

# INDIAN CLAIMS COMMISSION

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## LUCKY MAN CREE NATION TREATY LAND ENTITLEMENT PHASE II INQUIRY

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### PANEL

Chief Commissioner Renée Dupuis, C.M., *Ad.E.* (Chair)  
Commissioner Jane Dickson-Gilmore  
Commissioner Alan C. Holman

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**February 2008**



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## SUMMARY

### **LUCKY MAN CREE NATION TREATY LAND ENTITLEMENT PHASE II INQUIRY Saskatchewan**

The report may be cited as Indian Claims Commission, *Lucky Man Cree Nation: Treaty Land Entitlement Phase II Inquiry* (Ottawa, February 2008).

*This summary is intended for research purposes only.  
For a complete account of the inquiry, the reader should refer to the published report.*

**Panel:** Chief Commissioner R. Dupuis (Chair), Commissioner J. Dickson-Gilmore,  
Commissioner A.C. Holman

**Treaties** – Treaty 6 (1876); **Treaty Land Entitlement** – Date of First Survey – Policy – Settlement Agreement; **Saskatchewan** – North-West Rebellion

#### **THE SPECIFIC CLAIM**

This is the second request for inquiry to be brought by the Lucky Man Cree Nation (LMCN) to the Indian Claims Commission (ICC) with regard to its treaty land entitlement (TLE) claim under Treaty 6. The first request, brought by the First Nation in December 1995, asked that the ICC conduct an inquiry into whether it was able to bring a claim in light of an 1989 TLE Settlement Agreement. In March 1997, the ICC concluded that the date of first survey (DOFS) for the First Nation was 1887 and recommended further payroll analysis to determine whether there was a DOFS shortfall.

Canada's analysis led it to reject the First Nation's claim that it was owed further treaty land, and in 2003, the Lucky Man Cree Nation requested that the ICC hold a further inquiry into whether it had a TLE shortfall. The ICC accepted this request and initiated Phase II of the Lucky Man Cree Nation: TLE Inquiry.

The parties prepared written submissions; oral legal submissions took place on August 18, 2005. During oral argument, both parties made reference to other claims and to Canada's TLE analysis for other First Nations. The panel released three interim rulings on the objections by counsel for both parties and asked the parties for further written and oral evidentiary submissions. An oral evidentiary session was held on October 25, 2006.

#### **BACKGROUND**

The parties reached a TLE Settlement Agreement in 1989 that resulted in the LMCN obtaining a reserve of 7,680 acres, or sufficient land for 60 people, based on Treaty 6. The Settlement Agreement provided for the First Nation to receive compensation in lieu of land if at some point it could prove a treaty land shortfall. On the basis of the payroll for 1887, which is the date of first survey, the First Nation claims it is entitled to land for at least two additional people. Canada takes the position that the DOFS payroll contains many names of band members who cannot be counted because, although their names appear on a payroll, they were not present and not paid. The Lucky Man Cree Nation was one of a number of bands designated as "rebel" or "disloyal" as a result of the North-West Rebellion, and many members, including Lucky Man, fled to Montana, never to return to the Treaty 6 area.

#### **ISSUES**

On the basis of an 1887 "date of first survey," what was the population of the Lucky Man Cree Nation for treaty land entitlement purposes? With what quantum of land is Canada to be credited for treaty land

entitlement purposes? Having regard to the answers to both questions, has Canada satisfied its treaty land entitlement obligation to the Lucky Man Cree Nation with regard to land quantum?

#### **FINDINGS**

On the basis of an 1887 DOFS, a preliminary payroll analysis shows that the LMCN had at least 62 members with entitlement to treaty land. The panel rejects Canada's position that those band members who had fled to the United States as a result of the North-West Rebellion cannot be counted for TLE purposes. There is nothing in Canada's published guidelines that would exclude these members from being counted.

Canada is to be credited with providing 7,680 acres in treaty land through the Treaty Land Entitlement Settlement Agreement of 1989.

The First Nation has established that the Government of Canada owed an outstanding lawful obligation to provide land to the First Nation under the terms of Treaty 6.

#### **RECOMMENDATION**

That the Lucky Man Cree Nation's treaty land entitlement claim be accepted for negotiation under Canada's Specific Claims Policy.

#### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

#### **Cases Referred To**

*Lac La Ronge Indian Band v. Canada*, 2001 SKCA 109, (2001) sub nom. *Venne; R. v. Marshall*, [1999] 3 SCR 533; *Shepherd v. Canada (Royal Canadian Mounted Police)*, [2004] FCJ No. 1188 (FCA); *Durant v. Canada (Minister of Fisheries and Oceans)*, [2002] FCJ No. 441.

#### **ICC Reports Referred To**

*Lucky Man Cree Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109; *Kahkewistahaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21.

#### **Treaties and Statutes Referred To**

Canada, *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carleton, Fort Pitt and Battle River, with Adhesions*, IAND Publications No. QS-0574-000-EE-A-1 (Ottawa: Queen's Printer, 1964).

#### **Other Sources Referred To**

Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994) 1 ICCP 171; DIAND, "Office of Native Claims Historical Research Guidelines for TLE Claims" (Ottawa, May 1983); DIAND, "Historic Treaty Land Entitlement (TLE) Shortfall Policy Validation Criteria and Research Guidelines, October 1998.

#### **COUNSEL, PARTIES, INTERVENORS**

D. Knoll for the Lucky Man Cree Nation; P. Robinson for the Government of Canada, J.B. Edmond to the Indian Claims Commission.

**PART I**  
**INTRODUCTION**

**BACKGROUND TO THE INQUIRY**

The Lucky Man Band (today referred to as the Lucky Man Cree Nation or LMCN) entered Treaty 6 on July 2, 1879. Pursuant to the terms of the treaty, the Band was entitled to a reserve the equivalent of one square mile (640 acres) for each family of five, or 128 acres per person. Lucky Man was among a group of Chiefs who were reluctant to settle down. Before the reserve could be surveyed, the North-West Rebellion broke out near the Battleford area. Some of Lucky Man's followers were involved, and the Band was one of a number of bands designated as "rebel" by the government in the summer of 1885. Lucky Man and many of his followers fled to the United States.

In 1887, Canada surveyed Indian Reserve (IR) 116 for the Lucky Man and Little Pine Bands. The reserve was surveyed for 125 people. In a later treaty land entitlement (TLE) settlement with the Little Pine Band, the entire acreage was credited to Little Pine. (The historical background to this claim is set out in Appendix A to this report.) In 1989, the Lucky Man Cree Nation negotiated a TLE settlement with Canada, receiving 7,680 acres of land, sufficient for 60 people (see Appendix B to this report).

In 1995, the Lucky Man Cree Nation submitted a claim to Canada to be compensated for a TLE shortfall. Canada rejected the claim on July 7, 1995, on the basis of the negotiated Settlement Agreement. In December 1995, the LMCN requested that the ICC hold an inquiry into the claim. In 1997, the Commission issued an inquiry report, finding that 1887 should be used as the date of first survey (DOFS), and recommending that the parties conduct additional payroll analysis to establish the First Nation's TLE population. On the basis of additional research and analysis, Canada concluded there was no shortfall and rejected the claim again. In November 2003, the Lucky Man Cree Nation requested that the ICC hold a further inquiry into the DOFS population.

**MANDATE OF THE COMMISSION**

The mandate of the Indian Claims Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where

the claim was already rejected by the Minister.”<sup>1</sup> This Policy, outlined in the 1982 booklet of the Department of Indian Affairs and Northern Development (DIAND) entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding “lawful obligation” on the part of the federal government.<sup>2</sup> The term “lawful obligation” is defined in *Outstanding Business* as follows:

The government’s policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding “lawful obligation,” i.e., an obligation derived from the law on the part of the federal government.

A lawful obligation may arise in any of the following circumstances:

- i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
- ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
- iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
- iv) An illegal disposition of Indian land.<sup>3</sup>

Furthermore, Canada is prepared to consider claims based on the following circumstances:

- i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
- ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.<sup>4</sup>

The Commission received both oral and written submissions with regard to how TLE policy has evolved and how Canada has validated claims. During oral argument, both parties introduced

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<sup>1</sup> Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

<sup>2</sup> Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 *Indian Claims Commission Proceedings* (ICCP) 171–85 (hereafter *Outstanding Business*).

<sup>3</sup> *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 179–80.

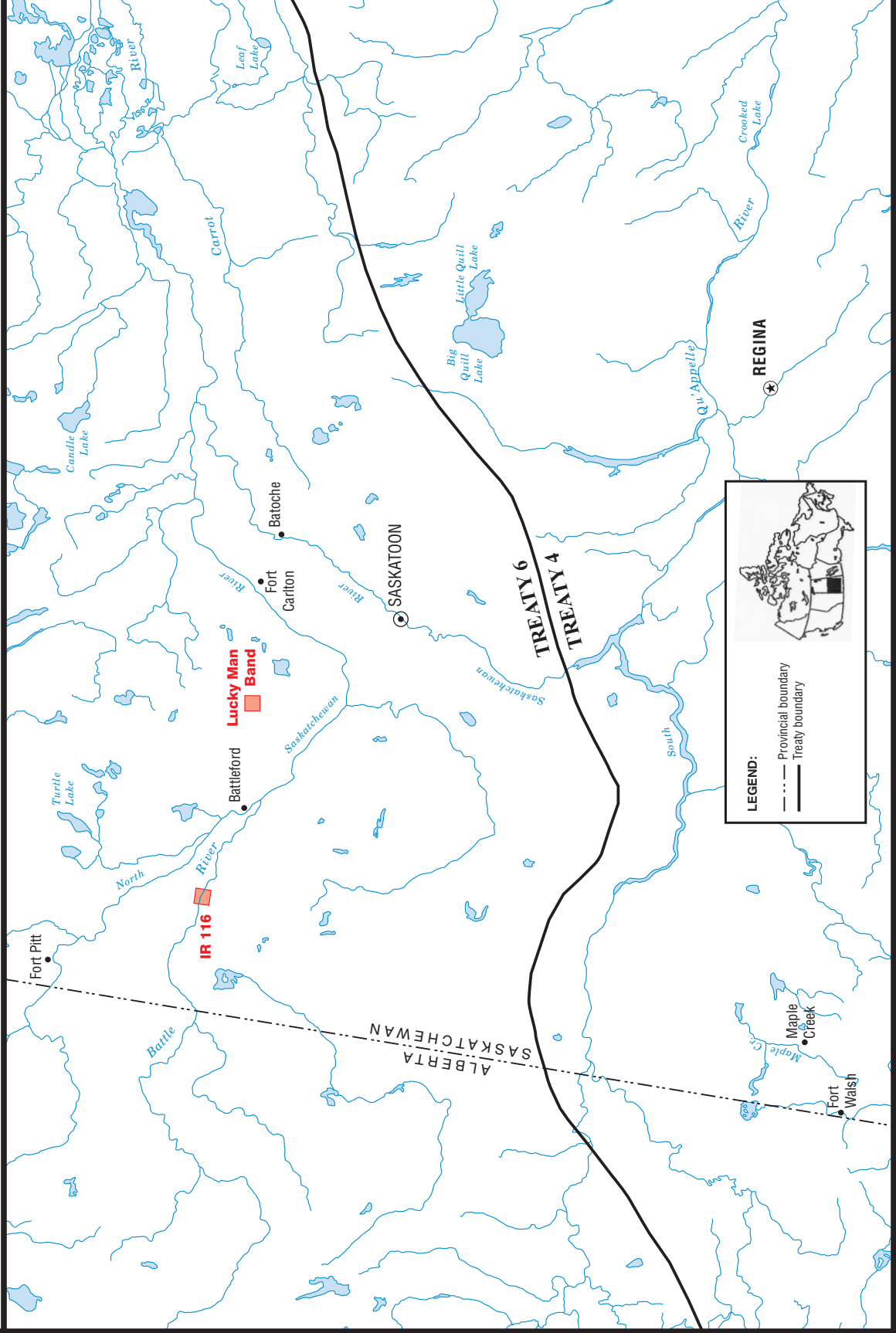
<sup>4</sup> *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 179–80.



arguments that resulted in three interim rulings and a further oral evidentiary session. The panel issued its Interim Ruling on September 19, 2005, a first amendment to the Interim Ruling on December 15, 2005, and a second amendment to the Interim Ruling on June 22, 2006 (see Appendices C, D, and E). The oral evidentiary hearing, with evidence presented on behalf of both the Lucky Man Cree Nation and Canada was held on October 25, 2006. The panel has now completed its inquiry into phase II of the Lucky Man Cree Nation's Treaty Land Entitlement Claim. A chronology of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is detailed in Appendix F.

Map 1

Claim Area Map



## **PART II**

### **THE FACTS**

In 1876, Treaty Commissioners Alexander Morris, W.J. Christie, and James McKay met with Chiefs of the Cree and Assiniboine at Fort Carleton and Fort Pitt. These negotiations resulted in the signing of Treaty 6. Under the treaty, the Bands ceded their rights to the land included within the boundaries of Treaty 6; in exchange, the Commissioners promised them reserve lands, annuities, farm implements, and instruction to help them move from a nomadic life of hunting buffalo to a more settled agricultural existence. To set aside reserves, the Department of Indian Affairs was to send out a surveyor who would mark out a band's reserve, but only after consulting with the Chiefs about where they wanted it to be.

Lucky Man was one of Big Bear's headmen. Big Bear was an influential Cree Chief, well known as a protector of Aboriginal rights and autonomy. Big Bear arrived at Fort Pitt on the last day of negotiations for Treaty 6, not to sign but to tell Canada's negotiators that there were other bands out on the Prairies and that he could not sign on their behalf without their being present. He assured the Treaty Commissioners that he would sign the next year, but he did not; instead, Big Bear waited to see if the government would keep the promises it had made to the Chiefs. While he waited, he sought changes to the treaty that he thought would benefit his people. Most notably, he tried to have the Cree reserves located together, so that the Bands would gain strength from each other.

One of the most significant changes of the era was the disappearance of the buffalo. Big Bear and other Cree Chiefs attempted to follow the quickly diminishing herds and spent much of their time in the Cypress Hills in what is now southwestern Saskatchewan. Many of their followers were ill and starving.

Some members questioned Big Bear's opposition to signing the treaty before better terms could be negotiated, believing that the benefits of treaty would alleviate some of the hardships they were enduring. One was Lucky Man, now a Chief in his own right, head of 20 lodges that had broken away from Big Bear. Both Lucky Man and Little Pine signed an adhesion to Treaty 6 on July 2, 1879. However, Lucky Man remained closely aligned with Big Bear and travelled with him for several more years.

During the next five years, government officials attempted to persuade Lucky Man to settle down and select reserve lands, but it was difficult to induce the nomadic, buffalo-hunting Cree to do so. Lucky Man told officials he wished to settle in the Battleford area of Treaty 6, but he continued to chase the few remaining buffalo south of there in the Treaty 4 area. During this time his Band's population reached 872 people, as recorded on the annuity payroll.

By 1882, the Plains Indians were starving, and in December of that year, Big Bear signed an adhesion to Treaty 6. By late 1883, Lucky Man and Little Pine were finally camped near Battleford, near to where the government was hoping they would settle.

Tension between the Cree and the government was exacerbated by Big Bear's reluctance to take treaty and Lucky Man's resistance to selecting a reserve and settling down. The Department of Indian Affairs believed that Big Bear was trying to establish the bands that had not yet settled on adjacent reserves, and viewed this apparent consolidation of bands as a threat.

Late in 1883, Lucky Man and Little Pine had stopped over at Poundmaker's reserve, awaiting a council with Big Bear. At the same time as the Cree appeared to be gathering, the Department of Indian Affairs was trying to separate the Cree bands who had yet to select reserves and had decided to withhold rations from band members who would not settle down. Because of that, several younger members of the Lucky Man and Little Pine Bands broke ranks with their Chiefs and did start farming. They were joined shortly after by Chief Little Pine himself.

By the time Big Bear arrived at Poundmaker's reserve in the spring of 1884, tension was running high. Two of Lucky Man's sons who were recovering from illness sought rations from Inspector John Craig, who decided that one of them, Kaweechatwaymat, had healed enough to be able to work. When Craig refused him rations and treated him roughly, Kaweechatwaymat retaliated and struck the Inspector with an ax handle. It was Lucky Man himself who turned his son over to the police. Kaweechatwaymat was tried and imprisoned for a brief period.

Shortly after, Big Bear apologized for what had happened, and requested a reserve between the camps of Lucky Man and Little Pine, near to where Poundmaker had established his reserve in 1879. The government was strongly against this. Little Pine and most of his Band had settled down. The department decided to provide rations to Little Pine, but to withhold them from Lucky Man, Poundmaker, and Big Bear.

By the end of July 1884, Lucky Man and Big Bear went to Duck Lake to attend a council of Battleford and Carlton area Chiefs, organized to address their common grievances. In August, the Chiefs met with Sub-Agent J.A. Macrae and presented a list of grievances for transmittal to Ottawa. Big Bear told government officials that what the Chiefs wanted was to be given what they had asked for and that all treaty promises should be fulfilled.

After the council, Big Bear went to Prince Albert and met with Louis Riel to gain support for the Chiefs' grievances. Shortly after meeting with Riel, Big Bear returned to Fort Pitt.

During this time, Lucky Man remained with Big Bear and was paid his annuities with him. The departmental official making the payments recorded Lucky Man as an ex-Chief and paid him as a member of Big Bear's band. There is no indication that Lucky Man had relinquished his chieftainship, but, because he had not yet selected a reserve, the department recommended that he be deposed from what it called a temporary chieftainship and be regarded only as an ordinary Indian. It appears that by this time the government had identified Lucky Man and Big Bear as a source of trouble.

By the end of 1884, the Cree were at a breaking point; the buffalo were gone, the people were starving, and the government was withholding rations because they would not move onto reserves. Again, some of the younger Indians questioned Big Bear's delay in selecting a reserve.

At the end of January 1885, Assistant Indian Commissioner Hayter Reed reported to the Superintendent General of Indian Affairs about the grievances the Cree Chiefs had presented in August 1884. Reed's lengthy report dismissed most of the grievances and placed the blame primarily on Big Bear and the growing influence of the Métis. All the while promising he would settle down, Big Bear continued to press for a meeting with Crown officials, who by this time had decided the troublesome Cree Chief would either settle down or have his Band broken up.

Events overtook the Cree. In March 1885, Louis Riel declared his provisional government and on March 18, the North-West Rebellion began when Riel took prisoners and seized stores at Batoche. When news spread to the Frog Lake settlement, a group of Indians killed several white settlers, including the Indian Sub-Agent, in an event that became known as the Frog Lake Massacre. It appears that Big Bear tried to stop the violence, but by then he was losing his influence to a war Chief, Wandering Spirit.

It does not appear from the historical documents that Lucky Man participated in the killings at Frog Lake, but he was there when they took place. Retaliation followed shortly, and the Cree were defeated by the much healthier, better-armed militia. Following the short-lived rebellion, Lucky Man fled to Montana.

In the summer of 1885, in the wake of the rebellion, Commissioner Edgar Dewdney wrote to the Superintendent General of Indian Affairs and identified those bands that were considered to be disloyal. Among the bands were the Lucky Man, Little Pine, and Big Bear Bands. The 1885 annuity paylists indicate that 82 Lucky Man band members who had remained at the area set aside for Little Pine's reserve were considered disloyal and were not paid their annuities that year.

The government instituted further restrictions. Annuity payments were to be withheld from disloyal bands; if investigation proved that certain Indians were responsible for damage to property, their annuities were to be withheld until compensation could be made. The government decided to disarm Indians and instituted the pass system to prevent rebellious band members from leaving their reserves. It confiscated horses and sold them to buy cattle for bands so that they would be more likely to settle down into an agricultural existence. Big Bear's Band, now without a leader, was disbanded and scattered.

The department noted that Lucky Man was no longer a problem, since he had fled and his band members had distributed themselves among other Battleford area bands.

Although many members of Little Pine's Band and some of Lucky Man's Band had been settled for several years, it was not until 1887 that the department sent a surveyor to the area to lay out and document the boundaries of their reserve. This reserve, recorded as IR 116, comprised 25 square miles, which by the terms of Treaty 6 was sufficient land for a population of 125 people. The reserve was confirmed by order in council in 1889. Both the survey plan and the description of IR 116 indicate the reserve was set aside for the Bands of Lucky Man and Little Pine. Neither Chief was present at the time, however; Little Pine had died in 1885 and Lucky Man had fled south and was living in Montana. The 1887 annuity payroll shows the population of the Lucky Man Band, paid at Little Pine's reserve, to be 62. Notations on the payroll indicate that many of the members listed there were living somewhere else.

In 1890, the names of band members who had fled to the United States after the North-West Rebellion were struck from the treaty annuity paylists.

In 1896, after 11 years in the United States, Lucky Man and Little Bear, Big Bear's son, were returned with their followers to Canada by American authorities. When they crossed the border, Lucky Man and Little Bear were arrested for participating in the Frog Lake massacre, but were released in July 1896 when officials decided that there was not enough evidence to support the prosecution of charges. At the time, Lucky Man was sick and old. After his release, he and Little Bear set out for the Hobbema Agency in Alberta to rejoin some of their companions. They settled on the vacant Bobtail Reserve 139. Two years later, some returned to the United States; those who remained in Alberta came to be known as the Montana Band.

There is no evidence Lucky Man ever returned to IR 116 near Battleford. It is believed he returned to Montana and died around 1899. His band members had mostly scattered. The few on IR 116 were a tiny minority of the population. In 1918, five more families believed to be in the United States were struck from the list, leaving only two families for a recorded total of seven people. The Band did not have a Chief of its own.

In 1961, at the request of Lucky Man band members, a letter was sent to Ottawa requesting that the department recognize the Band's entitlement to a reserve. Thirteen years later, in 1974, members of the Band assembled and elected its first Chief since Lucky Man. As one of its first orders of business, the members at the meeting decided to set about getting their own reserve.

In 1980, Canada and the Lucky Man Band agreed to settle the Band's claim to a separate reserve on the basis of its 1976 population of 60 people. Based on this understanding, the Band selected 7,680 acres of land at Meeting Lake, and Canada and the Lucky Man Band signed a Treaty Land Entitlement Settlement Agreement on November 23, 1989. Canada set aside the 7,680 acres as a reserve for the First Nation in exchange for the Band's providing an absolute surrender of any interest it had in IR 116. Band members approved the Settlement Agreement and the surrender in a referendum.

One provision of the agreement enabled the Band to bring a claim for compensation in lieu of land if, at some time, it was determined that the Band had a greater treaty land entitlement than the amount of land that had been set aside under the agreement.





**PART III**  
**ISSUES**

The Indian Claims Commission is inquiring into the following three issues:

- 1 On the basis of an 1887 “date of first survey,” what was the population of the Lucky Man Cree Nation for treaty land entitlement purposes?
- 2 With what quantum of land is Canada to be credited for treaty land entitlement purposes?
- 3 Having regard to the answers to these questions, has Canada satisfied its treaty land entitlement obligation to the Lucky Man Cree Nation, with respect to land quantum?



**PART IV**  
**ANALYSIS**

**ISSUE 1: TREATY LAND ENTITLEMENT POPULATION**

- 1 On the basis of an 1887 “date of first survey,” what was the population of the Lucky Man Cree Nation for treaty land entitlement purposes?

**Lucky Man Cree Nation TLE Settlement**

In 1976, Canada accepted the claims of four First Nations in Saskatchewan as having treaty land shortfalls according to the terms of the treaties they signed during the 1870s. Among the four were both the Lucky Man Cree Nation and the Little Pine First Nation, signatories to Treaty 6 in 1879, as well as the Nekaneet (Treaty 4) and Thunderchild (Treaty 6) First Nations. Both the Lucky Man and the Little Pine claims were negotiated and settled.

Part of the settlement for both First Nations was the apportionment of IR 116, which had been surveyed in 1887 and set aside for both the Lucky Man and Little Pine Bands by order in council in 1889. IR 116 had been surveyed as 25 square miles, an area sufficient for 125 people. A reading of the settlement agreements shows that the entire reserve was allocated to Little Pine as reserve land that had been set aside at the time of survey. Lucky Man’s corresponding agreement states that it gives an “absolute surrender to Canada ... of whatever right, title, interest and benefits ... the Band .... had, now have or may hereafter have in Indian Reserve No. 116.”<sup>5</sup> One hundred years after the order in council creating the reserve, Canada, Saskatchewan, and the two First Nations agreed that all the land surveyed in 1887 belonged to Little Pine, and Lucky Man had, in effect, received nothing.

In 1989, the Lucky Man Cree Nation negotiated a settlement of 7,680 acres of land, or enough for a population of 60. That figure was agreed by the parties to be the population of the Lucky Man Band at the time of the negotiated settlement. It was not based upon a determination of Lucky Man’s historical entitlement, which would have been calculated from the Band’s population at the date of first survey. Also included within the settlement were clauses that allowed the First

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<sup>5</sup> The Lucky Man Band of Indians, Treaty Land Entitlement Settlement Agreement, November 23, 1989, p. 2 (ICC Exhibit 10b, p. 2).

Nation to seek compensation for having been denied the use of reserve land for a century<sup>6</sup> and to seek compensation if, at a later time, it was determined that the settlement had not fulfilled the Band's treaty land entitlement.<sup>7</sup> After signing the agreement, Lucky Man took the position that, based on its historical population, Canada had not provided it enough land. The First Nation brought forward another claim.

Canada rejected the First Nation's claim in July 1995. In December 1995, the Lucky Man Cree Nation requested that the Indian Claims Commission conduct an inquiry into the rejected claim. In 1996, the Commission accepted the claim for inquiry. The only stated issue in the inquiry was to determine the date of first survey, which the parties had agreed was pivotal to determining the historical treaty land entitlement population, and preliminary to determining whether a TLE shortfall remained after the Settlement Agreement. In 1997, the panel in that inquiry concluded that, for it to make that determination, there were subsidiary issues that needed to be considered. Among these issues was whether the 1989 Settlement Agreement precluded the First Nation from bringing a subsequent claim, and second, whether the principles enunciated in what was then the recently concluded *Kahkewistahaw* report with regard to Treaty 4 could also be applied to Treaty 6.

The panel found that the Settlement Agreement did not preclude the First Nation from bringing forward a claim, and interpreted the agreement to mean that "in exchange for Lucky Man giving up all rights to IR 116, Canada provided the First Nation with the 1989 reserve containing 7680 acres, or sufficient land for 60 people – the First Nation's population in 1980."<sup>8</sup> The panel concluded that the agreement did not preclude the First Nation from seeking compensation in lieu of treaty land should it be determined that the First Nation's settlement should be based on a population of more than 60 people.<sup>9</sup>

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<sup>6</sup> The Lucky Man Band of Indians, Treaty Land Entitlement Settlement Agreement, November 23, 1989, p. 4 (ICC Exhibit 10b p. 4).

<sup>7</sup> The Lucky Man Band of Indians, Treaty Land Entitlement Settlement Agreement, November 23, 1989, p. 4 (ICC Exhibit 10b, p. 4).

<sup>8</sup> Indian Claims Commission (ICC), *Lucky Man Cree Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109 at 150.

<sup>9</sup> ICC, *Lucky Man Cree Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109.

The panel in what became the first phase of the Lucky Man Cree Nation's TLE inquiry concluded that the date of first survey (DOFS) was 1887, and recommended further payroll analysis to determine whether there was a DOFS shortfall.

