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

---

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

---

August 31, 2022

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Court File No. CV-18-594281

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**

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Defendants

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# TAB 1

Court File No. CV-18-594281

***ONTARIO***
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B E T W E E N:

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Plaintiff

and

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

Defendants

**AFFIDAVIT OF COLIN MARTIN**
*(Affirmed August 31, 2022)*

I, COLIN MARTIN, of the Town of Ohsweken, in the Six Nations of the Grand River Territory, MAKE OATH AND SAY:

1. I am a Haudenosaunee citizen. I am of the Mohawk Nation and Turtle Clan.

2. I have lived on the Six Nations of the Grand River Reserve No. 40 (the "**Six Nations of the Grand River Reserve**") since I was approximately 8 years old. I was a member of the Six Nations of the Grand River Police Service for over 22 years, from approximately January 1992 to August 2014.

3. The facts contained in this affidavit are based on my personal knowledge and my personal knowledge of Haudenosaunee customs, culture, and tradition or, where indicated, information and belief.

4. Today, I have several roles within the Haudenosaunee Confederacy, also known as the "Six Nations" Confederacy or "Iroquois" Confederacy. The Haudenosaunee Confederacy (*i.e.* the "Six Nations") is a Confederacy of Nations that has existed since long prior to European contact in North America.

5. The "Six Nations", which comprises all Haudenosaunee, is completely distinct from "Six Nations of the Grand River Band", which is only a small fraction of the Haudenosaunee / Six Nations as a later construct of the *Indian Act*.

## A. Core Haudenosaunee Values Throughout the Confederacy

6. I have a number of roles with the Haudenosaunee Confederacy that are focused on maintaining and coordinating Haudenosaunee culture, law, and tradition (which has been ongoing since time immemorial) throughout the entire Haudenosaunee population and throughout all Haudenosaunee Territories. These roles are described below.

### *a. Haudenosaunee Knowledge Keeping: the Haudenosaunee Resource Centre*

7. In 2014, I took on a role at the Haudenosaunee Resource Centre as a Cultural Apprentice. I remain in this role to this day.

8. The Haudenosaunee Resource Centre is an entity established and sanctioned by the Haudenosaunee Confederacy Chiefs Council (the "**HCCC**").

9. The Haudenosaunee Resource Centre is responsible for the maintenance of the Haudenosaunee ceremonial calendar, education regarding Haudenosaunee practices, medicines, language, and legal and ethical obligations to one another and to the land (land is of particular importance to the Haudenosaunee; the *Ganohonyohk*—the "words that come

before all else" which are recited at virtually all Haudenosaunee ceremonies—emphasizes the sacred and spiritual importance of land).

10. My role as a Cultural Apprentice is to learn and maintain these fundamental Haudenosaunee laws, principles, values, and traditions, which are fundamental parts of Haudenosaunee practices throughout the entire Haudenosaunee population across all Haudenosaunee Territories (described in further detail below).

### *b. Haudenosaunee Ceremonies: My Role as a Longhouse Faithkeeper*

11. A Longhouse is a Haudenosaunee gathering place. Historically, Longhouses would house Haudenosaunee clans. Today, Longhouses are attended (as they have been for centuries) by Haudenosaunee to hold ceremonies, funerals, Nation councils, social gatherings, and other sacred events (such as weddings).

12. In respect of Haudenosaunee ceremonies, I am a Faithkeeper. My role is to ensure the maintenance and observance of the Haudenosaunee ceremonial calendar and the passing-on of knowledge of Haudenosaunee ceremonies to Coming Faces (Haudenosaunee citizens of the future). Haudenosaunee ceremonies are gatherings to give thanks, appreciation, and gratitude for what the Haudenosaunee have been given by our Creator, and serve to unify the Haudenosaunee in one mind, body, and heart.

13. Haudenosaunee ceremonies are held throughout the year (approximately once monthly) in Longhouses across all Haudenosaunee Territories (defined below), including in present-day Ontario, Quebec, New York, Wisconsin, and Oklahoma (described in further detail below).

### *c. Universal Haudenosaunee Law: the Great Law of Peace Committee*

14. I also sit on the Great Law of Peace Committee. The Great Law of Peace Committee is an entity established and sanctioned by Haudenosaunee Grand Council. Its role is to provide ongoing recitals of the Great Law of Peace which is held throughout all Haudenosaunee Territories.

15. My role is to assist in coordinating the safety and security of that yearly recitation in the various Haudenosaunee territories where the recitation is held. In connection with this role, I regularly engage and coordinate with all Haudenosaunee Territories (defined below), most of which I have also visited through my role on this committee.

## B. The Haudenosaunee / Six Nations Confederacy at the International Stage

16. I am a co-chair of the Haudenosaunee External Relations Committee ("**HERC**"). HERC represents all citizens of the Haudenosaunee Confederacy in certain advocacy efforts on an international stage.

17. HERC is a committee established and sanctioned by the Grand Council Chiefs of the Haudenosaunee Confederacy. It was established in or about 1990, prompted by the Oka Crisis of 1990 (the Oka Crisis concerned the use of armed forces by Canada to resolve land disputes with the Haudenosaunee in the present-day town of Oka, Quebec).

18. I have been a co-chair of HERC since approximately 2019. The other co-chair is Mohawk Chief Howard Thompson, of Akwesasne (another Haudenosaunee Territory near Cornwall, ON). There are also fourteen HERC committee members. HERC represents all Haudenosaunee, including throughout all Haudenosaunee Territories.

19. Keeping with the principles embodied within the Two-Row Wampum, HERC is mandated by the Haudenosaunee Grand Council Chiefs to monitor any unwelcomed social, cultural, political, and economic interference with the Haudenosaunee from the United States and Canada.

20. As a co-chair of HERC, my role is to coordinate the activities of the committee and to initiate dialogue on behalf of the citizens of the Haudenosaunee Confederacy on an international level, including dialogue with the United States (or any relevant state), Canada (or any relevant Province), and before the United Nations (for example, I visited Geneva, Switzerland in 2018 to advocate for the Haudenosaunee Confederacy before the United Nations).

21. As the crisis committee of the Haudenosaunee Confederacy, HERC is delegated by the Grand Council of Chiefs to deal with possible Haudenosaunee conflicts with the United States and Canada. Using all diplomatic means at its disposal, HERC develops policies and strategies and initiates dialogue between the Haudenosaunee Confederacy and the United States and Canada to achieve a relationship of peaceful coexistence and non-interference between the Haudenosaunee and our neighbours.

### C. Haudenosaunee Territories are Throughout Northeast North America

22. The Haudenosaunee have lived and sustained themselves in Northeast North America for many centuries before European contact. The Haudenosaunee lived, occupied, and sustained themselves off large swaths of land in present-day Ontario, Quebec, and New York State.

23. Today, Haudenosaunee citizens live both on and off Haudenosaunee Territories (described immediately below). "**Haudenosaunee Territories**" today can be found throughout Northeast North America, including within present-day Ontario, Quebec, New York State, Wisconsin, and Oklahoma. For illustration, the map pasted below (which is from a Smithsonian *National Museum of the American Indian* publication called "Haudenosaunee Guide for Educators") depicts discrete Haudenosaunee Territories today:


24. Pursuant to the Great Law of Peace, established prior to European Contact in North America, all Haudenosaunee—regardless of whether they live within or outside any Haudenosaunee Territory—are entitled to use of and residence at all Haudenosaunee Territories, which are for the benefit of all Haudenosaunee, past, present, and future.

25. The Haudenosaunee Territories identified in the map above are set out in the table below, with their corresponding Haudenosaunee name and Colonial registrations administered by Crown-Indigenous Relations and Northern Affairs Canada (under the *Indian Act* in Canada) or the Bureau of Indian Affairs (in the United States), and the populations registered pursuant to those systems:

| | **Territory on Map** | **Geographical Reference** | **Colonial Registry Band / Tribe (*Registered Population*[1])** |
|---|---|---|---|
| 1 | Akwesasne (depicted within present-day Ontario) | Cornwall Island, ON / Akwesasne, QC | Mohawks of Akwesasne (***13,181***) |
| 2 | Kahnawake | South of Montreal, QC | Mohawks of Kahnawá:ke (***11,489***) |
| 3 | Kanesatake | Southeast of Montreal, QC | Mohawks of Kanesatake (***2,844***) |
| 4 | Oneida (depicted within present-day Ontario) | Southwold, ON | Oneida Nation of the Thames (***6,410***) |

[1] These figures reflect *Indian Act* registration information available from *Crown-Indigenous Relations and Northern Affairs Canada* (see, *e.g.*, https://geo.aadnc-aandc.gc.ca/cippn-fnpim/index-eng.html) and *Bureau of Indian Affairs* registration information available from 2013 American Indian Population and Labor Force Report (see https://www.bia.gov/sites/default/files/dup/assets/public/pdf/idc1-024782.pdf) and United States Census Bureau Information available from American Indian and Alaska Native Tribes in the United States and Puerto Rico (see, https://www.census.gov/data/tables/time-series/dec/cph-series/cph-t/cph-t-6.html)

| | **Territory on Map** | **Geographical Reference** | **Colonial Registry Band / Tribe (*Registered Population*[1])** |
|---|---|---|---|
| 5 | Six Nations (*Ohswege*) | South of Brantford, ON | Bay of Quinte Mohawk (***832***)<br>Bearfoot Onondaga (***682***)<br>Delaware (***740*)**<br>Konadaha Seneca (***611***)<br>Lower Cayuga (***3,854***)<br>Lower Mohawk (***4,411***)<br>Niharondasa Seneca (***430***)<br>Oneida (***2,191***)<br>Onondaga Clear Sky (***868***)<br>Upper Cayuga (***3,950***)<br>Upper Mohawk (***6,739***)<br>Tuscarora (***2,411***)<br>Walker Mohawk (***520***)<br>Six Nations of the Grand River (***1***) |
| 6 | Tyendinaga (*Kente*) | Bay of Quinte, ON | Mohawks of the Bay of Quinte (***10,669***) |
| 7 | Wahta | Near Bala, ON | Wahta Mohawk (***893***) |
| 8 | Akwesasne (depicted within present-day New York) | St. Regis, NY | Saint Regis Mohawk Tribe (***6,362***) |
| 9 | Allegany | Salamanca, NY; North of Allegheny County, PA | Seneca Nation of Indians (***1,429***) |
| 10 | Cattaraugus | Silver Creek, NY | Seneca Nation of Indians (***1,429***) |
| 11 | Ganienkeh | Altona, NY | N/A |
| 12 | Kanatsioharake | West of Fonda, NY | N/A |
| 13 | Tuscarora | Lewiston, NY | Tuscarora Nation of New York (***4,107***) |
| 14 | Tonawanda | South of Buffalo, NY | Tonawanda Band of Seneca (***338***) |

