Toronto Court File No. CV-18-594281-0000
(Originally Brantford Court File No: 406/95)

ONTARIO SUPERIOR COURT OF JUSTICE

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

FRESH AS AMENDED STATEMENT OF DEFENCE OF THE ATTORNEY GENERAL OF CANADA

I N D E X

DEFENCE

1. This Defendant, the Attorney General of Canada, in answer to the Plaintiff's Further Amended Statement of Claim (referred to in this pleading as the "Statement of Claim"), says as follows:

THE PARTIES

2. This Defendant admits the allegations in paragraph 2 of the Statement of Claim, but except as is herein expressly admitted, denies all other allegations. The Haudenosaunee, a confederacy of Iroquoian-speaking peoples, were settled in what is now known as upper New York state. This confederacy has been known variously as the League of the Iroquois, the Five Nations, and the Six Nations. The Six Nations, by the early 18th century, consisted of the Onoñda'gega' (Onondaga), Onyota'a:ka (Oneida), Onödowága:' (Seneca), Gayogohó:no' (Cayuga), Kanien'kehá:ka (Mohawk) and Skarù·rę? (Tuscarora). In this pleading, the predecessors and the current body of Indigenous people or Indians known as the Six Nations of the Grand River together are referred to as the "Six Nations".

3. Pleading to subparagraph 3(a) of the Statement of Claim, this Defendant denies that it is the Crown in Right of Canada that has legislative authority with respect to Indians and lands reserved to Indians. The *Constitution Act, 1867* provides for the division

of legislative powers between Parliament and the provincial Legislatures and pursuant to section 91(24) such exclusive authority to legislate is vested in Parliament.

4. Pleading to subparagraph 3(b), 4(b) and 5 of the Statement of Claim, this Defendant denies that the Crown in Right of Canada is the successor to the British Imperial Crown for all of the obligations, duties and liabilities which the British Imperial Crown had or owed to the Six Nations. This Defendant says that the Crown in Right of Canada came into existence in 1867 on passage of the *Constitution Act, 1867* and has only those obligations, duties and liabilities to the Six Nations that flow to it from the Constitution.

INTRODUCTION

5. This Defendant admits the allegations in paragraph 8 of the Statement of Claim.

6. Pleading to paragraphs 6 and 7 of the Statement of Claim, this Defendant says that the Crown in Right of Canada did not exist prior to July 1, 1867. The Crown in Right of Canada did not pass legislation, nor was it in a fiduciary relationship with the Plaintiff prior to July 1, 1867 and therefore could not owe any fiduciary duties to the Plaintiff prior to July 1, 1867.

6.(a) Specifically in response to the Plaintiff's allegations of Crown breach of treaty obligations and fiduciary duty as pleaded at paragraphs 6 and 7 of the Statement of

Claim, this Defendant says:

(i) As pleaded in paragraph 77 below, the Haldimand Proclamation is not a treaty and does not give rise to Crown treaty obligations;

(ii) As pleaded in paragraph 6 above, and paragraphs 80 and 81 below, while the Crown does have a fiduciary relationship with Indigenous peoples, not every aspect of the relationship gives rise to a fiduciary duty. This Defendant pleads that no fiduciary duty arose through the period covered by the Statement of Claim. Further, if the Crown was, became, or is, subject to such a duty, this Defendant says that the duty was not breached, and no loss was sustained by the Plaintiff as a result of any breach.

(iii) Further, should there be a basis for Crown liability in fact or law as alleged in the Statement of Claim, such liability could only be based in a duty or duties flowing from the honour of the Crown. Except as identified below, this Defendant pleads that no specific duty flowing from the honour of the Crown arose through the period covered by the Statement of Claim. Further, if the Crown was, became, or is, subject to such a duty, this Defendant says that the duty was not breached, and no loss was sustained by the Plaintiff as a result of any breach.

(iv) The Defendant also states that in all aspects of its relationship with the Plaintiff, the Crown has acted honourably and as contemplated by colonial and post-colonial Crown policy in place from time to time and in accordance with the dictates of the common law and statute law of the day.

THE ROYAL PROCLAMATION OF 1763

7. This Defendant denies the allegations contained in paragraphs 9 and 10 of the Statement of Claim and says the following.

8. The Royal Proclamation of October 7, 1763, (issued subsequent to the February 10, 1763 Treaty of Paris that affirmed the sovereignty of the British Imperial Crown over its territories in North America) was a restatement of the principle upon which it conducted its relations with the aboriginal inhabitants of America.

9. The Royal Proclamation of 1763 was also a policy issued to the Governors of the colonies as to the procedures to be followed in the purchase and sale of the lands occupied by First Nations.

10. These procedural requirements were revoked by the Quebec Act, 1774, and were replaced by subsequent policies such as Governors Instructions, including but not limited to the 1812 Instructions referred to at paragraph 19 of the Statement of Claim, and by subsequent legislation.

HISTORY

Part I

11. From at least the early 1700s the lands around the headwaters of the Grand River in what is now Southern Ontario were occupied by the Anishinaabeg (Chippewa).

12. From at least the early 1700s the lands south of the headwaters, down to Lake Erie, were occupied by the Anishinaabeg (Mississauga).

