

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ISKATEWIZAAGEGAN NO. 39 INDEPENDENT FIRST NATION

PLAINTIFF

(Moving Party)

-AND-

THE CITY OF WINNIPEG and HIS MAJESTY THE KING IN RIGHT OF ONTARIO

DEFENDANTS

NOTICE OF MOTION

THE PLAINTIFF will make a motion to the court on November 28 and 29, 2023, at 10:00 am, or as soon after that time as the motion can be heard.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR

- a. Pursuant to Rule 21.01(1)(a) of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (“*Rules*”), a Declaration that the category of harm – described as “harm allegedly caused to the Plaintiff by the removal of the “headlands” portion of its lands and properties,

and related rights therein” – falls within the ambit of the Compensation Provision and is therefore within the scope of this Claim;

- b. Pursuant to Rule 26 of the *Rules*, an Order granting leave to Amend the Statement of Claim in order to particularize one head of damages and to conform with information adduced by the Plaintiff in Discoveries with respect to this Headlands Issue;
- c. pursuant to Rule 37.10 of the *Rules*, an Order compelling the Respondents to answer questions on the Headlands Issue within the next thirty (30) days, or within whatever time period this Court may deem just;
- d. Costs for the herein motion; and,
- e. Any other such relief as the Moving Party may request and this Court deem just.

THE GROUNDS FOR THE MOTION ARE

I. Background of Claim for Compensation Related to the loss of “the Headlands Areas”

1. The Plaintiff’s claim arises in part from a 1913 Order in Council approved by the Lieutenant Governor for the Province of Ontario (“the 1913 Ontario Order in Council”) and incorporated into an Order of Approval of the International Joint Commission dated January 14, 1914 (the “IJC Order or Approval”). These orders establish an entitlement to compensation for parties affected by Winnipeg’s water-taking by Winnipeg at Shoal Lake.

2. Section one of the 1913 Order in Council and page 20 of the IJC Order of Approval state the following 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, but water taken within the terms hereof and considered merely as water is not property to be paid for.

3. On July 9, 2020, the Honourable Justice Arthur Gans issued an Order on consent of all parties, declaring in part that the City of Winnipeg is bound by the above-noted condition, and that the Plaintiff is entitled to compensation if it can be shown that its “properties or lands have been taken,

injuriously affected or in any way interfered with,” with the caveat that water taken merely as water is not “property to be paid for.”

4. The claim for compensation related to the Headlands arises in the context of Ontario’s actions in unilaterally re-drawing the reserve boundaries of the Plaintiff Iskwewizaagegan Independent First Nation (“IIFN”) to exclude Headlands Areas, which, for IIFN, include but are not limited to the entirety of Indian Bay.
5. The Plaintiff’s position remains that the removal of the Headlands Areas from their reserves, including the water and the land under water, is a taking, injurious affectation or interference with their lands or properties that they are entitled to compensation for, pursuant to the terms described above.

II. The Removal of the Headlands Areas from Reserves in Treaty #3

6. Treaty #3 was signed between the Crown and 28 Indigenous Nations, including IIFN in 1873. Among other terms, the Treaty protected the signatory Indigenous Nations’ right to hunt and fish throughout the territory covered by the Treaty. In 1888, *St. Catherine’s Milling* determined that most of the lands within Treaty #3 “belonged” to Ontario retroactively to 1867. This had the result that Ontario was required to confirm and transfer the reserves to Canada.
7. In 1891, Canada and Ontario enacted mirror legislation to allow the governments to enter into an agreement with each other to govern the terms of the transfer (*An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indians Lands*, SO 1891, c 3, and *An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indians Lands*, SC 1891, c 5, together the “1891 Acts”).
8. In 1894, an Agreement was signed between Canada and Ontario (the “1894 Agreement”) pursuant to the 1891 Acts. The 1894 Agreement, which has statutory authority, confirms that the lakebed

and islands within Indian Bay form part of the Plaintiff's reserve, found at section four of the 1894

Agreement:

That in case of all Indian reserves so to be confirmed or hereafter selected, the waters within the lands laid out or to be laid out as Indian reserves in the said territory, including the land covered with water lying between the projecting headlands of any lake or sheets of water, not wholly surrounded by an Indian reserve or reserves, shall be deemed to form part of such reserve, including islands wholly within such headlands and shall not be subject to the public common right of fishery by others than Indians of the band to which the reserve belongs.

9. Following this agreement, in or around 1912 the Defendant Winnipeg and its predecessors chose Shoal Lake as its new source of water because the water was soft, pure, and did not require treatment. The 1913 Ontario Order in Council specifically permits Winnipeg to draw water from Shoal Lake, which lays partly in present-day Manitoba and partly in present-day Ontario.

