

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

SPECIFIC CLAIMS TRIBUNAL		
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES		
F I L E D	October 6, 2023	D É P O S É
Alexandre Bois		
Ottawa, ON		11

HOLLOW WATER FIRST NATION

Claimant

- and -

HIS MAJESTY THE KING IN RIGHT OF CANADA

As represented by the Minister of Crown-Indigenous Relations and Northern Affairs

Respondent

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

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

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Overview

1. The Respondent, His Majesty the King in right of Canada (“Canada”), is committed to reconciliation and to a renewed nation-to-nation relationship with Indigenous peoples based on a recognition of rights, respect, cooperation and partnership. This commitment exists within the context of litigation and beyond. Canada endeavours to embody these principles as it assists the Specific Claims Tribunal (the “Tribunal”) in its task of adjudicating matters brought before it.
2. Canada favours resolving claims made by Indigenous peoples through negotiation and settlement. Canada will consider all appropriate forms of resolution regarding this Amended Declaration of Claim (the “claim”).
3. Canada did not breach any legal obligations to Hollow Water First Nation (“Hollow Water”) when it provided for a lower initial payment and land quantity in Treaty 5 than it provided under Treaties 3, 4, and 6 through 10 (“disparity portion” of the claim). Canada did not have a legal obligation to ensure treaty parity. Each treaty was negotiated in its own circumstances and reflects factors specific to the parties to that treaty. No two treaties are fully identical. The treaty relationships between Canada and all treaty First Nations are of greatest importance, notwithstanding that there is variation between the terms of the treaties.
4. Canada acknowledges that the Honour of the Crown is always at stake in its dealings with Indigenous peoples. In the circumstances of this case, Canada’s conduct in negotiating the treaty upheld the Honour of the Crown.
5. Canada acknowledges that its relationship with Hollow Water is a fiduciary one and that, in certain circumstances, the relationship may give rise to and require the performance of specific fiduciary duties by Canada. In this case, Canada fulfilled its fiduciary duty owed to Hollow Water. Canada did not breach any obligations prior to entering a treaty with Hollow Water by allowing timber operations to operate on Hecla Island, which Hollow Water asserts was its traditional territory,

and by reserving Hecla Island for Icelandic immigrants (“wrongful alienations portion” of the claim). Canada did not breach any obligations or cause any loss to Hollow Water by not setting aside Hollow Water Reserve No. 10 ~~by 1877~~ in a timely fashion (“Reserve No. 10 portion” of the claim). Nor did Canada breach any obligations with respect to the quality of land reserved for Hollow Water (“quality of land portion” of the claim).

6. Canada acknowledges that it had an obligation to honour and to purposively and diligently implement the terms of the treaty. In this case, Canada fulfilled its treaty obligations with respect to the setting aside of Hollow Water Reserve No. 10.

~~67.~~ The Tribunal may not have jurisdiction to adjudicate all or part of the claim because it may not fit within any of the grounds enumerated in section 14 of the *Specific Claims Tribunal Act*, SC 2008, c 22 (“SCTA”), and may be excluded by section 15 of the *SCTA*. The disparity portion effectively seeks to amend the terms of the treaty, which is outside of the scope of the *SCTA*. It is difficult to extricate the Reserve No. 10 portion, ~~and the wrongful alienations portion,~~ and the quality of land portion, from the disparity portion. Canada intends to raise these arguments in an application later in these proceedings.

I. Status of Claim

~~78.~~ With respect to paragraphs 3 through 5 of the claim, Canada agrees that on June 28, 2021, Hollow Water submitted a claim to the Minister of Crown-Indigenous Relations and Northern Affairs. Further, on December 22, 2021, Canada notified Hollow Water that the assertions contained in the claim did not fit within the scope of the *Specific Claims Policy and Process Guide*.

~~89.~~ On January 17, 2023, Hollow Water filed this claim with the Tribunal.

~~910.~~ Canada acknowledges that Hollow Water does not seek compensation in excess of \$150 million for the purposes of this claim, as stated in paragraph 6 of the claim.

II. Canada's Position Regarding the Validity of the Claim

~~10~~11. In response to paragraph 7 of the claim, this claim does not fall squarely within any of the enumerated grounds in section 14 of the *SCTA* and aspects of the claim may be excluded by section 15 of the *SCTA*. Accordingly, it is unclear that the Tribunal has jurisdiction over the claim. Canada intends to raise these arguments in an application later in these proceedings.

~~11~~12. Regardless of the jurisdiction issues, Canada's position is that this claim is not valid.

~~12~~13. Canada did not breach any legal obligation in negotiating the terms of Treaty 5 and in setting aside reserve land for Hollow Water.

III. Canada's Position Regarding Assertions of Fact in the Declaration of Claim

~~13~~14. In response to the whole of the claim, and to paragraphs 8 through 93 in particular, Canada states that Hollow Water has pleaded evidence contrary to Rule 39 of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119. Despite this, Canada has attempted to respond to the claim in a substantive manner.

~~14~~15. The facts underlying this claim date back to the nineteenth century. As this claim proceeds and Canada obtains more information, it will review its position on assertions of fact and work cooperatively with Hollow Water towards an agreed statement of facts and / or amend this Response as appropriate.

The Claimant

~~15~~16. In response to paragraphs 1 and 2 of the claim, Canada agrees that Hollow Water is a First Nation within the meaning of section 2(a) of the *SCTA*. Canada also agrees that Hollow Water Reserve No. 10 is located in the Province of Manitoba, and Hollow Water is a signatory to Treaty 5.

Traditional Territory of Hollow Water

- ~~16~~17. In response to paragraph 8, Canada agrees that the people of Hollow Water are Anishinaabe and were considered by the Crown to be part of the “Lake Winnipeg Saulteaux”.
- ~~17~~18. In response to paragraph 9, Canada has insufficient information at this time to confirm Hollow Water’s traditional territory.
19. In response to paragraph 10, Canada has insufficient information to confirm the Anishinaabe names for the islands in Lake Winnipeg or the location of Drumming Point. Canada agrees that Drumming Point was a ceremonial ground and old camping place and burial ground.
20. In response to paragraph 11, Canada agrees that there was confusion regarding the names of the islands in Lake Winnipeg, and the islands are inconsistently named in the historical record, but that the larger island is now referred to as “Hecla Island”.
- ~~18~~21. In response to paragraph ~~10~~12, Canada has insufficient information at this time regarding whether the Lake Winnipeg Anishinaabe were well established in their asserted territory in the late eighteenth century.

Legislative and Political Framework for Canada’s Westward Expansion

- ~~19~~22. In response to paragraph ~~11~~13, Canada agrees that the northwestern boundary of the Dominion of Canada extended to the Lake Superior watershed when the *Constitution Act, 1867* ((UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No. 5 [*Constitution Act, 1867*]) was proclaimed on July 1, 1867. Canada also agrees that the Hudson’s Bay Company (the “HBC”) claimed portions of western Canada, known to the Crown as Rupert’s Land, under *The Royal Charter for Incorporating the Hudson’s Bay Company*.

