Court File No. 03-CV-261134CM1

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and SAUGEEN FIRST NATION

Plaintiffs

- and –

THE ATTORNEY GENERAL OF CANADA, and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

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Court File No. 94-CQ-050872CM

ONTARIO

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BETWEEN:

CHIPPEWAS OF SAUGEEN FIRST NATION and CHIPPEWAS OF NAWASH UNCEDED FIRST NATION

Plaintiffs

- and –

THE ATTORNEY GENERAL OF CANADA; HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO; THE CORPORATION OF THE COUNTY OF GREY; THE CORPORATION OF THE COUNTY OF BRUCE; THE CORPORATION OF THE MUNICIPALITY OF NORTHERN BRUCE PENINSULA; THE CORPORATION OF THE TOWN OF SOUTH BRUCE PENINSULA; THE CORPORATION OF THE TOWN OF SAUGEEN SHORES and THE CORPORATION OF THE TOWNSHIP OF GEORGIAN BLUFFS

Defendants

FINAL ARGUMENT OF THE SAUGEEN OJIBWAY NATION

OVERVIEW

1. The Plaintiff First Nations are named the Chippewas of Nawash Unceded First Nation (Nawash) and the Saugeen First Nation (Saugeen). Collectively, today, in English, they refer to themselves as the Saugeen Ojibway Nation (SON).

2. There are two actions before this Court. One is an action for Aboriginal title. SON seeks recognition of their historic and continuing connection to their territory, which in this case, is their water territory. This connection to the water relates to their economy, their way of life, their culture, and their spirituality.

3. The second action is based on a promise made by the Crown at Treaty 45 ½ in 1836 to protect the Saugeen (Bruce) Peninsula for SON forever. This promise was breached leading up to and during the negotiations of a Treaty 72 in 1854, which had the result of taking much of SON's remaining territory from them. SON seeks remedies for this breach.

4. In addition, SON seeks an order clarifying that Treaty 72 did not affect any harvesting rights they had before that treaty.

Aboriginal Title

5. Although the two are now distinct First Nations, Saugeen and Nawash share the same history and ancestry, and historically were united. They also share lands, waters and resources throughout their territory – the Saugeen Ojibway Nation Traditional Lands (SONTL). SONTL consists of the Saugeen (Bruce) Peninsula (the Peninsula), about 1.5 million acres of land to the south of it, stretching from Goderich to Collingwood, and the portions of Lake Huron and Georgian Bay offshore of these lands. SONTL is illustrated in the Plaintiffs' Claim Map, Exhibit P (SONTL is marked in light blue, light green, yellow and includes the various reserves marked).

Exhibit P – (annotated) – SON claims map, Appendix D, Tab 1

6. Most of the dry land area of SONTL has been the subject of various treaties. However, none of these treaties deal with Lake Huron or Georgian Bay, leaving that area still subject to Aboriginal title. This claimed Aboriginal title area (marked in light blue on Exhibit P) is referred to as the Saugeen Ojibway Nation Unceded Traditional Lands (SONUTL).

Exhibit P – (annotated) – SON claims map, Appendix D, Tab 1

7. The Plaintiffs belong to the Anishinaabe nation, and this is their primary ethnic identifier. The traditional language spoken is Anishinaabemowin.

8. SON is the present manifestation of a local group of Anishinaabek which has occupied SONTL from ancient times, although at times in the historical record, they have been referred to by various different names. For example, SON was one of the groups called Odawa in the 17th century.

9. SON was, and still is, a fishing people. Fishing was central to their traditional economy and way of life. SON has an Aboriginal commercial fishing right which has been judicially recognized.

10. The water was and is central to SON's sense of territory, and indeed to their traditional spiritual beliefs. SON members feel a strong moral and spiritual obligation to care for the water. The water is as important to them, if not more important, than their dry land territory.

11. Knowledge of SON's ancient and ongoing responsibility to SONTL is embedded deeply in SON's traditions, in SON's stories, in SON's language, and in the land itself. It is central to SON's identity.

12. SON's long presence in SONTL is demonstrated by the following:

(a) SON's traditional knowledge that they have always been in SONTL has been passed down through generations;

(b) SON has a deep spiritual attachment to SONTL, including deeply-felt obligations to care for the burial sites of their ancestors and other relatives;

(c) SON has traditional stories which contain parallels to ancient geological events from thousands of years ago;

(d) There are specific geographical references to locations in or near SONTL in stories which are at the heart of Anishinaabe spiritual traditions;

(e) SON has retained its own unique geographic names for places within SONTL;

(f) There is local traditional knowledge of mid-17th century events;

(g) Some of the Dodemic ("clan") identities first noted by Europeans among the Anishinaabe on Georgian Bay in the early 17th century are still present among SON members today;

(h) An analysis of archaeological findings concludes the Odawa arose *in situ* around Georgian Bay;

(i) A linguistic analysis shows that the dialect of Anishinaabemowin spoken at Saugeen and Nawash is closest to the Odawa dialect, supporting that SON was one of these Odawa groups;

(j) There is archaeological evidence of use of the same ritual sites in SONTL for the same ceremonies over centuries, suggesting that these locations and their ritual significance had been passed down over many generations;

(k) A comparison of Anishinaabemowin dialects in surrounding communities supports that there has been stability of the geographic location of SON for hundreds of years; and

(l) In a fishing prosecution of members of SON, the Court found in 1993 that SON had continuously exercised their right of fishing in their territory "from the very distant past to the present".

