

Sept. 21, 2023

AMENDED THIS PURSUANT TO
MODIFIED CONFORMEMENT À
Électroniquement déposé / Déposé par voie électronique : 21-Sep-2023
Toronto Superior Court of Justice / Cour supérieure de justice

Court File No./N° du dossier du greffe : CV-18-00594281-0000

THE ORDER OF Justice Akbarali
L'ORDONNANCE DU Aug. 1, 2023
DATED/FAIT LE

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

Nazreen Mohammed-rahman
Digitally signed by Nazreen Mohammed-rahman
DN: cn=Nazreen Mohammed-rahman, o=
REGISTRAR GREFFIER
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS

Plaintiff

- and -

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

Defendants

- and -

MISSISSAUGAS OF THE CREDIT FIRST NATION

Intervenor

SECOND FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it upon the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Dated: March 7, 1995

Issued by

Local Registrar

Address of court office:

Court House
70 Wellington Street
Brantford, Ontario
N3T 2L9

TO: THE ATTORNEY GENERAL OF CANADA
Ontario Regional Office
National Litigation Sector
Department of Justice Canada
120 Adelaide Street West, Suite 400
Toronto, Ontario
M5H 1T1

Attention: Anusha Aruliah
Tania Mitchell

AND TO: HIS MAJESTY THE KING IN RIGHT OF ONTARIO
Crown Law Office - Civil
720 Bay Street, 8th Floor
Toronto, Ontario
M7A 2S9

Attention: Manizeh Fancy
David Feliciant

CLAIM

1. The Plaintiff Six Nations of the Grand River Band of Indians (the “**Six Nations of the Grand River**”) claims:

(a) A declaration that the Haldimand Proclamation set apart or aside lands whose legal title was vested in the Crown extending for six miles from each side of the Grand River beginning at Lake Erie and extending in that proportion to the head of the Grand River (the “**Haldimand Tract**”) for the use and benefit of the Six Nations of the Grand River, and that this gave rise to the **Reserve Land Duties, Surrender Duties, Surrender Implementation Duties, Appropriation Duties and Indian Monies Management Duties** defined further below in this Statement of Claim, including:

- (i) The duty to protect and preserve the Six Nations of the Grand River’s interest in the Haldimand Tract lands from exploitation;
- (ii) The duty to protect the Haldimand Tract from settlement, use, or alienation by or to persons other than the Six Nations of the Grand River, unless the free and informed consent of the Six Nations of the Grand River was obtained in accordance with applicable customs and practices for obtaining such consent and that the transaction was not exploitative;

- (iii) The duty to ensure that the use and benefit of the Haldimand Tract, including proceeds from sales, leases, licences or other authorizations of parts of the Haldimand Tract, were used for the use and benefit of the Six Nations of the Grand River; and
 - (iv) The duty to ensure that all monies or other assets provided as compensation for the sale, alienation, lease, use or appropriation of the Haldimand Tract were managed prudently and accounted for.
- (b) A declaration that, if the Haldimand Proclamation did not set aside the Haldimand Tract as a Reserve (as defined in paragraph 2 below) in 1784, that it obliged the Crown to make the Haldimand Tract a Reserve and gave rise to the **Reserve Creation Duties, Reserve Land Duties, Surrender Duties, Surrender Implementation Duties, Appropriation Duties and Indian Monies Management Duties** defined further below in this Statement of Claim, including:
- (i) The duty to act diligently to set aside the Haldimand Tract as a Reserve for the Six Nations of the Grand River;
 - (ii) The duty to protect the Haldimand Tract from settlement, use, or alienation by or to persons other than the Six Nations of the Grand River, unless the free and informed consent of the Six Nations of the Grand River was obtained in accordance with applicable customs and practices for obtaining such consent and that the transaction was not exploitative;

- (iii) The duty to ensure that the use and benefit of the Haldimand Tract, including proceeds from sales, leases, licences or other authorizations of parts of the Haldimand Tract, were used for the use and benefit of the Six Nations of the Grand River; and
 - (iv) The duty to ensure that all monies or other assets provided as compensation for the sale, alienation, lease, use or appropriation of the Haldimand Tract were managed prudently and accounted for.
- (c) Declarations that one or both of the Defendants breached fiduciary and/or treaty obligations owing to the Six Nations of the Grand River, as described herein;
- (d) equitable compensation and/or damages arising from the above-noted breaches of fiduciary and/or treaty obligations;
- (e) alternatively to (d), a declaration, if and as appropriate, that one or both of the Defendants is obliged to account to the Six Nations of the Grand River for all property, interests in property, money or other assets (“**assets**”) which were or ought to have been received, managed or held by the Defendants or either of them, or by others for whom they are in law responsible, including their predecessors (collectively, the “**Crown**”) for the benefit of the Six Nations of the Grand River, as described herein;
- (f) if necessary, a declaration that one or both of the Defendants must restore to the Six Nations Trust (as hereinafter defined) all assets which were not

received but ought to have been received, managed or held by the Crown for the benefit of the Six Nations of the Grand River or the value thereof;

- (g) a reference or references as may be appropriate;
- (h) all further or ancillary declarations, accounts and directions as may be appropriate, including declarations of breaches of the Crown duties set out in Schedule A;
- (i) costs on a full indemnity basis; and
- (j) such other relief as may seem just.

The Parties

2. The Plaintiff, the Six Nations of the Grand River, is a band within the meaning of the *Indian Act*, R.S.C. 1985, c.I-5, as amended. The members of the Six Nations of the Grand River are aboriginal people within the meaning of section 35 of the *Constitution Act, 1982*. In this pleading, the “Six Nations of the Grand River” and the “band” refers to the body of Indians for whose use and benefit the Haldimand Tract lands were set apart or aside under the Haldimand Proclamation, being those of the Six Nations who settled along the banks of the Grand River and their posterity. Land whose legal title is vested in the Crown and that is set apart or aside for the use and benefit for a body or band of Indians is a reserve (“**Reserve**”).

3. The Defendant The Attorney General of Canada represents His Majesty the King in right of Canada (the “**Crown in right of Canada**”), pursuant to section 23(1) of the

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, as amended. The Crown in right of Canada:

- (a) has legislative authority in Canada by and with the advice of the Parliament of Canada, with respect to Indians and lands reserved for the Indians, pursuant to section 91(24) of the *Constitution Act, 1867*; and
- (b) is the successor in Canada to, and is subject to all of the obligations, duties and liabilities which His Majesty the King or Her Majesty the Queen (the “**Imperial Crown**”) had or owed to the Six Nations of the Grand River except for those obligations, duties and liabilities conferred or imposed upon the Defendant, His Majesty the King in right of Ontario, under the *Constitution Act, 1867* or otherwise by law.

4. The Defendant His Majesty the King in right of Ontario (the “**Crown in right of Ontario**”):

- (a) became on July 1, 1867 the owner of all lands, mines, minerals and royalties situate within the Province of Ontario belonging to the former Province of Canada and the recipient of all sums then due or payable for such lands, mines, minerals or royalties, subject to any trusts existing in respect thereof and to any interest other than that of the then Province of Canada, pursuant to section 109 of the *Constitution Act, 1867*; and
- (b) is the successor in the Province of Ontario to, and is subject to all of the obligations, duties and liabilities which the Imperial Crown had or owed to

the Six Nations of the Grand River except for those obligations, duties and liabilities conferred or imposed upon the Crown in right of Canada, under the *Constitution Act, 1867* or otherwise by law.

5. The Defendants, either alone or together, are subject to all of the obligations, duties and liabilities owed to the Six Nations of the Grand River by the Imperial Crown or before Confederation by the Province of Canada and the Province of Upper Canada.

Introduction

6. As a result of the treaties, legislation, common law and facts hereinafter described, the Imperial Crown, the Crown in right of Canada and its predecessors, and the Crown in right of Ontario and its predecessors, were at all material times under fiduciary obligations to the Six Nations of the Grand River to *inter alia* hold, protect, manage and care for the lands, personal property and all other assets of the Six Nations of the Grand River for the benefit of the Six Nations of the Grand River in a similar manner that trustees are required to hold, protect, manage and care for the assets of a trust for the benefit of the beneficiaries of the trust.

6.1 Specifically, the Crown had the following duties in respect of the Haldimand Tract (the “**Reserve Land Duties**”):

- (a) The duty to protect and preserve the band’s interest in the Haldimand Tract Reserve from exploitation;

- (b) The duty to act with loyalty and good faith towards the band in respect of the management of the Reserve;
- (c) The duty to fully disclose material information in respect of the Crown's dealings with or management of the Reserve and to consult the band;
- (d) The duty to act with ordinary prudence with a view to the best interests of the band; and
- (e) The duty to make efforts to fairly reconcile conflicting demands or competing interests.

