

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

ELDON ALDERSON, DONNA ALDERSON, CHARLENE ALLIN, DENNIS RIVARD, ELAINE ANTRAM, STANLEY E. BIEMAN, C. ALAN BOBO, BARBARA K. BOBO, ELIZABETH A. CLEVELAND, JAMES W. COLLINSON, MADELEINE A. COLLINSON, ALAN W. CORMIER, SANDRA A. CORMIER, WILLIAM B. CROCKATT, WAYNE CURRIE, VALERIE CURRIE, CHERYL DALLNER, WAYNE DENNIS, GLADYS M. E. LEGACY, JANE A. DICOSMO, DEBORAH L.S. DOYLE, EDWARD DUEMM, DAVID H. ELLIOTT, JOHN R. ELLIS, JEFFREY P. ERWIN, JULIE A. ERWIN, TURLOUGH FINAN, BARBARA FINAN, WILLIAM FINCH, GEORGINA FINCH, MARGARET I. GALLAGHER, SUE A. GALLAGHER, TERRIE GEORGE, AUDREY S. THOMAS, GERARDUS GERLOFSMA, GEORGE H. GIBBS, JOAN GIBBS, JOHN GRIESE, VINCENZA GRIESE, PAULINE HADFIELD, RICHARD HADFIELD, JAMES F. HAMILTON, PATRICK D. HAYNE, FLORENCE P. HAYNE, ALBERT KOHRS, BONNIE KOHRS, PAUL G. LEACH, JOHN LLOYD, WILLIAM J. LORRIMAN, MARGARET C. LORRIMAN, JOHN MCDONALD, SANDRA MCGAGHRAN, ALAN REED, GARRY D. MCKENZIE, GRANT R. MCKENZIE, DAVID I. MCKENZIE, WALLACE MCLAY, WILLIAM J. MCNAUGHTON, MARGARET A. MCNAUGHTON, PETER A. MEEK, MARGARET R. MEEK, DONNA B. MESSECAR-MILLER, BILL MUNGALL, NANCY MUNGALL, JOHN A. NUNN, DOROTHY A. NUNN, LAURENCE D. C. OLDACRE, WILLIAM F. OLDACRE, RALPH PAGET, MARY PAGET, BRIAN PATIENCE, PATRICIA PATIENCE, SHEILA MCLAUGHLIN, JERRY MCLAUGHLIN, JOHN POPE, BETTY POPE, DEBORAH PORTER, LYNN HOWELL, CATHERINE A. PRIOR, GEORGE H. PRIOR, LAURIE JOHN RANKIN, MORELY W.F. ROSWELL, DIANNE ROYCE, KAREN SIRR, KEITH A. SMITH, HAROLD O. STEWART, DONNA M. STEWART, DONALD L. STEWART, MARILYN SZALAY, GREGORY J. TESTORI, WENDY E. GRAY, PAUL VAN DE KAMER, DAVID WOODS, FAYE E. WOODS

Plaintiffs

- and -

**CHIPPEWAS OF NAWASH FIRST NATION, CHIPPEWAS OF NAWASH BAND
COUNCIL and
THE ATTORNEY GENERAL OF CANADA**

Defendants

AMENDED STATEMENT OF DEFENCE
AND CROSSCLAIM
OF THE ATTORNEY GENERAL OF CANADA

OVERVIEW

1. This dispute arose as a result of the decision of the Chippewas of Nawash First Nation and the Chippewas of Nawash Band Council (together the “First Nation”) not to enter into new leases of reserve land. The Plaintiffs’ claim is based on purported rights they say flow from their previous occupation of lots on the reserve pursuant to leases that expired on or before February 16, 1995. At the centre of the dispute is ownership over the cottages built on the formerly leased lots.

2. The Plaintiffs do not challenge the right of the First Nation to decide not to enter into new leases, nor do they seek a declaration that the leases are still in force and effect. Rather, the Plaintiffs collectively claim general and punitive damages totalling \$50 million, for loss of enjoyment, lost opportunity, denial of compensation for the loss of the cottages, mental distress as well as any related expenses. In addition, the Plaintiffs seek a declaration that each of them is entitled to remove any buildings, structures or improvements erected on the lots, and to have access to the lots for that purpose.

3. In response, the position of the Attorney General of Canada (“the Defendant”) can be summarized as follows:

4. All the leases that underlie this action expired no later than February 16, 1995. This coincided with the expiration of the designation of the land for leasing purposes under the *Indian Act*. Thus as of February 16, 1995, the Plaintiffs had no surviving legal rights under the leases. Nonetheless, the Plaintiffs or those they purport to claim under continued to use and occupy the land. Thus, at best the Plaintiffs were overholding on some basis from February 16, 1995 forward with the knowledge and the express agreement of the First Nation until the decision of the First Nation not to proceed with the new lease.

5. None of the leases contained an option to renew beyond February 16, 1995. Consequently, even if some of the Plaintiffs were overholding tenants, they had no right of renewal.

