

January 17, 2023

Susie Thorsley

Ottawa, ON

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SCT File No.: SCT - 4001-22

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

HOLLOW WATER FIRST NATION

Claimant

v.

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

Respondent

DECLARATION OF CLAIM
Pursuant to Rule 41 of the
Specific Claims Tribunal Rules of Practice and Procedure

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

January 17, 2023

Date

Susie Thorsley

Registry Officer

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a) Claimant

1. The Claimant, HOLLOW WATER FIRST NATION (“Hollow Water” or “Nation” or “Band”) confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, SC 2008, c. 22, by virtue of being a “band” within the meaning of the *Indian Act*, RSC 1985, c. I-5.

2. Hollow Water is located on the Hollow Water Reserve No. 10 on the east shore of Lake Winnipeg in the Province of Manitoba and is a signatory to Treaty 5.

b) Conditions Precedent

3. The following conditions precedent as set out in paragraph 16(1)(a) of the *Specific Claims Tribunal Act*, have been fulfilled:

16 (1) A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister and

(a) the Minister has notified the First Nation in writing of his or her decision not to negotiate the claim, in whole or in part[.]

4. On June 28, 2021, Hollow Water submitted a claim to the Minister alleging that His Majesty the King in Right of Canada (“Canada” or “Crown”) breached its legal obligations owed to Hollow Water in 1876 when it failed to offer the Nation fair, just and equitable reserve and gratuity terms compared to Treaties 3, 4, 6, 7, 8, 9 and 10, contrary to the Crown’s statutory/constitutional duties, fiduciary duties, and the Honour of the Crown.

5. On December 22, 2021, the Minister notified Hollow Water that the Claim would not be assessed under the specific claims process as the Claim’s allegations did not fit within the scope of the *Specific Claims Policy and Process Guide*, and as such, the Claim was not filed with the Minister and would not proceed further under the specific claims process. No reasoning was provided for this assessment.

c) Claim Limit

6. For the purposes of this Claim, Hollow Water does not seek compensation in excess of \$150 million.

d) Grounds

7. Hollow Water submits that the Claim falls within the parameters of s. 14 of the *Specific Claims Tribunal Act* which states:

14 (1) Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:

(a) a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;

(b) a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation — pertaining to Indians or lands reserved for Indians — of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada; [and]

(c) a breach of a legal obligation arising from the Crown’s provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation[.]

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

Traditional Territory of Hollow Water First Nation

8. The people of Hollow Water are Anishinaabe (an Algonquian word meaning original people) and were considered by the Crown to be part of the “Lake Winnipeg Saulteaux.”

9. The core of Hollow Water’s traditional territory includes the three main Islands in the southern part of Lake Winnipeg, now known as Hecla Island, Black Island, and Deer Island, and the Hollow Water (*Wanipagow*) River basin area opening into the eastern shore of the south basin of Lake Winnipeg.

10. The Lake Winnipeg Anishinaabe including Hollow Water were well established in this territory by the late 18th century when non-Indigenous fur traders first established a handful of trading posts in the area.

Applicable Canadian Legislative Framework and Compensation for Claims by “Indian Tribes” (1867-1872)

11. The northwestern boundary of the Dominion of Canada at the time the *British North America Act, 1867 (Constitution Act, 1867)*¹ was proclaimed on 1 July 1867 extended to the height of land of the Lake Superior watershed. The vast region to the west known to the Crown as Rupert’s Land, was claimed by the HBC under the *HBC Royal Charter of 1670*.²

12. The Dominion Crown desired Rupert’s Land for strategic purposes, to build a transcontinental railway to British Columbia, to attract settlers to the western interior/plains, and to counter American imperialism on the continent. Rupert’s Land

¹ Today known as the *The Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3 [*Constitution Act, 1867*].

² *The Royal Charter for Incorporating the Hudson’s Bay Company, A.D. 1670* [“*HBC Royal Charter, 1670*”].

was viewed as crucial for nation-state building goals. The Lake Winnipeg region was considered a valuable strategic travel hub connecting the vast lands of the northwest.

13. On 12 December 1867, the Senate and the House of Commons reported on resolutions relating to Rupert's Land and the North-Western Territory and the *Constitution Act, 1867*. Those resolutions included the statement that upon unification, "Indian Tribes" claims "to compensation for lands required for purposes of settlement, would be considered and settled in conformity with the equitable principles which have uniformly governed the Crown in its dealings with the Aborigines." ("1867 Joint Address")

14. On 31 July 1868, the British Parliament passed the *Rupert's Land Act, 1868*³ whereby the Dominion government agreed to purchase HBC's rights in exchange for £300,000, land around its trading posts, and land within the "Fertile Belt." The 28 May 1869 Agreement between the Dominion Government and the Directors of the HBC set out under Clause 8 that any "Indian" claims "for lands required for purposes of settlement" would be "disposed of by the Canadian government".

