

**THE KING'S BENCH  
Winnipeg Centre**

BETWEEN:

O-Pipon-Na-Piwin Cree Nation, Community Association of South Indian Lake Inc.,  
and 2936527 Manitoba Ltd.

Plaintiffs

and

Manitoba Hydro-Electric Board

Defendant

---

**STATEMENT OF CLAIM**

---

**FILED MAY 19 2023**

Bruce McIvor & Melissa Rumbles, counsel for the Plaintiffs

First Peoples Law LLP

6<sup>th</sup> Floor, 73 Water Street, Vancouver, BC V6B 1A1

Telephone: 604 688 4272

*(Name, address, and telephone number of party filing)*

**THE KING'S BENCH  
Winnipeg Centre**

BETWEEN:

O-Pipon-Na-Piwin Cree Nation, Community Association of South Indian Lake Inc.,  
and 2936527 Manitoba Ltd.

Plaintiffs

and

Manitoba Hydro-Electric Board

Defendant

**STATEMENT OF CLAIM**

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a Manitoba lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *King's Bench Rules*, serve it on the plaintiffs' lawyer or where the plaintiffs do not have a lawyer, serve it on the plaintiffs, and file it in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Manitoba.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGEMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

**MAY 19 2023**

\_\_\_\_\_  
Date

Issued \_\_\_\_\_

**V. SCHAEFFER  
DEPUTY REGISTRAR  
COURT OF KING'S BENCH  
WINNIPEG, MANITOBA**

To: Manitoba Hydro-Electric Board  
360 Portage Avenue  
Winnipeg, MB R3C 0G8

## CLAIM

1. The Plaintiffs seek the following relief:
  - (a) an order that the Defendant compensate the Plaintiffs for the unreasonable interference with the Plaintiffs' use and enjoyment of their lands and Treaty rights caused by the Defendant's operation of the Churchill River Diversion (the "CRD");
  - (b) an order that the Defendant remedy the said nuisance by restoring the ecological integrity of Southern Indian Lake;
  - (c) an interim injunction restraining the Defendant, its servants, agents, or otherwise, from continuing the said nuisance, or from operating the CRD in such a manner as to unreasonably interfere with the Plaintiffs' use and enjoyment of their lands and Treaty rights;
  - (d) a permanent injunction restraining the Defendant, its servants, agents, or otherwise, from continuing the said nuisance, or from operating the CRD in such a manner as to unreasonably interfere with the Plaintiffs' use and enjoyment of their lands and Treaty rights;
  - (e) costs of this action; and
  - (f) such other relief as counsel may advise and this Honourable Court may allow.

## OVERVIEW

2. The Plaintiffs bring this action to protect their lands and waters, resources, and way of life from the ongoing impacts of the CRD.
3. Since long before the assertion of Crown sovereignty, the Plaintiffs have used the lands and waters in their territory to fish, hunt, trap, and gather. The Plaintiffs' dependence on these lands and waters – which centre on Southern Indian Lake – has shaped their unique identity and way of life, including their economy, culture, and spirituality.

4. The CRD is an infrastructure project that diverts water from the Churchill River into the Nelson River to flow through hydroelectric generating stations on the Nelson River.
5. The CRD has three main components:
  - (a) the Missi Falls Control Structure ("**Missi Falls**"), which restricts water flow into the lower Churchill River and creates an impoundment on Southern Indian Lake;
  - (b) the South Bay Diversion Channel (the "**Diversion Channel**"), which is a 9.3 km-long channel that diverts water from Southern Indian Lake into the Rat River–Burntwood River–Nelson River system; and
  - (c) the Notigi Control Structure ("**Notigi**"), which regulates water released through the Diversion Channel into the Nelson River via the Rat and Burntwood Rivers.
6. The Defendant's operation of the CRD has significantly altered the lands and waters of Southern Indian Lake and had devastating impacts on the Plaintiffs' way of life.

