CITATION: Niisaachewan Anishinaabe Nation et al. v. The Attorney General of Canada et al., 2025 ONSC 4166
COURT FILE NO.: CV-24-0086-0000
DATE: 2025-07-14

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
NIISAACHEWAN ANISHINAABE NATION, ANISHINABE OF WAUZHUSHK ONIGUM and WASHAGAMIS BAY Plaintiffs	L. Hildebrand and P. Bailey for the Plaintiffs/Responding Parties on Motion
- and -	
THE ATTORNEY GENERAL OF CANADA and THE CORPORATION OF THE CITY OF KENORA Defendants	T. Andreas for the Defendant/Moving Party, the Attorney General of Canada C. Bryson for the Defendant/Moving Party, the Corporation of the City of Kenora
	HEARD: May 23, 2025 at Thunder Bay, Ontario

Madam Justice R.A. Lepere

Decision on Motion

Preliminary Comments

[1] The Defendants have each both brought motions seeking orders that the Plaintiffs' claim be dismissed as against them pursuant to Rule 21.01(1)(a) of the *Rules Civil Procedure,* R.R.O. 1990, Reg. 194 (the "Rules"). More specifically, they assert that the Plaintiffs' claim is statute barred, as it was not commenced prior to the expiry of the applicable limitation period.

[2] Since this is a motion under Rule 21.01(1(a), it is important to note several points at the outset of this decision.

[3] Firstly, there is no evidence before me on these motions. The decision on this motion is based on the facts as pled in the Statement of Claim. As such, the facts set out below in this decision are as stated in the Statement of Claim. If these motions are dismissed and the action proceeds, the Plaintiffs will have to prove the facts set out in the Statement of Claim and referenced in this decision.

[4] Secondly, I have no authority on these motions to find that the Plaintiffs' claim is not statute barred. If I do not dismiss the Plaintiffs' claim that issue would be left for another trier of fact to determine on a complete evidentiary record.

[5] Lastly, the only decision I can make on this motion is whether it is plain and obvious, further to the facts pled in the Statement of Claim, that the Plaintiffs' claim is statute barred and ought to be dismissed.

Factual Background

[6] The Plaintiffs are Anishinaabe Nations and bands under the *Indian Act,* R.S.C. 1985, c. I.5. They were formerly one band that separated into three bands in the 1970s (collectively hereinafter referred to as the "Nations"). They live alongside the Lake of the Woods, near the City of Kenora, in the Province of Ontario.

[7] The Defendant, the Corporation of the City of Kenora ("Kenora"), is a municipality in Northwestern Ontario located in the traditional territory of the Nations. It was originally called Rat Portage but changed its name to Kenora in 1905.

[8] The Defendant, the Attorney General of Canada ("Canada"), is the representative of His Majesty the King in Right of Canada.

[9] On October 3, 1873, Treaty 3 was entered into between Canada and the ancestors of the Nations, among other Anishinaabe Nations. Pursuant to Treaty 3, lands were set aside for the Nations, which were known as Reserves 38A, 38B, and 38C. The Plaintiff, Washagamis Bay, is currently located on Reserve 38A. The Plaintiff, Anishinabe of Wauzhushk Onigum, is currently located on Reserve 38B. The Plaintiff, Niisaachewan Anishinaabe Nation, is currently located on Reserve 38C.

[10] Before Treaty 3 was signed, Kenora was little more than a trading post. By 1891, the Kenora area had expanded to nearly 4,000 people due to the growth of the timber industry and the construction of the Canadian Pacific Railway. Due to the rapid expansion of the population, the Nations were pushed out of the territory and the traditional uses of the lands were restricted.

[11] The lands at issue in this action are 14 acres on the north shore of Lake of the Woods comprising, at least in part, of the lands known as Anicinabe Park (the "Lands"). The Lands are located approximately two kilometres from Kenora's city center and operate as a full-service campground owned by Kenora. The Lands were not part of the land originally set aside for the Nations pursuant to Treaty 3.

