Court File No. CV-18-594281-0000

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 -

HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Defendants

- and -

THE HAUDENOSAUNEE DEVELOPMENT INSTITUTE

- and -

THE MEN'S FIRE OF THE SIX NATIONS GRAND RIVER TERRITORY

Moving Parties

FACTUM OF HIS MAJESTY THE KING IN RIGHT OF ONTARIO RESPONDING TO INTERVENTION MOTIONS BROUGHT BY THE HAUDENOSAUNEE DEVELOPMENT INSTITUTE AND THE MEN'S FIRE OF THE SIX NATIONS GRAND RIVER TERRITORY (RETURNABLE MAY 8-10, 2023)

May 1, 2023

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TABLE OF CONTENTS

PART I – OVERVIEW

1. The Defendant His Majesty the King in Right of Ontario ("Ontario") provides these submissions in response to intervention motions brought by the Haudenosaunee Development Institute ("HDI") and the Men's Fire of the Six Nations Grand River Territory (the "Men's Fire"). HDI and the Men's Fire seek to intervene in the current Six Nations litigation (the "Action").

2. Ontario takes the following positions regarding the HDI and Men's Fire motions:

   a. The HDI motion should be dismissed because HDI does not possess legal capacity. Ontario also notes that the record reflects challenges to HDI's purported ability to serve as a representative party on behalf of the Haudenosaunee Confederacy Chiefs Council ("HCCC") and all citizens of the Haudenosaunee Confederacy.

   b. Ontario takes no position on the Men's Fire motion other than to note that any Men's Fire participation should be limited to the HDI motion only, to speak exclusively to HDI's intervention request, rather than participating more broadly in the Action.

   c. Should the Court grant HDI and / or the Men's Fire leave to participate in the Action, Ontario requests that certain conditions be placed on such participation, including (i) confirming that HDI and / or the Men's Fire would be bound by findings of fact and law in the Action, including any appeals therefrom, (ii) allowing Ontario to rely on available procedural safeguards, like pleadings, discovery and interrogatories, (iii) granting Ontario additional time, as necessary, to respond to new claims and expert materials and (iv) ensuring that the Action is properly scoped to Six Nations claimants who settled on the Haldimand Tract, rather than all Haudenosaunee persons in North America.

3. Ontario submits that any intervention motion in the Action, including but not limited to those commenced by HDI and the Men's Fire, (i) is governed by the representative party test set out by the Supreme Court of Canada in *Western Canadian Shopping Centres*,[1] (ii) should be mindful of the collective nature of Indigenous rights

[1] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (CanLII) ("*Western Canadian Shopping Centres*").

and (iii) must be informed by Indigenous perspectives.

4. Ontario also underscores the need for finality in this litigation and takes the position that any person or entity having received the public notice circulated about the HDI motion and the case more generally (whether or not they have responded to it) should be deemed to be bound by any final judgment in the Action.

PART II – THE FACTS

A. THE ACTION

5. In 1995, Six Nations of the Grand River (the "Plaintiff"), a Band within the meaning of the *Indian Act*,[2] commenced an action in this Court against Canada and Ontario (the "Action").[3] The Action consists of 14 different claims,[4] which relate to historical events and financial transactions regarding land alleged to be the subject of the Haldimand Proclamation[5] of 1784, which authorized and permitted the Six Nations to settle on certain lands (the "Haldimand Tract").

6. The Plaintiff, in the Action, seeks among other things:

a. a declaration that one or both of the defendants breached fiduciary and / or treaty obligations owing to the Plaintiff;

b. equitable compensation and / or damages for such alleged breaches;

c. alternatively, a declaration that one or both of the defendants is obliged to account to the Plaintiff for all property, interests in property, money or other assets which were or ought to have been received, managed or held by the Crown for the benefit of the Plaintiff; and

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[2] *Indian Act*, R.S.C., 1985, c. I-5.

[3] March 7, 1995 Statement of Claim.

[4] The latest draft Statement of Claim, which has not yet been filed and which is the subject of a pleadings motion to be argued on May 23, 2023, would significantly expand the asserted claims at issue.

[5] Although Ontario uses the term Haldimand Proclamation, whether or not what Haldimand wrote is a "Proclamation" will be an issue at trial.

d. if necessary, a declaration that one or both of the defendants must restore to the Six Nations Trust all assets which were not received but ought to have been received, managed or held by the Crown for the benefit of the Plaintiff.[6]

7. While the Statement of Claim was originally filed on March 7, 1995, the Action was held in abeyance for several years to allow the parties to pursue settlement negotiations, which ultimately proved unsuccessful.[7] The Plaintiff has revised its claim several times since 1995, and has most recently proposed further amendments in a Further Further Amended Statement of Claim delivered to the parties in February 2023.[8]

8. The Action has been bifurcated into two phases: (i) liabilities and (ii) remedies and crossclaims, and is under case management.

