

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

SHOAL LAKE NO. 40 FIRST NATION

SPECIFIC CLAIMS TRIBUNAL		
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES		
F I L E D	October 30, 2014	D É P O S É
Guillaume Phaneuf		
Ottawa, ON	1	

Claimant

v.

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

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*.

October 30, 2014

Guillaume Phaneuf

(Registry Officer)

TO:

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I. Claimant (R. 41(a))

1. The Claimant, Shoal Lake No. 40 First Nation (the “First Nation”), confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act* in the Province of Ontario (“Ontario”).

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

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

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

(d) three years have elapsed after the day on which the Minister has notified the First Nation in writing of the Minister’s decision to negotiate the claim, in whole or in part, and the claim has not been resolved by a final settlement agreement.

3. In 1991, the First Nation submitted a statement of claim in relation to specific claim #0155-301 to the Specific Claims Branch of the Department of Indian and Northern Affairs Canada with respect to the expropriation and surrender of the First Nation’s reserve lands for the Greater Winnipeg Water District (“GWWD”) and related events. The statement of claim included allegations regarding Canada’s failure to set aside as reserve lands seven islands (the “Garden Islands”) in Indian Bay, Shoal Lake which were traditionally used for farming by the First Nation.
4. By letter dated March 7, 2005, Andy Scott, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, informed the First Nation that Canada had accepted the “Garden Islands in the Indian Bay claim” (the “Claim”) for negotiation “on the basis of non-fulfilment of Treaty obligations to set aside islands on which the First Nation had gardens at the time Treaty 3 was signed in 1873.”
5. By letter dated May 17, 2012, Michelle Adkins, Director of Negotiations Operations at the Specific Claims Branch of Aboriginal Affairs and Northern

Development Canada, notified the First Nation that the status of the Claim in the Specific Claims Database had been updated to “closed.”

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

6. For the purposes of the Claim, the First Nation does not seek compensation in excess of \$150 million.

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

7. The following are the grounds for the specific claim, as provided for in s. 14 of the *Specific Claims Tribunal Act*:

- (a) a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;
- (b) a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation — pertaining to Indians or lands reserved for Indians — of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;
- (c) a breach of a legal obligation arising from the Crown’s provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;
- (d) an illegal lease or disposition by the Crown of reserve lands; and
- (e) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority.

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

8. The First Nation is a Treaty 3 First Nation with reserve lands located in the vicinity of Indian Bay, Shoal Lake.
9. The border between Ontario and the Province of Manitoba (“Manitoba”) passes through Indian Bay. Some of the Garden Islands in Indian Bay are in Manitoba. The others are located on the Ontario side of Indian Bay.
10. Canada does not currently recognize the Garden Islands as part of the First Nation’s reserve lands.
11. On October 3, 1873, Her Majesty the Queen by her Commissioner representatives and certain First Nations of the Saulteaux Tribe of Ojibway Indians, by their respective representatives, concluded the articles of Treaty 3 (the “Treaty”). Chief Shah-win-na-binaiis from Shoal Lake put his mark on the Treaty on behalf of the First Nation.
12. Under the terms of the Treaty, the Crown was obligated to “lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians.”
13. The Treaty states that Canada is responsible for selling, leasing or otherwise disposing of the reserves of lands “or any interest or right therein or appurtenant thereto ... with the consent of the Indians entitled thereto first had and obtained.”
14. Under the terms of the Treaty, the Crown and the First Nations agreed that Canada may appropriate sections of the reserves that may be “required for Public Works or buildings ... for that purpose” provided that the First Nation received compensation for the value of any improvements on the reserves appropriated.
15. On March 2, 1874, Mr. S.J. Dawson, a Treaty Commissioner, submitted a report regarding reserve allocations in which he noted that the islands of the Lake of the

Woods were the primary farm lands of the First Nations of that area and that there was no reason to limit the reserves on those islands.

16. By letter dated January 28, 1875, Dawson reported to E.A. Meredith, Deputy Minister of the Interior, Canada, that the commissioners met with First Nations resident at Lake of the Woods and Lac Plat (now Shoal Lake), where the parties agreed that these First Nations “should have their farm Reserves so laid out as to embrace the gardens which they at present cultivate....”
17. By memorandum dated February 17, 1875, Dawson reported that the First Nations at Shoal Lake were “to have reserves of wild and farming lands at Lac Plat (now: Shoal Lake) within the area marked off on the map and also to have the islands in Lac Plat on which they have gardens.” The map has not been located.
18. By Order-in-Council dated February 27, 1875 the Garden Islands were provisionally approved as reserves.
19. On January 30, 1877, the Surveyor General, J.S. Dennis, in his “Schedule describing various Indian Reserves in Manitoba, Keewatin and the North-West Territories” described the reserves of Chief “Shawinabinais” by citing Dawson’s February 17, 1875 memorandum.
20. In 1884, Indian Agent George McPherson of Assabaskashing Agency wrote to the Superintendent General of Indian Affairs that the First Nation had gardens on islands outside its reserves because “they were told at treaty to keep farming on the islands, where they had their gardens then, as long as they liked to farm on them.”
21. On or about November 15, 1889, Lawrence VanKoughnet, Deputy Superintendent General of Indian Affairs, directed that instructions be sent to Ebenezer McColl, Inspector of Indian Agencies, Winnipeg, to ascertain and mark on a map the islands in Shoal Lake that contained gardens.

