

**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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**MOTION RECORD**

(Motion returnable January 20, 2021)

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January 6, 2021

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Court File No. CV-20-00644545-0000

**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

**NOTICE OF MOTION**

THE DEFENDANT, Her Majesty the Queen in Right of Ontario ("**Ontario**"), will make a motion to the Superior Court of Justice on January 20, 2021, by virtual attendance at the Courthouse at 393 University Avenue, Toronto, Ontario M5G 1R8.

**THE MOTION IS TO BE HEARD:**

- ☐ in writing under subrule 37.12.1;
- ☐ in writing as an opposed motion under subrule 37.12.1 (4);
- ☒ **orally by video conference.**

**THE MOTION IS FOR:**

1. An order striking out the amended statement of claim as against Ontario, without leave to amend, and dismissing the action as against Ontario, for failing to disclose a reasonable cause of action, pursuant to rule 21.01(1)(b) of the *Rules of Civil Procedure*, RRO 1990, Reg 194; and
2. Such further and other relief as this Honourable Court may grant.

**THE GROUNDS FOR THIS MOTION ARE:**

1. The plaintiff alleges that Ontario owed and breached a fiduciary duty to the plaintiff. Specifically, the plaintiff alleges that Ontario had a fiduciary obligation to protect the plaintiff's lands from the impacts of the City of Winnipeg taking water from Shoal Lake and that Ontario failed to exercise regulatory power over water-taking activities in Shoal Lake for the plaintiff's benefit and failed to ensure the plaintiff received compensation from the City of Winnipeg.
2. Shoal Lake is located in both Ontario and Manitoba. The plaintiff is a First Nation with reserves located on the shores of Shoal Lake in Ontario and in Manitoba.
3. The allegations in the claim relate to an Order-in-Council made by Ontario on October 2, 1913 regarding Winnipeg and the water in Shoal Lake ("1913 OIC"). Among other things, the 1913 OIC provides that Winnipeg is to pay compensation to Ontario and to private parties and that Winnipeg must abide by Ontario's regulation of water-taking operations.
4. In 1913, Winnipeg was contemplating building an aqueduct across the provincial border into Ontario to access Shoal Lake. In this context, Ontario granted permission to take water from the Ontario side of Shoal Lake. However, by the time the aqueduct was constructed in 1919, it was located entirely within Manitoba and only takes water from the Manitoba side of Shoal Lake.
5. Winnipeg does not take water from Shoal Lake pursuant to the 1913 OIC. The operative order is the International Joint Commission's Order of Approval made January 14, 1914. Ontario's ability to regulate water-taking activities does not extend to geographic areas beyond its provincial boundaries, and the 1913 OIC is not applicable to Winnipeg's water-taking operations which are entirely located within Manitoba.

6. The amended statement of claim does not disclose a reasonable cause of action against Ontario for either breach of *sui generis* fiduciary duty or breach of *ad hoc* fiduciary duty.

7. *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 responsibility in the nature of a private law duty. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Aboriginal interests. 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.

8. 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.

9. *Ad hoc* fiduciary obligations arise when (1) the alleged fiduciary has undertaken to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons is vulnerable to a fiduciary's control; and (3) a legal interest or a substantial practical interest of the beneficiary or beneficiaries stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

10. The interest affected must be a specific private law interest to which the person has a pre-existing distinct and complete legal entitlement, and the degree of control exerted by the government over the interest in question must be equivalent or analogous to direct administration of that interest.

11. Nothing in the 1913 OIC, the supporting legislation or in the factual relationship pleaded supports an undertaking by Ontario to put the plaintiff's best interest in regulating water-taking above Ontario's own interest or that of the public as a whole. The plaintiff points to no analogous duty in private law that could require such a duty of loyalty.

12. Further, the pleading cannot support a conclusion that Ontario's regulatory authority over water-taking and its exercise (or not) had the potential to adversely affect any legal interest or substantial practical interest of the plaintiff which could give rise to a fiduciary obligation.

Ontario cannot regulate Winnipeg's water-taking activities in Manitoba.

13. With respect to compensation, the plaintiff's ability to pursue compensation from Winnipeg is contingent on proving harm and is not a pre-existing distinct and complete legal entitlement (*ie* a vested right) that can give rise to a fiduciary duty. There is no adverse effect on the plaintiff's interest as Ontario exercises no discretionary control over the plaintiff's ability to pursue compensation from Winnipeg. There is no basis to conclude that Ontario undertook to secure compensation for the plaintiff or otherwise owed a fiduciary duty with respect to compensation for the plaintiff.

14. Ontario relies on Rules 21.01(1)(b) and 25.06 of the *Rules of Civil Procedure*, RRO 1990, Reg 194; and section 131 of the *Courts of Justice Act*, RSO 1990, c. C.43.

15. Such further and other grounds as counsel may seek to rely on and the Court may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED:**

1. The amended statement of claim, the demand for particulars, the response to the demand for particulars and documents incorporated by reference in the claim and particulars in the action bearing court file number CV-20-0064454-0000;

2. Consent order made July 9, 2020 in court file number CV-19-006325580000; and
3. Such further materials as counsel may seek to rely on and the Court may permit.

December 29, 2020

**MINISTRY OF THE ATTORNEY GENERAL**

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Thor Hansell  
Shea Garber

Counsel for the defendant,  
The City of Winnipeg



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

Court File No. CV-20-00644545-0000

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

ONTARIO

SUPERIOR COURT OF JUSTICE

**BETWEEN:**

**ISKATEWIZAAGEGAN NO. 39 INDEPENDENT FIRST NATION**

**PLAINTIFF**

**-AND-**

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

**DEFENDANTS**

---

**AMENDED STATEMENT OF CLAIM**

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TO THE DEFENDANTS

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

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

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

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

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

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

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

Date: July 24, 2020

Issued by:

*d e-filing*  
.....

Court Registrar

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

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

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

**AND TO:** THIS HONOURABLE COURT

## OVERVIEW

1. The needs of settler Canadians have long been prioritized over those of the Anishinaabe people. This is particularly true with regard to the water of Shoal Lake.
2. In 1900, Winnipeg went looking for a source of clean water, and in 1912, found it in Shoal Lake. Shoal Lake is located in Treaty #3 territory, in Northern Ontario. In 1913, at Winnipeg's request, Ontario granted permission to Winnipeg to take water from Shoal Lake, pursuant to an Order in Council, subject to several terms and conditions. Key amongst them was the condition that, "full compensation be made to the Province of Ontario, and also to all private parties whose lands or properties may be taken, injuriously affected or in any way interfered with."
3. Shoal Lake is, to this day, Winnipeg's sole water source. It is also a critical part of the reserve, treaty and traditional territory of the Anishinaabe of Iskatewizaagegan No. 39 Independent First Nation ("the Nation"). The water of Shoal Lake gives the community life and the community members in turn define themselves by their responsibility for the protection of this gift.
4. In 2019, the plaintiff, Iskatewizaagegan No. 39 Independent First Nation, and its Chief Gerald, brought an Application to the Ontario Superior Court, seeking a declaration that the applicants fall within the contemplated class of parties that would be entitled to compensation under the 1913 Order in Council, if it is found that they have suffered their lands and properties being taken, injuriously affected, or in any way interfered with. The defendants have consented to an Order declaring that the plaintiff is such a party.
5. As the plaintiff has suffered from Winnipeg's water taking, all without recognition of its rights much less compensation, it now seeks compensation pursuant to the 1913 Order in Council (incorporated into modern legislation by way of the *Ontario Water Resources Act*, RSO 1990, Chapter 0.40, s. 34.3 (3), which allows for "[a] transfer of water pursuant to the order of the Lieutenant Governor in Council dated October 2, 1913 respecting the Greater Winnipeg Water District").

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

### **CLAIM**

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

## THE PARTIES

9. The plaintiff Iskatewizaagegan No. 39 Independent First Nation is a distinct Aboriginal society, as well as a band recognized under the *Indian Act*, and an Aboriginal people within the meaning of s. 35 of the *Constitution Act, 1982*. While legally recognized by the government of Canada by the name listed above, the community refers to itself by the name of Iskatewizaagegan Independent First Nation, with no numerical attachment. The members of the Nation are all Indians within the meaning of s. 91(24) of the *Constitution Act, 1867* and members of an Aboriginal group within the meaning of s. 35 of the *Constitution Act, 1982*.
  
