

Court File No. CV-18-594281-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS

Plaintiff

- and -

**THE ATTORNEY GENERAL OF CANADA and
HIS MAJESTY THE KING IN RIGHT OF ONTARIO**

Defendants

**FACTUM OF THE MOVING PARTY
MISSISSAUGAS OF THE CREDIT FIRST NATION
(pursuant to Rules 13.01 and 37 of the *Rules of Civil Procedure*,
RRO 1990, Reg 194, returnable May 12, 2023)**

April 10, 2023

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PART I OVERVIEW

1. This action—both the pleadings of every one of the parties and several of the expert reports served by Six Nations of the Grand River Band of Indians (“Six Nations”)—directly implicates the history, rights, and treaties of the Mississaugas of the Credit First Nation (“MCFN”). Moreover, the story of MCFN history—and of MCFN’s traditional territory—that is advanced by Six Nations and its experts fundamentally deviates from history as MCFN understands it. Profound prejudice would be suffered by MCFN if the narrative advanced by Six Nations and its experts were to be adopted by this Court without MCFN ever being afforded an opportunity to tell its own story, in its own words, from its own perspective.

2. Accordingly, MCFN seeks leave to intervene in this action as an added defendant. MCFN’s intention is to participate in the fact-finding process to provide evidence on MCFN’s history, its rights, and its interests. MCFN does not seek to litigate its own claims against the Crown and—if leave to intervene is granted—will not advance any counter or cross claims. Rather, MCFN seeks to intervene as a steward of its history and as the guardian of its people’s future.

3. MCFN supports Six Nations’ decades-long effort to hold the Crown accountable for its abuses relating to the mismanagement of Six Nations’ lands. But it cannot sit on the sidelines while Six Nations, The Attorney General of Canada (“Canada”), and His Majesty the King in Right of Ontario (“Ontario”) litigate MCFN history and rights before this Court. MCFN seeks a seat at the table.

PART II FACTS

4. MCFN is an Indigenous community of Anishinaabe people and one of the “aboriginal peoples of Canada” under section 35 of the *Constitution Act, 1982* (“Section 35”).¹ MCFN’s traditional and treaty territory extends from the Rouge River Valley in the east, across to the headwaters of the Thames River, down to Long Point on Lake Erie and back along the shores of Lake Erie, the Niagara River and Lake Ontario to the Rouge River (“MCFN Territory”).² MCFN Territory encompasses Six Nations’ reserve and the “Haldimand Tract”—the lands that are the subject of this action.

5. MCFN possesses Aboriginal and treaty rights throughout MCFN Territory. These include governance and stewardship rights, which imbue MCFN with the authority and responsibility to care for MCFN Territory for future generations, and harvesting—including hunting and fishing—and economic rights, which entitle MCFN to sustain its people from these lands and to share in wealth generated within MCFN Territory. MCFN also holds Aboriginal title, including to lands within the Rouge River Valley, as well as to all water, land under water, and floodplains within MCFN Territory, including the Grand River and its riverbed.³ Prior to settlement by Europeans, MCFN exclusively occupied and controlled MCFN Territory, including the Grand River Valley and the lands that were subsequently granted to Six Nations by the British

¹ Affidavit of Chief R. Stacey Laforme, affirmed December 2, 2022, at para 1 (“Chief Laforme Affidavit”) [Motion Record of Mississaugas of the Credit First Nation, dated March 2, 2023 (“MCFN MR”), Tab 2 at 21]; *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, [s 35](#).

² Chief Laforme Affidavit at para 4 [MCFN MR, Tab 2 at 22].

³ Chief Laforme Affidavit at paras 27–31 [MCFN MR, Tab 2 at 30–31].

Crown through the Haldimand Proclamation. As MCFN Chief Laforme testified, MCFN is “the sole Indigenous people with treaties within and respecting” these lands.⁴

A. The history, rights, and interests of MCFN are central to this action

i) Six Nations asserts its traditional and treaty territory overlay MCFN Territory

6. Since time immemorial, MCFN⁵ and other Anishinaabeg nations have lived upon and occupied lands and waters in what is now Ontario.⁶ MCFN’s territory historically included lands north and west of Lake Ontario as well as lands along Georgian Bay and the north shore of Lake Huron.⁷ Canada and Ontario’s pleadings endorse this understanding of MCFN and Anishinaabeg history and both governments rely on it in their defence of this action.⁸ Canada pleads that “[f]rom at least the early 1700s the lands south of the [Grand River] headwaters, down to Lake Erie, were occupied by the Anishnaabeg (Mississauga),”⁹ while Ontario pleads that “[i]n 1763 the lands in question were occupied and used by the Mississauga Indians.”¹⁰

⁴ Chief Laforme Affidavit at para 18 [MCFN MR, Tab 2 at 27].

⁵ In this factum, MCFN and its predecessors are together referred to as “MCFN.”

⁶ Chief Laforme Affidavit at para 19 [MCFN MR, Tab 2 at 28].

⁷ Chief Laforme Affidavit at para 19 [MCFN MR, Tab 2 at 28].

⁸ Fresh as Amended Statement of Defence of the Attorney General of Canada, dated August 31, 2020, at paras 12, 75 (“Canada SOD”); Amended Statement of Defence and Crossclaim of the Defendant Her Majesty the Queen In Right of Ontario, amended August 31, 2020, at paras 10, 13–15 (“Ontario SOD”).

⁹ Canada SOD at para 12.

¹⁰ Ontario SOD at para 10.

7. In the 1600s, the Haudenosaunee—one of whose successors is Six Nations—attempted to take by force the territory of MCFN and other Anishinaabeg nations in what is now Ontario.¹¹ At the time of the invasion, Haudenosaunee territory was located south of Lake Ontario and east of the Niagara River in what is now the United States.¹²

8. In response to this threat from the south, MCFN left settlements on Lake Huron to repel the Haudenosaunee invaders in a protracted conflict known as the Beaver Wars.¹³ MCFN fought—alongside other Anishinaabeg nations—and defeated the Haudenosaunee in the battlefield, driving them back to what is now the United States.¹⁴ In their Statements of Defence, Canada and Ontario plead this history, stating “Six Nations may have intermittently occupied some of the lands that are the subject of this action in the 1600s ... [but] were driven out of the area in the latter part of that century by the Anishinaabeg”¹⁵ and “the only presence of the Six Nations or their predecessors in what is now Ontario ... was military incursion and other conflict with the Indian inhabitants from time to time, especially from about 1640 to about 1700.”¹⁶

9. In 1700, MCFN and other Anishinaabeg nations met with the Haudenosaunee to negotiate an agreement following the Haudenosaunee’s defeat in the Beaver Wars.¹⁷

¹¹ Chief Laforme Affidavit at para 20 [MCFN MR, Tab 2 at 28].

¹² Chief Laforme Affidavit at para 20 [MCFN MR, Tab 2 at 28].

¹³ Chief Laforme Affidavit at para 21 [MCFN MR, Tab 2 at 28].

¹⁴ Chief Laforme Affidavit at para 21 [MCFN MR, Tab 2 at 28].

