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 HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Defendants

- and -

THE MISSISSAUGAS OF THE CREDIT FIRST NATION

Intervenor

REPLY TO THE SECOND FRESH AS AMENDED STATEMENT OF DEFENCE OF THE ATTORNEY GENERAL OF CANADA, TO THE FURTHER AMENDED STATEMENT OF DEFENCE AND CROSSCLAIM OF HIS MAJESTY THE KING IN RIGHT OF ONTARIO AND TO THE STATEMENT OF DEFENCE OF THE MISSISSAUGAS OF THE CREDIT FIRST NATION

Introduction

1. The Plaintiff, the Six Nations of the Grand River Band of Indians (the "**Six Nations**"), admits paragraphs 5, 8, 34, and 73 of the Second Fresh as Amended

Statement of Defence (the "**Federal Crown's Defence**") of the Attorney General of Canada (the "**Federal Crown**"), and admits paragraphs 13 (first sentence only) and 28(m) (second last sentence only) of the Further Amended Statement of Defence (the "**Ontario Crown's Defence**") of His Majesty the King in Right of Ontario (the "**Ontario Crown**") (collectively the "**Defences"**).

2. Six Nations denies all of the other allegations in the Defences, except as previously pleaded in the Second Fresh as Amended Statement of Claim ("**Claim**") and except as expressly admitted in this Reply. For convenience, defined terms in the Claim shall continue to have the same meanings in this Reply, unless separately defined.

3. As to paragraphs 4, 6 and 6.1 of the Federal Crown's Defence, Six Nations repeats and relies on paragraphs 3 and 5 of the Claim. The British Imperial Crown and its successors in Canada (collectively the "**Crown**") at all relevant times owed treaty and fiduciary obligations to the Six Nations, as well as an overarching constitutional duty to act honourably in dealings with the Six Nations, in accordance with the common law doctrine of the "Honour of the Crown". The Crown's obligations and duties to the Six Nations were not limited to those arising from the *Constitution Act, 1867,* but also arose before 1867 as a matter of constitutional and common law.

Indian Provisions of the Royal Proclamation of 1763

4. The Royal Proclamation of October 7, 1763 contained detailed measures concerning Indigenous people and their lands (the "**Royal Proclamation Indian Provisions**"). As to paragraph 8 of the Federal Crown's Defence, the Royal Proclamation Indian Provisions restated the British common law respecting the conduct of the British

Imperial Crown's relations with the Indigenous inhabitants of British North America, and that common law continued to apply even after the enactment of the *Quebec Act, 1774*.

5. As to paragraph 10 of the Federal Crown's Defence, the common law codified in the Royal Proclamation Indian Provisions did not disappear with the passage of the *Quebec Act, 1774*, but continued thereafter in force as part of the British and Imperial common law including in connection with the Haldimand Proclamation of October 1784. The Indigenous rights or freedoms recognized by the Royal Proclamation are expressly referenced in section 25 of the *Constitution Act, 1982*.

Status of the Haldimand Proclamation as a Treaty

6. As to paragraphs 11 to 15.4 and 77 of the Federal Crown's Defence and paragraphs 16 to 17.1 of the Ontario Crown's Defence, the Haldimand Proclamation of 1784 resulted from a process of negotiation and mutual promises and consideration, between the Crown and the Six Nations as represented by War Chief Captain Joseph Brant, as well as other discussions between representatives of the Crown and the Haudenosaunee. The Haldimand Proclamation represented the culmination of a process of treaty making, which the parties intended to be legally binding, and therefore created treaty obligations of the Crown to the Six Nations.

7. In further reply to the allegations in the Defences that the Haldimand Proclamation was not a treaty, the Plaintiff pleads that at the end of the American Revolutionary War the Crown was concerned that the Six Nations would either ally themselves with the United States, or would continue to engage in hostile actions with the United States and call on Great Britain as an ally to assist the Six Nations against the United States, and

wanted to prevent each of these possibilities. The Crown was also interested in retaining the benefits of the trade in beaver and other pelts with Indigenous peoples, including the Six Nations. The Crown believed that it would assist in both of these matters for it to offer to allot lands in Quebec for those of their Six Nations allies who wished to relocate to Quebec. The Crown, as represented by General Frederick Haldimand and Sir John Johnson, Superintendent-General and Inspector-General of Indian Affairs, understood that Joseph Brant and John Deseronto were being sent as deputies of the Six Nations or of some of them to engage in discussions with the Crown on these matters.

8. In 1783, Haldimand met with Brant and discussed the concerns of the Six Nations and the Crown, and Haldimand proposed the possibility of allotting land for the benefit of those of the Six Nations who wished to relocate to the north side of Lake Ontario and the west side of the Niagara River. On or about May 21, 1783, Brant delivered a speech to Haldimand on behalf of the Six Nations concerning the Crown's preliminary articles of peace with the Americans to conclude the American Revolutionary War. In that speech Brant recited the history of the Covenant Chain between the Six Nations and the Crown, reminded Haldimand of the risks the Six Nations had taken as allies of the Crown, reminded the Crown of its obligations to the Six Nations and demanded to know whether Six Nations' lands in New York would be secured for them. On or about May 27, 1783 Haldimand provided a formal response to Brant's speech. Haldimand indicated that negotiations between the British and the Americans to conclude the Revolutionary War were not yet completed, but that he expected he would receive instructions from the Crown that would be satisfactory to the Six Nations.

9. Haldimand also sent Sir John Johnson to Niagara to meet with and deliver Haldimand's response to the Crown's Six Nations allies. Johnson met with over 1600 Six Nations persons at Niagara on July 23, 1783, including 107 chiefs. The chiefs named as being present included Sayengaraghta and Kayashota of the Senecas, Deigwanda of the Onondagas, Tagaaia of the Cayugas and Captain Aaron of the Mohawks. At the July 23, 1783 meeting, Johnson advised that he was delivering the response of Governor Haldimand to the speech of the Six Nations chiefs that had been delivered by Joseph Brant on May 21, 1783.

10. This meeting continued on July 24, 1783. There, Chief Sayengaraghta addressed Johnson indicating that the Six Nations were pleased with Haldimand's response to the speech that had been delivered on the Six Nations' behalf by Captain Brant, but that they expected they could call upon the Crown as their ally to protect their property in New York.

11. The negotiations continued at Niagara for approximately 15 days after which Johnson reported that he had had public and private meetings with the Six Nations where he had attempted to address their concerns and to convey the Crown's "paternal care" to them.

12. On August 8, 1783, Lord North (the British Secretary of State for Home Affairs with responsibility for the colonies) informed Governor Haldimand that the Crown had authorized him to make an offer of land to be allotted to those of the Mohawks and others who wished to withdraw from the United States to settle on the north side of Lake Ontario. Lord North indicated to Haldimand that the Crown hoped to benefit by this relationship as

the Six Nations would continue to hunt on their former grounds (south and west of the Great Lakes) while bringing their products to Quebec to be traded to British traders. After discussions about the location of the lands to be allotted, Haldimand ultimately agreed with Brant to grant the Haldimand Tract to the Six Nations of the Grand River.

13. Brant also insisted on a written version of the Crown's commitment to grant the Haldimand Tract to the Six Nations of the Grand River. He received such a written document issued on October 25, 1784 under Governor Haldimand's seal, which is the document referred to as the Haldimand Proclamation. Based upon this commitment made by the Crown through Governor Haldimand, certain Mohawk and other members of the Six Nations moved from the United States and settled on the Haldimand Tract as allies of the British Crown.

