

**ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)**

B E T W E E N:

SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS

Plaintiff

- and -

**THE ATTORNEY GENERAL OF CANADA
and
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**

Defendants

REPLY TO DEMAND FOR PARTICULARS

In response to the demand for particulars dated October 10, 1995 made by the Defendant, The Attorney General of Canada, the Plaintiff states that the particulars demanded therein (a) are not necessary for the purposes of pleading, and (b) should be within the knowledge or records of, or available to, this Defendant.

Without prejudice to this position, the following are the particulars requested in the demand for particulars insofar as the Plaintiff presently has information. Further particulars should become available once the Defendants

have made full documentary production in this action and once the Defendants have given an account.

1. The applicable sections of the *Constitution Act, 1867* referred to in subparagraph 3(b) are sections 109 and 112.

2. The treaties referred to are the Royal Proclamation of 1763, the Haldimand Proclamation of 1784, and the agreements understood between the parties which resulted in the signing of the surrenders referred to in the statement of claim.

3. According to historical accounts, the five original nations of the Six Nations, consisting of the Seneca, Cayuga, Onondaga, Oneida and Mohawk, occupied, possessed or used territories, from at least 1640, in what is presently southern Ontario from the south shores of Georgian Bay to the Niagara Peninsula, including the Grand River valley, and, from at least 1659, in all of southern Ontario, and parts of central Ontario. The Tuscaroras joined with the other five nations subsequent to the above dates.

4. In a letter of June 2, 1783, Sir Frederick Haldimand, Captain General and Governor in Chief of the then Province of Quebec (which included

present day southern Ontario) wrote to Lord North, Imperial Secretary of State for Colonies. After mentioning that no provision was made for the Six Nations in the Treaty of Paris of 1783 between the United States and Britain, Haldimand indicated that the Six Nations had "great merit and Sufferings to plead in the Cause of Great Britain" [resulting from their support for Britain in the American War of Independence]. Accordingly, he proposed "to prevail upon the Mohawks" to settle in Canada.

In a letter of August 8, 1783, Lord North responded by agreeing with General Haldimand that:

"These People [the Six Nations] are justly entitled to our peculiar attention, and it would be far from either generous or just in Us, after our Cession of their Territories and Hunting Grounds to forsake them."

Lord North then specifically advised General Haldimand in this letter as follows:

"I am, therefore, authorized to acquaint you, that the King allows you to make those Offers to them, or to any other Nations of the friendly Indians, who may be desirous of withdrawing themselves from the United States, and occupying any Lands which you may allot to them within the Province of Quebec."

The Province of Quebec then included what is presently southern Ontario. Copies of above-noted letters are enclosed.

5. The substance of the Haldimand Proclamation was agreed to on behalf of the Six Nations prior to its formal proclamation. This is confirmed, for example, in a transmittal enclosed by Frederick Haldimand (Captain General and Governor in Chief) with his letter of March 23, 1784 to Sir John Johnson (Superintendent General and Inspector General of Indian Affairs). A copy is enclosed.

6. The following sections of each Act referred to in subparagraphs 20(a) to (g) reflects a fiduciary obligation of the Crown to the Indians including the Six Nations, by way of statutory measures for their intended protection:

- (a) S.U.C. 1839, c.15 - the entire statute;
- (b) S. Prov. C. 1850, c.74 - the entire statute;
- (c) S. Prov. C. 1853, c.159 - sections VI, VII, XI to XIII, XV, XXI, XXV and XXIX;
- (d) S. Prov. C. 1859, c.81 - the entire statute;
- (e) S. Prov. C. 1860, c.151 - the entire statute;
- (f) S.C. 1868, c.42 - sections 3-37;
- (g) S.C. 1876, c.18 - the entire statute.

7. The Dispositions referred to in paragraph 22 are any and all Dispositions as will be revealed by the accounting requested of the Defendants

and all the particulars should be revealed by a proper account. The Plaintiff does not presently have particulars of all of the Dispositions.

