CITATION: Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City), 2021 ONSC 1209
COURT FILE NO.: CV-20-00644545-0000
DATE: 2021/02/17

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
ISKATEWIZAAGEGAN NO. 39 INDEPENDENT FIRST NATION Plaintiff	*Julian N. Falconer, Akosua Matthews* and *Mary (Molly) Churchill* for the Plaintiff
- and -	
CITY OF WINNIPEG and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO Defendants	*Thor Hansell* and *Shea Garber* for the Defendant the City of Winnipeg *Sarah Valair* and *Catherine Ma* for the Defendant Her Majesty the Queen in Right of Ontario **HEARD**: January 20, 2021

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] The Defendant City of Winnipeg, Manitoba extracts its drinking water from Shoal Lake, which is located in both Manitoba and Ontario - but predominantly in Ontario. Winnipeg has taken water from Shoal Lake for over 100 years and has not paid anything to the Plaintiff, the Iskatewizaagegan No. 39 Independent First Nation, for the damages alleged to have been caused to Iskatewizaagegan No. 39's reserve lands and traditional lands surrounding Shoal Lake. Iskatewizaagegan No. 39 contends that Winnipeg's water-taking has caused ecological injury, cultural damage, spiritual damage, and financial damage. Iskatewizaagegan No. 39 sues Winnipeg for compensation for injurious affection. It claims damages of $500 million.

[2] Iskatewizaagegan No. 39 also sues Her Majesty the Queen in Right of Ontario, the Province of Ontario, for breach of fiduciary duty for: (a) failing to protect Iskatewizaagegan No. 39's interests in Shoal Lake and the surrounding lands; and (b) failing to ensure appropriate compensation for the harm to Iskatewizaagegan No. 39's interests in Shoal Lake and the surrounding lands caused by Winnipeg taking water from Shoal Lake.

[3] The heart of Iskatewizaagegan No. 39's cause of action for breach of fiduciary duty is a 1913 Order in Council along with antecedent Royal Proclamations and Treaties and sequent legislation enacted by Ontario. Based on the 1913 Order in Council and the antecedent and sequent legal instruments, Iskatewizaagegan No. 39 pleads two distinct theories of Crown liability for breach of fiduciary duty; namely (a) a *sui generis* fiduciary duty based on the relationship between Aboriginal peoples and the Crown; and (b) an *ad hoc* fiduciary duty.

[4] Pursuant to rule 21.01(1)(b) of the *Rules of Civil Procedure*,[1] Ontario moves for an Order striking out the Amended Statement of Claim without leave to amend and dismissing the action for failing to disclose a reasonable cause of action.

[5] Ontario submits that the Amended Statement of Claim does not include material facts sufficient to establish the elements of either of Iskatewizaagegan No. 39's claims of breach of fiduciary duty. Ontario submits that it is plain and obvious that Iskatewizaagegan No. 39's pleading discloses no reasonable cause of action for breach of a *sui generis* or an *ad hoc* fiduciary duty.

[6] For the reasons that follow, I dismiss Ontario's motion.

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[1] R.R.O. 1990, Reg. 194.

B. Anthropological, Geographical, Historical, and Statutory Background

[7] In this section, I will summarize the critical material facts of anthropology, geography, history, and statutory instruments that underlie Iskatewizaagegan No. 39's breach of fiduciary duty claims.

[8] Shoal Lake is a part of the Shoal Lake watershed, which is comprised of 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 Shoal Lake's surface area is in Ontario, the balance is in Manitoba. Shoal Lake is part of the Nelson Basin which is regulated by the *Ontario Water Resources Act*.[2] Shoal Lake is a navigable water and is subject to the *Beds of Navigable Waters Act*,[3] which confirms that Ontario holds title to the lakebed.

[9] Shoal Lake is also part of the larger "Rainy River - Lake of the Woods - Winnipeg River" drainage basin ("the Rainy River Basin"). The International Joint Commission has regulatory authority with respect to the Rainy River Basin. The International Joint Commission is an international body comprised of representatives from both Canada and the United States. The Commission regulates waters that are subject to the *International Boundary Waters Treaty Act*.[4] The Commission has regulatory authority over Shoal Lake because the lake is interconnected with the Lake of the Woods, which is subject to the *International Boundary Waters Treaty Act*.

[10] The Commission's regulatory powers include granting permission to take water and setting water levels. The Lake of the Woods Control Board of the International Joint Commission exists under concurrent Canada, Manitoba, and Ontario legislation. It operates as a federal board with members from each province and from the federal government. The Commission is responsible for maintaining minimum and maximum water levels in Shoal Lake.

[11] The people of Iskatewizaagegan No. 39 are Anishinaabe. Iskatewizaagegan No. 39 is a distinct Aboriginal society, a recognized Band under the *Indian Act*,[5] and an Aboriginal people within the meaning of s. 35 of the *Constitution Act*, 1982.[6]

[12] Shoal Lake is a part of the cultural identity of Iskatewizaagegan No. 39 and its people. Since time immemorial, the Anishinaabe have used the waters of Shoal Lake and the surrounding land for survival. Iskatewizaagegan No. 39's culture is coextensive with Shoal Lake and the surrounding land. The transmission of Anishinaabe teachings, traditions, and values to future generations takes place and continues to take place at Shoal Lake.

[13] Iskatewizaagegan No. 39 has a reserve bordering half of the north shore and part of the west shore of Shoal Lake. There are three other First Nations with reserves on Shoal Lake. Iskatewizaagegan No. 39's traditional territory encompasses Shoal Lake and the Shoal Lake watershed. The traditional territory of Iskatewizaagegan No. 39 encompasses the Shoal Lake watershed and lands surrounding the watershed up to Falcon Lake and High Lake.

[14] Common law real property concepts do not apply to Aboriginal lands or to reserves.[7] Aboriginal title and the Aboriginal interest in reserves are communal *sui generis* interests in land

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[2] R.S.O. 1990, c. O.40.
[3] R.S.O. 1990, c. B.4.
[4] R.S.C. 1985, c. I-17.
[5] R.S.C. 1985, c. I-5.
[6] Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[7] *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85.

that are rights of use and occupation that are distinct from common law proprietary interests.[8] An aboriginal interest in land will generally have an important cultural component that reflects the relationship between an Aboriginal community and the land and the inherent and unique value in the land itself which is enjoyed by the community.[9] The Aboriginal interest in land is a *sui generis* (unique) independent beneficial legal ownership interest that burdens the Crown's underlying title, which is not a beneficial ownership interest and which may rather give rise to a fiduciary duty on the part of the Crown.[10]

[15] Iskatewizaagegan No. 39 is a beneficiary of the *Royal Proclamation of 1763,* [11] the text of which is set out in Schedule "A" to these Reasons for Decision.

[16] The *Royal Proclamation of 1763* was ratified by assembled Indigenous Nations by the *Treaty of Niagara 1764*. In the summer of 1764, representatives of the Crown and approximately 24 First Nations, met at Niagara. The lengthy discussions lead to the *Treaty of Niagara 1764*, which was recorded in wampum. The Crown does not recognize the *Treaty of Niagara 1764* as substantively altering the legal effects of the *Royal Proclamation of 1763*. In contrast, First Nations assert that the *Royal Proclamation of 1763* must be understood together with the *Treaty of Niagara 1764* and so understood the *Royal Proclamation of 1763* constitutes a recognition of Indigenous sovereignty.

[17] On October 3, 1873, Iskatewizaagegan No. 39 entered into Treaty No. 3 with the Crown. One subject of the treaty was 55,000 square miles of territory from west of Thunder Bay to north of Sioux Lookout in Ontario and extending the Manitoba border and the border with the United States. The text of Treaty No. 3. is set out in Schedule "B" to these Reasons for Decision. The reserve of Iskatewizaagegan No. 39 adjacent to Shoal Lake was established pursuant to Treaty No. 3.

[18] Treaty No. 3 is a pre-confederation treaty on behalf of the Dominion of Canada and Chiefs of the Ojibway. The Ojibway yielded ownership of their territory, except for certain lands reserved to them. In return, the Ojibway received annuity payments, goods, and the right to harvest the non-reserve lands surrendered by them until such time as they were taken up for settlement, mining, lumbering, or other purposes by the Government of the Dominion of Canada.

[19] Although Treaty No. 3 was negotiated with the Crown in right of Canada, the promises made in Treaty No. 3 are promises of the Crown. The federal Government and Ontario are responsible for fulfilling the promises of Treaty No. 3 when acting within the division of powers under the *Constitution Act, 1867*.[12]

[20] In accordance with the division of powers under the *Constitution Act, 1867,* Ontario exclusively had the authority to take up lands pursuant to Treaty No. 3 and it is the owner of the lands and of the resources on or under the lands taken up. Under the *Constitution Act, 1867,* Ontario has the exclusive power to manage the lands and the exclusive power to make laws in relation to the natural resources, forestry resources, and electrical energy on the lands taken up. [13] In

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[8] *Osoyoos Indian Band v. Oliver (Town),* 2001 SCC 85 at para. 42; *St. Mary's Indian Band v. Cranbrook (City),* [1997] 2 S.C.R. 657.
[9] *Osoyoos Indian Band v. Oliver (Town),* 2001 SCC 85 at para. 46.
[10] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at paras. 69-70; *Guerin v. The Queen*, [1984] 2 S.C.R. 335.
[11] R.S.C. 1985, App. II, No. 1.
[12] *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48.
[13] *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48.

exercising its jurisdiction over Treaty No. 3 lands, Ontario is bound by the duties attendant on the Crown and it must exercise its powers in conformity with the honour of the Crown and the fiduciary duties that lie on the Crown in dealing with Aboriginal interests.[14]

[21] In 1909, under the *Boundary Waters Treaty*, the International Joint Commission was established, and Shoal Lake came within the authority of the International Joint Commission.

[22] In 1913, the Greater Winnipeg Water District was established for the City of Winnipeg.[15] The Water District proposed a project to construct an aqueduct from Winnipeg to the shores of Shoal Lake across the provincial border. The purpose of the aqueduct was to take water from the lake for the citizens of Winnipeg. The Water District sought permission from Ontario, Canada, and the International Joint Commission to take water from Shoal Lake.

[23] On October 2, 1913, the Ontario Lieutenant Governor in Council approved an Order in Council granting permission to the Water District (which is now the City of Winnipeg) to enter upon and to divert and take water from Shoal Lake in the District of Kenora. The 1913 Order in Council stated:

> 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 […] has represented that the only available source of water supply for domestic and municipal purposes, for use in the said District is Shoal Lake, in the District of Kenora in the Province of Ontario and the said district has applied for permission to take water from the said Lake for the purposes aforesaid.
>
> The undersigned respectfully recommends that there be granted to the said Greater Winnipeg Water District the right to enter upon and to divert and take water from Shoal Lake in the District of Kenora in this Province subject to the following terms, conditions and stipulations:
>
> 1. That full compensation be made to the Province of Ontario and also to all private parties whose lands or properties may be taken, injuriously affected or in any way interfered with, but water taken within the terms thereof, and considered merely as water is not property to be paid for.
>
> 2. That the District shall abide by and conform to any and all rules, regulations or conditions regarding the ascertainment of the quantity of water being taken, and as to the inspection of works and premises, and the manner of carrying out the proposed works that the Government of Ontario may at any time see fit to make or enact in the premises.
>
> 3. That the water shall be used only for the purposes for which municipalities and residents therein ordinarily use water, and not for the generation of hydraulic or electric power and the quantity taken shall never, at any time, exceed one hundred million gallons per day.
>
> 4. That if it should hereafter appear that the taking of said water from Shoal Lake affects the level of the Lake of the Woods at the Town of Kenora, and thereby appreciably reduces the amount of power now developed and owned by the Town of Kenora or in any way injuriously affects the property of the said Town, the Greater Winnipeg Water Authority shall construct such remedial works as may be necessary to prevent or remove any such injurious affects and in the case of failure on the part of the said District to construct such works, then the said District shall pay to the Town of Kenora any damage the said Town shall sustain by reason of the taking of the water as aforesaid.
>
> 5. In the event of a dispute between the Town of Kenora and the Greater Winnipeg District with reference to any of the matters in the preceding paragraph mentioned, the same shall be finally settled and determined by arbitration under the Ontario *Arbitration Act*.

