

SPECIFIC CLAIMS TRIBUNAL

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TRIBUNAL DES REVENDICATIONS PARTICULIÈRES		
F I L E D	September 15, 2022	D É P O S É
Alexandre Bois		
Ottawa, ON	5	

B E T W E E N:

MONTANA FIRST NATION

Claimant

and

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

Respondent

RESPONSE

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

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
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Counsel for the Claimant
Montana First Nation

I. Overview

1. The Respondent, His Majesty the King in Right of Canada (Canada), acknowledges that Montana First Nation is entitled to the benefits of Treaty No. 6, is a band within the meaning of the *Indian Act*, and is a First Nation within the meaning of the *Specific Claims Tribunal Act (SCTA)*.
2. 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 endeavours to embody these principles as it attempts to assist the Specific Claims Tribunal (Tribunal) in adjudicating matters brought before it.
3. This Declaration of Claim relates to whether Canada breached its treaty and fiduciary obligations to Montana First Nation by failing to satisfy the full entitlement of reserve lands, and failing to act reasonably and with diligence in confirming a reserve for Montana First Nation in 1896 (the Claim).
4. Canada attempted to pursue negotiations with Montana First Nation in 2021 regarding a potential treaty land entitlement (TLE) shortfall as at 1909 (1909 TLE Shortfall). Those negotiations did not proceed as the scope of the allegations submitted in that claim exceeded the asserted TLE shortfall in 1909. Canada remains willing to use the Tribunal's processes to resolve the 1909 TLE Shortfall issue with Montana First Nation.
5. The Tribunal should decline to consider this Claim as pleaded because the Federal Court substantially adjudicated the same issues in *Montana Band v Canada*, 2006 FC 261. The Court determined that Montana First Nation's (then Montana Band) entitlement to the use and benefit of Indian Reserve No. 139 (IR 139) did not vest prior to 1909. The Federal Court of Appeal affirmed this decision in *Montana First Nation v Canada*, 2007 FCA 218.

6. Should this Claim proceed before the Tribunal as pleaded, it would result in a re-litigation of previously determined matters, contrary to the doctrines of *res judicata* and issue estoppel.

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

7. Canada admits that the requirements in section 16(1)(a) of the *SCTA* are satisfied as pleaded in paragraphs 2 to 4 of the Claim. The particulars are:
 - i. Montana First Nation filed a TLE shortfall claim with the Minister of Crown-Indigenous Relations and Northern Affairs Canada (Minister) on July 25, 2018 (2018 TLE Claim).
 - ii. On July 23, 2021, the Minister wrote to Montana First Nation seeking a negotiated settlement of the 2018 TLE Claim provided that the calculation would be based on the Date of First Survey, which for the Montana First Nation is in 1909.
 - iii. In the same letter, Canada advised Montana First Nation that it would not negotiate the 2018 TLE Claim based on the scope of the submissions in the claim, which go well beyond an alleged TLE shortfall in 1909.
 - iv. Canada acknowledges that this decision by the Minister satisfies the requirements of section 16(1)(a) of the *SCTA*.
8. With respect to paragraphs 5 to 6, and the whole of the Claim, this Claim is based on the same facts and issues substantially determined by the Federal Court in 2006 and affirmed by the Federal Court of Appeal in 2007. If the Tribunal process advances, it would amount to a re-litigation of these issues, contrary to the principles of *res judicata* and issue estoppel. These doctrines are meant to ensure the finality of judgments and conserve judicial resources by protecting litigants from advancing duplicative litigation involving the same issues.

9. The only outstanding issue left open by the Court is Montana First Nation's potential entitlement to the 1909 TLE Shortfall.

Res Judicata and Issue Estoppel Apply to Montana First Nation's Claim

10. Montana First Nation commenced a claim by statement of claim in 1985 in the Federal Court of Canada.

11. The statement of claim included the following allegations:

- i. IR 139 was surveyed and set apart for the Bobtail Band in 1885. The Bobtail Band dispersed and ceased to exist leaving no members with rights to the reserve. Therefore, Bobtail Band's interest in IR 139 was extinguished. Despite this fact, Canada continued to recognize IR 139 as a reserve.
- ii. Department of Indian Affairs officials set apart IR 139 for Montana Band in 1896 when approximately 150 Cree Indians were settled permanently on the vacant Bobtail Band reserve.
- iii. The June 12, 1909, surrender of IR 139 from the Bobtail Band was invalid, as Bobtail Band's interest in IR 139 had extinguished.
- iv. Montana First Nation was the only First Nation entitled to the use and benefit of IR 139 from the time it settled on the reserve up to and including June 12, 1909.

