

SCT-3001-14

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

SHOAL LAKE NO. 40 FIRST NATION

SPECIFIC CLAIMS TRIBUNAL		
F I L E D	TRIBUNAL DES REVENDICATIONS PARTICULIÈRES	D E P O S É
October 13, 2017		
Stephanie Duffy		
Ottawa, ON	70	

Claimant

and

ISKATEWIZAAGEGAN NO. 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

AMENDED 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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I. Introduction

1. The Respondent Her Majesty the Queen in Right of Canada (hereinafter “Canada” or “the Crown”) must respond to this claim according to the rules of practice applicable to pleadings in a matter of this nature and consistent with the duties and functions of the conduct of litigation for or against the Crown in Right of Canada. Canada will pursue reconciliation and is committed to a renewed nation-to-nation relationship with Indigenous Peoples based on recognition of rights, respect, co-operation and partnership. Canada must work in other contexts beyond pleadings to achieve the fulfilment of those commitments.

II. Overview

2. In 1873, the Crown entered into a treaty with representatives of Shoal Lake No. 40 First Nation (hereinafter “Shoal Lake No. 40”) and Iskatewizaagegan Independent First Nation (hereinafter “Iskatewizaagegan”) concerning certain lands located in and around the current Manitoba-Ontario border. One of the terms of that treaty was that the Crown would “lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians”.
3. Included in those lands were the seven “Garden Islands” located along the Manitoba-Ontario border of Shoal Lake.
4. This specific claim concerns the claims by Shoal Lake No. 40 and Iskatewizaagegan (collectively “the Claimants”) that the seven Garden Islands were either
 - never set aside as reserve as promised;
 - unlawfully expropriated, and/or
 - expropriated or taken away without adequate or any compensation having been paid.
5. The Crown admits that, for the Garden Islands situated on the Ontario side of the Manitoba-Ontario border, it had a treaty obligation to add the islands to reserve and failed

to do so. It further admits that both Shoal Lake No. 40 and Iskatewizaagegan lost use of those islands, and compensation is owed.

6. With respect to the islands situated on the Manitoba side of the Manitoba-Ontario border, the Crown admits that while it did fail to set aside those islands, the expropriation of those islands was lawful. The \$1500 paid to Shoal No.40 in 1915 for the Manitoba islands was adequate compensation. However, the Crown further admits that a portion of the \$1500 should have gone to the benefit of Iskatewizaagegan.
7. The Crown accordingly admits that both Shoal Lake No. 40 and Iskatewizaagegan are owed a share of the current unimproved market value of the Ontario Garden Islands, and their respective losses of use thereof. Additionally, Iskatewizaagegan is owed its share of the \$1500 paid in 1915 for the expropriation of the Manitoba islands.

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

8. In 1989, Iskatewizaagegan submitted a claim to the Minister of Indian and Northern Affairs Canada (the Minister) respecting the expropriation and surrender of portions of its reserve lands to the GWWD, and other related events. It also contained allegations regarding Canada's failure to set aside the Garden Islands as reserve lands.
9. By letter dated March 7, 2005, the Minister informed Iskatewizaagegan that Canada had accepted the "Garden Islands in the Indian Bay" claim for negotiation.
10. 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 Iskatewizaagegan that the status of the Garden Islands Claim in the Specific Claims Database had been updated to "closed."
11. On November 13, 1991, Shoal Lake No. 40 submitted a claim to the Minister of Indian and Northern Affairs Canada (the Minister), respecting the expropriation and surrender of lands

to GWWD and related events. It contained allegations regarding Canada's failure to set aside the Garden Islands as reserve lands as well.

12. By letter dated March 7, 2005, the Minister informed Shoal Lake No. 40 that Canada had accepted the "Garden Islands in the Indian Bay" claim for negotiation.
13. The remainder of the 1991 claim was not filed with the Minister within the meaning of s. 16(1) of the *Act*.
14. 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 Shoal Lake No. 40 that the status of the Garden Islands Claim in the Specific Claims Database had been updated to "closed."

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

15. The Crown admits that it had an outstanding treaty obligation to set aside, as reserve land, the 2.5 Garden Islands in Ontario, as identified on Ponton's 1890 survey and Pither's 1892 sketch, and that both Claimants lost use of the Ontario Islands.
16. The Crown also admits that Iskatewizaagegan did not receive their share of the compensation for expropriation of the 4.5 Garden Islands situated in Manitoba. While the expropriation was valid (in that it was authorized by legislation and the compensation provided was adequate), compensation was mistakenly paid only to Shoal Lake No. 40.
17. 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.