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[14] *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48.
[15] *An Act to Incorporate the Greater Winnipeg Water District*, S.M. 1913, c. 22.

[24] It should be noted that the 1913 Order in Council stipulated that the Water District (now Winnipeg) be liable "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."

[25] In understanding this stipulation, it shall be helpful to understand the nature of a claim for injurious affection. Injurious affection occurs when: (a) the statutory authority expropriates a part of the plaintiff's lands and the partial taking adversely affects the value of the plaintiff's remaining land; or (b) the statutory authority's activities on land interfere with the use or enjoyments of the plaintiff's lands.[16] It is the second type of injurious affection that is relevant to the facts of the immediate case.

[26] In understanding this stipulation in the 1913 Order in Council, it shall also be helpful to understand the nature of a public nuisance claim. A public nuisance is an activity that unreasonably interferes with the public's interest in questions of health, safety, morality, comfort, or convenience and a private person may bring a private action in public nuisance by proving special damage.[17]

[27] When the 1913 Order in Council was enacted, the Water District had not settled on the precise location of the terminus of the aqueduct from Winnipeg to Shoal Lake.

[28] In January 1914, the International Joint Commission held a hearing about the Water District's project. The International Joint Commission approved the project subject to the same terms and conditions as set out in Ontario's 1913 Order in Council.

[29] Under its Order of Approval, the Commission granted the Water Commission permission to take water from Shoal Lake for domestic and sanitary purposes up to a maximum of 100 million gallons per day.

[30] In early 1914, the Water District decided that the aqueduct would be built totally within the Province of Manitoba.

[31] In 1915, Ontario enacted legislation confirming that lands conveyed to fulfill Treaty No. 3's reserve requirement, including Iskatewizaagegan No. 39's reserve, excluded the lakebed of Shoal Lake. The legislation confirmed that the land covered by water was the property of Ontario.[18]

[32] In April of 1916, Ontario enacted *An Act to Confer Certain Rights and Powers upon the Greater Winnipeg Water District*.[19] The statute confirmed the 1913 Order in Council and declared that its terms and conditions were legal, valid, and binding as if the Order in Council had been enacted as a statute.

[33] As noted above, Shoal Lake is part of the Nelson Basin and pursuant to s. 34.3 (1) of the *Ontario Water Resources Act*, the taking of water from Shoal Lake pursuant to the 1913 Order in Council is exempted from the prohibition against water transfers. Section 34.3 (3) paragraph 6 states:

> *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:
>
> […]

[16] *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13.
[17] *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201.
[18] *An Act to Confirm the Title for the Government of Canada to Certain Lands and Indian Lands*, S.O. 1915, c. 12.
[19] S.O. 1916, c. 17.

> *Prohibition*
>
> (2) A person shall not take water from a water basin described in subsection (1) if the person will cause or permit the water to be transferred out of the basin.
>
> *Exceptions*
>
> (3) Subsection (2) does not apply if the transfer of water out of the water basin is one of the following:
>
> […]
>
> 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.

[34] In a six-year construction project, the Winnipeg Water District built a 150 km aqueduct from Winnipeg to Shoal Lake. The aqueduct intake was located at the west end of Indian Bay, which is in Manitoba. The aqueduct began operating in 1919.

[35] The International Joint Commission's Order of Approval, which permits the withdrawal of 100 million of gallons per day continues to apply to this day.

C. The Amended Statement of Claim

[36] The full text of Iskatewizaagegan No. 39's Amended Statement of Claim along with its responses to Ontario's Demand for Particulars are set out below:

> OVERVIEW
>
> 1. The needs of settler Canadians have long been prioritized over those of the Anishinaabe people. This is particularly true with regard to the water of Shoal Lake.
>
> 2. In 1900, Winnipeg went looking for a source of clean water, and in 1912, found it in Shoal Lake. Shoal Lake is located in Treaty No. 3 territory, in Northern Ontario. In 1913, at Winnipeg's request, Ontario granted permission to Winnipeg to take water from Shoal Lake, pursuant to an Order in Council, subject to several terms and conditions. Key amongst them was the condition that, "full compensation be made to the Province of Ontario, and also to all private parties whose lands or properties may be taken, injuriously affected or in any way interfered with."
>
> 3. Shoal Lake is, to this day, Winnipeg's sole water source. It is also a critical part of the reserve, treaty and traditional territory of the Anishinaabe of Iskatewizaagegan No. 39 Independent First Nation ("the Nation"). The water of Shoal Lake gives the community life and the community members in tum define themselves by their responsibility for the protection of this gift.
>
> 4. In 2019, the plaintiff, Iskatewizaagegan No. 39 Independent First Nation, and its Chief Gerald, brought an Application to the Ontario Superior Court, seeking a declaration that the applicants fall within the contemplated class of parties that would be entitled to compensation under the 1913 Order in Council, if it is found that they have suffered their lands and properties being taken, injuriously affected, or in any way interfered with. The defendants have consented to an Order declaring that the plaintiff is such a party.
>
> 5. As the plaintiff has suffered from Winnipeg's water taking, all without recognition of its rights much less compensation, it now seeks compensation pursuant to the 1913 Order in Council (incorporated into modem legislation by way of the *Ontario Water Resources Act*, R.S.O. 1990, Chapter O.40, s. 34.3 (3), which allows for "[a] transfer of water pursuant to the order of the Lieutenant Governor in Council dated October 2, 1913 respecting the Greater Winnipeg Water District").
>
> 6. The defendant Her Majesty the Queen in Right of Ontario ("Ontario") has a fiduciary obligation to the plaintiff with respect to the protection of the plaintiff's lands and properties; and any compensation for taking, injuriously affecting or in any way interfering with the same. The failure

of Ontario to ensure the effective exercise of the terms and conditions laid out in the 1913 Order in Council has caused the plaintiff to suffer ecological injury to its lands, as well as resulting cultural and financial injury to its community. The plaintiff pleads that, should it be found that the City of Winnipeg is not responsible for compensation for any period between the date of the Order in Council and the present due to laches or some other limitation defence, such compensation is owed by Ontario to the Nation based on Ontario's fiduciary obligations.

7. The language of this statutory right of entitlement under the 1913 Order in Council must now be interpreted through the lens of reconciliation, in order to replace this historic injustice with a new partnership.

CLAIM

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

(a) Damages in the amount of $500,000,000.00 (FIVE HUNDRED MILLION DOLLARS) or in the alternative, equitable remedies in the amount of $500,000,000.00 (FIVE HUNDRED MILLION DOLLARS);

(b) A declaration of breach of fiduciary duty by the defendant Ontario;

(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;

(d) Pre- and post-judgment interest pursuant to sections 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (as amended);

(e) Costs of this action on a substantial indemnity scale, together with Harmonized Sales Tax payable pursuant to the ***Excise Act*** as may be applicable; and

(f) Such further and other relief as this Honourable Court deems just.

THE PARTIES

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

10. The defendant the City of Winnipeg ("Winnipeg") inherited the powers and obligations of the Greater Winnipeg Water District ("GWWD") through legislation intended to sustain the authority granted in 1913 to take water from Shoal Lake. In 1960, the Metropolitan Corporation of Greater Winnipeg was incorporated and assumed all of the powers of the GWWD under the *Metropolitan Winnipeg Act*, S.M. 1960, c. 40. In 1971, *The City of Winnipeg Act*, S.M. 1971, c. 105 repealed the *Metropolitan Winnipeg Act* and formed the City of Winnipeg. This new City assumed all the powers of the Metropolitan Corporation of Greater Winnipeg, including the powers the Metropolitan Corporation of Greater Winnipeg had assumed from the GWWD (*The City of Winnipeg Act*, S.M. 1971 c. 105 at ss. 549, 550). This was restated in *The City of Winnipeg Act*, S.M. 1989-90, at s. 554. In 2002, new legislation came into effect, the *City of Winnipeg Charter Act*, S.M. 2002, c. 39, which sets out powers for the provision of water at s. 160. The City of Winnipeg, relying on the approvals sought and obtained by the GWWD dating back to 1913, continues to draw water from Shoal Lake today.

11. The defendant Her Majesty the Queen in Right of Ontario ("Ontario") is designated as the representative of the Ontario Crown, pursuant to s. 14 of the *Crown Liability and Proceedings Act. 2019*, S.O. 2019, c. 7, Sch. 17 ("CLPA"), and is liable for the actions and omissions of the Ontario Crown, of Ontario Departments and Ministers, and of all servants, agents, and employees of the Ontario Crown. Ontario also has a fiduciary obligation to the plaintiff with respect to the protection

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

THE FACTS

The Community of Iskatewizaagegan Independent First Nation

12. The plaintiff is an Anishinaabe First Nation located on the northwest shore of Shoal Lake, Ontario. For more than 6,000 years, Indigenous peoples have lived in the Shoal Lake area. The Anishinaabe peoples living in the area today are descendants of those original inhabitants and maintain a close connection to their traditional territory.

13. The plaintiff entered into a Treaty relationship with the Crown on October 3, 1873. Through *Treaty No. 3*, the Anishinaabe and Crown agreed to share 55,000 square miles of territory that spans from west of Thunder Bay to north of Sioux Lookout in Ontario, and along the international border to the province of Manitoba. *Treaty No. 3* territory is populated by 28 First Nation communities with a total population of approximately 25,000 people.

14. The plaintiff also has reserve territory pursuant to the *Indian Act*, and to *Treaty No. 3*. The Nation's reserve land begins at the base of High Lake and reaches south to the northern shore of Shoal Lake. To the west, it crosses over slightly into the province of Manitoba, and to the east, meets the District of Kenora. Approximately half of Shoal Lake's northern shore makes up part of the Nation's reserve. The community also holds a small piece of reserve land on the western shore of Shoal Lake.

15. Finally, the plaintiff has traditional territory, which contains within it Shoal Lake and the Shoal Lake watershed. The Nation's traditional territory encompasses all the land upon which the community's ancestors lived, hunted, fished, and protected. This includes all the land abutting the Shoal Lake watershed, including Shoal Lake itself and the Garden Islands, and the land up to and abutting Falcon Lake and High Lake. Traditionally, the community's ancestors would travel along waterways and by land between these territories to hunt, fish, and gather. All these lands were protected by and lived upon by the Iskatewizaagegan community's Anishinaabe ancestors and form a part of the land that was the subject of *Treaty No. 3.*

16. *Treaty No. 3*, according to the Anishinaabe view, was intended to reserve certain areas of land for the Anishinaabe, with the rest to be shared between the Anishinaabe and the settlers. Though the Canadian state has interpreted Treaty No. 3 as a surrender of title to traditional territory, the Anishinaabe did not surrender any land.

17. The current total registered population of the Nation is 585 people, with 297 people living on reserve.

18. An elected Chief and Council govern the Nation. The current Chief is Gerald Lewis.

A Description of Shoal Lake

19. Shoal Lake is a part of the Shoal Lake watershed and the larger "Rainy River - Lake of the Woods - Winnipeg River" drainage basin. The watershed crosses provincial boundaries with 54% of the watershed located in Ontario and 46% in Manitoba.

