COMMUNITY UPDATE

Peguis First Nation v. Andrew Marquess

Date: January 27, 2025

To: Peguis First Nation Community Members

From: Peguis Chief & Council

RE: *Peguis First Nation v. Andrew Marquess* (Court File No. CI24-01-48655)

The purpose of this notice is to update members on the status of the litigation filed against Andrew Marquess, and his related companies 6748831 Manitoba Inc., 10065951 Manitoba Ltd. and 10103553 Manitoba Ltd. The Statement of Claim was filed in the Manitoba King's Bench on September 27, 2024, and alleges that Mr. Marquess breached his fiduciary duties to Peguis, including by using his role at Peguis to maximize his own profit, without regard to the best interests of the nation and its members.

As of January 20, 2025, both Mr. Marquess, 6748831 Manitoba Inc. and 10065951 Manitoba Ltd. (who are represented by one lawyer) and 10103553 Manitoba Ltd. (which is separately represented) have brought motions to strike Peguis' claim.

In bringing these motions, the Defendants are asking the Court to find that Peguis should not be allowed to pursue the litigation and that Peguis' claim should be struck without any consideration of the merits. In support of the motion to strike, Mr. Marquess has provided an affidavit from former Chief Hudson. 10103553 Manitoba Ltd. has indicated that it intends to provide an affidavit from Maureen Diamond, Mr. Marquess' wife.

Peguis intends to oppose the motions. Peguis wishes to return focus to the important issues raised in the lawsuit and to have its claims resolved after a fair trial on the merits.

For further information, please find enclosed the following court records, all of which are publicly available from the Court Registry:

1. Statement of Claim filed on September 27, 2024
2. Notice of Motion filed on November 21, 2024
3. Affidavit of Glenn Hudson filed on December 23, 2024
4. Motion Brief Filed January 8, 2025

File No. CI24-01-48655

THE KING'S BENCH

Winnipeg Centre

BETWEEN:

PEGUIS FIRST NATION

Plaintiff

AND:

ANDREW MARQUESS, 6748831 MANITOBA INC., 10065951 MANITOBA LTD., 10103553 MANITOBA LTD. and ABC CORPORATION

Defendants

STATEMENT OF CLAIM

FILED
SEPT 27 2024

Cascadia Legal LLP
John W. Gailus and Madeline Adam
201-736 Broughton St, Victoria, BC V8W 1E1
250-419-8270

File No. _____

THE KING'S BENCH

Winnipeg Centre

BETWEEN:

PEGUIS FIRST NATION

Plaintiff

AND:

ANDREW MARQUESS, 6748831 MANITOBA INC., 10065951 MANITOBA LTD., 10103553 MANITOBA LTD. and ABC CORPORATION

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. 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 plaintiff's lawyer or where the plaintiff does not have a lawyer, serve it on the plaintiff, 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.

(Where the claim made is for a stated amount of money only, include the following:)

IF YOU PAY THE PLAINTIFF'S CLAIM, and $750.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and $750.00 for costs and have the costs assessed by the court.

September 27 2024
Date

Issued _____
Deputy Registrar

A. FRIESEN
DEPUTY REGISTRAR
COURT OF KING'S BENCH
FOR MANITOBA

File No. _____

To: ANDREW MARQUESS
1383 B Spruce Street
Winnipeg, MB R3E 2V8

6748831 MANITOBA INC.
1383 B Spruce Street
Winnipeg, MB R3E 2V8

10065951 MANITOBA LTD.
1383 B Spruce Street
Winnipeg, MB R3E 2V8

10103553 MANITOBA LTD.
1700-242 Hargrave Street
Winnipeg, MB R3C 0V1

ABC CORPORATION
n/a

File No. _____

CLAIM

I. Introduction:

1. The plaintiff claims against the defendants for:

    i. A declaration that the defendant Andrew Marquess, acting personally and through the defendant companies, breached his fiduciary duties to the plaintiff;

    ii. Equitable compensation for breach of fiduciary duty;

    iii. A tracing of all sums, profits, property, or other benefits that were received by the defendant Andrew Marquess, or the defendant companies, or any other person or entity on behalf of the defendant Andrew Marquess, or the defendant companies, as a result of the breaches of fiduciary duty;

    iv. Disgorgement of any profits retained by the defendants, and each of them, as a result of the breaches of fiduciary duty;

    v. A declaration that the defendants hold any sums, profits, property or other benefits improperly received by them directly or indirectly from the plaintiff, as a result of the breaches of fiduciary duty, in a constructive or resulting trust for the plaintiff;

    vi. Aggravated damages;

    vii. Punitive damages;

    viii. Pre and post-judgment interest;

    ix. Costs; and

    x. Such further and other relief as the Honourable Court deems just.

2. The plaintiff Peguis First Nation is a "Band", as that term is defined in the *Indian Act* ("**Peguis**").

3. Peguis has approximately 10,245 members of Ojibway and Cree descent and its main community and reserve is located 196 kilometres north of Winnipeg, Manitoba. Through its elected Chief and Council, Peguis holds funds, and operates and administers programs, for the benefit of its members.

4. The defendant Andrew Marquess is a developer in Winnipeg, Manitoba, with an address of 1383-B Spruce Street, Winnipeg, MB, and is not a member of Peguis.

5. The 6748831 Manitoba Inc. is a company, duly incorporated pursuant to the laws of Manitoba, with an address of 1383-B Spruce Street, Winnipeg, MB. At all material times, Andrew Marquess was the sole director and officer of 6748831 Manitoba Inc. As the directing mind of 6748831 Manitoba Inc., Andrew Marquess completely controlled and directed the operation and management of the company. Andrew Marquess used 6748831 Manitoba Inc., *inter alia*, for the purpose of entering into consulting agreements with Peguis and its related entities, and 6748831 Manitoba Inc. is referred to herein as "**Consulting Co**".

6. 10065951 Manitoba Ltd. is a company, duly incorporated pursuant to the laws of Manitoba, with an address of 1383-B Spruce Street, Winnipeg, MB. At all material times, Andrew Marquess was the sole director of 10065951 Manitoba Ltd. As the directing mind of 10065951 Manitoba Ltd., Andrew Marquess completely controlled and directed the operation and management of the company. Andrew Marquess used 10065951 Manitoba Ltd., *inter alia*, for the purpose of entering into development management agreements with Peguis and its related entities, and 10065951 Manitoba Ltd. is referred to herein as "**Management Co**".

7. 10103553 Manitoba Ltd. is a company, duly incorporated pursuant to the laws of Manitoba, with an address of 1700-242 Hargrave Street, Winnipeg, MB. Andrew Marquess' wife, Maureen Diamond, is the sole director and officer of 10103553 Manitoba Ltd. At material times, Andrew Marquess held himself out to Peguis and its related entities, as the operating mind of 10103553 Manitoba Ltd. and controlled and directed the operation and management of the company. Andrew Marquess used 10103553 Manitoba Ltd., *inter alia*, for the purpose of entering into lending agreements with Peguis and its related entities, and 10103553 Manitoba Ltd. is referred to herein as "**Lending Co**".

8. Peguis has named the defendant ABC Corporation as Peguis is not yet aware of all the corporations that Marquess incorporated and acted through in his dealings with Peguis, and Peguis-related entities.

9. A reference herein to "**Marquess**" includes a reference to the Defendant Andrew Marquess acting through one or more of the defendant companies, as applicable.

II. Marquess owed fiduciary duties to Peguis:

10. In or around late 2020, Peguis was dealing with the financial consequences of high-interest loans, as well as housing shortages and other economic issues caused by the repeated flooding of its reserve lands.

11. In or around late 2020, Marquess represented and held himself out to Peguis as an experienced developer and as possessing the necessary skill and expertise to manage Peguis' finances, operations and investments, with a view to resolving Peguis' debt and housing issues.

12. Peguis relied on Marquess' representations and, at material times, entrusted Marquess with various roles and responsibilities. At material times, beginning in or around late 2020 and up to the date of this Statement of Claim, Marquess' scope of responsibilities included, *inter alia*:

    i. developing a debt repayment plan and conducting a comprehensive review of Peguis' assets and operations;

    ii. using Peguis' Treaty Land Entitlement ("**TLE**") funds to purchase real estate assets for Peguis in order to diversify Peguis' economic holdings; and

    iii. providing consulting services related to housing shortages caused by flooding.

13. At material times, and in carrying out his roles and responsibilities as set out above, Marquess undertook to act in the best interests of Peguis. Marquess had the ability to unilaterally exercise his power and discretion in a manner that affected Peguis' legal, economic and practical interests. Peguis was vulnerable to and at the mercy of Marquess' exercises of discretion and power.

14. Marquess owed a fiduciary duty to Peguis and was required to act with care, loyalty and good faith in his dealings with Peguis, and Peguis-related entities. As Marquess was required to act in the best interests of Peguis, he was not permitted to place his interests before the interests of Peguis and was not permitted to profit from his role as a fiduciary, except as expressly permitted.

III. Marquess breached his fiduciary duties to Peguis:

15. At material times between in or around late 2020 and the date of this Statement of Claim, Marquess breached his fiduciary duties to Peguis, including by acting contrary to the 'no conflict' and 'no profit' rules, engaging in self-dealing without authorization, by acting without regard to the best interests of Peguis, and by failing to act in accordance with the standard of care required of him as a fiduciary in performance of his roles and responsibilities.

16. The full particulars of Marquess' breaches of fiduciary duty are unknown to Peguis at this time and will be provided as they are discovered. Insofar as Marquess' breaches of fiduciary duty are known to Peguis, those breaches are particularized herein.

i. The Peguis First Nation Real Estate Trust:

17. Marquess breached his fiduciary duties to Peguis by directing, influencing or causing Peguis, and Peguis-related entities, to enter into transactions with Marquess, and his related companies for his own profit, benefit and advantage, and to the detriment of the Peguis and its members, including, in particular, with respect to the operations of the Peguis First Nation Real Estate Trust ("**PFNRET**").

18. On or about March 17, 2021, Peguis passed a Band Council Resolution placing Marquess, acting through Consulting Co, in charge of selecting real estate investments to be purchased by Peguis, up to the aggregate sum of $20 million, using TLE funds, which funds are held in Trust for the benefit of Peguis and its members pursuant to a Treaty Entitlement Agreement with Manitoba and Canada (the "**TEA**").

19. In or around July of 2021, Marquess directed, influenced or caused Peguis to settle PFNRET for the purposes of acquiring and holding its real estate investments. Peguis is the beneficiary of PFNRET, and PFNRET is supposed to operate solely for the benefit of the Peguis and its members. However, since in or around July of 2021, Marquess has breached his fiduciary duties to Peguis by using his influence, power and discretion to control the management and operation of PFNRET to his own profit, benefit and advantage, and without regard to the best interest of Peguis and its members, including as set out herein.

