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Via Courier

February 10, 2017

Anne M. Richard

Judicial District of Moncton
Moncton Law Court
145 Assomption Blvd.
Moncton, NB E1C 0R2

Dear Ms. Richard:

Subject: Sock et al v Province of New Brunswick et al.
Cause No.: MC-745-2016

Enclosed for filing are the original and one copy of the Province of New Brunswick's Statement of Defence (Form 27A). Kindly stamp both the original and copy with the Court's filing particulars and return the copy to my attention.

Thank you for your assistance.

Yours truly,



William Gould
Solicitor

WEG/rc
Encl.



IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MONCTON

B E T W E E N :

ARREN SOCK and KENNETH FRANCIS, on their own behalf and on behalf of all members of Elsipogtog First Nation and all other members of the Mi'kmaq Nation,

Plaintiffs,

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEW BRUNSWICK and THE ATTORNEY GENERAL OF CANADA,

Defendants.

**STATEMENT OF DEFENCE
OF THE PROVINCE OF NEW BRUNSWICK
(Form 27A)**

A. Parties

(i) The Plaintiffs

1. The Defendant, Province of New Brunswick (the "Province") admits paragraph 1 of the Statement of Claim (the "Claim") to the extent that it admits the Mi'kmaq First Nations in New Brunswick and elsewhere may share common practices, customs and traditions; however, the Province has no knowledge of how the alleged common traits may inform the Plaintiffs' Claim or how the alleged distinctive ethnologic or anthropologic features or territorial circumstance specifically support the relief sought.
2. The Province admits the dates of Contact and Sovereignty alleged in paragraph 2 of the Claim but denies that the named plaintiffs possess capacity to speak for the

Mi'kmaq Nation or to speak for those who may allege sufficient, continuous and exclusive occupation as prerequisites to Aboriginal title, for which the Province will require proof of capacity and proof of criteria supporting title.

3. The Province admits paragraph 3 of the Claim but has no knowledge of how the scope or composition of the Mi'kmaq Nation or Elsipogtog First Nation may inform or authorize the allegations or relief sought in the Claim.
4. The Province admits paragraphs 4, 5, 6 and 8 of the Claim.
5. The Province has no knowledge of the representative capacity of the plaintiffs Sock and Francis as alleged in paragraph 7 of the Claim as none is provided and therefore denies that the plaintiffs Sock and Francis represent the communal aspect essential to the assertion of Aboriginal rights or title.

(ii) The Province

6. Regarding paragraphs 9 and 10 of the Claim, the Province says that, pursuant to sections 11 and 21 of the *Proceedings Against the Crown Act*, Chap. P-18, R.S.N.B. 1973 as amended, the proper designation of the Defendant Province is "Province of New Brunswick". Further, the Province denies any qualification in its property interest or legislative capacity founded in the *Constitution Act, 1867* or elsewhere and says that the Plaintiffs' rights and interests are subject to proof.

B. Material Facts

(i) The Claim Area

7. The Province admits that Mi'kma'ki is composed of distinct regions within the Maritime Provinces and Quebec as alleged paragraph 13 of the Claim, but has no

knowledge of the representative capacity of the plaintiffs Sock and Francis to speak for all other Aboriginal rights-holding members of Mi'kma'ki.

8. Regarding paragraph 14 of the Claim, the Province repeats paragraphs 1, 2 and 7 above and has no knowledge of the extent to which the allegations inform the Plaintiffs' claim, for which the Province will require proof.
9. Regarding paragraphs 15 and 16 of the Claim, the Province admits that the Plaintiffs are bringing the claim as described and may bring other claims in the future, but denies entitlement to same, and will require proof of the derivation of the Claim Area depicted in Appendix "A" to the Claim including the ethnology and anthropology supporting the demarcated territory and basis upon which the derivation supports a claim for Aboriginal title.

(ii) **Aboriginal Title**

10. Regarding paragraph 17 of the Claim, the Province denies that the plaintiffs, their ancestors or the Mi'kmaq Nation occupied the Claim Area to any degree upon which Aboriginal title could be founded or perpetuated. The Province says, when mindful of reasonable Aboriginal perspective in the circumstances:
 - (a) both the Claim and the Claim Area are dismissive of common law perspective;
 - (b) sufficiency of occupation over the Claim Area requires both regular use and effective control which are denied;
 - (c) continuity of occupation, even should these Plaintiffs establish ascendancy to the pre-sovereignty group whose practices are relied upon, is denied as applicable throughout the Claim Area;
 - (d) exclusivity of occupation requires capacity, intent and desire to exercise exclusive control on a regular basis, which, over the Claim Area, is denied;

(e) seasonal use has not been established as indicative of exclusive control; and,

(f) the scope of the Claim Area, in consideration of the criteria necessary to establish Aboriginal title, does not support the Claim.

