CITATION: Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City), 2024 ONSC 2163
COURT FILE NO.: CV-20-00644545-0000
DATE: 20240412

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
ISKATEWIZAAGEGAN NO. 39 INDEPENDENT FIRST NATION Plaintiff	*Julian N. Falconer, Meaghan Daniel, Jeremy Greenberg,* and *Christianne Labelle* for the Plaintiff
- and -	
CITY OF WINNIPEG and HIS MAJESTY THE KING IN RIGHT OF ONTARIO Defendants	*Thor Hansell* and *Shea T. Garber* for the Defendant the City of Winnipeg *Vanessa Glasser, Ram Rammaya,* and *Ella Leishman* for the Defendant His Majesty the King in Right of Ontario
	HEARD: March 26 and 27, 2024

PERELL, J.

Contents

A. Introduction 2
B. Overview 4
C. Anthropological, Geographical, Historical, Legal, and Statutory Background 5
D. Other Proceedings 14
E. Procedural Background 16
F. The Draft Amended Fresh as Amended Statement of Claim 20
G. Miscellaneous Evidentiary and Procedural Facts and the *Rules of Civil Procedure* in Aboriginal Law Cases 24
H. Legislative Background 25
I. The Significance of the Former Pleadings 25

J. Rule 21.01 (1)(a) and Rule 21.01 (1)(b) and The Headlands Issue 26

K. The Rules of Pleading and the Amendments to the Statement of Claim 28

L. The General Law about Amending a Statement of Claim 30

M. Should Leave to Amend be Denied because the Proposed Amendments Plead a Statute-Barred Cause of Action? 31

N. Should Leave to Amend by Denied because the Proposed Amendments Plead a Action that is Doomed to Fail because of the Absence of a Necessary Party? 36

O. The Defendants' Abuse of Process Argument 39

P. The Refusals Motion 41

Q. Conclusion 51

Schedule "A": *Rules of Civil Procedure* 53

Schedule "B": *Limitations Act, 2002* 58

REASONS FOR DECISION

A. Introduction

[1] Shoal Lake is the ancestral and current home of four First Nations: Iskatewizaagegan No. 39 Independent First Nation; Shoal Lake #40 First Nation; Anishnaabeg of Naongashiing First Nation; and Animakee Wa Zhing #37 First Nation (formerly known as Northwest Angle 37). Although Lake Winnipeg (9,416 square miles), Lake Winnipegosis, (2,075 square miles), and Lake Manitoba (1,785 square miles) are closer and larger, for 105 years, the City of Winnipeg has drawn its drinking water from Shoal Lake (100 square miles).

[2] In this action, Iskatewizaagegan No. 39 Independent First Nation (the First Nation) sues the City of Winnipeg and His Majesty the King in Right of Ontario (the Province of Ontario) for compensation for "lands or property taken, injuriously affected, or in any way interfered with" as a result of Winnipeg's construction of an aqueduct and water-takings at Shoal Lake. The First Nation claims damages of $500 million for: (a) ecological injury, (b) cultural damage, (c) spiritual damage, (d) financial damage; and (e) the "Headlands Issue". The Headlands Issue is an allegation that the First Nation was wrongfully deprived of reserve lands promised to it by the Government of Canada under Treaty No. 3.

[3] The First Nation now seeks leave to deliver an Amended Fresh as Amended Statement of Claim (a) to increase its claim for compensation to $2.0 billion and (b) to make it clear that the Headlands Issue is a part of its claim against Winnipeg and Ontario.

[4] In advancing its claims for compensation against Winnipeg and Ontario, the First Nation pleads a joint and several liability theory against Winnipeg and Ontario based on a 1913 Order in Counsel of the Ontario Government that obliged Winnipeg to pay compensation for "lands or property 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.

[5] The First Nation advances two distinct theories of Crown liability against Ontario for breach of fiduciary duty; namely: (a) a *sui generis* fiduciary duty based on the relationship between Aboriginal peoples and the Crown; and (b) an *ad hoc* fiduciary duty. The First Nation sues Ontario for breach of fiduciary duty for: (a) failing to protect the First Nation's interests in Shoal Lake and the surrounding lands; and (b) failing to ensure appropriate compensation for the harm to the First Nation's interests in Shoal Lake and the surrounding lands caused by Winnipeg taking water from Shoal Lake.

[6] Now before the court is what the parties describe as a "Hybrid Motion". From the First Nation's perspective, the Hybrid Motion has three branches. The first branch is pursuant to rule 21.01 (1) (a) of the *Rules of Civil Procedure*[1] for a ruling on a conceived issue of law. The second branch is pursuant to rule 26, for leave to amend the Fresh as Amended Statement of Claim to increase the quantum of the claim for compensation and to provide particulars of the Headlands Issue. The third branch is a refusals motion brought because during the examinations for discovery, the Defendants refused to answer questions about the Headlands Issue.

[7] The common denominator of these three branches is that they focus on the "Headlands Issue," which from the First Nation's perspective is a matter that falls within the scope of the existing claim. However, from the perspective of the Defendants, the Headlands Issue is about the First Nation's alleged entitlement to the Headlands in Shoal Lake and is a new claim about aboriginal rights and aboriginal land claims associated with Treaty No. 3, a treaty between the federal government of Canada and twenty-eight First Nations. The Defendants assert that the Headlands Issue is (a) new cause of action that is distinct from the First Nation's existing causes of action; (b) an abuse of process; (c) statute barred as a new cause of action beyond the two-year limitation period and beyond the fifteen year ultimate limitation period under Ontario's *Limitation Act, 2002*,[2] and (d) doomed to fail for want of necessary parties, including the federal government of Canada and other signatories of Treaty No. 3.

[8] For the reasons that follow, I decide the Hybrid Motion as follows.

[9] The first branch of the Hybrid Motion, which is for the determination of an issue before trial pursuant to rule 21.01, is dismissed.

[10] The second branch, which is for leave to deliver an amended pleading pursuant to rule 26.01, is granted on terms that within ten days the First Nation deliver a Second Fresh as Amended Statement of Claim that complies with the technical rules of pleading. In the Second Fresh as Amended Statement of Claim, the First Nation is at liberty, if it is so advised, to join His Majesty the King in Right of Canada (the federal Crown) and/or Shoal Lake #40 First Nation as a party defendant. After the First Nation delivers its Second Fresh as Amended Statement of Claim, Winnipeg and Ontario shall have ten days to either: (a) move to strike the Second Fresh as Amended Statement of Claim on technical grounds for non-compliance with the rules of pleading; or (b) deliver Fresh as Amended Statements of Defence and if it is so advised, to join His Majesty the King in Right of Canada (the federal Crown) and/or Shoal Lake #40 First Nation as a third party.

[11] As for the third branch of the Hybrid Motion, the refusals motion, it is dismissed save for four questions in the examination for discovery of Scott Lockhart (Ontario's representative).

---

[1] R.R.O. 1990, Reg. 194.
[2] S.O. 2002, c. 24, Sched. B.

B. Overview

[12] By way of overview, beginning with the first branch of the Hybrid Motion, the First Nation's conceived legal issue pursuant to rule 21.01(1)(a) is misconceived. In the immediate case, there is no discrete legal issue amenable to a motion under this subrule. Therefore, the First Nation's motion pursuant to rule 21.01(1)(a) is dismissed.

[13] Turning to the second branch of the Hybrid Motion, the Defendants argued that the motion under rule 26.01 should be dismissed because: (a) the draft of the Amended Fresh as Amended Statement of Claim is an abuse of process; (b) contrary to the *Limitations Act, 2002,* it asserts a statute-barred new cause of action that is not within the scope or ambit of the already pleaded material facts of the Fresh as Amended Statement of Claim; and (c) it asserts a cause of action that is doomed to fail because of a failure to join a necessary party. However, as I shall explain below: (a) there is no abuse of process; (b) it shall be for a trial judge to determine whether the First Nation's claim is statute-barred; and (c) it shall be for a trial judge to determine whether, the First Nation's claim should be dismissed in whole or in part because of the First Nation's alleged failure to join a necessary party.

[14] However, the draft Amended Fresh as Amended Statement of Claim does not comply with the technical rules of pleading. Among other infelicities, it pleads evidence, it includes conclusory arguments, and it contains embarrassing, inflammatory, and irrelevant allegations. Although the Defendants did not oppose the proposed amendments to paragraphs 39, 40, 66, 67, 68, 77, 87, 94 (b) and 111 of the draft amended pleading, they did object to paragraphs 5, 6, 8 (a), 35-38, 54-59, 74, 80, 86 (d), 98 (b), 101, 103-105, 108-110 (the Headlands Claims). Since there is merit to the Defendants' objections on the technical grounds that some of these paragraphs are non-compliant with the rules of pleading, in granting the second branch of the First Nation's Hybrid Motion, it is on terms that the First Nation have ten days to deliver a Second Fresh as Amended Statement of Claim that is complaint with the technical rules of pleading.

[15] With respect to the second branch of the Hybrid Motion, after the First Nation delivers its amended pleading, the Defendants shall have ten days to either: (a) move to strike the pleading solely on the grounds of non-compliance with the technical rules of pleading; or (b) to deliver Fresh as Amended Statements of Defence. I shall remain seized of any motion to strike, which shall be a motion in writing with a notional hearing date of May 10, 2024.

[16] It should be emphasized that notwithstanding the Defendants' arguments that leave to amend should not be granted because of missing necessary parties, I am granting the First Nation leave to deliver a Second Fresh as Amended Statement of Claim with or without joining Canada and/or Shoal Lake #40 First Nation as party defendants. The question of whether Canada is a necessary party was a predominant feature of the Hybrid Motion, and the First Nation undoubtably understands the potential consequences of a failure to join a necessary party. I observe that if Canada is not joined as a party defendant, then the First Nation runs the risk that some or even all of its $2.0 billion claim may be dismissed because the trial court may determine that Canada was a necessary party. This risk is most acute for the Headlands Issue, but the risk may extend to the totality of the First Nation's claims. For what it is worth, I recommend that the First Nation join Canada as a party defendant, but that ultimately is a decision for the First Nation and its legal advisers to make.

[17] I wish to be clear that this is a recommendation based on an observation of the possible

consequences if Canada is not joined as a party defendant. The outcome of the Hybrid Motion, however, is not a finding that Canada is a necessary party. Canada is certainly a proper party, and the Defendants have a reasonably strong argument that Canada is a necessary party, but that is a matter that they may plead in defence, and it is a matter to be determined by the trial judge. The Defendants also have the right to join Canada as a third party, but that is a decision for the Defendants to make as they may be advised by their legal counsel.

[18] By way of overview, with respect to the refusals motion, for a variety of reasons, the Defendants were justified in refusing the questions posed on the examinations for discovery save for four questions that were properly asked and improperly refused.

[19] Thus, as I shall explain in more detail below, the Hybrid Motion is dismissed in part and granted in part on terms.

C. Anthropological, Geographical, Historical, Legal, and Statutory Background

[20] In this section, I will summarize the critical material facts of geography, anthropology, history, statutory instruments, and agreements that underlie the First Nation's claims for: (a) breach of fiduciary duty; (b) compensation pursuant to the 1913 Order in Council for properties taken, injuriously affected, or interfered with; and (c) compensation for an entitlement to reserve lands (the Headlands Issue).

[21] Shoal Lake is a part of the Shoal Lake watershed, which is comprised of Shoal Lake, Falcon Lake, and High Lake. Shoal Lake is the largest of the watershed's three lakes with a surface area of about 260 square km (100 square miles). Over 95% of Shoal Lake's surface area is in Ontario, the balance is in Manitoba. Shoal Lake is part of the Nelson Basin which is regulated by the *Ontario Water Resources Act*.[3] Shoal Lake is a navigable water and is subject to the *Beds of Navigable Waters Act,*[4] which confirms that Ontario holds title to the lakebed.

[22] Shoal Lake is also part of the larger "Rainy River - Lake of the Woods - Winnipeg River" drainage basin ("the Rainy River Basin"). The International Joint Commission has regulatory authority with respect to the Rainy River Basin. The International Joint Commission is an international body comprised of representatives from both Canada and the United States. The Commission regulates waters that are subject to the *International Boundary Waters Treaty Act*.[5] The Commission has regulatory authority over Shoal Lake because the lake is interconnected with the Lake of the Woods, which is subject to the *International Boundary Waters Treaty Act*.

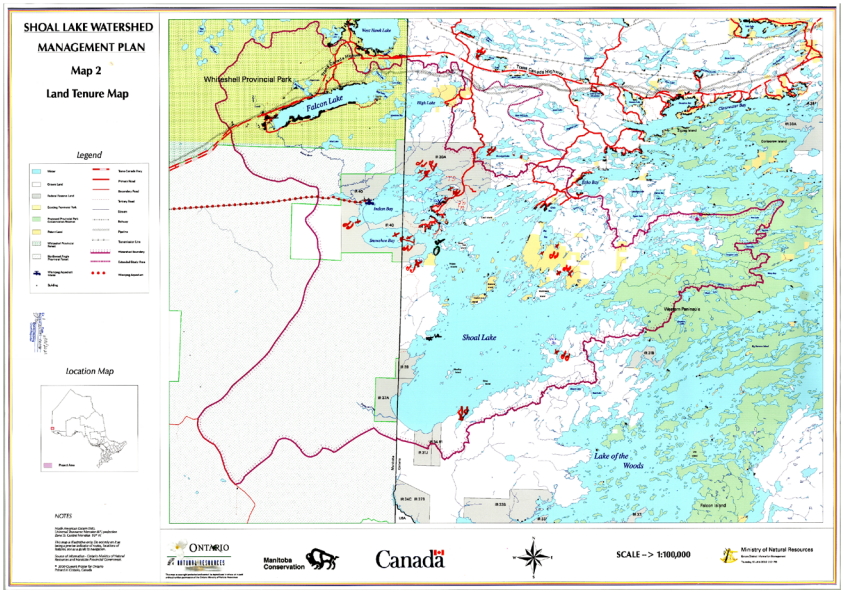
[23] The Commission's regulatory powers include granting permission to take water and setting water levels. The Lake of the Woods Control Board of the International Joint Commission exists under concurrent Canada, Manitoba, and Ontario legislation. It operates as a federal board with members from each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

[24] For more than 6,000 years people have lived in the Shoal Lake area. The people of Iskatewizaagegan No. 39 Independent First Nation are Anishinaabe. They are the decendents of the original inhabitants of the area. The First Nation is a distinct Aboriginal society, a recognized

[3] R.S.O. 1990, c. O.40.
[4] R.S.O. 1990, c. B.4.
[5] R.S.C. 1985, c. I-17.

Band under the *Indian Act*,[6] and an Aboriginal people within the meaning of s. 35 of the *Constitution Act*, 1982.[7]

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



[26] Iskatewizaagegan No. 39 Independent First Nation's traditional territory encompasses Shoal Lake and the Shoal Lake watershed. The traditional territory of the First Nation encompasses the Shoal Lake watershed and lands surrounding the watershed up to Falcon Lake and High Lake.

[27] Iskatewizaagegan No. 39 Independent First Nation has a reserve bordering half of the north shore and part of the west shore of Shoal Lake. The north shore portion is around Indian Bay.

[28] There are three other First Nations with reserves on Shoal Lake; namely: (a) Shoal Lake #40 First Nation, which like the Iskatewizaagegan No. 39 Independent First Nation, has headlands around Indian Bay; (b) Anishnaabeg of Naongashiing First Nation, which has reserve lands on the southern shores of Shoal Lake; and (c) Animakee Wa Zhing #37 First Nation (formerly known as Northwest Angle 37), which also has reserve lands on the southern shore.

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

[30] Pursuant to s. 92(13) of the *Constitution Act, 1867*, which gives the provinces the power to legislate with respect to property and civil rights in the province, provincial governments have the power to regulate land use within the province whether held by the Crown, Aboriginal title holders, or by private owners, or by the holders of Aboriginal title.[8] A province's power to regulate land held under Aboriginal title is limited by: (a) the Federal Government's power over "Indians and

---

[6] R.S.C. 1985, c. I-5.
[7] Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[8] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.

Lands reserved for Indians" under s. 91(24) of the *Constitution Act, 1867*; and (b) s. 35 of the *Constitution Act, 1982*,[9] which requires that any infringement of Aboriginal rights be justified.[10]

[31] Common law real property concepts do not apply to Aboriginal lands or to reserves.[11] Aboriginal title and the Aboriginal interest in reserves are communal *sui generis* interests in land that are rights of use and occupation that are distinct from common law proprietary interests.[12] An aboriginal interest in land will generally have an important cultural component that reflects the relationship between an Aboriginal community and the land and the inherent and unique value in the land itself which is enjoyed by the community.[13] The Aboriginal interest in land is a *sui generis* (unique) independent beneficial legal ownership interest that burdens the Crown's underlying title, which is not a beneficial ownership interest and which may rather give rise to a fiduciary duty on the part of the Crown.[14]

[32] Iskatewizaagegan No. 39 Independent First Nation is a beneficiary of the *Royal Proclamation of 1763.*[15] The *Royal Proclamation of 1763* was ratified by assembled Indigenous Nations by the *Treaty of Niagara 1764*. In the summer of 1764, representatives of the Crown and approximately 24 First Nations, met at Niagara. The lengthy discussions lead to the *Treaty of Niagara 1764*. The Crown does not recognize the *Treaty of Niagara 1764* as substantively altering the legal effects of the *Royal Proclamation of 1763*. In contrast, First Nations assert that the *Royal Proclamation of 1763* must be understood together with the *Treaty of Niagara 1764* and so understood the *Royal Proclamation of 1763* constitutes a recognition of Indigenous sovereignty.

[33] On **March 29, 1867**, Queen Victoria signed the *British North America Act, 1867*,[16] later renamed the *Constitution Act, 1867*, which came into effect on **July 1, 1867**. The Act divided the Province of Canada into Ontario and Québec and joined them with New Brunswick and Nova Scotia to form a confederated state called the Dominion of Canada.

[34] In accordance with the division of powers under the *Constitution Act, 1867,* Ontario exclusively had the authority to take up lands and it is the owner of the lands and of the resources on or under the lands taken up. Under the *Constitution Act, 1867*, Ontario has the exclusive power to manage the lands and the exclusive power to make laws in relation to the natural resources, forestry resources, and electrical energy on the lands taken up.[17]

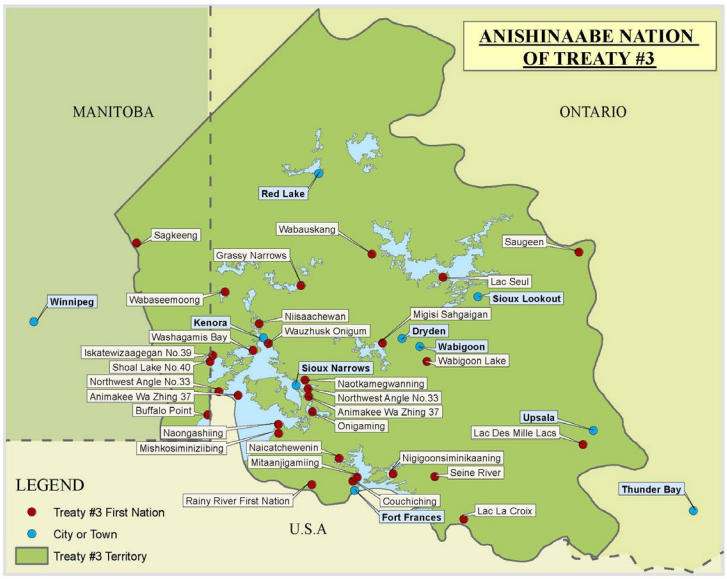
[35] In **1870**, Manitoba became a province of Canada, but its precise boundaries were not settled.

