

**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

**PARTICULARS IN RESPONSE TO  
DEMAND FOR PARTICULARS**

IN RESPONSE to the plaintiff's demand for particulars, dated December 1, 1998, of the allegations contained in the statement of defence of the defendant Her Majesty the Queen in right of Ontario ("Ontario"), Ontario provides the following particulars:

The plaintiff's demands are set out herein, each demand followed by the particulars provided in response to it. The demands are in boldface italics.

**A. With respect to paragraph 1, which incorporates by reference and repeats numerous paragraphs of the Statement of Defence of the Attorney General of Canada ("Canada's Defence") and with respect to the following paragraphs of Canada's Defence:**

Ontario has no particulars of the contents of the statement of defence of the defendant Canada. Ontario expects to be informed by the particulars to be provided by Canada. There is no historical, factual, legal or constitutional relatedness or connectedness between Ontario and any of the obligations to the Six Nations alleged by the plaintiff or any of the events, acts and omissions which constitute the alleged breaches in respect of which the plaintiff seeks relief.

...

**2. With respect to ... paragraph 18 of Ontario's Defence, provide ... a full and complete description of "the Simcoe lands" referred to in paragraph 18 of Ontario's Statement of Defence.**

Ontario has no such full and complete description.

...

**B. With respect to the following paragraphs of Ontario's Defence:**

**1. With respect to paragraphs 4 and 5:**

**(a) specify whether Ontario disputes in whole or in part the jurisdiction of the Ontario Court of Justice (General Division) to grant the relief claimed in this action;**

The General Division, as a superior court of record, has plenary jurisdiction in this action as in all civil proceedings in Ontario. If it granted the relief sought in this action or any part of it, it would err in law and exceed its jurisdiction in that sense.

**(b) provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for such dispute;**

Particulars of Ontario's allegations relied on in support of Ontario's assertion that the relief sought should not be granted are pleaded in Ontario's statement of defence and crossclaim *passim*.

**(c) provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for:**

**(i) Ontario's allegation that the obligations of the Imperial Crown to the Six Nations are not enforceable in the Courts and, in particular, in the Ontario Court of Justice (General Division);**

Any obligations that the Imperial Crown had to the Six Nations were a political trust and were not justiciable or enforceable in the courts. Inasmuch as any such obligations were not then justiciable or enforceable in the courts, they are not now justiciable or enforceable in the courts.

- (c) (ii) ***Ontario's denial that the obligations to the Imperial Crown to the Six Nations are now enforceable only against the Imperial Crown.***

Ontario asserts that if the Imperial Crown owed any obligations to the Six Nations that were justiciable or enforceable in the courts, which is denied, they are now justiciable or enforceable, if at all, against the Imperial Crown or the defendant Canada.

2. ***With respect to paragraph 6 provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for:***

- (a) ***the denial therein contained;***

Ontario asserts that if the Imperial Crown, the Province of Upper Canada, or the Province of Canada, or any of them, were subject to any obligations, duties or liabilities owed to the Six Nations, which is denied, those obligations, duties or liabilities belong today to the defendant Canada and liabilities for any past breaches of those obligations, duties or liabilities belong today to the Imperial Crown or the defendant Canada. The historical, factual, legal and constitutional bases for that assertion are pleaded with particularity at paras. 36 to 45 inclusive of the statement of defence of Ontario.

- (b) the allegation that "Ontario is subject to no obligations, duties or liabilities owed to the Six Nations by the Imperial Crown or before confederation by the Province of Canada or the Province of Upper Canada.**

The historical, factual, legal and constitutional bases for that assertion are pleaded with particularity at paras. 36 to 45 inclusive of the statement of defence of Ontario.

**3. With respect to paragraph 7:**

- (a) specify exactly what "the interest of the Six Nations in the lands, personal property and all other assets in question in this action" is alleged to be, including the nature and attributes of such interest or interests;**

The words "the interest of the Six Nations in the lands, personal property and all other assets in question in this action" are the plaintiff's. They appear in para. 7 of the statement of defence of Ontario as a repetition of words that appear in para. 6 of the statement of claim. Para. 7 of the statement of defence denies the allegation made in para. 6 of the statement of claim and the words are repeated in the former for the purpose of making plain that denial. The nature and attributes of "the interest of the Six Nations in the lands" is pleaded with particularity in the statement of defence *passim* and, in particular, in para. 21. Ontario denies that the plaintiff has had or has any interest in any "personal property or other assets in

question in this action" other than such property or assets as the defendant Canada acknowledges that it holds for the benefit of the plaintiff.

- (b) provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for the answer to paragraph (a) above;**

The facts, law or mixed fact and law relied on for "the answer to paragraph (a) above" are pleaded with particularity in the statement of defence of Ontario *passim*.

