Court File No. CV-20-00644545-0000

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 / Responding Parties

FACTUM OF THE CITY OF WINNIPEG

DATE: November 7, 2023

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AND TO: **THIS HONOURABLE COURT**

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PART I INTRODUCTION

1. This motion arises in the context of an action by the plaintiff (who will at times be referred to as "IIFN" for convenience) for damages based upon certain provisions in a 1913 Order in Council passed by the Province of Ontario (the "1913 OIC")[1], which was subsequently incorporated by reference in a 1914 Order issued by the International Joint Commission (the "IJC's 1914 Order")[2]. The IJC is a body established pursuant to the *International Boundary Waters Treaty* between Great Britain and the United States of America in 1909.

2. The 1913 OIC and the IJC's 1914 Order were for the purpose of allowing what was then the Greater Winnipeg Water District (now the City of Winnipeg – and referred to as the "City" herein) to withdraw water from Shoal Lake and convey it to the City by means of an aqueduct.

3. Shoal Lake is partly situated in Manitoba, and partly in Ontario. Shoal Lake is not a boundary water, but because of its connection to Lake of the Woods, it was considered necessary or at least prudent to obtain approval from the IJC to withdraw water from Shoal Lake.

4. One of the conditions for the withdrawal of water in the 1913 OIC, which was incorporated into the IJC's 1914 Order, is 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"*.

5. This is the provision on which IIFN's action is based (the "Compensation Provision").

6. At the time the IJC's 1914 Order was made, the aqueduct had not been constructed. It was thought that the intake might need to extend into part of Shoal Lake in Ontario. As it turned out, it was not necessary to do so. The aqueduct and the intake for it are located entirely within Manitoba.

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[1] Order of the Executive Council Office of Ontario, 2 October 1913 ("1913 OIC"), s. 1, enclosed to the Affidavit of Tim Shanks (October 31, 2023), Exhibit "B".

[2] International Joint Commission 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, ("1914 IJC Order"), s. 1, enclosed to the Affidavit of Tim Shanks (October 31, 2023), Exhibit "C".

7. A few days before examinations for discovery in the Fall of 2022, plaintiff's counsel forwarded a number of documents to counsel for the defendants that had not been disclosed in the parties' productions. The defendants were advised that plaintiff's counsel may have some questions about them. The purpose of the documents or how they related to the pleadings was not clear.

8. When the purpose for which the plaintiff sought to rely on these various documents became clear, answers and requests for undertakings were either refused or taken under advisement.

9. The plaintiff says it took six months of careful review after their historian identified the documents in March of 2022 to decide that issues arising from them would be raised on discovery. It should not therefore have been a surprise that defendants' counsel was at first unclear about the purpose of the line of questioning or how the documents related to the Claim as pleaded.

10. It has since become clear that IIFN is attempting to fundamentally change the nature of this action and advance new claims that are not presently pleaded.

11. The City's concerns and position were set out in detail by letter to plaintiff's counsel dated October 10, 2023.

12. The proposed amendments in the draft "Amended Fresh as Amended Statement of Claim" in IIFN's motion record to which the City takes exception are those as shown in paragraphs 5 (the words "among other and things"), 6 (the words "among other things"), 8 a), 35, 36, 37, 38, 54, 55, 56, 57, 58, 59, 74, 80, 86 d), 98 b), 101, 103, 104, 105, 108, 109 and 100 (collectively referred to herein as the "Headlands claims").

13. The Headlands claims raise new material facts, documents and claims that are not found or referred to anywhere in the Claim as presently framed. They allege the City and Ontario unlawfully "engineered an unconscionable bargain", or participated in a "scheme" that deprived IIFN of reserve lands. The amendments allege this was accomplished by certain federal and provincial statutory instruments and other material facts to which no reference whatsoever is made in the Claim in its present form.

14. As will be outlined in detail below, the Headlands claims are statute barred; they are already being litigated before other tribunals; and allowing them would result in substantial prejudice that cannot be compensated for by an order of costs.

15. The City does not oppose the proposed amendments to paragraphs 39, 40, 66, 67, 68, 77, 87, 94 b) and 111, but reserves its rights to fully respond to and defend those allegations if they are permitted.

PART II WHAT THIS MOTION IS ABOUT

16. The City respectfully submits that this motion is required to address the following three issues:

i) **Do the Headlands claims fall within the scope of the Fresh as Amended Statement of Claim in its current form?**

The City respectfully submits they do not. They are new claims, and should be viewed accordingly for the purpose of assessing whether the proposed amendments should be allowed.

ii) Should IIFN be permitted to add the Headlands claims to this action?

The City respectfully submits the Headlands claims should not be permitted. They are statute barred; they are already being pursued by IIFN before other tribunals; claims for alleged taking away of reserve lands and/or interference with treaty rights should be made (and are being made) against Canada; and it is plain and obvious they do not fall within the Compensation Provision.

iii) Should an order be made requiring the defendants to answer questions on discovery relating to the Headlands claims?

The City respectfully submits the defendants should not be required to answer questions which relate to issues that do not and should not form part of this action.

PART III RULE 21.01(1)(a) IS NOT APPROPRIATE TO MAKE THE DETERMINATION THE PLAINTIFF SEEKS

17. IIFN's motion and factum conflate two issues. One is whether the Headlands claims are within the scope of the Statement of Claim as presently pleaded. The other is whether the Headlands claims are within the scope of the Compensation Provision. The latter is a determination that would require a careful review of a very complex factual and legal historical record. The City submits such a determination cannot be made without evidence.

18. IIFN's factum also appears to conflate the requirements for a determination on a Rule 21.01(1)(a) motion, and the "plain and obvious" test that might apply to a motion to strike a claim or part of a pleading under Rule 21.01(1)(b). There is no motion to strike under Rule 21.01(1)(b) before the Court (although to be clear, it is the City's position that it is "plain and obvious" the Headlands claims do not fall within the Compensation Provision). IIFN's argument seems to be that if it is not "plain and obvious" the Headlands claims cannot succeed, then the Court should decide that the Headlands claims do fall within the Compensation Provision[3].

19. The latter does not logically flow from the former. Even if this Court were to conclude that it is not "plain and obvious" the Headlands claims will fail, it does not follow that the Court can or should decide on this motion that the Headlands claims fall within the Compensation Provision.

20. At paragraphs 52 and 53 of its factum, the plaintiff accepts that Rule 21.01(1)(a) cannot be relied upon to resolve questions of fact, or mixed fact and law. In paragraph 53 it is acknowledged that no evidence is admissible for such a motion, except with leave or on consent. The suggestion is then made that a plaintiff can rely on documents that already form part of the court record.

21. It is unclear what documents the plaintiff says are part of the court record on which it can rely for a Rule 21.01(1)(a) motion. If this is meant to include transcripts of examinations for discovery, or documents marked as exhibits on discovery, or to affidavits or exhibits attached to them, then the City disagrees. All of that is evidence, and the mere fact it may be filed with the court does not make it admissible for a Rule 21.01(1)(a) motion.

