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

REPLY FACTUM of the Plaintiff/Moving Party

DATE: November 17, 2023

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AND TO: THIS HONOURABLE COURT

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

PART I: OVERVIEW

I. Nature of the Hybrid Motion

1. The Plaintiff/Moving Party, Iskatewizaagegan Independent First Nation ("IIFN") files this factum in reply to the responding factums of the Defendants Ontario and Winnipeg (Nov. 1, 2023, subsequently amended on November 7, 2023).

2. This factum is submitted pursuant to the consent timetable for exchange of materials provided to this Court on September 26, 2023. This Reply addresses three new issues raised by the Defendants in their factums (as well as the letter from Winnipeg counsel sent on October 10, 2023, on the eve of the Plaintiff submitting its Motion materials), as follows:

    a. Contrary to the Defendants' assertions, there is no abuse of process here;
    b. The Defendants (Winnipeg in particular) are attempting a limitations defence, which is unavailable on this Motion; and
    c. The Defendants are attempting to deflect from their own Compensation Provision by trying to rely on the overlap with "lands or properties" covered by Treaty.

II. Overview of the Headlands Issue

3. In 1913, Ontario passed an Order-in-Council with a Compensation Provision that commits the Defendants to compensate <u>any</u> private party whose "lands or properties may be taken, injuriously affected or in any way interfered with" as a result of Winnipeg's construction of an aqueduct and subsequent water-takings at Shoal Lake. The Provision was then adopted by the International Joint Commission ("IJC") as an Order in 1914, and enshrined in an Ontario statute titled: *An Act to Confer Certain Rights and Powers upon the Greater Winnipeg Water District* ("1916 Ontario *Act*").[1]

[1] Ontario Order-in-Council re. Shoal Lake, Oct. 1, 1913 ["O-I-C 1913"] [Motion Record, Vol 2, at Tab 1 (A), the Reply Affidavit of Chief Gerald Lewis]; IJC Order re. Shoal Lake, Jan. 14, 1914 [Motion Record, Vol 2, at Tab 1 (B), the Reply Affidavit of Chief Gerald Lewis]; Ontario, *Act to Confer Certain Rights and Powers upon the Greater Winnipeg Water District*, 1916 [Motion Record, Vol 2, Tab 1 (C), Reply Affidavit of Chief Lewis].

4. The Defendants then caused harm to the Plaintiff, by implementing a scheme to extinguish its rights to lands or properties at the Headlands of Shoal Lake – the Headlands representing the entirety of Indian Bay, at which Winnipeg constructed its aqueduct – to facilitate Winnipeg's water-takings at Shoal Lake, *after* said Compensation Provision was in force. The Plaintiff maintains that Winnipeg and Ontario are jointly and severally liable for the harm arising from this scheme, and will both be required to pay compensation for said harm.

5. Regardless, for purposes of this Motion, this Court is not asked to determine whether the scheme occurred as the Plaintiff alleges, or whether, ultimately, compensation should be paid for the Headlands Issue. The only question is whether, assuming the facts as pleaded are true, the Plaintiff can pursue a claim for harm caused by the extinguishment of its rights at the Headlands (i.e., the entirety of Indian Bay), which only occurred as a result of Winnipeg's water-takings. The merits of that claim will require a further, developed evidentiary record, not least through answers to questions which the Defendants have so far refused to provide.

PART II: FACTS

I. The Defendants' Scheme to Extinguish the Headlands Rights (1894-1915)

6. The Plaintiff repeats and relies upon the facts as set out in its factum of October 11, 2023 at paragraphs 9-35, and in particular paragraphs 18-27, describing how, *after* the Shoal Lake Compensation Provision went into effect in 1913/1914, Ontario unilaterally extinguished IIFN's rights at the Headlands of Shoal Lake in 1916, in order to pave the way for Winnipeg to start taking water (the "Headlands Issue").

7. In particular, the plan to extinguish IIFN's rights at the Headlands resulted from the Defendants' realization that the proposed water intake site fell within the reserve boundaries of IIFN. In 1914, Ontario's Deputy Minister for the Department of Lands, Forests and Mines, Aubrey White, wrote to Deputy Superintendent-General of the Department of Indian Affairs,

Duncan Campbell Scott, raising Ontario's concern that the Agreement was "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[.]" The Deputy Minister goes on to note:

> 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...[2] [Emphasis added.]

8. As Winnipeg correctly points out[3], the 1915 Ontario *Act* was not exclusively focused on the extinguishment of the Headlands-related rights of IIFN. The 1915 *Act* resolved a number of outstanding issues in the then-ongoing dispute between Ontario and Canada as to the definition of reserve lands and their transfer to federal control, and avers to "several other cases" in which Ontario is concerned about at other reserves. That said, Ontario expressly chose to use the 1915 *Act* as the means with which to exclude the Headlands (which in IIFN's case meant all of Indian Bay) from reserve areas under Treaty No. 3. In doing so, it directly contradicted the definition of reserve boundaries in the 1894 Agreement.[4]

9. The parties do not dispute that the Compensation Provision was in effect before IIFN's rights at the Headlands were extinguished. Regardless of whether the in-force date is the Ontario Order-in-Council of October 1, 1913 (as the Plaintiff maintains) or, as Winnipeg contends, the IJC Order of January 14, 1914[5], the Compensation Provision was in-force prior to the 1915 Ontario *Act* which excluded the Headlands from IIFN's reserve. Notably, Canada did

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[2] Letter from A. White to D. Campbell-Scott, December 15, 1914 [Motion Record, Vol. 2, Tab 1(M), the Reply Affidavit of Chief Gerald Lewis].
[3] Winnipeg factum, at para 104.
[4] A full factual outline on this point can be found in IIFN's factum of Oct. 11, 2023 at paras 18-27.
[5] See: Transcript of Examinations for Discovery of T. Shanks (Winnipeg), Sep. 28, 2022, p. 435, line 13.

not pass equivalent legislation or otherwise endorse the 1915 Ontario *Act*, meaning that the extinguishment of the rights at the Headlands was a unilateral action by Ontario only.

II. IIFN is Recognized as a Private Party Under the Compensation Provision (2020)

10. In 2018, the Plaintiff IIFN expressed its intention to pursue compensation under the Compensation Provision. After the Defendants objected on the basis that IIFN was not, in their view, a "private party", the Plaintiff filed an Application, pursuant to Rule 14.05 of the *Rules of Civil Procedure*, asking this Court to declare it was a private party. The Defendants eventually acquiesced, agreeing to a Consent Order, issued by Justice Gans on July 9, 2020 ("Consent Order"), which confirmed that the Plaintiff is a "Private Party" for purposes of claiming compensation for harm caused by the Defendants' water-takings.[6]

11. The Consent Order contained no restrictions on the category of lands or properties for which IIFN would be entitled to claim compensation, nor was there any suggestion that some categories of lands or properties would be excluded if also covered by Treaty. This logically follows from the fact that all IIFN lands are, by definition, covered by Treaty No. 3, and to exclude "Treaty lands" would be to preclude IIFN from claiming under the Provision at all.

12. Nevertheless, it is now apparent the Defendants are trying to back out of that Consent Order, by arguing (1) that IIFN is already seeking compensation for the taking of the Headlands elsewhere (which is not the case), and (2) that, because the Headlands are also covered by Treaty, IIFN should not be able to make a claim under the Compensation Provision for the harm to its lands and properties at the Headlands. The effect of that logic, if accepted, would be to exclude any and all Indigenous claimants covered by Treaty from the Compensation

[6] Order of Gans J, Jul. 9, 2020, re: *Private Party Claim to Compensation* ["Consent Order"].

Provision. The Consent Order contains no such restrictions, and the Defendants remain bound by that Order.

III. This claim is headed to trial on the fiduciary duty issue (2021)

13. In 2020, Ontario brought a Motion to Strike under Rule 21.01(1)(b), seeking to strike those portions of IIFN's amended statement of claim that plead both a *sui generis* fiduciary duty and an *ad hoc* fiduciary duty against the Crown.[7]

14. On February 2, 2017, Justice Perell of this Honourable Court dismissed Ontario's motion, allowing IIFN's claims based on the fiduciary duty to proceed.[8] As such, this Court has confirmed there will be a trial in this claim, in order to address Ontario's alleged breach of fiduciary duty. As discussed below, the fact there will be a trial (and record to draw from) has significant implications for the premature testing of any evidence on this Motion.

15. Justice Perell's decision correctly recognized that the Crown-Indigenous fiduciary relationship is central to this case, given, among other factors, that (a) the stipulations in the 1913 Order-in-Council (and in the 1914 IJC Order) "satisfy the undertaking requirement of an *ad hoc* fiduciary relationship"; (b) IIFN is vulnerable to Ontario's control; and (c) that several of IIFN's "cognizable Aboriginal Interests" may be affected by Ontario's exercise of discretion or control over Shoal Lake.[9]

16. As Justice Perell correctly observed, Ontario's Order-in-Council and Compensation Provision have "been confirmed by its own legislation":

> To this day, Winnipeg is extracting up to 100 million gallons of water a day. The source of that water is a watershed in Ontario. That watershed feeds a lake with a surface area 95% in Ontario. At this juncture, Ontario's arguments to make meaningless and ineffective the stipulations in its 1913 Order in Council weaken its argument.[10]

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[7] *IIFN v. Ontario et al*, 2021 ONSC 1209, at para 2. ["Motion to Strike Decision"]
[8] *IIFN v. Ontario et al*, 2021 ONSC 1209, at para 100.
[9] *IIFN v. Ontario et al*, 2021 ONSC 1209, at para 101.
[10] *IIFN v. Ontario et al*, 2021 ONSC 1209, at para 104.

17. In so ruling, Justice Perell emphasized the general principle that any fiduciary relationship imposes "obligations that are stricter than the morals of the marketplace and of the workaday world", imposing a "higher standard of behaviour". As Justice Perell correctly observed, when there is a breach of said duty, "courts mete out more powerful remedies."[11]

18. Justice Perell also highlighted the significance of the Honour of the Crown when the fiduciary relationship is between the Crown and a First Nation. Justice Perell noted that when a "provincial government exercises Crown power", the exercise of that power is "burdened by the Crown obligations" toward the Indigenous population. The fiduciary duty is "called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples." This reflects the fact that what is at issue in this case is Crown-made Aboriginal law, rather than Indigenous law, the body of law developed since time immemorial within the First Nation itself.[12]

19. Justice Perell's ruling confirms that there is a freestanding breach of fiduciary duty claim against Ontario, independent of any claim against Winnipeg for the direct harm caused by the water-takings. In other words, even if Winnipeg is ultimately found not liable for the harm from water-takings, the Court can still find that Ontario failed in its obligations as a fiduciary towards the Plaintiff. The discrete fiduciary issue can and will be dealt with separately on trial, independent of the broader claim relating to harm from water-takings. Justice Perrell did not rule that the fiduciary duty arguments would succeed, only that IIFN should clearly be permitted to ground its compensation claim in that fiduciary duty, and in particular, the Ontario Crown's obligations towards IIFN.

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[11] *IIFN v. Ontario et al*, 2021 ONSC 1209, at para 54.
[12] *IIFN v. Ontario et al*, 2021 ONSC 1209, at paras 48, 65, 80, citing *Wewaykum Indian Band v. Canada*, 2002 SCC 79, at para 79.

