Toronto Court File No. CV-18-594281-0000
Originally 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 ~~HER~~HIS MAJESTY THE ~~QUEEN~~KING IN RIGHT OF ONTARIO

Defendants

- and -

MISSISSAUGAS OF THE CREDIT FIRST NATION

Intervenor

FURTHER AMENDED STATEMENT OF DEFENCE AND CROSSCLAIM OF THE DEFENDANT ~~HER~~HIS MAJESTY THE ~~QUEEN~~KING IN RIGHT OF ONTARIO

1. The defendant ~~Her~~His Majesty the ~~Queen~~King in right of Ontario ("Ontario") adopts and repeats, except as provided herein and with the additions herein, the ~~allegations in~~contents of paragraphs ~~15 to 62 inclusive, 63 except the last sentence, 64~~16 to 74 ~~inclusive~~, 77 to 79, 80, 82 to 87, 88 to 92, 95 to 100, 103 to ~~121, 123 to~~ 130 ~~and,~~ 135 to 138 inclusive of the further amended statement of defence of the ~~defendant the~~ Attorney General of Canada.

2. In adopting and repeating the allegation in paragraph 58 of the further amended statement of defence of the Attorney General of Canada, Ontario pleads that the appropriation of funds referenced therein means that any liability for investment loss that may exist, which is denied, would be the liability of ~~Her~~His Majesty the ~~Crown~~King in right of Canada and not that

of ~~Her~~His Majesty the ~~Queen~~King in right of Ontario. In adopting and repeating the allegation in paragraph 80 of the said further amended statement of defence, Ontario admits that there is today a fiduciary relationship between ~~Her~~His Majesty the ~~Queen~~King in right of Canada ("Canada") and the Aboriginal peoples of Canada. In adopting and repeating the allegation in paragraph 130 of the said further amended statement of defence, Ontario pleads that Canada acted in good faith in dealing with the oil and gas on the reserve. Ontario did not deal at all with such oil and gas and had no authority, role, obligation or occasion to do so. Apart from those instances, Ontario adopts the phrase "this Defendant" wherever it appears in the allegations in the paragraphs of the further amended statement of defence of the Attorney General of Canada which Ontario adopts and repeats, and Ontario intends that the phrase refer to Ontario as well as to Canada.

2.1 Ontario denies all of the allegations in the ~~further~~second fresh as amended statement of claim dated ~~May 7~~February 3, ~~2020~~2023 (the "statement of claim") except as expressly admitted or repeated in this pleading, or with respect to which Ontario pleads that it has no knowledge.

3. Ontario denies the relief sought in paragraph 1 of the statement of claim and that it was, has, or is subject to any of the alleged duties therein, including the alleged duties in Schedule A of the statement of claim. To the extent that the plaintiff seeks, in addition to equitable compensation and/or damages, declaratory relief entitled the plaintiff to an accounting and/or a restoration of assets, Ontario states that this would result in double recovery to which the plaintiff is not entitled at law nor in equity. Ontario denies that any restoration of assets to the Six Nations Trust, which Ontario denies the plaintiff is entitled to, could include lands or real property, as lands and/or real property never formed part of the Six Nations Trust as defined by the plaintiff and the recovery of lands or real property is not pleaded in the statement of claim. In the

alternative, see paragraph 34 below.

~~**3.** Ontario denies the relief sought in paragraph 1 of the statement of claim.~~

3.1 Ontario admits the ~~allegation~~first two sentences in paragraph 2 of the statement of claim~~, except Ontario has no knowledge with respect to the last sentence~~and denies the remainder of the paragraph including for the reasons set out in paragraph 7.1 below.

The Parties

4. Ontario admits the allegation in paragraph 3 of the statement of claim ~~except that if~~up to and including subparagraph 3(a) but denies the allegation in paragraph 3(b). Neither Canada nor Ontario was or is the successor to any obligations, duties and liabilities the Imperial Crown had or owed to Six Nations, the existence of which is denied. In the alternative, if Canada is found to be a successor to the Imperial Crown, as the Crown was historically immune from suit, Canada did not assume any liability alleged in the statement of claim upon Confederation or at any other time. If the Imperial Crown had or owed obligations, duties or liabilities to the Six Nations that were justiciable or enforceable in the courts, which is denied, and if those obligations, duties or liabilities today belong to or are justiciable or enforceable against a person other than the Imperial Crown, which is denied, they belong to and are justiciable or enforceable against ~~the Crown in right of Canada ("~~ Canada~~")~~ and not Ontario, and no such obligations, duties or liabilities have been or are conferred upon Ontario under the *Constitution Act, 1867* or otherwise. Further, Ontario is immune with respect to some or all of the claims raised in this proceeding, including without limitation all claims sounding in tort and in breach of fiduciary duty.

5. Ontario admits the allegation in paragraph 4 of the statement of claim except that Ontario denies that it was or is the successor to or subject to the obligations, duties and liabilities of the

Imperial Crown, and pleads that it did not become on July 1, 1867 or at any time thereafter, by section 109 of the *Constitution Act, 1867* or otherwise, the recipient of any sums due or payable for any lands, mines, minerals or royalties in which the plaintiff had or has any right or interest ~~and except that if~~. If the Imperial Crown had or owed obligations, duties or liabilities to the Six Nations that were justiciable or enforceable in the courts, which is denied, and if those obligations, duties or liabilities today belong to or are justiciable or enforceable against a person other than the Imperial Crown, which is denied, they belong to and are justiciable or enforceable against Canada and not Ontario, and no such obligations, duties or liabilities have been or are conferred upon Ontario under the *Constitution Act, 1867* or otherwise. In the alternative, if Ontario is found to be a successor to the Imperial Crown, as the Imperial Crown was historically immune from suit, Ontario did not assume any liability alleged in the statement of claim upon Confederation or at any other time.

6. Ontario denies the allegation in paragraph 5 of the statement of claim. Ontario is subject to no obligations, duties or liabilities owed to the Six Nations by the Imperial Crown on or before confederation by the Province of Canada or Province of Upper Canada.

The Plaintiff's Introduction

7. Ontario denies the allegation in paragraph 6 of the statement of claim. Ontario has not at any time, and is not, under fiduciary obligations of any kind to the Six Nations. The Crown was not at any time under fiduciary obligations, or any obligation or duty that was justiciable or enforceable in a court of law or equity, to the Six Nations to *inter alia* hold, protect, manage and care for the lands, personal property and all other assets of the Six Nations for the benefit of the Six Nations 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. In addition to and supplementary to the other matters set out or adopted herein, the interest of the Six Nations in the lands, personal property and all other assets in question in this action arose solely from the Haldimand Proclamation and the Simcoe Patent and was not and is not an independent right not created by an executive act of the Crown. If the Crown had or has any obligation or duty to the Six Nations in respect of those lands or proceeds of disposition of lands, ~~therefore~~which is denied, it was and is a political trust not justiciable or enforceable in the courts. To the extent Ontario is found to have been subject to any obligation or duty, Ontario denies that any such obligation or duty was breached.

7.1 Ontario denies the allegations at paragraphs 6.1 – 6.6 of the statement of claim. To the extent the plaintiff is pleading that by the Haldimand Proclamation the Crown intended to or did create a Reserve within the meaning of the *Indian Act* enacted decades later (a "Reserve") or in any manner advanced by the plaintiff, Ontario denies this and puts the plaintiff to the strict proof thereof. Any such Reserves did not exist in Upper Canada or in Lower Canada, in law, in fact, and were not contemplated at the time of the Haldimand Proclamation or Simcoe Patent. Ontario denies that the lands were set apart as a Reserve, including in the manner later contemplated by the *Indian Act*, and the Haldimand Proclamation did not create a legal interest or impose obligations on the Crown akin to a Reserve. To the extent that the word "reserve" was used in the historical record in relation to lands in the Haldimand Tract, the word was not used as a formal legal term of art, but rather in its ordinary, everyday manner as commonly understood in the English language. This is how Ontario has used the word "reserve" or "reserved" throughout this defence, except where "Reserve" is capitalized and is used as defined above. Specifically, Ontario denies that the Haldimand Proclamation created or set aside the Haldimand Tract as a Reserve,

obliged the Crown to create a Reserve, or gave rise to any Crown duties to the Six Nations, including those alleged in the statement of claim. Ontario denies that the Crown was subject to the alleged duties with respect to the Haldimand Tract and any proposed or actual alienation, surrender, disposition or appropriation of lands in the Haldimand Tract or any monies or assets held as investments of the plaintiff. To the extent that the Haldimand Proclamation imposed any obligation on the Crown, which is denied, any such obligation was satisfied.