6. The Plaintiffs purport to rely on a clause in the expired leases which provided that the lessees were entitled to at least 12 months notice if the leases were not to be renewed at the expiry of the term. This provision, however, does not apply here. The lease provided that, if a lessee were to overhold after the expiration of the term, then the tenancy would only continue "from month to month" and the tenancy could be terminated by the lessor at any time after the creation of such tenancy by "one month's written notice to the Lessee." Consequently, if any of the Plaintiffs had a right to notice of termination as an overholding tenant, that right was limited to one month's notice.

7. In May 2006, all of the Plaintiffs agreed to accept a temporary, non-renewable Permit as the basis for their occupation for a six month term. At that

point, any rights the Plaintiffs may have had pursuant to an overholding tenancy had come to an end, and all rights and obligations were contained within the terms of the Permit. The Permit provided no right of renewal. No rights were afforded to the Permittees with respect to removing the buildings upon expiration of the Permit. The Permit contained no termination provision or notice requirement with respect to termination, other than that implicit in the six-month term of the Permit itself.

8. Given the Plaintiffs had no right of renewal by way of any overholding tenancy or under the Permit, there is no basis for the damages claimed for loss of enjoyment, lost opportunity or mental distress. Any expectation of the Plaintiffs that they had such a right was unreasonable, and if they acted to their detriment based on that unreasonable expectation, this does not sound in damages.

9. Although the Defendant denies that the Plaintiffs have any remaining rights at law in the buildings as of the expiration of any overholding tenancy and/or the expiration of the Permit, it has been and remains the position of the Defendant that the Cottagers should still be afforded a reasonable opportunity to remove the buildings from the reserve. The First Nation disagrees with that view, and has asserted ownership rights over the buildings. Consequently, any cause of action the Plaintiffs may have with respect to these buildings, which is denied, is a cause of action against the First Nation alone.

10. Finally, the Plaintiffs or those they claim under were obligated under the terms of the expired lease, the overholding tenancy or otherwise, and the Permit to keep all improvements in a good state of repair. With respect to septic systems or its equivalent, these were to be kept up to the standards of government health regulators as specified in the lease from time to time ~~the local municipal health unit~~. The Plaintiffs agreed to conduct all activities on the lands in compliance with all applicable environmental laws, and pay for the entire costs of any remedial action necessary to mitigate any damage to the environment caused by their activities ~~of the Permittee~~. To the extent that any clean up, decommissioning or remedial action is required to the lots and/or improvements in order for the Plaintiffs to fulfil their obligations and/or mitigate any damage to the environment, the Defendant is entitled to an equitable set off against any damages that might be awarded.

STATEMENT OF DEFENCE

In answer to the Plaintiffs' Statement of Claim, the Defendant, the Attorney General of Canada (the "Defendant") states as follows:

11. Unless otherwise admitted, the Defendant denies all of the allegations in the Amended Statement of Claim.

THE FACTS:

12. In addition to the facts the Defendant has pleaded in response to specific allegations in the Amended Statement of Claim, the Defendant pleads and relies on the following:

13. All of the leases ~~that~~ that underlie the Plaintiffs' claims in this action expired no later than February 16, 1995. The Defendant has no knowledge that each of the Plaintiffs were the valid successors of a leasehold interest either prior to or after the expiry of the lease, the validity of such succession being determined by the terms of the lease, and puts each Plaintiff to the strict proof thereof. At best, the Plaintiffs or those they claim under were overholding tenants since February 16, 1995 until the decision of the First Nation not to proceed with the new lease.

14. During the term of the leases which expired no later than February 16, 1995 at the latest, the lessees were obligated to construct improvements on the leased property having a minimum value, which could include a cottage dwelling with a minimum 480 square foot area, or alternatively ~~place~~ a mobile home ~~on~~ the property. The lessees were also obligated from time to time to, *inter alia*:

- a) Supply the buildings with a flush toilet and septic tank or other sanitary waste disposal system that conformed to the various specifications from time to time ~~of the local county health unit~~;
- b) Maintain fire insurance sufficient to indemnify against loss to both the leased lands and the buildings;

- c) Keep the demised land in a condition satisfactory to Her Majesty's representative;
- d) Abate any nuisance and clean up the demised land, failing which the lessee would be liable for the cost of such cleanup;
- e) Comply with all applicable environmental laws; and
- f) Not deposit any rubbish or any matter of an offensive nature anywhere on the reserve except in such places at such times and under such conditions as allowed by the Crown's representative.

15. The expired leases provided that if new leases were to be offered, the lessees of record would have the right of first refusal of such offer, but that if the decision was made that the land shall not be available for lease after the expiry of the term, the lessees were entitled to not less than 12 months notice of such decision. If new leases were not to be offered, the lessees were obligated to surrender up to the Crown "the demised land with the appurtenances, together with all the fixtures made by the Lessee therein and thereon, in good and substantial repair and condition, reasonable wear and tear and damage by natural disaster only excepted." However, the lessees maintained the right to remove any buildings erected on the demised land, provided they were removed within 30 days following the expiration of the lease, failing which, the buildings would revert to the Crown without any claim for compensation. The decision whether new leases were to be offered or not could only be made "upon the advice of the Council of the Chippewas of Nawash Band of Indians" and in accordance with the designation provisions of the *Indian Act*.

