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 AND COUNTERCLAIM OF THE ATTORNEY GENERAL OF CANADA TO THE CROSSCLAIM OF THE DEFENDANT HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

The defendant to crossclaim, the Attorney General of Canada, repeats, pleads and relies upon the contents of Canada's Statement of Defence.

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 their predecessors from October 13, 1854, thereby denying the Saugeen First Nation the use of these lands.

2. The plaintiffs claim damages with respect to these lands, and demand an accounting of the full damages, costs and expenses suffered by the Saugeen First Nation as a consequence of this wrongful occupation.

3. It is Canada's position that the lands in question are included in the land reserved from surrender by the Saugeen Band, and therefore have formed a part of Saugeen Indian Reserve #29 since the 1854 Treaty. As such, Canada denies that the plaintiffs have been denied or lost the use of the lands as claimed, and that in any event, the plaintiffs have not suffered any damages as a result of the uses made of the lands in question since 1854.

4. In the alternative, if the plaintiffs have been denied or lost the use of the lands as claimed, and thereby suffered any damages that would attach to the Crown, then it is Canada's position that it is the Crown in right of Ontario who is responsible for any such liabilities.

5. Canada's position with respect to Crown liability is based on the following:

(a) Any errors with respect to the survey of the lands that was to be conducted in accordance with the terms of the 1854 Treaty, and the subsequent patent plan and plans of subdivision, which errors are denied, were the responsibility of the Crown Lands Department of the late Province of Canada. Pursuant to Article XI of the Aribtrators Award of September 3, 1870, conducted pursuant to s. 142 of the *Constitution Act, 1867*, Ontario became responsible to satisfy all claims with respect to the Crown Lands Department of the late Province of Canada "connected with or arising from lands situate in the said Province of Ontario."

(b) The application of Article XI to this litigation is consistent with the fact that the lands surrendered in 1854 were transferred to Ontario pursuant to section 109 of the *Constitution Act, 1867* ("the *Constitution Act*"); Ontario thereby received the entire beneficial interest in the surrendered lands. Therefore, in accordance with the common law principle that the *situs* of the crown for determining liability is the general revenue fund that enjoys the benefit of the assets associated with the liability, it is the province alone that is in a position to manage and secure those lands and only the province can possibly satisfy any liability owing to the plaintiffs for any damages suffered as a result of any loss of reserve lands.

(c) In the alternative, Canada states that if it is found to be responsible pursuant to section 111 of the *Constitution Act* for the liabilities of the Crown as alleged, than section 112 of that Act entitles Canada to indemnification from Ontario for any amounts owing pursuant to s. 111. Further, Canada's right to recovery pursuant to section 112 is in accordance with the constitutional principle established by the "Annuities Case" (*Province of Ontario v. Dominion of Canada*, [1897] A.C. 199 (P.C)). Canada pleads and relies on the doctrine of *res judicata*.

6. Canada therefore states that there is no basis that would allow this Court to hold the federal Crown obligated to indemnify Ontario for the liabilities alleged by the plaintiffs.

DEFENCE TO CROSSCLAIM

7. Canada denies the allegations made against Canada contained in Ontario's *Statement of Defence and Crossclaim* except those allegations that are hereinafter admitted, and pleads as follows:

The Plaintiffs' Claim For The Land In Question

8. Canada denies the allegations contained in paragraphs 10 to 15 of Ontario's *Statement of Defence and Crossclaim*. Canada states that pursuant to the terms of the 1854 Treaty, the lands in question were included in the land reserved from surrender by the Saugeen Band, have never since been surrendered, and therefore form part of the Saugeen Indian Reserve #29. Consequently, any lands added to the lands in question by accretion or otherwise were added to the Saugeen Indian Reserve #29, and not to Lots 26 to 31, or to the road allowances, as alleged.

9. Canada denies the allegations contained in paragraph 16 of Ontario's *Statement of Defence and Crossclaim*. 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.

10. In response to paragraphs 17 and 18 of Ontario's *Statement of Defence and Crossclaim*, Canada denies that the Crown ever sold the lands in question to private parties. 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 Rankin's survey of 1855. 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. In response to paragraph 19 of Ontario's *Statement of Defence and Crossclaim*, Canada denies that the expending of public money on roads by the Corporation of the Township of Amabel can result in such roads that pass through unsurrendered Indian reserve land becoming public highways pursuant to provincial legislation.

12. Further, and in response to paragraphs 20 through 22 inclusive of Ontario's *Statement of Defence and Crossclaim*, Canada denies that the plaintiffs' action is for the recovery of land, whether by the plaintiffs or the federal Crown. The lands in question are 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 provincial Crown, the Crown grantees, their successor in title or the public, cannot result in the loss of Indian title. Similarly, the plaintiffs' title to such lands cannot be lost pursuant to the operation of provincial legislation.

Ontario's Crossclaim Against Canada – Crown Liability

13. Pleading to the allegations at paragraphs 31-41 of Ontario's *Statement of Defence and Crossclaim* Canada states that if there was and is any liability of the Crown in respect of the alleged breaches, which is denied, Canada states that prior to 1867, it was a liability of the

Province of Canada. Canada denies, however, that any such liability became a liability of Canada by operation of the *Constitution Act, 1867*.

14. At Confederation, the Province of Canada was divided into the Province of Ontario and the Province of Quebec. Upon this division and reorganization, the obligation to satisfy any liabilities that might be found in this litigation for pre-Confederation wrongs of the Crown became the obligation of Ontario. That is because, by operation of section 109 of the *Constitution Act*, it is the general revenue fund of Ontario that has enjoyed, and continues to enjoy, all of the benefits of the assets associated with this litigation, as the successor to the general revenue fund of the Province of Canada. This is consistent with the common law principle that the *situs* of the Crown for determining liability is the general revenue fund that enjoys the benefit of the assets associated with the liability.