[3] Plaintiff's Factum, at paras. 49-51.

22. Any determination that the Headlands claims fall within the Compensation Provision requires an extensive review of the factual and legal background behind Treaty 3; certain reciprocal *Acts for the Settlement of Certain Questions between the Governments of Canada and Ontario respecting Indian Lands* passed by Ontario and Canada (the "1891 Acts")[4]; ongoing negotiations and litigation between Canada and Ontario as to who had the right to take up reserve lands situated within the Province; an 1894 statutory agreement between Canada and Ontario (the "1894 Agreement")[5]; the proceedings before the IJC; and certain legislation passed by Ontario in 1915 (the "1915 Ontario Act")[6]. A very wide scope of complex historical evidence would be required. Canada would be a necessary party. This will be outlined in more detail later in this factum.

23. The City respectfully submits that this Court should not make the final determination the plaintiff seeks on this motion pursuant to Rule 21.01(1)(a).

PART IV THE HEADLANDS CLAIMS ARE NOT PART OF THIS LITIGATION

24. At paragraphs 58 and 59 of its factum, IIFN argues that the Headlands claims have always been within the scope of the Statement of Claim. A review of the history of these proceedings, the Claim as filed and then amended, previous submissions made by IIFN to this Court, and statements made in IIFN's motion materials demonstrate that this is simply not the case.

25. In 2019, IIFN filed a Notice of Application, seeking a Declaration of whether it would be a party who may be entitled to compensation under the Compensation Provision.

26. There was no reference in the Notice of Application to the 1894 Agreement, or to the 1915 Ontario Act, or to correspondence between Ontario's Deputy Minister for the Department of Lands, Forests and Mines, Aubrey White, to Canada's Deputy Superintendent General of the

[4] *An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indians Lands*, SC 1891, c 5, enclosed to the Affidavit of Tim Shanks (October 31, 2023), Exhibit "A".
[5] Agreement between Government of Canada and Government of Ontario, 16 April 1894, enclosed to the Affidavit of Chief Lewis (October 11, 2023), Exhibit "H".
[6] *An Act to confirm the title of the Government of Canada to Certain Lands and Indian Lands,* SO 1915, c 12, enclosed to the Affidavit of Chief Lewis (October 11, 2023), Exhibit "H".

Department of Indian Affairs, Duncan Scott, in December of 2014[7]. There was no mention of any of those in the Affidavit of Chief of Lewis[8] affirmed in support of the Application either.

27. Paragraph 31 of the Notice of Application summarized the injurious impacts IIFN was seeking to claim against the City and Ontario for the water taking. Notably absent is any mention of any taking away of "Headlands", or the 1894 Agreement, or the 1915 Ontario Act which allegedly removed Headlands from IIFN's reserve entitlement.

28. Paragraph 18 of the Notice of Application made clear that no declarations were being sought in relation to any inherent rights or responsibilities, Treaty rights, or constitutional rights set out in s. 35 of the *Constitution Act*, 1982.

29. IIFN applied for case management of the Application. In its submission for case management, it stated as follows:

> *23. The facts in this case are historical in nature, dating back to 1913 and continuing to this day.*[9] (underline added)

30. IIFN was clearly not seeking to raise matters related to or arising from the 1894 Agreement.

31. The Application was ultimately resolved by a Consent Order. The Consent Order states that IIFN would be entitled to compensation if it can show that its lands or properties have been taken, injuriously affected or in any way interfered with pursuant to the IJC's Order[10].

32. It was understood that after disposition of the Application, IIFN would commence an action for damages arising from the issues that had been raised in the Notice of Application[11].

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[7] Aubrey White, Deputy Minister of Lands & Forests, to Duncan C. Scott, Deputy Superintendent General, 15 December 1914 ("A White 15 December 1914 Letter"), enclosed to the Affidavit of Chief Lewis (October 11, 2023), Exhibit "H".
[8] Affidavit of Chief Lewis (December 20, 2019), enclosed to the Affidavit of Tim Shanks (October 31, 2023), Exhibit "H".
[9] Notice of Motion (Rule 77) of the Plaintiff (February 25, 2020), at para. 23, enclosed to the Affidavit of Tim Shanks (October 31, 2023), Exhibit "I".
[10] Order of Justice Gans (July 9, 2020), at para. 3, enclosed to the Affidavit of Chief Lewis (October 11, 2023), Exhibit "D".
[11] Ibid, at para. 4.

33. On or about May 25, 2020, IIFN provided written notice to Ontario of its intention to bring this action, as required by the *Crown Liability and Proceedings Act*, SO 2019 c. 7, Sch17[12].

34. It is evident from reading this letter that the 1894 Agreement, the 1915 Ontario Act and the Headlands claims were not intended to be part of the action.

35. The Statement of Claim was filed on or about July 24, 2020. While it makes extensive reference to various statutes, Treaties and Orders, there is no reference to the 1891 Acts, the 1894 Agreement, the correspondence between Aubrey White and Duncan Scott, or the 1915 Ontario Act.

36. On or around August 5, 2020, counsel for Ontario served a Demand for Particulars in respect of the Statement of Claim[13]. IIFN filed its Response to Demand for Particulars on or about August 14, 2020, which included the following answers:

> 4. *With respect to paragraph 46, was any land taken or expropriated in Ontario for the purpose of constructing the aqueduct?*
>
> *A: To the best of the plaintiff's knowledge, no land was taken or expropriated in Ontario for the purpose of constructing the aqueduct.*
>
> *19. With respect to paragraph 74, please provide particulars of any and all undertakings that the plaintiff bases its allegation on to say that Ontario owed a fiduciary duty?*
>
> *A: 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 condition 2 of the Minister's Report appended to Ontario's 1913 Order in Council.*[14]

37. If the 1894 Agreement, or the correspondence between Aubrey White of Ontario and Duncan Scott of Canada, or the 1915 Act, and any taking away of "Headlands" from IIFN's

[12] Letter from Julian Falconer to Sarah Valair & Joshua Tallman (May 25, 2020), enclosed to the Affidavit of Tim Shanks (October 31, 2023), Exhibit "J".
[13] Ontario Demand for Particulars (August 5, 2020), enclosed to the Affidavit of Tim Shanks (October 31, 2023), Exhibit "K".
[14] Response to Ontario Demand for Particulars (August 14, 2020), enclosed to the Affidavit of Tim Shanks (October 31, 2023), Exhibit "L".

reserve lands formed any part of the action, then surely the plaintiff would have specifically said so in its Response. None of these documents were mentioned anywhere in the Response.

38. The Statement of Claim was amended, and a Fresh as Amended Statement of Claim was filed on or about September 15, 2021. The amendments were extensive. They included references to the Royal Proclamation of 1763 and the Treaty of Niagara of 1764[15]. Conspicuously absent is any mention of the 1891 Acts, the 1894 Agreement, the correspondence between White and Scott, or the 1915 Ontario Act. This surely was not oversight.