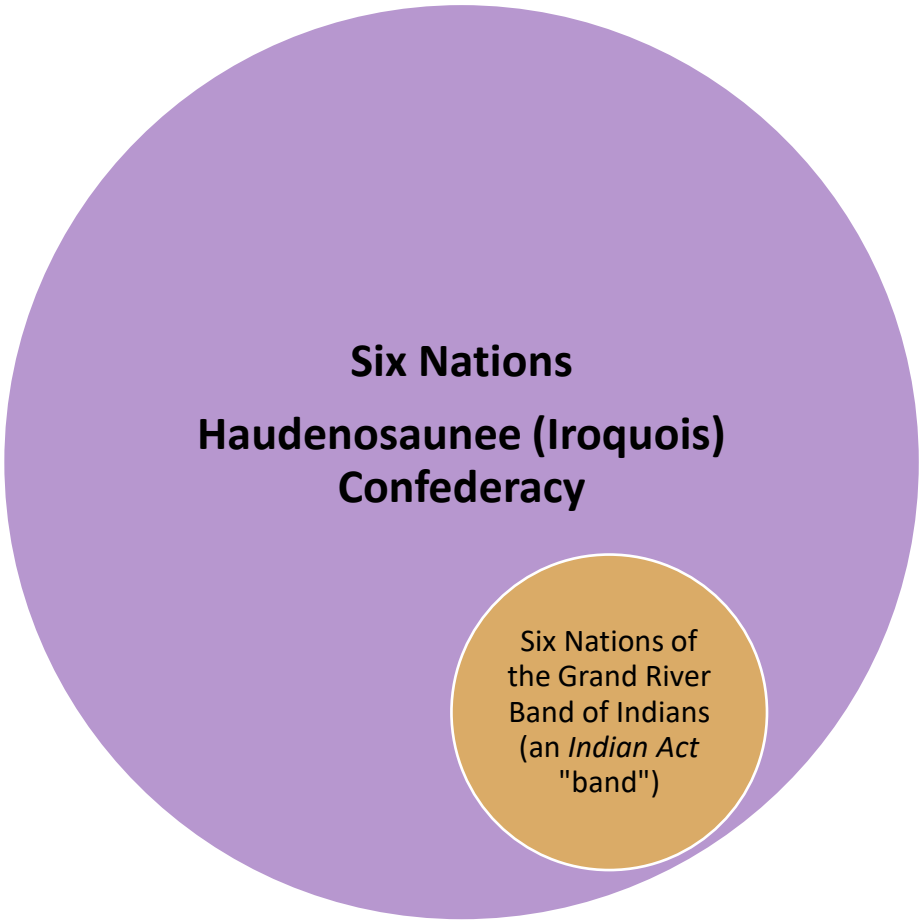
| | **Territory on Map** | **Geographical Reference** | **Colonial Registry Band / Tribe (*Registered Population*[1])** |
|---|---|---|---|
| 15 | Oneida (depicted within present-day New York) | East of Syracuse, NY | Oneida Nation of New York (***3,520***) |
| 16 | Onondaga | South of Syracuse, NY | Onondaga Nation (***9,144***) |
| 17 | Seneca/Cayuga (depicted within present-day Oklahoma) | Northeastern Oklahoma | Seneca-Cayuga Nation (***3,127***) |
| 18 | Oneida (depicted within present-day Wisconsin) | North of Green Bay, WI | Oneida Tribe of Indians of Wisconsin (***6,946***) |

26. There are **108,699** people registered under the *Indian Act* or with the Bureau of Indian Affairs who are Six Nations (*i.e.* Haudenosaunee) people, based on the information I have gathered for the table above. Since this information only concerns Haudenosaunee "registered", it is not a complete account of the Haudenosaunee population which includes many people not "registered" to one of the "bands" / "tribes" in the table above, or entitled to be but not registered with Canada or the United States at all.

27. I engage regularly with all these Haudenosaunee Territories through my role with HERC and the Great Law of Peace Committee. I have also learned extensively of each as a Cultural Apprentice with the Haudenosaunee Resource Centre.

28. I have personally visited all the Haudenosaunee Territories listed above, except for Ganienkeh, Kanatsiohareke, and Seneca/Cayuga in present-day Oklahoma.

29. As shown in the table above, and illustrated in the diagram below, the plaintiff in this action, the "Six Nations of the Grand River Band", is (like any other *Indian Act* band) only relevant to a small fraction of Haudenosaunee who happen to be registered to that band.




30. The Six Nations of the Grand River Band has no voice for the Six Nations (*i.e.* the Haudenosaunee Confederacy, also known as the Iroquois Confederacy) at large. The Haudenosaunee or Six Nations collective is only represented as a whole by the Chiefs of the Haudenosaunee Confederacy, or their delegate(s) where applicable (such as HERC, for example, as described above).

### D. Haudenosaunee Citizenship is Unrelated to Colonial Registrations

31. Haudenosaunee Citizenship is not dependent whatsoever on registration with any "band" under the *Indian Act* or any "tribe" under the Bureau of Indian Affairs. Haudenosaunee Citizenship is not based upon any registration with Canada or the United States. Citizenship is and has always been matrilineal.

32. The Haudenosaunee Confederacy issues its own passports to citizens, which are unrelated to any "Indian" registration with Canada or the United States. I, for example, regularly use my Haudenosaunee passport to travel across the border between Canada and the United States.

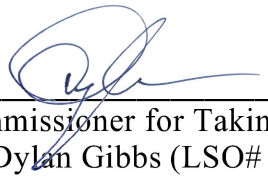
33. While many Haudenosaunee are "members" of certain "bands" under the *Indian Act* (my registration, for example, is to Upper Mohawk), and may be entitled to vote in certain *Indian Act* "band council" elections pertaining to their registered reserve, most Haudenosaunee to my knowledge do not participate in these elections. That is because most Haudenosaunee, in my experience, view the Haudenosaunee Confederacy Chiefs as their legitimate governance, not any "chief" or "councillor" under the *Indian Act*.

34. For example, as reported by the Brantford Expositor, the most recent election for the band council at Six Nations Reserve No. 40 (*i.e.*, where Six Nations of the Grand River and 13 other Indian Act Bands are located)[2] had a record turn out of 2,065 voters for approximately 27,000 members, with the current Indian Act "chief" receiving just 700 votes.

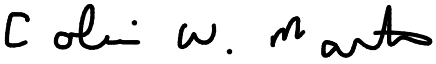
[2] See Item 8 of the table at paragraph 25, above.

A copy of an article from the Brantford Expositor dated November 11, 2019 is attached hereto as **Exhibit "A"**.

AFFIRMED BEFORE ME remotely in Toronto, in the Province of Ontario, by the affiant stated as being located in the Town of Perry Sound, in the Province of Ontario, this 31th day of August, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely



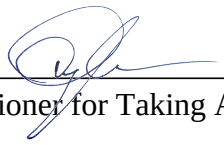
Commissioner for Taking Affidavits
Dylan Gibbs (LSO# 82465F)



COLIN MARTIN

# TAB A

This is Exhibit “A” to the Affidavit of
Colin Martin, affirmed this 31st day of
August, 2022



Commissioner for Taking Affidavits

Local News

# Six Nations voters elect young chief

**Brian Thompson**
Nov 11, 2019 • November 11, 2019 • 2 minute read • Join the conversation

Mark Hill beat out three other contenders and will be the new chief of the Six Nations Elected Council. Hill was first elected as a councillor nine years ago at the age of 19, and after three terms made the bid for chief. PHOTO BY BRIAN THOMPSON /The Expositor

OHSWEKEN Mark Hill was the youngest member to serve on Six Nations elected band council when he was first elected in 2010 at age 19.

Now he may be the the youngest elected chief of Six Nations of the Grand River.

Hill, who served three three-year terms, topped three other contenders for the job in Saturday's election. Hill got 700 votes, followed by Cynthia Jamieson with 517, Harvey Powless with 286 and Courtney Skye with 213.

Hill, who didn't respond to a number of requests from The Expositor for comment, heavily used social media to get out his message. His campaign page on Facebook described his involvement with groups, including the Ontario First Nations Young Peoples Council and the Assembly of First Nations Young Peoples Council.

The Brantford Collegiate Institute graduate urged voters "to consider an experienced and younger perspective, vision and approach to the leadership role as chief of the Six Nations elected council."

Hill is currently finishing a two-year online public administration and governance program through McGill University.

He will succeed Ava Hill, who did not seek re-election after serving two terms as chief.

The new chief and members elected to nine councillor positions will be sworn in on Nov. 12.

Steve Williams, who served as band council chief from 1991 to 1994, acted as chief polling officer for the election.

"We had 2,065 voters take part, which is a record," Williams noted. "A lot of young people came out to vote."

About 1,900 voters took part in the last election.

"We have 27,000 members who live all over the country, so we did online voting for the first time," Williams said. "We had 510 who voted online, so I think that was a success."

This election also saw other changes, as residents earlier voted to get rid of six electoral districts and reduce the number of councillor positions to nine from 12. They will serve four-year terms, instead of three. Other changes include a stipulation for a Grade 12 education for council candidates and a maximum of two consecutive terms for a chief or councillor.

The winners for the band councillor positions — in order of votes won — were: incumbent Sherri Lyn Hill-Pierce, incumbent Melba I. Thomas, incumbent Audrey Powless-Bomberry, Michelle J. Bomberry, Wendelyn Johnson, incumbent Hazel Johnson, incumbent Rheva Helen Miller, Nathan M. Wright and incumbent Kerry Bomberry.

“I think overall it’s good,” Williams said of the election. “We brought in new people, which is great, and we kept some of the older ones, which should balance things out.”

Williams said that the new chief’s previous experience on council will mean he knows how things work.

Michelle Bomberry is one of new faces on council.

She said she has served as a volunteer with community sports, veterans and agricultural groups, along with the Ontario Trillium Foundation and the Children’s Safety Village of Brant.

“There is a lot of work to do, and I’m excited to get started,” said Bomberry, who is finishing an PhD in education at Brock University.

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## LATEST NATIONAL STORIES

## NEWS NEAR BRANTFORD

## THIS WEEK IN FLYERS


## COMMENTS

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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 BRANTFORD

**AFFIDAVIT OF COLIN MARTIN**

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Lawyers for the Moving Party, the Haudenosaunee Development Institute

# TAB 2

Court File No. CV-18-594281

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**

B E T W E E N:

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Plaintiff

and

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Defendants

# AFFIDAVIT OF AARON DETLOR

*(Affirmed August 31, 2022)*

I, AARON DETLOR, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am *Kanienkehake* (Mohawk) of the Wolf Clan. As a Mohawk, I am a citizen of the Haudenosaunee Confederacy.

2. I am also a lawyer called to the bar in Ontario in 1998.

3. The facts contained in this affidavit are based on my personal knowledge, my personal knowledge of the oral history of the Haudenosaunee and, where indicated, information and belief.

4. The Haudenosaunee Confederacy—also known as the "Six Nations" or the "Iroquois Confederacy"—is a confederacy of Nations formed in time immemorial, and includes the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora Peoples.

5. In this affidavit, reference to "Six Nations" is to the Haudenosaunee (and *vice versa*), not to the plaintiff, the "Six Nations of the Grand River Band of Indians", which is a creature of Canadian statute. This is described in more detail at paragraphs 7 to 9, below.

6. As a Mohawk, I am a part of the Haudenosaunee collective. I, like all Haudenosaunee, share in the collective rights and interests of the Haudenosaunee. This is the case regardless of any *Indian Act* "band" or Bureau of Indian Affairs "tribe" to which I or any other Haudenosaunee person is registered as a matter of Canadian or American federal administration.