[12] Prior to Treaty 3, the Nations had used the Lands for thousands of years for feasts, sweat lodges, trading, fishing, harvesting, and to hold ceremony. They continued to use the Lands for these purposes well into the 20th century. After Treaty 3, the members of the Nations would also convene on the Lands to discuss governance issues.

[13] In the early 1900s, Kenora attempted to relocate Anishinaabe peoples away from the town and petitioned the Department of Indian Affairs (the "Department") on numerous occasions to open the reserves created by Treaty 3 for settlement.

[14] The Department acquiesced to the pressures and surrendered Reserve 38B, which comprised approximately 5,289 acres. The Nations protested the surrender and asserted that the Department did not comply with the provisions of the *Indian Act* at the time.

[15] The Department then leased 600+ acres of Reserve 38B to Kenora for nominal consideration to be used as a park (the "Lease"). The Lease had a term of 95 years. The Nations assert that they were not consulted about the Lease and did not consent to same.

[16] The Nations continued to protest the surrender of Reserve 38B. The surrender greatly reduced the Nations' land near Kenora and removed access to essential services in the town. The Nations continued to push the Department to acquire lands for them closer to town.

[17] On February 13, 1929, the Department purchased the Lands from a private citizen. The Nations state the following in their Statement of Claim regarding the acquisition of the Lands:

a. the Department had the Lands surveyed;
b. the Lands were purchased to address the Nations' need to have land near Kenora;

c. the purchase of the Lands ensured that the Department did not have to cancel the Lease with Kenora and risk legal action;

d. the Lands became known as the Indian Campground or Reserve 38D;

e. Department officials represented to the Nations that the Lands had been acquired for their use and benefit and was a reserve for the Nations;

f. the Lands were recorded as "Indian Reserve 38D" in the Department's 1939 asset inventory and in a survey of the Lands in 1949;

g. the Nations accepted the Lands as reserve;

h. members of the Nations soon after the Lands were purchased began to build "Indian House", a winter house and stables where members of the Nations could stay year-round and were not compensated for this work; and

i. the Lands allowed them the members of the Nations to have somewhere to stay when they visited their children at the residential schools nearby or access medical care or other services in Kenora as they were routinely denied accommodations and the use of washrooms and restaurants in Kenora;

j. the Lands supported traditional activities of the Nations, including, but not limited to, harvesting of traditional medicines, fish bartering and fur trading, holding of ceremonies and harvesting activities such as blueberry picking season, the rice harvest and the summer fishing camp; and

k. Indian house was expanded in 1943 by members of the Nations for which they were not compensated.

[18] Kenora was opposed to Reserve 38D and campaigned throughout the 1930s and 1940s to obtain the Lands from the Department. They asserted that the purchase of the Lands interfered with the town's plans to build a municipal park, and then later asserted that the establishment of Reserve 38D threatened the town's water supply.

[19] In the meantime, the Nations continued to advocate for the return of Reserve 38B. In 1933, the Department advised Kenora that it intended to cancel the Lease. When Kenora threatened legal action, the Department withdrew the cancellation of the Lease.

[20] In 1957, the Presbyterian Church of Canada approached the Department about converting Indian House into a church-run hostel. When Kenora learned of these discussions it reminded the Department of its interest in acquiring the Lands to build a park.

[21] The Department sold the Lands to Kenora in the summer of 1959. In exchange, Kenora agreed to relinquish the Lease, which would facilitate the return of Reserve 38B to the Nations. Kenora would also support the establishment of a church-run hostel elsewhere in Kenora.

[22] Kenora did not cooperate in the establishment of a church-run hostel and same was not established for two years, leaving the members of the Nations with nowhere to stay. In addition, Kenora did not relinquish the Lease until 1974, 15 years later, at which point the surrender of Reserve 38B was also rescinded and same was returned to the Nations.

[23] After acquiring the Lands, Kenora added them to Lakeside Park and renamed it Anicinabe Park. The Nations relationship with the Lands was fundamentally altered.

[24] Throughout the 1960s, the Nations continued to make inquires of the Department as to why the Lands were sold to Kenora. The Nations raised concerns that the sale of the Lands had contributed to the homelessness crisis for its members in and around Kenora.

