Oct 17, 2000

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

DEMAND FOR PARTICULARS

THE PLAINTIFF, Six Nations of the Grand River Band of Indians, demanded particulars of the allegations contained in the Attorney General of Canada's statement of defence. The Attorney General of Canada responds as follows:

A. 1. With respect to the allegations in paragraphs 2 and 3:

(a) specify whether the defendant, the Attorney General of Canada ("Canada's Attorney") admits or denies that Canada's Attorney represents Her Majesty the Queen in Right of Canada (hereafter "Canada"); and

Canada admits this statement.

(b) if Canada's Attorney denies that Canada's Attorney represents Canada, provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for such denial.

Not applicable.

(c) (i) does Canada's Attorney allege (as Ontario does in paragraph 7 of Ontario's Statement of Defence) that "if the Crown had or has any obligation or duty to the Six Nations in respect of (the Grand River) lands or proceeds of disposition of lands, it was and is a political trust, not justiciable or enforceable in the courts";

No.

(ii) if so, provide full particulars of 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";

Not applicable.

B. On the assumption that Canada's Attorney is properly named as the representative defendant for Canada pursuant to the *Crown Liability and Proceedings Act* (Canada), a reference to Canada in the remaining paragraphs of this demand for particulars will also hereafter refer to Canada's Attorney where the context requires.

2. With respect to paragraphs 2 and 4:

(a) specify exactly what relevant obligations, duties or liabilities of the Imperial Crown to the Six Nations, is Canada the successor to, or subject to;

Canada is not the successor to, or subject to, any pre-Confederation obligations, duties or liabilities of the Imperial Crown.

(b) specify exactly what relevant obligations, duties or liabilities the Imperial Crown had or owed to the Six Nations which Canada does not now have or owe to the Six Nations;

Canada is not liable to pay damages to the Six Nations for any breach of an obligation or duty committed by the Imperial Crown.

(c) specify, with respect to those obligations, duties or liabilities of the Imperial Crown which Canada alleges Canada does not now have or owe to the Six

Nations, who has or owes those obligations;

Ontario.

(d) provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for the particulars provided in answer to paragraphs (a), (b) and (c) above;

With respect to (a), the *Constitution Act, 1867* united three provinces, Canada, Nova Scotia, and New Brunswick, in the Dominion of Canada on July 1, 1867. A central government was established that was endowed with the powers of the newly-created Crown in Right of Canada. However, the *Constitution Act, 1867* did not make the Crown in right of Canada the successor of the Imperial Crown. There is likewise nothing in the common law that would make Canada the successor of the Imperial Crown.

With respect to (b) and (c), in the period preceding Confederation any obligations, duties or liabilities of the Imperial Crown would have been the responsibility of the Crown in Right of the Province of Canada. If the plaintiff can establish that the Province of Canada owed it a debt or liability as at the date of Confederation, pursuant to Commonwealth common law Ontario would be responsible for satisfying that liability. The common law states that the liability of the Crown is to be determined by the *situs* of the general revenue fund receiving the benefit of the asset giving rise to the liability.

The *Constitution Act, 1867* likewise assigns ultimate responsibility for any liability to Ontario. Section 111 makes the satisfaction of any debt or liability the responsibility of Canada subject to a right of indemnification against Ontario pursuant to section 112. The arbitration proceedings held pursuant to section 142 of the *Constitution Act, 1867* (to determine which of Ontario or Quebec would be liable for debts under section 112) held that where land was situate in Ontario, Ontario would pay for losses flowing from the acquisition of such land. (See: Report of the Nineteenth Meeting of Arbitrators, rendered May 28, 1870, located in the Sessional Papers (No. 42) 1878 (Attorney General's List of Documents, Tab 18, Document 112, pp. 37-39))

At end of the day, then, it is Canada's position that Ontario is liable to satisfy any of the claims established by the plaintiff against the Imperial Crown.

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

Canada does not dispute the jurisdiction of the Ontario Superior Court of Justice to grant the relief claimed in this action with respect to any allegations based on pre-Confederation events.

However, if the nature of any post-Confederation claims involve a review of ministerial actions made pursuant to federal legislative authority, then the Federal Court of Canada would have exclusive jurisdiction to undertake such judicial review.

(f) provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for the allegations (if any) that the Ontario Court of Justice (General Division) does not have complete jurisdiction to grant the relief claimed in this action;

Pursuant to section 18 of the *Federal Court Act*, the Federal Court has the exclusive jurisdiction to review ministerial actions made pursuant to federal legislative authority. While Canada has not alleged that the Ontario Superior Court of Justice lacks complete jurisdiction to grant the relief claimed, if after Canada's discovery of the plaintiff it becomes clear that the Federal Court of Canada has exclusive jurisdiction over any part of the relief claimed, Canada will amend its statement of defence accordingly.

(g) specify, what relevant obligations, duties or liabilities to the Six Nations, Canada has as a result of the *Constitution Act, 1867*; and

Canada has no obligations or duties to the Six Nations that flow from the *Constitution Act, 1867.*

Liabilities may flow to the Six Nations from Canada via section 111 of the *Constitution Act, 1867* if the plaintiff can establish that the Province of Canada owed it a "debt" or a "liability" as at the date of Confederation, subject to a right of indemnification against Ontario pursuant to section 112 of the *Constitution Act, 1867.*

(h) provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for the particulars provided in answer to paragraph (g) above.

If the plaintiff can establish that the Province of Canada owed it a debt or liability as at the date of Confederation, section 111 may make the satisfaction of any debt or liability the responsibility of Canada, subject to a right of indemnification against Ontario pursuant to section 112. The arbitration proceedings held pursuant to section 142 of the *Constitution Act, 1867* (to determine which of Ontario or Quebec would be liable under section 112) held that where land was situate in Ontario, Ontario would pay for losses flowing from the acquisition of such land. (See: Report of the Nineteenth Meeting of Arbitrators, rendered May 28, 1870, found within the *Sessional Papers* (No. 42) 1878, located in the Attorney General's List of Documents, Tab 18, Document 112, pp. 37-39)

3. **With respect paragraphs 4 and 6:**

(a) **specify whether Canada admits or denies that the Imperial Crown had or owed fiduciary obligations to the Six Nations and, in particular, was under a fiduciary obligation to the Six Nations to hold, protect, manage and care for the lands, personal property and other assets vested in the Crown for the benefit of the Six Nations;**

Canada admits that the Imperial Crown had fiduciary obligations to the Six Nations. However, Canada denies the "particular" obligation as described above.

(b) **if Canada denies that the Imperial Crown had or owed fiduciary obligations to the Six Nations and, in particular, was under a fiduciary obligation to the Six Nations to hold, protect, manage and care for the lands, personal property and other assets vested in the Crown for the benefit of the Six Nations, provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for such denial;**

Where the Imperial Crown had the discretion to accept or reject a proposed surrender of Six Nations' land, the Imperial Crown then had, at that time, a fiduciary obligation to ensure that such a surrender was in accord with the wishes of the Six Nations and not exploitative. Upon surrender, a fiduciary obligation then took hold to regulate the manner in which the Imperial Crown exercised its discretion in dealing with the land on the Six Nations' behalf. (See: *Guerin v. The Queen*, [1984] 2 S.C.R. 335 and *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344.)