¹⁵ Canada SOD at para 75.

¹⁶ Ontario SOD at para 13 [emphasis omitted].

¹⁷ Chief Laforme Affidavit at para 34 [MCFN MR, Tab 2 at 32].

Anishinaabeg nations and the Haudenosaunee reached a peace agreement known as the Dish with One Spoon, which set out the terms upon which they would respect each other's territories. Among other things, the Dish with One Spoon stipulated the Haudenosaunee could pass through and use MCFN Territory with MCFN consent.¹⁸

10. In 1701, Anishinaabeg nations, including MCFN, the Haudenosaunee, and the French convened in Montreal to engage in further peace discussions.¹⁹ Attendees reaffirmed the Dish with One Spoon and entered into a further agreement: the Great Peace of Montreal.²⁰ Like the Dish with One Spoon, the Great Peace of Montreal did not grant ownership or control over MCFN Territory to the Haudenosaunee.²¹

11. After the Beaver Wars, the Haudenosaunee did not return to MCFN Territory in any permanent way for more than 80 years, when Six Nations migrated to the Grand River Valley from the United States after the American Revolution.²²

12. While the pleadings of Ontario and Canada largely agree with MCFN's understanding of its history, Six Nations pleads, and its experts²³ proffer, a starkly

¹⁸ Chief Laforme Affidavit at para 34 [MCFN MR, Tab 2 at 32].

¹⁹ Chief Laforme Affidavit at para 35 [MCFN MR, Tab 2 at 32–33].

²⁰ Chief Laforme Affidavit at para 35 [MCFN MR, Tab 2 at 32–33].

²¹ Chief Laforme Affidavit at para 35 [MCFN MR, Tab 2 at 32–33].

²² Chief Laforme Affidavit at para 37 [MCFN MR, Tab 2 at 33].

²³ On May 4, 2022, Ontario provided MCFN three expert reports prepared by Six Nations for this action—(1) the report of Dr. Jon Parmenter, dated March 2022 (“Parmenter Report”); (2) the report of Dr. Alan Taylor, dated March 28, 2022 (“Taylor Report”); and (3) the report of Dr. Reginald Good, dated March 30, 2022 (“Good Report,” together the “Six Nations Expert Reports”): Affidavit of John Wilson, affirmed February 28, 2023, at para 6 (“Wilson Affidavit”) [MCFN MR, Tab 3 at 130]. Relevant excerpts of the Parmenter Report (“Parmenter Report Excerpts”) [*continues next page*],

different version of events. This alternate narrative minimizes the role of MCFN as steward and sole occupier of its territory. Significantly, Six Nations rejects the proposition that southern Ontario, including the Grand River Valley, was the exclusive territory of MCFN. Six Nations pleads instead that “[i]n the eighteenth century and from time immemorial, the Six Nations ... occupied, possessed or used very large territories in what is today the United States of America and the Provinces of Ontario and Quebec (the “Six Nations Aboriginal Lands”).”²⁴ Six Nations further pleads that the portion of MCFN Territory in the Grand River Valley subject to the Haldimand Proclamation was “a large tract of land within the Six Nations Aboriginal Lands.”²⁵

13. Rather than acknowledging their defeat at the hands of the Anishinaabeg, including MCFN, Six Nations characterizes the Beaver Wars as leading to Haudenosaunee sovereignty over MCFN Territory. The Six Nations Expert Reports assert that as a result of Haudenosaunee military victories, “[b]y 1666, the boundaries of Haudenosaunee sovereign territory ... included the entire Grand River Valley.”²⁶

14. The Six Nations Expert Reports opine the Dish with One Spoon “is crucial to the post-1700 history of Haudenosaunee use and occupancy of modern southern

Good Report (“Good Report Excerpts”), and Taylor Report (“Taylor Report Excerpts”) are attached as Exhibit E to the Wilson Affidavit [MCFN MR, Tab 3E at 150–369].

²⁴ Further Amended Statement of Claim, filed October 5, 2020, at para 11 (“2020 Amended SOC”).

²⁵ 2020 Amended SOC at para 13.

²⁶ Good Report Excerpts at 3–4, paras 33, 36–39 [MCFN MR, Tab 3E at 153–154]. See also Parmenter Report Excerpts at 101–105 [MCFN MR, Tab 3E at 251–255]. See also Taylor Report Excerpts at 8–10, para 82 [MCFN MR, Tab 3E at 158–160].

Ontario” and did not “indicate a surrender of Haudenosaunee sovereignty over lands north of Lake Ontario.”²⁷ The Parmenter Report expressly dismisses MCFN’s understanding that the Dish with One Spoon enshrined “Mississauga proprietorship over the territory north of Lake Ontario.”²⁸ Likewise, the Taylor Report asserts MCFN and the Haudenosaunee “agreed to share the region,”²⁹ including “sovereignty”³⁰ or “ownership to the entire Grand River Valley from mouth to source.”³¹

ii) Six Nations asserts the Nanfan Deed is a treaty that guarantees Six Nations rights to land in MCFN Territory

15. At the same time as peace discussions were taking place in Montreal, Lieutenant Governor John Nanfan, the representative of the British Crown in New York, asked for a meeting with the Haudenosaunee in Albany.³² The Haudenosaunee sent a small delegation to meet with Lieutenant Governor Nanfan and on July 19, 1701, these parties signed a document known as the Nanfan Deed, referred to by Six Nations as the “Albany Treaty” or “Nanfan Treaty,”³³ under which the Haudenosaunee purported to

²⁷ Parmenter Report Excerpts at 61 [MCFN MR, Tab 3E at 211].

²⁸ Parmenter Report Excerpts at 66 [MCFN MR, Tab 3E at 216].

²⁹ Taylor Report Excerpts at 8 [MCFN MR, Tab 3E at 158]. See also Affidavit of Mark Hill, affirmed on February 6, 2023, at para 7 (“Chief Hill Affidavit”) [Responding Motion Record of the Plaintiff, dated February 6, 2023 (“Six Nations MR”), Tab 1 at 3]; Taylor Report Excerpts at 9–10, 101, paras 82–83, 86 [MCFN MR, Tab 3E at 159–160, 251]; Parmenter Report Excerpts at 66–67, 125–126 [MCFN MR, Tab 3E at 216–217, 275–276].

³⁰ Taylor Report Excerpts at 202, para 85 [MCFN MR, Tab 3E at 352].

³¹ Taylor Report Excerpts at 203, para 89 [MCFN MR, Tab 3E at 353].

³² Chief Laforme Affidavit at para 36 [MCFN MR, Tab 2 at 33].