- (c) provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for:**

- (i) the allegation that "the Crown was not at any time under fiduciary obligations or any obligation or duty that was justiciable or enforceable in a court of law or equity to the Six Nations to inter alia hold, protect, manage and care for the lands, personal property and all other assets of the Six Nations for the benefit of the Six Nations in a similar manner that trustees are required to hold, protect, manage and care for the assets of a trust for the benefit of the beneficiaries of the trust";**

The words "fiduciary obligations to the Six Nations to *inter alia* hold, protect, manage and care for the lands, personal property and all other assets of the Six Nations for the benefit of the Six Nations in a similar manner that trustees are required to hold, protect, manage and care for the assets of a trust for the benefit of the beneficiaries of the trust" are the plaintiff's. They appear in para. 7 of the statement of defence of Ontario as a repetition of words that appear in para. 6 of the statement of claim. The sentence in para. 7 of the statement of defence in which the words appear pleads that the Crown was not at any time under any obligation or duty to the plaintiff to do those things or act in that way that was justiciable or enforceable in a court of law or equity. Ontario relies upon the fact that at all material times that was the law of what is now Ontario.

- (c) (ii) ***the allegation that "if the Crown had or has any obligation or duty to the Six Nations in respect of those lands or proceeds of disposition of lands, it was and is a political trust, not justiciable or enforceable in the courts";***

Ontario relies upon the fact that all material times the law of what is now Ontario provided that any obligation or duty of the Crown to Indians was a political trust, not justiciable or enforceable in the courts.

- (c) (iii) **any allegation that the Crown at any time regarded its obligations to the Six Nations as a "political trust, not justiciable or enforceable in the courts".**

The submissions of the Crown in right of Canada in *Henry v. The Queen* (1905), 9 Ex. 415 is an instance of the fact that it regarded its obligations to Indians as "a political trust, not justiciable or enforceable in the courts". It continued to so regard its obligations to Indians as recently as 1984: *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

4. **With respect to paragraph 7 and in the light of paragraph 6 of the Statement of Claim and Ontario's answers to paragraphs 5 and 13 of the Request to Admit incorporated by reference into Set No. 1 of the Questions to Ontario on Written Examination for Discovery which state as follows:**

**"5. The Haldimand Proclamation and the Simcoe Patent conferred upon the ancestors of the Six Nations the same rights as they would have enjoyed as the original inhabitants of the lands only in the sense that they conferred a personal and usufructuary right dependent upon the good will of the sovereign, and not an estate in fee simple.**

**13. It was the intention of the Crown under the Simcoe Patent to confer upon the members of the Six Nations Confederacy who had migrated to Upper Canada the same rights and privileges as were enjoyed by those Indians living within the lands in Upper Canada included in the Royal Proclamation of 1763 only in the sense that it was the intention of the Crown to confer, in respect of**



***the lands affected by the Simcoe Patent, a personal and usufructuary right dependent upon the good will of the sovereign, and not an estate in fee simple."***

***Provide full particulars of all allegations of fact, law or mixed fact and law relied upon as the basis for the inclusion of the word "only" in the above statements.***

As pleaded in para. 7 of its statement of defence, Ontario relies on the fact that the interest conveyed by the Simcoe Patent arose solely from that instrument and was not an independent right not created by an executive act of the Crown. The predecessors of the plaintiff were migrants to the lands at the invitation of and with the permission of the Crown. The plaintiff's interest is not, therefore, aboriginal title and, as pleaded in para. 10 of Ontario's statement of defence, is not subject to the *Royal Proclamation of 1763*. The plaintiff did not and does not have the same interest in the lands as the original inhabitants of lands in Canada had and have except in the limited sense found by the Court of Appeal in *Isaac v. Davey* (1974), 5 O.R. (2d) 610. In that case the Court was obliged to determine whether the Simcoe Patent conveyed an estate in fee simple. That was the only issue for the Court concerning the nature of the interest that was conveyed. It was held that the interest was not an estate in fee simple but, like the interest "enjoyed by those Indians who had always been there", was a personal and usufructuary right dependent upon the good will of the sovereign.

**5. *With respect to paragraph 12:***

- (a) **provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for the allegation that the plaintiff is now estopped from relying on:**
- (i) **the "surrender requirement" of the Royal Proclamation of 1763; or**
  - (ii) **the "surrender requirement" of any other instrument issued or enacted by the Crown;**

The plaintiff pleads at para. 9 of the statement of claim that "The purpose of this surrender requirement was to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited and to facilitate the Crown's ability to represent the Indians in dealings with third parties". The Six Nations expressly denied the existence of any such "surrender requirement" or the applicability of any such requirement to the Six Nations. Ontario asserts in para. 12 of its statement of defence that, as a result of that denial, the plaintiff cannot now rely on any such "surrender requirement", having repudiated its existence, under the *Royal Proclamation of 1763* or any other instrument or law, or its applicability to the Six Nations. Particulars of the facts on which Ontario relies were provided on April 19, 1996 in response to item 3 of an earlier demand for particulars by the plaintiff.

