

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**ISKATEWIZAAGEGAN NO. 39 INDEPENDENT FIRST NATION**

Plaintiff / Responding Party

- and -

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

Defendants / Moving Party

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**FACTUM OF THE DEFENDANT / MOVING PARTY  
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**  
(Motion returnable January 20, 2021)

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January 6, 2021

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## **PART I – OVERVIEW**

1. This is a motion to strike the claim and dismiss the action as against Her Majesty the Queen in right of Ontario (“Ontario”) pursuant to rule 21.01(1)(b).
2. The plaintiff’s action concerns the taking of water by the City of Winnipeg from Shoal Lake, and the plaintiff claims compensation from the City of Winnipeg for injurious affection resulting from ecological injury. The plaintiff claims damages against Ontario, in the alternative only, for breach of fiduciary duty for failing to regulate Winnipeg’s water-taking activities to the plaintiff’s detriment and for failing to ensure the plaintiff received compensation from Winnipeg. While Shoal Lake itself is located in both Ontario and Manitoba, the water-taking activities take place only in Manitoba and fall outside the regulatory jurisdiction of Ontario. As Ontario has no regulatory authority with respect to Winnipeg’s water-taking activities, Ontario has not asserted discretionary control over the plaintiff’s interests sufficient to give rise to a fiduciary duty as alleged or otherwise.
3. Further, Ontario exercises no discretionary control over the plaintiff’s ability to pursue compensation from Winnipeg which is a contingent legal interest insufficient to give rise to a fiduciary duty on its own.
4. The claim against Ontario should be dismissed on the basis that it is plain and obvious that the amended statement of claim discloses no reasonable cause of action for breach of either a *sui generis* or an *ad hoc* fiduciary duty.

## **PART II – THE FACTS**

5. Iskatewizaagegan #39 Independent First Nation is an Anishinaabe First Nation located on the northern shore of Shoal Lake. The plaintiff is one of four First Nations with reserves on

Shoal Lake and is a party to Treaty 3. Shoal Lake is located primarily in Ontario but partly in Manitoba and is the source of drinking water for the City of Winnipeg.<sup>1</sup> Shoal Lake is a navigable water and, accordingly, subject to the *Beds of Navigable Waters Act* which confirms that Ontario holds title to the lakebed in Ontario.<sup>2</sup>

6. In 1913, the City of Winnipeg contemplated building an aqueduct across the provincial border in order to access Shoal Lake from the Ontario side. In this context, the Greater Winnipeg Water District was established,<sup>3</sup> and it sought permission from Ontario, Canada and the International Joint Commission to take water from Shoal Lake.

#### **A. Ontario's 1913 Order in Council**

7. On October 2, 1913, the Ontario Lieutenant Governor in Council approved an Order-in-Council granting permission to the Greater Winnipeg Water District (which is now the City of Winnipeg) “to enter upon and to divert and take water from Shoal Lake in the District of Kenora in the Province of Ontario” subject to certain terms and conditions (“1913 OIC”).<sup>4</sup>

8. The first condition contained in the 1913 OIC states:

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, but water taken within the terms hereof, and considered merely as water, is not property to be paid for.<sup>5</sup>

9. The second condition contained in the 1913 OIC 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

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<sup>1</sup> Amended Statement of Claim, [Motion Record of the Defendant \[“MDE”\], Tab 2](#) at [para 20](#).

<sup>2</sup> Amended Statement of Claim, [MDE, Tab 2](#) at [para 30](#); *Beds of Navigable Waters Act*, [RSO 1990, c B4](#) at [s 1](#).

<sup>3</sup> *An Act to Incorporate the Greater Winnipeg Water District*, [SM 1913, c 22](#) at [s 22](#).

<sup>4</sup> Order-in-Council made by Ontario dated October 2, 1913 [“1913 OIC”], [MDE, Tab 5](#); *An Act to Confer Certain Rights and Powers upon the Greater Winnipeg Water District*, [SO 1916, c 17](#) at [ss 2 and 3](#).

<sup>5</sup> 1913 OIC, [MDE, Tab 5](#) at [clause 1](#).

enact in the premises.<sup>6</sup>

10. In 1916, Ontario enacted legislation confirming that the 1913 OIC and its terms and conditions were legal, valid and binding as if they had been enacted.<sup>7</sup> Section 34.3(3) of the *Ontario Water Resources Act* contains a reference to the 1913 OIC as the basis for an exemption from the prohibition on water-taking in the Nelson Basin.<sup>8</sup> There is no mention in the *Ontario Water Resources Act* to a right of action or entitlement to compensation in relation to the 1913 OIC or any other basis.

### **B. International Joint Commission's 1914 Order of Approval**

11. The International Joint Commission is an international body comprised of representatives from both Canada and the United States and regulates waters that are subject to the *International Boundary Waters Treaty Act*.<sup>9</sup> The International Joint Commission assumed regulatory authority over Shoal Lake because it is interconnected with the Lake of the Woods, which is a body of water that is subject to the *International Boundary Waters Treaty Act*.<sup>10</sup> The International Joint Commission's regulatory powers include granting permission to take water and setting water levels. The Lake of the Woods Control Board exists under concurrent Canada, Manitoba, and Ontario legislation operating as a federal board with members from each province and the federal government and is responsible for maintaining minimum and maximum water levels.<sup>11</sup>

12. On January 14, 1914, the International Joint Commission made an Order of Approval

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<sup>6</sup> 1913 OIC, [MDE, Tab 5](#) at [clause 2](#).

<sup>7</sup> *An Act to Confer Certain Rights and Powers upon the Greater Winnipeg Water District*, [SO 1916, c 17](#) at [s2](#).

<sup>8</sup> *Ontario Water Resources Act*, [RSO 1990, c O.40](#) at [s 34.3\(3\)](#).

<sup>9</sup> *International Boundary Waters Treaty Act*, [RSC 1985, c I-17](#).

<sup>10</sup> *Lac Seul First Nation (Southwind) v Canada*, [2017 FC 906](#) ["*Lac Seul*"] at [para 118](#); Order of Approval made by International Joint Commission dated January 14, 1914 ["IJC Order of Approval"], [MDE, Tab 6](#).

<sup>11</sup> *The Lake of the Woods Control Board Act, 1921*, [SC 1921, c 10](#) (Canada); *An Act Respecting The Lake of the Woods Control Board*, [1922 SO 105, c 21](#) (Ontario) as amended; *The Lake of the Woods Control Board Act*, [CCSM 1987, c L30](#) (Manitoba)

granting permission to the Greater Winnipeg Water District to take water from Shoal Lake generally for domestic and sanitary purposes up to a maximum of 1 million gallons (or 3.785 million litres) per day.<sup>12</sup> The International Joint Commission's Order of Approval permits the City of Winnipeg to withdraw water from Shoal Lake and continues to apply today to Winnipeg's water-taking.<sup>13</sup> The International Joint Commission expressly incorporated the condition from the 1913 OIC requiring the Greater Winnipeg Water District to pay compensation to Ontario and to all private parties and made it a condition of the Order for Approval.<sup>14</sup>

13. Following the International Joint Commission's Order of Approval, the water level for Shoal Lake was set but not by Ontario.<sup>15</sup> The International Joint Commission and the Lake of the Woods Control Board have the regulatory authority to set and maintain water levels for Shoal Lake.<sup>16</sup> There is no suggestion that Winnipeg has ever taken more water than it had permission to take.

### **C. Aqueduct Located Entirely in Manitoba**

14. The aqueduct carrying water from Shoal Lake to Winnipeg was completed in 1919.<sup>17</sup> Despite early on in the process considering a route for the aqueduct that crossed the border into Ontario to take water from the Ontario's side of Shoal Lake, the City of Winnipeg ultimately chose a route located entirely within Manitoba.<sup>18</sup> The City of Winnipeg has only ever taken water from its aqueduct on the Manitoba side of Shoal Lake.<sup>19</sup> Despite getting permission from

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<sup>12</sup> IJC Order of Approval, [MDE, Tab 6](#).

<sup>13</sup> Consent Order made July 9, 2020 in Court File No. CV-19-632558, [MDE, Tab 7](#).

<sup>14</sup> IJC Order of Approval, [MDE, Tab 6](#); Consent Order made July 9, 2020 in Court File No. CV-19-632558, [MDE, Tab 7](#) at [para 1](#).

<sup>15</sup> Response to Demand for Particulars, [MDE, Tab 4](#) at [8-9](#); the plaintiff has refused to provide particulars regarding when the water levels were set for Shoal Lake and by what authority. The Court is entitled to draw the inference that Ontario was not the authority that set water levels for Shoal Lake.

<sup>16</sup> Amended Statement of Claim, [MDE, Tab 2](#) at [para 53](#); Response to Demand for Particulars, [MDE, Tab 4](#) at [8-9](#).

<sup>17</sup> Amended Statement of Claim, [MDE, Tab 2](#) at [paras 50-52](#).

<sup>18</sup> Amended Statement of Claim, [MDE, Tab 2](#) at [para 42](#); Response to Demand for Particulars, [MDE, Tab 4](#) at [4-6](#).

<sup>19</sup> Amended Statement of Claim, [MDE, Tab 2](#) at [para 50](#); Response to Demand for Particulars, [MDE, Tab 4](#) at [4-5](#).

Ontario “to enter upon” Ontario and to take water from Shoal Lake, the City of Winnipeg has never crossed the provincial border to take water from Shoal Lake or in any way engaged the permission described in the 1913 OIC. As noted above, it is the International Joint Commission’s Order of Approval “which permits the City of Winnipeg to withdraw water from Shoal Lake.”<sup>20</sup>

#### **D. Previous Application Resolved on Consent**

15. The plaintiff and its Chief, Gerald Lewis, previously commenced an application against the City of Winnipeg and Ontario seeking direction from the Court and a declaration that the plaintiff and Chief Lewis were entitled to compensation pursuant to the 1913 OIC.

16. Through case management, the parties resolved the application on consent. The application was dismissed without prejudice to the plaintiff’s ability to commence the present action. The Order of Justice Gans made July 9, 2020 declared that the International Joint Commission’s Order of Approval “permits the City of Winnipeg to withdraw water from Shoal Lake” and that the plaintiff

would be entitled to full *compensation from the City of Winnipeg* if it can be shown that the Applicants’ properties or lands have been taken, injuriously affected or in any way interfered with *pursuant to the Order [of Approval]* provided, however, that water taken within the terms of the Order and considered merely as water is not property to be paid for.<sup>21</sup> [Emphasis added.]

#### **E. Allegations in Amended Statement of Claim**

17. The plaintiff alleges that the City of Winnipeg is liable for compensation for injurious affection pursuant to the 1913 OIC and the *Ontario Water Resources Act*<sup>22</sup> which the plaintiff

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<sup>20</sup> Consent Order made July 9, 2020 in Court File No. CV-19-632558, [MDE, Tab 7](#).

