

December 7, 2022

Susie Thorsley

Ottawa, ON

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SCT File No.: SCT-6003-22

**SPECIFIC CLAIMS TRIBUNAL**

B E T W E E N:

SWAN RIVER FIRST NATION

Claimant

v.

HIS MAJESTY THE KING IN THE RIGHT OF CANADA

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

Respondent

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

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This 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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Swan River First Nation

## Overview

1. The Respondent, His Majesty the King in right of Canada (“Canada”), is committed to reconciliation and a renewed nation-to-nation relationship with Indigenous peoples based on recognition of rights, respect, cooperation, and partnership. Canada endeavors to embody these principles as it assists the Specific Claims Tribunal (“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 continue to pursue all appropriate forms of resolution as this claim proceeds through the Tribunal process.
3. Canada acknowledges that Kinnosayoo Band was entitled to reserve lands as a signatory to Treaty No. 8. Swan River First Nation is one of the five successor bands to Kinnosayoo Band. Canada further acknowledges that Swan River First Nation is a “band” as set out by Treaty No. 8.
4. Canada provided Kinnosayoo Band, including its five successor bands, with its full treaty land entitlement (“TLE”) under Treaty No. 8 in a fair and timely manner. Consequently, Canada did not breach Treaty No. 8, nor any trust, honourable, or fiduciary duties owed to Swan River First Nation.

### **I. Status of Claim (R. 42(a))**

5. Canada admits, in response to paragraph 2 of the Declaration of Claim (“Claim”), that this Claim meets the condition precedent in paragraph 16(1)(a) of the *Specific Claims Tribunal Act*, SC 2008, c 22 (“SCTA”).
6. Canada admits the facts set out in the following paragraphs of the Claim:
  - a. at paragraph 3, that Swan River First Nation filed its specific claim with the Minister on January 12, 2011; and

- b. at paragraph 5, that Canada informed Swan River First Nation in writing, on September 13, 2013, of the Minister's decision to not pursue negotiations at that time respecting the claim.
7. In response to paragraph 4 of the Claim, Canada states that it is not aware of an action commenced by Swan River First Nation on October 9, 2009 in the Court of King's Bench of Alberta ("ABKB") against Canada for its failure to satisfy its TLE obligations. Canada is only aware of one TLE-related action filed by Swan River First Nation in the ABKB on March 24, 1996, which the ABKB dismissed for long delay (i.e., there was no step taken to materially advance the action for more than 5 years) in 2007.

## **II. Validity of Claim (R. 42(b) and (c))**

8. In response to paragraph 7 of the Declaration of Claim, Canada agrees that paragraph 14(1)(a) of the *SCTA* is the statutory ground for Swan River First Nation's Claim.
9. In response to paragraph 8 of the Claim, Canada provided Kinnoosayoo Band, including its five successor bands, with its full TLE under Treaty No. 8.
10. If the Tribunal finds Swan River First Nation's claim to be valid, paragraph 20(1) of the *SCTA* may provide a basis for the Tribunal to award compensation. This would be subject, however, to any applicable deduction for set-off from such compensation calculated in accordance with subsection 20(3) of the *SCTA*.

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

### **Swan River First Nation**

11. Canada admits Swan River First Nation is a First Nation within the meaning of section 2 of the *SCTA* and is located in the Province of Alberta, as pleaded in paragraph 1 of the Claim.

## **Treaty No. 8**

12. In response to paragraph 9 of the Claim, Canada agrees that Grand Chief Kinnosayoo and four headmen signed Treaty No. 8 at Lesser Slave Lake on June 21, 1899. The Chief and headmen signed Treaty No. 8 on behalf of Kinnosayoo Band, which included several communities in the Lesser Slave Lake area. Canada agrees that Felix Giroux signed Treaty No. 8 as the Swan River Headman. Swan River First Nation, Driftpile First Nation, Sucker Creek First Nation, Sawridge First Nation, and Kapawe'no First Nation (Grouard) are the five successor bands of Kinnosayoo Band.
13. In response to paragraph 16 of the Claim, Treaty No. 8 contains a clause obligating Canada to set aside reserves for those bands desiring one based upon a formula of one square mile for each family of five, or in that proportion for larger or smaller families. This amounts to a TLE calculation of 128 acres per person. Treaty No. 8 also contained a severalty clause, which allowed families or individual members to request lands apart from band reserves. If a family or individual member requested lands in severalty, they were entitled to 160 acres per person.

