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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,
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,
ATTORNEY GENERAL OF ONTARIO**

Defendants

STATEMENT OF DEFENCE OF THE ATTORNEY GENERAL OF CANADA TO THE CROSSCLAIM OF THE DEFENDANT SAUBLE BEACH DEVELOPMENT CORPORATION

The defendant to the crossclaim, the Attorney General of Canada ("Canada"), repeats, pleads and relies upon the contents of Canada's *Statement of Defence* and Canada's *Statement of Defence and Counterclaim to the Crossclaim of Ontario*.

OVERVIEW

1. The plaintiffs allege that Saugeen Reserve #29, as described in the Treaty of October 13, 1854, is unceded land subject to aboriginal title and the inherent jurisdiction of the Saugeen First Nation. The plaintiffs further allege that a portion of the Reserve (known as part

of Sauble Beach) was wrongfully occupied by the defendants and its predecessors from October 13, 1854, thereby denying the Saugeen First Nation the use of these lands.

2. In its defence, the defendant Sauble Beach Development Corporation (the "Corporation") alleges that its predecessor in title acquired title to its property for valuable consideration and that this title traces to a Crown Patent. The Corporation further alleges that its deed of title provides ownership in lands to Lake Huron.

3. It is Canada's position that the lands in question were included in the land reserved from surrender by the Saugeen Band pursuant to the Treaty of October 13, 1854 and have formed a part of Saugeen Indian Reserve #29 since the Treaty was signed.

4. The patent relied upon by the Corporation does not purport to grant any lands beyond the easterly boundary of the Saugeen Reserve as established by the Charles Rankin survey of 1855. Consequently, there is no basis for the Corporation's claim that it has any property rights in the lands in question.

5. In its crossclaim against Canada, the Corporation claims that, in the event that its claim to title of the lands at issue is denied, it is entitled to damages from Canada on the basis of Canada's alleged negligence, negligent misstatement (or negligent misrepresentation) and breach of fiduciary duty.

6. Canada's position with respect to the Corporation' crossclaim is that it does not owe a duty, fiduciary or otherwise, to the Corporation and that in the alternative, if such a duty

was owed, no such duty was breached. Further, Canada denies that statements made by Canada with respect to the lands in question can be construed as representations that could give rise to a claim in negligence.

7. In the further alternative, Canada states that if the Corporation has any cause of action for breach of duty, whether fiduciary or otherwise, which is denied, it can only be against Her Majesty, the Queen in Right of Ontario ("Ontario"). Canada's position with respect to Ontario's liability is set out in paragraph 5 of Canada's *Statement of Defence and Counterclaim to the Crossclaim of Ontario* in this action.

DEFENCE TO CROSSCLAIM

8. Except as otherwise specifically pleaded, Canada denies the allegations in the *Statement of Defence and Crossclaim* of the Corporation, and pleads as follows:

The Corporation's Claim for the Land in Question

9. Pleading to paragraphs 3, 8 and subparagraph 15(a), Canada denies that the Corporation has title to the lands in question. Canada admits that the Crown grants of Lots 26 to 31 inclusive were the subject of valid letters patent, but denies that the patents purported to grant any lands beyond the easterly boundary of the Saugeen Reserve as established by the Charles Rankin survey of 1855.

10. Therefore, there is no basis for the claim that the successors in title of the grantees from the Crown of the said Lots 26 to 31 inclusive have any property interests in the lands in question.

11. Further pleading to paragraph 8, Canada denies that the Corporation possessed the property adversely to the interests of any other claiming parties since the granting of the Crown patents. It is Canada's position that an interest in Indian reserve land cannot be acquired either by application of the doctrine of adverse possession, or by the application of a provincial statute of limitations. The lands in question have been and remain unsurrendered Indian reserve land, reserved for the exclusive use and occupation of the plaintiffs since at least 1836. As unsurrendered Indian reserve land, any use of these lands by the Corporation cannot result in the loss of Indian title.

12. Canada further states that Saugeen Band has always asserted that Sauble Beach is a part of Saugeen Indian Reserve #29. Sauble Beach has never been surrendered by treaty, or otherwise alienated pursuant to the provisions of the *Indian Act*, R.S.C. 1985 C. 1-5 or any preceding statute and therefore continues to form a part of the reserve.

13. In response to paragraphs 4 and 14, Canada admits that similar relief is sought in Action No. 44874/90, commenced by the Attorney General of Canada on January 18, 1990. However, Canada denies the remaining allegations in these paragraphs. Canada states that Action No. 448/90 was brought by Canada on the statutory basis and purpose recited in paragraph 2 of its statement of claim. Action 21521/95 is an independent claim commenced by then Chief Richard Kahgee and others on behalf of the Chippewas of Saugeen First Nation.

Despite the similarity of these two claims, there is no basis for the allegation that both claims were initiated by or are being maintained by the same party, that either or both claims were brought for some ulterior or improper purpose, or that either or both claims were not intended to litigate the title issues raised therein. Further, there is no basis for the allegation that the two claims are either inconsistent or contradictory. Although neither the parties to the two proceedings, nor the relief sought, is identical, the essential relief sought in both proceedings is for a declaration that the lands in question are lands reserved for the sole use and benefit of the Chippewas of Saugeen First Nation.