15. On 23 June 1870, the British government enacted the *Rupert's Land and North-Western Territory Order* ("1870 Rupert's Land Order")⁴ which formally transferred the vast "North West Territories" area, including Rupert's Land, to the Dominion of Canada. The *1867 Joint Address* was included by the United Kingdom (UK) as *Schedule A* to the Order.

16. Section 146 of the *Constitution Act, 1867* thereby adopted the *1870 Rupert's Land Order* and "the addresses expressed" as a term and condition for the union of Rupert's Land with the Dominion of Canada, including the Crown's undertaking to compensate "Indian Tribes" equitably for their lands required for settlement.

17. Section 146 set out that the *1870 Rupert's Land Order* was to have the same effect as if it had been enacted by the Parliament of the UK of Great Britain and Ireland.

18. The *1870 Rupert's Land Order*, including the *1867 Joint Address* (Schedule A), is today referred to in paragraph 52(2)(b) of *Constitution Act, 1982*⁵ and included in the Schedule as Item 3.

19. In 1872, the *Dominion Lands Act*,⁶ which applied to Manitoba (then the Postage Stamp Province) and the North West Territories, codified the homesteading

³ *An Act for enabling Her Majesty to accept a Surrender upon Terms of the Lands, Privileges, and Rights of 'The Governor and Company of Adventurers of England trading into Hudson's Bay,' and for admitting the same into the Dominion of Canada* 31-32 Vict., c. 105 (UK). [*Rupert's Land Act, 1868*].

⁴ *Rupert's Land and North-Western Territory Order* (U.K.), 23 June 1870, reprinted in RSC 1985, App. II, No. 9 [*1870 Rupert's Land Order*].

⁵ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁶ *An Act respecting the Public Lands of the Dominion*, SC 1872, c. 23, s. 1 [*Dominion Lands Act*].

policy adopted by Adams G. Archibald in 1871 for Manitoba based on one quarter-section parcels of 160 acres (four quarter sections equaling 640 acres). Section 42 exempted provisions respecting agricultural lands, timber lands, or mineral lands from applying where “Indian title” had not “been extinguished”.

Sawmill on Hecla Island and Granting of Hecla Island to the Icelanders Despite Hollow Water’s Residence and Known Claim to the Island (1872 – 1897)

20. In *circa* 1872 dedicated efforts were being made by Canada to assess the value of the natural resources in and around Lake Winnipeg and Lake Manitoba. Hecla Island, Black Island and Hollow Water River reportedly had valuable timber and good limestone and rock for building.

21. Starting in 1871, sawmills and lumber camps were commercially operational in the Lake Winnipeg region. Lake Winnipeg was used to send lumber by barge to Selkirk and then to Winnipeg. Government regulation and inspection of the timber trade was virtually non-existent during the 1870s, meaning the timber trade represented a low-cost, get-rich quick scheme.

22. Since the summer of 1874, a Mr. Ross of Ross & Co. was reportedly already operating a sawmill on “Big Island” (i.e. Hecla Island).

23. In the summer of 1874, Dominion Land Surveyor (D.L.S.) Lachlan Kennedy reported that Black Island was claimed by about a half dozen families “of Indians” encamped on Drumming Point. Though not consulted in the process of the survey, they permitted the survey to continue after Kennedy provided flour and promised to make their claim known to the government.

24. In the summer of 1874, the principal leader of “Big Island in Lake Winnipeg” (i.e. Hecla Island), *Ka-ka-kee-pe-ness*, later known as Chief Hardisty of Hollow Water, paid a visit to the second Lieutenant-Governor of Manitoba and the North West Territory, Alexander Morris. Morris did not record the meeting discussions.

25. On September 28, 1875, on his way back from taking a Treaty 5 Adhesion at Grand Rapids, Commissioner Morris encountered Thickfoot, “a principal Indian of the band inhabiting the islands” at Dog Head Point (Wapang) on the mainland south of Bloodvein River. Morris was told that the “Island Indians” lived on “Big Island [Hecla Island], Black Island, Wapang and the other islands in the vicinity.” Thickfoot reported that their population numbered 128 and had no leader.

26. Despite the Island Band residing on Hecla Island and having made their claims known to the highest levels of the Dominion government, and before a treaty was made with the Island Band, Order in Council (OIC) 1875-0987 was passed on 8 October 1875 granting a land reserve to Icelandic immigrants encompassing all of Hecla Island. That summer, the Icelanders had selected the reserve because of the fertile land and fishing and gaming privileges it would afford them.

27. The large tract also included a parcel on the western shore of Lake Winnipeg embracing townships Nos. 18 to 24 and the small islands lying in between the west coast and Hecla. In total, the Icelandic settlement was approximately 429,142 acres. Hecla Island is approximately 267,862 acres.

