

AMENDED THIS December 15, 2020 PURSUANT TO
MODIFIÉ CE 15 CONFORMÉMENT À
☒ RULE/LA RÈGLE 26.02 (15)
☐ THE ORDER OF _____
L'ORDONNANCE DU _____
DATED / FAIT LE _____

Court File No. CV-20-00644545-0000

M. Wallace
REGISTRAR GREFFIER
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ISKATEWIZAAGEGAN NO. 39 INDEPENDENT FIRST NATION

PLAINTIFF

-AND-

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

DEFENDANTS

AMENDED 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.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$2000.00 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400 for costs and have the costs assessed by the court.

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: July 24, 2020

Issued by:

e-filing
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Court Registrar

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

TO: The City of Winnipeg
c/o Thor Hansell & Shea Garber
MTL Aikins LLP
360 Main St., 30th Floor
Winnipeg, MB R3C 4G1

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

AND TO: THIS HONOURABLE COURT

OVERVIEW

1. The needs of settler Canadians have long been prioritized over those of the Anishinaabe people. This is particularly true with regard to the water of Shoal Lake.
2. In 1900, Winnipeg went looking for a source of clean water, and in 1912, found it in Shoal Lake. Shoal Lake is located in Treaty #3 territory, in Northern Ontario. In 1913, at Winnipeg's request, Ontario granted permission to Winnipeg to take water from Shoal Lake, pursuant to an Order in Council, subject to several terms and conditions. Key amongst them was 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."
3. Shoal Lake is, to this day, Winnipeg's sole water source. It is also a critical part of the reserve, treaty and traditional territory of the Anishinaabe of Iskatewizaagegan No. 39 Independent First Nation ("the Nation"). The water of Shoal Lake gives the community life and the community members in turn define themselves by their responsibility for the protection of this gift.
4. In 2019, the plaintiff, Iskatewizaagegan No. 39 Independent First Nation, and its Chief Gerald, brought an Application to the Ontario Superior Court, seeking a declaration that the applicants fall within the contemplated class of parties that would be entitled to compensation under the 1913 Order in Council, if it is found that they have suffered their lands and properties being taken, injuriously affected, or in any way interfered with. The defendants have consented to an Order declaring that the plaintiff is such a party.
5. As the plaintiff has suffered from Winnipeg's water taking, all without recognition of its rights much less compensation, it now seeks compensation pursuant to the 1913 Order in Council (incorporated into modern legislation by way of 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").

6. The defendant Her Majesty the Queen in Right of Ontario ("Ontario") has a fiduciary obligation to the plaintiff with respect to the protection of the plaintiff's lands and properties; and any compensation for taking, injuriously affecting or in any way interfering with the same. The failure of Ontario to ensure the effective exercise of the terms and conditions laid out in the 1913 Order in Council has caused the plaintiff to suffer ecological injury to its lands, as well as resulting cultural and financial injury to its community. The plaintiff pleads that, should it be found that the City of Winnipeg is not responsible for compensation for any period between the date of the Order in Council and the present due to laches or some other limitation defence, such compensation is owed by Ontario to the Nation based on Ontario's fiduciary obligations.
7. The language of this statutory right of entitlement under the 1913 Order in Council must now be interpreted through the lens of reconciliation, in order to replace this historic injustice with a new partnership.

CLAIM

8. The plaintiff Iskatewizaagegan No. 39 Independent First Nation claims:
 - a) Damages in the amount of \$500,000,000.00 (FIVE HUNDRED MILLION DOLLARS) or in the alternative, equitable remedies in the amount of \$500,000,000.00 (FIVE HUNDRED MILLION DOLLARS);
 - a)b) A declaration of breach of fiduciary duty by the defendant Ontario;
 - b)c) A declaration that the defendants have a duty to institute a process by which compensation can be made for any future taking, injury, or interference in any way with First Nations lands or properties in the future;
 - e)d) Pre- and post-judgment interest pursuant to sections 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (as amended);
 - d)e) Costs of this action on a substantial indemnity scale, together with Harmonized Sales Tax payable pursuant to the *Excise Act* as may be applicable; and
 - e)f) Such further and other relief as this Honourable Court deems just.

THE PARTIES

9. The plaintiff Iskatewizaagegan No. 39 Independent First Nation is a distinct Aboriginal society, as well as a band recognized under the *Indian Act*, and an Aboriginal people within the meaning of s. 35 of the *Constitution Act, 1982*. While legally recognized by the government of Canada by the name listed above, the community refers to itself by the name of Iskatewizaagegan Independent First Nation, with no numerical attachment. The members of the Nation are all Indians within the meaning of s. 91(24) of the *Constitution Act, 1867* and members of an Aboriginal group within the meaning of s. 35 of the *Constitution Act, 1982*.