³³ Chief Hill Affidavit at para 10 [Six Nations MR, Tab 1 at 4].

place MCFN Territory—the very lands from which the Haudenosaunee were expelled at the end of the Beaver Wars—under British protection.³⁴ The Nanfan Deed never had legal force or effect, let alone status as a treaty.³⁵

16. In the Reply, Six Nations pleads the opposite: “[t]he 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.”³⁶ The Six Nations Expert Reports devote significant efforts to trying to show this was the effect of the Nanfan Deed.³⁷

17. The Good Report states, “the Grand River Valley was located within the geographical boundaries of particular hunting grounds, reserved for the Six Nations exclusive use under the Albany Treaty of 1701,”³⁸ which “protected the exercise of Hudenosaunee sovereignty on conquered lands.”³⁹ The Parmenter Report similarly states, “[t]hrough the 1701 Nanfan Treaty the Haudenosaunee sought Crown protection of the southwestern portion of their ‘Beaver Hunting Grounds’ to supplement the access

³⁴ Chief Laforme Affidavit at para 36 [MCFN MR, Tab 2 at 33].

³⁵ Chief Laforme Affidavit at para 36 [MCFN MR, Tab 2 at 33].

³⁶ 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, dated September 30, 2020, at para 8 (“Reply”).

³⁷ For example, see Good Report Excerpts at 1, 73, 78, 79, paras 15, 74–77, 103, 105 [MCFN MR, Tab 3E at 151, 223, 228, 229]; Parmenter Report Excerpts at 33, 36, 61, 101, 121, 125, 157–158 [MCFN MR, Tab 3E at 183, 186, 211, 251, 271, 275, 307–308]; Taylor Report Excerpts at 100–101, 203–204, paras 84, 89 [MCFN MR, Tab 3E at 250–251, 353–354].

³⁸ Good Report Excerpts at 1, para 15 [MCFN MR, Tab 3E at 151].

³⁹ Good Report Excerpts at 79, para 105 [MCFN MR, Tab 3E at 229].

they secured to the northeastern portion of their hunting territories via the ‘Dish with One Spoon’ treaty (ratified at Montréal on August 4, 1701).”⁴⁰

18. The Taylor Report is even more emphatic: “[i]n a ... treaty made at Albany in 1701, the British Empire (through John Nanfan, the governor of New York) guaranteed Haudenosaunee sovereignty to the region north and west of Lake Ontario against French intrusions”;⁴¹ “the Albany Treaty of 1701 had guaranteed the Haudenosaunee possession of the vast region north and west of Lake Ontario”;⁴² and “[t]he Crown had recognized the Six Nations ownership to the region in the Treaty of Albany of 1701.”⁴³

19. Nearly one hundred pages of the Six Nations Expert Reports are aimed at establishing a factual foundation showing that the Nanfan Deed is in fact a treaty.⁴⁴

iii) Six Nations asserts MCFN’s Between the Lakes Treaty is a “Quit Claim”⁴⁵

20. On October 7, 1763, King George III issued a Royal Proclamation (“Royal Proclamation”). The Royal Proclamation recognized the pre-existing rights and sovereignty of Indigenous peoples and established that such rights could be ceded only

⁴⁰ Parmenter Report Excerpts at 127 [MCFN MR, Tab 3E at 277]. See also Parmenter Report Excerpts at 101, 121 [MCFN MR, Tab 3E at 251, 271].

⁴¹ Taylor Report Excerpts at 100, para 84 [MCFN MR, Tab 3E at 250].

⁴² Taylor Report Excerpts at 101, para 86 [MCFN MR, Tab 3E at 251].

⁴³ Taylor Report Excerpts at 203, para 89 [MCFN MR, Tab 3E at 353].

⁴⁴ Parmenter Report Excerpts at 109–175 [MCFN MR, Tab 3E at 259–325].

⁴⁵ See in particular Good Report Excerpts at 184–187, paras 347–363 [MCFN MR, Tab 3E at 334–337].

to the Crown. In doing so, the Royal Proclamation confirmed that the Crown was solely responsible for treaty making.⁴⁶ In the decades following the Royal Proclamation, the Crown pursued lands from MCFN to accommodate an influx of settlers emigrating north after the American Revolution.⁴⁷

21. At the end of the American Revolution, Six Nations—who had fought alongside the British in the war—found their territory under American control.⁴⁸ In 1784, in recognition of Six Nations’ support, the Crown offered to resettle Six Nations in the Grand River Valley.⁴⁹ At that time, the Crown did not have rights to the lands upon which Six Nations would settle under the Crown’s proposal.⁵⁰ To give effect to its promise, the Crown sought rights to those lands from MCFN for the use of Six Nations and other loyalists migrating to Canada.⁵¹ Consistent with this, Canada pleads that “[i]n 1784 the British Imperial Crown negotiated a surrender from the Mississauga of the land below the headwaters of the Grand River to Lake Erie in order to give the land to those members of the Six Nations who had been allied to it.”⁵² Similarly, Ontario pleads that “the lands to which the Haldimand Proclamation authorized and permitted

⁴⁶ Chief Laforme Affidavit at para 38 [MCFN MR, Tab 2 at 33–34].

⁴⁷ Between 1781 and 1820, MCFN and the Crown entered into a series of treaties respecting MCFN Territory. These treaties are canvassed in the Chief Laforme Affidavit at paras 38–62 [MCFN MR, Tab 2 at 33–41].

⁴⁸ Chief Laforme Affidavit at para 44 [MCFN MR, Tab 2 at 35].

⁴⁹ Chief Laforme Affidavit at para 44 [MCFN MR, Tab 2 at 35].

⁵⁰ Chief Laforme Affidavit at para 45 [MCFN MR, Tab 2 at 35–36].

⁵¹ Chief Laforme Affidavit at para 45 [MCFN MR, Tab 2 at 35–36].

⁵² Canada SOD para 14.

members of the Six Nations to migrate and to possess and settle were lands within the tract that had been purchased by the Imperial Crown from the Mississaugas.”⁵³

22. In 1784, MCFN agreed to transfer rights to lands between Lake Erie and Lake Huron, including lands along the Grand River Valley, to the Crown. This agreement was enshrined in the Between the Lakes Treaty.⁵⁴ Under this treaty, MCFN did not surrender Aboriginal title to water, land under water, or floodplains, nor did it agree to cease exercising Aboriginal rights.⁵⁵ As of 1784, lands north of the Between the Lakes Treaty—including the headwaters of the Grand River—were unceded by MCFN and other Anishinaabeg nations.

23. Six Nations asserts a drastically different narrative. In the Reply, Six Nations pleads the Between the Lakes Treaty is a “quit claim in favour of the Six Nations.”⁵⁶ The Six Nations Expert Reports assert the same,⁵⁷ and assert the Crown’s request to

⁵³ Ontario SOD para 16.

⁵⁴ Chief Laforme Affidavit at para 46 [MCFN MR, Tab 2 at 36].

⁵⁵ Chief Laforme Affidavit at para 31 [MCFN MR, Tab 2 at 31].

⁵⁶ Reply at para 7. In 1792, because of an error in the boundary description in the Between the Lakes Treaty, a new treaty was prepared setting out a revised description. MCFN confirmed the new treaty, known as Purchase No. 3: Chief Laforme Affidavit at para 47 [MCFN MR, Tab 2 at 36]. Like their characterization of the Between the Lakes Treaty, the Six Nations Expert Reports similarly characterize the Purchase No. 3 Treaty as a “quit claim:” Good Report Excerpts at 190–193, paras 364–376 [MCFN MR, Tab 3E at 340–343]; Taylor Report Excerpts at 205–206, paras 113–116 [MCFN MR, Tab 3E at 355–356].

