Court File No. CV-20-00644545-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ISKATEWIZAAGEGAN INDEPENDENT FIRST NATION

Plaintiff/Moving Party

-and-

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

Defendants/Responding Parties

FACTUM of the Plaintiff

DATE: October 11, 2023

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AND TO: **THIS HONOURABLE COURT**

FACTUM OF THE PLAINTIFF / MOVING PARTY
RE: HYBRID MOTION OF NOVEMBER 2023

PART I: OVERVIEW

I. Preliminary Note regarding Winnipeg's Position

1. On the eve of the delivery of the Plaintiff's Motion Materials (4:45pm on October 10, 2023), Winnipeg delivered a 44-page package (10 page letter + 34 page "appendix") raising issues completely unrelated to their original objections regarding the scope of the Plaintiff's claim. Instead, they raise new issues relating to other proceedings and the suggestion that IIFN has already been compensated for water-takings. The Plaintiff will not be substantively addressing the twelfth-hour delivery of these materials here, but will address them in reply.

II. Introduction

2. This motion arises in the context of a dispute between the Plaintiff/Moving Party, Iskatewizaagegan Independent First Nation ("IIFN"), and the Defendants/Respondents the City of Winnipeg ("Winnipeg") and His Majesty the King in Right of Ontario ("Ontario"), about the scope of the claim in this action. This dispute became apparent during the Examinations for Discovery of Timothy Shanks, Witness for Winnipeg, held on September 26-28 2022 and November 21, 2022, and Scott Lockhart, witness for Ontario, held on September 29-20, October 6-7, and 12, 2022. During these Examinations, the parties disagreed as to whether a specific category of harm – which the Plaintiff describes as "harm caused by steps taken by Ontario and Winnipeg to engineer the extinguishment of the Plaintiff's water rights within the Headlands area of Shoal Lake" – falls within the scope of this claim. The parties have agreed to jointly refer to this issue as the "Headlands Issue".
3. To that end, this Hybrid Motion encompasses three, interrelated aspects:
4. First, a Motion for Determination of an Issue Before Trial, pursuant to Rule 21.01(1)(a) of the Ontario *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194 ("*Rules*"), with the Parties

jointly seeking this Court's answer to a question of law, namely, whether the alleged harm described as the "Headlands Issue" gives rise to a head of damages within the scope of this claim, and is therefore the type of harm which can be claimed under the Compensation Provision (described below) upon which this action is predicated.

5. Second, a Motion for leave to Amend the Plaintiff's Statement of Claim, pursuant to Rule 26 of the *Rules,* in order to particularize the Headlands Issue and to conform with information obtained during the course of litigation, and in particular evidence adduced during the course of Examinations for Discovery ("Discoveries").
6. Third, a Motion to Compel Answers to questions relating to the Headlands Issue, which questions were refused during Discoveries by the Defendants/Respondents, based on their position that the Headlands Issue is not within the scope of this claim.
7. Because of both the timing and the narrow focus of this motion, which exclusively relates to whether the Headlands Issue is within scope, this motion is made without prejudice to: (a) the Plaintiff's further amending its Statement of Claim, as needed; (b) the Plaintiff seeking further determinations on other discrete issues under Rule 21; and (c) to the Plaintiff's stated intention to bring a further Motion to Compel Answers following the delivery of the Respondents' undertakings, which are due October 31, 2023.
8. The Plaintiff notes at the outset that, per Case Management directions and the Plaintiff's agreement to modify the timetable of delivery of Motion materials to allow the Respondents adequate time to review its materials in detail, the Plaintiff lacks the benefit of the Respondents' position and arguments on the issues addressed here. As previously indicated in correspondence of September 7, 2023 to Respondent Counsel, the Plaintiff respectfully

reserves the right to make full reply to the Respondents' factums, once they are served and the Plaintiff has the opportunity to review the Respondents' positions.

PART II: FACTS

I. Overview of the Proceedings

9. On December 10, 2019, IIFN filed a Notice of Application under Rule 14.05, requesting judicial guidance on whether it falls within the contemplated class of parties who can claim compensation under a Compensation Provision, described below, adopted by the Respondents with respect to the taking of water at Shoal Lake, which falls within IIFN's traditional and reserve territory.[1]

10. On July 9, 2020, the Hon. Justice Gans ordered on consent of the parties that IIFN "would be entitled to full compensation from the City of Winnipeg if it can be shown that IIFN's properties or lands have been taken, injuriously affected or in any way interfered with pursuant to the Order."[2] By way of this Consent Order, the Respondents conceded that the Plaintiff was eligible to make a claim for alleged harm caused by water-taking.

11. On July 24, 2020, filed its Statement of Claim for harm caused by the water-takings.[3] On September 24, 2020, Ontario brought a motion to strike the Plaintiff's claim for breach of fiduciary duty.[4] The Statement of Claim was amended on consent on December 14, 2020 and contained additions pertaining to Ontario's fiduciary duty.[5] The Motion to Strike was heard on January 20, 2021, by the Hon. Justice Perell, who released his decision dismissing

[1] Affidavit of Chief Lewis (October 11, 2023), at para 14, Exhibit "C" at 3.
[2] Ibid, Exhibit "D" at para 3.
[3] Ibid, para 13.
[4] Ibid, para 13.
[5] Ibid, para 13.

the motion on February 17, 2021.[6] A Fresh as Amended Statement of Claim was provided and issued by the Court on October 12, 2021.[7]

12. In the Motion to Strike decision, Perell J held, that Ontario was "responsible for fulfilling the promises of Treaty No. 3 when acting within the division of powers under the *Constitution Act, 1867*,"[8] and "[i]n 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."[9]

13. Perell J further recognized that IIFN's rights to hunt, fish, and gather on their traditional territories both on and off reserve were preserved under Treaty 3. Perell J stated that, "[b]y its own 1913 Order in Council, Ontario recognized that [IIFN] has a claim for injurious affectation and public nuisance with respect to the water taking from Shoal Lake."[10]

14. Finally, on September 17, 2021, Shoal Lake #40 First Nation served a Notice of Motion to Intervene.[11] The Motion did not succeed, and was dismissed on January 24, 2022.[12]

II. The Headlands Issue

a. 1873: Treaty #3 Signed between Crown and 28 Indigenous Nations

15. After multiple attempts to secure a treaty between the Rainy Lake/Lake of the Woods Indigenous Nations in 1869-1873, the Crown signed Treaty 3 on October 3, 1873 with 28 Indigenous Nations, including IIFN. The terms of the Treaty included the protection of the

[6] Affidavit of Chief Lewis (October 11 2023), para 13.
[7] Ibid, para 13.
[8] Ibid, Exhibit "E," para 19.
[9] Ibid, Exhibit "E," Paras 20, 95.
[10] Ibid, Exhibit "E," Para 91.
[11] Ibid, para 15.
[12] Ibid.

