1157-01-67-23-3-3

Jan 31, 2013

Court File No.: 03-CV-253768-CM3

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE CHIPPEWAS OF SAUGEEN FIRST NATION

Plaintiffs

- and -

THE CORPORATION OF THE TOWNSHIP OF AMABEL, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, THE ATTORNEY GENERAL OF ONTARIO, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, THE ATTORNEY GENERAL OF CANADA, BARBARA TWINING, LARRY TWINING, DAVID DOBSON, ALBERTA LEMON, SAUBLE BEACH DEVELOPMENT CORPORATION, ESTATE OF WILLIAM ELDRIDGE, and ESTATE OF CHARLES ALBERT RICHARDS

Defendants

AMENDED STATEMENT OF DEFENCE, COUNTERCLAIM: AND CROSSCLAIM: OF HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AND THE ATTORNEY GENERAL OF ONTARIO

AMENDED STATEMENT OF DEFENCE

AMENDED THIS Jan 31, 2013 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À
☐ RULE/LA RÈGLE 26.02 (
☑ THE ORDER OF The Honourable Mr. Justice Belobaba
L'ORDONNANCE DU
DATED / FAIT LE Dec 7, 2012

REGISTRAR
SUPERIOR COURT OF JUSTICE
GREFFIER
COUR SUPÉRIEURE DE JUSTICE

The allegations of the plaintiffs

1. The defendants Her Majesty the Queen in right of Ontario and The Attorney General of Ontario (hereinafter "Ontario") admit the allegations contained in paragraphs 3 ~~and 9~~ of the statement of claim in this action. Ontario admits the allegations contained in paragraph ~~7~~8 of the statement of claim except that ~~the Treaty of 1836 was made by the "Saugeen Indians" and~~ the Treaty of 1854 was made by the "Indian Tribes resident at Saugeen, Owen Sound". Ontario admits the allegations contained in paragraph 9 of the statement of claim, except for the emphasis added.

2. ~~Ontario admits the allegations contained in paragraphs 3 to 5 inclusive and paragraph 13 of the statement of claim in the action mentioned in paragraph 10 of the statement of claim in this action, which allegations are incorporated by reference into the statement of claim in this action by paragraph 10, except that the land and the territory mentioned in allegations in paragraphs 3 to 5 was not "occupied" by the Saugeen Indians.~~

3. ~~Ontario admits the allegations contained in paragraphs 6 to 9 inclusive of the statement of claim in the action mentioned in paragraph 10 of the statement of claim in this action, which allegations are incorporated by reference into the statement of claim in this action by paragraph 10.~~

4. Ontario denies the allegations contained in paragraphs 1, 4, 6, 7, 10-17, ~~11,~~ 20, 22-26 and the first and third sentences in paragraph 21 of the statement of claim in this action, and puts the plaintiffs to the strict proof thereof.

5. If the plaintiffs suffered damages, costs and expenses as alleged in paragraphs ~~11~~ 23 and ~~13~~ 26 of the statement of claim in this action, which is denied, the damages, costs and expenses were occasioned by the fault of the plaintiffs, were and are too remote for recovery, and were not the subject of reasonable or any steps by the plaintiffs to avoid or mitigate them. There can be no recovery in respect of such alleged damages, costs and expenses even if suffered and even if liability for them exists, both of which are denied. In the alternative, any recovery must be reduced by the degree of fault of the plaintiffs. Ontario pleads and relies upon the *Negligence Act,* R.S.O. 1990, c. N.1, s. 3 and its predecessors.

6. ~~Ontario denies the allegations contained in paragraphs 10 to 12 inclusive of the statement of claim mentioned in paragraph 10 of the statement of claim in this action, which allegations are incorporated by reference into the statement of claim in this action by paragraph 10, and puts the plaintiffs to the strict proof thereof.~~

7 Ontario has no knowledge in respect of the allegations contained in paragraphs 2, ~~and~~ 5, 18, 19, and the second and fourth sentences of paragraph 21 of the statement of claim in this action.

