief Passpasschase and his family, voluntarily elected to take scrip and to withdraw from Treaty No. 6.
  - b. Canada states that:
    - i. By December 1886 (or thereabouts), the remaining (or at least many of the remaining) members of the Passpasschase First Nation had expressed an interest in joining the Enoch Cree Nation;
    - ii. In or about November 1888, members of the Passpasschase First Nation voted to surrender I.R. No. 136; and
    - iii. By Order in Council P.C. No. 2329 dated October 12, 1889, the Governor in Council accepted the surrender of I.R. No. 136.

- c. Canada admits that, on or about January 24, 1894, the Enoch Cree Nation entered into an amalgamation agreement with the Passpasschase First Nation which provided, among other things, that:
  - i. The members of the Passpasschase First Nation and their descendants were admitted as members into the Enoch Cree Nation, and were entitled to an undivided interest in all land and other privileges; and
  - ii. In return, the members of the Passpasschase First Nation agreed that the Enoch Cree Nation and its descendants were entitled to a joint and undivided interest in all benefits that have accrued, or may accrue, from the sale of the lands of I.R. No. 136.
- d. Canada states that, by 1902, the lands comprising I.R. No. 136 had been sold. The proceeds from the sales of land were placed into a trust account for the benefit of the Enoch Cree Nation.

***Response to the Alleged Breach of Treaty and Fiduciary Obligations***

- 24. In response to paragraph 20 of the Declaration of Claim, Canada denies it has an outstanding lawful obligation to the Enoch Cree Nation for reserve land pursuant to Treaty No. 6, and further denies that it breached any fiduciary obligations.

### ***TLE Shortfall Policy***

25. In response to paragraph 21 of the Declaration of Claim:
- a. Canada admits that, in or about October 1998, Canada drafted the *Historic Treaty Land Entitlement (TLE) Shortfall Policy Validation Criteria and Research Guidelines* (“TLE Shortfall Policy”). The TLE Shortfall Policy sets out the policy criteria used to determine whether or not a First Nation has a TLE shortfall.
  - b. Canada denies that the Enoch Cree Nation has an outstanding TLE shortfall regardless of whether such claim is based upon the TLE Shortfall Policy or the requirements at law.

### ***Date of First Survey for the Enoch Cree Nation – September 1884***

26. Canada admits paragraph 22 of the Declaration of Claim, and expressly states that:
- a. The survey conducted by John C. Nelson in or about September 1884, which led to the establishment of I.R. No. 135, constitutes the first survey of reserve land for the Enoch Cree Nation.
  - b. On or about October 15, 1884, the Department of Indian Affairs compiled a payroll of the members of the “Enoch Lepotac Band” (now known as the Enoch Cree Nation) who received annuities at Stony Plain pursuant to Treaty No. 6 (“October 15, 1884 Paylist”).
  - c. In assessing whether the Enoch Cree Nation had a TLE shortfall, Canada used the October 15, 1884 Paylist as the base payroll (or, starting point) for its analysis.

***Quantum of Reserve Land set aside for the Enoch Cree Nation under Treaty No. 6***

27. In response to paragraph 23 of the Declaration of Claim:
- a. Canada repeats and relies upon paragraphs 20 and 21 of this Response.
  - b. Canada further states that the total acreage received by the Enoch Cree Nation – as reserve land pursuant to Treaty No. 6 – amounts to approximately 28,485 acres. This consists of 28,480 acres of land in I.R. No. 135 and 5 acres of land in I.R. No. 135A.

***Enoch Cree Nation's Population at DOFS for TLE Purposes***

28. In response to paragraph 24 of the Declaration of Claim:
- a. Canada admits that it uses the TLE Shortfall Policy to assist in determining a First Nation's TLE.
  - b. Canada states that the phrase appearing in quotations in the first sentence of paragraph 24 of the Declaration of Claim does not come from the TLE Shortfall Policy.

***Response to Enoch Cree Nation's Alleged TLE Shortfall***

29. In response to paragraphs 27 to 31 of the Declaration of Claim, Canada states as follows:
- a. Canada set apart approximately 28,485 acres as reserve land for the use and benefit of the Enoch Cree Nation pursuant to Treaty No. 6.
  - b. Canada admits that this equates to sufficient land for 222 individuals (based upon 128 acres per person).

- c. Canada denies that this amounts to a TLE shortfall owing to the Enoch Cree Nation.
- d. Instead, Canada states that the Enoch Cree Nation received a surplus of reserve land, for TLE purposes, pursuant to Treaty No. 6.
- e. Having regard for the TLE Shortfall Policy, Canada states as follows:
  - i. The DOFS population of the Enoch Cree Nation (inclusive of the Base List, Arrears and Absentees) – as of 1884 – was 165 persons;
  - ii. In addition, there were 40 persons eligible to be considered, and counted, as Late Additions (inclusive of Landless Transfers, Late Adherents and Non-Treaty individuals);
  - iii. Thus, the Adjusted DOFS population for the Enoch Cree Nation was 205 individuals;
  - iv. Based upon this Adjusted DOFS population, the Enoch Cree Nation was entitled to have 26,240 acres of reserve land set aside for it pursuant to Treaty No. 6 (i.e., 205 persons multiplied by 128 acres per person);
  - v. As noted above, the Enoch Cree Nation received 28,485 acres of reserve land, pursuant to Treaty No. 6;
  - vi. Therefore, the Enoch Cree Nation has received a surplus of 2,245 acres (i.e., 28,485 acres minus 26,240 acres) of TLE land; and
  - vii. Consequently, no TLE shortfall exists.