[36] On **October 3, 1873**, Iskatewizaagegan No. 39 Independent First Nation entered into Treaty No. 3 with the Federal Crown. The subject of the treaty was 55,000 square miles of territory from west of Thunder Bay to north of Sioux Lookout in Ontario and extending to the Manitoba border and the border with the United States. The reserve of Iskatewizaagegan No. 39 Independent

---

[9] Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[10] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.
[11] *Osoyoos Indian Band v. Oliver (Town),* 2001 SCC 85.
[12] *Osoyoos Indian Band v. Oliver (Town),* 2001 SCC 85 at para. 42; *St. Mary's Indian Band v. Cranbrook (City),* [1997] 2 S.C.R. 657.
[13] *Osoyoos Indian Band v. Oliver (Town),* 2001 SCC 85 at para. 46.
[14] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at paras. 69-70; *Guerin v. The Queen*, [1984] 2 S.C.R. 335.
[15] R.S.C. 1985, App. II, No. 1. The text of the *Royal Proclamation* is set out in Schedule "A" to *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City),* 2021 ONSC 1209.
[16] 1867 (UK), 30 & 31 Victoria, c 3.
[17] *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48.

First Nation, which is adjacent to Shoal Lake, was established pursuant to Treaty No. 3.



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

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

[39] In **August 1884**, the Judicial Committee of the Privy Council endorsed the 1878 boundary decision, which effectively set the western and northern boundaries of Ontario. The western Ontario boundary was officially enacted into legislation by the *Canada (Ontario Boundary) Act* of August 12, 1889,[18] which confirmed the boundaries of Ontario in accordance with the Privy Council's 1884 decision.

[40] In **1888**, in *St. Catherine's Milling and Lumber Company v. The Queen (Ontario)*,[19] the Privy Council determined that most of the lands contained within Treaty No. 3 belonged to Ontario. This decision was retroactive to 1867 – predating Treaty No. 3. The result of *St. Catherine's Milling and Lumber Company v. The Queen (Ontario)* meant that without Ontario's consent Canada had negotiated a treaty and set apart reserves for the Indigenous signatories using lands that belonged to Ontario.

[41] In **1891**, after the *St. Catherine's Milling and Lumber Company* decision, Ontario agreed to transfer the reserves of Treaty No. 3 to Canada. To effect this purpose, the province and the federal government enacted complementary statutes, which the parties describe as the "1891 Acts".[20]

[42] In exercising its jurisdiction over Treaty No. 3 lands, it is arguable that Ontario is bound

---

[18] (1899), 52 & 53 Vict. c.28 (Imp.)
[19] [1888] UKPC 70.
[20] *An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indians Lands*, S.O. 1891, c 3, and *An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indians Lands*, S.C. 1891, c. 5.

by the duties attendant on the Crown and it must exercise its powers in conformity with the honour of the Crown and the fiduciary duties that lie on the Crown in dealing with Aboriginal interests.[21] Although Treaty No. 3 was negotiated with the Crown in right of Canada, the promises made in Treaty No. 3 are promises of the Crown, it is arguable that the federal Government and Ontario are responsible for fulfilling the promises of Treaty No. 3 when acting within the division of powers under the *Constitution Act, 1867*.[22]

[43] The Canada-Ontario agreements were crystallized in the 1891 Acts and by an agreement in **1894**. Pursuant to 1891 Acts, a statutory agreement was signed between Canada and Ontario which the parties label the "1894 Agreement". According to Ontario's 1891 Act, "such agreement, when entered into, and every matter and thing therein shall be binding on this Province as if the same were specified and set forth in an Act of this Legislature." Section 4 of the 1894 Agreement states as follows [with my emphasis added]:

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

[44] The 1894 Agreement appears to define the limits of the reserve lands. However, historically, surveys of the reserve lands were never completed because Canada had directed its surveyors to defer any further surveying in the disputed territory until a settlement with Ontario had been definitively reached but the surveying was not resumed after the 1894 Agreement.

[45] Following the 1894 Agreement, Canada continued to press Ontario to carry out its obligations thereunder to confirm the limits of the reserves selected under Treaty No. 3. These efforts culminated in an **1899** Order-in-Council approved by the Governor General to appoint a joint commission to settle and determine questions in relation to the confirmation of the boundaries of the reserves under Treaty No. 3.

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

[47] In **1913**, the Greater Winnipeg Water District was established for the City of Winnipeg.[23] The Water District, which later became a part of the City of Winnipeg, proposed a project to construct an aqueduct from Winnipeg to the shores of Shoal Lake across the provincial border. The purpose of the aqueduct was to take water from the lake for the citizens of Winnipeg. The Water District sought permission from Ontario, Canada, and the International Joint Commission to take water from Shoal Lake.

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

---

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

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

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

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

[51] In **January 1914**, the International Joint Commission ("IJC") held a hearing about the Winnipeg Water District's aqueduct project. The International Joint Commission approved the project subject to the same terms and conditions as set out in Ontario's 1913 Order in Council. The IJC determined that Shoal Lake, as a part of the Lake of the Woods, was a boundary water and therefore the aqueduct must be overseen by the IJC. Under its Order of Approval, the

Commission granted the Winnipeg Water District permission to take water from Shoal Lake for domestic and sanitary purposes up to a maximum of 100 million gallons per day.

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

[53] In early **1914**, the Water District decided that the aqueduct would be built totally within the Province of Manitoba. Here, it must be recalled that a small portion (5%) of Shoal Lake was in Manitoba. This land was under the control of the federal Crown.

[54] In **1914**, Canada expropriated the Manitoba portion of the First Nation's reserve lands and sold it to the City of Winnipeg for its aqueduct project. It did this without a surrender under the *Indian Act* and without the consent of the First Nation.

[55] Pausing here in the history of the events the events of what happens next are a matter of vociferous and vehement contention with respect to the First Nation's claims against Winnipeg and Ontario especially with respect to the Headlands Issue. To put these events in context, it is necessary to summarize the situation in 1914. At that time, Ontario and Canada were still settling the parameters of the reserve lands for the signatories of Treaty No. 3 at the same time as Ontario and Winnipeg were bound together by the 1913 Order in Council that permitted the extraction of water from Shoal Lake subject to several compensation provisions. In settling the parameters of the reserve lands, Ontario and Canada were governed by the then twenty year old 1894 Agreement, under which pursuant to s. 4 of the agreement, the reserve lands for the Treaty No. 3 signatories would include as a part of the reserves "the land covered with water lying between the projecting headlands." As 1914 was coming to a close, the historical record reveals that Aubrey White, Ontario's Deputy Minister for the Department of Lands, Forests and Mines, was considering whether this provision in the 1894 Agreement should be reconsidered. Mr. White's concern was animated in part by an apprehension that the inclusion of the headlands in the reserve lands would hamper the application by Winnipeg to take water from Shoal Lake pursuant to the 1913 Order in Council and the associated instruments.

[56] It was in this context that on **December 15, 1914**, Mr. White wrote to Mr. Duncan Campbell Scott, Deputy Superintendent-General of the Department of Indian Affairs. Mr. White's letter stated:

> Dear Mr. Scott:
>
> I have been looking into the matter of the Indian Reserves under Treaty No. 3. I have been studying their situation and everything connected with them, as we are required to do under section 2 of the agreement signed by Mr. Daly and Mr. Gibson on the 15th of April, 1894, to see if there is any good reason why we should not now acquiesce in the selections made and the surveys on the ground.
>
> When I came to read clause 4 it struck me that that clause left the door open for all kinds of disputes and misunderstandings hereafter, and I thought it would be well to put our views before you so that, if possible, some agreement might be arrived at which would close the door to the entry of future disputes. You will see that clause 4 provides, -
>
> > "That in case of all Indian Reserves so to be confirmed or hereafter selected, the waters within the lands laid out as Indian reserves in the said territory, including the land covered with water lying between the projecting headlands of any lake or sheets of water, not wholly surrounded by an Indian reserve or reserves, shall be deemed to form part of such reserve, including islands wholly within such headlands, and shall not be subject to the

> public common right of fishery by others than Indians of the band to which the reserve belongs.

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

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

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

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

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

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

[…]

[57] On **December 30, 1914**, Mr. Scott responded to Mr. White's letter. Mr. Scott wrote:

Dear Mr. White,

I have given careful attention to your letter of December 15th, with reference to the Indian reserves in Treaty No. 3; the points you have raised are important and the difficulties you anticipate must be removed. For my own part, I have not lost sight of the agreement under the statute of 1894. You may remember that at the conference between our Ministers you explained to the Hon. Dr. Sache the operation of this statutory agreement of 1894, and I was under the impression that we all had it in mind in dealing with the reserves. I have not had an opportunity of conversing with the Superintendent General on the subject matter of your letter, but it occurs to me that it might be useful for me to state my own views, as they have been formed with a view to a settlement of our difficulties. I think it would be advisable to confirm the reserves as surveyed; we might of course, adhere to the terms of the statutory agreement, and in that event, would have to ascertain the acreage of the islands and pay you for them as surplus areas, but this might entail what we would consider to great an expenditure and also be productive of delays which we all agree are undesirable. If the reserves are conformed as surveyed, we would require to repeal the statute of 1984 and substitute therefore an enactment which would cover the settlement of the reserve question, Treaty No. 3, in all its bearings.

It is my conviction that we should say nothing about water or fisheries but leave those questions to be decided as the cases arise by the existing law and usage.

> I think we might arrange the question of water powers by your allowing the Indians water powers, not exceeding 500 horse power; this limit, you will remember, was fixed by the preliminary agreement for Treaty No. 9. It seems to me that the Indians should have some interest in larger water powers in the Treaty 3 reserves which might be fixed on a percentage of the gross earnings of water powers when developed. I think we could readily come to an agreement on this point.
>
> […]

[58] There is no evidence that Winnipeg was aware of this correspondence between Ontario and Canada. In the immediate case, it a matter of serious contention between the parties about whether Mr. White's statement that the inclusion of the headlands "might seriously cripple our [Ontario's? or Ontario and Canada's?] action with respect to the application of Winnipeg" was true or false. The Defendants dispute that the exclusion of the headlands in Ontario would not affect the aqueduct project given that the terminus of the aqueduct was in lands in Manitoba and the lands under water in Shoal Lake that were expropriated for the aqueduct are entirely within Manitoba. There is no evidence that Winnipeg thought the inclusion or exclusion of the headlands was a problem for its project. However, as appears from Mr. Scott's response for Canada, he was in general agreement with Mr. White's view that the inclusion of the headlands in Ontario was a problem.

[59] It is an even more serious matter of contention between the parties as to whether what happened next was a wrongdoing by one or other or both of Ontario and Canada. Within weeks of this exchange of White-Scott correspondence, in **1915**, Ontario enacted legislation specifying that the lands conveyed to Canada fulfill Treaty No. 3's reserve requirement, including Iskatewizaagegan No. 39 Independent First Nation's reserve, excluding the lakebed of Shoal Lake. The 1915 Legislation indicated that the land covered by water was the property of Ontario.[24] The 1915 Legislation also indicated that Ontario kept all Headlands areas in Treaty No. 3 under Ontario's control.

[60] In what the First Nation rhetorically described on the Hybrid Motion as a legislative sleight of hand, sections 1 and 2 of the 1915 Legislation stated [with my emphasis added]:

> WHEREAS under a treaty known as "the Northwest Angle Treaty, No. 3" certain Indians surrendered to Her late Majesty Queen Victoria all their rights, titles and privileges to the lands therein defined and described, out of which reserves were to be selected and laid aside for the benefit of said Indians; and whereas after the true boundaries of Ontario had been ascertained and declared it was found that certain of the reserves selected and laid aside were with the said boundaries; and whereas in pursuant of the terms of the said boundaries; and **whereas in pursuant of the terms of an agreement dated 14th April 1894, between the Government of Canada and the Government of Ontario, the Government of Ontario has made full enquiry as to the said reserves so laid out, and it has been decided to acquiesce in the location and extent thereof** with the exception of that known as Indian Reserve 24C, in the Quetico Forest Reserve and **subject to the modifications and additional stipulations of the said agreement hereinafter set forth**; and whereas the Government of Canada has deposited in the Department of Lands, Forests and Mines of Ontario plans of said reserves.
>
> 1. The said reserves … whose title is hereby confirmed […] and subject to the provision of the following sections.
>
> 2. […] and the **land covered with water lying between the projecting headlands** of any lake or sheets of water, not wholly surrounded by an Indian reserve or reserves, shall be deemed to form

[24] *An Act to Confirm the Title for the Government of Canada to Certain Lands and Indian Lands*, S.O. 1915, c. 12.

> part of such reserve and islands wholly within such headlands, **and shall not be deemed to form part of such reserve,** but shall continue to be property of the Province and the *Bed of Navigable Waters Act* shall apply, notwithstanding any thing contained in the paragraph of the agreement hereinbefore mentions.

[61] This allegedly nefarious legislative legerdemain is the Headlands Issue. The First Nation alleges that Ontario's 1915 Legislation contravened the 1894 Agreement and purported to extinguish the rights of all First Nations, including the Plaintiff, to their Headlands areas and their entitlements under Treaty No. 3. The First Nation alleges this unilateral extinguishment of rights to the Headlands was done without its consent and was purposefully designed to enable Winnipeg's aqueduct scheme.

[62] The expropriation of the lands in Manitoba for the aqueduct was confirmed by the Privy Council in 1915.

[63] In **April of 1916**, Ontario enacted *An Act to Confer Certain Rights and Powers upon the Greater Winnipeg Water District*.[25] The statute confirmed the 1913 Order in Council and declared that its terms and conditions were legal, valid, and binding as if the Order in Council had been enacted as a statute.

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

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

D. Other Proceedings

[66] In **1989**, the First Nation submitted a Specific Claim against Canada in relation to the islands in Shoal Lake, the Garden Islands. The First Nation's claim referred to the 1891 Act, the 1894 Agreement, and the 1915 Legislation. At paragraph 64, of the First Nation's claim, it alleged as follows:

> The Claimants further allege, and the fact is, that Her Majesty the Queen in Right of Canada came under statutory duties pursuant to An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian lands, 54-55 Victoria, c. 5, and the agreement therein authorized and actually entered into the 15th day of April, 1894, (the 1894 agreement) to safeguard the interests of the claimants and their predecessors in the lands claimed herein. Further, Her Majesty the Queen in Right of Ontario came under statutory duties pursuant to An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands, 54 Victoria, c.3, and the agreement therein authorized and actually entered into on the 15th day of April, 1894, (the 1894 agreement) to confirm the lands claimed herein. Further, Her Majesty the Queen in Right of Ontario, by An act to confirm the title of the Government of Canada to certain lands and Indian lands (1915), 5 Geo. V., c.12, did in fact confirm the lands herein. The claimants allege that thereafter, by granting patents thereto, Her Majesty the Queen in Right of Ontario breached Her said statutory duty.

[67] At paragraph 37 of the Garden Islands claim, the First Nation mentions the 1913 Order in Council and the International Joint Commission's 1914 Order and to the fact that those instruments contained conditions on which Winnipeg could draw water from Shoal Lake. The

---

[25] S.O. 1916, c. 17.

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

[68] The 1989 Specific Claim did not proceed.

[69] On **April 10, 2000**, in the Ontario Superior Court of Justice, the First Nation sued Ontario and Canada with respect to the Headlands Issue.[26] The First Nation sought a declaration that certain islands located in the Indian Bay of Shoal Lake are Indian reserve lands. The First Nation alleged that Canada is under a continuing duty to protect the First Nation's interest in the land and is under positive duties to manage the lands, including lands under water, for the First Nation's use and benefit. The First Nation alleged that:

> 18. In the year 1914 the City of Winnipeg applied to use the Manitoba portion of the aforesaid Indian Bay as its source of water. Canada determined that all of Indian Bay and the islands therein were Indian reserve. On this basis, Canada exercised expropriation powers under the *Indian Act* to sell the portion of Indian Bay within Manitoba to the City of Winnipeg, without a surrender under the *Indian Act*, and without consent of the Indians as required under the treaty.
>
> 19. At no time was a surrender of reserve 39 or any part of it or of any island within Indian Bay and within the Province of Ontario given by the plaintiff.

[70] The 2000 Action in the Superior Court did not proceed. The First Nation as embodied in its current leadership and extending back decades was not aware of this action. During the hearing of the Hybrid Motion, Mr. Falconer contacted the lawyer who had commenced the action and was advised that the action was commenced as some sort of placeholder but that it was never prosecuted.

[71] On **November 12, 2001**, a different lawyer commenced an action by the First Nation against Canada, Ontario, and Manitoba apparently in the Ontario Superior Court and in the Federal Court with respect to flooding on the reserve lands. In that action(s), the First Nation alleged, among other things, that: (a) Canada failed to adequately pursue implementation of the 1894 Statutory Agreement, thus encouraging the flooding trespasses and Ontario's purported unilateral expropriation and exclusion of the water powers and headlands portions of the Reserves and included islands; (b) failed to advise the First Nation of matters affecting its reserve land interests including the agreements made between Canada and Ontario in 1874, 1878, 1894, 1913 or 1914, and the unilateral provincial legislation of 1915; (c) failed to insist on clarity in the unilateral 1915 provincial legislation and failed to object or disallow said legislation; (d) purported to exclude from the Reserves the water powers and headlands portions in contravention of the reciprocal 1891 Acts and 1894 Agreement; and (e) failed to carry out duties contained in its own statutes and agreements. At paragraph 154 of IIFN's Flooding Claim, reference is made to the correspondence between Mr. White and Mr. Scott, which is the same correspondence the plaintiff seeks to rely on in this action.

[72] There is no evidence that the November 12, 2001 action(s) in the Ontario Superior Court and the Federal Court proceeded.

[73] In **2008**, Canada abruptly shut down that headlands "Specific Claim" process with respect

---

[26] *Shoal Lake #39 First Nation v. The Attorney General of Canada and Her Majesty the Queen in Right of Ontario*, Court File No. 00-02623 issued April 10, 2000.

to the Headlands Issue.

[74] In **2016**, First Nation joined with Shoal Lake 40 in its claim to the Specific Claims Tribunal with respect to the expropriation of the Garden Islands. Those proceedings are still outstanding.

E. Procedural Background

[75] On **December 10, 2019**, the First Nation commenced an application for a determination whether it came within the scope of the Compensation Provision in the 1913 Order in Council that stipulated that Winnipeg was liable "to […] all private parties whose lands or properties may be taken, injuriously affected or in any way interfered with."

