



Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

SHOAL LAKE #40 FIRST NATION

Plaintiff

- and -

THE ATTORNEY GENERAL OF CANADA and
THE CITY OF WINNIPEG

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY
LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL
LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not
been set down for trial or terminated by any means within five years after the action was
commenced unless otherwise ordered by the court.

Date:

Issued by:

Local registrar

Ontario Court of Justice

TO: ATTORNEY GENERAL OF CANADA
c/o Deputy Attorney General of Canada
Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

AND TO: CITY OF WINNIPEG
c/o Marc Lemoine, City Clerk
City of Winnipeg
510 Main Street
Winnipeg, MB R3B 1B9

OVERVIEW

1. Shoal Lake #40 First Nation (“**Shoal Lake #40**”) brings this action to seek redress for breaches of the Crown’s fiduciary obligations in respect of the expropriation of Shoal Lake #40’s reserve lands to enable the Greater Winnipeg Water District (the “**GWWD**”) and its successor, the City of Winnipeg (“**Winnipeg**”), to use and divert water from Shoal Lake.
2. In 1915, the Government of Canada (“**Canada**”) issued Order in Council 1915-463 (the “**Expropriation Order**”) authorizing the expropriation of portions of Shoal Lake #40’s main reserve to enable the GWWD to construct and operate a water diversion system (the “**Waterworks**”) to supply residents of the GWWD with water for domestic and sanitary purposes.
3. In issuing the Expropriation Order, Canada relied in part on Ontario Order in Council 285/1913 (the “**1913 Order in Council**”) and the *Act to enable the City of Winnipeg to get Water outside the Province of Manitoba*, S.C. 1913, c. 208 (the “**Outside Manitoba Act**”), both of which include conditions which expressly required the GWWD to compensate parties whose lands and properties were adversely affected by the construction and operation of the Waterworks (the “**Compensation Provisions**”).
4. In the course of constructing the Waterworks, the GWWD built a canal between Indian Bay and Snowshoe Bay on Shoal Lake which severed Shoal Lake #40’s reserve and left the community isolated on a man-made island without access to the mainland.
5. For more than a century, the community could only be reached by ice road in the winter or boat in the summer. Families were forced to relocate off-reserve to access basic health services and educational and professional opportunities. Costs associated with transporting building materials to the reserve soared, and the community struggled to maintain critical infrastructure, including roads and schools. In late fall and early spring, community members fell through the ice while trying to cross to and from the mainland.

6. Canada was obligated to protect Shoal Lake #40's interests and to ensure Shoal Lake #40 was properly compensated for the impacts of the expropriation of its reserve lands. Canada relied on the Compensation Provisions to satisfy these obligations.
7. To date, Shoal Lake #40 has not been compensated for injurious affection or interference with its reserve lands as required under the Compensation Provisions, nor has Canada taken steps to protect Shoal Lake #40's interests from the profound and disruptive effects of the Waterworks on Shoal Lake #40's reserves.

PLAINTIFF'S CLAIM

8. Shoal Lake #40 seeks the following relief:
 - a. a declaration that Canada breached its fiduciary duties to Shoal Lake #40 by failing to protect Shoal Lake #40's interests in respect of the Expropriation Order, including by failing to ensure Shoal Lake #40 was compensated for injurious affection and interference with its lands and properties as a result of the Waterworks in accordance with the Compensation Provisions;
 - b. a declaration that the GWWD and Winnipeg breached its obligations to compensate Shoal Lake #40 for injurious affection and interference with Shoal Lake #40's lands and properties as a result of the Waterworks in accordance with the terms and conditions of the Compensation Provisions;
 - c. an order that Winnipeg compensate Shoal Lake #40 for injurious affection and interference with Shoal Lake #40's lands and properties as a result of the Waterworks in accordance with the Compensation Provisions;
 - d. an order that Canada compensate Shoal Lake #40 for breaches of Canada's fiduciary obligations to Shoal Lake #40;
 - e. pre- and post-judgment interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 (as amended);
 - f. costs of this action; and

g. such further and other relief as this Honourable Court deems just.

THE PARTIES

9. The Plaintiff, Shoal Lake #40, is a part of the Anishinaabe Nation in Treaty #3. Shoal Lake #40 is a band under the *Indian Act*, R.S.C. 1985, c. I-5.
10. The Defendant, Canada, is the designated representative of the Crown in right of Canada pursuant to section 23(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50.
11. Canada is vested with the administration, control and beneficial interest in federal Crown lands which are at issue in this action pursuant to section 91(24) of the *Constitution Act, 1867*, 30 & 31 Vict., c. 3, subject to the rights and interests of the Plaintiff.
12. The Defendant, Winnipeg, is a corporation under *The City of Winnipeg Charter*, S.M. 2002, c. 39, and a municipality under the *Municipal Act*, C.C.S.M. c. M225.