[25] From July 19–22, 1974, the Ojibway Warrior Society ("OWS") and Grand Council Treaty #3 held a weekend long gathering on the Lands. Following the conference, the OWS and 100–150 of its delegates prohibited tourists and campers from entering the Lands. This was known as the Anicinabe Park Occupation, which lasted for 38 days. The occupation was ended further to an

agreement reached between the OWS and the Attorney General of Ontario to enter into a series of negotiations about many issues, including the ownership of the Lands.

[26] In November 1974, Grand Council Treaty #3 were parties to a specific claim over title to the Lands submitted to the Department. The claim was made on the same basis as advanced in this action. The submission of the claim was supported by Canada, which provided assistance to the Nations in advancing their claim.

[27] No agreement was reached regarding the Lands. On February 20, 1975, the Department advised the Nations that there were insufficient grounds to support a claim to the Lands.

[28] Since 1975, the Nations have continually maintained that the dispossession and sale of Reserve 38D was unlawful and have conducted numerous events and gatherings on the Lands.

Claims Advanced by the Nations in this Action

[29] The Nations seek an order transferring the Lands to them or that the Lands be held in trust for them by Canada. In addition, the Nations also seek several declaratory orders as against the Defendants.

[30] As against Canada, the Nations seek the following declaratory orders:

a. that Canada purchased and set aside the Lands for the use and benefit of the Nations;
b. that Canada purchased and set aside the Lands as reserve lands for the use and benefit of the Nations;
c. that Canada breached its constitutional, statutory, equitable and fiduciary obligations to the Nations by selling the Lands to Kenora in 1959; and
d. that Canada breached its fiduciary duty by failing to confirm the Lands as reserve through Order in Council.

[31] As against Kenora, the Nations seek the following declaratory orders:

a. that Kenora was not a bona fide purchaser of the Lands; and

b. that Kenora holds the Lands as a constructive trustee for the Nations.

[32] The Nations also seek damages as against Canada for loss of the Lands.

[33] With respect to the claims against Canada, the Nations allege that Canada breached its statutory duties, its fiduciary duties, its duty to consult, and its promises.

[34] Firstly, with respect to the alleged breach of its statutory duties, the Nations assert that the Lands were reserve lands and that the Lands were not surrendered by the Nations in accordance with the *Indian Act* prior to the sale of the lands to Kenora.

[35] Secondly, with respect to the alleged breach of its fiduciary duties, the Nations assert that Canada owed the Nations a fiduciary duty with respect to the Lands as they were reserve lands or were set aside for their use and benefit. They assert that Canada breached their fiduciary duties for several reasons, as set out in para. 162 of the Statement of Claim.

[36] Thirdly, with respect to the alleged breach of its duty to consult, the Nations assert that Canada owed them a duty to consult and accommodate when it contemplated the sale of the Lands, as they knew that the sale of the Lands would adversely affect the Nations' treaty and aboriginal rights. The allegations made by the Nations as to the breach of the duty to consult are found in para. 166 of the Statement of Claim.

[37] Lastly, the Nations state that Canada's conduct vested the Nations with an equitable interest in the Lands pursuant to the doctrine of proprietary estoppel. More specifically, the Nations assert that the Lands were acquired for their use and benefit and same was represented to them by Canada.

The Nations relied on this representation and made improvements to the Lands and conducted their affairs accordingly.

[38] In support of the claims against Kenora, the Nations state that Canada's breach of its statutory duties, its fiduciary duties, and/or its equitable promises entitles the Nations to equitable remedies, including a constructive trust. Since Kenora acquired the Lands further to the breaches of Canada's duties, Kenora ought to be ordered to transfer the Lands back to the Nations.

Issues to be Decided

[39] The issue on the motions is whether it is plain and obvious, further to the facts pled in the Statement of Claim, that the Plaintiffs' claim is statute barred and ought to be dismissed.

[40] There is a dispute between the parties as to whether a limitation statute applies to the Nations' claim and, if one does, which limitation statute applies. That dispute arises from the way in which the parties have characterized the nature of the claims advanced by the Nations and the way the parties have characterized the Lands.