10. In a December 1914 letter from Ontario's Deputy Minister for the Department of Lands, Forests and Mines, Aubrey White, to Deputy Superintendent-General of the Department of Indian Affairs, Duncan Campbell Scott, White stated in part that section four of the 1894 Agreement:

...is very far-reaching and might seriously cripple our actions with respect to the application of Winnipeg for leave to take its water supply from Shoal Lake...

11. Mr. Scott agreed, and stated in a reply letter that they would be required to "repeal the statute of 1894." In 1915 Ontario passed *An Act to confirm the title of the Government of Canada to Certain Lands and Indian Lands*, SO 1915, c 12 ("1915 Ontario Act"). Section 2 of this Act states in part:

...the land covered with water lying between the projecting headlands of any lake or sheets of water, not wholly surrounded by an Indian reserve or reserves, shall not be deemed to form part of such reserve...

12. In other words, contrary to the definition of reserve boundaries recognized by the 1894 Agreement and which bound Ontario, the 1915 Ontario Act indicated that the lands and waterbeds within the Headlands Areas of a given body of water were the property of Ontario. The correspondence between Mr. White and Mr. Scott in December 1914 reveals that the 1915 Ontario Act was adopted

for the express purpose of removing the Headlands Areas at Shoal Lake to enable Winnipeg to draw water from Indian Bay without trespassing on reserve territory.

13. All of this was done without the consent or knowledge of IIFN.

III. Determination of an issue before trial: The loss of the Headlands Areas lies within the claim for damages

14. Pursuant to the Case Management Order of the Honourable Justice Darla A. Wilson on November 25, 2021, examinations for discovery were conducted in September, October, and November of 2022;

15. When the Plaintiff filed its claim on July 24, 2020, the claim for compensation related to the loss of the Headlands Areas was implicit in the claim for damages for the taking, injury, or interference with “lands or properties.” Subsequently, during the regular court proceedings, the Plaintiff’s retained expert historian delivered a draft report in March 2022. This report outlined the documents referred to above, namely the 1894 Agreement and the December 1914 White-Scott correspondence.

16. After reviewing the report in detail and with further consideration, the Plaintiff delivered these and other documents to the Defendants on September 22 and 23, 2022, prior to the start of discoveries. The Plaintiff indicated that they may have questions on these documents.

17. During the above-mentioned discoveries, the Plaintiff asked questions around these documents and the Headlands Issue in general. However, the Defendants refused almost all of these questions. The defendants have continued to maintain refusals (see below) and to contest the Plaintiff’s ability to raise the claims for compensation related to the loss of the Headlands Areas in its submissions.

18. To that end, the Plaintiff brings this Hybrid Motion in part pursuant to Rule 21.01(1)(a) of the *Rules* to request an Order from the Court that the claim for compensation for the loss of the

Headlands Areas falls within the ambit of the Compensation Provision and is therefore within the scope of this Claim.

IV. An Amendment to the Pleadings

19. In light of above, the Plaintiff seeks to further clarify and particularize the pleadings via an Amended Fresh as Amended Statement of Claim, in order to ensure that the pleadings conform with the evidence adduced at examinations on discovery in relation to the Headlands Issue, as well as some other, related issues.

20. A draft Amended Fresh as Amended Statement of Claim is attached to this Notice, pursuant to Rule 26 of the *Rules*.

V. An Order to Compel Answers to Refusals Given on Discovery in relation to the Headlands Issue

21. Further to above, the Defendants refused to provide answers on almost all questions asked relating to the Headlands Issue. Further details to the content of these refused questions are attached hereto in the Refusals Charts of the Defendants Ontario and Winnipeg, both dated October 11, 2023 Form 37C.

22. Rule 37, 26, and 21 of the *Rules of Civil Procedure*; and

23. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

(a) Transcripts of the examinations for discovery of Timothy Shanks on September 26-28 and November 21, 2022, and Scott Lockhart on September 29-30, October 6-7 and 12, 2022;

(b) Form 37C Refusals Charts prepared by the Plaintiff, dated October 11, 2023;

- (c) A copy of the Fresh as Amended Statement of Claim, as issued by the court on October 12, 2021;
- (d) A copy of the proposed Amended Fresh as Amended Statement of Claim, dated October 11, 2023;
- (e) A copy of Ontario's Statement of Defence to the Amended Statement of Claim, dated June 30, 2021; and a copy of Winnipeg's Statement of Defence to the Amended Statement of Claim, dated January 28, 2021;
- (f) The Affidavit of Chief Gerald Lewis, dated October 11, 2023; and
- (g) Such further and other evidence as counsel may advise and this Honourable Court may permit.

October 11, 2023

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