12. At the time of the trial, three different First Nations claimed beneficial ownership of the former IR 139, including Montana First Nation.

13. The Federal Court 2006 judgment finally determined the three main questions set down for trial in the claim (2006 FC Decision). The Court held that:

- i. None of the three First Nations, including Montana First Nation, were entitled to the use and benefit of the lands comprising IR 139 prior to June 12, 1909;
 - ii. A surrender of IR 139 was unnecessary; however, if it was necessary, it was invalid; and
 - iii. Montana First Nation was entitled to the use and benefit of ten square miles on IR 139 purportedly set aside for it in a Surrender Agreement in 1909.
14. Montana First Nation admits these issues are barred by *res judicata* at paragraph 41 of its Claim before this Tribunal.
15. The 2006 FC Decision did not address the issue of Montana First Nation's alternative claim to a TLE shortfall in IR 139 as at 1909. Therefore, this is the only outstanding issue between the parties.
16. In 2007, the Federal Court of Appeal affirmed the judgment in the 2006 FC Decision, but varied the answer to the second question to remove the words, "however, if it was necessary, it was invalid".
17. As a result of the 2006 FC Decision, Montana First Nation's Claim is *res judicata* to the extent that the Claim asserts:
 - i. Canada breached its treaty obligations and fiduciary duties to Montana First Nation by failing to provide it with its "full reserve entitlement" in 1896; and
 - ii. Canada breached its fiduciary duties by failing to act reasonably and with diligence in setting aside a reserve for Montana First Nation in 1896.

18. This Claim substantially amounts to a re-litigation of these issues as it asserts matters the Federal Court finally determined in 2006, upheld on appeal in 2007.

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

19. Canada does not accept the validity of the Claim as pleaded.

20. Canada denies that it breached its treaty obligations and fiduciary duties in the setting apart of reserve land for the use and benefit of Montana First Nation in 1909.

21. In response to paragraph 7 of the Claim, Canada admits that a First Nation may file a claim for compensation for any losses arising from the grounds in section 14 of the *SCTA*.

22. Canada acknowledges that it is open to the Tribunal to find the Claim is valid, if the Claim is properly framed to include only the one remaining issue left open by the courts.

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

23. In response to the whole of the Claim, Canada states that to the extent these allegations are inconsistent with the findings of fact or mixed fact and law made in the 2006 FC Decision, Canada does not accept them. Canada relies upon the findings of fact in the 2006 FC Decision.

24. Canada admits the allegations in paragraph V.(a) and paragraphs 9 to 14, and 16 to 19 with the following clarifications:

- i. In response to paragraphs 9 and 14, Canada admits that Big Bear's two sons adhered to Treaty No. 6 in November 1882 with some of Big Bear's followers. Big Bear adhered on December 6, 1882.

- ii. In response to paragraph 10, Canada admits that Treaty No. 6 provides that government officials send a suitable person to determine and set apart the reserves for each band, after consulting with each band as to their preferred location for the reserve.
- iii. In further response to paragraph 14, Canada admits that, “[a]s a result of severe poverty and hunger in his camp, Big Bear finally succumbs to growing pressure within his band and agrees to adhere to Treaty No. 6.” On December 6, 1882, Big Bear signed an adhesion; however, he did not select a reserve. [2006 FC Decision, para 110]
- iv. In response to paragraph 16, Canada only admits that there were poor living conditions among the Cree and government officials recommended addressing their concerns.
- v. In response to paragraph 17, Canada admits that Big Bear unsuccessfully requested a reserve for his followers next to Poundmaker’s Reserve.
- vi. In response to paragraph 19, Canada admits only that in 1885 the Métis proclaimed a provisional government at Batoche under the leader Louis Riel.

25. Canada has no knowledge of the facts pleaded in paragraph 15.

26. Canada admits the facts in paragraph 20, specifically that the Northwest Rebellion started on March 26, 1885, with a clash between Riel’s Métis forces and the North-West Mounted Police at Duck Lake and a number of incidents involved Chief Big Bear and other members of his First Nation. Canada has no knowledge that “[r]eports on the Indians’ participation in the events of the short-lived Rebellion were greatly exaggerated.” Canada admits that the Rebellion ended with Louis Riel’s surrender on May 15, 1885.

