

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

BETWEEN:

**ELDON ALDERSON, DONNA ALDERSON, CHARLENE ALLIN, DENNIE 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, CHAERYL 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, GERARDU GERLOFSMA, GEORGE H. GIBBS, JOAN GIBBS,  
JOHN GRIESE, VINCENZA GRIESE, PAULINE HADFIELD, RICHARD HADFIELD,  
JAMES. F. HAMILTON, PATRICK 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 SIR, 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 CHIPPEWAS OF NAWASH FIRST NATION**  
**AND THE CHIPPEWAS OF NAWASH BAND COUNCIL**

1. The Defendants, the Chippewas of Nawash First Nation and the Chippewas of Nawash Band Council (hereinafter collectively referred to as the “First Nation”), admit the allegations contained in paragraphs 4, 6, 7, and 22 of the Amended Statement of Claim.
  
2. The Defendant, First Nation, denies the allegations contained in paragraphs 1, 2, 3, 8, 11, 12, 14, 15, 16, 18, 21, 23, 24, 27 to 45 inclusive, 47, 50 and 51 of the Amended Statement of Claim.
  
3. The Defendant, First Nation, has no knowledge of the allegations contained in paragraphs 5, 9, 10, 13, 17, 19, 20, 25, 26, 46, 48, and 49 of the Amended Statement of Claim.
  
4. The Chippewas of Nawash Unceded First Nation, also known as the Chippewas of Nawash First Nation, is a Band within the meaning of the *Indian Act*, R.S.C. 1985, c.I-5 (as amended) and an Aboriginal people within the meaning of s.35 of the *Constitution Act, 1985*.

5. The cottage lots formerly leased by the Plaintiffs are located on land known as the Hope Bay Subdivision, which is described on Plan No. 51850 C.L.S.R., located on the Cape Croker Indian Reserve, also known as Neyaashiinigiing Indian Reserve No. 27 (the “reserve”). The reserve is held by the Federal Crown, under the *Indian Act*, for the use and benefit of the First Nation.

6. The Neyaashiinigiing Indian Reserve is unceded land, subject to the First Nation’s unextinguished Aboriginal title. The First Nation’s Aboriginal title is a right, protected by s.35 of the *Constitution Act, 1982*.

### **The 1965 Designation and Leases**

7. The *Indian Act* prohibits all bands, including the Chippewas of Nawash Unceded First Nation, from entering into any agreement regarding the use or occupation of reserve land with anyone who is not a member of the First Nation. The *Indian Act* requires the First Nation to conditionally surrender (also referred to as “designate”) any reserve land to Her Majesty the Queen in right of Canada (the “Crown”), and thereby the Crown may enter into agreements for the use and occupation of the reserve land.

8. On February 16, 1965, pursuant to the *Indian Act* and the procedures contained therein, the First Nation conditionally surrendered the Hope Bay Subdivision land to the Crown for a fixed period of 30 years, and for the specific purpose of allowing the Crown to lease the land to non-members for that 30-year period.

9. The terms of the surrender were that all rental monies generated by the land were to be deposited by the Crown into the First Nation's Revenue Account held by the Crown, and that on expiration of the 30-year term all beneficial interest and control of the land would automatically revert to the First Nation as though this surrender had never been given, consented to, or approved. As required under the *Indian Act*, this surrender was accepted by Order-in-Council P.C. 1965-588, dated April 1, 1965.

10. As a result of the conditional surrender (the "designation") the Minister of Indian Affairs and Northern Development and the Minister's predecessors, on behalf of the Crown, entered into lease agreements with various non-members of the First Nation ("Cottagers"). None of these lease agreements extended beyond April 1, 1995, which was the date that the designation ended.

11. The Plaintiffs represent 60 out of a total 131 cottage lots that were available for lease by the Crown to Cottagers.

12. The First Nation has never been a party to any lease or contract with any Cottager nor with any of the Plaintiffs in relation to the use or occupation of reserve land. Moreover, because of s.28 (1) of the *Indian Act* any such agreement would be void.

13. Contrary to paragraph 11 of the Amended Statement of Claim, the First Nation denies that it has ever had the power to fix rental amounts under the Plaintiffs' lease agreements. At all times, the contracting parties to the leases were the Crown and the Plaintiffs. Rent increases were conducted pursuant to the Crown's contractual rights under section 2 of the lease.

14. On April 1, 1995, the conditional surrender of the Hope Bay Subdivision ended, and the use and occupancy of that land automatically reverted to the First Nation, pursuant to the terms of the conditional surrender and the *Indian Act*. Upon expiration of the conditional surrender, the Crown no longer had authority to enter into leases with non-members.

