June 23, 2017

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She:kon:

I write in my legal and official capacity as Executor of my father's estate and that of my uncle Harold. Attached please find a copy of my draft Application for Judicial Review. The facts contained therein are self-explanatory.

The band council's actions in the matter of my father's estate leave me with little choice but to pursue legal remedies. What I am doing will undoubtedly affect your ability to administer land, and it may well have an impact on all transactions council has conducted over the years.

Given the broader public interest in Kanesatake's ongoing land issues, I am circulating copies of this Application widely. It is my preference to resolve this through an open and informed dialogue in the community, but I am prepared to use the courts as last resort to protect our ancestral land rights and responsibilities.

Nia:wen,

Kanatiio

Kanatiio (Allen Gabriel)

June 23, 2017

Arihote
Roianer
Rotinonsionni Confederacy

She:kon:

I am writing to you in your capacity as condoled Roianer. As you know, both my parents passed away in 2015. In my legal capacity as Executor of my father's estate and that of my uncle Harold, I am trying to fulfill my father's last wishes.

I am sending you a copy of my draft Application for Judicial Review. The facts contained therein are self-explanatory. Because this deals with land, I don't want to proceed without your prior knowledge.

The band council's actions in the matter of my father's estate leave me with little choice but to pursue legal remedies. What I am doing will undoubtedly affect their ability to administer land, and it may well have an impact on all transactions council has conducted over the years.

Given the broader public interest in Kanesatake's ongoing land issues, I am circulating copies of this Application widely. It is my preference to resolve this through an open and informed dialogue in the community, but I am prepared to use the courts as last resort to protect our ancestral land rights and responsibilities.

Nia:wen,

Kanatiio (Allen Gabriel)

Court File No. T-

IN THE FEDERAL COURT OF CANADA

BETWEEN:

Kanatiio, also called Allen Gabriel,

Applicants

-and-

THE MOHAWK COUNCIL OF KANESATAKE

-and-

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondents

APPLICATION FOR DECLARATION

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1. The Applicant Kanatiio is a Bear Clan citizen of the Kanienkehá:ka Nation (the Mohawk Nation) of the Haudenosaunee (the Iroquois Confederacy) and a member of the Kanienkehá:ka community of Kanesatake.

2. Kanatase, also called Raymond Gabriel, Kanatiio's father, died in 2015. At the time of his death he was in possession of Lot 128, consisting of approximately eight acres, of Kanesatake land. His will provided that Kanatiio should be his executor, and that the land should remain in the Gabriel family, as it had been for over 150 years.

3. As executor, and in keeping with Kanatase's wishes, Kanatiio has sought to keep the land in one shared piece. Some of Kanatiio's siblings have sought to have the land surveyed and allotted to them individually, with a view to possibly selling it to third parties. The Mohawk Council of Kanesatake, hereinafter called "the Band Council," a local government

recognized by the Government of Canada, has authorized and paid for the surveying of parts of the land.

4. This Application is for a judicial review of the decision made by the Band Council to transfer part of Lot 128 to Philip Gabriel and to Eric Gabriel, or, if the decision has already been implemented, to set that decision aside, on the grounds that the Band Council lacks the jurisdiction to effect any transfer of interests in land in Lot 128.

History of the Land

5. "Kanesatake" is a Kanienkéha:ka word. It means "On the Hillside." It is the name for the place on the Lake of Two Mountains near where the Ottawa River meets the St. Lawrence River, is a community of Kanienkehá:ka people. Their 1787 description of the formation of the settlement: Kanesatake's speaker explained:

> Father, before the Wall was built around this Town, we lived at the foot of the Mountain, near to where the Priests of the Seminary have their Country seat, where we resided in peace and tranquility a considerable time, when the Priest settled amongst us, and the other clergy of the Island, represented in Council the inconveniences arising to the White People from our living so near a Town, particularly the disorders committed by some of our Young Men (as they alleged) when they got Rum, and they exhorted us strenuously to remove farther off from the Town, where we would be more quiet and happy, and pointed out to us Sault au Recollet as the spot near to the Priests' Mills, accordingly we complied, left our habitations and moved with our Wives and Children to the place allotted for us, where we resided for twenty three or twenty four years, when again our Priest (in conjunction with the Clergy of the Seminary of Montreal) told us we should remove once more with our Families, for that it was no longer proper that any Indians should live on this Island, and that if we would consent to go and settle at the Lake of Two Mountains we should have a large tract of land for which we should have a Deed from the King of France as our property, to be vested in us and our Heirs for ever, and that we should not be molested again in our habitations.
>
> Altho' it was very inconvenient to us to be quitting our houses and small clearings, yet the desire of having a fixed property of our own induced us to comply, and we accordingly set out and took possession of the Land assigned to us, and as was the custom of our Forefather, we immediately set about making a Belt (which we now deliver to you), by which our Children would see that the Lands was to be theirs for ever, and as was customary with our Ancestors, we placed the figure of a Dog at each

> end of the Belt to Guard our property and to give notice when an enemy approached, and as soon as it was finished we spread it on the ground and covered it with earth, that no evil-minded persons should find it, where it remained undisturbed till about seven years ago, when a dispute arose between us and some Canadians living near us, who first settled on our Lands under the idea of trading with us, and who a out this time wished to make some agreement with us for their lots, if we would engage to prevent our Cattle from breaking into their Lots and the use of the common a Dollar for each head of Cattle they possessed. The matter was referred to our late Priest, who said half a Dollar would be sufficient, and on our refusing to comply with his decision, he told us not to insist on any terms, for that the Land did not belong to us, no, not as much as the smallest shrub. However, the Canadians agreed to pay us annually a Dollar a head for the Cattle &c., possessed by the Canadians, and altho' this matter was then settled the declaration of our Priest hung heavy on our minds and made us uneasy ever since.

6. There has never been a surrender by the Kanienkehá:ka of any Aboriginal or other title to the land at Kanesatake.

7. In 1534, Jacques Cartier, a Breton sea captain, met people at the town of Hochelaga, near the present Montreal. These people spoke a language cognate with modern Kanienkehá:ka. While it is said that the "Laurentian Iroquois" disappeared as a people, historians agree that they were probably battered by disease and war, and dispersed, some of them finding a home among the Kanienkehá:ka who lived in the Mohawk River valley to the south.

8. Beginning in the 1680s, after the establishment of New France, some Kanienkehá:ka and other Haudenosaunee moved to create communities near French settlements on the St. Lawrence River. The motivation for the creation of these communities was a combination of seeking Catholic religion, French education, participation in trade (including a flourishing Montreal-Albany trade), a degree of control over the St. Lawrence River, and political balance between the French and the English. These Iroquoian communities included Kanesatake, Kahnawá:ke, Akwesasne, and Oswegatchie, all of which became part of a confederation of communities linked economically and militarily to the French, known as the Seven Nations of Canada.

9. In 1757, New France had fewer than 75,000 French inhabitants. The British colonies along the Atlantic seaboard had more than 3 million British inhabitants. France preferred to invest

in the Caribbean colonies rather than the “quelques arpents de neige” of Quebec. The fall of the French stronghold at Niagara in 1759 was an important milestone. Seeing that the fall of New France was inevitable, the Seven Nations of Canada quietly made an agreement with the Imperial Superintendent General of Indian Affairs, Sir William Johnson, to remain neutral when the British finally attacked the French. In exchange, they would be guaranteed their possessions and the practice of the Catholic religion.

10. On September 30, 1759, Sir William Johnson wrote:

> ...these two Indians were sent by the rest of the party to know whether the news which the Swegatchie Indians told them they received was true: if it was, they assured me that all their, as well as the Coghnawaga castles, would pay all regard to what I said to them, and never more assist the French &c.

11. On October 11, 1759, Sir William Johnson sent a message with a wampum belt to the Seven Nations of Canada through the Haudenosaunee:

> Thirdly, a large black belt sent to the Swegatchie, Coghnawagey and Skanendaddy Indians, letting them know that I have hitherto befriended them; that they have it in their power now, by quitting the French, to become once more a happy people, but if, contrary to the many and solemn professions made to me and the Six Nations, and the assurances they lately, by belts and strings of wampum, gave me of their fixed resolutions to abandon the French, they should act a different part, they must expect no quarter from us. Gave a large Belt of Black Wampum Mixed.

“Skanendaddy” was another term for Kanesatake. On the following day, Johnson met informally with the Onondaga, Seneca and Cayuga Chiefs in his tent. They assured him they would use "all their influence with their relations" to persuade them "to quit the French entirely, if not, they must suffer for it".

On February 16, 1760, Johnson wrote to George Croghan that the "French Indians particularly the Cagnawagas, Conesadagos, Swegatchys &c." had promised peace with the British, and had "given Belts in solemn Testimony”. By “Conesadagos,” he meant the people of Kanesatake.

12. In the summer of 1760, the British army descended the St. Lawrence River to attack Montreal. Sir William Johnson met with representatives of each of the Seven Nations,

including Kanesatake, at Oswegatchie (the present Ogdensburg, New York). This council was recognized as a "treaty" in the Supreme Court of Canada's decision in *R. v. Sioui.*[1] While there is no transcript of the council, an account of August 21, 1769, in Sir William Johnson's papers, explained:

> By this String of Wampum we beg to remind you of what you Transacted with the Dep's. of ye Seven Confederate Nations of Canada in August 1760, near Swegatchy, when in behalf of the Great King of England, and the Concurrance of the Commander in Chief of his Troops then on the Spot, you entered into preliminary Engagements, with [depu]tized by sd. 7 Nations, that provided [ ] on the English Armys descending the [River] & during the final Conquest of Canada you would secure to us the quiet & peaceful possession of the Lands we lived upon, and let us enjoy the free exercise of the Religion we were instructed in; which Engagements we then firmly & mutually agreed upon, and after the final conquest of this country they were confirmed and ratified by you in behalf of the Great King of England our Father, at a general Congress of all the Ind'n. Nations in Canada, held by you at Caghnawagey, all which is still fresh in our memories, & we on our side have strictly & inviolably adhered to.

13. A more formal and final agreement took place in September 16, 1760 at Kahnawake, across the river from Montreal, after the French capitulation of that town. Kahnawake was the "fire place" or capital of the Seven Nations. The record of that council in the *Papers of Sir William Johnson* states that the Seven Nations explained to Johnson:

> As every matter is now settled to our mutual satisfaction we have one request to make to you who have now the possession of this country, that as we have according to your desire kept out of the way [and been neuter] of your Army, You will allow us the peaceable possession of ye spot of ground we now live upon, and in case we should remove from it, to reserve as our own.
>
> A large Black Belt.[2]

To peoples with oral rather than written record-keeping, regular reaffirmation of commitments is an important means of keeping those commitments alive. The slightly tentative tone of the statement by the Seven Nations reflects the formality of speech in council, as well as the manner in which statements are designed to draw consensus and agreement between the two sides of the council fire. It must be kept in mind, as well, that

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1 [1990] 1 SCR 1025.