8. Ontario denies the allegation in paragraph 7 of the statement of claim and puts the plaintiff to the strict proof of the alleged breaches and of the claimed right to a general accounting.

9. Ontario admits the allegation in paragraph 8 of the statement of claim except that it has no knowledge of notice of the action to Canada prior to service of the statement of claim.

The Royal Proclamation of 1763

10. Ontario denies the allegations in paragraphs 9 and 10 of the statement of claim. The *Royal Proclamation of 1763* had and has no effect on or relationship to the position of the Six Nations with respect to the lands in question in this action. The provisions of the *Royal Proclamation of 1763* in relation to "lands of the Indians" concern the lands occupied and used by particular nations, bands or other Indigenous groups at that date. The Six Nations did not occupy and use the lands in question in 1763. They migrated to the lands more than 20 years after 1763. In 1763 the lands in question were occupied and used by the Mississauga Indians who subsequently, in 1784, ceded their interest in the lands to the Crown thereby terminating any effect on or relationship to the lands in question that the *Royal Proclamation* might have had until then.

11. The Royal Proclamation of 1763 did not recognize or confirm any fiduciary obligations in respect of the Six Nations and the lands in question. Further, it did not continue, affirm or enunciate any law then existing. The reservation of lands by the king was for the use of "Indians" as "hunting grounds". The provision called by the plaintiff in paragraph 9 of the statement of claim the "surrender requirement" and paraphrased in paragraph 10(d) was never in force in the lands in question inasmuch as the particular provision had application only in a "colony" within the meaning of the Royal Proclamation and the lands in question did not become part of a colony until the coming into force of the *Quebec Act, 1774*, 14 Geo. the III, c. 83 (U.K.) (R.S.C. 1985, app. II, no. 2) but by that Act the provision was repealed. Further, the purpose of the surrender provision of the *Royal Proclamation of 1763* was not to ensure that the Crown's sovereign jurisdiction would extend over Indian lands settled by non-Indians. The Crown's sovereignty existed independently of the *Royal Proclamation of 1763*. By the terms of the Royal Proclamation it was of the very nature of the policies concerning the Indians set out therein that they were subject to change by the Crown at any time. Both the reservation of lands for the use of the Indians as hunting grounds and the direction to the governors and commanders in chief to not pass patents in respect of reserved lands were by the very terms of the Royal Proclamation expressly subject to such change at the will of the Crown. The prohibition of purchase, settlement and possession of reserved lands was expressly inapplicable where the Crown's leave and licence for that purpose was first obtained. And the policies concerning "Indians" set out in the Royal Proclamation were directory only, and not mandatory.

12. After migrating to the lands in question in 1784 the Six Nations expressly denied that the lands that were granted to them by the Crown were inalienable by them otherwise than to the Crown and asserted the contrary, and did in fact on many occasions purport to grant or lease

portions of the lands to persons other than the Crown notwithstanding the objections of the Crown. The plaintiff is now estopped from relying on the "surrender requirement" of the *Royal Proclamation of 1763* or of any other instrument issued or enacted by the Crown.

Six Nations Lands

13. Ontario admits the allegation in paragraph 11 of the statement of claim insofar as it concerns territories in what is today the United States of America. Ontario denies the allegation insofar as it concerns territories in what is today the Provinces of Ontario and Quebec. At all times the Six Nations occupied, possessed or used territories in what is today the United States. Prior to the purchases of lands in what is today Ontario by the Crown from the Mississaugas in 1783 (Bay of Quinte) and 1784 (Grand River) and the subsequent grants of parts of those purchased lands to members of the Six Nations who migrated to them, the only presence of the Six Nations or their predecessors in what is now Ontario and Quebec was military incursion and other conflict with the Indian inhabitants from time to time, especially from about 1640 to about 1700, and establishment by some persons, mainly Mohawks, of two villages near Montreal in the 1670s and establishment by some descendants of those persons of a village near what is today the City of Cornwall in the 1740s. The inhabitants of those villages were not predecessors of the plaintiff. The predecessors of the plaintiff migrated to what is today part of Ontario, from what is today the United States, in 1784.

14. Ontario admits the allegation in paragraph 12 of the statement of claim except that the two tracts of land in what is today Ontario to which many, but not all, of the Six Nations migrated after the American War of Independence (125 to the Bay of Quinte and 1,843 to the Grand River)

were not within their Aboriginal lands, and except that only some members of the Six Nations were faithfully allied with and supported the Imperial Crown in the war. Others were allied with the Americans and fought against the Crown and their fellow Six Nations members.

15. Ontario admits the allegations of paragraph 13 of the statement of claim except that the tracts in what is today Ontario to which the Imperial Crown authorized and permitted members of the Six Nations to migrate and to possess and settle were not Aboriginal lands of the Six Nations. They were not lands that were historically part of the traditional territories of the Six Nations, and were not Reserve lands and did not become Reserve lands pursuant to the Haldimand Proclamation.

The Haldimand Proclamation

16. Ontario admits the allegation of paragraph 14 of the statement of claim except that theas noted in this paragraph and the next paragraph of this statement of defence. The lands to which the Haldimand Proclamation authorized and permitted members of the Six Nations to migrate and to, possess and settle were lands within the tract that had been purchased by the Imperial Crown from the Mississaugas on May 22, 1784 and did not include any lands not within the tract so purchased. The tract so purchased included lands in what is today the Township of Nichol in the County of Wellington but nodid not include lands above the Township of Nichol, the bed of the Grand River, or waters thereon. Ontario denies that practices of the day for determining the precise boundaries of tracts or parcels of lands are as the plaintiff has claimed. The chiefs of the Six Nations confirmed and agreed in 1791 that the Haldimand Proclamation Lands include no lands above the Township of Nichol and the plaintiff is estopped from now contending otherwise.

16.1 The Haldimand Proclamation delineated the east and west boundaries of the tract as being "six miles deep from each side of the Grand River", thereby excluding the bed of the Grand River and the waters thereon from the Haldimand Tract. Neither the Six Nations nor the Crown intended the Haldimand Proclamation and/or the Haldimand Tract to include the bed of the Grand River. If the Haldimand Proclamation is found to include the bed of the Grand River, which is denied, Ontario pleads that subsequent surrender(s) had the effect of extinguishing any such interest. Further, the Grand River is a navigable waterway. Granting the bed of the Grand River would have been, and is, inconsistent with the common law right of public navigation and Crown sovereignty. Ontario further pleads the *Bed of Navigable Waters Act*, RSO 1990 C. B.4 and its predecessors.

16.2 Ontario denies the allegations at paragraph 14.1 of the statement of claim. The Haldimand Proclamation did not create a Reserve for the Six Nations of the Grand River and the Crown did not intend for it to have this effect. The Six Nations also did not understand the lands to be Reserve lands.

16.3 Ontario denies the allegations at paragraphs 14.2 and 14.3 of the statement of claim. The interest of the Six Nations in the Haldimand Proclamation/Simcoe Patent lands was not a Reserve interest, and the Crown was not and is not subject to any of the alleged obligations and duties listed in paragraphs 14.2 or 14.3 of the statement of claim.

17. Ontario denies the ~~allegation of~~allegations in paragraph 15 of the statement of claim. The Haldimand Proclamation was not and is not a treaty. The point has been resolved by a court having jurisdiction to do so (*Logan v. Styres* (1959), 20 D.L.R. (2d) 416 at 419-420 (Ont. H.C.J.). The Haldimand Proclamation gives rise to no treaty rights within the meaning of section 35 of the *Constitution Act, 1982* and did not create a Reserve, did not set aside the whole or any part of

the Haldimand Tract as a Reserve, and did not give the Six Nations a right to the alleged Reserve or to have the alleged Reserve created. It also did not impose any obligations to set aside the Haldimand Tract as a Reserve, and did not give rise to the alleged obligations and duties set out in paragraph 15 of the statement of claim.