**A. The Six Nations is not the "Six Nations of the Grand River Band of Indians"**

7. The "Six Nations" (*i.e.* the Haudenosaunee) is not synonymous with the "Six Nations of the Grand River Band".

8. The former—the "Six Nations", also known as the Haudenosaunee or the Iroquois—are Indigenous Peoples.

9. The latter—the "Six Nations of the Grand River Band"—is a creation of Canadian federal legislation representing no more than a small fraction of the Haudenosaunee collective.

10. The division of the Haudenosaunee people into "bands" is of no import for the collective rights and interests of the Haudenosaunee as a whole. The Haudenosaunee are,

regardless of any decision by a colonial government to slot them into discrete “bands” and “tribes”, one collective. They are the Haudenosaunee.

### B. My *Indian Act* Band Registration – Mohawks of the Bay of Quinte

11. I am a registered “Indian” under the *Indian Act*. The *Indian Act* “band” of which I am a registered member is Number 164, Mohawks of the Bay of Quinte.

12. As a member of the Mohawks of the Bay of Quinte, I am a qualified “elector” within the meaning of the *Indian Act*, and can vote in elections of the Band Council for the Mohawks of the Bay of Quinte (but not in elections concerning any other *Indian Act* band, including the Six Nations of the Grand River Band of Indians, as described further below).

13. However, like many Haudenosaunee to my knowledge, I do not view any *Indian Act* band council as my legitimate governing body, nor the legitimate governing body of any Haudenosaunee:

a. First, no *Indian Act* band council represents the collective rights and interests of the whole Haudenosaunee Confederacy and its citizens;

b. Second, *Indian Act* band councils were forced upon Indigenous people across Canada, including the Haudenosaunee, removed by force from the Council House in 1924, in an effort to silence the Haudenosaunee Confederacy Chiefs (see, *e.g.*, the affidavit of Richard Hill affirmed June 10, 2022 at paragraphs 65 to 73, which I have reviewed).

14. The Chiefs of the Haudenosaunee Confederacy in council speak for the interests of the entire Haudenosaunee Confederacy and its citizens; the Haudenosaunee governance

system was established centuries prior to European contact in North America and continues to this day (see, *e.g.*, the affidavit of Richard Hill affirmed June 10, 2022 at paragraphs 25 to 33).

### C. The litigation concerns collective Haudenosaunee interests

15. The litigation does not concern the collective rights of only *some* Mohawks, or of only *some* Haudenosaunee. The litigation concerns collective rights belonging to *all* Haudenosaunee. The entire collective—*i.e.* all Haudenosaunee—have a direct interest in the subject matter of the litigation, may be adversely affected by a judgment or settlement in the litigation, and (as the collective) have questions of law and fact in respect of the Crown's breaches that are the same as those raised in the litigation. It is that entire collective that has a claim against the Crown, not a fraction of it.

16. This litigation seeks to adjudicate collective rights arising from the Haldimand Proclamation of 1784, which on its face concerns rights of the "*Mohawk Nation and such others of the Six Nations Indians*" as well as "*their posterity*", forever. The text of the Haldimand Proclamation of 1784 is at Exhibit C to the affidavit of Richard Hill affirmed June 10, 2022.

17. As Mohawk and Haudenosaunee, I understand that I am a beneficiary under the Haldimand Proclamation of 1784. The Haldimand Proclamation of 1784 on its face does not limit rights to any subset of Mohawk or other Six Nations people. I do not understand the rights arising from the Haldimand Proclamation to be conditional upon future "registration" with a particular "band" under the *Indian Act* over a hundred years after.

18. This litigation also seeks to adjudicate remedies flowing from unfulfilled agreements between the Imperial Crown and Haudenosaunee Chiefs (not *Indian Act* "chiefs" imposed upon Indigenous people across Canada far later) acting on behalf of and for the benefit of all Haudenosaunee, not some subset thereof.

### D. The Six Nations of the Grand River Band does not represent the collective

19. Despite the breadth of collective rights at stake, the plaintiff in this action, the "Six Nations of the Grand River Band of Indians", has confirmed to counsel for HDI in a letter dated August 2, 2022 that it represents only the pleaded band, the Six Nations of the Grand River Band.

20. The plaintiff accordingly represents no more than a small fraction of Haudenosaunee people, and thus only a small fraction of the Haudenosaunee collective.

21. For example, despite being Mohawk and a member of the collective and beneficiary of the instruments asserted in the litigation, I, like tens of thousands of other Haudenosaunee people, have no say in the plaintiff's conduct whatsoever and no voice in the litigation. I am not a member (or eligible to be a member) of the Six Nations of the Grand River Band, nor am I eligible to vote for the *Indian Act* band council or any *Indian Act* "chief" or "councillor" of that band. This is despite my entitlement to the benefit of the treaty and other rights of the Haudenosaunee collective.

### E. HDI acts at the direction of the HCCC to represent all Haudenosaunee people

22. The Chiefs of the Haudenosaunee Confederacy sitting on the Haudenosaunee Confederacy Chiefs Council ("**HCCC**") represent the interests of the Haudenosaunee

Confederacy at large, including the interests of all its citizens (see, *e.g.*, the affidavit of Richard Hill affirmed June 10, 2022 at paragraph 33). The HCCC does not represent any particular subset of Haudenosaunee people—they act for all Haudenosaunee people, wherever they are situated, all of whom have an interest in this litigation, as described in paragraphs 15 through 18, above.

23. In respect of this litigation, the HCCC has delegated its authority to speak on behalf of all Haudenosaunee people to the Haudenosaunee Development Institute ("**HDI**"). HDI is a department of the HCCC formed in 2007 to facilitate engagement with the HCCC in respect of Haudenosaunee lands. I am a "Delegate" with HDI and have held this title since its formation. In this role—including for this litigation—I take instruction directly from the HCCC in the interests of the Haudenosaunee Confederacy and its citizens.

24. HDI seeks to intervene in this litigation on the HCCC's authority and at its instruction. The HCCC has instructed HDI to take steps to protect the interests of the Haudenosaunee Confederacy and its citizens in this litigation. As described above, those interests are the collective interests of the Haudenosaunee engaged directly by this litigation.

25. HDI's participation in the litigation will be at the HCCC's instruction on behalf of all Haudenosaunee people, and on broad notice to relevant news publications and to the Longhouse representatives in Haudenosaunee territories throughout northeastern North America.

26. Unless HDI is granted leave to intervene, the interests of the Haudenosaunee collective—which are directly impacted, as described in paragraph 15, above—will be unrepresented in this litigation.

### F. Federal support for HDI's involvement in the litigation on behalf of the Haudenosaunee Confederacy

27. Since this litigation began, the Canadian government has issued directives and legislation that facilitate HDI's intervention in the litigation to represent the Haudenosaunee Confederacy (and all its citizens) at the direction of the HCCC.

28. First, the Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples published in 2018 (the "**AG Directive**", a copy of which is attached as **Exhibit "A"**) is pertinent to HDI's intervention as a representative of the Haudenosaunee Confederacy, the larger collective rightsholder unrepresented by the current plaintiff, as described above. Guideline #15 of the AG Directive states:

a. "A large and liberal approach should be taken to the question of who is the proper rights holder";

b. "Canada respects the right of Indigenous peoples and nations to define themselves and counsel's pleadings and other submissions must respect the proper rights-bearing collective";

c. "Where rights and title have been asserted on behalf of larger Indigenous entities – nations or linguistic groups, for example – and there are no conflicting interests, Canada in the proper case, or where supported by the available evidence, will not object to the entitlement of those groups to bring the litigation";

d. "In Aboriginal rights and title cases, Canada will not usually plead that smaller Indigenous entities – clans or extended family groups, for example – are the proper holders of Aboriginal rights and title" (in this case, the smaller entity would be the current plaintiff, the *Six Nations of the Grand River Band of Indians*).

29. Second, the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c. 14 (the "***UNDRIP Act***") which received royal assent on June 21, 2021, is particularly pertinent to the issue of the appointment of HDI (a department of the HCCC) as a representative of the Haudenosaunee Confederacy, as delegated and instructed by the HCCC. The *UNDRIP Act* states:

a. At Article 18, that "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, **through representatives chosen by themselves in accordance with their own procedures**, as well as to maintain and develop their own indigenous decision-making institutions" [*emphasis added*];

b. At Article 32, that "**States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions** in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources." [*emphasis added*]

c. At Article 40, that "Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. **Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights**." [*emphasis added*]

## G. The Circumstances imposed on the Haudenosaunee Confederacy explain any delay

### *a. Historic suppression of the Haudenosaunee Confederacy*

30. Since at least 1924, upon the forced removal of Haudenosaunee Chiefs from the council house in Ohsweken (described in further detail at paragraphs 65 to 74 of the affidavit of Richard Hill affirmed June 10, 2022), the Haudenosaunee Confederacy, and especially its centuries-old government, has faced systemic oppression and has been "suppressed and ignored historically by the federal government" (see *e.g.*, the Prime Minister's Mandate Letter to the Minister of Crown-Indigenous Relations dated December 16, 2021, attached as Exhibit E to the supplementary affidavit of Brian Doolittle affirmed July 6, 2022).

31. These circumstances rendered it extremely difficult or impossible for the HCCC to (a) gain the necessary recognition and (b) marshal the necessary resources to (*i*) assert its rights against the Crown defendants in this case and (*ii*) challenge the plaintiff on its assertion of rights belonging to a broader collective than it purports to represent.

### *b. Engagement efforts to regain recognition and resources*

32. These circumstances began to change upon the Supreme Court of Canada's release of seminal companion decisions in *Haida Nation* and *Taku River* in November 2004, each of which concerned the constitutional duty to consult. Following those decisions and increased demand for consultation and engagement with the HCCC in respect of Haudenosaunee lands, HDI was formed in 2007 to facilitate that engagement.

33. Since 2007, the HCCC (through HDI as a delegated representative) has been increasingly, and is now routinely, engaged in respect of land issues in Haudenosaunee

territories, including by the Federal and Provincial Crowns, municipalities, and industry proponents in respect of development and infrastructure projects. For example, in respect of Ontario and Canada:

a. In 2020, Ontario's Ministry of Energy, Northern Development and Mines determined that engagement with the HCCC was required in respect of a pipeline in Milton, ON, and directed that such engagement be commenced with copy to HDI; and

b. In 2022, Canada's Ministry of Transport, in respect of a project to create high frequency rail in the Toronto-Quebec corridor, committed to "engage and consult with the HCCC through the HDI as its agent".

(For further detail, see *e.g.*, paragraphs 19-23 of the Affidavit of Brian Doolittle affirmed on June 10, 2022).

34. Through this engagement and, among other things, related environmental and archaeological monitoring agreements reached in respect of development and infrastructure projects, the HCCC, through HDI as its representative, has been able to (a) regain some recognition historically suppressed by the Federal Government and (b) garner resources for the HCCC's use in respect of land rights issues.