27. Canada admits the facts in paragraph 21 regarding post Northwest Rebellion actions by Canada.
28. Canada admits the facts in paragraph 22; specifically, Canada admits that due to the outbreak of the Northwest Rebellion, Chief Big Bear and his band never settled on the reserve.
29. In response to paragraph 23, Canada states that in November 1882, Big Bear continued to refuse to sign the treaty. His sons, Little Bear and Twin Wolverine adhered to treaty and accepted annuities. Many of Big Bear's followers also accepted annuities.
30. In response to paragraph 24, Canada admits that Big Bear was found guilty of treason and sentenced to three years at Stony Mountain Penitentiary. He was released before his full term was served and died in January 1888.
31. Canada admits the facts in paragraphs 25 to 27 regarding First Nations' members residing in Montana after the Northwest Rebellion and Little Bear's return to Canada in 1896.
32. In response to paragraph 28, Canada states that the facts pleaded constitute legal argument and evidence contrary to paragraph 39 of the Rules. To the extent that these allegations may be characterized as statements of fact, Canada states that, in November 1896, 151 people in "Little Bear's Band" were paid treaty annuities in Hobbema. The Paylist evidenced forty-eight heads of families. Ten individuals refused payment and Little Bear was paid \$15.00 as a headman.
33. Canada admits paragraph 29 with the following clarification:
 - i. "Turning first to the question as to when the Montana Cree became an *Indian Act* band, based on my earlier analysis, this occurred as early as 1896 when 151 Indians were paid annuities as members of "Little Bear's Band". The fact that the group shrank considerably in size over the next few

years is immaterial. It is equally immaterial that Chief Little Bear left the band and returned to Montana. There is no question, however, that it was a band within the meaning of the *Indian Act* by 1899, when 45 Indians were paid as members of the "Montana Band," as it continues to be known today." [2006 FC Decision 642]

34. Canada admits paragraph 30 regarding Canada's consideration of where the "Montana Band" would reside.
35. In response to paragraph 31, Canada admits that Canada considered where to settle the "Montana Cree" and decided on IR 139 rather than Sharphead IR 141.
36. Canada admits paragraph 32 that Canada paid treaty annuities to 151 people in "Little Bear's Band" in November 1896.
37. Canada admits paragraph 33 in that in 1885, J.C. Nelson, the Dominion Land Surveyor, surveyed IR 139 consisting of 31.5 square miles for the Bobtail Band, which was confirmed by Order in Council 1151 on May 17, 1889.
38. Canada admits the facts in paragraph 34 in that in February 1897, Little Bear traveled to Ottawa with Rev. McDougall who acted as his interpreter. During that visit to Ottawa, it was decided that 200 Indians would be recognized as a band under the chieftainship of Little Bear, and should be given the reserve that was previously occupied by Chief Bob Tail's band on the Battle River. As well, they were to be provided with stock, implements, and rations and to be treated in all respects as other Indians. Further, any treaty monies they were entitled to would be forfeited due to their absence.
39. With respect to paragraph 35, Canada states that the facts pleaded constitute legal argument and evidence contrary to paragraph 39 of the Rules. Canada admits only that by the fall of 1896, Montana Cree were given livestock, implements, and

- provisions and in the spring of 1897, Montana Cree started to build homes and cultivate land on the south side of the Battle River with the assistance of Canada.
40. In response to paragraph 36, Canada states that the facts pleaded constitute legal argument and evidence contrary to paragraph 39 of the Rules. Canada does not accept these statements as fact.
41. In response to paragraph 37 of the Claim, Canada states that it obtained a surrender of 31.5 square miles of IR 139 from former members of Bobtail's band on behalf of the Bobtail Band in 1909. Canada admits that the surrender was confirmed by Order in Council P.C. 1674 and the surrender document and Order in Council stated that ten square miles were allotted to the "Montana Band" as reserve.
42. Canada admits that the issue of whether Montana First Nation had a reserve interest in IR 139 as of 1896 was litigated in *Montana Band v Canada*, 2006 FC 261, [2006] 3 CNLR 70, 287 FTR 159, affirmed in *Montana First Nation v Canada*, 2007 FCA 218, 370 NR 237, as pleaded in paragraph 38 of the Claim.
43. In response to paragraph 39 of the Claim, Canada admits that this claim has been substantially determined by the courts.
44. In response to paragraph 40, Canada states that facts for the purposes of this Claim cannot be considered separately from the facts and legal conclusions determined in the 2006 FC Decision. Canada agrees with Montana First Nation's summary of the factual findings made in the 2006 FC Decision with the following clarification:
- i. "[T]he Montana Cree became an *Indian Act* band, based on my earlier analysis, this occurred as early as 1896 when 151 Indians were paid annuities as members of "Little Bear's Band". The fact that the group shrank considerably in size over the next few years is immaterial. It is equally immaterial that Chief Little Bear left the band and returned to Montana. There is no question, however, that it was a band within the

meaning of the *Indian Act* by 1899, when 45 Indians were paid as members of the "Montana Band," as it continues to be known today." (2006 FC Decision, para 642]

