Court File No. CV-18-594281

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

MOTION RECORD OF THE HAUDENOSAUNEE DEVELOPMENT INSTITUTE

(*Motion for Joinder/Intervention*)

VOLUME I OF II

June 10, 2022

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AFFIDAVIT OF CAROL FUNG
(Sworn June 10, 2022)

I, Carol Fung, of the City of Markham, in the Province of Ontario, Canada, MAKE OATH AND SAY as follows:

1. I am a legal assistant at Gilbert's LLP, lawyers for the Moving Party, the Haudenosaunee Development Institute (the "**HDI**"), in this matter, and as such have personal knowledge of the facts set out herein except where the facts are stated to be based on information and belief, in which case I believe that the facts stated are true.

2. I attach as **Exhibit "A"** the Further Amended Statement of Claim of the Plaintiff, the Six Nations of the Grand River Band of Indians (the "**SNGRBI**") dated June 10, 2020.

3. I attach as **Exhibit "B"** the Fresh as Amended Statement of Defence of the Defendant, the Attorney General of Canada (the "**AGC**"), dated August 31, 2020.

4. I attach as **Exhibit "C"** the Amended Statement of Defence and Crossclaim of the Defendant, Her Majesty the Queen in Right of Ontario ("**HMQRO**"), dated August 31, 2020.

5. I attach as **Exhibit "D"** the Plaintiff's Reply to the Amended Statements of Defence of the Defendants, the AGC and HMQRO, dated September 30, 2020.

6. I attach as **Exhibit "E"** the Amended Statement of Defence and Crossclaim of the AGC to the Crossclaim of HMQRO, dated September 30, 2020.

7. I attach as **Exhibit "F"** a letter dated April 7, 2022 from Tim Gilbert, counsel to the HDI, to Anusha Aruliah, Manizeh Fancy, and Iris Antonios, counsel to the AGC, HMQRO, and the SNGRBI, respectively.

8. I attach as **Exhibit "G"** correspondence dated April 8, 2022 from Ms. Antonios, counsel to the SNGRBI, to Mr. Gilbert, counsel to the HDI.

9. I attach as **Exhibit "H** a letter dated April 21, 2022 from Ms. Fancy, counsel to the HMQRO to Mr. Gilbert, counsel to the HDI, copying Ms. Antonios and Ms. Aruliah, counsel to the SNGRBI and AGC, respectively.

10. I attach as **Exhibit "I"** a letter dated April 26, 2022 from Mr. Gilbert, counsel to the HDI, to Ms. Fancy, Ms. Antonios, and Ms. Aruliah, counsel to HMQRO, SNGRBI, and AGC, respectively.

11. I attach as **Exhibit "J"** correspondence dated April 27, 2022 from Ms. Antonios, counsel to the SNGRBI to Mr. Gilbert, counsel to the HDI, and copying Ms. Fancy and Ms. Aruliah, counsel to HMQRO and the AGC, respectively.

12. I attach as **Exhibit "K"** correspondence dated April 27, 2022 from Mr. Gilbert, counsel to the HDI, to Ms. Antonios, counsel to the SNGRBI.

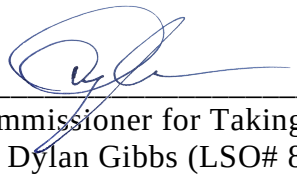
13. I attach as **Exhibit "L"** a letter dated April 27, 2022 from Mr. Gilbert, counsel to the HDI to Ms. Antonios, counsel to the SNGRBI.

14. I attach as **Exhibit "M"** the Case Management Endorsement of Justice Sanfilippo dated February 23, 2018.

15. I attach as **Exhibit "N"** the Case Management Endorsement of Justice Sanfilippo dated May 25, 2020.

16. I am informed by Thomas Dumigan, counsel to the HDI, and believe, that counsel for HDI has had discussions with counsel for AGC and HMQRO with a view to assisting to streamline issues on HDI's motion for intervention.

SWORN BEFORE ME at Montreal, in the Province of Quebec, remotely by the affiant stated as being located in the City of Markham, in the Province of Ontario, this June 10, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely

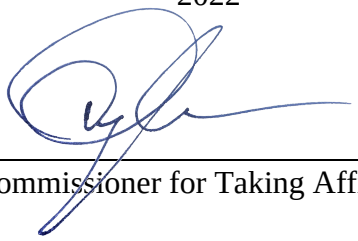


_____
Commissioner for Taking Affidavits
Dylan Gibbs (LSO# 82465F)

_____
CAROL FUNG

EXHIBIT A

This is Exhibit “A” to the Affidavit of Carol Fung, sworn this 10th day of June, 2022



Commissioner for Taking Affidavits

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

FURTHER AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it upon the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Dated: March 7, 1995

Issued by Barbara J. Dawson
Local Registrar

Address of court office:
Court House
70 Wellington Street
Brantford, Ontario
N3T 2L9

TO: HER MAJESTY THE QUEEN IN RIGHT OF CANADA
c/o Attorney-General of Canada
Department of Justice
P.O. Box 36
3400 Exchange Tower
First Canadian Place
Toronto, Ontario
M5X 1K6

Attention: Charlotte A. Bell, Q.C.
(416) 973-6901

AND TO: HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
c/o Attorney-General of Ontario
Crown Law Office - Civil
720 Bay Street, 8th Floor
Toronto, Ontario
M5G 2K1

Attention: J.T.S. McCabe, Q.C.
(416) 326-4127

C L A I M

1. The Plaintiff Six Nations of the Grand River Band of Indians (the "Six Nations") claims:

(a) Declarations that one or both of the defendants breached fiduciary and/or treaty obligations owing to the Six Nations, as described herein;

(b) equitable compensation and/or damages arising from the above-noted breaches of fiduciary and/or treaty obligations;

(c) alternatively to (b), a Declaration, if and as appropriate, that one or both of the defendants is obliged to account to the Six Nations for all property, interests in property, money or other assets ("assets") which were or ought to have been received, managed or held by the defendants or either of them, or by others for whom they are in law responsible, including their predecessors (collectively, the "Crown") for the benefit of the Six Nations, as described herein;

(d) if necessary, a Declaration that one or both of the defendants must restore to the Six Nations Trust (as hereinafter defined) all assets which were not received but ought to have been received, managed or held by the Crown for the benefit of the Six Nations or the value thereof;

(e) a reference or references as may be appropriate;

(f) all further or ancillary declarations, accounts and directions as may be appropriate;

(g) costs on a full indemnity basis; and

(h) such other relief as may seem just.

The Parties

2. The Plaintiff, the Six Nations, is a band within the meaning of the *Indian Act*, R.S.C. 1985, c.I-5, as amended. The members of the Six Nations are aboriginal people within the meaning of section 35 of the *Constitution Act, 1982.* In this pleading, the predecessors, and the current body, of the Indians known as the Six Nations of the Grand River together are referred to as the "Six Nations".

3. The Defendant The Attorney General of Canada represents Her Majesty the Queen in right of Canada (the "Crown in right of Canada"), pursuant to section 23(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, as amended. The Crown in right of Canada:

(a) has legislative authority in Canada by and with the advice of the Parliament of Canada, with respect to Indians and lands reserved for the Indians, pursuant to section 91(24) of the *Constitution Act, 1867*; and

(b) is the successor in Canada to, and is subject to all of the obligations, duties and liabilities which His Majesty the King or Her Majesty the Queen (the "Imperial Crown") had or owed to the Six Nations except for those obligations, duties and liabilities conferred or imposed upon the

Defendant, Her Majesty the Queen in right of Ontario, under the *Constitution Act, 1867* or otherwise by law.

4. The Defendant Her Majesty the Queen in right of Ontario (the "Crown in right of Ontario"):

(a) became on July 1, 1867 the owner of all lands, mines, minerals and royalties situate within the Province of Ontario belonging to the former Province of Canada and the recipient of all sums then due or payable for such lands, mines, minerals or royalties, subject to any trusts existing in respect thereof and to any interest other than that of the then Province of Canada, pursuant to section 109 of the *Constitution Act, 1867*; and

(b) is the successor in the Province of Ontario to, and is subject to all of the obligations, duties and liabilities which the Imperial Crown had or owed to the Six Nations except for those obligations, duties and liabilities conferred or imposed upon the Crown in right of Canada, under the *Constitution Act, 1867* or otherwise by law.

5. The Defendants, either alone or together, are subject to all of the obligations, duties and liabilities owed to the Six Nations by the Imperial Crown or before Confederation by the Province of Canada and the Province of Upper Canada.

Introduction

6. As a result of the treaties, legislation, common law and facts hereinafter described, the Imperial Crown, the Crown in right of Canada and its predecessors, and the Crown in right of Ontario and its predecessors, were at all material times under fiduciary obligations to the Six Nations to *inter alia* hold, protect, manage and care for the lands, personal property and all other assets of the Six Nations for the benefit of the Six Nations in a similar manner that trustees are required to hold, protect, manage and care for the assets of a trust for the benefit of the beneficiaries of the trust.

7. The Crown has repeatedly breached its fiduciary duties and treaty obligations to the Six Nations as hereinafter described, and should be held liable for those breaches to the Six Nations.

8. Notice of this action was given to the Crown in right of Ontario on December 23, 1994, in accordance with section 7 of *The Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, and to the Crown in right of Canada on December 28, 1994.

The Royal Proclamation of 1763

9. By the *Royal Proclamation of 1763*, the Imperial Crown recognized and confirmed certain of the fiduciary obligations which the Crown had assumed in respect of Indian peoples and their lands. It also continued, affirmed and enunciated the unwritten law of the colonies with regard to the status and alienation of lands occupied or used by the Indians in British North America. Unceded lands were recognized as

reserved to the Indian peoples, no such lands were to be taken from them without their express consent, and the Indians' interest in unceded lands was to be inalienable otherwise than to the Crown. The purpose of this surrender requirement was to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited and to facilitate the Crown's ability to represent the Indians in dealings with third parties. The *Royal Proclamation of 1763* has never been repealed, was and is part of the laws in force in Canada and Ontario and bound the Crown.

10. The *Royal Proclamation of 1763* inter alia provided that:

(a) colonial governments were forbidden from granting unceded Indian lands;

(b) private persons were prohibited from settling on or otherwise possessing unceded Indian lands;

(c) private persons were prohibited from purchasing unceded land from the Indians; and

(d) Indian lands could only be granted after these had been ceded or surrendered to the Crown in a public assembly of the Indians held by the governor or commander-in-chief of the colony in which the lands in question lay.

Six Nations Lands

11. In the eighteenth century and from time immemorial, the Six Nations (sometimes then referred to as the Five Nations) occupied, possessed or used very large territories in what is today the United States of America and the Provinces of Ontario and Quebec (the “Six Nations Aboriginal Lands”).

12. Throughout the American War of Independence, the Six Nations were faithfully allied with and supported the Imperial Crown. As a result of the ultimate defeat of the Imperial Crown in that war, many of the Six Nations left the United States and at the invitation of the Crown settled on a very large specific tract of land within their aboriginal lands in what is today Canada.

13. In order to facilitate this settlement and in partial recompense for the Six Nations’ alliance with and support of the Imperial Crown, the Imperial Crown agreed as hereinafter described to formally reserve for the Six Nations a large tract of land within the Six Nations Aboriginal Lands for the exclusive possession and settlement of the Six Nations so that those lands could be enjoyed by the Six Nations and their descendants forever.

The Haldimand Proclamation

14. On October 25, 1784, the Imperial Crown through its representative in British North America, the Governor of Canada, Sir Frederick Haldimand, issued a Proclamation (the “Haldimand Proclamation”) authorizing the Six Nations to take

possession of and settle upon the Banks of the Grand River running into Lake Erie, allocating to them the lands extending for six miles from each side of the river beginning at Lake Erie and extending in that proportion to the head of the Grand River (the "Haldimand Proclamation Lands"), which the members of the Six Nations and their descendants were to enjoy forever. The lands allocated to the Six Nations under the Haldimand Proclamation consist of approximately 950,000 acres (384,465 hectares).

15. The Haldimand Proclamation was accepted by the Six Nations and constitutes a treaty within the meaning of section 35 of the *Constitution Act, 1982*.

The Simcoe Patent

16. On January 14, 1793, the Imperial Crown through its representative, the Lieutenant-Governor of Canada, John Graves Simcoe, drafted a Patent (the "Simcoe Patent") to, *inter alia*, grant to the Six Nations forever, all of that territory of land forming part of the district lately purchased by the Imperial Crown from the Mississauga Nation, beginning at the mouth of the Grand River where it empties itself into Lake Erie, and running along the Banks of the Grand River for a space of six miles on each side of the river, or a space co-extensive therewith, and continuing along the Grand River to a place known by the name of the Forks, and from there along the main stream of the Grand River for the space of six miles on each side of the main stream, or for a space equally extensive therewith (the "Simcoe Patent Lands").

17. The Crown failed to set aside for the Six Nations all of the lands which the Six Nations were entitled to have reserved for them under the Haldimand Proclamation. In particular, the Crown failed to reserve for the Six Nations those lands along the Grand River located north of the present Township of Nichol extending to the head of the Grand River in the Township of Melancthon, consisting of approximately 275,000 acres (111,292.5 hectares). This failure constituted a breach by the Crown of its treaty obligations to the Six Nations under the Haldimand Proclamation.

18. The terms of the Simcoe Patent incorporated the following provisions existing at law:

(a) the Six Nations could not lawfully alienate the Simcoe Patent Lands except by surrender to the Crown at a public meeting or assembly of the Chiefs, warriors and people of the Six Nations;

(b) any transfer, alienation, conveyance, sale, gift, exchange, lease or possession of the Simcoe Patent Lands directly to any persons whatever other than members of the Six Nations, was to be null and void, unless there was first a surrender to the Crown for that purpose; and

(c) the Six Nations were to enjoy free and undisturbed possession of the Simcoe Patent Lands under the protection of the Crown.

1812 Governor's Instructions

19. On May 1, 1812, the Crown's duly authorized representative, the Governor-General of Upper Canada issued Instructions (the "1812 Governor's Instructions") further regulating the alienation of Indian lands in the then Province of Upper Canada by requiring *inter alia*:

(a) that the person administering the government in Upper Canada requisition any Indian lands wanted for public service and identify those lands with a sketch;

(b) that all purchases by the Crown be made at a public council according to the ancient usages and customs of the Indians to whom the lands belonged, with proper interpreters present and without the presence of liquor;

(c) that the Governor or two persons commissioned by him, the Superintendent of Indian Affairs, two or three members of his Department and at least one military officer be present at the public council;

(d) that there be a proper explanation to the Indians of the nature and extent of the proposed disposition and the proceeds to be paid therefor; and

(e) that deeds of conveyance and descriptive plans of the lands so conveyed be attached to the deed and be executed in public by the Principal Indian Chiefs and the Superintendent of the Indian Department or his appointee, and duly witnessed.

Legislation

20. The Crown's recognition of its fiduciary obligation to the Six Nations is in part reflected in the enactment of legislation *inter alia* to protect the Six Nations Lands and regulate dispositions of those lands including:

(a) *An Act with respect to trespass upon lands of Indians and upon other lands and the removal of persons therefrom,* S.U.C. 1839, c.15;

(b) *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury,* S. Prov. C. 1850, c.74;

(c) *An Act to amend the Law for the Sale and the Settlement of the Public Lands*, S. Prov. C. 1853, c.159;

(d) *An Act to prevent trespasses to Public and Indian Lands*, S. Prov. C. 1859, c.81;

(e) *An Act respecting the Management of the Indian Lands and Property*, S. Prov. C. 1860, c.151;

(f) *An Act providing for the Organization of the Department of Secretary of State of Canada and for the management of Indian and Ordinance Lands*, S.C. 1868, c.42;

(g) The *Indian Act*, 1876, S.C. 1876, c.18.

Crown's Breach of Fiduciary Duty

21. The Six Nations currently occupies and uses only the lands which comprise the Six Nations Indian Reserve No. 40 which is located southeast of the City of Brantford, Ontario and the Six Nations Indian Reserve No. 40B and lot 5, Eagle's Nest tract which are located within the City of Brantford. These lands consist of approximately 45,506 acres (18,416 hectares), less than 4.8 percent of the lands allocated to the Six Nations forever by the Haldimand Proclamation.

22. Subsequent to the dates of the Haldimand Proclamation and the Simcoe Patent, the Imperial Crown and its successors in Canada including the Defendants made or permitted to be made various grants, sales, leases, permits or other dispositions ("Dispositions") which purported to grant the title to, rights of possession, occupation, use or other interests in, parts of the Haldimand Proclamation Lands or Simcoe Patent Lands (collectively the "Six Nations Lands") to persons who were not members of the Six Nations ("Third Parties") in breach of the Crown's fiduciary duty to the Six Nations and without complying with the requirements of the laws hereinbefore referred to.

23. The Crown repeatedly breached its fiduciary and treaty obligations to the Six Nations by *inter alia* repeatedly:

(a) making or permitting Dispositions of the Six Nations Lands to Third Parties without the consent of the Six Nations and without first obtaining from the Six Nations a lawful and valid surrender to the Crown;

(b) permitting Third Parties to possess, occupy, or trespass on the Six Nations Lands without obtaining lawful surrenders from the Six Nations to the Crown;

(c) making or permitting transactions relating to the Six Nations Lands without obtaining full and fair compensation therefor for the Six Nations and without ensuring that the Six Nations' interest in such transactions was at all times fully protected and that the Six Nations received or were credited with all the proper proceeds of such Dispositions (which proceeds are hereinafter referred to as the "Six Nations Trust");

(d) failing to honour the terms or conditions of surrenders, sales and leases;

(e) taking or permitting the taking or use of parts of the Six Nations Lands for roads, canals or other public waterways, railways, cemeteries, church grounds, public squares or parks, or for military, naval or other public purposes without obtaining lawful surrenders or providing full and fair compensation to the Six Nations;

(f) 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; and

(g) failing to account to the Six Nations.

24. The following are some examples of the breaches of the Crown's obligations to the Six Nations hereinbefore described.

Crown Grant of Block No. 5 of the Simcoe Patent Lands

25. On November 18, 1807, the Crown granted letters patent under the seal of the Province of Upper Canada to one Thomas Douglas, Earl of Selkirk ("Selkirk") for a block of the Simcoe Patent Lands known as Block No. 5, which later became the Township of Moulton in the County of Haldimand (the "Block No. 5 lands").

26. The Crown conveyed the Block No. 5 lands to Selkirk without obtaining a surrender of those lands from the Six Nations to the Crown for the purpose of such sale.

27. Selkirk entered into a one-year mortgage with the Crown due and payable on November 18, 1808, purportedly to secure most or all of the purchase price (the "Selkirk Mortgage"). The Selkirk Mortgage provided for interest at the rate of six percent per year.

28. The principal and interest due under the Selkirk Mortgage was not paid on November 18, 1808 as required by its terms. The Crown neither enforced nor attempted to enforce the collection of the principal sum and interest payable under the Selkirk Mortgage.

29. The principal sum owing under that Selkirk Mortgage has never been paid. Some interest payments may have been made on the principal prior to February 1853 but the particulars have not been provided and are presently unknown to the plaintiff.

30. Since at least February, 1853, no payments of any kind in respect of the Selkirk Mortgage or any other mortgage for the Block No. 5 lands have been collected by the Crown for the benefit of the Six Nations Trust.