FACTS

Shoal Lake & Treaty #3

13. Shoal Lake is an integral part of Shoal Lake #40's territory and cultural identity as Anishinaabe people.
14. Shoal Lake #40 members have always relied on the lands and waters in and around Shoal Lake to maintain their way of life and to carry out traditional, cultural and economic pursuits, including hunting, fishing, gardening and cultivating wild rice.
15. Shoal Lake is located on the Manitoba-Ontario border. Approximately 95% of Shoal Lake's surface area is located in Ontario.
16. In 1873, Anishinaabe representatives, including predecessors of Shoal Lake #40, entered into Treaty #3 with the Crown in right of Canada.

17. Treaty #3 is a “treaty” within the meaning of section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11.
18. On entering into Treaty #3, the Crown promised, *inter alia*, to set aside reserves for Shoal Lake #40’s use and benefit, and to protect Shoal Lake #40’s rights to hunt, fish and trap through the treaty territory, including in respect of the lands and waters in and around Shoal Lake.
19. The written English text of Treaty #3 as published by Canada further provides that “due compensation” would be paid to Shoal Lake #40 for the taking or appropriation of reserve lands required for public works.
20. Between 1875 and 1882, reserves were selected, approved and set aside for Shoal Lake #40 in and around Indian Bay and Snowshoe Bay on the western shores of Shoal Lake.
21. Shoal Lake #40’s reserves were selected because of their proximity to Shoal Lake and the cultural, spiritual and economic importance of the lands and waters in and around Shoal Lake to Shoal Lake #40 members.
22. Shoal Lake #40’s reserves include Indian Reserve Shoal Lake #40 (“**IR 40**”), located on Shoal Lake, on the border between Manitoba and Ontario.
23. Shoal Lake #40 also holds Indian Reserve #34B2, located on the western shore of Shoal Lake, jointly with its neighbour, Iskatewizaagegan #39 Independent First Nation.
24. Shoal Lake #40’s main village site was originally located at the mouth of the Falcon River on the shores of Shoal Lake on IR 40 in Manitoba.
25. Shoal Lake #40 is located less than 100 kilometres away from the town of Kenora, Ontario, and less than 20 kilometres from the TransCanada Highway.

Establishing Authority to Take Water from Shoal Lake

26. In or around 1912, Winnipeg, as it was then constituted, identified Shoal Lake as a potential source of water for the residents of Winnipeg and surrounding municipalities.
27. In 1913, Manitoba formed and incorporated the GWWD pursuant to the *Greater Winnipeg Water District Act*, S.M. 1913, c. 22 (the “**GWWD Act**”) for the purpose of supplying water for the inhabitants of the Greater Winnipeg Water District.
28. The *GWWD Act* provides the GWWD with authority to acquire lands for “the purposes of waterworks, or for the purposes of conveying electric motive force or other power for the operation of same,” subject to the requirement that the GWWD “pay to the owners or occupiers of the said lands and those having an interest or right in the said water, reasonable compensation for any land or any privilege that may be required.”
29. The GWWD was required to apply for and obtain a series of orders and approvals from Ontario, Canada and the International Joint Commission—a Canada-U.S. entity established pursuant to the 1909 *Boundaries Water Treaty*—in order to take water from Shoal Lake.
30. In 1913, Ontario issued the 1913 Order in Council authorizing the GWWD to enter upon and to divert and take water from Shoal Lake for domestic and municipal purposes, subject to the condition that “full compensation be made to the Province of Ontario and also to all private parties whose lands or properties may be taken, injuriously affected or in any way interfered with.”
31. The 1913 Order in Council was declared legal, valid and binding through the *Greater Winnipeg Water District Act (Ontario)*, 1916, S.O. 1916, c. 17.
32. In 1914, the International Joint Commission issued *In the Matter Of: The Application of the Greater Winnipeg Water District – For the Approval of the Use of the Waters of Shoal Lake*, 14 January 1914 (the “**1914 Approval**”) approving the GWWD’s use and diversion of waters from Shoal Lake for domestic and sanitary purposes.