39. Comparing the amendments IIFN now seeks to the Claim as it presently leads inescapably to the conclusion the Headlands claims are new.

40. The proposed amendment to paragraph 8 a) is to increase the damages claimed from $500 million to $2 billion. The obvious inference is that IIFN is now looking to claim compensation for the Headlands claims that was not part of the Claim at the time it was filed.

41. This is made even clearer by looking at the other amendments the plaintiff seeks. Paragraphs 35 through 38 would add an entirely new section, and refer for the first time to the 1891 Acts, the 1894 Agreement, and the 1915 Ontario Act.

42. Proposed paragraphs 54 through 59 would also add an entirely new section relating to the alleged taking away of Headlands from IIFN's reserve lands. They refer for the first time to the correspondence between Mr. White and Mr. Scott. They refer to the 1915 Ontario Act. Surely those material facts would (and should) have been pleaded in the Claim as initially filed if they were truly meant to be part of this litigation.

43. Paragraph 80 would add a new claim for compensation for "waters", and relies on the 1894 Agreement (even though by the Compensation Provision water is "not property to be paid for")[16].

44. Paragraph 86(d), seeks to add a claim for loss of access to fisheries "within the Headlands boundary".

[15] Plaintiff's Amended Statement of Claim (December 15, 2020), at paras. 42-47; 85-89.
[16] 1913 OIC, supra note 1, s. 1.

45. Paragraph 98 (b) seeks to add a new claim for "*the unconscionable bargain of depriving the plaintiff of the benefits and its rights under the Agreement*".

46. Paragraphs 104, 105 and 109 all seek to add new claims, for constructive trusts, equitable liens, unjust enrichment, unlawful removal of Headlands area by the 1915 Ontario Act, fraudulent concealment and "knowing receipt". None of these form part of the Claim as it presently exists.

47. A plaintiff is required to plead all material facts upon which it relies in support of the relief claimed. None of the material facts on which the Headlands claims are based were pleaded.

48. In his Affidavit in support of this motion, Chief Lewis admits that it was not until plaintiff's counsel received a draft report from their expert historian in March of 2022 that consideration was given to adding the Headlands claims to this action[17].

49. The letters of instruction provided by plaintiff's counsel to their expert historian are also noteworthy. In the letter to Dr. Storey dated November 2, 2021[18], there is no mention of the 1894 Agreement or 1915 Ontario Act. It was only later that Dr. Storey was asked to consider the Headlands claims[19]. Surely Dr. Storey would have been instructed to consider those issues at first instance if they were part of the Claim.

50. Documents related to the Headlands claims should also have been included in IIFN's Affidavit of Documents if they were part of the Claim when filed. They were not, even though IIFN has known about the Headlands claims and the documents relating to them for decades.

51. In IIFN's factum, reliance is placed on the fact that plaintiff's counsel asked questions about the 1894 Agreement and these other documents at discovery[20], and explained the plaintiff's position in relation to them. While this is true, the fact issues are raised for the first time during discovery does not mean that they must then be considered to be part of the claim from the outset.

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[17] Affidavit of Chief Lewis (October 11, 2023), at paras. 12-13.
[18] Letter from Meaghan Daniel to Dr. Kenneth Storey (November 2, 2021), enclosed to the Affidavit of Tim Shanks (October 31, 2023), Exhibit "N".
[19] Letter from Meaghan Daniel to Dr. Kenneth Storey (March 3, 2023), enclosed to the Affidavit of Tim Shanks (October 31, 2023), Exhibit "O".
[20] Plaintiff's Factum, at para. 33.

52. A plaintiff cannot include a completely new claim simply by disclosing it at discoveries. As stated in *2250898 Ontario Inc. v. Mukelova*:

> *35 Put another way, the "particulars" provided on discovery help fill in an existing claim. They are not the "material facts" that are required in pleadings to identify a claim. In this case, the Associate Judge's reasons conflate the two.*
>
> *36 Second, the effect of the test that the Associate Judge adopted in this case would be to render the limitations periods under the Limitations Act nullities, at least in some circumstances…..The Associate Judge's interpretation allows for a Plaintiff to advance what was, on the pleadings, a completely new claim simply by disclosing it at discoveries.*[21](underlines added)

53. The proposed amendments include numerous material facts that are not pleaded in the Claim as it presently exists. The matters raised on discovery were not merely "particulars" of the existing claim.

54. At paragraphs 31 and 32 of its factum, the plaintiff refers to the "*evidence uncovered in the course of Dr. Storey's research*", and describe the 1894 Agreement and correspondence between Mr. Scott and Mr. White as "*newly-unearthed information*". They say it was only after "*a careful, months' long review*" that the plaintiff identified new issues to pursue on discovery.

55. If all that is true, it is entirely inconsistent with the plaintiff's position that the Headlands claims have been part of the litigation from the outset. IIFN cannot have it both ways.

56. The argument that the Headlands claims were always part of the Claim also stands in stark contrast to IIFN's written submissions to this Court when it opposed the application of Shoal Lake #40 to intervene. Commencing at paragraph 26 of its factum filed for that motion[22], the plaintiff described the "Nature of the Litigation". At paragraph 27, it described the claim as one brought by a private party for compensation under the terms of the 1913 OIC. At paragraphs 28 and 29, it stated as follows:

> *"Any compensation order related to IIFN will have no impact on Shoal Lake #40 or any other outside party. This claim is exclusively a private party claim filed by*

[21] *2250898 Ontario Inc. v. Mukelov*a, 2022 ONSC 610, at paras. 35-36.
[22] Plaintiff's Factum (Intervention Motion of Shoal Lake No. 40 First Nation) (October 26, 2021), enclosed to the Affidavit of Tim Shanks (October 31, 2023), Exhibit "M".

> *IIFN, like any other claim that might be filed by a private party under the terms of the Order in Council*"

57. In essence, IIFN opposed Shoal Lake #40's motion on grounds that this action was merely a claim for damages suffered by a private party, and the issues to be litigated would have no impact on Shoal Lake #40, or any other party, which would include other Treaty #3 First Nations.

58. These arguments appear to have influenced this Court's decision to dismiss Shoal Lake #40's motion. At paragraph 14 of the Court's Endorsement dated January 24, 2022, this Court stated:

> "*This action is not seeking a declaration, for example, of rights nor is it asking the Court to interpret the provisions of a Treaty, or a contract which might result in an adverse outcome for No. 40.*"[23]

59. Paragraphs 15 to 21 of the Endorsement further reflect that this Court considered the claim to be in the nature of a private compensation dispute rather than one involving constitutional treaty rights issues that might affect Shoal Lake #40 or other Treaty 3 First Nations.