[76] On the application, on **July 9, 2020**, Justice Gans ruled that the First Nation "would be entitled to full compensation from the City of Winnipeg if it can be shown that [the First Nation's] properties or lands have been taken, injuriously affected or in any way interfered with pursuant to the Order."[27] Justice Gans' Order was made on consent. The operative part of the Order stated:

> THIS COURT ORDERS AND DECLARES THAT:
>
> 1. Paragraph numbered 1 of the report of the Honourable Minister of Lands, Projects and Mines annexed to the Order in Council approved by the Lieutenant Governor for the Province of Ontario dated October 2, 1913 which paragraph reads as follows:
>
>> That full compensation be made to the Province of Ontario and also to all private parties whose lands or properties may be taken, injuriously affected, or in any way interfered with, but water taken within the terms hereof and considered merely as water is not property to be paid for.
>
> forms part of and is one of the conditions of the Order of Approval of the International Joint Commission dated January 14, 1914 (hereinafter referred to as the "Order"), which permits the City of Winnipeg to withdraw water from Shoal Lake.
>
> 2. The Respondent of the City of Winnipeg is bound by the provisions of the Order including paragraph numbered 1 or the report annexed to the 1913 Order in Council recited above.
> 3. The Applicants would be entitled to full compensation from the City of Winnipeg if it can be shown that the Applicants' properties or lands have been taken, injuriously affected or in any way interfered with pursuant to the Order provided, however, that waters taken within the terms of the Order and considered merely as water is not property to be paid for.
> 4. The balance of the application is dismissed without prejudice to the rights of the Applicants to commence an action for compensation in damages under the terms of the Order or any other relevant statute or cause, and without prejudice to the rights of any defendant to that action to raise any defences whatsoever.
>
> […]

[77] On **May 25, 2020**, the First Nation provided written notice to Ontario of its intention to bring this action, as required by the *Crown Liability and Proceedings Act*.[28]

[78] On **July 24, 2020**, the First Nation filed its Statement of Claim for harm caused by Winnipeg's extraction of water from Shoal Lake. The First Nation asserted that Ontario was jointly and severally liable for the harm caused by Winnipeg. The First Nation also asserted a

---

[27] Justice Gans did not issue Reasons for Decision.
[28] S.O. 2019 c. 7, Sch.17.

breach of fiduciary duty claim against Ontario.

[79] On **August 5, 2020**, Ontario served a Demand for Particulars.

[80] On **August 24, 2020**, the First Nation filed its Response to Demand for Particulars, which included the following answers:

> Q.4. With respect to paragraph 46, was any land taken or expropriated in Ontario for the purpose of constructing the aqueduct?
>
> A: To the best of the plaintiff's knowledge, no land was taken or expropriated in Ontario for the purpose of constructing the aqueduct.
>
> […]
>
> Q.15. With respect to paragraphs 66 and 67, please provide particulars of any lands or real property that are alleged to have been taken separate and apart from any claim for loss of use or enjoyment of those lands or real property. Please include particulars of how the lands or real property were taken and details of the mechanism used to take the land, as alleged?
>
> A: The damages suffered by the plaintiffs are as detailed in paragraphs 66-73 of the amended claim and referred to at paragraph 8(a). The plaintiff asserts its claim for compensation as damages which arise from "lands or properties that may be taken, injuriously affected or in any way interfered with". The interference and injuries suffered by the plaintiff include, but are not limited to, the loss of use of their lands as a consequence of the damages alleged in paragraphs 66-73.
>
> […]
>
> Q. 19. With respect to paragraph 74, please provide particulars of any and all undertakings that the plaintiff bases its allegation on to say that Ontario owed a fiduciary duty?
>
> A: The plaintiff alleges that Ontario owed a fiduciary duty pursuant to the common law, the Treaty of Niagara, Treaty 3, the Royal Proclamation of 1763, and condition 2 of the Minister's Report appended to Ontario's *1913 Order in Council.*

[81] On **September 24, 2020**, Ontario brought a motion to strike the First Nation's claim for breach of fiduciary duty.

[82] In **October 2020**, the Plaintiff retained expert historian Dr. Kenton Storey to look generally at issues relating to the historical context of the plan to take water from Shoal Lake, the purpose of the 1913 Order in Council, and the role of the International Joint Committee.

[83] On **October 16, 2020**, Winnipeg delivered its Statement of Defence.

[84] Before the pleadings motion was argued, the First Nation's Statement of Claim was amended on contained additions pertaining to Ontario's fiduciary duty. The Statement of Claim was amended on or about **December 15, 2020**.

[85] The Motion to Strike was heard on **January 20, 2021**.

[86] On **February 12, 2021**, Winnipeg delivered an amended Statement of Defence.

[87] On **February 17, 2021**, I dismissed Ontario's pleadings motion.[29]

[88] On **March 3, 2021**, the First Nation delivered its Reply to Winnipeg's Statement of

---

[29] *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City),* 2021 ONSC 1209.

Defence.

[89] On **June 30, 2021**, Ontario delivered its Statement of Defence.

[90] On **September 15, 2021**, the First Nation filed a Fresh as Amended Statement of Claim.

[91] On **September 17, 2021**, Shoal Lake #40 First Nation, another First Nation on Shoal Lake, brought a motion to be added to intervene in the action against Winnipeg and Ontario.

[92] On **September 23, 2021**, the First Nation delivered its Reply to Ontario's Statement of Defence.

[93] On **January 24, 2022,** Justice Wilson dismissed Shoal Lake #40 First Nation's motion to intervene.[30] She did so, amongst other reasons, because in her view, the First Nation's claims in this action would not adversely affect the rights of Shoal Lake No. 40.

[94] On **October 12, 2021**, the First Nation delivered a Fresh as Amended Statement of Claim.

[95] In **March 2022**, Dr. Storey delivered a draft historical report to the First Nation. From the report, the First Nation's counsel identified the Headlands Issue as an issue to pursue at the examinations for discovery. Among other things, Dr. Storey had discovered the correspondence in 1894 between Aubrey White, Ontario's Deputy Minister for the Department of Lands, Forests and Mines and Duncan Campbell Scott, Canada's Deputy Superintendent-General of the Department of Indian Affairs. The First Nation's counsel intended to question Ontario and Winnipeg about the White-Scott correspondence which arguably connected the Headlands Issue with the aqueduct project and the 1913 Order in Council.

[96] In accordance with its ongoing duties of continuous documentary disclosure, the First Nation's counsel prepared a disclosure package and provided it to the Defendants' counsel. The First Nation's counsel advised that the documents had been found by Dr. Storey and would be the subject matter of questioning at the examinations for discovery.

[97] On **September 26-28, 2022** and **November 21, 2022, Timothy Shanks**, Winnipeg's witness was examined for Discovery. He is the Director of the Water and Waste Department of the defendant, the City of Winnipeg. Mr. Shanks refused to answer any questions about the Headlands Issue.

[98] On **September 29-30, October 6-7, 2022**, **Scott Lockhart**, Ontario's witness was examined for discovery. Mr. Lockhart refused to answer questions about the Headlands Issue.

[99] On **November 15, 2022**, Chief Gerald Lewis, the representative of the First Nation was examined for discovery.

[100] On the examinations for discovery, the Defendants objected to any questioning about the newly disclosed documents. Winnipeg and Ontario believed that the First Nation was attempting to fundamentally change the nature of this action and to advance new claims that are not been pleaded.

[101] On **March 30, 2023**, the First Nation served Mr. Storey's expert report and stated that the Headlands Issue was an aspect of the existing claim. The First Nation also advised that a recent Freedom of Information request made by Mr. Storey was wrongfully being denied.

---

[30] *Iskatewizaagegan No. 39 Independent First Nation v. The City of Winnipeg*, 2022 ONSC 535.

[102] On **April 11, 2023**, the First Nation proposed the scheduling of a refusals motion.

[103] On **April 20, 2023**, Ontario's counsel wrote the First Nation's counsel. Ontario asserted that the Headlands Issue had arisen for the first time in discovery and that should the First Nation wish to advance this new cause of action, it would require leave to amend its pleading, which would be opposed. Ontario asserted that if the new claim was asserted this would affect the research and productions completed to date and impact the selection of experts and preparation of a historical report. Ontario asserted that Canada was not a party to the new claim and was a necessary party.

[104] On **April 21, 2023**, counsel for Winnipeg indicated that Winnipeg agreed with Ontario's position, including that Canada would be a necessary party should the Plaintiff advance a claim based on the Headlands Issue.

[105] On **July 13, 2023**, counsel for the First Nation responded. The First Nation's position was that the Headlands Issue was properly a part of the claim and that Canada was not a necessary party.

[106] On **July 28, 2023**, counsel for the First Nation advised that the First Nation was willing to amend the Statement of Claim expressly to include the Headlands Issue.

[107] On **August 21, 2023**, the parties attended a case conference to schedule a motion for leave to amend the pleadings. Justice Wilson scheduled the "Hybrid Motion." Her endorsement stated:

> This case conference was requested jointly by counsel to address the timetable for the delivery of expert reports.
>
> On consent, I order that the timetable I set for the delivery of expert reports be amended as follows: […]
>
> There is an issue with respect to the ambit of the claims the Plaintiff can assert in this action. A particular claim, referred to as the "Headlands Issue", is the subject of disagreement between counsel. Mr. Falconer for the Plaintiffs asserts that a claim for the loss of the Headlands is within the scope of this proceeding and was canvassed extensively at the examinations for discovery. Ms. Glasser submitted that if the motion that the solicitor for the Plaintiffs is contemplating is in reality a motion to determine an issue, it should be heard by the trial judge and not by the case management judge.
>
> 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.
>
> The Defendants take the position that the Headlands issue is not contained in the original claim and cannot be asserted. I have agreed to hear a motion on this point for up to 2 days, on November 28 and 29, 2023 […] Counsel will work out a timetable for the delivery of motion materials.

[108] On **October 10, 2023**, counsel for Winnipeg advised the parties that based on Winnipeg's investigations, the proposed amendments were an attempt by the First Nation to advance the same or substantially similar claims that have already been made by the First Nation in other courts and tribunals (See the description of other claims above.)

[109] On **October 11, 2023**, the First Nation brought the Hybrid Motion for: (a) a determination of an issue pursuant to rule 21.01(1)(a); (b) an amendment to the pleading pursuant to rule 26.01; and (c) to compel answers to questions refused during the examinations for discovery. The motion

was supported by the affidavits dated October 11, 2023 and November 17, 2023 of Chief Lewis and the affidavit dated March 21, 2024 of **David Schwartz**. Mr. Schwartz is a paralegal at Falconers LLP, counsel for the First Nation.

[110] City of Winnipeg opposed the motion and relied on the affidavit dated October 31, 2023 of Mr. Shanks. Ontario opposed the motion and relied on the affidavit dated October 31, 2023 of **Ella Leishman**. Ms. Leishman is a counsel with the Ministry of the Attorney General, Crown Law Office – Civil.

F. The Draft Amended Fresh as Amended Statement of Claim

[111] For the purpose of the Hybrid Motion, the First Nation drafted an Amended Fresh as Amended Statement of Claim. As noted above, the Defendants did not oppose the proposed amendments to paragraphs 39, 40, 66, 67, 68, 77, 87, 94 (b) and 111 of the draft amended pleading.

[112] The Defendants did, however, object to paragraphs 5, 6, 8 (a), 35-38, 54-59, 74, 80, 86 (d), 98 (b), 101, 103-105, 108-110 (the Headlands Claims). The impugned paragraphs are set out below. The underlining identifies the changes from the Fresh as Amended Statement of Claim:

> 5. As the plaintiff has suffered from Winnipeg's water taking, all without recognition of its rights much less compensation, it now seeks, among other things, compensation pursuant to the 1913 Order in Council (incorporated into modern legislation by way of the *Ontario Water Resources Act*, R.S.O. 1990, Chapter 0.40, s. 34.3 (3), which allows for "[a] transfer of water pursuant to the order of the Lieutenant Governor in Council dated October 2, 1913 respecting the Greater Winnipeg Water District") and an equitable unjust enrichment, disgorgement or tracing order in regard to monies earned by Winnipeg on sale of the water.
>
> 6. The defendant ~~Her~~ His Majesty the ~~Queen~~ King in Right of Ontario ("Ontario") has a fiduciary obligation to the plaintiff with respect to the protection of the plaintiff's lands and properties; and any compensation for taking, injuriously affecting or in any way interfering with the same. The failure of Ontario to, among other things, ensure the effective exercise of the terms and conditions laid out in the 1913 Order in Council has caused the plaintiff to suffer, among other things, ecological injury to its lands, as well as resulting cultural and financial injury to its community. The plaintiff pleads that, should it be found that the City of Winnipeg is not responsible for compensation for any period between the date of the Order in Council and the present due to laches or some other limitation defence, such compensation is owed by Ontario to the Nation based on Ontario's fiduciary obligations.
>
> […]
>
> 8. The plaintiff Iskatewizaagegan No. 39 Independent First Nation claims:
>
> > (a) Damages in the amount of ~~$500,000,000 (FIVE HUNDRED MILLON DOLLARS)~~ $2,000,000,000 (TWO BILLION DOLLARS) or in the alternative, equitable remedies in the amount of ~~$500,000,000 (FIVE HUNDRED MILLON DOLLARS)~~ $2,000,000,000 (TWO BILLION DOLLARS);
>
> […]
>
> 35 *Agreement between Ontario and Canada Regarding Reserve Boundaries*
>
> 35. Treaty #3 was concluded prior to the finalization of the provincial border between Manitoba and Ontario in 1889. Once its borders had been established, Ontario, which had not been a party to Treaty #3 negotiations, disputed the reserve entitlements being surveyed by Canada.

36. In 1891, Canada and Ontario began making efforts to resolve this dispute by enacting mutual legislation (*An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indians Lands,* S.O. 1891, c 3, and *An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indians Lands,* S.C. 1891, c. 5). Pursuant to these statutes, Canada and Ontario signed a joint statutory agreement in 1894 (the "Agreement"). Section 4 of the Agreement states as follows:

> 4. That in case of all Indian reserves so to be confirmed or hereafter selected, the waters within the lands laid out or to be laid out as Indian reserves in the said territory, including the land covered with water lying between the projecting headlands of any lake or sheets of water, not wholly surrounded by an Indian reserve or reserves, shall be deemed to form part of such reserve, including islands wholly within such headlands and shall not be subject to the public common right of fishery by others than Indians of the band to which the reserve belongs.

37. The geographical area described in this section is referred to herein as the "Headlands Boundary". Under the Agreement, Canada and Ontario agreed, among other things, that the Headlands Boundary included the waters, islands, and waterbeds of Indian Bay within Shoal Lake as reserve lands set aside for the plaintiff and its neighbouring band, Shoal Lake 40 First Nation ("Shoal Lake 40"). Section 4 of the Agreement also provides that fishing rights within the Headlands Boundary are exclusive to the plaintiff and Shoal Lake 40.

38. Despite the terms of the Agreement, in 1915, Ontario unilaterally and unlawfully removed the plaintiff's rights under section 4 and took ownership of the lands and waterbeds within the Headlands Boundary, among other things, for the benefit of Winnipeg and to the detriment of the Nation, as detailed below.

[…]

Unilateral Removal of the Nation's Property Rights for Winnipeg's Benefit

54. The GWWD's water taking would not have been possible based on the Agreement generally and, in particular, the plaintiff's exclusive rights within the Headlands Boundary. Ontario considered section 4 of the Agreement to be a direct threat to GWWD's plan to divert water from Shoal Lake. In December 1914, Ontario's Deputy Minister for the Department of Lands, Forests and Mines, Aubrey White ("Deputy Minister White"), wrote to Deputy Superintendent-General of the Department of Indian Affairs, Duncan Campbell Scott ("Deputy Superintendent-General Scott"), and stated, among other things:

> [Section 4 of the Agreement] is very far-reaching and might seriously cripple our actions with respect to the application of Winnipeg for leave to take its water supply from Shoal Lake [...]

55. Deputy Superintendent-General Scott responded 15 days later, stating, among other things:

> [T]he points you have raised are important and the difficulties you anticipate must be removed [...][W]e would require to repeal the statute of 1894 […] we should say nothing about water or fisheries […]

56. Subsequently, Ontario passed *An Act to confirm the title of the Government of Canada to Certain Lands and Indian Lands*, S.O. 1915, c 12 ("1915 Ontario Act"). Section 2 of the 1915 Ontario Act expressly contradicted section 4 of the Agreement and provided that the lands and waterbeds within the Headlands Boundary were the property of Ontario.

57. Despite any informal agreement between Deputy Minister White and Deputy Superintendent-General Scott, the Agreement was never formally amended, repealed, or rescinded. Ontario did not have the authority to unilaterally amend or rescind the Agreement, or to unilaterally enact legislation

relating to the reserves. In particular, section 3 of the Agreement provides that questions related to the reserves within Ontario's borders were to be determined by a joint commission selected by both Canada and Ontario, which was never established. Additionally, no federal legislation or Order in Council was passed to confirm the amendment or rescission of the Agreement.

58. The 1915 Ontario Act was silent as to fishing rights and did not purport to deprive the plaintiff of its exclusive fishing rights. Nonetheless, Ontario purported to authorize recreational and commercial fishing within the Headlands Boundary of the plaintiff's reserve by persons other than the plaintiff for many decades. These activities, among other things, contributed to the collapse of the walleye fishery in Shoal Lake in or around the 1980s, and the decline of other fish populations. Ontario closed the walleye fishery in or around 1983 in an attempt to allow walleye populations to recover.

59. The plaintiff's position is that the repeal of section 4 of the Agreement occurred after the operative implementation date of the compensation provision in the 1913 Order in Council as it relates to the taking of the waters by Winnipeg. The said repeal of the rights to lands and/or properties that the Nation enjoyed occurred expressly for the purpose of clearing the way for Winnipeg to take the water. Thus, the said repeal is an interference, injury, or in any other way an affectation on the lands or properties of the Nation to which the Nation is eligible to be compensated for.

[…]

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

[…]

80. For the purposes of compensation under the 1913 Order in Council, the plaintiff's lands and properties include all lands and waters, including lands under water, set aside for the Nation under the Indian Act, the Agreement, and under Treaty #3. In addition, the plaintiff's lands and properties include all lands and waters, including lands under water, that are within their traditional territory.

[…]

Financial Damage

86. The plaintiff also pleads financial damage due to:

> […]
>
> (d) the loss of its access and commercial opportunities with respect to the fisheries within the Headlands Boundary, including the walleye fishery and spawning area within Indian Bay, among other things.