8. ~~Paragraph 8 and 14 of the statement of claim in this action set out strategic positions adopted by the plaintiffs for purposes of this action and are not in a form to which defendants can plead. Ontario does not admit any allegations contained or implied in those paragraphs.~~

The Plaintiffs

9. "The Chippewas of Saugeen First ~~n~~Nation" is a name by which a band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5 today describes itself. Some of the Indian ancestors of some members of the band were Ojibwa who migrated to what is now southern Ontario beginning in about the year 1700. No ancestors of members of the band were present in what is now southern Ontario before that time. Beginning in the late 1830s a substantial number of Potawatomi and Ojibwa and some Ottawa, Sioux and Mississauga settlers moved to the location of the very small Ojibwa settlement at the mouth of the Saugeen River, mostly from Michigan, Illinois and Wisconsin but some from elsewhere in Upper Canada. By the date of the Treaty of October 13, 1854 the new Indian settlers outnumbered the Ojibwa inhabitants who had preceded them. The immigration of Indian settlers continued after 1854. Today the large majority of the Indian ancestors of the members of the band are persons who were part of the migration to the mouth of the Saugeen that began in the late 1830s.

Title in the lands since October 13,1854

10. On the date of the Treaty of October 13, 1854 and prior thereto the lands described in paragraph 1(a) of ~~in Schedule "A" to~~ the statement of claim in the action (hereinafter "the lands") were part of Lake Huron and were covered by the waters of Lake Huron. The lands have never been subject to the aboriginal title of the plaintiffs, their predecessors or their band or held by them pursuant to aboriginal title. The lands were never part of the Indian Reserve that was ceded and surrendered by the predecessors of the plaintiffs to the Crown by the Treaty of October 13, 1854 or any part of any reservation to which that cession and surrender was subject.

11. The lands became lands not covered by water by the gradual and imperceptible recession of the waters of Lake Huron or by the gradual and imperceptible deposit of sand, or by both, over the years after 1854. The lands were therefore added by accretion to Lots 26 to 31 inclusive, Concession D, Township of Amabel and to the allowances for roads between Lots 25 and 26 and between Lots 30 and 31.

12. In the alternative, if the lands or any part of them were not part of Lake Huron and were not covered by the waters of Lake Huron at the date of the Treaty of October 13, 1854, which is denied, the predecessors of the plaintiffs by the Treaty ceded and surrendered to the Crown any and all rights they had in the lands.

13. The cession and surrender of the lands was an absolute surrender.

14. The cession and surrender of the lands was in accordance with the intention and understanding of the predecessors of the plaintiffs.

15. Whether by accretion or otherwise, the lands comprise part of township Lots 26 to 31 inclusive, Concession D, Township of Amabel and part of the allowances for roads between Lots 25 and 26 and between Lots 30 and 31, established by and shown on the original survey and plan of the Township of Amabel in 1856 by C. Rankin, P.L.S.

16. The lands do not now comprise and never have comprised any part of the Indian Reserve established by and shown on the said original survey and plan, or any part of a "reserve" within the meaning of the *Indian Act,* R.S.C. 1985, c. 1-5 or its predecessors~~, which reserve is mentioned in subparagraphs 1(a) and (c) and paragraphs 7 and 8 of the statement of claim in this action~~.

17. With the exception of the said allowances for roads between Lots 25 and 26 and between Lots 30 and 31, the lands were sold by the Crown to private parties by the Crown grants of Lots 26 to 31 inclusive, Concession D, Township of Amabel and were the subject of valid letters patent in respect of those lots.

18. With the exception of the said allowances for roads, the lands are today owned by the successors in title of the grantees from the Crown of the said Lots 26 to 31 inclusive who have property interests in the portions of those lots that comprise the lands.

19. The Corporation of the Township of Amabel has expended public money for the opening of the said allowances for roads and for maintaining and repairing the roads and statute labour has been usually performed on them. The said allowances for roads are today common and public highways the soil and freehold of which are vested in the Township. Ontario pleads and relies upon the *Municipal Act,* R.S.O. 1990, c. M.45, ss. 261 and 262, the *Surveys Act,* R.S.O. 1990, c. S.30, s. 9, and their predecessors.

The effects of the plaintiffs' delay

20. At all times since the 1850s the lands have been in the actual, continuous, open, notorious and visible possession of the Crown, the grantees from the Crown, their successors in title, and the public. The lands have never been in the possession of the plaintiffs or their predecessors.

21. The action is in part for the recovery of land. The declarations and other relief claimed in subparagraphs 1(a), 1(b), ~~and~~ 1(c), 1(d) and 1(e) of the statement of claim are remedies claimed insofar as the action is for the recovery of land. The right to bring the action accrued to the plaintiffs more than 20 years before the commencement of the action. The action is therefore barred by statute insofar as it claims the relief claimed in subparagraphs 1(a), 1(b), ~~and~~ 1(c), 1(d) and 1(e) of the statement of claim, and any right or title to the lands that the plaintiffs may have had, which right or title is denied, is therefore extinguished. Ontario pleads and relies upon *An Act respecting the limitation of Actions and Suits relating to Real Property, and the time of prescription in certain cases,* C.S.U.C. 1859, c. 88, ss. 1 and 16, their successors to and including the *Limitations Act,* R.S.O. 1990, c. L.15, ss. 4 and 15, and the *Constitution Act,* 1867, s. 129.