Indigenous Nations' ability to hunt and fish in their traditional territory, and that Canada would undertake to create reserve areas for their exclusive use, benefit and occupation.[13]

b. 1888: Decision on Ontario's retroactive "ownership of" Treaty #3 Lands

16. In *St Catherines Milling,*[14] the Privy Council determined that most of the lands contained within Treaty 3 belonged to Ontario, and that this decision was retroactive to 1867 – predating Treaty 3.[15] The effect, under colonial laws, was that Canada negotiated a treaty and set apart reserves for the Indigenous signatories using lands that belonged to Ontario without Ontario's consent.

c. 1891: Mirror Acts to Settle the Jurisdictional Issue

17. In light of the above, Canada and Ontario enacted mirror acts in 1891 in preparation for a statutory agreement outlining responsibility for reserves. The 1891 Acts acknowledged that Ontario was required to consent to and transfer the reserves of Treaty 3 to Canada.[16]

d. 1894: Ontario Recognizes the Headlands Areas are part of Treaty 3 Reserves

18. Pursuant to the 1891 Acts, a statutory agreement was signed between Canada and Ontario in 1894 (the "1894 Agreement").[17] According to the Provincial 1891 Act, "such agreement, when entered into, and every matter and thing therein shall be binding on this Province as if the same were specified and set forth in an Act of this Legislature."[18]

19. Section 4 of the 1894 Agreement states as follows:

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[13] *Treaty 3 between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions*, 3 October 1873, online: Government of Canada <aadnc-aandc.gc.ca> [perma.cc/NN5G-4J6T].
[14] *St. Catherine's Milling and Lumber Company v The Queen (Ontario)* [1888] UKPC 70 (12 December 1888) 14 App Cas 46, (1889) LR 14 App Cas 46, [1888] UKPC 70.
[15] Ibid, at 5.
[16] *An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indians Lands*, SO 1891, c 3,[16] 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").
[17] 1894 Agreement, signed 16 April 1894 between Thomas Mayne Daly and John Morison Gibson, s. 4
[18] *An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indians Lands*, SO 1891, c 3, s.1.

> 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.[19]

e. 1913: The Compensation Provision comes into Force

20. Because Shoal Lake straddles two provinces and is connected to the international boundary water of Lake of the Woods, Winnipeg sought permission to access Shoal Lake from various bodies in and around 1913, including the government of Ontario.

21. On October 2, 1913, the Executive Council Office of Ontario passed an Order in Council (the "1913 Ontario OiC" or "OiC") authorizing Winnipeg to take water from Shoal Lake for "domestic and municipal purposes," subject to certain terms.[20]

22. The first term of the 1913 Ontario OiC was the Compensation Provision (referred to above), which indicated 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…."[21]

f. January 1914: The International joint Commission Adopts the 1913 Ontario OiC

23. On January 14, 1914, the International Joint Commission ("IJC") - a Canadian-American commission overseeing regulation of specific boundary waters - issued its Order of Approval for Winnipeg's application to take water from Shoal Lake, adopting the 1913 Ontario OiC in its entirety, including the Compensation Provision.[22] Through Winnipeg's

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[19] 1894 Agreement, signed 16 April 1894 between Thomas Mayne Daly and John Morison Gibson, s.4. Emphasis Added.
[20] Order of the Executive Council Office of Ontario, 2 October 1913.
[21] Ibid, s.1 ["Compensation Provision"]
[22] Order of Approval of the Diversion of the Waters of the Lake of the Woods and Shoal Lake for Sanitary and Domestic Purposes, 14 January 1914, International Joint Commission.

application, the IJC determined that Shoal Lake, as a part of the Lake of the Woods, was a boundary water and therefore the aqueduct must be overseen by the IJC.

g. December 1914: The Defendants realize the Shoal Lake headlands are protected by Treaty

24. After the Compensation Provision was approved and adopted by both Ontario and the IJC, Ontario and Winnipeg realized that the 1894 Agreement was a direct threat to Winnipeg's aqueduct, now well under construction at the Shoal Lake headlands. On December 15, 1914, Ontario's Deputy Minister for the Department of Lands, Forests and Mines, Mr. Aubrey White, wrote to Deputy Superintendent-General of the Department of Indian Affairs, Mr. Duncan Campbell Scott and stated, among other things, that section 4 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 [...]."[23]

25. Mr. Scott replied on December 30, 1914, and agreed, stating "the points you have raised are important and the difficulties you anticipate must be removed [...] [W]e would require to repeal the statute of 1894 […] we should say nothing about water or fisheries […]."[24] However, the 1894 Agreement was never repealed, and remains in effect to this day.

h. 1915: Ontario Unilaterally Strips IIFN of the Headlands

26. Following the informal agreement between Mr. Scott and Mr. White, Ontario adopted *An Act to confirm the title of the Government of Canada to Certain Lands and Indian Lands*, SO 1915, c 12, intended to confirm and transfer all reserve lands of Treaty 3 to Canada. However, in light of its desire to facilitate water-takings at the headlands area of Shoal Lake specifically, the 1915 Ontario Act – in direct contravention of section 4 of the 1894

[23] Affidavit of Chief Lewis (October 11, 2023), Exhibit "H" (Exhibit 7J of the Examination of Timothy Shanks).
[24] Affidavit of Chief Lewis (October 11, 2023), Exhibit "H" (Exhibit 7K of the Examination of Timothy Shanks).

Agreement – kept all Headlands areas in Treaty 3 under Ontario's control, extinguishing the rights of all First Nations, including the Plaintiff, to their Headlands areas.[25]

27. This unilateral extinguishment of all Indigenous rights to Headlands areas, which occurred *after* the Compensation Provision was operative, was done without the knowledge or consent of the Plaintiff, and was expressly meant to enable the Shoal Lake aqueduct scheme.

i. 1989-1990: Shoal Lake #40 First Nation Agrees to Compensation for Water-Takings.

28. As this Court is already aware, the neighbouring community of Shoal Lake #40 First Nation has directly received more than $9 million in compensation arising from the taking of water from Shoal Lake. The Plaintiff, on the other hand, has never been compensated for the water-taking through any agreement, claim, or any other process, including Canada's "Specific Claim" or "Special Claim" processes, which the Plaintiff views as dysfunctional and incapable of providing justice to Indigenous peoples.[26]

j. 2010: Manitoba Public Utility Board Publicizes Winnipeg's Billion Dollar Profits from Aqueduct

29. Since 1915, Winnipeg has continued to take water-takings from Shoal Lake without the consent of IIFN or any compensation. In 2010, the Public Utility Board (PUB) conducted an inquiry into the Winnipeg water and sewer utility, reporting that as of 2012, Winnipeg, the only city in Manitoba to set its own rates, had accumulated approximately $1.2 Billion dollars in revenue from its Shoal Lake water-takings.[27] The PUB Report raised serious concerns about Winnipeg "cross-subsidizing" other City expenses using this revenue.[28]