These were the Imperial Crown's only fiduciary obligations to the Six Nations.

(c) **specify whether Canada was in a fiduciary relationship with the Six Nations on and after July 1, 1867;**

Yes.

(d) **if Canada denies that it was in a fiduciary relationship with the Six Nations on or after July 1, 1867 provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for such denial;**

Not applicable.

(e) specify whether Canada held title to or possessed any assets belonging to or held for the benefit of the Six Nations on and after July 1, 1867;

Canada held and continues to hold moneys for the benefit of the Six Nations, and administers those moneys pursuant to the legislative requirements of the *Indian Act*. These moneys were transferred to Canada from the Province of Canada at Confederation. Canada did not and does not hold title to any of the Six Nations land.

(f) if Canada held title to or possessed any assets belonging to or held for the benefit of the Six Nations on or after July 1, 1867, specify who held title to or possessed such assets immediately prior to July 1, 1867; and

The Province of Canada held moneys for the benefit of the Six Nations immediately prior to July 1, 1867..

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

Canada assumes that this question references (e) and (f), above, as the particulars of (a) are provided in (b), above.

With respect to the Six Nations' moneys, Canada holds these for the benefit of the Six Nations as per its legislative authority pursuant to section 91(24) of the *Constitution Act, 1867*. These moneys were transferred to Canada from the Province of Canada in 1867.

With respect to Six Nations' land, title to unpatented land is in the "Crown" (one and indivisible). However, Canada has legislative capacity over reserve land pursuant to section 91(24) of the *Constitution Act, 1967*.

(h) specify whether Canada now holds title to or is in possession of any assets belonging to or held for the benefit of the Six Nations.

Canada holds moneys for the benefit of the Six Nations.

4. **With respect to paragraphs 7 and 10:**

   (a) **specify whether Canada admits or denies that the Royal Proclamation of 1763 (other than the procedural requirements identified in paragraph 10) has never been repealed and was and is part of the laws in force in Canada and Ontario and binds the Crown; and**

Canada denies this statement.

   (b) **if the statement in paragraph (a) above is denied, provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for such denial.**

Canada's denial is based on its understanding of the *Quebec Act, 1774* which "revoked, annulled and made void" the *Royal Proclamation of 1763* so far as it related to the Province of Quebec. Canada also relies upon the Ontario Court of Appeal judgement in *Isaac v. Davey* (1975), 5 O.R. (2d) 610 in which the Court said that the *Royal Proclamation* was "superseded in 1774 by the Imperial Statute, 14 Geo. III, c. 83, the Quebec Act." Canada further states that it is not completely accurate to use the word "repealed" in respect of the *Royal Proclamation of 1763*. Only statutes can be repealed and the *Royal Proclamation of 1763* is not a statute.

5. **With respect to paragraphs 76 and 77 (and in the light of answer 2(b) to the questions on written examination for discovery to Canada, Set No. 1):**

   (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 Haldimand Proclamation was not or is not a treaty within the meaning of section 35 of the *Constitution Act, 1982*;**

A proclamation is an exercise of Crown prerogative that by its very nature is unilateral. In the late 18th century the Crown used proclamations to ensure its subjects were aware of existing laws. The Crown also used proclamations to regulate in those areas over which it had prerogative. Therefore a proclamation cannot be confused with a treaty, as the latter is characterised by mutually binding obligations.

Canada also relies on jurisprudence holding that the Haldimand Proclamation was not a treaty: *Logan v. Styres*, 20 D.L.R. (2d) 416 (Ont. H.C.J.)

   (b) **does Canada admit or deny that the rights conferred upon the Six Nations by the Haldimand Proclamation are aboriginal rights now protected by the**

Constitution Act, 1982;

Canada denies this statement.

(c) if Canada denies that the rights conferred upon the Six Nations by the Haldimand Proclamation are aboriginal rights now protected by the *Constitution Act, 1982* provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for such denial;

The tests to establish aboriginal rights were set out by the Supreme Court of Canada in *R. v. Van Der Peet*, [1996] 2 S.C.R. 507 and *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010. According to *Van Der Peet*, the test for an aboriginal right to engage in particular activity requires, *inter alia*, that the practice of that activity predate European contact. According to *Delgamuukw*, a claim for "aboriginal title" requires a First Nation to establish, *inter alia*, occupancy of the land at the time of the assertion of Crown sovereignty. Whatever rights were conferred upon the Six Nations by the Haldimand Proclamation, these rights cannot satisfy either of the above tests.

(d) does Canada admit that the plaintiff band is the successor to the beneficial interest of the lands allotted to the Six Nations under the Haldimand Proclamation and the Simcoe Patent?;

Yes.

(e) (i) provide a full and complete description of the beneficial interest which the plaintiff band is the successor to; and

The full and complete description of the beneficial interest which the Six Nations is successor to is the right of exclusive use and occupation to the lands described in the Haldimand Proclamation and the Simcoe Patent set out in 7, below.

(ii) provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for the description provided in answer to paragraph (e)(i) above.

Following the description of the lands in the Simcoe Patent, the document reads as follows:

> To Have and to Hold the said District or Territory of Land so bounded as aforesaid of Us, Our Heirs and Successors, to them the Chiefs, Warriors, Women, and people of the Six Nations, and to

> and for the sole use and Behoof of them and their Heirs for ever, Freely and Clearly of and from all, and all manner of rents, fines, and services whatever to be rendered by them or stipulations and agreements whatever, except as hereinafter by us expressed and declared. Giving and granting, and by the Presents confirming to the said Chiefs, warriors, women, and people of the said Six Nations and their Heirs, the full and entire possession, use, benefit and advantage of the said district or territory, to be held and enjoyed by them in the most free and ample manner,...

6. **With respect to paragraphs 16(b), 17(b), (c) and (d), 19, 21, 26(b) and 28(c) of Canada's Reply to the Demand for Particulars dated March 14, 1996, specify whether those for whose benefit the lands described in the Haldimand Proclamation and the Simcoe Patent were allotted, were the "plaintiff's ancestors", the "ancestors of the plaintiff" or the "ancestors of the Six Nations" as those phrases are used in the above-noted paragraphs of the Reply for the Demand for Particulars, and if not, provide a full and complete definition of "the plaintiff's ancestors", "the ancestors of the plaintiff" and the "ancestors of the Six Nations" as used in the aforesaid Reply to the Demand for Particulars together with full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for such definition.**

Canada admits that those for whose benefit the lands described in the Haldimand Proclamation and the Simcoe Patent were allotted, were the plaintiff's ancestors. Canada sees no distinction between the phrases the "plaintiffs' ancestors", the "ancestors of the plaintiff" or the "ancestors of the Six Nations" as those phrases were used in the above noted paragraphs of the Reply for the Demand for Particulars.

7. **With respect to paragraph 79, provide a full and complete description of "the land" referred to in that paragraph.**

The Simcoe Patent described the lands as follows:

> All that district or territory of land, being parcel of a certain district lately purchased by us of the Mississague Nation, lying in being in the home district of our Province of Upper Canada, beginning at the mouth of a certain river formerly know by the name of the Ouse or Grand River, now called the River Ouse, where it empties itself into Lake Erie, and running along the banks of the same for the space of six miles on each side of the said river, or a space coextensive therewith, conformably to a certain survey made of the said tract of land, and annexed to these presents, and continuing

> along the said river to a place called or known by the name of the forks, and from thence along the main stream of the said river for the space of six miles on each side of the said stream, or for a space equally extensive therewith as shall be set out by a survey to be made of the same to the utmost extent of the said river as far as the same has been purchased by us, and as the same is bounded and limited in a certain deed made to us by the Chiefs and people of the said Mississague nation, bearing date the 7th day of December in the year of our Lord, one thousand seven hundred and ninety-two.