28. On 19 October 1875, John Taylor, federal Icelandic Agent at Fort Garry, wrote to Morris reporting that the Icelandic settlers numbering 285 were on their way to their new reserve. Taylor asked for a letter from Morris to the “Indians as promised.” This letter, if ever provided, has never been located.

29. On 5 July 1876, “*Ka-ka-kee-pe-ness* of Big Island” visited Morris at Fort Garry for a second time. *Ka-ka-kee-pe-ness* asked for a reserve on “the Big Island” which Morris refused to grant. *Ka-ka-kee-pe-ness* then asked for reserve on the east side of Lake Winnipeg at High Bluff River. Morris asked him to notify his people of the coming treaty that summer.

30. In September of 1876, a newspaper reported that the “Indians” did not want to give up their claim to Hecla Island to “white” settlers. Hecla was considered the best location on Lake Winnipeg for timber and agriculture and contained known mineral deposits, which had led the “natives” to place a “corresponding value” on it.

31. On 31 December 1880, Taylor reported that despite encouraging winter fishing, the bad weather ruined crops and cattle and many Icelanders planned to leave the colony. On 7 July 1897, OIC P.C. 1897-2306 approved the cancellation of the Icelandic Reserve making it available for sale and settlement.

32. Today, Hecla Island, Black Island and Deer Island form part of the Hecla/Grindstone Provincial Park of Manitoba.

Need for Treaty 5 and Crown Instructions for Treaty 5 (1872-1875)

33. The Lake Winnipeg Bands knew that the advance of European settlement and taking up of their traditional lands and homes – even without treaty as the case of the Icelandic settlement and sawmill demonstrated to Hollow Water – was inevitable.

34. Declining hunting grounds was a growing concern for the Lake Winnipeg Bands in the post-1870 era who had for centuries built an economy and livelihood based on the trade in furs and goods with the HBC. The deployment of steamboats on Lake Winnipeg and major tributaries also meant unemployment for these families who had made a living conveying HBC goods.

35. The Lake Winnipeg Band’s main staples of sturgeon and whitefish were also increasingly under threat by commercial fishing companies and settlers. As feared, by the 1880s, the Lake Winnipeg Berens River Indian Agency reported that commercial fishing practices had caused dwindling numbers of sturgeon and whitefish at Indian reserves all along Lake Winnipeg, including at Hollow Water. The prior independent Bands were increasingly dependent on the Agency for clothing and provisions.

36. Treaty 5 Nations recognized and hoped that a treaty with the Crown would offer a remedy for their declining economy and in particular saw farming as crucial to address their poverty, starvation and provide for life necessities in the new era, as missionaries had been encouraging them to do. The Nations started making urgent requests for reserves, agricultural implements, and tools to build permanent homes starting in the 1871-1874 period.

37. As for the Crown, as first advised by Morris on 31 May 1875, the progress of steam navigation, missions, saw milling enterprises, and discovery of minerals in the Lake Winnipeg area meant that Treaty 5 should be “made without delay.” Morris also believed that requests for agricultural implements should be complied with to encourage the Bands to “enter upon a more civilized mode of life.”

38. In 1880, Morris reported that access to the “large and valuable sheet of water” of Lake Winnipeg, connecting with the Red River and the Nelson River up to Hudson Bay, and the building of the tramway at Grand Rapids, had also made Treaty 5 an urgent priority.

39. In his Annual Report for the Interior dated 31 January 1876 for the period ending 30 June 1875, Minister Laird wrote that paramount public reasons for treating with Lake Winnipeg Bands included: access to Lake Winnipeg and the Saskatchewan River as key transportation and communication routes; the progress of steam navigation; access to Crown minerals, timber and land sales and undisturbed access to the region by settlers/traders; and expectation of immediate agricultural settlement.

40. According to Laird, these paramount public reasons made it “essential” that “Indian Title” be extinguished and necessitated “prompt negotiation with the Indians on both sides of the Lake Winnipeg.”

41. Morris, and James McKay, Speaker of Manitoba’s Legislative Council (1870-1874), and Minister of Agriculture (1875-1878), were appointed as Commissioners for Treaty 5 on 17 July 1875.

42. On 10 August 1875, given the numerous petitions for reserves, Morris was instructed by Laird to select, in consultation with the Bands, desirable reserves immediately after the conclusion of treaty or within the year as practicable. Morris was not instructed on reserve size for Treaty 5.

43. Laird did instruct that the annuity and the gratuity be capped at \$5.00, claiming that this was due to the comparatively smaller area of territory proposed to be ceded; and as the territory was not required for immediate use (contrary to his Annual Report that “prompt negotiations” were a “necessity” given time sensitive public goals).