Crown Grant of Block No. 6 of the Simcoe Patent Lands

31. On February 5, 1798, the Crown granted letters patent under the seal of the Province of Upper Canada to one Benjamin Canby for a block of the Simcoe Patent Lands known as Block No. 6, which later became the Township of Canborough in the County of Haldimand (the “Block No. 6 lands”).

32. The Crown conveyed the Block No. 6 lands to Canby:

(a) without obtaining a surrender of the lands from the Six Nations to the Crown for the purpose of a sale to Canby or anyone else;

(b) without obtaining any mortgage or other security from Canby or anyone else to secure the payment of the purchase price;

(c) without collecting any payment from Canby or anyone else for the lands for the benefit of the Six Nations Trust;

(d) without taking any legal proceedings against Canby or his heirs or assigns to obtain payment for the Block No. 6 lands, despite the Crown's acknowledgement, reduced to writing in 1803, 1830 and 1843, that the lands ought not to have been conveyed as a free grant and that the Crown was under a fiduciary duty to take the steps necessary to remedy the matter.

Colonel Claus and the lands in Innisfil and East Hawkesbury Townships

33. In the early 1800's the Crown's Deputy Superintendent General and Inspector General of Indian Affairs in Upper Canada, Colonel William Claus, misappropriated monies belonging to the Six Nations Trust.

34. In 1830, the Lieutenant Governor of Upper Canada ordered an investigation into the Six Nations Trust which resulted in a report determining that Colonel William Claus (who died in November 1826) and his son, John Claus, had misappropriated monies from the Six Nations Trust.

35. The Crown, however, failed to pursue a full accounting from Colonel William Claus' estate and from John Claus with respect to the handling of Six Nations trust monies by Colonel William Claus and John Claus.

36. Instead, the Crown unilaterally, and without securing legal title, arranged to obtain three tracts of land elsewhere in the Province of Ontario for the benefit of the Six Nations from members of the Claus family purportedly in lieu of a monetary settlement

for the misappropriation of the Six Nations' trust monies by Colonel William Claus. On June 6, 1831, John Claus (Colonel William Claus' son) purported to convey some 900 acres in Innisfil Township (the "Innisfil lands"), and, in addition, John Claus along with Catherine Claus (Colonel William Claus' widow) purported to convey some 2,800 acres and 1,200 acres respectively in East Hawkesbury Township (the "East Hawkesbury lands") to some nominees appointed by the Crown "in trust for the sole use, benefit and behoof of the Indians known as the Six Nations Indians".

37. The Crown failed to ensure that the conveyances were effective and in fact the titles purportedly conveyed were defective.

38. On June 16, 1840, the Executive Council of Upper Canada determined that the Six Nations' Innisfil and East Hawkesbury lands should be sold by private sale, rather than by public auction, and at prices which in total were less than required to offset the minimum amounts which years earlier had been misappropriated by Colonel William Claus and John Claus.

39. Subsequently, in the 1840's, the Crown made sales of portions of the Innisfil and East Hawkesbury lands without obtaining any surrender of those lands from the Six Nations to the Crown.

40. In 1852, the Court of Upper Canada, Queen's Bench, held in a test case (*Dickson v. Gross* (1852), 9 U.C.Q.B. 580) that the title of one of the purchasers to a part of the Innisfil lands was defective because John Claus did not have proper title in

1831 in order to be able to convey the lands to the nominees to be held in trust for the Six Nations. The Court held that such title had resided in the Colonel William Claus Estate, and not in John Claus personally.

41. The Province of Canada undertook the defence of this action on behalf of the third party purchaser. Costs of the action were awarded against the defendants. Those costs and the other expenses of the defendants in relation to the action were paid out of the Six Nations Trust, without the knowledge, authorization or consent of the Six Nations.

42. On February 23, 1853, the Crown unilaterally withdrew £5,000 from the Six Nations Trust to pay to the beneficiaries of Colonel William Claus' Estate. This payment was made to release any and all interests that the beneficiaries of the Colonel William Claus Estate might allegedly continue to have in the Innisfil and East Hawkesbury lands which the Crown either had already sold or would later sell to third parties.

43. Notwithstanding the defect found by the Court in the Six Nations' title to the Innisfil and East Hawkesbury lands to be received in place of the trust monies earlier misappropriated by Colonel William Claus and John Claus, the Crown never reimbursed the Six Nations Trust for the misappropriated funds.

Welland Canal Flooding

44. The Crown failed to secure or pay compensation to the Six Nations for the value of at least 2,415.6 acres of the Simcoe Patent Lands expropriated and flooded for the

Welland Canal project. The flooding resulted from canal construction projects, more particularly dam projects, which were carried on between approximately 1829 and 1835.

45. Under special legislation of the Parliament of Upper Canada, specifically S.U.C. 1824, c.17, enacted January 19, 1824, a company called the Welland Canal Company (the "WCC") was incorporated to construct the Welland Canal.

46. This legislation imposed an obligation on the WCC to compensate landowners or occupiers for any damages sustained as a result of the WCC exercising its statutory powers. Part IX of the statute provided that if any part of the Welland Canal passed through Indian lands, or damaged the property or possessions of Indians, compensation was to be made in the same manner as with respect to the property, possessions or rights of other individuals. The amount of the compensation was to be paid to the Chief Officer of the Indian Department to the use of the Indians.

47. Despite assurances by the Crown's representatives that the WCC would compensate the Six Nations for any losses occasioned by the Welland Canal project and despite the statutory obligation to compensate, no compensation was made to the Six Nations for the value of the portions of the Simcoe Patent Lands lost due to the flooding. The WCC only made payments to individuals for their improvements on the land.

48. On June 9, 1846, by Act of the Parliament of the Province of Canada, being S. Prov. C. 1846, c.37 (the "1846 Act"), the works *inter alia* of the Welland Canal were

vested in the government of the Province of Canada, with provision made for the determination of any unsettled claim for property taken, or for direct or consequential damages to property arising from the construction of public works including the Welland Canal.

49. Pursuant to section 108 of the *Constitution Act, 1867*, ownership and control of the Welland Canal passed from the Province of Canada to the Crown in right of Canada at Confederation in 1867.

50. Since Confederation, various government departments have undertaken valuations of the Simcoe Patent Lands flooded by the Welland Canal project and have recommended that compensation be paid to the Six Nations Trust in respect of the flooded lands:

(a) On January 25, 1878, the Superintendent General of Indian Affairs, David Mills, recommended to the Minister of Public Works a payment of $29,715.63 as proposed compensation for 1,993.65 acres of the acreage that had been flooded.

(b) On August 5, 1882, James Cowan, an official arbitrator, reported to the Minister of Railways and Canals, that 1,993.65 acres of the flooded lands had a value of $28,672.67.

(c) On May 6, 1884, John A. Macdonald, Superintendent General of Indian Affairs, recommended to the Privy Council that the sum of $28,672.67 be

paid as compensation for 1,993.65 acres of the acreage which had been flooded.

The Grand River Navigation Company

51. Beginning in or about 1834 the Crown improvidently invested trust monies belonging to the Six Nations in the undertaking of the Grand River Navigation Company (the "GRNC") in return for worthless shares and debentures of the GRNC.

52. The GRNC was incorporated and established under special legislation enacted on January 28, 1832, being S.U.C. 1832, c.13 (the "GRNC Act") for the purpose of constructing dams and related works in order to make the Grand River more navigable and provide a better transportation route between the Welland Canal and the City of Brantford. The Six Nations were opposed to this project.

53. The Crown knew from the outset that:

(a) investments of the Six Nations Trust monies in the GRNC were speculative and imprudent;

(b) public revenues would not be invested in the GRNC's activities because of the speculative nature of the GRNC's project and the heavy expenditures it would require; and

(c) the Province and the private promoters of the GRNC, rather than the Six Nations, would derive all of the potential benefits of the investment.

54. In addition to diverting trust monies belonging to the Six Nations to the GRNC, the Crown granted free letters patent dated November 18, 1837 to the GRNC under the seal of the Province of Upper Canada contrary to the requirements of the GRNC Act, for a tract of the Simcoe Patent Lands consisting of 368 and 7/10 acres including a 36 acre portion of towing path lands along the Grand River.

55. The Crown purported to convey such lands to the GRNC without obtaining any surrender from the Six Nations and without obtaining full and fair compensation for these lands for the Six Nations Trust.

Lands Surrendered for the Purpose of Sale but Subsequently Conveyed by the Crown Without Obtaining Proper Compensation for Six Nations

56. The Crown conveyed or otherwise transferred surrendered Simcoe Patent Lands ^ to Third Parties without obtaining full and fair compensation for the Six Nations in accordance with its own valuations and sale conditions or, indeed, without obtaining any compensation for the benefit of the Six Nations. This frequently occurred for conveyances or transfers of Simcoe Patent Lands, for example, under the following surrenders:

(a) surrender no. 30 dated April 19, 1830, being a surrender of an estimated 807 acres for a townplot for Brantford; and

(b) surrender no. 40 dated April 2, 1835, being a surrender of an estimated 48,000 acres in the Township of Brantford excluding an area of land later known as the Johnson Settlement.

57. These surrenders had been agreed to by the Six Nations so that the Crown could make Dispositions of lands within the surrendered areas to Third Parties for the benefit of the Six Nations, namely Dispositions that would result in full and fair compensation to the Six Nations for all of the lands, that fully protected at all times Six Nations' interest in the relevant transactions and that would result in the Six Nations receiving or being credited with all the proper proceeds of such Dispositions. The Crown has never accounted to the Six Nations for the proceeds from Dispositions over the years of the numerous specific parcels of lands encompassed by surrender documents no. 30 and 40.

Talbot Road Lands

58.1 On April 20, 1831, the Six Nations in council confirmed their previous consent of March 22, 1830, to a surrender proposed of lands needed for the construction of a road to be known as the Talbot Road (today Ontario Highway 3) from Canborough Township to Rainham Township and lands on each side of the road in lots of "33 chains by 30", being approximately 100 acre lots, all of which were to be sold for the benefit of the Six Nations. The surrender proposed was recorded in a letter of March 9, 1830 which was communicated to the Six Nations in council (the "Talbot Road Lands Surrender Proposal").

58.2 On April 20, 1831, representatives of the Six Nations executed a document of surrender dated April 19, 1831, known as surrender no. 31, on the understanding that it reflected the Talbot Road Lands Surrender Proposal.

58.3 In fact, surrender document no. 31 wrongfully contained a metes and bounds legal description for an area of land considerably larger in size than the extent of land reflected in the Talbot Road Lands Surrender Proposal that had been consented to by the Six Nations in council.

58.4 As a result, the Crown did not immediately sanction surrender document no. 31 with any order in council and in fact did not accept or act upon surrender document no. 31 as it formally read because on July 7, 1831 a written communication was made by the Chief Superintendent of the Indian Department advising that the Lieutenant Governor requested that the Six Nations cede to the Crown a portion of land on either side of the Talbot Road, so that the ceded lots could be sold to Third Parties for the benefit of the Six Nations.

58.5 On September 28, 1831, the Six Nations in council and the Crown agreed that the Crown could sell 100 acre lots, or any portion of such lots, on either side of the Talbot Road to settlers, with the proceeds therefrom to benefit the Six Nations, provided that there was reserved for the use of the Six Nations an area of the Talbot Road lands consisting of two miles on each side of the Grand River. This agreement had the effect of restricting or reducing the area of land formally and incorrectly described as being surrendered in surrender document no. 31.

58.6 Subsequently, the Crown issued a public notice dated December 1, 1831 ordering that lands for disposition to Third Parties were to be laid out in 100 acre lots. Notwithstanding the agreement of September, 1831 with the Six Nations and the notice,

the Crown subsequently proceeded wrongfully to sell lots of greater depth from the Talbot Road, resulting in lots being sold consisting of 200 acres rather than 100 acres. The selling agent for the Crown acknowledged in writing that this was contrary to the instructions of the Lieutenant Governor.

58.7 The Crown wrongfully failed to reserve for the Six Nations the area of the Talbot Road lands on each side of the Grand River which the Six Nations in council had reserved on September 28, 1831. Instead, the Crown ordered on November 25, 1831 that only a one mile tract on each side of the Grand River along the Talbot Road be reserved for the Six Nations and a survey subsequently reflected that reservation of lands.

58.8 In 1833, the Six Nations consented to the sale of part of the reserved tract of the Talbot Road lands in order to accommodate the establishment of a town plot for the Town of Cayuga.

58.9 The Crown failed to seek and did not receive consent from the Six Nations to dispose of the remaining portion of the reserved tract within the Talbot Road lands which were not included in the Cayuga town plot.

58.10 Although a public notice dated January 22, 1844 issued by the Crown's Chief Superintendent of Indian Affairs advised that the lands on the south side of the Grand River between the Townships of Brantford and Dunn were exclusively appropriated to the use of Six Nations, the Crown failed to reserve any portion of the surrender no. 31

lands on the south side of the Grand River for the benefit of the Six Nations including the reserved tract of the Talbot Road lands not used for the Cayuga town plot. The Crown has not accounted to the Six Nations for the proceeds of Dispositions purporting to grant title or other interests to Third Parties in the Talbot Road and the lands on either side of it.

Hamilton/Port Dover Plank Road Lands

59. The Crown granted letters patent in fee simple to Third Parties on the lands approximately a half-mile on each side of a Plank Road from Hamilton to Port Dover (which eventually became Highway 6) built across unsurrendered Simcoe Patent Lands, although the Six Nations only wished to lease those lands.

60. The Six Nations were accordingly deprived of continual earnings from these lands from continual rental revenues for the land and royalty revenues on the mineral resources thereunder.

Port Maitland Lands

61. The Crown took possession of lands comprising lots 25 and 26, concession 4 in the Township of Dunn (the "Port Maitland lands"), purportedly under *An Act to authorize Her Majesty to take Possession of Lands for the erection of Fortifications in this Province, under certain restrictions*, S.U.C. 1840, c.16, which *inter alia* provided that:

(a) land could be purchased or leased for the erection of military works;

(b) where the requisite land could not be obtained by consent, the Military could take possession of lands required for military works if the necessity for the lands was first certified by the Commander of Her Majesty's Forces in the Province of Upper Canada, or there was an enemy invasion; and

(c) proper compensation was required to be made to the owners of land taken for military purposes.

62. There was no voluntary purchase or lease of the Port Maitland lands for the purpose of erecting military works, no invasion and no certification that the Port Maitland lands were required to be taken by the Crown for military purposes. No compensation was ever made to the Six Nations for the taking of the Port Maitland lands.

Purported Surrender of 1841

63. On January 18, 1841, the then Chief Superintendent of Indian Affairs, Samuel Jarvis ("Jarvis") (who was later discharged by the Crown after an investigation by a Commission of Inquiry) obtained the signatures of seven individuals to what purported to be an agreement of the Six Nations to "Her Majesty's Government disposing of the land belonging and formerly reserved upon the Grand River for the Six Nations Indians", expressly excluding some lands in a tract known as the "Johnson Settlement".

64. The document of January 18, 1841 incorporates by reference two letters of January 5 and January 15, 1841 authored by Jarvis (together, "the Purported 1841 Jarvis Arrangement"). None of these documents contained any definite description of

what land was to be surrendered for lease or otherwise to Third Parties. While the letter of January 15, 1841 refers to the preparation of a "general survey of the tract", none was appended to the document of January 18, 1841 or to any later document which might properly be characterized as a surrender document.

65. The Purported 1841 Jarvis Arrangement did not constitute a lawful and valid surrender of Simcoe Patent Lands for reasons which include the following:

(a) the Six Nations did not authorize the seven signatories to consent to the Purported 1841 Jarvis Arrangement; and

(b) no specific lands were identified in the relevant documents for lease or otherwise by the Six Nations and no survey was prepared.

66. In the letter dated January 5, 1841, Jarvis represented that the only solution to prevent unlawful white settlements on the Simcoe Patent Lands was for the Six Nations to surrender those lands, with the exception of the portions the Six Nations wished to retain for their own use.

67. In the letter dated January 15, 1841, Jarvis represented:

(a) that neither would he recommend nor the government approve, the removal of unauthorized Third Parties from unsurrendered Six Nations Lands;

(b) that if the Six Nations adopted the government's proposal, the income of the Six Nations would immediately be increased and that monies from future land dispositions would be paid over to the benefit of the Six Nations Trust; and

(c) that measures would soon be adopted resolving the issue of investment in stock of the GRNC in a manner advantageous to the Six Nations.

68. The Jarvis letter of January 15, 1841 recommended approval by the Six Nations of the "Government disposing for their exclusive benefit and advantage, either by lease or otherwise, all of their Lands which can be made available, with the exception of the farms at present in their actual occupation and cultivation, and of 20,000 acres as a further reservation, and that the selection of this reservation be deferred until after a general survey of the tract when the position most advantageous to the general interests and peculiar wants of the Indians can be more judiciously selected".

69. Upon learning of the Purported 1841 Jarvis Arrangement, the Six Nations protested by *inter alia*:

(a) submitting a petition of February 4, 1841, signed by fifty-one Chiefs, Warriors and Sachems of the Six Nations to the Governor General of Canada;

(b) submitting a petition of July 7, 1841 signed by one hundred twenty three Chiefs, Warriors and Sachems of the Six Nations to the Governor General of Canada;

(c) making a submission of January 28, 1843 to a three-person commission of inquiry (the Bagot Commission) which had been appointed in October 1842 to investigate the affairs of the Indian Department; and

(d) submitting a further petition dated June 24, 1843 to a newly appointed Governor General of Canada, in which the Chiefs of the Six Nations *inter alia* asked the new Governor General to examine the earlier submissions protesting the irregularity of the Purported 1841 Jarvis Arrangement.

70. In response to the protests by the Six Nations, the Crown acting by the Governor General of Canada, in Council, decided on October 4, 1843 that the Crown would continue to reserve for the Six Nations those parts of the Simcoe Patent Lands identified as follows:

(a) all of the Simcoe Patent Lands on the south side of the Grand River with the exception of the Plank Road lands between the Township of Cayuga and Burtch's Landing, being a distance of more than twenty miles;

(b) a tract near Brantford called the "Oxbow" containing some 1,200 acres;

(c) another tract on the north side of the Grand River called the "Eagles Nest" containing some 1,800 acres;

(d) the “Martin Tract” containing some 1,500 acres;

(e) the “Johnson Settlement” land containing some 7,000 acres;

(f) a lot at Tuscarora on which a church was built;

(g) lands on the north side of the Grand River resided upon and improved by members of the Six Nations; and

(h) any further lands which the Six Nations wished to retain.

71. The Crown through the Governor General in Council decided that the Johnson Settlement lands and other small tracts would be leased on short term leases for the benefit of the Six Nations. The Crown then granted letters patent in fee simple, instead of leases, to Third Parties for these lands, thereby depriving the Six Nations of the continual rental revenues which could be earned therefrom.

72. There has been no surrender by the Six Nations to the Crown of any of the above-mentioned lands and the present day Six Nations Reserve does not include all of the area that the Crown indicated would be reserved on October 4, 1843.

73. On May 10, 1845, Jarvis was discharged by the Crown as Chief Superintendent of Indian Affairs after a Commission of Inquiry could not obtain an accounting of Jarvis’ administration of Indian trust monies which included unauthorized use of such monies.