10. The defendant the City of Winnipeg (“Winnipeg”) inherited the powers and obligations of the Greater Winnipeg Water District (“GWWD”) through legislation intended to sustain the authority granted in 1913 to take water from Shoal Lake. 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. 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. In 2002, new legislation came into effect, the *City of Winnipeg Charter Act*, S.M. 2002, c. 39, which sets out powers for the provision of water at s. 160. The City of Winnipeg, relying on the approvals sought and obtained by the GWWD dating back to 1913, continues to draw water from Shoal Lake today.

11. The defendant Her Majesty the Queen in Right of Ontario (“Ontario”) is designated as the representative of the Ontario Crown, pursuant to s. 14 of the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sch. 17 (“CLPA”), and is liable for the actions and omissions of the Ontario Crown, of Ontario Departments and Ministers, and of all servants,

agents, and employees of the Ontario Crown. Ontario also has a fiduciary obligation to the plaintiff with respect to the protection of the plaintiff's lands and properties, and with respect to any compensation for the GWWD/Winnipeg taking, injuriously affecting or in any way interfering with the same. Ontario furthermore has a special responsibility to ensure the full implementation and effective exercise of terms and conditions laid out in the 1913 Order in Council, demonstrably still in force by way of its incorporation into s. 34.3 (3) of the *Ontario Water Resources Act*, all of which this defendant has breached.

THE FACTS

The Community of Iskatewizaagegan Independent First Nation

12. The plaintiff 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 those original inhabitants and maintain a close connection to their traditional territory.
13. The plaintiff entered into a Treaty relationship with the Crown on October 3, 1873. Through Treaty #3, the Anishinaabe and Crown agreed to share 55,000 square miles of territory that spans from west of Thunder Bay to north of Sioux Lookout in Ontario, and along the international border to the province of Manitoba. Treaty #3 territory is populated by 28 First Nation communities with a total population of approximately 25,000 people.
14. The plaintiff also has reserve territory pursuant to the *Indian Act*, and to Treaty #3. The Nation's reserve land begins at the base of High Lake and reaches south to the northern shore of Shoal Lake. To the west, it crosses over slightly into the province of Manitoba, and to the east, meets the District of Kenora. Approximately half of Shoal Lake's northern shore makes up part of the Nation's reserve. The community also holds a small piece of reserve land on the western shore of Shoal Lake.
15. Finally, the plaintiff has traditional territory, which contains within it Shoal Lake and the Shoal Lake watershed. The Nation's traditional territory encompasses all the land upon which the community's ancestors lived, hunted, fished, and protected. This includes all the

land abutting the Shoal Lake watershed, including Shoal Lake itself and the Garden Islands, and the land up to and abutting Falcon Lake and High Lake. Traditionally, the community's ancestors would travel along waterways and by land between these territories to hunt, fish, and gather. All these lands were protected by and lived upon by the Iskatewizaagegan community's Anishinaabe ancestors and form a part of the land that was the subject of Treaty #3.

16. Treaty #3, according to the Anishinaabe view, was intended to reserve certain areas of land for the Anishinaabe, with the rest to be shared between the Anishinaabe and the settlers. Though the Canadian state has interpreted Treaty #3 as a surrender of title to traditional territory, the Anishinaabe did not surrender any land.
17. The current total registered population of the Nation is 585 people, with 297 people living on reserve.
18. An elected Chief and Council govern the Nation. The current Chief is Gerald Lewis.

A Description of Shoal Lake

19. 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.
20. The three lakes of greatest significance in the watershed are Shoal Lake, Falcon Lake and High Lake. Shoal Lake is the largest of the watershed's three lakes with a surface area of about 260 km. Over 95% of the lake's surface area is situated in Ontario, while less than 5% is contained within the province of Manitoba. The lake has an estimated average depth of 9 metres, but incorporates many shallower bays such as Indian Bay, Snowshoe Bay, and Clytie Bay in its northern portions.
21. Outflows from both Falcon Lake and High Lake drain into Shoal Lake at Snowshoe Bay via Falcon River, at Shoal Lake's northwest shore. At its eastern shore, Shoal Lake

connects to the Lake of the Woods via Ash Rapids. Around the year 1900, the channel at Ash Rapids was deepened and widened by settlers from its natural state through blasting.. This was reportedly done to provide a water-based transportation route to serve both timber and mining operations in the Shoal Lake area. While opening up the lake to unrestricted small boat access to and from Lake of the Woods, the channel modifications also allowed for two-way water exchange between the lakes.