The Meadows Property

20. Marquess breached his fiduciary duties to Peguis by using his influence, power and discretion to cause Peguis, PFNRET, and its related entities, to enter into a series of contracts with Marquess, and the defendant companies, with respect to the property located at 2511 McGregor Farm Road, R.M. East Saint Paul, MB (the "**Meadows Property**"). These contracts, as particularized herein, were not in the best interests of Peguis and resulted in significant improper profit to Marquess, and the defendant companies.

21. Beginning on or about March 25, 2021, Marquess directed, influenced or caused Peguis, through its related entities, to purchase the Meadows Property for development, using $10 million in TLE funds towards the total purchase price of $12,265,500.00. Marquess directed, influenced or caused Peguis to purchase the Meadows Property because it was a property that Marquess was personally interested

in developing, and not because doing so was in the best interests of Peguis.

22. On or about August 6, 2021, Marquess directed, influenced or caused PFNRET, and its related numbered company 10089844 Manitoba Ltd. ("**Purchase Co**", which holds legal title to the Meadows Property), to enter into a Development Management Agreement with Management Co. Under the Development Management Agreement:

    i. Marquess was placed in total control of the development of the Meadows Property;

    ii. Marquess was placed in total control of accounting and the management of finances with respect to the development of the Meadows Property; and

    iii. Purchase Co was to pay Marquess fees equal to 5% of all site servicing costs, 5% of the construction costs of buildings, 2% of the sales or leases of serviced lots, and site plan services at an hourly rate of $495, as well as accounting and reporting fees of $15,000 per quarter.

23. In addition, the Development Management Agreement contains a clause that purports to prevent Purchase Co from terminating the Development Management Agreement with Marquess and Management Co until all loans to Lending Co are repaid in full. The clause states that:

    ...Any attempt by the Owner to terminate this Agreement or to prevent the Manager from performing the Services shall be a default under the Mortgages, entitling 10103553 Manitoba Inc. as lender and mortgagee to take all remedies available to 101035533 Manitoba Inc. [sic] *under the Mortgages and at law.*

    (the "**Termination Clause**").

24. At the time that the parties entered into the Development Management Agreement, Lending Co had not yet made any loans to PFNRET, Purchase Co, or its related entities, and the final terms of any future mortgages or lending agreements were not known to Peguis, PFNRET, or Purchase Co.

25. The terms of the Development Management Agreement, and, in particular the Termination Clause, are unconscionable, unenforceable and result from a breach of Marquess' fiduciary duties.

26. In directing, influencing or causing PFNRET and Purchase Co to enter into the Development Management Agreement with Management Co, Marquess acted contrary to the 'no profit' and 'no conflict' rules and failed to protect the interests of Peguis, and its related entities, including by failing to take steps to determine whether a more favourable arrangement could be reached with a third-party.

27. On or about August 16, 2021, Marquess directed, influenced or caused PFNRET, and Purchase Co, to enter into a Credit Agreement with Lending Co. Under the Credit Agreement, Lending Co lent Purchase Co, with PFNRET acting as guarantor, $5.5 million at an interest rate of 5.75% compounded monthly (which interest rate was later increased to 9.18%).

28. The Credit Agreement is secured by a General Security Agreement, Limited Recourse Guarantee and Pledge Agreement, Assignment of Material Contracts, Environmental Indemnity Agreement and Debenture (as described below), all in favour of Lending Co.

29. Also on or about August 16, 2021, Marquess directed, influenced or caused PFNRET, and Purchase Co, to enter into the Debenture Agreement with Lending Co, which gives Lending Co a mortgage over the Meadows Property, over Purchase Co's related personal property, and a number of different remedies, including the right to seek the sale or foreclosure of the Meadows Property.

30. Notably, the Debenture Agreement purports to record a promise by Purchase Co to pay $20 million, plus interest, on demand to Lending Co. In its later terms, the Debenture Agreement provides that even though the Debenture Agreement contains a promise to pay $20 million to Lending Co, Purchase Co is only liable to Lending Co for the funds actually provided pursuant to the Credit Agreement (namely, the $5.5 million).

31. On or about August 20, 2021, a $20 million mortgage was registered on title to the Meadows Property in favour of Lending Co, and then subsequently transferred to CWB Maxium Financial Inc. ("**CWB**") for consideration of $1.00.

32. The terms of the agreement between Lending Co and CWB with respect to the transfer of Lending Co's interest in the mortgage are not known to Peguis.

33. At no time did Lending Co, or CWB, lend $20 million to Peguis, Purchase Co, PFNRET, or its related entities. The registration of a $20 million mortgage on title to the Meadows Property is false and misleading, and designed or intended to increase the financial dependence of the Peguis entities on Marquess by making it more difficult to secure alternate financing.

34. The terms of the Credit Agreement and Debenture Agreement are unconscionable, and constitute a breach of Marquess' fiduciary duties.

35. In directing, influencing or causing PFNRET and Purchase Co to enter into the Credit Agreement and Debenture Agreement with Lending Co, Marquess acted contrary to the 'no profit' and 'no conflict' rules and failed to protect the interests of Peguis, and its related entities, including by failing to take steps to determine whether a more favourable arrangement could be reached with a third-party.

36. As of the date of this Statement of Claim, Marquess and the defendant companies have accrued, and continue to accrue, significant improper profit as a result of their breaches of fiduciary duty with respect to the Meadows Property. The specific amount of this improper profit is not yet known to Peguis.

***The Wellington Property*:**

37. On or about October 9, 2020, Manitoba provided notice to Peguis, pursuant to the TEA, that the property located at 611/633 Wellington Crescent, Winnipeg, MB (the "**Wellington Property**") was available for purchase by Peguis, for addition to reserve.

38. Beginning in or around November 2021, Marquess directed, influenced or caused Peguis, through its related entities, to purchase the Wellington Property for development. Marquess directed, influenced or caused Peguis to purchase the Wellington Property because it was a property that Marquess was personally interested in developing, and not because it was in the best interests of Peguis.

39. On or about April 29, 2022, Manitoba agreed to sell the Wellington Property to Peguis for $350,000, on the condition that the property be added to reserve, in accordance with the TEA.

40. At material times, following the purchase of the Wellington Property, Marquess breached his fiduciary duties by causing, influencing or directing Peguis, PFNRET, and its related entities to pay Marquess, acting through one or more of the defendant companies, to develop the Wellington Property.

41. Marquess and the defendant companies accrued significant improper profit as a result of their breaches of fiduciary duty with respect to the Wellington Property. The specific amount of the improper profit is not yet known to Peguis.

42. In or around November of 2022, Marquess directed, influenced or caused Peguis, PFNRET, and its related entities, to sell their interest in the Wellington Property to a third-party purchaser, for profit. In doing so, Marquess caused Peguis, and its related entities, to breach the terms of the April 29, 2022 agreement with Manitoba, and the terms and purposes of TEA, both of which required that the Wellington Property be added to reserve. In doing so, Marquess breached his fiduciary duties to Peguis and, in particular, failed to act in accordance with the standard of care required of him as a fiduciary.

IV. Conclusion

43. At material times, Marquess breached his fiduciary duties to Peguis and failed to competently carry out the roles and responsibilities entrusted to him by Peguis, including as set out at para. 12 of this Statement of Claim. Marquess has consistently misused his power and discretion as a fiduciary to enrich himself to the detriment of Peguis.

44. Marquess and the defendant companies have made significant improper profit from these breaches of fiduciary duty. By way of example, between in or around April 2021 and in or around April 2023, prior to the election of current Chief and Council, payments of at least $4.4 million were made to Marquess and Consulting Co through Peguis and PFNRET.

45. Peguis is not yet aware of the full scope of the payments and improper profits to Marquess, including payments and profits to the other defendant companies, or payments and profits flowing through other Peguis-related entities. Peguis seeks various remedies with respect to these improper profits, including an accounting and the imposition of a constructive trust, as set out in paragraph 1 of this Statement of Claim.

46. Further, as a result of these breaches of fiduciary duty, Peguis has suffered losses, damages and expenses, for which Marquess, and the defendant companies, are liable.

27
September 26, 2024

John W. Gailus and Madeline Adam
Cascadia Legal LLP
201 – 736 Broughton St.
Victoria, BC V8W 1E1
250-419-8270

File No. CI 24-01-48655

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

PEGUIS FIRST NATION,

Plaintiff,

– and –

ANDREW MARQUESS, 6748831 MANITOBA INC., 10065951 MANITOBA LTD., 10103553 MANITOBA LTD. and ABC CORPORATION,

Defendants.

NOTICE OF MOTION
Associate Judges' Uncontested List
on Thursday, November 28, 2024 at 9:30 a.m.

FILED NOV 2 1 2024

HILL SOKALSKI LLP
Litigation Counsel
2670 – 360 Main Street
Winnipeg, Manitoba
R3C 3Z3

Kevin D. Toyne

Telephone: (204) 943-6740
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File No. **24053**

File No. CI 24-01-48655

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

PEGUIS FIRST NATION,

Plaintiff,

– and –

ANDREW MARQUESS, 6748831 MANITOBA INC., 10065951 MANITOBA LTD., 10103553 MANITOBA LTD. and ABC CORPORATION,

Defendants.

NOTICE OF MOTION

The Defendants, Andrew Marquess, 6748831 Manitoba Inc. and 10065951 Manitoba Ltd. (hereinafter referred to as "the Marquess Defendants") will make a motion to the presiding Associate Judge on Thursday, the 28th day of November, 2024, at 9:30 a.m. or as soon after that time as the motion can be heard at the Law Courts, 408 York Avenue, Winnipeg, Manitoba.