10. The defendant the City of Winnipeg (“Winnipeg”) inherited the powers and obligations of the Greater Winnipeg Water District (“GWWD”) through legislation intended to sustain the authority granted in 1913 to take water from Shoal Lake. In 1960, the Metropolitan Corporation of Greater Winnipeg was incorporated and assumed all of the powers of the GWWD under the *Metropolitan Winnipeg Act*, S.M. 1960, c. 40. In 1971, *The City of Winnipeg Act*, S.M. 1971, c. 105 repealed the *Metropolitan Winnipeg Act* and formed the City of Winnipeg. This new City assumed all the powers of the Metropolitan Corporation of Greater Winnipeg, including the powers the Metropolitan Corporation of Greater Winnipeg had assumed from the GWWD (*The City of Winnipeg Act*, S.M. 1971 c. 105 at ss. 549, 550). This was restated in *The City of Winnipeg Act*, S.M. 1989-90, at s. 554. In 2002, new legislation came into effect, the *City of Winnipeg Charter Act*, S.M. 2002, c. 39, which sets out powers for the provision of water at s. 160. The City of Winnipeg, relying on the approvals sought and obtained by the GWWD dating back to 1913, continues to draw water from Shoal Lake today.
  
11. The defendant Her Majesty the Queen in Right of Ontario (“Ontario”) is designated as the representative of the Ontario Crown, pursuant to s. 14 of the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sch. 17 (“CLPA”), and is liable for the actions and omissions of the Ontario Crown, of Ontario Departments and Ministers, and of all servants,

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

## **THE FACTS**

### ***The Community of Iskatewizaagegan Independent First Nation***

12. The plaintiff is an Anishinaabe First Nation located on the northwest shore of Shoal Lake, Ontario. For more than 6,000 years, Indigenous peoples have lived in the Shoal Lake area. The Anishinaabe peoples living in the area today are descendants of those original inhabitants and maintain a close connection to their traditional territory.
13. The plaintiff entered into a Treaty relationship with the Crown on October 3, 1873. Through Treaty #3, the Anishinaabe and Crown agreed to share 55,000 square miles of territory that spans from west of Thunder Bay to north of Sioux Lookout in Ontario, and along the international border to the province of Manitoba. Treaty #3 territory is populated by 28 First Nation communities with a total population of approximately 25,000 people.
14. The plaintiff also has reserve territory pursuant to the *Indian Act*, and to Treaty #3. The Nation's reserve land begins at the base of High Lake and reaches south to the northern shore of Shoal Lake. To the west, it crosses over slightly into the province of Manitoba, and to the east, meets the District of Kenora. Approximately half of Shoal Lake's northern shore makes up part of the Nation's reserve. The community also holds a small piece of reserve land on the western shore of Shoal Lake.
15. Finally, the plaintiff has traditional territory, which contains within it Shoal Lake and the Shoal Lake watershed. The Nation's traditional territory encompasses all the land upon which the community's ancestors lived, hunted, fished, and protected. This includes all the

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

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

#### ***A Description of Shoal Lake***

19. Shoal Lake is a part of the Shoal Lake watershed and the larger "Rainy River – Lake of the Woods – Winnipeg River" drainage basin. The watershed crosses provincial boundaries with 54% of the watershed located in Ontario and 46% in Manitoba.
20. The three lakes of greatest significance in the watershed are Shoal Lake, Falcon Lake and High Lake. Shoal Lake is the largest of the watershed's three lakes with a surface area of about 260 km. Over 95% of the lake's surface area is situated in Ontario, while less than 5% is contained within the province of Manitoba. The lake has an estimated average depth of 9 metres, but incorporates many shallower bays such as Indian Bay, Snowshoe Bay, and Clytie Bay in its northern portions.
21. Outflows from both Falcon Lake and High Lake drain into Shoal Lake at Snowshoe Bay via Falcon River, at Shoal Lake's northwest shore. At its eastern shore, Shoal Lake

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

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

### ***The Gift of Shoal Lake to the Nation***

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



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

26. Since time immemorial, the Anishinaabe have used the waters of Shoal Lake and the surrounding land for survival. Shoal Lake has provided an abundance of walleye, other fish species, and aquatic mammals and reptiles. Further, the surrounding land has provided habitat for large mammals (including bears and moose), small game (including hares and porcupine), and waterfowl (including geese, ducks, and loons).
27. Fishing carries particular cultural significance to the plaintiff, such that the community fishers organize youth activities to ensure the skills, traditional teachings, and other cultural and spiritual knowledge will be shared while out on Shoal Lake.
28. Since time immemorial, the Anishinaabe have harvested numerous species of trees and plants in Shoal Lake and the surrounding land, including berries, bark, roots, herbs, and other plants or plant products, both cultivated and uncultivated. These plants are used for subsistence, medicine, cultural purposes, and spiritual purposes.
29. The ricing days are of particular cultural significance to the plaintiff. These highly organized cultural and spiritual gatherings were led by certain elders tasked with passing on the teachings of manoomin (wild rice). Blueberry harvesting sites are located on the Shoal Lake watershed. Shoal Lake is also home to the Garden Islands or Gitiiganii Minis, islands used to grow various vegetable crops. Farming took place on the islands for two reasons: to protect crops from people outside of the community who typically did not have canoes; and to avail of good quality soil.
30. Additionally, Shoal Lake is a navigable waterway. It connects the community to the nearby Lake of the Woods via Ash Rapids and other rivers and waterways, which provide means to travel across the region and access nearby lands, fisheries, and communities.

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

***Winnipeg seeks Settler Authority to Take Water***

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

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

The corporation shall pay to the owners or occupiers of the said lands and those having an interest or right in the said water, reasonable compensation for any land or any privilege that may be required for the purposes of the said waterworks or for the conveying of elective motive force or power.

37. The *Act to Enable the City of Winnipeg to Get Water Outside the Province of Manitoba* (June 6, 1913) provided the authority for the GWWD to obtain water outside of the Province of Manitoba. As the Shoal Lake water sought by the GWWD was partially located in Ontario, the GWWD was required to seek authorization from Ontario to draw from it.
  
38. In 1913, the Executive Council Office of Ontario passed an Order in Council authorizing the GWWD to take water from Shoal Lake. The 1913 Order in Council granted the GWWD permission to take water for "domestic and municipal purposes", and advised that this included the right to "enter upon and to divert and take water from Shoal Lake, subject to the terms, conditions, and stipulations" set out in an annexed report of the Honourable Minister W. H. Hearst of Lands, Forests and Mines.
  
39. The first of these terms was the condition that "full compensation be made to the Province of Ontario and also to all private parties whose lands or properties may be taken, injuriously affected or in any way interfered with...."
  
40. The second condition required the GWWD to "abide by and conform to any and all rules, regulations or conditions regarding the ascertainment of the quantity of water being taken, and as to the inspection of works and premises, and the manner of carrying out the proposed works that the government of Ontario may at any time see fit to make or enact...."

41. The 1913 Order in Council was declared to be legal, valid, and binding through the *Greater Winnipeg Water District Act (Ontario) 1916*, S.O. 1916, c. 1717 ["the 1916 GWWD Act"].

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

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

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

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

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

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

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

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

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

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

45.49. The 1913 Order in Council has been incorporated by reference into legislation currently in force in Ontario. The *Ontario Water Resources Act*, s. 34.3(3) allows for “[a] transfer of water pursuant to the order of the Lieutenant Governor in Council dated October 2, 1913 respecting the Greater Winnipeg Water District.” The 1913 Order in Council forms a part of the Canadian legal authority upon which Winnipeg continues to draw water from Shoal Lake today.

### ***Winnipeg Avails Itself of the Water***

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

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

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

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

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

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

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

#### **A PRIVATE LAW CAUSE OF ACTION**

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

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

~~54.58.~~ The first of these terms was the condition that “full compensation be made to the Province of Ontario and also to all private parties whose lands or properties may be taken, injuriously affected or in any way interfered with....”

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

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

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

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

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

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



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

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

~~61-65.~~ The plaintiff relies upon the defendants' many pronouncements of reconciliation as a guide in defining the current relationship between Winnipeg, Ontario, the water, and the people of the Nation in seeking compensation, pursuant to the 1913 Order in Council.

## **DAMAGES**

### **Injuriously Affected or in Any Way Interfered with**

~~62-66.~~ The plaintiff has suffered its land and properties taken, injuriously affected, and interfered with due to the actions of the defendants in a manner that has caused ecological, cultural/spiritual, and financial loss to the Nation.

