

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

SPECIFIC CLAIMS TRIBUNAL		
TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES		
F I L E D	October 29, 2019	D É P O S É
Isabelle Bourassa		
Ottawa, ON		5

BEARDY'S & OKEMASIS FIRST NATION 96/97

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* and the *Specific Claims Tribunal Rules of Practice and Procedure*.

TO: Beardy's & Okemasis First Nation
As represented by Ron S. Maurice and David House,
Maurice Law
Barristers & Solicitors
#300, 602 12th Ave SW
Calgary, AB T2R 1J3
Phone: (403) 266-1201
Fax: (403) 266-2701
Email: rm Maurice@mauricelaw.com and dhouse@stewardhouselaw.com

I. Overview

1. Her Majesty the Queen 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 endeavours to embody these principles as it assists the 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 Beardy's & Okemasis First Nation (also referred to as the Beardy's & Okemasis Bands, as applicable) is an adherent to Treaty 6, is a band within the meaning of the *Indian Act*, and is a First Nation within the meaning of the *Specific Claims Tribunal Act (SCTA)*.
4. In the twentieth century, Canada granted territorial and provincial authorities rights of way on Beardy's & Okemasis First Nation's reserve lands (IR 96/97) for public works. Those authorities constructed a drainage ditch on IR 96/97 in 1904 to control the water level of Duck Lake and authorized multiple public roads in the 1950s. The declaration of claim alleges that Canada breached various obligations owed to Beardy's & Okemasis First Nation in relation to these uses of reserve lands. The claim also involves the flooding and alleged loss of use of reserve lands.
5. Canada admits the following breaches of statutory and fiduciary obligations owed to Beardy's & Okemasis First Nation:
 - Breach of the 1886 *Indian Act* in allowing the 1904 drainage ditch to be built on IR 96/97 in violation of statutory requirements;
 - Breach of its fiduciary duty in failing to provide adequate compensation for use of the drainage ditch lands; and
 - Breaches of its fiduciary duties in allowing the granting and transfer of the public road interests without adequate compensation, with the exception of the 1949 road allowance.

6. Canada admits it has a statutory duty to obtain consent from First Nations and provide proper compensation for takings and surrenders of reserve lands in accordance with the *Indian Act* and expropriation legislation. Canada obtained the required consent of Beardy's & Okemasis First Nation to grant the rights of way used for public roads on IR 96/97.
7. Canada states that no obligations or duties owed by Canada to Beardy's & Okemasis First Nation ever arose regarding the design, construction or maintenance of the drainage ditch.

II. Status of Claim

8. Canada acknowledges the requirements in paragraph 16(1)(d) of the *Specific Claims Tribunal Act (SCTA)* are satisfied in that more than 3 years elapsed without the Minister of Crown-Indigenous Relations (formerly Indian Affairs and Northern Development) (the Minister) rendering a decision on whether to negotiate the claim filed with the Minister on November 10, 2015.
9. Canada says that on August 9, 2019 the Minister wrote to Beardy's & Okemasis First Nation, inviting the First Nation to negotiate the claim.

III. Canada's Position Regarding the Validity of the Claim

The 1904 Drainage Ditch

10. Canada admits that it breached statutory duties in relation to the drainage ditch, as pled in paragraphs 32 and 36 of the declaration of claim. Canada admits that the land used for the drainage ditch was not validly taken or surrendered pursuant to the 1886 *Indian Act*.
11. Canada admits that these statutory breaches constitute breaches of its fiduciary duties to Beardy's & Okemasis First Nation. Canada further admits that it failed to compensate Beardy's & Okemasis First Nation for the drainage ditch lands, as pled in paragraphs 33 and 37 of the declaration of claim.

12. In further response to paragraphs 33 and 37 of the declaration of claim, Canada states that no obligations or duties owed by Canada to Beardy's & Okemasis First Nation ever arose in relation to the design, construction or maintenance of the drainage ditch, which were handled exclusively by the Northwest Territories Department of Public Works. Canada was not involved in the design, construction or maintenance of the drainage ditch, and was not made aware of any issues or deficiencies following construction in 1904 or flooding in 1955. Canada became aware of flooding concerns on IR 96/97 in the 1970s. Canada says the flooding at that time was caused by an off-reserve culvert built by a neighbouring municipality in 1970, not the 1904 drainage ditch.

The 1949 Road Allowance

13. In response to paragraphs 32, 34 and 38 of the declaration of claim, Canada states that no obligations owed by Canada to Beardy's & Okemasis First Nation ever arose in relation to the 1949 road allowance. Canada admits that a surrender vote occurred on January 26, 1948, but states that the associated lands were never taken or used by Canada. No obligation to obtain compensation arose.

