

IN THE FEDERAL COURT OF CANADA

BETWEEN:

THE MOHAWKS OF AKWESASNE

FEDERAL COURT COUR FÉDÉRALE		D E P O S É
FEB 14 2020 K. Lalonde		
F I L E D	OTTAWA, ON	631

AND:

GRAND CHIEF ABRAM BENEDICT, FORMER GRAND CHIEF MICHAEL MITCHELL (KANENTAKERON), and FORMER CHIEF WILLIAM SUNDAY acting personally and on behalf of and as representatives of the Mohawks of Akwesasne

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

AND:

THE FEDERAL BRIDGE CORPORATION LIMITED

AND:

THE SEAWAY INTERNATIONAL BRIDGE CORPORATION, LTD.

DEFENDANTS

AMENDED STATEMENT OF CLAIM (No. 34)

Dionne Schulze ————— O'Reilly & Associés
507 Place d'Armes, Suite 502 ————— 1155 boul Robert Bourassa, Suite 1007
Montreal, QC ————— Montreal, QC
Canada ————— Canada
H2Y 2W8 ————— H3B 3A7

Nathan Richards ————— James O'Reilly
Nicholas Dodd ————— Gary Carot

Telephone: (514) 842-0748 ————— Telephone: (514) 871-8117
Facsimile: (514) 824-9983 ————— Facsimile: (514) 871-9177

Nathan Richards ————— James O'Reilly
407 Blvd Saint-Laurent, Suite 800 ————— O'Reilly & Associés
Montreal, QC ————— 1155 Blvd Robert-Bourassa, Suite 1009
Canada ————— Montreal, QC
H2Y 2Y5 ————— Canada
————— H3B 3A7

Telephone: (514) 350-4835 ————— Telephone: (514) 871-8117
Facsimile: (514) 849-9984 ————— Facsimile: (514) 871-9177

TO:

Deputy Attorney General of Canada
Department of Justice Canada
500-50 O'Connor Street
Ottawa, Ontario
K1A 0H8
Jeff Anderson

Telephone: (613) 670-6259
Facsimile: (613) 954-1920

THE PLAINTIFFS DECLARE:

A1 The Plaintiff seeks relief from this Honourable Court for the breach by the Crown of obligations arising from the acts, omissions, and representations of the Crown and of Crown agents in connection with the appropriation of lands and the construction and operation of navigation and hydroelectric projects in the traditional territory of the Mohawks of Akwesasne.

A2 ~~This~~ The Amended Statement of Claim (No 3) ~~is~~ was filed pursuant to the Order of Justice Bell of October 21, 2015. The said Order separated the issues of liability and the appropriate remedy, with the parties proceeding only on the issue of liability until further order of the Court. In addition, the said Order maintained the Order of February 13, 2007, dividing the trial of this action into phases and enumerating the issues to be determined in Phase 1.

A2.1 This Amended Statement of Claim (No 4) is filed to fulfil certain requirements of the Mohawks of Akwesasne Tsikaristisere/Dundee Claim Settlement Agreement approved by the Mohawks of Akwesasne in a referendum held in 2018.

A3 The claims of the Mohawks of Akwesasne respecting the appropriation of lands and the construction and operation of major navigation and hydroelectric projects in Akwesasne between approximately 1952 and 1959 are set out herein for the purposes of all phases of the proceedings. The claims were amended to give effect to the partial discontinuance of claims relating to hydroelectric development filed on June 16, 2009, among other things.

A4 A Table of Concordance between the present amendments and Amended Statement of Claim (No 2) is included in Schedule A to the present Amended Statement of Claim. A Statement of Particulars is included in Schedule B pursuant to the Order of Justice Bell of October 21, 2015, providing some additional particulars of the material facts relevant to the issues to be determined in Phase 1.

A5 The present particulars have been provided:

- a. On a voluntary basis and solely to assist the Defendants and the Court in their understanding of the issues in Phase 1;

- b. With the understanding that they do not in any way limit the generality of the allegations made in the Amended Statement of Claim (No 3);
- c. With the understanding that they do not represent an exhaustive statement of the material facts, and, in particular, that the fact that a particular issue is not specifically addressed does not constitute a barrier in producing evidence on that issue at trial;
- d. Under reserve of the Plaintiff's right to provide further particulars.

FACTS AND ARGUMENT

Introduction

A6 For centuries, the Mohawks have lived near the Long Sault Rapids in the St Lawrence River from which Akwesasne takes its name.

A7 The governments of Canada, the United States, Ontario, and New York have contemplated the development of the Long Sault Rapids for navigation and power since at least 1921.

A8 Work on the Seaway and Power Project began following the Project's approval by the International Joint Commission in 1952. Lands in Canada and the United States were expropriated. Some of the expropriated lands were eventually flooded by the Power Project. Other lands were used for the construction of navigation works and for bridges over the St Lawrence River.

A9 Between 1955 and 1958, the government of Canada purported to approve the expropriation of parts of the Akwesasne reserve for the construction of the Seaway and Power Project. The legality of these expropriations is a central issue in these proceedings.

A10 The construction and operation of the Seaway and Power Project fundamentally altered the natural environment of the St Lawrence River and the way of life of the Mohawks of Akwesasne. The losses suffered by the Plaintiff as a result of the Project are also central to these proceedings.

A11 In connection with the expropriation of lands and the construction of works, the Crown and Crown agents gave solemn undertakings to the Plaintiff:

- a. That lands on Kawehnoke that were surplus to the requirements of the St Lawrence Seaway Authority would be restored to the Plaintiff;
- b. That new land created along the shores of Kawehnoke by the St Lawrence Seaway Authority would belong to the Plaintiff;
- c. That certain lands on Kawehnoke that were used by the St Lawrence Seaway Authority as spoil areas would be restored to their individual occupiers in an improved condition that would be suitable for residential development and agriculture; and
- d. That Mohawks would be exempt from the payment of tolls on the bridge constructed over the St Lawrence River.

The enforcement of these undertakings is also central to these proceedings.

A12 The Plaintiff says that the expropriation of its lands and waters, and the works undertaken in connection with the Seaway and Power Project, were a breach of the honour of the Crown and the fiduciary duties of the Crown, and a breach of the aboriginal title, aboriginal rights, treaty rights, and other rights of the Plaintiff. The Plaintiff says these purported expropriations and works were unconstitutional, illegal, null, and void.

A13 In the alternative, the Plaintiff says that the Crown, in all of its dealings with the Plaintiff respecting the Seaway and Power Project, was subject to a fiduciary duty to ensure the minimal impairment of the lands and interests of the Plaintiff and a fiduciary duty to honour its undertakings and those of its agents with respect to the Projects. The Plaintiff says that the Crown and Crown agents breached their fiduciary duty of minimal impairment and have violated their undertakings.

A14 Some of the lands at issue in these proceedings were allotted to individual Mohawks pursuant to the provisions of the *Indian Act*. Between 1955 and 1967, individual Mohawks received payments from Crown agents in connection with the appropriation and use of the Plaintiff's lands. While acknowledging these payments, the Plaintiff says that its collective interest in allotted lands has never been properly addressed or compensated.

A15 Prior to, during, and after the construction of the Projects, representatives of the Crown and of Crown agents met with the St Regis Band Council, ostensibly to obtain approval, via

resolutions of the Council, for the appropriation of lands, for works, or for compensation paid to individual Mohawks in consideration of the appropriation of lands or works. The Plaintiff acknowledges these resolutions of the Council, but says that the Council was at all relevant times dependent on the Crown and Crown servants and agents and subject to legal constraints including those of s 28 of the *Indian Act*, RSC 1952.

A16 In what follows:

Part I describes the parties, the lands at issue in these proceedings, the relationship between the Mohawks of Akwesasne and the Crown, the rights and obligations asserted by the Plaintiff in support of its claims, and a general description of the Seaway and Power Project.

Part II concerns the Plaintiff's causes of action in relation to the appropriation of its lands for the Seaway and Power Project.

Part III concerns the Plaintiff's causes of action in relation to damages resulting from the construction and operation of the Project.

Part I

A. The Parties

1. Grand Chief Abram Benedict, former Grand Chief Michael Mitchell (Kanentakeron) and former Chief William Sunday are all Mohawks of Akwesasne, Indians within the meaning of s 91 (24) of the *Constitution Act, 1867*, and within the meaning of s 35 of the *Constitution Act, 1982*, registered Indians within the meaning of the *Indian Act* of Canada, and members of the Mohawks of Akwesasne within the meaning of the *Indian Act*.
2. The Mohawks of Akwesasne are part of the Mohawk Nation and part of the Haudenosaunee (People of the Longhouse) or the Iroquois Confederacy.
3. Former Chief William Sunday and former Grand Chief Michael Mitchell (Kanentakeron) were, and Grand Chief Abram Benedict is, duly authorized to act on behalf of the Mohawks of Akwesasne and all members of the Mohawks of Akwesasne in respect to the present proceedings

and have sued and sue personally and in their representative capacity as representatives of all members of the Mohawks of Akwesasne, each of whom has an interest and the same interest in the present proceedings.

4. Plaintiff the Mohawks of Akwesasne is a recognized legal entity pursuant to the *Indian Act* with a sufficient interest, right and capacity to act herein and for the purpose of these proceedings is represented by Grand Chief Abram Benedict.

4.1 The Mohawks of Akwesasne and the representative plaintiffs are collectively referred to herein as the "Plaintiff."

5. Defendant Her Majesty the Queen in Right of Canada, sometimes referred to herein as "Her Majesty" or as "the Crown," is liable for the breach of the constitutional and fiduciary duties of the Crown toward the Plaintiff and the breach of the rights of the Plaintiff, for the wrongful taking of lands as alleged herein, and for breach of the Honour of the Crown.

6. The Crown is subject to the present suit by virtue of the provisions of the *Constitution Acts* 1867 and 1982, federal common law, the *Crown Liability and Proceedings Act*, the *Federal Courts Act*, and other federal legislation, as the holder of trust, fiduciary and equitable obligations in favour of Plaintiff and as the guardian of the Indian interest of Plaintiff at all times relevant to the present proceedings.

6.1 The St Lawrence Seaway Authority, referred to herein as the "SLSA", was named as a defendant in the Statement of Claim filed on June 7, 1976, to answer for the breach of its obligations in connection with the planning, construction, and operation of navigation works and bridges and the appropriation of lands.

7. The SLSA, at all material times, has been responsible and liable for, and has had the management, control, maintenance, and operation of, and has carried out construction and other works in connection with the St Lawrence Seaway, *ie* a deep waterway between the Port of Montreal and Lake Erie, as referred to in the *St Lawrence Seaway Authority Act*, and has constructed, carried out works in connection with, and operated and maintained bridges over the north and south channels in the St Lawrence River near Cornwall, Ontario, and has carried out as well incidental and related works.

7.1 The SLSA was duly incorporated under the provisions of the *St Lawrence Seaway Authority Act*, was an agent of the Crown and was subject to the present suit by virtue of the provisions of sections 3 and 4 of the said *Act* (as amended to 1998) and the present action was taken against the SLSA in this Court by reasons of the provisions of the *Constitution Acts* 1867 and 1982, the *St Lawrence Seaway Authority Act*, the *Indian Act* and federal common law and in accordance with the provisions of the *Federal Courts Act* and pursuant to the *Exchequer Court Act* and other federal legislation and international agreements relating to the Seaway Project and the Power Project as defined herein.

7.2 By Order in Council PC 1998-2034 dated November 19, 1998, the Governor in Council dissolved the SLSA effective December 1, 1998.

7.3 Upon the dissolution of the SLSA, all of its liabilities and obligations toward the Plaintiff were assumed by Her Majesty.

7.4 Defendant The Seaway International Bridge Corporation, Ltd, was a mandatary or agent of the St Lawrence Seaway Authority and has been an agent of Defendant Her Majesty the Queen in Right of Canada since its incorporation in 1962 and has carried out works and operations relating to the operation of bridges from the City of Cornwall, Ontario, to Kawehnoke (also known as Cornwall Island, part of the Akwesasne Reserve) over the north channel and from Kawehnoke to the United States mainland in the State of New York, over the south channel.

7.5 Defendant The Federal Bridge Corporation Limited, also an agent of Defendant Her Majesty the Queen in Right of Canada, has participated in the operation and maintenance of the bridges described in paragraph 7.4 since approximately December 1, 1998.

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[...]

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B. Akwesasne: Aboriginal Use and Occupation

11. The Mohawks of Akwesasne, as a distinct aboriginal society or group, have continuously occupied and used since time immemorial the St Lawrence River (Kaniatarowanenneh) between

approximately Prescott and Valleyfield, adjacent lands and waters and other lands and waters, the islands in the St Lawrence River between approximately Prescott and Valleyfield, the weed-beds and marshes, and certain parts of Quebec, Ontario and the United States, and all natural resources and cultural properties in, under, over or on such lands.

11A.

11B.

11C.

11.1 Mohawks have claimed, occupied, and used the lands and waters known as Akwesasne since well prior to contact with European settlers in or around 1608. These lands and waters are referred to herein as the “Traditional Lands.”

11.2 For the purpose of the present action, the Traditional Lands consist of lands and waters in the St Lawrence River watershed, including certain lands on the south shore of the St Lawrence River, and the islands and weed beds in the St Lawrence River, with an eastern boundary in the vicinity of Point au Beaudet and a western boundary in the vicinity of Prescott and Ogensburg, but do not include the “Dundee Lands” as that term is defined in the Mohawks of Akwesasne Tsikaristisere/Dundee Claim Settlement Agreement approved by the Mohawks of Akwesasne in a referendum held in 2018 and, for greater certainty, no claim is made herein with respect to the Dundee Lands.

11.3 The Plaintiff is the successor in title to the Iroquois and Iroquoian nations or groups that exclusively occupied, possessed, and used the lands, waters and resources of Akwesasne prior to the establishment by them of a permanent settlement in St Regis in or around 1754. St Regis is referred to herein by its Mohawk name of “Kanatakon.”

11.4 Prior to and since 1754, the Mohawks of Akwesasne have continued the practices, customs, and traditions which were integral to their distinctive culture and society well prior to their contact with Europeans in or around 1608, including the following:

- a. They have called their Traditional Lands “Akwesasne” and they have named the islands, rivers, and other significant places in Akwesasne;

- b. They have enjoyed a special relationship with Akwesasne where they carry on their spiritual and cultural practices and ceremonies;
- c. They used the St Lawrence River as their principal transportation route between the lands and islands of the Traditional Lands;
- d. They harvested fish and other aquatic species in the St Lawrence River and its tributaries for their consumption and livelihood;
- e. They harvested animal species on their Traditional Lands for their consumption and livelihood;
- f. They harvested plant species on their Traditional Lands for their consumption and livelihood and in the practice of traditional medicine;
- g. They cultivated lands in and near their village sites;
- h. They have relied on the St Lawrence River as a source of potable water for themselves and their livestock;
- i. They used, harvested, and managed the timber and other natural resources on their Traditional Lands.

11.5 Prior to and since 1754, the Mohawks of Akwesasne have drawn economic benefits from their Traditional Lands. Without limiting the generality of the foregoing:

- a. They have engaged in trade for their agricultural produce for their livelihood;
- b. They have maintained commercial fisheries; and
- c. They have drawn revenues from the use of their lands by settlers and others.

11.6 Prior to and since 1754, the Mohawks of Akwesasne have maintained traditional institutions of governance and have managed the allocation and use of their Traditional Lands in accordance with their customs, laws, and traditions.

11.7 Following the settlement of Kanatakon, the Mohawks of Akwesasne were recognized as a distinct political entity or “nation” with the capacity to enter into treaty relations with respect to their military allegiance and their use and occupation of Akwesasne.

11.8 As British forces advanced to take Montreal from the French in August 1760, Sir William Johnson, as a representative of the Imperial Crown, entered into a treaty with the Mohawks of Akwesasne and other Indian Nations during a treaty conference at Oswegatchie on August 30, 1760. The treaty is referred to herein as the "Treaty of Swegatchy."

11.9 Pursuant to the Treaty of Swegatchy, the Crown acknowledged and confirmed the tenure of the Mohawks of Akwesasne over their village sites and hunting grounds and solemnly undertook to protect their right to occupy those lands.

11.10 The Treaty of Swegatchy was an oral treaty, the terms of which were confirmed at subsequent treaty conferences and in the official correspondence of representatives of the Crown.

11.11 On September 8, 1760, French forces at Montreal capitulated to General Amherst, marking the effective assertion of British sovereignty over the territory of New France.

