

**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. 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

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiffs' lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service, in this Court office, **WITHIN TWENTY DAYS** after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFFS' CLAIM, and \$5000 for costs, within the time for serving and filing your Statement of Defence, you may move to have this proceeding dismissed by the Court. If you believe the amount claimed for costs is excessive, you may pay the Plaintiff's claim and \$400.00 for costs and have the costs assessed by the Court.

Date: March 26, 2008

Issued by: _____
Local Registrar

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AND TO: Gary Penner
Department of Justice
Ontario Regional Office
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Suite 3400, Box 36
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CLAIM

1. The Plaintiffs claim:
 - (a) general damages in the amount of \$40,000,000;
 - (b) punitive damages in the amount of \$10,000,000;
 - (c) pre-judgment interest in accordance with the *Courts of Justice Act*, R.S.O. 1990 c. C.43, as amended;
 - (d) 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;
 - (f) a declaration that each of the Plaintiffs held an equitable lease or, in the alternative, permission to use and occupy the lot on which his or her cottage is situated (the particulars of which are set out in Schedule "A" to this Statement of Claim) until it was arbitrarily revoked by the Defendants, or any of them, in December of 2006;
 - (g) a declaration that each of the Plaintiffs is entitled to remove from the lot or lots on which his or her cottage is located (as is more particularly set out in Schedule "A" to this Statement of Claim) any buildings, structures or improvements erected on the said lot or lots and to have access to the said lot or lots for that purpose; and
 - (h) such further and other relief as this Honourable Court deems just.

PARTIES

2. Each of the Plaintiffs (the "**Plaintiffs**") is an individual who has an interest in a cottage located in the Hope Bay subdivision of Neyaashiinigiing Indian Reserve Number 27 (formerly known as Cape Croker Indian Reserve Number 27, hereinafter referred to as the "**Reserve**"), the particulars of which are set out in Schedule "A" to this Statement of Claim.

3. Each of the Plaintiffs leased a lot in the Hope Bay subdivision and each of the Plaintiffs occupied, maintained and improved a cottage and various other structures and amenities on that lot. The cottages on all of the lots in the Hope Bay subdivision were built by the Plaintiffs or by their predecessors in title who previously leased lots and held interests in cottages in the Hope Bay subdivision (referred to collectively with the Plaintiffs as the "**Cottagers**"). Cottagers have leased lots and occupied cottages in the Hope Bay subdivision for over thirty years.

4. The Defendant, the Chippewas of Nawash First Nation, also known as the Chippewas of Nawash Indian Band and formerly known as the Cape Croker Indian Band (hereinafter referred to as the "**First Nation**"), is an Indian Band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5 and is governed by the Chippewas of Nawash Band Council (the "**Band Council**"). The Reserve in which the Hope Bay subdivision is located has been set apart by Her Majesty the Queen in Right of Canada for the use and benefit of the First Nation.

5. The Defendant, the Attorney General of Canada, is named as a party pursuant to s. 23 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, as the representative of Her Majesty the Queen in Right of Canada (the "**Crown**") and the Crown's ministries, departments, servants and agents.

6. Indian and Northern Affairs Canada, or the Department of Indian Affairs and Northern Development (hereinafter referred to as "**INAC**"), is the federal government department with primary responsibility for meeting the federal government's constitutional, treaty, political and legal responsibilities to First Nations, Inuit and Northerners. At all relevant times, INAC and individuals employed there acted as representatives, servants or agents of the Crown and were responsible for leasing and issuing permits in respect of the Hope Bay subdivision and administering all aspects of the leasing and occupation of the Hope Bay subdivision on behalf of the Crown, for the benefit of the First Nation.

LEASES

7. Effective April 1, 1965 the First Nation conditionally surrendered certain lands (referred to as the "**Hope Bay subdivision**") located in the Reserve to the Crown, to be leased by

the Crown for the benefit of the First Nation. That conditional surrender (hereinafter referred to as the "**Designation**") covered the period from April 1, 1965 to March 31, 1995.

8. Commencing in 1968, INAC, on behalf of the Crown, issued leases to the Cottagers for a term of 5 years (with a right of renewal, at the option of the lessees, for two further 5-year periods) with respect to a number of lots in the Hope Bay subdivision. Those original leases required each lessee to construct a dwelling with a minimum area of 480 square feet in floor space on his or her leased lot and provided for the lessees to remove their buildings from the lots following the expiry of the leases.

9. Commencing in 1973, when the original leases expired, INAC (on behalf of the Crown) issued new leases to the Cottagers for terms of 20 years (hereinafter referred to as the "**long-term leases**"). The long-term leases required the Cottagers to construct a building on their leased lots within three years, if a building did not already exist.