22. Although the action is not brought by or on behalf of the Crown, the action purports to be in part for the recovery of land by the Crown. The declaration claimed in subparagraph 1(b) of the statement of claim is a remedy claimed insofar as the action purports to be for the recovery of land by the Crown. The right to bring such action accrued to Her Majesty's remote predecessor more than 60 years before the commencement of the action. The action is therefore barred by statute insofar as it claims the relief claimed in subparagraph 1(b) of the statement of claim, and

any right or title which the Crown or any person claiming under the Crown, except a grantee from the Crown of the said Lots 26 to 31 inclusive or a successor in title of such grantee, is extinguished. Ontario pleads and relies upon the *Crown Suits Act,* 1769 (commonly called the *Nullum Tempus Act),* 9 Geo. III, c. 16, s. 1 (U.K.), its successors in Ontario to and including the *Limitations Act,* R.S.O. 1990. c. L.15, ss. 3(1) and 15, the *Constitution Act,* 1867, s. 129, and the *Crown Liability and Proceedings Act,* R.S.C. 1985, c. C-50, s. 32 as am. S.C. 1990, c. 8, s. 31.

23. The action is in part for trespass to land or upon the case or both. The relief claimed in subparagraph 1(f) ~~1(e)~~ of the statement of claim is a remedy claimed insofar as the action is for trespass to land or upon the case. The cause of action arose more than six years before the commencement of the action. The action is therefore barred by statute insofar as it claims the relief claimed in subparagraph 1(f) ~~1(e)~~ of the statement of claim. Ontario pleads and relies upon the *Limitations Act,* R.S.O. 1990, c. L.15, s. 45(1)(g) and its predecessors.

24. The action is in part for alleged breach of treaty. The allegations in paragraphs ~~7,~~ 8, 15-20 and 23-26 ~~and 11~~ of the statement of claim in this action ~~and the allegations in paragraphs 6 and 10 of the statement of claim mentioned in paragraph 10 of the statement of claim in this action, which latter allegations are incorporated by reference into the statement of claim in this action by paragraph 10,~~ are assertions that the relief sought is in respect of alleged breach of the Treaty of October 13, 1854. That Treaty is a specialty. The action is therefore in part an action upon a specialty. The cause of action arose more than 20 years before the commencement of the action. The action is therefore barred by statute. Ontario pleads and relies upon the *Limitations Act,* R.S.O. 1990, c. L.15, s. 45(1)(b) and its predecessors.

25. The plaintiffs' reserve under the *Indian Act* was reserved by the terms of the Treaty of October 13, 1854. The reserve abuts the lands. At all times since October 13, 1854 the plaintiffs and their predecessors and members of the band have inhabited the reserve. Throughout the period from that date to the date of the commencement of the action the plaintiffs and their predecessors had full knowledge of the cause of action and of the allegations contained ~~and incorporated by reference~~ in the statement of claim, and of the fact that at all times since the 1850s the lands have been in the actual, continuous, open, notorious and visible possession of the Crown, the grantees from the Crown their successors in title, and the public. In the alternative, if the plaintiffs and their predecessors did not have such knowledge, which is denied, they would have obtained such knowledge by the exercise of reasonable diligence.

26. The delay of almost one century and a half in bringing the action gives rise to a reasonable inference of acquiescence by the plaintiffs and their predecessors. The action is therefore barred by the equitable doctrine of laches.

27. Further, the prodigious delay of the plaintiffs and their predecessors in bringing the action gives rise to circumstances that make prosecution of the action unreasonable. The action is therefore barred by the equitable doctrine of laches on that ground as well.

28. The delay has been of such a length and extent that a reasonable expectation has arisen that the defendants will not be held to account for the ancient claim that the plaintiffs assert in the action. Further, the plaintiffs and their predecessors have, instead of bringing suit in a timely

fashion, slept on their rights with the result that the public interest requires that the action be barred.

