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 HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Defendants (Responding Parties)

- and -

MISSISSAUGAS OF THE CREDIT FIRST NATION

Moving Party

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

MOTION RETURNABLE MAY 12, 2023

May 1, 2023

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PART I - INTRODUCTION

1. The Mississaugas of the Credit First Nation ("**MCFN**")'s novel intervention request to be added as a claimless defendant with "full party rights" at this late stage should be dismissed because it will materially expand the issues to be tried, cause prejudice to the Six Nations of the Grand River Band of Indians ("**SNGR**"), and result in potentially **years** of delay to SNGR's already decades-long quest for access to justice, at significant expense.

2. In considering late intervention requests:

> …interveners are guests at a table already set with the food already out on the table. Interveners can comment from their perspective on what they see, smell and taste. They cannot otherwise add food to the table in any way.
>
> To allow them to do more is to alter the proceedings that those directly affected—the applicants and the respondents—have cast and litigated under for months, with every potential for procedural and substantive unfairness.[1]

3. MCFN says it seeks a 'seat at the table' to 'tell its own story'. It arrives very late and with little notice, asks to re-start the meal, wishes to serve a different menu, and asks the hosts to pay the bill.

PART II - FACTS

4. SNGR started this action in 1995 to hold Canada and Ontario (the "**Crowns**") accountable for a shameful history of failed promises and breaches of fiduciary duty and treaty obligations dating back to the creation of the Six Nations Reserve (defined below) in 1784.

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[1] *Tsleil-Waututh Nation v Canada (AG)*, 2017 FCA 174 at paras 55-56 (per Justice Stratas). Here, the Court allowed British Columbia's request to intervene under Rule 110 of the *Federal Courts Rules*, on strict terms, in a consolidated application to quash administrative decisions of the National Energy Board approving a pipeline project.

5. At its core, this is an action brought by a band about the loss of a tract of reserve land and the mismanagement of monies derived from that land by the Crowns. SNGR seeks equitable compensation for breaches of fiduciary duty and treaty rights.

6. No relief is, or ever has been, sought against MCFN, any other Indigenous group, or any entity other than the Crowns. No declarations involving Aboriginal rights or title are sought.[2]

A. The Parties and the Moving Party

7. SNGR is a band recognized under the *Indian Act* that is represented by an Elected Council. SNGR is the posterity of an Indigenous community of Haudenosaunee people for whom a reserve on the Grand River was created through the 1784 Haldimand Proclamation (the "**Six Nations Reserve**"). Its members are Aboriginal people under section 35 of the *Constitution Act, 1982*.[3]

8. SNGR claims the defendant Crown in right of Canada, as successor to the Imperial Crown, is liable for the obligations, duties, and liabilities of the British Crown, and those owed prior to Confederation, and that the defendant Ontario Crown, as the successor to the Imperial Crown, is liable for all the obligations, duties, and liabilities of the British Crown within the province.[4] Through multiple pleading amendments since 1995, the Crowns have denied the alleged wrongdoing or blamed each other for it.[5] They have never sought to bring in another party.

9. MCFN is an Indigenous community of Anishinaabe people, an *Indian Act* band, and is represented by an Elected Council. MCFN has its own treaties with the Crowns and has

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[2] Affidavit of Mark Hill affirmed February 6, 2023 [**Hill Affidavit**] at paras 13-14, Responding Motion Record of the Plaintiff [**SNGR RMR**], Tab 1, p. 5 [**CL A1585**] (All Caselines references are to Master page numbers).
[3] Further Amended Statement of Claim dated May 2, 2020 [**SNGR Claim**] at para 2.
[4] SNGR Claim at paras 3-4.
[5] Amended Statement of Defence and Crossclaim of Ontario dated August 31, 2020 at e.g. paras 47-50; Amended Statement of Defence and Crossclaim of Canada dated September 30, 2020 at e.g. paras 15-18.

commenced court actions to enforce its rights,[6] including a 2020 Aboriginal title claim against the Crowns (the "**Water Claim**") discussed below.

B. Haudenosaunee and Anishinaabe History

10. The Haudenosaunee and Anishinaabe have a long and at times painful history. Both groups have historically used and occupied lands in what is now the midwestern United States and the provinces of Ontario and Quebec for hunting, trapping, fishing, harvesting, and trading.[7]

11. In the 1600s and early 1700s, there was a long conflict between them known as the "Beaver Wars". This ended with the Dish with One Spoon agreement in 1700 and Great Peace of Montreal in 1701.[8]

12. The Six Nations Reserve was created by the Haldimand Proclamation in 1784, under which the Six Nations of the Grand River were granted approximately 950,000 acres of lands along the Grand River after the American Revolutionary War. This action is based, in part, on the British Crown failing to set aside for the Six Nations of the Grand River all of the lands promised under the Haldimand Proclamation.[9] This area is sometimes called the Haldimand Tract.

13. In 1847, the Six Nations of the Grand River invited the Mississaugas to live on Six Nations Reserve lands within the Haldimand Tract. The Mississaugas live there to this day.[10] As MCFN's Chief describes this in his affidavit, "…in the 1840s, when our people were driven from our village

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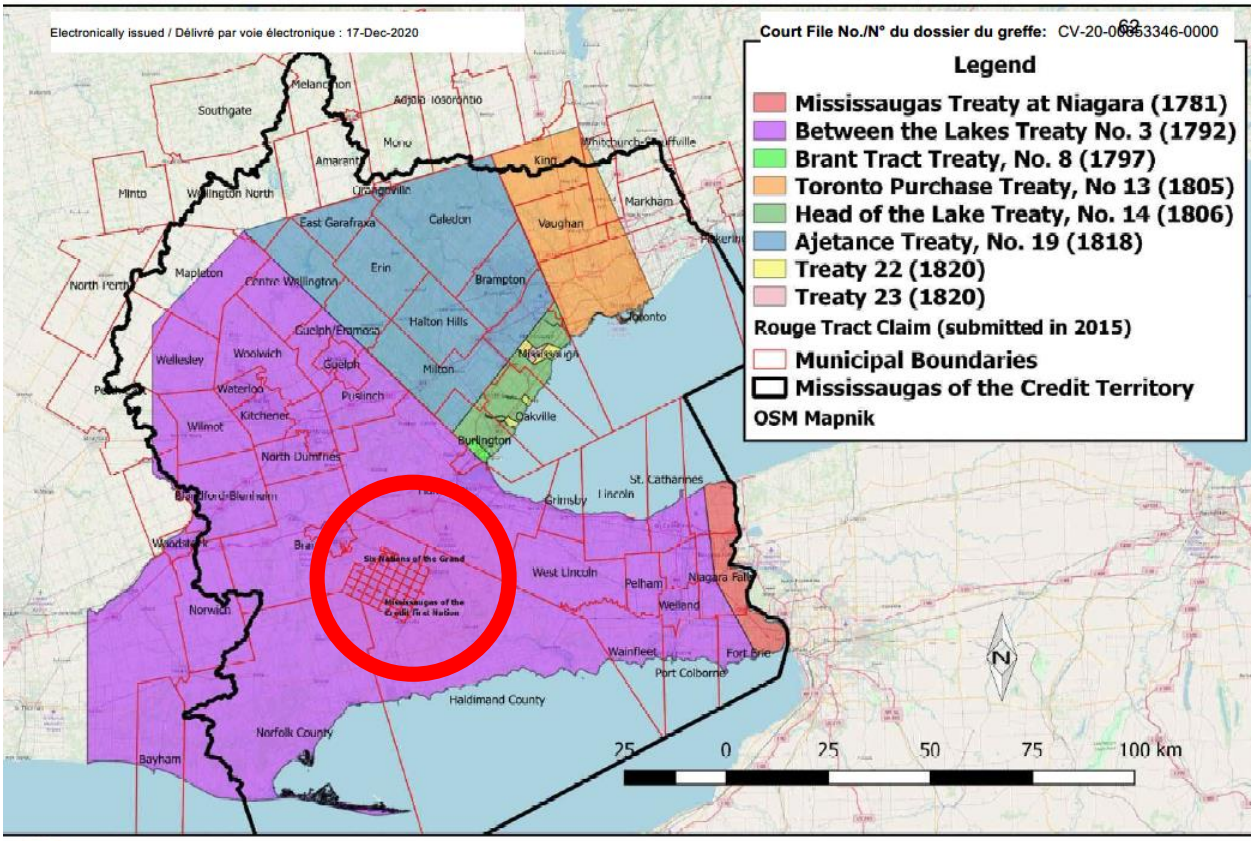
[6] Affidavit of Chief R. Stacey Laforme affirmed December 2, 2022 [**Laforme Affidavit**] at paras 1-2, 6, 31**,** MCFN Motion Record [**MCFN MR**], Tab 2, p. 21-23, 31 [**CL B-3-133-135, B-3-143**].
[7] Laforme Affidavit at para 19, MCFN MR, Tab 2, p. 28 [**CL B-3-140**]; Hill Affidavit at para 5, SNGR RMR, Tab 1, p. 2 [**CL A1582**].
[8] Hill Affidavit at para 7, SNGR RMR, Tab 1, p. 3 [**CL A1583**].
[9] Hill Affidavit at para 14, SNGR RMR, Tab 1, p. 5 [**CL A1585**].
[10] Transcript of the Cross Examination of Chief R. Stacey Laforme on March 20, 2023 [**Laforme Transcript**] at p. 10-11, q. 30, Transcript Brief of the Plaintiff [**SNGR Brief**], Tab B, p. 39-40 [**CL A3668-A3669**].

on the banks of the Credit River, Six Nations offered us lands that have now become our reserve."[11] The MCFN reserve, New Credit 40A,[12] is adjacent to the Six Nations Reserve, as circled in the map below excerpted from MCFN's Water Claim:



Municipalities within MNCFN Treaty Lands

C. Key Undisputed Facts

14. Two key historical facts are **not** in issue as between MCFN and SNGR.

[11] Laforme Affidavit at para 9, MCFN MR, Tab 2, p. 24 [CL B -3-136]; Laforme Transcript at p. 17-18, q. 58-60, SNGR Brief, Tab B, p. 46-47 [CL A3675-A3676].
[12] Laforme Affidavit at para 67, MCFN MR, Tab 2, p. 42 [CL B-3-154].