44. Treaty 5 territory applied to mainly central Manitoba in 1875/1876 (not including the 1908/1910 Adhesions covering mainly northern Manitoba) and covered approximately 100,000 square miles in total. This was already approximately 25%

more land than Treaty 4 (75,290 sq. miles) and nearly double Treaty 3 (55,000 sq. miles), where the gratuity was \$12 per person.

45. While no written instructions appear to exist regarding reserve size, an undated draft fragment of Treaty 5 located in Morris' personal papers has the reserve term "one square mile" per family of five crossed out.

46. Based on his previous experience as Commissioner for Treaties 3 and 4, Morris wrote that a gathering of large number of Chiefs and followers, not previously in the habit of meeting together, intensified the difficulty of making treaty. Thus, for Treaty 5, the Commissioners visited each Band or smaller groups of Bands separately near or at their place of residence, travelling along Lake Winnipeg by steamboat.

47. Also, as a result of previous experience, the Crown decided to sever the acceptance of Treaty 5 (i.e. the surrender of vast territories) from the delineation of their reserve. As such, identified reserves were not promised in the body of Treaty 5.

Signing of Treaty 5 and the Adhesion by Hollow Water First Nation (1875-1876)

48. On 20 September 1875, Morris took Treaty 5 starting with Berens River, Little Grand Rapids and Poplar River at Berens River. He then travelled to the northern half of Lake Winnipeg to take treaty at Norway House (September 24) and Grand Rapids (September 27) at their respective communities.

49. The Berens River treaty document included the treaty at Norway House that Morris had not yet visited. The treaty as signed must have been completed as written sometime after 24 September 1875. All other Treaty 5 Nations, starting with Grand Rapids onwards, adhered to the Berens River/Norway House Treaty 5 text.

50. In June of 1876, Morris informed Laird that Treaty 5 had yet to be completed, including taking treaty from the "Island Indians" and the Bands at the Pas. Taking these Adhesions was assigned to Thomas Howard and J. Lestock Reid, as Morris and McKay would proceed on to Treaty 6. Morris instructed them to promise no more than 160 acres per family of five and the \$5.00 annuity.

51. On 26 July 1876, an Adhesion to Treaty 5 was signed at Dog Head with the "Big Island" Band (Hollow Water), the "Blood Vein River" Band, the "Dog Head" Band, and the "Jack[-Fish] Head" Band. The Treaty 5 talks spanned from 3 pm to the "evening" and included the election of Council.

52. Though their joint treaty report admitted that they were in fact distinct Bands, the Commissioners required that one Chief be elected to represent the group to save on costs otherwise incurred for a full council for each Band. A Bloodvein member had the most members present at the time and received the most votes as 'Chief', and Big Island, Doghead and Jack-Fish Head each had one councillor elected.

53. *Ka-tuk-e-pin-ais* refused to treat unless he was recognized as Chief of the Island Indians as Morris had apparently promised him. The Commissioners rejected the claim and claimed in turn that all families in his Band, with one or two exceptions including the Chief himself, had received annuity with the St. Peter's Band since 1870, and had thus effectively agreed to Treaty 1.

54. Treaty 1, signed in 1871, did not cover Hollow Water's core traditional territory, hence the need for Treaty 5 in 1875/1876. Treaty 1 also set out the areas of future reserves within the text of the treaty as agreed to during the treaty negotiations by the impacted Bands. During the weeklong negotiations, a significant amount of time was spent by Treaty 1 Bands in attempting to secure "extensive" reserves based on known geographical land markers.

55. When *Ka-tuk-e-pin-ais* continued to maintain that his people did not want to sign unless they were promised Big Island for a reserve, the Commissioners refused this time stating that his people could either take the treaty terms as offered or return home, though their home had already been granted to the Icelanders in 1875. At that point, only "one or two of his people" remained opposed to the treaty and *Ka-tuk-e-pin-ais* ultimately signed.

56. While the Band's reserve selection could not be promised in the treaty itself given the Crown decision to sever the signing of treaty from the identification of the reserve, the Commissioners indicated to the Bands that they felt sure the Government would grant their request and give them their reserves as had been discussed.

57. As a result of Crown actions, the Island Indians then living on the Lake Winnipeg Islands were forced to relocate to the mouth of the Hollow Water River on the east shore of Lake Winnipeg, at which point they became known as the Hollow Water River Band.

Limited Reports of Treaty 5 & Other Numbered Treaties (1871-1930)

58. Remarkably, few official records regarding the substance of the Treaty 5 discussions exist. Unlike Treaties 1, 3, 4, 6, and 8, there are few published third-party accounts from journalists shedding additional light on the discussions.

59. One exceptional third-party account regarding the reserve term comes from the personal diary of Missionary Egerton Ryerson Young, who signed Treaty 5 at Berens River as a witness. His diary entry dated 9 October 1875, made 18 days after treaty signing, makes mention of 160 acres in relation to his church property only; and that "a fine reserve, twelve miles square" was "marked out" for Berens River.