## **Treaty Implementation**

14. In response to paragraph 10 of the Claim, Canada agrees that from 1899 until 1909, it paid members of Kinnosayoo Band on a single payroll and that in 1910, it created separate paylists for Sucker Creek, Driftpile, Swan River, and Sawridge. Canada agrees that it titled the new paylists "Kinnosayoo Band Paid at [the individual location]." However, this was done for administrative purposes only and not for the purpose of recognizing the members of Kinnosayoo Band at each individual location as separate bands.
15. In response to paragraph 11 of the Claim, Canada agrees that, in April 1900, Chief Kinnosayoo and four headmen sent a letter requesting reserve land. However, Kinnosayoo Band also made a request prior to February 1900.
16. In response to paragraph 12 of the Claim, in 1900, with the assistance of Treaty Commissioner MacRae, Chief Kinnosayoo, Headman Moostoos, and their followers staked out two temporary reserves, each 25 square miles in area. Canada agrees with paragraph 12

of the Claim regarding Surveyor Ponton's instructions in 1901 and experience. The Secretary of the Department of Indian Affairs also instructed Surveyor Ponton in 1901 to survey lots for any other members of Kinnosayoo Band who desired to have land in severalty.

17. In response to paragraph 13 of the Claim, Canada agrees that, in 1901, Surveyor Ponton set aside two reserves at and near the west end of Lesser Slave Lake. Sucker Creek Indian Reserve ("I.R.") No. 150A comprised 18.68 square miles and was for Councilor Moostoos and a portion of Kinnosayoo Band: 21 families totaling 70 persons. Driftpile River I.R. No. 150 comprised 21.1 square miles and was for Chief Kinnosayoo and a portion of Kinnosayoo Band: 24 families totaling 89 persons. Canada agrees that the survey plans for both of these reserves list the names of the families for whom this land was set aside. In 1901, Surveyor Ponton also surveyed three parcels of severalty land for Kinnosayoo Band members Louise Freeman (I.R. No. 150B totaling 73.36 acres), John Pakashan (I.R. No. 150D totaling 964.22 acres), and Thomas Halcrow (I.R. No. 150C totaling 51.79 acres).
18. In response to paragraph 14 of the Claim, in 1901, Surveyor Ponton also met with Kinnosayoo Band members living at Lesser Slave River, Assineau River, and Swan River, although he did not survey lands in these areas until 1902. During his survey work in 1902, Surveyor Ponton encountered fourteen families, with a total population of 59 persons, located at Assineau River and the narrows where Swan River flows into Lesser Slave Lake (the "Narrows") who were members of Kinnosayoo Band.
19. In response to paragraph 15 of the Claim, in February and March 1902, Surveyor Ponton expressed to the Secretary of Indian Affairs a hope that members of Kinnosayoo Band at the Narrows, Assineau River, and foot of Lesser Slave Lake who had not already received reserve lands would take a reserve together at Swan River because of its agriculturally better land. Surveyor Ponton based this hope on conversations he had with Chief Kinnosayoo and Councilor Moostoos wherein they indicated they would use their influence to persuade these members to do so. When Surveyor Ponton reached Lesser Slave Lake in 1902, he found the families located at Assineau River and the Narrows unwilling to abandon these locations entirely. Surveyor Ponton proposed a compromise,

promising to survey small fishing stations at these locations if, after he completed this work, they would meet him at Swan River to select agricultural land there.

20. In further response to paragraph 15 and in response to paragraph 17 of the Claim, after Surveyor Ponton finished surveying the fishing stations at the Narrows and Assineau River in 1902, he learned of a relationship breakdown between the families located in these areas. The families had returned to their homes and were refusing to meet with each other. After significant discussions, the fourteen families decided to take their land in severalty along Swan River. Surveyor Ponton agreed that these lands should be set aside in severalty. The families all wanted frontage on Swan River.
21. In response to paragraphs 18 and 20 of the Claim, Canada agrees that, in 1902, Surveyor Ponton surveyed three complete parcels and two partial parcels at Swan River. However, Surveyor Ponton was also able to survey a sufficient length of the Swan River to provide each of the fourteen families with river frontage. All that remained to complete the survey of these lands was determining how far back from the river each parcel should extend. Canada agrees that Surveyor Ponton was unable to complete the surveys at Swan River in 1902 because of the families' delay in reaching a consensus and the opening of the traditional fishery season. Surveyor Ponton prepared an interim survey plan (the "1902 Interim Survey Plan") that listed the heads of the fourteen families.
22. Canada agrees with paragraph 19 of the Claim respecting whom Surveyor Ponton surveyed the parcels for in 1902.
23. In further response to paragraph 20 of the Claim, Canada has insufficient knowledge about whether one or two families requested land at Assineau River.
24. Canada agrees with paragraph 21 of the Claim that it was not possible for Indian Affairs to complete the surveys at Swan River in 1903, in part, because Surveyor Ponton resigned before the start of the surveying season. Canada also agrees that the attempt to send another surveyor to complete the work in 1905 was frustrated by the refusal of Chief Kinnoyayoo and the local headmen to allow any survey work.