16. The leases contained an overholding provision, that if the lessee holds over after the expiration of the term of the lease or any renewal without a written agreement, then the tenancy thereby created would continue “from month to month during the pleasure of the Minister, which may be terminated at any time after the creation of such tenancy by one month’s written notice to the Lessee.” It further provided that the tenancy would be subject to all the terms and conditions of the expired lease “so far as the same are applicable to such tenancy.” Thus, the 12-month notice provision of the expired lease was no longer applicable where ~~the any overholding~~ right to notice was explicitly limited to one month.

17. From the expiry of the lease in 1995, until the decision of the First Nation not to proceed with the new lease, to the extent the Plaintiffs continued to use and occupy these lands as overholding tenants or otherwise, the Plaintiffs ~~lessees~~ were subject to all of the obligations they assumed under the lease, including the obligations to keep any buildings in good and substantial repair, maintain adequate fire insurance, and keep a septic tank or its equivalent up to the standards specified in the leases from time to time ~~of the local municipal health unit.~~

18. In the spring of 2006, the First Nation erected a gate at the entrance to the Hope Bay subdivision and agreed to allow for further occupancy by way of Permit only. The Cottagers were advised of this decision by correspondence, with two copies of the Permit attached for execution. That correspondence specifically

put the Cottagers on notice that there was no authorization to issue a new lease and that the permit was “a temporary permit and contains no renewal clause.”

19. The Permit that was issued pursuant to subsection 28(2) of the *Indian Act* is in the form of a contractual agreement made between Her Majesty the Queen and the individual “Permittee.” The Permit commenced May 1, 2006 and terminated on October 31, 2006, and contained various provisions relevant to these proceedings, including but not limited to the following:

- a) The Permit contained no termination provision or notice requirement with respect to termination other than that implicit in the six-month term of the Permit itself;
- b) The Permit contained no renewal clause;
- c) The Permittee was not to construct or extend any works within the lands without the consent of the Minister and the Band Council;
- d) The Permittee agreed to keep the improvements on the lands in a good and tenable state of repair, both inside and outside, including but not limited to fixtures, walls, foundations, roofs and septic systems “and all other fixtures and appurtenances to the Lands and Improvements;”
- e) The Permittee agreed to conduct all activities on the lands in compliance with all applicable environmental laws, and pay for the entire costs of any remedial action necessary to mitigate any damage to the environment caused by the activities of the Permittee;
- f) The Permittee agreed that “no representations, warranties or conditions have been made to the Permittee in respect of the Lands

by Her Majesty” or in respect of the Permittee’s “use or occupation of the Lands by Her Majesty, the Band or the Band Council except as expressly set out herein;”

g) The Permittee acknowledged and agreed that the rights granted under the Permit were to “be construed as personal contractual rights only and shall not be deemed to grant, convey or confer on the Permittee any right *in rem* or any estate or interest in the title to the Lands;” and

h) The Permit made no reference to the expired leases, or any of the expired provisions, and conferred no right on the lessees to remove the buildings upon the expiration of the Permit.

20. By voluntarily entering into the Permits, the Plaintiffs brought to an end any purported rights they may have had pursuant to the expired leases, or otherwise waived any rights they may have had, including any rights under the overholding provision of the expired leases and voluntarily accepted the rights and obligations provided under the Permits.

PLEADING TO THE AMENDED STATEMENT OF CLAIM

21. The Defendant admits the allegations contained in paragraphs 4, 5, 6, and 15 of the Amended Statement of Claim.

22. Pleading to paragraphs 2 and 3, the Defendant has no knowledge that each of the Plaintiffs was the valid successor of a leasehold interest prior to or after the expiry of the lease, the validity of such succession being determined by

the terms of the lease subject to approval by Indian and Northern Affairs Canada ("INAC"). The Defendant puts each Plaintiff to the strict proof thereof.

23. Pleading to paragraph 7, the Defendant admits that the First Nation conditionally surrendered the lands referred to, but states that the effective dates of the designation were from February 16, 1965 to February 16, 1995.

24. Pleading to paragraph 8, the Defendant states that leasing generally commenced in or around 1967, and that while some of the leases entered into around that time were for 5 year terms, others were for 10 year terms. The Defendant admits that the leases allowed for the lessees to remove their buildings from the lots following the expiry of the leases, but only if they did so within 30 days of such expiry, failing which the buildings would "revert to and become the property of the lessor."

25. Pleading to paragraph 9, the Defendant states that the issuance of the further 20 year leases occurred between 1972 and 1977 but, whatever the commencement date, no leases extended past February 16, 1995. These leases required the lessees to construct "improvements" on the demised lands, for example, improvements having a minimum value, with such improvements including, at the option of the lessee, a dwelling with a minimum 480 square foot floor space or a mobile home.