60. This corroborated Chief Berens' account as made to Surveyor O'Hanly in 1877 (Young had moved to Ontario). The Chief claimed that Morris promised a reserve of "twelve miles square, to extend twelve miles up the Berens River and six miles back from the river on either side" (i.e., 144 square miles or 92,160 acres), which would include more quality land for agriculture given much of the land was

rock and swamp. The Chief explained that the treaty was only accepted on this understanding and condition; and claimed that Morris had cheated and deceived them, taking advantage of their inability to read and write.

61. On his end, Morris simply reported that the question of the reserve had been a difficult one, but ultimately “arranged” (during talks that spanned a total of 7 hours), and only then did Berens River agree to accept his offer.

62. Another account regarding the substance of the negotiations comes from Commissioner Howard when he met The Pas, Cumberland and Moose Lake Bands on 5 September 1876 at The Pas. According to Howard, the Bands asked for the same terms as Treaty 6 (Fort Carlton), which acted “prejudicially” against his “mission”. He responded that the land of the Plains “would be of value” to the Queen as “homes” for “white” settlers, while the Pas territory was “useless to the Queen”.

63. In December of 1873, Chief John Constant and others at the Pas had written Morris wanting to know when their lands would be purchased “same as the lands of the Manitoba Indians and those at the Rainy River.” Grouping Treaties 1, 2 and 3 (Rainy River) together demonstrates that the Chief Constant did not appreciate that the terms of these treaties differed, and markedly so.

64. Morris’ response in January of 1874 did not clarify the matter. He responded merely that he was “directed to answer” that the Queen’s Government “will always deal” with “all Indian subjects justly & fairly”.

65. Commissioner statements and promises made at Treaties 1 and 4 provide additional insight regarding how the numbered treaties were promoted by the Crown, echoing the promise Morris had made to The Pas Bands in 1874. Morris had served as Treaty Commissioner for Treaties 3, 4, 5 and 6.

66. Morris stated to Treaty 4 Nations that the Crown would deal with them “fairly” and “justly” and make them “good offers”, and that the Queen would deal “generously with all her children” only having their “good at heart”.

67. He further stated that the “Queen acts in daylight” and had “nothing to hide, nothing to conceal”, and that they should “trust” his “words” that “come from the heart of one that loves the Indian people”.

68. Morris also rejected Treaty 4 requests for certain terms by invoking the principle of non-discriminatory treatment, claiming that Treaty 3 Nations would complain that Treaty 4 Nations had been treated better than Treaty 3 Nations.

69. Similarly, Commissioner Archibald stated to Treaty 1 Nations that “in laying aside these reserves, and in everything else that the Queen shall do for” them, the Queen could not do “more than she has done for her red children in the East” as “that would be unjust for them.” Conversely, the Queen would “not do less” for Treaty 1 Nations, because they “are all her children alike, and she must treat [them] all alike.”

70. In response to Chief Henry Prince's statement that he trusted the Queen Mother would treat them "as she has treated her children in the East", Archibald also claimed that the offered Treaty 1 terms were better terms than those offered to Treaty 3 (1873; not yet signed), the Robinson-Superior Treaty (1850), and Minnesota region. In most cases, much larger reserves had been included under these treaties which were not tied to the homesteading policy of Canada or the United States.

71. The Stone Fort Treaty (No.1) and the Manitoba Post Treaty (No. 2) were signed on 3 August 1871 and 22 August 1871 respectively. Treaty 2 Nations, aware of Treaty 1 terms, expected to receive the same terms at a minimum. Archibald, the first Lieutenant-Governor of Manitoba and the North-West Territories and architect of the homesteading policy, was Commissioner for both treaties.

72. Treaties 1, 2 and 5 cover a majority of present-day Manitoba and are the only numbered treaties that contained the one quarter reserve term (160 acres per family of five) versus one square mile (640 acres per family of five) and the lesser initial gratuity (\$5.00, rather than \$12.00).

73. On 16 August 1876, Morris told Treaty 6 Nations at Fort Carlton that the goal of the Crown in entering the treaty was to ensure that they have as much or more land than they need. Seven days later, Treaty 6 was signed on 23 August 1876, just under one month after Hollow Water had adhered to Treaty 5 (26 July 1876).

74. In contrast to Treaty 5 and its Adhesions, the Treaty 6 Council Meeting at Fort Carlton was attended by a large number of Saulteaux and Cree Chiefs and their followers from a wide geographical area. This large-scale gathering was not what Morris had earlier recommended and had followed in the case of Treaty 5.

75. Treaty 6 was then signed by a second large gathering at Fort Pitt on 5 September 1876, where Morris offered the same terms, the latter being aware of the terms as offered at Fort Carlton and expecting the same at a minimum. As with Treaties 3 (1873) and 4 (1874), Morris offered one square mile (640 acres) per family of five and a present of \$12 per person.