15. First, MCFN agrees the Haldimand Proclamation created the Six Nations Reserve.[13] This is consistent with SNGR's pleading and its understanding as stated by SNGR's Elected Chief:[14]

> 12. The Haldimand Proclamation has always been understood in our community to be a treaty made between the Six Nations and the British Crown, and to have created the Reserve. The Six Nations, led by Joseph Brant, accepted the Haldimand Proclamation as partial recompense for the Six Nations' alliance with and support of the British Crown during the American Revolutionary War. We understand the Haldimand Proclamation to mean what exactly what it says.

16. Second, MCFN agrees that in 1784, MCFN "surrendered certain lands to share with the Crown ",[15] which "paved the way for the Crown to grant Six Nations its lands in the Grand River Valley."[16] This was done in what MCFN calls the Between the Lakes Treaty. Though MCFN takes issue with SNGR's Reply and the expert report prepared by Dr. Good, which describes this transfer more neutrally as a "quit claim",[17] before this motion MCFN publicly described this as a "a

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[13] Notice of Motion dated October 27, 2022 [**NOM**] at para 8, MCFN MR, Tab 1, p. 3 [**CL B-3-115**]; Laforme Transcript at p. 18, q. 59-60, SNGR Brief, Tab B, p. 47 [**CL A3676**].
[14] Hill Affidavit at para 12, SNGR RMR, Tab 1, p. 4 [**CL A1584**].
[15] Laforme Transcript at p. 20, 22, q. 68-69, 73, SNGR Brief, Tab B, p. 49, 51 [**CL A3678**, **A3680**]; Laforme Transcript at p. 20, q. 68-69, SNGR Brief, Tab B, p. 49 [**CL A3678**].
[16] Laforme Transcript at p. 20, 22, q. 68-69, 73, SNGR Brief, Tab B, p. 49, 51 [**CL A3678**, **A3680**]; Laforme Affidavit at para 46, MCFN MR, Tab 2, p. 36 [**CL B-3-148**].
[17] Dr. Good's report was not the first time that SNGR's materials referred to the 1784 surrender as a "quit claim". This term was also used in SNGR's September 30, 2020 Reply pleading at para 7.

surrender"[18] and "land ceded".[19] MCFN's Elected Chief confirmed this on cross-examination:[20]

> 69 Q. So there was a surrender in 1784; do I have that right?
> A. Yes.

D. This Action's Long History

17. This action has been public and well known to the community and the Canadian public at large since the 1990s,[21] including to MCFN through local news outlets.[22]

18. There have been at least two constants since SNGR's claim was issued in 1995, both of which MCFN only **now** says are concerning enough to ground a late-stage intervention request.

19. First, SNGR claims that the Six Nations Reserve was created pursuant to the Haldimand Proclamation from 950,000 acres of lands that, in part, came from the Mississauga Nation.[23]

20. Second, SNGR claims that the Haldimand Proclamation "constitutes a treaty within the meaning of section 35 of the *Constitution Act, 1982*".[24]

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[18] See e.g. 2015 MCFN "Statement of Claim" at paras 34-35 [**2015 MCFN Claim**], Affidavit of Elena Reonegro affirmed February 6, 2023 [**Reonegro Affidavit**], Exhibit F, SNGR RMR, Tab 2-F, p. 78, [**CL A1658**] (…"Land surrenders were taken from the Mississaugas to secure territory for Joseph Brant at the Grand River and other Six Nations Indians at the bay of Quinte (Mohawks of Tyendinaga)…"). See also March 2015 Report for MCFN entitled "Aboriginal Title Claim to Water Within the Traditional Lands of the Mississaugas of the New Credit" at p. 23, Reonegro Affidavit, Exhibit G, SNGR RMR, Tab 2-G, p. 149 [**CL A1729**] ("A copy of the original deed indicates that the Mississaugas ceded a tract of land between Lake Erie and Lake Ontario…this tract included a 550,000 acre section along the Grand River that was later reserved for the Six Nations…"). These documents illustrate that MCFN has put Six Nations history in issue in its claims against the Crowns, without notice to SNGR.

[19] MCFN website page titled "Between the Lakes Treaty No. 3 (1792)", Reonegro Affidavit, Exhibit B, SNGR RMR, Tab 2-B, p. 21 [**CL A1601**] (see also the reference to "[t]he land grant to the Six Nations").

[20] Laforme Transcript at p. 20-22, q. 68-69, 71-73, SNGR Brief, Tab B, p. 49-51 [**CL A3678-A3680**].

[21] Hill Affidavit at para 17, SNGR RMR, Tab 1, p. 5-6 [**CL A1585-A1586**].

[22] Laforme Transcript at p. 69-70, q. 258-263, SNGR Brief, Tab B, p. 98-99 [**CL A3727-A3728**].

[23] Statement of Claim dated March 7, 1995 [**1995 SNGR Claim**] at paras 14 and 16, the latter of which refers to "all of that territory of land forming part of the district lately purchased by the Imperial Crown from the Mississauga Nation…" The parallel references to the current version of the claim are at the same paras 14 and 16.

[24] 1995 Claim at para 15. The parallel reference to the current version of the claim is at the same para 15.

21. The parties' pleadings, including SNGR's claim, were most recently amended in 2020, on consent. This process was publicized in Case Management Endorsements,[25] and SNGR posted the amended claim to the website of its Lands and Resources Unit.[26]

E. MCFN Advances Band Claims in Parallel to SNGR's Band Claim

22. In cross-examination, MCFN's Elected Chief agreed that each band can advance claims on its own behalf, and respects the ability of other bands to advance claims on their own behalf.[27] Consistent with that, SNGR has prosecuted this action over the years at the direction of its Elected Council. In parallel, MCFN has advanced its own claims against the Crown to enforce treaty rights, including at least two Aboriginal title claims and one reserve land claim.[28] One of the title claims covers territory involving First Nations and bands other than MCFN, including the SNGR.[29]

23. In December 2020 MCFN issued the Water Claim against Canada and Ontario in which it seeks (among other things) a declaration that it "has aboriginal title to all of the water, beds of water, and floodplains in its territory".[30] The size of this territory is specified in a map appended to the claim which highlights hundreds of square kilometers – including, at the centre, the territory which comprises the modern-day Six Nations Reserve.[31]

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[25] See e.g. *SNGR v Canada and Ontario*, 2020 ONSC 3747 dated June 12, 2020

[26] www.sixnations.ca/LandsResources/20200507FurtheramendedSOC.pdf

[27] Laforme Transcript at p. 27, q. 97-98, SNGR Brief, Tab B, p. 56 [**CL A3685**].

[28] [28] Ontario website entitled "Current Land Claims", Reonegro Affidavit, Exhibit C, SNGR RMR, Tab 2-C, p. 24-25 [**CL A1604-A1605**]; Laforme Transcript at p. 22-27, q. 74-100, SNGR Brief, Tab B, p. 51-56 [**CL A3680-A3685**].

[29] Laforme Transcript at p. 25-26, q. 85-86, 93, SNGR Brief, Tab B, p. 54-55 [**CL A3683-A3684**].

[30] MCFN Statement of Claim issued December 17, 2020 (Toronto Court File No. CV-20-00653343-0000) [**MCFN Water Claim**] at para. 1(a), Reonegro Affidavit, Exhibit D, SNGR RMR, Tab 2-D, p. 42 [**CL A1622**].

[31] MCFN Water Claim at Schedule A, Reonegro Affidavit, Exhibit D, SNGR RMR, Tab 2-D, p. 62 [**CL A1642**]; Laforme Transcript at p. 26, q. 93, SNGR Brief, Tab B, p. 55 [**CL A3684**]; Laforme Transcript at p. 26, q. 93, SNGR Brief, Tab B, p. 55 [**CL A3684**].

24. Even though it involves territory of other bands and First Nations including SNGR, the Water Claim names only the Crowns as defendants. This is consistent with MCFN's position that it is not seeking to reduce SNGR's reserve entitlement in this action, discussed below.