## THE PARTIES

7. O-Pipon-Na-Piwin Cree Nation ("**OPCN**") is a First Nation in Manitoba. OPCN's reserve, O-Pipon-Na-Piwin Cree Nation 1 ("**OPCN 1**"), is located within the community of South Indian Lake on the shore of Southern Indian Lake.
8. OPCN is a "band" as defined in the *Indian Act*, R.S.C. 1985, c. I-5 (the "**Indian Act**"), and an "aboriginal people" within the meaning of section 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11 (the "**Constitution Act, 1982**").
9. Community Association of South Indian Lake Inc. ("**CASIL**") is non-profit corporation that was incorporated in 1989 to enforce the rights of South Indian Lake residents.

10. 2936527 Manitoba Ltd., also known as the South Indian Lake Fisherman's Association ("SILFA"), is a corporation representing South Indian Lake fishermen.
11. CASIL and SILFA were created to enforce the rights of South Indian Lake residents and fishermen before OPCN was recognized by Canada as a First Nation.
12. Manitoba Hydro-Electric Board ("**Manitoba Hydro**") is a provincial Crown corporation governed by the *Manitoba Hydro Act*, C.C.S.M. c. H190. Manitoba Hydro generates and distributes electricity and natural gas in Manitoba and sells electricity to additional markets in Canada and the United States.

## **FACTS**

### **Southern Indian Lake**

13. Southern Indian Lake is a large freshwater lake in Northern Manitoba. It has a complex shoreline stretching approximately 3,800 km with many islands and peninsulas.
14. Ancestors of the Plaintiffs have lived on Southern Indian Lake for thousands of years.
15. Members of the Plaintiffs have always relied on the lands and waters in and around Southern Indian Lake to maintain their way of life and to carry out traditional, cultural, and economic pursuits, including fishing, hunting, harvesting, and gardening.
16. Prior to the CRD, members of the Plaintiffs lived on the western shore of Southern Indian Lake. The community was a thriving self-sufficient economy, supported primarily by the Lake Whitefish fishery.
17. The CRD raised the average water level of Southern Indian Lake by approximately 10 feet, flooding the surrounding lands.
18. As a result, members of the Plaintiffs were forced to relocate to the eastern side of Southern Indian Lake.

**Treaty 5 and the Plaintiffs' Treaty Rights**

19. In 1908, Nisichawayasihk Cree Nation (then known as Nelson House Indian Band) adhered to Treaty 5 with the Crown in right of Canada.
20. Treaty 5 is a "treaty" within the meaning of section 35 of the *Constitution Act, 1982*.
21. Other signatories and adherents to Treaty 5 include Norway House Cree Nation and Pimicikamāk Cree Nation.
22. Treaty 5 guarantees the Indigenous beneficiaries the right to maintain a traditional lifestyle in their territory including the right to hunt, fish, trap, and gather.
23. In 2005, OPCN was constituted as a band under the *Indian Act* and members of the Nisichawayasihk Cree Nation (primarily those who lived at South Indian Lake) joined OPCN.
24. Members of the Plaintiffs are descendants of the signatories to Treaty 5 and are beneficiaries of Treaty 5.
25. At the time of Treaty 5, the Plaintiffs' ancestors fished, hunted, trapped, and gathered a wide range of species and natural resources for subsistence and for cultural, social, and spiritual purposes from Southern Indian Lake and the surrounding lands (the "Treaty Rights").

**OPCN's Reserves**

26. After OPCN was constituted as an *Indian Act* band in 2005, OPCN 1 was set aside for the use and benefit of OPCN.
27. Legal title to OPCN 1 is held by Canada, on behalf of OPCN for the use and benefit of the members of OPCN. OPCN is the beneficial owner and lawful occupier of OPCN 1.

**Additional Lands for the Use and Benefit of the Plaintiffs**

28. In 1992, the Government of Manitoba ("Manitoba") promised to transfer 8,500 acres of land to Canada to be set aside for the use and benefit of CASIL (the

**“Compensation Lands”**). The Compensation Lands were to include lands contiguous to and including the community of South Indian Lake.

29. In 2005, when OPCN was constituted as a band under the *Indian Act*, CASIL's entitlement to the Compensation Lands was transferred to OPCN. At this time, OPCN identified lands that were to be transferred to Canada to hold for the use and benefit of OPCN (the **“Identified Lands”**).
30. The process of setting aside the Identified Lands as reserve lands is ongoing.