⁵⁷ Good Report Excerpts at 177, 180, 182, 185, 186, 187, 190, 196, paras 330, 337, 344, 348, 358, 360, 365–366, 407 [MCFN MR, Tab 3E at 327, 330, 332, 335, 336, 337, 340, 346]; Taylor Report Excerpts at 199, 203–204, paras 32–33, 88–89 [MCFN MR, Tab 3E at 349, 353–354].

treat for lands in the Between the Lakes Treaty “puzzled [MCFN] for, as they explained, the Haudenosaunee already held an equal share to the valley.”⁵⁸

24. The Good Report asserts the Between the Lakes Treaty is “tripartite” and extinguished any interest in the lands treated for—including “lands covered by water”⁵⁹ and the “source of the Grand River,”⁶⁰ which the Good Report acknowledges “was located within the traditional hunting grounds of the Credit River Mississaugas”⁶¹—and that MCFN agreed to cease exercising Aboriginal rights:

What the Crown actually purchased was a quit-claim from the Mississaugas, with whom the Six Nations had shared the use of the Grand River Valley from approximately 1701. Agents or servants of the Crown concluded a tripartite treaty with the Six Nations and the Mississaugas on or about 22 May 1784. By this treaty, the Mississaugas quit-claimed all their interests in particular lands, including those selected by the Six Nations as relocated sovereign territory for their resettlement following the American Revolution. Pursuant to this treaty, the Mississaugas undertook to cease exercising customary hunting and ancillary interests within the area selected by the Six Nations as relocated sovereign territory for their resettlement.⁶²

⁵⁸ Taylor Report Excerpts at 8, 202, para 85 [MCFN MR, Tab 3E at 158, 352]. See also Parmenter Report Excerpts at 216 [MCFN MR, Tab 3E at 366]; Good Report Excerpts at 177, para 331 [MCFN MR, Tab 3E at 327].

⁵⁹ Good Report Excerpts at 185, paras 348, 351–352 [MCFN MR, Tab 3E at 335].

⁶⁰ Good Report Excerpts at 182, para 344 [MCFN MR, Tab 3E at 332].

⁶¹ Good Report Excerpts at 185, para 353 [MCFN MR, Tab 3E at 335].

⁶² Good Report Excerpts at 177, para 330 [citations omitted] [MCFN MR, Tab 3E at 327]. See also Good Report Excerpts at 1, para 16 [MCFN MR, Tab 3E at 151].

25. The Good Report further asserts, “[t]he oral history of the Mississaugas ... explicitly states that the Mississaugas did not want to be paid for their interest in the ‘Grand River tract’, which the Six Nations selected for their resettlement.”⁶³

26. The Parmenter Report opines that:

[t]he Mississaugas’ surrender of land in modern southern Ontario to the Crown on May 22, 1784 entailed a tract far larger than that which was eventually granted along the Grand River to the Haudenosaunee, and therefore we should not read into that purchase any intent on the part of Crown authorities regarding a perceived need to clear Mississauga title to the Grand River tract prior to deeding that land to the Haudenosaunee.⁶⁴

27. These views conflict with MCFN’s understanding of its treaty with the Crown.⁶⁵

iv) Six Nations asserts the Haldimand Proclamation is a treaty that guarantees Six Nations’ rights respecting land in MCFN Territory

28. After the Crown acquired rights to the Grand River Valley, it granted six miles on either side of the Grand River—extending from Lake Erie to the northern border of the Between the Lakes Treaty—to Six Nations under the Haldimand Proclamation of 1784.⁶⁶ These lands bisect MCFN Territory.

⁶³ Good Report Excerpts at 177, para 331 [MCFN MR, Tab 3E at 327].

⁶⁴ Parmenter Report Excerpts at 217 [citations omitted] [MCFN MR, Tab 3E at 367]. See also Parmenter Report Excerpts at 218, footnote 352 [MCFN MR, Tab 3E at 368].

⁶⁵ Chief Laforme Affidavit at para 41 [MCFN MR, Tab 2 at 34].

⁶⁶ Between the Lakes Treaty and Purchase No. 3 [MCFN MR, Tab 2G at 72–74]; Chief Laforme Affidavit at para 46 [MCFN MR, Tab 2 at 36].

29. MCFN—like Canada and Ontario—denies the Haldimand Proclamation is a treaty under Section 35.⁶⁷ Six Nations pleads it is.⁶⁸ The Six Nations Expert Reports support Six Nations’ pleading. The Good Report asserts, “Crown officials consistently recognized the Haldimand Proclamation as a binding, nation-to-nation agreement – which they often referred to as a Treaty, or part of a Treaty.”⁶⁹

30. The Six Nations Expert Reports also link the Haldimand Proclamation to the Nanfan Deed. The Parmenter Report asserts, “the Haldimand Proclamation of 1784 represents the deferred fulfillment by the British Crown of a portion of its commitments to the Haudenosaunee as articulated in the 1701 Nanfan Treaty.”⁷⁰ The Taylor Report asserts, “the British in the Albany Treaty of 1701 had guaranteed the Haudenosaunee possession of the vast region north and west of Lake Ontario. Consequently, Haldimand’s grant did not initiate, but instead enhanced, the Six Nations’ ownership to that valley by promising them a Crown title.”⁷¹

⁶⁷ Chief Laforme Affidavit at para 18 [MCFN MR, Tab 2 at 27]; Canada SOD at para 77; Ontario SOD at para 17.

⁶⁸ 2020 Amended SOC at para 15. In addition to the Nanfan Deed and the Haldimand Proclamation, the Six Nations Expert Reports assert various other treaties ground Six Nations rights or interests in lands within MCFN Territory, including, for example, the Albany Treaty of 1726 and 1768 Treaty of Fort Stanwix: Good Report Excerpts at 87–88, paras 119–127 [MCFN MR, Tab 3E at 237–238]; Taylor Report Excerpts at 100, para 48 [MCFN MR, Tab 3E at 250].

⁶⁹ Good Report Excerpts at 96, 98, 99–100, paras 389, 400, 411 [MCFN MR, Tab 3E at 246, 248, 249–250].

⁷⁰ Parmenter Report Excerpts at 105 [MCFN MR, Tab 3E at 255].

⁷¹ Taylor Report Excerpts at 101, para 86 [MCFN MR, Tab 3E at 251].