2 *Sir William Johnson Papers,* 13:160-166.

these statements are being read through three lenses. First, they were originally made in Mohawk, and have been translated into English. Second, they were made over two hundred years ago, and English itself has evolved. Third, they were made in the context of cultures that were quite different from that of 21st century Canada.

14. In May, 1762, Sir William Johnson affirmed to the Seven Nations in council, including Kanesatake, not only the promises made at Kahnawáke, but also the Covenant Chain relationship:

> Brethren of Caghnawaga, Ganeghsadaga, & all others our Friends in Canada...
>
> At the Meeting which I held with you in Canada after the reduction of that Country to His Britannic Majestys arms, I spoke to you with Sincerity, and meant what I said, and you may rest assured that Whatever promises the English make, or engagements they enter into with you, or any other Nation they will punctually observe, as long as you continue to behave well & friendly towards them and this I recommend to you to do, as the most certain means of making you an Happy people.
>
> A belt of 9 rows and 4 Ovals thereon.
>
> Brethren,
>
> As you are now become one people with us, I chearfully join in strengthening and brightening the Covenant Chain of Peace and friendship, and you may depend on it that no thing on Earth can break it, so long as you all strictly abide thereby, and as you have not the advantage of records like us, I recommend it to you, often to repeat the purport thereof & of all our mutual Engagements, to your Young People so as they may never be forgotten.
>
> A Cov't Chain Belt of 8 Rows.[3]

15. On February 8, 1788, Sir John Johnson, successor to his father as Imperial Superintendent General of Indian Affairs, was addressed by Agneetha, a speaker for Kanesatake. Agneetha spoke of the arrangements made at the end of the French regime, including the agreements made with Sir William Johnson. This explanation continues the description in Paragraph 5 above.

> Father

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3 *Sir William Johnson Papers,* 10:450.

You are well acquainted with our situation previous to the Last French War, and that we were under the necessity of taking an active part with the King of France, but before Montreal was taken by the English many of us became sensible of our error, and as a first step towards a reconciliation with our Father the King of England, we came to a resolution to return all the prisoners taken by us during the war – accordingly we collected them and conveyed them to your worthy Father, Sir William Johnson, at Fort Johnson, who received us kindly and accepted our submissions, and he soon after sent us back with a message to the Seven Nations of Canada to acquaint them that the Great King of England was still willing to forgive the errors of the poor deluded Indians of Canada who were ensnared into the quarrel and that he would receive all those who sincerely repented and would come in and sue for protection, but if after this warning they still persisted in their former conduct and blindly rushed on to make opposition to the Army that would soon march into their country, He would extirpate all those Nations and raze their Villages to the Ground.

We returned to Canada and faithfully delivered this Message which was attended to by a great many of our people, but some of our French Generals would be obliged to quit America as they were told. Soon after we received another message at our Village from Sir William Johnson who was then at Oswegatchie, to the same purpose as the one we had brought in, and, Father, telling us that it should be the last we would receive from him while he looked upon us as Enemies. We immediately called a Council and determined to accept the protection held out to us, and accordingly the principal men of our village, as well as those from the other villages, attended Sir William Johnson at Oswegatchie where he received the submission of all the Deputies from Canada, and there in full council granted us protection in the King's name, and confirmed to us our lands as granted by the King of France, and the free exercise of our religion with the indulgence of a priest to reside in our village, in confirmation of which he delivered us the Belt which we now lay at your feet, had we any doubts respecting the tenure by which we hold our lands, we would then Petition to have a new Deed lodged with Sir William in trust for us.

Father,

We have now opened our hearts and made our fears know to you, and we trust you are sensible that our minds labour under a heavy burden from which it is our earnest prayer that you will endeavour to relieve us and use your interest with the Governor in Chief, Lord Dorchester, that a new Deed for the lands we live on be made out for us and that we may hold them on the same tenure that the Mohawks at Grand River and Bay of Quinte hold theirs.

Delivers the large Belt of Twenty Seven Rows made on the occasion of the first settlement of the Indians at the Lake of Two Mountains.

The wampum belt created at the foundation of the community of Kanesatake
Now held by the McCord Museum in Montreal

16. Article 40 of the Articles of Capitulation of the French at Montreal, which remained as binding law in the European sense until superseded by British statutes creating a colonial government, states:

> The Savages or Indian Allies of His Most Christian Majesty shall be maintained in the land they inhabit, if they chuse to remain there; they shall not be molested on any pretense whatsoever, for having carried arms, and served his most Christian Majesty. They shall have, as well as the French, liberty of religion…

17. In the case of the Seven Nations of Canada, "the lands they inhabit" at Kahnawake, Wendake, and Kanesatake were within seigneurial grants from the King of France to religious orders. The priests were to set up missions for the benefit of the Indians they served.

18. At Kahnawake, the seigniory was Sault St. Louis. The Jesuits, recipients of the French grant, began selling parts of the land to French settlers. The mainly Kanienké:haka inhabitants of the land objected, taking their case to General Thomas Gage, the British officer who was acting as Governor of Quebec. The "General Gage Judgment" of 1762[4] confirmed that the land was not Jesuit property, but rather held on behalf of the Indian inhabitants as a form of trust. The judgment was later reversed. Today, the "Seigniory claim" is being negotiated as between the Mohawks of Kahnawake and the Government of Canada, on the basis that the Crown failed to keep its treaty commitments to that community.

The Royal Proclamation of 1763

19. After a short, sharp war in the summer of 1763, the King issued a Proclamation on October 7, 1763, creating the colony of Quebec (and thereby confirming the place of the Proclamation as a constitutional document of Canada), reserving the lands to the west of the Quebec colonial boundary "to the Nations or Tribes of Indians with whom We are connected, and who live under Our Protection, as their Hunting Grounds," and making rules to prevent "great Frauds and Abuses" by preventing the buying of Indian reserved lands by individuals. The lands reserved, and governed by the procedural protection in the Royal Proclamation, included lands within the existing colonies and provinces. The Supreme Court of Canada, in *R. v. Sioui* in 1990, explained:

> The Royal Proclamation of October 7, 1763 organized the territories recently acquired by Great Britain and reserved two types of land for the Indians: that located outside the colony's territorial limits and the establishments authorized by the Crown inside the colony" (p. 1052 (emphasis added), *per* Lamer J.). (Approved in *R. v. Bernard, R. v. Marshall* at Para. 94).

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4 Canada, *Indian Treaties and Surrenders,* Vol. II, pp. 293-304, March 22, 1762.

20. As Imperial Superintendent General, Sir William Johnson received the Royal Proclamation in late December, 1763 from Governor Thomas Gage and immediately declared it in effect in the territory of the Six Nations (Haudenosaunee) and their allies.[5] He had copies printed and distributed in the early spring of 1763. On December 23, 1763, he wrote to Gage:

> I am hopefull that on receipt of my last letter, their Lordships will be able to still farther contribute toward the salutary points in view relative to the Indians. This Proclamation does not relieve their present grievances which are many, being calculated only to prevent the like hereafter, altho' there are numberless instances of tracts which have indeed been purchased, but in the most illegal & fraudulent manner, all which demands redress. I have at this Meeting made the best use in my power of His Majesty's Proclamation for the convincing the Indians here of his gracious & favourable disposition to do them Justice, & shall communicate the same to all the rest.[6]

21. While no direct transcript exists of the Iroquois village at Kanesatake receiving the Royal Proclamation in early 1764, the copies received at the adjacent Algonquin and Nipissing villages are now in the Library and Archives Canada, where they were placed as a result of petitions to the Crown relying on the Proclamation for protection. The Algonquins referred to both the Articles of Capitulation and the Royal Proclamation in their petition to the Crown for protection of their hunting grounds in 1847, the culmination of seventy years of petitions. They began by describing how Deputy Superintendent General Daniel Claus had delivered the Proclamation to them.

> My Children;
> Here is true copy of the writing which your good Father the King has transmitted to your Chief Superintendent Sir William Johnson, it is certified by him dated 24th December 1763. My orders are to place it in your hands. Be careful of it. It may at a future period be of service to you.
>
> Father
>
> We hold this writing our ancestors and ourselves were proud of it. We considered it as a sacred document. It contains the words of our late Father King George the Third and as we were always given to understand we were persuaded that his words and signature were sufficient to ensure us of the peaceable enjoyment of our hunting grounds and keep us from being molested by strangers of any description. …

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[5] *Sir William Johnson Papers,* 10:976.
[6] *Sir William Johnson Papers,* 10:973.

22. In 1769, the Seven Nations described their understanding of the Royal Proclamation's protection of the lands they inhabited to Sir William Johnson: Adighwadooni, their speaker, explained:

> You will likewise remember that in Spring 1764 you ordered your Deputy, to publish & explain to us His Majestys most gracious Proclamation of Octr. 1763 confirming & securing us our Possessions & Hunting Grounds when at the same time you desired to collect our still dispersed people to their respective Nations & Villages.[7]

23. At the German Flats Treaty on July 22, 1770, a speaker for Akwesasne appealed to Sir William Johnson concerning title to land, citing the arrangements at Oswegatchie and Kahnawake and the Royal Proclamation:

> Brother
> You know us for many years – we knew you, and esteemed your character, when we were in the arms of the French, and when you came down with the army to Montreal ten years ago; you then spoke to us, gave us good words, and by the order of the General gave us solemn assurances, that if we did not assist the French, but permitted you to descend the River without interruption, we should be placed among the number of your friends, and enjoy our rights and possessions and the free exercise of our religion forever. This we believed, for we knew your character, and had a confidence in you, and accordingly agreed to your request, and have ever since behaved in such a manner, as to demonstrate our fidelity, and attachment to the English.
>
> …that the Iroquois of St. Regis as proprietors of the place appeal to the agreements made at the conquest of the country with Sir William Johnson as representing the King, as well as to the Royal Proclamation of October 3, 1763, confirmed and published by His Excellency, General Carleton, in the year 1766.[8]

24. In March, 1784, at a council with Deputy Superintendent General of Indian Affairs John Campbell, the speaker for Akwesasne, one of the Seven Nations of Canada, produced a copy of the Royal Proclamation and described the manner of its receipt:

> After the King our Great Father got this country and about eighteen years ago, we went to Sir. William Johnson to whom we presented our case and he confirmed us in our settlement by this Belt [here they presented a Belt which they said he gave

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[7] *Sir William Johnson Papers,* 7:109-112.
[8] *Sir William Johnson Papers* 7:923.