25. Though MCFN now complains that SNGR did not provide notice to it about SNGR's claim, MCFN similarly did not give SNGR or any other First Nation notice about its claims.[32]

26. MCFN did not put the Water Claim into the record on this motion.[33] According to MCFN's factum, that claim "was put into abeyance on April 26, 2021, while the parties pursue settlement negotiations", which MCFN says are "confidential and subject to settlement privilege."[34]

F. MCFN Seeks Late Participation Rights in this Action

27. Despite being a sophisticated and active litigant, it was not until **October 27, 2022** that MCFN delivered its Notice of Motion to intervene in this case.[35] Its Elected Chief agreed this "could be perceived as late".[36]

28. MCFN says little about how it developed this late interest, however did disclose, in undertaking answers, that its genesis lies in information – what SNGR would call misinformation – that Ontario shared with MCFN's counsel in "late fall 2021":[37]

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[32] Laforme Transcript at p. 26-27, q. 93-95, 100; p. 29, q. 107-111; p. 60, q. 124, SNGR Brief, Tab B, p. 55-56, 58, 89 [**CL A3684-A3685**, **A3687**, **A3718**].
[33] MCFN Factum at note 80 [**CL B-3-66**]; MCFN Water Claim, Reonegro Affidavit, Exhibit D, SNGR RMR, Tab 2-D, p. 43 [**CL A1623**].
[34] MCFN Factum at note 80 [**CL B-3-66**]; Order of Justice Chalmers dated April 26, 2021, Reonegro Affidavit, Exhibit E, SNGR RMR, Tab 2-E, p. 65 [**CL A1645**].
[35] NOM, MCFN MR, Tab 1, p. 16 [**CL B-3-113**].
[36] Laforme Transcript, p. 71, q. 268, SNGR Brief, Tab B, p. 100 [**CL A3729**].
[37] Laforme UT Chart at #17-19, p. 2-3, SNGR Brief, Tab B-6, p. 182-183 [**CL A3811-A3812**] [emphasis added].

	UNDERTAKING/REFUSAL	ANSWER
17	To answer **who advised the MCFN of the information related to the potentially expanded scope of the issues in the action**, referenced in the letter from the MCFN's counsel to Justice Sanfilippo dated January 6, 2022.	Counsel for the defendant His Majesty the King in Right of Ontario (Ontario) advised counsel for MCFN of the specified information in or around late fall 2021.
18	To answer **how the MCFN came to understand that the plaintiff may now be seeking relief beyond the damages and compensation claimed** in the pleadings.	Counsel for the defendant His Majesty the King in Right of Ontario (Ontario) advised counsel for MCFN of the specified information in or around late fall 2021.
19	To provide the source of the understandings, including who provided them, where the January 6, 2022 letter from the MCFN's counsel to Justice Sanfilippo says: "**We understand the Plaintiff may now be seeking relief beyond the damages and compensation claimed in the pleadings**"; "**We understand the Plaintiff's expanded claims may include claims for title to land in MCFN's traditional territory, including to the bed of the Grand River**"; and "**We further understand that the Plaintiff may put in issue the scope and content of its rights, if any, under the 1701 Nanfan Deed**, including whether such rights are protected by section 35 of the *Constitution Act, 1982*"	Counsel for the defendant His Majesty the King in Right of Ontario (Ontario) advised counsel for MCFN of the specified information in or around late fall 2021.

29. The 'understandings' that MCFN developed based on information from Ontario, which Ontario shared in secret without telling SNGR, appear to have resulted in MCFN's counsel sending a letter to then-Case Management Justice Sanfilippo on January 6, 2022. In that letter, MCFN raised a possible intervention motion but advised that, **up to the date of the letter**, SNGR's pleadings "**in their current form** – provide some comfort to MCFN that the issues in the Six

Nations Action will not require this Honourable Court to make determinations that could impact MCFN Section 35 Rights; this is why MCFN has not previously sought leave to intervene."[38]

30. MCFN changed its mind sometime after Ontario took yet another step without SNGR's knowledge and, in May 2022, secretly shared three of SNGR's unfiled expert reports with MCFN's counsel. Only after this disclosure, the details of which MCFN has claimed common interest privilege over and refused to elaborate upon,[39] did MCFN decide to move.

G. MCFN Does not Oppose Any Relief Sought by SNGR

31. Nowhere in its materials does MCFN oppose any of the relief sought by SNGR. To the contrary, MCFN previously advised this Court that it "does not seek damages for itself, nor does it intend to diminish compensation the Crown may owe Six Nations".[40] In its factum, MCFN says it will not advance any counterclaims against SNGR or crossclaims against the Crowns.[41]

32. In cross-examination, its Elected Chief further confirmed that MCFN:

(a) is not seeking to "to take issue with the size of the Haldimand Tract";[42]

(b) does not seek money or land from SNGR;[43]

(c) has "no interest in damages with regards to the land that may have been sold or stolen improperly and divested improperly"[44] and "[t]he land that the Mississaugas

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[38] Letter from N. Frame to the Hon. Justice Sanfilippo, Affidavit of John A. Wilson affirmed February 28, 2023, Exhibit A, MCFN MR, Tab 30A, p. 134 (emphasis added) [**CL B-3-246**]. Chief Laforme confirmed this on cross-examination: Laforme Transcript at p. 74, q. 277 (Q: "…at this point MCFN was not concerned enough about the pleadings to get involved; fair?" A: "Fair."), SNGR Brief, Tab B, p. 103 [**CL A3732**].

[39] Laforme UT Chart at #22, p. 4, SNGR Brief, Tab B-6, p. 183 [**CL A3812**].

[40] Laforme Transcript, Exhibit 3 at para 2, SNGR Brief, Tab B-3, p. 157 [**CL A3786**].

[41] MCFN Factum at para 2 [**CL B-3-51**].

[42] Laforme Transcript at p. 56, q. 218-220, SNGR Brief, Tab B, p. 85 [**CL A3714**].

[43] Laforme Transcript at p. 53, q. 209-210, SNGR Brief, Tab B, p. 82 [**CL A3711**].

[44] Laforme Transcript at p. 53, q. 211, SNGR Brief, Tab B, p. 82 [**CL A3711**].

agree to with the Crown, we will not be seeking anything from Six Nations with regard to that";[45]

(d) is not claiming Six Nations Reserve land;[46]

(e) agreed that there is no harm to MCFN "if Six Nations is compensated because the Crown failed to set aside reserve land for the Six Nations";[47] and

(f) when pressed about paragraph 11 of his affidavit which asserted that SNGR had put "our history, our rights, and our territory in its crosshairs", acknowledged that was not in fact the case and that MCFN's intervention request was similarly not "taking aim" at the Six Nations people or community.[48]

PART III - ISSUES AND THE LAW

33. The issue to be decided on this motion is whether the MCFN should be granted leave to intervene as an added party under Rule 13.01. SNGR says no.

A. Rule 13.01 Intervention Test

34. Rule 13.01 requires a proper interest and ensuring justice to the existing parties. It states:

> **13.01** (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,
>
> (a) an interest in the subject matter of the proceeding;
>
> (b) that the person may be adversely affected by a judgment in the proceeding; or
>
> (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

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[45] Laforme Transcript at p. 55, q. 214, SNGR Brief, Tab B, p. 84 [**CL A3713**].

[46] Laforme Transcript at p. 35, q. 136, SNGR Brief, Tab B, p. 64 [**CL A3693**].

[47] Laforme Transcript at p. 57, q. 224, SNGR Brief, Tab B, p. 86 [**CL A3715**].

[48] Laforme Transcript at p. 88, q. 325-328, SNGR Brief, Tab B, p. 117 [**CL A3746**].

> (2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.[49]

35. In considering the proper interest under Rule 13.01(1), a proposed intervenor may only be added if it has a sufficient, "direct" interest in the case, and will make a "useful contribution".[50]

36. Where there is a proper direct interest, the Court must then consider undue prejudice and delay under Rule 13.01(2). The Court will refuse to add a party where it is unlikely that they will be able to make a useful contribution to the resolution of the dispute **without causing injustice to the immediate parties**.[51] This is a weighing of the balance of convenience. Within this analysis, the Court may consider terms that might be imposed on the moving party to ensure that a useful contribution is made without causing undue delay or prejudice.[52]

37. The fact that an intervening party seeks to expand the issues and add to the record can amount to prejudice.[53]

B. MCFN does not meet the intervention test

(i) A "softened threshold" does not override the requirements to be met

38. The "softened threshold"[54] that MCFN says applies does not mean that this Court should assess its intervention motion in a less rigorous way. The cases on which MCFN relies indicate

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[49] See e.g. *Miller v Jansen et al and Elguindy*, 2012 ONSC 4059 at para 14.
[50] *Dorsey, Newton, and Salah v Attorney General of Canada*, 2021 ONSC 2464 at para 13 [*Dorsey*], citing *Halpern v Toronto (City) Clerk*, 2000 CanLII 29029 (ON SCDC) at para 21 [*Halpern*].
[51] *Canada (AG) v Anishnabe of Wauzhushk Onigum Band*, 2001 CarswellOnt 2372 (ON SC) at para 18 [**Appendix 1**], citing *Peel (Regional Municipality) v Great Atlantic & Pacific Co of Canada*, 1990 CanLII 6886 (ON CA) [Emphasis added].
[52] *Dorsey* at para 13, citing *Halpern* at para 21.
[53] *Red Rock First Nation v Canada (Attorney General)*, 2022 ONSC 2309 at paras 79-83, 88 [*Red Rock*].
[54] MCFN Factum at para 43 [**CL B-3-70**].

that the standard is **more** onerous when the underlying action is a private one,[55] and it is that higher threshold which may then be softened where public policy matters are implicated[56] or where the intervener is a public interest organization.[57] The fact that the Crowns are defendants does not rise to the level of a public policy matter, and the MCFN is not a public interest organization.

39. The focus of the intervention test remains squarely on whether the proposed intervener has a direct interest and can make a useful contribution without prejudicing the parties.