8. The particulars of each breach of fiduciary obligation and treaty obligation as described in subparagraphs (a) to (g) are those particulars as will be revealed by a proper account. The examples of those breaches of the Crown's obligations relied upon by the Plaintiff as justifying the requested order for a full general accounting of all money, real property and other assets belonging to the Six Nations are described in the statement of claim and should be evident from reading the material facts which are pleaded.

9. The Plaintiff does not have complete information of all the transactions from which money was misappropriated by Colonel William Claus, but this should be revealed by a proper account. Colonel William Claus was at all material times acting in his capacity as an officer of the Crown; consequently, the Defendants should possess or have available all the information concerning the misappropriation of monies by Colonel William Claus. The following are presently relied upon by the Plaintiff.

The Six Nations' General Council complained to the Crown on June 11, 1829 that:

During the late War, Colonel Claus did not pay our Interest Money for one Year — and Mr. John Claus is about two Years in arrears — for several Years in receiving our dividend — a Sum has always been Stated to be uncollected — but promised to be paid the following year — which we have not received nor have we ever received our double Interest (Premium) for our Money in England.

The conduct of Colonel William Claus was investigated by the Executive Council of the Province of Upper Canada which delivered a Report dated May 14, 1830. The Report stated in part:

...It seems by the papers before us that the Indians had repeatedly demanded that an account of the investment of their money should be given to them. ...

The only account we have seen is that laid before us by your Excellency dated February 17, 1826 which gives no general statement of the Trust monies but which may serve to suggest inquiries that may lead to satisfactory information as to the manner in which some of the trust monies have been invested.

It seems from this account that several sums are outstanding in the hands of individuals to whom they have probably been lent by the Trustees on Interest and it is hoped on sufficient securities, but all of these sums it would be expedient to call in and invest them in the public funds. The state of the trust account with Colonel Claus individually at the time of his death does not appear but it ought to be ascertained.

The Council deem it proper to remark that by the manner in which a sterling bill for £772 is carried to Colonel Claus Credit in this account no advantage is given to the Indians of the premium on exchange which was then probably ten per cent or more.

It was one of the grounds of complaint noticed by your Excellency as having been urged by the Indians that the premium had been thus withheld from them and if that has been so, the Council cannot refrain from saying that it has been (so far as their knowledge extends) a deduction wholly unauthorized, and in any series of years the premium thus withheld must have amounted to a large sum. What charges were made during that part of the time in which the exchange was in favour of this Province we are not informed, but unless it is shown that for that period the loss on the Bills was borne by the Trustee, no deduction should be made on that score.

In concluding this very imperfect account of the pecuniary concerns of the Five Nations, the Council cannot but remark that in their opinion that whatever was done by the Deputy Superintendent General in his capacity of Trustee ought to have been regarded as part of his public duty for which he as at all time liable to be called to account by the Government in the same manner as for any other matter belonging to his Department. The Council have no reason to think that Colonel Claus did in fact look upon his situation of Trustee in any other light, and it is much to be regretted that since his death the Books and Documents connected with this Branch of his duty have been separated from the Official papers in the Indian Department with which they have necessary connection ...

By reports dated August 10 and September 23, 1831, B.

Turquand, Accountant for the Province of Upper Canada, reported to the Executive Council of Upper Canada on certain irregularities in transactions

involving the Six Nations trust fund for which Colonel William Claus was responsible. Mr. Turquand determined that as of September 23, 1831 Colonel William Claus had misappropriated at least £5,641.1.4½ (provincial currency) from the Six Nations trust fund.

Copies of the above documents are enclosed.

10. A list providing particulars of each sale, including the date of sale and the purchaser of the lands, and a copy of each patent is enclosed in respect of the conveyances of land in the Townships of Innisfil, Concession 4, and East Hawkesbury, Concessions 3, 4, 5 and 6.