13. Among the Anishinaabe, local land use decisions were made by local politically and economically independent groups known to anthropologists as "bands". Anishinaabe customary law provided procedures for persons seeking permission to be present in another band's territory. Such permission was given routinely to friendly or allied Anishinaabe persons.

14. When faced with an external threat at a broad level, however, Anishinaabe groups co-operated to deal with such a threat.

15. In the early 17th century, SON shared a portion of their territory with an Indigenous group called the Petun, with whom they were allied, and with whom they maintained trading relationships.

16. In the mid 17th century, a conflict with the Haudenosaunee (a group whose homeland is south of Lake Ontario) broke out, and the Haudenosaunee raided up into the Georgian Bay area and beyond. The Haudenosaunee targeted the Huron and the Petun more specifically, but there may have been some temporary displacement of SON.

17. SON was back in SONTL within one generation, and by 1701 at the latest, had, together with their allies, completely driven the Haudenosaunee out of what is now Ontario.

18. SON acknowledges that various people joined and left SON over the years. This was in accordance with Anishinaabe customary law and is part of the normal process of succession inherent in all social groups. One instance of this is that a number of Pottawatomi moved to SONTL in the mid-19th century and became integrated into SON.

19. The test in Canadian law for Aboriginal title requires the Indigenous group to show exclusive occupation of the area claimed at the time of the assertion of British sovereignty. For the purposes of this case, this date is 1763. Accordingly, SON need not prove their presence in SONTL earlier than 1763 in order to establish Aboriginal title, although SON submits that the evidence demonstrates their presence in and control of SONTL is much earlier than that.

20. In examining if Aboriginal title is proven, Courts have used the lenses of sufficiency of occupation; exclusivity of occupation; and, if present occupation is relied on, continuity between pre-sovereignty and present occupation. However, these factors are useful lenses, not independent requirements of the Aboriginal title test.

21. Courts must consider the Indigenous perspective, including Indigenous customary laws, throughout the analysis. This requires that the Court consider what Aboriginal title looks like from the perspective of the Indigenous group seeking the declaration.

22. From SON's perspective, their water territory is a part of who they are. Their waters were a gift from the Creator and with this gift came the responsibility to care for and protect the territory. This responsibility of stewardship cannot be discharged by others but belongs exclusively to SON alone.

23. SON demonstrates its occupation in this sense by:

(a) the roles assigned to certain members who hold special responsibility for safeguarding and protecting the waters, such as women and certain pipe carriers;

(b) the water ceremonies performed to fulfill the spiritual obligations to the protect water;

(c) customary laws which reflect their spiritual obligations to protect their territory; and

(d) the spiritual practices SON harvesters utilize when fishing.

24. Other evidence on which SON relies relates to control of their territory. SON submits that such evidence relates to both exclusivity and sufficiency. If one controls who enters a territory, by definition, that relates to exclusivity, but it also relates to sufficiency because keeping intruders out clearly shows a strong presence.

25. Given the geography of Lake Huron/Georgian Bay, many aspects of such control were manifested on a broad regional level. SONUTL was surrounded by the territories of other allied Anishinaabe people. SON, together with their allies, collectively controlled all the access points to Lake Huron/Georgian Bay. It was like their gated community. Internal to Lake Huron/Georgian Bay, however, it remained the local band which controlled local territory.

26. Supporting control of SONUTL by SON around 1763 are the following:

(a) There are Anishinaabe land control customary laws reflecting this;

(b) Champlain was the first European to enter Georgian Bay. When he reached the mouth of the French River in 1615 he was met by a force of 300 Anishinaabe warriors, including some warriors from SON. Champlain was allowed to proceed once he had established a diplomatic and trading relationship with the Anishinaabe;

(c) Anishinaabe living on Lake Huron and Georgian Bay (which included SON) drove the Haudenosaunee out of the region in the late 17th century;

(d) Shortly after Britain conquered the French in North America and asserted sovereignty, the Anishinaabe took offence to British policies, and the Three Fires Confederacy (of which SON was a part), led by Chief Pondiac, besieged or captured numerous British forts, and kept the British out of Lake Huron and Georgian Bay in 1763;

(e) There were no Europeans in SONTL in 1763;

(f) The Anishinaabe (including SON) agreed to the British entering Lake Huron/Georgian Bay once the British agreed to suitable conditions at Niagara in 1764;

(g) The British relied on Anishinaabe geographical knowledge and military support to maintain a British presence in Lake Huron/Georgian Bay until after the war of 1812-1814; and

(h) When Euro-Canadian fishermen began to enter SONTL, they leased fishing grounds from SON. Even after the Crown took over leasing the fisheries, the Crown paid the proceeds of the leases to SON for a number of years.

27. This Court has also heard considerable evidence of historic land and water use of SONTL by SON, which directly addresses the lens of sufficiency of occupation. The evidence also demonstrates that SON continues to use its land and water territories throughout SONTL today, which – as mentioned above – serves as evidence of pre-sovereignty occupation.

28. A key issue that is contested is whether it is legally possible to hold Aboriginal title to the beds of navigable water.