**(b) specify the detrimental reliance (if any) alleged to give rise to the estoppels referred to in paragraph (a) above.**

The many grants and leases by the Six Nations of portions of their lands in violation of the "surrender requirement" comprised representations by the Six Nations that they did not consider that any "surrender requirement" existed or was applicable to the Six Nations. The Crown relied to its detriment on that representation. The Crown was subjected to demands from the purchasers and lessees from the Six Nations for confirmation of their titles, to the requirement and expense of investigating the circumstances of their grants and leases and their occupancy, and to the requirement and expense of considering the best course or courses to follow in light of the presence of settlers on the lands claiming pursuant to the grants or leases.

**6. With respect to paragraph 23 provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for the allegation that "the Crown neither recognized nor owed any fiduciary obligation to the Six Nations in respect of the Six Nations' lands".**

Para. 23 of the statement of defence of Ontario is a denial of the allegation in para. 20 of the statement of claim that "The Crown's recognition of its fiduciary obligation to the Six Nations is in part reflected in the enactment of legislation *inter alia* to protect the Six Nations lands and regulate dispositions of those lands

including ... [the *Acts* pleaded]". As pleaded elsewhere in the statement of defence of Ontario, and as repeated in response to item 3(c) above, at the dates of the enactment of the legislation the Crown neither recognized nor owed any fiduciary obligation to the Six Nations in respect of the Six Nations' lands. And in any event, as pleaded in para. 23, none of the legislation pleaded mentioned the Six Nations.

**7. *With respect to paragraph 26 provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for the allegation that "all parts of the Six Nations' lands that were the subject of a disposition, transaction, or use other than trespass were the subject of a lawful and valid absolute surrender by the Six Nations or a valid statutory provision authorizing the disposition, transaction or use" and specify what legislation is referred to.***

The basis of the allegation is the surrender of Blocks 1 to 6 of the Simcoe Patent Lands of January 15 and February 5, 1798, the surrender of Sherbrooke of March 13, 1809, the surrender of Brantford village of April 19, 1830, the surrender of North Cayuga of April 19, 1831, the surrender of South Cayuga, Dunn, and the remainder of Moulton and Canborough of February 8, 1834, the confirmation of the Joseph Brant leases of March 26, 1835, the surrender of part of Brantford township of April 2, 1835, the surrender of the remainder except the Six Nations reserve of January 18, 1841, *An Act to Incorporate a Joint Stock Company, to Improve the Navigation of the Grand River*, S.U.C. 1832, c. 13, and *An Act to*

*incorporate certain persons therein mentioned under the style and title of "The Welland Canal Company", S.U.C. 1824, c. 17. There may be other surrenders and statutes.*

**8. With respect to paragraph 31:**

**(a) provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for the allegation that "the plaintiff had full knowledge" of the circumstances therein pleaded;**

The plaintiff has at all material times had full knowledge of:

- the fact that the Simcoe Patent did not convey any lands north of the present Township of Nichol (of which complaint is made in para. 17 of the statement of claim);
- the fact that lands conveyed in the Simcoe Patent other than the current Six Nations reserve were and are owned and occupied by persons other than the Six Nations (of which complaint is made at paras. 26, 32(a), 55, 58.1 to 58.10, 62, and 63 to 73 of the statement of claim);
- the default of Colonel William Claus and the subsequent events concerning it (of which complaint is made at paras. 33 to 43 of the statement of claim);
- the Welland Canal flooding (of which complaint is made at paras. 44 to 50 of the statement of claim);

- the investment in securities of the Grand River Navigation Company (of which complaint is made at paras. 51 to 53 of the statement of claim); and
- the fee simple grants of lands along the Hamilton/Port Dover Plank Road (of which complaint is made at paras. 59 and 60 of the statement of claim).

Ontario relies upon the facts pleaded in the statement of defence of Canada concerning those matters and the particulars provided by it to date, on paras. 52 and 69 of the statement of claim, and on the fact that it is a necessary and certain inference that the Six Nations could not have been other than fully aware of those events and circumstances.

***(b) provide full particulars of all acts, omissions, events or circumstances (other than the mere passage of time) alleged to support "the reasonable inference of acquiescence of the plaintiff".***

Particulars of such acts, omissions, events, and circumstances are set out in paras. 31 to 33 of the statement of defence of Ontario. Apart from protests alleged in the statement of claim or in the statement of defence or particulars of the defendant Canada, Ontario has no knowledge of any complaint made by the plaintiff about any of the alleged breaches prior to the commencement of this action. In any event, the plaintiff made no such complaint to Ontario at any time, nor did it have any reason to do so.

**9. With respect to paragraph 40 specify what relevant liabilities that existed prior to July 1, 1867 became on that date liabilities of Canada.**

No relevant liabilities existed prior to July 1, 1867. Para. 40 of the statement of defence of Ontario simply asserts that if any such liabilities existed they became on that date liabilities of the defendant Canada, not Ontario.

February 5, 1999

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SIX NATIONS OF THE GRAND RIVER  
BAND OF INDIANS

Plaintiff

- and -

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

Defendants

**ONTARIO COURT  
(GENERAL DIVISION)**

Proceeding commenced at Brantford

**PARTICULARS IN RESPONSE TO  
DEMAND FOR PARTICULARS**

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