> them] and the Great King's words sealed by himself [shewing a copy of His Majesties' Proclamation in 1763, counter-signed by Sir William] who at the same time told us that we might depend our property would be safe to the end of the world and recommended to us to allow no white people to settle amongst us otherwise they should root us and spread like oil upon cloth.[9]

25. The war of the summer of 1763 led not only to the issuance of the Royal Proclamation of October of that year, but also to the Treaty of Niagara, the single largest assemblage of Indigenous nations with the Crown. It was attended by delegates from twenty-four nations, including representatives from Kanesatake (noted as part of the Iroquois Confederacy by Sir William Johnson). In its decision in the *Chippewas of Sarnia* case, the Ontario Court of Appeal concluded:

> [54] After setting out its policy in the Royal Proclamation, the Crown took extraordinary steps to make the First Nations aware of that policy and to gain their support on the basis that the policy as set down in the Royal Proclamation would govern Crown-First Nations relations. In the summer of 1764, at the request of the Crown, more than 2,000 First Nations Chiefs representing some twenty-two First Nations, including chiefs from the Chippewa Nation, attended a Grand Council at Niagara. Sir William Johnson, the Crown representative, who was well known to many of the chiefs present, read the provisions of the Royal Proclamation respecting Indian lands and committed the Crown to the enforcement of those provisions. The chiefs, in turn, promised to keep the peace and deliver up prisoners taken in recent hostilities. The singular significance of the Royal Proclamation to the First Nations can be traced to this extraordinary assembly and the treaty it produced.
>
> [55] The First Nations chiefs prepared an elaborate wampum belt to reflect their understanding of the Treaty of Niagara. That belt described the relationship between the Crown and the First Nations as being based on peace, friendship and mutual respect. The belt symbolized the Crown’s promise to all of the First Nations who were parties to the Treaty that they would not be molested or disturbed in the possession of their lands unless they first agreed to surrender those lands to the Crown.
>
> [56] The meeting at Niagara and the Treaty of Niagara were watershed events in Crown-First Nations relations. The Treaty established friendly relations with many First Nations who had supported the French in the previous war. It also gave recognition to the nation-to-nation relationship between the First Nations

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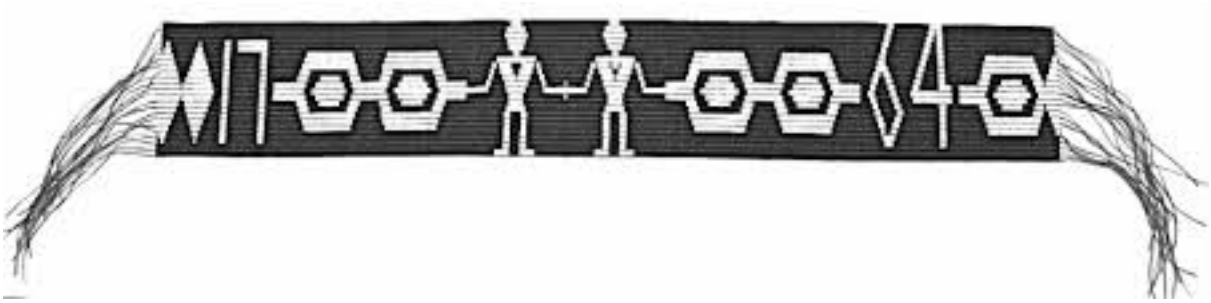
9 Library and Archives Canada (LAC) RG10 (Indian Affairs) Vol. 1833.

and the British Crown, Indian rights in their lands and the process to be followed when Indian lands were surrendered.[10]



Niagara Treaty Wampum Belt, 10,076 beads,
a reproduction based on an 1881 rubbing of the belt
at Wikwemikong, Manitoulin Island

26. The Royal Proclamation of 1763 continues to apply to and protect reserved lands within the former colonies of Quebec and Nova Scotia, and continues to bind the Crown in Canada in a general sense:

> The *Royal Proclamation* must be interpreted liberally, and any matters of doubt resolved in favour of aboriginal peoples: *Nowegejick v. The Queen*, [1983] 1 SCR 29, at p. 36. Further, the *Royal Proclamation* must be interpreted in the light of its status as the "Magna Carta" of Indian rights in North America and the Indian "Bill of Rights"; *R. v. Secretary of State for Foreign and Commonwealth Affairs*, [1982] 1 QB 892 (CA) at p. 912.[11]

27. For the participants in the Niagara Treaty, like the community of Kanesatake, the Proclamation is an element of a constitutionally protected treaty. It continues to govern the process to be followed when lands are to be surrendered. It also contains the Crown's promise to protect the land from arbitrary or private taking or sale.

Treaties with the Crown

28. In 1982, Section 35 of the new Constitution Act recognized and affirmed the Treaty and Aboriginal rights of the Aboriginal peoples of Canada. Section 54 of that Act asserted that

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10 *Chippewas of Sarnia v. Canada,* (Ont. CA), (2000) 195 DLR 4th 195.

11 *R. v. Bernard, R. v. Marshall,* [2005] 2 SCR 220, Paragraphs 88-89 and 95.

the Constitution is the supreme law of the country, and that laws inconsistent with the Constitution were, to the extent of the inconsistency, of no force and effect.

29. In *R. v. Sioui*, the Supreme Court of Canada defined what constituted a "treaty" for the purposes of the *Constitution Act* (as well as the *Indian Act*). A treaty is a meeting conducted with a degree of solemnity or formality, between representatives of an Indigenous people on the one hand, and a person whom the Indians could reasonably believe had the authority to bind the Crown, on the other hand, at which promises or commitments were exchanged.

30. A "treaty" is an agreement. The written and signed document is evidence of that agreement. The wampum belts given during the negotiations, accompanied by the oral or written tradition that accompanies them, are evidence of the agreement. The minutes of the councils are relevant (see *R. v. Taylor and Williams,*[12] and *R. v. Donald Marshall*[13]). The conduct of the parties after the treaty is relevant to a court seeking to understand their intentions and understandings. Many treaty councils include renewals or reminders of previous agreements, and so are both original treaties and evidence or prior or ongoing engagements.

> When considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed in writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement.[14]

31. Many of the above transcripts of treaty councils include reference to belts or strings of wampum being delivered to accompany a statement. In Haudenosaunee law, wampum is linked to the ceremony of condolence, an expression of deep compassion and relationship, and therefore sacred. The use of wampum calls the attention of the Creator to the words being spoken and the promises being made. The use of wampum in council denotes a "degree of solemnity" referred to as a requirement for a "treaty" in *R. v. Sioui*.

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12 (1981) 62 CCC (2d) 227 (Ont. CA).
13 [1999] 3 SCR 456 at para. 11.
14 *R. v. Badger*, [1996] 1 SCR 771, cited with approval in *Marshall* at para. 14.

32. The council at Oswegatchie was found by the Supreme Court of Canada to be a "treaty" in *R. v. Sioui.* The Niagara Treaty of 1764 was found to be a "treaty" by the Ontario Court of Appeal in *Chippewas of Sarnia* (an appeal of which was denied by the Supreme Court of Canada). The Treaty at Kahnawake in 1760 was referred to in *Mitchell v. MNR* in 2001.[15] As for the other councils referred to above, the Crown was in each case represented by the Imperial Superintendent General or Deputy Superintendent General, who actually represented the Crown; and the nations, according to the Crown's written records, were represented by their Chiefs.

33. On April 20, 2017, the Band Council produced a "draft for community consultation" of a "Protocol of the Mohawk Council of Kanesatake." Page 3 of that document:

> The Mohawk Council of Kanesatake are the Proxy Beneficiaries but not limited to the following Treaties, Grants and Agreements which pertain but not limited to the rights addressing Land Claims, Education, Public Security, Cultural, Medical and the necessities of life, etc…
>
> - 1717 King Louis XV of France granting the Sulpicians the Seigneurie du Lac-des-Deux-Montagnes
> - 1760 Treaty of Oswegatchie
> - 1760 Treaty of Kahnawake
> - 1763 The Royal Proclamation
> - 1764 Treaty of Niagara
> - 1813 [sic] Treaty of Ghent
> - 1945 Agreement between the Sulpicians and [sic] the British Crown

34. The effect of the successive treaties cited above was, together with the promises contained in the 1763 Proclamation, to affirm that the lands "inhabited" by the Seven Nations of Canada, including the community of Kanesatake, would be guaranteed to them. Despite this, the land at Kanesatake remained in the control of the Sulpician Order, a control that included the power to dispose of the land without Kanienkeha:ka consent, and which was later affirmed by the Privy Council in the case of *Corinthe v. St. Sulpice.*[16] Neither that case nor any other case in Canadian courts considered these treaties while ruling on the respective rights of the

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15 [2001] 1 SCR 911.
16 [1912] AC 872.

religious orders holding the lands and the Indigenous peoples for whom the lands had been held and granted.

35. According to the Supreme Court of Canada in *Mikisew Cree First Nation v. Canada*,[17] the Crown is presumed to be aware of, and to keep its treaty promises.

36. In the 1880s, about a third of the people of Kanesatake moved from there to Wahta, on southern Georgian Bay, as a result of continued conflicts with the Sulpician priests over land issues.

37. The Court of King's Bench had ruled in *Corinthe v. St. Sulpice:*

> It is very doubtful that Article 40 of the Capitulation and the Royal Proclamation would have the effect of giving rights of private property to the savages. This proclamation had above all the goal of protecting the savages in the occupation of the vague lands which, later, were designated by the authorities under the name of "Indian reserves." Neither the King of France nor the King of England intended to confer rights of property upon the savages. They treated them with tolerance and benevolence, for political and humanitarian reasons, but no one would have dreamed of giving land titles to these children of the woods, who in their own interest had to be held in a kind of tutelage. Thus, even if the Royal Proclamation could be invoked in favour of the appellants, as conferring a title, that title could be revoked: "It is to be deemed a right exclusively belonging to the government in its sovereign capacity, to extinguish the Indian title, and to perfect its own dominion over the soil, and dispose of it according to its own good pleasure" (SCR vol. 13, p 599). But the savages say that this statute conserved their rights and that it is mentioned therein that the right of property will be the same as that of the Seminary of St. Sulpice in Paris. It is impossible, when one reads the acts of cession, to know which rights the King of France conceded to the savages, as I said, and as for the right conferred by the Royal Proclamation, that answer has already been given, that is, the document remained in effect only until the day when royal authority would modify it, and the statute I cited took no account of the alleged rights of which the negotiators of 1760 and 1763 had probably never dreamed.