The Haldimand Proclamation described the lands as follows:

> The banks of the river commonly called Ours or Grand River running into lake Erie allotting to them for that purpose six miles deep from each side of the river, beginning at Late Erie, and extending in that proportion to the head of the said river.

The Messissague Surrender, clearly referenced in both documents, sets out the northern boundary of the lands:

> All that tract or parcel of land lying and being between the Lake Ontario and Erie beginning at Lake Ontario four miles southwesterly from the point opposite to Niagara Fort known by the name of Messissague point and running from thence along the said lake to the creek the falls from a small lake known by the name of Washquarter into the said Lake Ontario, and from thence north forty five degrees west fifty miles; thence south forty five degrees.

Canada states that at the time of the Haldimand Proclamation, no survey of the Grand River lands had been undertaken. Its description was therefore imprecise. Prior to the issuance of the Simcoe Patent, a proper survey was made, the results of which were presented to several Chiefs of the Six Nations for their approval, and accepted by them. This survey is reflected in the patent. Therefore, it is Canada's position that the Simcoe Patent accurately reflects the lands granted to the Six Nations.

8. With respect to paragraphs 2 and 80:

(a) specify when the fiduciary relationship between Canada and the members of the Six Nations (who are admitted to be aboriginal people by paragraph 2 of Canada's Statement of Defence) arose;

July 1, 1867.

(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 *Constitution Act, 1867* united three provinces, Canada, Nova Scotia, and New Brunswick, in to the Dominion of Canada on July 1, 1867. Until then Canada did not exist and could not have been in a fiduciary relationship with the Six Nations.

(c) specify what (if any) fiduciary obligations arose as a result of the fiduciary relationship referred to in paragraph 80;

Where the Crown in right of Canada ("Canada") has the discretion to accept or reject a proposed surrender of Six Nations' land, Canada then has, at that time a fiduciary obligation to ensure that such a surrender is in accord with the wishes of the Six Nations and not exploitative. Upon surrender, a fiduciary obligation then takes hold to regulate the manner in which Canada exercises its discretion in dealing with the land on the Six Nations' behalf. (See: *Guerin v. The Queen*, [1984] 2 S.C.R. 335 and *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344.)

This would be the extent of Canada's fiduciary obligations to the Six Nations.

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

With respect to the taking of surrenders (consensual alienation), the fiduciary relationship has its roots in the concept of aboriginal, native or Indian title, and the further proposition that the Indian interest in land is inalienable except upon surrender to the Crown. The surrender requirement, and the responsibility it entails, is the source of the distinct fiduciary obligation owed by Canada to the Six Nations.

(e) specify what aspects of the fiduciary relationship referred to in paragraph 80 are alleged not to give rise to a fiduciary duty; and

Canada states that it has no fiduciary obligations other than that described in (c), above.

(f) provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for the answer to paragraph (e) above.

Canada understands the law to impose no other relevant fiduciary obligations. In other words, Canada knows of no material facts that would support an assertion that additional fiduciary obligations exist, other than that described above in (c), above.

9. With respect to paragraph 25:

(a) specify whether legal title to the Six Nations lands referred to in paragraph 25 was vested in the Crown;

Legal title to the Six Nations lands referred to in paragraph 25 of Canada's Statement of Defence was and remains vested in the Crown (one and indivisible).

(b) specify whether Canada alleges that Joseph Brant had the capacity necessary to effectively appoint Colonel William Claus to be a trustee of property vested in the Crown or to receive funds from the sale of Six Nations' lands the title to which was vested in the Crown; and

Canada did not allege that Joseph Brant appointed Claus to be a trustee of property vested in the Crown. Rather, Canada alleged that Brant appointed Claus to be a "trustee to receive funds from the sale of the Six Nations lands."

(c) provide full particulars of all allegations of fact, law or mixed fact and law relied upon as the basis for the answers provided to paragraphs (a) and (b) above.

In respect of paragraph (a) above, both the Haldimand Proclamation and the Simcoe patent state that the land given to the Six Nations was "purchased" by the Crown.

In respect of paragraph (b) above, Canada states that Brant's capacity to appoint Claus to be "trustee to receive funds from the sale of the Six Nations lands" was based on the power of attorney which the Six Nations granted to him. Through this power of attorney Brant was entrusted with authority over Six Nations' affairs and the power to appoint trustees in respect of the same:

> And we do further Authorize our said Brother and Attorney after the passing of such grants to ask, Demand, Receive and take such *Security* or *Securitys* Either in his own name or the names of others to be by him then and there Nominated, as he or they may deem necessary for securing the payment of the several sums of money that may become due and owing from such purchasers; And

> Likewise to receive all such Sum or Sums of money, as may be due and owing therefore, and on receipt of all or any part there of full and absolute manner as we all and each of us could do if personally present Hereby allowing satisfying, and in the fullest manner Confirming Whatsoever our said Brother and hereby Constituted Attorney may lawfully do or cause to be done in the Premisses.

10. (a) with respect to paragraphs 2 and 105 and the allegations contained in the Statement of Claim, particularly in paragraphs 22, 23 and 56 thereof, does Canada admit or deny that the Crown had an obligation to obtain full and fair compensation for the benefit of the Six Nations in return for a conveyance of legal title to any or all of the Grand River Lands;

Canada denies this statement.

(b) provide full particulars of all allegations of fact, law or mixed fact and law relied upon as the basis for the answer provided to paragraph (a) above.

Generally speaking, where the Crown had the discretion to accept or reject a proposed surrender of Six Nations' land, the Crown had, at that time a fiduciary obligation to ensure that such a surrender was in accord with the wishes of the Six Nations and not exploitative. Upon surrender, a fiduciary obligation then took hold to regulate the manner in which the Crown exercised its discretion in dealing with the land on the Six Nations' behalf. (See: *Guerin v. The Queen*, [1984] 2 S.C.R. 335 and *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344.)

The facts are that from time to time the Six Nations or their representatives themselves arranged for the sale of tracts of the Grand River Lands, bargaining for what they considered to be full and fair compensation. They received the money or other valuable consideration (e.g. mortgages or securities) from these sales. These transactions were in accord with the wishes of the Six Nations.

Therefore, the Crown was not in a position where it received or ought to have received full and fair compensation for the benefit of the Six Nations for the conveyance of legal title to <u>all</u> of the Grand River Lands.

With respect to the sale or conveyance of <u>any</u> of the Six Nations' lands, Canada alleges that when Six Nations' land was surrendered to the Crown for the express purpose of obtaining full and fair compensation, then the Crown would have been subject to a fiduciary obligation to do so.

11. With respect to paragraphs 29, 40, 50, 83 and 119 provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for the proposition implicit in those paragraphs that the Six Nations had the capacity necessary to effectively appoint William Claus, John Claus, J.H. Dunn or other persons to be trustees of assets legal title to which was vested in the Crown for the benefit of the Six Nations.