(ii) No Direct Interest and No Useful Contribution Under Rule 13.01(1)

40. The resolution of this issue depends on the framing of the MCFN's interest and what MCFN says it wishes to bring to its 'seat at the table'. According to MCFN, its interest arises because SNGR is seeking "…a judicially endorsed history of MCFN Territory that privileges the Six Nations' perspective while minimizing, or eliminating, that of MCFN".[58]

41. SNGR disagrees that this action is focused on the Mississaugas. SNGR's long-pleaded prayer for relief does not reference MCFN at all, and its Elected Chief delivered an affidavit confirming that SNGR is not seeking declarations or relief regarding MCFN treaties or history.[59]

42. As for the intended contribution, MCFN says it wants "an opportunity to tell its own story, in its own words, from its own perspective" by calling "expert and Elder evidence on the issues that impact its rights".[60] If that is correct, it begs the question why that could not be accomplished by an existing party calling an MCFN witness at trial or why MCFN has not sought 'friend of the

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[55] *Jones v Tsige*, 2011 CanLII 99894 (ON CA) at para 23 [*Jones*]. See also *Foxgate Developments Inc v Jane Doe*, 2021 ONCA 745 at para 39 [*Foxgate*]; *Huang v Fraser Hillary's Limited*, 2018 ONCA 277 at para 5 [*Huang*].
[56] *Jones* at para 23. See also *Foxgate* at para 39.
[57] *Dorsey* at paras 15-16.
[58] MCFN Factum at para 47 [**CL B-3-72**].
[59] Hill Affidavit at paras 8, 10, SNGR RMR, Tab 1, p. 3-4 [**CL A1583-A1584**].
[60] MCFN Factum at paras 1, 60 [**CL B-3-51**, **B-3-77**].

court' status under Rule 13.02 as would be expected for a non-party seeking such a neutral role. MCFN refused to identify the Elders and experts it wishes to call as witnesses, and to advise if it has obtained reports for use in this action,[61] and it is unknown **when** MCFN might be able to make the contribution it now seeks.

MCFN has no genuine and direct legal interest in this action

43. A proposed intervener has an interest in a matter when it affects their legal rights.[62] While the intervener need not have a direct interest in the very issues to be decided, "intervention is more likely to be granted where the [proceeding] directly bears on the proposed party's legal interests, **and not simply a potential or parallel legal proceeding**".[63]

44. A "genuine and direct" interest is one that rises above a financial interest in the outcome of the proceeding, or a potentially adverse impact to a parallel proceeding. The potential intervener must be able to draw a nexus between the issues to be decided in the proceeding and how the resolution of those issues will directly impact the intervener's substantive rights.[64]

45. MCFN has no direct legal interests here. MCFN points to two purported interests, at paragraph 51 of its factum, where it asserts "[t]his action expressly engages MCFN's Between the Lakes Treaty and the Purchase No. 3 Treaty, as well as MCFN's Aboriginal rights within MCFN territory." Flowing from these, MCFN then says this action raises four "main issues" (MCFN does not call these 'interests' or 'rights'):[65]

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[61] Laforme UT Chart at p. 1-2, SNGR Brief, Tab B-6, p. 180-181 [**CL A3809-A3810**].

[62] MCFN Factum at para 51 [**CL B-3-74**]. On this, MCFN and SNGR agree.

[63] *Canada (Attorney General) v M.C.*, 2023 ONCA 124 at para 9 (emphasis added) [*Canada v MC*], citing *McIntyre Estate v Ontario (Attorney General)*, 2001 CanLII 7972 (ON CA) at paras 19-21 [*McIntyre Estate*].

[64] *McIntyre Estate* at paras 17-21.

[65] MCFN Factum at para 46 [**CL B-3-71**].

(a) the historic use, occupation, and control of MCFN Territory by MCFN and Six Nations;

(b) the nature, scope and meaning of agreements between MCFN and Six Nations with respect to MCFN Territory;

(c) the interpretation and effect of agreements between Six Nations and the Crown relating to MCFN Territory, and whether such agreements are treaties under Section 35; and

(d) the interpretation of treaties and agreements between MCFN and the Crown.[66]

46. SNGR considered these issues, which appeared to it as extremely broad and largely unconnected with its reserve-based claim against the Crowns arising from the 1784 Haldimand Proclamation. Through counsel, it raised these concerns in the lead-up to the motion:[67]

> It appears that MCFN intends to raise, or to 'keep the door open' to potentially raising, a wide range of irrelevant or peripheral matters that are not actually raised in Six Nations' claim and for which Six Nations has not sought judicial relief. For example, MCFN's materials suggest that it intends to ask the court to make rulings on matters such as the existence of MCFN's claimed Aboriginal title and Aboriginal rights; the effect (or non-effect) of various treaties on MCFN's claimed Aboriginal rights and title; and the legal status of various instruments (such as the Nanfan deed) as treaties for the purpose of Section 35(1) of the *Constitution Act, 1982*. Further, while MCFN has articulated an interest in certain general historical matters, it has not identified what specific legal interests it says are potentially affected – notably, whether MCFN has any legal interest in the core questions in the Six Nations' action about whether the Haldimand Proclamation is a treaty and created the Six Nations reserve. Based on MCFN's materials, we are concerned that it intends to take the action far beyond the issues raised in the existing pleadings and into issues that are primarily of interest to MCFN in its dealings with the Crowns and which would not be legally affected by the relief sought in Six Nations' action.

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[66] MCFN Factum at para 46 [**CL B-3-71**]. Contrary to the fourth purported issue, SNGR's Elected Chief gave evidence that at no time has SNGR ever sought declarations or relief about any interactions with or treaties between the British Crown and MCFN or MCFN's predecessors: Hill Affidavit at paras 8, 10, 13-15, SNGR RMR, Tab 1, p. 3-5 [**CL A1583-1585**

[67] Letter from SNGR to MCFN Counsel dated February 6, 2023, Laforme Transcript, Exhibit 5, SNGR Brief, Tab B-5, p. 173 [**CL A3802**].. See also letter from SNGR to MCFN Counsel dated March 3, 2023, Laforme Transcript, Exhibit 4, SNGR Brief, Tab B-4, p. 162 [**CL A3791**].

47. SNGR went out of its way to try providing further comfort to MCFN that its direct legal interests were not engaged by this action. SNGR's Elected Chief delivered an affidavit confirming that it is not seeking declarations regarding many of the "treaties and agreements" that MCFN says are part of the "main issues" driving its intervention, including about:

(a) the Dish with One Spoon agreement and Great Peace of Montreal;[68]

(b) whether the Albany Treaty (also referred to as the Nanfan Deed or the Nanfan Treaty) is a treaty;[69]

(c) Aboriginal title in relation to the Haldimand Proclamation or the draft Simcoe Patent;[70] and

(d) other treaties signed between the Mississaugas and the British Crown after 1793.[71]

48. It also provided MCFN with a copy of its current proposed amended pleading, which clarifies its claims surrounding the Haldimand Proclamation and should reasonably have given MCFN greater comfort that its direct legal interests are not in issue.[72]

49. Not understanding MCFN's purported interest in the claim, SNGR asked MCFN to deliver a draft pleading to provide more clarity. MCFN declined.[73]

50. The answer became clear from cross-examinations and MCFN's factum: MCFN wishes to participate in SNGR's action now in order to bolster its separate Water Claim against the Crowns.

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[68] Hill Affidavit at para 8, SNGR RMR, Tab 1, p. 3 [**CL A1583**].
[69] Hill Affidavit at para 10 SNGR RMR, Tab 1, p. 4 [**CL A1584**].
[70] Hill Affidavit at paras 11-13, SNGR RMR, Tab 1, p. 4-5 [**CL A1584-A1585**].
[71] Chief Hill Affidavit at para 15, SNGR RMR, Tab 1, p. 5 [**CL A1585**].
[72] Further Further Amended Statement of Claim, Reonegro Affidavit, Exhibit I, HDI RMR, Tab 2-I, p. 267 [**CL A1847**] and especially the relief claimed in para 1, the Reserve Land Duties, Reserve Creation Duties, Surrender Duties, Surrender Implementation Duties, Appropriation Duties, and Indian Money Management Duties respectively pleaded in paras 6.1-6.6 (and summarized in Schedule A – Crown Duties), and the historical events surrounding the Haldimand Proclamation pleaded in paras 14-18.
[73] Letter from SNGR to MCFN Counsel dated February 6, 2023, Laforme Transcript, Exhibit 5, SNGR Brief, Tab B-5, p. 169 [**CL A3798**].

This is precisely the type of "potential or parallel legal proceeding" that the courts have concluded does **not** meet the direct interest test under Rule 13.01(1).

51. MCFN's Elected Chief admitted this on cross-examination:[74]

> 221 Q. And you are not trying to reduce the Crown's obligations to the Six Nations at the same time; fair?
>
> A. That is fair.
>
> 222 Q. You want to protect your title claims?
>
> A. Yes.

52. MCFN reiterates this in paragraph 56 of its factum, which bears excerpting:

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

53. What little the MCFN has disclosed above is that the issues in its Water Claim align closely with the purported issues that it says SNGR's action raises.[75] MCFN's true interest in seeking to intervene is therefore a collateral and indirect goal of furthering its Water Claim rather than a direct legal interest in SNGR's claim against the Crowns.

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[74] Laforme Transcript at p. 57, q. 221-222, Transcript Brief of the Plaintiff [**SNGR Brief**], Tab B, p. 86 [**CL A3715**].
[75] MCFN's Statement of Claim against the Crowns would not be before this Court unless SNGR included it in its record: MCFN Water Claim, Reonegro Affidavit, Exhibit D, SNGR RMR, Tab 2-D, p. 42 [**CL A1622**]; MCFN Factum at para 55, note 117, cites to the Band's record [**CL B-3-75**].

