

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 MAJESTY THE
QUEEN IN RIGHT OF ONTARIO

Defendants

FURTHER AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

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

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

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

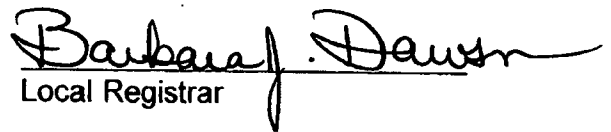
Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

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

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

Dated: March 7, 1995

Issued by


Local Registrar

Address of court office:

Court House
70 Wellington Street
Brantford, Ontario
N3T 2L9

TO: HER MAJESTY THE QUEEN IN RIGHT OF CANADA
c/o Attorney-General of Canada
Department of Justice
P.O. Box 36
3400 Exchange Tower
First Canadian Place
Toronto, Ontario
M5X 1K6

Attention: Charlotte A. Bell, Q.C.
(416) 973-6901

AND TO: HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
c/o Attorney-General of Ontario
Crown Law Office - Civil
720 Bay Street, 8th Floor
Toronto, Ontario
M5G 2K1

Attention: J.T.S. McCabe, Q.C.
(416) 326-4127

CLAIM

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

- (a) Declarations that one or both of the defendants breached fiduciary and/or treaty obligations owing to the Six Nations, as described herein;
- (b) equitable compensation and/or damages arising from the above-noted breaches of fiduciary and/or treaty obligations;
- (c) alternatively to (b), a Declaration, if and as appropriate, that one or both of the defendants is obliged to account to the Six Nations for all property, interests in property, money or other assets ("assets") which were or ought to have been received, managed or held by the defendants or either of them, or by others for whom they are in law responsible, including their predecessors (collectively, the "Crown") for the benefit of the Six Nations, as described herein;
- (d) if necessary, a Declaration that one or both of the defendants must restore to the Six Nations Trust (as hereinafter defined) all assets which were not received but ought to have been received, managed or held by the Crown for the benefit of the Six Nations or the value thereof;
- (e) a reference or references as may be appropriate;
- (f) all further or ancillary declarations, accounts and directions as may be appropriate;

- (g) costs on a full indemnity basis; and
- (h) such other relief as may seem just.

The Parties

2. The Plaintiff, the Six Nations, is a band within the meaning of the *Indian Act*, R.S.C. 1985, c.I-5, as amended. The members of the Six Nations are aboriginal people within the meaning of section 35 of the *Constitution Act, 1982*. In this pleading, the predecessors, and the current body, of the Indians known as the Six Nations of the Grand River together are referred to as the "Six Nations".

3. The Defendant The Attorney General of Canada represents Her Majesty the Queen in right of Canada (the "Crown in right of Canada"), pursuant to section 23(1) of the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, as amended. The Crown in right of Canada:

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

Defendant, Her Majesty the Queen in right of Ontario, under the *Constitution Act, 1867* or otherwise by law.

4. The Defendant Her Majesty the Queen in right of Ontario (the “Crown in right of Ontario”):

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

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

Introduction

6. As a result of the treaties, legislation, common law and facts hereinafter described, the Imperial Crown, the Crown in right of Canada and its predecessors, and the Crown in right of Ontario and its predecessors, were at all material times under fiduciary obligations to the Six Nations 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.

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

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

The Royal Proclamation of 1763

9. By the *Royal Proclamation of 1763*, the Imperial Crown recognized and confirmed certain of the fiduciary obligations which the Crown had assumed in respect of Indian peoples and their lands. It also continued, affirmed and enunciated the unwritten law of the colonies with regard to the status and alienation of lands occupied or used by the Indians in British North America. Unceded lands were recognized as

reserved to the Indian peoples, no such lands were to be taken from them without their express consent, and the Indians' interest in unceded lands was to be inalienable otherwise than to the Crown. The purpose of this surrender requirement was to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited and to facilitate the Crown's ability to represent the Indians in dealings with third parties. The *Royal Proclamation of 1763* has never been repealed, was and is part of the laws in force in Canada and Ontario and bound the Crown.