38. In 1912, the Privy Council issued its decision in *Angus Corinthe v. Seminaire de St. Sulpice.* It affirmed the lower court decision: the land belonged to the Sulpician Order, and the Kanienkehá:ka were mere tenants at will, without legal rights to the land.

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[17] [2005] 3 SCR 388.

39. In 1944, the Government of Canada began a project of recovering lands within the original Seigniory. The major purchases came from the Compagnie Immobiliere Belgo-Canadienne and the Seminary of St. Sulpice. On April 11, 1945, 550 acres were purchased from the former company. On May 31, 1945, 1,551 acres were purchased from the Seminary. Smaller purchases continued over the five decades that followed. On December 10, 1992, Order in Council 1992-2587, according to the federal Department of Natural Resources, "authorized the Indians of Kanesatake to occupy the lands acquired from the Sulpicians on May 31, 1945. The order, however, did not give reserve status to these lands."

40. For some purposes, the Government of Canada treated the land at Kanesatake as an Indian reserve pursuant to the *Indian Act*, for example by providing funding that was available only to bands on reserves, and for other purposes it refused to do so. There was no clear policy.

41. After the "Oka crisis" of 1990, the Government of Canada engaged with the Band Council in negotiations that led to agreement about the land that Canada had acquired from the Sulpicians and the Belgo-Canadian company.

42. The *Kanesatake Interim Land Base Governance Act* of 2001, in establishing structures for the Mohawk governance, under limits established by agreement with Canada, of the interim land base, deliberately avoids the question of land rights or processes established by treaty. It states that:

> This Act does not address any aboriginal or treaty rights of the Mohawks of Kanesatake. Nothing in this Act is intended either to prejudice such rights or to represent a recognition of such rights by Her Majesty in right of Canada.

Land reserved for the Indians

43. In Canadian law, the courts have stated that the origin of the legal term "lands reserved for the Indians" lies in the Royal Proclamation of 1763 which, as noted above, reserved two kinds of Indian lands. The term described all lands reserved in whatever manner, and was not restricted to "Indian reserves" created pursuant to, or consistent with, the *Indian Act.* The term next appeared significantly in class 24 of Section 91 of the *Constitution Act, 1867,*

which allocated "lands reserved for the Indians" as an exclusively federal head of legislative jurisdiction.

44. The *Kanesatake Interim Land Base Governance Act* of 2001 deliberately places the interim land base within the category of "lands reserved for the Indians" and avoids any suggestion that these lands are "Indian reserves" under the *Indian Act.* Section 4 states:

> The lands in the Kanesatake Mohawk interim land base, other than the lands known as Doncaster Reserve No. 17, are set aside for the use and benefit of the Mohawks of Kanesatake as lands reserved for the Indians within the meaning of class 24 of Section 91 of the *Constitution Act, 1867* but not as a reserve within the meaning of the *Indian Act.*

45. A very similar clause was considered by the British Columbia Court of Appeal in *Sechelt Indian Band v. British Columbia*[18] in which the Court found that:

> The essence of the case concerns the subject matter of the management and possession of the Sechelt lands… The terms of the *Self-Government Act*… did provide that such lands shall be considered reserved for the purposes of S. 91(24)… This is a core element of jurisdiction under Section 91(24) of the *Constitution Ac7 1867*. It is a matter that lies at the core of Indianness.

46. The combined effect of the laws relating to "lands reserved for Indians" on the Kanesatake Mohawk interim land base is that (1) the Mohawk interest, in its relationship to the Crown's dealings with the land, is a collective one; (2) pursuant to the Royal Proclamation of 1763, the land is not alienable to anyone other than a Mohawk of Kanesatake without the consent of the community and the interposition of the Crown; and (3) the *Indian Act* has no application to the land.

Legal Systems of Indigenous Nations

47. In 1984, the Supreme Court of Canada considered the relationship between an Indigenous community and the Crown in relation to a land transaction conducted by the Crown on behalf of the community. Pursuant to a surrender in trust for leasing, the Department of Indian

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18 [2013] 9 WWR 274.

Affairs had entered into a long-term lease of valuable Musqueam lands for a golf course. The lease was improvident, and not one the band would have accepted. The Supreme Court found that the Crown had a fiduciary relationship with the Musqueam Band that was as enforceable, in the event of its breach, as a breach of trust in Canadian civil law.

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
>
> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.
>
> An Indian Band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the Band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763.[19]

48. In the course of its decision, the Court explained that the fiduciary relationship had its origin in Indian Aboriginal title, but also in the manner in which the Royal Proclamation of 1763 represented an interposition of the Crown between Indians and prospective purchasers of their land. In doing so, the Crown had assumed discretion or control over the land. The court also said - and this has not been the subject of sufficient legal or judicial consideration, that:

> It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases: see *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 *A.C.* 401, at pp. 410-11 (the *Star Chrome* case).

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19 [1984] 2 SCR 335 at 376.

49. The December 21, 2000 agreement between the Band Council and the Government of Canada states in Paragraph 13:

> Nothing in this agreement is intended to affect the underlying title to Kanesatake Mohawk lands.

50. What does this mean? Which underlying title - that of the Crown, or that of the Kanienkehá:ka? The Agreement deliberately leaves that question unresolved, while the Act does not address it at all. In *Delgamuukw*, the Supreme Court stated:

> Aboriginal title, however, is a right to the land itself. Subject to the limits I have laid down above, that land may be used for a variety of activities, none of which need be individually protected as aboriginal rights under s. 35(1). Those activities are parasitic on the underlying title.[20]

51. The interest of the people of Kanesatake, in relation to the rest of the world, is communal. That is crucial to the existence of a Crown fiduciary relationship and fiduciary obligation: see *Wewaykum Indian Band v, Canada;*[21] *Daniels v. the Queen.*[22]:

> A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.[23]

52. An example of the collective nature of Kanesatake Kanienkeha:ka landholdings is the fact that both Canada and Kanesatake required the consent of the community to any alteration in its rights to its land base.

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20 [1997] 3 SCR 1010.
21 [2002] 4 SCR 245.
22 [2016] 1 SCR 99.
23 *Delgamuukw,* para. 115.

53. In its dealings with cases involving Aboriginal title, the Crown must pay equal respect to the legal system of the Indigenous nation involved. In *Delgam'uukw*, the Supreme Court of Canada:

> The source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law. It follows that both should be taken into account in establishing the proof of occupancy… The aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples: at para. 41. As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.[24]

54. In 2016, the Truth and Reconciliation Commission of Canada distinguished between what it called "Aboriginal law," the laws of Canada about Indigenous peoples, and "Indigenous law," the laws of those peoples themselves.[25] The *Kanesatake Interim Land Base Governance Act* is a law of Canada.

55. In 2012, Chief Justice Lance Finch of British Columbia spoke of the difficulty confronting Canadian lawyers and judges in achieving an ability to pay equal respect to Indigenous legal systems:

> One might argue that if those individuals presently involved in identifying, presenting and analyzing Indigenous legal issues – that is, counsel and judges – find themselves ill-equipped for the task, better, perhaps, to leave well alone, rather than risk the consequences of misinterpretation and misapplication. But this would be to evade the courts' existing legal responsibilities, or worse still, to pay lip service to the principles involved while perpetrating a legal paradigm which has done little, thus far, to effect meaningful reconciliation between the Crown and Indigenous peoples in Canada. As a result, it is a precondition for the principled application of Indigenous laws that these laws be viewed, as far as may be possible, through the lens of the Indigenous culture in question.
>
> From the outset of our education as Canadian lawyers, indeed from the outset of our education, we are immersed in a particular context and point of view. This saturation far transcends our legal training, of course: the experience of a cultural narrative in any form, or on any subject, will be informed…by our understandings

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24 *Delgamuukw*, para. 147-48.

25 *Report of the Truth and Reconciliation Commission of Canada,* Vol. 6, p. 45.

> of place, kinship, and ideas about personhood. This is largely an unconscious process. Whether reading a novel or perusing a judgment, our accrued experience sets off a constant series of connective sparks, or internal signals, affirmations and disruptions, all at a level so deeply ingrained as to take place, most of the time, below the radar of awareness. And it is dangerously easy to carry our unconscious matrices of interpretation to our approach to another culture's values and laws.
>
> Recognizing and addressing this form of perceptual distortion is perhaps the single most important precondition to the Canadian legal community's meaningful incorporation of Indigenous legal orders. The danger in retaining and imposing our ideas of what constitutes "law," according to our training and established habits of mind, is that we may inadvertently give weight only to those elements of an Aboriginal legal system which are recognizable in Canadian law, rendering the Canadian legal framework determinative. At the same time, we may fail to perceive essential elements of these legal orders. At the very least, we must question our assumptions: at most, we must unlearn them. Not, of course, in every context. But for purposes of approaching Aboriginal legal orders, we must do our utmost to recognize and to relinquish our preconceptions of what *objectively* constitutes a "law" or a "system of laws."
>
> Respect in this context is simply the acknowledgment that we are all human, we are all different, and that no matter how important they may be, our values cannot be treated as absolute and exclusive. We all have much to learn from one another.[26]

56. The Band Council is limited in its authority by its origin in the *Indian Act* and has learned to act and think substantially within the boundaries of that Act's administrative processes, despite its references to both the treaties and Haudenosaunee law. The concept of an elected council as a "proxy beneficiary" of the treaties fails to acknowledge the continuous and continued existence of the Grand Council of the Haudenosaunee as an Indigenous government and as the actual steward of the treaty rights. That is, the Band Council is also faced with the challenge of understanding and respecting the Kanienkehá:ka legal system.

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[26] Chief Justice Lance S.G. Finch, British Columbia Court of Appeal, *The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice*, Continuing Legal Education Society of British Columbia, November 2012, at Paragraphs 5, 34, 35 and 41.

Kanesatake Kanienkeha:ka Law and Custom

57. The Covenant Chain relationship between the Crown and the Haudenosaunee originated in relations between the Colony of New York, on behalf of the Crown, and the Haudenosaunee in 1677. Haudenosaunee law is based on family relationships, and the brotherhood described by the Covenant Chain is one of equality, respect, trust and friendship – as the Ontario Court of Appeal noted of the expansion of the Chain in 1764, in *Chippewas of Sarnia*. The relationship draws its origins from the principles of the *Kaianerenkó:wa*, the constitution of the Haudenosaunee. The government of the Confederacy, the Grand Council, consists of fifty *Rotiianeshon* ("chiefs"), representatives of their extended clan families (*ohwatsira*), joined in a circle of equality and commitment to peace and future generations. In Council, there are two sides to decision-making, and that process was adopted by the British in treaty councils from the 1660s to the 1830s. The crucial treaties were made according to the processes of Haudenosaunee law, by people on both sides of the council fire who understood that law and its principles and metaphors.