54. This Court should be wary of permitting SNGR's action to be used to adjudicate MCFN's claims and history against the Crowns, which are separate from those of SNGR. It should be especially wary where MCFN has not provided SNGR or the Court with a meaningful ability to test the specific similarities between the issues in this action and the Water Claim. MCFN's Notice of Motion claims confidentiality over its "various agreements with Canada and Ontario establishing confidential negotiations and other processes to settle outstanding claims",[76] while its factum describes the "substance of negotiations on these claims" as "confidential and subject to settlement privilege."[77]

55. Courts have distinguished between situations where potential interveners seek to intervene on the basis that their legal interests may be affected in a parallel proceeding involving broadly common issues of law or fact, and where the potential intervener's "substantive rights" may be directly impacted in a "fact-specific way".[78] The latter is sufficient to ground a "direct interest" under Rule 13.01; the former is not. For example, in *Canada (AG) v. M.C.*, the Court of Appeal recently dismissed an intervention motion on the basis that the proposed intervener did not have a sufficient "direct interest" and could not bring any additional perspective to merit intervention. The proposed intervener sought to intervene in an appeal relating to the jurisdiction of the Ontario Court of Justice to hear a reference case under the *Firearms Act* on the basis that he had an application pending before that same court which could be affected by the outcome of the appeal.[79] The same reasoning applies here.

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[76] NOM at para 26, MCFN MR, Tab 1, p. 8 [**CL B-3-120**]; Laforme Affidavit at para 70, MCFN MR, Tab 2, p. 43 [**CL B-3-155**].
[77] MCFN Factum at note 80 [**CL B-3-66**].
[78] *Canada v MC* at para 11.
[79] *Canada v MC* at paras 10-11.

56. Returning to MCFN's two specifically alleged interests:

(a) **On the Between the Lakes Treaty and the Purchase No. 3 Treaty**, SNGR is not seeking declarations or relief regarding these or any other MCFN treaties. In any event, as noted above, MCFN already agrees that the Haldimand Proclamation created the Six Nations Reserve, and that lands which formed part of that reserve were "surrendered" or "ceded" or 'transferred' from the Mississaugas to 'pave the way' for that.

(b) **On MCFN's Aboriginal rights within MCFN territory**, SNGR does not assert any such rights, claim under such rights, or seek to have such rights adjudicated. SNGR's reserve interest in the bed of the Grand River (arising from the Haldimand Proclamation) can co-exist with any underlying Aboriginal title that MCFN may prove, as the Court has recognized that Aboriginal title may be subject to rights granted to others.[80] In any event, section 35 of the *Constitution Act, 1982* preserves existing Aboriginal and treaty rights, meaning that this Court cannot compromise them.

57. Fundamentally, given the nature of the relief sought, there is no conflict between the claims of SNGR and MCFN. SNGR's claim is about breaches of the Crown's promise to set aside a tract of land under the Haldimand Proclamation and the damages and equitable relief that should flow from the Crown for breaching that promise and the duties flowing therefrom. MCFN's Water Claim concerns breaches of its Aboriginal title – a right that arises as a result of its exclusive occupancy of land at the date of the assertion of British Sovereignty (likely 1763). Given that MCFN does not seek to challenge the validity of the Haldimand Proclamation or diminish the extent of the Haldimand Tract or seek relief from SNGR, it is entirely possible for both Nations to prove their claims and to obtain their own relief against the Crowns.

58. Three further concerns raised by MCFN do not amount to "genuine and direct" legal interests under Rule 13.01.

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

59. First, MCFN argues that its participation in SNGR's action would assist it in rebuilding its nation-to-nation relationship with Crown by "[r]eaching shared—and accurate—understandings between MCFN and the Crown of MCFN's history".[81] No authority establishes this as a sufficient interest to ground an intervention request to participate as a full party in another litigant's action. MCFN's relationship with the Crown is arguably a political interest not suited to a judicial forum.

60. Second, MCFN worries that potential findings in this action will "bind" the Crowns in their dealings with MCFN in separate claims and negotiations.[82] This is misplaced. That a proceeding might set a precedent which could impact the interests of a proposed intervener in another context is not sufficient to justify an intervention.[83] As stated by Justice Sherstobitoff of the Saskatchewan Court of Appeal: "It is fundamental that the law will not permit a person's rights to be affected by any legal proceedings to which he was not a party".[84] Further, the Divisional Court has held that a non-party "will not be bound by the principles of *res judicata* or issue estoppel from contesting the factual issue in another case." There, where the Court dismissed an intervention motion, it reasoned that any "concern about acquiescence was addressed by the proposed intervener having brought this motion for leave to intervene and this court's disposition of it."[85]

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[81] MCFN Factum at para 35 [**CL B-3-66-67**].
[82] MCFN Factum at paras 44, 49 [**CL B-3-70. B-3-73**].
[83] *Brown v Hanley*, 2017 ONSC 7400 at paras 48-51, citing *Re Schofield and Minister of Consumer and Commercial Relations*, 1980 CanLII 1726 (ON CA) (per Wilson JA, as she then was) and *M v H*, 1994 CanLII 7324 (ON SC) (per Epstein J, as she then was) [*M v H*].
[84] *Cook et al v Saskatchewan et al*, 1990 CanLII 7817 (SK CA), cited with approval in *The Council of the Haida Nation v British Columbia*, 2017 BCSC 1665 at para 23.
[85] *Haudenosaunee Development Institute v Ontario (Min Environment)*, 2022 ONSC 2072 (Div Ct) at para 11 [*HDI v Ontario*].

61. Finally, MCFN suggests that it wishes to take issue with what it calls the 1701 "Nanfan Deed" and what SNGR calls the "Nanfan Treaty".[86] This is not in issue in SNGR's pleading, and two Ontario courts have already decided that that instrument is a "treaty" binding on the Crown.[87]

62. In sum, SNGR's accepts that its claim implicates limited shared history between the Six Nations and the Mississaugas regarding the Haldimand Proclamation, but that should come as no surprise to MCFN since that history has been pleaded for decades and MCFN has had decades to consider whether to intervene.[88] 'Shared history' does not amount to a direct and genuine legal interest. If it did, the participant lists on Indigenous court files across Canada would be much lengthier.

MCFN will not make a useful contribution

63. Assessing whether a proposed intervener will make a useful contribution carries less weight when the intervener seeks to join as an added party under Rule 13.01, and only arises where a direct interest is first made out. Where the proposed intervener cannot satisfy the court that it has an interest in the outcome of the case, it generally will not be able to establish that it will make a "useful contribution".[89]

64. In considering whether the proposed intervener will make a useful contribution, the court must also balance any such contribution against any resulting delay or prejudice to the parties.[90]

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[86] MCFN's Factum states baldly at para 15 that "[t]he Nanfan Deed never had legal force or effect, let alone status as a treaty." [**CL B-3-58**].
[87] *R v Ireland (Gen. Div.)*, 1990 CanLII 6945 (ON SC); *R v Barberstock*, 2003 CarswellOnt 6542 (OCJ). These cases are referenced in the 2015 MCFN Claim at para 51, Reonegro Affidavit, Exhibit F, SNGR RMR, Tab 2-F, p. 82 [**CL A1662**].
[88] Hill Affidavit at para 17, SNGR RMR, Tab 1, p. 5-6 [**CL A1585-A1586**].
[89] *HDI v Ontario* at para 9.
[90] *Halpern* at para 20.

65. Here, MCFN's proposed contribution is novel: it wishes to be an "added defendant" that does not oppose any of the relief sought by the plaintiff and "will not advance any counter or cross claims".[91]

66. It then uses vague, non-confirmatory language to say that it is not its "intention to expand the issues".[92] In reality, as described above, MCFN wishes to do exactly that by creating new issues or expanding existing ones. That is not useful because the parties have the right to frame the issues and develop the record as they see fit,[93] and should not be put to the expense of unpleaded issues and yet-further complexity.

67. MCFN's proposed intervention would dramatically shift the focus of the case away from the central issues relating to the Haldimand Tract to issues that are peripheral (at best). This runs afoul of what the Supreme Court of Canada warned against in *Lax Kw'alaams Indian Band v. Canada (AG)* – allowing a civil action to drift away from its moorings in the pleadings and instead becoming a wide-ranging commission of inquiry.[94] This is contrary to the public interest in ensuring that trials are carried out efficiently and in timely fashion, and also runs counter to the principle that reconciliation and the Honour of the Crown "require giving increased attention to minimizing costs and complexity when litigating s. 35 matters".[95]

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[91] MCFN Factum at para 2 [**CL B-3-51**].

[92] MCFN Factum at para 60 [**CL B-3-77**].

[93] *Bedford v Canada (Attorney General)*, 2011 ONCA 209 at para 16 [*Bedford*].

[94] *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56 at para 11.

[95] *Kwikwetlem First Nation v British Columbia (Attorney General)*, 2021 BCCA 311 at para 34, citing *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para 51. See also *Kwikwetlem First Nation v British Columbia*, 2021 BCSC 436 at paras 59-63.

68. MCFN's stated intention to participate in order to 'tell its own story' bears close scrutiny against a backdrop where MCFN declined to deliver a draft pleading[96] despite being aware of the pleadings in this action since at least January 2022,[97] equivocated on whether it will be bound by court findings if added as a party,[98] refused to identify the Elders and experts it purportedly wishes to call as witnesses, refused to advise if it has obtained reports for use in this action,[99] and refused to commit to meeting a trial date in 2024 if allowed to participate.[100] All of this suggests MCFN is not able to make a useful contribution.