13. Some of the Six Nations had been allies of the British Imperial Crown during the War against France and the American Revolutionary War. When it became apparent that the Revolutionary War was lost, the British Imperial Crown arranged to purchase a tract of land for the Six Nations in what is now Canada.

14. In 1784 the British Imperial Crown negotiated a surrender from the Mississauga of the land below the headwaters of the Grand River to Lake Erie in order to give the land to those members of the Six Nations who had been allied to it, and to obtain land for Loyalist settlement. The Six Nations participated in the surrender negotiations.

15. The 1784 surrender sets the northern boundary of the surrendered area at the northeastern boundary at Nichol Township, and consequently the northerly limit of the land provided to the Six Nations in the Haldimand Proclamation of 1784 and the Simcoe Patent of 1793.

Part II

16. After settling on the Grand River, the Six Nations, aware that the tract of

land would not sustain their traditional lifestyle, decided to sell about one-half of the tract, to invest the proceeds, and to convert the balance to agricultural purposes.

17. Joseph Brant, a prominent leader of the Six Nations, entered into several land transactions, but was unable to grant title due to the British policy as to the inalienability of land referred to in the Haldimand Proclamation and the Simcoe Patent.

18. On November 2, 1796 in order to accomplish sale transactions, the Six Nations Council gave Joseph Brant a Power of Attorney. He was authorized:

> to... take such security.. either in his own name or the name of others to be by him...nominated, as he or they may deem necessary for securing the payment...of money due and owing from...purchasers.

19. The British Imperial Crown initially opposed the concept of sale. But between July 24 and 26, 1797 the full Council of the Six Nations met with the President of the Executive Council of Upper Canada and made clear its firm commitment to sell its lands.

20. Joseph Brant asked for and received an undertaking from the President to confirm the sales by issuing patents to purchasers named by Brant who produced a certificate from the Six Nations trustee that the purchase price had been secured.

21. The Crown accepted the July 1797 surrender by way of an Order in Council

dated February 5, 1798, the Six Nations sold a large portion of its lands (approximately blocks 1-6), and the British Imperial Crown issued patents in accordance with its undertaking.

22. Sometime prior to 1795, the Six Nations promised to give John Dockstader about 21,000 acres on the north side of the Grand River, known as the Block 6 lands. Dockstader fought with the Six Nations in the American Revolutionary War. Benjamin Canby offered to purchase 19,254 acres from Dockstader. Dockstader agreed and sold his interest to Canby and took back a mortgage for the purchase price.

23. Brant agreed and a transfer to Canby was included in the February 5, 1798 surrender. The land was patented to Canby the same day.

24. No mortgage "was taken or intended to be taken" in favour of the Six Nations on the purchase. It was a private mortgage between Canby and Dockstader.

Part III

25. On December 28, 1797 Joseph Brant appointed Colonel William Claus to be a Six Nations trustee to receive funds from the sale of the Six Nations lands. Claus and his ancestors had close ties to the Six Nations.

26. About 1807 the Six Nations gave 5,000 acres of land to a lawyer, William

Dickson, as a retainer to transact all necessary business on their behalf.

27. On instructions from the Six Nations, William Claus held the securities received from the sale of the Six Nations lands, made loans, kept accounts, distributed money among the different tribes, and attended at Six Nations Council meetings to advise and explain. On occasion he sought guidance from the British Imperial Crown.

28. On August 3, 1826 the Six Nations surrendered 15,360 acres of land as a donation to Claus. The surrender contained the following recital:

> [he] hath been for the last thirty years our trustee, and hath during all that time conducted and managed our affairs with great advantage to our interests, and made profitably available our money without compensation from us whatever.

29. On August 4, 1826 the Six Nations appointed William's son, John Claus, to succeed William in the event of the death of William Claus.

30. On November 11, 1826 William Claus died and John Claus became the Six Nations trustee.

31. The British Imperial Crown delayed in issuing the patent for the 15,360 acres. On June 11, 1829 the Six Nations Council countermanded its direction to issue the patent.

32. John Claus then advised the Six Nations that he:

> intended to withhold annual interest for eight years as a remuneration for his late Father's services in consequence of the donation of land not being confirmed.

33. On October 5, 1829 the Six Nations petitioned the Lieutenant Governor of Upper Canada to endeavour to recover the "rents and documents in Mr. Claus' hands". The Six Nations instructed William Dickson to conduct the case against John Claus, and to recover the money.

34. On December 1, 1829 John Claus was commanded to appear before the Executive Council. He refused. On February 17, 1830 a Bill was proposed to permit the Crown to retrieve the accounts and sue for the trust assets. The legislation did not pass.

35. On May 14, 1830 a Committee of the Executive Council, chaired by the Chief Justice of Upper Canada, considered the matter of the Claus trust. It recommended that "the Crown officers be requested to consider by what means (if any) the Trust vested in Mr. Claus can be divested, or his authority suspended, and how an account can be obtained of the State of the Trust at Colonel Claus' death."

36. In December, 1830 John Claus surrendered the accounts, but was unable to repay the money he had withheld since his father's death.

