Court File No. CV-20-00644545-0000

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ISKATEWIZAAGEGAN NO. 39 INDEPENDENT FIRST NATION
PLAINTIFF/RESPONDENT

-AND-

THE CITY OF WINNIPEG
DEFENDANT/RESPONDENT

-AND-

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
DEFENDANT/MOVING PARTY

RESPONDENT'S FACTUM
(re. Motion to Strike)

DATE: January 15, 2021

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AND TO: THIS HONOURABLE COURT

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FACTUM OF PLAINTIFF/RESPONDENT
(re. Motion to Strike)

PART I: OVERVIEW

1. Iskatewizaagegan No. 39 Independent First Nation ("the Nation") claims breach of fiduciary duties on the part of the Ontario Crown ("Ontario") for its failure to protect the Nation's interests in Shoal Lake and surrounding lands, and for failing to ensure appropriate compensation to the Nation for damages to these interests caused by the City of Winnipeg ("Winnipeg") taking water from Shoal Lake. The Nation claims that a 1913 Order in Council ("OIC") and subsequent legislation lie at the heart of Ontario's fiduciary duties. The OIC granted permission to Winnipeg to take water from Shoal Lake provided it pay compensation to private parties in Ontario whose lands or properties may be negatively impacted by such water-taking. The Nation's lands and properties have been so impacted for over 100 years, yet the Nation has not received one cent of compensation. This claim represents the first time that a Court will consider the 1913 OIC as a potential basis for Crown duty and liability.

2. Ontario now seeks to strike the entirety of the claim of its treaty partner without leave to amend. The onus on a party seeking to strike a claim is heavy. It is particularly heavy in cases such as this involving fiduciary claims by an Indigenous group against the Crown. In the present case, Ontario has not discharged the burden on it to justify the striking of this novel claim. There is no case on point demonstrating that the issue raised by the Nation has been squarely dealt with and rejected.

3. Underlying Ontario's argument is an unstated position: that its 1913 OIC granting Winnipeg permission to take water from Shoal Lake is not operative. Ontario seems to take the position that, once it was determined in 1914 that the aqueduct intake would be located entirely within the province of Manitoba, Ontario's OIC became irrelevant. Ontario offers no explanation as to why Ontario subsequently affirmed the legal and binding nature of the OIC in 1916 and has continued to incorporate the OIC by way of reference in modern-day legislation for over 100 years. Ontario asks (by implication) that this

Honourable Court find the OIC means nothing. The Nation respectfully asks, explicitly, for this Honourable Court to give meaning to the OIC, and to give meaning to Ontario's continued reliance on the same.

4. The question of whether the OIC remains operative, and how its terms should be interpreted, is a question of mixed fact and law; the answer to this question is the source of direct opposition between the parties. For the Court to resolve the dispute, a trial with evidence and legal argument is required. It would be inappropriate to definitively resolve such matters on a motion to strike.

5. The Nation should not be driven out of court. Its pleadings disclose the facts to support the cause of action for breach of fiduciary duty. It has pleaded cognizable Aboriginal interests over which Ontario exercised discretionary control by granting Winnipeg permission to take water from Shoal Lake subject to the obligation to pay compensation for damage to private parties' interests. The Nation has further pleaded the requisite elements to establish the existence of *ad hoc* fiduciary duties. The Nation should be permitted to have its day in court so that this Honourable Court can clarify the rights and responsibilities governing the Nation's relationship with Ontario with the benefit of a full evidentiary record. Ontario's request to summarily dismiss this claim ought to be rejected by this Honourable Court.

PART II: FACTS

6. The facts pleaded are to be treated as true for purposes of the motion to strike.

(A) Shoal Lake[1]

7. Shoal Lake is a part of the Shoal Lake watershed and the larger "Rainy River - Lake of the Woods - Winnipeg River" drainage basin. 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.

[1] ASOC, paras 19-24 [MDE, Tab 2, pp. 12-13 (PDF pp. 15-16)].

8. 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. The nearest settler town to Shoal Lake is the Town of Kenora, which sits on the northeast shore of Lake of the Woods.

(B) The Nation and its Relationship with Shoal Lake and with Ontario[2]

9. The plaintiff, Iskatewizaagegan No. 39 Independent First Nation ("the Nation"), is a distinct Aboriginal society, a recognized Band under the *Indian Act*, and an Aboriginal people within the meaning of s. 35 of the *Constitution Act*, 1982.[3] Located on the northwest shore of Shoal Lake, the Nation's reserve is bordered by half of Shoal Lake's northern shore, with a small part of the Nation's reserve being located on the western shore of Shoal Lake.[4] Further, the Nation's traditional territory encompasses Shoal Lake and the Shoal Lake watershed. This includes all land surrounding the Shoal Lake watershed, including Shoal Lake itself, the Garden Islands, and the land up to and abutting Falcon Lake and High Lake.[5]

10. Shoal Lake is a critical part of the identity of the community of the Nation. Its water gives the community life and they in turn define themselves by their responsibility for the protection of such a gift.[6] Since time immemorial, the Anishinaabe have used the waters of Shoal Lake and the surrounding land for survival, engaging in fishing as well as harvesting of numerous species of trees and other plants, including manoomin (wild rice).[7] The Nation's culture is coextensive with the land. 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. Shoal Lake and the surrounding land provide not only the means for life, but the manner of bimaatiziwin (to live a good life).[8]

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[2] ASOC, paras 12-18, 25-34 [MDE, Tab 2, pp. 11-12, 13-15 (PDF pp. 14-15, 16-18)].
[3] *Ibid.*, para 9 [MDE, Tab 2, p. 10 (PDF p. 13)].
[4] *Ibid.*, para 14 [MDE, Tab 2, p. 11 (PDF p. 13)].
[5] *Ibid.,* para 15 [MDE, Tab 2, pp. 11-12 (PDF pp. 14-15)].
[6] *Ibid.*, para 25 [MDE, Tab 2, pp. 13-14 (PDF pp. 16-17)].
[7] *Ibid.*, paras 26-29 [MDE, Tab 2, p. 14 (PDF p. 7)].
[8] *Ibid.*, para 31 [MDE, Tab 2, p. 15 (PDF p. 18)].

11. On October 3, 1873, the Nation entered into Treaty #3 with the Crown. 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.[9] 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. The Nation has reserve territory pursuant to the *Indian Act* and to Treaty #3.[10] Shoal Lake and the surrounding land are not only part of the Nation'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 Nation's constitutionally protected Aboriginal and treaty rights.[11]

12. The Nation pleads that 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 in the plaintiff's best interest.[12] These other undertakings include the Treaty of Niagara 1764 and Treaty #3.[13]

(C) Ontario Gives Permission for the GWWD to take Water from Shoal Lake in 1913

13. Through a 1913 Order in Council ("OIC"), Ontario authorized the Greater Winnipeg Water District ("GWWD") to take water from Shoal Lake for certain purposes, provided certain conditions were adhered to.[14] The City of Winnipeg ("Winnipeg") later inherited the powers and obligations of the GWWD through legislation sustaining the authority granted in 1913 to take water from Shoal Lake.[15]

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[9] ASOC, para 13 [MDE, Tab 2, p. 11 (PDF p. 14)].
[10] *Ibid.*, paras 12-16 [MDE, Tab 2, pp. 11-12 (PDF pp. 14-15)].
[11] *Ibid.*, para 34.
[12] *Ibid.,* para 78 [MDE, Tab 2, p. 25 (PDF p. 28)].
[13] Response to Demand for Particulars, 21A [MDE, Tab 4, p. 44 (PDF p. 47)].
[14] ASOC, paras 38 and 41 [MDE, Tab 2, pp. 16, 17 (PDF pp. 19, 20)].
[15] *Ibid.*, para 10 [MDE, Tab 2, p. 10 (PDF p. 13)].

14. The OIC 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.[16]

15. The first of these terms and conditions was 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…."[17]

16. This condition establishes a right to compensation from the GWWD/Winnipeg to any private party whose "lands or properties may be taken, injuriously affected or in any way interfered with…". Superimposing liability over the common law, Ontario interposed itself between the GWWD/Winnipeg and a distinct class of private parties in Ontario by establishing liability for compensation for damage to these parties in addition to any right for compensation that would arise from the common law.[18]

17. At the time of the passing of the OIC, it was not yet settled whether the aqueduct would extend into Ontario.[19] What was settled, however, was that water would be taken from Shoal Lake.