[…]

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

> […]
>
> (b) wrongfully engineering the unconscionable bargain of depriving the plaintiff of the benefit and its rights under the Agreement, which include, among other things, interests in lands and properties within Shoal Lake, as described in the section of this claim under the heading "Unilateral Removal of the Nation's Property Rights for Winnipeg's Benefit",

without any notice or consultation whatsoever and for the benefit of Ontario and in order to facilitate the application of the GWWD to divert the water supply from Shoal Lake;

[…]

[…]

101. The plaintiff has legal interests that stand to be adversely affected by the Crown's exercise of discretion or control. Specifically, the plaintiff has a legal interest in their reserve land; a legal interest in their hunting, fishing, and gathering activities throughout their traditional territory; a constructive trust, equitable lien or other equitable right, including the right to claim unjust enrichment, in the properties (including water) taken by Winnipeg since 1919, and a legal interest in the right to compensation if the GWWD/Winnipeg's taking of water from Shoal Lake causes the plaintiff's lands or properties to be "taken, injuriously affected, or in any way interfered with." The 1913 Order in Council and 1916 *GWWD* Act created a complete legal entitlement to compensation in the event the plaintiff's lands or properties were "taken, injuriously affected, or in any way interfered with" by Winnipeg/the GWWD.

[…]

103. The plaintiff pleads that Ontario is liable for breaching their fiduciary duty as described above in relation to the allegations set out above in the section of this claim under the heading "Unilateral Removal of the Nation's Property Rights for Winnipeg's Benefit."

104. In particular, the plaintiff pleads that the 1915 Ontario Act breached Ontario's fiduciary duty to act in the best interest of the Nation by unlawfully removing their entitlement to the Headlands area, and the plaintiff is entitled to be compensated for this breach.

105. The plaintiff relies on the equitable principle of fraudulent concealment. The plaintiff pleads that Ontario wilfully concealed its breach of fiduciary duty and the unlawful acts and improper purposes of its public officers, such that the plaintiff was prevented from knowing it had a cause of action. Ontario had a special relationship with the plaintiff as a fiduciary, among other things, and Ontario's conduct is unconscionable in light of that special relationship.

[…]

108. Further, as a result of Ontario's breach of fiduciary duty, the plaintiff lost opportunities to make use of the lands, waters, and waterbeds set out in section 4 of the Agreement, as well as the exclusive fishing rights set aside for the plaintiff under that section. The plaintiff is entitled to equitable compensation for its losses, which have been incurred over more than a century, and are extensive.

109. The plaintiff further pleads that Winnipeg and Ontario are jointly and severally liable for the relief flowing from Ontario's breach of fiduciary duty by, among other things, the operation of the doctrine of knowing receipt. In particular, Winnipeg knew or ought to have known of the plaintiff's interests and rights to the waters, waterbeds, and lands within the Headlands Boundary. Winnipeg received those waters and access to those waters, waterbeds, and lands for its own benefit, at the expense of the plaintiff.

110. As a result, Winnipeg and Ontario are jointly and severally liable for damages to the plaintiff for a portion of the excess revenue and cross-subsidization earned by Winnipeg and obviating the need to treat their water for 90 years, as described above. The plaintiff is entitled to an equitable remedy and entitled to disgorgement, unjust enrichment damages, or to trace funds "earned" by Winnipeg in the excess revenue and cross-subsidization. Further, Winnipeg and Ontario are jointly and severally liable to compensate the plaintiff under the 1913 Order in Council and its enabling legislation.

G. Miscellaneous Evidentiary and Procedural Facts and the *Rules of Civil Procedure* in Aboriginal Law Cases

[113] Paragraph 18 of the First Nation's Notice of Application decided on consent by Justice Gans indicates that no declarations were being sought in relation to any inherent rights or responsibilities, Treaty rights, or constitutional rights set out in s. 35 of the *Constitution Act*, *1982*.

[114] The original Statement of Claim, the answers to the Demand for Particulars, and the Fresh as Amended Statement of Claim do not refer to the 1891 Acts, the 1894 Agreement, the 1915 Legislation, or the correspondence between Messrs. White and Scott.

[115] In the 1915 Legislation, the correspondence between Messrs. White and Scott, and in the application materials and Order granted by Justice Gans on the original application, there is no specific reference to the Headlands.

[116] In the immediate case, the honour of the Crown is a factual element of the First Nation's claims apparently against both Defendants. However, it also appears that the First Nation is relying on the honour of the Crown as a legal element predominantly relevant to the application of the laws of civil procedure. In that regard, I agree with Ontario's submission that the principles of the honour of the Crown do not fundamentally alter the normal application of the *Rules of Civil Procedure* as they may apply to the Hybrid motion.[31]

[117] However, that is not to say that the honour of the Crown, and the totality of the history of the relationship between the First Nations and the Crown, including the mutual desire for reconciliation are irrelevant to the application of the *Rules of Civil Procedure*, rather, it is to say that the Rules are malleable and adaptable and can accommodate the exigencies of Aboriginal law in a way that is fair to the litigants and that secures the just, most expeditious, and least expensive determination of the Aboriginal law dispute on its merits.[32]

[118] The First Nation's case concerns Aboriginal law. More precisely, the Hybrid Motion concerns the law of civil procedure in Aboriginal law cases, particularly the rules about pleading and about the joinder of parties to a proceeding. Given the paradigm shift of the enshrinement of aboriginal rights under s. 35 of the *Constitution Act, 1982* and given the aspirations and imperatives of reconciliation, and given the need to examine the history and the historiography of each case, the civil procedure in Aboriginal law cases is a dynamic and a still developing specialized subject of the law of civil procedure. The Supreme Court of Canada has emphasized that in Aboriginal law cases, the *Rules of Civil Procedure* and the rules of evidence apply but that these rules must be approached "flexibly" and creatively within the limits set by the rules of practice and the need to prevent prejudice to opposing parties.[33] To achieve the project of reconciliation, it is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter and thus the rules are to be applied functionally, practically, and pragmatically.[34]

---

[31] *Meekis v. Ontario (AG)*, 2019 ONSC 2370; *Fort McKay First Nation v Alberta (Environment and Sustainable Resource Development),* 2014 ABQB 32.
[32] See Rule 1.04.
[33] *Kwikwetlem First Nation v. British Columbia (Attorney General)*, 2021 BCCA 31 at paras. 30-36; *Lax Kw'alaams Indian Band v. Canada (Attorney General),* 2011 SCC 56 at paras. 43-44.
[34] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam),* 2020 SCC 4 at 40-45; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at paras. 20-23.

H. Legislative Background

[119] For the purposes of deciding the Hybrid Motion, the relevant rules from the *Rules of Civil Procedure* are Rules 1.04, 5.01-5.05, 21.01, 25.06, 25.11, 26.01, 26.02 and 34.12. These rules are set out in Schedule "A" to these Reasons for Decision.

[120] For the purposes of deciding the Hybrid Motion, the relevant provisions of the *Limitations Act, 2002* are sections 2, 4, 5, and 15. These provisions are set out in Schedule "B" to these Reasons for Decision.

I. The Significance of the Former Pleadings

[121] As noted at the outset, the common denominator of the three branches of the Hybrid Motion is the Headlands Issue. At the outset of the Hybrid Motion, there is one aspect of the Headlands Issue that can and should be addressed and removed as a meaningful factor in the analysis that follows.

[122] Both Defendants make a great deal about the fact that the Headlands Issue and what may be found to be a breach of Treaty No. 3 are not expressly or explicitly mentioned in the original Statement of Claim and in the Amended Fresh as Amended Statement of Claim. Further, the Defendants make a great deal of the circumstance that when Ontario demanded particulars, it asked for particulars of any lands or real property that were alleged to have been taken as well as the mechanism used to take the land. In responding to the Demand for Particulars, however, the First Nation's response made no express reference to the Headlands Issue or to a contravention of Treaty No. 3.

[123] This fuss about the absence of a detailed mention of the Headlands Issue in the prior pleadings and in the response to the Demand for Particulars, which become part of the prior pleadings, is, in my opinion, a meaningless diversion from the genuine issue to be determined on the Hybrid Motion. The genuine issue is whether the court should grant leave to permit the First Nation to deliver an amended Fresh as Amended Statement of Claim that does actually expressly plead and particularize the Headlands Issue.

[124] In the immediate case, there is no basis for some sort of issue estoppel or pleadings estoppel because of how the First Nation's formerly pleaded or particularized its claim. At the pure pleadings stage apart from admissions, no findings of fact are made, and the Defendants are simply being given notice of the claim that they have to meet. It is possible for pleadings to be amended during the course of the discovery process to accommodate and to reflect the material facts that are revealed by documentary productions and examinations for discovery. It is possible for pleadings to be amended at a summary judgment or trial. Granted that the phenomena of formally amending a pleading after examinations for discoveries is a relatively rare occurrence, but it is not a remarkable or extraordinary phenomena.

[125] If in the immediate case, the draft Amended Fresh as Amended Statement of Claim were to be taken as the withdrawal of an admission, which I rather doubt because an admission is an unambiguous and intended concession of a fact,[35] then an admission in a pleading may be

[35] *Horrocks v. Hachem*, 2023 ONSC 5307; *Hobson v. Turner,* 2021 ONSC 4407 (Master); *Yang (Guardian of) v Simcoe (County),* 2011 ONSC 6405.

withdrawn with leave of the court,[36] and in the immediate case, I grant the First Nation permission to withdraw the admission, if that is what it was, and to replace it with details of the Headlands Issue. The case law establishes that before the court will grant leave for an admission to be withdrawn, the person seeking the withdrawal must: (1) raise a triable issue; (2) provide a reasonable explanation for the admission and for its withdrawal; and (3) establish that the withdrawal will not result in non-compensable prejudice.[37] All of these three elements are established in the immediate case.

[126] As the description of the facts above and as the discussion and analysis below will reveal, the First Nation has strong arguments that the pleaded articulation of the Headlands Issue is itself an expression of evidence and not a material fact, the material fact being, as pleaded from the outset, that the First Nation is entitled to compensation from the promises made in Ontario's Order in Council and that the taking of lands; i.e., the Headlands Issue is an aspect of the compensation entitlements of the 1913 Order in Council.

[127] The First Nation acted reasonably and responsibly, throughout. At the time of the original pleadings and the Answer to the Demand for Particulars, the First Nation had not yet benefitted from the work of their expert historian, who was retained precisely to describe the historical events around the time of the 1913 Order in Council. The correspondence between Messrs. White and Scott that Dr. Storey discovered does connect the events of the aqueduct planning with the settling of the boundaries of the reserve lands. It appears to me to be evidence and not itself a material fact. When apprised of what Dr. Storey had learned, the First Nation's lawyer promptly disclosed the evidence discovered by the historian.

[128] Thus, the circumstances that the Headlands Issue is not expressly or explicitly mentioned in the original pleadings is at most a neutral factor in addressing whether the proposed Amended Fresh as Amended Statement of Claim needed amendment to assert the Headlands Issue. The circumstance that the Headlands Issue is not expressly or explicitly mentioned in the original pleadings simply sets the scene for determining whether the amended pleadings are advancing an already statute barred cause of action or an already doomed cause of action because of the failure to include a necessary party, to which matters, I shall now turn.

J. Rule 21.01 (1)(a) and Rule 21.01 (1)(b) and The Headlands Issue

[129] The first branch of the First Nation's Hybrid Motion about the Headlands Issue relies on rule 21.01 (1)(a) of the *Rules of Civil Procedure,* and as the discussion below will reveal, the second branch relies on Rule 26, which, in turn engages rule 21.02 (1)(b), as an operative element in determining whether to grant leave for an amended pleading. As I shall now explain, the first branch of the Hybrid Motion was ill-conceived, and the first branch of the motion should be dismissed. Practically and juridically speaking, the dismissal of the first branch does not affect the second and third branches of the Hybrid Motion.

---

[36] Rule 51.05; *Phillips v. Disney*, 2018 ONSC 1021; *Stickel v Lezzaik*, 2015 ONSC 4659; *BNP Paribas (Canada) v. Donald S. Bartlett Investments Ltd.,* 2012 ONSC 5315, leave to appeal refused [2012] O.J. No. 4806 (Div. Ct.).
[37] *Horrocks v. Hachem*, 2023 ONSC 5307; *Praxy Cladding Corp. v. Stone Lamina Inc.* 2023 ONSC 5288 (Assoc. J.); *PBW High Voltage Ltd. v. Metrolinx*, 2021 ONSC 6715 (Assoc. J.); *Phillips v. Disney*, 2018 ONSC 1021 (S.C.J.); *Stickel v. Lezzaik*, 2012 ONSC 5912 (Master), aff'd 2015 ONSC 4659; *Epstein Equestrian Enterprises Inc. v. Cyro Canada Inc.*, 2012 ONSC 4653; *1679753 Ontario Ltd. v. Muskoka Lakes (Township)*, [2010] O.J. No. 736 (S.C.J.), aff'd 2011 ONSC 1997 (Div. Ct.).

[130] The first branch of the Hybrid Motion developed in an odd way. After being informed by the investigations of their historian expert, the First Nation became aware of the White-Scott correspondence, and the First Nation disclosed the information in anticipation that it would be the subject of question during the upcoming examinations for discovery. However, because the Defendants' position was that this correspondence and the Headlands Issue was outside the scope of the existing action, the First Nation felt compelled to seek a declaration or confirmation that the Headlands Issue was captured by the existing claim. That could have been achieved by a refusals motion without amending the existing pleadings. However, the First Nation also wished to increase the quantum of their claim to $2.0 billion having regard to the new appreciation of the Headlands Issue. Amending the Fresh as Amended Statement of Claim to increase the quantum of damages required a motion pursuant to Rule 26.01.

[131] In seeking confirmation of the scope of the existing action, the First Nation resorted to rule 21.01(1)(a) because it seemed to be a way to compel the Defendants to answer questions about the Headlands Issue. This resort to rule 21.01 (1)(a), however, was all ill-conceived, unnecessary, and unavailable.

[132] A court may only determine a question of law on a motion under rule 21.01 (1)(a), if the court has the necessary undisputed factual record before it so that the interlocutory motion court is in just as good a position as the trial judge would be to decide the question of law.[38] For a motion under rule 21.01(1)(a), the issue to be determined must be an issue of law raised by the pleading and an issue of fact or of mixed fact and law cannot be determined on a motion made under this rule.[39] If there is a factual dispute or if a full factual record is necessary to decide the issue of law, the court should decline to hear the motion under rule 21.01(1)(a).[40] Rule 21.02 (1)(a) is not designed to answer questions of law where material facts are in dispute.[41] Rule 21.01(1)(a) is not the proper procedural vehicle for weighing evidence or making findings of fact.[42] Although the Court of Appeal has not categorically precluded the determination of whether a claim is statute barred pursuant to rule 21.01(1)(a), the rule's availability will be rare and limitations issues are not properly determined under this rule unless pleadings are closed and the facts are undisputed.[43]

[133] In the immediate case, while pleadings are closed, the facts about the application of limitation periods to the Headlands Issue are very much disputed.

[134] In short, in the immediate case, resort to rule 21.01 (1)(a) was inappropriate to resolve the dispute of how or whether the Headlands Issue was a new claim or a particularization of the claims existing in the action as originally pleaded. The appropriate way to address the Headlands Issue

---

[38] *Harris v. GlaxoSmithKline Inc.*, [2010] O.J. No. 1710 at para. 66 (S.C.J.), aff'd [2010] O.J. No. 5546 (C.A.); *Aronowicz v. Emtwo Properties Inc.*, [2010] O.J. No. 475 at para. 71 (C.A.).
[39] *McLean v. Vassel*, [2001] O.J. No. 3212 (S.C.J.); *Gibson v. Cigna Life Insurance Co. of Canada*, [1998] O.J. No. 5447 (Gen. Div.).
[40] *Portuguese Canadian Credit Union Ltd. (Liquidator of) v. CUMIS General Insurance Co.,* 2011 ONSC 6107; *Rhône-Poulenc Canada Inc. v. Reichhold*, [1998] O.J. No. 2531 at para. 15 (Gen. Div.).
[41] *Portuguese Canadian Credit Union Ltd. (Liquidator of) v. CUMIS General Insurance Co.*, 2011 ONSC 6107.
[42] *Beaudon Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57; *McIlvenna v. 1887401 Ontario Ltd.*, 2015 ONCA 830; *Andersen Consulting Ltd. v. Canada (Attorney General)*, [2001] O.J. No. 3576 (C.A.).
[43] *Toussaint v. Canada (Attorney General)*, 2023 ONCA 117; *Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57 at para. 31; *Kaynes v. BP p.l.c.*, 2021 ONCA 36 at para. 81; *Clark v. Ontario (Attorney General)*, 2019 ONCA 311, at paras. 42-48, rev'd on other grounds 2021 SCC 18; *Brozmanova v. Tarshis*, 2018 ONCA 523; *Ridel v. Goldberg*, 2017 ONCA 739; *Salewski v. Lalonde*, 2017 ONCA 515.

was in the context of the second branch of the Hybrid Motion to which I now turn.

[135] Therefore, the first branch of the Hybrid Motion is dismissed.

K. The Rules of Pleading and the Amendments to the Statement of Claim

[136] In my opinion, the proposed Amended Fresh as Amended Statement of Claim does not comply with the rules of pleading.

[137] The proposed amendments of the Amended Fresh as Amended Statement of Claim are set out above. As foreshadowed in the Introduction and Overview above, I conclude that leave should be granted to plead a Second Fresh as Amended Statement of Claim. However, I do so with the caveat that the Second Fresh as Amended Statement of Claim must comply with the technical rules of pleading, i.e., it must not replicate the pleading infelicities of the draft Amended Fresh as Amended Statement of Claim.

[138] Rule 25.06 (1) of the *Rules of Civil Procedure* directs that every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. A pleading should be brief, clear, focused and contain the skeletal or core facts and not the evidence that details those facts unless particulars are required by the rules.[44]

[139] "Material" facts include facts that establish the constituent elements of the claim or defence.[45] The causes of action must be clearly identifiable from the facts pleaded and must be supported by facts that are material.[46] Material facts include facts that the party pleading is entitled to prove at trial, and at trial, anything that affects the determination of the party's rights can be proved; accordingly, material facts includes facts that can have an effect on the determination of a party's rights.[47]

[140] A pleading shall contain material facts, but it should not contain the evidence by which those facts are to be proved.[48] Pleadings of evidence may be struck out.[49] The prohibition against pleading evidence is designed to restrain the pleading of facts that are subordinate and that merely tend toward proving the truth of the material facts.[50]

[141] A fact that is not provable at the trial or that is incapable of affecting the outcome is immaterial and ought not to be pleaded.[51] A pleading of fact will be struck if it cannot be the basis of a claim or defence and is designed solely for the purposes of atmosphere or to cast the opposing

---

[44] *Mudrick v. Mississauga Oakville Veterinary Emergency Professional Corp.*, [2008] O.J. No. 4512 (Master).
[45] *Philco Products, Ltd. v. Thermionics, Ltd.*, [1940] S.C.R. 501.
[46] *Cerqueira v. Ontario*, 2010 ONSC 3954 at para. 11.
[47] *Brydon v. Brydon*, [1951] O.W.N. 369 (C.A.); *Hammell v. British American Oil Co.*, [1945] O.W.N. 743 (Master); *Daryea v. Kaufman* (1910), 21 O.L.R. 161 (H.C.J.).
[48] *McDowell and Aversa v. Fortress Real Capital Inc*., 2017 ONSC 4791; *Murray v. Star*, 2015 ONSC 4464; *Mudrick v. Mississauga Oakville Veterinary Emergency Professional Corp*., [2008] O.J. No. 4512 (Master).
[49] *Envirochill Cryogen Development Corporation v. University of Ontario Institute of Technology,* 2018 ONSC 766 (Master); *Jacobson v. Skurka*, 2015 ONSC 1699; *Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd.* (1991), 3 O.R. (3d) 684 (Gen. Div.).
[50] *Grace v. Usalkas*, [1959] O.W.N. 237 (H.C.J.).
[51] *Wood Gundy Inc. v. Financial Trustco Capital Ltd.*, [1988] O.J. No. 275 (H.C.J.); *Guaranty Trust Co. of Canada v. Public Trustee* (1978), 20 O.R. (2d) 247 (H.C.J.); *Everdale Place v. Rimmer*, (1975), 8 O.R. (2d) 641 (H.C.J.); *Elder v. Kingston (City)*, [1953] O.W.N. 409 (H.C.J.).

party in a bad light.[52] As described by Riddell J. in *Duryea v. Kaufman*,[53] such a plea is said to be "embarrassing".