76. On 27 March 1877, Morris wrote to the Minister of the Interior noting that the "provisions of Treaty No. 5 are far less onerous than any of the other Treaties because the circumstances are different."

77. In 1880, Morris wrote that Treaty 3 "was one of great importance, as it not only tranquilized the large Indian population affected by it, but eventually shaped the terms of all the treaties, four, five, six and seven - who speedily became apprised of the concessions which had been granted to the Ojibbeway nation."

78. Treaty 5 is the evident outlier, however, considering the substantially smaller reserve and gratuity provisions, as Minister Laird noted on 31 January 1876.

79. Treaties 8 (324,900 sq. miles), 9 (128,000 sq. miles), and 10 (84,000 sq. miles) covering northern British Columbia, parts of the Northwest Territories, northern Alberta, northern Saskatchewan, and northern Ontario were signed between 1899 to 1929/1930. As with Treaties 3, 4, 6, and 7, all included one square mile per family of five with an initial gratuity of \$12.00 per person.

Later Treaty 5 Adhesions (1907 – 1910)

80. From 1907 until 1910, the Crown obtained further Adhesions to Treaty 5 covering present-day northern Manitoba, reverting again to the smaller reserve entitlement and lesser initial gratuity - even following the signing of Treaty 10 from 1906 to 1907 covering mainly northern Saskatchewan.

81. Originally, Canada was planning to have these Bands adhere to Treaty 10 as it had been specifically structured for non-agricultural land. Instead, it was decided that Adhesions to Treaty 5 would be more beneficial for the government when officials realized that Treaty 10 provided for the larger present and reserve terms.

82. On 12 May 1908, Reverend John Semmens was appointed as Commissioner to take Adhesions to Treaty 5 and to Treaty 10, in addition to his duties as Inspector of Indian Agencies among others. He also acted as translator.

83. As with prior Commissioners for the Treaty 5 Adhesions, Semmens was instructed not to deviate from the upper limits of Treaty 5 terms. By 1910, the last Treaty 5 Adhesions were carried out.

Setting Aside of and Addition to the Hollow Water Reserve (1880-1930)

84. On 31 December 1877, the Surveyor-General instructed certain surveys to be made of Indian Reserves in the Treaty 5 area. Hollow Water was not listed.

85. In 1877, the Dog Head Indian Reserve No. 11 was surveyed for the Dog Head Band and comprised 1,357 acres. According to the surveyor, there was a shortfall of 19 acres based on population.

86. In 1880, Hollow Water requested that their reserve be surveyed immediately as lumbermen were cutting timber in its vicinity. In 1881, the Band again asked for the reserve to be surveyed as lumber dealers were trespassing on their reserve.

87. On 3 October 1884, Hollow Water Reserve No. 10 was surveyed as 3,574 acres. D.L.S. Thomas D. Green reported that he had surveyed a third-class reserve mostly not suitable for agriculture, and that the heavy timber had been cut by Dick & co., who had operated a sawmill at the mouth of Hollow Water River until the previous autumn. The reserve was confirmed by OIC on 14 October 1916.

88. In 1884, the Loon Straits Indian Reserve No. 11 A was surveyed as 1,135 acres. It had been provided in exchange for the Dog Head reserve (1,357) which had been abandoned as rocky and unsuitable for farming.

89. The shortfall relating to this reserve was now at 242 acres, which is 256 acres when rounding up for 8 members. Hollow Water's share would have been approximately 100.70 acres.

90. In 1918, the Loon Straights reserve was surrendered by Hollow Water, Blood Vein, and Jack Head River Band with three portions of land to be added to the Band's respective reserves in proportion to each Band's membership population.

91. In 1926, an additional 446.10 acres of land was surveyed and added to the Hollow Water Reserve No. 10 based on their 1922 population. The reserve now comprised 4,020.10 acres of land as confirmed by OIC P.C. 918 in 1930.

92. In July of 1928, Henry J. Bury re-surveyed Hollow Water Reserve No. 10 as 3,574 acres (not including the addition confirmed in 1930). Approximately 2,000 acres was indicated as good land, while marsh (700 acres), rock (500 acres), and swamp (300 acres) made up the balance (1,500 acres).

93. Had Treaty 5 contained the one square mile per family of five term, and factoring in the Dog Head/Loon Straits surveying shortfalls, the Hollow Water reserve would have comprised an additional 10,722 acres in 1884 and an additional 1,741.10 acres in 1926, for a total shortfall of 12,463.10 acres.

f) The Basis in Law on Which the Crown is said to have failed to meet or otherwise breached a lawful obligation:

Treaty 5 Disparity Claim

94. The decision to offer one quarter the land acreage to Treaty 5 Nations as was just offered to Treaty 3 (October 1873) and Treaty 4 (September 1874) Nations was made by Canada knowing that reserves for farming was a main concern for Treaty 5 Nations, and that the Winnipeg Lake region included a significant amount of muskeg/swamp.