25. In response to paragraph 22 of the Claim, in 1902, Surveyor Ponton opined that the most difficult and tedious part of the survey work was complete because he had surveyed a sufficient distance of Swan River to provide river frontage to each of the fourteen families. The 1902 Interim Survey Plan contained a dotted line along Swan River indicating the survey work Surveyor Ponton had completed along it. In 1908, Surveyor Reid did not complete the surveys at Swan River despite direction to do so. Canada has insufficient knowledge as to the reason why Surveyor Reid did not complete the surveys.
26. In response to paragraph 23 of the Claim, Canada completed township surveys in the Swan River area in 1908, not 1909. In 1908, the Secretary of Indian Affairs asked the Surveyor General of the Department of the Interior to direct the township surveyors not to include lands within the Swan River reserve, as identified by the 1902 Interim Survey Plan, in their township subdivision surveys. The Departments of the Interior and Indian Affairs subsequently agreed that the township surveyors could include lands within the Swan River reserve in their surveys, but that these lands were not open to settlement and would be set aside as reserve land at the appropriate time.
27. In response to paragraph 24 of the Claim, in 1909, Indian Agent Donald was asked to consult with the First Nations in the Lesser Slave Lake area regarding the selection of lands. Agent Donald was instructed that it would be preferable for the boundaries of the selected lands in the Swan River area to conform as close as possible to those outlined in the 1902 Interim Survey Plan. Agent Donald was also instructed that the First Nations could select other lands provided they had not been homesteaded or squatted upon. Canada has insufficient knowledge about whether Agent Donald was advised in 1909 that the completion of the township survey made the finalization of land selection at Swan River urgent.
28. In response to paragraph 25 of the Claim, in November 1909, Agent Donald met with the heads of eleven of the fourteen families Surveyor Ponton had met with in 1902 at the Narrows and Assineau River. The heads of the families that Agent Donald did not meet with were Michel Courtorielle, whose land had already been surveyed, and Edward Twin and Francois Giroux, whose lands had not yet been surveyed. The eleven families had a

population of 62 in 1909. Eight of these families, with a population of 48, were on the Swan River paylist in 1910 and three, with a population of 14, were on the Driftpile paylist in 1910. Canada agrees that, in November 1909, Agent Donald forwarded his report and map with the land selections to the Department of Indian Affairs. Canada also agrees that Agent Donald's report and map did not refer to severalty, but assigned land selections, including the fishing stations, to individual families.

29. Canada agrees with paragraph 26 of the Claim that Agent Donald's land survey in 1909 was not completed.
30. In response to paragraph 27 of the Claim, Canada agrees that Surveyor McLean completed the surveys at Lesser Slave Lake in 1912. Surveyor McLean began in the Sawridge area and surveyed:
  - a. Sawridge I.R. No. 150G: six non-contiguous parcels of land along Lesser Slave River totaling 2,263 acres with each parcel between 130 and 615 acres; and
  - b. Sawridge I.R. No. 150H: a larger parcel on the south side of Lesser Slave Lake totaling 3,133.7 acres after Canada subsequently added 500 acres to it.

500 acres were added to Sawridge I.R. No. 150H after 1912 in response to Surveyor McLean's claim that these families were short that amount of land. The survey plan for Sawridge I.R. No. 150H listed the names of the 13 families, with a population of 42 persons, for whom Sawridge I.R. No. 150H and 150G were set aside. Canada agrees that Surveyor McLean indicated that these lands were set aside for the Sawridge Band. 5,396.7 acres, not 5,396 acres, were set aside in total in these reserves.

31. In response to paragraph 28 of the Claim, Canada agrees that, after completing the surveys at Sawridge in 1912, Surveyor McLean travelled to the west end of Lesser Slave Lake where he surveyed two parcels as additions to the Sucker Creek reserve. The total acreage of these two parcels was 3,244.6, not 3,236. The survey plan for this addition lists the eight families, with a population of 25, for whom these lands were set aside and does not include the names of the families on the plan for Sucker Creek I.R. No. 150A prepared by Surveyor Ponton in 1901.