58. Kanesatake, along with the other Iroquois communities of the Seven Nations of Canada, had become reunited with the Haudenosaunee in September, 1760, at the Council at Kahnawake. This gave these communities the benefit, not only of the commitments they had previously received from Sir William Johnson on behalf of the Crown, but the protection and brotherhood of the entire Iroquois Confederacy, which they had now rejoined. It gave them the benefits of the Covenant Chain relationship with the Crown, replete with reciprocal respect, trust and friendship, and with procedural treaty rights including timely resolution of concerns. The record of the 1760 Council at Kahnawake includes both the peacemaking by Sir William Johnson on behalf of the Crown, and the reunification of the Seven Nations with the Five Nations (as the Haudenosaunee were still often called at the time). The reply on behalf of the Seven (eight nations, by then, including the Onondagas at Oswegatchie) repeated what they had been told in Council the day before, first by Sir William Johnson:

> We heard and took to heart the good Words you spoke to us yesterday. We thank you most heartily for [them] renewing and strengthening the old Covenant Chain

> [of] which before this War subsisted between us, and we in ye name of every Nation here pres't. assure you [to] that we will hold fast [of] the same, for ever hereafter.

The speaker then addressed the Haudenosaunee delegation, and confirmed the reunifaction, resuming being one Confederacy:

> ...Brethren of the 5 Nat's.
>
> [You] In return to your Belt of Yesterday Whereby you told us that as your Br. W'y. [Sir William Johnson] had finished everything with us, you on your part had something to say which was that as there had been during this war a division and disunion between us; and [thereby] desired us to reunite and be firm friends as heretofore, We hereby assure all present that we with pleasure agree to your friendly proposal and reunite as formerly.[27]

59. Lord Denning, in *R. v. Secretary of State*, in 1981, expressed the paternalistic, colonialist, essentialist, reductionist view that "in simple societies," custom has the force of law. The Supreme Court of Canada, in *Delgam'uukw* in 1997, adopted a more sophisticated approach: songs and ceremonies such as the *aadawx* and *kungax* of the Gitk'san and Wethsuwelthen are indeed elements of law, though in a form unfamiliar to Canadian (British North American) law. That is, Canadian law requires more than mere consideration of "Aboriginal law."

60. The fundamental landholding custom of Kanesatake was set out in the explanation of the establishment of the community. At its core is the communal nature of the way the people held their land.[28] There is no doubt that the matrilinear, clan-based society of the Kanienkehá:ka and other Haudenosaunee affected the way the land was held and used. As long as horticulture was conducted mainly by groups of women, the gardens and fields would be planted and maintained by *ohwatsiras,* the extended family groups within each clan. The edge of the woods marked a boundary between cultivated clearing and the darker forest, a place where the ceremonies of greeting guests and strangers would take place, and where

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[27] *Sir William Johnson Papers* 13:162-64.

[28] Explanations of Haudenosaunee understandings of land tenure systems can be found in a general overview in William Fenton's *Northern Iroquoian Culture Patterns* in the *Handbook of North American Indians*, Vol. 15 (Northeast) Smithsonian, Washington, 1981, p. 296 ff., and in detail in Robert Venables' *The Clearings and the Woods: The Haudenosaunee (Iroquois) Landscape – Gendered and Balanced*, in S. Baugher, S.M. Spencer-Wood (Eds.) *Archaeology and Preservation of Gendered Landscapes,* Springer Science & Business Media, 2010.

control shifted, in some ways, from women to men. Government remained balanced between the authority of men and that of women. By the early 1800s, the advent of draft animals had transformed farming, as a team of oxen or horses driven by one man could do the work of a group of women. Single family farms became possible. At the same time, the influence of the Catholic Church was making itself felt. Family names became patrilineal, and family groups were becoming that way, as well. Beginning in 1869[29], federal laws began to define "Indian" in terms that followed the father's line, excluding women who married non-Indians, and declaring non-Indian women to be Indians upon marriage to Indians. While people continued to retain and identify themselves by the clans they inherited from their mothers, or by adoption, they were pressured by Canadian law to become more patrilinear, as well as more racially defined. In Kanesatake, by the mid-1800s, family enclaves were becoming established. They continued to be the basic social unit of the community's society through the 20th century. They remain so today.

61. The Haudenosaunee and their laws and government continue to exist, despite efforts by the Government of Canada to abolish traditional governments and deny the existence of the legal systems followed by Indigenous societies. The Truth and Reconciliation Commission of Canada, in its 2015 report, echoed the call of the 1994 Royal Commission on Aboriginal Peoples for the Government of Canada to respect Haudenosaunee traditional government and Indigenous legal systems,[30] and in 2015 the Prime Minister issued "mandate letters" to the Minister of Indian Affairs and Northern Development and the Minister of Justice directing them to "restore respectful nation-to-nation relationships" with Indigenous nations.

62. Despite continuous Kanienkeha:ka occupation of the land at Kanesatake, the "legal title" remained in the Sulpician Order. The priests had alienated many parcels of the land, and the result was a checkerboarded territory in which Kanienkeha:ka lands and lands occupied by local French Canadians were scattered and adjoined. The Municipality of Oka exercised control over zoning and land use over much of the territory, including lands that in common practice were shared between Kanienkeha:ka and their neighbours. In 1990, a decision by the

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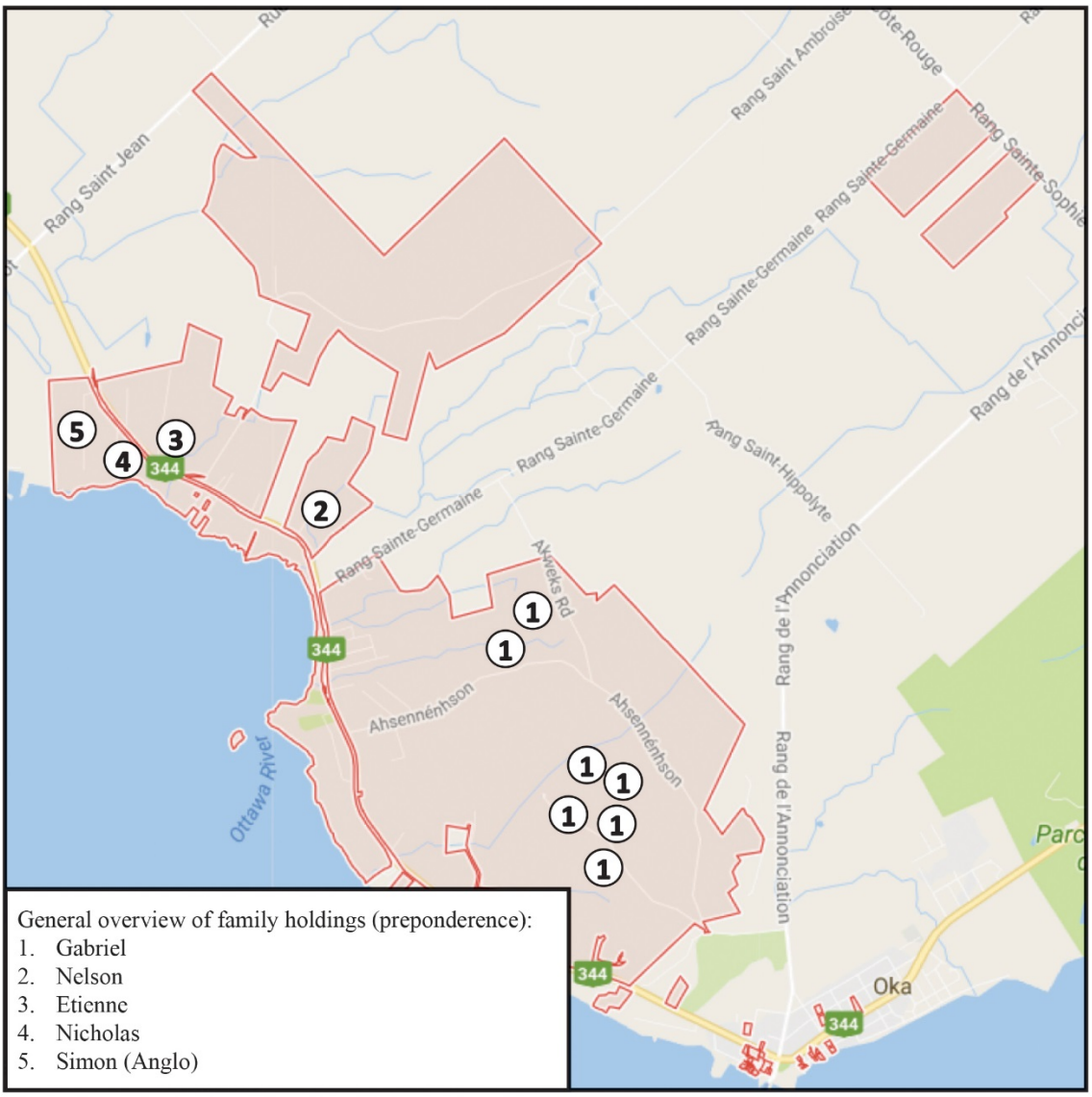
29 31 Victoria, Chapter 425

30 *Report of the Truth and Reconciliation Commission of Canada*, Vol. 6, pp. 45-58.

municipal council to expand a golf course into the Pines, a shared area, ignited a crisis that led to the occupation of the Kanienkeha:ka areas of Kanesatake by the Canadian Armed Forces and a dangerous and fundamentally unresolved confrontation.