95. This was acknowledged in the written Treaty 5 text itself, which undertook to lay aside reserves for farming lands and provided a unique clause for a reasonable addition being made given the presence of swamp land.

96. While the surveyors exercised their discretion to add *some* additional land above and beyond the strict 160 acres per family of five term to account for swamp, as was done with Hollow Water's Reserve (approximately 886 acres added based on 84 people listed on the 1884 treaty payroll), it still contained only 2,000 acres of good

land - enough for 62.5 persons per 32 acres. Or by contrast, enough for 15.60 persons per 128 acres (640 acres per family of five).

97. There is no legitimate reason given by Minister Laird or Commissioner Morris as to why Treaty 5 needed to be offered one quarter less land and less than half the gratuity as offered to the other numbered Treaties signed immediately before and after Treaty 5.

98. The timing of the signings of Treaties 3, 4, 6, 7, 8, 9 and 10, spanning from 1873-1930, and their varying sizes and differing territories covered, affirm the arbitrariness of Treaty 5's reserve and gratuity terms by comparison.

99. With the knowledge of prior protracted and difficult treaty negotiations, the Crown deliberately sought ways to obtain assent to Treaty 5 more readily, including, as mentioned, by separating out the selection of reserve land from treaty signing, and by negotiating in smaller groups rather in a public assembly better representing the vast territory being surrendered in the treaty.

100. The tactics worked, as Treaty 5 was signed in record speed, taking a day, half of day or even less than half a day. The time often included time spent on the election of Council, as in the case of Hollow Water (which had been contentious).

101. Though the adequacy of the explanation of the terms can never be known for certain given the paucity of Crown and independent records, the speed with which Treaty 5 and its Adhesions were signed challenges the notion that they were adequately explained and understood.

102. Treaty 5 Nations did not speak, write, or read English, were not familiar with western concepts such as acres, nor had any point of reference for the size of one homesteading lot on the ground. They had no independent advisors nor previous experience negotiating with the Crown.

103. The speed of the discussions also suggests that the Bands placed a great deal of trust in the Commissioners to present them with fair and just terms on that day, and likely would have been explicitly told as much (as all other treaty records suggest the Commissioners would have used language to this effect).

104. Prior to Treaty 5, Morris allowed Treaty 5 Bands at the Pas to continue to believe that Treaty 5 terms were the same as Treaty 1 *and* Treaty 3, as he did not clarify that the terms were markedly different when presented with the opportunity to do so.

105. When Treaty 5 Bands did have knowledge of more favourable treaty terms, as with the Bands at The Pas, Howard complained that *he* was prejudiced in his mission as a result. He then told those Bands that their land was of no value to the Queen and thus in effect, the Queen was making them a gift.

106. In summary, the facts suggest that Canada was intent all along on securing Treaty 5 as expeditiously as possible and to the inferior reserve and gratuity terms above all else, seeking to either keep the Nations in the dark regarding the superior terms of Treaties 3, 4 and 6, or mislead, if not outright lie, when made aware of superior treaties by sources not originating with the Crown.

107. Available facts suggest that the Crown exercised complete control over what Treaty 5 terms would be offered (and no Commissioner deviated by offering superior terms); and sought to limit the extent of and quality of material information otherwise available to Treaty 5 Nations to judge the offered terms against.

108. It is also known that Hollow Water had asked for Hecla Island as a reserve (267,862 acres), which was denied. In addition, Hollow Water was unequivocally told by the Commissioners that they could either accept the treaty terms as offered then and there, or else go home.

109. Hollow Water was made powerless to revise the Crown's offer. If they refused, they would be left treaty-less, reserve-less, homeless, in abject poverty, and defenseless to the continued advance of settlement in their territory.

110. Given all of the above, it is asserted that the treaty 'negotiations' with Hollow Water cannot be characterized as open and transparent 'negotiations' between autonomous actors. Instead, Hollow Water was vulnerable to and depended entirely on the Crown to present fair, just, and equitable terms, or even any treaty terms at all.

111. Hollow Water thus asserts that Canada breached its legal obligations owed to Hollow Water contrary to the *1870 Rupert's Land Order/s.146 of the Constitution Act, 1867*, the Honour of the Crown, and fiduciary duties owed at law when it made 'take it or leave it' offers of one quarter less reserve land and less than half the gratuity compared to what was offered to Treaties 3, 4, 6, 7, 8, 9 and 10.