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

21. Outflows from both Falcon Lake and High Lake drain into Shoal Lake at Snowshoe Bay via Falcon River, at Shoal Lake's northwest shore. At its eastern shore, Shoal Lake connects to the Lake

of the Woods via Ash Rapids. […]

22. Today, the watershed is home to the two First Nations communities of Iskatewizaagegan Independent First Nation and Shoal Lake #40. These communities are independent of one another, and despite sharing an anglicised name (the Nation is referred to by some as Shoal Lake #39), are separate communities with distinct histories and governance. […]

23. There are cottages on Shoal Lake, many of them owned by residents from the nearby Winnipeg area. […]

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

The Gift of Shoal Lake to the Nation

25. What is often considered to be part of the geography or a valuable natural resource to settler Canadians is a critical part of the identity of the community of the Nation. This water gives the community life and they in turn define themselves by their responsibility for the protection of such a gift.

26. Since time immemorial, the Anishinaabe have used the waters of Shoal Lake and the surrounding land for survival. Shoal Lake has provided an abundance of walleye, other fish species, and aquatic mammals and reptiles. Further, the surrounding land has provided habitat for large mammals (including bears and moose), small game (including hares and porcupine), and waterfowl (including geese, ducks, and loons).

27. Fishing carries particular cultural significance to the plaintiff, such that the community fishers organize youth activities to ensure the skills, traditional teachings, and other cultural and spiritual knowledge will be shared while out on Shoal Lake.

28. Since time immemorial, the Anishinaabe have harvested numerous species of trees and plants in Shoal Lake and the surrounding land, including berries, bark, roots, herbs, and other plants or plant products, both cultivated and uncultivated. These plants are used for subsistence, medicine, cultural purposes, and spiritual purposes.

29. The ricing days are of particular cultural significance to the plaintiff. These highly organized cultural and spiritual gatherings were led by certain elders tasked with passing on the teachings of manoomin (wild rice). Blueberry harvesting sites are located on the Shoal Lake watershed. Shoal Lake is also home to the Garden Islands or Gitiiganii Minis, islands used to grow various vegetable crops. Farming took place on the islands for two reasons: to protect crops from people outside of the community who typically did not have canoes; and to avail of good quality soil.

30. Additionally, Shoal Lake is a navigable waterway. It connects the community to the nearby Lake of the Woods via Ash Rapids and other rivers and waterways, which provide means to travel across the region and access nearby lands, fisheries, and communities.

31. The plaintiffs culture is coextensive with the land. The community's traditional knowledge of Shoal Lake and the surrounding land itself has been transmitted through the Nation's oral traditions, spiritual beliefs, and practices. Shoal Lake and the surrounding land include significant areas where the transmission of Anishinaabe teachings, traditions, and values to future generations has taken place and continues to take place. In this way, Shoal Lake and the surrounding land provide not only the means for life, but the manner of bimaatiziwin (to live a good life). In turn, the Nation acts as stewards or caretakers of all that has been given.

32. Shoal Lake and the surrounding land include significant areas of spiritual significance, including numerous sites where connections to past generations were and are maintained and commemorated.

33. Harvesting natural resources from Shoal Lake and the surrounding land for use by the Nation, and for trade with fur-traders and settlers, has been the basis of the plaintiffs economy and commercial trade.

34. Shoal Lake and the surrounding land are not only part of the plaintiffs 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 plaintiffs constitutionally protected Aboriginal and treaty rights.

Winnipeg seeks Settler Authority to Take Water

35. In 1900, Winnipeg was looking for a source of safe and clean drinking water. In 1912, Shoal Lake was identified as an ideal source for drinking water for the city.

36. In 1913, Winnipeg and certain smaller municipalities formed and incorporated the Greater Winnipeg Water District ("GWWD"), which was created and tasked to obtain the necessary approvals to take water from Shoal Lake. It was established by *An Act to Incorporate the "Greater Winnipeg Water District"* S.M. 1913, c. 22 (February 15, 1913), which, at Chapter 22, gives it "full power to acquire, hold and alienate both real and personal estate for all its purposes." This Act specifically contemplates compensation for such acquisitions in section 22:

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

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

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

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

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

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

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

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

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

said Order in Council should be confirmed and declared to be legal, valid and binding;

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

45. In 1914, the IJC approved the GWWD's use and diversion of waters from Shoal Lake and Lake of the Woods. At the UC hearing in January 1914 which resulted in the JJC's 1914 Order of Approval, an important consideration for the IJC was whether Ontario approved of the GWWD's desire and intention to draw water from Shoal Lake. The Plaintiff states that the GWWD made the following representations to the IJC explaining that the GWWD had sought Ontario's approval and the reasons why, and then read out the 1913 Order in Council and entered it as an exhibit to establish Ontario's approval:

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

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

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

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

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

Winnipeg Avails Itself of the Water

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

[Answer to Demand for Particulars:

To the best of the plaintiff's knowledge, no land was taken or expropriated in Ontario for the purpose of constructing the aqueduct and no portion of the aqueduct constructed by Winnipeg is located in Ontario.

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

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

52. The aqueduct was constructed over 6 years, beginning operation in 1919. The flow of water from Indian Bay is taken by gravity only, with low-lifts pumps having been installed at the intake to provide additional capacity when the lake's water level is low. The aqueduct requires that the water level of Shoal Lake be at a minimum level in order for it to flow smoothly to service the City of Winnipeg.

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

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

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

A PRIVATE LAW CAUSE OF ACTION

56. The plaintiff pleads that the failure to compensate the Nation as per the terms and conditions laid out in the 1913 Order in Council (and incorporated into modern legislation by way of the *Ontario Water Resources Act*, R.S.O. 1990, Chapter O.40, s. 34.3 (3)) creates a civil cause of action between the parties.

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

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

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

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

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

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

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

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

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

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

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

DAMAGES

Injuriously Affected or in Any Way Interfered with

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

[…]

Cultural Damage

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

> […]

Financial Damage

73. The plaintiff also pleads financial damage due to:

[…]

BARRIERS TO THE NATION'S ABILITY TO ASSERT ITS RIGHTS

74. For the majority of the period in question (between 1913 and the present) the plaintiff, or its ancestors, was unable to assert its right of action against· Winnipeg. The plaintiff pleads the effect of ongoing historical injustice and imbalance of power as between the plaintiff and the defendants in general and including the following, *inter alia*:

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

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

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

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

BREACH OF FIDUCIARY OBLIGATIONS

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

> [Answer to Demand for Particulars: The plaintiff alleges that Ontario owed a fiduciary duty pursuant to the common law, *the Treaty of Niagara*, *Treaty 3*, the *Royal Proclamation of 1763*, and conditions of the Minister's Report appended to Ontario's 1913 Order in Council.]

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

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

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

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

[Answer to Demand for Particulars: Ontario's exercise of discretion or control in relation to regulating water-taking from Shoal Lake and in relation to a legislated compensation scheme related to such water-taking constituted the exercise of discretion or control by Ontario creating ad hoc fiduciary duties. This exercise of discretion or control has to be understood within the broader colonial context of the Crown's exercise of discretion or control over the lives and lands of Indigenous people, including specifically the plaintiff. The amended claim contains sufficient particulars as to how this exercise of discretion or control has affected the plaintiff's legal interests to enable the framing of a defence.]

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

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

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

(a) the respect, protection, preservation, implementation, and enforcement of the right of compensation of the plaintiff in respect of its land and property; and

(b) the obligation to carry out the terms and conditions of the Order in Council, and the duty to make adequate provision for the protection of the rights of the plaintiff to compensation.

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

(a) failing to recognize, preserve, protect, or give effect to the right of compensation under the 1913 Order in Council; and

(b) conveying interests to and/or in respect of the lands and properties of Anishinaabe persons in the area, without regard to the special relationship that First Nations persons have with their land and territory.

85. Without limiting any of the foregoing. the plaintiff pleads that the defendant Crown owes sui generis fiduciary duties to the plaintiff. The plaintiff states these arise from the *Royal Proclamation of 1763, the Constitution Act, 1867* and from the defendant Crown undertaking discretional control over protection of and compensation for harm to (a) the plaintiffs interest in their reserve land and property and/or (b) the plaintiffs 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 of their reserve territory.

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

87. The plaintiff has legal interests that stand to be adversely affected by the Crown1s exercise of discretion or control. Specifically, the plaintiff has a legal interest in their reserve land; a legal interest in their bunting, fishing, and gathering activities throughout their traditional territory; and a legal interest in the right to compensation if the GWWD/Winnipeg s taking of water from Shoal Lake causes the plaintiffs lands or properties to be "taken, injuriously affected, or in any way interfered with." The 1913 Order in Council and 1916 *GWWD Act* created a complete legal entitlement to compensation in the event the plaintiff's lands or properties were taken, injuriously affected, or in any way interfered with" by Winnipeg/the GWWD.

88. The 1913 Order in Council and the 1916 *GWWD Act*, either alone or in concert with the *Royal*

> *Proclamation of 1763, the Treaty of Niagara of 1764, Treaty 3,* and the covenant chain relationship more generally. constitute an undertaking by the defendant Crown to act with the utmost loyalty and in the best interests of the plaintiff as a *Treaty 3* partner whose lands or properties stand to be taken, injuriously affected, or in any way interfered with by Winnipeg's taking of water.
>
> 89. The plaintiff falls within a distinct class of persons vulnerable to the defendant Crown's discretion or control: (1) any party whose land or property have been taken, injuriously affected, or in any other way interfered with by Winnipeg's taking of water from Shoal Lake; and/or more specifically (2) any Treaty 3 First Nation who e lands or prope11y have been taken, injuriously affected, or in any other way interfered with by Winnipeg's taking of water from Shoal Lake.
>
> 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.
>
> 91. The plaintiff pleads and relies upon the 1913 Order in Council and the 1914 Order of Approval of the International Joint Commission.
>
> 92. The plaintiff proposes that this action be tried in Toronto, Ontario Jurisdiction to Strike Pleadings for Failure to Show a Reasonable Cause of Action.

D. Striking Claims for Failure to Show a Reasonable Cause of Action

[37] Ontario's motion is brought pursuant to rule 21.01 (1)(b) of the *Rules of Civil Procedure,* which states:

> WHERE AVAILABLE
>
> *To any Party on Question of Law*
>
> 21.01 (1) A party may move before a judge,
>
> (a) […]
>
> (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.
>
> (2) No evidence is admissible on a motion, …
>
> (b) under clause (1)(b).

[38] Where pursuant to rule 21.01 (1)(b), a defendant submits that the plaintiff's pleading does not disclose a reasonable cause of action, to succeed in having the action dismissed, the defendant must show that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed in the claim.[20] Matters of law that are not fully settled should not be disposed of on a motion to strike, and the court's power to strike a claim is exercised only in the clearest cases.[21]

[39] In *R. v. Imperial Tobacco Canada Ltd.*,[22] the Supreme Court of Canada noted that although the tool of a motion to strike for failure to disclose a reasonable cause of action must be used with considerable care, it is a valuable tool because it promotes judicial efficiency by removing claims that have no reasonable prospect of success and it promotes correct results by allowing judges to focus their attention on claims with a reasonable chance of success. Chief Justice McLachlin

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[20] *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.); *Hunt v. Carey Canada Inc.* (1990), 74 D.L.R. (4th) 321 (S.C.C.).
[21] *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.); *Temelini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.).
[22] 2011 SCC 42 at paras. 17-25.

stated:

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners Ltd*., [1963] 2 All E.R. 575 (U.K. H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *McAlister (Donoghue) v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[40] In *Atlantic Lottery Corp. Inc. v. Babstock*,[23] the Supreme Court of Canada stated that the test applicable on a motion to strike is a high standard that calls on courts to read the claim as generously as possible because cases should, if possible, be disposed of on their merits based on the concrete evidence presented before judges at trial.