- ~~20~~23. In response to paragraph ~~42~~14, Canada agrees that Rupert's Land was important to the Dominion Government's goal to build a transcontinental railway, to attract settlers to the west, and to establish a national presence in the west. Canada further agrees that the Lake Winnipeg region was an important transportation route linking Manitoba with the North-West territories.
- ~~21~~24. In response to paragraph ~~43~~15 Canada agrees that, in December of 1867, the Senate and House of Commons made a joint address to Her Majesty the Queen regarding the transfer of Rupert's Land and the North-Western Territory to Canada (the "1867 Joint Address"). The 1867 Joint Address proposed that, once the land was transferred, "the claims of Indian Tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with equitable principles which have uniformly governed the British Crown in its dealings with the Aborigines". The 1867 Joint Address later formed Schedule A of the *Rupert's Land and North-Western Territory Order* (Item 3 of Schedule to the *Constitution Act, 1982*, reprinted in RSC 1985, Appendix II, No 9 ["1870 Order"]).
- ~~22~~25. In response to paragraph ~~44~~17, on July 31, 1868, the British Parliament passed the *Rupert's Land Act* (1868, 31-32 Vict., c. 105 (U.K.) [*Rupert's Land Act, 1868*]). The *Rupert's Land Act, 1868* did not itself set the terms by which HBC surrendered Rupert's Land for admission into Canada, but empowered the Crown, by subsequent Order-in-Council, to admit Rupert's Land into the Dominion of Canada upon the arrangement of such terms and their embodiment in a second address by both houses of the Canadian Parliament. The *Rupert's Land Act, 1868* was necessary, doubts having arisen about Britain's ability to act upon that part of the 1867 Joint Address requesting transfer of Rupert's Land from the United Kingdom to Canada, as HBC had not yet relinquished its rights over that area.
- ~~24~~26. In ~~further~~ response to paragraphs ~~44~~16 and 17, Canada ~~clarifies~~ states that the "Details of Agreement between the Delegates of the Government of the Dominion and the Directors of the Hudson's Bay Company" were dated March 22, 1869.

Clause 8 of this agreement relieved the HBC of all responsibility for compensating “Indian” claims to compensation for land required for settlement, such claims to be disposed of instead by the Canadian government. This agreement was included in the requisite second Joint Address of the Canadian Parliament in May of 1869 (the “1869 Joint Address”), which later formed part of Schedule B of the *1870 Order*. Canada does not agree that the 1869 Joint Address was dated May 18, 1869. Rather, it was signed by the speakers of the House of Commons and the Senate on May 29 and 31, 1869 respectively.

27. In further response to paragraph 16, Canada agrees that the 1869 Joint Address included “[t]hat upon the transference of the territories in question to the Canadian Government, it will be our duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer”.

2528. In further response to paragraph ~~14~~17 and in response to paragraph ~~15~~18, Canada agrees that the *1870 Order* was enacted on June 23, 1870. By the terms of the *1870 Order*, Rupert’s Land and the North-Western Territory, as separately addressed therein, were transferred to the Dominion of Canada, effective July 15, 1870. In exchange for Rupert’s Land, the HBC was granted payment of £300,000 and allowed to retain certain lands around trading posts and within the “Fertile Belt”, as defined therein. The 1867 Joint Address formed Schedule A and the 1869 Joint Address formed part of Schedule B to the *1870 Order*.

2629. In response to paragraph ~~16~~19, Canada says does not agree that section 146 of the *Constitution Act, 1867* authorized, rather than adopted, the *1870 Order*, which came after it, and says agrees that the 1869 Joint Address, as included in the *1870 Order*, contained the terms and conditions for the union of Rupert’s Land with the Dominion of Canada. ~~Even if the terms and conditions embodied in the 1867 Joint Address remained applicable to Rupert’s Land, there was not a~~ Canada does not agree there was any substantive “undertaking” by the Crown to compensate First Nations equally and identically across various treaties for their lands required for settlement, in the way implied by the claim.

- ~~27~~30. In response to paragraph ~~17~~20, Canada agrees that, by operation of section 146 of the *Constitution Act, 1867*, the *1870 Order* had the same effect as if it had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.
- ~~28~~31. In response to paragraph ~~18~~21, Canada agrees that the *1870 Order*, including the 1867 and 1869 Joint Addresses, forms part of the Constitution of Canada, by operation of subsection 52(2)(b) of the *Constitution Act, 1982* (being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act, 1982*]). The *1870 Order* is item 3 in the Schedule to the *Constitution Act, 1982*.
- ~~29~~32. In response to paragraph ~~19~~22, Canada agrees that *An Act Respecting the Public Lands of the Dominion* (SC 1872, c 23 [*Dominion Lands Act, 1872*]), which applied to Manitoba and the Northwest Territories, established a homestead policy to grant up to 160 acres of land under certain conditions. Canada further agrees that section 42 exempted provisions relating to the settlement of agricultural lands, the lease of timber lands, and the purchase and sale of mineral lands from applying to land where “Indian title” had not been extinguished.

Natural Resources and the Icelandic Reserve

- ~~30~~33. In response to paragraph ~~20~~23, Canada currently has insufficient information to determine whether it made dedicated efforts to assess the value of natural resources in this region circa 1872. Canada was aware of potential mineral and timber locations around Lake Winnipeg and Lake Manitoba by approximately 1874.
- ~~31~~34. In response to paragraph ~~21~~24, Canada agrees that sawmills and lumber camps were commercially operational in the Lake Winnipeg region, and that Lake Winnipeg was used to send lumber to Selkirk and Winnipeg. However, government regulation of the timber trade existed in the 1870s. Canada does not have sufficient information to assess whether the timber trade could be fairly described as “a low-cost, get-rich scheme” at this time.

- ~~3235~~. In response to paragraph ~~2225~~ and footnote 7, Canada agrees that the Winnipeg Free Press reported on August 24, 1874 that Ross & Co. had begun operating a sawmill on “Big Island”. However, it is unclear whether this article’s reference to the “Big Island” was a reference to Hecla Island.
- ~~3336~~. In response to paragraph ~~2326~~, Canada agrees that Lachlan Kennedy reported in his 1874 survey that “Big Island” ~~“Black Island”~~ was claimed by about six families “of Indians” encamped at Drumming Point. Kennedy reported that they were unaware of his survey but permitted the survey to continue upon being provided flour and an assurance that their claim would be reported to the government.
- ~~3437~~. Beyond paragraph ~~2326~~, several paragraphs of the claim discuss evidence with respect to “Big Island”. As noted below, Canada has insufficient information to confirm whether the “Big Island” referred to in those paragraphs is Hecla Island in those particular instances, or a reference to Black Island; both are large islands in Lake Winnipeg, located close together.
- ~~3538~~. In response to paragraph ~~2427~~, Canada agrees that Chief *Ka-ka-kee-pe-ness*, also known as Chief Hardisty, met with second Lieutenant-Governor of Manitoba and the North West Territory, Alexander Morris (Morris), in the summer of 1874. Canada is also presently unaware of a record of the meeting discussions.
- ~~3639~~. In response to paragraph ~~2528~~, Canada agrees that Morris met with Thickfoot at Dog Head Point on September 28, 1875. According to Morris, Thickfoot informed him that “the Island Indians at Big Island, Black Island, Wapang and the other islands in the vicinity had no chief”, ~~and~~ that their population numbered 128 people, that “he had cattle and would like to have a place assigned to his people on the main shore where they could live by farming and fishing”, and that “he believed that Indians of the various Islands and of Jack Head Point would cheerfully accept the Queen’s benevolence and settle on a reserve”. ~~Canada has insufficient information to confirm whether “Big Island” referred to Hecla Island in this instance.~~

3740. In response to paragraph 2629, Canada agrees that Order-in-Council P.C. 1875-0987 was passed on October 8, 1875, granting a land reserve to Icelandic immigrants encompassing Hecla Island (referred to as “Big Black Island” therein). This occurred prior to the adhesion of the Big Island Band to Treaty 5 on July 26, 1876. Canada agrees that fishing and agricultural opportunities influenced the selection of the Icelandic reserve. Canada does not presently have sufficient information regarding the Dominion government’s awareness of Indigenous claims pertaining to Hecla Island at this time.