18. The 1913 OIC is, to this day, incorporated into provincial legislation: section 34.3(3) of the *Ontario Water Resources Act* contains an exception to a prohibition of transferring water from certain water basins if the transfer is "[a] transfer of water pursuant to the order of the Lieutenant Governor in Council dated October 2, 1913 respecting the Greater Winnipeg Water District."[20]

(D) The IJC Gives Permission to the GWWD to Take Water from Shoal Lake in 1914

19. In addition to requiring authorization from Ontario to take water from Shoal Lake, the GWWD also required approval from the International Joint Commission (IJC), an international organization

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[16] ASOC, para 57 [MDE, Tab 2, p. 20 (PDF p. 23)].
[17] *Ibid.,* para 58 (MDE, Tab 2, p. 21 [PDF p. 24)]; 1913 Order in Council [MDE, Tab 5, p. 48 (PDF p. 51)].
[18] *Ibid.* Statement of Claim, para 59 [MDE, Tab 2, p. 21 (PDF p. 24)].
[19] *Ibid.*, para 42 [MDE, Tab 2, p. 17 (PDF p. 20)].
[20] *Ibid*., para 5 [MDE, Tab 2, p. 8 (PDF p. 11)]; *Ontario Water Resources Act,* RSO 1990, Chapter 0.40, s. 34.3(3).

established in 1909 by Canada and the United States under the *Boundary Waters Treaty*. This authorization was required 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.[21]

20. The IJC held a hearing about the GWWD's plan in January 1914. The location of the aqueduct had not yet been settled. An important consideration for the IJC at its hearing was whether Ontario approved of the GWWD's plan to take water from Shoal Lake. The IJC approved of the plan subject to the same terms and conditions set out in the 1913 OIC. Multiple authorizations, including that of Ontario, were required prior to the GWWD taking water from Shoal Lake. The IJC Order was only one of the required authorizations.[22]

(E) The GWWD Determines the Aqueduct Intake Will be in Manitoba in 1914

21. By early 1914, it was settled by the GWWD that the aqueduct would be entirely within the Province of Manitoba. Confirmation of this plan was publicized as statutorily required, including in the Canada Gazette in 1915.[23]

(F) Ontario Confirms Permission for the GWWD to take Water from Shoal Lake in 1916

22. In April of 1916, with knowledge that the aqueduct would be located entirely within Manitoba, Ontario passed the *Greater Winnipeg Water District Act* (Ontario) 1916, S.O. 1916, c. 1717 ["the 1916 *GWWD Act*"][24]. The 1916 *GWWD Act* declared the 1913 OIC to be legal, valid, and binding.[25]

23. Whereas the OIC referred to the right to "enter upon and to divert and take water from…Shoal Lake,"[26] the preamble to the *GWWD Act* omits reference to the right to enter upon; it refers only to the

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[21] ASOC, para 44 [MDE, Tab 2, p. 17 (PDF p. 20)].
[22] *Ibid.*, paras 45-47 [MDE, Tab 2, pp. 17-18 (PDF pp. 20-21)]; IJC Order of Approval, pp. 20-22 [MDE, Tab 6, pp. 56-58 (PDF pp. 59-61)]
[23] ASOC, para 42 [MDE, Tab 2, p. 17 (PDF p. 20)].
[24] ***Greater Winnipeg Water District Act (Ontario) 1916*, S.O. 1916, c. 17.**
[25] ASOC, paras 41-42 [MDE, Tab 2, p. 17 (PDF p. 20)].
[26] *Ibid.*, para 38 [MDE, Tab 2, p. 16 (PDF p. 19)]; 1913 Order in Council [MDE, Tab 5, p. 47 (PDF p. 50)].

right "to divert and take water from Shoal Lake."[27] This change in language reflects the reality that in 1913, the location of the aqueduct intake was an open question, whereas by 1916, it was settled that the aqueduct intake would be located in Manitoba. Ontario's authorization, however, was required regardless of whether the GWWD planned to build the aqueduct on Ontario's side of the border. In the words of counsel for the GWWD, it was "necessary" for the GWWD "to go to Toronto, to the Province of Ontario, because the ungranted watershed around our body of water belongs to the Province of Ontario. …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… [28]

24. Ontario's reasons for exerting and retaining control over the GWWD's plan to take water from Shoal Lake did not begin and end with the initially unknown geographic location of the aqueduct; rather, the reasons extended to protecting from and establishing compensation for damage to public and private property located in Ontario, including to the natural resources within the water and the surrounding watershed, effects on navigation, and on the water itself.

25. Ontario's 1913 OIC was concerned with much more than the location of the aqueduct. Had the OIC been rendered meaningless by the decision to locate the aqueduct in Manitoba in 1914, as argued by Ontario, then there would have been no need to enact the 1916 legislation to confirm that the 1913 OIC and its terms and conditions were legal, valid and binding. Furthermore, Ontario provides no explanation as to why the 1913 OIC is, to this day, incorporated into legislation and can be relied upon "as an exemption from the prohibition of water-taking from the Nelson Basin",[29] and yet cannot, in Ontario's version of events, be relied upon as evidence of Ontario's discretionary control relating to water taking and an accompanying compensatory scheme for damage caused by the same.

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[27] ASOC, para 43 [MDE, Tab 2, p. 17 (PDF p. 20)]; ***Greater Winnipeg Water District Act (Ontario) 1916*, S.O. 1916, c. 17.**
[28] *Ibid.*, para 45 [MDE, Tab 2, p. 18 (PDF p. 21)].
[29] Ontario's factum, para 10 (p. 3; PDF p. 6).

(G) Winnipeg Blasts and Diverts River Flow to Take Water from Shoal Lake for Over 100 Years

26. In order to take water from Shoal Lake, Winnipeg constructed a massive work of infrastructure: a 150 km aqueduct. Water is delivered through this aqueduct to Winnipeg from Shoal Lake starting at the west end of Indian Bay. The Shoal Lake-to-Winnipeg aqueduct was constructed over six years and began operating in 1919. It was engineered by a team of consultants hired by the GWWD in 1913. In addition to construction of the actual aqueduct, a channel was blasted to divert water from the Falcon River into Snowshoe Bay, as opposed to into Indian Bay, in order to facilitate the water-taking. This was done to maintain the clarity of the water in Indian Bay, where the aqueduct intake is located. [30]

(H) The Nation Has Not Been Compensated for Lands or Property "Taken, Injuriously Affected, or in Any Way Interfered With" By Winnipeg's Water-Taking

27. The Nation has suffered its land and properties taken, injuriously affected, and interfered with due to the taking of water from Shoal Lake in a manner that has caused ecological, cultural/spiritual, and financial loss to the Nation.[31] The Nation has never received compensation for the takings, injurious effects, and interference of its lands and properties caused by the GWWD's/Winnipeg's taking of water from Shoal Lake.[32] Ontario conveyed interests to and/or in respect of the lands and properties of the Nation without regard to the special relationship the Nation has with their land and territory.[33] Ontario further failed to recognize, preserve, protect, or give effect to the right of compensation under the 1913 OIC.[34]

PART III: LAW AND ANALYSIS

(A) The Test on a Motion to Strike is an Onerous One for the Moving Party, Especially in the Context of Crown-Indigenous Fiduciary Claims

[30] ASOC, paras 50-52 [MDE, Tab 2, p. 19 (PDF p. 22)].
[31] ASOC., paras 66-73 [MDE, Tab 2, pp. 22-24 (PDF pp. 25-27)].
[32] *Ibid*., para 63 [MDE, Tab 2, p. 21 (PDF p. 24)].
[33] *Ibid*., para 84 (MDE, Tab 2, p. 27 (PDF p. 30)].
[34] *Ibid.*

28. The Defendants bring their motion to strike on the basis of Rule 21.01(1)(b).[35] Under this Rule, a judge may order that a pleading be struck on the ground that it discloses no reasonable cause of action.[36]

29. The striking of a claim is a drastic measure reserved for the clearest of cases. The Supreme Court of Canada has set the test for this remedy at a high threshold:

> [A]ssuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? […If there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect should […the] plaintiff's statement of claim be struck […].[37]

30. The requisite threshold is not met even if a judge finds that the claim will likely fail.[38] The claim will be struck only if it is "beyond a reasonable doubt" that it is doomed to fail.[39]

31. The Superior Court recently reaffirmed the following explanation from Epstein J, as she then was, of the "radical defect" required to justify striking a claim at this preliminary stage:

> In order to foreclose the consideration of an issue past the pleadings stage, the moving party must show that there is an existing bar in the form of a decided case directly on point from the same jurisdiction demonstrating that the very issue has been squarely dealt with and rejected by our courts. Only by restricting successful attacks of this nature to the narrowest of cases can the common law have a full opportunity to be refined or extended […].[40]

32. In keeping with the above, matters of law not fully settled in the jurisprudence should not be settled on a motion to strike.[41] Additionally, as mentioned above, novelty of a claim is not a reason to strike it. As McLachlin CJC explained in *R v Imperial Tobacco Canada Ltd*, "The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial."[42]