(a) The position of the Defendants is that it is not possible, as a matter of pure law, to hold Aboriginal title to the beds of navigable waters, since, as an exclusive right, Aboriginal title would be incompatible with a common law public right of navigation, and with Canadian sovereignty.

(b) It is submitted that this position incorrectly interprets both Aboriginal title and the common law public right of navigation as absolute and irreconcilable with each other. Rather, neither Aboriginal title nor the public right of navigation are absolute. There is room to reconcile them, and to provide for appropriate sharing.

29. A declaration of Aboriginal title is **not** sought for any lands within SONUTL that are in the hands of private parties in fee simple. Rather, compensation for such land will be sought in Phase 2 of this litigation.

Treaty 72 as a Breach of Fiduciary Duty

30. In approximately the 1830s, Euro-Canadian settlers and fishermen began moving into SONTL.

31. By 1836, farmer settlers were beginning to enter SONTL and the Crown told SON that they could not prevent these settlers from encroaching on SON lands. Therefore, at Treaty 45 ½,

the Crown pressed SON to cede their lands south of Owen Sound – approximately 1.5 million acres of rich farmland – to make way for settlement. SON agreed to this very reluctantly. In exchange, SON received a promise that the Crown would protect a smaller proportion of their territory – the lands north of Owen Sound on the Peninsula – which the Crown engaged "for ever to protect for you from the encroachments of the whites".

32. Settlers, however, were soon encroaching on the Peninsula itself. Although it took some measures "on paper", the Crown generally condoned squatting, and even acted in some ways that encouraged it.

33. In 1854, the Crown came back and this time said that settlers were beginning to move onto the Peninsula, and that it was not possible to prevent that. The Crown pressed SON to surrender almost all the Peninsula, leaving some small reserves which would then be protected. The Crown negotiators used SON's fear of being overrun to, in the Crown representative's words, "wring from [SON] some assent [to the treaty] however reluctant", including through the use of threats and bullying. SON agreed to the proposed surrender very reluctantly, and signed Treaty 72.

34. Strikingly, **the day after Treaty 72**, the Crown negotiator wrote to the local sheriff and asked him to keep squatters off the Peninsula, since it had been surrendered and was going to be sold. Thus, the Crown took steps to do precisely what it had said was impossible just one day before. The Crown negotiator had lied to SON.

35. In addition, much of the land on the Peninsula was rocky and unsuitable for farming, and the Crown knew this at the time of Treaty 72. Demand for the land did not prove to be as high as the Crown had stated, and SON had feared. **Seventeen years** after the treaty was signed, almost

half the Treaty 72 land remained unsold. It was **50 years** before the proportion of unsold land dropped below 3%. This further belies what SON had been told at Treaty 72.

36. The core of the legal theory of the Treaty 72 action is that as a result of Treaty 45 ½ and other actions, the Crown took on a fiduciary duty to respect and protect SON's rights over the Peninsula.

37. The Crown breached this duty by failing to protect the Peninsula from "the encroachments of the whites", as it had undertaken to do. The Crown also lied to SON at the treaty council when officials stated that there was nothing they could do to protect the Peninsula from this encroachment. To the contrary, it was possible to address and prevent encroachments on the Peninsula, and as soon as the treaty had been made, the Crown immediately took steps to do so.

38. Compounding this breach was conduct by Crown representatives leading up to the treaty signing which involved threats, intimidation, and rushed and manipulative proceedings.

39. The consequence of these breaches of fiduciary duty was that SON agreed to Treaty 72. In this phase of the litigation, SON seeks only a declaration that the Crown owed SON a fiduciary duty, and that this duty was breached, as well as that this resulted in a stain on the honour of the Crown. Further remedies will be the subject of Phase 2.

Exclusion from Treaty 72

40. Independently of the relief sought for breach of fiduciary duty in the course of taking Treaty 72, SON says that one matter was carved out of Treaty 72 entirely and was not intended to have been dealt with.

41. SON says that Treaty 72 is silent about harvesting rights and that such rights continue in the Treaty 72 area. In support of this are the following:

(a) The language of Treaty 72, when translated into Anishinaabemowin, would not necessarily convey that harvesting over the area would no longer be permitted;

(b) It would clash with fundamental Anishinaabe cultural norms to agree to stop traditional harvesting;

(c) It would not have been in the Crown's interest for SON to stop traditional harvesting since SON would then be unable to provide for themselves and would need to seek Crown assistance;

(d) Traditional harvesting can often be compatible with the use of land for farming; and

(e) SON has continued to harvest throughout the Peninsula in the years since Treaty 72, including up to the present day and including on privately held lands.

Road Map of the Argument

42. The Plaintiffs' argument is structured as follows:

(a) Three chapters of preliminary issues regarding what this case is not about, evidence law considerations in Indigenous claims, and a note about expert disciplines;

(b) Eight chapters of facts about the Anishinaabe, their identity, their culture, and their way of life, organized thematically;

(c) 21 chapters about events from about 10,000 years ago to the present, organized chronologically;

(d) Three chapters briefly listing the legal issues raised;

(e) Three chapters about the legal issues in the Aboriginal title case;

(f) Five chapters about the legal issues in the Treaty 72 case;

(g) One chapter on the law regarding declarations;

(h) One chapter setting out the orders SON seeks; and

(i) A set of appendices:

(i) Glossary;

(ii) Timeline;

(iii) Cast of characters;

(iv) Maps;

(v) For each witness, an appendix addressing the relevance and weight of their evidence, as well as an appendix addressing the relevance weight of a series of maps entered into evidence by Ontario (Exhibits 4866 to 4872); and

(vi) A consolidated summary of findings of fact sought.