3841. In further response to paragraph 2629 and in response to paragraph 2730, Order-in-Council P.C. 1875-0987 provided the following description of the land reserve it granted:

[...] tract bounded by the South and Northern boundary of the Province of Manitoba, to the North by the Seventh Base Line, to the East by Lake Winnipeg, and to the West by the Eastern boundary of the Second Range, East of the Principal Meridian embracing townships Nos. 18 to 24, inclusive in the Third and Fourth Ranges, east, also Big Black Island and the small islands lying between it and the said Coast.

Information currently in Canada’s possession indicates that the Icelandic reserve was approximately 261,684 acres (1059 km²), and Hecla Island is approximately 38,054 acres (154 km²). The acreage of modern-day Hecla/Grindstone Provincial Park – which encompasses a peninsula of land and a series of islands, one of which is Hecla Island – is approximately 267,862 acres (1084 km²).

3942. In response to paragraph 2831, Canada agrees that on October 19, 1875, Icelandic Agent John Taylor wrote to Morris and reported 285 Icelandic settlers were immigrating to the new reserve. Canada further agrees that Taylor asked for a letter from Morris to the “Indians as promised”. Canada is also presently unaware of the existence or location of this letter.

4043. In response to paragraph 2932, Canada agrees that “Ka-ka-kee-pe-ness of Big Island” (Chief Hardisty) met with Morris on July 5, 1876. He requested a reserve

on “Big Island;” ~~or alternatively~~ but Morris told him it could not be granted. He then asked for a reserve on the east side of Lake Winnipeg at High Bluff River opposite “Big Island” where he then lived. Morris advised that he ~~could not grant the reserve request at Big Island but that he~~ would provide an answer “when the Indians met” ~~in relation to the reserve request on the east side of Lake Winnipeg.~~ Chief Hardisty promised to “warn the Indians” of their discussions.

~~4144.~~ In response to paragraph ~~3033~~ and footnote 8, Canada agrees that a newspaper reported in September of 1876 that First Nations did not want to give up their claim to “Big Island” to settlers. The newspaper also opined that Big Island was probably the best spot on Lake Winnipeg for timber and agriculture. However, Canada has insufficient information at this time regarding whether this article referred to modern-day Hecla Island as Big Island.

~~4245.~~ In response to paragraph ~~3134~~, Canada agrees that on December 31, 1880, Taylor reported that many Icelanders planned to leave the reserve due to crop failure caused by bad weather, despite encouraging winter fishing. Canada further agrees that Order-in-Council P.C. 1897-2306 rescinded Order-in-Council P.C. 1875-0987, making the Icelandic reserve available for sale and settlement.

~~4346.~~ In response to paragraph ~~3235~~, Canada agrees that Hecla Island, Black Island, and Deer Island today form part of the Hecla-Grindstone Provincial Park of Manitoba.

Treaty 5 and Crown Instructions (1872 – 1875)

~~4447.~~ In response to paragraph ~~3336~~, Canada currently has insufficient knowledge of whether Lake Winnipeg Bands considered the settlement and taking up of their traditional lands and homes to be inevitable.

~~4548.~~ In response to paragraph ~~3437~~, hunting and fishing remained largely viable activities in the wooded country north of Treaties 1 and 2 in the 1870s. By 1876, Canada was aware that the deployment of steamboats in Lake Winnipeg was

affecting Indigenous families who had previously been employed to convey goods by boat.

4649. In further response to paragraph 3437 and in response to paragraph 3538, on November 14, 1888, Superintendent Inspector of Indian Agencies, Ebenezer McColl (McColl), reported that commercial fishing operations were affecting First Nations who relied on the Lake Winnipeg fisheries for sustenance. The 1890 year-end report for the Berens River Agency stated that as fishing and hunting grounds were becoming less plentiful, First Nations within the Agency were looking to the Department for assistance in clothing and provisions.
4750. In response to paragraph 3639, Canada has insufficient knowledge at this time to address Treaty 5 Nations' hopes and motivations for entering a treaty with the Crown. Canada agrees that Treaty 5 Nations inquired about entering treaties, and related land, agricultural supports and implements, from approximately 1871 to 1874.
4851. In response to paragraph 3740, Canada agrees that on May 31, 1875, Morris stated that the progress of steam navigation, missions, saw milling, and the discovery of minerals near Lake Winnipeg meant that Treaty 5 should be "made without delay". Canada further agrees that on April 24, 1875, Morris suggested the Department comply with a request to provide agricultural implements to encourage a "civilized mode of life".
4952. In response to paragraph 3841, Canada agrees that in 1880, Morris wrote that the necessity for Treaty 5 "had become urgent". Morris recognized that a tramway had been built at Grand Rapids, and he characterized Lake Winnipeg as a "large and valuable sheet of water", which the Red River flows into, and which connects with the Nelson River to Hudson Bay.
5053. In response to paragraph 3942, Canada agrees that Minister Laird (Laird) wrote that important reasons to enter into Treaty at Lake Winnipeg included: the establishment of steam navigation; the establishment of Lake Winnipeg and the

Saskatchewan River as principal thoroughfares; indications of minerals and timber; agricultural potential in certain areas; and so that settlers and traders might have undisturbed access to the Lake.

- ~~51~~54. In response to paragraphs ~~40~~43 and ~~41~~44, Canada agrees that Laird stated it was essential that “Indian title” be extinguished and that prompt negotiations take place with First Nations on both sides of Lake Winnipeg. Laird appointed Morris and James McKay as Commissioners for Treaty 5 on July 17, 1875.
- ~~52~~55. In response to paragraphs ~~42~~45 and ~~43~~46, Canada agrees that, by August 1875, it had received multiple inquiries from Treaty 5 Nations about entering treaties and related reserves. On August 10, 1875, Laird instructed Morris, if possible, to consult with First Nations to select reserves immediately upon the conclusion of the Treaty. Laird instructed that annuities and gratuities should be no larger than five dollars as provided for in Treaties 1 and 2, based on the comparatively small area of ceded land and the fact that Canada did not require the land for immediate railroad or other public use. Laird’s instructions did not provide for reserve size.
- ~~53~~56. In response to paragraph ~~44~~47, Canada agrees that Treaty 5 territory covered approximately 100,000 square miles of central Manitoba in 1875 and 1876. Canada agrees this was more than Treaty 3 (55,000 square miles) and Treaty 4 (75,290 square miles).
- ~~54~~57. In response to paragraph ~~45~~48, Canada agrees there is a document that appears to be a draft fragment of Treaty 5 in Morris’ personal papers, in which “one square mile” is crossed out.
- ~~55~~58. In response to paragraph ~~46~~49, Canada agrees that Morris wrote that the difficulty of entering treaties intensified when a large number of First Nations assembled, who were not previously in the habit of meeting together. He stated that it was better to address First Nations separately and at the places where they were accustomed to meeting. Canada agrees that the Treaty 5 Commissioners visited

First Nations or groups of First Nations by steamboat at or near their places of residence to address Treaty 5.

5659. In response to paragraph 4750, the Crown discussed prospective reserve locations in its meetings with the various Treaty 5 First Nations immediately following the conclusion of the main treaty terms, and these locations were included in the text of Treaty 5 and for many of its adhesions, although not in the one signed at Dog Head.