22. Today, the watershed is home to the two First Nations communities of Iskatewizaagegan Independent First Nation and Shoal Lake #40. These communities are independent of one another, and despite sharing an anglicised name (the Nation is referred to by some as Shoal Lake #39), are separate communities with distinct histories and governance. Year-round road access to the Nation's reserve from the Trans-Canada Highway has existed only since construction of the Shoal Lake Road in 1965. Year-round road access to the Shoal Lake #40 reserve land was made possible only as of June 2019, with the construction of Freedom Road, before which the community could only be reached by car ferry or personal watercraft in the ice-free period, and by ice road in winter.
23. There are cottages on Shoal Lake, many of them owned by residents from the nearby Winnipeg area. Most cottage development is concentrated along the shoreline in the northeast shore of the lake, and on the many islands located in the northern half of the lake. Road access to mainland cottages is via the Clytie Bay Road. The lake's island residents use either the Clytie Bay Road or the Shoal Lake Road to access parking, docking, and boat launching facilities. Winter access is available to many island cottages by ice road.
24. The nearest settler town to Shoal Lake is the Town of Kenora, which sits on the northeast shore of Lake of the Woods.

The Gift of Shoal Lake to the Nation

25. What is often considered to be part of the geography or a valuable natural resource to settler Canadians is a critical part of the identity of the community of the Nation. This

water gives the community life and they in turn define themselves by their responsibility for the protection of such a gift.

26. Since time immemorial, the Anishinaabe have used the waters of Shoal Lake and the surrounding land for survival. Shoal Lake has provided an abundance of walleye, other fish species, and aquatic mammals and reptiles. Further, the surrounding land has provided habitat for large mammals (including bears and moose), small game (including hares and porcupine), and waterfowl (including geese, ducks, and loons).
27. Fishing carries particular cultural significance to the plaintiff, such that the community fishers organize youth activities to ensure the skills, traditional teachings, and other cultural and spiritual knowledge will be shared while out on Shoal Lake.
28. Since time immemorial, the Anishinaabe have harvested numerous species of trees and plants in Shoal Lake and the surrounding land, including berries, bark, roots, herbs, and other plants or plant products, both cultivated and uncultivated. These plants are used for subsistence, medicine, cultural purposes, and spiritual purposes.
29. The ricing days are of particular cultural significance to the plaintiff. These highly organized cultural and spiritual gatherings were led by certain elders tasked with passing on the teachings of manoomin (wild rice). Blueberry harvesting sites are located on the Shoal Lake watershed. Shoal Lake is also home to the Garden 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.
30. Additionally, Shoal Lake is a navigable waterway. It connects the community to the nearby Lake of the Woods via Ash Rapids and other rivers and waterways, which provide means to travel across the region and access nearby lands, fisheries, and communities.

31. The plaintiff's culture is coextensive with the land. The community's traditional knowledge of Shoal Lake and the surrounding land itself has been transmitted through the Nation's oral traditions, spiritual beliefs, and practices. Shoal Lake and the surrounding land include significant areas where the transmission of Anishinaabe teachings, traditions, and values to future generations has taken place and continues to take place. In this way, Shoal Lake and the surrounding land provide not only the means for life, but the manner of bimaatiziwin (to live a good life). In turn, the Nation acts as stewards or caretakers of all that has been given.
32. Shoal Lake and the surrounding land include significant areas of spiritual significance, including numerous sites where connections to past generations were and are maintained and commemorated.
33. Harvesting natural resources from Shoal Lake and the surrounding land for use by the Nation, and for trade with fur-traders and settlers, has been the basis of the plaintiff's economy and commercial trade.
34. Shoal Lake and the surrounding land are not only part of the plaintiff's traditional and treaty territory, but are considered to be within its reserve lands, land set aside for the community's exclusive use, benefit, and occupation. Use of Shoal Lake and the surrounding land is critical to the exercise of the plaintiff's constitutionally protected Aboriginal and treaty rights.