### *c. The UNDRIP Act created a framework for HCCC's participation*

35. Canada's recent adoption of the *UNDRIP Act* in July 2021 has for the first time made it possible for governments such as the HCCC to be recognized in a more fulsome manner, including to provide access to decision-making that respects its own chosen representatives

(*i.e.* HDI), procedures, customs, traditions, rules and legal systems (described in more detail at paragraph 29, above).

36. By 2021, the HCCC had (a) recognition and framework provided by the *UNDRIP Act* and (b) the ability to marshal resources sufficient to engage directly with this litigation. The HCCC promptly did so, putting the parties on notice of its position by letter to the parties dated November 19, 2021 (via HDI, as its delegated representative). A copy of HDI's November 19, 2021 letter is attached as **Exhibit "B"**.

37. The HCCC subsequently took active steps to intervene in this litigation by directing HDI to do so on its behalf on April 2, 2022.

***d. Any delay is justified and, in any event, will not prejudice the parties***

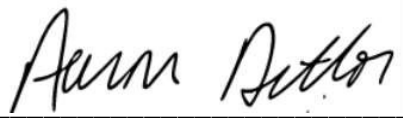
38. For the reasons given above, the HCCC (through HDI as its representative) took steps to engage with this litigation as expeditiously as it could. Any alleged "delay" in bringing this motion to intervene as a party or join as a necessary party is neither excessive nor surprising given the circumstances and historic oppression of Indigenous people in Canada, including the HCCC as one of the "traditional Indigenous governments and leaders, whose nations and [form] of governance were suppressed and ignored historically by the federal government" (see, *e.g.*, the Prime Minister's Mandate Letter to the Minister of Crown-Indigenous Relations dated December 16, 2021, attached as Exhibit E to the supplementary affidavit of Brian Doolittle affirmed July 6, 2022).

39. As described above, HCCC (via HDI) is the party that speaks for the entire collective affected by the plaintiff's claim. HDI is a necessary party, and its intervention/joinder will not prejudice the parties. Given the historical nature of the claims, there is no risk of

prejudice associated with loss of memory for fact witnesses or loss of documents. Even if HDI's motion were to cause increased costs, such costs would be minimal compared to those associated with a duplicative proceeding against the same parties and, in any event, can be addressed in an order respecting costs at the conclusion of trial.

AFFIRMED BEFORE ME at Toronto, in the Province of Ontario, remotely by the affiant stated as being located in the City of Toronto, in the Province of Ontario, this 31st day of August, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely

_____
Commissioner for Taking Affidavits
Thomas Dumigan (LSO# 74988P)



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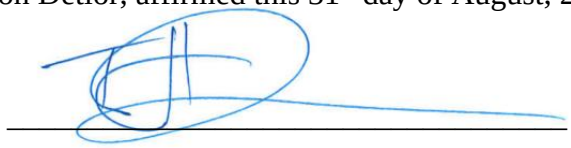
AARON DETLOR

# TAB A

This is Exhibit “A” to the affidavit of

Aaron Detlor, affirmed this 31st day of August, 2022



Commissioner for Taking Affidavits

# The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples

Canada

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# Foreword by the Attorney General of Canada

In my mandate letter from the Prime Minister, I was tasked as Attorney General of Canada to review the Government of Canada's litigation strategy. I was mandated to make decisions to end appeals or positions inconsistent with the Government's commitments, the *Charter of Rights and Freedoms*, and Canadian values. With the Government of Canada's publication of the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* (the *Principles*),[1] we have stated our commitment to a significant move away from the status quo and a fundamental change in Canada's relationship with Indigenous peoples. That includes the Crown's conduct in litigation. On February 14, 2018, the Prime Minister of Canada further confirmed the Government's shift to the recognition of rights as the basis for relations with Indigenous peoples, and that a new recognition and implementation of rights framework would now be developed to operationalize recognition.

These *Principles* are rooted in section 35 of the *Constitution Act, 1982*, guided by the UN Declaration on the Rights of Indigenous Peoples (the UN Declaration), and informed by the Report of the Royal Commission on Aboriginal Peoples and the Truth and Reconciliation Commission (TRC)'s Calls to Action. At their core, the *Principles* seek to further the full promise of section 35 of the *Constitution Act, 1982* through the recognition and implementation of Indigenous rights.

The work of shifting to, and implementing, recognition-based relationships through a new recognition and implementation of rights framework is a process that will take dynamic and innovative action by the Government of Canada and Indigenous peoples. We are now in a significant period of transition in Crown-Indigenous relations.

[1] http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html

In order to advance this transition, and demonstrate how the *Principles* shape the work of the Attorney General of Canada as a broader recognition and implementation of rights framework is developed and implemented, I have sought to outline in this Directive the approach that should guide the Attorney General of Canada in the discharge of her litigation duties as the Chief Law Officer of the Crown. This Directive promotes our Government's commitment to reconciliation by establishing guidelines that every litigator must follow in the approaches, positions, and decisions taken on behalf of the Attorney General of Canada in the context of civil litigation regarding section 35 of the *Constitution Act, 1982* and Crown obligations towards Indigenous peoples.

The nature of section 35 litigation has always been unique. When section 35 was included in the *Constitution Act, 1982*, it was agreed further political work needed to be done regarding its implementation. Attempts to advance understandings and implementation of section 35 occurred over the course of four constitutional conferences in the 1980s, and through two attempts at constitutional amendment. The lack of success in this work contributed to the courts assuming a leading role in defining section 35. In this way, litigation became a central forum to resolve major issues in the Crown-Indigenous relationship as opposed to a forum of last resort focused on specific areas or issues in dispute.

Litigation is by its nature an adversarial process, and it cannot be the primary forum for achieving reconciliation and the renewal of the Crown-Indigenous relationship. This is why a core theme of this Directive is to advance an approach to litigation that promotes resolution and settlement, and seeks opportunities to narrow or avoid potential litigation. Our Government is committed to pursuing dialogue, co-operation, partnership and negotiation based on the recognition of rights.

We recognize, however, that Indigenous peoples are entitled to choose their preferred forum to resolve legal issues, that some matters will require legal clarification, and that at times litigation will be unavoidable. When matters do result in litigation, this Directive instructs that the Government of Canada's approach to litigation should be to assist the court constructively, expeditiously, and effectively so that it may provide direction on the matters in issue.

I hope that, in time, this litigation Directive will be recognized to have brought about a significant shift in the Government of Canada's positions and strategies. I hope, too, that litigation will be recognized as a dispute settlement forum of last resort, as trust and good faith allow collaborative processes, including facilitation, mediation and negotiations, to be the primary means of resolution.

The Honourable Jody Wilson-Raybould, P.C., Q.C., M.P.
Minister of Justice and Attorney General of Canada

# Application

This Directive applies to the Attorney General's role in civil litigation regarding section 35 of the *Constitution Act, 1982* and other Crown obligations towards Indigenous peoples.[2] It is a concrete manifestation of how the *Principles* are effecting transformative change.

The Directive promotes an approach to conflict resolution that will be consistent with the goal of achieving reconciliation with Indigenous peoples. It provides counsel[3] with objectives and litigation guidelines to apply the *Principles* in litigation while respecting the role of client departments and Cabinet in providing counsel with instructions on particular cases.

In the context of civil litigation, departments – and, in appropriate cases, Cabinet – generally act as instructing clients. This means that on a day-to-day basis Justice litigation counsel on behalf of the Attorney General consult with their clients, give them legal advice and receive instructions from those clients on the approaches and positions to be taken in the litigation, including in relation to this Directive.

As was explained by the Prime Minister in *Open and Accountable Government,*

> "In the civil litigation context, departments generally act as instructing clients, although in having carriage of all litigation the Attorney General must keep in mind his or her duty to ensure that public affairs are administered in accordance with law. Depending on the complexity or sensitivity of a case, it may be appropriate for the Attorney General to consult with the Prime Minister as well as Cabinet colleagues whose mandates could be affected by particular litigation."[4]

The legal and policy implications beyond a particular case before the court are essential considerations in developing an approach to litigation. In considering options and applying this Directive, counsel must take into account the potential impacts on existing and future claims, as well as Canada's ongoing efforts to advance reconciliation with Indigenous peoples more broadly.

[2] While this Directive primarily applies to section 35 litigation, the general themes will find broader application to all civil litigation and other forms of conflict resolution that relate to the distinct obligations that exist at law on the Crown as a result of the historic and ongoing relationship between the Crown and Indigenous peoples. Similarly, much of the Directive's content includes best practices that apply to the conduct of all litigation.

[3] "Counsel" in this Directive is intended to include not only litigation counsel, but all departmental counsel involved in litigation. Where there is reference to specific counsel, such as litigation counsel or legal services counsel, it is used as emphasis.

[4] *Open and Accountable Government*, Annex F.5 Ministers and the Law, Role of Minister of Justice and Attorney General (https://pm.gc.ca/eng/news/2015/11/27/open-and-accountable-government).

# Core objectives

A core theme of this Directive is to advance an approach to litigation that promotes resolution and settlement, and seeks opportunities to narrow or avoid potential litigation. Indigenous peoples are entitled to choose their preferred forum to resolve legal issues, and some matters will require legal clarification. Indeed, litigation may be necessary and important in order to obtain guidance from the courts. This may involve, in appropriate cases, the pursuit of appeals or other judicial remedies by Indigenous parties or by the Crown. However, litigation cannot be the primary forum for achieving reconciliation. Where litigation is unavoidable, this Directive instructs that Canada's approach to litigation should be constructive, expeditious, and effective in assisting the court to provide direction.

This Directive pursues the following objectives: (1) advancing reconciliation, (2) recognizing rights, (3) upholding the honour of the Crown, and (4) respecting and advancing Indigenous self-determination and self-governance. These objectives, and the guidelines for litigation counsel they promote, are interrelated.

## Advancing reconciliation

Reconciliation is a fundamental purpose of section 35 of the *Constitution Act, 1982*. Reconciliation is an ongoing process through which Indigenous peoples and the Crown work cooperatively to establish and maintain a mutually respectful framework for living together, with a view to fostering strong, healthy, and sustainable Indigenous nations within a strong Canada. Reconciliation requires hard work, changes in perspectives and actions, and compromise and good faith by all.

Adversarial litigation cannot and should not be a central forum for achieving reconciliation. This is a message the Supreme Court of Canada has sent time and time again, strongly encouraging that the work of reconciliation take place through political, economic, and social processes that involve negotiating, building understanding, and finding new ways of working together. Adversarial litigation between the Crown and Indigenous peoples presents challenges for achieving reconciliation.

## Recognition of rights

The Government of Canada recognizes the ongoing presence and inherent rights of Indigenous peoples as a defining feature of Canada. The promise of section 35 mandates that reconciliation be based on the recognition and implementation of Aboriginal rights.

Aboriginal rights do not require a court declaration or an agreement in order to be recognized. Despite this, the Government of Canada has often insisted on a court declaration or an agreement before recognizing rights. Transitioning out of this practice is part of the work of forming new nation-to-nation, government-to-government, and Crown-Indigenous relations.

In many instances where matters do proceed to court, the dispute may involve a conflict between an Indigenous group or people and the Government of Canada about how to effect the recognition of rights. When this arises, it may be extremely difficult to give full effect to recognition through a court proceeding. Aspects of the precise scope of the right may engage complex evidentiary matters. For this reason, recognition speaks to the need for the Government of Canada to prioritize resolution and settlement through collaboration and co-operation.