[41] On a motion under rule 21.01 (1)(b), the court accepts the pleaded allegations of fact in the statement of claim as proven, unless they are patently ridiculous or incapable of proof.[24]

[42] The failure to establish a cause of action usually arises in one of two ways: (a) the allegations in the statement of claim do not come within a recognized cause of action; or (b) the allegations in the statement of claim do not plead all the elements necessary for a recognized cause of action.[25] If a material fact necessary for a cause of action is omitted, the statement of claim is bad and the remedy is a motion to strike the pleadings, not a motion for particulars.[26]

E. The Honour of the Crown

[43] For Ontario's Rule 21 motion to succeed, it must be plain and obvious that Ontario did not have a fiduciary relationship with attendant fiduciary obligations to Iskatewizaagegan No. 39 with respect to Winnipeg's water taking from Shoal Lake. However, before the matter of fiduciary duties can be addressed, it is necessary to address the matter of the honour of the Crown principle and the role it plays in the immediate case.

[44] The honour of the Crown has been a principle animating Crown conduct since at least the *Royal Proclamation* of 1763, through which the British asserted sovereignty over what is now Canada and assumed *de facto* control over land and resources previously in the control of Aboriginal peoples.[27] The honour of the Crown recognizes that the Crown, in asserting sovereignty

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[23] 2020 SCC 19 at para. 87–88.
[24] *Folland v. Ontario* (2003), 64 OR (3d) 89 (C.A.); *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (CA); *Canada v. Operation Dismantle Inc*., [1985] 1 S.C.R. 441; *A-G. Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.
[25] *2106701 Ontario Inc. (c.o.b. Novajet) v. 2288450 Ontario Ltd.*, 2016 ONSC 2673 at para. 42; *Aristocrat Restaurants Ltd. v. Ontario*, [2004] O.J. No. 5164 (S.C.J.); *Dawson v. Rexcraft Storage & Warehouse Inc.*, [1998] O.J. No. 3240 at para. 10 (C.A.).
[26] *Balanyk v. University of Toronto*, [1999] O.J. No. 2162 (S.C.J.); *Regional Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)* (1990), 12 O.R. (3d) 750 (Gen. Div.); *Copland v. Commodore Business Machines Ltd.* (1985), 52 O.R. (2d) 586 (Master), appeal dismissed (1985), 52 O.R. (2d) 586n (H.C.J.).
[27] *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701 at para 479; *Mitchell v. Minister of Natural Resources*, 2001 SCC 33 at para. 9.

over lands already occupied by First Nations undertook obligations of honour.[28] The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty.[29]The honour of the Crown is a foundational principle of Aboriginal law governing the relationship between the Crown and Indigenous peoples that has the underlying purpose of reconciliation of the Crown and Indigenous interests.[30]

[45] The honour of the Crown is a constitutional principle enshrined in s. 35 of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights.[31] The honour of the Crown is a fundamental concept that exists as a source of obligations independent of treaty obligations and fiduciary duties.[32] 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.[33]The honour of the Crown infuses the processes of treaty making and treaty interpretation, and in making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of sharp dealing.[34] The Crown's fiduciary obligations are linked to the honour of the Crown.[35]

[46] The honour of the Crown is unique and exclusive to Aboriginal law, and it is not a principal of the general civil law.[36] The honour of the Crown is a general principle that underlies all of the Crown's dealings with Aboriginal peoples, but it cannot be used to call into existence undertakings that were never given.[37]

[47] It is the last point that bears repeating, the honour of the Crown cannot be used to call into existence undertakings that were never given. Thus, in the context of the immediate case, the honour of the Crown begs but does not answer the overarching question. The honour of the Crown needs to be always kept in mind in the immediate case, but it is not determinative of the issue of whether Ontario had a fiduciary relationship with attendant fiduciary duties to Iskatewizaagegan No. 39.

F. The Fiduciary Obligations of the Crown to Aboriginal Peoples

1. General Principles of Fiduciary Obligations

[48] The law that governs the relationship between Canada and Aboriginal peoples of Canada

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[28] *Manitoba Metis Federation Inc. v. Canada (Attorney General),* 2013 SCC; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* 2004 SCC 74; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 7.
[29] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* 2004 SCC 74 at para. 24
[30] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, at paras. 21-22; *Manitoba Metis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14 at paras. 66 - 67.
[31] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, at para. 24; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para. 42.
[32] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage*, 2005 SCC 69 at para. 51.
[33] *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48.
[34] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73; *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Badger*, [1996] 1 S.C.R. 771; R. v. Sparrow, [1990] 1 S.C.R. 1075.
[35] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development*), 2018 SCC 4 at para. 43; *Manitoba Métis Federation v. Canada (Attorney General)*, 2013 SCC 14; *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73.
[36] *Scott v. Canada (Attorney General),* 2017 BCCA 422.
[37] *Lax Kw'alaams Indian Band v. Canada (Attorney General),* 2011 SCC 56 at para. 13.

is what is now known as Aboriginal law. Indigenous law is not the same as Aboriginal law. Both before and after the arrival of European settlers, the Aboriginal peoples in North America had well-developed civilizations that had legal systems and legal customs. Those discrete legal systems are the source of Indigenous law, the law that governs the first cultures as discrete civilizations or civil societies. The case at bar concerns Aboriginal law, not Indigenous law.

[49] Pursuant to s. 92(13) of the *Constitution Act, 1867*, which gives the provinces the power to legislate with respect to property and civil rights in the province, provincial governments have the power to regulate land use within the province whether held by the Crown, Aboriginal title holders, or by private owners, or by the holders of Aboriginal title.[38] A province's power to regulate land held under Aboriginal title is limited by: (a) the Federal Government's power over "Indians and Lands reserved for Indians" under s. 91(24) of the *Constitution Act, 1867*; and (b) s. 35 of the *Constitution Act, 1982*,[39] which requires that any infringement of Aboriginal rights be justified.[40]

[50] As a matter of the general civil law, fiduciary duties arise in one of two ways. First, some relationships are categorically fiduciary relationships with attendant fiduciary duties. Historically, the law has recognized certain relationships as categorically fiduciary in nature; trustee-beneficiary, lawyer-client, principle-agent, parent-child, guardian-ward are the main examples. Second, some relationships are situationally fiduciary, which is to say that when certain circumstances exist, the law recognizes an *ad hoc* fiduciary relationship with attendant duties.

[51] As a matter of Aboriginal law, fiduciary duties also arise in one of two ways.[41] First, in certain circumstances, there is a *sui generis*, *i.e.*, a categorical fiduciary relationship between the Crown and an Aboriginal people. Second, in certain circumstances there is an *ad hoc* fiduciary relationship between the Crown and an Aboriginal people.

[52] Before discussing the particular nature of the Aboriginal *sui generis* fiduciary relationship and the Aboriginal *ad hoc* fiduciary relationship, it is necessary to describe the nature of a fiduciary relationship that holds for both the general civil law and for Aboriginal law.

[53] Justice Bora Laskin in *Canadian Aero Services Ltd. v. O'Malley*,[42] said that cases about alleged breaches of fiduciary duty involved four issues:[43] (1) the determination of whether the relationship is fiduciary; (2) the determination of the duties that arise from the particular relationship; (3) the determination of whether a particular duty has been breached; and (4) the determination of the extent of liability for the breach of the particular fiduciary duty.

[54] A fiduciary relationship imposes obligations that are stricter than the morals of the marketplace and of the workaday world and a higher standard of behaviour, and when there is a breach of a fiduciary duty, courts mete out more powerful remedies, including the constructive trust, tracing, an accounting of profits, and disgorgement of gains. As Justice Cardozo noted in a

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[38] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.
[39] Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[40] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.
[41] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development*), 2018 SCC 4; *Manitoba Métis Federation v. Canada (Attorney General)*, 2013 SCC 14; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24; *Wewaykum Indian Band v. Canada*, 2002 SCC 79; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Guerin v. The Queen*, [1984] 2 S.C.R. 335.
[42] [1974] S.C.R. 592 at p. 616. See also *Investors Syndicate Ltd. v. Versatile Investments Inc.* (1983), 42 O.R. (2d) 397 (C.A.).
[43] [1974] S.C.R. 592 at p. 605.

famous passage from the well-known American case of *Meinhard v. Salmon*,[44] which is frequently quoted in Canadian cases and legal literature:

> Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honour the most sensitive, is then the standard of behaviour.

[55] As a matter of the general civil law, fiduciary relationships exist as a matter of course within the traditional categories of trustee-cestui que trust, executor-beneficiary, solicitor-client, agent-principal, director-corporation, and guardian-ward or parent-child; by contrast, *ad hoc* fiduciary relationships must be established on a case-by-case basis.[45]

[56] The modern general civil law has examined whether relationships outside the recognized classes could be fiduciary and asks whether a fiduciary relationship is a closed or an open class of relationships. A series of Supreme Court of Canada decisions debated the issue.[46] The juridical outcome of the debate in the Supreme Court case law, is that courts have recognized indicia that need to be present before the court will classify a particular relationship as an *ad hoc* fiduciary relationship with attendant fiduciary obligations.

[57] The indicia for an *ad hoc* fiduciary relationship, which are not a comprehensive code, but rather guidance to a court in analyzing the legal classification of a relationship are: (a) the alleged fiduciary has scope for the exercise of some discretion or power; (b) the alleged fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal interest; (c) the alleged beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power; and (d) the alleged fiduciary either implicitly or expressly has undertaken or accepted a responsibility to act in the best interest of the alleged beneficiary and to act in accordance with a duty of loyalty. The degree of discretionary control must be equivalent or analogous to direct administration of that interest.[47]

[58] In *Alberta v. Elder Advocates of Alberta Society*,[48] Chief Justice McLachlin stated:

> 36. In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame:* (l) 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 (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.

[59] Although they may sometimes overlap with other legal obligations, fiduciary obligations are a discrete and independent legal phenomenon with their own quality and characteristics. A breach of fiduciary duty may coincidentally also be negligence, a breach of contract, or a breach

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[44] (1928), 164 N.E. 545 at p. 546 (N.Y.C.A.).
[45] *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 33.
[46] *Frame v. Smith*, [1987] 2 S.C.R. 99; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Galambos v. Perez*, 2009 SCC 48; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24; *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71.
[47] *Brown v. Canada (Attorney General)*, 2017 ONSC 251 at para. 67; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 53.
[48] 2011 SCC 24 at para. 36.

of confidence, and then there will be concurrent liability.[49] However, the presence of a claim in tort, contract, or for breach of confidence does not, by itself, entail nor does it rule out the claim for breach of fiduciary duty. Breach of fiduciary duty remains an independent claim with its own unique characteristics and sterner quality.[50]

[60] Misconduct by a person who is a fiduciary does not necessarily mean that there has been a breach of fiduciary duty; rather, for there to be a breach of fiduciary duty, the misconduct must involve the particular duties that the law imposes on the particular fiduciary. As Justice Southin observed in *Girardet v. Crease & Co.*:[51]

> The word 'fiduciary' is flung around now as if it applied to all breaches of duties by solicitors, directors of companies and so forth. But 'fiduciary' comes from the Latin 'fiducia' meaning 'trust'. Thus, the adjective "fiduciary" means of or pertaining to a trustee or trusteeship.

[61] It is fallacious in determining fiduciary status and fiduciary duty by reasoning from misbehaviour or from remedy to duty. This result-driven reasoning process begs the question of whether a person has fiduciary status by moving from the breach of a duty or the desired remedy to a finding that the person had a duty. It is an analytical error for a plaintiff to reason from an alleged breach of a fiduciary duty to the conclusion that there is a fiduciary relationship. This fallacy was noted long ago in *Tito v. Waddell (No. 2)*,[52] where Megarry, V.C. stated:

> If there is a fiduciary duty, the equitable rules about self-dealing apply: but self-dealing does not impose the duty. Equity bases its rules about self-dealing upon some pre-existing fiduciary duty: it is a disregard of this pre-existing duty that subjects the self-dealer to the consequences of the self-dealing rules. I do not think that one can take a person who is subject to no pre-existing fiduciary duty and then say that because he self-deals he is thereupon subjected to a fiduciary duty.