Winnipeg seeks Settler Authority to Take Water

35. In 1900, Winnipeg was looking for a source of safe and clean drinking water. In 1912, Shoal Lake was identified as an ideal source for drinking water for the city.
36. In 1913, Winnipeg and certain smaller municipalities formed and incorporated the Greater Winnipeg Water District ("GWWD"), which was created and tasked to obtain the necessary approvals to take water from Shoal Lake. It was established by *An Act to*

Incorporate the "Greater Winnipeg Water District" S.M. 1913, c. 22 (February 15, 1913), which, at Chapter 22, gives it "full power to acquire, hold and alienate both real and personal estate for all its purposes." This Act specifically contemplates compensation for such acquisitions in section 22:

The corporation shall 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 for the purposes of the said waterworks or for the conveying of elective motive force or power.

37. *The Act to Enable the City of Winnipeg to Get Water Outside the Province of Manitoba* (June 6, 1913) provided the authority for the GWWD to obtain water outside of the Province of Manitoba. As the Shoal Lake water sought by the GWWD was partially located in Ontario, the GWWD was required to seek authorization from Ontario to draw from it.

38. In 1913, the Executive Council Office of Ontario passed an Order in Council authorizing the GWWD to take water from Shoal Lake. The 1913 Order in Council granted the GWWD permission to take water for "domestic and municipal purposes", and advised that this included the right to "enter upon and to divert and take water from Shoal Lake, subject to the terms, conditions, and stipulations" set out in an annexed report of the Honourable Minister W. H. Hearst of Lands, Forests and Mines.

39. The first of these terms was 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...."

40. The second condition required the GWWD to "abide by and conform to any and all rules, regulations or conditions regarding the ascertainment of the quantity of water being taken, and as to the inspection of works and premises, and the manner of carrying out the proposed works that the government of Ontario may at any time see fit to make or enact...."

41. 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. 1717 [“the 1916 GWWD Act”].

42. At the time of the passing of the Order in Council, it was not yet settled whether the aqueduct would extend into Ontario. By early 1914, it was settled by the GWWD that the aqueduct would be entirely within the Province of Manitoba. The Plaintiff states that confirmation of this plan was publicized as statutorily required, including in the Canada Gazette in 1915, and that this plan gained official approval by the Dominion government in March of 1916, prior to the passing of the 1916 GWWD Act in late April of 1916. Ontario was aware of the plan regarding location of the aqueduct when it passed the 1916 GWWD Act.

43. The preamble to the 1916 GWWD Act states in part as follows:

...whereas it has been made to appear that the only available source of water supply for domestic and municipal purposes for use in the district is Shoal Lake, in the District of Kenora in the Province of Ontario; and whereas the said corporation [i.e. the GWWD] applied to the Lieutenant-Governor in Council for the right and power to divert and take water from Shoal Lake for the purposes aforesaid; and whereas the Lieutenant-Governor in Council by Order-in-Council approved the 2nd day of October, 1913, purported to grant such right and power to The Greater Winnipeg Water District; and whereas it is expedient that subject to the conditions and stipulations hereinafter set out in section 2 of this Act the said Order-in-Council should be confirmed and declared to be legal, valid and binding;

42.44. The GWWD also required approval from the International Joint Commission (IJC), an international organization established in 1909 by Canada and the United States under the *Boundary Waters Treaty*, due to the potential impacts of the water diversion from Shoal Lake on Lake of the Woods, a boundary water between Canada and the United States.

45. In 1914, the IJC approved the GWWD’s use and diversion of waters from Shoal Lake and Lake of the Woods. At the IJC hearing in January 1914 which resulted in the IJC’s 1914 Order of Approval, an important consideration for the IJC was whether Ontario approved of the GWWD's desire and intention to draw water from Shoal Lake. The Plaintiff states

that the GWWD made the following representations to the IJC explaining that the GWWD had sought Ontario's approval and the reasons why, and then read out the 1913 Order in Council and entered it as an exhibit to establish Ontario's approval:

[The Province of Ontario] owned the lands that belonged previously to the confederation[...]. That included forests, minerals, waters, and the fish[...]. That made it necessary for us to go to Toronto, to the Province of Ontario, because the ungranted watershed around our body of water belongs to the Province of Ontario. The bed of Shoal Lake belonged to that Province. If minerals were found there, they would have the authority to give licenses to take them, and they also issue the licenses and collect the revenue for fishing purposes, although the Dominion Government may make regulations, by order in council, for the preservation of fish as game, and for their regulation. That is why we went to Ontario, because they had the watershed, and they had the bed of the lake, so far as ungranted, as part of their title.