6.2 To the extent that the Haldimand Proclamation did not set aside the Haldimand Tract as a Reserve, it was a unilateral undertaking or agreement by the Crown which obliged it to create the Haldimand Tract as a Reserve and which gave rise following duties (the "**Reserve Creation Duties**"):

- (a) The duty to act diligently to create the proposed Reserve;
- (b) The duty to act with loyalty and good faith towards the band in respect of the creation of the Reserve;
- (c) The duty to fully disclose material information in respect of the Crown's dealings with or management of the Reserve land;
- (d) The duty to act with ordinary prudence with a view to the best interests of the band in the process of creating the Reserve; and

- (e) The duty to correct any deficiencies or omissions in the Reserve creation process reasonably capable of correction.

6.3 Where it was proposed that all or part of the Haldimand Tract be alienated whether by sale, lease or otherwise, the Crown was under the following fiduciary duties (the “**Surrender Duties**”) in considering whether or not to accept an absolute or conditional surrender for this purpose:

- (a) To ensure the surrender is made in accordance with the applicable procedural requirements;
- (b) To ensure that the band consents to the surrender;
- (c) To ensure that the surrender reflects the intention of the band; and
- (d) To ensure that the surrender is not exploitative.

6.4 In respect of land that has been subject to surrender, whether absolute or conditional, the Crown was under the following fiduciary duties (the “**Surrender Implementation Duties**”):

- (a) To manage the process to advance the best interests of the band;
- (b) To give effect to the intention of the band in making the surrender, including fulfilling any conditions;
- (c) To seek the consent of the band for any change in the implementation of the surrender;

- - -

- (d) To scrutinize the proposed transaction to ensure that it is not an exploitative bargain; and
- (e) To fully disclose material information in respect of the Crown's dealings with or management of the Reserve land.

6.5 In respect of any Haldimand Tract land lawfully appropriated for public purposes of carrying out an activity or undertaking the Crown was under the following fiduciary duties (the "**Appropriation Duties**"):

- (a) To ensure that the appropriation was actually required;
- (b) To ensure that the least interest possible was appropriated or that the band's interest in the Reserve was preserved to the greatest extent possible;
- (c) To protect a sufficient Six Nations of the Grand River interest in expropriated land in order to preserve the taxation jurisdiction of the band over the land; and
- (d) To secure compensation that reflected the nature of the Reserve interest, the impact on the band, and the value of the land to the proposed activity or undertaking.

6.6 In respect of any Six Nations of the Grand River monies (including any monies or proceeds derived from the disposition or appropriation of Haldimand Tract lands) or

assets held as investments of Six Nations of the Grand River monies the Crown was and is under the following fiduciary duties (the “**Indian Monies Management Duties**”):

- (a) To manage the monies prudently to preserve the capital and to achieve a reasonable return, including:
 - (i) The duty to invest these monies in the manner of a common law trustee, subject to any legislation limiting its ability to do so; and
 - (ii) The duty to account for the monies when requested;
- (b) Where the Crown appointed a manager to manage a band's monies, the duty to ensure that the manager made full and adequate disclosure to the band of information relating to the management of the band's funds.

7. The Crown has repeatedly breached its fiduciary duties and treaty obligations to the Six Nations of the Grand River as hereinafter described, and should be held liable for those breaches to the Six Nations of the Grand River.

8. Notice of this action was given to the Crown in right of Ontario on December 23, 1994, in accordance with section 7 of *The Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, and to the Crown in right of Canada on December 28, 1994.

The Royal Proclamation of 1763

9. By the *Royal Proclamation of 1763*, the Imperial Crown recognized and confirmed certain of the fiduciary obligations which the Crown had assumed in respect

of Indian peoples and their lands. It also continued, affirmed and enunciated the unwritten law of the colonies with regard to the status and alienation of lands occupied or used by the Indians in British North America. Unceded lands were recognized as reserved to the Indian peoples, no such lands were to be taken from them without their express consent, and the Indians' interest in unceded lands was to be inalienable otherwise than to the Crown. The purpose of this surrender requirement was to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited, to facilitate the Crown's ability to represent the Indians in dealings with third parties, and to ensure that the Crown's sovereign jurisdiction would extend over Indian lands settled by non-Indians. The *Royal Proclamation of 1763* has never been repealed, was and is part of the laws in force in Canada and Ontario and bound the Crown.

10. The *Royal Proclamation of 1763 inter alia* provided that:

- (a) colonial governments were forbidden from granting unceded Indian lands;
- (b) private persons were prohibited from occupying or otherwise possessing unceded Indian lands;
- (c) private persons were prohibited from purchasing unceded land from the Indians; and
- (d) Indian lands could only be granted after these had been ceded or surrendered to the Crown in a public assembly of the Indians held by the

governor or commander-in-chief of the colony in which the lands in question lay.

Six Nations of the Grand River Lands

11. In the eighteenth century and from time immemorial, the Six Nations (sometimes then referred to as the Five Nations) occupied, possessed or used very large territories in what is today the United States of America and the Provinces of Ontario and Quebec (the “**Six Nations Aboriginal Lands**”).

12. Throughout the American War of Independence, most of the Six Nations were faithfully allied with and supported the Imperial Crown. As a result of the ultimate defeat of the Imperial Crown in that war, the Six Nations of the Grand River left the United States and at the invitation of the Crown settled on a very large specific tract of land within their aboriginal lands in what is today Canada.

13. In order to facilitate this settlement and in partial recompense for the Six Nations of the Grand River’s alliance with and support of the Imperial Crown, the Imperial Crown agreed as hereinafter described to formally reserve for the Six Nations of the Grand River a large tract of land within the Six Nations Aboriginal Lands for the exclusive possession and settlement of the Six Nations of the Grand River so that those lands could be enjoyed by the Six Nations of the Grand River and their descendants forever.

The Haldimand Proclamation

14. On October 25, 1784, the Imperial Crown through its representative in British North America, the Governor of Canada, Sir Frederick Haldimand, issued a Proclamation (the “**Haldimand Proclamation**”) authorizing the Six Nations of the Grand River to take possession of and settle upon the banks of the Grand River running into Lake Erie, allocating to them the lands extending for six miles from each side of the river beginning at Lake Erie and extending in that proportion to the head of the Grand River (the Haldimand Tract), which the members of the Six Nations of the Grand River and their descendants were to enjoy forever. The lands allocated to the Six Nations of the Grand River under the Haldimand Proclamation consist of approximately 950,000 acres (384,465 hectares), inclusive of the riverbed between the banks of the Grand River. It was expected, in accordance with the practices of the day for determining the precise boundaries of tracts or parcels of lands, that the precise boundaries of the Haldimand Tract would be determined in consultation with and with the consent of the Six Nations of the Grand River as the lands were surveyed or it became necessary to ascertain the precise boundaries.

14.1. The Haldimand Proclamation set aside or had the effect of setting aside the whole of the Haldimand Tract as land held by the Crown for the use and benefit of the Six Nations of the Grand River, and as such constituted the whole of the Haldimand Tract as a Reserve for the Six Nations of the Grand River.

14.2. In the alternative, to the extent that the Haldimand Proclamation failed to set aside some or all of the Haldimand Tract as a Reserve (which is denied), the Haldimand Proclamation gave rise to an obligation to set these lands apart as a Reserve and the Crown was subject to the Reserve Creation Duties in the process of doing so.

14.3 In either case, from the date that the Haldimand Proclamation was issued, the Crown was subject to Indian Monies Management Duties in respect of any compensation derived from the sale, lease or other disposition of the land forming part of the Haldimand Tract.

15. In addition, the Haldimand Proclamation constitutes a treaty within the meaning of section 35 of the *Constitution Act, 1982*. In this action the Plaintiff claims that as a treaty the Haldimand Proclamation either:

- (a) Set aside the whole of the Haldimand Tract as a Reserve (as described above), subjected the Crown to the Reserve Land Duties, and gave the Six Nations a right to the Reserve; or
- (b) Imposed an obligation on the Crown to set aside the whole of the Haldimand Tract as a Reserve (as described above) and subjected the Crown to the Reserve Creation Duties and gave the Six Nations a right to have the Reserve created and a right to the Reserve so-created.

15.1 To the extent that the Haldimand Proclamation did not set aside the whole of the Haldimand Tract as a Reserve (which is not admitted but denied) the only administrative

step required to complete the Reserve creation process was the Crown satisfying itself that it had obtained sufficient consent from other potentially affected Indigenous nations to enable it to set aside the Haldimand Tract as a Reserve. By 1793 (when Lieutenant Governor John Graves Simcoe drafted the Simcoe Patent described further below) the Crown had satisfied itself that any such conditions had been satisfied, and thereafter treated the Haldimand Proclamation as having created the Reserve of the whole of the Haldimand Tract.

