

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

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. ELLIOT, 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, MORLEY 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

**REPLY TO THE STATEMENT OF DEFENCE OF THE CHIPPEWAS OF
NAWASH FIRST NATION and THE CHIPPEWAS OF NAWASH BAND
COUNCIL**

1. Unless otherwise admitted, the Plaintiffs deny all of the allegations in the Statement of Defence of the Chippewas of Nawash First Nation and the Chippewas of Nawash Band Council (hereinafter referred to as the "**First Nation**").

2. The Plaintiffs admit the allegations of fact contained in paragraphs 4, 5, 8, 9, 23 and 30 of the First Nation's Statement of Defence.

3. The Plaintiffs have no knowledge of the allegations of fact contained in paragraph 6 of the First Nation's Statement of Defence.

4. The Plaintiffs repeat and rely on the facts and defined terms set out in the Amended Statement of Claim. Where those defined terms are used in this Reply, they have the same meaning as in the Amended Statement of Claim.

THE 1965 DESIGNATION AND LEASES

5. With respect to the allegations of fact in paragraph 7 of the First Nation's Statement of Defence, the Plaintiffs admit that the *Indian Act*, R.S.C. 1985, c. I-5 prohibits bands from entering into agreements regarding the use or occupation of reserve land with anyone who is not a member of the First Nation, but deny that reserve land must be conditionally surrendered to the Crown (or designated) before the Crown can enter into agreements for the use or occupation of reserve land. Section 28(2) of the *Indian Act* allows the Crown to, by permit in writing, authorize the use and occupation of First Nation reserve lands which have not been designated for leasing.

6. With respect to the allegations of fact in paragraph 10 of the First Nation's Statement of Defence, the Plaintiffs admit those allegations, except that the conditional surrender (or "designation") of the Hope Bay subdivision lands was stated to be for 30 years from February

16, 1965, although the Order-in-Council accepting the surrender ("designation") was dated April 1, 1965.

7. With respect to the allegations of fact in paragraph 11 of the First Nation's Statement of Defence, the Plaintiffs admit that they represent 60 out of a total of 131 cottage lots that were available for lease in the Hope Bay Subdivision, but state that only 70 of those lots were actually leased. The Plaintiffs represent 60 of the 70 leased lots.

8. With respect to the allegations of fact in paragraph 12 of the First Nation's Statement of Defence, the Plaintiffs admit that the First Nation has not been a party to any lease under the *Indian Act* with any Cottager. However, the First Nation did agree to supply fire protection, policing, garbage collection and road maintenance services to the Cottagers in return for the annual service fees which were paid by the Cottagers and accepted by the First Nation. In addition, the Cottagers' use and occupation of the lots in the Hope Bay subdivisions occurred with the knowledge, consent and acquiescence of the First Nation.

9. With respect to the allegations of fact in paragraphs 14 and 16 of the First Nation's Statement of Defence, the Plaintiffs admit that the 1965 designation of the lots in the Hope Bay subdivision ended by no later than April 1, 1995, but state that what reverted to the First Nation upon the expiry of that designation was "all beneficial interest and control of the land".

10. The Plaintiffs admit that they remained on the land after the expiry of that designation and paid compensation to the Crown. The Plaintiffs admit that the Crown no longer had authority to enter into leases under the *Indian Act* with non-members covering the period during which the lands were not designated. However, the Crown had authority to, by permit in writing, authorize the use and occupation of the lands in accordance with s. 28(2) of the *Indian Act*. In the alternative, these circumstances did not prevent the Plaintiffs from having equitable leases of the lots on which their cottages are located.

11. With respect to the allegations of fact in paragraph 14 of the First Nation's Statement of Defence, the Plaintiffs specifically deny that from April 1, 1995 until the issuance of the May 2006 Permit, the Cottagers lacked any lawful right to use or occupy the lots in the

Hope Bay subdivision. The Cottagers had equitable leases or, in the alternative, INAC's written permission or agreement to occupy and use their respective lots in the Hope Bay subdivision, pending the issuance of the new long-term lease.

12. That permission was given with the knowledge and consent of the First Nation's Band Council, which was aware that the Cottagers continued to occupy lots in the Hope Bay subdivision, consented to that use and charged and accepted payment from the Cottagers of annual service fees throughout that period.

13. The Plaintiffs plead and rely upon s. 28(2) of the *Indian Act*, which authorizes the Minister of Indian and Northern Affairs Canada (as represented by INAC) to, by permit in writing, authorize the use and occupation of First Nation reserve lands which have not been designated for leasing. The Plaintiffs state that the correspondence and written communications the Cottagers received from INAC, permitting their continued occupation of the lots and charging them annual rental fees for that use (as described in the Amended Statement of Claim), constituted such a written permit. The terms of that permit included (among other things) continued ownership of the cottages by the Cottagers.