B. THE MOTIONS

a) HDI motion

9. HDI, an unincorporated association,[9] was formed by the HCCC in 2007.[10] HDI purports to act as a delegate of the HCCC, which is also unincorporated.[11]

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[6] May 7, 2020 Further Amended Statement of Claim, para. 1.
[7] *Six Nations of the Grand River Band of Indians v. The Attorney General of Canada and His Majesty the King in Right of Ontario*, 2022 ONSC 7041 (CanLII) ("December 14, 2022 Endorsement") at para. 7.
[8] As per footnote 4 above, this is the subject of a pleadings motion to be argued on May 23, 2023.
[9] March 7, 2023 cross-examination transcript of Richard Saul ("Saul Transcript"), p. 40, Q. 171, lines 6-8 and p. 85, Qs. 375-376, lines 2-10, May 1, 2023 Transcript Compendium of His Majesty the King in Right of Ontario ("Ontario Transcript Compendium") at pp. 9-10; March 8, 2023 cross-examination transcript of Brian Doolittle ("Doolittle Transcript"), p. 26, Q. 128, lines 13-14, Ontario Transcript Compendium at p. 17.
[10] April 24, 2023 HDI Second Amended Notice of Motion ("HDI Second Amended Notice of Motion") at para. 30; June 10, 2022 Motion Record of the Hadenosaunee Development Institute (volume I of II), Tab 1.
[11] Doolittle Transcript, p. 77, Q. 351, line 22 and p. 140, Q. 683, lines. 5-6, Ontario Transcript Compendium at pp. 26-27.

10. HDI seeks to be joined as a party to the Action under Rule 5.03 of the *Rules of Civil Procedure*[12] or, alternatively, to be granted leave to intervene as a party under Rule 13.01. HDI also asks to be appointed, pursuant to Rule 10.01(1), as representative for the HCCC and all citizens of the Haudenosaunee Confederacy.

11. HDI, acting on behalf of the HCCC, filed a Notice of Motion on June 10, 2022, an Amended Notice of Motion on April 10, 2023 and a Second Amended Notice of Motion on April 24, 2023.[13] HDI views the HCCC as the traditional governing body of the Haudenosaunee people, and rejects the authority of the Plaintiff to bring the Action.[14] HDI states that the citizens of the Haudenosaunee Confederacy are the beneficiaries of and / or counterparties to both the Haldimand Proclamation and the Simcoe Patent.[15]

12. HDI indicates that it seeks to join the Action to advance a claim on behalf of Haudenosaunee beneficiaries and / or counterparties. It adds that, if its motion is denied, "a separate action to adjudicate the interests of the Haudenosaunee Confederacy will be required, at least as against the Defendants and potentially as against the plaintiff."[16]

13. Different HDI affiants have indicated that the HCCC does not recognize the jurisdiction of this Court and would not consider itself bound by any order or final judgment rendered in the Action.[17] It asserts that it is the legitimate representative of the

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[12] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
[13] HDI Second Amended Notice of Motion.
[14] HDI Second Amended Notice of Motion at paras. 21, 26-29, 42-44, 48, 53.
[15] HDI Second Amended Notice of Motion at para. 59.
[16] HDI Second Amended Notice of Motion at para. 56.
[17] Doolittle Transcript, pp. 57-64, Qs. 273-302, Ontario Transcript Compendium at pp. 18-25; March 8, 2023 cross-examination transcript of Colin Martin ("Martin Transcript"), p. 35, Qs. 171-174, lines 6-25, Ontario Transcript Compendium at p. 34.

Haudenosaunee people and that such authority was displaced in 1924, when the Six Nations Elected Council ("Elected Council") was created pursuant to a federal Order in Council.[18] The HCCC asserts that the Elected Council represents no more than a small fraction of the Haudenosaunee people.[19]

b) Men's Fire motion

14. The Men's Fire describes itself as a collective of Haudenosaunee persons across Turtle Island.[20]

15. The Men's Fire filed a Notice of Motion on November 7, 2022 and an Amended Notice of Motion on February 6, 2023.[21] Men's Fire takes issue with HDI's assertion that it is "the official representative of the Haudenosaunee People to advance the interests of the Haudenosaunee Confederacy and its citizens"[22] for purposes of the Action.

16. Relying on the Gayanashagowa or the Great Law of Peace as the legal basis for its proposed intervention,[23] the Men's Fire seeks (i) to be added as a party to the HDI motion under Rule 13.01 and, should the HDI motion be granted, (ii) to be granted leave

[18] HDI Second Amended Notice of Motion at paras. 45-47; November 1, 2022 affidavit of Gail Ava Hill ("Hill Affidavit"), at para. 12 and Exhibit B, November 2, 2022 Responding Motion Record of the Plaintiff, Six Nations of the Grand River Band of Indians ("Six Nations Responding Motion Record"), Tab 2.
[19] August 31, 2022 affidavit of Aaron Detlor at paras. 19-20, August 31, 2022 Second Supplementary Motion Record of the Haudenosaunee Development Institute, Tab 2.
[20] April 10, 2023 Men's Fire factum ("Men's Fire Factum") at para. 8.
[21] February 6, 2023 Men's Fire Amended Notice of Motion ("Men's Fire Amended Notice of Motion"), January 9, 2023 Amended Responding Motion Record of the Men's Fire of the Six Nations Grand River Territory ("Men's Fire Amended Responding Motion Record"), Tab 1.
[22] Men's Fire Amended Notice of Motion at para. 3.
[23] Men's Fire Amended Notice of Motion at paras. 5-9; January 6, 2023 affidavit of Paul Delaronde ("Delaronde Affidavit") at paras. 24-25, Men's Fire Amended Responding Motion Record, Tab 3.

to intervene in the Action as a friend of the Court under Rule 13.02.[24]

PART III – ISSUES

17. The issues to be determined on the HDI and Men's Fire motions are:

a. whether HDI should be joined as a necessary party in the Action under Rule 5.03 or, alternatively, granted leave to intervene as an added party pursuant to Rule 13.01;

b. whether HDI should be appointed as representative for all HCCC citizens under Rule 10.01(1); and

c. whether the Men's Fire should be granted leave to intervene as an added party on HDI's motion under Rule 13.01 and, if the HDI motion is granted, whether it should be granted leave to intervene as a friend of the court in the Action as per Rule 13.02.

