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 (Responding Party)

- and -

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

Defendants (Responding Parties)

- and -

THE HAUDENOSAUNEE DEVELOPMENT INSTITUTE (AARON DETLOR AND BRIAN DOOLITTLE), AS APPOINTED BY THE HAUDENOSAUNEE CONFEDERACY CHIEFS COUNCIL, ON BEHALF OF THE HAUDENOSAUNEE CONFEDERACY

Moving Party

RESPONDING FACTUM OF THE PLAINTIFF,
SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS

MOTION RETURNABLE MAY 8-10, 2023

May 1, 2023

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PART I - INTRODUCTION

1. The Haudenosaunee Development Institute's ("**HDI**") motion to insert itself into this action is a decades-late, ill-defined attempt by aggrieved traditional hereditary chiefs of the Haudenosaunee Confederacy Chiefs Council ("**HCCC**") to abuse the court's process and disrupt the Six Nations of the Grand River Band's efforts to obtain justice for the loss of its reserve and financial resources. The HCCC hides behind HDI for the express purpose of derailing this action while purporting not to be bound by any rulings of this Court.

2. The asserted claims and interests are at best tenuous, peripheral to the pleaded issues in the action, and exceedingly difficult to discern. The admitted goal of HDI and HCCC is to get the Plaintiff 'out of the picture', stop the litigation, and force the governments of Canada and Ontario to negotiate solely with HCCC. Its motion should be dismissed, with costs.

PART II - FACTS

I. THE PLAINTIFF AND THE ACTION

3. The Plaintiff Six Nations of the Grand River Band ("**Six Nations of the Grand River**" or the "**Band**") includes peoples from all six Haudenosaunee nations: the Seneca, Cayuga, Onondaga, Oneida, Mohawk, and Tuscarora nations. It is among the largest First Nations in Canada.[1] While it is recognized under Canadian law as a band, it was not "created" by the *Indian Act*,[2] but rather is the group of Indians who are the posterity of the Haudenosaunee who settled on the lands set aside along the Grand River under the 1784 Haldimand Proclamation (the "**Haldimand Tract**").[3]

4. That Haldimand Tract was set aside by the British Crown for its Haudenosaunee allies as compensation for lost homes and property after the American Revolution, for the use and benefit

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[1] Affidavit of Mark Hill affirmed November 2, 2022 [**Mark Hill Affidavit]** at paras 6-29, Respondent's Motion Record dated November 2, 2022 [**RMR]**, Tab 1, p. 5-12 [**CL A13-A30**] (All Caselines references are to Master page numbers).

[2] RSC 1985, c I-5 [***Indian Act***].

[3] Mark Hill Affidavit at para 4, RMR, Tab 1, p. 4 [**CL A12**]; Ava Hill Affidavit affirmed November 1, 2022 [**Ava Hill Affidavit]** at paras 5-8, RMR, Tab 2, p. 400-402 [**CL A408-A410**].

of those who wished to settle there and their posterity.[4]

5. Disputes then arose between the Six Nations of the Grand River and the Crown over the commitments made in the Haldimand Proclamation, including the extent of lands set aside, whether certain lands were properly alienated, and whether the Crown properly managed and accounted for the Band's monies. After a century and a half of the Crown refusing to deal with the claims, the Six Nations of the Grand River formally advanced them.[5]

6. First, the Band commenced federal Specific Claims starting in 1982.[6] Given the limits of this process, in 1995, it commenced this action in this Court against Canada and Ontario seeking compensation for breaches of fiduciary and treaty obligations.[7] The claim does not seek declarations of Aboriginal title or Aboriginal rights under section 35 of the *Constitution Act, 1982*[8] though it does plead that the Haldimand Proclamation is a treaty. Canada and Ontario defended the action and amended their pleadings over the years.[9] Neither ever brought third party claims or applied to have a non-party added as a necessary party.

7. The Band is governed by its Elected Council.[10] This Council was created in 1924, under the *Indian Act* as it existed at the time, because members of the Six Nations of the Grand River wanted to choose their own democratically elected representatives.[11] The Elected Council is no

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[4] Further Amended Statement of Claim dated May 2, 2020 [**SNGR Claim]** at para 14; Ava Hill Affidavit at paras 5-8 and Exhibit A, RMR, Tabs 2 and 2A, p. 400-402 an 413-417 [**CL A408-A410** and **A421-A425**]; See also *Bown v West* (1846), 1 E & A 117, 1846 CarswellOnt 2, Plaintiff's Book of Authorities [**PBOA**], Tab 1; *Doe Dem Sheldon v Ramsay et al* (1851), (1852) 3 NBR 259, 9 UCQB 105 [PBOA, Tab 2] ; Transcript of the Cross Examination of Richard Hill on March 7, 2023 [**Richard Hill Transcript**], p. 146-148, q. 421-430, Transcript Brief of the Plaintiff [**SNGR Brief]** Tab E, p. 859-861 [**CL A2782-A2784**].

[5] SNGR Claim; See also *Ross River Dena Council Band v Canada*, 2002 SCC 54 at paras 41-44, 54-68, 86-104.

[6] Ava Hill Affidavit Exhibit E, Tab 2E, p. 622 [**CL A630**].

[7] Statement of Claim dated March 7, 1995 at para 1.

[8] SNGR Claim at para 1; *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[9] Ava Hill Affidavit, Exhibit C, RMR, Tab 2C, p. 423-588 [**CL A431-596**]; Fresh as Amended Statement of Defence of Canada dated August 31, 2020 and Amended Statement of Defence and Crossclaim of Ontario dated August 31, 2020.

[10] Mark Hill Affidavit at para 7, RMR Tab 1, p. 5 [**CL A13**].

[11] Ava Hill Affidavit at paras 11-12 and Exhibit B, RMR Tabs 2 and 2B, p. 403 and 419-421 [**CL A411**, **A427-429**];

longer elected under the *Indian Act* but is now elected under its own custom election code. In 1995, following community consultation, the Elected Council exited the *Indian Act* electoral system and elections occurred in accordance with a Six Nations of the Grand River election code.[12] Today, elections take place under a 2019 revised draft election code, reflecting the desire of community members for a smaller council with councillors representing the entire community instead of specific electoral districts.[13]

II. PRESENT-DAY HAUDENOSAUNEE CONFEDERACY

8. The Haudenosaunee Confederacy includes over 100,000 people, most of whom are not settled at Grand River. As HDI's witnesses conceded, the present-day Haudenosaunee Confederacy is organized into numerous bands and tribes across Canada and the U.S., each of which has their own reserves (in Canada) or reservations (in the U.S.).[14] The Six Nations of Grand River Band has approximately 28,000 members.[15]

Order in Council PC 1629 (September 17, 1924) provided that Part II of the Indian Act as it existed at the time was to apply to the Six Nations of the Grand River band, and that the Six Nations Indian Reserve was to be divided into six sections and that two councillors be elected to represent each of the said sections. Order in Council PC 6015 (November 12, 1951) then revoked Order in Council PC 1629 as it related to elections to the Council of the Six Nations of the Grand River Band, and declared in its place that the Council of the Six Nations Indian Band in the Province of Ontario would be selected by elections to be held in accordance with the *Indian Act*. Order in Council PC 6015 was then revoked on December 21, 1989 by a regulation to the *Indian Act*, entitled *Indian Bands Council Method of Election Regulations under the Indian Act* and replaced with a list of bands that have elections under the *Indian Act*, which included the Six Nations of the Grand River (the "1989 Regulation"): SOR/90-46 at 62, 72. [Item 2, of Part III, of Schedule III of Section 4]; Richard Hill Transcript, p. 181 q. 571, SNGR Brief, Tab E, p. 894 [**CL A2817**].

[12] On March 4, 1997 *Regulations Amending the Indian Bands Council Method of Election Regulations* came into effect repealing the 1989 Regulation. On the same date, a new Indian Band Elections Order came into force which did not include Six Nations of the Grand River as a band that governed by Indian Act elections. By combined effect, these delisted Six Nations of the Grand River from any list of the bands that that have elections under the *Indian Act*. SOR/97-134 at 36 and SOR/97-138 at 49.

[13] Mark Hill Affidavit at paras 27, 30, RMR, Tab 1, pp. 11-12 [**CL A19-A20**]; Ava Hill Affidavit at paras 14-16, RMR, Tab 2, p. 404 [**CL A412**].

[14] Affidavit of Colin Martin affirmed August 31, 2022 [**Martin Affidavit**] at paras 23-25, HDI 2nd Supplementary Motion Record dated August 31, 2022 [**HDI 2nd Supp MR]**, Tab 1, p. 6-8 [**CL B-3-1281-B-3-1284**]; Transcript of Cross Examination of Brian Doolittle on March 8, 2023 [**Doolittle Transcript]**, p. 22-24, q. 110-116, SNGR Brief, Tab B, p. 306-308 [**CL A2229-A2231**]; Mark Hill Affidavit at para 6, RMR, Tab 1, p. 5 [**CL A13**].

[15] Mark Hill Affidavit, Exhibit P, RMR, Tab 1P, p. 332 [**CL A340**]. HDI's witness, Richard Hill misstated the Six Nations of the Grand River population as one person, at page 57 of his affidavit. On cross-examination he admitted that he was aware there were a number of Haudenosaunee groups within Six Nations of the Grand River, and that in explaining to the Court his understanding of the population, he did not think it necessary to comment on the population information posted on the CIRNAC website, "Because that's not my case to be made." Richard Hill Transcript, p. 154-

9. The Haudenosaunee Confederacy includes different communities in Canada such as the Mohawks of the Bay of Quinte, Mohawks of Akwesasne, Oneida Nation of the Thames, Wahta Mohawks, Mohawks of Kahnawá:ke, and Mohawks of Kanesatake, and various U.S. tribal bodies such as the Saint Regis Mohawk Tribe, Cayuga Nation, Seneca Nation of Indians, Tonawanda Band of Seneca, Onondaga Nation, Tuscarora Nation, Delaware-Shawnee, Oneida Nation of Wisconsin, and Wyandotte Nation.[16] Each band and tribal body has its own governance systems and manages its own affairs for its people.[17] HDI also conceded that each of these bands or tribes have their own membership lists and bring their own claims in respect of lands.[18]

III. HAUDENOSAUNEE CONFEDERACY CHIEFS COUNCIL

10. As of 1847, the Six Nations of the Grand River community was governed by the Chiefs of the Grand River Confederacy Council, sometimes called the Hereditary Council or HCCC.[19] The HCCC Chiefs were not democratically elected or accountable to the community. From the 1890s to 1924, many community members sought an elected democratic government under the *Indian Act*.[20] As a result, in 1924, the Canadian government passed an Order-in-Council replacing the HCCC with an elected council.[21]

11. No HCCC Chief has given evidence on this motion. The HCCC also "is not willing to

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155, q. 455-460, SNGR Brief, Tab E, p. 867-868 [**CL A2790-A2791**].

[16] Ava Hill Affidavit at para 6 and Exhibit B, RMR, Tabs 2 and 2B, p. 401 and 419-421 [**CL A409** and **A427-429**]; See also Martin Affidavit at para 25, HDI HDI 2nd Supp MR, Tab 1, p. 7-9 [**CL B-3-1282-B-3-1284**].