73A. In any event, regardless of whether the Purported 1841 Jarvis Arrangement was valid, the Crown has never provided an account to the Six Nations identifying the specific lands allegedly encompassed by it or an account for the related proceeds that ought to have been received as full and fair compensation for the benefit of the Six Nations as a result of all Dispositions allegedly made on the basis of that arrangement.

Misappropriation of Trust Monies

74. The Crown in right of Canada reported to the Six Nations that, as of February 1, 1995, it only held $2,183,312 in trust monies for the benefit of the Six Nations, consisting of $2,080,869 on capital account and $102,443 on revenue account.

75. The Crown has not accounted to the Six Nations for the administration of the monies which ought to be in the Six Nations Trust and despite the Crown's awareness of the improprieties hereinbefore referred to.

Allowing the Removal by Third Parties of Natural Resources from the Six Nations Reserve Without Valid Authority and Without Proper Compensation

76. At various times, the Crown failed to protect Six Nations' interest in the natural resources underlying the Six Nations Reserve by failing to take any or appropriate steps to prevent Third Parties from removing natural resources from the Six Nations Reserve without proper authority. In addition the Crown failed to obtain or provide proper compensation to the Six Nations. An example of these failures is the extraction of

natural gas from the Six Nations Reserve in the period from July 15, 1945 through November 18, 1970.

77. On May 20, 1925, the Six Nations surrendered to the Crown for twenty years the oil and gas rights under the Six Nations Reserve so that a twenty year lease for the same could be granted to the Honourable Edward Michener.

78. By agreement dated December 31, 1928, Michener assigned his rights to Petrol Oil & Gas Company Limited ("POG").

79. By letter of July 18, 1947, the Deputy Minister of the Department of Indian Affairs advised POG that the Michener lease had expired on July 15, 1945 and that no authority had been obtained by POG pursuant to section 54 of the *Indian Act* (R.S.C. 1927, Chap. 98) which would enable POG to operate thereafter on the Six Nations Reserve.

80. From July 15, 1945 through November 18, 1970, POG drilled wells and extracted natural gas from gas wells on the Six Nations Reserve without any lawful entitlement to the gas or any lawful authority to drill and extract gas.

81. Accordingly, the Crown in right of Canada should account to the Six Nations Trust for the fair market value of all natural gas extracted by POG from the Six Nations Reserve.

The Crown's Failures to Account

82. The Crown has breached its fiduciary obligations and/or treaty obligations to the Six Nations to such an extent that the Six Nations is not fully aware of all of the transactions since 1784 concerning the assets held, or which ought to have been held, by the Crown for the benefit of the Six Nations, including from all sales, leases and other dispositions of the Six Nations Lands, and monies earned or derived or which ought to have been earned or derived therefrom. In particular, as a result of the lack of accountings (particularly respecting when most of the Dispositions of Six Nations Lands occurred), the Six Nations do not have a full awareness as to matters such as the following:

(a) whether all portions of the Six Nations Lands which today are not part of the Six Nations Reserve No. 40 and 40B were lawfully disposed of by first obtaining from the Six Nations a surrender in accordance with the applicable legal requirements;

(b) whether the terms and conditions of any valid surrenders, sales and leases, were fulfilled and whether full and fair compensation was obtained in respect of the Dispositions or uses of the Six Nations Lands;

(c) whether the Six Nations Trust earned, derived, received, held and continues to hold all appropriate sums which should have been earned, derived, received or held on behalf of the Six Nations in accordance with the Crown's fiduciary obligations; and

(d) the extent to which the Six Nations have been deprived of their property rights by the Crown's failure to fulfil its treaty obligations under the Haldimand Proclamation.

83. Despite the Crown's fiduciary obligations the Crown has failed to account for the administration of the Six Nations Trust. In particular:

(a) By letter dated October 25, 1979 the Six Nations Council requested the Auditor General of Canada to conduct an historical audit and report on the Six Nations trust funds and lands. On November 15, 1979, the Parliament of Canada directed the Auditor General to conduct an audit of Indian trust accounts generally but no report on any such audit has yet been supplied to the Six Nations as requested.

(b) By letter of October 23, 1992, the Six Nations by its solicitors requested a full general accounting of all transactions involving the property held for the benefit of the Six Nations including all sales and leases of land and all money held by the Crown since 1784. The Crown in right of Canada refused to do so and instead directed the representatives of the Six Nations to examine the Indian Land Registry. The Crown in right of Ontario did not respond at all to the request for an accounting.

84. The plaintiff proposes that the trial of this action take place in the City of Toronto, Ontario.

March 7, 1995
(Amended: , 2020)

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SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS Plaintiff	-and-	THE ATTORNEY GENERAL OF CANADA et al. Defendants

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

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

FURTHER AMENDED STATEMENT OF CLAIM

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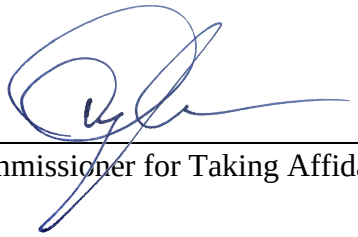
EXHIBIT B

This is Exhibit “B” to the Affidavit of Carol Fung, sworn this 10th day of June, 2022



Commissioner for Taking Affidavits

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

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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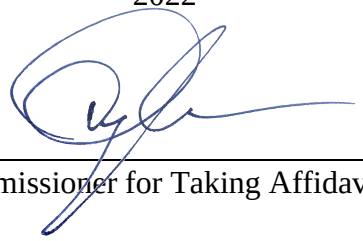
EXHIBIT C

This is Exhibit “C” to the Affidavit of Carol Fung, sworn this 10th day of June, 2022



Commissioner for Taking Affidavits

1

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

AMENDED STATEMENT OF DEFENCE AND CROSSCLAIM OF THE DEFENDANT HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

1. The defendant Her Majesty the Queen in right of Ontario ("Ontario") adopts and repeats, except as provided herein and with the additions herein, the allegations in paragraphs 15 to 62 inclusive, 63 except the last sentence, 64 to 74 inclusive, 77 to 92, 95 to 100, 103 to 121, 123 to 130 and 135 to 138 inclusive of the amended statement of defence of the defendant the Attorney General of Canada.

2. In adopting and repeating the allegation in paragraph 58 of the amended statement of defence of the Attorney General of Canada, Ontario pleads that the appropriation of funds referenced therein means that any liability for investment loss that may exist, which is denied, would be the liability of Her Majesty the Crown in right of Canada and not that of Her Majesty the Queen in right of Ontario. In adopting and repeating the allegation in paragraph 80 of the said amended statement of defence, Ontario admits that there is today a fiduciary relationship between Her Majesty the Queen in right of Canada ("Canada") and the Aboriginal peoples of Canada. In adopting and repeating the allegation in paragraph 130 of the said amended statement

of defence, Ontario pleads that Canada acted in good faith in dealing with the oil and gas on the reserve. Ontario did not deal at all with such oil and gas and had no authority, role, obligation or occasion to do so. Apart from those instances, Ontario adopts the phrase "this Defendant" wherever it appears in the allegations in the paragraphs of the amended statement of defence of the Attorney General of Canada which Ontario adopts and repeats, and Ontario intends that the phrase refer to Ontario as well as to Canada.

2.1 Ontario denies all of the allegations in the further amended statement of claim dated May 7, 2020 (the "statement of claim") except as expressly admitted or repeated in this pleading, or with respect to which Ontario pleads that it has no knowledge.

3. Ontario denies the relief sought in paragraph 1 of the statement of claim. Ontario admits the allegation in paragraph 2 of the statement of claim, except Ontario has no knowledge with respect to the last sentence.

The Parties

4. Ontario admits the allegation in paragraph 3 of the statement of claim except that if the Imperial Crown had or owed obligations, duties or liabilities to the Six Nations that were justiciable or enforceable in the courts, which is denied, and if those obligations, duties or liabilities today belong to or are justiciable or enforceable against a person other than the Imperial Crown, which is denied, they belong to and are justiciable or enforceable against the Crown in right of Canada ("Canada") and not Ontario, and no such obligations, duties or liabilities have been or are conferred upon Ontario under the *Constitution Act, 1867* or otherwise. Ontario is immune with respect to some or all of the claims raised in this proceeding, including without limitation all claims sounding in tort.

5. Ontario admits the allegation in paragraph 4 of the statement of claim except that Ontario did not become on July 1, 1867 or at any time thereafter, by section 109 of the *Constitution Act, 1867* or otherwise, the recipient of any sums due or payable for any lands, mines, minerals or royalties in which the plaintiff had or has any right or interest, and except that if the Imperial Crown had or owed obligations, duties or liabilities to the Six Nations that were justiciable or enforceable in the courts, which is denied, and if those obligations, duties or liabilities today belong to or are justiciable or enforceable against a person other than the Imperial Crown, which is denied, they belong to and are justiciable or enforceable against Canada and not Ontario, and no such obligations, duties or liabilities have been or are conferred upon Ontario under the *Constitution Act, 1867* or otherwise.

6. Ontario denies the allegation in paragraph 5 of the statement of claim. Ontario is subject to no obligations, duties or liabilities owed to the Six Nations by the Imperial Crown on or before confederation by the Province of Canada or Province of Upper Canada.

The Plaintiff's Introduction

7. Ontario denies the allegation in paragraph 6 of the statement of claim. Ontario has not at any time, and is not, under fiduciary obligations of any kind to the Six Nations. The Crown was not at any time under fiduciary obligations, or any obligation or duty that was justiciable or enforceable in a court of law or equity, to the Six Nations to *inter alia* hold, protect, manage and care for the lands, personal property and all other assets of the Six Nations for the benefit of the Six Nations in a similar manner that trustees are required to hold, protect, manage and care for the assets of a trust for the benefit of the beneficiaries of the trust. In addition to and supplementary to the other matters set out or adopted herein, the interest of the Six Nations in the

lands, personal property and all other assets in question in this action arose solely from the Haldimand Proclamation and the Simcoe Patent and was not and is not an independent right not created by an executive act of the Crown. If the Crown had or has any obligation or duty to the Six Nations in respect of those lands or proceeds of disposition of lands, therefore, it was and is a political trust not justiciable or enforceable in the courts.

8. Ontario denies the allegation in paragraph 7 of the statement of claim and puts the plaintiff to the strict proof of the alleged breaches and of the claimed right to a general accounting.

9. Ontario admits the allegation in paragraph 8 of the statement of claim except that it has no knowledge of notice of the action to Canada prior to service of the statement of claim.

The Royal Proclamation of 1763

10. Ontario denies the allegations in paragraphs 9 and 10 of the statement of claim. The *Royal Proclamation of 1763* had and has no effect on or relationship to the position of the Six Nations with respect to the lands in question in this action. The provisions of the *Royal Proclamation of 1763* in relation to "lands of the Indians" concern the lands occupied and used by particular nations, bands or other Indigenous groups at that date. The Six Nations did not occupy and use the lands in question in 1763. They migrated to the lands more than 20 years after 1763. In 1763 the lands in question were occupied and used by the Mississauga Indians who subsequently, in 1784, ceded their interest in the lands to the Crown thereby terminating any effect on or relationship to the lands in question that the *Royal Proclamation* might have had until then.

11. The Royal Proclamation of 1763 did not recognize or confirm any fiduciary obligations

in respect of the Six Nations and the lands in question. Further, it did not continue, affirm or enunciate any law then existing. The reservation of lands by the king was for the use of "Indians" as "hunting grounds". The provision called by the plaintiff in paragraph 9 of the statement of claim the "surrender requirement" and paraphrased in paragraph 10(d) was never in force in the lands in question inasmuch as the particular provision had application only in a "colony" within the meaning of the Royal Proclamation and the lands in question did not become part of a colony until the coming into force of the *Quebec Act, 1774*, 14 Geo. the III, c. 83 (U.K.) (R.S.C. 1985, app. II, no. 2) but by that Act the provision was repealed. By the terms of the Royal Proclamation it was of the very nature of the policies concerning the Indians set out therein that they were subject to change by the Crown at any time. Both the reservation of lands for the use of the Indians as hunting grounds and the direction to the governors and commanders in chief to not pass patents in respect of reserved lands were by the very terms of the Royal Proclamation expressly subject to such change at the will of the Crown. The prohibition of purchase, settlement and possession of reserved lands was expressly inapplicable where the Crown's leave and licence for that purpose was first obtained. And the policies concerning "Indians" set out in the Royal Proclamation were directory only, and not mandatory.

12. After migrating to the lands in question in 1784 the Six Nations expressly denied that the lands that were granted to them by the Crown were inalienable by them otherwise than to the Crown and asserted the contrary, and did in fact on many occasions purport to grant or lease portions of the lands to persons other than the Crown notwithstanding the objections of the Crown. The plaintiff is now estopped from relying on the "surrender requirement" of the *Royal Proclamation of 1763* or of any other instrument issued or enacted by the Crown.

Six Nations Lands

13. Ontario admits the allegation in paragraph 11 of the statement of claim insofar as it concerns territories in what is today the United States of America. Ontario denies the allegation insofar as it concerns territories in what is today the Provinces of Ontario and Quebec. At all times the Six Nations occupied, possessed or used territories in what is today the United States. Prior to the purchases of lands in what is today Ontario by the Crown from the Mississaugas in 1783 (Bay of Quinte) and 1784 (Grand River) and the subsequent grants of parts of those purchased lands to members of the Six Nations who migrated to them, the only presence of the Six Nations or their predecessors in what is now Ontario and Quebec was military incursion and other conflict with the Indian inhabitants from time to time, especially from about 1640 to about 1700, and establishment by some persons, mainly Mohawks, of two villages near Montreal in the 1670s and establishment by some descendants of those persons of a village near what is today the City of Cornwall in the 1740s. The inhabitants of those villages were not predecessors of the plaintiff. The predecessors of the plaintiff migrated to what is today part of Ontario, from what is today the United States, in 1784.

14. Ontario admits the allegation in paragraph 12 of the statement of claim except that the two tracts of land in what is today Ontario to which many of the Six Nations migrated after the American War of Independence (125 to the Bay of Quinte and 1,843 to the Grand River) were not within their Aboriginal lands, and except that only some members of the Six Nations were faithfully allied with and supported the Imperial Crown in the war. Others were allied with the Americans and fought against the Crown and their fellow Six Nations members.

15. Ontario admits the allegations of paragraph 13 of the statement of claim except that the tracts in what is today Ontario to which the Imperial Crown authorized and permitted members of the Six Nations to migrate and to possess and settle were not Aboriginal lands of the Six Nations.

The Haldimand Proclamation

16. Ontario admits the allegation of paragraph 14 of the statement of claim except that the lands to which the Haldimand Proclamation authorized and permitted members of the Six Nations to migrate and to possess and settle were lands within the tract that had been purchased by the Imperial Crown from the Mississaugas on May 22, 1784 and did not include any lands not within the tract so purchased. The tract so purchased included lands in what is today the Township of Nichol in the County of Wellington but no lands above the Township of Nichol. The chiefs of the Six Nations confirmed and agreed in 1791 that the Haldimand Proclamation Lands include no lands above the Township of Nichol and the plaintiff is estopped from now contending otherwise.

17. Ontario denies the allegation of paragraph 15 of the statement of claim. The Haldimand Proclamation was not and is not a treaty. The point has been resolved by a court having jurisdiction to do so (*Logan v. Styres* (1959), 20 D.L.R. (2d) 416 at 419-420 (Ont. H.C.J.). The Haldimand Proclamation gives rise to no treaty rights within the meaning of section 35 of the *Constitution Act, 1982*.

17.1 In the alternative, should the Haldimand Proclamation constitute a treaty within the meaning of section 35 of the *Constitution Act, 1982*, which is denied, Ontario pleads that the Crown has fulfilled any obligations that could be imposed on the Crown as a result of the Haldimand Proclamation being deemed a treaty. In particular, Ontario denies the allegations made

at paragraphs 17 and 23 of the statement of claim regarding breaches by the Crown of any treaty obligations under the Haldimand Proclamation and puts the plaintiff to the strict proof to thereof.

17.2 Ontario pleads in the further alternative that if there is liability to the plaintiff in respect of any breach of duty in or related to the implementation or administration of the Haldimand Proclamation as a treaty, which is denied, Canada would be solely liable for any such breach.

The Simcoe Patent

18. Ontario admits the allegation of paragraph 16 of the statement of claim, except that the Simcoe Patent was issued not merely drafted. The Simcoe Patent Lands were the same as the Haldimand Proclamation Lands, which were lands within the tract that had been purchased by the Imperial Crown from the Mississaugas on May 22, 1784 and which were the subject of a subsequent deed of December 7, 1792 from the Mississaugas to the Imperial Crown by which the boundary lines of the tract that had been purchased were confirmed and clarified, and except that the Simcoe Patent Lands are the lands set out in surveys showing the boundaries of the tract.

19. Ontario denies the allegation in paragraph 17 of the statement of claim. The Crown granted to the Six Nations by the Simcoe Patent all of the lands which the Six Nations were entitled to have reserved for them under the Haldimand Proclamation.

20. Ontario denies that the terms of the Simcoe Patent incorporated provisions existing at law. Ontario admits the remaining allegations in paragraph 18 of the statement of claim except that that the Simcoe Patent made no mention of the protection of the Crown and the Six Nations were to enjoy possession of the lands under the protection of the Crown in the sense that they were entitled to military protection by the Crown against its foreign enemies.

21. The right of the Six Nations in the Haldimand Proclamation/Simcoe Patent lands was not an estate in fee simple or any other corporeal property interest, but rather a personal, usufructuary right guaranteed in perpetuity or until surrendered or until taken by the Crown or granted to a third party by the Crown. For that reason, the right of the Six Nations could not form the res of a trust.

1812 Governor's Instructions

22. Ontario admits the allegation in paragraph 19 of the statement of claim except that the 1812 Governor's Instructions have no application to the facts of this case. They were "Instructions for the Good Government of the Indian Department To Sir John Johnson, Baronet, Superintendent General and Inspector General of Indian Affairs" from the governor, Sir George Prevost, in the latter's role as commander of the forces at the commencement of the War of 1812. As instructions, they were directions from the commander of the forces to a servant of the Crown as to how he should carry out his duties. They were not public documents and did not have the force of law. They were private orders of the Crown by the commander of the forces to a subordinate officer. Further, the 1812 Instructions were directed and addressed to Sir John Johnson and were applicable only during the term of that officer (if not altered earlier). Sir John Johnson ceased to occupy the office of superintendent General and Inspector General of Indian Affairs in 1828. Further, the provisions of the 1812 Instructions that were on the subject of purchases of "Indian Territory ... wanted for the Public Service" concerned lands held by virtue of Aboriginal title which were, at that time and according to the terms of the 1812 Instructions, to be purchased by the immediate delivery by the Crown to the Aboriginal parties of goods. The Haldimand Proclamation Lands (*i.e.,* the Simcoe Patent Lands) were not lands held by Aboriginal title and

were never the subject of any sale by the Six Nations to the Crown for goods and it was never contemplated by either the Crown or the Six Nations that any of those lands would be exchanged for goods. The leaders of the Six Nations, from the time of Chief Joseph Brant in 1784, were knowledgeable sellers of their lands for monetary compensation. No Haldimand Proclamation Lands were "wanted for the Public service", and no such lands were sold by the Six Nations to the Crown for that purpose, until after 1828. If the Instructions had the force of law, which is denied, their provisions were directory only, and not mandatory.