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[35] Notice of Motion of the Defendant dated December 29, 2020, at para 1 [MDE, Tab 1, p. 1 (PDF p. 4)].
[36] *Rules of Civil Procedure,* RRO 1990, Reg 194, Rule 21.01(1)(b)
[37] *Hunt v. Carey Canada Inc.,* 1990 CanLII 90 (SCC), [1990] 2 SCR 959, at p. 980.
[38] *Hughes v. Sunbeam Corp. (Canada) Ltd*., 2002 CanLII 45051 (ON CA), at para 25.
[39] *Caldwell v. The Peace Naturals Project Inc*., 2018 ONSC 3065 (CanLII), at para 10.
[40] *Mathur (Litigation guardian of) v. Ontario*, [2020] O.J. No. 5061, at para 39 ["*Mathur*"], and also *Canadian National Railway Company v. Brant*, 2009 CanLII 32911 (ON SC) ["*Brant*"], at para 44, both reproducing with approval a statement in *Dalex Co. v. Schwartz Levitsky Feldman* (1994), 19 O.R. (3d) 463 (S.C.), 1994 CanLII 7290 (ON SC)
[41] *Amato v. Welsh*, 2013 ONCA 258 (CanLII), at para 89.
[42] *R. v. Imperial Tobacco Canada Ltd*, 2011 SCC 42 (CanLII), at para 21.

33. Because of the "dynamic" nature of the law in the area of Crown-Indigenous fiduciary duties, "more claims of this nature may be, as of yet, unprecedented but nonetheless tenable at law within the meaning of Rule 21."[43] As this Honourable Court has stated, in this type of claim, the defendant has "a particularly heavy burden in seeking to strike a pleading."[44]

34. As detailed below, the Nation submits that Ontario has not met the high threshold required to have its claim struck under Rule 21.01(b). The Nation should not be deprived of its day in court.

(B) Pleadings Disclose a Reasonable Cause of Action for Breach of Sui Generis Fiduciary Duty

35. In the Crown-Indigenous context, fiduciary duties are intended to "facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples."[45] The honour of the Crown can give rise to *sui generis* fiduciary duties when two criteria are met: (1) the existence of a "specific or cognizable Aboriginal interest" and (2) the Crown undertaking of discretionary control over this interest.[46]

i. Pleadings Disclose a Specific or Cognizable Aboriginal Interest

36. The requirement of identifying a "cognizable Indian [i.e. Aboriginal] interest"[47] to establish a *sui generis* fiduciary duty was solidified in the Supreme Court's unanimous decision in *Wewaykum* almost 20 years ago. The Nation pleads two types of "cognizable Aboriginal interest" at the heart of Ontario's *sui generis* fiduciary duty: (1) the Nation's interest in its reserve land and property; and (2) the Nation's interest in the lands and properties of its traditional territory, including the *sui generis* rights to hunt, fish, and gather on the Nation's traditional territories both on and off reserve.[48]

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[43] *Grand River Enterprises Six Nations Ltd. v. Attorney General (Canada),* 2017 ONCA 526 (CanLII), at para 202 ["*Grand River Enterprises*"], quoting with approval *Lafrance Estate v. Canada (Attorney General)*, (2003), (also indexed as *Bonaparte v. Canada*) 2003 CanLII 40016 (ON CA), 64 O.R. (3d) 1, at paras 32-33.

[44] *Brown v. Canada (Attorney General),* 2013 ONSC 5637 (CanLII), at para 32 [*per* Belobaba J], quoting with approval *Davis et al. v. Canada (Attorney General) et al.,* 2004 NLSCTD 153 (CanLII), at para 11.

[45] *Wewaykum Indian Band v. Canada*, 2002 SCC 79 (CanLII), [2002] 4 SCR 245, at para 79 [*Wewaykum*].

[46] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 (CanLII), [2013] 1 SCR 623, at para 73, para 51 ["*MMF*"]; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 (CanLII), [2018] 1 SCR 83, at para 44 [*Williams Lake*].

[47] *Wewaykum, supra* note 45, at para 85.

[48] ASOC, para 85 [MDE, Tab 2, p. 27 (PDF p. 30)].

37. It is well-established that a First Nation's interest in its reserve lands is a "cognizable Aboriginal interest"[49]. Case law about how to determine what else can constitute a "specific or cognizable Aboriginal interest" capable of attracting fiduciary duties is characterized by uncertainty and conflicting authorities.

38. What interests in land may be compensated for under the OIC remains a live issue for trial. This will be decided by an interpretation of the words "lands or properties" as well as "taken, injuriously affected or in any way interfered with" in the 1913 OIC. The Nation has pleaded damage to lands and properties which include reserve, treaty and traditional territory, and maintains these are specific or cognizable Aboriginal interests that Ontario exerted discretionary control over. The injurious affects or interferences include ecological, cultural/spiritual and financial loss arising from damage to these territories. The interests listed under paragraphs 66-73 of the Amended Statement of Claim include blueberry patches, medicinal areas, spawning areas for fish and other wildlife, culturally significant rice beds, and educational and recreational activities on the water with the Nation's children to connect them to ancestral traditions and spiritual practices. These are distinctly Aboriginal interests in the land integral to the nature of the First Nation community and its relationship to land.

39. As recently as December 2018, this Honourable Court declined to determine whether a First Nation's interest in their non-reserve traditional territory subject to treaty could ground a *sui generis* fiduciary duty.[50] The question is an unresolved and live issue. Justice Hennessy found it was unnecessary to resolve the issue because the second requirement of establishing a *sui generis* fiduciary duty was not met on the facts in the lengthy summary judgment motion before her.

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[49] E.g. *Guerin v. The Queen,* 1984 CanLII 25 (SCC), [1984] 2 SCR 335 ["*Guerin*"]*; Wewaykum, supra* note 45*; Osoyoos Indian Band v. Oliver (Town),* 2001 SCC 85 (CanLII), [2001] 3 SCR 746 ["*Osoyoos*"]; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, 1995 CanLII 50 (SCC), [1995] 4 SCR 344.

[50] *Restoule v. Canada (Attorney General),* 2018 ONSC 7701 (CanLII), at paras 509-512 ["*Restoule*"]. Specifically, Justice Hennessy declined to answer the following question: did the Robinson Treaties in Ontario extinguish the Anishinaabe's specific or cognizable Aboriginal interest in their traditional territory lands not kept as reserve lands under the Treaties, thereby rendering the non-reserve traditional territories incapable of being a "cognizable Aboriginal interest" for purposes of grounding a *sui generis* fiduciary duty?

40. If it was inappropriate to resolve this issue in the face of a voluminous evidentiary record on the conclusion of the Robinson Treaties and the relevant historical and cultural context,[51] it is even less appropriate to resolve a similar issue on a motion to strike. The Nation maintains that the case law supports a conclusion that its interests in its non-reserve traditional territories may constitute a "cognizable Aboriginal interest" capable of grounding fiduciary duties.

41. Ontario relies on the reasons of the majority of the Supreme Court in *Manitoba Metis* (or "*MMF"*) for its assertion that what Ontario calls "surrendered non-reserve land" cannot be a specific or cognizable Aboriginal interest that gives rise to a fiduciary duty. The case law is not as straightforward as Ontario suggests. It is true that the majority of the Supreme Court stated as follows in *Manitoba Metis*: "An Aboriginal interest in land giving rise to a fiduciary duty cannot be established by treaty, or, by extension, legislation. Rather, it is predicated on historic use and occupation."[52] It is also true that despite the majority relying throughout its reasons on the Supreme Court's earlier unanimous decision in *Wewaykum*, the majority's statement about what sort of Aboriginal interest can attract a *sui generis* fiduciary duty is wholly incompatible with the approach taken by a unanimous court in *Wewaykum*.

42. In *Wewaykum,* Justice Binnie, writing for the Court, explained that even bands whose reserves were created outside of their traditional territory had quasi-proprietary interests in their reserve land sufficient to trigger fiduciary duties on the part of the Crown.[53] Justice Binnie explicitly noted that the Crown's role in the case was <u>creation of a new interest</u>:

> The situation here, unlike *Guerin*, does not involve the Crown interposing itself between an Indian band and non-Indians with respect to an existing Indian interest in lands. Nor does it involve the Crown as "faithless fiduciary" failing to carry out a mandate conferred by a band with respect to disposition of a band asset. <u>The federal Crown in this case was carrying out various functions imposed by statute or undertaken pursuant to federal-provincial agreements. Its mandate was not the *disposition* of an existing Indian interest</u>

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[51] During the long summary judgment motion hearing in *Restoule*, Justice Hennessy heard the evidence of 18 witnesses, including 11 experts, chiefs, and Elders, and the parties filed approximately 30,000 pages of primary source documents and approximately the same number of pages of secondary source material: *Restoule*, *supra* note 50, at paras 7-11.
[52] *MMF, supra* note 46, at para 58 [*per* McLachlin CJ & Karakatsanis J].
[53] *Wewaykum*, *supra* note 45, at paras 86, 91-92, 98.