THIS MOTION is for:

1. If required, an Order abridging the time for filing and service of this Notice of Motion and supporting materials;

2. An Order pursuant to Rule 25. 11(d) striking out the Statement of Claim for failing to disclose a reasonable cause of action without leave to amend (or, alternatively, with leave to amend);

3. An Order pursuant to Rule 25.11(b) striking out the Statement of Claim for being scandalous, frivolous and/or vexatious;

4. An Order pursuant to Rule 25.11(c) striking out the Statement of Claim for being an abuse of the process of this Honourable Court;

5. Alternatively, an Order pursuant to Rule 25.10 compelling the Plaintiff to provide particulars;

6. If required, an Order pursuant to Rule 39.03 for the examination of Joanne Levasseur and/or Bartley Kives;

7. Costs on a solicitor and client basis against:

(a) Chief Stan Bird and each Councillor that voted to authorize the issuance of the Statement of Claim (including an Order that each of them be required to reimburse the Plaintiff for all legal expense incurred by the Plaintiff in connection with this Statement of Claim); and/or

(b) The Plaintiff; and,

8. Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THIS MOTION are:

1. The within action is part of an orchestrated and improper campaign of Chief Stan Bird and his supporters on the Plaintiff's Council to smear the reputation of the Defendant Andrew Marquess for the purposes of improving their chances of being re-elected;

2. The within action was commenced on September 27, 2024 but the Plaintiff intentionally failed to serve it upon the Defendants for over a month. Instead of serving the Statement of Claim, the Plaintiff provided the pleading to the CBC for the purposes of generating a news story intended to defame the Defendant Marquess;

3. Consistent with its improper intent (i.e., to generate a defamatory news story), the Statement of Claim fails to disclose a reasonable cause of action or otherwise comply with the rules of pleading that apply to pleadings filed in this Honourable Court (including but

not limited to Rules 25.06(1) and 25.06(11)). As Senior Associate Judge Clearwater stated in *Dowd v. Skip the Dishes Restaurant Services Inc.*, 2019 MBQB 63:

> [96] To establish a breach of a fiduciary duty occurred, and to support the reasonable existence of such a claim, material facts must be pled, as they relate to each defendant, that establish the presence of the following factors set out in the Attorney General of Canada v The Virginia Fontaine Memorial Treatment, 2006 MBQB 85:
>
> > 71 ... The Supreme Court of Canada has stated in Lac Minerals Ltd. v. International Corona Resources Ltd. (supra) that, when extending fiduciary obligations to new categories of relationships, the following characteristics must exist:
> >
> > (i) The fiduciary must have scope for the exercise of some discretion or power.
> >
> > (ii) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> >
> > (iii) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.
> >
> > 72 The court goes on to say that the hallmark of a fiduciary relationship is that the beneficiary is entitled to expect that the fiduciary will be concerned solely for the beneficiary's interest and never the fiduciary's own. The relationship must be the dependence or reliance of the beneficiary upon the fiduciary (see R. v. Neil, (supra) at [paragraph]16).
> >
> > 73 In the pleadings filed, there are no material facts alleged to disclose that:
> >
> > (i) the Crown was obliged to act solely for the best interests of the personal defendants or the corporations in which they were involved;
> >
> > (ii) any obligation was expressly undertaken by the Crown;
> >
> > or

> (iii) the undertaking of an obligation as alleged was understood as such by both parties.
>
> [97] If the material facts forming the foundation of a possible fiduciary relationship have been pled, the plaintiffs must also ensure that the facts relating to the breach are provided with sufficient particularity. This includes specifics of the dependent relationship, why it was dependant in nature, and how it was breached by each of the defendants. Material facts are required to show who owed the duty and to whom, as well as the basis upon which the fiduciary was expected to act solely for the plaintiffs' interest and not its own.

4. Further, the Statement of Claim is scandalous, frivolous, vexatious and/or an abuse of this Honourable Court's process because:

(a) The Statement of Claim is a series of bald, unsubstantiated assertions and demonstrates a complete absence of material facts;

(b) The Statement of Claim was provided to the CBC over a month before any efforts to serve it were made;

(c) The Plaintiff has previously provided the CBC with confidential documents and information in the hopes that the CBC would publish defamatory allegations against the Defendant Marquess;

(d) The purpose of the issuance of the Statement of Claim is to harm the reputation of the Defendant Marquess and thereby improve the electoral prospects of Chief Stan Bird and his supporters; and

(e) Finally, and most importantly, the Plaintiff is aware that the Defendant Marquess did not and does not owe fiduciary duties to the Plaintiff.

5. In the event that the Chief Stan Bird fails to swear an Affidavit in opposition to this motion and produce all communications with the CBC by or on behalf of the Plaintiff, this Honourable Court should permit these Defendants to examine the CBC producer (Joanne Levasseur) and/or reporter (Bartley Kives) to obtain those documents;

6. In all of the circumstances, an award of solicitor client costs is warranted and:

(a) The responsibility for paying those costs should be borne by the individuals that improperly commenced this claim: Chief Stan Bird and his supporters on Council;

(b) Further, and similar to power provided by Rule 57.07(1) and pursuant to this Honourable Court's inherent jurisdiction, Chief Stan Bird and his supporters on Council should be compelled to reimburse the Plaintiff for all legal expense incurred in pursuing this Statement of Claim and responding to this Motion; and

(c) In the alternative, the responsibility for paying those costs should be borne by the Plaintiff.

7. *King's Bench Rules*, and in particular Rules 1.04, 1.05, 2.03, 3.02, 25.06, 25.10, 25.11, 37, 39 and 57; and

8. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of this motion:

1. The pleadings and proceedings herein;

2. Affidavit of Kerry MacDonald to be sworn;

3. Affidavit of Glenn Hudson to be sworn;

4. Affidavit of Wade Sutherland to be sworn;

5. Affidavit of Martin Favel to be sworn;

6. If a motion pursuant to Rule 39.03 is required, the Affidavit of Andrew Marquess to be sworn;

7. If required, the transcripts of the Rule 39.03 examinations of Joanne Levasseur and/or Bartley Kives and the exhibits thereto; and

8. Such further and other evidence as counsel may advise and this Honourable Court may permit.

November 21, 2024

Per: _____
Kevin D. Toyne

HILL SOKALSKI LLP
Litigation Counsel
Suite 2670 – 360 Main Street
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NOV 2 1 2024

TO: Cascadia Legal LLP
201 – 736 Broughton Street
Victoria BC V8W 1E1

Attention: John W. Gailus | Madeline Adam
Counsel for the Plaintiff

AND TO: 10103553 Manitoba Ltd.
% Thompson Dorfman Sweatman LLP
1700 – 242 Hargrave Street
Winnipeg MB R3C 0V1

File No. CI 24-01-48655

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

PEGUIS FIRST NATION,

Plaintiff,

– and –

ANDREW MARQUESS, 6748831 MANITOBA INC., 10065951 MANITOBA LTD., 10103553 MANITOBA LTD. and ABC CORPORATION,

Defendants.

AFFIDAVIT OF GLENN HUDSON
SWORN: DECEMBER 23, 2024

FILED DEC 23 2024

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File No. **24053**

File No. CI 24-01-48655

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

PEGUIS FIRST NATION,

Plaintiff,

– and –

ANDREW MARQUESS, 6748831 MANITOBA INC., 10065951 MANITOBA LTD., 10103553 MANITOBA LTD. and ABC CORPORATION,

Defendants.

AFFIDAVIT OF GLENN HUDSON

I, **GLENN HUDSON**, of the Peguis First Nation, in the Province of Manitoba,

MAKE OATH AND SAY THAT:

1. I was the elected Chief of Peguis First Nation ("PFN") from 2007 until 2015 and again from 2017 until 2023. I have personal knowledge of the facts hereinafter deposed to by me except where same are stated to be based upon information and belief, in which case I do verily believe same to be true.

2. I am an engineer. Notwithstanding my training and professional background, I am familiar with the concept of fiduciary duty. For example:

(a) PFN was involved in the litigation that alleged breaches of

fiduciary duty (2013 MBQB 104 and 2014 MBQB 98) during the first part of my time as Chief. Master Berthaudin and Justice Dewar were critical of how those breaches of fiduciary duty were pleaded; and,

(b) More recently, PFN was sued by a numbered company alleging breach of fiduciary duty (2022 MBQB 84).

Introduction to Marquess and His First Assignment

3. To the best of my recollection:

(a) I was introduced to Andrew Marquess ("Marquess") towards the end of 2019; and,

(b) My first meeting with Marquess was at Rae and Jerry's restaurant for dinner in early 2020. PFN was contemplating various real estate acquisitions and one of the options being considered was Marquess' Fort Rouge Yards development in the Lord Roberts neighborhood.

4. I subsequently approached Marquess about the development of a seniors' home. I had been meeting with a number of other developers (such as Shindico, Qualico and CB Ellis) to try to get them to work with PFN but those discussions did not go anywhere. Marquess was interested in working with PFN so we discussed the services that he could provide to PFN.

5. On March 20, 2020, PFN and 6748831 Manitoba Inc. entered into:

(a) an agreement with respect to the design and construction of an assisted living residence. A copy of this agreement is attached hereto as **Exhibit "A"**; and

(b) an agreement with respect to the preparation of a related financing proposal. A copy of this agreement is attached hereto as **Exhibit "B"**.

6. I was impressed with Marquess' work as it related to the assisted living residence. Several members of Council were also impressed.

7. Unfortunately, due to the issues involving Bridging Finance that arose in early 2021, this project did not move forward. PFN borrowed funds from Bridging Finance in 2017. I am not providing further details as there is ongoing litigation between PFN and Bridging Finance's receiver.

PFN Chief and Council Hire Marquess as an Advisor

8. Towards the end of 2020, PFN was asked by Bridging Finance to invest an additional $5 million or so into the "Warman Road Project" (the name used by PFN Chief and Council to describe our investment in the cannabis industry as the business was located on Warman Road).

9. Two members of PFN Council – Wade Sutherland and Martin Favel – opposed this request. With the approval of Council, I asked Marquess to prepare a report evaluating the Warman Road Project to help us decide whether to provide the requested funds.

10. In late November, 2020, Marquess provided us with a lengthy report

and attended a meeting of PFN Chief and Council to answer questions. Councillor Sutherland in particular asked a number of questions. After Marquess' presentation, he left and Council decided not to provide further funds.

11. Marquess did not charge PFN for the preparation of this report or his presentation.

12. Shortly after this presentation, we asked Marquess to help us apply for funding from the Canada Mortgage Housing Corporation's rapid housing initiative. Marquess prepared the grant application. PFN was approved for funding of an 18 unit building in March, 2021. The building was constructed by Grandeur Homes (no affiliation to Marquess) and completed in the Fall of 2021. PFN Chief and Council chose the site and the builder.

13. In early January, 2021, PFN and Marquess began discussions about expanding the scope of services being provided to PFN by Marquess. Those discussions resulted in:

(a) A Band Council Resolution removing several members of the PFN Bridging Finance Inc. Task Force and replacing them with Marquess. A copy of this BCR is attached hereto as **Exhibit "C".** The Task Force assisted Chief and Council with the various financial and legal issues related to the Bridging Finance loans; and

(b) PFN, 674 and Marquess entering into a Consulting Agreement dated January 31, 2021, attached hereto as **Exhibit "D"**.

14. During the discussions with Marquess, it was made clear that neither he nor anyone working with him would have the authority or ability to make decisions for PFN. Section 12.2 and Schedule "A" of the Consulting Agreement reflects Marquess' role as an advisor to PFN. For example:

(a) During my time as Chief, Chief and Council relied on our Chief Operating Officer (Ryan McCorrister) to implement the decisions that we made. He was also responsible for overseeing PFN finances and administration. Mr. McCorrister was replaced as COO shortly after the 2023 election;

(b) Marquess proposed that PFN hire Murray Sinclair and his law firm (Cochrane Saxberg). PFN Chief and Council considered that recommendation and ultimately accepted it after consulting with Jamie Kagan (a lawyer at TDS that was PFN's General Counsel at the time);

(c) On March 17, 2021, PFN Chief and Council passed a BCR that authorized us to execute any agreement of purchase and sale recommended and presented to us by 674. PFN Chief and Council retained the right to decide whether or not to sign any agreement that Marquess recommended to us. A copy of this BCR is attached hereto as **Exhibit "E"**; and

(d) BDO was hired by PFN to provide training and financial support services, and to conduct a review of our various departments for the purposes of streamlining and identifying

efficiencies. Mr. McCorrister oversaw this process and Marquess was not involved.