Joseph Brant, pursuant to the power of attorney given to him by the Six Nations in 1796 (signed by thirty five chiefs), appointed three trustees in whose names the purchasers of the Six Nations' land would provide their security for the principle and interest arising from the sale. The trustees had the authority to deal with money belonging to, and the investments made on behalf of, the Six Nations.

These assets (money and investments) were never vested in the Crown, nor can one properly refer to "legal title" in relation to these assets.

Further, it is Canada's position in law that the Six Nations had the capacity necessary to appoint the three trustees. Other than the Six Nations' incapacity to pass legal title, it had full capacity at that time to manage its own affairs – and to appoint trustees if it so chose.

12. With respect to paragraph 89 provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for:

(a) the proposition that the Six Nations had the responsibility for enforcing the terms of the Selkirk Mortgage; and

In 1796, the Six Nations gave Joseph Brant a power of attorney which included the authority to

> Demand, Receive and take such security or Securitys Either in his own name or the Names of others to be by him then and there Nominated, as he or they may deem necessary for securing the payment of the several sums of money that may become due and owning from such purchasers.

Pursuant to this authority, Brant constituted the Honourable David William Smith, William Claus and Alexander Stewart as trustees for the Six Nations.

In 1798, when Blocks 1-6 of the Grant River lands were surrendered to the Crown for sale to specified purchasers, the Secretary of the Province was directed not to deliver the deeds of grant to the named purchasers

> unless the shall produce and leave with him a Certificate under the

> Hands and Seals of the Honourable D.W. Smith, William Claus, Esq. and Alexander Stewart Esq., trustees authorised by the five Nations to received mortgages of the said lands that the said Parties have done everything required of them & necessary to secure to the five Nations and their Posterity the Stipulated Annuities and Considerations which they agreed to give for the same.

Brant directed that the trustees were the persons to whom and in whose names the necessary securities (for the purchase moneys) should be taken. The trustees were entrusted with the receiving and accounting for the moneys to be paid to the Six nations for the land purchased. In 1807, Claus was the sole remaining Six Nations trustee. In order to secure the principle and the interest payable on the purchase of Block 5, Lord Selkirk gave a mortgage to Claus personally.

When Brant nominated the trustees, Peter Russell wrote Brant saying:

> I can have no objection to the Gentlemen whom you have named to be the Trustees, in whose names the Securities are to be taken for the payment of the Annuities to the five Nations on the lands they are about selling. I beg leave however to repeat the opinion I gave you yesterday that as Offices never die, but are permanent, three or four of the principle Officers of Govt for the time being and their successors, might have been probably more eligible in a Transaction of this nature for very obvious reasons.

After Claus died, his son John was appointed trustee by the Six Nations. In 1831, the Selkirk mortgage was assigned by John to the Six Nations' new trustees (George H. Markland, John Henry Dunn, and the Honourable James Baby) in trust for the Six Nations. The instrument by which the mortgage was transferred from the heirs of William Claus to Markland, Dunn and Baby stipulated that the trustees were responsible for demanding, taking and receiving moneys due on the mortgage.

Markland, the last surviving trustee, legally transferred the Selkirk mortgage to the Crown on December 4, 1856. The conveyance read in part:

> ...all powers and authorities of the said John Henry Dunn and George Herchmer Markland to recover and enforce the same (...) Together with full power and authority in the name of the said George Herchmer Markland his executors or administrators to receive and give effectual discharges for the said sum and sums of money, and from time to time to commence institute and prosecute such actions suits another lawful proceedings upon the covenants contained in the same Indentures respectively and the said Bond for the recovery of moneys benefits and advantages secured

thereby as shall be deemed necessary and expedient.

(b) the proposition implicit in that paragraph that the Six Nations had the capacity necessary to effectively give responsibility for enforcing the Selkirk Mortgage to the "Claus trustees".

Canada states that the Six Nations had the capacity necessary to effectively give responsibility for enforcing the Selkirk mortgage to the Claus trustees. Other than the Six Nations' incapacity to pass legal title, it had full capacity at that time to manage its own affairs – and to appoint the Claus trustees if it so chose.

13. With respect to paragraph 17:

(a) specify in detail the origin and attributes of the "particular land conveyancing system"; and

When Joseph Brant sold land on behalf of the Six Nations, Upper Canada's land conveyancing system was governed by the common law. The fundamental attribute of that system was that the Crown held radical title to all lands within the realm. Private ownership of such lands could only exist with the permission of the Crown, evidenced by the issuance of a Crown patent.

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

Canada's understanding of the law with respect to the Crown's radical title in an aboriginal context is based Canada's reading of *Guerin v. The Queen*, [1984] 2 S.C.R. 335: "Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown." (at 382) and *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 at 1081:

> Lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, is inalienable to third parties.

Prior to 1854, the Governor or his designate issued Crown patents of Indian land pursuant to Crown prerogative. From 1854 forward, Crown patents of Indian land were issued pursuant to statutory authority. See *An Act to amend the Law for the Sale and the Settlement of the Public Lands,* S.C. 1853, c. 159 (16 Vict.). See also Order in Council dated April 28, 1854.

14. With respect to paragraph 18:

(a) specify whether Canada alleges that the Six Nations' council had the capacity necessary to give Joseph Brant a power of attorney authorizing him to take such security...either in his own name or in 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; and

Canada so alleges.

(b) provide full particulars of all allegations of fact, law or mixed fact and law relied upon as the basis for the answer provided to paragraph (a) above.

The fact that the Imperial Crown was in a fiduciary relationship with the Six Nations at the time did not preclude the Six Nations from granting the power of attorney to Joseph Brant. Other than the Six Nations' incapacity to pass legal title to its lands, it had full capacity at that time to manage its own affairs – and to appoint an attorney if it so chose.

Because the Six Nations had the capacity to engage in the activities for which it gave power of attorney to Brant, Brant could exercise those same activities.

Specifically, the power of attorney given to Brant by the Six Nations in 1796 permitted Brant to

> Demand, Receive and take such security or Securitys Either in his own name or the Names of others to be by him then and there Nominated, as he or they may deem necessary for securing the payment of the several sums of money that may become due and owning from such purchasers.

Pursuant to this authority, Brant constituted the Honourable David William Smith, William Claus and Alexander Stewart as trustees for the Six Nations.

15. With respect to paragraph 85:

(a) does Canada allege that there are "records extant today" which would permit the "accounting" therein mentioned to be completed;

Canada does not so allege.

(b) if so, specify the records listed in the plaintiff's Affidavit of Documents or

Supplementary Affidavit of Documents or otherwise specifically identify the documents to which the allegation in paragraph 85 refers; and

Notwithstanding Canada's response to paragraph (a), there are some partial records available, and those within the knowledge of Canada have been listed. (See Canada's Supplementary List of Documents #2.)

Other records which may have existed to permit a full accounting of the Claus estate were given to the Six Nations through its lawyer, and at its Council, on September 28, 1831. Canada has no knowledge of the nature of these records or their location today. In addition, the Turquand Report reviews the documents that were provided to the Six Nations on September 28, 1831 and may contain additional information that may allow such an accounting to be completed. This report was Turquand's attempt to reconstruct the Six Nations' accounts as best he could. (See Canada's Supplementary List of Documents #2, Claim 4, Document 114.)