> in the subject lands, but the *creation* of an altogether new interest in lands to which the Indians made no prior claim by way of treaty or aboriginal right.[54]

43. Justice Binnie stated that the above-noted difference between the case he was dealing with and previous cases in which the Court had found a *sui generis* fiduciary duty owed by the Crown to Indigenous people did not mean that such a duty did not arise in the facts before him. Rather, the difference spoke to how the *content* of the duty should be defined.[55] The Supreme Court found that, on the facts of the case, the content of the fiduciary duty changed upon reserve creation. Prior to reserve creation, the Crown had a "fiduciary duty to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with 'ordinary' diligence in what it reasonably regarded as the best interest of the beneficiaries."[56] Once the reserves were created, the Crown "was obliged to preserve and protect each band's legal interest in the reserve."[57]

44. Both *Wewaykum* and *Manitoba Metis* are important Supreme Court decisions on *sui generis* fiduciary duties that remain good law today, yet they are not reconcilable. In *Wewaykum*, the Supreme Court explained that it was possible for the Crown, in "carrying out various functions imposed by statute or undertaken pursuant to federal-provincial agreements," to create a cognizable Aboriginal interest that can give rise to fiduciary duties. In *Manitoba Metis*, on the other hand, a majority of the Supreme Court (in a decision that relies throughout on *Wewaykum*) stated that a cognizable Aboriginal interest in land giving rise to a fiduciary duty "cannot be established by treaty, or, by extension, legislation" and is instead "predicated on historic use and occupation." There are thus inconsistencies within the *sui generis* Crown-Indigenous fiduciary doctrine jurisprudence that still need to be worked out about what type of interest can attract a *sui generis* fiduciary duty.

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[54] *Ibid.*, *supra* note 45, at para 91.
[55] *Ibid.*, *supra* note 45 at paras 92-97.
[56] *Wewaykum*, *supra* note 45 at para 97.
[57] *Ibid.*, at para 104.

45. The Nation maintains that, particularly given the inconsistencies in the case law, it would be inappropriate for the Court to dismiss the Nations' claim that its interests in its non-reserve traditional territories can constitute a "cognizable Aboriginal interest" capable of grounding a fiduciary duty.

46. Finally, while Ontario may be correct that compensation for damages is not a "cognizable Aboriginal interest",[58] this is not the interest on which the Nation relies. It is settled in the jurisprudence that the Crown's failure to ensure adequate compensation when it is disposing of or leasing reserve land on behalf of a First Nation constitutes a breach of fiduciary duty.[59] In these instances, it is the reserve land that is the "cognizable Aboriginal interest", and the Crown's fiduciary duty is to ensure appropriate compensation to the First Nation when it gives up any of this interest. In keeping with this case law, the Nation has a right to compensation for damage to/interference with its land interests, even though the compensation itself is not a cognizable Aboriginal interest.

ii. Pleadings Disclose Crown Undertaking of Discretionary Control

47. The facts pled disclose an undertaking of discretionary control by Ontario in relation to the "cognizable Aboriginal interests" outlined above.

(a) Ontario's Discretionary Control and Resulting Duty

48. In this case, it is pled that Ontario assumed discretionary control over the Nation's interests through Ontario's regulation of water-taking from Shoal Lake by the GWWD. Ontario's undertaking of discretionary control over water-taking and related compensation resulted in Ontario assuming discretionary control over the Nation's interests. In granting the GWWD the right to take water from Shoal Lake subject to the obligation to compensate private parties (including the plaintiff) for lands or properties "taken, injuriously affected or in any way interfered with", Ontario was exercising discretionary control over interests in lands or properties by granting the GWWD the right to interfere with them. Ontario was also exercising discretionary control over these interests by interposing itself between the GWWD and

[58] Ontario factum at para 37 (p. 12; PDF p. 15).
[59] E.g. *Guerin*, *supra* note 49.

these private parties to ensure recognition and protection of their interests in lands or properties through the compensation requirement.

49. In *Osoyoos*, the federal Crown was found liable for breach of fiduciary duty in relation to expropriation of reserve land. The majority determined that, once the federal government decided that it was in the public interest to expropriate land from the reserve, it then had a fiduciary duty to preserve the "Indian interest" to the extent possible. [60]

50. The Supreme Court has stated in no uncertain terms that Ontario's exercise of its powers in relation to Treaty 3 land must be exercised in accordance with Crown obligations to Indigenous nations who are parties to Treaty 3:

> When a government — be it the federal or a provincial government — exercises Crown power, the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question. Here, Ontario must exercise its powers in conformity with the honour of the Crown, and the exercise of those powers is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests.[61]

51. Thus, just as the federal government owes a fiduciary duty to preserve a First Nation's interest to the extent possible once it has decided it is in the public interest to expropriate part of a First Nation reserve, so too does Ontario owe a fiduciary duty to the Nation to preserve its interests to the extent possible once it had decided it was in the public interest to permit the GWWD to infringe on the Nation's interests for the purposes of taking water from Shoal Lake. Additionally, by interposing itself between the GWWD and private landowners through creation of a compensation entitlement for lands or properties "taken, injuriously affected, or otherwise interfered with", Ontario owed a fiduciary duty to ensure the Nation could access such compensation. Indeed, ensuring compensation could be accessed would reasonably be expected to deter the taking, injurious affection, and interference with the Nation's interests.

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[60] *Osoyoos*, *supra* note 49, at paras 52-53.
[61] *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48 (CanLII), [2014] 2 SCR 447, at para 50 [*Grassy Narrows*].

Discretionary Control Does Not Have to be Exclusive to the Aboriginal Interest

52. The assumption of discretionary control described above, though broader than discretionary control over the Nation's interests in its lands, included discretionary control over these interests. The Nation maintains this control can ground a fiduciary duty.

53. An analogy to the duty to consult – another type of duty that flows from the honour of the Crown – is instructive. The Crown owes a duty to consult an Aboriginal group when the Crown "has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[62] In situations giving rise to the duty to consult, the contemplated Crown conduct will usually affect many parts of the general population in addition to the affected Aboriginal group(s). Similarly, Ontario's granting of authority to the GWWD to take water from Shoal Lake and its creation of a related compensation scheme for loss/injury/interference was an exercise of discretionary control that affected the land and property rights not only of the Nation but also of other private parties.

54. In situations giving rise to the duty to consult, while the contemplated conduct may affect other portions of the general population, the duty to consult is owed only to the Aboriginal group that may have Aboriginal title or rights standing to be affected. The fact that the contemplated conduct has effects on the public other than the relevant Aboriginal group(s) does not negate the duty to consult. This is because the Aboriginal group's relationship to and interests in the land – and its relationship with the Crown – may be different from that of other segments of the population. There is no reason why the same should not be true with *sui generis* fiduciary duties. When the Crown assumes discretionary control over land interests that include, but are not limited to, First Nations' interest in their lands, the assumption of discretionary

[62] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 (CanLII), [2004] 3 SCR 511, at para 35 (emphasis added). The Supreme Court explained that on the facts in *Haida Nation,* "Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title" (at para 18); also *MMF*, *supra* note 46 at para 73.

control will give rise to a fiduciary duty owed to the relevant First Nation(s). The fact that the discretionary control is also over interests held by other segments of the population should not negate the fiduciary duty.

(b) The 1913 Order in Council is Engaged and Operative

55. Ontario has taken the surprising position that the 1913 OIC is a meaningless anachronism: "the 1913 OIC, if it has any application at all, can only apply to the portion of Shoal Lake located within Ontario. Ontario can only engage in the regulation described in the 1913 OIC if some portion of the aqueduct or water intake were located within Ontario."[63] Ontario supports this position by shifting responsibility to other bodies – arguing that the IJC Order is the sole operative authority pursuant to which the GWWD/Winnipeg has taken and continues to take water from Shoal Lake.[64]

56. The facts as pled do not support Ontario's legal position. First of all, the Nation has pleaded as follows:

> 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.[65]

57. One of the findings of fact made by the IJC at its 1914 hearing that informed its own granting of permission to the GWWD was that the authorization to withdraw water from Shoal Lake "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..."[66]

58. Ontario has provided no legal authority establishing that authorization from Ontario was not required for the GWWD to take water from Shoal Lake, or that the IJC's authorization depended in part on Ontario's authorization. As no evidence is permitted on a motion to strike, the Nation's version of events must be taken as true. It is ultimately an issue of mixed law and fact that can only be determined

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[63] Ontario factum at para 52 (p. 17; PDF p. 20) (emphasis added).
[64] *Ibid.,* at paras 21, 49 (pp. 6-7. 16; PDF pp. 10-11, 19).
[65] ASOC, para 47 [MDE, Tab 2, p. 18 (PDF p. 21)].
[66] IJC Order of Approval, pp. 21-22 [MDE, Tab 6, pp. 57-58 (PDF pp. 60-61).

based on evidence. Ontario may plead its alternate position in a statement of defence and bring evidence at trial to attempt to establish its position.