1. WHAT THIS CASE IS NOT ABOUT

43. There are a number of matters about which this Court has heard evidence, which SON submits can be used for limited purposes, or in some cases not at all, given what is and is not in issue in this litigation.

Fulfilment of Treaty 72

44. There is some evidence before this Court about the fulfilment of Treaty 72. While such evidence might shed some light on the intentions and understandings of the parties to Treaty 72, the question of whether the terms of Treaty 72 were properly fulfilled is not before this Court. SON makes no such claim in this litigation. Indeed, claims in litigation about the fulfilment of the terms of Treaty 72 have been stayed pending the outcome of this litigation.[1] Rather, the claim SON presses before this Court is whether Treaty 72 is itself the result of a breach of the Crown's fiduciary duty. SON requests that this Court not make any ruling about whether the terms of Treaty 72 were properly fulfilled.

Aspects of Prof. Beaulieu's Evidence

45. This Court has heard evidence from Prof. Alain Beaulieu (and some reply evidence from Prof. Michel Morin) about whether the French in the 17th and 18th centuries felt themselves legally bound to seek permission from Indigenous communities when they used the Great Lakes or built forts and trading posts. SON submits that what the French did in the years leading up to 1763 could be relevant to the key issue of exclusive occupation of SONUTL in 1763. However, the state of French law, much less what the French **felt** about the law, is not relevant, and therefore can be disregarded.

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[1] Agreed Statement of Fact Regarding Stayed Litigation, Exhibit 4263.

Relevance and Weight of the Evidence of Prof. Alain Beaulieu, Appendix E, Tab 1.

46. This Court has also heard evidence from Prof. Beaulieu (and some reply evidence from Prof. Morin) about the interaction of the French and Indigenous peoples over a wide geographic and temporal range. While relevance should be considered broadly, and while much evidence can be relevant to understanding the appropriate context, SON submits that there still must be some nexus between the evidence and the issue of exclusive occupation of SONUTL in 1763. If the evidence relates to an Anishinaabe group, or if it relates to Lake Huron/Georgian Bay in some way, it could be helpful evidence. However, Prof. Beaulieu's evidence included substantial matters about the interaction of the French and the Haudenosaunee in the St. Lawrence Valley. SON submits that this evidence does not bear on the key issue of exclusive occupation of SONUTL in 1763, and therefore is irrelevant and can be disregarded.

Relevance and Weight of the Evidence of Prof. Alain Beaulieu, Appendix E, Tab 1.

Aspects of Prof. McHugh's Evidence

47. Much of Prof. Paul McHugh's evidence was devoted to questions about how mid 19th century actors perceived their duties and responsibilities, and whether these were legally enforceable at the time. SON submits that such evidence may be relevant to limitations and laches arguments (which, if raised by the Defendants, will be dealt with by SON in a Reply Argument). However, SON submits that such evidence is not relevant to the questions of the existence or breach of the Crown's fiduciary duties to SON. These latter questions should be decided on the basis of the law as it stands now, not on the basis of how it would have been decided by a court in the mid-19th century. Courts are not time machines.

Relevance and Weight of the Evidence of Prof. Paul McHugh, Appendix E, Tab 32.

Matters Outside the Scope of Fiduciary Law

48. As argued in more detail below, fiduciary law has an approach very different from that of the common law:

(a) Fiduciary law is aimed at monitoring and protecting relationships of trust and confidence.

(b) In such relationships, the beneficiary is in a position of structural vulnerability to the fiduciary.

(c) Therefore, equity does not treat the parties as independent and equal, but favours the wronged beneficiary.

(d) Since the power in the relationship resides solely with the fiduciary, the sole focus of the assessment of whether there has been a breach of fiduciary duty is on the actions of the fiduciary. The conduct of the beneficiary is not considered.

(e) Fiduciary law has a strong emphasis on deterrence and is concerned with potential harms, not just actual harms.

(f) A lack of economic loss does not excuse a breach.

(g) The inevitability of a loss does not excuse a breach.

See paras 1117-1124 *(The Fiduciary Concept)*
See paras 1212-1217 *(Consequences of Breach)*

49. SON therefore submits that the focus of the analysis about the Treaty 72 case should be the duty the Crown owed to SON, and what the Crown did (or did not do) to fulfil that duty. What

SON did does not bear on whether the Crown breached its duty. What SON might have done had the Crown not breached its duty is similarly not relevant to whether the Crown breached its duty.

50. It would not be practical or sensible to try to pull apart the evidence to exclude everything but Crown actions, but the focus of the analysis of the breach must remain resolutely on the Crown's actions. Other considerations are distractions.

51. For example, it is not disputed that SON understood (mostly) what Treaty 72 meant, nor that the SON representatives agreed to Treaty 72 at the meeting on the night of October 13-14, 1854. The heart of SON's case is that the Crown breached its duty to SON before and at that meeting. The analysis of whether the Crown breached its duty can stop there.