17.1 In the alternative, should the Haldimand Proclamation constitute a treaty within the meaning of section 35 of the *Constitution Act, 1982*, which is denied, Ontario pleads that neither the Crown nor the Haldimand Proclamation set aside, or intended to set aside, the Haldimand Tract as a Reserve. The Haldimand Proclamation did not give rise to the alleged obligations and duties outlined in paragraph 15 of the statement of claim. Six Nations also did not intend the Haldimand Tract to be a Reserve. Ontario further pleads that the Crown has fulfilled any obligations that could be imposed on the Crown as a result of the Haldimand Proclamation being deemed a treaty. In particular, Ontario denies the allegations made at paragraphs 7, 17 ~~and~~, 17.1, 23, and 82 of the statement of claim regarding breaches by the Crown of any treaty obligations under the Haldimand Proclamation and puts the plaintiff to the strict proof to thereof.

17.1(a) Ontario denies the allegations at paragraph 15.1 of the statement of claim. At no time did the Crown have the intention to set aside the whole or any alleged part of the Haldimand Tract as a Reserve or to treat it as such.

17.2 Ontario pleads in the further alternative that if there is liability to the plaintiff in respect of any breach of duty in or related to the implementation or administration of the Haldimand Proclamation as a treaty, which is denied, Canada would be solely liable for any such breach.

The Simcoe Patent

18. Ontario admits the allegation of paragraph 16 of the statement of claim, except that the Simcoe Patent was issued not merely drafted, and the lands in question did not include the riverbed between the banks of the Grand River. The Simcoe Patent Lands were the same as the Haldimand Proclamation Lands, which were lands within the tract that had been purchased by the Imperial Crown from the Mississaugas on May 22, 1784 and which were the subject of a subsequent deed of December 7, 1792 from the Mississaugas to the Imperial Crown by which the boundary lines of the tract that had been purchased were confirmed and clarified, and except that the Simcoe Patent Lands are the lands set out in surveys showing the boundaries of the tract.

18.1 Ontario denies the allegations at paragraphs 16.1-16.4 of the statement of claim. Six Nations objected to the Simcoe Patent on the basis that it did not permit Six Nations to lease or sell land independent of the Crown, not because the Simcoe Patent excluded what the plaintiff refers to as the "Headwaters Lands". The Simcoe Patent did not include any such lands because the Haldimand Proclamation and/or the Haldimand Tract never included the "Headwaters Lands". At the time of the Haldimand Proclamation, neither the Crown nor Six Nations were aware of the correct location of the source of the Grand River and the Haldimand Proclamation was limited to the lands on six miles on either side of the Grand River that had been surrendered by the Mississauga. The Mississauga and other First Nations had not surrendered the "Headwaters Lands" to the Crown in or prior to 1784; those lands were not available to be provided to the Six Nations in 1784. Ontario therefore denies that any surrender, and/or consent, was required from Six Nations for the Crown to grant, lease, patent, or otherwise dispose of, or make use of the "Headwaters Lands". Further, the Crown had no obligation to hold funds derived from those lands for the benefit of Six Nations. Further, Ontario denies the Simcoe Patent created a Reserve, that

the acceptance by Maitland of the Executive Council report of March 20, 1819 created a Reserve, or that either imposed any obligation on the Crown to create a Reserve or imposed any of the alleged Reserve Land Duties.

19. Ontario denies the ~~allegation~~allegations in ~~paragraph~~paragraphs 17 to 17.2 of the statement of claim. The Crown granted to the Six Nations by the Simcoe Patent all of the lands which the Six Nations were entitled to have reserved for them under the Haldimand Proclamation. Ontario denies the alleged obligations and duties set out in paragraphs 17 to 17.2 of the statement of claim. The "Headwaters Lands" were not surrendered by the Mississauga in 1784 and were not included in the Haldimand Proclamation, and accordingly, there was no appropriation of these lands and no breaches of any duties which the Crown may have had, which are not admitted but denied. Ontario therefore denies that it is liable to the plaintiff for damages, including equitable damages or equitable compensation.

20. Ontario denies the allegations in paragraph 18 of the statement of claim that the Simcoe Patent was never issued or that the geographic limitations described in the Simcoe Patent were not accurate and holds the plaintiff to the strict proof thereof. Ontario also denies that the terms of the Simcoe Patent ~~incorporated~~repeated provisions existing at law. Ontario admits the remaining allegations in paragraph 18 of the statement of claim except that ~~that~~ the Simcoe Patent made no mention of the protection of the Crown ~~and~~ nor that the Six Nations were to enjoy possession of the lands under the protection of the Crown in the sense that they were entitled to military protection by the Crown against its foreign enemies.

21. The right of the Six Nations in the Haldimand Proclamation/Simcoe Patent lands was not an estate in fee simple or any other corporeal property interest, but rather a personal, usufructuary right guaranteed in perpetuity or until surrendered or until taken by the Crown or granted to a

third party by the Crown. For that reason, the right of the Six Nations could not form the *res* of a trust.

1812 Governor's Instructions

22. Ontario admits the allegation in paragraph 19 of the statement of claim except that the 1812 Governor's Instructions have no application to the facts of this case. They were "Instructions for the Good Government of the Indian Department To Sir John Johnson, Baronet, Superintendent General and Inspector General of Indian Affairs" from the governor, Sir George Prevost, in the latter's role as commander of the forces at the commencement of the War of 1812. As instructions, they were directions from the commander of the forces to a servant of the Crown as to how he should carry out his duties. They were not public documents and did not have the force of law. They were private orders of the Crown by the commander of the forces to a subordinate officer. Further, the 1812 Instructions were directed and addressed to Sir John Johnson and were applicable only during the term of that officer (if not altered earlier). Sir John Johnson ceased to occupy the office of superintendent General and Inspector General of Indian Affairs in 1828. Further, the provisions of the 1812 Instructions that were on the subject of purchases of "Indian Territory ... wanted for the Public Service" concerned lands held by virtue of Aboriginal title which were, at that time and according to the terms of the 1812 Instructions, to be purchased by the immediate delivery by the Crown to the Aboriginal parties of goods. The Haldimand Proclamation Lands (*i.e.,* the Simcoe Patent Lands) were not lands held by Aboriginal title and were never the subject of any sale by the Six Nations to the Crown for goods and it was never contemplated by either the Crown or the Six Nations that any of those lands would be exchanged for goods. The leaders of the Six Nations, from the time of Chief Joseph Brant in 1784, were

knowledgeable sellers of their lands for monetary compensation. No Haldimand Proclamation Lands were "wanted for the Public service", and no such lands were sold by the Six Nations to the Crown for that purpose, until after 1828. If the Instructions had the force of law, which is denied, their provisions were directory only, and not mandatory.

Legislation

23. Ontario denies the ~~allegation~~allegations in paragraph 20 of the statement of claim. The Crown neither recognized nor owed any fiduciary obligation to the Six Nations in respect of the Six Nations Lands, and therefore no recognition of such an obligation is reflected in the legislation pleaded and relied upon by the plaintiff, none of which mentions the Six Nations or their lands.

"Crown's Breach of Fiduciary Duty" alleged by the plaintiff

24. Ontario admits the allegation in paragraph 21 of the statement of claim, except for the word "only" and except that the lands allocated to the Six Nations by the Haldimand Proclamation were the same as those described in the Simcoe Patent and therefore the percentage that the lands currently occupied and used by the Six Nations is of the lands allocated by the Haldimand Proclamation is the same as the percentage that the former is of the lands described in the Simcoe Patent.

25. Ontario denies the ~~allegation~~allegations in paragraph 22 of the statement of claim. Ontario neither made nor permitted to be made any grants, sales, leases, permits or other dispositions in any parts of the Six Nations Lands and is not a successor of any person who did so, and Ontario puts the plaintiff to the strict proof of the contrary. Further, neither the Imperial Crown nor any successor of it in Canada owed any duty, including any fiduciary duty and/or

including any duty that was justiciable or enforceable in the courts in respect of dispositions of Six Nations Lands. And further, if any such duty was owed, which is denied, no dispositions of Six Nations Lands were made or permitted to be made in breach of any such duty or without complying with the requirements of any law, and Ontario puts the plaintiff to the strict proof of the contrary.