15. The First Nation states that after April 1, 1995, and until the Plaintiffs purchased temporary-use permits from the Crown in the spring of 2006, pursuant to s.28 (2) of the *Indian Act*, none of the Plaintiffs had a lawful right to the use or occupancy of the reserve lands. The First Nation relies upon the *Indian Act*.

16. Notwithstanding the expiry of the leases and the end of the designation, the Plaintiffs remained on the land. The Plaintiffs paid compensation to the Crown and the Crown *accepted that* compensation, despite there being no designation and the fact that the land was incapable of being leased.

17. Contrary to *paragraph 17* of the Amended Statement of Claim, the First Nation denies that the correspondence or the leases issued by the Crown in 1996 for the period of 1993 to 1995 evidences any intention on the part of the Crown to create an ‘interim measure’ intended to apply until a new designation was completed. In fact, these short-term leases simply extended the Plaintiffs’ leases so that they would expire simultaneously with the expiration of the Designation.

## **Fixtures**

18. It is the position of the First Nation that all buildings constructed by the Plaintiffs on the lots in the Hope Bay subdivision are fixtures to the land. None of the Plaintiffs have disputed this position.

19. Every lease agreement between the Plaintiffs and the Crown, and executed by each of the Plaintiffs and referred to by the Plaintiffs in their Amended Statement of Claim, refers to the cottage buildings and improvements as fixtures to the reserve land. The First Nation has never led any Plaintiff to believe otherwise.

20. The clause in the lease referred to by the Plaintiffs in paragraph 10 of the Amended Statement of Claim provides that if the buildings are not removed by the Lessee within 30 days following the expiry of the lease, the buildings would revert to and become the property of Her Majesty “without any claim for allowance or payment in lieu thereof” to the Lessee.

21. The Plaintiffs have always known, acknowledged and accepted that they were leasing reserve land, that the lease was subject to the *Indian Act*, and that they could not acquire indefinite property rights to property located on an Indian reserve.

22. In response to the Plaintiffs' claim for a declaration that they are entitled to remove fixtures from reserve lands, the First Nation pleads and relies upon the common law of fixtures and the *Indian Act*. Moreover, the First Nation states that the property is property of the First Nation located on reserve, and is, therefore, exempt from any form of seizure or encumbrance by the Plaintiffs pursuant to s.89 of the *Indian Act*.

### **Period after the Designation**

23. During the period of 1995 until December 2006, the First Nation considered designating the Hope Bay Subdivision for lease to non-members of the First Nation. While there has been consideration of a fresh designation, there has not been a lawful or effective designation of the Hope Bay Subdivision lands after 1995.

24. Under the *Indian Act*, Indian reserve land cannot be designated to the Crown for leasing to non-members unless it is properly approved by a majority of the electors of the First Nation and accepted by the Governor in Council. Neither the First Nation, nor the Crown, nor the Department of Indian and Northern Affairs have the capacity to give a binding commitment about the outcome of the designation process until it has been lawfully concluded according to the *Indian Act*.

25. In 2005, the members of the Chippewas of Nawash Unceded First Nation considered and held two community referenda to vote on a new designation of the Hope Bay Subdivision lands. Ultimately, a majority of the electors of the First Nation approved a designation of the lands to the Crown which expressly required the Crown to seek the First Nation's approval on the final lease document to be offered by the Crown to tenants for the Hope Bay Subdivision lots.

26. However, the First Nation and the Crown were not able to agree on the terms of that lease and the Crown did not submit the designation to the Governor-in-Council for acceptance or refusal. As a result, after 1995, there was never a lawful or effective designation of the Hope Bay Subdivision land.

### **Overholding Clause of Leases**

27. The Plaintiffs claimed that each of them believed they were entitled, under the 1995 lease, to 12-months' advance notice that the land would not be available for further leasing. This was a contractual term between the Crown and each of the Plaintiffs, and the First Nation was never a party to that contract. The First Nation states that whether or not this clause was breached by the Crown cannot result in each Plaintiff acquiring a legal or equitable interest in reserve property located on the Hope Bay Subdivision, particularly after the expiration of the Designation in 1995.

28. The 1965 Designation contained no provision which could be interpreted as permitting overholding by the Crown's tenants beyond the period of the Designation. Moreover, such overholding would be inconsistent with the *Indian Act* and the Order-in-Council which accepted the Designation.

### **2006 Sale of Temporary Permits**

29. In May 2006, with the First Nation's consent, the Crown sent letters to all Cottagers, including the Plaintiffs, directly and unequivocally informing them that their leases had ended and that the Crown did not have any authority to offer a new lease to them. The Plaintiffs were then offered a temporary permit to use and occupy the land until October 31, 2006, pursuant to s.28(2) of the *Indian Act*. The Plaintiffs were expressly told by the Crown that this permit was temporary and non-renewable.