112. More particularly, Canada breached its legal obligations contrary to paragraphs 14(1)(a), (b), and (c) of the SCTA by:

- a. failing to follow the Crown's stated standard and codified law of non-discriminatory practice between numbered Treaty Nations in offering vastly inferior take it or leave it reserve and gratuity terms to Hollow Water compared to Treaties 3, 4, 6, 7, 8, 9 and 10, in breach of the *1870 Rupert's Land Order/s.146 of the Constitution Act, 1867* and the Honour of the Crown;
- b. failing to negotiate Treaty 5 in good faith, disclose material information, avoid dishonest and misleading conduct, and act without sharp practice, while taking full advantage of the Nation's vulnerability, destituteness, isolation and dependence on the Crown to make it good offers, in breach of the *1870 Rupert's Land Order/s.146 of the Constitution Act, 1867* and the Honour of the Crown;

- c. failing to demonstrate loyalty, ordinary prudence, even-handedness, provide full disclosure, and avoid sharp dealing, while taking full advantage of the Nation's vulnerability, destituteness, isolation and dependence on the Crown to make it good offers, in breach of the *1870 Rupert's Land Order/s.146* of the *Constitution Act, 1867*, and basic fiduciary obligations owed at law;
- d. by framing, tainting and applying undue influence in the 'negotiations' such that they cannot be characterized as conscientious discussions conducted in an honest, open, and transparent manner, thereby abnegating Hollow Water's free and informed decision-making power regarding the surrender of its significant cognizable legal interests in its lands to the Crown, and thereby making it unsafe to rely on Hollow Water's consent to the reserve and gratuity terms, in breach of the *1870 Rupert's Land Order/s.146* of the *Constitution Act, 1867*, and the Crown's fiduciary obligations owed at law; and
- e. failing to withhold consent to the reserve and gratuity terms in exchange for the surrender of Hollow Water's territory which the Crown had already granted to settlers and declared valuable, leveraging the Crown's considerable unequal bargaining power to offer unconscionable take it or leave it inferior reserve and gratuity terms that it knew were foolish, improvident and exploitative, in breach of the *1870 Rupert's Land Order/s.146* of the *Constitution Act, 1867*, and its fiduciary obligations owed at law.

Wrongful Alienations of Hecla Island & Hollow Water Reserve No. 10

113. Canada further breached its legal obligations owed to Hollow Water contrary to paragraph 14(1)(b) of the SCTA as follows:

- a. breach of section 42 of *Dominion Lands Act, 1874* and the *1870 Rupert's Land Order/s.146* of the *Constitution Act, 1867* in allowing timber operations to operate on Hecla Island starting in 1874, prior to treating with Hollow Water in 1876; and
- b. breach of section 42 of *Dominion Lands Act, 1874* and the *1870 Rupert's Land Order/s.146* of the *Constitution Act, 1867* with the issuance of OIC 1875-0987 on 8 October 1875, granting all of Hecla Island as a land reserve to Icelandic immigrants, prior to treating with Hollow Water in 1876.

114. Canada further breached its legal obligations owed to Hollow Water contrary to paragraphs 14(1)(a) and (c) of the SCTA as follows:

- a. breach of Crown instructions, Honour of the Crown and fiduciary obligations owed at law to set aside Hollow Water's reserve in an expeditious fashion by 1877 following the signing of treaty in 1876, and thereby protect Hollow Water Reserve No. 10 from known timber operations and associated losses.

g) Relief Sought

115. Hollow Water seeks the following relief:

Treaty 5 Disparity Claim

- a. Equitable compensation for the loss of use of, and current unimproved market value of, approximately 10,722 acres of shortfall land (the “1884 Shortfall Lands”);
- b. Equitable compensation for the loss of use of, and current unimproved market value of, approximately 1,741.10 acres of shortfall land (the “1926 Shortfall Lands”);
- c. Equitable compensation for the shortfall of \$7.00 one-time initial gratuity since 1876 (the “1876 Gratuity Shortfall”);

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- d. Equitable compensation for the use of Hecla Island for timber operations from 1874 until 26 July 1876, and thereafter to be calculated in accordance with the Treaty 5 Disparity losses as may be applicable;
- e. Equitable compensation for other losses of use of Hecla Island from 8 October 1875 until 26 July 1876, and thereafter to be calculated in accordance with the Treaty 5 Disparity losses as may be applicable;
- f. Equitable compensation for the use of Hollow Water Reserve No. 10 for timber operations from 1877 until *circa* November 30, 1883;

Other Relief

- g. Equitable interest calculated from the date of the breaches to the date of judgment;
- h. An award of solicitor-client costs pursuant to the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119, section 110(2) in relation to the Claim and this proceeding; and
- i. Such other relief as this Honourable Tribunal deems just.

Dated this 17th day of January 2023 in the Rural Municipality of Headingley, in Swan Lake Indian Reserve No. 8A, in the Province of Manitoba.

MAURICE LAW



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Bradley D. Regehr, K.C.



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