

**SPECIFIC CLAIMS TRIBUNAL**

SPECIFIC CLAIMS TRIBUNAL		
TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES		
F I L E D	December 21, 2016	D E P O S É
David Burnside		
Ottawa, ON	1	

BETWEEN:

OJIBWAYS OF ONIGAMING FIRST NATION (INDIAN BAND) and  
BIG GRASSY (MISHKOSIIMIINIIZIIBING) FIRST NATION (INDIAN BAND)

Claimants

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*.

December 21, 2016

David Burnside  
(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 Claimants, Big Grassy (Mishkosiimiiniiziibing) First Nation and Ojibways of Onigaming First Nation are First Nations within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*.

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

2. The following condition precedent as set out in s. 16(1) of the *Specific Claims Tribunal Act*, has been fulfilled:

The condition precedent in s.16(1), subsection (a) has been fulfilled.

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

3. For the purposes of the claim, the Claimants do not seek compensation in excess of \$150 million.

**IV Grounds (Act, s. 14(1))**

4. The following are the grounds for the specific claim, as provided for in s. 14 of the *Specific Claims Tribunal Act*:

- i. failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty,
- ii breach of a legal obligation of the Crown under the *Indian Act*,
- iii breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, or its administration of reserve lands or other assets, and
- iv failure to provide adequate compensation for reserve lands taken or damaged by the Crown under legal authority,

contrary to s.14(1), subsections (a) (b) (c) and (e).

## **V Allegations of Fact (R. 41(e))**

5. The Claimants were formerly one “band” of Indians, known as the Assabaska Band.
6. Lands now known as Indian Reserve 35J (or Zhaagweshi Gaming in the Ojibway language), composed of islands located in Sabaskong Bay in the southeast part of Lake of the Woods, Province of Ontario, have been used and occupied by the Assabaska Band since time immemorial. These islands were used for resource harvesting, ceremonial, residential and other purposes.
7. On October 3 1873 the part of the Anishinaabe Nation to which the Assabaska Band belonged made a treaty with the Crown, known as Treaty 3. One of the terms of Treaty 3 was that reserves of land would be set aside. This was to be done by the Crown as soon as possible after the Treaty, and was to involve consultation with the applicable band, followed by a survey of the land.
8. Another term of Treaty 3 respecting the reserves was that “any interest or right thereon or appurtenant thereto may be leased sold or otherwise disposed of” by the Crown, but only “with the consent of the Indians entitled thereto first had and obtained”.
9. The principal treaty commissioner, Alexander Morris, recommended both in his official report following the treaty and in February 1874 that Canada grant no permits for lumbering until the Indian reserves had been set aside.
10. Beginning shortly following the treaty First Nation representatives repeatedly pressed Canada to get the reserves set aside lest they be trespassed on by non-Indians.
11. In 1874 Canada was in ongoing negotiations with one R. Fuller and others for a proposed lease of timber harvesting rights (the “Fuller lease”). The lease would cover 60 square miles in the north part of Lake of the Woods, mostly on islands.

12. Lake of the Woods is divided into north and south parts by the Aulneau Peninsula, a large land mass in the middle of the lake attached to the eastern shore.
13. One of the Crown commissioners who negotiated Treaty 3 in 1873, Simon Dawson, was appointed commissioner to meet with the Indian bands to select and set aside the reserves. In March 1874 Dawson advised Canada that the proposed Fuller lease should be subject to the consent of the Indians if it covered land to be set aside as reserves under the treaty. At this time Dawson submitted a preliminary report emphasizing the importance to the Indians of islands in Lake of the Woods.
14. Surveyor General J.S. Dennis recommended that a lease to Fuller be approved, and in accordance with Dawson's recommendation that it should be subject to the consent of the Indians if it covered land to be set aside as reserves under the treaty. Approval for a lease was given by Order in Council dated March 2, 1874, but the lease itself was not granted until 1875 as stated in paragraph 22 herein. The approved lease would provide for substitute land to the lessee where no consent from the Indians was given. The lease would be for "the islands in the north part of Lake of the Woods".
15. Canada engaged surveyor L. Kennedy to survey the lands to be covered by the lease.
16. On June 26 1874 Canada and Ontario entered into an agreement setting a provisional western boundary for the province, and providing that the two governments would confirm land titles given by the other if the final boundary turned out to be different. This agreement was enlarged in 1878 so as to include all leases and licenses, and continued in effect until 1883.
17. In July 1874, the proposed Fuller lessees obtained what they called consent from Indians to harvest wood on "Islands in the Northern part of" Lake of the Woods. If actually given the consent was not from any representative of the Assabaska Band, nor was it given to the Crown, nor was it given in accordance with the procedural requirements and safeguards in the relevant federal legislation (S.C.1868, c.42, ss. 6, 8) or the principles

