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Sui Generis Fiduciary Duty

➤ ***sui generis* (Latin)**

➤ “unique”; “of its own kind” (English)

➤ Not “sweet and generous”

Ad Hoc Fiduciary Duty

➤ ***ad hoc*** (Latin)

➤ “to this”; “formed or used for specific or immediate problems or needs”*; i.e. established case-by-case (English)

➤ Not “odd hawk”

* <https://www.merriam-webster.com/dictionary>

Geography Identified in Claim: 150 km Aqueduct to Winnipeg

(Amended Statement of Claim,
paras. 15 & 50 – Motion Record
Tab 2); Compendium, Tab 1

Plaintiff's Amended Statement of Claim

Para 15: "...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 of 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. 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."

Para 50: "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."

Google Map <https://tinyurl.com/y2qynglb>

Geography Identified in Claim: Aqueduct entry point at Indian Bay

(Amended Statement of Claim,
paras. 51 – Motion Record Tab 2);
Compendium, Tab 1

Plaintiff's Amended Statement of Claim

Para 51: "... 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."

Google Map <https://tinyurl.com/yxuxmfmb>

Order of Justice Gans, para 1 (Motion Record, Tab 7)

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

– and –

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

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.

Order of Justice Gans, paras 3-4 (Motion Record, Tab 7)

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.

Shoal Lake: Canada Gazette

Plaintiff's Amended Statement of Claim – Motion Record, Tab 2; Compendium Tab 1

Para 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*.”

1913 Order in Council

(Motion Record, Tab 5); Compendium Tab 2



ONTARIO

EXECUTIVE COUNCIL OFFICE

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

. . . 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,
. . .

1913 Order In Council

(Motion Record, Tab 5); Compendium Tab 2

. . . 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.

Permission to “enter upon and to divert and to take water from Shoal Lake

Right to compensation for private parties

Obligation to abide by rules, regulations, conditions set by Ontario

1913 Order In Council

(Motion Record, Tab 5); Compendium Tab 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.

. . .

Right to take up to 100 million gallons (~378 million litres) of water per day

Legal Counsel for GWWD (Winnipeg), 1914 Speech to IJC

(Amended Statement of Claim, para 45 [Motion Record, Tab 2]); Compendium Tab 1

(site undetermined)

[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.

Shoal Lake: Canada Gazette

Site determined early 1914, see para 42 of Amended Statement of Claim, Motion Record Tab 2; Compendium Tab 1

The right of way of the said District as at present located and surveyed is shown upon plans of survey of said right of way, of record in the Department of the Interior as numbers 20929, 21246, 21076, 21076, 22013, 22014 and 22672, and which plans are also registered in the Winnipeg Land Titles Office as numbers 2200, 2312, 2361, 2352, 2363, 2364 and 2388 respectively.

Canada Gazette, dated October 2, 1915

GREATER WINNIPEG WATER DISTRICT.

NOTICE is hereby given that in accordance with the provisions of chapter 208, of the Acts of the Parliament of the Dominion of Canada, passed in the session held in the third year of the reign of His Majesty, King George the Fifth, it is the intention of the Greater Winnipeg Water District to apply to the Minister of Public Works for the Dominion of Canada for his sanction of the plans, profiles and books of reference of the works of the said District.

And further take notice that duplicates of such plans, profiles and books of reference have been deposited for public inspection in the office of the Mayor of the City of Winnipeg.

The nature of the works proposed is,—

1. The construction and operation of works, plant and equipment, etc., for the conveyance and distribution of water for the use of the residents of the Greater Winnipeg Water District and others, as more particularly set forth in,

(a) Said chapter 208, of the Acts of the Parliament of the Dominion of Canada, passed in the session held in the third year of the reign of His Majesty, King George the Fifth and in,

(b) The Greater Winnipeg Water District Act, being chapter 22, of The Acts of the Legislature of the Province of Manitoba, passed in the session held in the third year of the reign of His Majesty, King George the Fifth, and amendments thereto; and

2. The construction and operation of a railway as provided in said Greater Winnipeg Water District Act and amendments thereto.

The area to be affected by the said works is the lands, municipalities, or parts of municipalities comprised or to be comprised within the Greater Winnipeg Water District from time to time, and lands adjacent to the right of way of the District, and upon which right of way said works and railway are and are to be constructed and operated.

The area at present comprised within said District is particularly set forth in said Greater Winnipeg Water District Act and amendments thereto.