22. In January 1890, Simon Bray, Surveyor for the Department of Indian Affairs (“DIA”), produced a schedule of “Indian Reserves in Treaty No. 3” which included “Certain Islands in Shoal Lake in which the Indians have gardens.”
23. A list of “Indian Reserves in Treaty No. 3 that have yet to be selected and surveyed” which was appended to the schedule stated that “Bands No. 39 and 40 are entitled to those islands in Shoal Lake on which they have or had gardens.”
24. In June 1890, A.W. Ponton, Dominion Land Surveyor, was instructed to conduct certain surveys under the Treaty, including the Garden Islands.
25. In November 1890, Ponton reported to the Superintendent General of Indian Affairs that he had made a survey “of certain islands in Indian Bay, Shoal Lake.” He reported that the First Nation’s impression was that all the islands in Indian Bay were included as reserve.
26. On June 9, 1891, Ponton forwarded to Hayter Reed, Indian Commissioner at Regina, a “Sketch Showing Survey” (“the Sketch”) regarding islands on which the First Nation had gardens. The Sketch does not show all the islands in Indian Bay. Those islands shown, which are in the northern portion of Indian Bay, are marked “A”, “B”, “C”, “D”, “E”, and “F.” Ponton placed his signature under the words “Surveyed in August 1890.”
27. On or about August 27, 1892, Pither advised the Deputy Superintendent General of Indian Affairs that he had consulted with the First Nations and found “that the Islands marked on the (Sketch) are all the Islands of importance, on which they had gardens.” The copy of the Sketch in the file with Pither’s letter included one additional large island not marked with a letter but entitled “garden.”
28. The Garden Islands appeared on the following schedules of reserves compiled by the DIA:
 - (a) September 10, 1890 - “Schedule showing certain lands of Indian in Treaty No. 3 that require to be definitely located and surveyed.” “Bands Nos. 39

40. Chiefs Sheshegence and Shawinabinias. Instructions have been issued for the survey of certain small islands in Shoal Lake that belong to the said Bands.”

(b) June 19, 1891 – “39 & 40 Certain Islands in Shoal Lake in which the Indians have gardens. Not surveyed.”

(c) 1901 – “Schedule of the Indian Reserves in the Dominion – Treaty No. 3 – Ontario” printed with the *Annual Report of the Department of Indian Affairs for the Year ended June 30, 1902* in the *Canada, Sessional Papers, 1902*: “39} Islands in Shoal Lake | Not Surveyed | Partly in Manitoba.”

29. In 1911, Shoal Lake I.R. No. 40 was re-surveyed by Canada.

30. On or about April 3, 1914, Bray, Chief Surveyor, DIA, advised Duncan Scott, Deputy Superintendent General of Indian Affairs, that the First Nation was “entitled to those islands in (Indian) Bay on which they have or had gardens.”

31. In February 1913, the *Greater Winnipeg Water District Act*, S.M. 1913 c. 22 (the “Act”) received Royal Assent. The Act incorporated the GWWD with the object of supplying water to the inhabitants of the district.

32. On March 30, 1914, J.G. Harvey, solicitor for the GWWD, applied to the Hon. Dr. Roche, Minister of the Interior and Superintendent General of Indian Affairs, for a grant of that part of Indian Bay situated in Manitoba.

33. By Order-in Council 463 dated March 3, 1915, Canada authorized the expropriation of the bed and islands of Indian Bay, totaling 3000 acres, for 50 cents per acre to the GWWD. Order-in-Council 463 authorized the taking of the bed of Indian Bay in Shoal Lake I.R. No. 40 together with the islands therein.

34. Descriptions of patent drawn up by the DIA on March 26, 1915 include all the islands and land covered by water in Indian Bay in Manitoba.

35. By Order-in-Council 1641 dated July 24, 1930, Shoal Lake I.R. No. 40 was set apart for the First Nation. The Garden Islands were not included in the reserve.

VI. The Basis in Law on which the Crown is said to have failed to meet or otherwise breached a lawful obligation

36. This claim is based on the Crown's breaches of its treaty, legal and fiduciary obligations in respect of the Garden Islands.

37. Canada breached its treaty and legal obligations to the First Nation in its failure to set aside the Garden Islands as reserve lands as provided for by the terms of the Treaty and by the promises made pursuant to the Treaty.

38. Canada breached its legal obligations to the First Nation in respect of the unlawful taking of those Garden Islands located in Manitoba, and for its failure to obtain adequate compensation in respect of the expropriation of those islands.

39. Canada breached its fiduciary obligations to the First Nation in respect of the Garden Islands by failing to act with ordinary prudence with a view to the best interests of the First Nation and to preserve and protect the First Nation's interests in the Garden Islands from exploitation.

40. The First Nation seeks compensation from Canada for:

(a) compensation and/or damages for losses resulting from Canada's breaches of its treaty and legal obligations in relation to the failure to allot the Garden Islands to the First Nation as reserve lands;

(b) compensation and/ or damages for losses resulting from Canada's breaches of its legal obligations in relation to the unlawful expropriation of those Garden Islands located in Manitoba and for its failure to obtain adequate compensate in respect of the expropriation of those islands;

(c) compensation and/ or damages for losses relating to Canada's breaches of its fiduciary obligations by its failure to act with ordinary prudence with a

view to the best interests of the First Nation and for its failure to preserve and protect the First Nation's interests in the Garden Islands from exploitation; and

(d) such other relief as this Honourable Tribunal deems appropriate.

Dated this 29th day of October, 2014.



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