

**SPECIFIC CLAIMS TRIBUNAL**

B E T W E E N:

**BEARDY'S & OKEMASIS FIRST NATION 96/97**

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES	
F I L E D	July 30, 2019
Isabelle Bourassa	
Ottawa, ON	1

Claimant

v.

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA**

As represented by the Minister of Indian Affairs and Northern Development

Respondent

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**DECLARATION OF CLAIM**  
**Pursuant to Rule 41 of the**  
***Specific Claims Tribunal Rules of Practice and Procedure***

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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*.

July 31, 2019

\_\_\_\_\_  
Date

Isabelle Bourassa  
\_\_\_\_\_

Registry Officer

TO: Assistant Deputy Attorney General, Litigation, Justice Canada  
Bank of Canada Building 234 Wellington Street East Tower  
Ottawa, Ontario K1A 0H8  
Fax: (613) 954-1920

**I. Claimant (R. 41(a))**

1. The Claimant, the Beardy's & Okemasis First Nation, is a "First Nation" within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*. The First Nation is located near Duck Lake approximately 90 kilometres north of Saskatoon in the Province of Saskatchewan.
2. The First Nation is the successor in interest to the bands who signed Treaty 6 on August 28, 1876 near Fort Carlton. The Claimant may be referred to as "Beardy's", the "Band", or the "First Nation" when referred to in a modern context.

**II. Conditions Precedent (R. 41(c))**

3. 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

...

(b) three years have elapsed since after the day on which the claim was filed with the Minister and the Minister has not notified the First Nation in writing of his or her decision on whether to negotiate the claim; ...

4. This claim addresses alleged breaches by Canada relating to the unlawful taking and use of the First Nation's reserve lands for a drainage ditch and roads constructed on its reserve lands (hereinafter referred to as the "Flooding and Roads Claim" or the "Claim"). These uses and takings were without valid legal authority, without the consent of the First Nation, and without the payment of adequate compensation. Additionally, the Crown's failure to properly construct and maintain the drainage ditch on the reserve caused substantial flooding and damage to the First Nation's reserve lands.
5. The claim was filed with the Minister under Canada's Specific Claims Policy on November 10, 2015. Over three years have elapsed since the First Nation filed the Claim with the Minister.

**III. Claim Limit (Act, s. 20(1)(b))**

6. The First Nation does not seek compensation in excess of \$150 million for the Flooding and Roads Claim.

**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*:

**14(1)** Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:

...

(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;
- (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))

### *Treaty 6 and Setting Apart of the Claimant's Reserve*

8. In 1876, the Crown and the Plains and Wood Cree Indians in what is now central Saskatchewan entered into Treaty 6. The Treaty covered an area of 121,000 square miles of land in exchange for various promises and Treaty benefits to be provided by the Crown, including reserve lands for each band based on one square mile per family of five.
9. On August 28, 1876, at Fort Carlton, the Joint Chiefs of the Willow Cree, Kah-pay-yak-wahsk-oo-num" (Beardy) and "See-see-quan-ish" (Okemasis), adhered to Treaty 6 near Fort Carleton. The Willow Cree lived in the area around Duck Lake.
10. In June 1878, the "Chief of Duck Lake Indian Tribe" sent a petition to the Governor General of Canada requesting a reserve at Duck Lake be surveyed for them.
11. When Dominion Land Surveyor Reid arrived at Duck Lake in July 1879, Beardy refused to accept the reserve. Chief Beardy wanted the lands surrounding Duck Lake and extending two miles back from the shoreline. Reid informed Beardy that the consequence of holding out for this land would be that all the desirable lands would be taken up by settlers.
12. Faced with this threat, Beardy relented and in 1879-1880, Dominion Land Surveyor Reid surveyed a joint reserve for the Beardy's and Okemasis Bands to the west and north-west of Duck Lake, which included only a small part of Duck Lake. The townships in the area were also surveyed at that time, as well as the Carleton to Duck Lake Trail. This trail ran through the reserve for approximately 3½ miles.
13. Dominion Land Surveyor Nelson completed the official survey of Beardy's and Okemasis Indian Reserve Number 96/97 (undivided) in August 1887 and July 1888. Nelson added lands that had been omitted in error and which were essential haylands for the Band, as well as including on the survey the Carlton to Duck Lake Trail running approximately 3½ miles through the reserve. John C. Nelson approved the survey of Indian Reserve No. 96/97 (undivided) ("IR 96/97") on January 23, 1889.
14. By Order in Council P.C. 1151 dated May 17, 1889, "INDIAN RESERVES NOS 96 AND 97 (UNDIVIDED)" was set aside for the bands of Chiefs Beardy and Okemasis. The reserve was 44 square miles (28,160 acres) in size.
15. On September 17, 1889, Order in Council P.C. 2173 transferred the Carlton to Duck Lake Trail from the Dominion Government to the North-West Territories, including the part of the trail within IR 96/97.
16. On June 12, 1893, Order-in-Council P.C. 1694 removed the reserve lands confirmed by Order in Council in 1889 from the operation of the *Dominion Lands Act*.