(c) **specify whether or not Canada alleges that there are relevant records in the possession, power or control of the plaintiff which have not been listed in the Affidavit of Documents or the Supplementary Affidavit of Documents provided by the plaintiff and provide full particulars of all allegations of fact, law or mixed fact and law relied upon as the basis for that allegation.**

Canada does not so allege.

16. With respect to paragraph 27:

(a) **specify whether Canada alleges that the Six Nations had the capacity to effectively instruct William Claus to hold securities received from the sale of Six Nations' lands, make loans or distribute money among the different tribes;**

Canada so alleges.

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

The fact that the Imperial Crown was in a fiduciary relationship with the Six Nations did not preclude the Six Nations from instructing Claus. Other than the Six Nations' incapacity to pass legal title to its lands, it had full capacity at that time to manage its own affairs – and to instruct its trustees if it so chose.

Because the Six Nations had the capacity to engage in the activities for which it instructed Claus, it could request that he exercise those same activities.

Evidence that such instructions were effective can be found in Canada's List of Documents, Claim 2, Document 34 where reference is made to Claus pursuing an action against William Kerr, a Six Nations' chief, for moneys owing to the Six Nations. Judgement was obtained and the accounts reflect that payment was made pursuant to that judgement.

17. With respect to paragraph 33:

(a) specify whether Canada alleges that the Six Nations had the capacity necessary to instruct William Dickson as alleged in paragraph 33 and specify the nature of the proceedings that the Six Nations were capable of instituting and the necessary parties thereto; and

Canada so alleges. As the instructions to Dickson were to recover money from John Claus, it is assumed that the appropriate proceedings would have included an action for the recovery of money. Under the circumstances of these particular facts, it is assumed that the necessary parties would have been the three trustees subsequently appointed by the Six Nations (Dunn, Markland and Baby) as plaintiffs and John Claus as defendant.

(b) if so, provide full particulars of all allegations of fact, law or mixed fact and law relied upon as the basis for the answer to paragraph (a) above.

Other than the Six Nations' incapacity to pass legal title to its lands, it had full capacity at that time to manage its own affairs – and to instruct counsel if it so chose.

As to the instructions given by the Six Nations to its lawyer, William Dickson, Canada has no particulars. Full particulars would be in the knowledge of the ancestors of the Six Nations. Evidence of the fact that instructions were given can be found in the following documents: Minutes of a Six Nations Council Meeting dated June 29, 1830 and Letter from Z. Mudgeto the Attorney General of Upper Canada dated July 14, 1830. (See Canada's List of Documents, Claim 4, Documents 95 and 100.)

18. With respect to paragraph 94:

(a) specify when an action or other proceeding to enforce "this claim" could first have been instituted and specify the nature of the proceeding and the essential parties to the proceeding; and

"This claim" is the Six Nations' claim for land and property flooded or damaged during the construction of the Welland Canal. This claim was governed by the legislation allowing for this form of expropriation for public purposes, entitled *An Act to Incorporate certain persons therein mentioned, under the style and title of "the Welland Canal Company"*, 4th Wm. IV, Chap. 17 (1824), which provided for the arbitration of claims relating to property loss or damage. Subject to article VIII, the award of a majority of the arbitrators "shall be final".

> VIII. And it be further enacted by the authority aforesaid, That any award made under this Act shall be subject to be set aside on application to the Court of King's Bench, in the same manner and on the same grounds as in ordinary cases of submission by the parties, in which case a reference may be made again to the arbitrators, as herin-before provided.
>
> IX. ...if any part of the said Canal shall pass through any tract of land in the possession of any tribe or tribes of Indians in this Province, or if any act occasioning damage to their property or their possessions shall be done under the authority of this Act, compensation shall be made to them in the same manner as is provided with respect to the property, possessions or rights of other individuals; and that in any arbitration required for settling the amount of compensation, the Chief Officer of the Indian Department within this province is hereby authorised and required to name an Arbitrator on the behalf of the Indians and the amount which shall be awarded in any such case shall be paid to the said Chief Officer of the Indian Department to the use of the said Indians...

Individual members of the Six Nations submitted claims to arbitration for property loss and property damage caused by the Welland Canal flooding. Most of these claims were resolved in 1835 by arbitration. The final claim was resolved in 1849 by the Board of Works. Subsequent flooding claims were addressed either through negotiation, or possibly arbitration.

It appears that the essential parties to the arbitration were the arbitrators, including one selected by the Chief Officer of the Indian Department to act on behalf of the Indians, and the Indian claimant.

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

An Act to Incorporate certain persons therein mentioned, under the style and title of "the Welland Canal Company", 4th Wm. IV, Chap. 17 (1824).

Amendments to the above act are as follows:

6 Geo. 4, c. 2
7 Geo. 4, cs. 19 & 20
8 Geo. 4, cs. 2 & 17
10 Geo. 4, c. 9
11 Geo. 4, c. 11
1 Wm. 4, c. 17
2 Wm. 4, c. 12
3 Wm. 4, c. 54
4 Wm. 4, cs. 22 & 39
5 Wm. 4, c. 24
6 Wm. 4, c. 34
7 Wm. 4, c. 92
1 Vict., c. 28
4th and 5th Vict., cs. 28, 38 and 48.

See also the following documents:

Claim 5, Doc. 20
Claim 5, Doc. 32.
Claim 5, Doc. 33
Claim 5, Doc. 34
Claim 5, Doc. 52
Claim 5, Doc. 62, pp. 328-332
Claim 5, Doc. 111
Claim 5, Doc. 115
Claim 5, Doc. 162.

19. With respect to paragraphs 99 and 100:

(a) does Canada allege that "crediting the Six Nations' account for subscribed shares in the amount of £368.14 provincial currency" was full and fair compensation for the land patented to the Grand River Navigation Company; and

Yes.

(b) if so, provide full particulars of all allegations of fact, law or mixed fact and law relied upon as the basis for the answer to paragraph (a) above.

At the time of the expropriation, the highest upset price at the last sales in the Town of Brantford was £1 per acre for unimproved lands. It was on this basis that the price was fixed for the expropriated lands. See Canada's List of Documents, Claim 6, Doc. No. 69.

20. With respect to paragraph 103:

(a) does Canada allege that no Six Nations' lands were sold or conveyed without the Six Nations' agreement as to the nature and amount of the consideration to be obtained in return for such sale or conveyance;

Canada does not so allege.

(b) does Canada allege that no Six Nations' lands were sold or conveyed without obtaining full and fair compensation for the Six Nations;

No.

(c) does Canada allege that the Crown did not have a fiduciary obligation to obtain full and fair compensation in return for the sale or conveyance of any or all of the Six Nations' lands; and

Yes.

(d) provide full particulars of all allegations of fact, law or mixed fact and law relied upon as the basis for the answers to paragraphs (a), (b) and (c) above.

With respect to (a), Six Nations' land was surrendered to the Crown for sale. There was no requirement or obligation for the Crown to go back to the Six Nations for approval or agreement as to the terms and conditions of subsequent sales or lease of such lands.

With respect to (b), Canada's present state of analysis has so far disclosed no evidence that surrendered land was sold or conveyed without obtaining full and fair compensation for the Six Nations. To Canada's knowledge there are potentially thousands of conveyances. Canada only has an overview of these facts at this time, and this does not reveal that any lands were sold or conveyed without obtaining full and fair compensation.