Signing of Treaty 5 and Hollow Water Adhesion (1875 - 1876)

5760. In response to paragraph 4851, Canada agrees that Morris entered Treaty with the First Nations at Berens River on September 20, 1875, the First Nations at Norway House on September 24, 1875, and the First Nations at Grand Rapids on September 27, 1875.

5861. In response to paragraph 4952, Canada agrees that the Berens River treaty documents included the treaty at Norway House. However, Canada has insufficient knowledge to confirm whether “the treaty as signed must have been completed as written sometime after 24 September 1875”. While not every adhesion to Treaty 5 mirrors the wording of the Berens River/Norway House text, all Treaty 5 adhesions contained similar text.

62. In response to paragraph 53, Canada agrees that on October 11, 1875, Morris wrote that a “large settlement” was ensured on the west coast of Lake Winnipeg based on a “prevalence of timber suitable for fuel and building purposes, of lime and sandstone, of much good soil, and natural hay lands on the west shore of the lake, together with great abundance of white fish, sturgeon and other fish in the lake”. Morris also described “the east coast as much inferior to the west coast”, as far as he could learn, as it appeared to be “thickly wooded”, though it had “indications of mineral deposits”. Canada has insufficient knowledge to confirm that a “large settlement” referred to “New Iceland”.

63. In response to paragraph 54, Canada agrees that in 1872, G.C. Rainboth had surveyed the eastern shore of the lake as far north as Berens River, and found, according to the Secretary of State's assessment of his survey, that the land was "worthless for farming purposes".
- ~~59~~64. In response to paragraph ~~50~~55, Canada agrees that on June 7, 1876, Morris wrote to Laird requesting the completion of Treaty 5, including taking treaty from the "Island Indians" and those at The Pas. On July 14, 1876, Morris instructed Thomas Howard and J. Lestock Reid to take adhesions to Treaty 5 and to promise 160 acres per family of five and an annuity of \$5.00.
- ~~60~~65. In response to paragraph ~~54~~56, Canada agrees that on July 26, 1876, the Big Island, Blood Vein River, Dog Head, and Jack-Fish Head Bands signed an adhesion to Treaty 5 at Dog Head. *Ka-tuk-e-pin-ais*, also known as Chief Hardisty, signed on behalf of the "Big Island" Band, which appears to be a reference to Hollow Water. Negotiations lasted from 3 p.m. on July 25, 1876 to the evening of July 26, 1876 and included the election of Council.
- ~~61~~66. In response to paragraph ~~52~~57, Howard and Reid reported to Morris on the adhesion at Dog Head on October 10, 1876. They noted that the Island Bands were distinct but they required the Bands to elect one Chief and three Councillors. Howard and Reid did not say this was done to save on costs of a Chief and Council for each Band. The Bands elected a Chief from the Bloodvein Band and Councillors from the Big Island, Doghead, and Jack-Fish Head Bands, by a majority vote.
- ~~62~~67. In response to paragraph ~~53~~58, Canada agrees that Howard and Reid noted that *Ka-tuk-e-pin-ais* refused to accept treaty unless he was recognized as Chief of the Island Bands. The Commissioners did not accept that Morris had promised *Ka-tuk-e-pin-ais* he would be Chief. They also wrote that the majority of the twenty-two families from the Big Island Band had already effectively agreed to treaty by receiving annuities with the St. Peter's Band since 1870.

~~63~~68. In response to paragraph ~~54~~59, Canada currently has insufficient knowledge of Hollow Water's "core traditional territory". Canada agrees that the text of Treaty 1 set out prospective reserve locations for signatory First Nations, and that Treaty 1 First Nations spent multiple days negotiating for significant land for reserves during Treaty 1 negotiations.

~~64~~69. In response to paragraph ~~55~~60, *Ka-tuk-e-pin-ais* told the Commissioners that, with the exception of one or two people who did not want him to sign the Treaty unless it was agreed "Big Island" would be set aside as their reserve, most of his people wanted him to sign. The Commissioners then told *Ka-tuk-e-pin-ais* that "Big Island" was not open for reserve, and unless he and his people agreed, "they might return to their homes". Canada has insufficient information at this time to confirm their relationship to Big Island, whether Hecla Island or Big Island were their homes, and whether Big Island was consistently used to refer to Hecla Island in this context.

~~65~~70. In response to paragraph ~~56~~61, the Treaty 5 Commissioners did not have instructions to promise the Island Bands' requested reserve locations, but the Commissioners advised the Bands that they felt the Government would grant their requests to set aside reserves at their desired locations.

~~66~~71. In response to paragraph ~~57~~62, Canada agrees that, following their adhesion to Treaty 5, the "Big Island Band" relocated to the mouth of the Hollow Water River across from Black Island on the east shore of Lake Winnipeg. Canada currently has insufficient information regarding how Crown actions and other factors may have affected this relocation.

Reports of Treaty 5 and Other Numbered Treaties (1871 – 1930)

~~67~~72. In response to paragraph ~~58~~63, Canada currently has insufficient information to comment on the number of official records and published third-party accounts regarding the substance of the Treaty 5 discussions.

- ~~68~~73. In response to paragraph ~~59~~64, Canada agrees that Egerton Ryerson Young signed Treaty 5 at Berens River as a witness. Young's October 9, 1875 diary entry states his understanding that a reserve of twelve miles square had been set apart for the Berens River Band, and 160 acres had been set apart for his church property. Canada has insufficient knowledge regarding whether this third party account was "exceptional".
- ~~69~~74. In response to paragraph ~~60~~65, Canada agrees that, according to Dominion Land Surveyor J.P.L. O'Hanly, Chief Berens claimed he had accepted treaty on the basis that a reserve was promised of "twelve miles square, to extend twelve miles up the Berens River and six miles back from the river on either side". O'Hanly reported that the Berens Band felt they were taken advantage of because they could not read or write. Canada has insufficient evidence to confirm whether or not a copy of the treaty had been left with the Berens River Band.
- ~~70~~75. In response to paragraph ~~61~~66, Canada agrees that Morris reported that negotiations regarding a reserve were difficult, but the Berens Band agreed to accept their terms of Treaty after seven hours of negotiations.
- ~~71~~76. In response to paragraph ~~62~~67, on October 10, 1875, Commissioner Howard reported that he had met with The Pas, Cumberland, and Moose Lake Bands at The Pas. Howard reported the Bands had heard of the terms granted to the First Nations at Fort Carlton and that this affected negotiations. The Bands accepted treaty once Howard agreed to give them reserves at their desired locations, subject to government approval, and upon being advised that the land in Treaty 6 had greater value to settlers.
- ~~72~~77. In response to paragraph ~~63~~68, Canada agrees that, on December 17, 1873, members of The Pas Band wrote to Morris inquiring whether their land would be purchased "the same as the Manitoba Indians and those at the Rainy River". ~~However, Canada has insufficient knowledge regarding what understanding of treaty terms this statement demonstrates on the part of its writers.~~

- ~~7378.~~ In response to paragraph ~~6469~~, Canada agrees that Morris responded to the above letter on January 8, 1874, that he was “directed to answer” that the Queen’s Government “will always deal” with “all Indian subjects justly & fairly.” ~~However, Canada has insufficient knowledge at this time regarding the impact of Morris’ letter upon its readers, and whether there was any misunderstanding regarding previous treaty terms.~~
7479. In response to paragraph ~~6570~~, Canada presently has insufficient knowledge regarding what insights, if any, can be gleaned from the commissioner statements made at Treaties 1 and 4, and Morris’s communications with The Pas Band in 1874. Canada agrees that Morris served as one of the treaty commissioners for Treaties 3, 4, 5 and 6.
7580. In response to paragraphs ~~6671~~ and ~~6772~~, Canada agrees that Morris told Treaty 4 First Nations the Crown would deal “generously with all her children”, treat them fairly, justly, with their “good at heart” and make them “good offers”. Morris further stated that the “Queen acts in daylight”, he had nothing to hide or conceal, and that Treaty 4 Nations should trust his words as coming from the heart of one who “loves the Indian people”.
7681. In response to paragraph ~~6873~~, Morris explained to Treaty 4 First Nations the reasons for and differences between the terms of Treaty 3 and the terms offered for Treaty 4. However, a “principle of non-discriminatory treatment” was not considered in the way implied by paragraph ~~6873~~.
7782. In response to paragraph ~~6974~~, Canada agrees that Commissioner Archibald told Treaty 1 First Nations that the Queen “can do for you no more than she has done for her red children in the East”, as “that would be unjust for them”. He added that the Queen “will not do less for you because you are all her children alike, and she must treat you all alike”. Canada does not agree this statement guaranteed complete parity of terms as between the various treaties, in the way implied by paragraph 74.