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[25] *An Act to confirm the title of the Government of Canada to Certain Lands and Indian Lands*, SO 1915, c 12 (the "1915 Ontario Act").
[26] *Iskatewizaagegan No. 39 v. The City of Winnipeg*, 2022 ONSC 535, at para 8. ["SL40 Intervention"].
[27] A HEARING IN REGARDS TO THE CITY OF WINNIPEG'S WATER & SEWER UTILITIES, Public Utilities Board Order No. 56/12, May 3, 2012 (COW Production #1182).
[28] A HEARING IN REGARDS TO THE CITY OF WINNIPEG'S WATER & SEWER UTILITIES, Public Utilities Board Order No. 56/12, May 3, 2012 (COW Production #1182).

k. The Headlands Issue Crystallizes in Preparation for Discoveries

30. On October 14, 2020, the Plaintiff retained expert historian Dr. Kenton Storey to look generally at issues relating to the historical context of the plan to take water from Shoal Lake, the purpose of the 1913 OiC, and how the 1913 OiC was relied on at the IJC.[29]

31. In March 2022, Dr. Storey delivered a draft historical report to the Plaintiff.[30] Following a careful, months' long review of the draft report and the evidence uncovered in the course of Dr. Storey's research, the Plaintiff identified various issues to pursue on Discoveries, including, but not limited to, the history of the 1913 Ontario OiC, Winnipeg's 1968 application to the IJC to draw more water, and the Headlands Issue.

32. Ultimately, the Plaintiff identified that newly-unearthed information about the 1894 Agreement, the correspondence between Mr. Scott and Mr. White, and the redefining of reserve/headlands boundaries raised serious questions about the alleged harm caused to IIFN's reserve lands. Following its duty to diligently disclose its position and the documents upon which it intended to rely on Discoveries, the Plaintiff adduced a package of Headlands-related documents to the Respondents shortly before Discoveries commenced.[31]

l. Examinations For Discovery: The Respondents' Blanket Refusals

33. The Headlands Issue was a prominent issue within Discoveries to ascertain the relevant knowledge of each party. The defendants unreasonably refused to engage with the Issue whatsoever, giving only blanket refusals to every question which, in their view, touched on said Issue. These questions related, generally to: (a) the 1894 Agreement; (b) the 1914 IJC Hearing; (c) the 1914 Scott-White letters; (d) the 1915 Ontario Act; (e) the 1913 Ontario OiC; (f) letters sent by Scott to J.G Harvey, Solicitor for Winnipeg, in 1914; (g) Aboriginal

[29] Affidavit of Chief Lewis (October 11, 2023), para 12.
[30] Affidavit of Chief Lewis (October 11, 2023), para 19.
[31] Affidavit of Chief Lewis (October 11 2023), para 21.

and Treaty Rights to the Shoal Lake Area; (h) Reconciliation; (i) the Duty of Candour; and (j) questions relating generally to injurious affection and/or interference with lands and properties at Shoal Lake.

m. The Defendants Offer Differing Positions on the Headlands Issue

34. On March 30, 2023, the Plaintiff wrote to the Respondent Ontario, outlining again its position on the Issue, and advising of recent Freedom of Information requests made by its expert seeking documents on the Issue that were being withheld.[32] Ontario replied on April 20, 2023, stating its view that the Headlands Issue was not within scope of this claim, and the question of scope would need to be adjudicated. Ontario also opined that the Issue is a land claim, and that Canada was a required party.[33] Winnipeg replied on April 21, 2023, agreeing with Ontario and indicating any amendment should be made through the *Rules.*[34]
35. Aside from correspondence such as the above (and the late-arriving October 10th correspondence from Winnipeg), neither Respondent's positions on this Issue have been properly put to either the Plaintiff or the Court.

PART III: ISSUES

36. The Parties have jointly agreed to raise three issues in this Hybrid Motion:
37. Is the alleged harm caused by steps taken by Ontario and Winnipeg to engineer the extinguishment of the Plaintiff's water rights at the Headlands of Shoal Lake within the scope of the Compensation Provision and therefore within the scope of this claim? [**Motion For Determination of an Issue, Rule 21.01(1)(a)**] ;

[32] Affidavit of Chief Lewis (October 11, 2023), para 31.
[33] Ibid, para 33.
[34] Ibid, para 34.

38. Should the Court grant leave to the Plaintiff to Amend its Statement of Claim, in order to particularize the Headlands Issue, thereby conforming with information adduced during Discoveries? [**Motion to Amend Pleadings, Rule 26**]; and

39. Should the Respondents be compelled to answer questions relating to the Headlands Issue, which they previously refused to answer on the basis of their view that said Issue was not within scope of this claim? [**Motion to Compel Answers, Rule 37 re. Failure to Answer on Discovery under Rule 31.07**].

40. Additionally, as described below, the overriding consideration on this Motion is whether, in granting it, the Court is promoting and upholding the interrelated principles of the Honour of the Crown, Reconciliation, and the Crown's fiduciary duty towards the Plaintiff.

PART IV: LAW AND ARGUMENT

I. Overview of Rule 21.01(1)(a): Determination of an Issue Before Trial

a. The General Rule: promoting judicial economy

41. Under Rule 21.01(1)(a), any Party may bring a motion for the Court's "determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs."[35]

42. If the "response to the question posed on the motion" is likely to significantly advance the litigation, then the Court shall make the determination in the moving party's favour, thereby allowing it to proceed to be heard on the merits.[36] That said, if the Court determines that a Party took an unreasonably long time to bring its motion, it can dismiss the motion.[37]

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[35] Rule 21.01(1)(a).
[36] *Harris v. Ontario (Community Safety & Correctional Services),* 2017 ONCA 750 , at para 7.
[37] *Colonna v. Bell Canada* (1993), 15 CPC (3d) 65 (Ont. Gen. Div.). [**Not available online, copy included in Book of Authorities].**

43. Additionally, to the extent there is any novelty or overt complexity to the specific Issue raised here – which the Plaintiff contends is not complex at all – the Court should "be generous and err on the side of permitting a novel but arguable claim to proceed to trial[.]"[38]

b. The Issue must arise from the pleadings, assuming the facts as pleaded are true

44. The facts do not need to be settled in order to adjudicate the question of law. For purposes of the motion, facts pleaded by the Plaintiff are assumed to be true, unless they are "patently ridiculous or manifestly incapable of proof".[39] The Statement of Claim should therefore be read "as generously as possible" to accommodate any drafting inadequacies.[40]

45. Relatedly, the issue to be determined must "arise" from the pleadings, in the sense that it can be inferred from the Statement of Claim, even if not explicitly set out there.[41]

46. Although the Court must accept as true the facts as pleaded, it may disregard conclusory statements of fact which are "manifestly incapable of being proven", meaning, "bald conclusory statements of fact, unsupported by material facts."[42]

47. Finally, in the event the Parties disagree on some facts, so long as the question of law can be "clearly isolated" from any "contested issues of fact in the case", then the Court should address it and proceed as if those facts are true.[43] In any event, the Court must always proceed as if the facts are true, for purposes of answering the legal question.