26. Pleading to paragraph 10, the Defendant admits that the lessor was obligated to provide not less than 12 months notice if the land would no longer be

available for leasing purposes at the expiry of the term. However, at the latest, the 12 months notice provision came to an end on February 16, 1995 at the expiry of the term of the leases and the designation of the land for leasing purposes. After February 1995, the occupation of the land continued on a month to month basis. Regardless of the 12 month notice provision, at all relevant times during the terms of the various leases, the lessees knew or ought to have known that the land would not be available for lease after February 16, 1995 unless the First Nation consented to a new designation of the land for leasing purposes in accordance with the requirements of the *Indian Act*. Further, the lessor's reversionary interest in the buildings was not dependent on providing notice that the lease would not be renewed; rather the cottages became the property of the lessor if the buildings were not removed by the lessees within 30 days following the expiration of the lease. The lease also provided that the decision of the lessor to continue the lease would be predicated upon the advice of First Nation's Band Council.

27. The Defendant admits paragraph 11, and adds that during the term of the lease the periodic rent increases were calculated in reliance on appraisals completed by a qualified, accredited appraiser when necessary and in accordance with the terms of the lease that provided that the periodic adjustments to the rent were to be based on the "fair market" rent for the land, without regard for the improvements. The lessees retained the right, if they disagreed with the determination of fair market rent, to have the rents reviewed by the Federal Court Trial Division.

28. Pleading to paragraph 12, the Defendant is aware that the First Nation charged fees for services provided, but has only partial knowledge of the particulars of such fees, or whether these fees were paid at all, as all such fees charged by the First Nation were arranged as between the First Nation and the Cottagers and were not part of the lease between the Cottagers and Her Majesty the Queen. The Defendant is aware that the First Nation was still billing for such fees up to and including 2006. The First Nation knew of and accepted the Cottagers continued occupation of the lots.

29. Pleading to paragraph 13, the Defendant admits that no notice was provided to the Cottagers 12 months prior to the expiry of the lease on February 16, 1995. INAC was not in a position to provide such notice because it did not know whether the lands would be available for leasing, a decision that only the First Nation could make. The First Nation did not make that decision at that time. Again, as of February 1995, regardless of any notice provisions in the expired leases, the lessees knew or ought to have known that the lands were no longer available for lease until the First Nation consented to a new designation of the land for leasing purposes in accordance with the requirements of the *Indian Act*.

30. The Defendant admits that INAC wrote to some of the Cottagers or their lawyers, copied to the First Nation, advising that new leases were being prepared, but denies that INAC wrote to all the Cottagers. The Defendant further admits only that a copy of a draft lease was enclosed in some of the letters sent, and again, to only some of the Cottagers. The letters that were sent specifically

referred to the requirement for First Nation approval and stated only that the leases were being prepared. The letters that were sent did not amount to an offer to lease and the cottagers knew or ought to have known this. The Defendant further denies that this draft lease contained the same provision as the expired leases regarding the removal of cottages, but in any event the draft lease was never entered into, and its provisions do not give rise to any rights.

31. Although a new lease was being considered by the First Nation, INAC was aware at all times that it could not issue any new lease until the lands were designated for lease in accordance with the wishes of the First Nation, and pursuant to the requirements of the *Indian Act*. The Plaintiffs also knew or ought to have known this.

32. Pleading to paragraph 14, the Defendant admits that the First Nation took steps to designate the Hope Bay subdivision for further leasing, including the holding of a referendum in 1995. The Defendant also admits that in this instance a second vote as required by the provisions of the *Indian Act* was not held, and says that in accordance with INAC's policy, INAC did not arrange for a second vote because the First Nation did not submit a Band Council Resolution requesting one.

33. Pleading to paragraph 16, the Defendant denies that any decision of the Plaintiffs not to remove the buildings from the lands was based on their reliance on the representations and conduct of INAC. The Plaintiffs either obtained their own legal advice and relied on that, or failed to obtain their own legal advice and

acted as they saw fit. In either event, this does not disclose a cause of action. At the expiry of the designation and leases in 1995, none of the cottagers advised INAC that they intended to remove the buildings according to the terms of the lease or made any inquiries to that effect. In addition, for the most part, the Plaintiffs or the lessees who constructed the buildings, did not do so in a manner that contemplated their later removal. Further, most if not all of the buildings on the reserve were and are incapable of being moved, cannot be relocated off reserve onto provincial lands without being brought into compliance with provincial building codes and/or cannot be removed on any economically rational basis.

34. At no time did INAC represent that the Hope Bay subdivision “would” continue to be available for leasing or that written leases “would” be issued to the Cottagers. Rather, at all times INAC’s references were to a lease that “may” be implemented, dependant always on the willingness of the First Nation to redesignate the Hope Bay lands in order to enter into a new lease agreement. Regardless, the Plaintiffs knew or ought to have known that any lease of land on the reserve could not proceed until there had been a formal designation pursuant to the requirements of the *Indian Act*.