FIXTURES

14. With respect to the allegations of fact contained in paragraphs 18 to 22 of the First Nation's Statement of Defence, the Plaintiffs specifically deny that any of the cottages are fixtures and deny that they were referred to as fixtures in the leases which were issued to the Cottagers from time to time. In the initial 5-year renewable leases (which were issued in or around 1968) and the initial long-term leases (issued in or about the early to mid-1970's), the Cottagers were required to construct "dwelling houses" and were entitled to remove "any buildings erected [by them]...on the demised premises". The later long-term and short-term leases required the Cottagers to construct "improvements" and entitled them to remove "any buildings erected by [them] on the demised land".

15. The Plaintiffs deny that each of the cottages is annexed to the lands to a degree, in a manner and for a purpose that would make the cottages fixtures at common law. To the extent that the cottages are annexed to the lands (which is not admitted, but is specifically denied), the purposes or objects of any annexation were not to affix the cottages permanently to

the land, so as to enhance the value or usefulness of the land, but to enable the cottages to be used and subsequently removed at the option of the Cottagers.

16. The leases expressly contemplated that the cottages belonged to the Cottagers and not to the First Nation or the Crown as fixtures to the reserve lands. The leases provided that the Cottagers were entitled to remove their cottages from the land and that if they chose not to do so (after the provision of 12-months notice and within 30 days of the expiry of the lease, as more particularly described in the Amended Statement of Defence), the cottages would only then "revert to and become the property of Her Majesty". The Plaintiffs deny that any such reversion has occurred in the present case, for the reasons set out in the Amended Statement of Claim.

17. Both INAC and the First Nation have consistently treated the cottages as being owned by the Cottagers for more than 30 years, allowing them to be bought, sold and renovated by the Cottagers and never suggesting that either INAC, the Crown or the First Nation had any ownership interest in the cottages.

18. Even if a particular cottage was considered to be a fixture (which is not admitted, but specifically denied), the Plaintiffs deny that this would eliminate the Cottager's entitlement to remove it. The fact that a building is a fixture is not inconsistent with its removal in accordance with the terms of a lease or other agreement, or pursuant to any or all of the equitable rights asserted in the Amended Statement of Claim.

19. The Plaintiffs deny that s. 89 of the *Indian Act* has any application to their cottages or prevents their removal from the Reserve. Section 89 only protects the real and personal property "of an Indian or a band" situated on a reserve from mortgage, seizure, distress or execution, etc. The Plaintiffs state that the cottages are not the real or personal property of the First Nation or any of its members. In any event, s. 89 affects only the enforcement mechanisms available with respect to on-reserve property and not the entitlement to or existence of an interest in such property.

20. With respect to the allegations of fact in paragraphs 42 to 44 of the First Nation's Statement of Defence, the Plaintiffs deny that their cottages are fixtures which have become part of the First Nation's reserve lands and deny that the cottages can only be transferred by means of

absolute surrender under s. 39 of the *Indian Act*. Those surrender provisions apply only to a "reserve", which is defined in the *Indian Act* to mean "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty, for the First Nation's use and benefit". The cottages are not "a tract of land", are not vested in Her Majesty and were not set apart by Her Majesty for the First Nation's use and benefit.

21. The Plaintiffs deny that their cottages are subject to any protections in favour of the First Nation under the *Constitution Act, 1982*. In particular, the Plaintiffs deny that the cottages are subject to any existing aboriginal or treaty rights of the First Nation, which are recognized and affirmed under s. 35 of the *Constitution Act, 1982*.

PERIOD AFTER THE 1965 DESIGNATION

22. With respect to the allegations of fact at paragraphs 23 to 26 of the First Nation's Statement of Defence, the Plaintiffs admit that the First Nation considered re-designating the Hope Bay subdivision lands during the period from 1995 to 2006 and that the First Nation held a number of community referenda for that purpose in or about 1995 and 2005.

23. The Plaintiffs admit that in the 2005 referenda, ultimately a majority of the electors of the First Nation approved a designation of the lands for leasing by the Crown and that one of the conditions of the designation was that "leases be consented to by the Chief and Council of the Band". The Plaintiffs admit that the Crown did not submit the designation to the Governor-in-Council for approval and that as a result, no Order-in-Council was issued in respect of the designation.