After the release of the Commission's report, Canada conducted additional research on the Lucky Man Band's population in 1887 and reported to the First Nation that the population at date of first survey was fewer than 60. The First Nation disagreed, but based on its research, Canada rejected the claim again. The government's position was that the negotiated TLE settlement of 7,680 acres, or land for 60 people, was sufficient and that the Lucky Man Cree Nation did not have a valid claim for additional land. The First Nation requested that the Commission conduct a further inquiry into the DOFS population. In December 2003, the ICC accepted the First Nation's request, creating a second phase of this TLE inquiry.

The panel in the present phase of the inquiry has accepted the first panel's determination of the date of first survey as 1887, and the date has been accepted by the parties. All argument from the parties about the historical population of the Lucky Man Cree Nation for the purpose of determining whether a TLE shortfall remains centres on the application of the guidelines to the population in 1887.

### **Development of TLE Policy**

The guidelines and the working assumptions Canada uses in interpreting its policy are at the heart of the disagreement between Canada and the Lucky Man Cree Nation. During the course of this inquiry, the Commission decided to hold an evidentiary session to hear from both parties how TLE policy has evolved and been applied.

### ***The Relationship between Treaty and TLE Policy***

An analysis of Canada's treaty land entitlement policy begins with the treaty itself, in the case of Treaty 6, the "reserve clause":

And her Majesty The Queen hereby agrees and undertakes to lay aside reserves for farming land, due respect being had to lands at present cultivated by the said Indians and other reserves for the benefit of the said Indians, to be administered and dealt

with for them by her Majesty's Government of the Dominion of Canada; provided, all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say that the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each Band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them.<sup>10</sup>

Although the treaty provision is clear about how much land is to be set aside for each family – one square mile, or 640 acres for a family of five, which works out to 128 acres per person – it is not clear about which persons are to be counted. The treaty speaks to setting aside reserves for bands, but offers no guidance about how to decide whether an individual Indian is a band member, entitled under the treaty to be counted for the purpose of setting aside reserve land. As well, there is no guidance about how to count Indians who may leave one band and join another, who may marry into a band or who may seem not to belong to a band at all, even though they consider themselves to have adhered to the treaty.<sup>11</sup> Treaty land entitlement policy grew out of a need to set guidelines, both for the First Nations, who believed that their reserve lands did not meet the requirements of the treaty, and for Canada, which bears the legal duty of fulfilling the Crown's obligations under treaty.

Canada's TLE guidelines have been formulated and reformulated several times and continue to be published in draft form. The most recent set of draft guidelines was issued in 1998 and has yet to be published in final form.

The Lucky Man Cree Nation argues that, to be fair, Canada must treat it in the same way it has treated other First Nations and must validate its claim on the same basis, using the same criteria as it has for others, particularly others in similar or the same circumstances. Canada argues that there are unique factors in this claim that inevitably lead to a unique answer.

Since it first began to conduct inquiries into rejected TLE claims, the Indian Claims Commission has had little guidance from the courts on the principles that should be applied to TLE

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<sup>10</sup> Canada, *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carleton, Fort Pitt and Battle River, with Adhesions*, IAND Publications No. QS-0574-000-EE-A-1 (Ottawa: Queens' Printer, 1964), 3.

<sup>11</sup> The treaty was also silent about exactly when Indians were to be counted, but the courts have settled that question by stating that a band's TLE entitlement crystallized at the date of first survey, when the dominion surveyor arrived to set aside land. In the case of the Lucky Man Cree Nation, the date of first survey (DOFS) is 1887.

policy; however, there is the Saskatchewan Court of Appeal's decision in *Lac La Ronge Indian Band v. Canada*.<sup>12</sup> In a unanimous decision, Justice Vancise summarized the principles of treaty interpretation as they had been set out by Chief Justice McLachlin of the Supreme Court in *R. v. Marshall*.<sup>13</sup> Among those that are relevant to the interpretation of the reserve clause are these:

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation:
2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the Aboriginal signatories:
3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one that best reconciles the interests of both parties at the time the treaty was signed:
4. In searching for the common intention of the parties, the honour and integrity of the Crown is presumed.<sup>14</sup>

These are principles that the Indian Claims Commission endeavours to uphold and which we will keep foremost in our minds as we consider the issues in this inquiry.

### ***Early TLE Policy***

In the earliest years, the usual practice followed by departmental officials was to calculate entitlement by counting the number of people listed on the treaty payroll for the year in which Crown officials surveyed the reserve. If the land set aside was less than the band's entitlement under the treaty, based on the population recorded on the payroll at the DOFS, the band had a shortfall and therefore a validated claim. One of the early difficulties was whether the method used for validating a claim, that of the historical population, would also be used to settle the claim. In 1976, Canada continued to use the DOFS population as the method for determining whether a band had a valid claim, but agreed with the government of Saskatchewan and First Nations in the province that, for

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<sup>12</sup> *Lac La Ronge Indian Band v. Canada*, 2001 SKCA 109, (2001), sub nom. *Venne*.

<sup>13</sup> *R. v. Marshall*, [1999] 3 SCR 533.

<sup>14</sup> *Lac La Ronge Indian Band v. Canada*, 2001 SKCA 109 at para. 39, citing *R. v. Marshall*, [1999] 3 SCR 456 at 511-12.

the purpose of settling an outstanding shortfall, it would use what became known as the Saskatchewan formula.

The Saskatchewan formula used band populations as of December 31, 1976, for the purpose of settling a claim. Problems quickly arose with this method of calculating settlement and it was soon discontinued. However, one of the claims negotiated on the basis of a current, rather than a historical, population was that of the Lucky Man Cree Nation, and it resulted in the First Nation being credited with land for a population of 60 people, that is, for its population as it existed in 1976. When the Saskatchewan formula was discontinued, with the cooperation of the province of Saskatchewan, Canada decided it would use the population at date of first survey for settling claims as well as deciding whether a First Nation had a valid claim.

The separation between validation and settlement remains. The first stage of a TLE claim is determination of whether a valid claim exists. Only First Nations that have validated claims enter into settlement negotiations. In 1977, Canada validated claims for four Saskatchewan First Nations – Lucky Man,<sup>15</sup> Little Pine, Thunderchild, and Nekaneet. The population used to determine validation was that shown as “Total Paid” on the annuity payroll for the year of survey. Some people were specifically excluded from the accounting, such as band members who were absent at the time of treaty payment, new members who transferred into the band from bands that did not have reserve land set aside, new members who subsequently adhered to treaty, and band members who left the band to join another band.

In 1983, Canada published a set of guidelines to be used by the Office of Native Claims (ONC). The 1983 guidelines accounted for a number of categories of people who had previously not been considered for the purpose of calculating TLE, such as absentees, double counts, landless transferees, and late adherents. Absentees were Indians who were considered to be band members, but who were away at the time of treaty payments; double counts were people who appeared on more than one annuity payroll at date of first survey for different bands; landless transferees were people who transferred in from bands that did not have reserve land. The fourth category of people, late adherents, were those Indians who adhered to treaty after the reserve had been surveyed.

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<sup>15</sup>

This led to the Settlement Agreement dated 1989.



What is of particular relevance to this claim is found in the category of “persons not included.” These people were defined as “[a]bsentees, new adherents and transfers from landless bands, who do not retain a reasonable continuity of membership to the band, i.e.: they are away most of the time.”<sup>16</sup> The guidelines went on to state that “these are dealt with on a case by case basis and there may be circumstances which warrant the inclusion of a band member even though he may be absent for an extended period of time.”<sup>17</sup>

The next iteration of TLE policy took place after the Department of Indian Affairs conducted a policy review in the late 1980s. In 1990, the federal government created the Office of the Treaty Commissioner (OTC) in Saskatchewan to work with the Federation of Saskatchewan Indian Nations, to facilitate the resolution of outstanding treaty issues, including claims for treaty land entitlement.<sup>18</sup> In 1991, through the Office of the Treaty Commissioner, Canada restated its guidelines for validation of a claim.<sup>19</sup> It rejected claims where validation occurred only because of the addition of late adherents or landless transfers; instead, claims were validated on the basis of two criteria: first, whether there was a shortfall at DOFS based on the treaty annuity paylists, and, second, whether there were people considered to be band members who were absent at the time of the payments. Landless transfers and late adherents were factored in only during negotiations to settle a validated claim.

However, the criteria did anticipate the situation where an Indian appears on the DOFS payroll but does not appear on another payroll for that band. The OTC assumed that the surveyor would have counted these people. Otherwise, people who appeared on only one or two paylists, neither of which was the DOFS payroll, were not counted. These people were considered to be

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<sup>16</sup> DIAND, “Office of Native Claims Historical Research Guidelines for TLE Claims” (Ottawa, May 1983), p. 3 (ICC Exhibit 9c, p. 3).

<sup>17</sup> DIAND, “Office of Native Claims Historical Research Guidelines for TLE Claims” (Ottawa, May 1983), p. 3 (ICC Exhibit 9c, p. 3).

<sup>18</sup> The Office of the Treaty Commissioner had been scheduled to close on March 31, 2007; however, in June 2007, the then Minister of Indian Affairs and Northern Development, James Prentice, announced that the OTC would resume its work in Saskatchewan on treaty issues until March 31, 2008. The Minister appointed former DIAND Minister, William McKnight, as Treaty Commissioner.

<sup>19</sup> Office of the Treaty Commissioner, Treaty Land Entitlement Research, Appendix E, September 23, 1991 (ICC Exhibit 3k, p. 21).

transient, unless they died with the band, could in some other way establish an affiliation with the band, or the Elders could provide information that would allow them to be counted. One or two years of affiliation was not sufficient to establish membership within the community. One of the exceptions noted in the 1991 document was that of the Sweetgrass Indian Band:

There have been references to an exception made in the case of the Sweetgrass Band where persons appearing after the date of survey for “one-time-only” have been counted. Sweetgrass is an example of where external circumstances (the Rebellion) impacted upon the membership of the Band and warranted careful consideration to determine [what] happened to the 70 odd people who were affected.

**Sweetgrass Fact Situation:**

Sweetgrass’ DOFS is 1884, but the 1883 payroll was used. In 1884, approximately 70 people entered the band. In 1885, as a consequence of the Rebellion, many band members disappeared, including some of the 1884 people. A few reappeared in later years, but most did not.

These people were counted, even though they were only there for one year because the events of the Rebellion were beyond their control. These people may well have stayed on at Sweetgrass had they not been forced to leave because of the Rebellion.<sup>20</sup>

As a result of the new statement of policy, several First Nations brought their rejected claims to the Indian Claims Commission for an inquiry, and the Lac La Ronge Indian Band took its claim to court. As a result, Canada reformulated its policy again in 1998. The 1998 guidelines, published in draft form, remain as Canada’s stated TLE policy.

***Current Policy***

***Draft Guidelines of 1998***

In October 1998, DIAND released its “Historic Treaty Land Entitlement (TLE) Shortfall Policy Validation Criteria and Research Guidelines.” This document, which came to be known as the “Draft Guidelines of 1998,” was part of the department’s attempts to improve its TLE policy “to better

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<sup>20</sup> Office of the Treaty Commissioner, Treaty Land Entitlement Research, Appendix E, September 23, 1991 (ICC Exhibit 3k, p. 21).

reflect historic realities and to bring a greater measure of fairness to the process.”<sup>21</sup> According to Canada, these guidelines remain the most current statement of the government’s TLE policy and have been applied to the validation of every claim since they were announced to determine the “adjusted date of first survey population.”<sup>22</sup> Once a claim has been validated and Canada agrees that insufficient land has been set aside for the First Nation under the treaty, the parties enter into negotiations, which often include the relevant provincial government.<sup>23</sup>

Part of the Draft Guidelines is quoted below.

**4.1 Subject to 4.2 and 4.3, the following treaty Indians will generally be included towards a band’s entitlement calculation:**

**4.1.1 Inclusions:**

a) Date of First Survey (DOFS) Population

i) DOFS Paylist

This population consists of treaty Indians whose names appear on the paylist at DOFS. Generally, the paylist from the year of the DOFS best reflects the band’s membership.

ii) Individuals who remained with the band for a short time at DOFS

These individuals that appear on the DOFS paylist for a particular band, will generally be considered towards the DOFS population for that band, unless there is stronger evidence that they were members of another band.

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<sup>21</sup> DIAND, “Historic Treaty Land Entitlement (TLE) Shortfall Policy Validation Criteria and Research Guidelines,” October 1998 (ICC Exhibit 9b).

<sup>22</sup> ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 118 (John Scime).

<sup>23</sup> At the time that most of the Numbered Treaties were signed, Canada had jurisdiction over the land because the provinces had not yet been formed, and, as a result, the creation of reserves in what are now the Prairie Provinces was entirely within the jurisdiction of the federal government. Since 1930, the creation of “new” reserve land in Numbered Treaty areas requires the cooperation of both the federal and provincial levels of government, with the exception of the Northwest Territories, because it is a federal territory.

## iii) Arrears and Absentees

## a) Arrears

Treaty Indians who were absent on the date of first survey, but appear on a payroll subsequent to DOFS and were paid arrears for the year of the first survey with that band.

## b) Absentees

Treaty Indians who were not on the DOFS payroll but appeared on a payroll for that band before and after DOFS, demonstrating they were band members at DOFS.

b) Late Additions – shortly after DOFS

There are two categories of late additions:

i) Indians who were bound by and eligible to receive the benefits of treaty but who had not yet appeared on any band's payroll nor been included in any band's entitlement calculations. Such individuals may be eligible to be counted by the band on whose payroll they appear.

ii) Treaty Indians who were originally members of a landless band (i.e. a band that had not yet had land set aside) and who then transferred to another band that already had reserve land set aside. An individual will be counted with the first band the individual joined that had had reserve land set aside. The effective date of transfer to the new band is the date that the individual actually appears on the annuity payroll or membership list.

#### **4.2 In order to be counted towards a band's collective TLE entitlement, the individuals must not fall into any of the following categories:**

##### **4.2.1 Exclusions**

a) The following people are excluded from the TLE calculation to prevent "double counts":

1) anyone who has already been included in the calculation of another band's TLE, or alternatively, has a *paternal* ancestor who has already been included in the calculation of a band's TLE;

2) and anyone who has taken scrip<sup>[24]</sup> or severalty<sup>[25]</sup> or who has a *paternal* ancestor who took scrip or severalty, before they were born or of the age of majority. However, anyone who took scrip after DOFS is not removed from the DOFS payroll count.<sup>26</sup>

Once the adjusted date of first survey population has been calculated, that population is compared to the area of land that was surveyed and set aside as a reserve for the First Nation; if too little land had been set aside – in the case of Treaty 6, calculated at 128 acres per person – the First Nation has a TLE shortfall.

### ***Working Assumptions***

At the planning conference held for this inquiry on April 28, 2004, Commission counsel asked Canada to “provide the ICC and the LMCN with a synopsis of any working assumptions that are employed by the Specific Claims Branch when applying the 1998 *Historic Treaty Land Entitlement (TLE) Shortfall Policy*.”<sup>27</sup> John Scime, Senior Policy Advisor, confirmed the following assumptions:<sup>28</sup>

#### **1. Requirement for Continuity of Membership**

As discussed during the Planning Conference, Canada takes the position that individuals must show a continuity of membership with a First Nation in order to be

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<sup>24</sup> Métis scrip is not relevant for bands within Treaty 6, although some individuals who decided to identify themselves as Métis may have taken scrip. By taking scrip and exchanging it for either land or money, an individual was no longer eligible to be counted for TLE purposes. Explanatory footnote added.

<sup>25</sup> Severalty is not relevant for bands within Treaty 6, because there no provisions for Indians to receive land as individuals. Treaty 8 in Northern Alberta and British Columbia is the first of the Numbered Treaties to allow individuals to elect to take land in severalty, rather than be allocated an amount of land to be added to a reserve. Explanatory footnote added.

<sup>26</sup> DIAND, “Historic Treaty Land Entitlement (TLE) Shortfall Policy Validation Criteria and Research Guidelines,” October 1998 (ICC Exhibit 9b, pp. 2–4).

<sup>27</sup> John Scime, Senior Policy Advisor, DIAND, to John Edmond, Commission Counsel, ICC, September 7, 2004, p. 1 (ICC Exhibit 9a, p. 1).

<sup>28</sup> Only the section of John Scime’s letter that is relevant to the disagreement between the parties is reproduced. That part of his letter dealing with the effective date of transfer and paternal line tracing was not relevant to this inquiry.

counted for the purposes of that First Nation's TLE. As I pointed out, this was a proposition that the ICC supported in its report on the *Kahkewistahew* Inquiry.

As a working assumption, an individual who is only paid once or twice on a First Nation's payroll (i.e. a "One-time-only" or "Two-time-short-stay") before being paid on another First Nation's payroll does not demonstrate the required continuity of membership. In other words, as a general practice, it is Canada's position that a minimum of three years payment on a First Nation's payroll must occur to show a continuity of membership.

However, as per Section 4.1.1.a.ii of the 1998 policy, individuals whose names appear on a First Nation's payroll only once or twice may be counted in that first Nation's TLE population if the individuals' names appear on the First Nation's date of first survey (DOFS) payroll, and if there is no stronger evidence linking these individuals to another First Nation's membership. In addition, in cases where an individual dies shortly after joining the First Nation at DOFS or later, the possibility of subsequent affiliation with another First Nation or inclusion in another TLE calculation is removed. Such individuals can be included in the First Nation's TLE population. In both of these cases, though, the individual must still meet other eligibility criteria (i.e., they have not previously been counted for TLE, they have not received scrip, etc.).<sup>29</sup>

This letter is almost identical to a letter written earlier that year by another departmental official to the ICC.<sup>30</sup> Because the two letters are so similar, we understand them to be a standard letter, sent by the department when there is a request for additional information about how Canada applies its TLE policy.

We also received information in this inquiry in the form of an affidavit from John Scime, which included the following paragraphs:

10. ... Canada takes the position that individuals must show a continuity of membership with a First Nation in order to be counted for the purposes of that First Nation's TLE validation. This is a proposition that the ICC supported in its report on the *Kahkewistahew* TLE inquiry. Canada has applied this criteria consistently since October 1998.

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<sup>29</sup> John Scime, Senior Policy Advisor, DIAND, to John Edmond, Commission Counsel, ICC, September 7, 2004, pp. 1–2 (ICC Exhibit 9a, pp. 1–2).

<sup>30</sup> John L. Hall, Senior Policy Advisor, DIAND, to Steve Bouris, Head of Research, ICC, March 31, 2004, pp. 1–3 (ICC Exhibit 2g, p. 25).

11. An individual's [*sic*] who is only paid with a particular First Nation prior to the DOFS date of that First Nation and is not paid subsequent to the DOFS date of said First Nation, does not demonstrate the required continuity of membership. As a general practice, it is Canada's position that a minimum of three years payment on a First Nation's payroll must occur to show a continuity of membership.
12. As a working assumption, to be counted for TLE validation, an eligible individual must meet the continuity of membership criteria in one of three scenarios:
  - i) paid before DOFS and at DOFS for a total of three or more payments;
  - ii) paid at DOFS and after DOFS for a total of three or more payments; and/or
  - iii) paid before DOFS and after DOFS for a total of three or more payments.
13. In addition, Canada takes the position that membership is merely the first threshold that must be met for the purpose of TLE validation. However, it is not enough to be merely a member of a band – a person must also be eligible to be counted for TLE validation. As outlined in section 4.2.1 of the (*Draft*) *1998 Historic Treaty Land Entitlement (TLE) Shortfall Policy Validation Criteria and Research Guidelines*, double counts, scrip takers and severalty electors are excluded from the validation count because they have already received land and are therefore ineligible. Likewise, absentees are not considered eligible for TLE validation unless they have returned to the band following their noted absence, as evidenced by the receipt of treaty annuity payments following said absence.<sup>31</sup>

The letters stating the working assumptions and the affidavit use the expression “continuity of membership.” The concept appears to have been formulated first in the 1983 guidelines, in Canada's description of absentees. Under the 1983 guidelines, absentees – described as people whose names were not on the DOFS payroll – were required to show “continuity in band memberships.”<sup>32</sup> The guidelines went on to explain that for an absentee to be counted within a band's population, it “must be shown that they were not included in the population base of another band for

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<sup>31</sup> Affidavit of John Scime, Senior Policy Advisor, DIAND, December 2, 2005 (ICC Exhibit 3J p. 12).

<sup>32</sup> DIAND, “Office of Native Claims Historical Research Guidelines for TLE Claims” (Ottawa, May 1983), pp. 3–4 (ICC Exhibit 9c, pp. 3–4).

treaty land entitlement purposes while absent from the band.”<sup>33</sup> These guidelines and the working assumptions are at the heart of the dispute between Canada and the Lucky Man Cree Nation, specifically, how to apply the guidelines to assess the eligibility of the 62 names that appear on the Band’s 1887 payroll. Of the 62, 37 are noted as being “south.” It is agreed between the parties that “south” almost certainly means they had fled Canada to the United States as the result of Canada’s designating the Lucky Man Band as a “rebel” band in the wake of the North-West Rebellion. They also agree that none of the 37 returned to the Lucky Man Band, and that, in 1890, when the Crown reinstated payment of annuities to rebel bands, it also struck the names of the 37 people from the annuity payroll. As a result, the stated membership of the Lucky Man Band dropped substantially. Others are noted as being at different places, such as Qu’Appelle or Maple Creek. It is agreed that, at the time, probably only about 10 Lucky Man members were resident in the area that had been set aside as one reserve for both the Lucky Man and Little Pine Bands.

The Lucky Man Cree Nation says the correct starting point for the analysis is to take the 62 names on the payroll at face value, including the 37 who are thought to have left the country. The First Nation says all should be counted for treaty land entitlement purposes. Canada says that only those who were actually resident at the time should be counted, that the 37 cannot be counted, because they were not present and not paid at the annuity payment in the year the reserve was surveyed, and they never returned to take up residence, and never received annuity payments again on the reserve.

### **Lucky Man Cree Nation’s Interpretation of TLE Policy**

The Lucky Man Cree Nation takes the position that the guidelines are to be applied as they are written. The First Nation argues that the starting point to determine the amount of reserve land that should have been set aside is the DOFS payroll, and that, as a general principle, if names appear on a payroll, those names are eligible to be counted.<sup>34</sup>

The sequence of criteria the First Nation would apply is as follows:

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<sup>33</sup> DIAND, “Office of Native Claims Historical Research Guidelines for TLE Claims” (Ottawa, May 1983), p. 4 (ICC Exhibit 9c, p. 4).

<sup>34</sup> ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 18 (Jayme Benson).



- How many names are on the date of first survey payroll?
- How many absentees should be added?
- Are any of the names on the payroll those of “short-stays,” people who were with Lucky Man less than three years? If they were with Lucky Man less than three years, is there stronger evidence that they should be counted with another band?
- How many people are “late additions,” people who joined the band after the reserve was surveyed, but who have not been counted elsewhere for TLE?
- Deduct from the DOFS payroll those people who should not be counted because either they have received land (or its equivalent) or another Band has received land on that person’s behalf: people who have been counted already, people who have taken scrip or severalty; people with a paternal ancestor who has already been counted, taken scrip or taken severalty.

The First Nation has also taken the position that only those people whose names did not appear on the DOFS payroll were required to show three years on paylists other than the DOFS payroll to show continuity of membership.<sup>35</sup>

An element of the policy the First Nation says is important is stated in the section that deals with “one-time-onlys” and “two-time-short-stays,” those people whose names were on the DOFS payroll, but who did not remain with the First Nation for more than one or two years. The policy states that the short-timers should be counted with the First Nation, “unless there is stronger evidence that they were members of another band.”<sup>36</sup> The Lucky Man Cree Nation states that “you’d look whether any of those names were members of other bands and we did that research and couldn’t find evidence that they were counted anywhere else or members anywhere else.”<sup>37</sup> The First Nation does not say that the 37 people are “short-stays,” but does state that since they do not appear to have been counted as part of any other TLE settlement, they should be counted with Lucky Man.

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<sup>35</sup> ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 19 (Jayme Benson).

<sup>36</sup> DIAND, “Historic Treaty Land Entitlement (TLE) Shortfall Policy Validation Criteria and Research Guidelines, October 1998 (ICC Exhibit 9b).

<sup>37</sup> ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 26 (Jayme Benson).

As far as the First Nation is concerned, the word “appear” means exactly that: the names are written down and therefore “appear” on a list; further, there is no requirement in the 1998 guidelines that individuals be present and paid to be counted.<sup>38</sup>

One aspect of the 1887 payroll the First Nation considers to be important is that, because the list is a “dummy” payroll, it does not account for people who were actually paid; instead it accounts for people who were entitled to be paid had the North-West Rebellion not taken place.

The First Nation also argues that the Department of Indian Affairs would not have put the names of people on a payroll if it had not considered them to be members of a particular band. In its view, it does not matter whether the members were paid or not paid, the department considered them to be band members. “There is agreement that they were not paid on that day, but it doesn’t indicate that they were not members of that band.”<sup>39</sup>

The argument made by the First Nation is that the Lucky Man members who were not physically present, but whose names appear on the list are not “absentees” because according to the policy, absentees are people who are not on the DOFS payroll, and the names of the 37 were on the payroll.

Lucky Man’s position is that the members who had gone south because they were afraid of retaliation after the Rebellion do not fit any of the categories of exclusions. These members do not qualify as double counts (that is, people who are counted towards another First Nation’s treaty land entitlement, either through themselves or through their fathers or grandfathers); they did not take scrip or severalty; they were not “non-Aboriginal”; and their names had not been entered fraudulently.

The First Nation says it first saw the working assumptions when they were produced for this inquiry but also states that, as far as it is concerned, they do not contradict the guidelines and do not support the position Canada has taken in this inquiry. The First Nation also says there is nothing in the working assumptions that says members must be “present and paid” before they can be counted.

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<sup>38</sup> ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 204 (David Knoll).

<sup>39</sup> ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 204 (David Knoll).

### **Canada's Interpretation of TLE Policy**

Canada states that in this claim, the DOFS payroll cannot be taken as written, that it is wrong for the First Nation to rely on what Canada calls a “sanctity of the base payroll” approach.<sup>40</sup> Canada states that, “if the individual’s name appears on the base payroll but they are not present, they are not paid and they never return, then they don’t meet the eligibility to be included with that particular First Nation.”<sup>41</sup>

Canada also argues there was nothing standing in the way of band members who had gone south returning to Canada. The amnesty was proclaimed in 1886 and it is Canada’s position that by putting the amnesty in place, the government was clearing any obstacles that may have been in the way of band members returning to Canada. Canada acknowledged the fear that sent many people to the United States, but also stated that “certainly Canada can’t be impugned for having granted an amnesty.”<sup>42</sup>

Canada agrees that the framework for determining TLE entitlement is set out in the 1998 Guidelines, but also adds that there is a requirement for continuity, that the DOFS list in itself is only a starting point.<sup>43</sup> Canada states that several key criteria must be considered in addition to the names on the payroll, that “mere appearance”<sup>44</sup> is not enough. Canada points to the fact that the policy specifically enumerates exclusions, members whose names appear on the list but who are not eligible to be counted for treaty land entitlement.

It is Canada’s position that among the criteria used to determine TLE eligibility is one that it describes as “continuity of membership”<sup>45</sup> and that a band member must show a minimum of three years payment on a First Nation’s payroll in order to demonstrate the required continuity. These three years must, in some way, span the date of first survey. According to Canada, to be considered band

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<sup>40</sup> ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 121 (John Scime).

<sup>41</sup> ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 121 (John Scime).

<sup>42</sup> ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 164 (John Scime).

<sup>43</sup> Written Submissions on Behalf of Canada, September 22, 2006, p. 3.

