

**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 ATTORNEY  
GENERAL OF CANADA**

1. Unless otherwise admitted, the Plaintiffs deny all of the allegations in the Statement of Defence of the Attorney General of Canada (hereinafter referred to as the "Crown").

2. The Plaintiffs admit the allegations of fact contained in paragraphs 23, 25, 27 (except that the Plaintiffs have no knowledge of the particulars of certain appraisals referred to), 28 and 43 of the Crown's Statement of Defence.

3. 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.

**OVERHOLDING TENANCY PROVISION**

4. With respect to paragraphs 5, 6, 9, 10, 16 and 17 of the Crown's Statement of Defence, the Plaintiffs admit that the terms of the short-term leases and, in some cases, the long-term leases expired no later than February 16, 1995 and that both of those leases contained an overholding tenancy provision, but deny that the provision applied to any of the Plaintiffs in the circumstances of this case.

5. The overholding tenancy provision stated that: " if the lessee holds over after the expiration of the term of this lease or any renewal thereof without any further written agreement the tenancy thereby created shall be a tenancy 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 notice to the lessee", with a "monthly rental" being charged during the tenancy.

6. The Cottagers were not treated as month-to-month tenants and were never charged rent on a monthly basis. They were charged rent and service fees annually for the occupation of the lots, were told that they would receive new long-term leases which would be

issued in their names and were treated as the owners of the cottages on the lots they occupied. They 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 equitable leases.

7. The overholding tenancy provisions, by their express wording, applied only where a lessee "holds over...without any further written agreement". In the present case, the Cottagers had 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. 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 fees for fire, police protection, garbage collection and road maintenance services provided by the First Nation throughout that period.

8. The Plaintiffs plead and rely upon s. 28(2) of the *Indian Act, R.S.C. 1985, c. I-5*, 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. With respect to paragraphs 35-36 of the Crown's Statement of Defence, 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.

9. With respect to paragraph 14 of the Crown's Statement of Defence, the Plaintiffs admit 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, the provision of a sanitary waste disposal system, and maintaining the demised land in a condition satisfactory to Her Majesty's representative. However, the Plaintiffs deny that their obligations in that regard are accurately summarized in paragraph 14 of the Crown's Statement of Defence.

10. The wording of the relevant lease provisions varied over time and the Cottagers' obligations with respect to certain matters, such as the manner in which buildings were to be

constructed or the type of sanitary waste disposal system to be installed, depended upon the wording of the lease in force at the time that the building or waste disposal system in question was constructed and upon the applicable laws and regulations in force from time to time.

#### **SEPTIC SYSTEM REQUIREMENTS**

11. With respect to paragraphs 14 and 60-62 of the Crown's Statement of Defence (regarding 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".

12. 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".

13. 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.

14. 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.

15. 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 and put the Crown to the strict proof thereof.

16. 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.

17. 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 IMPROVEMENTS**

18. With respect to paragraph 14 of the Crown's Statement of Defence, the Plaintiffs admit 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. However, 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.

19. 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".

20. 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.

21. 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 lease) after submitting a development plan to Her Majesty's representative (including INAC or the First Nation, or both) and having the proposed construction approved.

#### **MAINTENANCE AND REPAIR REQUIREMENTS**

22. With respect to paragraphs 14, 59, 61 and 62 of the Crown's Statement of Defence, both the long-term and short-term leases 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.

23. 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.

24. Neither the Crown nor INAC nor any other representative of Her Majesty ever indicated to any of the Plaintiffs that the demised land was not being kept in a satisfactory condition, or that (in the opinion of Her Majesty's representative) a nuisance existed. Neither the Crown nor INAC nor any other representative of Her Majesty ever 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.

25. 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, the Crown is not 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 Crown 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.

#### **EFFECT OF THE MAY 2006 PERMITS**

26. With respect to the allegations of fact contained in paragraphs 18-20 and 47 of the Crown's Statement of Defence, the Plaintiffs deny that the First Nation erected a gate at the entrance to the Hope Bay subdivision in or about May 16, 2006, and state that no gate was erected there until in or about late October of 2006.

27. The Plaintiffs admit that in May of 2006, INAC provided them with temporary Permits, drafted by INAC, which would allow the Plaintiffs to have access to their cottages for the 2006 season. INAC sent the Plaintiffs two copies of the Permit in respect of each cottage lot, with a letter instructing them to sign and return both copies to INAC along with their rental fees in the amount of \$3,300.00.

28. From the spring of 2006, when it sent the Permit to the Plaintiffs, up to and including November 2006, INAC repeatedly assured the Plaintiffs that it was continuing to discuss leasing issues with the First Nation and the Plaintiffs continued to expect that a new long-term lease would be issued to them, as previously indicated by INAC. Neither INAC nor the First Nation ever suggested to any of the Plaintiffs that the lots would no longer be available for leasing after the expiry of the Permit, nor that the Plaintiffs would be expected to vacate their cottages and leave them on the lands at the conclusion of the Permits. Although the First Nation had informed INAC by in or about October of 2005 that it was claiming that the cottages were the property of the First Nation, this information was not shared with the Plaintiffs.

29. In reliance upon INAC's assurances and its previous representations (detailed above and in the Amended Statement of Claim), the Plaintiffs signed the Permits, paid the rental fees and returned them to INAC, as instructed. The Plaintiffs deny that signing the Permit had the effect of waiving any of their rights in respect of their cottages or altering the obligations of the Crown and the First Nation.

#### **RESTITUTION AND UNJUST ENRICHMENT**

30. With respect to paragraph 55 of the Crown's Statement of Defence, 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.

**DATED:** September 22, 2008

**WeirFoulds LLP**  
Barristers & Solicitors  
Suite 1600, The Exchange Tower  
130 King Street West  
P.O. Box 480  
Toronto, ON M5X 1J5

**Jeff G. Cowan**  
(LSUC# 17728Q)

**M. Jill Dougherty**  
(LSUC# 26159E)

**April D. Brousseau**  
(LSUC# 53935J)

Tel: 416-365-1110  
Fax: 416-365-1876

Solicitors for the Plaintiffs

**TO: DEPARTMENT OF JUSTICE**  
**Ontario Regional Office**  
The Exchange Tower  
130 King Street West  
Suite 3400, Box 36  
Toronto, ON M5X 1K6

**Gary Penner**  
Tel: 416-973-9268  
Fax: 416-973-2319

Solicitors for the Defendant,  
The Attorney General of Canada

**AND TO: NADJIWAN LAW OFFICE**  
Barristers & Solicitors  
915 Jocko Point Road, RR4  
Nipissing First Nation  
North Bay, ON P1B 8G5

**Patrick Nadjiwan**  
Tel: 705-753-9815  
Fax: 705-753-9795

Solicitors for the Defendants,  
Chippewas of Nawash First Nation  
and Chippewas of Nawash Band  
Council

**ELDON ALDERSON, et al**  
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 AND  
COUNTERCLAIM OF THE ATTORNEY GENERAL OF  
CANADA**

**WeirFoulds LLP**  
Barristers & Solicitors  
The Exchange Tower, Suite 1600  
P.O. Box 480, 130 King Street West  
Toronto, Ontario M5X 1J5

**Jeff G. Cowan**  
(LSUC# 17728Q)  
**M. Jill Dougherty**  
(LSUC# 26159E)  
**April D. Brousseau**  
(LSUC# 53935J)  
Tel: 416-365-1110  
Fax: 416-365-1876

Solicitors for the Plaintiffs