## Upholding the honour of the Crown

The honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples. The Attorney General and her counsel must act with honour, integrity, good faith, and fairness in all work that relates to Indigenous peoples. The overarching aim is to ensure that Indigenous peoples are treated with respect and as full partners in Confederation, with their rights, treaties, and agreements recognized and implemented.

The honour of the Crown is reflected not just in the substance of the positions taken, but in how those positions are expressed.

## Respecting and advancing Indigenous self-determination and self-governance

Indigenous self-determination and self-government are affirmed in the UN Declaration and are central to addressing the history of colonization and forming new relationships based on recognition, respect, partnership, and co-operation. Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government.
Recognition of the inherent jurisdiction and legal orders of Indigenous nations is a starting point of discussions aimed at interactions between federal, provincial, territorial, and Indigenous governments.

# Litigation Guidelines

The following 20 litigation guidelines instruct counsel as to how the *Principles* must be applied in civil litigation involving Indigenous peoples. The work of operationalizing these Guidelines is already taking place and will be on-going.

## Litigation Guideline #1: Counsel must understand the *Principles* and apply them throughout a file's lifespan.

The Department of Justice is committed to fostering an internal culture that encourages its counsel to pursue reconciliation. Counsel must understand and apply the 10 principles in their work. This means, for example, that counsel must seek to understand Indigenous perspectives, recognizing that there will be diversity among those perspectives, and that Indigenous-Crown relationships are to be guided by the recognition and implementation of rights. The Department of Justice will provide its counsel with the training and resources needed to achieve these objectives.[5]

Where litigation was started before the *Principles* or this Directive, counsel must review their pleadings, legal positions, and litigation strategy to ensure that they are consistent with the *Principles* and this Directive. Working with the client and other departmental counsel, litigation counsel should take steps to resolve any inconsistencies, including amending pleadings.[6] In those circumstances where it appears impossible to resolve an inconsistency, counsel must seek direction from the Assistant Deputy Attorney General.[7]

[5] Training may include, for example, training in intercultural competency, as suggested by the TRC's Call to Action #57.

[6] This requirement applies to active litigation only.

[7] Throughout this document, where a matter is referred to the Assistant Deputy Attorney General, further consultation with other senior governmental officials may be sought, and approvals obtained. In many instances, the Attorney General personally will give direction.

# Litigation Guideline #2: Litigation strategy must reflect a whole-of-government approach.

Principle 3 requires the Government of Canada and its departments, agencies, and employees to act with honour, integrity, good faith and fairness in all dealings with Indigenous peoples. As suggested by Litigation Guideline #3 below, at the beginning of each file, counsel and the client department or agency must have a discussion about the possible effects of litigation on the relationship between Indigenous peoples and those departments or agencies. These possible effects should inform the litigation strategy, which must include ways of resolving all or part of the litigation as expeditiously as possible.

Effective advocacy starts with developing a litigation strategy rooted firmly in the government's policy objectives and the applicable law, supported by good legal advice. Litigation and legal services counsel have key roles to play in working with client departments and agencies to underscore the importance of adopting a strategy that demonstrates respect for the broader objectives of reconciliation.

While departments generally act as instructing clients, counsel for the Attorney General act for the government as a whole, not for any particular department or agency.[8] Counsel must always be conscious of government-wide concerns that may arise in litigation, and the government-wide implications of judicial decisions or settlements.

Broad consultation is frequently necessary to ensure that legal positions reflect a whole-of-government approach. Counsel in legal services, centres of expertise, and specialized sections in the Aboriginal Affairs Portfolio and Public Law and Legislative Services Sector play an important role in supporting litigation files. This includes counsel for Crown-Indigenous Relations and Northern Affairs Canada and Indigenous Services Canada; the Aboriginal Law Centre; the Human Rights Law Section; and the Constitutional, Administrative, and International Law Section. In addition to bringing specialized knowledge, these counsel can assist with identifying broader issues, including alternative methods of dispute resolution, and bringing a whole of government perspective to litigation files. Instructing clients should be encouraged to support counsel in this work by consulting with other departments as appropriate.

[8] Under Paragraph 4(a) of the *Department of Justice Act*, the Minister of Justice, who is *ex officio* the Attorney General, has the responsibility of seeing that the administration of public affairs is in accordance with law. As a result, he or she "[…] is not subject to the same client direction as private clients," *R. v. Campbell*, [1999] 1 S.C.R. 565, at 603. See also *Open and Accountable Government*, Annex F.5 Ministers and the Law, Role of Minister of Justice and Attorney General (https://pm.gc.ca/eng/news/2015/11/27/open-and-accountable-government).

## Litigation Guideline #3: Early and continuous engagement with legal services counsel and client departments is necessary to seek to avoid litigation.

Litigation is by its nature an adversarial process, and cannot be the primary forum for broad reconciliation and the renewal of the Crown-Indigenous relationship. One of the goals of reconciliation in legal matters is to make conflict and litigation the exception, by promoting respectful and meaningful dialogue outside of the courts. To achieve this, counsel must engage with client departments and agencies as soon as they become aware of a conflict that may result in litigation. Working with the client and other departmental counsel, counsel must develop a coordinated approach with the aim of achieving a resolution that avoids litigation.

Indigenous groups are entitled to choose their preferred forum to resolve their legal issues; sometimes litigation will be unavoidable. But the relationship between Indigenous peoples and the Crown can be adversely affected by how we conduct this litigation. The conduct of litigation must respect this relationship by pursuing reconciliation and focusing the litigation on those specific issues that cannot be resolved through other forums.

## Litigation Guideline #4: Counsel should vigorously pursue all appropriate forms of resolution throughout the litigation process.

Counsel's primary goal must be to resolve the issues, using the court process as a last resort and in the narrowest way possible. This is consistent with a counsel's ongoing obligation to consider means of avoiding or resolving litigation throughout a file's lifespan. Counsel must engage in these efforts early and often, ensuring that all reasonable avenues for narrowing the issues and settling the dispute are explored. A focus on effective resolution does not require abandoning valid legal positions. Rather, it involves advancing legal positions in a way that ensures the issues are addressed in a principled way that equally considers the implications for the law, government operations, and Canada's relationship with Indigenous peoples.

Counsel must work with client departments and agencies to develop problem-solving approaches that promote reconciliation.[9] These approaches should include alternative dispute resolution processes such as negotiations and mediations.[10] Where appropriate, counsel must consider whether the issues can be resolved through Indigenous legal traditions or other traditional Indigenous approaches.

Other problem-solving approaches may include a range of measures not strictly required by law. For example, further consultation with the Indigenous party may be undertaken even though there is no legal requirement to do so.[11] Where such a recommendation is made, counsel must advise the client department or agency that this measure is being proposed as a matter of policy.

Where there are obstacles to resolving all or part of the litigation, counsel must consider creative solutions with other departmental counsel and other government departments or agencies. For example, counsel should ask about existing programming and funding authorities that may provide a means of resolving the litigation and/or addressing ongoing harms.

The partial resolution and settlement of litigation must be considered and sought wherever possible with the aim of narrowing the issues and facilitating an expeditious resolution. Other approaches can include developing agreed statements of fact, limiting the scope of discovery, using written interrogatories, using alternative dispute resolution, and, where appropriate, using processes such as summary judgment, summary trial, and the trial of an issue.

Counsel must bear in mind that the Government of Canada may be engaged with Indigenous groups in other processes, such as 'comprehensive claims' negotiations, 'specific claims' negotiations, exploratory tables, or consultations regarding resource development projects. Counsel, in consultation with client departments and agencies, must consider both the impact of the litigation, and of any proposed negotiations to settle the litigation, on these other processes.

Conversely, where problem-solving approaches are employed as a means of narrowing or resolving the litigation, counsel should consider whether these approaches can reasonably occur alongside the litigation. Given how long it can take to bring some of these matters to trial, counsel should consider whether postponing or staying the litigation to pursue a potential settlement may actually frustrate the objectives of reconciliation if settlement efforts are unsuccessful.

[9] For example, see the Minister of Crown-Indigenous Relations and Northern Affairs Mandate letter that requires the Minister to "work with the Minister of Justice to ensure that both in our dispute resolution mechanisms and litigation we advance positions that are consistent with the resolution of past wrongs toward Indigenous Peoples, promote co-operation over adversarial processes, and move towards a recognition of rights approach."

[10] Where a proceeding is brought in the Federal Court, counsel should consult that court's *Practice Guidelines for Aboriginal Law Proceedings*. (http://cas-cdc-www02.cas-satj.gc.ca/fct-cf/pdf/Aboriginal%20Law%20Practice%20Guidelines%20April-2016%20(En).pdf)

[11] Principles 5 and 9 signal Canada's willingness to enter into innovative and flexible arrangements with Indigenous peoples that will ensure that the relationship accords with the aspirations, needs, and circumstances of the Indigenous-Crown relationship.

# Litigation Guideline #5: Recognizing Aboriginal rights advances reconciliation.

The *Principles* require a decisive break with the status quo. Specifically, principle 1 calls on the Government of Canada to ensure its relationships with Indigenous peoples are based on the recognition and implementation of the right to self-determination, including the inherent right of self-government. Principle 2 recognizes that reconciliation requires "hard work, changes in perspectives and actions, and compromise and good faith, by all."

The *Principles* require the Government of Canada and its officials to change the way they do business. In litigation, this means, above all, approaching issues in a way that does not begin and end with a denial of Aboriginal rights.[12]

As specified in Litigation Guideline #12 (below), this Guideline requires counsel to recognize Aboriginal rights, including Aboriginal title. In this period of transition – as a new recognition and implementation of rights framework is being developed and implemented – rights must be recognized where they can be recognized.

In some circumstances recognition may be complicated by the fact that other Indigenous groups have an overlapping or competing interest. It is preferable for Indigenous groups and Nations to resolve disputes amongst themselves. Litigation counsel should generally avoid seeking to add other Indigenous parties to the litigation and should also avoid taking positions that could undermine the ability of Indigenous groups to resolve disputes amongst themselves. Where possible and appropriate, litigation counsel should explore with clients and other parties to the litigation whether the overlapping or competing interests of Indigenous groups may be addressed through discussions between them outside the litigation and whether Canada may assist in facilitating such discussions.

The effect of recognition will often be avoiding or substantially narrowing litigation. Where Aboriginal title and rights are proposed to be denied, counsel must seek direction on the proposed position from the Assistant Deputy Attorney General.

In addition to recognizing rights, counsel must ensure that their submissions and positions do not have the direct or collateral effect of undermining or restraining those rights, including Indigenous peoples' right to self-determination.

[12] Throughout this document, references to Aboriginal rights include Treaty rights.

## Litigation Guideline #6: Positions must be thoroughly vetted and counsel should not advise client departments and agencies to pursue weak legal positions.

Counsel must make an early assessment of the likelihood of success of the Crown's substantive legal positions. Given Canada's commitment to recognize Aboriginal rights and the obligation to act honourably in all of its dealings with Indigenous peoples, counsel should advise against taking weak legal positions. In exceptional circumstances where there is a principled basis for pursuing a position that may seem likely to fail, counsel must seek direction from the Assistant Deputy Attorney General.