15. Lands that passed to Ontario pursuant to section 109 of the *Constitution Act, 1867* are not, and have never been, within the administrative authority of Canada. Ontario has sole liability in respect of such lands.

16. Therefore if the plaintiffs are able to establish Crown liability on the facts as pleaded, Ontario is solely responsible to satisfy such liability pursuant to section 109.

17. In the alternative, if as is pleaded in paragraph 35 of Ontario's *Statement of Defence and Crossclaim*, any such liability is a liability of the Dominion of Canada pursuant to section 111 of the *Constitution Act, 1867*, then Canada has a right of recovery pursuant to s. 112 of the *Constitution Act, 1867*. This is because s. 112 holds Ontario liable to indemnify Canada

for any and all unaccrued debts and liabilities of the old Province of Canada. The plaintiff's monetary claim, if proved, would be such a debt and liability.

18. Canada's right of recovery pursuant to section 112 is in accordance with the constitutional principle established by the Judgment of the Arbitrators dated May 28, 1870 conducted pursuant to section 142 of the *Constitution Act, 1867*. Canada pleads and relies on the doctrine of *res judicata*. Additionally, as the Arbitrators included an arbitrator appointed by Ontario by way of Letters Patent under the Great Seal of the Province of Ontario with "full power and authority" to make such a judgment, Ontario is thereby estopped from asserting that it is not now bound by that judgment.

19. Pleading to paragraph 31-34 of its *Statement of Defence and Crossclaim* Canada denies that Ontario has no nexus to the allegations and claims of the plaintiffs. Canada admits that Ontario did not exist at the time the Treaty was entered into; however, neither did Canada. Rather, it was the Province of Canada that entered into the Treaty on behalf of the Crown.

20. The nexus, therefore, is that in 1867 the Province of Canada was divided into the Province of Ontario and the Province of Quebec. The newly formed Dominion of Canada was given exclusive legislative authority in respect of Indians and lands reserved for Indians, but Ontario received the entire beneficial interest of land surrendered pursuant to treaty.

21. In reference to paragraphs 37-39 of Ontario's *Statement of Defence and Crossclaim*, Canada admits that it has *legislative* authority over Indians and lands reserved for Indians pursuant to section 91(24) of the *Constitution Act, 1867*. However, Canada denies that

legislative authority over Indians and lands reserved for Indians is the source of treaty obligations of the Crown. Rather, it is the common law relating to the aboriginal title, and specifically the independent legal interest that Indian's have in their lands that underlies the fiduciary nature of the Crown's obligation.

22. Therefore, as a matter of law, and as between Canada and Ontario, any obligations of the Crown regarding alleged pre-1867 wrongs are the responsibility of the Crown in right of the government against which such obligations can be enforced. This is true both at common law and by the terms of the *Constitution Act, 1867*.

23. Canada denies the allegations contained in paragraphs 35 and 36 of Ontario's *Statement of Defence and Crossclaim*. The alleged breaches may or may not have been in respect of alleged acts or omissions of the Department of Indian Affairs. The fact that the Department of Indian Affairs became a branch of Canada after July 1, 1867 does not govern the pass-through of debts and liabilities from the old Province of Canada to the newly established Crown entities known as Canada Ontario. The pass-through of debts and liabilities is governed by the application of the constitutional common law principles (the *situs* of the Crown) pleaded above, or alternatively, as provided by ss. 111 and 112 of the *Constitution Act, 1867*.

24. Pleading to paragraphs 40 and 41, Canada admits that 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 Crown in right of Canada. However, Canada denies that the said patents purport in any way to grant any portion of the lands in question. Canada further states that this is equally true for the pre-Confederation patent of Lot 28.

25. If there has been any confusion or error as to the extent of the property granted which has adversely affected 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.

26. 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.

27. Pleading to paragraph 74 of Ontario's *Statement of Defence and Crossclaim* Canada states that section 31 of the *Crown Liability and Proceedings Act,* R.S.C. 1985, c-50, s. 27, as am. S.C. 1990, c.8, s.31 does not establish an indemnification process; rather it is a provision dealing solely with the calculation of interest.

28. Further pleading to paragraph 74, Canada states that section 6 of the *Proceedings Against the Crown Act* sets out that the laws of indemnification are enforceable by, and as against, the Crown. However, Canada denies that Ontario has established any independent basis for the assertion that Canada is liable to Ontario for all or any part of the plaintiffs' claims for which the Court may find Ontario liable.

29. Canada therefore denies the allegations made at paragraphs 71- 74 of Ontario's *Statement of Defence and Crossclaim*.

COUNTERCLAIM

30. Canada claims against the Defendant Ontario:

(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 Ontario only or, in the alternative, an order directing Ontario to indemnify Canada in the amount of any relief and costs for which this Court finds Canada liable to the plaintiff; and

(b) Costs.

31. Canada repeats and relies upon, in the counterclaim, the contents of the statements of defence of Canada in the main action and in the crossclaim of Ontario.

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

33. Ontario is therefore liable to Canada for all or any part of the plaintiffs' claim for which the court may find Canada liable. Canada pleads and relies upon Rule 27.10 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. 1993, c. 40, ss. 24, 28 and 31, and the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, s. 6, 7 and 20.

Dated at Toronto, this 18th day of May 2004.

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