59. Second, Ontario's granting of permission for the GWWD to take water from Shoal Lake, including its step of interposing itself between the GWWD and private landowners in Ontario through establishment of a compensation scheme, was not done solely in response to the possibility that the GWWD would build an aqueduct on Ontario's side of Shoal Lake and thus take Ontario's water (and not Manitoba's water) out of Shoal Lake. Ontario's discretionary control was preserved and formalised as legal, valid and binding in the 1916 *GWWD Act* even after it was known that the aqueduct would be built in Manitoba. If the 1913 OIC was only required if some portion of the aqueduct or water intake was located in Ontario, as claimed by Ontario, then Ontario would have no reason to pass the 1916 *GWWD Act*, or to continue to incorporate the 1913 OIC in current legislation by reference.

60. While Ontario has cited an authority establishing that Ontario does not have the authority to limit the amount of fish individuals can take from the Manitoba side of Shoal Lake,[67] this has no bearing on a key element of the discretionary control pleaded by the Nation in this case. Specifically, the authority to ensure compensation for damage to property interests in Ontario caused by the taking of water from Shoal Lake (exercised through the 1913 OIC) cannot be compared to a lack of authority to place a quota on fish taken from the Manitoba side of Shoal Lake.

(c) Control of Water Levels Not an Essential Part of Establishing Fiduciary Duty by Ontario

61. Ontario argues that because it does not control the water levels of Shoal Lake, any damages caused by changes to water levels cannot give rise to a fiduciary duty on the part of Ontario.[68] To make out a claim of breach of fiduciary duty, it is not necessary for the Nation to establish that Ontario directly controls the water levels of Shoal Lake. Rather, the Nation must establish that Ontario assumed discretionary control by inserting itself as an intermediary between the GWWD and the Nation (and

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[67] Ontario factum at paras 50-51 (pp. 16-17; PDF pp. 19-20).
[68] *Ibid.* at para 54 (p. 18; PDF p. 21).

others). Having assumed discretionary control, Ontario cannot later absolve itself of its responsibility to protect property interests from damage simply by allowing another body to make decisions about water levels.

62. Furthermore, the question of who controls water levels is immaterial to Ontario's duty, once it had interposed itself between the GWWD and the Nation in the manner it did, to ensure compensation by the GWWD for damage to the Nation's interests in its lands and properties caused by water-taking.

(d) It is Not Necessary to Establish a "Private Law Element to the Regulation of Water-Taking"

63. Ontario's assertion that it is necessary for the Nation to establish that there is a "private law element to the regulation of water-taking",[69] writ large, in order to survive the motion to strike is misplaced and incorrect. For example, there is not a "private law element" to expropriation -- a decision to expropriate is made in the public interest --- yet a fiduciary duty arises when the government expropriates reserve land (*Osoyoos*).

64. In *MMF*, the majority stated that the requirement of the Crown undertaking discretionary control was met on the facts of that case because the Crown undertook discretionary control of the administration of land grants pursuant to legislation.[70] It did not suggest that it was necessary to establish a "private law element" to administration of land grants.

65. In case law regarding the Crown-Indigenous fiduciary context, when courts refer to considerations "in the nature of a private law duty", their focus is usually on the type of interest at play, since it is the interest itself that will determine whether it is capable of giving rise to obligations "in the nature of a private law duty." In *Guerin*, Dickson J explained as follows:

> …[T]he Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty.[71]

[69] *Ibid.* at para 45 (p. 15; PDF p. 18).
[70] *MMF*, *supra* note 46, at para 52.
[71] *Guerin*, supra note 49, at p. 385.

66. This reasoning was explained as follows by a unanimous Court in *Wewaykum*:

> … A quasi-proprietary interest (e.g., reserve land) could not be put on the same footing as a government benefits program. The latter will generally give rise to public law remedies only. The former raises considerations "in the nature of a private law duty" (*Guerin*, at p. 385). Put another way, the existence of a public law duty does not exclude the possibility that the Crown undertook, in the discharge of that public law duty, obligations "in the nature of a private law duty" towards aboriginal peoples.[72]

67. Thus, the existence of a public law duty in water regulation does not exclude the possibility that Ontario undertook obligations in the nature of a private law duty towards the Nation in discharging its public law duty. As established further above, the pleadings establish that Ontario undertook discretionary control over the Nation's interests in its reserve lands and/or traditional territories by permitting the GWWD to take water from Shoal Lake and guaranteeing compensation to the Nation for any harms to its interests from such taking. These interests, being "cognizable Aboriginal interests" that are quasi-proprietary, are capable of giving rise to obligations "in the nature of a private law duty."

(C) Pleadings Disclose a Reasonable Cause of Action for Breach of an Ad Hoc Fiduciary Duty

i. Overview of the Ad Hoc Fiduciary Duty Framework

68. It is possible for there to be no *sui generis* fiduciary duty owed by the Crown to an Indigenous people on the facts of a case, but for the Crown nonetheless to owe the Indigenous peoples a fiduciary duty. The *ad hoc* framework was articulated in *Elder Advocates* in 2011 and first applied by the Supreme Court in the Crown-Indigenous context in 2013 in *Manitoba Metis*. It provides that three criteria must be met to establish an *ad hoc* fiduciary duty, in addition to vulnerability in the relationship:

- (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;
- (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and

[72] *Wewaykum*, *supra* note 45, at para 74. See also *Williams Lake*, *supra* note 46, at para 52.

- (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.[73]

Iskatewizaagegan Independent First Nation submits that its claim meets all three criteria.

ii. Elder Advocates

69. In *Elder Advocates*, the Court applied the three-part *ad hoc* framework to determine whether the government was a fiduciary in its relationship with residents of long-term care homes. It answered the inquiry in the negative. Chief Justice McLachlin explained that because the Crown has a responsibility to act in the public interest, "situations where it is shown to owe a duty of loyalty to a particular person or group will be rare."[74]

iii. Pleadings disclose a legal or substantial practical interest of the Nation that stands to be adversely affected by the Ontario's exercise of discretion or control

70. When the government is the alleged fiduciary, the interest affected by the fiduciary's control "must be a specific *private law* interest to which the person has a pre-existing distinct and complete legal entitlement."[75] Access to a benefit scheme will rarely attract a fiduciary duty.[76] The following are examples "of sufficient interests": "property rights, interests akin to property rights, and the type of fundamental or human or personal interest that is implicated when the state assumes guardianship of a child or incompetent person."[77] When the alleged fiduciary is a government actor, the degree of discretionary control "must be equivalent or analogous to direct administration of that interest before a fiduciary relationship can be said to arise."[78] Additionally, "a statute that creates a complete legal entitlement might also give rise to a fiduciary duty on the part of government in relation to administering the interest."[79]

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[73] *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 (CanLII), [2011] 2 SCR 261, at para 36 ["*Elder Advocates*"].
[74] *Ibid*., at para 44.
[75] *Ibid* at para 51.
[76] *Ibid*., at para 52.
[77] *Ibid*.
[78] *Ibid.,* at para 53.
[79] *Ibid.,* at para 51.

71. The Nation has pleaded a legal interest capable of grounding a fiduciary duty: the Nation has a legal interest in the right to compensation if the GWWD/Winnipeg's taking of water from Shoal Lake causes the Nation'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. The Nation's entitlement to compensation set out in the OIC and legislation is readily distinguishable from a benefits scheme as it is built upon legal rights that exist independent of the legislation. Ontario is responsible for administering this interest insofar as it responsible for ensuring a process whereby the Nation can establish its entitlement and avail itself of the compensation due.

iv. Pleadings disclose a defined person or class of persons vulnerable to a fiduciary's control

72. Though this second requirement in the *ad hoc* framework – that the duty is owed to a specified beneficiary or class of beneficiaries – will rarely be met when the government is involved, [80] it is clearly made out on the facts pled. The plaintiff falls within a class of persons vulnerable to Ontario's control. This class of persons can be (1) those with property interests in the Shoal Lake/Lake of the Woods area whose legal interests could be affected by Winnipeg's taking of water; and/or most specifically (2) any Treaty 3 First Nation with property interests in the Shoal Lake/Lake of the Woods area whose legal interests could be affected by Winnipeg's taking of water.