11.12 The surrender of the French forces was subject to the Articles of Capitulation of Montreal which were granted by General Amherst on September 8, 1760. Article XL provides as follows:

The Savages or Indian allies of his most Christian Majesty, shall be maintained in the Lands they inhabit; if they [choose] to remain there; [...].

11.13 On September 16, 1760, an Indian Conference was held in Kahnawake between the representatives of the Imperial Crown and representatives of various Indian Nations including Akwesasne. During this conference the terms of the Treaty of Swegatchy were confirmed by the Treaty of Kahnawake.

12. At the time of the Seaway Project, the Power Project, and the purported expropriations referred to below, the Plaintiff had aboriginal title, aboriginal rights and treaty rights pursuant to various agreements with the colonial powers over all of the Traditional Lands.

C. Lands Reserved For the Indians

13. All the said islands, weed-beds, and marshes, and Kawehnoke, and the said part of the St Lawrence River, were at all relevant times part of the lands set aside for Plaintiff the Mohawks of Akwesasne and lands reserved for the Indians within the meaning of s 91(24) of the *Constitution Act, 1867*, in respect to which Her Majesty had specific trust, fiduciary and equitable obligations in favour of the Plaintiff.

13A.

13.1 The Crown secured the Plaintiff's occupation of the Traditional Lands in Article XL of the Articles of Capitulation of Montreal of 1760 and in the Royal Proclamation of 1763. These constitutional instruments imposed and continue to impose fiduciary duties on the Crown, which duties were recognized by the Crown in the Instructions to Governor Murray of 1763 and to Governor Carleton of 1775 and the "Additional Instructions" from Lord Dorchester to Sir John Johnson of 1794.

13.2 At all relevant times, the Superintendents General of Indian Affairs have recognized all those parts of the Traditional Lands at issue in these proceedings as reserve lands for the purposes of the Royal Proclamation of 1763, the *Constitution Act, 1867*, and the *Indian Act*.

13.3 The Traditional Lands include all of those lands in Canada that are set apart for the exclusive use and benefit of the Mohawks of Akwesasne and which are commonly referred to as Akwesasne Reserves Nos 15 and 59 (together referred to herein as the "Akwesasne Reserve") which, in turn, include the islands contemplated by the *St Regis Islands Act*.

D. Asserted Rights and Obligations

13.4 In the present action the Plaintiff asserts the following rights:

- a. Aboriginal title in and to the Traditional Lands of Akwesasne;
- b. Aboriginal rights in the Traditional Lands, either as an incident of the Plaintiff's aboriginal title, or as aboriginal rights arising from the practices, customs, and traditions that were central to the distinctive culture of the Mohawks at the time of contact with European settlers;
- c. A treaty right to use, occupy and control the Traditional Lands pursuant to the terms of the Treaty of Swegatchy;
- d. A constitutional right to use, occupy and control their Traditional Lands pursuant to the terms of the Articles of Capitulation of Montreal of 1760 and the Royal Proclamation of 1763;
- e. A *sui generis* interest in the lands comprising the Akwesasne Reserve as beneficiaries of a fiduciary relationship with the Crown;

f. To the extent of their applicability to the Akwesasne Reserve, rights pursuant to the Indian Act, RSC 1952 c 249, as amended from time to time, as well as other applicable statutes of Canada.

13.5 The Crown has at all relevant times been obligated to Plaintiff as a fiduciary and trustee with respect to the Traditional Lands, and more particularly the Akwesasne Reserve, and with respect to all dealings and matters involved in or related to the purported expropriations or takings described herein.

13.6 The Seaway Project and the Power Project breached the Plaintiff's aboriginal title, aboriginal rights and treaty rights respecting the Traditional Lands and the exercise of such rights, constituted an unjustified infringement thereof, caused substantial interference with the Plaintiff's use, occupation and enjoyment of the Traditional Lands and the activities referred to in paragraphs 11.4 to 11.6 hereof, and caused substantial losses and damages to the Plaintiff for which Her Majesty is liable.

E. The Seaway and Power Projects

13.7 The St Lawrence Seaway and Power Project was a binational undertaking in the St Lawrence River between Montreal and Lake Ontario which was the object of international agreements between Canada and the United States, and notably an agreement dated March 19, 1941, providing for the development of navigation and power in the Great Lakes St Lawrence River Basin.

1. The Seaway Project

13.8 Her Majesty the Queen in Right of Canada, in addition to having responsibility and liability for the works related to the Seaway Project, has at all material times had the management, charge and direction of, and responsibility and liability for, the works done in connection with navigation, shipping, watercourses, canals, and harbours of the St Lawrence River, and bridges over that river from approximately Lake Ontario to Valleyfield, Quebec.

13.9 The SLSA, in conjunction with the St Lawrence Seaway Development Corporation of the United States, herein referred to as the "SLSDC," carried out the construction of a deep waterway from the Port of Montreal to Lake Ontario. The construction of the Seaway was a

massive undertaking with an intensive schedule. The SLSA also carried out works on the Welland Canal between Lake Ontario and Lake Erie. While these latter works form part of the Seaway, they were carried out by the SLSA alone, as the Welland Canal is located entirely within Canada.

13.10 The term "Seaway", as used herein, refers to the deep waterway for ocean-going ships between the Port of Montreal and Lake Erie and to all related facilities.

13.11 At all relevant times after the construction of the Seaway, and up until its dissolution, the SLSA was responsible for:

- a. The administration of that part of the Seaway that is situated in Canada, including all related works, structures, and facilities;
- b. In conjunction with the SLSDC, the maintenance and operation of the Seaway;
- c. The administration of lands in connection with the Seaway, including lands on Kawehnoke;
- d. In conjunction with the SLSDC, the construction of a suspension bridge over the south channel of the St Lawrence River between Kawehnoke and the United States mainland;
- e. The construction of a high-level bridge over the north channel of the St Lawrence River between the City of Cornwall and Kawehnoke;
- f. In conjunction with the SIBC, the administration of the bridges constructed over the north and south channels of the St Lawrence River and related facilities; and
- g. In conjunction with the SIBC, the collection of substantial tolls and other revenues in connection with the use and control of the bridges and land on Kawehnoke.

13.12 The St Lawrence Seaway was operational by July 1958 and was officially opened on June 26, 1959.

2. *The Power Project*

13.13 The hydroelectric component of the project, referred to herein as the "Power Project," includes a kilometre-long dam at Long Sault, blocking off a channel of the St Lawrence River and two power stations, one controlled, operated, and maintained by the Hydro-Electric Power

Commission of Ontario, referred to herein as "HEPCO", and its successors, and the other by the New York Power Authority, each with 16 generators and each with an installed capacity of some 930 megawatts (MW).

13.14 The Power Project was the object of an agreement dated December 3, 1951, between the Governments of Canada and Ontario, subsequently approved by the Parliament of Canada in the *International Rapids Power Development Act, 1951*, and by the Legislature of Ontario in the *International Rapids Power Development Agreement Act, 1952*, as amended.

13.15 The Agreement of December 3, 1951 provided for the indemnification by Ontario in favour of Canada in respect to claims arising out of the construction, maintenance or operation of the Power Project and that the Power Project would be constructed, maintained and operated in accordance with that Agreement.

13.16 HEPCO was purportedly authorized by the *St Lawrence Development Act, 1952* (No 2) to undertake and perform the obligations of Ontario pursuant to the Agreement of December 3, 1951.

13.17 At all material times, HEPCO and its successors, and the Province of Ontario, had the care, control, management, charge and direction of the Power Project, subject to the jurisdiction of the Parliament of Canada over navigation, international waters, Indians and lands reserved for Indians, and international relations, as well as the exercise of jurisdiction in these matters by Her Majesty.

13.18 HEPCO constructed, maintained, and operated the Power Project in conjunction with the New York Power Authority.

13.19 HEPCO was continued as Ontario Hydro in 1973 pursuant to s 4 of the *Power Commission Amendment Act*.

13.20 In 1999, by virtue of Order in Council 647/99, dated March 31, 1999, the Lieutenant-Governor in Council purportedly transferred all of the assets, liabilities, rights, and obligations of Ontario Hydro relating to the business of power generation carried on by Ontario Hydro at the generating facilities on the St Lawrence River, to OPG–St Lawrence River Inc, by Transfer Order under section 116 of the *Electricity Act, 1998*, effective as of April 1, 1999.

13.21 OPG–St Lawrence River Inc, together with several other companies, was amalgamated effective January 1, 2003, and continues under the name Ontario Power Generation Inc., known as “OPG.” OPG is presently responsible for the maintenance and operation of all works in Canada that are connected with the Power Project.

Part II – The Appropriation of Lands

14. Purportedly pursuant to the *Indian Act*, the *St Lawrence Seaway Authority Act* and the *Expropriation Act*, and their amendments and orders in council, the SLSA was purportedly authorized by Her Majesty to acquire parts of the Akwesasne Reserve for the purposes of the construction and maintenance of the Seaway Project.

15. Purportedly pursuant to such authorization, Defendant the St Lawrence Seaway Authority purported to acquire by way of expropriation and took large parts of the Akwesasne Reserve, which expropriations appropriated a total area of approximately 147 acres, the whole as more fully appears from Order in Council PC 1956-1761 dated November 29, 1956, Order in Council PC 1958-1034 dated July 24, 1958, Order in Council PC 1955-748 dated May 19, 1955, Order in Council PC 1956-1730 dated November 22, 1956 and plans and descriptions relating thereto.

16. Moreover, pursuant to purported authorizations given pursuant to the *Indian Act* by Defendant Her Majesty the Queen in Right of Canada, in other Orders in Council, including PC 1955-1709 dated November 9, 1955, contemplating Sheek Island of an area of 944 acres, PC 1956-742 dated May 17, 1956, contemplating Toussaint Island of an area of 90 acres, and PC 1956-1416 dated September 20, 1956, contemplating Adams, Steen, Wagner, Grassy, Indian and Doran Islands of an area of approximately 163 acres, forming a total area of 1,197 acres, Her Majesty the Queen in Right of Ontario and HEPCO appropriated, took, and were transferred, subject to certain conditions, various islands in the St Lawrence River situated in Ontario, forming part of the Akwesasne Reserve.

**A. The Purported Expropriations and Acquisitions are Unconstitutional, Illegal,
Null and Void**

17. The SLSA, HEPCO, and Her Majesty the Queen in Right of Ontario were not legally authorized to expropriate, even purportedly, the St Lawrence River or other parts of the Traditional Lands but illegally took or detrimentally affected extensive parts of the Traditional Lands, including water lots and the bed of the St Lawrence River, caused or condoned the removal of and damages to cultural sites and properties of the Plaintiff including the human remains of the ancestors or predecessors of the Mohawks of Akwesasne and destroyed or impaired the property of Mohawks of Akwesasne, the whole with the concurrence of Defendant Her Majesty the Queen in Right of Canada.

17A.

17.1 The power of the Governor in Council to approve the taking of parts of the Akwesasne Reserve was subject to the constitutional duties of the Crown toward the Plaintiff having their source in the Articles of Capitulation of Montreal of 1760, the Royal Proclamation of 1763, and the Constitution Act, 1867.

17.2 The power of the Governor in Council to approve the taking of parts of the Traditional Lands was also subject to the Crown's treaty obligation to secure to the Plaintiff the peaceable possession of its Traditional Lands.

17.3 The Plaintiff says that the Orders in Council which purported to authorize the taking of parts of the Akwesasne Reserve were in fact issued without any consideration of the aboriginal title and rights of the Mohawks of Akwesasne, the treaty relationship between the Mohawks of Akwesasne and the Crown, and the requirements of the Royal Proclamation of 1763, and without consultation with the traditional governing bodies of the Mohawks of Akwesasne.

17.5 The said Orders in Council infringe the aboriginal title, aboriginal rights, and the treaty rights of the Mohawks of Akwesasne, and are contrary to the constitutional duties imposed on the Crown by the Articles of Capitulation of 1760, the Royal Proclamation of 1763, and the Constitution Act, 1867, and are invalid and of no legal effect.

17.6 The Plaintiff did not give the Crown its informed consent to the taking of any part of the Traditional Lands nor to any interference with the occupation, use, and enjoyment of the Traditional Lands by the Mohawks of Akwesasne.

17.7 The St Regis Band Council was not authorized by the Plaintiff to consent to the acquisition of any part of the Traditional Lands and did not have the legal capacity to consent to terms relating to the acquisition of parts of the Akwesasne Reserve.

18. The purported expropriations or acquiring of lands were and are unconstitutional, illegal, null, and void.

19.

20.

B. The Taking of the Lands Violated the Duty of Minimal Impairment

20.1 In the alternative, the Plaintiff says the power of the Governor in Council to approve the taking of the lands in question was subject to a fiduciary duty to ensure the minimal impairment of the rights, title, and interests of the Mohawks of Akwesasne in their Traditional Lands. This duty flows from the obligations of the Crown pursuant to the Treaty of Swegatchy, the Articles of Capitulation of Montreal of 1760, the Royal Proclamation of 1763, the *Constitution Act, 1867*, and, to the extent of their applicability, the provisions of the *Indian Act* and the *St Regis Islands Act*.

20.2 The Orders in Council which purported to authorize the taking of parts of the Akwesasne Reserve are only valid to the extent of their consistency with the Crown's duty to ensure the minimal impairment of the rights, title, and interests of the Mohawks of Akwesasne in their Traditional Lands.

20.3 To the extent that the Governor in Council purported to authorize the expropriation of more land than was reasonably required for the construction or operation of navigation or hydroelectric works, the authorizations constitute breaches of the legal and equitable obligations of the Crown, as will be more fully set out below.

20.4 To the extent that the SLSA or HEPCO purported to acquire more land than was reasonably required for the construction or operation of navigation or hydroelectric works, or to

expropriate a greater legal interest in land than was required for those works, the expropriation was illegal to the extent of its inconsistency with the Crown's duty of minimal impairment, as will be more fully set out below.

1. *Breach of the Duty of Minimal Impairment – Lands Appropriated for the Power Project*

20.5 The Governor in Council purported to transfer the administration and control of Sheek Island to the Province of Ontario by Order in Council PC 1955-1709, dated November 9, 1955. The said Order breached Her Majesty's duty of minimal impairment for the following reasons:

- a. The Governor in Council failed to impose suitable conditions on the transfer of Sheek Island to the Province of Ontario, notably, the condition that lands not flooded would revert to Her Majesty for the use and benefit of the Mohawks of Akwesasne;
- b. The Governor in Council transferred a greater interest than was required for the purpose of the Power Project, which was an interest in the nature of a flooding easement; and
- c. Following the transfer of Sheek Island to the Province of Ontario, Her Majesty failed to ensure that the Mohawks of Akwesasne were fully compensated for their entire interest in Sheek Island by HEPCO.

20.6 The Governor in Council purported to authorize HEPCO to take Toussaint Island by Order in Council PC 1956-742 dated May 17, 1956. The Governor in Council purported to authorize HEPCO to take possession of Adams, Steen, Wagner, Grassy, Indian and Doran Islands by Order in Council PC 1956-1416.

20.7 The said Orders breached Her Majesty's duty of minimal impairment because the Governor in Council authorized HEPCO to take a greater interest than was required for the purpose of the Power Project which was an interest in the nature of a flooding easement for those islands, or parts of islands, that were flooded.

2. Breach of the Duty of Minimal Impairment – Lands Appropriated for the Seaway Project

20.8 The Governor in Council purported to authorize the SLSA to expropriate a portion of Stanley Island by Order in Council PC 1956-1730 dated November 22, 1956. The said Order breached Her Majesty's duty of minimal impairment for the following reasons:

- a. The Governor in Council authorized the SLSA to take more land than was required for the purpose of the Seaway Project;
- b. Alternatively, the Governor in Council authorized the SLSA to take a greater interest in land than was required for the construction of navigation works.

20.9 The Governor in Council purported to authorize the SLSA to expropriate approximately 130 acres of land on Cornwall Island by Order in Council PC 1956-1761 dated November 29, 1956. The said Order breached Her Majesty's duty of minimal impairment for the following reasons:

- a. The Governor in Council purported to authorize the SLSA to take more land than was required for the construction of navigation works;
- b. The Governor in Council purported to authorize the SLSA to take more land than was required for the construction and operation of bridges over the north and south channels of the St Lawrence River and a road connecting those bridges;
- c. The Governor in Council purported to authorize the SLSA to take a greater interest than was required for the operation of a bridge highway corridor. The SLSA required at most a legal interest in the nature of an easement for the operation of bridge and highway facilities.

