

Court File No.

ONTARIO

SUPERIOR COURT OF JUSTICE



BETWEEN:

CHIEF GERALD LEWIS and ISKATEWIZAAGEGAN NO. 39 INDEPENDENT FIRST
NATION

Applicants

-and-

THE CITY OF WINNIPEG and HER MAJESTY THE QUEEN IN RIGHT OF
ONTARIO

Respondents

NOTICE OF APPLICATION

(Pursuant to Rules 14.05 and 38 of the *Rules of Civil Procedure*)

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing on a date and time to be determined by the Registrar of the Superior Court at 393 University Avenue, Toronto, Ontario M5G 1E6.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date:

December 10, 2019

Issued by:



Court Registrar
Ontario Court of Justice
393 University Avenue
Toronto, Ontario
M5G 1E6

TO: The City of Winnipeg
c/o Acting Deputy City Solicitor Sarah Rentz
City Hall
Susan A. Thompson Building – Main Floor
510 Main St.
Winnipeg, MB R3B 1B9

AND TO: Her Majesty the Queen in Right of Ontario
(Ministry of the Attorney General)
c/o Crown Law Office – Civil
720 Bay Street, 8th floor
Toronto, Ontario
M5G2K1

AND TO: THIS HONOURABLE COURT

APPLICATION

OVERVIEW

This is an application by a First Nation and its Chief for judicial guidance on a key phrase that has informed the taking of water from Shoal Lake for over a century.

In 1913, Ontario granted Winnipeg permission to take water from Shoal Lake by Order in Council, 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”. The Order in Council was later incorporated by reference into the *Ontario Water Resources Act*, RSO 1990, Chapter 0.40, s. 34.3(3) which allows for “[a] transfer of water pursuant to the order of the Lieutenant Governor in Council dated October 2, 1913 respecting the Greater Winnipeg Water District”.

Together, these words form part of the linchpin authority granted by Ontario to Winnipeg for the taking of water from Shoal Lake.

The Applicant, Chief Gerald Lewis, is the Chief of Iskatewizaagegan #39 Independent First Nation (variously referred to as IIFN or the Nation). The Applicant, the Nation, is an Anishinaabe community located in Northwestern Ontario in the Shoal Lake area.

No approval has ever been sought from or granted by Chief Gerald Lewis as an individual or IIFN as a community. Further, despite having sought reparations, neither of the applicants have signed any agreement related to the water, or had compensation for the loss of land, property or injurious effects or interference.

This application simply asks whether Chief Gerald Lewis and/or IIFN fall within the contemplated class of parties whose lands or properties have been “taken, injuriously affected or in any way interfered with”.

THE APPLICANTS MAKES APPLICATION FOR:

1. This Honourable Court’s guidance pursuant to Rule 14.05(3)(d) and (h) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, in respect of the following:
 - A) A declaration as to Chief Gerald Lewis’ and/or IIFN’s entitlement to compensation under Ontario’s 1913 Order in Council and the *Ontario Water Resources Act*;
2. The costs of this application; and
3. Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE APPLICATION ARE:

4. The needs of settler Canadians have long been prioritized over the responsibility and interests of the Anishinaabe regarding the water of Shoal Lake.
5. Shoal Lake is a part of the Shoal Lake watershed and the larger “Rainy River – Lake of the Woods – Winnipeg River” drainage basin. The watershed crosses provincial boundaries with 54% of the watershed located in Ontario and 46% in Manitoba.
6. Iskatewizaagegan #39 Independent First Nation is an Anishinaabe First Nation located on the northwest shore of Shoal Lake, Ontario. For more than 6,000 years, Indigenous peoples have lived in the Shoal Lake area. The Anishinaabe peoples living in the area today are descendants of these original inhabitants.
7. In 1900, Winnipeg was looking for a source of safe and clean drinking water. In 1913, the City of Winnipeg and certain smaller municipalities formed and incorporated the Greater Winnipeg Water District (GWWD) pursuant to the *Greater Winnipeg Water District Act*, S.M. 1913, c. 22. The GWWD was created and tasked to obtain the necessary approvals to take water from Shoal Lake.
8. Authority was granted to the GWWD in 1913 to take water by Canada, Manitoba and Ontario. Considering the potential impacts of the water diversion on the Lake of the Woods, a boundary water, the project also required approval from the International Joint Commission (IJC).
9. In all cases, the authority to take water was subject to certain conditions. In addition to granting Winnipeg the authority to take water, other authorizations were required to support the infrastructure necessary to do so, namely the aqueduct. Water is taken from Shoal Lake through the west end of Indian Bay, and is delivered through a 150 km aqueduct. That aqueduct runs along a right of way or grant of land which required taking of reserve lands from the Nation.
10. As the water sought was beyond the boundaries of the province of Manitoba, Ontario’s approval was key. Ontario granted permission by means of an October 2, 1913 Ontario Order in Council with terms, conditions and stipulations set out in an annexed report of the Honourable Minister of Lands, Forests and Mines. Among others, Ontario’s grant of permission to the GWWD for taking water from Shoal Lake was 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...” This Order in Council has been incorporated by reference into the *Ontario Water Resources Act*, and forms Winnipeg’s current authority to take water from Shoal Lake.
11. Chief Gerald Lewis and/or the Nation have suffered their land and property being taken, injuriously affected and interfered with, all without recognition much less compensation. The applicants now seek an interpretation of the 1913 Order in Council, and the *Ontario Water Resources Act*, specifically, whether Chief Gerald Lewis and/or the Nation fits within the class of parties described in the Order and is entitled to compensation.

IIFN and the Community's Interest in Shoal Lake

12. IIFN is governed by Chief and Council. The current Chief is Gerald Lewis.
13. The Nation maintains close connections with their ancestral and traditional territory. Iskatewizaagegan is the spirit name of a spring at the centre of Shoal Lake which the water comes up from. This spring and this lake are sacred to the community.
14. The Nation is located on the north end of Shoal Lake. Shoal Lake is not only part of IIFN's ancestral territory, but considered to be part of its reserve lands within the Indian Bay area.
15. Since prior to contact, the Anishinaabe have used the waters of Shoal Lake and its surrounding lands for survival and trade. Shoal Lake has provided an abundance of sturgeon, blueberries and wild rice. The ricing days were of particular significance to this community as they were highly organized and led by particular elders. A number of blueberry harvesting sites are located on the Shoal Lake watershed. And, in addition to these ongoing gathering activities, fishing also remains culturally significant, such that IIFN fishers organize youth activities to ensure the skills, traditional teachings and other cultural and spiritual knowledge will be shared while out on the lake. Shoal Lake is also home to the gardening islands or Gitiiganii Minis, islands used to grow various vegetable crops. Farming took place on the islands for two reasons: to protect crops from people outside of the community who typically did not have canoes; and to avail of good quality soil.
16. The Nation's relationship with the land includes farming, fishing and ricing. There are also a number of important cultural and spiritual sites within their traditional territory and the lake.
17. What is often considered to be part of the geography, or a valuable natural resource to settler Canadians is a critical part of identity to the Anishinaabe of Shoal Lake. This water gives their community life and they in turn define themselves by their responsibility for the protection of such a gift.
18. To be clear, this is an application seeking the answer to a narrow legal question: whether Chief Gerald Lewis and/or the Nation fall within the class of parties entitled to compensation under Ontario's 1913 Order in Council. It is not seeking a quantification of any damages or adjudication of the other interests that the applicants have - including inherent jurisdiction, Aboriginal rights, title and Treaty rights - in relation to the water of Shoal Lake, and the underlying lakebed. Accordingly, there are no declarations sought in this application in relation to any inherent rights or responsibilities, Treaty rights, or constitutional rights as set out in s. 35 of the *Constitution Act, 1982*.