73. Ontario argues that there cannot be an *ad hoc* fiduciary duty because the Nation is not the only party potentially entitled to compensation. This argument must fail, however, since the Nation belongs to a defined class of beneficiaries. There is no other group to whom the Crown owes a duty of loyalty in this process.[81] The Crown has no competing interest or duty in fulfilling its promise to ensure compensation for detrimental effects of the authorized water-taking. Compensation by Winnipeg to parties whose interests are negatively affected by the water-taking does not detract from or compete with Crown duties

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[80] *Elder Advocates, supra* note 73 at para 49.
[81] *Restoule*, *supra* note 50, at para 524.

to other members of the public. The duty owed to the Nation is the same as that owed to any party whose lands or property could be taken, injuriously affected, or otherwise interfered with by the water-taking.

v. Pleadings disclose undertaking by Ontario to act in the Nation's best interest

74. In *Elder Advocates,* the Chief Justice explained that it will be "rare" for facts of any case "to meet the requirement of an undertaking by a government actor."[82] She specified that a "mere grant to a public authority of discretionary power to affect a person's interest does not suffice."[83]

75. The Nation is relying on more than a mere grant of public authority of discretionary power. It has pleaded that "fiduciary obligations to the plaintiff [...] arise on an *ad hoc* basis pursuant to and/or are confirmed by the *Royal Proclamation of 1763* and other undertakings to act in the plaintiff's best interest."[84] It relies on the Treaty of Niagara of 1764 and conditions of the Minister's Report appended to Ontario's 1913 OIC as giving rise to an undertaking by Ontario grounding a fiduciary duty in this case.[85]

76. Ontario, exercising its public law duties, deemed it in the public interest to permit the GWWD/Winnipeg to take water from Shoal Lake, and so it authorized this taking through the OIC and 1916 *GWWD Act.* Through the condition regarding compensation, Ontario moved its focus from the public interest to the legal interests of a specific class of persons – those whose legal interests stood to be affected by the taking of water. It created an accompanying legal entitlement to compensation for any land or properties taken, injuriously affected, or otherwise interfered with. The condition is an undertaking to act with the utmost loyalty in relation to these interests, and specifically an undertaking to act with the utmost loyalty in ensuring a process whereby these persons can be compensated for damage to the interests.

77. The wording of the OIC and legislation is readily distinguishable from the wording in the legislation considered in *Manitoba Metis*. In that decision, the majority found that the relevant statute promising grants of land to Metis children made it clear the Crown was not forsaking the interests of all

[82] *Elder Advocates, supra* note 73, at para 48.
[83] *Ibid*., at para 45.
[84] ASOC, para 78 (MDE, Tab 2, p. 25 (PDF p. 28)].
[85] Response to Demand for Particulars, 21A [MDE, Tab 4, p. 44 (PDF p. 47)].

others in favour of the Metis. Specifically, the legislation provided that the land "shall be granted to the said children respectively, *in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.*"[86] Neither the OIC nor the 1916 *GWWD Act* contains similar language suggesting that the right to compensation for lands taken, injuriously affected, or otherwise interfered is similarly limited or circumscribed by other potentially competing interests. There are no competing interests with respect to this undertaking, as Ontario does not owe public law duties to Winnipeg/the GWWD.

78. Additionally, the wording of the OIC and *GWWD Act* must be read in the historical context of the relationship between the Nation and the Crown. Through the *Royal Proclamation of 1763* and the Treaty of Niagara of 1764, the Crown undertook to act as intermediary between the Nation (and other Indigenous peoples) and settlers in respect of the Nation's interests in its lands to prevent the Nation from being exploited.[87] In negotiating Treaty 3, the Anishinaabe parties (including the Nation) "were only prepared to cooperate with the Crown if they could retain their way of life, particularly their traditional hunting, fishing and trapping activities."[88] One aspect of Treaty 3 is that the Anishinaabe retain harvesting rights on the non-reserve land within their territory until the land is "taken up" for settlement or industry purposes by the Crown.[89] Particularly with this context in mind, the right to compensation set out in the Order in Council amounts to an undertaking to act with the utmost loyalty and in the best interest of the Nation, as part of a class of beneficiaries, regarding compensation for damage.

(D) The Jurisprudence Regarding Fiduciary Duties Applicable to this Case is Far from Settled

79. The idea that there is a *sui generis* Crown-Indigenous fiduciary relationship that can give rise to *sui generis* fiduciary duties was first articulated by Dickson J. in the Supreme Court's 1984 decision of

[86] *MMF*, *supra* note 46, at paras 11, 62 (emphasis added).
[87] *Guerin*, *supra* note 49, at p. 383 [*per* Dickson J].
[88] *Grassy Narrows*, *supra* note 61, at para 8.
[89] *Ibid.*, at para 10.

Guerin. Despite refinements and developments since then that are part and parcel of the common law, Crown-Indigenous fiduciary doctrine has not yet arrived the same level of certainty as fiduciary doctrine outside the Crown-Indigenous context.

80. Some specific examples of inconsistencies and unanswered questions in the case law – particularly about whether a First Nation's interests in its off-reserve traditional territory subject to treaty can ground a *sui generis* fiduciary duty – have been highlighted already. The most recent Supreme Court of Canada decision dealing with fiduciary duties in the Crown-Indigenous context is the 2018 decision of *Williams Lake*.[90] The Court issued a split decision about whether the Specific Claims Tribunal's application of the *sui generis* framework and finding of a fiduciary duty was reasonable. A majority found the Tribunal's approach and conclusion reasonable, while a minority found it unreasonable. The fact that the Court could not agree when using the standard of review of reasonableness indicates that this area of law is far from settled.

81. Additionally, application of the *ad hoc* framework to the Crown-Indigenous context is in its infancy, having first been applied by the Supreme Court in 2013. *Restoule* is a more recent (December 2018) Superior Court decision about a treaty provision relating to conditional augmentation of annuities by the Crown to the Anishinaabe beneficiaries of the Robinson Treaties. In that case, the Court determined that no *sui generis* fiduciary duty arose on the facts of the case, but that an *ad hoc* fiduciary duty did. Justice Hennessy found that the Crown owed a fiduciary duty to engage in a process to determine whether the condition in the provision was met, such that augmentation to the annuities would be due.

82. Upon finding an *ad hoc* fiduciary duty existed, Justice Hennessy stated the following:

> [526] The Crown reminded that court that a finding of ad hoc fiduciary duty on the part of the Crown would be rare. However, the circumstances in this case, being a duty to engage in a process to meet a treaty promise, may constitute one of those rare cases. The Crown has no other conflicting demands when it comes to engaging in the process.

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[90] Williams Lake, *supra* note 46.

> [527] The purpose of the fiduciary duty is to facilitate supervision of the high degree of discretionary control assumed by the Crown over the lives of Indigenous peoples. In the context of the Robinson Treaties' promise and undertaking, the conduct of the Crown as fiduciary that comes under scrutiny is its exercise of discretionary control over the process to implement the augmentation clause. While the process is not explicitly defined in the Treaties, the Crown is bound by the honour of the Crown and a fiduciary duty to conduct themselves within the parameters framed by those duties. The fiduciary duty applies so that the actions of Crown officials that could have an adverse impact upon the implementation of the promise meet established standards of conduct in the context of the Crown-Anishinaabe relationship.[91]

83. These above statements by Justice Hennessy indicate that in the context of Crown-Indigenous fiduciary doctrine, even when applying the *ad hoc* framework developed outside of the Crown-Indigenous context, the court's analysis will be infused by considerations specific to the *sui generis* nature of Crown-Indigenous relationships. This is consistent with the Supreme Court's unequivocal statement in *Elder Advocates* that the "unique and historic nature of Crown-Aboriginal relations" means that Crown-Indigenous fiduciary duties cannot "serve as a template for the duty of the government to citizens in other contexts."[92] It follows that the template for the duty of the government to citizens in other contexts (the *ad hoc* framework) may take on a different hue when being used in the Crown-Indigenous context.

84. Based on the facts as pleaded in this case and given the unsettled state of the law in some key respects, it would be inappropriate to strike the plaintiff's claim at this preliminary stage.