With respect to (c), generally speaking, as stated above at paragraph 10, where the Crown had the discretion to accept or reject a proposed surrender of Six Nations' land, the Crown then had, at

that time a fiduciary obligation to ensure that such a surrender was in accord with the wishes of the Six Nations and not exploitative. Upon surrender, a fiduciary obligation then took hold to regulate the manner in which the Crown exercised its discretion in dealing with the land on the Six Nations' behalf. (See: *Guerin v. The Queen*, [1984] 2 S.C.R. 335 and *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344.)

More specifically, the facts are that from time to time the Six Nations or their representatives themselves arranged for the sale of tracts of the Grand River Lands, bargaining for what they considered to be full and fair compensation. They received the money or other valuable consideration (e.g. mortgages or securities) from these sales. These transactions were in accord with the wishes of the Six Nations.

Therefore, the Crown was not in a position where it received or ought to have received full and fair compensation for the benefit of the Six Nations for the sale or conveyance of legal title to all of the Grand River Lands.

With respect to the sale or conveyance of any of the Six Nations' lands, Canada alleges that when Six Nations' land was surrendered to the Crown for the express purpose of obtaining full and fair compensation, then the Crown would have been subject to a fiduciary obligation to do so.

21. With respect to paragraph 105 specify:

(a) what (if any) duty the Province of Canada had to obtain any or adequate compensation for the sale or conveyance of Six Nations' lands; and

Upon surrender, a fiduciary obligation then took hold to regulate the manner in which the Crown in right of the Province of Canada exercised its discretion in dealing with the land on the Six Nations' behalf. (See: *Guerin v. The Queen*, [1984] 2 S.C.R. 335 and *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344.)

When Six Nations' land was surrendered to the Crown in right of the Province of Canada for the express purpose of obtaining full and fair compensation, then the Crown in right of the Province of Canada would have been subject to a fiduciary obligation to so.

When the Six Nations or their representatives themselves arranged for the sale of tracts of the Grand River Lands, bargaining for what they considered to be full and fair compensation, then the Crown in right of the Province of Canada had no such fiduciary duty.

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

The duty of the Crown was never to substitute the Crown's view as to whether Indian land should be sold, but rather to prevent exploitative bargains. The Six Nations always had the right to decide whether to sell its land, and on what terms, and that decision was to be respected.

The Six Nations entered into many arrangements with private purchasers to sell their land. The fact that the Crown was eventually required to issue a patent in order to give legal effect to the Six Nation's intention to sell did not give rise to any fiduciary duty upon surrender because at this stage of the process, the Crown had no discretion to deal with the land on the Six Nations' behalf (and therefore no obligation to obtain adequate compensation).

Canada's response to (a), above, is in accord with its understanding of the nature of the Crown's fiduciary obligation to aboriginal peoples as set out in *Guerin v. Canada*, [1984] 2 S.C.R. 335 and *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344.)

22. With respect to paragraph 106 specify exactly what benefits flowed to the Six Nations by reason of the "well founded and flexible" "regime" therein mentioned.

One benefit was the Crown's respect for the wishes of the Six Nations concerning the disposition of their lands. The second benefit was the Crown's protection of the Six Nations from exploitative bargains at the time of surrender. The third benefit was the Crown's obligation to exercise its discretion on behalf of the Six Nations when dealing with surrendered lands in accordance with the exigencies at the time.

23. With respect to paragraph 107:

(a) provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for the denial of a fiduciary or other duty to obtain full and fair compensation for Six Nations' lands "otherwise transferred"; and

Where the Crown had the discretion to accept or reject a proposed surrender of Six Nations' land, the Crown then had, at that time a fiduciary obligation to ensure that such a surrender was in accord with the wishes of the Six Nations and not exploitative. Upon surrender, a fiduciary obligation then took hold to regulate the manner in which the Crown exercised its discretion in dealing with the land on the Six Nations' behalf. (See: *Guerin v. The Queen*, [1984] 2 S.C.R. 335 and *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344). As land sales could not occur without roads, compensation could only be maximized with the allocation of road allowances for the construction of roadways. Therefore the Crown's fiduciary obligations could only be fulfilled with the allocation of such allowances that made such sales possible.

(b) provide a full explanation of what Canada means by the statement "it was implicit that the sale price of any lands sold took into account the value of lands "otherwise transferred"".

Where land was dedicated or "otherwise transferred" for public purposes such as roads, the value of the surrounding land would increase as settlement was facilitated. Thus the Six Nations would have been indirectly compensated for the value of the lands dedicated or "otherwise transferred".

24. With respect to paragraph 113:

(a) provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for the denial that the Crown took possession of Lots 25 and 26, Concession 4, of the Township of Dunn; and

Canada denies that the Crown took possession of Lots 25 and 26, Concession 4, Dunn Township ("Lots 25 and 26") under *An Act to authorize Her Majesty to take Possession of Lands for the erection of Fortification in this Province, under certain circumstances,* S.U.C., 1840, c. 16 (for the purposes of answering question 24, "the Act"). The Act was proclaimed in 1840 and repealed in 1843. At no time between 1840 and 1843 did the Crown expropriate Lots 25 and 26 for military purposes.

Lots 25 and 26 were leased pursuant to a "Brant lease." These lots were included as part of the lands the Six Nations surrendered in 1835 to allow the Crown to quiet the title to land held pursuant to "Brant leases." See surrender No. 39, March 26, 1835.

(b) provide full particulars of the compensation (if any) obtained for or paid to or for the benefit of the Six Nations with respect to Lots 25 and 26, Concession 4, Township of Dunn.

With respect to lots 25 and 26, the lease between Brant and the leaseholder, Tunis Thompson, was destroyed by fire. See Claim 11, Doc. No. 69, p. 441.

Canada has no information at this time regarding what lease payments were made by Thompson to Brant.

25. With respect to paragraph 115 provide full particulars of the compensation obtained or paid to or for the benefit of the Six Nations for the lands described in paragraphs 71 and 72 of the Statement of Claim.

The Land Sales System contains a number of entries for sales from the aforementioned tracts. They are as follows:

Township	Tract	Number of Sales Entries
Brantford	Johnson Settlement	183
Brantford	Oxbow	7
Brantford	Eagles Nest	38
Onondaga	Martins Tract	1

DIAND employees explained that the Lands Sales records are not likely complete, perhaps explaining the lack of entries for the Oxbow and the Martins Tract. Additional documentation for sales in these tracts, according to the Lands Department, could possibly be found in records of the National Archives. In addition, it seems possible that some entries relate to the Martins Tract but are not specifically identified as such.

A chart tracking the sale of individual tracts, with accompanying details, is attached as Appendix "A".

The Lands Sales System printed off any sales that mentioned "Johnson Settlement," thus a number of entries were printed off that included lots described as "east" or "west" of Johnson Settlement. When these were deleted, the number of entries was 183.

26. With respect to paragraph 120:

(a) does Canada allege that placing monies held for the benefit of the Six Nations in the consolidated revenue fund is consistent with the Crown's fiduciary obligations to the Six Nations;

Yes.