~~63-67.~~ For the purposes of compensation under the 1913 Order in Council, the plaintiff's lands and properties include all lands, including lands under water, set aside for the Nation under the *Indian Act*, and under Treaty #3. In addition, the plaintiff's lands and properties include all lands, including lands under water, that are within their traditional territory.

~~64-68.~~ The plaintiff's treaty, traditional, and reserve lands have been directly affected by Winnipeg's taking of water. Raised water levels of Shoal Lake have led to the destruction of rice beds, blueberry patches, medicinal areas, and spawning areas for fish and other

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

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

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

### **Ecological Interference**

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

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

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

### **Cultural Damage**

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

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

### **Financial Damage**

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

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

### **BARRIERS TO THE NATION'S ABILITY TO ASSERT ITS RIGHTS**

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

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

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

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

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

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

#### **BREACH OF FIDUCIARY OBLIGATIONS**

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

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

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

~~76.80.~~ The plaintiff pleads that the right to monitor the taking of water out of Shoal Lake constituted an undertaking that gave rise to corresponding fiduciary obligations to the plaintiff. Ontario assumed and exercised discretionary power or control, affecting the plaintiff's interests in respect of the taking of water from the plaintiff's traditional, treaty, and reserve territory, without consultation with the plaintiff Nation. The plaintiff pleads and relies upon the historic injustice and power imbalance against Aboriginal peoples in general and the Nation in particular, including, especially, the prohibition on hiring legal counsel, and the close proximity of the Cecilia Jeffrey Residential school. The plaintiff and its ancestors are and were vulnerable to the exercise of this discretionary power by the defendant. A fiduciary relationship exists with Ontario as a fiduciary and the plaintiff as a beneficiary of Crown fiduciary obligations with respect to:

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

~~77.81.~~ The fiduciary relationship between the defendant Ontario and the plaintiff in respect of the compensation owed under the Order in Council requires that the defendant act with respect to the interests of the plaintiff with loyalty, good faith, full disclosure, and due diligence in advancing the best interests of the plaintiff.

~~78.82.~~ The fiduciary obligations of the defendant Ontario, vis-à-vis the plaintiff's interests, extend to the protection of, preservation of, and taking of positive measures to protect the plaintiff's lands and properties, including from any ecological, cultural, and financial taking, injurious effect, or interference in any way.

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

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

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

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

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

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

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

~~83.92.~~ The plaintiff proposes that this action be tried in Toronto, Ontario.

Date: November 26, 2020

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**Iskatewizaagegan No. 39 Independent First Nation et al.      -and-      The City of Winnipeg et al.**  
**Plaintiff**

**Defendants**

**Court File No. CV-20-00644545-0000**

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**Proceedings commenced in TORONTO**

**AMENDED STATEMENT OF CLAIM**

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**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

BETWEEN:

ISKATEWIZAAGEGAN NO. 39 INDEPENDENT FIRST NATION

Plaintiff

– and –

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

Defendants

**DEMAND FOR PARTICULARS**

The defendant Her Majesty the Queen in Right of Ontario (“Ontario”) requests the following particulars from the plaintiff about allegations in the amended statement of claim. Where the request for particulars was previously asked with respect to the unamended statement of claim and only the new paragraph number has changed, the plaintiff’s original response has been inserted:

1. With respect to paragraph 8(a) of the amended statement of claim, what equitable remedies are claimed other than equitable damages and the declarations sought in subparagraphs (b) and (c)?
  
2. With respect to paragraphs 22 and 23, besides the plaintiff and Shoal Lake 40 First Nation, which other First Nations have reserves located on Shoal Lake?
  
3. With respect to paragraphs 42 and 46-47, was the Order for Approval from the International Joint Commission (IJC) made in 1914 only an interim approval for Winnipeg to

take water from Shoal Lake? If so, did Winnipeg receive final approval from the IJC to take water from Shoal Lake, when, and through what instrument? After the IJC provided final approval to Winnipeg to take water from Shoal Lake, did Winnipeg require any further approvals?

4. With respect to paragraph 50, was any land taken or expropriated in Ontario for the purpose of constructing the aqueduct?

Plaintiff's response:

[To the best of the plaintiff's knowledge, no land was taken or expropriated in Ontario for the purpose of constructing the aqueduct.]

5. With respect to paragraph 50, is any portion of the aqueduct constructed by Winnipeg including the water intake and the channel between Indian Bay and Snowshoe Bay located in Ontario?

Plaintiff's response:

[This information is within the knowledge of Ontario.]

6. With respect to paragraph 50, by what process and instruments did the federal government authorize the grant of land and/or the rights of way for the aqueduct including particulars about the First Nation referenced in the plaintiff's original response including the name of the referenced First Nation and confirmation of whether it is the plaintiff?

7. Which damages, if any, are alleged to have been caused by the construction of the aqueduct and which damages, if any, are alleged to have been caused by the operation of the aqueduct?

8. With respect to paragraph 52 of the amended claim, what is the minimum water level of Shoal Lake required for the water to flow smoothly through the aqueduct? Is the minimum water level set for Shoal Lake different than the minimum water level required for the aqueduct? If it is different, what is the minimum water level for Shoal Lake? When was the water level for Shoal Lake set, by which regulatory body, and through what instrument?

9. With respect to paragraph 53 of the amended claim, does the Lake of the Woods Control Board set the water level for Shoal Lake either on its own or alongside another regulatory body? If not, what regulatory body controls the water level for Shoal Lake?

10. With respect to paragraphs 55 and 71-73 of the amended claim, which damages and impacts specifically are claimed to be caused by high water levels?

11. With respect to paragraph 57, please provide particulars of any court proceedings brought by the plaintiff in Manitoba relating to the OIC or to the permission to take water for “domestic and municipal purposes” including when such court proceedings were commenced? Further please provide particulars of any proceedings commenced by the plaintiff in Ontario, before a federal court, tribunal or administrative body including the Specific Claims Tribunal, or before the International Joint Commission with respect to taking water from Shoal Lake including when such proceedings were commenced?

Plaintiff's response:

[While the requested information may well be the subject of examinations for discovery, the particulars sought are not necessary for the framing of a defence.]

12. With respect to paragraphs 69, 75 and 77, when does the plaintiff say that it first discovered its claim?

Plaintiff's response:

[While the requested information may well be the subject of examinations for discovery, the particulars sought are not necessary for the framing of a defence.]

13. With respect to paragraphs 62, 63 and 75, when did the plaintiff first provide notice in writing of its claim to Winnipeg? To Ontario?

Plaintiff's response:

[The record keeping and files of Iskatewizaagegan are not in a condition whereby it is possible, at this stage of the proceedings, to be precise as to when notice in writing may have been provided to Winnipeg or Ontario. Furthermore, written correspondence delivered to Ontario would be within its knowledge. In addition, Ontario may seek such particulars from the defendant Winnipeg in relation to notice delivered to Winnipeg.]

14. With respect to paragraphs 66 and 67, does the plaintiff allege damage to any personal property? If so, please provide particulars of the alleged damage to personal property including the alleged cause of the damage?

Plaintiff's response:

[The plaintiff alleges damage to personal property, including loss of family burial sites, ceremonial grounds, gathering grounds and hunting trap lines that are now inaccessible. The plaintiff will be tendering expert evidence to support these damage claims.]

15. With respect to paragraphs 66 and 67, please provide particulars of any lands or real property that are alleged to have been taken separate and apart from any claim for loss of use or enjoyment of those lands or real property. Please include particulars of how the lands or real property were taken and details of the mechanism used to take the land, as alleged?

16. With respect to paragraphs 66 and 67, what construction, project or work does the claim for injurious affection relate to? Was any part of that construction, project or work located in Ontario? What is the statutory authority for the construction, project or work that the claim for injurious affection relates to?

Plaintiff's response:

[Winnipeg's establishment of an infrastructure for the taking of the water is described in a detailed way in the claim at paragraphs 46-51. The authority that Winnipeg obtained from Ontario and Canada is also described in the claim at paragraphs 35-45. Therefore, adequate information has already been provided for the framing of a defence. While the requested information may well be the subject of examinations for discovery, the particulars sought are not necessary for the framing of a defence.]

17. With respect to paragraph 68, what was determined to be the natural water level of Shoal Lake before Winnipeg began taking water? Which regulatory body made the determination about the natural water level of Shoal Lake and when?

18. With respect to paragraph 71, if raised water levels in Shoal Lake is not the alleged cause of all of the alleged ecological impacts, then please provide particulars of the alleged cause for each of the ecological impacts?