33. The 1914 Approval was subject to the GWWD's compliance and adherence to the terms and conditions set out in domestic federal and provincial statutes and orders, including *inter alia*, the 1913 Order in Council and the *Outside Manitoba Act*. The 1914 Approval provided that failure to fulfil the conditions "would carry with it the loss and cancellation of the franchise".
34. In 1915, Canada issued the Expropriation Order pursuant to section 46 of the *Indian Act*, R.S.C. 1906, c. 81, as amended by S.C. 1911, c. 14, s. 1, and section 7 of the *Outside Manitoba Act*, authorizing the expropriation of portions of IR 40 in and around Shoal Lake to enable the GWWD to construct and operate the Waterworks.
35. Section 7 of the *Outside Manitoba Act* incorporates by reference section 175 of the *Railway Act*, R.S.C. 1906, c. 37. Section 175 of the *Railway Act*, as modified by the *Outside Manitoba Act*, states:

No Corporation shall take possession of or occupy any portion of any Indian reserve or lands, without the consent of the Governor in Council.

2. When, with such consent, any portion of any such reserve or lands is taken possession of, used or occupied by the Corporation, or when the same is injuriously affected by the construction of any line of conduit or pipe by this Act authorized and includes all property, works and structures so authorized, compensation shall be made therefor as in the case of lands taken without the consent of the owner.

Construction & Operation of the Waterworks

36. In or around 1915, the GWWD commenced construction of the Waterworks, including a 150-kilometre-long aqueduct to convey water from Shoal Lake to Winnipeg.
37. In the course of construction, Shoal Lake #40 was displaced from its main village at the mouth of the Falcon River to the remaining portion of IR 40, located on a peninsula on Shoal Lake on the Ontario side of the Manitoba-Ontario border.
38. As part of the Waterworks, the GWWD built a canal between Indian Bay and Snowshoe Bay on Shoal Lake. The canal severed the peninsula and isolated Shoal Lake #40's community on a man-made island.

39. Construction of the Waterworks was completed in 1919.
40. Over time and through the enactment of legislation including the *Metropolitan Winnipeg Act*, S.M. 1960, c. 40, at Part VII, the GWWD evolved into Winnipeg, which assumed all powers and liabilities of the GWWD.
41. Winnipeg, relying on the orders and approvals sought and obtained by the GWWD, including the 1913 Order in Council, the 1914 IJC Approval and the Expropriation Order, continues to draw water from Shoal Lake today.

Impacts on Shoal Lake #40

42. The construction and operation of the Waterworks has had serious, ongoing negative consequences for Shoal Lake #40.
43. As a direct result of the Waterworks, Shoal Lake #40 was left without road access to the mainland. For over a century, the only way to get on or off IR 40 was by boat or barge across Indian Bay in the summer or by ice road in the winter.
44. Travel on and off the reserve was especially hazardous during fall freeze-up and spring thaw. Several Shoal Lake #40 members drowned while crossing the ice on Indian Bay between IR 40 and the mainland. Many others experienced life-threatening and traumatic experiences falling through the ice while trying to travel to and from the reserve.
45. Many Shoal Lake #40 members moved away to Kenora and other locations to pursue economic, professional and educational opportunities due to the uncertainty and dangers associated with travel to and from the reserve.
46. As a result of the Waterworks, Shoal Lake #40 members were deprived of their ability to access critical infrastructure and services on the mainland.
47. The access issue made it very challenging for members to maintain businesses on reserve. Instead, Shoal Lake #40 members were required to cross Indian Bay by barge or ice road to obtain basic provisions, including gas, mail and groceries.

48. It became more difficult and more expensive to construct and maintain houses, schools, roads and other essential infrastructure on IR 40.
49. In 1997, Shoal Lake #40 was placed under a drinking water advisory because the existing water treatment system on IR 40 did not meet requirements for providing safe drinking water.
50. Due to the prohibitive costs associated with transporting construction materials and equipment on reserve, the advisory remained in place until 2021, when Shoal Lake #40 was finally able to establish a new water treatment facility.
51. In 2019, after decades of negotiation with federal and provincial governments, Shoal Lake #40 constructed a 24-kilometre-long road, known as Freedom Road, to connect the community with the TransCanada Highway.
52. Shoal Lake #40 continues to experience the long-term cultural, economic and social effects of the forced isolation on its community and its lands and properties.
53. Winnipeg's operation of the Waterworks continues to impact Shoal Lake #40 today.
54. The Waterworks disrupt and damage areas in and around IR 40 which Shoal Lake #40 members rely on for cultural and traditional practices, including hunting, fishing, trapping and harvesting.
55. This in turn negatively affects Shoal Lake #40's ability to maintain its connection and relationship with the lands and waters in and around Shoal Lake, including members' ability to pass on traditions, teachings, practices and cultural knowledge to younger generations.
56. Shoal Lake #40 has never been compensated for injurious affection or ongoing interference with its reserves as a result of the construction and operation of the Waterworks.