The Simcoe Patent and the Appropriation of the Headwaters Lands

16. On January 14, 1793, the Imperial Crown through its representative, the Lieutenant-Governor of Canada, John Graves Simcoe, drafted a patent (the “**Simcoe Patent**”) to, *inter alia*, grant to the Six Nations of the Grand River forever, all of that territory of land forming part of the district lately purchased by the Imperial Crown from the Mississauga Nation, beginning at the mouth of the Grand River where it empties itself into Lake Erie, and running along the banks of the Grand River for a space of six miles on each side of the river, or a space co-extensive therewith, and continuing along the Grand River to a place known by the name of the Forks, and from there along the main stream of the Grand River for the space of six miles on each side of the main stream, or for a space equally extensive therewith (the “**Simcoe Patent Lands**”). The above lands included the riverbed between the banks of the Grand River.

16.1 Simcoe met with representatives of the Six Nations of the Grand River to discuss the proposed patent. The Six Nations of the Grand River objected to the terms of the

proposed patent for a number of reasons. The Six Nations of the Grand River rejected or disputed many aspects of the proposed Simcoe Patent but, in particular, the Six Nations did not accept that the draft Simcoe Patent accurately defined the geographic extent of the Haldimand Tract lands. The representatives of the Six Nations of the Grand River explained to Simcoe that the Haldimand Tract extended to the source of the Grand River. The draft Simcoe Patent excluded those lands along the Grand River located north of the present Township of Nichol extending to the head of the Grand River (the “**Headwaters Lands**”). Because of these deficiencies in the Simcoe Patent – including the failure to include the whole of the Haldimand Tract – Simcoe did not issue the Simcoe Patent. Given the lack of agreement on the proposed deed, Crown officials continued to recognize that these lands set aside for the Six Nations of the Grand River were those lands described in the Haldimand Proclamation.

16.2 In 1819 Crown officials began to negotiate with the Six Nations of the Grand River for the surrender or release of the Headwaters Lands but no such agreement was reached. On March 30, 1819 the Executive Council made a report to Lieutenant-Governor Maitland taking the position that (1) the Headwaters Lands were not part of the Haldimand Tract and that (2) only the Simcoe Patent Lands had been reserved for the Six Nations of the Grand River. Maitland accepted this report.

16.3 To the extent that the Simcoe Patent Lands had not been established as a Reserve by the Haldimand Proclamation, the effect of Maitland accepting the March 30, 1819 report from the Executive Council was to confirm the Simcoe Patent Lands as a Reserve, subject to any lawful surrenders that had been made prior to that date. From

this date forward the Crown was subject to the Reserve Land Duties in respect of any Crown land in the Simcoe Patent Lands.

16.4 After Maitland accepted the Executive Council report of March 30, 1819, the Crown refused to recognize or protect any interest of the Six Nations of the Grand River in the Headwaters Lands and used and alienated those lands (1) without advising or consulting with the Six Nations of the Grand River; (2) without the consent of the Six Nations of the Grand River; and (3) without holding the monies derived from the disposition of the Headwaters Lands for the benefit of the Six Nations of the Grand River.

17. The Crown failed to set aside for the Six Nations of the Grand River in the draft Simcoe Patent all of the lands which the Six Nations of the Grand River were entitled to have reserved for them under the Haldimand Proclamation. In particular, the Crown failed to reserve for the Six Nations of the Grand River those lands along the Grand River located north of the present Township of Nichol extending to the head of the Grand River in the Township of Melancthon, consisting of approximately 275,000 acres (111,292.5 hectares). This failure constituted a breach by the Crown of its fiduciary and/or treaty obligations to the Six Nations of the Grand River under the Haldimand Proclamation.

17.1 In particular, to the extent that the Haldimand Proclamation:

- (a) Created the Haldimand Tract as a Reserve or created a Reserve as a treaty right of the Six Nations of the Grand River, and the Crown by appropriating the Headwaters Lands for its own use and benefit breached the Reserve Land Duties; or
- (b) In the alternative, created an obligation to set aside a Reserve for the Six Nations of the Grand River or a treaty right to set aside a Reserve for the Six Nations of the Grand River, and the Crown by appropriating the Headwaters Lands for its own use and benefit breached the Reserve Creation Duties.

17.2 As a result of the appropriation of the Headwaters Lands for its own use and benefit and the consequent breach of either the Reserve Land Duties or the Reserve Creation Duties, the Crown is liable to pay equitable damages or equitable compensation for the fair market value of the Headwaters Lands.

18. Although never issued, and despite its geographic limitations, the terms of the Simcoe Patent did repeat the following provisions existing at law:

- (a) the Six Nations of the Grand River could not lawfully alienate the Simcoe Patent Lands except by surrender to the Crown at a public meeting or assembly of the Chiefs, Warriors and people of the Six Nations of the Grand River;
- (b) any transfer, alienation, conveyance, sale, gift, exchange, lease or possession of the Simcoe Patent Lands directly to any persons whatever

other than members of the Six Nations of the Grand River, was to be null and void, unless there was first a surrender to the Crown for that purpose; and

- (c) the Six Nations of the Grand River were to enjoy free and undisturbed possession of the Simcoe Patent Lands under the protection of the Crown.

1812 Governor's Instructions

19. On May 1, 1812, the Crown's duly authorized representative, the Governor-General of Upper Canada issued instructions further regulating the alienation of Indian lands in the then Province of Upper Canada by requiring *inter alia*:

- (a) that the person administering the government in Upper Canada requisition any Indian lands wanted for public service and identify those lands with a sketch;
- (b) that all purchases by the Crown be made at a public council according to the ancient usages and customs of the Indians to whom the lands belonged, with proper interpreters present and without the presence of liquor;
- (c) that the Governor or two persons commissioned by him, the Superintendent of Indian Affairs, two or three members of his Department and at least one military officer be present at the public council;

- (d) that there be a proper explanation to the Indians of the nature and extent of the proposed disposition and the proceeds to be paid therefor; and
- (e) that deeds of conveyance and descriptive plans of the lands so conveyed be attached to the deed and be executed in public by the Principal Indian Chiefs and the Superintendent of the Indian Department or his appointee, and duly witnessed.

Legislation

20. The Crown's recognition of its fiduciary obligation to the Six Nations of the Grand River is in part reflected in the enactment of legislation *inter alia* to protect the Six Nations of the Grand River lands and regulate dispositions of those lands including:

- (a) *An Act for the Protection of the Lands of the Crown in this Province, from trespass and injury*, S.U.C. 1839, c.15;
- (b) *An Act for the Protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, S. Prov. C. 1850, c.74;
- (c) *An Act to amend the Law for the Sale and the Settlement of the Public Lands*, S. Prov. C. 1853, c.159;
- (d) *An Act to prevent trespasses to Public and Indian Lands*, S. Prov. C. 1859, c.81;

- (e) *An Act respecting the Management of the Indian Lands and Property, S. Prov. C. 1860, c.151;*
- (f) *An Act providing for the Organization of the Department of Secretary of State of Canada and for the Management of Indian and Ordinance Lands, S.C. 1868, c.42;*
- (g) The *Indian Act, 1876, S.C. 1876, c.18* and its successor legislation.

Crown's Breach of Fiduciary Duty

21. The Six Nations of the Grand River currently occupies and uses only the lands which comprise the Six Nations of the Grand River Indian Reserve No. 40 which is located southeast of the City of Brantford, Ontario and the Six Nations of the Grand River Indian Reserve No. 40B and lot 5, Eagle's Nest tract which are located within the City of Brantford. These lands consist of approximately 45,506 acres (18,416 hectares), less than 4.8 percent of the lands allocated to the Six Nations of the Grand River forever by the Haldimand Proclamation.

22. Subsequent to the dates of the Haldimand Proclamation and the Simcoe Patent, the Imperial Crown and its successors in Canada including the Defendants made or permitted to be made various grants, sales, leases, permits or other dispositions ("**Dispositions**") which purported to grant the title to, rights of possession, occupation, use or other interests in, parts of the Haldimand Tract or Simcoe Patent Lands (collectively the "**Six Nations Lands**") to persons who were not members of the Six

Nations of the Grand River (“**Third Parties**”) in breach of the Crown’s fiduciary duty to the Six Nations of the Grand River and without complying with the requirements of the laws hereinbefore referred to.

23. The Crown repeatedly breached its fiduciary and/or treaty obligations to the Six Nations of the Grand River by *inter alia* repeatedly:

- (a) making or permitting Dispositions of the Six Nations Lands to Third Parties without the consent of the Six Nations of the Grand River and without first obtaining from the Six Nations of the Grand River a lawful and valid surrender to the Crown;
- (b) permitting Third Parties to possess, occupy, or trespass on the Six Nations Lands without obtaining lawful surrenders from the Six Nations of the Grand River to the Crown;
- (c) making or permitting transactions relating to the Six Nations Lands without obtaining full and fair compensation therefor for the Six Nations of the Grand River and without ensuring that the Six Nations of the Grand River’s interest in such transactions was at all times fully protected and that the Six Nations of the Grand River received or were credited with all the proper proceeds of such Dispositions (which proceeds are hereinafter referred to as the “**Six Nations Trust**”);
- (d) failing to honour the terms or conditions of surrenders, sales and leases;

- (e) taking or permitting the taking or use of parts of the Six Nations Lands for roads, canals or other public waterways, railways, cemeteries, church grounds, public squares or parks, or for military, naval or other public purposes without obtaining lawful surrenders or providing full and fair compensation to the Six Nations of the Grand River;
- (f) managing the Six Nations Trust or permitting it to be managed, in a manner inconsistent with the standards of conduct required by the Crown's fiduciary obligations; and
- (g) failing to account to the Six Nations of the Grand River.