30. The temporary permits sold to the Plaintiffs in May 2006 did not include a contractual right to remove buildings from the reserve, as was in the Plaintiffs' leases that expired at the end of the Designation.

31. The First Nation states that even if each Plaintiff held an honest and reasonable belief that he or she had acquired some type of right to a new long-term lease, the May 2006 notice and offer of temporary permits made any such belief untenable.

32. Notwithstanding the clear statement of the Crown to the Plaintiffs in May 2006 that the Crown had no authority to offer a new lease and that the permit was temporary and non-renewable, when the temporary permit expired on October 31, 2006, the Plaintiffs did not remove their personal property, nor did any Plaintiff ask to, or attempt to, remove any building or fixture.

33. At no time has any Plaintiff ever asked to, or attempted to, remove any building or fixture from the Hope Bay Subdivision, nor has any Plaintiff ever expressed any intention of relying upon or exercising the 30-day limited right of removal that existed in the leases that expired in 1995.

34. The Plaintiffs' right to occupy the reserve ended on October 31, 2006. However, the Plaintiffs were never denied the ability to retrieve their personal property at the conclusion of the permit. The Plaintiffs were given four months following the expiration of the permits to remove their personal property. Any personal property that was not retrieved was because of the Plaintiffs' failure to act within that additional four-month period.

### **Cottager Transfers between 1995 and 2006**

35. Contrary to paragraph 24 of the Amended Statement of Claim, the First Nation denies that it facilitated the sale of cottages or the transfer of lease interests to the reserve land.

36. Any lease, document, or agreement of any kind which purports to grant an interest in unsurrendered reserve land to a non-member is void.

37. In the alternative, as the First Nation was not a party to the leases with the Plaintiffs, the First Nation did not have standing or capacity to facilitate or otherwise participate in the transfer of legal interests amongst leaseholders.

38. If each Plaintiff and their respective lawyers relied upon the First Nation's conduct, as stated in paragraph 16 of the Amended Statement of Claim, then it was a result of their own or their lawyers' lack of knowledge of the *Indian Act* reserve land designation requirements and procedures, and their failure to conduct due diligence inquiries into the nature of the property and the transferors interest. The First Nation had no duty to advise the Plaintiffs or their lawyers on the legal implications of the *Indian Act* or on the merits of the purchase of expired leases on reserve land. Moreover, it is reasonable to assume that prospective buyers and their lawyers would have conducted due diligence investigations regarding the properties, including the basic step of insuring that the vendor had a legal interest in the property to be purchased.

39. Contrary to paragraph 24 of the Amended Statement of Claim, the First Nation specifically denies that it approved renovations to buildings located on the Hope Bay Subdivision. The First Nation was advised by some of the Plaintiffs of repairs or renovations, but the First Nation's approval was never sought nor given. The Plaintiffs were aware or should have been aware that their leases required them to obtain such approvals from the Minister of Indian Affairs. Moreover, if the First Nation was advised of any such repairs or renovations, the expired leases required the Plaintiffs to turn over the buildings in a good state of repair. The First Nation was never in a position to further investigate any other motivation that any Plaintiff may have had for such repairs, maintenance or renovations.

### **Equitable Lease**

40. In response to the claims of an equitable lease by the Plaintiffs, the First Nation denies that an equitable lease was formed or existed in relation to the reserve land between the First Nation and each of the Plaintiffs or between the Plaintiffs and the Crown.

41. In the alternative, if such an agreement was formed between the First Nation and each of the Plaintiffs, which is not admitted but specifically denied, then the First Nation pleads and relies upon s.28 of the *Indian Act*, which would declare any such agreement void. If such an agreement was formed between the Plaintiffs and the Crown, which is also not admitted but specifically denied, then the First Nation pleads and relies upon s.37(2) of the *Indian Act*.

## **Estoppel**

42. The First Nation's interest in reserve land, which includes the Hope Bay Subdivision, is inalienable except by surrender to the Crown. At no point has the First Nation ever agreed to surrender for sale any part or portion of the reserve land at the Hope Bay Subdivision. As the buildings are fixtures and are, therefore, part of the real estate that is the First Nation's reserve land, any agreement or decision to permanently transfer that part of the reserve land requires an absolute surrender. The First Nation denies that estoppel can be used to supersede this statutory and Constitutional requirement.

43. The First Nation states that the Plaintiffs' claims which seeks to create an enforceable right to seize and remove fixtures from reserve land cannot be maintained as such a claim is wholly inconsistent with the inalienable nature of Aboriginal title, the *Indian Act*, and the *Constitution Act, 1982*.