(ii) Adding MCFN will Cause Undue Delay and Prejudice to SNGR

69. There are two intertwined factors in assessing whether a proposed intervention will unduly delay or prejudice the parties:

(a) if the late timing of the intervention would result in delay; and

(b) if the scope of the evidence and issues would be expanded.[101]

70. As explained by O'Connor A.C.J.O in *Bedford v. Canada (AG)*, an intervening party who seeks to introduce new evidence and issues – as here – often does so at the expense of the existing parties, who would have to prepare new materials to address the issues raised by the intervener, resulting in delay. There, the Court of Appeal refused to grant an intervention that would have

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[96] Email chain ending February 5, 2023 between counsel, Reonegro Affidavit, Exhibit H, SNGR RMR, Tab 2-H, p. 191 [**CL A1771**].

[97] Laforme Transcript at p. 73-74, q. 275-276, SNGR Brief, Tab B, p. 102-103 [**CL A3731-A3732**].

[98] Laforme Transcript, Exhibit 5, SNGR Brief, Tab B-5, p. 164 [**CL A3793**]; Undertakings and Refusals on the Cross Examination of Chief R. Stacey Laforme [**Laforme UT Chart**] at p. 2-3, SNGR Brief, Tab B-6, p. 181-182 [**CL A3810-A3811**].

[99] Laforme UT Chart at p. 1-2, SNGR Brief, Tab B-6, p. 180-181 [**CL A3809-A3810**].

[100] Laforme UT Chart at p. 3, SNGR Brief, Tab B-6, p. 182 [**CL A3811**].

[101] See e.g. *Bedford* at paras 10, 17-18; *Red Rock* at paras 79-91, 97; *Arnold v Arnold*, 2019 ONSC 3679 at paras 40-43, 50 [*Arnold*]; *Steeves v Doyle Salewski Inc*, 2016 ONSC 2223 at paras 56-59; *Blue Mountain Resorts Ltd v Den Bok*, 2011 ONSC 1909 (Div Ct) at paras 16-17; *Halpern* at para 10.

introduced a new legal ground, necessitated preparing new materials, and delayed the hearing, all of which the Court held amounted to prejudice.[102]

71. A late intervention motion can result in delay and prejudice by itself. In *Huang v Fraser Hillary's Limited*, Strathy C.J.O. dismissed a motion to intervene on an appeal in part because the motion was brought close to the hearing date and allowing the intervention would likely result in a further adjournment of the hearing, causing prejudice to the parties.[103] A similar issue arose in *Arnold v. Arnold*, where an intervention motion was brought too close to the hearing date and the Court held that allowing the intervention would result in undue prejudice.[104]

72. In Indigenous cases, courts must not be used, or perceived to be used, as a colonial vehicle for denying or delaying justice for one Indigenous group for the benefit of another.

73. All of these principles point in one direction: MCFN's eleventh-hour intervention, prompted by Ontario, would prejudice SNGR by delaying the trial of its action and should therefore be rejected.

74. The prejudice concerns are very real, as explained by SNGR's Elected Chief:

> The Band is very worried that the MCFN's request to intervene at this time, so close to the planned trial start date, will delay the hearing of this case and will prejudice the Six Nations of the Grand River by significantly expanding the scope of the claim beyond what is pleaded. The Band's interest is to litigate its claims against Canada and Ontario, and not to create tensions between the Six Nations of the Grand River and MCFN communities or to litigate our sometimes painful history.[105]

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[102] *Bedford* at paras 17-18, 23.
[103] *Huang* at para 15.
[104] *Arnold* at paras 40-42.
[105] Hill Affidavit at para 17, SNGR RMR, Tab 1, p. 5-6 [**CL A1585-A1586**].

75. MCFN meets these legitimate concerns with the incredible response that any complexity or delay to date "can be attributed to the parties"[106] and by MCFN proposing an expansive, undefined role as a party with "broad participatory rights – including appeal rights and entitlement to costs – to permit it to adequately defend its rights and interests".[107] At the same time, MCFN resists setting "hard subject matter limits"[108] and proposes, without specifics "to introduce expert and Elder evidence on the issues that impact its rights".[109] This is the opposite behaviour the Court should expect from a late-arriving party, and particularly from a party arguing that it supports SNGR's fight for justice against the Crowns.[110]

76. Given the clear threat of prejudice and delay, coupled with the arrival of the intervention request decades after the action was commenced, and after SNGR, Canada, and Ontario have all delivered expert reports in advance of an impending trial, the Court should decline MCFN's intervention request.

77. This result is further dictated by fairness, as recognized in reasons of the Court of Appeal in *Bedford v Canada (AG)* which directly apply:[111]

> [17] I would also dismiss the motion to intervene with respect to s. 15 on the basis of fairness to the parties to the appeal. This is a complicated appeal. All of the parties are anxious that it be heard as soon as possible. It is scheduled to be argued in mid-June. The court has imposed tight timelines for the filing of material. Seven interveners are going to participate. The respondents do not oppose the moving party's motion to intervene provided there is no delay in the hearing of the appeal.

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[106] MCFN Factum at para 58 [**CL B-3-77**].

[107] MCFN Factum at para 64 [**CL B-3-79**].

[108] MCFN Factum at para 64 [**CL B-3-79**].

[109] MCFN Factum at para 60 [**CL B-3-77**].

[110] Laforme Affidavit at para 9, MCFN MR, Tab 2, p. 24 [**CL B-3-136**] ("We have always supported – and will always support – Six Nations' efforts to hold [the Crowns] accountable for their mismanagement and abuses relating to the lands granted to the Six Nations under the Haldimand Proclamation of 1784.").

[111] *Bedford* at paras 17-18.

> [18] I am satisfied that if the moving party were allowed to intervene on s. 15, it would result in the argument of the appeal having to be delayed. Introducing such a significant new ground on which to challenge the legislation, even on the existing record, would necessitate a thorough analysis of the record and the preparation of new material to address the issues.

C. If the intervention is granted in some form, "just terms" must be imposed

78. If the Court is satisfied that the delay or prejudice will not be undue, it may "may make any such order as is just" under Rule 13.01(2).[112] This empowers courts to set strict conditions on interventions to minimize prejudice and delay to the parties.[113] These may include ordering the intervener to adhere to timetables, undertaking not to repeat perspectives and arguments advanced by the parties, limiting the issues on which the intervener may advance its perspective, ordering that the intervener cannot seek costs, and limiting the evidence the intervener may file without consent or leave, among others.[114]

79. If the Court is inclined to allow some form of MCFN participation, it should be subject to strict terms, as are regularly ordered on intervention motions, to clearly define MCFN's role and ensure this action remains on track for trial. The imposition of such terms is particularly important where, as here, MCFN purports to be a claimless defendant that is not opposing the relief sought by SNGR. MCFN proffers no authority in support of the novel role it wishes to play but, in any case, the starting point for late interveners is **not** 'broad participatory rights'.

80. In SNGR's view, any intervention order must, at a minimum, include terms:

(a) requiring adherence to all timetables set by the Case Management Judge;

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[112] *Halpern* at para 14. See also *Restoule v Canada (Attorney General)*, 2022 ONSC 1294 at para 20 [*Restoule*].
[113] *Dorsey* at paras 36-41; *Halpern* at paras 40-44.
[114] See *e.g. Halpern* at para 44; *Canadian Blood Services v Freeman*, 2004 CanLII 35007 (ON SC) at para 39; *Restoule* at para 22.

(b) 'catching up' MCFN as quickly as reasonably possible by timetabling deadlines for delivering a pleading, documents (if any), and expert reports;

(c) directing that MCFN cannot repeat perspectives and arguments advanced by the parties, seek to adjudicate new issues, or seek to expand existing issues;

(d) directing that MCFN's intervention and any evidence it introduces should be limited to the historical background of the Haldimand Proclamation and the extent of the Haldimand Tract, to the extent it advances novel perspectives and arguments not already covered by the parties;

(e) directing that MCFN will not be permitted to examine the parties for discovery since discoveries are complete, MCFN has indicated it will abide by timetables, and is not seeking relief against SNGR; and

(f) directing that MCFN bear its own costs.

81. If circumstances change in manner that could impact its rights, MCFN could move to vary the terms of the intervention order,[115] all the while bearing the burden of proving such an impact based on a proper record.

D. SNGR Should not be Exposed to an Adverse Costs Award

(i) Ontario's Conduct Merits a Costs Sanctions

82. SNGR seeks its full indemnity motion costs from Ontario for having secretly misstated the nature of SNGR's claim to MCFN, and sharing SNGR's unfiled expert reports with MCFN's counsel, to entice MCFN to intervene and thereby delay this case. But for Ontario's improper conduct, MCFN would not have brought this motion.

83. As the Court of Appeal recently confirmed in upholding a 'no costs' award for a successful defendant at trial, costs are in the discretion of the Court, and "a judge may deprive a successful party of costs, or even order the successful party to pay costs, as long as the exercise of discretion

[115] See *e.g. Halpern* at para 45.

is not tainted by errors or law or principle, or does not result in a decision that is plainly wrong because it is based on irrelevant factors and overlooks relevant ones".[116]

84. Among the non-exhaustive list of factors the Court may consider in Rule 57.01(1) is "the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding", in sub-paragraph (e). Courts have exercised this discretion to:

(a) award costs to the appellants on a moot appeal where the respondents failed to produce an expert report in a timely fashion;[117] and

(b) award costs to the unsuccessful moving plaintiffs, where the motion was brought on by the defendants' failure to produce an expert report in a timely manner, resulting in "the need for several case conferences…the need for the Plaintiffs' motion and ultimately, the delay and adjournment of the trial".[118]

85. Here, this Court should apply these principles and exercise its discretion to order Ontario to pay SNGR's full indemnity motion costs – regardless of the outcome.