52. While SON's position is that absent the Crown's breach of duty, SON would not have agreed to Treaty 72, this Court need not decide whether that is so. Once there has been a breach of fiduciary duty, a beneficiary is entitled to a ruling to that effect. This is fundamental to the approach of fiduciary law.

2. EVIDENCE LAW CONSIDERATIONS IN INDIGENOUS RIGHTS CASES

53. SON relies on different types of evidence, including oral history, other traditional knowledge, academic expert knowledge and direct eyewitness observation. This is characteristic of Indigenous rights litigation, and courts have adapted the usual rules of evidence to deal with unique challenges presented when consideration and receipt of such evidence requires a "departure from the court's usual fare."

> Many of the oral histories and oral traditions I was privileged to hear in this case were woven with history, legend, politics and moral obligations. This form of evidence is a marked departure from the court's usual fare and poses a challenge to the

> evaluation of the entire body of evidence. Courts generally receive and evaluate evidence in a positivist or scientific manner: a proposition or claim is either supported or refuted by factual evidence, with the aim of determining an objective truth. However, in cases such as this, the "truth" which lies at the heart of the oral history and oral tradition evidence can be much more elusive.

Tsilhqot'in Nation v British Columbia, 2007 BCSC 1700 (CanLII) at para 137, Plaintiffs' Book of Authorities, Tab 107. (Trial Court ruled Aboriginal title in principle established, but not ordered for procedural reasons; BCCA ruled Aboriginal title not established (2012 BCCA 285); SCC granted declaration of Aboriginal title ([2014] 2 SCR 257).

The Indigenous Perspective

54. This Court must make decisions which will profoundly affect SON. A key purpose of Canadian law relating to Indigenous people is to reconcile the pre-existence of Indigenous society with the sovereignty of the Crown. Such reconciliation requires stepping outside one's own worldview to the extent possible so as to be able to see, understand, and take into account the Indigenous perspective.

> More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

R v Van der Peet [1996] 2 SCR 507 at para 31. See also para 49, Plaintiffs' Book of Authorities, Tab 89.

> It is critical to consider the nature of the potential loss from an Aboriginal perspective. From that perspective, the relationship that aboriginal peoples have with the land cannot be understated. The land is the very essence of their being. It is their very heart

> and soul. No amount of money can compensate for its loss. Aboriginal identity, spirituality, laws, traditions, culture, and rights are connected to and arise from the land. This is a perspective that is foreign to and often difficult to understand from a non-Aboriginal viewpoint.
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> *Platinex v Kitchenuhmaykoosib Inninuwug First Nation* 2006 CanLII 26171 (ON SC) at para 80, Plaintiffs' Book of Authorities, Tab 65.

55. The reconciliatory objective of section 35 requires the Court to approach the test for Aboriginal title from both the common law and Indigenous perspective. When looking at whether the claimant group has met the elements of the test, the Court must consider how the Indigenous group in question might conceive of Aboriginal title. This means looking at the evidence through an Indigenous perspective lens and includes considering evidence of occupation that might not typically be considered under the common law but that accords with the Indigenous perspective.

> The common law test for possession — which requires an intention to occupy or hold land for the purposes of the occupant — must be considered alongside the perspective of the Aboriginal group which, depending on its size and manner of living, might conceive of possession of land in a somewhat different manner than did the common law.
>
> *Tsilhqot'in Nation* v *British Columbia*, [2014] 2 SCR 257 at para 41. See also para 35, Plaintiffs' Book of Authorities, Tab 108.

> The idea is to reconcile indigenous and non-indigenous legal traditions by paying attention to the Aboriginal perspective on the meaning of the right at stake.
>
> *R* v *Marshall*; *R* v *Bernard*, [2005] 2 SCR 220, at para 128, citing J. Borrows, "Creating an Indigenous Legal Community" (2005), 50 McGill L.J. 153, at p. 173, Plaintiffs' Book of Authorities, Tab 79.

56. Understanding and considering the Indigenous perspective in the context of a claim for Aboriginal title is especially important and means departing, in part, from more traditional common law notions. As the Supreme Court of Canada noted in *R.* v. *Marshall*; *R.* v. *Bernard*:

> In my view, aboriginal conceptions of territoriality, land-use and property should be used to modify and adapt the traditional common law concepts of property in order to develop an occupancy standard that incorporates both the aboriginal and common law approaches.
>
> …
>
> Taking into account the aboriginal perspective on the occupation of land means that physical occupation as understood by the modern common law is not the governing criterion. The group's relationship with the land is paramount. To impose rigid concepts and criteria is to ignore aboriginal social and cultural practices that may reflect the significance of the land to the group seeking title.

R v *Marshall*; *R* v *Bernard*, [2005] 2 SCR 220, at paras 127 and 136, Plaintiffs' Book of Authorities, Tab 79.

57. The Indigenous perspective can be found in oral history (understood in its broad sense), and other kinds of traditional knowledge, such as sacred stories and practices, explanations of spiritual connection to territory and responsibility for the territory, customs relating to land and water use, and traditional harvesting practices and their cultural importance.

> Aboriginal oral histories may meet the test of usefulness on two grounds. First, they may offer evidence of ancestral practices and their significance that would not otherwise be available. No other means of obtaining the same evidence may exist, given the absence of contemporaneous records. **Second, oral histories may provide the aboriginal perspective on the right claimed. Without such evidence, it might be impossible to gain a true picture of the aboriginal practice relied on or its significance to the society in question.**

Mitchell v *M. N. R.*, [2001] 1 SCR 911, 2001 SCC 33 at para 32 [emphasis added], Plaintiffs' Book of Authorities, Tab 48.