31. The rights that the Six Nations Expert Reports assert the Haldimand Proclamation enshrines are significant, referring to the land contemplated under the Haldimand Proclamation as the “relocated sovereign territory” of Six Nations,⁷² and asserting the Haldimand Proclamation “dedicated the Haldimand Proclamation lands to the Six Nations sovereign jurisdiction.”⁷³ The Parmenter Report concludes, “there can be no question that the Haldimand Proclamation of 1784 embodied Crown recognition of the sovereign nationhood of the Haudenosaunee.”⁷⁴

32. Additionally, Six Nations pleads the Haldimand Proclamation had the effect of granting to Six Nations 275,000 acres of land north of the boundary of the Between the Lakes Treaty.⁷⁵ These are the lands in relation to which the Good Report concludes MCFN extinguished its interests in the Between the Lakes Treaty.⁷⁶ From MCFN’s perspective, in 1784, these 275,000 acres were unceded lands of MCFN and other Anishinaabeg nations. They were not treated for until 1818.⁷⁷

⁷² Good Report Excerpts at 1, 70, 93, 94, 95, 177–178, 180, 181, 182, 186–187, 196, paras 9–11, 16, 286, 295, 311, 328, 330, 332, 335, 337, 341, 343, 345, 356, 358, 360, 361, 363, 384–385, 407 [MCFN MR, Tab 3E at 151, 220, 243, 244, 245, 327–328, 330, 331, 332, 336–337, 346].

⁷³ Good Report Excerpts at 96, 97, 99, paras 388, 393, 404 [MCFN MR, Tab 3E at 246, 247, 249].

⁷⁴ Parmenter Report Excerpts at 107 [MCFN MR, Tab 3E at 257].

⁷⁵ 2020 Amended SOC at para 17.

⁷⁶ Good Report Excerpts at 192, para 375 [MCFN MR, Tab 3E at 342]. See also Good Report Excerpts at 182, para 344 [MCFN MR, Tab 3E at 332].

⁷⁷ In October 1818, the Chippewa of Lakes Huron and Simcoe ceded territory spanning roughly from Georgian Bay in the north to the present-day border between Simcoe County and Peel Region in the south under Treaty No. 18. Later that month, MCFN entered into Ajetance Treaty No. 19, which addressed lands south of Treaty No. 18 and north of MCFN lands previously treated for [*continues next page*]

B. MCFN and the Crown are rebuilding a nation-to-nation relationship

33. The Crown's treaty promises to MCFN have gone largely unfulfilled. MCFN has been progressively dispossessed of its lands and resources, displaced within its own territory, and deprived of any share of the wealth and benefits that others have taken.⁷⁸

34. On April 6, 2015, MCFN notified the Crown of its claim of Aboriginal title to land in and around the Rouge River Valley as well as to all water, land under water, and floodplains in MCFN Territory, including the Grand River and its riverbed.⁷⁹ MCFN submitted these claims to the Crown for negotiation, which are ongoing.⁸⁰

35. In recent years, MCFN has also entered into various agreements with the Crown establishing negotiations and other processes to settle MCFN's outstanding claims, achieve recognition of MCFN's Section 35 rights, and implement the Crown's treaty

in the Head of the Lake Treaty No. 14: Chief Laforme Affidavit at paras 57–58 [MCFN MR, Tab 2 at 39–40].

⁷⁸ Chief Laforme Affidavit at para 68 [MCFN MR, Tab 2 at 42–43].

⁷⁹ Letter from Chief B. Laforme to the Honourable B. Valcourt and the Honourable D. Zimmer (6 April 2015) [MCFN MR, Tab 2B at 51–53].

⁸⁰ Chief Laforme Affidavit at para 31 [MCFN MR, Tab 2 at 31]; MCFN Statement of Claim Submitted to the Government of Canada and to the Government of Ontario (31 March 2015) [Six Nations MR, Tab 2F at 69]. On December 17, 2020, MCFN issued a claim against the Crown in the Ontario Superior Court of Justice in respect of its Aboriginal title to water within MCFN Territory. That claim was put into abeyance on April 26, 2021, while the parties pursue settlement negotiations: MCFN Statement of Claim issued December 17, 2020 (Toronto Court File No. CV-20-00653346-0000) [Six Nations MR, Tab 2D at 43]; Order of Justice Chalmers dated April 26, 2021 (Toronto Court File No. CV-20-00653346-0000) [Six Nations MR, Tab 2E at 65]. The substance of negotiations on these claims is confidential and subject to settlement privilege.

and other constitutional obligations to MCFN.⁸¹ The scope and content of the processes established under these agreements—and others—are determined, in part, by MCFN’s Aboriginal and treaty rights, its claims against the Crown, and the scope and content of the Crown’s duties to MCFN that flow from the honour of the Crown. Reaching shared—and accurate—understandings between MCFN and the Crown of MCFN’s history is central to advancing reconciliation under these processes.

C. MCFN seeks leave to intervene to protect its history, rights, and interests

36. Despite the inextricability of MCFN, its rights, and its history from this action, Six Nations never once provided notice to MCFN of this action’s potential to impact its rights and interests in the nearly three decades since this action was commenced.⁸²

37. In January 2022, MCFN wrote to Justice Sanfilippo requesting an invitation to case conferences.⁸³ Six Nations vigorously opposed the request,⁸⁴ however, the parties agreed to defer the issue of MCFN’s attendance at case conferences until the

⁸¹ These agreements include, but are not limited to, the Memorandum of Understanding—Recognition of Indigenous Rights and Self-Determination Table, dated June 9, 2017, the Consultation Protocol Agreement, dated September 6, 2018, and the Preliminary Agreement to Advance Reconciliation and Establish a Renewed Relationship, dated August 28, 2019: Chief Laforme Affidavit at paras 72–74 [MCFN MR, Tab 2 at 44–45].

⁸² Transcript of the Cross-Examination (“Tr C-X”) of Chief Hill (16 March 2023) at 11:5–25 to 13:1–10.

⁸³ Letter from N. Frame to O. Scolieri (6 January 2022) [MCFN MR, Tab 3A at 134–135].

⁸⁴ Case Management Endorsement (Revised) (24 January 2022) at para 8 [MCFN MR, Tab 3C at 142]; Case Management Endorsement (2 March 2022) at paras 7–9 [MCFN MR, Tab 3D at 146].

completion of an “issues list,” which—despite the passage of more than a year—has yet to be finalized.⁸⁵

38. On May 4, 2022, Ontario provided MCFN the Six Nations Expert Reports.⁸⁶ These reports reference MCFN dozens of times and include hundreds of pages relating to MCFN’s history within Ontario, MCFN’s agreements with the Haudenosaunee, Six Nations’ alleged treaties within MCFN Territory, and MCFN’s treaties with the Crown.⁸⁷ The Six Nations Expert Reports vastly expand on issues raised briefly, generically, or in passing in the pleadings and are deeply alarming to MCFN.

39. On October 27, 2022, MCFN served a notice of motion for leave to intervene.⁸⁸

PART III ISSUES

40. The sole issue before this Court is whether MCFN ought to be granted leave to intervene as an added party under Rule 13.01. MCFN satisfies the requirements of Rule 13.01 and ought to be granted leave to intervene as an added defendant.

⁸⁵ Case Management Endorsement (2 March 2022) at para 9 [MCFN MR, Tab 3D, at 146].