c. The Issue should be permitted to proceed to trial, unless it is "Plain and Obvious" it is doomed to fail

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[38] *R. v. Imperial Tobacco Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 21.
[39] *Taylor v. Hanley Hospitality Inc.*, 2022 ONCA 376, at para 24 ; *Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57, at para. 14.
[40] Ibid.
[41] *PDC 3 Limited v. Bregman + Hamann Architects*, 2001 CanLII 38745 (ON CA) , at para 5.
[42] *Rausch v. Pickering (City)*, 2013 ONCA 740, at para 34 ; and *Trillium Power Wind Corporation v. Ontario (Natural Resources)*, 2013 ONCA 683, at para 31.
[43] *R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.* (C.A.), 5 O.R. (3d) 778 [1991] O.J. No. 1962, at p. 6. [**No hyperlink available; copy provided in Plaintiff's BoA].**

48. The principles applicable to a Rule 21.01(1)(a) Motion for Determination of an Issue are the same as on a 21.01(1)(b) Motion to Strike. In particular, both start from the low threshold test which states that a Court can only strike a claim or portion of a claim if it is "plain and obvious" that it cannot succeed.[44]

49. In other words, the Court shall only refuse to grant the determination in the Party's favour – whether a question of scope, or limitations, or some other legal question – if it is "plain and obvious" that said Issue is doomed to fail on the merits.[45]

50. This approach "unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial", ensuring that "where a reasonable prospect of success exists, the matter should be allowed to proceed to trial[.]"[46]

51. So long as the Plaintiff shows it will be able to present a "substantive" case on the Issue during the merits stage, the determination should be granted (which, on the herein Motion, means a finding that the specified Issue is in scope) and allowed to proceed to trial.[47]

d. The motion must raise a question of law

52. Finally, the Rule 21.01(1)(a) aspect of this Hybrid Motion is limited to questions of law and cannot be relied upon to resolve questions of fact, or questions of mixed fact and law.[48]

53. To that end, no evidence is admissible under 21.01(1)(a) except with leave of a judge or on consent,[49] however, the Plaintiff is entitled to rely on documents which already form part

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[44] *R. v. Imperial Tobacco Ltd*., 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 17.
[45] *MacDonald v. Ontario Hydro 1994, supra* at "Analysis".
[46] *R. v. Imperial Tobacco Ltd*., 2011 SCC 42, at para 17, 19.
[47] *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at p. 980.
[48] *Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57, at para 30.
[49] Ibid, at para 13 ; *Boutin v. Co-Operators Life Insurance Company*, 1999 CanLII 2071 (ON CA) , at p. 10 ; *Taylor v. Hanley Hospitality Inc*., supra n. 41, at para 23.

of the Court record, which by virtue of Rule 25.06(7) are deemed to be incorporated into the Statement of Claim by reference and which form an integral part of a Plaintiff's claim.[50]

II. Applying Rule 21.01(1)(a) to this Motion

a. This Motion Supports the Goal of Judicial Economy

54. As noted, this Hybrid Motion has been brought by joint agreement of the Parties, who agree that this Honourable Court is best situated to bring clarity to the unresolved question of the role of the Headlands Issue in this claim.

55. That said, this Court's determination permitting the Plaintiff to particularize one category of harm – the alleged harm caused by redrawing reserve boundaries and the attendant harm to the Plaintiff's rights at the headlands – alongside a longer list of harms, must, by any definition be in the interests of judicial economy. It will clarify a contested point of law, allowing the Headlands Issue to proceed with clear definition to a merits consideration, rather than leaving the Parties to litigate various alternatives at trial. The inverse – deciding at this early stage that the Headlands Issue can never be pursued – can only occur if this Court finds that a claim for headlands-related harm is doomed to fail, no matter what evidence may be adduced at the merits trial.

56. Moreover, the Plaintiff has been diligent in bringing this Motion to Court in a timely fashion, having first raised it in Discoveries, then followed up in correspondence to the Court and the parties, and then during Case Management where the Parties jointly agreed to have the issue addressed on this Motion. Similarly, this Motion does not rely on evidence other than what is already found in the Court record, including transcripts of Discoveries.

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[50] *Montreal Trust Co. of Canada v. Toronto-Dominion Bank*, [1992] O.J. No. 1274, at p. [**Hyperlink not available; copy included in Plaintiff BoA**].

57. Finally, to the extent there is anything novel about claiming this category of harm under the Compensation Provision (which to the Plaintiff's knowledge has not been tested in Court), the presumption favours allowing this potentially novel claim to proceed to trial where it can be tested on merits with benefit of a full evidentiary record.

b. The issue arises from the pleadings (assuming the facts as pleaded are true)

58. The Plaintiff has maintained the position that harm to the headlands has always been within scope. The Statement of Claim has, since its initial issuance on July 24, 2020, clearly outlined the Plaintiff's position that the alleged harm includes harm to "all lands, including lands under water, set aside for the Nation under the *Indian Act*, and under Treaty #3."[51]

59. By definition, this category described in the Statement of Claim must include that area of land – the headlands – which the Plaintiff alleges was taken away from it, without its knowledge, in apparent contravention of Treaty 3, the 1894 Agreement, and the Plaintiff's reserve allocation under the *Indian Act*, by way of an alleged scheme by the Defendants. Assuming (as this Court is required) this is true, then at minimum the allegation of such harm should be allowed to proceed to be tested on merits.

c. The Determination passes the low threshold of the "Plain and Obvious" test

60. At its heart, this action is centered on one question: has the Plaintiff suffered harm as a result of Winnipeg's water-takings? If so, then the Compensation Provision, which was deliberately broad in its scope, requires that full compensation be paid to the Plaintiff.[52]

61. On its face, it is "plain and obvious" that the Compensation Provision was never intended to restrict the types of harm that could be claimed, given its broad terms.[53] At minimum, a party alleging harm should at least be able to claim harm relating to the loss of its reserve

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[51] IIFN, Fresh as Amended Statement of Claim (August 24, 2021), at para 67. Emphasis added.
[52] *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City)*, 2021 ONSC 1209, at para 23.
[53] Ibid, at para 23.

lands, if it can be shown that loss is a result of the water-takings. In a sense, the Headlands Issue – assuming the facts as pleaded are true – may even be the "original" harm of the water-takings: but for Winnipeg's desire to take water, and Ontario's desire to facilitate those water-takings, the Plaintiff's headlands would never have been taken from them.

62. That said, all this Court must decide is whether, if the Headlands Issue is within scope, it is "plain and obvious" that the claim for harm associated with the Headlands Issue is doomed to fail. If it is not plain and obvious it will fail, then the Determination should be made to allow it to proceed to trial.

63. The Plaintiff submits it simply cannot be the case the Headlands Issue is "doomed to fail". Alleged harm caused by a scheme to extinguish its rights in order to facilitate water-takings represents a distinct, and potentially significant category of harm, different from harms to, for example, water rights, riparian rights, or land use rights (which are also all pleaded separately in this action). Assuming the facts as pleaded are eventually proven to be true, it is not "plain and obvious" that the Plaintiff should never be compensated for the harm it suffered when it lost the headlands in order for Winnipeg to take water.