<sup>21</sup> Consent Order made July 9, 2020 in Court File No. CV-19-632558, [MDE, Tab 7](#).

<sup>22</sup> *Ontario Water Resources Act*, [RSO 1990, c O.40](#).



alleges creates a statutory cause of action. The claim for compensation relates primarily to damages for ecological injury from elevated water levels (i.e. flooding). The plaintiff seeks compensation from the City of Winnipeg as a private party pursuant to the 1913 OIC.

18. The entire claim for damages as against Ontario is pled in the alternative if the claim against Winnipeg is statute-barred. If the plaintiff is unable to pursue its claim for compensation against Winnipeg, the plaintiff seeks equitable damages against Ontario on the basis of breach of a fiduciary duty.

19. The plaintiff alleges that the 1913 OIC created a fiduciary obligation on the part of Ontario for the benefit of the plaintiff to protect the plaintiff's lands and to ensure it received compensation. Specifically, the plaintiff alleges that Ontario undertook to regulate the taking of water from Shoal Lake and Winnipeg's operations creating a fiduciary duty and then failed to regulate to the plaintiff's detriment resulting in injury to the plaintiff's land. To support the first alleged undertaking, the plaintiff appears to rely on the second condition of the 1913 OIC requiring the Greater Winnipeg Water District to abide by Ontario's regulations including the limit on the quantity of water to be removed. It is this condition retaining an ongoing right or obligation to monitor the taking of water from Shoal Lake that appears to form the basis for the claim that a fiduciary duty was owed.

20. The plaintiff also alleges that Ontario undertook to ensure that the plaintiff received compensation from the City of Winnipeg creating a fiduciary duty. To support the second undertaking, the plaintiff appears to rely on the first condition of the 1913 OIC requiring compensation be paid to Ontario and private parties.

21. The plaintiff's fiduciary duty claim against Ontario appears to be premised entirely on the incorrect assumption that the 1913 OIC is the operative legal instrument by which the City of

Winnipeg takes water. It is Ontario's position that the International Joint Commission's Order of Approval is the operative legal instrument that permits the City of Winnipeg to withdraw water from Shoal Lake and entitles the plaintiff to pursue compensation from Winnipeg – not the 1913 OIC.<sup>23</sup>

### **PART III – THE ISSUES**

22. The sole question on this motion is whether the plaintiff's claim against Ontario for breach of fiduciary duty should be struck and the action dismissed.

23. Ontario submits that the claim as against Ontario should be struck and dismissed for failing to disclose a reasonable cause of action.

### **PART IV – ARGUMENT AND THE LAW**

#### **The Test for a Motion to Strike as Disclosing No Reasonable Cause of Action**

24. Claims should be struck where it is plain and obvious that they do not disclose a reasonable cause of action or where they do not include the material facts required to establish the legal elements of a cause of action. A Court hearing a motion to strike must proceed on the basis that the facts pled in the claim are true; evidence is not admissible on a motion brought pursuant to rule 21.01(1)(b). However, the Court is not required to accept "bald conclusory statements of fact, unsupported by material facts" as true. Legal conclusions are not facts. It is incumbent on the plaintiff to clearly plead the facts upon which it relies in making its claim. The plaintiff "is not entitled to rely on the possibility that new facts may turn up" to rescue a claim on a motion to strike.<sup>24</sup>

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<sup>23</sup> Consent Order made July 9, 2020 in Court File No. CV-19-632558, [MDE, Tab 7](#).

<sup>24</sup> *Rules of Civil Procedure*, [RRO 1990, Reg 194](#) at [rule 21.01\(1\)\(b\)](#); *R v Imperial Tobacco Canada Ltd*, [2011 SCC 42](#) [*Imperial Tobacco*] at [paras 17-25](#); *Syl Apps Secure Treatment Centre v BD*, [2007 SCC 38](#) at [para 15](#); *Hunt v Carey Canada Inc*, [\[1990\] 2 SCR 959 \(SCC\)](#).

25. The Supreme Court of Canada emphasized the advantage of resolving issues of this nature where possible at an early stage of the proceeding.

The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

This promotes two goods – efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. ... The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties’ respective positions on those issues and the merits of the case.<sup>25</sup>

26. The same rationale applies to striking a fiduciary duty claim as disclosing no reasonable cause of action on a preliminary motion. The Supreme Court of Canada held in *Alberta v Elder Advocates of Alberta Society*:

Claims against the government that fail to satisfy the legal requirements of a fiduciary duty should not be allowed to proceed in the speculative hope that they may ultimately succeed. ... Plaintiffs suing for breach of fiduciary duty must be prepared to have their claims tested at the pleadings stage, as for any cause of action.<sup>26</sup>

27. The fact that a case involves complex fiduciary duty claims or Aboriginal law is no barrier to the court concluding that it is plain and obvious that the claim is bound to fail.<sup>27</sup> Courts across the country routinely strike out claims against the Crown or government authorities on motions to strike on the ground that no fiduciary duty is owed,<sup>28</sup> including claims involving Indigenous

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<sup>25</sup> *Imperial Tobacco*, [2011 SCC 42](#) at [paras 19-20](#).

<sup>26</sup> *Alberta v Elder Advocates of Alberta Society*, [2011 SCC 24](#) [*“Elder Advocates”*] at [para 54](#).

<sup>27</sup> *Spookw v Gixsan Treaty Society*, [2017 BCCA 16](#) at [para 74](#).

<sup>28</sup> *Elder Advocates*, [2011 SCC 24](#); *Scott v Canada (Attorney General)*, [2017 BCCA 422](#); *Trapp v British Columbia*, [2018 BCSC 580](#); *Filson v Canada (Attorney General)*, [2014 SKQB 164](#), aff’d [2015 SKCA 80](#); *Kasheke v Canada (Attorney General)*, [2017 NSSC 61](#); *MacLellan v Canada (Attorney General)*, [2014 NSSC 280](#); *Walsh v Atlantic Lottery Corporation*, [2013 NSSC 409](#); *Burns Bog Conservation Society v Canada (Attorney General)*, [2012 FC 1024](#), aff’d [2014 FCA 170](#) [*“Burns Bog”*].

parties.<sup>29</sup>

28. That Aboriginal law is an evolving area is not sufficient to save a claim on a motion to strike. The Court of Appeal has repeatedly stated that

fiduciary law in Canada, particularly in respect of the Crown's relationship with aboriginal peoples, is a very dynamic area of Canadian law. The nature and extent of the particular obligations that may arise out of this relationship are matters that remain largely unsettled in the jurisprudence.

This state of the law does not mean, of course, that any claim for breach of fiduciary duty arising out of the relationship between the Crown and the aboriginal peoples of Canada must necessarily survive the pleading stage. The same test under Rule 21 applies to this kind of action.<sup>30</sup>

### **The Amended Statement of Claim Does Not Disclose a Reasonable Cause of Action**

29. The only cause of action alleged against Ontario is breach of fiduciary duty. Ontario submits that the amended statement of claim does not include material facts sufficient to establish the legal elements of the claim and that it is plain and obvious that the pleading discloses no reasonable cause of action against Ontario for breach of fiduciary duty.

30. The Supreme Court of Canada has explained that a fiduciary obligation may arise from the relationship between the Crown and Indigenous Peoples in two ways. First, it may arise from the Crown's discretionary control over a specific or cognizable Aboriginal interest. Because this obligation is specific to the relationship between the Crown and Indigenous Peoples, it has been characterized as a "*sui generis*" fiduciary obligation. Second, a fiduciary obligation may arise where the general conditions for a private law *ad hoc* fiduciary relationship are satisfied – that is,

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<sup>29</sup>*C.R. v Ontario*, [2019 ONSC 2734](#), aff'd *J.B. v Ontario*, [2020 ONCA 198](#), leave to appeal (SCC) denied October 8, 2020; *Grand River Enterprises Six Nations Ltd v Canada (Attorney General)*, [2017 ONCA 526](#) ["Grand River Enterprises"]; *Conley v Chippewas of the Thames First Nation*, [2015 ONSC 404](#); *Chingee v British Columbia*, [2016 BCSC 760](#), aff'd [2017 BCCA 250](#); *Spookw v Gitksan Treaty Society*, [2014 BCSC 1100](#), aff'd [2017 BCCA 16](#).

<sup>30</sup> *Grand River Enterprises*, [2017 ONCA 526](#) at [para 202](#); *Bonaparte v Canada (Attorney General)* (2003), 64 OR (3d) 1 (Ont CA) at [paras 32-33](#).

where the Crown has undertaken to exercise its discretionary control over a legal or substantial practical interest in the best interests of the alleged beneficiary.<sup>31</sup>

#### **A. The Allegations Cannot Support the Finding of a *Sui Generis* Fiduciary Duty**

31. While the relationship between the Crown and Indigenous Peoples can properly be described as fiduciary in nature, the Supreme Court of Canada has not described this relationship as a *per se* fiduciary relationship in which all undertakings by the fiduciary give rise to a fiduciary duty. Indeed, the Supreme Court has been clear that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature, and that there is not a “universal trust relationship ... encompassing all aspects of the relationship between the Crown and Aboriginal peoples.”<sup>32</sup> The “fiduciary duty imposed on the Crown does not exist at large but in relation to specific Aboriginal interests.”<sup>33</sup>

32. *Sui generis* fiduciary obligations may arise from the relationship between the Crown and Indigenous Peoples when the Crown exercises discretionary control over a specific or cognizable Aboriginal interest (which includes a communal Aboriginal interest) in a way that invokes a responsibility in the nature of a private law duty.<sup>34</sup> To determine whether there is a *sui generis* fiduciary duty, it is necessary to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.<sup>35</sup>

33. Fiduciary duties generally arise only with regard to obligations originating in a private law

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<sup>31</sup> *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, [2018 SCC 4](#) [“*Williams Lake*”] at [para 44](#).

<sup>32</sup> *Williams Lake*, [2018 SCC 4](#) at [para 43](#); see also *Wewaykum Indian Band v Canada*, [2002 SCC 79](#) [“*Wewaykum*”] at [paras 79-85](#) and *Gladstone v Canada (Attorney General)*, [2005 SCC 21](#) [“*Gladstone*”] at [para 23](#).

<sup>33</sup> *Wewaykum*, [2002 SCC 79](#) at [para 81](#).

<sup>34</sup> *Williams Lake*, [2018 SCC 4](#) at [paras 44, 47](#) and [52](#).