35. The Defendant was aware that many of the Cottagers continued to occupy their cottages, and make payments to INAC, but has no knowledge to what extent they maintained or improved their cottages, and puts each individual Plaintiff to the strict proof thereof. Further, the Defendant denies that INAC ever

provided the cottagers with written permission to continue to occupy, maintain or improve their cottages. INAC admits only that it continued to receive and process cheques submitted by the cottagers. From February 16, 1995 forward, any decision to improve the cottages was undertaken by the Cottagers at their own risk with the full knowledge that the land was not currently designated for lease.

36. Pleading to paragraph 17, the Defendant admits only that it wrote to approximately 22 of the Cottagers, advising them that their lease had expired July 31, 1993, and providing them with a short-term lease for their review and completion, covering the period from August 1, 1993 to February 16, 1995.

37. Pleading to paragraph 18, the Defendant admits that these short-term leases contained the same 12-month notice provision as the original leases, including the same right of the Cottagers to remove their buildings. The Defendant pleads that the 12 month notice provision did not apply after February 16, 1995. The Defendant also admits that INAC did not give notice to the Cottagers that the land would no longer be available for leasing at the expiry of these short-term leases. In the absence of any advice being received from the First Nation on the matter, there was no basis for INAC to notify the Cottagers. The Defendant denies that INAC ever represented that a written lease "would be issued" as pleaded. To the contrary, at all material times INAC understood and communicated that any new lease was dependant on the First Nation's decision

to redesignate the lands for such purposes. Again, the Plaintiffs knew or ought to have known this.

38. Further pleading to paragraph 18, the Defendant states that at various times throughout the relevant period, the parties had varying expectations that the Hope Bay subdivision would continue to be available for leasing. The Defendant denies, however, that these expectations give rise to a cause of action. That these expectations might not be met was always a possibility and known to all the parties. As the Plaintiffs or those they claim under had occupied the lots for more than a decade without a lease, it is not reasonable for the Plaintiffs to assert legal rights beyond those available to tenants overholding on a month to month basis.

39. Pleading to paragraph 19, the Defendant has incomplete knowledge whether various Cottagers validly sold their cottages or assigned their rights as lessees, and puts the individual Plaintiffs to the strict proof thereof. Even if sales and assignments took place with or without the knowledge of INAC, the Defendant denies that any assignment of rights could have included any rights under potential future leases that were allegedly "forthcoming" or that might be implemented. The Plaintiffs seeking assignments knew or ought to have known that no assignment could take place prior to a new designation. Any correspondence that INAC had with Cottagers or their lawyers about such sales and assignments was limited to mailing an instruction sheet upon request that set out the steps a lessee would have to take to effect such a sale and assignment

and in some cases included blank assignment documents, a copy of draft terms of a lease and an abstract parcel report. Further, from February 16, 1995 forward, no assignments could be registered, as the designation of the lands as lands set aside for leasing purposes had expired.

40. Pleading to paragraph 20, INAC never suggested or otherwise asserted during this period that the First Nation or the Crown owned the cottages or that the cottages could not be sold. The Defendant says that the right of ownership of the cottages was and is determined by the terms of the lease, so far as the same are applicable to such overholding tenancy.

41. Pleading to paragraph 21, the Defendant admits that the Band Council held a referendum in June 2005 to re-designate the Hope Bay lots for leasing, pursuant to section 39(1) of the Indian Act, and that the designation document in the referendum included a draft lease, but again denies that the draft lease contained the same rights of the Cottagers to remove improvements and chattels as had been contained in the expired leases. This draft lease was never entered into, and its provisions do not give rise to any rights.

42. The Defendant admits that a majority of the eligible electors did not vote in the June 2005 referendum and states that, pursuant to section 39(2) of the Indian Act, such a result was not sufficient to designate the land. Where a majority of those who did vote were in favour, then, in that circumstance, the Minister has the discretion to call another meeting. If such a second vote is held, in that

circumstance a majority of those voters participating is sufficient to deem the vote valid.

43. Pleading to paragraph 22, the Defendant admits the allegations contained therein with respect to the September 2005 referendum, except to say that as was the situation in the June 2005 referendum, a majority of eligible electors did not vote. Rather, of the eligible electors who did vote, a majority voted in favour of the designation.

44. Pleading to paragraph 23, the Defendant denies the allegations contained therein. Although the s. 39 requirements of the *Indian Act* had been met, the Governor in Council was not in a position to consider whether to accept such a designation until the requirements of s. 40 of the *Indian Act* had also been met. Section 40 requires that a proposed designation that has been assented to by the First Nation in accordance with s. 39 must be certified on oath by the superintendent or other officer who attended the meeting and by the Chief or a member of the Council of the First Nation before it can be submitted to the Governor in Council for acceptance or refusal. ~~The Missing from the required certification that was otherwise completed by the electoral officer as well as by the Chief or member of the Council was Annex "A", which is the "Designation" document, was never received by INAC, and consequently the matter could not be and never was put before the Governor in Council. To meet the documentary requirements as set out in Article 14 of Directive 5-4 of INAC's Land Management Manual, Annex "A" must be attached to the Certification, and~~

signed by the Chief and all the Councillors of the First Nation. INAC requested the Annex "A" Designation document be signed and forwarded to INAC on several occasions. It is INAC's understanding that the Chief and Councillors ~~or a member of the Band Council~~ did not sign the Annex "A" Designation document ~~certify the second vote~~ because the Chief and Council were no longer satisfied with the terms of the draft lease.