24. The following are some examples of the breaches of the Crown's obligations to the Six Nations of the Grand River hereinbefore described.

Brant's Power of Attorney

24.1 On February 5, 1798 Mohawk Chief Joseph Brant obtained a limited power of attorney from Five of the Six Nations of the Grand River assembled in Council on November 2, 1796 ("**Brant's Power of Attorney**").

24.2 By the terms of Brant's Power of Attorney, in order that monies from the sales of certain lands could be used to purchase an annuity or stipend for their future support, the Six Nations of the Grand River consented to surrender that portion of their lands, namely Blocks 1 to 4, legally described in the power of attorney and consisting of about 310,391 acres. This was upon the "express condition" that those lands would be

regranted by the Crown, through grants under the Great Seal of the Province of Upper Canada, to persons nominated by Joseph Brant, and on the understanding that security would be demanded and received for the payment of the purchase price for such lands.

24.3 In breach of the Crown's obligations under the Haldimand Proclamation and the Crown's Reserve Land Duties, Reserve Creation Duties and Surrender Implementation Duties, the Six Nations of the Grand River did not receive any or full payment for the purchase price of such lands, nor did they receive any interest on the monies from the sale nor proceeds of any investment from the monies from the sale. Further, the Crown used Six Nations of the Grand River's money to fund the expenses related to the sale of these lands.

Crown Grant of Block No. 5

24.4 Despite Brant's Power of Attorney only being for Blocks 1 to 4, on February 5, 1798, in breach of the Crown's obligations under the Haldimand Proclamation the Crown purported to accept a surrender for sale an area of land totalling 352,707 acres, that included Blocks 5 and 6.

24.5 In purporting to accept a surrender of Block 5 and subsequently disposing of this land as described below, the Crown breached the Haldimand Proclamation and the Reserve Land Duties (or in the alternative, the Reserve Creation Duties) and is liable for equitable compensation or equitable damages for the loss of these lands from the Haldimand Tract, subject to adjustment for any consideration that the Crown can demonstrate was obtained for the sale of Block 5 that was properly credited to the Six Nations of the Grand River.

24.6 In the alternative, if Block 5 was lawfully surrendered, which is not admitted but denied, the Crown was subject to the Surrender Implementation Duties which required the Crown to obtain fair market compensation for the land, collect any consideration due on the payment of the land, take reasonable steps to recover any consideration that was not paid, and to hold that consideration for the Six Nations of the Grand River. By its failure to obtain consideration due for the sale of Block 5, as detailed below, the Crown breached the Surrender Implementation Duties.

25. On November 18, 1807, the Crown granted letters patent under the seal of the Province of Upper Canada to one Thomas Douglas, Earl of Selkirk (“**Selkirk**”) for a block of the Simcoe Patent Lands known as Block No. 5, which later became the Township of Moulton in the County of Haldimand (the “**Block No. 5 lands**”).

26. The Crown conveyed the Block No. 5 lands to Selkirk without obtaining a surrender of those lands from the Six Nations of the Grand River to the Crown for the purpose of such sale.

27. Selkirk entered into a one-year mortgage with the Crown due and payable on November 18, 1808, purportedly to secure most or all of the purchase price (the “**Selkirk Mortgage**”). The Selkirk Mortgage provided for interest at the rate of six percent per year.

28. The principal and interest due under the Selkirk Mortgage was not paid on November 18, 1808 as required by its terms. The Crown neither enforced nor attempted

to enforce the collection of the principal sum and interest payable under the Selkirk Mortgage.

29. The principal sum owing under that Selkirk Mortgage has never been paid. Some interest payments may have been made on the principal prior to February 1853 but the particulars have not been provided and are presently unknown to the Plaintiff.

30. Since at least February, 1853, no payments of any kind in respect of the Selkirk Mortgage or any other mortgage for the Block No. 5 lands have been collected by the Crown for the benefit of the Six Nations Trust.

Crown Grant of Block No. 6

30.1 In purporting to accept a surrender of Block 6 and subsequently disposing of this land as described below, the Crown breached the Haldimand Proclamation and the Reserve Land Duties (or in the alternative, the Reserve Creation Duties) and is liable to the Six Nations of the Grand River for equitable compensation or damages for the loss of these lands from the Haldimand Tract, subject to adjustment for any consideration that the Crown can demonstrate was obtained for the sale of Block 6 that was properly credited to the Six Nations of the Grand River.

30.2 In the alternative, if Block 6 was lawfully surrendered, which is not admitted but denied, the Crown was subject to the Surrender Implementation Duties which required the Crown to obtain fair market compensation for the land, collect any consideration due on the payment of the land, take reasonable steps to recover any consideration that

was not paid, and to hold that consideration for the Six Nations of the Grand River. By its failure to obtain consideration due for the sale of Block 6, as detailed below, the Crown breached the Surrender Implementation Duties.

31. On February 5, 1798, the Crown granted letters patent under the seal of the Province of Upper Canada to one Benjamin Canby for a block of the Simcoe Patent Lands known as Block No. 6, which later became the Township of Canborough in the County of Haldimand (the “**Block No. 6 lands**”).

32. The Crown conveyed the Block No. 6 lands to Canby:

- (a) without obtaining a surrender of the lands from the Six Nations of the Grand River to the Crown for the purpose of a sale to Canby or anyone else;
- (b) without obtaining any mortgage or other security from Canby or anyone else to secure the payment of the purchase price;
- (c) without collecting any payment from Canby or anyone else for the lands for the benefit of the Six Nations Trust;
- (d) without taking any legal proceedings against Canby or his heirs or assigns to obtain payment for the Block No. 6 lands, despite the Crown’s acknowledgement, reduced to writing in 1803, 1830 and 1843, that the lands ought not to have been conveyed as a free grant and that the Crown

was under a fiduciary duty to take the steps necessary to remedy the matter.

Colonel Claus and the Lands in Innisfil and East Hawkesbury Townships

33. In the early 1800's the Crown's Deputy Superintendent General and Inspector General of Indian Affairs in Upper Canada, Colonel William Claus, misappropriated and mismanaged monies belonging to the Six Nations Trust in breach of the Crown's Indian Monies Management Duties to the Six Nations of the Grand River.

33.1 In or about 1803, Claus also inappropriately influenced certain Six Nations of the Grand River individuals to purport to give 4,000 acres of Haldimand Tract lands, at the mouth of the Grand River, to William Dickson, without obtaining a lawful surrender and despite the passing of a Six Nations of the Grand River general council resolution rejecting a previous proposal by Claus to give the lands to Dickson. The Crown subsequently issued Dickson a grant for these lands and the Six Nations of the Grand River did not receive proper compensation for such lands, in breach of the Crown's Reserve Land Duties or in the alternative its Surrender Duties and Surrender Implementation Duties.

34. In 1830, the Lieutenant Governor of Upper Canada ordered an investigation into the Six Nations Trust which resulted in a report determining that Colonel William Claus (who died in November 1826) and his son, John Claus, had misappropriated monies from the Six Nations Trust.

35. The Crown, however, failed to pursue a full accounting from Colonel William Claus' estate and from John Claus with respect to the handling of Six Nations of the Grand River trust monies by Colonel William Claus and John Claus.

36. Instead, the Crown unilaterally, and without securing legal title, arranged to obtain three tracts of land elsewhere in the Province of Ontario for the benefit of the Six Nations of the Grand River from members of the Claus family purportedly in lieu of a monetary settlement for the misappropriation of the Six Nations of the Grand River's trust monies by Colonel William Claus. On June 6, 1831, John Claus (Colonel William Claus' son) purported to convey some 900 acres in Innisfil Township (the "**Innisfil lands**"), and, in addition, John Claus along with Catherine Claus (Colonel William Claus' widow) purported to convey some 2,800 acres and 1,200 acres respectively in East Hawkesbury Township (the "**East Hawkesbury lands**") to some nominees appointed by the Crown "in trust for the sole use, benefit and behoof of the Indians known as the Six Nations Indians".

37. The Crown failed to ensure that the conveyances were effective and in fact the titles purportedly conveyed were defective.

38. On June 16, 1840, the Executive Council of Upper Canada determined that the Six Nations of the Grand River's Innisfil and East Hawkesbury lands should be sold by private sale, rather than by public auction, and at prices which in total were less than required to offset the minimum amounts which years earlier had been misappropriated by Colonel William Claus and John Claus.