Oral History

58. Some, but not all scholars, distinguish "oral history" and "oral tradition". The distinction, when made, turns on whether or not the event in question took place during the lifetime of the person recounting the history.[2]

59. Courts, however, often use "oral history" in a broad sense, encompassing both "oral history" and "oral tradition" in the narrower sense, and more. In *Delgamuukw v British Columbia*, the Supreme Court of Canada referred to oral history as sometimes being "the only record of [an Aboriginal nation's] past", which clearly refers to events prior to the lifetime of any living person. In *Mitchell v. MNR*, the Supreme Court of Canada described oral history as possibly "contain[ing] elements that may be classified as mythology", which is neither "oral history" nor "oral tradition" in the narrower sense.

> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 84, Plaintiffs' Book of Authorities, Tab 18.
>
> *Mitchell v M.N.R,* [2001] 1 SCR 911, 2001 SCC 33 at para 34**,** Plaintiffs' Book of Authorities, Tab 48.

60. When it is about identifiable historical events, SON may be relying on oral history as proof of such events. SON may also be relying on oral history or other forms of traditional knowledge less directly. For example, SON relies on their stories to demonstrate their spiritual connections to the territory, to explain who they are, and also to show that they occupied and used their territory. In the words of the Supreme Court of British Columbia:

> Thus, in order for the plaintiffs to succeed in this case they must prove that the Tsilhqot'in people are an aboriginal group of people entitled to the use and occupation of the land claimed in this action. The

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[2] Evidence of Dr. Alexander von Gernet, Transcript vol 52, October 11, 2019, p. 6553, line 11 to p. 6555, line 1.

> starting point is proof that they are a group of people with shared values, culture and traditions. The telling of legends and stories, shared and repeated through the decades, is one way to demonstrate that a group of people do share values, culture and traditions so that in their shared history they come together and live as an aboriginal nation.

William et al. v British Columbia et al., 2004 BCSC 1022 at para 20, Plaintiffs' Book of Authorities, Tab 114.

61. This kind of inference should be evaluated in accordance with the Indigenous perspective.

> In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts.
>
> The evidence, oral and documentary, must be evaluated from the aboriginal perspective. What would a certain practice or event have signified in their world and value system?

R v Marshall; R v Bernard, [2005] 2 SCR 220 at paras 68-69, Plaintiffs' Book of Authorities, Tab 79.

Weight to be Given to Oral History, Traditional Knowledge, and Evidence of the Indigenous Perspective

62. When dealing with evidence in cases involving Aboriginal rights, the laws of evidence must be adapted "so that the Aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight."

> This appeal requires us to apply not only the first principle in *Van der Peet* but the second principle as well, and adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past.

Delgamuukw v British Columbia, [1997] 3 SCR 1010 at para 84, Plaintiffs' Book of Authorities, Tab 18.

63. As noted, for many Indigenous nations, oral histories are the only record of their past. In order not to place an "impossible burden of proof" on Indigenous people, oral histories must be placed on an equal footing with the historical documents with which courts are more familiar.

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents … To quote Dickson C.J., given that most aboriginal societies "did not keep written records", the failure to do so would "impose an impossible burden of proof" on aboriginal peoples, and "render nugatory" any rights that they have

Delgamuukw v British Columbia, [1997] 3 SCR 1010 at para 87, Plaintiffs' Book of Authorities, Tab 18.

See also *R v Van der Peet*, [1996] 2 SCR 507 at para 68, Plaintiffs' Book of Authorities, Tab 89. (The court should be conscious of the evidentiary difficulties in dealing with the historical record to prove rights which originated in times where there were no written records)

64. Of course, oral histories and traditional knowledge must meet standards of usefulness and reliability, but this too should be assessed from the Indigenous perspective.

> In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions. Oral histories reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective. Thus, *Delgamuukw* cautions against facilely rejecting oral histories simply because they do not convey "historical" truth, contain elements that may be classified as mythology, lack precise

> detail, embody material tangential to the judicial process, or are confined to the community whose history is being recounted.

Mitchell v M.N.R, [2001] 1 SCR 911, 2001 SCC 33 at para 34, Plaintiffs' Book of Authorities, Tab 48.

> Underlying all these issues is the need for a sensitive and generous approach to the evidence tendered to establish aboriginal rights, be they the right to title or lesser rights to fish, hunt or gather. Aboriginal peoples did not write down events in their pre-sovereignty histories. Therefore, orally transmitted history must be accepted, provided the conditions of usefulness and reasonable reliability set out in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, are respected. Usefulness asks whether the oral history provides evidence that would not otherwise be available or evidence of the aboriginal perspective on the right claimed. Reasonable reliability ensures that the witness represents a credible source of the particular people's history. In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts.
>
> The evidence, oral and documentary, must be evaluated from the aboriginal perspective. What would a certain practice or event have signified in their world and value system?

R v Marshall; R v Bernard, [2005] 2 SCR 220 at paras 68-69, Plaintiffs' Book of Authorities, Tab 79.

