FILE NO.: SCT-3001-14
CITATION: 2016 SCTC 4
DATE: 20160405

SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
SHOAL LAKE NO. 40 FIRST NATION	Bruce McIvor and Kate Gunn, for the Claimant
Claimant	
– and –	
ISKATEWIZAAGEGAN NO. 39 INDEPENDENT FIRST NATION	Terence Douglas, for the Claimant
Claimant	
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development	Joseph Langan and Susan Ols, for the Respondent
Respondent	
	HEARD: via written submissions

REASONS FOR DECISION

Honourable Harry Slade, Chairperson

ON THE REQUEST OF the Claimant Shoal Lake No. 40 First Nation for costs against the Respondent in relation to an application by Iskatewizaagegan No. 39 Independent First Nation for party status, initially filed as an application for intervenor status, and varied on the recommendation of the Respondent as expressed in its Response to Iskatewizaagegan No. 39 Independent First Nation's initial application for intervenor status.

NOTE: This document is subject to editorial revision before its reproduction in final form.

Cases Cited:

Big Grassy (Mishkossimiiniiziibing) First Nation (Indian Band) v Her Majesty the Queen in Right of Canada, 2012 SCTC 6.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, ss 22, 25, 5, 34, preamble.
Specific Claims Tribunal Rules of Practice and Procedure, SOR/2011-119, r 30, 44, 110.

TABLE OF CONTENTS

I. THE CLAIM

[1] The Claim arises from the Crown's alleged failure to fulfill its legal obligation to set aside reserve lands in the island upon which Shoal Lake No. 40 First Nation had gardens ("Garden Islands") at the time Treaty 3 was concluded.

[2] The Garden Islands are located in Indian Bay on both sides of the Ontario/Manitoba provincial boundary.

[3] The Claimant further alleges that a portion of the Garden Islands situated in the Province of Manitoba, and that were reserved, was unlawfully expropriated by the Greater Winnipeg Water District and that the Claimant received inadequate compensation for the expropriation.

[4] The Claim is based in law on the Respondent's alleged breaches of Treaty 3, and legal and fiduciary obligations relating to the Garden Islands on both sides of the provincial boundary. The Respondent admits that it had a treaty obligation to set aside, as reserve, seven of the Garden Islands for the Claimant and the Shoal Lake 39 First Nation (also known as Iskatewizaagegan No. 39 Independent First Nation).

[5] The Respondent says that the 4.5 Garden Islands situated in the Province of Manitoba were lawfully expropriated and that the First Nation was compensated, including compensation that should have been paid to Iskatewizaagegan No. 39 Independent First Nation for its interest in the Manitoba Garden Islands. Accordingly, the Respondent says that it has an outstanding treaty obligation to set aside 2.5 Garden Islands in Ontario only, as reserve lands.

II. THE APPLICATIONS

A. Applications for Leave, Intervenor Status and Party Status

[6] Iskatewizaagegan First Nation was issued a Notice pursuant to section 22 of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*] on May 19, 2015 further to its request in a letter filed March 30, 2015.

[7] Iskatewizaagegan First Nation filed an application on October 22, 2015 seeking leave and intervenor status pursuant to rules 30 and 44 of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119 [*Rules*], and section 25 of the *SCTA*.

[8] Iskatewizaagegan First Nation's Application for Leave and Intervenor Status relies on allegations of fact made by the Respondent in its Response to the Declaration of Claim, filed January 27, 2015. At paragraph 19, the Respondent says that Iskatewizaagegan No. 39 Independent First Nation held the Garden Islands in common with the Claimant First Nation. At paragraph 28, Iskatewizaagegan First Nation is identified by the Respondent as having an interest in the Garden Islands.

[9] Iskatewizaagegan First Nation says that common and overlapping issues over entitlement to the Garden Islands, based on Treaty 3, give rise to Iskatewizaagegan First Nation's direct interest in the claim and its outcome.

[10] The Claimant Shoal Lake No. 40 First Nation consented to Iskatewizaagegan First Nation's addition as an intervenor.

[11] The Respondent Canada opposed Iskatewizaagegan First Nation's addition as an intervenor. However, the Respondent favours Iskatewizaagegan First Nation becoming a party as its claim in relation to the Garden Islands could be directly affected by the outcome of the Claim.

[12] In its Reply filed February 1, 2016, the Claimant objects to the Respondent's position that Iskatewizaagegan First Nation be joined as a party on the technical ground that the application sought intervenor status under section 25 of the *SCTA*.

[13] In its Reply dated February 1, 2016, Iskatewizaagegan First Nation said that upon considering Canada's Response and undertaking community consultations, which included Elders, Iskatewizaagegan First Nation decided to seek to become a party to the Claim as a Claimant.

[14] Both the Respondent and Claimant consented to Iskatewizaagegan First Nation's Application for Leave and Party Status filed March 1, 2016.

[15] The Tribunal granted Iskatewizaagegan First Nation's Application for Leave and Party Status in an Order issued March 22, 2016.

B. Claimant Shoal Lake First Nation's Request for Costs

[16] The Claimant Shoal Lake No. 40 First Nation seeks an order pursuant to sub-section 110(1) of the *Rules* for $5,000 in costs against the Respondent relating to the Claimant's reply to the Crown's Response (Claimant's Costs Submissions, filed February 29, 2016).