The 1953 Easement Under Section 35 of the Indian Act

14. In response to paragraphs 32, 34 and 39 of the declaration of claim, Canada admits that it failed to provide Beardy's & Okemasis First Nation more than nominal compensation for the 1953 easement lands, but states that the easement was granted in accordance with section 35 of the 1952 *Indian Act*. Canada's failure to adequately compensate Beardy's & Okemasis First Nation constitutes a breach of fiduciary duty.

The 1958 Permit Under Section 28(2) of the Indian Act

15. In response to paragraphs 32 and 40 of the declaration of claim, Canada states that it fully complied with section 28(2) of the 1952 *Indian Act* in issuing the permit. The permit did not constitute a taking under section 35 of the *Indian Act*.

16. In further response to paragraphs 32, 34 and 40 of the declaration of claim, Canada had a fiduciary duty to adequately compensate Beardy's & Okemasis First Nation for the use of reserve lands, even though section 28(2) does not require compensation. In providing only nominal compensation to Beardy's & Okemasis First Nation for the 1958 permit, Canada breached its fiduciary duty to Beardy's & Okemasis First Nation.

The 1968 Transfer Under Section 35 of the Indian Act

17. In response to paragraphs 32, 34 and 41 of the declaration of claim, Canada admits that it failed to provide Beardy's & Okemasis First Nation more than nominal compensation for the 1968 transfer of reserve land interests, but states that it complied with section 35 of the 1952 *Indian Act* in effecting the transfer. Canada's failure to adequately compensate Beardy's & Okemasis First Nation constitutes a breach of fiduciary duty.

The Honour of the Crown

18. In response to paragraph 35 of the declaration of claim, Canada admits that it failed to uphold the honour of the Crown only in committing the breaches of fiduciary duty outlined in paragraphs 11, 14, 16 and 17 above. Canada states that any losses associated with its failure to uphold the honour of the Crown are subsumed by the fiduciary breaches.

Relief Sought in the Declaration of Claim

19. In response to paragraph 42 of the declaration of claim, Canada admits that Beardy's & Okemasis First Nation is entitled to compensation for the following statutory and fiduciary breaches:
- Breach of the 1886 *Indian Act* in allowing the 1904 drainage ditch to be built on IR 96/97 in violation of statutory requirements;
 - Breach of fiduciary duty in failing to provide adequate compensation for use of the drainage ditch lands;

- Breach of fiduciary duty in failing to provide adequate compensation for the 1953 section 35 easement;
 - Breach of fiduciary duty in failing to provide adequate compensation for the 1958 section 28(2) permit; and
 - Breach of fiduciary duty in failing to provide adequate compensation for the 1968 section 35 transfer.
20. In further response to paragraph 42 of the declaration of claim, Canada denies that Beardy's & Okemasis First Nation is entitled to compensation for the following alleged breaches:
- Breach of any obligation or duty relating to the design, construction or maintenance of the 1904 drainage ditch;
 - Breach of any obligation or duty relating to the 1949 road allowance;
 - Breach of the 1952 *Indian Act* in relation to the 1953 section 35 easement;
 - Breach of the 1952 *Indian Act* in relation to the 1958 section 28(2) permit; and
 - Breach of the 1952 *Indian Act* in relation to the 1968 section 35 transfer.

IV. Canada's Position Regarding Allegations of Fact

Treaty 6 and Setting Apart the Beardy's & Okemasis Reserve

21. Canada admits that Plains and Wood Cree peoples living in what is now central Saskatchewan entered into Treaty 6 with the Crown in 1876, as pled in paragraph 8 of the declaration of claim. Treaty 6 covers an area of 121,000 square miles of land, and includes various promises to the Plains and Wood Cree peoples. Canada admits that reserve lands were to be provided to each Treaty 6 First Nation based on one square mile of land per family of five.
22. In response to paragraph 9 of the declaration of claim, Canada admits that Chiefs Beardy and Okemasis adhered to Treaty 6 on August 28, 1876 at or near Fort Carlton. Canada further admits that the Willow Cree lived in the area around Duck Lake.