The Plaintiffs' claim against Ontario predates the coming into force of the Proceedings Against the Crown Act and can only proceed by Petition of Right

29. If any of the alleged acts, omissions, or transactions in respect of which the action is brought occurred or exist, which is denied, they occurred or existed before the coming into force of the *Proceedings Against the Crown Act* on September 1, 1963. The plaintiffs' claim can only proceed as against Ontario by way of petition of right, and only after the issuance of a Royal fiat by the Lieutenant Governor. Since those requirements have not been fulfilled, this Honourable Court has no jurisdiction with respect to the plaintiffs' claim against Ontario.

30. Even if a Royal fiat were to issue, permitting the Plaintiffs to proceed by petition of right, Ontario is immune with respect to some or all of the claims that are raised in this proceeding, including without limitation all claims sounding in tort.

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

31. The allegations and claims of the plaintiffs are in respect of alleged acts, omissions or transactions of the Indian Affairs department of the Crown or its officers or agents and in respect of alleged loss of use and occupation of the lands consequential to those alleged acts, omissions or transactions and dependent on them. The Treaty of October 13, 1854 was negotiated and entered into on behalf of the Crown by the Superintendent General of Indian Affairs. The survey

of the Township of Amabel and of the abutting Indian Reserve reserved by the terms of the Treaty were made by an agent of the Indian Affairs department. The sales of Lots 26 to 31 inclusive, Concession D, Township of Amabel to private parties and the letters patent to the grantees from the Crown were by the Indian Affairs department.

32. The sale and letters patent in respect of Lot 28 were before July 1, 1867. The sales and letters patent in respect of Lots 26, 27, 29, 30 and 31 were after July 1, 1867.

33. There is no historical, factual, legal or constitutional relatedness or connectedness between Ontario and any of the allegations and claims of the plaintiffs or any of the alleged acts, omissions or transactions of the Indian Affairs department or its officers and agents in respect of which the allegations and claims of the plaintiffs are based.

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

35. If there was and is any liability in respect of the alleged acts, omissions or transactions which occurred prior to July 1, 1867, which is denied, it existed on July 1, 1867. Any liability of the Crown on July 1, 1867, if it was not a liability of the Imperial Crown, was a liability of the Province of Canada. Any such liability became a liability of the Dominion of Canada by operation of the *Constitution Act,* 1867 and remains today a liability of Her Majesty in right of Canada (hereinafter "Canada"), not Ontario. Ontario pleads and relies upon s. 111 of the *Constitution Act,* 1867.

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

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

38. The fiduciary obligation of the Crown to Indians in Canada and any responsibility of the Crown to provide for the welfare and protection of native peoples are, as a matter of constitutional law, an obligation and a responsibility of the Crown in right of Canada, not the

Crown in right of a province. Ontario pleads and relies upon that obligation and responsibility and upon s. 91.24 and s. 130 of the *Constitution Act, 1867*.

39. If there was prior to July 1, 1867 and is any liability in respect of the allegations and claims of the plaintiffs, which is denied, and if it was a liability of the Imperial Crown, it is today a liability of the Imperial Crown or of Canada. Ontario pleads and relies upon s. 12, s. 91.24, s. 129 and s. 130 of the *Constitution Act, 1867*.

40. The sales and letters patent in respect of Lots. 26, 27, 29, 30 and 31 made or granted after July 1, 1867 were made by the Department of Indian Affairs pursuant to Acts of Parliament. Ontario pleads and relies upon *The Indian Act*, 1876, S.C. 1876, c. 18, ss. 29-44 and their successors, *The Indian Lands Act, 1924*, S.O. 1924, c. 15, schedule "A", and *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, S.C. 1924, c. 48, schedule.

41. None of the alleged acts or omissions in respect of which the plaintiffs seek relief were acts or omissions of a servant of Ontario or of any person appointed by or employed by Ontario. Therefore, on that ground as well, the action does not lie against Ontario. Ontario pleads and relies upon the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, s. 2(2)(c) and s. 1 (definition of "Crown" in the Act).

The right of the public to use the lands

42. The lands and the beach, bank, foreshore, sand dunes and plains located thereon (hereinafter subsumed in "the lands") were used by the inhabitants of other lands in the vicinity, by the public, and by individual members of the public (hereinafter "the public") for purposes ancillary to commercial fishing, including curing fish, storing nets, salt, barrels and other equipment, and drying nets, at all times from before the 1850s to the 1920s in an open, peaceable, legal undisputed, unobstructed and uninterrupted manner.

