

SPECIFIC CLAIMS TRIBUNAL

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| I | PARTICULIÈRES | É |
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| E | July 25, 2022 | O |
| D | Guillaume Phaneuf | S |
| Ottawa, ON | | 1 |

B E T W E E N:

SWAN RIVER FIRST NATION

Claimant

v.

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

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*.

July 25, 2022.

Guillaume Phaneuf

(Registry Officer)

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I. Claimant (R. 41(a))

1. The Claimant, Swan River First Nation (“SRFN”), confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*. SRFN is located in the Province of Alberta.

II. Conditions Precedent (R. 41(c))

2. The following condition precedent, as set out in s. 16(1) of the *Specific Claims Tribunal Act* (“SCTA”), has 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.

3. On January 12, 2011, SRFN filed this claim under Canada’s Specific Claims Policy, asserting that Canada has failed to provide SRFN with its full treaty land entitlement (“TLE”) pursuant to the terms of Treaty 8 (“TLE Claim”).
4. On October 9, 2009, SRFN commenced an action in the Court of Queen’s Bench of Alberta against Canada for failing to satisfy Canada’s TLE obligations. This litigation has been put in abeyance since then to allow the TLE Claim to proceed under the Specific Claims Policy.
5. On September 13, 2013, Canada informed SRFN in writing of the Minister’s decision not to negotiate the TLE Claim, in whole.

III. Claim Limit (Act, s. 20(1)(b))

6. SRFN does not seek compensation in excess of \$150 million in relation to its claim.

IV. Grounds (Act, s. 14(1))

7. The following is the ground for SRFN's claim as provided for in s. 14 of the *Specific Claims Tribunal Act*:

14. (1) ...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 fulfill a legal obligation of Canada to provide lands or other assets under a treaty or another agreement between the First Nation and Canada.

8. Specifically, Canada has failed to fulfill its legal obligation to provide SRFN all the TLE land SRFN is entitled to under Treaty 8.

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

9. Treaty 8 was signed at Lesser Slave Lake on June 21, 1899 by Grand Chief Kinnosayoo and four Headmen representing communities on Lesser Slave which were later recognized as the Sucker Creek, Driftpile, Swan River, and Sawridge Bands. Felix Giroux executed the Treaty as the Swan River Headman.
10. From 1899 until 1909 inclusive, members of "Kinnosayoo's Band" were paid on a single payroll rather than being divided or grouped by residence. In 1910, separate paylists were created for Sucker Creek, Driftpile, Swan River, and Sawridge. Each entity was described as "Kinnosayoo's Band paid at [the individual location]."

Despite that terminology, Sucker Creek, Driftpile, Swan River, and Sawridge were viewed as separate entities regarding the survey of reserves.

11. In April 1900, Headman Felix Giroux signed, along with Chief Kinnosayoo and the other Headmen, the first documented request for reserve land at Lesser Slave Lake.
12. On April 15, 1901, Indian Affairs Surveyor A W Ponton DLS was instructed to proceed to Lesser Slave Lake as part of his 1901 survey program and survey the two reserves staked in 1900. Ponton was an experienced surveyor, having been employed for that purpose since 1883.
13. In 1901, surveyor Ponton set aside two reserves at and near the west end of Lesser Slave Lake. For the Sucker Creek Band, he set aside a reserve for 70 persons in 21 families, whose names were on a list on the survey plan. At the Driftpile River, he surveyed a reserve for 24 families totaling 89 persons. The survey plan included a list of these families. Ponton also surveyed three small parcels of land at Grouard that were intended to be severalty lands for families that had requested it.
14. Ponton did not visit the land around the Swan River located near the narrows where the Swan River flows into Lesser Slave Lake until July 1902. When he arrived, he encountered 14 families with a population of 59 persons.
15. Ponton had recommended to Indian Affairs that the lands along the Swan River should be surveyed in a single block that included the agricultural land on both banks of that river. However, the families he met insisted that the lands be surveyed as individual family parcels, although they agreed that these should be located on both banks of the Swan River.
16. Treaty 8 contained the provision that reserve lands would comprise 128 acres for each member of a band at the time of survey. However, Treaty 8 also contained a “severalty” clause that allowed individual families to request non-contiguous lands,

which would be surveyed into parcels calculated on the basis of 160 acres for each member of a family.