PART IV – LAW AND ARGUMENT

A. HDI INTERVENTION MOTION

a) HDI does not have legal capacity

i) HDI does not possess legal capacity

18. Absent legal capacity, a party cannot "sue or be sued."[25]

19. HDI lacks such capacity, as a result of which it "has no capacity to engage in these proceedings in its own right"[26] to "sue" the defendants on behalf of the HCCC and the Haudenosaunee Confederacy.[27] Its intervention motion, through which it attempts

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[24] Men's Fire Amended Notice of Motion at para. 1.
[25] *R. v. Kelly*, 2013 ONSC 1220 (CanLII) ("*Kelly*") at para. 111; *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 BCCA 193 (CanLII) ("*Kwicksutaineuk*") at para. 64.
[26] *Athabasca Regional Government v. Canada (Attorney General)*, 2010 FC 948 (CanLII) ("*Athabasca*") at para. 162.
[27] April 10, 2023 HDI factum ("HDI Factum") at para. 109. See also HDI Factum at paras. 7, 61, 95, 107 and HDI Second Amended Notice of Motion at paras. 1, 6, 34, 52, 56, 59.

"to sue to enforce the Haldimand Proclamation on behalf of the HCCC",[28] must therefore be dismissed.

20. Legal capacity is a threshold requirement for undertaking litigation.[29] To possess such capacity, the moving party must be a natural person, a corporation or a body "which has been given that capacity by statute."[30] Any statute said to endow a party with legal capacity must do so "expressly" or by "necessary implication".[31]

21. HDI has commenced its intervention motion on behalf of the HCCC, who is purported to have "delegated authority to HDI to advance the interests of the Haudenosaunee Confederacy in this proceeding in accordance with the traditions, customs, and practices of the Haudenosaunee Confederacy."[32]

22. The need for legal capacity in the Indigenous context has been confirmed by this Court and other Canadian courts.[33]

23. HDI, the only named moving party on its motion, is an unincorporated association, a fact established in the record,[34] conceded by HDI[35] and confirmed by this

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[28] HDI Factum at para. 109.
[29] *Wawanesa Mutual Insurance Company v. Marta*, 2023 ONSC 692 (CanLII) ("*Wawanesa*") at para. 17.
[30] *Wawanesa* at para. 18; *Kwicksutaineuk* at para. 64.
[31] *Cadeau v. Barrie Police Services Board*, 2018 ONSC 4331 (CanLII) at para. 9.
[32] HDI Second Amended Notice of Motion at para. 32.
[33] See, for instance, *Kelly* at paras. 111-119; *Papaschase First Nation v. McLeod*, 2021 ABQB 415 (CanLII) ("*Papaschase*") at paras. 11-13; *Hwlitsum First Nation v. Canada (Attorney General)*, 2018 BCCA 276 (CanLII) ("*Hwlitsum First Nation*") at para. 18; *Kwicksutaineuk* at para. 64; *Athabasca* at para. 162; *Soldier v. Canada (Attorney General)*, 2009 MBCA 12 (CanLII) at para. 47.
[34] Saul Transcript, p. 40, Q. 171, lines 6-8 and p. 85, Qs. 375-376, lines 2-10, Ontario Transcript Compendium at pp. 9-10; Doolittle Transcript, p. 26, Q. 128, lines 13-14, Ontario Transcript Compendium at p. 17.
[35] HDI Factum at paras. 43, 107.

Court.[36] HDI is neither a natural or legal person, nor is it (as discussed below) vested with legal capacity by way of legislation. It does not, accordingly, have the legal capacity required to commence or join litigation against the Crown, including the present Action.[37]

24. Unlike *Indian Act* Bands which are legal entities separate from their members with the status to sue or to be sued,[38] unincorporated associations lack any capacity to sue because they have no legal existence separate from their members.[39]

25. While HDI is said to act pursuant to HCCC authority,[40] any intervention motion brought on behalf of the HCCC would first need a legally cognizable moving party. As with HDI, the HCCC does not possess legal capacity[41] and would thus require incorporation or a proper representative capable of engaging in litigation on behalf of the collective.[42]

ii) UNDRIP Act does not vest HDI with legal capacity

26. HDI asserts that the *United Nations Declaration on the Rights of Indigenous Peoples Act*[43] ("*UNDRIP Act*") "provides for [legal] capacity" with respect to this motion.[44] However, this is incorrect and there is nothing whatsoever in this legislation

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[36] *Davey v. Hill*, 2018 ONSC 5274 (CanLII) at para. 5.
[37] *Kelly* at paras. 111-113, 117-119 (reversed in part on different grounds). See also *Kwicksutaineuk* at para. 65; *Papaschase* at para. 13.
[38] *Kelly* at para. 112.
[39] *Wawanesa* at para. 19.
[40] HDI Second Amended Notice of Motion at para. 32.
[41] Doolittle Transcript, p. 77, Q. 351, line 22 and p. 140, Q. 683, lines. 5-6, Ontario Transcript Compendium at pp. 26-27.
[42] *Kelly* at para. 119.
43 *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 ("*UNDRIP Act*").
[44] HDI factum at para. 107.

which "enables HDI to sue and be sued."[45]

27. There are several problems which undermine HDI's efforts to rely on the *UNDRIP Act*. First, this statute applies only to federal law.[46] Second, and critically, the *United Nations Declaration on the Rights of Indigenous Peoples*[47] ("UNDRIP"), on which the legislation is based, is "a non-binding aspirational document" which cannot invalidate statutory or other rules governing the legal capacity requirement.[48]

28. Also, neither the language of the *UNDRIP Act* or UNDRIP endows HDI with legal capacity, either expressly or by necessary implication.