44. The First Nation denies that estoppel, in any of the forms pleaded by the Plaintiffs, supports an action for damages known to law. In the alternative, if estoppel can be the basis for an action in damages, the First Nation denies that such a claim lies against the First Nation. The First Nation has never been a party to any of the lease agreements pleaded by the Plaintiffs, and has never had any legal relationship with the Plaintiffs for the use and occupancy of the land. As such, the First Nation lacked the capacity to make any statements, implied or express, about the enforceability or continuance of the terms or conditions of that lease.

45. The First Nation denies that the Plaintiffs have alleged a sufficient factual basis for any of their estoppel claims. Every Plaintiff made a decision not to exercise the clause in their leases which allowed them a limited right to remove buildings within 30 days of the expiry of their leases in 1995. However, all of the encouragements, inducement, or mutual conventions every Plaintiff claims to have relied upon occurred after they made that decision not to remove the buildings, and well after the 30-day period expired.

46. In the alternative, if estoppel is applicable as against the First Nation, the First Nation states that the Plaintiffs do not have clean hands as they have never tried to or asked to remove the buildings and fixtures from the Hope Bay Subdivision.

47. Moreover, the Crown advised the Plaintiffs in May 2006 that the Crown did not have authority to offer them any right to occupy reserve land after the end of the s.28 permit. Given this, and after 11 years of consideration and negotiation of a potential new designation and new leases, it was unreasonable for every Plaintiff to have sustained an honest belief that a new designation and new leases would be guaranteed to them.

48. The Plaintiffs' leases that expired in 1995 contained a limited right to remove buildings and fixtures. This right lapsed 30-days after the expiration of the leases. The First Nation denies that it had any obligation to remind the Plaintiffs of the terms of their leases with the Crown in 1995 or at any time thereafter.

### **Proprietary Estoppel**

49. The First Nation denies that proprietary estoppel lies against the First Nation to prohibit the First Nation from using and occupying their reserve land and the fixtures which were attached thereto.

50. The First Nation was never a party to the leases and so lacked the capacity to give any representations, inducements, or encouragements to the Plaintiffs about how the leases would be enforced by the Crown. The First Nation never had the capacity to enter into any contract with the Plaintiffs for the use and occupancy of reserve land, nor could the First Nation conclude a designation of reserve land on its own.

### **Estoppel by Convention**

51. The First Nation states that it has never assumed that the buildings on reserve land were not fixtures, as pleaded in paragraph 36 of the Amended Statement of Claim. Until 2005, the First Nation did not have any position regarding the buildings on reserve land that was leased by the Crown to the Plaintiffs. It is unreasonable and implausible for there to have been any sort of “shared assumption” when the First Nation had not even considered the issue prior to 2005 and was not party to the leases.

52. Moreover, by operation of law, the buildings located on the Hope Bay Subdivision became fixtures and are merged with the land. Neither the parties to the lease, nor the First Nation can change this result by assumption, agreement or otherwise.

53. The First Nation states that the Plaintiffs and the Crown knew, or ought to have known, that the buildings were fixtures to the reserve land.

54. The First Nation states that the Plaintiffs knew, or ought to have know, that neither Indian and Northern Affairs nor the First Nation had the capacity to commit to leasing the property to the Plaintiffs prior to a new designation. The Plaintiffs were aware from the outset that a new designation had to be approved by the members of the First Nation. It would be unreasonable to conclude that a commitment to lease could be made prior to the designation, when the designation was subject to approval by a majority of the electors of the First Nation.

55. The claim of estoppel must be determined at the time the Plaintiffs claim to have relied upon the mutual assumption to their detriment. The Plaintiffs have claimed that they were encouraged to believe that they would have 30 days to remove the buildings once the lease had expired or terminated. It is the position of the First Nation that the Plaintiffs knew, or ought to have known, that the leases ended in 1995, since that is the date indicated on the leases.

56. If the First Nation did encourage the Plaintiffs to believe that they retained a right to remove buildings, which is not admitted but specifically denied, then the First Nation states that the Crown's letter of May 2006 and the offer of a permit under s.28 of the *Indian Act* was wholly contrary to any mutual convention alleged by the Plaintiffs. The failure of the Plaintiffs to act thereafter to remove or ask to remove the buildings from the reserve land was not, and could not, have been pursuant to the alleged mutual assumptions.

57. The First Nation states that the results in this case were not unconscionable. The Plaintiffs' leases which provided a limited 30-day right to remove buildings expired in 1995. At no time in 1995 or at any time after has any Plaintiff ever removed the buildings, tried to remove the buildings, or requested to remove the buildings. The First Nation states that the result herein is exactly as was agreed to by the Plaintiffs in the 1995 leases.

### **Restitution and Unjust Enrichment**

58. The First Nation denies all claims of unjust enrichment. The leases between the Crown and the Plaintiffs specifically indicated that if the buildings were not removed within the 30-day period following the 1995 expiry they revert to the property of the Crown "without any claim for allowance or payment in lieu thereof". Thus the parties always intended that either the buildings would be removed within the time permitted or they would be left on the property without compensation.

