

SPECIFIC CLAIMS TRIBUNAL		
F I L E D	TRIBUNAL DES REVENDICATIONS PARTICULIÈRES	D É P O S É
	April 26, 2016	
	David Burnside	
Ottawa, ON	39	

**SCT File No.:** SCT-3001-14

**SPECIFIC CLAIMS TRIBUNAL**

**B E T W E E N:**

ISKATEWIZAAGEGAN N0.39 INDEPENDENT FIRST NATION

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*.

April 26, 2016

(Registry Officer)

**TO:**

Assistant Deputy Attorney General, Litigation, Justice Canada  
Bank of Canada Building  
234 Wellington Street East Tower  
Ottawa, Ontario K1A 0H8  
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## **I. Claimant (R. 41(a))**

1. The Claimant, Iskatewizaagegan No. 39 First Nation (the "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 1989, the Nation submitted a statement of claim in relation to specific claim #0154-501 to the Specific Claims Branch of the Department of Indian and Northern Affairs Canada. The statement of claim contained allegations regarding Canada's failure to set aside as reserve lands certain islands (the "Garden Islands") in Shoal Lake, including those in Indian Bay, that were traditionally used for farming by the Nation, and the alleged expropriation of the Nation's interest and rights to the Garden Islands by the Greater Winnipeg Water District ("GWWD") and other related events.
4. By letter dated March 7, 2005 the Minister of Indian Affairs and Northern Development and Federal Interlocutor for Metis 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."<sup>99</sup>

### **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 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 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 Indian"s, by their respective representatives, concluded the articles of Treaty 3 (the "Treaty"). Chief She-she-gance from the Nation entered into the Treaty on behalf of the Nation.
12. Under the terms of the English version 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 English version of 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 English version 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 Nations

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. In a memorandum dated February 11, 1875 Dawson reports "At Lake of the Woods and Lac Plat (now Shoal Lake) some of the farms and gardens of the Indians are on islands and in other localities not laid down on maps ... ". In a document, and presumably a part of the above noted memorandum, entitled "Descriptions of Reserves to be set aside for certain Bands of the Saulteux tribe of Ojibbeway Indians under Treaty no. 3" and dated February 7, 1875, Dawson reported that the Nation was "... to have Reserves of wild and farming lands at Lac Plat (now Shoal Lake) within the areas marked off on the map and also to have the islands in Lac Plat on which they have gardens ...".
18. By Order-in-Council dated February 27, 1875 the Garden Islands were provisionally approved as reserves.
19. In a memorandum to the Minister of the Interior dated November 1, 1875, Surveyor-General J.S. Dennis stated that "Chief She-she-gance and band to have their land at North West Angle of Lac Plat, as described generally in Mr. Dawson's report, but in a manner as will be pointed out by the Chief or his head man to the surveyor".

20. In a November 30, 1878 Report, the Nation was referred to, by the local Indian Agent, Mr. George McPherson, as:

"... the most industrious than all the Bands in my District, most of them have settled on their reserves, and have begun to cultivate land, and built their houses on them, though they still farm on islands, where they had their gardens before the Treaty, the Chief is an industrious man, they generally look forward for the future, such as collecting fish for the winters use, which the other Bands do not . . ."

21. On October 23, 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."

22. In a memorandum dated 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 as "Chief She-she-gance and Band of Shoal Lake . . . are entitled according to Treaty to those Islands in Shoal Lake on which they have gardens". The said instructions were issued to Mr. McColl on November 21, 1889.

23. 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."

24. 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."

25. In June 1890, A.W. Ponton, Dominion Land Surveyor, was instructed to conduct certain surveys under the Treaty, including the Garden Islands.
26. 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 Nation's impression was that all the islands in Indian Bay were included as reserve.
27. On June 9, 1891, Ponton forwarded to Hayter Reed, Indian Commissioner at Regina, a "Sketch Showing Survey" ("the Sketch") regarding islands on which the 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."
28. 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."
29. 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."

30. 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.

31. 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.

32. On April 3, 1914, Mr. Simon Bray, Chief Surveyor, Department of Indian Affairs advised Duncan Campbell Scott, Deputy Superintendent of Indian Affairs that the Nation, along with Shoal Lake #40 First Nation, "are entitled to those islands in (Indian) Bay in which they have or had gardens".

33. By Order-in Council 463 dated March 3, 1915, Canada authorized the expropriation only of "that part of the bed in Indian Bay in Shoal Lake Indian Reserve, No. 40 together with the islands therein, situated within the Province of Manitoba", totaling 3,000 acres, for .50 cents per acre to the GWWD.

34. By Order-in-Council 1379 dated June 14, 1930, Shoal Lake I.R. No. 39A was set apart for the 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**

35. This claim is based on the Crown's breaches of its treaty, legal and fiduciary

obligations in respect of the Garden Islands.

36. Canada breached its treaty, legal and fiduciary obligations to the 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 verbal promises made to the Nation prior to the entering into the Treaty.

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

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

39. The Nation seeks compensation from Canada for:

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

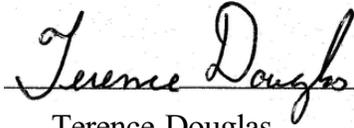
b) compensation and/or damages for losses resulting from Canada's breaches of its legal and fiduciary obligations in relation to the unlawful expropriation of those Garden Islands located in Manitoba and for its failure to obtain any compensation for the benefit of the Nation in respect of the expropriation 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 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 26th day of April, 2016.

A handwritten signature in cursive script that reads "Terence Douglas".

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