45. Pleading to paragraph 24, the Defendant admits only that from 1995 to October of 2006 the Cottagers paid money for the continued use and occupation of the Hope Bay lots. The Defendant has no knowledge ~~whether~~ the extent to which service fees were paid to the First Nation. INAC did not approve renovations and improvements and has no knowledge whether the First Nation gave such approval. With respect to the sale of various cottages and the assignment of rights, INAC may have provided the necessary forms for such transactions upon request but did not approve or process any assignments as the land was not designated for leasing during this time period.

46. Pleading to paragraphs 25 and 26, the Defendant admits that INAC became aware that the First Nation was considering taking the position that the cottages in the Hope Bay subdivision were fixtures on reserve lands, and that the Cottagers had no right to remove them. However, INAC took a different position, advising the First Nation that the Cottagers should be notified that the leases have ended, and that the Cottagers should be provided a reasonable opportunity to remove the cottages.

47. Pleading to paragraph 27, the Defendant admits that in May of 2006, INAC wrote to the Cottagers advising that their leases had expired and that no authority to issue a new lease had been given, but that the Minister of Indian Affairs and Northern Development, with the concurrence of the Chief and Council of the First Nation, was prepared to offer a Permit to use and occupy lots in the Hope Bay Subdivision for the period of May 1, 2006 to October 31, 2006. The correspondence from INAC to the Cottagers clearly stated that the Permit was temporary, and contained no renewal clause. Two copies of the Permit were enclosed with the letter, as well as instructions on executing the Permits and returning them to INAC with the appropriate fee. The Permit contained no notice provisions with respect to termination, as this would have been redundant: the Permit had its own expiry date with no right of renewal. Further, the letter itself explicitly advised the Cottagers that the lease had expired and no authority to issue a new lease had been given. Additionally, the Permit was silent with respect to any right of the Cottagers to remove their chattels, buildings or other improvements on the expiry of the Permit. Although the covering letter and Permit were clear and unequivocal, none of the Cottagers made any inquiries or took any steps to remove the cottages.

48. Pleading to paragraph 28, the Defendant admits the contents of the letter of December 1, 2006 as alleged, but has no knowledge as to when the Cottagers actually left their cottages for the season. The Defendant adds that although the letter stated that the Cottagers only had until January 31, 2007 to remove their chattels, extensions of time were given. Throughout this period, INAC made

every effort to facilitate the Cottagers' access to the reserve to remove their chattels.

49. Pleading to paragraph 29, the Defendant denies that in its December 1, 2006 letter INAC claimed the cottages were owned by the Crown. In that letter, INAC advised the Cottagers that they were not allowed to remove or dismantle any structures affixed to the land, on the basis of the First Nation's view that the fixtures on the reserve now formed part of the reserve land. INAC then advised the Cottagers to seek independent legal advice regarding that matter, and also provided INAC contact numbers. INAC was clear when the Permit was issued that there was no right of renewal, and when the Cottagers executed the Permit they knew or ought to have known that all of their rights were set out within it. Further, INAC was under no obligation to advise or indicate to the Cottagers or their lawyers whether a lease would be forthcoming, or to provide legal advice to the cottagers.

50. Pleading to paragraph 30, although INAC became aware that there was an issue regarding ownership of the cottages, INAC was under no obligation to notify the Cottagers of this. It is admitted that the 30-day notice period was a provision under the expired leases, but the Plaintiffs waived any rights they had under the expired leases when they entered into the Permit and the Permit contained no such notice provision.

PROPRIETARY ESTOPPEL

51. Pleading to paragraphs 31 and 32, the Defendant denies that INAC ever encouraged or induced the Plaintiffs to remain on the lots as pleaded. At all relevant times, to the extent that INAC was able to determine that there was still an ongoing interest on the part of both the Cottagers and the First Nation to continue the leasing relationship, INAC did everything that could be expected of a prudent administrator under the circumstances. Thus, at various times INAC did make statements that new leases were being considered by the First Nation, but none of these statements can be construed as being inducements. Further, to the extent that the Plaintiffs allegedly acted to their detriment resulting in loss of property, such loss cannot be attributable to the actions or omissions of INAC.