37. William Dickson directed C.A. Hagerman, the Solicitor General, to "act with

respect to them (the accounts) on behalf of the Six Nations". Hagerman had the accounts examined. From the Statement of Accounts, which was presented to the Six Nations, it was "supposed" (some accounts were disputed) that there was £5,641 that should have been paid to the trustees, but had not been paid to the Six Nations.

38. On December 31, 1830 officials of the Province of Upper Canada sought instructions from the Six Nations on an offer of settlement made by John Claus. Claus offered "the whole of his estates and property with a view to their being appropriated to the liquidation of the debt which (he) has incurred by withholding the annual payments for which he was trustee". The lands that John offered in settlement were lands that he believed he owned as sole heir at law of William Claus.

39. John Claus' offer was accepted, likely upon the advice of William Dickson. Additionally it was arranged that Catherine Claus, the widow of William, would give her lands as well in satisfaction of the debt.

40. On June 6, 1831 John Claus transferred 2,800 acres of land in East Hawkesbury, and 900 acres of land in Innisfil to three trustees recommended by the Crown and appointed by the Six Nations to act as trustees. Catherine Claus, on the same date, transferred 1,200 acres of land in East Hawksbury.

41. Throughout the years following, various members of the Claus family pressed

the Government and the Six Nations for a grant of the 15,360 acres that had been promised to William Claus. Some members of the Six Nations supported the demand, but negotiations which ensued proved fruitless.

42. On September 15, 1838 the Six Nations told the Crown they wanted to sell the Innisfil and East Hawkesbury lands, saying that the lands were “not only unproductive but are subjected to taxes”. The trustees began to sell off parcels of the lands.

43. On December 10, 1846 Warren Claus, acting for the Claus family, excepting John Claus, advised the Government that “should the Crown continue to oppose and finally refuse to sanction” the surrender of the 15,360 acres, he would assert a claim to the Innisfil and East Hawkesbury lands, on behalf of the rightful heirs of William Claus. (No claim was made to the lands that had been given by Catherine Claus.)

44. Likely with the knowledge and upon instructions from the Six Nations, the Crown opposed the claim. In 1852 the Appeal Court of Upper Canada's Queen's Bench held that William Claus’ lands had passed to the residual heirs, not solely to John Claus, who had inherited only an one-quarter interest.

45. After the decision of the Appeal Court, Government officials examined the options available, consulted with the Six Nations, and determined that it would be best to negotiate with the Warren Claus heirs for the purchase of their three-quarters interest. This

would free the balance of the lands for sale, and would also prevent lawsuits from those who had already purchased parcels of the Innisfil and East Hawkesbury lands.

46. The Six Nations demanded that the Crown pass legislation to extinguish the title of the Warren Claus heirs, but the Crown did not comply.

47. On December 3, 1852 the Warren Claus heirs agreed to accept £5,000 in return for a release of their interest in the Innisfil and East Hawkesbury land, and the 15,360 acres. The payment was made from Six Nations' funds.

48. Subsequently, the balance of the Innisfil and East Hawkesbury lands were sold. The result was an elimination of the Claus trust debt, and at least a partial elimination of the costs incurred in clearing the title.

Part IV

49. The Six Nations approved the sale of Block 5 to the Earl of Selkirk at a Council meeting of May 29, 1807. Letters Patent were issued on April 13, 1808.

50. The Six Nations, likely through William Dickson, arranged for security to be given for the sale. By indenture dated January 15, 1808 Selkirk gave a mortgage to William Claus as trustee appointed by the Six Nations to hold the mortgage. The mortgage, according to some historical evidence, was payable in full in one year.

51. Selkirk later defaulted on the mortgage and the land was taken by a creditor, sold, subdivided and conveyed to others. To the knowledge of this Defendant the mortgage was not registered.

52. After 1831, Crown recommended trustees assumed the management of the mortgage from John Claus. The Crown took numerous steps to enforce the mortgage, and was partially successful in collecting on it. In 1861 the Province of Canada assumed the mortgage as an asset of the Six Nations; historical documents characterize the mortgage as being, at that time, a doubtful asset.

Part V

53. The Grand River Navigation Company was incorporated on January 28, 1832 to open navigation on the Grand River between Dunnville and Brantford, thereby opening up trade routes from the heart of Southwestern Ontario to Detroit and Buffalo. John Colborne, the Lieutenant Governor of Upper Canada, believed that such an effort would greatly increase the value of Six Nations lands. Private investors expected that the stocks of the Company would be profitable.

54. In 1834, Colborne advised the Six Nations Council of his recommendation to take stock and obtained the consent of the Council before investing Six Nations funds in the stock.

55. From 1834 to 1847, the Six Nations invested approximately $160,000.00 in the Company. The project proved to be unprofitable and the investment was lost.

56. The Six Nations petitioned the Crown for redress. The Federal Crown at all times denied liability for the loss; however, about January, 1925 it met with the Six Nations in an effort to address their concerns.

57. The Federal Crown offered to make annual grants for roads and other public purposes on the reserve, gradually compensating for the investment loss.

58. Accordingly, from 1925 to 1932 funds were appropriated by Parliament for public purposes such as roads, a hospital and an electric plant for a total of $164,938.61 and paid towards improvements on the Six Nations reserve.