39. Subsequently, in the 1840's, the Crown made sales of portions of the Innisfil and East Hawkesbury lands without obtaining any surrender of those lands from the Six Nations of the Grand River to the Crown.

40. In 1852, the Court of Upper Canada, Queen's Bench, held in a test case (*Dickson v. Gross* (1852), 9 U.C.Q.B. 580) that the title of one of the purchasers to a part of the Innisfil lands was defective because John Claus did not have proper title in 1831 in order to be able to convey the lands to the nominees to be held in trust for the Six Nations of the Grand River. The Court held that such title had resided in the Colonel William Claus Estate, and not in John Claus personally.

41. The Province of Canada undertook the defence of this action on behalf of the third party purchaser. Costs of the action were awarded against the Defendants. Those costs and the other expenses of the Defendants in relation to the action were paid out of the Six Nations Trust, without the knowledge, authorization or consent of the Six Nations of the Grand River.

42. On February 23, 1853, the Crown unilaterally withdrew £5,000 from the Six Nations Trust to pay to the beneficiaries of Colonel William Claus' Estate. This payment was made to release any and all interests that the beneficiaries of the Colonel William Claus Estate might allegedly continue to have in the Innisfil and East Hawkesbury lands which the Crown either had already sold or would later sell to Third Parties.

43. Notwithstanding the defect found by the Court in the Six Nations of the Grand River's title to the Innisfil and East Hawkesbury lands to be received in place of the trust monies earlier misappropriated by Colonel William Claus and John Claus, the Crown never reimbursed the Six Nations Trust for the misappropriated funds.

43.1 Throughout Claus' management of the Six Nations Trust and the Reserve, the Crown was subject to the Indian Monies Management Duties and Reserve Land Duties. The Crown breached the duties through the various dealings set out above and is liable for equitable damages or equitable compensation to the Six Nations of the Grand River as a result.

Welland Canal Flooding

44. The Crown failed to secure or pay compensation to the Six Nations of the Grand River for the value of at approximately 3,500 to 3,800 acres of the Simcoe Patent Lands expropriated and flooded for the Welland Canal project. The flooding resulted from canal construction projects, more particularly dam projects, which were carried on between approximately 1829 and 1835.

45. Under special legislation of the Parliament of Upper Canada, specifically S.U.C. 1824, c.17, enacted January 19, 1824, a company called the Welland Canal Company (the "**WCC**") was incorporated to construct the Welland Canal.

46. This legislation imposed an obligation on the WCC to compensate landowners or occupiers for any damages sustained as a result of the WCC exercising its statutory

powers. Part IX of the statute provided that if any part of the Welland Canal passed through Indian lands, or damaged the property or possessions of Indians, compensation was to be made in the same manner as with respect to the property, possessions or rights of other individuals. The amount of the compensation was to be paid to the Chief Officer of the Indian Department to the use of the Indians.

47. Despite assurances by the Crown's representatives that the WCC would compensate the Six Nations of the Grand River for any losses occasioned by the Welland Canal project and despite the statutory obligation to compensate, no compensation was made to the Six Nations of the Grand River for the value of the portions of the Simcoe Patent Lands lost due to the flooding. The WCC only made payments to individuals for their improvements on the land.

47.1 Upon considering and then allowing the WCC to appropriate Haldimand Tract land for the Welland Canal project, the Crown was subject to the Appropriation Duties. The Crown breached those Appropriation Duties by failing to ensure that the Six Nations of the Grand River's interest in the appropriated lands was preserved to the greatest extent possible and that the WCC compensated the Six Nations of the Grand River for the lands lost due to flooding.

48. On June 9, 1846, by Act of the Parliament of the Province of Canada, being S. Prov. C. 1846, c.37, the works *inter alia* of the Welland Canal were vested in the government of the Province of Canada, with provision made for the determination of any

unsettled claim for property taken, or for direct or consequential damages to property arising from the construction of public works including the Welland Canal.

49. Pursuant to section 108 of the *Constitution Act, 1867*, ownership and control of the Welland Canal passed from the Province of Canada to the Crown in right of Canada at Confederation in 1867.

50. Since Confederation, various government departments have undertaken valuations of the Simcoe Patent Lands flooded by the Welland Canal project and have recommended that compensation be paid to the Six Nations Trust in respect of the flooded lands:

- (a) On January 25, 1878, the Superintendent General of Indian Affairs, David Mills, recommended to the Minister of Public Works a payment of \$29,715.63 as proposed compensation for 1,993.65 acres of the acreage that had been flooded.
- (b) On August 5, 1882, James Cowan, an official arbitrator, reported to the Minister of Railways and Canals, that 1,993.65 acres of the flooded lands had a value of \$28,672.67.
- (c) On May 6, 1884, John A. Macdonald, Superintendent General of Indian Affairs, recommended to the Privy Council that the sum of \$28,672.67 be paid as compensation for 1,993.65 acres of the acreage which had been flooded.

The Grand River Navigation Company

51. Beginning in or about 1834 the Crown improvidently invested trust monies belonging to the Six Nations of the Grand River in the undertaking of the Grand River Navigation Company (the “**GRNC**”) in return for worthless shares and debentures of the GRNC. Through these improvident investments and through subsequent failures to mitigate or limit the losses arising from these improvident investments, the Crown breached the Indian Monies Management Duties.

52. The GRNC was incorporated and established under special legislation enacted on January 28, 1832, being S.U.C. 1832, c.13 (the “**GRNC Act**”) for the purpose of constructing dams and related works in order to make the Grand River more navigable and provide a better transportation route between the Welland Canal and the City of Brantford. The Six Nations of the Grand River were opposed to this project.

53. The Crown knew from the outset that:

- (a) investments of the Six Nations Trust monies in the GRNC were speculative and imprudent;
- (b) public revenues would not be invested in the GRNC’s activities because of the speculative nature of the GRNC’s project and the heavy expenditures it would require; and

- (c) the Province and the private promoters of the GRNC, rather than the Six Nations of the Grand River, would derive all of the potential benefits of the investment.

54. In addition to diverting trust monies belonging to the Six Nations of the Grand River to the GRNC, the Crown granted free letters patent dated November 18, 1837 to the GRNC under the seal of the Province of Upper Canada contrary to the requirements of the *GRNC Act*, for a tract of the Simcoe Patent Lands consisting of 368 and 7/10 acres including a 36 acre portion of towing path lands along the Grand River. In conveying these lands to the GRNC contrary to the requirements of the *GRNC Act*, the Crown breached its Reserve Land Duties and its Appropriation Duties owed to the Six Nations of the Grand River.

55. The Crown purported to convey such lands to the GRNC without obtaining any surrender from the Six Nations of the Grand River and without obtaining full and fair compensation for these lands for the Six Nations Trust. If this conveyance was lawfully authorized, which is not admitted but denied, the Crown was subject to the Appropriation Duties and breached those duties by failing to obtain full and fair compensation for these lands.

55.1 As a result of the breaches of the Reserve Land Duties, Indian Monies Management Duties and the Appropriation Duties the Crown is liable to the Six Nations of the Grand River for equitable damages or compensation for the monies invested in the GRNC and the fair value of the lands appropriated by the GRNC.

Lands Surrendered for the Purpose of Sale but Subsequently Conveyed by the Crown Without Obtaining Proper Compensation for Six Nations of the Grand River

56. The Crown conveyed or otherwise transferred surrendered Simcoe Patent Lands to Third Parties without obtaining full and fair compensation for the Six Nations of the Grand River in accordance with its own valuations and sale conditions or, indeed, without obtaining any compensation for the benefit of the Six Nations of the Grand River. This frequently occurred for conveyances or transfers of Simcoe Patent Lands, for example, under the following surrenders:

- (a) surrender no. 30 dated April 19, 1830, being a surrender of an estimated 807 acres for a townplot for Brantford;
- (b) surrender no. 40 dated April 2, 1835, being a surrender of an estimated 48,000 acres in the Township of Brantford excluding an area of land later known as the Johnson Settlement;
- (c) surrender no. 38 dated 8 February 1834, being a surrender of an estimated 50,212 acres in Dunn, Moulton, Canborough and Cayuga Townships; and
- (d) the purported surrender of 26 March 1835 to settle possession of lands that were the subject of so-called “Brant Leases” made in opposition to government orders, without having been surveyed, and without proper consideration to the Six Nations of the Grand River.

56.1 In disposing of the lands above, the Crown was subject to the Surrender Implementation Duties. The Crown breached these duties, as described below, in two ways. First, by failing to maintain proper records and accounts, the Crown made it impossible to assess or account for the disposition of the lands and the management of the monies derived from the sale of the lands. Second, the information that is available indicates that the Crown systematically failed to obtain fair market value or take steps to obtain fair market value.