23. Canada admits that the “Chief of Duck Lake Indian Tribe” sent a petition to the Governor General of Canada requesting the survey of a reserve at Duck Lake in June 1878, as pled in paragraph 10 of the declaration of claim.
24. In response to paragraph 11 of the declaration of claim, Canada admits that Chief Beardy refused to accept the reserve surveyed in July 1879, because he wanted the reserve to encompass the lands surrounding Duck Lake, extending two miles back from the shoreline. Canada further admits that Dominion Land Surveyor Reid told Chief Beardy that holding out for those lands would allow settlers to take up all the desirable lands.
25. Canada admits that Chief Beardy accepted a reserve surveyed by Reid in 1879 and 1880, as pled in paragraph 12 of the declaration of claim. Canada admits that the reserve was surveyed jointly for the Beardy’s and Okemasis Bands, and comprised a small portion of Duck Lake as well as lands to the west and northwest of the lake. Canada further admits that the townships in the area were surveyed at the same time, along with the Carlton to Duck Lake Trail, which ran through the new reserve for approximately 3.5 miles.
26. In response to paragraph 13 of the declaration of claim, Canada admits that Dominion Land Surveyor Nelson surveyed IR 96/97 in August 1887 and July 1888. Nelson added the Beardy’s & Okemasis Bands’ hay lands and the Carlton to Duck Lake Trail to the reserve. Nelson approved the survey on January 23, 1889.
27. Canada admits that IR 96/97 was established on May 17, 1889 for the Beardy’s and Okemasis Bands by Order in Council P.C. 1889-1151, as pled in paragraph 14 of the declaration of claim.
28. Canada admits that Order in Council P.C. 1889-2173 transferred the entire Carlton to Duck Lake Trail from the federal government to the Northwest Territories government on September 17, 1889, as pled in paragraph 15 of the declaration of claim.

29. Canada admits that Order in Council P.C. 1893-1694 removed IR 96/97 from the operation of the *Dominion Lands Act* on June 12, 1893, as pled in paragraph 16 of the declaration of claim.

The 1904 Drainage Ditch

30. In response to paragraphs 17 and 18 of the declaration of claim, Canada admits that the drainage ditch was planned to the specifications outlined in those paragraphs. Prior to construction, the Northwest Territories Department of Public Works (Public Works) noted the advisability of extending the ditch an additional 3,000 feet for better drainage, but identified physical difficulties (excavation in muskeg) and costs of extending the ditch. Public Works decided to construct the ditch to drop only 2.5 feet under its authority according to *An Ordinance Respecting the Department of Public Works* (ONWT 1897, c 17) to administer, manage and control all drains and drainage works not under the control of the Dominion Government. The evidentiary record does not reflect that Public Works was aware the waters would drain onto more of the reserve. Canada notes this was internal correspondence within Public Works, not a Government of Canada department.
31. In response to paragraph 19 of the declaration of claim, Canada agrees that Beardy's & Okemasis First Nation approved the construction of the drainage ditch, without compensation for the land used, on July 15, 1904. However, Indian Agent J. Macarthur did not report that the ditch would benefit Beardy's & Okemasis First Nation as alleged. Canada admits that Beardy's & Okemasis First Nation did not have a Chief or Councillors in 1904, and did not elect either until 1936.
32. Canada admits that the Deputy Superintendent General of Indian Affairs gave approval on July 27, 1904 to the Northwest Territories government to construct the drainage ditch, as pled in paragraph 20 of the declaration of claim.
33. In response to paragraph 21 of the declaration of claim, Canada admits that the drainage ditch was constructed in August 1904 according to the dimensions and location pled and that Canada did not compensate Beardy's & Okemasis First Nation for the land used.

34. In response to paragraphs 22 and 23 of the declaration of claim, with regard to the operation of the drainage ditch, Canada admits only that the drainage ditch functioned from 1904 until around 1919, at which time it ceased to function. There is no evidence of any drainage ditch maintenance.
35. In further response to paragraph 23 of the declaration of claim, Canada admits that lands within IR 96/97 were flooded in 1955. Canada agrees there were no floodwaters on IR 96/97 during two periods of drought in the 1960s and early 2000s. However, the evidentiary record does not indicate with certainty that floodwaters remained on reserve in non-drought years.

The 1949 Road Allowance

36. Canada admits that Duck Lake dried up in the early 1940s, but then filled with water again in 1948, as pled in paragraph 24 of the declaration of claim. Canada further admits that the northwest portion of the lake was disconnected from the main body of the lake.
37. As pled in paragraphs 25 and 26 of the declaration of claim, Canada admits that members of Beardy's & Okemasis First Nation met on January 26, 1948 to vote on the "surrender" of a right of way for the construction of a public road connecting the towns of Carlton and Duck Lake. A majority of the members voted in favour of granting the right of way to the Rural Municipality of Duck Lake. The Inspector of Indian Agencies reported to that effect on January 29, 1948. Canada agrees that there was no formal surrender or Order in Council related to the right of way. A June 1949 survey depicted an additional trail running across dry lakebed on Section 6 of IR 96/97.