[142] Under rule 25.11, the court may strike out a pleading that may prejudice or delay the fair trial of the action or that is scandalous, frivolous, vexatious or an abuse of process of the court.[54] The same test that is used for striking a pleading for the failure to show a reasonable cause of action; *i.e.*, the plain and obvious test, is used to determine whether a pleading is scandalous, frivolous or an abuse of process of the court.[55]

[143] A claim may be found to be frivolous, vexatious or an abuse of process when it asserts untenable pleas, is argumentative, contains insufficient material facts to support the allegations made, or is made for an extraneous or collateral purpose.[56] For the purpose of rule 25.11, the term "scandalous", includes allegations that are irrelevant, argumentative, simply inserted for colour or to impugn the behaviour or character of the other party unrelated to the issues in the litigation.[57]

[144] Parties are to be allowed a great deal of latitude in how they plead, but there are limits, and the court has the jurisdiction to strike a pleading to remove the pleading of evidence, prolix or vague allegations, repetitive or redundant allegations, or inconsistent allegations that are not clearly pled as alternatives and to direct a party to plead with certainty, precision and with sufficient particulars.[58]

[145] A scandalous pleading refers to indecent or offensive allegations designed to prejudice the opponent or unnecessary allegations maliciously directed at the moral character of the opponent.[59] Pleadings that are irrelevant, argumentative or inserted only for colour, or that constitute bare unfounded allegations should be struck out as scandalous.[60] A pleading that raises an issue that cannot influence the outcome of the action is scandalous.[61] The pleading is struck out because it serves no purpose other than to add colour or argument and to disconcert or humiliate the

---

[52] *Canadian National Railway Co. v. Brant* (2009), 96 O.R. (3d) 734 (S.C.J.); *Wilson v. Wilson*, [1948] O.J. No. 62 (H.C.J.).
[53] *Duryea v. Kaufman* (1910), 21 O.L.R. 165 at p. 168 (H.C.J.).
[54] *876502 Ontario Inc. v. I.F. Propco Holdings (Ontario) 10 Ltd.* (1997), 37 O.R. (3d) 70 (Gen. Div.); *R. Cholkan & Co. v. Brinker* (1990), 71 O.R. (2d) 381 (H.C.J.); *Demeter v. British Pacific Life Insurance Co.* (1983), 43 O.R. (2d) 33 (H.C.J.), affd (1984), 48 O.R. (2d) 266 (C.A.); *Foy v. Foy*, (1978), 20 O.R. (2d) 747 (C.A.).
[55] *Resolute Forest Products Inc. v. 2471256 Canada Inc. (c.o.b. Greenpeace Canada)*, 2016 ONSC 5398 (Div. Ct.); *Miguna v. Toronto (City) Police Services Board*, 2008 ONCA 799.
[56] *Carney Timber Co. v. Pabendinskas,* [2008] O.J. No. 4818 (S.C.J.); *Hainsworth v. Ontario*, [2002] O.J. No. 1380 (S.C.J.); *Panalpina Inc. v. Sharma*, [1988] O.J. No. 1401 (H.C.J.).
[57] *Holder v. Wray*, 2018 ONSC 6133 (S.C.J.); *Carney Timber Co. v. Pabendinskas,* [2008] O.J. No. 4818 (S.C.J.); *George v. Harris*, [2000] O.J. No. 1762 (S.C.J.).
[58] *Cadieux (Litigation guardian of) v. Cadieux*, 2016 ONSC 4446 (Master); *Dolan v. Centretown Citizens Ottawa Corp.*, 2015 ONSC 2145 (Master); *Fockler v. Eisen*, 2012 ONSC 5435.
[59] *Wolker v. Ogilvie Realty Ltd*., [2006] O.J. No. 381 (S.C.J.); *876502 Ontario Inc. v. I.F. Propco Holdings (Ontario) 10 Ltd.* (1997), 37 O.R. (3d) 70 (Gen. Div.); *Paul v. Paul* (1980), 28 O.R. (2d) 78 (H.C.J.).
[60] *Gardner v. Toronto Police Services Board*, [2006] O.J. No. 3320 (Ont. S.C.J.), var'd 2007 ONCA 489; *Senechal v. Muskoka (District Municipality)*, [2003] O.J. No. 885 (S.C.J.); *Solid Waste Reclamation Inc. v. Philip Enterprises Inc*., [1991] O.J. No. 213 (Gen. Div.).
[61] *Caras v. IBM Canada Ltd*., [2004] O.J. No. 3009 (Master); *Everdale Place v. Rimmer* (1975), 8 O.R. (2d) 641 (H.C.J.).

opponent.[62]

[146] The rule authorizing the court to strike out a pleading as prejudicial, scandalous, frivolous, vexatious, or an abuse of the process of the court is exercised only in the clearest of cases.[63] Where a pleading is struck as defective, leave to amend should only be denied in the clearest cases when it is plain and obvious that no tenable cause of action is possible on the facts as alleged.[64] The usual practice is to grant the plaintiff leave to amend unless it is clear that the plaintiff cannot improve its case by any further and proper amendment.[65]

[147] The following paragraphs of the draft Amended Fresh as Amended Statement of Claim are contrary to the rules of pleading because in whole or in part the paragraphs are the evidence by which a material fact is to be proved: paragraphs 54 and 55.

[148] The following paragraphs of the draft Amended Fresh as Amended Statement of Fresh are contrary to the rules of pleading because the paragraphs in whole or in part are argumentative or make vague, repetitive, redundant, irrelevant, inconsistent, or scandalous allegations: paragraphs 57, 58, 59, and 74.

L. The General Law about Amending a Statement of Claim

[149] Rule 26.01 provides: "[o]n motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment." The rule is mandatory and amendments must be allowed unless the responding party can demonstrate prejudice that cannot be compensated by costs.[66] A party cannot circumvent the operation of a limitation period by amending his or her claim to add statute-barred claims.[67]

[150] On a motion to amend a pleading, the court examines whether as a matter of law, the amendment raises a tenable claim and whether the proposed amendment has been properly pleaded in the sense of complying with the rules that govern pleadings, including sufficient particularity.[68] If an amendment would violate the rules of pleading, or if it raises an issue that

---

[62] *Sequin v. Van Dyke* 2011 ONSC 2566 (Master); *Dugal v. Manulife Financial Corp*., 2011 ONSC 387; *Williams v. Wai-Ping*, [2005] O.J. No. 1940 (S.C.J.), aff'd, [2005] O.J. No. 6186 (Div. Ct.); *Jane Doe v. Escobar*, [2004] O.J. No. 2760 (S.C.J.); *Hodson v. Canadian Imperial Bank of Commerce*, [2001] O.J. No. 4378 (Div. Ct.); *George v. Harris*, [2000] O.J. No. 1762 (S.C.J.).

[63] *Tarion Warranty Corp. v. Brookegreene Estates Inc.*, [2006] O.J. No. 923 (S.C.J.); *Wernikowski v. Kirkland, Murphy & Ain* (1999), 50 O.R. 124 (C.A.).

[64] *Mitchell v. Lewis*, 2016 ONCA 903; *Conway v. Law Society of Upper Canada*, 2016 ONCA 72; *Piedra v. Copper Mesa Mining Corp.*, 2011 ONCA 191; *Heydary Hamilton Professional Corp. v. Hanuka*, 2010 ONCA 881.

[65] *Fournier Leasing Co. v. Mercedes-Benz Canada Inc.*, 2012 ONSC 2752; *AGF Canadian Equity Fund v. Transamerica Commercial Finance Corp. Canada,* (1993), 14 O.R. (3d) 161 (Gen. Div.).

[66] *Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 56 O.R. (3d) 768 (C.A.); *King's Gate Developments Inc. v. Drake* (1994), 17 O.R. (3d) 841 (C.A.).

[67] *Avedian v. Enbridge Gas Distribution Inc.,* 2023 ONCA 289; *United Food and Commercial Workers Canada, Local 175 Region 6 v. Quality Meat Packers Holdings Limited,* 2018 ONCA 671; *Davis v. East Side Mario's Barrie,* 2018 ONCA 410; *1588444 Ontario Ltd. (c.o.b. Alfredo's) v. State Farm Fire and Casualty Co.*, 2017 ONCA 42; *1100997 Ontario Ltd. v. North Elgin Centre Inc.*, 2016 ONCA 848; *Marks v. Ottawa (City),* 2011 ONCA 248; *Frohlick v. Pinkerton Canada Ltd*., 2008 ONCA 3.

[68] *Jourdain v. Ontario* (2008), 91 O.R. (3d) 506 (S.C.J.); *Andersen Consulting Ltd. v. Canada (Attorney General)*, [2001] O.J. No. 3576 (C.A.).

would not constitute a reasonable cause of action, the amendment should not be allowed.[69]

[151] The courts apply the liberal case law applied under rule 21.01(1)(b) to the effect that an amendment will not be denied unless assuming the facts pleaded to be true, it is plain and obvious that the amendment is untenable at law.[70]

M. Should Leave to Amend be Denied because the Proposed Amendments Plead a Statute-Barred Cause of Action?

[152] The Defendants argue that: (a) the Headlands Issue is a new cause of action that was not included in the First Nation's original Statement of Claim or in the Fresh as Amended Statement of Claim; (b) this new cause of action is statute barred based on the principles of discoverability; and (c) based on the ultimate limitation period set out in Ontario's *Limitation Act, 2002.* Therefore, the Defendants submit that leave to amend must be denied because the proposed Amended Fresh as Amended Statement of Claim pleads a statute-barred cause of action.

[153] The analysis and critique of the Defendants' argument may begin with the first premise of the Defendants' argument, which is that the Headlands Issue is a new cause of action. and by noting that the Defendants have already asserted a limitation period defence to the First Nation's causes of action as they currently exist in the present pleadings. These limitation issues will be determined at trial or perhaps on a summary judgment motion.

[154] A new cause of action is not asserted if the amendment pleads an alternative claim for relief out of the same facts previously pleaded and no new facts are relied upon, or amount simply to different legal conclusions drawn from the same set of facts, or simply provide particulars of an allegation already pled or additional facts upon with the original right of action is based.[71] An amendment of a statement of claim to assert an alternative theory of liability or an additional remedy based on material facts that have already been pleaded in the statement of claim does not assert a new claim for purposes of section 4 of the *Limitations Act*.[72]

[155] Thus, where a limitation period has run its course, allowing or disallowing the amendment depends upon whether the allegations of the proposed amendment arise out of the already pleaded facts, in which case the amendment will be allowed, but if they do not the amendment will be refused.[73]

---

[69] *Spar Roofing and Metal Supplies Ltd. v. Glynn,* 2016 ONCA 296 *at para. 43; Turner v. York University*, 2011 ONSC 6151 at paras. 55–57; *Mastercraft Group Inc. v. Confederation Trust Co.*, [1997] O.J. No. 3451 at para. 7 (Gen. Div.).

[70] *Wilson v. Legacy Private Trust*, 2013 ONSC 1046; *Brookfield Financial Real Estate Group Ltd. v. Azorim Canada (Adelaide Street) Inc.*, 2012 ONSC 3818 at paras. 22–30.

[71] *Boyer v. Callidus Capital Corp.,* 2023 ONCA 233; *Catalyst Capital Group Inc. v. Dundee Kilmer Developments Limited Partnership*, 2020 ONCA 272 at para. 75; *Klassen v. Beausoleil*, 2019 ONCA 407 at paras. 27-30; *Greenstone (Municipality) v. Marshall Macklin Monaghan Ltd.*, 2013 ONSC 7058 (Div. Ct.); *Dee Ferraro Ltd. v. Pellizzari*, 2012 ONCA 55.

[72] *Caetano v. Quality Meat Packers Holdings Ltd*., (*sub nom*. *United Food and Commercial Workers Canada, Local 175, Region 6 v. Quality Meat Packers Holdings Ltd.)* 2018 ONCA 671; *1100997 Ontario Ltd. v. North Elgin Centre Inc*., 2016 ONCA 848; *Dee Ferraro Ltd. v. Pellizzari,* 2012 ONCA 55 at paras. 4–5; *Canadian Industries Ltd. v. Canadian National Railway Co*., [1940] O.J. No. 266 (C.A.) aff'd, [1941] S.C.R. 591.

[73] *Rabb Construction Ltd. v. MacEwan Petroleum Inc.*, 2018 ONCA 170; *Farmers Oil and Gas Inc. v. Ontario (Ministry of Natural Resources)*, 2016 ONSC 6359 at para. 22 (Div. Ct.), leave to appeal refused Court File No. M47111 (February 24, 2017); *Rausch v. Pickering (City)*, 2013 ONCA 740.

[156] In the immediate case, it is a hotly contested matter whether the premise of the Defendants' argument that the draft Fresh as Amended Statement of Claim asserts a new cause of action is true or false. If the Headlands Issue is not a separate cause of action, then the premise of the Defendants' argument is false, and their limitation period argument fails.

[157] However, at this juncture of the Hybrid Moton, notwithstanding the Defendants' arguments, it is not undoubtedly true that the Headlands Issue is a separate cause of action. At this juncture, it is not plain and obvious that a new cause of action has been asserted. It follows that the court should grant leave to the First Nation to deliver an amended Statement of Claim and then the matter of whether any or all of the First Nation's causes of action are statute barred can and will be determined at the trial of the actions.

[158] In the immediate case, from a factual perspective, as a story or as a history, the events of the Headlands Issues are contemporaneous with the events of the construction of the aqueduct, and thus the First Nations has a strong argument that the pleading of the particulars of the Headlands Issue is just that, i.e., simply providing particulars of an allegation already pled or providing additional facts upon with the original right of action is based.

[159] In this regard, the fulcrum allegation in the First Nation's claim from the outset of the proceedings going back to the application before Justice Gans is that pursuant to the 1913 Order in Council, the First Nation has a claim to compensation for "lands or property taken, injuriously affected, or in any way interfered with" as a result of Winnipeg's construction of an aqueduct and water-takings at Shoal Lake. Thus, the First Nation has a strong argument that the Headlands Issue is not a new cause of action.

[160] This brief analysis is a complete answer to the Defendants' argument that leave to amend the Fresh as Amended Statement of Claim should not be granted and rather supports granting leave.

[161] Moreover, even if this brief analysis were incorrect, it would not follow that leave to amend should be refused. In other words, even if the Headlands Issue was a new cause of action, it is not plain and obvious that this new cause of action is statute barred under (a) discoverability principles or (b) as a matter of the ultimate limitation period of Ontario's *Limitations Act, 2002*. Thus, once again, the matter of whether any or all of the First Nation's causes of action are statute barred is to be determined by the trial judge and not on an interlocutory pleadings motion.

[162] In the immediate case on the Hybrid Motion, without deciding the point, I can say that that the First Nation has a quite strong set of arguments that even if the Headlands Issue were found to be a new cause of action, it is not statute barred. Since the First Nation's arguments are quite strong, it follows that it is not plain and obvious that the Headlands Issue is a cause of action that is statute barred.

[163] To dispute that the Headlands Issue is statute barred, the First Nation advances four strong arguments, that ultimately will have to be decided by the trial judge (or perhaps a judge on a summary judgment motion) on a full evidentiary record.

[164] The First Nation's first argument is that pursuant to s. 2 (1)(e) and (f) of the *Limitations Act, 2002,* the Headlands Issue is exempt from the application of the *Limitations Act, 2002*. Section 2 (1)(e) and (f) of the Act states:

> 2 (1) This Act applies to claims pursued in court proceedings other than,

> […]
>
> (e) proceedings based on the existing aboriginal and treaty rights of the aboriginal peoples of Canada which are recognized and affirmed in section 35 of the *Constitution Act, 1982*;
>
> (f) proceedings based on equitable claims by aboriginal peoples against the Crown; and
>
> […]

[165] It is apparent from a plain reading of the draft Amended Fresh as Amended Statement of Claim that the Headlands Issue is "based on the existing aboriginal and treaty rights of the aboriginal peoples of Canada which are recognized and affirmed in section 35 of the *Constitution Act, 1982*."

[166] Given that the First Nation asserts a breach of fiduciary duty claim, it was apparent from the original Statement of Claim and carried forward into the draft Amended Fresh as Amended Statement of Claim that its proceedings are based on equitable claims by aboriginal peoples against the Crown. Since Winnipeg is implicated in the Headlands Issue claims as against Ontario, the First Nation has a strong argument that neither Ontario nor Winnipeg can rely on the *Limitations Act, 2002* to assert a limitations period defence.

[167] The First Nation also has the strong argument that the Defendants cannot rely on s. 2 (2) of the *Limitations Act, 2002*, which states "proceedings referred to in clause (1) (e) and (f) are governed by the law that would have been in force with respect to limitation of actions if this Act had not been passed." In *Restoule v. Canada (Attorney General)*,[74] the Court of Appeal held that claims based on a breach of an Aboriginal treaty are not subject to the predecessors to the modern Ontario *Limitations Act, 2002*.[75]

[168] The First Nation's second argument is the constitutional law explanation and rationale for the existence of s. 2 (1)(e) and (f) of the *Limitations Act, 2002*, but this argument is advanced as a mutually exclusive argument.

[169] The First Nation's second argument is that Indigenous rights are constitutionally protected and cannot be barred unless the principles of reconciliation and the honour of the Crown are considered. The First Nation asserts that the "overarching constitutional goal of reconciliation that is reflected in s. 35 of the *Constitution Act, 1982*" [must be] factored into the question of whether a Plaintiff First Nation should be prevented from having its claim heard on the merits."

[170] Thus. as a constitutional law principle, the First Nation asserts that the policies that underlie limitations statutes do not apply to Indigenous claimants. In their Reply Factum, the First Nation submits:

> 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. 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

---

[74] 2021 ONCA 779 at paras. 632-662.

[75] See also *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641, [2000] O.J. No. 4804 at paras. 236-242(C.A.), where in a case decided under the former *Limitations Act,* the Court of Appeal upheld a decision that an Aboriginal law claim was not statute barred.