56.2 In particular, the Crown failed to protect unsurrendered Haldimand Tract lands for the Six Nations of the Grand River's exclusive use, failing to evict existing intruders from these lands. The Crown then sought and obtained surrenders from the Six Nations of the Grand River on the expectation that the land would be surveyed, subdivided, and sold at fair market value for the benefit of the Six Nations of the Grand River. However, the Crown disposed of the surrendered land below market value, in certain cases to the intruders who had unlawfully settled upon the land prior to it being offered for sale, failed to set appropriate upset prices for the disposal of the land, and failed to collect compensation that was owing or gave credit for alleged improvements that had been illegally made to the land by persons who had unlawfully entered onto and occupied the lands. The Crown also disposed of certain lots as free grants and others for nominal consideration. The failure to obtain proper compensation was contrary to the wishes of the Six Nations of the Grand River who wanted to obtain fair value for the lands; and was contrary to the obligation to ensure that the surrenders were not implemented in a way that was exploitative.

56.3 As a result of the Crown's breaches of the Surrender Implementation Duties, the Crown must:

- (a) account for the disposition of the lands and the monies derived from disposition of the lands; and
- (b) to the extent that it cannot or there is shortfall in either the value or the sale proceeds, pay equitable compensation to the Six Nations of the Grand River for the value of the surrendered lands, subject to any proceeds of disposition as the Crown can demonstrate were held for the benefit of the Six Nations of the Grand River.

57. These surrenders had been agreed to by the Six Nations of the Grand River so that the Crown could make Dispositions of lands within the surrendered areas to Third Parties for the benefit of the Six Nations of the Grand River, namely Dispositions that would result in full and fair compensation to the Six Nations of the Grand River for all of the lands, that fully protected at all times Six Nations of the Grand River's interest in the relevant transactions and that would result in the Six Nations of the Grand River receiving or being credited with all the proper proceeds of such Dispositions. The Crown has never accounted to the Six Nations of the Grand River for the proceeds from Dispositions over the years of the numerous specific parcels of lands encompassed by surrender documents listed above.

Talbot Road Lands

58.1 On April 20, 1831, the Six Nations of the Grand River in council confirmed their previous consent of March 22, 1830, to a surrender proposed of lands needed for the construction of a road to be known as the Talbot Road (today Ontario Highway 3) from Canborough Township to Rainham Township and lands on each side of the road in lots of “33 chains by 30”, being approximately 100 acre lots, all of which were to be sold for the benefit of the Six Nations of the Grand River. The surrender proposed was recorded in a letter of March 9, 1830 which was communicated to the Six Nations of the Grand River in council (the “**Talbot Road Lands Surrender Proposal**”).

58.2 On April 20, 1831, representatives of the Six Nations of the Grand River executed a document of surrender dated April 19, 1831, known as surrender no. 31, on the understanding that it reflected the Talbot Road Lands Surrender Proposal.

58.3 In fact, surrender document no. 31 wrongfully contained a metes and bounds legal description for an area of land considerably larger in size than the extent of land reflected in the Talbot Road Lands Surrender Proposal that had been consented to by the Six Nations of the Grand River in council.

58.4 As a result, the Crown did not immediately sanction surrender document no. 31 with any order in council and in fact did not accept or act upon surrender document no. 31 as it formally read because on July 7, 1831 a written communication was made by the Chief Superintendent of the Indian Department advising that the Lieutenant

Governor requested that the Six Nations of the Grand River cede to the Crown a portion of land on either side of the Talbot Road, so that the ceded lots could be sold to Third Parties for the benefit of the Six Nations of the Grand River.

58.5 On September 28, 1831, the Six Nations of the Grand River in council and the Crown agreed that the Crown could sell 100 acre lots, or any portion of such lots, on either side of the Talbot Road to settlers, with the proceeds therefrom to benefit the Six Nations of the Grand River, provided that there was reserved for the use of the Six Nations of the Grand River an area of the Talbot Road lands consisting of two miles on each side of the Grand River. This agreement had the effect of restricting or reducing the area of land formally and incorrectly described as being surrendered in surrender document no. 31.

58.6 Subsequently, the Crown issued a public notice dated December 1, 1831 ordering that lands for disposition to Third Parties were to be laid out in 100 acre lots. Notwithstanding the agreement of September, 1831 with the Six Nations of the Grand River and the notice, the Crown subsequently proceeded wrongfully to sell lots of greater depth from the Talbot Road, resulting in lots being sold consisting of 200 acres rather than 100 acres. The selling agent for the Crown acknowledged in writing that this was contrary to the instructions of the Lieutenant Governor.

58.7 The Crown wrongfully failed to reserve for the Six Nations of the Grand River the area of the Talbot Road lands on each side of the Grand River which the Six Nations of the Grand River in council had reserved on September 28, 1831. Instead, the Crown

ordered on November 25, 1831 that only a one mile tract on each side of the Grand River along the Talbot Road be reserved for the Six Nations of the Grand River and a survey subsequently reflected that reservation of lands.

58.8 In 1833, the Six Nations of the Grand River consented to the sale of part of the reserved tract of the Talbot Road lands in order to accommodate the establishment of a town plot for the Town of Cayuga.

58.9 The Crown failed to seek and did not receive consent from the Six Nations of the Grand River to dispose of the remaining portion of the reserved tract within the Talbot Road lands which were not included in the Cayuga town plot.

58.10 Although a public notice dated January 22, 1844 issued by the Crown's Chief Superintendent of Indian Affairs advised that the lands on the south side of the Grand River between the Townships of Brantford and Dunn were exclusively appropriated to the use of Six Nations of the Grand River, the Crown failed to protect any portion of the surrender no. 31 lands on the south side of the Grand River for the benefit of the Six Nations of the Grand River including the reserved tract of the Talbot Road lands not used for the Cayuga town plot. The Crown has not accounted to the Six Nations of the Grand River for the proceeds of Dispositions purporting to grant title or other interests to Third Parties in the Talbot Road and the lands on either side of it.

58.11 The Crown breached the Reserve Land Duties and/or the Surrender Implementation Duties by failing to ensure that the Six Nations of the Grand River's

interest in the appropriated lands was preserved to the greatest extent possible and that the lands that were supposed to have been reserved were in fact reserved and not disposed of and that any proceeds that may have been derived from the disposition of these lands was accounted for and held to the benefit of the Six Nations of the Grand River. As a result of these breaches the Crown is liable to pay equitable compensation or equitable damages for these lands, subject to any proceeds of disposition that the Crown can establish were obtained and held for the benefit of the Six Nations of the Grand River.

Hamilton/Port Dover Plank Road Lands

59. The Crown granted letters patent in fee simple to Third Parties on the lands approximately a half-mile on each side of a Plank Road from Hamilton to Port Dover (which eventually became Highway 6) built across unsurrendered Simcoe Patent Lands, although the Six Nations of the Grand River only wished to lease those lands.

60. The Six Nations of the Grand River were accordingly deprived of continual earnings from these lands from continual rental revenues for the land and royalty revenues on the mineral resources thereunder. The Crown breached the Reserve Land Duties and/or the Surrender Implementation Duties by failing to ensure that the Six Nations of the Grand River's interest in these lands was preserved to the greatest extent possible and that the lands that were supposed to have been reserved were in fact reserved and not disposed of and that any proceeds that may have been derived from the disposition of these lands was accounted for and held to the benefit of the Six

Nations of the Grand River. As a result of these breaches the Crown is liable to pay equitable compensation or equitable damages for these lands, subject to any proceeds of disposition that the Crown can establish were obtained and held for the benefit of the Six Nations of the Grand River.

Port Maitland Lands

61. The Crown took possession of lands comprising lots 25 and 26, concession 4 in the Township of Dunn (the “**Port Maitland lands**”), purportedly under *An Act to authorize Her Majesty to take Possession of Lands for the erection of Fortifications in this Province, under certain restrictions*, S.U.C. 1840, c.16, which *inter alia* provided that:

- (a) land could be purchased or leased for the erection of military works;
- (b) where the requisite land could not be obtained by consent, the Military could take possession of lands required for military works if the necessity for the lands was first certified by the Commander of Her Majesty’s Forces in the Province of Upper Canada, or there was an enemy invasion; and
- (c) proper compensation was required to be made to the owners of land taken for military purposes.

62. There was no voluntary purchase or lease of the Port Maitland lands for the purpose of erecting military works, no invasion and no certification that the Port Maitland lands were required to be taken by the Crown for military purposes. No compensation

was ever made to the Six Nations of the Grand River for the taking of the Port Maitland lands, including when the Crown subsequently sold most of the Port Maitland lands.

62.1 The Crown breached the Reserve Land Duties and/or the Appropriation Duties by appropriating the Port Maitland Lands for its own uses and by failing to ensure that the Six Nations of the Grand River's interest in the appropriated lands was preserved to the greatest extent possible and that proper compensation was paid for the appropriation of the lands. The Crown is liable to pay equitable compensation or equitable damages for the loss of these lands, subject to any compensation that the Crown can demonstrate was paid and held for the benefit of the Six Nations of the Grand River.