29. While HDI does not cite any specific *UNDRIP Act* provisions in support of its assertion that this legislation "provides for capacity,"[49] it appears that, rather than relying on the statute itself, HDI instead seeks to rely on UNDRIP articles 18 and 40:

> 18. 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.
>
> . . . . . .
>
> 40. 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

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[45] HDI factum at para. 95.
[46] *UNDRIP Act*. s. 5. *Wesley v. Alberta*, 2022 ABKB 713 (CanLII) ("*Wesley*") at para. 139. See also *Hydro One Networks Inc. (Re)*, 2022 LNONOEB 43 at para. 49, Book of Authorities of His Majesty the King in Right of Ontario, Tab 1, where the Ontario Energy Board dismissed an effort by HDI to rely on this federal legislation.
[47] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution adopted by the General Assembly*, 2 October 2007, A/RES/61/295.
[48] *Wesley* at paras. 145, 148. See also *AltaLink Management Ltd v. Alberta (Utilities Commission)*, 2021 ABCA 342 (CanLII) at para. 122; *Watson v. Canada*, 2020 FC 129 (CanLII) ("*Watson*") at para. 351.
[49] HDI factum at para. 107.

> consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.[50]

30. Yet neither UNDRIP article 18 or 40 (i) references legal capacity, (ii) can reasonably be said to expressly or by necessary implication vest HDI with legal capacity or (iii) otherwise signals that this requirement must be suspended or ignored by the Court.

31. Likewise, nothing in the *UNDRIP Act* may expressly or by necessary implication be read as somehow curing HDI's lack of legal capacity.

32. And, in any event, the HCCC has not actually been prevented from selecting its delegate of choice.

33. To be clear: the legal capacity requirement does not force the HCCC to act "under legal disabilities",[51] nor does it prevent it from selecting an HDI representative to bring the motion on its behalf. Instead of appointing HDI, the HCCC could have appointed one or more HDI delegates with legal capacity[52] to commence the motion on behalf of the HCCC and Haudenosaunee Confederacy citizens.

34. Counsel for HDI have acknowledged that the Plaintiff had previously expressed concerns over HDI's lack of legal capacity[53] but they chose to press forward despite such concerns.

iii) Legal capacity is necessary in judicial proceedings

35. The Court of Appeal, in *Gratton-Masuy Environmental Technologies Inc. v.*

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[50] UNDRIP articles 18, 40; HDI factum at paras. 98, 96.
[51] HDI factum at para. 99.
[52] March 24, 2023 cross-examination transcript of Aaron Detlor, p. 97, Qs 329-331, lines 6-14, Ontario Transcript Compendium at p. 38.
[53] HDI factum at para. 106. Ontario also noted such concerns in its written submissions for the September 16, 2022 case management conference before Sanfilippo J.

Ontario, explains that legal capacity is critical since, without it, courts lack jurisdiction to grant relief vis-à-vis parties that do "not have the legal capacity to be sued in [their] own right."[54] Underscoring the "the central principle that suability is a prerequisite to the court's jurisdiction to entertain the claims advanced by a plaintiff against a defendant", Cronk J.A. (as she then was) remarks, quoting the New Brunswick Court of Appeal, that in "all cases, the Court must have jurisdiction over the party being sued before it can deal with the claim being made."[55]

36. Stated differently, an unincorporated association like HDI seeking to advance claims in litigation is an "entity not known to the law" and any "judgment against it [would thus be] null and void."[56]

37. This established principle has also been confirmed in the Indigenous context.[57]

38. Beyond jurisprudence, this recognition of the Court's lack of jurisdiction over parties without legal capacity, and the consequence that "an action cannot be brought against a non-suable entity regardless of the claims advanced and the relief sought,"[58] finds expression in the *Rules of Civil Procedure*. As per Rule 21.01(3)(b), parties can move to strike out claims featuring plaintiffs or defendants lacking such capacity.

39. Ensuring legal capacity is of heightened significance here, given the confirmation by different HDI affiants that the HCCC has chosen to seek to intervene through a delegate because (i) it does not recognize the jurisdiction of this Court and (ii) would not

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[54] *Gratton-Masuy Environmental Technologies Inc. v. Ontario*, 2010 ONCA 501 (CanLII) ("*Gratton-Masuy*") at para. 62 (leave to appeal requested but application for leave discontinued: [2010] S.C.C.A. No. 397).
[55] *Gratton-Masuy* at paras. 62, 64.
[56] *Trapp v. British Columbia*, 2018 BCSC 580 (CanLII) at para. 20.
[57] *Papaschase* at para. 25.
[58] *Gratton-Masuy* at para. 73.

consider itself bound by any order or final judgment rendered in the Action.[59] Given such evidence, it is even more important that any prospective HCCC delegate clearly possess legal capacity.

b) Challenges in the record to HDI's capacity to serve as representative party

40. Beyond legal capacity, the record reflects a number of challenges to HDI's ability to serve as a representative party in the Action, including (i) the alleged improper delegation to HDI of HCCC authority under the Gayanashagowa[60] and (ii) allegations of improper financial and related activities on the part of HDI.[61]

41. Ontario takes no position on the merits of any such issue, or the proper decision-making process, if any, under the Gayanashagowa,[62] but merely observes that such challenges are germane to the fourth part of the *Western Canadian Shopping Centres* test which, as indicated below, governs this intervention motion.