<sup>44</sup> Written Submissions on Behalf of Canada, September 22, 2006, p. 4.

<sup>45</sup> Written Submissions on Behalf of Canada, September 22, 2006, p. 4.

members eligible to be counted for treaty land entitlement, members must fall within one of the following three categories:

- i) paid before DOFS and at DOFS for a total of three or more payments;
- ii) paid at DOFS and after DOFS for a total of three or more payments;
- iii) paid before DOFS and after DOFS for a total of three or more payments.<sup>46</sup>

Canada states the problem that arises in counting the Lucky Man band members is that, although most had been on the paylists for several years before the North-West Rebellion, from 1885 on none of the named members were either paid or present, and, in 1890, their names were removed, never to appear on a Lucky Man band list again. Canada did not dispute the First Nation's contention that the flight from the Battleford area, resulting in the striking of band members' names from the annuity paylists was the result of the North-West Rebellion, but it did not concede that, had the Rebellion not happened, the band members would have stayed where they were in 1884.

To counter the First Nation's position that the guidelines state the names must "appear" on the list, Canada states: "We're not so much stating that "appear" equals "must be paid and present," we're asking that the entire context of the exercise be taken into consideration when assessing the guidelines. And we're asking that we look at more than just the mere words ... what we're trying to do inside the policy which is to recreate a population at a particular time."<sup>47</sup>

Canada acknowledges that the group that never comes back cannot be considered to be absentees, because the guidelines define absentees as being members whose names are not on the DOFS payroll. Nevertheless, Canada considers them to be absent yet not absentees, because they were not on the reserve at the time of survey and never return.

Canada's position is that the only exception to the requirement for a continuity of membership is individuals who remained with the band for a short time at first survey, but where there is no stronger evidence they were members of another band.<sup>48</sup>

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<sup>46</sup> Affidavit of John Scime, Senior Policy Advisor, DIAND, December 2, 2005, para. 5 (ICC Exhibit 3J p. 11).

<sup>47</sup> ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 159 (John Scime).

<sup>48</sup> Written Submissions on Behalf of Canada, September 22, 2006, p. 10.

### **The Parties' Positions on Fairness and Consistency**

A unique aspect of this inquiry was the question of whether Canada had dealt fairly with the Lucky Man Cree Nation and, particularly, whether it was applying an interpretation of the Guidelines in this claim that it had not applied to any other claim. One of the First Nation's primary arguments was that "the way other claims were settled in Saskatchewan is the basis on which you should be proceeding with Lucky Man." With regard to Canada's argument that the names on the base payroll had to be analyzed for criteria such as whether they were "present and paid," the First Nation states that "you can't ignore the approach the department has taken in all the previous TLE claims because they applied what we would submit is a consistent approach to determining who should count at date of first survey,"<sup>49</sup> and that "the department itself, in settling those claims never deducted people from the base pay sheet, except those that were considered double counts. That is the consistent approach that the department has taken."<sup>50</sup>

The Lucky Man Cree Nation also pointed to the reports of two other validated claims in Saskatchewan, the Sweetgrass First Nation and the Little Pine First Nation, as examples of unique circumstances in which the department could have applied restrictive criteria to validating TLE claims but did not do so.

The Sweetgrass First Nation's reserve was surveyed in 1884, the year before the North-West Rebellion; the base payroll was 1883.<sup>51</sup> In 1884, about 70 people entered the Band. Then, in 1885, as a result of the North-West Rebellion, many band members disappeared, including some of the members who entered the Band in 1884. According to the Office of the Treaty Commissioner, "a few

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<sup>49</sup> ICC Transcript, Oral Submission on Behalf of the First Nation, August 18, 2005, p. 50 (David Knoll).

<sup>50</sup> ICC Transcript, Oral Submission on Behalf of the First Nation, August 18, 2005, p. 51 (David Knoll).

<sup>51</sup> Which payroll becomes the base payroll has changed over the years. In the early years of TLE, researchers and the Office of the Treaty Commissioner in Saskatchewan used the payroll immediately before the survey, reasoning that this is the payroll that would have been available to the surveyor at the time. In later years, however, both as a result of the Saskatchewan Court of Appeal's ruling in *Lac La Ronge Indian Band v. Canada*, 2001 SKCA 109, (2001) and the ICC's report on *Kahkewistahaw*, the standard practice became to use the payroll closest in time to the survey, even if the annuity payments were made after the survey. The reasoning was that the closest payroll would most accurately reflect the actual membership of the band at the time of survey. The Sweetgrass First Nation's treaty land entitlement was validated prior to the change and so the payroll available to the surveyor was used; in this case, it was the payroll for 1883, even though the date of first survey was 1884.

reappeared in later years, but most did not.”<sup>52</sup> One of the letters sent from the Office of the Treaty Commissioner to the First Nation during the claim validation process dealt with the issue of how to treat band members who had been affected by the North-West Rebellion. The letter states: “Sweetgrass is an example of where external circumstances (The Rebellion), impacted upon the membership of the Band and warranted careful consideration to determine what happened to the approximately 70 people who were affected.”<sup>53</sup>

The First Nation points to the Sweetgrass TLE validation, because it is almost the mirror image of the claim in this inquiry: in the case of Sweetgrass, members who entered the Band after the survey and stayed with the Band only for a year were counted even though they were not on the base payroll. The letter from the OTC states: “[T]hese people were counted even though they were only there for one year because the events of the Rebellion were beyond their control. These people may well have stayed on at Sweetgrass had they not been forced to leave because of the Rebellion.”<sup>54</sup> The First Nation states that the impact of the North-West Rebellion must be taken into account when assessing Lucky Man’s TLE claim, in the same way as it was for the Sweetgrass TLE claim. The argument is that the impact of these events is clear in the case of Lucky Man, as “it was Canada that removed Lucky Man as chief of his band, that withheld rations for no work, labeled Lucky Man Band members as rebels, which caused them to flee south to the border after the 1885 rebellion,”<sup>55</sup> and that “Canada cannot take advantage of the reduced circumstances faced by Lucky Man that Canada was partially responsible for, to justify that they had no entitlement.”<sup>56</sup>

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<sup>52</sup> Emil Korchinski, Executive Director, Office of the Treaty Commissioner, to Chief Irvin Starr, Starblanket Band, September 25, 1991 (ICC Exhibit 2G, p. 129).

<sup>53</sup> Emil Korchinski, Executive Director, Office of the Treaty Commissioner, to Chief Irvin Starr, Starblanket Band, September 25, 1991 (ICC Exhibit 2G, p. 129).

<sup>54</sup> Emil Korchinski, Executive Director, Office of the Treaty Commissioner, to Chief Irvin Starr, Starblanket Band, September 25, 1991 (ICC Exhibit 2G, p. 129).

<sup>55</sup> ICC Transcript, Oral Submissions on Behalf of the Lucky Man Cree Nation, August 18, 2005, p. 58 (David Knoll).

<sup>56</sup> ICC Transcript, Oral Submissions on Behalf of the Lucky Man Cree Nation, August 18, 2005, p. 58 (David Knoll).

Canada does not dispute the historical circumstances but, as was stated earlier, points to the 1886 amnesty as mitigation of any of Canada's actions that affected the First Nation negatively. Canada also points to the fact that the 70 members who entered the Sweetgrass First Nation whose names were not on the base payroll, actually entered in the year of the survey and were paid that year. Canada says the facts are too different to afford a useful comparison, because "it's based on a different fact scenario; the individuals in Sweetgrass were actually paid; the individuals in Lucky Man were not paid."<sup>57</sup>

The First Nation states that the best example of how Canada has not been consistent and has been unfairly penalizing the Lucky Man Cree Nation is how Canada dealt with the Little Pine First Nation's TLE claim. Counsel for the First Nation says Canada must have regard for the following facts: Little Pine and Lucky Man shared a reserve since it was first surveyed in 1887; Little Pine and Lucky Man were the only First Nations designated as rebel bands for whom the date of first survey falls in the years when no annuities were paid. In 1992, the Little Pine Band signed a treaty land entitlement agreement with Canada. In determining the band's adjusted DOFS population, the researchers began with the base population, that is, the population on the base payroll of 1887, and adjusted it, factoring in absentees, double counts, and other classes of inclusions and exclusions. What Lucky Man says is important is that there was no attempt to strike names from the base payroll, even though many of those people went south after the Rebellion and did not return to Little Pine. It points to researcher Jim Gallo's 1990 report in which he states "Little Pine's band was considered to be 'Rebel Indians' and as such most were not paid annuities from 1885 to 1889. To arrive at a number of 299 people for October 8, 1887, the number actually paid that day (7) is added to the 'Rebel' list of the same day (292)."<sup>58</sup>

Canada acknowledges there is very little difference and does not dispute that the Little Pine settlement was done as Lucky Man would like its TLE settlement to be done; however, according to Canada, what is important is whether the criteria now applied to Lucky Man are the correct

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<sup>57</sup> ICC Transcript, Evidentiary Hearing, October 25, 2006, pp. 67–68 (Perry Robinson).

<sup>58</sup> Jim Gallo, "Little Pine DOFS Summary," October 23–31, 1990, attached to Response to Canada's position on the outstanding Treaty Land Entitlement of the Lucky Man Cree Nation, prepared by Knoll & Co., June 2002 (ICC Exhibit 2e, p. 642).

criteria. Canada's view is that what had been done in the past should not establish a benchmark for what it ought to do in the present, that "[w]e're obligated to do what the law in the best of our interpretation tells us. And there is no obligation to get it wrong twice but only to get it right in this circumstance."<sup>59</sup>

### **Application of TLE to the Lucky Man Cree Nation**

We think the analysis of this treaty land entitlement claim cannot be made without taking into account the impact of the North-West Rebellion on the Lucky Man Cree Nation, consistent with Canada's practice in similar claims. The Rebellion lasted only a few months in the spring of 1885, but for some First Nations, the ripple effects endure today.

Although we have limited evidence about the extent of the Lucky Man Band's involvement in the events of 1885, it is clear that Lucky Man himself was in the company of Big Bear and others when they were involved in a skirmish at the settlement at Frog Lake, in which some settlers and the Indian Sub-Agent were killed. Undoubtedly, it was in part as a result of this event that, following its defeat of the Métis at Batoche and its quashing of the potential Cree uprising, Canada designated the Lucky Man Band as one of a number of "disloyal" or "rebel" bands and suspended annuity payments to members of those bands. We do not find it surprising that many band members left Canada, not knowing what actions the government might take against them after the Rebellion. There is little evidence about whether many of the Lucky Man band members returned to Canada; however, Lucky Man himself returned in 1896, to be arrested but released when prosecutors realized there was insufficient evidence to support prosecution for the killings at Frog Lake.<sup>60</sup>

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<sup>59</sup> ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 202 (John Scime).

<sup>60</sup> A.B. Perry, Superintendent, NWMP, Annual Report, December 22, 1896, Canada, *Report of the Commissioner of the North-West Mounted Police Force, 1896*, 62 (ICC Exhibit 1a, p. 1151).



The last pre-Rebellion payroll for the band is dated 1884. It shows that 82 people were paid as Lucky Man band members,<sup>61</sup> although Lucky Man himself was not on that list. He and a group of followers had travelled to be with Big Bear and were paid their annuities at Fort Pitt.<sup>62</sup>

The government did not pay annuities to band members of rebel bands, but it did maintain the paylists, which are now referred to as “dummy” paylists. Although it is not known whether the agents actually visited the communities to count the band members, the lists from 1885 to 1890 show a careful accounting of deaths and movement in and out of the Band.

The other fact we consider to be important is the timing of the Crown’s survey of the Lucky Man reserve in 1887. The survey took place at a time when both Lucky Man and Little Pine had been designated as rebel bands and were not being paid their treaty annuities. As a result, the annuity list compiled at the date of first survey for the reserve set aside in 1887 is a dummy payroll.

It is this background that lies at the heart of Canada’s argument – that because there are Lucky Man Cree Nation members who appear on the payroll, but who are not present and not paid, they are absent and should not be counted for the purposes of treaty land entitlement.

We reject this argument for two reasons. First, we find that there is nothing in the current TLE policy, as published by Canada in 1998, that would justify removal of these people from the TLE calculation; there is no category that would exclude people who are listed on the annuity payroll but who are believed to be not paid and not present. Second, we think there are significant fairness issues, and that there are compelling reasons why the Lucky Man Cree Nation should be treated similarly to other First Nations in similar circumstances. Our examination of Canada’s policy and practice regarding continuity of membership leads us to the conclusion that it does not and should not exclude the members who fled in the aftermath of the North-West Rebellion.

We begin by examining the 1998 Draft Guidelines, which are the most recent guidelines published by Canada. We find that the First Nation has met the first criteria listed for the inclusion of members entitled to be counted for TLE purposes, that of the number of people whose names appear on the DOFS annuity payroll.

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<sup>61</sup> Lucky Man Band, Treaty annuity payroll, 1884, LAC, RG 10, vol. 9417, p. 109 (ICC Exhibit 1c, p. 20).

<sup>62</sup> Lucky Man Band, Treaty annuity payroll, 1884, LAC, RG 10, vol. 9417, p. 109 (ICC Exhibit 1c, p. 20).

Section 4 of the Guidelines deals with inclusions, exclusions, and clarifications. “Inclusions” are categories of people to be counted for the purpose of TLE; “exclusions” are not included within the count, and “clarification” deals with individuals who fall within areas that might be considered to be grey. Section 4.1.1 of the policy states that the first category of inclusions are those people whose names appear on a DOFS payroll.<sup>63</sup> There is no disagreement between the parties as to whether the 1887 list is a DOFS payroll, although both parties agree no-one on that list was actually paid. Another inclusion is “absentees,” defined as “Treaty Indians who were not on the DOFS payroll but appear on a payroll for that band before and after DOFS, demonstrating they were band members at DOFS.”<sup>64</sup> The people Canada wishes to exclude from the calculations appear on the DOFS payroll and, therefore, they are not absentees as defined in the 1998 Guidelines. There is nothing in the inclusions part of the policy that deals with the specific situation of members whose names appear on a DOFS payroll but who are not present and not paid except for the general provision that the people whose names appear on a DOFS payroll should be included.

We also examined the “exclusions” part of the policy, which accounts for circumstances where people whose names appear on a payroll should not be counted for the purpose of treaty land entitlement. Section 4.2.1 of the 1998 Guidelines lists the exclusions. We consider this list to be exhaustive, and there is no category for people whose names are on the list but who are “absent” from the reserve, and no category for people who are not present and not paid. These criteria that Canada wishes to apply are not in the 1998 Guidelines. We note that section 4.3 dealing with clarification does not deal with this particular fact situation, although we note 4.3.c in which individuals who “commuted,” generally women who left the band because they married non-Aboriginal men, were not removed from the DOFS payroll.

Canada has argued that it is not fair to count the 37 people who never return. There is nothing in the criteria that requires a person whose name is on the DOFS payroll to remain with the band; the fact that an individual leaves and does not return is not a relevant criterion, and the criterion it most

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<sup>63</sup> DIAND, “Historic Treaty Land Entitlement (TLE) Shortfall Policy Validation Criteria and Research Guidelines,” October 1998 (ICC Exhibit 9b pp. 2–3).

<sup>64</sup> DIAND, “Historic Treaty Land Entitlement (TLE) Shortfall Policy Validation Criteria and Research Guidelines,” October 1998 (ICC Exhibit 9b, p. 2).

resembles is 4.3.c dealing with commutations. Like the Lucky Man members who left for the United States, women who commuted did not return to their bands. Since the names of the members appear on the Lucky Man payroll, the Lucky Man Cree Nation should not be penalized for the fact that they never returned, any more than it would be if a member had died, a woman had commuted, or a member had decided to leave the band permanently. Canada's challenge when members moved from band to band is to ensure they were not counted twice, so that two different First Nations received treaty land for the same person; that is the purpose behind section 4.2.1.a of the exclusions. In this case, however, there is no evidence that the individuals were ever paid with another band, or that any other band has received treaty land on their behalf. The Indian Claims Commission has previously stated the principle that every treaty Indian is to be counted once for TLE purposes, and we see no reason to deviate from that principle and not count these individuals.

The North-West Rebellion of 1885 was a significant historical factor that had the effect of triggering involuntary population displacements. This effect has been widely recognized by historians and by the government in other claims, notably the Little Pine First Nation's TLE settlement, and that of the Sweetgrass First Nation. We accept the words of the Office of the Treaty Commissioner in the 1991 letter to Chief Irvin Starr of the Starblanket First Nation, which gave an explanation of why the Commission included names of members whose names appeared on the 1884 payroll, but not on the 1885 payroll "as a consequence of the rebellion"<sup>65</sup> and who disappear after that. In the letter, the OTC stated "these people were counted even though they were only there for one year because the events of the Rebellion were beyond their control. These people may well have stayed on at Sweetgrass had they not been forced to leave because of the Rebellion."<sup>66</sup> We consider that the same can be said of the Lucky Man Band after 1885, and we have not been presented with any evidence that would justify our taking a different approach. Canada has not presented any justification for adopting an interpretation for Lucky Man that is different from its interpretation of other First Nations' treaty land entitlements.

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<sup>65</sup> Emil Korchinski, Executive Director, Office of the Treaty Commissioner, to Chief Irvin Starr, Starblanket First Nation, September 25, 1991 (ICC Exhibit 2g, p. 129).

<sup>66</sup> Emil Korchinski, Executive Director, Office of the Treaty Commissioner, to Chief Irvin Starr, Starblanket First Nation, September 25, 1991 (ICC Exhibit 2g, p. 129).

### **The 1886 Amnesty**

Canada has argued that the 1886 amnesty allowed any Indian who had fled the country to return without fear of sanctions, that there was no reason for anyone to remain in the United States, and that, as a result, the 37 members should have and could have been on the reserve in 1887 at the date of first survey.

We have no evidence of how or whether the amnesty was communicated to anyone across the border. The language of the amnesty left open enough questions that, even if band members had known about it, it is quite possible they were still afraid of what might happen if they came back to Canada. We do know that 10 years after the amnesty, in 1896, when Lucky Man himself returned, he was arrested. It is not difficult to think that Indians south of the border would have been skeptical about the amnesty.

We have no evidence that the Indians south of the border knew of section 10 of the 1886 *Indian Act*, which stripped them of band membership if they lived for five years outside Canada.<sup>67</sup> Similarly, we have no evidence that they were aware that a reserve was being surveyed for the Lucky Man Band in 1887.

In any event, the repercussions of historical events such as the Rebellion cannot be used by Canada to void the obligations it assumed when it signed treaties. We consider it to be an important principle that historical circumstances do not provide an excuse to avoid treaty obligations. The obligation to provide reserve land arose when Lucky Man signed Treaty 6 in 1879, and crystallized in 1887 when John C. Nelson surveyed the reserve. None of the events surrounding the North-West Rebellion change the Crown's treaty obligations. Canada's arguments would have the First Nation bearing the entire brunt of all the changes that occurred during this time, when there is no evidence any of the band members were aware of what was happening or of the significance of their actions.

If anything, the results from the North-West Rebellion would seem to bolster the First Nation's point of view. For instance, even if Lucky Man band members believed the amnesty gave

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<sup>67</sup> *Indian Act*, RSC 1886, c. 43, s. 10 reads: "Any Indian who has for five years continuously resided in a foreign country without the consent in writing of the Superintendent General or his agent shall cease to be a member of the band of which he or she was formerly a member and he shall not again become a member of that band, or of any other band unless the consent of such band, with the approval of the Superintendent General is first obtained." The text of the 1880 Act is almost identical.

them safe passage to Canada, why would they have returned to a reserve if they believed they were not to be paid? We understand from the historical record, and the parties agree, that the annual cash payments were not made to those band members who continued to reside on the reserve near Battleford, but we do not know whether the agent actually visited the reserve or whether the list was amended on the basis of reports and other attendance.

Canada had a purpose for maintaining the paylists in the aftermath of the Rebellion. Both Canada and the First Nation agreed that one purpose of the “dummy” paylist was to determine how much was to be paid in reparations to settlers who suffered damage to their homes and farms during the Rebellion. Historical documentation records another purpose – that of maintaining the annuity lists for the year that the members returned to the reserve. Regardless of the purpose for keeping the lists, Canada must have considered these people to have been members of the Lucky Man Band. We also know that Canada took some care with these lists, since these “dummy” paylists are as detailed as any other paylists for that era. At the time and in 1887, when the reserve was surveyed, Canada would have had no way of knowing whether members would return to the reserve, just as it would have no ability to foresee births or deaths in the coming year.

### **The Panel’s Analysis of Fairness and Consistency**

There are two components that comprise this element of our analysis. The first is general in nature and concerns the working assumptions that Canada has utilized to determine continuity of membership. We are concerned about whether it is fair for Canada to apply claims assessment criteria that have not been made public. The second pertains to the specific circumstances of the Lucky Man Cree Nation and whether it is fair for Canada to treat it differently from the way in which it treated other First Nations in the same situation.

### ***Continuity of Membership and the Working Assumptions***

Canada has argued that, as a working assumption,<sup>68</sup> individuals need to demonstrate continuity of membership in order to be counted for TLE purposes. The First Nation has argued that continuity

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<sup>68</sup> See earlier reference for the wording of the working assumptions.

of membership is a concept to be examined only when it is not clear which First Nation is entitled to land on behalf of an individual.

We wish to state first that we are concerned about the application of these working assumptions as the basis for validating a claim because of their unpublished nature. This internal document has no official status. We think that using these assumptions in the validation of TLE claims raises serious questions of administrative law and procedural fairness. This internal working document was not provided by Canada to the Lucky Man Cree Nation at the time it made its initial application, nor was it available to the First Nation at the time it was gathering its evidence and making its case for consideration to the government. These working assumptions were disclosed to the Indian Claims Commission in the course of inquiries because the ICC asked for them. According to well-established principles of administrative law, “the right to be heard fundamentally requires that a person know the case to be met and be given an opportunity to answer it.”<sup>69</sup> Had it not been for the Commission’s inquiry, the Lucky Man Cree Nation would not have known the criteria that were being applied to assess its claim.

This is not to say that Canada cannot change its policy in order to fully implement its treaty obligations. It is obvious that has happened during the past two decades in response to the Commission and the courts and the Crown’s own assessment of its policies. What is required is that Canada disclose any policy changes it has made and, where a change is contemplated that would have a negative impact on people who have relied on a policy, the doctrine of legitimate expectations requires Canada to give notice of the change and provide an opportunity for response.<sup>70</sup> Procedural fairness requires that the department publish its working assumptions and state clearly that they are a complement to its 1998 Draft Guidelines, and that these working assumptions will be used in the validation of claims.

We do not accept Canada’s practice of giving equal weight to the published guidelines and its unpublished working assumptions. It is almost 10 years since the Draft Guidelines were published, and almost five years since the Indian Claims Commission was notified during the course

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<sup>69</sup> *Shepherd v. Canada (Royal Canadian Mounted Police)*, [2004] FCJ No. 1188 (FCA) at para. 22.

<sup>70</sup> *Durant v. Canada (Minister of Fisheries and Oceans)*, [2002] FCJ No. 441, at para. 34.

of an inquiry that working assumptions existed. Canada has had ample time to publish the assumptions and has offered no reason why it has not done so. The fact that the working assumptions do not appear to be inconsistent with the Guidelines is not enough to justify their use without the First Nation's knowledge.

Having stated our concerns about the use of these assumptions in the first place, we still do not see how applying them in this claim results in the outcome claimed by Canada. Furthermore, there is nothing in this section of the assumptions that would contradict the Guidelines, or for that matter, that excludes the 37 members listed on Lucky Man's 1887 payroll, noted as having gone "south." The 37 people are not "one-time-onlies" or "two-time-short-stays." Their names appear on several earlier annuity paylists. Their names are on the DOFS payroll and there is no evidence that they had stronger ties to another treaty band.

We have concerns about what appears to be an attempt to deal more strictly with the Lucky Man Cree Nation's claim through the use of the working assumptions than would be warranted under the existing policy Guidelines. It also appears that Canada is using these assumptions as a method of diminishing its treaty obligations. In his affidavit, Canada's representative stated that to be counted for TLE validation, an individual must meet these continuity of membership criteria in one of three scenarios: all required a total of three payments, with combinations of being paid before, at, and after DOFS.<sup>71</sup>

Two of the scenarios would appear to contradict the working assumptions, in that the working assumptions state that in some cases only one or two years of membership is sufficient for TLE. At the oral hearing, Canada's representative agreed and said he wasn't "thinking in terms of one-time-only and two-time-short-stays on the base payroll because Lucky Man doesn't contain any of those individuals,"<sup>72</sup> but agreed they would be exceptions to the continuity of membership requirements.<sup>73</sup>

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<sup>71</sup> Affidavit of John Scime, Senior Policy Advisor, DIAND, December 2, 2005 (ICC Exhibit 3J, p. 12).

<sup>72</sup> ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 150 (John Scime).

<sup>73</sup> ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 150 (John Scime).

We can find no reason for applying criteria that are more restrictive to Lucky Man than are applied to other First Nations. We also find that the third scenario cited by Canada, that an individual's name appears on a payroll before DOFS, after DOFS, but not on DOFS itself, is part of the Guidelines, as that is almost exactly what we understand is the definition of absentees.

Canada's explanation of "continuity of membership" has added little to our understanding of the policy. What the policy indicates to us is that to be included within a band's membership for the purpose of calculating TLE, a member's name must appear on the DOFS payroll. If the name is on the DOFS payroll and is not on any other payroll,<sup>74</sup> that is sufficient.<sup>75</sup> If a name is not on a DOFS payroll, then that person must show three years of continuity of membership before he or she can be counted for TLE. If continuity of membership is to be applied, it would be applied only to absentees or late additions, people whose names are not on the DOFS payroll, as part of the inquiry to determine the nature of the best evidence of membership. We accept the First Nation's arguments about the meaning of continuity of membership. We can find no reason why it might be applied to the Lucky Man Band, where the DOFS payroll indicates a population of 62 and there is no disagreement about how many names appear on the payroll.

There is nothing in the working assumptions that would justify Canada's position that for a person on the DOFS payroll to be counted, that person must have been present and paid.

Canada has argued that the Indian Claims Commission has approved the concept of continuity of membership in the *Kahkewistahaw First Nation: Treaty Land Entitlement Inquiry*.<sup>76</sup> In that inquiry, the Band's population had varied considerably between the time of signing treaty to the time of first survey. One of the questions the panel considered was whether or how the variation

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<sup>74</sup> The Guidelines do account for the possibility of a band member's name appearing on a DOFS payroll and then on one other payroll. In this situation, the person would be counted in the DOFS population if there was no better evidence that the person belonged to the other band. It was common for band members to take their annuities with another band, and be recorded on that band's payroll if they were hunting or trapping away from the band.

<sup>75</sup> We understand this to mean that, if a name appears on a DOFS payroll but the next year that same person takes annuities with a different First Nation and remains there, a payroll analysis of both First Nations would reveal the individual had stronger ties to the second First Nation, and should be counted in that First Nation's TLE, either as a name that appears on a DOFS payroll or as a late addition. Both possibilities are accounted for in the 1998 Draft Guidelines.

<sup>76</sup> ICC, *Kahkewistahaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported [1998] 6 ICCP 21.



in the band's membership over several years should be taken into account when determining the band population for TLE. The panel considered the difference between "objective," "subjective," and "continuity of membership" approaches to payroll selection. The "continuity of membership" considered by the panel and proposed by Canada would have required a consideration of whether an Indian was a member over a period of time that spanned the date of first survey. The panel rejected this concept in favour of one that mirrors the current policy – one that takes as a starting point the population at date of first survey and adjusts for individuals who were not counted, but who demonstrated they were members of the band. The panel did not think that individuals needed to show they were members at, before, and after the survey. As well, there is nothing in the inquiry report stating that, to be counted, individuals needed to be both paid and present.