IV. Inequities Faced By the Plaintiff (Pre-Contact to Present)

20. The harm caused by the loss of the Headlands must be viewed in the context of the Defendants' choice to avoid harm to three freshwater sources in the immediate vicinity of Winnipeg. Lake Manitoba (approximately 80 kilometres northwest of the City of Winnipeg), Lake Winnipeg (50 kilometres north of Winnipeg), and Lake Winnipegosis (300 kilometres northwest of Winnipeg) are all within Manitoba, and two of those lakes are closer to Winnipeg than Shoal Lake (155 kilometres, according to Winnipeg's own measurements).

21. This Court is free to draw inferences from the Defendants' choice of a remote lake within the reserve lands of a First Nation, in another province, rather than a water source closer to Winnipeg, effectively creating the "longest straw" in Canada. Winnipeg's choice of Shoal Lake suggests a fear of harm to lakes closer to home. Of course, IIFN continues to experience such harms every day, including the inability to exercise its fishing, hunting, and gathering rights on Shoal Lake; the inability to grow and harvest traditional crops including rice and blueberries; the inability to maintain its commercial fishery; the inability to access sacred sites; the inability to engage in cultural practices; and the reversal of the flow of water, bringing in contaminants and invasive species from outside Shoal Lake.[13]

22. Moreover, as outlined in the Reply Affidavit of Chief Lewis, there is a significant difference between Winnipeg – a major urban metropolis, which has significantly expanded in size and wealth since 1913, and has profited billions of dollars off of Shoal Lake's water – and IIFN, a First Nation suffering from a host of negative socioeconomic indicators. These indicators

[13] Chief Lewis Reply Affidavit, Nov. 17, 2023, at para 47.; See also: Fresh as Amended Statement of Claim (Aug. 24, 2021), at paras 26-34, 68, 72, 87. Transcripts of Examinations for Discovery of IIFN Witnesses: Nov. 17, 2022 at pp. 43-44 and 45-49 and 51-59 (wild rice), 82-91 and 99-102 (blueberries), 123-130 (fishing); and Nov. 16, 2022 at pp. 205-207 (fishing); and Nov. 18, 2022 at pp. 155 (wild rice), 152-159 (cultural impacts), and pp. 18-19 and 136-137 and 147-150 (impacts from reversal of water flow).

are a direct result of the widely known impacts of colonization, Indian Residential Schools, the Sixties Scoop, the overincarceration of Indigenous peoples, and other related factors.[14]

PART III: LAW AND SUBMISSIONS

I. There is no "Abuse of Process" [Ontario factum at paras 45-59; Winnipeg factum at paras 87-101; and T. Hansell (Winnipeg) letter of Oct. 10, 2023]

A. The Headlands issue is not "new".

23. The Defendants, having proposed this Motion to resolve the "scope" question raised by the Headland Issue, now plead surprise and ask that the Court not address that very issue, on the basis it is "new" and they were unprepared for it. They now argue particularization of the Headlands Issue is an "attempt to graft on a new claim,"[15] and that, "[a] plaintiff cannot include a completely new claim simply by disclosing it at discoveries."[16]

24. IIFN's position remains that the Headlands Issue has always been within the scope of the Claim. While the term "Headlands" does not itself appear in the Statement of Claim, the Claim does specifically identify the harm caused by the Defendants' use of Indian Bay, which the Plaintiff has always understood to constitute the Headlands of Shoal Lake.[17] The Claim also clarifies that compensation is for harm caused to all reserve lands set aside for its use:

> [T]he plaintiff's lands and properties include all lands, including lands under water, set aside for the Nation under the *Indian Act*, and under Treaty #3. In addition, the plaintiff's lands and properties include all lands, including lands under water, that are within their traditional territory.[18] [Emphasis added.]

25. The Statement of Claim further states IIFN's view that that its "treaty, traditional, and reserve lands have been directly affected by Winnipeg's taking of water", as a result of Ontario

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[14] Chief Lewis Reply Affidavit, Nov. 17, 2023, at para 42.
[15] Ontario factum, at para 46.
[16] Winnipeg factum, at para 52, 65-75, 83-86.
[17] Fresh as Amended Statement of Claim (filed on consent), August 24, 2021, at paras 50-52.
[18] Fresh as Amended Statement of Claim (filed on consent), August 24, 2021, at para 67; See also: paras 34, 68-69.

assuming and exercising "discretionary power or control, affecting the plaintiff's interests in respect of the taking of water from the plaintiff's traditional, treaty, and reserve territory, without consultation with the plaintiff Nation."[19] This, by definition, must include Ontario's exercise of that control to extinguish the rights at the Headlands in its 1915 *Act.*

26. That Indian Bay was not explicitly described as the "Headlands" cannot be sufficient reason to prevent IIFN from particularizing the Headlands now. The Court must read the pleadings generously in favour of the proposed amendment, considering both the existing pleadings and the amendment and asking "whether the respondents would reasonably have understood" from the amendment and "the particulars provided on discovery" that IIFN was "pursuing a claim in respect of the matter addressed by the proposed amendment."[20]

27. It is a basic principle of amendment that pleadings should be read generously, accommodating any drafting "deficiencies", in order to ensure that they are considered on their merits based on evidence presented before judges at trial. "The Court should always consider whether the deficiency can be addressed through an amendment to the pleadings and leave to amend should be denied only in the clearest of cases."[21]

28. The law on amendments is abundantly clear: "Pleading amendments will not comprise a new cause of action if the original pleading contains the facts that are necessary to support the additional relief claimed."[22] In this case, the amendment merely particularizes the "Headlands" – a term implicit in the original Statement of Claim, given the extensive

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[19] Fresh as Amended Statement of Claim (filed on consent), August 24, 2021, at paras 68, 80.
[20] *Polla v. Croatian (Toronto) Credit Union Limited*, 2020 ONCA 818, at paras 37-39.
[21] *PMC York Properties Inc. v. Siudak*, 2022 ONCA 635, at para 31; *Hunt v. Carey Canada Inc*., 1990 CanLII 90 (SCC), [1990] 2 SCR 959, at p. 980 ; *Noram Building Systems Inc v Zurich Insurance Co*, [2023] OJ No 4136, 2023 ONSC 5088, [2023] OJ No 4136 at para. 67 ; *Farmers Oil and Gas Inc. v. Ontario*, 2016 ONSC 6359.
[22] *Noram Building Systems Inc v Zurich Insurance Co*, [2023] OJ No 4136, 2023 ONSC 5088, [2023] OJ No 4136 at para. 67 citing *Klassen v. Beausoleil*, 2019 ONCA 407, at para. 28; *Dee Ferraro Limited v. Pellizzari,* 2012 ONCA 55 (CanLII), at para. 4; *Canadian National Railway v. Canadian Industries Ltd*., 1940 CanLII 346 (ON CA), [1940] 4 D.L.R. 629 (Ont. C.A.), at pp. 634-635.

discussion of Indian Bay – and the harm caused to IIFN's "lands or properties" when its rights at the Headlands were extinguished by the Defendants. So long as the "basis for the claim is based upon facts that can reasonably be seen as falling within the four corners of the existing claim," it shall be granted.[23] In considering whether an amendment falls within the four corners of the claim, "[t]he pleading must be read generously…"[24], considering "facts outlined in documents incorporated into the pleadings by reference[.]"[25]

29. In any event, the Plaintiff sufficiently particularized the Headlands Issue as a discrete issue at the latest by September 2022, when it provided relevant documents to the Defendants, and then proceeded to pursue the Headlands Issue extensively during Examinations for Discovery. As is plainly on the record in these proceedings, the Plaintiff diligently disclosed a set of documents relevant to the Headlands Issue, covering the time period from an 1894 Statutory Agreement through to the 1915 Ontario *Act*, ahead of the Examinations for Discovery of the Defendants, before posing a series of questions about the Issue during said Examinations.[26]

30. The Examination transcripts demonstrate that on no less than eighteen separate occasions, IIFN counsel answered the Defendants by providing a detailed description of the Plaintiff's position on the Headlands Issue, and its intent to vigorously pursue this issue as a category of harm.[27] It is a basic tenet of the Discoveries process that when the Plaintiff's legal counsel answers a question or states a position for the record, that position is taken as the Plaintiff's

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[23] *Noram Building Systems Inc v Zurich Insurance Co*, [2023] OJ No 4136, 2023 ONSC 5088, [2023] OJ No 4136 at para. 67 citing *Boyer v. Callidus Capital Corporation*, 2023 ONCA 233, at para. 66.
[24] *Klassen v. Beausoleil*, 2019 ONCA 407, at para. 30 and *Operation Dismantle Inc. v. R.*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, at p. 14.
[25] *Noram Building Systems Inc v Zurich Insurance Co*, [2023] OJ No 4136, 2023 ONSC 5088, [2023] OJ No 4136 at para. 67 *Hitchlock v. AG Ontario*, 2020 ONSC 5348, at paras. 11-12; *Advance Beauty Supply Limited v 233930 Ontario Inc.*, 2015 ONSC 422 at para. 11 ; *Trillium Power Wind Corp. v. Ontario*, 2013 ONCA 683, at paras. 30-31.
[26] Reply Affidavit of Chief Lewis, Nov. 17, 2023, at para 4.
[27] Chief Lewis Affidavit, Oct. 11, 2023, Ex. J: Excerpts from Transcripts [Motion Record, Vol. 1, Tab 2(J)]

(The only exception is if the opposing party expressly objects to the Plaintiff's lawyer having spoken, in which case they can suspend their questioning and seek an adjournment, neither of which occurred during these Discoveries).[28]

31. Similarly, the identification of the location of the Headlands as being at Indian Bay was discussed during Discoveries, including in questions posed to the Defendants.[29] Moreover, the Defendants *themselves* posed questions on the Headlands Issue towards IIFN's witnesses, plainly demonstrating that they have not been caught unawares on this Issue.[30]

32. Subsequent to Examinations, counsel engaged in back-and-forth discussions, in phone calls, correspondence, and Case Management Conferences, on the Headlands Issue. Ultimately, at the suggestion of the Defendants – not the Plaintiff – Justice Wilson agreed that the best approach would be to resolve the Headlands Issue by way of this herein Motion:

> I am of the view that motions concerning pleadings and the nature of the claims that will be advanced at trial should be heard prior to the trial, unless there is some compelling reason for the trial judge to hear the motion. In my view, this promotes clarity for counsel in terms of the case that must be advanced and/or defended and streamlines the evidence, making for a more efficient trial.[31]

33. Finally, Winnipeg misleadingly argues that it might one day be ordered to pay IIFN "millions or even billions of dollars in this action", only to later see some other court or tribunal reach a different conclusion on the Headlands Issue.[32] But that is an irrelevant consideration at this stage: the only question on this Motion is whether IIFN should be allowed to claim

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[28] Rule 31.08 of the Ontario *Rules of Civil Procedure ; Kobre v. Sun Life Assurance Company of Canada*, 2005 CanLII 36165 (ON SC), at para 14.
[29] Transcripts, Examinations for Discovery of IIFN Witnesses (Nov. 17, 16, and 17, 2022), at pp.65-69, 105, 115, 141, and 173-174, pp. 293, and pp. 66-69, 91-92, 108, 151, 160-162, 166, and 194-195; Transcripts, Examinations for Discovery of Winnipeg Witness (Sept. 26, 28, and Nov. 21), at pp. 43-48, 51-52, and 55, pp. 404-409, and pp. 743-748; Transcripts, from Examinations for Discovery of Ontario Witness (Sept 29 and Oct. 6, 2022), at pp. 85-90, 91, 107, 131, and 143, pp. 395-397 and 399-407.
[30] Transcript, Examinations for Discovery of IIFN Witnesses (Nov. 17, 2022), at pp. 141, 142, and 146.
[31] Wilson J Order re. Hybrid Motion, Aug. 21, 2023, at p. 2 [Motion Record, Vol. 2, Tab 2(O)]
[32] Winnipeg factum, at para 95.

compensation for harm to its "lands or properties" caused by the alleged extinguishment of its Headlands rights. Any future issues about "double compensation" (which IIFN submits are unfounded) can be addressed at the merits stage by reducing damages appropriately.[33]

B. There is no evidence of "non-compensable" prejudice

34. A party is entitled to amend its pleadings, with a strong presumption that such amendment shall be granted unless it would result in prejudice that could not be compensated by costs or an adjournment. That extends to the ability to amend its pleadings to a particularize a claim, albeit with leave of the Court once pleadings have closed (as is the case here).[34]

35. In other words, any amendment designed to "conform to the evidence after the parties have closed their cases" is a matter of discretion, but the Court shall exercise that discretion unless it results in prejudice which "cannot be compensated for by costs or an adjournment."[35]

36. There is "little purpose served in refusing an amendment" simply on the basis that it could just as easily be "commenced as a separate action."[36]

37. As Ontario acknowledges, a Defendant should not have to "defend more than one proceeding on the same subject matter by the same plaintiff involving claims for lands and billions of dollars."[37] And yet, the natural result of the Defendants' position would be to require IIFN to launch a new action on the same subject matter, against the same parties, based on the same statutory Compensation Provision. This, if nothing else, is a waste of judicial resources.