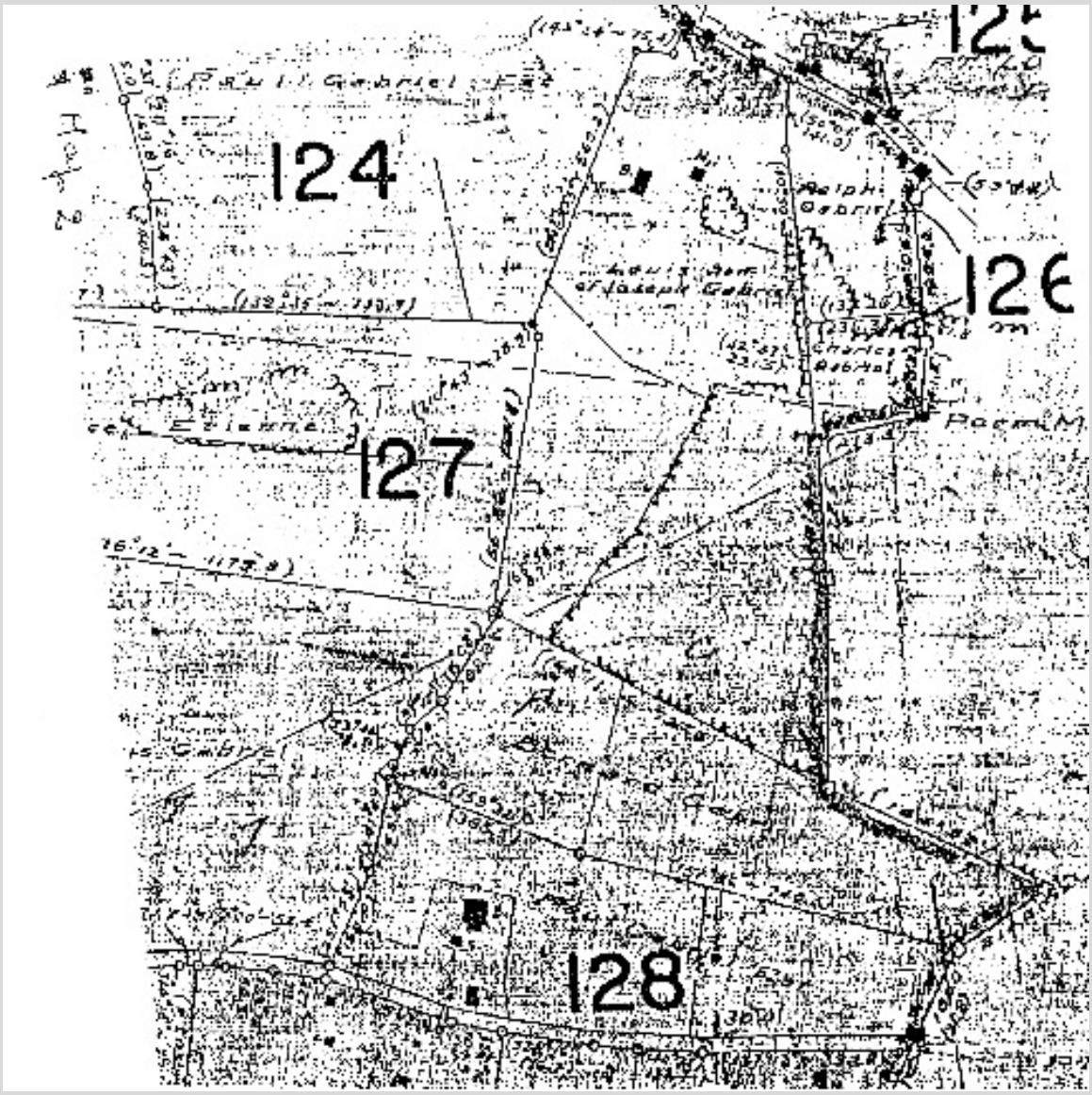
63. While the Sulpician priests continued to hold “legal title” as acknowledged by Canadian law, the Kanienké:haka at Kanesatake were allotting the land they were occupying in their own ways, within their extended family groups, maintaining the family enclaves while ensuring that each member of the family was provided for. Today, several families at Kanesatake have well-identified land bases within the community. The following map shows the lands of the Gabriel, Nelson, Etienne, Nicholas and Simon families.



64. The Gabriel family has kept documents showing how its land was protected, allocated, divided and used in ways that cared for the rights and interests of both individuals and family, adopting a long, multi-generational view. The “Gabriel estate,” as it became known, is the largest of these Kanienkeha:ka family enclaves. Kennatose, also known as Karenhatase Gabriel, had inherited a large parcel of land from his father. Upon his death, his wife, Konwakeri, called a meeting of her five sons, which resulted in an agreement dated September 18, 1878. The Gabriel brothers were Joseph Tehotakeraton, Sak Taioroniote, Areksis Tekaniataroken, Ignace (Angus) Awenrathon, and Joseph Kanahwatiron. The agreement, to be administered by Konwakeri and Awenrathon, divided the land between the brothers, but required that none may sell his portion of the land except to another brother, and

if he did not do so, the land would revert to his brothers. The 1878 agreement provided for the land to pass to children and grandchildren.

65. Lot 128 has remained in the Gabriel family for over 150 years. Its holder, Awenrathon, died on August 19, 1929, leaving the land to his nephews Paul and Bernard. Paul, the holder of the south half of the lot, died intestate on September 25, 1945, survived by his wife and ten children. Bernard, holder of the north half, died on May 17, 1955, survived by his wife and ten children. In 1963, Paul's wife died, leaving the west portion of the southern half of the lot to her son Harold and the east half to her son Raymond. In 1965, Bernard's wife died, leaving the northern half of Lot 128 to be divided between her sons Ronald and Hugh. In 1976, Ronald transferred his part to his brother Jeffrey, who then transferred it to Archie Gabriel; Hugh transferred his interest to Archie Gabriel as well. By 1985, after the death of Archie Gabriel and his wife Annie, Archie Gabriel Jr. was the sole holder of the northern half of the lot.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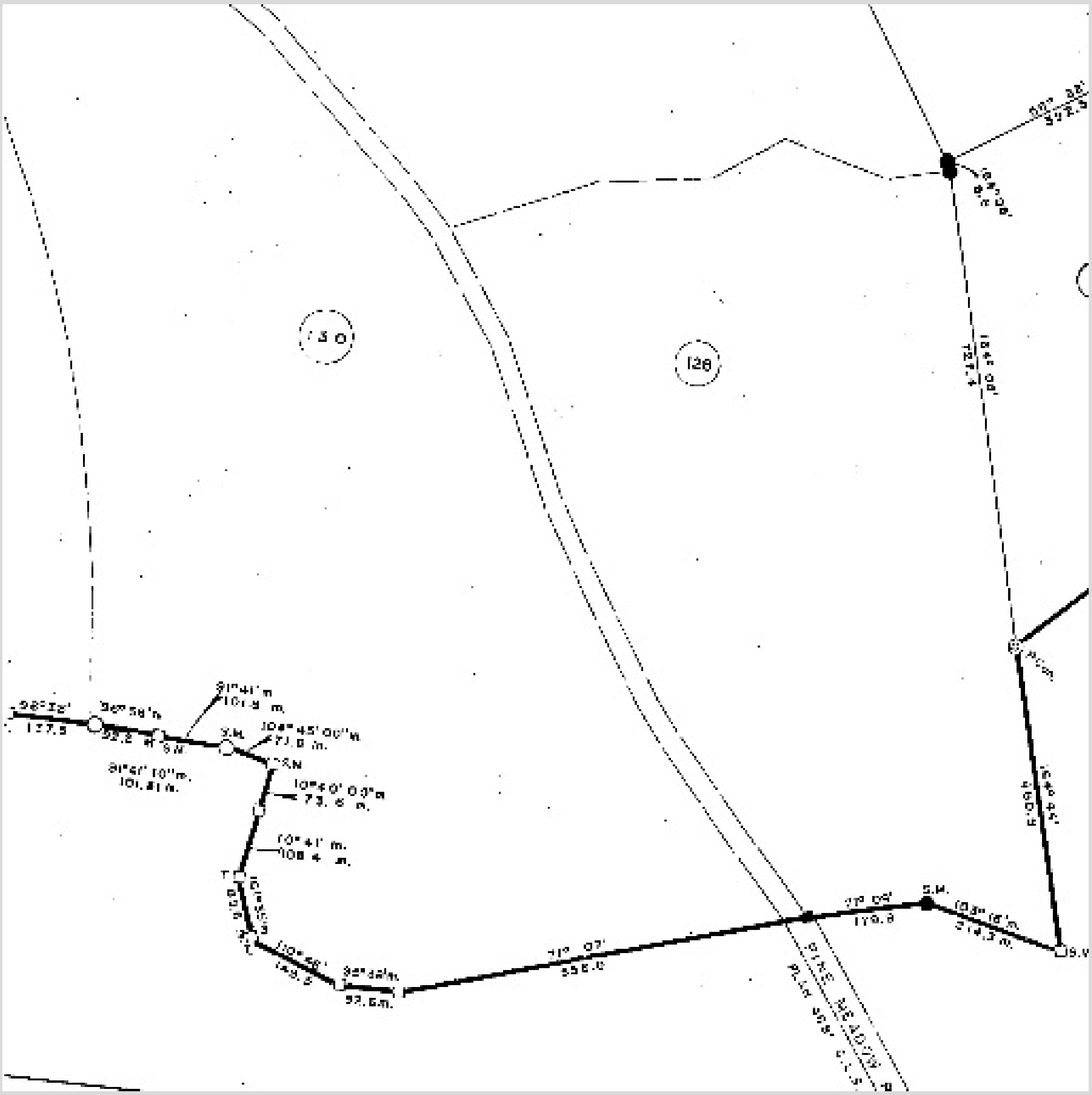
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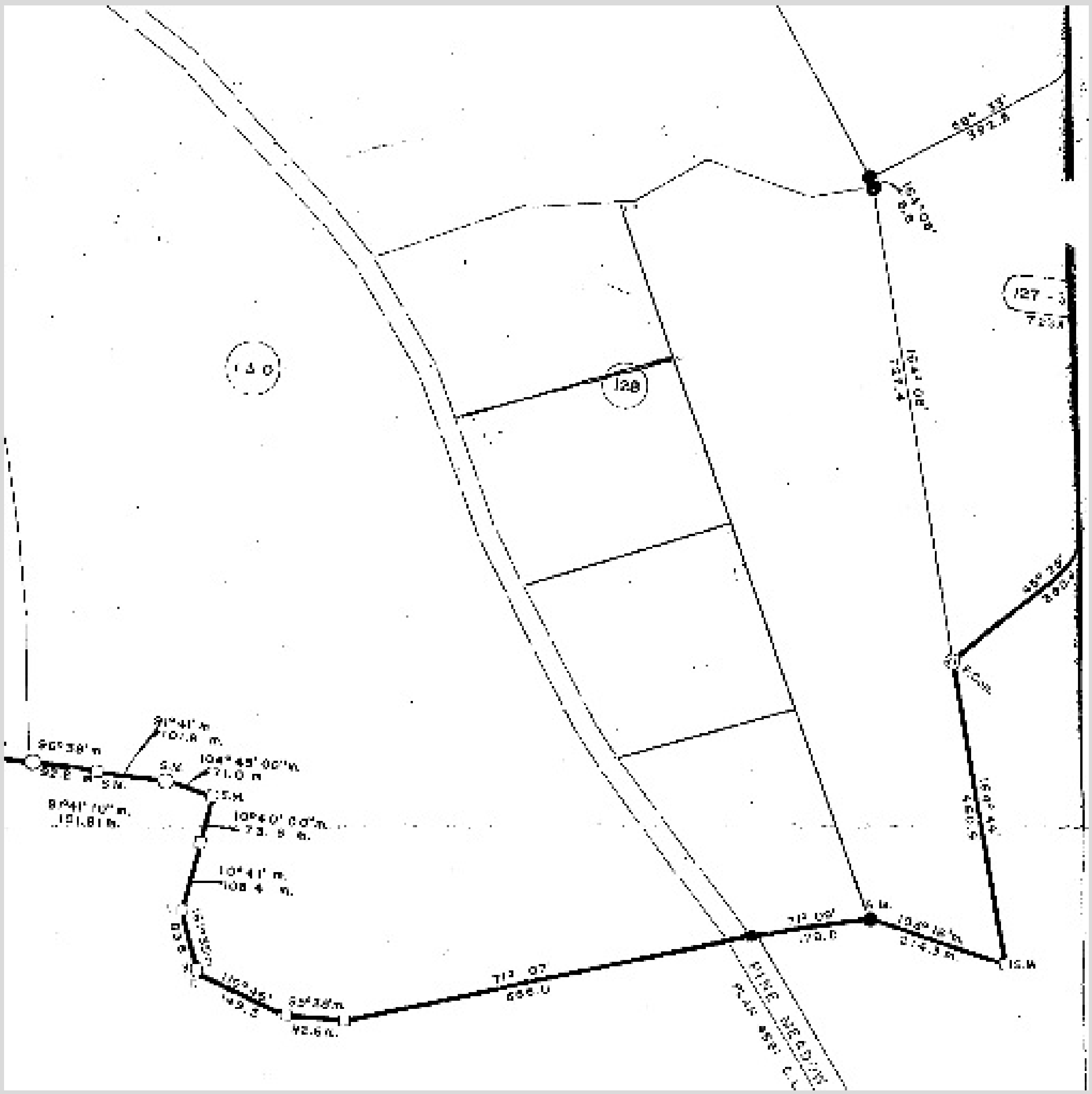
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The 2000 Agreement between Canada and Kanesatake and
The 2001 Statute on Creation and Transfer of Interests and Rights in Kanesatake Land

