AMENDED THIS Sept. 28, 2023 PURSUANT TO
MODIFIÉ CONFORMÉMENT À

☐ RULE/LA RÈGLE 26.02 (_____)

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

Nazreen Mohammed-rahaman
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Date: 2023.10.10 15:20:38 -04'00'

REGISTRAR
SUPERIOR COURT OF JUSTICE

GREFFIER
COUR SUPÉRIEURE DE JUSTICE

Toronto Court File No. CV-18-00594281-0000
(Formerly Brantford Court File No. 406/95)

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 DEFENCE OF THE ATTORNEY GENERAL OF CANADA

I N D E X

D E F E N C E

1. This Defendant, the Attorney General of Canada, in answer to the Second Fresh as Amended Statement of Claim (referred to in this pleading as the "Statement of Claim"), says as follows:

1.1 In 1784, the British Imperial Crown set out to negotiate a surrender from the Mississauga of the land between Lake Ontario, Lake Huron, and below the headwaters of the Grand River to Lake Erie in order to give the land to allied members of the Six Nations, and to obtain land for Loyalist settlement.

1.2 In 1793, the Simcoe Patent officially confirmed the land grant made to the Six Nations and imposed limitations on the disposal of those lands by the Six Nations to anyone but the Crown.

1.3 This 18th century land grant did not create a "reserve" as the term is understood today, nor did the Six Nations' interest in the lands give rise, at the time, to the specific Crown duties that developed through policy and legislation in the latter part of the 19th century.

1.4 Though the British Imperial Crown and Province of Canada accepted surrenders and issued patents over time, the Crown was not at all times involved in other aspects of the management of the lands and proceeds of sale, as the Six Nations had appointed representatives for this purpose.

1.5 In all aspects of its relationship with the Six Nations raised in these proceedings, the Crown has acted honourably and as contemplated by colonial and post-colonial Crown policy, and in accordance with the dictates of the common law and the statute law of the day.

1.6 Given that most events and transactions implicated in these proceedings predate confederation, in the event that this Court finds for the Six Nations in relation to any aspect of their claim, this Court will need to determine whether Canada became responsible for any failure to uphold the honour of the Crown or a breach of duty flowing therefrom.

THE PARTIES

2. Pleading to paragraph 2 of the Statement of Claim, this Defendant admits that the Plaintiff, the Six Nations of the Grand River Band of Indians is a "band" within the meaning of the *Indian Act*, R.C.S. 1985, c. I-5, as amended, and adds that Canada currently holds IR No. 40 and Glebe Farm No. 40B for its use and benefit, admits that the members of the Six Nations of the Grand River Band of Indians are Aboriginal people within the meaning of section 35 of the *Constitution Act, 1982,* and denies all other allegations. The Haudenosaunee, a confederacy of Iroquoian-speaking peoples, were settled in what is now known as Upper New York State. This confederacy has been known variously as the League of the Iroquois, the Five Nations, and the Six Nations. The Six Nations, by the early 18th century, consisted of the Onoñda'gega' (Onondaga), Onyota'a:ka (Oneida), Onödowága:' (Seneca), Gayogohó:no' (Cayuga), Kanien'kehá:ka (Mohawk) and Skarù·rę? (Tuscarora). In this pleading, the predecessors and the current body of Indigenous people known as the Six Nations of the Grand River Band of Indians together are referred to as the "Six Nations". This Defendant accepts that the Plaintiff has standing to bring this action.

3. Pleading to subparagraph 3(a) of the Statement of Claim, this Defendant denies that it is the Crown in Right of Canada that has legislative authority with respect to Indians, and lands reserved for the Indians. The *Constitution Act, 1867*,

provides for the division of legislative powers between Parliament and the provincial Legislatures, and pursuant to subsection 91(24), such exclusive authority to legislate is vested in Parliament.

4. Pleading to subparagraphs 3(b) and 4(b) and to paragraph 5 of the Statement of Claim, this Defendant denies that the Crown in Right of Canada is the successor to the British Imperial Crown for all of the obligations, duties, and liabilities that the British Imperial Crown had or owed to the Six Nations. This Defendant says that the Crown in Right of Canada came into existence in 1867 on passage of the *Constitution Act, 1867*, and has only those obligations, duties, and liabilities to the Six Nations that flow to it from the Constitution.

4.1 This Defendant denies subparagraph 4(a) of the Statement of Claim, as drafted.

5. This Defendant admits the allegations in paragraph 8 of the Statement of Claim.

6. Pleading to paragraphs 6 to 7 of the Statement of Claim, this Defendant says that the Crown in Right of Canada did not exist prior to July 1, 1867. The Crown in Right of Canada did not pass legislation, nor was it in a fiduciary relationship with the Plaintiff prior to July 1, 1867, and therefore could not owe any fiduciary duties to the Plaintiff prior to July 1, 1867.

GENERAL PLEADINGS

6.1 Specifically, in response to the Plaintiff's allegations of Crown breach of treaty obligations and fiduciary duty as pleaded at paragraphs 6 to 7 of the Statement of Claim, this Defendant says:

(i) As pleaded in paragraph 77 below, the Haldimand Proclamation is not a treaty and does not give rise to Crown treaty obligations;

(i.i) As pleaded in paragraphs 79 to 79.2 below, the Haldimand Proclamation and Simcoe Patent did not have the effect of creating a “reserve” for the Six Nations or give rise to an obligation to set the lands apart as a “reserve”.

(ii) As pleaded in paragraph 6 above, and paragraphs 80 and 81 below, while the Crown has a fiduciary relationship with Indigenous peoples, not every aspect of the relationship gives rise to a fiduciary duty. This Defendant pleads that no fiduciary duty arose through the period covered by the Statement of Claim. Further, if the Crown was, became, or is, subject to such a duty, this Defendant says that the duty was not breached, and no loss was sustained by the Plaintiff as a result of any breach.

(iii) As pleaded at paragraphs 79.3 to 79.7 below, should there be a basis for Crown liability in fact or law as alleged in the Statement of Claim, such liability could only be based in a duty or duties flowing from the honour of the Crown. Except as identified below, this Defendant pleads that no specific duty flowing from the honour of the Crown arose through the period covered by the Statement of Claim. Further, if the Crown was, became, or is, subject to such a duty, this Defendant says that the duty was not breached, and no loss was sustained by the Plaintiff as a result of any breach.

(iv) This Defendant also states that in all aspects of its relationship with the Plaintiff raised in these proceedings, the Crown has acted honourably and as contemplated by colonial and post-colonial Crown policy in place from time to time, and in accordance with the dictates of the common law and statute law of the day.

7. This Defendant denies the allegations contained in paragraphs 9 and 10 of the Statement of Claim.

8. The Royal Proclamation of October 7, 1763, (issued subsequent to the February 10, 1763 Treaty of Paris that affirmed the sovereignty of the British Imperial Crown over its territories in North America) was a restatement of the principle upon which it conducted its relations with the Indigenous inhabitants of North America.

9. The Royal Proclamation of 1763 was also a policy issued to the Governors of the colonies as to the procedures to be followed in the purchase and sale of the lands occupied by Indigenous people.

10. These procedural requirements were revoked by the *Quebec Act*, 1774, and were replaced by subsequent policies such as Governors Instructions, including but not limited to the 1812 Instructions referred to at paragraph 19 of the Statement of Claim, and by subsequent legislation.

HISTORY

I. Six Nations Settlement on the Grand River

A. Indigenous Occupation of the Grand River Region

11. From at least the early 1700s, the lands around the headwaters of the Grand River in what is now Southern Ontario were occupied by the Anishinaabeg (Chippewa).

12. From at least the early 1700s, the lands south of the headwaters, down to Lake Erie, were occupied by the Anishinaabeg (Mississauga).