20.10 In the alternative, the Governor in Council failed to impose suitable conditions on the taking of lands by the SLSA, notably, the condition that lands that were surplus to the needs of the SLSA would revert to the Crown for the use and benefit of the Mohawks of Akwesasne.

20.11 The Governor in Council purported to authorize the SLSA to expropriate approximately 16 acres of land on Kawehnoke by Order in Council PC 1958-1034 dated July 24, 1958. Although this authorization was in breach of the constitutional and treaty obligations of the

Crown, as alleged in paragraphs 17.1 to 18, this authorization contrasts with previous authorizations in that:

- a. The Governor in Council imposed conditions on the taking of lands by the SLSA, notably, the condition that lands that were surplus to the needs of the SLSA would revert to the use and benefit of the Mohawks of Akwesasne; and
- b. The Governor in Council authorized the SLSA to take only that land required for the regulating channel north of Cornwall Island.

C. Other Breaches of Fiduciary Duty – Lands Appropriated for the Power Project

20.12 The Indian Agent and other officers of the Indian Affairs Branch of the Department of Citizenship and Immigration purported to act on behalf of the Mohawks of Akwesasne in respect to the fixing of compensation for the taking of islands by HEPCO. Their conduct breached the trust, fiduciary, and equitable duties of the Crown to the Mohawks of Akwesasne, as follows:

- a. At all relevant times, the Crown failed to ensure that the Plaintiff was fully informed about the nature, extent, and consequences of the taking of islands contemplated by HEPCO;
- b. Officers of the Crown, including the Indian Agent and other officers of the Department of Citizenship and Immigration, interfered in the deliberations and decisions of the St Regis Band Council and proposed or drafted band council resolutions that purportedly approved or authorized the taking of lands for the Power Project and the amount of compensation to be paid for the taking, and thereafter acted on those resolutions to the Plaintiff's detriment;
- c. The Crown failed to obtain an independent appraisal of the islands;
- d. The Crown accepted less compensation for lands than was reasonable in the circumstances and less than was approved by the St Regis Band Council;
- e. The Crown failed to protect the interests of the Plaintiff in respect to Presquile Island;
- f. The Crown failed to protect the reversionary interest of the Plaintiff in some or all of the islands acquired by HEPCO.

20.13 Since 1958, the Crown has failed to restore the unflooded portions of Sheek Island, Adams Island, Presquile Island, and Toussaint Island to the Akwesasne Reserve for the use and benefit of the Mohawks of Akwesasne.

20.14 The failure of the Crown to restore unflooded portions of Sheek, Adams, Presquile, and Toussaint Islands to the Akwesasne Reserve in a timely manner has deprived the Plaintiff, and continues to deprive the Plaintiff, of the effective management and sustainable development of those islands.

D. Other Breaches of Fiduciary Duty – Lands Appropriated for the Seaway Project

20.15 Officials of the Department of Citizenship and Immigration acted on behalf of the Plaintiff with respect to negotiations with the SLSA. In conducting such negotiations, the Crown acted in a negligent manner, in conflict of interest, and in breach of its trust, fiduciary and equitable obligations to the Plaintiff.

20.16 L-A Couture, legal counsel seconded from the Department of Justice to the Indian Affairs Branch, acted in conflict of interest during negotiations, purporting to advise and act on behalf of the St Regis Band Council while in fact representing the interests of the SLSA and working in close collaboration with SLSA officials.

20.17 The Crown was obliged to engage and ought to have engaged independent advisors to act on behalf of and in the interest of the Plaintiff with respect to such negotiations and in all matters relating to the acquisition of lands by the SLSA. No such independent advisors were engaged.

20.18 At all relevant times, the Crown failed to ensure that the Mohawks of Akwesasne were fully informed about the circumstances, extent, and consequences of the taking of lands contemplated by the SLSA. Officials of the Department of Citizenship and Immigration concealed information from the St Regis Band Council and otherwise managed the information made available to the Council, and deliberately acted solely for the purpose of facilitating the expropriation of lands without regard to the rights, title and interest of the Plaintiff.

20.19 Officers of the Crown, including Indian agents and officers of the Department of Justice, interfered in the deliberations and decisions of the band council and proposed or drafted band

council resolutions that purportedly approved or authorized the taking of lands by the SLSA and the amount of compensation to be paid for the taking.

20.20 The Crown failed to make a full and accurate record of the verbal representations of the Crown and of the SLSA to the St Regis Band Council and to Mohawks and of the undertakings of the Crown and the SLSA arising from and in connection with the acquisition of lands by the SLSA.

21.

[...]

29.

E. Effect of the Appropriations

30.

30.1 The Plaintiff is entitled to declaratory relief with respect to its unextinguished aboriginal title in those lands that were purportedly expropriated.

30.2 For the purpose of Phase 1, the Plaintiff is entitled to a declaration that the lands purportedly expropriated remain a part of the Akwesasne Reserve and the Plaintiff retains its collective interest in those lands.

30.3 In the alternative, the acquisition of lands for the purposes of the Power Project and the Seaway Project breached the fiduciary duty of the Crown to ensure the minimal impairment of the Plaintiff's rights, title, and interests.

30.4 The Plaintiff is entitled to a declaration of its present rights and title in the lands acquired for the purposes of the Power Project and the Seaway Project.

30.5 For the purpose of Phase 1, the Plaintiff is entitled to a determination of its present interest in those parts of the Akwesasne Reserve that were purportedly expropriated.

30.6 In any case, in the course of the acquisition of lands for the purposes of the Power Project and the Seaway Project, the agents and servants of Her Majesty the Queen failed to ensure that the Plaintiff was fully compensated for the acquisition and use of parts of the Traditional Lands in breach of the Crown's fiduciary duty to the Plaintiff.

31.

[...]

35.

F. Payments Pursuant to Alleged Expropriations

36. During the years between the dates of the said expropriations and the present date, but subject to paragraph 18, and for the purpose of negotiations only, Plaintiff submitted claims to the SLSA respecting the expropriations and the consequential damages but there has been no final agreement on the part of Plaintiff in regard to such claims respecting total compensation nor any final settlement within the meaning of the said Orders in Council although amounts of approximately \$31,158.50 have been paid by the SLSA for the credit of Plaintiff.

37. The SLSA has paid certain amounts to individual members of the Mohawks of Akwesasne in regard to individual holdings or interests and certain damages but Plaintiff the Mohawks of Akwesasne has received no damages whatsoever in respect of any of the purported expropriations or takings described herein.

38.

38.1 The HEPCO paid Her Majesty various sums of money for the acquisition of lands for the Power Project and Her Majesty received those moneys as trustee of the Plaintiff, made payments to individual Mohawks, and deposited money in the band's capital account.

39.

39.1 Subject to a determination of the effect of the expropriations as set out in paragraphs 30.1 to 30.5, the compensation paid to Her Majesty and deposited in the capital account of the band was substantially less than the value of the Plaintiff's interest in the Traditional Lands and in the Akwesasne Reserve.

39.2 Plaintiff invokes the terms of Order in Council PC 1956-1761 which purport to authorize the issuance of letters patent to the SLSA only "in the event that an agreement as to the amount to be paid in full and final compensation is reached between the St Regis Band of Indians, the

Minister of Citizenship and Immigration, The St Lawrence Seaway Authority and all other persons having an interest therein as their respective interests may appear.”

39.3 The Plaintiff never reached agreement with the SLSA as to the amount to be paid in full and final compensation for the extinguishment of aboriginal title in Kawehnoke nor, for the purposes of Phase 1, for its collective interest in Kawehnoke as part of the Akwesasne Reserve.

40.

G. Breaches of Specific Undertakings – Return of Lands

41. In June 1972, the Plaintiff outlined certain of its claims under reserve of certain rights asserted herein to the SLSA in some detail and negotiations between the Plaintiff and the SLSA commenced and were the object of meetings.

42. No agreement was reached between the Plaintiff and the SLSA following these negotiations and subsequent negotiations.

43.

44. Furthermore, subject to the foregoing, Defendants have trust, fiduciary, equitable or other legal obligations to return or release or abandon to the Plaintiff approximately 128 acres of land on Cornwall Island, including the following:

- a. 20.63 acres which were part of the old New York Central Railway right of way;
- b. 58.32 acres of reclaimed land adjacent to the shore line;
- c. 14.61 acres of expropriated land that it was to return under Order in Council PC 1958-1034; and
- d. 34.51 acres of land expropriated under Order in Council PC 1956-1761.

44.1 The Crown and the SLSA made specific representations and undertakings to the Plaintiff that lands on Kawehnoke not required by the SLSA would be restored to the Plaintiff including lands comprising a railway corridor and lands that were acquired by the SLSA in 1956 and 1958 and which were determined by the SLSA to be surplus to their operational requirements.

44.2 The representations and undertakings of the Crown and the SLSA gave rise to a binding obligation on the part of the SLSA to transfer its interest in the said lands to the Crown, and a fiduciary duty on the part of the Crown to restore the said lands to the Akwesasne Reserve without delay.

44.3 In breach of its undertaking, the SLSA failed to transfer its interest in the said lands to the Crown.

44.4 In breach of its fiduciary duty, the Crown tolerated the illegal retention by the SLSA of lands which it had undertaken to restore to the reserve.

44.5 Just prior to the dissolution of the SLSA in 1998, the Minister of Transport directed the SLSA to transfer its interest in lands on Cornwall Island to the FBC pursuant to s 80(1) of the *Canada Marine Act*.

44.6 The direction of the Minister of Transport was issued without prior notification to the Mohawks of Akwesasne and without regard for the obligation of the SLSA and the Crown to set aside the said lands for the use and benefit of the Mohawks of Akwesasne, which constitutes an additional breach of the trust, fiduciary, and equitable obligations of the Crown to the Mohawks of Akwesasne, as well as a breach or infringement of their treaty rights.

44.7 The Plaintiff is entitled to relief for the unconscionable delay in the restoration of the said lands to the Akwesasne Reserves.

45.

[...]

54.

Part III

A. Damages Resulting from the Power Project

54.1 All claims for damages arising from the construction, maintenance, and operation of the Power Project which are within the ambit of paragraph (4) of Article V of the Canada-Ontario Agreement of December 3, 1951, were discontinued by the Plaintiff, without costs, on June 16, 2009.

54.2 Plaintiff relies on the *International Rapids Power Development Act*, SC 1951, c 13 and the terms of the Agreement set out in the schedule to that *Act*.

B. Damages Resulting from the Seaway Project

54.3 During the construction of the Seaway, the SLSA dredged a navigation channel from the Beauharnois Canal to the Snell Lock, with a subsidiary navigation channel to the Port of Cornwall. The channel passes through the Traditional Lands of the Mohawks of Akwesasne in proximity to numerous islands that form part of the Akwesasne Reserve. In the course of dredging the navigation channel, millions of cubic yards of soil from the bed of the St Lawrence River were disposed at various locations in the St Lawrence River.

54.4 The SLSA excavated a sizable portion of Kawehnoke in order to construct navigation works in the north and south channels of the St Lawrence River. In the course of excavation, millions of cubic yards of soil were disposed of in spoil sites on and around Kawehnoke. Work on the excavation was completed by July 1958. Remedial work on Cornwall Island continued well after the opening of the Seaway on June 26, 1959.

54.5 Concurrently with the construction of navigation works, the SLSA, in conjunction with the SLSDC, constructed a high-level suspension bridge over the south channel of the St Lawrence River between 1956 and 1958. The south channel bridge was officially opened on December 1, 1958.

54.6 The St Lawrence Seaway Authority constructed a high-level bridge over the north channel of the St Lawrence River between 1958 and 1962. The north channel bridge was officially opened on July 3, 1962 and was closed on January 24, 2014.

54.7 The Plaintiff invokes the following alternative causes of action in relation to its losses arising from the construction, maintenance, and operation of the navigation works and bridges:

- a. The works were an infringement of the Plaintiff's aboriginal title, aboriginal rights, and treaty rights in the Traditional Lands and an unreasonable interference with the Plaintiff's use and enjoyment of the Traditional Lands;
- b. The works, or elements of the works, were a *de facto* taking of an interest in the Traditional Lands or in the Akwesasne Reserve;

- c. Some or all of the losses arising from the works constitute injurious affection for which the Plaintiff is entitled to compensation;
- d. Some of the works constitute a trespass on the Akwesasne Reserve;
- e. Some of the works constitute an interference with the riparian rights and interests of the Plaintiff;
- f. The works, or parts thereof, were in breach of the Crown's fiduciary duties to the Mohawks of Akwesasne and, in particular, the Crown's duty to ensure the minimal impairment of the rights, title and interests of the Mohawks of Akwesasne in the Traditional Lands and in the Akwesasne Reserve.

All of the causes of action invoked by the Plaintiff arise from the same factual matrix.

54.8 The works interfered with the natural environment and ecosystem of the Traditional Lands and of the Akwesasne Reserve. In particular:

- a. The flow regime of the St Lawrence River was permanently altered;
- b. The formation of ice in the St Lawrence River was permanently altered;
- c. Water levels in the St Lawrence River were regulated;
- d. The waters of the St Lawrence River were polluted; and
- e. The works constituted a substantial interference with wildlife habitat.

54.9 The works interfered with the integrity of the Traditional Lands and of the Akwesasne Reserve. In particular:

- a. Parts of the Akwesasne Reserve were excavated and flooded;
- b. Islands forming part of the Akwesasne Reserve were covered with organic waste and debris;
- c. Parts of Kawehnoke were permanently covered with soil excavated from other parts of the island;
- d. Beaches on Kawehnoke were destroyed;

- e. The shores of islands in Lake St Francis were subjected to ship-generated waves that have caused substantial erosion; and
- f. The peace and solitude that the Mohawks enjoyed in their Traditional Lands was permanently impaired.

54.10 The expropriation of lands and connected works impaired the health, livelihood, subsistence, and way of life and economic self-sufficiency of Mohawks living on the Akwesasne Reserve. In particular:

- a. The property of individual Mohawks was destroyed or impaired;
- b. The traditional harvesting and farming activities of Mohawks were impaired;
- c. The residential and economic development of parts of the Akwesasne Reserve was impaired;
- d. Travel by boat between different locations within the Traditional Lands was impaired; and
- e. Mohawks were deprived of drinking water.

1. *Damages Resulting from Certain Works on Kawehnoke*

54.11 Order in Council PC 1956-1761 purported to authorize the SLSA to acquire approximately 130 acres of land. Of these, approximately 81 acres were acquired for navigation works.

54.12 Order in Council PC 1958-1034 purported to authorize the SLSA to acquire approximately 16 acres of land for the completion of a regulating channel.

54.13 The navigation-related work on Cornwall Island undertaken by contractors and supervised by the SLSA comprised the following:

- a. Haul roads were constructed, partly on lands that were purportedly expropriated, including lots 138, 95, 94, 69, and partly on lots that were not expropriated, including lots 137, 70, 71, 89, 94, 93, 91, 90, 96, 97, 98, 100, 108, 131, and 135;
- b. A maintenance site was occupied on part of lot 138;

- c. Parts of the lands that were purportedly expropriated were excavated to below water level by means of coffer dams and land-based excavation equipment;
- d. Excavated soil was transported by haul roads to spoil sites, including those referred to as Area F, Area K, and Area M;
- e. The spoil sites were formed and graded under the supervision of SLSA engineers;
- f. Soil rehabilitation works were undertaken at Area M;
- g. Drainage works were undertaken at Area F;
- h. Temporary structures and maintenance sites were decommissioned;
- i. The railway line crossing Cornwall Island was decommissioned.

54.14 At all relevant times, the Crown had a fiduciary duty to ensure the minimal impairment of the Plaintiff's title, rights, and interest in Kawehnoke during the works and to restrain works which were not consistent with the duty of minimal impairment.

54.15 At all relevant times, the SLSA was under the legal obligation to obtain the approval or authorization of the Crown for all works on the Akwesasne Reserve and all works which would reasonably be expected to detrimentally affect the Akwesasne Reserve.

54.16 Contractors working under the supervision of the SLSA occupied and used reserve lands without obtaining permits pursuant to the *Indian Act*. These encroachments on reserve land were known to and tolerated by the Crown.

54.17 Contractors deposited excavated soil on the bed of the St Lawrence River as well as on the shore of Cornwall Island substantially interfering with the riparian interests of the Mohawks of Akwesasne and without obtaining the necessary permits pursuant to the *Indian Act*. The deposit of excavated soil adjacent to Cornwall Island resulted in the creation of the "reclaimed lands" referred to below.