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

18. ~~Unless expressly admitted, The Crown asserts that the expropriation of the Manitoba Garden Islands was lawful and that the expropriation received was adequate, though it admits that some of the \$1500 received should have gone to Iskatewizaagegan. each and every allegation of fact or law in the Declarations of Claim and puts the Claimants to the strict proof thereof.~~
19. 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, 22, 23, 24, 25, 28, 30, 31, 32 33, 34 of both Declarations of Claim.
20. The Crown also admits paragraphs 20, 26, 29 of the Declaration of Claim brought by Iskatewizaagegan.
21. It further admits paragraphs 21, 27, and 35 of the Declaration of Claim brought by Shoal Lake No. 40.
22. In response to paragraph 7 of both Declarations, the Crown denies that any of the grounds set out in s. 14 of *the Act* apply except
 - s. 14 (a) with respect to the Ontario Garden Islands, and
 - s. 14 (e) for the Manitoba Garden Islands for the claimant Iskatewizaagegan only.
23. With respect to paragraph 16 of both Declarations, the Crown admits the facts but notes that Dawson dated his letter as “1874” in error. The letter was in fact written in 1875.

24. With respect to paragraph 18 of both Declarations, 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 that the Claimants are to have the islands on which they have gardens.
25. With respect to paragraph 21 of the Claim by Iskatewizaagegan and paragraph 20 of the claim by Shoal Lake No. 40, the Crown admits the facts except that the quote should read "island," not "islands." However, the Crown admits that the Claimants had gardens on more than one island.
26. With respect to paragraph 27 of the Claim by Iskatewizaagegan and paragraph 26 of the Claim by Shoal Lake No. 40, the Crown admits the facts except the sketch was marked "Surveyed in Sept. 1890," not "August 1890."
27. With respect to paragraph 29 of the Declaration of Claim by Shoal Lake No. 40, 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.
28. With respect to paragraphs 35, 36 and 37 of the Claim by Iskatewizaagegan, and paragraphs 36, 37 and 38 of the Claim by Shoal Lake No. 40, the Crown admits that it breached its treaty obligations by failing to set aside the Ontario Garden Islands indicated on Pither's 1892 sketch. The Crown denies that the expropriation of the Manitoba Garden Islands was unlawful or that the compensation paid was inadequate. The Crown admits that Iskatewizaagegan should have been credited a portion of the compensation for the Manitoba Garden Islands paid to Shoal Lake No. 40 at that time, but otherwise denies these paragraphs.
29. The Crown denies paragraph 38 of the Claim brought by Iskatewizaagegan and paragraph 39 of the Claim brought by Shoal Lake No. 40.

30. In response to paragraph 39 of the Claim brought by Iskatewizaagegan and paragraph 40 of the Claim brought by Shoal Lake No. 40, the Crown denies that the Claimants are entitled to the relief claimed.

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

Treaty No. 3 reserve provisions

31. 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 Iskatewizaagegan. An Order in Council dated October 31, 1873 approved the Treaty.
32. 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.
33. The Treaty also provided that, as needed, the Crown could appropriate reserve lands for Public Works.

The Claimant First Nations select Garden Islands as reserve lands

34. 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

35. 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.

36. 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".

- ~~37. 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.~~

38. 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 Iskatewizaagegan and Shoal Lake No. 40 have interest in the Garden Islands

39. As noted in Ponton's 1891 letter, the Garden Islands were farmed by both the Claimants. Accordingly, both bands had an interest in the Garden Islands.

Ontario & Manitoba interprovincial boundary

40. The boundary between Manitoba and Ontario passes through Indian Bay.

41. 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

42. *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.
43. On February 15, 1913, the *Greater Winnipeg Water District Act* was enacted. It incorporated the GWWD with the object of supplying water to the inhabitants of the district.
44. 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.
45. 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.
46. In January of 1915, the sum of \$1,500.00, representing the above-noted payment, was deposited into the trust account of Shoal Lake No. 40.
47. ~~There was no deduction from the amount received by Shoal Lake No. 40 to account for Iskatewizaagegan~~ was not credited their portion of the sum that was paid to Shoal Lake No. 40 for the Manitoba Islands.

Lands set aside as reserve

48. 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.

49. 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))

50. The Crown seeks the dismissal of the Declarations of Claim, except with respect to the allegation regarding compensation to Iskatewizaagegan for the expropriation of the Manitoba Garden Islands, and with respect to the allegation regarding compensation for the current unimproved market value and loss of use of the Ontario Islands.

- ~~51. To the extent that the Crown may be found liable to pay any compensation for losses incurred by Iskatewizaagegan 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 but is specifically denied, the Crown seeks an offset pursuant to s. 20 (3) of the Act for any such losses.~~

52. The Crown seeks costs in these proceedings.

53. Such other relief as this Honourable Tribunal deems just.

VI. Communication (R. 42(g))

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Dated: October 13, 2017

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