60. The Headlands claims would necessarily involve the interpretation of Treaty 3, the 1891 Acts, the 1894 Agreement between Canada and Ontario that relates to all Treaty 3 lands. They would require consideration of the lengthy negotiations and litigation between Ontario and Canada relating to the allocation of reserve lands under Treaty 3, which culminated in the 1915 Ontario Act. These issues potentially impact the rights of every Treaty 3 First Nation across all of Treaty 3 territory, which extends far beyond Shoal Lake and IIFN's reserve lands.

61. To properly adjudicate these issues, all Treaty 3 First Nations and the Government of Canada would be necessary parties. Conversely, there is really no reason for the City to be involved at all. The City had no authority over the allocation of reserve lands in Ontario. The aqueduct was constructed entirely in Manitoba. No lands in Ontario were expropriated by the City for the aqueduct. The 1894 Agreement and 1915 Ontario Act have no application to lands in Manitoba or those parts of Shoal Lake that are in Manitoba.

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[23] I*skatewizaagegan No. 39 v. The City of Winnipeg*, 2022 ONSC 535, at para. 14.

62. It is no answer for IIFN to say that the City or Ontario could third party Canada into this action. The onus is on a plaintiff to have included any necessary party against whom its claims and the relief sought are made, or who might be directly impacted (Rule 5.03 (1)). Neither the City nor Ontario should be required to advance third party claims because the plaintiff now seeks to fundamentally change the nature of its action from what it was when initially filed.

63. From all of the above, it is abundantly clear the Headlands claims are not part of this action (nor should they be). They are new claims, and if allowed would substantially alter the character of this litigation.

64. The fact the Headlands claims are new necessarily impacts upon how the Court should assess whether leave ought to be granted to include them. It brings into play whether limitations issues arise, whether or to what extent there may be prejudice to the defendants if the amendments are permitted, and whether it may be an abuse of process to permit them.

PART V THE HEADLANDS CLAIMS ARE STATUTE-BARRED

65. An amendment to a Statement of Claim will be refused if it seeks to assert a new cause of action after the expiry of the applicable limitation period[24].

66. This Court has noted the distinction between pleading a new cause of action and pleading a new or alternative remedy based on the same facts originally pleaded. A proposed amendment will not be permitted where it advances a "fundamentally different claim", including events that occurred prior to the events described in the original statement of claim that were not put in issue or encompassed within the original claim[25].

67. In *Polla v. Croatian Toronto Credit Union Limited*[26], the appellant had proposed to amend his claim at trial to allege a misrepresentation that was not previously pleaded. The trial judge

[24] *1100997 Ontario Ltd. v. North Elgin Centre Inc.*, 2016 ONCA 848; 409 DLR (4th) (382) ("*1100997 Ontario Ltd.*"), at para. 23; *Polla v. Croatian Toronto Credit Union Limited*, 2020 ONCA 818 ("*Polla*"), at para. 33.
[25] *1100997 Ontario Ltd.*, supra note 24, at para. 22.
[26] *Polla*, supra note 24.

concluded that the proposed amendment was not part and parcel of the dealings already described in the existing amended claim[27]. As the limitation period had expired, the amendment was denied.

68. With respect to determining whether a cause of action is "new", the Court of Appeal adopted the following:

> *34 The relevant principles are summarized in Paul M. Perell & John W. Morden, The Law of Civil Procedure in Ontario, 4th ed. (Toronto: LexisNexis Canada, 2020), at pp. 220-21, as follows:*
>
> > *A new cause of action is not asserted if the amendment pleads an alternative claim for relief out of the same facts previously pleaded and no new facts are relied upon, or amount simply to different legal conclusions drawn from the same set of facts, or simply provide particulars of an allegation already pled or additional facts upon which the original right of action is based.*[28]

69. The Court of Appeal concluded that the trial judge was correct that the appellant was seeking to evolve his claim midway through trial, and that it was not open to the appellant to change course in the middle of trial to advance a new claim in respect of a new and different act that had not been pursued up to that point in the action[29].

70. In *Toronto Standard Condominium Corporation No. 1786 v. Fernbrook Homes (Wilson) Limited*[30], a dispute related to an escrow agreement, the plaintiff sought to amend its claim to include multiple references to a new document, a corporate declaration, after the completion of pleadings, disclosure, examinations for discovery and mediation[31].

71. The Court concluded that the new alleged breaches were a separate, different act, independent of the escrow agreement and distinct from the allegations in the original claim. They were not merely particulars or an alternate claim for relief or theory of liability[32].

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[27] Ibid, at para. 27.
[28] Ibid, at para. 34.
[29] Ibid, at paras. 40-42.
[30] *Toronto Standard Condominium Corporation No. 1786 v. Fernbrook Homes (Wilson) Limited*, 2021 ONSC 6652.
[31] Ibid, at paras. 13-14.
[32] Ibid, at paras. 29-31.

72. The Court also held that the expiry of a limitation period in respect of a proposed new claim is a form of non-compensable prejudice. Leave to amend to assert the new claim was refused. The Court adopted the reasoning in *1100997 Ontario Ltd.* that an amendment will be refused if it seeks to assert a "new cause of action" after the expiry of the applicable limitation period[33].

73. As demonstrated in Part IV above, it is clear the Headlands claims are not part of this action as presently pleaded. They arise from facts, events, legislation, a Statutory Agreement, and an alleged "scheme" or "unconscionable bargain" that were never mentioned in the original claim. They are undeniably new claims, and should not be permitted if they are statute barred.

74. There is no question the Headlands claims are statute barred. They are based on events that culminated with the 1915 Ontario Act, which date back more than 100 years. Furthermore, unlike the damages alleged to be caused by the City's ongoing withdrawal of water from Shoal Lake, such as raised or changing water levels and various ecological impacts, any loss of "Headlands" or reserve lands resulting from the 1915 Ontario Act crystallized when the legislation was enacted.

75. Issues or principles of discoverability or discovery do not assist the plaintiff. IIFN has had knowledge of the Headlands claims for at least 34 years, and likely much longer than that. This includes specific knowledge of the various statutes, the 1894 Agreement, the correspondence between Aubrey White and Duncan Scott, and the 1915 Ontario Act, on which the Headlands claims are based. This can be demonstrated with reference to some of the other claims IIFN has filed, notably to the Specific Claims Tribunal.

76. In 1989, IIFN submitted a Specific Claim against Canada in relation to the Garden Islands[34] (the "Garden Islands claim"). At paragraph 64, IIFN alleged as follows:

> *The Claimants further allege, and the fact is, that Her Majesty the Queen in Right of Canada came under statutory duties pursuant to An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian lands, 54-55 Victoria, c. 5, and the agreement therein authorized and actually entered into the 15th day of April, 1894, (the 1894 agreement) to safeguard the interests of the claimants and their predecessors in the lands claimed herein. Further, Her Majesty the Queen in*

[33] Ibid, at paras. 32-35.

[34] *Shoal Lake Band 39 of Indians v. Canada*, Specific Claim 0154-501 (filed March 31, 1989), enclosed to the Affidavit of Tim Shanks (October 31, 2023), Exhibit "D".