52. At all relevant times, the Cottagers were fully aware that any decision to enter into new leases with them was the decision of the First Nation. After over 12 years of, at best, overholding, the risks assumed by the Cottagers by continuing to maintain and improve cottages situated on reserve land were knowingly assumed by them. Any expectation or belief that the Cottagers may have had that a new lease was a certainty was unreasonable. The role of INAC was limited to approving any decision of the First Nation to lease. Further, if any loss was suffered by the Plaintiffs because they were unable to remove their buildings, which loss is denied, such loss was occasioned solely by the decisions of the Plaintiffs, or by the actions of the First Nation, and cannot be attributed to INAC acting as administrator of the leases or the Permits.

53. Pleading to paragraphs 33 to ~~35~~ 36, the Defendant denies that INAC ever led the Cottagers to believe it would not insist on strict enforcement of the terms of the lease. INAC officials never had any discussions with the Cottagers on this topic generally, or in relation to the clause in the expired lease addressing the limited rights of the Cottagers to remove their building within 30 days of the expiry of the lease. Based on the actions of INAC officials, it was unreasonable for the Plaintiffs to have made any assumptions that a lease was definitely forthcoming, or that any rights that were accorded them under the expired lease, by way of or their overholding tenancy or otherwise, would carry over to the Permit issued by INAC, which terms were not identical, and in many respects were substantively different to the terms of the expired lease.

ESTOPPEL BY CONVENTION

54. Pleading to paragraphs 36 to 39, as the Plaintiffs or those they claim under had occupied the lots for more than a decade without a lease, the Defendant denies that any of the assumptions as alleged by the Plaintiffs were shared with INAC. The only assumption that INAC made with respect to the renewal of the leases was that there “may” be new leases. After the Plaintiffs, or those they claim under, had occupied the lots for more than a decade without a lease, any assumption that went beyond the mere possibility of new leases was not an assumption shared by INAC, and was in any event unreasonable. INAC was aware that the Cottagers wanted a new lease to issue, but had no reason to believe that the Cottagers assumed that this was guaranteed. The fact that at

best, the Cottagers had the benefits of overholding tenants for over 12 years does not support a plea that the Cottagers were acting to their detriment. INAC did not take the position that the cottages were fixtures and not removable by the Cottagers. INAC merely informed the Cottagers that this was the position of the First Nation, and on that basis, advised the Cottagers that they were not to remove the buildings.

RESTITUTION AND UNJUST ENRICHMENT

55. Pleading to paragraphs 40 to 44, INAC could not possibly have been unjustly enriched as it has never had, or ever claimed, any interests in these cottages. INAC is not in possession of the cottages and as such has received no tangible benefit. The First Nation is in possession of the cottages and any claim of unjust enrichment must be directed there. The decision to lease Indian reserve land lies with the First Nation, subject to the right of the Minister of Indian Affairs and Northern Development and the Governor in Council to refuse to approve the leasing of reserve land if that would amount to approving an improvident bargain. Any decisions with respect to the right of the Cottagers to continued ownership or removal of the buildings were and are decisions of the First Nation, who has possession of the buildings. The Defendant denies INAC encouraged the Cottagers as alleged. The Plaintiffs knew or ought to have known that they had no right to lease the property after February 16, 1995.

DAMAGES SUFFERED BY THE PLAINTIFFS

56. Pleading to paragraphs 45 to 49, the Defendant denies that any of the damages allegedly suffered by the Plaintiffs, which is denied, can be attributable to INAC in its administration of the leasing aspects of the Hope Bay subdivision. The decision not to enter into new leases and the decision not to let the Cottagers remove their cottages were decisions of the First Nation alone.

57. There is no basis for the allegation that INAC ever acted in a callous manner as alleged. To the contrary, INAC made every effort to facilitate a resolution to the outstanding issues regarding the leasing of the lands. INAC administered the leases throughout the 30-year period in a professional manner. The Defendant denies that INAC was ever in a position of power relative to the Cottagers, and denies that the Cottagers were ever vulnerable, as alleged. The law considers the Cottagers to be capable of looking out for their own interests, and capable of obtaining and acting in accordance with sound legal advice. Any failure of the Cottagers to look out for their interests or obtain such legal advice and act accordingly does not support a cause of action against the Defendant.

58. The Defendant denies that INAC waited, intentionally or otherwise, until the Cottagers had left their cottages and 30 days had elapsed from the expiry of the Permits before advising the Cottagers that the First Nation was claiming ownership of the Cottages. INAC advised the Cottagers when it became aware that the First Nation was not going to resile from claiming ownership. INAC has never claimed to have any interest in these buildings.

59. There is no basis upon which INAC should compensate the Plaintiffs for their alleged loss, and similarly no basis for the punitive damages claimed. Their claims for damages are excessive and remote and are based on valuations that do not correspond to the nature of the interest asserted. The Defendant pleads that some or all of the buildings over which the Plaintiffs seek a declaration and damages were not built in a manner that makes them capable of being moved, are not capable of being removed from the reserve and, even if capable of being removed, they cannot be relocated in Ontario due to non-compliance with Provincial building code requirements. Even if the buildings could physically be removed or relocated onto non-reserve land, to which the Defendant puts the Plaintiffs to the strict proof, the cost would not be economically rational. Further, the Cottagers never had a right under the Leases to remove fixtures, appurtenances or improvements other than the buildings, therefore cannot claim damages in respect of them.