Counsel should make every effort to resolve differences of opinion on available arguments and the strength of legal positions through discussion. Where resolution is not possible, counsel must ensure not only that consultation is full, but that approvals are obtained from the relevant decision-making authority. This will include, in appropriate circumstances, approvals from the Assistant Deputy Attorney General or by the Regional Litigation Committees and the National Litigation Committee, as well as approvals from other government departments. The goal is always to reach a consensus on a position that best serves the government as a whole, and that is in accordance with the *Principles.*

## Litigation Guideline #7: Counsel must seek to simplify and expedite the litigation as much as possible.

Counsel must ensure that litigation is dealt with promptly. Litigation counsel should avoid unnecessary procedural motions and seek agreements on non-contentious matters. All those involved in litigation should seek to avoid delays due to internal bureaucracy. Avoiding delay can be a contributing factor to advancing justice and reconciliation.

Counsel must also consider resource imbalances that may exist between the parties. Counsel should be willing to extend deadlines on costly litigation steps, like document production.

## Litigation Guideline #8: All communication and submissions must be regarded as an important tool for pursuing reconciliation.

Written and oral submissions, including pleadings, are a form of communication between the parties, between the Attorney General and Indigenous peoples generally, between the Attorney General and the courts, and between the Attorney General and the public. Canada's submissions and pleadings must seek to advance reconciliation by applying the *Principles.*

## Litigation Guideline #9: Counsel must use respectful and clear language in their written work.

The Attorney General of Canada is expected to be a model litigant. All communications with the courts, Indigenous peoples or their counsel, the media, the public and other parties must uphold this expectation, maintaining high standards of civility and advocacy.

Similarly, all communications, pleadings, and submissions must reflect the special relationship between the Crown and Indigenous peoples. The honour of the Crown is reflected not just in the substance of the positions taken, but in how those positions are expressed.[13]

Respectful advocacy is persuasive advocacy. Counsel must ensure that language and tone are not unnecessarily pointed or dismissive.

Clear language communicates respect for Indigenous peoples and their counsel. Counsel must bear in mind that legalese may be perceived as an obstacle to communication. However, counsel must be careful that plain language does not create misunderstanding by distorting a clear legal meaning and there may be times where legal language is unavoidable.

[13] See Principle 3, *The Government of Canada recognizes that the honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples.* The overarching goal of this principle is to ensure that Indigenous peoples are treated with respect and as full partners in Confederation.

# Litigation Guideline #10: Legal terminology must be consistent with constitutional and statutory language.

In English, the term "Indigenous" is largely synonymous with the term "Aboriginal", and both refer to the First Nations (Indian[14]), Inuit, and Métis peoples of Canada. Generally, the term "Indigenous" should be used instead of "Aboriginal" or "Indian". This distinction in terminology does not exist in French, so the term "autochtone" should continue to be used.[15]

However, counsel should continue using the specific terms used in the Constitution, by Parliament, and by the legislatures relating to Indigenous peoples. The preference for using the term "Indigenous" does not require its use where the context requires a different term, as the following examples illustrate:

- "Aboriginal" is a defined term in section 35 of the *Constitution Act, 1982.* When counsel refer to groups who are or may be holders of section 35 rights, or refer to section 35 rights themselves, "Aboriginal" and not "Indigenous" should be used.
- The term "Indian" appears in subsection 91(24) of the *Constitution Act, 1867* and legislation flowing from that head of power, such as the *Indian Act*, R.S.C. 1985, c I-5.
- "First Nation" is the legally accurate term when referring to the *First Nations Land Management Act*, S.C. 1999, c. 24.

This is not to say that counsel should simply use the term "Indigenous" in their dealings with particular groups. Counsel should use the specific name of the Indigenous party with whom they are dealing.

In choosing the appropriate terminology, counsel must be sensitive to the fact that terminology that may be acceptable to some might be offensive to others. This is an area that continues to evolve, and counsel should consult the Aboriginal Law Centre where they require advice about terminology.

[14] Section 35 of the *Constitution Act, 1982* refers to the "Indian, Inuit, and Métis peoples of Canada".

[15] The change in terminology has been influenced by use of the term "Indigenous" by Indigenous peoples themselves, and use of that term in international instruments.

## Litigation Guideline #11: Overviews must be used to concisely state Canada's position and narrow the issues.

An overview of Canada's position, whether in pleadings or in factums, is an important communicative tool. The overview must be used to plainly explain Canada's position, what is in issue and what is not in issue. As prescribed by the supporting commentary for principle 2, acknowledging wrongs where appropriate and focusing on what is common between the parties may help facilitate reconciliation and narrow the issues.

## Litigation Guideline #12: To narrow the scope of litigation, admissions ought to be made, where possible.

Statements of fact must reflect a careful approach to admissions. Where historical harms were done, in the appropriate case, the narrative should acknowledge those harms and reflect an awareness that things would be done differently today. Where such acknowledgements are made, counsel must seek approval from the client and, where appropriate, the Assistant Deputy Attorney General.[16]

In pleadings, facts that are known to support the statements in the Indigenous party's pleading and that may advance reconciliation should be explicitly stated and not just admitted where appropriate. For example, instead of only listing those paragraphs with such facts in a generic statement of admission, counsel should affirmatively plead those facts:

> **In response to paragraph x of the statement of claim, since at least the date of contact, the plaintiffs and their ancestors have lived at various sites in the vicinity of the identified area.**

[16] The Assistant Deputy Attorney General must keep track of the admissions made on litigation files and report to the Attorney General on their use.

Counsel should make admissions of fact and identify areas of agreement on the law relevant to establishing Aboriginal rights and title or other issues in the litigation wherever possible. Such admissions narrow the issues in dispute, and signal Canada's respect for and recognition of Aboriginal rights, as required by principle 2.[17]

For example, where the scope, but not the existence, of Aboriginal title or rights is at issue, Canada will not simply deny the title or rights. This may include litigation where the existence of Aboriginal title or rights is not disputed, but the area is unknown or may overlap with the territory of other Indigenous groups that are not parties to the litigation. In such cases, counsel should make meaningful admissions relevant to the establishment of title and recognition of rights, while requiring the Indigenous party to prove the scope of title and rights.

## Litigation Guideline #13: Denials must be reviewed throughout the litigation process.

Canada's pleadings must not consist simply of a broad denial of the Indigenous party's statements in its pleadings, demanding proof of each and every statement. As indicated in Litigation Guideline #12, this is particularly so for statements of Aboriginal title or Aboriginal rights, where the existence of the title or rights may not be in doubt, and only the scope of the title or rights is in issue.[18]

Denials made at early stages of litigation, when the facts may be unknown and when it would be imprudent to admit too much, must be withdrawn if and when it becomes clear that such denials are inconsistent with the available evidence. Counsel should consider whether reconciliation and efficiency may be served by seeking additional time to file a pleading. This may allow for information to be gathered to make certain admissions that would otherwise be denied at this stage.

[17] See Principle 2, *The Government of Canada recognizes that reconciliation is a fundamental purpose of section 35 of the Constitution Act, 1982*. This principle explains that reconciliation requires recognition of rights and that Indigenous peoples and the Crown work together to implement Aboriginal rights.

[18] See Principle 2, *The Government of Canada recognizes that reconciliation is a fundamental purpose of section 35 of the Constitution Act, 1982.*

# Litigation Guideline #14: Limitations and equitable defences should be pleaded only where there is a principled basis and evidence to support the defence.

## Extinguishment, surrender, abandonment

The *Principles* discourage certain long-standing federal positions, including relying on defences such as extinguishment, surrender, and abandonment.[19]

Generally, these defences should be pleaded only where there is a principled basis and evidence to support the defence.[20] Such defences must not be pleaded simply in the hope that through discoveries or investigation some basis for the defence may be found.

When determining whether such circumstances exist, counsel must consider whether the defence would be consistent with the honour of the Crown. Reconciliation is generally inhibited by pleading these defences.

When considering pleading these defences, counsel must seek approval from the Assistant Deputy Attorney General.

[19] Principles 1, 2, 4, and 5 recognize the ongoing presence and inherent rights of Indigenous peoples as a defining feature of Canada.

[20] The Assistant Deputy Attorney General shall track the situations in which these defences are pleaded and report to the Attorney General on their use.

## Limitations and laches

In cases where litigation is long delayed, equitable defences such as laches and acquiescence are preferable to limitation defences. However, these defences should also be pleaded only where there is a principled basis and evidence to support the defence,[21] and where the Assistant Deputy Attorney General's approval has been obtained.[22]

> Litigation Guideline #15: A large and liberal approach should be taken to the question of who is the proper rights holder.

Canada respects the right of Indigenous peoples and nations to define themselves and counsel's pleadings and other submissions must respect the proper rights-bearing collective. Where rights and title have been asserted on behalf of larger Indigenous entities – nations or linguistic groups, for example – and there are no conflicting interests, Canada in the proper case, or where supported by the available evidence, will not object to the entitlement of those groups to bring the litigation. This approach is consistent with principle 1, which affirms the Government of Canada's renewed nation-to-nation approach.[23] In Aboriginal rights and title cases, Canada will not usually plead that smaller Indigenous entities – clans or extended family groups, for example – are the proper holders of Aboriginal rights and title.[24]

Where Indigenous groups have overlapping or competing interests, it is preferable for those groups to resolve these disputes amongst themselves as described in Litigation Guideline #5.

[21] There are certain limitation periods that cannot be waived, such as where a statute precludes waiver.

[22] This Guideline goes beyond the TRC's Call to Action #26, which discourages reliance on limitation defences specifically in legal actions regarding historical abuse brought by Indigenous peoples. Counsel should also be aware of the research and perspectives underpinning this Call to Action.

[23] See also principles 4 and 6. These two principles affirm Indigenous peoples' right to participate in decision-making matters that affect their rights through their own representative institutions.

[24] Counsel must also be conscious of the fact that the existence of competing claims and multiple potential rights holders can be a divisive issue among Indigenous communities. Regardless of who may be the proper rights holder in law, counsel must be conscious of the potential effect on reconciliation for all groups.

## Litigation Guideline #16: Where litigation involves Federal and Provincial jurisdiction, counsel should seek to ensure that the litigation focuses as much as possible on the substance of the complaint.

In assessing litigation, counsel should carefully consider the respective responsibilities of each order of government. While seeking to add another government as a party or addressing that government or party's responsibility may be appropriate, counsel should not add other parties to a litigation proceeding unless there is a principled and evidentiary basis for doing so.

Counsel should remain cognizant of the fact that too often positions taken by government have left Indigenous peoples in "a jurisdictional wasteland with significant and obvious disadvantaging consequences."[25]

## Litigation Guideline #17: Oral history evidence should be a matter of weight, not admissibility.

Counsel should treat oral history evidence as a matter of weight, not admissibility. Similarly, counsel must take a respectful and cautious approach when testing oral history evidence through cross-examination. To ensure appropriate treatment of this evidence, counsel should consider developing an oral history protocol with opposing counsel.[26]

[25] *Daniels v. Canada* (*Indian Affairs and Northern Development)*, 2016 SCC 12 at para. 14.