43-46. The exact location of the aqueduct was not settled when the IJC approved the plan but was settled shortly thereafter. The IJC granted permission to the GWWD subject to certain conditions and assumptions. Based on the amount of water sought by the GWWD, it was assumed that there would likely be no effect on other bodies of water. Specifically, the GWWD warranted to the IJC that the diversion of waters would not injuriously affect the interest or rights of any parties, and in addition, that "full compensation" for any damage due to the taking of water was provided for pursuant to the identical conditions contained in the GWWD statute and Ontario Order in Council. The purpose for the taking of water was limited to domestic and sanitary purposes by the inhabitants of the GWWD. The IJC Order also relied upon the assurance that a failure to observe any of the outlined conditions would carry with it the "loss and cancellation of the franchise." In addition, the IJC order stated that its approvals and permissions would not prejudice the rights of any "person, corporation, or municipality" to damages or compensation due in whole or part to the diversion.

47. Multiple authorizations were required prior to the GWWD taking water, including that of Ontario, which was given in the form of the 1913 Order in Council and subsequently reaffirmed and declared legal and binding via the 1916 GWWD Act. The IJC's 1914 Order of Approval was only one of the required authorizations and it depended in part on Ontario's authorization.

44.48. Over the years, the GWWD has evolved into the City of Winnipeg, through legislation intended to sustain the authority to take water from Shoal Lake.

45.49. The 1913 Order in Council has been incorporated by reference into legislation currently in force in Ontario. The *Ontario Water Resources Act*, s. 34.3(3) 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.” The 1913 Order in Council forms a part of the Canadian legal authority upon which Winnipeg continues to draw water from Shoal Lake today.

Winnipeg Avails Itself of the Water

46.50. In order to take the water, Winnipeg constructed a massive work of infrastructure: the aqueduct. Water is taken from Shoal Lake through the west end of Indian Bay and is delivered through a 150 km aqueduct to Winnipeg. The aqueduct runs along a right of way or grant of land, authorized by the federal government in 1916. The Shoal Lake-to-Winnipeg aqueduct and water supply operation began operating in 1919.

47.51. The aqueduct was engineered by a team of consultants hired by the GWWD in 1913 to study and submit a report on the best means of supplying the GWWD with water from Shoal Lake. Indian Bay was identified as the ideal location from which to construct the aqueduct, due to its proximity to the City of Winnipeg compared to the rest of the lake, and its depth, which was sufficient to ensure that water would flow through the aqueduct. It was recommended that a small channel be cut between Snowshoe Bay and Indian Bay, which would divert water from Falcon River to Snowshoe Bay as opposed to Indian Bay, thereby maintaining the clarity of the water and making Indian Bay the ideal access point for the aqueduct.

48.52. The aqueduct was constructed over 6 years, beginning operation in 1919. The flow of water from Indian Bay is taken by gravity only, with low-lifts pumps having been installed at the intake to provide additional capacity when the lake’s water level is low. The

aqueduct requires that the water level of Shoal Lake be at a minimum level in order for it to flow smoothly to service the City of Winnipeg.

~~49.~~53. The water level of Lake of the Woods, which is controlled by the Lake of the Woods Control Board (“Lake of the Woods Board”), affects the water level of Shoal Lake through Ash Rapids. When the water levels are high in Lake of the Woods, this leads to the intermingling of the two lakes via Ash Rapids and raises the levels of Shoal Lake as a result.

~~50.~~54. Notably, in or around the year 1900, the channel at Ash Rapids was artificially deepened and widened through blasting. This blasting allowed for two-way water exchange between the lakes. At its narrowest point, the navigable channel at Ash Rapids is about 10 metres wide and the mid-channel water depth is about 1.5 metres at low water. The blasting of Ash Rapids has affected the direction of the flow of water in Shoal Lake.

~~51.~~55. The Lake of the Woods Board is aware of the importance of ensuring that the water levels of Shoal Lake remain high enough to service the aqueduct. The City of Winnipeg is recognized as a special interest group and is invited to represent their needs in regulating the levels of Lake of the Woods. The plaintiff is not so recognized.

A PRIVATE LAW CAUSE OF ACTION

~~52.~~56. The plaintiff pleads that the failure to compensate the Nation as per the terms and conditions laid out in the 1913 Order in Council (and incorporated into modern legislation by way of the *Ontario Water Resources Act*, RSO 1990, Chapter 0.40, s. 34.3 (3)) creates a civil cause of action between the parties.

~~53.~~57. The Order in Council granted the GWWD permission to take water for “domestic and municipal purposes”, and advised that this included the right to “enter upon and to divert and take water from Shoal Lake, subject to the terms, conditions, and stipulations” set out in an annexed report of the Honourable Minister W. H. Hearst of Lands, Forests and Mines.