[17] Ava Hill Affidavit at paras 6-7, RMR, Tab 2, p. 401-402 [**CL A409-A410**].

[18] Doolittle Transcript, p. 23-25, q. 113-123, SNGR Brief, Tab B, p. 307-309 [**CL A2230-A2232**]; Transcript of the Cross Examination of Colin Martin on March 8, 2023 [**Martin Transcript**], p. 17-19 q. 77-84, p. 20, q. 90-91, SNGR Brief, Tab C, p. 544-546 [**CL A2467-A2469**].

[19] Ava Hill Affidavit at para 9, RMR, Tab 2, p. 402-403 [**CL A410-A411**]; Richard Hill Transcript, p. 125, q. 335, SNGR Brief, Tab E, p. 838 [**CL A2761**].

[20] Ava Hill Affidavit at paras 11-12, RMR, Tab 2, p. 403 [**CL A411**]. The evidence of this witness is uncontested; See also Richard Hill Transcript, p. 171-198, q. 524-635, SNGR Brief, Tab E, p. 884-911 [**CL A2807-A2834**] and Affidavit of Richard Hill affirmed June 10, 2022 at Exhibit G, Motion Record of HDI dated June 10, 2022 [**HDI MR**], Tab 3G, p. 247-271 [**CL B-3-772-B-3-796**].

[21] Ava Hill Affidavit at para 18, RMR, Tab 2, p. 405 [**CL A413**]; Richard Hill Transcript, p. 148-149, q. 431-434, SNGR Brief, Tab E, p. 861-862 [**CL A2784-A2785**].

advance one or more Chiefs to serve as representative parties in connection with this proceeding".[22] This is because the HCCC does not "attorn to the jurisdiction" of Canadian courts,[23] meaning it does not recognize Canadian courts or law as applying to them or their affairs. HDI also says Canadian courts are unable to interpret or apply Haudenosaunee law.[24] The HCCC **has never** commenced, and has admitted that it **will never** commence, an action of its own for the rights it now alleges it holds.[25]

IV. HCCC HAS KNOWN OF THE BAND'S ACTION FOR DECADES

12. This action, commenced in Brantford, dates to 1995. The claim has been highly publicized, is well-known to the community, the HCCC, and to the Canadian public at large. In 1995, the Elected Council announced the filing of the claim to the community. Articles were published in local, and national publications. Following the initial exchange of pleadings, the local media reported on a highly publicized motion in late 1999 and 2000.[26]

13. In the early 2000s until 2009, the Elected Council agreed to put the action in abeyance to attempt a negotiated resolution, and invited the HCCC to participate in those discussions.[27] The HCCC and Aaron Detlor were directly involved in these negotiations.[28] Around 2007-2008 negotiations broke off and in 2009, the action was taken out of abeyance.[29] There was considerable

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[22] Letter dated August 9, 2022 from T. Gilbert to I. Antonios, A. Aruliah, and M. Fancy, Mark Hill Affidavit, Exhibit L, RMR, Tab 1L, p. 253 [**CL A261**].

[23] Doolittle Transcript, p. 57-64, q. 271-302, SNGR Brief, Tab B, p. 341-348 [**CL A2264-A2271**]; Mark Hill Affidavit, Exhibits K, L, RMR, Tabs 1K and 1L, p. 245-254 [**Cl A253 to A262**]; Supplementary Affidavit of Aaron Detlor affirmed February 8, 2023 [**Detlor Affidavit February 8, 2023]**, Exhibits A and B, HDI 4th Supplementary Motion Record dated February 8, 2023, Tabs 1A and 1B, p. 4-8 [**CL B-3-1614-B-3-1618**].

[24] Doolittle Transcript, p. 100-103, q. 459-473, SNGR Brief, Tab B, p. 384-387 [**CL A2307-A2310**]; Martin Transcript, p. 23-27, q. 108-129, SNGR Brief, Tab C, p. 550-554 [**CL A2473-A2477**].

[25] Doolittle Transcript, p. 86-87, q. 396-397, p. 88, q. 402-4-5, SNGR Brief, Tab B, p. 370-372 [**CL A2293-A2295**].

[26] Ava Hill Affidavit at paras 19-25, RMR, Tab 2, p. 405-408 [**CL A413-A416**].

[27] Ava Hill Affidavit at para 27-28, RMR, Tab 2, p. 408-409 [**CL A416**].

[28] Ava Hill Affidavit at para 28-29, RMR, Tab 2, p. 408-409 [**CL A416-A417**].

[29] Ava Hill Affidavit at para 27, RMR, Tab 2, p. 408 [**CL A416**].

reporting when the litigation became active again.[30] The Elected Council also published booklets, community update newsletters and held open houses providing updates.[31] HCCC supporters were welcomed to community meetings about the litigation, and many did attend.[32]

14. In 2017, the action was transferred to Toronto on consent. It has been actively case managed since 2018.[33]

15. The HCCC has been considering intervening in this court case since approximately 2004[34] but did not do so. In 2018, HDI published a newsletter stating it was again considering intervening at that time.[35] It did not.

V. THE HDI MOTION

A. The Ever-Changing Nature of the Motion

16. HDI seeks an order under Rule 10.01 to represent classes of "unascertained persons" – which it defines as the HCCC and the Haudenosaunee Confederacy. It also seeks to be added as a party intervener to advance a claim on behalf of the Haudenosaunee Confederacy.

17. Although the HCCC has previously contested the governance of the Six Nations of the Grand River community, it has never questioned that this community is the "rightsholder" under the Haldimand Proclamation, as HDI now does.

18. The claim HDI seeks to advance is confusing and legally ill-defined, but appears to be that

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[30] Ava Hill Affidavit at para 32, RMR, Tab 2, p. 410 [**CL A418**].

[31] Ava Hill Affidavit at paras 30-31, RMR, Tab 2, p. 409-410 [**CL A417-A418**].

[32] Ava Hill Affidavit at paras 30-31, RMR, Tab 2, p. 409-410 [**CL A417-A418**]. At least one HCCC Chief stated to media that had no concerns with the court case re-activating.

[33] Many of the case management endorsements were published, and among other things included reports on the action's status and timetable to trial. See Supplementary Affidavit of Mark Hill (December 5, 2022) [**Mark Hill Supp Affidavit]**, Exhibit A, Schedule A, Chronology, Supplemental Responding Motion Record of the Plaintiff [**Supp RMR**], Tab 1A, p. 14-17 [**CL A1378-A1381**].

[34] Doolittle Transcript, p. 90-94, q. 416-437, SNGR Brief, Tab B, p. 374-378 [**CL A2297-A2301**].

[35] HCCC Winter 2018 Newsletter, Affidavit of Aaron Detlor affirmed February 6, 2023 [**Detlor February 6, 2023 Affidavit]**, Exhibit A, Responding Motion Record of the HDI to Men's Fire Motion to Intervene [**HDI RMR MF**], Tab 3A, p. 173 [**CL B-3-2210**].

(1) the Haudenosaunee Confederacy is the "treaty partner" of the Crown in the Haldimand Proclamation; and (2) that its members have an open-ended right to settle at the Grand River and become part of the Indigenous collective entitled to the benefit of the Haldimand Tract and the claims derived from it.

B. Purpose of Intervention is to Push Out and Replace the Plaintiff

19. HDI's admitted purpose in bringing this motion is for the HCCC (through HDI) to replace the Plaintiff in the action and then stop the litigation. HDI's draft "Statement of Defence, Counterclaim, and Crossclaim of the Intervenor"[36] claims what amounts to a stay, in the form of a declaration that the Plaintiff "is not entitled to the relief sought in the Statement of Claim".[37] HDI then seeks a mandatory order "directing the defendants to participate in nation-to-nation negotiation and/or mediation with the Haudenosaunee Confederacy Chiefs."[38]

20. HDI's Brian Doolittle confirmed this, and stated that the HCCC "doesn't do claims":

> Q. The bottom line from those two points, I take it, is that HDI wants to stop the litigation by the Elected Council; correct?
>
> A. Yes.
>
> Q. And they want to negotiate directly with the governments instead, right?
>
> A. They want to negotiate with the Crown.
>
> […]
>
> Q. The HCCC has never brought a claim about land in Canadian Courts; correct?
>
> A. Never.
>
> Q. And it never will, right?
>
> A. No, it doesn't do claims. Claims is a part of Canada's world, law. It is not independent. And the only thing that they have is land claims, and that was set up so they could rob the Bands of the rest of their land. That is the only thing. So we would never participate in that when it is just open theft.
>
> Q. And you never participate in a Court process about land, right?
>
> A. Land claims.
>
> Q. Land claims, right?

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[36] Doolittle Transcript, Exhibit 3, SNGR Brief, Tab B3, p. 487-520 [**CL A2410-A2443**].

[37] Draft Statement of Defence, Counterclaim and Crossclaim of the Intervenor [**HDI Draft Defence**] at paras 95(a), 96(a) [**CL B-3-2326-B-3-2327**].

[38] HDI Draft Defence at para 96(c) [**CL B-3-2327**].

A. Right.[39]

21. Mr. Doolittle confirmed that the HCCC wants the Plaintiff 'out of the picture':

> Q. So if I can summarize from what we just walked through, the HCCC does not want the Six Nations Band to be able to litigate the claims it has in this case against the governments in Canadian Courts; correct?
>
> A. Correct.
>
> Q. The HCCC would rather there not be litigation at all because, as it says in the document, they don't believe that helps achieve reconciliation; correct?
>
> A. Correct.
>
> Q. And they want - and by "they", I mean the HCCC - to negotiate directly with the Crown about the issues raised in the case; correct?
>
> A. Correct.
>
> Q. They want the Elected Council out of that picture and out of those negotiations; correct?
>
> A. Correct.[40]

22. According to documents disclosed on this motion, HCCC's goal is to "renew the existing relationship that we had with Crown prior to 1924",[41] meaning to restore the HCCC as the government of the Six Nations of the Grand River, before the Elected Council was formed.

C. HDI is a "Veil" for HCCC

23. HDI is an unincorporated association comprising two individuals, Aaron Detlor and Brian Doolittle, created in 2007.[42] HDI is controlled by HCCC[43] and is being put forward to allow HCCC to participate in the action while refusing to be bound by any court determination.[44]

24. HDI's position is that the HCCC can ignore whatever the court decides:

> Q. So if HDI becomes a party to the litigation, it would be subject to the Canadian Courts; correct?

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[39] Doolittle Transcript, p. 86-87, q. 396-397, p. 88, q. 402-405, SNGR Brief, Tab B, p. 370-372 [**CL A2293-A2295**].

[40] Doolittle Transcript, p. 98-99, q. 452-455, SNGR Brief, Tab B, p. 382-383 [**CL A2306-A2307**].

[41] 2006 Land Rights Statement of the Haudenosaunee Confederacy Chiefs Council, Affidavit of Brian Doolittle affirmed June 10, 2022, Exhibit F, HDI MR, p. 119 [**CL B-3-633**].