Legislation

23. Ontario denies the allegation in paragraph 20 of the statement of claim. The Crown neither recognized nor owed any fiduciary obligation to the Six Nations in respect of the Six Nations Lands, and therefore no recognition of such an obligation is reflected in the legislation pleaded and relied upon by the plaintiff, none of which mentions the Six Nations or their lands.

"Crown's Breach of Fiduciary Duty" alleged by the plaintiff

24. Ontario admits the allegation in paragraph 21 of the statement of claim except that the lands allocated to the Six Nations by the Haldimand Proclamation were the same as those described in the Simcoe Patent and therefore the percentage that the lands currently occupied and used by the Six Nations is of the lands allocated by the Haldimand Proclamation is the same as the percentage that the former is of the lands described in the Simcoe Patent.

25. Ontario denies the allegation in paragraph 22 of the statement of claim. Ontario neither made nor permitted to be made any grants, sales, leases, permits or other dispositions in any parts of the Six Nations Lands and is not a successor of any person who did so, and Ontario puts the

plaintiff to the strict proof of the contrary. Further, neither the Imperial Crown nor any successor of it in Canada owed any duty, including any fiduciary duty and/or including any duty that was justiciable or enforceable in the courts in respect of dispositions of Six Nations Lands. And further, if any such duty was owed, which is denied, no dispositions of Six Nations Lands were made or permitted to be made in breach of any such duty or without complying with the requirements of any law, and Ontario puts the plaintiff to the strict proof of the contrary.

26. Ontario denies the allegation in paragraph 23 of the statement of claim. Ontario neither made nor permitted dispositions of the Six Nations Lands, or permitted third parties to possess, occupy, or trespass on the Six Nations Lands, or made or permitted transactions relating to the Six Nations Lands, or failed to honour the terms or conditions of valid surrenders, sales or leases, or took or permitted the taking or use of any parts of the Six Nations Lands for roads, canals or other public waterways, railways, cemeteries, church grounds, public squares or parks, or for military, naval or other public purposes, or managed the Six Nations Trust or permitted it to be managed, and is not a successor of any person who did so, and Ontario puts the plaintiff to the strict proof of the contrary. Further, the Crown owed no duty, including any fiduciary duty and/or any duty that was justiciable or enforceable in the courts in respect of the Six Nations Lands. And further, all parts of the Six Nations Lands that were the subject of a disposition, transaction, or use other than trespass were the subject of a lawful and valid absolute surrender by the Six Nations or of a valid statutory provision authorizing the disposition, transaction or use. And further, under the *Constitution Act, 1867* and otherwise Ontario had and has no constitutional authority, role, obligation or occasion to prevent trespasses on, or prevent improper taking or use of the lands in question or to act as guardian of the Six Nations' interests in relation to transactions concerning the Six Nations Lands and in relation to the terms or conditions of surrenders, sales or leases, or

to manage or permit the management of the proceeds of dispositions of the Six Nations Lands or to act as guardian of the Six Nations' interests in relation to management of those proceeds, or to account to the Six Nations, and Ontario is not a successor of any person who had any authority, role, obligation or occasion to do any of those things. And further, no acts or omissions of the kind described in paragraph 23 occurred and Ontario puts the plaintiff to the strict proof of the contrary.

27. Further, if the alleged breaches occurred, which is denied, the breaches were at the times that they occurred breaches of the political trust of the Crown and/or were not justiciable in the courts. Accordingly, even if the Crown is today under any obligations to the plaintiff that are justiciable or enforceable in the courts, which is denied, the alleged breaches cannot now be justiciable or the foundation of liability.

The alleged "examples of breaches"

28. Concerning the allegations in paragraphs 24 to 81 inclusive of the statement of claim, Ontario pleads the following in addition to the allegations in the amended statement of defence of the defendant the Attorney General of Canada that are adopted and repeated by Ontario:

a) With respect to paragraphs 25 to 30 inclusive of the statement of claim ("Crown Grant of Block No. 5 of the Simcoe Patent Lands"), the lands in question were the subject of an absolute surrender by the Six Nations to the Crown dated February 5, 1798. The Six Nations requested, and the Crown agreed, to grant the lands to an individual specified by the Six Nations for a sum agreed upon by the Six Nations and the purchaser. The Six Nations' attorney, Chief Joseph Brant, appointed three individuals, including Captain William Claus, trustee "in whose names I [i.e., Chief Brant] wish the necessary securities

to be taken for securing to the said [Six] Nations, the monies due and arising upon the sale of the said lands they having been in virtue of the authority vested in me expressly nominated and appointed". At the date of the events alleged in paragraphs 25 to 30 inclusive the Six Nations had no right, title or interest in the lands in question. If they had any right that was justiciable or enforceable in the courts, which is denied, it was a personal right against the three trustees for the purchase money if and to the extent that it had not been duly credited to them.

b) With respect to paragraphs 31 and 32 of the statement of claim ("Crown Grant of Block No. 6 of the Simcoe Patent Lands"), the lands in question were also the subject of the said absolute surrender to the Crown. But Block No.6 was a free gift by the Six Nations to the person specified by them "as a mark of their affection for him and as a reward for his Services with them --- and that no money as the price thereof or annual Rent as a compensation therefor was ever excepted by them from him". That person, John Datchsteder or Dockstader, sold the lands to Benjamin Canby, and Canby was in fact the individual specified by the Six Nations to receive the Crown grant of the lands. After the absolute surrender of the lands the Six Nations had no right, title or interest in the lands in question and, as Chief Brant acknowledged, no right to any payment from Canby or anyone else.

c) With respect to paragraphs 33 to 43 inclusive of the statement of claim ("Colonel Claus and the lands in Innisfil and East Hawkesbury Townships"), the two townships in question were and are not within the "Haldimand Proclamation Lands" and were and are located in regions far distant from the "Haldimand Proclamation Lands". With respect to paragraph 36, the Province of Ontario did not exist in 1831.

d) With respect to paragraphs 44 to 50 inclusive of the statement of claim ("Welland Canal Flooding"), the lands flooded were portions of the tracts surrendered absolutely by the Six Nations to the Crown by the surrenders dated February 5, 1798, March 13, 1809, April 19, 1830, April 19, 1831, February 8, 1834, March 26, 1835, April 2, 1835 and January 18, 1841. After the dates of those surrenders the Six Nations had no right, title or interest in the lands in question. If they had any right that was justiciable or enforceable in the courts, which is denied, it was a right to receive compensation under S.U.C. 1824, c. 17 in respect of portions of the lands, if any, not yet surrendered as of the date of the alleged flooding between approximately 1829 and 1835. Ontario admits and relies upon paragraph 48 and 49 of the statement of claim.

e) With respect to paragraphs 54 and 55 of the statement of claim ("The Grand River Navigation Company"), the lands patented were portions of the tracts surrendered absolutely by the Six Nations to the Crown by the surrenders mentioned in subparagraph 28 d) herein. After the dates of those surrenders the Six Nations had no right, title or interest in the lands in question. If they had any right that was justiciable or enforceable in the courts, which is denied, it was a right to receive compensation under S.U.C. 1832, c.13 in respect of portions of the lands, if any, not yet surrendered as of the date of the patent, November 18, 1837.

f) With respect to paragraphs 56 and 57 of the statement of claim ("Lands Surrendered for the Purpose of Sale but Subsequently Conveyed by the Crown Without Obtaining Proper Compensation for Six Nations"), the lands conveyed or otherwise transferred were portions of the tracts surrendered absolutely by the Six Nations to the Crown by the surrenders mentioned in subparagraph 28 d) herein. After the dates of those surrenders, the Six Nations

had no right, title or interest in the lands in question. If they had any right that was justiciable or enforceable in the courts, which is denied, it was a personal right for the purchase money in respect of tracts in the lands surrendered by the surrenders of April 2, 1835 and January 18, 1841 that were subsequently sold, if and to the extent that the purchase money had not been duly credited to them.

g) With respect to paragraphs 58.1 to 58.10 inclusive of the statement of claim ("Talbot Road Lands"), the lands in question were the subject of an absolute surrender by the Six Nations to the Crown dated April 19, 1831. Thereafter, the Six Nations had no right, title or interest in the lands in question and no consent of the Six Nations to dispositions of the lands was necessary or appropriate. At all times the Crown had legal title in the lands and a right to grant them. If the Six Nations had any right that was justiciable or enforceable in the courts, which is denied, it was a personal right for compensation in respect of the alleged breaches.

h) With respect to paragraphs 59 and 60 of the statement of claim ("Hamilton/Port Dover Plank Road Lands"), the lands in question were the subject of an absolute surrender by the Six Nations to the Crown dated January 18, 1841. Thereafter, the Six Nations had no right, title or interest in the lands in question. If they had any right that was justiciable or enforceable in the courts, which is denied, it was a personal right for compensation in respect of the alleged breach. If the Plank Road existed prior to January 18, 1841 it was a common and public highway. Ontario pleads and relies upon *An Act to provide for the laying out, amending, and keeping in repair, the public highways and roads in this province, and to repeal the laws now in force for that purpose,* S.U.C. 1810, c.1, ss. 12 and 35 and the successors of those statutory provisions.

i) With respect to paragraphs 61 and 62 of the statement of claim ("Port Maitland Lands"),

the lands in question were the subject of an absolute surrender by the Six Nations to the Crown dated February 8, 1834. Thereafter, the Six Nations had no right, title or interest in the lands in question. If there was a taking of the lands, which is denied, it was not a taking from the Six Nations.

j) With respect to paragraphs 63 to 73A inclusive of the statement of claim ("Purported Surrender of 1841"), the absolute surrender of January 18, 1841, confirmed in 1847, complied with all applicable laws, was in accordance with the intention of the Six Nations and the Crown, and was and is valid and effective. Thereafter the Six Nations had no right, title or interest in the lands. If any earlier surrenders were not absolute or were subject to reservations, which is denied, the 1841 surrender as confirmed constituted in law and equity a variation of the earlier surrenders, and of any trusts created by them, so that all of the land surrendered, without reservations, could be sold.

k) With respect to paragraphs 74 and 75 of the statement of claim ("Misappropriation of Trust Monies"), Ontario has no knowledge of the allegations in paragraph 74. Concerning paragraph 75, Ontario holds no "monies which ought to be in the Six Nations Trusts" and has no authority, role, obligation or occasion, under the *Constitution Act, 1867* or otherwise, to do so or to account to the Six Nations. If any of the alleged improprieties occurred or existed, which is denied, Ontario has no "awareness" of any such improprieties and has no authority, role, obligation or occasion, under the *Constitution Act, 1867* or otherwise, to have such "awareness".

l) With respect to paragraphs 76 to 81 inclusive of the statement of claim ("Allowing the Removal by Third Parties of Natural Resources from the Six Nations Reserve Without Valid Authority and Without Proper Compensation"), the Six Nations Reserve is a

"reserve" within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, as amended, and its predecessors, and has been and is, therefore, within the exclusive administration of the Governor in Council and the Minister of Indian Affairs and Northern Development and his predecessors. It is within the exclusive legislative authority of the Parliament of Canada. Ontario had and has no authority, role, obligation or occasion, under the *Constitution Act, 1867* or otherwise, to administer the Six Nations Reserve or any part of it and has not engaged in such administration and has not done any of the acts or committed any of the omissions alleged. In particular, Ontario is and never has been under any duty "to protect the Six Nations' interest in the natural resources underlying the Six Nations Reserve by (taking)… steps to prevent Third Parties from removing natural resources from the Six Nations Reserve without proper authority." Ontario pleads and relies upon the *Constitution Act, 1867*, s. 91.24, the *Indian Act* and its predecessors, *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands,* S.C. 1924, c. 48, and *The Indian Lands Act, 1924,* S.O. 1924, c. 15.

m) With respect to paragraphs 24 to 81 inclusive of the statement of claim, if the Crown was at any time subject to any fiduciary or other obligations to the Six Nations in respect of any of the lands that were the subject of the Haldimand Proclamation and the Simcoe Patent or in respect of surrenders or sales or other dispositions of any of those lands or the proceeds of disposition of any of those lands, which is denied, or if the Crown was subject to any duty justiciable or enforceable in a court of equity to hold, protect, manage and care for such lands or proceeds in a manner similar to a trustee, which is denied, the Crown at all times fulfilled its obligations or duty to the Six Nations and committed no breach of such obligations or duty. With respect to surrenders, any obligation or duty of the Crown was a

duty to prevent exploitative bargains. There were no exploitative bargains. With respect to sales or other dispositions of surrendered lands and the proceeds of disposition, any obligation or duty of the Crown was a duty to act in the best interests of the Six Nations according to the terms of the surrenders, acting as a person of ordinary prudence would act in the management of his or her own affairs and with reasonable diligence. In all of the matters referred to in paragraphs 24 to 81 inclusive of the statement of claim, the Crown acted in accordance with that obligation or duty.

The Plaintiff's Allegations about the "Crown's Failures to Account"

29. Ontario denies the allegation in paragraph 82 of the statement of claim. Ontario pleads, in addition to or supplementary to the other pleadings set out or adopted herein, and including but not limited to paragraph 119 in Canada's amended statement of defence:

a) The plaintiff styles the alternative relief sought as an accounting and inquiry. But in fact the plaintiff seeks a roving judicial historical investigation into all surrenders, sales and transactions involving a vast tract of land and into the crediting, adequacy and management of the proceeds of the disposition of the land from 1784 to the date of the proposed investigation. This court has no jurisdiction, either at law or equity, to grant that relief.

b) The court is not equipped to engage in a historical investigation of that kind, by means of a reference or otherwise, and, therefore, if it has jurisdiction to order an investigation of the kind and scope sought, which is denied, it should decline to exercise a discretion to do so.

c) The Crown owed no treaty obligation or other duty, including any fiduciary duty, in equity or in law justiciable or enforceable in the courts in respect of the assets in question and,

therefore, no remedy by way of declarations, equitable compensation and/or damages, or alternatively by way of accounting (paragraph 1 of the statement of claim) can be granted.

d) There is no reasonable *prima facie* inference that breaches that are not pleaded in the statement of claim occurred and, therefore, if the relief sought is properly characterized as an accounting, which is denied, and would be otherwise available, which is denied, no roving accounting of the kind sought can be granted.

e) The court has no jurisdiction to grant an "inquiry". Throughout Canadian history, from earliest times to today, an "inquiry" is relief and a course of action that may be ordered by Her Majesty-in-Council pursuant to the royal prerogative or statute. It is not relief that may be ordered by a court of law and equity.

f) An accounting is a remedy that a plaintiff can claim by which the defendant is required to account for monies received or due. Neither the question of “whether all portions of the Six Nations Lands which today are not part of the Six Nations Reserve No. 40 and 40B were lawfully disposed of by first obtaining from the Six Nations a surrender in accordance with the applicable legal requirements” (subparagraph 82(a) of the statement of claim) nor the question of the “extent to which the Six Nations have been deprived of their property rights by the Crown's failure to fulfil its treaty obligations under the Haldimand Proclamation” (subparagraph 82 (d)) are issues of account. Therefore, even if the alternative remedy of accounting were otherwise available, which is denied, and even if the Haldimand Proclamation gives rise to treaty obligations, which is denied, the questions set out in subparagraphs 82(a) and (d) of the statement of claim are not matters for an accounting and no remedy by way of accounting can be granted in respect of them.

g) Further, all or most of the alleged "examples of breaches" of the Crown's obligations to the Six Nations pleaded and relied upon by the plaintiff are not matters of account. Among the examples that are not matters of account are: **1.** whether the Crown breached a duty in 1831 by obtaining three tracts of land elsewhere in Upper Canada for the Six Nations to make good the amount owing to the Six Nations by the Six Nations' deceased trustee, Colonel Claus (paragraph 36 of the statement of claim); **2.** whether the Crown breached a duty in 1831 by not ensuring that Colonel Claus' son had a right to convey some of the tracts in his own name (paragraphs 37 and 40); **3.** whether the Crown breached a duty in 1840 by deciding to sell the tracts in the manner adopted and for the prices obtained (paragraph 38); **4.** whether the Crown breached a duty in the 1840s by selling the tracts without obtaining a surrender from the Six Nations (paragraph 39); **5.** whether the Crown breached a duty in 1852 by paying from the Six Nations Trust the costs of defending the Six Nations' interests in *Dickson v. Gross* (paragraphs 40 and 41); **6.** whether the Crown breached a duty in 1853 by paying the Claus Estate from the Six Nations Trust for the three tracts of land that had been conveyed to the Six Nations (paragraph 42); **7.** Whether the Crown was legally obliged to reimburse the Six Nations the amount owed to the Six Nations by the Six Nations' deceased trustee, Colonel Claus (paragraph 43); **8.** whether the Crown breached a duty by the alleged sale of 200 acre lots in the "Talbot Road Lands" instead of 100 acre lots (paragraphs 58.5 and 58.6); **9.** whether the Crown breached a duty by the alleged failure to reserve 2 miles on each side of the Grand River from sale of "Talbot Road Lands" (paragraphs 58.5 and 58.7); **10.** Whether the Crown breached a duty by the alleged sale of "Talbot Road Lands" that were within a tract reserved from sale and outside the Cayuga town plot (paragraphs 58.8 to 58.10 inclusive); **11.** whether the crown breached a duty by

the alleged failure to reserve from sale “Talbot Road Lands” notwithstanding the public notice of January 22, 1844 (paragraph 58.10); **12.** whether the Crown breached a duty by the alleged granting of "Hamilton/Port Dover Plank Road Lands" in fee simple instead of in leasehold (paragraphs 59 and 60); **13.** whether the Crown breached a duty by the alleged wrongful taking of "Port Maitland Lands" (paragraphs 61 and 62); **14.** whether the Crown breached a duty in connection with the “Purported Surrender of 1841" (paragraphs 63 to 73 inclusive). Therefore, even if the alternative remedy of accounting were otherwise available, which is denied, and even if the allegations concerning the alleged “examples of breaches” were true, which is denied, all or most of the “examples” are not matters for an accounting and no remedy by way of an accounting can be granted in respect of them.

30. Concerning paragraph 83 of the statement of claim, the Crown had and has no fiduciary obligations to the Six Nations. It had and has a political trust not justiciable or enforceable in the courts, which political trust has been since confederation an obligation of Canada. Ontario has no knowledge of the letter dated October 25, 1979 or the response to it by the Parliament of Canada or the Auditor General of Canada or anyone else. The letter of October 23, 1992 was addressed to the Minister of Indian Affairs and Northern Development of Canada and the Minister of Justice of Canada. It demanded an accounting. Copies were sent to Ontario. The letter closed, on page 3, with the assertion that a copy was sent to an Ontario minister “to inform him of this demand [made to Canada]. An accounting is also requested from the Province with respect to all matters related to the trust that may for any reason have been treated as within the jurisdiction of the Province.” No such matters were ever treated as within the jurisdiction of the province. By inadvertence, Ontario did not acknowledge receipt of the copies of the letter sent to it. Ontario has no knowledge of the response of Canada to the letter.

The Effect of the Plaintiff's Delay

31. All of the events, acts and omissions which constitute the alleged breaches in respect of which the plaintiff seeks relief, with the exception of the allegation about failure to protect the Six Nations' interest in oil and gas underlying the Six Nations Reserve (paragraphs 76 to 81 inclusive of the statement of claim), occurred between 1793 and 1841. Notice of this action was given in December, 1994 and the action was commenced in 1995. Throughout the period between the alleged events, acts and omissions on which the plaintiff now bases its claim and the date of commencement of the action the plaintiff had full knowledge of those events, acts and omissions and of the claim that it now asserts. The delay of between more than one century and a half and s lightly more than two centuries in bringing the action gives rise to a reasonable inference of acquiescence by the plaintiff. The action is therefore barred by the equitable doctrine of laches.