59. Moreover, the First Nation denies that it has been enriched by the cottages which have been erected on the reserve land. The cottages have many serious construction faults, poor or negligent workmanship, and safety concerns. None of the buildings, as they were left on the reserve, meet the National Building Code. Moreover, the Plaintiffs use and occupation of the buildings and the Hope Bay Subdivision has resulted in environmental contamination which has not been remediated by the Plaintiffs.

60. In relation to the Plaintiffs' claims to compensation or damages for fixtures other than buildings and improvements to the land, the First Nation states that the Plaintiffs never had a right to remove other fixtures from the reserve land, during the term of the leases or thereafter and so cannot have been deprived of that right and are not, therefore, entitled to compensation for their supposed loss.

61. In relation to the buildings erected on the reserve lots, the First Nation denies that the Plaintiffs have suffered a deprivation. The cost to remove the buildings, transport them off the reserve, reassemble, bring them to any applicable building code, and restore the reserve land to the state that it had been in previously, far outweighs the value of the structures.

62. Finally, the First Nation denies that it is unjust for the buildings to remain on the reserve. By contract, the Plaintiffs agreed, acknowledged, and accepted that if they failed to remove the buildings within 30 days of the end of their leases, the buildings would become the property of the Crown, without claim for allowance or payment in lieu thereof. The First Nation claims that the result was not unjust, but was the natural and contemplated result of the contractual agreement agreed to by the Plaintiffs.

63. In addition, the First Nation pleads that the potential of the buildings being left on the reserve land, had they been in good and proper repair, was a consideration flowing to the First Nation from the designation, and that it would be unjust and unfair to deny the First Nation that benefit.

### **Damages**

64. The First Nation denies that the Plaintiffs are entitled to the damages alleged and states that the claim is excessive and exaggerated.

65. The First Nation states that the buildings have no value, or even a negative value, given:

(a) That none of these buildings were designed to be dismantled, shipped and reassembled, and most would not survive the process;

(b) That none of the buildings are in compliance with the National Building Code;

(c) That none of the buildings are in compliance with the Ontario Building Code and would require costly improvements if they are placed anywhere in Ontario;

(d) The cost to remove the buildings, and rehabilitate and remediate the land; and,

(e) The cost to remediate any and all environmental damages to the reserve lots, including faulty and improper septic systems, and shoreline degradation.

66. The First Nation submits that the Plaintiffs' action be dismissed against them with costs to the First Nation on a substantial indemnity basis.

**CROSSCLAIM AGAINST THE DEFENDANT CROWN**

67. The Defendants, the Chippewas of Nawash Unceded First Nation and the Chippewas of Nawash Band Council (hereinafter referred to collectively as the “First Nation”), claim against the Defendant, the Attorney General of Canada:

- a. General damages in the amount of \$60,000,000.00;
- b. Contribution and indemnity for any and all damages, compensation and costs which this Court may find are owing from the First Nation to the Plaintiffs in the within action;
- c. Contribution and indemnity for the costs of defending the within action;
- d. Pre-judgement interest in accordance with the *Courts of Justice Act*, R.S.O. 1990 C.C-43, as amended;
- e. Post-judgement interest in accordance with the *Courts of Justice Act*, R.S.O. 1990 c.C-43, as amended;
- f. Costs of this crossclaim on a substantial indemnity basis; and,
- g. Such further and other relief as this Honourable Court deems just.

68. The First Nation repeats and relies upon the statements made in defence of the main action herein.

69. The Defendant, the Attorney General of Canada, is the representative of Her Majesty the Queen in Right of Canada, pursuant to Section 23(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, as amended, and hereinafter referred to as the “Crown”.

70. Title to the First Nation’s reserve land, including the Hope Bay Subdivision, is and was at all material times held by the Crown for the use and benefit of the First Nation.

71. The 1965 conditional surrender of the Hope Bay Subdivision to the Crown imposed a fiduciary duty on the Crown, for the benefit of the First Nation, with respect to the subsequent leases and administration of the land.

72. For greater certainty, by accepting the conditional surrender and entering into leases with the Cottagers, the Crown took upon itself extensive discretionary powers over the use and occupation of the reserve land by non-members of the First Nation, and the First Nation is particularly vulnerable to the Crown’s discretion in this regard.

73. The First Nation states that, as part of its fiduciary duty, the Crown was required to act with the utmost good faith, care, and in the best interest of the beneficiary First Nation in relation to the administration and management of the Hope Bay Subdivision.

### **Construction of Buildings**

74. The Crown owes the First Nation a fiduciary duty, as a prudent and reasonable land owner and/or manager, to ensure that any and all buildings constructed on the Hope Bay Subdivision lands were constructed, installed, and maintained in a good and safe manner.