~~54.58.~~ The first of these terms was 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....”

~~55.59.~~ This condition establishes a right to compensation from the GWWD to any private party whose “lands or properties may be taken, injuriously affected or in any way interfered with...”. Intended to superimpose liability over the common law, this condition establishes liability for compensation for damage in addition to any right for compensation that would arise from the common law.

~~56.60.~~ The plaintiff pleads that, in order to be entitled to compensation pursuant to the Order in Council, the only evidence required is that which shows that the plaintiff’s properties and lands have been “taken, injuriously affected, or in any way interfered with....”

~~57.61.~~ The statutory right to compensation created by the 1913 Order in Council, and incorporated into modern legislation in s. 34(3) of the *Ontario Water Resources Act*, should be interpreted broadly, with the words used given their plain and ordinary meaning.

~~58.62.~~ A plain reading of the condition makes clear that the plaintiff is entitled to recover the full cost of their lands or properties being taken, injuriously affected, or in any way interfered with.

~~59.63.~~ The City of Winnipeg has never provided any compensation to the plaintiff for the takings, injurious effects, and interference caused by Winnipeg’s taking of water to its land.

~~60.64.~~ The right to compensation should also be interpreted through the lens of reconciliation between settler Canadians and the Anishinaabe peoples of the Nation. As was stated in the summary to the final report to the Truth and Reconciliation Commission:

Reconciliation requires that a new vision, based on a commitment to mutual respect, be developed. It also requires an understanding that the most harmful impacts of residential schools have been the loss of pride and self-respect of Aboriginal people, and the lack of respect that non-Aboriginal people have been raised to have for their Aboriginal neighbours. Reconciliation is not an Aboriginal problem; it is a Canadian one. Virtually all aspects of Canadian society may need to be reconsidered [emphasis added] (Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at p. vi)

It is clear that all Canadians are responsible for working towards reconciliation, in all contexts. Given the role of the Courts as adjudicator, reconciliation must rise past a commitment and be used as a principle. It is a guide for interpretation in the context of Indigenous-settler disputes.

~~61.65.~~ The plaintiff relies upon the defendants' many pronouncements of reconciliation as a guide in defining the current relationship between Winnipeg, Ontario, the water, and the people of the Nation in seeking compensation, pursuant to the 1913 Order in Council.

DAMAGES

Injuriously Affected or in Any Way Interfered with

~~62.66.~~ The plaintiff has suffered its land and properties taken, injuriously affected, and interfered with due to the actions of the defendants in a manner that has caused ecological, cultural/spiritual, and financial loss to the Nation.

~~63.67.~~ For the purposes of compensation under the 1913 Order in Council, the plaintiff's lands and properties include all lands, including lands under water, set aside for the Nation under the *Indian Act*, and under Treaty #3. In addition, the plaintiff's lands and properties include all lands, including lands under water, that are within their traditional territory.

~~64.68.~~ The plaintiff's treaty, traditional, and reserve lands have been directly affected by Winnipeg's taking of water. Raised water levels of Shoal Lake have led to the destruction of rice beds, blueberry patches, medicinal areas, and spawning areas for fish and other

wildlife on the shore of the Nation's reserve lands, which historically relied upon Shoal Lake's natural, lower water levels in order to grow. Development upon these shorelines has been limited by environmental restrictions aimed at ensuring the continued quality of Winnipeg's drinking water.

65-69. These takings, injurious effects, and interferences are ongoing; they escalate every year that they are allowed to continue. As any ecological system is a system of interdependencies, interference with one part of the ecosystem structure triggers reciprocal changes throughout. As Winnipeg has taken water for over 100 years, these impacts are of a serious and prolonged nature.

66-70. These ecological impacts have affected the trade and development capacity of the community. Further, they have had a direct impact on the culture and identity of the community, stripping them of their traditional practices and going to the heart of what it means to be part of the Nation's community. As result, the nature of the damage suffered by the plaintiff is complex, intergenerational, and cascading in nature.

Ecological Interference

67-71. The plaintiff pleads that the ecological health of its lands and properties has suffered injurious effects and interference from Winnipeg's water taking, and the related development required for Winnipeg to access the water, including, *inter alia*:

- a) detrimental impacts to the ecosystem in Shoal Lake, including in particular in Indian and Snowshoe Bays with regard to valuable spawning areas for fish and other wildlife which had been a source of food and trade;
- b) destruction of culturally significant rice beds, blueberry patches and other sustenance, including spiritual and medicinal plant-life upon which the community relied for food, trade, cultural, medicinal, and spiritual practices;
- c) lack of navigability along the streams and rapids to adjoining lakes and lands;
- d) changing water quality and water quantity available to the Nation; and

- e) depletion of lands and wetlands available to the Nation traditionally used for trapping and hunting, and gathering for food, trade, medicine, cultural purposes, and spiritual purposes.