45. Canada admits that paragraph 41 is generally accurate in summarizing the issues determined in the 2006 FC Decision.
46. In response to paragraph 42, Canada does not accept that Montana First Nation has an outstanding TLE shortfall based on the scope of this Claim. Canada further states that Montana First Nation's Claim is *res judicata*.
47. Canada asserts that the statements in paragraphs 43 and 44 to 57 constitute legal argument and evidence contrary to paragraph 39 of the Rules. To the extent that these allegations may be characterized as statements of fact, Canada states as follows:
 - i. With respect to paragraph 43, Canada is of the view that the Historic Treaty Land Entitlement (TLE) Shortfall Policy Validation Criteria and Research Guidelines (TLE Shortfall Policy) are irrelevant for litigation purposes. In response to paragraph 53, the TLE Shortfall Policy does not create obligations as pleaded.
 - ii. With respect to paragraph 52, Canada admits only that Treaty No. 6 provides that reserves shall not exceed one square mile for each family of five or in that proportion for larger or smaller families.
48. In response to paragraph 58, Canada denies that it breached its treaty and fiduciary obligations to Montana First Nation and that it failed to provide Montana First Nation with its full entitlement to reserve lands under Treaty 6.

V. Canada's Statements of Fact (R. 42(e))

Big Bear Adheres to Treaty

49. Big Bear agreed to adhere to Treaty 6 on December 6, 1882, after yielding to the growing pressure from his followers stemming from poverty and hunger in his camp. Big Bear signed an adhesion; however, he did not select a reserve.

The Northwest Rebellion

50. In March 1885, Big Bear indicated a willingness to have his reserve at Dog Rump Creek. Due to the outbreak of the Northwest Rebellion, Chief Big Bear and his band never settled on the reserve.

51. In early June 1885, Big Bear's son Little Bear, Lucky Man, Little Poplar and a number of Plains Cree followers fled to the United States. Big Bear did not go with his son Little Bear to Montana, and instead made his way to Fort Carlton to surrender of his own accord where he was arrested on July 2, 1885.

52. In early July 1885, after the Northwest Rebellion, Commissioner Dewdney requested Assistant Commissioner Reed to make suggestions regarding the "future management of the Indian" in light of the recent trouble. Subsequently, Mr. Reed prepared a detailed memorandum setting out an extensive list of measures that ought to be adopted regarding the "rebellious Indians". After a meeting with the Indian Commission, the proposed measures were modified and forwarded to Deputy Superintendent General Vankoughnet.

- i. Following consultations with Mr. Vankoughnet, a policy of "reward and punishment" was prepared which included:

“With regard to the distinction proposed to be made by Mr. Reed between Half-breeds who are on the Pay lists of rebel Bands and the full-blooded Indian members of such Bands, the Superintendent General directs that the Agents be instructed to endeavor to induce all Half-breeds to withdraw from the Bands with which they have been connected and as an inducement for them to do so they should be offered Half-breed grants of land. Neither Half-breeds nor full-blooded Indian members of rebel Bands are to be paid annuity in future until at least the full cost of the depredations committed shall have been repaid to the Government by deducting same from the annuities that would otherwise have been payable to them.”

- ii. Government officials received this direction after the 1885 annuity payments were paid at Peace Hills.
- iii. Canada issued a proclamation declaring an amnesty on July 10, 1886 for crimes during the Rebellion:

“On July, 10, 1886, Canada issues a Proclamation declaring an amnesty for those who committed crimes of a political nature during the Rebellion of 1885. All acts stemming from the Northwest Rebellion are pardoned. However, the amnesty does not extend to persons who committed homicide otherwise than in actual warlike conflict.”

Settlement of Repatriated Montana Cree

- 53. On July 23, 1896, Indian Commissioner Forget sent a telegram to Deputy Superintendent General Reed recommending locating the Montana Cree on Sharphead’s old reserve, Wolf Creek. He was notified that there were approximately 105 “Montana Cree” willing to settle there. Deputy Superintendent General Reed replied with his recommendation and the decision was ultimately

made to locate the “Montana Cree” on the IR 139 instead of Wolf Creek to avoid the expenses that would be required with establishing and maintaining a farm and the cost of engaging another farmer on the old Sharphead reserve, which would not be necessary if they were settled on IR 139.