32. In response to paragraph 29 of the Claim, after completing the surveys at Sucker Creek in 1912, Surveyor McLean attended at Driftpile River to complete the surveys there. He surveyed a 2,460-acre, not a 2,740-acre, addition to Driftpile I.R. No. 150. Canada agrees that Surveyor McLean included a list on the survey plan for this addition of the 12 families, with a population of 42 persons, for whom these lands were set aside. Surveyor McLean did not include in this list any of the families included on the 1901 survey plan for Driftpile I.R. No. 150.
33. Canada agrees with paragraph 30 of the Claim that Surveyor McLean noted on the Driftpile survey plan that the 740 acres still owed them was “given with Sucker Creek Band”.
34. In response to paragraphs 31 and 50 of the Claim, after completing the surveys at Driftpile River in 1912, Surveyor McLean attended Swan River to complete the surveys there. Surveyor McLean calculated that the lands selected by members of Kinnosayoo Band in the Swan River area in 1902 and 1909, including the two fishing stations, totaled 8,283 acres. Canada agrees that Surveyor McLean surveyed an additional 3,245 acres for these members in 1912.
35. In response to paragraphs 32 and 33 of the Claim, Canada agrees that the Swan River survey plan prepared by Surveyor McLean in 1912 contained a list of 18 families, with a population of 92 persons, for whom the land had been set aside. This included eight surviving families that Surveyor Ponton had included on the 1902 Interim Survey Plan. It also included five families, with a population of 20 persons, who, according to a memorandum dated March 5, 1913, were “admitted to Swan River Band” from Sawridge. This transfer occurred following a meeting on October 13, 1912, that Agent Donald, the Headmen for Sawridge and Swan River, and some members from Swan River attended. The transfer of the five families was not recorded on the 1913 payroll for Swan River.
36. Canada agrees with paragraph 34 of the Claim respecting the 177-acre parcel. The survey plan for this parcel refers to it as Assineau I.R. No. 150F and notes that it “is held for the Swan River Band in common”.

37. In response to paragraph 35 of the Claim, Canada agrees that 11,705 acres of land were surveyed for Swan River members. Canada states that this was the amount surveyed for Swan River members as of 1912.
38. In response to paragraph 36 of the Claim, Surveyor McLean forwarded his plans for Swan River I.R. No. 150E to the Department of the Interior in April 1913 with a request that the necessary action be taken confirming the original reserve lands and addition by Order-in-Council.
39. Canada agrees with paragraph 37 of the Claim that on June 29, 1914, the Department of the Interior advised the Department of Indian Affairs that three quarter sections of land within Surveyor McLean's survey were subject to homestead applications and were not available for selection as reserve land (the "Disputed Homestead Land").
40. In response to paragraph 38 of the Claim, in July 1914, Agent Donald was instructed to enquire into the homestead applications. Canada states that by the end of July 1914, Agent Donald determined that the homestead applications were filed in April 1913, not April 2013. However, the lands were disposed of under homestead entries prior to when the Department of the Interior received the Department of Indian Affairs application for Swan River I.R. No. 150E.
41. Canada agrees with paragraph 39 of the Claim that the Department of Indian Affairs' position was that Swan River had a better claim to the Disputed Homestead Land.
42. In response to paragraph 40 of the Claim, resulting from the homestead claims, the Department of the Interior dispatched a homestead inspector to investigate and report on the matter. On January 26, 1915, the Department of the Interior indicated that no further action would be taken towards setting apart Swan River I.R. No. 150E until receipt of the homestead inspector's report.
43. In response to paragraph 41 of the Claim, in November 1920, the Department of the Interior advised that all three homestead entries were granted thereby removing these lands from possible inclusion in a reserve. This had the effect of removing three quarter sections from the lands surveyed by Surveyor McLean for Swan River I.R. No. 150E.