24. The Plaintiffs deny that the Crown could not give a binding commitment concerning the designation of reserve lands where, as in the present case, a designation had been assented to by the majority of the electors of the band in accordance with s. 39 of the *Indian Act* and the only remaining step was its acceptance by the Governor in Council, which step was within the control of the Crown.

OVERHOLDING TENANCY PROVISION

25. With respect to the allegations of fact in paragraphs 27 and 28 of the First Nation's Statement of Defence, the Plaintiffs admit that the 1965 designation of the Hope Bay

subdivision contained no provision for overholding by the Cottagers as tenants under their leases after the leases and the designation expired.

26. As of February 16, 1995, both the Cottagers' leases and the 1965 designation of the Hope Bay subdivision lands for leasing had expired. Thereafter, the Cottagers continued to use and occupy the lands with the knowledge and consent of the First Nation and with the written permission of the Crown or, in the alternative, based upon an equitable lease and not as overholding tenants. The Plaintiffs plead and rely on sections 28, 38 and 53 of the *Indian Act*.

THE MAY 2006 PERMITS

27. With respect to the allegations of fact in paragraph 33 of the First Nation's Statement of Defence, the Plaintiffs admit that prior to December 2006, they did not ask or attempt to remove their cottages from the Hope Bay subdivision lots. They did not do so because, as more particularly set out in the Amended Statement of Claim, they reasonably believed, based upon the representations and conduct of the First Nation and INAC, that a long-term lease was being issued to them and that there was no issue concerning their ownership of their cottages and no need to remove them.

28. Although the First Nation had advised INAC, by in or about October of 2005, of its position that the cottages were the property of the First Nation, this information was not shared with the Cottagers. The Plaintiffs were not told that the First Nation was claiming ownership of their cottages and that the Plaintiffs were required to vacate them and remove their chattels until December 2006, after they had left their cottages for the season. By that time, the First Nation had erected a gate, preventing the Plaintiffs from gaining access to the Reserve, and prohibited them from removing their cottages.

ALLEGED ENVIRONMENTAL, CONSTRUCTION AND MAINTENANCE ISSUES

Septic Systems

29. With respect to paragraphs 59, 61, 63 and 65 of the First Nation's Statement of Defence (regarding alleged environmental issues and alleged deficiencies in the Plaintiffs' septic systems), the earliest leases (issued in or about 1967 and 1968 for 5-year terms, with rights of renewal) required lessees to, among other things, supply all residential buildings with "a sanitary

privy, chemical closet or such other convenience as may be approved by the lessor". The subsequent long-term leases (issued in or about the early to mid-1970's) required lessees to, among other things, supply all residential buildings with a "sanitary privy, chemical closet or such other convenience as may be approved by the lessor" and to "install at his own expense a flush toilet and septic tank according to the regulations of the Bruce County Health Unit".

30. Long-term leases issued in or about the mid-to-late 1970's and the subsequent retrospective short-term leases issued in 1996 (to cover the period from 1993-1995) required lessees to supply "all residential buildings...with a flush toilet and septic tank or other sanitary waste disposal system which, in the opinion of Her Majesty's representative, conforms to the specification of the Bruce County Health Unit".

31. The septic systems or sanitary waste disposal systems for the Plaintiffs' cottages were each installed in accordance with the requirements of the lease which was in force at the time of installation and any laws and regulations which may then have been applicable to the installation of septic systems or sanitary waste disposal systems on the Reserve.

32. Cottagers who installed such septic systems or other waste disposal systems obtained any approvals or permits which were required from the authority or authorities responsible for approving the installation and operation of those septic systems or sanitary waste disposal systems on the Reserve. In issuing those approvals, the Bruce County Health Unit, Health Canada and any other approving authorities were required to apply any standards which may have been relevant to septic and sanitary waste disposal systems on the Reserve, as set out in any applicable legislation and regulations from time to time.

33. At all relevant terms, the Plaintiffs have used their septic systems or sanitary waste disposal systems for their intended purpose and have maintained them and operated them properly, in accordance with the basis upon which the construction and use of those systems were approved and in accordance with any applicable standards. The Plaintiffs specifically deny that their septic systems or sanitary waste disposal are non-compliant with those standards or that they have caused environmental damage.

34. Under both the short-term and long-term leases, the Crown was responsible for ensuring that the Cottagers' septic systems or other sanitary waste disposal systems conformed to the specifications of the Bruce County Health Unit "in the opinion of Her Majesty's representative". INAC, as Her Majesty's representative, sought and was provided with the certificates of approval, use permits or other similar approvals relating to the Plaintiffs' septic systems or sanitary waste disposal systems. INAC accepted those permits and approvals as sufficient evidence of compliance with the specifications of the Bruce County Health Unit.