The 1953 Easement Under Section 35 of the Indian Act

38. As pled in paragraph 27 of the declaration of claim, Canada admits that an easement was granted to the Rural Municipality of Duck Lake on September 29, 1953 to use the listed lands on IR 96/97 for road purposes. Canada provided only nominal compensation to Beardy's & Okemasis First Nation for the easement.

The 1958 Permit Under Section 28(2) of the Indian Act

39. Canada admits that by way of a June 13, 1958 band council resolution, Beardy's & Okemasis First Nation authorized Canada to grant a permit under section 28(2) of the *Indian Act* to the Rural Municipality of Duck Lake to build a grid road on the Carlton to Duck Lake Trail, as pled in paragraphs 28 and 29 of the declaration of claim. The road crossed IR 96/97, and the permit was issued to the Rural Municipality on August 8, 1958 for the nominal sum of \$1.00.

The 1968 Transfer Under Section 35 of the Indian Act

40. In response to paragraph 30 of the declaration of claim, Canada states that Order in Council P.C. 1968-300, dated February 15, 1968, authorized the transfer of a north-south grid road and an east-west grid road from the Rural Municipality of Duck Lake to the Province of Saskatchewan. Order in Council P.C. 1968-300 contained the caveat that the lands would revert to Canada if used for anything other than public road purposes. The transfer followed band council resolutions issued on December 13, 1967 and January 11, 1968. It occurred in accordance with section 35 of the *Indian Act*. The identified lands were those governed by the 1953 easement and the 1958 permit. Canada provided only nominal compensation to Beardy's & Okemasis First Nation for the transfer.
41. In response to paragraph 31 of the declaration of claim, Canada acknowledges the map attached to the declaration of claim as "Schedule A."

Alleged Failures/Breaches of Lawful Obligations

42. Canada addresses the alleged breaches of its statutory, fiduciary and honourable duties to Beardy's & Okemasis First Nation, as outlined in paragraphs 32-41 of the declaration of claim, in paragraphs 10-18 of this response.

V. Canada's Statement of Facts

Treaty 6 and Setting Apart the Beardy's & Okemasis Reserve

43. On August 28, 1876, Chiefs Beardy and Okemasis adhered to Treaty 6.
44. IR 96/97 was surveyed in 1887. On May 17, 1889, Order in Council P.C. 1151 set aside IR 96/97 for what became Beardy's & Okemasis First Nation.

The 1904 Drainage Ditch

45. On July 15, 1904, Beardy's & Okemasis First Nation agreed to allow the construction of a drainage ditch on reserve lands to lower the waters of Duck Lake and improve nearby hay lands. Beardy's & Okemasis First Nation consented to the work proceeding without compensation for the land used. The drainage ditch was constructed in August 1904 by the Northwest Territories Department of Public Works. On June 13, 1905, a right of way was registered on the associated title. That year, Public Works noted that the drainage ditch had caused Duck Lake to lower by four feet, resulting in the recovery of nearby roads and hay lands.
46. On August 10, 1921, the Rural Municipality of Rosthern wrote to Canada to report significant spring flooding. This flooding affected hay lands adjacent to IR 96/97. Canada referred the matter to the provincial Department of Highways. Correspondence between the Rural Municipality and the provincial department suggested the cleaning of sand and weeds from the drainage ditch was a possible option to remove floodwaters. Canada was not aware of this correspondence regarding maintenance of the drainage ditch.
47. Drought conditions existed in the area of Duck Lake, including IR 96/97, between 1937 and 1950.
48. By 1950, flooding in the area became an issue again. On June 21, 1955, local landowners asked the Rural Municipality of Duck Lake to re-open the "old drainage canal" that had previously functioned to remove spring runoff. They thought that deepening the drainage ditch would reclaim flooded lands. On February 1, 1956,

the Rural Municipality noted that the lake dried up in dry years, eliminating the need for drainage.