32. Further, the delay of the plaintiff in bringing the action gives rise to circumstances that make prosecution of the action unreasonable. The action is therefore barred by the equitable doctrine of laches on that ground as well.

33. The delay has been of such a length and extent that a reasonable expectation has arisen that the Crown will not be held to account for the obligations that the plaintiff alleges existed and were breached. Further, the delay has ensured that the witnesses of the facts are dead, much evidence is lost completely, and all evidence that would explain the surviving evidence so that the court can properly understand it and make findings of fact is lost, with the result that the claim is now necessarily based on stale and inadequate evidence. And further, the plaintiff has, instead of bringing suit in a timely fashion, failed to do so with the result that the public interest requires that the action be barred.

34. Ontario pleads and relies upon the *Limitations Act*, R.S.O. 1990, c. L. 15, s. 46 and its predecessors. The action is in the alternative an action of account or for not accounting. These causes of action arose more than six years before the commencement of the action. The action is therefore barred by statute.

35. The action is in respect of acts done in pursuance or execution or intended execution of an alleged statutory or other public duty or authority, or in respect of alleged neglects or defaults in the execution of such duty or authority. The cause of action arose and the alleged injury or damage therefrom occurred more than six months before the commencement of the action. The action is therefore barred by statute for that reason as well. Ontario pleads and relies upon the *Public Authorities Protection Act*, R.S.O. 1990, c. P.38, s. 7(1), and the *Crown Liability and Proceedings Act, 2019*, S.O 2019, c. 7, Sch 17.

The historical, factual, legal and constitutional unrelatedness and unconnectedness between Ontario and the allegations and claims of the plaintiff

36. There is no historical, factual, legal or constitutional relatedness or connectedness between Ontario and any of the obligations to the Six Nations alleged by the plaintiff or any of the events, acts and omissions which constitute the alleged breaches in respect of which the plaintiff seeks relief.

37. Ontario did not exist prior to July 1, 1867. It came into existence by virtue of the *Constitution Act, 1867.*

38. The alleged breaches, with the exception of the allegation about failure to protect the Six Nations' interest in oil and gas underlying the Six Nations Reserve (paragraphs 76 to 81 inclusive

of the statement of claim), occurred before July 1, 1867. If there was and is any liability in respect of the alleged breaches, which is denied, it existed on July 1, 1867. Any liability of the Crown on July 1, 1867, if it was not a liability of the Imperial Crown, was a liability of the Province of Canada. Any such liability became a liability of the Dominion of Canada by operation of the *Constitution Act, 1867* and remains today a liability of Canada, not Ontario. Ontario pleads and relies upon s. 111 of the *Constitution Act, 1867.*

39. Any liability of the Crown in respect of the alleged breaches, which is denied, would have been in respect of alleged acts or omissions of the Department of Indian Affairs. Before 1867 the Department of Indian Affairs was, successively, a branch of the Imperial Crown and of the Province of Canada. After July 1, 1867 the Department of Indian Affairs was at all times, and it continues to be, a branch of Canada pursuant to s. 91.24 and s. 130 of the *Constitution Act, 1867*. Ontario pleads and relies upon those provisions of the Constitution and upon *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, S.C. 1868, c.42, *The Indian Act, 1876*, S.C. 1876, c. 18, and the successors of those Acts of Parliament.

40. Since July 1, 1867 the officers of the Department of Indian Affairs have been and are officers of Canada and have been and are subject to any liabilities that existed prior to July l, 1867. Any such liabilities became on that date, and continue to be, liabilities of Canada, and not of Ontario. Ontario pleads and relies upon s. 91.24 and s. 130 of the *Constitution Act, 1867, An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, S.C. 1868, c. 42, *The Indian Act, 1876,* S.C. 1876, c. 18, and the successors of those Acts of Parliament.

41. No lands in the Haldimand Proclamation/Simcoe Patent lands came to belong to Ontario,

by s. 109 of the *Constitution Act, 1867* or otherwise, which were not before 1867 the subject of an absolute surrender to the Crown by the Six Nations. Subsequent to those absolute surrenders the Six Nations had no right, title or interest in the lands. The lands that came to belong to Ontario were not "subject to any Trusts existing in respect thereof, [or] to any Interest other than that of the Province in the same" within the meaning of s. 109. Further, the many sales or other dispositions by the Crown of the surrendered lands were made prior to July 1, 1867. After that date all sums then due or payable for such lands continued to belong to the Department of Indian Affairs, a branch of Canada. Ontario pleads and relies upon *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands,* S.C. 1924, c. 48 and *The Indian Lands Act, 1924,* S.O. 1924, c. 15.

42. The fiduciary obligation of the Crown to Indians in Canada and any responsibility of the Crown to provide for the welfare and protection of Indigenous peoples are, as a matter of constitutional law, an obligation and a responsibility of the Crown in right of Canada, not the Crown in right of a province. Ontario pleads and relies upon that obligation and responsibility and upon s. 91.24 and s. 130 of the *Constitution Act, 1867*. In the alternative, Ontario pleads that any alleged breaches of fiduciary obligation as against Ontario, which are denied, are not justiciable or enforceable.

43. Ontario pleads that certain of the plaintiff's claims are *res judicata* as a result of *Miller v. The King*, [1950] S.C.R. 168 and those claims must necessarily be dismissed. It is not possible that liability in respect of the claims did not belong to the Province of Canada between 1840 and 1867 but then re-emerged on July 1, 1867 as a liability of the new Province of Ontario.

44. If there was and is any liability in respect of the alleged breaches, which is denied, and if it was a liability of the Imperial Crown, it is today a liability of the Imperial Crown or of Canada.

Ontario pleads and relies upon s. 91.24 and s. 130 of the *Constitution Act, 1867*.

45. None of the alleged acts or omissions which constitute the alleged breaches in respect of which the plaintiff seeks relief were acts or omissions of a servant of Ontario or of any person appointed by or employed by Ontario. Therefore, on that ground as well, the action does not lie against Ontario. Ontario pleads and relies upon the *Proceedings Against the Crown Act, R.S.O. 1990*, c. P. 27, s. 2(2)(c) and s. 1 (definition of "Crown" in the Act) and its predecessors, as well as the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c 7, Sch 17.

46. Ontario therefore asks that the action be dismissed with costs or, in the alternative, dismissed with costs as against Ontario.

CROSSCLAIM

47. The defendant Ontario claims against the defendant the Attorney General of Canada ("Canada"):

a) an order that any and all relief and costs to which this Court may find the plaintiff entitled in the action is relief and costs against Canada only or, in the alternative, an order directing Canada to indemnify Ontario in the amount of any relief and costs for which this Court finds Ontario liable to the plaintiff; and

b) costs.

48. Ontario repeats and relies upon, in the crossclaim, the contents of the statement of defence of Ontario.

49. Any liability to the plaintiff in the action, which is denied, is therefore a liability of the defendant Canada and not a liability of the defendant Ontario.

50. Canada is liable to Ontario for all or any part of the plaintiff's claim for which the court may find Ontario liable. Ontario pleads and relies upon Rule 28.01 of the *Rules of Civil Procedure*, the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s.27 as am. S.C. 1990, c. 8, s. 31, and the *Proceedings against the Crown Act*, R.S.O. 1990, c. P.27, s.6 and its predecessors, and the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c.7, Sch 17.

January 22, 1995
(Amended August 31, 2020)

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

SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS

- and -

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

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto

AMENDED STATEMENT OF DEFENCE AND CROSSCLAIM OF THE DEFENDANT HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

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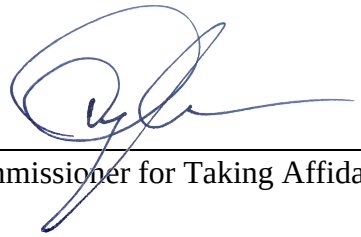
EXHIBIT D

This is Exhibit “D” to the Affidavit of Carol Fung, sworn this 10th day of June, 2022



Commissioner for Taking Affidavits

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

REPLY TO THE FRESH AS AMENDED STATEMENT OF DEFENCE OF THE ATTORNEY GENERAL OF CANADA AND TO THE AMENDED STATEMENT OF DEFENCE OF HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

1. The Plaintiff, the Six Nations of the Grand River Band of Indians (the "**Six Nations**"), admits paragraphs 5, 8, 34, 64, 65 (second sentence only) and 73 of the Fresh as Amended Statement of Defence (the "**Federal Crown's Defence**") of the Attorney General of Canada on behalf of Her Majesty the Queen in Right of Canada (the "**Federal Crown**"), and admits paragraphs 13 (first sentence only) and 28(m) (second last sentence only) of the Amended Statement of Defence (the "**Ontario Crown's Defence**") of Her Majesty the Queen in Right of Ontario (the "**Ontario Crown**") (collectively the "**Defences"**).

2. Six Nations denies all of the other allegations in the Defences, except as previously stated in the Further Amended Statement of Claim ("**Claim**") and except as expressly admitted in this Reply. For convenience, defined terms in the Claim shall continue to have the same meanings in this Reply, unless separately defined.

3. As to paragraphs 4, 6 and 6 (a) of the Federal Crown's Defence, Six Nations repeats and relies on paragraphs 3 and 5 of the Claim. The British Imperial Crown and its successors in Canada (collectively the "**Crown**") at all relevant times owed treaty and fiduciary obligations to the Six Nations, as well as an overarching constitutional duty to act honourably in dealings with the Six Nations, in accordance with the common law doctrine of the "Honour of the Crown". The Crown's obligations and duties to the Six Nations were not limited to those arising from the *Constitution Act, 1867,* but also arose before 1867 as a matter of constitutional and common law.

Indian Provisions of the Royal Proclamation of 1763

4. The Royal Proclamation of October 7, 1763 contained detailed measures concerning Indigenous people and their lands (the "**Royal Proclamation Indian Provisions**"). As to paragraph 8 of the Federal Crown's Defence, the Royal Proclamation Indian Provisions restated the British common law respecting the conduct of the British Imperial Crown's relations with the Indigenous inhabitants of British North America, and were also part of the treaty relationships between the British Imperial Crown and the Six Nations.

5. As to paragraph 10 of the Federal Crown's Defence, the Royal Proclamation Indian Provisions did not disappear with the passage of the *Quebec Act, 1774*, but continued thereafter in force as part of the British common law including in connection with the Haldimand Proclamation of October 1784. The Indigenous rights or freedoms recognized by the Royal Proclamation are expressly referenced in section 25 of the *Constitution Act, 1982*.

Haldimand Proclamation

6. As to paragraphs 11 to 15 of the Federal Crown's Defence, the Haldimand Proclamation of 1784 resulted from a process of negotiation and mutual promises and consideration, between the Crown and the Six Nations as represented by War Chief Joseph Brant. The Haldimand Proclamation represented the culmination of a process of treaty making, which the parties intended to be legally binding, and therefore created treaty obligations of the Crown to the Six Nations.

7. Further, as to paragraph 15 of the Federal Crown's Defence, the Haldimand Proclamation's northern geographic limit was not limited by the Mississaugas' 1784 quit claim in favour of the Six Nations, nor did the terms of the Haldimand Proclamation express any such geographical limit. To the contrary, the Haldimand Proclamation expressed that its northern geographical limits were from its source (i.e. the headwaters), evidencing the understanding and intention of the Crown and the Six Nations.

8. As to paragraphs 11 and 12 of the Federal Crown's Defence, from the early 1700s and earlier, the Six Nations used the area of lands around the headwaters of the Grand River for harvesting beaver due to that area being prime beaver habitat, as well as using the Grand River valley for villages and for travel to the Six Nations beaver hunting grounds (particularly in the vicinity of the headwaters of the Grand River). The Six Nations' Indigenous lands for hunting, trapping, fishing, harvesting and trading, including in the Grand River valley, were specifically recognized by and undertaken to be protected by the British Imperial Crown in the Albany Treaty of 1701.

9. As to paragraphs 16 to 19 of the Federal Crown's Defence, Six Nations denies that the Six Nations wanted to sell half of its lands allocated under the Haldimand Proclamation. Rather, the Six Nations wanted to derive on-going revenues to sustain themselves economically solely through leasing only their surplus uplands to white farmers. However, Lieutenant-Governor Simcoe and Peter Russell (President of the Executive Council of Upper Canada) would not countenance Six Nations as Indigenous landowners leasing lands to white farmers as tenants. As a result, the Crown insisted that they would not sanction or permit lease arrangements for Six Nations lands. Instead, the Crown pressed the Six Nations to surrender lands to the Crown in order to facilitate permanent sales of the lands and obtain revenue for Six Nations through those land sales.

Blocks 5 and 6 of the Haldimand Proclamation Lands

10. As to paragraphs 19 and 21 of the Federal Crown's Defence and paragraphs 28(a) and 28(b) of the Ontario Crown's Defence, alleging that the Six Nations absolutely surrendered Blocks 5 and 6 on February 5, 1798, Six Nations denies that any valid surrender to the Crown of Blocks 5 or 6 was made in July 1797, on February 5, 1798, or any other date by the Six Nations or any duly authorized representative on its behalf.

11. As to paragraphs 17 to 21 of the Federal Crown's Defence, Six Nations admits that Joseph Brant obtained a limited power of attorney from Five of the Six Nations assembled in Council on November 2, 1796 ("**Brant's Power of Attorney**").

12. By the terms of this power of attorney, in order that monies from the sales of certain lands could be used to purchase an annuity or stipend for their future support, the Six Nations consented to surrender that portion of their lands legally described in the power of attorney and consisting of about 310,391 acres. This was upon the "express Condition" that those lands would be regranted by the Crown, through grants under the Great Seal of the Province of Upper Canada, to persons nominated by Joseph Brant, and on the understanding that security would be demanded and received for the payment of the purchase price for such lands.

13. The February 5, 1798 document characterized by the Ontario Crown as a surrender by the Six Nations of Blocks 1 to 6 of its lands (the "**Purported**

Surrender of February 1798"), is signed only by Joseph Brant and purported to surrender for sale an area of land totalling 352,707 acres, an area more than 40,000 acres larger than the tract which had been authorized for surrender and sale in Brant's Power of Attorney.

14. The lands described in Brant's Power of Attorney as being authorized by Six Nations for surrender for sale purposes comprised only what subsequently was described in the Purported Surrender of February 1798 as Blocks 1 to 4, later the Townships of Dumfries, Waterloo, Woolwich and Nichol.

15. Brant's Power of Attorney did not provide any consent or authorize a surrender by the Six Nations of the other lands referred to in the Purported Surrender of February 1798 that became known as Blocks 5 and 6, later the Townships of Moulton and Canborough.

16. Accordingly, the Purported Surrender of February 1798, purporting to rely upon Brant's Power of Attorney as the consent of Five of the Six Nations, could not and did not represent a valid surrender by the Six Nations of Blocks 5 and 6.

17. At no time during the July 1797 Council meetings of the Six Nations, referred to in paragraph 19 of the Federal Crown's Defence, did President Peter Russell ask Six Nations to consent to a surrender of Blocks 5 and 6, nor did the Six Nations offer, ask for or provide a surrender of Blocks 5 and 6.

18. As to paragraph 22 of the Federal Crown's Defence, on or about February 26, 1787, the Six Nations assigned to John Dockstader, the use of the Block 6

lands by him and his family with the proviso that it could not be transferred by Dockstader to anyone else. The Six Nations did not make a grant in fee simple of these lands to Dockstader nor did they consent to a sale and transfer of these lands from Dockstader to Benjamin Canby.

19. As to paragraph 49 of the Federal Crown's Defence, Six Nations did not approve the sale of Block 5 to the Earl of Selkirk at a Council meeting of May 29, 1807. William Claus, who was the Deputy Superintendent of Indian Affairs in Upper Canada, approved the sale of Block 5 to Selkirk.

20. As to paragraph 50 of the Federal Crown's Defence, William Claus held the mortgage with Selkirk, in his name as agent for the Crown.

Fiduciary Duty of the Crown

21. Six Nations specifically denies the allegations in paragraphs 27 and 83 of the Federal Crown's Defence that William Claus and John Claus and other officials of the Province of Upper Canada were, in effect, private trustees. William Claus ultimately reported to and took directions from the Crown. The persons appointed as trustees to receive and manage the funds from the dispositions of the Six Nations' lands were appointed and delegated their duties as officials, employees or agents for the Crown. The Crown at all relevant times had and assumed responsibility to the Six Nations for William Claus and the other trustees. The Crown through the Executive Government in Upper Canada and the Imperial Government actively participated in the trustees' decisions, and gave directions to the trustees, relating to the Six Nations' lands and funds.

The Grand River Navigation Company

22. As to paragraphs 54, 55 and 96 of the Federal Crown's Defence, the decision to invest Six Nations' funds in the Grand River Navigation Company (the "**GRNC**") ultimately rested with and was made by the Lieutenant-Governor of Upper Canada, John Colborne. The Six Nations did not consent in advance, or at any time, to such use of their funds. The Crown investigated the use of Six Nations' funds for the GRNC on numerous occasions and each time concluded that such investment had been imprudent.

23. As to paragraphs 57, 58 and 97 of the Federal Crown's Defence, Six Nations denies that there has been any satisfaction of Six Nations' claim with respect to the Crown's breach of fiduciary duty concerning the misuse of Six Nations' funds for the GRNC. The Federal Crown did not pay any sums to the Six Nations between 1925 and 1932 towards satisfaction of the GRNC claim, nor did the Six Nations agree to accept any sums during that period in partial settlement of the claims resulting from the Crown's misuse of Six Nations' funds improperly invested in the GRNC.

24. On or about July 14, 1925, an official with the Department of Indian Affairs suggested that the Federal Crown might make annual grants to the Six Nations until the amount of the GRNC claim had been fully repaid, but emphasized that an agreement to that effect between the Six Nations and the Federal Crown would be required.

25. No such agreement was ever concluded between the Six Nations and the Federal Crown to settle the claims arising from the Crown's misuse of Six Nations funds for the GRNC and for other improper purposes.

26. The Federal Crown acknowledged that there had been no settlement with the Six Nations of the claims involving the GRNC by subsequently engaging in settlement negotiations concerning that matter and making a substantial monetary offer of settlement to the Six Nations on or about September 26, 1950, which offer was not accepted. Accordingly, the appropriation by Parliament of any funds between 1925 and 1932 for public purposes on the Six Nations reserve, such as for roads, a hospital, or an electric plant, has no relevance or connection to the GRNC claims; instead, any appropriations were simply related to the Federal Crown's normal on-going fiduciary obligations to the Six Nations, just as they would be to other First Nations.

27. In response to paragraphs 93 and 101 (last two sentences) of the Federal Crown's Defence, the litigation there referred to remained alive in the Exchequer Court, later Federal Court, for the duration of the period mentioned. At no time did the Federal Crown bring a motion for dismissal for want of prosecution or for delay, presumably because the Federal Crown was not prejudiced by, but benefited from, any delay. The *Miller v. The King* action was formally discontinued after this action was commenced and supplanted it.

Welland Canal Flooding

28. Six Nations admits paragraphs 92(a) (except for the last sentence thereof), and 92(e) (first two sentences), of the Federal Crown's Defence.