> 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. 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. […] the significant legal and socioeconomic barriers faced by Indigenous peoples made it impossible for [the First Nation] to initiate and pursue this case any earlier.
>
> 69. As the Truth and Reconciliation Commission 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.

[171] The First Nation's argument, the merits of which for present purposes I need not decide, gains support from the Supreme Court of Canada's decision in *Manitoba Metis Federation v. Canada (Attorney General)*.[76] In this case, although in a dissenting judgment, Justice Rothstein made a lengthy and forceful argument at paragraphs 228-271 that provincial limitation statutes were applicable to Aboriginal Law Claims, the majority of the court disagreed. Chief Justice McLachlin and Justice Karakatsanis (LeBel, Fish, Abella, and Cromwell, JJ. concurring) stated at paragraphs 140-141 of the majority judgment:

> 140. What is at issue is a constitutional grievance going back almost a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s. 35 of the *Constitution Act, 1982* and underlying s. 31 of the *Manitoba Act*, remains unachieved. The ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied. The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import. The courts are the guardians of the Constitution and, as in *Ravndahl* and *Kingstreet*, cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less: see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 72.
>
> 141. Furthermore, many of the policy rationales underlying limitations statutes simply do not apply in an Aboriginal context such as this. Contemporary limitations statutes seek to balance protection of the defendant with fairness to the plaintiffs: *Novak v. Bond*, [1999] 1 S.C.R. 808, at para. 66, per McLachlin J. In the Aboriginal context, reconciliation must weigh heavily in the balance. As noted by Harley Schachter:
>
> > The various rationales for limitations are still clearly relevant, but it is the writer's view that the goal of reconciliation is a far more important consideration and ought to be given more weight in the analysis. Arguments that provincial limitations apply of their own force, or can be incorporated as valid federal law miss the point when aboriginal and treaty rights are at issue. They ignore the real analysis that ought to be undertaken, which is one of reconciliation and justification. ("Selected Current Issues in Aboriginal Rights Cases: Evidence, Limitations and Fiduciary Obligations", in *The 2001 Isaac Pitblado Lectures: Practising Law In An Aboriginal Reality* (2001), 203, at pp. 232-33)
>
> Schachter was writing in the context of Aboriginal rights, but the argument applies with equal force here. Leonard I. Rotman goes even farther, pointing out that to allow the Crown to shield its unconstitutional actions with the effects of its own legislation appears fundamentally unjust: "Wewaykum: A New Spin on the Crown's Fiduciary Obligations to Aboriginal Peoples?" (2004), U.B.C. L. Rev. 219, at pp. 241-42. The point is that despite the legitimate policy rationales in favour

[76] 2013 SCC 14.

> of statutory limitations periods, in the Aboriginal context, there are unique rationales that must sometimes prevail.

[172] In short, in the immediate case, at this juncture, it is not plain and obvious that the First Nation's second argument is incorrect.

[173] Assuming that the First Nation's first and second arguments were to fail, then its third argument is that it can rebut the presumption in s. 5 of the Act as to when it is deemed to have discovered the Headlands Issue cause of action. This third argument would focus on s. 5 (1)(a)(iv) of the *Limitations Act, 2002*, which provides that a claim is discovered on the earlier of the day on which the First Nation knew "that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it." Section 5 (1)(a) of the Act states:

> **5** (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) […]

[174] In the context of an aboriginal law claim, having regard to the nature of the injury, loss or damage, means it is necessary for the court to examine the factual and historical record of the centuries old relationship between the First Nations and the colonializing governments that established the provinces, territories, and federal government of Canada. The First Nation's argument is that before Dr. Storey's report, given the deplorable history of colonial bigotry, racism, and violation of human rights, the First Nation was not aware or even capable of being aware of the wrongdoing perpetrated on it by the 1915 legislation that exempted the Headlands from the First Nation's reserve lands, and accordingly, the First Nation submits that a proceeding about the Headlands Issue would not have been an appropriate or feasible means to seek a remedy until the receipt of the historian's report. Thus, it follows that only after receiving this information would having regard to the nature of the injury, loss or damage, a proceeding be an appropriate means to seek a remedy.

[175] Once again, it is not plain and obvious that this argument to rebut the running of the limitation period is incorrect.

[176] Assuming that the First Nation's first, second, and third arguments were to fail, then its fourth argument is that it can rebut the ultimate limitation period pursuant to the wilful or fraudulent concealment principle. The plaintiff relies on the equitable principle of wilful concealment which is found in s. 15 (4) of the *Limitations Act, 2002*. In this regard, in its draft Amended Fresh as Amended Statement of Claim, the First Nation pleads that Ontario wilfully concealed its breach of fiduciary duty and the unlawful acts and improper purposes of its public officers, such that the plaintiff was prevented from knowing it had a cause of action.

[177] Once again, it is not plain and obvious that this argument is doomed to fail and thus at this juncture the First Nation should not be disallowed from delivering a Second Fresh as Amended Statement of Claim notwithstanding the Defendants' arguments that the Headlands Issue cause of action is statute barred.

N. Should Leave to Amend by Denied because the Proposed Amendments Plead a Action that is Doomed to Fail because of the Absence of a Necessary Party?

[178] The Defendants argue that to be determined, i.e., to be adjudicated by the court, the Headlands Issue requires Canada as a necessary party. The Defendants submit that Canada must be a party because the adjudication of the Headlands Issue involves the events associated with the negotiation and implementation of Treaty No. 3 and the subsequent events, negotiations, agreements, and legislative steps taken to settle the territory of the reserves, which activities occurred contemporaneously with the events associated with the building of an aqueduct to the shores of Shoal Lake. The Defendants submit that for the legal and factual issues associated with the Headlands Issue to be properly adjudicated, all Treaty 3 First Nations and Canada, would be necessary parties.

[179] Winnipeg also submits supplementarily that there is no reason for it to be involved with the Headlands Issue because it had no authority over the allocation of reserve lands in Ontario and the aqueduct was constructed entirely in Manitoba without lands in Ontario having been expropriated. In other words, Winnipeg would isolate its involvement to being a party to the events associated just with the building of the aqueduct and divorced from the problems caused when Canada was informed by the Privy Council in *St. Catherine's Milling and Lumber Company v. The Queen (Ontario)* that the reserve lands in the province of Ontario, whose boundary with Manitoba had not been surveyed and settled, were not Canada's to allocate to the First Nations.

[180] The lethal edge of the Defendants' argument is that the absence of a necessary party, i.e., Canada provides an absolute defence to the Headlands Issue cause of action and therefore leave to amend should not be granted because the Headlands Issue cause of action is doomed to failed and does not present a tenable cause of action.

[181] Theoretically speaking, the Defendants' argument has merit in so far as it is true that the absence of a necessary party does provide a defence to a claim and in the immediate case, it may be the true that Canada is a necessary party to an adjudication of the Headlands Issue cause of action. However, this possibly meritorious argument does not provide a reason for not granting leave to the First Nation to plead the Headlands Issue in a Second Fresh as Amended Statement of Claim for two reasons.

[182] First, the First Nation may decide to join Canada (as I recommended at the outset of these Reasons for Decision), and this will make the Defendants' necessary party argument moot.

[183] Second, that the Defendants may a have a defence to the Headlands Issue based on a necessary party argument is not a reason to disallow an amended statement of claim because it is not plain and obvious that Canada is indeed a necessary party and if it were a necessary party it is not plain and obvious the extent to which this would provide a defence to the First Nation's claim against Ontario and Windsor. Visualize, the presence of Canada is arguably not necessary to the First Nation's claim based predominantly on the 1913 Order in Council.

[184] The point to emphasize is that it is premature to determine whether and the extent to which

Canada's absence provides the Defendants with a defence. Therefore, the Defendants' necessary party argument does not provide a basis to dismiss the second branch of the Hybrid Motion.

[185] By way of elaboration of the Defendants' argument and of the First Nation's counterarguments, the law of civil procedure differentiates among: (a) a "necessary party", that is, a person that must be before the court as a prerequisite to the court having jurisdiction to decide the issues in the proceeding;[77] (b) a "proper" party, that is, a person who may be made subject to the court's determination but whose presence is not absolutely required for the court to decide the issues in the proceeding; and (c) an "improper party", a person who cannot or ought not to be made subject to the court's determination because they have no substantive rights or interest in the proceeding or they have been included for an improper purpose.

[186] To determine whether a person is a proper party, the court must determine whether the rights of that person would likely to be affected or prejudiced by the order being sought. To determine whether a proper party is a necessary party, the court must determine whether the person should be bound by the result which will enable the court to effectually and completely resolve the dispute.[78] A proper party is a necessary party if the party's rights would be affected by the outcome, making the party's joinder necessary to prevent re-litigation that carries the risk of inconsistent outcomes.[79] In determining whether a person is a necessary party, the court should consider whether the person is likely to be affected by the order being sought and the person should be added if his or her rights will be determined or affected.[80]

[187] Although the general rule is that a plaintiff is *dominus litis* ("the master of the suit") and free to choose whom he or she will sue, and the general rule is that the court will not add a party at the request of a defendant or respondent, who will be left to join the new party as a party to a third party proceeding,[81] the court has the power to join a necessary party. If a necessary party is not a party to the proceeding, then the proceedings will be improperly constituted, and the court may dismiss the claim unless the party is added.[82]

---

[77] *Ontario Federation of Anglers and Hunters v. Ontario (Minister of Natural Resources and Forestry)*, , 2015 ONSC 7969; *Shubenacadie Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2002 FCA 509 at para. 8; *Morandan Investments Ltd. v. Spohn* (1987), 58 O.R. (2d) 621 (Dist. Ct); *Amon v. Raphael Tuck & Sons Ltd.*, [1956] 1 Q.B. 357 at p. 380.

[78] *York Region Condominium Corporation No. 890 v. Market Village Markham Inc*., 2020 ONSC 3993; *Ontario Federation of Anglers and Hunters v. Ontario (Minister of Natural Resources and Forestry),* 2015 ONSC 7969; *Air Canada v. Thibodeau*, 2012 FCA 14; *School of Dance (Ottawa) Pre-Professional Programme Inc. v. Crichton Cultural Community Centre*, [2006] O.J. No. 5224 (S.C.J.); *Shubenacadie Indian Band v. Canada (Attorney General),* 2002 FCA 509; *Stevens v. Canada (Commission of Inquiry),* [1998] 4 F.C. 125 (Fed. C.A.); *Amon v Raphael Tuck & Sons Ltd.*, [1956] 1 All E.R. 273 (Eng. Q.B.).

[79] *Abrahamovitz v. Berens*, 2018 ONCA 252.

[80] *Abrahamovitz v. Berens*, 2018 ONCA 252; *Ontario Federation of Anglers and Hunters v. Ontario (Minister of Natural Resources and Forestry)*, 2015 ONSC 7669; *School of Dance (Ottawa) Pre-Professional Programme Inc. v. Crichton Cultural Community Centre*, [2006] O.J. No. 5224 (S.C.J.); *Stevens v. Canada (Commission of Inquiry)*, [1998] 4 F.C. 125 (C.A.); *Amon v. Raphael Tuck & Sons Ltd.*, [1956] 1 Q.B. 357.

[81] *Swearengen v. Bowater Canadian Forest Products Inc.*, [2007] O.J. No. 4251 (S.C.J.); *School of Dance (Ottawa) Pre-Professional Programme Inc. v. Crichton Cultural Community Centre*, [2006] O.J. No. 5224 (S.C.J.); *Ogletree v. Jackson*, [1942] O.J. No. 155 (H.C.J.); *Lecomte v. Bell Telephone Co. of Canada*, [1931] O.J. No. 27 (C.A.); *René v. Carling Export Brewing and Malting Co.* (1927), 61 O.L.R. 495 (H.C.J.); *Potter v. Essex Terminal Railway Co.*, [1925] O.J. No. 234 (H.C.J.); *Laing v. Toronto General Trusts Corp.*, [1919] O.J. No. 269 (H.C.J.); *Ottawa Separate School Trustees v. Quebec Bank* (1917), 39 O.L.R. 118 (H.C.J.).

[82] *Muscat v. Camilleri* (1974), 2 O.R. (2d) 459 (H.C.J.).

[188] Neither level of government is permitted to legislate in a way that results in a meaningful diminution of an Aboriginal right, unless the infringement is justified.[83] There are aboriginal law cases in which Courts have held that Canada is a necessary party,[84] and there have been aboriginal law cases in which Canada was not a party and the claim was brought against a province.[85] In the immediate case for the purposes of the Hybrid Motion it is not plain and obvious whether or not Canada is a necessary party with respect to the Headlands Issue. And, in the immediate case, the First Nation understands the risks of not joining Canada if it turns out that Canada is a necessary party. In these circumstances, the appropriate response on the Hybrid Motion is to grant permission to the First Nation to deliver a Second Fresh as Amended Statement of Claim with the recommendation but not the requirement that Canada be added as a party defendant. If Canada is not joined, then the Defendants are of course entitled but not required to join Canada as a third party.

[189] *Kwikwetlem First Nation v. British Columbia (Attorney General)*,[86] a very helpful decision of the British Columbia Court of Appeal, demonstrates that it is not plain and obvious that Canada is a necessary party in an Aboriginal law case. Whether Canada is a necessary party will depend upon the precise nature of the case and Canada's role in the factual underpinnings of the case. In this case, the Kwikwetlem First Nation sued the Province of British Columbia, the City of Port Coquitlam and three British Columbia public authorities.[87] The Defendants were the owners in fee simple of lands over which the Kwikwetlem First Nation claimed Aboriginal title. The Defendants brought application to have Canada joined as a co-defendant or to add Canada as a third party. Both applications were dismissed.

[190] The Kwikwetlem First Nation purposely did not sue Canada while aware of the risks Canada's absence entailed. The situation is similar in the immediate case, although the risks in the immediate case are appreciably higher than the risks in *Kwikwetlem First Nation v. British Columbia (Attorney General),* because in the immediate case Canada's role in the Headlands Issue is implicated while in the *Kwikwetlem First Nation* case, the First Nation had designed its claim to focus on the province's activities after a federal Crown patent. For present purposes, the point to emphasize is that the British Columbia Court recognized that although Canada could have been a party, it did not need to be one if the First Nation knowingly and with the advice of legal counsel was prepared to accept the risks that its omission of Canada might afford the province with a defence. Thus, Justice Abrioux stated for the British Columbia Court of Appeal at paragraph 82:

> 82. And if the Province is correct that Canada's historical responsibility for the grants makes the relief sought by the KFN unavailable against the existing named defendants—since they may fall exclusively within federal jurisdiction—the KFN's claim, as it readily concedes, will simply be dismissed. While I accept that this possibility may, hypothetically, contribute to the "just and convenient" analysis for joining an additional defendant […] it does not readily assist the Province in the circumstances of this case. The risk of pleading its case as it has is something the KFN,

---

[83] *Grassy Narrows First Nation v. Ontario (Minister of Natural Resources)*, 2014 SCC 48 at para. 37; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at paras. 139, 141-142, and 151-152.
[84] *Kwikwetlem First Nation v. British Columbia (Attorney General)*, 2021 BCCA 311
[85] *Kwikwetlem First Nation v. British Columbia (Attorney General)*, 2021 BCCA 311; *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam),* 2020 SCC 4; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73; *Gardner v. The Queen in right of Ontario*, (1984), 45 OR (2d) 760 (H.C.J.); *Calder v. British Columbia (Attorney General),* [1973] S.C.R. 313.
[86] 2021 BCCA 311, aff'g 2020 BCSC 174.
[87] Metro Vancouver Regional District; (2) British Columbia Housing Management Commission, and (3) Provincial Rental Housing Corporation

> represented as it is by counsel experienced in Aboriginal title issues, has considered and is prepared to accept. That risk is effectively the price of what the KFN hopes will be a simpler, more focused trial.

[191] In the immediate case, in my opinion, it is not inevitable, which is to say that it is not plain and obvious that the First Nation's claim with respect to the Headlands Issue will be defeated or diminished in whole or in part by the absence of Canada and the First Nation has knowingly and purposely pleaded its case knowing the advantages and disadvantages of joining Canada. In these circumstances, it is appropriate to grant leave for the First Nation to deliver a Second Fresh as Amended Statement of Claim notwithstanding that Canada is not a party to the litigation about the Headlands Issue.

O. The Defendants' Abuse of Process Argument

[192] The Defendants argue that the draft Amended Fresh as Amended Statement of Claim should not be permitted because it is an abuse of process. The foundation for this argument is the factual circumstance that there are four other proceedings involving the Headlands Issue; visualize: (a) the 1989 Specific Claim against Canada about the Garden Islands in Lake Shoal; (b) the 2000 action against Ontario and Canada about the expropriation of a portion of Indian Bay for the aqueduct project; (c) the 2001 flooding claim against Canada, Ontario, and Manitoba; and (d) the 2016 Specific Claims Tribunal claim with respect to the expropriation of the Garden Islands.

[193] It is true that depending on the circumstances of the particular case, a multiplicity of proceedings based on the same factual nexus may constitute a procedural abuse of process and thus there may grounds to dismiss the duplicated action pursuant to rule 21.03(1)(c) and/or rule 21.03(1)(d).[88] The immediate case, however, is not such a case.

[194] Pursuant to rule 21.01(3)(c), a defendant may move to have an action stayed or dismissed when a duplicative action is pending. If there is another proceeding in Ontario or another jurisdiction between the same parties in respect of the same subject matter, the test for determining whether the duplicated action should be dismissed or stayed is that a stay or dismissal should only be ordered in the clearest of cases, and where: (a) the continuation of the action would cause the defendant prejudice or injustice, not merely inconvenience or additional expense; and (b) the stay or dismissal would not be unjust to the plaintiff. Thus, the onus is on the party seeking a dismissal of the duplicated action to show both: (a) that it would be oppressive or vexatious or in some other way an abuse of process to have to be in involved in more than one proceeding; and also (b) that the stay would not cause an injustice or prejudice to the other party.[89]

---

[88] *Howlett v. The Northern Trust Company and Sgambelluri* 2023 ONSC 4531; *Carbone v. DeGroote*, 2018 ONSC 109 at paras. 41-47; *Power Tax Corp. v. Millar,* 2013 ONSC 135; *Maynes v. Allen-Vanguard Technologies Inc.*, 2011 ONCA 125.