26. Ontario denies the ~~allegation~~allegations in paragraph 23 of the statement of claim. Ontario neither made nor permitted dispositions of the Six Nations Lands, or permitted third parties to possess, occupy, or trespass on the Six Nations Lands, or made or permitted transactions relating to the Six Nations Lands, or failed to honour the terms or conditions of valid surrenders, sales or leases, or took or permitted the taking or use of any 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, or managed the Six Nations Trust or permitted it to be managed, and is not a successor of any person who did so, and Ontario puts the plaintiff to the strict proof of the contrary. Further, the Crown owed no duty, including any fiduciary duty and/or any duty that was justiciable or enforceable in the courts in respect of the Six Nations Lands. And further, all parts of the Six Nations Lands that were the subject of a disposition, transaction, or use other than trespass were the subject of a lawful and valid absolute surrender by the Six Nations or of a valid statutory provision authorizing the disposition, transaction or use. And further, under the *Constitution Act, 1867* and otherwise Ontario had and has no constitutional authority, role, obligation or occasion to prevent trespasses on, or prevent improper taking or use of the lands in question or to act as guardian of the Six Nations' interests in relation to transactions concerning the Six Nations Lands and in relation to the terms or conditions of surrenders, sales or leases, or to manage or permit the management of the proceeds of dispositions of the Six

Nations Lands or to act as guardian of the Six Nations' interests in relation to management of those proceeds, or to account to the Six Nations, and Ontario is not a successor of any person who had any authority, role, obligation or occasion to do any of those things. And further, no acts or omissions of the kind described in paragraph 23 occurred and Ontario puts the plaintiff to the strict proof of the contrary.

27. Further, if the alleged breaches occurred, which is denied, the breaches were at the times that they occurred breaches of the political trust of the Crown and/or were not justiciable in the courts. To the extent any alleged breaches were committed by individuals including Crown servants, the plaintiff did not and/or chose not to pursue remedies against those individuals. The Crown was not vicariously liable for acts or omissions of others at any of the relevant times. Accordingly, even if the Crown is today under any obligations to the plaintiff that are justiciable or enforceable in the courts, which is denied, the alleged breaches cannot now be justiciable or the foundation of liability.

The alleged "examples of breaches"

28. Concerning the allegations in paragraphs 24 to ~~81~~82 inclusive of the statement of claim, the Crown was not subject to any of the alleged duties and obligations, including those set out in paragraphs 24.2-24.6, 30.1-30.2, 33-33.1, 43.1, 47.1, 51, 55-55.1, 56-56.3, 58.10-58.11, 60, 62.1, 73.2-73.7, 74.1-74.3 of the statement of claim. Ontario also denies the alleged breaches and puts the plaintiff to the strict proof thereof. The plaintiff is not entitled to any of the relief claimed for each of the alleged breaches, including any equitable compensation or damages. Ontario pleads the following in addition to the allegations in the further amended statement of defence of ~~the defendant~~ the Attorney General of Canada that are adopted and repeated by Ontario:

a.1) With respect to paragraphs 24.1-24.3 inclusive of the statement of claim ("Brant's Power of Attorney"), the lands in question were the subject of an absolute surrender by the Six Nations to the Crown. The Six Nations requested, and the Crown agreed, to grant the lands to individuals specified by the Six Nations for a sum agreed upon by the Six Nations and the purchaser. The Six Nations' attorney, Chief Joseph Brant, appointed three individuals, including Captain William Claus, trustee "in whose names I [i.e., Chief Brant] wish the necessary securities to be taken for securing to the said [Six] Nations, the monies due and arising upon the sale of the said lands they having been in virtue of the authority vested in me expressly nominated and appointed". Pursuant to the terms of the surrender, the Block 1 lands were sold to Philip Stedmen, the Block 2 lands were sold to Richard Beasley, James Wilson and John Baptiste Rousseau, the Block 3 lands were sold to William Wallace and the Block 4 lands were sold to an unnamed purchaser (later selected by the Six Nations to be Thomas Clark). For each of the Blocks, the monies, interest or any proceeds of investment from the sale which were due and owing was collected, received and/or distributed in full or to the satisfaction of the Six Nations, by the trustees on behalf of the Six Nations or by Six Nations directly. These monies were collected, received and/or distributed beginning in 1798, including through a series of transactions involving subsequent sales and/or transfers. At the date of the events alleged in paragraphs 24.1 to 24.3 inclusive, the Six Nations had no right, title, or interest in the lands in question. If they had any right that was justiciable or enforceable in the courts, which is denied, it was not by way of an action against the Crown, which was in any event immune from suit, but rather it was a personal right against the individuals appointed by and/or acting for the Six Nations as trustees for the purchase money if and to the extent that it had not been duly

credited to them. Ontario denies that it used any of the Six Nations monies to fund the expenses related to the sale of these lands, or that there was any improper use of the Six Nations funds.

a) With respect to paragraphs ~~25~~24.4 to 30 inclusive of the statement of claim ("Crown Grant of Block No. 5 of the Simcoe Patent Lands"), the lands in question were the subject of an absolute surrender by the Six Nations to the Crown dated February 5, 1798. The acceptance of this surrender was not a breach of the Haldimand Proclamation. Along with Blocks 1 to 4, the Six Nations requested, and the Crown agreed, to grant the lands to an individual specified by the Six Nations for a sum agreed upon by the Six Nations and the purchaser. The Six Nations' attorney, Chief Joseph Brant, appointed three individuals, including Captain William Claus, trustee "in whose names I [i.e., Chief Brant] wish the necessary securities to be taken for securing to the said [Six] Nations, the monies due and arising upon the sale of the said lands they having been in virtue of the authority vested in me expressly nominated and appointed". At the date of the events alleged in paragraphs ~~25~~24.4 to 30 inclusive the Six Nations had no right, title or interest in the lands in question. If they had any right that was justiciable or enforceable in the courts, which is denied, it was not by way of an action against the Crown, which was in any event immune from suit, but rather it was a personal right against the three trustees for the purchase money if and to the extent that it had not been duly credited to them. The Crown was not subject to any duties arising from the surrender and sale of the Block 5 lands and if it was subject to such duties, which is denied, there was no breach of any of the alleged duties or the Haldimand Proclamation. The Crown took all reasonable steps to obtain, hold, or recover the monies due and arising on the sale of Block 5 lands and Ontario denies that

it is liable for any alleged loss relating to these lands and puts the plaintiff to the strict proof thereof.

b) With respect to paragraphs ~~31 and~~30.1 to 32 inclusive of the statement of claim ("Crown Grant of Block No. 6 ~~of the Simcoe Patent Lands~~"), the lands in question were ~~also~~ the subject of the said absolute surrender to the Crown~~. But~~ as with Blocks 1 to 5. Ontario denies that accepting this surrender was in breach of the Haldimand Proclamation. Block No.6 was a free gift by the Six Nations to the person specified by them “as a mark of their affection for him and as a reward for his Services with them --- and that no money as the price thereof or annual Rent as a compensation therefor was ever excepted by them from him". That person, John Datchsteder or Dockstader, sold the lands to Benjamin Canby, and Canby was in fact the individual specified by the Six Nations to receive the Crown grant of the lands. After the absolute surrender of the lands the Six Nations had no right, title or interest in the lands in question and, as Chief Brant acknowledged, no right to any payment from Canby or anyone else. The Crown was not subject to any duties arising from the surrender and sale of the Block 6 lands and if it was subject to any such duties, which is denied, there was no breach of any of the alleged duties.

c) With respect to paragraphs 33 to ~~43~~43.1 inclusive of the statement of claim (“Colonel Claus and the lands in Innisfil and East Hawkesbury Townships”), the plaintiff has not identified or specified any of the transactions or dealings involving Colonel Claus that it impugns and Ontario holds the plaintiff to the strict proof thereof, and further Ontario denies any alleged misappropriation and/or mismanagement of the monies belonging to Six Nations Trust. Further, if there is any liability arising from the allegations contained in paragraphs 33 to 43.1 inclusive of the statement of claim, which is denied, it lies not

against the Crown, which was immune from suit in any event, but rather against Colonel Claus himself or his heirs. If the plaintiff has any right or remedy arising therefrom, which is denied, it is a personal right or remedy against Colonel Claus as a trustee. William Claus acted as a trustee for the Six Nations, and not as a public accountant. This was found by a court having jurisdiction to do so (*Dickson v Gross* (1852) 9 U.C.Q.B. 580). In any event, the Crown was not vicariously liable for any acts or omissions of William Claus or others at any of the relevant times. With respect to paragraph 33.1, the lands in question were the subject of an absolute surrender to the Crown of March 13, 1809 as recorded under an Order in Council dated October 4, 1820. These lands were provided by the Six Nations to William Dickson for "counsel and advise and some other professional services to and for the said Nations" as he had "long done business for them for several years." This was made by the Six Nations freely, without undue influence, and not at the suggestion of the Crown. The surrender or granting of the lands in question was in accordance with the Six Nations' wishes. After the absolute surrender of the lands, the Six Nations had no right, title, or interest in the lands in question and no right to any payment from Dickson or anyone else. Further, with respect to paragraph 39, no surrenders were required. The two townships in question were not and are not within the "“Haldimand Proclamation Lands" Tract" and were and are located in regions far distant from the "Haldimand Proclamation LandsHaldimandTract". With respect to paragraph 36, the Province of Ontario did not exist in 1831.