64. The timing of the alleged Headlands scheme is significant – as noted above, the Compensation Provision, with its catch-all phrase "full compensation", was adopted before Ontario allegedly engineered the redrawing of reserve boundaries. Assuming the facts are true, this means Ontario knowingly caused harm to the Plaintiff's rights to a portion of its reserve land in order to facilitate water-takings, despite knowledge of a Compensation Provision which committed to full compensation for harms related to water-takings.

65. Indeed, as discussed further below, this Court has already suggested that the Compensation Provision covers harms associated with the Crown's fiduciary duty on "expropriation of an

interest in reserve lands, reserve creation, taking up treaty lands, and protecting existing reserves from exploitation."[54]

d. The Motion raises a question of law

66. Finally, by jointly consenting to bring this issue for determination by the Court, the Respondents have signaled their agreement that the question only entails a question of law, which is: does a given category of harm fall within the scope of the harm contemplated in the Compensation Provision at the heart of this claim?

67. While there may be some facts in dispute, the question of law itself does not turn on any questions of fact, or even questions of mixed fact and law. All the parties ask is: if harm to the Plaintiff's headlands, as alleged, actually occurred, is that harm capable of being claimed within the scope of the Compensation Provision, and therefore this action? The Court need not rule on whether harm occurred, the degree of harm, or issues of compensation.

III. Overview of Rule 26: Motion to Amend Pleadings

a. The General Rule: pleading amendments shall be granted

68. A party may amend its pleadings either (a) without leave, if the pleadings have not yet closed, (b) on consent of all parties, or (c) with leave of the court.

69. The bar for granting an amendment is a low one. An amendment shall be granted unless it results in prejudice that cannot be compensated for by costs or an adjournment. The burden is on the opposing parties to demonstrate, on a balance of probabilities, that they will experience such "non-compensable" prejudice. [55]

70. Additionally, the proposed amendment must meet the low threshold of describing an issue worthy of trial that is *prima facie* meritorious. However, no amendment should be allowed

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[54] *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City)*, 2021 ONSC 1209, at paras 25, 107.
[55] Rule 26.01 ; *Phyzex Technologies Inc. v. Correct Development Corporation*, 2019 ONSC 278, at para 109.

which, if originally pleaded, would have been struck. In any event, the proposed amendment must contain sufficient particulars.[56]

71. The Court may also refuse an amendment if it is shown to be "scandalous, frivolous, vexatious" or an abuse of the court's process, or it discloses no reasonable cause of action.[57]

72. Furthermore, even if the issue was "not raised at first instance", the Court must grant some latitude for consideration of issues described in an amended pleading, provided that the other party is afforded procedural fairness and is not prejudiced.[58]

73. Finally, if the Respondents do claim non-compensable "prejudice", "mere speculation" is insufficient to establish the degree of prejudice required to deny the motion.[59]

b. Amendments should generally be granted if they are intended to conform with information obtained through the litigation

74. Amendments to conform with evidence obtained in the course of litigation are "not uncommon". Courts generally grant leave to amend to conform to information obtained in the course of litigation, in particular to evidence adduced on Discoveries, because such amendments are intended to "rationalize the pleadings to conform to the position being developed and taken," aligning with the underlying goal of promoting judicial economy.[60]

75. Factors weighing in favour of such an amendment include: whether proposed amendments are "not complicated", "simply reflect" evidence obtained in the course of Discoveries, or if the moving party has taken steps to inform opposing Parties of its position on the issue.[61]

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[56] *Marks v. Ottawa (City)*, 2011 ONCA 248, at para 19 ; *Fram Elgin Mills 90 Inc. v. Romandale Farms Limited*, 2016 ONCA 404, at para 36.
[57] *Andersen Consulting v. Canada (Attorney General)*, 2001 CanLII 8587 (ON CA), at para 37.
[58] *Hodge v. Neinstein*, 2017 ONCA 494, at para 189.
[59] *Steel Tree Structures Ltd. v Gemco Solar Inc*., 2016 ONSC 955, at para 25 ; *Stickel v Lezzaik*, 2015 ONSC 4659, at para 21.
[60] *Apotex Inc. v. Abbott Laboratories Limited*, 2018 ONSC 7736, at para 42 ; *Stickel v Lezzaik*, supra n. 61, at para 28 ; *Birkett v. Astris Energi Inc*., 2004 CanLII 7855, at para 68 ; *Faridani v. Stubbert*, 2013 ONSC 1233, at para 15.
[61] *Computron Systems International Inc. v. Ladhani et al*., 2020 ONSC 3188, at para 40.

76. If the moving party's counsel gave "timely notice to the other parties" of their intent to move to amend their claim, this favours granting the proposed amendment.[62]

77. Amendments can occur in late stages of an action, even many years in, if it can be shown that amendments are intended to conform pleadings to facts discovered in litigation.[63]

78. This reflects the general principle that actions should be decided on their merits, based on the role of the Court as a court of equity and in the interests of access to justice.[64]

79. By the same token, an amendment should be denied only "in the clearest of cases, when it is plain and obvious that no tenable cause of action is possible on the facts as alleged."[65]

80. The Court's sole interest is whether granting the amendment promotes clarity, without concerning itself whether the amendment helps a party "frame" its case to better succeed.[66]

81. The Court must disregard many other considerations despite a possible temptation to factor them, including: (1) whether the proposed amendments arise from a myopia of counsel, a surprise in the evidence or from any other cause; (2) whether the proposed amendments would substantially prolong the trial; (3) whether the locale of the court is burdened with a long trial list; (4) frustration of and inconvenience to the court and opposing counsel; (5) the impact on the length and complexity of the trial; (6) whether or not the amendments are substantive; and (7) whether the amendments will add to the cost of the litigation.[67]

82. Further factors in favour of granting leave to amend include: consistency with the pleadings already filed by the party; consistency with evidence previously tendered by the party,

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[62] Ibid, at para 38.
[63] *Boyes Homes Inc. v. Payne*, 2013 ONSC 1056, at paras 17, 28. **In this case, the amendment was granted eight years into ongoing litigation.**
[64] *Spar Roofing & Metal Supplies Limited v. Glynn*, 2016 ONCA 296, at para 36 ; *Chohan v Chohan*, 2023 BCSC 800, at para 26.
[65] *Mitchell v. Lewis*, 2016 ONCA 903, at para 21.
[66] *Spar Roofing*, supra n. 66, at para 36.
[67] *Auto Workers' Village (St. Catharines) Ltd. v. Blaney et al* , [1997] O.J. No. 6405, at para 11. [**Hyperlink not available; copy included in Plaintiff BoA]** .

including evidence tendered during the Discoveries process; and/or (8) the amendment is necessary for the purpose of determining the issues raised or relying upon the pleadings.[68]

83. Importantly, the Court should not engage in any evaluation of the merits of the evidence the Party purports to rely on in its amended pleadings. Proposed amendments are therefore to be read generously to allow for deficiencies in drafting.[69]

84. That said, Courts will, however, be skeptical if an amendment goes beyond particularizing a claim, and instead attempts to add on a new claim with a new cause of action.[70]

IV. Applying Rule 26 to this Motion

a. The proposed amendment will cause no prejudice

85. There has already been one amendment to the Statement of Claim in this case; on December 15, 2020, an amended Statement of Claim was issued on consent, clarifying aspects of the Plaintiff's claims regarding Ontario's fiduciary duty. That said, to the extent the Respondents may claim prejudice arising from this latest amendment, the onus lies on the Respondents to convince this Court that (a) prejudice will actually arise, and (b) that such prejudice could not be compensated by costs or adjournment.