B. MEN'S FIRE INTERVENTION MOTION

42. Ontario takes no position on the Men's Fire motion, other than to note that any

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[59] Doolittle Transcript, pp. 57-64, Qs. 273-302, Ontario Transcript Compendium at pp. 18-25; Martin Transcript, p. 35, Qs. 171-174, lines 6-25, Ontario Transcript Compendium at p. 34.

[60] See January 6, 2023 affidavit of Wilfred Davey ("Davey Affidavit") at paras. 19-28, Men's Fire Amended Responding Motion Record, Tab 2; Delaronde Affidavit at paras. 29-33. See also Men's Fire Factum at paras. 17-52.

[61] See, for example, Davey Affidavit at paras. 14-18; November 1, 2022 affidavit of Helen Miller at paras. 8-13, Six Nations Responding Motion Record, Tab 3; November 3, 2022 Karizma Defreitas-Barnes, Exhibit B, November 3, 2022 HDI Third Supplementary Motion Record, Tab 7(B). See also Men's Fire Factum at paras. 53-65.

[62] The Gayanashagowa principles and protocols at issue are referenced in the record. See, for instance, HDI Second Amended Notice of Motion at paras. 7, 28, 61; Men's Fire Amended Notice of Motion at paras. 17-23; Delaronde Affidavit at paras. 12-28. Note that the Men's Fire interpretation of the Gayanashagowa is disputed by HDI: see February 6, 2023 affidavit of Richard Wayne Hill Sr. at paras. 51-54, February 6, 2023 Responding Motion Record of the Haudenosaunee Development Institute (Men's Fire Motion), Tab 2.

Men's Fire participation (i) should be limited to the HDI motion only, not the Action more broadly, and (ii) should focus exclusively on HDI's intervention request.

43. The Men's Fire explains in its Amended Notice of Motion that the central purpose of its intervention request is to object to "HDI's claim that they have been selected, according to traditional Haudenosaunee law, as the official representative of the Haudenosaunee People to advance the interests of the Haudenosaunee Confederacy and its citizens in litigation."[63] Accordingly, limiting the Men's Fire intervention to the HDI motion, where the question of HDI's own intervention will be resolved, is fair and reasonable, while remaining responsive to the need to avoid any undue delay or other prejudice to the parties.

44. Were the Court to grant HDI leave to intervene in the Action, any further role for the Men's Fire, once the central issue on which it seeks to intervene has been decided, would appear limited. In Ontario's view, Men's Fire participation in the Action, if HDI was permitted to intervene, makes little practical sense, and any potential added value would not outweigh the further complications that would invariably arise from adding yet another party to the litigation.

45. A final point in this regard: the Men's Fire proposes that this Court should treat the Gayanashagowa as foreign law.[64] This approach to Indigenous legal systems was expressly rejected by the Court of Appeal in a proceeding involving efforts to rely on Haudenosaunee law in the context of a family law dispute: "For the purpose of applying s. 35 of the *Constitution Act, 1982*, Aboriginal rights or Indigenous law do not constitute

[63] Men's Fire Amended Notice of Motion at para. 3.
[64] Men's Fire Factum at para. 85.

"foreign law", even conceptually."[65] Such would be the case, in Ontario's view, whether or not the Action engages s. 35 interests.

C. LEGAL TEST AND PRINCIPLES GOVERNING INTERVENTION MOTIONS

46. Should the Court dismiss the HDI motion, Ontario takes no position on the suitability of any potential replacement representative that the HCCC may decide to put forward instead of HDI to advance the interests of the HCCC and Haudenosaunee Confederacy citizens in the Action.

47. Before taking a position on the suitability of any such alternate HCCC representative, Ontario would need to review the details of the proposed representative, including whether it has legal capacity.

48. Ontario takes the position that adjudicating the suitability of any proposed representative party in the Action should (i) be governed by the test set out in *Western Canadian Shopping Centres*, (ii) be mindful of the collective nature of Indigenous rights, (iii) prioritize Indigenous perspectives and (iv) be properly scoped.

a) ***Western Canadian Shopping Centres*** **test governs intervention requests**

49. The test for assessing the suitability of a proposed representative party is outlined in *Western Canadian Shopping Centres Inc. v. Dutton*. Pursuant to this test, any potential party seeking to act in this capacity must satisfy the Court that:

a. the class is capable of clear definition;

b. there are issues of fact or law common to all class members;

c. success for one class member means success for all; and

[65] *Beaver v. Hill,* 2018 ONCA 816 (CanLII) at para. 17.

d. the proposed representative adequately represents the interests of the class.[66]

50. While confirmed by the Supreme Court of Canada in the context of class action proceedings,[67] there is a clear consensus (contrary to HDI's suggestion that this framework is optional and is "not a stringent test"[68]) that this test is "correct" in "cases involving challenges to standing of Aboriginal litigants".[69]

51. Accordingly, any proposed representative in this case would need (among other things) to satisfy the Court that the class it purports to represent is capable of clear definition and that it adequately represents the interests of that class.