[26] For additional guidance, counsel should consult the Federal Court's *Practice Guidelines for Aboriginal Proceedings.* (http://cas-cdc-www02.cas-satj.gc.ca/fct-cf/pdf/Aboriginal%20Law%20Practice%20Guidelines%20April-2016%20(En).pdf)

## Litigation Guideline #18: Decisions on judicial reviews and appeals should be subject to full consultation within government and be limited to important questions.

The Government of Canada will not judicially review or appeal every decision with which it disagrees. Decisions to challenge a judgment by judicial review or appeal should be limited to only important questions. All recommendations to judicially review, appeal or seek leave to appeal must be the subject of full consultation within Government and approved by the Attorney General where appropriate.

## Litigation Guideline #19: Intervention should be used to pursue important questions of principle.

The *Principles* guide Canada's approach to interventions. The Attorney General may seek to intervene in cases that raise important issues, particularly ones that may affect reconciliation. In deciding whether an intervention is warranted, counsel must consider whether the Attorney General's intervention can assist the court by providing a legal or constitutional perspective that may not be addressed by the parties to the dispute. All interventions must be approved by the Attorney General.

# Litigation Guideline #20: All files must be reviewed to determine what lessons can be learned about how the *Principles* can best be applied in litigation.

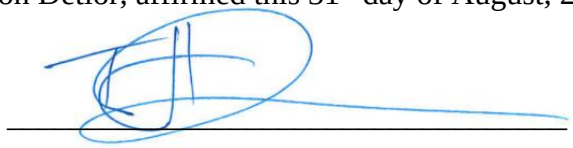
At the conclusion of any litigation file involving Indigenous parties or issues, the litigation team and client department or agency must debrief on lessons learned and ways of preventing similar litigation from re-occurring. This must include a discussion of the *Principles* both in how they were applied throughout the litigation and how they can be applied as the lessons learned are implemented. Counsel and the client departments and agencies should discuss the impact of the litigation on the relationship with the Indigenous groups involved in the litigation. Where a litigation file is ongoing, a similar discussion should occur, at reasonable intervals. The Directive itself should also be re-considered at regular intervals, to accord with evolving practice and other government initiatives towards reconciliation.

Please visit the justice.gc.ca to read the Principles Respecting the Government of Canada's Relationship with Indigenous peoples.

# TAB B

This is Exhibit “B” to the affidavit of

Aaron Detlor, affirmed this 31st day of August, 2022



Commissioner for Taking Affidavits

Haudenosaunee Development Institute
Our Land, Our Law, Our People, Our Future

November 19, 2021

The Honourable David Lametti
Minister of Justice and Attorney General of Canada
Department of Justice
284 Wellington Street
Ottawa, ON  K1A 0H8

The Honourable Doug Downey
Attorney General of Ontario
Ministry of the Attorney General
720 Bay Street, 11th Floor
Toronto, ON  M7A 2S9

Dear Ministers Lametti and Downey:

**RE: Six Nations of the Grand River Band of Indians v Attorney General of Canada et al, Toronto Court File No. CV-18-594281**

We are counsel to the Haudenosaunee Development Institute ("HDI") which acts with delegated authority from the Haudenosaunee Confederacy Chiefs Council (the "HCCC"). The HCCC has directed HDI to articulate HCCC's position with respect to the above noted Action which is currently before the Ontario Superior Court (the "Action") and to protect Haudenosaunee rights and interests. The HCCC's position is as follows:

1. The HCCC is one of the two parties to the Haldimand Proclamation of 1784, the treaty at issue in the Action;
2. The HCCC is the collective rights holder for the Haudenosaunee, and the Haudenosaunee (or Six Nations) Trust (the "Trust") beneficiary;
3. The Plaintiff to the Action, the Six Nations of the Grand River Band of Indians, is not the proper party to advance the claims in the Amended Statement of Claim (the "Claim") dated May 7, 2020;
4. The Action cannot proceed to a decision on the merits or a settlement without the consent of the HCCC;
5. The Crown must fulfill its treaty and fiduciary obligations to the HCCC, including its obligations as the trustee of the Trust; and
6. The matters at issue in the Action can only be resolved with the Crown's return to the negotiating table with the HCCC.

Each of these points is elaborated upon below.

## 1. HCCC is Party to the Treaty

***Party to the Treaty at Issue in the Action***. The Claim pleads breach of treaty obligations and particularizes the Haldimand Proclamation of 1784 as the treaty at issue (see e.g. paras 15, 17, 82(d) of the Claim). The HCCC is party to the Haldimand Proclamation with the Crown as the HCCC was at the time, as it continues to be, the governing body of the Haudenosaunee.

In recognition of the Haudenosaunee's allied assistance in the American War of Independence and in recognition of encroachments upon the Haudenosaunee's 1701 treaty lands, the Haldimand Proclamation of 1784 confirmed that the lands prescribed therein would be held, managed, and used by the Haudenosaunee for the exclusive benefit of the Haudenosaunee. These Proclamations confirmed the area of Haudenosaunee exclusivity (or "the prescribed lands") as:

> "six miles deep from each side of the River beginning at Lake Erie and extending in proportion to the Head of said River, which Them and Their Posterity are to enjoy forever."

There are other treaties which govern the HCCC-Crown relationship and establish Haudenosaunee rights and interests that are not pleaded in the Claim. The HCCC's longstanding treaty relations with the Crown include, for example, the Two Row Wampum and Silver Covenant Chain of Friendship, and the Nanfan Treaty of 1701. With respect to the lands prescribed in the Haldimand Proclamation, the HCCC has from time immemorial held title to those lands. The Haldimand Proclamation merely sets out the Haudenosaunee right to possess and occupy the lands in a manner cognizable to the Crown.

## 2. *Collective Rights Holder & Trust Beneficiary*.

The HCCC is the collective rights holder on behalf of the Haudenosaunee people. The Chiefs that comprise the HCCC, referred to at times by Crown actors and others as the "Hereditary Chiefs", are the descendants of the collective rights holders and empowered by the Haudenosaunee to advance the collective treaty rights and interests of the Haudenosaunee made up of the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora people. The HCCC, referred to historically as the State of the Six Nations of the Iroquois, has been and continues to be the governing entity of the Haudenosaunee. The HCCC continues to have a sovereign status notwithstanding efforts on the part of Canada and Ontario to undermine or encroach upon that status.

The HCCC as the collective rights holder is the proper beneficiary of the Trust that was imposed on any monies from dispositions of the prescribed lands; accordingly, the Crown

owes important duties to the HCCC as trustee of the Trust in accordance with the terms of the Trust and Treaty promises.

The HCCC has raised the trust relationship in past communications and documents, referring to the collective beneficial Haudenosaunee rights. For example, in the Redman's Appeal for Justice dated August 6, 1923 where Deskaheh, Sole Deputy and Speak of the HCCC Council states (emph. added):[1]

> … the Imperial Government [Great Britain] of its sole accord handed over to the Dominion Government [Canada] such funds, but for administration according to the terms of that trust and promise, **and the fund is now in the actual possession of the Dominion Government, the beneficial rights remaining as before in the Six Nations**. …

### 3. Plaintiff Lacks Authority to Advance Haudenosaunee Rights and Interests

The Plaintiff to the Action, the Six Nations of the Grand River Band of Indians, also referred to as the Six Nations Band Administration ("SNBA") is not a proper party to the Action. The SNBA lacks authority to advance the Claim to resolution via litigation or settlement.

***Colonial Imposition of the Six Nations Indian Act Council***. The SNBA exists by way of the *Indian Act* and Crown Orders in Council, P.C. 1629, dated September 17, 1924, later replaced by P.C. 6015 to the same effect dated November 12, 1951 (the "Orders in Council"). The Crown's Orders in Council purported to unilaterally impose the *Indian Act's* band council and electoral scheme on the Haudenosaunee people against their will, almost 150 years after the Crown treated with the HCCC in 1784 regarding the prescribed lands at issue in the Action.

As of October 1924, the SNBA existed as an illegitimate creature of colonial statute pursuant to the *Indian Act* that is wholly separate and apart from the HCCC and Haudenosaunee systems of governance. Since the Crown's creation of the SNBA and with Crown support and funding, the SNBA has attempted to assert itself as a governing body of the Haudenosaunee, despite not being recognized by the Haudenosaunee people as the legitimate government. The HCCC has continued to exist and govern with the support of the Haudenosaunee people as it has from time immemorial. The Crown's interference with Haudenosaunee governance and politics through the forced imposition of the SNBA was contrary to Treaty promises with the Haudenosaunee, and forms part

[1] The Redman's Appeal for Justice to the League of Nations, Submission from Deskaheh to the Hon. Sir James Eric Drummond (August 6, 1923), p 3.

of the Crown's colonial legacy of oppression and broken Treaty promises with the Haudenosaunee.

***Haudenosaunee People and Predecessors Not a "Band".*** The SNBA in its Claim pleads at paragraph 2 that the "[t]he Plaintiff, the Six Nations, is a band within the meaning of the Indian Act…" and that "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"'. The Six Nations – that is the Haudenosaunee people today and their predecessors – are not a "band" within the meaning of the *Indian Act*. The HCCC and Haudenosaunee people do not recognize Canada's imposed *Indian Act* scheme and, contrary to the Claim as pleaded, do not accept that they are a "band" within the meaning of the *Indian Act*. The Haudenosaunee people are the People of the Longhouse. They are comprised Nations and maintain a Clan system which adheres to Haudenosaunee law.

***SNBA Lacks Requisite Authority*.** The SNBA lacks the requisite authority to advance the Claim; it is not the proper collective rights holder under Crown or Haudenosaunee law to litigate or settle the Action.

In applying Crown law to standing issues regarding the proper party to advance collective rights claims, Canadian courts have recognized that defining the proper collective rights holder of an Indigenous Nation is a matter principally determined by the Indigenous people who make up the Nation taking into account Indigenous perspectives and histories of nationhood.[2] To be the proper collective rights holder and thus the proper party to advance a collective rights claim, the collective must empower the collective rights holder with the authority to act. Such authority is in part informed by process and representation, such as the collective's participation in an electoral process and the collective's representation in the council or other entity which is the collective rights holder.

The HCCC and the vast majority of Haudenosaunee people have never accepted the SNBA as the governing body of the Haudenosaunee people. Nor have they empowered the SNBA through participation in the *Indian Act* electoral process with authority to govern and make decisions with respect to collective Haudenosaunee rights and interests. In other words, the vast majority of Haudenosaunee people consider the SNBA to be an illegitimate arm of the colonial state that was unlawfully imposed on the Haudenosaunee and is propped up by the Crown.

[2] See e.g. *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700, paras 437-471, rev'd on other grounds 2012 BCCA 285, paras 51-57, 150-151, 148-149156, rev'd on other grounds 2014 SCC 44, para 19; and *Kwicksutaineuk/Ah-Kwa-Mish First Nation v Canada (Attorney General),* 2012 BCCA 193, paras 77-78.