86. On that note, Ontario has in the past indicated its position that IIFN is presently seeking or has previously received compensation in respect of the water-takings. In response, the Plaintiff denies that it has ever received (or is presently seeking) such compensation, and there is therefore no prejudice that arises on that point. In any event, the protections against "double recovery" of compensation for similar harm simply mean that this Court can, if absolutely necessary – and only after the Defendants prove that IIFN has been compensated

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[68] *Sperring v. Shutiak*, 2023 BCCA 54, at para 95.
[69] *Brookfield Financial Real Estate v. Azorim Canada (Adelaide Street) Inc*., 2012 ONSC 3818, at para 23.
[70] *Faridani v. Stubbert*, supra n. 62, at para 15.

on the Headlands Issue in some other claim – reduce damages relative to that claim. This reflects the principle that a "plaintiff should receive full compensation and not recover less than that which he or she is entitled, i.e. by being subjected unfairly to deductions" based on "uncertainty and speculation". The Respondents carry "a very strict onus of proof" here, and would need to show it is "patently clear" that it is necessary to reduce damages in this action; evidence of mere "likelihood" or "probability" will not be sufficient.[71]

b. The proposed amendment conforms with the latest evidence obtained in the course of litigation

87. The Headlands Issue was already provided for in the claim within the references to harm to reserve lands, as noted. However, once the issue crystallized, the Plaintiff diligently informed the Respondents of historical materials obtained by its expert, as evidence to be the subject of Discoveries. It then followed up by posing extensive questions – and offering extensive commentary – outlining its position on the Headlands Issue.

88. As noted above, the Statement of Claim has a clear statement of the Plaintiff's position on the territory affected by the water-taking, which includes its reserve lands as allocated under Treaty 3, as well as the following area, which encompasses the headlands of Shoal Lake: "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.[72]

[71] *El-Khodr v. Lackie*, 2017 ONCA 716, at para 31.
[72] IIFN, Fresh as Amended Statement of Claim (August 24, 2021), at para 15.

89. The Statement of Claim specifies how, in constructing its aqueduct, Winnipeg constructed "a small channel" in said headlands, i.e., "between Snowshoe Bay and Indian Bay, which would divert water from Falcon River to Snowshoe Bay as opposed to Indian Bay."[73]

90. It is clear that the Plaintiff was exceptionally diligent in ensuring that it wished to pursue this Headlands Issue at least by the time of Examinations for Discovery. As outlined above in the Facts section*: (1)* At the issuance of the Claim, the Plaintiff was generally aware that its original Treaty 3 reserve boundaries as well as the headlands areas had been negatively affected by the water-taking; *(2)* An expert was retained in October 2020 to look into the history of the approval of the aqueduct, focusing on the 1913 OiC; *(3)* Through said research, historical documents were uncovered that pointed to an apparent scheme to extinguish the Plaintiff's rights at the headlands; *(4)* the Plaintiff put the relevant documents directly to the Respondents prior to Discoveries, signaling it would pursue a line of questioning on this issue; and *(5)* During Discoveries, Plaintiff counsel extensively outlined its position on this Headlands Issue, with opposing counsel responding with only general, blanket refusals to any question they viewed as relating to the Headlands Issue.

91. Plaintiff counsel referred to the Headlands Issue no less than eighteen times during Examinations, taking particular time to outline the Plaintiff position on September 29, 2022 during the examination of Mr. Lockhart for Ontario, as follows:

> Section 4 of the 1894 statutory agreement confers rights… Those rights remained in place, including the water rights granted pursuant to section 4 and the rights to the lake beds granted pursuant to section 4 up until actions were taken to eliminate those rights. The plaintiff's case is that Ontario engineered the unconscionable bargain to remove those rights from treaty entitlements without any notice whatsoever to the First Nations, including Iskatewizaagegan No. 39. More particularly, the record reflects, through Exhibit 7J, the correspondence from Deputy Minister Aubrey White, that Ontario engineered the unconscionable deprivation of these rights out of a

[73] Fresh as Amended Statement of Claim, *Iskatewizaagegan Independent First Nation v Winnipeg and Ontario*, CV-20-00644545-0000, 12 October 2021, para 61.

motivation to enable and facilitate the application of Winnipeg to divert the water supply from Shoal Lake.[74]

92. In sum, the Plaintiff has continuously and diligently made the Respondents aware of its position on the Headlands Issue once it properly crystallized in the course of litigation, and seeks only to have the Court confirm what should already be "plain and obvious": that this Issue forms a part of this Action and the Plaintiff can amend its pleadings accordingly.

V. Overview of Rule 37.10: Motion to Compel Answers and Rule 31.07: Failure to Answer on Discovery

a. The General Rule: Parties must respond to all questions which are relevant

93. Under Rule 31.07, any Party is deemed to fail to answer a question if, (a) the party refuses to answer the question, whether on the grounds of privilege or otherwise; (b) the party indicates that the question will be considered or taken under advisement, but no answer is provided within 60 days after the response; or (c) the party undertakes to answer the question, but no answer is provided within 60 days after the response.[75]

94. In response, the opposing party is entitled to bring a Motion to Compel Answers, providing a Refusals and Undertakings Chart as outlined in Rule 37.10(10).[76]

95. Discovery questions must be relevant to the issues as defined by the pleadings. If the questions are "relevant to any matter in issue", then the party being questioned is required to answer them. The witness on an examination for discovery may be questioned about facts as well as the party's position on questions of law. Additionally, the Court can compel undertakings to be given on examinations for discovery because the person examined is required to "inform himself or herself about the matters in issue."[77]

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[74] Transcript, Examination of S. Lockhart (Ontario), September 29, 2022, at p. 103, line 16. Emphasis added.
[75] Rule 31.07 (1): Failure to Answer on Discovery.
[76] Rule 37.10(10).
[77] *Ontario v. Rothmans Inc*., 2011 ONSC 2504, at paras 129-132.