d) With respect to paragraphs 44 to 50 inclusive of the statement of claim ("Welland Canal Flooding"), the lands flooded were portions of the tracts surrendered absolutely by the Six Nations to the Crown by the surrenders dated February 5, 1798, March 13, 1809, April 19,

1830, April 19, 1831, February 8, 1834, March 26, 1835, April 2, 1835 and January 18, 1841. After the dates of those surrenders the Six Nations had no right, title or interest in the lands in question. If they had any right that was justiciable or enforceable in the courts, which is denied, it was a right to receive compensation under S.U.C. 1824, c. 17 in respect of portions of the lands, if any, not yet surrendered as of the date of the alleged flooding between approximately 1829 and 1835. In any event, Ontario denies that as many as 3,500 to 3,800 acres of land were flooded and puts the plaintiff to strict proof thereof. Further, the plaintiff received compensation and any action lay against the company and/or its officers for any deficiencies in payment relating to compensation or damages relating to the construction of the dam, not against the Crown, which was in any event immune from suit. Ontario admits and relies upon ~~paragraph~~paragraphs 48 and 49 of the statement of claim. To the extent the plaintiff may be entitled to any compensation with respect to the Welland Canal Flooding, which is denied, it is Canada that is liable, not Ontario.

e) ~~With respect to~~Ontario denies paragraphs ~~54 and 55~~51 to 55.1 of the statement of claim. With respect to paragraphs 54, 55, and 55.1 of the statement of claim ("The Grand River Navigation Company"), the lands patented were portions of the tracts surrendered absolutely by the Six Nations to the Crown including by the surrenders mentioned in subparagraph 28 d) herein. After the dates of those surrenders the Six Nations had no right, title or interest in the lands in question. If they had any right that was justiciable or enforceable in the courts, which is denied, it was a right to receive compensation under S.U.C. 1832, c.13 in respect of portions of the lands, if any, not yet surrendered as of the date of the patent, November 18, 1837. Ontario denies that it acted in contravention of the *GRNC Act*.

f) With respect to paragraphs 56 ~~and~~ to 57 of the statement of claim ("Lands Surrendered for the Purpose of Sale but Subsequently Conveyed by the Crown Without Obtaining Proper Compensation for Six Nations"), the lands conveyed or otherwise transferred were portions of the tracts surrendered absolutely by the Six Nations to the Crown including by the surrenders mentioned in subparagraph 28 d) herein. After the dates of those surrenders, the Six Nations had no right, title or interest in the lands in question. If they had any right that was justiciable or enforceable in the courts, which is denied, it was a personal right for the purchase money in respect of tracts in the lands surrendered by the surrenders of February 8, 1834, March 26, 1835, April 2, 1835 and January 18, 1841 that were subsequently sold, if and to the extent that the purchase money had not been duly credited to them. With respect to paragraphs 56 to 57 inclusive of the statement of claim, the plaintiff has not identified or specified any of the conveyances, transfers, transactions, or dealings that it impugns and Ontario denies the allegations and holds the plaintiff to the strict proof thereof. Ontario did not at any time owe the plaintiff a duty to maintain proper records and accounts and it also relies on the facts set out in but not limited to paragraphs 52.1, 119, and 120 of the further amended statement of defence of the Attorney General of Canada. Ontario pleads that in any event the Crown kept records and accounts in a manner reasonable and appropriate for the time and circumstances. Any relevant records which may have become unavailable over time became so as a result of reasonable document retention policies and the passage of time, and Ontario denies this constituted a breach of any alleged duty. Further, if the plaintiff has any right that was justiciable or enforceable in the courts, which is denied, it was not enforceable against the Crown, which was immune from suit in any event, but rather it was a personal right against the Six

Nations' trustee(s) for the purchase money if and to the extent that it had not been duly credited to them. With respect to paragraph 56 (d), Ontario pleads that Six Nations acknowledged that the lands subject to "Brant leases" were to be surrendered to the Crown in order for letters patent to be granted. Ontario pleads that the surrender of March 26, 1835 was a valid surrender and that the lands in question were surveyed. Ontario denies the allegation that no proper consideration for these lands was provided to the Six Nations. Ontario denies the allegations with respect to fair market value as detailed in paragraph 28.2 below.

g) With respect to paragraphs 58.1 to ~~58.10~~58.11 inclusive of the statement of claim ("Talbot Road Lands"), the lands in question were the subject of an absolute surrender by the Six Nations to the Crown dated April 19, 1831. Thereafter, the Six Nations had no right, title or interest in the lands in question and no consent of the Six Nations to dispositions of the lands was necessary or appropriate. At all times the Crown had legal title in the lands and a right to grant them. Ontario denies that the lands were or were supposed to be Reserve Lands, that it failed to protect the Talbot Road Lands, or that it was subject to any of the alleged duties. If the Six Nations had any right that was justiciable or enforceable in the courts, which is denied, it was not by way of an action against the Crown, which was in any event immune from suit, but rather it was a personal right for compensation in respect of the alleged breaches. Ontario denies that any proceeds that may have been derived from the disposition of these lands were not accounted for or held for the benefit of the Six Nations.

h) With respect to paragraphs 59 and 60 of the statement of claim ("Hamilton/Port Dover Plank Road Lands"), the lands in question were the subject of a surrender in 1835 and/or

an absolute surrender by the Six Nations to the Crown dated January 18, 1841. Thereafter, the Six Nations had no right, title or interest in the lands in question. If they had any right that was justiciable or enforceable in the courts, which is denied, it was not by way of an action against the Crown, which was in any event immune from suit, but rather it was a personal right for compensation in respect of the alleged breach. If the Plank Road existed prior to January 18, 1841 it was a common and public highway. Ontario pleads and relies upon *An Act to provide for the laying out, amending, and keeping in repair, the public highways and roads in this province, and to repeal the laws now in force for that purpose,* S.U.C. 1810, c.1, ss. 12 and 35 and the successors of those statutory provisions. With respect to paragraph 60 of the statement of claim, Ontario denies that the lands were Reserve lands or that they were supposed to have been Reserved.

i) With respect to paragraphs 61 ~~and 62~~to 62.1 of the statement of claim ("Port Maitland Lands"), the lands in question were the subject of an absolute surrender by the Six Nations to the Crown dated February 8, 1834. Thereafter, the Six Nations had no right, title or interest in the lands in question. If there was a taking of the lands, which is denied, it was not a taking from the Six Nations. Further, to the extent that the Crown is found to be liable for any compensation arising from the sale of the Port Maitland lands, which is not admitted but denied, Ontario pleads said liability lies with Canada and not Ontario pursuant to paragraphs 40 and 41 of Ontario's statement of defence. If any interest remained in these lands after February 8, 1834, which is denied, it would have been surrendered pursuant to an absolute surrender by the Six Nations to the Crown dated January 18, 1841.