54.18 The operation of heavy equipment on Cornwall Island, including a fleet of earth-moving trucks, continuously disturbed residents of Cornwall Island and was a substantial nuisance during the construction.

54.19 The excavation of parts of Kawehnoke permanently and substantially altered the shoreline of Kawehnoke, eliminating privileged sites of community access to the river and interfering with the agricultural and fishing activities of residents of the island.

54.20 The cumulative effects of the works on Cornwall Island constituted a substantial and unreasonable interference with the use and enjoyment of reserve lands by the Mohawks of Akwesasne.

54.21 To this day, the end result of the works undertaken on Kawehnoke constitute a substantial and unremediated impairment of the physical integrity of the Akwesasne Reserve and the collective interest of the Plaintiff.

54.22 Some of the works on Kawehnoke were the object of representations and undertakings by the SLSA to the St Regis Band Council. The Plaintiff invokes those undertakings that are consistent with the Crown's duty of minimal impairment as enforceable obligations.

a. Breach of an Undertaking Respecting the Reclaimed Lands

54.23 The Crown and the SLSA represented to the St Regis Band Council, in connection with the acquisition of lands on Kawehnoke by the SLSA, that lands created along the shores of Kawehnoke during the construction of a navigation channel and a regulating channel would belong to the Plaintiff. The relevant lands are referred to herein as the "reclaimed lands."

54.24 The representations and undertakings of the Crown and the SLSA gave rise to a binding obligation on the part of the SLSA to transfer its interest in the said lands to the Crown, and a fiduciary duty on the part of the Crown to take such measures as were required to set aside the reclaimed lands for the use and benefit of the Plaintiff without delay.

54.25 The failure of the Crown to obtain the administration and control of the reclaimed lands and to set aside the reclaimed lands for the use and benefit of the Plaintiff constitutes a breach of fiduciary duty.

b. Specific Breaches Respecting Area M

54.26 The Crown and the SLSA made representations to the St Regis Band Council with respect to the temporary occupation of part of Kawehnoke by the SLSA and the deposit in that

part of Kawehnoke of a substantial volume of soil excavated from other parts of Kawehnoke. That part of Kawehnoke is referred to herein as "Area M."

54.27 The SLSA gave the St Regis Band Council assurances that Area M would be restored to individual occupiers in an improved condition that would be suitable for residential development and agriculture as practiced by the Mohawks living on Kawehnoke.

54.28 The SLSA knew or should have known that the deposit of a vast quantity of excavated soil was likely to render Area M, or a significant part of it, less fit for agriculture and residential development than it was prior to the commencement of the work.

54.29 The works did in fact render a significant part of Area M less fit for agriculture and residential development. In addition, other forms of development in Area M are more costly as a result of the geotechnical properties of the soil deposited there by the SLSA.

54.30 The primary purpose of the SLSA in Area M was to permanently dispose of soil excavated during the construction of the navigation channel south of Kawehnoke and the regulating channel north of Kawehnoke.

54.31 The permanent disposal of soil in Area M constituted a *de facto* and uncompensated taking of an interest in the Akwesasne Reserve.

54.32 Officials of the Indian Affairs Branch were fully aware of the proposed use of Area M and of the representations of the SLSA to the effect that the land would be substantially improved for agriculture and residential development.

54.33 The Crown failed to subject the proposed use of Area M to even the most rudimentary evaluation by an agronomist prior to the commencement of work in breach of its fiduciary obligations and contrary to the requirements of the *Indian Act*.

c. Specific Breaches Respecting Reclaimed Lands

54.34 The primary purpose of the creation of reclaimed lands was to permanently dispose of soil excavated during the construction of the navigation channel south of Kawehnoke and the regulating channel north of Kawehnoke.

54.35 The creation of reclaimed lands constitutes a permanent use of the shore of Kawehnoke for the storage of soil excavated during the construction of the navigation channel and a *de facto* taking of an interest in the Akwesasne Reserve.

54.36 The SLSA knew or should have known that the deposit of soil on and adjacent to the south-east shore of Kawehnoke would impede the drainage of the upland.

54.37 The deposit of soil, which created reclaimed lands referred to as "Area F", did in fact impede the drainage of adjacent lands and rendered lands unusable until the Mohawk Council of Akwesasne undertook the construction of drainage works in or around 1989.

54.38 The interference with drainage constitutes an unreasonable interference with the use of lands on Kawehnoke by the SLSA and a breach of the Crown's fiduciary duty to ensure that the works on Kawehnoke impaired the use of the Akwesasne Reserve to the least extent possible.

2. *Certain Damages and Losses Resulting from the Construction and Operation of Bridges*

54.39 Order in Council PC 1956-1761 purported to authorize the SLSA to acquire approximately 130 acres of land. Of these, approximately 49 acres were acquired for the construction of bridges and related facilities.

54.40 The bridge-related work on Cornwall Island undertaken and supervised by the SLSA comprised the following:

- a. Haul roads were constructed, partly on lands that were purportedly expropriated, including lots 143, 145, 158, 159, 161, 162, 169, and 174 and partly on lots that were not expropriated, including lots 162 and 165;
- b. A corridor of land was cleared of standing timber and other fixtures and the topsoil stripped and stored;
- c. Stone for the construction of the works was obtained from a quarry on adjacent lands;
- d. Ramps for the bridges over the north and south channels were constructed from excavated soil;
- e. Concrete piers for the bridges were constructed on or adjacent to Kawehnoke;

- f. The bridge superstructure was constructed;
- g. The corridor between the two bridges was graded;
- h. A highway was constructed between the two bridges intersecting the main east-west road on Kawehnoke;
- i. A toll plaza, customs buildings, and maintenance and administration buildings were constructed; and
- j. Fences were erected along the outside boundary of the bridge corridor.

54.41 The operations of the international bridge and highway corridor comprise the following:

- a. The collection of tolls at the toll plaza on Kawehnoke;
- b. The authorization of the installation of a gas pipeline on the north and south bridges and in the corridor between them and the collection of fees from the pipeline operator;
- c. The authorization of the installation of telephone and electricity lines in the corridor;
- d. The authorization of signage in the corridor;
- e. The payment of grants in lieu of taxes to the City of Cornwall in connection with the highway corridor on Kawehnoke;
- f. Maintenance of the north and south bridges; and
- g. Maintenance of the road, buildings, and adjacent lands in the bridge corridor.

a. Loss of Use of Land and Revenues

54.42 Subject to a determination of the validity of Order in Council PC 1956-1761 and of the present interest of the Plaintiff in the lands comprised in the bridge corridor, the SLSA illegally occupied all or part of the bridge corridor up until its dissolution in 1998. The FBC has, since 1998, illegally occupied all or part of the bridge corridor.

54.43 The illegal occupation of the bridge corridor, or part thereof, has deprived the Plaintiff of the use of the corridor lands and has interfered with the use and enjoyment of adjacent lands.

54.44 The SLSA purported to grant a licence to Niagara Gas Transmission Limited, herein referred to as "NGTL," to construct and operate a natural gas pipeline on lands that are part of the Akwesasne Reserve.

54.45 At all times, NGTL has operated its natural gas pipeline without a valid permit under the provisions of the *Indian Act* and without payment of a reasonable permit fee to the Crown in trust for the Plaintiff.

54.46 The Plaintiff is entitled to an accounting of the revenues collected from NGTL for the part of the natural gas pipeline that is located on the Akwesasne Reserve.

54.47 The SIBC made grants to the City of Cornwall in respect to the occupation of lands in the bridge corridor. The SIBC did not make any grants to the Plaintiff for the occupation of part of the Akwesasne Reserve.

54.48 During a substantial part of this period, the Mohawk Council of Akwesasne has provided services and support to the SIBC and other agencies of the Crown, and has, notably, provided policing services, ambulance services, fire and emergency response services.

b. Illegal Collection of Tolls

54.49 In connection with the use of lands on Kawehnoke for the purposes of a bridge, the Crown and the SLSA made representations to the St Regis Band Council that Mohawks would be entitled to toll-free travel on the bridge or bridges to be constructed by the SLSA.

54.50 The Crown knew that the provision of toll-free passage was of substantial importance to the social and economic welfare of the Mohawks of Akwesasne and to the integrity of the Akwesasne Reserve.

54.51 By virtue of a band council resolution dated December 8, 1956, the St Regis Band Council, with the concurrence of the Indian Agent, made toll-free passage a condition of the use of the Akwesasne Reserve for the purpose of an international bridge.

54.52 The SLSA, the St Regis Band Council, and the Minister of Citizenship and Immigration, have never reached a final agreement on the precise terms of the toll exemption for the Mohawks of Akwesasne, in spite of the terms of Order in Council PC 1956-1761.

54.53 In spite of this, the representations and conduct of the SLSA, the Crown, and the St Regis Band Council, gave rise to a legal right, enforceable against the SIBC, the FBC, and the Crown:

- a. Exempting all Mohawks of Akwesasne from the payment of tolls, including Mohawks affiliated with the St Regis Mohawk Tribal Council and the Mohawk Nation Council of Chiefs;
- b. Exempting Mohawks of Akwesasne from the payment of tolls for the delivery of goods and services to them.

54.54 Since 1957, the SLSA and the SIBC have illegally collected tolls from Mohawks for their personal travel on the bridge and for the delivery of goods and services.

54.55 The illegal toll policies of the SLSA and the SIBC have increased the cost of living of Mohawks and the administrative costs of the Mohawk Council of Akwesasne.

54.56 The location of the toll booth between the City of Cornwall and Kawehnoke has acted as a barrier to trade which has substantially affected the economic development of Kawehnoke and the welfare of Mohawks on that island.

3. *Losses Arising from Navigation-Related Works in Lake St Francis*

54.57 The navigation-related work in Lake St Francis undertaken and supervised by the SLSA comprised the following:

- a. The bed of the St Lawrence River was excavated at various locations between the Beauharnois Canal and the Snell Lock in order to cut a channel with a minimum depth of 27 feet between natural channels requiring no excavation;
- b. The dredge spoils were transported to other locations in Lake St Francis and deposited on the bed of the river up to prescribed elevations;
- c. The spoil sites, or some of them, were levelled;
- d. Navigation aids were constructed at various locations on the Akwesasne Reserve;
- e. A flow regime was established to maintain water levels in Lake St Francis for the purpose of navigation.

54.58 The operations of St Lawrence Seaway comprise the following:

- a. The maintenance of the navigation channel;
- b. The maintenance of navigation aids;
- c. The regulation of vessel speeds;
- d. The maintenance of water levels for the purpose of navigation; and
- e. The determination of the opening and closing of navigation in the Seaway.

a. Interference with the Traditional Fishery

54.59 At all relevant times, the Crown had a fiduciary duty to ensure the minimal impairment of the Plaintiff's rights, title, and interest in the Traditional Lands and the Akwesasne Reserve during the dredging of the navigation channel and to restrain works which were not consistent with the duty of minimal impairment.

54.60 Alternatively, the Crown had a fiduciary duty to ensure that the Plaintiff was compensated for the unreasonable interference with the use and benefit of the Traditional Lands and the Akwesasne Reserve.

54.61 The navigation works in Lake St Francis were an unreasonable interference with the traditional fishery of the Mohawks of Akwesasne for the period between roughly 1956 and 1959.

54.62 The disruption of the traditional fishery continued after the official opening of the Seaway to navigation as a result of maintenance of the navigation channel.

b. Erosion

54.63 The construction and operation of the St Lawrence Seaway had the foreseeable effect of introducing ocean-going vessels into a channel passing in close proximity to islands that are part of the Akwesasne Reserve.

54.64 By necessary implication, the construction and operation of the Seaway has subjected the Akwesasne Reserve to the effect of ship-generated waves.

54.65 During the early years of the operation of the Seaway, structures attached to the shore of the Akwesasne Reserve were destroyed or damaged by waves generated by speeding vessels in the Seaway.

54.66 Over a longer period of operation, ship-generated waves have caused or amplified the erosion of the shores of the Traditional Lands and particularly the shores of those islands of the Akwesasne Reserve which face the navigation channel.

54.67 In addition, the modification of currents and the regulation of water levels in Lake St Francis have materially contributed to the erosion of parts of the Akwesasne Reserve.

54.68 At all relevant times, the Crown had an obligation to protect the shores of the Akwesasne Reserves which, in the circumstances, required the construction and maintenance of erosion protection works.

54.69 The Crown had established policies respecting the construction of erosion protection works on shore properties in the St Lawrence River subjected to ship-generated waves, but failed to apply those policies for the benefit of the Mohawks of Akwesasne during the period from 1959 to approximately February 1971, when erosion protection works were constructed on Hamilton Island.

54.70 Erosion was necessarily incidental to the construction and operation of the Seaway and constitutes an injurious affection of the Traditional Lands and the Akwesasne Reserve.

54.71 The Crown has, since 1971, constructed shore protection works on the Akwesasne Reserve which have mitigated the erosion of various islands subject to ship-generated waves. Some of the erosion protection works require maintenance or replacement.

54.72 Shore protection is a permanent burden that has been imposed on the Plaintiff by the construction and operation of the Seaway.

55.

[...]

64.

Conclusion

65. Defendant Her Majesty the Queen in Right of Canada should be declared to be in breach of Her trust or fiduciary and equitable obligations with respect to the Plaintiff *inter alia* in regard to the purported expropriations, the taking of lands, the failure to return lands, the illegal occupation of part of the Traditional Lands, the failure to protect and preserve the Plaintiff's rights and interests and the losses and damages to date to the Plaintiff arising from the construction and operation of the Seaway Project.

65A.

[...]

65S.

66. The Plaintiff is entitled to the value of damages caused to it by Defendant Her Majesty the Queen in Right of Canada with respect to the breaches by Her of Her trust, fiduciary, equitable and treaty obligations respecting the Power Project and the Seaway Project.

66A.

66B.

66C.

67. The Plaintiff is further entitled to interest on all amounts to which it is entitled hereunder from the date of the said purported expropriations and breaches of trust, fiduciary, treaty and equitable obligations by Defendant Her Majesty the Queen in Right of Canada.

68.

69. The Plaintiff's action is well founded in fact and in law.

RELIEF SOUGHT

PLAINTIFF CLAIMS RELIEF AS FOLLOWS:

A. DECLARE that the Mohawks of Akwesasne hold aboriginal title to their Traditional Lands, and have aboriginal rights within their Traditional Lands, or such parts of the Traditional Lands that the Court determines.

B. DECLARE that the Mohawks of Akwesasne and His Majesty the King made a solemn treaty at Oswegatchie on August 30, 1760, by virtue of which His Majesty promised to preserve and protect the Mohawks' use, possession, and occupation of the Traditional Lands.

C. DECLARE that the Traditional Lands, or parts thereof, were under the effective control and administration of the Crown in right of Canada at all relevant times.

D. DECLARE that the Mohawks of Akwesasne have been in a fiduciary relationship with Her Majesty the Queen in Right of Canada with respect to Her administration of the Traditional Lands at all relevant times.

E. DECLARE that Her Majesty the Queen in Right of Canada breached its treaty obligations and contravened the provisions of the Articles of Capitulation of Montreal of 1760 and the Royal Proclamation of 1763:

When the Governor in Council purported to transfer the administration of islands forming part of the Traditional Lands to the Province of Ontario;

When the Governor in Council purported to approve the expropriation of part of the Traditional Lands by the Hydro-Electric Power Commission of Ontario;

When the Governor in Council purported to approve the expropriation of part of the Traditional Lands by the St Lawrence Seaway Authority; and

When the Governor in Council purported to approve works in connection with the St Lawrence Seaway which detrimentally affected the Traditional Lands and impaired the use of those lands by the Mohawks of Akwesasne.

F. DECLARE that the said transfers and approvals were illegal, null, and void and that the occupation of the lands and the works undertaken on those lands were illegal and were an unjustified infringement of the aboriginal title, aboriginal rights, and treaty rights of the Mohawks of Akwesasne.

OR, IN THE ALTERNATIVE TO THE ABOVE DECLARATION:

DECLARE that the acquisition of lands for the purpose of the Seaway and Power Projects breached the Crown's fiduciary duty to ensure the minimal impairment of the rights, title and interests of the Mohawks of Akwesasne.

ADJUDGE AND DETERMINE the present legal interest of the Plaintiff in any lands that the Court judges were legally acquired for the purposes of the Power Project and the Seaway Project;

G. DECLARE that Her Majesty the Queen breached her fiduciary duty to the Mohawks of Akwesasne to act in their best interest and to obtain full compensation for the lands or interests in land transferred to or acquired by the Province of Ontario and the Hydro-Electric Power Commission of Ontario.