[42] Transcript of Cross Examination of Aaron Detlor on March 24, 2023 [**Detlor Transcript March 24, 2023]**, p. 133, q. 490, SNGR Brief, Tab H, p. 1272 [**CL A3195**]; Transcript of Cross Examination of Richard Saul on March 7, 2023 [**Saul Transcript**] p. 21, q. 71, SNGR Brief, Tab A, p. 21 [**CL A1944**]; Affidavit of Helen Miller affirmed November 1, 2022 [**Miller Affidavit]** Exhibit B, bullet point 3, RMR, Tab 3B, p. 1143 [**CL A1151**]; See also *Davey v Hill*, 2018 ONSC 5274 at para 5.

[43] Saul Transcript, SNGR Brief, Tab A, p. 21, q. 70, SNGR Brief, Tab A, p. 21 [**CL A1944**].

[44] Doolittle Transcript, p. 35-36, q. 194-195, p. 58, q. 274, p. 60, q. 283, p. 62 q. 290, SNGR Brief, Tab B, p. 319-310, 342, 344 and 346 [**CL A2242-2243**, **A2265**, **A2267** and **A2269**].

A. HDI?

Q. Yes.

A. Yes.

Q. But because HDI is a step removed from the HCCC, the HCCC would not be subject to the Courts; correct?

A. Correct.

Q. The HCCC wouldn't be bound by the Court's decision, right?

A. Right.

Q. And the HCCC could ignore what the Court decides?

A. Yes.

Q. The Chiefs could ignore the Court; correct?
A. Yes.[45]

D. HCCC Intervention is Opposed Within Haudenosaunee Confederacy

25. Haudenosaunee communities outside of Grand River did not know and were not consulted about HDI's motion to represent them until this court ordered HDI to give notice to them.[46] As Mr. Doolittle put it, "We don't consult Band Councils."[47] Several communities have objected to HDI trying to represent and bind them.[48]

26. There have also been significant community concerns raised about whether or not the HCCC is properly constituted and whether HCCC decision-making is being carried out in accordance with Haudenosaunee Law.[49]

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[45] Doolittle Transcript, p. 63, q. 296-301, SNGR Brief, Tab B, p. 347-348 [**CL A2270-2271**].

[46] Doolittle Transcript, p. 84-85, q. 381-387, SNGR Brief, Tab B, p. 368-369 [**CL A2291-A2292**].

[47] Doolittle Transcript, p. 83, q. 377-379, SNGR Brief, Tab B, p. 367 [**CL A2290**].

[48] Email chain between Secretary-General Benjamin Doolittle UE to Tim Gilbert commencing September 24, 2022, Exhibit A, Defreitas-Barnes Affidavit, Third Supplementary Motion Record of HDI dated November 3, 2022 [**HDI 3rd Supp MR**], Tab 7A pgs. 48-47, [**CL B-3-1452 to B-3-1464**]; Email chain between [Redacted] to Tim Gilbert commencing October 17, 2022, Exhibit B, Defreitas-Barnes Affidavit, HDI 3rd Supp MR, Tab 7B pgs. 59-72, [**CL B-3-1467 to B-3-1482**]; Email chain between Leanna Bomberry and Tim Gilbert commencing October 27, 2022, Exhibit C, Defreitas-Barnes Affidavit, HDI 3rd Supp MR, Tab 7C pgs. 74-78, [**CL B-3-1485 to B-3-1490**]; Letter from Hodiskeagehda to Gilbert's LLP dated October 20, 2022, Exhibit D, Defreitas-Barnes Affidavit, HDI 3rd Supp MR, Tab 7D pgs. 80-81, [**CL B-3-1493 to B-3-1494**]; Correspondence between Mohawk Nation Council of Chiefs and Gilbert's Law commencing October 24, 2022, Exhibit E, Defreitas-Barnes Affidavit, HDI 3rd Supp MR, Tab 7E pgs. 83-84, [**CL B-3-1497 to B-3-1499**]; Correspondence between Oneida Council of Chiefs and Gilbert's commencing October 24, 2022, Exhibit F, Defreitas-Barnes Affidavit, HDI 3rd Supp MR, Tab 7F pgs. 86-87, [**CL B-3-1502-B-3-1504**]; Correspondence between Mohawks of the Bay of Quinte and Gilbert's commencing October 28, 2022, Exhibit G, Defreitas-Barnes Affidavit, HDI 3rd Supp MR, Tab 7G pgs. 89-96, [**CL B-3-1507-B-3-1515**]; Letter from Mohawk Council of Akwesasne and Gilbert's dated October 31, 2022, Exhibit H, Defreitas-Barnes Affidavit [**Akwesasne Correspondence**], HDI 3rd Supp MR, Tab 7H pg. 98 [**CL B-3-1518**] (together, [**Objection Letters**]).

[49] Many Chief and Clan Mothers positions are vacant, and in some cases for quite some time. The Men's Fire's

PART III - ISSUES AND THE LAW

I. ISSUES

27. The three main issues to be decided on this motion are:

(a) Is HDI's motion a collateral attack and abuse of this Court's process? If yes, the analysis ends.

(b) Should HDI be granted leave to intervene as an added party under Rule 13.01, or alternatively, granted party status under Rule 5.03? If not, the analysis ends.

(c) Should HDI be authorized to bring a representative proceeding under Rule 10.01(1) on behalf of the HCCC and/or the Haudenosaunee Confederacy?

28. There are two overarching considerations in deciding these issues. First, HCCC/HDI has refused to advance its own claims for decades despite knowing of this action. Second, HCCC/HDI remain free to advance any of the issues raised on this motion in its own other proceedings. HCCC/HDI simply chooses not to but instead wants to use this Court's processes to derail the Band's action as it approaches trial. Fundamentally, what is at issue is whether the HCCC, using HDI as a stand-in, should be allowed to attach its claims to the Six Nations of the Grand River's longstanding litigation. The Plaintiff says no.

II. ISSUE 1: HDI'S MOTION IS AN ABUSE OF PROCESS AND COLLATERAL ATTACK

A. Overview

29. The courts exist to resolve *bona fide* legal and equitable disputes in a timely fashion. Evaluated as a whole, this motion and the proposed intervention is a collateral attack on the elected governance and membership of the Six Nations of the Grand River. This motion and proposed intervention are manifestly an abuse of the court's process, designed to stymie resolution of a legitimate dispute; it is not a *bona fide* effort by HCCC to resolve its own issues with the Crown.

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evidence shows that there is vehement disagreement within the community about HCCC's interpretation of Haudenosaunee laws and traditions and its declarations of authority on that basis. Affidavit of Wilfred Davey affirmed January 6, 2023 [**Davey Affidavit**] at para 6, Amended Responding Motion Record of Men's Fire [**MF ARMR**] dated February 6, 2023, Tab 2, p. 17 [**CL B-4-21**]**;** Affidavit of Paul Delaronde affirmed January 6, 2023 [**Delaronde Affidavit**] at paras 7-37; Transcript of Cross Examination of Wilfred Davey on March 13, 2023 [**Davey Transcript**], p. 25-26, q. 89-90, Transcript Brief of HDI [**HDI Brief**], Tab E, p. 312-313 [**CL B-3-2686-B-3-2687**]; Doolittle Transcript, p. 31-32, q. 168-171, SNGR Brief, Tab B, p. 315-316 [**CL A2238-A2239**].

30. Abuse of process is a flexible doctrine that "engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute."[50] There is an abuse of process where a party brings proceedings that are "unfair to the point that they are contrary to the interest of justice"[51], and "oppressive",[52] and where allowing litigation to proceed would "violate principles such as judicial economy, consistency, finality, and the integrity of the administration of justice."[53] It applies to protect the integrity of the adjudicative functions of courts,[54] and can be engaged by an unreasonable delay that causes serious prejudice.[55]

31. In *Behn v Moulton Contracting Ltd.*, the Supreme Court held that trying to raise a collateral treaty rights issue in a proceeding, when the claimant failed to raise it in appropriate, timely proceedings, is an abuse of process.[56] In *Canam Enterprises Inc. v Coles*[57] the Supreme Court held that one circumstance in which abuse of process applies is where the litigation is in essence an attempt to relitigate a claim which the court has already determined.

32. The related but distinct doctrine of collateral attack prevents a party from undermining previous orders issued by a court, and is invoked where a party "is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes

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[50] *Canam Enterprises Inc v Coles*, 2002 SCC 63 [*Canam* SCC], aff'g 2000 CanLII 8514 (ONCA) (Goudge J.A. dissenting) at para 55 [*Canam* ONCA].

[51] *R v Power*, 1994 CanLII 126 (SCC) at 616.

[52] *R v Conway*, 1989 CanLII 66 (SCC).

[53] *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 37, 51 [*CUPE*].

[54] *CUPE* at para 37, citing *Canam* ONCA at para 55; *Niagara North Condominium Corp No 125 v Waddington*, 2007 ONCA 184 at para 21.

[55] *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 41 [*Behn*].

[56] *Behn* at paras 37-42. There, the appellants blockaded logging sites in objection to the issuance of a forestry permit. In a subsequent claim against them for damages, the appellants sought to raise a defence based on treaty rights and a breach of a duty to consult. The Supreme Court held that raising such a defence was an abuse of process because the appellants failed to challenge the decision in a timely way in proper proceedings.

[57] *Canam* ONCA at para 56, aff'd *Canam* SCC.

into question in separate proceedings when that party has not used the direct attack procedures that were open to it".[58] It also avoids the abuse of judicial processes by preventing the re-litigation of issues that should have been dealt with in other proceedings. The policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice", the principle being that if a party could "avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system".[59]

B. Intervention Motion is a Thinly-Disguised Governance Challenge

33. HCCC's interest in this action, as alleged by HDI, has shifted repeatedly and confusingly from its notice of motion to draft pleading to factum. Even its position on whether it was moving to be a defendant shifted.[60] It is unclear who they purport to and are authorised to represent.

34. Contrary to the assertions that the HCCC represents the entire Haudenosaunee Confederacy "collective",[61] its website states that it only represents "…Citizens **on Grand River Enrollment**" from each of the Six Nations,[62] and HDI's witnesses admitted that this meant Six Nations peoples within the Grand River community.[63]

35. The HCCC or its representatives have unsuccessfully challenged the governance of the Elected Council over the Six Nations of the Grand River in court at least three times, including one case which went to the Supreme Court of Canada:

(a) First, in 1959 in *Logan v Styres*[64] a representative of the HCCC sued the Elected Council to restrain the surrender of Six Nations reserve land, which the Elected Council had negotiated to sell to a third party in exchange for a sum of money. The

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[58] *Garland v Consumers' Gas Co*, 2004 SCC 25 at para 71 [*Garland*].
[59] *Garland* at para 72.
[60] Miller Affidavit, Exhibit B, bullet point 2, RMR, Tab 3B, p. 1143 [**CL A1151**].
[61] See e.g. HDI Draft Defence at paras 24, 58, 63-69 [**CL B-3-2305-B-3-2306**, **B-3- 2315-B-3-2317**].
[62] Mark Hill Affidavit at para 42 and Exhibit R, RMR, Tabs 1 and 1R, p. 16-17 and 341-352 [**CL A349-A360**] [emphasis added].
[63] Doolittle Transcript, p. 19-20, q. 93-96, SNGR Brief, Tab B, p. 303-304 [**CL A2226-A2227**].
[64] *Logan v Styres et al*, 1959 CanLII 406 (ONSC) [*Logan*].

basis of the challenge was an assertion that the orders-in-council establishing and continuing the Elected Council were beyond the power of the Canadian federal Parliament, as the Six Nations Indians were allies of the Crown and not subjects. The court rejected this argument and held that the orders-in-council were effective.