65. The Supreme Court of Canada's direction to resist "facile assumptions based on Eurocentric traditions" is in line with the *United Nations Declaration on the Rights of Indigenous Peoples*:

> Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

United Nations Declaration on the Rights of Indigenous Peoples, https://undocs.org/A/RES/61/295, 4th recital.

66. In Anishinaabe culture, important and relevant Indigenous perspectives are communicated through the oral histories and traditional knowledge held by traditional knowledge holders (often called "elders") in Indigenous communities. Traditional knowledge holders are relied on to provide an understanding of the meaning of places and events in a community's history, but are not expected to give exactly the same account or story as others when called upon to share oral history. It is not perceived as a conflict when different traditional knowledge holders give slightly different accounts of oral history, as all are assumed to be adding to the knowledge of the event or place.

> *Report of the Royal Commission on Aboriginal Peoples*, (Minister of Supply and Services Canada, 1996), Vol. 4, p. 117 (Cultural teachings, passed on through oral histories, are the very foundation of Aboriginal people's identity), Plaintiffs' Book of Authorities, Tab 191.
>
> > The prominent position accorded to elders is a striking feature of Aboriginal societies. They have been largely responsible for retaining much of the knowledge of Aboriginal cultural traditions.
>
> *Report of the Aboriginal Justice Inquiry of Manitoba*, Volume 1: The Justice System and Aboriginal People (Winnipeg: Queen's Printer, 1991) at p. 19, Plaintiffs' Book of Authorities, Tab 187.
>
> > The 'truth' of an incident would be arrived at through hearing many descriptions of the place or event. Because it is impossible to arrive at "the whole truth" in any circumstances, Aboriginal peoples would believe that more of the truth can be determined when everyone is free to contribute information.
>
> Justice Murray Sinclair, "Aboriginal Peoples, Justice, and the Law", in *Continuing Poundmaker and Riel's Quest, Presentations Made at a Conference on Aboriginal Peoples and Justice,* comp. Richard Gosse, James Youngblood Henderson and Roger Carter (Saskatoon: Purich Publishing, 1994) at pp. 180-181, as cited in The Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*

> (Ottawa: minister of Supply and Services Canada, 1996) at p. 201, Plaintiffs' Book of Authorities, Tab 199.

67. The expert witnesses in this litigation added that difference in the details of stories should not suggest discounting the value of the evidence – rather, one should look for a core, or the constant aspects. The core may well be reliable despite difference in detail.

(a) Prof. Paul Driben addressed this directly, noting he looks to the core of the story.[3]

(b) Prof. Jarvis Brownlie also noted:

> One of the problems with this kind of story is that sometimes people discount stories like this because of the inconsistencies on some details, such as when it happened and who witnessed it, and that would be a great mistake.[4]

(c) Dr. Gwen Reimer also gave the opinion, in reference to oral tradition about the Anishinaabe-Haudenosaunee War that:

> I agree with the general consensus that these oral traditions provide a compelling and methodologically valid explanation for how southern Ontario came to be inhabited by Ojibway peoples by the early 1700s.[5]

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[3] Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p. 7090, line 23 to p. 7091 line 1; applied to an example at p. 7093, line 22 to p. 7094, line 11.
[4] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019 p. 3207, lines 15-19; applied to an example at p. 3206, line 22 to p. 3207, line 5.
[5] Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA 500 BC-1860 AD" (as revised 2019), Exhibit 4576, p. 272: She refers to the reliability of the "main fact", despite differing details at p. 123. Some examples of such variations in details about the War can be found at pp. 135-137.

Indigenous Laws

68. Indigenous laws are one particular kind of traditional knowledge, which can provide proof of exclusive occupation of territory.

> For example, the aboriginal group asserting the claim to aboriginal title may have trespass laws which are proof of exclusive occupation, such that the presence of trespassers does not count as evidence against exclusivity. As well, aboriginal laws under which permission may be granted to other aboriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation. Indeed, if that permission were the subject of treaties between the aboriginal nations in question, those treaties would also form part of the aboriginal perspective.

Delgamuukw v British Columbia, [1997] 3 SCR 1010 at para 157, Plaintiffs' Book of Authorities, Tab 18.

> The aboriginal perspective on the occupation of their land can also be gleaned in part, *but not exclusively*, from pre-sovereignty systems of aboriginal law. The relevant laws consisted of elements of the practices, customs and traditions of aboriginal peoples and might include a land tenure system or laws governing land use.

R v *Marshall*; *R v Bernard*, [2005] 2 SCR 220 at para 139, Plaintiffs' Book of Authorities, Tab 79.

69. In this case, in addition to evidence from traditional knowledge holders at SON, there has been expert evidence about Anishinaabe customs and laws more generally concerning land use and control and the granting or denial of permission to enter territory. SON is Anishinaabe and has a shared culture with other Anishinaabe First Nations. Thus, evidence of broader Anishinaabe customs and laws is evidence generally applicable to SON.

See paras 351-384 (*Territorial Use Customary Laws)*

The Burden of Proof

70. A sensitive application of evidentiary principles requires the Court to take into account the difficulties of proof of the facts in issue.