13. Some of the Six Nations had been allies of the British Imperial Crown during the War against France and the American Revolutionary War and suffered losses in their traditional territory located in the Mohawk River Valley. When it became apparent that the Revolutionary War was lost, the British Imperial Crown arranged to purchase a tract of land for the Six Nations in what is now Canada.

B. Mississauga Surrender, 1784

14. In 1784, the British Imperial Crown set out to negotiate a surrender from the Mississauga of the land between Lake Ontario, Lake Huron, and Lake Erie in order to give the land to those members of the Six Nations who had been allied to it, and to obtain land for Loyalist settlement. The Six Nations were present during the surrender negotiations between the British Imperial Crown and the Mississauga.

14.1 The Mississauga were not amenable to the British Imperial Crown's proposal to purchase the entire area, but agreed to surrender a portion of the land between the three lakes.

15. On May 22, 1784, the Mississauga agreed to surrender lands from the Head of Lake Ontario or the Creek Waghquata (present-day Burlington Bay) to the River La Tranche (present-day Thames River), then down the river until a south course strikes the mouth of Catfish Creek on Lake Erie (commonly known as the "Between the Lakes Treaty").

15.1 However, the text of the Mississauga Surrender of 1784 did not accurately reflect the Mississauga's intentions with respect to the northern boundary of the surrender, nor did it describe a geographically possible north-west orientation line connecting Burlington Bay to the Thames River.

15.2 The Mississauga signalled this geographical discrepancy to the Crown a few months later, but the matter was only resolved in 1792, when a corrective surrender was executed between the Mississauga and the Crown.

C. Lands Granted to the Six Nations

15.3 On October 24, 1784, Joseph Brant of the Six Nations requested a meeting with Governor Haldimand. A meeting was not possible that day and Joseph Brant was asked to outline the purpose of his visit in writing.

15.4 The next day, Governor Haldimand, who was preparing to depart the colony, provided Joseph Brant with a document under his own seal, authorizing the

Six Nations to occupy and settle on lands along the banks of the Grand River. This document, though not proclaimed publicly or a proclamation by nature, is commonly referred to as the “Haldimand Proclamation” of October 25, 1784. The Haldimand Proclamation did not grant any interest in the lands or the riverbed between the banks of the Grand River.

15.5 Between 1784 and 1792, some Six Nations’ members settled at the Grand River, with the understanding that they could do so from the time of the Mississauga Surrender.

15.6 Until late 1792, while Six Nations’ members settled at Grand River, colonial authorities were unaware of the Haldimand Proclamation.

15.7 Between 1788 and 1791, internal disputes arose within the ranks of the Six Nations who had settled at Grand River with respect to land grants made by Joseph Brant to loyalists, and some members of the Six Nations made requests to the Crown asking the terms upon which the Six Nations held lands.

15.8 On January 4, 1791, Governor Dorchester appointed a five-member committee of the Executive Council to determine the nature of their claims and make a permanent provision for the Six Nations settlers and their descendants.

15.9 On December 24, 1791, the Committee of the Executive Council issued a recommendation that an act of the provincial legislature or a grant under the

Great Seal of the Province be made in favour of the principal Chiefs of the Six Nations on behalf of their nation, or persons in trust for them forever.

15.10 The Constitutional Act, 1791, took effect on December 26, 1791 and divided the Province of Quebec into two provinces, Upper and Lower Canada.

15.11 In or about March of 1792, Lieutenant-Governor Simcoe turned his mind to the recommendation of the Executive Council related to the Six Nations' lands.

15.12 The first order of business consisted of resolving the issues associated with the northern purchase line of the Mississauga Surrender mentioned above at paragraphs 15 to 15.2.

15.13 On December 7, 1792, the corrective surrender was concluded with the Mississauga.

15.14 By clarifying the northern boundary with the Mississauga, and considering the surveys conducted under the auspices of the Committee of the Executive Council appointed in 1791 (in the presence of representatives from the Six Nations and Mississauga), the Crown could establish the boundaries of the land grant to be made to the Six Nations.

15.15 On January 1, 1793, the Executive Council recommended that a grant be made, under the Great Seal of the Province, in favour of the principal Chiefs of the Six Nations, on behalf of their Nations, or persons in trust for them and their

heirs on the Grand River, and directing that the Attorney General prepare a grant to the Six Nations in accordance with the survey.

15.16 In January of 1793, Joseph Brant produced the Haldimand Proclamation to Lieutenant-Governor Simcoe in order to challenge the northern boundary of the tract based on the language employed in the Haldimand Proclamation, which made reference to the head of the Grand River, and to dispute the prohibition in relation to the disposition of land by the Six Nations. The Crown took the position that the grant conformed to its undertaking to allocate lands to the Six Nations within the colony along the banks of the Grand River, which excluded the headwater lands.

15.17 The grant was issued on January 14, 1793, and was later registered in the Office of the Commissioner of Crown Lands in 1837. This instrument, though not a patent by nature, is commonly referred to as the “Simcoe Patent” of January 14, 1793.

15.18 The Simcoe Patent granted to the Six Nations a tract containing 674,910 acres, lying on each side of the Grand River. The Simcoe Patent did not grant any interest in the riverbed between the banks of the Grand River.

II. Land Disposition by the Six Nations (1784-1796)

A. Brant Leases

16. After settling on the Grand River, the Six Nations, aware that the tract of land would not sustain their traditional lifestyle, decided to sell about one-half of the tract, to invest the proceeds, and to convert the balance to agricultural purposes.

17. Joseph Brant, a prominent leader of the Six Nations, began leasing land to Crown loyalists in the late 1780s, but was unable to grant valid title due to the British policy as to the inalienability of land and terms of the Simcoe Patent.

B. Blocks 1 to 6

18. On November 2, 1796, the Six Nations Council gave Joseph Brant a Power of Attorney to formalize his role as agent for their land dealings and to accomplish particular sale transactions in relation to 310,391 acres of land (Blocks 1 to 4). He was authorized:

> to... take such security.. either in his own name or the name of others to be by him...nominated, as he or they may deem necessary for securing the payment...of money due and owing from...purchasers.

19. The British Imperial Crown initially opposed the concept of sale. But between July 24 and 26, 1797, the full Council of the Six Nations met with the President of the Executive Council of Upper Canada ("The President") and authorized the surrender for sale of 381,480 acres of land, which included the lands eventually known as Blocks 5 and 6.

20. Joseph Brant asked for and received an undertaking from the President to confirm the sales by issuing patents to purchasers named by Brant who produced a certificate from the Six Nations trustee that the purchase price had been secured.

21. The Crown accepted the July 1797 surrender by way of an Order in Council dated February 5, 1798, allowing the Six Nations to sell 352,707 acres of its lands (approximately Blocks 1-6), and for the British Imperial Crown to issue patents in accordance with its undertaking.

22. Sometime prior to 1795, the Six Nations promised to give John Dockstader about 21,000 acres on the north side of the Grand River, known as the Block 6 lands. Dockstader fought with the Six Nations in the American Revolutionary War. Benjamin Canby offered to purchase 19,254 acres from Dockstader. Dockstader agreed and sold his interest to Canby and took back a mortgage for the purchase price.

23. Brant agreed and a transfer to Canby was included in the February 5, 1798 surrender. The land was patented to Canby the same day.

24. No mortgage “was taken or intended to be taken” in favour of the Six Nations on the purchase. It was a private mortgage between Canby and Dockstader.

III. Six Nations Trustees

A. Trustees Selected and Appointed by the Six Nations

25. On December 15, 1797, Joseph Brant appointed Colonel William Claus to be one of the Six Nations trustees to receive funds from the sale of the Six Nations lands (the "Six Nations Appointed Trustees"). Claus and his ancestors had close ties to the Six Nations.

26. In 1809, the full Council of the Six Nations appointed William Dickson as their lawyer and gave him 4,000 acres of land as a retainer to transact all necessary business on their behalf and for having previously provided "counsel and advice and done other professional services."