(b) Second, in 1977 in *Isaac v Davey*,[65] the Supreme Court dealt with a self-help attempt by the HCCC to remove the Elected Council by barricading the Council House. The Elected Council sought an injunction and the HCCC argued that the Six Nations of the Grand River was not a band under the *Indian Act* and therefore that the orders-in-council removing the HCCC as the band's government were of no force. The Court rejected this and held that the Six Nations of the Grand River were a band and that the removal of the HCCC as its government was lawful.

(c) Third, in 1998 in *Hill v Canada*[66] the plaintiff Leroy Hill (the current HCCC secretary)[67] sued Canada for a declaration that a surrender of the Band's interest in certain lands was null and void on the grounds that, among other things, the HCCC did not accept it. The surrender had been negotiated between the Elected Council and Canada as part of a settlement of a Band claim under the Specific Claims Policy, and approved by community referenda. The court dismissed the action, and held that the community referenda were valid in accordance with the *Indian Act*.

36. The HCCC declined to pursue the opportunities afforded by the community-based decisions to move to a custom election code. First, it could have participated in those process and advocated for the community to re-adopt the traditional system. Second, it could have pursued judicial challenges to these processes in Federal Court based on Section 35 of the *Constitution Act, 1982* but ultimately did not.

37. Not only has the governance issue been litigated, this Court has no jurisdiction to consider HDI's indirect governance challenge in any event. Under section 18 of the *Federal Courts Act*, the Federal Court has exclusive jurisdiction over decisions of a federal board, commission, or tribunal, which includes the Six Nations Elected Council.[68] The jurisdiction over internal governance disputes therefore lays squarely with the Federal Court, or separately, an internal band governance

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[65] *Davey et al v Isaac et al*, 1977 CanLII 21 (SCC) [*Davey*].

[66] *Hill v Canada*, 1998 CanLII 8264 (FC) [*Hill*].

[67] Supplementary Affidavit of Brian Doolittle affirmed July 6, 2023 at para 5, HDI 1st Supplementary Motion Record, Tab 1, p. 2 [**CL B-3-1071**].

[68] Jurisprudence has established that an Indian Band Council, which would include the Six Nations of the Grand River band council, is such a "federal board, commission or other tribunal": *McDonald v Fond du Lac Denesuline First Nation*, 2022 FC 844 at para 29, citing *Felix Sr v Sturgeon Lake First Nation*, 2011 FC 1139 at para 15.

process, in which the HCCC has declined to take part.[69]

C. Intervention Motion is Also a Meritless Membership Challenge

38. HDI's factum suggests that it now asserts a narrow, contingent interest on behalf of members of the Haudenosaunee Confederacy: the right to settle at Grand River in the future and become members of the collective entitled to an interest in the Haldimand Tract and claims derived from it. HDI says that because the membership of the Band is limited to "Indians" under the *Indian Act*, the Band is potentially under-inclusive of all Haudenosaunee people who might hypothetically claim an entitlement to be part of the collective because there is "no deadline" in the Haldimand Proclamation.[70] This theory is not found in HDI's Notice of Motion or draft pleading.

39. First, as with the governance challenge, this Court does not have jurisdiction over a membership dispute. That rests exclusively with the Federal Court.[71] Second, there is no dispute in the action about the membership of the band or composition of the Band list.

40. Third, HDI has not put forward any evidence of an actual Haudenosaunee person claiming membership in the collective entitled to an interest in the Haldimand Tract who is either not a member of the Band already, or has been denied membership in the Band. Mr. Detlor, for example, is a member the Mohawks of the Bay of Quinte, and has never applied to become a member of Six Nations of the Grand River.[72]

41. Finally, even if there was a membership dispute, this litigation does not affect it. The

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[69] *Dakota Plains First Nation v Smoke*, 2022 FC 911 at paras 14-15; *Marcel Colomb First Nation v Colomb*, 2016 FC 1270 at para 153; *Mathias v Squamish Nation*, 2022 BCSC 116.

[70] Richard Hill Transcript, p. 168-169, q. 514, SNGR Brief, Tab E, p. 881-882 [**CL A2804-A2805**].

[71] The *Indian Act* also provides for a process for dealing with a challenge to the under and/or over inclusiveness of a person or persons on a Band List. Section 14.2(1) provides that a protest may be made in respect of the inclusion or addition of the name of a person in, or the omission or deletion of the name of a person from, the Indian Register, or a Band List maintained in the Department, within three years of the inclusion/addition/omission or deletion by providing notice to the Registrar, containing a brief statement of the grounds therefore.

[72] Detlor Transcript March 24, p. 92, q. 304-30, p. 94-95, q. 316-318, SNGR Brief, Tab H, p. 1231, 1233-1234 [**CL A3154** and **A3156-A3157**].

interest of an Indigenous collective in reserve land or Aboriginal title land is communal – individuals do not have a several or separate interest in the assets or rights of the collective. This litigation will determine the rights of the collective to damages, declarations, or equitable relief and not the rights of any *individual* to participate in the communal benefit of held by the collective. Collective rights cannot be assigned to any other entity other than the Crown.[73] Until an individual is part of the collective, they do not have a claim against the communal assets of a band or Nation.[74]

D. HCCC Views Itself as Beyond Jurisdiction of Canadian Law and Courts

42. The concerns about abuse of process through thinly-disguised band governance and membership challenges are acute, since HDI admits it is being put forward as a litigant 'one step removed' to try to shield HCCC from having to "attorn" to the Court's jurisdiction.[75] HDI admits that HCCC does not view itself as being bound by determinations of the court,[76] and gave evidence that it would in fact contradict Haudenosaunee law for HCCC to accept adverse court rulings.[77]

43. Further, HCCC supporters – including Mr. Detlor – have a history of engaging in extrajudicial self-help in the face of adverse court orders or government decisions.[78] HDI's

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[73] *Blueberry River Band Indian v Canada (Department of Indian Affairs and Northern Development)*, 2001 FCA 67 at paras 14-18 [*Blueberry River*]; *Pasco v Canadian National Railway Company*, 1989 CanLII 249 (BCCA) at para 27; *Indian Act*, s 16(2).

[74] See paras. 51-54, below.

[75] Doolittle Transcript, p. 57-64, q. 271-302, SNGR Brief, Tab B, p. 341-348 [**CL A2264-A2271**]; Mark Hill Affidavit, Exhibits K, L, RMR, Tabs 1K and 1L, p. 245-254 [**CL A253 to A262**]; Detlor Affidavit February 8, 2023, Exhibits A and B, HDI 4th Supp MR, Tabs 1A and 1B, p. 4-8 [**CL B-3-1614**, **B-3-1618**].

[76] Detlor Affidavit March 8, 2023, Exhibits A and B, HDI 4th Supp MR, Tabs 1A and 1B, p.4-8 [**CL B-3-1614**, **B-3-1618**] Doolittle Transcript, p. 63-64, q. 296-302, SNGR Brief, Tab B, p. 347-348 [**CL A2270-A2271**].

[77] For example, Mr. Martin agreed that it would be contrary to Haudenosaunee law for the Haudenosaunee Confederacy Chiefs to submit to the judgment of a Canadian Court: Martin Transcript, p. 35, q. 173, SNGR Brief, Tab C, p. 562 [**CL A2485**]; Mr. Martin also agreed that it would be contrary to the duties of the Haudenosaunee Confederacy Chiefs to submit to the judgment of a Canadian Court: Martin Transcript, p. 35, q. 174, SNGR Brief, Tab C, p. 562 [**CL A2485**].

[78] Article entitled "Six Nations based HCCC/HDI are not the government of the Haudenosaunee" dated October 5, 2022, Exhibit 2 to Cross Examination of Aaron Detlor on March 20, 2023 [**Detlor Transcript March 20**], SNGR Brief, Tab G2, [**CL A3127-A3131**]; Article entitled "HDI lawyer accused of overcharging clients" dated May 6, 2015, Exhibit 3 to Detlor Transcript March 20, SNGR Brief, Tab G3, [**CL A3132-A3134**]; Article entitled "Six Nations based HCCC/HDI are not the government of the Haudenosaunee" dated October 5, 2022 and Article entitled "HDI asks Ontario Court to name them rightful government, remove elected council from land claim" dated October 19,

policies, for example, "prohibit" developments without its consent and its supporters physically attend at sites where its "pre, prior and informed consent" has not been granted.[79]

III. ISSUE 2: RULES 13.01 AND 5.03 ARE NOT SATISFIED

44. In deciding whether to add parties or interveners, the court must engage in a balancing exercise. Here, it must balance the public interest in having the Six Nations of the Grand River's claim continue to trial in an orderly, cost-effective manner, against any harm that may flow from requiring HDI to pursue its undeveloped, uncertain and long delayed claims in its own proceedings. Given HDI's admittedly obstructive intentions, the balance clearly lies against them.

A. Rule 13.01 Requires a Proper Interest and No Injustice to Parties

45. Rule 13.01 requires a two-step analysis: (a) the applicant must showing a qualifying interest under Rule 13.01(1); and (b) the court must determine if the intervention will cause injustice to the parties.[80] This includes considering whether the proposed intervener's involvement will prejudice or delay the determination of the parties' rights.[81] This second branch requires weighing the balance of convenience between adding the proposed intervener and the prejudice they may cause. In this case even if HDI can satisfy the first part of the test (which is denied) it manifestly fails the second. It would be unjust to allow HDI to attach claims that are both weak

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2022, Exhibit D, Miller Affidavit, RMR Tab 3D, p. 1158-1164, [**CL A1167-A1172**]; Article entitled "Aaron Detlor and the Haudenosaunee Development Institute" dated April 27, 2016, Exhibit G, Miller Affidavit, RMR Tab 3G, p. 1179-1182, [**CL A1187-A1190**]; Article "HCCC launches paid social media campaign spreading misinformation about hereditary chiefs removal in 1924", Supplemental Affidavit of Elena Reonegro affirmed February 6, 2023 [**Reonegro Affidavit February 6, 2023**], Exhibit F, Supp RMR Tab 3F, p. 58-60, [**CL A1422-A1424**]; Detlor Transcript March 24, p. 129-131, q. 468-475, SNGR Brief, Tab H, p. 1267-1270 [**CL A3191-A3193**].

[79] Detlor Transcript March 24, p. 103-105, q. 365-376, SNGR Brief, Tab H, p. 1242-1244 [**CL A3165-A3167**]. See also *Haudenosaunee Development Institute v Metrolinx*, 2023 ONSC 1170 at para 15: Metrolinx gave evidence that Mr. Detlor stopped work, damaged fencing and harassed Metrolinx employees. Aff'd at 2023 ONCA 144.

[80] *Miller v Jansen et al and Elguindy*, 2012 ONSC 4059 at para 18; *Canada (Attorney General) v Anishnabe of Wauzhushk Onigum Band*, [2001] OJ No 26754, 2001 CarswellOnt 2372 (ONSC) at para 18 [*Anishnabe of Wauzhushk Onigum Band*] BOA, Tab 2, citing *Peel (Regional Municipality) v Great Atlantic & Pacific Co. of Canada*, 1990 CanLII 6886 (ONCA).