<sup>35</sup> *Wewaykum*, [2002 SCC 79](#) at [paras 79-83](#) and [85](#).

context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship.<sup>36</sup> The Aboriginal interest must be sufficiently independent of the Crown’s executive and legislative functions to give rise to responsibility in the nature of a private law duty – *i.e.* a fiduciary duty – otherwise it is only a public law duty.<sup>37</sup>

34. The courts have recognized such *sui generis* fiduciary duties were owed by the federal Crown in contexts involving Aboriginal interests in land including the disposition of existing reserves,<sup>38</sup> reserve creation and protecting existing reserves from exploitation.<sup>39</sup> The fact that the plaintiff is a First Nation and has an interest in the land is not sufficient to establish an Aboriginal interest in land. The interest must be a distinctly Aboriginal interest in the land that is integral to the nature of the First Nation community and its relationship to the land.<sup>40</sup>

35. In the context of taking up lands under Treaty 3, the Supreme Court has indicated that the province when exercising its jurisdiction is bound by the duties attendant on the Crown including that it may be subject to a fiduciary duty that arise in dealing with Aboriginal interests.<sup>41</sup> A *sui generis* fiduciary duty will most often arise in respect of actions of the federal Crown given the federal Crown’s more prevalent control over Aboriginal interests.<sup>42</sup> In a claim involving flooding of Treaty 3 reserve land, the Federal Court of Appeal held the federal Crown liable for breach of a *sui generis* fiduciary duty and refused to apportion damages to the provinces for breach of the fiduciary duty owed by Canada.<sup>43</sup> The Federal Court noted that “Canada has an equitable

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<sup>36</sup> *Guerin v the Queen*, [1984] 2 SCR 335 (SCC) [“*Guerin*”] at p 385.

<sup>37</sup> *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 [“*Manitoba Metis Federation*”] at paras 49 and 51.

<sup>38</sup> *Guerin*, [1984] 2 SCR 335 (SCC).

<sup>39</sup> *Wewaykum*, 2002 SCC 79; *Williams Lake*, 2018 SCC 4.

<sup>40</sup> *Manitoba Metis Federation*, 2013 SCC 14 at para 53.

<sup>41</sup> *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 [“*Grassy Narrows*”] at para 50.

<sup>42</sup> *Bear Island Foundation v Ontario*, [2000] 2 CNLR 13 (Ont CA) at para 34.

<sup>43</sup> *Lac Seul*, 2017 FC 906 at paras 221, 226-227 and 542-543, aff’d 2019 FCA 171; appeal to SCC heard December 8, 2020.

obligation to deal with the land for the benefit of the First Nation.”<sup>44</sup> To date, no court has found a province liable for breach of a *sui generis* fiduciary duty.

36. Even when read generously, the amended statement of claim does not set out facts to support an allegation that Ontario assumed discretionary control over a specific Aboriginal interest of the plaintiff sufficient to give rise to a fiduciary obligation.

**(i) No Specific or Cognizable Aboriginal Interest Subject to Ontario's Control**

37. The plaintiff does not plead a specific or cognizable Aboriginal interest that would support a finding that Ontario owed a *sui generis* fiduciary duty. The plaintiff claims compensation from Winnipeg as a private party, but any interest in the compensation itself cannot be characterized as a cognizable Aboriginal interest even if the underlying property interest can. The plaintiff does not assert an Aboriginal right to regulate water-taking activities, nor have the courts ever recognized such a right. Indeed, the Supreme Court of Canada recently commented that a specific set of arrangements for environmental regulation is not equivalent to an Aboriginal right or treaty right.<sup>45</sup> Instead, the plaintiff relies on an interest in its reserve lands and a broader interest in exercising harvesting rights in its traditional territory to support its claim for a *sui generis* fiduciary duty. However, the plaintiff does not allege that Ontario assumed discretionary control over the plaintiff’s specific Aboriginal interest in its reserve lands or the exercise of harvesting rights. For the reasons set out in more detail in the next section on discretionary control, Ontario did not assume discretionary control over the plaintiff’s interests in its reserve lands or harvesting activities. Ontario also had no authority to set or regulate water levels in Shoal Lake, and the plaintiff does not allege that Ontario authorized raising water levels. In

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<sup>44</sup> *Lac Seul*, 2017 FC 906 at paras 221; *Guerin*, [1984] 2 SCR 335 (SCC) at p 376.

<sup>45</sup> *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 158.

other words, the specific Aboriginal interests identified by the plaintiff in the claim could not give rise to a fiduciary duty on the part of Ontario in these circumstances.

38. Surrendered non-reserve land cannot be a specific or cognizable Aboriginal interest that gives rise to a fiduciary duty.<sup>46</sup> Although Shoal Lake and the surrounding land make up part of the plaintiff's traditional territory and the plaintiff pleads that it did not surrender any land under Treaty 3,<sup>47</sup> the Supreme Court of Canada has confirmed that Treaty 3 involved a surrender of land.<sup>48</sup> Any claim of fiduciary duty based on an Aboriginal interest in surrendered traditional territory must fail. To the extent that Ontario exercised control over the surrendered land, it did so as the owner and the governing authority duly authorized by Treaty 3 and the Constitution to "take up" the land from time to time.

39. The plaintiff's interest in its reserves, a quasi-proprietary interest<sup>49</sup> in the land adjacent to Shoal Lake, is not an interest in the water itself that could give rise to a fiduciary duty with respect to regulation of water-taking for the reasons that follow.

40. While the plaintiff does not assert a claim of Aboriginal title to the lakebed, the plaintiff does state that it considers part of Shoal Lake to be included in its reserves but does not go so far as to allege ownership of the lakebed on the basis of its interest in the reserve lands.<sup>50</sup>

41. The courts have declined to extend ownership or title to bodies of waters adjacent to an Aboriginal reserve absent an express intention to grant title to the bed.<sup>51</sup> As noted by the

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<sup>46</sup> *Inuit of Nunavut v Canada*, [2014 NUCA 2](#) at [paras 33-34](#) and [47-49](#); *Manitoba Metis Federation*, [2013 SCC 14](#) at [paras 51-59](#).

<sup>47</sup> Amended Statement of Claim, [MDE, Tab 2](#) at [paras 14](#) and [16](#).

<sup>48</sup> *Grassy Narrows*, [2014 SCC 48](#) at [para 2](#). See also *Lac Seul*, [2017 FC 906](#) at [paras 105](#) and [220](#).

<sup>49</sup> *Guerin*, [\[1984\] 2 SCR 335 \(SCC\)](#); *Wewaykum*, [2002 SCC 79](#) at [para 74](#).

<sup>50</sup> Amended Statement of Claim, [MDE, Tab 2](#) at [para 34](#); see also [para 45](#) in which it appears that the plaintiff admits that Ontario holds title to the lakebed.

<sup>51</sup> *R v Lewis*, [\[1996\] 1 SCR 921 \(SCC\)](#) at [para 62](#); *R v Nikal*, [\[1996\] 1 SCR 1013 \(SCC\)](#) at [para 64](#).



Manitoba Court of Appeal in *Iverson v Greater Winnipeg Water District* and followed by the Supreme Court of Canada in *R v Nikal*, title to the land on the banks of non-tidal navigable waters does not extend to the waters themselves due to the importance of the public rights in those waters.<sup>52</sup>

42. Ontario holds title to the lakebed of Shoal Lake located on the Ontario side of the provincial border as a matter of common law and as confirmed by statute.<sup>53</sup> In 1915, Ontario enacted legislation confirming that lands conveyed to Canada to fulfill the Treaty 3 reserve requirement (including the plaintiff's reserves) excluded the lakebed and expressly confirmed that the land covered by water continued to be the property of Ontario.<sup>54</sup>

43. Even if the plaintiff were to assert a title claim to the lakebed of Shoal Lake, the plaintiff cannot base its claim for breach of a fiduciary duty with respect to controlling the use of water on such an assertion, as ownership of the lakebed does not confer a right to control the use of water above the lakebed. The water itself in a body of water cannot be owned in common law.<sup>55</sup> While a property interest in the land on the bank of a river or lake may include riparian rights which entitle the landowner to access and use of the adjacent water, riparian rights do not include private ownership of the lakebed or a private right to exclusive possession absent an express grant.<sup>56</sup>

44. An interest in the reserve land adjacent to a lake does not create an ownership interest in the

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<sup>52</sup> *R v Nikal*, [1996] 1 SCR 1013 (SCC) at para 67 citing *Iverson v Greater Winnipeg Water District* (1921), 57 DLR 184 (Man CA) at para 80.

<sup>53</sup> *Bed of Navigable Waters Act*, RSO 1990, c B4 at s 1. See Amended Statement of Claim, MDE, Tab 2 at para 45.

<sup>54</sup> *An Act to Confirm the Title for the Government of Canada to Certain Lands and Indian Lands*, SO 1915, c 12 at s 2.

<sup>55</sup> *Groat v City of Edmonton*, [1928] SCR 522 (SCC) at p 531; *R v Nikal*, [1996] 1 SCR 1013 (SCC) at para 67 citing *Iverson v Greater Winnipeg Water District* (1921), 57 DLR 184 (Man CA) at 202.

<sup>56</sup> *Saik'uz First Nation v Rio Tinto Alcan Inc*, 2015 BCCA 154 at paras 58-59 and 68; *Attorney General of Canada v Higbie*, [1945] SCR 385 (SCC) at p 436.

lakebed or in the water in the lake itself.<sup>57</sup> In other words, the Aboriginal interest in the reserve lands does not extend to an Aboriginal interest in the water in the lake. Even if the plaintiff had a property interest in the bed of Shoal Lake, the plaintiff would not have an Aboriginal interest in the water itself and would not have authority to regulate activities within Shoal Lake including the taking of water.<sup>58</sup>

45. There is a wide assortment of regulatory statutes empowering international bodies, the province and the federal government to regulate the exercise of riparian rights and other water rights.<sup>59</sup> The exercise of these regulatory powers is a public law duty arising from the ordinary exercise of statutory powers. As recognized by the Supreme Court of Canada, the performance of such public law duties requires the exercise of discretion and does not typically give rise to a fiduciary obligation.<sup>60</sup> There is no private law element to the regulation of water-taking and, therefore, no discretionary control over a private interest that can give rise to any fiduciary duty.

46. Even if the regulation of water-taking could amount to discretionary control in a private law nature, there is no connection between the alleged discretionary control and the specific Aboriginal interest in the reserve identified by the plaintiff. The alleged discretionary control – regulating water-taking – is not an exercise of control over the plaintiff’s interest in its reserve lands which legally does not include the lake.

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<sup>57</sup> *R v Lewis*, [1996] 1 SCR 921 (SCC) at para 62; *R v Nikal*, [1996] 1 SCR 1013 (SCC) at para 64.

<sup>58</sup> *Erik v McDonald*, 2019 ABCA 217 at para 136, quoting *Johnson v Seifert* (1960), 257 Minn 159 (Sup Ct): “Ownership of the lakebed does not carry with it a right of control over the overlying waters.” See also *R v Moss* (1896), 26 SCR 322 (SCC); *Frederick Gerring Jr. v Canada* (1897), 27 SCR 271 (SCC) (per Sedgewick J); *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 (SCC).