We find there is nothing in Canada's draft policy that would substantiate the exclusion of the 37 members on the basis that they did not display a continuity of membership. Our reading of the policy is that only those individuals whose names did not appear on a DOFS payroll needed to show a continuity of membership. The names of these members do appear on the 1887 payroll, they are not double counted, and their names do not appear on any other annuity payroll; therefore, they do not meet the circumstances where their eligibility for TLE would need to be examined further.

### ***Similarity of Circumstances – Lucky Man and Little Pine***

A second aspect of fairness must be examined in this inquiry. There was only one reserve surveyed for "rebel" bands during the years in which Canada was not paying annuities to members of rebel bands and this was the common reserve for Lucky Man and Little Pine. Canada agreed several years ago that the two Bands continued to exist and that each should be considered separately for the purposes of treaty land entitlement. No other First Nation is in the same situation, and we find it is only fair that Canada should treat First Nations with identical fact situations in the same way.

Like Lucky Man, Little Pine's DOFS payroll is 1887 and, like Lucky Man's, it is a dummy payroll. It shows 292 members were designated as being rebels, with only seven members eligible to actually receive annuity payments. Many of the members are noted as being "south," and in October 1887, when Surveyor Nelson arrived, only 114 people were on the reserve. In calculating Little Pine's TLE, Canada did not discount those members who had fled to the United States and

never returned to the reserve. The analysis prepared by the Office of the Treaty Commissioner states: “Only 114 can be said to have been present at the survey. Most of those listed as “unknown” or “south” never return and in fact had been absent since 1885 according to the payroll notes for the period.”<sup>77</sup>

Since only these two First Nations are in this unique situation, fairness dictates that Lucky Man should be treated in the same way as Little Pine. Canada’s argument that “there is no obligation to get it wrong twice”<sup>78</sup> misses the mark. Since the Little Pine First Nation’s TLE settlement is not the subject of this inquiry, we do not wish to comment on whether the method for calculating Little Pine’s TLE was right or wrong, but, where there are only two First Nations in the same circumstances, there is no justification for treating them differently. The decision to reject the Lucky Man claim appears to be arbitrary, based upon an analysis crafted after the fact to justify the decision.

We find that the starting point for the analysis must be the 62 members listed as being on the annuity payroll for the Lucky Man band in 1884. Canada’s confirming research has shown that there may be additions to that number, but there are insufficient exclusions to reduce the entitlement count to less than 60. We find no basis for excluding the 37 band members who fled as a result of the aftermath of the North-West Rebellion, and think that had the Rebellion not happened, they would have been on the reserve at the time of survey and would have remained there.

## **ISSUE 2: QUANTUM OF LAND CREDITED FOR TLE PURPOSES**

2 With what quantum of land is Canada to be credited for treaty land entitlement purposes?

The question at the heart of this issue is how to characterize the 25 square miles of land that were set aside for the Lucky Man Cree Nation in the Settlement Agreement of 1989. The First Nation takes the position that this question must be answered by examining what was set aside by the surveyor, and then goes on to state that, “if there was no land received or surveyed for Lucky Man

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<sup>77</sup> Jim Gallo, “Little Pine DOFS Summary,” October 23–31, 1990, attached to Response to Canada’s position on the outstanding Treaty Land Entitlement of the Lucky Man Cree Nation, prepared by Knoll & Co., June 2002 (ICC Exhibit 2e, p. 667).

<sup>78</sup> ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 202 (John Scime).

in 1887, then there was a shortfall no matter what the size of the population at the date of first survey.”<sup>79</sup> This would mean that it would not matter whether any of the Lucky Man members who had gone south returned once treaty annuity payments resumed, because it is common ground between the parties that there were a small number of Lucky Man band members who remained on IR 116 after 1885. The names of the people who remained appeared on the paylist of 1884, the last year before the Rebellion, which is also the last year that annuity payments were made, were repeated in the “dummy” paylists, and appear from 1890 onwards when treaty annuity payments were reinstated. The First Nation argues that, since this small number is greater than zero, which was the acreage set aside for the Band in 1887, Canada must validate its claim.

To reinforce its point, the First Nation points out that the 16,000 acres that were surveyed in 1887 were all credited to the Little Pine First Nation in its negotiated TLE settlement. According to the First Nation, that would mean that “it would essentially be double counting land”<sup>80</sup> if the 7,680 acres of the 1989 settlement were counted as if they had been surveyed in 1887. In addition to the argument about validation, the First Nation says it is important to characterize the land in its proper time frame, because to allocate the land in calculating TLE as if it had been set aside in 1887 “would potentially compromise the loss of use claim that the Lucky Man Cree nation has under the provisions of the settlement agreement.”<sup>81</sup>

The First Nation’s position is that it has two claims that should be negotiated. First, it has a claim for a TLE shortfall: the First Nation should have received land for more than 60 people and that the land it did receive in 1989 was only a partial settlement. Second, it has a claim because for 100 years it did not have reserve land.

Canada’s position is that the 7,680 acres received by Lucky Man in 1989 constitute a TLE settlement such that, for the First Nation to now have a valid claim, it must prove that in 1887 it had

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<sup>79</sup> ICC Transcript, Oral Submissions of the Lucky Man Cree Nation, August 18, 2005, p. 26 (David Knoll).

<sup>80</sup> ICC Transcript, Oral Submission of the Lucky Man Cree Nation, August 18, 2005, p. 26 (David Knoll).

<sup>81</sup> ICC Transcript, Oral Submissions of the Lucky Man Cree Nation, August 18, 2005, p. 26 (David Knoll).

more than 60 members entitled to be counted and, “if they don’t do it, they haven’t got an entitlement claim.”<sup>82</sup>

Canada argues that the First Nation was not deprived of land between 1887 and 1989, because band members lived on IR 116, had a legal entitlement to live there, and had to surrender their interest in the land as a condition of the 1989 Settlement Agreement.

Canada also takes the position that, if the Lucky Man Cree Nation does have a treaty land entitlement of more than 60, according to the Settlement Agreement of 1989 it can be compensated only with money, and not with additional land that can acquire reserve status.

We do not think we need to decide whether the First Nation has a valid claim based on any number greater than zero, because we have previously stated that we accept the payroll of 1887, which shows a band membership of 62 as the starting point of the analysis. We are satisfied that applying the 1998 Guidelines would generate an entitlement number higher than 62. Accordingly, we do not need to decide whether an entitlement population of less than 60 but greater than zero would generate a validated claim for the First Nation.

We think the starting point for this analysis is the Treaty Land Entitlement Settlement Agreement signed between the Lucky Man Band and the Government of Canada in 1989. In the preamble to that agreement, the First Nation and Canada agree that “Canada has recognized and validated the Band’s claim to treaty land entitlement.”<sup>83</sup> In that agreement, Canada set aside 7,680 acres of land which it would “recommend to the Governor in Council that the Entitlement Lands be set aside for the use and benefit of the Lucky Man Band of Indians.”<sup>84</sup> Using the formula in Treaty 6, of a square mile or 640 acres for a family of five, this is sufficient land for 60 band members. The release clause, which states that the Band may have “a greater TLE than the quantum of land set

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<sup>82</sup> ICC Transcript, Oral Submissions of the Lucky Man Cree Nation, August 18, 2005, p. 107 (Perry Robinson).

<sup>83</sup> The Lucky Man Band of Indians, Treaty Land Entitlement Settlement Agreement, November 23, 1989, Preamble (ICC Exhibit 10b, p. 2).

<sup>84</sup> The Lucky Man Band of Indians, Treaty Land Entitlement Settlement Agreement, November 23, 1989, section 2 (ICC Exhibit 10b, p. 2).

aside as the Band's reserve"<sup>85</sup> and therefore contemplates that the Band may be owed a greater amount of land, specifically refers to the quantum of land set aside as treaty land entitlement. We acknowledge that the First Nation and Canada made detailed argument about the characterization of the land but we find the Settlement Agreement unambiguous. Our interpretation of the Settlement Agreement is that it reflects the common intent of the parties, and that intent was to negotiate a settlement of outstanding treaty land entitlement, and to consider the 7,680 acres put into reserve status as TLE lands.

We conclude that Canada is to be credited with a TLE settlement of 7,680 acres, which satisfies an entitlement for 60 people. The date of this credit is 1989.

### **ISSUE 3: QUANTUM OF LAND IN RELATION TO TLE OBLIGATION**

3 Having regard to the answers to these questions, has Canada satisfied its treaty land entitlement obligation to the Lucky Man Cree Nation with regard to land quantum?

In light of the evidence put before us, we find that Canada has not satisfied its TLE obligation to the Lucky Man Cree Nation, and we find a TLE shortfall of at least two people. We invite the parties to review the extensive additional research and payroll analysis that has already been conducted in this claim, and, if necessary, conduct additional research and analysis into the treaty land entitlement population of the Lucky Man Cree Nation, according to the 1998 Draft Guidelines. The payroll analysis should include all the names which appear on the 1887 DOFS payroll. We acknowledge the land quantum for 60 people that was negotiated between the parties in 1989. We also note that, according to that agreement, if it is later discovered that there is a TLE shortfall, section 3.B (b) provides for compensation in lieu of land.

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<sup>85</sup> The Lucky Man Band of Indians, Treaty Land Entitlement Settlement Agreement, November 23, 1989, section 3 (ICC Exhibit 10b, pp. 3–4). The release clause is “given without prejudice to and without it being construed in any way as a forfeiture or waiver by the Band ... to any claim ...

a) to compensation for allegedly being denied the privilege of 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 TLE than the quantum of land set aside as the Band's reserve.”



**PART V**  
**CONCLUSIONS AND RECOMMENDATION**

We find that the Lucky Man Cree Nation has established that the Government of Canada owes an outstanding lawful obligation to provide land to the First Nation under the terms of Treaty 6. We also find that Canada is to be credited with having provided 7,680 acres of TLE land to the First Nation. We therefore recommend:

**That the Lucky Man Cree Nation's treaty land entitlement claim be accepted for negotiation under Canada's Specific Claims Policy.**

**FOR THE INDIAN CLAIMS COMMISSION**



Renée Dupuis, C.M., *Ad.E.* (Chair)  
Chief Commissioner



Jane Dickson-Gilmore  
Commissioner



Alan C. Holman  
Commissioner

Dated this 28th day of February, 2008.





**APPENDIX A**  
**HISTORICAL BACKGROUND**

**LUCKY MAN CREE NATION: TREATY LAND ENTITLEMENT PHASE II INQUIRY**

**Indian Claims Commission**



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## **TREATY 6: BIG BEAR'S RESISTANCE AND LUCKY MAN BAND'S FORMATION, 1876–79**

### **Negotiation and Signing of Treaty 6, 1876**

Throughout the late 1860s and early 1870s, the Plains Cree were growing concerned about increasing encroachments on their territory by white settlers. The buffalo herds that had once been the cornerstone of their culture were vanishing from the prairie. Word had already spread to the Cree that the government had entered treaty negotiations with the Chippewa Indians to the east and the increasing presence of boundary and railway surveyors made the Cree uneasy about their security. These and other factors led some Cree chiefs to consider negotiating a treaty with the government to assure their future in the new dominion. The government, too, was anxious to formalize relations with the people of the plains so that the settlement of western Canada could proceed smoothly.<sup>1</sup>

To that end, Treaty Commissioners were appointed in the 1870s by the Government of Canada to negotiate treaties with the Indian nations of the western Prairies. In 1876, Treaty Commissioners Alexander Morris (Lieutenant Governor of Manitoba and the North-West Territories, including present-day Saskatchewan), W.J. Christie (Hudson's Bay Company chief factor), and James McKay (Minister of Agriculture for Manitoba) met with Chiefs of the Cree and Assiniboine Nations at Fort Carlton and Fort Pitt.<sup>2</sup> Those negotiations resulted in a number of Chiefs signing Treaty 6 at or near Fort Carlton on August 23 and 28, 1876, and at Fort Pitt on September 9, 1876. Under the terms of the treaty, the Indian signatories agreed to “cede, release, surrender and yield up” to Canada “all their rights, titles and privileges, whatsoever, to the lands included within the ... limits” of the Treaty 6 area, as well as “all other lands wherever situated in the North-West Territories, or in any other Province or portion of Her Majesty's Dominions, situated and being within the Dominion of Canada.”<sup>3</sup> In exchange, the Indians were promised, among other things, reserve lands, annuities, farm implements, and instruction to ease their transition from a buffalo-

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<sup>1</sup> Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 168–72 (ICC Exhibit 1e, pp. 1–5); John L. Tobias, “A Brief History of Little Pine / Lucky Man Bands: 1870–1910,” Report prepared for the Federation of Saskatchewan Indians, [1975], p. 4 (ICC Exhibit 2a, p. 4).

<sup>2</sup> Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 196–244 (ICC Exhibit 1e, pp. 29–77).

<sup>3</sup> Canada, *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River, with Adhesions* (Ottawa: Queen's Printer, 1964), 1–2 (ICC Exhibit 1b, pp. 1–2).

based subsistence to an agrarian economy. Of greatest interest in the present inquiry are the following terms of Treaty 6:

Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided, all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say: that *the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them.*<sup>4</sup>

At the time of treaty, Lucky Man was a headman under Big Bear, one of the most powerful of the Cree Chiefs, who later became known for protesting government attempts to erode native rights and autonomy.<sup>5</sup> Big Bear was not present at the initial treaty negotiations at Fort Carlton and did not arrive at Fort Pitt until September 13, 1876, the final day of treaty talks that year.<sup>6</sup> He appeared without his Band, informing the Commissioners that he represented other bands still out on the plains and that he would not sign treaty on their behalf without representatives from those bands being present. As Morris reported the exchange, Big Bear stated:

“I am glad to meet you, I am alone; but if I had known the time, I would have been here with all my people. I am not an undutiful child, I do not throw back your hand; but as my people are not here, I do not sign. I will tell them what I have heard, and next year I will come.” About an hour afterwards the Big Bear came to Fort Pitt House to see the Governor, and again repeated that he accepted treaty as if he had

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<sup>4</sup> Canada, *Treaty No. 6 Between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River, with Adhesions* (Ottawa: Queen's Printer, 1964), 3 (ICC Exhibit 1b, p. 3). Emphasis added.

<sup>5</sup> John L. Tobias, “A Brief History of Little Pine / Lucky Man Bands: 1870–1910,” Report prepared for the Federation of Saskatchewan Indians, [1975], pp. 6–8 (ICC Exhibit 2a, pp. 6–8).

<sup>6</sup> Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 239–42 (ICC Exhibit 1e, pp. 72–76); John L. Tobias, “A Brief History of Little Pine / Lucky Man Bands: 1870–1910,” Report prepared for the Federation of Saskatchewan Indians, [1975], p. 5 (ICC Exhibit 2a, p. 5).

signed it, and would come next year, with all his people, to meet the Commissioners and accept it.<sup>7</sup>

Several more Cree bands adhered to Treaty 6 in the years that followed. Despite Big Bear's assurance in 1876 that he would consider signing the treaty the following year, he did not sign.<sup>8</sup> Over the next few years, in fact, Big Bear became a leading advocate for revising Treaty 6 to reflect more favourable terms, both for those Indians who had already signed treaty and for those who had not yet adhered.<sup>9</sup> Since he had not been present at the initial treaty meetings, he decided to wait and see whether the government would honour its treaty obligations, but in the meantime, he tried to negotiate and improve upon what he and other Cree leaders, such as Piapot and Little Pine, perceived to be inadequate treaty provisions. Big Bear also resisted attempts by the government to have the Crown's law become the exclusive law by which his people were governed and sought to preserve and strengthen Indian autonomy and influence.<sup>10</sup> As historian John Tobias states:

Believing that small reserves were more susceptible to the control of the Canadian government and its officials, Big Bear, Piapot, and Little Pine sought to effect a concentration of the Cree people in an Indian territory similar to the reservation system in the United States. In such a territory the Cree would be able to preserve their autonomy, or at least limit the ability of others to control them; they would be better able to take concerted action on matters of importance to them.<sup>11</sup>

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<sup>7</sup> Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 242 (ICC Exhibit 1e, p. 75).

<sup>8</sup> Canada, *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River, with Adhesions* (Ottawa: Queen's Printer, 1964), 10–18 (ICC Exhibit 1b, p. 10–18).

<sup>9</sup> David Laird, Lieutenant Governor and Indian Superintendent, to the Minister of the Interior, May 9, 1878, Library and Archives Canada (hereafter LAC), RG 10, vol. 3655, file 9000 (ICC Exhibit 1a, pp. 44–47).

<sup>10</sup> Edgar Dewdney, Indian Commissioner, to the Superintendent General of Indian Affairs (SGIA), January 2, 1880, Canada, *Report of the Deputy Superintendent General of Indian Affairs, 1879*, 77 (ICC Exhibit 1a, p. 124); John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879–1885," in J.R. Miller, ed., *Sweet Promises: A Reader in Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 214–16 (ICC Exhibit 8c, pp. 3–5).

<sup>11</sup> John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879–1885," in J.R. Miller, ed., *Sweet Promises: A Reader in Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 217 (ICC Exhibit 8c, p. 6).

The strong stands taken by Big Bear and other Indian leaders at this time led to their being regarded with a mixture of respect and fear – the latter often due to misunderstanding and misinformation.<sup>12</sup>

As Big Bear biographer Hugh Dempsey wrote:

Big Bear was not the only chief to protest the lot of the Crees. Little Pine had refused to accept treaty in 1877 because it would mean losing his freedom, and *Piapot*, complaining that the terms of Treaty Four were inadequate, would not take a reserve. Even the peaceful chief Star Blanket was concerned about insufficient help to start farming, while Beardy angrily demonstrated against the low rations. But Big Bear's dramatic appeals at Fort Pitt and Sounding Lake in 1877 and 1878 had made him the symbol of government defiance, both among disaffected Indians and the white people in nearby settlements. To the Cree, Big Bear was a determined, unyielding leader who was trying to unite the Indians and thus negotiate a better deal from the government. To many whites, he was an untrustworthy scoundrel who wanted to lead the plains tribes in a war of extermination. The growing community of Battleford feared the Cree chief, and wild rumours circulated that made it sound as though the plains would erupt in violence at any moment. In disgust, the Indian commissioner [Edgar Dewdney] commented that "the inhabitants have shown a great amount of unnecessary nervousness."<sup>13</sup>

Edgar Dewdney, the newly appointed Indian Commissioner for the North-West Territories who later became the lightning rod for Cree disaffection, also acknowledged after meeting Big Bear in 1879: "I have not formed such a poor opinion of 'Big Bear,' as some appear to have done. He is of a very independent character, self-reliant, and appears to know how to make his own living without begging from the Government."<sup>14</sup>

With the spread of settlement and the disappearance of the buffalo, the last quarter of the 19th century represented a time of great social, economic, and spiritual upheaval for the Plains Indians.

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<sup>12</sup> See L.N.F. Crozier, Superintendent, North-West Mounted Police (NWMP), to James MacLeod, Commissioner, NWMP, December 29, 1879, Canada, *North-West Mounted Police Force, Commissioner's Report, 1879*, 18 (ICC Exhibit 1a, p. 107); Hugh A. Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 74, 80, 86 (ICC Exhibit 3h, pp. 124, 130, 136); M.G. Dickieson to L. Vankoughnet, Deputy Superintendent General of Indian Affairs (DSGIA), July 26, 1879, LAC, RG 10, vol. 3672, file 10853 (ICC Exhibit 1a, pp. 84–86).

<sup>13</sup> Hugh A. Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 86–87 (ICC Exhibit 3h, pp. 136–37). Emphasis in the original.

<sup>14</sup> Edgar Dewdney, Indian Commissioner, to the SGIA, January 2, 1880, Canada, *Report of the Deputy Superintendent General of Indian Affairs, 1879*, 77 (ICC Exhibit 1a, p. 124).



In the years immediately following the initial execution of Treaty 6 in 1876, buffalo became more difficult to find. Big Bear and other Chiefs moved their bands into the Cypress Hills area near the border with the United States, in what would later become southwest Saskatchewan. That location brought them closer to the last remaining herds and the Cree bands regularly travelled south across the 49th parallel into the United States in pursuit of the great beasts.<sup>15</sup>

Initially, Canadian authorities were not opposed to the Cree crossing the border in search of food. They believed that the eventual depletion of buffalo stocks, together with the government's continued promotion of farming, would persuade Canada's Indians to enter treaty and take reserves. In the meantime, since Canadian authorities also believed that any problems with Canadian Indians in the United States were related to the scarcity of buffalo, they requested that the Americans allow hunting within their borders:

The Canadian Government is making great exertions to settle these Indians and to induce them to become herdsmen and to cultivate land and raise supplies of food for themselves, but in the meantime and until this is accomplished Half-Breeds & Indians alike depend upon the chase, particularly of the Buffalo, for sustenance.<sup>16</sup>

### **Lucky Man Band's Formation and Adhesion to Treaty 6, 1879**

As buffalo hunting became increasingly inconsistent and unproductive, some members of Big Bear's Band began to question his strategy of refusing to adhere to treaty, believing that the benefits of treaty might alleviate some of the hardships they were facing. Acceptance of treaty, some felt, would at least secure annuity payments, with which they could purchase provisions for their struggling families. As Tobias notes, Commissioner Dewdney was ready and willing to use the situation to his advantage:

The new Indian commissioner quickly sought to use rations as a means of getting control over the Cree. In the fall of 1879 he announced that rations were to be provided only to Indians who had taken treaty. To get the Cree into treaty more easily and to reduce the influence of recalcitrant leaders, Dewdney announced that he would

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<sup>15</sup> L.N.F. Crozier, Superintendent, NWMP, to James MacLeod, Commissioner, NWMP, December 29, 1879, Canada, *North-West Mounted Police Force, Commissioner's Report, 1879*, 18–19 (ICC Exhibit 1a, pp. 107–8); Hugh A. Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 81–82 (ICC Exhibit 3h, pp. 131–32); DSGIA to the SGIA, December 31, 1879, Canada, *Report of the Deputy Superintendent General of Indian Affairs, 1879*, 12 (ICC Exhibit 1a, p. 117).

<sup>16</sup> Canada, Order in Council PC 1322, September 22, 1879, LAC, RG 10, vol. 3652, file 8589-1 (ICC Exhibit 1a, pp. 94–102).

adopt an old Hudson's Bay Company practice of recognizing any adult male Cree as chief of a new band if he could induce 100 or more persons to recognize him as leader. He expected that the starving Cypress Hills Cree would desert their old leaders to get rations. As a means of demonstrating Canada's control over the Cree, Dewdney ordered that only the sick, aged, and orphans should receive rations without providing some service to one of the government agencies in the west.

Dewdney's policies seemed to work, for when the Cree and Assiniboine who had gone to hunt in Montana returned starving, their resolve weakened. Little Pine's people convinced their chief to take treaty in 1879, but when Big Bear refused to do the same, almost half of his following joined Lucky Man or Thunderchild to form new bands in order to receive rations.<sup>17</sup>

On July 2, 1879, at Fort Walsh, Lucky Man signed an adhesion to Treaty 6 as the new Chief of a Band comprised of 20 lodges who had separated from Big Bear's Band.<sup>18</sup> The adhesions signed by Lucky Man and Little Pine stated:

And whereas the said Commissioner [Dewdney] has recognized the said "Little Pine" as the Headman of his Band, and the said Band of twenty lodges have selected and appointed Pap-a-way, "The Lucky Man," one of their number as the Headman of their Band, and have presented him as such to the said Commissioner, who has recognized and accepted him as such Headman;

Now, This Instrument Witnesseth that the said "Little Pine" and "Pap-a-way," or "the Lucky Man," for themselves and on behalf of the Bands which they represent, do transfer, surrender and relinquish to Her Majesty the Queen, Her heirs and successors, to and for the use of Her Government of the Dominion of Canada, all their right, title and interest whatsoever which they have held or enjoyed of, in and to the territory described and fully set out in the said treaty [6]; also, all their right, title and interest whatsoever to all other lands wherever situated, whether within the limits of any other treaty heretofore made or hereafter to be made with Indians or elsewhere in Her Majesty's territories, to have and to hold the same unto and for the use of Her Majesty, the Queen, Her heirs and successors for ever. And do hereby agree to accept the several benefits, payments and reserves promised to the Indians adhering to the said treaty at Carlton and Fort Pitt on the dates above mentioned; and further, do solemnly engage to abide by, carry out and fulfil all the stipulations,

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<sup>17</sup> John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879-1885," in J.R. Miller, ed., *Sweet Promises: A Reader in Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 216-17 (ICC Exhibit 8c, pp. 5-6).

<sup>18</sup> Canada, *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River, with Adhesions* (Ottawa: Queen's Printer, 1964), 14-15 (ICC Exhibit 1b, p. 15).

obligations and conditions contained on the part of the Indians therein named, to be observed and performed, and in all things to conform to the articles of the said treaty, as if the said “Little Pine” and Pap-a-way or “the Lucky Man,” and the Bands whom they represent had been originally contracting parties thereto, and had been present at the treaty at Carlton and Fort Pitt, and had there attached their signatures to the said treaty.<sup>19</sup>

Although Dewdney formally recognized Lucky Man as the leader of the 20 lodges referred to in the adhesion to Treaty 6 in 1879, Lucky Man and his followers remained closely aligned with Big Bear and Little Pine and continued to travel with them for several years.<sup>20</sup>

At the annuity payments in September 1879 at Fort Walsh, 470 individuals were identified as belonging to the Lucky Man Band, including Lucky Man and four headmen.<sup>21</sup> Although Fort Walsh was situated at the Cypress Hills, within the boundaries of Treaty 4 and well south of the limits of Treaty 6, Dewdney agreed to pay annuities to Little Pine and Lucky Man at that location because he thought it would be onerous for the bands to travel to more northerly agencies when most of their hunting was confined to the south.<sup>22</sup>

#### **GOVERNMENT ATTEMPTS TO SECURE THE SETTLEMENT OF LUCKY MAN BAND, 1880–84**

Lucky Man did not select reserve land immediately after adhering to treaty. Like some other bands, he and his people struggled to subsist by traditional means. The buffalo were practically extinct by the end of the 1870s, however, and the Cree living in the Cypress Hills were constantly threatened with starvation. In his report for 1880, Dewdney reported: “The bulk of the Indians in the North-West Territories are to-day and have been for the last 12 months, almost entirely dependent on the

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<sup>19</sup> Canada, *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Cort Carlton, Fort Pitt and Battle River, with Adhesions* (Ottawa: Queen’s Printer, 1964), 15 (ICC Exhibit 1b, p. 15).

<sup>20</sup> Edgar Dewdney, Indian Commissioner, to L. Vankoughnet, DSGIA, July 4, 1879, LAC, RG 10, vol. 3636, file 6694-2 (ICC Exhibit 1a, p. 61); C.E. Denny, Indian Agent, to the Assistant Indian Commissioner, December 6, 1881, LAC, RG 10, vol. 3744, file 29506-2 (ICC Exhibit 1a, p. 267).

<sup>21</sup> Lucky Man Band, Treaty annuity payroll, 1879, LAC, RG 10, vol. 9413, pp. 49–51 (ICC Exhibit 1c, pp. 1–3).