19. With respect to paragraph 71, please identify which damages or impacts, if any, that are alleged to have been caused by the removal of water from Shoal Lake or the lowering the water level of Shoal Lake? Further, please provide particulars of how removing or taking water from Shoal Lake is alleged to have caused those damages? If the plaintiff does not allege that any damages or impacts were caused by the removal water from Shoal Lake or by lowering the water level, please confirm that the particular allegation is not included in the amended claim?

20. With respect to paragraph 73(b), what is the alleged cause of the loss of schools or education resources, and how has the plaintiff suffered financial loss as a result?

Plaintiff's response:

[The plaintiff alleges that the ecological and cultural impacts of the taking of water have seriously hampered the current generation in its ability to educate younger generations about their history, their stories, and their way of life. Traditionally, Shoal Lake was a teacher, a resource for schooling and education about the history of the Iskwewizaagegan people. That form of education has been lost, and it has resulted in financial loss to the development of those areas of trade and ways of life that would have allowed the plaintiff to develop and benefit economically from the gifts of its own land.]

21. With respect to paragraph 78, please provide particulars of any and all undertakings that the plaintiff bases its allegation on to say that Ontario owed a fiduciary duty?

Plaintiff's response:

[The plaintiff alleges that Ontario owed a fiduciary duty pursuant to the common law, the Treaty of Niagara, Treaty 3, the Royal Proclamation of 1763, and condition 2 of the Minister's Report appended to Ontario's 1913 Order in Council.]

22. With respect to paragraph 84(b), does the plaintiff allege that by granting permission to Winnipeg to take water, Ontario breached a fiduciary duty? In other words, is it the plaintiff's allegation that the Order-in-Council itself is a breach of fiduciary duty?

Plaintiff's response:

[The requested information is not necessary for the framing of a defence, as the plaintiff does not take the position that the sole act of passing the Order-in-Council breached a fiduciary duty.]

23. With respect to paragraphs 80 and 87, what was the exercise of discretion or control by Ontario that the plaintiff alleges created an *ad hoc* fiduciary duty? Specifically, how does the alleged exercise of discretion or control affect the legal interests identified in paragraph 87?

December 10, 2020

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**Court File No. CV-20-00644545-0000**

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**ISKATEWIZAAGEGAN NO. 39 INDEPENDENT FIRST NATION**

**PLAINTIFF**

**-AND-**

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

**DEFENDANTS**

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**RESPONSE TO DEMAND FOR PARTICULARS**  
**(15 Dec 2020)**

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The herein response to Demand for Particulars is provided on the basis of the legal criteria that govern the furnishing of particulars: 1) that the provision of the particulars at issue are required for the framing of a defence; *and*, 2) the particulars being sought are not within the knowledge of the Her Majesty the Queen in Right of Ontario (“Ontario”) (see *Areva NP GmbH v. Atomic Energy of Canada Limited*, 2009 CanLII 58610 (ON SC), at para 39; *Setter Capital Inc. v. Bridge Capital Inc.*, 2020 ONSC 4751, at para 3).

1. With respect to paragraph 8(a) of the statement of claim, what equitable remedies are claimed other than equitable damages and the declaration sought in subparagraphs (b) and (c)?

A: The Plaintiff is seeking equitable damages in addition to the declarations.

2. With respect to paragraphs 22 and 23, besides the plaintiff and Shoal Lake 40 First Nation, which other First Nations have reserves located on Shoal Lake?

A: Paragraphs 22 and 23 are self-explanatory and the particulars sought are not necessary for the framing of a defence.

3. With respect to paragraphs 42 and 46-47, was the Order for Approval from the International Joint Commission (IJC) made in 1914 only an interim approval for Winnipeg to take water from Shoal Lake? If so, did Winnipeg receive final approval from the IJC to take water from Shoal Lake, when, and through what instrument? After the IJC provided final approval to Winnipeg to take water from Shoal Lake, did Winnipeg require any further approvals?

A: The particulars sought are not necessary for the framing of a defence and paragraphs 42 and 46-47 are self-explanatory.

4. With respect to paragraph 50, was any land taken or expropriated in Ontario for the purpose of constructing the aqueduct?

A: To the best of the plaintiff's knowledge, no land was taken or expropriated in Ontario for the purpose of constructing the aqueduct.

5. With respect to paragraph 50, is any portion of the aqueduct constructed by Winnipeg including the water intake and the channel between Indian Bay and Snowshoe Bay located in Ontario?

A: No.

6. With respect to paragraph 50, by what process and instruments did the federal government authorize the grant of land and/or the rights of way for the aqueduct including particulars about the First Nation referenced in the plaintiff's original response including the name of the referenced First Nation and confirmation of whether it is the plaintiff?

A: In 1914, the federal Department of Indian Affairs allegedly expropriated the land necessary to build the aqueduct pursuant to provisions of the *Indian Act* which allowed land to be taken by the government without the consent of the plaintiff for any project of public utility (see Section 35 of the modern legislation). Title was thereby passed to the City of Winnipeg (then the GWWD) without payment to or consultation with the First Nations – specifically Iskwewizaagegan No. 39 Independent First Nation and Shoal Lake No. 40 – for whom the land had been reserved. In 1915, the federal government authorized expropriation of 3,335 acres of reserve lands falling within Manitoba's boundaries for the GWWD.

7. What damages, if any, are alleged to have been caused by the construction of the aqueduct and which damages, if any, are alleged to have been caused by the operation of the aqueduct?

A: Paragraphs 66-73 of the amended claim set out the plaintiff's claim for damages and adequately permit the defendants to frame a defence.

8. With respect to paragraph 52 of the amended claim, what is the minimum water level of Shoal Lake required for the water to flow smoothly through the aqueduct? Is the minimum water level set for Shoal Lake different than the minimum water level required for the aqueduct? If it is different, what is the minimum water level for Shoal Lake? When was the water level for Shoal Lake set, by which regulatory body, and through what instrument?

A: While the information sought relating to minimum water levels may well be the subject of examinations for discovery, it is not necessary for the framing of a defence. It is anticipated the plaintiff will be tendering expert evidence in respect of water levels. The information sought in the last question above is information within the knowledge of Ontario, as it pertains to a body of water situated partly within the boundaries of the province of Ontario.

9. With respect to paragraph 53 of the amended claim, does the Lake of the Woods Control Board set the water level for Shoal Lake either on its own or alongside another regulatory body? If not, what regulatory body controls the water level for Shoal Lake?

A: The information sought is within the knowledge of Ontario, as it pertains to a body of water situated partly within the boundaries of the province of Ontario.

10. With respect to paragraphs 55 and 71-73 of the amended claim, which damages and impacts specifically are claimed to be caused by high water levels?

A: While the requested information may well be the subject of examinations for discovery, the particulars sought are not necessary for the framing of a defence.

11. With respect to paragraph 57, please provide particulars of any court proceedings brought by the plaintiff in Manitoba relating to the OIC or to the permission to take water for "domestic and municipal purposes" including when such court proceedings were commenced? Further please provide particulars of any proceedings commenced by the plaintiff in Ontario, before a federal court, tribunal or administrative body including the Specific Claims Tribunal, or before the International Joint Commission with respect to taking water from Shoal Lake including when such proceedings were commenced?

A: While the requested information may well be the subject of examinations for discovery, the particulars sought are not necessary for the framing of a defence.

12. With respect to paragraphs 69, 75 and 77, when does the plaintiff say that it first discovered its claim?

A: While the requested information may well be the subject of examinations for discovery, the particulars sought are not necessary for the framing of a defence.

13. With respect to paragraphs 62, 63 and 75, when did the plaintiff first provide notice in writing of its claim to Winnipeg? To Ontario?

A: The record keeping and files of Iskatewizaagegan are not in a condition whereby it is possible, at this stage of the proceedings, to be precise as to when notice in writing may have been provided to Winnipeg or Ontario. Furthermore, written correspondence delivered to Ontario would be within its knowledge. In addition, Ontario may seek such particulars from the defendant Winnipeg in relation to notice delivered to Winnipeg.

14. With respect to paragraphs 66 and 67, does the plaintiff allege damage to any personal property? If so, please provide particulars of the alleged damage to personal property including the alleged cause of the damage?

A: The plaintiff alleges damage to personal property, including loss of family burial sites, ceremonial grounds, gathering grounds and hunting trap lines that are now inaccessible. The plaintiff will be tendering expert evidence to support these damage claims.