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

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

Six Nations Lands

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

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

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

The Haldimand Proclamation

14. On October 25, 1784, the Imperial Crown through its representative in British North America, the Governor of Canada, Sir Frederick Haldimand, issued a Proclamation (the "Haldimand Proclamation") authorizing the Six Nations to take

possession of and settle upon the Banks of the Grand River running into Lake Erie, allocating to them the lands extending for six miles from each side of the river beginning at Lake Erie and extending in that proportion to the head of the Grand River (the “Haldimand Proclamation Lands”), which the members of the Six Nations and their descendants were to enjoy forever. The lands allocated to the Six Nations under the Haldimand Proclamation consist of approximately 950,000 acres (384,465 hectares).

15. The Haldimand Proclamation was accepted by the Six Nations and constitutes a treaty within the meaning of section 35 of the *Constitution Act, 1982*.

The Simcoe Patent

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

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

18. The terms of the Simcoe Patent incorporated the following provisions existing at law:

- (a) the Six Nations could not lawfully alienate the Simcoe Patent Lands except by surrender to the Crown at a public meeting or assembly of the Chiefs, warriors and people of the Six Nations;
- (b) any transfer, alienation, conveyance, sale, gift, exchange, lease or possession of the Simcoe Patent Lands directly to any persons whatever other than members of the Six Nations, was to be null and void, unless there was first a surrender to the Crown for that purpose; and
- (c) the Six Nations were to enjoy free and undisturbed possession of the Simcoe Patent Lands under the protection of the Crown.

1812 Governor's Instructions

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

- (a) that the person administering the government in Upper Canada requisition any Indian lands wanted for public service and identify those lands with a sketch;
- (b) that all purchases by the Crown be made at a public council according to the ancient usages and customs of the Indians to whom the lands belonged, with proper interpreters present and without the presence of liquor;
- (c) that the Governor or two persons commissioned by him, the Superintendent of Indian Affairs, two or three members of his Department and at least one military officer be present at the public council;
- (d) that there be a proper explanation to the Indians of the nature and extent of the proposed disposition and the proceeds to be paid therefor; and
- (e) that deeds of conveyance and descriptive plans of the lands so conveyed be attached to the deed and be executed in public by the Principal Indian Chiefs and the Superintendent of the Indian Department or his appointee, and duly witnessed.

Legislation

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

- (a) *An Act with respect to trespass upon lands of Indians and upon other lands and the removal of persons therefrom*, S.U.C. 1839, c.15;
- (b) *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, S. Prov. C. 1850, c.74;
- (c) *An Act to amend the Law for the Sale and the Settlement of the Public Lands*, S. Prov. C. 1853, c.159;
- (d) *An Act to prevent trespasses to Public and Indian Lands*, S. Prov. C. 1859, c.81;
- (e) *An Act respecting the Management of the Indian Lands and Property*, S. Prov. C. 1860, c.151;
- (f) *An Act providing for the Organization of the Department of Secretary of State of Canada and for the management of Indian and Ordinance Lands*, S.C. 1868, c.42;
- (g) *The Indian Act*, 1876, S.C. 1876, c.18.

Crown's Breach of Fiduciary Duty

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

22. Subsequent to the dates of the Haldimand Proclamation and the Simcoe Patent, the Imperial Crown and its successors in Canada including the Defendants made or permitted to be made various grants, sales, leases, permits or other dispositions ("Dispositions") which purported to grant the title to, rights of possession, occupation, use or other interests in, parts of the Haldimand Proclamation Lands or Simcoe Patent Lands (collectively the "Six Nations Lands") to persons who were not members of the Six Nations ("Third Parties") in breach of the Crown's fiduciary duty to the Six Nations and without complying with the requirements of the laws hereinbefore referred to.

