

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES	
October 22, 2015	
Nicholas Young	
Ottawa, ON	8

**SCT File No.:** SCT-3001-14

**SPECIFIC CLAIMS TRIBUNAL**

**BETWEEN:**

SHOAL LAKE #40 FIRST NATION

Claimant

v.

HER MAJESTY THE QUEEN IN RIGHT OF CANADA  
As represented by the Minister of Indian Affairs and Northern Development

Respondent

-and-

ISKATEWIZAAGEGAN N0.39 INDEPENDENT FIRST NATION

Applicant

**APPLICATION FOR LEAVE AND APPLICATION FOR INTERVENOR  
STATUS**

**Pursuant to Section 25(1) of the  
*Specific Claims Tribunal Act* and Rules 29, 30, 31, 34, 40 and 45 of the *Specific  
Claims Tribunal Rules of Practice and Procedure***

TO: SHOAL LAKE #40 FIRST NATION

As represented by Bruce McIvor  
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AND TO: HER MAJESTY THE QUEEN IN RIGHT OF CANADA

As represented by Paul Anderson/Lisa Cholosky  
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## **APPLICATION FOR LEAVE and APPLICATION FOR INTERVENOR STATUS**

### **I. RELIEF SOUGHT**

**TAKE NOTICE** than an application will be made on behalf of the Applicant, ISKATEWIZAAGEGAN N0.39 INDEPENDENT FIRST NATION (“Iskatewizaagegan”), before the Specific Claims Tribunal (the “Tribunal”), at a time and place to be determined by the Tribunal, for the following relief:

- a) An order for leave of the Tribunal to bring an application pursuant to Rule 30 and 44 of the Specific Claims Tribunal Rules of Practice and Procedure (the “Rules”);  
and
- b) An order that the Applicant be granted intervenor status in the within action pursuant to Section 25 of the Specific Claims Tribunal Act (the “Act”).

### **II. GROUNDS**

**TAKE NOTICE** that this application is brought on the following grounds:

1. The Declaration of Claim in *Shoal Lake #40 First Nation v. Her Majesty the Queen in Right of Canada* (SCT-3001-14) (the “Claim”) asserts Canada breached and failed to

fulfill its treaty and legal obligations as well as its fiduciary duty to the Shoal Lake #40 First Nation in failing to set aside as reserve lands certain islands (the "Garden Islands") that Shoal Lake #40 First Nation had used as gardens at the time of Treaty #3. The Claim further asserts that Canada also breached and failed to fulfill its treaty and legal obligations as well as its fiduciary duty to the Shoal Lake #40 First Nation in failing to protect the Garden Islands from expropriation and exploitation.

2. The Claim asserts that Canada breached its treaty and legal obligations to the First Nation in its failure to set aside certain islands in Shoal Lake (the "Garden Islands") as reserve lands as provided for by the terms of Treaty #3 and by the promises made pursuant to the Treaty, and in the unlawful taking of the Garden Islands located in Manitoba and for Canada's failure to obtain adequate compensation in respect to the expropriation of the Garden Islands.
3. Canada's Response in the Claim states, and the fact is, that the Applicant has an interest in and holds in common the Garden Islands.

#### *The Garden Island Claim*

4. Iskatewizaagegan is a Treaty #3 (the "Treaty") First Nation with reserve lands located in the vicinity of Indian Bay, Shoal Lake.
5. The provincial borders, which were created after the Treaty, between Ontario and the Province of Manitoba ("Manitoba") passes through Indian Bay. Some of the Garden Islands in Indian Bay are in Manitoba. The others are located on the Ontario side of Indian Bay.
6. Canada does not currently neither recognizes the Garden Islands as part of Iskatewizaagegan's reserve lands, nor does Canada acknowledge Iskatewizaagegan's Indigenous Lands as being integral to the survival of Iskatewizaagegan Peoples.