15. With respect to paragraphs 66 and 67, please provide particulars of any lands or real property that are alleged to have been taken separate and apart from any claim for loss of use or enjoyment of those lands or real property. Please include particulars of how the lands or real property were taken and details of the mechanism used to take the land, as alleged?

A: The damages suffered by the plaintiffs are as detailed in paragraphs 66-73 of the amended claim and referred to at paragraph 8(a). The plaintiff asserts its claim for compensation as damages which arise from “lands or properties that may be taken, injuriously affected or in any way interfered with”. The interference and injuries suffered by the plaintiff include, but are not limited to, the loss of use of their lands as a consequence of the damages alleged in paragraphs 66-73.

16. With respect to paragraphs 66 and 67, what construction, project or work does the claim for injurious affection relate to? Was any part of that construction, project or work located in Ontario?

What is the statutory authority for the construction, project or work that the claim for injurious affection relates to?

A: Winnipeg's establishment of an infrastructure for the taking of the water is described in a detailed way in the amended claim at paragraphs 50-55. The authority that Winnipeg obtained from Ontario and Canada is also described in the amended claim at paragraphs 35-49. Therefore, adequate information has already been provided for the framing of a defence. While the requested information may well be the subject of examinations for discovery, the particulars sought are not necessary for the framing of a defence.

17. With respect to paragraph 68, what was determined to be the natural water level of Shoal Lake before Winnipeg began taking water? Which regulatory body made the determination about the natural water level of Shoal Lake and when?

A: While the requested information may well be the subject of examinations for discovery, the particulars sought are not necessary for the framing of a defence. While paragraph 68 of the claim refers to "natural, lower water levels", it is anticipated the plaintiff will be tendering expert evidence in respect of water levels. Furthermore, information regarding regulation is within the knowledge of Ontario.

18. With respect to paragraph 71, if raised water levels in Shoal Lake is not the alleged cause of all of the alleged ecological impacts, then please provide particulars of the alleged cause for each of the ecological impacts?

A: The claim is broader and more nuanced than a claim solely about raised water levels, as made clear at paragraphs 66 to 73 of the amended claim. The plaintiff will be tendering expert evidence to support its damages claims. The plaintiff claims that its lands and properties have been taken, injuriously affected, and interfered with through alteration of the natural hydrological and ecological variability of habitat areas and other culturally, spiritually, and economically important areas caused by Winnipeg's actions in relation to the taking of water from Shoal Lake. This includes, without limiting any of the foregoing, the action of altering the course of the Falcon River and suppressing or otherwise altering the variability of hydrologic inputs and nutrient inputs.

19. With respect to paragraph 71, please identify which damages or impacts, if any, that are alleged to have been caused by the removal of waters from Shoal Lake or the lowering [of] the water level of Shoal Lake? Further, please provide particulars of how removing or taking water from Shoal Lake is alleged to have caused those damages? If the plaintiff does not allege that damages or impacts were caused by the removal water from Shoal Lake or by lowering the water level, please confirm that the particular allegation is not included in the amended claim?

A: The claim is broader and more nuanced than a claim solely about lowering of water levels, as made clear at paragraphs 66 to 73 of the amended claim. The plaintiff will be

tendering expert evidence to support its damages claims. The plaintiff claims that its lands and properties have been taken, injuriously affected, and interfered with through alteration of the natural hydrological and ecological variability of habitat areas and other culturally, spiritually, and economically important areas caused by Winnipeg's actions in relation to the taking of water from Shoal Lake. This includes, without limiting any of the foregoing, the action of altering the course of the Falcon River and suppressing or otherwise altering the variability of hydrologic inputs and nutrient inputs, as well as the plaintiff being unable to develop the only lands it has recognized authority to develop for economic purposes due to the proximate location of the aqueduct intake to these lands.

20. With respect to paragraph 73(b), what is the alleged cause of the loss of schools or education resources, and how has the plaintiff suffered financial loss as a result?

A: The plaintiff alleges that the ecological and cultural impacts of the taking of water have seriously hampered the current generation in its ability to educate younger generations about their history, their stories, and their way of life. Traditionally, Shoal Lake was a teacher, a resource for schooling and education about the history of the Iskatewizaagegan people. That form of education has been lost, and it has resulted in financial loss to the development of those areas of trade and ways of life that would have allowed the plaintiff to develop and benefit economically from the gifts of its own land.

21. With respect to paragraph 78, please provide particulars of any and all undertakings that the plaintiff bases its allegation on to say that Ontario owed a fiduciary duty?

A: The plaintiff alleges that Ontario owed a fiduciary duty pursuant to the common law, the Treaty of Niagara, Treaty 3, the Royal Proclamation of 1763, and conditions of the Minister's Report appended to Ontario's 1913 Order in Council.

22. With respect to paragraph 84(b), does the plaintiff allege that by granting permission to Winnipeg to take water, Ontario breached a fiduciary duty? In other words, is it the plaintiff's allegation that the Order-in-Council itself is a breach of fiduciary duty?

A: The requested information is not necessary for the framing of a defence, as the plaintiff does not take the position that the sole act of passing the Order-in-Council breached a fiduciary duty.

23. With respect to paragraphs 80 and 87, what was the exercise of discretion or control by Ontario that the plaintiff alleges created an *ad hoc* fiduciary duty? Specifically, how does the alleged exercise of discretion or control affect the legal interests identified in paragraph 87?

A: Ontario's exercise of discretion or control in relation to regulating water-taking from Shoal Lake and in relation to a legislated compensation scheme related to such water-taking constituted the exercise of discretion or control by Ontario creating *ad hoc* fiduciary duties. This exercise of discretion or control has to be understood within the broader colonial

context of the Crown's exercise of discretion or control over the lives and lands of Indigenous people, including specifically the plaintiff. The amended claim contains sufficient particulars as to how this exercise of discretion or control has affected the plaintiff's legal interests to enable the framing of a defence.

Date: December 15, 2020

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Lawyers for the defendant, the City of Winnipeg



**Iskatewizaagegan No. 39 Independent First Nation**

**-and- The City of Winnipeg et al.**

**Plaintiff**

**Defendants**

**Court File No. CV-20-00644545-0000**

***ONTARIO***

**SUPERIOR COURT OF JUSTICE**

**Proceedings commenced in TORONTO**

**RESPONSE TO DEMAND FOR PARTICULARS  
(December 15, 2020)**

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**Lawyers for the Plaintiffs**



ONTARIO  
EXECUTIVE COUNCIL OFFICE

Copy of an Order-in-Council approved by His Honour  
the Lieutenant Governor, the 2<sup>nd</sup> day of October, A.D. 1913.

The Committee of Council have had under consideration  
the annexed report of the Honourable the Minister of Lands,  
Forests and Mines, with reference to the application of the  
Greater Winnipeg Water District comprising the following  
Municipalities in the Province of Manitoba, that is to say:-

Winnipeg having a population of	191,067
St Boniface " " "	9,100
Transcona " " "	1,632
Assiniboia " " "	6,000
Port Garry " " "	3,000
St Vital " " "	1,817
Kildonan " " "	2,075

for permission to take water from Sheal Lake in the District  
of Kenora for domestic and municipal purposes and advise  
that there be granted to the said Greater Winnipeg Water  
District the right to enter upon and to divert and take  
water from the said Sheal Lake, subject to the terms, conditions  
and stipulations set forth and contained in the Minister's  
report

Certified,

*James D. Macdonald*  
Clerk, Executive Council.



To His Honour,

The Lieutenant Governor in Council;

The undersigned has the honour to report that the Greater Winnipeg Water District, comprising the following municipalities in the Province of Manitoba, that is to say;

Winnipeg, having a population of	191,067
St. Boniface	9,100
Transcona	1,632
Assiniboia	6,000
Fort Garry	3,000
St. Vital	1,817
Kildonan	2,075

which said district is shown on the map hereto annexed, has represented that the only available source of water supply for domestic and municipal purposes, for use in the said District is Shoal Lake, in the District of Kenora in the Province of Ontario, and the said district has applied for permission to take water from the said Lake for the purposes aforesaid.

The undersigned respectfully recommends that there be granted to the said Greater Winnipeg Water District the right to enter upon and to divert and take water from Shoal Lake in the District of Kenora in this Province subject to the following terms, conditions and stipulations;

1. 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.

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

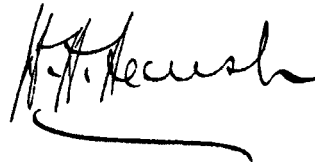
-2-

3. That the water shall be used only for the purposes for which municipalities and residents therein ordinarily use water, and not for the generation of hydraulic or electric power, and the quantity taken shall never, at any time, exceed one hundred million gallons per day.