Purported Surrender of 1841

63. On January 18, 1841, the then Chief Superintendent of Indian Affairs, Samuel Jarvis ("**Jarvis**") (who was later discharged by the Crown after an investigation by a Commission of Inquiry) allegedly obtained the signatures of seven individuals to what purported to be an agreement of the Six Nations of the Grand River to "Her Majesty's Government disposing of the land belonging and formerly reserved upon the Grand River for the Six Nations Indians", expressly excluding some lands in a tract known as the "Johnson Settlement".

64. The document of January 18, 1841 incorporates by reference two letters of January 5 and January 15, 1841 authored by Jarvis (together, "**the Purported 1841**

Jarvis Arrangement”). None of these documents contained any definite description of what land was to be surrendered for lease or otherwise to Third Parties. While the letter of January 15, 1841 refers to the preparation of a “general survey of the tract”, none was appended to the document of January 18, 1841 or to any later document which might properly be characterized as a surrender document.

65. The Purported 1841 Jarvis Arrangement did not constitute a lawful and valid surrender of Simcoe Patent Lands for reasons which include the following:

- (a) the Six Nations of the Grand River did not authorize the seven alleged signatories to consent to the Purported 1841 Jarvis Arrangement; and
- (b) no specific lands were identified in the relevant documents for lease or otherwise by the Six Nations of the Grand River and no survey was prepared.

66. In the letter dated January 5, 1841, Jarvis represented that the only solution to prevent unlawful white settlements on the Simcoe Patent Lands was for the Six Nations of the Grand River to surrender those lands, with the exception of the portions the Six Nations of the Grand River wished to retain for their own use.

67. In the letter dated January 15, 1841, Jarvis represented:

- (a) that neither would he recommend nor the government approve, the removal of unauthorized Third Parties from unsurrendered Six Nations Lands;

- (b) that if the Six Nations of the Grand River adopted the government's proposal, the income of the Six Nations of the Grand River would immediately be increased and that monies from future land dispositions would be paid over to the benefit of the Six Nations Trust; and
- (c) that measures would soon be adopted resolving the issue of investment in stock of the GRNC in a manner advantageous to the Six Nations of the Grand River.

68. The Jarvis letter of January 15, 1841 recommended approval by the Six Nations of the Grand River of the "Government disposing for their exclusive benefit and advantage, either by lease or otherwise, all of their Lands which can be made available, with the exception of the farms at present in their actual occupation and cultivation, and of 20,000 acres as a further reservation, and that the selection of this reservation be deferred until after a general survey of the tract when the position most advantageous to the general interests and peculiar wants of the Indians can be more judiciously selected".

69. Upon learning of the Purported 1841 Jarvis Arrangement, the Six Nations of the Grand River protested by *inter alia*:

- (a) submitting a petition of February 4, 1841, signed by fifty-one Chiefs, Warriors and Sachems of the Six Nations of the Grand River to the Governor General of Canada;

- (b) submitting a petition of July 7, 1841 signed by one hundred twenty three Chiefs, Warriors and Sachems of the Six Nations of the Grand River to the Governor General of Canada;
- (c) making a submission of January 28, 1843 to a three-person commission of inquiry (the Bagot Commission) which had been appointed in October 1842 to investigate the affairs of the Indian Department; and
- (d) submitting a further petition dated June 24, 1843 to a newly appointed Governor General of Canada, in which the Chiefs of the Six Nations of the Grand River *inter alia* asked the new Governor General to examine the earlier submissions protesting the irregularity of the Purported 1841 Jarvis Arrangement.

70. In response to the protests by the Six Nations of the Grand River, the Crown acting by the Governor General of Canada, in Council, decided on October 4, 1843 that the Crown would continue to reserve for the Six Nations of the Grand River those parts of the Simcoe Patent Lands identified as follows:

- (a) all of the Simcoe Patent Lands on the south side of the Grand River with the exception of the Plank Road lands between the Township of Cayuga and Burtch's Landing, being a distance of more than twenty miles;
- (b) a tract near Brantford called the "Oxbow" containing some 1,200 acres;

- (c) another tract on the north side of the Grand River called the “Eagles Nest” containing some 1,800 acres;
- (d) the “Martin Tract” containing some 1,500 acres;
- (e) the “Johnson Settlement” land containing some 7,000 acres;
- (f) a lot at Tuscarora on which a church was built;
- (g) lands on the north side of the Grand River resided upon and improved by members of the Six Nations of the Grand River; and
- (h) any further lands which the Six Nations of the Grand River wished to retain.

71. The Crown through the Governor General in Council decided that the Johnson Settlement lands and other small tracts would be leased on short term leases for the benefit of the Six Nations of the Grand River. The Crown then granted letters patent in fee simple, instead of leases, to Third Parties for these lands, thereby depriving the Six Nations of the Grand River of the continual rental revenues which could be earned therefrom.

72. There has been no surrender by the Six Nations of the Grand River to the Crown of any of the above-mentioned lands and the present day Six Nations of the Grand River Reserve does not include all of the area that the Crown indicated would be reserved on October 4, 1843.

73. On May 10, 1845, Jarvis was discharged by the Crown as Chief Superintendent of Indian Affairs after a Commission of Inquiry could not obtain an accounting of Jarvis' administration of Indian trust monies which included unauthorized use of such monies.

73.1 In any event, regardless of whether the Purported 1841 Jarvis Arrangement was valid, the Crown has never provided an account to the Six Nations of the Grand River identifying the specific lands allegedly encompassed by it or an account for the related proceeds that ought to have been received as full and fair compensation for the benefit of the Six Nations of the Grand River as a result of all Dispositions allegedly made on the basis of that arrangement.

73.2 In respect of all of the lands subject to the Purported 1841 Jarvis Arrangement the Crown was subject to the Reserve Land Duties or, in the alternative, the Surrender Duties and the Surrender Implementation Duties and breached all of these duties.

73.3 The Crown breached the Reserve Land Duties by failing to protect the Reserve land from squatters and permitting Reserve land to be alienated without the consent of the Six Nations of the Grand River and contrary to their intentions with respect to these lands. As such the Crown is liable for equitable damages and equitable compensation for the loss of these lands on the basis of the fair market value of these lands as a Reserve, subject to any compensation the Crown can demonstrate was obtained for these lands and held for the benefit of the Six Nations of the Grand River.

73.4 In the alternative, if there was a valid surrender, which is not admitted but denied, the Crown breached the Surrender Duties and the Surrender Implementation Duties by failing to:

- (a) ensure that the surrender was not exploitative on account of it arising from unlawful occupation of the Reserve and the Crown's unwillingness to address this unlawful occupation;
- (b) implement the surrenders in accordance with the expectations of the Six Nations of the Grand River that fair market value would be obtained for any lands alienated and that those monies would be held for the benefit of the Six Nations of the Grand River; and
- (c) ensure that certain lands would be withheld from disposition and continue to be held for the exclusive use and benefit of the Six Nations of the Grand River.

73.5 As a part of the Surrender Duties and Surrender Implementation Duties, the Crown was also under a duty to account and be able to account for the land that was surrendered and any monies that were derived from the disposition of these lands. The Crown breached these duties both by failing to maintain the necessary books and records that would allow for an accounting, and by failing to account. The Crown is therefore liable for equitable damages or equitable compensation on the basis of the fair market value of the land subject to any compensation the Crown can demonstrate was obtained for these lands and held for the benefit of the Six Nations of the Grand River.

73.6 In either case, to the extent that the Crown appropriated land that formed part of the Purported 1841 Jarvis Arrangement the Crown was obliged to compensate the Six Nations of the Grand River for the appropriation of the land, either as a result of the Appropriation Duties or as a result of the terms of the Purported 1841 Jarvis Arrangement. The Crown did not pay such compensation and is therefore liable for equitable damages or equitable compensation on the basis of the fair market value of the land subject to any compensation the Crown can demonstrate was obtained for these lands and held for the benefit of the Six Nations of the Grand River.

73.7 To the extent that the Crown obtained monies or other compensation for the lands forming part of the Purported 1841 Jarvis Arrangement, those monies formed part of the Six Nations Trust and the Crown was subject to the Indian Monies Management Duties in respect of such funds. The Crown breached the Indian Monies Management Duties in respect of these funds by failing to: (1) in fact credit them to the Six Nations Trust; (2) maintain adequate books and records that would allow the Crown to account for these monies; and (3) account for these monies.

Misappropriation and/or Mismanagement of Trust Monies

74. The Crown in right of Canada reported to the Six Nations of the Grand River that, as of February 1, 1995, it only held \$2,183,312 in trust monies for the benefit of the Six Nations of the Grand River, consisting of \$2,080,869 on capital account and \$102,443 on revenue account.

74.1 The Crown was at all times subject to the Indian Monies Management Duties in respect of all compensation derived from the sale, lease, appropriation or any other disposition of the Haldimand Tract, whether such lands were Reserve land or subject to being set aside as Reserve land. The Indian Monies Management Duties extended to any monies or compensation obtained by way of investment of the existing Six Nations of the Grand River monies.