10. The long-term leases also required the Crown to provide the Cottagers with at least twelve months notice if it was decided that "the land shall not be available for cottage lease purposes at the expiration of the term" and gave the Cottagers the right "to remove any buildings erected by him on the demised land, provided that if they are not so removed within thirty days following the expiry of the lease, they shall revert to and become the property of Her Majesty."

11. For the duration of the long-term leases, the Cottagers paid rent annually to the Crown (as represented by INAC). The rent was increased periodically in 5 year increments, pursuant to Band Council resolutions fixing the annual rent amount.

12. In addition, the First Nation established annual service fees for providing fire and police protection, garbage collection and road maintenance, which service fees were increased periodically and have been paid directly to the First Nation by the Cottagers since in or about 1974.

13. Between 1993 and 1995, the term of the long-term leases expired but the Crown did not provide notice to any of the Cottagers that the Hope Bay lands would not be available for cottage lease purposes after the expiry of the term of the long-term leases. To the contrary, INAC wrote to the Cottagers or their lawyers, copying the First Nation, advising that new long-

term leases were being prepared. Enclosed in many of the letters was a copy of the new draft long-term lease, which contained the same provision regarding removal of cottages.

14. At the same time, the First Nation took steps to designate the Hope Bay subdivision for further leasing in accordance with the procedure set out in s. 39 of the *Indian Act*, which requires a community vote or referendum. In 1995, the First Nation held a referendum at which the majority of electors who voted approved the continued designation of the Hope Bay subdivision for leasing. However, an insufficient number of the First Nation's eligible electors voted, making a second vote or referendum necessary. INAC and the First Nation failed to hold that second vote or referendum. Enclosed in many of the letters was a copy of the new draft long term lease which contained the same provision regarding removal of cottages.

15. Band Council subsequently approved new rental rates for the continued leasing of the Hope Bay lots for the 5-year period from January 1, 1993 to December 31, 1997 and the Cottagers paid those increased rents to INAC during the relevant period.

16. In reliance upon the representations and conduct of the First Nation and INAC, indicating that the Hope Bay subdivision would continue to be available for leasing and that written long-term leases would be issued to the Cottagers, none of the Cottagers removed their buildings from the lands. The Cottagers, with the knowledge, agreement and written permission of INAC and the First Nation, continued to occupy, maintain and improve their cottages and to pay annual rent and service fees to INAC and the First Nation, respectively, as they had done in the past.

17. In or around 1996, INAC wrote to the Cottagers indicating that their long-term leases had expired and providing them with retroactive short-term leases (the "**short-term leases**") to cover the period between 1993 and 1995. The letter stated that Band Council was reviewing "new" cottage leases that would be finalized in the "near future" at which time "you (the Cottagers) will be issued a new cottage lease covering the twenty (20) year period from February 16, 1995 to February 15, 2015." The letter indicated that the short-term leases were being issued as an interim measure, pending issuance of the long-term lease document. The letter also indicated that the new rental rate for the period beginning in 1995 to 2000 would be \$1500 per annum.

18. The short-term leases contained the same 12-month notice provision and the same right for cottagers to remove their buildings as did the previous long-term lease. The Crown did not give notice to the Cottagers that the lands would no longer be available for leasing after the expiry of the short-term leases. INAC and the First Nation continued to represent, by their conduct and communications with the Cottagers, that a written long-term lease would be issued to the cottagers, under which they would have the same right to remove their buildings if leasing were to end.

19. Throughout the period between 1993 and 1996 and up until 2005, various former Cottagers sold their cottages and assigned their rights as lessees (including rights under the forthcoming long-term leases) to a number of current Cottagers (including some of the Plaintiffs). INAC corresponded with Cottagers or their lawyers about those sales and assignments, notified the First Nation of the transactions, instructed Cottagers to execute standard assignment forms provided by INAC and required Cottagers to pay assignment fees for each assignment. INAC indicated to the Cottagers that it would change its records to reflect the names of the new lessees and that it would hold the assignment forms on file for future registration.

20. Neither INAC nor the First Nation suggested to any of the Cottagers who were seeking to buy or sell cottages in the Hope Bay subdivision that the cottages were owned by the First Nation or the Crown and therefore could not be sold by the Cottagers, or that no valid lease or leasehold interest was in existence.

21. In or about June 2005, Band Council held a Referendum to seek approval of the majority of the electors of the First Nation to the re-designation of the Hope Bay lots for a twenty-year period. Attached to the proposed designation was a draft long-term lease which included the same right of cottagers to remove improvements and chattels. The majority of electors who voted, voted in favour of the re-designation, but an insufficient number of eligible electors voted, making it necessary to hold a further community vote or referendum.

22. In or about September 2005, another Referendum was held regarding the re-designation, with the same draft lease attached for approval. A majority of eligible First Nation electors voted in favour of the re-designation.