52. To obtain leave to intervene, one must satisfy the Court that the class or collective it seeks to represent is capable of clear definition. In other words, an intervener should "only be sanctioned when the putative representative proceeding and representative plaintiff meet the four criteria established by the Supreme Court of Canada"[70] in *Western Canadian Shopping Centres*.

b) Indigenous rights are collective in nature

53. Aboriginal and treaty rights are held collectively,[71] and any party asserting such rights would need to do so on behalf of a collective rather than on behalf of specific

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[66] *Western Canadian Shopping Centres* at para. 48.
[67] *Western Canadian Shopping Centres* at paras. 30-51.
[68] HDI Factum at para. 89.
[69] *Hwlitsum First Nation* at paras. 17-19, 22. See also, for instance, *Kwicksutaineuk* at para. 84; *Kelly* at para. 99; *Whiteduck v. HMQ in Right of Ontario*, 2020 ONSC 5592 (CanLII) at paras. 24-25; *Wesley v. Canada*, 2017 FC 725 (CanLII) at para. 23; *Cowichan Tribes v. Canada (Attorney General)*, 2016 BCSC 420 (CanLII) at para. 20; *Campbell v. British Columbia (Forest and Range)*, 2011 BCSC 448 (CanLII) ("*Campbell*") at paras. 10-11, 129-130; *Komoyue Heritage Society v. British Columbia (AG)*, 2006 BCSC 1517 (CanLII) ("*Komoyue Heritage Society*") at paras. 29-30, 35.
[70] *Komoyue Heritage Society* at para. 35; *Campbell* at para. 130.
[71] *Kelly* at paras. 57, 107-108.

members of that group.[72]

54. Further, it is the Indigenous party seeking to intervene in a proceeding, not the Crown or the Court, which bears the onus of "defin[ing] the group they claim to represent with sufficient clarity".[73]

55. These principles align with the fourth prong of the *Western Canadian Shopping Centres* test regarding the need to show that the class at issue is capable of clear definition.

56. In light of these principles, a salient consideration with respect to any HCCC rights assertion is whether any claimants said to be represented by the HCCC[74] are also members of the Six Nations Band and thus already ostensibly represented by the Plaintiff in the Action.

57. This consideration is important since, if Haudenosaunee Confederacy citizens said to be represented by the HCCC are also Plaintiff Band members, this could raise the question of whether the HCCC in fact constitutes a collective "distinct"[75] from the Band,[76] whose members would already be entitled to any remedy granted in the Action.

58. Should it be established that the HCCC and the Plaintiff represent the same "collective", HCCC intervention would raise vexing questions for the trial judge. Among other things, the trier of fact would need to determine if the same claimants can be represented by two different entities and two sets of counsel. Ontario does recognize

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[72] *R. v. Sundown*, 1999 CanLII 673 (SCC) at paras. 35-36.
[73] *Hwlitsum First Nation* at paras. 25, 28. See also *Campbell* at paras. 144-145.
[74] See discussion of the need to properly scope the Action below.
[75] HDI Second Amended Notice of Motion at para. 48.
[76] See *Watson* at paras. 439 and 443, where the Federal Court found that a proposed Indigenous representative party did not have standing because it could not demonstrate that it "is a collective separate from [the] Ochapowace [Band]" (para. 439).

that HCCC supporters who are Band members may not necessarily see their interests as being best represented by the Plaintiff.

c) Need for Indigenous perspectives on representation issue

59. Any adjudication of the question of who properly represents the claimants in the Action would also need to be informed by Indigenous perspectives advanced as part of that litigation process.

60. As this Court has opined, "the definition of the proper rights holder is a matter to be determined primarily from the viewpoint of the Aboriginal collective itself in accordance with its customs and habits."[77]

61. The HDI and Men's Fire motions address the issue of which entity, including but not limited to the Plaintiff, is best positioned to represent members of the Haudenosaunee community with a potential stake in any remedy granted in the Action.

62. Some community members, as signaled in the record, do not view the Plaintiff as representing their interests. This longstanding disagreement over Six Nation governance dates back to 1924, when the Elected Council was created by a federal Order in Council,[78] and has been addressed by this Court, the Court of Appeal and the Supreme Court of Canada.[79]

63. Underlying this disagreement between the Plaintiff and the HCCC is the fact that "in some cases, an Aboriginal collective may self-identify along traditional lines independent of *Indian Act* designation as a Band." Depending on the facts of any given case, it could similarly be true that "a Band is not necessarily the proper entity to assert

[77] *Kelly* at para. 59.
[78] Hill Affidavit at para. 12 and Exhibit B.
[79] *Davey et al. v. Isaac et al.*, 1977 CanLII 21 (SCC).

an Aboriginal right."[80]

d) The Action should be properly scoped

64. It is Ontario's position that the tract of land described in the 1784 Haldimand Proclamation and 1793 Simcoe Patent, which was made available to people of the Six Nations who wished to settle there, came from lands covered by a treaty made with the Mississaugas. These lands were not Six Nations treaty lands, nor were they reserve lands.

65. Ontario submits that only the Six Nations who settled on the Haldimand Tract, rather than the wider North American Haudenosaunee community, are proper claimants in this Action.

66. While HDI seeks to represent Haudenosaunee Confederacy citizens geographically based in Quebec, Wisconsin and Oklahoma,[81] adjudicating this broader claim would unnecessarily complicate the trial of this already complex Action by significantly expanding the scope of the collective seeking relief, without in Ontario's submission any basis in the historical record to support such an expansion.

D. FINALITY IN LITIGATION AND NEED TO LIMIT PREJUDICE TO ONTARIO

a) Need for finality in the Action

67. Ontario (i) objects to the HDI motion and (ii) takes no position on the Men's Fire motion for the reasons outlined above. Ontario also maintains that the same "collective" or group of persons cannot litigate the Action through different representatives.

68. Despite this, were the Court to determine that a collective other than the Plaintiff

[80] *Kwicksutaineuk* at para. 77; *Kelly* at paras. 58, 117.
[81] HDI Second Amended Notice of Motion at paras. 1(b), 8, 25, 58-61.

should, through a proper representative, participate in the Action, it may well be preferable for this entity to be added to this litigation than for it to commence a separate claim against the Crown.