The Haldimand Proclamation Gives Rise to Treaty Rights Even if it is Held to be a Unilateral Act

14. Irrespective of whether or not the Haldimand Proclamation was a unilateral act at the time that it was made, the Six Nations of the Grand River relied upon the Haldimand Proclamation and:

(a) Relocated to the Haldimand Tract;

(b) Maintained the peace with the United States;

(c) Maintained their alliance with the Crown; and

(d) Did not insist that the Crown provide military support in recovering their American lands.

15. As a result, the promise of the reserve set out in the Haldimand Proclamation as described in the Claim is a treaty right within the meaning of s. 35 of the *Constitution Act, 1982*.

The Haldimand Proclamation Gives Rise to Legally Enforceable Rights Even if it is Held to be a Unilateral Act

16. It was not necessary for the Haldimand Proclamation to be a treaty or to give rise to treaty rights in order to create legally enforceable reserve-related rights for the Six Nations of the Grand River. In particular, even if it were a unilateral act the Haldimand Proclamation could and did:

(a) Create the Haldimand Tract as a reserve, or, in the alternative give rise to the obligation to set aside the Haldimand Tract as a reserve (as described in the Claim); and

(b) Give rise to each of the Reserve Land Duties, Reserve Creation Duties, Surrender Duties, Surrender Implementation Duties, Appropriation Duties, and Indian Monies Management Duties described in the Claim.

The Boundaries of the Haldimand Tract were not Determined or Altered by the Mississaugas 1792 Quit Claim

17. As to paragraphs 15.3 to 15.8 of the Federal Crown's Defence and paragraphs 15 and 18 to 20 of the Ontario Crown's Defence, in which the Federal Crown and the Ontario Crown allege that Haldimand Tract was limited to the northern purchase line negotiated by the Mississaugas and excludes the Headwaters Lands, the Plaintiff denies these allegations and pleads the following in reply.

18. Prior to 1784, the Haudenosaunee knew of and used the lands that later became known as the Haldimand Tract. Before the 1700s, these lands were used and occupied by the Huron-Wendat and Neutral Nations, both Iroquois Nations whose traditional territory included what later became the Haldimand Tract. Before the 1700s, the Haudenosaunee expanded their territory to include the area now known as the Haldimand Tract and in doing so defeated and absorbed the Neutral Nation. Most of the remnants of the Neutral Nation were absorbed into and became part of the Seneca Nation, one of the Six Nations.

19. Prior to the 1700s, the Haudenosaunee used and occupied the former territory of the Neutral Nation (including the Haldimand Tract) for a variety of reasons including maintaining village sites, hunting, and harvesting beaver pelts (which were a valuable commodity in the trade with Europeans). As part of their use and occupation of these lands, the Haudenosaunee traveled through and used the Grand River and the lands around the Grand River, including those lands that became the Haldimand Tract.

20. By 1700 the Anishinaabeg had, as allies of the French Crown, made gains in their conflict with the Haudenosaunee, but the Haudenosaunee continued to assert claims to the lands on the north side of the Lake Erie through a variety of means, including building and strengthening their alliance with the British Imperial Crown. In 1700-1701, the French Crown, which had an interest in establishing peaceful trading relations with all Indigenous Nations in the Great Lakes Basin (and to the east), pressed the Anishinaabeg and the Haudenosaunee to enter into peace negotiations. This resulted in an agreement between the Haudenosaunee and a number of Anishinaabeg Nations to share this land, referred to as the Dish with One Spoon, and these arrangements were ratified on August 4, 1701,

in the “Great Peace of Montréal”. As a result , hostilities between the Haudenosaunee and the Anishinaabeg came to an end in the area north of Lake Erie that encompasses the Haldimand Tract. Following this, the Haudenosaunee expected and did continue to use the Grand River and its watershed, and had amicable relations with the Anishinaabeg.

21. At the same time, the Haudenosaunee sought assurances from the Crown that it too would respect Haudenosaunee use of the lands north of Lake Erie (as well their territory elsewhere). They received those assurances from the Crown in 1701 in the agreement generally referred to as the Treaty of Fort Albany or the Nanfan Treaty. The lands covered by the Nanfan Treaty (which included what later became the Haldimand Tract) were different than the lands covered by the Dish with One Spoon. A map of the lands covered by the Nanfan Treaty dating to 1701, produced by Samuel Clowes, identified the Haudenosaunee’s beaver hunting territory as including the Haldimand Tract. Thereafter the Haudenosaunee continued to use the lands north of Lake Erie for hunting, travel and trade. The Haudenosaunee and the Anishinaabeg maintained peaceful relations from that time forward in the area that included what later became the Haldimand Tract.

22. Prior to the Crown negotiating the quit claim of May 1784 with the Mississaugas, the Mississaugas did not object to the Six Nations of the Grand River establishing themselves at the Grand River. In 1784, the Mississaugas said to Joseph Brant that the whole country was before the Six Nations and that they could choose a tract for themselves and there build their wigwams and plant their corn.

23. In entering into the negotiations with the Mississaugas in 1784, the Crown sought to procure all of the land between Lake Ontario, Lake Huron and Lake Erie from the Mississaugas – an area that included the whole of the Haldimand Tract – both with the intention of the setting aside the Haldimand Tract for the Six Nations of the Grand River, and also because it was required to do so for the purpose of later making land grants to settlers. When the Crown entered into these negotiations, it understood that the Six Nations of the Grand River sought the whole of the Grand River Valley from its mouth to its source.

24. During the 1784 quit claim negotiations, the Crown arranged for representatives of the Six Nations to be present and to participate. The Six Nations of the Grand River and the Mississaugas engaged in direct discussions and negotiations in relation to the 1784 quit claim. During these negotiations, the Mississaugas made it clear that they had no objection to the Six Nations of the Grand River establishing a settlement along the Grand River and advised the Crown that, given the amicable relationship between the Mississaugas and the Six Nations, no surrender or consent was needed for this. In this respect, the Mississaugas stated the following to the Crown's representatives in the presence of representatives of Six Nations of the Grand River:

> Your request or proposal does not give us that trouble or concern, that you might imagine from the Answer you received from Some of our people the other day, that difficulty is entirely removed, we are Indians, and consider ourselves and the Six Nations to be one and the same people, and agreeable to a former and mutual agreement. We are bound to help each other, Brother, Captain Brant, we are happy to hear that you intend to settle at the River Oswego with your people, we hope you will keep your young men in good order, as we shall be in one neighborhood, and to live in friendship with each other as Breth[re]n ought to do.

25. The Mississaugas advised the Crown's representatives that they did not own all of the land that the Crown sought. At no point during the 1784 quit claim negotiations, however, did the Mississaugas suggest that the lands they *were* surrendering did not include the whole of the Haldimand Tract, including the Headwaters Lands.

26. After the Mississaugas made the 1784 quit claim, Joseph Brant asked Governor Haldimand to provide a written assurance of the Crown's commitment to provide the Haldimand Tract to the Six Nations of the Grand River. In response, Governor Haldimand provided the Six Nations of the Grand River with the Haldimand Proclamation under his seal which described in writing the Haldimand Tract as expressly including the Headwaters Lands.

27. At no point during the time when the Six Nations of the Grand River began to relocate to the Haldimand Tract did the Crown advise them that they were not entitled to use and occupy the Headwaters Lands or that they were limited to only the Haldimand Tract below the Headwaters Lands.

