

SPECIFIC CLAIMS TRIBUNAL		
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May 24, 2016		
David Burnside		
Ottawa, ON	41	

SCT-3001-14

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

SHOAL LAKE NO. 40 FIRST NATION

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

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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Overview

Iskatewizaagegan No. 39 Independent First Nation (hereinafter “Iskatewizaagegan”) alleges that the Crown had a legal obligation to set aside as reserve land the islands upon which it had gardens (the Garden Islands) at the time of treaty, and that it 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. Iskatewizaagegan further alleges that the Garden Islands on the Manitoba side (the Manitoba Garden Islands) were unlawfully expropriated by the Greater Winnipeg Water District (GWWD), for which Iskatewizaagegan did not receive compensation.

The Crown admits that it had a treaty obligation to set aside as reserve 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 Crown asserts that the 4.5 Manitoba Garden Islands were lawfully expropriated. The Crown also asserts that the co-claimant Shoal Lake No. 40 was overcompensated for this expropriation, since some of the compensation paid to Shoal Lake No. 40 should have been paid to Iskatewizaagegan. Accordingly, the Crown admits that it owes compensation to Iskatewizaagegan for the expropriation of the Manitoba Garden Islands. The Crown also admits that it has an outstanding treaty obligation to set aside the 2.5 Ontario Garden Islands as reserve, but asserts that Iskatewizaagegan did not ever lose the use of the Ontario Garden Islands, as there is no evidence Iskatewizaagegan was prevented from gardening or gathering on these Islands.

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

1. 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.

2. By letter dated March 7, 2005, the Minister informed Iskatewizaagegan that Canada had accepted the “Garden Islands in the Indian Bay” claim for negotiation.
3. 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.”

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

4. The Crown admits that it has 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.
5. The Crown also admits that Iskatewizaagegan did not receive compensation for expropriation of the 4.5 Garden Islands situated in Manitoba.
6. The Crown denies the validity of all other aspects of Iskatewizaagegan’s Specific Claim, as set out in its Declaration of Claim, and denies that Iskatewizaagegan has suffered any other losses 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 or that the total compensation obtained was inadequate (though it admits that a portion of the compensation obtained should have gone to Iskatewizaagegan);
 - b) That Canada breached its fiduciary obligations to Iskatewizaagegan in respect of the Garden Islands by failing to act with ordinary prudence with a view to the best interests of Iskatewizaagegan and to preserve and protect Iskatewizaagegan’s interests in the Garden Islands from exploitation; and

- c) That Iskatewizaagegan suffered demonstrable financial losses related to the islands located in Ontario and Manitoba.

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, 16, 17, 19, 20, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33 and 34.
10. In response to paragraph 7, 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.

11. With respect to paragraph 16, the Crown admits the facts 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 Iskatewizaagegan is to have the islands on which they have gardens.
13. With respect to paragraph 21, the Crown admits the facts except that the quote should read "island," not "islands." However, the Crown admits that Iskatewizaagegan had gardens on more than one island.
14. With respect to paragraph 27, the Crown admits the facts except the sketch was marked "Surveyed in Sept. 1890," not "August 1890."
15. With respect to paragraphs 35 and 36, the Crown admits that it breached its treaty obligations by failing to set aside the Ontario Garden Islands indicated on Pither's 1892 sketch, and that Iskatewizaagegan is owed some compensation for the expropriation of the Manitoba Garden Islands, but otherwise denies these paragraphs.
16. In response to paragraph 37, the Crown denies that the expropriation of the Manitoba Garden Islands was unlawful or that the compensation obtained was inadequate, but admits that Shoal Lake No. 40 was overcompensated for the Manitoba Garden Islands expropriation, and that Iskatewizaagegan is owed some compensation.
17. The Crown denies paragraph 38.
18. In response to paragraph 39, the Crown denies Iskatewizaagegan is entitled to the relief claimed. Insofar as the Crown is liable in relation to the Ontario Garden Islands, the Crown asserts that there is no evidence of financial losses suffered by First Nations with respect to the islands.

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

Treaty No. 3 reserve provisions

19. 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.
20. 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.
21. The Treaty also provided that, as needed, the Crown could appropriate reserve lands for Public Works.

Iskatewizaagegan selects Garden Islands as reserve lands

22. 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

23. 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.

24. 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”.

25. 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.

26. 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

27. As noted in Ponton’s 1891 letter, the Garden Islands were farmed by both the co-claimant Shoal Lake No. 40 and Iskatewizaagegan. Accordingly, both bands had an interest in the Garden Islands.

Ontario & Manitoba interprovincial boundary

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

29. 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

30. *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.
31. 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.
32. 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.
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.
34. 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.
35. There was no deduction from the amount received by Shoal Lake No. 40 to account for Iskatewizaagegan's interest in the Garden Islands.

Lands set aside as reserve

36. 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.
- V. Relief (R. 42(f))**
37. The Crown seeks the dismissal of the Claim as described by Iskatewizaagegan in its

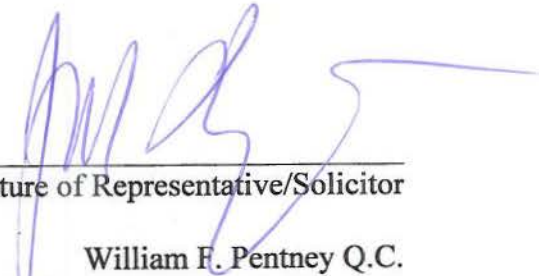
Declaration of Claim except the allegation regarding the compensation obtained for the expropriation of the Manitoba Garden Islands.

38. 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.
39. The Crown seeks costs in these proceedings.
40. Such other relief as this Honourable Tribunal deems just.

VI. Communication (R. 42(g))

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Dated: May 24, 2016



Signature of Representative/Solicitor

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