

SPECIFIC CLAIMS TRIBUNAL		
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January 27, 2015		
Nicholas Young		
Ottawa, ON	5	

SCT File No.: SCT – 3001-14

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

SHOAL LAKE NO. 40 FIRST NATION

Claimant

v.

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

Respondent

RESPONSE

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

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

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as represented by:
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Overview

The Shoal Lake No. 40 First Nation (First Nation) alleges the Crown had a legal obligation to set aside as reserve lands the islands upon which it had gardens (Garden Islands) at the time of treaty and that the Crown failed to do so. The Garden Islands are located in Indian Bay, (which is part

of Shoal Lake), on either side of the provincial boundary between Manitoba and Ontario. The First Nation further alleges that the Garden Islands on the Manitoba side (Manitoba Garden Islands) were unlawfully expropriated by the Greater Winnipeg Water District (GWWD), for which the First Nation received inadequate compensation.

The Crown admits that it had a treaty obligation to set aside as reserve for the First Nation and the Shoal Lake 39 First Nation, (now known as the Iskwatewizaagegan #39 Independent First Nation and hereinafter referred to as Band No. 39), the 7 Garden Islands identified on a plan of survey prepared by Surveyor A.W. Ponton, dated September, 1890, (registered under the Canada Lands Survey System as Plan CLSR F4395), and Indian Agent Pither's 1892 sketch. However, the 4.5 Manitoba Garden Islands were lawfully expropriated and the First Nation was compensated, including compensation that should have been paid to Band No. 39, for its interest in the Manitoba Garden Islands. Accordingly, the Crown has an outstanding treaty obligation to set aside as reserve the 2.5 Garden Islands in Ontario (Ontario Garden Islands) only. The Crown asserts that the First Nation did not lose the use of the Ontario Garden Islands, as there is no evidence the First Nation was prevented from gardening or gathering on these Islands.

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

1. The First Nation submitted a claim to the Minister of Indian and Northern Affairs Canada (the Minister) on November 13, 1991, respecting the expropriation and surrender of portions of its reserve lands to GWWD and related events. It contained allegations regarding Canada's failure to set aside the Garden Islands as reserve lands as well.
2. By letter dated March 7, 2005, the Minister informed the First Nation that Canada had accepted the "Garden Islands in the Indian Bay" claim for negotiation.
3. The remainder of the 1991 claim was not filed with the Minister, within the meaning of section 16(1) of the *Act*.

4. 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 Garden Islands Claim in the Specific Claims Database had been updated to “closed.”

II. Validity (R. 42(b) and (c))

5. The Crown admits that it has an outstanding treaty obligation to set aside as reserve lands the 2.5 Garden Islands in Ontario, as identified on Ponton’s 1890 survey and Pither’s 1892 sketch.

6. The Crown denies the validity of all other aspects of the First Nation’s Specific Claim, as set out in its Declaration of Claim, and denies that the First Nation has suffered any loss or damage resulting from breaches of treaty, legal and fiduciary obligation or at all. Specifically the Crown denies:

- a) That the expropriation of the Manitoba Garden Islands was unlawful and that compensation was inadequate;
- b) That 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.
- c) That there are any consequential, uncompensated or remaining losses or damages with respect to the Manitoba Garden Islands; and
- d) That there is any loss of use of the Ontario or Manitoba Garden Islands.

7. The following are the bases for the Tribunal to award compensation as provided for in s. 20 (1) of the *Act*:

The Tribunal, in making a decision on the issue of compensation for a specific claim,

- a) shall award monetary compensation only;

b) shall not, despite any other provision in this subsection, award total compensation in excess of \$150 million;

c) shall, subject to this Act, award compensation for losses in relation to the claim that it considers just, based on the principles of compensation applied by the courts;

...

(g) shall award compensation equal to the current, unimproved market value of the lands that are the subject of the claim, if the claimant establishes that those lands were never lawfully surrendered, or otherwise taken under legal authority.

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

8. Unless expressly admitted, the Crown denies each and every allegation of fact or law in the Declaration of Claim and puts the Claimant to the strict proof thereof.

9. The Crown admits the facts set out in paragraphs 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 17, 19, 21, 22, 23, 24, 25, 27, 28, 30, 31, 32, 33, 34 and 35.

10. In response to paragraph 7, the Crown denies that any of the grounds set out in s. 14 of *the Act* apply except (a) failure to fulfill 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, with respect to the Ontario Garden Inlands only, as detailed herein.

11. The Crown admits the facts in paragraph 16, but notes that Dawson dated his letter as “1874” in error. The letter was in fact written in 1875.

12. With respect to paragraph 18, the Order in Council recommended provisionally reserving the lands described in the annex, subject, however, to such further surveys

as may be necessary and subject to final confirmation by the Governor General in Council. The annex indicates Shoal Lake No. 40 is to have the islands on which they have gardens.

13. The Crown admits the facts in paragraph 20, except that the quote should read "island," not "islands." However, the Crown admits the First Nation had gardens on more than one island.
14. The Crown admits the facts in paragraph 26, except the sketch was marked "Surveyed in Sept. 1890," not "August 1890."
15. The Crown admits the facts in paragraph 29, but notes that only the rectilinear boundaries of the reserves were traced. As re-surveys were not made along the waterline, the islands in Indian Bay, Shoal Lake, were not surveyed.
16. The Crown denies paragraphs 36 and 37, but admits that it breached its treaty obligations by failing to set aside the Ontario Garden Islands indicated on Ponton's 1890 survey and on Pither's 1892 sketch.
17. In response to paragraph 38, the Crown denies that the expropriation of the Manitoba Garden Islands was unlawful and that the compensation paid to the First Nation was inadequate. The Crown asserts that the First Nation was overcompensated for the Garden Islands expropriation, as there was no deduction made for Band No. 39's interest in the islands.
18. The Crown denies paragraph 39.
19. In response to paragraph 40, the Crown denies the First Nation is entitled to the relief claimed. Insofar as Canada is liable in relation to the Ontario Garden Islands, which were held in common with Band No. 39, the Crown asserts that there should be a set

off to account for the fact the First Nation was overcompensated for the Manitoba Garden Islands.