28. At this time, the Mississaugas and Six Nations had a close relationship. The Indian Department delivered presents jointly to the Mississaugas and Six Nations at the Head of Lake Ontario. In or around 1798, the Mississaugas chose Joseph Brant to be their chief and to act as their representative before Crown officials. However, to discourage cooperation between First Nations, and pursuant to a direction from the Duke of Portland to break up coalitions by First Nations, including the Six Nations' ties to the Mississaugas, around 1798 Crown officials began to separately deliver presents to the Mississaugas at Credit River.

29. In 1791, the Land Board of the District of Nassau commissioned a survey of the boundaries of the Haldimand Tract that lay within the District of Nassau. The Commissioners of this Land Board stated that the survey was not intended to describe the entire Haldimand Tract. While this survey showed a boundary at the western boundary of the District of Nassau, the Land Board provided assurances to the Six Nations of the Grand River that it was understood the Haldimand Tract extended beyond the District of Nassau western boundary to the source of the Grand River. The surveyor, Augustus Jones, recorded this understanding in a memorandum to the survey.

30. By 1792, issues had arisen between the Crown and the predecessors of the Mississaugas of the Credit (one of the Mississaugas Nations) concerning whether or not a proper quit claim had been obtained in 1784 and whether the Mississaugas had been properly compensated for their lands being opened for settlement. As a result, the Crown entered into negotiations with the predecessors of the Mississaugas of the Credit to confirm or obtain the surrender of their interest in the lands proposed for settlement. Neither the Crown nor the Mississaugas of the Credit gave notice to the Six Nations of the Grand River of this negotiation nor invited the Six Nations of the Grand River to attend or participate in it. Neither the Crown nor the Mississaugas of the Credit sought the consent of the Six Nations of the Grand River to the agreement reached between them in 1792.

31. In preparing the Simcoe Patent (as that term is defined in paragraph 16 of the Claim to refer to the document that was drafted), Lieutenant Governor Simcoe was not aware of Governor Haldimand’s commitment to grant the Haldimand Tract including the Headwaters Lands to the Six Nations of the Grand River or Haldimand having expressly

confirmed this in writing in the Haldimand Proclamation. When later faced with Haldimand's written description of the Haldimand Tract, along with other disputes concerning the terms and conditions Simcoe proposed for the patent, Simcoe (as described in the Claim) did not proceed to sign, seal or make the Simcoe Patent effective. The subsequent registration of this document in 1837 was made without official authority or the consent of the Six Nations of the Grand River, and did not, and could not, render it an effective patent.

32. The registration of the Simcoe Patent in 1837 did not reflect the Crown's intention in 1792 to re-define or limit the extent of the Haldimand Tract. Rather, it was intended to be an after-the-fact justification of the decision of Lieutenant Governor Maitland to refuse to respect the inclusion of the Headwaters Lands in the Haldimand Tract and of his decision to open these lands for settlement without the consent of the Six Nations of the Grand River.

***Reserves Pre-Date and Are Not Dependant Upon the* Indian Act**

33. The Federal Crown and Ontario Crown plead various facts (in paragraphs 1.3, 6.1(i.i), 74.2 to 74.8, 79.1 to 79.2 of the Federal Crown's Defence, and paragraphs 7.1, 15, 16.2 to 17.1(a),18.1 to 19, 28(g) to 28(h), 28(l) and 29(g) of the Ontario Crown's Defence) about the process by which the current Six Nations of the Grand River reserve lands became a reserve within the meaning of the *Indian Act*, and allege that the Haldimand Tract was not a reserve within the meaning of the *Indian Act* or as the term "reserve" is currently understood. These allegations provide an incomplete or inaccurate picture of the history or law concerning the creation or recognition of reserves in Canada, and in particular, that part of Canada variously known as the Province of Quebec (pre-

1791), Upper Canada (between 1791 and 1841), Canada (West) (between 1841 and 1867) and Ontario (after 1867).

34. From 1763 onward it was understood by the Crown and colonial officials that there would be lands within the colonies that would be reserved for Indigenous peoples (variously called tribes, nations or bands) as a part of treaties, or through other promises made by the Crown to Indigenous Nations. Although the legal title of these lands remained vested in the Crown, these lands were not available for settlement and were held by the Crown for the use and benefit of the relevant Indigenous group. These lands were referred to in various ways but are now referred to in Canada as “reserves” or “Indian reserves”.

35. The pre-existence of such reserves was recognized in the original Indian Act (*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)* in 1868 which did not define the reserves but instead provided as follows:

> 6. All lands reserved for Indians or for any tribe, band or body of Indians or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as before the passing of this Act, but subject to its provisions; and no such lands shall be sold, alienated or leased until they have been released or surrendered to the Crown for the purposes of this Act.

36. This provision encompassed all lands reserved for Indians for any tribe, band or body of Indians or held in trust for their benefit regardless of whether or not the underlying legal title of the land was vested in the Federal Crown or Ontario Crown. By the time of this statute in 1868, all of the Haldimand Tract other than the current reserve lands was understood by the Crown to have been surrendered or appropriated or, in the case of the

Headwaters Lands, was incorrectly not recognized by the Crown as being part of the lands reserved for the Six Nations of the Grand River.

37. As a result of a series of disputes between the Federal Crown and Ontario Crown from the 1880s to the early 1890s, it became clear that it was administratively and legislatively inconvenient for reserve lands to be vested in Ontario (pursuant to section 109 of the *Constitution Act, 1867*), while legislative and administrative responsibility for those lands rested with Canada, and the beneficial interest in those lands belonged to the relevant Indian band. The Federal Crown and Ontario Crown therefore entered into the arrangements between them described in paragraph 74.5 of the Federal Crown's Defence. These arrangements have no relevance to the legal status of reserve land prior to 1868 or Crown duties in respect thereof.

38. Further, the Crown's reserve-related fiduciary duties (as described in the Claim) and the legal obligations related to them are not and were not dependent upon the Haldimand Tract being a reserve within the meaning of the *Indian Act.*

Crown's Fiduciary Duties to Indigenous Peoples Arose at the Assertion of Crown Sovereignty

39. The Federal Crown pleads in paragraphs 6 to 6.1, 80 to 81, 83, 103, 105 to 107 and 135 of its Defence, and the Ontario Crown pleads in paragraphs 4, 7, 11, 23 to 26, 28(m), 28.1 to 28.4, 29(c), 30 and 42 of its Defence, that the fiduciary duties arising out of the establishment of a reserve or the commitment to establish a reserve did not exist or were diminished in their effect in the early colonial period. This is incorrect.

40. As matter of law, the Crown's fiduciary relationship with Indigenous peoples in respect of their lands arose with the Crown's assertion of sovereignty, which in the case of the Haldimand Tract occurred no later than the October 6, 1763 with the making of the Royal Proclamation of 1763. The fiduciary duties asserted in the Claim arose and became enforceable when the essential elements of the relevant fiduciary duty arose (as detailed in the Claim).