stated in the Royal Proclamation of 1763 or the Treaty 3 provision regarding “any interest or right therein or appurtenant to” the reserves, as referred to in paragraph 8 herein.

18. In the early fall of 1874 Dawson met with representatives of the Assabaska Band for selection of their reserves. Earlier reports made clear that he knew the Assabaska Band had important established interests in islands in Sabaskong Bay in the southeast part of Lake of the Woods. There is no evidence that the proposed Fuller lease was disclosed to the Assabaska Band by Dawson or by any other Crown representative, nor that there was any communication about the consent supposedly given in July for this proposed lease.
19. In his report of the 1874 reserve selection meetings Dawson referred to the reserve land to be set aside for the Assabaska Band as “chiefly on the islands” but he did not describe the land exactly. He prepared and submitted a map showing the land but this map has been lost from the Crown’s records. In his report he recommended, with respect to the Assabaska Band:

*Both the islands and coasts of this district should be surveyed so that the Reserves of the Indians may be properly laid off.*

20. In January 1875 Surveyor General Dennis instructed surveyor C.F. Miles to commence surveying reserves for the Assabaska Band based on Dawson’s reports and map.
21. In June 1875 the survey work of L. Kennedy in the north part of Lake of the Woods for the proposed Fuller lease was ended due to its expense to the Crown. Kennedy’s plan of survey to that date showed that the lease would cover islands and other land north of what is known as “the narrows” of the Lake, at the western end of the Aulneau Peninsula.
22. The Fuller lease was formally granted by Canada on July 22, 1875, for a term of 21 years. It was issued pursuant to the *Dominion Lands Act* (1872) so the rights given under the lease were subject to any “previous lease, sale, grant or setting apart” (s. 52).

23. The lands covered by the lease are not described as being “in the north part of Lake of the Woods”, as approved by the Order in Council of March 2, 1874 referred to in paragraph 14 herein and as surveyed by L. Kennedy, but as:

*... all of the Islands in the Lake of the Woods north of the steamboat channel.*

24. This change effectively added the islands in Sabaskong Bay, which lies south of the Aulneau Peninsula, to the Fuller lease.

25. Simon Dawson had not completed setting aside the reserves in 1874 so Surveyor General J.S. Dennis was assigned in 1875 to continue the process. Like Dawson, he knew about the Fuller lease, but there is no evidence that it was disclosed or discussed when he met with the Assabaska Band representatives in October 1875. On October 5, he made a list with descriptions of the band’s reserves, nine in number, including:

*9<sup>th</sup> two certain islands near Mink Portage, not far from Na-ou-goshing*

26. Even without a more precise description it was clear that these islands were in Sabaskong Bay, south of the Aulneau Peninsula.

27. Immediately after his meeting with the Assabaska Band in October 1875 Dennis instructed surveyor C.F. Miles to proceed with surveys of the reserves, but Miles did not do so at that time. Miles did, however, acting for the lessee, survey areas covered by the proposed Fuller lease in October and November of that year.

28. In 1879 Surveyor Miles proceeded to survey some of the Assabaska Band reserves, but not Reserve 35J. There is no clear record of why he failed to complete a survey of Reserve 35J, nor of why Canada did not require him to do so. The islands composing this reserve contained valuable timber and were within the area covered by the Fuller lease since its geographic coverage had been expanded in 1875 to include islands in Sabaskong Bay.