29. As to the last sentence in paragraph 92(a) of the Federal Crown's Defence, the height of the dam located at Dunnville was raised incrementally between 1829 and 1842, and then again in 1874.

30. As to paragraph 92(b) of the Federal Crown's Defence, Lewis Burwell never attempted to estimate the flooded area of Six Nations lands resulting from flooding after 1834, including the area located to the north of the Townships of Cayuga and Dunn. Further, the reliability of Burwell's estimates may be in doubt as a result of his discreditable conduct while a government official. As of December 24, 1840, Burwell was prohibited from any further surveying on Haldimand Proclamation Lands as a result of the discovery that he was aiding squatters on those lands and accepting kickbacks in connection with his surveying on Haldimand Proclamation Lands.

31. As to paragraph 92(c) of the Federal Crown's Defence, the Crown did not present available evidence to Cowan which showed higher land values that would have been more favourable to Six Nations compensation claims.

32. As to paragraph 92(d) of the Federal Crown's Defence, at the conclusion of the arguments in November 1895 made respectively by Canada and Ontario to a board of three arbitrators, Chancellor Boyd (sitting as one of the arbitrators)

indicated that the Board of Arbitrators had no jurisdiction to grant any relief in the matter, but commented: "It appears from what we see now that they have not been paid for their lands, whatever their value was; but the Superintendent General of Indian Affairs should have presented the claim [to the Welland Canal Company arbitrators], and he did not do it."

Accounting

33. As to the allegations in paragraphs 119 and 121 of the Federal Crown's Defence that the Crown lacks records and that the Court ought not to order the Crown to provide an accounting to Six Nations because it would be a practical impossibility, Six Nations says:

(a) The Crown at all times had and continues to have a fiduciary obligation to account to the Six Nations for the Six Nations' land and money;

(b) The Crown at all times had and continues to have an obligation to maintain all necessary records as would enable it to provide a true and complete accounting to the Six Nations for their property;

(c) The Crown's failure to maintain the records necessary for an accounting to be given is further evidence of the breach of fiduciary duty complained about in this action; and

(d) None of the records referred to in paragraph 119 of the Federal Crown's Defence, all of which the Federal Crown is required to

produce in this action, constitute a settled account or true record of account required to be provided by a fiduciary.

Taking of Six Nations Lands for Public Purposes

34. In response to paragraph 135 of the Federal Crown's Defence, prior to 1867, takings of Six Nations lands for public purposes were subject to the requirements recognized in the Royal Proclamation Indian Provisions and required the express authorization of the Imperial Crown. Colonial or provincial legislation enacted prior to 1867 could not validly take Indian lands, including Six Nations lands, on a non-consensual basis in violation of those requirements.

Response to Technical Defences: Limitations or Other Statutory Bars, Laches, Waiver by Acquiescence, and Res Judicata

35. As to paragraphs 34, 35 and 45 of the Ontario Crown's Defence, Six Nations denies that any provision that the Ontario Crown purports to rely upon of the *Limitations Act*, R.S.O 1990, c. L.15 and its predecessors, the *Proceedings Against the Crown Act*, R.S.O. 1990, c.P.27 and its predecessors, the *Crown Liability and Proceedings Act*, 2019, S.O. 2019, c. 7, Sch 17, or the *Public Authorities Protection Act*, R.S.O 1990, c.P.38, s. 7(1), has any application to Six Nations' causes of action or the remedies sought in this action. It is noted that the Federal Crown's Defence withdrew any continued reliance upon the *Limitations Act*, R.S.O 1990, c. L.15, or the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, which the Federal Crown had pleaded at paragraphs 87, 94, 102 and 122 of its original statement of defence.

36. Six Nations specifically denies the allegations made in paragraph paragraphs 31 through 33 of the Ontario Crown's Defence that the doctrines of laches or waiver by acquiescence should be applied to this case. It is noted that the Federal Crown's Defence withdrew any continued reliance upon a plea of laches or waiver by acquiescence, which the Federal Crown had pleaded at paragraph 131 of its original statement of defence. The Ontario Crown's pleas of laches and waiver by acquiescence are equitable doctrines which Six Nations states would be inequitable to apply in all of the relevant circumstances of this case including the merits, the fiduciary relationship between the Crown and the Six Nations, the power imbalance in that relationship, and the legal, historic and practical impediments to the First Nations, including the Six Nations, in bringing and pursuing legal actions against the Crown.

37. Six Nations denies the allegations in paragraph 43 of Ontario Crown's Defence that certain of Six Nations' claims are *res judicata* as a result of *Miller v. The King*, [1950] S.C.R. 168, which was a proceeding not involving the Ontario Crown. It is further noted that the Federal Crown does not plead *res judicata,* even though it was a party to that proceeding. The Supreme Court of Canada's decision was not a final decision on the merits. It did not determine the same questions or issues as are raised in this action. In particular, the Supreme Court did not deal with the pleadings in this action which allege that the Federal Crown and/or the Ontario Crown are successors to and subject to the obligations, duties and liabilities which the Imperial Crown and its emanations had or owed to the Six Nations.

38. In the alternative, there are special circumstances that make it inequitable and inappropriate for the Court to apply the doctrine of *res judicata* in favour of the Ontario Crown in this action. Such special circumstances include the position and submissions on behalf of The Government of Canada before the English Court of Appeal and House of Lords in *R. v. Secretary of State for Foreign and Commonwealth Affairs,* [1982] 1 Q.B. 892 (C.A.), affirmed [1982] 1 Q.B. 937 (H.L.). In that case it was held that all of the obligations, duties and liabilities of the Imperial Crown to Indians or First Nations in Canada had devolved or been transferred from the Imperial Crown to the Federal Crown and/or the relevant Crown in right of a Province by operation of law. The Defendants are bound by that decision.

39. In the alternative, the Ontario Crown is acting unconstitutionally in an attempt to avoid a judicial determination of Six Nations' claims on their factual merits and any ensuing remedy, by repleading a long list of technical defences in paragraphs 31 to 35 and 45 of the Ontario Crown's Defence, and introducing a new purported claim of Ontario Crown immunity from certain claims as a result of the enactment of 2019 provincial legislation. In purporting to rely on its own legislation referred to in paragraph 35 above, including legislation enacted only in 2019, and on the discretionary doctrines of laches or waiver by acquiescence, or *res judicata,* the Ontario Crown is acting inconsistently with the constitutional requirements of the "Honour of the Crown" in its dealings with the Six Nations, and in breach of the Crown's unextinguished successor treaty and fiduciary

obligations towards the Six Nations, and therefore also in breach of the Six Nations' rights under section 35 of the *Constitution Act, 1982.*

September 30, 2020
(Original Reply dated July 25, 1996)

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SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS	-and-	THE ATTORNEY GENERAL OF CANADA et al.	Toronto Court File No. CV-18-594281-0000 (Originally Brantford Court File No. 406/95)
Plaintiff		Defendants	

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

REPLY TO THE FRESH AS AMENDED STATEMENT OF DEFENCE OF THE ATTORNEY GENERAL OF CANADA AND TO THE AMENDED STATEMENT OF DEFENCE OF HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

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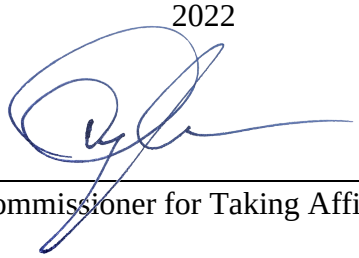
Lawyers for the Plaintiff

EXHIBIT E

This is Exhibit “E” to the Affidavit of Carol Fung, sworn this 10th day of June, 2022



Commissioner for Taking Affidavits

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

AMENDED STATEMENT OF DEFENCE AND ~~COUNTER~~ CROSSCLAIM
OF THE ATTORNEY GENERAL OF CANADA
TO THE CROSSCLAIM OF THE DEFENDANT
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

The Attorney General of Canada pleads on behalf of Her Majesty the Queen in Right of Canada ("Canada") in defence to the crossclaim of the Defendant Her Majesty the Queen in Right of Ontario ("Ontario").

1. Canada denies the allegations contained in the *Amended Statement of Defence and the Crossclaim of Ontario* except those allegations that are hereinafter admitted, and pleads as follows:

2. Canada specifically denies the allegations contained in paragraph 4 of Ontario's defence to the main action. Certain obligations, duties and liabilities that the Imperial Crown, the Province of Upper Canada or the Province of Canada had or owed to the plaintiff were conferred on or imposed upon Ontario under or by the *Constitution Act, 1867,* and otherwise by law. Canada pleads and relies on Part VIII of the *Constitution Act, 1867*, specifically including, but not limited to, ss. 109, 110, 111, 112, 113, 114, 115, 116, 118 (~~repealed~~ as amended by the *Constitution Act, 1907*) and 120 contained therein, and s. 142 contained within Part IX of the same said Act.

3. Canada denies the allegations contained in paragraph 36 of Ontario's defence to the main action. Canada asserts that there is a historical, factual, legal and constitutional nexus between Ontario and the events, acts and omissions that constitute the alleged breaches for which the plaintiff seeks relief.

4. Regarding the allegations contained in paragraph 37 of Ontario's defence to the main action, Canada admits that Ontario did not exist prior to July 1, 1867, and adds that Canada also did not exist prior to July 1, 1867.

5. Regarding the allegations contained in paragraph 38 of Ontario's defence to the main action, if there was and is any liability in respect of the alleged breaches, which is denied, Canada admits it existed on July 1, 1867. Canada further admits that if there was and is any liability of the Crown on July 1, 1867, which is denied, it was not a liability of the Imperial Crown,

but a liability of the Crown in Right of the Province of Canada. Canada denies, however, that any such liability became a liability of Canada by operation of the *Constitution Act, 1867*.

5a. The allegations made in this action put in issue Crown liability based on alleged breaches of fiduciary duty, breaches of other duties flowing from the honour of the Crown, and breaches of treaty obligations. To the extent that any such liabilities are determined to be those of the Province of Canada and within the scope of Section 111 of the *Constitution Act, 1867*, the allocation of legal responsibility for them is governed by that provision together with Section 112. To the extent that any such liabilities are determined not to be those of the Province of Canada, or are based on obligations that had not arisen or breaches that had not yet occurred at the time of the Union on July 1, 1867, or are otherwise not within the scope of Section 111, the allocation of legal responsibility for them is governed by the common law or the constitutional division of assets, including revenues, and powers provided for in Section 109, together with Sections 91, 92, 92A, and 142 of the *Constitution Act, 1867*, or both.

6. Upon the division and reorganization of the Province of Canada into Ontario and Quebec, the obligation to satisfy any liabilities that might be found in this litigation for pre-Confederation wrongs of the Crown became the obligation of Ontario. This follows from the principle that the *situs* of the Crown for determining liability is the general revenue fund that enjoys the benefit of the assets associated with the liability. Prior to 1867 it was the general revenue fund of the Province of Canada that enjoyed the benefit of the assets associated with this litigation. In relation to those assets associated with this litigation, it is the general revenue fund of Ontario that

is the successor to the general revenue fund of the Province of Canada and that has enjoyed, and continues to enjoy, the benefits of the assets associated with this litigation.

7. In addition and in the alternative, if, as is pleaded in paragraph 38 of Ontario's defence to the main action, any such liability is a liability of the Dominion of Canada pursuant to s. 111 of the *Constitution Act, 1867*, then Ontario, by operation of s. 112 of the same said Act, is liable to indemnify Canada in accordance with the terms of s.112 itself and with the constitutional principle established by the Judgment of the Arbitrators dated May 28, 1870, such arbitration having been conducted pursuant to s. 142 of the *Constitution Act, 1867*. Canada pleads and relies on the doctrine of *res judicata*.

8. Further, as the Arbitrators included an arbitrator appointed by Ontario by way of Letters Patent under the Great Seal of the Province of Ontario with "full power and authority" to make such a judgment, Ontario is thereby estopped from asserting that it is not now bound by that judgment.

9. In addition and in the further alternative, Ontario is solely liable to satisfy all claims arising from lands situate in the Province of Ontario pursuant to Article XI of the Arbitrators Award of September 3, 1870, such arbitration having been conducted pursuant to s. 142 of the *Constitution Act, 1867*. Canada pleads and relies on the doctrine of *res judicata*. Further, as the Arbitrators included an arbitrator appointed by Ontario by way of Letters Patent under the Great Seal of the

Province of Ontario with "full power and authority" to make such an award, Ontario is thereby estopped from asserting that it is not now bound by that award.

10. Canada denies the allegations contained in paragraph 39 of Ontario's defence to the main action. The alleged breaches may or may not have been in respect of alleged acts or omissions of the Department of Indian Affairs. The fact that the Department of Indian Affairs became a branch of Canada after July 1, 1867, does not govern the pass-through of debts and liabilities from the old Province of Canada to the newly established Crown entities known as Canada and Ontario. The pass-through of debts and liabilities is governed by the application of the constitutional common law principle (the *situs* of the Crown) pleaded at paragraphs 5a and 6 above, or ~~alternatively~~, as provided by constitutional document as pleaded at paragraphs 5a, 7 and 9 above, or both.

11. Canada denies the allegations contained in paragraph 40 of Ontario's defence to the main action. S. 91.24 of the *Constitution Act, 1867* assigned "exclusive Legislative Authority" to the Parliament of Canada for "Indians, and Lands reserved for the Indians." This assignment to Canada of legislative jurisdiction for Indians imposed no duty on Canada regarding liabilities that might flow from the extinguishment of any aboriginal interests in land before 1867. Further, the responsibility of officers referred to in s. 130 of the *Constitution Act, 1867*, and the liabilities, responsibilities and penalties referred to therein is utterly unrelated to any liabilities that may attach to the Crown for alleged breaches of duties owed by the Crown to Indians.

12. Canada denies the allegations contained in paragraphs 42 and 44 of Ontario's defence to the main action. Canada acknowledges that it has legislative authority over Indians and lands reserved for Indians pursuant to s. 91.24 of the *Constitution Act, 1867*. Canada denies, however, that legislative authority can be the source of the fiduciary obligation of the Crown to Indians. The Indian interest in land is an independent legal interest; therefore it is the common law relating to ~~aboriginal title and~~ the honour of the Crown that underlies the fiduciary nature of the Crown's obligations. As a matter of constitutional law, and as between Canada and Ontario, any liability ~~obligations~~ of the Crown regarding alleged pre- and post-1867 obligations or wrongs are the responsibility of the Crown in right of the government against which such obligations or wrongs can be enforced. This is true both at common law and by the terms of the *Constitution Act, 1867*, as pleaded at paragraph 5a above.

13. Regarding paragraph 45 of Ontario's defence to the main action, Canada says that the alleged breaches were no more the acts or omissions of a servant of Canada or of any person appointed by or employed by Canada than they were the acts or omissions of a servant of Ontario. The issue is, as a matter of constitutional law, "what governmental representative of the Crown would be liable, should any pre- and post-1867 breaches by the Crown or its representatives be proven?" For the reasons stated herein, any such liability, should it be found, would lie with Ontario.

14. Canada specifically denies the allegations contained in paragraphs ~~80~~ 49 and ~~50~~ ~~81~~ of Ontario's Crossclaim against Canada.

~~COUNTER~~ CROSSCLAIM

15. Canada claims against the Defendant Ontario:

(1) an order that any and all relief and costs to which this Court may find the plaintiff entitled in the action is relief and costs against Ontario only or, in the alternative, an order directing Ontario to indemnify Canada in the amount of any relief and costs for which this Court finds Canada liable to the plaintiff; and

(2) costs.

16. Canada repeats and relies upon, in this ~~counter~~ crossclaim, the contents of the Amended Statement of Defence of Canada in the main action and in Canada's defence to the crossclaim of Ontario, above.

17. Any liability to the plaintiff in the action, which is denied, is therefore a liability of the defendant Ontario and not a liability of the defendant Canada.

18. Ontario is therefore liable to Canada for all or any part of the plaintiff's claim for which the court may find Canada liable. Canada pleads and relies upon Rule 28.01 ~~27.10~~ of the *Rules of Civil Procedure*, the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. c-50, s. 27, as am. S.C. 1993, c. 40, ss. 24, 28 and 31, the *Proceedings Against the Crown Act*, R.S.O. 1990, c.

P.27, s. 6, 7 and 20 and its predecessors, and the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c.7, Sch 17, s. 8, 26.

Dated at Toronto, Ontario this ~~8th day of October, 1997.~~
30th day of September, 2020

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Lawyers for the Plaintiff

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

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)

AMENDED STATEMENT OF DEFENCE AND CROSSCLAIM OF THE ATTORNEY GENERAL OF CANADA

TO THE CROSSCLAIM OF HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

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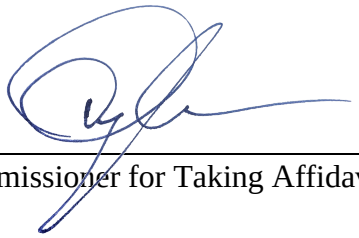
Lawyers for the Defendant,
The Attorney General of Canada

EXHIBIT F

This is Exhibit “F” to the Affidavit of Carol Fung, sworn this 10th day of June, 2022



Commissioner for Taking Affidavits

GILBERT'S

April 7, 2022

Delivered by Email

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Counsel for Her Majesty the Queen in Right of Ontario

Dear Counsel:

Re: ***Six Nations of the Grand River Band of Indians v Canada (AG) et al***
Court File No. CV-18-594281

We write to advise that the Haudenosaunee Confederacy Chiefs Council (the "**HCCC**") has delegated authority to the Haudenosaunee Development Institute (the "**HDI**"), to intervene as a party on their behalf in the above-noted legal proceeding, as confirmed in the enclosed letter from Council Secretary for the HCCC, Leroy Hill, to The Honourable Marc Miller, Minister of Crown Indigenous Relations, dated April 6, 2022.

As I am sure you are all aware, the Haudenosaunee have had a representative government that has been active for centuries. Consistent with their Constitution, the HCCC is empowered by the Haudenosaunee to advance their collective rights and interests and is party to, *inter alia*, the Haldimand Proclamation of 1784 and the Simcoe Patent of 1793, instruments which we understand to be at issue in this litigation.

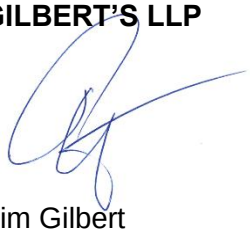
We understand that this action is case managed by Justice Sanfilippo. We have been unable to obtain all endorsements from the case management process to date, nor the most recent pleadings and any documents exchanged since approximately 2001, but for the Amended Statement of Claim from May 7, 2020.

We would be grateful if you would advise (a) whether your clients would consent to this intervention and (b) whether, in any event, your clients would consent to a case management conference before Justice Sanfilippo to address our clients' participation.

We would be pleased to discuss at the parties' convenience.

Yours very truly,

GILBERT'S LLP



Tim Gilbert

c. Leroy Hill, Council Secretary, Haudenosaunee Confederacy Chiefs Council
Aaron Detlor and Brian Doolittle, Haudenosaunee Development Institute

Six Nations "Iroquois" Confederacy
GRAND RIVER COUNTRY

2634 6th Line R.R.# 2 Ohsweken, ON N0A 1M0

April 6, 2022

The Honourable Marc Miller, PC, MP
Minister of Crown Indigenous Relations
House of Commons
Ottawa, Ontario
K1A 0A6

Dear Minister Miller:

I trust this correspondence finds you well and in good spirits.