15. In April, 2021, Marquess prepared a report containing a debt repayment plan. Before and afterward, Marquess worked with various parties to assist PFN Chief and Council with the BFI situation. He also assisted us in negotiations with BFI's receiver and the various lawyers.

PFNRET and Meadows

16. Around the same time, Marquess alerted PFN Chief and Council to the availability of the former Meadows golf course in East St. Paul (on the east side of Highway 59 just north of the Perimeter Highway). We were very interested in this land for two main reasons:

(a) First, it was close to Winnipeg for students and community members needing medical treatment; and,

(b) Second, it was close to St. Peter's Reserve (traditional Peguis lands located near Selkirk). During my first term as Chief, PFN had established the Surrender Claim Trust to manage the settlement funds paid by the Government of Canada for the loss of St. Peter's Reserve in 1907.

17. Since being established in 2008, the Treaty Land Entitlement ("TLE") Trust acquired reserve lands for PFN. The TLE Trust is not controlled by PFN Chief and Council – instead, like our other Trusts, there are elected Trustees that make decisions for the Trust.

18. We had initially contemplated taking steps to acquire Meadows through the TLE Trust and/or the Surrender Claim Trust. Ryan McCorrister and Andrew had some preliminary discussions with our Surrender Claim Trust and TLE Trust but they did not go well. The Surrender Claim Trust Administrator suggested to Marquess that if he thought Meadows was such a good investment he should buy it himself.

19. We ultimately decided to pursue this acquisition in a different way.

20. Prior to 2021, PFN did not have a vehicle for acquiring lands off reserve or administering lands purchased with TLE funds. I had been contemplating different ways for PFN to establish a vehicle for the ownership of non-reserve lands for quite some time. Councillor Sutherland and I had discussed the topic several times because he had land experience and I valued his input.

21. The establishment of a trust for this purpose was my idea. PFN had already established the TLE Trust and Surrender Claim Trust during my first term as Chief and they had operated successfully and with the approval and support of our community. I wanted an entity that could pursue initiatives and investments over the long term without them being dissolved or reversed after each change in PFN leadership. Andrew's involvement in the establishment of the trust was to provide advice and guidance on the structure (as did other PFN advisors) and to connect us with financial and legal professionals to implement the trust's creation.

22. Marquess had no role in selecting the initial trustees because he was not familiar enough with our community. Each member of Council nominated one of the initial trustees.

23. In late July, 2021, the Peguis First Nation Real Estate Trust ("PFNRET") was established. A copy of the trust agreement is attached hereto as **Exhibit "F"**.

24. PFN funds were not used to purchase Meadows. The Trustees of the TLE Trust provided $10 million from the TLE Trust's funds and 10103553 Manitoba Ltd. ("1010") provided the remaining funds to PFNRET in exchange for a mortgage against the Meadows property. As described below, I understand that 1010 obtained the funds from Canadian Western Bank.

25. A numbered company (10089844 Manitoba Inc.) became the owner of Meadows. This numbered company is owned by PFNRET and the directors of this numbered company are PFNRET Trustees. A declaration of bare trust and agency agreement is attached hereto as **Exhibit "G"**.

26. PFN's lawsuit refers to a Development Management Agreement. A copy of this agreement is attached hereto as **Exhibit "H"**. Neither PFN nor PFNRET are parties to this agreement.

27. PFN's lawsuit also refers to a number of other agreements that it is not a party to:

(a) Credit Agreement attached hereto as **Exhibit "I"**;

(b) General Security Agreement attached hereto as **Exhibit "J"**;

(c) Limited Recourse and Guarantee and Pledge Agreement attached hereto as **Exhibit "K"**;

(d) Assignment of Material Contracts attached hereto as **Exhibit "L"**;

(e) Environmental Indemnity Agreement attached hereto as **Exhibit "M"**; and

(f) Debenture attached hereto as **Exhibit "N"**.

28. The PFN lawsuit alleges that the terms of agreement between the two lenders is not known to PFN. This is misleading: Chief and Council met with Marquess to discuss financing the acquisition of Meadows and he provided us with an overview of the relationship between the two lenders.

2022 Consulting Agreement

29. On March 3, 2022, Marquess sent us a letter about continuing to provide consulting services to PFN. A copy of this letter is attached hereto as **Exhibit "O"**.

30. On June 30, 2022, PFN and 674 entered into a consulting services agreement. A copy of this agreement is attached hereto as **Exhibit "P"**. Section 3.1 was removed from the agreement because one of our Councillors objected to it.

31. The preamble to this agreement refers to the 2022 flood. The flooding of PFN in the Spring of 2022 was the worst of my lifetime and resulted in over 1000 of our members being forced from their homes.

32. Marquess' efforts with respect to the aftermath of the 2022 flood were very beneficial to PFN and our members:

(a) Marquess and his team assisted PFN in our dealings with the federal government, including a federal Cabinet minister when officials in her department were not being responsive to our concerns and needs;

(b) A lengthy report containing proposals for rebuilding and flood proofing was prepared and submitted;

(c) Marquess and his team oversaw and facilitated the submission of claims for reimbursement for flood damage, evacuation and related costs. PFN received approximately $17 million in much needed funds as a result, with an additional $6 million or so that was available to be received after the 2023 election (subject to the current PFN leadership pursuing those funds);

(d) The current leadership of PFN has relied on some of Marquess' work with respect to the lawsuit started earlier this year against the federal and provincial governments (and two nearby municipalities) being handled by DD West LLP.

33. I don't know if current leadership took any steps to obtain the additional $6 million or so that was available after the 2023 election.

Wellington Property

34. In the Spring of 2022, the Province of Manitoba offered to sell land located at 611 – 633 Wellington Crescent, Winnipeg to PFN. This land was made available to PFN as part of the Treaty Land Entitlement process and related agreement that PFN had entered into with the Province of Manitoba and Government of Canada not long before I became Chief in 2007.

35. Chief and Council considered whether or not these lands should become reserve lands. We ultimately decided that we did not want these lands to become reserve lands. PFN Chief and Council decide whether lands become part of our reserve or not. The Province of Manitoba does not – and should not – make that decision for us. Marquess did not make this decision either. Similarly, once the Wellington property was purchased by PFNRET, decisions regarding potential development and/or sale were the responsibility of the Trustees.

36. The colonial position being taken by PFN in this lawsuit regarding the Wellington property could result in tax consequences to PFN. I do not know or understand why the current Chief and Council of PFN are so anxious to be subservient and pay additional taxes to the Crown.

37. On July 6, 2022, the Wellington property was acquired by PFNRET through a numbered company subsidiary for $350,000. PFN Chief and Council provided PFNRET with a loan to purchase the property.

38. There were significant challenges with this property: for example, significant riverbank stabilization work would be required and the two structures needed to be demolished. As I became more and more aware of these challenges and the associated costs to remedy them, I began to feel that the Province had unloaded a significant liability onto PFNRET.

39. On February 27, 2023, PFNRET sold the Wellington property for net $2.8 million (the gross purchase price was $5.1 million but the purchaser received a $2.3 million credit to take into account the various remaining challenges). PFNRET generated a net profit of $1.8 million and fully repaid the loan made by Chief and Council with interest.

Meadows Geothermal Project and Daycare Project

40. On January 10, 2023, PFN Chief and Council passed a Band Council Resolution approving of the efforts of PFNRET (advised by Marquess) to pursue a potential geothermal system to be located at Meadows. A copy of this BCR is attached hereto as **Exhibit "Q"**.

41. PFN Chief and Council sent a letter of support for this proposal to the federal government in late March, 2023 just before the 2023 election.

42. The current leadership also supports the efforts of PFNRET to pursue the Meadows geothermal system: on September 14, 2023, a quorum of Chief and Council sent another letter of support to the federal government. A copy of this letter is attached hereto as **Exhibit "R"**.

43. PFN Chief and Council were also supportive of the efforts of

PFNRET (advised by Marquess) to obtain funding to construct a daycare with 70 or so spaces located in the Meadows property. This initiative began in 2022 and funding was ultimately received and construction of the daycare began after the 2023 election. I believe that the construction was completed in the last few weeks.

Disputed 2023 PFN Election

44. On April 6, 2023, PFN held an election for Chief and Council. I lost the election for Chief to current Chief Stan Bird but challenged that result in the Federal Court of Canada.

45. On October 24, 2024, my court challenge to the 2023 election was dismissed. I am appealing this decision and the Notice of Appeal has been filed. I note that in paragraph 53 of the judge's reasons, she refers to Chief Bird and Councillor Kelvin Wilson's conduct as being close to fraud or corruption.

46. I believe that this lawsuit is part of the re-election strategy of the current Chief (whether or not the next election occurs as a result of a Court order) and intended to harm my re-election chances (if I seek election as Chief again) by attacking the reputation of any advisors that worked with PFN while I was Chief.

47. During his cross-examination, Chief Bird stated:

(a) "I was skeptical of all decisions he was making";

(b) "I didn't trust any decision that the Peguis Chief and Council – that they were making"; and,

(c) "I didn't have any trust in the decisions that Glenn Hudson and the council were making".

A copy of the excerpts from his cross-examination transcript are attached hereto as **Exhibit "S"**.

Working with Marquess

48. Once Chief and Council had decided upon Marquess' scope of work, Marquess would undertake that work and eventually come back to us with information, documentation, options and/or recommendations. For certain decisions, he would attend meetings of Chief and Council, make a presentation, answer our questions and then leave. Council would then discuss and decide after he had left. Marquess frequently interacted with our COO to assist in the implementation of decisions made by Chief and Council.

49. When discussing options and/or recommendations with me or Council more broadly, Marquess would often say "I don't live in Peguis. I'm not from Peguis. I provide options and information. You make the decision" or "I advise. You decide".

50. The Statement of Claim accuses Marquess of "directing, influencing or causing" PFN to do various things. Marquess did not direct or cause PFN

to do anything and any influence that he had was the same type of influence any of our other consultants or advisors had.

51. Marquess was never authorized to make decisions on behalf of PFN and I am unaware of him ever doing so. He always consulted us and obtained whatever direction was required.

52. Based on my many interactions with Marquess during my time as Chief, I believe that Marquess has a genuine interest in helping PFN as one of PFN's professional advisors. As much I and other members of Council appreciated his advice and counsel, Marquess was just that: one of PFN's professional advisors. Marquess requested and received payment for the services that he provided to PFN.

53. At no time during my time as Chief did Marquess:

(a) Have any power, discretion or authority to make decisions on behalf of PFN Chief and Council;

(b) Make decisions on behalf of PFN Chief and Council;

(c) Agree to act in the best interests of PFN to the exclusion of his own interests; or

(d) Assume the role of fiduciary (as I understand that concept) with respect to PFN.

54. With respect to the payment for the services provided by Marquess, I was interviewed by the CBC this past summer and I stand by the comments

that were published:

(a) Marquess "has done great, good work for Peguis" at the same price other consultants charge;

(b) "You need the professionals, you need consultants to gather the information, put together the reports,"

(c) "It costs money to do that. The government of Manitoba does it, [the] government of Canada and the City of Winnipeg. We're no different. As First Nations, you need that type of support."

