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

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

B E T W E E N:

SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS

Plaintiff

- and -

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

Defendants

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

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

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

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

***Indian Provisions of the Royal Proclamation of 1763***

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

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

***Haldimand Proclamation***

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

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

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

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

***Blocks 5 and 6 of the Haldimand Proclamation Lands***

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

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

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

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

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

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

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

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

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

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

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

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

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

***Fiduciary Duty of the Crown***

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

***The Grand River Navigation Company***

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

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

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

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

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

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

***Welland Canal Flooding***

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

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

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

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

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

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

***Accounting***

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

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

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

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

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

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

***Taking of Six Nations Lands for Public Purposes***

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

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

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

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

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

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

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

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

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

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

Proceeding commenced at Toronto

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

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