I am writing to follow up on my correspondence to you of March 7, 2022 which was provided in response to your correspondence of February 3, 2022.

We remain open to meeting with you to address the abuses committed against the Haudenosaunee Confederacy Chiefs Council ("HCCC") on or about 1924 with a view to advancing the direction in your mandate letter to **"[W]ork with existing and traditional Indigenous governments and leaders, whose nations and forms of governance were suppressed and ignored historically by the federal government, to restore respectful nation-to-nation relations, in the spirit of self-determination, by renewing and updating treaty relationships where they exist, including pre-confederation treaties."**

As you may be aware we have asked the Haudenosaunee Development Institute ("HDI") to take such steps as it deems necessary to protect our interests in the litigation that has been commenced by the Six Nations Elected Band Administration as against Her Majesty the Queen in Right of Ontario and Canada (Six Nations of the Grand River v. AG CV-18-594281).

We do not believe that participation in the litigation will impair our ability to begin discussions with your Ministry and the Government of Canada to advance our relationship and your mandate letter. We look forward to meeting with you at your earliest convenience to better understand your mandate and how we can jointly begin the work to restore the respectful relationship between our Confederacy and the Crown.

Until we hear from you and confirm your commitment to meet we have asked other HCCC Committees to refrain from asking for meetings with your Ministry so that we can focus on this issue.

In peace and friendship,

Hohahes, Leroy Hill

Hohahes, Leroy Hill
Council Secretary
Haudenosaunee Confederacy Chiefs Council

EXHIBIT G

This is Exhibit “G” to the Affidavit of Carol Fung, sworn this 10th day of June, 2022

Commissioner for Taking Affidavits

Subject: RE: Six Nations v Canada (AG) et al - CV-18-594281
Date: Friday, April 8, 2022 at 3:47:19 PM Eastern Daylight Saving Time
From: Antonios, Iris
To: Tim Gilbert
CC: Shapiro, Max, Robert Janes
Attachments: image605224.png, image255593.png, image006.png, image005.jpg, image004.png, image003.png, image002.png, image001.png

Tim,
Thank you for your letter, however it does not provide sufficient information to allow us to respond to your request. We ask that you please provide a description of the entity who will be seeking leave to intervene, including its legal status, its principals, and purported basis for its standing.
Please also provide a description of the issues the purported intervener proposes to address, the position it intends to take on each issue, and the nature of the interest(s) you say give rise to the right to intervene as a party on those issues.
Regards,
Iris

Iris Antonios
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Blake, Cassels & Graydon LLP
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From: Melissa Amero <Melissa@gilbertslaw.ca>
Sent: Thursday, April 7, 2022 3:05 PM
To: anusha.aruliah@justice.gc.ca; manizeh.fancy@ontario.ca; Antonios, Iris <iris.antonios@blakes.com>
Cc: Tim Gilbert <tim@gilbertslaw.ca>; aarondetlor@gmail.com; ganowa@me.com; ohahokta@hotmail.com
Subject: Six Nations v Canada (AG) et al - CV-18-594281

External Email | Courrier électronique externe

Good afternoon,
Please find attached correspondence from Tim Gilbert in regards to the above noted matter.
Should you have any questions or concerns, please do not hesitate to contact us.
Kind regards,
Melissa

Melissa Amero - She/Her
Executive Assistant
Gilbert's LLP
Lawyers | Patent and Trademark Agents

Tel: 416.703.1100
Fax: 416.703.7422
www.gilbertslaw.ca

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We Have Temporarily Moved:
Law Chambers
181 University Avenue, Suite 2200
Toronto, Ontario M5H 3M7
Canada

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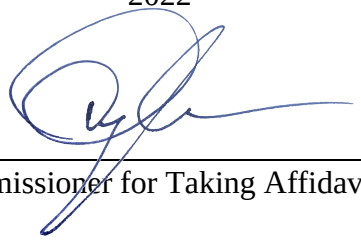
EXHIBIT H

This is Exhibit “H” to the Affidavit of Carol Fung, sworn this 10th day of June, 2022



Commissioner for Taking Affidavits

Ministry of the Attorney General

Crown Law Office
Civil Law
720 Bay Street, 8th Floor
Toronto ON M7A 2S9

Manizeh Fancy
Senior Counsel
Tel/Tél: (416) 578-7637
Fax/Téléc.: (416) 326-4181
Email: manizeh.fancy@ontario.ca

Ministère du Procureur général

Bureau des avocats
de la Couronne Droit civil

720 rue Bay
8e étage
Toronto ON M7A 2S9

Ontario

April 21, 2022

VIA EMAIL

Tim Gilbert
Gilbert's LLP
181 University Avenue, Suite 2200
Toronto, Ontario M5H 3M7

Dear Mr. Gilbert:

RE: *Six Nations of the Grand River Band of Indians v Canada and Ontario*
Court File No. CV-18-594281

Thank you for your letter dated April 7, 2022 regarding the above matter.

With respect to your query as to whether the parties would consent to the proposed intervention in this proceeding of the Haudenosaunee Development Institute on behalf of the Haudenosaunee Confederacy Chiefs Council, we will need to seek instructions regarding Ontario's position and may require more information before we can obtain those instructions. We would welcome a call to discuss your clients' proposed intervention in more detail. To the extent that you have any materials you are preparing for court, such as a draft order, it would be helpful to have them in advance of a call.

With respect to your other query, Ontario consents to a case management conference before Justice Sanfilippo to address the issues raised in your letter, and to your attendance at the same.

Regards,

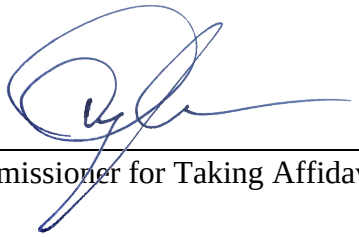
Manizeh Fancy

Manizeh Fancy
Senior Counsel

c. Iris Antonios, Blake, Cassels & Graydon LLP
Anusha Aruliah, Department of Justice Canada

EXHIBIT I

This is Exhibit “I” to the Affidavit of Carol Fung, sworn this 10th day of June, 2022



Commissioner for Taking Affidavits

GILBERT'S

April 26, 2022

Delivered By Email

Manizeh Fancy
Ministry of the Attorney General
Crown Law Office – Civil Law
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9

Iris Antonios
Blake, Cassels & Graydon LLP
199 Bay Street, Suite 4000
Toronto, ON M5L 1A9

Anusha Aruliah
Department of Justice Canada
120 Adelaide St West, Suite 400
Toronto, ON M5H 1T1

Dear Ms. Fancy:

Re: ***Six Nations of the Grand River Band of Indians v Canada (AG) et al***
Court File No. CV-18-594281

Thank you for your letter of April 21.

We are pleased to hear that your client consents to a case management conference before Justice Sanfilippo. We would be grateful for your thoughts for whether we should set up a case management conference earlier rather than later.

We would be pleased to have a call to discuss the matter in more detail, and are in the process of preparing materials, including a notice of motion, affidavit evidence, and a draft order. We hope to have these materials ready for delivery in the next two weeks.

Should you wish to discuss in the meantime, we would be happy to have a call at your convenience.

Yours truly,

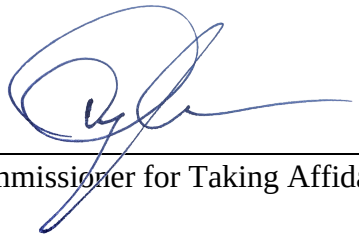
GILBERT'S LLP

Tim Gilbert

c. Iris Antonios, Blake, Cassels & Graydon LLP
Anusha Aruliah, Department of Justice Canada

EXHIBIT J

This is Exhibit “J” to the Affidavit of Carol Fung, sworn this 10th day of June, 2022



Commissioner for Taking Affidavits

Thomas Dumigan

From: Antonios, Iris <iris.antonios@blakes.com>
Sent: Wednesday, April 27, 2022 11:22 AM
To: Tim Gilbert
Cc: Melissa Amero; manizeh.fancy@ontario.ca; anusha.aruliah@justice.gc.ca; Thomas Dumigan; Shapiro, Max; Robert Janes
Subject: RE: Six Nations of the Grand River Band of Indians v Canada (AG) et al, Court File No. CV-18-594281
Attachments: Email to T Gilbert - 8 Apr 2022.pdf

Mr. Gilbert,

We are not in a position to consent to a case conference at this time. We are still awaiting information on the proposed intervener and the other information I requested in my email to you of April 8, 2022 (attached).

Please also copy Max Shapiro and Robert Janes, copied here, on future correspondence.

Regards,

Iris Antonios
Partner
iris.antonios@blakes.com
T. +1-416-863-3349

Blake, Cassels & Graydon LLP
199 Bay Street, Suite 4000, Toronto ON M5L 1A9 (Map)
blakes.com | LinkedIn

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From: Melissa Amero <Melissa@gilbertslaw.ca>
Sent: Tuesday, April 26, 2022 5:33 PM
To: manizeh.fancy@ontario.ca
Cc: anusha.aruliah@justice.gc.ca; Antonios, Iris <iris.antonios@blakes.com>; Tim Gilbert <tim@gilbertslaw.ca>; Thomas Dumigan <tdumigan@gilbertslaw.ca>
Subject: Six Nations of the Grand River Band of Indians v Canada (AG) et al, Court File No. CV-18-594281

External Email | Courrier électronique externe

Good afternoon,

Please see the attached correspondence from Tim Gilbert in regards to the above noted matter.

Should you have any questions or concerns, please do not hesitate to contact us.

Thank you,

Melissa Amero

Melissa Amero - She/Her
Executive Assistant
Gilbert's LLP
Lawyers | Patent and Trademark Agents

Tel: 416.703.1100
Fax: 416.703.7422
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EXHIBIT K

This is Exhibit “K” to the Affidavit of Carol Fung, sworn this 10th day of June, 2022

Commissioner for Taking Affidavits

Thomas Dumigan

From: Tim Gilbert <tim@gilbertslaw.ca>
Sent: Wednesday, April 27, 2022 1:17 PM
To: Antonios, Iris
Cc: Melissa Amero; manizeh.fancy@ontario.ca; anusha.aruliah@justice.gc.ca; Thomas Dumigan; Shapiro, Max; Robert Janes
Subject: Re: Six Nations of the Grand River Band of Indians v Canada (AG) et al, Court File No. CV-18-594281
Attachments: image825754.png; image032369.png; image001.png; image002.png; image003.png; image004.png; image005.jpg; image006.png; Email to T Gilbert - 8 Apr 2022.pdf

Hi Iris:

Thank you for your email. We have a draft response to you on your letter which should come to you later today.

All the best,

Tim

Tim Gilbert
T:416.703.1100
Law Chambers
181 University Avenue, Suite 2200
Toronto, Ontario M5H 3M7
Canada

On Apr 27, 2022, at 11:22 AM, Antonios, Iris <iris.antonios@blakes.com> wrote:

Mr. Gilbert,

We are not in a position to consent to a case conference at this time. We are still awaiting information on the proposed intervener and the other information I requested in my email to you of April 8, 2022 (attached).

Please also copy Max Shapiro and Robert Janes, copied here, on future correspondence.

Regards,

Iris Antonios
Partner
iris.antonios@blakes.com
T. +1-416-863-3349

Blake, Cassels & Graydon LLP
199 Bay Street, Suite 4000, Toronto ON M5L 1A9 (Map)
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From: Melissa Amero <Melissa@gilbertslaw.ca>
Sent: Tuesday, April 26, 2022 5:33 PM
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Subject: Six Nations of the Grand River Band of Indians v Canada (AG) et al, Court File No. CV-18-594281

External Email | Courrier électronique externe

Good afternoon,

Please see the attached correspondence from Tim Gilbert in regards to the above noted matter.

Should you have any questions or concerns, please do not hesitate to contact us.

Thank you,

Melissa Amero

Melissa Amero - She/Her
Executive Assistant
Gilbert's LLP
Lawyers | Patent and Trademark Agents

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EXHIBIT L

This is Exhibit “L” to the Affidavit of Carol Fung, sworn this 10th day of June, 2022

Commissioner for Taking Affidavits

GILBERT'S

April 27, 2022

Delivered By Email (iris.antonios@blakes.com)

Iris Antonios
Blake, Cassels & Graydon LLP
199 Bay Street, Suite 4000
Toronto, ON M5L 1A9

Dear Counsel:

Re: *Six Nations of the Grand River Band of Indians v Canada (AG) et al*
Court File No. CV-18-594281

We write in response to your email of April 8, 2022 and to provide additional information regarding the intervention of the Haudenosaunee Development Institute ("**HDI**") as a party on behalf of the Haudenosaunee Confederacy in the above-noted legal proceeding (the "**Proceeding**").

The Haudenosaunee Confederacy

As you may be aware, the Haudenosaunee Confederacy has the oldest participatory democracy structure in the world.

The Haudenosaunee Confederacy Chiefs Council (the "**HCCC**") and Clan Mothers have governed the Haudenosaunee people for centuries. It is the Haudenosaunee Confederacy, through the HCCC, that entered into treaty-based relationships with European settlers, including the *Haldimand Proclamation* of 1784 and *Simcoe Patent* of 1793.

The HCCC's mandate is to manage and protect the prosperity of future Haudenosaunee generations, including preserving land, environmental, and cultural inheritances, rights, and interests of the Haudenosaunee. Despite attempts to forcibly replace it with the elected band council system pursuant to the *Indian Act*, the HCCC has operated, and continues to operate, in accordance with Haudenosaunee laws, rules, and customs as it has from time immemorial.

In keeping with this mandate, HDI was established pursuant to authorization by the HCCC to represent Haudenosaunee interests in the development of lands within areas of Haudenosaunee jurisdiction, including but not limited to lands prescribed by the *Haldimand Proclamation* of 1784 and *Simcoe Patent* of 1793.

As set out in our letter of April 7, 2022 and the letter from Council Secretary to the HCCC, Leroy Hill, to the Honourable Marc Miller, Minister of Crown-Indigenous Relations, attached thereto, a HCCC meeting was held April 2, 2022 wherein the HCCC resolved to delegate authority to HDI

to intervene as a party on behalf of the Haudenosaunee Confederacy in the Proceeding. A committee was also established to ensure that all Haudenosaunee Confederacy Chiefs are kept apprised of significant steps taken in the connection with the Proceeding.

Any decision on the merits of the Proceeding that does not give due consideration to the customs, traditions, rules, and legal systems of the Haudenosaunee Confederacy is not in keeping with the spirit of reconciliation, the inherent right of indigenous peoples to exercise autonomy or self-government, or the principles of the *United Nations Declaration on the Rights of Indigenous Peoples*. As you are aware, on June 21, 2021, the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021 c. 14 came into force, which affirmed, among other things, that the Declaration is a universal international human rights instrument with application in Canadian law.

Position on the Issues in the Proceeding

HDI has not received documents exchanged by the parties, discovery transcripts, expert reports, or other relevant documentation in the Proceeding. Once this is done, HDI will be able to provide more clarity on the issues it intends to address and the position it intends to take on each issue.

The Haudenosaunee Confederacy's presence (through HDI on its behalf) is necessary for the Court to adjudicate effectively and completely on the issues raised in the Proceeding. It is clear from the pleadings that the Haudenosaunee Confederacy has a direct and substantial interest in the pleadings, particularly given the fact that it is the counterparty to the instruments at issue in the Proceeding—the *Haldimand Proclamation* of 1784 and the *Simcoe Patent* of 1793. Additionally, the Haudenosaunee Confederacy will be adversely impacted by a decision and shares issues of fact and law in common with the parties.

We trust this letter provides sufficient information to allow you to respond to our previous request to advise (a) whether your clients would consent to this intervention and (b) whether, in any event, your clients would consent to a case management conference before Justice Sanfilippo to address our clients' participation. We are in the process of preparing materials including a Notice of Motion and affidavit evidence.

We remain available to discuss at your convenience.

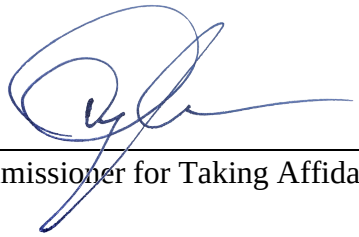
Yours truly,

GILBERT'S LLP

Tim Gilbert

EXHIBIT M

This is Exhibit “M” to the Affidavit of Carol Fung, sworn this 10th day of June, 2022



Commissioner for Taking Affidavits

CITATION: Six Nations of the Grand River Band of Indians v. The Attorney General of Canada, et al, 2018 ONSC 1289
COURT FILE NO.: 406/95
DATE: 20180223

2018 ONSC 1289 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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

BEFORE: SANFILIPPO J.

COUNSEL: *Ben A. Jetten, Iris Antonios, Max Shapiro,* for the Plaintiff

Michael McCulloch, Jennifer Roy and Ben Mitchell, for the Defendant the Attorney General of Canada

Leonard Marsello, Tamara Barclay, Jennifer Lepan and Noelle Spotten for the Defendant Her Majesty the Queen in Right of Ontario

HEARD: January 31, 2018

1ST CASE MANAGEMENT ENDORSEMENT

A. Overview of Proceedings

[1] This action was initiated by statement of claim issued on March 7, 1995. The plaintiff, Six Nations of the Grand River Band of Indians, alleges that the defendants, Attorney General of Canada ("Canada") and Her Majesty the Queen in Right of Ontario ("Ontario"), or their predecessors, breached fiduciary and treaty obligations alleged to be owed and thereby seeks an accounting, declaratory relief, equitable compensation and references in connection with events that largely took place in the 18th and 19th centuries.

[2] This action was initiated in Brantford, Ontario, and was there subject to case management by Justice J.C. Kent. This action was transferred to Toronto, on consent, pursuant to the Order of Regional Senior Justice Morawetz dated November 24, 2017.

[3] On January 3, 2018, a request was made, on consent, for this action to be subject to case management. On January 5, 2018, I was appointed as the case management judge.

[4] The first case management conference was conducted on January 31, 2018 (the "1st CM Conference").

[5] This action had a lengthy period of active litigation, which resulted in the exchange of numerous affidavits of documents and document lists. In the result, the parties collectively produced over 31,000 documents. The discovery representative of Canada was examined for five days in 2000, both preceded by and followed by extensive motions on discovery issues.

[6] This action was placed in abeyance for a period of more than six years, on consent of all parties, but has since been taken out of abeyance and has entered a stage of renewed, active litigation.

[7] The parties agreed to a discovery plan in March 2016 which incorporated a detailed electronic discovery protocol. By continued use of this discovery plan, the parties are currently engaged in discovery and attempting to narrow factual issues in dispute before trial through a process of detailed requests to admit, supplemented by written discovery.

[8] To date, the plaintiff has delivered eleven requests to admit, of which ten have been answered, while Canada has delivered one request to admit, which has been answered. The plaintiff also delivered to Ontario, in April 2017, an instalment of written questions

B. Position of the Parties

[9] At the 1st CM Conference, the parties sought direction on a timetable leading to trial, including deadlines for: (1) delivery and responding to outstanding and pending requests to admit and written discovery questions; (2) completion of any other examinations for discovery; (3) motions arising from discoveries; (4) expert reports; and (5) the scheduling of a pre-trial conference.