<sup>59</sup> See e.g. *International Boundary Waters Treaty Act*, RSC 1985 c 1-17; *Fisheries Act*, RSC 1985, c F14; *Species at Risk Act*, SC 2002, c 29; *Ontario Water Resources Act*, RSO 1990, c O40; *Conservation Authorities Act*, RSO 1990, c C27; *Environmental Bill of Rights*, 1993, SO 1993, c 28; *Environmental Protection Act*, RSO 1990, c E19; *Fish and Wildlife Conservation Act*, 1997, SO 1997, c 41; *Lakes and Rivers Improvement Act*, RSO 1990, c L3; *Public Utilities Act*, RSO 1990, c P52.

<sup>60</sup> *Guerin*, [1984] 2 SCR 335 (SCC) at p 385.

47. Similarly, while the plaintiff may access Shoal Lake in order to exercise treaty rights such as fishing, the regulation of water-taking is not an exercise of discretionary control over those harvesting activities in Shoal Lake. To date, no court has recognized harvesting rights as an Aboriginal interest sufficient to ground a *sui generis* fiduciary duty.

**(ii) No Discretionary Control by Ontario**

48. The claim against Ontario for breach of fiduciary duty must also fail because it was the federal government that had and exercised discretionary control over the plaintiff's reserves – not Ontario. It was the federal government that authorized and administered any expropriation or “taking” of reserve land for the construction of the aqueduct.<sup>61</sup> Any claim for breach of fiduciary duty with respect to those reserve lands taken and associated injurious effects would be against the federal government.

49. While Ontario has authority to regulate water-taking activities within Ontario, it does not have regulatory authority to control Winnipeg's water-taking activities in Shoal Lake and, therefore, cannot be said to be exercising discretionary control over the plaintiff's Aboriginal interest. To the extent that the 1913 OIC addressed regulatory control over water-taking activities, it should be read as regulatory authority only over water-taking activities located within Ontario. As noted earlier, there are multiple governments and bodies with overlapping authority to regulate water in Ontario including the International Joint Commission which is the regulatory body that provided the operative permission for the City of Winnipeg's water-taking activities.

50. In *R v Shoal Lake Band of Indians No. 39*, the Ontario Supreme Court considered whether Ontario could exercise regulatory powers over fishing activities in Shoal Lake, including the

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<sup>61</sup> Amended Statement of Claim, [MDE, Tab 2](#) at [para 50](#); Response to Demand for Particulars, [MDE, Tab 4](#) at [6](#).

waters located within Manitoba. The applicants (who include the plaintiff in the present action) argued that Ontario could not restrict or impose a quota upon fish taken from the Manitoba side of Shoal Lake. Justice Cory (as he was then) granted a declaration that Ontario's fishing regulations do not apply to the waters of Shoal Lake located within Manitoba.<sup>62</sup>

51. The Ontario Supreme Court granted the declaration even though fish are not confined to a certain geographic region, presumably passing across the Ontario-Manitoba border unrestricted. While the water in Shoal Lake is not confined to a specific geographic area and moves freely across the provincial border, the authority to regulate that water and its use is confined to specific geographic areas.<sup>63</sup> It is trite law to say that Ontario's regulatory authority is restricted to the area within its provincial boundaries. Just as Justice Cory concluded in *Shoal Lake Band of Indians No. 39*, Ontario's regulatory powers cannot and do not apply in any waters located within Manitoba, including the Manitoba side of Shoal Lake.

52. Because Ontario has no authority to regulate water-taking activities beyond its provincial boundaries, the 1913 OIC, if it has any application at all, can only apply to the portion of Shoal Lake located within Ontario. Ontario can only engage in the regulation described in the 1913 OIC if some portion of the aqueduct or water intake were located within Ontario. As the City of Winnipeg is not conducting any water-taking activities on the Ontario side of Shoal Lake, there is nothing to engage Ontario's regulatory powers as described in the 1913 OIC or otherwise.

53. The City of Winnipeg did not need Ontario's permission to build its aqueduct entirely in Manitoba and to carry out all of its water-taking activities on the Manitoba side of Shoal Lake.

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<sup>62</sup> *R v Shoal Lake Band of Indians No. 39* (1979), 25 OR (2d) 334 (Ont Supreme Court).

<sup>63</sup> *R v Hare and Debassige*, [1985] 3 CNLR 139 (Ont CA); See also *Interprovincial Co-operatives Ltd v Dryden Chemicals Ltd*, [1976] 1 SCR 477 (SCC); Reference re: Upper Churchill Water Rights Reversion Act, [1984] 1 SCR 297 (SCC).

Even though the City of Winnipeg obtained Ontario's permission to access and take water from the Ontario side of Shoal Lake, in the end Winnipeg chose a different route for its aqueduct that did not need Ontario's permission. The City of Winnipeg has not taken any steps that would have engaged the 1913 OIC or Ontario's permission to take water from the Ontario side of Shoal Lake. Even if Ontario were to revoke the 1913 OIC permitting the City of Winnipeg "to enter upon and to divert and take water from Shoal Lake in the District of Kenora *in the Province of Ontario*," there would be no impact to the water-taking operations by the City of Winnipeg currently taking place only in Manitoba.<sup>64</sup>

54. Further, it is the International Joint Commission and the Lake of the Woods Control Board that set water levels for Shoal Lake.<sup>65</sup> Responsibility for the alleged elevated water levels in Shoal Lake is more properly attributable to the International Joint Commission and the Lake of Woods Control Board. As Ontario does not control the water levels of Shoal Lake, the regulation or - as alleged in the amended statement of claim - the insufficient regulation of water levels cannot give rise to a fiduciary duty on the part of Ontario. Although the plaintiff may have a claim for breach of fiduciary duty with respect to authorizations given to raise water levels and/or flood its reserve lands, such a claim would be against the authority that granted such permission and not Ontario.

55. Assuming all of the facts pled to be true, it is plain and obvious that no *sui generis* fiduciary duty was owed to the plaintiff since Ontario has no regulatory authority to control Winnipeg's water-taking activities in Shoal Lake and cannot be said to be exerting discretionary control over the plaintiff's specific or cognizable Aboriginal interest.

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<sup>64</sup> 1913 OIC, [MDE, Tab 5](#) [emphasis added].

<sup>65</sup> Amended Statement of Claim, [MDE, Tab 2](#) at [para 53](#); Response to Demand for Particulars, [MDE, Tab 4](#) at [8-9](#).

## **B. The Allegations Cannot Support the Finding of an *Ad Hoc* Fiduciary Duty**

56. *Ad hoc* fiduciary duties may arise from the relationship between the Crown and Indigenous people where the general conditions for a private law *ad hoc* fiduciary relationship are satisfied.<sup>66</sup> *Ad hoc* fiduciary duties arise when there is

- (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiaries;
- (2) a defined class of beneficiaries vulnerable to the alleged fiduciary's control; and
- (3) a legal interest or a substantial practical interest of the beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.<sup>67</sup>

The interest affected must be a specific private law interest to which the person has a pre-existing distinct and complete legal entitlement. It is not enough that the alleged fiduciary's action generally impacts on a person's well-being, property, or security.<sup>68</sup>

57. Public law duties, the performance of which requires the exercise of discretion, generally do not give rise to a fiduciary relationship. The requirement for a fiduciary to deliberately forsake its own interests and the interests of all others in favour of the interests of the beneficiary is inherently at odds with the Crown's duty to the public as a whole. It will be exceedingly rare for the Crown to be liable for an *ad hoc* fiduciary duty.<sup>69</sup>

58. Where a statute gives rise to a fiduciary duty, the language in the statute must clearly

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<sup>66</sup> *Manitoba Metis Federation*, [2013 SCC 14](#) at [paras 49-50](#) and [60-63](#); *Wewaykum*, [2002 SCC 79](#) at [paras 78-80](#) and [85](#); *Williams Lake*, [2018 SCC 4](#) at [para 44](#).

<sup>67</sup> *Elder Advocates*, [2011 SCC 24](#) at [para 36](#); *Williams Lake*, [2018 SCC 4](#) at [para 162](#); *Manitoba Metis Federation*, [2013 SCC 14](#) at [paras 50](#) and [60](#).

<sup>68</sup> *Elder Advocates*, [2011 SCC 24](#) at [para 51](#).

<sup>69</sup> *Elder Advocates*, [2011 SCC 24](#) at [para 44](#); *Guerin*, [\[1984\] 2 SCR 335 \(SCC\)](#) at p 385; *Grand River Enterprises*, [2017 ONCA 526](#) at [para 181](#). The only decision that Ontario is aware of involving Indigenous claimants where a court has found an *ad hoc* fiduciary duty was owed is *Restoule v Canada*, [2018 ONSC 7701](#). However, it is not yet clear what guidance can be taken from that finding. In a subsequent decision in the same matter *Restoule v Canada*, [2020 ONSC 3932](#), the trial judge referred to her previous decision and stated that she found a *sui generis* fiduciary duty. Both decisions have been appealed and will be heard in April and June 2021, respectively.

support an undertaking to act in the beneficiary's best interest. It is insufficient that a public authority has been granted discretionary power to affect a person's interest.<sup>70</sup> The type of discretion that arises from the ordinary exercise of statutory powers does not suffice; otherwise, fiduciary obligations would arise in most government functions, rendering it difficult or almost impossible for the government to take any general action for the public good. The degree of control exerted by a government over the interest in question must be equivalent or analogous to direct administration of the interest before a fiduciary relationship can be said to arise.<sup>71</sup> Generally speaking, a strong correspondence with a traditional fiduciary relationship is a precondition to finding an implied fiduciary duty on the Crown.<sup>72</sup>

59. The mere enforcement of regulations is the type of legal control over an interest that arises from the ordinary exercise of statutory powers and is considered a public law duty. Even agreeing to enforce laws against third parties does not give rise to a fiduciary duty. Enforcement of laws against third parties is not equivalent or analogous to the direct administration of a specific private law interest to which a person or a class of persons has a legal entitlement.<sup>73</sup>

60. Not every undertaking made by the Crown to Indigenous Peoples constitutes an undertaking sufficient to give rise to an *ad hoc* fiduciary duty.<sup>74</sup> The Supreme Court of Canada has been clear that Indigenous ancestry alone is insufficient to create a fiduciary duty.<sup>75</sup> The undertaking must be in respect of an interest already held by the recipient of that undertaking and must be specifically to put that interest above all others' interests.<sup>76</sup> Further, the Crown's

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<sup>70</sup> *Elder Advocates*, [2011 SCC 24](#) at [para 45](#).

<sup>71</sup> *Elder Advocates*, [2011 SCC 24](#) at [para 53](#).

<sup>72</sup> *Elder Advocates*, [2011 SCC 24](#) at [para 47](#).

<sup>73</sup> *Grand River Enterprises*, [2017 ONCA 526](#) at [para 194](#); see also *Gladstone*, [2005 SCC 21](#) at [para 27](#).

<sup>74</sup> *Manitoba Metis Federation*, [2013 SCC 14](#) at [paras 60-63](#).