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

- (a) making or permitting Dispositions of the Six Nations Lands to Third Parties without the consent of the Six Nations and without first obtaining from the Six Nations a lawful and valid surrender to the Crown;

- (b) permitting Third Parties to possess, occupy, or trespass on the Six Nations Lands without obtaining lawful surrenders from the Six Nations to the Crown;
- (c) making or permitting transactions relating to the Six Nations Lands without obtaining full and fair compensation therefor for the Six Nations and without ensuring that the Six Nations' interest in such transactions was at all times fully protected and that the Six Nations received or were credited with all the proper proceeds of such Dispositions (which proceeds are hereinafter referred to as the "Six Nations Trust");
- (d) failing to honour the terms or conditions of surrenders, sales and leases;
- (e) taking or permitting the taking or use of parts of the Six Nations Lands for roads, canals or other public waterways, railways, cemeteries, church grounds, public squares or parks, or for military, naval or other public purposes without obtaining lawful surrenders or providing full and fair compensation to the Six Nations;
- (f) managing the Six Nations Trust or permitting it to be managed, in a manner inconsistent with the standards of conduct required by the Crown's fiduciary obligations; and
- (g) failing to account to the Six Nations.

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

Crown Grant of Block No. 5 of the Simcoe Patent Lands

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

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

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

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

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

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

Crown Grant of Block No. 6 of the Simcoe Patent Lands

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

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

- (a) without obtaining a surrender of the lands from the Six Nations to the Crown for the purpose of a sale to Canby or anyone else;
- (b) without obtaining any mortgage or other security from Canby or anyone else to secure the payment of the purchase price;
- (c) without collecting any payment from Canby or anyone else for the lands for the benefit of the Six Nations Trust;

- (d) without taking any legal proceedings against Canby or his heirs or assigns to obtain payment for the Block No. 6 lands, despite the Crown's acknowledgement, reduced to writing in 1803, 1830 and 1843, that the lands ought not to have been conveyed as a free grant and that the Crown was under a fiduciary duty to take the steps necessary to remedy the matter.

Colonel Claus and the lands in Innisfil and East Hawkesbury Townships

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

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

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

36. Instead, the Crown unilaterally, and without securing legal title, arranged to obtain three tracts of land elsewhere in the Province of Ontario for the benefit of the Six Nations from members of the Claus family purportedly in lieu of a monetary settlement

for the misappropriation of the Six Nations' trust monies by Colonel William Claus. On June 6, 1831, John Claus (Colonel William Claus' son) purported to convey some 900 acres in Innisfil Township (the "Innisfil lands"), and, in addition, John Claus along with Catherine Claus (Colonel William Claus' widow) purported to convey some 2,800 acres and 1,200 acres respectively in East Hawkesbury Township (the "East Hawkesbury lands") to some nominees appointed by the Crown "in trust for the sole use, benefit and behoof of the Indians known as the Six Nations Indians".

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

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

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

40. In 1852, the Court of Upper Canada, Queen's Bench, held in a test case (*Dickson v. Gross* (1852), 9 U.C.Q.B. 580) that the title of one of the purchasers to a part of the Innisfil lands was defective because John Claus did not have proper title in

1831 in order to be able to convey the lands to the nominees to be held in trust for the Six Nations. The Court held that such title had resided in the Colonel William Claus Estate, and not in John Claus personally.

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

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

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

Welland Canal Flooding

44. The Crown failed to secure or pay compensation to the Six Nations for the value of at least 2,415.6 acres of the Simcoe Patent Lands expropriated and flooded for the

Welland Canal project. The flooding resulted from canal construction projects, more particularly dam projects, which were carried on between approximately 1829 and 1835.

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

46. This legislation imposed an obligation on the WCC to compensate landowners or occupiers for any damages sustained as a result of the WCC exercising its statutory powers. Part IX of the statute provided that if any part of the Welland Canal passed through Indian lands, or damaged the property or possessions of Indians, compensation was to be made in the same manner as with respect to the property, possessions or rights of other individuals. The amount of the compensation was to be paid to the Chief Officer of the Indian Department to the use of the Indians.