96. However, the party is not permitted to go beyond the pleadings to try to find a claim or defense that has not been pleaded; this is sometimes called a "fishing expedition".[78]

VI. Applying the Refusals rules to this Hybrid Motion

97. The sole issue to be determined on this aspect of the Hybrid motion is whether the Respondents are required to answer questions relating to the Headlands Issue.

a. The Respondents improperly refused questions on the Headlands Issue

98. As set out in the Refusals Chart in the Motion Record, the Respondents refused sixty-one (61) total questions relating to the Headlands.

99. If this Court finds that the Headlands Issue is in scope, then it must follow that the Refusals Motion should be granted, i.e. that those questions are all relevant, as follows:

a. Questions about the 1894 Agreement are relevant because they directly bear on the Crown's acknowledgement and protection of the Plaintiff's Headlands areas;
b. Questions about the 1914 IJC Hearing are relevant because they relate to the Compensation Provision generally, and specifically in relation to the Headlands area;
c. Questions about the 1914 Scott-White letters are relevant because they directly bear on the alleged scheme by the Respondents to engineer the extinguishment of the Plaintiff's rights in the Headlands area;
d. Questions about the 1915 Ontario Act are relevant because they directly bear on the removal of the Headlands areas from Treaty 3 reserves and IIFN's reserve specifically;
e. Questions about the 1913 Ontario OiC are relevant because they directly bear on the Compensation Provision, generally and specifically in relation to the Headlands areas;
f. Questions about the 1914 Scott-Harvey letters are relevant because they directly bear on Winnipeg's involvement in the alleged scheme to engineer the extinguishment of the Plaintiff's rights in the Headlands areas;
g. Questions about Aboriginal and Treaty Rights relating to the Headlands are generally relevant because the parties to this litigation include the Crown and Aboriginal Peoples;

[78] *Ontario v. Rothmans Inc*., supra n. 79, at para 129.

h. Questions about the duty of candour in disclosing information are relevant because they relate to duties undertaken and subsequently refused by the defendants; and,

i. Questions generally about the taking of, injurious affectation to and/or interference provisions are relevant because they bear on the application of the Compensation Provision to the Headlands Issue.

100. Finally, even if this Court finds that at the time of Discoveries, the Respondents might reasonably have believed that Headlands Issue was not in scope, if the Court holds today that it is in scope (as the Plaintiff has always maintained), then the Respondents must be compelled to answer the Headlands questions, now that the Court has clarified the scope.

VII. The Honour of the Crown and its Fiduciary Duty weigh in favour of the Motion

101. It is important to understand that the Compensation Provision does not require that the alleged harm is caused by the action (or inaction) of either of the Respondents. This is on purpose: by remaining deliberately neutral on the source of any alleged harm, the Compensation Provision ensures that, if harm does occur, then there is a mechanism for compensation. That said, as set out below, it is clearly apparent that the allegations raised on the Headlands Issue directly implicate actions by the Crown, and therefore invite strong application of the Honour of the Crown, Reconciliation, and the Fiduciary Duty.

102. That said, there is no doubt that the Crown's *sui generis* fiduciary duty towards the Plaintiff as an Aboriginal party adds an important, constitutionally binding lens to the Court's considerations of this Motion. Because the alleged harm, if proven, arises from alleged conduct of the Ontario Crown, considerations relating to the Honour of the Crown, Reconciliation, and the Crown's fiduciary duty towards the Plaintiff all come into play.

103. As this Court observed in dismissing Ontario's motion under Rule 21.01(1)(b):

104. The Crown's fiduciary obligations are linked to the honour of the Crown. When a government, be it federal or a provincial government, exercises Crown power, the exercise of that power is burdened by Crown obligations toward the Aboriginal people in question.[79]

> …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.[80]

105. Importantly this Court also found sufficient Aboriginal interests giving rise to a fiduciary duty as including property rights and interests akin to property rights.[81]

106. When a government, be it the federal or a provincial government, exercises Crown power it is burdened by Crown obligations toward the Aboriginal people in question.[82]

107. In viewing this issue, the alleged actions of the Ontario Crown must implicate the fiduciary duty. There is a clear property interest – the headlands are a defined land area where the Plaintiff historically exercised a wealth of rights (Traditional Rights, Land Use Rights, Water/Riparian Right, Treaty Rights, among others) – and there is a clear exercise of Crown control with respect to both defining reserve boundaries (the 1894 Agreement), and later redrawing those boundaries to exclude headlands (the 1915 Ontario Act).

108. Reconciliation is the objective of the legal approach to treaty rights and the "overarching purpose" of treaty making and promises. In addressing the question of scope, the constitutional principle of the Honour of the Crown must inform the Court's ruling.[83]

109. In accordance with the purposive approach to s. 35 rights, this Court should therefore be sensitive to and advance the distinct purposes of the Aboriginal rights of the Plaintiff as a

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[79] Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City), 2021 ONSC 1209, at para 65.
[80] Ibid, at para 66.
[81] Ibid, at para 71.
[82] Ibid, at para 65.
[83] *Restoule*, 2021 ONCA 779, at para 113.

First Nation, reflecting the importance of treaty-making as an honourable form of Reconciliation.[84] The Honour of the Crown must inform Treaty implementation, since it "infuses the processes" of treaty making and interpretation.[85]

110. In this situation, what is required is that the Plaintiff have the opportunity to pursue the Headlands Issue on the basis of a full evidentiary record, including the answers to questions previously refused. This is in line with the "purposive interpretation of treaties by the courts and by the Crown", and the goal of Reconciliation.[86]

111. Judicial notice should be given to the Indigenous perspective and "historical, social, and legal context" of the Plaintiff's unique position as a First Nation claiming that, without its knowledge, its reserve boundaries were redrawn to strip it of its rights. While this Motion should not determine the truth of this allegation, Reconciliation and the Honour of the Crown hold that the claim must be "viewed through… these guiding principles."[87]

112. Finally, this ongoing project of Reconciliation flows from the Crown's "duty of honourable dealing toward Aboriginal peoples, arising 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".[88] The Plaintiff seeks only the opportunity to have its claim dealt with fairly, in line with said principles, with a proper hearing on the merits.

113. Finally, this Court must also consider the possibility that an *ad hoc* fiduciary duty also arose in the context of the Crown's alleged actions in conspiring to redraw the Plaintiff's reserve boundaries.

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[84] *Yahey v British Columbia*, 2021 BCSC 1287, at para 1869.
[85] *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City)*, 2021 ONSC 1209, at para 45.
[86] *Restoule v. Canada (Attorney General)*, 2021 ONCA 779, at para 241.
[87] *Indigenous Police Chiefs of Ontario v Public Safety Canada*, 2023 FC 916, at para 140.
[88] *Southwind v. Canada*, 2021 SCC 28, at para 55.