27. On instructions from the Six Nations, William Claus held the securities received from the sale of the Six Nations' lands, made loans, kept accounts, distributed money among the different tribes, and attended at Six Nations Council meetings to advise and explain the transactions. On occasion, he sought guidance from the British Imperial Crown.

28. On August 3, 1826, the Six Nations surrendered 15,360 acres of land as a donation to Claus. The surrender contained the following recital:

> [he] hath been for the last thirty years our trustee, and hath during all that time conducted and managed our affairs with great advantage to our interests, and made profitably available our money without compensation from us whatever.

29. On August 4, 1826, the Six Nations appointed William's son, John Claus, to succeed William in the event of the death of William Claus.

30. On November 11, 1826, William Claus died and John Claus became the Six Nations trustee.

31. The British Imperial Crown delayed in issuing the patent for the 15,360 acres. On June 11, 1829, the Six Nations Council countermanded its direction to issue the patent.

32. John Claus then advised the Six Nations that he:

> intended to withhold annual interest for eight years as a remuneration for his late Father's services in consequence of the donation of land not being confirmed.

33. On October 5, 1829, the Six Nations petitioned the Lieutenant Governor of Upper Canada to endeavour to recover the “rents and documents in Mr. Claus' hands”. The Six Nations instructed William Dickson to conduct the case against John Claus, and to recover the money.

34. On December 1, 1829, John Claus was commanded to appear before the Executive Council. He refused. On February 17, 1830, a Bill was proposed to permit the Crown to retrieve the accounts and sue for the trust assets. The legislation did not pass.

B. Report on the Administration of the Six Nations Trust by William and John Claus

35. On May 14, 1830, a Committee of the Executive Council, chaired by the Chief Justice of Upper Canada (“1830 Executive Council Committee”), considered the matter of the Claus trust. The 1830 Executive Council Committee recommended that “the Crown officers be requested to consider by what means (if

any) the Trust vested in Mr. Claus can be divested, or his authority suspended, and how an account can be obtained of the State of the Trust at Colonel Claus' death."

35.1. With respect to William Claus, the 1830 Executive Council Committee found:

> "that on several occasions in which the affairs of the Trust were under discussion Colonel Claus constantly declared his readiness to submit every thing to the Government and to account for all his receipts, appearing only desirous to be relieved from a duty which he said exposed him to much misrepresentation and which he found irksome and unthankful. The Council did not find in the course of their examination that any dissatisfaction was expressed by the Indians in Colonel Claus' life time except with regard to the delay which had taken place in compelling payment from the purchasers, but how the account actually stood between Colonel Claus and the Indians for the monies actually received in their behalf up to the time of Colonel Claus' decease the Counsel cannot ascertain."

C. Baby, Dunn, and Markland Replace John Claus as Trustees

35.2 On October 14, 1829, the Six Nations Council unanimously resolved to revoke John Claus' position as trustee.

35.3 In Spring of 1830, the Six Nations Council unanimously confirmed J.B. Baby, J. H. Dunn, and G. H. Markland as their trustees.

D. Crown Review of William and John Claus' Accounts and John Claus' Settlement of the Six Nations' Trust

36. In December 1830, John Claus surrendered the accounts, but was unable to repay the money he had withheld since his father's death.

37. William Dickson directed C.A. Hagerman, the Solicitor General, to "act with respect to them [the accounts] on behalf of the Six Nations". Hagerman had

the accounts examined by B. Turquand who produced reports on August 10, 1831 and September 23, 1831. From the Statement of Accounts, which was presented to the Six Nations, it was “supposed” (as some accounts were disputed) that there were £5,641 that should have been paid to the trustees, but had not been paid to the Six Nations.

38. On December 31, 1830, officials of the Province of Upper Canada sought instructions from the Six Nations on an offer of settlement made by John Claus. Claus offered “the whole of his estates and property with a view to their being appropriated to the liquidation of the debt which [he] has incurred by withholding the annual payments for which he was trustee”. The lands that John Claus offered in settlement were lands that he believed he owned as sole heir at law of William Claus. William Claus’ widow, Catherine Claus, also included certain lands in the township of East Hawkesbury as part of the settlement offered by John Claus.

39. The settlement offer was communicated to the Six Nations Council in February and April 1831.

40. On June 6, 1831, John Claus transferred 2,800 acres of land in East Hawkesbury, and 900 acres of land in Innisfil to trustees Baby, Dunn, and Markland. Catherine Claus, on the same date, transferred 1,200 acres of land in East Hawkesbury.

40.1 On October 3, 1832, the Six Nations Council accepted the lands as payment for the Claus’ debt, requested that it be sold at auction, and to be informed of the amount of the proceeds of sale.

41. Throughout the years following, various members of the Claus family pressed the Government and the Six Nations for a grant of the 15,360 acres that had been promised to William Claus. Some members of the Six Nations supported the demand, but the negotiations that ensued proved fruitless.

42. On September 15, 1838, at a meeting of the Six Nations Council, attended by Lieutenant Governor Sir George Arthur, the Six Nations told the Crown they wanted to sell the Innisfil and East Hawkesbury lands, saying that the lands were “not only unproductive but are subjected to taxes”. The trustees began to sell off parcels of the lands. On June 16, 1840, the Executive Council of Upper Canada reviewed offers to purchase certain lots of those lands, determined that “the terms offered appear to be advantageous” to the Six Nations, and authorized their sale.

43. On December 10, 1846, Warren Claus, acting for the Claus family, excepting John Claus, advised the Government that “should the Crown continue to oppose and finally refuse to sanction” the surrender of the 15,360 acres, he would assert a claim to the Innisfil and East Hawkesbury lands, on behalf of the rightful heirs of William Claus. (No claim was made to the lands that had been given by Catherine Claus.)

44. Likely with the knowledge of and upon instructions from the Six Nations, the Crown opposed the claim. In 1852, the Appeal Court of Upper Canada's Queen's Bench held that William Claus’ lands had passed to the residual heirs, not solely to John Claus, who had inherited only a one-quarter interest in those lands.

45. After the decision of the Appeal Court, Government officials examined the options available, consulted with the Six Nations, and determined that it would be best to negotiate with the Warren Claus heirs for the purchase of their three-

quarters interest in those lands. This would free the balance of the lands for sale, and would also prevent lawsuits from those who had already purchased parcels of the Innisfil and East Hawkesbury lands.

46. The Six Nations demanded that the Crown pass legislation to extinguish the title of the Warren Claus heirs, but the Crown did not comply.

47. On December 3, 1852, the Warren Claus heirs agreed to accept £5,000 in return for a release of their interests in the Innisfil and East Hawkesbury lands, and the 15,360 acres. The payment was made from Six Nations' funds.

48. Subsequently, the balance of the Innisfil and East Hawkesbury lands were sold. The result was an elimination of the Claus trust debt, and at least a partial elimination of the costs incurred in clearing the title.

E. Selkirk Mortgage (Block 5)

49. The Six Nations approved the sale of Block 5 to the Earl of Selkirk at a Council meeting of May 29, 1807. Letters Patent were issued on November 18, 1807, and due to an error in the metes and bounds description, were reissued on April 14, 1808.

50. The Six Nations, likely through William Dickson, arranged for security to be given for the sale. By indenture dated January 15, 1808, Selkirk gave a mortgage to William Claus to hold as one of the Six Nations Appointed Trustees. The mortgage, according to some historical evidence, was payable in full in one year.

51. Selkirk later defaulted on the mortgage and the land was taken by a creditor, sold, subdivided, and conveyed to others. To the knowledge of this Defendant, the mortgage was not registered.

52. After 1831, trustees Baby, Dunn and Markland assumed the management of the Selkirk mortgage from John Claus. The Crown took numerous steps to enforce the mortgage, and was partially successful in collecting on it. In 1861, the Province of Canada assumed the mortgage as an asset of the Six Nations; historical documents characterize the mortgage as being, at that time, a doubtful asset.