[81] *Dorsey, Newton, and Salah v Attorney General of Canada*, 2021 ONSC 2464 at para 13, citing *Halpern v Toronto (City) Clerk*, 2000 CanLII 29029 (ON Div Ct) at para 21.

and an abuse of process to the Band's action at this late date, when to do so would only further HDI's stated goal of derailing the litigation to pursue its political agenda, cause delay and additional costs, and require the litigation of a wide range of peripheral, irrelevant, and jurisdictionally complex issues. In other words, allowing HDI in would run counter to the goal of all parties, and the Court, to adjudicate the Band's claim on the merits.

B. Rule 5.03 Requires Necessity and No Undue Prejudice

46. The question under Rule 5.03 is whether the proposed party is necessary to enable the court to adjudicate effectively and completely on the issues.[82] Rule 5.03(6) also provides that "[t]he court may by order relieve against the requirement of joinder under this rule." The court retains this discretion where joinder prejudices a party or would result in overly complex litigation.[83] Similarly, Rule 5.05 provides that "[w]here it appears that the joinder of multiple claims or parties in the same proceeding may unduly complicate or delay the hearing or cause undue prejudice to a party" the court has the discretion to, among other things, require one or more of the claims to be asserted, if at all, in another proceeding.

C. HCCC Has No Proper Interest and is Not Necessary: Its Claim is an Abuse of Process

47. First, for the reasons in paragraphs 29 to 43 above, HCCC's claims, through HDI, are collateral attacks and attempts to relitigate matters already decided in abuse of this court's process. In this sense, HDI cannot demonstrate a proper interest in this action.

48. HDI has also failed to show that it is a **necessary** party as required by Rule 5.03(4). The action seeks to determine the communal entitlement of the Six Nations of the Grand River to compensation for the loss of land in the Haldimand Tract and mismanagement of monies deriving

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[82] *Rules of Civil Procedure*, RRO 1990, Reg 194, r 5.03(4) [*Rules*].

[83] *Rules*, r 5.03(6). See *Glasjam v Freedman*, 2014 ONSC 3878 at para 73 (Master); *Plante v Industrial Alliance Life Insurance Co*, 2003 CanLII 64295 (ONSC) at para 27(c) (Master).

from it. There has been no evidence that the Plaintiff is not equipped to advance this communal claim. The court is not being asked to determine the legitimate government of the Six Nations of the Grand River, or who is entitled to Band membership, or what is the proper political relationship between the Haudenosaunee Confederacy and the Canadian government (that is, HCCC's claim that only "nation-to-nation" negotiations should take place, not litigation).

D. Balance of Convenience Strongly Weighs Against HCCC/HDI Intervention

(i) Proposed Claim is Extraordinarily Weak

49. In weighing the balance of convenience to determine whether the intervention would be just, the Court must consider the strength of HCCC/HDI's claim. It is legally and factually weak.[84]

50. HDI's argument that the Plaintiff's action concerns the identity of the "rightsholder" or counter-party to the Haldimand Proclamation and that this must be determined at trial, is completely new for HCCC, and extremely tenuous. Even HCCC's position on this motion that the Haldimand Proclamation is a treaty[85] amounts to an about-face from its prior position to the contrary.[86] HCCC has never brought a claim against the Crowns raising the allegation that the rightsholder or "beneficiaries" of the Haldimand Proclamation comprise all members of the Haudenosaunee Confederacy. It is and was free to commence its own claim, but never has.

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[84] HDI's factum also improperly references extracts of expert reports that are not before the Court on HDI's pending motion. The improper references are at factum paragraphs 4, 10, 34, 37, 68, and footnotes 3, 46, 50, and the Plaintiff objects to these portions of HDI's factum: HDI Factum dated April 10, 2023 **[HDI Factum]** [**CL B-3-5**, **B-3-8-B-3-9**, **B-3-11-B-3-12** and **B-3-21**]. Additionally, HDI delivered an affidavit on April 10, 2023, containing answers to undertakings and refusals delivered one business day before the factum was served, after the motion record was closed, and after cross-examinations were completed, in breach of Rule 39.02(2). This affidavit and the references to it in factum paragraphs 48 and 49, and footnotes 71, 73, and 74 are improper [**CL B-3-15-B-3-16**].

[85] HDI Draft Defence at para 47 [**CL B-3-2312**].

[86] HCCC Winter 2018 Newsletter, Detlor February 6, 2013 Affidavit, Exhibit A, HDI RMR MF, Tab 3A, p. 169, 174-175 [**CL B-3-2206** and **B-3-2211-B-3-2212**]: "The HCCC do not recognize the Haldimand as being a deed…" (p. 169, **CL B-3-2206**); "The HCCC does not use the Haldimand Proclamation as the basis for their land registry nor does it view the Haldimand as anything more than a document which provided that the Crown was acknowledging that area of land where the Crown's people were not supposed to go." (p. 174, **CL B-3-2211**); "…the Haudenosaunee do not view the Haldimand Proclamation as providing 'title' to any lands since the British Crown did not have authority to give lands that it did not own, and the Haudenosaunee were already in possession of those lands as evidenced by the 1701 Treaty of Albany and set out in the Mitchell Map of 1755." (p. 175, **CL B-3-2212**).

51. HDI's assertion that the HCCC is entitled to be added as a party because it is the "counter-party" to the Haldimand Proclamation also ignores that this action is not an academic exercise about the Haldimand Proclamation being a treaty. Rather, it is a claim arising from a specific entitlement to a reserve *under* that treaty and seeking compensation from the Crowns for the mismanagement of that and funds flowing from it. Canadian law recognizes this communal right, and the Band's ability to claim for it.

52. In *Isaac v Davey*, the Supreme Court found that Reserve No. 40 – one of the Band's two modern-day reserves – is held for the Six Nations of the Grand River Band and that the Elected Council is lawfully entitled to govern it.[87] A minority group such as HDI or the HCCC is not permitted to sue for communal rights on behalf of a band.[88]

53. As a matter of *Canadian* law, reserves are exclusively vested in the smaller collectives, and the mechanism under Canadian law for resolving a dispute related to lands that should have been set aside for a collective is for the band to bring a claim. This was considered in *Canada v Anishinaabe of Wauzhushk Onicum Band*[89] in which the Anishinaabe Nation sought to be added as a party defendant to an action on the basis that it had a beneficial interest, under a treaty, in a reserve. The Court found that only Indian bands can enjoy the use and benefit of a reserve. It followed that the Anishinaabe Nation's presence was not necessary, it did not have an interest in the subject matter of the case, and its presence would only extend and complicate the

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[87] *Davey*. See also *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 77-88.

[88] For example, in *Assu v Chickite*, 1998 CanLII 4684 (BCSC) [*Wewayakai*] , a band chief, supported by a minority of band council members commenced an action allegedly on behalf of the band they claimed to represent. The Court held that "as a matter of law, only a majority of the Band Council may initiate or defend an action on behalf of the Band", finding that the minority band members, even if it included the Band Chief, were not a proper plaintiff to the action (para 36, 39). See also *Te Kiapilanoq v British Columbia*, 2008 BCSC 54 at paras 28-29 [*Te Kiapilanoq*], citing *Ryan et al v Harold Leighton, Metlakatla Dev Corp et al*, 2006 BCSC 278, *Joe v Findlay*, 1987 CanLII 2728 BCSC); *Mack v Mack*, 1994 CanLII 2194 (BCSC) (Master); *Komoyue Heritage Society v British Columbia (Attorney General)* 2006 BCSC 1517.

[89] *Anishnabe of Wauzhushk Onigum Band*, BOA, Tab 2.

proceedings.[90] Similarly, in *Blueberry River* the claims of individuals to a share of settlement entitlements based on a treaty interest was rejected.[91] The same reasoning applies here.

54. HDI cites *Tsilhqot'in Nation v B.C.* for the proposition that the "collective" is wider than the band, however *Tsilhqot'in* actually highlights the opposite point. *Tsilhqot'in* was a claim for Aboriginal title in Crown lands on behalf of a large indigenous collective that consisted of five Indian bands and members from a sixth. However, the claim was designed to **exclude** Indian Reserves of bands within the claim area,[92] reflecting the recognition that reserves are held for bands and not for larger collectives holding Aboriginal title.

55. This is consistent with Canada's approach to Specific Claims. Neither HDI's or HCCC's approval was necessary when Canada settled claims with another Haudenosaunee community in respect of its reserve lands, the Mohawks of the Bay of Quinte Band (of whom Mr. Detlor is a member), nor did HDI or HCCC seek to challenge them.[93] Similarly neither HDI nor HCCC had a role in a settlement with another Haudenosaunee band, the Mohawks of Akwesasne.[94]

56. Moreover, neither HDI's evidence nor the law suggest that the Haldimand Tract was set aside for all the Haudenosaunee Confederacy, as it asserts. Instead, it was set aside for the Haudenosaunee British allies and those who could be induced to follow them and settle along the Grand River. HDI's own witness Richard Hill agreed that some Haudenosaunee stayed in the U.S. or in their original settlements in what is now Quebec and eastern Ontario, some of the British allies followed John Deseronto to Tyendinaga and became the Mohawks of the Bay of Quinte,

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[90] *Anishnabe of Wauzhushk Onigum Band* at paras 14-20, BOA, Tab 2.
[91] *Blueberry River* at para 27.
[92] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 984.
[93] Transcript of Cross Examination of Stefan Matiation on March 9, 2023 [**Matiation Transcript**], p. 16-24, q. 56-104, SNGR Brief, Tab D, p. 597-605 [**CL A2520-A2528**].
[94] Matiation Transcript p. 22-40, q. 91-192, SNGR Brief, Tab D, p. 603-621 [**CL A2526-A2544**].

while others moved to Grand River, and that the group who settled at Grand River was the group associated with the Haldimand Tract.[95]

57. HDI's claim is also inconsistent with the HCCC's historically asserted claims. From its petition to the League of Nations in 1923,[96] to its petition to the United Nations in 1945,[97] to *Logan*, to *Isaac v Davey*,[98] the HCCC has always asserted claims on the basis that the lands under the Haldimand Proclamation were for those members of the Six Nations **who settled on the Haldimand Tract and became the Six Nations of the Grand River**.[99]

58. HDI/HCCC's evidence shows that they have, in fact, historically tried to downplay or distance themselves from the Haldimand Proclamation and instead rested their claims on assertions of Aboriginal title or claims under the 1701 Nanfan Treaty.[100]

59. The basis for HDI's novel assertion that there remains an open-ended invitation under the Haldimand Proclamation to join the Haudenosaunee that settled at Grand River is extraordinarily weak. There is not one prior instance where the HCCC attempted to challenge or expand the *membership* of Six Nations of the Grand River to everyone in the Haudenosaunee Confederacy.

60. HDI also misstates the evidence of Richard Hill for the proposition that there was no "deadline" on accepting the offer to settle at Grand River. HDI omits Mr. Hill's immediate next

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[95] Richard Hill Transcript, p. 146-148, q. 421-430, SNGR Brief, Tab E, p. 859-861 [**CL A2782-A2784**].