The Crown Always Understood the Haldimand Tract to be an Indian Reserve

41. Contrary to paragraphs 1.2, 1.3, 6.1(i.i) and 79 to 79.2 of the Federal Crown's Defence and paragraphs 7.1, 15, 16.2 to 16.3, 17 to 17.1(a) the Ontario Crown's Defence which plead that the lands granted to the Six Nations pursuant to the Haldimand Proclamation and/or Simcoe Patent were not a reserve for the Six Nations or were not set aside for a reserve for the Six Nations, the Crown has from an early date consistently recognized the Haldimand Tract as being an Indian reserve, both by referring to it as such (or using terms with equivalent meanings) and by Crown officials acknowledging or referencing the special duties or obligations attached to these lands. Examples of these references include (but are not limited to):

(a) The Haldimand Proclamation refers to the land as being for the Mohawk Nation and others of the Five Nations Indians and their posterity forever;

(b) On April 4, 1791 the Land Committee of the District of Nassau described the Haldimand Tract as "Indian Lands";

(c) On December 24, 1791 the Executive Council of Upper Canada described the Haldimand Tract as having being held for the quiet possession and property of the Indians of the Mohawk Nation forever;

(d) The survey of 1791 by land surveyor Augustus Jones described the land that he surveyed as “reserved for the Mohawk Indians and others”;

(e) In 1797 Peter Russell as Administrator to the Duke of Portland stated that trustees should be appointed by the Crown to manage the proposed transactions in respect of Blocks 1 to 6 to protect the Six Nations of the Grand River from exploitation and from the dissipation of their assets, contrary to the intentions of the Crown;

(f) Peter Russell as Administrator made multiple references to the fact that a surrender from the Six Nations of the Grand River would be required to give effect to the transactions proposed in respect of Blocks 1 to 6;

(g) On March 27, 1819, at a meeting with the Six Nations of the Grand River, Deputy Superintendent General of Indian Affairs William Claus described the Haldimand Tract as land that had been acquired by the Crown for the Six Nations to retire to and as their property, and that no sale to settlers could be effective without the sanction of the Crown or acceptance of a surrender from the Six Nations of the Grand River;

(h) On March 30, 1819 the Executive Council of Upper Canada, in considering the boundaries of the Haldimand Tract, described the effect of the

Haldimand Proclamation as "reserving" the subject lands for the use of the Six Nations of the Grand River;

(i) On September 28, 1821, the colonial secretary Lord Bathurst, in stating the Crown's position that the Headwaters Lands were not included in the Haldimand Tract, described the Haldimand Tract lands as being those lands that were "permanently reserved for the Five Nations of Indians"; and

(j) Throughout the 1830s and 1840s, government officials acted on the basis that in order to open the lands within the Haldimand Tract for settlement it was necessary to obtain a surrender from the Six Nations of the Grand River given the land's status as reserve land.

42. As to the Federal Crown, the Plaintiff also pleads and relies upon the prior representations and statements of position made previously in this action by the Federal Crown that one or both of the Haldimand Proclamation and/or Simcoe Patent did create a reserve for the Six Nations or did give rise to an obligation to set aside lands for a reserve for the Six Nations. These include but are not limited to the following:

(a) In the Statement of Defence of the Attorney General of Canada dated January 15, 1996 authored by Charlotte Bell KC, the Federal Crown pleaded at paragraph 77 that pursuant to the Haldimand Proclamation, the British Imperial Crown declared "that it would abstain from granting the allocated lands to others and would reserve them to be occupied by the Six Nations";

(b) In Answers on Written Examination for Discovery sworn to be true by the Federal Crown's representative Franklin Roy on October 17, 2000, in answer to a question regarding what lands the Haldimand Proclamation and Simcoe Patent conferred upon the Six Nations, the Federal Crown stated that "…it is Canada's position that the interest that the Six Nations has in its reserve lands is the same interest that other First Nations have in their aboriginal title lands." This position was memorialized in Reasons of The Hon. Justice James C. Kent in this action dated October 19, 2001;

(c) At an examination for discovery of the Federal Crown's representative Franklin Roy held on December 4, 2000, that representative adopted his counsel Gary Penner's answer that Six Nations did not have to prove Aboriginal title because the Six Nations had an interest "in its reserve lands" from "initially, the Haldimand [Proclamation]" that "gives rise to rights";

(d) In the Fresh as Amended Statement of Defence of the Attorney General of Canada dated August 31, 2020, the Federal Crown pleaded at paragraph 77 that pursuant to the Haldimand Proclamation, the British Imperial Crown declared "that it would abstain from granting the allocated lands to others and would reserve them to be occupied by the Six Nations";

(e) In Answers dated March 12, 2021 to the Plaintiff's Written Questions on Discovery dated October 30, 2020, the Federal Crown admitted that "the Haldimand Proclamation was a unilateral declaration by the British Imperial

Crown that it would abstain from granting the allocated lands to others and would reserve them to be occupied by the Six Nations"; and

(f) At a cross-examination of the Federal Crown's representative Joyce Harkins held on June 14, 2023, prior to the Order granting the Plaintiff's motion to amend its Claim, that representative stated that in this claim she understood that Six Nations "is saying that the Haldimand Tract is a reserve" and that both Defences (as they were pleaded at the time) addressed the Haldimand Tract as being a reserve.

43. As to the Ontario Crown, the Plaintiff pleads and relies upon the prior representations and statements of position made previously in this action by the Ontario Crown that one or both of the Haldimand Proclamation and/or Simcoe Patent created a reserve for the Six Nations or did give rise to an obligation to set aside lands for a reserve for the Six Nations. These include but are not limited to the following:

(a) In paragraph 1 of the Statement of Defence and Crossclaim of the Defendant His Majesty The King in Right of Ontario dated January 22, 1995 authored by J.T.S. McCabe, KC the Ontario Crown adopted and repeated paragraph 77 of the Statement of Defence of Canada, in which Canada pleaded that pursuant to the Haldimand Proclamation, the British Imperial Crown declared "that it would abstain from granting the allocated lands to others and would reserve them to be occupied by the Six Nations";

(b) In the Statement of Defence and Crossclaim of the Defendant His Majesty The King in Right of Ontario dated January 22, 1995 authored by J.T.S.

McCabe, KC the Ontario Crown pleaded at paragraph 19 that "[t]he 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";

(c) In paragraph 1 of the Amended Statement of Defence and Crossclaim of the Defendant His Majesty The King in Right of Ontario dated August 31, 2020, the Ontario Crown adopted and repeated paragraph 77 of the Statement of Defence of Canada, in which Canada pleaded that pursuant to the Haldimand Proclamation, the British Imperial Crown declared "that it would abstain from granting the allocated lands to others and would reserve them to be occupied by the Six Nations";

(d) In the Amended Statement of Defence and Crossclaim of the Defendant His Majesty The King in Right of Ontario dated August 31, 2020, the Ontario Crown pleaded at paragraph 19 that "[t]he 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"; and

(e) In His Majesty the King in Right of Ontario's Responses to the Plaintiff's Questions on Written Examination for Discovery dated March 12, 2021, the Ontario Crown interchangeably used the terms "Grand River tract", "Haldimand Proclamation lands", "Six Nations Lands" and "Grand River Lands" and stated they "should be understood to mean lands set aside for

the use and enjoyment of Six Nations under instruments issued in 1784 and 1793 by Governors Haldimand and Simcoe".

44. Given the above, the conduct of the Federal Crown and the Ontario Crown in seeking to resile from their prior representations, admissions, and/or statements of position through their current Defences is contrary to the Honour of the Crown and amounts to an abuse of process and/or collateral attack on prior judicial determinations. Six Nations of the Grand River relies upon this conduct in support of its prior claim for costs on a full indemnity basis.