[89] *Sun Life Assurance Co of Canada v. Yellow Pages Group Inc.*, 2010 ONSC 2780; *Areva NP GmbH v. Atomic Energy of Canada Ltd.*, [2009] O.J. No. 861 (S.C.J.); *Grover v. Canada (Attorney General)* (2005), 78 O.R. (3d) 126 (S.C.J.); *Navionics Inc. v. Nautical Data International Inc.*, [2006] O.J. No. 5397 (S.C.J.); *Farris v. Staubach Ontario Inc.*, [2004] O.J. No. 1227 (S.C.J.); *TDL Group Ltd. v. 1060284 Ontario Ltd.*, [2000] O.J. No. 4582 (S.C.J.), aff'd [2001] O.J. No. 1165 (S.C.J.); *Sportmart, Inc. v. Toronto Hospital Foundation*, [1995] O.J. No. 2058 (Gen. Div.); *Canadian Express Ltd. v. Blair* (1992), 11 O.R. (3d) 221 (Gen. Div.); *Varnam v. Canada (Minister of National Health and Welfare)* [1987] F.C.J. No. 511 (T.D.); *Polar Hardware Manufacturing Co. v. Zafir*, [1983] O.J. No. 1357; *Imperial Oil v. Schmidt Mouldings Ltd.*, [1981] O.J. No. 711 (H.C.J.); *B.L. Armstrong Co. v. Cove-*

[195] Determining whether to stay an action because of another proceeding is an exercise of discretion taking into account the circumstances of the particular case, and the party seeking a stay must demonstrate a substantial prejudice beyond inconvenience and expense.[90] While a multiplicity of proceedings should be avoided, courts should not be quick to stay a civil action simply to avoid a multiplicity of proceedings and the moving party must satisfy the test for a stay with clear and specific evidence.[91]

[196] Factors to be considered in determining whether an order should be made under rule 21.03(1)(c) include: (a) differences in the substantive scope and remedial jurisdiction of the two tribunals; (b) any juridical advantages associated with the plaintiff's choice of jurisdiction; (c) the comparative progress of the two proceedings, including which proceeding started first; (d) whether the proceedings will proceed sequentially or in tandem; (e) the effect of two proceedings about the same subject matter proceeding in tandem; (f) the ability of the defendant to adequately respond to both matters apart from just the financial burden or inconvenience of having to do so; (g) the possibility of inconsistent results; (h) the potential for double recovery; and (i) the effect of a stay in delaying or prejudicing access to justice, for example by degradation in the evidentiary record for one or other of the proceedings.[92]

[197] Pursuant to rule 21.01(3)(d), a defendant may move before a judge to have an action stayed or dismissed on the ground that the action is frivolous or vexatious or is otherwise an abuse of the process of the court. The doctrine of abuse of process, among other things, engages the inherent power of the court to prevent the misuse of its procedure in a way that would be manifestly unfair to a party to the litigation before it or would in some way bring the administration of justice into disrepute.[93]

[198] The doctrine of abuse of process is a flexible doctrine whose aim is to protect litigants from abusive, vexatious or frivolous proceedings or otherwise prevent a miscarriage of justice, and its application will depend on the circumstances, facts and context of a given case.[94]

[199] For a host of reasons, the case at bar is not an abuse of process. The First Nation has not

---

Craft Industries Inc. (1980), 27 O.R. (2d) 490 (Dist. Ct.); *Empire-Universal Films Ltd. v. Rank*, [1947] O.R. 775 (H.C.J.).

[90] *Dufferin Construction Company v. The Corporation of the City of Mississauga,* 2021 ONSC 1919; *Birdseye Security Inc. v. Milosevic,* 2020 ONCA 355; *Abarca v. Vargas* 2015 ONCA 4; *Farris v. Staubach Ontario Inc.* [2004] O.J. No. 1227 (S.C.J.).

[91] *Farris v. Staubach Ontario Inc.*, [2004] O.J. No. 1227 at para. 27 (S.C.J.).

[92] *Birdseye Security Inc. v. Milosevic,* 2020 ONCA 355; *Conway, Baxter, Wilson LLP. v. 1179 Hunt Club Road*, 2019 ONSC 1056; *Hathro Management Partnership v. Adler*, 2018 ONSC 1560; *Canadian Standards Assn. v. P.S. Knight Co.*, 2015 ONSC 7980; *Sun Life Assurance Co of Canada v. Yellow Pages Group Inc.*, 2010 ONSC 2780; *Areva NP GmbH v. Atomic Energy of Canada Ltd.*, [2009] O.J. No. 861 (S.C.J.); *Catalyst Fund Limited Partnership II v. IMAX Corp.* (2008), 92 O.R. (3d) 430 (S.C.J.); *Hollinger International Inc. v. Hollinger Inc.*, [2004] O.J. No 3464 (S.C.J.), leave to appeal refused [2005] O.J. No 708 (Div. Ct.); *Farris v. Staubach Ontario Inc.*, [2004] O.J. No. 1227 (S.C.J.); *Sportmart, Inc. v. Toronto Hospital Foundation*, [1995] O.J. No. 2058 (Gen. Div.); *Polar Hardware Manufacturing Co. v. Zafir,* [1983] O.J. No. 1357 (H.C.J.).

[93] *Davies v. Clarington (Municipality)* 2023 ONCA 376; *Carbone v. DeGroote*, 2018 ONSC 109 at paras. 41-47; *Behn v. Moulton Contracting Ltd*., 2013 SCC 26; *Waterloo (City) v. Wolfraim,* 2007 ONCA 732; *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77; *Currie v. Halton (Region) Police Services Board,* [2003] O.J. No. 4516 (C.A.); *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 at para. 55 *per* Justice Goudge dissenting (C.A.), (approved [2002] 3 S.C.R. 307.

[94] *Plate v. Atlas Copco Canada Inc.*, 2019 ONCA 196; *Hanna v. Abbott* (2006), 82 O.R. (3d) 215 at paras. 29–32 (C.A.); *Novartis Pharmaceuticals Canada Inc. v. RhoxalPharma Inc.*, [2002] F.C.J. No. 1006 (T.D.).

received a penny of compensation for the harm alleged to have been caused by the construction of the aqueduct from Shoal Lake to Winnipeg and the construction of the aqueduct can be connected to the Headlands Issue. There has never been an adjudication of the Headlands Issue to a judgment. There has never been an adjudication to a judgment with respect to the compensation provision of the 1913 Order in Council to which the Headlands Issue can be connected. Three of the four prior proceedings are moribund proceedings, including the 2000 action which the leaders of the First Nation were not even aware of. The moribund 2000 action is the only one of the four actions that specifically addresses the aqueduct project and Ontario knew next to nothing about this proceeding and Ontario has never been called on to defend the 2000 action. The currently alive 2016 Specific Claims Tribunal Proceeding does not address the aqueduct project.

[200] Treating the Headlands Issue as a discreet issue, it is an issue that has never been litigated to a judgment. Further, it does no honour to Ontario in its relationship with the First Nation to rely on a flaccid technical argument to avoid addressing the Headlands Issue as an aspect of a claim of breach of fiduciary duty, which Ontario shall in any event be addressing on its merits. There is nothing oppressive or vexatious in having the Headlands Issue included in the existing action and as a factual matter; it will be included in any event, since the Headlands Issue is a part of the historical narrative of the building of the aqueduct from Lake Shoal to Winnipeg.

[201] The spectre of an inconsistent decision from the 2016 Specific Claims Tribunal that would embarrass the administration of justice about farmland islands in Shoal Lake is just a bogeyman argument. If an award was made by the Specific Claims Tribunal it would not be about the damage alleged to have been caused by the viaduct project, and the Superior Court is capable of addressing any double recovery, if any, for the Headlands Issue. In any event, Ontario and Winnipeg are not parties to the Specific Claims Tribunal proceedings and would not be bound by any decision.

[202] Excising the Headlands Issue from the compensation claim is factually impossible and excising the Headlands Issue from the compensation claim would substantively prejudice the First Nation and would be unjust. If the Headlands Issue is included, its inclusion prejudices neither party, and its inclusion is not unjust. Neither Ontario nor Winnipeg can demonstrate a substantial prejudice beyond inconvenience and expense and some of that expense is already ingrained into the existing action, which includes the Headlands Issue as a part of the factual narrative.

[203] There is no merit to the Defendants' argument that the draft Amended Fresh as Amended Statement of Claim should be disallowed because it is an abuse of process.

P. The Refusals Motion

[204] The third branch of the First Nation's Hybrid Motion is a refusals motion arising from unanswered questions for Mr. Lockhart, who was Ontario's representative, and Mr. Shanks, who was Winnipeg's representative. Like the other two branches of the motion, the critical matter of dispute was the Headlands Issue. Ontario and Winnipeg took the position that questions about the Headlands Issue were not relevant to the First Nation's action as it was pleaded. Therefore, Ontario's and Winnipeg's representatives at the examinations for discovery refused to answer questions touching upon the Headlands Issue.

[205] For the reasons set out above, it shall be for the trial judge to determine whether as a legal matter the pleadings with respect to the Headlands Issue: (a) are within the existing action; (b) are statute barred and/or (c) are defeated or diminished because of the absence of a necessary party.

However, for the purposes of the third branch of the Hybrid Motion, I conclude that as – a factual matter – the Headlands Issue is a relevant matter and as a general proposition, questions about the Headlands Issue should have been answered – unless there was some justification that the particular question was objectionable.

[206] In *Doucet v. The Royal Winnipeg Ballet (The Royal Winnipeg Ballet School)*,[95] I set out a list of principles that would justify a witness refusing to answer a question at examinations for discovery or at a cross-examination. I stated at paragraph 29.

> 29. A person being examined may properly refuse to answer a question or to give an undertaking at a cross-examination on an affidavit or an examination for discovery.[96] The justifications for refusals are:
>
> a. Unanswerable – the question is not capable of being answered, which is to say that the question is vague, unclear, inconsistent, unintelligible, redundant, superfluous, repetitious, overreaching, fishing, beyond the scope of the examination, speculative, unfair, oppressive, or a matter of rhetoric or argument;
>
> b. Immaterial – the question is not material, which is to say that the question falls outside the parameters of the action and does not address a fact in issue;
>
> c. Irrelevant – the question is not relevant, which is to say that the question does not have probative value; it does not adequately contribute to determining the truth or falsity of a material fact;
>
> d. Untimely – the question is not relevant because it concerns events or matters temporally unconnected to the cause of action or defence;
>
> e. Idiosyncratic or uncommon – in an action under the *Class Proceedings Act, 1992*, the question is not relevant to the common issues because it concerns an individual inquiry that was not certified for the common issues trial;
>
> f. Answered – the question or the documents relevant to the question have already been provided by the party being examined;
>
> g. Disproportionate – the question is disproportionate, which is to say that the question may be relevant but providing an answer offends the proportionality principle; and
>
> h. Privileged – the answer to the question is subject to a privilege, including lawyer and client privilege, litigation privilege, or the privilege for communications in furtherance of settlement.

[207] In the immediate case, the Headlands Issue was as much a part of the factual narrative of the First Nation's claim and Winnipeg and Ontario's defence to it as is the story of how the aqueduct came to be located at the western and Manitoba part of Shoal Lake. From a factual perspective, the Headlands were a part of the existing pleading, regardless whether there was an issue about whether these lands were part of the First Nation's reserve. If the Headlands were not part of the First Nation's reserve, then they were part of the First Nation's traditional and accessorial territory, which was part of the existing pleadings from their initial iteration.

---

[95] 2019 ONSC 6982. See also *Spina v. Shoppers Drug Mart Inc*., 2020 ONSC 4000.

[96] *Abou-Elmaati v. Canada (Attorney General)*, 2016 ONSC 6075; *Fischer v. IG Investment Management Ltd*., 2015 ONSC 3525; *Fehr v. Sun Life Assurance Co. of Canada*, 2015 ONSC 2908; *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2013 ONSC 917; *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp*., 2012 ONSC 6549; *Axiom Plastics Inc. v. E.I. Dupont Canada Co.*, 2011 ONSC 4510; *Ontario v. Rothmans,* 2011 ONSC 2504, leave to appeal refused 2011 ONSC 3685 (Div. Ct.).

[208] Properly asked questions about the Headlands and the Headlands Issue ought not to have been refused based on the Statement of Claim and the Fresh as Amended Statement of Claim. And, there's the rub. With just four exceptions, the questions asked about the Headlands and the Headlands Issue were not proper questions and the questions were justifiably refused.

[209] Set out below are the Refusals Motion charts for Mr. Lockhart and Mr. Shanks. There were 67 refused questions.[97] The charts set out my reasons for ordering or not ordering answers. As will become apparent, many questions were justifiably refused on the grounds of being unanswerable, which encompasses questions that while they may to varying degrees may touch on a relevant matter, are not capable of being answered because the question is vague, unclear, inconsistent, unintelligible, redundant, superfluous, repetitious, overreaching, fishing, beyond the scope of the examination, speculative, unfair, oppressive, or a matter of rhetoric or argument.

[210] In the examinations of Messrs. Lockhart and Shanks there were a host of unanswerable questions. As two examples:

> a. Mr. Lockhart was told that the First Nation's position was that the repeal of the rights in the 1894 Agreement represents impacts on lands or properties compensable by Winnipeg and it was then Mr. Lockhart was asked whether Ontario agreed. The question is meaningless because Mr. Lockhart cannot disagree that the First Nation's position is other than what it is expressed to be. Moreover, the question is also unfair because the 1894 Agreement was not strictly speaking "repealed" but rather the rights in it were overridden by a 2015 statute and moreover "repealing" a contract is a legal oddity. Further still, the question is argumentative and irrelevant because Ontario's opinion, if that is what was being sought about what was compensable under its Order in Council is irrelevant.
>
> b. Mr. Shanks was asked whether the City of Winnipeg wants to go down in history as taking advantage of an oppressed community while they were most vulnerable and most abused. Mr. Shanks views about how some anthropomorphized city wishes to go down in history is irrelevant and all the question does is badger and attempt to embarrass the witness.

[211] Mr. Lockhart's Refusals Chart is set out immediately below.

REFUSALS CHART: SCOTT LOCKHART (Ontario)			
Issue & relationship to pleadings or affidavit (*Group the questions by issues*.)	**Question No.**	**Specific question**	**Disposition by the Court**
1. 1914 IJC Hearing	93	Do you agree with the position taken by Mr. Campbell for the City of Winnipeg? And if you do not agree with portions of the submission that I've just read to you, could you please identify which portions of this submission you do not agree with?	Unanswerable, Irrelevant

[97] The First Nation submitted five of the sixty-seven questions during the course of the Hybrid Motion. I accepted them notwithstanding that they were late.

2.	"	Line 1, pg. 50	To have the witness inform himself in respect of the position for the Province of Ontario [regarding the same passage referenced in question 93]	Unanswerable, Irrelevant
3.	"	94	"... when the original Canada was formed, with four Provinces, the natural resources, lands, forests, minerals, and fisheries, belonged to the Provinces - the four old historical Provinces." Do you agree with that statement?	Immaterial, Irrelevant
4.	"	96	Do you agree with the contents of what I've just read to you, Mr. Lockhart? And if you disagree with the contents of it, could you please identify which portions of the contents of the passage I just read to you you disagree with?	Unanswerable, Irrelevant
5.	"	98	Do you agree with that passage and, if not, can you please identify which portions you do not agree with?	Unanswerable, Irrelevant
6.	"	100	"If minerals were found there, they would have the authority to give licenses to take them, and they also issue the license and collect the revenue for fishing purposes, although the Dominion Government may make regulations, by order in council, for the preservation of fish as game, and for their regulation." Mr. Lockhart, do you agree with the passage I've just read to you and, if you disagree with portions, could you please identify those portions?	Unanswerable, Irrelevant
7.	"	101	"That is why we went to Ontario, because they had the watershed, and they had the bed of the lake, so far as ungranted, as part of their title." Do you agree with this passage I have read to you, Mr. Lockhart, and if you do not agree with portions, can you simply please identify the portions you disagree with?	Irrelevant, Unanswerable
8.	1894 Agreement	143	"... and the Saulteaux Tribe of the Ojibbeway Indians, inhabitants of the country within the limits thereinafter defined and described by their chiefs, chosen and named as thereinafter mentioned, and of the other part; which said Treaty is usually known as the North West Angle Treaty No. 3 ..." So can we agree this is in respect of Treaty 3?	Unanswerable
9.	"	145	Would you agree with me that, on its face, [s.4 of the 1894 Agreement] appears to be conferring rights over the water to the Indigenous parties to the Treaty 3 agreement?	Unanswerable
10.	"	146	Prior to reading this document last week, Mr. Lockhart, did you know, now I'm speaking in the various capacities, to you	Irrelevant, Unanswerable

		in the various capacities you have held for the Province of Ontario in relation to this specific region, about the conferral of rights over the water, as reflected in section 4, prior to seeing this document last week?	
11. "	Line 5, pg. 101	I'm asking for an undertaking to explain the statutory trail of the Exhibit 7B 1894 statutory agreement that would depict what you've just said that it wasn't enshrined in law.	Unanswerable, Disproportionate
12. "	Line 8, Pg. 103	the plaintiff is also seeking an undertaking for the defendant Ontario to advise as to how the 1894 statutory agreement became law, and provide its position on how that statutory agreement changed and how that was statutorily reflected	Irrelevant, Unanswerable, Disproportionate
13. "	161	Mr. Lockhart, you would agree that the language in section 4 of the statutory agreement that I read to you depicts certain rights to water between the headlands, et cetera? You saw that, correct?	Unanswerable
14. Scott-White letters	180	The Dominion statute that is referred to, I'm asking you to inform yourself and respond by undertaking to provide a copy of the Dominion statute referred to by Deputy Minister White to the plaintiff?	Unanswerable
15. "	183	Given that this is a position formally conveyed from the deputy minister for a Department of Lands, Forests and Mines for the Province of Ontario to the deputy superintendent general Indian Affairs for Canada, I am seeking an undertaking that Ontario produce any and all documentation within its possession, power or control that bear on the production of this correspondence dated December 15, 1914 from Deputy Minister White.	Unanswerable, disproportionate
16. "	183	Has Exhibit 7J, and this is obviously a question your counsel will be answering, Mr. Lockhart, has Exhibit 7J been raised in other matters, specifically other proceedings involving Treaty 3 Indigenous rights holders in Ontario?	Unanswerable, Disproportionate, Irrelevant
17. 1915 Ontario Act	184	What steps were taken by Ontario, either prior to or in and around December 1914, to notify Iskatewizaagegan No. 39 that Ontario would be seeking to eradicate its water rights in order to facilitate the taking of the water by Winnipeg from Shoal Lake?	Unanswerable, Disproportionate
18. "	185	What steps were taken by Ontario, in and around the period I've just identified in the previous question, to notify the First Nations impacted of Ontario's position with Canada	Unanswerable, Disproportionate, Irrelevant