j) With respect to paragraphs 63 to ~~73A~~73.7 inclusive of the statement of claim ("Purported Surrender of 1841"), the absolute surrender of January 18, 1841, confirmed in 1847,

complied with all applicable laws, was in accordance with the intention of the Six Nations and the Crown, was signed, and was and is valid and effective. Thereafter the Six Nations had no right, title or interest in the lands. If any earlier surrenders were not absolute or were subject to reservations, which is denied, the 1841 surrender as confirmed constituted in law and equity a variation of the earlier surrenders, and of any trusts created by them, so that all of the land surrendered, without reservations, could be sold. Accordingly, Ontario denies that there was any appropriation of the lands. With respect to paragraphs 71 and 73.1-73.7 of the statement of claim, the plaintiff has not identified or specified any of the transactions or dealings that it impugns and Ontario holds the plaintiff to the strict proof thereof. Further, Ontario pleads that any compensation for the sale of the lands was paid to the plaintiff and was reasonable in the circumstances. With respect to paragraphs 73.2 – 73.7, Ontario denies that it was subject to the alleged duties listed therein or if it is found to owe any such alleged duties that it breached those duties. Ontario denies that the plaintiff is entitled to the relief sought, or if the plaintiff is entitled to equitable compensation or equitable damages, which is denied, that such damages or compensation should be calculated on the basis of the fair market value of the lands. Ontario holds no "monies which ought to be in the Six Nations Trust" and has no authority, role, obligation, or occasion, under the *Constitution Act, 1867* or otherwise, to do so or to account to the Six Nations. Ontario pleads that the Crown kept records in a manner reasonable and appropriate to the time and circumstances. Any relevant records which may have become unavailable over time became so as a result of reasonable document retention policies and the passage of time, and Ontario denies this constituted a breach of any alleged duty. Ontario denies that the Crown failed to account to Six Nations. To the extent that any Crown servants acted in

a manner that breached any obligations to Six Nations, no action lies against the Crown, which was immune from suit in any event, but rather against the Crown servants individually. The Crown was not vicariously liable for acts or omissions of individuals including Crown servants at any of the relevant times.

k) With respect to paragraphs 74 ~~and~~ to 75 inclusive of the statement of claim ("Misappropriation and/or Mismanagement of Trust Monies"), Ontario has no knowledge of the allegations in paragraph 74. Concerning paragraph 75, Ontario holds no "monies which ought to be in the Six Nations Trusts" and has no authority, role, obligation or occasion, under the *Constitution Act, 1867* or otherwise, to do so or to account to the Six Nations. If any of the alleged improprieties occurred or existed, which is denied, Ontario has no "awareness" of any such improprieties and has no authority, role, obligation or occasion, under the *Constitution Act, 1867* or otherwise, to have such "awareness". With respect to paragraphs 74.1 to 74.3 inclusive, Ontario denies that it was subject to the alleged duties listed therein or if it is found to owe any such duties that it breached those duties. Ontario further denies that the plaintiff is entitled to the relief sought. Ontario pleads that the Crown kept records in a manner reasonable and appropriate to the time and circumstances. Any relevant records which may have become available over time became so as a result of reasonable document retention policies and the passage of time, and Ontario denies this constituted a breach of any alleged duty. With respect to paragraphs 74.2 to 75 of the statement of claim, the plaintiff has not identified or specified any of the transactions or dealings that it impugns and Ontario holds the plaintiff to the strict proof thereof. Ontario denies that the Crown failed to account to Six Nations. To the extent that any Crown employees, agents, or servants acted in a manner that breached any obligations to Six

Nations, which is denied, no action lies against the Crown, which is immune from suit in any event, but rather the individuals in question The Crown was not vicariously liable for acts or omissions of individuals including Crown employees, agents, or servants at any of the relevant times.

l) With respect to paragraphs 76 to 81 inclusive of the statement of claim ("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"), the Six Nations Reserve isOntario denies the allegations made therein, and pleads that with the exception of the allegations in relation to the extraction of natural gas from the period of July 15, 1945 through November 18, 1970, which Ontario denies, the plaintiff has not identified or specified any of the transactions or dealings that it impugns, and Ontario holds the plaintiff to the strict proof thereof. With respect to paragraph 76, except for the last sentence, Ontario denies that the lands were or were supposed to be Reserve lands. In relation to the allegations about the extraction of natural gas from the period July 15, 1945 through November 18, 1970, these concern Indian Reserves 40 and 40B, which by that time was a "reserveReserve" within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, as amended, and its predecessors, and has been and is, therefore, within the exclusive administration of the Governor in Council and the appropriate federal Minister of Indian Affairs and Northern Development and hisand their predecessors. It is within the exclusive legislative authority of the Parliament of Canada. Ontario had and has no authority, role, obligation or occasion, under the *Constitution Act, 1867* or otherwise, to administer the Six Nations ReserveReserves 40 and 40B or any part of it and has not engaged in such administration and has not done any of the acts or committed any of the omissions alleged. In particular,

Ontario is and never has been under any duty "to protect the Six Nations' interest in the natural resources underlying the Six Nations Reserve by (taking)… steps to prevent Third Parties from removing natural resources from the Six Nations Reserve without proper authority." Ontario pleads and relies upon the *Constitution Act, 1867*, s. 91.24, the *Indian Act* and its predecessors, *An 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.

m) With respect to paragraphs 24 to ~~81~~82 inclusive of the statement of claim, if the Crown was at any time subject to any fiduciary or other obligations to the Six Nations in respect of any of the lands that were the subject of the Haldimand Proclamation and the Simcoe Patent or in respect of surrenders or sales or other dispositions of any of those lands or the proceeds of disposition of any of those lands, which is denied, or if the Crown was subject to any duty justiciable or enforceable in a court of equity to hold, protect, manage and care for such lands or proceeds in a manner similar to a trustee, which is denied, the Crown at all times fulfilled its obligations or duty to the Six Nations and committed no breach of such obligations or duty. With respect to surrenders, any obligation or duty of the Crown was a duty to prevent exploitative bargains. There were no exploitative bargains. With respect to sales or other dispositions of surrendered lands and the proceeds of disposition, any obligation or duty of the Crown was a duty to act in the best interests of the Six Nations according to the terms of the surrenders, acting as a person of ordinary prudence would act in the management of his or her own affairs and with reasonable diligence. In all of the matters referred to in paragraphs 24 to 81 inclusive of the statement of claim, the Crown acted in accordance with that obligation or duty.

28.1 With respect to paragraphs 21 to 82 inclusive of the statement of claim, in 1784 and before, and for many decades thereafter, any fiduciary duties of the Imperial Crown to the predecessors of the plaintiff, if any existed which is denied, were not justiciable duties. Any alleged breach of such duty or duties did not then found liability in law or equity, and a breach alleged to have occurred then cannot now be justiciable or the foundation of liability. Further, at all material times the Crown fulfilled any duties it may have owed to the plaintiff's predecessors.

28.2 With respect to paragraphs 21 to 82 inclusive of the statement of claim, Ontario pleads that the plaintiff has not identified particular land sales or valuations that it alleges were improper, and Ontario puts the plaintiff to strict proof thereof. Ontario denies that the Crown systematically failed to obtain "fair market value" or to take steps to obtain fair market value, and denies that "fair market value" as a term of art or law was applicable at the relevant times. At times there was no process for purchasing land from the Crown and various factors related to the administration and management of lands by the Crown were closely connected to broad issues of public policy and finance. Ontario further denies that the Crown had any duties which required it to provide to the plaintiff the "fair market value" of any lands in the Haldimand Tract (including through the Haldimand Proclamation, Simcoe Patent, Brant's Power of Attorney, any surrender including those referenced above in paragraph 28(d) or the "Purported 1841 Jarvis Agreement"). Further, the plaintiff itself and through its members initiated, negotiated, participated in, were involved in, were aware of and/or consented to or did not dispute sales and valuations of lands. If it was found that the Crown was under a duty to provide to the plaintiff the "fair market value" for lands in the Haldimand Tract, which is denied, Ontario pleads that the Crown did all that could reasonably be asked of it in attempting to obtain fair and just compensation for the benefit of the plaintiff in the circumstances. Ontario pleads that any processes used by the Crown for sale of

lands including to secure appropriate compensation where applicable were fair, reasonable, and appropriate to the time and circumstances. Further, if the plaintiff was entitled to the "fair market value" of the lands, which is not admitted but denied, Ontario pleads that "fair market value" should be determined by the price a willing buyer at the time of sale would have paid to a willing seller for the specific lands. Ontario denies that any compensation received by the plaintiff was exploitative or represented an improvident bargain. Accordingly, if the Crown owed any duty to the plaintiff, which is denied, any such duty was satisfied in the circumstances.