<sup>75</sup> *Gladstone*, [2005 SCC 21](#) at [para 23](#).

<sup>76</sup> *Elder Advocates*, [2011 SCC 24](#) at [para 31](#); *Manitoba Metis Federation*, [2013 SCC 14](#) at [paras 61-62](#); *Williams Lake*, [2018 SCC 4](#) at [para 163](#); *Grand River Enterprises*, [2017 ONCA 526](#) at [para 182](#).

responsibility for the public interest means that it rarely will be found to have assumed a paramount obligation to an Indigenous community in the nature of a private law obligation. That is, it will rarely have undertaken to act in the best interests of that Indigenous community at the expense of all others, such that an *ad hoc* fiduciary duty arises.<sup>77</sup>

61. The honour of the Crown is not an independent source of fiduciary duty.<sup>78</sup> While the honour of the Crown can give rise to a *sui generis* fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest, the Supreme Court of Canada has not applied the honour of the Crown to ground an *ad hoc* fiduciary duty.<sup>79</sup> Not all interactions between the Crown and Indigenous people engage the honour of the Crown. Rights that are “held by everyone and not merely by Aboriginal peoples” do not engage the honour of the Crown, and it is an error to use the doctrine of the honour of the Crown to inform the analysis of those rights.<sup>80</sup>

62. Even if the pleadings are read generously, the plaintiff has not pled material facts that establish the required elements for an *ad hoc* fiduciary duty. Nothing in the 1913 OIC, the supporting legislation or the facts pled support that bald allegation that Ontario undertook to act in the best interests of the plaintiff. Nor is there support for the bare assertion that Ontario exercised any discretion or control with respect to water-taking activities by the City of Winnipeg in a manner that affected any legal interest or substantial practical interest of the plaintiff.

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<sup>77</sup> *Williams Lake*, [2018 SCC 4](#) at [para 163](#); *Wewaykum*, [2002 SCC 79](#) at [para 96](#); *Chingee*, [2017 BCCA 250](#) at [paras 66-69](#).

<sup>78</sup> *Inuit of Nunavut v Canada*, [2014 NUCA 2](#) at [para 69](#); *Manitoba Metis Federation*, [2013 SCC 14](#).

<sup>79</sup> *Manitoba Metis Federation*, [2013 SCC 14](#) at [para 73](#).

<sup>80</sup> *R v Kokopenace*, [2015 SCC 28](#) at [paras 99-100](#); see also *Manitoba Metis Federation*, [2013 SCC 14](#) at [para 72](#).



**(i) No Undertaking of Responsibility to Act in the Best Interests of the Plaintiff**

63. The plaintiff's reliance on the common law, the Treaty of Niagara, Treaty 3, the Royal Proclamation of 1763, the covenant chain relationship, and the 1913 OIC<sup>81</sup> is so broad that it appears to amount to an allegation of fiduciary duty at large to all Indigenous Peoples. Again, the Supreme Court of Canada has already confirmed that a fiduciary duty at large does not exist.<sup>82</sup> More particularly, the plaintiff alleges that Ontario expressly undertook in the 1913 OIC to act in the best interests of the plaintiff with respect to the regulation of water-taking and with respect to ensuring compensation for the plaintiff.

64. The plaintiff pleads that in the 1913 OIC, Ontario gave an undertaking to act as a fiduciary towards the plaintiff "with respect to the protection of the plaintiff's lands and properties" and "to monitor the taking of water out of Shoal Lake." The plaintiff relies on the second condition included in the 1913 OIC requiring Winnipeg 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 in the premises.<sup>83</sup>

65. A general obligation to the public or sectors of the public cannot meet the requirement of an undertaking.<sup>84</sup> If the undertaking creating a fiduciary obligation is alleged to flow from a statute (or an Order-in-Council), "the language in the legislation must clearly support it. ... The mere grant to a public authority of discretionary power to affect a person's interest does not suffice."<sup>85</sup> The language of the 1913 OIC is too general to support the alleged undertaking by Ontario to act in the best interests of the plaintiff.

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<sup>81</sup> Amended Statement of Claim, [MDE, Tab 2](#) at [para 88](#); Response to Demand for Particulars, [MDE, Tab 4](#) at [21](#).

<sup>82</sup> *Wewaykum*, [2002 SCC 79](#) at [para 81](#).

<sup>83</sup> 1913 OIC, [MDE, Tab 5](#) at [clause 2](#).

<sup>84</sup> *Elder Advocates*, [2011 SCC 24](#) at [para 48](#).

<sup>85</sup> *Elder Advocates*, [2011 SCC 24](#) at [para 45](#).

66. The reference in the 1913 OIC to Ontario’s ability to monitor the water-taking activities in order to ensure it does not exceed the daily maximum amount is a regulatory activity for the benefit of the public as a whole. Environmental regulation is an interest shared by the public such that it cannot be a specific private law interest to which a person has a pre-existing distinct and complete legal entitlement. Environmental regulation is not a private law interest that can attract a fiduciary duty.<sup>86</sup> Even if the enforcement of such environmental regulations may have the result of affecting particular groups more than others, having the authority to regulate is not an undertaking and cannot create a fiduciary duty. Further, there is no private law duty to regulate the environment and, thus, no cause of action for failure to regulate. Ontario submits that regulation of water-taking is the kind of public law duty that the courts have said does not create fiduciary obligations.

67. To the extent that the plaintiff relies on the first condition in the 1913 OIC requiring compensation to Ontario and “private parties,” the general reference to private parties without a specific reference to the plaintiff is insufficient to establish that Ontario undertook to hold the interests of the plaintiff above all other interests including Ontario’s own interest. It is common practice when approving public works to allow affected parties to pursue compensation from the party undertaking the project.<sup>87</sup> If such a general reference in the 1913 OIC were to be considered an undertaking sufficient to create a fiduciary duty, then most approvals of public works and projects would create a fiduciary relationship with anyone who could seek compensation relating to the impacts from the project. Such a conclusion is incompatible with Supreme Court jurisprudence noting that only in rare circumstances will a government be found

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<sup>86</sup> *Burns Bog*, [2012 FC 1024](#) at [para 125](#), aff’d [2014 FCA 170](#) at [paras 43](#) and [46-47](#).

<sup>87</sup> See e.g. *An Act to Incorporate the Greater Winnipeg Water District*, [SM 1913, c 22](#) at [s 22](#).

to owe an *ad hoc* fiduciary duty.<sup>88</sup>

68. Further, a plain reading of the text provides for compensation going *to* Ontario from Winnipeg and does not support the plaintiff's allegation that Ontario undertook to pay compensation to the plaintiff or to ensure that the plaintiff received compensation from others.

69. In addition, the general reference to compensation in the 1913 OIC is insufficient to establish that Ontario undertook to create a system by which claims for compensation would be determined or that Ontario undertook to ensure that the plaintiff received such compensation. In fact, a system already existed in the courts, tribunals and administrative decision-makers enabled to adjudicate such claims. Even if Ontario had made such an undertaking, which is not admitted, Ontario fulfilled any obligations flowing from such an undertaking. The plaintiff required no action on the part of Ontario in order to pursue its claim for compensation from Winnipeg whether the plaintiff pursued that claim in Ontario or in Manitoba.

70. While the 1913 OIC shows an intention to potentially compensate Ontario, the plaintiff and other individuals whose lands might be affected by the water-taking activities of the City of Winnipeg, it does not demonstrate an undertaking to act in the plaintiff's best interests in priority to other legitimate concerns. Any responsibilities of Ontario under the 1913 OIC, should they exist absent water-taking or expropriation of land within the provincial borders, are owed to all Ontarians potentially affected and not exclusively to Indigenous communities or to the plaintiff.

71. The plaintiff has not pled facts sufficient to establish an implied undertaking by Ontario to act with undivided loyalty in the regulation of water-taking or in ensuring compensation. The plaintiff asserts no analogous duty in private law that could correspond to the alleged fiduciary

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<sup>88</sup> *Elder Advocates*, [2011 SCC 24](#) at [para 44](#).

duty on the part of Ontario, and the facts pled do not assert any basis upon which such an undertaking could be advanced.

**(ii) The Plaintiff's Legal Interests or Substantial Practical Interests are Not Affected by Ontario's Alleged Discretion or Control**

72. Even if the 1913 OIC is characterized as an undertaking by Ontario for the benefit of the plaintiff to ensure compensation or to regulate water-taking, the plaintiff does not describe a legal interest or a substantial practical interest that could be affected by the alleged exercise of discretion or control that could support the finding of a fiduciary duty.

73. To the extent that the plaintiff relies on the 1913 OIC as the source of its legal interest in compensation, the plaintiff cannot establish that it had a pre-existing and complete legal interest that was the subject of Ontario's exercise of discretion or control in the 1913 OIC.

74. To the extent the plaintiff relies on a pre-existing property right as the source of its legal interest, the 1913 OIC did not affect that legal interest and preserved the plaintiff's ability to pursue compensation for any harm to its property. Any interest in compensation was contingent on proving harm and not a vested right capable of supporting an *ad hoc* fiduciary duty. Ontario exercises no discretionary control over the plaintiff's ability to pursue compensation from Winnipeg, and no action by Ontario is required for the plaintiff to pursue a claim for compensation.

75. With respect to the regulation of water-taking, the plaintiff does not allege that Ontario exercised any discretion or control over the plaintiff's reserve land, and the plaintiff has no legal interest in the water that it alleges was subject to the alleged discretion or control. In any event, Ontario submits that the regulation of water-taking is the kind of public law duty that the courts have held does not create fiduciary obligations for the reasons set out below.

76. Any interest the plaintiff may have in the enforcement of water-taking regulations is an interest shared with the public as a whole and not a private law interest that can attract a fiduciary duty. In *Grand River Enterprises Six Nations Ltd v Canada (Attorney General)*, the Ontario Court of Appeal concluded that regulatory enforcement was a public law matter that could not give rise to a fiduciary duty. Specifically, the Court of Appeal concluded that the federal Crown did not owe a fiduciary duty to an Indigenous-owned business in relation to the enforcement of measures to address contraband tobacco. While the business would have benefitted from the measures, the business had no specific private law interest in their implementation and enforcement.<sup>89</sup>

77. The fact that the plaintiff uses and holds the reserve lands adjacent to Shoal Lake and exercises treaty rights in Shoal Lake makes the regulation of that the water resource relevant to the plaintiff, but it does not create a *legal interest* or substantial practical interest in the enforcement of water-taking regulations. There is no private law interest in the regulation of water-taking or stewardship of the environment that could create a fiduciary obligation on the part of Ontario to the plaintiff or anyone else. The plaintiff, as a member of the public, has a public interest in water-taking and its regulation. In exercising regulatory authority over water-taking, Ontario is not exerting control over the plaintiff's legal interest (a quasi-proprietary interest in land abutting the lake) at all, let alone to a degree equivalent or analogous to direct administration of that interest so as to attract an *ad hoc* fiduciary duty. It is only the federal Crown that directly administers Aboriginal interests in reserves. In any event, the plaintiff had recourse for any rights indirectly affected by Winnipeg's water-taking activities by seeking compensation from the parties responsible for the injury (for nuisance, trespass,

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<sup>89</sup> *Grand River Enterprises*, [2017 ONCA 526](#) at [para 194](#).

expropriation/injurious affection).<sup>90</sup>

78. Even if the plaintiff had a legal interest or substantial practical interest in water-taking, Ontario is not exercising any discretion or control in relation to Winnipeg's water-taking activities in Shoal Lake. As discussed above, Ontario has no authority to regulate water-taking activities beyond its provincial boundaries including the aqueduct which is located entirely within Manitoba. As the City of Winnipeg is not conducting any water-taking activities on the Ontario side of Shoal Lake, there is nothing to engage Ontario's regulatory powers as described in the 1913 OIC or otherwise. Further, authority to regulate water levels rests with the International Joint Commission and the Lake of the Woods Control Board and cannot give rise to an *ad hoc* fiduciary duty on the part of Ontario.