[62] For example, a finding that a person was disloyal and that harm was caused may have the tendency to lead to the fallacious conclusion that the person had a fiduciary's duty to be loyal. Although they disagreed about the nature of fiduciary status, both Justices La Forest and Sopinka warned against this kind of reasoning in *Lac Minerals Ltd. v. International Corona Resources Ltd.*,[53] where Justice La Forest said that using the term "fiduciary" as a conclusion to justify a result "reads equity backwards"[54] and Justice Sopinka said:[55] [T]he presence of conduct that incurs the censure of a court of equity in the context of a fiduciary duty cannot itself create the duty."[56]

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[49] On the question of concurrent liability, see: *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Luscar Ltd. v. Pembina Resources Ltd.* (1994), 24 Alta. L.R. (3d) 305 (Alta. C.A.), leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 6; *Canson Enterprises Ltd. v. Broughton & Co.*, [1991] 3 S.C.R. 129.

[50] *Hub Financial Inc. v. Molinaro* (2002), 26 B.L.R. (3d) 295 (Ont. S.C.J.); *Wallace Welding Supplies Ltd. v. Wallace* (1986), 8 C.P.C. (2d) 157 (Ont. H.C.J.); *Investors Syndicate Ltd. v. Versatile Investments Inc.* (1983), 42 O.R. (2d) 397 (C.A.); *Bee Chemical Co. v. Plastic Paint & Finish Specialties Ltd.* (1978), 41 C.P.R. (2d) 175; affd. 47 C.P.R. (2d) 133, leave to appeal to S.C.C. refused 30 N.R. 356n.

[51] (1987), 11 B.C.L.R. (2d) 361 (S.C.) at p. 362. See also *Jostens Canada Ltd. v. Gibsons Studio Ltd.*, [1998] 5 W.W.R. 403 (B.C.C.A.) at p. 412.

[52] [1977] 3 All E.R. 129 at p. 230.

[53] [1989] 2 S.C.R. 574.

[54] [1989] 2 S.C.R. 574 at pp. 561–62. La Forest, J. notes that this logical fallacy was noted by Professor E.J. Weinrib in "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1 at p. 5 and by Megarry, V-C. in *Tito v. Waddell (No. 2)*, [1977] 3 All E.R. 129 at p. 232.

[55] [1989] 2 S.C.R. 574 at p. 581.

[56] See also Justices Sopinka and McLachlin, as she then was, in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at p. 463.

[63] While there may be situations where the federal government, a provincial government, or a public authority may have a fiduciary relationship with an individual or group with attendant fiduciary obligations, those instances will be rare because: [57]

> a. a government's or public authority's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare;
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> b. it will be rare that either by implication from the relationship between the parties or as deriving from a statute that a government will undertake to act with loyalty just for a particular individual or group;
>
> c. it will be difficult to establish the requirement that the government's action adversely affects a specific *private law* interest to which the person has a pre-existing distinct and complete legal entitlement, and in this regard, it is not enough that the government's or public authority's activities impact on the individual's or group's well-being, property or security; and
>
> d. the degree of control exerted by the government or public authority over the interest in question must go beyond the ordinary exercise of statutory powers and must be equivalent or analogous to direct administration of that interest before a fiduciary relationship can be said to arise.

[64] Although rare, examples of individuals or groups having interests where a government or a public authority might have a fiduciary relationship with them with attendant fiduciary obligations include property rights, interests akin to property rights, and the type of fundamental human or personal interest that is implicated when the state assumes guardianship of a child or incompetent person or where a statute creates a complete legal entitlement.[58]

2. *Sui Generis* Fiduciary Relationship under Aboriginal Law

[65] Turning then to fiduciary obligations under Aboriginal law, the Crown's fiduciary obligations, if any, are linked to the honour of the Crown.[59] 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.[60]

[66] The categorical fiduciary duty owed by the Crown in the Aboriginal context is *sui generis*, which is to say uniquely available to Aboriginal peoples.[61] From the honour of the Crown and the Federal Government's exclusive jurisdiction in respect of Indians under s. 91(24) of *the Constitution Act, 1867*[62] emerged a categorial fiduciary relationship between the Federal Government and Canada's Aboriginal peoples, which has been described as a *sui generis* fiduciary

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[57] *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at paras. 37-54.
[58] *Alberta v. Elder Advocates of Alberta Society* 2011 SCC 24 at paras. 37-54.
[59] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development*), 2018 SCC 4 at para. 43; *Manitoba Métis Federation v. Canada (Attorney General)*, 2013 SCC 14; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.
[60] *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48.
[61] *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 33; *Wewaykum Indian Band v. Canada*, 2002 SCC 79 at para. 96; *Hogan v. Newfoundland (Attorney General)* (2000), 183 D.L.R. (4th) 225, at paras. 66-67 (Nfld. C.A.); *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at p. 1108.
[62] 1867 (U.K,), 30 & 31 Vict. c. 3.

relationship.[63] Historically, Aboriginal peoples have in effect been treated as wards of the state whose care and welfare are a political trust of the highest obligation.[64] As a general principle, the Crown has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples.[65]

[67] As a matter of Aboriginal law, a *sui generis* fiduciary relationship between the Crown and an Aboriginal people may arise when:

> a. the Aboriginal People have a specific, cognizable Aboriginal interest, which is to say an identifiable existing Aboriginal interest, and
>
> b. the Crown has undertaken discretionary control over that interest.[66]

[68] Although they may be exercised by individual members of an Aboriginal or Métis community or group, aboriginal rights are collective in character.[67] An Aboriginal group or individual asserting an Aboriginal right is required to frame its claim as a cognizable right. To plead and prove the elements of a specific cognizable right, the Aboriginal individual or group must: (a) identify the existence of an ancestral practice, custom or tradition that was integral to the distinctive culture of the group's or individual's pre-contact society; and (b) demonstrate reasonable continuity between the pre-contact practice, custom or tradition and the contemporary claim.[68] An Aboriginal interest in land giving rise to a fiduciary duty cannot be established by treaty or by legislation; it is predicated on historic use and occupation."[69]

[69] Thus, the claimant of an Aboriginal right must prove a modern practice, tradition, or custom that has a reasonable degree of continuity with the practices, traditions, or customs that existed prior to contact and that were integral to the distinctive culture of the Aboriginal peoples.[70] To be integral to the distinctive culture, a practice, custom, or tradition must be of central significance to the Aboriginal society in question and the court cannot look at those aspects of the Aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the Aboriginal society that are only incidental or occasional to that society."[71]

[70] The fiduciary relationship and fiduciary obligations are engaged when the government or public authority exercises discretionary control over a cognizable Aboriginal interest.[72] Where the Crown has assumed discretionary control over specific cognizable Aboriginal interests, the honour

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[63] *Manitoba Métis Federation v. Canada (Attorney General),* 2013 SCC 14; *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73; *Wewaykum Indian Band v. Canada*, 2002 SCC 9; *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

[64] *Wewaykum Indian Band v. Canada*, 2002 SCC 9 at para. 73; *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211 at p. 219.

[65] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at para. 59.

[66] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development*), 2018 SCC 4.

[67] *Hiawatha First Nation v. Ontario (Minister of Environment)*, [2007] 2 C.N.L.R. 186 (Ont. Div. Ct.); *Perron v. Canada (Attorney General)*, [2003] O.J. No. 1348 (S.C.J); *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Ontario v. Bear Island Foundation*, [1996] 1 C.N.L.R. 16, (Ont. Gen. Div.), aff'd [2000] 2 C.N.L.R. 13 (Ont. C.A.); *Oregon Jack Creek Indian Band v. Canadian National Railway Co*., [1990] 2 C.N.L.R. 85 (B.C.C.A.) aff'd [1989] 2 S.C.R. 1069.

[68] *Mitchell v. M.N.R.*, 2001 SCC 33.

[69] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para. 58.

[70] *Mitchell* v. *M.N.R.*, 2001 SCC 33; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075.

[71] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 56, 57.

[72] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 47; *Ross River Dena Council Band v. Canada*, 2002 SCC 54 at paras. 68, 77; *Wewaykum Indian Band v. Canada*, 2002 SCC 9 at paras. 90, 93; *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at p. 382.

of the Crown gives rise to a fiduciary duty.[73] The fiduciary duty imposed on the Federal Crown does not exist at large but exists in relation to specific Aboriginal interests as a collective, and a fiduciary obligation will exist if the Crown assumes some discretion or power in relation to that interest sufficient to ground a fiduciary obligation.[74]

[71] Sufficient interests include property rights, interests akin to property rights, and the type of fundamental human or personal interest that is implicated when the state assumes guardianship of a child or incompetent person.[75]

[72] In *Guerin v. The Queen*,[76] the Supreme Court recognized that the federal Crown had a *sui generis* fiduciary relationship with respect to an Indian Band with respect to its reserve lands. *R. v. Sparrow*[77] expanded the notion of a *sui generis* fiduciary duty to include protection of the Aboriginal People's pre-existing and still existing aboriginal and treaty rights within s. 35 of the *Constitution Act, 1982.* The Aboriginal's interest in their ancestral lands is a cognizable legal interest that predates European settlement.[78] The Aboriginal communal interest in land or to aboriginal title is a matter of specific aboriginal interest to which the federal government may have fiduciary obligations.[79] Rights under s. 35 of the *Constitution Act, 1982*, which include Aboriginal title and treaty rights satisfy the requirement of an independent legal interest that is capable of grounding a fiduciary duty.[80] Lands subject to the reserve creation process even if the process is not finalized constitute a cognizable Aboriginal interest.[81]

[73] In *Manitoba Métis Federation v. Canada (Attorney General)*,[82] a grant of land to children in s. 31 of the *Manitoba Act, 1870*,[83] did not establish a specific or cognizable Aboriginal interest capable of grounding a *sui generis* fiduciary duty because it was not granted as a communal interest.

[74] If there is a fiduciary relationship between the Crown and an Aboriginal People, the determination of the duties that arise from the relationship will be shaped by the circumstances although the obligation will include to some extent, the duty of loyalty, the duty of good faith, and the duty of disclosure, which are major fiduciary obligations under the general civil law governing fiduciary relationships.[84] For an Aboriginal individual or group to succeed with the claim for breach of fiduciary duty, the individual or group must show that the Federal Government acted in

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[73] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 at para. 18; *Wewaykum Indian Band v. Canada*, 2002 SCC 79, at para. 79.
[74] *Brown v. Canada (Attorney General)*, 2013 ONSC 5637 at para. 40 aff'd 2014 ONSC 6967 (Div. Ct.); *Wewaykum Indian Band v. Canada*, 2002 SCC 9 at para. 83.
[75] *Brown v. Canada (Attorney General)*, 2013 ONSC 5637 aff'd 2014 ONSC 6967 (Div. Ct.) and *Brown v. Canada (Attorney General)*, 2017 ONSC 251; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 51.
[76] [1984] 2 S.C.R. 335.
[77] [1990] 1 S.C.R. 1075.
[78] *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313.
[79] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para. 53; *Wewaykum Indian Band v. Canada*, 2002 SCC 79 at para. 76; *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at pp. 385.
[80] *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4; *Mitchell v. Minister of National Revenue*, 2001 SCC 33
[81] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 54; *Ross River Dena Council Band v. Canada*, 2002 SCC 54; *Wewaykum Indian Band v. Canada*, 2002 SCC 9.
[82] 2013 SCC 14.
[83] S.C. 1870, c. 3.
[84] *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701 para 531; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4.

an unconscionable or unreasonable way inconsistent with the interests of the Aboriginal claimant.[85] Just showing a breach of statute, or even negligence, is not enough to show a breach of fiduciary duty.[86] When the Crown has a fiduciary obligation, the standard of care to which it is held in its pursuit of the beneficiary's interests is that of a man of ordinary prudence in managing his own affairs.[87]

[75] The content of the Crown's *sui generis* obligation is shaped by the government's or public authority's public responsibilities and may take into account broader public obligations, and the shape of the obligations may change as the government's activities in relation to the cognizable aboriginal interest develop.[88] If fiduciary duties are engaged, although the government or public authority cannot ignore the reality of conflicting demands, the existence of these demands does not absolve the government or public authority of its fiduciary duty in its efforts to reconcile them fairly.[89]

[76] In *Wewaykum Indian Band v. Canada*,[90] two Indian Bands were involved in a decades-long process to establish reserves. The historical records indicated inconsistently that each Band had exclusive claims to the reserve it actually occupied and also an exclusive claim to the reserve it did not occupy. The two Bands sued the federal government for breach of fiduciary duty. In a judgment written by Justice Binnie, the Supreme Court of Canada upheld the lower court judgments dismissing the Bands' competing claims. The Court held that the government had not breached any fiduciary duty. Justice Binnie stated that there were limits to the obligations imposed on a fiduciary, and at para. 36 of the judgment, he stated: "The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests." At para. 86, Justice Binnie stated that fiduciary duty did not provide a general indemnity and that: "the content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected."