23. Under s. 39 of the *Indian Act*, the only further requirement to give effect to the designation was its acceptance by Order-in Council. Notwithstanding that the First Nation had approved the designation and wanted to continue to lease the Hope Bay subdivision lands, INAC refused or failed to pursue the acceptance of the designation by Order-in Council. As a result of that refusal or failure, the Hope Bay lands remained undesignated. INAC never took steps to have the re-designation approved by an Order in Council.

24. From 1995 to October of 2006, Cottagers continued to pay annual rental fees to INAC and service fees to the First Nation. Up until and including the spring of 2006, INAC, the Band Council and employees of the Band Council continued to approve substantial renovations and improvements by Cottagers to their cottages and INAC and the First Nation continued to facilitate the sale of various cottages in the Hope Bay subdivision and assignment of rights to lease the lots on which those cottages were located. INAC and the First Nation also continued to communicate with the Cottagers up until the end of November 2006, indicating that a written long-term lease was forthcoming or that discussions between INAC and the First Nation concerning the continued leasing of the lots were ongoing.

PERMITS

25. By early spring of 2006, at the latest, INAC became aware that the First Nation was taking or proposed to take the position that the cottages in the Hope Bay subdivision were fixtures on Reserve lands and, as such, were owned by the Crown (for the use and benefit of the First Nation) rather than by the Cottagers.

26. INAC obtained legal advice on the issue of the ownership of the cottages and advised the First Nation that, in light of the provisions in the expired leases for the Hope Bay lots concerning notice and the Cottagers' right to remove their buildings, the Cottagers should be notified of the termination of leasing and given a reasonable opportunity to remove their improvements. INAC recognized that the Cottagers had relied upon the notice and removal provisions in the leases and brought that to the attention of the First Nation.

27. In or about May 2006, INAC wrote to the Cottagers advising that their leases had expired and providing the Cottagers with a new temporary permit (the "**Permit**"). The letter and Permit were silent regarding the status of the cottages and did not suggest that Cottagers would

be required to vacate their cottages at the expiry of the Permit, or that the Cottagers would no longer be entitled to remove their buildings from the lots, or that ownership of the cottages was in dispute. The letter and permit did not indicate that the Hope Bay lots would not continue to be available for leasing after the expiry of the permits, but merely that as of May 2006, no authority had yet been given by the First Nation to issue a new lease.

28. The Permit (like the previous leases) provided for occupation of the cottages from May to October 31. On December 1, 2006, thirty days after the expiry of the Permits and after the Cottagers had left their cottages for the season, INAC wrote to all the Cottagers advising them that their Permits had expired and that access to retrieve chattels would only be provided up until January 31, 2007. The letter further indicated to the Cottagers that "you no longer have the right to use and occupy the said land. ... You are not allowed to remove or dismantle any structures affixed to the land. The First Nation is of the view that the fixtures on the reserve now form part of the reserve land."

29. The December, 2006 letter was the Cottagers' first notice that the First Nation or INAC, or both of them, claimed that the cottages were owned by the Crown and that the Cottagers were not entitled to remove them. At no time prior to December 2006 did INAC or the First Nation indicate to the Cottagers or their lawyers that a long-term lease would not be forthcoming or that, in their view, the cottages were fixtures owned by the Crown.

30. Although both INAC and the First Nation knew by early spring of 2006 (at the latest) that there was an issue regarding the ownership of the cottages, they chose not to notify the Cottagers until they had left their cottages for the season and the 30-day cottage removal period (which would have applied under the leases) had elapsed. At that point, the Cottagers had no right of access to the Reserve and were informed expressly that they would not be permitted to remove their buildings.

PROPRIETARY ESTOPPEL

31. INAC and the Band knowingly encouraged the Cottagers to remain on the lots after the formal expiry of their leases. INAC and the Band induced the Cottagers to believe that they enjoyed ownership of and an interest in cottages and encouraged the cottagers to expect that their leases would be renewed on a long-term basis.

32. In reliance on that belief, the Cottagers acted to their detriment by purchasing or by continuing to maintain and improve their cottages, or both, and by not removing their cottages, improvements, or chattels within thirty days of the expiry of their original leases, the long-term leases or the subsequent short-term leases (collectively referred to as the "**Leases**").

33. The Band and INAC led the Cottagers to believe that they would not insist on strict enforcement of the terms of the Leases and did so knowing that the Cottagers would act on that belief by not removing their cottages within thirty days of the expiry of the Leases.

34. The Band and INAC then sought to take unconscionable advantage of the Cottagers by denying them the long-term Leases which they expected to receive and the right to remove their cottages, which INAC and the Band encouraged them to understand was a right to which they were entitled.

35. In the alternative, if INAC and the Band did not intend that their representations would be relied on by the cottagers, it was nonetheless reasonable in the circumstances for the Cottagers to have relied on those representations.