28.3 With respect to paragraphs 21 to 82 inclusive of the statement of claim, Ontario pleads that if any alleged "intruders" or "squatters" existed on the Haldimand Tract, which is denied, the presence of any such alleged intruders or squatters does not give rise to any liability that is justiciable or enforceable in the courts, including because alleged intruders or squatters were invited or authorized by Six Nations and or its members. In the alternative if any intruders or squatters existed at any point, which is not admitted but denied, the Crown took measures to address intrusion or squatting that were reasonable in the time and circumstances and had no power in practice to prevent such intrusion or squatting beyond those measures which were utilized. In the further alternative, the Crown and Six Nations agreed to enter into surrenders including those mentioned in subparagraph 28 d) in part in order to address problems with intruders or squatters by Six Nations ceding any interest, with proceeds from the sales paid to the predecessors of the plaintiff. Any duties the Crown had with respect to these lands, which duties are not admitted but denied, were therefore fulfilled. Further, any Crown decisions regarding the allocation of resources constituted policy decisions and did not and do not give rise to any justiciable duties enforceable in the courts.

28.4 In the further alternative, if there was or is found to be a trust or fiduciary obligation and

if this defendant is a trustee or fiduciary and if the trust or fiduciary obligation was breached, all of which is denied, this defendant acted honestly and reasonably at all times and ought fairly to be relieved from any liability for any such breach and for omitting to obtain the directions of the court in any matter in which this defendant may have committed a breach. This defendant pleads and relies upon the *Trustee Act*, RSO 1990, c T.23, and its predecessors.

The Plaintiff's Allegations about the "Crown's Failures to Account"

29. Ontario denies the allegation in paragraph 82 of the statement of claim. Ontario pleads, in addition to or supplementary to the other pleadings set out or adopted herein, and including but not limited to paragraph 119 in Canada's amended statement of defence:

a) The plaintiff styles the alternative relief sought as an accounting and inquiry. But in fact the plaintiff seeks a roving judicial historical investigation into all surrenders, sales and transactions involving a vast tract of land and into the crediting, adequacy and management of the proceeds of the disposition of the land from 1784 to the date of the proposed investigation. This court has no jurisdiction, either at law or equity, to grant that relief.

b) The court is not equipped to engage in a historical investigation of that kind, by means of a reference or otherwise, and, therefore, if it has jurisdiction to order an investigation of the kind and scope sought, which is denied, it should decline to exercise a discretion to do so.

c) The Crown owed no treaty obligation or other duty, including any fiduciary duty, in equity or in law justiciable or enforceable in the courts in respect of the assets in question and, therefore, no remedy by way of declarations, equitable compensation and/or damages, or alternatively by way of accounting (paragraph 1 of the statement of claim) can be granted.

d) There is no reasonable *prima facie* inference that breaches that are not pleaded in the

statement of claim occurred and, therefore, if the relief sought is properly characterized as an accounting, which is denied, and would be otherwise available, which is denied, no roving accounting of the kind sought can be granted.

e) The court has no jurisdiction to grant an "inquiry". Throughout Canadian history, from earliest times to today, an "inquiry" is relief and a course of action that may be ordered by Her Majesty-in-Council pursuant to the royal prerogative or statute. It is not relief that may be ordered by a court of law and equity.

f) An accounting is a remedy that a plaintiff can claim by which the defendant is required to account for monies received or due. Neither the question of "whether all portions of the Six Nations Lands which today are not part of the Six Nations Reserve No. 40 and 40B were lawfully disposed of by first obtaining from the Six Nations a surrender in accordance with the applicable legal requirements" (subparagraph 82(a) of the statement of claim) nor the question of the "extent to which the Six Nations have been deprived of their property rights by the Crown's failure to fulfil its treaty obligations under the Haldimand Proclamation" (subparagraph 82 (d)) are issues of account. Therefore, even if the alternative remedy of accounting were otherwise available, which is denied, and even if the Haldimand Proclamation gives rise to treaty obligations, which is denied, the questions set out in subparagraphs 82(a) and (d) of the statement of claim are not matters for an accounting and no remedy by way of accounting can be granted in respect of them.

g) Further, all or most of the alleged "examples of breaches" of the Crown's obligations to the Six Nations pleaded and relied upon by the plaintiff are not matters of account. Among the examples that are not matters of account are: **1.** whether the Crown breached a duty in 1831 by obtaining three tracts of land elsewhere in Upper Canada for the Six Nations to make

good the amount owing to the Six Nations by the Six Nations' deceased trustee, Colonel Claus (paragraph 36 of the statement of claim); **2.** whether the Crown breached a duty in 1831 by not ensuring that Colonel Claus' son had a right to convey some of the tracts in his own name (paragraphs 37 and 40); **3.** whether the Crown breached a duty in 1840 by deciding to sell the tracts in the manner adopted and for the prices obtained (paragraph 38); **4.** whether the Crown breached a duty in the 1840s by selling the tracts without obtaining a surrender from the Six Nations (paragraph 39); **5.** whether the Crown breached a duty in 1852 by paying from the Six Nations Trust the costs of defending the Six Nations' interests in *Dickson v. Gross* (paragraphs 40 and 41); **6.** whether the Crown breached a duty in 1853 by paying the Claus Estate from the Six Nations Trust for the three tracts of land that had been conveyed to the Six Nations (paragraph 42); **7.** Whether the Crown was legally obliged to reimburse the Six Nations the amount owed to the Six Nations by the Six Nations' deceased trustee, Colonel Claus (paragraph 43); **8.** whether the Crown breached a duty by the alleged sale of 200 acre lots in the "Talbot Road Lands" instead of 100 acre lots (paragraphs 58.5 and 58.6); **9.** whether the Crown breached a duty by the alleged failure to reserve 2 miles on each side of the Grand River from sale of "Talbot Road Lands" (paragraphs 58.5 and 58.7); **10.** Whether the Crown breached a duty by the alleged sale of "Talbot Road Lands" that were within a tract reserved from sale and outside the Cayuga town plot (paragraphs 58.8 to 58.10 inclusive); **11.** whether the crown breached a duty by the alleged failure to reserve from sale "Talbot Road Lands" notwithstanding the public notice of January 22, 1844 (paragraph 58.10); **12.** whether the Crown breached a duty by the alleged granting of "Hamilton/Port Dover Plank Road Lands" in fee simple instead of in leasehold (paragraphs 59 and 60); **13.** whether the Crown breached a duty by the alleged

wrongful taking of "Port Maitland Lands" (paragraphs 61 and 62); **14.** whether the Crown breached a duty in connection with the "Purported Surrender of 1841" (paragraphs 63 to 73 inclusive). Therefore, even if the alternative remedy of accounting were otherwise available, which is denied, and even if the allegations concerning the alleged "examples of breaches" were true, which is denied, all or most of the "examples" are not matters for an accounting and no remedy by way of an accounting can be granted in respect of them.

30. Concerning paragraph 83 of the statement of claim, the Crown had and has no fiduciary obligations to the Six Nations. It had and has a political trust not justiciable or enforceable in the courts, which political trust has been since confederation an obligation of Canada. Ontario has no knowledge of the letter dated October 25, 1979 or the response to it by the Parliament of Canada or the Auditor General of Canada or anyone else. The letter of October 23, 1992 was addressed to the Minister of Indian Affairs and Northern Development of Canada and the Minister of Justice of Canada. It demanded an accounting. Copies were sent to Ontario. The letter closed, on page 3, with the assertion that a copy was sent to an Ontario minister "to inform him of this demand [made to Canada]. An accounting is also requested from the Province with respect to all matters related to the trust that may for any reason have been treated as within the jurisdiction of the Province." No such matters were ever treated as within the jurisdiction of the province. By inadvertence, Ontario did not acknowledge receipt of the copies of the letter sent to it. Ontario has no knowledge of the response of Canada to the letter.

The Effect of the Plaintiff's Delay

31. All of the events, acts and omissions which constitute the alleged breaches in respect of which the plaintiff seeks relief, with the exception of the allegation about failure to protect the Six Nations' interest in oil and gas underlying the Six Nations Reserve (paragraphs 76 to 81

inclusive of the statement of claim), occurred between 1793 and 1841. Notice of this action was given in December, 1994 and the action was commenced in 1995. Throughout the period between the alleged events, acts and omissions on which the plaintiff now bases its claim and the date of commencement of the action the plaintiff had full knowledge of those events, acts and omissions and of the claim that it now asserts. The delay of between more than one century and a half and ~~s lightly~~ more than two centuries in bringing the action gives rise to a reasonable inference of acquiescence by the plaintiff. The action is therefore barred by the equitable doctrine of laches.