⁸⁶ Wilson Affidavit at para 6 [MCFN MR, Tab 3 at 130]; Case Management Endorsement (28 September 2022) at paras 31–32 [MCFN MR, Tab 3G at 384–385]; Case Management Conference Endorsement (19 December 2022), 2022 ONSC 7158 at [para 30](#).

⁸⁷ Table of Excerpts of the Parmenter Report, Taylor Report, and Good Report [MCFN MR, Tab 3E at 151–369].

⁸⁸ Notice of Motion, dated October 27, 2022 [MCFN MR, Tab 1 at 16].

PART IV LAW AND ARGUMENT

A. Test for leave to intervene under Rule 13.01

41. A proposed intervener may move to intervene as a party under Rule 13.01(1):

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

(a) an interest in the subject matter of the proceeding;

(b) that the person may be adversely affected by a judgment in the proceeding; or

(c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.⁸⁹

42. Only one element of Rule 13.01(1) must be satisfied.⁹⁰ The factors to be considered are: (1) the nature of the case; (2) the issues which arise; and (3) the likelihood of the applicant being able to make a useful contribution to the resolution of the matter without causing injustice to the immediate parties⁹¹—in other words, “whether the intervention will unduly delay or prejudice the determination of the rights of the parties” under Rule 13.01(2).⁹²

⁸⁹ *Rules of Civil Procedure*, RRO 1990, Reg 194, [Rule 13.01\(1\)](#) (“ROCP”).

⁹⁰ *Feldberg v Andrews*, 2021 ONSC 1099 at [para 5](#) [*Feldberg*].

⁹¹ *Peel (Regional Municipality) v Great Atlantic & Pacific Co of Canada Ltd* (1990), 74 OR (2d) 164 at [para 10](#) (CA); *Halpern v Toronto (City) Clerk* (2000), 51 OR (3d) 742 at [para 17](#) (SC DC).

⁹² *ROCP*, [Rule 13.01\(2\)](#); *Feldberg* at [para 5](#).

B. This action is of a public and constitutional nature

43. This action has an unquestionably public and constitutional nature. “[W]here constitutional cases and those involving elements of public interest are before the court, the approach to intervention tends to be a more relaxed one”⁹³ or “may be softened somewhat.”⁹⁴ A softened threshold—while not necessary for MCFN to satisfy the test—is appropriate in this case.

44. Based on both the pleadings and the historical issues opined on in the Six Nations Expert Reports, this action will call upon this Court to make findings of fact and law that engage the history and rights of MCFN—including Section 35 rights—spanning nearly 400 years. Regardless of the relief sought by Six Nations, these findings will bind Canada and Ontario who—as the Crown—owe constitutional duties to MCFN. For MCFN, the scope and content of these duties—such as the duty to consult and accommodate and the duty to negotiate—are informed by the very history to be litigated in this action.

C. Rule 13.01(1)(a): MCFN has an unquestionable interest in this action

45. In *Butty v. Butty*, the Ontario Court of Appeal endorsed a liberal approach to the application of Rule 13.01(1)(a).⁹⁵ Unlike Rule 13.01(1)(b), Rule 13.01(1)(a) does not

⁹³ *Terratec Environmental Ltd v Melancthon (Township)*, 2003 CarswellOnt 4319 at para 12 (ONSC) [Book of Authorities (“BA”), Tab 3].

⁹⁴ *Jones v Tsige*, 106 OR (3d) 721 at [para 23](#) (CA); *Render v ThyssenKrupp Elevator*, 2018 ONSC 3182 at [para 8](#) [Render].

⁹⁵ *Butty v Butty* (2009), 98 OR (3d) 713 at [para 8](#) (CA).

depend on a legal right; an interest in a broad and practical sense suffices.⁹⁶ MCFN and its history are at the centre of this action. MCFN has an interest in participating in the fact-finding process to ensure its perspectives on its own history are before this Court.

46. In this action, Six Nations, Canada, and Ontario introduce four main issues—and numerous sub-issues—relating to MCFN’s history, the history of MCFN Territory, and the interpretation of MCFN’s treaties with the Crown:

- a) The historic use, occupation, and control of MCFN Territory by MCFN and Six Nations;⁹⁷
- b) The nature, scope, and meaning of agreements between MCFN and Six Nations with respect to MCFN Territory;⁹⁸
- c) The interpretation and effect of agreements between Six Nations and the Crown relating to MCFN Territory, and whether such agreements are treaties under Section 35;⁹⁹ and

⁹⁶ For example, reputational interests or questions of integrity are legitimate interests for the purpose of Rule 13.01(a): *Feldberg* at [para 21](#); *Render* at [paras 14–22](#).

⁹⁷ See paragraphs 6–14, above. Excerpts of the Six Nations Expert Reports relating to this issue are located at Table of Excerpts of the Parmenter Report, Taylor Report, and Good Report at 1–60 [MCFN MR, Tab 3E at 151–210].

⁹⁸ See paragraphs 9, 10, 14, above. Excerpts of the Six Nations Expert Reports relating to this issue are located at Table of Excerpts of the Parmenter Report, Taylor Report, and Good Report at 61–69 [MCFN MR, Tab 3E at 211–219].

⁹⁹ See paragraphs 15–19, 28–32, above. Excerpts of the Six Nations Expert Reports relating to this issue are located at Table of Excerpts of the Parmenter Report, Taylor Report, and Good Report at 70–175 [MCFN MR, Tab 3E at 220–325].

- d) The interpretation of treaties and agreements between MCFN and the Crown.¹⁰⁰

47. Chief Hill testified that Six Nations “is not seeking any declarations from the court about [the Dish with One Spoon or the Great Peace of Montreal]”¹⁰¹ and “is not seeking declarations or relief in its court case about whether the Albany Treaty is a treaty.”¹⁰² Chief Hill did not testify that Six Nations is not seeking findings of fact or law about these or other historical issues. And it clearly is. Six Nations appears to be seeking—through this action—a judicially endorsed history of MCFN Territory that privileges the Six Nations’ perspective while minimizing, or eliminating, that of MCFN.

48. Based on its pleadings and the Six Nations Expert Reports, Six Nations appears to be asking this Court to find, among other things:

- a) Six Nations has used and occupied MCFN Territory since time immemorial;¹⁰³
- b) Six Nations gained sovereignty over MCFN Territory in the 1600s;¹⁰⁴

¹⁰⁰ See paragraphs 20–27, above. Excerpts of the Six Nations Expert Reports relating to this issue are located at Table of Excerpts of the Parmenter Report, Taylor Report, and Good Report at 176–219 [MCFN MR, Tab 3E at 326–369].

¹⁰¹ Chief Hill Affidavit at para 8 [Six Nations MR, Tab 1 at 3].

¹⁰² Chief Hill Affidavit at para 10 [Six Nations MR, Tab 1 at 4].

¹⁰³ See paragraph 12, above.

¹⁰⁴ See paragraph 13, above.