Part VI

59. The period 1830-1840 in Upper Canada was characterized by political agitation, reduction in immigration, commercial and monetary crisis, rebellion and invasion. Crown disposal of Six Nations lands was slow. Funds from Britain to manage Indian affairs had been substantially reduced and further reductions were being contemplated.

60. Many members of the Six Nations continued to dispose of Six Nations

lands without the approval of the government. As early as 1834 the government advised the Six Nations that, if leases were given, settlers would consider that they were entitled to a pre-emption to purchase. Squatter encroachment also became a major problem.

61. Factions developed within the Six Nations. The Six Nations sought action by the government against both the squatters who bought land and against the Band members who sold it.

62. The government took action on a number of fronts. In 1835 the government suggested and the Six Nations agreed to surrender lands held by settlers under “Brant leases”.

63. The government also suggested that the Six Nations consider taking a certain quantity of their land for cultivation and disposing of the remainder for the general benefit of the Six Nations. In 1838 the Six Nations sought legislation to protect their land from squatters. In 1839 the government passed the requested legislation.

64. In January 1840, the government instructed John Gwynne, a lawyer, to prosecute squatters under the new legislation.

65. While Gwynne was taking action, some members of the Six Nations continued to sell their land to squatters. Gwynne made two recommendations: the Six

Nations should voluntarily move to a smaller tract which could be more easily protected against squatters, and the government should lease the remainder of the land for the benefit of the Six Nations.

66. On November 27, 1840 the Executive Council recommended that a reserve of 20,000 acres be established on the south side of the Grand River and that the remaining lands be sold unless circumstances warranted leasing. On January 5 and 15, 1841 the government wrote to the Six Nations with a proposal to solve the squatter problem.

67. On January 18, 1841 the Six Nations in Council agreed to the surrender of all of their lands, with certain exceptions, with a view to those lands being disposed of for the benefit of the Six Nations.

68. Following the surrender, a faction of the Six Nations sent the government petitions objecting to the surrender. They asserted that the Six Nations had been deceived or intimidated into consenting and that the proposal had not been properly explained. Other factions supported the surrender.

69. All factions of the Six Nations agreed to dispose of lands that they did not occupy. Objections concerned the extent and location of the reserve as determined by the 1841 surrender. The government, while maintaining that the 1841 surrender was valid,

continued detailed negotiations with the Six Nations to ensure that the interests of all factions were considered.

70. In 1842 the government appointed the Bagot Commission to investigate and make recommendations for the future management of the Indian Department. The Six Nations made representations to the Commission, in particular stating that it wanted at least a 50,000 acre reserve, not a 20,000 acre reserve.

71. In a petition of June 24, 1843 the Six Nations reiterated its request for a larger reserve on the south side of the Grand River. It also wanted to reserve specific lands and to lease several tracts, including the Oxbow, Eagles' Nest, Martin's Tract and Johnson Settlement. The balance of their lands were to be sold.

72. On October 4, 1843 the Executive Council responded to the June 24 petition. The Council acknowledged that it had no wish to obtain a surrender "against the free wish of the Indians themselves" and accordingly acceded to the Six Nations request as an interim measure.

73. In 1844 the Governor General appointed David Thorburn as a Special Commissioner for the adjustment of questions relating to the Six Nations.

74. From 1844 to 1848 the Six Nations held numerous council meetings and

made representations to the Governor General on which of their lands should be reserved and which should be sold. In 1850 the Crown issued a Proclamation under the *Indian Protection Act*, 13-14 Vic. c. 74. The Proclamation set out the extent of the Six Nations reserve lands that reflected the decisions made by the Six Nations Council, including its decision to retain approximately 50,000 acres as its reserve.

SIX NATIONS LANDS

75. This Defendant denies the allegations in paragraphs 11 to 13 of the Statement of Claim. This Defendant admits that some of the Six Nations may have intermittently occupied some of the lands that are the subject of this action in the 1600s, after dispersing the Huron, Petun and Neutral, who previously occupied those lands, but says that if so, they were driven out of the area in the latter part of that century by the Anishnaabeg. The Mississauga occupied the lands of Southern Ontario which are under discussion, in the 1700s.

THE HALDIMAND PROCLAMATION AND THE SIMCOE PATENT

76. This Defendant denies the allegations in paragraphs 14 to 18 of the Statement of Claim.

77. This Defendant denies that the Haldimand Proclamation constitutes a treaty within the meaning of section 35 of the *Constitution Act, 1982* and says that rather it was a unilateral declaration by the British Imperial Crown that it would abstain from

granting the allocated lands to others and would reserve them to be occupied by the Six Nations.

78. Both the Haldimand Proclamation and the Simcoe Patent use clear and unambiguous language linking the grant to the Six Nations to the surrender given by Mississauga.

79. The Simcoe Patent fully implemented the Haldimand Proclamation. This Defendant says that the Six Nations received all of the land given to them by the British Imperial Crown for their use and occupation in the Haldimand Proclamation and the Simcoe Patent.

LEGISLATION AND FIDUCIARY DUTY

80. It is admitted that there is today a fiduciary relationship between this Defendant and the aboriginal peoples of Canada. However, not every aspect of the relationship between a fiduciary and a beneficiary gives rise to a fiduciary duty.

