

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

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N :

SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS

Plaintiff

- and -

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

Defendants

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

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

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

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Act, 1867*, specifically including, but not limited to, ss. 109, 110, 111, 112, 113, 114, 115, 116, 118 (~~repealed~~ as amended by the *Constitution Act, 1907*) and 120 contained therein, and s. 142 contained within Part IX of the same said Act.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COUNTER CROSSCLAIM

15. Canada claims against the Defendant Ontario:
- (1) an order that any and all relief and costs to which this Court may find the plaintiff entitled in the action is relief and costs against Ontario only or, in the alternative, an order directing Ontario to indemnify Canada in the amount of any relief and costs for which this Court finds Canada liable to the plaintiff; and
 - (2) costs.
16. Canada repeats and relies upon, in this counter crossclaim, the contents of the Amended Statement of Defence of Canada in the main action and in Canada's defence to the crossclaim of Ontario, above.
17. Any liability to the plaintiff in the action, which is denied, is therefore a liability of the defendant Ontario and not a liability of the defendant Canada.
18. Ontario is therefore liable to Canada for all or any part of the plaintiff's claim for which the court may find Canada liable. Canada pleads and relies upon Rule 28.01-27.10 of the *Rules of Civil Procedure*, the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. c-50, s. 27, as am. S.C. 1993, c. 40, ss. 24, 28 and 31, the *Proceedings Against the Crown Act*, R.S.O. 1990, c.

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

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

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HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Plaintiff

Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings commenced at Toronto
(transferred from Brantford)

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

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

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