55. I believe that PFN received good value in exchange for the $150,000 funds paid by PFN to Marquess on a monthly basis and that we were not overcharged. Marquess and his team had multi-disciplinary areas of experience and expertise that other consultants lack. During his time as an advisor and consultant, Marquess provided services with respect to a number of issues, including flood management. PFN's current flood managers only handle that one issue and are charging $169,000/month. I am unaware of how much PFN is spending on other consultants hired to do the work that was previously done by Marquess.

56. During my time as Chief, payments owing to advisors such as Marquess were processed by the PFN Finance Department. The PFN Chief Financial Officer ("CFO") oversees the Finance Department and is directly responsible to Chief and Council. Amounts paid to advisors such as Marquess are kept confidential by PFN.

57. Audited financial statements are prepared in accordance with GAAP and the Peguis Financial Administration Law. PFN's audited financial statements do not contain a list of advisors that have received payment, nor a list of specific payments made to each advisor. PFN's audited financial statement for the fiscal year ending March 31, 2023 (and approved by the current Chief and Council) are attached hereto as **Exhibit "T"**. Audited financial statements are made available for our members to review – not the underlying documents used to prepare them.

58. As a result, the details of payments made to Marquess contained in the CBC's article "Cash-strapped First Nation spent at least $4.4M on consulting firm controlled by Winnipeg developer" could only have been provided to the CBC by or with the knowledge and/or involvement of Chief and Council.

59. I was not contacted by PFN's current lawyers about the allegations made against Marquess before this lawsuit was filed. I would have provided this information to them so they didn't waste PFN funds pursuing a meritless lawsuit. I was, however, contacted by PFN's lawyers handling the BFI litigation and asked to provide information. The BFI litigation is ongoing so I will not discuss what I was asked to provide or the content of my response.

60. I am also aware that the current Chief has refused to meet with Marquess to discuss the various services that he provided to PFN. Had the current Chief spoken to myself or Marquess in good faith, I believe that this meritless lawsuit would not have been started.

61. The suggestion that Marquess was a fiduciary for PFN is preposterous. The current Chief and Council may allow advisors to make important decisions for them. Neither I nor the Council I served with allowed advisors to make decisions for us.

62. To borrow Marquess' phrase, "He advised. Chief and Council decided".

63. I make this Affidavit bona fide.

SWORN before me at the City of)
Winnipeg, in the Province of)
Manitoba, this 23rd day of)
December, 2024.)

GLENN HUDSON

A Barrister-at-law entitled to practice
in and for the Province of Manitoba

File No. CI 24-01-48655

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

PEGUIS FIRST NATION,

Plaintiff,

– and –

ANDREW MARQUESS, 6748831 MANITOBA INC., 10065951 MANITOBA INC., 10103553 MANITOBA LTD. and ABC CORPORATION,

Defendants.

MOTION BRIEF OF THE DEFENDANTS, ANDREW MARQUESS, 6748831 MANITOBA INC. and 10065951 MANITOBA INC.

FILED JAN 0 8 2025

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File No. **24053**

File No. CI 24-01-48655

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

PEGUIS FIRST NATION,

Plaintiff,

– and –

ANDREW MARQUESS, 6748831 MANITOBA INC., 10065951 MANITOBA INC., 10103553 MANITOBA LTD. and ABC CORPORATION,

Defendants.

MOTION BRIEF OF THE DEFENDANTS, ANDREW MARQUESS, 6748831 MANITOBA INC. and 10065951 MANITOBA INC.

INDEX

		Page Nos.
PART I	LIST OF DOCUMENTS TO BE RELIED ON	1
PART II	LIST OF CASES AND STATUTORY PROVISIONS TO BE RELIED ON	2
PART III	OVERVIEW	3
PART IV	LIST OF POINTS TO BE ARGUED	10
PART V	ARGUMENT	11

PART I

LIST OF DOCUMENTS TO BE RELIED ON

	Date	Court Registry No.	Description
1.	September 27, 2024	1	Statement of Claim
2.	December 23, 2024	4	Affidavit of Kerry MacDonald sworn December 20, 2024
3.	December 23, 2024	5	Affidavit of Glenn Hudson affirmed December 23, 2024

PART II

LIST OF CASES AND STATUTORY PROVISIONS TO BE RELIED ON

Tab

1. *Court of King's Bench Rules*, M.R. 553/88, Rules 25.06, 25.11(1)(b), (c) and (d) and 57.01
2. *Dowd v. Skip the Dishes Restaurant Services Inc.*, 2019 MBQB 63 at paras. 51 – 57, 96 – 97
3. *Sarrasin v. Sokal*, 2022 MBCA 67 at para. 28
4. *Del Giudice v. Thompson*, 2024 ONCA 70 at paras. 17 – 18 and 23
5. *Dow Chemical Canada Inc. v. Nova Chemicals Corporation*, 2010 ABQB 524, at para. 21
6. *Private Trading Group, LLC v. The Government of Manitoba et al*, 2021 MBQB 180, at paras. 23 – 24
7. *Kowalchuk v. Adduri*, 2000 MBQB 9 at paras. 9 – 22
8. *Conversions by Vantasy Ltd. et al. v. General Motors of Canada Limited*, 2003 MBQB 263 at paras. 21 – 22
9. *1318847 Ontario Limited v. Laval Tool & Mould Ltd.*, 2017 ONCA 184 at para. 77
10. *The Court of King's Bench Act*, C.C.S.M. c. C280, Section 96(1)
11. *Judges of the Provincial Court v. Manitoba*, 2013 MBCA 74 at paras. 177 and 180 – 181
12. *Carcillo v. Canadian Hockey League*, 2023 ONSC 886 at para. 233 – 241
13. *Raponi v. Olympia Trust Company*, 2022 ONSC 4481 at paras. 178 – 180
14. *Terracon Development Ltd. v. City of Winnipeg*, 2023 MBKB 155 at paras. 79 and 81 – 82
15. *574201 Alberta Limited v Ground Level Transport et al*, 2017 MBQB 70, at paras. 15 – 16
16. *The Limitations Act*, C.C.S.M. c. L150, sections 6 – 9 and 31

PART III
OVERVIEW

1. The Plaintiff sues the Defendants for breach of fiduciary duty but the Statement of Claim is completely devoid of both material facts and the full particulars required by Rule 25.06(11) to support:

(a) The alleged existence of an *ad hoc* fiduciary relationship;

(b) The alleged existence and scope of fiduciary duties; and

(c) The alleged breaches of one or more specific fiduciary duties.

2. Claims that are devoid of material facts and consist of repetitive conclusory statements are frivolous, scandalous, vexatious and abusive.

3. The reason that the Statement of Claim is fatally deficient is that its purpose is not to pursue a viable claim against the Defendants: instead, the purpose of the claim was to generate negative media coverage by the CBC to improve the re-election prospects of the current Chief and his supporters on Council. Legal proceedings regarding the disputed April 2023 election continue and the Federal Court recently held that the conduct of the current Chief was "close" to fraudulent and corrupt.

4. As the Chief of PFN (Glenn Hudson) during the time of the underlying event states in his supporting Affidavit: "The suggestion that Marquess was a fiduciary for PFN is preposterous."

5. This Honourable Court can and should strike out the entirety of the Statement of Claim as failing to disclose a reasonable cause of action and as being frivolous, scandalous, vexatious and abusive.

6. The current Chief and any members of Council that voted in favour of commencing this meritless and abusive claim should be compelled not just to pay solicitor-client costs to the Defendants, but also to reimburse the Plaintiff for the costs it has incurred.

Facts

7. In support of this motion, these Defendants have filed an Affidavit sworn by Glenn Hudson (the former Chief of Peguis First Nation).[1] In his Affidavit, Mr. Hudson gives evidence that:

(a) He is familiar with the concept of fiduciary duty;[2]

(b) He was introduced to Marquess in late 2019;[3]

(c) Hudson approached Marquess about the development of a seniors' home.[4] On March 20, 2020, PFN and 674 8831 Manitoba Inc. entered into two agreements.[5] The project ultimately did not proceed;[6]

(d) In late 2020, and with the approval of Council, Hudson asked Marquess to prepare a report evaluating what was referred to as the Warman Road Project. Marquess provided a detailed report and attended a meeting of Chief and Council to answer questions. Marquess did not charge PFN for the preparation of his report or the presentation;[7]

(e) Marquess was then asked to help PFN apply for CMHC funding and the application was granted;[8]

(f) In early January, 2021, discussions about expanding the scope of services provided by Marquess resulted in a BCR appointing Marquess to a task force and the entering into of a consulting agreement between PFN, Marquess and 674;[9]

[1] Affidavit of Glenn Hudson sworn December 23, 2024 ("Hudson Affidavit") at para. 1
[2] Hudson Affidavit, para. 2
[3] Hudson Affidavit, para. 3
[4] Hudson Affidavit, para. 4
[5] Hudson Affidavit, para. 5 and Exhibits "A" and "B"
[6] Hudson Affidavit, para. 7
[7] Hudson Affidavit, paras. 8 - 11
[8] Hudson Affidavit, para. 12
[9] Hudson Affidavit, para. 13 and Exhibit "D"

(g) During the discussions with Marquess, it was made clear that neither he nor anyone working with him would have the authority or ability to make decisions for PFN;[10]

(h) In April 2021, Marquess prepared a report containing a debt repayment plan;[11]

(i) In 2021, and after Marquess alerted PFN to the availability of the former Meadows Golf Course in East St. Paul, PFN took steps to create the Peguis First Nation Real Estate Trust (an idea of Hudson's). Marquess provided some advice and connected PFN with required professionals but was not involved in selected any of the initial trustees;[12]

(j) PFN funds were not used by PFNRET to purchase Meadows and a numbered company owned by PFNRET became the owner of Meadows. Chief and Council met with Marquess to discuss financing Meadows' acquisition and were provided with an overview of the relationship between the two lenders involved;[13]

(k) Various agreements were entered into by parties other than PFN;[14]

(l) In early March, 2022, Marquess sent a letter to PFN about continuing to provide consulting services to PFN. At the end of June, 2022, PFN and 674 entered into a consulting agreement;[15]

(m) Marquess efforts with resect to the aftermath of the 2022 flood were very beneficial to PFN and its members;[16]

[10] Hudson Affidavit, para. 14 and Exhibit "E"
[11] Hudson Affidavit, para. 15
[12] Hudson Affidavit, paras. 16 – 23 and Exhibit "F"
[13] Hudson Affidavit, paras. 24 – 25, 28 and Exhibit "G"
[14] Hudson Affidavit, paras. 26 – 27 and Exhibits "H" – "N"
[15] Hudson Affidavit, paras. 29 – 30 and Exhibits "O" – "P"
[16] Hudson Affidavits, paras. 31 – 33

(n) In the Spring of 2022, PFN had the opportunity to purchase 611-633 Wellington Crescent. Chief and Council ultimately decided that the property would not become reserve land;[17]