83. In response to paragraph 75, Canada agrees that Archibald stated that their “Great Mother will lay aside ... ‘Lots’ of land to be used by” them and their “children forever”, and that they would be “large enough ... to give a farm to each family, where farms shall be required”; that “they will enable” them “to earn a living should the chase fail” and should they “choose” to earn a “living by tilling”. And that they “must not expect to have included in [the] reserve more hay grounds than will be reasonably sufficient for [this] purpose in case [they] adopt the habits of farmers”.
- ~~78~~84. In response to paragraph ~~70~~76, it was reported at the time that Chief Henry Prince and Archibald made statements to these effects. According to that report, Archibald suggested that Treaty 1 would have better terms than Treaty 3, the Robinson-Huron Treaty, and treaties in Minnesota “or elsewhere in the States”. The reserve land provided for in Treaty 3 (640 acres per family of five) was greater than reserve land under Treaty 1. The Robinson-Huron Treaties did not stipulate a formula like the numbered treaties, but its reserves are comparatively large. Canada presently has insufficient knowledge to address the terms of treaties in the “Minnesota region” or the broader United States.
- ~~79~~85. In response to paragraph ~~74~~77, Treaty 1 was signed on August 3, 1871 and Treaty 2 on August 21, 1871. Canada agrees that Archibald was one of the Treaty Commissioners for both Treaty 1 and Treaty 2. Canada agrees that Treaty 2 First Nations knew and expected to receive the same terms as in Treaty 1.
- ~~80~~86. In response to paragraph ~~72~~78, Canada agrees that Treaties 1, 2 and 5 cover a majority of Manitoba. These treaties also provide for a reserve allotment of one-quarter section of land (160 acres) per family of five, and initial gratuities of \$3.00 (Treaties 1 and 2) and \$5.00 (Treaty 5).
- ~~81~~87. In response to paragraph ~~73~~79, on August 19, 1876, Morris told those Treaty 6 First Nations gathered at Fort Carlton that the Crown wished to give them “as much or more of the land than you need”. Canada agrees that Treaty 6 was signed

at Fort Carlton on August 23, 1876, approximately one month after Chief Hardisty adhered to Treaty 5 on behalf of the Big Island Band on July 26, 1876.

8288. In response to paragraph 7480, Canada agrees that there was a large gathering of Saulteaux and Cree people at the signing of Treaty 6 at Fort Carlton. However, the degree to which this differed from the approach that Morris had recommended and followed regarding Treaty 5 is a matter for argument.

8389. In response to paragraph 7581, Canada agrees that a second signing of Treaty 6 occurred at Fort Pitt on September 9, 1876 before a large gathering of people. Morris informed the First Nations of the signing at Fort Carlton and offered the same terms. As in Treaties 3 and 4, Morris offered one square mile of land (640 acres) per family of five and an initial gratuity of \$12.00 per person.

8490. In response to paragraph 7682, Canada agrees that on March 27, 1877, Morris wrote to the Minister of the Interior that “the provisions of Treaty 5 are far less onerous than the other Treaties because the circumstances are different”.

8591. In response to paragraph 7783, Canada agrees that in 1880, Morris wrote that Treaty 3 “was one of great importance, as it 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”.

8692. In response to paragraph 7884, Laird’s Annual Report dated January 31, 1876 states the terms of Treaty 5 were “almost identical” to Treaties 3 and 4, except for the land quantity granted and initial gratuity provided. Laird’s report did not state that Treaty 5 is an “outlier”.

93. In response to footnote 9, Canada agrees that the text of Treaty 5 provided 100 acres per family of five for those members of Norway House First Nation who wanted to move to Fisher River.

8794. In response to paragraph 7985, Canada agrees that Treaties 8, 9, and 10 cover parts of British Columbia, the Northwest Territories, Alberta, Saskatchewan and Ontario, and they were signed between 1899 and 1930. These treaties included reserve allotments of one square mile per family of five. While Treaties 8 and 10 provided for an initial gratuity of \$12.00, the Treaty 9 gratuity was \$8.00.

95. In response to paragraph 86, Canada agrees that Treaty 8 and Treaty 10 offered reserves or “land in severalty” for members who wanted to live off reserve. Reserves were sized in proportion to one square mile per family of five. Members who preferred to live apart were granted 160 acres per person.

Treaty 5 Adhesions: 1907-1910

8896. In response to paragraph 8087, between 1907 and 1910, adhesions to Treaty 5 were made covering present-day northern Manitoba, which provided for the same reserve allotment and initial gratuity terms as the 1875 signing of Treaty 5. Canada agrees that some First Nations adhered to Treaty 5 after the initial signings of Treaty 10 in 1906 and 1907. There were many reasons for the timing of Treaty 10 and northern Treaty 5 adhesions, including the willingness of First Nations to enter treaty and Canada’s settlement and land usage patterns.

8997. In response to paragraph 8188, government officials discussed whether treaty adhesions of northern Manitoba First Nations should be under Treaty 5 or Treaty 10. Canada currently has insufficient knowledge regarding the reason(s) why government officials settled on Treaty 5.

9098. In response to paragraph 8289, Canada agrees that on May 12, 1908, John Semmens (Semmens) was appointed as Commissioner for Treaties 5 and 10 in addition to his role as Inspector of Indian Agencies. Canada further agrees that Semmens provided translations of Treaty documents in certain instances.

9199. In response to paragraph 8390, Canada agrees that Semmens was instructed to take Treaty 5 adhesions, but Canada presently has insufficient information on the

limits of these instructions. Canada agrees that the last adhesion to Treaty 5 during this period was in 1910.

Setting Aside and Adding to Hollow Water's Reserve (1880 ~~1875~~ – 1930)

100. In response to paragraph 91, Canada has insufficient information to confirm whether on January 6, 1875, Molyneux St. John stated that “[t]hese reservations should be surveyed with due allowance for rock or marsh so that the proper quantity of Land should be good land”.

101. In response to paragraph 92, Canada agrees that on June 18, 1877, Surveyor General J.S. Dennis wrote to Dominion Land Surveyor J.P.L. O’Hanly and instructed him to survey certain reserves in the Treaty 5 area. Canada has also not located this letter, but agrees O’Hanly’s report dated February 4, 1878 indicated that he had received Dennis’s instructions and had made immediate arrangements to proceed with the surveys. On his first surveying trip for Treaty 5 in 1877, O’Hanly surveyed Berens River, Poplar River, Black River and Dog Head.