17. After considerable discussion among the families and several meetings between the families and Ponton, the residents and the surveyor agreed that the lands along the Swan River should be set aside in severalty. Ponton proposed a plan by which the lands that would be held by each family would include river frontage.
18. Ponton began to survey the boundaries of the individual parcels, but because of the delay in reaching a consensus and the opening of the traditional fishery season (which deprived the surveyor of the work of the Swan River members assisting him), he was only able to complete three parcels and to get close to completion on two others.
19. Ponton completed the survey of severalty lands for Swan River members Magloire Giroux, Felix Chalifoux, and Michel Courtoreille. He began but did not complete the surveys of lands for Alexandre Giroux and Julien Courtoreille, as he was forced to give up work before including all of the land to which the two families were entitled under the severalty provision of Treaty 8.
20. Ponton advised that he had not surveyed any land for nine families, and he attached a list of their names. He also noted that one or two of these families requested land at Assineau River, a few miles east of Swan River. Ponton was of the opinion that this land would more appropriately be surveyed for a fishing station.
21. It was not possible for Indian Affairs to complete the surveys at Swan River in 1903, in part because Ponton resigned before the start of the surveying season. The attempt to send another surveyor to complete the work in 1905 was frustrated by the refusal of Chief Kinosayoo and the local Headmen to allow any survey work.
22. Ponton had indicated before his resignation that the completion of the surveys at Swan River would be relatively straight-forward and easy. On his map he added

dotted lines to indicate what lines remained to be run. In 1908, J. Lestock Reid to complete the surveys and provided him with Ponton's map to assist him. There is no indication that Reid even visited Swan River that year.

23. By 1909, the township survey of public land had reached Lesser Slave Lake. Indian Affairs requested that the area identified by Ponton as land selected by the Swan River families be excluded from this survey, but after the Department of Interior announced its intention to include those lands in the township survey, Indian Affairs acquiesced in the decision.
24. The same year, Indian Agent Doctor W.B.L. Donald was advised that the completion of the township survey made the finalization of land selection at Swan River urgent. The Agent was instructed to advise the Swan River population that while Indian Affairs had withdrawn the parcels surveyed by Ponton from selection by homesteaders, other lands at Swan River would not be available as reserve land if homestead applications had been made regarding them.
25. Agent Donald met with the Swan River families whose lands had not been surveyed completely in 1902 and found that the population of these families was 62. In November 1909 Donald forwarded his report, including a map on which he had indicated additional land selections. Donald made no reference to severalty in his report, but his map was divided into individual parcels, all of which (including fishing reserves) were assigned to individual families.
26. Donald cautioned that the selection of land had not been completed, and additional land would be identified at the time of survey.
27. The surveys at Lesser Slave Lake was completed by J.K. McLean DLS in 1912. McLean began by surveying six non-contiguous parcels ranging from 130 acres to 650 acres on both banks of the Lesser Slave River and a larger parcel of land near the southeast corner of Lesser Slave Lake. McLean indicated that the lands had been

set aside for the Sawridge Band, and he included on the plans the names of 42 persons in 13 families for whom the land was surveyed. The total land surveyed was 5,396. McLean indicated that Sawridge was entitled to [an unspecified amount of] additional reserve land.

28. McLean then travelled to the west end of Lesser Slave Lake, where he surveyed 3,236 acres in two parcels as additions to the Sucker Creek Reserve. A list on the survey plan set out 25 persons in eight families to explain the amount of land he surveyed. McLean took care to exclude from his list families and persons for whom land had been surveyed in 1901.
29. McLean followed a similar process at Driftpile River, where he surveyed 2,740 acres as an addition to the Driftpile Reserve. He attached a list of 42 persons in 12 families, again taking care to exclude names of persons for whom land had been surveyed in 1901.
30. McLean also added a note to the Driftpile survey plan the notation that the “[R]emainder still due them 740 acres was given with Sucker Creek Band.”
31. Swan River was the last community visited by McLean. There he confirmed the parcels surveyed by Ponton in 1902 and the lands identified by Agent Donald in 1909, determining that these had a total area of 8,283 acres (inclusive of two fishing stations). McLean also surveyed 3,245 acres of additional reserve land at Swan River.
32. As with his other surveys, McLean included a list of persons for whom land had been set aside. Because he had been required to confirm the 1902 surveys, he included the persons for whom this land had been surveyed in 1902 on the list.
33. The list of persons completed by McLean contained 92 persons in 18 families. Included in this list were five families totaling 20 persons who the Headman from Sawridge, the Headman from Swan River, and other Swan River members agreed

should be transferred from Sawridge to Swan River. The meeting at which the two bands reached this agreement was held on October 13, 1912, and as such the transfers were recorded on the 1913 paylists.

34. McLean surveyed an additional parcel of 177 acres on the east bank of the Assineau River at the point where it enters Lesser Slave Lake, where two Swan River members had operated a stopping place on the Grouard Trail for many years.
35. The total amount of land surveyed for Swan River members was 11,705 acres.
36. McLean's survey plans were forwarded to the Department of the Interior in April 1913 with the request that the lands surveyed be set aside as reserves under Treaty 8.
37. On June 29, 1914, the Department of the Interior advised Indian Affairs that three quarter-sections (477 acres) of land within McLean's survey were subject to homestead applications and were not available for selection as reserve land.
38. Indian Agent Donald was instructed to look into the matter immediately, and by the end of July 1914 it had been determined that the homestead applications had not been filed until April 1913, six months after the completion of the survey, and two of the three applications had not been made until after the plans had been forwarded by Indian Affairs.
39. Indian Affairs responded to the Department of the Interior by reviewing the facts and taking the position that Swan River had the better claim to the land.
40. In October 1914 (and again in January 1915) the Department of the Interior advised that it could not respond until after it had received a report from the homestead inspector.