19.	1894 Agreement	186	Does Ontario accept that the rights described in section 4 of the 1894 agreement represent land or property rights?	Question should be answered
20.	1913 Order in Council	187	Does Ontario accept that the term "lands or properties" as stated in the compensation provision quoted at paragraph 39 of the plaintiff's claim encompasses rights such as those referred to in section 4 of the 1894 statutory agreement?	Question should be answered.
21.	1894 Agreement	Line 12, pg. 131	Does the defendant Ontario agree that those rights described in paragraph 4 of the 1894 statutory agreement remained in force and were, indeed, the rights of First Nation Treaty 3 holders up to and including their repeal in 1960?	Unanswerable.
22.	Scott-Harvey letters	193	And you would agree with me that the gist of this is Harvey asking Scott whether in the opinion of the Department of Indian Affairs, quote, " ... the bed of Indian Bay is part of any Indian Reserve?" That's what he is asking, isn't it?	Unanswerable
23.	"	194	Do you understand the nature of the inquiry in front of you dated May 6, 1914 by the City of Winnipeg to Indian Affairs, Mr. Lockhart?	Irrelevant, Unanswerable
24.	"	201	And you understand that what is being conveyed to the City of Winnipeg is that the lake bed at Indian Bay forms part of the Indigenous reserve, correct?	Irrelevant, Unanswerable
25.	"	202	Does Ontario agree that the position taken in respect of the ownership of the lakebed as reflected in the correspondence of May 12, 1914, appended as Exhibit 7I to the discoveries, is based on the rights granted under section 4 of the 1894 statutory agreement?	Irrelevant, Unanswerable
26.	Scott-White letters	247	"If the reserves are confirmed as surveyed, we would require to repeal the statute of 1894 ...", And did you know that that, in fact, happened?	Irrelevant, Unanswerable
27.	1894 Agreement	249	The plaintiff's position is that the repeal of the rights described in section 4 of the original 1894 statutory agreement represents impacts on lands or properties properly compensable by Winnipeg. Does Ontario agree?	Unanswerable
28.	Scott-White letters	Line 25, pg. 173	such significant correspondence exchanged between Deputy Minister White for Ontario and Deputy Superintendent General Scott for Canada does not occur in a vacuum. We are seeking the production of all documents, historical or archival, and/or archival, in form. We are seeking the entire correspondence trail, memo trail	Unanswerable, Disproportionate,

		that led to this exchange of correspondence from Ontario	
29. "	Line 12, Pg. 174	Memos and briefing notes and correspondence would have flowed after the assurances provided by said Deputy Superintendent General Scott to the effect that section 4 would be repealed. We are asking for an undertaking that Ontario provide all briefing notes, memos, correspondence that would have been produced as a result of the exchange of correspondence from White to Scott, and then back from Scott to White?	Unanswerable, Disproportionate,
30. 1915 Ontario Act	250	What steps, if any, did Ontario take to notify Iskatewizaagegan No. 39 and/or Shoal Lake No. 40 of the bargain struck between White and Scott for the repeal of the water rights?	Unanswerable
31. 1894 Agreement	Line 10, pg. 175	The plaintiff seeks any all file materials maintained by Ontario in respect of the 1894 statutory agreement, please?	Disproportionate
32. "	Line 15, pg. 175	The plaintiff asks, by way of undertaking, sorry, by way of request for undertaking, that Ontario set out its legal position on how section 4 of the 1894 agreement was repealed, as described by Deputy Scott?	Unanswerable
33. 1913 Order in Council	762	Could you please inform yourself on what position Ontario takes as to the steps it took to engage in such consultations with First Nations up to and including the decision to issue the Order in Council in 1913?	Unanswerable, disproportionate
34. Aboriginal and Treaty Rights to the Shoal Lake Area	Line 25, pg. 872	With respect to sub (e), does Ontario take the position that the plaintiff has ever expressly waived its aboriginal and treaty rights in the Shoal Lake area?	Question should be answered
35. Compensation for Damages to Lands and Properties	Line 6, pg. 873	Does Ontario take the position the plaintiff has ever expressly waived its right to compensation for damages to its lands and properties?	Question should be answered

[212] Mr. Shanks' Refusals Chart is set out immediately below.

REFUSALS CHART: TIMOTHY SHANKS (Winnipeg)			
Issue & relationship to pleadings or affidavit (*Group the questions by issues*.)	**Question No.**	**Specific question**	**Disposition by the Court**
36. White-Scott Letter	57	Under consideration with reference to the letter dated December 15, 1914, see if the City has correspondence that deals with the comment in this letter between other parties about an application that "might seriously cripple" Winnipeg's water taking application.	Unanswerable, irrelevant

37. Reconciliation	62	So could you, in addition to undertaking to advise as to which parts of paragraph 65 you deny, could you also advise what significance we are to attach to your pronouncements about reconciliation? What do they actually mean? Could you undertake to do that, please?	Unanswerable
38. "	72	would you want the City of Winnipeg to go down in history as taking advantage of an oppressed community while they were most vulnerable and most abused? Would you want that to be your legacy as the City of Winnipeg?	Unanswerable
39. "	78	Does the City of Winnipeg want to take advantage of that prohibition to say they should have protected their legal rights anyway in that time period? Is that the intent of the City of Winnipeg?	Unanswerable
40. "	79	the pronouncements about reconciliation by the leadership of the City of Winnipeg, the regular pronouncements about reconciliation, I'm asking you, how do I reconcile those statements with your legal position that the people of Iskatewizaagegan No. 39 should have been protecting their legal interests while it was against the law for them to have a lawyer? How do I reconcile that, sir?	Unanswerable
41. White-Scott letter	102	Under Consideration: Provide an answer to the question, "Deputy Minister Aubrey White, by correspondence of December 15, 1914, writs to Deputy Superintendent Duncan Scott, and states that section 4 of the 1894 statutory enactment, were it to be allowed to remain in place, would cripple the Winnipeg project, and I am asking for the City's position on whether that statement is accurate or not?"	Unanswerable
42.	748	Under Advisement: Advie if the defendant disagrees with the position that the plaintiff takes in these proceedings, that the section 4 rights as granted pursuant to the 1894 statutory agreement, essentially resulted in a line between the headlands that would have resulted in all of Indian Bay being part of the reserve territory, including the lake beds, and as accurately observed by Aubrey White, the islands.	Unanswerable, irrelevant
43. Duty of Candour	946	Would you agree with me that in terms of the actions of The City of Winnipeg it would have had a duty of candor and transparency to those it dealt with in the steps it took in respect of the taking of the water, it would have been required no matter who it dealt with, whether it was First Nations, whether it was the Province,	Unanswerable

			whether it was Canada, or in fact the IJC, there would have been a duty of candor and transparency in all of its dealings. Would you agree with that?	
44.	“	948	Amongst those for whom I say you had a duty of candor and a duty of transparency was the International Joint Commission, when Winnipeg appeared before the IJC in 1914. Would you agree with that?	Irrelevant, Unanswerable
45.	“	949	Will you undertake to inform yourself whether Winnipeg, and obviously from the historical record, whether Winnipeg saw itself, when appearing before the IJC in 1914, as having a duty of candor and transparency to the commission?	Irrelevant, Unanswerable
46.	“	950	whether Winnipeg, at the relevant times, was of the view that it had a duty of candor and transparency, it had a duty to exercise that in its dealings with the First Nations around the taking of the water	Irrelevant, Unanswerable
47.	“	Line 1 Pg. 383	Provide a legal position in relation to the duty of candor and transparency that Winnipeg in 1914 would have seen itself as having towards First Nations in relation to the taking of the water	Irrelevant, Unanswerable
48.	“	1072	Provide a legal position in relation to the duty of candor and transparency that Winnipeg in 1914 would have seen itself as having towards First Nations in relation to the taking of the water	Irrelevant, Unanswerable
49.	“	1081	don't you think it would have been relevant for the IJC to know, once it happened, that the First Nations were stripped of their water rights in order to avoid crippling your application to draw the water?	Irrelevant, Unanswerable
50.	“	1083	Do you think it is important to be candid and transparent with the International Joint Commission?	Irrelevant, Unanswerable
51.	“	1085	Today, September 2022, you now know that the indigenous people of Treaty 3 were stripped of their water rights in order to pave the way for your drawing of the water. Do you think it's important to notify the IJC that you know about that now, in the interests of candor and transparency?	Unanswerable
52.	1894 Agreement	960	They're saying that the reserve includes, quote, "... the waters within the lands laid out or to be laid out as Indian reserves ... shall be deemed to form part of such reserve ... and shall not be subject to the public common right of fishery by others than Indians of the band to which the reserve belongs," correct?	Unanswerable
53.	“	1089	Do you agree with me that the corollary to -- the corollary to not removing section 4,	Unanswerable

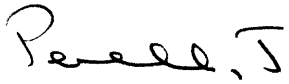
		that is leaving section 4 in the statutory agreement, not repealing section 4, would have meant that Winnipeg could not draw the water from Indian Bay in the way it was proposing? Do you agree with that?	
54. Scott-White letters	1051	So they're discussing the indigenous treaty rights that now exist by statutory agreement, and according to Deputy Minister White, by Dominion Statute, they're discussing those treaty rights. They're saying those treaty rights, if they stand as passed, could cripple the Winnipeg application, correct?	Unanswerable
55. "	1062	And so Canada says to Ontario 15 days after Ontario's letter, I have this, we'll repeal it, right?	Unanswerable
56. "	1144	Have you formed an opinion about what Deputy Minister White meant by the word cripple in the context of the application by Winnipeg to draw the water?	Irrelevant, unanswerable
57. 1915 Ontario Act	1086	Do you agree with me that the actual foundation for you to get your water to this city was to strip the First Nation members of Treaty 3 of their water rights, including their rights to the lake beds? That's how you got the water. Do you agree with that?	Unanswerable
58. "	1090	Do you agree with me that to this day Winnipeg has never come clean on what it did in order to get the water. Do you agree with that?	
59. "	1091	I'm asking for an undertaking in respect of any and all information that you can obtain by informing yourself from those in possession or control, in respect of the historical record, concerning the repeal of section 4 of the 1894 statutory agreement, any information that Winnipeg has about the circumstances leading up to the repeal of section 4. Can I have an undertaking for that, please?	Irrelevant, Disproportionate
60. Order in Council	Line 18, pg. 447	With reference to the compensation provision that was passed by order in council in 1913, and subsequently enshrined in Ontario statute, advise whether the witness knows of a single instance, since 1913, of that compensation provision actually being invoked and resulting in compensation being paid, and confirm the date of his evidence of the example given.	Answered
61. 1915 Ontario Act	1093	Has any other First Nations, either through, directly or through legal counsel, raised a concern with The City of Winnipeg around the dropping, or repeal of section 4 of the 1894 legislation?	Irrelevant, Disproportionate

62.	"	Line 2, pg. 440	I'm asking, in addition, for an undertaking that the witness inform himself from those who have information in their possession, power or control with The City of Winnipeg about any and all steps taken by members of Treaty 3 to communicate around the repeal of section 4 of this statutory agreement?	Irrelevant, Disproportionate
63.	"	1148	we're seeking an undertaking as to everything Winnipeg knows from the historical record, and is able to obtain, whether that historical record is in paper form or digital or otherwise, is able to obtain with respect to its involvement in the discussions leading up to the repeal of section 4 of the 1894 statutory agreement.	Disproportionate, Unanswerable
64.	Injurious Affection and/or interference with lands and properties	1139	based on our review of the correspondence, in particular that under Exhibit 7 today, have you formed a view, Mr. Shanks, as to whether the First Nations lost lands or properties as a result of the repeal of section 4?	Unanswerable
65.	"	1140	Does Winnipeg have a view or a legal position as to whether Iskatewizaagegan No. 39 suffered losses to lands or properties as a result of the repeal of section 4 of the 1894 statutory enactment?	Unanswerable
66.	"	1141	Mr. Shanks, how do you determine the entitlement to compensation as a result of the water taking? If you don't know, on the one hand, the lands or properties that Iskatewizaagegan No. 39 had before what I like to call the steal, and then after the steal? Don't you need to compare both?	Unanswerable
67.	Letter Feb. 26, 1914	Line 396 pg. 396	Advise why the letter from the major of the City of Winnipeg dated February 26, 1914 is not in the City's productions	Answered

Q. Conclusion

[213] An order shall go in accordance with the terms described in the Introduction to these Reasons for Decision.

[214] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the First Nation's submissions within twenty days of the release of these Reasons for Decision followed by the Defendants' submissions within a further twenty days.



Perell, J.

Released: April 12, 2024

Schedule "A": *Rules of Civil Procedure*

For the purposes of deciding the Hybrid Motion, the relevant rules are Rules 1.04, 5.01-5.05, 21.01, 25.06, 25.11, 26.01, 26.02 and 34.12.

Interpretation

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

Proportionality

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

Matters Not Provided For

(2) Where matters are not provided for in these rules, the practice shall be determined by analogy to them.

[…]

RULE 5 JOINDER OF CLAIMS AND PARTIES

Joinder of Claims

5.01 (1) A plaintiff or applicant may in the same proceeding join any claims the plaintiff or applicant has against an opposite party.

(2) A plaintiff or applicant may sue in different capacities and a defendant or respondent may be sued in different capacities in the same proceeding.

(3) Where there is more than one defendant or respondent, it is not necessary for each to have an interest in all the relief claimed or in each claim included in the proceeding.

Joinder of Parties

Multiple Plaintiffs or Applicants

5.02 (1) Two or more persons who are represented by the same lawyer of record may join as plaintiffs or applicants in the same proceeding where,

> (a) they assert, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;
>
> (b) a common question of law or fact may arise in the proceeding; or
>
> (c) it appears that their joining in the same proceeding may promote the convenient administration of justice.

Multiple Defendants or Respondents

(2) Two or more persons may be joined as defendants or respondents where,

(a) there are asserted against them, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;

(b) a common question of law or fact may arise in the proceeding;

(c) there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief;

(d) damage or loss has been caused to the same plaintiff or applicant by more than one person, whether or not there is any factual connection between the several claims apart from the involvement of the plaintiff or applicant, and there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief or the respective amounts for which each may be liable; or

(e) it appears that their being joined in the same proceeding may promote the convenient administration of justice.

Joinder of Necessary Parties

General Rule

5.03 (1) Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding.

Claim by Person Jointly Entitled

(2) A plaintiff or applicant who claims relief to which any other person is jointly entitled with the plaintiff or applicant shall join, as a party to the proceeding, each person so entitled.

[…]

Power of Court to Add Parties

(4) The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding shall be added as a party.

Party Added as Defendant or Respondent

(5) A person who is required to be joined as a party under subrule (1), (2) or (3) and who does not consent to be joined as a plaintiff or applicant shall be made a defendant or respondent. R.R.O. 1990, Reg. 194, r. 5.03 (5).

Relief Against Joinder of Party

(6) The court may by order relieve against the requirement of joinder under this rule.

Misjoinder, Non-Joinder and Parties Incorrectly Named

Proceeding not to be Defeated

5.04 (1) No proceeding shall be defeated by reason of the misjoinder or non-joinder of any party and the court may, in a proceeding, determine the issues in dispute so far as they affect the rights of the parties to the proceeding and pronounce judgment without prejudice to the rights of all persons who are not parties.

Adding, Deleting or Substituting Parties

(2) At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

Adding Plaintiff or Applicant

(3) No person shall be added as a plaintiff or applicant unless the person's consent is filed.

Relief against Joinder

5.05 Where it appears that the joinder of multiple claims or parties in the same proceeding may unduly complicate or delay the hearing or cause undue prejudice to a party, the court may,

(a) order separate hearings;

(b) require one or more of the claims to be asserted, if at all, in another proceeding;

(c) order that a party be compensated by costs for having to attend, or be relieved from attending, any part of a hearing in which the party has no interest;

(d) stay the proceeding against a defendant or respondent, pending the hearing of the proceeding against another defendant or respondent, on condition that the party against whom the proceeding is stayed is bound by the findings made at the hearing against the other defendant or respondent; or

(e) make such other order as is just.

[…]

RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL

Where Available

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b).

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

Jurisdiction

(a) the court has no jurisdiction over the subject matter of the action;

Capacity

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

Another Proceeding Pending

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

Action Frivolous, Vexatious or Abuse of Process

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly.

[…]

Rules of Pleading — Applicable to all Pleadings

Material Facts

25.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. R.R.O. 1990,

Pleading Law

(2) A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded. R.R.O. 1990, Reg. 194, r. 25.06 (2).

[…]

Documents or Conversations

(7) The effect of a document or the purport of a conversation, if material, shall be pleaded as briefly as possible, but the precise words of the document or conversation need not be pleaded unless those words are themselves material.

Nature of Act or Condition of Mind

(8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.

Claim for Relief

(9) Where a pleading contains a claim for relief, the nature of the relief claimed shall be specified and, where damages are claimed,

(a) the amount claimed for each claimant in respect of each claim shall be stated; and

(b) the amounts and particulars of special damages need only be pleaded to the extent that they are known at the date of the pleading, but notice of any further amounts and particulars

shall be delivered forthwith after they become known and, in any event, not less than ten days before trial.

[…]

Striking out a Pleading or Other Document

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court.

RULE 26 AMENDMENT OF PLEADINGS

General Power of Court

26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

When Amendments may be Made

26.02 A party may amend the party's pleading,

(a) without leave, before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action;

(b) on filing the consent of all parties and, where a person is to be added or substituted as a party, the person's consent; or

(c) with leave of the court.

[…]

Objections and Rulings

34.12 (1) Where a question is objected to, the objector shall state briefly the reason for the objection, and the question and the brief statement shall be recorded.

(2) A question that is objected to may be answered with the objector's consent, and where the question is answered, a ruling shall be obtained from the court before the evidence is used at a hearing.

(3) A ruling on the propriety of a question that is objected to and not answered may be obtained on motion to the court.

Schedule "B": ***Limitations Act, 2002***

For the purposes of deciding the Hybrid Motion, the relevant provisions of the *Limitations Act, 2002* are sections 2, 4, 5, 15.

Application

2 (1) This Act applies to claims pursued in court proceedings other than,

[…]

(e) proceedings based on the existing aboriginal and treaty rights of the aboriginal peoples of Canada which are recognized and affirmed in section 35 of the *Constitution Act, 1982*;

(f) proceedings based on equitable claims by aboriginal peoples against the Crown; and

[…]

Exception, aboriginal rights

(2) Proceedings referred to in clause (1) (e) and (f) are governed by the law that would have been in force with respect to limitation of actions if this Act had not been passed.

[…]

Basic limitation period

4 Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. 2002, c. 24, Sched. B, s. 4.

Discovery

5 (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[…]

Ultimate limitation periods

15 (1) Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section.

General

(2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.

[…]

Period not to run

(4) The limitation period established by subsection (2) does not run during any time in which,

[…]

(c) the person against whom the claim is made,

(i) wilfully conceals from the person with the claim the fact that injury, loss or damage has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was that of the person against whom the claim is made, or

(ii) wilfully misleads the person with the claim as to the appropriateness of a proceeding as a means of remedying the injury, loss or damage.

Burden

(5) The burden of proving that subsection (4) applies is on the person with the claim.

Day of occurrence

(6) For the purposes of this section, the day an act or omission on which a claim is based takes place is,

(a) in the case of a continuous act or omission, the day on which the act or omission ceases;

(b) in the case of a series of acts or omissions in respect of the same obligation, the day on which the last act or omission in the series occurs;

(c) in the case of an act or omission in respect of a demand obligation, the first day on which there is a failure to perform the obligation, once a demand for the performance is made.

[…]

CITATION: Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City), 2024 ONSC 2163
COURT FILE NO.: CV-20-00644545-0000
DATE: 20240412

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ISKATEWIZAAGEGAN NO. 39 INDEPENDENT FIRST NATION

Plaintiff

- and -

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

Defendants

REASONS FOR DECISION

PERELL J.

Released: April 12, 2024