### **C. Remedy-Based Fiduciary Duty is Misuse of Concept**

79. Fiduciary duty is a responsibility in the nature of a private law duty arising from particular relationships. "The concept of fiduciary duty is not an invitation to engage in 'results oriented' reasoning. It is a principled analysis."<sup>91</sup> Fiduciary duty when "used as a conclusion to justify a result, reads equity backwards. It is a misuse of the term."<sup>92</sup> The Supreme Court of Canada and Ontario courts have specifically rejected a "remedy-based" approach to finding fiduciary relationships.<sup>93</sup>

80. In *J.B. v Ontario*, the Ontario Court of Appeal considered whether remedy-based fiduciary duties should be recognized in an Indigenous context. The appellants relied on the Truth and

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<sup>90</sup> The plaintiff does not assert a claim for infringement of its rights protected under s 35 of the *Constitution Act, 1982*.

<sup>91</sup> *Gladstone*, [2005 SCC 21](#) at [para 24](#).

<sup>92</sup> *Lac Minerals Ltd v International Corona Resources Ltd*, [\[1989\] 2 SCR 574 \(SCC\)](#) at 652 ["*Lac Minerals*"]; *Brown v Canada (Attorney General)*, [2017 ONSC 251](#) at [para 71](#).

<sup>93</sup> *Lac Minerals*, [\[1989\] 2 SCR 574 \(SCC\)](#); *Gladstone*, [2005 SCC 21](#) at [para 24](#); *J.B. v Ontario*, [2020 ONCA 198](#) at [para 72](#); *Brown v Canada*, [2017 ONSC 251](#) at [paras 68-71](#).

Reconciliation Commission, and the National Inquiry into Missing and Murdered Indigenous Women and Girls in support of their argument that a fiduciary duty ought to exist in order to repair past wrongs. The Court of Appeal held that this approach would be an improper remedy-based fiduciary duty that misuses the concept of fiduciary duty.<sup>94</sup>

81. In *Brown v Canada*, this Court similarly declined to recognize a remedy-based fiduciary duty in an Indigenous context. Justice Belobaba acknowledged that the federal Crown failed to consult First Nations within Ontario regarding the extension of the provincial child welfare regime to their reserves, and its failure to do so resulted in “great harm.” Nevertheless, Justice Belobaba held that there had been no fiduciary duty on the part of the federal Crown as the circumstances did not fulfill the criteria required to establish a fiduciary duty.<sup>95</sup>

82. Where the plaintiff cannot meet the test for either a *sui generis* or an *ad hoc* fiduciary duty, it would be “reading equity backwards” to recognize a fiduciary duty solely on the basis of honour of the Crown, the lens of reconciliation, or repairing past wrongs generally. Such a remedy-based approach is to be avoided.

#### **D. No Injurious Affection Claim Against Ontario**

83. In the event that the claim against City of Winnipeg is statute-barred, the plaintiff also seeks compensation from Ontario for injurious affection pursuant to the 1913 OIC. Ontario relies on its submissions with respect to the fiduciary duty claim and submits that the alternative claim for compensation against Ontario on the basis of a breach of fiduciary duty should be struck as disclosing no reasonable cause of action.

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<sup>94</sup> *J.B. v Ontario*, [2020 ONCA 198](#) at [para 72](#).

<sup>95</sup> *Brown v Canada*, [2017 ONSC 251](#) at [paras 68-71](#).

**(i) No Cause of Action for Injurious Affection before Superior Court of Justice**

84. In any event, injurious affection is not a recognized free-standing cause of action. The ability to claim damages for injurious affection is a statutory remedy that allows for compensation where a party experiences loss or damage to their lands or properties, including any reduction in the market value of the land, as the result of an expropriation or government-approved project or work. In Ontario, the *Expropriations Act* is the statutory authority for claims of injurious affection, and the Local Planning Appeal Tribunal is authorized to consider such claims.<sup>96</sup> The Superior Court of Justice hears the appeals of the tribunal's decisions. However, the present action is not an appeal of the tribunal's decision.<sup>97</sup>

85. Contrary to the suggestion in the amended statement of claim that section 34.3(3) of the *Ontario Water Resources Act* creates a statutory cause of action for compensation pursuant to the 1913 OIC,<sup>98</sup> the section only refers to the 1913 OIC as the basis for an exemption from the prohibition on water-taking. Ontario submits that a reference to an exemption does not create a statutory cause of action for compensation absent express language clearly establishing such a right and cannot form the legal foundation for the plaintiff's claim against either the City of Winnipeg or Ontario.<sup>99</sup>

**Leave to Amend Pleading Further Cannot Remedy Deficiencies in Claim**

86. Before commencing the present action, the plaintiff brought an application for direction and a declaration of entitlement to compensation pursuant to the 1913 OIC. The statement of claim

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<sup>96</sup> *Expropriations Act*, [RSO 1990, c E26](#) at [s 21](#).

<sup>97</sup> The plaintiff has refused to provide particulars of any other proceedings it may have commenced relating to the taking of water from Shoal Lake including any claim properly brought before the Local Planning Appeal Tribunal. Response to Demand for Particulars, [MDE, Tab 4](#) at [11](#).

<sup>98</sup> *Ontario Water Resources Act*, [RSO 1990, c O.40](#) at [s 34.3\(3\)](#).

<sup>99</sup> *Canadian Alliance of Pipeline Landowners' Assoc v Enbridge Pipelines Inc*, [2008 ONCA 227](#) at [paras 31-32](#).



was prepared in the context of the application proceeding and active case management where the parties thoroughly canvassed the issues and the grounds for the claim. After reviewing the notice of motion and factum of Ontario delivered in the motion to strike the original statement of claim, the plaintiff has now amended the statement of claim. The plaintiff should be presumed to have pled any grounds that exist to support the claim. The amended statement of claim cannot be improved by further amendment so as to create a cause of action against Ontario.

87. It is submitted that the Court should exercise its discretion not to grant leave to amend the pleading further. The failure to establish a sufficient factual basis to support the cause of action alleged is not a minor deficiency that further amendments can remedy. The underlying legal foundation of the claim rests on an erroneous interpretation of the 1913 OIC and *Ontario Water Resources Act* which, even with further factual submissions, cannot support the plaintiff's claim.<sup>100</sup>

#### **PART V – ORDER REQUESTED**

88. Ontario respectfully submits that the amended statement of claim discloses no reasonable cause of action as against Ontario and request an order striking the claim and dismissing the action as against Ontario in its entirety.

#### **ALL OF WHICH IS RESPECTFULLY SUBMITTED**

January 6, 2021

*Sarah Valair*

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Sarah Valair / Catherine Ma  
**ATTORNEY GENERAL FOR ONTARIO**  
Counsel for the defendants/moving parties

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<sup>100</sup> Consent Order made July 9, 2020 in Court File No. CV-19-632558, [MDE, Tab 7](#); *Meekis v Ontario (AG)*, [2019 ONSC 2370](#) at [para 163](#).

**SCHEDULE A**  
**LIST OF AUTHORITIES**

1. *Lac Seul First Nation (Southwind) v Canada*, 2017 FC 906, aff'd 2019 FCA 171; appeal to SCC heard December 8, 2020.
2. *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42
3. *Syl Apps Secure Treatment Centre v BD*, 2007 SCC 38
4. *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 (SCC)
5. *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24
6. *Spookw v Gitxsan Treaty Society*, 2014 BCSC 1100, aff'd 2017 BCCA 16
7. *Scott v Canada (Attorney General)*, 2017 BCCA 422
8. *Trapp v British Columbia*, 2018 BCSC 580
9. *Filson v Canada (Attorney General)*, 2014 SKQB 164, aff'd 2015 SKCA 80
10. *Kasheke v Canada (Attorney General)*, 2017 NSSC 61
11. *MacLellan v Canada (Attorney General)*, 2014 NSSC 280
12. *Walsh v Atlantic Lottery Corporation*, 2013 NSSC 409
13. *Burns Bog Conservation Society v Canada (Attorney General)*, 2012 FC 1024, aff'd 2014 FCA 170
14. *C.R. v Ontario*, 2019 ONSC 2734, aff'd *J.B. v Ontario*, 2020 ONCA 198, leave to appeal denied October 8, 2020 in 2020 CanLII 74017 (SCC)
15. *Grand River Enterprises Six Nations Ltd v Canada (Attorney General)*, 2017 ONCA 526
16. *Conley v Chippewas of the Thames First Nation*, 2015 ONSC 404
17. *Chingee v British Columbia*, 2016 BCSC 760, aff'd 2017 BCCA 250
18. *Bonaparte v Canada (Attorney General)* (2003), 64 OR (3d) 1 (Ont CA)
19. *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4
20. *Wewaykum Indian Band v Canada*, 2002 SCC 79
21. *Gladstone v Canada (Attorney General)*, 2005 SCC 21
22. *Guerin v the Queen*, [1984] 2 SCR 335 (SCC)
23. *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14
24. *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48
25. *Bear Island Foundation v Ontario*, [2000] 2 CNLR 13 (Ont CA)
26. *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40
27. *Inuit of Nunavut v Canada*, 2014 NUCA 2
28. *R v Lewis*, [1996] 1 SCR 921 (SCC)
29. *R v Nikal*, [1996] 1 SCR 1013 (SCC)
30. *Iverson v Greater Winnipeg Water District* (1921), 57 DLR 184 (Man CA)
31. *Groat v City of Edmonton*, [1928] SCR 522 (SCC)