[96] Mark Hill Supp Affidavit, Exhibit A, Schedule "B", Supp RMR, Tab 1A, p. 18-24 [**CL A1382-1388**].

[97] Mark Hill Supp Affidavit, Exhibit A, Schedule "C", Supp RMR, Tab 1A, p. 25 [**CL A1389**].

[98] *Davey* at 901; *Logan* at 422-424.

[99] Martin Affidavit at para 25, HDI HDI 2nd Supp MR, Tab 1, p. 7-9 [**CL B-3-1282-B-3-1284**].

[100] HCCC Winter 2018 Newsletter, Detlor February 6, 2023 Affidavit, Exhibit A, HDI RMR MF, Tab 3A, p. 169, 174-175 [**CL B-3-2206** and **B-3-2211-B-3-2212**]: "The HCCC do not recognize the Haldimand as being a deed…" (p. 169, **CL B-3-2206**); "The HCCC does not use the Haldimand Proclamation as the basis for their land registry nor does it view the Haldimand as anything more than a document which provided that the Crown was acknowledging that area of land where the Crown's people were not supposed to go." (p. 174, **CL B-3-2211**); "…the Haudenosaunee do not view the Haldimand Proclamation as providing 'title' to any lands since the British Crown did not have authority to give lands that it did not own, and the Haudenosaunee were already in possession of those lands as evidenced by the 1701 Treaty of Albany and set out in the Mitchell Map of 1755." (p. 175, **CL B-3-2212**).

statement, which was that "[m]any people moved over the course of 15, 20 years after this proclamation was made."[101] Mr. Hill did not present the process of joining the community at Grand River as ongoing and never-ending. This is all inconsistent with the claim that there is an ongoing right for any Haudenosaunee person to join the collective at the Grand River at any time.[102]

61. As confirmed in *Kwikwetlem First Nation v British Columbia (AG)*, reconciliation requires that Aboriginal cases be tried in the most effective and timely way possible, and, "Adding a party that has, at best, a mere general interest in the outcome and who opposes any involvement can only prolong the litigation and unnecessarily add to the length, complexity and cost of the trial, without anyone's interests being advanced."[103] HDI is exactly such a party.

(ii) Adding HDI As a Party Would Cause Undue Prejudice and Delay

62. Adding HDI would unduly prejudice and delay the determination of the Plaintiff's rights. The HCCC is using this motion and its potential intervention through HDI as a means to disrupt the case while trying to remain outside of the Court's reach.

63. It is incredible for HDI's factum to assert that "[n]o party has led evidence of prejudice"[104] in the face of its own witnesses' evidence that HDI's purpose is to get the Plaintiff out of the way and stop this action.[105] HDI's explicit **pleaded** goal is stopping the resolution of the issues in this action in Canadian courts. This fact alone makes any involvement of HDI unduly prejudicial to

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[101] Richard Hill Transcript, p. 168-169, q. 514, SNGR Brief, Tab E, p. 881-882 [**CL A2804-A2805**]

[102] HDI's factum also improperly references extracts of the plaintiff's expert reports that are not before the Court on HDI's pending motion. The improper references are at factum paragraphs 4, 10, 34, 37, 68, and footnotes 3, 46, 50, and the Plaintiff objects to these portions of HDI's factum [**CL B-3-5**, **B-3-8-B-3-9**, **B-3-11-B-3-12** and **B-3-21**]. Additionally, HDI delivered an affidavit on April 10, 2023, containing answers to undertakings and refusals delivered one business day before the factum was served, after the motion record was closed, and after cross-examinations were completed, in breach of Rule 39.02(2). This affidavit and the references to it in factum paragraphs 48 and 49, and footnotes 71, 73, and 74 are improper [**CL B-3-15-B-3-16**].

[103] See *Kwikwetlem First Nation v British Columbia (Attorney General)*, 2021 BCCA 311 at paras 174-176, where the application judge's decision was upheld on appeal. See also *Kwikwetlem First Nation v British Columbia*, 2021 BCSC 436 at paras 59-63.

[104] HDI Factum para 82 [**CL B-3-25**].

[105] HDI Draft Defence at paras 95(a), 96(a) [**CL B-3-2326-B-3-2327**].

the determination of the Band's rights, and should be dispositive of HDI's motion.

64. The HCCC has also unreasonably delayed in raising these issues, without credible explanation.[106] Unexplained delay weighs heavily against intervention, and HDI's failure to seek intervenor status in a timely fashion is sufficient on its own to dismiss its motion. In both *Blencoe* and *Behn*, delay in advancing a claim was found in and of itself an abuse of process.[107] The HCCC has known about this case since its inception, participated in negotiations during the abeyance period, admitted that it considered intervening as early as 2004 and later in 2018 (but did not do so), and never pursued its own claim. And despite bald assertions to the contrary, HDI clearly had the financial means to bring this motion years ago.[108]

65. HDI's involvement as currently framed would also massively expand the scope of the evidence and issues to be determined at trial compared to the matters which are currently in issue and which have progressed through five years of careful case management. HDI's materials raise a wide range of new issues, which the Plaintiff does not wish to litigate, including:

(a) Haudenosaunee Aboriginal title;[109]
(b) Governance of the Six Nations of the Grand River;[110]
(c) Governance of the Haudenosaunee Confederacy;[111]

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[106] See *e.g. R v Roberts*, where the applicant Chief of an Indian Band, contended that he had lawful proprietary rights to certain lands in question applied to be allowed to participate in a dispute involving the ownership of two Indian Reserves just seven weeks after the action had been commenced. The court dismissed the application, noting that the applicant did not submit any acceptable reasons for not having filed his application to intervene earlier. See 1993 CarswellNat 2385, 65 FTR 292 (FCTD) at 8 [*Roberts*] BOA, Tab 4.

[107] *Behn* at para 41, citing *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras 101-121.

[108] Saul Transcript, p. 47-72, q. 208-324 and Exhibits 8-10 and 12-13, p. 211-250 and p. 252-272 SNGR Brief, Tabs A, A8-A10 and A12-A13, p. 47-73 [**CL A1970-A1995**, **CL A2134-A2173** and **A2194**] and Documents Produced by HDI with Answers to Undertakings on April 6, 2023, SNGR Brief, Tabs I6-I27, p. 1380-1694 [**CL A3303-A3617**].

[109] HDI Draft Defence at paras 41 and 53 [**CL B-3-2310** and **B-3-2313**]; Amended Notice of Motion of HDI dated April 10, 2013 ("**ANOM**") at para 52 [**CL B-3-98**].

[110] HDI Draft Defence at paras 13, 70 [**CL B-3-2303** and **B-3-2318**]; HDI Factum at paras 19-22, 25, 42 [**CL B-3-7-B-3-9** and **B-3-13-B-3-14**].

[111] HDI Draft Defence at paras 4, 21, 23-24, 68-69, 92 [**CL B-3-2301-B-3-2302**, **B-3-2305-B-3-2306**, **B-3-2317** and **B-3-2325**]; ANOM at paras 7, 26-27, 29, 48, 53 [**CL B-3-88**, **B-3-91**, **B-3-97-B-3-98**]; HDI Factum at paras 1, 5-6 and 69 [**CL B-3-3-B-3-4** and **B-3-21-B-3-22**].

(d) The composition of the collective entitled to the Haldimand Tract;[112]

(e) The inclusiveness of the band membership criteria;[113]

(f) The inclusiveness of the *Indian Act* membership criteria;[114]

(g) The role of Canadian courts in adjudicating disputes between the Crown and the Haudenosaunee Confederacy;[115]

(h) The role of Canadian courts in adjudicating claims by bands within the Haudenosaunee Confederacy;[116]

(i) Whether Canadian courts have any role in resolving disputes concerning Haudenosaunee governance;[117] and

(j) Claims for a reference, ancillary declarations, accounts (presumably an accounting) and unspecified directions against the Six Nations of the Grand River.[118]

66. Letting HDI in would delay the case, require adjourning the trial timetable, and cause the parties to incur significantly increased costs.[119] This will cause the Plaintiff injustice.[120]

67. This is further evidenced by HDI's request for directions regarding pleadings amendments, additional productions, discovery of additional witnesses, and timetable for delivery of expert reports.[121] While HDI demands all of this, it presents no plan for how its proposed counterclaims and crossclaims could be litigated in a timely or efficient manner. HDI's witnesses **refused** to answer questions related to conduct of the action if it were made a party, including whether HCCC Chiefs would make themselves available for examinations (presumably the answer is no), whether

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[112] HDI Draft Defence at paras 26, 44-45, 48-49, 51, 55-58, 63-66, 95a-b, 96a-b, 96d-h [**CL B-3-2306**, **B-3-2311-B-3-2312**, **B-3-2313-B-3-2316**, **B-3-2326-B-3-2328**]; ANOM at paras 6, 34, 36, 43, 59 [**CL B-3-87**, **B-3-92-B-3-93**, **B-3-95**, **B-3-100-B-3-101**]; HDI Factum at paras 4, 30, 32-37, 58, 62-64, 67-68, 72-74, 91 [**CL B-3-3**, **B-3-10-B-3-12**, **B-3-18-B-3-23** and **B-3-27**].

[113] HDI Draft Defence at paras 20, 56b, 58, 61-62, 67-68 [**CL B-3-2305**, **B-3-2314-B-3-2315** and **B-3-2317**]; ANOM at paras 44, 49 [**CL B-3-95** and **B-3-97**]; HDI Factum at paras 4-5, 11-14, 17-18 [**CL B-3-3-B-3-7**].

[114] HDI Draft Defence at para 20, 56b, 58, 67-68 [**CL B-3-2305**, **B-3-2314-B-3-2315** and **B-3-2317**]; ANOM at para 44 [**CL B-3-95**]; HDI Factum at para 17 [**CL B-3-7**].

[115] HDI Draft Defence at paras 86-91, 96c [**CL B-3- 2323-B-3-2325** and **B-3-2327**]; HDI Factum at para 81 [**CL B-3-25**].

[116] HDI Draft Defence at paras 83c, 84 [**CL B-3-2322-B-3-2323**].

[117] HDI Draft Defence at paras 30, 34 [**CL B-3-2307-B-3-2308**]; HDI Factum at para 80 [**CL B-3-25**].

[118] HDI Draft Defence at paras 95(c) and (d) [**CL B-3-2326**].

[119] Ontario, for example has signalled in its factum that intervention will trigger requests for discovery and interrogatories, and more time for pleadings and expert reports. See Ontario Responding Factum to HDI and Men's Fire Motions at para 76(e) and (f).

[120] See *e.g. Jones v Tsige*, 2011 CanLII 99894 (ONCA).

[121] HDI Factum at para 110(iv) [**CL B-3-32**].