<sup>22</sup> Edgar Dewdney, Indian Commissioner, to L. Vankoughnet, DSGIA, July 4, 1879, LAC, RG 10, vol. 3636, file 6694-2 (ICC Exhibit 1a, p. 62).

Government for their existence.”<sup>23</sup> Nevertheless, they continued to hunt, travelling ever farther in search of sustenance and using the provisions allocated under treaty as a means of subsidizing their traditional pursuit of the buffalo.

Despite the depletion of the buffalo herds and increasing pressure from American authorities to block Cree access to hunting grounds south of the border, the government continued to have difficulty inducing the traditional hunters to settle on reserves. Treaty 4 Indian Agent Edwin Allen commented in his annual report for 1880 that Lucky Man, Little Pine, and another band, Piapot, had returned to Fort Walsh from hunting buffalo in the Missouri River district, but had arrived too late to receive the distribution of annuities in July that year. The Bands, he wrote, were weary from their search for buffalo and “in a very destitute condition, almost without clothing of any description.”<sup>24</sup>

The first discussions between Lucky Man and the government regarding reserve locations appear to have occurred in the fall of 1880. Indian Agent Allen met with the chiefs of several bands at Fort Walsh to determine whether they intended to select and settle on reserves:

I held several councils with the Indians who had not yet determined on a reservation with a view of ascertaining their opinion on the matter; there were several chiefs present, the principal being Pie-à-pot, Little Pine and Lucky Man. The first two of these chiefs expressed a wish of settling in this mountain, and *Lucky Man wished to locate in the neighbourhood of Battleford. I could get no definite answer from any of the chiefs as to when they would settle down. They were anxious to receive their annuity payments. ... I consulted Colonel Macleod, and he agreed with me in recommending the payment of those who had not arrived for the regular payment in July. The Indians ... came from the plains with the expectation of receiving their payments and purchasing clothing, &c., before returning again, the camp numbered about 2,500 persons drawing rations.*<sup>25</sup>

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<sup>23</sup> E. Dewdney, Indian Commissioner, to the SGIA, December 31, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880*, 91 (ICC Exhibit 1a, p. 153).

<sup>24</sup> Edwin Allen, Indian Agent, to the SGIA, September 30, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880*, 106 (ICC Exhibit 1a, p. 133).

<sup>25</sup> Edwin Allen, Indian Agent, to the SGIA, September 30, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880*, 106 (ICC Exhibit 1a, p. 133). Emphasis added.

Between October 1 and 6, arrangements were made to pay the bands that had missed the earlier annuity distributions. The Lucky Man payroll shows that 754 individuals were paid with the Band at Fort Walsh in 1880.<sup>26</sup>

Despite indicating that he wished to locate near Battleford within the boundaries of Treaty 6, Lucky Man continued to pursue the buffalo in southern Saskatchewan and the United States, showing no inclination to settle on a reserve during the ensuing year. No reserve was set apart for the Band at that time, although Commissioner Dewdney and many of his colleagues maintained a belief that the ever-decreasing supply of buffalo would soon force the Cree onto reserves. In 1881, Dewdney instructed the new Indian Agency Inspector, T.P. Wadsworth, to attempt to convince the Treaty 6 Indians to move north:

From Mr. Allen you will get a copy of the payroll of Indians paid last October at Fort Walsh. You will see from it that Stragglers from no less than 43 different Bands were paid there. They must be told that they must join their own Chiefs and cannot be paid this year unless they accede to this request.

There are three Bands, viz: "Little Pine" "Pie Pot" and "Lucky-Man" who have not settled on their Reservations – altho "Pie pot" agreed, I believe, to take one of Reservations surveyed at Crooked Lakes, and he should move there with his Band. "Little Pine" & "Lucky-Man" when they joined the treaty, were anxious to be in Treaty 6. You will see the agreement in Mr. Morris' Book of Treaties made with the Indians – page 366. Last year they returned so late from the South and in such a wretched condition that it was thought advisable to pay them at Ft. Walsh but, at that time, they were told they must go North this year, and I hope you will be able to bring this about. These Indians are the wildest of our Plain Indians and have remained out as long as there was any chance of getting buffalo. I am of the opinion that this spring they will see that it is useless to depend any longer on that source of food supply and you sh[oul]d take the earliest opportunity of informing them of the urgent necessity there is for their settling down. If they agree to this proposition & you feel yourself satisfied that they are in earnest – let me know at once in order that provisions might be made to meet their demand.

I promised "Lucky-Man" that if I came south this year, I would take him with me and let him see that those already settled were making a very good start and that the reports they heard from Half Breeds and interested parties that Indians could not live on the assistance given them by the Government, were untrue. Inform him that I find it impossible to visit the South as I had expected during this Spring, but that

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<sup>26</sup> Lucky Man Band, Treaty annuity payroll, 1880, LAC, RG 10, vol. 9414, pp. 18–21 (ICC Exhibit 1c, pp. 4–7).

if he is anxious to go North & see for himself, you will assist him. He could arrange for his Band to go to the Saskatchewan and you might take him with you and assist him to look out for a location. I would not object to his taking another of the Headmen of his Band with him.<sup>27</sup>

Still, the Cree remained resolute. In 1881, 802 people were paid annuities with the Lucky Man Band at Fort Walsh.<sup>28</sup>

The Fort Walsh area remained a rendezvous point for the Cree. Lucky Man, Little Pine, and Big Bear continued to hunt for buffalo during part of the year in the United States,<sup>29</sup> and although it was reported that Big Bear was “trying to get a reserve from the US Government,”<sup>30</sup> he and the other Cree returned to Fort Walsh when the hunt was over to receive annuities and purchase provisions.<sup>31</sup>

The government and the North-West Mounted Police (NWMP) eventually decided that Fort Walsh should be closed to discourage this practice and to force the bands that had not yet chosen reserves to make their site selections.<sup>32</sup> A report by Indian Agent Denny reflected the government position at the time:

It will be a good thing should the Police and Indian Dept leave this place altogether as early as possible next summer, before the big camp of mixed Crees, now across the line come back.

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<sup>27</sup> Edgar Dewdney, Indian Commissioner, to T.P. Wadsworth, Inspector of Indian Agencies, February 21, 1881, LAC, RG 10, vol. 3726, file 27335 (ICC Exhibit 1a, pp. 171–73).

<sup>28</sup> Lucky Man Band, Treaty annuity payroll, 1881, LAC, RG 10, vol. 9415, pp. 6–10 (ICC Exhibit 1c, pp. 8–12).

<sup>29</sup> C.E. Denny, Indian Agent, to the Assistant Indian Commissioner, December 6, 1881, LAC, RG 10, vol. 3744, file 29506-2 (ICC Exhibit 1a, p. 267).

<sup>30</sup> C.E. Denny, Indian Agent, to the Indian Commissioner, October 24, 1881, LAC, RG 10, vol. 3740, file 28748-1 (ICC Exhibit 1a, pp. 194–95).

<sup>31</sup> Draft telegram to E. Dewdney, Indian Commissioner, April 21, 1885, LAC, RG 10, vol. 3744, file 29506-3 (ICC Exhibit 1a, pp. 335–36).

<sup>32</sup> Edgar Dewdney, Indian Commissioner, to Lieutenant Colonel Irvine, Commissioner, NWMP, October 27, 1882, LAC, RG 10, vol. 3744, file 29506-2 (ICC Exhibit 1a, p. 364).

The Indians will always make this a centre, as long as the Police and I[ndian] Dept remain, and I can see that the only way to get them on to their reserves is for this place to be abandoned.

...

If all were not here, the Indians certainly would not come here, and if the Police and I[ndian] Dept wait till the Indians go back to their reserves, they will remain here always. This big camp I speak of is comprised of Indians from all points some from Edmonton, there are about 200 lodges, the principle Chiefs being Little Pine, Little Poplar, Lucky Man and Big Bear. This camp is now across the line, but in case they run out of Buffalos or are driven back by the Americans will at once make for this place, but if this place were abandoned I think they would gradually break up and go back to where they belong.<sup>33</sup>

Denny reiterated his views in a subsequent letter to Dewdney:

As long as there are a few Buffalo South and around these Hills and as long as the Police and Indian Department remain at this place this camp of Crees will remain away from their Reserves and come in here for their payments and when they run out of provisions for grub.

They go across the line for Buffalo and whiskey and have easy times and then congregate and come to this place, which is within easy reach when they get a little hard up.

This combination is a hard one to break up and can only be done in two ways. Either men enough should be stationed here to make them do what is required or else this point should be altogether abandoned and that as early as possible.<sup>34</sup>

The government was also concerned that the Cypress Hills offered limited agricultural potential. As early as 1880, Indian Agent Allen had noted the difficulties experienced by the Assiniboines in the area:

I next visited the Assiniboine Reservation at the Head of Cypress Mountain. The reserve is situated in an excellent locality, for wood and water, but the climate is such that it is useless to think of continuing agriculture in that locality owing to the early frosts and snow storms which are so prevalent. ... Although their crops were a failure

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<sup>33</sup> C.E. Denny, Indian Agent, to the Assistant Indian Commissioner, December 6, 1881, LAC, RG 10, vol. 3744, file 29506-2 (ICC Exhibit 1a, pp. 266–67).

<sup>34</sup> C.E. Denny, Indian Agent, to Edgar Dewdney, Indian Commissioner, December 14, 1881, LAC, RG 10, vol. 3744, file 29506-2 (ICC Exhibit 1a, p. 273).

they appear in no way discouraged, on the contrary, they speak of looking for a better location for their reserve next year.<sup>35</sup>

These sentiments were echoed by the NWMP Commissioner the following year in his recommendation that the government close Fort Walsh:

In making this recommendation I am in a great measure prompted by the knowledge of the fact that the Indian Department do not consider that the farming operations at Maple Creek have been successful in the past, and that they are still less likely to prove so in the future.

...

It has been proved beyond a doubt that the Cypress Hills are not suited for agricultural purposes. The police force has been stationed here for six years, and yet there is not a *bona fide* settler within one hundred miles of Fort Walsh.<sup>36</sup>

Another aggravation for the Crown was the fact that Fort Walsh and the Cypress Hills were located within the Treaty 4 area. Dewdney and the government made it clear that they did not want to have Lucky Man or any other band selecting lands outside its own treaty area.

The removal of Indians from within the limits of a treaty to which they were parties to another treaty in which they have no interest is, as you are aware, considered very objectionable by the Department.

Complications which it is most desirable to avoid are almost certain to arise at some time or another unless the status of the Bands included with the various treaties is carefully preserved ....<sup>37</sup>

Although the department desired the Cree to return north to the Treaty 6 area, the Cree were not easily persuaded to cooperate. In a report to the Minister of the Interior, NWMP Commissioner A.G. Irvine described his attempt to convince the Cree to move north:

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<sup>35</sup> Edwin Allen, Indian Agent, to the SGIA, September 30, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880*, 106 (ICC Exhibit 1a, p. 133).

<sup>36</sup> A.G. Irvine, Commissioner, NWMP, to the Minister of the Interior, February 1, 1882, Canada, *Report of the Commissioner, North-West Mounted Police, 1881*, 13 (ICC Exhibit 1a, p. 303).

<sup>37</sup> Draft, Department of Indian Affairs to Edgar Dewdney, Indian Commissioner, May 11, 1882, LAC, RG 10, vol. 3744, file 29056-2 (ICC Exhibit 1a, p. 337–38).



At the time of “Pie-a-pot’s” departure from Fort Walsh [June 23, 1882], the Cree chief “Big Bear” (non-treaty Indian), “Lucky Man,” and “Little Pine,” with about 200 lodges, finding that I would not assist them in any way unless they went north, started from Fort Walsh to the plains in a southerly direction. These chiefs informed me that their intention was to take “a turn” on the plains in quest of Buffalo, and after their hunt to go north. They added that they did not intend crossing the international boundary line, – a statement which I considered questionable at the time.

I, therefore, at the request of the officer commanding the United States troops at Fort Assinaboine, informed the American authorities of the departure of these chiefs. The Americans in expressing their thanks were much gratified with the information imparted.<sup>38</sup>

Irvine went on to state that, with the departure of these Chiefs, “Fort Walsh was entirely rid of Indians.”<sup>39</sup> Irvine’s assessment, however, turned out to be premature; with the coming of fall, he realized that the fort could not be closed as planned.

In the fall of 1882, the Cree again returned to Fort Walsh following the annual buffalo hunt. The hunt had not gone well that season. Some 2,000 Indians representing various bands gathered at the fort, their condition apparently so poor that it was later described by the NWMP surgeon, Augustus Jukes, as a state of “extreme wretchedness.”<sup>40</sup> Irvine himself thought their condition to be so dire that they could not make a journey north even if they could be persuaded to do so.<sup>41</sup> Nevertheless, he convened a general council with the Chiefs at Fort Walsh on September 17, 1882, to discuss the matter. Several Chiefs at the meeting indicated that they were prepared to select reserve sites, although some were still reluctant to move north:

For some considerable time they made no demand for aid from the Government, but as the cold weather came on, being very poorly clad, and insufficiently supplied with

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<sup>38</sup> A.G. Irvine, Commissioner, NWMP, to the Minister of the Interior, January 1, 1883, Canada, *Report of the Commissioner of the North-West Mounted Police, 1882*, 4 (ICC Exhibit 1a, p. 392).

<sup>39</sup> A.G. Irvine, Commissioner, NWMP, to the Minister of the Interior, January 1, 1883, Canada, *Report of the Commissioner of the North-West Mounted Police, 1882*, 4 (ICC Exhibit 1a, p. 392).

<sup>40</sup> Dr Augustus Jukes, Surgeon, NWMP, to F. White, Comptroller, NWMP, October 17, 1882, LAC, RG 10, vol. 3744, file 29506-2 (ICC Exhibit 1a, p. 355).

<sup>41</sup> A.G. Irvine, Commissioner, NWMP, to the Minister of the Interior, January 1, 1883, Canada, *Report of the Commissioner of the North-West Mounted Police, 1882*, 5 (ICC Exhibit 1a, p. 393).

food, they experienced much hardship from exposure and starvation. It was then that they requested me to transmit to you their message to the effect that “Pie-a-pot” wished to settle on the reserve given him by Mr. Wadsworth last summer. “Little Pine” who is a relation of “Pie-a-pot’s” to settle alongside of him, “Lucky man” and “Front man” wanted their reserves at Big Lake [located within the Treaty 4 boundaries] about thirty miles east of Fort Walsh. All wanted to receive their annuity money to enable them to make their winter Buffalo hunt.<sup>42</sup>

Although Irvine had earlier told the Chiefs “that they must go north or forfeit any help from the Government,”<sup>43</sup> he now believed that “if no aid was accorded them, they would starve, and in a starving condition might have attempted to commit depredations.”<sup>44</sup>

Despite Dewdney’s reluctance to pay annuities again at Fort Walsh, he eventually agreed to do so. He instructed Irvine, however, to inform the Indians that requests from the northern Cree for reserves in the Cypress Hills would not be entertained, nor would the Cree receive further assistance unless they moved north:

You are aware that the Southern Country is not the Country of the Crees and they should be told that it is no good their making a request to be given Reserves in the South.

I hope you will impress upon the Indians that they have brought their helpless condition on themselves, that they have been warned that they would suffer if they remained South and the longer they continue to act against the wishes of the Govt the more wretched will they become.<sup>45</sup>

The department was forced to abandon its original plan to close Fort Walsh during the summer of 1882, despite its expectation that the longer the post remained open, the more difficult it would be to entice the Indians to move northward. Treaty 4 Indian Agent Allan McDonald

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<sup>42</sup> A.G. Irvine, Commissioner, NWMP, to the Minister of the Interior, January 1, 1883, Canada, *Report of the Commissioner of the North-West Mounted Police, 1882*, 4 (ICC Exhibit 1a, p. 393).

<sup>43</sup> J.N. McIlree, Superintendent, NWMP, to the Indian Commissioner, December 2, 1882, LAC, RG 10, vol. 3744, file 29506-3 (ICC Exhibit 1a, p. 380).

<sup>44</sup> A.G. Irvine, Commissioner, NWMP, to the Minister of the Interior, January 1, 1883, Canada, *Report of the Commissioner of the North-West Mounted Police, 1882*, 5 (ICC Exhibit 1a, p. 393).

<sup>45</sup> Edgar Dewdney, Indian Commissioner, to A.G. Irvine, Commissioner, NWMP, October 27, 1882, LAC, RG 10, vol. 3744, file 29506-2 (ICC Exhibit 1a, pp. 364–65).

distributed annuity money in the fall of 1882 at Fort Walsh, at which time the payroll recorded 872 Indians paid with the Lucky Man Band.<sup>46</sup> In the department's annual report, however, Lucky Man was said to be leading a Band of about 1,200 – Pie-a-pot, Foremost Man, Big Bear, and Little Pine were leading another 3,200 – and that the “bulk of these Indians belong to a chief in the north, but who have temporarily joined these chiefs in order that they may obtain their annuity in the south.”<sup>47</sup> Fort Walsh remained open through the winter of 1882–83, and additional provisions were distributed to prevent starvation among the approximately 4,000 Indians camped in the Cypress Hills.<sup>48</sup>

On December 8, 1882, Chief Big Bear finally signed an adhesion to Treaty 6 at Fort Walsh.<sup>49</sup> At this time, Dewdney reasserted his intention to have the Cree move north to the areas set out in Treaty 6. In Dewdney's eyes, the situation at Fort Walsh was worsening. In his annual report to the department, he wrote:

The large sum expended last year in assisting Indians to remove to their reserves was, to a great extent, thrown away, the greater number of them having returned to Fort Walsh, where they had been accustomed to be fed without work, and where they had been bribed by the traders to remain and receive their payments.

These Indians until lately made the Cypress Hills their point of rendezvous, and were a source of more or less anxiety, as, owing to their proximity to the International boundary line, they were constantly tempted to make incursions across the border into the camps of the United States Indians on horse-thieving expeditions; these, of course, being followed up by reprisals, which in the end, if not stopped, might have led to more serious complications of an international nature.

I consequently decided to make another effort to disperse these bands and endeavor to get them to move to those sections of the Territories which they had formerly claimed as their own and had ceded under treaty to the Dominion.

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<sup>46</sup> Lucky Man Band, Treaty annuity payroll, 1882, LAC, RG 10, vol. 9415A, pp. 83–87 (ICC Exhibit 1c, pp. 13–17).

<sup>47</sup> Tabular statement entitled “Number of Indians in the North-West Territories and their whereabouts on the 31<sup>st</sup> December, 1882,” in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, 202–3 (ICC Exhibit 1a, pp. 389–90).

<sup>48</sup> Frank Norman, Inspector, NWMP and Acting Indian Agent, to E.T. Galt, Assistant Indian Commissioner, January 3, 1883, LAC, RG 10, vol. 3744, file 29506-3 (ICC Exhibit 1a, pp. 415–16).

<sup>49</sup> Canada, *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River, with Adhesions* (Ottawa: Queen's Printer, 1964), 16 (ICC Exhibit 1b, p. 16).

On being approached in this direction it was discovered that they were desirous of procuring fixed ammunition, of making one final horse-stealing expedition across the line in all the force at their command, return with as many scalps as possible, then after a certain delay acquiesce with our wishes. Their requests were refused, and on being told that every effort would be made on our behalf, as well as by the United States troops, to frustrate any such attempt, and to catch and punish the offenders, the idea, in the main, was abandoned. Repeated promises were then made on the part of the Indians, and as often broken by them, to leave Cypress Hills, until after two months constant talking and urging, the 2nd of July saw all but some 125 lodges of recalcitrants with their backs towards the hills on the trails leading to their respective reserves.<sup>50</sup>

Lucky Man and some of his followers were among those who went north following the demolition of Fort Walsh in 1883 but they soon returned to the Cypress Hills. Upon arriving in Maple Creek, they were met by Dewdney's Assistant Commissioner, Hayter Reed, and told to return north. Lucky Man explained that he had only returned to gather up some of his members who had stayed behind. Dewdney, who later questioned the Chief's motives in his 1883 annual report, had instructed Reed to have Lucky Man and his people escorted northward, if necessary, by a detachment of the NWMP to ensure they would not stray.<sup>51</sup> Irvine reported on the NWMP's efforts in this regard:

During the month of July, a strong escort was furnished to proceed with the Indians travelling from Maple Creek to Battleford, with a view of their settling upon their legitimate reserves. In the month of September it was found that notwithstanding the number of Indians who, at the request of the Indian Department, had proceeded to their reserves, we had still a very large camp remaining at Maple Creek, at which place they desired to remain for the winter. Knowing it to be the policy of the Government that these Indians should be removed from the proximity of the boundary, and located on their reserves north of the Canadian Pacific Railway line, and being fully aware how important it was that this judicious policy should be carried into effect, I was but too willing, at the request of [His] Honour the Lieutenant-Governor, to accompany the Acting Assistant Indian Commissioner to Maple Creek for the purpose of moving the Indians as desired.

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<sup>50</sup> Edgar Dewdney, Indian Commissioner, to the SGIA, October 2, 1883, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883*, 93 (ICC Exhibit 1a, p. 426).

<sup>51</sup> Edgar Dewdney, Indian Commissioner, to the SGIA, October 2, 1883, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883*, 93 (ICC Exhibit 1a, p. 426)

It affords me much pleasure to be able to report that the result of my mission was an eminently successful one. On mustering the Indians, I inform[ed] them that it was not the intention of the Government to allow them to remain at Maple Creek as they had no reserve there, and further that their loitering about the Canadian Pacific Railway line was contrary to their own interests. I explained to them the terms of the Vagrant Act recently extended to these Territories, stating to them that no body of men would be allowed to remain idly about the country, and that unless the wishes of the Government were acceded to, I should be forced to make arrests. In the case of “Lucky Man” who had returned from his reservation with the buck-boards and carts given him by the Indian Department, I explained to that Chief that these articles had been supplied with a view of enabling the Indians to follow agricultural pursuits on their reserves, and thus gain their own livelihood. I told “Lucky Man” that he had accepted the articles in question, and other aid from the Indian Department, upon these conditions, and that unless he promptly returned with his entire camp, to their reservation, he would be arrested.

The Indians brought forward all manner of frivolous excuses in view of having their move delayed. These excuses I would not entertain for a moment. I told the Indians so in the plainest of language, and they proceeded northward the same day.<sup>52</sup>

Dewdney knew that the government policy of moving the Cree onto reserves meant they would have to abandon their traditional ways, and he acknowledged that this decision was difficult for them to accept:

It is a matter of no wonder that such a strong stand should have been made against our repeated efforts to cause them to leave their old haunts, places associated with thoughts of freedom and plenty, whilst the buffalo roamed the Plains in countless numbers. Leaving these hills behind them dashed to the ground the last hope to which they had so strenuously and fondly clung, of once more being able to live by the chase.<sup>53</sup>

By November 1883, the Lucky Man and Little Pine Bands had camped near Battleford. The department’s year-end report included the following comments with regard to Little Pine’s people: “These Indians are at Battleford and not actually on the land selected by them, but are to move on

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<sup>52</sup> A.G. Irvine, Commissioner, NWMP, to the Minister of the Interior, January 1, 1884, Canada, *Report of the Commissioner of the North-West Mounted Police Force, 1883*, 15–16 (ICC Exhibit 1a, pp. 452–53).

<sup>53</sup> Edgar Dewdney, Indian Commissioner, to the SGIA, October 2, 1883, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883*, 93 (ICC Exhibit 1a, p. 426).

to it so soon as the warm weather of the spring will permit.”<sup>54</sup> The Lucky Man Band was described in these terms: “These Indians may be considered as virtually settled, as they are being kept working in neighbourhood of Battleford prior to moving to Reserve, being adjacent.”<sup>55</sup> The payroll indicates that at the November 15, 1883, distribution of annuities at Battleford, 366 Indians were paid with the Lucky Man Band.<sup>56</sup>

### **Numbering of Reserves in Manitoba and the North-West Territories, 1883**

In the spring of 1883, Dewdney informed Assistant Indian Commissioner E.T. Galt of his intention to number all reserves, whether they had been surveyed or not, in Manitoba and the North-West Territories.<sup>57</sup> Reserves 116, 117, and 118 were assigned to Little Pine, Lucky Man, and Big Bear, respectively.<sup>58</sup> Since 1918, however, the number 117 has been used to denote the Witchehan Lake Indian Reserve, which was set apart in that year for the Witchehan Lake Band.<sup>59</sup> Whether the number 117 was ever associated with an actual site on which Lucky Man *intended* to settle is unclear. In 1883, Lucky Man appears to have camped in the Battleford area, although there is no precise description of his location. Similarly, there is no evidence before us that a reserve 117 was ever *formally* set aside for the Lucky Man Band. Still, it is interesting to note that, later in the spring of

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<sup>54</sup> Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883*, 205 (ICC Exhibit 1a, p. 449).

<sup>55</sup> Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883*, 205 (ICC Exhibit 1a, p. 449).

<sup>56</sup> Lucky Man Band, Treaty annuity payroll, 1883, LAC, RG 10, vol. 9416, pp. 82–83 (ICC Exhibit 1c, pp. 18–19).

<sup>57</sup> Edgar Dewdney, Indian Commissioner, to E.T. Galt, March 5, 1883, LAC, RG 10, vol. 3582, file 889 (ICC Exhibit 1a, pp. 419–20).

<sup>58</sup> Edgar Dewdney, Indian Commissioner, to the SGIA, August 21, 1885, LAC, RG 10, vol. 3710, file 19550-3 (ICC Exhibit 1a, pp. 716–17).

<sup>59</sup> G.A. Poupore, Director, Lands and Membership, to Director of Operations, Saskatchewan Region, April 28, 1977 (ICC Exhibit 1a, pp. 1307–8).

1883, Commissioner Dewdney purchased 10 yoke of oxen as required by Treaty 6 “to go North with the Indians, for ‘Big Bear,’ ‘Little Pine’ and ‘Lucky Man.’”<sup>60</sup>

### **BIG BEAR’S RESISTANCE AND THE DISINTEGRATION OF LUCKY MAN BAND, 1884–85**

Throughout this period, tensions between the government and the Cree increased. The government believed that Big Bear was trying to establish the Cree on adjacent reserves so that they could be readily organized into a unified confederation.<sup>61</sup> The Department of Indian Affairs viewed this as a potential threat and instituted plans to maintain distance between sites of proposed reserves. Hayter Reed wrote to the Superintendent General of Indian Affairs in April 1884 to inform him of the Commissioner’s intentions concerning reserves:

The Agent was ordered to place [farming] instructors on Red Pheasant’s, Poundmakers, Little Pines, Lucky Mans, Thunder Child and Big Bears Reserves—; but as the bands of Chiefs Little Pine, & Lucky Man have not fulfilled their promises by settling on Reserves, and working, I am under the belief none have been engaged for them.

...

If the Bands of Little Pine and Lucky Man should consent to settle on Reserves where the Commissioner considers it most desirable to place them, they will be well away from other Indians (viz at the Two Ponds about 30 miles above Poundmakers on the Battle River.) Consequently it would be advisable to have an Instructor, instead of an Overseer for them, if not one for each band; and the latter course I respectfully submit would be found to be in the interests of the Department; owing to their numbers, (over 700 between the two bands).<sup>62</sup>

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<sup>60</sup> W. McGirr for the Indian Commissioner, to the SGIA, May 25, 1883, LAC, RG 10, vol. 3744, file 29506-3 (ICC Exhibit 1a, p. 422).

<sup>61</sup> DIA to Edgar Dewdney, Indian Commissioner, July 7, 1884, LAC, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Exhibit 1a, p. 514); Hugh Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 125 (ICC Exhibit 3h, p. 190).