43. The lands have been used by the public for recreational purposes, including swimming, boating, fishing, sun-bathing, games, children's play, picnics and bonfires, and for road and travel purposes, at all times since the 1850s in an open, peaceable, legal, undisputed, unobstructed and uninterrupted manner.

44. That use of the lands by the public for recreational purposes and road and travel purposes as aforesaid continues to this day.

45. At all times since the 1850s the owners of the lands have had the intention to dedicate the lands to the use of the public as aforesaid, that intention has been carried out by the lands being thrown open to the public for those uses, and the dedication of the lands for those uses has been accepted by the public.

46. If the lands have been held since October 13, 1854 by Her Majesty the Queen as fiduciary for the band, which is denied, Her Majesty dedicated the lands to the use of the public as aforesaid.

47. The defendant The Corporation of the Township of Amabel (hereinafter "the Township") has used and occupied the lands and expended public money for the facilitation of use of the lands for recreational purposes as aforesaid. Pursuant to *The Parks Assistance Act*, R.S.O. 1970, c. 337 Ontario granted public money to the Township to be expended for the facilitation of such use of a portion of the lands.

48. The lands or a portion of them comprise a park established under *The Parks Assistance Act*, R.S.O. 1970, c. 337 and must therefore "be maintained and operated for the use and enjoyment of the public". Ontario pleads and relies upon s. 2 of that *Act* and its successors. The lands or a portion of them comprise a park within the meaning of the *Public Parks Act*, R.S.O. 1990, c. P. 46 and must therefore "be open to the public free of all charge" except as set out in that *Act*. Ontario pleads and relies upon s. 2(1) of that *Act* and its predecessors.

49. Portions of the lands comprise road allowances, highways, streets, lanes, walks or commons shown on plans of subdivision. Those portions of the lands are therefore public roads, highways, streets, lanes, walks and commons respectively. Ontario pleads and relies upon the *Surveys Act*, R.S.O. 1990, c. S. 30, s. 57 and its predecessors. The roads were dedicated by the owners of the portions of the lands to public use. They are therefore common and public

highways the soil and freehold of which are vested in the Township. Ontario pleads and relies upon the *Municipal Act,* R.S.O. 1990, c. M. 45, ss. 261 and 262 and their predecessors.

50. The Township has expended public money for the opening of the roads mentioned in paragraphs 42, 43 and 48 herein and for maintaining and repairing them and statute labour has been usually performed on them.

51. Portions of Lots 26 to 31 inclusive, Concession D, Township of Amabel which include or are in the vicinity of portions of the lands are the subject of plans of subdivision. Lots in the plans of subdivision were sold for summer cottage purposes. Without the lands, and the beach, bank, foreshore, sand dunes and plains located thereon, and the access to Lake Huron afforded thereby, the lots in the plans of subdivision would have been valueless and could not have been sold. The vendors of the lots in the plans of subdivision retained the lands. The lands were set aside by the vendors for the benefit of the purchasers as part of building schemes which were the foundations of the sales. The purchasers of the lots therefore received implied grants of easement, or equities in the nature of easement, to use the lands or the portions opposite their subdivisions for all purposes for which a summer colony beach is ordinarily used. The purchasers and their successors in title continue to hold that easement.

52. The easement mentioned in paragraph ~~50~~ 51 herein has been actually enjoyed for the full period of forty years without any consent or agreement by the plaintiffs, or their predecessors, or their band. The easement is therefore by statute absolute and indefeasible as against the plaintiffs. Ontario pleads and relies upon the *Limitations Act,* R.S.O. 1990, c. L.15, s. 31.

Estoppel

53. At no time since October 13, 1854 have the plaintiffs, their predecessors, or their band held or purported to hold the lands or any part of them as unsurrendered Indian lands. At no time since that date has the Crown held the lands or any part of them or purported to hold the lands or any part of them in trust or as fiduciary for the plaintiffs, or their predecessors, or their band. At no time since that date have the lands been set apart for the use or benefit of the plaintiffs, or their predecessors, or their band, or been occupied or used or administered as unsurrendered Indian lands or reserve. At all times the lands have been surrendered lands *de facto*.

54. The sales of the lands and the creation of the allowances for roads described in paragraphs 15 and 17 herein were for the benefit of the predecessors of the plaintiffs pursuant to the terms of the Treaty of October 13, 1854.

55. The grantees from the Crown and their successors purchased the lands and, as owners, made expenditures and otherwise altered their positions to their detriment. The Township made expenditures and otherwise altered its position to its detriment as owner of the allowances for roads.