~~92~~102. In response to paragraph ~~84~~93, on December 31, 1877, Deputy Superintendent General of Indian Affairs Lawrence Vankoughnet reported that, during the previous year, reserves were surveyed under the Surveyor-General’s instructions for several interested Bands under Treaty 5 and other treaties. Canada agrees that Hollow Water was not among the Treaty 5 First Nations whose reserves had been surveyed.

~~93~~103. In response to paragraph ~~85~~94, Canada agrees that, in 1877, a surveyor conducted surveys for the benefit of the Dog Head Band, although it was not then referred to as “Dog Head Indian Reserve No. 11”. Canada also agrees that the surveyor wrote that he had surveyed 1,357 acres, and he understood this to be a shortfall of 19 acres.

~~94~~104. In response to paragraph ~~86~~95, Canada agrees that, in the Annual Report of the Department of Indian Affairs, for the year ending December 31, 1880, McColl,

Inspector of Indian Agencies, stated that a councillor of Hollow Water was desirous of having his reserve surveyed, as “lumbermen” were cutting timber in the vicinity.

~~95~~105. In further response to paragraph ~~86~~95, Canada agrees that, in the Annual Report of the Department of Indian Affairs for the year ending December 31, 1881, A. McKay, Indian Agent, reported that Hollow Water wanted their reserve to be surveyed as soon as possible. In the same report, McColl wrote the Band had complained that lumber dealers were trespassing upon their reserve, and asked that it be surveyed.

~~96~~106. In response to paragraph ~~87~~96, Canada agrees that Thomas G. Green began surveying Hollow Water Reserve No. 10 on October 3, 1884, and that he surveyed a total of 3,574 acres. Canada agrees that Green wrote to the Superintendent General of Indian Affairs in a letter dated March 9, 1885, stating that he had surveyed “what may be called a third class reserve, as the greater part of the allotment at this place is useless for arable purposes, and the heavy timber has been cut by Dick & Co. who own, & until last autumn operated, a saw mill at the outlet of the above named river”. Green continued: “Mostly all good land is to be found at the banks of the Hole River, but some good land of small areas in detached portions may be found towards the South West part of Reserve”. Canada agrees that Order-in-Council P.C. 1916 - 2518, dated October 14, 1916, confirmed and set apart 3,574 acres, more or less, for the Hollow Water Indian Reserve.

~~97~~107. In response to paragraph ~~88~~97, Canada is currently in possession of records indicating that Loon Straits Indian Reserve No. 11 was surveyed at 1.77 square miles in 1884, equivalent to approximately 1132.8 acres. Later documentation states that Loon Straits Indian Reserve No. 11 comprised an area of 1135 acres.

~~98~~108. In further response to paragraph ~~88~~97, Canada agrees that, according to an 1879 report of Angus McCay, Indian Agent, residents at Dog Head reserve found it to be unfit for farming purposes and too rocky. By 1890, Dog Head Reserve No. 11 had been abandoned, and Loon Straits had been provided in lieu thereof.

~~99~~109. In response to paragraph ~~89~~98, Canada has insufficient information to confirm a shortfall in 1884 of the Loon Straits Indian Reserve No. 11-A, as described and rounded up in the claim. Canada therefore cannot presently assess what share of this amount might be apportioned to Hollow Water.

~~100~~110. In response to paragraph ~~90~~99, Canada agrees that, in 1918, representatives of the Hollow Water, Blood Vein and Jack Head Bands signed a surrender of the Loon Straits Indian Reserve No. 11, described therein as 1135 acres, more or less, “to be exchanged for three portions of land to be added to our reserves, of areas proportionate to our numbers, and together equal to the area hereby surrendered”.

~~101~~111. In response to paragraph ~~91~~100, Canada agrees that, in 1926, additional land was surveyed for Hollow Water Indian Reserve No. 10, among other reserves. Records from 1928 confirm that 446.10 acres were surveyed for Hollow Water Reserve No. 10, and later records indicate that this acreage was calculated based on Hollow Water’s 1922 population. Canada agrees that, in 1930, Order-in-Council P.C. 1930-918 added a total, by admeasurement, of 446.10 acres, more or less, to Hollow Water Reserve No. 10. Canada agrees that 446.10 acres, combined with the 3,574 acres set aside by Order-in-Council 1916-2518, comprise a total of 4,020.10 acres.

~~102~~112. In response to paragraph ~~92~~101, Canada agrees that, in 1928, Henry J. Bury, Supervisor of Indian Timber Lands, described Hollow Water Reserve No. 10 as 3,574 acres total, comprising 2,000 acres of “good land”, including 700 acres of “agricultural land”. Bury also indicated that there were 700 acres of marsh, 500 acres of rock and 300 acres of swamp land, making up the balance (1,500 acres).

~~103.~~ Paragraph 93 is argument, not fact. There is not a land shortfall with respect to Hollow Water Reserve No. 10. Canada did not have an obligation to set aside Hollow Water’s reserve using the one square mile per family of five formula. Canada did not have an obligation to factor any Dog Head/Loon Straits surveying shortfalls into the 1926 addition, which is based on Hollow Water First Nation’s 1922 population.

The Crown did not fail to meet or otherwise breach a lawful obligation

~~104~~113. In response to paragraph ~~94~~102, Canada agrees that the terms of Treaty 5 provided one quarter the land acreage compared to the terms of Treaty 3 (October 1873) and Treaty 4 (September 1874). However, Canada did not have an obligation to ensure treaty land parity. Different treaty terms were negotiated for different reasons in different areas. Canada agrees that some Treaty 5 First Nations wanted to farm. Canada knew that there was muskeg / swampland in some of the Lake Winnipeg region, specifically, in the area where the Berens River Band wished to reside. However, the Lake Winnipeg region was not unsuitable for farming to the extent asserted.

114. In response to paragraph 95103, in the opening text of Treaty 5, Canada agreed to “lay aside reserve 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”. Under the terms of the Treaty, Canada also agreed to provide agricultural implements to bands “now cultivating the soil, or who shall hereafter commence to cultivate the land...”. Canada also agreed to provide other benefits, such as annual salaries, clothing and flags and medals for Chiefs and subordinate officers and annuities for band members. The purpose of reserves was multifaceted and not limited to potential agricultural use. Considerations such as traditional lands, timber, other resources and trade routes likely also played a role in reserve selection.

~~105~~115. In further response to paragraph 103, Canada agrees that Treaty 5 provided a clause for reasonable addition to be made for the presence of swamp land, which, as per the text of the Treaty, applied to the Berens River Band only. the text of Treaty 5 does not acknowledge that the Lake Winnipeg region included a significant amount of muskeg / swamp. Furthermore, the clause in Treaty 5, which provides for a reasonable addition to be made for the presence of swamp land, applied to Berens River only.

~~106~~116. In response to paragraph ~~96~~104, Dominion Land Surveyor Thomas D. Green indicated with respect to his surveys of Treaty 5 reserves that in most cases the actual number of acres allotted surpassed the actual number of acres required to make allowances for marshes and other wastelands. On October 3, 1884, Hollow Water Reserve No. 10 was surveyed as 3,574 acres. Canada has insufficient information to confirm Hollow Water's population in 1884. In July of 1928, Bury re-surveyed Hollow Water Reserve No. 10 as 3,574 acres, indicating it contained 2,000 acres of good land, 700 acres of marsh, 500 acres of rock and 300 acres of swamp.