35. Neither INAC nor the First Nation ever advised any of the Plaintiffs that those approvals were insufficient or that their septic or sanitary waste disposal systems were regarded as non-compliant with any relevant standards or specifications. At all relevant times, the Plaintiffs operated their septic systems or sanitary waste disposal systems on the lots occupied by them with the knowledge, licence and permission of the Crown (as represented by INAC).

Construction of Cottages

36. With respect to paragraphs 59, 61, 63 and 65 of the First Nation's Statement of Defence, the Plaintiffs state that the various leases issued by the Crown to the Cottagers between 1968 and 1996 contained provisions relating to the construction of improvements on the lots by the Cottagers. Those provisions varied over the years and the extent and nature of the Cottagers' obligations in that regard depended upon the wording of the lease which existed at the time that a particular improvement was constructed.

37. Under the 5-year renewable leases which were issued to some Cottagers in or about 1967 or 1968, the lessee was required to "construct a dwelling house on the demised land with a minimum area of 480 feet in floor space".

38. The subsequent long-term and short-term leases required Cottagers to "construct improvements on the demised lands with a construction value of not less than \$5,500.00", which requirement would be satisfied if improvements of that value existed on the lands. Those leases also provided that the improvements could, at the option of the lessee, include a mobile home with a floor area of not less than 480 square feet, if the mobile home was "placed on a full foundation of solid concrete or concrete blocks". The long-term and short-term leases required

Cottagers to submit a development plan to Her Majesty's representative for approval prior to any construction.

39. The Cottagers built their cottages on the lands in accordance with the requirements of the applicable leases and (in the case of cottages built under the long-term or short-term leases) after submitting a development plan to Her Majesty's representative (including INAC or the First Nation, or both) and having the proposed construction approved. The Plaintiffs deny that their cottages fail to comply with any applicable standards regarding their construction.

Repair and Maintenance

40. Both the long-term and short-term leases further contemplated that the demised land would be kept in a condition "satisfactory to Her Majesty's representative", who could "order the lessee to repair or paint any building on the demised land". The long-term and short term leases also provided that Her Majesty's representative would determine whether a nuisance existed, in which case the representative could order the lessee or occupier of the land to abate the nuisance or clean up the demised land. If the Lessee or occupier then failed to do so, the representative could abate the nuisance and the lessee would be liable for the costs.

41. The Plaintiffs kept their cottages in a good state of repair and maintained them as would prudent owners. The Plaintiffs specifically deny that their cottages were in a poor state of repair as of the date that they ceased to occupy them and ceased to have access to the Reserve. The Plaintiffs deny that they created a nuisance on the demised land.

42. Neither the Crown nor the First Nation ever indicated to any of the Plaintiffs that the demised land was not being kept in a satisfactory condition, or that a nuisance existed. The Crown never ordered any of the Plaintiffs to repair or paint their buildings, or to abate a nuisance on or clean up the demised land, while the Plaintiffs were occupying those lands.

43. Having failed to identify any issues concerning the maintenance and repair of the cottages or the condition of the demised land during that occupancy and having failed to make any orders or demands to the Plaintiffs to perform repairs or maintenance, abate a nuisance or clean up the demised land, neither the Crown nor the First Nation is now entitled to now require

the Plaintiffs to defray any alleged maintenance, clean up or remediation costs. The Plaintiffs deny that any such costs exist and put the First Nation to the strict proof thereof. In the alternative, if any such costs do exist (which is not admitted), they are not attributable to the Plaintiff's occupation of the demised lands, or result from the negligence of the Crown.

RESTITUTION AND UNJUST ENRICHMENT

44. With respect to paragraph 63 of the First Nation's Statement of Defence, the Plaintiffs state that the Crown and the First Nation have been unjustly enriched by the possession of the cottages and will be unjustly enriched if permitted to retain them without compensating the Plaintiffs. Reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart. The First Nation seeks to retain the cottages on the basis that they are fixtures and therefore form part of the Reserve, to which the Crown holds legal title. Retention of the cottages therefore enriches both the First Nation and the Crown by increasing the value and utility of the lands on which the cottages are located. The Plaintiffs plead and rely on s. 18 of the *Indian Act*, R.S.C. 1985, c. I-5.

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Plaintiffs

and

CHIPPEWAS OF NAWASH FIRST NATION, et al
Defendants

Court File No. 08-CV-349340PD1

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

**REPLY TO THE STATEMENT OF DEFENCE OF THE
CHIPPEWAS OF NAWASH FIRST NATION and THE
CHIPPEWAS OF NAWASH BAND COUNCIL**

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