74.2 As described above, the historical record demonstrates that the Crown or its employees or agents failed to keep appropriate books and records that would allow for an accounting and that the Crown and/or its agents mismanaged or misappropriated monies from the Six Nations Trust.

74.3 Given this historical record of misappropriation or mismanagement, the Crown must either account for the monies that ought to have been in the Six Nations Trust and demonstrate that such misappropriation or mismanagement has been remedied, or pay equitable damages or equitable compensation for the loss of these monies.

75. The Crown has not accounted to the Six Nations of the Grand River for the administration of the monies which ought to be in the Six Nations Trust and despite the Crown's awareness of the improprieties hereinbefore referred to.

Allowing the Removal by Third Parties of Natural Resources from the Six Nations of the Grand River Reserve Without Valid Authority and Without Proper Compensation

76. At various times, the Crown failed to protect Six Nations of the Grand River's interest in the natural resources underlying the Six Nations of the Grand River Reserve by failing to take any or appropriate steps to prevent Third Parties from removing natural resources from the Six Nations of the Grand River Reserve without proper authority. In addition the Crown failed to obtain or provide proper compensation to the Six Nations of the Grand River. An example of these failures is the extraction of natural gas from the Six Nations of the Grand River Reserve in the period from July 15, 1945 through November 18, 1970.

77. On May 20, 1925, the Six Nations of the Grand River surrendered to the Crown for twenty years the oil and gas rights under the Six Nations of the Grand River Reserve so that a twenty year lease for the same could be granted to the Honourable Edward Michener.

78. By agreement dated December 31, 1928, Michener assigned his rights to Petrol Oil & Gas Company Limited ("**POG**").

79. By letter of July 18, 1947, the Deputy Minister of the Department of Indian Affairs advised POG that the Michener lease had expired on July 15, 1945 and that no authority had been obtained by POG pursuant to section 54 of the *Indian Act* (R.S.C.

1927, Chap. 98) which would enable POG to operate thereafter on the Six Nations of the Grand River Reserve.

80. From July 15, 1945 through November 18, 1970, POG drilled wells and extracted natural gas from gas wells on the Six Nations of the Grand River Reserve without any lawful entitlement to the gas or any lawful authority to drill and extract gas.

81. Accordingly, the Crown in right of Canada should account to the Six Nations Trust for the fair market value of all natural gas extracted by POG from the Six Nations of the Grand River Reserve.

The Crown's Failures to Account

82. As set out above, the Crown has breached its fiduciary obligations and/or treaty obligations to the Six Nations of the Grand River to such an extent that the Six Nations of the Grand River is not fully aware of all of the transactions since 1784 concerning the assets held, or which ought to have been held, by the Crown for the benefit of the Six Nations of the Grand River, including from all sales, leases and other dispositions of the Six Nations Lands, and monies earned or derived or which ought to have been earned or derived therefrom. In particular, as a result of the lack of accountings (particularly respecting when most of the Dispositions of Six Nations Lands occurred), the Six Nations of the Grand River do not have a full awareness as to matters such as the following:

- (a) whether all portions of the Six Nations Lands which today are not part of the Six Nations of the Grand River Reserve No. 40 and 40B were lawfully disposed of by first obtaining from the Six Nations of the Grand River a surrender in accordance with the applicable legal requirements;
- (b) whether the terms and conditions of any valid surrenders, sales and leases, including any lands that were validly surrendered pursuant to Brant's Power of Attorney, were fulfilled and whether full and fair compensation was obtained in respect of the Dispositions or uses of the Six Nations Lands;
- (c) whether the Six Nations Trust earned, derived, received, held and continues to hold all appropriate sums which should have been earned, derived, received or held on behalf of the Six Nations of the Grand River, including those derived from lands included within Brant's Power of Attorney, in accordance with the Crown's fiduciary obligations; and
- (d) the extent to which the Six Nations of the Grand River have been deprived of their property rights by the Crown's failure to fulfil its fiduciary or treaty obligations under the Haldimand Proclamation.

83. Despite the Crown's fiduciary obligations the Crown has failed to account for the administration of the Six Nations Trust. In particular:

- (a) By letter dated October 25, 1979 the Six Nations of the Grand River Council requested the Auditor General of Canada to conduct an historical

audit and report on the Six Nations of the Grand River trust funds and lands. On November 15, 1979, the Parliament of Canada directed the Auditor General to conduct an audit of Indian trust accounts generally but no report on any such audit has yet been supplied to the Six Nations of the Grand River as requested.

- (b) By letter of October 23, 1992, the Six Nations of the Grand River by its solicitors requested a full general accounting of all transactions involving the property held for the benefit of the Six Nations of the Grand River including all sales and leases of land and all money held by the Crown since 1784. The Crown in right of Canada refused to do so and instead directed the representatives of the Six Nations of the Grand River to examine the Indian Land Registry. The Crown in right of Ontario did not respond at all to the request for an accounting.

84. The Plaintiff proposes that the trial of this action take place in the City of Toronto, Ontario.

SCHEDULE A: CROWN DUTIES

(Crown as defined in paragraph 1(e) of the Statement of Claim)

Reserve Land Duties

1. In respect of the Haldimand Tract Reserve, the Crown has the following duties (the “**Reserve Land Duties**”):
 - a. The duty to protect and preserve the band’s interest in the Haldimand Tract lands from exploitation;
 - b. The duty to act with loyalty and good faith towards the band in respect of the management of the Reserve;
 - c. The duty to fully disclose material information in respect of the Crown’s dealings with or management of the Reserve and to consult the band;
 - d. The duty to act with ordinary prudence with a view to the best interests of the band; and
 - e. The duty to make efforts to fairly reconcile conflicting demands or competing interests.

Reserve Creation Duties

2. In respect of land where the Crown has made a unilateral undertaking or agreed to create a Reserve (whether by treaty or otherwise) the Crown has the following duties (the “**Reserve Creation Duties**”):
 - a. The duty to act diligently to create the proposed Reserve;

- b. The duty to act with loyalty and good faith towards the band in respect of the creation of the Reserve;
- c. The duty to fully disclose material information in respect of the Crown's dealings with or management of the Reserve land;
- d. The duty to act with ordinary prudence with a view to the best interests of the band in the process of creating the Reserve; and
- e. The duty to correct any deficiencies or omissions in the Reserve creation process reasonably capable of correction.

Surrender Duties

- 3. In respect of a Reserve where it is proposed that all or part of the Reserve be alienated whether by sale, lease or otherwise, the Crown is under the following fiduciary duties (the "**Surrender Duties**") in considering whether or not to accept an absolute or conditional surrender for this purpose:
 - a. The surrender is made in accordance with the applicable procedural requirements;
 - b. The band consents to the surrender;
 - c. The surrender reflects the intention of the band; and
 - d. The surrender is not exploitative.

Surrender Implementation Duties

4. In respect of land that has been subject to surrender, whether absolute or conditional, the Crown is under the following fiduciary duties (the “**Surrender Implementation Duties**”):
- a. To manage the process to advance the best interests of the band;
 - b. To give effect to the intention of the band in making the surrender, including fulfilling any conditions;
 - c. To seek the consent of the band for any change in the implementation of the surrender;
 - d. To scrutinize the proposed transaction to ensure that it is not an exploitative bargain; and
 - e. To fully disclose material information in respect of the Crown’s dealings with or management of the Reserve land.

Appropriation Duties

5. In respect of any land that is lawfully appropriated for public purposes of carrying out an activity or undertaking the Crown is under the following fiduciary duties (the “**Appropriation Duties**”):
- a. To ensure that the appropriation is actually required;
 - b. To ensure that the least interest possible is appropriated or that the band’s interest in the Reserve was preserved to the greatest extent possible;

- c. To protect a sufficient Indian interest in expropriated land in order to preserve the taxation jurisdiction of the band over the land; and
- d. To secure compensation that reflected the nature of the Reserve interest, the impact on the band, and the value of the land to the proposed activity or undertaking.

Indian Monies Management Duties

- 6. In respect of any Indian Monies (including any monies or proceeds derived from the disposition or appropriation of Reserve lands or land identified to become Reserve lands) or assets held as investments of Indian Monies the Crown is under the following fiduciary duties (the “**Indian Monies Management Duties**”):
 - a. To manage the monies prudently to preserve the capital and to achieve a reasonable return, which includes:
 - i. The duty to invest these monies in the manner of a common law trustee, subject to any legislation limiting its ability to do so; and
 - ii. The duty to account for the monies when requested;
 - b. Where the Crown appoints a manager to manage a band's monies, the duty to ensure that the manager makes full and adequate disclosure to the band of information relating to the management of the band's funds.

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

Plaintiff

Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**SECOND FRESH AS AMENDED
STATEMENT OF CLAIM**

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