~~107~~117. In response to paragraph ~~97~~105, Canada has insufficient information at this time to address whether Laird or Morris did not give a reason for the land quantum difference between Treaty 5 and the other numbered Treaties signed immediately before and after Treaty 5. However, Laird instructed that annuities and gratuities be no larger than five dollars, as provided for in Treaties 1 and 2, based on the comparatively small area of ceded land and the fact Canada did not require the land for immediate railroad or other public use.

~~108~~118. In response to paragraph ~~98~~106, the differences between the terms of Treaty 5 and other treaties are not arbitrary.

~~109~~119. In response to paragraphs ~~99~~107 through ~~101~~109, Canada negotiated Treaty 5 in smaller groups and at more than one location in part for the convenience of Indigenous peoples. This phased approach was also an aspect of negotiations for Treaty 3, 4 and 6. The speed in which Treaty 5 and its adhesions were signed was appropriate for the times.

~~110~~120. In further response to paragraph ~~101~~109, it is not unusual to have limited records or limited surviving records from the nineteenth century. The terms of Treaty 5 were adequately explained and understood.

~~111~~121. In response to paragraph ~~102~~110 and footnote 10 Canada has insufficient knowledge at this time to comment on the extent of the following, but some Treaty

5 First Nations and members spoke, wrote and read English, were familiar with western concepts of land size, had independent advisors and had previous experience negotiating with the Crown. Canada has insufficient knowledge to comment on whether Chief Berens could read or write.

~~112~~122. In response to paragraph ~~103~~111, the length of discussions was appropriate and consistent with the era in which they took place. The Commissioners presented the First Nations with fair, just and equitable terms.

~~113~~123. In response to paragraph ~~104~~112, Canada has insufficient information to confirm whether Treaty 5 Bands at The Pas believed the terms of ~~Treaty 5 were the same~~ as Treaty 1 and Treaty 3 were the same, and whether Morris had an opportunity, or an obligation, to address their beliefs.

~~114~~124. In response to paragraph ~~105~~113, during the September 8, 1876 adhesion meeting with the four First Nations gathered at The Pas, the various chiefs noted they had heard of the treaty (No. 6) concluded ten days earlier at Fort Carlton. Like Treaties 3 and 4, Treaty 6 provided for reserves based on 640 acres per family of five. Commissioner Howard reported this acted “most prejudicially” to his mission, but convinced them to sign by explaining the land they were giving up was “useless to the Queen”, whereas the lands within Treaty 6 were of value to her as homes for “her white children”.

~~115~~125. In response to paragraph ~~106~~114, timeliness was important in completing Treaty 5, but not for the purpose of securing inferior terms. The Crown did not try to keep the First Nations “in the dark” or mislead them in any way.

~~116~~126. In response to paragraph ~~107~~115, the Crown appropriately negotiated the terms of Treaty 5 and did not seek to limit information available to Treaty 5 First Nations, whether it was material to negotiations or otherwise.

~~117~~127. In response to paragraph ~~108~~116, Hollow Water asked for a reserve on the “Big Island.” Canada currently has insufficient information to confirm that the “Big

Island” was Hecla Island. Historical records are inconsistent regarding the location of the “Big Island”.

~~118~~128. In further response to paragraph ~~108~~116, *Ka-tuk-e-pin-ais* told the Commissioners that most of his people wanted him to sign the treaty. *Ka-tuk-e-pin-ais* only mentioned one or two people who did not want him to sign the Treaty unless it was agreed “Big Island” would be set aside as their reserve. The Commissioners then told *Ka-tuk-e-pin-ais* that “Big Island” was not open for reserve, and unless he and his people agreed, “they might return to their homes”.

~~119~~129. In response to paragraph ~~109~~117, Hollow Water was not made powerless to propose revised terms. Even if they refused the initial treaty terms as offered, it is unknowable whether Hollow Water would have been left “treaty-less, reserve-less, homeless, in abject poverty, and defenseless”.

~~120~~130. In response to paragraph ~~110~~118, the treaty negotiations with Hollow Water were conducted in good faith. Hollow Water represented its own interests and was not entirely dependent on the Crown during negotiations. The terms of Treaty 5 were fair, just and equitable.

131. In response to paragraph 119, Canada agrees that on August 3, 1928, Bury, Supervisor of Indian Timber Lands wrote Acting Deputy Superintendent General of Indian Affairs about the Hollow Water Reserve. Bury indicated 700 acres of Hollow Water Reserve No. 10 was agricultural land. Canada currently has insufficient knowledge of the number of individuals that could have engaged in agriculture on reserve. Bury noted that Hollow Water Band members had not made an effort to develop the agricultural or timber resources on the reserve. Canada breached no obligations with respect to the quality or amount of land set aside for Hollow Water.

~~121~~132. In response to paragraphs ~~111~~120 and ~~112~~121, the assertions as pleaded may not fall within any of the grounds enumerated in section 14 of the *SCTA*, and aspects of these assertions may be excluded by application of section 15 of the *SCTA*.

Regardless, Canada did not breach any legal obligations regarding the treaty negotiations, ~~and~~ the resulting Treaty 5 land formula and in setting aside reserve land. Specifically:

- a. The Treaty 5 land formula and the initial payment amount are different from that provided under other treaties because they are the result of different negotiations in different contexts. No two treaties are fully identical, nor was there any obligation upon Canada to negotiate identical terms.
- b. Canada acknowledges that it had a duty to negotiate Treaty 5 in good faith, flowing from the honour of the Crown. Canada negotiated the terms of Treaty 5 in good faith and, at all times, its conduct upheld the honour of the Crown.
- c. Neither the *1870 Order* nor section 146 of the *Constitution Act, 1867* created legal obligations owed by Canada to Hollow Water to the extent asserted in this claim.
- d. Canada acknowledges that its relationship with Hollow Water is a fiduciary one and that, in certain circumstances, this relationship may give rise to and require the performance of specific fiduciary duties by Canada. However, Canada was not under a fiduciary obligation in treaty negotiations, and more particularly, Canada was not under a fiduciary obligation to negotiate terms identical to those of other treaties.
- e. Treaty 5 First Nations, including Hollow Water, validly consented to the terms of Treaty 5 and obligations were not breached in obtaining that consent. Hollow Water adhered to Treaty 5 on July 26, 1876, and the solemn promises exchanged between the parties have bound them ever since.

- f. Canada acknowledges that it had a duty to honour and to purposively and diligently implement the terms of Treaty 5. Canada upheld this duty and breached no obligations in the manner in which it set aside reserve land for Hollow Water, including with respect to the amount of land and the suitability of the land for agriculture. The purpose and intent of the treaty and allotment of reserve land was multifaceted. Canada had no obligation to ensure all reserve acreage was suitable for agriculture. Rather, many considerations, including the preferences of Hollow Water, went into the selection and location of reserve land.

~~122~~133. In response to paragraph ~~113~~122, Canada did not breach any legal obligation to Hollow Water with respect to Hecla Island. Furthermore, the *Dominion Lands Act, 1872*, the *1870 Order* and section 146 of the *Constitution Act, 1867* did not create any legal obligations on Canada to the extent asserted in this claim.

~~123~~134. In response to paragraph ~~114~~123, Canada did not breach any legal obligation to Hollow Water with respect to Hollow Water Reserve No. 10. Specifically:

- a. ~~Crown actors did not have an obligation to follow instructions to the extent asserted in the claim. However, Crown instructions were followed.~~
- a. Canada acknowledges it had an obligation to honour and to purposively and diligently implement the terms of Treaty 5. In this case, Canada's conduct in setting aside Hollow Water Reserve No. 10 upheld these obligations.
- b. Canada acknowledges that the Honour of the Crown is always at stake in its dealings with Indigenous peoples. In this case, Canada's conduct in setting aside Hollow Water Reserve No. 10 upheld the Honour of the Crown.
- c. Canada acknowledges that its relationship with Hollow Water is a fiduciary one and that, in certain circumstances, the relationship may give

rise to and require the performance of specific fiduciary duties by Canada. In this case, Canada fulfilled any fiduciary duty owed to Hollow Water.