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[33] IIFN factum of Oct. 11, 2023, at para 86.
[34] Rule 26.01; *Phyzex Technologies Inc. v. Correct Development Corporation*, 2019 ONSC 278, at para 109; This point is discussed at paras 74-78 of the Plaintiff's Factum on this motion. The main B.C. Case is *Sperring v. Shutiak*, 2023 BCCA 54; while the Ontario equivalent is *Faridani v. Stubbert*, 2013 ONSC 1233 [*Faridani*].
[35] *Kalkinis (Litigation guardian of) v Allstate Insurance Co*., 1998 CanLII 6879 (ON CA), at p. 9.
[36] *Faridani*, at para 7.
[37] Ontario Factum, at para 52.

38. Moreover, the Defendants mischaracterize the case of *Faridani v. Stubbert*, 2013 ONSC 1233[38], which involves a different factual and legal matrix. In *Faridani*, a civil suit between former romantic partners, the deemed undertaking rule was invoked, after one party sought to rely upon the disclosure of certain confidential medical records (unrelated to and pre-dating the romantic relationship) in order to belatedly introduce a new cause of action.[39]

39. Conversely, this motion to amend only particularizes information that was naturally obtained in the course of litigation, including through disclosure of expert materials, productions by the Defendants, and information elicited during Examinations for Discovery. As the Court correctly held in *Faridani*, an amendment must be permitted unless it creates non-compensable prejudice for the other party. Prejudice which arises merely from having to face the amended pleading is itself insufficient to bar an amendment, because that is simply the prejudice that results from facing any successful plea, in the normal course.[40]

40. The Defendants – who carry the burden to demonstrate they will suffer "non-compensable prejudice" – have simply not provided any evidence that the amendment will result in that significant degree of prejudice. As discussed below, the only "non-compensable prejudice" argued by the Defendants invokes their limitations defence, albeit without providing any evidence of the supposed prejudice they will face if the amendment is permitted.

C. IIFN is not pursuing the Headlands Issue in any other proceedings.

41. The Defendants allege that IIFN's Motions are an abuse of process based on a multiplicity of proceedings, based on their view that IIFN is already pursuing the Headlands Issue in

[38] Cited in the Plaintiff's factum at para 84 and Ontario's factum at para 46.
[39] *Faridani,* at paras 2-5, 21-23.
[40] *Ibid,* at para 7.

other forums.[41] They argue – and IIFN completely agrees – that IIFN "is obligated to make full and fair disclosure" of "other claims that may overlap" with this action, so that "the defendants and this Court can make a proper assessment."[42]

42. As has repeatedly been communicated to the Defendants[43], including by way of answers to undertakings, IIFN has never received compensation for the extinguishment of its rights at the Headlands area of Shoal Lake, nor is it pursuing any claims on the Headlands Issue.[44] As set out below, the claims cited by the Defendants do not advance the Headlands Issue whatsoever. The Defendants are misrepresenting the substance of these claims (in particular the Garden Islands claim). The one headlands-related claim, a 2004-2008 Specific Claim unilaterally opened and then unilaterally closed by Canada, never progressed at all.

43. IIFN can confirm that it is not pursuing the Headlands Issue in any of these claims, nor has it ever pursued the Headlands Issue in any forum. Specifically, IIFN can advise:

    a. There is no Specific Claim for the Headlands Issue;
    b. IIFN has filed three other Specific Claims which are unrelated to the Headlands Issue, instead relating to (a) Canada's failure to set aside certain islands for IIFN (1989), (b) inadequate allocation of reserve land for farming (2009), and (c) damages due to flooding caused by Canada's actions/inactions (2001); and
    c. In 2016, IIFN joined Shoal Lake #40 First Nation's claim for Canada's failure to set aside the Garden Islands for farming. [45]

44. Additionally, Winnipeg has included as evidence a copy of a 2000 claim from IIFN against Ontario and Canada relating to the "Garden Islands".[46] A plain reading shows this Claim

[41] Winnipeg Factum, at paras 49, 76-82, 87, 94; T. Hansell (Winnipeg legal counsel) letter to IIFN Counsel, Oct. 10, 2023; Ontario factum at paras 49-53.
[42] Winnipeg factum, at para 101.
[43] Chief Lewis Affidavit, Oct. 11, 2023, at para 7; Chief Lewis Reply Affidavit, Nov. 17, 2023, at para 3.
[44] See, i.e., IIFN, Answers to Undertakings 1, 3, 4, 7, 20, 38, 45, 46, 61, 72, and 111.
[45] Chief Lewis Reply Affidavit, Nov. 17, 2023, at para 23 and 24.
[46] Winnipeg Motion Record, at Tab 1 - D.

relates to unfulfilled treaty promises for the provision of certain islands as part of IIFN's reserve territory. In any event, IIFN can confirm this claim has not been litigated further and no compensation has been provided to IIFN for any element of this claim.[47]

45. The one proceeding that did involve aspects of the Headlands Issue was a Specific Claim opened by Canada (*not* by IIFN) in 2004 and subsequently shuttered by unilateral act of Canada in 2008. At the time, Canada faced a number of claims from First Nations on various issues, including flooding, harms to reserve lands, and a concern that Ontario's 1915 *Act,* which purported to extinguish their rights to their respective headlands across Treaty No. 3, was an illegal act of expropriation. In the face of so many claims, Canada unilaterally (without foreknowledge or consent of the First Nations) established a separate "Specific Claim" process in 2004, promising to address any and all headlands issues raised by the Nations. Less than four years later, in 2008, Canada abruptly shut down that headlands "Specific Claim" – by way of a bureaucratic, generic letter sent to each Chief – putting an end to the Nations' various claims regarding the headlands, including IIFN's claims.[48]

46. Finally, IIFN is aware that in the 1980s, the Eagle Lake Band (a different First Nation, unrelated to IIFN) initiated a claim against Ontario for, among other issues, the loss of their Headlands when Ontario "attempted unilaterally to alter the boundaries of the Band's reserve by a statute of the Legislature of Ontario" (i.e., the 1915 Ontario *Act*). To the Plaintiff's knowledge, this case did not proceed further than Ontario's motion for determination of a pre-trial issue, in which the Court ruled that Eagle Lake could not plead two specific

[47] Chief Lewis Reply Affidavit, Nov. 17, 2023, at para 35.
[48] Chief Lewis Reply Affidavit, Nov. 17, 2023, at para 32..

categories of damages arising out of "breach of contract (agency relationship)" and "breach of trust."[49] Regardless, this claim has nothing to do with IIFN or Shoal Lake.

II. Limitations Defences are not available to the Defendants [Reply to Winnipeg factum at paras 52, 65-69, 83-84; Ontario factum at paras 57-59]

47. On the "abuse of process" argument, Winnipeg has suggested that to proceed on the Headlands Issue, Winnipeg would be required to "defend a claim based on matters that occurred more than 100 years ago."[50] This appears to lie at the core of Winnipeg's limitations defence on this Motion. However, as discussed below, such a limitations defence is unavailable to either Defendant by virtue of a clear prohibition set out in provincial statute.

48. Furthermore, even if Winnipeg (but not Ontario) may raise a limitations defence, it will require a complete trial record to understand IIFN's capacity to start and pursue this claim, given the new legal landscape which recognizes the significant barriers faced by Indigenous peoples, and the singular importance of allowing their claims to be heard on their merits.[51]

A. There is a statutory exemption that disentitles both Defendants from raising any limitations defence against the claim for statutory compensation in this case

49. Ontario's own statutory framework makes clear that the Defendants cannot raise a limitations defence. As set out in section 2(1)(f) of Ontario's *Limitations Act*, 2002, S.O. 2002, c. 24:

> 2 (1) This Act applies to claims pursued in court proceedings other than…
> … (f) proceedings based on equitable claims by aboriginal peoples against the Crown.[52]

50. Nevertheless, Ontario has pled a limitations defence in their Statement of Defence,[53] which the Plaintiff specifically identified, in its Reply pleadings, as violating the Honour of the

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[49] *Gardner et al. v. The Queen in right of Ontario et al.*, 1984 CanLII 1941 (ON SC), at pp. 7, 8, 21.
[50] Winnipeg Factum at paras 84-85 & 95.
[51] Winnipeg factum, at paras 65-87.
[52] *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, at s. 2(1)(f) [*Limitations Act*].
[53] Ontario Statement of Defence to Amended Statement of Claim (Jun. 30, 2021), at paras 45 and 49.

Crown.[54] Moreover, Ontario has remained silent on the limitations issue by failing to fulfil its basic honourable obligation, informed by its commitments to Reconciliation, to bring to this Court's attention the existence of its own statutory exemption. Ontario's failure to do so is yet another example of the Crown failing to meet its Honour of the Crown and Reconciliation obligations as it once more seeks to skirt liability.

51. At the same time, it is Winnipeg that was the primary beneficiary of the extinguishment of IIFN's rights at the Headlands. While the 1916 *Act* enshrines the Compensation Provision into Ontario statute, the fact remains that Winnipeg was a knowing participant in the exercise, making it jointly and severally liable with Ontario. Winnipeg knew, or ought to have known, that the site at Indian Bay (that is, the Headlands of Shoal Lake) identified for construction of the intake point was within the reserve boundaries of IIFN. Winnipeg also knew, or ought to have known, that when Ontario passed its 1915 *Act,* which unilaterally redefined IIFN's reserve boundaries, the purpose and effect of said *Act* was to extinguish IIFN's rights at Indian Bay so that Winnipeg could construct its aqueduct. Given Winnipeg's direct role in the Ontario Crown's scheme to extinguish the Headlands rights, it follows that the limitations bar in the Ontario statute must by definition also extend to Winnipeg.

52. That limitations bar, enshrined in s. 2(1)(f) of the Ontario *Limitations Act,* is direct reflection of the fiduciary relationship imposed upon the Crown to deal with surrendered 'Indian' lands for the benefit of the 'Indians', and is a "central and fundamental aspect" to consider when the Crown seeks to raise a limitations defence. It reflects the basic principle of modern limitations law that there is no limitations period for breach of fiduciary duty claims by First Nations. As such, a limitations defence is simply unavailable on this Motion.[55]

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[54] IIFN Reply (Mar. 3, 2021), at para 5(d).
[55] *Chippewas of Sarnia Band v. Canada*, 2000 CanLII 16991 ONCA, at para 287.