75. Further to this obligation, the Crown entered into leases with each of the Plaintiffs which contained terms aimed at protecting the First Nation's interest in the buildings to be constructed on the reserve land and, without limiting the forgoing, included terms:

- (a) requiring that the Lessees meet applicable building codes for any and all construction;
- (b) requiring that prior to construction, the Lessee submit a development plan to the Crown for approval;
- (c) requiring the Lessees to surrender up to the Crown at the end of the lease the buildings they had constructed on the reserve land, in a condition "satisfactory" to the Crown and "in good and substantial repair and condition," excepting only for reasonable wear and tear and natural disaster;
- (d) securing to the Crown the right to inspect the land and buildings, and to demand the buildings be repaired or painted if, in the opinion of the Crown, it was needed; and,

(e) securing to the Crown an indemnity from the Lessees for any and all liabilities which may arise from the faulty construction, inspection, or maintenance of the buildings constructed on the land.

76. The Crown breached its fiduciary duties owed to the First Nation by allowing the Plaintiffs to construct buildings which fail to meet the applicable building codes, are unsafe, poorly constructed or poorly maintained. The buildings constructed and left on the reserve land by the Plaintiffs were never inspected and all of the buildings currently located on the reserve fail to comply with the National Building Code. In addition, many of the buildings contain construction errors, faults, or failings which make them unsafe to use and which will require significant cost to make safe and suitable for their intended purpose.

77. If the Crown had exercised the rights and enforced the obligations secured under the leases in the manner of a prudent and reasonable land owner and/or manager, the buildings would be safe, usable, and compliant with applicable building codes.

78. The First Nation demands from the Crown such damages or compensation as are necessary to put the First Nation in the position they would have been in but for the Crown's breach of this fiduciary duty. Without limiting the forgoing, the First Nation demands damages or compensation from the Crown for:

(a) any and all work necessary to bring the buildings up to a good, safe, and workman-like standard of construction that they would have been in, but for the Crown's breach of fiduciary duty; ~~and~~,

(b) any and all costs related to the demolition and disposal of buildings which cannot be repaired, and including all costs related to the rehabilitation of the reserve land thereafter; and,

(c) any and all costs associated with moving or demolishing buildings which are located too close to the shoreline.

### **Environmental Damage**

79. The Crown owes the First Nation a fiduciary duty, as a careful, prudent and reasonable land owner and/or manager, to take all reasonable steps to ensure that the land and adjacent waters were not polluted, contaminated, or unnecessarily damaged by the conduct of the Plaintiffs.

80. Further to this obligation, the Crown entered into leases with the Plaintiffs which contained terms aimed at protecting the reserve land and the surrounding waters from environmental damage and, without limiting the foregoing, which included:

- (a) that the buildings have a flush toilet and sanitation system that is approved by the Bruce County Health Unit;
- (b) that the Lessees were obligated to leave no residual or adverse environmental impacts on the reserve land;
- (c) that the Lessees were financially responsible for any and all costs to clean up and remediate any environmental impact they may have on the reserve land; and,
- (d) a right to enter and inspect the land and buildings on the land.

81. The Crown breached its fiduciary duties owed to the First Nation by failing to properly inspect the land for environmental contamination and by allowing the Plaintiffs to install and operate septic systems on the reserve land which were inadequate for the purpose and which pose a public health hazard. Moreover, as early as 1980, the Crown had actual knowledge of specific environmental hazards resulting from the septic systems.

82. If the Crown has exercised the rights and enforced the obligations secured under the leases in the manner of a prudent and reasonable land owner and/or manager, the septic systems would be safe, ~~and compliant Bruce County Health Unit specifications~~ with the Health Canada Technical Standards for such septic systems, and otherwise environmentally sound.

83. The First Nation demands from the Crown such damages or compensation as are necessary to put the First Nation in the position they would have been in but for the Crown's breach of this fiduciary duty. Without limiting the forgoing, the First Nation demands damages or compensation from the Crown for:

- (a) any and all work necessary to remove and dispose of the inadequate and unsafe septic beds, and to install septic systems which conform with the Health Canada Technical Standards for such septic systems and which are environmentally sound ~~the specifications of the Grey Bruce County Health Unit;~~
- (b) any and all costs necessary to remediate the environmental damage caused by the use of faulty septic systems;
- (c) any and all costs related to the clean up, disposal, and remediation related to improperly stored fuels, batteries, and other material, on the reserve; and,

- (d) any and all costs related to the rehabilitation of the reserve shoreline required due to Plaintiffs' improper shoreline constructions, including the installation of piers, breakwaters, walkways, and docks.