Successor Liability

45. In reply to the Federal Crown's and Ontario Crown's denials (at paragraph 4 of the Federal Crown's Defence and paragraphs 4 to 5 of the Ontario Crown's Defence) that they are successors to the liability of the Imperial Crown and that the breaches alleged in the Claim are breaches by the Imperial Crown, the Plaintiff pleads as follows in reply.

46. Crown successorship liability in respect of Indigenous peoples is not governed by international law but by Imperial common law and the legal principles governing the Crown's relationship with Indigenous peoples.

47. The breaches of fiduciary duty and/or treaty described in the Claim involve misconduct both by colonial officials and Imperial officials, and later officials of the Federal Crown. As a result of these breaches, lands and assets that were held for the use and benefit of the Six Nations of the Grand River were either lost or put to the benefit of the colonies, the Imperial Crown, the Federal Crown and/or Ontario Crown.

48. To the extent such breaches were caused by, contributed to or enured to the benefit of a colony, the colony and its successors became liable for that breach or for the obligation to account for that breach. In this regard, Upper Canada was the successor of the Province of Quebec; the Province of Canada was the successor of Upper Canada; and Ontario is the successor of the Province of Canada.

49. Further, in 1867, as result of s. 111 of the *Constitution Act, 1867*, the Federal Crown became liable for the debts and liabilities of the Province of Canada existing on July 1, 1867 and as such became jointly and severally liable with the Ontario Crown to the Six Nations of the Grand River for any liability of the Province of Canada, Upper Canada and the Province of Quebec for breaches of fiduciary duty and/or breaches of treaty existing as at July 1, 1867.

50. To the extent there are issues of allocation of liability as between the Federal Crown and the Ontario Crown, these are to be resolved as between those parties in accordance with s. 111 and s. 112 of the *Constitution Act, 1867*, and such allocation does not affect the joint and several liability of those parties to the Six Nations of the Grand River.

51. To the extent the Imperial Crown was liable to the Six Nations of the Grand River for breaches of fiduciary duty and/or breaches of treaty, these liabilities devolved onto the relevant colony or to the Federal Crown as the Imperial Crown devolved responsibility for Indian affairs to that colony or the Federal Crown, as applicable. To the extent that Imperial Crown liability devolved onto a colony, that liability passed to any successor colony or the Federal Crown as described above. To the extent there was any Imperial

Crown liability to the Six Nations of the Grand River in respect of breaches of fiduciary duty and/or breaches of treaty that had not devolved to the colonies, it devolved to the Federal Crown on July 1, 1867 as all remaining Imperial Crown responsibility for Indian affairs devolved on to the Federal Crown with the coming into effect of the *Constitution Act, 1867*.

Particular Transactions

52. As to paragraphs 16 to 19 of the Federal Crown's Defence, Six Nations denies that the Six Nations wanted to sell half of its lands allocated under the Haldimand Proclamation. Rather, the Six Nations wanted to derive on-going revenues to sustain themselves economically solely through leasing only their surplus uplands to white farmers. However, Lieutenant-Governor Simcoe and Peter Russell (President of the Executive Council of Upper Canada) would not countenance Six Nations as Indigenous landowners leasing lands to white farmers as tenants. As a result, the Crown insisted that they would not sanction or permit lease arrangements for Six Nations lands. Instead, the Crown pressed the Six Nations to surrender lands to the Crown in order to facilitate permanent sales of the lands and obtain revenue for Six Nations through those land sales.

Blocks 5 and 6 of the Haldimand Proclamation Lands

53. As to paragraphs 19 and 21 of the Federal Crown's Defence and paragraphs 28(a) and 28(b) of the Ontario Crown's Defence, alleging that the Six Nations absolutely surrendered Blocks 5 and 6 on February 5, 1798, Six Nations denies that any valid surrender to the Crown of Blocks 5 or 6 was made in July 1797, on February 5, 1798, or any other date by the Six Nations or any duly authorized representative on its behalf.

54. As to paragraphs 17 to 21 of the Federal Crown's Defence, Six Nations admits that Joseph Brant obtained a limited power of attorney from Five of the Six Nations assembled in Council on November 2, 1796 ("**Brant's Power of Attorney**").

55. By the terms of this power of attorney, in order that monies from the sales of certain lands could be used to purchase an annuity or stipend for their future support, the Six Nations consented to surrender that portion of their lands legally described in the power of attorney and consisting of about 310,391 acres. This was upon the "express Condition" that those lands would be regranted by the Crown, through grants under the Great Seal of the Province of Upper Canada, to persons nominated by Joseph Brant, and on the understanding that security would be demanded and received for the payment of the purchase price for such lands.

56. The February 5, 1798 document characterized by the Ontario Crown as a surrender by the Six Nations of Blocks 1 to 6 of its lands (the "**Purported Surrender of February 1798**"), is signed only by Joseph Brant and purported to surrender for sale an area of land totalling 352,707 acres, an area more than 40,000 acres larger than the tract which had been authorized for surrender and sale in Brant's Power of Attorney.

57. The lands described in Brant's Power of Attorney as being authorized by Six Nations for surrender for sale purposes comprised only what subsequently was described in the Purported Surrender of February 1798 as Blocks 1 to 4, later the Townships of Dumfries, Waterloo, Woolwich and Nichol.

58. Brant's Power of Attorney did not provide any consent or authorize a surrender by the Six Nations of the other lands referred to in the Purported Surrender of February 1798 that became known as Blocks 5 and 6, later the Townships of Moulton and Canborough.

59. Accordingly, the Purported Surrender of February 1798, purporting to rely upon Brant's Power of Attorney as the consent of Five of the Six Nations, could not and did not represent a valid surrender by the Six Nations of Blocks 5 and 6.

60. At no time during the July 1797 Council meetings of the Six Nations, referred to in paragraph 19 of the Federal Crown's Defence, did President Peter Russell ask Six Nations to consent to a surrender of Blocks 5 and 6, nor did the Six Nations offer, ask for or provide a surrender of Blocks 5 and 6.

61. As to paragraph 22 of the Federal Crown's Defence, on or about February 26, 1787, the Six Nations assigned to John Dockstader, the use of the Block 6 lands by him and his family with the proviso that it could not be transferred by Dockstader to anyone else. The Six Nations did not make a grant in fee simple of these lands to Dockstader nor did they consent to a sale and transfer of these lands from Dockstader to Benjamin Canby.

62. As to paragraph 49 of the Federal Crown's Defence, Six Nations did not approve the sale of Block 5 to the Earl of Selkirk at a Council meeting of May 29, 1807. William Claus, who was the Deputy Superintendent of Indian Affairs in Upper Canada, approved the sale of Block 5 to Selkirk.

63. As to paragraph 50 of the Federal Crown's Defence, William Claus held the mortgage with Selkirk, in his name as agent for the Crown.

Fiduciary Duty of the Crown

64. Six Nations specifically denies the allegations in paragraphs 27 and 83 of the Federal Crown's Defence that William Claus and John Claus and other officials of the Province of Upper Canada were, in effect, private trustees. William Claus ultimately reported to and took directions from the Crown. The persons appointed as “trustees” to receive and manage the funds from the dispositions of the Six Nations' lands were appointed and delegated their duties as officials, employees or agents for the Crown. The Crown at all relevant times had and assumed responsibility to the Six Nations for William Claus and the other trustees. The Crown through the Executive Government in Upper Canada and the Imperial Government actively participated in the trustees' decisions, and gave directions to the trustees, relating to the Six Nations' lands and funds. In certain cases the Crown also exercised its own powers to approve of or give effect to transactions proposed by the trustees.