(o) PFNRET purchased the Wellington property with funds borrowed from PFN. PFNRET repaid those funds after the property was sold (at a significant profit) due to significant challenges associated with the property;[18]

(p) Chief and Council have been supportive of the Meadows geothermal and daycare projects pursued by PFNRET with Marquess' advice;[19]

(q) On April 6, 2023, PFN held an election for Chief and Council. The results of that election are the subject of litigation in the Federal Courts. In her decision, Justice MacDonald referred to the conduct of Stan Bird and Kelvin Wilson as being close to fraud or corruption;[20]

(r) Once Chief and Council had decided upon Marquess' scope of work, Marquess would undertake that work and eventually come back to them with information, documentation, options and/or recommendations. For certain decisions, he would attend meetings of Chief and Council, make a presentation, answer their questions and then leave. Council would then discuss and decide after he had left. Marquess frequently interacted with the PFN COO to assist in the implementation of decisions made by Chief and Council;[21]

(s) When discussing options and/or recommendations with Hudson or Council more broadly, Marquess would often say "I don't live in Peguis. I'm not

[17] Hudson Affidavit, paras. 34 – 36
[18] Hudson Affidavit, paras. 37 – 39
[19] Hudson Affidavit, paras. 40 – 43
[20] Hudson Affidavit, paras. 44 – 47 and Exhibit "S"
[21] Hudson Affidavit, para. 48

from Peguis. I provide options and information. You make the decision" or "I advise. You decide";[22]

(t) Marquess did not direct or cause PFN to do anything and any influence that he had was the same type of influence any of PFN's other consultants or advisors had. Marquess was never authorized to make decisions on behalf of PFN and Hudson is unaware of him ever doing so. Marquess always consulted Chief and Council and obtained whatever direction was required;[23]

(u) Based on Hudson's many interactions with Marquess during his time as Chief, Hudson believes that Marquess has a genuine interest in helping PFN as one of PFN's professional advisors. As much Hudson and other members of Council appreciated his advice and counsel, Marquess was just that: one of PFN's professional advisors. Marquess requested and received payment for the services that he provided to PFN;[24]

(v) At no time during Hudson's time as Chief did Marquess:

(i) Have any power, discretion or authority to make decisions on behalf of PFN Chief and Council;

(ii) Make decisions on behalf of PFN Chief and Council;

(iii) Agree to act in the best interests of PFN to the exclusion of his own interests; or

(iv) Assume the role of fiduciary (as Hudson understand that concept) with respect to PFN;[25]

(w) PFN received good value in exchange for the funds provided to Marquess;[26]

[22] Hudson Affidavit, para. 49
[23] Hudson Affidavit, paras. 50 – 51
[24] Hudson Affidavit, para. 52
[25] Hudson Affidavit, para. 53
[26] Hudson Affidavit, paras. 54 – 55

(x) Amounts paid to PFN professional advisors are kept confidential. PFN's audited financial statements do not contain a list of advisors that have received payments, nor a list of payments made to each advisor. Audited financial statements are made available to PFN members – not the underlying documents used to prepare them;[27]

(y) The details of payments made to Marquess contained in the CBC's article "Cash-strapped First Nation spent at least $4.4M on consulting firm controlled by Winnipeg developer" could only have been provided to the CBC by or with the knowledge and/or involvement of Chief and Council;[28]

(z) While he has been contacted about other PFN litigation matters, Hudson was not contacted prior to the issuance of the Statement of Claim.[29]

8. In mid-February, 2024, the CBC published a story entitled "New Chief of Peguis First Nation questions flip of desirable Wellington Crescent land". The story refers to an allegedly "confidential source" that provided confidential records to the CBC.[30]

9. Shortly thereafter, the CBC contacted the Defendant Marquess about another story. The CBC had again been provided with confidential information and records.

10. Days after the Plaintiff's lawyer claimed that the Plaintiff had not provided documents to the CBC,[31] the CBC again contacted Marquess about a story regarding confidential information and records from the Plaintiff.[32] A number of emails were subsequently exchanged.[33]

[27] Hudson Affidavit, paras. 56 – 57
[28] Hudson Affidavit, para. 58
[29] Hudson Affidavit, para. 59 – 60
[30] Affidavit of Kerry MacDonald sworn December 20, 2024 (the "MacDonald Affidavit"), para. 2 and Exhibit "A"
[31] MacDonald Affidavit, para. 8 and Exhibit "G"
[32] MacDonald Affidavit, para. 9 and Exhibit "H"
[33] MacDonald Affidavit, paras. 10 – 22 and Exhibits "I" – "W"

11. In mid-July, 2024, the CBC published a story entitled "Cash-strapped First Nation spent at least $4.4M on consulting firm controlled by Winnipeg developer".[34]

12. On September 27, 2024, PFN commenced this proceeding.

13. On October 3, 2024, the CBC contacted notified Marquess of the claim and their intention to write a story about it. After a 25 hour delay, the CBC provided a copy of the claim. Several days later, the CBC published a story entitled ""Peguis sues developer Andrew Marquess over 'improper profit' while working for First Nation".[35]

14. Thirty one days after the Statement of Claim was issued, PFN's counsel emailed counsel for these Defendants asking whether he would be representing any of the Defendants and requesting admission of service.[36]

[34] MacDonald Affidavit, para. 23 and Exhibit "X"
[35] MacDonald Affidavit, paras. 24 – 27 and Exhibits "Y" – "BB"
[36] MacDonald Affidavit, paras. 28 – 29 and Exhibits "CC" – "DD"

PART IV
LIST OF POINTS TO BE ARGUED

15. The points to be argued in this matter are:

(a) General principles governing motions to strike pursuant to Rule 25.11(d);

(b) General principles governing motions to strike pursuant to Rule 25.11(b) and (c);

(c) General principles governing costs;

(d) Whether or not the Statement of Claim discloses a reasonable cause of action;

(e) Whether or not the Statement of Claim is scandalous, frivolous, vexatious and/or an abuse of process; and,

(f) Whether or not solicitor-client or elevated costs should be awarded, and against whom should any costs award be made.

PART V

ARGUMENT

(a) General Principles: Reasonable Cause of Action

16. Rule 25.11(d) reads as follows:

> 25.11(1) The court may on motion 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,
>
> (d) does not disclose a reasonable cause of action or defence.[37]

17. As Senior Associate Judge Clearwater stated in *Dowd v. Skip the Dishes Restaurant Services Inc.*:

> [51] The legal test and process to be applied on a motion pursuant to Rule 25.11(1)(d) is long settled. Both parties accept that the motion to strike for failure to disclose a reasonable cause of action is to be considered on the face of the pleadings, which in this case will include the particulars filed. The law says that it is only appropriate to strike pleadings in the clearest of cases, where the court is satisfied that it is plain and obvious that the pleadings fail to disclose a reasonable cause of action, (See *R. v Imperial Tobacco Ltd.*, 2011 SCC 42, at para 17, and the decision of the master in *Ebb and Flow First Nation et al v The Attorney General of Canada et al.*, 2013 MBQB 104 at page 12).
>
> [52] A finding that the pleading fails to disclose a reasonable cause of action may be made for various reasons. It is often because the court has determined there is a complete failure to plead the material facts supporting a particular cause of action. Alternatively, the court may determine the cause of action being pled is not one recognized by law. Finally, the court may strike the claim because it has found the pleadings are so incomprehensible, or fatally flawed, that it is clear the defendant cannot reasonably be expected to understand the case it must meet (see *Ebb and Flow*).
>
> [53] It is also important to note on a motion to strike that, while the facts are deemed to be true for the purposes of assessing such a motion, the fundamental rules of pleading must be followed. The claim cannot be based on mere speculation, or the plaintiffs' view that discovery will uncover the necessary facts, (see *Imperial Tobacco*, para. 22).

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[37] *Court of King's Bench Rules*, M.R. 553/88, Rule 25.11(1)(d) **[TAB 1]**

[54] The idea that a plaintiff may be entitled to plead some facts, but then be permitted to proceed to discovery to determine the remainder of the material facts needed to prove a claim is also addressed by the Manitoba Court of Appeal in *Robertson v Manitoba Keewatinowi Okimakanak Inc. et al.*, 2011 MBCA 4. At paragraph 56 of this case, the court holds:

> 56. …The discovery is not to be a fishing expedition to look for facts to fill the holes in a defective claim. The whole purpose of permitting a party to challenge the sufficiency of the pleading is to weed out those claims for which there is not a sufficient foundation to succeed at trial, so to permit a plaintiff to proceed to discoveries in the hope of obtaining material facts in support of the claim would defeat the purpose of requiring pleadings and make it impossible for the other party to know the case to be met.

[55] Further, although we must assume the facts pled to be true in the consideration of such a motion, the same is not so for conclusions of law or bald assertions. Conclusions of law can only be pled if the material facts have also been pled (Rule 25.06(3)). Failure to plead those material facts may lead to a determination that such conclusory statements are scandalous, frivolous or vexatious, and open to a strike motion, (See *Rebillard v Manitoba A.G. et al*, 2014 MBQB 181, paragraphs 30 and 31).

[56] Also in accordance with the rules, where intentional torts are pled, the requirement to include specific particulars is higher. This is important given the intentional nature of the acts complained of (Rule 25.06(11)).

[57] As set out by the Manitoba Court of Appeal in *Dumont v Canada (A.G.)*, 1991 CanLII 8222 (MB CA), [1992] 2 C.N.L.R. 34, all pleadings are required to include sufficient material facts in order that they meet the following purposes:

> (a) to inform the Defendants of the nature of the case they have to meet as distinguished from the mode in which it is to be provided;
> (b) to prevent the Defendants from being taken by surprise;
> (c) to enable the Defendants to know what evidence they ought to be prepared with and to prepare for trial;
> (d) to limit the generality of the Plaintiffs' claim;
> (e) to limit and decide the issues to be tried, and as to which discovery is required; and
> (f) to tie the hands of the Plaintiffs so that they cannot, without leave, go into any matters not included in their claim.[38]

[38] 2019 MBQB 63 at paras. 51 – 57 **[TAB 2]**; see also Rule 25.06 **[TAB 1]**

18. In *Sarrasin v. Sokal*, Justice Simonsen defined materials facts to mean "facts which must be proved in order to establish a cause of action".[39]

19. For the purposes of assessing the adequacy of a pleading, documents referred to in that pleading are incorporated by that reference into it. As Justice Miller of the Ontario Court of Appeal has stated:

> [17] ... A document incorporated by reference in a pleading is not evidence, and a judge considering a document so incorporated in assessing a pleading is not making findings of fact: *McCreight v. Canada (Attorney General)*, 2013 ONCA 483, 116 O.R. (3d) 429, at para 32; *Darmar*, at para. 44.
>
> [18] It is well established that a statement of claim is deemed to include any document to which it refers, and which forms an integral part of the plaintiffs' claim: *McCreight*, at para. 32. …
>
> [23] ... Whether the documents were integral to the claim is to be assessed objectively and not according to the plaintiffs' intentions. "Integral to the claim" does not mean "integral to the plaintiffs' dominant theory of liability". The claims to be assessed include theories of liability pleaded in the alternative. …[40]