> *Right of Ontario came under statutory duties pursuant to An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands, 54 Victoria, c.3, and the agreement therein authorized and actually entered into on the 15th day of April, 1894, (the 1894 agreement) to confirm the lands claimed herein. Further, Her Majesty the Queen in Right of Ontario, by An act to confirm the title of the Government of Canada to certain lands and Indian lands (1915), 5 Geo. V., c.12, did in fact confirm the lands herein.* (underlines added)

77. At paragraph 37 of the Garden Islands claim, IIFN references the 1913 OIC and the IJC's 1914 Order, and the fact that those instruments contained conditions on which the City could withdraw water from Shoal Lake. The Garden Islands claim also seeks an accounting in respect of the alienation of the lands and waters resulting from the alleged taking of "Headlands"[35].

78. On April 10, 2000, IIFN filed a Statement of Claim in the Ontario Superior Court of Justice against Canada and Ontario. This claim seeks a declaration that all of the Garden Islands within Ontario are Indian reserve lands[36]. It makes many of the same, if not identical arguments to the Garden Islands claim, that Canada wrongfully expropriated portions of Indian Bay without consent of the plaintiff (see for example paragraphs 16 – 19 of the Claim).

79. The status of this 2000 Ontario Superior Court claim is presently unclear to the City. What is clear, however, is that IIFN has consistently litigated, and/or is actively litigating, alleged claims that "Headlands" were improperly or wrongfully surveyed and expropriated from its reserve lands stemming from the territorial disputes between Ontario and Canada, which were addressed in the 1894 Agreement and later the 1915 Ontario Act.

80. The next year, in 2001, IIFN filed a "Flooding Claim" against Canada, Ontario and Manitoba[37] (the "Flooding Claim"). It features many similar, if not identical, heads of damage and allegations as the Headlands claims, including the 1891 Acts, the 1894 Agreement, and the 1915

[35] Ibid, at para. 70(b).
[36] S*hoal Lake #39 First Nation v. Canada (Attorney General)*, CV 00-00000263-0000 (filed April 10, 2000), at para. 2, enclosed to the Affidavit of Tim Shanks (October 31, 2023), Exhibit "F".
[37] *Iskatewizaagegan #39 Independent First Nation v. Canada et al*., Specific Claim 0154-601 (filed November 12, 2001), enclosed to the Affidavit of Tim Shanks (October 31, 2023), Exhibit "G".

Ontario Act that IIFN now seeks to add to this action. In paragraphs 294 to 296 of the Flooding Claim, for example, the following claims are made:

> *294. Without limiting the generality of the foregoing, the claimant states that Canada, in breach of its aforesaid duties and negligently:*
>
> *a) failed at the time of the Treaty to advise the Indians or record in the instrument that its right to provide reserves as promised was or could be contested by Ontario, and failed continually and repeatedly thereafter to so inform the claimant when that right was in fact contested by Ontario;*
>
> *b) failed to adequately pursue implementation of the 1894 Statutory Agreement, thus encouraging the flooding trespasses and Ontario's purported unilateral expropriation and exclusion of the water powers and headlands portions of the Reserves and included islands;*
>
> *d) attended to its own interests by pursuing a money claim against Ontario instead of obtaining Ontario's formal concurrence with the reserves;*
>
> *e) failed to advise the claimant of matters affecting its reserve land interests, including establishment of the provincial boundary, negotiation of agreements such as the agreements made between Canada and Ontario in 1874, 1878, 1894, 1913 or 1914, the unilateral provincial legislation of 1915, and the various commissions, arbitrations and court cases in which reserve land rights were addressed and in which Canada participated directly or indirectly;*
>
> *f) failed to act swiftly and effectively, whether by legislation or otherwise, even when on notice that the claimant's interests were in jeopardy;*
>
> *g) failed to act in accordance with its own legislation in regard to the water powers and headlands portions of the Reserves and included islands, by failing to insist on clarity in the unilateral 1915 provincial legislation and failing to object or disallow said legislation;*
>
> *ii) discriminated against the claimant in its application of the conventional boundary agreement, by confirming the land interests of non-Indians while not confirming the interests of Indians.*
>
> ……
>
> *296. Without limiting the generality of paragraphs 285-295, the claimant states that Ontario, in breach of its duties as stated therein, and negligently:*
>
> *a) was on full actual notice at all relevant times of the terms of the Treaty*

and the Crown's obligations respecting reserves thereunder, but continually and repeatedly dismissed, neglected, or frustrated performance of the same;

c) was on full actual notice of the extent and location of the Reserves since at least 1890, but persistently conducted itself as if the reserve did not exist or as if the claimant had no interest therein;

e) purported to exclude from the Reserves the water powers and headlands portions thereof and included islands in contravention of the reciprocal legislation of 1891 and the statutory agreement of 1894;

f) failed to carry out duties contained in its own statutes and agreements;

g) adopted an adversarial position as against the Treaty land reserve right by imposing its own conditions precedent to withdrawing its own claim to the reserves.

(underlines added)

81. At paragraph 154 of IIFN's Flooding Claim, reference is made to the correspondence between Mr. White and Mr. Scott, the same correspondence IIFN seeks to rely on in this action.

82. The Government of Canada's Status Report of Specific Claims brought by the plaintiff as of October 30, 2023 is attached to the Affidavit of Tim Shanks as Exhibit "Q".

83. It is very clear IIFN has had knowledge of the Headlands claims for decades. IIFN cannot credibly argue that it has only recently discovered these claims (which would be inconsistent with IIFN's argument they were always included in the Claim). They are statute barred. The ultimate limitation period prescribed by s. 15 of the *Limitations Act,* SO 2002[38] has also expired.

84. As noted earlier, allowing an amendment after the expiry of the limitation period results in non-compensable prejudice.

85. The prejudice to the City if the amendments are allowed would be significant. The City has acted and relied on the authority granted by the IJC to withdraw water from Shoal Lake for more than a century. It would be extremely prejudicial for the City to have to defend a claim based on matters that occurred more than 100 years ago, particularly when there is no reason those claims

[38] *Limitations Act,* SO 2002, c. 24 Sch B, s. 4-5 and 15.

could have been advanced decades ago. Relevant documents and other evidence may no longer be available. Potential opportunities for mitigation or resolution may have been lost. While these may involve some degree of speculation, it would be unreasonable to suggest there would be no prejudice to have to defend a claim that is more than 100 years old.

86. For the reasons outlined above, the proposed amendments to add the Headlands claims are statute barred, and should not be permitted.

PART VI ABUSE OF PROCESS

87. As noted in the section above, the Headlands claims are already being advanced by IIFN to other tribunals. This includes the Garden Island claim and Flooding Claim referenced earlier. It includes the Claim filed with the Ontario Superior Court in 2000. It potentially includes claims for Farming Lands and Headlands that are or were also being considered by the Specific Claims Tribunal, or its forerunner, the Specific Claims Branch of Canada.