General Legal Principles – Rule 21.01(1)(a) and Limitation Issues

[41] Rule 21.01(1)(a) provides that a court may determine, before trial, a question of law raised by a pleading where its determination may dispose of all or part of the action, substantially shorten the trial, or result in a substantial savings of costs.

[42] Evidence is not permitted on a motion under Rule 21.01(1)(a) without leave of the Court. No request for leave was made in this case. As such, there is no evidence before me on this motion.

[43] The Ontario Court of Appeal in *Wyatt v. Mirabelli*, 2025 ONCA 178, at para. 20, recently outlined three principles governing Rule 21.01(1)(a):

> (i) the test is whether determining the issue is plain and obvious; (ii) the pleaded facts in the statement of claim are assumed to be true unless patently ridiculous or manifestly incapable of proof; and (iii) the statement of claim should be read as generously as possible."

[44] The Court of Appeal went on to state "if the claim has some chance of success, it should be permitted to proceed."

[45] The Courts have discouraged the use of Rule 21.01(1)(a) to determine limitation issues, as the issue of discoverability is often factual and the rule is intended for legal issues only. However, Rule 21.01(1)(a) can be used in very narrow circumstances to determine limitation issues when pleadings are closed and the facts relevant to the limitation issue (i.e. the date a claim was discovered) are undisputed: see *Wyatt,* at para. 21.

[46] In this instance, the pleadings are closed and the date on which the Plaintiffs discovered their claim is not in dispute. The parties agree that, based on the pleadings, the Plaintiffs would have had the requisite knowledge of the material facts to support their claim by February 1975 at the latest.

[47] The issue on these motions, as set out above, are legal questions that can properly be decided pursuant to a Rule 21.01(1)(a).

Applicability of Limitation Periods to Treaty Claims and Claims by Aboriginal Peoples

[48] Prior to 2002, limitation periods in Ontario were governed by the *Limitations Act,* R.S.O. 1990, c. L. 15 (the "*1990 Act*"). The *1990 Act* contained both general limitation periods (Part II) and those specific to real property (Part I) and trusts (Part III). Part II of the 1990 Act did not provide for a blanket limitation period for all claims not otherwise referenced in the 1990 Act. It provided specific limitation periods for different categories of claims.

[49] When the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B (the "*2002 Act*") was enacted in 2004, it repealed Parts II and III of the *1990 Act*. In doing so, the *2002 Act* provided for a general two-year limitation period for all claims subject to any exceptions found in the *2002 Act*. In addition, Part I was separated out and renamed the *Real Property Limitations Act*, R.S.O. 1990, c. L. 15 (the "*RLPA*") which deals exclusively with real property limitations.

[50] The *2002 Act* provides that "proceedings based on existing Aboriginal and treaty rights recognized and affirmed by s. 35 of the *Constitution Act, 1982* and equitable claims by Aboriginal peoples against the Crown" are governed by "the law that would have been in force with respect to limitation of actions if this Act had not been passed": see ss. 2(1)(e), 2(1)(f), and 2(2)). Since it was the *1990 Act* that was in force prior to the enactment of the *2002 Act*, it is the *1990 Act* that applies to these types of claims.

[51] In *Ontario (Attorney General) v. Restoule*, 2024 SCC 27, 494 D.L.R. (4th) 383 ("*Restoule*"), the Supreme Court of Canada considered whether the *1990 Act* barred the claim of the plaintiff First Nation. The plaintiffs had commenced a claim alleging that a treaty had been breached, as the annuity payments payable pursuant to the treaty had not been increased as required.

[52] One of the defences advanced at trial was that the claim was statute barred by the *1990 Act*, as the plaintiffs' claim fell within one or more of the defined categories in the *1990 Act*. More specifically, that the plaintiff's claim was an action "upon a… specialty", an action "of account" or an action "for contract…without specialty".

[53] The trial judge, in rejecting the position of the defendants, held that "treaties are not contracts, whether with or without specialty. Rather, treaties are *sui generis* agreements that form part of the constitutional fabric of this country": see *Restoule v. Canada (Attorney General),* 2018 ONSC 7701, 431 D.L.R. (4th) 32, at para. 200.