F. Accounting to the Six Nations by J.H. Dunn

52.1 From 1831, trustee J. H. Dunn published the accounts of the Six Nations and distributed them to the Six Nations. In 1849, the Six Nations trust fund records were centralized within the Indian Department; these records run to the present. They have been available to the Six Nations at the National Archives of Canada, Crown-Indigenous Relations, and Northern Affairs Canada. From 1952 to 1982, the Six Nations were given copies of trust accounting records and, since 1981, have received monthly financial reports.

IV. Grand River Navigation Company

53. The Grand River Navigation Company was incorporated on January 28, 1832 to open navigation on the Grand River between Dunnville and Brantford, thereby opening up trade routes from the heart of Southwestern Ontario to Detroit and Buffalo. John Colborne, the Lieutenant Governor of Upper Canada, believed

that such an effort would greatly increase the value of Six Nations' lands. Private investors expected that the stocks of the Company would be profitable.

54. In 1834, Colborne advised the Six Nations Council of his recommendation to take stock and obtained the consent of the Council before investing Six Nations' funds in the stock.

55. From 1834 to 1847, the Six Nations invested approximately $160,000.00 in the Company. The project proved to be unprofitable and the investment was lost.

56. The Six Nations petitioned the Crown for redress. The Federal Crown at all times denied liability for the loss; however, about January 1925, it met with the Six Nations in an effort to address their concerns.

57. The Federal Crown offered to make annual grants for roads and other public purposes on the reserve, gradually compensating for the investment loss.

58. Accordingly, from 1925 to 1932 funds were appropriated by Parliament for public purposes such as roads, a hospital, and an electric plant for a total of $164,938.61 and paid towards improvements on the Six Nations' reserve.

V. Land Disposition by the Six Nations (1830-1850)

59. The period 1830-1840 in Upper Canada was characterized by political agitation, reduction in immigration, commercial and monetary crisis, rebellion, and invasion. Crown disposal of Six Nations' lands was slow. Funds from Britain to manage Indian affairs had been substantially reduced and further reductions were being contemplated. The increasing encroachment by settlers on Six Nations' land

raised significant concerns for both the Crown and the Six Nations in the decade preceding the January 18, 1841 surrender.

A. Presence of Settlers on Six Nations' Lands

60. Throughout the period covered by this claim, multiple circumstances led to settlement on Six Nations' lands. Proclamations were issued warning settlers against settling on Six Nations' lands. However, individual Six Nations' members and Chiefs allowed settlers unauthorized possession of Six Nations' lands, undermining efforts to curb encroachment.

60.1 In 1832, James Winniett succeeded John Brant as Superintendent of the Six Nations. That same year, he was instructed by the Superintendent of Indian Affairs, James Givins, to determine the number of people who occupied Six Nations' lands without authority and to take measures to remove them.

60.2 On January 31, 1833, the Six Nations Council agreed to lease lands occupied by settlers on the lower parts of the Grand River, from Talbot Road to the mouth of the Grand River.

60.3 On February 8, 1834, portions of the lands described above, were surrendered by the Six Nations. The lands surrendered formed the Township of Dunn and parts of the Townships of Moulton, Canborough, and Cayuga.

60.4 In 1835, the Six Nations agreed to surrender lands held by settlers under "Brant leases" in order to regularize title on lands granted and leased by Joseph Brant beginning in the late 1780s.

60.5 On December 12, 1838, Winniett reported the presence of three classes of “intruders” on Six Nations’ lands: those who occupied the land through leases made by Six Nations’ members, those who purchased improvements on unsurrendered lands, and those who squatted on the lands without lease or title.

61. In 1838, the Six Nations Council sought action by the government against both the squatters who bought land and the members who sold it. Both the government and some of the Six Nations’ membership were reluctant to punish individual members of the Six Nations who disposed of lands.

62. In 1839, the Province of Upper Canada enacted the *Act for the Protection of Lands of the Crown in this Province, from Trespass and Injury*, S. Prov. U.C. 1839 (2 Vict.), c. 15 (“1839 legislation”), which provided for the appointment of Commissioners to investigate and take measures for the summary removal of persons unlawfully in possession of lands within the province. The law provided for penalties including a jail term and fines. Starting in January of 1840, a number of individuals were charged and convicted pursuant to the *1839 legislation*.

63. In July 1840, the government instructed lawyer John Gwynne to inspect the Six Nations’ lands and make recommendations. Gwynne was to investigate claims and obtain information regarding persons unlawfully in possession of Six Nations’ lands, and initiate proceedings against them when advisable. Some settlers were removed as part of this process.

64. Gwynne delivered a report to the Executive Council in September 1840, in which he recommended that Six Nations’ members voluntarily move to a smaller tract that could more easily be protected against encroachment, and surrender the remainder of the lands.

65. [Deleted]

66. On November 27, 1840, the Executive Council made a number of recommendations regarding the valuation and sale of Six Nations' lands. Noting the continued difficulties of keeping settlers off the lands, the Executive Council recommended that the Six Nations surrender the whole tract with the exception of any part they chose to occupy as a concentrated body. Thereafter, the Government posted three public notices warning settlers about the consequences of squatting within the proposed boundaries of the remaining Six Nations' lands.

66.1 On January 5 and 15, 1841, the Government wrote to the Six Nations to propose that they select a tract to occupy as a concentrated body and surrender the remainder of their lands. On January 22, 1844, the Government warned settler families living on the south side of the Grand River, between the townships of Brantford and Dunn, to remove themselves or risk being prosecuted.

B. 1841 Surrender

67. On January 18, 1841, the Six Nations Council agreed to the surrender of all of their lands, with certain exceptions, with a view to those lands being disposed of for the benefit of the Six Nations.

68. Following the surrender, a faction of the Six Nations sent the government petitions objecting to the surrender. They asserted that the Six Nations had been deceived or intimidated into consenting and that the proposal had not been properly explained. Other factions supported the surrender.

69. All factions of the Six Nations agreed to dispose of lands that they did not occupy. Objections concerned the extent and location of the lands to be selected for the use and occupation by the Six Nations following the 1841 surrender. The government, while maintaining that the 1841 surrender was valid, continued detailed negotiations with the Six Nations to ensure that the interests of all factions were considered.

70. In 1842, the government appointed the Bagot Commission to investigate and make recommendations for the future management of the Indian Department. The Six Nations made representations to the Commission, in particular stating that it wanted to retain at least 50,000 acres of land for its use and occupation.

71. In a petition forwarded to the Executive Council on June 24, 1843, the Six Nations reiterated its request, identifying lands they wished to retain for their use and occupation and lands they wished to lease, including the Oxbow, Eagles' Nest, Martin's Tract, and Johnson Settlement. The balance of their lands was to be sold.

72. On October 4, 1843, the Executive Council responded to the June 24, 1843 petition. The Executive Council acknowledged that it had no wish to obtain a surrender "against the free wish of the Indians themselves" and accordingly acceded to the Six Nations' request as an interim measure.

73. In 1844, the Governor General appointed David Thorburn as a Special Commissioner for the adjustment of questions relating to the Six Nations.

73.1 In 1847, the Six Nations and Mississaugas of the Credit made an arrangement for the settlement of the Mississaugas of the Credit on 6,000 acres of Six Nations lands.

74. From 1844 to 1848, the Six Nations held numerous Council meetings and made representations to the Governor General regarding which of their lands should be retained and which should be sold. In 1850, the Crown issued a Proclamation under the *Indian Protection Act*, 13-14 Vic. c. 74. The Proclamation set out the extent of the land reserved for the use and occupation of the Six Nations that reflected the decisions made by the Six Nations Council, including its decision to retain approximately 50,000 acres and confirmed that the provisions of that Act would apply to those lands. The lands reserved for the use and occupation of the Six Nations extended to the edge of the waters of the Grand River and did not include the riverbed.