65. The Crown is therefore liable as fiduciary both for any misconduct or breach of duty by the individual trustees and for the Crown’s own breaches of duty in failing to supervise and control the trustees, and in approving or giving effect to transactions proposed by the trustees which themselves were in breach of its fiduciary duty.

The Grand River Navigation Company

66. As to paragraphs 54, 55 and 96 of the Federal Crown's Defence, the decision to invest Six Nations' funds in the Grand River Navigation Company (the "**GRNC**") ultimately

rested with and was made by the Lieutenant-Governor of Upper Canada, John Colborne. The Six Nations did not consent in advance, or at any time, to such use of their funds. The Crown investigated the use of Six Nations' funds for the GRNC on numerous occasions and each time concluded that such investment had been imprudent.

67. As to paragraphs 57, 58 and 97 of the Federal Crown's Defence, Six Nations denies that there has been any satisfaction of Six Nations' claim with respect to the Crown's breach of fiduciary duty concerning the misuse of Six Nations' funds for the GRNC. The Federal Crown did not pay any sums to the Six Nations between 1925 and 1932 towards satisfaction of the GRNC claim, nor did the Six Nations agree to accept any sums during that period in partial settlement of the claims resulting from the Crown's misuse of Six Nations' funds improperly invested in the GRNC.

68. On or about July 14, 1925, an official with the Department of Indian Affairs suggested that the Federal Crown might make annual grants to the Six Nations until the amount of the GRNC claim had been fully repaid, but emphasized that an agreement to that effect between the Six Nations and the Federal Crown would be required.

69. No such agreement was ever concluded between the Six Nations and the Federal Crown to settle the claims arising from the Crown's misuse of Six Nations funds for the GRNC and for other improper purposes.

70. The Federal Crown acknowledged that there had been no settlement with the Six Nations of the claims involving the GRNC by subsequently engaging in settlement negotiations concerning that matter and making a substantial monetary offer of settlement to the Six Nations on or about September 26, 1950, which offer was not accepted.

Accordingly, the appropriation by Parliament of any funds between 1925 and 1932 for public purposes on the Six Nations reserve, such as for roads, a hospital, or an electric plant, has no relevance or connection to the GRNC claims; instead, any appropriations were simply related to the Federal Crown's normal on-going fiduciary obligations to the Six Nations, just as they would be to other First Nations.

71. In response to paragraphs 81.1, 93 and 101 (last two sentences) of the Federal Crown's Defence, the litigation there referred to remained alive in the Exchequer Court, later Federal Court, for the duration of the period mentioned. At no time did the Federal Crown bring a motion for dismissal for want of prosecution or for delay, presumably because the Federal Crown was not prejudiced by, but benefited from, any delay. The *Miller v. The King* action was formally discontinued after this action was commenced and supplanted it.

Welland Canal Flooding

72. Six Nations admits paragraphs 92.2 (except for the last sentence thereof), 92.6 (first two sentences), and paragraph 93.1 (only insofar as the Six Nations of the Grand River were not compensated for their flooded lands) of the Federal Crown's Defence.

73. As to the last sentence in paragraph 92.2 of the Federal Crown's Defence, the height of the dam located at Dunnville was raised incrementally between 1829 and 1842, and then again in 1874.

74. As to paragraph 92.3 of the Federal Crown's Defence, Lewis Burwell never attempted to estimate the flooded area of Six Nations lands resulting from flooding after 1834, including the area located to the north of the Townships of Cayuga and Dunn.

Further, the reliability of Burwell's estimates may be in doubt as a result of his discreditable conduct while a government official. As of December 24, 1840, Burwell was prohibited from any further surveying on Haldimand Proclamation Lands as a result of the discovery that he was aiding squatters on those lands and accepting kickbacks in connection with his surveying on Haldimand Proclamation Lands.

75. As to paragraph 92.4 of the Federal Crown's Defence, the Crown did not present available evidence to Cowan which showed higher land values that would have been more favourable to Six Nations compensation claims.

76. As to paragraph 92.5 of the Federal Crown's Defence, at the conclusion of the arguments in November 1895 made respectively by the Federal Crown and Ontario Crown to a board of three arbitrators, Chancellor Boyd (sitting as one of the arbitrators) indicated that the Board of Arbitrators had no jurisdiction to grant any relief in the matter, but commented: “It appears from what we see now that they have not been paid for their lands, whatever their value was; but the Superintendent General of Indian Affairs should have presented the claim [to the Welland Canal Company arbitrators], and he did not do it.”

77. The Plaintiff denies paragraph 92.7 of the Federal Crown’s Defence and pleads that there is no basis for the allegation that at most 2,400 acres of lands flooded by the Dunnville Dam were Six Nations of the Grand River lands. The Plaintiff further denies the Federal Crown’s contradictory pleading that no Six Nations of the Grand River lands were flooded in relation to the feeder canal and Dunnville Dam, and repeats and relies upon paragraphs 44 to 50 of the Claim.

78. The Plaintiff denies the allegations at paragraph 28(d) of the Ontario Crown's Defence, including Ontario's unparticularized allegation that the Plaintiff received any compensation for its flooded lands and the unparticularized defence that the Crown is "in any event immune from suit".

Accounting

79. As to the allegations in paragraphs 119 and 121 of the Federal Crown's Defence that the Crown lacks records and that the Court ought not to order the Crown to provide an accounting to Six Nations because it would be a practical impossibility, Six Nations says:

(a) The Crown at all times had and continues to have a fiduciary obligation to account to the Six Nations for the Six Nations' land and money;

(b) The Crown at all times had and continues to have an obligation to maintain all necessary records as would enable it to provide a true and complete accounting to the Six Nations for their property;

(c) The Crown's failure to maintain the records necessary for an accounting to be given is further evidence of the breach of fiduciary duty complained about in this action; and

(d) None of the records referred to in paragraph 119 of the Federal Crown's Defence, all of which the Federal Crown is required to produce in this action, constitute a settled account or true record of account required to be provided by a fiduciary.

Taking of Six Nations Lands for Public Purposes

80. In response to paragraph 135 of the Federal Crown's Defence, prior to 1867, takings of Six Nations lands for public purposes were subject to the requirements recognized in the Royal Proclamation Indian Provisions and required the express authorization of the Imperial Crown. Colonial or provincial legislation enacted prior to 1867 could not validly take Indian lands, including Six Nations lands, on a non-consensual basis in violation of those requirements.

Response to Technical Defences: Limitations or Other Statutory Bars, Laches, Waiver by Acquiescence, and Res Judicata

81. As to paragraphs 34, 35 and 45 of the Ontario Crown's Defence, Six Nations denies that any provision that the Ontario Crown purports to rely upon of the *Limitations Act*, R.S.O 1990, c. L.15 and its predecessors, the *Proceedings Against the Crown Act*, R.S.O. 1990, c.P.27 and its predecessors, the *Crown Liability and Proceedings Act*, 2019, S.O. 2019, c. 7, Sch 17, or the *Public Authorities Protection Act*, R.S.O 1990, c.P.38, s. 7(1), has any application to Six Nations' causes of action or the remedies sought in this action. It is noted that the Federal Crown's Defence withdrew any continued reliance upon the *Limitations Act*, R.S.O 1990, c. L.15, or the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, which the Federal Crown had pleaded at paragraphs 87, 94, 102 and 122 of its original statement of defence.