[54] The Ontario Court of Appeal in *Restoule v. Canada (Attorney General),* 2021 ONCA 779, 466 D.L.R. (4th) 1, at para. 662, in upholding the decision of the trial judge on this issue, concluded as follows:

> The legislature chose not to reference Aboriginal treaties in the 1990 *Limitations Act*, although it did so in the 2002 *Limitations Act*. This is strongly suggestive of an intention not to impose a limitation period for claims based on a breach of an Aboriginal treaty. Ontario's arguments that the legislature intended to cover Aboriginal treaty claims under the terms "contract" "specialty" or "action of account" are unpersuasive. As discussed above, these claims are distinct in law from one based on a breach of an Aboriginal treaty.

[55] The Supreme Court of Canada upheld the decisions of the trial judge and the Court of Appeal in *Restoule,* finding that the plaintiffs' claims were not statute barred pursuant to the *1990 Act*. In doing so, the Supreme Court of Canada made the following finding, at paras. 208–217:

a. The *1990 Act* applies only to a closed list of enumerated causes of action and therefore, the legislation cannot be interpreted so broadly as to capture all claims not specifically enumerated in the *1990 Act* as an acceptance of this would read into the *1990 Act* a catch all or basket clause where one was not provided.

b. Since the legislature expressly dealt with aboriginal and treaty rights in the *2002 Act* the legislature understood that Aboriginal treaty claims are distinct from other causes of action and when the legislature intended to deal with aboriginal treaty claims it did so explicitly. It did not explicitly provide a limitation period for aboriginal treaty claims in the *1990 Act* and therefore, did not intend for one to apply.

c. It agreed with the findings of the trial judge that treaties are *sui generis* agreements and engage issues of public law, rather than private law.

[56] Based on *Restoule,* the *1990 Act* does not expressly impose a limitation period for breach of treaty rights.

[57] In *Chippewas of Saugeen First Nation v. Town of South Bruce Peninsula et al.*, 2023 ONSC 2056, the Plaintiff sought various declarations, including that a beach owned by the Defendant Town was unsurrendered reserve land and that the First Nation was entitled to exclusive possession of the beach. One of the defences advanced was that the First Nation's claim was statute barred. The Defendants asserted that the action was for the recovery of land and, therefore, the governing limitation period was found in ss. 4 and 15 of the *1990 Act,* being ten years from the discovery of the claim. It is important to note that these are the same provisions now found in ss. 4 and 15 of the *RPLA.*

[58] Vella J. in *Chippewas of Saugeen*, at paras. 623 and 624, provides the following statements about reserve lands:

> Reserve land is not the same land interest as is privately or Crown owned land. It arises from a Treaty in which the First Nation surrendered vast traditional territory in exchange for protection from encroachment by settlers onto the unsurrendered land which became its reserve territories.

> Reserve land has a *sui generis* nature as well, owing to the fact that legal title to it remains vested in the federal Crown, with a right of exclusive possession reserved to the First Nation under the terms of the Treaty. The jurisprudence has characterized the First Nation's interest in reserve land as a quasi-proprietary interest that reflects "an obligation that arose out of treaties between the Crown and Indigenous Peoples". [Citations omitted].

[59] Vella J. concluded in *Chippewas of Saugeen*, at para. 608, that s. 4 of the *1990 Act* did not apply to a claim for the return of reserve land.

[60] Based on the submissions made by the parties on the motions, they are in agreement with the principles that flow from the decisions in *Restoule* and *Chippewas of Saugeen* with respect to the applicability of limitation periods to claims relating to treaty rights and/or the return of reserve land.

[61] However, they disagree as to whether those principles apply to the claims advanced by the Plaintiffs in this matter.

Position of the Defendants

[62] The position of the Defendants is largely based on the assertion that the Lands were public lands, not reserve lands, at the time they were sold to Kenora in 1959. The Defendants state that, if the Lands were public lands, then the position of the Nations cannot be accepted, as their claim cannot be characterized as one that has a constitutional or *sui generis* nature to which limitation periods do not apply further to the decisions in *Restoule* and *Chippewas of Saugeen.*

[63] Therefore, the *RLPA* applies to the Nations' claims. More specifically, they assert that the Nations' claim is "an action to recover land" and, therefore, pursuant to s. 4 of the *RLPA* their claim had to have been commenced ten years from the discovery of the claim.