7. On October 3, 1873, Her Majesty the Queen by her Commissioner representatives and certain First Nations of the Saulteaux Tribe of Ojibway Indians, by their respective representatives, concluded the articles of the Treaty. Chief She-she-Gance from Iskatewizaagegan put his mark on the Treaty on behalf of the First Nation.
8. Under the terms of the Treaty, the Crown was obligated to "lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians."
9. The Treaty states that Canada is responsible for selling, leasing or otherwise disposing of the reserves of lands "or any interest or right therein or appurtenant thereto ... with the consent of the Indians entitled thereto first had and obtained."
10. Under the terms of the Treaty, the Crown and the First Nations agreed that Canada may appropriate sections of the reserves that may be "required for Public Works or buildings ... for that purpose" provided that the First Nation received compensation for the value of any improvements on the reserves appropriated.
11. On March 2, 1874, Mr. S.J. Dawson, a Treaty Commissioner, submitted a report regarding reserve allocations in which he noted that the islands of the Lake of the Woods were the primary farm lands of the First Nations of that area and that there was no reason to limit the reserves on those islands.
12. By letter dated January 28, 1875, Dawson reported to E.A. Meredith, Deputy Minister of the Interior, Canada, that the commissioners met with First Nations resident at Lake of the Woods and Lac Plat (now Shoal Lake), where the parties agreed that these First Nations "should have their farm Reserves so laid out as to embrace the gardens which they at present cultivate...."
13. By memorandum dated February 17, 1875, Dawson reported that the First Nations at Shoal Lake were "to have reserves of wild and farming lands at Lac Plat (now: Shoal

Lake) within the area marked off on the map and also to have the islands in Lac Plat on which they have gardens." The map has not been located.

14. By Order-in-Council dated February 27, 1875 the Garden Islands were provisionally approved as reserves.
15. On January 30, 1877, the Surveyor General, J.S. Dennis, in his "Schedule describing various Indian Reserves in Manitoba, Keewatin and the North-West Territories" described the reserves of Chief "She-she-gance" by citing Dawson's February 17, 1875 memorandum.
16. In 1884, Indian Agent George McPherson of Assabaskashing Agency wrote to the Superintendent General of Indian Affairs that the First Nation had gardens on islands outside its reserves because "they were told at treaty to keep farming on the islands, where they had their gardens then, as long as they liked to farm on them."<sup>59</sup>
17. On or about November 15, 1889, Lawrence VanKoughnet, Deputy Superintendent General of Indian Affairs, directed that instructions be sent to Ebenezer McColl, Inspector of Indian Agencies, Winnipeg, stating that Chief She-she-gance of Shoal Lake, in addition to two (2) reserves on the main land, ". . . are also entitled according to Treaty to those islands in Shoal Lake on which they have gardens" and to therefore ascertain and mark on a map the islands in Shoal Lake that contained such gardens.
18. In January 1890, Simon Bray, Surveyor for the Department of Indian Affairs ("DIA"), produced a schedule of "Indian Reserves in Treaty No. 3" which included "Certain Islands in Shoal Lake in which the Indians have gardens."
19. A list of "Indian Reserves in Treaty No. 3 that have yet to be selected and surveyed was appended to the schedule noted in paragraph 22 and stated that "Bands No. 39 and 40 are entitled to those islands in Shoal Lake on which they have or had

gardens.”

20. In June 1890, A.W. Ponton, Dominion Land Surveyor, was instructed to conduct certain surveys under the Treaty, including the Garden Islands.
21. In November 1890, Ponton reported to the Superintendent General of Indian Affairs that he had made a survey "of certain islands in Indian Bay, Shoal Lake." He reported that the First Nation's impression was that all the islands in Indian Bay were included as reserve.
22. On June 9, 1891, Ponton forwarded to Hayter Reed, Indian Commissioner at Regina, a "Sketch Showing Survey" ("the Sketch") regarding islands on which Iskatewizaagegan had gardens. The Sketch does not show all the islands in Indian Bay. Those islands shown, which are in the northern portion of Indian Bay, are marked "A", "B", "C", "D", "E", and "F." Ponton placed his signature under the words "Surveyed in September 1890."
23. On or about August 27, 1892, Pither advised the Deputy Superintendent General of Indian Affairs that he had consulted with the Iskatewizaagegan and Shoal Lake #40 First Nation and found "that the Islands marked on the (Sketch) are all the Islands of importance, on which they had gardens." The copy of the Sketch in the file with Pither's letter included one additional large island not marked with a letter but entitled "garden."
24. The Garden Islands appeared on the following schedules of reserves compiled by the . DIA:
  - a) September 10, 1890 - "Schedule showing certain lands of Indian in Treaty No. 3 that require to be definitely located and surveyed:" "Bands Nos. 39 40. Chiefs Sheshegence and Shawinabinias. Instructions have been issued for the survey of certain small islands in Shoal Lake that belong to the said Bands."