EQUITABLE SET-OFF

60. During the term of the leases or subsequently during the period of occupancy of the lots, including during the terms of the Permits, the Plaintiffs or those they claim under caused or contributed to environmental damage or harm to the lots. Environmental damage or harm includes but is not limited to harm caused by non-compliant or marginally compliant wastewater disposal systems, toilets and septic systems, sewage tanks and outhouses, and waste or stockpiles

of various potentially hazardous materials. Details of these allegations will be provided prior to trial.

61. Similarly, during the term of the leases or subsequently during the period of occupancy of the lots, including during the terms of the Permits, the Plaintiffs or those they claim under failed to keep the buildings on the lots in a proper state of repair. Details of these allegations will be provided prior to trial.

62. Should the Plaintiffs succeed in their claims for declarations that they had equitable leases or any other interest which results in an award of damages or restitution herein, it would be manifestly unjust if the Plaintiffs were not also held to their obligations under the expired leases or Permits with respect to the upkeep of the buildings and lots on the reserve and with respect to environmental matters This includes upkeep and maintenance of septic and other sanitary waste disposal systems. Therefore, should the Plaintiffs succeed in their claim for declarations and damages or restitution herein, the Defendant seeks an equitable set-off for the cost of any maintenance, clean up and remediation of the buildings, and the environment lots.

CROSSCLAIM

63. Should the Attorney General of Canada ("Canada"), be found liable to the plaintiffs or any of them in the main action herein, Canada seeks contribution and indemnity from the Chippewas of Nawash First Nation and Chippewas of

Nawash Band Council (together the “First Nation”) jointly and severally on the basis that any and all decisions that were made with respect to the Plaintiffs’ rights and interests in the cottages and any actions that were taken to prevent the Plaintiffs from removing the cottages were independently made and taken by the First Nation.

64. Canada claims against the First Nation, as follows:

- a) Damages for contribution and indemnity for any and all damages awarded against Canada in the main action herein;
- b) In the alternative, damages for wrongfully interfering with any contractual relations found to have existed between Her Majesty the Queen and the Plaintiffs in the main action;
- c) Special damages, particulars of which will be provided prior to trial;
- d) Pre-judgment and post-judgment interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- e) Costs of this action on a substantial indemnity basis or as this court deems just; and
- f) Such further and other relief as this Honourable Court deems just.

65. Canada repeats and relies on the allegations set out in its Statement of Defence herein.

66. At all material times relevant to these proceedings, any decisions of the First Nation not to proceed with the designation of the Hope Bay lands for leasing purposes was their decision to make. Any delays are attributable to the actions or omissions of the First Nation.

67. At or about the time of their ultimate decision not to proceed with the designation of the subdivision lands, the First Nation took the position for the first time that the cottages were fixtures on the reserve and that these belonged to the First Nation as part of their reserve lands. This decision was taken by the First Nation with the benefit of independent legal advice. This decision was taken against the recommendation of INAC that the Cottagers be allowed to remove their cottages.

68. In the spring of 2006, the First Nation erected a gate at the entrance to the subdivision lands.

69. After the Permits expired on October 31, 2006, the First Nation refused to allow the Cottagers access to the land to remove the cottages, and INAC advised the Cottagers accordingly.

70. To the extent that the Cottagers in the main action herein are found to have an interest at law or equity to an interest in the cottages or damages for interference with the exercise of that property interest, the denial of those interests and any damages flowing therefrom were solely the result of the actions and decisions of the First Nation, not INAC. Canada seeks contribution and

indemnity from the First Nation for any damages found against Canada in the main action.

71. Alternatively, to the extent that the First Nation interfered with INAC's ability to fulfil any obligations that may be found to have existed in favour of the Cottagers in the main action, Canada seeks damages from the First Nation for unlawful interference with Canada's economic relations with the cottagers.

72. In or about 1995, the First Nation entered into a INAC's Regional Land Administration Assistance Program ("RLAAP") under which the First Nation received funding and assumed administration and control over some aspects of the leasing on its reserve, including the Hope Bay Subdivision. The First Nation was specifically responsible for inspection, monitoring and reporting of any encroachments or violations of the terms of a lease or permit. The First Nation is responsible for any losses flowing from its failure to monitor, identify and report as required under RLAP.

73. ~~72.~~ Canada pleads and relies on the *Negligence Act*, R.S.O. 1990, c. N.1, and Rule 28 of the *Rules of Civil Procedure*.

74. ~~73.~~ Canada requests that this crossclaim be tried at the same time or immediately after the trial of the main action, unless otherwise ordered by the court.

~~May 12, 2008~~
December 15, 2009

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**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding Commenced at Toronto

**STATEMENT OF DEFENCE AND
CROSSCLAIM OF THE ATTORNEY
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