[17] The request is based on the Crown's Response to Iskatewizaagegan First Nation's initial application for intervenor status as contrary to both the spirit and intent of the *SCTA* and its specific provisions:

> The preamble of the Act recognizes the importance of resolving specific claims as a means of promoting reconciliation between First Nations and the Crown. The Act further provides that it will only affect the rights of a First Nation "if the First Nation chooses to file a specific claim with the Tribunal and only to the extent that this Act expressly provides" [*SCTA*, s 5]. Canada's response is effectively a request for an order which would bar Iskatewizaagegan from participating in the Claim unless it applies to be added as a party. Canada's position is directly contrary to the objectives of the Act.
>
> In addition, the procedure for adding parties and intervenors to a claim pursuant to the Act is based on the principle that First Nations are entitled to determine the extent to which they wish to apply to participate in a claim. The Act provides for a process whereby a First Nation who may be significantly affected by a claim may choose to apply for either intervenor or party status in a claim [*SCTA*, ss 22(1), 24, 25]. There are no provisions in the Act that allow a First Nation to be added as party unless it specifically chooses to apply.
>
> The ability of a First Nation to choose and if and how it participates in the resolution of a claim is an essential element in achieving the goal of reconciliation which underlies the specific claims process.
>
> Shoal Lake #40 submits that absent an order for costs, the outcome of this application will set a precedent which allows the Crown to seek to prevent First Nations from participating in claims in the manner of their choosing.
>
> Shoal Lake #40 further submits that First Nations should not be required to bear their own costs replying to submissions from the Crown which are inconsistent with the objectives of the Act, as in the current application. [Claimant's Cost Submissions, filed February 29, 2016]

[18] The Respondent Canada submits in its Response, filed March 4, 2016, to the Claimant's costs submissions:

> …that its Response to Iskatewizaagegan's application for intervenor status was in keeping with the spirit and intent of the *Act*, was reasonable and principled, and definitely did not meet the "reprehensible, egregious or outrageous conduct", or an abuse of process, that could justify a Tribunal award of costs. The Tribunal has been clear that a no costs regime for interim applications should be the norm… [Respondent's Submission on Costs for Iskatewizaagegan's Application, at para 22]

III. ANALYSIS

A. *The Specific Claims Tribunal Act*: Choice, Finality, Justice and Timeliness

[19] I agree with the Claimant that the enabling statute embraces a "choice" regime for First Nations further to section 5 of the *SCTA*. The *SCTA* preamble describes the choice of First Nations in this regard as, "the right of First Nations to choose and have access to a specific claims tribunal...".

[20] The *SCTA* provides procedural options for First Nations to participate in Tribunal proceedings where their interests may be affected or where they may contribute to a final resolution of a specific claim. Parties before the Tribunal are free to choose their preferred procedural method, and opposing parties are free to respond. Ultimately, the Tribunal decides on whether to allow an application and any related conditions.

[21] Finality is a critical feature of the Tribunal's work (*SCTA*, s 34(2)). The *SCTA* is also concerned with justice and timely resolution:

> …
>
> there is a need to establish an independent tribunal that can resolve specific claims and is designed to respond to the distinctive task of adjudicating such claims in accordance with law and in a just and timely manner; [*SCTA*, preamble]
>
> …

[22] Iskatewizaagegan First Nation has determined that its interest would be best advanced as a Party to the Claim. The position taken by the Respondent contributed to the making of this decision but did not limit the choices available to Iskatewizaagegan First Nation on how to proceed.

[23] Both the Claimant Shoal Lake No. 40 First Nation and the Respondent consent to Iskatewizaagegan First Nation's Application for Leave and Party Status.

[24] In my view, the "choice" provisions of the *SCTA* should not discourage parties, Crown or otherwise, to propose, in a response to an application, a means toward the *efficient* progress of a claim toward final resolution. The Respondent made its suggestion in the appropriate place and for sound reasons.

[25] The Tribunal has ruled on costs. Smith J. expressed the Tribunal's policy on costs in interim applications in *Big Grassy (Mishkossimiiniiziibing) First Nation (Indian Band) v Her Majesty the Queen in Right of Canada,* 2012 SCTC 6. Except where a party has acted in a "reprehensible, scandalous or outrageous" (*Young v Young*, [1993] 4 SCR 3 at 134 cited in *Big Grassy* at paras 35- 46) manner, the Tribunal favours a no costs regime.

[26] The Respondent's approach cannot be viewed as "reprehensible, scandalous or outrageous" conduct. To the contrary – it was constructive, and in light of the parties' consent, the appropriate procedural means by which claims in relation to the Garden Islands may be resolved.

IV. ORDER

[27] The Claimant's request for costs against the Respondent is dismissed.

HARRY SLADE

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Honourable Harry Slade, Chairperson

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OTTAWA, ONTARIO April 05, 2016

PRESENT: Honourable Harry Slade

BETWEEN:

SHOAL LAKE NO. 40 FIRST NATION

Claimant

and

ISKATEWIZAAGEGAN NO. 39 INDEPENDENT FIRST NATION

Claimant

and

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

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimant SHOAL LAKE NO. 40 FIRST NATION**
As represented by Bruce McIvor and Kate Gunn
First Peoples Law Corporation

AND TO: **Counsel for the Claimant ISKATEWIZAAGEGAN NO. 39 INDEPENDENT FIRST NATION**
As represented by Terence Douglas
Terence Douglas Professional Corporation

AND TO: **Counsel for the Respondent**
As represented by Joseph Langan and Susan Ols
Department of Justice