<sup>62</sup> Hayter Reed, Acting Indian Commissioner, to the SGIA, April 14, 1884, LAC, RG 10, vol. 3664, file 9843 (ICC Exhibit 1a, pp. 467–68).

Battleford District Indian Agent J.M. Rae advised Reed in April 1884 that “Little Pine’s and Lucky Man’s Bands started from here [Battleford] to go to *their Reserves* as per agreement.”<sup>63</sup> The location of Lucky Man’s “reserve” was later described by Rae as being “near Poundmaker’s,”<sup>64</sup> but, by the end of spring in 1884, there was still no formal survey of a reserve for the Lucky Man Band.

Lucky Man and Little Pine stopped at Poundmaker’s Reserve en route from Battleford to “their Reserves.” Poundmaker invited the Chiefs to be present when Chief Big Bear arrived for a council planned for later that spring.<sup>65</sup> Rae sent a proxy, Mr Gardner, to meet the Lucky Man and Little Pine Bands at Poundmaker’s Reserve. Gardner had instructions to persuade the two Chiefs to accept their treaty provisions and to move from Poundmaker’s Reserve to establish their own settlements. Gardner informed Lucky Man and Little Pine that, until they accepted their farming implements and cattle and started to work, they would receive no further rations.<sup>66</sup>

Rae reported that Gardner was unable to convince the Chiefs to accept the treaty provisions:

Mr. Gardner whom I sent out with the Instructor tried to get the young men to take their implements and cattle (the latter I had to take from the other reserves as I did not want them to have as an excuse that they had nothing to work with). The Chiefs however prevailed on the young men not to take them. Under the circumstances and acting on my order, Mr. Gardner stopped their rations.<sup>67</sup>

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<sup>63</sup> J.M. Rae, Indian Agent, to the Indian Commissioner, April 23, 1884, LAC, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Exhibit 1a, p. 473). Emphasis added.

<sup>64</sup> J.M. Rae, Indian Agent, to the SGIA, October 13, 1884, Canada, *Annual Report of the Department of Indian Affairs for the Year ended 31st December, 1884*, 85 (ICC Exhibit 1a, p. 540).

<sup>65</sup> J.M. Rae, Indian Agent, to the Indian Commissioner, April 23, 1884, LAC, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Exhibit 1a, p. 473).

<sup>66</sup> J.M. Rae, Indian Agent, to the Indian Commissioner, April 23, 1884, LAC, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Exhibit 1a, p. 473).

<sup>67</sup> J.M. Rae, Indian Agent, to the Indian Commissioner, April 23, 1884, LAC, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Exhibit 1a, p. 473).



### **Kamanitowas Leaves Lucky Man to Settle with Little Pine's Band, Spring 1884**

Eventually, some younger members of the two Bands decided to break ranks with their Chiefs and start farming. They were joined shortly by Chief Little Pine himself. As Deputy Superintendent General of Indian Affairs, Lawrence Vankoughnet, noted in his annual report:

On the opposite side of Battle River [from the reserves of Thunder Child and Nepahase] are the reserves of Chiefs Poundmaker [sic] and Little Pine. The band of the latter chief only settled on their reserve last spring [i.e., spring 1884]. They however ploughed seventy acres, fenced fifty acres and planted thirty acres of land, besides cutting one hundred tons of hay, and erecting twelve houses, two stables, a store house and a building in which to keep their implements and tools.<sup>68</sup>

In May 1884, the Deputy Superintendent General of Indian Affairs gave instructions to Indian Commissioner Dewdney in anticipation of the possibility of "Little Pine and Lucky Man consenting to settle on Reserves where you consider it most desirable to place them." Dewdney was instructed that, "[i]n the selection of Instructors, the importance of a Band should in all cases be considered. Bands like Lucky Man and Little Pine for instance, numbering 700 souls, will require a more experienced and intelligent man."<sup>69</sup>

The arrival of Big Bear at Poundmaker's Reserve in May 1884 and an altercation over Instructor Craig's control of rations pre-empted the government's plans, at least temporarily. In his annual report written in the fall of 1884, Indian Agent Rae recounted the events of the preceding year:

In respect to the bands of Little Pine and Lucky Man, I may say that having come in late in the fall [of 1883], they were kept close to Battleford, so as to avoid expense in freighting provisions. They, however, were not idle and cut several hundred cords of wood during winter. In spring they moved off towards their reserve near Poundmaker's, and though I had sent out their implements and cattle, through evil counsel, they remained at Poundmaker's for a long time. During this period I refused to feed them. At last, owing to hunger, they agreed to go on to their reserve.

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<sup>68</sup> SGIA to the Governor General in Council, Annual Report, January 1, 1884 [*sic* 1885], Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1884*, xlv (ICC Exhibit 1a, p. 614).

<sup>69</sup> L. Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, May 10, 1884, LAC, RG 10, vol. 4486, p. 518 (ICC Exhibit 1a, p. 478).

Most of Lucky Man's men joined Little Pine, who has always shown himself well inclined. In this respect, however, his head councillor, Mistutinwas, is the better of the two. They then began working, and did well, getting in thirty-four acres crop and fencing the same, also putting up a house and storehouse for the instructor. In May Big Bear and his party came down from Pitt, and Lucky Man's people began to leave their work. Kamanitowas, the headman, however, said he wished to leave his chief and join Little Pine. There was not much trouble with those who now remained on the reserve, until a Thirst Dance was begun, when even Little Pine and his people left their work for a short time, and the affair nearly ended in a riot, as one of the Indians struck Instructor Craig, and when the police attempted to arrest the man, they at first refused to give him up.<sup>70</sup>

### **Lucky Man's Sons' Conflict with Instructor Craig over Rations, June 1884**

The incident referred to by Rae began when two of Lucky Man's sons – recovering from illness – sought rations from Instructor Craig, who deemed one of them, Kaweechatwaymat, had healed sufficiently to work. When Craig refused him rations and treated him roughly, Kaweechatwaymat retaliated by striking the instructor with an axe handle. Craig reported the incident to the police, and Lucky Man's sons reported it to the rest of the Indians assembled for the thirst dance. Tensions escalated.<sup>71</sup> Colonel Crozier, who went to apprehend the accused man, later reported:

The chiefs including Big Bear were doing, or seemed to be doing all they could to have the man given up quietly; they said however from the first, they did not think their influence was sufficient to induce the young men to consent to this course, and if an attempt was made to take him forcibly, they felt sure bloodshed would follow.<sup>72</sup>

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<sup>70</sup> J.M. Rae, Indian Agent, to the SGIA, October 13, 1884, Canada, *Annual Report of the Department of Indian Affairs for the Year ended 31st December, 1884*, 85 (ICC Exhibit 1a, p. 540).

<sup>71</sup> Hugh Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 128 (ICC Exhibit 3h, p. 194).

<sup>72</sup> Colonel Crozier, NWMP, to Edgar Dewdney, Lieutenant Governor of the North-West Territories, June 22, 1884, LAC, RG 10, vol. 3576, file 309, pt B (ICC Exhibit 1a, p. 493). See also A.G. Irvine, Commissioner, NWMP, Annual Report, 1884, Canada, *Report of the Commissioner of the North-West Mounted Police Force, 1884*, 10–11 (ICC Exhibit 1a, pp. 622–23).

In the end, it was Lucky Man, with the support of the other Chiefs, who finally delivered his son to the police.<sup>73</sup> Although Indian Commissioner Dewdney was convinced “that Farming Instructor Craig was too overbearing in his manner towards the Indians,”<sup>74</sup> the Deputy Superintendent General of Indian Affairs, in his annual report, placed the blame on the Indians: “[t]he instructor’s refusal was in accord with the general requirements of the Department. ... the offender ... was brought to Battleford, tried, and imprisoned for a brief period.”<sup>75</sup>

Following this incident, Big Bear requested a meeting with Indian Agent Rae, Colonel Crozier, and William McKay:

Big Bear speaking for the rest of the Indians stated that they were very sorry for what had occurred, and promised that the like would not occur again, and that they did not fully understand the law in the stand they took in protecting the prisoners. He (Big Bear) wants his Reserve between Lucky Mans and Little Pines, who is moving to his new Reserve at Wolf Dung Hill, about 40 miles beyond Poundmakers.<sup>76</sup>

Although the actual location of Wolf Dung Hill is not clearly described in the documentation, Big Bear’s proposed site reportedly would have positioned him next to Poundmaker, which the department strongly resisted. In May 1884, Vankoughnet had advised Dewdney that “Big Bear should not be allowed to take his Reserve near [Poundmaker’s reserve, close to] Battleford, his country being in the Fort Pitt district, and for other obvious reasons.”<sup>77</sup> In a telegram to the

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<sup>73</sup> Colonel Crozier, NWMP, to Edgar Dewdney, Lieutenant Governor of the North-West Territories, June 22, 1884, LAC, RG 10, vol. 3576, file 309, pt B (ICC Exhibit 1a, p. 495).

<sup>74</sup> Edgar Dewdney, Indian Commissioner, to the Indian Agent, Battleford, July 4, 1884, LAC, RG 10, vol. 3576, file 309, pt B (ICC Exhibit 1a, p. 509).

<sup>75</sup> SGIA to the Governor General in Council, January 1, 1885, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1884*, x (ICC Exhibit 1a, p. 607).

<sup>76</sup> J.M. Rae, Indian Agent, to Edgar Dewdney, Indian Commissioner, June 28, 1884, LAC, RG 10, vol. 3576, file 309, pt B (ICC Exhibit 1a, p. 503).

<sup>77</sup> Lawrence Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, May 12, 1884, LAC, RG 10, vol. 3576, file 309, pt B (ICC Exhibit 1a, p. 479).

Commissioner at the end of June, Vankoughnet was more direct: “Fear more serious complications in future if Big Bear and Pound Maker have Reserves adjoining.”<sup>78</sup>

A few days later, Rae reported to Commissioner Dewdney that he had heard that Lucky Man, Poundmaker, and Big Bear were planning to take up a reserve at Buffalo Lake, near Hobbema, Alberta.<sup>79</sup> He also warned Poundmaker that he would not receive any assistance from the government if he was to abandon his existing reserve.<sup>80</sup> Shortly thereafter, Dewdney wired the following instructions to Rae:

As Little Pine behaving his band to be well rationed. Lucky Man band to be fed if in any way acquiescing to your demands in this you to judge. Poundmaker will not be allowed another Reserve or take cattle.<sup>81</sup>

The warning did not sway Poundmaker or Lucky Man; both departed with Big Bear for Buffalo Lake.<sup>82</sup> Chief Little Pine and most of his Band, however, chose not to follow Big Bear and remained at their reserve. On June 28, Indian Agent Rae reported: “Since the prisoner was taken his [Little Pine’s] men have been working every day; he has about 30 tents and some of Lucky Man’s men have joined him.”<sup>83</sup>

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<sup>78</sup> DSGIA to Edgar Dewdney, Indian Commissioner, June 27, 1884, LAC, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Exhibit 1a, p. 502).

<sup>79</sup> J.M. Rae, Indian Agent, to the Indian Commissioner, June 29, 1884, LAC, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Exhibit 1a, p. 507).

<sup>80</sup> J.M. Rae, Indian Agent, to the Indian Commissioner, June 29, 1884, LAC, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Exhibit 1a, p. 507).

<sup>81</sup> Edgar Dewdney, Indian Commissioner, to the Indian Agent, Battleford, July 5, 1884, LAC, RG 10, vol. 3576, file 309, pt A (ICC Exhibit 1a, p. 513).

<sup>82</sup> J.M. Rae, Indian Agent, to the Indian Commissioner, June 30, 1884, LAC, RG 10, vol. 3576, file 309, pt B (ICC Exhibit 1a, p. 508).

<sup>83</sup> J.M. Rae, Indian Agent, to the Indian Commissioner, June 30, 1884, LAC, RG 10, vol. 3576, file 309, pt B (ICC Exhibit 1a, p. 503).

A week later, in early July 1884, Dominion Land Surveyor John C. Nelson arrived in the Battleford area to survey reserves for bands desiring them. Chief Little Pine, however, “expressed a wish to have the survey of his Reserve postponed,”<sup>84</sup> and Nelson left without conducting a survey.

Some members of the Lucky Man Band continued to travel with Big Bear and Lucky Man during the summer of 1884, while others apparently remained with Little Pine. According to the October 20, 1884, payroll, only 82 Indians were paid with the Lucky Man Band at a “reserve,” which was not specifically identified.<sup>85</sup> Lucky Man himself did not appear on the payroll for that year.<sup>86</sup>

### **Lucky Man’s and Other Chiefs’ Grievances: August 1884 Duck Lake Council**

At the end of July 1884, Lucky Man and Big Bear went to Duck Lake in the Carlton Agency to attend a council of the Battleford and Carlton area Chiefs, which had been organized to address common grievances.<sup>87</sup> The council was hosted by Chief Beardy, whose reserve at Duck Lake was close to Carlton House. Among the other Chiefs in attendance were Big Child, Star Blanket, James Smith, Okemasis, One Arrow, Petequaquay, John Smith, and Joseph Badger.<sup>88</sup> Although Louis Riel appears to have played a role in encouraging Beardy to organize the council, the extent of any further influence is unclear.<sup>89</sup>

On July 31, the Chiefs, accompanied by a number of men, went to Carlton and “asked for food for the purpose of holding this council. Their request was refused.”<sup>90</sup> In order to monitor the

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<sup>84</sup> John C. Nelson, Dominion Land Surveyor, to the Indian Commissioner, December 31, 1884, LAC, RG 10, vol. 3703, file 17728 (ICC Exhibit 1a, pp. 596–97).

<sup>85</sup> Lucky Man Band, Treaty annuity payroll, 1884, LAC, RG 10, vol. 9417, p. 109 (ICC Exhibit 1c, p. 20).

<sup>86</sup> Lucky Man Band, Treaty annuity payroll, 1884, LAC, RG 10, vol. 9417, p. 109 (ICC Exhibit 1c, p. 20).

<sup>87</sup> J.M. Rae, Indian Agent, to Edgar Dewdney, Indian Commissioner, July 29, 1884, LAC, RG 10, vol. 3576, file 309, pt A (ICC Exhibit 1a, p. 521).

<sup>88</sup> Hugh A. Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 135–39 (ICC Exhibit 3h, p. 202).

<sup>89</sup> Hugh A. Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 135–39 (ICC Exhibit 3h, pp. 201–5).

<sup>90</sup> J.A. Macrae, to unknown recipient, August 25, 1884, LAC, RG 10, vol. 3697, file 15423 (ICC Exhibit 1a, p. 525).

situation, however, and reduce “malign influences that were said to be at work,” Sub-Agent J.A. Macrae subsequently agreed to provide rations on condition that the council relocate to Carlton and the working men be sent home to their reserves.<sup>91</sup>

After another week of discussions, the Chiefs met with Macrae on August 12 and presented their grievances for transmittal to the government in Ottawa. In his report on this meeting, Macrae summarized “the gist of what the different speakers had to say ... as they all spoke in the same terms, and with the same objects in view” under the following 18 headings: “Work,” “Cows,” “Horses,” “Waggon,” “Conveyance for Chiefs,” “Eleemosynary [charitable] Aid,” “Clothing,” “Schools,” “Machinery,” “Request,” “Renewals,” “Insufficiency of Government assistance,” “Lack of confidence in the Government,” “Medicines,” “Beef,” “Effect of not fulfilling promises,” “Maps of reserves,” and “Harness.”<sup>92</sup> The key grievances raised were these:

The promise made to them at the time of their treaty was that when they were destitute, liberal assistance would be given to them. ... With the present amount of assistance they cannot work effectively on their reserves, and it should be increased.

...

... they were told that they would see how the white man lived and would be taught to live like him. It is seen that he has threshing mills, mowers, reapers, and rakes. As the Govt. pledged itself to put them in the same position as the white man, it should give them these things.

... requests for redress of these grievances have been again & again made without effect. They are glad that the young men have not resorted to violent measures to gain it. That it is almost too hard for them to bear the treatment received at the hands of the Government after its “sweet promises” made in order to get their country from them. They now fear that they are going to be cheated. They will wait until next summer to see if this council has the desired effect failing which they will take measures to get what they desire. (The proposed “measures” could not be elicited, but a suggestion of the idea of war was repudiated.)

... That all bad things, implements and tools, as well as stock &c should be replaced by gifts of better articles.

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<sup>91</sup> J.A. Macrae, to unknown recipient, August 25, 1884, LAC, RG 10, vol. 3697, file 15423 (ICC Exhibit 1a, p. 525).

<sup>92</sup> J.A. Macrae, to unknown recipient, August 25, 1884, LAC, RG 10, vol. 3697, file 15423 (ICC Exhibit 1a, pp. 526–530).

... many are forced to wander from the reserves, who desires to settle, as there is not enough of anything supplied to them to enable all to farm. – Although a living by agriculture was promised to them.

... at the time of making the treaty they were comparatively well off, they were deceived by the sweet promises of the Commissioners, and now are “full of fear” for they believe that the Government which pretended to be friendly is going to cheat them. They blame not the Queen, but the Government at Ottawa.

...

... had the Treaty promises been carried out “all would have been well”, instead of the present feeling existing.

... every Chief should be given a map of his reserve in order he may not be robbed of it.<sup>93</sup>

Macrae noted that Joseph Badger “spoke very plainly on the alleged grievances, and warns the Government that it must redress them, to escape the Measures that may be taken.”<sup>94</sup> Big Bear, after requesting permission to address Macrae, also spoke firmly, but diplomatically:

He said that the Chiefs should be given what they asked for, that all treaty promises should be fulfilled. A year ago, he stood alone, in making these demands; Now the whole of the Indians are with him. That the Mounted Police treated him very well after a disturbance was created at B’ford. That he averted any serious results at that place, by his efforts as a peacemaker.<sup>95</sup>

Macrae closed his report by emphasizing that a detailed answer was “expected by the council, which declared itself to be a representative one of the Battleford as well as Carlton Crees. No doubt need be entertained that the Indians regard it as such.”<sup>96</sup>

After the council, most of the Chiefs departed. Big Bear, however, went to Prince Albert, declaring to the local population that his intentions were entirely peaceful. About a week later, he

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<sup>93</sup> J.A. Macrae, to unknown recipient, August 25, 1884, LAC, RG 10, vol. 3697, file 15423 (ICC Exhibit 1a, pp. 528–531).

<sup>94</sup> J.A. Macrae, to unknown recipient, August 25, 1884, LAC, RG 10, vol. 3697, file 15423 (ICC Exhibit 1a, p. 531).

<sup>95</sup> J.A. Macrae, to unknown recipient, August 25, 1884, LAC, RG 10, vol. 3697, file 15423 (ICC Exhibit 1a, p. 531).

<sup>96</sup> J.A. Macrae, to unknown recipient, August 25, 1884, LAC, RG 10, vol. 3697, file 15423 (ICC Exhibit 1a, p. 532).

met with Louis Riel in order to obtain support for the grievances outlined by the Chiefs at Carlton, but following their meeting, the *Saskatchewan Herald* reported that Big Bear did “not seem to have been favourably impressed with the prospects held out to him by Riel.” After the meeting with Riel, Big Bear returned to Fort Pitt.<sup>97</sup>

### **Department’s Rejection of Lucky Man’s Chieftainship, 1884**

Lucky Man apparently remained with Big Bear and was paid annuities with him at Fort Pitt in October 1884. The department official recording the payments, however, identified Lucky Man as an ex-Chief and paid him as Big Bear band member 100.<sup>98</sup> Moreover, remarks on the payroll indicate at least 123 people who were paid with Big Bear’s Band in that year – including Lucky Man – had previously been paid with Lucky Man’s Band, and others had been paid with Little Pine’s Band.<sup>99</sup>

There is no indication, however, that Lucky Man had relinquished his chieftainship. On the contrary, a report written by Inspector Wadsworth later in the month of October implicitly acknowledged Lucky Man’s continued leadership:

In passing through Fort Pitt I was interviewed by Big Bear, Lucky Man, Little Poplar, and their followers. I endeavored to convince them how much better off they would be if they chose a reserve and settled down.<sup>100</sup>

Nevertheless, Lucky Man’s chieftainship was being put into question by other department officials. In a report to the Superintendent General of Indian Affairs dated November 25, 1884, Indian Commissioner Dewdney expressed frustration with the leaders of the Cree bands that had not yet selected reserves.

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<sup>97</sup> Hugh A. Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 139–141 (ICC Exhibit 3h, pp. 205–07).

<sup>98</sup> Big Bear Band, Treaty annuity payroll, 1884, LAC, RG 10, vol. 9417, p. 125 (ICC Exhibit 1c, p. 224).

<sup>99</sup> Big Bear Band, Treaty annuity payroll, 1884, LAC, RG 10, vol. 9417, pp. 123–26 (ICC Exhibit 1c, pp. 222–25).

<sup>100</sup> T.P. Wadsworth, Inspector of Indian Agencies, to the SGIA, October 25, 1884, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1884*, 150 (ICC Exhibit 1a, p. 542).



*A few of the Indians that came from the South the year before last, have not selected a reserve, notably those under Big Bear and Lucky Man.*

...

It has been recommended that Lucky Man be deposed from the temporary position of chief, which he occupies. He is utterly worthless, and was paid as an ordinary Indian at the last payment.

His followers have joined Big Bear.<sup>101</sup>

A table accompanying the department's report for 1884 indicates that neither Little Pine nor Lucky Man had selected reserves to be surveyed or otherwise set apart for the benefit of their respective band members.<sup>102</sup> Little Pine, however, was at least settled down and working.<sup>103</sup> Big Bear is shown as having a reserve in the Long Lake area, although the table also notes: "Reserve not definitely located."<sup>104</sup> In his introduction to this year-end report, the Deputy Superintendent General of Indian Affairs, Lawrence Vankoughnet, commented as follows:

It is satisfactory to be able to report that the Indians who, as stated in my report of last year, were induced to remove north from the country bordering on the boundary line between Canada and the United States, have settled upon reserves, and are now making fair progress in farming – with the exception of Big Bear and his band, who delay their selection of a reserve, and who as they roam about the country and visit the reserves of other bands, endeavoring to instil disaffection among them, are a cause of considerable anxiety. Up to the present time, however, their efforts to induce the Cree Indians generally to increase their demands from the Government have been futile.<sup>105</sup>

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<sup>101</sup> Edgar Dewdney, Indian Commissioner, to the SGIA, November 25, 1884, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1884*, 158 (ICC Exhibit 1a, p. 565). Emphasis added.

<sup>102</sup> Tabular Statement entitled "Number of Indians in the North-West Territories and their whereabouts, 31<sup>st</sup> December, 1884," in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1884*, 207 (ICC Exhibit 1a, p. 605).

<sup>103</sup> J.M. Rae, Indian Agent, to the Indian Commissioner, June 28, 1884, LAC, RG 10, vol. 3576, file 309, pt B (ICC Exhibit 1a, p. 503).

<sup>104</sup> Tabular Statement entitled "Number of Indians in the North-West Territories and their whereabouts, 31<sup>st</sup> December, 1884," in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1884*, 206 (ICC Exhibit 1a, p. 604).

<sup>105</sup> SGIA to the Governor General in Council, Annual Report, January 1, 1885, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1884*, x (ICC Exhibit 1a, p. 607).

Although Vankoughnet made no reference to Lucky Man, the government apparently had identified Big Bear and Lucky Man as a source of trouble among the Indians in the North-West, despite their receiving the support of other Chiefs in the presentation of grievances at Carlton.

### **1885 Uprising and Lucky Man's Flight to Montana**

Big Bear travelled from Duck Lake to Fort Pitt late in the summer of 1884 and, although he had informed department officials that he would settle on a reserve after receiving annuities, again he failed to select a reserve.<sup>106</sup> In November, still accompanied by Lucky Man, Big Bear camped near Frog Lake, approximately 30 miles southeast of Fort Pitt, where he intended to wait out the winter.<sup>107</sup> In the meantime, pressure from the department to have the Chief select a reserve site was mounting, as was resentment within his Band.<sup>108</sup>

The Cree were close to their breaking point. The buffalo were gone, and Deputy Superintendent General of Indian Affairs Vankoughnet – who had severely reduced the department's budget – refused to provide them with provisions until they had selected reserves. Some of the younger Indians, including Big Bear's son, Imasees (who later took the name Little Bear), saw the old Chief as an impediment to progress and persisted in the belief that reserves would alleviate their suffering. Growing increasingly impatient of Big Bear's resistance to change, their frustrations continued to mount in the early months of 1885.<sup>109</sup>

In January, the Indian sub-agent at Fort Pitt, Thomas Quinn, reported that little progress in having Big Bear select a reserve site had been made over the winter.<sup>110</sup> Big Bear had continued with

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<sup>106</sup> Thomas Quinn, Indian Office, Frog Lake, to the Indian Commissioner, September 10, 1884, LAC, RG 10, vol. 3580, file 730 (ICC Exhibit 1a, pp. 533–34).

<sup>107</sup> Thomas Quinn, Acting Sub-Indian Agent, to the Indian Commissioner, November 7, 1884, LAC, RG 10, vol. 3580, file 730 (ICC Exhibit 1a, pp. 551–52).

<sup>108</sup> Hugh A. Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 121–22 (ICC Exhibit 3h, pp. 187–88).

<sup>109</sup> Hugh A. Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 121–22 (ICC Exhibit 3h, pp. 187–88); Thomas Quinn to the Indian Commissioner, March 13, 1885, LAC, RG 10, vol. 3580, file 730 (ICC Exhibit 1a, pp. 676–82).

<sup>110</sup> Thomas Quinn, Acting Sub-Indian Agent, to the Indian Commissioner, January 3, 1885, LAC, RG 10, vol. 3580, file 730 (ICC Exhibit 1a, pp. 629–31).

his strategy of delaying that selection in the hope that the “general gathering” he and Beardy were planning for the summer would eventually help them win concessions from the government and revisions in the terms of treaty.<sup>111</sup> Meanwhile, at the end of January, Assistant Indian Commissioner Hayter Reed had reported to the Superintendent General of Indian Affairs on the grievances laid before Macrae the previous August. His lengthy report dismissed most of the grievances and placed the blame primarily on Big Bear and the influence of the Métis:

Again Big Bear is an agitator and always has been and having received the moral support of the half breed community he is only too glad to have the opportunity of inciting the Indians to make fresh and exorbitant demands.

Big Bear has stated before Indians and to officials that the Treaty stipulations have not been and are not being carried out. I managed to meet him at Pitt after the meeting at Carlton and had two or three long talks with him and although he laughed when I asked him in what way the government was not carrying out its promises with the Indians and what he meant when stating it was at fault in so many particulars he could not enumerate them. I demanded that he give me a few instances and one case in which he had a just claim which could not have been settled, at an earlier date settled on the spot. After this he [said] to the interpreter that the Government was carrying out all its promises.

...

Riel’s movement has a great deal to do with the demands of the Indians and there is no possible doubt but that they as well as the Halfbreeds are beginning to look up to him as one who will be the [means] of curing all their ills and obtaining for them all they demand.<sup>112</sup>

Quinn managed to obtain a commitment from the Chief in February 1885 to select a reserve in the spring,<sup>113</sup> but the department was not satisfied with this vague promise. Métis interpreter Peter Ballendine was sent to Fort Pitt early in March to persuade Big Bear to select a definite reserve site

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<sup>111</sup> P. Ballendine to the Indian Commissioner, November 20, 1884, LAC, RG 10, vol. 3701, file 17169 (ICC Exhibit 1a, p. 557).