[64] It is their position that the Nations' claim was discovered in February 1975 (at the latest) when the Department rejected their claim to the Lands. Therefore, the Nations' claim is statute barred, as the claim was not commenced before February 1985.

Position of the Nations

[65] The position of the Nations is largely based on the assertion that the Lands were reserve lands or were promised pursuant to a treaty. If the position of the Nations is accepted, their claim is one that is constitutional or *sui generis* in nature and their claim is not statute barred as the limitation periods found in the *1990 Act* and the *RLPA* do not apply further to the decisions in *Restoule* and *Chippewas of Saugeen.* In the alternative, they assert that their claim is an equitable claim by aboriginal peoples against the Crown and there is no limitation period applicable to their claim.

Analysis and Disposition

[66] For the Defendants to be successful on these motions, it must be plain and obvious further to the facts pled in the Statement of Claim that the Lands were not reserve lands at the time they were sold to Kenora in 1959 and/or that the Nations' claim does not arise further to a treaty right. It is in these instances that the *RLPA* will apply so as to bar the Nations' claim.

[67] If there is question as to whether the Lands were reserve lands in 1959, or whether the Nations' claim arises from a treaty right, I must dismiss the Defendants' motions as it will not be plain and obvious that the limitation period found in the *RLPA* bars the Nations' claim.

[68] The Defendants assert that I can find on these motions that the Lands were not reserve lands in 1959 and/or that the Nations' claim is not based on a treaty right, for the following reasons:

a. the Lands were not promised as part of Treaty 3;

b. Canada took no formal steps to confirm that the Lands were reserve lands (i.e. Order in Council);

c. the sale of the Lands in 1959 was done pursuant to a statutory regime;

d. there are no particulars in the pleading of the coercive conduct or threats that led to the illegal surrender and dispossession of Reserve 38B in 1919;

e. the Nations do not plead in the Statement of Claim that:
   i. the Land was part of Treaty 3;
   ii. the Land was promised pursuant to Treaty 3; and
   iii. the Land was set aside pursuant to Treaty 3;

f. based on the facts pled in the Statement of Claim I cannot conclude that the Lands were reserve lands pursuant to the reserve creation test set out in *Ross River Dena Council Band v. Canada*, 2002 SCC 54, [2002] 2 S.C.R. 816 ("*Ross River*"); and

g. the Nations have not pled that this is a claim under s. 35 of the *Constitution Act.*

[69] Further to the reasons set out below, I find that it is not plain and obvious, further to the facts pled in the Statement of Claim, that the Lands were not reserve lands at the time they were sold to Kenora in 1959 and/or that the Nations' claim does not arise further to a treaty right. Therefore, I cannot find that it is plain and obvious that the *RLPA* bars the Nations' claim. As such, I must dismiss the Defendants' motions.

[70] Firstly, I agree that the Lands were not expressly promised as part of Treaty 3 and that the Lands were not part of Treaty 3. However, Treaty 3 provided for a certain amount of land to be set aside for the Nations as reserve land. When the Nations were dispossessed of Reserve 38B in 1919, the Nations were no longer in receipt of all of the lands they were entitled to under Treaty 3. The

Nations allege in the Statement of Claim that the Lands were given to them to make up for/mitigate the loss of Reserve 38B which was surrendered illegally as it did not comply with the provisions of the *Indian Act* at the time. If that is accepted to be true, which I must do on this motion, then the claim of the Nations could be viewed as arising from the Nations' treaty rights and, pursuant to the decision in *Chippewas of Saugeen*, the *RLPA* cannot not apply.