29. In 1878 an arbitration decision placed the Ontario provincial boundary considerably west of the provisional boundary used in the 1874 agreement referred to in paragraph 16 herein. The revised boundary would enclose much of the territory covered by Treaty 3 including lands that would be set aside as the Assabaska Band's reserves, including Reserve 35J.
30. The more westerly Ontario boundary displeased Canada. It also created ambiguity regarding land rights in the large additional area that would fall within Ontario. This part of what is now Northwestern Ontario became known as the "disputed territory".
31. The disputed territory matter caused 40 years of intra-Crown conflict, including:
- a. Litigation regarding Canada's ability if any to grant land rights within the disputed territory after the provisional boundary agreement ended, which did not conclude until Canada lost in court in 1888 (the "*St. Catherines Milling case*"). In this case Canada wanted the revenue from timber cut under its licences in the disputed territory.
  - b. Litigation regarding Canada's right to sell Indian reserve land that had been surrendered for sale, which did not conclude until Canada lost in court in 1902 (the "*Seybold case*"). In this case Canada wanted private parties to whom it had made grants to have the title including mineral rights in surrendered Indian reserve land.
  - c. A monetary claim by Canada against Ontario first in arbitration then in litigation, which was not concluded until Canada finally lost in court in 1910 (the "*Treaty 3 annuities case*"). In this case Canada wanted reimbursement from Ontario of Crown costs incurred in connection with the making and implementing of Treaty 3.

32. Ontario respected the 1874 provisional boundary agreement to the extent of adopting land surveys made by Canada and honouring land rights given by Canada to non-Indians during the term of the agreement, such as the Fuller lease, but it questioned the Indian reserves that had been set aside by Canada during the same period.
33. In January 1890 Canada provided Ontario with copies of surveys of the Indian reserves under Treaty 3, but not Reserve 35J, which had not yet been surveyed.
34. Reserve 35J was finally surveyed by A.W. Ponton in July 1890, but Canada did not provide Ontario with a copy of the survey, or any detailed information about the location of the reserve.
35. In May 1891 Ontario and in July 1891 Canada enacted reciprocal and substantially identical legislation (S.C. 54-55 Victoria, c. 5, S.O. 54 Victoria c. 3) dealing with the Indian reserves that Canada had set aside within the recently clarified boundaries of Ontario. The Acts called for Ontario to make full enquiry and either acquiesce in the reserves, or a commission or commissions would be established to settle disagreements.
36. Following this legislation Canada continued to administer the Treaty 3 reserves under the *Indian Act*, as it had been doing previously.
37. In November 1891 Ontario negotiated with the Keewatin Lumbering and Manufacturing Company (KLMC), as assignees of the rights under the Fuller lease, and arrived at terms that continued the lease holder's right to harvest timber on islands that would include islands in Sabaskong Bay, and thus included the ones composing Reserve 35J. Ontario agreed to give KLMC harvesting rights for 10 years.
38. In 1898 KLMC established a camp and proceeded to cut large quantities of timber on Reserve 35J. The Assabaska Band immediately notified Canada, and was told not to interfere with the logging operation but to "rest assured" that its interests would be protected.



39. Canada made enquiries of Ontario about the cutting but was told Ontario had no knowledge that the land was a reserve. Since the 1891 legislation referred to in paragraph 35 herein and as of 1898 Canada was managing the Treaty 3 reserves including Reserve 35J under the provisions of the *Indian Act*, and Ontario was refraining from dealing with lands set aside as Treaty 3 reserves, pending completion of the process called for by the legislation. This informal arrangement was not in place for Reserve 35J because Canada had not given notice to Ontario of its location despite having been selected in 1874 or 1875 and set aside no later than 1890.
40. Although Ontario had agreed to give rights to KLMC for 10 years commencing in 1891 Ontario was only able under the relevant provincial legislation (*Act Respecting the Timber on Public Lands*, RSO 1887, c. 28, s. 1) to grant annual licences, and KLMC had no such licence in 1898. Neither did KLMC have any continuing rights under the Fuller lease.
41. The Assabaska Band refused to give a surrender of its rights, or otherwise consent to the cutting of the timber on Reserve 35J.
42. In October 1902, the Assabaska Band petitioned directly to Clifford Sifton, Minister of the Interior and Superintendent General of Indian Affairs. No reply was given by him but the Department of Indian Affairs advised that the Band's interests would be "faithfully protected". Mr. Sifton had extensive close and confidential business connections with John Mather, President of KLMC.
43. In 1915, Ontario acquiesced in and confirmed most of the Treaty 3 reserves, as called for in the 1891 legislation, and transferred the underlying Crown title to Canada including Reserve 35J.
44. The Assabaska Band continued to complain about its loss of timber on Reserve 35J, and failure of Canada to honour its several promises to protect its interests and make good the

loss. This included a complaint in 1919, to which Canada replied that “proper attention” was being paid to the matter.