85. While Ontario has pointed to cases involving Indigenous plaintiffs in which claims for breach of fiduciary duty have been struck,[93] those cases are readily distinguishable from the present claim. The majority of the cases cited do not involve claims by or on behalf of a First Nation.[94] One of the cases was determined after receiving evidence.[95] In *Spookw v Gitxan Society*, the Court of Appeal for British Columbia dealt with a claim involving the allegation that the Crown was in breach of fiduciary duties for

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[91] *Restoule, supra* note 50, at paras 526-527 (citations omitted).
[92] *Elder Advocates, supra* note 73, at para 40.
[93] Crown factum at para 27.
[94] *C.R. v Ontario*, 2019 ONSC 2734, aff'd *J.B. v Ontario*, 2020 ONCA 198, leave to appeal (SCC) denied October 8, 2020 [Defendant's Book of Authorities, Vol 1, Tab 14]; *Grand River Enterprises, supra* note 43; *Conley v Chippewas of the Thames First Nation*, 2015 ONSC 404 [Defendant's Book of Authorities, Vol. 1, Tab 16].
[95] *Chingee v British Columbia*, 2016 BCSC 760, at paras 108-109, aff'd 2017 BCCA 250 [Defendant's Book of Authorities, Vol 1, Tab 17].

continuing to engage in treaty negotiations with the Gitxsan Treaty Society even after the plaintiffs had asserted to the Crown that the GTS did not have a proper negotiating mandate. The Court found there was no such duty, largely because the statutory scheme made it clear that it was an arm's-length entity (the British Columbia Treaty Commission), and not the Crown, who had responsibility for assessing GTS's negotiating mandate.[96] The facts pleaded in the present case are not in any way similar.

86. *Grand River Enterprises* is one of the cases that does not involve a claim by or on behalf of a First Nation. The plaintiffs in that case were four individuals with status under the *Indian Act* who were shareholders of Grand River Enterprises ("GRE") and former members of a partnership that pre-existed GRE. Part of their claim was that the Crown was liable for breach of fiduciary duty to them for failing to combat the problem of contraband and counterfeit tobacco, despite having adopted initiatives with this aim and despite having promised the plaintiffs it would intensify enforcement to "level the playing field between GRE and other on-Reserve tobacco manufacturers."[97]

87. The Crown was unsuccessful at first instance when it brought a motion to strike the claim. The Crown argued on appeal that the motions judge "erred in holding that a corporation or individual can seek damages…for breach of fiduciary duty for lost market share and profits when Ministers allegedly fail to properly implement policy initiatives aimed at a range of objectives…".[98] The Court of Appeal granted this part of the appeal and struck the claim.

88. Ontario relies on the Court's statement that "it is difficult to see how a failure to enforce public laws [such as excise legislation] is anything more than '[t]he type of legal control over an interest that arises from the ordinary exercise of statutory powers'", therefore suggesting such failure cannot give rise to an *ad hoc* fiduciary duty.[99] The facts and type of legislation at play in *Grand River Enterprises* are

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[96] *Spookw v. Gitxsan Treaty Society*, 2017 BCCA 16 (CanLII), at para 77, cited at footnote 27 to Ontario's factum and found at Volume 1, Tab 6B of the Defendant's Book of Authorities (listed as *Gitxsan Indian Band v Gitxsan Treaty Society*, 2017 BCCA 16)
[97] *Grand River Enterprises, supra* note 43, at para 4.
[98] *Ibid., supra* note 43, at para 69.
[99] *Ibid*., at para 194; Ontario factum at para 59.

significantly different from the facts, Order in Council, and legislation pled in the Nation's claim. The Nation pled that Ontario failed to ensure the Nation was able to avail itself of its right to compensation set out in the OIC and the *GWWD Act*. This is markedly different from the claim in *Grand River Enterprises* about failure to enforce parts of excise legislation and policy initiatives with no direct bearing on any rights of the plaintiff.

89. The Court of Appeal has stated that the "dynamic" nature of the law of Crown-Indigenous fiduciary duties does not mean that every claim asserting such a duty must survive the pleadings stage, but it does mean that "more claims of this nature may be, as of yet, unprecedented but nonetheless tenable at law within the meaning of Rule 21." The Nation submits its claim, while novel, should not be struck at the pleadings stage because it is tenable at law.

(E) No Misuse of Concept

90. At paragraphs 79-82 of its factum, Ontario argues that the Nation's fiduciary claim represents a misuse of the fiduciary concept. Its argument is based on the premise that the Nation cannot make out a claim for breach of a *sui generis* or *ad hoc* fiduciary duty, a premise which the Nation rejects.

91. Furthermore, by suggesting that the Nation is seeking a "remedy-based fiduciary duty", Ontario misapprehends the claim. The Nation pleads there has been a breach of fiduciary duty. It is seeking a declaration of such breach and a declaration that Winnipeg and Ontario jointly 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.[100] The plaintiff's "in the alternative" claim relates solely to equitable remedies for breach and reflects that the plaintiff is not seeking double compensation for the harms caused by the breach of fiduciary duty.[101]

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[100] ASOC, para 8(b),(c) [MDE, Tab 2, p. 9 (PDF p. 12)].
[101] *Ibid*., para 8(a).

(F) Claim Against Ontario is a Claim for Breach of Fiduciary Duty

92. The Nation's claim against Ontario is a claim for breach of fiduciary duty, not a claim for injurious affection. The Superior Court of Justice is the proper forum for bringing the Nation's claim.

(G) Leave to Amend Should be Granted if the Claim is Struck

93. In light of all of the above, the Nation's claim against Ontario should be allowed to proceed; it should not be struck. In the alternative, should this Honourable Court find that the claim as currently drafted cannot support a fiduciary duty claim, this honourable Court should respect the principle that actions should be decided on their merits and should grant the Nation leave to amend the claim.[102] The Court of Appeal has endorsed the following explanation that should guide the Court's decision on whether or not to grant leave to amend:

> The rule of conduct of the Court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs: but, if the amendment will put them into such a position that they must be injured, it ought not to be made.[103]

94. Ontario has not established that it would suffer non-compensable prejudice should the Nation be granted leave to amend its claim

(H) Conclusion: The Nation's Fiduciary Claim Should Not Be Struck

95. The Nation's pleadings disclose a reasonable cause of action for breach of fiduciary duty. Ontario has not provided an authority demonstrating that the very issue at play in the Nation's claim – whether the Ontario Crown's undertaking of discretionary control, through the 1913 OIC and the *GWWD Act*, over Treaty 3 lands and waters including through and over a compensation scheme setting out a right to compensation for any such lands and properties taken, injuriously affected, or otherwise interfered with,

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[102] *Spar Roofing & Metal Supplies Limited v Glynn*, 2016 ONCA 296(CanLII), at paras 35-37.
[103] *Ibid*, at para 37.

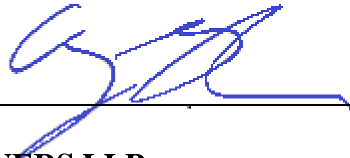
can give rise to a fiduciary duty owed by the Crown to the Nation – has been "squarely dealt with and rejected by our courts." [104]

96. The case law on fiduciary duty doctrine in the Crown-Indigenous context is not a settled area of law, and in particular there remain inconsistencies and uncertainties as to the type of interest that can attract a *sui generis* fiduciary duty and as to the type of Crown discretion or control that can give rise to a *sui generis* fiduciary duty. Ontario has not met the "particularly heavy burden" on it to justify striking this claim.[105] The Nation should be permitted to pursue its claim to have the rights and responsibilities governing its relationship with Ontario clarified by the Court with the benefit of a full evidentiary record.

PART IV: RELIEF REQUESTED

97. The Plaintiff asks that the motion to strike be dismissed in its entirety. In the alternative, it seeks leave to amend. It also requests costs on a partial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:



January 15, 2021

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Lawyers for the Plaintiff

[104] *Mathur*, at para 39 and *Brant*, at para 44, both reproducing with approval a statement in *Dalex*, all *supra* note 40.
[105] *Brown v. Canada (Attorney General),* 2013 ONSC 5637 (CanLII), at para 32 [*per* Belobaba J] [BOA, Tab 11], quoting with approval *Davis et al. v. Canada (Attorney General) et al.,* 2004 NLSCTD 153 (CanLII), at para 11 [BOA, Tab 12] all *supra* note 44.