Cultural Damage

~~68~~.72. The plaintiff pleads that injurious effects and interference with its land and properties has affected the Nation's ability to use its lands and properties for traditional, cultural, and spiritual practices. This in turn affects the Nation's ability to pass on those traditions, teachings, and practices to subsequent generations, leading to the loss of language, culture, and identity. These losses include, *inter alia*:

- a) traditional ceremonies arising from hunting, fishing, trapping, and gathering practices;
- b) educational and recreational activities with the Nation's children on the water to connect them to their ancestral traditions; and
- c) spiritual practices, including the Nation's relationship and sacred connection with the land and its ability to protect heritage, sacred, and burial sites, and access to the land for healing purposes.

Financial Damage

~~69~~.73. The plaintiff also pleads financial damage due to:

- a) the loss of its ability to develop and create business on the shoreline of Shoal Lake due to risks posed to the quality of Winnipeg's water;
- b) the loss of schools or education resources on the reserve; and
- c) the reduced ability to pursue trade related to the harvesting of wild rice, blueberries, and medicinal plants, and to fisheries.

BARRIERS TO THE NATION'S ABILITY TO ASSERT ITS RIGHTS

~~70~~.74. For the majority of the period in question (between 1913 and the present) the plaintiff, or its ancestors, was unable to assert its right of action against Winnipeg. The plaintiff pleads

the effect of ongoing historical injustice and imbalance of power as between the plaintiff and the defendants in general and including the following, *inter alia*:

- Between 1927 and 1951, the plaintiff, or its ancestors, was statute-barred from hiring legal counsel by virtue of section 141 of the *Indian Act*.
- The repeal of this provision coincided with the height of the residential school era, of which one school was located just east of the Shoal Lake reserve, the Cecilia Jeffery Residential School, sometimes referred to as the Shoal Lake school. This school was in operation between 1901 and 1976.

~~71-75.~~ The damages to the plaintiff's lands and properties are continuous and interconnected, and as a result, the actual injury to the land could not be recognized for some time.

~~72-76.~~ The damages outlined above are continuous, ongoing, and present to this day.

~~73-77.~~ The plaintiff has demanded compensation, but the defendants have provided no process by which the plaintiff can access the compensation to which it is rightfully entitled.

BREACH OF FIDUCIARY OBLIGATIONS

~~74-78.~~ The provincial Crown has fiduciary obligations to the plaintiff by virtue of the common law and the honour of the Crown. The defendant Ontario's fiduciary obligations to the plaintiff also arise on an *ad hoc* basis pursuant to and/or are confirmed by the Royal Proclamation of 1763 and other undertakings to act with the utmost loyalty to the plaintiff and/or in the plaintiff's best interest.

~~75-79.~~ The provincial Crown created the statutory entitlement to compensation and retained an ongoing right or obligation to monitor any and all rules, regulations, or conditions to inspect the infrastructure and actions of Winnipeg, and to oversee the manner in which water was being taken from Shoal Lake. Specifically, the 1913 Order in Council states:

...that the District shall abide by and conform to any and all rules, regulations or conditions regarding the ascertainment of the quantity of water being taken, and as to the inspection of works and premises, and the manner of carrying out the proposed works that the Government of Ontario may at any time see fit to make or enact in the premises.

~~76-80.~~ The plaintiff pleads that the right to monitor the taking of water out of Shoal Lake constituted an undertaking that gave rise to corresponding fiduciary obligations to the plaintiff. Ontario assumed and exercised discretionary power or control, affecting the plaintiff's interests in respect of the taking of water from the plaintiff's traditional, treaty, and reserve territory, without consultation with the plaintiff Nation. The plaintiff pleads and relies upon the historic injustice and power imbalance against Aboriginal peoples in general and the Nation in particular, including, especially, the prohibition on hiring legal counsel, and the close proximity of the Cecilia Jeffrey Residential school. The plaintiff and its ancestors are and were vulnerable to the exercise of this discretionary power by the defendant. A fiduciary relationship exists with Ontario as a fiduciary and the plaintiff as a beneficiary of Crown fiduciary obligations with respect to:

- a) the plaintiff's interests in relation to the natural resources on their lands and properties; and
- b) full compensation for lands and properties taken, injuriously affected, or in any way interfered with.