***The 1904 Drainage Ditch***

17. In 1902, the Department of Public Works proposed the construction of a drainage ditch on IR 96/97. The ditch would divert water from the lake onto the reserve which would benefit off reserve farmers who owned haylands along Duck Lake, as well as assist in draining nearby roads and road allowances. The proposed ditch would run for 3400 feet, extending from the northern tip of Duck Lake on IR 96/97 across the Carlton Trail to a muskeg pond which would eventually drain off the reserve.
18. Although Public Works stated in January 1903 that extending the ditch an additional 3000 feet would allow for better drainage (a drop of 6.1 feet instead of only 2.5 feet), there would be physical difficulties and extra cost with doing so. Public Works decided to construct the ditch to drop only 2.5 feet which meant the waters would drain onto more of the reserve.
19. On July 15, 1904, Indian Agent Macarthur reported that the ditch would also benefit the Band, and the Band gave its “sanction” for the ditch being constructed without compensation for the reserve lands. The Band in 1904 had no Chief or Councillors, and did not have an elected Chief or Councillors until 1936.
20. On July 27, 1904, the Deputy Superintendent General of Indian Affairs gave approval to the Territorial Government to construct the drainage ditch on IR96/97.
21. The drainage ditch on IR 96/97, known as Government Drain No. 141, was constructed sometime in August 1904. The ditch crossed the Carlton to Duck Lake trail on the reserve and was 3400 feet in length, approximately 30 feet wide at the top, 2.5 feet deep, and occupied 9.05 acres of IR 96/97. No compensation was paid to the First Nation.
22. The drainage ditch functioned from 1904 until around 1919, at which time it ceased to function due to silting, as had been predicted in 1904. No plans had been made for maintenance of the ditch, nor was there evidence that any maintenance was done. By 1921, the drain was in disrepair and no longer functioned properly.
23. By 1950, the drain was completely blocked. In 1955, waters returned to Duck Lake and flooded the reserve. Since then, other than two droughts in the 1960s and early 2000s, the floodwaters remained on the reserve.

***The 1949 Road***

24. Although Duck Lake dried up in the early 1940s, the water returned in 1948. The northwest portion of Duck Lake was no longer connected with the main body of the lake.
25. On January, 26, 1948, a band meeting was held to vote on the “surrender” of a 7-mile road allowance from west to east across IR 96/97 to connect the towns of Carlton to the west and Duck Lake to the east. This road allowance ran along the dried-up lakebed between the northwest portion of Duck Lake and the main body of the lake. The vote was 47 for, 2 against and 20 were absent.
26. On January 29, 1948, the Inspector of Indian Agencies reported that “a good majority” of the Band had approved a road seven miles in length to be constructed on its reserve. There was no formal surrender and no Order in Council. A survey of the reserve in June 1949 showed the road cutting across the reserve through section 6.

***The 1953 Taking***

27. By Order in Council dated September 29, 1953, the Rural Municipality of Duck Lake was granted an easement under section 35 of the *Indian Act* for two parcels of land: a road constructed east to west across IR 96/97 known as the Lake Road, from Duck Lake to Carlton, and the portion of the Carlton to Duck Lake trail that passed through section 7. This was the portion of the road allowance that had previously been underwater. No compensation was paid to the First Nation.

***The 1958 Section 28(2) Permit***

28. In 1958, the Rural Municipality of Duck Lake decided to change the entire length of the Carlton to Duck Lake Trail within IR 96/97 into a grid road.
29. A BCR on June 13, 1958 authorized the Minister of Citizenship and Immigration to grant a section 28(2) permit under the *Indian Act* to the Rural Municipality to use the road from Carlton through the reserve to the northeast corner of the reserve, and then onward to the town of Duck Lake. The section 28(2) permit was issued on August 8, 1958 for \$1.