66. In the aftermath of the "Oka crisis," the Government of Canada decided to complete the recovery of land from the Sulpicians and, eventually, into Kanienkeha:ka hands. Since 1945, hundreds of acres had been administered pursuant to the Indian Act as if they were an "Indian reserve," even though in fact and law they were admittedly not so, being held directly by the Crown rather than for the use and benefit of the Mohawks of Kanesatake.

67. The Agreement of December 21, 2000 between the Band Council and the Government of Canada was explicit concerning dealing with interests in land within the community: Paragraph 9 states:

> This Agreement does not address or affect jurisdiction over the creation, recognition or transfer of interests in land.

68. While purporting to implement the Agreement, the *Kanesatake Interim Land Base Governance Act* stated this issue differently, omitting "recognition" and changing "interests in land" into "interests in relation to land" without explanation: Section 3(3)(b) states:

> This Act does not alter existing jurisdiction over the creation or transfer of rights or interests in relation to lands in the Kanesatake Mohawk interim land base.

69. The Agreement provided, in Section 22:

> For greater certainty, section 21 does not include jurisdiction over the creation, recognition or transfer of interests in land, which matters shall be addressed in a subsequent agreement or in an amendment to this Agreement, negotiated according to the priorities identified by the parties.

The Act, in contrast, contains no similar provision.

There has been no subsequent agreement and no amendment to the 2000 agreement.

70. The Agreement provides, in Section 10:

> …any existing interests in Kanesatake Mohawk Lands continue in accordance with their terms and conditions and will be administered as they were prior to this Agreement.

71. This is not the same as the Act, which makes no provision at all for administration, but only provides, in Section 20, that:

> A right or interest in relation to lands in the Kanesatake Mohawk interim land base that exists on the coming into force of this Act continues in accordance with its terms and conditions.

72. Both the Act and the Agreement address and protect the continuity of existing rights and interests. They are unaffected by the Act and Agreement. The Agreement, but not the Act, provides that existing rights will be administered as they were prior to the agreement. All of these are expressly different from the creation, recognition and transfer of interests in land – which are covered by neither the Agreement nor the Act.

73. The transfer of interests in land is excluded from both the Agreement and the Act.

74. The Agreement clearly contemplated a further agreement or an amendment that would clarify the authority and processes for creating and transferring interests in land (or, as the Act says, interests in relation to land). This was never done. Instead, the Band Council has proceeded to replicate the *Indian Act* system of dealing with land transfers, issuing "Oka letters" that resemble Certificates of Possession, and registering the transactions and Band Council approvals in the Department of Indian Affairs and Northern Development's Indian Lands Registry. There is no legal authority for this: the *Indian Act*, the *First Nations Land Management Act* do not apply to Section 91(24) "lands reserved for Indians" that are expressly not Indian reserves, and the *Kanesatake Interim Land Base Governance Act* expressly does not address land transfers. It is doubtful that the Indian Lands Registry can be used to register lands that are not reserve or surrendered lands, but the Department of Indian Affairs and Northern Development nevertheless accommodates registration of "Oka letters."

75. The Agreement provides for the administration of existing interests in land: the Act that implements the Agreement does not. Neither provides for the creation of new interests or the transfer of existing interests in land. In operating a new system for approving and registering transfers and the creation of new interests, the Band Council has exceeded the authority provided in the *Kanesatake Interim Land Governance Act.*

76. In referring to prior ways of administering *existing* interests in Kanesatake's land, the Agreement is careful not to restrict these to administrative practices immediately prior to the making of the Agreement. In approaching the resolution of long-outstanding matters, the Crown and the Kanienkehá:ka must have intended to adopt the long view of their remedial measures, as well. They would not, for example, have intended the perpetuation of the corporate vehicle employed in the two-year Management Agreement between the Government of Canada and Kanesatake Orihwa'shon:a Development Corporation. Nor would they have intended the resumption of administration pursuant to the *Indian Act* which both parties agreed would have no application to the land. Kanienkehá:ka law, which requires equal respect in this matter, admonishes decision-makers to consider the rights of the coming seven generations. It also ensures that the legacy and wisdom of past generations is taken into account in all lawmaking decisions. Also required is consideration of the impact of the decisions on the natural world, and impact of the decisions on peace, including peace within the community. These elements of the *Kaianerenkó:wa,* the Great Law of Peace of the Haudenosaunee, are not present in the Constitution of Canada, neither in the relevant *Constitution Act, 1867* nor the *Constitution Act, 1982*. Nor are they present in the *Indian Act.* These considerations are, however, present in the way the Gabriel family and other families at Kanesatake have continued to use, occupy and protect their lands.

What the Mohawk Council of Kanesatake purported to do with Lot 128

77. Kanatase Raymond Gabriel left a carefully drafted, witnessed will, which provided above all for the land to remain in the family. He named Kanatiio Allen Gabriel his executor. He provided that his part of Lot 128 should be held by his four children, and that Kanatiio should seek to ensure that the land was dealt with according to his wishes. In making this provision,

Kanatase was deliberately echoing the way in which Angus Awenrathon had encouraged the larger lot in 1878 remaining among his family members.

78. Kanatiio's brothers Philip and Eric applied to the Band Council to have their parts of the eight acre lot surveyed and severed, thereby permitting them to potentially sell those lots. Their sister Kim had made a similar application and had her portion of the land surveyed, and she then sold it to a person outside the family.

79. The vehicle adopted by the Band Council as its equivalent of a Certificate of Possession issued pursuant to the *Indian Act* is a document called an "Oka letter."

80. When Kanatiio became aware of Philip and Eric Gabriel's intention to seek "Oka letters" to place them in a position to potentially sell their interests in the land, he wrote to the Band Council as executor of the estate. On March 23, 2017, he wrote to Chief Serge Simon:

> I am the executor of the estate of my father, Kanatase (Raymond Gabriel) and my uncle Harold Gabriel. I have the legal and moral duty and authority to carry out their wishes to the best of my ability. That includes their wishes about the land.
>
> I am addressing the request of Philip and Eric Gabriel, dated March 20, 2017, to have their land surveyed.
>
> My father's wishes in his will concerning the land reflect two fundamental principles: first, that there should be harmony in our family; second, that the land should remain in our family. His will provided for what ought to happen if we came to one mind, and alternatively what ought to happen if we were unable to do that.
>
> Philip, Eric and I are of one mind about some basic things. It is entirely consistent with my father's wishes that each of them should have possession of specific land within the [larger] Gabriel Family Estate… I have concluded that surveys for the purpose of clarifying the specific land that Philip and Eric possess do not affect the nature of the land.
>
> Therefore, as executor of the estate of my father, I consent to the survey of Lots 1 and 2.

81. Kanatiio sent a second letter to Chief Serge Simon on March 23, 2017. It stated:

> …I am the executor of my father's estate. The land that he held is part of the estate. I have the authority to decide what is to be done with the land, until it is no longer part of the estate.
>
> I consented to the *surveying* of two lots. I did not consent to those lots being treated as if they were "band land" and allotted by the Council...
>
> Consistent with my authority as executor, I do *not* grant authority to the Council to "allot" the two lots after they have been surveyed.
>
> Philip and Eric desire reasonable assurance of their possession of the lots they have asked to have surveyed. I will take the opportunity to discuss alternatives with them. I hope we come to one mind about how that assurance can be provided.

82. As executor of his father's estate, Kanatiio consented to the surveying of parts of Lot 128. Surveys draw lines on the land. Surveys do not create or transfer interests in the land. They may facilitate the pragmatic allocation of the land within the family. Completing a survey does not go beyond the authority contained in the 2000 Agreement or the *Kanesatake Interim Land Governance Act.*

83. On May 5, 2017, Kanatiio wrote to Chief Serge Simon:

> I have asked for confirmation that you will not take any action that affects the land without my knowledge and consent. Please do confirm that.

84. On May 7, 2017, Amanda Simon, "Certified Lands and Estates Manager" for the Band Council, sent an e-mail to Kanatiio:

> As you are aware you [sic] brothers Philip and Eric Gabriel have asked Council to move forward with the subdivision for their land lots.
>
> As land lot 128 is Band Land the Council have agreed to move forward with the subdivision in favour of Philip and Eric Gabriel.
>
> Please be advised that your fathers family home will not be part of the survey therefore should you eventually wish to have an Oka Letter for the land lot the cost of the survey in order to allot will be at your expense entirely.