ESTOPPEL BY CONVENTION

36. Prior to and after the expiry of the Leases, INAC, the Band and the Cottagers (or their predecessors) operated on the shared assumption that the cottages are not fixtures and that the leases would be renewed. The parties have, at all times prior to December 2006, dealt with each other based on those shared assumptions.

37. At no point prior to December 2006 did INAC or the Band indicate that they no longer shared these assumptions. Nonetheless, they were aware that the Cottagers were conducting themselves in reliance on these assumptions, to their detriment.

38. INAC and the Band allowed the Cottagers to purchase and to make improvements and expenditures on the cottages up until the end of 2006, immediately before taking the position that the Leases and permits had expired, the Cottagers were required to vacate their cottages and remove their chattels and that the cottages were fixtures and not removable by the Cottagers.

39. To allow INAC or the Band to now resile from these assumptions by changing their presumed position on the status of the leases and cottages would cause serious detriment to the Cottagers who can no longer remove or access their cottages, chattels or improvements.

RESTITUTION AND UNJUST ENRICHMENT

40. The Crown and the Band have been unjustly enriched by the possession of the cottages on the Hope Bay subdivision and the improvements made to them.

41. The Cottagers have suffered a corresponding deprivation of the use of their cottages and the improvements made to them by the refusal of the Crown and the Band to issue long-term Leases and to allow the Cottagers to retain ownership of and to remove their cottages.

42. The terms of the Leases provided that the Cottagers would be able remove their cottages, chattels and improvements at the expiry of their leases and INAC and the Band encouraged the Cottagers to believe that they would still be able to enforce this right, even after the expiry of the Leases.

43. The Cottagers reasonably relied on INAC's and the Band's representations that new long-term Leases would be issued and expected that, at the expiry of any lease they would have adequate notice and be able to remove their cottages and improvements. Further, the Cottagers made improvements to the cottages based on the understanding that they had a right to lease the property.

44. The Crown and the Band wrongfully denied the Cottagers' rights to remove their cottages or, in the alternative, receive compensation for their cottages, particularly given that, under the terms of the Leases, the Crown and the Band required the cottages to be constructed in the first place.

DAMAGES SUFFERED BY THE PLAINTIFFS

45. As a result of the matters described herein, the Plaintiffs have suffered significant damages including:

- (i) loss of the enjoyment of their cottages since December 2006;

- (ii) loss of the opportunity to remove their cottages and chattels or sell their cottages for their fair market value and invest the proceeds in a replacement property;
- (iii) denial of economic compensation for the loss of their cottages, improvements and chattels;
- (iv) mental distress caused by the callous conduct of INAC and the Band and by the loss of their cottages;
- (v) moving, storage, accommodation and other expenses associated with being required to remove their chattels from their cottages in the manner required by INAC and the First Nation;
- (vi) legal, appraisal and other experts' fees, disbursements and costs associated with pursuing compensation for the value of the cottages.

46. The Plaintiffs plead that an implied term of their dealings with INAC (as a servant, representative or agent of the Crown) was that they deal with each other fairly and in good faith. INAC and the Crown were at all relevant times in a position of power relative to the vulnerable Cottagers. INAC and the Crown breached this implied term by not dealing with the Cottagers fairly or in good faith.

47. INAC knew that the interests at stake (namely, the Cottagers' interests in their family cottages which they had built, improved and maintained) were deeply personal to the Cottagers. INAC knew that the Cottagers had relied upon the provisions in the Leases which entitled them to remove their cottages, and on the representations made by INAC and the First Nation that a new long-term lease would be issued.

48. Although INAC knew, by the spring of 2006 at the latest, that ownership or entitlement to the cottages was in dispute and had determined (after receiving legal advice) that the Cottagers should be given notice and a chance to remove their cottages, INAC and the Crown refrained from advising the Cottagers of the dispute and giving them a chance to remove their cottages.

49. Instead, INAC and the Crown intentionally waited until the Cottagers had left their cottages for the season and 30 days had elapsed from the expiry of the Permits before advising the Cottagers that the First Nation was claiming that the Crown owned the cottages. INAC knew that this would prejudice the Cottagers in their ability to gain access to the Reserve and remove their cottages.

50. INAC and the Crown then refused to compensate the Plaintiffs for the loss of their cottages or for any of the storage, moving, accommodation, travel or other expenses the Plaintiffs had incurred by reason of the manner in which INAC and the First Nation required the Cottagers to remove their chattels from their cottages by January 31, 2007.

51. Further, the conduct of INAC and the Crown in dealing with the Cottagers as described above was deliberate, callous, exhibited bad faith and took place over a long period of time. Their actions were high-handed and reprehensible and demonstrated a disregard for the plaintiffs' rights.

Date: March 26, 2008

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