Canada's Fiduciary Obligations to Shoal Lake #40

57. Canada holds fiduciary obligations to Shoal Lake #40 in respect of lands which were reserved for Shoal Lake #40's benefit under Treaty #3, including the lands which are the subject of the Expropriation Order.

58. Canada's fiduciary obligations include, *inter alia*:

- a. a duty to act with loyalty and good faith in discharge of its mandate as a trustee of the reserve lands;
- b. a duty to provide full disclosure and consult with Shoal Lake #40;
- c. a duty to act with ordinary prudence with a view to the best interests of Shoal Lake #40; and
- d. a duty to protect and preserve Shoal Lake #40's proprietary interests from exploitation.

59. In the context of an expropriation of reserve lands, Canada's fiduciary obligations further include a duty to ensure Shoal Lake #40 was compensated in a manner that reflected the nature of the interest and the impacts of the taking on the community.

Breaches of Canada's Fiduciary Obligations

60. Canada issued the Expropriation Order pursuant to the *Outside Manitoba Act*, which included provisions that required the GWWD to compensate First Nations whose reserve lands were injuriously affected or interfered with as a result of the construction and operation of the Waterworks.

61. Canada's decision to issue the Expropriation Order was further informed by the existence of the 1913 Order in Council, which required the GWWD to compensate parties whose lands were injuriously affected or interfered with as a result of the construction and operation of the Waterworks.

62. Shoal Lake #40 falls within the definition of a “party” entitled to compensation for injurious affection and interference with its lands and properties within the meaning of the 1913 Order in Council.
63. Shoal Lake #40’s reserves fall within the definition of “Indian reserve or lands” for which the GWWD must pay compensation if such lands are injuriously affected within the meaning of the section 7 of the *Outside Manitoba Act*.
64. Canada relied, in part, on the existence of the Compensation Provisions for the fulfilment of Canada’s fiduciary obligations to Shoal Lake #40, including the obligation to preserve and protect Shoal Lake #40’s interests from exploitation, and to ensure Shoal Lake #40 was compensated in a manner which reflected the nature of the interest and the impacts on the community.
65. As a result of Expropriation Order and the construction and operation of the Waterworks, Shoal Lake #40’s reserves have been injuriously affected and interfered with, including, but not limited to, in the manner described in paragraphs 42 to 55.
66. Neither the GWWD nor Winnipeg have compensated Shoal Lake #40 for injurious affection or interference with Shoal Lake #40’s reserves as required pursuant to the Compensation Provisions.
67. Canada has failed to take any steps to enforce the fulfilment of the Compensation Provisions.
68. Consequently, Canada breached its fiduciary obligations to Shoal Lake #40, including its obligation to preserve and protect Shoal Lake #40’s interests from exploitation, and to ensure Shoal Lake #40 was compensated in a manner which reflected the nature of the interest and the impacts of the taking on the community.

Breaches of Winnipeg’s Legal Obligations

69. The GWWD relied on the 1913 Order in Council, the 1914 IJC Approval and the Expropriation Order as authority to construct and operate the Waterworks.

70. Winnipeg continues to rely on the 1913 Order in Council, the 1914 IJC Approval and the Expropriation Order as authority to draw water from Shoal Lake.
71. The GWWD and Winnipeg have never compensated Shoal Lake #40 for injurious affection and interference with Shoal Lake #40's lands and properties as a result of the Waterworks as required pursuant to the Compensation Provisions.
72. Consequently, Winnipeg is in breach of its legal obligations under the 1913 Order in Council and 1914 IJC Approval.
73. The Plaintiff pleads and relies on the 1913 Order in Council, the 1914 Approval, the *Outside Manitoba Act*, and Rules 17.02(a), (c), (f), and (g) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
74. The Plaintiff proposes the action be tried in Kenora, Ontario.

July 25, 2023



Bruce McIvor



Kate Gunn



Melissa Rumbles

FIRST PEOPLES LAW LLP
73 Water Street, 6th Floor
Vancouver, BC V6B 1A1
Tel. (604) 688-4272

Court File No.: _____

Shoal Lake #40 First Nation

Plaintiff

- and -

Attorney General of Canada and City of Winnipeg
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT KENORA

STATEMENT OF CLAIM

FIRST PEOPLES LAW LLP
73 Water Street, 6th Floor
Vancouver, BC V6B 1A1
Tel: (604) 688-4272

Bruce McIvor (LSO #: 78586P)
Email: bmcivor@firstpeopleslaw.com

Kate Gunn (LSO #: 56724D)
Email: kgunn@firstpeopleslaw.com

Melissa Rumbles (LSBC #: 515221)
Email: mrumbles@firstpeopleslaw.com

Counsel for the Plaintiff