86. According to MCFN's undertaking answers, and unbeknownst to SNGR, Ontario advised MCFN of what it characterized as the "expanded scope" of the action in late fall 2021. In SNGR's view this is a serious mischaracterization. Ontario then proceeded to share three of SNGR's unfiled expert reports with MCFN in May 2022, again without telling SNGR. This is the step that triggered MCFN to move.

87. Ontario's conduct is even more egregious in light of its pending request to revisit the existing trial timetable in the main action on the basis that is a there is a pending intervention motion from MCFN – **which Ontario encouraged** – that might impact the trial.

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[116] *Przyk v Hamilton Retirement Group Ltd (The Court at Rushdale)*, 2021 ONCA 267 at para 12, citing, among other authorities, *Courts of Justice Act*, RSO 1990, c C.43, s 131(1).
[117] *Stekel v Toyota Canada Inc*, 2010 ONSC 6213 (Div Ct) at paras 23-30.
[118] *Mattiucci v Roman*, 2021 ONSC 784 at para 7 [*Mattiucci*].

88. Ontario's improper conduct continued in the lead up to the motion hearing when, on April 28, without notice or consent, it forwarded to the Court correspondence MCFN had sent to the parties just one hour before. This was an improper attempt to supplement the record in breach of the *Rules* since that correspondence was not in the record, and required SNGR to object and divert resources to respond.

89. Ontario's consent to MCFN's motion, which also occurred on April 28 (one business day before its responding factum was due), completes the circle of improper conduct on Ontario's part that merits a costs sanction.

(ii) MCFN's Delay Merits Costs Consequences

90. The Court may deprive a successful moving party of costs if it delayed in bringing the motion[119] and even award costs in favour of an unsuccessful party.[120]

91. MCFN delayed for years if not decades in bringing its motion about an action which it has long known about. In the circumstances described above, this should attract costs consequences. If Ontario is not responsible for SNGR's costs, then MCFN should be.

PART IV - ORDER REQUESTED

92. SNGR requests that the MCFN's motion be dismissed, with SNGR's full indemnity costs payable by Ontario or, alternatively, partial indemnity costs payable by MCFN.

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[119] *Williams Estate v Carleton Condominium Corp No 66*, 2015 ONSC 5479 at para 11; *Williams Estate v Carleton Condominium Corporation No 66*, 2015 CanLII 90545 (ON SC) at para 3. See also *Project 360 Investments Limited (Sound Emporium Nightclub) v Toronto Police Services Board*, 2009 CanLII 41541 (ON SC) at paras 5-6.

[120] *Mattiucci* at para 7. There, Justice Pinto awarded costs in favour of an unsuccessful party on a motion where the moving party's late filing of an expert report led to subsequent motions, case conferences, examinations, and ultimately the delay and adjournment of the trial.

93. If the Court is inclined to grant MCFN's motion in whole or in part, given MCFN's delay in moving this is an appropriate case for MCFN to pay SNGR's costs or, alternatively, for the Crowns to pay SNGR's costs since they never previously sought to bring in an added party to this action. In the further alternative, the participants should bear their own costs.

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

Iris Antonios/Max Shapiro/
Robert Janes/Gregory Sheppard

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

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Arnold v Arnold*, 2019 ONSC 3679
2. *Bedford v Canada (Attorney General)*, 2011 ONCA 209
3. *Blue Mountain Resorts Ltd v Den Bok*, 2011 ONSC 1909 (Div Ct)
4. *Brown v Hanley*, 2017 ONSC 7400
5. *Dorsey, Newton, and Salah v Attorney General of Canada*, 2021 ONSC 2464
6. *Canada (AG) v Anishnabe of Wauzhushk Onigum Band*, 2001 CarswellOnt 2372 (ON SC) [**Appendix 1**]
7. *Canada (AG) v M.C.*, 2023 ONCA 124
8. *Canadian Blood Services v Freeman*, 2004 CanLII 35007 (ON SC)
9. *Cook et al v Saskatchewan et al*, 1990 CanLII 7817 (SK CA)
10. *Foxgate Developments Inc v Jane Doe*, 2021 ONCA 745
11. *Halpern v Toronto (City) Clerk*, 2000 CanLII 29029 (ON SCDC)
12. *Haudenosaunee Development Institute v Ontario (Min Environment)*, 2022 ONSC 2072 (Div Ct)
13. *Huang v Fraser Hillary's Limited*, 2018 ONCA 277
14. *Jones v Tsige*, 2011 CanLII 99894 (ON CA)
15. *Kwikwetlem First Nation v British Columbia*, 2021 BCSC 436
16. *Kwikwetlem First Nation v British Columbia (Attorney General)*, 2021 BCCA 311
17. *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56
18. *Mattiucci v Roman*, 2021 ONSC 784
19. *McIntyre Estate v Ontario (Attorney General)*, 2001 CanLII 7972 (ON CA)
20. *Miller v Jansen et al and Elguindy*, 2012 ONSC 4059
21. *Project 360 Investments Limited (Sound Emporium Nightclub) v Toronto Police Services Board*, 2009 CanLII 41541 (ON SC)

22. *Przyk v Hamilton Retirement Group Ltd (The Court at Rushdale)*, 2021 ONCA 267

23. *Red Rock First Nation v Canada (AG)*, 2022 ONSC 2309

24. *Restoule v Canada (AG)*, 2022 ONSC 1294

25. *SNGR v Canada and Ontario*, 2020 ONSC 3747

26. *Steeves v Doyle Salewski Inc*, 2016 ONSC 2223

27. *Stekel v Toyota Canada Inc*, 2010 ONSC 6213 (Div Ct)

28. *The Council of the Haida Nation v British Columbia*, 2017 BCSC 1665

29. *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44

30. *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 174

31. *Williams Estate v Carleton Condominium Corporation No 66*, 2015 ONSC 5479 and 2015 CanLII 90545 (costs only)

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.

Courts of Justice Act, RSO 1990, c C.43, s 131

Costs

131 (1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

Rules of Civil Procedure, RRO 1990, Reg 194, rr 13.01, 57.01

Leave to Intervene as Added Party

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

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

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

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

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

[…]

General Principles
Factors in Discretion

57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer;

(h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under rule 1.08; and

(i) any other matter relevant to the question of costs.

Costs Against Successful Party

(2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case.

2001 CarswellOnt 2372
Ontario Superior Court of Justice

Canada (Attorney General) v. Anishnabe of Wauzhushk Onigum Band

2001 CarswellOnt 2372, [2001] O.J. No. 2674, [2001] O.T.C. 484, 106 A.C.W.S. (3d) 620, 9 C.P.C. (5th) 374

The Attorney General of Canada, Applicant and Anishnabe of Wauzhushk Onigum Band, Anishnaabeg of Naongashing Band, Big Grassy Band, Buffalo Point First Nation, Couchiching First Nation, Eagle Lake Band, Grassy Narrows First Nation, Iskatewizaagegan #39 Independent First Nation, Lac Des Mille Lacs Band, Lac La Croix Band, Lac Seul Band, Naicatchewenin Band, Naotkamegwanning Band, Nicickousemenecaning Band, Northwest Angle #33 Band, Northwest Angle #37 Band, Ochiichagewe'Babigo'Ining First Nation, Ojibway Nation of Saugeen Indian Band, Ojibways of Onigaming First Nation, Rainy River Band, Seine River First Nation, Shoal Lake #40 Band, Slate Falls Nation, Stanjikoming First Nation, Wabaseemoong Independent Nations, Wabauskang First Nation, Wabigoon Lake Ojibway Nation, Washagamis Bay Band, Respondents

McCartney J.

Heard: April 2, 2001
Judgment: May 25, 2001
Docket: Thunder Bay 00-0121

Counsel: *John S. Tyhurst*, *Umberto Agostino*, for Applicant
Lorne D. Clark, for Respondents, Couchiching First Nation, Naicatchewenin Band, Nicickousemenecaning Band, Stanjikoming First Nation
Paul B. Forsyth, for Moving Party, Anishinaabe Nation in Treaty No. 3

***McCartney J.*:**

1 This is a motion brought by ANISHINAABE NATION IN TREATY NO. 3 (*Anishinaabe*). This motion asks that Anishinaabe be added as a party defendant under Rule 5.03 of the *Rules of Civil Procedure* — or alternatively as an intervenor under Rule 13.01 of the *Rules*.

2 Rule 5.03 reads as follows:

> **5.03.(1)** *General Rule* — 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.
>
> **(2)** *Claim by Person Jointly Entitled* — A plaintiff or applicant who claims relief to which any other person is jointly entitled with the plaintiff or applicant shall join, as a party to the proceeding, each person so entitled.
>
> **(3)** *Claim by Assignee of Chose in Action* — In a proceeding by the assignee of a debt or other chose in action, the assignor shall be joined as a party unless,
>
> (a) the assignment is absolute and not by way of charge only; and
>
> (b) notice in writing has been given to the person liable in respect of the debt or chose in action that it has been assigned to the assignee.