82. Six Nations specifically denies the allegations made in paragraphs 31 through 33 of the Ontario Crown’s Defence that the doctrines of laches or waiver by acquiescence should be applied to this case. It is noted that the Federal Crown's Defence withdrew any continued reliance upon a plea of laches or waiver by acquiescence, which the Federal

Crown had pleaded at paragraph 131 of its original statement of defence. The Ontario Crown's pleas of laches and waiver by acquiescence are equitable doctrines which Six Nations states would be inequitable to apply in all of the relevant circumstances of this case including the merits, the fiduciary relationship between the Crown and the Six Nations, the power imbalance in that relationship, and the legal, historic and practical impediments to the First Nations, including the Six Nations, in bringing and pursuing legal actions against the Crown.

83. Six Nations denies the allegations in paragraph 43 of Ontario Crown's Defence that certain of Six Nations' claims are *res judicata* as a result of *Miller v. The King*, [1950] S.C.R. 168, which was a proceeding not involving the Ontario Crown. It is further noted that the Federal Crown does not plead *res judicata,* even though it was a party to that proceeding. The Supreme Court of Canada's decision in [1950] S.C.R. 168 was not a final decision on the merits of the case. It did not determine the same questions or issues as are raised in this action. In particular, the Supreme Court did not deal with the pleadings in this action which allege that the Federal Crown and/or the Ontario Crown are successors to and subject to the obligations, duties and liabilities which the Imperial Crown and its emanations had or owed to the Six Nations.

84. In the alternative, there are special circumstances that make it inequitable and inappropriate for the Court to apply the doctrine of *res judicata* in favour of the Ontario Crown in this action. Such special circumstances include the position and submissions on behalf of The Government of Canada before the English Court of Appeal and House of Lords in *R. v. Secretary of State for Foreign and Commonwealth Affairs,* [1982] 1 Q.B. 892 (C.A.), affirmed [1982] 1 Q.B. 937 (H.L.). In that case it was held that all of the

obligations, duties and liabilities of the Imperial Crown to Indians or First Nations in Canada had devolved or been transferred from the Imperial Crown to the Federal Crown and/or the relevant Crown in right of a Province by operation of law. The Defendants are bound by that decision.

85. In the alternative, the Ontario Crown is acting unconstitutionally in an attempt to avoid a judicial determination of Six Nations' claims on their factual merits and any ensuing remedy, by repleading a long list of technical defences in paragraphs 31 to 35 and 45 of the Ontario Crown's Defence, and introducing a new purported claim of Ontario Crown immunity from certain claims as a result of the enactment of 2019 provincial legislation. In purporting to rely on its own legislation referred to in paragraph 81 above, including legislation enacted only in 2019, and on the discretionary doctrines of laches or waiver by acquiescence, or *res judicata,* the Ontario Crown is acting inconsistently with the constitutional requirements of the "Honour of the Crown" in its dealings with the Six Nations, and in breach of the Crown's unextinguished successor treaty and fiduciary obligations towards the Six Nations, and therefore also in breach of the Six Nations' rights under section 35 of the *Constitution Act, 1982.*

86. For greater clarity, in reply to the Ontario’s Crown’s yet further new purported immunity claims as pleaded at paragraphs 4, 5, 28(a.1), 28(a), 28(c), 28(d), 28(f), 28(g), 28(h), 28(j), 28(k) and 42 of the Ontario Crown’s Defence, the Plaintiff pleads in reply that these claims are improper, frivolous, unparticularized, untenable at law and in fact, statute-barred by any applicable limitations legislation, contrary to the Honour of the Crown, and/or amount to an abuse of process and should be struck.

REPLY TO THE STATEMENT OF DEFENCE OF THE INTERVENOR MISSISSAUGAS OF THE CREDIT FIRST NATION

Six Nations of the Grand River Repeats and Relies on Reply to Crown Defences

87. The Plaintiff repeats and relies on its Reply above in reply to the Statement of Defence of the Mississaugas of the Credit First Nation ("**MCFN**") dated September 29, 2023 (the "**MCFN Defence**").

Proof Required

88. The Plaintiff admits the allegations at paragraphs 5 and 8 of the MCFN Defence. Except as expressly admitted herein, the Plaintiff denies all other allegations in the MCFN Defence. To the extent that the MCFN rely upon any of the facts pleaded in the MCFN Defence in this action, the Plaintiff puts them to the strict proof thereof.

MCFN Defence Pleads Inaccurate or Incomplete Facts Regarding the Haldimand Tract

89. The facts pleaded in the MCFN Defence in respect of the Haldimand Tract are incomplete or inaccurate. The Plaintiff pleads and relies upon the following facts in addition to what it otherwise pleads in the Claim and in the Reply above.

90. In reply to paragraph 7 of the MCFN Defence, the Plaintiff denies that the whole of the Haldimand Tract falls within the traditional territory of the MCFN as described in Appendix "A" to the MCFN Defence. Contact between Europeans and the Indigenous Nations in the vicinity of the Great Lakes and the Haldimand Tract, including the Mississaugas, occurred between about 1610 to 1620. Prior to and up to the date of contact with Europeans the Haldimand Tract was not part of the territory of the Mississaugas. Rather, the area now known as the Haldimand Tract, including the

headwaters of the Grand River, was part of the territory of the Huron-Wendat and the Neutrals, which were Iroquoian-speaking peoples.

91. In the 1600s, prior to the expansion of the territory of the Mississaugas to the area of the Haldimand Tract, the Haudenosaunee engaged in warfare with the Neutrals. By 1650, the Haudenosaunee had conquered and absorbed the Neutral Nation, which largely became part of the Seneca Nation and, more generally, the Haudenosaunee.

92. In the late 1600s, the predecessors of the Mississaugas of the Credit (and other Anishinaabe peoples) (collectively the "**Mississaugas**"), as allies of the French, expanded their territory westward to include the lands that included the Haldimand Tract. The Mississaugas attempted to exclude the Haudenosaunee from the lands in the vicinity of the Haldimand Tract but failed in these efforts as the Haudenosaunee continued to use lands north of Lake Erie and Lake Ontario for hunting, trapping, trade, transit and settlement.

93. Haudenosaunee use and occupation of the lands in the vicinity of the Haldimand Tract continued into the 1700s, up to and including 1783.

94. By the early 1700s, the Mississaugas and the Haudenosaunee had largely amicable relations in the vicinity of the Haldimand Tract.

95. In the period leading up to the negotiation of the Mississaugas' 1784 quit claim, the Haudenosaunee asked the Mississaugas to confirm that the Six Nations could establish a settlement along the Grand River. The Mississaugas confirmed that they could do so.

96. At the negotiation of the 1784 quit claim (which the MCFN Defence refers to as the Between the Lakes Treaty), the Mississaugas (including the predecessors of the Mississaugas of the Credit) acknowledged that they consented to the making of the Haldimand Tract and that they had, and could have, no objection to the Six Nations of the Grand River being settled there.

97. The Crown in 1784 also sought the surrender of a larger tract of land from the Mississaugas for the purpose of settlement, including all of the land situated between Lake Ontario, Lake Erie and Lake Huron. However, the Mississaugas who were present at that time of the 1784 negotiation advised the Crown's representatives that they did not own all of the land that the Crown sought. The Mississaugas did not at that time make any suggestion to the Crown's representatives or the Six Nations of the Grand River's representatives that the headwaters of the Grand River were outside of the tract that was the subject of the 1784 quit claim.