- c) In the Dish with One Spoon and Great Peace of Montreal, MCFN and Six Nations agreed to share sovereignty over MCFN Territory;¹⁰⁵
- d) The Nanfan Deed is a treaty that guarantees Six Nations' rights within MCFN Territory;¹⁰⁶
- e) In the Between the Lakes Treaty and the Purchase No. 3 Treaty, MCFN extinguished its interests in the lands treated for (and lands not treated for at the headwaters of the Grand River)—including Aboriginal title—and agreed to cease exercising rights on those lands;¹⁰⁷ and
- f) The Haldimand Proclamation is a treaty within the meaning of Section 35 that guarantees Six Nations rights within MCFN Territory.¹⁰⁸

49. These findings would run counter to MCFN's understanding of its own history and rights within MCFN Territory, and would bind the Crown even as it works with MCFN to establish a renewed nation-to-nation relationship through the processes established under the Memorandum of Understanding—Recognition of Indigenous Rights and Self-Determination Table dated June 9, 2017, the Consultation Protocol Agreement dated September 6, 2018, and the Preliminary Agreement to Advance Reconciliation and Establish a Renewed Relationship dated August 28, 2019.¹⁰⁹

¹⁰⁵ See paragraph 14, above.

¹⁰⁶ See paragraphs 16–19, above.

¹⁰⁷ See paragraphs 23–26, above.

¹⁰⁸ See paragraphs 29–32, above.

¹⁰⁹ Chief Laforme Affidavit at paras 72–74 [MCFN MR, Tab 2 at 44–45].

50. For MCFN, its history is as important as its future. MCFN’s history grounds its sacred connection to its territory and its responsibility to its people to sustain that territory for future generations. In Canadian law, however, MCFN’s history serves a very different purpose: it is the legal basis for MCFN’s Aboriginal and treaty rights under Section 35—including Aboriginal title—and it determines the scope and content of the duties to MCFN owed by the Crown.¹¹⁰

D. Rule 13.01(1)(b): This action may adversely impact MCFN’s rights

51. Rule 13.01(1)(b) is focused on impacts on legal rights.¹¹¹ This action expressly engages MCFN’s Between the Lakes Treaty and the Purchase No. 3 Treaty, as well as MCFN’s Aboriginal rights within MCFN Territory.

52. The pleadings and the Six Nations Expert Reports put in issue the interpretation and legal effect of MCFN’s Between the Lakes Treaty and the Purchase No. 3 Treaty, including whether such treaties were “quit claims” that extinguished MCFN interests in

¹¹⁰ For example, the duty to consult and accommodate—which flows from the honour of the Crown—depends on “a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed”: *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at [para 39](#) [*Haida*]. The test for Aboriginal title is similarly driven by historical facts: *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 at [para 26](#) [*Tsilhqot’in*].

¹¹¹ *Lawyers’ Professional Indemnity Co v Geto Investments Ltd*, 2002 CarswellOnt 350 at para 20 (ONSC) [BA, Tab 1]; *Render* at [para 22](#).

the land, and whether MCFN agreed to cease exercising Aboriginal rights over the lands treated for.¹¹²

53. The Between the Lakes Treaty and the Purchase No. 3 Treaty are treaties within the meaning of Section 35 that govern, in part, the relationship between MCFN and the Crown. To the extent they are interpreted in this action, MCFN ought to have participatory rights to defend the constitutionally protected rights enshrined therein.

54. Moreover, this action will unavoidably adjudicate the factual foundation of MCFN's Section 35 rights¹¹³—including Aboriginal title¹¹⁴—as well as Crown duties that are owed to it, including the duty to consult and the duty to negotiate.¹¹⁵

E. Rule 13.01(1)(c): There are questions of fact in the proceeding which MCFN shares in common with the Crown

55. In April 2015, MCFN put the Crown on notice of its claims to Aboriginal title within MCFN Territory, both to certain lands within the Rouge River Valley, as well as to all water, land under water, and floodplains within MCFN Territory.¹¹⁶ In 2020, MCFN commenced a claim against the Crown in the Ontario Superior Court of Justice

¹¹² Good Report Excerpts at 1, 177, 190–193, paras 16, 330, 364–376 [MCFN MR, Tab 3E at 151, 327, 340–343]; Taylor Report Excerpts at 205–206, paras 113–116 [MCFN MR, Tab 3E at 355–356]. See also paragraphs 23–26, and footnote 56, above.

¹¹³ *R v Van der Peet*, [1996] 2 SCR 507 at [paras 46–67](#).

¹¹⁴ *Tsilhqot'in* at [para 26](#).

¹¹⁵ *Haida* at [para 39](#).

¹¹⁶ Letter from Chief B. Laforme to the Honourable B. Valcourt and the Honourable D. Zimmer (6 April 2015) [MCFN MR, Tab 2B at 51–53].

with respect to its Aboriginal title to water claim.¹¹⁷ Both claims are subject to negotiations between MCFN and the Crown.

56. Many of the factual matters engaged by this action are live issues in MCFN's outstanding claims against the Crown, including the occupation of MCFN Territory by MCFN prior to Crown sovereignty, continuity between present and pre-sovereignty occupation of MCFN Territory by MCFN, and exclusivity of MCFN occupation of MCFN Territory at Crown sovereignty.¹¹⁸ Issues of use and occupation of MCFN Territory are at the centre of this action. MCFN must have a role in their adjudication.

F. The intervention of MCFN would not unduly delay or prejudice the determination of the parties' rights

57. Rule 13.01(2) requires this Court to assess whether “the intervention will unduly delay or prejudice the determination of the rights of the parties.”¹¹⁹ As this Court explained in *Render v ThyssenKrupp Elevator*, “[t]he question is ... whether granting leave to intervene ... will delay the resolution of the action as a whole.”¹²⁰ MCFN's intervention would not unduly delay or prejudice the parties.

¹¹⁷ Statement of Claim, issued December 17, 2020 [Six Nations MR, Tab 2D at 43].

¹¹⁸ *Tsilhqot'in* at [para 26](#).

¹¹⁹ *ROCP*, [Rule 13.01\(2\)](#).

¹²⁰ *Render* at [para 42](#).

58. In a complex proceeding, care must be taken to distinguish delay caused by pre-existing complexities and “undue” delay caused by the proposed intervention itself.¹²¹ Any complexity or delay in this action to date can be attributed to the parties.

59. Long before MCFN wrote to the case management judge in January 2022, to express its interest in learning more about the issues in the case, this action was already complex with a trial date uncertain. For example, the parties—which have been litigating this action for nearly thirty years—still cannot even agree on a list of issues engaged by this action.¹²² Trial had been pushed to “a date after January 1, 2024,”¹²³ and as recently as March 16, 2023, the defendants have sought further extensions to the timetable to accommodate proposed amendments to the statement of claim, which leave to amend will be heard in May 2023.¹²⁴ If those amendments are granted, additional discovery and further amendments to pleadings are likely.

60. For its part, MCFN proposes a straightforward role. It proposes to introduce expert and Elder evidence on the issues that impact its rights. It is not MCFN’s intention to counter or cross claim. Nor is it MCFN’s intention to expand the issues beyond what has already been introduced in the pleadings or in the parties’ proposed expert evidence.