~~124~~135. In response to paragraph ~~115~~124 and 125 of the claim, compensation is not owed to Hollow Water, as Canada upheld any legal obligations it may have had to Hollow Water in the circumstances of the facts giving rise to this claim. In the event the Tribunal finds compensation is owed, Canada states that any compensation must be assessed in accordance with prevailing legal principles and s. 20 of the *SCTA*.

IV. Canada's Statement of Facts

~~125~~136. Canada relies upon the facts set out in section III.

~~126~~137. The people of Hollow Water are Anishinaabe and were considered by the Crown to be part of the "Lake Winnipeg Saulteaux".

~~127~~138. Canada took control over the region formally known as Rupert's Land via the *1870 Order*, pursuant to the process described at paragraphs ~~222~~225 through ~~283~~1 above.

~~128~~139. Pre-treaty, several First Nations, known as the "Island bands", were known to frequent the islands and land in the area of what is known today as Hecla Island. The historical documents use inconsistent terms for the First Nation groups making up the "Island bands". The historical documents also use inconsistent terms for the multiple islands in the area. This makes it difficult to determine the history of Hollow Water, the uses of each island, and the history of Hecla Island in particular.

~~129~~140. Treaty 5 was concluded with the Swampy Cree and Ojibwa peoples occupying the territory north of Treaties 1 and 2, on either side of Lake Winnipeg, and extending up the Saskatchewan River as far west as The Pas. The main articles of Treaty 5 were concluded with several First Nations assembled at Berens River on September 20, 1875, and at Norway House on September 24, 1875. These

signatories included the Berens River, Poplar River, Norway House, Cross Lake and Fisher River communities. On September 27, 1875, the Swampy Cree signed an adhesion to Treaty 5 at Grand Rapids. On September 28, 1875, certain Island Lake First Nations assembled at Dog Head Point, a little south of Berens River, expressed interest in entering Treaty 5, and made arrangements with Morris to adhere the next summer. A series of adhesions were then taken the following summer and fall, including the July 26, 1876 adhesion at Dog Head with the “Island Indians”, which included the band that came to be known as Hollow Water. While outside the relevant timeframe of this claim, multiple other northern First Nations adhered to Treaty 5 between 1908 and 2006.

~~130~~141. Canada did not initially prioritize the quieting of Aboriginal title in the area covered by Treaty 5. Its settlement potential was considered limited, and the pending railway would soon overtake the water transportation route along Lake Winnipeg and its tributaries in terms of importance. Nevertheless, there were several important economic and public interests considered in the development of Treaty 5, including: livelihood concerns for the Swampy Cree at Norway House, safeguarding the Lake Winnipeg - Saskatchewan River navigation route while the Canadian Pacific Railway was being built, sawmill and logging activities along Lake Winnipeg, and reports of minerals in the area.

~~131~~142. On March 27, 1877 Morris wrote to the Minister of the Interior noting that the “provisions of Treaty No. 5 were far less onerous than any of the other Treaties because the circumstances are different”.

~~132~~143. While the general model remained consistent from one treaty to the next, no two treaties were fully identical. In just under two years, interested First Nations and Canada concluded Treaty 4, revisions to Treaties 1 and 2, Treaty 5, Treaty 6 and multiple adhesions, including Hollow Water’s.

~~133~~144. On August 10, 1875, Laird provided instructions to Morris as a Commissioner of Treaty 5. Laird instructed Morris to provide an initial gratuity and annuity of \$5.00 – the latter being the same amount provided in Treaties 1 and 2 after their

amendments in 1875 – based on the comparatively small area of land to be ceded, and the fact that the land was not required for immediate railroad use or other public purpose. Laird stated that reserves should be selected immediately, if possible, rather than providing a treaty term that reserves would be selected at a later date.

~~134~~145. On these instructions, Morris secured agreement on the main terms of Treaty 5 at Berens River on September 20, 1875, and at Norway House on September 24, 1875, followed immediately by the first adhesion at Grand Rapids on September 27, 1875.

~~135~~146. On June 26, 1876, Laird authorized Morris to appoint two individuals to secure further adhesions to Treaty 5. Laird delegated to Morris the task of providing specific instructions and assignments to the selected Commissioners.

~~136~~147. On July 14, 1876, Morris instructed Commissioners Howard and Reid to pay annuities to existing Treaty 5 signatories and take further adhesions to Treaty 5 from the island bands at Dog Head Point, the Grand Rapids of Berens River, and the Swampy Cree Bands gathered at The Pas. The Commissioners were instructed that reserves could only be granted by an officer appointed by the Privy Council at a later date rather than at the time of signing.

~~137~~148. On July 26, 1876, an Adhesion to Treaty 5 was signed at Dog Head with the “Big Island” Band, the Blood Vein River Band, the Dog Head Band and the Jack Head Band. *Ka-tuk-e-pin-ais*, also known as Chief Hardisty, signed on behalf of the “Big Island” Band, which in this instance appears to be a reference to Hollow Water.

~~138~~149. In 1881, Indian Agent Angus MacKay wrote that the island bands desired that their reserve be surveyed as soon as possible. He did not mention “Big Island” but referred to “Hollow-water River”.

~~139~~150. Hollow Water Reserve No. 10 was surveyed in October 1884, as 3,574 acres, which was confirmed by Order-in-Council P.C. 1916-2518.

~~140~~151. In 1918, Hollow Water surrendered its interest in Loon Straits Indian Reserve No. 11. In recognition thereof, an additional 446.1 acres were surveyed in 1926, to be added to Hollow Water Reserve No. 10, based on Hollow Water's 1922 population. The addition of these 446.1 acres to Hollow Water Reserve No. 10 was confirmed by Order-in-Council P.C. 1930-918.

V. Canada's Statement of Relief

~~141~~152. Canada seeks the following relief:

- a. Dismissal of this claim or portions of this claim on the basis that it is outside of this Honourable Tribunal's jurisdiction as it does not fall within a ground enumerated in section 14 of the *SCTA*, or is excluded by section 15 of the *SCTA*;
- b. Dismissal of this claim on the basis that it is not valid;
- c. If this Honourable Tribunal finds any portion of the claim to be valid, set-off under subsection 20(3) of the *SCTA*;
- d. Canada may decide not to seek costs upon the final determination of the action, however it reserves the right to seek such costs; and
- e. Such further relief as counsel may request and this Honourable Tribunal deems just.

VI. Communication

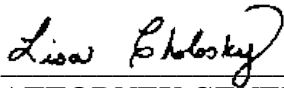
~~142153~~. The Respondent's address for the service of documents is:

Department of Justice Canada
Prairie Regional Office (Winnipeg)
601 – 400 St. Mary Avenue
Winnipeg, MB R3C 4K5
Attention: Lisa Cholosky / ~~Brady Fetch~~ Sydney Ramsay

Facsimile number for service is: **(204) 983-3636**

Email address for service is: lisa.cholosky@justice.gc.ca /
~~brady.fetch@justice.gc.ca~~ sydney.ramsay@justice.gc.ca

Dated this 18th day of April, 2023 (and amended October 6, 2023).



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