[71] Secondly, I agree with the Defendants that the position of the Nations is dependent on the fact that Reserve 38B was illegally surrendered in 1919. They cannot assert that the claim is based on an existing treaty right, nor that the Lands were promised pursuant to treaty, without asserting that the Lands were promised further to the illegal surrender of Reserve 38B. However, I disagree with the Defendants that sufficient facts have not been pled in the Statement of Claim to set out the circumstances surrounding the illegal surrender of Reserve 38B in 1919. The Nations have pled that Reserve 38B was surrendered due to threats of sanctions at para. 50 of the Statement of Claim. At para. 53, they reference a letter that specifically discusses the threats and the individuals who allegedly made the threats. They go on to state, at para. 52 of the Statement of Claim, that the surrender of Reserve 38B "did not comply with the *Indian Act* provisions in force at the time". As such, I cannot accept the position of the Defendants.

[72] Lastly, whether the Lands are reserve lands will require a determination of whether the facts of this case meet the requirements for the creation of a reserve, as set out by the Supreme Court of Canada in para. 67 of the decision in *Ross River*. The requirements are as follows:

a. an intention by the Crown to create a reserve with that intention being possessed by Crown agents holding sufficient authority to bind the Crown;

b. taking steps to set apart the lands for the benefit of Indians;

c. that the band accepted the setting apart of the Lands; and

d. that the band started to make use of the lands so set apart.

[73] The Nations have pled facts in the Statement of Claim in support of each of these four requirements. With respect to the each of the four requirements, I will set out some (but not all) of the specific paragraphs where the material facts are pled in support of the particular requirement.

[74] With respect to requirement (a), the Nations have pled material facts in support of same at paragraphs 9, 73, 74, 75, 76, 77, 78, 79, 81, 150, 151, 152, 154, and 169 of the Statement of Claim.

[75] With respect to requirement (b), the Nations have pled material facts in support of same at paragraphs 72, 73, 75, 79, 149, 151, 157, 165(a), 168, and 169 of the Statement of Claim.

[76] With respect to requirement (c), the Nations have pled material facts in support of same at paragraphs 80, 81, and 153 of the Statement of Claim.

[77] With respect to requirement (d), the Nations have pled material facts in support of same at paragraphs 82, 96, 97, 98, 154, and 170 of the Statement of Claim.

[78] When giving the Statement of Claim a generous reading, and assuming the above facts to be true, I cannot conclude that the Lands are not reserve lands.

[79] The Defendants assert specifically that the Nations have not pled sufficient facts, as they have not pled the name of the person that had authority to bind the Crown in creating the alleged reserve. I find that this is not something that is required in a pleading. A particular about the name of the individual that made the alleged representations to the Nations about the Lands is something

that can be discovered during the documentary production phase, or during examinations for discovery. It is certainly not fatal to their claim at this early stage of the proceeding.

Other Relief Sought on the Motions

[80] While the Moving Parties made submissions regarding whether I have the authority to dismiss or strike the declaratory relief sought by the Nations if the motions are granted, on the basis that they are moot or of no practical purpose I do not need to determine that issue, as I have not dismissed the Nations' claim.

[81] While the parties did make submissions on whether leave to amend should be granted to the Nations to rectify any deficiencies in their pleadings, no specific amendments were discussed by the parties at the hearing of the motions. As such, I do not make any comments on suggested amendments or the right of the Nations to make those amendments to the Statement of Claim. If the Nations wish to make amendments to the Statement of Claim to address the position of the Defendants, they can do so in the normal course pursuant to the *Rules*.

Costs

[82] If the parties cannot agree as to the costs of these motions, they can deliver written cost submissions of not more than five pages plus a Costs Outline as follows:

a. the Nations within twenty days of the date of this decision;
b. the Defendants, within ten days of receipt of the Nations' submissions; and
c. reply submissions by the Nations, if any, within five days of receipt of the Defendants' submissions with same being limited to two pages.

"original signed by"
The Hon. Madam Justice R.A. Lepere

Released: July 14, 2025

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SUPERIOR COURT OF JUSTICE

B E T W E E N:

NIISAACHEWAN ANISHINAABE NATION, ANISHINABE OF WAUZHUSHK ONIGUM and WASHAGAMIS BAY

Plaintiffs

- and –

THE ATTORNEY GENERAL OF CANADA and THE CORPORATION OF THE CITY OF KENORA

Defendants

DECISION ON MOTION

Lepere J.

Released: July 14, 2025