53. It is also deeply disappointing that Ontario – in addition to failing to advise the Court of its own statutory exception to limitations periods – would argue on this Motion that this Court should effectively ignore the Honour of the Crown in favour of "procedural rules":

> There is no justification for the principles of the honour of the Crown to alter the application of the rules to this motion to secure the just, most expeditious and least expensive determination of every civil proceeding. [56]

54. Finally, Ontario's position ignores the principle that constitutionally-protected Indigenous rights, which are of fundamental constitutional importance, cannot be barred by "mere statute. The principles of legality, constitutionality, and the rule of law demand no less.[57]

B. Even if Winnipeg can raise a limitations defence, the new landscape of limitations law requires that the defence be tested on the basis of a full evidentiary record

55. While IIFN maintains that s. 2(1)(f) of the *Limitations Act* serves as a complete bar to the raising of any limitations defence, it may be that this Court rules that the exemption does not apply to Winnipeg. Thus, to the extent Winnipeg – but not Ontario – may be able to raise limitations defences on the Headlands Issue, such defences must, by definition, only be tested on the basis of a full trial record.

56. At this juncture, it is essential to understand that this claim is already proceeding to trial, as against Ontario for its alleged breaches of fiduciary duty, and because Ontario's own statutory bar to raising a limitations defence means that, at the very least, *Ontario* will face the Headlands Issue at trial. Justice Perell's February 2021 ruling on Ontario's Motion to Strike is unequivocal: these proceedings are heading to trial on the fiduciary duty issue, which includes consideration of the entire history of Ontario's actions as a fiduciary in identifying Shoal Lake as a water source, implementing the Compensation Provision,

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[56] Ontario Factum, at paras 58-59.
[57] *Manitoba Metis Federation v. Canada (Attorney General)*, 2013 SCC 14, at para 140.

convincing Canada to exclude the Headlands from reserve boundaries, failing to ensure compensation was paid to IIFN for the water-takings, and other related issues.[58]

57. Given that these issues will be developed on a trial record, it follows that permitting Winnipeg to raise a limitations defence now, absent that record, would be unjust and could lead to contradictory results, since this Court may well rule differently on the limitations defence once it has the benefit of the trial record.

58. To be clear, the principle that limitations defences should not be resolved on Rule 21 Motions is not exclusive to equitable claims grounded in the Crown-Indigenous fiduciary relationship. By definition, limitations issues must always be determined on the basis of facts backed by evidence (i.e., a factual assessment of whether (or when) a claim should have been discovered under the *Limitations Act*, which is not available on a Rule 21 Motion).[59]

59. It is appropriate to address limitations issues on a pleadings motion only "where pleadings are closed and the facts relevant to the limitation period are undisputed".[60] That is simply not the case on this Motion: there are too many ambiguities in the facts, and basic questions about capacity and discoverability which have yet to be tested on the merits (And for which the Defendants have so far maintained multiple refusals on key facts).

60. Put another way, limitations defences raise questions of discoverability, which are factual. It is therefore unjust for a motion judge to make such factual findings on a motion to determine a question of law under rule 21.01(1)(a), since that rule prohibits evidence on the motion.[61]

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[58] Motion to Strike Decision, at paras 85-88, 94-99, 100-108.
[59] *Toussaint v. Canada (Attorney General)*, 2023 ONCA 117, at para 11.
[60] *Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57, at para 31; *Toussaint v. Canada (Attorney General)*, 2023 ONCA 117, at para 11; *Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57, 154 O.R. (3d) 587, at para. 31; *Kaynes v. BP p.l.c.*, 2021 ONCA 36, 456 D.L.R. (4th) 247, at para. 81; *Clark v. Ontario (Attorney General)*, 2019 ONCA 311, at paras. 42-48, rev'd on other grounds 2021 SCC 18, 456 D.L.R. (4th) 361; *Brozmanova v. Tarshis*, 2018 ONCA 523, 81 C.C.L.I. (5th) 1, at paras. 19-21; *Salewski v. Lalonde*, 2017 ONCA 515, 137 O.R. (3d) 750, at paras. 45-46, 50; and *Ridel v. Goldberg*, 2017 ONCA 739, at paras. 11-12
[61] *Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57, at paras 32-33.

61. Indeed, in this case, there is a factual dispute about the discovery date of the new information regarding the Headlands and the alleged scheme to extinguish IIFN's rights; the Plaintiff contends it was not discoverable until recently, but the Defendants argue variously that it was discoverable thirty-four years ago or at some earlier date.[62]

62. Moreover, even to the extent that any limitation period has expired (which is not admitted), the fundamental principle that amendments shall be permitted absent non-compensable prejudice, also applies when limitations periods have expired:

> the requirement to read a pleading generously, and the concomitant requirement to allow amendments unless they will inflict non-compensable prejudice, means that the presumption is that any amendment, that can reasonably be seen as falling within the four corners of the existing claim, ought to be permitted.[63] [Emphasis added.]

63. Regardless, the new legal landscape requires that Reconciliation and Honour of the Crown be considered before deciding whether an Indigenous claim can or should be statute-barred on the basis of an applicable limitation period. To accept the Defendants' raising of a premature limitations defence now – before the Headlands Issue is tested on the merits and while the Defendants have still refused to answer direct questions about the Headlands Issue – would be to disregard this new legal landscape. On that note, it is noteworthy that during the course of Examinations for Discovery, Winnipeg pointedly refused to answer questions about whether it was committed to Reconciliation.[64]

64. As mentioned, the Headlands Issue is going to be argued on the merits at trial against Ontario, given, at minimum, the express bar to Ontario raising any limitations defences under

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[62] Winnipeg factum, at para 75.
[63] *Farmers Oil and Gas Inc. v Ontario (Natural Resources)*, 2016 ONSC 6359, at para 31.
[64] Transcripts of Examinations for Discovery (T. Shanks for Winnipeg) (Sep. 28, 2022), at p. 35, question 62; p.40, question 72; p. 41, question 78; and p. 42, question 79.

its own statute, and combined with the fact that Justice Perell directed that all issues related to the fiduciary duty claim proceed to trial.[65]

65. As such, even if Winnipeg (though not Ontario) is permitted to raise a limitations defence, the Court must still ensure that the "overarching constitutional goal of reconciliation that is reflected in s. 35 of the *Constitution Act*, 1982" is factored into the question of whether a Plaintiff First Nation should be prevented from having its claim heard on the merits.[66]

66. Fundamentally, a failure to bring a claim within a colonially-imposed limitation period cannot be used to avoid compensation or remedies for an Indigenous plaintiff. Limitations defences "miss the point" when Indigenous rights are at issue. They "ignore the real analysis that ought to be undertaken, which is one of Reconciliation."[67]

67. Indeed, many of the policy rationales underlying limitations statutes simply do not apply to Indigenous claimants. While limitations statutes seek to balance protection of the defendant with fairness to the plaintiffs, in the Indigenous context it is Reconciliation which must weigh heavily in the balance: "the goal of reconciliation is a far more important consideration and ought to be given more weight in the analysis."[68]

68. Moreover, the underlying principles of limitations defences rely on presumptions, such as the ability of a party to both inform itself about the existence of a claim and the capacity of the party to initiate and pursue said claim, which do not necessarily apply in the Indigenous context. As will become clear later in these proceedings, on the basis of a full evidentiary

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[65] Motion to Strike Decision (Feb. 17, 2021).
[66] *Manitoba Metis Federation Inc. v. Canada (A.G.)*, 2013 SCC 14, at para 137 [*MMF*] ; *Restoule v. Canada (Attorney General)*, 2020 ONSC 3932 (CanLII), at para 190.
[67] *MMF* 2013 SCC 14, at para 141.
[68] *MMF*, at para 141.

record, the significant legal and socioeconomic barriers faced by Indigenous peoples made it impossible for IIFN to initiate and pursue this case any earlier.[69]

69. As the Truth and Reconciliation Commission ("TRC") points out in its Final Report, while statutes of limitation do have utility in providing some stability for the legal system, they can also have the effect of denying a plaintiff an opportunity to have the truth of the allegation determined on its merits or to receive compensation for a wrong.[70]

70. This Call to Action was further endorsed and expanded upon in the Department of Justice's *Directive on Civil Litigation Involving Indigenous Peoples* (2018) (the "*Directive*")[71] and *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*.[72]

71. Among other guidance, the *Directive* explicitly states that limitations defences should no longer be relied upon, so that Indigenous claims can be heard on the merits:

> Limitations and equitable defenses should be pleaded only where there is a principled basis and evidence to support the defense… When determining whether such circumstances exist, counsel must consider whether the defense would be consistent with the honour of the Crown. [73]

72. That said, and as this Honourable Court is aware, the long-term impacts of colonization have resulted in a "legacy of dislocation"[74] and "have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation."[75]

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[69] Winnipeg, at para 81 of its factum and in the letter of legal counsel T. Hansell (Oct. 10, 2023), refers to a lawsuit filed by IIFN against Canada in the 1990s related to flooding, which referred to some of the Headlands-related issues, including the White-Scott letters, but which did not invoke the Compensation Provision. As described in the Affidavit of Chief Lewis, at para 5 and 7 and the Chief Lewis Reply Affidavit, Nov. 17, 2023, at para 39 and 40, no compensation was ever pursued in that claim for the extinguishment of the rights at the Headlands.
[70] Truth and Reconciliation Commission, *Final Report, Vol. 5: The Legacy*, 2015, at pp. 202-203.
[71] Department of Justice Canada, *Directive on Civil Litigation Involving Indigenous Peoples*, 2018 ["*Directive*"].
[72] Department of Justice Canada, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples,* 2018 ["*Principles*"].
[73] *Directive,* at p. 18.
[74] *R. v. Gladue*, [1999] 1 SCR 688, at para 68.
[75] *Ibid,* at para 67.