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

48. On June 9, 1846, by Act of the Parliament of the Province of Canada, being S. Prov. C. 1846, c.37 (the "1846 Act"), the works *inter alia* of the Welland Canal were

vested in the government of the Province of Canada, with provision made for the determination of any unsettled claim for property taken, or for direct or consequential damages to property arising from the construction of public works including the Welland Canal.

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

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

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

paid as compensation for 1,993.65 acres of the acreage which had been flooded.

The Grand River Navigation Company

51. Beginning in or about 1834 the Crown improvidently invested trust monies belonging to the Six Nations in the undertaking of the Grand River Navigation Company (the "GRNC") in return for worthless shares and debentures of the GRNC.

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

53. The Crown knew from the outset that:

- (a) investments of the Six Nations Trust monies in the GRNC were speculative and imprudent;
- (b) public revenues would not be invested in the GRNC's activities because of the speculative nature of the GRNC's project and the heavy expenditures it would require; and
- (c) the Province and the private promoters of the GRNC, rather than the Six Nations, would derive all of the potential benefits of the investment.

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

55. The Crown purported to convey such lands to the GRNC without obtaining any surrender from the Six Nations and without obtaining full and fair compensation for these lands for the Six Nations Trust.

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

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

- (a) surrender no. 30 dated April 19, 1830, being a surrender of an estimated 807 acres for a townplot for Brantford; and
- (b) surrender no. 40 dated April 2, 1835, being a surrender of an estimated 48,000 acres in the Township of Brantford excluding an area of land later known as the Johnson Settlement.

57. These surrenders had been agreed to by the Six Nations so that the Crown could make Dispositions of lands within the surrendered areas to Third Parties for the benefit of the Six Nations, namely Dispositions that would result in full and fair compensation to the Six Nations for all of the lands, that fully protected at all times Six Nations' interest in the relevant transactions and that would result in the Six Nations receiving or being credited with all the proper proceeds of such Dispositions. The Crown has never accounted to the Six Nations for the proceeds from Dispositions over the years of the numerous specific parcels of lands encompassed by surrender documents no. 30 and
40.
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Talbot Road Lands

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

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

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

58.4 As a result, the Crown did not immediately sanction surrender document no. 31 with any order in council and in fact did not accept or act upon surrender document no. 31 as it formally read because on July 7, 1831 a written communication was made by the Chief Superintendent of the Indian Department advising that the Lieutenant Governor requested that the Six Nations cede to the Crown a portion of land on either side of the Talbot Road, so that the ceded lots could be sold to Third Parties for the benefit of the Six Nations.

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

58.6 Subsequently, the Crown issued a public notice dated December 1, 1831 ordering that lands for disposition to Third Parties were to be laid out in 100 acre lots. Notwithstanding the agreement of September, 1831 with the Six Nations and the notice,

the Crown subsequently proceeded wrongfully to sell lots of greater depth from the Talbot Road, resulting in lots being sold consisting of 200 acres rather than 100 acres. The selling agent for the Crown acknowledged in writing that this was contrary to the instructions of the Lieutenant Governor.

58.7 The Crown wrongfully failed to reserve for the Six Nations the area of the Talbot Road lands on each side of the Grand River which the Six Nations in council had reserved on September 28, 1831. Instead, the Crown ordered on November 25, 1831 that only a one mile tract on each side of the Grand River along the Talbot Road be reserved for the Six Nations and a survey subsequently reflected that reservation of lands.

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

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

58.10 Although a public notice dated January 22, 1844 issued by the Crown's Chief Superintendent of Indian Affairs advised that the lands on the south side of the Grand River between the Townships of Brantford and Dunn were exclusively appropriated to the use of Six Nations, the Crown failed to reserve any portion of the surrender no. 31

lands on the south side of the Grand River for the benefit of the Six Nations including the reserved tract of the Talbot Road lands not used for the Cayuga town plot. The Crown has not accounted to the Six Nations for the proceeds of Dispositions purporting to grant title or other interests to Third Parties in the Talbot Road and the lands on either side of it.