49. On April 6, 1956, Beardy's & Okemasis First Nation representatives attended a municipal meeting. They indicated that the flooding of Duck Lake was damaging their cultivated lands and hay lands. The meeting included discussion of the possibility of the Saskatchewan Provincial Department of Agriculture digging another drainage ditch to lower the lake by three feet.
50. On May 29, 1970, Beardy's & Okemasis First Nation requested that the federal Department of Indian Affairs and Northern Development (DIAND) investigate flooding of farmland on IR 96/97. DIAND's investigation on June 1, 1970 revealed that the Rural Municipality of Duck Lake had installed a new culvert off-reserve shortly before the investigation to replace one that was plugged and damaged. The new culvert released waters previously held back by the damaged culvert onto IR 96/97.
51. DIAND conducted further investigations on June 5 and June 18, 1970. It concluded that the installation of the new culvert had caused the 1970 flooding.
52. On February 26, 1971, Beardy's & Okemasis First Nation issued a band council resolution requesting negotiation of an agreement between DIAND and the Province of Saskatchewan regarding the effects of the 1904 drainage ditch on Duck Lake water levels and IR 96/97 lands. DIAND forwarded the band council resolution to the province on April 13, 1971. By that time, Beardy's & Okemasis First Nation had sought legal advice about the Rural Municipality of Duck Lake's liability for recent flooding.
53. The Province of Saskatchewan and DIAND observed that maintenance or lowering of the drainage ditch would cause considerable damage to agricultural lands and municipal roads downstream. Thereafter, Beardy's & Okemasis First Nation held discussions with the Province of Saskatchewan regarding the management of Duck Lake water levels.

54. In September 1976, the Province of Saskatchewan considered implementing a flood control project to lower the water level of Duck Lake. The Province of Saskatchewan and Beardy's & Okemasis First Nation continued discussions for several years without reaching agreement.

The 1949 Road Allowance

55. On January 26, 1948, Beardy's & Okemasis First Nation held a meeting where it consented to the surrender of a road allowance to the Rural Municipality of Duck Lake to connect the towns of Duck Lake and Carlton. A survey completed in June 1949 shows the road in question, but the Rural Municipality took no further action following the vote by Beardy's & Okemasis First Nation.

The 1953 Easement Under Section 35 of the Indian Act

56. In 1953, the Rural Municipality of Duck Lake applied for an easement on IR 96/97 to build roads. Beardy's & Okemasis First Nation recommended approval of the application without payment of any compensation. Canada recommended to the Governor in Council that the easement be granted as long as the lands were used for road purposes without charge. The easement was granted to the Rural Municipality on September 29, 1953 by Order in Council P.C. 1953-1500. In late 1953, Canada and the Rural Municipality signed an agreement allowing the Rural Municipality to use and maintain a public road on the associated lands for the nominal sum of \$1.00.

The 1958 Permit Under Section 28(2) of the Indian Act

57. On June 13, 1958, Beardy's & Okemasis First Nation issued a band council resolution authorizing Canada to grant the Rural Municipality of Duck Lake a permit to construct a grid road between the towns of Duck Lake and Carlton. The permit was granted under section 28(2) of the *Indian Act* on or about September 12, 1958. It was issued for the nominal sum of \$1.00.

The 1968 Transfer Under Section 35 of the Indian Act

58. On January 11, 1968, Beardy's & Okemasis First Nation issued a band council resolution allowing the transfer of the easements and rights of way previously granted from the Rural Municipality of Duck Lake to the Province of Saskatchewan. Order in Council P.C. 1968-300 on February 15, 1968 authorized the transfer of the lands in question to the Province of Saskatchewan, with the caveat that they would revert to Canada if used for anything other than public road purposes. The lands comprise those governed by the 1953 section 35 easement and the 1958 section 28(2) permit.

VI. Canada's Statement of Relief

59. Canada seeks the following relief:
- a. A determination of the amount for which Canada is liable for the admitted breaches of statutory and fiduciary duties to Beardy's & Okemasis First Nation;
 - b. Dismissal of the remainder of the Declaration of Claim; and
 - c. Such further relief as this Honourable Tribunal deems just.

VII. Communication (R. 42(g))

The Respondent's address for the service of documents is:

Department of Justice (Canada)
Prairie Regional Office (Saskatoon)
410 – 22nd Street East, 4th floor, Suite 410
Saskatoon, SK S7K 5T6
Attention: Lauri Miller and Jayme Anton

Facsimile number for service is: (306) 975-4030.

Email address for service is: sasSCT-5007-19-bdyokemfdrd@justice.gc.ca

Dated this 24th day of October 2019.



Lauri M. Miller

ATTORNEY GENERAL OF CANADA

Department of Justice

Prairie Regional Office (Saskatoon)

410 – 22nd Street East, 4th floor, Suite 410

Saskatoon, SK S7K 5T6

Fax: (306) 975-4030

Per: Lauri Miller and Jayme Anton

Tel: (306) 518-0747 / (306) 518-0718

E-mail address:

sasSCT-5007-19-bdyokemfdrd@justice.gc.ca

Counsel for the Respondent.