4. That if it should hereafter <sup>appear</sup> that the taking of said water from Shoal Lake affects the level of the Lake of the Woods at the Town of Kenora, and thereby appreciably reduces the amount of power now developed and owned by the Town of Kenora or in any way injuriously affects the property of the said Town, the Greater Winnipeg Water District shall construct such remedial works as may be necessary to prevent or remove any such injurious effects, and in the case of failure on the part of the said District to construct such works, then the said District shall pay to the Town of Kenora any damages the said Town shall sustain by reason of the taking of the water as aforesaid.

5. In the event of a dispute between the Town of Kenora and the Greater Winnipeg Water District with reference to any of the matters in the preceding paragraph mentioned, the same shall be finally settled and determined by arbitration under the Ontario Arbitration Act.

Toronto, October 1st. 1913.



INTERNATIONAL JOINT COMMISSION.

IN THE MATTER OF:

THE APPLICATION OF THE GREATER WINNIPEG WATER DISTRICT "FOR THE APPROVAL OF THE USE OF THE WATERS OF SHOAL LAKE (SITUATE IN THE PROVINCES OF ONTARIO AND MANITOBA, CANADA), IN PURSUANCE OF THE POWERS CONFERRED BY AN ACT OF THE PARLIAMENT OF CANADA TO ENABLE THE CITY OF WINNIPEG TO GET WATER OUTSIDE THE PROVINCE OF MANITOBA."

ORDER OF APPROVAL.

The application in this matter filed at Ottawa and Washington on the 8th September, 1913, is in the following terms:

To the Honourable ROBERT ROGERS,

*Minister of Public Works for the Dominion of Canada:*

The petition of the Greater Winnipeg Water District humbly sheweth as follows:

1. Your petitioners are a Corporation duly created by an act of the legislative assembly of the Province of Manitoba, being chapter 22 of the statutes of said Province passed in 3 George V (1913), and brought into force by proclamation of the lieutenant governor in council on the tenth day of June, 1913, issued upon and after the vote mentioned in sections 86 to 89 of said act had been duly taken and was answered affirmatively by six-sevenths of the electors voting thereon.
2. Your petitioners are desirous of obtaining the approval of the Government of Canada for the use of the waters of Shoal Lake (situate in the Provinces of Ontario and Manitoba) for domestic and sanitary purposes by the inhabitants of the Greater Winnipeg Water District and for such purposes the right, privilege, and power of constructing a system of waterworks with the pipe line or intake pipe placed in said Shoal Lake at or about latitude 49° 38' N., longitude 95° 7' 50" W., in the Province of Ontario, and from there carried and connected by a pipe line through parts of the Provinces of Ontario and Manitoba to a point or points in the Greater Winnipeg Water District; and for said purposes to exercise the powers conferred by an act of the Parliament of Canada to enable the city of Winnipeg to get water outside the Province of Manitoba, which said act was passed in the session of 1912-13.
3. The use of said water for the purposes aforesaid is rendered imperative in the opinion of your petitioners after careful examination by competent experts and authorities, owing to the rapidly increasing population of the said Greater Winnipeg Water District and the insecurity of the present artesian source of supply, and the difficulties and danger attending the use of the water of either of the rivers flowing through the district (Red and Assiniboine Rivers).
4. Your petitioners submit that the use and diversion of said water from Shoal Lake for said purpose will not appreciably affect the level of the Lake of the Woods, or in any way affect the right or ability to navigate said lake and will not injuriously affect the interests or rights of any parties.

## GREATER WINNIPEG WATER DISTRICT.

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5. Your petitioners beg to point out that the present population of the Greater Winnipeg Water District is estimated at two hundred and twenty-five thousand souls and that the population for the same territory at the census of 1901 was only fifty thousand.

6. Herewith are filed the following: Two tracings or maps showing the position of Shoal Lake and indicating generally the route of the proposed pipe line from the said lake to the city of Winnipeg.

## APPLICATION TO INTERNATIONAL JOINT COMMISSION.

7. In view of clause "10" of the said act of the Parliament of Canada and the connection of said Shoal Lake with the Lake of the Woods, which latter lake is a boundary water under the terms of the waterways treaty between Great Britain and the United States of America of January eleventh, nineteen hundred and nine, respecting boundary waters, your petitioners are desirous that the International Joint Commission under said treaty should confirm your petitioners' right to take the water of Shoal Lake for the purposes aforesaid, and do hereby request that you will transmit this application to the said commission, under rules 6, 7, and 8 of said commission, accompanied with a request that the commission take appropriate action thereon. For such purpose your petitioners forward herewith the following documents (in addition to those hereinbefore mentioned and in addition to the two originals of this paper intended for the approval of your department).

(a) One duplicate original of this application for each of the secretaries of said commission.

(b) One original tracing map (for each of said secretaries), showing the territory in question and indicating the general direction of the proposed pipe line (this is duplicate of the map herewith filed with your department).

(c) Twenty-five printed copies of this application for each secretary (50 in all).

(d) Twenty-five white prints of said map for each secretary (50 in all).

8. Your petitioners request that in transmitting this application and the accompanying papers to the Canadian and American secretaries of the commission at Ottawa and Washington, respectively, that your department forward therewith your approval thereof under the terms of rule numbered 8 of said commission.

Your petitioners therefore pray:

(1) That you will approve of said map under the provisions of section 3 of said act of the Parliament of Canada, and

(2) That you will transmit this application to the Canadian and American secretaries of the International Joint Commission in compliance with its rules, together with your expressed approval thereof and with your request that the commission take appropriate action thereon.

And your petitioners will ever pray.

The approval of the minister of public works of Canada, which bears date the 25th day of August, 1913, reads as follows:

I hereby approve of the annexed application by the Greater Winnipeg Water District and of the map referred to therein (the scale of said map being, in my opinion, sufficient).

Duplicates of said application and of said map are hereby transmitted to the International Joint Commission under the treaty between the United States and Great Britain, signed January 11th, 1909, and I hereby request the commission to take appropriate action thereon.

Dated at Winnipeg, this twenty-fifth day of August, A. D. 1913.

R. ROGERS,  
*Minister of Public Works.*

Subsequently, at the hearing, a motion was made on behalf of the applicant for leave to amend the application by inserting the words "and Lake of the Woods" in the second paragraph, after the word "Manitoba," in the fourth paragraph after the words "Shoal Lake," and in the seventh paragraph between the words "Shoal Lake" and the words "for the purposes aforesaid."

The United States Government, within the delays fixed by the rules, filed no statement in answer to the said application.

On the 30th December, 1913, the municipal corporation of the town of Kenora filed a document styled "Petition," addressed to the commission and reading as follows:

The petition of the municipal corporation of the town of Kenora humbly sheweth, as follows:

1. Your petitioner is a municipal corporation, situated upon and at the outlets of the Lake of the Woods, and is largely dependent upon the lumbering navigation and water-power interests thereon and connected therewith.

2. The use of the water of Shoal Lake for the purposes and in the manner proposed under the application of the Greater Winnipeg Water District, filed with the International Joint Commission on the 8th day of September, 1913, will divert large quantities of water from the Lake of the Woods (of which Shoal Lake is merely an arm) materially affecting the levels of the Lake of the Woods and the rights and interests of navigation thereon.

3. Your petitioner being situated as aforesaid and being owner and otherwise interested in valuable water powers on the outlets of said lake will be seriously affected by the proposed diversion of such water from its natural course especially in low-water periods.

4. That such proposed diversion being from Shoal Lake will deprive such water powers of the special advantages of a large natural storage reservoir (Shoal Lake) which fills up from the Lake of the Woods in high-water seasons and flows back again through its narrow connecting channel during low-water periods thereby maintaining a more uniform water level in the Lake of the Woods to the great advantage of such water powers as well as navigation.

5. That such proposed diversion of water from Shoal Lake will render much more difficult and impracticable the successful working out of any scheme or plan for regulating and maintaining uniformity of water levels on the Lake of the Woods for the improvement and advantages of water powers, navigation, lumbering, summer resorts, and other interests of importance and benefit to the town of Kenora.

6. That there is no actual or substantial necessity for the applicants, the Greater Winnipeg Water District, to obtain such water supply from Shoal Lake or divert water therefrom for such purposes as proposed inasmuch as an ample supply of good water is easily available without interfering with or affecting the interests above mentioned:

Your petitioner therefore prays:

(a) That the said application of the Greater Winnipeg Water District be not granted, approved, or confirmed.