11. In a letter dated June 2, 1829, from Mr. Z. Mudge, Civil Secretary to the Lieutenant Governor of Upper Canada, to Captain Brant, Superintendent for Six Nations, it was stated that "the Directors [of the Welland Canal Company] promised to remunerate all persons who may sustain any loss from the inundation of that part of the land between the fall and the mouth of the river [caused by the construction of the Welland Canal]. His Excellency requests that these circumstances may be carefully explained to the Six Nations Indians". This assurance was repeated by William Hamilton Merritt, on behalf of the Board of Directors of the Welland Canal Company, in a letter

dated March 29, 1833 addressed to Mr. James Winniett, Superintendent of Indian Affairs. A written record of a Six Nations' Council Meeting on September 15, 1838 indicates that "the Lieutenant Governor promised that a surveyor should be sent to ascertain the number of acres which had been drowned, and that we [the Six Nations] should be paid for our losses".

Copies of the above-noted documents are enclosed.

12. Mr. John Brant, the Crown's Superintendent of the Six Nations Indians, gave a written warning in a letter of February 4, 1829 that "whatever benefit the proposed improvement may promise for the general good of the province, it would be fraught with evils of great magnitude to the interests of the Indians ...".

A letter of August 16, 1834 from William Rowan, Civil Secretary to the Lieutenant Governor of Upper Canada to W.H. Merritt, Director of the Grand River Navigation Company, said that "the Lieutenant Governor is desirous of promoting the improvement in the navigation of the Grand River, being persuaded that the province generally will derive the greatest advantage from the proposed undertaking."

In a letter of November 14, 1834, written on behalf of the Lieutenant Governor, Rowan again indicated that the Grand River navigation company (the "GRNC") project was "an undertaking from which the Province must derive the greatest advantage". However, the governments of Upper Canada and later the Province of Canada were unwilling to use and risk public revenues on the GRNC's project. Instead, they decided to use and risk Six Nations' monies. Rowan indicated in the above-noted letter that "the advances of sums to enable them [the GRNC] to carry on the works, depended on the punctual payment of the instalments due on sales of Indian lands; and that every effort has been made to supply them [the GRNC] with funds, and in fact that the Trustees have raised the sums for the use of the Directors [of the GRNC] ..."

The Executive Council of Upper Canada confirmed on June 22, 1839 that "... the investment of Indian monies [Six Nations' monies] in a speculation of this nature was most unadvised and imprudent."

Copies of the above-noted documents are enclosed.

13. (a) Enclosed is a "Land Sales Inventory Report on Surrender No. 30 lands, dated September, 1995" prepared by the Plaintiff's Research Office.

This land inventory report provides particulars concerning each conveyance of land within the tract of land described in surrender no. 30, and identifies those conveyances where the Plaintiff presently believes the Crown did not obtain full and fair compensation or, in a number of cases, any compensation for the benefit of the Six Nations. Enclosed also is a list of and copies of patents issued in respect of conveyances of surrender no. 30 lands.

The land inventory report contains a fully coloured coded copy of the entire plan of survey for the Town of Brantford, being the lands described in surrender no. 30.

The lands identified in orange include road allowances and two lots for which no patents were issued, and no sales were made; no compensation was paid therefor to the credit of the Six Nations Trust.

The lands identified in yellow are road allowances for which a patent was issued, a sale made and some compensation was paid; however, the land was not appraised prior to the sale.

The lands identified in purple represent lands disposed of or transferred by the Crown to third parties (a) without obtaining any

compensation for the benefit of the Six Nations or (b) without obtaining full compensation for the Six Nations Trust. The lands identified in green also represent lands disposed of or transferred by the Crown to third parties without obtaining full and fair compensation for the Six Nations.

While it nominally appears from certain patents for these lands that the sales were at the Crown's minimum appraised values (upset or reserve prices), full and fair compensation was not received for the benefit of the Six Nations because of such matters as third parties receiving patents for lands: (i) without having met all the terms of sale such as the schedule for payments; (ii) without paying balances owing on the purchase price; and (iii) possessing areas of land which exceeded the legal descriptions in the patents.