74.1 In 1860, the British Crown transferred the administration of Indian Affairs to the Province of Canada. Pursuant to the *Act respecting the Management of the Indian Lands and Property*, S.C. 1860, c. 151, all lands reserved for the Indians, or for any tribe or band of Indians, or held in trust for their benefit was deemed to be reserved and held for the same purpose as before the passing of the Act by the Commissioner of Crown Lands.

VI. Six Nations' Reserve Lands

74.2 After confederation, the lands reserved for the use and occupation of the Six Nations were deemed to be reserved and held for the same purposes as before, but subject to the provisions of the *Act providing for the organisation of the*

Department of the Secretary of State of Canada, and for the management of Indian Ordnance lands, S.C. 1868, c. 42 (31 Vict).

74.3 The *Indian Act*, 1876, S.C. 1876, c. 18 (39 Vict.), was the first Act to define the term “reserve”:

> 6. The term “reserve” means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered, and includes all the trees, wood, timber, soil, stone, minerals, metals or other valuables thereon or therein.

74.4 Major constitutional disputes emerged in relation to this definition, which were ultimately decided by the Judicial Committee of the Privy Council (“JCPC”) in 1888 (*St. Catherines Milling and Lumber*, [1889] 14 A.C. 46 (P.C.)) and 1921 (*Star Chrome Mining Co.*, [1921] 1 A.C. 401 (P.C.)). The JCPC found that Parliament has authority to legislate in relation to Indians and Lands reserved for Indians, and the beneficial interest (property) in those lands rests in the Provincial Crown, rather than the Federal Crown. Canada has authority to accept a surrender to the Crown, but has no power to dispose of the lands, nor does it have ownership over the proceeds of sale – the provinces do.

74.5 In the aftermath of these decisions, an agreement was reached between Ontario and Canada, whereby Canada would have full power and authority to sell, lease, and convey title to surrendered reserve lands to third parties for the benefit of the band(s), subject to some exceptions. The agreement also confirmed conveyances made prior to its execution. It received reciprocal legislative implementation pursuant to the *Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, S.C. 1924, c. 48 and *The Indian Lands Act*, 1924, S.O. 1924, c. 15.

74.6 While the *Indian Act* definition of “reserve” has remained relatively unchanged over time, its legal meaning must be read in conjunction with the above noted historical and legislative backdrop.

74.7 Today, the Six Nations reserve is administratively known as Reserves 40 and 40B.

74.8 The Mississaugas of the Credit reserve is administratively known as Reserve 40A.

RESPONSE TO CLAIMS

I. Historical Indigenous Presence in the Grand River Area

75. This Defendant denies the allegations in paragraphs 11 to 13 of the Statement of Claim. This Defendant admits that some of the Six Nations may have intermittently occupied some of the lands that are the subject of this action in the 1600s, after dispersing the Huron, Petun, and Neutral, who previously occupied those lands, but says that if so, they were driven out of the area in the latter part of that century by the Anishinaabeg. By the 1700s, the Mississauga occupied the lands of Southern Ontario that are the subject of this action.

II. Lands Granted to the Six Nations

76. This Defendant denies the allegations in paragraphs 14 to 18 of the Statement of Claim.

77. This Defendant denies that the Haldimand Proclamation constitutes a treaty within the meaning of section 35 of the *Constitution Act, 1982* and says that

it was a unilateral declaration by the British Imperial Crown that certain lands would be allocated to the Six Nations.

78. Both the Haldimand Proclamation and the Simcoe Patent use clear and unambiguous language linking the grant to the Six Nations to the surrender given by the Mississauga. Furthermore, while the instruments provided to the Six Nations are commonly referred to as the “Haldimand Proclamation” of October 25, 1784, and “Simcoe Patent” of January 14, 1793, this Defendant specifically denies that these instruments are, respectively, a proclamation or patent.

79. The Simcoe Patent fully implemented the British Imperial Crown’s intention to make lands available within the colony to the Six Nations for settlement. This Defendant says that the Six Nations received possession of all of the land given to them by the British Imperial Crown intended for their use and occupation in the Haldimand Proclamation and the Simcoe Patent. The Simcoe Patent did not grant any interest in the riverbed between the banks of the Grand River.

79.1 This Defendant specifically denies that the Haldimand Proclamation and Simcoe Patent had the effect of creating a “reserve” for the Six Nations or that these instruments gave rise to an obligation on the British Imperial Crown, the Province of Upper Canada, the Province of Canada or this Defendant to set the lands apart as a “reserve” as described at paragraphs 14.1 to 15.1 of the Statement of Claim.

79.2 Rather, the Simcoe Patent officially confirmed a grant made collectively to the Six Nations and imposed limitations on the disposal of lands by the Six Nations to anyone but the Crown, under penalty of lawful repossession, by the Crown for itself, its heirs, and successors. The grant did not create, in the 18th

century, a “reserve” as the term is understood today, nor did the Six Nations’ interest in the lands give rise, at the time, to the specific Crown duties that developed through policy and legislation in the latter part of the 19th century, as further described below.

III. Crown Duties

79.3 This Defendant acknowledges that the Crown is, and has been, in a relationship with the Plaintiff that developed through historical interactions and arrangements as pleaded in this Statement of Defence, but says that the Defendant named in this action did not participate in these interactions and arrangements. Nevertheless, with respect to pre-confederation historical arrangements, the Crown is presumed to have acted honourably and in a manner that was consistent with, and upheld, the honour of the Crown.

79.4 Further, this Defendant states that throughout the pre-confederation period, the relationship between the Crown and the Plaintiff continuously evolved, was affected by, and reflected substantial changes in military, political, social, economic, demographic and legal considerations, events and circumstances.

79.5 In this time of societal upheaval, the Crown attempted to balance Indigenous and non-Indigenous interests, while developing its own public-oriented participation in the types of transactions that may appear private by present day standards, and conducted itself in accordance with its colonial policies and the common law.

79.6 This Defendant states that in all relevant periods, the exercise by the Crown of its prerogatives or other Crown conduct upheld the honour of the Crown

and met any duty flowing therefrom, and reflected either common law standards of the day or was pursuant to prevailing legislation.

79.7 In addition, and in the alternative, this Defendant states that if Crown conduct in all relevant periods is now determined to have constituted a failure, at any particular time, to uphold the honour of the Crown or breach a duty flowing therefrom, any such deficiencies were addressed by the pre- and post-confederation Crown and by colonial and post-confederation legislatures. This was done through measures that included the formal statement of Crown policies, the establishment from time to time of responsive legislative committees and commissions of inquiry, orders in council, the passage of legislation, and other measures.

80. It is admitted that there is today a fiduciary relationship between this Defendant and the Indigenous peoples of Canada. However, not every aspect of the relationship between a fiduciary and a beneficiary gives rise to a fiduciary duty.

81. In light of the early history covered by the Statement of Claim, characterized by a gradual strengthening of Crown administration and control over the affairs, lands, and assets of the Six Nations, this Defendant denies paragraphs 20 to 24 of the Statement of Claim. The Plaintiff is put to the strict proof of establishing that there was a fiduciary duty or any other specific duty flowing from the honour of the Crown on the facts of any specific transaction, and that the British Imperial Crown, the Province of Upper Canada, the Province of Canada, or this Defendant failed to discharge those duties, or is otherwise responsible for any damages incurred prior to confederation.

81.1 In 1950, certain issues concerning the liability of His Majesty the King in Right of Canada to the Six Nations for any damages incurred prior to the *Act of Union,* 1840, were determined in *Miller v. The King*, (1950] S.C.R. 168, affirming [1948] Ex. C.R. 372. From 1950 until 1995 when the Statement of Claim in this action was issued, the Plaintiff did not litigate this claim. Canada does not plead this fact as a bar, but states that it is a circumstance that should be taken into consideration in determining the existence of, or nature of, any duty or breach of duty and in fashioning an appropriate remedy for it.