(b) That your petitioner be given notice of the date of hearing of the said application and of such other proceedings as it may please the commission to order.

(c) That your petitioner be also granted leave to be represented by counsel at the hearing of the said application and to adduce evidence in support of the allegations above contained as provided for under the rules of procedure of the commission.

And your petitioner will ever pray.

## GREATER WINNIPEG WATER DISTRICT.

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The application came up for hearing at Washington, D. C., on the 14th of January, when Isaac Campbell, Esq., K. C., appeared on behalf of the applicant, George W. Koonz, Esq., appeared on behalf of the War Department of the United States, C. S. MacInnes, Esq., K. C., on behalf of the Government of the Dominion of Canada and Allan McLennan, on behalf of the municipal corporation of the town of Kenora and the board of trade thereof.

Mr. Koonz, on behalf of the War Department of the United States, filed the following statement or brief:

To the honourable, The International Joint Commission.

As counsel for the War Department in this regard the undersigned respectfully submits:

The project of the Greater Winnipeg Water District, pending before your honourable commission, contemplates the diversion of the waters of Shoal Lake for domestic and sanitary purposes, and involves for the accomplishment of such diversion the placing in said lake of a system of water works including pipe lines, intakes, and other appurtenant structures. The project has been approved by the minister of public works of the Dominion of Canada and the approval of your honorable commission is sought by reason of the fact that Shoal Lake connects with the Lake of the Woods, which latter is a boundary water within the terms of the treaty between the United States and Great Britain proclaimed May 13th, 1910.<sup>1</sup>

Shoal Lake is situated in the Provinces of Ontario and Manitoba, and the proposed waterworks structures are to be located wholly within Canadian territory. The chief concern of the War Department with the project is the effect that the proposed diversion will have on the level of the Lake of the Woods, and consequently on the navigable capacity of the lake and its tributaries, which under present conditions will be directly proportional to the amount of water diverted.

It is understood that the present consumption of water in Winnipeg is a little less than 50 gallons per capita per day, and that the possible maximum consumption is placed at 100 gallons. With this maximum consumption and a population of 500,000, which is more than double that of the present, the daily consumption would be 50,000,000 gallons, which translated into stream flow means about 77 cubic feet per second. This flow would have but little effect on the level of the Lake of the Woods, as if kept up continuously for an entire year, and all other influences affecting the level of the lake are disregarded, it would lower the lake only three-fourths of an inch. The area of the lake is 1,450 square miles, of which 111 square miles, or about 8 per cent, are in Shoal Lake, and if the latter should be entirely separated, the reservoir area would be reduced only 8 per cent.

With respect to the proposed diversion on the outflow of the lake, and hence on the water powers there located, it may be said that there are approximately 25,900 square miles in the watershed of the lake, and based upon the best estimates obtainable there is a minimum flow of 2,600 second-feet. The proposed diversion of 77 second-feet for the Winnipeg water system is, therefore, less than 3 per cent of the minimum flow, and much smaller per cent of the normal flow, and this amount will be required only with more than double the present population and double the present per capita consumption.

It is apparent from the foregoing that it will be many years before the consumption of water by the Greater Winnipeg Water District will be great enough to lower the Lake of the Woods an appreciable amount or before the maximum effect on the outflow will be as much as 3 per cent, and that the reservoir area, if Shoal Lake were sepa-



rated, would be reduced only 8 per cent. A reduction of even as much as one inch on a navigable depth of 8 to 10 feet could scarcely be considered important and surely would cause little injury to navigation on the Lake of the Woods, and still less to the navigable capacity of Rainy River.

For the foregoing reasons the War Department makes no objection to the favorable consideration by your honorable commission of the application of the Greater Winnipeg Water District.

It is deemed appropriate to add that in reaching this conclusion the War Department has considered the projected diversion in its relation to the problem of fixing the level of the Lake of the Woods and its tributaries, which is also before your honorable commission for determination. While greatly interested in this problem, and in the ultimate level to be fixed, and while fully recognizing that the authority which may be constituted to supervise and maintain the level of the Lake of the Woods should also control all users of its waters, the War Department feels that the proposed diversion by the Winnipeg Water District is so small a factor of the general problem as to be practically insignificant, and that no valid reason exists for objecting to its consummation.

Mr. MacInnes read to the commission and produced in the record copy of an order of His Royal Highness the Governor General in council, dated the 3d day of January, 1914, which is in the following terms:

His Royal Highness the Governor General in council.

Whereas an application was recently made by the Greater Winnipeg Water District (a corporation created by a special act of the legislature of Manitoba and on which certain powers were conferred by a special act of the Parliament of Canada passed in 1913, ch. 208 of 3-4 George V) to the minister of public works asking for the approval, under section 3 of the said act of the Parliament, of a certain map of plan in relation to the use of the waters of Shoal Lake, situated in the Provinces of Ontario and Manitoba, for domestic and sanitary purposes by the inhabitants of the Greater Winnipeg Water District, and requesting that the said application be transmitted to the International Joint Commission with the approval of the minister of public works and with the request that the said commission take appropriate action thereon;

And whereas the said application was transmitted by the minister of public works to the International Joint Commission with his approval and with the request that appropriate action be taken thereon;

And whereas it appears that under the ruling subsequently made by the International Joint Commission the existing rules of procedure of the said commission require that approval of such a map or plan as is attached to the said application should first be given by the Governor in council before consideration thereof by the said commission;

And whereas after full consideration the conclusion has been reached that Shoal Lake is not a boundary water within the definition thereof in the treaty between Great Britain and the United States relating to boundary waters, dated 11th January, 1909, or otherwise, but it has further appeared, however, that the said application is in such terms that the diversion of water contemplated thereby may be such as to affect the natural level or flow of boundary waters and the interests of navigation of both Canada and the United States;

And whereas it has also appeared that the said Shoal Lake is within the scope of an outstanding reference to the International Joint Commission under Article IX of the said treaty, relating to "the waters of the Lake of the Woods and the waters flowing into and from the lake;"

## GREATER WINNIPEG WATER DISTRICT.

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The secretary of state of external affairs, with the approval of the minister of public works, reports that Shoal Lake is not to be considered a boundary water, but that the interests of navigation and the level of boundary waters on both sides of the boundary may possibly be affected, and that the said application covers matters connected with the investigation directed by the said reference to the said commission, Article IX of the said treaty. It thus appears desirable that the said application of the Greater Winnipeg Water District relating to the use of the waters of Shoal Lake should be considered and dealt with by the International Joint Commission.

His Royal Highness the Governor General in council is therefore pleased to approve of the said plan (subject to such conditions and regulations as may be contained in any order in council as provided by section 9 of the said act of Parliament) in order that appropriate action whether by decision or report may be taken by the International Joint Commission, without awaiting the disposition of all matters covered by the said reference under Article IX of the said treaty.

RODOLPH BOUDREAU,  
*Clerk of the Privy Council.*

It was established on behalf of the applicant that the Greater Winnipeg Water District was duly incorporated by a statute of the Province of Manitoba, entitled "The Greater Winnipeg Water District Act," being chapter 22, 3 George V, assented to on February 15, 1913. By the eighty-sixth section the said act was to come into force upon proclamation of the lieutenant governor in council. By a proclamation dated the 10th June, 1913, the said act was duly brought into force, which proclamation was published in the Manitoba Gazette of June 21. By the act 3-4 George V, chapter 208 of the Parliament of the Dominion of Canada, power was given to the city of Winnipeg "for the purpose of conveying from sources outside of the Province of Manitoba to the city of Winnipeg, water for the use of the municipal corporation of the said city, hereinafter called 'the Corporation,' and of the inhabitants of the said city," to lay, build, construct, equip and maintain a line of conduit or pipe from the city of Winnipeg extending out of the Province of Manitoba and into any other Province, with all the powers incidental thereto, and under certain conditions mentioned in the said act. By section 11 of the said act, the powers granted thereby to the city of Winnipeg were to be extended to the Greater Winnipeg Water District so soon as the statute of the Province of Manitoba, hereinabove mentioned, had been brought into force by proclamation.

By section 10 of the Dominion act, any order of the governor general in council permitting the corporation to take any waters "over which the Parliament of Canada has control or may for the purposes of the act exercise control," is subject in so far as it applies to "any waters sought to be affected, to the provisions of an act relating to the establishment and expenses of the International Joint Commission under the Waterways treaty of January the eleventh, nineteen hundred and nine, and to the said treaty."