69. Ontario would be significantly prejudiced if, following a final judgment in the Action, further litigation was commenced by another party which sought to adjudicate claims similar to those advanced by the Plaintiff. Among other things:

a. Ontario would be required to defend against related claims in multiple proceedings, a fact which would require it to expend very significant financial and other resources;

b. Ontario would have previously disclosed expert reports without having reviewed similar materials filed by any future plaintiff; and

c. any decisions in the Action, which would bind Ontario and any future plaintiff, may not have considered any novel or other circumstances relating to any future plaintiff and may thus prove prejudicial to Ontario.

70. This Court has advised that all proper and necessary parties in Indigenous litigation should be involved in the proceeding at the earliest opportunity: "the preferable way to adjudicate claims to Aboriginal rights is in civil proceedings where all the proper and necessary parties are before the court."[82]

71. Making sure that the necessary parties participate in the Action would promote the finality of this litigation. Finality is both "an important aim of litigation"[83] and "a central principle in the administration of justice."[84] The "law rightly seeks a finality to litigation",

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[82] *Kelly* at para. 105. A similar view was expressed by Lamer J. (as he then was), in the context of Aboriginal title assertions, in *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 (CanLII) at para. 185.
[83] *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII) at para. 4. See also *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 (CanLII) at para. 111.
[84] *Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Limited*, 2007 ONCA 695 (CanLII) ("*Marché D'Alimentation Denis Thériault*") at para. 37.

which should remain “a compelling consideration”[85] for this Court in connection with any intervention motion.

72. Ontario argues, however, that the finality principle does not justify allowing one collective to speak through different representatives in the same case, or failing to apply necessary frameworks like the *Western Canadian Shopping Centres* test.

73. The parties have taken various steps to provide broad public notice of the Action and intervention motions. As per successive case management endorsements,[86] the parties have offered such notice to potentially impacted “Haudenosaunee communities”[87] and have created a public website[88] to facilitate this information sharing.

74. To this end, Ontario maintains that any person or entity having received this public notice (whether or not they have responded to it) should be deemed to be bound by any final judgment in the Action. Ontario requests that this fact be confirmed by way of Order prepared in response to the HDI and Men’s Fire motions.

b) Conditions on intervention required to limit prejudice to Ontario

75. Should the Court grant leave to HDI and / or the Men’s Fire to participate in the Action, Ontario requests that conditions be placed on such participation to mitigate any resulting prejudice to Ontario.

76. Ontario requests:

a. that the Court confirm that HDI and / or the Men’s Fire will be bound by any findings of fact and law in the Action, including any appeals therefrom;

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[85] *Marché D'Alimentation Denis Thériault* at para. 37.
[86] *Six Nations of the Grand River Band of Indians v. The Attorney General of Canada*, 2022 ONSC 5373 (CanLII) at para. 2; December 14, 2022 Endorsement at paras. 28-30.
[87] December 14, 2022 Endorsement at para. 29.
[88] See www.sngrlitigation.com.

b. that HDI and / or the Men's Fire be prevented from filing any expert reports, except with the consent of the parties or leave of the Court;

c. that any new claims advanced by HDI and / or the Men's Fire be communicated to the parties within 30 days of a court order granting intervention status;

d. that any new claims advanced by HDI and / or the Men's Fire be limited in scope and that Ontario be afforded sufficient additional time to respond to these claims, including time to adduce responsive evidence and / or expert reports;

e. that Ontario likewise be afforded sufficient additional time to respond to expert reports (filed with consent of the parties or leave of the Court) filed by HDI and / or the Men's Fire;

f. that Ontario be allowed to rely on existing procedural safeguards, like pleadings, discovery and interrogatories, as provided for in the *Rules of Civil Procedure*;

g. that HDI and / or the Men's Fire be prevented from taking any step which could result in case splitting, which the Supreme Court of Canada has long held to be impermissible;[89]

h. that HDI and / or the Men's Fire be directed to coordinate their cross-examinations with the Plaintiff to the extent possible so as not to unduly lengthen the trial; and

i. that any participation by HDI and / or the Men's Fire be properly scoped to Six Nations claimants who settled on the Haldimand Tract, rather than all Haudenosaunee persons in North America.

PART V – ORDER REQUESTED

77. Ontario respectfully requests:

A. an Order dismissing the HDI motion for want of legal capacity;

B. that this Order stipulate that any person or entity having received the public notice provided in relation to the Action (whether or not they have responded to such notice) be deemed to be bound by any final judgment in the Action;

C. that any leave to participate granted to the Men's Fire, in response to its motion, be limited to the HDI motion only, not the Action more broadly, to speak exclusively to HDI's intervention request; and

[89] *R. v. Krause*, 1986 CanLII 39 (SCC) at para. 15.