### **Regulation of the CRD**

31. Manitoba approved the CRD in 1973 with the granting of an interim license under the *Water Power Act* (the **“Interim License”**). The CRD began operating in 1976.
32. The Interim License granted Manitoba Hydro the right to divert water from the Churchill River into the Nelson River, to impound water on the Rat River and Southern Indian Lake, and to construct, operate, and maintain the CRD, subject to certain requirements, including:
  - (a) Manitoba Hydro must regulate the water level of Southern Indian Lake to prevent the water level from receding below 844 feet;
  - (b) if the water level of Southern Indian Lake is above 847 feet, Manitoba Hydro must operate Missi Falls and Notigi to effect the maximum discharge possible until the water level returns to 847 feet; and
  - (c) Manitoba Hydro must not allow the drawdown in water level of Southern Indian Lake during any 12-month period to exceed two feet.
33. In 1986 Manitoba and Manitoba Hydro entered the **“Augmented Flow Program”** whereby:
  - (a) the maximum water level in Southern Indian Lake was increased from 847 feet to 847.5 feet;

- (b) the minimum water level in Southern Indian Lake was decreased from 844 feet to 843 feet; and
  - (c) the drawdown in water level in Southern Indian Lake was increased to 4.5 feet, subject to the requirement that the drawdown be staged over a period of time and in such a manner as to minimize adverse impacts on Southern Indian Lake residents.
- 34. The Augmented Flow Program also required that Manitoba Hydro fully mitigate any effects of the altered water levels and flows.
- 35. The Augmented Flow Program renewed every year until 2021.
- 36. Manitoba issued a Final License to Manitoba Hydro with respect to the CRD on May 12, 2021. The Final License substantially replicates the conditions of the Augmented Flow Program.
- 37. The Final License expires on September 1, 2026.
- 38. Manitoba Hydro has breached the terms of the Interim License, the Augmented Flow Program, and the Final License, including in the following ways:
  - (a) Manitoba Hydro has permitted the water level in Southern Indian Lake to go below 843 feet;
  - (b) Manitoba Hydro has permitted the water level in Southern Indian Lake to go above 847.5 feet;
  - (c) Manitoba Hydro has failed to stage the drawdown in water level in Southern Indian Lake to minimize adverse impacts on Southern Indian Lake residents; and
  - (d) Manitoba Hydro has failed to mitigate the effects of the altered water levels and flows.



**Impacts of the CRD**

39. Manitoba Hydro's operation of the CRD has had devastating impacts on Southern Indian Lake and the Plaintiffs.
40. Operation of the CRD has significantly altered the flow of water in Southern Indian Lake. Prior to the CRD, water entered Southern Indian Lake at the southern end of the lake and travelled northeast to the outflow at Missi Falls. With the CRD, the majority of water now flows out of the lake through the Diversion Channel, which is much closer to the inflow point. The result is that the movement of water is largely restricted to the southern half of the lake, and the northern half of the lake is stagnant.
41. Operation of the CRD has also significantly altered the water level on Southern Indian Lake. The fluctuating water level has eroded the shoreline, introducing additional organic matter into the lake and increasing turbidity, and littering the shore with debris. In many places, the high water level has flooded the low-lying land so the shoreline is now composed of unstable clay cliffs instead of sandy beaches.
42. In addition, the rise in water level and erosion of the shoreline have caused heavy metals, including mercury, to leach into the water.
43. As a result of these changes to Southern Indian Lake, the shoreline is now almost devoid of the once-teeming wildlife and fish populations.
44. Significantly for the Plaintiffs, these changes to Southern Indian Lake have decimated the Lake Whitefish population and the quality of the remaining fish has been severely undermined.
45. The shoreline of Southern Indian Lake is now clogged with debris. This debris makes it impossible for members of the Plaintiffs to dock at the shoreline to practice traditional activities such as hunting and gathering.