81. The plaintiff is put to the strict proof of establishing that there was a fiduciary duty on the facts of any specific transaction, and that the British Imperial Crown, the Province of Upper Canada, the Province of Canada or this Defendant failed to discharge that duty.

THE CLAUS TRUST

82. This Defendant specifically denies the allegations at paragraphs 34 and 35 of the Statement of Claim. The Robinson Commission of 1830 did not find that William Claus had misappropriated trust funds. To the contrary it found that William Claus had served as a trustee appointed by the Six Nations reluctantly, for years, that during his service there was never a complaint from the Six Nations, that he would not have failed to render accounts upon request of the Six Nations, and that hence it was likely such accounts were in their possession.

83. This Defendant says that the Plaintiff has pleaded no basis on which a fiduciary duty could be imposed on the British Imperial Crown or the Province of Upper Canada. Further this Defendant says that William Claus and John Claus were trustees appointed and instructed by the Six Nations, and that officials of the Province of Upper Canada were at all times acting upon the request of the Six Nations to assist it in the matter of recovering its records, and did so.

84. While it is denied that there was any fiduciary duty to pursue a full accounting from the Claus estate, this Defendant says that if there had been, that duty was discharged when such records as were available from John Claus, were provided to the Six Nations through its lawyer, and at its Council on September 28, 1831.

85. In any event, there are no such records extant today, to the knowledge of

this Defendant, which would permit such an accounting to be done, except those already in the possession of the Plaintiff.

86. With respect to the allegation at paragraph 37 of the Statement of Claim, this Defendant denies that the British Imperial Crown or the Province of Upper Canada owed any such duty as a fiduciary. Officials of the Province of Upper Canada were requested by the lawyer of the Six Nations to act with respect to the accounts, and did so, after consulting with the Six Nations as to the settlement.

87. In the alternative, if there was any such fiduciary duty, which is denied, officials of the Province of Upper Canada discharged the obligation in using reasonable efforts in the best interests of the Plaintiff by negotiating the repayment of the debt, in difficult circumstances, with the result that there was a substantial if not complete retirement of the debt.

BLOCK 5 (SELKIRK MORTGAGE)

88. This Defendant denies the allegations in paragraphs 25 to 30 of the Statement of Claim.

89. The Selkirk mortgage was negotiated and arranged by William Dickson with Selkirk's agent. Responsibility for collecting payments was given by the Six Nations to the Claus trustees.

90. After 1831 Crown recommended trustees made many attempts to collect and enjoyed partial success. The mortgage was otherwise uncollectible. Historical documents relating to the collection of the mortgage are in the possession of the Plaintiff, or are available in archives to the Plaintiff, as they are to the Defendants; or no longer exist.

BLOCK 6 (CANBY MORTGAGE)

91. This Defendant denies the allegations in paragraphs 31 and 32 of the Statement of Claim.

92. This Defendant says that the mortgage was a private matter between the estates of the parties to the mortgage, not involving the Crown or the Six Nations.

WELLAND CANAL FLOODING

92.(a) In 1829, the Directors of the Welland Canal Company (the "WCC") resolved to build a dam upstream from the mouth of the Grand River for the purpose of a feeder canal to provide water to the Welland Canal. The Lieutenant Governor consented to the construction of the dam and the Six Nations were advised that the directors of the WCC would compensate all persons who sustained any loss from resulting flooding. The dam was constructed in 1829. The height of the dam was periodically raised between 1829 and approximately 1835.

92.(b) In 1834, Lewis Burwell, Deputy Provincial Land Surveyor of Upper Canada, reported on his survey of lands flooded by the dam. He found that, as of 1834, a total of 2,393.65 acres had been flooded in the Townships of Cayuga and Dunn, and deducted 400 acres, which were private property. On this basis, he calculated that the WCC should pay compensation to the Six Nations for the remaining 1993.65 acres of flooded land.

92.(c) Various attempts were made to value the lands flooded by the construction of the dam. James Cowan, an arbitrator with the Dominion Board of Arbitrators, considered this question in 1882 using 1842 land values to conclude that the average price per acre was $4.23, making the total value of the 1993.65 acres flooded $28,672.67.

92.(d) Six Nations did receive compensation for improvements damaged by flooding, but did not receive compensation for the land itself. Post-Confederation, it was unclear whether it was the Crown in right of Canada or of Ontario that was to be responsible for the outstanding flooding-related damage. On behalf of Six Nations, the Dominion of Canada presented the Welland feeder canal claim against the provinces of Ontario and Quebec before the Dominion Board of Arbitrators in 1895. Six Nations' claim was dismissed by the arbitrators without reasons.

92.(e) From 1895 onwards, compensation for the flooded lands was still not paid

by either Canada or Ontario. This Defendant says that as a matter of honour of the Crown principles, the lapse in time that occurred after the 1895 arbitration does warrant an appropriate remedy that is reconciliatory, reparative of the damage as it relates to this Welland feeder canal claim, and restorative of the Crown-Six Nations relationship. Any such remedy must be fashioned in the context of this case as a whole and requires an analysis of the pre-Confederation context referred to in paragraphs 59 above and 131(b)-(c), below in order to determine:

- the nature and scope of the Crown duty or obligation that arose;
- the nature and circumstances of the breach;
- the remedy warranted by the breach; and
- which present day manifestation of the Crown bears the burden of responsibility for any such remedy.