IV. Brant's Power of Attorney

81.2 In response to paragraphs 24.1 and 24.2 of the Statement of Claim, this Defendant defers to the terms of the power of attorney given to Joseph Brant by the Six Nations Council on November 2, 1796, and denies the remainder of the paragraphs.

81.3 This Defendant denies the allegations in paragraph 24.3 of the Statement of Claim and states that the Crown did not owe the alleged duties to the Six Nations at the time. The Six Nations' trustees, not the Crown, were at all times responsible for managing the mortgages, collecting payments from third party purchasers, and investing the proceeds of sale.

V. Blocks 1 to 6

81.4 This Defendant denies the allegations contained in paragraph 24.4 of the Statement of Claim. As outlined in paragraph 19 above, at meetings held from July 24 to 26, 1797, the Six Nations Council authorized the surrender for sale of 381,480 acres of land to the Crown (including Blocks 1-6) and maintained Joseph Brant as their representative.

81.5 This Defendant denies all the allegations in paragraphs 24.5 to 24.6 and 30.1 to 30.2 and states that the Crown did not owe the alleged duties at the time.

VI. The Claus Trust

82. This Defendant specifically denies the allegations contained at paragraphs 33, 33.1, 34, 35, 43 and 43.1 of the Statement of Claim.

82.1 In denying the allegations in paragraphs 33, 34, and 35 of the Statement of Claim, this Defendant states, as outlined in paragraphs 35 to 35.2 above, that the 1830 Executive Council Committee did not find that William Claus had misappropriated or mismanaged trust funds. To the contrary, it found that William Claus had served reluctantly as a trustee appointed by the Six Nations for years; and that during his service there was never a complaint from the Six Nations; that he would not have failed to render accounts upon request of the Six Nations; and that it was likely such accounts were rendered and in their possession. The 1830 Executive Council Committee concluded that in the "whole of these proceedings it is material to consider in reference to the manner in which the Trust has been performed by Colonel Claus, as he vindicates himself distinctly and with earnestness upon the several points on which he heard his conduct had been questioned".

83. This Defendant says that the Plaintiff has pleaded no basis on which a fiduciary duty could be imposed on the British Imperial Crown or the Province of Upper Canada. Further this Defendant says that William Claus and John Claus were trustees appointed and instructed by the Six Nations, and that officials of the Province of Upper Canada were at all times acting upon the request of the Six Nations to assist it in the matter of recovering its records, and did so.

84. While it is denied that there was any fiduciary duty to pursue a full accounting from the Claus estate, this Defendant says that if there had been, that duty was discharged when such records as were made available by John Claus, were provided to the Six Nations through their lawyer, and at their Council meeting held on September 28, 1831.

85. In any event, there are no such records extant today, to the knowledge of this Defendant, which would permit such an accounting to be done, except those already in the possession of the Plaintiff.

85.1 In denying the allegations in paragraph 33.1, this Defendant states, as indicated in paragraph 26 above, that the Six Nations granted the 4,000 acres to Williams Dickson for his past professional services to them and as a retainer "to transact all necessary business on their behalf."

85.2 In response to the allegations in paragraph 36 of the Statement of Claim, which are denied, this Defendant states, as outlined in paragraphs 38 to 40.1 above, that the Crown sought and received the Six Nations' acceptance of John Claus' offer to transfer his Innisfil and East Hawkesbury lands and Catherine Claus' East Hawkesbury lands. These lands were transferred to trustees Baby, Dunn, and Markland, whose appointments were unanimously approved by the Six Nations Council in April and June 1830, as outlined in paragraph 35.2, above.

86. With respect to the allegation at paragraph 37 of the Statement of Claim, this Defendant denies that the British Imperial Crown or the Province of Upper Canada owed any such duty as a fiduciary. Officials of the Province of Upper Canada were requested by the lawyer of the Six Nations to act with respect to the accounts, and did so, after consulting with the Six Nations as to the settlement.

87. In the alternative, if there was any such fiduciary duty, which is denied, officials of the Province of Upper Canada discharged the obligation in a manner consistent with the standards of the day by using reasonable efforts in the best interests of the Plaintiff by negotiating the repayment of the debt, in difficult circumstances, with the result that there was a substantial if not complete retirement of the debt.

87.1 This Defendant denies the allegations in paragraph 38 and 39 of the Statement of Claim and states, as outlined in paragraphs 40 and 42 above, that on September 15, 1838, the Six Nations requested that the Innisfil and East Hawkesbury lands be sold because they were unproductive and subject to taxes. The Executive Council determined that the terms of sale offered "appear to be advantageous" to the Six Nations. The trustees held these lands on behalf of the Six Nations.

87.2 This Defendant admits the allegations in paragraph 40 of the Statement of Claim.

87.3 In response to the allegations in paragraph 41 of the Statement of Claim, this Defendant admits that the Province of Upper Canada undertook the defence of the action in *Dickson and Gross* (referred to in paragraph 40 of the Statement of Claim) and the costs of the action and other expenses were paid out of the Six Nations' trust, but denies the remainder of the paragraph.

87.4 In response to the allegations in paragraph 42 of the Statement of Claim, this Defendant admits that the Crown withdrew £5,000 from the Six Nations trust to pay the beneficiaries of the Colonel William Claus' estate but denies the remainder of the allegations in that paragraph.

VII. Block 5 (Selkirk Mortgage)

88. This Defendant denies the allegations in paragraphs 25 to 30 of the Statement of Claim.

89. The Selkirk mortgage was negotiated and arranged by William Dickson with Selkirk's agent. Responsibility for collecting payments was given to the Six Nations Appointed Trustees.

90. After 1831, trustees Baby, Dunn, and Markland made many attempts to collect payments and were partially successful. The mortgage was otherwise uncollectible. Historical documents relating to the collection of the mortgage are in the possession of the Plaintiff, or are available in archives to the Plaintiff, as they are to the Defendants; or they no longer exist.

VIII. Block 6 (Canby Mortgage)

91. This Defendant denies the allegations in paragraphs 31 and 32 of the Statement of Claim.

92. This Defendant says that the mortgage was a private matter between the estates of the parties to the mortgage, not involving the Crown or the Six Nations.

IX. Welland Canal Flooding

92.1 In response to paragraphs 44 to 50 of the Statement of Claim, this Defendant says the following:

92.2 In 1829, the Directors of the Welland Canal Company (the “WCC”) resolved to build a dam upstream from the mouth of the Grand River for the purpose of a feeder canal to provide water to the Welland Canal. The Lieutenant Governor consented to the construction of the dam and the Six Nations were advised that the directors of the WCC would compensate all persons who sustained any loss from resulting flooding. The dam was constructed in 1829. The height of the dam was periodically raised between 1829 and approximately 1835.

92.3 In 1834, Lewis Burwell, Deputy Provincial Land Surveyor of Upper Canada, reported on his survey of lands flooded by the dam. He found that, as of 1834, a total of 2,393.65 acres had been flooded in the Townships of Cayuga and Dunn, and deducted 400 acres, which were private property. On this basis, he calculated that the WCC should pay compensation to the Six Nations for the remaining 1993.65 acres of flooded land.

92.4 Various attempts were made to value the lands flooded by the construction of the dam. James Cowan, an arbitrator with the Dominion Board of Arbitrators, considered this question in 1882 using 1842 land values to conclude that the average price per acre was $4.23, making the total value of the 1993.65 acres flooded $28,672.67.

92.5 Six Nations received compensation for improvements damaged by flooding, but did not receive compensation for the flooded land itself. Post-Confederation, it was unclear whether it was the Crown in right of Canada or of Ontario that was to be responsible for the outstanding flooding-related damage. On behalf of Six Nations, the Dominion of Canada presented the Welland feeder canal claim against the provinces of Ontario and Quebec before the Dominion Board of

Arbitrators in 1895. Six Nations' claim was dismissed by the arbitrators without reasons.