***The 1968 Section 35 Taking***

30. By Order in Council P.C. 1968-30 dated February 15, 1968 Canada allowed the taking of two parcels of land on IR 96/97 pursuant to section 35 of the *Indian Act*: a north-south road allowance (60 acres) and the entire Carlton to Duck Lake Trail within the reserve which had previously been the subject of the section 28(2) permit (41.84 acres). No compensation was paid to the First Nation.
31. A map of the drainage ditch and the roads on IR 96/97 is attached as Schedule A.

**The Basis in Law on Which the Crown is said to have failed to meet or otherwise breached a lawful obligation:**

32. In light of the foregoing, the Flooding and Roads Claim is brought on the grounds that Canada breached its statutory, fiduciary and honourable obligations to the Claimant when it allowed the use and occupation of the First Nation's reserve lands for the 1904 drain, and for the alienation of reserve lands for roads in 1949, 1953, 1958 and 1968.
33. With respect to the 1904 construction of the drainage ditch on the First Nation's reserve, the Crown breached its statutory and fiduciary obligations by acting without legal authority in constructing the drain, by negligently allowing the drain to be improperly designed and then constructed, by failing to ensure that the drain was properly and adequately maintained, and by failing to obtain adequate compensation for the First Nation.
34. With respect to the roads, the Crown failed to obtain proper compensation for the takings of the road allowances and failed to comply with the relevant legislation.
35. At all times in relation to the drain and the roads, the Crown failed to comply with the honour of the Crown.

***The 1904 Drainage Ditch***

36. The drainage ditch constructed on IR 96/97 in 1904 was built without legal authority and constituted trespass on reserve lands. There was no valid surrender, expropriation or other authority to take reserve lands, in breach of the Crown's statutory and fiduciary obligations.
37. The Crown breached its fiduciary obligations owed to the First Nation relating to all aspects of the construction, operation and maintenance of the 1904 drainage ditch. The Crown failed to advise and consult with the First Nation regarding the construction of the ditch, and failed to divulge that the drain was being constructed shoddily and inadequately due to cost concerns. The drainage ditch was constructed without ensuring ongoing provision for maintenance. The Crown failed to minimize the effects of flooding on the reserve by constructing the drain 3000 feet shorter than was recommended due to financial considerations. The Crown failed to provide any compensation for the lands used for the drain.

***The 1949 Road Allowance***

38. The 1949 road allowance for the Lake Road running west to east through the middle of IR 96/97 was taken without valid legal authority. A "surrender" vote was taken, but was not done according to the provisions of the *Indian Act*. The First Nation received no compensation for this reserve land.

***The 1953 Taking of Reserve Lands***

39. The 1953 taking of the road allowance on the Duck Lake lakebed and the portion of the Carlton to Duck Lake Trail did not follow the proper procedure under section 35 of the *Indian Act*. It was done primarily for the benefit of off-reserve farmers, and no compensation was paid to the First Nation.

***The 1958 Section 28(2) Permit***

40. The section 28(2) permit issued in 1958 for the entire Duck Lake to Carlton trail within IR 96/97 was issued in breach of the Crown's statutory and fiduciary obligations and was done without adequate compensation (\$1) being paid. In effect, it was a section 35 taking but the correct process was circumvented.

***The 1968 Taking of Reserve Lands***

41. The 1968 taking of approximately 100 acres of IR 96/97 for road purposes did not follow the proper procedure under section 35 of the *Indian Act*, and was done without compensation to the First Nation.

**VI. Relief Sought**

42. In light of the foregoing, the First Nation seeks the following relief:
- a) Equitable compensation for the reserve lands taken for the drainage ditch in 1904, plus current unimproved market value of the land taken for the drain, and loss of use of those lands;

- b) Equitable compensation for the flooding and damage on IR 96/97 as a result of Canada's failure to ensure that the drainage ditch was properly constructed and subsequently maintained, including the failure to implement the Duck Lake Flood Control Project. The First Nation is entitled to compensation for losses—past, present, future—it suffered and continues to suffer by virtue of Canada's mismanagement of its lands;
- c) With respect to the road and road allowances, compensation for the current unimproved market value of the lands taken for road purposes, and loss of use of those lands;
- d) Equitable interest;
- e) An award of solicitor-client costs pursuant to the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119, section 110(2) in relation to the specific claim and this proceeding; and
- f) Such other damages, compensation or interest as this Honourable Tribunal deems just.