73. As the Supreme Court stated in *R v Ipeelee*, 2012 SCC 13:

> …courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide… [76]

74. Similarly, in the recent case of *Anderson v. Alberta*, 2022 SCC 6, the Supreme Court noted, "judicial notice may be taken of the systemic and background factors affecting Indigenous peoples in Canadian society", outside the specific criminal context as in *Ipeelee.*[77] Similarly, when a case involves an Indigenous party, the Court must ensure that in any contextual analysis (irrespective of the domain of law), "the assessment… must also be considered with the principles of Reconciliation and of the Honour of the Crown in mind."[78]

75. This Court is therefore free to take judicial notice of a host of factors, which, in the absence of the evidentiary record that has yet to be developed at trial, can provide context for any delays in both starting and pursuing a claim on the Headlands Issue. Such factors include the impacts of colonization, Indian Residential Schools, the Sixties Scoop, overincarceration, the documented lack of drinking water at IIFN, and the importance of ensuring that state harm is appropriately addressed by the courts. [79]

76. Significantly, there was even a period of time when Indigenous peoples were statutorily barred from pursuing legal claims. From 1927-1951, the *Indian Act* imposed fines of up to

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[76] *R v Ipeelee*, 2012 SCC 13, at para 60.
[77] *Anderson v Alberta*, 2022 SCC 6, at para 36.
[78] *Indigenous Police Chiefs of Ontario v. Canada (Public Safety)*, 2023 FC 916, at para 138-140.
[79] See: "Motion to Strike Decision" generally; Wilson J Endorsement of May 26, 2021, finding Ontario in "contempt of Court" for failure to disclose archival documents to Indigenous plaintiff; *Odhavji Estate v. Woodhouse*, 2003 SCC 69; *Wood v. Schaeffer*, 2013 SCC 71; *Ontario (Indigenous Police) v. Canada (Public Safety)*, 2023 FC 916; *Restoule v. Canada et al*, 2018 ONSC 7701; *Restoule v Canada et al*, 2020 ONSC 3932; *Restoule v. Canada et al*, 2021 ONCA 779; *Pierre v. McRae*, 2011 ONCA 187; and Reply Affidavit of Chief Lewis at para 42, *passim.* See also: *Kahentinetha et al. v. Societe quebecoise des infrastructures*, Oral Decision (Oct. 27, 2022), Quebec S.C. No.: 500-17-120468-221, at pp. 4, 7 and *Kahentinetha et al. v. Societe quebecoise des infrastructures et al*, Written Decision (Oct. 27, 2022), at paras 10, 19, 25 [**Decisions not publicly reported; attached as App. "A" to this factum**].

two hundred dollars and/or two months' imprisonment for any individual who acted as lawyer for an Indigenous claimant. As noted by the TRC, the law was a reflection of the "questionable legal view" that Indigenous people were "wards" of the Crown who could not be trusted to manage their own legal affairs.[80]

77. In any event, the specific evidence of IIFN's unique barriers to bringing a claim will become more apparent with the benefit of the full trial record. At this point, this Court need only take judicial notice (as it is entitled to do) of the history in which Indigenous peoples have faced (and continue to face) barriers to starting and pursuing claims.

C. To the extent laches is available as an equitable defence, it too requires a full evidentiary record arising from trial

78. Because the *Limitations Act* does not set any fixed limitation period for breach of fiduciary duty, the equitable limitation period defence of *laches* may apply. *Laches* is only available as a defence to equitable claims and relief, including those brought by First Nations. However, mere delay is insufficient to bar a claim in equity or for equitable relief.[81]

79. Just as with a limitations defence, the Court will still require a full evidentiary record to understand any *laches* defence based on the notion that the Plaintiff First Nation "acquiesced" to the Defendants' wrongful contact. With the benefit of that record, the Court can then determine (1) whether IIFN delayed commencement of the action, notwithstanding knowledge of the facts necessary to give rise to a claim, such that the delay amounts to a

[80] TRC, Final Report, Vol. 5: Legacy, at pp. 199-200; *Indian Act,* R.S.C. 1927, c. 98, s. 141.
[81] *Chippewas of Saugeen First Nation v. Town of South Bruce Peninsula et al*., 2023 ONSC 2056, at paras 606, 635.

waiver of or acquiescence to the wrongful conduct, and (2) whether the Defendants suffered prejudice or altered their position in reliance on the Plaintiff's "acquiescence". [82]

80. It is therefore striking that, despite the significant barriers faced by Indigenous peoples as discussed above, Winnipeg argues there is no reason this claim could not have been advanced decades ago.[83] To accept Winnipeg's assertion is to ignore decades of precedent on the historical harms suffered by Indigenous peoples. This Court should be skeptical of any argument by the Defendants that the Plaintiff First Nation "acquiesced" to the harm caused by the water-takings, given the history of the conditions faced by First Nations.[84]

D. The Harm is Felt Daily

81. Finally, in the alternative, this Court should consider how harm from the water-takings is repeated on a daily basis. The Plaintiff is mustering evidence of environmental damage in the form of expert reports, which will demonstrate the cascading nature of said daily harm. From this perspective, the harm associated with the extinguishment of all rights at the Headlands (i.e., the loss of all of Indian Bay), is a daily harm, similar to IIFN's daily inability to fish or harvest, the daily inability to access sacred sites, or the daily harm caused by contaminants due to the reversal of the water flow of Shoal Lake.

82. This Court can consider the harm to be in the nature of a continuing breach, which "arises from the repetition of acts or omissions of the same kind as that for which the action was brought". To that extent, the Headlands Issue should also be viewed as a succession or

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[82] *M.(K.) v. M.(H.)*, 1992 CanLII 31 (SCC), [1992] 3 SCR 6, at pp. 66-67; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623, at paras 145-146; *Chippewas of Saugeen First Nation v. Town of South Bruce Peninsula et al.*, 2023 ONSC 2056, at paras 634-638.
[83] Winnipeg factum, at para 85.
[84] See also: Chief Lewis Reply Affidavit, Nov. 17, 2023, at para 42.

repetition of acts of the same character, not merely as one original act with continuing effects of consequences.[85]

83. Indeed, the statutory Compensation Provision under which this claim is pursued itself contains no limitations period. Whether today, fifty years ago, or fifty years from now, the Provision simply provides that any Private Party shall be compensated for the harm so described in the Provision; as happens, the particular category of harm on this Motion is the daily harm of not having the rights to its Headlands.

84. Therefore, in the alternative and without prejudice to IIFN's position set out above, if – on the basis of a full evidentiary record – this Court later decides that the harm is of a daily or continuing nature, then a new limitation period starts to run on every day on which that damage continues. However, that determination need not be made today.

E. The Necessity of Contextual Evidence on this Hybrid Motion [Ontario factum, at paras 4, 31, 37-43, 58; Winnipeg factum, at paras 17, 20-22]

85. Finally, the Defendants argue that no evidence should be argued on a Rule 21 Motion. The Defendants are correct, although they have mischaracterized the principle: it is a basic tenet that, for purposes of resolving a Motion for Determination of an Issue, the Court does not require evidence that goes to the merits of the issue, only facts. That is, for purposes of answering the question on the Motion, the "facts pleaded in the statement of claim" – including any proposed amendment to the claim – are "assumed to be true, unless they are patently ridiculous or manifestly incapable of proof".[86]

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[85] *Sunset Inns Inc. v. Sioux Lookout (Municipality)*, 2012 ONSC 437; and *Tyszko v. St. Catharines (City)*, 2023 ONSC 2892, at para 43; *Manitoba v. Manitoba (Human Rights Commission)* (1983), 1983 CanLII 2967 (MB CA), 25 Man. R. (2d) 117 (C.A.), at para 19.

[86] *Taylor v Hanley Hospitality Inc (cob Tim Hortons)*, 2022 ONCA 376, at paras 24-32.

86. However, to the extent that a limitations defence raises evidentiary issues, the Plaintiff maintains that the testing of that evidence can only happen with the benefit of a full trial record, specifically with evidence of IIFN's capacity to start and pursue a claim. For purposes of this Hybrid Motion, this Court does, however, require some evidence provided as context – *not* adduced for the truth of its contents – in order to understand the types of challenges faced by IIFN in terms of capacity, discoverability, and limitations factors. To that end, IIFN has provided, by way of affidavit evidence, some limited information explaining the socioeconomic context and other challenges faced by the Plaintiff First Nation. Similarly, the Defendants have provided some limited contextual evidence relating to IIFN's other legal proceedings, including the Specific Claim that Canada unilaterally shuttered.[87]

87. It is an error of law to "fail[…] to apply the correct principles on a motion under Rule 21.01(1)(a)". Failing to assume that the allegations in a pleading are true is a misapplication of principle and is thus an error of law.[88] As such, "evidence" is not only inadmissible subject to Rule 21.01(1)(a), but it is also unnecessary: all that matters is resolving the issue(s) on the Motion, which do not go to the merits of the case.

88. Moreover, "where [an agreement's] terms are unclear and capable of more than one meaning… [t]he interpretation is best dealt with by the trial judge, who will have the benefit of considering the relevant provisions of the agreements in the context of the evidence."[89]

89. As this Court has repeatedly held, a Rule 21.01(1)(a) motion is not the proper procedural vehicle for weighing evidence or findings of fact. This is because the rule focuses only on questions of law, and does not require of the Court – nor does it permit the parties – to weigh

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[87] Ontario Motion Record at Tab 1-P ; Winnipeg Motion Record at Tab 1 - D, F, G, P.
[88] *Taylor v Hanley Hospitality Inc (cob Tim Hortons)*, 2022 ONCA 376, at para 25.
[89] *Montreal Trust Co of Canada v Toronto-Dominion Bank*, [1992] OJ No 1274, 40 CPC (3d) 389, 34 ACWS (3d) 38, 1992 CarswellOnt 1131, at para 14. [*Montreal Trust,* **attached as App. "A" to Ontario's factum**].

factual issues that are to be resolved later when applying the facts to the law. Notably, this includes limitations defences which are already discussed in this factum.[90]

90. The same principles or tests apply whether the motion is brought under rule 21.01(1)(a) – as is the case here – or under sub-rule (b), "Motion to Strike". Both involve a consideration of legal principles applied to facts as set out in the pleadings. Both require that the Court only prevent the pleading from proceeding to trial if it is "plain and obvious" it is doomed to fail.[91]

91. Therefore, assuming the facts are true, the Court must answer the question(s) of law on the basis of those facts. The Court need only concern itself with whether the issue – in this case, the Headlands Issue – is doomed to fail. If not, then it should proceed to a full hearing on the merits, where competing factual accounts will inevitably be weighed.[92]

92. As this Court observed in *Montreal Trust Co v Toronto-Dominion Bank*, [1992] OJ No 1274:

> [I]t is necessary to keep in mind the distinction between a fact as pleaded and the evidence necessary to prove the fact, and to remember that R. 21.01(1) is concerned with facts only, and assuming that they can be proved, whether they raise a question of law determinative of the action or fail to disclose a reasonable cause of action.[93]

93. In considering this Motion, the Plaintiff agrees that this Court should not engage in a fact-finding exercise, weighing the merits of the various evidence provided for context by both the Plaintiff and the Defendants (including the affidavit evidence, transcripts from Discoveries, productions, and the like). However, in anticipation of any eventual consideration of evidence on the limitations issue specifically, IIFN and the Defendants have each provided some limited evidence for context, which will later inform any limitations arguments that rely on the full trial record.

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[90] *Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57, at paras 30-31.
[91] *MacDonald v. Ontario Hydro*, 1994 CanLII 7294, at pp. 8-9; *T-D Bank v. Deloitte*, 1991 CanLII 7366, at p. 5.
[92] *Montreal Trust*, at p. viii and para 4; *Taylor v Hanley Hospitality Inc (cob Tim Hortons)*, 2022 ONCA 376 at paras 24, 32.; Ontario Factum at para. 41 and Winnipeg Factum at para. 22.
[93] *Montreal Trust*, at p. viii.

III. The Defendants are seeking to deflect from the Compensation Provision by pointing to the "overlap" with Treaty "lands and properties" [Ontario factum at paras 32, 47-48; Winnipeg factum at paras 57-61, 119-124]

94. Finally, the Defendants have, for the first time on this Motion, objected to IIFN pursuing its claim on the basis that its lands and properties are protected by Treaty.[94] This is a transparent attempt to deflect from the unequivocal commitment in their own Compensation Provisions to pay for harm to "lands or properties", and an attempt to dictate the venue. To follow the Defendants' logic to its natural conclusion would mean any First Nation would be excluded from the Compensation Provision. That simply cannot be the case.

95. The Consent Order makes it clear that a First Nation has standing to claim under the Compensation Provision. The Consent Order indicates Winnipeg is bound by the Compensation Provision[95]; and that IIFN "would be entitled to full compensation" if it can show its "properties or lands have been taken, injuriously affected or in any way interfered with pursuant to the Order."[96] At no point was it suggested that "lands or properties" would be excluded from compensation if also covered by Treaty.