45. Finally, in 1922 Canada obtained from Ontario the amount that Ontario said it was paid by KLMC in or about 1898 for royalties for the timber cut from Reserve 35J. This \$3,544 was credited to the Assabaska Band’s trust account maintained by Canada.
46. The \$3,544 amount represented \$1 per 1000 board feet, a specially negotiated low rate paid by KLMC to Ontario, with no interest added for the intervening years to 1922. It did not reflect prescribed royalties and other required payments that would have been collected for lawfully taken timber under either federal or provincial legislation and regulations of the time.
47. Canada took no effective steps to ensure that there was a clear record of the quantity and quality of wood taken from Reserve 35J either at the time of the taking, or afterward.
48. Under the *Indian Act*, R.S.C. 1886, c. 43, in force in 1898, when the timber was taken, a formal surrender by the band was required. In regulations under the Act any such properly surrendered timber had to be surveyed, valued, and offered by public tender. Royalties dues and other payments at prescribed rates were required to be paid for the benefit of the surrendering band, including interest. Any taking of timber outside the Act and regulations was a trespass and subject the trespasser to seizure and forfeiture of timber, payment of multiples of the basic timber dues, and other penalties.
49. At no relevant time was a surrender of the timber on Reserve 35J or any part of it given by the Assabaska Band or its successors, nor was the timber expropriated by a competent authority. Neither the Assabaska Band nor its successors gave to the Crown any consent under the treaty or otherwise to take timber from Reserve 35J.
50. The Assabaska Band divided into the two Claimant First Nations in or about the year 1964.

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

51. Under Treaty 3 reserves were to be selected and set aside by Canada in consultation with the First Nations. This was done for Reserve 35J in 1874 and 1875, as stated herein at paragraphs 18, 19, 25 and 34 herein. Under the treaty, Canada also obligated itself to carry out surveys of the reserves. Canada failed to do so for Reserve 35J until 1890, and then failed to provide Ontario with particulars of the location of the reserve with the result that Ontario's licensee KLMC stripped the reserve of large quantities of valuable timber in 1898.
52. In the course of the intra-Crown conflict associated with the disputed territory matter, referred to in paragraph 31 herein, Canada had internal advice that it was putting Indian rights at risk and that it would be better to not press weak claims in court. In particular, after the 1891 legislation referred to in paragraph 35 herein Canada had advice that it should not pursue the claim but instead complete the process of obtaining Ontario's acquiescence in the Treaty 3 reserves. Despite this the *Treaty 3 annuities* case continued. It was under the direction of the Department of Finance, which successfully imposed its agenda of attempting to obtain money from Ontario over that of the Department of Indian Affairs which wanted to complete the reserves process.
53. If Canada had acted promptly, diligently and in the interests of the First Nations, instead of advancing its own ill-founded money claims against Ontario, and worked in a reasonable time with Ontario to obtain acquiescence in the reserves, Reserve 35J would not have remained in an ambiguous status in 1898, 25 years after the treaty, when the timber was taken.
54. During the intra-Crown conflict associated with the disputed territory matter, the First Nations under Treaty 3 were neither informed nor consulted, nor were they provided with access to independent advice. In this period the reserves lingered in an ambiguous status

for approximately 40 years, exposing the First Nations to loss, which in the case of Reserve 35J occurred in 1898 when it was stripped of valuable timber. Canada acted in its own interests and without due regard for those of the First Nations during this lengthy period.