85. The term “Band Land” is not defined in the *Indian Act*, the *Kanestake Interim Land Base Governance Act*, or the Agreement giving rise to that Act. It is unclear what would cause Amanda Simon to conclude that classifying Lot 128 as “Band Land” would authorize the Council to proceed with a transfer not authorized by law.

86. Also on May 8, 2017, Chief Serge Simon wrote to Kanatiio:

> If a proper response is to be given by council we need to see the parts of the wills that give the directives you want enforced. As we all know there are different systems of belief in our territory but one does not overrule the other as the UNDRIP and the American declaration on the rights of indigenous peoples both state in article 3:
>
> > Indigenous people have the right of self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> If you wish to share this info council would be happy to do what it can to accommodate you.

87. On May 9, 2017 Amanda Simon wrote to Kanatiio:

> …On April 11, 2017 I presented the file and requests to Chief and Council at a duly convened Council meeting. At this time they offered the following directive as described in an excerpt from the Minutes of the meeting: “The request for a decision today is to proceed with the process for a survey and then creating an individual interest for Philip and Eric Gabriel. Council instructs Amanda Simon, Lands and Estates Manager to proceed with the survey process and upon completion to create individual interests for Philip and Eric Gabriel.”
>
> On April 20th 2017 the firm Legault Trudeau Arpenteurs Geometres were instructed by my office to begin work on the subdivision of 128 as per the sketches supplied by Philip and Eric Gabriel which were copied to you depicting the instructions as per the wills of the late Harold and Raymond Gabriel and CLSR plan 105058 which created land lots 128-1, 128-2. And 128-3 (representing the land lots which were allotted by BCR in favour of Kim Gabriel, Ellen Gabriel, Mamie Gabriel and Bridget Gabriel). These allotments were based on the transfer of land in an Indian Reserve which was signed in favour of Kim Gabriel by the late Raymond Gabriel and last will signed by the late Archie and Annie Gabriel in favour of Ellen, Mamie and Bridget Gabriel).
>
> May 5th 2017 an email was received from Allen Gabriel mentioning that it had been six weeks since his letter was offered to Council and mentioning that he had

> not received any formal reply. As the above narrative demonstrates a response was dependent on the directives from Council at a duly convened meeting which occurred on April 11th 2017.
>
> I offered my response to Allen Gabriel on May 7th 2017. I informed you that as Land Lot 128 is "band land" and a directive was given by Council that the surveyors were moving forward with a survey for subdivision which will be followed by allotment by Council by BCR. In your letter dated March 23rd 2017 you stipulate in bold "I consent to the survey of lots 1 and 2." I re-iterate that land lot 128 is legally Band Land.
>
> I am sorry that it was assumed by the office of the Grand Chief that I would have offered a formal written response prior to tabling the file at Council and obtaining a decision. Rest assured that the utmost importance was given to this file and proper procedures were executed prior to offering my response of May 7th 2017.

88. The survey of land to be allotted to Philip and Eric Gabriel has been completed. It is unclear from the letters from Amanda Simon whether any further steps have been taken to "subdivide" Lot 128. It is unclear whether a BCR – Band Council Resolution – to allot the land has been passed. It is unclear whether "Oka letters" have been issued in respect of parts of the Lot.

Equity

89. Lot 128 has been classed by the *Kanesatake Interim Land Governance Act* as "lands reserved for the Indians" pursuant to Section 91(24) of the *Constitution Act, 1867*. That places the lot within an exclusively federal field of jurisdiction. Section 4 of the *Act* further specifies that the land is "set aside for the use and benefit of the Mohawks of Kanesatake." The land is also part of the land acquired by the Government of Canada from the Seminary of St. Sulpice in 1945, and the acquisition by Canada was for the use and benefit of the Band. Since the *Act* is a federal statute, it is clear that the setting aside is being undertaken by Her Majesty. When one party holds land for the use and benefit of another, the first party is the holder of the legal title and the second is the holder of the beneficial title. The first party has ultimate discretion or control over the land, subject to whatever agreement the parties arrive at. In this case, the *Act* can be unilaterally repealed by Parliament. The Agreement (but not the *Act*) explicitly lacks the constitutional protection of a land claim settlement agreement: Article 11 states that "this Agreement is not a treaty or a land claims agreement within the meaning of Section 35

of the *Constitution Act, 1982*." The Crown's continued possession and control over the land, and the holding for the use and benefit of Kanesatake, creates or perpetuates a fiduciary relationship.

90. A general fiduciary relationship exists between the Crown and Indians. Where there is also a cognizable Aboriginal interest in land, and the Crown exercises discretion in relation to that interest, the fiduciary relationship is transformed into a fiduciary obligation, according to the Supreme Court of Canada in *Wewaykum.* The setting aside of the land by the Act identifies a cognizable and collective Kanesatake interest in the land. The continued possession of the land by the Crown, and the limits placed by the Crown on Kanesatake's use of the land in the Act, are exercises of Crown discretion and control. The Crown bears fiduciary obligations to Kanesatake in relation to the land.

91. The Crown has been a full participant in the Band Council's purported allocation and approval of land transfers. It has acted to register "Oka letters" in the federal Indian Lands Registry. It has confirmed directly to transferors and transferees that the transactions have been completed. To the extent that the transactions in which it has participated were without lawful authority, the Crown has acted in breach of its fiduciary obligations.

92. The Band Council, in exercising jurisdiction over land, stands in the position of a fiduciary with respect to members of the band, both because it is the steward of the collective interest that the band holds in all its land, and because it has discretion over the individual members' possession of land. Where, in a decision about land, it exceeds the jurisdiction it has been granted by law – because at Kanesatake, the Band Council is a creature of Canadian law – and acts without lawful authority, it is in breach of that fiduciary obligation.

93. The Crown and the Band Council may carry a further obligation: to negotiate and complete an additional agreement or an amendment to the existing 2000 Agreement to provide for the creation, recognition or transfer of interests in land, as provided in Article 22 of the Agreement. If they have such an obligation, they have failed to carry it out for more than sixteen years. Ironically, this delay is the period the Supreme Court of Canada found to

constitute a breach of the honour of the Crown in its failure to implement, in a timely manner, a treaty obligation to provide land to Métis children.[31] Fulfilling an agreement requires "diligent and purposive fulfillment," not "a persistent pattern of inattention."

94. Both a breach of the honour of the Crown and a breach of fiduciary obligation invoke remedies in equity rather than the common law.

95. In this case, if the Council has issued "Oka letters," the applicant Kanatiio has been deprived of the opportunity to bring the family together harmoniously to share Lot 128, as has been the custom of the Gabriel family for over 150 years, consistent with the wishes expressed in Kanatase's will, because the Band Council and the Crown have facilitated, without authority, what appears to be a transfer of interests in the land.

Jurisdiction of the Federal Court of Canada

96. The Band Council has limited powers, granted by statute. If its actions exceed its statutory authority, they can be subject to review. This is true whether the council is elected pursuant to Section 74 of the *Indian Act* or selected according to custom. It remains an *Indian Act* council. In *Public Service Alliance of Canada v. Francis*, the Supreme Court of Canada explained:

> The powers exercisable by the Council and the Band arise by virtue of the provisions of the *Indian Act.*… The Band Council is a creature of the *Indian Act.*[32]

97. A Band Council, even where the land in question is not an Indian Reserve, is a "federal board, commission or other tribunal" within the meaning of Section 2(1) of the *Federal Court Act*, and its decisions are subject to review by that Court on the same basis as other boards, commissions or tribunals. In *Hill v. Oneida of the Thames Band Council*, the Federal Court of Canada explained:

> There are two reasons to justify review of band council decisions under the Federal Court Act. First, the council finds the authority for its existence in the

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31 *Manitoba Métis Federation v. Canada,* [2013] 1 SCR 623.
32 [1982] 2 SCR 72 at 76 and 77.

> *Indian Act.* Second, the subject matter over which the authority is exercised is designated or delegated by federal statute.[33]

98. In this case, by deciding to "move forward" to allocate land, or in fact to purport to allocate land, in effect transferring an interest in land from the Kanatase (Raymond Gabriel) estate to Philip and Eric Gabriel as individuals, the Band Council has exceeded its jurisdiction, going beyond any authority for its administration of the land pursuant to the *Kanesatake Interim Land Base Governance Act*, the sole source of its authority in respect of the land.

99. Resolutions of a Band Council are considered decisions under the Federal Courts Act and may be subject to judicial review: *Vollant v. Sioui.*[34]

Remedies

100. In equity, a court must seek to place a victim of a breach of fiduciary obligation in the position he would have been in had the breach not occurred.

101. Equity – like reconciliation, a constitutional goal of Canada in its dealings with Indigenous peoples – is restorative. It is principled rather than detailed. It seeks fairness, without rigidity. It permits a court to exercise flexibility and imagination that common law remedies do not permit. It permits the court to effectively implement respect for Indigenous legal systems.

102. The surveys of Lots 128 have been completed. As noted above, a survey does not constitute the creation of new interests in the land. The surveys do not conflict with Kanatase's wishes, expressed in his will. No remedy need lie in respect of the surveys.

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33 2014 FC 796. For decisions involving judicial review of the band council at Kanesatake, see *Gabriel v. Canatonquin*, [1978] 1 FC 124 at para. 10, aff'd *Canatonquin v. Gabriel,* [1980] 2 FC 792 (FCA), *Francis v. Mohawk Council of Kanesatake,* 2003 FCT 115, [2003] 4 FC 1133. In the case of the matters raised in this application, the only federal statutes involved are the *Kanesatake Interim Land Base Governance Act*, with respect to the land (because the *Indian Act* expressly does not apply to the land) and the *Indian Act*, to the extent that it created the Band Council.

34 2006 FC 487, para. 25.

103. If the Band Council issued "Oka letters" by the Band Council to Paul and Eric Gabriel pursuant to a Band Council resolution, this would purport to create or recognize new interests in the land (the existing interest being the Kanatase estate, not merely "Band Land" as asserted by Amanda Simon). Setting aside the "Oka letters" would not injure an innocent third party. If the letters have not been issued, the Court should order that no such letters be issued. If the letters have issued, the Court should set aside these letters, as well as any subsequent steps taken by the Crown or the Band Council to transfer, or ratify the transfer of land from the estate, or register such transfers.

104. As for the purported transfer of one lot to Kim Gabriel, she has, through the Band Council, sold her interest in the land to a third party. In equity, it is too late to recover this land through a court order. The alternative is cash compensation, which would allow the remaining family members to buy the land from the third party if he is willing to sell, and to make adjustments to the land if he is not so willing.

105. Kanatiio seeks his costs of this application.

106. Kanatiio seeks such further remedies as this Honourable Court in its equitable and legal jurisdiction can provide.

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