96. There is, of course, overlap between "lands or properties" at the Headlands and the fact that said Headlands were and are protected under Treaty. However, the Compensation Provision was adopted by the Defendants (not Canada), and the act of extinguishing IIFN's rights was done by way of the provincial statute the 1915 Ontario *Act*. At most, Canada's Deputy-Superintendent of Indian Affairs, Duncan Campbell Scott, privately acquiesced in correspondence to Ontario's proposal to exclude the Headlands from the definition of reserve land.[97]

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[94] Ontario Factum, at para 48; Winnipeg Factum, at para 60.
[95] Consent Order, at para 2.
[96] Consent Order, at para 3.
[97] White-Scott Letters, 1914 [Motion Record Vol. 2, at Tab 1 (M), Reply Affidavit of Chief Gerald Lewis]

97. In any event, the Defendants cannot dictate the venue: this is a claim under the Compensation Provision they adopted, and which they consented to have proceed as an action.

PART IV: RELIEF SOUGHT

98. The Plaintiff/Moving Party respectfully requests the following:

    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 type 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 any other time period this Court may deem just;
    d. Costs of this herein Motion; and
    e. Any other such relief as the Moving Party may request and this Court deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th DAY OF NOVEMBER 2023.

Dated: November 17, 2023

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Iskatewizaagegan Independent First Nation

Sched. "A": List of Authorities

Jurisprudence	
1.	*Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City)*, 2021 ONSC 1209, at paras. 2, 48, 54, 65, 80, 100, 101, 104
2.	*Wewaykum Indian Band v. Canada*, 2002 SCC 79, at para 79.
3.	*Polla v. Croatian (Toronto) Credit Union Limited*, 2020 ONCA 818, at paras 37-39.
4.	*Noram Building Systems Inc. v. Zurich Insurance Company Ltd.*, 2023 ONSC 5088 (CanLII), at para. 67.
5.	*Klassen v. Beausoleil*, 2019 ONCA 407, at paras. 28, 30.
6.	*Dee Ferraro Limited v. Pellizzari*, 2012 ONCA 55 (CanLII), at para. 4.
7.	*Canadian National Railway v. Canadian Industries Ltd.*, 1940 CanLII 346 (ON CA), [1940] 4 D.L.R. 629 (Ont. C.A.), at pp. 634-635.
8.	*Boyer v. Callidus Capital Corporation*, 2023 ONCA 233, at para. 66.
9.	*Operation Dismantle Inc. v. R.*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, at p. 14.
10.	*Hitchlock v. AG Ontario*, 2020 ONSC 5348, at paras. 11-12.
11.	*Advance Beauty Supply Limited v 233930 Ontario Inc.*, 2015 ONSC 422 at para. 11.
12.	*Trillium Power Wind Corp. v. Ontario*, 2013 ONCA 683, 117 O.R. (3d) 721, at paras. 30-31.
13.	*Phyzex Technologies Inc. v. Correct Development Corporation*, 2019 ONSC 278, at para 109.
14.	*PMC York Properties Inc. v. Siudak*, 2022 ONCA 635, at para 31.
15.	*Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 SCR 959, at p. 980
16.	*Kobre v. Sun Life Assurance Company of Canada*, 2005 CanLII 36165 (ON SC), at para 14.
17.	*Sperring v. Shutiak*, 2023 BCCA 54 (CanLII).
18.	*Faridani v. Stubbert*, 2013 ONSC 1233, at paras. 2-5, 7, 21-23.
19.	*Kalkinis (Litigation guardian of) v Allstate Insurance Co.*, 1998 CanLII 6879 (ON CA), at p. 9.
20.	*Gardner et al. v. The Queen in right of Ontario et al.*, 1984 CanLII 1941 (ON SC), at pp. 7, 8, 21.
21.	*Farmers Oil and Gas Inc. v. Ontario (Natural Resources)*, 2016 ONSC 6359, 134 O.R. (3d) 390, at para. 31.
22.	*Chippewas of Sarnia Band v. Canada*, 2000 CanLII 16991 ONCA, at para 287.

23.	*Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 (CanLII), [2013] 1 SCR 623, at paras 137, 140-141, 145-146
24.	*Toussaint v. Canada (Attorney General)*, 2023 ONCA 117 (CanLII), at para 11.
25.	*Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57, at paras 30-33.
26.	*Kaynes v. BP p.l.c.*, 2021 ONCA 36, 456 D.L.R. (4th) 247, at para. 81.
27.	*Clark v. Ontario (Attorney General)*, 2019 ONCA 311, at paras. 42-48.
28.	*Ontario (Attorney General) v. Clark*, 2021 SCC 18 (CanLII)
29.	*Brozmanova v. Tarshis*, 2018 ONCA 523, 81 C.C.L.I. (5th) 1, at paras. 19-21.
30.	*Salewski v. Lalonde*, 2017 ONCA 515, 137 O.R. (3d) 750, at paras. 45-46, 50.
31.	*Ridel v. Goldberg*, 2017 ONCA 739, at paras. 11-12.
32.	*R. v. Gladue*, [1999] 1 SCR 688, at paras 60, 67-68.
33.	*R v Ipeelee*, 2012 SCC 13, at para 60.
34.	*Anderson v Alberta*, 2022 SCC 6, at para 36.
35.	*Indigenous Police Chiefs of Ontario v. Canada (Public Safety)*, 2023 FC 916 (CanLII), at para 140.
36.	*Odhavji Estate v. Woodhouse*, 2003 SCC 69.
37.	*Wood v. Schaeffer*, 2013 SCC 71.
38.	*Restoule v. Canada (Attorney General)*, 2018 ONSC 7701 (CanLII).
39.	*Restoule v. Canada (Attorney General)*, 2020 ONSC 3932 (CanLII).
40.	*Restoule v. Canada (Attorney General)*, 2021 ONCA 779 (CanLII).
41.	*Pierre v. McRae*, 2011 ONCA 187 (CanLII).
42.	*Chippewas of Saugeen First Nation v. Town of South Bruce Peninsula et al.*, 2023 ONSC 2056, at paras 606, 634-638.
43.	*M.(K.) v. M.(H.)*, 1992 CanLII 31 (SCC), [1992] 3 SCR 6, at pp. 66-67.
44.	*Sunset Inns Inc. v. Sioux Lookout (Municipality)*, 2012 ONSC 437 (CanLII).
45.	*Tyszko v. St. Catharines (City)*, 2023 ONSC 2892, at para 43.
46.	*Manitoba v. Manitoba (Human Rights Commission) (1983)*, 1983 CanLII 2967 (MB CA), 25 Man. R. (2d) 117 (C.A.), at para 19.

47.	*Taylor v Hanley Hospitality Inc.*, 2022 ONCA 376, at paras 24-32.
48.	*Montreal Trust Co of Canada v Toronto-Dominion Bank*, [1992] OJ No 1274, 40 CPC (3d) 389, 34 ACWS (3d) 38, 1992 CarswellOnt 1131, at p. viii, and paras 4, 14 [Appendix 'A' to Ontario Factum, October 7, 2023].
49.	*Kahentinetha et al. v. Societe quebecoise des infrastructures et al*, Written Decision (Oct. 27, 2022). [**Enclosed below at Appendix "A" to this Factum**"]
50.	*Kahentinetha et al. v. Societe quebecoise des infrastructures et al*, Oral Decision (Oct. 27, 2022) [**Enclosed below at Appendix "A" to this Factum**"]

Appendix A

Attached on the following pages are copies of the written reasons and transcript of oral reasons of Justice Moore in the matter of *Kahentinetha et al. v. Societe quebecoise des infrastructures et al*, Written Decision (Oct. 27, 2022).

CANADA

PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

No :
500-17-120468-221

PROCÈS-VERBAL D'AUDIENCE CORRIGÉ
Pratique

COUR SUPÉRIEURE

Chambre Civile

Référée de

Salle prévue
16.12

Date
Le 27 octobre 2022

L'HONORABLE GREGORY MOORE, J.C.S.

JM-2711

Partie demanderesse		**Procureur(s)**	
KAHENTINETHA KARENNATHA KARAKWINE KWETIIO OTSITSATAKEN KARONHIATE	Présente Présente Présente Présente Absent Absent	Se représentent seules	
Partie défenderesse		**Procureur(s)**	
SOCIÉTÉ QUÉBÉCOISE DES INFRASTRUCTURES	Absente	Me Fabrice L. Coulombe Me Laurence Vallée-Dandurand Me Vicky Berthiaume BCF fabricel.coulombe@bcf.ca laurence.valleedandurand@bcf.ca vicky.berthiaume@bcf.ca	Présent Présente Présente
HÔPITAL ROYAL VICTORIA et CENTRE UNIVERSITAIRE DE SANTÉ McGILL	Absentes	Me Véronique Roy LANGLOIS AVOCATS veronique.roy@langlois.ca	Présente
UNIVERSITÉ McGILL	Absente	Me Danielle Marcovitz Me Douglas Mitchell IMK L.L.P. dmitchell@imk.ca dmarcovitz@imk.ca	Présente
VILLE DE MONTRÉAL	Absente	Me Simon Vincent BÉLANGER, SAUVÉ svincent@belangersauve.com	Présente
PROCUREUR GÉNÉRAL DU CANADA	Absent	Me David Lucas Me Mireille-Anne Rainville MINISTÈRE DE LA JUSTICE CANADA david.lucas@justice.gc.ca mireille-anne.rainville@justice.gc.ca	Présent Présente

CANADA

PROVINCE DE QUÉBEC
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JM-2711

PROCUREUR GÉNÉRAL DU QUÉBEC	Absent	Me Daniel Benghozi (TEAMS) Me Pierre-Luc Beauchesne Me Eric Bellemare BERNARD, ROY (JUSTICE-QUÉBEC) pierre-luc.beauchesne@justice.gouv.qc.ca daniel.benghozi@justice.gouv.qc.ca eric.bellemare@justice.gouv.qc.ca	Présent Présent
OFFICE OF THE INDEPENDENT SPECIAL INTERLOCUTOR FOR MISSING CHILDREN AND UNMARKED GRAVES AND BURIAL SITES ASSOCIATED WITH INDIAN RESIDENTIAL SCHOOLS	Présente	Me Donald Worme, KC Me Mark Ebert Me Julian N. Falconer Me Mitchell Goldenberg Me Paul Vincent Marcil (TEAMS) Avocat conseil MARCIL & COOPER	Présents Présent Présent Présent

Nature de la cause

Montant : $

Cote(s)	Requête (s) Gestion particulière

Greffier(ière)	Interprète	Sténographe
Carmen Sevillano		

ENREGISTREMENT NUMÉRIQUE

Audition AM :	Début	Fin	Audition PM :	Début	Fin
	09 H 04	12 H 18		14 H 04	16 H 56

Affaires référées au maître des rôles	Résultat de l'audition
	Jugement rendu sur l'injonction interlocutoire

HEURE

09 H 04 **OUVERTURE DE L'AUDIENCE**
Identification de la cause des procureurs

09 H 06 Échanges préliminaires de part et d'autre

Argumentations en défense (suite)
Sur l'objection à la preuve et sur l'injonction interlocutoire