### **Lease Administration**

84. The Crown owes the First Nation a fiduciary duty to administer the lease agreements for the Hope Bay Subdivision as a prudent and reasonable land owner and/or manager, and to take any and all necessary and reasonable actions to secure the best possible return for the use of the land, and to protect and indemnify the First Nation from costs or liability arising from the leasing of the reserve land. These duties include:

- (a) taking care to draft leases which were within the Crown's authority, as stipulated and limited by the 1965 Designation;
- (b) taking care to draft leases which complied with the *Indian Act*;
- (c) administering the land and the leases in a manner which ensured that the use and occupancy of the reserve land complied with the *Indian Act*;
- (d) initiating discussions in the early 1990s with the First Nation to continue leasing arrangements on the basis of the fair market value of the improved land;
- (e) complying with its leases by giving notice to the Plaintiffs that the lands would not be available for future leasing at least 12 months before the designation expired in 1995;

- (f) attempting to resolve the dispute that arose by proposing lease terms to the cottagers which were acceptable to the First Nation; and,
- (g) managing and administering the designated lands in a manner that did not expose the First Nation, as beneficial owner of the land, to potential liability vis-a-vis the Plaintiffs.

85. Further to ~~this~~ these obligations, the Crown entered into leases with the Plaintiffs which contained terms aimed at protecting the Crown from any liability arising from the leasing of the reserve land, which included:

- (a) that the Lessee indemnify and hold harmless the Crown from any claims or actions related to the rights granted under the lease, including any claims arising from the construction, operation, maintenance, repair or inspection of the buildings constructed by the Plaintiffs; and,
- (b) that the Lessee purchase a policy of insurance sufficient to meet the Plaintiffs' Crown indemnity obligations.

86. The Crown offered and entered into leases with the Plaintiffs which may have placed upon the Crown an obligation to provide the Plaintiffs with 12 months advance notice that the land would not be designated for leasing to non-members. At all times, the Crown was fully aware of the law and procedures necessary to complete an effective designation and, moreover, was always aware of whether or not a new designation had been accepted by the Governor-in-Council.

87. The First Nation claims indemnity, compensation, or damages for any award of damages or cost ordered against the First Nation because of any Crown breach of the leases, including the failure to give any required notices under the leases. The Crown has breached its fiduciary duty to the First Nation, and the First Nation seeks damages or compensation for such breach.

88. Moreover, if the Crown created any liability on the part of the First Nation, intentional or not, through communications with the Plaintiffs as part of the administration of the leasing of the reserve land, the First Nation claims the Crown breached its fiduciary duty to the First Nation. The First Nation claims indemnity, compensation, or damages for any award of damages or costs ordered against the First Nation in relation to representations or misrepresentations made to the Plaintiffs regarding the Hope Bay Subdivision.

89. As title holder, property manager, and fiduciary to the First Nation in relation to the Hope Bay Subdivision, the First Nation requested that the Crown defend the action within on behalf of the First Nation. That request was expressly denied.

90. In 2004, the First Nation was considering designating the Hope Bay Subdivision lands to the Crown for leasing to non-members of the First Nation. At that time, the Crown informed the First Nation membership that rents for the designated lands would be based on the fair market value of the lands.

91. However, the text of the lease proposed by the Crown indicated that “fair market value” expressly excluded any and all improvements, fixtures or buildings on the lands.

92. The Crown also informed the First Nation membership that if the land was designated and leased, then at the end of that new designation the First Nation would have the right to take possession of the land along with the buildings and structures on the land. In addition, they would also have the option to further designate the land and then lease the lands and buildings. There was no community referendum on this matter in 2004 and the land was not, therefore, designated.

93. In 2005, the Crown again recommended that the First Nation consider designating the Hope Bay lands for leasing to non-members of the First Nation. The Crown again informed the First Nation membership that the First Nation would receive rents based upon fair market value of the land, but again failed to disclose to the members its intent, as expressed in the draft lease, that the property value assessment of the land would only be based on notional vacant and unimproved lots.

94. If the First Nation had accepted the Crown's proposal on how the lands were to be valued, it would have substantially reduced the First Nation's economic return from the land, and the First Nation states that this constitutes a clear preference of the interests of the Plaintiffs over the First Nation.

95. In the fall of 2005, after the second community vote, the First Nation was prepared to designate the land again, and consent to the Crown entering into new leasing arrangements with the Plaintiffs. The Band Council proposed draft leases to the Crown wherein the rents were based on the value of each lot as they existed, including all fixtures, buildings and improvements on the lot. The Crown refused to accept the designation, and refused to offer these draft leases to the Plaintiffs.

96. On October 7, 2005, the First Nation advised the Crown of its interpretation of the status of the expired designation, the expired leases, and that the buildings were fixtures upon the reserve land, and invited the Crown to provide its interpretation. However, the Crown did not convey its legal position to the First Nation, despite the frequent requests of the First Nation to do so.