There is contained in the land inventory report further breakdowns or categories for the lands identified in purple and green, consisting of both lists and colour coded maps.

The lands identified in white on the fully colour coded plan of survey represent lands which do not fall within the above categories. However, the Plaintiff has not received confirmation that the proceeds

apparently received by the Crown for the benefit of the Six Nations with respect to the dispositions of these lands (or for that matter those proceeds received in respect of the other lands noted above) were properly credited to the Six Nations Trust.

A list of conveyances and copies of patents, describing the date of the patent and the name of the patentee in respect of conveyances of land within the tract of land described in surrender no. 40, are enclosed.

(b) The valuations and sales conditions respecting the conveyances of land within the tracts of land described by surrenders no. 30 and 40 depended on the date and circumstances of the conveyance. The Crown conducted the sales of the land, and such information should be within the knowledge (records) of the Crown. The following are the valuations and conditions respecting the conveyances of land which are presently known to the Plaintiff.

In a letter dated July 20, 1830, Mr. Peter Robinson, Commissioner of Crown Lands wrote to Mr. Z. Mudge, Civil Secretary to the Lieutenant Governor and stated that, with respect to the valuation of the town lots in the lands described within Surrender 30, "no one lot should be sold for

less than Ten pounds". A letter dated May 11, 1831 from Mr. Peter Robinson, Commissioner of Crown Lands, to Mr. Lewis Burwell, Deputy Surveyor, stated that the terms and conditions of the sale of vacant lots were:

- (i) "a Stone, Brick or frame house, not less than twenty four feet long, and eighteen feet wide shall be built within two Years from the day of Sale"; and
- (ii) "The upset price at which You [ie. Lewis Burwell] will put up each lot, to be ten pounds Currency payable one quarter down, or at this office [the Commissioner of Crown Lands] within twenty days, the remainder payable in three Years by annual Instalments with Interest."

A notice of sale dated August 8, 1835 further set out minimum reserve prices and terms and conditions for a further sale of lots of land described within Surrenders 30 and 40. Town lots in Brantford would be sold for £15 per acre. Farm lots with a river frontage would be sold at £1 5s. per acre, and farm lots without river frontage at £1 per acre. The notice provided for a number of conditions of sale of these lots, including:

"The purchase money to be paid to the Commissioner of Crown Lands at his office in the city of Toronto, by the following instalments, viz. one quarter at or before the expiration of one week from the date of sale, and the remainder thereof by three annual instalments with interest at the rate of six per centum per annum from the day of sale, and no transfer of any purchase will be permitted until the full amount of purchase money and interest shall be discharged."

The minutes of the Executive Council Meeting of the Province of Upper Canada dated November 27, 1840 required *inter alia*, with respect to any remaining unsold surrendered land:

"1st. That a competent inspector be immediately directed to visit and set a value upon each lot in the Surrendered tract.

2nd. That this valuation should be the full value of the land (without improvements) at the present time without any reference to former upset prices, or alleged expectations on the part of the claimants

8th. and for the purpose of preventing timber speculations, that 1/3 of the value of the land (with the whole value assessed upon the improvements) be paid down, without which the applicant shall be considered as having no claim whatever. The remaining instalments amounting to 2/3 rd of the purchase money may be made payable in four annual instalments with interest."

Copies of the above-noted documents are enclosed.

14. At a Council meeting of the Chiefs of the Six Nations Indians on January 16, 1835, the Six Nations stated:

"... it is necessary that both sides of the Road [from Hamilton to the Grand River] should be settled [and] they will permit half a mile on each side of the Road to be leased to the Whites for their benefit. The Chiefs agree to the advice of His Excellency with respect to the leasing of the lands on each side of the Hamilton Swamp Road."

A written record of the Council meeting is enclosed.