09 H 08 De Me Coulombe

09 H 11	Question du Tribunal
09 H 26	Sur l'objection au rapport de Monsieur Philippe Blouin et à la déclaration sous serment de Madame Kimberly R. Murray Objection sur l'interlocutrice spéciale
09 H 47	De Me Berthiaume
10 H 04	Question du Tribunal
10 H 15	Questions du Tribunal
10 H 19	Questions du Tribunal
10 H 25	Question du Tribunal
10 H 31	Question du Tribunal
10 H 41	Questions du Tribunal
10 H 45	Intervention de Me Coulombe
10 H 47	**SUSPENSION**
10 H 48	**REPRISE**
10 H 08	Madame Kwetiio s'adresse au Tribunal
10 H 08	Argumentations en défense (suite) De Me Roy
11 H 09	Question du Tribunal
11 H 10	De Me Vincent
11 H 15	Questions du Tribunal
11 H 28	De Me Rainville
12 H 05	Échanges de part et d'autre (gestion)
12 H 15	**SUSPENSION DE L'AUDIENCE**
12 H 18	**REPRISE DE L'AUDIENCE**

14 H 07	Argumentations en demande
	De Me Falconer
14 H 08	De Me Worme
15 H 04	**SUSPENSION**
15 H 38	**REPRISE**
15 H 56	Argumentations en demande (suite)
15 H 57	De Madame Kwetiio
16 H 23	**SUSPENSION**
16 H 27	**REPRISE**
	Réplique
16 H 27	De Me Mitchell
16 H 33	De Me Vincent
16 H 35	Le Tribunal s'adresse aux parties
	Le Tribunal rend jugement séance tenante

1 For the reasons explained verbally and recorded digitally, **THE COURT**:

DISMISSES the objection to the admissibility of the sworn statement of Philippe Blouin, dated August 20, 2022;

GRANTS the application to intervene on a conservatory basis by the Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites Associated with Residential Schools;

And for the reasons explained verbally, recorded digitally, and appended to these Minutes, **THE COURT**:

GRANTS, in part, the plaintiffs' application for an interlocutory injunction;

ORDERS the Société québécoise des infrastructures and McGill University not to conduct, authorize, or allow any excavation in furtherance of the redevelopment of the site of the Allan Memorial Institute or the Royal Victoria Hospital until the parties have completed discussions, undertaken in a spirit of reconciliation, regarding the archaeological investigations that must be conducted;

INVITES the parties to discuss and to establish the parameters of an appropriate archaeological plan;

DECLARES that this interlocutory injunction is issued without prejudice to a party's right to apply for its revocation once an appropriate archaeological plan has been established;

PLACES the parties' discussion of an appropriate archaeological plan on the agenda of the next case management conference;

WITH legal costs in favour of the plaintiffs.

GREGORY MOORE, J.S.C.

16 H 56 **FIN DE L'AUDIENCE.**

Carmen Sevillano,g.a.C.S.

APPENDIX to the Minutes

of the hearing held on October 27, 2022

Kahentinetha et als.* v. *Société québécoise des infrastructures, et als.

500-17-120468-221

OVERVIEW

1. The plaintiffs apply for the following interlocutory injunction:

   > ORDER the Defendants Société québécoise des infrastructures, McGill University (...) and the Ville de Montreal to stop the renovation plans of the Royal Victoria Hospital and Allan Memorial psychiatric hospital site.
   >
   > ORDER the Defendants McGill University and the Attorney General of Canada to provide funds for a forensic and archeological investigation of the Allan Memorial and Ravenscrag Gardens to be carried out by an independent investigation team led by the kahnistensera and MK-Ultra survivors.

2. They are concerned that Indigenous patients are buried in unmarked graves on the grounds that will be excavated as part of the site redevelopment. Before that work begins, they insist that an appropriate archeological study be performed to identify any graves and to ensure that they will not be desecrated or destroyed by the excavation. The study must be conducted by archaeologists who are sensitive to Indigenous concerns and who will use ground penetrating radar, lidar, dogs, or other non-invasive techniques to identify unmarked graves before any excavation begins.

3. The defendants respond that they will respect the provincial and municipal laws and regulations that protect Mount Royal as a heritage site. They cannot excavate without a permit, which will not be issued without considering the archaeological impact of the project and which could take account of Indigenous groups' preoccupations. Should the plaintiffs disagree with the issuance of a permit, they could make their concerns known through the regulatory appeal and judicial review processes.

4. Furthermore, the defendants will respect the *Cultural Heritage Act*, which requires that excavation cease as soon as archaeological property is found and that the Minister of Culture and Communications be informed. They add

that the plaintiffs' evidence does not establish the probability that Indigenous patients are buried in unmarked graves on the site.

5. For the reasons that follow, the Société québécoise des infrastructures and McGill University must not excavate the site until an appropriate archaeological plan has been established.

6. The parties are invited to meet out of court to establish how the archaeological work should be conducted. We will follow up during the next case management conference.

7. The second conclusion is moot because McGill University and the Société québécoise des infrastructures admit that they will be responsible for any archaeology investigation that is required.

ANALYSIS

8. The plaintiffs apply to stop the redevelopment work until a final judgment is rendered on the merits. However, their concern lies with the identification of unmarked graves before that work begins. There is no reason to halt the redevelopment project completely, especially when we do not know when the trial will take place nor when final judgment will be rendered. The parties have not begun to ready the case for a trial that will deal with complex factual and legal issues that will take time to prepare, to present, and to decide.

9. The plaintiffs' application will be analysed in terms of a case management safeguard order (article 158(8) *Code of Civil Procedure*).

Serious Issue or Appearance of Right

10. The plaintiffs have a clear right to expect that the defendants will address and attempt to resolve their concerns in a spirit of reconciliation before relying on the adversarial process to advocate their positions.

11. The plaintiffs allege that Indigenous patients of the Allan Memorial Institute and the Royal Victoria Hospital are buried on the site that is scheduled to be redeveloped. In addition, a 2016 archeological report prepared for the defendants (Exhibit PM-11), suggests that Mount Royal was used as a burial site before the arrival of Europeans. The redevelopment of the site will require excavation, which could disturb those burial sites.

12. The plaintiffs have a right to bring these concerns to Court and to be listened to and heard. They are exercising these rights at the beginning of an era of reconciliation in Canada, which the Truth and Reconciliation Commission defines as an ongoing process of establishing and maintaining respectful relationships.

13. The identification of unmarked Indigenous burial sites is a priority for discovering the truth and working towards reconciliation. The TRC's Call to Action 76 encourages public and para-public institutions like McGill University and the Société québécoise des infrastructures who are

> ... engaged in the work of documenting, maintaining, commemorating, and protecting residential school cemeteries to adopt strategies in accordance with the following principles:
>
> i. The Aboriginal community most affected shall lead the development of such strategies.
>
> ii. Information shall be sought from residential school Survivors and other Knowledge Keepers in the development of such strategies.
>
> iii. Aboriginal protocols shall be respected before any potentially invasive technical inspection and investigation of a cemetery site.

14. This call to action is drafted in terms of residential schools but the plaintiffs and the Special Interlocutor have demonstrated the possible parallels between that system and the health services offered to Indigenous peoples.

15. Although these issues are raised in the adversarial court process, the parties must be mindful of opportunities to speak out of court to settle their differences on an amicable basis. Indeed, article 1 of the *Code of Civil Procedure* requires that parties consider private prevention and resolution processes before referring their dispute to the courts.

16. The adversarial process does not appear best-suited to resolve the issue that divides the parties at this interlocutory stage, especially when they are not far apart. They agree that archaeological work must be conducted on the site and that best practices should be followed. The defendants do not challenge the plaintiffs' assertion that archaeological best practices include the principle that "any work to locate missing Indigenous children must be led by Indigenous communities" (Exhibit K-7).

17. Despite how close the parties' positions are, they have not spoken out of court since the judicial application was filed in March 2022 nor since July when they began preparing for this interlocutory injunction.

18. An out of court discussion, undertaken in the spirit of reconciliation, could resolve the issue more comprehensively than litigation.

Serious or Irreparable Harm

19. Continuing excavation will harm the plaintiffs and those who share their concerns. This satisfies the definition of irreparable harm because it cannot easily be compensated by the author(s) of that harm.

20. The plaintiffs speak of the trauma that results from not knowing what happened to their family and community members, from the possibility that they were mistreated and suffered, and from the threat that their remains will be disturbed. They refer to the ceremonies that must be conducted at burial sites but that aren't part of the redevelopment plans.

21. The plaintiffs' and some of the people who came to support them reacted emotionally during their presentation in court. They described their anguish at being prevented by the redevelopment project from fulfilling their obligations to look after generations past, present, and future. They expressed their frustration about having to fight every level of government to receive help in discovering the truth about what happened to their ancestors.

22. The plaintiffs do not trust the defendants' claims that they will be respectful of Indigenous concerns. McGill University allowed an archeological excavation to begin on October 24th, two days before this hearing.

23. The plaintiffs proved the serious or irreparable harm that they will suffer unless an injunction is ordered.

24. The order sought also refers to the Ville de Montréal but the City is not conducting the redevelopment and is not responsible for the harm caused by excavating the site before any unmarked graves are identified.

Balance of Convenience

25. The balance of convenience favours the plaintiffs. They will suffer irreparable harm if the excavation work is not suspended for the time it takes to develop an appropriate archaeological plan to identify any unmarked graves.

26. McGill University and the SQI did not suggest that establishing or executing an appropriate archaeological plan will cause any inconvenience.

27. The evidence does not show that the redevelopment will be delayed. The start date is not known and the timetable for its completion has not been established. There is no evidence that meeting with the plaintiffs, establishing, and conducting an appropriate archaeological plan will add to the cost of project, either.

28. Indeed, the redevelopment cannot begin until the Minister of Culture and Communication issues a permit to conduct archaeological work, which suggests that this is the most convenient time to address the plaintiffs' concerns.

Urgency

29. McGill has applied for a permit to conduct archaeological excavation and conducted related excavation this week. The development of an appropriate archaeological plan in the short term can inform those processes and ensure that the work proceeds in a manner that respects the plaintiffs' legitimate concerns about identifying any unmarked graves before they are disturbed. Otherwise, the plaintiffs and those who share their concerns will continue to face the trauma that comes from not knowing whether, when, or how their community members' graves might be disturbed.

GREGORY MOORE, J.S.C.

No.: 500-17-120468-221

PROVINCE DE QUÉBEC
DISTRIC DE MONTRÉAL

B E T W E E N:

KAHENTINETHA, KARENNATHA, KARAKWINE, KWETIIO, OTSITSATAKEN, KARONHIATE

- and -

SOCIÉTÉ QUÉBÉCOISE DES INFRASTRUCTURES, HÔPITAL ROYAL VICTORIA, CENTRE UNIVERSITAIRE DE SANTÉ MCGILL, UNIVERSITÉ MCGILL, VILLE DE MONTRÉAL, PROCUREUR GÉNÉRAL DU CANADA, PROCUREUR GÉNÉRAL DU QUÉBEC, OFFICE OF THE INDEPENDENT SPECIAL INTERLOCUTOR FOR MISSING CHILDREN AND UNMARKED GRAVES AND BURIAL SITES ASSOCIATED WITH INDIAN RESIDENTIAL SCHOOLS

****

BEFORE L'HONORABLE GREGORY MOORE, J.C.S.
on October 27, 2022.

****

APPEARANCES:

Partie demanderesse	Se représentent seules
Me F. Coulombe Me L. Vallée-Dandurand Me V. Berthiaume	Société Québécoise des Infrastructures
Me V. Roy	Hôpital Royal Victoria et Centre Universitaire de Santé Mcgill
Me D. Marcovitz Me D. Mitchell	Université Mcgill
Me S. Vincent	Ville de Montréal
Me D. Lucas Me M. Rainville	Procureur Général du Canada
Me D. Benghozi Me P. Beauchesne Me E. Bellemare	Procureur Général du Québec
Me D. Worme QC. Me M. Ebert Me J. Falconer Me M. Goldenberg	Special Interlocutory
Me P. Marcil	Adocat conseil

THURSDAY, OCTOBER 27, 2022

All right, thank you very much. It has been a very very intense two days, a very busy two days with a lot of information and a lot of emotion, and a lot of nuance in terms of the issues that are raised in the way that the law asks us to deal with these issues.