93. In 1950, issues raised in this Welland feeder canal claim were adjudicated by the Supreme Court of Canada in *Miller v. The King*, [1950] S.C.R. 168, affirming [1948] Ex. C.R. 372. The petition was dismissed because it did not assert any valid grounds upon which Canada could be held liable for actions that took place prior to 1840. From 1950 until 1995 when the Statement of Claim in this action was issued, the Plaintiff did not litigate this claim. Canada does not plead this fact as a bar, but states that it is a circumstance that should be taken into consideration in determining the existence of or nature of any duty or breach of duty and in fashioning an appropriate remedy for it.

94. In any event, if there is any Crown liability for damages or other remedies for this claim, it is not the liability of this Defendant.

THE GRAND RIVER NAVIGATION COMPANY

A. Investment

95. This Defendant denies the allegations at paragraphs 51, 52 and 53 of the Statement of Claim.

96. While it is admitted that Colborne recommended the investment to the Six Nations, the allegations at paragraph 53 of the Statement of Claim are specifically denied. It was believed that the stocks would be profitable and that the project would greatly enhance the value of Six Nations lands. The investment was made with the knowledge and consent of the Six Nations.

97. In any event, Her Majesty the Queen in Right of Canada paid the Six Nations the sum of $164,938.61 between 1925 and 1932 by way of improvements to its reserve.

98. [Deleted]

B. Appropriation of Land

99. This Defendant denies the allegations in paragraphs 54 and 55 of the

Statement of Claim and states that the land was patented to the Grand River Navigation Company pursuant to Article III of *An Act to Incorporate a Joint Stock Company, to Improve the Navigation of the Grand River*, Chap. XIII. 2nd Year William IV, 1832.

100. The Grand River Navigation Company compensated the Six Nations for the land by crediting the Six Nations account for subscribed shares in the amount of £368.14 provincial currency.

101. In 1950, issues raised in this GRNC appropriation claim were adjudicated by the Supreme Court of Canada in *Miller v. The King*, [1950) S.C.R. 168, affirming [1948] Ex. C.R. 372. The petition was dismissed because it did not assert any valid grounds upon which Canada could be held liable for actions that took place prior to 1840. From 1950 until 1995 when the Statement of Claim in this action was issued, the Plaintiff did not litigate this claim. Canada does not plead this fact as a bar, but states that it is a circumstance that should be taken into consideration in determining the existence of or nature of any duty or breach of duty and in fashioning an appropriate remedy for it.

102. In any event, if there is any Crown liability for damages or other remedies for this claim, it is not the liability of this Defendant.

LAND SURRENDERS OF THE 1830s AND 1840s

103. This Defendant specifically denies the allegations in the Statement of Claim

relating to breach of fiduciary duty arising from surrenders of Six Nations lands in the 1830s and 1840s. As a result of a process of consultation and consent no Six Nations lands were sold without the consent of the Six Nations Council.

104. This Defendant further says that the Crown complied with all relevant Governor's Instructions and other policies respecting consensual alienation of the Six Nations' interest in its lands, and further in the alternative says that in any event a Court is not bound to enforce strict compliance with policy.

A. Brantford Tract and Brantford Township

105. With respect to the allegation in paragraph 56 of the Statement of Claim, this Defendant denies that there was any duty on the Province of Canada as a fiduciary or otherwise, to sell these lands at set valuations or in accordance with sale conditions established from time to time by officials of the Province of Canada.

106. Alternatively, officials of the Province of Canada acted reasonably and in the best interests of the Six Nations in establishing a regime for the sale of these lots that was well-founded and flexible, allowing for change to deal with exigencies, all of which was for the benefit of the Six Nations. Accordingly, the Crown discharged any fiduciary duty which might have been imposed by its undertaking to dispose of the lands for the benefit of the Six Nations.

107. Further in reply to the allegations in paragraph 56 of the Statement of Claim, this Defendant denies that there was any duty on the Province of Canada as a fiduciary or otherwise, to compensate for lands "otherwise transferred." It was implicit that the sale price of any land sold took into account the value of lands "otherwise transferred".

B. Talbot Road Lands

108. This Defendant denies the allegations in paragraphs 58.l to 58.10 of the Statement of Claim and says that at the time of the surrender of the Talbot Road lands the Six Nations were aware that the lands were to be subdivided into 200 acre lots for sale, and that in any event no objection was taken to the sale of 200 acre lots at the time the lots were being sold.

109. After the surrender of the Talbot Road lands, the Six Nations requested a reservation within the surrendered lands so that their "people living on either side of the Grand River would not be disturbed". The Crown complied with this request.

110. In any event, the Six Nations consented to the sale of the Talbot Road lands by way of petition to the Crown of June 24, 1843 as reflected in a public notice of March 28, 1844.

C. Hamilton/Port Dover Plank Roads Lands

111. This Defendant denies the allegations in paragraphs 59 and 60 of the Statement of Claim. This Defendant says that the Six Nations consented to the lease of the subject lands at a Six Nations Council meeting on January 15 and 29, 1835. However, the Lieutenant Governor of Upper Canada, Sir Francis Bond Head, would not accept the decision to surrender.