98. When the Haldimand Proclamation was made in 1784, the Crown provided an express description of the Haldimand Tract and its boundaries which described the lands to extend to the head of the Grand River as follows (emphasis added):

> I have at the earnest desire of many of these His Majesty's faithful Al-lies purchased a tract of land from the Indians situated between the Lakes Ontario, Erie and Huron and I do hereby in His Majesty's name authorize and permit the said Mohawk Nation and such others of the Five Nation Indians as wish to settle in that quarter to take possession of and settle upon the Banks of the River commonly called Ours [Ouse] or Grand River, running into Lake Erie, **allotting to them for that purpose six miles deep from each side of the river beginning at Lake Erie and extending in that proportion to the head of the said river**, which them and their posterity are to enjoy for ever.

99. Following the establishment of the Haldimand Tract, the Mississaugas acknowledged that the whole of the Haldimand Tract including the Headwaters Lands belonged to the Six Nations of the Grand River, and Mississaugas chiefs instructed men of their Nation not to trespass upon the Haldimand Tract when hunting.

100. The subsequent negotiation of the further quit claim in 1792 between the Mississaugas and the Crown did not mention the Haldimand Tract. No effort was made by the Crown or the Mississaugas to seek the consent of the Six Nations of the Grand River or include them in these negotiations.

101. The Plaintiff pleads that the whole of the Haldimand Tract was subject to the 1784 quit claim. In any event, the whole of the Haldimand Tract is included within the aggregated geographic boundaries of the following treaties or surrenders:

(a) The 1784 quit claim;

(b) The quit claim negotiated with the Mississaugas of the Credit in 1792;

(c) Treaty and Surrender No. 18 of 1818; and,

(d) Treaty and Surrender No. 19 of 1818.

A Surrender Was Not Required to Establish the Haldimand Tract as a Reserve

102. In reply to paragraphs 34 to 47 and 52 of the MCFN Defence, the Haldimand Tract was not a grant or patent issued to a settler but was instead a commitment by the Crown to set aside, or reserve, a tract of land whose legal title was vested in the Crown for the exclusive use and benefit of the Six Nations of the Grand River. As such, the Crown was

not required to obtain a surrender of these lands for the purpose of establishing the Haldimand Tract as a reserve.

The Crown Obtained Any Necessary Consent from Mississaugas to Establish the Haldimand Tract as a Reserve

103. In reply to paragraph 48 of the MCFN Defence, to the extent that the Crown was required to obtain the consent of the Mississaugas, which is not admitted but denied, such consent was obtained by means of the quit claim of 1784 and/or Treaty No. 19 dating to 1818.

MCFN Defence Contains Irrelevant Allegations and Should Not Be Determined in This Action

104. The following matters pleaded in the MCFN Defence are not relevant to this action, not properly within the scope of the MCFN's role as an intervenor, and therefore should not be determined and should be struck from the MCFN Defence:

(a) Whether or not the Six Nations of the Grand River had or have Aboriginal Title to the Haldimand Tract or lands in the vicinity of the Haldimand Tract (paragraph 23 of the MCFN Defence);

(b) Whether or not the Treaty of Fort Albany of 1701 (also known as the Nanfan Treaty) is a treaty within the meaning of s. 35 of the *Constitution Act, 1982*, or the legal status of the Nanfan Treaty in general (paragraphs 22 to 23 of the MCFN Defence);

(c) Whether or not the Dish with One Spoon is a treaty within the meaning of s. 35 of the *Constitution Act, 1982* or the legal status of the Dish with One Spoon generally (paragraphs 17 to 18, 20 and 25 of the MCFN Defence);

(d) Whether or not the Mississaugas of the Credit have or had any rights, including Aboriginal Title, in the Haldimand Tract or any land in the vicinity of the Haldimand Tract (paragraphs 11, 33, 43 and 51 of the MCFN Defence);

(e) What the legal effect of the 1784 quit claim, the quit claim negotiated with the Mississaugas of the Credit in 1792, and Treaty 19 is or may be other than having the effect of consenting to the establishment of the Haldimand Tract as a reserve for the Six Nations of the Grand River (paragraphs 29 to 30, 32 and 50 to 51 of the MCFN Defence); and

(f) Whether or not the Crown owes any duties to the MCFN, including the duty to consult or to negotiate in good faith, in respect of the Haldimand Tract or other lands (paragraphs 32 to 33, 42 to 43 and 41 of the MCFN Defence).

MCFN Defence Contains Pleadings that are Frivolous, Vexatious, and an Abuse of Process

105. The MCFN Defence alleges, including at paragraphs 11, 32 to 33, 42 to 43, 51 and 53, that the MCFN had or have Aboriginal rights in the Haldimand Tract and that these give rise to various alleged legal obligations, duties and consequences. In doing so, the MCFN Defence fails to:

(a) Specify and describe which Aboriginal rights are being asserted;

(b) Plead the characteristics of those Aboriginal rights; and

(c) Plead what effect, if any, the Haldimand Proclamation has on those rights.

106. Absent these necessary particulars it is impossible to know the legal or factual significance, if any, of these allegations. The potential expansive scope of such vaguely and incompletely pleaded claims of Aboriginal rights is frivolous, vexatious, and abusive in that it puts the Six Nations of the Grand River in the untenable position of having to address factual issues regarding a different Indigenous group without any meaningful indication of the relevance of these issues in this action.

107. The allegations in the MCFN Defence purporting to assert MCFN Aboriginal rights are frivolous, vexatious, and abusive in that they fail to plead any of the necessary elements to allow the Plaintiff or the Court to consider these claims and because they are contrary to an order of this court dated June 14, 2023 which provides, *inter alia*, that MCFN "shall seek no relief in this action" (the "**Intervention Order**").

108. Further, it is frivolous, vexatious and abusive for MCFN to purport to raise Aboriginal rights claims in this action when it is already advancing these claims in a separate action in this Court against the Federal Crown and Ontario Crown to which the Six Nations of the Grand River is not a party. In that action, MCFN did not name the Six Nations of the Grand River as a defendant and has not asserted any claims against the Six Nations of the Grand River.

Costs as against MCFN

109. Given the frivolous, vexatious and abusive nature of many allegations in the MCFN Defence, and MCFN purporting to take a role in this action that is contrary to the Intervention Order, the Plaintiff seeks full indemnity costs from MCFN for any additional costs the Plaintiff incurs arising from MCFN's participation in this action and any added length or complexity caused by that participation.

October 31, 2023
(Original Reply dated July 25, 1996)
(Reply to Amended Crown Defences September 30, 2020)

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SIX NATIONS OF THE GRAND RIVER and BAND OF INDIANS

Plaintiff

THE ATTORNEY GENERAL OF CANADA et al.

Defendants

(Originally Brantford Court File No. 406/95)

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Brantford and Transferred to Toronto

REPLY TO THE SECOND FRESH AS AMENDED STATEMENT OF DEFENCE OF THE ATTORNEY GENERAL OF CANADA, TO THE FURTHER AMENDED STATEMENT OF DEFENCE AND CROSSCLAIM OF HIS MAJESTY THE KING IN RIGHT OF ONTARIO AND TO THE STATEMENT OF DEFENCE OF THE MISSISSAUGAS OF THE CREDIT FIRST NATION

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