41. No further action was reported for almost six years, and in November 1920 the Department of the Interior advised that titles had been issued on all three quarter-sections and titles had been issued. Therefore, it was not possible to include these lands in the Swan River Reserve under any circumstances.
42. After the 477 acres were removed from the lands surveyed by McLean, the amount of land that was set aside as Swan River IR 150E by Order-in-Council on April 4, 1925 to 11,063.14 acres. The Assineau lands, containing 177 acres, were confirmed by Order-in-Council on December 18, 1922.
43. The amount of TLE land set aside by Orders-in-Council for Swan River, inclusive of road allowances, totaled 11,240 acres.

VI. The Basis in Law on Which Canada is said to have failed to meet or otherwise breached a lawful obligation:

44. Canada breached its treaty and fiduciary of Treaty 8 for failing to provide SRFN with its full TLE under the terms of Treaty 8. The Crown's lawful obligation remains outstanding to the present.

Calculating a Band's TLE

45. Canadian law provides that for purposes of determining TLE, each "Indian" is entitled to be counted once. The only limitation on this is the exclusion of persons who or whose ancestors have been counted in the calculation of an earlier TLE. Therefore, the TLE of a band is calculated by multiplying the ADOFS population by the per capita land allotment set in a treaty.
46. The identification of "Indians" in Canada is exclusively a matter of statute, in that it is determined exclusively by the definition of that term in the *Indian Act*.

47. The DOFS population is comprised of all persons who are paid annuity at DOFS, together with persons who are paid arrears or otherwise absent at DOFS.
48. The ADOFS population is calculated by adding to the DOFS population the number of persons who:
 - a. increase a band's population by adhering to treaty after DOFS, which includes persons who adhere by marriage; and/or
 - b. transfer from a band that has not received treaty land for those persons.

Calculating SRFN's TLE Shortfall

49. The survey of reserves for SRFN began with surveyor Ponton in 1902 after the surveyor and the SRFN members he met with reached a consensus that lands should be set aside for SRFN under the severalty provision of Treaty 8.
50. However, all of the lands surveyed in 1902 were confirmed by re-survey when J.K. McLean did a complete survey of reserve land for SRFN in 1912, which is SRFN's DOFS.
51. The survey plan completed by surveyor McLean indicates that the population of SRFN at its Date of First Survey ("DOFS") in 1912 was 92.
52. Subsequent to DOFS, an additional 34 persons adhered to Treaty 8 by marriage to SRFN members. Accordingly, SRFN's Adjusted Date of First Survey ("ADOFS") population is 107.
53. Each First Nation that has received land in partial fulfillment of its TLE is entitled to additional land. The amount of additional land is equal to the difference between that First Nation's TLE based on the calculation outlined above and the quantum of land received pursuant to the terms of Treaty 8.

54. After surveyor Ponton advised SRFN members in 1902 that his survey would be conducted in accordance with the severalty provision of 160 acres per person, the honour of the Crown forbade the use of the treaty formula of 128 acres per person in determining SRFN's TLE.
55. Based on an ADOFS population of 107, SRFN's TLE is 19,072 acres.
56. As SRFN has received 11,240 acres of reserve land, SRFN's TLE shortfall is 7,832 acres.

Honour of the Crown

57. In the face of a TLE shortfall that has existed for more than a century, the honour of the Crown will not allow Canada to rectify the damage done to SRFN by simply providing the land that SRFN should have received in 1912.
58. SRFN has suffered ongoing damage for the continuing lack of reserve land, for which it claims compensation. Without limiting the generality of this statement, SRFN has suffered specifically by the loss of 477 acres surveyed for it, as the location of this lacuna in IR 151E also limits the use and value of remaining reserve land surrounding it.
59. This TLE shortfall claim is based on the amount of reserve land provided in the 1922 and 1925 Orders-in-Council. It does not deal with the loss of reserve land for railway, road, and townsite purposes between 1912 and 1925, which are the subject of separate claims.
60. Canada has a continuing constitutional and treaty obligation to provide SRFN with its TLE under Treaty 8.

VII Relief Sought

61. The Claimant SRFN seeks the following relief:
- a. A determination that the Claimant has established a treaty land entitlement shortfall of 7,832 acres of reserve land pursuant to Treaty 8 or such other amount as may be proven at a hearing before this Honourable Tribunal;
 - b. Equitable compensation for Canada’s breach of its treaty, trust, fiduciary and honourable duties and failure to satisfy the Claimant’s full treaty land entitlement in a fair and timely manner;
 - c. Damages for loss of use of lands that should have been set apart for the use and benefit of Swan River IR 150E and Swan River IR 150F by Canada from 1912 to the present;
 - d. Equitable interest or restitution on historical losses suffered by the Claimant SRFN;
 - e. Such other damages or compensation as this Honourable Tribunal deems just; and
 - f. Costs in relation to the specific claims process.

DATED this 25th day of July 2022 at the City of Edmonton in the Province of Alberta.

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