20. Leave to amend a pleading that has been struck out can be denied if "there is an element of bad faith associated with the failure to the plead the amendment in the first instance".[41]

(b) General Principles: Scandalous, Frivolous, Vexatious and Abuse of Process

21. Rule 25.11(b) and (c) read as follows:

> 25.11(1) The court may on motion 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,
>
> (b) is scandalous, frivolous or vexatious;

[39] 2022 MBCA 67 at para. 28 **[TAB 3]**
[40] *Del Giudice v. Thompson*, 2024 ONCA 70 at paras. 17 – 18 and 23 **[TAB 4]**
[41] *Dow Chemical Canada Inc. v. Nova Chemicals Corporation*, 2010 ABQB 524, at para. 21 **[TAB 5]**

(c) is an abuse of the process of the court;[42]

22. In *Private Trading Group LLC v. Manitoba*, Associate Judge Berthaudin stated:

> [23] For clarity, the terms scandalous, frivolous, and vexatious were discussed in *Rebillard v. Manitoba (AG)*, 2014 MBQB 181, at paragraphs 29 and 30:
>
> > 29 A pleading is scandalous where it contains "anything which is unbecoming of the court to hear", including "any unnecessary allegation, bearing cruelly on the moral character of an individual". Pleadings made "without any probable justification at law, mala fide with a clear intent only to annoy or embarrass the opposing party" are frivolous and vexatious and ought to be struck. See *Kreiner v. Auditor General (Man.)*, 2007 MBQB 61, 213 Man. R. (2d) 252 at paras. 8 and 9.
> >
> > 30 In *Bellan v. Curtis et al.*, 2007 MBQB 221, 219 Man. R. (2d) 175 at para. 37, the court considered the meaning of "scandalous", "frivolous" and "vexatious" in light of Queen's Bench Rule 25.11 as follows:
> >
> > > [37] Queen's Bench Rule 25.11 allows a court to strike a pleading that is "scandalous, frivolous or vexatious". Epstein, J., dealt with the meaning of "scandalous, frivolous or vexatious" in *George Estate v. Harris et al.*, [2000] O.T.C. Uned. 404 (Sup. Ct.); [2000] O.J. No. 1762. At para. 20, he stated:
> > >
> > > > "The next step is to consider the meaning of 'scandalous', 'frivolous' or 'vexatious'. There have been a number of descriptions provided in the multitude of authorities decided under this or similar rules. It is clear that a document that demonstrates a complete absence of material facts will be declared to be frivolous and vexatious. Similarly, portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations should be struck out as scandalous. The same applies to a document that contains only argument and includes unfounded and inflammatory attacks on the integrity of a party, and speculative, unsupported allegations of defamation. In such a case the offending statements will be struck out

[42] Rule 25.11(1)(b) and (c) **[TAB 1]**

> as being scandalous and vexatious. In addition, documents that are replete with conclusions, expressions of opinion, provide no indication whether information is based on personal knowledge or information and belief, and contain many irrelevant matters, will be rejected in their entirety."

[24] With respect to abuse of process, those words were defined in *Vitacea Co. v. Winning Combination Inc.*, 2016 MBQB 180, at paragraph 87, as follows:

> 87 . . . An abuse of process may arise when a legal process is used for an ulterior motive, other than that for which it was intended. When properly invoked, an allegation of abuse of process is meant to provide protection against harassment or the perversion of the legal process for the purposes of accomplishing an improper result. See *Re Moss* (1999), 1999 CanLII 14182 (MB KB), 137 Man.R. (2d) 199 at para. 35 (C.A.). An abuse of process may be established where the proceedings are oppressive and vexatious and/or they violate the fundamental principles of justice underlying the community's sense of fair play and decency. See *Nygard* at paras. 14-16. A claim found to be frivolous and vexatious and/or embarrassing may nonetheless also constitute an abuse of process. A particular or unique emphasis and focus of an abuse of process claim is on the court's integrity and its interest in maintaining confidence in the administration of justice.[43]

(c) General Principles: Costs

23. This Honourable Court has both statutory and inherent jurisdiction to award costs. In Manitoba, the power to award costs against a non-party flows from this Honourable Court's inherent jurisdiction to award costs.[44] Costs can be awarded against the directors of a corporate litigant.[45] With respect to statutory jurisdiction, section 96 of *The Court of King's Bench Act* reads:

> **Costs**

[43] *Private Trading Group, LLC v. The Government of Manitoba et al*, 2021 MBQB 180, at paras. 23 – 24 **[TAB 6]**
[44] *Kowalchuk v. Adduri*, 2000 MBQB 9 at paras. 9 – 22 **[TAB 7]**; *Conversions by Vantasy Ltd. et al. v. General Motors of Canada Limited*, 2003 MBQB 263 at paras. 21 – 22 **[TAB 8]**
[45] *1318847 Ontario Limited v. Laval Tool & Mould Ltd.*, 2017 ONCA 184 at para. 77 **[TAB 9]**

> 96(1) Subject to the provisions of an Act or the rules, the costs of or incidental to, a proceeding, or a step in a proceeding, are in the discretion of the court and the court shall determine liability for costs and the amount of the costs or the manner in which the costs shall be assessed.[46]

24. Rule 57.01 provides broad discretion to this Honourable Court with respect to awards of costs. Solicitor-client costs can be awarded when the conduct of a party has been "reprehensible, scandalous or outrageous". The phrase "reprehensible" includes milder forms of misconduct that are deserving or reproof or rebuke.[47]

(d) No Reasonable Cause of Action

25. The sole cause of action asserted by PFN is breach of fiduciary duty. For the purposes of assessing the adequacy of PFN's pleading, the following documents are incorporated by reference:

(a) PFN BCR dated March 17, 2021 (paragraph 17);

(b) The Treaty Entitlement Agreement (paragraph 18);

(c) The Development Management Agreement (paragraph 22);

(d) The Credit Agreement (paragraph 27);

(e) The General Security Agreement, Limited Recourse Guarantee and Pledge Agreement, Assignment of Material Contracts, Environmental Indemnity Agreement and Debenture (paragraph 28);

(f) The Debenture Agreement (paragraph 29);

(g) The Mortgage (paragraph 31); and,

(h) The TEA Notice (paragraph 38).

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[46] *The Court of King's Bench Act*, C.C.S.M. c. C280, Section 96(1) **[TAB 10]**
[47] Rule 57.01 **[TAB 1]**; *Judges of the Provincial Court v. Manitoba*, 2013 MBCA 74 at paras. 177 and 180 – 181 **[TAB 11]**

Jurisprudence

26. In *Carcillo v. Canadian Hockey League*, Justice Perell states:

> [233] The elements of a claim for breach of fiduciary duty are: (1) a fiduciary relationship: (2) a fiduciary duty; and (3) breach of the fiduciary duty.
>
> [235] The existence of trust and fiduciary duties requires a case-by-case analysis, and the court will analyze the trust and contract terms as well as the circumstances and nature of the relationship. The scope of a trustee's or a fiduciary's duty arises within the scope of the engagement and the functions assumed by the trustee or fiduciary in a given case.
>
> [236] Fiduciary duties are not fixed or immutable. In *Canadian Aero Services Ltd. v. O'Malley*, which is the leading case about the cause of action for breach of fiduciary duty, Justice Laskin, as he then was, said that cases about alleged breaches of fiduciary duty involved four issues: (1) the determination of whether the relationship is fiduciary; (2) the determination of the duties that arise from the particular relationship; (3) the determination of whether a particular duty has been breached; and (4) the determination of the extent of liability for the breach of the particular fiduciary duty. The extent or scope of a fiduciary's duty is not fixed or immutable but rather must be determined on a case-by-case basis.
>
> [237] In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, Justice La Forest observed that "the fiduciary obligation may vary in its specific substance depending on the relationship, though compendiously it can be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the fiduciary."
>
> [238] In *Canson Enterprises Ltd. v. Boughton & Co.*, in *McInerney v. MacDonald*; and in *M. (K.) v. M. (H.)*, Justice La Forest stated that equity will impose on a fiduciary a range of obligations co-ordinate with the undertaking; fiduciary obligations are not uniform and are shaped by the demands of the situation. And in *Hodginson v. Simms*, he stated:
>
> > However, while both negligent misrepresentation and breach of fiduciary duty arise in reliance-based relationships, the presence of loyalty, trust, and confidence distinguishes the fiduciary relationship from a relationship that simply gives rise to tortious liability. Thus, while a fiduciary obligation carries with it a duty of skill and competence, the special elements of trust, loyalty, and confidentiality that obtain in a

> fiduciary relationship give rise to a corresponding duty of loyalty.

[239] The nature or character of fiduciary duties is malleable, and the nature of the fiduciary duty must be analyzed on a case-by-case basis because it involves a particular quality that differentiates fiduciary duties from a fiduciary's concurrent other duties. Not every duty of a fiduciary is a fiduciary duty. [48]

27. In *Raponi v. Olympia Trust Company*, Justice Perell stated:

[178] In *Luscar Ltd. v. Pembina Resources Ltd.*, Justice Conrad of the Alberta Court of Appeal noted that fiduciary duties should not be conflated with contractual duties; he stated:

> [A] party may have fiduciary obligations arising from its relationship, but not every obligation is a fiduciary one. In the case of contract, one party may be put in a position of owing extended duties, but it is important to examine carefully the alleged actions to ensure that they derive from the loyalty of the relationship, and are truly fiduciary obligations, as opposed to merely contractual, express or implied.

[179] In *Varcoe v. Sterling*, where a stockbroker was liable for negligence but not for breach of fiduciary duty, Justice Keenan stated: "But not every wrong done by a fiduciary is a breach of that duty. It must be a wrong which is a betrayal of that trust component of the relationship." Justice Sopinka also made this point in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, where he stated that fiduciary obligation "must be reserved for situations that are truly in need of the special protection that equity affords." In *Norberg v. Wynrib*, Justice Sopinka noted that fiduciary duties should not be superimposed on common law duties to improve the nature or extent of the remedy.