88. Courts have always sought to avoid a multiplicity of proceedings arising from the same underlying factual circumstances, in order to avoid inconsistent findings, increased costs of litigation, and inconvenience to litigants and the courts. It has been stated that avoidance of a multiplicity of proceedings is fundamental to the civil process[39].

89. This objective is codified in s. 138 of the *Courts of Justice Act,* RSO 1990 c. C43, which states:

> *As far as possible, a multiplicity of proceedings shall be avoided*[40].

90. Two points arise from this language. One is the use of the mandatory "shall" rather than the permissive "may". The other is the words "as far as possible". The section provides clear direction that courts should not allow duplicative proceedings unless it is not possible to avoid it.

91. Courts, including the Supreme Court of Canada, have recognized that the doctrine of abuse of process may be invoked in a variety of legal contexts. It is a flexible doctrine that engages the

[39] *McNaughton v. Baker* (1988) 28 CPC (2d) 49 (BCCA), at para. 14.; *Hollinger International Inc. v. Hollinger Inc.* (2004), 11 C.P.C. (6th) 245 (Ont. S.C.J. [Commercial List]), at para. 5.
[40] *Courts of Justice Act,* RSO 1990 c. C43, s. 138.

inherent power of the court to prevent the misuse of its processes. This includes preventing violations of the principles of judicial economy, the avoidance of conflicting or inconsistent results, and preserving the integrity of the administration of justice[41].

92. If a result in a subsequent proceeding turns out to be inconsistent or different from a conclusion reached in another proceeding on the same issue, this by itself would undermine the credibility of the entire judicial process[42].

93. It is not necessary for the same parties to be involved in both proceedings. The real issue is whether the issues to be decided in the two proceedings are the same[43].

94. The fact the Headlands claims are already being litigated before the Specific Claims Tribunal gives rise to the very real possibility of conflicting results being reached in respect of the same issues. This would bring the administration of justice into disrepute.

95. For example, conflicting answers to the question of whether or not "Headlands" were wrongfully taken from IIFN's reserve lands would surely bring the administration of justice into disrepute. So too would different answers to the question of who may be liable to IIFN for the wrongful taking away of reserve lands – Canada? Ontario? The City? What if the City was ordered to pay the plaintiff millions or even billions of dollars in this action, only to later see the Specific Claims Tribunal, or this Court in the 2000 action against Canada and Ontario, or some other court or tribunal, find that there was no wrongful taking of "Headlands" from IIFN's reserve lands, or any other Treaty 3 First Nation's reserve lands? Allowing the Headlands claims to proceed in this action and the potential consequences of conflicting answers are extremely serious, not only for the City and Ontario, but also for Canada and all Treaty 3 First Nations. The prejudice and damage that could result may be irremediable.

[41] *Toronto (City) v. CUPE Local 79,* 2003 SCC 63, at paras. 35-51.
[42] Ibid.
[43] Ibid; *Kostic v. Merrill Lynch Canada Inc*., 2010 MBCA 81, at paras. 47 and 55.

96. The City's position and concerns about the apparent attempt to re-litigate the "Headlands" issues were set out in detail in the letter to counsel for IIFN dated October 10, 2023[44]. Some of those issues are particularized above. Others include the following:

- The Garden Islands claim seeks an accounting in respect of the alienation of the lands and waters resulting from the alleged taking of "Headlands".

- In 2016, IIFN joined with Shoal Lake 40 in its claim to the Specific Claims Tribunal with respect to expropriation of the Garden Islands.

- Canada appears to have accepted IIFN's claims for negotiation.

- From IIFN's financial statements, it appears it may have already received advance compensation from INAC pending settlement of the Garden Islands claim, and the Flooding Claim.

- As recently as 2021 it appears global settlement offers were being exchanged between Canada, IIFN and Shoal Lake 40.

97. In accordance with the legal principles and the authorities cited above, the City submits it would be an abuse of process to litigate those same issues in this litigation. The proposed amendments to add the Headlands claims should not be permitted.

98. Before leaving the subject of other claims the plaintiff has advanced for the same issues and relief, the City must address some of the other arguments advanced by the plaintiff in its factum.

99. At paragraph 86, IIFN denies it has ever received or is presently seeking compensation "*in respect of the water-takings*". It is unclear whether this statement is meant to apply broadly to any claims for the alleged taking away of "Headlands", including the waters and lands under waters in Shoal Lake, or if the use of the words "*water-takings*" is intended to be more narrowly construed.

[44] Letter from Thor J. Hansell to Julian Falconer (October 10, 2023), enclosed to the Affidavit of Tim Shanks (October 31, 2023), Exhibit "P".

Regardless, the statement appears to be at odds with the information presently known to the City, as set out in the letter to counsel for IIFN dated October 10, 2023[45].

100. The plaintiff then argues in paragraph 86 that 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 on the Headlands Issue in some other claim – reduce damages relative to that claim*". The suggestion is then made that the City and Ontario "*bear a very strict onus of proof*", and would have to show it is "*patently clear*" that it is necessary to reduce damages in this action, and that "*evidence of mere 'likelihood' or 'probability' will not be sufficient"*.

101. The City submits that this is not an accurate statement of the law. The argument that unless the defendants find out that the plaintiff has made other claims and/or received compensation, and can prove this to a standard beyond a balance of probabilities, then no issue of double recovery would arise, is simply wrong. If the plaintiff has made other claims that may overlap with what it seeks to claim in this action (which certainly appears to be the case), it was and is obligated to make full and fair disclosure to allow the defendants and this Court can make a proper assessment.

PART VII THE HEADLANDS CLAIMS DO NOT FALL WITHIN THE COMPENSATION PROVISION

102. At paragraphs 15 through 27 of the plaintiff's factum, IIFN suggests the 1915 Ontario Act came about because "*Ontario and Winnipeg realized the 1894 Agreement was a direct threat to Winnipeg's aqueduct"*. They refer to one comment in the letter from Aubrey White dated December 15, 1914, and then suggest the 1915 Ontario Act was "*expressly meant to enable the Shoal Lake aqueduct scheme*".

103. This is simply not an accurate portrayal of these historical events. The comment in Mr. White's letter is taken out of context. There is no evidence that the City "realized" the 1894

[45] Ibid.

Agreement was a "direct threat" to the aqueduct, and then engaged in some "scheme" that resulted in the 1915 Ontario Act.

104. The 1915 Ontario Act was the culmination of decades of disagreement, litigation and negotiations between Ontario and Canada. This included disputes over the location of Ontario's borders; which of the two governments had control over and the right to take up reserve lands within Treaty 3 territory; and the surveying and proper identification and confirmation of various reserves within Treaty 3 territory.