HDI has retained experts, and how long it would take for HDI to get expert reports ready.[122]

68. The burden lies on HDI to show it can and will participate in this litigation without causing prejudice to the parties. Instead, it has shown it has no plan and, in fact, intends to be a chaos agent. The interests of justice are not served by this.[123]

69. No detriments would flow from denying HDI leave to intervene. If HDI wishes, it can assert claims in its own proceedings. HCCC's lack of diligence in pursuing its purported claims is the only cause of any prejudice they may suffer at this time. On the other side of the ledger, there are significant harms that will flow from the proposed intervention, including that it will significantly increase complexity, cost, and delay, expand the issues, practically and literally take the litigation away from the Plaintiff, and create a forum in which the HDI and HCCC can continue their political efforts to delegitimize the Elected Council. In weighing these matters in the context of a weak claim, the interests of justice weigh in favour of denying the intervention.

IV. ISSUE 3: HDI DOES NOT MEET THE REPRESENTATION ORDER TEST

A. Balance of Convenience Weighs Against a Representation Order

70. Rule 10.01 provides that in certain circumstances 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. Where such an appointment is made, an order in the proceeding is **binding** on a person or class so represented.[124]

71. The applicant must satisfy the court that the balance of convenience favours granting a

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[122] Detlor Transcript March 24, p. 105-112, q. 377-400, SNGR Brief, Tab H, p. 1272 [**CL A3167-A3174**].

[123] *Roberts* at 8-9, BOA, Tab 4. Other examples of delay being the reason for denial of intervention, albeit in the appeal context: *Sawridge Band v Canada*, 2009 FCA 61 and *Manitoba Métis Federation Inc v Canada (AG)*, 2009 MBCA 17.

[124] *Rules*, r. 10.01(2).

representation order, and if the court is satisfied that a representation order is appropriate, the applicant must next demonstrate that they are an appropriate representative.[125] Courts have considered whether the proposed representative plaintiff will consider their own interests to the exclusion of the interests of other parties, and the proposed representative must at least share an individual cause of action with all members of the group they seek to represent.[126]

72. HDI does not meet the test for a Rule 10.01 representative order because, as explained below, the classes of persons HDI purports to represent are ascertained and reject the principle that they would be bound, the alleged "interest" of the classes is a collateral attack and abuse of the court's process, there is no commonality of interest within and between HDI and the proposed classes, and HDI is not an appropriate representative.

B. HDI's Motion Perverts Purpose of a Representation Order – to Bind the Represented

73. The basic purpose of a representation order is to efficiently ensure all persons affected by an order are bound.[127] Here, the represented party is explicitly seeking the representation order so as to **avoid** being bound.

C. The HCCC and Haudenosaunee Confederacy are Ascertained

74. Most claims for Aboriginal rights, Aboriginal title or treaty rights are made using the representative action process under Rule 12.08.[128] Rule 10, however, only applies to unascertained groups. The HCCC itself is ascertained – it is a body of fifty Chiefs (when all offices are filled). All Chiefs could be named, or one Chief could seek a Rule 12.08 representation order, but here

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[125] *Police Retirees of Ontario Inc v Ontario Municipal Employees' Retirement Board*, 1997 CanLII 12271 (ONSC), 1997 CarswellOnt 3084 at para 18; *Ryan v Ontario (Municipal Employees Retired Board)*, [2006] OJ No 61, 2006 CarswellOnt 883 [*Ryan*] BOA, Tab 5.

[126] *Ryan* at para 20, BOA, Tab 5.

[127] *Oregon Jack Creek Indian Band v Canadian National Railway Co*, 1989 CanLII 4 (SCC) [*Oregon Jack Creek*], *Nemaiah Valley Indian Band v Riverside Forest Products Ltd*, 1999 CanLII 2837 [*Nemaiah Valley*].

[128] See *Kelly v Canada (Attorney General)*, 2013 ONSC 1220 [*Kelly* ONSC], rev'd in part 2014 ONCA 92 [*Kelly* ONCA]; *Nemaiah Valley*; *Oregon Jack Creek.*

they have declined to take either approach, in order to avoid being bound.

75. The Haudenosaunee Confederacy is also ascertained in that it consists of the members of the various bands and tribes for whom the reserves and reservations have been set aside. They were identified when HDI belatedly gave them notice of its motion.[129] Each of these Haudenosaunee communities has their own government that manages their own lands and claims. In such a case, the body of persons are known and their proper representatives are known.

76. HDI originally relied on Rule 12.08 in its Notice of Motion; following cross-examinations, presumably recognizing the weakness of its position, it amended its Notice of Motion to remove this.[130] HDI knows that the class it purports to represent comprises many bands in Canada and tribes in the U.S. that *will not* authorize it to represent them. When it was forced to give notice of its motion to other present-day Haudenosaunee communities, the evidence shows that those other communities did not know what HDI was doing, and several opposed it.[131]

D. Representation Order Not Appropriate Where Legal Conflicts Exist Within the Class

77. A representation order can only be made when success for one class member is success for all class members.[132] That cannot be the case here. The Haudenosaunee Confederacy includes bands within Canada and tribes within the U.S., and also members of the Six Nations of the Grand River Band. These groups are internally conflicted, in that a 'successful' claim by the HCCC and its supporters would oust the Band from the proceeding, and dilute the interest of Six Nations of

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[129] Order of Justice Sanfilippo dated September 21, 2022 at para 1; Martin Affidavit at paras 22-30, HDI 2nd Supp MR, Tab 1, p. 5-10 [**CL B-3-1280-B-3-1285**].

[130] ANOM at para 1(b) [**CL B-3-86-B-3-87**].

[131] Doolittle Transcript, p. 66-83, q. 311-379, SNGR Brief, Tab B, p. 349-367 [**CL A2273-A2290**]; Objection Letters, see footnote 48. See, in particular, Letter from the Mohawks of the Bay of Quinte dated October 28, 2022 Exhibit G, Defreitas-Barnes Affidavit, HDI 3rd Supp MR, Tab 7G pgs. 89-96, [**CL B-3-1507-B-3-1515**]**;** dated October 31, 2022, Exhibit H, Defreitas-Barnes Affidavit, HDI 3rd Supp MR, Tab 7H pg. 98 [**CL B-3-1518**]**.**

[132] See *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 40. This principle has been applied in the context of representation orders in Ontario, see *e.g. Whiteduck v HMQ in Right of Ontario*, 2020 ONSC 5592 at para 24; *Kelly* ONSC at para 99.

the Grand River in any judgment or settlement resulting from the proceeding. This internal conflict legally bars a representation order.

E. Representation Order Cannot be Used to Avoid Respecting Known Governments

78. HDI mistakenly relies upon *Kelly v Canada*[133] to argue that in determining whether or not to make a representation order the court should not consider issues of authority. In *Kelly* the court was faced with a similar situation – an application for a representation order for a larger Indigenous group comprised of many bands. The Court of Appeal dealt with this when allowing the representation order by requiring the proposed plaintiff to either (1) show that they had the formal consent to representation – in the form of band council resolutions – of all of the underlying bands, or (2) join as a defendant each band that did not consent.[134] The same principle should apply here. HDI does **not** have the formal consent of all bands and tribes of the Haudenosaunee Confederacy. And naming over a dozen Canadian and American Haudenosaunee communities as defendants would cause massive prejudice to the existing parties. This concern is particularly acute here as the evidence is clear that HCCC's interests are local to Six Nations of the Grand River and not to the Haudenosaunee as a whole.

F. Representation Order Inappropriate Where Traditional Governance Disputed

79. Courts have recognized that they must inquire into the authority of a proposed representative party where there exists a dispute within the Indigenous community with respect to the person's authority.[135] Where the dispute relates to traditional governance, the Court should send the matter back to the Indigenous governance institution for resolution as it is likely the Court does not have jurisdiction over such matter.[136]

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[133] *Kelly* ONCA; HDI includes the lower court decision in its factum, but not the appeal decision.
[134] *Kelly* ONCA at para 21. See also lower court decision, *Kelly* ONSC at paras 89-122.
[135] *Te Kiapilanoq* at para 35, citing *Oregon Jack Creek*.
[136] *Wesley v Canada*, 2017 FC 725 at paras 9-10.

80. The authority of the HCCC/HDI to involve themselves in this action is clearly disputed by the community. Several Haudenosaunee governing bodies gave notice to the court of their objections.[137] These have not been resolved. The Men's Fire has provided a detailed record setting out its issues with how the HDI was purportedly authorized to proceed with this motion. The factual basis for these complaints, including lack of participation by Chiefs and Clan Mothers, lack of notice, lack of community consultation and lack of consensus are borne out by the evidence.[138]

G. HDI is an Inappropriate Representative Due to Community Conflicts Over its Status

81. HDI is an opaque association that is divisive and controversial within the Grand River community and Haudenosaunee Confederacy. It is not a corporation or "person" under Canadian law.[139] It is not a traditional Haudenosaunee governance body. [140] Neither Mr. Detlor nor Mr. Doolittle are Haudenosaunee Chiefs.[141] Mr. Detlor is not a member of the Six Nations of the Grand River Band.[142] HDI states that it was delegated authority by the HCCC to bring this motion on behalf of the Haudenosaunee Confederacy but has not provided evidence of this in the form of any HCCC resolution, despite numerous requests.[143]

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[137] Objection Letters, see footnote 48.

[138] The evidence reveals that the HCCC's putative decision to authorize HDI to bring this motion was made by about 12-14 Chiefs out of 50 at a meeting that was held without notice; Doolittle Transcript, p. 31-32, 48-50, q. 168-171, 246-257, SNGR Brief, Tab B, p. 314-316, 332-334 [**CL A2237-A2239**, **A2255-A2257**]. Clan Mothers do not appear to have been involved: Davey Affidavit at paras 23-25, MF ARMR, Tab 2, p. 19-20 [**CL B-4-23-B-4-24**] Many Chief and Clan Mothers positions are vacant, and in some cases for quite some time. The Men's Fire's evidence shows that there is vehement disagreement within the community about HCCC's interpretation of Haudenosaunee laws and traditions and its declarations of authority on that basis. Davey Affidavit at para 6, MF ARMR, Tab 2, p. 17 [**CL B-4-21b**]**;** Delaronde Affidavit at paras 7-37; Davey Transcript on March 13, 2023, p. 25-26, q. 89-90, Transcript Brief of HDI [**HDI Brief**], Tab E, p. 312-313 [**CL B-3-2686-B-3-2687**]; Doolittle Transcript, p. 31-32, q. 168-171, SNGR Brief, Tab B, p. 315-316 [**CL A2238-A2239**].

[139] *Detlor v Brantford (City)*, 2013 ONCA 560 at para 11.

[140] Miller Affidavit at para 4, RMR, Tab 3, p. 1133 [**CL A1141**].

[141] Miller Affidavit at para 6, RMR, Tab 3, p. 1134 [**CL A1142**]; Detlor Transcript March 24, 2023, p. 95, q. 319, SNGR Brief, Tab H, p. 1234 [**CL A3157**]; Doolittle Transcript p. 15, q. 66-67, SNGR Brief, Tab 2, p. 299 [**CL A2222**].].

[142] Affidavit of Aaron Detlor affirmed August 31, 2022 at paras 6 and 11-12, HDI 2nd Supp MR, Tab 2, p. 2-3 [**CL B-3-1277-B-3-1278**]; Detlor Transcript March 24, SNGR Brief Tab H, p. 1233-1234, q. 316-318 [**CL A3156-A3157**].