32. *Saik'uz First Nation v Rio Tinto Alcan Inc*, 2015 BCCA 154
33. *Attorney General of Canada v Highbie*, [1945] SCR 385 (SCC)
34. *Erik v McDonald*, 2019 ABCA 217
35. *R v Moss* (1896), 26 SCR 322 (SCC)
36. *Frederick Gerring Jr. v Canada* (1897), 27 SCR 271 (SCC)
37. *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 (SCC).
38. *R v Shoal Lake Band of Indians No. 39* (1979), 25 OR (2d) 334 (Ont Supreme Court)
39. *R v Hare and Debassige*, [1985] 3 CNLR 139 (Ont CA)
40. *Interprovincial Co-operatives Ltd v Dryden Chemicals Ltd*, [1976] 1 SCR 477 (SCC)
41. *Reference re: Upper Churchill Water Rights Reversion Act 1980*, [1984] 1 SCR 297 (SCC)
42. *Restoule v Canada (Attorney General)*, 2018 ONSC 7701
43. *Restoule v Canada (Attorney General)*, 2020 ONSC 3932
44. *R v Kokopenace*, 2015 SCC 28
45. *Brown v Canada (Attorney General)*, 2017 ONSC 251
46. *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 (SCC)
47. *Canadian Alliance of Pipeline Landowners' Assoc v Enbridge Pipelines Inc*, 2008 ONCA 227
48. *Meekis v Ontario (AG)*, 2019 ONSC 2370

**SCHEDULE B**  
**LIST OF STATUTORY AUTHORITIES**

*An Act to incorporate the Greater Winnipeg Water District, SM 1913, c 22*

22 It shall be lawful for the corporation, its agents, servants and workmen, from time to time, and at such times hereafter as they shall see fit, and they are hereby authorized and empowered, to enter into and upon the lands of any person or persons, bodies politic or corporate, and to survey, set out and ascertain such parts thereof as they may require for the purposes of waterworks, or for the purposes of conveying electric motive force or other power for the operation of same, and also to divert and appropriate any spring, stream or body of water thereon, as they shall judge suitable and proper; 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 electric motive force or power; and in case of any disagreement between the corporation and the owners or occupiers of such lands, or any persons having an interest in the said water or the natural flow thereof, or any such privilege as aforesaid, respecting the value thereof, or as to the damages such appropriation shall cause to them or otherwise, the same shall be decided by three arbitrators to be appointed as hereinafter mentioned, namely, the corporation shall appoint one, the owner shall appoint another, and such two arbitrators shall, within ten days after their appointment, appoint a third arbitrator; but, in the event of such two arbitrators not appointing a third arbitrator within the time aforesaid, the Court of King's Bench, or a judge thereof, shall, on application by either party, appoint such third arbitrator. In case any such owner or occupier shall be an infant, married woman or insane, or absent from this Province, or shall refuse to appoint an arbitrator on his or her behalf, then the said Court of King's Bench, or a judge thereof, on application being made to it or him for that purpose by the said corporation, shall nominate and appoint three indifferent persons as arbitrators. The arbitrators to be appointed as hereinafter mentioned shall award, determine, adjudge and order the respective sums of money which the corporation shall pay to the respective persons entitled to receive the same, and the award of the majority of the said arbitrators shall be final. And the said arbitrators shall be and they are hereby required to attend at some convenient place at or in the vicinity of Winnipeg, to be appointed by the corporation, after eight days' notice given for that purpose by the corporation, then and there to arbitrate and award, adjudge and determine such matters and things as shall be submitted to their consideration by the parties interested, and each arbitrator shall be sworn before some one of *His* Majesty's justices of the peace, or other officer authorized thereunto, well and truly to assess the value or damages between the parties to the best of his judgment; provided always that any award under this Act shall be subject to be set aside on application to the Court of King's Bench in the same manner and on the same grounds to Court of as in ordinary cases of arbitration, in which case a reference may be again made to arbitration as hereinbefore provided, and that any sum so awarded shall be paid within three calendar months from the date of the award, or determination of any motion to annul the same; and, in default of such payment, the corporation shall give up possession of the property, and all his rights shall thereupon revive. The award of a majority of the said arbitrators shall be binding on all parties concerned, subject as aforesaid. Any money awarded to any person under an arbitration may be paid by the corporation to the credit of such person in any chartered bank, and such payment shall be payment under this Act.

***An Act to Confer Certain Rights and Powers upon the Greater Winnipeg Water District. SO 1916, c 17***

2 Subject to the provisions of section 3, the Order-in-Council approved by the Lieutenant-Governor in Council on the 2nd day of October, AD 1913, adopting the report of the Honourable the Minister of Lands, Forests and Mines also set out in the said schedule, and the terms, conditions and stipulations set out in the said report are confirmed and declared to be and to have been, as from the said date, legal, valid, and binding to all intents and purposes as if the same had been set out and enacted by an Act of the Legislature of Ontario.

3 The Greater Winnipeg Water District shall conform to and comply with and fulfill any order or recommendation which the International Joint Commission may make under the terms and authority of the International Boundary Water Treaty made between His Britannic Majesty and the United States of America whenever and so soon as such order or recommendation becomes of legal force and effect in the Dominion of Canada.

***An Act respecting The Lake of the Woods Control Board, 1922 SO 105, c 21***

WHEREAS it has been agreed by and between the Government of the Dominion of Canada and the Government of the Province of Ontario that the powers hereinafter mentioned shall be vested in a Board consisting of four members, two to be appointed by the Governor-General in Council and two by the Lieutenant-Governor in Council, and that the necessary legislation to authorize the same shall be enacted by the Parliament of Canada and the Legislature of Ontario respectively.

Therefore, His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1 This Act may be cited as *The Lake of the Woods Control Board Act, 1922*.

2 There shall be a Board to be called "The Lake of the Woods Control Board " which shall consist of four members, who shall be duly qualified engineers, two of whom shall be appointed by the Governor-General in Council and two of whom shall be appointed by the Lieutenant-Governor in Council of Ontario, and each of the persons so appointed shall hold office during the pleasure of the Governor-General in Council or the Lieutenant-Governor in Council, respectively, and any vacancy on the said Board shall be filled by the Governor-General in Council or the Lieutenant-Governor in Council, according as the previous appointment to such position was made by the Governor-General in Council or the Lieutenant-Governor in Council.

3 It shall be the duty of the Board to secure severally and at all times the most dependable flow and the most advantageous and beneficial use of:

- (a) The waters of the Winnipeg river; and
- (b) The waters of the English river;

and for these purposes the Board shall have power

- (a) To regulate and control the outflow of the waters of the Lake of the Woods so as to maintain the level of the lake between the elevations that have been recommended by the International Joint Commission in their final report of the 12th June, 1917, or between such elevations as may be agreed upon by the United States and Canada;
- (b) To regulate and control the outflow of the waters of Lac Seul so as to maintain the level of the Lake between such elevations as the Board may from time to time recommend and which shall be approved by the Governor-General in Council and the Lieutenant-Governor in Council;
- (c) To regulate and control the flow of the waters of the Winnipeg river between its junction with the English river and the Lake of the Woods, and also the flow of the water in the English river between its junction with the Winnipeg river and Lac Seul;
- (d) To regulate and control the level and flow of such other waters of the watershed of the Winnipeg river as the Governor-General in Council and the Lieutenant-Governor in Council may both agree to place under the jurisdiction of the said Board. Save and excepting the control and operation of all dams and regulating works extending across the International Boundary and the dam and regulating works across the Canadian channel at Kettle Falls.

4 In addition to any other legal or other proceedings that may be taken to enforce any order of the said Board, every person violating or refusing to obey any order of the said Board, or obstructing or preventing the carrying out and enforcement of any order made by the said Board shall be liable, upon summary conviction, to a fine not exceeding \$1,000, or to imprisonment for a period not exceeding three months, or to both such fine and imprisonment and to a further penalty not exceeding \$500 for each day on or during which any such offence shall continue or be repeated.

5 The said Board shall have all the powers necessary for Enforcement effectively carrying out the authority and control vested in it by this Act and by any Act passed by the Parliament of the Dominion of Canada and any order made by the said Board may be made a rule, order or decree of the Exchequer Court of Canada or of the Supreme Court of Ontario, and shall be enforced in the same manner as any rule, order or decree may be enforced in the court in which such proceeding is taken.

6(1) Where any person or corporation neglects or refuses to obey or carry out any order of the Board, the Board in addition to any other remedy provided by this Act, may from time to time enter upon and take such complete or partial possession of any mill, dam, plant, works, machinery, land, waters or premises, and may do all such acts and things as the Board may deem necessary for the due enforcement and carrying out of such order, and may retain possession and control of any such mill, dam, plant, works, machinery, land, waters or premises for such period as the Board may deem necessary for that purpose.

(2) All expenses incurred by the Board under subsection 1 of this section shall constitute a debt due from such person or corporation to the Board, and shall be recoverable by the Board with costs in any court of competent jurisdiction.

7(1) The Board shall have power to appoint such inspectors and other officers and employees as the Board may deem necessary for the purposes of this Act.

(2) Any inspector or other officer when so authorized by the Board, may enter upon any land, works or plant constructed or installed upon any of the waters mentioned in section 3, or in or by which any such waters are used or diverted, and take all such measurements and do all such acts and things as may be necessary for the information of the Board as to the use or diversion of such waters by the person or corporation owning or controlling such land, works or plant.

(3) Every person who hinders or obstructs any inspector or officer in the performance of his duties under subsection 2 of this section shall incur the penalties mentioned in section 4.

8 The Board and the members thereof and its officers and employees shall not be liable to any action for acts done by them or any of them under the authority of this Act.

9 The expenses of the Board, including the remuneration of the members of the Board, shall be paid out of such funds as may be appropriated by the Parliament of Canada and the Legislature of Ontario respectively for paying expenses incurred for the purposes of this Act in such proportions as the Governor-General in Council and the Lieutenant-Governor in Council may agree.

10(1) The Governor-General in Council and the Lieutenant-Governor in Council may make such regulations (including provisions as to what shall constitute a quorum of the Board, and how orders of the Board shall be signed), as they may agree to be necessary for carrying out the provisions of this Act.

(2) All regulations made hereunder shall be published in The Ontario Gazette.

11 This Act shall come into force on a day to be named by the Lieutenant-Governor by his proclamation after the repeal by the Parliament of Canada of *The Lake of the Woods Regulation Act, 1921*, being chapter 38 of the Statutes of Canada, 1921.

### ***Rules of Civil Procedure, RRO 1990, Reg 194***

#### **RULE 21 - DETERMINATION OF AN ISSUE BEFORE TRIAL WHERE AVAILABLE**

##### **To Any Party on a Question of Law**

21.01(1) A party may move before a judge,

- (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
- (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

***Beds of Navigable Waters Act, RSO 1990, c B4***

**Grant to be deemed to exclude the bed**

1 Where land that borders on a navigable body of water or stream, or on which the whole or a part of a navigable body of water or stream is situate, or through which a navigable body of water or stream flows, has been or is granted by the Crown, it shall be deemed, in the absence of an express grant of it, that the bed of such body of water was not intended to pass and did not pass to the grantee.