105. The City will briefly summarize some of the more relevant events that led up to the 1915 Ontario Act below. A more detailed summary may be found at Exhibit "E" of the Affidavit of Tim Shanks[46]. There is also a helpful summary in the Supreme Court of Canada's decision in *Grassy Narrows First Nation v. Ontario (Natural Resources)*[47].

106. In 1874, Canada and Ontario reached a provisional boundary agreement. Under this agreement, Ontario would grant patents and licenses for the lands to the east and south of the provisional boundary, while Canada would do so for the lands west and north of the boundary. Ontario's position in the boundary dispute was eventually accepted by a panel of arbitrators in August of 1878[48].

107. In August 1884, the Judicial Committee of the Privy Council endorsed the 1878 decision, which effectively set the western and norther boundaries of Ontario. Many Treaty 3 First Nations, including the plaintiff, were located in whole or in part within the boundary of Ontario[49].

108. In 1888, the Privy Council dismissed the appeal of Canada in *St. Catherine's Milling*, holding that upon surrender of the lands in Treaty 3, the beneficial interest in that portion of the surrendered lands situated in Ontario was held by the Province, subject only to the legislative power of Canada over lands reserved for the Indians[50].

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[46] Summary of Research Findings, Shoal Lake Band #39 – Garden Islands Claim (Specific Claim 0154-501) ("Shoal Lake #39 Research Findings"), enclosed to the Affidavit of Tim Shanks (October 31, 2023), Exhibit "E".
[47] *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48 ("*Keewatin*"), at paras. 5-15; 41-42.
[48] Ibid, at para. 14; Shoal Lake #39 Research Findings, supra note 46, at p. 3-4.
[49] *Keewatin*, at para. 14; Shoal Lake #39 Research Findings, supra note 46, at p. 3-4.
[50] *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, at p. 13.

109. The western Ontario boundary was officially enacted into legislation by the *Canada (Ontario Boundary) Act* of August 12, 1889, which confirmed the boundaries of Ontario in accordance with the Privy Council's 1884 decision[51].

110. The 1888 ruling by the Privy Council was subsequently confirmed in reciprocal legislation passed by Canada and Ontario, the 1891 Acts. The 1891 Acts incorporated a draft agreement between Canada and Ontario, that was ultimately executed in 1894. This is the 1894 Agreement.

111. Article 1 of the 1894 Agreement provided that as the disputed territory belonged to Ontario, Ontario was officially responsible for and entitled to the "taking up" of Treaty 3 lands within its boundaries[52].

112. During the time the Canada-Ontario agreements were being crystallized in the 1891 Acts and 1894 Agreement, however, surveys of the reserve lands of the plaintiff had not been completed, as there had been direction from Canada to defer any further surveying in the disputed territory until a settlement with Ontario had been definitively reached[53].

113. Following the 1894 Agreement, Canada continued to press Ontario to carry out its obligations to confirm the reserves selected under Treaty 3, which culminated in an 1899 Order-in-Council approved by the Governor General to appoint a joint commission to settle and determine questions in relation to the confirmation of reserves set apart under Treaty 3[54].

114. In December of 1913, Canada and Ontario agreed that Ontario would confirm most of the reserves previously set aside by Canada, subject to certain conditions. One condition was that Canada pay Ontario for what the latter felt was an amount of reserve land in excess of what it was legally obligated to provide[55]. Discussions ensued in order to determine the boundaries of the various reserves; any excess acreage Ontario believed was more than it was legally obliged to convey to Canada; and the amount to be paid to Ontario as a result[56].

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[51] *Canada (Ontario Boundary) Ac*t, 1889: 52-53 Victoria, c.28 (U.K.), 12 August 1889.
[52] *Keewatin*, at para. 15.
[53] Shoal Lake #39 Research Findings, supra note 46, at p. 5-6.
[54] Ibid.
[55] Ibid, at p. 6-7.
[56] Ibid.

115. The correspondence between Mr. White and Mr. Scott reflect only a small part of that ongoing discourse. There were disagreements over the boundaries of the reserve lands to be set aside, and to what extent there were "excess" lands for which Ontario was entitled to be paid.

116. Given the reliance the plaintiff places on Mr. White's letter, for ease of reference the full text of it is set out below:

ONTARIO
Department of Lands, Forestry and Mines
Woods & Forests Branch

Toronto, December 15th, 1914.

Dear Mr. Scott:

I have been looking into the matter of the Indian Reserves under Treaty No. 3. I have been studying their situation and everything connected with them, as we are required to do under section 2 of the agreement signed by Mr. Daly and Mr. Gibson on the 15th of April, 1894, to see if there is any good reason why we should not now acquiesce in the selections made and the surveys on the ground.

When I came to read clause 4 it struck me that that clause left the door open for all kinds of disputes and misunderstandings hereafter, and I thought it would be well to put our views before you so that, if possible, some agreement might be arrived at which would close the door to the entry of future disputes.

You will see that clause 4 provides, - "That in case of all Indian Reserves so to be confirmed or hereafter selected, the waters within the lands 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.

This provision is very far-reaching and might seriously cripple our action with respect to the application of Winnipeg for leave to take its water supply from Shoal Lake, and I think you will agree with me that there is much room otherwise for future trouble under the clause as it reads, because in some of the reserves I find there are rivers of considerable size running through them and it surely never was intended that lands under a river should belong to the Indians.

I find also that there are some water powers lying within the boundaries of reserves, and I also find that some reserves, - notably Shoal Lake, border on the lake in such a way that, under the language with respect to headlands, a large number of islands would become property of the Indians, the possession of which islands would give them large additional areas beyond that surveyed and covered by us in our estimate of the total areas taken for reserves, and this would not be an isolated case for I have noticed several other cases, without examining all the plans, in which the same thing might occur.

What my Minister had in mind when discussing this question was the approval of the Indian Reserves as actually surveyed, leaving nothing open to argument hereafter.

Will you please look at the draft agreement I have referred to. It is to be found within 54 Victoria, Charter 3, Statutes of Ontario, but I think there was a Dominion Statute passed about the same time dealing with the same matter.

The agreement was signed on the 16th of April, 1894, by Mr. Daly for the Dominion Government, and Mr. Gibson for the Ontario Government. No doubt this agreement will be of record in the Department of State at Ottawa, and you will see how it read when it was signed. There may have been some changes in it.

After you have considered this matter I will be very pleased to hear from you as to what adjustment can be made.

Yours truly,

Aubrey White

Deputy Minister.

Duncan G. Scott, Esq.,

Deputy Superintendent General of Indian Affairs, Ottawa, Can.

117. Mr. Scott's response may be found in the plaintiff's motion record, within Exhibit "H".

118. As is evident from the letter and the context in which it took place, it related to the ongoing dispute and negotiations between Canada and Ontario to settle the question of reserve lands. That process had been underway for decades, long before the aqueduct was even being considered. The 1915 Ontario Act did not result from some "realization" by the City and Ontario that the 1894 Agreement would "cripple" the aqueduct project. It is not indicative of any "scheme" by Ontario and the City to facilitate the aqueduct.