[77] The existence of a public law duty does not exclude the possibility that the Crown undertook in the discharge of a public law duty fiduciary obligations toward Aboriginal Peoples.[91] However, the Crown is not an ordinary fiduciary because it represents many interests, some of which cannot help but be conflicting.[92] For an Aboriginal individual or group to succeed with a claim for breach of fiduciary duty, the individual or group must show that the Crown undertook an obligation in the nature of a private law duty to the Aboriginal individual or group.[93] If there is

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[85] *Wewaykum Indian Band v. Canada*, 2002 SCC 79 at paras. 86, 100; *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at pp. 349, 383.
[86] *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2004 ABQB 655 at para. 83.
[87] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 46; *Wewaykum Indian Band v. Canada*, 2002 SCC 9 at para. 94; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 at para. 104.
[88] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 55; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 18. *Wewaykum Indian Band v. Canada*, 2002 SCC 9 at para. 96; *Osoyoos Indian Band v. Oliver (Town*), 2001 SCC 85.
[89] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 55; *Wewaykum Indian Band v. Canada*, 2002 SCC 9 at paras. 96-97 and 103-4; *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85 at para. 53
[90] 2002 SCC 9.
[91] *Wewaykum Indian Band v. Canada*, 2002 SCC 9 at para. 74.
[92] *Ermineskin Indian Band and Nation v. Canada* 2009 SCC 9; *Wewaykum Indian Band v. Canada*, 2002 SCC 79 at para. 96
[93] *Wewaykum Indian Band v. Canada*, 2002 SCC 79 at para. 74.

no Aboriginal interest sufficiently independent of the Crown's executive and legislative functions to give rise to responsibility in the nature of a private law duty, then no fiduciary duties arise - only public law duties.[94]

3. *Ad Hoc* Fiduciary Relationship under Aboriginal Law

[78] As a matter of Aboriginal law, an *ad hoc* fiduciary relationship between the Crown and an Aboriginal people may arise where the conditions for a private law *ad hoc* fiduciary relationship, described above, are satisfied, that is, where the Crown has undertaken to exercise its discretionary control over a legal or substantial practical interest in the best interests of the Aboriginal People.[95]

[79] As a matter of Aboriginal law, an *ad hoc* fiduciary relationship between the Crown and an Aboriginal People may arise when: [96]

a. The Crown makes an undertaking of utmost loyalty to act in the best interests of the Aboriginal People in the nature of a private law duty. Not any undertaking will suffice, and it must be undertaking by the Crown that it will forsake the interests of all others in favour of the beneficiary of the fiduciary relationship.[97] For there to be a fiduciary relationship, the Crown by undertaking, agreement, or statute, imposes upon itself the duty to act exclusively in the beneficiary's best interests with respect to the cognizable Aboriginal interest at issue.[98]

b. The Aboriginal interest is vulnerable to the Crown's control; and

c. The Aboriginal people's cognizable Aboriginal Interest may be adversely affected by the Crown's exercise of discretion or control.

[80] It should be noted that while in a particular case an Aboriginal people may be vulnerable in the conventional sense of dependency, an Aboriginal people will also be vulnerable for the purposes of a *sui generis* or *ad hoc* fiduciary relationship without a paternalistic element and while respecting the strength of the Aboriginal people to care for themselves without being a dependent; i.e. without treating them as if they were children. This non-paternalistic approach to vulnerability in the context of a fiduciary relationship was explained by Justice Binnie in *Wewaykum Indian Band v. Canada*[99] as follows:

> The "historic powers and responsibility assumed by the Crown" in relation to Indian rights, although spoken of in *Sparrow*, at p. 1108, as a "general guiding principle for s. 35(1)", is of broader importance. All members of the Court accepted in *Ross River* that potential relief by way of fiduciary remedies is not limited to the s. 35 rights (*Sparrow*) or existing reserves (*Guerin*). The fiduciary

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[94] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 52; *Wewaykum Indian Band v. Canada*, 2002 SCC 9 at paras. 74, 85; *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at p. 385.

[95] *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development*), 2018 SCC 4

[96] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development*), 2018 SCC 4; *Nunavut Tunngavik Incorporated v. Canada (Attorney General)*, 2014 NUCA 2; *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14.

[97] *Grand River Enterprises Six Nations Ltd. v. Canada (Attorney General),* 2017 ONCA 526 at para. 182-185; *Manitoba Métis Federation v. Canada (Attorney General),* 2013 SCC 14 at para. 61.

[98] *Nunavut Tunngavik Incorporated v. Canada (Attorney General),* 2014 NUCA 2; *Gladstone v. Canada (Attorney General*), 2005 SCC 21.

[99] 2002 SCC 9 at para. 79.

> duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples. As Professor Slattery commented:
>
> > The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help. (B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 753)
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> See also *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 17; W. R. McMurtry and A. Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution: *Guerin* in Perspective", [1986] 3 C.N.L.R. 19, at p. 31.

[81] In *Manitoba Metis Federation Inc. v. Canada (Attorney General),*[100] the non-paternalistic approach to vulnerability was explained by Chief Justice McLachlin and Justice Karakatsanis (Lebel, Fish, Abella, and Cromwell concurring) as follows:

> 66. The honour of the Crown arises "from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people": *Haida Nation*, at para. 32. In Aboriginal law, the honour of the Crown goes back to the *Royal Proclamation* of 1763, which made reference to "the several Nations or Tribes of Indians, with whom We are connected, and who live under our Protection": see *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para. 42. This "Protection", though, did not arise from a paternalistic desire to protect the Aboriginal peoples; rather, it was a recognition of their strength. Nor is the honour of the Crown a paternalistic concept. The comments of Brian Slattery with respect to fiduciary duty resonate here:
>
> > The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help. ("Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 753)
>
> […]

[82] Rights under s. 35 of the *Constitution Act, 1982*, which include Aboriginal title and treaty rights satisfy the requirement of an independent legal interest that is capable of grounding a fiduciary duty.[101]

[83] Fiduciary duties are private law obligations and the Crown, which operates in the public sector with public law obligations, will not have fiduciary duties, unless the Crown in the discharge of its public law obligations undertook a private law duty to the Aboriginal people.[102]

[84] Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship, and therefore, the Aboriginal interest must be sufficiently independent of the Crown's legislative and executive functions to give rise to

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[100] 2013 SCC 14 at para. 66.
[101] *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4; *Mitchell v. Minister of National Revenue*, 2001 SCC 33
[102] *Brown v. Canada (Attorney General)*, 2013 ONSC 5637 at para. 35, aff'd 2014 ONSC 6967 (Div. Ct.); *Gladstone v. Canada (Attorney General)*, 2005 SCC 21; *Wewaykum Indian Band v. Canada*, 2002 SCC 79

responsibility in the nature of a fiduciary duty – otherwise it is only a public law duty.[103]

G. Has Iskatewizaagegan No. 39 Pled a Tenable Cause of Action based on a *Sui Generis* Fiduciary Duty?

[85] Applying the Aboriginal law described above, in my opinion, it is not plain and obvious that Iskatewizaagegan No. 39 does not have a tenable cause of action based on a *sui generis* fiduciary duty.

[86] As noted above, as a matter of Aboriginal law, a *sui generis* fiduciary relationship between Ontario and Iskatewizaagegan No. 39 may arise when: (a) Iskatewizaagegan No. 39 has a specific, cognizable Aboriginal Interest; and (b) the Crown has undertaken discretionary control over that interest.[104] In the immediate case, it is arguable that Iskatewizaagegan No. 39 has plead and could prove both elements of a breach of a *sui generis* fiduciary cause of action. In other words, in the immediate case, it is not plain and obvious that Iskatewizaagegan No. 39 does not have a claim for breach of a *sui generis* fiduciary duty.

[87] Visualize, as the basis for a *sui generis* fiduciary duty in the immediate case:

> a. Iskatewizaagegan No. 39 pleads three cognizable Aboriginal interests namely: (a) its interest in its reserve lands; (b) its interest in the lands and properties of its traditional territory; and (c) its rights to hunt, fish, and gather on Iskatewizaagegan No. 39 's traditional territories both on and off reserve, which rights are preserved under Treaty No. 3.
>
> b. Each of those cognizable Aboriginal interests is culturally connected to Shoal Lake and Iskatewizaagegan No. 39 pleads how its cognizable Aboriginal interests have suffered ecological injury, cultural damage, spiritual damage, and financial damage.
>
> c. Iskatewizaagegan No. 39 pleads that Ontario has undertaken discretionary control over those cognizable Aboriginal interests. In this regard, Ontario: (a) maintained its regulatory control over Shoal Lake, which it shared with the Commission, and (b) among other things, superimposed liability on Winnipeg, ensuring Winnipeg's liability "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," which is to say that Ontario superimposed liability on Winnipeg for injurious affection and for public nuisance. In exercising its jurisdiction over Treaty No. 3 lands, the Province of Ontario is bound by the duties attendant on the Crown and must exercise its powers in conformity with the honour of the Crown and the fiduciary duties that lie on the Crown in dealing with Aboriginal interests.[105]

[88] In its factum, Iskatewizaagegan No. 39 argues:

> 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 [see *Osoyoos Indian Band v. Oliver (Town),* 2001 SCC 85], 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

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[103] *Manitoba Metis Federation Inc v Canada (Attorney General),* 2013 SCC 14 at paras. 49, 51 .
[104] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development*), 2018 SCC 4.
[105] *Grassy Narrows First Nation v. Ontario (Natural Resources),* 2014 SCC 48.

> 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.

It is not plain and obvious that this argument from Iskatewizaagegan No. 39 is doomed to fail.

[89] Ontario, however, argues that because it has the ownership title to Shoal Lake and because Iskatewizaagegan No. 39 surrendered its traditional territories, there is not cognizable Aboriginal interest in the immediate case.

[90] Ontario's argument certainly fails with respect to the Iskatewizaagegan No. 39's rights to hunt, fish, and gather on the Iskatewizaagegan No. 39's traditional territories both on and off reserve, which rights are preserved and not surrendered or abandoned under Treaty No. 3. And, in my opinion, it is not plain and obvious in the circumstances of the immediate case that Iskatewizaagegan No. 39 does not have a cognizable Aboriginal interest connected to Shoal Lake, notwithstanding that it does not have title to Shoal Lake and notwithstanding its surrender of title to its traditional territories included Shoal Lake.

[91] In this regard, it should be recalled from the discussion above of Aboriginal law that Aboriginal title and Aboriginal property rights are *sui generis* communal rights that are different than common law property rights and are connected to the honour of the Crown. By its own 1913 Order in Council, Ontario recognized that Iskatewizaagegan No. 39 has a claim for injurious affection and public nuisance with respect to the water taking from Shoal Lake. As noted above in the discussion of the statutory background, the injurious affection is a claim that a landowner has against a public authority for activities on lands controlled by the public authority. In these circumstances, it is not plain and obvious that in the circumstances of the immediate case that Iskatewizaagegan No. 39's connection to Shoal Lake notwithstanding its ownership by Ontario is insufficient to constitute a cognizable Aboriginal Interest.