32. Further, the delay of the plaintiff in bringing the action gives rise to circumstances that make prosecution of the action unreasonable. The action is therefore barred by the equitable doctrine of laches on that ground as well.

33. The delay has been of such a length and extent that a reasonable expectation has arisen that the Crown will not be held to account for the obligations that the plaintiff alleges existed and were breached. Further, the delay has ensured that the witnesses of the facts are dead, much evidence is lost completely, and all evidence that would explain the surviving evidence so that the court can properly understand it and make findings of fact is lost, with the result that the claim is now necessarily based on stale and inadequate evidence. And further, the plaintiff has, instead of bringing suit in a timely fashion, failed to do so with the result that the public interest requires that the action be barred.

34. Ontario pleads and relies upon the *Limitations Act*, R.S.O. 1990, c. L. 15, ~~s. 46~~ and its predecessors. The action is in part a claim for breach of treaty, and in the alternative an action of account or for not accounting. These causes of action arose ~~more than six years before the commencement of the action. The action is~~well outside of applicable limitation periods and are therefore barred by statute. In the alternative to paragraph 3 above, to the extent the action is a

claim for land and/or real property, Ontario relies on the *Real Property Limitations Act*, R.S.O. 1990, c. L. 15 and its predecessors, and pleads that any claim to recover land arose well outside of the applicable limitation period and is therefore barred by statute.

35. The action is in respect of acts done in pursuance or execution or intended execution of an alleged statutory or other public duty or authority, or in respect of alleged neglects or defaults in the execution of such duty or authority. The cause of action arose and the alleged injury or damage therefrom occurred more than six months before the commencement of the action. The action is therefore barred by statute for that reason as well. Ontario pleads and relies upon the *Public Authorities Protection Act*, R.S.O. 1990, c. P.38, s. 7(1), and the *Crown Liability and Proceedings Act, 2019*, S.O 2019, c. 7, Sch 17 and their predecessors.

The historical, factual, legal and constitutional unrelatedness and unconnectedness between Ontario and the allegations and claims of the plaintiff

36. There is no historical, factual, legal or constitutional relatedness or connectedness between Ontario and any of the obligations to the Six Nations alleged by the plaintiff or any of the events, acts and omissions which constitute the alleged breaches in respect of which the plaintiff seeks relief.

37. Ontario did not exist prior to July 1, 1867. It came into existence by virtue of the *Constitution Act, 1867.*

38. The alleged breaches, with the exception of the allegation about failure to protect the Six Nations' interest in oil and gas underlying the Six Nations Reserve (paragraphs 76 to 81 inclusive of the statement of claim), occurred before July 1, 1867. If there was and is any liability in respect

of the alleged breaches, which is denied, it existed on July 1, 1867. Any liability of the Crown on July 1, 1867, if it was not a liability of the Imperial Crown, was a liability of the Province of Canada. Any such liability became a liability of the Dominion of Canada by operation of the *Constitution Act, 1867* and remains today a liability of Canada, not Ontario. Ontario pleads and relies upon s. 111 of the *Constitution Act, 1867.*

39. Any liability of the Crown in respect of the alleged breaches, which is denied, would have been in respect of alleged acts or omissions of the Department of Indian Affairs. Before 1867 the Department of Indian Affairs was, successively, a branch of the Imperial Crown and of the Province of Canada. After July 1, 1867 the Department of Indian Affairs was at all times, and it continues to be, a branch of Canada pursuant to s. 91.24 and s. 130 of the *Constitution Act, 1867*. Ontario pleads and relies upon those provisions of the Constitution and upon *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, S.C. 1868, c.42, *The Indian Act, 1876*, S.C. 1876, c. 18, and the successors of those Acts of Parliament.

40. Since July 1, 1867 the officers of the Department of Indian Affairs have been and are officers of Canada and have been and are subject to any liabilities that existed prior to July l, 1867. Any such liabilities became on that date, and continue to be, liabilities of Canada, and not of Ontario. Ontario pleads and relies upon s. 91.24 and s. 130 of the *Constitution Act, 1867, An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, S.C. 1868, c. 42, *The Indian Act, 1876,* S.C. 1876, c. 18, and the successors of those Acts of Parliament.

41. No lands in the Haldimand Proclamation/Simcoe Patent lands came to belong to Ontario, by s. 109 of the *Constitution Act, 1867* or otherwise, which were not before 1867 the subject of

an absolute surrender to the Crown by the Six Nations. Subsequent to those absolute surrenders the Six Nations had no right, title or interest in the lands. The lands that came to belong to Ontario were not "subject to any Trusts existing in respect thereof, [or] to any Interest other than that of the Province in the same" within the meaning of s. 109. Further, the many sales or other dispositions by the Crown of the surrendered lands were made prior to July 1, 1867. After that date all sums then due or payable for such lands continued to belong to the Department of Indian Affairs, a branch of Canada. Ontario pleads and relies upon *An 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.

42. The fiduciary obligation of the Crown to Indians in Canada and any responsibility of the Crown to provide for the welfare and protection of Indigenous peoples are, as a matter of constitutional law, an obligation and a responsibility of the Crown in right of Canada, not the Crown in right of a province. Ontario pleads and relies upon that obligation and responsibility and upon s. 91.24 and s. 130 of the *Constitution Act, 1867*. In the alternative, Ontario pleads that any alleged breaches of fiduciary obligation as against Ontario, which are denied, are not justiciable or enforceable or Ontario is immune at common law from such claims.

43. Ontario pleads that certain of the plaintiff's claims are *res judicata* as a result of *Miller v. The King*, [1950] S.C.R. 168 and those claims must necessarily be dismissed. It is not possible that liability in respect of the claims did not belong to the Province of Canada between 1840 and 1867 but then re-emerged on July 1, 1867 as a liability of the new Province of Ontario.

44. If there was and is any liability in respect of the alleged breaches, which is denied, and if it was a liability of the Imperial Crown, it is today a liability of the Imperial Crown or of Canada. Ontario pleads and relies upon s. 91.24 and s. 130 of the *Constitution Act, 1867*.

45. None of the alleged acts or omissions which constitute the alleged breaches in respect of which the plaintiff seeks relief were acts or omissions of a servant of Ontario or of any person appointed by or employed by Ontario. Therefore, on that ground as well, the action does not lie against Ontario. Ontario pleads and relies upon the *Proceedings Against the Crown Act, R.S.O. 1990*, c. P. 27, s. 2(2)(c) and s. 1 (definition of "Crown" in the Act) and its predecessors, as well as the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c 7, Sch 17.

46. Ontario therefore asks that the action be dismissed with costs or, in the alternative, dismissed ~~with costs~~ as against Ontario with costs.

CROSSCLAIM

47. The defendant Ontario claims against the defendant the Attorney General of Canada ("Canada"):

- **a)** an order that any and all relief and costs to which this Court may find the plaintiff entitled in the action is relief and costs against Canada only or, in the alternative, an order directing Canada to indemnify Ontario in the amount of any relief and costs for which this Court finds Ontario liable to the plaintiff; and
- **b)** costs.

48. Ontario repeats and relies upon, in the crossclaim, the contents of the statement of defence of Ontario.

49. Any liability to the plaintiff in the action, which is denied, is therefore a liability of the defendant Canada and not a liability of the defendant Ontario.

50. Canada is liable to Ontario for all or any part of the plaintiff’s claim for which the court

may find Ontario liable. Ontario pleads and relies upon Rule 28.01 of the *Rules of Civil Procedure*, the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s.27 as am. S.C. 1990, c. 8, s. 31, and the *Proceedings against the Crown Act*, R.S.O. 1990, c. P.27, s.6 and its predecessors, and the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c.7, Sch 17.

January 22, 1995
(Amended August 31, 2020)
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Toronto Court File No. CV-18-594281-0000
Originally Brantford Court File No.: 406/95

SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS

- and -

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

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto

FURTHER AMENDED STATEMENT OF DEFENCE AND CROSSCLAIM OF THE DEFENDANT ~~HER~~HIS MAJESTY THE ~~QUEEN~~KING IN RIGHT OF ONTARIO

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