The Greater Winnipeg Water District is now the City of Winnipeg

19. The Greater Winnipeg Water District was created in 1913 when the City of Winnipeg and certain smaller municipalities formed and incorporated the GWWD pursuant to the *Greater Winnipeg Water District Act*, S.M. 1913, c. 22. The GWWD was created and tasked to obtain the necessary approvals to take water from Shoal Lake.
20. In 1960, the Metropolitan Corporation of Greater Winnipeg was incorporated and assumed all of the powers of the GWWD under the *Metropolitan Winnipeg Act*, S.M. 1960, c. 40 at Part VII.
21. In 1971, *The City of Winnipeg Act*, S.M. 1971, c. 105 repealed the *Metropolitan Winnipeg Act* and formed the City of Winnipeg. This new City assumed all the powers of the Metropolitan Corporation of Greater Winnipeg, including the powers the Metropolitan Corporation of Greater Winnipeg had assumed from the GWWD (*The City of Winnipeg Act*, S.M. 1971 c. 105 at ss 549, 550). This was restated in *The City of Winnipeg Act*, S.M. 1989-90, at s. 554.
22. In 2002, new legislation came into force, the *City of Winnipeg Charter Act*, S.M. 2002, c. 39, which sets out powers for the provision of water at s. 160.

Ontario's 1913 Order in Council Remains the Basis for Winnipeg's Authority to Take Water

23. The Executive Council Office of Ontario passed an Order in Council in 1913 regarding GWWD's ability to take water from Shoal Lake.
24. The Order in Council granted the GWWD permission to take water from Shoal Lake subject to the terms, condition and stipulations set out in an annexed report of the Honourable Minister of Lands, Forests and Mines.
25. These terms included 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..."
26. The 1913 Order in Council was declared to be legal, valid, and binding through the *Greater Winnipeg Water District Act (Ontario) 1916*, S.O. 1916, c. 17.
27. This Order in Council remains the basis of Winnipeg's authority to take water from Shoal Lake, as it has been incorporated by reference and repeated in *Ontario Water Resources Act*.
28. The *Ontario Water Resources Act*, RSO 1990, Chapter 0.40, s. 34.3(3) outlines the exceptions to the general provision that no person should remove water from a water basin in Ontario. One of the exceptions laid out at s. 34.3(3)(6) allows for "[a] transfer of water pursuant to the order of the Lieutenant Governor in Council dated October 2, 1913 respecting the Greater Winnipeg Water District".

29. Though the Order in Council is now over a hundred years old, it remains in force, and is relied upon by Winnipeg.
30. In turn, Chief Gerald Lewis and the Nation rely upon the government's many pronouncements of reconciliation as a guide in defining the current relationship between Winnipeg, Ontario, the water, and the people of the Nation.

Impacts from Winnipeg Taking the Water

31. Chief Gerald Lewis and/or IIFN have observed the follow injurious impacts from Winnipeg's water taking and development required for Winnipeg to access the water:
 - a. detrimental impacts to the ecosystem in Shoal Lake, including in particular to Indian and Snowshoe Bays with regard to valuable spawning areas for fish and other wildlife;
 - b. destruction of culturally significant rice beds;
 - c. changing water quality and water quantity available to the Nation; and
 - d. depletion of lands and wetlands available to the Nation.
32. No approval has ever been sought from or granted by Chief Gerald Lewis as an individual or IIFN as a community. Further, despite having sought reparations, neither of the applicants have signed any agreement related to the water, or had compensation for the loss of land, property or injurious effects or interference.