***An Act to confirm the title for the Government of Canada to certain lands and Indian Lands, SO 1915, c 12***

Whereas under a treaty known as "The Northwest Angle Treaty, No. 3," certain Indians surrendered to Her late Majesty Queen Victoria all their rights, titles and privileges to the lands therein defined and described, out of which reserves were to be selected and laid aside for the benefit of the said Indians; and whereas after the true boundaries of Ontario had been ascertained and declared it was found that certain of the reserves selected and laid aside were within the said boundaries; and whereas in pursuance of the terms of an agreement dated 16th April, 1894, between the Government of Canada and the Government of Ontario, the Government of Ontario has made full enquiry as to the said reserves so laid out, and it has been decided to acquiesce in the location and extent thereof with the exception of that known as Indian Reserve 240, in the Quetico Forest Reserve, and subject to the modifications and additional stipulations of said agreement hereinafter set. forth; and whereas the Government of Canada has deposited in the Department of Lands, Forests and Mines of Ontario plans of said reserves;

Therefore His Majesty, by and with the advice and con-sent of the Legislative Assembly of the Province of Ontario, enacts as follows:

[...]

2. All water powers which in their natural condition at the average low stage of water have a greater capacity than 500 horsepower, and such area of land, including roads in connection therewith, as may be necessary for the development and utilization thereof, and the land covered with water lying between the projecting headlands of any lake or sheets of water not wholly surrounded by an Indian reserve or reserves and islands wholly within such headlands shall not be deemed to form part of such reserve, but shall continue to be the property of the Province, and *The Bed of Navigable Waters Act* shall apply, notwithstanding anything contained in the fourth paragraph of the agreement hereinbefore mentioned.

***Ontario Water Resources Act, RSO 1990, c O.40 at section 34.3(3)***

**Water transfers: Great Lakes-St. Lawrence River, Nelson and Hudson Bay Basins**

34.3(1) For the purposes of this Act, Ontario is divided into the following three water basins:

1. The Great Lakes-St. Lawrence River Basin, which consists of,



- i. the part of Ontario the water of which drains into the Great Lakes or the St. Lawrence River, including the parts of the Great Lakes and of the St. Lawrence River that are within Ontario, or
  - ii. if the boundaries of the area described by subparagraph i are described more specifically by the regulations, the area within those boundaries.
2. The Nelson Basin, which consists of,
  - i. the part of Ontario the water of which drains into the Nelson River, or
  - ii. if the boundaries of the area described by subparagraph i are described more specifically by the regulations, the area within those boundaries.
3. The Hudson Bay Basin, which consists of,
  - i. the part of Ontario, not included in the Nelson Basin, the water of which drains into Hudson Bay or James Bay, or
  - ii. if the boundaries of the area described by subparagraph i are described more specifically by the regulations, the area within those boundaries.

### **Prohibition**

(2) A person shall not take water from a water basin described in subsection (1) if the person will cause or permit the water to be transferred out of the basin.

### **Exceptions**

(3) Subsection (2) does not apply if the transfer of water out of the water basin is one of the following:

1. A transfer of water that is in a container having a volume of 20 litres or less.
2. A transfer of water that occurs when a product other than water is manufactured or produced in the water basin, using water from that basin, and the product is then transferred out of that basin.
3. A transfer of water that is necessary for the operation of a vehicle, vessel or other form of transport that the water is transferred in, including water that is for the use of people, livestock or poultry in or on the vehicle, vessel or other form of transport.
4. A transfer of water for the purpose of firefighting or other emergency purposes.
5. A transfer of water by an undertaking that commenced before January 1, 1998, if the amount of water transferred out of the water basin in any calendar year after December 31, 1997 does not exceed the highest amount of water transferred out of the basin by the undertaking in any calendar year after December 31, 1960 and before January 1, 1998.
6. A transfer of water pursuant to the order of the Lieutenant Governor in Council dated October 2, 1913 respecting the Greater Winnipeg Water District.

### **No permit**

(4) A permit shall not be issued, amended or renewed under section 34.1 if water taken under the permit is to be taken from a water basin described in subsection (1) and transferred out of the basin contrary to subsection (2).

***Expropriations Act, RSO 1990, c E26***

**Compensation for injurious affection**

21 A statutory authority shall compensate the owner of land for loss or damage caused by injurious affection. R.S.O. 1990, c. E.26, s. 21.

***Expropriation Act, CCSM c E190***

**Application of Act**

2(1) Notwithstanding any Act of the Legislature enacted before January 1, 1971, whether special or general, this Act applies wherever an authority expropriates land or in the exercise of its lawful powers causes the injurious affection of land, and due compensation shall be determined in accordance with the provisions hereof.

**Conflict with other Acts**

2(2) Where there is a conflict between a provision of this Act and a provision of any other general or special Act, the provision of this Act prevails.

[...]

**Application to commission to determine compensation**

15(1) After an offer of compensation is served under section 16, the authority or an owner of the land may, subject to section 37 (time limits), apply to the commission, in accordance with the rules of the commission, for the determination of compensation payable by the authority to the owner for the expropriation.

**Certification of amount by commission**

15(2) On receiving an application under subsection (1), the commission shall give the authority and owner of the land an opportunity to be heard and shall determine and certify the compensation payable by the authority to the owner.

**Certified amount is binding**

15(3) Subject to subsection (6) and section 44 (appeal), an amount certified by the commission under subsection (2) is binding on the authority and the owner.

**Authority to pay prescribed fee**

15(4) The authority shall pay any fee or charge that is prescribed in respect of a proceeding under subsection (2).

**Commission may vary certified amount**

15(5) Where new evidence is available after an amount is certified under subsection (2), the authority or owner may, within 30 days after the date of the certificate, apply to the commission for a variation of the certified amount, and the commission may, where it is satisfied that the new evidence was not available at the time of the certification, vary the certified amount and, where the amount is varied, the commission shall certify the new amount of compensation payable.

**Authority to pay costs of owner**

15(6) The authority shall pay reasonable appraisal, legal and other costs that are reasonably incurred by an owner for the purpose of determining the compensation payable under this Act for an expropriation.

**Commission may determine costs**

15(7) Where the amount of compensation payable under this Act for an expropriation is settled by the authority and an owner without a hearing or is determined by the commission, the commission may, on application by the authority or owner, determine the costs.

**Offer of compensation**

16(1) Within 120 days after the registration of the declaration and before serving a notice for possession of the land the authority shall serve upon every registered owner of the land an offer in writing stating

- (a) the amount that the authority offers in compensation for the market value of the owner's estate or interest in the land and the amount that the authority offers in compensation for the market value of all the estates and interests in the land;
- (b) that the authority offers to pay immediately to the person entitled thereto the entire amount offered in compensation for the market value of the owner's estate or interest in the land;
- (c) unless the market value has been estimated for the purposes of clause (b) upon the basis of a use of the land other than the existing use, that the authority offers to pay
  - (i) the moving costs, as they are incurred, that are reasonably incurred by an owner in possession of the land at the time the declaration or expropriation was filed, and
  - (ii) the costs, as they are incurred, that are reasonably incurred by any owner in possession of the land at the time the declaration or expropriation was filed of removing and relocating any fixture or structure owned by that owner and situated on the land at the time the declaration or expropriation was filed; and
- (d) that the payment and receipt of the amount estimated for the purposes of clause (b) or of any amount under clause (c) is without prejudice to the rights conferred by this Act in respect of the determination of the compensation and that the amounts are subject to adjustment in accordance with the compensation that is subsequently agreed upon or determined under this Act.

**Offer may contain offer of due compensation**

16(2) An offer served on a registered owner by an authority may state

- (a) the amount that the authority offers in full settlement of due compensation to the owner including that part thereof that is not compensation for the market value of the owner's estate or interest in the land; and
- (b) the total amount that the authority offers in full settlement of due compensation to all registered owners including that part thereof that is not compensation for the market value of the owners' estates or interests in the land.

### **Offer of further portion of due compensation**

16(3) Where an offer served on a registered owner by an authority states in accordance with clause (2)(a) the amount that the authority offers in full settlement of due compensation to the owner, the offer may also state

- (a) that the authority offers to pay immediately to the person entitled thereto, in addition to the amount offered to be paid in accordance with clause (1)(b) in compensation for the market value of the owner's estate or interest in the land and the amounts offered to be paid in accordance with clause (1)(c) as moving costs and costs of removing and relocating any fixture or structure, an amount equal to 75% of that part of the amount offered in full settlement of due compensation that is in excess of the total of
  - (i) the amount offered to be paid in accordance with clause (1)(b) in compensation for the market value of the owner's estate or interest in the land, and
  - (ii) the amounts offered to be paid in accordance with clause (1)(c) as moving costs and costs of removing and relocating any fixture or structure; and
- (b) that payment and receipt of the amount calculated for the purpose of clause (a) is without prejudice to the rights conferred by the Act in respect of the determination of due compensation payable by the authority and that the amount of due compensation payable by the authority is subject to adjustment in accordance with due compensation that is subsequently agreed upon or determined under this Act.

### **Offer may refer to amounts owing under liens**

16(4) Where a registered owner's estate or interest in the land is subject to a registered lien, charge, mortgage or encumbrance on the land, the offer served on the owner by the authority may state the amount that the authority offers in compensation to the owner for the market value of his estate or interest free and clear of the lien, charge, mortgage or encumbrance and indicate that the amount will be reduced by any amount needed to be paid to the holder of the lien, charge, mortgage or encumbrance to obtain the owner's estate or interest free and clear of the lien, charge, mortgage or encumbrance.

### **Offer to holder of lien, etc.**

16(5) Where a registered owner upon whom an offer is served holds a registered lien, charge, mortgage or encumbrance on the land, the offer may state the amount that the authority offers in compensation to the owner for the market value of the lien, charge, mortgage or encumbrance, as an indefinite amount needed to be paid to the owner to obtain from him the discharge, withdrawal, postponement or removal of the lien, charge, mortgage or encumbrance not exceeding the amount that the authority offers to pay the owner whose estate or interest is subject to the lien, charge, mortgage or encumbrance as compensation for the market value of his estate or interest free and clear of the lien, charge, mortgage or interest.

### **Offer to be held open for acceptance**

- 16(6) Where the authority makes an offer to an owner under this section, the authority
- (a) shall hold open the offer for acceptance by the owner until an amount is certified under subsection 15(2); and
  - (b) may, from time to time before the offer is accepted by the owner or an amount is certified under subsection 15(2), amend the offer by serving the owner with an amended offer.

**ISKATEWIZAAGEGAN NO. 39  
INDEPENDENT FIRST NATION**  
Plaintiff / Responding Party

- and -

**CITY OF WINNIPEG and HER MAJESTY THE  
QUEEN IN RIGHT OF ONTARIO**  
Defendants / Moving Party

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***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**  
Proceeding commenced in Toronto

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**FACTUM OF THE DEFENDANT / MOVING PARTY  
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**  
(Motion returnable January 20, 2021)

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