Hamilton/Port Dover Plank Road Lands

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

60. The Six Nations were accordingly deprived of continual earnings from these lands from continual rental revenues for the land and royalty revenues on the mineral resources thereunder.

Port Maitland Lands

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

- (a) land could be purchased or leased for the erection of military works;

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

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

Purported Surrender of 1841

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

64. The document of January 18, 1841 incorporates by reference two letters of January 5 and January 15, 1841 authored by Jarvis (together, "the Purported 1841 Jarvis Arrangement"). None of these documents contained any definite description of

what land was to be surrendered for lease or otherwise to Third Parties. While the letter of January 15, 1841 refers to the preparation of a "general survey of the tract", none was appended to the document of January 18, 1841 or to any later document which might properly be characterized as a surrender document.

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

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

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

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

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

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

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

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

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

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

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

- (a) all of the Simcoe Patent Lands on the south side of the Grand River with the exception of the Plank Road lands between the Township of Cayuga and Burtch's Landing, being a distance of more than twenty miles;
- (b) a tract near Brantford called the "Oxbow" containing some 1,200 acres;
- (c) another tract on the north side of the Grand River called the "Eagles Nest" containing some 1,800 acres;

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

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

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

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

73A. In any event, regardless of whether the Purported 1841 Jarvis Arrangement was valid, the Crown has never provided an account to the Six Nations identifying the specific lands allegedly encompassed by it or an account for the related proceeds that ought to have been received as full and fair compensation for the benefit of the Six Nations as a result of all Dispositions allegedly made on the basis of that arrangement.

Misappropriation of Trust Monies

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

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

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

76. At various times, the Crown failed to protect Six Nations' interest in the natural resources underlying the Six Nations Reserve by failing to take any or appropriate steps to prevent Third Parties from removing natural resources from the Six Nations Reserve without proper authority. In addition the Crown failed to obtain or provide proper compensation to the Six Nations. An example of these failures is the extraction of

natural gas from the Six Nations Reserve in the period from July 15, 1945 through November 18, 1970.

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

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

79. By letter of July 18, 1947, the Deputy Minister of the Department of Indian Affairs advised POG that the Michener lease had expired on July 15, 1945 and that no authority had been obtained by POG pursuant to section 54 of the *Indian Act* (R.S.C. 1927, Chap. 98) which would enable POG to operate thereafter on the Six Nations Reserve.

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

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

The Crown's Failures to Account

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

- (a) whether all portions of the Six Nations Lands which today are not part of the Six Nations 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;
- (b) whether the terms and conditions of any valid surrenders, sales and leases, were fulfilled and whether full and fair compensation was obtained in respect of the Dispositions or uses of the Six Nations Lands;
- (c) whether the Six Nations Trust earned, derived, received, held and continues to hold all appropriate sums which should have been earned, derived, received or held on behalf of the Six Nations in accordance with the Crown's fiduciary obligations; and

- (d) 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.

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

- (a) By letter dated October 25, 1979 the Six Nations Council requested the Auditor General of Canada to conduct an historical audit and report on the Six Nations trust funds and lands. On November 15, 1979, the Parliament of Canada directed the Auditor General to conduct an audit of Indian trust accounts generally but no report on any such audit has yet been supplied to the Six Nations as requested.
- (b) By letter of October 23, 1992, the Six Nations by its solicitors requested a full general accounting of all transactions involving the property held for the benefit of the Six Nations including all sales and leases of land and all money held by the Crown since 1784. The Crown in right of Canada refused to do so and instead directed the representatives of the Six Nations to examine the Indian Land Registry. The Crown in right of Ontario did not respond at all to the request for an accounting.

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

SIX NATIONS OF THE GRAND -and-
RIVER BAND OF INDIANS

THE ATTORNEY GENERAL OF
CANADA et al.

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

Plaintiff

Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

FURTHER AMENDED STATEMENT OF CLAIM

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-and-

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CONSENT

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