<sup>112</sup> Hayter Reed, Assistant Indian Commissioner, to the Superintendent General, January 23, 1885, LAC, RG 10, vol. 3697, file 15423 (ICC Exhibit 1a, pp. 636–50).

<sup>113</sup> Thomas Quinn, Indian Sub-Agent, to the Indian Commissioner, February 25, 1885, LAC, RG 10, vol. 3580, file 730 (ICC Exhibit 1a, pp. 667–69).

and, after several meetings, Big Bear finally “picked upon a spot at the mouth of Dog Rump Creek,” 30 miles from Frog Lake.<sup>114</sup>

Big Bear was not quite through. After meeting with Ballendine, he stipulated that he would not leave Frog Lake until he had first met with either Commissioner Dewdney or Assistant Commissioner Reed.<sup>115</sup> Big Bear was hoping for one more audience with the Crown to voice his concerns, but the department was not prepared to bend. On March 19, 1885, the Indian sub-agent at Battleford was instructed to inform Big Bear that the department had “neither the time nor the desire to accede to such demands.”<sup>116</sup> About two weeks later, Deputy Superintendent General of Indian Affairs Vankoughnet informed Indian Commissioner Dewdney that, “if Big Bear does not fulfil his promises and settle on a Reserve in the Spring, it will be better to break up his Band if practicable.”<sup>117</sup> By that time, however, events unfolded which were beyond both the Chief’s and the department’s control. On March 3, 1885, Louis Riel declared his own provisional government in the territories and, on March 18, the North-West Rebellion began after Riel took prisoners and seized stores at Batoche.<sup>118</sup>

News of the conflict quickly spread to the Frog Lake settlement following the outbreak of the insurrection. The frustration of the younger Chiefs finally came to a head and, with news of the Métis hostilities, violence exploded at the small village. On April 2, 1885, a group of Indians killed several white inhabitants, including Indian Sub-Agent Quinn and two clergymen. Although the motive behind the killings was undoubtedly connected to the Riel revolt, they were more directly related to factors affecting only the Cree. In any case, the slayings were carried out by younger

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<sup>114</sup> Thomas Quinn to the Indian Commissioner, March 13, 1885, LAC, RG 10, vol. 3580, file 730 (ICC Exhibit 1a, p. 677).

<sup>115</sup> Thomas Quinn to the Indian Commissioner, March 18, 1885, LAC, RG 10, vol. 3580, file 730 (ICC Exhibit 1a, p. 683).

<sup>116</sup> DIA, Regina, to DIA, Battleford, March 19, 1885, LAC RG 10, vol. 3580, file 730 (ICC Exhibit 1a, p. 684).

<sup>117</sup> L. Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, April 7, 1885, LAC, RG 10, vol. 3580, file 730 (ICC Exhibit 1a, p. 685).

<sup>118</sup> Hugh A. Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 150–51 (ICC Exhibit 3h, pp. 216–17).

Indians under the influence of alcohol. It appears that Big Bear tried to stop the violence, realizing that any chance of negotiating or holding out for a better deal with the government would end with the deaths of the white men. By then, however, Big Bear had lost his leadership to the war chief Wandering Spirit, who was leading the Band towards further conflict with the government.<sup>119</sup>

The evidence before the Commission does not suggest that Lucky Man participated in any of the killings that day at Frog Lake, but he was clearly there when they took place.<sup>120</sup> The armed response anticipated by Big Bear was not long in coming. Relentlessly pursued after Frog Lake and an ensuing battle at Fort Pitt, the Cree were inevitably defeated by the greater numbers of the military and the police. Lucky Man and Little Bear (Imasees) fled to Montana in the United States in late June after the uprising.<sup>121</sup>

Four years later, in 1889, Lucky Man recounted the story of his flight to a Canadian trader with whom he was well acquainted, and whose son, W. Henry McKay, published an account almost 60 years later, in 1948. Most of the article chronicled the final stages of Lucky Man's flight to Montana in June 1885, but it began with Lucky Man's comments on the 1885 uprising:

Nechiwam (meaning brother), I would like very well to go back and see my old friends and my old hunting ground and to die on my native soil but through the foolishness of two of my young men there is a rope ready to be placed around my neck should I return to the land which now belongs to the Great White Queen (Victoria). I am not guilty of any crime; even in the battle of Cut Knife I refused to fight but I was forced to take part in a small way, but I never shot anyone. When some of Big Bear's people came to Cut Knife and told us that a big army of Red Coats had come from Beaver Hills House (Edmonton) and killed some of their fellow tribesmen at Frenchman's Butte, my brother and I and some others decided to try and skip to the land of the Big Knives (America) where we thought we would be safer.

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<sup>119</sup> Hugh A. Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 151–64 (ICC Exhibit 3h, pp. 217–30).

<sup>120</sup> A.B. Perry, Superintendent, NWMP, Annual Report, December 22, 1896, Canada, *Report of the Commissioner of the North-West Mounted Police Force, 1896*, 62 (ICC Exhibit 1a, p. 1151).

<sup>121</sup> Hugh A. Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 163–81 (ICC Exhibit 3h, pp. 229–46).

That was four years ago. We started about the beginning of the Egg-laying Moon (June).<sup>122</sup>

In Lucky Man's view, his flight to Montana "was a narrow escape ... from the oppression of our Indian agents and the privations we suffered on the reservations."<sup>123</sup> The Government of Canada's view of the matter, however, was quite different.

### **Lucky Man Band Labelled as Rebels and the Consequences, 1885 Onwards**

On August 21, 1885, Commissioner Dewdney wrote to the Superintendent General of Indian Affairs, identifying the bands considered to be either loyal or disloyal during the 1885 rebellion. On that list, Dewdney categorized the Bands of Lucky Man, Little Pine, and Big Bear (among others) as disloyal.<sup>124</sup> The 1885 annuity paylists indicate that 82 Lucky Man band members who had remained at the Little Pine reserve were considered disloyal and were not paid their annuities that year.<sup>125</sup> Both Lucky Man and Big Bear were later identified by Indian Affairs as having been key leaders in the 1885 rebellion:

With the exception of Big Bear's Band these Indians were disposed to be loyal. However, Big Bear (and Lucky Man who was there from Battleford, carried most of the older Indians with them. They were followed by the scum of the Indians, & had long resisted entering Treaty & after doing so had been a constant source of trouble, as they had before been in the U[nited] States.<sup>126</sup>

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<sup>122</sup> W. Henry McKay, "Lucky Man's Flight," *Canadian Cattlemen* (December 1948), 133 (ICC Exhibit 1f, p. 2).

<sup>123</sup> W. Henry McKay, "Lucky Man's Flight," *Canadian Cattlemen* (December 1948), 137 (ICC Exhibit 1f, p. 4).

<sup>124</sup> Edgar Dewdney, Indian Commissioner, to the SGIA, August 21, 1885, LAC, RG 10, vol. 3710, file 19550-3 (ICC Exhibit 1a, p. 716).

<sup>125</sup> Lucky Man Band, Treaty annuity payroll, 1885, LAC, RG 10, vol. 9418, p. 147 (ICC Exhibit 1c, p. 21).

<sup>126</sup> Indian Affairs, "Memo re Indians who took part in Rebellion of 1885," March 19, 1894, LAC, RG 10, vol. 3710, file 19550-4 (ICC Exhibit 1a, p. 1074).

In his annual report for 1885, Indian Commissioner Dewdney insisted that blame for the uprising should fall on a few misguided individuals, not the government's policy. Dewdney wrote:

It may be fairly presumed, therefore, when regarding the matter without prejudice, and in the light of Indian utterances before and after the rebellion, that their participation in it sprang, not from universal race hatred, from the existence of grievances, discontent or general malignity, but rather from a feeling that the action of a few Indian discontents, who were influenced by the half-breed movement, and of their young men, who, when excited by these, lost their heads and commenced raiding, committed them to association with the rebels in order – after the sources of supply from the Department were closed to them, from the causes before described – to gain the necessities of life and protection against individual white men, which the law at the moment was unable to afford. We may rest assured, I think, that the past policy of the Government was not to blame, as none of the Indians, when spoken to of their conduct on the reserves, have pleaded grievances in extenuation of it.<sup>127</sup>

In the wake of the rebellion, the department instituted policies designed to ensure that another revolt could not occur. Although not as harsh as those originally suggested by Assistant Commissioner Hayter Reed,<sup>128</sup> they were nonetheless very restrictive. Annuity payments were temporarily withheld from bands considered to have been disloyal to the Crown. If investigations proved that Indians had been responsible for any damages to property, their annuities were to be withheld until all such damages had been paid for.<sup>129</sup>

The tribal system in the North-West Territories was to be “broken up as much as possible, so that each individual Indian may be dealt with instead of through the Chiefs.”<sup>130</sup> One method of “striking at the heart of the tribal system and that of community of lands” was to subdivide reserves

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<sup>127</sup> Edgar Dewdney, Indian Commissioner, to the SGIA, December 17, 1885, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1885*, 140 (ICC Exhibit 1a, pp. 747).

<sup>128</sup> Hayter Reed, Assistant Indian Commissioner, “Memorandum for the Honorable the Indian Commissioner relative to the future management of Indians,” July 13, 1885, LAC, RG 10, vol. 3584, file 1130 (ICC Exhibit 1a, pp. 696–701).

<sup>129</sup> L. Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, July 3, 1885, LAC, RG 10, vol. 3584, file 1130 (ICC Exhibit 1a, pp. 692–95); Lawrence Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, October 28, 1885, LAC, RG 10, vol. 3584, file 1130, pt 1B (ICC Exhibit 1a, pp. 731–32).

<sup>130</sup> Lawrence Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, October 28, 1885, LAC, RG 10, vol. 3584, file 1130, pt 1B (ICC Exhibit 1a, p. 730).

into individual farms, which was expected “to foster self-reliance, to increase a spirit of emulation in their labours, and hasten the attainment of independence ... [and] the sense of personal proprietorship and responsibility.”<sup>131</sup>

Efforts were made to disarm all Indians, “not by compulsion, but by persuasion and by keeping ammunition from them.”<sup>132</sup>

The pass system was instituted “to prevent ... Indians who were involved in the rebellion from leaving the Reserves without passes signed by an official of the Department,” and was also “introduced as far as practicable in the loyal Bands as well.”<sup>133</sup>

Transfers of membership between bands – which was previously common practice – were to be restricted:

There must be no changing from Band to Band, without it is considered advisable by the Agent, and has his sanction and no change from Agency to Agency without express permission from this Office. No Indians not already in the Treaty are to be taken on the Paysheets without Authority from this Office. As in all probability many Indians from Bands, lately disaffected, will endeavour to join other Bands, and remain on the Reserves for Payment, Agents will make every effort to have these Indians warned that they are not to remain, but join their own Bands, as they will not be paid. The names of these should be taken and sent to the Head Office.<sup>134</sup>

Horses belonging to rebel Indians were to be confiscated and sold, with the proceeds to be applied to the purchase of cattle and other necessities for the bands.<sup>135</sup>

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<sup>131</sup> Edgar Dewdney, Indian Commissioner, to the SGIA, November 17, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886*, 108–9 (ICC Exhibit 1a, pp. 769–70).

<sup>132</sup> Lawrence Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, October 28, 1885, LAC, RG 10, vol. 3584, file 1130, pt 1B (ICC Exhibit 1a, p. 732).

<sup>133</sup> Lawrence Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, October 28, 1885, LAC, RG 10, vol. 3584, file 1130, pt 1B (ICC Exhibit 1a, pp.732–33).

<sup>134</sup> Edgar Dewdney, Indian Commissioner, circular letter to Indian Agents, July 20, 1885, LAC, RG 10, vol. 3714, file 21223 (ICC Exhibit 1a, p. 705).

<sup>135</sup> Lawrence Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, October 28, 1885, LAC, RG 10, vol. 3584, file 1130, pt 1B (ICC Exhibit 1a, p. 741).



Since the department considered that Big Bear's Band "would doubtless continue to be a source of trouble ... which will be greatly minimized if they are scattered amongst a number of Bands,"<sup>136</sup> the Band – already dispersed to a large degree – was broken up and its members redistributed.

For the time being, Lucky Man, too, was gone and no longer a concern of the department. In the department's annual reports for 1885 and 1886, it was noted that the Indians of Lucky Man Band had "been incorporated with the other bands of the Battleford district, some few having joined the Peace Hills reserves."<sup>137</sup> This comment appears to refer to the band members who, after 1884, had remained with Lucky Man (and Big Bear) instead of Kamanitowas (and Little Pine). In 1886, Battleford Indian Agent J.A. MacKay reported that Little Pine's reserve "is the most recently settled of any in this agency, and the bands that occupy it (Little Pine's and Lucky Man's) have been very much broken up by the rebellion."<sup>138</sup> This reserve, however, had still not yet been surveyed.

#### **THE SURVEY OF INDIAN RESERVE 116 FOR LITTLE PINE AND LUCKY MAN BANDS, 1887**

There is no evidence on record that the Lucky Man Band was ever given a reserve designated exclusively for its members before 1989. Some members of the Band, however, were living on IR 116 when it was surveyed in 1887. In the department's 1887 annual report, Deputy Superintendent General Vankoughnet described the reserve arrangement between the Lucky Man and Little Pine Bands in these terms:

The Battleford Agency embraces at present the reserves and bands of Moosomin, Thunder Child (with the subsidiary bands of Nipahays and young Chipewayan living on the same reserve), Little Pine (with the subsidiary band of Lucky-man on the same

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<sup>136</sup> Lawrence Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, October 28, 1885, LAC, RG 10, vol. 3584, file 1130, pt 1B (ICC Exhibit 1a, p. 736).

<sup>137</sup> Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1885*, 220 (ICC Exhibit 1a, p. 745); Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886*, 254 (ICC Exhibit 1a, p. 766).

<sup>138</sup> J.A. MacKay, Indian Agent, Battleford, to the SGIA, August 13, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886*, 127 (ICC Exhibit 1a, p. 762).

reserve), Poundmaker, Sweet Grass, Red Pheasant, Mosquito (with the subsidiary bands of Bear's Head and Lean Man on the same reserve).<sup>139</sup>

Dominion Land Surveyor John C. Nelson, who had been sent away by Little Pine in 1884, returned to supervise the survey of IR 116 in September 1887. In his report to the Superintendent General of Indian Affairs, Nelson stated:

On our return to camp, Mr. Gopsil [the local farming instructor] and I examined the lands upon which the bands of "Little Pine" and "Lucky Man" have settled, and I decided to make the reserve five miles square as shown by the accompanying plan, marked (d), and proceeded with the survey.

This reserve contains twenty-five sections and a small gore adjoining the west boundary of Poundmaker's Reserve. The townships in which it lies are sub divided. It is situated on Battle River, thirty-five miles west of Battleford. The location is remarkably beautiful and the soil is very much better than that on the reserve of Poundmaker which bounds it on the east side. There are hay meadows, rich soil, plenty of good water, a variety of wild berries, fishing grounds, and on the north side of Battle River an abundance of timber; on the north side, however, the soil is generally light and sandy.<sup>140</sup>

IR 116 comprised 25 square miles, more or less, and was confirmed by Order in Council PC 1151 on May 17, 1889. The survey plan and the description of IR 116, which appeared in the confirming Order in Council, both indicate that the reserve was surveyed "For the bands of Chiefs 'Little Pine' and 'Lucky Man.'"<sup>141</sup> Neither of the old Chiefs was present during the survey, however,

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<sup>139</sup> Thomas White, SGIA, to the Governor General, January 3, 1888, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1887*, lii (ICC Exhibit 1a, p. 806).

<sup>140</sup> John C. Nelson, DLS, in charge Indian Reserve Surveys, to the SGIA, December 30, 1887, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1887*, 277–78 (ICC Exhibit 1a, pp. 796–97). The township subdivision referred to by Nelson had been performed by Dominion Land Surveyor C.F. Leclerc in 1884, and the copies of Leclerc's plans in evidence before the Commission contain handwritten notations indicating the location of "Little Pine's Reserve." It seems clear, however, that these notations were inscribed on the plans in 1887 or later since they state that the reserve was "surveyed" in 1887. See *Plan of Township No. 45, Range 21 West of Third Meridian*, surveyed by Chs. Frs. Leclerc, DLS, July & September 1884, CLSR SK 5967-133 (ICC Exhibit 7a).

<sup>141</sup> Order in Council PC 1151, May 17, 1889, DIAND, Indian Lands Registry, Instrument no. B4000 (ICC Exhibit 1a, pp. 903–4).

since Little Pine had died in 1885<sup>142</sup> and Lucky Man was still in the United States. The 1887 annuity payroll showed the population of the Lucky Man Band “Paid at Little Pine’s Reserve” as 62.<sup>143</sup> It should be noted, though, that remarks on the payroll indicate almost all of those shown on the list were actually living elsewhere.

There are no indications in any of the documents following the 1885 uprising that the Lucky Man Band ever requested a reserve of its own. In the ensuing years, band members participated in the farming activities on IR 116. In correspondence dated April 28, 1891, however, Indian Commissioner Hayter Reed provided a summary of provisions distributed to bands in the Battleford Agency under the terms of Treaty 6. The Little Pine Band was listed as receiving one horse, eight oxen, one bull and 12 cows, but no separate mention was made of the Lucky Man Band.<sup>144</sup> From time to time in correspondence and official records, IR 116 was variously referred to as the “Little Pine and Lucky Man Indian Reserve”<sup>145</sup> or the “Little Pine Indian Reserve,”<sup>146</sup> but never as the “Lucky Man Indian Reserve.” There is also no evidence that Lucky Man ever went to the IR 116 after it was surveyed, even after he was repatriated in 1896.

#### **“MONTANA BAND”: LUCKY MAN’S 1896 REPATRIATION AND FINAL RETURN TO MONTANA**

In January 1889, Indian Commissioner Hayter Reed noted the following with regard to absentee “rebels” on treaty annuity paylists:

Although persons have been struck off, as being unaccounted for, it does not necessarily follow that they have been paid in previous years. Their names have been

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<sup>142</sup> Little Pine Band, Treaty annuity payroll, 1885, LAC, RG 10, vol. 9418, p. 144 (ICC Exhibit 1c, p. 117).

<sup>143</sup> Lucky Man Band, Treaty annuity payroll, 1887, LAC, RG 10, vol. 9420, p. 220 (ICC Exhibit 1c, p. 26).

<sup>144</sup> Hayter Reed, Indian Commissioner, to the DSGIA, April 28, 1891, LAC, RG 10, vol. 3876, file 73870 (ICC Exhibit 1a, pp. 949).

<sup>145</sup> W.C. Bethune, Chief, Reserves and Trust Division, Indian Affairs Branch, to Albert Chatsis, Correspondent Secretary, QVTP Association, September 15, 1961, DIAND correspondence file (ICC Exhibit 1a, p. 1220).

<sup>146</sup> T.R.L. McInnes, Secretary, Indian Affairs Branch, to J.P.B. Ostrander, Indian Agent, November 4, 1939, DIAND file 671/30-2-116 (ICC Exhibit 1a, p. 1210).

retained, in order to give every opportunity of their presenting themselves, for identification; and when it has become perfectly evident, either that no such person exists, or will never likely return, the name has been left out.

Since the rebellion, it has been a matter of no little difficulty for the Agents of rebel bands to make accurate estimate for them, owing to so many of them having left the Agencies, for parts other than other Agencies.

It should be borne in mind that the estimates of this and previous years, have been framed to meet the payments of such rebels and absentees as it was considered possible might present themselves at the Agencies.<sup>147</sup>

In 1890, the names of these absentees were struck off the treaty annuity paylists.<sup>148</sup>

After 11 years in the United States, Lucky Man and Little Bear (Big Bear's son, Imasees) were returned with their followers to Canada in 1896 by American authorities. When they crossed the border, Lucky Man and Little Bear were arrested for allegedly participating in the Frog Lake massacre but were released in July 1896 when it was decided that the evidence was insufficient to support the prosecution of charges:

“Lucky Man” and “Little Bear,” two chiefs of the Crees, who fled to the United States after the rebellion of 1885, were returned to Canada with their bands by the United States authorities last July. They were arrested by order of Superintendent Deane, at Lethbridge, on the charge of participating in the massacre at Frog Lake, and were brought to Regina for preliminary examination ... The charges against both were dismissed as there was no evidence connecting them with the actual murders, although strenuous efforts were made to obtain it. It was conclusively proved that they were present under arms, and as chiefs directing the Indians, but it was not evident that they had instigated or directed the massacre, consequently they were protected by the terms of the amnesty.<sup>149</sup>

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<sup>147</sup> Hayter Reed, Indian Commissioner, to the SGIA, January 2, 1889, LAC, RG 10, vol. 3809, file 53980 (ICC Exhibit 1a, p. 900).

<sup>148</sup> Hayter Reed, Indian Commissioner, to the SGIA, October 31, 1889, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1889*, 159 (ICC Exhibit 1a, p. 906).

<sup>149</sup> A.B. Perry, Superintendent, NWMP, Annual Report, December 22, 1896, Canada, *Report of the Commissioner of the North-West Mounted Police Force, 1896*, 62 (ICC Exhibit 1a, p. 1151).

It was also noted at the time that Lucky Man was “very sick and old and is not, in consequence, expected to live long.”<sup>150</sup>

After their release, Lucky Man and Little Bear set out for the Hobbema Agency by train to rejoin some of their party who were awaiting them there.<sup>151</sup> They settled on the vacant Bobtail Reserve 139 but, within two years, many of them returned to the United States. The group that remained soon came to be known as the

#### Montana Band, No. 139

This band is located on Bobtail’s old reserve, and the Indians came from Montana in 1896. About one hundred and fifty came then to this agency, but one hundred returned, either to where they came from or other parts, leaving fifty on the reserve. They are capital workers, and have built nine houses and they had as many fields from four to five acres each.<sup>152</sup>

Lucky Man’s whereabouts after the repatriation is difficult to track but, as noted earlier, there is no evidence that he ever rejoined the rest of the Lucky Man Band on IR 116. Lucky Man appears to have returned south of the border, where – according to W. Henry McKay – he “died in Montana some 10 years later [or 1899, 10 years after McKay’s father encountered Lucky Man].”<sup>153</sup>

### **LUCKY MAN FIRST NATION TREATY LAND ENTITLEMENT (TLE) CLAIM**

Lucky Man, whose leadership waned long before his death in 1899, was not succeeded by another Chief until 1974, a state of affairs that was consistent with the department’s policy following the

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<sup>150</sup> A.E. Forget, Indian Commissioner, to the DSGIA, August 5, 1896, LAC, RG 10, vol. 3710, file 19550-4 (ICC Exhibit 1a, p. 1135).

<sup>151</sup> “List of Little Bears Band Paid at Hobbema Indian Agency, November 13, 1897,” LAC, RG 10, vol. 1407, pp. 222–23 (ICC Exhibit 1a, pp. 1156–57).

<sup>152</sup> Alexander McGibbon, Inspector of Indian Agencies, to the SGIA, September 27, 1898, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1898*, 200 (ICC Exhibit 1a, p. 1174).

<sup>153</sup> W. Henry McKay, “Lucky Man’s Flight,” *Canadian Cattlemen* (December 1948), 153 (ICC Exhibit 1f, p. 5).

1885 rebellion.<sup>154</sup> In addition to the department's reluctance to replace Chiefs and councillors after the rebellion, section 93 of the 1906 *Indian Act* and later section 96 of the 1927 *Indian Act* had important implications for the leadership of the Lucky Man Band. These sections of the *Indian Act* set out restrictions concerning the election of Chiefs and councillors and required bands to have a population of at least 30 band members before elections could take place.<sup>155</sup>

As previously discussed, the population of the Lucky Man Band was widely scattered after the rebellion. Although annuities which had been withheld from "rebels" after the 1885 uprising were eventually reinstated, many names were removed from the Band's payroll in 1890.<sup>156</sup> Again in 1918, the names of five more families believed to be living in the United States were removed from the Lucky Man Band annuity payroll, leaving only two remaining families, with a total of seven members.<sup>157</sup> According to the annuity paylists of the Band, that number grew slowly over the ensuing years. In 1955, there were a total of eight families, comprised of 12 people.<sup>158</sup>

Lucky Man band members residing on IR 116 comprised a tiny minority on the reserve and, under the provisions of the 1906 and 1927 *Indian Acts*, the Band's small population was ineligible to elect councillors or a Chief before 1951, when that restriction was repealed. Although the Lucky Man Band shared a common trust account with the Little Pine Band until the fiscal year ending in 1979 (the Lucky Man Band has held a separate trust account since 1980), separate treaty annuity paylists for the Lucky Man Band have been continuously maintained since 1879.<sup>159</sup>

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<sup>154</sup> Lawrence Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, October 28, 1885, LAC, RG 10, vol. 3584, file 1130, pt 1B (ICC Exhibit 1a, p. 730).

<sup>155</sup> *Indian Act*, RSC 1906, c. 81, s. 93(4) (ICC Exhibit 6c, p. 35). See also *Indian Act*, RSC 1927, c. 98, s. 96(4).

<sup>156</sup> Hayter Reed, Indian Commissioner, to the SGIA, October 31, 1889, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1889*, 159 (ICC Exhibit 1a, p. 906).

<sup>157</sup> Lucky Man Band, Treaty annuity payroll, July 11, 1918, LAC, RG 10, vol. 9459, pp. 63–64 (ICC Exhibit 1c, p. 58).

<sup>158</sup> Lucky Man Band, Treaty annuity payroll, 1955, DIAND Genealogical Unit (ICC Exhibit 1c, p. 96).

<sup>159</sup> H.M. Chapman, Senior Administrative Officer, Indian Affairs Branch, to the Registrar, Indian Affairs Branch, January 28, 1964, file reference unknown (ICC Exhibit 1a, pp. 1225–26).

At the request of Lucky Man band members, a letter was sent in August 1961 to W.C. Bethune, Chief of Reserves and Trusts Division of what was then the Department of Northern Affairs and National Resources, requesting recognition of the Band's entitlement to a reserve and band council equal to that of other bands in Canada.<sup>160</sup> Thirteen years later, on April 26, 1974, the members of the Lucky Man Band assembled at the home of member Simon Okemow on IR 116 to consider the election of the Band's first Chief since Lucky Man. They decided to hold an election on May 7, 1974, with the new Chief and councillors "would be elected by the custom of the Band."<sup>161</sup> Another major concern expressed at the meeting was that the Band did not have its own reserve, and it "was agreed by the Band that we approach the Federation [of Saskatchewan Indians] to assist the Band in getting a separate reserve."<sup>162</sup>

The minutes of this meeting were forwarded to H.L. Hansen, Supervisor for the North Battleford District, who stated in a reply dated April 29, 1974, that he had not yet received any response from his Regional Director "as to whether there was any historic reason why Lucky Man Band do not have their own Council and if there is anything to prevent them now from electing their own Band Council."<sup>163</sup> However, Hansen refused the Band's request that a senior departmental official act as Electoral Officer, saying:

Departmental staff can not interpret what your Band Custom is. They can not be influential in helping you determine what your Band Custom is. If you are to elect a Chief and Council by means of Custom, this process must be carried out completely in the absence of Departmental Staff.<sup>164</sup>

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<sup>160</sup> Albert Chatsis, Correspondent Secretary, QVTP Association, to W.C. Bethune, Chief of Reserves and Trust Division, August 20, 1961, file reference unknown (ICC Exhibit 1a, p. 1219).

<sup>161</sup> Minutes of meeting of the members of the Lucky Man Band, April 26, 1974 (ICC Exhibit 1a, p. 1262).

<sup>162</sup> Minutes of meeting of the members of the Lucky Man Band, April 26, 1974 (ICC Exhibit 1a, p. 1264).