H. DECLARE that Her Majesty the Queen in Right of Canada has no legal right to indemnity from the Province of Ontario under Article V of the Canada-Ontario Agreement of December 3, 1951, for claims arising from Her breach of fiduciary duty in relation to the

acquisition of parts of the Traditional Lands, or the Akwesasne Reserve, by the Province of Ontario and the Hydro-Electric Power Commission of Ontario.

I. DECLARE that the Queen breached her fiduciary duty to the Mohawks of Akwesasne to act in their best interest and to obtain full compensation for the lands or interests in land transferred to or acquired by the SLSA.

J. DECLARE that that the construction, maintenance and operation of navigation works and bridges, or elements of these works, have caused the Plaintiff substantial losses, and were and are:

An infringement of the Plaintiff's aboriginal title, aboriginal rights, and treaty rights in the Traditional Lands and an unreasonable interference with the Plaintiff's use and enjoyment of the Traditional Lands;

A de facto taking of an interest in the Traditional Lands and in the Akwesasne Reserve;

An injurious affection;

A trespass on the Akwesasne Reserve; and

An interference with the riparian rights and interests of the Plaintiff.

K. DECLARE that the navigation channel and the bridges over the St Lawrence River, or elements of these works, were constructed, maintained and operated in breach of the Crown's fiduciary duties to the Mohawks of Akwesasne.

L. DECLARE that agents of the Crown have collected tolls in breach of the rights of the Mohawks to toll-exempt travel on the bridges and toll-exempt delivery of goods and services.

M. DECLARE that Her Majesty the Queen in Right of Canada is responsible and liable for:

The wrongful acquisition of lands by the SLSA and HEPCO;

Unreasonable interference with the use of the Traditional Lands and the Akwesasne Reserve; and

The illegal collection of tolls and revenues.

N. DECLARE that the Plaintiff is entitled to equitable compensation in lieu of an accounting for the following:

The use of the Traditional Lands for the construction, maintenance, and operation of the St Lawrence Seaway and for the losses resulting from that use;

The use of parts of Kawehnoke for the permanent disposal of soil;

The use of parts of Kawehnoke for the construction, maintenance, and operation of the bridge and highway corridor;

The use of lands for a gas transmission line;

The collection of tolls from Mohawks of Akwesasne and from travellers delivering goods and services to the Mohawks of Akwesasne;

Losses arising from the failure of the Crown to restore or transfer lands on Kawehnoke to the Akwesasne Reserve in a timely fashion;

Losses arising from the failure of the Crown to restore or transfer Adams, Toussaint, Presquile and Sheek Islands to the Akwesasne Reserve in a timely fashion.

O. Subject to and upon the determination of the liability of the Defendants, GRANT an award of damages to the Plaintiff, in an amount greater than \$50,000 and to be fixed by this Honourable Court.

P. ORDER the trial of any issues required for judgment of the remedies to which the Plaintiff is entitled.

Q. Such further relief as this Honourable Court deems just.

The whole with costs.

MONTREAL, this ~~15th~~ 12th day of ~~January, 2016~~ February, 2020.



Nathan Richards
ATTORNEY FOR PLAINTIFF



PER: James O'Reilly
COUNSEL

TO: The Registrar
AND TO: Defendants

Schedule A

Concordance Table between Paragraphs in Amended Statements of Claim No 2 and No 3

Paragraph in ASC No 2	Paragraph in ASC No 3
1	1
2	2
3	3
4	4
5	7.1
6	6
7	7
7A	7.4
7B	7.5
8	13.8
8A	13.7
8B	Removed, but see 13.9, 13.10, 13.11
8C	Removed, but see A12, 13.6
8D	Removed, but see 13.11
8E	Removed
8F	Removed
8G	Removed
8H	Removed
9	Removed, but see 13.17
10	Removed

Schedule A

Concordance Table between Paragraphs in Amended Statements of Claim No 2 and No 3

10A	Removed, but see 13.7
10B	Removed
10C	Removed, but see 13.14
10D	13.15
10E	13.16
10F	13.18
10G	Removed, but see 13.18
10H	13.13
10I	Removed
10J	Removed
10K	Removed
10L	Removed, but see 13.20, 13.21
10M	Removed, but see 13.21
10N	Removed
10O	Removed
11	11, also see 11.2, 13.3
11A	Removed, but see 11.1
11B	Removed, but see 11.4, 11.5
11C.	Removed, but see 11.4, 11.5
12	12
13	13
13A	13.6
14	14

Schedule A

Concordance Table between Paragraphs in Amended Statements of Claim No 2 and No 3

15	15
16	16
17	17
17A	Removed, but see 17.6, 17.7
18	18
19	Removed
20	Removed
21	Removed, but see 54.4, 54.8, 54.9, 54.10
21A	Removed, but see 54.9, 54.10
21B	Removed
22	Removed, but see 54.7f, 54.14
23	Removed
24	Removed
25	Removed
26	Removed
27	Removed, but see 39.2
28	Removed, but see 39.3
29	Removed, but see 54.42, 54.44, 54.45
30	Removed, but see 54.10 and Relief Sought
31	Removed
32	Removed
33	Removed
34	Removed

Schedule A

Concordance Table between Paragraphs in Amended Statements of Claim No 2 and No 3

35	Removed
36	36
37	37
38	Removed
39	Removed
40	Removed
41	41
42	42
43	Removed
44	44
45	Removed
46	Removed
47	Removed
48	Removed
49	Removed, but see 54.8, 54.9
50	Removed, but see 54.8, 54.9
51	Removed
52	Removed
53	Removed
54	Removed
55	13.5
56	Removed, but see 20.12, 20.15
57	Removed, but see 20.12, 20.15

Schedule A

Concordance Table between Paragraphs in Amended Statements of Claim No 2 and No 3

58	Removed, but see 20.12, 20.15
59	Removed, but see 20.18, 20.19, 20.20
60	Removed, but see 20.12, 20.15
61	Removed, but see 20.16
62	Removed, but see 20.12c, 20.17
63	Removed, but see 20.17
64	Removed
65	65
65A	Removed
65B	Removed
65C	Removed
65D	7.2
65E	Removed
65F	Removed, but see 7.3
65G	Removed, but see 7.3
65H	Removed, but see Particulars
65I	Removed
65J	Removed, but see 7.4
65K	Removed, but see 7.5 and Particulars
65L	Removed
65M	Removed, but see 7.5 and Particulars
65N	Removed, but see 54.42
65O	Removed

Schedule A

Concordance Table between Paragraphs in Amended Statements of Claim No 2 and No 3

65P	Removed, but see Particulars
65Q	Removed, but see Particulars
65R	Removed, but see 44.5 44.6
65S	Removed
66	66
66A	Removed
66B	Removed
66C	Removed
67	67
68	Removed
69	69

SCHEDULE B

STATEMENT OF PARTICULARS FOR PHASE 1

These particulars are filed with the Amended Statement of Claim pursuant to the Order of Justice Bell of October 21, 2015.

The particulars are provided as a complement to the facts alleged in the Amended Statement of Claim (No 3).

The order of these particulars follows that of the Amended Statement of Claim (No 3). Where appropriate, the same headers have been used.

Part I

A. The Parties

1. The Mohawks of Akwesasne (sometimes referred to herein as the "Plaintiff") were previously known as the Iroquois of St Regis Indian Band. The Mohawk Council of Akwesasne was previously known as the St Regis Band Council.
2. The St Lawrence Seaway Authority (herein referred to as the "SLSA") was incorporated by subsection 3(1) of the *St Lawrence Seaway Authority Act*, RSC 1952, c 242, (hereinafter the "SLSAA") and was constituted an agent of the Crown by subsection 3(2). The SLSAA was proclaimed in force on July 1, 1954.
3. By Order in Council PC 1962-1486, the Governor in Council approved the incorporation of a subsidiary of the SLSA for the purpose of operating and managing the international bridge between Cornwall, Ontario and Rooseveltown, New York.
4. The Seaway International Bridge Corporation, Ltd (herein referred to as "SIBC") was incorporated by Letters Patent issued on November 13, 1962 under Part I of the *Companies Act*, RSC 1952, c 53.

5. The Federal Bridge Corporation Limited (herein referred to as the "FBC") was incorporated by the SLSA under the *Canada Business Corporations Act*, RSC 1985 c C-44 on September 2, 1998.

6. The FBC is a "parent Crown corporation" within the meaning of s 2 of the *Financial Administration Act*, RSC 1985 c F-11.

7. Since December 1, 1998, the FBC is subject to the *Government Corporations Operations Act*, RSC 1985 c G-4 and is an agent of the Crown.

B. Territorial Divisions in Akwesasne

8. Following the *Treaty of Paris* of 1763, the boundaries of Quebec were fixed by the *Royal Proclamation* of 1763:

The Government of Quebec bounded on the Labrador Coast by the River St John, and from thence by a Line drawn from the Head of that River through the Lake St John, to the South end of the Lake Nipissim; from whence the said Line, crossing the River St Lawrence, and the Lake Champlain, in 45. Degrees of North Latitude, passes along the High Lands which divide the Rivers that empty themselves into the said River St Lawrence from those which fall into the Sea; and also along the North Coast of the Baye des Chaleurs, and the Coast of the Gulph of St Lawrence to Cape Rosieres, and from thence crossing the Mouth of the River St Lawrence by the West End of the Island of Anticosti, terminates at the aforesaid River of St John.

A part of the Traditional Lands of the Plaintiff are within the boundaries of the Province of Quebec as defined by the *Royal Proclamation*, the remainder being "lands reserved for the Indians."

9. The boundaries of Quebec were extended by the *Quebec Act, 1774*, which defined the boundaries of the Quebec as follows:

May it therefore please your most Excellent Majesty that it may be enacted; and be it enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same: That all the Territories, Islands, and Countries in North America, belonging to the Crown of Great Britain, bounded on the South by a Line from the Bay of Chaleurs, along the High Lands which divide the Rivers that empty themselves into the River Saint Lawrence from those which fall into the Sea, to a Point in forty-five Degrees of Northern Latitude, on the Eastern Bank of the River Connecticut, keeping the same Latitude directly West, through the

Lake Champlain, until, in the same Latitude, it meets the River Saint Lawrence: from thence up the Eastern Bank of the said River to the Lake Ontario; thence through the Lake Ontario, and the River commonly call Niagara and thence along by the Eastern and South-eastern Bank of Lake Erie, following the said Bank, until the same shall be intersected by the Northern Boundary, granted by the Charter of the Province of Pennsylvania, in case the same shall be so intersected: and from thence along the said Northern and Western Boundaries of the said Province, until the said Western Boundary strike the Ohio: But in case the said Bank of the said Lake shall not be found to be so intersected, then following the said Bank until it shall arrive at that Point of the said Bank which shall be nearest to the North-western Angle of the said Province of Pennsylvania, and thence by a right Line, to the said North-western Angle of the said Province; and thence along the Western Boundary of the said Province, until it strike the River Ohio; and along the Bank of the said River, Westward, to the Banks of the Mississippi, and Northward to the Southern Boundary of the Territory granted to the Merchants Adventurers of England, trading to Hudson's Bay; and also all such Territories, Islands, and Countries, which have, since the tenth of February, one thousand seven hundred and sixty-three, been made Part of the Government of Newfoundland, be, and they are hereby, during his Majesty's Pleasure, annexed to, and made Part and Parcel of, the Province of Quebec, as created and established by the said Royal Proclamation of the seventh of October, one thousand seven hundred and sixty-three.

10. Following the American Revolution, British and American authorities concluded The *Definitive Treaty of Peace* of 1783 which defined the boundary between British North America and the newly formed United States. The relevant provision of the Treaty is as follows:

[...] it is hereby agreed and declared, that the following are and shall be their boundaries, viz.; from the northwest angle of Nova Scotia, viz., that angle which is formed by a line drawn due north from the source of St Croix River to the highlands; along the said highlands which divide those rivers that empty themselves into the river St Lawrence, from those which fall into the Atlantic Ocean, to the northwesternmost head of Connecticut River; thence down along the middle of that river to the forty-fifth degree of north latitude; from thence by a line due west on said latitude until it strikes the river Iroquois or Cataraquy; thence along the middle of said river into Lake Ontario [...].

11. Since the *Definitive Treaty of Peace* of 1783, the Traditional Lands of the Plaintiff have been bisected by the International Boundary between what is now Canada and the United States.

12. Following the War of 1812, British and American authorities concluded the *Treaty of Ghent* of 1814. That Treaty provided for the determination of the boundary by two Commissioners, as follows:

ARTICLE THE SIXTH.

Whereas by the former Treaty of Peace that portion of the boundary of the United States from the point where the fortyfifth degree of North Latitude strikes the River Iroquois or Cataraquy to the Lake Superior was declared to be "along the middle of said River into Lake Ontario, through the middle of said Lake until it strikes the communication by water between that Lake and Lake Erie, thence along the middle of said communication into Lake Erie, through the middle of said Lake until it arrives at the water communication into the Lake Huron; thence through the middle of said Lake to the water communication between that Lake and Lake Superior:" and whereas doubts have arisen what was the middle of the said River, Lakes, and water communications, and whether certain Islands lying in the same were within the Dominions of His Britannic Majesty or of the United States: In order therefore finally to decide these doubts, they shall be referred to two Commissioners to be appointed, sworn, and authorized to act exactly in the manner directed with respect to those mentioned in the next preceding Article unless otherwise specified in this present Article. The said Commissioners shall meet in the first instance at Albany in the State of New York, and shall have power to adjourn to such other place or places as they shall think fit. The said Commissioners shall by a Report or Declaration under their hands and seals, designate the boundary through the said River, Lakes, and water communications, and decide to which of the two Contracting parties the several Islands lying within the said Rivers, Lakes, and water communications, do respectively belong in conformity with the true intent of the said Treaty of one thousand seven hundred and eighty three. And both parties agree to consider such designation and decision as final and conclusive. And in the event of the said two Commissioners differing or both or either of them refusing, declining, or wilfully omitting to act, such reports, declarations, or statements shall be made by them or either of them, and such reference to a friendly Sovereign or State shall be made in all respects as in the latter part of the fourth Article is contained, and in as full a manner as if the same was herein repeated.

13. Between 1816 and 1822, the Boundary Commission determined the final location of the boundary between the United States and British North America in the St Lawrence River. Upon completion of the work of the Commission, a number of islands in the St Lawrence River belonging to the Plaintiff became part of the United States.

14. By the *Constitutional Act, 1791*, the Imperial Parliament divided the Province of Quebec into two separate provinces called the Province of Upper Canada and the Province of Lower Canada. The Proclamation of 1791 fixed the boundaries of the two Provinces according to the following line of division:

To commence at a stone boundary on the north bank of the Lake St Francis, at the cove west of Pointe au Boudet, in the limit between the Township of Lancaster and

the Seigneurie of New Longueuil, running along the said limit in the direction of north thirty-four degrees; West to the westernmost angle of the said Seigneurie of New Longueuil, thence along the north-western boundary of the Seigneurie of Vaudreuil, running north twenty-five degrees, East until it strikes the Ottawas River, to ascend the said River into the Lake Tomiscanning, and from the head of the said Lake, by a line drawn due north until it strikes the boundary line of Hudson's Bay, including all the territory to the westward and southward of the said line, to the utmost extent of the country commonly called or known by the name of Canada.

15. The lands south of the International Boundary that were reserved to the Mohawks of Akwesasne by the *Royal Proclamation* of 1763 are today referred to as the St Regis Mohawk Reservation.

16. The lands north of the International Boundary are today referred to as the Akwesasne Reserves Nos 15 and 59.

C. Administration of Lands in Akwesasne

1. Pre-Confederation

17. The British Indian Department was established in 1755, with Sir William Johnson appointed as Superintendent reporting to the Commander in Chief of British Forces in North America.

18. In 1764, the administration of Indian affairs in British North America was divided between a southern and a northern district. The Northern District included Akwesasne. Sir William Johnson was appointed as the Superintendent of Indian Affairs for the Northern District on July 10, 1764. He held the post until his death on July 11, 1774.

19. Guy Johnson was appointed as the Superintendent of Indian Affairs for the Northern District in 1774 and held the post until 1781.