[143] Six Nations of the Grand River Responding Factum (Men's Fire Motion) at paras 5-9. Doolittle Transcript at p. 44-48, q 243-246, SNGR Brief, Tab B, p. 328-332 [**CL A2251-A2255**].

82. Despite what it says about acting for all Haudenosaunee people, HDI is in reality focused in and on the Grand River community. Its properties, apart from a Toronto condominium, are in or around the Six Nations of the Grand River reserve, as are its offices, employees, and activities.[144]

83. There are also serious concerns that the persons behind HDI are financially benefiting themselves, concerns confirmed by the difficulty of accessing HDI financial information, and the substantial body of assets and funds accumulated by HDI or related entities.[145] Particularly significant are benefits conferred on individuals, especially Mr. Detlor, such as substantial "success fees" and 50 percent ownership of a Toronto condominium.[146] These all raise the spectre that HDI may be concerned with stymieing the Band in order to preserve these benefits.

V. CONCLUSION

84. HDI's motion is a collateral attack on the governance and membership of the Six Nations of the Grand River in abuse of this Court's process, and it fails the tests for joinder, intervention, and representation. HCCC is only bringing this motion now, hiding behind HDI, because the Plaintiff's action is nearing trial and it wants to stop it. The Court should not allow its processes to be abused in this way, and should deny HDI's motion.

PART IV - ORDER REQUESTED

85. For the foregoing reasons, the motion should be dismissed in its entirety, with costs.

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[144] Saul Transcript, p. 83-93, q. 369-415, SNGR Brief, Tab A, p. 83-93 [**CL A2006-A2016**].

[145] HDI provided limited financial disclosure regarding its affairs, while further disclosure was only made after cross-examinations were completed. Saul Transcript, Exhibits 8-10 and 12-13, SNGR Brief, Tabs A8-A10, A12-A13, p. 211-250 and p. 252-271 [**CL A2134-A2173** and **A2194**] and Documents Produced by HDI with Answers to Undertakings on April 6, 2023, SNGR Brief, Tabs I6-I27, p. 1380-1694 [**CL A3303-A3617**].

[146] Detlor Transcript March 24, p. 173, q. 633-636, SNGR Brief, Tab H, p. 1312 [**CL A3235**]; Saul Transcript, p. 62-64, q. 269-279, p. 72, q. 324, p. 112-113, q. 490-493, SNGR Brief, Tab A, p. 62-64, 72 and 112-113 [**CL A1985-A1987**, **A1995** and **A2305-A2306**]; Detlor Transcript March 20, 2023, p. 46-49, q. 155-170, SNGR Brief, Tab G, p. 1117-1120 [**CL A3040-A3043**]; Doolittle Transcript, p. 31-33, q. 163-181, SNGR Brief, Tab B, p. 315-317 [**CL A2238-A2240**].

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

Iris Antonios/Max Shapiro/
Robert Janes/Rebecca Torrance

Lawyers for the Plaintiff (Responding Party),
Six Nations of the Grand River Band of
Indians

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Assu v Chickite*, 1998 CanLII 4684 (BCSC)
2. *Behn v Moulton Contracting Ltd*, 2013 SCC 26
3. *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44
4. *Blueberry River Band Indian v Canada (Department of Indian Affairs and Northern Development)*, 2001 FCA 67
5. *Bown v West* (1846), 1 E & A 117, 1846 CarswellOnt 2 [BOA, Tab 1]
6. *Canada (Attorney General) v Anishnabe of Wauzhushk Onigum Band*, [2001] OJ No 26754, 2001 CarswellOnt 2372 (ONSC) [BOA, Tab 2]
7. *Canam Enterprises Inc v Coles*, 2002 SCC 63 [*Canam* SCC], aff'g 2000 CanLII 8514 (ONCA)
8. *Dakota Plains First Nation v Smoke*, 2022 FC 911
9. *Davey v Hill*, 2018 ONSC 5274
10. *Davey et al v Isaac et al*, 1977 CanLII 21 (SCC)
11. *Detlor v Brantford (City)*, 2013 ONCA 560
12. *Doe Dem Sheldon v Ramsay et al* (1851), (1852) 3 NBR 259, 9 UCQB 105 [BOA, Tab 3]
13. *Dorsey, Newton, and Salah v Attorney General of Canada*, 2021 ONSC 2464
14. *Felix Sr v Sturgeon Lake First Nation*, 2011 FC 1139
15. *Garland v Consumers' Gas Co*, 2004 SCC 25
16. *Glasjam v Freedman*, 2014 ONSC 3878
17. *Halpern v Toronto (City) Clerk*, 2000 CanLII 29029 (ON Div Ct)
18. *Haudenosaunee Development Institute v Metrolinx*, 2023 ONSC 1170 aff'd 2023 ONCA 144
19. *Hill v Canada*, 1998 CanLII 8264 (FC)
20. *Joe v Findlay*, 1987 CanLII 2728 (BCSC)

21. *Jones v Tsige*, 2011 CanLII 99894 (ONCA)

22. *Kelly v Canada (Attorney General)*, 2013 ONSC 1220, rev'd in part 2014 ONCA 92

23. *Komoyue Heritage Society v British Columbia (Attorney General)* 2006 BCSC 1517

24. *Kwikwetlem First Nation v British Columbia*, 2021 BCSC 436 aff'd 2021 BCCA 311

25. *Logan v Styres et al*, 1959 CanLII 406 (ONSC)

26. *Mack v Mack*, 1994 CanLII 2194 (BCSC)

27. *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2009 MBCA 17

28. *Marcel Colomb First Nation v Colomb*, 2016 FC 1270

29. *Mathias v Squamish Nation*, 2022 BCSC 116

30. *McDonald v Fond du Lac Denesuline First Nation*, 2022 FC 844

31. *Miller v Jansen et al and Elguindy*, 2012 ONSC 4059

32. *Nemaiah Valley Indian Band v Riverside Forest Products Ltd*, 1999 CanLII 2837 (BCSC)

33. *Niagara North Condominium Corp No 125 v Waddington*, 2007 ONCA 184

34. *Oregon Jack Creek Indian Band v Canadian National Railway Co*, 1989 CanLII 4 (SCC)

35. *Pasco v Canadian National Railway Company*, 1989 CanLII 249 (BCCA)

36. *Peel (Regional Municipality) v Great Atlantic & Pacific Co. of Canada*, 1990 CanLII 6886 (ONCA)

37. *Plante v Industrial Alliance Life Insurance Co*, 2003 CanLII 64295 (ONSC)

38. *Police Retirees of Ontario Inc v Ontario Municipal Employees' Retirement Board*, 1997 CanLII 12271 (ONSC), 1997 CarswellOnt 3084

39. *R v Conway*, 1989 CanLII 66 (SCC)

40. *R v Power*, 1994 CanLII 126 (SCC)

41. *R v Roberts*, 1993 CarswellNat 2385, 65 FTR 292 (FCTD) [BOA, Tab 4]

42. *Ross River Dena Council Band v Canada*, 2002 SCC 54

43. *Ryan v Ontario (Municipal Employees Retired Board)*, [2006] OJ No 61, 2006 CarswellOnt 883 [BOA, Tab 5]

44. *Ryan et al v Harold Leighton, Metlakatla Dev Corp et al*, 2006 BCSC 278

45. *Sawridge Band v Canada*, 2009 FCA 61

46. *Te Kiapilanoq v British Columbia*, 2008 BCSC 54

47. *Toronto (City) v CUPE, Local 79*, 2003 SCC 63

48. *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700, aff'd 2012 BCCA 285, rev'd 2014 SCC 44

49. *Wesley v Canada*, 2017 FC 725

50. *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46

51. *Whiteduck v HMQ in Right of Ontario*, 2020 ONSC 5592

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Constitution Act, 1982, s 35, 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.

Indian Act, RSC 1985, c I-5

Protests
14.2 (1) A protest may be made in respect of the inclusion or addition of the name of a person in, or the omission or deletion of the name of a person from, the Indian Register, or a Band List maintained in the Department, within three years after the inclusion or addition, or omission or deletion, as the case may be, by notice in writing to the Registrar, containing a brief statement of the grounds therefor.

Protest in respect of Band List
(2) A protest may be made under this section in respect of the Band List of a band by the council of the band, any member of the band or the person in respect of whose name the protest is made or that person's representative.

Protest in respect of Indian Register
(3) A protest may be made under this section in respect of the Indian Register by the person in respect of whose name the protest is made or that person's representative.

Onus of proof
(4) The onus of establishing the grounds of a protest under this section lies on the person making the protest.

Registrar to cause investigation
(5) Where a protest is made to the Registrar under this section, the Registrar shall cause an

investigation to be made into the matter and render a decision.

Evidence
(6) For the purposes of this section, the Registrar may receive such evidence on oath, on affidavit or in any other manner, whether or not admissible in a court of law, as the Registrar, in his discretion, sees fit or deems just.

Decision final
(7) Subject to section 14.3, the decision of the Registrar under subsection (5) is final and conclusive.

[…]

16 (1) [Repealed, R.S., 1985, c. 32 (1st Supp.), s. 6]

Transferred member's interest
(2) A person who ceases to be a member of one band by reason of becoming a member of another band is not entitled to any interest in the lands or moneys held by Her Majesty on behalf of the former band, but is entitled to the same interest in common in lands and moneys held by Her Majesty on behalf of the latter band as other members of that band.

***Rules of Civil Procedure,* RRO 1990, Reg 194**

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).

[…]

Power of Court to Add Parties
(4) The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding shall be added as a party. R.R.O. 1990, Reg. 194, r. 5.03 (4).
[…]

Relief Against Joinder of Party
(6) The court may by order relieve against the requirement of joinder under this rule. R.R.O. 1990, Reg. 194, r. 5.03 (6).

[…]

Relief against Joinder

5.05 Where it appears that the joinder of multiple claims or parties in the same proceeding may unduly complicate or delay the hearing or cause undue prejudice to a party, the court may,

(a) order separate hearings;

(b) require one or more of the claims to be asserted, if at all, in another proceeding;

(c) order that a party be compensated by costs for having to attend, or be relieved from attending, any part of a hearing in which the party has no interest;

(d) stay the proceeding against a defendant or respondent, pending the hearing of the proceeding against another defendant or respondent, on condition that the party against whom the proceeding is stayed is bound by the findings made at the hearing against the other defendant or respondent; or

(e) make such other order as is just.

[…]

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).

Order Binds Represented Persons
(2) Where an appointment is made under subrule (1), an order in the proceeding is binding on a person or class so represented, subject to rule 10.03. R.R.O. 1990, Reg. 194, r. 10.01 (2).

[…]

On a Motion or Application
39.02 (1) A party to a motion or application who has served every affidavit on which the party intends to rely and has completed all examinations under rule 39.03 may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion or application. R.R.O. 1990, Reg. 194, r. 39.02 (1).

(2) A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03. R.R.O. 1990, Reg. 194, r. 39.02 (2).

SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS Plaintiff	-and-	THE ATTORNEY GENERAL OF CANADA et al. Defendants	-and-	THE HAUDENOSAUNEE DEVELOPMENT INSTITUTE et al. Moving Party	Court File No. CV-18-594281-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

RESPONDING FACTUM OF SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS (MOTION RETURNABLE MAY 8-10, 2023)

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