A list of the letters patent and copies of the patents issued in respect of conveyances of the Hamilton-Port Dover Plank Road lands are enclosed.

15. *An Act respecting the Ordnance and Admiralty Lands transferred to the Province*, S.C. 1859, Cap. XXIV refers to a 426 acre reserve in Port Maitland in the second schedule to that statute, purporting to list military properties in Canada transferred to the Provincial Government.

In a letter dated June 11, 1915 written to the federal Secretary, Department of the Interior, E. L. Newcombe, then federal Deputy Minister of Justice, claimed that the Port Maitland lands were reserved for military purposes in 1840. If so, the reservation of the Port Maitland lands for military purposes should have been done in compliance with the legislation referred to in paragraph 61 of the statement of claim; however, the Crown did not comply with the legislation.

It is not apparent to the Plaintiff what justified the Crown's taking of the Port Maitland lands and certainly what justified the Crown's taking

without the payment of compensation therefor to the Six Nations. As the taking of possession by the Crown for its own use and purposes appears to have been an improper taking without compensation, the Plaintiff is unable to furnish any "expropriating document" as requested.

16. (a) The Committee of the Executive Council of Upper Canada received a petition from the Six Nations dated August 3, 1843 requesting that the lands in the Johnson Settlement should be leased to settlers on short term leases. On October 4, 1843, the Governor General in Council approved the requested leasing of the Johnson Settlement lands on short term leases. A copy of the Report of the Executive Committee is enclosed.

(b) A list of each letters patent, describing the date of the patent and the name of the patentees, and copies of the patents issued are enclosed.

17. The Plaintiff expects that the dates and circumstances surrounding each failure of the Crown should be revealed by a proper account.

18. The Crown in right of Canada had a fiduciary obligation to collect and keep this information and, if it did not obtain and retain this information, breached this fiduciary duty. The Plaintiff believes that the information

requested is in the possession of the Defendant, Her Majesty the Queen in right of Ontario [Ministry of Natural Resources ("MNR")]. The Plaintiff is able to provide a copy of a map dated November, 1968 prepared by the MNR indicating the location of each oil and gas well on the Six Nations reserve, which is enclosed.

19. The treaty obligations referred to are those earlier referred to in the statement of claim. See also paragraph 2 of this reply to the demand for particulars.

The assets which ought to have been held for the benefit of the Six Nations are sufficiently disclosed by the statement of claim. Initially these were to consist of the Haldimand Proclamation Lands referred to in paragraph 14 of the statement of claim. Where there was a lawful and valid surrender of lands or resources to the Crown, the Six Nations were nevertheless to receive or be credited with proper, full and fair proceeds to be derived by the Crown from dispositions of the lands or resources. The Six Nations were to receive or be credited with revenues that would be derived from leases, permits or other uses of the land and the monies which ought to have been earned or derived on all proceeds or trust monies. The monies which ought to have been earned or derived therefrom are those which would have been consistent

with management of the land and trust monies in a manner that reflected the standards of conduct required by the Crown's fiduciary obligations.

Subparagraphs (a) to (d) of paragraph 82 provide further information.

The particular money, real property and other assets which ought to be held today for the benefit of the Six Nations should be disclosed by the outcome of a proper account.

20. In response to the Six Nations' request for a full general accounting, the Minister of Indian Affairs (on behalf of the Crown in right of Canada) in a letter dated February 1, 1993 did not provide or agree to provide a proper account but merely directed the representatives of the Six Nations to, (i.e., indicated that they should examine), the Indian Land Registry. A copy of the letter is enclosed.

Copies of the documents requested in sub-paragraphs (a) through (q) of the Demand for Particulars are enclosed.

Date: October 31, 1995

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SIX NATIONS OF THE GRAND RIVER

- AND -

THE ATTORNEY GENERAL OF CANADA ET AL

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)

Proceeding Commenced at Brantford

REPLY TO DEMAND FOR PARTICULARS

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