[10] The plaintiff and Canada each produced their own versions of a proposed draft timetable that outlined their submissions on the timing considered necessary to foster the development of the procedural steps listed above. The timing proposed by each for the commonly-identified proposed steps varied widely. The plaintiff's proposed timetable provided precise timing parameters for steps leading to a pre-trial conference in late 2020. Canada's proposed timetable did not set time deadlines for completion of litigation steps in as much as it proposed time parameters prescribing ranges of time for steps to be completed, measured in multiple years, with no certainty or predictability of time within which the action will be ready for trial. Ontario did not propose a timetable on the basis of its submission that complex historical litigation is not well-suited to precise timetabling, particularly in the circumstances of this case which pleads causes of action that arise from pre-Confederation conduct.

[11] The plaintiff delivered a request to admit dated December 13, 2017 that has not yet been responded to by either Canada or Ontario (the "December 2017 RTA"). The plaintiff stated that it has in progress the preparation of at least one further lengthy request to admit that might be delivered in shorter phases.

2018 ONSC 1289 (CanLII)

2018 ONSC 1289 (CanLII)

C. Specific Case Management Directions

[12] While this action is undoubtedly complex, and has unique elements that contribute to its almost 23 year history, it is like all other actions in that it must be advanced to the point of trial readiness. The case management process is designed to assist in meeting this objective.

[13] A succinct statement of the purpose of case management, and counsel's role in relation to it, is set out by Justice F.L. Myers in *Schenk v. Valeant Pharmaceuticals International, Inc.*, 2017 ONSC 5101 at paras. 5 and 6 (Ont. S.C.J.):

> "The purpose of this case management process is to resolve the lawsuit as efficiently, affordably and proportionately as the interests of justice allow. The proceeding will be managed to move forward efficiently but not urgently. There should always be at least one process step scheduled and being actively pursued. Parallel scheduling of multiple steps should be expected.
>
> Parties and counsel are required to cooperate on procedural and scheduling matters so as to ensure there is a fair process for all. (See the Commentary under Rule 5-1.1 of the *Rules of Professional Conduct* "[t]he lawyer must discharge this duty … in a way that promotes the parties' right to a fair hearing in which justice can be done") and also *Bosworth v. Coleman*, 2014 ONSC 6135)."

[14] Effective case management requires that the action be moved forward expeditiously, in the circumstances of each case, mindful of the need for efficiency and proportionality, always with at least one process step scheduled and being actively implemented.

[15] The 1st CM Conference did not allow sufficient time to identify means by which the procedural development of this action can effectively be enhanced through the development of a realistic timetable to guide the progress of the next stages of this action.

[16] As such, a further Case Management Conference will be conducted, in person, on March 26, 2018 at 9:00 am, a date canvassed and understood to be available to all counsel. My judicial assistant will advise of the location of this second Case Management Conference ("2nd CM Conference") as its date approaches.

[17] Counsel for the plaintiff will, in anticipation of the 2nd CM Conference, prepare a compilation of all facts on which agreement has been reached by reason of the ten requests to admit delivered by the plaintiff that have been responded to by Canada and Ontario and the one request to admit that has been delivered by Canada and responded to by the plaintiff and Ontario (the "Compilation of Agreed Facts"). This is intended to enhance a common understanding of the factual elements on which agreement has been reached and to allow, then, for an understanding of the factual development required to address areas of factual dispute or under-development, in order to prepare this matter for trial. This is also intended to allow for discussion on possible expert evidence required and the possibility of separating and addressing distinctly and individually discrete issues that may be suitable for partial summary determination.

[18] The plaintiff will work toward distribution of the Compilation of Agreed Facts in advance of the 2nd CM Conference to allow an opportunity for its review prior to discussions that day.

[19] In the meantime, the steps in this action are not to be held in abeyance. In particular, the timing for responding to the December 2017 RTA, and any such further requests to admit that may be delivered since the 1st CM Conference, is not stayed.

D. General Case Management Directions

[20] Parties and counsel are required to cooperate on procedural and scheduling matters so as to ensure there is a fair and just process for all, consistent with Rule 1.04 and with the principles of proportionality, fairness and efficiency set out in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 28: "The principal goal remains the same: a fair process that results in a just adjudication of disputes."

[21] Delegation to junior counsel is invited, including the presentation of argument, appearances at case conferences or assisting in the questioning of witnesses with whom they have worked, without concern that it be viewed as over-staffing in the consideration of any cost award.

[22] No motion may be brought in this action before being considered at a case conference.

[23] Broad application of Rule 50.13 will be used to address and resolve matters raised at case conference, in circumstances where this is possible. Counsel ought to expect that procedural orders and directions will be made at case conferences, in accordance with Rule 50.13(6), on informal notice of the issue to be addressed.

[24] Any party who seeks to address an issue identified in this action between now and the next scheduled case conference of March 26, 2018 and who considers that a case conference would assist in expeditious and efficient handling of any such issue, may request the scheduling of a further case conference by email to my assistant in the same manner that the first case conference was organized.

[25] The requirement of preparation, issuance and entry of a formal order is hereby dispensed with in accordance with Rule 77.07(6).

Sanfilippo J.

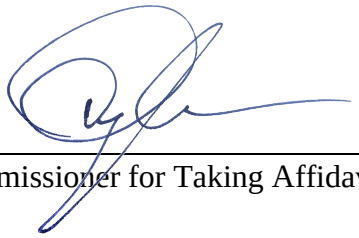
2018 ONSC 1289 (CanLII)

Date: February 23, 2018

2018 ONSC 1289 (CanLII)

EXHIBIT N

This is Exhibit “N” to the Affidavit of Carol Fung, sworn this 10th day of June, 2022



Commissioner for Taking Affidavits

CITATION: Six Nations of the Grand River Band of Indians v. The Attorney General of Canada, et al, 2020 ONSC 3230
COURT FILE NO.: CV-18-594281-0000
(Formerly Court file no.: 406/95)
DATE: 20200525

2020 ONSC 3230 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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

BEFORE: SANFILIPPO J.

COUNSEL: *Ben A. Jetten, Iris Antonios, Max Shapiro, and Rebecca Torrance,* for the Plaintiff

Anusha Aruliah, Michael McCulloch., Alexandra Colizza and Tanya Muthusamipillai, for the Defendant the Attorney General of Canada

Manizeh Fancy, David Tortell, Stephanie Figliomeni and Insiyah Kanvee for the Defendant Her Majesty the Queen in Right of Ontario.

HEARD: May 14, 2020

CASE MANAGEMENT ENDORSEMENT

[1] The 11th Case Management Conference in this action was initiated on April 21, 2020, in accordance with paragraph 7(e) of the 10th Case Management Endorsement dated December 9, 2019. This 11th CM Conference was not completed that day, but adjourned to be continued on May 14, 2020, for the reasons set out in my Case Management Endorsement issued May 1, 2020. In brief, I adjourned the CM Conference on April 21, 2020 to allow the parties additional time to consider and discuss the most efficient process to advance this action to trial in 2022, and to work collaboratively on a timetable to complete trial preparation steps within this timeframe.

[2] On May 13, 2020, each party delivered a written memorandum, in accordance with paragraph 7 of the May 1, 2020 CM Endorsement. By reason of the COVID-19 pandemic, and the resultant restriction in court operations effective March 17, 2020, as set out in the *Notice to*

Profession, the Public and the Media Regarding Civil and Family Proceedings, suspending regular court operations effective March 17, 2020,[1] this case management conference was conducted by teleconference rather than in person.

A. Issues Addressed

[3] The parties made further submissions on the trial process and the procedure and timing for trial preparation.

(a) Trial Process

[4] Throughout this case management process, the parties have considered and discussed ways that the extensive issues raised by this action could be prepared for adjudication in a manner that would allow this action to proceed to trial promptly and efficiently. All parties recognized that if this action were to proceed to adjudication as a trial of all issues, referred to by one party as a 'mega-trial', its trial date would be more distant than if advanced in a staged or phased manner, or with certain discrete issues identified for determination in sequence. Also, the parties assessed whether the determination of certain issues might render unnecessary the adjudication of other issues, or might narrow the scope of the remaining issues. All parties shared the commitment to pursuing the most efficient, expeditious, fair and just manner of structuring this action for trial.

[5] Although the parties shared these objectives and engaged in extensive discussions through many meetings, they had not, by the initiation of this 11th CM Conference on April 21, 2020, agreed on a trial process. They identified three trial structures: trial of the whole; phased trial, or; severed/ bifurcated trial. The parties' trial timing estimates showed that an adjudication of a 'trial of the whole' would necessitate a much more distant scheduling for the initiation of trial than a phased trial or severed/ bifurcated trial. A trial of all issues was thereby inconsistent with the objective of initiating the adjudication of this action in 2022.

[6] In the time between the initiation of this 11th CM Conference on April 21, 2020, and its conclusion on May 14, 2020, the parties engaged in numerous further discussions and while they came to agree on the trial structure, they could not agree on its terms. Specifically, the parties agreed that the trial of this action would be bifurcated into phases but could not agree on the degree of bifurcation.

[7] A bifurcated trial structure with the use of phases has been used in other litigation involving complex claims involving historic evidence, such as *Restoule v. Canada (Attorney General),*[2] which was heard as a bifurcated summary judgment motion, and *Chippewas of the*

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[1] The *Consolidated Notice to the Profession, Litigants, Accused Persons, Public and the Media*, dated May 13, 2020 and effective May 19, 2020 has now superseded the earlier *Notice to Profession*.
[2] 2018 ONSC 7701.

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Saugeen First Nation,[3] wherein Matheson J. rendered an order on January 16, 2020 formatting the trial into two stages, namely: Phase 1, the issue of liability; Phase 2, the issue of apportionment of liability in the crossclaims and remedies. These cases, like the within action, raise complex and novel issues, and have efficiently been adjudicated in stages, as a fair, effective and economic way to deal with large-scale litigation.

[8] The disagreement between the parties on the degree of bifurcation focused on whether the trial should be structured into two phases or four phases. The Plaintiff proposed two liability phases each followed by a phase to determine remedies and crossclaims relating to the specific liability determinations adjudicated within each phase. This would result in a "Liability 1" phase, grouping together those claims which the plaintiff considered could be tried together and for which significant fact gathering work had already been completed. The Liability 1 Phase would be followed by a "Remedies and Crossclaims 1" phase. The Plaintiff proposed that, next, a "Liability 2" phase would be conducted, grouping together the remaining claims, followed by a "Remedies and Crossclaims 2" phase.

[9] The Attorney General of Canada ("Canada") and Her Majesty the Queen in Right of Ontario ("Ontario") proposed jointly that the trial be structured into two phases: with all issues of liability determined in Phase 1; and all issues of remedies and crossclaims determined in Phase 2. They contended that this would significantly reduce the potential for inefficiencies from overlapping evidence and intertwining issues that could result from subdivision of liability into two phases and thereby also splitting adjudication on remedies and crossclaims into two phases. They contended that there would be the potential for inconsistent findings between the two liability phases and the two remedy/crossclaim phases. Further, Canada and Ontario maintained that staging four adjudicative steps, each with intervening periods of time required for adjudication and possibly appeal, would result in a much longer time to have full determination of all issues raised by this action than a two-phase process.

[10] I accept that a four-phase adjudicative process would take longer for full determination than a two-phase process. Any inefficiencies through overlapping and duplication would be eliminated or minimized in a two-phase process, as would any inconsistency in findings or result. The trial judge hearing the liability issues would have available the evidence on all issues at the same time in order that all matters raised by the parties could be determined by the same court at the same time. With fewer phases, the number of intervals between trial stages would be reduced.

[11] Six Nations submitted that the determination of all liability issues at once could stall the initiation of a trial in 2022 or could dramatically expand the time required for adjudication of all phases. I am not persuaded of this but acknowledge that the assessment of the validity of these concerns will become clearer over the next year, as the parties complete the further steps required to prepare this action for trial in 2022. And, of course, the preparation of this action for

[3] 94-CQ-50872CM and 03-CV-261134CM1.

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trial, the timing of trial and its anticipated completion may be affected in unexpected ways by the continued uncertainties and complications presented by the COVID-19 pandemic.

[12] Recognizing that the parties have an agreement on bifurcation of this action into phases for determination at trial, acknowledging that ultimately the decision concerning the manner by which the trial will proceed will be made by the trial judge, and keeping in mind that the purpose of case management is to prepare the action for trial in the most efficient manner possible, I concluded as follows: this action shall be organized for a bifurcated trial, on consent, divided into Phase 1 liability and Phase 2 remedies and crossclaims, subject to the direction of the trial judge and reserving to all parties further submission and consideration on subdivision of Phase 1 and Phase 2 after the parties advance this action to the pre-trial stage, being after April 30, 2021.

(b) Timetable

[13] The parties filed detailed proposed timetables that were thoroughly addressed and considered at the 11th CM Conference.

[14] While the parties sought different timing for the remaining steps required to prepare this action for trial, the Plaintiff uniformly asserting more narrow timelines while the Defendants had broader timing requirements, they all had as their objective that the Timetable ensure fairness through procedural reciprocity. The Timetable was built on this principle.

[15] The parties agreed that the first stage of the Timetable will address amendment to the pleadings. The pleadings were drafted over two decades ago and each party will have an opportunity to consider amendments to bring them up-do-date with recent developments in the law and ready for trial. The parties concurred, through their draft timetables, that all oral and written examination and all documentary production must be completed in time to prepare a joint database of all documentary productions by April 30, 2021. All further discovery steps required must be completed by April 30, 2021, in order to keep this action on track for trial in 2022.

[16] The time available for the 11th CM Conference allowed for submissions on a Timetable for the pleading and discovery steps to April 30, 2021, leaving for the next case management conference submissions and determination on the remainder of the Timetable. This will include expert reports, agreed statements of facts and compendia, and pre-trial motions and conferencing.

B. Specific Case Management Directions

[17] Further to the issues addressed at the 11th CM Conference, I order as follows:

(1) On consent, subject to the direction of the trial judge, the trial in this action shall be bifurcated to be conducted in phases.

(2) Subject to the direction of the trial judge, and with reservation to all parties to seek, at the pre-trial stage, further refinement or definition of the phases of trial to be bifurcated, this action shall be organized for trial in two phases: Phase 1, for

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determination of liability on all claims advanced; Phase 2, for determination of remedies and the crossclaims.

(3) Subject to further Order of this Court, including subject to the completion of the steps set out in Case Management for the preparation of this action for trial, the trial of this action will be conducted in 2022, on a date to be fixed by the Court.

(4) The parties shall advance this action for trial in accordance with the following Timetable:

Pleadings Amendment:

(a) The Plaintiff shall attend to any amendment of its Statement of Claim by June 15, 2020, either on the consent of the Defendants or by bringing a motion for leave to amend. Ontario shall, within this time frame, notify the Plaintiff of its position regarding the amendment of its Statement of Claim;

(b) Canada and Ontario shall attend to any amendment of their Statements of Defence by August 31, 2020, either on the consent of the parties or by bringing a motion for leave to amend;

(c) The Plaintiff shall, by September 30, 2020, deliver any Reply to any Amended Statements of Defence;

(d) Canada shall, by September 30, 2020, deliver any Amended Statement of Defence and Counterclaim to Ontario's Crossclaim.

Requests to Admit

(e) The Defendants shall serve any Requests to Admit by October 30, 2020.

(f) The timing deadline for the Plaintiff and Plaintiff by Crossclaim to respond to any Requests to Admit served by the Defendants shall be brought forward to the Case Management Conference scheduled immediately after the Defendants' service of any Requests to Admit.

Productions and Discovery

(g) The parties shall, by November 30, 2020, comply with any additional documentary production made necessary by any expansion in the scope of material documents resulting from the pleading amendments, to ensure ongoing compliance with Rule 30.03.

(h) All parties may serve written questions on discovery by October 30, 2020;

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(i) All parties shall answer any written questions on discovery by December 30, 2020;

(j) All parties may serve, by January 29, 2021, any written questions on discovery that follow-up on answers provided to previous written questions on discovery ("Follow-Up Written Questions");

(k) All parties shall answer any Follow-Up Written Questions by February 26, 2021;

(l) The parties may conduct any oral examinations, considered supplementary to the written examination questioning, by March 30, 2021;

(m) The parties shall, by March 30, 2021, complete all documentary production further to their continuing obligation of documentary production in compliance with Rule 30.07;

(n) Any party who seeks to schedule a motion for relief arising from the discovery process, including written and oral examinations for discovery and document production, shall do so by April 30, 2021;

(o) The parties shall complete a Joint Electronic Database of documentary productions by April 30, 2021.

(5) I reserve to the parties the right to seek extensions of time in relation to certain Timetable steps, in the following circumstances:

(a) In regard to paragraphs 17(4)(g) and 4(m), should an extension of time be required to address impediments to documentary production arising from inaccessibility of document retrieval from archive by reason of the COVID-19 pandemic; or

(b) In regard to paragraphs 17(4)(i) and 4(k), should the scope or volume of the written questions, or the source of consultation or research required for their response, render the available time insufficient to provide full and fair response.

(6) A further Case Management Conference shall be conducted on June 12, 2020 at 1:00 pm, by teleconference or videoconference, with call-in coordinates for a teleconference, or the connection coordinates for a videoconference, to be provided. The parties shall be prepared at that time to address the further timetable steps required to develop this action for trial in the period after April 30, 2021 ("Additional Timetable Steps"), including the following:

(a) The sequencing and timing for the parties' delivery of expert reports;

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(b) The timing for the parties' completion of the following:

(i) Agreed statement(s) of facts;

(ii) Chronology;

(iii) Map Books;

(iv) Compendia and *aide memoires*;

(v) Aide memoires.

(c) The timing for any pre-trial motions;

(d) The timing of the pre-trial conference and Trial Management Conference.

(7) The parties shall serve and deliver to me, by email to my judicial assistant no later than June 10, 2020 at 1:00 pm, a Memorandum, of no more than four pages in length plus any attached material, setting out their positions in relation to the Additional Timetable Steps, as well as any other issues related to the orderly development of this action for trial. Should the parties reach an agreement on these issues, they may deliver a joint written submission.

C. General Case Management Directions

[18] Any party who seeks to address an issue identified in this action between now and the next scheduled case conference of June 12, 2020 and who considers that a case conference would assist in expeditious and efficient handling of any such issue, may request the urgent scheduling of a case conference by email to my judicial assistant, having first canvassed with all counsel their availability for such a case management conference and their concurrence with the out-of-court communication, in accordance with Rule 1.09.

[19] Broad application of Rule 50.13 will be used to address and resolve matters raised at case conference, in circumstances where this is possible. Counsel ought to expect that procedural orders and directions will be made at case conferences, in accordance with Rule 50.13(6), on informal notice of the issue to be addressed.

[20] The requirement of preparation, issuance and entry of a formal order is hereby dispensed with in accordance with Rule 77.07(6).

Sanfilippo J.

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Date: May 25, 2020

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SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS

Plaintiff

- and -

THE ATTORNEY GENERAL OF CANADA *et al.*

Defendants

Court File No.: CV-18-594281

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at TORONTO

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SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS
Plaintiff

-and-

THE ATTORNEY GENERAL OF CANADA *et al.*
Defendants

Court File No. CV-18-594281

ONTARIO
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PROCEEDING COMMENCED AT
TORONTO

MOTION RECORD OF THE HAUDENOSAUNEE DEVELOPMENT INSTITUTE
(*Motion for Joinder/Intervention*)

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