11. Regarding paragraph 18 of the Claim, the Province says that the practices, customs and traditions of any traditional Aboriginal group would have been exercised as required by the group in consideration of its needs and the carrying capacity of the land in question, but denies that such practices, customs and traditions were exercised throughout the Claim Area to an extent that would support the Plaintiffs' claim.
12. Regarding paragraph 19 of the Claim, the Province has no knowledge of the alleged Mi'kmaq legal and political regimes governing the use and occupation of land and will require proof, but denies that the alleged legal and political instruments were exercised throughout the Claim Area to an extent that would support the Plaintiffs' claim.
13. Regarding paragraph 20 of the Claim, the Province says that, in 1760 the British Crown entered into negotiations with Maliseet and Passamaquoddy Indians who in that year entered into a Treaty of Peace and Friendship with the British Crown, the terms of which were communicated to Mi'kmaq communities who made peace with the British Crown in treaties in 1760 and 1761 upon similar terms but absent a specific reaffirmation of previous treaties as contained in the 1760 Maliseet and Passamaquoddy treaty. The Province has no knowledge of the specific 1761 treaty alleged in the Claim.
14. The Province denies paragraphs 21, 22 and 23 of the Claim and says that the Treaties of Peace and Friendship were not intended to confirm or recognize Aboriginal title and further says that the Plaintiffs' allegations are matters of interpretation and argument.

(iii) Aboriginal Rights

15. Regarding paragraphs 24, 25 and 26 of the Claim, the Province says that Aboriginal rights are practiced throughout New Brunswick including the Claim Area by many First Nation members. Generally with respect to Aboriginal rights, the Province says:

- (a) many practices, customs and traditions integral to pre-Contact Mi'kmaq society have been acknowledged through negotiation or accepted through past legal challenge and should not be in dispute;
- (b) established and asserted Aboriginal rights are not absolute;
- (c) established and asserted Aboriginal rights are subject to regulation that can be justified on the basis of conservation and other grounds of public importance; and
- (d) the Treaties of Peace and Friendship recognized the traditional way of life of those with whom the treaties were concluded, being a hunting, fishing and gathering lifestyle, which should not be in dispute.

16. The Province denies paragraph 27 of the Claim and says that:

- (a) the Province will require proof that the Plaintiffs speak for the Mi'kmaq Nation;
- (b) Aboriginal rights are exercised in traditional territory; and
- (c) the Province repeats paragraph 11 and will require proof that the entirety of the Claim Area is the traditional territory of the Plaintiffs.

(iv) Alleged Wrongful Conduct of the Province

17. The Province denies paragraph 28 of the Claim and says:

- (a) the alleged Constitutional Duties arose through the enactment of the *Constitution Act, 1982* which affirmed Aboriginal and Treaty Rights existing at the time of affirmation;

- (b) there has been no appreciable interference or adverse effect on the Plaintiffs' ability to practice any constitutionally guaranteed right resulting from the alleged activities related to Tenures, land conveyances, land control, land management, enacted laws, resource management, Benefits or other alleged actions including nuisance, trespass and the commission of unsustainable practices (hereafter, "alleged Crown actions"),
- (c) any alleged Crown actions occurring prior to the enactment of the *Constitution Act, 1982* arose from competent legislation;
- (d) any alleged Crown actions occurring subsequent to the enactment of the *Constitution Act, 1982* have been undertaken and discharged honourably and respectful of the developing common law, with adequate consultation and reasonable accommodation;
- (e) past wrongs, which are not admitted, do not suffice to establish a breach of Aboriginal rights;
- (f) fiduciary duties are owed to the Plaintiffs only in circumstances not specified or alleged in the Claim;
- (g) any alleged unjustified rights infringement is subject to proof of causation; and
- (h) The Province, at all material times, has acted honourably and appropriately, mindful of the balance of competing interests of Aboriginal and non-Aboriginal persons.

C. Plaintiffs' Claim

(i) Legal Basis

18. The Province repeats its Statement of Defence *seriatim* and therefore denies the allegations contained in paragraphs 29, 30, 31, 32 and 33 of the Claim. Accordingly, the Province denies that damages and loss have been suffered as alleged in paragraph 34 of the Claim, or that injunctive relief is warranted as alleged in paragraph 35 but also because no particular circumstance that might warrant interim measures has been pleaded.

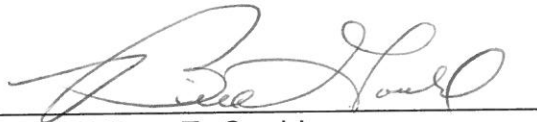
19. For the foregoing reasons, the Province denies the relief claimed in paragraph 36 of the Claim.

20. The Province requests that the Plaintiffs' claim be dismissed with costs in favour of the Province.

The Province intends to proceed in the English language.

DATED at Fredericton, New Brunswick this 10th day of February, 2017.

ATTORNEY GENERAL FOR THE PROVINCE OF
NEW BRUNSWICK
Solicitors for the Defendant.



Per: William E. Gould
Solicitor and Agent for the Attorney General for the
Province of New Brunswick

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