¹²¹ *Ontario Hydro v Ajax (Town)*, 1996 CarswellOnt 3592 at para 26 (ONSC) [BA, Tab 2].

¹²² Case Management Endorsement (28 September 2022) at para 24 [MCFN MR, Tab 3G at 383].

¹²³ Case Management Endorsement (28 September 2022) at para 23(g) [MCFN MR, Tab 3G at 383].

¹²⁴ Case Management Conference Endorsement (16 March 2023), 2023 ONSC 1777 at [para 2](#).

61. MCFN has consistently confirmed its intention to adhere to the timelines that are set by the Court. This intention was most recently conveyed by MCFN to the parties in a March 17, 2023, letter.¹²⁵ MCFN is not seeking to intervene to delay this action, nor to litigate its own claims against the Crown. It is simply here to do what it has said since the beginning: to ensure its history is fairly and accurately told and to have a voice in how this Court interprets its treaties with the Crown.

G. MCFN seeks to intervene with the full rights of a party

62. Rule 13.01(2) empowers this Court to “make such order as is just” with respect to the participatory rights of an intervener.¹²⁶ MCFN seeks all the rights of a party on issues engaging its rights and interests to adequately defend those rights and interests. It intends to introduce Elder and expert evidence on issues engaging MCFN’s history and rights—no other party is equipped to faithfully represent MCFN’s perspectives.

63. In *Ontario Federation of Anglers and Hunters v. Ontario (Minister of Natural Resources and Forestry)*, this Court observed “the only effective way to respect the rights of the First Nations and ensure they are fully protected in the proceeding” is to

¹²⁵ Letter from N. Frame to M. Shapiro, dated March 17, 2023 [Tr C-X, Chief Laforme (20 March 2023), Exhibit 5].

¹²⁶ *ROCP*, [Rule 13.01\(2\)](#).

grant “the same rights as a party.”¹²⁷ Such rights should not be restricted as to the degree of participation in the action, nor with respect to entitlement to costs.¹²⁸

64. The same principles apply to MCFN’s proposed intervention. The complexity and interconnectedness of the issues, combined with the unpredictability about the evidence the parties will lead about those issues, demand MCFN be granted broad participatory rights—including appeal rights and entitlement to costs—to permit it to adequately defend its rights and interests. While MCFN has no interest in some issues, setting hard subject matter limits risks forcing MCFN to sit on the sidelines if issues evolve in unpredictable ways that clearly impact its rights; this concern is particularly acute given the uncertainty among the parties as to what the issues in the case even are, and given the proposed amendments to the pleadings that are ongoing.

PART V RELIEF SOUGHT

65. MCFN respectfully seeks:

- a) An order under Rule 13.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 granting MCFN leave to intervene as an added party in this action with the full rights of a party;

¹²⁷ *Ontario Federation of Anglers and Hunters v Ontario*, 2015 ONSC 7969 at [para 23](#), aff’d [2017 ONSC 441](#) [*OFAH*]; *North American Financial Group Inc v Ontario Securities Commission*, 2017 ONSC 2965 at [para 8](#).

¹²⁸ *OFAH* at [para 23](#), aff’d [2017 ONSC 441](#); *Durham Area Citizens for Endangered Species v Ontario (Minister of Natural Resources and Forestry)*, 2014 ONSC 7167 at [para 48](#).

- b) An order requiring the parties to this action to, within 15 days, provide MCFN all documents exchanged between the parties in this action to date, inclusive of productions, discovery transcripts or questions and answers on written examination for discovery, expert reports and documents referred to therein, and orders and endorsements of this Court;
- c) Costs of this motion; and
- d) Such further relief as MCFN may request and this Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of April 2023.



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SCHEDULE A
LIST OF AUTHORITIES REFERRED TO

No.	Item
Legislation	
1.	<i>Constitution Act, 1982</i>, being Schedule B to the <i>Canada Act 1982 (UK)</i>, 1982, c 11
2.	<i>Rules of Civil Procedure</i>, RRO 1990, Reg 194
Jurisprudence	
3.	<i>Butty v Butty</i>, (2009), 98 OR (3d) 713 (CA)
4.	<i>Durham Area Citizens for Endangered Species v Ontario (Minister of Natural Resources and Forestry)</i>, 2014 ONSC 7167
5.	<i>Feldberg v Andrews</i>, 2021 ONSC 1099
6.	<i>Haida Nation v British Columbia (Minister of Forests)</i>, 2004 SCC 73
7.	<i>Halpern v Toronto (City) Clerk</i> (2000), 51 OR (3d) 742 (SC DC)
8.	<i>Jones v Tsige</i>, 106 OR (3d) 721 (CA)
9.	<i>Lawyers' Professional Indemnity Co v Geto Investments Ltd</i> , 2002 CarswellOnt 350 (ONSC) [BA, Tab 1]
10.	<i>North American Financial Group Inc v Ontario Securities Commission</i>, 2017 ONSC 2965
11.	<i>Ontario Federation of Anglers and Hunters v Ontario</i>, 2015 ONSC 7969
12.	<i>Ontario Federation of Anglers and Hunters v Minister of Natural Resources and Forestry</i>, 2017 ONSC 441
13.	<i>Ontario Hydro v Ajax (Town)</i> , 1996 CarswellOnt 3592 (ONSC) [BA, Tab 2]
14.	<i>Peel (Regional Municipality) v Great Atlantic & Pacific Co of Canada Ltd</i> (1990), 74 OR (2d) 164 (CA)
15.	<i>R v Van der Peet</i>, [1996] 2 SCR 507

No.	Item
16.	<i>Render v ThyssenKrupp Elevator</i>, 2018 ONSC 3182
17.	<i>Six Nations of the Grand River Band of Indians v The Attorney General of Canada and His Majesty the King in Right of Ontario</i>, 2022 ONSC 7158
18.	<i>Six Nations of the Grand River Band of Indians v The Attorney General of Canada</i>, 2023 ONSC 1777
19.	<i>Terratec Environmental Ltd v Melancthon (Township)</i> , 2003 CarswellOnt 4319 (ONSC) [BA, Tab 3]
20.	<i>Tsilhqot'in Nation v British Columbia</i>, 2014 SCC 44

**SCHEDULE B
EXCERPTS OF LEGISLATION, REGULATIONS, AND BYLAWS**

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11

Recognition of existing aboriginal and treaty rights

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of aboriginal peoples of Canada

(2) In this Act, aboriginal peoples of Canada includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) treaty rights includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Rules of Civil Procedure, RRO 1990, Reg 194

RULE 13 INTERVENTION

Leave to Intervene as Added Party

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

- (a) an interest in the subject matter of the proceeding;
- (b) that the person may be adversely affected by a judgment in the proceeding;
or
- (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

Six Nations of the Grand River
Band of Indians
(Plaintiff)

- and - The Attorney General of Canada et al.
(Defendants)

Court File No. CV-18-594281-0000

ONTARIO

SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT
Toronto

FACTUM OF THE MOVING PARTY
MISSISSAUGAS OF THE CREDIT FIRST NATION

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