56. The grantees from the Crown and their successors and the Township would not have purchased the lands, made expenditures and altered their positions as aforesaid if they were not

owners at the material times. They had at all times and continue to have a true, reasonable and *bona fide* belief that they were owners at the material times and continue to be owners.

57. The plaintiffs, their predecessors, and their band had actual knowledge at all times of the facts set out in paragraphs 53 to 55 herein.

58. If the plaintiffs, their predecessors, and their band held the position that the lands were in fact unsurrendered Indian lands or that they did not belong to the Crown, the grantees from the Crown and their successors and, in the case of the allowances for roads and other common and public highways, the Township, they had a duty to speak and, act to assert that position as against the Crown, the grantees from the Crown and their successors, and the Township, who purchased the lands and made expenditures and altered their positions as aforesaid in the belief that the lands were theirs.

59. The plaintiffs, their predecessors and their band make a representation, by their silence or inaction or both, which precludes the plaintiffs from now asserting that title in the lands is not in the grantees from the Crown and their successors and the Township as aforesaid. The plaintiffs are estopped from now asserting a claim to title in the lands.

60. The defendants other than Canada and The Attorney General of Canada, and a very large number of owners of real property interests and businesses in the Township of Amabel, have expended money and have otherwise altered their positions to their detriment for the purposes of constructing and establishing a community and houses, cottages, businesses, public highways,

public utilities, schools, churches, parks, public offices, club facilities, recreational facilities and amenities and other things, the *raison d'etre* for which was and is the fact that the public may as of right use the lands for recreational purposes and road purposes as aforesaid, and the viability of which was and is dependent upon the continued use by the public of the lands for such purposes as of right.

61. Those defendants and other persons would not have made the expenditures and altered their positions if the public could not use the lands for recreational purposes and road purposes as aforesaid as of right. They had at all times and continue to have a true, reasonable, and *bona fide* belief that the public had and has a right to use the lands for recreational purposes and road purposes as aforesaid.

62. The plaintiffs, their predecessors, and their band had actual knowledge at all times of the facts set out in paragraphs 59 and 60.

63. If the plaintiffs, their predecessors, or their band held the position that the lands were in fact unsurrendered Indian lands or that the public may not in fact use the lands for recreational purposes and road purposes as of right, they had a duty to speak and act to assert that position as against the defendants and other persons who made expenditures and altered their position in the belief that the lands were surrendered lands and that the public may use the lands as of right for recreational purposes and road purposes as aforesaid.

64. The plaintiffs, their predecessors and their band made a representation, by their silence or inaction or both, which had the presumptive intention and the result of inducing the defendants and the other persons who made expenditures and altered their positions as aforesaid to do so. The plaintiffs are estopped from now asserting that the public may not use the lands as of right.

Provincial enactments

65. The enactments of Ontario pleaded and relied upon herein have been at all times and are laws of general application from time to time in force in the province. They have been and are applicable as pleaded of their own force and effect. In the alternative, if they are not so applicable they are applicable pursuant to the *Indian Act*, R.S.C. 1985, c. 1-5, s. 88 and its predecessors.

66. Ontario therefore asks that the action be dismissed with costs.

COUNTERCLAIM

67. The defendant The Attorney General of Ontario claims:

a) a declaration that the lands are subject to a right in the public to use them for recreational purposes and road purposes; and

b) costs.

68. The counterclaim is made by the Attorney General of Ontario as the officer charged at common law with the assertion and enforcement of the rights of the public.

69. The Attorney General of Ontario repeats and relies upon, in the counterclaim, the contents of the statement of defence of Ontario.

70. The public therefore has a right to use the lands for recreational purposes and road purposes. Ontario pleads and relies upon rule 27.01 of the *Rules of Civil Procedure* and the *Crown Liability and Proceedings Act,* R.S.C. 1985,c. C-50, s. 27, as am. S.C. 1990, c. 8, s. 31.

CROSSCLAIM

71. The defendant Ontario claims against the defendants Her Majesty the Queen in right of Canada and The Attorney General of Canada (hereinafter "Canada"):

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

b) costs.

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

73. Any liability to the plaintiffs in the action, which is denied, is therefore a liability of Canada and not a liability of Ontario.

74. Canada is therefore liable to Ontario for all or any part of the plaintiffs' claim for which the Court may find Ontario liable. Ontario pleads and relies upon rule 28.01 of the *Rules of Civil Procedure*, the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 27, as am. S.C. 1990, c. 8, s. 31, and the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P. 27, s. 6.

April 15, 2004

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