D. that the following conditions be imposed on any HDI and / or the Men's Fire participation in the Action granted by the Court, as necessary depending on the scope of participation granted:

a. that the Court confirm that HDI and / or the Men's Fire will be bound by any findings of fact and law in the Action, including any appeals therefrom;

b. that HDI and / or the Men's Fire be prevented from filing any expert reports, except with the consent of the parties or leave of the Court;

c. that any new claims advanced by HDI and / or the Men's Fire be communicated to the parties within 30 days of a court order granting intervention status;

d. that any new claims advanced by HDI and / or the Men's Fire be limited in scope and that Ontario be afforded sufficient additional time to respond to these claims, including time to adduce responsive evidence and / or expert reports;

e. that Ontario likewise be afforded sufficient additional time to respond to expert reports (filed with consent of the parties or leave of the Court) filed by HDI and / or the Men's Fire;

f. that Ontario be allowed to rely on existing procedural safeguards, like pleadings, discovery and interrogatories, as provided for in the *Rules of Civil Procedure*;

g. that HDI and / or the Men's Fire be prevented from taking any step which could result in case splitting, which the Supreme Court of Canada has long held to be impermissible;

h. that HDI and / or the Men's Fire be directed to coordinate their cross-examinations with the Plaintiff to the extent possible so as not to unduly lengthen the trial; and

i. that any participation by HDI and / or the Men's Fire be properly scoped to Six Nations claimants who settled on the Haldimand Tract, rather than all Haudenosaunee persons in North America.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of May, 2023.

per Manizeh Fancy, David Tortell and Brandon Fragomeni
Counsel for the Defendant,
His Majesty the King in right of Ontario

SCHEDULE "A"

1. *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (CanLII)
2. *Six Nations of the Grand River Band of Indians v. The Attorney General of Canada and His Majesty the King in Right of Ontario*, 2022 ONSC 7041 (CanLII)
3. *R. v. Kelly*, 2013 ONSC 1220 (CanLII)
4. *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 BCCA 193 (CanLII)
5. *Athabasca Regional Government v. Canada (Attorney General)*, 2010 FC 948 (CanLII)
6. *Wawanesa Mutual Insurance Company v. Marta*, 2023 ONSC 692 (CanLII)
7. *Cadeau v. Barrie Police Services Board*, 2018 ONSC 4331 (CanLII)
8. *Papaschase First Nation v. McLeod*, 2021 ABQB 415 (CanLII)
9. *Hwlitsum First Nation v. Canada (Attorney General)*, 2018 BCCA 276 (CanLII)
10. *Soldier v. Canada (Attorney General)*, 2009 MBCA 12 (CanLII)
11. *Davey v. Hill*, 2018 ONSC 5274 (CanLII)
12. *Wesley v. Alberta*, 2022 ABKB 713 (CanLII)
13. *Hydro One Networks Inc. (Re)*, 2022 LNONOEB 43
14. *AltaLink Management Ltd v. Alberta (Utilities Commission)*, 2021 ABCA 342 (CanLII)
15. *Watson v. Canada*, 2020 FC 129 (CanLII)
16. *Gratton-Masuy Environmental Technologies Inc. v. Ontario*, 2010 ONCA 501 (CanLII)
17. *Trapp v. British Columbia*, 2018 BCSC 580 (CanLII)
18. *Beaver v. Hill,* 2018 ONCA 816 (CanLII)
19. *Whiteduck v. HMQ in Right of Ontario*, 2020 ONSC 5592 (CanLII)
20. *Wesley v. Canada*, 2017 FC 725 (CanLII)
21. *Cowichan Tribes v. Canada (Attorney General)*, 2016 BCSC 420 (CanLII)
22. *Campbell v. British Columbia (Forest and Range)*, 2011 BCSC 448 (CanLII)
23. *Komoyue Heritage Society v. British Columbia (AG)*, 2006 BCSC 1517 (CanLII)

24. *R. v. Sundown*, 1999 CanLII 673 (SCC)

25. *Davey et al. v. Isaac et al.*, 1977 CanLII 21 (SCC)

26. *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 (CanLII)

27. *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII)

28. *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 (CanLII)

29. *Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Limited*, 2007 ONCA 695 (CanLII)

30. *Six Nations of the Grand River Band of Indians v. The Attorney General of Canada*, 2022 ONSC 5373 (CanLII)

31. *R. v. Krause*, 1986 CanLII 39 (SCC)

SCHEDULE "B"

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

RULE 5 JOINDER OF CLAIMS AND PARTIES

Joinder of Necessary Parties
General Rule

5.03 (1) Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding. R.R.O. 1990, Reg. 194, r. 5.03 (1).

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RULE 10 REPRESENTATION ORDER

Representation of an Interested Person Who Cannot Be Ascertained
Proceedings in which Order may be Made

10.01 (1) In a proceeding concerning,

(a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
(b) the determination of a question arising in the administration of an estate or trust;
(c) the approval of a sale, purchase, settlement or other transaction;
(d) the approval of an arrangement under the Variation of Trusts Act;
(e) the administration of the estate of a deceased person; or
(f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served. R.R.O. 1990, Reg. 194, r. 10.01 (1).

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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. R.R.O. 1990, Reg. 194, r. 13.01 (1).

(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. R.R.O. 1990, Reg. 194, r. 13.01 (2).

Leave to Intervene as Friend of the Court

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or associate judge, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument. R.R.O. 1990, Reg. 194, r. 13.02; O. Reg. 186/10, s. 1; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

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RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL

To Defendant

21.01 (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that…

Capacity

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

Court File No. CV-18-594281-0000

SIX NATIONS OF THE GRAND RIVER INDIAN BAND OF INDIANS	**AND**	**THE ATTORNEY GENERAL OF CANADA AND HIS MAJESTY THE KING IN RIGHT OF ONTARIO**
Plaintiff		Defendants

ONTARIO SUPERIOR COURT OF JUSTICE
Proceeding commenced in Toronto

FACTUM OF HIS MAJESTY THE KING IN RIGHT OF ONTARIO RESPONDING TO INTERVENTION MOTIONS OF THE HAUDENOSAUNEE DEVELOPMENT INSTITUTE AND THE MEN'S FIRE OF THE SIX NATIONS GRAND RIVER TERRITORY

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