114. As this Court previously observed in this case, such an *ad hoc* fiduciary duty may arise where: *(1)* 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; *(2)* The Aboriginal interest is vulnerable to the Crown's control; and (3) The Aboriginal people's cognizable Aboriginal Interest may be adversely affected by the Crown's exercise of discretion or control.[89]

115. Assuming the facts as pleaded are true, this aspect of the Respondent Ontario's actions is borne out by the fact that the Ontario Crown was able, and in fact empowered by statute, to redraw the Plaintiff's reserve boundaries with zero consultation or notification to the Plaintiff.[90] This allegation, of a clear exercise of Crown control over vulnerable, cognizable Aboriginal Interests reserve land, water, fisheries, and resources, and the exercise of its rights within the Headlands Areas, deserves to be tested on the merits by allowing the Headlands Issue to proceed to trial.

116. In sum, this Court has already recognized that the Crown's fiduciary duty, the Honour of the Crown, and Reconciliation all play a role in this litigation. This Motion seeks to have one aspect of its claim clarified, on behalf of a First Nation claiming serious harm caused by the Respondents' actions in apparent contravention of these constitutional principles. To dismiss the Rule 21 Motion, and/or to refuse the Rule 26 Amendment or the Rule 37 Motion to Compel would significantly diverge from these principles of the Nation-to-Nation relationship which the Courts have recognized over and over.

PART V: RELIEF SOUGHT

117. The Plaintiff/Moving Party respectfully requests the following relief:

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[89] *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City)*, 2021 ONSC 1209, at para 79.
[90] *An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indians Lands*, SO 1891, c 3, s.1 and 1894 Agreement, signed 16 April 1894 between Thomas Mayne Daly and John Morison Gibson, s.1.

a. 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. 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. 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; and,

d. Any other such relief as the Moving Party may request and this Court deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11th DAY OF OCTOBER 2023.

Dated: October 11, 2023

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Iskatewizaagegan Independent First Nation

Sched. "A": List of Authorities

Jurisprudence	
1	*St. Catherine's Milling and Lumber Company v The Queen (Ontario)* [1888] UKPC 70 (12 December 1888) 14 App Cas 46, (1889) LR 14 App Cas 46, [1888] UKPC 70.
2	*Harris v. Ontario (Community Safety & Correctional Services)*, 2017 ONCA 750, at para 7.
3	*Colonna v. Bell Canada (1993)*, 15 CPC (3d) 65 (Ont. Gen. Div.).
4	*R. v. Imperial Tobacco Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 17, 19, 21.
5	*Taylor v. Hanley Hospitality Inc.*, 2022 ONCA 376, at para 23, 24.
6	*Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57, at para. 13, 14, 30.
7	*PDC 3 Limited v. Bregman + Hamann Architects*, 2001 CanLII 38745 (ON CA), at para 5.
8	*Rausch v. Pickering (City)*, 2013 ONCA 740, at para 34.
9	*Trillium Power Wind Corporation v. Ontario (Natural Resources)*, 2013 ONCA 683, at para 31.
10	*R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd. (C.A.)*, 5 O.R. (3d) 778 [1991] O.J. No. 1962, at p. 6.
11	*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at p.980.
12	*Boutin v. Co-Operators Life Insurance Company*, 1999 CanLII 2071 (ON CA), at p. 10.
13	*Montreal Trust Co of Canada v Toronto-Dominion Bank (1992)*, 40 CPC (3d) 389 (Ont. Gen. Div.).
14	*Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City)*, 2021 ONSC 1209, at para 23, 25, 45, 65, 66, 71, 79, 107, 241.
15	*Phyzex Technologies Inc. v. Correct Development Corporation*, 2019 ONSC 278, at para 109.
16	*Andersen Consulting v. Canada (Attorney General)*, 2001 CanLII 8587 (ON CA), at para 37.
17	*Hodge v. Neinstein*, 2017 ONCA 494, at para 189.
18	*Steel Tree Structures Ltd. v Gemco Solar Inc.*, 2016 ONSC 955, at para 25.
19	*Stickel v Lezzaik*, 2015 ONSC 4659, at para 21, and 28.
20	*Marks v. Ottawa (City)*, 2011 ONCA 248, at para 19.
21	*Fram Elgin Mills 90 Inc. v. Romandale Farms Limited*, 2016 ONCA 404, at para 36.
22	*Apotex Inc. v. Abbott Laboratories Limited*, 2018 ONSC 7736, at para 42.
23	*Birkett v. Astris Energi Inc.*, 2004 CanLII 7855, at para 68.
24	*Faridani v. Stubbert*, 2013 ONSC 1233, at para 15.

25	*Computron Systems International Inc. v. Ladhani et al.*, 2020 ONSC 3188, at para 40.
26	*Computron Systems International Inc. v. Ladhani et al.*, 2020 ONSC 4521, at para 38.
27	*Boyes Homes Inc. v. Payne*, 2013 ONSC 1056, at paras 17, and 28.
28	*Spar Roofing & Metal Supplies Limited v. Glynn*, 2016 ONCA 296, at para 36.
29	*Chohan v Chohan*, 2023 BCSC 800, at para 26.
30	*Mitchell v. Lewis*, 2016 ONCA 903, at para 21.
31	*Auto Workers' Village (St. Catharines) Ltd. v. Blaney, McMurtry, Stapells, Friedman*, [1997] O.J. No. 6405, at para 11.
32	*Sperring v. Shutiak*, 2023 BCCA 54, at para 95.
33	*Brookfield Financial Real Estate Group Limited v. Azorim Canada (Adelaide Street) Inc.*, 2012 ONSC 3818, at para 23.
34	*Ontario v. Rothmans Inc.*, 2011 ONSC 2504 at paras 129-132, 143.
35	*Ontario v. Rothmans Inc.*, 2011 CarswellOnt 2916 (Ont. S.C.J.), at paras 141-144.
36	*Strathan Corp. v. Chromeshield Co.*, 2012 CarswellOnt 11727 (Ont. S.C.J.), para 23.
37	*Romspen Investment Corp. v. Woods Property Development Inc.*, 2010 CarswellOnt 4008, 2010 ONSC 30005 (Ont. Master), at para. 16.
38	*Restoule*, 2021 ONCA 779, at para 113.
39	*Yahey v British Columbia*, 2021 BCSC 1287, at para 1869.
40	*Indigenous Police Chiefs of Ontario v Public Safety Canada*, 2023 FC 916, at para 140
41	*Southwind v. Canada*, 2021 SCC 28, at para 55.
42	*El-Khodr v. Lackie*, 2017 ONCA 716, at para 31.
43	*Iskatewizaagegan No. 39 v. The City of Winnipeg*, 2022 ONSC 535 (CanLII)
Historical Statutory Instruments (Not Otherwise Included as Exhibits to Chief Lewis Affidavit)	
45	*An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indians Lands*, SO 1891, c 3
46	*An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indians Lands*, SC 1891, c 5
47	Order of the Executive Council Office of Ontario, 2 October 1913.

Iskatewizaagegan Independent First Nation **-and-** **The City of Winnipeg et al.**

Plaintiff **Defendants**

Court File No. CV-20-00644545-0000

	ONTARIO **SUPERIOR COURT OF JUSTICE** **Proceedings commenced in TORONTO**
	FACTUM OF THE PLAINTIFF
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