92.6 From 1895 onwards, compensation for the flooded lands was still not paid by either Canada or Ontario. This Defendant says that as a matter of honour of the Crown principles, the lapse in time that occurred after the 1895 arbitration does warrant an appropriate remedy that is reconciliatory, reparative of the damage as it relates to this Welland feeder canal claim, and restorative of the Crown-Six Nations relationship. Any such remedy must be fashioned in the context of this case as a whole and requires an analysis of the pre-Confederation context referred to in paragraphs 59 and 79.3 to 79.7 above in order to determine:

- the nature and scope of the Crown duty or obligation that arose;
- the nature and circumstances of the breach;
- the remedy warranted by the breach; and
- if such liability is shared, which respective level of government bears the burden of responsibility for any such remedy or any proportion thereof.

92.7 In particular response to paragraph 44 of the Statement of Claim, this Defendant says that at most 2,400 acres of lands flooded by the dam were Six Nations' lands and that no Six Nations' lands were flooded in relation to the feeder canal and Dunnville Dam.

93. In 1950, issues raised in this Welland feeder canal claim were adjudicated by the Supreme Court of Canada in *Miller v. The King*, [1950] S.C.R. 168, affirming [1948] Ex. C.R. 372. The petition was dismissed because it did not

assert any valid grounds upon which Canada could be held liable for actions that took place prior to 1840. From 1950 until 1995, when the Statement of Claim in this action was issued, the Plaintiff did not litigate this claim. Canada does not plead this fact as a bar, but states that it is a circumstance that should be taken into consideration in determining the existence of or nature of any duty or breach of duty and in fashioning an appropriate remedy for it.

93.1 In response to paragraph 47.1 of the Statement of Claim, this Defendant admits that the Six Nations were not compensated for the flooded lands, as indicated in paragraphs 92.5 to 92.7 above, and denies the remainder of the paragraph.

94. In any event, if there is any Crown liability for damages or other remedies for this claim, it is not the liability of this Defendant.

X. The Grand River Navigation Company

95. This Defendant denies the allegations at paragraphs 51 to 53, and 55.1 of the Statement of Claim.

96. While it is admitted that Colborne recommended the investment to the Six Nations, it was believed that the stocks would be profitable and that the project would greatly enhance the value of Six Nations' lands. The investment was made with the knowledge and consent of the Six Nations.

97. In any event, His Majesty the King in Right of Canada paid the Six Nations the sum of $164,938.61 between 1925 and 1932 by way of improvements to its reserve.

98. [Deleted]

99. This Defendant denies the allegations in paragraphs 54 and 55 of the Statement of Claim and states that the land was patented to the Grand River Navigation Company ("GRNC") pursuant to Article III of *An Act to Incorporate a Joint Stock Company, to Improve the Navigation of the Grand River*, Chap. XIII. 2nd Year William IV, 1832.

100. The GRNC compensated the Six Nations for the land by crediting the Six Nations' account for subscribed shares in the amount of £368.14 provincial currency.

101. In 1950, issues raised in this GRNC appropriation claim were adjudicated by the Supreme Court of Canada in *Miller v. The King*, [1950) S.C.R. 168, affirming [1948] Ex. C.R. 372. The petition was dismissed because it did not assert any valid grounds upon which Canada could be held liable for actions before 1840. From 1950 until 1995, when the Statement of Claim in this action was issued, the Plaintiff did not litigate this claim. Canada does not plead this fact as a bar, but states that it is a circumstance that should be taken into consideration in determining the existence of, or nature of, any duty or breach of duty and in fashioning an appropriate remedy for it.

102. In any event, if there is any Crown liability for damages or other remedies for this claim, it is not the liability of this Defendant.

XI. Land Surrenders of the 1830s and 1840s

103. This Defendant specifically denies the allegations in the Statement of Claim relating to a breach of fiduciary duty arising from surrenders of Six Nations'

lands in the 1830s and 1840s. As a result of a process of consultation and consent no Six Nations' lands were sold without the consent of the Six Nations Council.

104. This Defendant further says that the Crown complied with all relevant Governor's instructions and other policies respecting consensual alienation of the Six Nations' interest in their lands, and further in the alternative says that in any event a Court is not bound to enforce strict compliance with policy.

A. Brantford Tract and Brantford Township

105. With respect to the allegations in paragraphs 56 to 57 of the Statement of Claim, this Defendant denies that there was any duty on the Province of Canada as a fiduciary or otherwise, to sell these lands at set valuations or in accordance with sale conditions established from time to time by officials of the Province of Canada.

106. Alternatively, officials of the Province of Canada acted reasonably and in the best interests of the Six Nations in establishing a regime for the sale of these lots that was well-founded and flexible, allowing for change to deal with exigencies, all of which was for the benefit of the Six Nations. Accordingly, the Crown discharged any fiduciary duty that might have been imposed by its undertaking to dispose of the lands for the benefit of the Six Nations.

107. Further in reply to the allegations in paragraph 56 of the Statement of Claim, this Defendant denies that there was any duty on the Province of Canada as a fiduciary or otherwise, to compensate for lands "otherwise transferred." It was implicit that the sale price of any land sold took into account the value of lands "otherwise transferred".

107.1 In particular response to the allegations contained in paragraph 56.1 of the Statement of Claim related to records and accounts, this Defendant denies that the Crown was at all times responsible for maintaining records and accounts, and adds that contemporaneous records and accounts were kept in accordance with the practices and standards of the day.

107.2 In particular response to the allegations contained in paragraph 56.2 of the Statement of Claim, this Defendant says that, in any event, the Crown took measures to protect the Grand River tract, including by investigating the circumstances of the occupation by settlers of Grand River tract lands, enacting legislation, and removing a number of them, where appropriate. With the consent of the Six Nations, lands were surrendered, surveyed, subdivided, and sold for their benefit.

B. Talbot Road Lands

108. This Defendant denies the allegations in paragraphs 58.l to 58.11 of the Statement of Claim and says that at the time of the surrender of the Talbot Road lands, the Six Nations were aware that the lands were to be subdivided into 200 acre lots for sale, and that in any event no objection was taken to the sale of 200 acre lots at the time the lots were being sold.

109. At the time of the surrender of the Talbot Road lands or shortly thereafter, the Six Nations requested that some of the surrendered lands, be retained rather than sold, so that their “people living on either side of the Grand River would not be disturbed”. The Crown complied with this request to the satisfaction of the Six Nations, by exempting from sale lots 29 to 35 located immediately on either side of the banks of the Grand River.

109.1 On February 1, 1833, the Six Nations consented to the sale of several lots on the banks of the Grand River that had previously been exempted from sale for the establishment of a village to be located near a bridge that was to be constructed in the area. The village and bridge, respectively, were to become the Cayuga Townplot and Cayuga Bridge.

109.2 As pleaded at paragraph 60.3 above, lands south of the Talbot Road lands and forming part of Cayuga Township were surrendered on February 8, 1834.

110. In particular response to paragraph 58.11 of the Statement of Claim, this Defendant says that the Crown sought and received the consent of the Six Nations to surrender lands for the purpose of establishing Talbot Road and complied with their request to retain lots on the banks of the Grand River. The Six Nations also consented to the sale of lands for the later establishment of the Cayuga Townplot. These lands were then surveyed, subdivided, and sold for the benefit of the Six Nations.

C. Hamilton/Port Dover Plank Roads Lands

111. This Defendant denies the allegations in paragraphs 59 and 60 of the Statement of Claim. This Defendant says that the Six Nations consented to the lease of the subject lands at Six Nations Council meetings on January 16 and 29, 1835. However, the Lieutenant Governor of Upper Canada, Sir Francis Bond Head, would not accept the Council's decision to surrender the subject lands for lease.

112. The Six Nations surrendered the subject lands for sale on January 18, 1841. The Six Nations affirmed their decision to sell in their petition to the

government of June 24, 1843. In the petition, the Six Nations selected lands they wished to retain for their use and occupation, and sought to have most of the balance, which included the Plank Road lots, sold. The government accepted the decision by an Order in Council of October 4, 1843. The Six Nations re-affirmed their decision to sell the subject lands at a Council meeting on December 18, 1844.