46. In addition, this debris gets washed into Southern Indian Lake and poses a hazard to individuals travelling and fishing on the lake. Large floating trees have destroyed boats and nets.
47. The islands on Southern Indian Lake have eroded to the point that many of them have disappeared. These islands were previously used by the members of the Plaintiffs for navigation when travelling on the lake, for safe harbour during storms, and for traditional activities such as berry picking and moose hunting.
48. In addition, heavy erosion and flooding of the shoreline and islands have destroyed significant archaeological sites, including gravesites, of the Plaintiffs.
49. During the winter, as a direct result of the operation of the CRD, the water level on Southern Indian Lake fluctuates and prevents the lake from freezing solid. This unstable ice makes it extremely dangerous for members of the Plaintiffs to travel on the lake. Members have fallen through the ice, lost equipment, and at least one member has drowned due to these hazardous conditions.

#### **Manitoba Hydro's Operation of the CRD Constitutes a Nuisance**

50. Manitoba Hydro operated and continues to operate the CRD in a manner that unreasonably interferes with OPCN's use and enjoyment of OPCN 1 and OPCN's ability to exploit fisheries resources adjacent to OPCN 1.
51. Manitoba Hydro operated and continues to operate the CRD in a manner that unreasonably interferes with the Plaintiffs' use and enjoyment of the Identified Lands and the Plaintiffs' ability to exploit fisheries resources adjacent to the Identified Lands.
52. Manitoba Hydro operated and continues to operate the CRD in a manner that unreasonably interferes with the Plaintiffs' Treaty Rights, including their right to fish.

#### **Agreements between the Plaintiffs and Manitoba Hydro**

53. In 1984, Manitoba Hydro and SILFA (previously known as the South Indian Lake Commercial Fisherman's Association) entered into an agreement (the "**1984 SILFA Agreement**"), whereby Manitoba Hydro agreed to pay SILFA \$2,525,000 as

- compensation for the impacts of the CRD on commercial fishing on Southern Indian Lake, in exchange for certain releases on behalf of the members of SILFA.
54. In 1992, Manitoba, Manitoba Hydro, and CASIL entered into an agreement (the “**1992 CASIL Agreement**”), whereby Manitoba Hydro agreed to pay CASIL \$18,000,000 as compensation for the impacts of the CRD on members of CASIL, in exchange for certain releases on behalf of members of CASIL.
55. CASIL did not release claims for damages arising from the CRD that:
- (a) were not reasonably foreseeable on August 29, 1991; or
  - (b) are attributable to water levels on Southern Indian Lake above 848 feet.
56. In 1999, Manitoba Hydro, Manitoba, and SILFA entered into an agreement (the “**1999 SILFA Agreement**”), whereby Manitoba Hydro agreed to pay SILFA \$1,000,000 as compensation for the impacts of the CRD on commercial fishing on and around Southern Indian Lake, in exchange for certain releases on behalf of members of SILFA.
57. SILFA did not release claims for damages arising from the CRD that were attributable to:
- (a) water levels on Southern Indian Lake above 848 feet or below 843 feet;
  - (b) variation in water level greater than 3 feet in any direction during September and October; and
  - (c) effects of the CRD that were not foreseeable or contemplated at the time of the 1999 SILFA Agreement.
58. The 1984 SILFA Agreement, the 1992 CASIL Agreement, and the 1999 SILFA Agreement are referred to collectively as the “**Settlement Agreements**”.
59. Manitoba Hydro's operation of the CRD has caused damages to the Plaintiffs that are not released by the Settlement Agreements, including:

(a) damages attributable to water levels above 848 feet and below 843 feet;  
and

(b) damages caused by the CRD that were not foreseeable or contemplated at  
the time of the Settlement Agreements.

60. The Plaintiffs plead and rely on the *Constitution Act, 1982* and the *Indian Act*.

61. The Plaintiffs therefore seek the relief described in paragraph 1 herein.

MAY 19 2023

\_\_\_\_\_  
Date of issue

Bruce McIvor & Melissa Rumbles, counsel  
for the Plaintiffs

\_\_\_\_\_  
First Peoples Law LLP

\_\_\_\_\_  
6<sup>th</sup> Floor, 73 Water Street, Vancouver, BC  
V6B 1A1

\_\_\_\_\_  
Telephone: 604 688 4272

\_\_\_\_\_  
*(Name, address, and telephone number of party filing)*