- b) June 19, 1891 - "39 & 40 Certain Islands in Shoal Lake in which the Indians have gardens. Not surveyed."
- c) 1901 - "Schedule of the Indian Reserves in the Dominion - Treaty No. 3 - Ontario" printed with the *Annual Report of the Department of Indian Affairs for the Year ended June 30, 1902* in the *Canada, Sessional Papers, 1902*: "39} Islands in Shoal Lake | Not Surveyed | Partly in Manitoba."
25. On or about April 3, 1914, Bray, Chief Surveyor, DIA, advised Duncan Scott, Deputy Superintendent General of Indian Affairs, that Iskatewizaagegan and Shoal Lake #40 First Nation was "entitled to those islands in (Indian) Bay on which they have or had gardens."
26. In February 1913, the *Greater Winnipeg Water District Act*, S.M. 1913 c. 22 (the "Act") received Royal Assent. The Act incorporated the GWWD with the object of supplying water to the inhabitants of the district.
27. On March 30, 1914, J.G. Harvey, solicitor for the 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.
28. 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. Order-in-Council 463 authorized the taking of the bed of Indian Bay in Shoal Lake I.R. No. 40 together with the islands therein.
29. Descriptions of patent drawn up by the DIA on March 26, 1915 include all the islands and land covered by water in Indian Bay in Manitoba.
30. By Order-in-Council dated June 14th, 1930, Shoal Lake I.R. No. 39A was set apart

for the First Nation. The Garden Islands were not included in the reserve.

31. On March 27, 2015, Iskatewizaagegan submitted a letter to the Tribunal requesting that it receive notice pursuant to s.22 (1) of the *Specific Claims Tribunal Act*.
32. On May 19, 2015, the Tribunal provided Iskatewizaagegan with notice regarding party or intervenor status pursuant to s.22 (1) of the *Specific Claims Tribunal Act* and Rules 49 (1)(e) and 49 (2)(g) of the *Specific Claims Tribunal Rules of Practice and Procedure* indicating that a decision in this matter may, in the opinion of the Tribunal, significantly affect the legal interests of Iskatewizaagegan. In such notice, Iskatewizaagegan was provided with a sixty (60) day limitation period to submit an application for party or intervenor status to the Tribunal.
33. Due to various social issues within the Iskatewizaagegan community, including suicides, the Council of Iskatewizaagegan was unable to reasonably bring their focus upon the application for party or intervenor status within the sixty (60) day limitation period as required.
34. Iskatewizaagegan has a direct interest in the claim and outcome and therefore requests the Tribunal to grant leave to Iskatewizaagegan for the applicant and grant the relief requested for Iskatewizaagegan to be granted intervenor status

### III. CONSENT

35. In electronic correspondence dated August 25, 2015, the Claimant consented to Iskatewizaagegan being permitted to submit this application past the sixty (60) day limitation.
36. In electronic correspondence dated September 3, 2015, the Respondent consented to Iskatewizaagegan being permitted to submit this application past the sixty (60) day limitation

#### IV. COMMUNICATION

37. The name, address and telephone number of the Applicant and its legal counsel are as follows:

Iskatewizaagegan No. 39 Independent First Nation  
c/o Terence Sakohianisaks Douglas  
Terence Douglas Professional Corporation  
101 Chipman Street  
Kenora, Ontario  
P9N1V7

38. If the Applicant is granted intervenor status, it intends to present evidence and legal arguments.

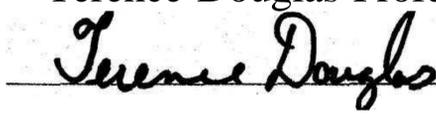
39. The Applicant intends to support the Claimants position regarding Canada's breach and failure to fulfill its treaty and legal obligations as well as its fiduciary duty to set aside as reserve lands the Garden Islands

40. The Applicant intends to support the Claimants position regarding Canada's breach and failure to fulfill its treaty and legal obligations as well as its fiduciary duty to protect the Garden Islands from expropriation and exploitation.

41. The Applicant intends to assist the Tribunal in resolving the issues in the Claim by providing evidence and legal arguments as to the negative effects and damage resulting from Canada's breach and failure to fulfill its treaty and legal obligations as well as its fiduciary duty as set out above.

42. The applicant intends to use the English language in these proceedings.

Dated at the City of Kenora in the Province of Ontario this 21st day of October, 2015.

Terence Douglas Professional Corporation  
Per   
Terence Sakohianisaks Douglas

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