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

Treaty No. 3 reserve provisions

20. On October 3, 1873, Treaty No. 3 was entered into between Canada and the First Nations of northwestern Ontario, including Shoal Lake No. 40 and Band No. 39. An Order in Council dated October 31, 1873 approved the Treaty.
21. The Treaty provided that reserve land should be set aside in consultation with the bands and that any land already under cultivation should be respected.
22. The Treaty also provided that the Crown could appropriate reserve lands as needed for Public Works.

First Nation selects Garden Islands as reserve lands

23. In a letter to the Minister of the Interior dated January 28, 1874 [*sic*; should read 1875], S.J. Dawson (Treaty Commissioner) stated that after consultation with the bands involved in Treaty No. 3, reserve land had been selected.

Identification of Garden Islands

24. In a letter dated 20 June, 1890, L. Vankoughnet, Deputy Superintendent General of Indian Affairs, issued instructions to E. McColl, Inspector of Indian Agencies, for transmission to Surveyor Ponton regarding the surveying of islands in Shoal Lake:

Bands Nos. 39 and 40 are entitled to those Islands in Shoal Lake on which they have or had gardens.

The Surveyor will make a survey of these Islands and connect his survey with a known point on the Reserve on the main land or with some other well known point in order that the said Islands may be correctly shown on the general maps. He will return the usual Field notes and Plan and show therein to which band each Island belongs.

25. By letter dated June 9, 1891 Ponton forwarded to Hayter Reed, Indian Commissioner at Regina, a sketch titled "Survey in connection with islands in Shoal Lake on which the Indians of Bands Nos. 39 and 40 have or had gardens." The letter also stated the following:

With reference to the bands Nos. 39 and 40. The islands which are at present occupied, or on which traces of former tillage are found are marked on the annexed sketch by the letters "A", "B", "C", "D", "E" and "F".

26. Vankoughnet instructed Indian Agent R. Pither, by letter dated August 3, 1892, to ascertain if any other islands in Shoal Lake and Lake of the Woods were claimed by Bands Nos. 38D, 39 and 40.

27. Pither replied to these instructions August 27, 1892:

I have consulted the Indians, of these Reserves and find that the islands marked on the sketches are all the Islands of importance on which they had gardens or laid claimed to.

As well as the islands marked with a letter symbol as per Ponton's survey sketch, Pither's sketch shows one large island marked with the word "garden."

Both Bands No. 39 & No. 40 have interest in the Garden Islands

28. As noted in Ponton's 1891 letter, the Garden Islands were farmed by both Shoal Lake No. 40 (the First Nation Claimant in this case) and Band No. 39. Accordingly, both bands had an interest in the Garden Islands.

Ontario & Manitoba interprovincial boundary

29. The boundary between Manitoba and Ontario passes through Indian Bay.
30. Islands marked as "A", "B", "C" and "D" on Pither's 1892 sketch are in Manitoba. Islands marked "E" and "F" are in Ontario. The large island marked "garden" straddles the border and is partially in Manitoba and partially in Ontario (but mostly in Ontario).

Expropriation and compensation of Manitoba Islands

31. An *Act to Amend the Indian Act* was assented to on May 19, 1911. Subsection 46(1) of the *Indian Act* was repealed and amended to allow expropriation for public works by either federal or provincial powers, with the consent of the Governor General in Council.
32. On February 15, 1913, the *Greater Winnipeg Water District Act* was enacted. It incorporated GWWD with the object of supplying water to the inhabitants of the district.
33. On March 30, 1914, J.G. Harvey, solicitor for 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.

34. By Order in Council 463 dated March 3, 1915, Canada authorized the expropriation by GWWD of the bed and islands of Indian Bay, totaling 3000 acres, for 50 cents per acre.
35. In January of 1915, the sum of \$1,500.00, representing the above-noted payment, was deposited into the trust account of the First Nation.
36. There was no deduction from the amount received by the First Nation to account for Band No. 39's interest in the Garden Islands.

Lands set aside as reserve

37. In 1915, Ontario passed *An act to confirm the title of the Government of Canada to certain lands and Indian lands*, which transferred to the federal Crown reserve lands indicated in the plan, which did not include the Ontario Garden Islands.
38. Following passage of the *Manitoba Natural Resources Transfer Act* in 1930, the part of Shoal Lake Indian Reserve No. 40 located in Manitoba was set apart for the First Nation by Order in Council 1641 dated July 24, 1930.

V. Relief (R. 42(f))

39. The Crown seeks dismissal of the claim as described by the First Nation in its Declaration of Claim.
40. To the extent that the Crown may be found liable to pay any compensation for losses incurred by the First Nation as a result of this claim and more particularly any failure to set aside the Garden Islands or any related breach of treaty, legal or fiduciary obligations, which is not admitted, the Crown seeks an offset pursuant to s. 20 (3) of

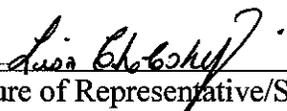
the *Act* for any such losses, taking into account the compensation received for the Manitoba Garden Islands and related expropriations and surrenders to GWWD.

41. The Crown seeks costs in these proceedings.
42. Such other relief as this Honourable Tribunal deems just.

VI. Communication (R. 42(g))

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Dated: January 27 2015



Signature of Representative/Solicitor

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