[92] In an argument that is also relevant to the question of whether Ontario has an *ad hoc* fiduciary duty to Iskatewizaagegan No. 39, Ontario argues that in the immediate case, the pleadings reveal that Ontario only took on only a public law duty and that in the discharge of its public law obligations Ontario did not undertake a private law duty of a fiduciary nature to Iskatewizaagegan No. 39.

[93] However, the problem for Ontario with that argument is that while it might succeed, it is not plain and obvious that it will succeed. In the immediate case, it is arguable that Ontario did take on a private law duty of a fiduciary nature to Iskatewizaagegan No. 39 and for that matter it is at least arguable that Ontario took on *ad hoc* fiduciary obligations to "all private parties whose lands or properties may be taken, injuriously affected or in any way interfered with" by the water taking activities of Winnipeg. The arguments on both sides are not doomed to fail and what is required in the immediate case is a trial on the merits of Iskatewizaagegan No. 39's claim and Ontario's defence.

[94] In the immediate case, Ontario argues that Iskatewizaagegan No. 39's fiduciary duty claim is contingent on the 1913 Order in Council being the operative legal instrument by which Winnipeg takes water from Shoal Lake. Ontario, and since that contingency is not true (because the operative legal instrument is the approval of the International Joint Commission), Iskatewizaagegan No. 39's

fiduciary duty claim is doomed to fail.

[95] This is another argument that must be tried on the merits for two reasons. First, it is not plain and obvious that Iskatewizaagegan No. 39's fiduciary duty claim is contingent on the 1913 Order in Council being the operative legal instrument. Second, it is not plain and obvious that the pertinent parts of the 1913 Order in Council are not still operative. As stated in its factum:

> Ontario's discretionary control was preserved and formalised as legal, valid and binding in the 1916 [*An Act to Confer Certain Rights and Powers upon the Greater Winnipeg Water District*] even after it was known that the aqueduct would be built in Manitoba. If the 1913 Order in Council 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 Order in Council in current legislation by reference. [*Ontario Water Resources Act*, s. 34.3 (3) para. 6]

[96] In the immediate case, relying on the 1979 case of *Shoal Lake Band of Indians No. 39 v. Queen in Right of Ontario,*[106] Ontario argues that because the intake terminus of the aqueduct is in Manitoba, Winnipeg is extracting water outside the regulatory authority of Ontario and thus Ontario has no fiduciary obligations to Iskatewizaagegan No. 39. In my opinion, this argument based on a case that does not discuss Aboriginal law and that pre-dates *Guerin v. The Queen*,[107] *R. v. Sparrow*,[108] *Wewaykum Indian Band v. Canada*,[109] and *Alberta v. Elder Advocates of Alberta Society*,[110] the cases that do discuss Aboriginal Law, does not assist Ontario on its Rule 21 motion.

[97] In *Shoal Lake Band of Indians No. 39,* Iskatewizaagegan No. 39 sought judicial review of Ontario's decision to impose quotas with respect to fish taken from that portion of Shoal Lake within the boundaries of Manitoba. Justice Cory held that Iskatewizaagegan No. 39 was entitled to a declaration that the Ontario's fishery regulations do not apply to waters within the Province of Manitoba - which was a point that was conceded by Ontario. Apart from the fact that *Shoal Lake Band of Indians No. 39* is not an Aboriginal law case, I do not understand how the analogy of fish taking from Shoal Lake can be made to water taking from Shoal Lake. Fish are a solid that moves in a liquid, water is a liquid that fills its solid vessel, and when Winnipeg extracts up to 100 million gallons of water a day from Shoal Lake, then depending on water inflows from the water shed in Manitoba and Ontario, the water volume and the water levels may decrease in the vessel that is the whole of Shoal Lake, wherever the lakebed is located.

[98] In any event, the salient point is that Ontario continues to have regulatory control over the portions of Shoal Lake that are in Ontario and the alleged cognizable Aboriginal Interests of Iskatewizaagegan No. 39 are also in Ontario.

[99] I, therefore, conclude that it is not plain and obvious that Iskatewizaagegan No. 39 does not have a tenable cause of action for breach of a *sui generis* fiduciary duty.

H. Has Iskatewizaagegan No. 39 Pled a Tenable Cause of Action based on an *Ad Hoc* Fiduciary Duty?

[100] Applying the Aboriginal law described above, in my opinion, it is not plain and obvious

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[106] (1979), 25 O.R. (2d) 334 (H.C.J.).
[107] [1984] 2 S.C.R. 335.
[108] [1990] 1 S.C.R. 1075.
[109] 2002 SCC 9.
[110] 2011 SCC 24 at para. 36.

that Iskatewizaagegan No. 39 does not also have a tenable cause of action based on an *ad hoc* fiduciary duty.

[101] Visualize: (a) the stipulations in the 1913 Order in Council that were carried forward into the approval granted by the International Joint Commission satisfy the undertaking requirement of an *ad hoc* fiduciary relationship; (b) Iskatewizaagegan No. 39 is vulnerable to Ontario's control; and (c) one or more of three cognizable Aboriginal Interests may be affected by Ontario's exercise of discretion or control over Shoal Lake and the associated cognizable Aboriginal interest.

[102] Further, as noted above, the existence of a public law duty does not exclude the possibility that Ontario undertook in the discharge of a public law duty fiduciary obligations toward the Aboriginal peoples that lived around Shoal Lake.[111]

[103] Ontario has a tidal wave of arguments that the stipulations in the 1913 Order in Council that were carried forward into the approval granted by the International Joint Commission do not satisfy the undertaking of loyalty requirements of an *ad hoc* fiduciary relationship. These arguments are strong, but the arguments are not so strong as to make it plain and obvious that Ontario did not make a sufficient undertaking to Iskatewizaagegan No. 39 that would be sufficient as a matter of Aboriginal law or as a matter of the general law of *ad hoc* fiduciary relationships.

[104] Not to say that Ontario's arguments may not ultimately succeed; however, Ontario's arguments at this juncture are not inevitably successful. And, at this juncture, Ontario's arguments are weakened by its attempting, by the peculiarity that the aqueduct's intake point is in Manitoba, to negate the existence of its 1913 Order in Council, which has been confirmed by its own legislation. To this day, Winnipeg is extracting up to 100 million gallons of water a day. The source of that water is a watershed in Ontario. That watershed feeds a lake with a surface area 95% in Ontario. At this juncture, Ontario's arguments to make meaningless and ineffective the stipulations in its 1913 Order in Council weaken its argument that it is plain and obvious that there is no breach of fiduciary duty claim in the circumstances of the immediate case.

[105] Apparently, to avoid its potential liability to Iskatewizaagegan No. 39, Ontario appears intent on abandoning the protections it obtained for all private parties whose lands or properties may be taken, injuriously affected or in any way interfered with by Winnipeg's taking water from Shoal Lake. (I also parenthetically note that it would follow that Ontario is also abandoning the protections it extracted for the Town of Kenora if the taking of water from Shoal Lake appreciably reduces the amount of power developed and owned by the Town of Kenora or in any way injuriously affects the property of the Town of Kenora.)

[106] Ontario exercised its public law duties when it granted Winnipeg the right to extract water from Shoal Lake. It is arguable that through the stipulations first found in the 1913 Order in Council, Ontario undertook private law and Aboriginal law not public law obligations to Iskatewizaagegan No. 39.

[107] Courts have recognized *sui generis* fiduciary duties were owed in contexts involving Aboriginal interests in land including the disposition of Indian reserves, the expropriation of an interest in reserve lands, reserve creation, taking up treaty lands, and protecting existing reserves

[111] *Wewaykum Indian Band v. Canada*, 2002 SCC 9 at para. 74.

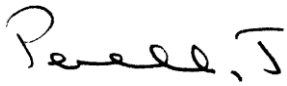
from exploitation.[112] While this phenomenon of a movement from public law to Aboriginal fiduciary law may be rare, it is not plain and obvious that the circumstances for this legal phenomenon are not present in the immediate case.

[108] I, therefore, conclude that it is not plain and obvious that Iskatewizaagegan No. 39 does not have a tenable cause of action for breach of an *ad hoc* fiduciary duty.

I. Conclusion

[109] For the above reasons, I dismiss Ontario's motion.

[110] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Iskatewizaagegan No. 39's submissions within twenty days of the release of these Reasons for Decision, followed by Ontario's submissions within a further twenty days.



Perell, J.

Released: February 17, 2021

[112] *Guerin v. The Queen,* [1984] 2 S.C.R. 335; *Osoyoos Indian Band* v. *Oliver (Town)* 2001 SCC 85; *Wewaykum Indian Band v. Canada* 2002 SCC 9; *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4.

Schedule "A": Royal Proclamation of 1763

Royal Proclamation of 1763[113]

Whereas We have taken into Our Royal Consideration the extensive and valuable Acquisitions in America, secured to Our Crown by the late Definitive Treaty of Peace, concluded at Paris the Tenth Day of February last, and being desirous, that all Our loving Subjects, as well of Our Kingdoms as of Our Colonies in America, may avail themselves, with all convenient Speed, of the great Benefits and Advantages which must accrue therefrom to their Commerce, Manufactures, and Navigation; We have thought fit, with the Advice of Our Privy Council, to issue this Our Royal Proclamation, hereby to publish and declare to all Our loving Subjects, that We have, with the Advice of Our said Privy Council, granted Our Letters Patent under Our Great Seal of Great Britain, to erect within the Countries and Islands ceded and confirmed to Us by the said Treaty, Four distinct and separate Governments, styled and called by the Names of Québec, East Florida, West Florida, and Grenada, and limited and bounded as follows; viz.

[…]

And whereas it will greatly contribute to the speedy settling Our said new Governments, that Our loving Subjects should be informed of Our Paternal Care for the Security of the Liberties and Properties of those who are and shall become Inhabitants thereof; We have thought fit to publish and declare, by this Our Proclamation, that We have, in the Letters Patent under Our Great Seal of Great Britain, by which the said Governments are constituted, given express Power and Direction to Our Governors of Our said Colonies respectively, that so soon as the State and Circumstances of the said Colonies will admit thereof, they shall, with the Advice and Consent of the Members of Our Council, summon and call General Assemblies within the said Governments respectively, in such Manner and Form as is used and directed in those Colonies and Provinces in America, which are under Our immediate Government; and We have also given Power to the said Governors, with the Consent of Our said Councils, and the Representatives of the People, so to be summoned as aforesaid, to make, constitute, and ordain Laws, Statutes, and Ordinances for the Public Peace, Welfare, and Good Government of Our said Colonies, and of the People and Inhabitants thereof, as near as may be agreeable to the Laws of England, and under such Regulations and Restrictions as are used in other Colonies. […]

[…]

And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds; We do therefore, with the Advice of Our Privy Council, declare it to be Our Royal Will and Pleasure, that no Governor or Commander in Chief in any of Our Colonies of Québec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also, that no Governor or

[113] R.S.C. 1985, App. II, No. 1.

Commander in Chief in any of Our other Colonies or Plantations in America, do presume, for the present, and until Our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North-West, or upon any Lands whatever, which, not having been ceded to, or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under Our Sovereignty, Protection, and Dominion, for the Use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West, as aforesaid; and We do hereby strictly forbid, on Pain of Our Displeasure, all Our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without Our especial Leave and Licence for that Purpose first obtained.