20. Sir John Johnson was appointed as the Inspector General of Indian Affairs on March 14, 1782. After the *Definitive Treaty of Peace* of 1783, Sir John Johnson had authority over Indian Affairs in Canada, holding the position of Superintendent General and Inspector General until his retirement in 1828.

21. Pursuant to instructions from Sir Frederick Haldimand in 1784, Sir John Johnson oversaw the survey and settlement of lands by United Empire Loyalists along the north shore of

the St Lawrence River from the western boundary of the Seigneurie of Nouvelle-Longueuil to the Bay of Quinte.

22. During the settlement of Loyalists, the islands in the St Lawrence River were confirmed as reserve lands for the Plaintiff's use and benefit.

23. The administration of Indian Affairs in St Regis was entrusted to a series of local superintendents or agents including William Gray, acting agent from 1796 to 1802, Louvigny de Montignany, superintendent from 1808 to 1813, and Jean-Baptiste de Lorimier, resident superintendent from 1812 to 1832.

24. Solomon Yeomans Chesley was appointed as agent of St Regis on or around August 21, 1820 to assist Jean-Baptiste de Lorimier in connection with the affairs of the Mohawks of Akwesasne. In 1832, Chesley was appointed as the Resident Superintendent of St Regis and held that position to 1845.

25. From 1796 to 1845, the British Chiefs of St Regis purported to grant long-term leases of various islands to Loyalist settlers without first surrendering the said islands to the Crown. The leases were administered by the Indian Agents for St Regis. More particularly:

- a. Milles Roches Island was leased to Jeremiah French in 1796 for a term of 999 years. The Island is presently known as Sheek Island.
- b. The island presently known as Thompson Island was leased to David Thompson in 1817 for a term of 99 years renewable for 999 years.
- c. The island presently known as Colquhoun Island West, also known as Snyder Island, was leased to Robert Colquhoun in 1817 for a term of 99 years.
- d. The island presently known as Hamilton Island was leased to William Hamilton in 1819 for a term of 99 years.
- e. The island presently known as Colquhoun Island East also known as Lewis Island, was rented to Robert Colquhoun in 1821 for a term of 99 years.
- f. Part of Cornwall Island was leased to Solomon Chesley in 1821 for a term of 99 years renewable for 999 years.

- g. The island presently known as Renshaw Island was leased to David Summers in 1831 for a term of 99 years.
- h. The leasehold of Solomon Chesley and Solomon Raymond on Milles Roches Island was confirmed in 1837.

26. Also during this period, an island referred to as "Captain Fraser's Island" was surveyed in 1798. In or around 1801, the Crown purportedly granted the island, described as a peninsula connected to the mainland by a rocky isthmus, to William Fraser. This island is presently known as Presquile Island.

27. The Provinces of Upper and Lower Canada were united by the *Act of Union* (1840) which came into force in 1841. The administration of Indian Affairs was amalgamated and placed under the authority of the Governor General. The Indian Department was reorganized in 1844. The office of Superintendent General of Indian Affairs was continued.

2. Post-Confederation

28. After Confederation, the administration of the Akwesasne Reserve Lands continued under the Superintendent General of Indian Affairs, now an office of the Crown in Right of Canada.

a. Sheek Island Canal Expropriation

29. In 1894, the Department of Railways and Canals appropriated lands on Sheek Island for the enlargement of the Cornwall Canal.

30. There is no record of an order of the Governor in Council approving the taking of lands on Sheek Island in 1894, in spite of the provisions of the *Indian Act*, RSC 1886, c 43 as amended by s 5 of SC 1887, c 33.

31. The Governor in Council approved settlements with lessees who were generously compensated. The Department of Indian Affairs received a portion of the compensation for unpaid rents and for the loss of future revenue.

32. In 1904, the Department of Railways and Canals appropriated additional land on Sheek for a further enlargement of the Cornwall Canal.

33. There is no record of an order of the Governor in Council approving the taking of lands on Sheek Island in 1904.

34. The lessees were compensated for losses arising from the appropriation of 1904. The Department of Indian Affairs received part of the compensation for unpaid rents and for the loss of future revenue.

35. Some of the land appropriated by the Department of Railway and Canals was flooded as a result of the enlargement of the Cornwall Canal. The "canal lands" that were not flooded were licenced by the Department of Railways and Canals primarily as cottage sites until the construction of the Seaway and Power Project.

b. Cornwall Island Railway Right-of-Way

36. In June 1897, the Ottawa and New York Railway Company applied to the Superintendent General of Indian Affairs to acquire land to construct a rail line across Cornwall Island and a station.

37. On July 14, 1897, on the recommendation of the Minister of Railway and Canals, the Governor in Council approved the taking of a portion of the reserve by the railway company pursuant to s 35 of the *Indian Act*, RSC 1886, c 43 as amended by s 5 of SC 1887, c 33, by Order in Council PC 1972, "compensation to be made for the land and the improvements thereon in the same manner as is provided with respect to the lands or rights of other persons".

38. Compensation was paid for the land, apart from improvements, to the credit of the Capital Funds of the St Regis Band. Individual occupiers were paid for their respective improvements.

39. The railway company engaged contractors for the construction of the railway crossing which required extensive earthworks to grade the corridor.

40. On October 5, 1897, letters patent for the lands were issued to the railway company under the Great Seal of Canada.

41. On January 18, 1898, the railway company made an application to the Superintendent General of Indian Affairs for additional land for the construction of the railway.

42. On February 14, 1898, on the recommendation of the Minister of Railway and Canals, the Governor in Council approved the taking of a further portion of the reserve by the railway company by Order in Council PC 296, "compensation to be made for the land and the improvements thereon in the same manner as is provided with respect to the lands or rights of other persons."

43. Compensation was paid for the additional land, apart from the improvements, to the credit of the Capital Funds of the St Regis Band. One individual occupier was paid for his improvements.

44. On April 21, 1898, letters patent for the additional lands were issued to the railway company under the Great Seal of Canada.

45. The railway was in operation from 1899 until February 1957.

c. Cornwall Island Toll Highway

46. In the spring of 1929, the National Toll Bridge Company sought the approval of the Department of Indian Affairs to build a toll highway across Cornwall Island, parallel to the railway right-of-way.

47. In September 1929, the Department of Indian Affairs prepared a resolution which was passed by the St Regis Band Council which provided "that the title to the said roadway shall remain in the Indians," that compensation be paid, and that the Mohawks of Akwesasne be exempted from the payment of tolls.

48. The National Toll Bridge Company abandoned the project in the summer of 1931. Soon after, the Cornwall-Northern New York International Bridge Corporation (both before and after its incorporation) revived the plan to build a toll highway across Cornwall Island.

49. The Cornwall-Northern New York International Bridge Corporation sought the approval of the Department of Indian Affairs for the highway crossing Cornwall Island, with the understanding that it would agree to similar conditions as those set forth in September 1929.

50. In December 1932, the Department of Indian Affairs prepared a resolution which was passed by the St Regis Band Council which "requests the Superintendent General of Indian Affairs to have set apart a road allowance [...] through this reserve [...] subject to" certain

provisions, including “that the title to the said roadway shall remain in the Indians,” that compensation be paid for improvements and lands, and that the Mohawks of Akwesasne be exempted from the payment of tolls.

51. On August 14, 1933, the Crown, represented by the Superintendent General of Indian Affairs, granted a twenty-five (25) year licence of occupation to the Cornwall-Northern New York International Bridge Corporation for the lands needed to construct the highway across Cornwall Island, subject to certain conditions, including:

1. “Title to the lands [...] shall remain in his Majesty the King.

[...]

4. All the Indians of the St Regis Band, the Missionary and all Departmental Officials, shall have for and during the term of any License granted by the Superintendent General of Indian Affairs to the Cornwall-Northern New York International Bridge Corporation, and of any renewal thereof, the right to go to and fro over the said road and bridges used in connection with the said road without any charge, tax or tolls whatsoever in respect of their persons, their vehicles, implements, stock or their personal belonging; provided, however that an Indian using his vehicle for hire or for the transport for hire of persons or freight or for any purpose of gain, shall not be allowed free passage.”

52. After construction was completed, Cornwall-Northern New York International Bridge Corporation operated the toll highway across Cornwall Island, including the collection of tolls.

53. On September 16, 1949, Cornwall-Northern New York International Bridge Corporation assigned its interest in the licence of occupation of August 14, 1933 to the Cornwall International Bridge Company.

d. R v McMaster

54. On March 17, 1926, in an action for possession in the Exchequer Court of Canada brought by the Attorney General of Canada, the Court determined that the long-term lease of Thompson Island was void in the absence of a surrender pursuant to the terms of the *Royal Proclamation* of 1763, and that the Crown was entitled to the immediate possession of Thompson Island for the benefit of the Mohawks of Akwesasne.

55. The Court held that Thompson Island “was in Indian occupation from the date of the proclamation of 1763, and doubtless prior to that date, until 1819, when the same was leased in

writing, to one David Thompson, by certain chiefs of the Indian tribe then in occupancy of the same, and which constituted a part of what was known as the St Regis Indian Reserve,” and that “there can be no doubt but that the property in question was part of an Indian Reserve” subject to the *Royal Proclamation*.

56. The Court also held that the “power of the Crown to manage and legislate in respect of Indian lands, surely implies the right to bring action to recover or protect any interest of the Indians in such lands.”

e. St Regis Islands Act, 1926

57. Following the decision of the Exchequer Court in *R v McMaster*, with similar cases pending, Parliament enacted the *St Regis Islands Act* in 1926.

f. R v Jack

58. On May 28, 1928, the Exchequer Court of Canada rendered judgment on the validity of the long-term lease of Hamilton Island in an action for possession brought by the information of the Attorney General of Canada.

59. The Court described Hamilton Island as being “ever set apart prior to the 21st June, 1819, for the use and benefit of the Band of Iroquois Indian known as the St Regis Tribe, and which has never been surrendered by the said Indians to the Crown.”

60. The Court determined that case of *R v McMaster* involved “questions of law and facts absolutely identical with the present case” and decided that “the lease of 1819 is null and void *ab initio* for want of power and authority on behalf of the Indians to enter into such agreement.” The Court held that His Majesty the King was entitled to the possession of the Island and the Defendant was not entitled to recover the value of his improvements.

61. The Supreme Court of Canada confirmed the judgement of the Exchequer Court of Canada on November 4, 1929.

62. In its factum filed as Respondent on the appeal to the Supreme Court of Canada, the Attorney General, submitting that the judgement of the Exchequer Court of Canada should be “affirmed in every respect,” made the following remarks:

- a. “the said Island forms part of the unsurrendered Indians lands of the said Tribe of St Regis, presumably set apart some time prior to 21st day of June, 1819 [...] for the use and benefit of the said Indians”;
- b. “this Island has been considered and dealt with, at all times, by all the parties [...] including the Department of Indian Affairs and the St Regis Tribe, as forming part of the reserve of the said St Regis Indians or as Indian lands burdened with the Indian right of occupancy and usufruct”;
- c. “the Indian right attached to this Island is incontrovertible”;
- d. “Being Indian lands they are subject to the provisions of section 40 of the Articles of Capitulation dated 8th September, 1760 [...], and to that part of the Royal Proclamation dated 7th October 1963 which deals with the question of Indian rights [...], as well as the various Indian Acts in force from time to time [...] and so far as the Indian right is concerned, alienation by sale or lease of Indian lands has always been forbidden (since Canada was acquired by Great Britain), except upon a surrender by the Indians, which could only be made to the Crown”;
- e. “From the date of the said Proclamation down to the present time the regulations respecting the dealing with Indian lands are the same, in effect, as set out in the said Proclamation and have been, from time to time, embodied in successive statutes down to the present Indian Act [...]”

g. *R v Easterbrook*

63. On May 28, 1928, the Exchequer Court of Canada rendered judgement on the validity of the long-term lease of the Easterbrook Farm on Cornwall Island in an action for possession brought by the Attorney General of Canada.

64. The Court described the parcel of land situated on Cornwall Island as “forming part of certain tracts of land ever set apart prior to the 10th March, 1821, for the use and benefit of the Band of Iroquois Indian known as the St Regis Tribe, and which has never been surrendered by the said Indians to the Crown.”

65. The Court determined that case of *R v McMaster* involved “questions of law and facts absolutely identical with the present case” and decided that the long-term lease “of 1821 is null

and void *ab initio* for want of power and authority on behalf of the Indians to enter into such agreement”.

66. The Court held that His Majesty the King was entitled to the possession of the lands on Cornwall Island and that the Defendant was not entitled to recover the value of his improvements.

67. In December 1931, the Supreme Court of Canada had “no doubt” that the conclusions of the Exchequer Court “must be maintained” and so dismissed the appeal of the respondent Easterbrook.

h. Easterbrook Subdivision

68. In 1933, the Easterbrook Farm was surveyed and subdivided into narrow lots fronting on both the north and south shore of Cornwall Island. These lots were allotted to various individual occupiers who obtained location tickets from Indian Affairs.

i. Renewal of Leases on Sheek Island

69. Following the judgments of *R v McMaster*, *R v Jack* and *R v Easterbrook*, the Superintendent General of Indian Affairs took the position that the long-term lease of Sheek Island was void.

70. As of February 1932, the Superintendent General of Indian Affairs Department of Indian contemplated a new scheme to grant new leases to the occupiers of Sheek Island without first obtaining a surrender of the island from the Mohawks of Akwesasne.

71. The new leases were granted between 1934 and 1943 for a term of 25 years beginning on January 1, 1933, renewable for two further terms of 25 years each, “upon such terms and conditions as may be considered satisfactory.”

E. The Seaway and Power Projects

1. Precursors

72. On January 11, 1909, the United States and the United Kingdom signed the *Boundary Waters Treaty* of 1909, ratified in 1910. The Treaty was first given legal effect by *An Act*

relating to the establishment and expenses of the International Joint Commission under Waterways Treaty of January the eleventh, nineteen hundred and nine, SC 1911, c 28.

73. Pursuant to Article 7, the parties agree to establish and maintain an International Joint Commission (“IJC”), with three commissioners appointed by the President of the United States, and three commissioners appointed by His Majesty on the recommendation of the Governor in Council.

74. Pursuant to Article 3, the parties agree not to permit the use, obstruction, or diversion of boundary waters affecting the natural level or flow of those boundary waters, except under the authority of the United States and the Dominion of Canada within their respective jurisdictions and with the approval of the International Joint Commission.

75. Pursuant to Article 4, the United States and Canada have equal and similar rights in the use of boundary waters. No use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in the following order of preference:

1. Uses for domestic and sanitary purposes;
2. Uses for navigation, including the service of canals for the purposes of navigation;
3. Uses for power and for irrigation purposes.

76. On January 21, 1920, Canada and the United States referred questions relating to the improvement of the St Lawrence River between Montreal and Lake Ontario for navigation and power to the IJC for investigation and report.

77. The governments of Canada and the United States constituted a Joint Board of Engineers (“JBE”) in 1920 to report to the IJC on the engineering features of the proposed improvements. The JBE submitted its report to the IJC in July-August, 1921.

78. The IJC completed its report on December 21, 1921 and submitted the report to the governments of Canada and the United States in January 1922. The report confirmed the viability of improvements in the St Lawrence River to permit deep-draft vessels to navigate from Montreal to Lake Ontario and to generate hydroelectric power. The IJC recommended that the

question of the development of the St Lawrence River for navigation and power be referred to an enlarged board of engineers.

79. The new Joint Board of Engineers was constituted in 1924 and provided with terms of reference in 1925.

80. The JBE submitted a report to the governments of Canada and the United States dated November 16, 1926. In that report, the JBE made recommendations respecting the construction of navigation and power works in Lake St Francis and the International Rapids Section of the St Lawrence River. The United States Section of the JBE recommended a single-stage project for the International Rapids Section of the St Lawrence River; the Canadian Section of the JBE recommended a double-stage project.

81. In 1928, the Governor in Council referred questions relating to the jurisdiction of Canada and the Provinces in relation to the development of the St Lawrence River. The Supreme Court of Canada issued its opinion on the questions submitted on February 5, 1929 in *Reference Re Waters and Water Powers*, [1929] SCR 200.

82. On December 30, 1929, the Canadian members of the JBE and engineers from the Hydro-Electric Power Commission of Ontario ("Conference of Canadian Engineers") submitted a report to the government of Canada on the International Rapids Section of the St Lawrence River. In that report, the Conference of Canadian Engineers made recommendations respecting the construction of a double-stage project for navigation and power works in the International Rapids Section of the St Lawrence River which would have flooded a much smaller area of land than a single-stage project.