55. The Claimants say that:

- a. Canada's granting and administration of the Fuller lease despite its glaring conflict with the Claimant's land interests, in particular by enlarging its geographic scope to include islands in Sabaskong Bay, and also by acting on a supposed consent of Indians that was legally void and in any event not given by the Assabaska Band,
- b. Canada's failure to advise the Assabaska Band at the time its reserves were being selected in 1875 that islands in Sabaskong Bay had already been leased for timber harvesting,
- c. Canada's failure to deal effectively and in a reasonable time with the consequences its "disputed territory" issues with Ontario, and in particular Canada's pursuit of monetary interests so as to expose the Claimant's land interests to loss.
- d. Canada's failure to diligently follow up and implement the selection and setting aside of Reserve 35J, by having it surveyed, as required by Treaty 3,
- e. Canada's failure to inform Ontario of the location of Reserve 35J,
- f. Canada's failure to intervene effectively when logging was carried out on Reserve 35J in 1898,
- g. Canada's failure to recognize that the logging was not legally authorized by either Canada and Ontario,

- h. Canada's failure to conduct itself properly such as by appointing independent counsel for the Assabaska Band when the responsible Minister of the Crown was in a conflict of interest through his connections with KLMC, the company doing the logging, and
- i. Canada's unilateral undertakings given to the Assabaska Band, as referred to in paragraphs 38, 42 and 44 herein, to protect the band's interests, and its failure to do so;

led to the value of the timber resource on Reserve 35J being lost to the Claimants. The Claimants say that the above constituted breach of fiduciary duty, and was contrary to the honour of the Crown. It was also a breach of the term of Treaty 3 referred to in paragraph 8 herein.

56. The fiduciary relationship between the Crown and First Nations serves as a guiding principle for assessing the appropriateness of Crown conduct. Treaty 3 clothed the Crown with discretion to deal with the treaty land free of Aboriginal interests. Canada assumed and exercised power respecting the rights of First Nations to have their reserves created, including completion of land surveys and dealing with the provincial government, and thus had a fiduciary duty to the Assabaska Band.
57. When Reserve 35J was selected and set aside the Assabaska Band gained a distinct cognizable interest in the land and the timber on it. It was incumbent upon Canada to act reasonably and with diligence in the best interest of the Band to protect this band interest but Canada instead committed the errors and failures outlined in paragraph 55 herein and at all relevant times failed to consult with the Assabaska Band.
58. The Claimants say that the purpose of reserves under Treaty 3, as discussed in the treaty negotiations, was to assure availability of land capable of providing for economic growth and cultural survival. It was contemplated at the time of the treaty that First Nations would be entitled to the income from the sale of timber and other resources on the

reserves. The timber on Reserve 35J was not, however, available to the Band as a source of income, due to Canada's failures as stated above.

59. Due to extensive losses and damages to its land and resource rights in its traditional territory the Assabaska Band was reduced to destitution and penury in the latter part of the 19th and early part of the 20th century. Its population declined and was weakened by hunger, disease, and want. These dire circumstances did not begin to reverse until funds from sales of timber, and the funds from Ontario referred to in paragraph 45 herein, became available such that the Band had sufficient money resources to assist its people.
60. If the Assabaska Band had received full and appropriate compensation in 1898 when the timber was taken, or if it could have harvested and sold the timber at the most advantageous times and for the most advantageous prices on its own account or through the processes under the *Indian Act*, the suffering referred to in paragraph 59 would not have occurred or would have been less severe.

61. The Claimants claim

- a. the present value of:
  - i. the net revenues that could have accrued to the Claimant at any time after 1875 from the harvesting and sale of the aforesaid timber if it had not been cut in 1898 but instead was managed in the most advantageous manner for timber production; or in the alternative
  - ii. the fair market value in 1898 of the timber taken from Reserve 35J at the best sale location that could reasonably have been accessed at the time, without deduction for the costs of harvesting, shipping or any other costs of production;

to the date of the Order of this Tribunal,

b. less the present value of \$3,544, and

c. their costs

Dated: December 21, 2016



---

Donald R. Colborne  
Barrister and Solicitor  
1125 Fort Street  
Victoria BC V8V 3K9  
Telephone 250-386-6628  
Fax 250-386-6638  
Email: [drcolborne@shaw.ca](mailto:drcolborne@shaw.ca)