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

***General***

30. Canada relies upon the facts set out under heading “IV. Allegations of Fact – Declaration of Claim”.

***Treaty No. 6***

31. In 1876, Canada entered into Treaty No. 6 with certain “Plain and Wood Cree and the other Tribes of Indians” in what is now central Saskatchewan and Alberta.
32. First Nations which signed or adhered to Treaty No. 6 were entitled to have reserve lands set apart for their use and benefit in the amount of one square mile for each family of five, or in that proportion for larger or smaller families. This amounts to a TLE of 128 acres per person.
33. The Enoch Cree Nation adhered to Treaty No. 6 by way of its conduct.

***Indian Reserve No. 135***

34. In or about 1880, Commissioner Dewdney made arrangements with 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.
35. In or about July 1883, an employee of the Department of Indian Affairs inspected the lands upon which Tommy le Potac and others had settled. These lands were about eight miles away from Edmonton. As a result of the inspection, the employee issued the July 1883 Report.

36. In or about August 1883, Commissioner Dewdney forwarded the July 1883 Report to the Office of the Superintendent General of Indian Affairs, along with his written recommendation that the lands upon which Tommy le Potac had settled be set apart as a reserve.
37. In or about August 1883, the Acting Deputy of the Superintendent General of Indian Affairs recommended to the Superintendent General of Indian Affairs that he exercise his authority to bring Commissioner Dewdney's recommendation into effect.
38. In or about September 1883, the Superintendent General of Indian Affairs indicated that a survey of a reserve for "Tommy le Potac's Band" should proceed at once.
39. In or about September 1884, John C. Nelson, Dominion Land Surveyor, surveyed a reserve of 44.5 square miles (or approximately 28,480 acres) for the Enoch Cree Nation.
40. This reserve was designated I.R. No. 135 and was confirmed by Order in Council P.C. No. 1151 dated May 17, 1889.

***Indian Reserve No. 135A***

41. By way of Order in Council P.C. No. 1995-226 dated February 14, 1995, additional lands (consisting of 5 acres, more or less) were set apart as reserve lands for the use and benefit of the Enoch Cree Nation. These reserve lands have been designated as I.R. No. 135A.

***Quantum of Reserve Land set aside for the Enoch Cree Nation under Treaty No. 6***

42. In total, the Enoch Cree Nation has received approximately 28,485 acres as reserve land pursuant to Treaty No. 6.

*Members of Passpasschase First Nation Already Counted for TLE Purposes*

43. Passpasschase adhered to Treaty No. 6 on August 21, 1877 at Fort Edmonton.
44. In or about September 1884, a reserve of approximately 39.9 square miles was surveyed for the Passpasschase First Nation. This reserve was designated I.R. No. 136 and was confirmed by Order in Council P.C. No. 1151 dated May 17, 1889.
45. While Canada acknowledges that the Passpasschase First Nation later surrendered I.R. No. 136, and that certain members of the Passpasschase First Nation subsequently joined the Enoch Cree Nation, Canada states as follows:
  - a. The members of the Passpasschase First Nation had already been counted for TLE purposes as part of the Passpasschase First Nation (whose DOFS was September 1884).
  - b. As a result, as a matter of law, the members of the Passpasschase First Nation are not to be counted again for the purpose of establishing the Enoch Cree Nation's TLE.

*TLE Surplus*

46. Canada set apart approximately 28,485 acres as reserve land for the use and benefit of the Enoch Cree Nation pursuant to Treaty No. 6. This equates to sufficient land for 222 individuals (based upon 128 acres per person).
47. The Adjusted DOFS population for the Enoch Cree Nation amounts to 205 persons. This amounts to a TLE pursuant to Treaty No. 6 of 26,240 acres (i.e., 205 persons multiplied by 128 acres per person).
48. Therefore, the Enoch Cree Nation has received a TLE surplus of 2,245 acres (i.e., 28,485 acres minus 26,240 acres). Consequently, no TLE shortfall exists.

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

49. Canada seeks the following relief:

- a. Dismissal of the Declaration of Claim in its entirety (including 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))**

50. 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

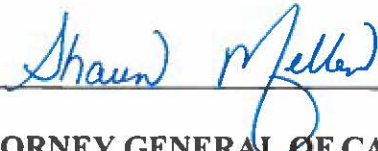
Attention: Shaun Mellen

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

52. The e-mail address for the service of documents on Canada is:

[shaun.mellen@justice.gc.ca](mailto:shaun.mellen@justice.gc.ca)

DATED at the City of Edmonton, in the Province of Alberta, this 9th day of March 2020.



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**ATTORNEY GENERAL OF CANADA**

Department of Justice Canada  
Prairie Region (Edmonton Office)  
300 EPCOR Tower  
10423 – 101 Street  
Edmonton, Alberta  
T5H 0E7  
Fax: 780-495-2964

**Per: Shaun Mellen**

Tel: (780) 495-5307  
Email: [shaun.mellen@justice.gc.ca](mailto:shaun.mellen@justice.gc.ca)

Counsel for the Respondent  
Her Majesty the Queen in Right of Canada