They are - on the one hand they are complex and they are big issues. On the other hand, I think they were well summarized by Maître Rainville who said that the real crux at this interlocutory stage is where will an archeological study be conducted, who will do it, how will they do it, and who will pay for it. And I think that the best role I can play, in the spirit of what Maître Falconer and the Special Interlocutory, Interlocutory, excuse me, suggested, is to deal with this as a case management issue and not so much as an interlocutory injunction that would shut down work until we get to a final judgement on the merit. It may take a while, especially given the complexity of the issues that are raised on the merits.

I am prepared to issue an Order today to stop excavation on the RVH site and the site that is being managed by the SQI as well, but I would do it for a short term, for, perhaps, three or four months right now, which would take us to a next case management issue -- case management meeting, which we will have to have anyway, in order to start

planning for the next steps. Actually, I would not limit in time for a month, I would issue it and say that if in three or four months we can decide where you have progressed in terms of coming to an understanding about what kind of archeological investigation has to be conducted going forward.

I think a certain amount of solace in the fact that the timetable for the work does not seem to be established or set in stone or immediate. So I think there is some time that you have to have these discussions that will allow the plaintiffs' interest to be fully expressed and that will not slow down the project unduly, because it does not seem to be moving very quickly right now.

I should say that as a case management issue, the claim still has to respect the criteria for an injunction, and I am satisfied that on that level, those criteria are met. I think in terms of the serious issue - well, but before I get to that, I would say that part of the reason that I think this might be a more appropriate way of dealing with this situation is, despite the strong positions taken on each side, I do not see a huge disagreement in terms of these fundamental issues. There is a recognition on the part of the defendants that archeological work has to be conducted before a permanent - excavation permit can be conducted. There is a commitment on the part of the defendants to respect best practices in terms of the archeological work that has to be done. There is no contestation, that

I've heard, in terms of what those practices are, or whether the Canadian Archeological Association's list of best practices are, in fact, best practices, so I think it seems to be a question of when the parties can, and how the parties can discuss when is the appropriate time to set those out. Is it ahead - is it before the work - before a permit is applied for and is obtained, or is it afterwards when a permit that might not respect those best practices is issued and then someone might want to contest that?

I think going down that regulatory route is not appropriate. That route is not the preferred route for a couple of reasons. The first being that in terms of access to justice, I do not think that we are getting closer to a solution if we ask the plaintiffs to follow that process and to contest at every possible stage, including at the application for the permit, an appeal to the [In French], an appeal towards the Court of Québec, a judiciary review in the Superior Court, and possibly an appeal after that. And I think that process presupposes that at each stage they will be opposed by whoever received the permit, and I do not think that that is in the best interest of the parties in a long-term scenario either.

So I prefer to issue an Order that will allow the parties to speak sooner rather than later, and to speak in a spirit of cooperation and reconciliation.

So in terms of the criteria for the injunction, the first issue is a question of a clear right. The plaintiffs have a clear right to speak up, a right to be heard, and to be listened to. They are exercising that right now and they are exercising it in a context where we are at the very beginning of an era of reconciliation.

And I rely on the TRC, the Truth and Reconciliation Commission definition of reconciliation as an ongoing process of establishing and maintaining respectful relations of *[indiscernible]*, and I take the point that the adversarial process is not for strengthening long-term and respectful relationships. Not that it creates disrespectful relationships, but in this particular context of this case and these parties, I do not think that an adversarial environment is the best place to start having these discussions.

And I think that the plaintiffs' clear right is also informed by the Calls to Action that were proposed by the Truth and Reconciliation Commission, especially Call to Action 76 which, while it deals with residential schools, it can be adapted to this situation, and it is the Call to Action that deals with parties who are engaged in documenting and protecting cemeteries, and calls on those parties to work together to adopt strategies, according to the three principles that I think have come out earlier, yesterday and today. That is that the Aboriginal community most affected shall lead the development

of the strategies. We were speaking of what Indigenous-led means, and the point was well taken that it does not mean that the Indigenous group will lead and conduct the archeological study, but the strategy adopted that gives rise to that study, according to this Call to Action, would be led by the Indigenous group.

The Call to Action also mentions the importance of obtaining information from survivors and from knowledge-keepers. I think that is consistent as well with what the plaintiffs have brought forward. And it also highlights the fact that before there is any invasive technical inspection or investigation of the cemetery site, that Aboriginal protocols be followed, and I think that if a discussion is possible and is productive between all the parties, the plaintiffs can bring those protocols to the table and ensure that whatever work is eventually done on this site is respectful of the people who may be buried there, and of the people who conduct their lives according to their obligation to care for them and to care for future generations.

Again, in terms of the clear right, I think that the - well, the plaintiffs have a clear right, not only to raise their concerns, but to have them heard by public institutions, by McGill, by the SQI, by the Government of Canada, of Québec, and the City of Montréal, and by the courts.

The next criteria is irreparable harm. So what is the irreparable harm if this right to speak and to be heard is not respected? Well, we saw yesterday and today, the emotional reactions of people who were expressing their frustration and their hurt at not having been able to speak in the past. And you are all facing this way, but when I face this way, I see everyone who is in the public and those reactions were expressed as much by members of the public as they were by the people who were speaking yesterday. And that cannot be ignored. And the concerns that were raised had to do with what happened to their family and to their community members, and I sensed as well a frustration at having to fight every level of government to receive help in discovering the truth of what happened, whatever that truth might be. Irreparable harm, in the legal context, is often defined as a harm that cannot be compensated by money and I think that is a clear example of something that cannot be compensated by money, if a claim for damages were later brought on that level.

The third issue is the balance of convenience, and in terms of the convenience to the defendants, the evidence has shown that the project is in its early stages. There is an acknowledgement that some archeological work has to be conducted and there is a commitment to following best practices, and there has been no suggestion that ground-penetrating radar or lidar, or the use of dogs would be too expensive or would take to much time and that it is not an

appropriate or useful or cost-effective way of conducting the archeological work that has to be conducted.

And I think that the Order that I am issuing is akin to what is called a Safeguard Order under the *Code of Civil Procedure,* and those are orders that require an element of urgency as well. And I think in terms of starting down the path of reconciliation, we cannot accept that the answer would be, "Well, we will deal with this issue later on in the regulatory process" or "We will deal with it later once we uncover artifacts or unmarked graves", and that it is urgent to begin as soon as the parties are able to.

So I will draft a more precise language for the physical order that we will add to the minutes and that you will all receive, but I do not want to keep people too late past 4:30, and we are getting close to five, but I did not want to leave today without letting you know where I was headed in terms of the Order. And I do not want you to leave thinking either that because I am rendering judgement today, that it is an easy issue. I think that all of the parties did a very good job of honing in on what the real issue is, and to the extent that it is a debate over when and how the archeological work should be done, that is fairly straightforward and can be circumscribed, which is why I prefer to make this Order today, than to take it under a reserve and

issue a written judgement which would come out later.

There are two other issues that were raised, and that is the objection raised to the affidavit of Monsieur Blouin. I am going to dismiss that objection, but with the caveat that the statements made in the affidavit are not based on personal facts that Mr. Blouin has witnessed, but I think we can read the affidavit in that spirit.

And the other issue was with respect to the role of the Special Interlocutor; question being whether the application should be granted that would allow the Special Interlocutory to play a conservatory role and to file evidence. I am going to allow that application and allow the sworn declaration and exhibits of Ms. Murray into the file. Because this such a new issue, I think that we benefit from the most expertise possible, and I think too we have to remember that when this issue was first raised about a month ago, or a month-and-a-half ago, the Special Interlocutor took the position that it would review the evidence submitted by the other parties and to the extent that some additional evidence needed to be filed in order to complete the picture provided by the other parties, that they would do so and that is what happened. So I take the point that this Special Interlocutory filed a lot of information and that it came late in the process, but given the process we had established in order to be ready for the hearing yesterday and today, I think it is

appropriate that that information be filed and be admitted.

There are two points that I want to make as we -- two final points I want to make and that have to do with the likelihood or the chances that any discussion between the parties would be successful. And it is really not anything of a juridical nature, it is more a reflection of what I have seen in terms of the dynamics between the parties, which are one thing in the courtroom, but I think if you are going to have out of court discussions, it would be useful to have this reflected back.

The first point is that it is a very interesting dynamic where the plaintiffs are raising very big and broad issues which challenge a lot of established ways of doing things, and established ways of organizing things, in terms of how the law works, and procedure works. And the defendants are understandably trying to put those big issues into the small boxes that this court's procedure provides, in order to know what we are talking about and how to deal with them. And I think it is indicative of the fact that the parties might be speaking, to a certain extent, at crossed purposes, and so if you are going to have discussions out of court, I think it is an opportunity to put those viewpoints, maybe not entirely aside, but to be open to the fact that you are speaking different languages and coming from different perspectives and have to listen more openly to the other side in

order to understand where they are coming from and have it come to a consensus. And I think that is very much in keeping with what was described as the process in the longhouse, and it is also very similar to what we speak about in terms of interest-based negotiation and mediation techniques, and those are all things that can occur out of court and it can be effective, and I do not think that they are new techniques that people have to learn.

The second point I wanted to raise has to do with the -- it is something that I noticed at the debate we had a few weeks ago when on the debate about whether the plaintiff should be represented or not, and I thought -- I found it interesting that the plaintiffs listened to the points raised by the defendants, understood where they were coming from, and modified their application in order to answer those concerns. And I had the sense on the other side, that the defendants were listening strategically to figure out how best to come back and counterattack at the position brought by the plaintiffs. And I think that it is perfectly legitimate, Maître Falconer pointed out in terms of how litigation works, but I think that if you are speaking out of court, that is another technique that will not be conducive to coming to a consensus and to arriving at a solution, a solution that I think you are quite close to achieving, but speaking on the same level will help you get there.

So I was a little hesitant about making those comments, given the fact that this is an ongoing case, but I think that you should have all the tools necessary to make a success of this next step. So as an objective outsider, I thought it was important to share that with you, so that you know – well, give a little bit of perspective as to where the other side is coming from and can move forward.

So as I say, I will put those main conclusions, I will write them more specifically, put them into, the minutes, and we will be in touch about setting up the next case management conference, probably at the end of January, beginning of February, in order to see where you are at in terms of the discussions and also importantly, to plan out the steps leading to the hearing of the main case.

So thank you very much for all your work. You can see by the paper that I take back with me, that a lot of work went into this case. A very sophisticated level of analysis and presentation on all sides. So thank you very much and that is the end of the hearing today.

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ELECTRONIC CERTIFICATE OF TRANSCRIPT

I, Laura Rowsell, certify that this document is a true and accurate transcript of the recording of *Kahentinetha et als v Société Québécoise des Infrastructures et als*, in the Superior Court of Justice held on October 27, 2022 in the Province de Québec, Distric de Montréal.

Date: April 10, 2023

LRowsell

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Signed in the province of Ontario, Canada

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

Court File No. CV-20-00644545-0000

	ONTARIO **SUPERIOR COURT OF JUSTICE** **Proceedings commenced in TORONTO**
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