54. In February 1897, Little Bear travelled to Ottawa with Rev. McDougall as his interpreter. On February 25, 1897, the *Calgary Herald* reported that Little Bear received assurances that “the Cree” would be given a reservation, paid an annuity, and given the same rations as distributed among other “tribes”.

1901 - Opening Reserves for Settlement

55. On December 9, 1901, Department of Indian Affairs Secretary J.D. McLean wrote to Indian Commissioner David Laird to ask that he look into the question of bringing the Bobtail Reserve “into the market”.
56. On December 28, 1901, Indian Commissioner David Laird wrote to the Agent at Hobbema inquiring whether the Montana Band members residing on the Bobtail Reserve were all refugees deported from the United States in 1896 and whether it would be possible to move the members off the Bobtail Reserve and join the other bands in his Agency.

1901 Road Allowance Surrender

57. In 1901, approximately 1.5 acres of IR 139 were surrendered for a road allowance. The surrender was taken from the Montana “Indians”, based on the erroneous assumption that the “Indians” on the reserve were members of the Bobtail Band.

1905 - Chief Little Bear's Return to Canada

58. On August 8, 1905, Indian Commissioner Laird wrote to Little Bear advising that his application to return to Canada was approved on a number of terms including their agreement to settle him in the Onion Lake Agency.

Surrender of Portion of IR 139 in 1909

59. On December 23, 1908, J.A. Markle, Alberta Inspectorate, Department of Indian Affairs, reported to the Department of Indian Affairs Secretary that Rev. McDougall had recently been at Hobbema talking to the Indians about a prospective surrender of what he called the “wedge” along the western edge of IR 139.
60. In January 1909, Rev. McDougall spoke to the Montana Indians about a surrender of part of IR 139 west of the Battle River, but advised them he came to them only as a matter of courtesy. He advised a surrender was “not really necessary” as the reserve belonged to the government and they were only dwelling there “by the grace of the government”.

Survey of Montana IR 139

61. In May 1909, Dominion Lands Surveyor J.K. McLean was working on the proposed surrender of the Bobtail Indian Reserve. In August 1909, he sent the plans of his survey of the Bobtail reserve to Deputy Superintendent General of Indian Affairs Pedley.
62. J.K. McLean's survey plan of Bobtail IR 139 was certified on August 5, 1909, and subsequently registered as Canada Lands Survey Records (CLSR) T2615. The plan showed, among other things, the part of the Bobtail Reserve that was set aside “for Montana Band”. Another version of McLean's 1909 survey plan of Bobtail IR 139,

registered as Plan CLSR T977AB, records the area set aside for Montana Band as 7,004.80 acres.

1909 Surrender of IR 139

63. On June 12, 1909, IR 139 was surrendered. The surrender was executed by “the undersigned members of Bobtail’s Band” and was witnessed by Indian Agent George Mann and Rev. McDougall. [2006 FC Decision, para 303]

64. The surrender provided that 10 square miles of the eastern portion of IR 139 south of the Battle River was to be “allotted to the Montana Band as a Reserve”. Further, a portion north of the Battle River, amounting to approximately 4.27 square miles (2730 acres), was added to the Samson Band’s reserve. The remainder of IR 139 was to be sold. All the “Indians” in the Hobbema Agency received a portion of the proceeds. [2006 FC Decision, para 303]

Montana Reserve

65. On July 29, 1909, the surrender of IR 139 was formally accepted by Order in Council P.C. 1674.

66. On October 22, 1909, Indian Agent Mann wrote to Secretary McLean and reported that a majority of the principal men of the Montana Band came to him and asked him to inform the Department they were “quite satisfied with the reserve surveyed for them ... and did not wish the Department to make any changes in their reserve”. [2006 FC Decision, para 311]

VI. Relief (R. 42(f))

67. Canada seeks the following relief:

- i. Canada requests that this action be dismissed as against Canada;

- ii. In the alternative, dismissal of all parts of the Claim except the potential 1909 TLE shortfall that was not resolved in the 2006 FC Decision;
- iii. Canada may decide not to seek costs upon the final determination of the action, however it reserves the right to seek such costs; and
- iv. Such further relief as Canada may request and this Tribunal deems just.

VII. Communication (R. 42(g))

68. 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: Soniya Bhasin

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

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

soniya.bhasin@justice.gc.ca

DATED at the City of Edmonton, in the Province of Alberta, this 15th day of September 2022.

Soniya Bhasin "digitally signed"

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