83. 71. On April 9, 1932 the Joint Board of Engineers (reconvened) submitted a report to the governments of Canada and the United States. In that report, the JBE was of the unanimous opinion that the two-stage project was practicable and feasible from an engineering point of view and that the project adequately provided for navigation and power requirements.

84. On March 1, 1932, the Governor in Council exercised the authority granted by *An Act respecting the Beauharnois Light, Heat and Power Company, Limited*, SC 1931, c 19, s 2, by issuing Order in Council PC 504 which prescribes the conditions for the diversion of waters of the St Lawrence River by the Beauharnois Light, Heat, and Power Company.

85. Section 2 of the Order in Council makes reference to “the improvement of inland navigation by the development of a deep waterway, which is now in progress, [...] in part in, over or along the St Lawrence River, requires that the canal now being constructed [...] should be made available for navigation for vessels of such size and draught as may use the Welland Ship Canal upon its completion.”

86. The Order in Council further provides, at section 12, that the Company is to convey to the Crown the Beauharnois Canal and all the lands and works that are “deemed by the Governor in Council necessary or useful for the maintenance and improvement of navigation by means of the said canal and the maintenance and operation thereof for navigation purposes between Lake St Francis and Lake St Louis.”

87. The Order in Council further provides, at section 15, that “whenever the Governor in Council so declares, the public right of navigation within and along the said canal or any portion thereof shall thereafter exist to the same extent as and in manner similar to that provided in the case of the Welland Ship Canal [...].”

88. Construction of the Fourth Welland Canal between Port Colborne on Lake Erie and Port Weller on Lake Ontario was completed in 1932. The canal was officially opened on August 6, 1932. The canal had a minimum depth of 25-feet. The locks on the canal were constructed to the specifications of the proposed deep waterway in the St Lawrence River.

89. On March 19, 1941, the governments of Canada and the United States signed *An Agreement between Canada and the United States of America relating to the Great Lakes–St Lawrence Basin Development*. The agreement provides for the preparation of plans and specifications respecting the construction of a single-stage project for deep water (27-foot) navigation and power works in Lake St Francis and the International Rapids Section of the St Lawrence River.

2. Approvals

90. On June 30, 1952, the Governments of Canada and the United States jointly submitted an application to the IJC for an order of approval of certain works for the development of power in the International Rapids Section of the St Lawrence River.

91. The application sought approval of the construction of works jointly by entities to be designated by the respective Governments, in accordance with the "Controlled Single Stage Project (238-242)" which was the subject of the Agreement of March 19, 1941 between the Canada and the United States of America.

92. Canada notified the IJC that it would concurrently construct, maintain and operate all works necessary to provide and maintain a deep waterway between the Port of Montreal and Lake Erie.

93. On October 29, 1952, the IJC issued an order approving the construction, maintenance and operation of the works subject to certain conditions.

94. On May 13, 1954, Congress passed the *Wiley-Dondero Act* which approved the construction and operation of a deep waterway in American waters. With the passage of this Act in the United States, the government of Canada abandoned plans to construct an "all-Canadian Seaway."

95. The *Wiley-Dondero Act* provided for the creation of the Saint Lawrence Seaway Development Corporation ("SLSDC") to construct part of the St Lawrence Seaway in the United States. The Act enabled the SLSDC to enter into certain arrangements with the SLSA relative to the construction and operation of the St Lawrence Seaway.

96. Order in Council PC 1959-204, issued by the Governor in Council on February 19, 1959:
- a. Made the Welland Ship Canal part of the Seaway effective on April 1, 1959;
 - b. Declared the public right of navigation to exist on the Beauharnois Canal effective April 1, 1959; and
 - c. Entrusted the administration of the Welland Canal and the Beauharnois Canal (among others) to the SLSA.

3. Description of the Projects

97. The St Lawrence Seaway is a deep waterway between the Port of Montreal and Lake Erie which includes the construction, maintenance, and operation of the following physical components:

- a. The South Shore Canal, the Beauharnois Canal, the Wiley-Dondero Canal, the Iroquois Canal, and the Welland Canal;
- b. Locks, including the Snell Lock, the Eisenhower Lock, and the Iroquois Lock;
- c. Water level control facilities, including the facility at Iroquois, the Moses-Saunders Dam, and the Beauharnois Dam;
- d. A navigation channel in the St Lawrence River, with a minimum depth of 27 feet, part of which was dredged;
- e. Dykes and other works to control currents in the St Lawrence River; and
- f. Navigation aids, including lighthouses and rangefinders constructed on dry land, and buoys.

In addition to its physical components, the St Lawrence Seaway comprises the following:

- a. A regulatory regime governing the operation of ships in transit in the Seaway, including a regime governing the speed of vessels;
- b. A regulatory regime governing the level and flow of the St Lawrence River;
- c. Administrative agreements between the Crown and the Canadian manager of the St Lawrence Seaway; and
- d. The administration of lands in Canada by the Crown or by Crown agents.

98. The Power Project includes the construction, maintenance, and operation of the following physical components:

- a. The Moses-Saunders Dam, part of which is located in Canada and called the R.H. Saunders Generating Station, and part of which is located in the United States and called the St Lawrence-Franklin D. Roosevelt Power Project;
- b. The Iroquois Dam, referred to above;
- c. The Head Ponds;
- d. Dykes and earthworks in Canada and the United States;
- e. The diversion of waters;

- f. Ice booms; and
- g. Transmission lines.

In addition to its physical components, the Power Project comprises the following:

- a. The regulatory regime governing the level and flow of the St Lawrence River referred to above;
- b. Administrative agreements between the Ontario and New York utilities that operate the facility;
- c. Water leases and other interests in land granted by the Province of Ontario to the Hydro-Electric Power Commission of Ontario from time to time; and
- d. The administration of certain lands by the Province of Ontario.

Part II - The Appropriation of Lands

A. Power Project

1. Sheek Island

99. As alleged in paragraph 20.5 of the Amended Statement of Claim, the Governor in Council purported to transfer the administration and control of Sheek Island to the Province of Ontario by Order in Council PC 1955-1709 dated November 9, 1955.

100. As alleged in paragraph 20.5a, the Governor in Council failed to impose suitable conditions on the transfer. More particularly, the Order in Council does not contain a reversion clause like that found in Order in Council PC 1956-742 of May 17, 1956 although it was known that only part of Sheek Island would be flooded.

101. At the present time, approximately 60 acres of Sheek Island are above the 250' IGLD contour. Depending on the water level in the head pond, between 75 and 100 acres of Sheek Island are not flooded.

102. As alleged in paragraph 20.5c the Governor in Council failed to ensure that the Plaintiff was fully compensated for its entire interest in Sheek Island.

103. Indian Affairs requested the Veteran's Land Administration ("VLA") to undertake an appraisal of Sheek Island on or around June 7, 1955, with instructions to attempt to separate the appraisal of those parts of the island considered to be reserve lands from lands that were previously appropriated for the Cornwall Canal but not flooded (ie canal lands).

104. On July 11, 1955, VLA provided Indian Affairs with its first appraisal of Sheek Island.

105. Just prior to the issuance of the Order in Council, on November 8, 1955, Indian Affairs instructed VLA to prepare a revised appraisal.

106. On November 17, 1955, the Province of Ontario purported to transfer its interest in Sheek Island to the Hydro-Electric Power Commission of Ontario ("HEPCO") by quitclaim deed.

107. On November 18, 1955, VLA provided Indian Affairs with a revised appraisal of Sheek Island in the amount of \$170,115 for land and timber. The revised report did not specify the geographical limits or the total acreage appraised.

108. Officials from Indian Affairs discussed the possibility of seeking an independent appraisal of Sheek Island, but this was never carried out.

109. On November 19, 1955, the St Regis Band Council passed a resolution which requested a rate of no less than \$240 per acre. In forwarding this resolution to the Indian Affairs Branch in Ottawa, the Superintendent of the St Regis Agency indicated that VLA had unofficially appraised Sheek Island at \$198,000.

110. On January 18, 1956, an appraisal report was prepared for HEPCO. The report indicated that the total area under consideration was 929 acres which excluded the canal lands. The report appraised the bare land value of Sheek Island at \$122,000.

111. On January 28, 1956, the St Regis Band Council passed a resolution which indicated that it would not accept a price less than the appraisal arrived at by VLA.

112. Negotiations took place between officials from Indian Affairs and HEPCO with respect to the amount to be paid for Sheek Island, culminating in Indian Affairs accepting an offer of \$120,000 from HEPCO. Indian Affairs received a cheque for \$120,000 on or around February 10, 1956.

113. On February 24, 1956, in the presence of officials from Indian Affairs, the St Regis Band Council passed a resolution authorizing Indian Affairs to accept \$120,000 for about 944 acres of Sheek Island.

114. No amount was paid to Indian Affairs for the benefit of the Plaintiff for the canal lands on Sheek Island, which lands were not included in the Order in Council of November 9, 1955.

115. The Crown failed to properly advise the St Regis Band Council, the VLA appraisers, and HEPCO of the full extent of the rights and title of the Plaintiff.

116. The Crown failed to conduct an adequate preliminary assessment and inventory of the rights and title of the Plaintiff in respect to Sheek Island.

117. The transfer of the administration and control of Sheek Island was precipitated by the request of HEPCO to take immediate control of Sheek Island to undertake urgent work on its cofferdam.

118. The compensation failed to take account of the following:

- a. The Plaintiff's title to the lands and improvements on Sheek Island;
- b. The limited interest of the lessees of Sheek Island in 1955 and 1956;
- c. The unique adaptability of Sheek Island to hydroelectric development; and
- d. The interest of the Plaintiff in the canal lands.

2. Toussaint Island

119. As alleged in paragraph 20.6 of the Amended Statement of Claim, the Governor in Council purportedly authorized HEPCO to exercise its statutory power to expropriate Toussaint Island pursuant to s 35 of the *Indian Act* and transferred the administration and control of Toussaint Island to the Province of Ontario by Order in Council PC 1956-742 of May 17, 1956. More particularly:

- a. The authorization and transfer were subject to the reversion of the portion of Toussaint Island "that will not be flooded";
- b. The legal description of the island reserved all mines and minerals from the authorization and transfer.

120. Part of Toussaint Island was excavated to an approximate depth of 27 feet below water level for the purpose of navigation. The excavated soil was deposited on the remainder of Toussaint Island, substantially impairing its use.

121. Approximately 29 acres of Toussaint Island are currently above the 250' IGLD contour.

122. Navigation aids were constructed on the south shore of the unexcavated portion of Toussaint Island and are presently under the administration of the Canadian Coast Guard.

3. Other Islands

123. The Governor in Council purportedly authorized HEPCO to exercise its statutory power to expropriate the Adams Island, Steen Island, Wagner Island, Grassy Island, Indian Island, and Doran Island pursuant to s 35 of the *Indian Act* by Order in Council PC 1956-1416 of September 20, 1956.

124. The authorization was subject to the reversion of the portion or portions of islands "that will not be flooded."

125. After the completion of the works, Steen Island, Wagner Island, Grassy Island, Indian Island, and Doran Island were all flooded. Adams Island is barely flooded. Approximately 27 acres of Adams Island are currently above the 250' IGLD contour.

B. Seaway Project

1. Stanley Island

126. As alleged in paragraph 20.8 of the Amended Statement of Claim, the Governor in Council (a) purportedly authorized the SLSA to exercise its statutory power under s 18 of the *SLSAA* to expropriate a portion of Stanley Island, (b) consented to the exercise by the SLSA of its statutory authority pursuant to s 35 of the *Indian Act*, and (c) authorized the issuance of letters patent granting the said lands to the SLSA in the event of final agreement on compensation, by Order in Council PC 1956-1760 of November 22, 1956.

127. Following the taking of a portion of Stanley Island, contractors for the SLSA demolished a concrete pier, excavated a portion of the island below the surface of the St Lawrence River, and

constructed a lighthouse on that part of the land that was purportedly expropriated but not excavated.

128. Navigation aids were also placed elsewhere on Stanley Island. The Plaintiff has received permit fees for the occupation of these lands.

2. Kawehnoke: Appraisal

129. As alleged in paragraph 20.9 of the Amended Statement of Claim, the Governor in Council purported to (a) authorize the SLSA to exercise its statutory power under s 18 of the *SLSAA* to expropriate four parcels of land on Cornwall Island, (b) consent to the exercise by the SLSA of its statutory authority pursuant to s 35 of the *Indian Act*, and (c) authorize the issuance of letters patent granting the said lands to the SLSA in the event of final agreement on compensation, by Order in Council PC 1956-1761 of November 29, 1956.

130. The SLSA paid compensation to Mohawks with certificates of possession for lots on Cornwall Island, and to the Plaintiff for certain lots deemed to be “band-owned land,” following an appraisal based on contemporaneous sales of lots on the north shore of the St Lawrence River.

131. The appraiser took no account of the collective interest of the Mohawks of Akwesasne in the lands on Kawehnoke that were purportedly expropriated and did not account for the Plaintiff’s right to benefit from the economic development of the Traditional Lands and the Akwesasne Reserves.

132. The appraiser took no account of injurious affection to lands that were not purportedly expropriated.

133. The appraiser took no account of the collective use of lands along the shores of Kawehnoke, notably for swimming, boating, fishing, and for watering livestock.

134. The appraiser fixed the compensation for “band equity” at 10% without any support other than the prior practice of the Indian Affairs Branch.

135. The compensation received by the Mohawks of Akwesasne for “band equity” was no more than would reasonably compensate the Mohawks of Akwesasne for administrative costs incurred by the St Regis Band Council during the expropriation process and thereafter.

136. With respect to the lands appropriated for the bridge corridor, the Crown and the SLSA failed to give due consideration to the following:

- a. The interests of the Mohawks arising under the provisions of the *Indian Act* that exempt Indians from the payment of taxes;
- b. The powers of the Plaintiff to raise revenues pursuant to the provisions of the *Indian Act*;
- c. The historical use of Cornwall Island as an international crossing;
- d. The interest of the Plaintiff in the planning of land use on the Akwesasne Reserve; and
- e. The restricted access to the highway between the bridges over the north and south channel.

Part III

B. Damages Resulting from the Seaway Project

1. Works On Kawehnoke (Cornwall Island)

a. *Claims specific to Area M*

137. Under the supervision of the SLSA, contractors transported soil excavated from various parts of Cornwall Island and deposited that soil on approximately 180 acres of agricultural land known as "Area M."

138. Area M was designed by SLSA engineers to receive an estimated 2,000,000 cubic yards of excavated soil in a two-year period.

139. The primary purpose of Area M was to permanently dispose of soil excavated during the construction of the navigation channel.

140. The SLSA represented the deposit of soil in Area M to the St Regis Band Council and to the Indian Affairs Branch as a means to improve low-lying and poorly drained lands for agricultural and residential use.

141. Neither the SLSA nor the Crown consulted an agronomist or a suitably qualified engineer to assess the proposed land-forming project.

142. The SLSA and the Crown failed to inform the Mohawks of Akwesasne of the risk that the agricultural value of Area M would be substantially diminished by the deposit of the projected quantity of excavated soil.

143. The SLSA misrepresented the time that would be required for Area M to return to appropriate levels of agricultural productivity, representing a return to productivity in two years when, in fact, the land-forming and rehabilitation work took seven years or more.

144. L-A Couture, a lawyer acting on behalf of the SLSA or the Crown, or both, drafted a band council resolution purporting to authorize the deposit of fill in Area M, which resolution was passed by the St Regis Band Council on January 15, 1957.

145. Mr Couture knew, or should have known, that s 28 of the *Indian Act*, RSC 1952, c 249, as amended, prevented the St Regis Band Council from legally authorizing the occupation or use of Area M by the SLSA and its contractors.

146. The SLSA or the Crown, or both, nevertheless accepted the resolution of January 15, 1957, as the Plaintiff's "approval" for work in Area M.

147. The SLSA did not obtain the approval of the Crown to use Area M for the permanent disposal of excavated soil. The Crown knew of the intentions of the SLSA and, at all times, tolerated the work.

148. In the absence of a permit from the Minister of Citizenship and Immigration, the work in Area M constituted a trespass, and the failure of the Crown to protect the interests of the Mohawks of Akwesasne constitutes a breach of fiduciary duty.

149. In the alternative, the SLSA became a fiduciary when it obtained the agreement of the St Regis Band Council to the proposal to deposit soil in Area M in the form of a resolution passed on January 15, 1957, and took discretionary control over the design and management of Area M.