~~77-81.~~ The fiduciary relationship between the defendant Ontario and the plaintiff in respect of the compensation owed under the Order in Council requires that the defendant act with respect to the interests of the plaintiff with loyalty, good faith, full disclosure, and due diligence in advancing the best interests of the plaintiff.

~~78-82.~~ The fiduciary obligations of the defendant Ontario, vis-à-vis the plaintiff's interests, extend to the protection of, preservation of, and taking of positive measures to protect the plaintiff's lands and properties, including from any ecological, cultural, and financial taking, injurious effect, or interference in any way.

~~79-83.~~ The fiduciary obligations of the defendant Ontario, with respect to the plaintiff and the plaintiff's right to compensation under the 1913 Order in Council, also include, without limitation, the following aspects and components:

- a) the respect, protection, preservation, implementation, and enforcement of the right of compensation of the plaintiff in respect of its land and property; and
- b) the obligation to carry out the terms and conditions of the Order in Council, and the duty to make adequate provision for the protection of the rights of the plaintiff to compensation.

~~80-84.~~ The defendant Ontario has abdicated, neglected, and breached its obligations, and its responsibilities as fiduciary of the plaintiff as described herein. The breaches by the defendant Ontario of its fiduciary obligations include, without limitation, the following:

- a) failing to recognize, preserve, protect, or give effect to the right of compensation under the 1913 Order in Council; and
- b) conveying interests to and/or in respect of the lands and properties of Anishinaabe persons in the area, without regard to the special relationship that First Nations persons have with their land and territory.

85. Without limiting any of the foregoing, the plaintiff pleads that the defendant Crown owes *sui generis* fiduciary duties to the plaintiff. The plaintiff states these arise from the *Royal Proclamation of 1763*, the *Constitution Act, 1867* and from the defendant Crown undertaking discretionary control over protection of and compensation for harm to (a) the plaintiff's interest in their reserve land and property and/or (b) the plaintiff's interest in the lands and properties of their traditional territory, including their *sui generis* rights to hunt, fish, and gather on their traditional territories both on and off their reserve territory.

86. Without limiting any of the foregoing, the plaintiff states that the defendant Crown owes the plaintiff *ad hoc* fiduciary duties.

87. The plaintiff has legal interests that stand to be adversely affected by the Crown's exercise of discretion or control. Specifically, the plaintiff has a legal interest in their reserve land; a legal interest in their hunting, fishing, and gathering activities throughout their traditional territory; and a legal interest in the right to compensation if the GWWD/Winnipeg's taking of water from Shoal Lake causes the plaintiff's lands or properties to be "taken, injuriously affected, or in any way interfered with." The 1913 Order in Council and 1916 *GWWD Act* created a complete legal entitlement to compensation in the event the plaintiff's lands or properties were "taken, injuriously affected, or in any way interfered with" by Winnipeg/the GWWD.
88. The 1913 Order in Council and the 1916 *GWWD Act*, either alone or in concert with the *Royal Proclamation of 1763*, the Treaty of Niagara of 1764, Treaty 3, and the covenant chain relationship more generally, constitute an undertaking by the defendant Crown to act with the utmost loyalty and in the best interests of the plaintiff as a Treaty 3 partner whose lands or properties stand to be taken, injuriously affected, or in any way interfered with" by Winnipeg's taking of water.
89. The plaintiff falls within a distinct class of persons vulnerable to the defendant Crown's discretion or control: (1) any party whose lands or property have been taken, injuriously affected, or in any other way interfered with by Winnipeg's taking of water from Shoal Lake; and/or more specifically (2) any Treaty 3 First Nation whose lands or property have been taken, injuriously affected, or in any other way interfered with by Winnipeg's taking of water from Shoal Lake.
- ~~81-90.~~ The plaintiff pleads that should it be found that the City of Winnipeg is not responsible for compensation for any period between the date of the 1913 Order in Council and present due to laches or some other limitation defence, that such compensation is owed by Ontario to the plaintiff based on the fiduciary obligations set out above.
- ~~82-91.~~ The plaintiff pleads and relies upon the 1913 Order in Council and the 1914 Order of Approval of the International Joint Commission.

~~83-92.~~ The plaintiff proposes that this action be tried in Toronto, Ontario.

Date: November 26, 2020

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Defendants

Court File No. CV-20-00644545-0000

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceedings commenced in TORONTO

AMENDED STATEMENT OF CLAIM

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