The applicant filed the following order in council, approved by his honor the lieutenant governor of the Province of Ontario, on the 2d October, 1913:

The committee of council have had under consideration the annexed report of the honourable the minister of lands, forests, and mines, with reference to the application of the Greater Winnipeg Water District, comprising the following municipalities in the Province of Manitoba, that is to say:

Winnipeg having a population of.....	191,067
St. Boniface " " " ".....	9,100
Transcona " " " ".....	1,632
Assiniboia " " " ".....	6,000
Fort Garry " " " ".....	3,000
St. Vital " " " ".....	1,817
Kildonan " " " ".....	2,075

for permission to take water from Shoal Lake in the district of Kenora for domestic and municipal purposes and advise that there be granted to the said Greater Winnipeg Water District the right to enter upon and to divert and take water from the said Shoal Lake, subject to the terms, conditions, and stipulations set forth and contained in the minister's report.

Certified.

J. LONSDALE CAPEEOL,  
*Clerk, Executive Council.*

*To His Honour the Lieutenant Governor in Council:*

The undersigned has the honor to report that the Greater Winnipeg Water District, comprising the following municipalities in the Province of Manitoba, that is to say:

Winnipeg having a population of.....	191,067
St. Boniface " " " ".....	9,100
Transcona " " " ".....	1,632
Assiniboia " " " ".....	6,000
Fort Garry " " " ".....	3,000
St. Vital " " " ".....	1,817
Kildonan " " " ".....	2,075

which said district is shewn on the map hereto annexed, has represented that the only available source of water supply for domestic and municipal purposes for use in the said district is Shoal Lake in the district of Kenora, in the Province of Ontario, and the said district has applied for permission to take water from the said lake for the purposes aforesaid.

The undersigned respectfully recommends that there be granted to the said Greater Winnipeg Water District the right to enter upon and to divert and take water from Shoal Lake, in the district of Kenora, in this Province, subject to the following terms, conditions, and stipulations:

1. 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.

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

3. That the water shall be used only for the purposes for which municipalities and residents therein ordinarily use water, and not for the generation of hydraulic or electric

## GREATER WINNIPEG WATER DISTRICT.

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power, and the quantity taken shall never, at any time, exceed one hundred million gallons per day.

4. That if it should hereafter appear that the taking of said water from Shoal Lake affects the level of the Lake of the Woods at the town of Kenora, and thereby appreciably reduces the amount of power now developed and owned by the town of Kenora, or in any way injuriously affects the property of the said town, the Greater Winnipeg Water District shall construct such remedial works as may be necessary to prevent or remove any such injurious effects, and in the case of failure on the part of the said district to construct such works, then the said district shall pay to the town of Kenora any damages the said town shall sustain by reason of the taking of the water as aforesaid.

5. In the event of a dispute between the town of Kenora and the Greater Winnipeg Water District with reference to any of the matters in the preceding paragraph mentioned, the same shall be finally settled and determined by arbitration under the Ontario Arbitration Act.

Toronto, October 1st, 1913.

W. H. HEARST.

The following essential facts were established in evidence:

1. That it is necessary for the city of Winnipeg and surrounding municipalities constituting the Greater Winnipeg Water District to obtain from some source outside the limits of such district a sufficient supply of water for domestic and sanitary purposes.

2. That after examination and researches by competent engineers it is manifest that the most feasible plan to obtain such supply of water is to construct an aqueduct from Shoal Lake as described in the statutes, orders in council, and plans mentioned in and filed with the application herein.

3. That it is proposed eventually to draw from Shoal Lake for the Greater Winnipeg Water District a quantity of water amounting to from 85,000,000 to 100,000,000 gallons per diem.

4. That Shoal Lake, which communicates with the Lake of the Woods by a series of passages, rapids, and lakes varying in width and about 7 miles long, can not supply such a quantity of water without drawing from the waters of the Lake of the Woods, a boundary water within the meaning of the waterways treaty of the 11th of January, 1909.

5. That the diversion eventually contemplated will amount to 158 second-feet per day, or 260 horsepower, of which the town of Kenora and its industries will be deprived, but that, on the other hand, even if the town of Kenora installed and operated its whole plant, there would still be, as there always has been, water enough passing down the river to operate all the undertakings at the foot of the Lake of the Woods, and that the withdrawal of the said quantity of water would have no appreciable effect upon the said undertakings.

6. That the authorization to withdraw the said quantity of water from Shoal Lake and the Lake of the Woods is subject to certain specified conditions contained in the statutes and orders in council hereinabove recited under and pursuant to which the applicant



is seeking to act, and that the inobservance of such conditions would carry with it the loss and cancellation of the franchise, and that thereby the public and private interests are fully protected.

After hearing witnesses and counsel for the different parties represented, and after careful consideration, the commission unanimously decided to grant the said application, subject to the conditions specified. And it is therefore

*Ordered*, That the use and diversion of the waters of Shoal Lake and of the Lake of the Woods for domestic and sanitary purposes by the inhabitants of the Greater Winnipeg Water District, prayed for in the said application, be permitted, subject to the conditions contained in the statutes and orders in council hereinabove recited: And provided further, That the water so to be diverted from Shoal Lake and from the Lake of the Woods be not used for other than domestic and sanitary purposes, that the present approval and permission shall in no way interfere with or prejudice the rights, if any, of any person, corporation, or municipality to damages or compensation for any injuries due in whole or in part to the diversion permitted and approved of, and that the quantity of water so taken and diverted shall never at any time exceed one hundred million gallons per day: And provided further, That the present permission and order shall not be invoked or relied upon in any manner against the recommendations or report to be made by the commission on the reference to it respecting the levels of the Lake of the Woods and shall in no way interfere with the action of the commission in that regard.

Dated at Washington the fourteenth day of January, one thousand nine hundred and fourteen.

JAMES A. TAWNEY,  
TH. CHASE CASGRAIN,  
GEORGE TURNER,  
HENRY A. POWELL,  
OBADIAH GARDNER,  
CHARLES A. MAGRATH.

Court File No. CV-19-006325580000

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

The Honourable  
Mr. Justice GANS

) MADE This 12 DAY  
) OF July, 2020

BETWEEN:

CHIEF GERALD LEWIS and  
ISKATEWIZAAGEGAN NO. 39 INDEPENDENT FIRST NATION

Applicants

– and –

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

Respondents



**ORDER**

ON REQUEST of all parties in case management for, *inter alia*, direction from the Court on the applicants' qualification as "private parties" referenced in the Order in Council dated October 2, 1913 approved by the Lieutenant Governor in Council for the Province of Ontario and incorporated by reference in the Order of Approval of the International Joint Commission dated January 14, 1914 and ON CONSENT of all parties, THIS COURT ORDERS and declares that:

1. Paragraph numbered 1 of the report of the Honourable Minister of Lands, Projects and Mines, annexed to the Order in Council approved by the Lieutenant Governor for the Province of Ontario dated October 2, 1913, which paragraph reads as follows:

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.

forms part of and is one of the conditions of the Order of Approval of the International Joint Commission dated January 14, 1914 (hereinafter referred to as the "Order"), which permits the City of Winnipeg to withdraw water from Shoal Lake.

2. The Respondent the City of Winnipeg is bound by the provisions of the Order including paragraph numbered 1 of the report annexed to the 1913 Order in Council recited above.
3. The Applicants 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 provided, however, that water taken within the terms of the Order and considered merely as water is not property to be paid for.
4. The balance of the application is dismissed without prejudice to the rights of the Applicants to commence an action for compensation or damages under the terms of the Order or any other relevant statute or cause, and without prejudice to the rights of any defendant to that action to raise any defences whatsoever.
5. Costs of this application are in the cause and may be fixed by this Honourable Court if the parties are unable to agree.

Date:

July 13, 2020

  
Gans J.

ENTERED IN THE REGISTRY OF TORONTO  
ONTARIO BOOK NO. / INSCRIT À TORONTO  
LE / DANS LE REGISTRE NO.:

JUL 15 2020

PER / PAR:



<b>CHIEF GERALD LEWIS et al.</b>	<b>-and-</b>	<b>THE CITY OF WINNIPEG et al.</b>	<b>Respondent</b>
<b>Applicants</b>			<b>Court File No. CV-19-006325580000</b>

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
Proceedings commenced in TORONTO**

# ORDER DISPOSING OF APPLICATION

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**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

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

**MOTION RECORD**  
(Motion returnable January 20, 2021)

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