14. Pleading to paragraph 6 and subparagraph 15(c), Canada has no knowledge that the Corporation maintained the property as claimed, or paid taxes and insurance on it, and puts its to the strict proof thereof. Canada also no knowledge of whether the Corporation discussed generally the nature of native Indian land claims with the other defendants or whether the Corporation relied upon the information discussed and puts the Corporation to the strict proof thereof.

15. Further pleading to paragraph 6 and subparagraph 15(b), Canada's position with regard to any correspondence that passed between the other named defendants and Canada is set out in paragraphs 15 and 16 of Canada's *Defence to the Crossclaim of the Defendants Barbara Twining, Larry Twinning, David Dobson and Alberta Lemon*.

16. In particular, Canada denies that any correspondence from representatives of the Government of Canada to alleged titleholders of the lands in question purported to be legal advice or purported to provide assurance that the any of the landholders were "legally entitled"

to the land in question. Canada further denies that such correspondence can be interpreted as providing either legal advice or such assurance.

17. It is Canada's position that the Corporation should have sought independent legal advice with respect to its title to the land in question. Whether the Corporation failed to obtain independent legal advice, or if it did obtain legal advice, whether it then relied upon such legal advice to its detriment, does not give rise to a cause of action against Canada.

18. In the alternative, and in further response to paragraph 6 of the Corporation's *Statement of Defence and Counterclaim, with Crossclaim* as a whole, Canada states that the original survey conducted by Charles Rankin in 1855 clearly shows the location of the northeast corner of the reserve, and that the lands in question form part of the Saugeen Indian Reserve #29.

19. If there has been any confusion or error as to the extent of the property granted which has adversely affect any of the successors in title to the original grants of Lots 26 through 31 inclusive, which is denied, that confusion or error can be traced to the actions of the Commissioner of Crown Lands of either or both of the late Province of Canada and the Province of Ontario.

20. It was the Commissioner of Crown Lands of the late Province of Canada who was responsible for approving the original survey of Charles Rankin, and for preparing the Township of Amabel "patent plan." If there was any error in the patent plan giving rise to Crown liability, which is denied, such liability became the responsibility of the Province of Ontario. Canada pleads and relies on Article XI of *Judgment of the Arbitrators* dated May 28, 1870

21. In response to paragraph 7, Canada has no knowledge of the Corporation's relations with the Township of Amabel, or of the alleged steps taken by the Corporation to assert rights and control over the lands in question, and puts it to the strict proof thereof. In any event, Canada denies that any of the alleged steps or actions purportedly taken by the Corporation could, in law, divest the plaintiff of its title interest in the lands in question.

The Landowners' Crossclaim Against Canada

22. Pleading to paragraph 15(d) and (e) of the Corporation' *Statement of Defence and Counterclaim with Crossclaim* Canada denies that it owed any duty of care to the Corporation. Canada further denies that it had or has a fiduciary relationship with the Corporation or that her officials had power and control over the Corporation. Canada again states that the patent relied upon by the Corporation does not purport to grant any lands beyond the easterly boundary of the Saugeen Reserve as established by Rankin's survey of 1855. Consequently, there is no basis for the Corporation' reliance on the Crown patent in claiming rights to the lands in question. Canada specifically denies that the original grant of title in this case, like grants of title generally, could give rise to any fiduciary or other duties on the part of Canada or her officers.

23. In the alternative, if Canada did owe any duty to the Corporation, which is denied, Canada denies that it breached any such duties and puts the Corporation to the strict proof thereof.

24. Canada further states that should there been a finding of breach of duty owed to the Corporation, such a duty lays with the Her Majesty the Queen in Right of Ontario. Canada's

position with respect to Ontario's liability is set out in paragraph 5 of *Canada's Statement of Defence and Counterclaim to Ontario's Crossclaim* and in paragraphs 19 and 20 of this *Statement of Defence to Crossclaim.*

25. With respect to the Corporation' *Statement of Defence and Counterclaim with Crossclaim* generally, Canada pleads and relies on the *Limitations Act*, R.S.O. 1990, c. L-15, ss. 4 and 15, and the *Crown Liability and Proceedings Act*, R.S.C., c. C-50, and its predecessor the *Crown Liability Act*, S.C. 1952-53, c. 30.

26. In further response to the Corporation' *Statement of Defence and Counterclaim with Crossclaim* generally:

a) Canada denies that the Corporation has suffered any losses, injuries and/or damages, as alleged or at all, and puts it to the strict proof thereof.

b) In the alternative, Canada states that any such losses, injuries and/or damages were not caused by or contributed to by the actions and/or omissions of Canada, but were caused by or contributed to by the actions and/or omissions of Ontario.

c) Canada further states that any such losses, injuries and/or damages are exaggerated, remote and unforeseeable and puts the Corporation to the strict proof thereof.

27. In response to the Corporation's claim for pre-judgment interest, Canada states that the failure of the Corporation to give sufficient particulars of the damages claimed and the basis of such claims caused Canada to be unable to evaluate such claims, and thus disentitles the Corporation from claiming pre-judgment interest. In the alternative, if the Corporation is entitled to pre-judgment interest, then same may only be awarded for a period beginning on February 1, 1992 by virtue of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 as amended.

28. With respect to the Corporation' *Statement of Defence and Counterclaim with Crossclaim* generally, Canada pleads and relies on the equitable defence of laches.

Dated at Toronto, this 21st day of June 2004.

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