And We do further strictly enjoin and require all Persons whatever, who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands, which, not having been ceded to, or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

And whereas great Frauds and Abuses have been committed in the purchasing Lands of the Indians, to the great Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians; in order therefore to prevent such Irregularities for the future, and to the End that the Indians may be convinced of Our Justice, and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of Our Privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where We have thought proper to allow Settlement; but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, that same shall be purchased only for Us, in Our Name, at some public Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies respectively, within which they shall lie: and in case they shall lie within the Limits of any Proprietary Government, they shall be purchased only for the Use and in the Name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose: And We do, by the Advice of Our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all our Subjects whatever; provided that every Person, who may incline to trade with the said Indians, do take out a Licence for carrying on such Trade from the Governor or Commander in Chief of any of Our Colonies respectively, where such Person shall reside; and also give Security to observe such Regulations as We shall at any Time think fit, by Ourselves or by Our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the said Trade; And We do hereby authorize, enjoin, and require the Governors and Commanders in Chief of all Our Colonies respectively, as well Those under Our immediate Government as those under the Government and Direction of Proprietaries, to grant such Licences without Fee or Reward, taking especial Care to insert therein a Condition, that such Licence shall be void, and the Security forfeited, in Case the Person, to whom the same is granted, shall refuse or neglect to observe such Regulations as We shall think proper to prescribe as aforesaid.

[…]

Given at Our Court at St. James's, the Seventh Day of October, One thousand seven hundred and sixty-three, in the Third Year of Our Reign.

God Save the King

Schedule “B”: Treaty No. 3

TREATY No. 3

ARTICLES OF A TREATY made and concluded this third day of October, in the year of Our Lord one thousand eight hundred and seventy-three, between Her Most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners, the Honourable Alexander Morris, Lieutenant-Governor of the Province of Manitoba and the North-west Territories; Joseph Alfred Norbert Provencher and Simon James Dawson, of the one part, and the Saulteaux Tribe of the Ojibway Indians, inhabitants of the country within the limits hereinafter defined and described, by their Chiefs chosen and named as hereinafter mentioned, of the other part.

Whereas the Indians inhabiting the said country have, pursuant to an appointment made by the said Commissioners, been convened at a meeting at the north-west angle of the Lake of the Woods to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and the said Indians of the other.

And whereas the said Indians have been notified and informed by Her Majesty's said Commissioners that it is the desire of Her Majesty to open up for settlement, immigration and such other purpose as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty and arrange with them so that there may be peace and good will between them and Her Majesty and that they may know and be assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence.

And whereas the Indians of the said tract, duly convened in council as aforesaid, and being requested by Her Majesty's said Commissioners to name certain Chiefs and Headmen, who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for their faithful performance by their respective bands of such obligations as shall be assumed by them, the said Indians have thereupon named the following persons for that purpose, that is to say:

> KEK-TA-PAY-PI-NAIS (Rainy River.) KITCHI-GAY-KAKE (Rainy River.) NOTE-NA-QUA-HUNG (North-West Angle.) NAWE-DO-PE-NESS (Rainy River.) POW-WA-SANG (North-West Angle.) CANDA-COM-IGO-WE-NINIE (North-West Angle.) PAPA-SKO-GIN (Rainy River.) MAY-NO-WAH-TAW-WAYS-KIONG (North-West Angle.) KITCHI-NE-KA-LE-HAN (Rainy River.) SAH-KATCH-EWAY (Lake Seul.) MUPA-DAY-WAH-SIN (Kettle Falls.) ME-PIE-SIES (Rainy Lake, Fort Frances.) OOS-CON-NA-GEITH (Rainy Lake.) WAH-SHIS-KOUCE (Eagle Lake.) KAH-KEE-Y-ASH (Flower Lake.) GO-BAY (Rainy Lake.) KA-MO-TI-ASH (White Fish Lake.) NEE-SHO-TAL (Rainy River.) KEE-JE-GO-KAY (Rainy River.) **SHA-SHA-GANCE (Shoal Lake.) SHAH-WIN-NA-BI-NAIS (Shoal Lake.)** AY-ASH-A-WATH (Buffalo Point.) PAY-AH-BEE-WASH (White Fish Bay.) KAH-TAY-TAY-PA-E-CUTCH (Lake of the Woods.) [emphasis added]

And thereupon, in open council, the different bands having presented their Chiefs to the said Commissioners as the Chiefs and Headmen for the purposes aforesaid of the respective bands of Indians inhabiting the said district hereinafter described:

And whereas the said Commissioners then and there received and acknowledged the persons so presented as Chiefs and Headmen for the purpose aforesaid of the respective bands of Indians inhabiting the said district hereinafter described:

And whereas the said Commissioners have proceeded to negotiate a treaty with the said Indians, and the same has been finally agreed upon and concluded, as follows, that is to say:

The Saulteaux Tribe of the Ojibbeway Indians and all other the Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say:—

Commencing at a point […] and from thence by the international boundary to the place beginning.

The tract comprised within the lines above described, embracing an area of fifty-five thousand square miles, be the same more or less. To have and to hold the same to Her Majesty the Queen, and Her successors forever.

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and also to lay aside and reserve for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, in such a manner as shall seem best, other reserves of land in the said territory hereby ceded, which said reserves shall be selected and set aside where it shall be deemed most convenient and advantageous for each band or bands of Indians, by the officers of the said Government appointed for that purpose, and such selection shall be so made after conference with the Indians; provided, however, that such reserves, whether for farming or other purposes, shall in no wise exceed in all one square mile for each family of five, or in that proportion for larger or smaller families; and such selections shall be made if possible during the course of next summer, or as soon thereafter as may be found practicable, it being understood, however, that if at the time of any such selection of any reserve, as aforesaid, there are any settlers within the bounds of the lands reserved by any band, Her Majesty reserves the right to deal with such settlers as She shall deem just so as not to diminish the extent of land allotted to Indians; and provided also that the aforesaid reserves of lands, or any interest or right therein or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained.

And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians She hereby, through Her Commissioners, makes them a present of twelve dollars for each man, woman and child belonging to the bands here represented, in extinguishment of all claims heretofore preferred.

And further, Her Majesty agrees to maintain schools for instruction in such reserves hereby made as to Her Government of Her Dominion of Canada may seem advisable whenever the Indians of the reserve shall desire it.

Her Majesty further agrees with Her said Indians that within the boundary of Indian reserves, until otherwise determined by Her Government of the Dominion of Canada, no intoxicating liquor shall be allowed to be introduced or sold, and all laws now in force or hereafter to be enacted to preserve Her Indian subjects inhabiting the reserves or living elsewhere within Her North-west Territories, from the evil influences of the use of intoxicating liquors, shall be strictly enforced.

Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.

It is further agreed between Her Majesty and Her said Indians that such sections of the reserves above indicated as may at any time be required for Public Works or buildings of what nature soever may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made for the value of any improvements thereon.

And further, that Her Majesty's Commissioners shall, as soon as possible after the execution of this treaty, cause to be taken an accurate census of all the Indians inhabiting the tract above described, distributing them in families, and shall in every year ensuing the date hereof, at some period in each year to be duly notified to the Indians, and at a place or places to be appointed for that purpose within the territory ceded, pay to each Indian person the sum of five dollars per head yearly.

It is further agreed between Her Majesty and the said Indians that the sum of fifteen hundred dollars per annum shall be yearly and every year expended by Her Majesty in the purchase of ammunition and twine for nets for the use of the said Indians.

It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any band of the said Indians who are now actually cultivating the soil or who shall hereafter commence to cultivate the land, that is to say: two hoes for every family actually cultivating, also one spade per family as aforesaid, one plough for every ten families as aforesaid, five harrows for every twenty families as aforesaid, one scythe for every family as aforesaid, and also one axe and one cross-cut saw, one hand-saw, one pit-saw, the necessary files, one grindstone, one auger for each band, and also for each Chief for the use of his band one chest of ordinary carpenter's tools; also for each band enough of wheat, barley, potatoes and oats to plant the land actually broken up for cultivation by such band; also for each band one yoke of oxen, one bull and four cows; all the aforesaid articles to be given once for all for the encouragement of the practice of agriculture among the Indians.

It is further agreed between Her Majesty and the said Indians that each Chief duly recognized as such shall receive an annual salary of twenty-five dollars per annum, and each subordinate officer, not exceeding three for each band, shall receive fifteen dollars per annum; and each such Chief and subordinate officer as aforesaid shall also receive once in every three years a suitable suit of clothing; and each Chief shall receive, in recognition of the closing of the treaty, a suitable flag and medal.

And the undersigned Chiefs, on their own behalf and on behalf of all other Indians inhabiting the tract within ceded, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen. They promise and engage that they will in all respects obey and abide by the law, that they will maintain peace and good order between each other, and also between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians or whites, now inhabiting or hereafter to inhabit any part of the said ceded tract, and that they will not molest the person or property of any inhabitants of such ceded tract, or the property of Her Majesty the Queen, or interfere with or trouble any person passing or travelling through the said tract, or any part thereof; and that they will aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded.

IN WITNESS WHEREOF, Her Majesty's said Commissioners and the said Indian Chiefs have hereunto subscribed and set their hands at the North-West Angle of the Lake of the Woods this day and year herein first above named.

Signed by the Chiefs within named, in presence of the following witnesses, the same having been first read and explained by the Honorable James McKay: […]

We, having had communication of the treaty, a certified copy whereof is hereto annexed, but not having been present at the councils held at the North West Angle of the Lake of the Woods between Her Majesty's Commissioners, and the several Indian Chiefs and others therein named, at which the articles of the said treaty were agreed upon, hereby for ourselves and the several bands of Indians which we represent, in consideration of the provisions of the said treaty being extended to us and the said bands which we represent, transfer, surrender and relinquish to Her Majesty the Queen, Her heirs and successors, to and for the use of Her Government of Her Dominion of Canada, all our right, title and privilege whatsoever, which we, the said Chiefs and the said bands which we represent have, hold or enjoy, of, in and to the territory described and fully set out in the said articles of treaty, and every part thereof. To have and to hold the same unto and to the use of Her said Majesty the Queen, Her heirs and successors forever.

And we hereby agree to accept the several provisions, payments and reserves of the said treaty, as therein stated, and solemnly promise and engage to abide by, carry out and fulfil all the stipulations, obligations and conditions therein contained, on the part of the said Chiefs and Indians therein named, to be observed and performed; and in all things to conform to the articles of the said treaty as if we ourselves and the bands which we represent had been originally contracting parties thereto, and had been present and attached our signatures to the said treaty.

IN WITNESS WHEREOF, Her Majesty's said Commissioners and the said Indian Chiefs have hereunto subscribed and set their hands, this thirteenth day of October, in the year of Our Lord one thousand eight hundred and seventy-three.

Signed by S. J. Dawson, Esquire, one of Her Majesty's said Commissioners, for and on behalf and with the authority and consent of the Honorable Alexander Morris, Lieutenant Governor of Manitoba and the North-West Territories, and J. A. N. Provencher, Esq., the remaining two Commissioners, and himself and by the Chiefs within named, on behalf of themselves and the several bands which they represent, the same and the annexed certified copy of articles of treaty having been first read and explained in presence of the following witnesses: THOS. A. P. TOWERS, JOHN AITKEN, A. J. McDONALD. UNZZAKI.

For and on behalf of the Commissioners, the Honorable Alexander Morris, Lieut. Governor of Manitoba and the NorthWest Territories, Joseph Albert Norbert Provencher, Esquire, and the undersigned S. J. DAWSON, Commissioner. PAY-BA-MA-CHAS, his x mark RE-BA-QUIN, his x mark ME-TAS-SO-QUE-NESKANK, his x mark

CITATION: Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City), 2021 ONSC 1209
COURT FILE NO.: CV-20-00644545-0000
DATE: 2021/02/17

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ISKATEWIZAAGEGAN NO. 39 INDEPENDENT FIRST NATION

Plaintiff

- and -

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

Defendants

REASONS FOR DECISION

PERELL J.

Released: February 17, 2021