The right of way of the said District as at present located and surveyed is shown upon plans of survey of said right of way, of record in the Department of the Interior as numbers 20929, 21246, 21076, 21076, 22013, 22014 and 22672, and which plans are also registered in the Winnipeg Land Titles Office as numbers 2200, 2312, 2361, 2352, 2363, 2364 and 2388 respectively.

Dated at Winnipeg, in the Province of Manitoba, this 27th day of September, A. D. 1915.

M. PETERSON,
Clerk of the Greater Winnipeg Water
District.

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Greater Winnipeg Water District Act, 1916 *(Ontario)*

(Schedule B to Respondent's Factum)

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

Assented to 27th April, 1916.

...
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;

Ontario Water Resources Act

(Schedule B to Respondent's Factum)

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:

[...]

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).

Claim Excerpt

Amended Statement of Claim, para 8 (Motion Record, Tab 2), Compendium Tab 1

CLAIM

8. The plaintiff Iskatewizaagegan No. 39 Independent First Nation claims:

• • •

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;

Claim Excerpt

Amended Statement of Claim, para 80 (Motion Record Tab 2); Compendium Tab 1

BREACH OF FIDUCIARY OBLIGATIONS

. . .

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.

Claim Excerpt

Amended Statement of Claim, para 85 (Motion Record Tab 2); Compendium Tab 1

BREACH OF FIDUCIARY OBLIGATIONS

. . .

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.

Claim Excerpt

Amended Statement of Claim, paras 86, 90 (Motion Record Tab 2); Compendium Tab 1

BREACH OF FIDUCIARY OBLIGATIONS

. . .

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

. . .

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.



Factum Excerpt

Respondent's Factum, para 91

“...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. 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.”

(paragraph 91, Plaintiff's Responding Factum)



Factum Excerpt

Respondent's Factum, relied on at para 33

"...[W]hen the areas of fiduciary obligations and aboriginal law intersect, as is claimed here, then clearly a defendant has a particularly heavy burden in seeking to strike a pleading." *Davis v. Canada*, para 11 (BOA, Vol. 1, Tab 12) cited with approval by Justice Belobaba in *Brown v. Canada*, 2013 ONSC 5637, at para 32 [BOA, Vol. 1, Tab 11]

(relied on at para 33 of Respondent's Factum)

The Law is in Flux:

Grand River Enterprises, para 202 (June 2017)

“Further, as Binnie J’s review of the law in *Wewaykum Indian Band* reveals, fiduciary law in Canada, particularly in respect of the Crown’s relationship with aboriginal peoples, is a very dynamic area of Canadian law. The nature and extent of the particular obligations that may arise out of this relationship are matters that remain largely unsettled in the jurisprudence.

The state of the law does not mean, of course, that any claim for breach of fiduciary duty arising out of the relationship between the Crown and the aboriginal peoples of Canada must necessarily survive the pleading stage. The same test under Rule 21 applies to this kind of action. It does mean, however, that more claims of this nature may be, as of yet, unprecedented but nonetheless tenable at law within the meaning of Rule 21.”

(Bonaparte v. Canada, 2003 CanLII 40016 (ON CA), at paras 32-33, reproduced with approval by Epstein J.A. for the Court in *Grand River Enterprises Six Nations Ltd. v Attorney General (Canada)*, 2017 ONCA 526, at para 202: Respondent’s Book of Authorities (BOA) Vol 1, Tab 9)

Compendium, Tab 5



The Law is in Flux:

Borrows & Rotman (June 2018)

“A great deal of uncertainty about the nature and scope of the Crown’s fiduciary obligations to Aboriginal peoples remains in spite of the continued application of the fiduciary concept to Crown-Native relations since the *Guerin* decision [in 1984].”

John Borrows & Leonard Rotman, “Chapter 5: Crown Obligations” in *Aboriginal Legal Issues*, 5th Ed. (LexisNexis Canada Inc: June 2018), at p. 440.

(Note provided to Court and parties by email on January 19, 2021)

The Law is in Flux: Fiduciary Duty Case Law

Cases on fiduciary duties in the Crown-Indigenous context are not decided on motions to strike.

Authority	Decided on Motion to Strike?
<i>Guerin v. The Queen</i> , [1984] 2 SCR 335	No
<i>Osoyoos Indian Band v. Oliver (Town)</i> , 2001 SCC 85	No
<i>Wewaykum Indian Band v. Canada</i> , 2002 SCC 79	No
<i>Manitoba Metis Federation Inc. v. Canada (Attorney General)</i> , 2013 SCC 14	No
<i>Restoule v. Canada (Attorney General)</i> , 2018 ONSC 7701	No
<i>Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)</i> , 2018 SCC 4	No