<sup>163</sup> H.L. Hansen, District Supervisor, North Battleford District, to Rod King, Federation of Saskatchewan Indians, April 29, 1974, file reference unknown (ICC Exhibit 1a, p. 1265).

<sup>164</sup> H.L. Hansen, District Supervisor, North Battleford District, to Rod King, Federation of Saskatchewan Indians, April 29, 1974, file reference unknown (ICC Exhibit 1a, p. 1265).

The results of the Lucky Man Band's first election were forwarded to the Superintendent of Community Affairs in what was then the Department of Indian Affairs and Northern Development on May 22, 1974.<sup>165</sup> The Band subsequently passed a Band Council Resolution dated June 7, 1974, requesting that the department "recognize our Election by Band Custom, effective May 23, 1974."<sup>166</sup> Subsequent correspondence indicates that Canada accepted the results of the election and recognized the new Chief and council.<sup>167</sup>

In September 1977, the Lucky Man Band passed a Band Council Resolution requesting the establishment of its own reserve with the area to be calculated on the basis of its 1881 population. Subject to the results of additional historical research, however, Canada disagreed with the use of this year.<sup>168</sup>

In 1980, Canada and the Lucky Man Band compromised and agreed to settle the Band's claim for entitlement to a separate reserve based on its 1976 population of 60 people. This settlement acknowledged that the Band could proceed in future with a TLE shortfall grievance based on its claim that the Band should have been granted a reserve at the 1882 population level.<sup>169</sup> Under this agreement, lands were selected at Meeting Lake and the Lucky Man Band signed a TLE Settlement Agreement on November 23, 1989. Canada agreed to set apart 7,680 acres of land as a reserve for the use and benefit of the Band. In return, the Band provided Canada with an absolute surrender of

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<sup>165</sup> Pat Burglar, Electoral Officer, Lucky Man Band, to Jim McIntyre, Superintendent of Community Affairs, Department of Indian Affairs and Northern Development, May 22, 1974, file reference unknown (ICC Exhibit 1a, p. 1266).

<sup>166</sup> Lucky Man Band, Band Council Resolution 1974-75/2, June 7, 1974, file reference unknown (ICC Exhibit 1a, p. 1268).

<sup>167</sup> V.M. Gran, Chief, Band Management Division, to the Chief, Special and Administrative Services Division, Indian and Eskimo Affairs, June 18, 1974, file reference unknown (ICC Exhibit 1a, p. 1270).

<sup>168</sup> Lucky Man Band, Band Council Resolution, undated, file reference unknown (ICC Exhibit 1a, p. 1311); Report by the Lucky Man Band, July 16, 1990, file reference unknown (ICC Exhibit 1a, pp. 1445-46).

<sup>169</sup> See Bernard Loiselle, Parliamentary Secretary to the Minister of Indian Affairs, to Rod King, Chief, November 7, 1980, file reference unknown (ICC Exhibit 1a, pp. 1370-71); Bernard Loiselle, Parliamentary Secretary to the Minister of Indian Affairs, to Rod King, Chief, November 12, 1980, file reference unknown (ICC Exhibit 1a, pp. 1372-73); Rod King, Chief, to Solomon Sanderson, Chief, Federation of Sakatchewan Indians, December 7, 1980, file reference unknown (ICC Exhibit 1a, pp. 1374-75); Rod King, Chief, to Bernard Loiselle, December 7, 1980, file reference unknown (ICC Exhibit 1a, pp. 1376-77).



all the Lucky Man Band's right, title, interest and benefit which the Band, the members of the Lucky Man Band of Indians, for themselves and each of their respective heirs, successors, descendants and permitted assigns, may have (if any) in and to Reserve No. 116 established by Order in Council P.C. 1151 dated the 17th of May, 1889, the description of which Reserve is as follows:

The whole of Little Pine and Lucky Man Indian Reserve No. 116 as shown on a Plan of Survey No. 284 of record in the Canada Lands Survey Records at Ottawa.<sup>170</sup>

The Settlement Agreement and surrender were later approved by a referendum of band members. Although this portion of the Band's claim was settled, the TLE shortfall claim continued to be negotiated.

The department officially rejected the Lucky Man TLE claim in July 1995.<sup>171</sup> The department took the position that the proper date of first survey (DOFS) was 1887 and that the population from that year should be used to calculate the Band's treaty land entitlement. This rejected claim was subsequently brought before the ICC in December 1995. In 1997, the ICC recommended that the 1887 DOFS be used to calculate the Band's treaty land entitlement and that the parties carry out further treaty payroll analysis to determine the Band's actual population for that year.<sup>172</sup>

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<sup>170</sup> Schedule "A" to the Notice of Referendum, The Lucky Man Band of Indians, Document of Surrender, July 15, 1989, file reference unknown (ICC Exhibit 1a, p. 1434); Submissions on Behalf of the Government of Canada, November 19, 1996, Exhibit 2.

<sup>171</sup> Al Gross, Indian Affairs and Northern Development, to Chief and Council, Lucky Man Cree Nation, July 7, 1995 (ICC Exhibit 4a, pp. 1-4).

<sup>172</sup> See Indian Claims Commission, *Lucky Man Cree Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109.

APPENDIX B

THE LUCKY MAN BAND OF INDIANS TREATY LAND ENTITLEMENT  
SETTLEMENT AGREEMENT, NOVEMBER 23, 1989

*SCHEDULE 'C' TO THE NOTICE OF REFERENDUM*

*THE LUCKY MAN BAND OF INDIANS*

*TREATY LAND ENTITLEMENT SETTLEMENT AGREEMENT*

*This Agreement is made the 23rd day of November A.D. 1989.*

*BETWEEN:*

*HER MAJESTY THE QUEEN IN RIGHT OF CANADA  
as represented by the Minister of Indian Affairs and Northern  
Development  
(hereinafter called 'Canada')*

*PARTY OF THE FIRST PARTY*

*- and -*

*THE LUCKY MAN BAND OF INDIANS as represented  
by the Chief and Councillors  
(hereinafter called 'the Band')*

*PARTY OF THE SECOND PARTY*

*WHEREAS Canada and the Band are parties to a Treaty known as Treaty No. 6  
signed respectively on their behalf in 1879 (hereinafter referred to as 'Treaty No. 6').*

*AND WHEREAS, in the articles of Treaty No. 6, Canada made certain undertakings  
to the Band, including the following:*

*'And Her Majesty the Queen hereby agrees and  
undertakes to lay aside reserves for farming  
lands, due respect being had to lands at  
present cultivated by the said Indians, and  
other reserves for the benefit of the said  
Indians to be administered and dealt with  
for them by Her Majesty's government of the  
Dominion of Canada...'*

*AND WHEREAS the parties hereto have agreed on the location and the area in size for the establishment of a reserve for the Lucky Man Band of Indians with the participation of the Government of Saskatchewan in the establishment of such reserve;*

*AND WHEREAS Canada has recognized and validated the Band's claim to treaty land entitlement notwithstanding the establishment of Indian Reserve No. 116 by Order in Council P.C. 1151 dated May 17, 1889.*

*AND WHEREAS the electors of the Band have by way of Referendum vote given an absolute surrender to Canada, subject to the terms set out in the Document of Surrender, of whatever right, title, interest and benefit (if any) the Band, the members of the Band, their respective heirs, successors and permitted assigns and each of them or any of them had, now have or may hereafter have in Indian Reserve No. 116, and in the oil and gas Revenue and Capital Trust Fund held by Canada with respect to oil and gas revenues accruing from Indian Reserve No. 116.*

*NOW WHEREFORE in consideration of the premises and of the mutual covenants and agreements hereinafter set out, Canada and the Band agree as follows:*

**1. DEFINITIONS**

*In this Agreement:*

*a) the terms 'Band', 'Chief', 'Council of the Band', 'Minister' and 'Reserve' shall have the same meaning as they have in the Indian Act, R.S.C. 1985, c. I-5 and amendments thereto; and*

*b) the term 'Saskatchewan' means Her Majesty the Queen in right of Saskatchewan.*

**2. RESERVE LANDS**

*a) Subject to third party interests in the lands described in Schedule '1' hereto (hereinafter referred to as 'the Entitlement Lands'), being satisfied by Saskatchewan and the Band in a manner acceptable to Canada, Saskatchewan and the Band, and upon approval by the Council of the Band of the selection of the Entitlement Lands containing some 7,680 acres, more or less, as the lands and their location are more particularly shown outlined in Schedule '2' hereto, and upon the transfer to Canada of the administration and control of the Entitlement Lands by Saskatchewan in accordance with the terms of the Settlement Agreement between Canada and Saskatchewan, a copy of which agreement between Canada and Saskatchewan is annexed hereto as Schedule '3', Canada shall recommend to the Governor in Council that the Entitlement Lands be set apart as a reserve for the use and benefit of the Lucky Man Band of Indians.*

*b) Prior to the Entitlement Lands being set apart as a reserve for the use and benefit of the Band, but made effective upon the Entitlement Lands being set apart as a reserve (hereinafter referred to as the 'Reserve'), the Chief and Council of the Band shall*

provide to Canada a Band Council Resolution duly executed by a quorum of the Band Council, approving at no cost and without further compensation therefore:

1. the transfer of administration and control by Canada to Saskatchewan, pursuant to section 35 of the Indian Act, a 30 metre wide road right of way, as the said right of way is more particularly described in section 12 of the Settlement Agreement between Canada and Saskatchewan, a copy of which is annexed hereto as Schedule '3'; said right of way to be more particularly described by Plan of Survey filed in the Canada Land Surveys Records.
2. the grant of Letters Patent in favour of Saskatchewan Telecommunications, pursuant to section 35 of the Indian Act, of an easement for a telephone cable right of way, as the same is more particularly described in section 13 of the Settlement Agreement between Canada and Saskatchewan, a copy of which is annexed hereto as Schedule '3'.
3. a permit pursuant to section 28(2) of the Indian Act to the Minister of Agriculture of Canada, in the form of the Memorandum of Understanding hereinafter referred to, authorizing him, Canada's employees in his department and their contractors, agents, licencees and invitees, to use and occupy the reserve, or portions thereof, in accordance with the terms of a Memorandum of Understanding made between the Minister of Agriculture and the Minister of Indian Affairs and Northern Development annexed as Appendix 'C' to the Settlement Agreement between Canada and Saskatchewan, a copy of which is annexed hereto as Schedule '3'.

### 3. RELEASE

(A) In consideration of this Treaty Land Entitlement Settlement Agreement and in particular the covenants and agreements contained herein and subject to the provisions of paragraph (B), the Band does hereby:

- i) cede, release and surrender to Canada all claims, rights, title, interests and benefits the Band ever had, now has or may hereafter have by reason of or in any way arising out of land quantum pursuant to Treaty No. 6, up to 7,680 acres, more or less, as such lands are more particularly described in Schedule '1' annexed hereto; and,
- ii) release and forever discharge Canada, Her servants, agents and successors from all obligations imposed on, and from all promises and undertakings made by Canada under Treaty No. 6 relating to land entitlement of up to 7,680 acres, more or less, and does hereby waive any rights, actions or causes of action, claims or demands of whatever nature or kind which the Band ever had, now has or may hereafter have against Canada by reason of or in any way arising out of Treaty No. 6 relating to land entitlement of up to 7,680 acres, more or less, it being further understood by the parties hereto that this agreement, and in particular the covenants contained herein, represent full and final satisfaction of all obligations or undertakings of Canada relating to land entitlement of up to 7,680 acres, more or less, contained in Treaty No. 6; and is in full satisfaction of all

manner of costs, legal fees, travel and other expenses expended by the Band or its representatives for the purpose of arriving to and entering into this Settlement Agreement."

"(B) The Release referred to in paragraph (A) herein is given without prejudice to and without it being construed in any way as a forfeiture or waiver by the Band, its members or each or any of them, to any claim the Band, its members or each or any of them may have:

a) to compensation for allegedly being denied the privileges of 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.

#### 4. INDEMNITY

The Band hereby and forever agrees to indemnify and save harmless Canada from and to be responsible for, all manner of actions, suits, causes of actions, claims, demands, damages, costs or expenses, liability and entitlement, initiated, made or incurred after the execution of this Treaty Land Entitlement Settlement Agreement (hereinafter referred to as the 'Settlement Agreement'), whether known or unknown, against Canada which any person who is eligible to participate in this Settlement Agreement including any heirs, successors or permitted assigns of such person ever had, now has or may hereafter have against Canada relating to the subject matter of this Settlement Agreement.

#### 5. FURTHER ASSURANCES

The parties hereto covenant each with the other to do such things and to execute such further documents and to take all necessary measures to carry out and to implement the terms of this Settlement Agreement; and the Band hereby authorizes, empowers and directs its present Council of the Band and succeeding Councils of the Band, to act for and on behalf of the Band in executing such documents and taking such further necessary measures to carry out and implement the terms, intent and meaning of this Settlement Agreement.

#### 6. REFERENDUM

The acceptance of the terms and entry into this Settlement Agreement by the Band shall be by the majority of the electors of the Band voting in favour of this Settlement Agreement at a referendum held in accordance with the definitions and procedures set out in the Indian Referendum Regulations made pursuant to the Indian Act, a copy of which is annexed as Schedule '4' hereto.

## 7. ENUREMENT

*This Settlement Agreement shall enure to the benefit of and be binding upon Canada, Her Heirs and Successors, and upon the Band, its heirs, successors and permitted assigns.*

## 8. APPROVAL

a) *This Settlement Agreement shall be signed by the Chief and Councillors of the Band in good faith, following the approval and ratification of this Settlement Agreement by a referendum of the Band duly called and held in accordance with the definitions and procedures set out in Schedule "4" hereto.*

b) *This Settlement Agreement shall come into effect upon the happening of the last of the following events which shall be deemed to be conditions precedent:*

- (1) Approval by Canada prior to Referendum*
- (2) Ratification and execution by the Band*
- (3) Execution by the Minister of Indian Affairs and Northern Development on behalf of Canada*

## 9. NOTICES

*Any notice or other written communication required or permitted to be given pursuant to this Settlement Agreement, may be given as follows:*

### a) *To Canada:*

*Assistant Deputy Minister,  
Lands, Revenues & Trusts,  
Indian and Northern Affairs,  
Ottawa, Ontario.  
KJA 024*

### b) *To the Band:*

*Chief and Councillors of the  
Lucky Man Band of Indians*

10. ENTIRE AGREEMENT

a) All of the schedules attached hereto form part of this Settlement Agreement.

b) This Settlement Agreement shall be the entire agreement and there is no representation, warranty, collateral agreement or condition affecting this Settlement

Agreement except as expressed within it.

11. PRESUMPTIONS

There shall not be any presumption that doubtful expressions in this Settlement Agreement be resolved in favour of either party.

12. MISCELLANEOUS

a) Subject to the terms and provisions herein, this Settlement Agreement may be signed in counterpart.

b) The headings are inserted solely for convenience and shall not control or affect the meaning or construction of any part of this agreement.

c) The Band acknowledges it has retained independent legal advice during the negotiations leading up to this Settlement Agreement and regarding all the matters associated with it.

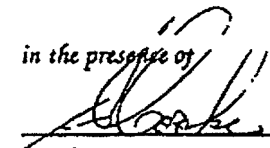
d) In this Settlement Agreement, words in the singular include the plural and words in the plural include the singular, and words importing male persons include female persons and corporations.

IN WITNESS WHEREOF the Minister of Indian Affairs and Northern Development on behalf of Her Majesty the Queen in right of Canada has executed this agreement under his hand this 23rd day of November, A.D. 1989 at the City of North Battleford, in the Province of Saskatchewan.

Signed by

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

in the presence of

  
Witness

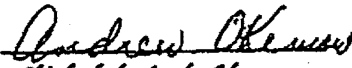
  
Minister of Indian Affairs and Northern Development

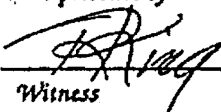
IN WITNESS WHEREOF the Lucky Man Band of Indians, as represented by the Chief and Councillors of the Band, for themselves and on behalf of the members of the Band, have executed this agreement under their respective hands this 23rd day of November, A.D. 1989 at the City of North Battleford, in the Province of Saskatchewan.

Signed by


THE LUCKY MAN BAND OF INDIANS

in the presence of

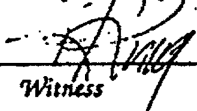
Per:   
Chief of the Lucky Man Band of Indians

  
Witness

Signed by

  
Councillor

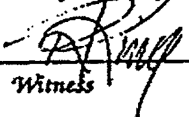
in the presence of

  
Witness

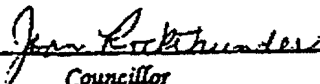
Signed by

  
Councillor

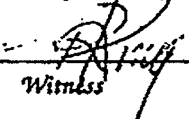
in the presence of

  
Witness

Signed by

  
Councillor

in the presence of

  
Witness



**APPENDIX C**

**LUCKY MAN CREE NATION: TREATY LAND ENTITLEMENT PHASE II INQUIRY –  
INTERIM RULING, SEPTEMBER 19, 2005**

**INDIAN CLAIMS COMMISSION**

**INTERIM RULING: LUCKY MAN CREE NATION INQUIRY  
TREATY LAND ENTITLEMENT CLAIM  
PHASE II**

**PANEL**

Chief Commissioner Renée Dupuis (Chair)  
Commissioner Jane Dickson-Gilmore  
Commissioner Alan C. Holman

**COUNSEL**

For the Lucky Man Cree Nation  
David C. Knoll

For the Government of Canada  
Perry Robinson

To the Indian Claims Commission  
Karen L. Webb

**SEPTEMBER 19, 2005**

## **BACKGROUND**

The oral hearing in the Lucky Man Cree Nation Treaty Land Entitlement Inquiry was held on August 18, 2005 at the Wanuskewin Heritage Park. During the hearing, counsel for both parties were assisted in their presentations by non-counsel. Toward the end of the hearing, counsel for Canada objected to submissions put forth on behalf of the First Nation by Mr. Jayme Benson. Mr. Benson is Director of Specific Claims for the Federation of Saskatchewan Indian Nations and had, we understand, assisted the Lucky Man Cree Nation in the research and preparation of their submission. The Panel met briefly to consider Canada's request and made an initial ruling on whether the Commission would strike from the transcript those of Mr. Benson's remarks regarding claims that were not the subject of this inquiry.

Subsequently, counsel for the Lucky Man Cree Nation objected to submissions made on behalf of the Government of Canada by Mr. John Scime, Senior Policy Advisor of the Specific Claims Branch, INAC, who had assisted counsel for Canada. Counsel for Lucky Man stated that Mr. Scime had provided evidence in his remarks about claims that were not the subject of the inquiry.

As a result of the combined requests, the Panel further determined that it would consider the issue as a whole.

## **RULING**

The Panel notes that both parties have argued that the Lucky Man Cree Nation Treaty Land Entitlement claim must be treated consistently with other claims, even though they disagree on what consistency would mean for this particular claim. However, prior to the oral hearing, at the stage in the process when the inquiry's record was being created, neither party presented the Panel with evidence that would support their respective arguments respecting consistency; counsel have only argued the point. Both counsel have allowed their clients to put evidence before the oral hearing and then asked the Panel to strike evidence of the other party.

As a result of this turn of events, the Panel is put in the position of being asked to weigh evidence that has not been properly put before it. Without remedial action, it would also result in unfairness, since each party has put forward evidence at a point in the proceeding, namely the oral hearing, when the opposing party has no opportunity to assess or rebut it.

As a Commission of Inquiry, created by Order in Council under the *Inquiries Act*, the Commissioners may adopt methods they consider expedient for the conduct of the inquiry. The Commission may adopt its own process and may vary that process when it is necessary to determine the issues the parties have agreed to put before it.

To maintain the integrity of the oral hearing, the Panel has decided to retain the written transcript of the oral hearing in its entirety. Rather than disregard the passages objected to by counsel and in

keeping with its ability to amend its process when necessary in the interests of conducting a full inquiry, the Panel will supplant or supplement the submissions with additional evidence and submissions.

Accordingly, the Panel requires both parties to put forward new evidence and related argument on the matter of consistency. Since both parties have argued the matter, we think it is only fair that both parties put forward their new evidence and their legal submissions grounded in that evidence in a single submission and concurrently with one another. Since at that time, neither party will have seen the evidence put forward by the other, both parties will be given adequate and equal time to respond and reply.

The dates set by the Panel for submission of the additional evidence and legal argument by both parties are as follows:

<b>Submission of evidence and legal argument:</b>	<b>November 18, 2005</b>
<b>Response to evidence and argument</b>	<b>December 16, 2005</b>
<b>Reply</b>	<b>January 16, 2006</b>

The Panel may require a further oral hearing, should it prove necessary, but would urge the parties to put forward their full evidence and argument in writing.

**FOR THE INDIAN CLAIMS COMMISSION**



Renée Dupuis (Chair)  
Chief Commissioner



Jane Dickson-Gilmore  
Commissioner



Alan C. Holman  
Commissioner

Dated this 19th day of September 2005.

**APPENDIX D**

**LUCKY MAN CREE NATION: TREATY LAND ENTITLEMENT PHASE II INQUIRY –  
INTERIM RULING, AMENDMENT, DECEMBER 15, 2005**

**INDIAN CLAIMS COMMISSION**

**INTERIM RULING: LUCKY MAN CREE NATION INQUIRY  
TREATY LAND ENTITLEMENT CLAIM  
PHASE II**

**AMENDMENT TO SEPTEMBER 19, 2005 RULING**

**PANEL**

Chief Commissioner Renée Dupuis (Chair)  
Commissioner Jane Dickson-Gilmore  
Commissioner Alan C. Holman

**COUNSEL**

For the Lucky Man Cree Nation  
David C. Knoll

For the Government of Canada  
Perry Robinson

To the Indian Claims Commission  
Karen L. Webb

**DECEMBER 15, 2005**

The ruling of September 19, 2005 is amended as follows:

At the request of the First Nation, the dates set by the Panel for submission of the additional evidence and legal argument by both parties are as follows:

<b>Submission of evidence and legal argument:</b>	<b>December 2, 2005</b>
<b>Response to evidence and argument</b>	<b>January 13, 2006</b>
<b>Reply</b>	<b>January 27, 2006</b>

**FOR THE INDIAN CLAIMS COMMISSION**



Renée Dupuis (Chair)  
Chief Commissioner



Jane Dickson-Gilmore  
Commissioner



Alan C. Holman  
Commissioner

Dated this 15th day of December 2005.

**APPENDIX E**

**Lucky Man Cree Nation: Treaty Land Entitlement Phase II Inquiry –  
Interim Ruling, Amendment, June 22, 2006**

**INDIAN CLAIMS COMMISSION**

**INTERIM RULING: LUCKY MAN CREE NATION INQUIRY  
TREATY LAND ENTITLEMENT CLAIM  
PHASE II**

**AMENDMENT TO SEPTEMBER 19, 2005 RULING**

**PANEL**

Chief Commissioner Renée Dupuis (Chair)  
Commissioner Jane Dickson-Gilmore  
Commissioner Alan C. Holman

**COUNSEL**

For the Lucky Man Cree Nation  
David C. Knoll

For the Government of Canada  
Perry Robinson

To the Indian Claims Commission  
Karen L. Webb

**JUNE 22, 2006**

The ruling of September 19, 2005 is further amended as follows:

### **BACKGROUND**

As a result of objections made by both counsel to information presented at the oral hearing by non-counsel, the Panel made an interim ruling on September 19, 2005, amended December 15, 2005, with regard to additional evidence to be provided by the parties.

Both parties submitted additional evidence and legal argument on December 2, 2005 and their responses to the other's material on January 13, 2006. Canada has objected to the Lucky Man Cree Nation's response, on the grounds that in addition to legal argument responding to Canada's submission, the First Nation's response contains additional evidence. In its letter of objection, dated January 26, 2006, Canada argued that the First Nation could not submit new evidence at the response stage, since doing so violated the terms of the Panel's ruling of September 19, 2005.

### **RULING**

The panel reviewed Canada's letter of objection, the Lucky Man Cree Nation's letter in answer to Canada, its ruling of September 19, 2005 and the background to that ruling. The Panel also considered the mandate of the Indian Claims Commission to review the application by the Government of Canada of the Specific Claims Policy to individual claims. The Commissioners have been authorized to adopt such methods as they consider expedient for the conduct of the inquiry.

The Panel's interest is in ensuring it has a full body of evidence, so that it can deliberate on the issues decided and agreed to by the parties. To fulfill its mandate, once informed of evidence that is available, the Panel has a responsibility to consider whether that evidence may be relevant to the issues in the inquiry and to gather relevant evidence.

Rather than ask First Nation to resubmit its response, the panel has decided that the response and reply stages of the Order of September 19, 2005 will be replaced by an oral hearing. The Panel has concluded that a hearing is necessary to gather evidence from the parties about the nature and consistency in application of Treaty Land Entitlement policy.

The Panel ruling of September 19, 2005 had stated that the first submission by both parties was to contain both evidence and legal argument. The ruling did not provide for the submission of additional evidence after the initial submission. As a result, the Lucky Man Cree Nation's submissions in response to Canada's evidence and argument, dated January 13, 2006 will not be accepted as submitted. Canada's Response submission, dated January 13, 2006 will not be accepted.

Both parties are to provide a brief written report, outlining the scope and nature of the evidence to be provided, with documentation as required. Both parties are to provide a witness to provide oral evidence, in both direct and cross-examination. Both parties will have an opportunity to present legal argument following the oral examination.

The Panel will not accept any additional evidence following the conclusion of the oral hearing.

The dates set by the Panel for the submission of the additional evidence, oral hearing and legal argument are as follows:

**Submission of written report and supporting documentation:**

**Lucky Man Cree Nation:**

**July 7, 2006**

**Canada**

**September 22, 2006**

**Hearing of Oral Evidence**

**October 24, 2006**

**FOR THE INDIAN CLAIMS COMMISSION**



Renée Dupuis (Chair)  
Chief Commissioner



Jane Dickson-Gilmore  
Commissioner



Alan C. Holman  
Commissioner

Dated this 22 day of June, 2006.



## APPENDIX F

### LUCKY MAN CREE NATION: TREATY LAND ENTITLEMENT PHASE II INQUIRY – CHRONOLOGY

- 1 Planning conference April 28, 2004, Saskatoon  
January 27, 2005, Saskatoon
- 2 Community session No session held at the request of the First Nation.
- 3 Written legal submissions
  - Submission on Behalf of the Lucky Man Cree Nation, May 2, 2005
  - Submission on Behalf of the Government of Canada, July 7, 2005
  - Reply Submission on Behalf of the Government of Canada, July 28, 2005
- 4 Oral legal submissions August 18, 2005, Saskatoon
- 6 Written evidentiary submissions
  - Submission on Behalf of the Lucky Man Cree Nation, July 6, 2006
  - Submission on Behalf of the Government of Canada, September 25, 2006
- 7 Evidentiary hearing October 25, 2006, Saskatoon
- 8 Interim rulings
  - Panel ruling September 19, 2005
  - Amendment to panel ruling of September 19, 2005, December 15, 2005
  - Amendment to panel ruling of September 19, 2005, June 22, 2006
- 9 Content of formal record

The formal record of the Lucky Man Cree Nation: Treaty Land Entitlement Phase II Inquiry consists of the following materials:

- Exhibits 1 – 11a tendered during the inquiry
- transcript of oral session (1 volume)
- transcript of evidentiary hearing (1 volume)

The report of the Commission and letter of transmittal to the parties will complete the formal record of this inquiry.