The First Nation Should be Entitled to Compensation pursuant to Ontario's Order in Council: IIFN Can be Considered a Private Party

33. In *Public Service Alliance of Canada v. Francis et. Al.*, [1982] 2 SCR 72 at 78, the Supreme Court held that a Band Council is not a "person" but rather, a "creature of the *Indian Act*" imbued with the powers granted to it by the *Indian Act* on behalf of the members of the Band. In that case, a Band Council was found to be a designated body of persons, representing the persons of the Band.
34. The case law has evolved since then, and in 2012 the British Columbia and Quebec Courts of Appeal found that First Nations Band Councils are legal persons and have the legal capacity to bring actions on behalf of their members, who are themselves private parties, pursuant to their powers under the *Indian Act* (*Kwicksutaineuk/Ah-Kwa-Mish First Nation v Canada (Attorney General)*, 2012 BCCA 193, at para. 76; *Crevette du Nord Atlantique inc. v Conseil de la Première Nation malécite de Viger*, 2012 QCCA 7, at paras. 48-50).
35. Legal persons are considered private parties by the law. Notably, private parties are generally conceived of as individual citizens. A First Nations Band Council does not sit

squarely in this definition – although it represents the rights of private parties, it does so in a government-like manner – and that tension is reflected in jurisprudence on this issue. However, this tension cannot be resolved in such a way as to exclude First Nations from accessing a remedy available to Ontario or any private party.

36. In 2015, the Courts recognized the right of First Nations to pursue private law actions, such as nuisance or trespass, against private parties, without the interposition of the Crown. In *Saik'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan Inc.*, 2015 BCCA 154, the plaintiff First Nations commenced a tort action against Rio Tinto Alcan Inc. for nuisance and breach of riparian rights resulting from the operation of the Kenney dam in Northwestern British Columbia. Alcan brought applications for summary judgement, as well as to strike out the claim on the basis that it did not disclose a reasonable cause of action.

37. The Court found that it was at least arguable that the property interest that exists in Aboriginal title lands was enough to support an action in nuisance, and that reserve lands that are set aside for the exclusive use of the First Nation may support an action in nuisance as well. In so finding, the Court wrote:

Aboriginal people are part of Canada's community, and they should not be treated disadvantageously in comparison to any other litigant asserting claims for nuisance and breach of riparian rights. Setting a separate standard for Aboriginal people before they can sue other parties in order to enforce their rights is not only lacking in principle but could also be argued to be inconsistent with the principle of equality under the *Charter of Rights and Freedoms* (para 68).

38. IIFN seeks judicial interpretation of the Order in Council in light of the above jurisprudence, and in particular, to establish their entitlement to compensation as Ontario or a private party would be entitled under the Order in Council.

Chief Gerald Lewis Should be Entitled to Compensation pursuant to Ontario's Order in Council: Chief Lewis Can be Considered a Private Party

39. Chief Lewis, as an individual, is considered a private party under the above case law.

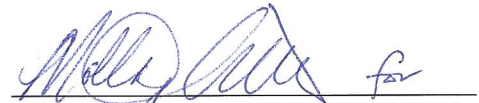
THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE APPLICATION:

1. October 2, 1913 Ontario Order in Council with the annexed report of the Honourable Minister of Lands, Forests and Mines;
2. *Ontario Water Resources Act*, RSO 1990, Chapter 0.40;
3. International Joint Commission 1914 decision and order;

4. The affidavit of Chief Gerald Lewis;
5. The affidavit of Elder and Councillor Fred Greene; and
6. Such further and other evidence as Counsel may advise and this Honourable Court permits.

DATE: December 10, 2019

FALCONERS LLP



Julian N. Falconer (LSO #29465R)
Meaghan Daniel (LSO #57068V)

Barristers at Law
10 Alcorn Avenue, Suite 204
Toronto, Ontario
M4V 3A9
Tel.: (416) 964 0495
Fax: (416) 929 8179

U-14-00632 5580000

CHIEF GERALD LEWIS et al.

Applicants

-and-

THE CITY OF WINNIPEG et al.

Respondents

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings commenced in TORONTO

NOTICE OF APPLICATION

FALCONERS LLP
Barristers-at-Law
10 Alcorn Avenue, Suite 204
Toronto, Ontario M5V 3A9

Julian N. Falconer (L.S.O. # 29465R)
Meaghan Daniel (LSO #57068V)

Ph: (416) 964-0495
Fax: (416) 929-8179

Lawyers for the Applicants