150. The SLSA stripped the topsoil from Area M and stored that topsoil prior to depositing fill. This was consistent with good agricultural practice and indicates the intention of the SLSA to preserve the agricultural potential of Area M.

151. The SLSA took no measures during the land-forming phase of the project, or took inadequate measures, to ensure that Area M would have suitable surface and subsurface drainage for agricultural purposes.

152. The SLSA took no measures, or took inadequate measures, to ensure that the upper strata of fill in Area M were reasonably exempt from boulders and cobbles.

153. After completion of grading, the SLSA took no measures, or took inadequate measures, to correct surface depressions in Area M by means of land-levelling equipment prior to the distribution of topsoil in Area M.

154. The SLSA undertook a soil rehabilitation project under the supervision of several experts. The soil rehabilitation program was consistent with good agricultural practice and indicates the intention of the SLSA to improve the topsoil of Area M.

155. The SLSA failed to consider the level of agricultural technology and expertise of the Mohawks of Akwesasne in 1959 and whether the Mohawks had the equipment and experience to successfully work the soil in Area M before, during, and after the soil rehabilitation program.

156. The attempts of the SLSA and of the St Regis Band Council to rehabilitate the topsoil in Area M during the period from approximately 1961 to 1963 did not, and could not, remediate the results of the negligent design and supervision of the land-forming and grading work in Area M.

157. As a result of the works in Area M:

- a. The agricultural utility of approximately 46 acres of land has been substantially and irremediably diminished by the deposit of excessively stoney fill in the upper strata of the soil;
- b. The agricultural utility of approximately 105 acres of land is presently compromised by inadequate surface drainage which is remediable;
- c. The residential utility of approximately 40 acres of land is presently compromised by drainage and soil compaction problems;

- d. Road infrastructure is compromised by inadequate drainage; and
- e. Community construction projects are more challenging and costly.

158. Moreover, the SLSA failed to provide adequate drainage measures when they built the haul road from the excavation site to Area M, which resulted in ponding along Wolf Lane (Seymour Road) in lot 137 and at the intersection of Wolf Lane and Cornwall Island Road.

159. In the late 1990s, the Mohawk Council of Akwesasne incurred costs to remedy this drainage problem by building large drainage ditches running the length of Wolf Lane (Seymour Road) from the cross-roads to the south channel of the St Lawrence River.

b. Claims specific to Area F

160. Under the supervision of the SLSA, contractors excavated parts of lots 62A, 63, 66, 67, 68 (in whole), 69, 94, and 95 and transported the soil on a haul road constructed along the south shore of lots 95, 96, 97, 100, and 108 where the soil was deposited on the shore of Cornwall Island and in the adjacent waters of the St Lawrence River. The quantity of soil deposited was sufficient to create an area of reclaimed land referred to herein as "Area F."

161. The SLSA did not obtain the approval of the Crown to use parts of lots 95, 96, 97, 100, and 108 for the permanent disposal of excavated soil. The Crown knew of and tolerated the work.

162. The SLSA took no measures, or took inadequate measures, to ensure that the surface and subsurface drainage of lots 95, 96, 97, 100, and 108 into the St Lawrence River would not be impeded by the deposit of soil along the shore and in the adjacent waters.

163. Upon the completion of work, Area F was considerably higher than the adjacent lands to the north which impeded the drainage of the relevant lots.

164. The use of lots 95, 96, 97, 100, and 108 was impaired due to the impoundment of surface water behind the reclaimed lands.

165. The SLSA were notified of the nuisance caused by Area F and took steps to correct the surface drainage in 1966. However, the work undertaken by the SLSA was inadequate and a substantial part of the land north of Area F was covered by standing water, including lot 97.

166. The Mohawk Council of Akwesasne acquired lot 97 in 1969. Beginning in 1989, the MCA planned and constructed drainage ditches which effectively remediated the nuisance caused by Area F.

167. After the construction of ditches, the MCA has been responsible for the maintenance of the drainage ditch around Area F, which involves work to periodically excavate the accumulated soil and sediment in the ditch.

2. Return of Lands

168. As alleged in paragraph 44 of the Amended Statement of Claim, the Crown and its agents have an obligation to return approximately 128 acres of land on Kawehnoke to the Plaintiff, including the following:

- a. 20.63 acres which were part of the old New York Central Railway right of way;
- b. 58.32 acres of reclaimed land adjacent to the shore line;
- c. 14.61 acres of expropriated land that it was to return under Order in Council PC 1958-1034; and
- d. 34.51 acres of land expropriated under Order in Council PC 1956-1761.

169. In 1956, the SLSA acquired the assets of the New York Central Railway including a right-of-way crossing Cornwall Island. Upon the decommissioning of the railway in 1957, the lands were surplus to the requirements of the SLSA.

170. No later than December 1956, the SLSA undertook to convey the railway lands to Her Majesty for the use and benefit of the Mohawks of Akwesasne, giving rise to a binding equitable obligation.

171. Prior to the taking of lands on Cornwall Island for the construction of the Seaway, the SLSA and the Crown made representations to the St Regis Band Council to the effect that reclaimed lands would become part of the reserve and would be turned over to the use of the Mohawks of Akwesasne.

172. No later than 1964, the SLSA determined that the reclaimed lands were surplus to its requirements and communicated its intention to convey the reclaimed lands to Her Majesty for the use and benefit of the Mohawks of Akwesasne.

173. A survey of the reclaimed lands was completed by October 1968 by DH Browne, OLS and the reclaimed lands were identified in the relevant surveys as follows:

- a. The parcel of land identified as Part 1 on CLSR 57225, referred to herein as “Area F.”
- b. A small parcel of land identified as Part 3 on CLSR 57225.
- c. The parcel of land identified as Part 1 on CLSR 57226, referred to as “Area K.”
- d. The parcels of land identified as Part 1, Part 3, Part 5, and Part 7 on CLSR 57227.

174. No later than 1964, the SLSA determined that it no longer required approximately 49 acres of land on Cornwall Island taken in 1956 and 1958 and communicated its intention to convey the lands to Her Majesty for the use and benefit of the Mohawks of Akwesasne.

175. In any event, all of the lands identified in paragraph 44 of the Amended Statement of Claim were no longer required by the SLSA as of 1964 and are referred to as “surplus lands.”

176. No later than 1972, and thereafter until its dissolution, the SLSA refused to transfer any surplus lands on Kawehnoke until it received a full and final release from the Plaintiff for all claims arising from the works on Cornwall Island and effectively opposed the return of the lands identified in paragraph 44 to the Akwesasne Reserve.

177. The failure of the SLSA to convey lands on Cornwall Island that were not required for the operations of the Seaway was a breach of prior undertakings of the Crown and of the SLSA to transfer the reclaimed lands to the use and benefit of the Mohawks of Akwesasne.

178. In the case of the lands on Cornwall Island taken for the regulating channel in 1958, the detention of the lands by the SLSA was in flagrant breach of the terms of Order in Council PC 1958-1034 which required that the lands that were not excavated for the purpose of the regulating channel be conveyed to the Crown to be set aside for the use and benefit of the Mohawks of Akwesasne. Work on the regulating channel was completed in December 1958.

179. Her Majesty tolerated and acquiesced in the detention of surplus lands by the SLSA on Cornwall Island until the dissolution of the SLSA in 1998 in breach of her fiduciary duty and in breach of the rights and title of the Plaintiff in the Akwesasne Reserve.

180. In December 1995, the Minister of Transport published a paper entitled “National Marine Policy” announcing the intention of the Government of Canada to introduce legislation that would substantially modify the governance of the St Lawrence Seaway.

181. In that paper, the Minister of Transport stated that the “Crown will retain title to all current Seaway lands and structures” and that “commercialization of the Seaway will not affect federal responsibilities concerning First Nations [...]”.

182. The Minister of Transport introduced the *Canada Marine Act* in the House of Commons on June 10, 1996. The *Canada Marine Act* received royal assent on June 11, 1998.

183. On September 28, 1998, the Minister of Transport directed the SLSA to transfer its right, title, and interest in “all reclaimed land over the bed of the St Lawrence River at Cornwall Island” to the FBC, pursuant to the *Canada Marine Act*.

184. The SLSA transferred the reclaimed lands to the FBC on September 30, 1998.

185. Neither the SLSA nor the Crown consulted the Plaintiff with respect to the transfer to the FBC of the reclaimed lands, or any lands on Kawehnoke. Indeed, the Plaintiff had no knowledge of the transfer of lands until counsel for the Defendants divulged the information in the present proceedings.

186. Since the transfer of lands on September 30, 1998, the Federal Bridge Corporation has used lands that were appropriated in 1958 for the construction of a new low-level bridge across the north channel of the St Lawrence River.

187. The officers of the Federal Bridge Corporation have steadfastly refused to acknowledge any legal obligation to restore lands appropriated by the SLSA for the construction of the regulating channel in spite of the terms of Order in Council PC 1958-1034.

188. In a letter to former Grand Chief Timothy Thompson dated November 14, 2008, Glenn Hewus, Senior Vice-President of the Federal Bridge Corporation, confirmed that certain parcels of land on the south shore of the island were not required by the Corporation but then advised the Mohawk Council of Akwesasne that lands that had previously been identified as surplus to the requirements of the SLSA were “required for bridge purposes and must therefore be retained by the Corporation.”

189. The letter from a senior officer of the Defendant Federal Bridge Corporation is a repudiation by a Crown agent of the clear terms of Order in Council PC 1958-1034 and is a breach of the Honour of the Crown and of the rights and title of the Plaintiff in the Akwesasne Reserve.

190. The failure of the Crown and its agents to restore lands on Kawehnoke to the reserve interfered with the administration, use, and development of the said lands.

191. Virtually all of the lands on Kawehnoke are administered on the basis of Certificates of Possession. The lands appropriated by the SLSA, and the reclaimed lands created by the SLSA, cannot be allotted to individual residents under the provisions of the Indian Act until those lands are formally set aside as reserve lands by the Governor in Council, or until the Federal Court determines that the said lands remain an integral part of the Akwesasne Reserve.

192. Between approximately 1964 and the present time, the residents of Kawehnoke and the Mohawk Council of Akwesasne have relied on the representations and undertakings of the Crown respecting the return of land. Residents of Kawehnoke have taken effective possession of surplus lands in various locations in anticipation of their return to the Plaintiff and their allotment by the Mohawk Council of Akwesasne.

193. After more than 50 years:

- a. Residents are unable to register and transfer an interest in the surplus lands;
- b. The right of heirs and other successors of residents claiming an interest in the said lands are uncertain; and
- c. The possession of certain parcels of the surplus lands has been disputed
- d. The Plaintiff has incurred and will incur substantial costs with respect to the return of the surplus land and its administration.

3. Construction and Operation of the Seaway

a. Route of the Navigation Channel

194. As alleged in paragraph 54.57a of the Amended Statement of Claim, a navigation channel was dredged at various locations between the Beauharnois Canal and the Snell Lock.

195. Ships enter the Beauharnois Canal at the western end of Lake St Louis. Two locks lift ships to the level of Lake St Francis.

196. Ships exit the Beauharnois Canal and traverse Lake St Francis in an excavated channel in the direction of Pointe au Foin until reaching the deep channel of the River.

197. Ships navigate the deep channel until the Lancaster Bar, located at approximately 55 nautical miles.

198. Beginning at approximately 57 nautical miles, the excavated channel threads its way between the islands of the Akwesasne Reserve. From east to west, the navigation channel passes in proximity to the islands identified in the following table.

<i>Island</i>	<i>Estimated distance from center line of the navigation channel</i>	
Butternut	820 feet	250 m
Maiden (aka Squaw)	820–1230 feet	250–375 m
Thompson (aka Cameron)	1640–2050 feet	500–625 m
St Francis	820 feet	250 m
Hamilton	410–1230 feet	125–375 m
Renshaw	410–1230 feet	125–375 m
Little Hog	853–984 feet	260–300 m
Stanley	197–410 feet	60–125 m
Jacobs	820 feet	250 m
Clark	197–410 feet	60–125 m
Dodens	984 feet	300 m

Canal	1066	325 m
Dickerson	820–1640 feet	250–500 m
St Regis	820–1640 feet	250–500 m
Colquhoun (East and West)	820 feet	250 m

199. In the vicinity of the Colquhoun Islands, the excavated channel bifurcates, with the northern branch passing between Kawehnoke and Pilon Island, terminating at the Port of Cornwall.

200. The primary channel passes south between Kawehnoke and St Regis Island and then runs roughly parallel to the south shore of Kawehnoke, crossing the International Boundary in the vicinity of the International Bridge. For most of the length of Kawehnoke, deep-draft vessels navigate between 100m and 500m (325 feet and 1650 feet) from shore.

201. Residents of Kawehnoke experience powerful vibrations in their homes caused by the passage of deep-draft vessels in the navigation channel.

202. Ships enter the Snell Lock in the United States, travel the length of the Wiley-Dondero Canal to the Eisenhower Lock, and then into Lake St Lawrence, continuing in American waters to the deep channel of the River south of Croil Island, thereafter crossing and recrossing the International Boundary until the Iroquois Lock in Ontario, which lifts ships to the level of Lake Ontario.

203. West of the Iroquois Lock, the navigation channel threads its way among numerous islands on either side of the International Boundary, passing in the vicinity of the following islands of the Akwesasne Reserve:

Toussaint	410–820 feet	125–250 m
Presquile	1640–2050 feet	500–625 m

Adams (aka Prison)	2460 feet	750 m
Pier	1640 feet	500 m
Lame Squaw	1230 feet	375 m
Drummond	820–2460 feet	250–750 m
Spencer	820 feet	250 m

204. East of Spencer Island, ships pass beyond the western boundary of the lands at issue in Phase I.

b. Causes of Erosion

205. The operation of the Seaway exposes the islands of the Akwesasne Reserve to ship-generated waves as well as wind-generated waves at artificially maintained water levels, causing erosion.

206. The primary factors contributing to the erosion are the location of the navigation channel, vessel size, and water levels.

207. The locks of the Seaway have the following approximate dimensions:

Length	766 feet	233.5 m
Width	80 feet	24.4 m
Draft (over sills)	30 feet	9.1 m
Draft (channels)	27 feet	8.2 m

208. The length and width follow the dimensions of the locks in the Fourth Welland Ship Canal, completed in 1932.

209. Prior to the opening of the Seaway, vessels of the dimensions indicated in the previous table were confined to the Great Lakes or parts of the St Lawrence River east of the Port of Montreal. Between the Port of Montreal and Lake Ontario, a system of canals permitted navigation by ships with a draft of 14 feet.

210. The introduction of deep-draft navigation into the St Lawrence River effectively introduced a class of vessels capable of generating substantially more wave action than was generated by vessels using the pre-existing 14 foot navigation facilities.

211. The several locks and control structures between the Port of Montreal and the Iroquois Dam stabilize the flow and level of the St Lawrence River to ensure the priority of navigation. The levels of Lake St Francis and Lake St Lawrence have been artificially maintained to ensure 27 foot navigation at all times except during the close season.

212. Canada is responsible for the maintenance of water levels in Lake St Francis, pursuant to the terms of The Boundary Waters Treaty of 1909, Order in Council PC 504 of March 1, 1932, Order in Council PC 1959-204 of February 19, 1959, Order in Council PC 1959-506 of April 23, 1959, and the Canada-Ontario Agreement of 1951, among others.

c. Dredging

213. As a result of the excavation of substantial parts of Kawehnoke and of the St Regis Mohawk Reservation, the flow of water in the south channel of the St Lawrence River has been substantially and permanently altered.

214. The flow of the St Lawrence River has also been altered by the excavation of the navigation channel and the deposit of dredge spoils at various locations in Lake St Francis including the channel between St Regis Island and Yellow Island.

215. During the planning and construction of the navigation channel, the SLSA knew or should have known that the dredging in Lake St Francis and the deposit of dredge spoils in the vicinity of islands that are part of the Akwesasne Reserve would substantially modify the flows and currents in the river, but failed to consider and properly investigate the environmental effects of the modified flow regime before and after construction.

216. During the construction of the navigation channel, the SLSA and the Crown were informed by Mohawks that the dredging and deposit of dredge spoils substantially interfered with subsistence fishing. The SLSA and the Crown trivialized and ignored the damage to fishing equipment and the loss of livelihood of Mohawk fishers.

217. During the construction of the navigation channel south of Kawehnoke, submerged spoil deposits were created in the waters adjacent to the island, damaging fishing sites, interfering with the access of residents of the island to the river for agricultural and recreational purposes.