112. In the absence of a surrender for lease, the Six Nations surrendered the subject lands for sale on January 18, 1841. The Six Nations affirmed its decision to sell in its petition to the government of June 24, 1843. In the petition, the Six Nations selected its reserve lands and sought to have most of the balance, which included the Plank Road lots, sold. The government accepted the decision by an Order in Council of October 4, 1843. The Six Nations re-affirmed its decision to sell the subject lands at a Council meeting on December 18, 1844.

D. Port Maitland Lands

113. This Defendant denies the allegations in paragraphs 61 and 62, and in particular the allegation that the subject lands were taken for military purposes under *An Act to authorize Her Majesty to take Possession of Lands for the erection of Fortification in this Province, under certain restrictions*, S.U.C., 1840, c. 16.

114. This Defendant says that no decision was made in 1840, as alleged, to

reserve the Port Maitland Lands for military purposes. In 1840 the Executive Council of Upper Canada merely postponed any decision on the matter pending consultation with the Ordnance department on the need for a reserve in the area.

E. Surrender of 1841

115. This Defendant denies the allegations in paragraphs 63 to 73 and 73A, particularly the allegation in paragraph 71 that the Crown granted letters patent for the Johnson Settlement lands contrary to the wishes of the Six Nations. This Defendant says that the Six Nations consented to the sale of these lands. The consent was given after the Six Nations had thoroughly discussed the matter at various Council meetings between 1840 and 1844, and after the Crown dealt with the objections and concerns of the Six Nations. More particularly, the Six Nations consented to the sale of these lands at a Council meeting held on December 18, 1844.

TRUST FUNDS

116. It is admitted that the Crown discharged William Jarvis as Chief Superintendent of Indian Affairs following the report of the Bagot Commission. The Commission noted that it had been asserted that Jarvis had been negligent in his management of the Indian fund, and recommended that an accounting be demanded of Jarvis.

117. An accounting was demanded and conducted by Jarvis and by Crown

accountants. These documents are a matter of public record.

118. This Defendant denies the allegation at paragraph 75 of the Statement of Claim.

119. With respect to the Plaintiff's claim for an accounting of all lands and moneys that the Plaintiff had, or should have had, or now has, from 1784 to date, this Defendant says:

1. Prior to 1831 the Plaintiff managed its own funds through its own trustees. In 1831 officials of the Province of Upper Canada, at the request of the Six Nations, prepared and produced an account of the Claus trust.

2. From 1831 to 1847 J.H. Dunn, trustee for the Six Nations and Receiver General of Canada, published the accounts of the Six Nations and distributed them to the Six Nations.

3. In 1849 the Six Nations trust fund records were centralized within the Indian Department; these records run to the present. They have been available to the Six Nations at the National Archives of Canada and the Indian Department.

4. The Six Nations has been given copies of trust accounting records from 1952 to 1982.

5. Since 1981 all First Nations receive monthly financial reports.

120. This Defendant therefore says that the Plaintiff is not entitled to an accounting as all money held for Indian Bands is placed in the Consolidated Revenue Fund which holds all public funds collected by the federal government. As such, there is

no specific proprietary interest in the money, although the government is obliged to pay an equivalent sum.

121. Further, a court has no jurisdiction to direct the manner in which funds are distributed, as they are distributed within a legislated mandate. Alternatively, if the Plaintiff is entitled to an accounting and if the court finds it has such jurisdiction, the Court ought not to order an accounting which, because of the number of transactions and the number of centuries which have passed, would be inordinately expensive for all Parties and a practical impossibility.

122. [Deleted]

NATURAL RESOURCES

123. This Defendant denies the allegation in paragraph 77 of the Statement of Claim. This Defendant states that the Six Nations had full knowledge of the extraction of natural resources by third parties and received full compensation for such removal. Specifically, the Six Nations had knowledge of and gave explicit consent to such extraction during the impugned period.

124. This Defendant denies that the surrender was for 20 years but states that it was for the purpose of giving effect to the proposal made by Senator Edward Michener by letter dated March 4, 1925. In his proposal Michener made an offer to the Six

Nations to drill for oil on their reserves and asked for a lease which would enable him to extract oil so long as oil could be produced in commercial quantities. This offer was accepted by a Band Council Resolution dated March 5, 1925.

125. A surrender given on March 20, 1925 stated that the surrender was given for the purpose of carrying out the Michener proposition as set out in the letter of March 4, 1925 and in accordance with the Band Council Resolution referred to above.

126. The lease given to Michener on July 9, 1925 and the revised lease given to Michener on January 11, 1926 were given for a period of "twenty years from the fifteenth day of July, one thousand nine hundred and twenty-five, or so long as oil or gas is found in paying quantities". The Plaintiff had full knowledge of the terms of the lease and continued to receive royalties from Petrol Oil and Gas Company.

127. This Defendant admits the allegation in paragraph 78 of the Statement of Claim that by agreement dated December 31, 1928, Michener assigned his rights to Petrol Oil & Gas Company Limited.