(b) if so, provide full particulars of all allegations of fact, law or mix fact and law relied upon as the basis for the answer to paragraph (a) above; and

Pursuant to Orders in Council dated August 25, 1859 and January 16, 1861, administration of the Indian Fund was assumed by the Province of Canada as of December 31, 1860. Thereafter, all Indian moneys received by the Receiver General were deposited in the Consolidated Revenue Fund to the credit of the applicable First Nation.

The placement of moneys held for the benefit of the Six Nations in the consolidated revenue fund is done pursuant to statute. Whatever the fiduciary obligations of the Crown are to the Six

Nations, the Crown cannot act contrary to statutory requirement; to do so would be contrary to law.

The statute that requires the placement of Indian moneys in the consolidated revenue fund is the *Financial Administration Act* and its predecessors. In particular, see as follows:

(a) *The Constitution Act, 1867.* Section 102 stipulated as follows:

> All Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have Power of Appropriation, except such Portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of Canada in the Manner and subject to the Charges in this Act provided.

(b) *An Act respecting the collection and management of the Revenue, the Auditing of Public Accounts, and the liability of Public Accountants*, (1867) 31 Vict., c. 5. The relevant provision is s. 12, which provides as follows:

> All public moneys, from whatever source of revenue derived, -- shall be paid to the credit of the Receiver General through such officers, banks or parties, and in such manner, as the Governor in Council may from time to time direct and appoint.

(c) *Financial Administration Act*, R.S.C. 1985, c. F-11. The relevant provisions are as follows:

s. 2

> "Consolidated Revenue Fund" means the aggregate of all public moneys that are on deposit at the credit of the Receiver General;
>
> "public money" means all money belonging to Canada received or collected by the Receiver General or any other public officer in his official capacity or any person authorized to receive or collect such money, and includes

(a) duties and revenues of Canada,

(b) money borrowed by Canada or received through the issue or sale of securities,

(c) money received or collected for or on behalf of Canada, and

(d) all money that is paid to or received or collected by a public officer under or pursuant to any Act, trust, treaty, undertaking or contract, and is to be disbursed for a purpose specified in or pursuant to that Act, trust, treaty, undertaking or contract;

s. 17.

(1) Subject to this Part, all public money shall be deposited to the credit of the Receiver General.

s. 21.

(1) Money referred to in paragraph (d) of the definition "public money" in section 2 that is received by or on behalf of Her Majesty for a special purpose and paid into the Consolidated Revenue Fund may be paid out of the Consolidated Revenue Fund for that purpose, subject to any statute applicable thereto.

(2) Subject to any other Act of Parliament, interest may be allowed and paid from the Consolidated Revenue Fund in respect of money to which subsection (1) applies, in accordance with and at rates fixed by the Minister with the approval of the Governor in Council.

(c) if, as suggested in the answer to paragraph 15 of the Request to Admit, incorporated by reference into question 2 of Set No. 1 of the Questions to Canada on Written Examination for Discovery, "costs incurred by the Crown in the course of administering Indian Affairs may have been charged back to some or all Bands whose assets were being administered by the Crown", provide full particulars of all allegations of fact, law or mixed fact and law relied upon as the basis for the justification for such charge backs and the differential treatment of Bands of Indians including Bands "whose assets were being administered by the Crown" and Bands without assets

being administered by the Crown.

The charge backs were justified on the "principle that the Indians were in justice liable to share of the Office expenditure, proportional to the services rendered to them, based upon receipt of their sums." (R.B. Sullivan, Surveyor General, 6 January 1840, Claim 13, Doc. 34)

See also: Despatches from the Governor General to the Secretary of State for the Colonies, July 22, 1856, U.K. Sessional Paper No. 595, 1860.

> The "sinking fund" of which mention is made in this Minute relates to a per-centage which has since the 1st April last been, by my direction, deducted from the proceeds of the sales of Indian lands. The greater part of this it is intended to invest, and allow to accumulate for the purpose of ultimately forming a fund to meet the expense of management of the Indian property, and the incidental expenses connected therewith.

Since 1860, legislation has existed that empowered the Crown to charge back administrative costs:

> June 30, 1860, *An Act Respecting the Management of the Indian Lands & Property*, S.C. 23 Vict., c. 151, s. 8
>
> May 22, 1868, *An Act Providing for the Organization of the Secretary of State of Canada, and for the Management of Indian and Ordinance Lands*, S.C. 1868, 31 Vict., c. 42, s. II.
>
> April 12, 1876, *An Act to Amend and Consolidate the Laws Respecting Indians*, S.C. 39 Vict., c. 18, s. 59.
>
> May 7, 1880, *An Act to Amend and Consolidate the Laws Respecting Indians*, S.C. 43 Vict., c. 18, s. 69-71.
>
> June 3, 1895, *An Act to Further Amend the Indian Act*, amendment to s. 70.
>
> 1906 Amendments to the *Indian Act*, s. 84, 87 and 89.

Canada has no knowledge of bands of Indians without assets being administered by the Crown or any differential treatment in the administration of assets.

27. With respect to paragraph 121:

(a) specify all provisions of all legislation alleged to constitute the "legislative mandate" referred to in paragraph 121;

The provisions of all contemporary legislation alleged to constitute the "legislative mandate" referred to in paragraph 121 are sections 2 ("Indian moneys") and 61-69 of the *Indian Act* (the management of Indian moneys) and sections 2 ("Consolidated Revenue Fund", "public monies"), 17 and 21(1) of the *Financial Administration Act* (the authority to disburse Indian moneys out of the Consolidated Revenue Fund).

(b) provide full particulars of all allegations of fact, law or mixed fact and law relied upon for:

(i) the proposition that an accounting would be inordinately expensive; and

The plaintiff has advised that to provide an accounting Canada would have to prepare a set of ledgers that account for: (1) the plaintiff's original estate; (2) all assets received for the benefit of the plaintiff's estate; (3) all assets disbursed from the plaintiff's estate; and (4) all assets remaining in the plaintiff's estate. It is the plaintiff's position, therefore, that Canada account for every transaction involving the plaintiff's assets between 1784 and the present.

That such a proposition would be inordinately expensive is evidenced by the fact that contemporary accountings performed with the benefit of modern record keeping methods can run into the millions of dollars. To undertake an accounting of a 200-year period on the basis of archaic record keeping practices would likely run into the tens of millions of dollars. That said, Canada has no way of precisely estimating the cost of such an accounting.

(ii) an accounting would be a practical impossibility;

The production of an accounting would be a practical impossibility as the accounting records of the Six Nations were not in control of the Crown until the mid-19th century. Furthermore, some records have been accidentally destroyed or lost over the centuries.

Therefore, an accounting would be a practical impossibility because of the length of time covered and the state and complexity of the records. It is Canada's experience, in attempting to create an inventory of Six Nations' lands, that records are far too scattered, extensive, and incomplete to create a complete record of all transactions and related documents.

(c) if, as pleaded, the Court should not order an accounting on the basis that it

would be inordinately expensive or a practical impossibility,

(i) does Canada allege that the Six Nations' Trust should not be made whole;

Canada does not so allege.

(ii) if Canada alleges that the Six Nations Trust should not be made whole, on what basis (if any) should the Six Nations be compensated; and

Not applicable.

(iii) provide full particulars of all allegations of fact, law or mixed fact and law relied upon as the basis for the answer to paragraph (c) above.