(4) *Power of Court to Add Parties* — 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.

(5) *Party Added as Defendant or Respondent* — A person who is required to be joined as a party under subrule (1), (2) or (3) and who does not consent to be joined as a plaintiff or applicant shall be made a defendant or respondent.

(6) *Relief Against Joinder of Party* — The court may by order relieve against the requirement of joinder under this rule.

3 Rule 13.01 reads as follows:

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

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

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

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

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

4 Treaty 3, also known as the North West Angle Treaty, was entered into between the Federal Crown and the Indians inhabiting the territory in question — being 55,000 square miles in and around Rainy Lake and Lake Of The Woods. This treaty was entered into on October 3, 1873, and the Indians living in the territory which was the subject matter of the treaty were described in the treaty as the "Saulteaux Tribe of the Ojibbeway Indians". The Chiefs and Headmen of the "respective bands" attended the negotiations, and these persons were identified in the treaty and when it was concluded each signed on behalf of his or her respective band. [1]

5 Part of the treaty anticipated reserve lands being set aside for each band, as follows:

And Her Majesty the Queen hereby agrees and undertakes to put aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and also to lay aside and reserve for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, in such a manner as shall seem best, other reserves of land in the said territory hereby ceded, which said reserves shall be selected and set aside where it shall be deemed most convenient and advantageous for each band or bands of Indians, by the officers of the said Government appointed for that purpose, and such selection shall be so made after conference with the Indians; provided, however, that such reserves, whether for farming or other purposes, shall in no wise exceed in all one square mile for each family of five, or in that proportion for larger or small families; and such selections shall be made if possible during the course of next summer, or as soon thereafter as may be found practicable . . . [2]

6 The basis on which Treaty 3 was negotiated goes back to the Royal Proclamation of 1763 wherein it was stated as follows:

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds. . . .

> And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid. [3]

Furthermore, as the Supreme Court of Canada set out in the *Guerin v. R*:

> Their interests in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision.
>
> It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases. [S.C.R. at p.379]

The nature of the Indian interest and the fiduciary obligation of the Crown is described as follows:

> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest give rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indian. . . . [4]

7 So, as can be readily seen, the Crown was obliged to enter into a treaty in which the Indians of the area voluntarily surrendered the land in question to it, and in the case of Treaty 3, part of the consideration for same was the setting up of reserve lands for each of the bands involved.

8 The concept of a "band" is not found in the Proclamation of 1763, which speaks only of "nations or tribes of Indians". However, Treaty 3 quite clearly sets out the concept of setting up the promised reserves in an area which was convenient to a band and in consultation with the band in question. The first *Indian Act*, passed three years later in 1876, defined "band" to mean "tribe, band or body of Indians" who have a reserve or an annuity. And today, s. 2(1) of the *Indian Act* defines "band" as follows:

> "band" means a body of Indians
>
> > (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after the 4 th day of September 1951,
> >
> > (b) for whose use and benefit in common, moneys are held by Her Majesty, or
> >
> > (c) declared by the Governor in Council to be a band for the purpose of this Act;

Furthermore the language of Treaty 3 and the fact that each band had its own representative at the negotiations, and each representative signed on behalf of his or her own band, made it clear that:

> (1) each band was required to sign the treaty before it was considered valid, and
>
> (2) in consideration of same, each band was to receive its reserve land along with the other items provided in the treaty.

9 So, in the end, this was a treaty which, even through it came into effect prior to the first *Indian Act*, did in fact set out reserve lands for the benefit of the respective bands which had agreed to and signed the treaty. All of these bands, or their successors, are party respondents in the application under which this motion is being brought. The application itself is being brought to determine who has the beneficial interest to one of these reserve lands, commonly known as Agency 1 reserve.

10 The confusion around Agency 1 reserve arose since it was some time after the Treaty was signed that the various reserves were actually set out. When the appointed commissioners set out Agency 1 reserve, in their report to the government dated February 11, 1875, it was described as follows:

> **Rainy River**
>
> No. 1 At the foot of Rainy Lake to be laid off as nearly as may be in the manner indicated on the plan. Two chains in depth along the shore of Rainy Lake and bank of Rainy River, to be reserved for roads, right of way to lumbermen, booms, wharves, and other public purposes.
>
> This Indian reserve not to be for any particular Chief or Band, but for the Saulteaux Tribe, generally, and for the purpose of maintaining thereon an Indian agency with the necessary grounds and buildings.

Furthermore, the Order-in-Council of February 27, 1875 only "provisionally approved" the reserve as set up by the Commissioner.

11 In any event, the description raises the main question posed by the application i.e. for which of the Respondent Indian Bands was Agency 1 reserve set up? This is the basis on which the moving party claims it should be added in that, in its amended motion, it claims to be the successor to the Saulteaux Tribe.

12 Four of the Respondents, the Couchiching First Nation, the Naicatchewenin Band, the Nicickousemenecaning Band and the Stanjikoming First Nation take very strong exception to the above position, stating that the moving party has neither the legal status to be added as a party or intervenor, nor is it the successor to the Saulteaux Tribe. The Saulteaux Tribe, they argue, with support from many of the other bands, while it still exists as a distinct Anishnabe Nation, is represented and operated "through assemblies of the chiefs of the First Nations in the Territory covered by Treaty 3 acting as a Grand Council of Chiefs" (see paragraph 4, Affidavit of Chief Charles McPherson, sworn March 19, 2001). This position would seem to be consistent with the way the original Treaty was entered into.

13 The Attorney General of Canada, in his response to this motion, argues:

> (1) The Anishinaabe Nation in Treaty 3 is not a necessary party in that:
>
> (a) it does not raise the question of a beneficial interest and
>
> (b) it does not have such an interest in any event (since only bands under the *Indian Act* can have beneficial interests in reserves).
>
> (2) Even as an intervenor, since all of the bands are represented in the application, the Anishinaabe Nation in Treaty 3 would be merely duplicating the position of the other parties.

14 The question of whether the Anishinaabe Nation in Treaty 3, representing itself as the successor to the Saulteaux Tribe, could have a beneficial interest is certainly answered by s. 2(1) of the *Indian Act*, recited earlier, as well as s. 18(1) of the *Act* which reads as follows:

> **18.(1) Reserves to be held for use and benefit of Indians** — Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

In saying this I have concluded that the *Indian Act* speaks retrospectively to the time the land was set out as Agency 1 reserve, which appears to be just prior to the date of the original *Indian Act* (see *Isaac v. Davey*, [1977] 2 S.C.R. 897 (S.C.C.)). Clearly, under these sections, only Indian bands can enjoy the use and benefit of a reserve.

15 But even if one has to go back to the Treaty itself, without the assistance of the *Indian Act*, what that Treaty anticipated, and what was done, was to set aside reserve lands for various bands. And in that process was apparently set aside the Agency 1 reserve lands for the use of all the bands, or so it is stated. One can surmise the reason for this, since members of the various bands would need a place to stay when doing business with the "Indian Agency" in the area. At the very most this might give all the bands a claim to Agency 1 reserve, but the reference to the "Saulteaux Tribe generally" appears to be merely a convenient way of describing all the signatories bands to the Treaty in the same fashion as they were described generally in the Treaty itself.

16 It seems clear to me that having no beneficial interest in the Agency 1 reserve, the addition of the Anishinaabe Nation in Treaty 3 under Rule 5.03 is not necessary to enable the court to adjudicate effectively and completely on the issues in the application.

17 Regarding the proposition that the Anishinaabe Nation in Treaty 3 should be added as an intervenor under Rule 13, I must say firstly that I am more convinced, at least based on the evidence I have heard in this motion, that it is the Grand Council of Treaty 3 speaking through its properly constituted Assembly of Chiefs rather than the moving party herein which most truly and logically represents the Saulteux Tribe of the Ojibbeway Indians as described in the Treaty. However, I am not required to make a determination of that issue on this motion.

18 Regarding the proper approach to be taken to an Application to be added under Rule 13, the Ontario Court of Appeal had this to say [5] :

> Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the application being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

19 Here, with all the parties involved in the original Treaty as named Respondents, and the major issue being confined to a determination of who among them have rights in the reserve in question, and it having been determined that the Anishnaabe in Treaty 3 is not an entity that can have any beneficial interest in the reserve, then there is little likelihood that it can make a useful contribution to the resolution of the issues, and would only extend and complicate the proceedings unnecessarily.

20 In all respects then the motion is denied.

21 If the parties cannot agree on the issue of costs they may arrange to speak to me in regard thereto within the next 30 days.

Motion dismissed.

Footnotes

1 See Treaty No. 3 — 2000 Consolidated Native Law Statutes, Regulations and Treaties — Carswell Publishers, pg. 569.

2 See Treaty No. 3

3 See The Royal Proclamation of 1763 - 2000 Consolidated Native Law Statutes, Regulations and Treaties — Carswell Publishers, pg. 399.

4 [1984] 2 S.C.R. 335 (S.C.C.)

5 *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada*, [1990] O.J. No. 1378 (Ont. C.A.) at p. 3; (1990), 74 O.R. (2d) 164 (Ont. C.A.) at p. 167.

SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS	-and-	THE ATTORNEY GENERAL OF CANADA et al.	-and-	MISSISSAUGAS OF THE CREDIT FIRST NATION	Court File No. CV-18-594281-0000
Plaintiff (Responding Party)		Defendants (Responding Parties)		Moving Party	

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

RESPONDING FACTUM OF SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS (MOTION RETURNABLE MAY 12, 2023)

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