128. In pleading to paragraph 79 of the Statement of Claim, this Defendant states that the Order in Council accepting the surrender in 1925 gave the requisite authority under section 54 of the *Indian Act*, R.S.C. 1927, c. 98. The Order in Council accepted the surrender on the basis that it was for the purpose of entering into a lease

for the oil and gas. In any event it was decided that it would be in the interest of the Six Nations to continue the leasing arrangement with Petrol Oil and Gas Company on the basis that the wells were nearly exhausted and that it would therefore not be attractive to other companies. This was accepted and endorsed by Band Council Resolution dated February 5, 1948.

129. This Defendant denies the allegation in paragraph 80 of the Statement of Claim. Throughout the period of July 15, 1945 to November 18, 1970, the Plaintiff received royalty payments from Petrol Oil and Gas Company. When the Petrol Oil and Gas Company proposed an assignment of its lease to the George Hyslop Construction Ltd in 1969, the Six Nations expressed their desire that any ambiguity in the surrender not delay the assignment of the lease. This, together with the acceptance of royalties, provides implicit consent for the operations of Petrol Oil and Gas Company on the reserve.

130. This Defendant denies that it has an obligation as alleged in paragraph 81 of the Statement of Claim to account to the "Six Nations Trust for the fair market value of all natural gas extracted by the Petrol Oil and Gas Company from the Six Nations Reserve." This Defendant acted in good faith in dealing with the oil and gas on the reserve and with the consent of the Six Nations.

GENERAL PLEADINGS

A. Social, political, military, economic, demographic, legal, and historical context

131. [Deleted]

131.(a). The Defendant acknowledges that the Crown is, and has been, in a relationship with the Plaintiff that has developed through historical interactions and arrangements as pleaded in this Statement of Defence, but alleges that the Defendant named in this action was not a participant in their creation or making. Nevertheless, with respect to pre-Confederation historical arrangements, the Crown is to be presumed to have acted honourably and, in any event, did act in a manner that was consistent with and upheld the honour of the Crown, particularly as that concept was understood and operated at the particular times.

131.(b) Further, and pleading to the allegations made in the Statement of Claim, the Defendant states that throughout the pre-Confederation period, and particularly from 1815-1850, the relationship between the Crown and the Plaintiff was a continuously evolving one that was affected by and reflected substantial changes in military, political, social, economic, demographic and legal, considerations, events and circumstances.

131.(c). In this time of societal upheaval, the Crown attempted to balance Indigenous and non-Indigenous interests, developed an emerging balance for its own public-oriented

participation in the types of transactions that may appear private by present day standards, and conducted itself in accordance with its colonial policies and the common law. Such Crown policies included the protection of the interests of Indigenous people in British North America through integration into the agrarian and, subsequently, industrial and market economies and through the promotion of the inclusion of Indigenous people in non-Indigenous settler political structure and society.

131. (d). The Defendant states that in all relevant periods, the exercise by the Crown of its prerogatives or other Crown conduct that reflected either common law principles of the day or was pursuant to prevailing legislation did not constitute a failure to uphold the honour of the Crown or the breach of a duty flowing therefrom.

131.(e). In addition, and in the alternative, the defendant states that if Crown conduct in all relevant periods is now determined to have constituted a failure, at any particular time, to uphold the honour of the Crown or breach of a duty flowing therefrom, any such deficiencies were addressed by the pre- and post-Confederation Crown and by colonial and post-Confederation legislatures through measures that included the formal statement of Crown policies, the establishment from time to time of responsive legislative committees and commissions of inquiry, orders in council, by the passage of legislation, and other measures.

B. *Miller v The King*

132. In 1950, certain issues concerning the liability of Her Majesty the Queen in Right of Canada to the Six Nations for any damages incurred prior to the *Act of Union* 1840 were determined in *Miller v. The King*, (1950] S.C.R. 168, affirming [1948] Ex. C.R. 372. From 1950 until 1995 when the Statement of Claim in this action was issued, the Plaintiff did not litigate this claim. Canada does not plead this fact as a bar, but states that it is a circumstance that should be taken into consideration in determining the existence of or nature of any duty or breach of duty and in fashioning an appropriate remedy for it.

133. [Deleted]

134. [Deleted]

C. Taking For Public Purposes

135. In response to paragraph 23(e) of the Statement of Claim, this Defendant says that all takings of land which were not consensual takings, have been accomplished pursuant to valid legislation, and cannot give rise to an action for damages for breach of fiduciary duty.

D. Management of Funds

136. In response to paragraph 23(f) of the Statement of Claim this Defendant says that the manner of the management, distribution and disbursement of the Funds held

to the credit of the Plaintiff was conducted in accordance with the standards of the day and. is mandated by legislation. No action for breach of fiduciary duty will lie where the Crown has acted in accordance with valid legislation.

E. Interest

137. This Defendant says that in view of the passage of time and the circumstances surrounding the events as pleaded in defence, the Plaintiff's claim for interest is excessive.

138. This Defendant therefore asks that the within action be dismissed, and for costs.

Dated: August 31 2020

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SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS	and	**THE ATTORNEY GENERAL OF CANADA and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**
Plaintiff		Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceedings commenced at Toronto
(transferred from Brantford)

FRESH AS AMENDED STATEMENT OF DEFENCE OF THE ATTORNEY GENERAL OF CANADA

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