44. In response to paragraph 42 of the Claim, Canada agrees that an Order-in-Council on April 4, 1925, set aside 11,063.14 acres as Swan River I.R. No. 150E and an Order-in-Council on December 18, 1922, set aside 177 acres as Assineau I.R. No. 150F. The acreage set aside as Swan River I.R. No. 150E did not include the three quarter sections removed for homesteaders.
45. In response to paragraph 43 of the Claim, 11,240.14 acres, inclusive of road allowances, were set aside by Orders-in-Council for Swan River First Nation, not 11,240 acres.
46. In response to paragraph 44 of the Claim, Canada acknowledges that the relationship between Swan River First Nation and Canada 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. However, in the circumstances of this case, Canada fulfilled its fiduciary duties to Swan River First Nation as it provided Kinnoyayoo Band, Swan River First Nation's predecessor, with its full TLE under Treaty No. 8.
47. Paragraphs 45 to 48, 53 to 54, and 57 of the Claim contain no facts to respond to, but rather consist of legal argument.
48. In response to paragraphs 49 to 52 and 55 to 56 of the Claim, when Canada assessed its TLE obligations to each of Kinnoyayoo Band's five successors, it assessed Kinnoyayoo Band's TLE under Treaty No. 8 as a whole. August 1901 is the Date of First Survey ("DOFS") because the survey of reserves for Kinnoyayoo Band began when Surveyor Ponton set aside Driftpile I.R. No. 150 in August 1901.
49. In response to paragraphs 56 and 60 of the Claim, there is no TLE shortfall. Canada provided Kinnoyayoo Band, including Swan River First Nation and the four other successor bands, with its full TLE under Treaty No. 8.
50. In response to paragraphs 58, 59, and 61 of the Claim, any compensation owed to Swan River First Nation must be assessed in accordance with prevailing legal principles.

#### **IV. Statements of Fact (R. 42(e))**

51. Canada relies upon the facts set out under Section III. Allegations of Fact – Declaration of Claim (R.41(e)): Acceptance, denial or no knowledge (R. 42 (d)).
52. On June 21, 1899, Chief Kinnoyoo and four headmen of the Kinnoyoo Band signed Treaty No. 8.
53. Kinnoyoo Band's five successors are Swan River First Nation, Driftpile First Nation, Sucker Creek First Nation, Sawridge First Nation, and Kapawe'no First Nation.
54. Treaty No. 8 contains a clause obligating Canada to set aside reserves based on a formula of one square mile per family of five (128 acres per person) if taken in common or 160 acres per person if taken in severalty. A severalty clause in Treaty No. 8 allowed families or individual members to request lands apart from band reserves.
55. In 1900, Kinnoyoo Band requested that reserves be set aside for them.
56. Between July 30 and August 23, 1901, Surveyor Ponton completed the survey of Driftpile I.R. No. 150, which was the first reserve surveyed for Kinnoyoo Band. August 1901 is accordingly the DOFS.
57. Between 1901 and 1912, Canada surveyed nine reserves for Kinnoyoo Band and its members – three of which were for families that became Kapawe'no First Nation. Excluding the Kapawe'no First Nation reserves, Canada set aside 47,800.64 acres for Kinnoyoo Band across six reserves: Driftpile I.R. No. 150 – 15,964 acres, Sucker Creek I.R. No. 150A – 15,199.8 acres, Swan River I.R. No. 150E – 11,063.14 acres, Assineau I.R. No. 150F – 177 acres, Sawridge I.R. No. 150G – 2,263 acres, and Sawridge I.R. No. 150H – 3133.7 acres. The size of each reserve was based on the number of families intending to settle at each location.
58. On November 24, 1991, Kapawe'no First Nation signed a TLE Settlement Agreement with Canada resolving its TLE claim that it filed in September 1980.
59. The annuity payroll dated April 13, 1901 is the closest payroll in time to the DOFS.

60. Kinnoyoo Band's total eligible population plus late additions, excluding those who were involved in the Kapawe'no First Nation TLE settlement agreement, was 303.

61. Canada provided Kinnoyoo Band with their full TLE.

**V. Relief sought by Canada (R.42(f))**

62. Canada seeks the following relief:

- a. Dismissal of the claim in its entirety;
- b. If the Tribunal finds the claim to be valid, set-off under subsection 20(3) of the *SCTA*;
- c. Canada may decide not to seek costs upon the final determination of the action, however it reserves the right to seek such costs; and
- d. Such further relief as this Honourable Tribunal deems just.

**VI. Communication (R. 42(g))**

63. The address for the service of documents on Canada is:

Department of Justice Canada  
Prairie Regional Office (Edmonton)  
300 EPCOR Tower, 10423 – 101 Street  
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Attention: Tanya Knobloch / Dakota Vassberg

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

65. The email addresses for the service of documents on Canada are:

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Dated this 6th day of December, 2022.



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