Dated this 30<sup>th</sup> day of July, 2019 at the City of Calgary in the Province of Alberta.

**MAURICE LAW**



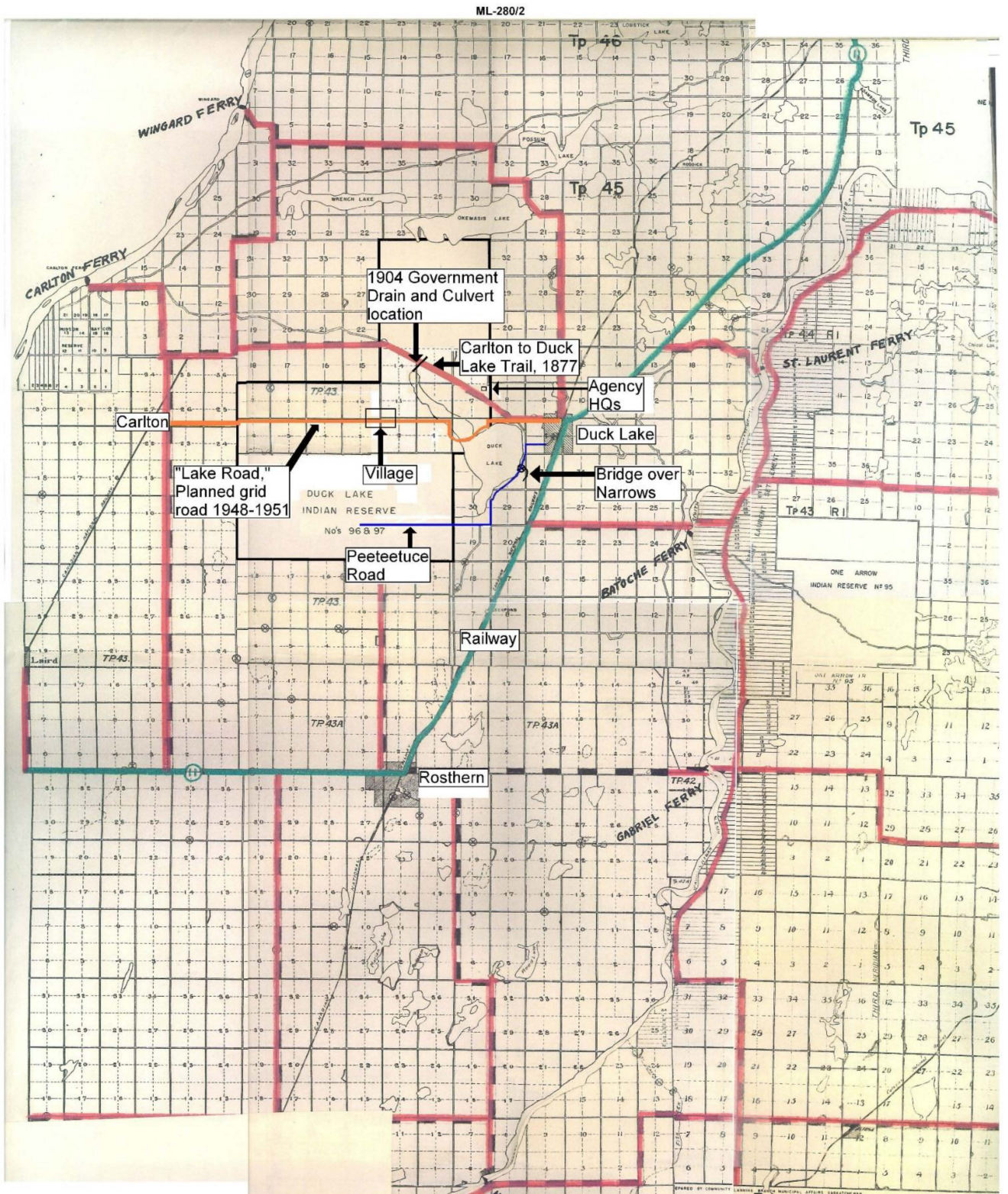
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Schedule A: Beardy's & Okemasis Indian Reserve 96/97: Roads and Drainage Ditch



L.F. McIntosh Papers, Minister of Municipal Affairs, 65-1, A-M189, Saskatchewan Archives Board, Regina, Saskatchewan.