The trial judge's decision in *Isaac et al v Davey et al* speaks to the collective's lack of participation in the *Indian Act* electoral process, noting that the SNBA's authority to represent the Haudenosaunee people is "seriously in doubt":[3]

> It is claimed by the plaintiffs [the SNBA] that even if they have no statutory rights they do represent all other members of the Six Nations except the defendants [members of the Confederacy]. **Some showing of the right to such a claim must be made if it is to be sustainable. In the present instance not only is there no showing of such a right, but such evidence as there is indicates conclusively not only that the system imposed by the Indian Act is not supported by more than a small fraction of the population [of Haudenosaunee people] of the lands in question, but that at least certain of the plaintiffs were elected by a very small fraction of those eligible.** Mrs. Mary Bloomfield, the secretary to the Six Nations Council [SNBA] for about the last five years, produced exs. 16 and 17, photostatic copies of the official reports of the band elections in 1969 and 1971. In 1969, out of some 10,000 band members of whom about 5,000 are in actual residence, a total of 547 votes were cast. Of these 315 were cast for Richard Isaac as chief councillor. Acclamations apparently occurred in all other districts but Nos. 5 and 6. In those districts totals of 225 and 156 votes were cast respectively and the winning candidates obtained in district No. 5, 70 and 62 votes, and in district No. 6, 42 and 41 votes. **Their representative character is therefore seriously in doubt.**

The lack of Haudenosaunee people's support for the SNBA and involvement in the *Indian Act* electoral process among other SNBA band matters continues to this day. The current SNBA does not have the support of a majority of Haudenosaunee people and is not representative of all the Nations that make up the Haudenosaunee people. For example, only 1720 people (approximately 6%) of the total voting population of over 30,000 people voted in the last SNBA election in November of 2019.

Crown law on the proper party to advance collective rights held by Indigenous peoples has significantly advanced since *Isaac et al v Daveys et al* was decided at the trial level and then overturned on appeal. Under the Crown's own law today, the SNBA's authority to represent the Haudenosaunee people as the collective rights holder remains highly questionable at best.[4] The HCCC maintains that the SNBA is clearly not the proper party vested with the requisite authority to advance the Claim.

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[3] *Isaac et al v Davey et al,*1973 CanLII 814 (ONSC), rev'd 1974 CanLII 40 (ONCA), aff'd 1977 CanLII 21 (SCC).

[4] See e.g. *Hydro One Networks Inc v The Haudenosaunee Confederacy Chiefs*, 2019 ONSC 4616, para 20.

**4. Action Cannot Proceed to A Decision on the Merits or Settlement that Affects Haudenosaunee Treaty Rights and Interests**

There are at least three reasons why the Action cannot proceed: lack of standing; impacts on Haudenosaunee rights and interests; and differing views and characterizations of the Treaty promises and history of Crown action at issue in the Claim.

***Standing.*** Further to the above, the SNBA does not have standing to pursue the Action as it is not a proper party. The HCCC is the Crown's treaty partner, not the SNBA. The HCCC Chiefs are the descendants and heirs of those who entered into treaties with the Crown agents in pre-confederation times. The Crown cannot in good faith litigate or settle the Action with the SNBA when the HCCC is the proper treaty partner and Haudenosaunee collective rights holder, and any decision on the merits or settlement would affect Haudenosaunee rights and interests.

***Impact on Haudenosaunee Rights and Interests***. The Claim as pleaded encompasses the Crown's breach of its fiduciary duties and Treaty promises, including the Crown's failure to account for Trust monies and other assets as trustee of the Trust. The content of the treaty promises made to the Haudenosaunee – encompassing the treaty rights, and the Crown's various breaches of those rights and other Crown obligations owing to the Haudenosaunee as trustee of the Trust and pursuant to the Crown's fiduciary duty – are at issue in the Action. A settlement or any decision on the merits of the Claim would thus impact on such Haudenosaunee treaty rights.

The Crown cannot proceed to litigate Haudenosaunee rights and/or enter a settlement with respect to those rights without engaging the HCCC. To do so would constitute dishonourable conduct and bad faith dealings on the part of the Crown, particularly when the Crown engages with the HCCC with respect to Haudenosaunee rights in other contexts, including through its delegate HDI.

The HCCC is not in receipt of any communications from the Crown alerting the HCCC to this Action, nor requesting the HCCC's position on the Claim. The HCCC considers the Crown's failure to communicate with the HCCC regarding the Claim to be but another example of the Crown's dishonourable conduct in its dealings with the Haudenosaunee.

***Characterization of Treaty Promises and History***. The HCCC's position on the treaty promises and their breaches, including the history of land dispositions in breach of treaty promises, differs in many respects from what is pleaded in the Claim. The Haudenosaunee agree with only a very few of the descriptions of the historical acts of land misappropriation set out in the Claim.

The resolution of the Action would not resolve all issues with respect to the Crown's breaches of Haudenosaunee treaty rights and its fiduciary duties as trustee of the Trust. The Crown could not honourably assert that a resolution of the Claim would absolve the Crown from its treaty promises made to the HCCC or determine Haudenosaunee rights and interests as advanced by the HCCC.

The Crown cannot in good faith and with any certainty litigate or settle the Claim when the Crown has real or constructive knowledge of the following:

(i) The HCCC and the vast majority of Haudenosaunee people do not recognize the Plaintiff as a proper party with authority to advance the issues in the Claim and bind the Haudenosaunee people;

(ii) Any decision on the merits or settlement would improperly determine and/or affect Haudenosaunee treaty rights in the absence of the HCCC, the proper collective rights holder; and

(iii) The HCCC has differing views on the extent of the treaty rights and Crown breaches at issue in the Claim.

For the Crown to proceed with the Action in light of the above is untenable.

**5. Crown Obligations as Treaty Partner and Trustee**

While the Action cannot proceed, the Crown's breaches of treaty promises and its fiduciary duties at issue in the Action are live issues in need of resolution.

The Haldimand Proclamation recognized exclusive Haudenosaunee use, occupation and possession to over 950,000 acres of land with that land base now diminished to approximately 45,000 acres. Since 1784, Haudenosaunee lands have been chipped away contrary to the promises of the Crown to the HCCC. The HCCC does not accept the taking of Haudenosaunee land and the Crown's blatant abuse of the Trust and failure to fulfill its treaty promises and fiduciary duties owing to the Haudenosaunee. These matters must be addressed on a Nation-to-Nation basis at the negotiating table outside the colonial litigation context which is governed by Crown laws, procedures, and judicial appointments.

The HCCC understands that the treaty based relationship with the Crown is governed by the extension of the Haudenosaunee law of skennen, kariwiio and kasastensera.

While we rely upon fiduciary and trust law to articulate the legal obligations that arise from a treaty based relationship, it is without prejudice to HCCC's position that these exist as a subset of the legal principles to which the parties to a treaty are bound and which necessarily includes Haudenosaunee law.

With that said we understand that the Haldimand Treaty and the Crown's actions with respect to Haudenosaunee lands and Trust monies have created what Canadian law characterizes as a fiduciary and trust relationship. The Crown has held and still holds funds for the benefit of the Haudenosaunee.

The Crown's law of trusts developed in the courts of Equity to address situations where one party holds funds or other property for the benefit of another and has duties in equity

that go beyond contracts under law. At the same time the operation of section 35 of the *Constitution Act, 1982* provides that the Crown owes a strong fiduciary duty to the Haudenosaunee as the Crown has exercised discretionary control over Haudenosaunee land and trust monies.[5]

As a fiduciary and trustee of assets belonging to the Haudenosaunee, the Crown has clear obligations that must be addressed. The HCCC, as the beneficiary of the Trust expects these obligations to be met in full.

The Crown as trustee is obliged to, *inter alia*:

- Act faithfully and loyally, which involves avoiding conflict of interest, and being honest and transparent with the beneficiary, the HCCC; and

- Act with reasonable skill and competency, which involves using the reasonable skill needed to invest or make other decisions regarding management of the Trust assets on behalf of the beneficiary, the HCCC.

It is clear that the Crown has breached its fiduciary duties and failed in its duties as trustee to the Haudenosaunee. The history of the Crown-HCCC relationship is littered with examples of the Crown putting its interests ahead of the Haudenosaunee, acting with a lack of honesty and transparency, and taking unreasonable risks with the Trust monies and lands of the Haudenosaunee. The Crown has failed thus far to inform the HCCC of its actions as Trustee even though the duty to account to the beneficiary is key to the obligation to act with transparency. In determining the equitable compensation owing to the Haudenosaunee for the Crown's breach of its fiduciary duty, the controlling question is what the Crown ought to have done as a fiduciary.[6]

The HCCC treaty relationship requires that the Crown adhere to its duties as the trustee of the funds and property that flowed from the purported dispositions of lands which were to be transferred to and for the exclusive benefit of the Haudenosaunee. The HCCC raises this issue now in connection with the Crown's obligations as a trustee over the funds it holds for the Haudenosaunee. There are many other serious concerns regarding the Crown's disposition of Haudenosaunee lands that will need to be addressed separately.

## 6. Steps Towards a Resolution: Crown Return to the Negotiations Table

The HCCC calls on Canada and Ontario to return to the negotiations table.

The HCCC requests a meeting to initiate discussions on the process for the Crown to return to the negotiations table with the HCCC and to disengage from the SNBA litigation.

[5] *Southwind v Canada*, 2021 SCC 28, paras 60-61, 64 [*Southwind*].
[6] *Southwind*, para 11.

The negotiations table is the proper forum to discuss and resolve issues arising in the Crown-HCCC treaty relationship and how the Crown will account for Trust assets and discharge its fiduciary duties moving forward in managing the Trust assets. The first step towards a proper trust relationship is for the Crown to account for all monies resulting from dispositions of Haudenosaunee lands and their investment in the Trust. At the very least, the Crown must account for the more than 900,000 acres which it has disposed of as a trustee and how the monies related to those dispositions have been held and invested for the benefit of the Haudenosaunee and where there have been failures to meet the fiduciary standards, specifically conflict of interest and the use of reasonable skill in investment, which are inherent in its role.

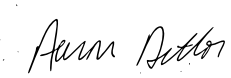
At the same time, the Crown as trustee must examine its processes around investment and reporting on the Trust monies it currently holds to ensure the way forward is clear and consistent with its fiduciary duties to the Haudenosaunee.

Finally, the Crown as Trustee is well aware that the HCCC expects the Crown to address the failures of the past and compensate the Haudenosaunee for the Crown's breach of its fiduciary duties. As a trustee, the Crown must account for any losses to the Trust that flowed from its breaches of fiduciary duties and account for any unauthorized profits it earned through the use of its position of trustee over the Trust monies (all of which were improper).

The HCCC expects that the negotiations table will be the forum where the Crown, *inter alia*, will provide an accounting of Trust assets, engage in discussion with respect to Haudenosaunee land and treaty rights, and settle for past wrongs.

We look forward to your response to the above. Should you have any questions or concerns please do not hesitate to contact us.

Yours truly



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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 BRANTFORD

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SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS
Plaintiff

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PROCEEDING COMMENCED AT
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**SECOND SUPPLEMENTARY MOTION RECORD OF THE HAUDENOSAUNEE DEVELOPMENT INSTITUTE**
(*Motion for Joinder/Intervention*)

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