97. To provide time for the Crown and the First Nation to discuss these issues and because the 2006 summer cottage season was starting, the First Nation agreed to allow the Crown to sell the Plaintiffs temporary occupancy permits for the 2006 summer.

98. To date, the Crown has taken no action to resolve its uncertainty regarding the formerly designated lands and the buildings located thereon, despite the frequent requests of the First Nation to do so.

99. To date the Crown has never informed the First Nation that there is any legal or equitable encumbrance on the Hope Bay Subdivision land that conflicts with the interests of the First Nation. Moreover, if the Crown had entered into any lease with the cottagers after 1995, or had conducted itself in a manner wherein it believed that an equitable lease may exist after 1995, it never advised the First Nation.

100. The First Nation states that the Crown breached its fiduciary obligations to the First Nation by:

- (a) entering into leases which contained terms which were not authorized under the *Indian Act* scheme, and, therefore, which were legally ineffective, but which nonetheless inflated the expectations of the Plaintiffs concerning their rights;
- (b) subjugating the First Nation's interest and rights in the reserve land to the Crown's interests in minimizing its liability to the Plaintiffs as a result of the Crown's breach of the lease;
- (c) failing to take any action whatsoever to determine or resolve the ownership of the cottages, if the Crown was incapable of coming to a conclusion on its own regarding the legal status of the Hope Bay Subdivision and the cottages located thereon;
- (d) advising the First Nation that the First Nation was obligated to forfeit its assets to remedy the Crown's breach of contracts to which the First Nation was never a party;
- (e) failing to take reasonable steps to avoid, or otherwise deal with, its conflict of interest between securing and protecting the First Nation's interests in the fixtures and improvements within the Hope Bay Subdivision and minimizing the Crown's liability for breach of contract;
- (f) failing to advise the First Nation of the above-noted potential conflict of interest;

- (g) preferring the interests of the Plaintiffs and the interests of the Crown ahead of the First Nation's interests in relation to Indian reserve lands; specifically, by advising the First Nation to give away the cottage buildings, and any rights to the building which may have accrued to the First Nation; also, by taking the position that the First Nation should accept a much lower rate of return on land leases than the market would bear;
  
- (h) failing to initiate discussions with the First Nation in the early 1990's to continue leasing arrangements on the basis of the fair market value of the improved land. Instead, the Crown is alleged by the Plaintiffs to have given the cottagers ill-advised assurances about continuing leasing the reserve land. The existence of these assurances may have triggered the Crown's liability, resulting in the Crown being subject to the conflicting interests of maximizing the First Nation's return and minimizing the Crown's own liability;
  
- (i) failing to prevent trespass on the reserve from 1995 to 2006;
  
- (j) providing the First Nation members with deceptive information materials regarding the contemplated designations in 2004 and 2005, which were contrary to the legal rights and interests of the First Nation;
  
- (k) failing to accede to the First Nation's request to discuss revised lease provisions, which would have resulted in a formal Designation of the Hope Bay Subdivision, and leases that could have been offered to the Plaintiffs and thereby possibly avoid litigation; and,
  
- (l) crossclaiming against the First Nation in this action for liabilities the Crown created when drafting of the leases, failing to properly administer the leases, or for representations made to the Plaintiffs by the Crown.

### **Loss of Income**

101. ~~90.~~ The Crown owed the First Nation a fiduciary duty to administer the designated lands and the leasing of same lands as a prudent and reasonable land owner and/or manager, and in a manner which complies with the terms and conditions of the First Nation's 1965 Designation.

102. ~~91.~~ In breach of this duty, and in consequence of the above claimed breaches of fiduciary duty, the First Nation is now unable to use the land at Hope Bay subdivision for any meaningful purpose and has suffered damages due to ~~the~~ faulty construction and environmental damage.

103. ~~92.~~ The Crown, as the First Nation's fiduciary, is aware that the First Nation had used the land to generate income by lease to non-members of the First Nation, and had been considering further designations of the land for that same use.

104. ~~93.~~ The First Nation claims damages and compensation necessary to place it in the position it would have occupied, but for the breach of fiduciary duty. In this case, had the Crown met its obligations to the First Nation, the buildings would have been available for continued use as seasonal cottage lots.

105. ~~94.~~ Many of the lots of the Hope Bay Subdivision were never leased by the Crown, and remained unused throughout the term of the 1965 conditional surrender. The First Nation states that the Crown breached its duty to the First Nation by failing to make reasonable efforts to secure a return for the First Nation for the land.

106. ~~95.~~ The First Nation asks that this crossclaim be tried together with the main action.

**Date: ~~May 6, 2008~~  
September 7<sup>th</sup>, 2008**

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