D. Port Maitland Lands

113. This Defendant denies the allegations in paragraphs 61 to 63, and in particular the allegation that the subject lands were taken for military purposes under *An Act to authorize Her Majesty to take Possession of Lands for the erection of Fortification in this Province, under certain restrictions*, S.U.C., 1840, c. 16.

114. This Defendant says that no decision was made in 1840, as alleged, to reserve the Port Maitland Lands for military purposes. In 1840, the Executive Council of Upper Canada merely postponed any decision on the matter pending consultation with the Ordnance Department on the need for a reserve in the area.

E. Surrenders of 1841 and Selection of Lands for the Use and Occupation of the Six Nations

115. This Defendant denies the allegations in paragraphs 63 to 73.7, particularly the allegation in paragraph 71 that the Crown granted letters patent for the Johnson Settlement lands contrary to the wishes of the Six Nations. This Defendant says that the Six Nations consented to the surrender and sale of these lands. The consent was given after the Six Nations had thoroughly discussed the matter at various Council meetings between 1840 and 1844, and after the Crown dealt with the objections and concerns of the Six Nations. More particularly, the

Six Nations consented to the sale of these lands at a Council meeting held on December 18, 1844.

116. In particular response to paragraph 73 of the Statement of Claim, it is admitted that the Crown discharged William Jarvis as Chief Superintendent of Indian Affairs following the report of the Bagot Commission. The Commission noted that it had been asserted that Jarvis had been negligent in his management of the Indian fund, and recommended that an accounting be demanded of Jarvis.

117. In response to paragraph 73.1 of the Statement of Claim, an accounting was demanded and conducted by Jarvis and by Crown accountants. These documents are a matter of public record.

XII. Management of Trust Funds and Accounting

118. This Defendant denies paragraphs 14.3, 23(c), 23(f), 23(g), 74 to 75 and 82 to 83 of the Statement of Claim, and says that the Crown was neither involved in, nor responsible for, the management, distribution, and disbursement of the Plaintiff's lands, proceeds of sale, or funds throughout the period covered by this claim and adds that to the extent it became responsible for same, the duties were conducted and discharged in accordance with the standards of the day and as mandated by the applicable legislation at the time.

119. With respect to the Plaintiff's claim for an accounting of all lands and moneys that the Plaintiff had, or should have had, or now has, from 1784 to date, this Defendant says:

> 1. Prior to 1831, the Plaintiff managed their own funds through their own trustees. In 1831, officials of the Province of

Upper Canada, at the request of the Six Nations, prepared and produced an account of the Claus trust.

2. From 1831 to 1847, J.H. Dunn, trustee for the Six Nations and Receiver General of Canada, published the accounts of the Six Nations and distributed them to the Six Nations.

3. In 1849, the Six Nations trust fund records were centralized within the Indian Department; these records run to the present. They have been available to the Six Nations at the National Archives of Canada and the Indian Department.

4. The Six Nations have been given copies of trust accounting records from 1952 to 1982.

5. Since 1981, all First Nations receive monthly financial reports from the Government of Canada.

120. This Defendant therefore says that the Plaintiff is not entitled to an accounting as all money held for Indian Bands is placed in the Consolidated Revenue Fund, which holds all public funds collected by the federal government. As such, there is no specific proprietary interest in the money, although the government is obliged to pay an equivalent sum.

121. Further, a court has no jurisdiction to direct the manner in which funds are distributed, as they are distributed within a legislated mandate. Alternatively, if the Plaintiff is entitled to an accounting and if the court finds it has such jurisdiction, this Court ought not to order an accounting that, because of the number of transactions, the management of the Plaintiff's affairs by non-Crown trustees at certain periods, and the number of centuries that have passed, will be inordinately expensive for all Parties, and is not likely to yield full answers or implicate the Crown.

122. [Deleted]

XIII. Natural Resources

123. This Defendant denies the allegation in paragraph 76 of the Statement of Claim. This Defendant states that the Six Nations had full knowledge of the extraction of natural resources by third parties and received full compensation for such removal. Specifically, the Six Nations had knowledge of and gave explicit consent to such extraction during the impugned period.

124. With respect to paragraph 77 of the Statement of Claim, this Defendant denies that the surrender was for 20 years but states that it was for the purpose of giving effect to the proposal made by Senator Edward Michener by letter dated March 4, 1925. In his proposal, Michener made an offer to the Six Nations to drill for oil on their reserves and asked for a lease that would enable him to extract oil so long as oil could be produced in commercial quantities. This offer was accepted by a Band Council Resolution dated March 5, 1925.

125. A surrender given on May 20, 1925 stated that the surrender was given for the purpose of carrying out the Michener proposition as set out in the letter of March 4, 1925, and in accordance with the Band Council Resolution referred to above.

126. The lease given to Michener on July 9, 1925, and the revised lease given to Michener on January 11, 1926, were given for a period of “twenty years from the fifteenth day of July, one thousand nine hundred and twenty-five, or so long as oil or gas is found in paying quantities”. The Plaintiff had full knowledge of the terms of the lease and continued to receive royalties from Petrol Oil & Gas Company Limited.

127. This Defendant admits the allegation in paragraph 78 of the Statement of Claim that by agreement dated December 31, 1928, Michener assigned his rights to Petrol Oil & Gas Company Limited.

128. In pleading to paragraph 79 of the Statement of Claim, this Defendant states that the Order in Council accepting the surrender in 1925 gave the requisite authority under section 54 of the *Indian Act*, R.S.C. 1927, c. 98. The Order in Council accepted the surrender on the basis that it was for the purpose of entering into a lease for the oil and gas. In any event, it was decided that it would be in the interest of the Six Nations to continue the leasing arrangement with Petrol Oil & Gas Company Limited on the basis that the wells were nearly exhausted and that it would therefore not be attractive to other companies. This was accepted and endorsed by Band Council Resolution dated February 5, 1948.

129. This Defendant denies the allegation in paragraph 80 of the Statement of Claim. Throughout the period of July 15, 1945 to November 18, 1970, the Plaintiff received royalty payments from Petrol Oil & Gas Company Limited. When the Petrol Oil & Gas Company Limited proposed an assignment of its lease to the George Hyslop Construction Ltd in 1969, the Six Nations expressed their desire that any ambiguity in the surrender not delay the assignment of the lease. This, together with the acceptance of royalties, provides implicit consent for the operations of Petrol Oil & Gas Company Limited on the reserve.

130. This Defendant denies that it has an obligation as alleged in paragraph 81 of the Statement of Claim to account to the “Six Nations Trust for the fair market value of all natural gas extracted by the [Petrol Oil & Gas Company Limited] from the Six Nations Reserve.” This Defendant acted in good faith in

dealing with leasing for the extraction of the oil and gas on the reserve and with the consent of the Six Nations.

131. [Deleted]

131.(a) [Deleted]

131.(b) [Deleted]

131.(c). [Deleted]

131.(d). [Deleted]

131.(e). [Deleted]

132. [Deleted]

133. [Deleted]

134. [Deleted]

XIV. Taking for Public Purposes

135. In response to subparagraph 23(e) of the Statement of Claim, this Defendant says that all takings of land that were not consensual takings, were effected pursuant to valid legislation, and cannot give rise to an action for damages for breach of fiduciary duty.

136. [Deleted]

REMEDIES

137. This Defendant says that in view of the passage of time and the circumstances surrounding the events as pleaded in defence, the Plaintiff's claim for interest is excessive.

138. This Defendant therefore asks that the within action be dismissed, and for costs.

Dated: September 15, 2023.

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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

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto

SECOND FRESH AS AMENDED STATEMENT OF DEFENCE OF THE ATTORNEY GENERAL OF CANADA

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