Schedule "A"

Alberta v. Elder Advocates of Alberta Society, 2011 SCC 24 (CanLII), [2011] 2 SCR 261

Amato v. Welsh, 2013 ONCA 258 (CanLII)

Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), 1995 CanLII 50 (SCC), [1995] 4 SCR 344

Bonaparte v. Canada (also indexed as *Lafrance Estate v. Canada (Attorney General)*, (2003)) 2003 CanLII 40016 (ON CA)

Brown v. Canada (Attorney General), 2013 ONSC 5637 (CanLII)

Canadian National Railway Company v. Brant, 2009 CanLII 32911 (ON SC)

Caldwell v. The Peace Naturals Project Inc., 2018 ONSC 3065 (CanLII)

Chingee v British Columbia, 2016 BCSC 760, aff'd 2017 BCCA 250

Conley v Chippewas of the Thames First Nation, 2015 ONSC 404

C.R. v Ontario, 2019 ONSC 2734*, aff'd J.B. v Ontario,* 2020 ONCA 198, leave to appeal (SCC) denied October 8,2020

Dalex Co. v. Schwartz Levitsky Feldman (1994), 19 O.R. (3d) 463 (S.C.) 1994 CanLII 7290 (ON SC)

Davis et al. v. Canada (Attorney General) et al., 2004 NLSCTD 153 (CanLII)

Grand River Enterprises Six Nations Ltd. v. Attorney General (Canada), 2017 ONCA 526 (CanLII)

Grassy Narrows First Nation v. Ontario (Natural Resources), 2014 SCC 48 (CanLII), [2014] 2 SCR 447

Guerin v. The Queen, 1984 CanLII 25 (SCC), [1984] 2 SCR 335

Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73 (CanLII), [2004] 3 SCR 511

Hughes v. Sunbeam Corp. (Canada) Ltd., 2002 CanLII 45051 (ON CA)

Hunt v. Carey Canada Inc., 1990 CanLII 90 (SCC), [1990] 2 SCR 959

Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14 (CanLII), [2013] 1 SCR 623

Mathur (Litigation guardian of) v. Ontario, [2020] O.J. No. 5061

Osoyoos Indian Band v. Oliver (Town), 2001 SCC 85 (CanLII), [2001] 3 SCR 746

R. v. Imperial Tobacco Canada Ltd, 2011 SCC 42 (CanLII)

Restoule v. Canada (Attorney General), 2018 ONSC 7701 (CanLII)

Spar Roofing & Metal Supplies Limited v Glynn, 2016 ONCA 296(CanLII)

Wewaykum Indian Band v. Canada, 2002 SCC 79 (CanLII), [2002] 4 SCR 245

Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development), 2018 SCC 4 (CanLII), [2018] 1 SCR 83

Schedule "B"

Rules of Civil Procedure, RRO 1990, Reg 194

RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL

WHERE AVAILABLE

To Any Party on a Question of Law

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

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

[…]

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

Jurisdiction

(a) the court has no jurisdiction over the subject matter of the action;

Ontario Water Resources Act, RSO 1990, c O.40

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

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

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

    i. the part of Ontario the water of which drains into the Great Lakes or the St. Lawrence River, including the parts of the Great Lakes and of the St. Lawrence River that are within Ontario, or

ii. if the boundaries of the area described by subparagraph i are described more specifically by the regulations, the area within those boundaries.

2. The Nelson Basin, which consists of,

   i. the part of Ontario the water of which drains into the Nelson River, or

   ii. if the boundaries of the area described by subparagraph i are described more specifically by the regulations, the area within those boundaries.

3. The Hudson Bay Basin, which consists of,

   i. the part of Ontario, not included in the Nelson Basin, the water of which drains into Hudson Bay or James Bay, or

   ii. if the boundaries of the area described by subparagraph i are described more specifically by the regulations, the area within those boundaries. 2007, c. 12, s. 1 (10).

Prohibition

(2) A person shall not take water from a water basin described in subsection (1) if the person will cause or permit the water to be transferred out of the basin. 2007, c. 12, s. 1 (10).

Exceptions

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

[…]

6. A transfer of water pursuant to the order of the Lieutenant Governor in Council dated October 2, 1913 respecting the Greater Winnipeg Water District. 2007, c. 12, s. 1 (10).

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CHAPTER 17.

An Act to confer certain rights and powers upon The Greater Winnipeg Water District.

Assented to 27th April, 1916.

Preamble.

WHEREAS The Greater Winnipeg Water District is a corporation comprising the municipalities of Winnipeg, St. Boniface, Transcona, Assiniboia, Fort Garry, St. Vital and Kildonan and was incorporated for the purpose of supplying these municipalities with a sufficient quantity of pure and wholesome water for the use of the inhabitants; and 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 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;

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

Short title.

1. This Act may be cited as *The Greater Winnipeg Water District Act (Ontario), 1916.*

Order-in-Council confirmed.

2. Subject to the provisions of section 3, the Order-in-Council approved by the Lieutenant-Governor in Council on the 2nd day of October, A.D. 1913, adopting the report of The Honourable the Minister of Lands, Forests and Mines also set out in the said schedule, and the terms, conditions and stipulations set out in the said report are confirmed and declared to be and to have been, as from the said date, legal, valid

valid and binding to all intents and purposes as if the same had been set out and enacted by an Act of the Legislature of Ontario.

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

District to comply with orders, etc. of International Joint Commission.

SCHEDULE "A"

Copy of an Order-in-Council approved by His Honour the Lieutenant-Governor, the 2nd 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
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.

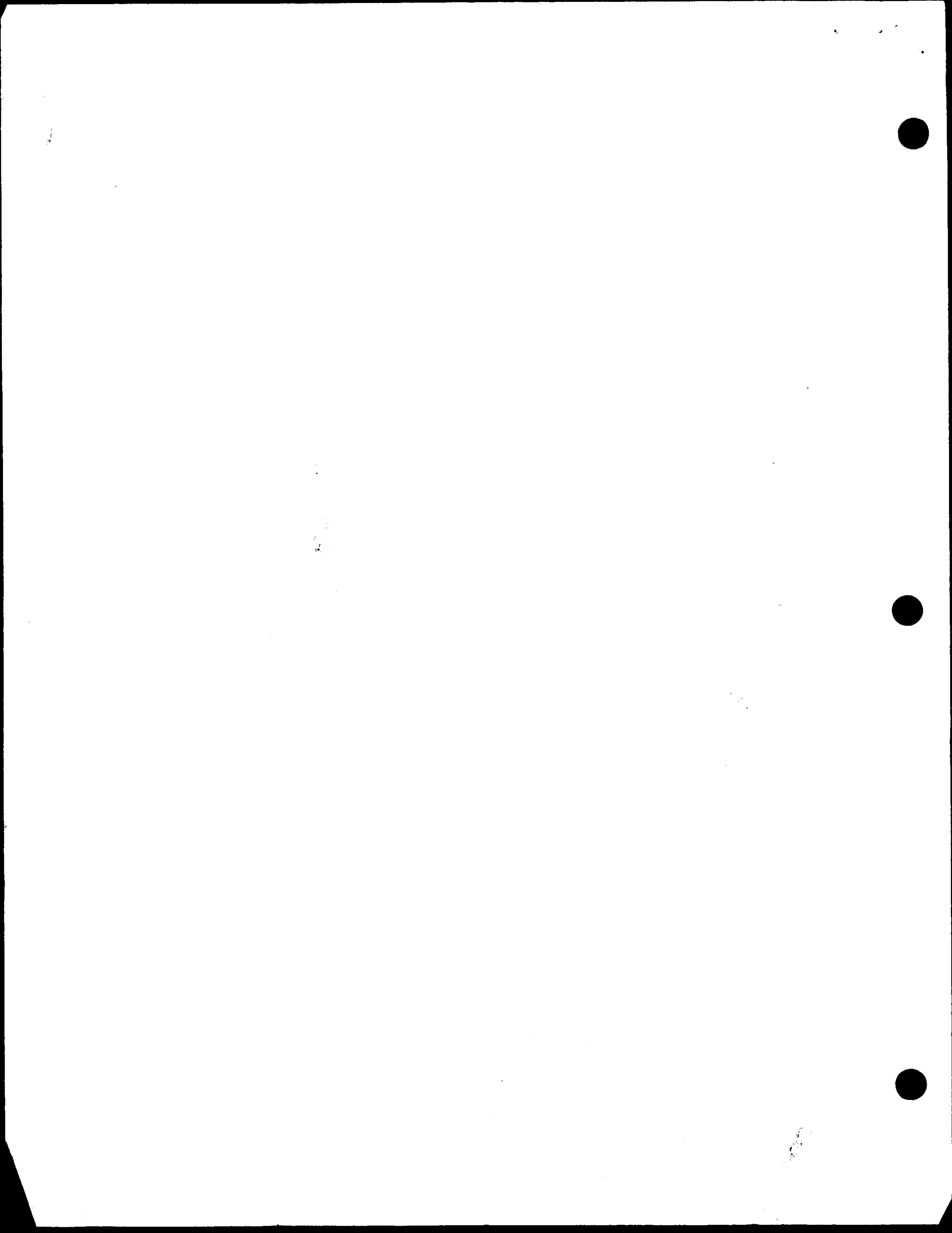
(Sgd.) J. Lonsdale Capreol,
Clerk, Executive Council.

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



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

Plaintiff/Respondent **Defendants**

Court File No. CV-20-00644545-0000

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceedings commenced in TORONTO

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