[180] That there is a special quality to fiduciary relations and a special quality to fiduciary obligations can lead to the doctrinal mistake of reasoning from a situation in which there is a fiduciary relationship and the beneficiary of the relationship has suffered a loss, that the fiduciary is responsible for the loss. Both Justice La Forest and Justice Sopinka warned against this kind of reasoning in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, where Justice La Forest said that using the term "fiduciary" as a conclusion to justify a result "reads equity backwards" and where Justice Sopinka said: [T]he presence of conduct that incurs the censure of a

[48] 2023 ONSC 886 at para. 233 – 241 **[TAB 12]**

court of equity in the context of a fiduciary duty cannot itself create the duty."[49]

28. As Senior Associate Judge Clearwater stated in *Dowd v. Skip the Dishes Restaurant Services Inc.*:

> [96] To establish a breach of a fiduciary duty occurred, and to support the reasonable existence of such a claim, material facts must be pled, as they relate to each defendant, that establish the presence of the following factors set out in the *Attorney General of Canada v The Virginia Fontaine Memorial Treatment*, 2006 MBQB 85:
>
> > 71 … The Supreme Court of Canada has stated in Lac Minerals Ltd. v. International Corona Resources Ltd. (supra) that, when extending fiduciary obligations to new categories of relationships, the following characteristics must exist:
> >
> > > (i)The fiduciary must have scope for the exercise of some discretion or power.
> > > (ii)The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> > > (iii)The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.
> >
> > 72 The court goes on to say that the hallmark of a fiduciary relationship is that the beneficiary is entitled to expect that the fiduciary will be concerned solely for the beneficiary's interest and never the fiduciary's own. The relationship must be the dependence or reliance of the beneficiary upon the fiduciary (see R. v. Neil, (supra) at [paragraph]16).
> >
> > 73 In the pleadings filed, there are no material facts alleged to disclose that:
> >
> > > (i)the Crown was obliged to act solely for the best interests of the personal defendants or the corporations in which they were involved;
> > > (ii)any obligation was expressly undertaken by the Crown; or
> > > (iii)the undertaking of an obligation as alleged was understood as such by both parties.
>
> [97] If the material facts forming the foundation of a possible fiduciary relationship have been pled, the plaintiffs must also ensure that the facts

[49] 2022 ONSC 4481 at paras. 178 – 180 **[TAB 13]**

> relating to the breach are provided with sufficient particularity. This includes specifics of the dependent relationship, why it was dependant in nature, and how it was breached by each of the defendants. Material facts are required to show who owed the duty and to whom, as well as the basis upon which the fiduciary was expected to act solely for the plaintiffs' interest and not its own.[50]

29. Fiduciary relationships are either *per se* or *ad hoc*. The alleged fiduciary relationship in the case at bar is necessarily *ad hoc*. As Justice Bock stated in *Terracon Development Ltd. v. City of Winnipeg*:

> [79] In *Filkow v. D'Arcy Deacon LLP*, 2019 MBCA 61, [2019] M.J. No. 147 (QL), the court observed that fiduciary relationships may be categorized as either per se or ad hoc. A per se fiduciary relationship is simply " … one of a recognised category of fiduciary relationships giving rise to the obligation of one party to act for the benefit of the other" (para. 58, citing *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 33 (QL)), while an ad hoc relationship is " … not recognised by the courts as fiduciary per se, but rather, arise[s] out of the specific circumstances of a case." (para. 63).
>
> [81] In order to determine if an ad hoc fiduciary relationship arose between Terracon and the City, one must consider the specific circumstances of the case. Those circumstances must satisfy the three hallmark elements of a fiduciary relationship identified by Wilson J. in *Frame v. Smith*, [1987] 2 S.C.R. 99, 1987 CanLII 74 (SCC) (at para. 60):
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.
>
> [82] In *Elder Advocates*, McLachlin C.J.C. augmented Justice Wilson's criteria with three additional elements (para. 36):
>
> > In summary, for an ad hoc fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*: (1) an undertaking by the alleged fiduciary to act in the bests interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries);

[50] *Dowd*, *supra*, at paras. 96 – 97 **[TAB 2]**

> and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.[51]

30. In *574201 Alberta Limited v Ground Level Transport et al*, Senior Associate Judge Clearwater held that breach of fiduciary duty falls within the scope of Rule 25.06(11).[52]

Alleged Existence of Fiduciary Relationship

31. Paragraphs 13 and 14 of the Statement of Claim consist of a series of bald conclusory statements that track some of the legal requirements to establish the existence of an *ad hoc* fiduciary duty:

(a) None of the documents incorporated by reference contain material facts to sustain the existence of an alleged *ad hoc* fiduciary duty;

(b) Several of the documents incorporated by reference contain material facts that are directly contrary to the alleged existence of an ad hoc fiduciary duty;

(c) There are no material facts to sustain allegation that Marquess undertook to act in the best interests of PFN;

(d) There are no material facts to sustain the allegation that Marquess had any power or discretion, let alone the ability to unilaterally exercise it;

(e) There are no material facts to sustain the allegation that any such power or discretion held by Marquess could affect the PFN's interests;

(f) The specific interest(s) that Marquess can allegedly affect are not identified;

(g) There are no material facts to sustain the allegation that PFN was vulnerable or at the mercy of Marquess' alleged exercised of allegedly possessed discretion and power.

[51] 2023 MBKB 155 at paras. 79 and 81 – 82 **[TAB 14]**
[52] 2017 MBQB 70 ("574"), at paras. 15 – 16 **[TAB 15]**

32. There are no material facts regarding the alleged representations referred to in paragraph 11.

33. In addition to the missing material facts, the Statement of Claim also fails to provide the "full particulars" as required by Rule 25.06(11).

Alleged Existence of Fiduciary Duties

34. Even if the relationship between Marquess and the Plaintiff is a fiduciary one, not every duty of a fiduciary is a fiduciary duty. Material facts supporting the existence and scope of specific fiduciary duties are required. Bald assertions are not presumed to be true.

35. Paragraphs 14 and 15 of the Statement of Claim contain a series of bald conclusory statements that recite some of the types of fiduciary duties that can flow from an *ad hoc* fiduciary relationship.

36. There are no material facts alleged to sustain the alleged fiduciary duties owing to the Plaintiff in the Statement of Claim, let alone any extension of those alleged fiduciary duties to "Peguis-related entities" when those entities have not been identified and the material facts upon which there is some legally relevant relation between the entities and the Plaintiff.

37. In addition to the missing material facts, the Statement of Claim also fails to provide the "full particulars" as required by Rule 25.06(11).

Alleged Breaches of Fiduciary Duties

38. Even if Marquess owes one or more specific fiduciary duties to the Plaintiff, not every wrong by a fiduciary is a breach of fiduciary duty. Material facts supporting the breach of specific fiduciary duties are required. Bald assertions are not presumed to be true.

39. The Statement of Claim complains about the following events:

(a) The settlement of PFNRET;

(b) The purchase of Meadows;

(c) The Development Management Agreement;

(d) The Credit Agreement and Debenture Agreement;

(e) The purchase of the Wellington Property; and,

(f) The sale of the Wellington Property.

40. The only one of these events that the Plaintiff alleges it was directly involved in is the settlement of PFNRET. The Statement of Claim does not disclose any material facts upon which the Plaintiff has standing to complain about acts undertaken by or involving other legal entities.

41. When complaining about these events, the Plaintiff repeats some version of the phrases "directed, influenced or caused" or "influence, power and discretion" but fails to allege any material facts that would support a finding that Marquess did any of these things.

42. For example, paragraph 19 of the Statement of Claim is completely silent on Marquess' role in the settlement of PFNRET. Material facts establishing that Marquess was involved are a necessary precondition to a finding that his involvement rose to the level of directing, influencing or causing the Plaintiff to settle this particular trust.

43. The source of Marquess' alleged "influence, power and discretion to control the management and operation of PFNRET" is similarly mysterious. There are also no material facts regarding the management and operation of PFNRET and relationship and involvement that Marquess is alleged to have with PFNRET. The same can be said for 100889844 Manitoba Ltd.

44. The Statement of Claim fails to disclose any material facts to support the assertion the mortgage registered against a property not owned by PFN and to which PFN is not a party is "false and misleading" (or somehow inconsistent with Manitoba practice or the practice of CWB). The manner in which this mortgage allegedly makes it more difficult

to secure alternate financing is a secret being kept from this Honourable Court by the Plaintiff. There are also no material facts regarding efforts to secure such funding.

45. The Plaintiff alleges that the terms of the Development Management Agreement, the Credit Agreement and the Debenture Agreement are unconscionable and that the terms of the Development Management Agreement are unenforceable. The Statement of Claim does not seek any relief regarding these agreements that were entered into by parties other than the Plaintiff.

46. In addition to the missing material facts, the Statement of Claim also fails to provide the "full particulars" as required by Rule 25.06(11).

47. The Plaintiff has not commenced proceedings against the other entities referred to in the Statement of Claim. Many of the events referred to in the Statement of Claim involving other entities took place more than two years prior to the issuance of the Statement of Claim. The remainder of those events took place more than two years ago. None of the other entities referred to in the Statement of Claim have commenced proceedings against these Defendants. Therefore, all causes of action relating to those events that other entities may have had against these Defendants or that the Plaintiff may have against those entities are necessarily statute-barred by operation of sections 6, 31(3) and (4) of *The Limitations Act*.[53]

Conclusion

48. As set out above, the Statement of Claim is fatally defective because it fails to disclose a reasonable cause of action. The entirety of the claim should be struck out without leave to amend. Alternatively, this Honourable Court should require that the Plaintiff amend the Statement of Claim so as to comply with the rules of pleading regarding this cause of action and contained in the *KB Rules*. In the further alternative, particulars should be ordered.

(e) Claim is Scandalous, Frivolous, Vexatious and Abuse of Process

[53] *The Limitations Act*, C.C.S.M. c. L150, sections 6 – 9 and 31 **[TAB 16]**

49. This action is scandalous, frivolous and vexatious:

(a) The relationship between PFN and Marquess as described in detail by the person that was Chief at all material times is not a fiduciary one;

(b) Much of the Statement of Claim relates to transactions and agreements that the Plaintiff is not a party, has no standing to raise and for which any claims are now statute-barred;

(c) The Plaintiff is unable to comply with the rules of pleading because there is no merit to the allegation of breach of fiduciary duty;

(d) The purpose of the issuance of the claim was to generate a fourth news story about Marquess and to assist Stan Bird in his re-election campaign while harming any re-election bid by Hudson; and,

(e) Pleadings made without any probable justification at law, mala fide with a clear intent only to annoy or embarrass the opposing party are frivolous and vexatious.

50. For similar reasons, this action is an abuse of process: it was commenced for the ulterior purpose of generating negative media coverage of Marquess. The provision of the pleading to the CBC prior to service, coupled with the repeated disclosure of confidential information to the CBC and the delay in taking any steps to serve the claim, is confirmation of same.

51. In the event that this Honourable Court is not prepared to strike out the Statement of Claim without leave to amend, it should nonetheless strike out the Statement of Claim as being scandalous, frivolous, vexatious and/or an abuse of process.

(f) Costs

52. With respect to the requested costs award, the following principles are engaged:

(a) Parties that initiate lawsuits for the purposes of generating negative media coverage can and should be subjected to awards of solicitor-client costs;

(b) Leaders of corporations or First Nations that authorize and approve the initiation of frivolous litigation for abusive purposes should personally be liable for such awards of costs; and,

(c) If the entity is not a business corporation, those leaders should also be compelled to reimburse the organization that they serve for the costs incurring in pursuing the frivolous and abusive litigation.

53. In all of the circumstances, neither these Defendants nor the Plaintiff itself should bear the financial costs associated with the commencement of this action. Solicitor-client costs should be awarded against each member of Chief and Council that authorizes the issuance of this action and they should be compelled to reimburse the Plaintiff for all related legal expenditures.

January 8, 2025

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