Canada's pleas regarding the inordinate expense and the practical impossibility of an accounting are made in the alternative. Should the Six Nations identify and prove some loss with respect to their trust prior to Confederation, then Ontario would be responsible for satisfying that claim. Should the Six Nations identify and prove some loss with respect to their trust following Confederation, then Canada would be responsible for satisfying that claim.

28. With respect to paragraph 122:

(a) specify when an action or other proceeding to enforce the claims said to be barred by the statutory provisions referred to could first have been instituted and specify the nature of the proceeding and the essential parties thereto; and

Canada states that it has always been open to the Six Nations to have recourse to the Courts for any appropriate remedy.

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

Canada knows of no good law that would have prevented the Six Nations from suing or making a complaint to the Crown.

29. With respect to paragraph 130, provide full particulars of all allegations of fact, law

or mixed fact and law relied on as the basis for the denial of the obligation to account.

In 1925, the Six Nations surrendered the oil and gas rights on the Six Nations reserve to the Petrol Oil and Gas Company ("POG") for a period of 20 years. Gas and oil extraction, however, continued for a further 25 years (1945-1970) with the knowledge of the Six Nations. The Six Nations implicitly consented to the continued extractions by receiving royalties pursuant to the terms of the lease.

Further, it is Canada's position in law that there is no duty to account. This is based on the proposition that all money held for Indian Bands is placed in the Consolidated Revenue Fund that holds all public funds collected by the federal government. While the Crown may have an administrative or governmental obligation to administer such moneys, this obligation does not amount to a trust or fiduciary duty.

30. With respect to paragraph 131, provide full particulars of all allegations of fact, law or mixed fact and law relied upon as the basis for the proposition that the plaintiffs have waived their right to the relief claimed in this action.

Canada states that the plaintiff's delay in bringing this action constitutes a waiver of its right to the relief claimed in this action. Almost fifty years passed since the litigation of *Miller v. The King* and the commencement of this action. Canada's position is that this delay is excessive and constitutes a waiver through acquiescence.

31. With respect to paragraphs 132 and 133:

(a) does Canada admit or deny that in *Miller v. The King*, Canada argued that:

(i) the Imperial Crown retained responsibility for Indian Affairs in Canada after 1840; and

Canada admits this statement.

(ii) the claims put forward by the Six Nations in *Miller v. The King* could not be asserted against the Crown in Right of Canada by reason of the provisions of the *Petition of Right Act* and/or the *Exchequer Court Act*;

Canada admits this statement.

(b) does Canada admit or deny that neither the Six Nations nor Canada argued and neither the Exchequer Court nor the Supreme Court of Canada held that by operation of law the obligations of the Imperial Crown to the Indians of Canada in general and the Six Nations in particular became the obligations of Canada or Ontario subsequent to 1840;

Canada admits this statement.

(c) does Canada admit or deny that Canada argued in *Regina v. Secretary of State* (1982), 1 Q.B. 892, 937, that the obligations of the Imperial Crown to the Indians of Canada had at some point in time prior to 1982, become the obligations of the Crown in Right of Canada or in Right of the Provinces of Canada and were no longer the obligations of the Imperial Crown and the English Court of Appeal so held;

Canada admits this statement.

(d) does Canada admit or deny that the law with respect to whether the Imperial Crown or a Crown in Canada was liable to honour the obligations of the Crown to the Indians of Canada changed in 1982 as a result of the judgment of the English Court of Appeal in *Regina v. Secretary of State*;

Canada denies this statement.

(e) provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for the answers to paragraphs (a), (b), (c) and above.

With respect to (a)(i), Canada relies on its review of Canada's factum filed at the Supreme Court of Canada in *Miller v. The King* (page 38, paragraph 16)

With respect to (a)(ii), Canada relies on its review of Canada's factum filed at the Supreme Court of Canada in *Miller v. The King* (page 37, paragraph 14 and page 38, paragraph 17)

With respect to (b), Canada relies on its review of Canada's factum filed at the Supreme Court of Canada in *Miller v. The King* as well as the reported decision in *Miller*.

With respect to (c), Canada relies on its review of the reported decision of *Regina v. Secretary of State*.

With respect to (d), Canada states that the English Court of Appeal did not change the law

concerning the devolution of rights and obligations of the Crown in respect of the government of Great Britain to another government within the Commonwealth. On the contrary, *Regina v. Secretary of State* was entirely consistent with the decision of the House of Lords in *Attorney General v. Great Southern and Western Railway Co. of Ireland* [1925] A.C. 754.

32. With respect to paragraph 135 specify all of the provisions of all of the "valid legislation" referred to therein.

Canada's pleading at paragraph 135 of its Statement of Defence was in response to the Plaintiff's pleading at paragraph 23(e) of its Statement of Claim, wherein the plaintiff made the general, non-specific assertion that the Crown "repeatedly" breached its obligations to the Six Nations by "taking or permitting the taking" of Six Nations lands for various public purposes without obtaining lawful surrenders or providing full and fair compensation to the Six Nations. In Canada's Demand for Particulars, dated October 10, 1995, Canada asked the plaintiff to provide particulars of the alleged breaches. In reply, the plaintiff did not provide particulars, answering that the particulars "are those particulars as will be revealed by a proper account," with examples as "described in the statement of claim and [as] should be evident from reading the material facts which are pleaded." If the plaintiff wishes to know what legislative authority Canada relies on for such alleged takings, Six Nations would have to be specific about what takings it is referring to in its pleadings.

If the plaintiff is referring to the expropriation of land by the Grand River Navigation Company, the legislative authority for that expropriation was *An Act to Incorporate a Joint Stock Company, to Improve the Navigation of the Grand River*, Wm. IV, Chap. XIII (1832). See, in particular articles VII to IX.

If the plaintiff is referring to the flooding of the Grand River land during the construction of the Welland Canal, the legislative authority for that public work was 4th Geo. IV, Chap. 17. See, in particular, articles VII to IX.

33. With respect to paragraph 136:

(a) specify all of the provisions of all legislation referred to therein;

The provisions of the legislation referred to are provided at paragraph 26 above.

(b) provide full particulars of all allegations of fact, law or mixed fact and law relied on as the basis for the proposition that the Crown has acted in accordance with valid legislation and specify all provisions of such valid legislation and all acts alleged to be in accordance with such legislation.

These particulars demanded have been provided throughout Canada's statement of defence, Canada's answers to the written interrogatories and Canada's response to all of the plaintiff's demands for particulars.

Canada's pleading at paragraph 136 of its Statement of Defence was in response to the Plaintiff's pleading at paragraph 23(f) of its Statement of Claim, wherein the plaintiff made the general, non-specific assertion that the Crown "repeatedly" breached its obligations to the Six Nations by "managing the Six Nations Trust or permitting it to be managed, in a manner inconsistent with the standards of conduct required by the Crown's fiduciary obligations." In Canada's Demand for Particulars, dated October 10, 1995, Canada asked the plaintiff to provide particulars of the alleged breaches. In reply, the plaintiff did not provide particulars, answering that the particulars "are those particulars as will be revealed by a proper account," with examples as "described in the statement of claim and [as] should be evident from reading the material facts which are pleaded." If the plaintiff wishes further particulars, Six Nations would have to provide its own particulars identifying the alleged breaches, other than those already provided.