119. It should also be kept in mind that the 1894 Agreement and the 1915 Ontario Act apply to all lands set aside for Treaty 3 First Nations in Ontario. Treaty 3 covers an extremely large area and includes numerous bodies of water (see Exhibit "R" to the Affidavit of Tim Shanks[57]. Shoal Lake and IIFN's reserve lands at Shoal Lake are a very small piece of a very large puzzle.

120. It should further be kept in mind that the plaintiff is only one of 28 First Nations with reserve lands in Treaty 3 territory[58].

121. This is the backdrop and the context in which Mr. White's letter was written. While he mentions the aqueduct, it is evident from a fair reading of his letter as a whole that it is directed at finalizing the selection of all reserve lands within Treaty 3 territory. He was expressing concerns about the allocation of reserve lands across all of Treaty 3 territory; whether the 1894 Agreement accurately reflected the intention of Treaty 3; the potential for ongoing disputes; and approval of reserves "as actually surveyed"[59].

122. The City submits that the purpose of the 1915 Ontario Act is clear – to confirm the selection of reserve lands for all Treaty 3 First Nations and transfer those lands to Canada. It was not "*expressly meant to enable the Shoal Lake aqueduct scheme"*, as the plaintiff argues in its factum[60].

123. The premise of Mr. White's comment about the aqueduct was also factually and legally wrong. There was some uncertainty about whether the aqueduct might need to extend into Ontario, but it was ultimately constructed entirely within Manitoba. The lands and lands under water in Shoal Lake expropriated for the aqueduct are entirely within Manitoba. The expropriation was confirmed by the Privy Council in 1915[61].

124. Neither the 1894 Agreement nor the 1915 Ontario Act have any application to lands or waters in Manitoba. They could not "cripple" the aqueduct project, as Mr. White commented in his letter.

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[57] Map of Anishinaabe Nations of Treat #3, enclosed to the Affidavit of Tim Shanks (October 31, 2023), Exhibit "R".
[58] Ibid.
[59] A White 15 December 1914 Letter, supra note 7.
[60] Plaintiff's Factum, at para. 27.
[61] Report of the Committee of the Privy Council, 3 March 1915, enclosed to the Affidavit of Chief Lewis (October 11, 2023), Exhibit "H".

125. The Compensation Provision does not give rise to an obligation on the City's part to compensate the plaintiff (or any other person for that matter) for damages alleged to have resulted from the actions of governments or other parties over whom the City had no control. It is evident from a review of the proceedings before the IJC and the Order itself that this was never the intention of the Compensation Provision.

126. The purpose of the IJC's Order was to allow the City to construct certain physical works, consisting of an intake to be placed in Shoal Lake through which water could be withdrawn from the Lake, and then conveyed through a pipe to the City of Winnipeg[62]. It is evident that the IJCs concern, and the focus of submissions from parties at the hearing, was whether the withdrawal of water from Shoal Lake might adversely affect lake levels, navigation and hydro power[63]. It was recognized that some lands would have to be expropriated to construct the physical infrastructure. Those are the matters the Compensation Provision was intended to address.

127. There was no mention of the 1894 Agreement in the proceedings before the IJC. There was no suggestion the City would be liable for damages that were not caused by the actual withdrawal of water from the Lake, or the construction of the physical works. There was no suggestion the City would be responsible for the actions of third parties or governments over whom it had no control.

128. The Compensation Provisions cannot reasonably be interpreted to mean that the City would be liable to all Treaty 3 First Nations for any alleged taking away of "Headlands" by virtue of the actions of Canada and Ontario relating to the allocation of reserve lands. This is not rationally connected to the withdrawal of water from Shoal Lake through the aqueduct. This nevertheless may be the result if the plaintiff's interpretation were to prevail.

129. The City respectfully submits that the Headlands claims are clearly not matters that fall within the Compensation Provision, and would be doomed to fail. They are claims that should be

[62] 1914 IJC Order, supra note 2, s. 2.
[63] International Joint Commission, "Hearings and Arguments in the Matter of the Application of the Greater Winnipeg Water District", 1913-1914, at p. 29-39, enclosed to the Affidavit of Chief Lewis (October 11, 2023), Exhibit "I".

made, and are being made, against IIFN's treaty partner, not the City. The proposed amendments should also be denied on this basis.

PART VIII CONCLUSION AND RELIEF SOUGHT

130. The Headlands claims are new, statute-barred, an abuse of process, and doomed to fail. The proposed amendments to add them should not be permitted, for any or all of these reasons.

131. The City requests that the plaintiff's motion, other than with respect to the amendments identified in paragraph 15 above, be dismissed, with costs.

DATED at Winnipeg, Manitoba, this 7th day of November, 2023.

MLT Aikins LLP

Per: 

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The City of Winnipeg

Schedule. "A": List of Authorities

Jurisprudence

1 *2250898 Ontario Inc. v. Mukelov*a, 2022 ONSC 610, at paras. 35, 36.

2 *Iskatewizaagegan No. 39 v. The City of Winnipeg*, 2022 ONSC 535, at paras. 14, 15, 16, 17, 18, 19, 20, 21.

3 *1100997 Ontario Ltd. v. North Elgin Centre Inc*., 2016 ONCA 848; 409 DLR (4th) (382), at paras. 22, 23.

4 *Polla v. Croatian Toronto Credit Union Limited*, 2020 ONCA 818, at paras. 27, 33, 34, 40, 41, 42.

5 *Toronto Standard Condominium Corporation No. 1786 v. Fernbrook Homes (Wilson) Limited*, 2021 ONSC 6652, at paras. 13, 14, 29, 30, 31, 32, 33, 34, 35.

6 *McNaughton v. Baker* (1988) 28 CPC (2d) 49 (BCCA), at para. 14.

7 *Hollinger International Inc. v. Hollinger Inc.* (2004), 11 C.P.C. (6th) 245 (Ont. S.C.J. [Commercial List]), at para. 5.

8 *Toronto (City) v. CUPE Local 79,* 2003 SCC 63, at paras. 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51.

9 *Kostic v. Merrill Lynch Canada Inc*., 2010 MBCA 81, at paras. 47, 55.

10 *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, at paras. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 41, 42.

11 *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, at p. 13.

Statutes

1 *Limitations Act,* SO 2002, c. 24 Sch B, s. 4, 5, 15.

2 *Courts of Justice Act,* RSO 1990 c. C43, s. 138.

3 *Canada (Ontario Boundary) Ac*t, 1889: 52-53 Victoria, c.28 (U.K.), 12 August 1889.

ISKATEWIZAAGEGAN NO. 39 INDEPENDENT FIRST NATION **Plaintiff**	**and**	THE CITY OF WINNIPEG and HIS MAJESTY THE KING IN RIGHT OF ONTARIO **Defendants**

Court File No. CV-20-00644545-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED IN TORONTO

FACTUM OF THE CITY OF WINNIPEG

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