> The evidence as to some disputed questions of fact is extremely meagre, so meagre that, in other circumstances, I should feel that the burden of proof had not been discharged. The meagreness of the evidence is, however, inherent in its subject-matter. The barren lands are vast and their inhabitants few … Snow houses leave no ruins and, until the proto-historic period, most of their tools and weapons were made of local materials which, like themselves, their dogs and tents, were organic and, hence, biodegradable.
>
> *Hamlet of Baker Lake v Canada (Indian Affairs and Northern Development)*, 1979 CanLII 2560 (FC) at para 76, Plaintiffs' Book of Authorities, Tab 31.

71. In this case, the ancient and traditional occupation of water spaces is at issue. Similar to snow houses leaving no ruins, birchbark canoes leave no ruins either.

72. The Supreme Court of Canada has repeatedly cautioned against imposing an impossible burden of proof in Indigenous cases.

> The appellant is, therefore, a Shubenacadie‑Micmac Indian, living in the same area as the original Micmac Indian tribe, party to the Treaty of 1752.
>
> This evidence alone, in my view, is sufficient to prove the appellant's connection to the tribe originally covered by the Treaty. True, this evidence is not conclusive proof that the appellant is a direct descendant of the Micmac Indians covered by the Treaty of 1752. It must, however, be sufficient, for otherwise no Micmac Indian would be able to establish descendancy. The Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present day Shubenacadie Micmac Indian

> would otherwise be entitled to invoke based on this Treaty.

Simon v The Queen, [1985] 2 SCR 387 at pages 407-408, Plaintiffs' Book of Authorities, Tab 100.

> In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.

R v Van der Peet, [1996] 2 SCR 507 at para 68, per Lamer CJC, Plaintiffs' Book of Authorities, Tab 89.

73. While claims must be proven with cogent evident on the balance of probabilities, this principle:

> should not be read as imposing upon aboriginal claimants the "next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community" (*Van der Peet*, supra, at para. 62). McKeown J. correctly observed that indisputable evidence is not required to establish an aboriginal right (p. 20). Neither must the claim be established on the basis of direct evidence of pre-contact practices, customs and traditions, which is inevitably scarce. Either requirement would "preclude in practice any successful claim for the existence" of an aboriginal right (Van der Peet, supra, at para. 62).

Mitchell v M.N.R., [2001] 1 SCR 911, 2001 SCC 33 at para 52, per McLachlin CJC, Plaintiffs' Book of Authorities, Tab 48.

74. The Truth and Reconciliation Commission took this idea further:

> The Commission believes that it is manifestly unfair for Aboriginal claimants to be held to the requisite standard of proof throughout legal proceedings. However, it is reasonable to require that an Aboriginal claimant establish occupation of specified territory at the requisite period of time. That could be at the time of contact or at the time of Crown assertion of sovereignty. It is our view that once occupation has been proven, then the onus should shift to the other party to show that the claim no longer exists, either through extinguishment, surrender, or some other valid legal means. Therefore, we conclude that Aboriginal claims of title and rights should be accepted on assertion, with the burden of proof placed on those who object to such claims.

*Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada***,** The Truth and Reconciliation Commission of Canada, (2015) at p. 215, Plaintiffs' Book of Authorities, Tab 176.

75. In this case, key events at issue date from the 17th, 18th, and early 19th centuries when written records pertaining to the territory in question are sparse and were recorded only with a European perspective. Some events at issue date back as much as 10,000 years, for which archaeology, geology and myths are the only possible evidence. Further, ancient Anishinaabe practices and customary laws are at issue, and these can only be inferred from some sporadic observations at the time of early contact by Europeans (who often failed to understand the meaning or significance of what they were observing), and from the evidence of traditional knowledge holders. All of these factors call for adaptions of typical evidence law principles, as has been repeatedly stated by Canadian Courts, as noted above.

> For an example of cultural misunderstanding see paras 466-468 (*Champlain at mouth of French River in 1615*)

76. Additionally, and crucially, pieces of evidence must not be weighed individually, but as a body of evidence as a whole. Various pieces of evidence, insufficient alone to lead to a particular factual inference, may combine together to justify such an inference.

> Pieces of evidence, each by itself insufficient, may together constitute a significant whole, and justify by their combined effect a conclusion.

Grant v Australian Knitting Mills, [1936] AC 85 (PC), [1935] UKPC 62 at pages 6-7 (BAILII), Plaintiffs' Book of Authorities Tab 27.

> The "beyond a reasonable doubt" standard of proof is not applied to individual pieces of testimony. Rather, it is brought to bear on the evidence as a whole for the purpose of determining whether each of the necessary elements of an offence have been established. See: *R. v. Morin*, [1988] 2 S.C.R. 345; *R. v. Ménard*, [1998] 2 S.C.R. 109.

R v Armbruster, 2010 SKCA 25 (CanLII) at para 26, Plaintiffs' Book of Authorities, Tab 69.

77. In this case, for example, the continuity of the identity of SON over time is in issue. SON argues that a continuous identity can be inferred from numerous threads of evidence, including:

(a) traditional knowledge of belief of continuity;

(b) apparent parallels between Anishinaabe myths and ancient geologic events;

(c) detailed analysis of local variations of Anishinaabemowin dialects;

(d) archaeological reconstruction of ways of living of earlier occupants of the territory;

(e) the continuity of the ritual use of specific sites over centuries;

(f) knowledge of specific geographic locations deeply embedded in Anishinaabe myths;

(g) ongoing knowledge of distinct and unique Anishinaabemowin names of geographic features;

(h) traditional knowledge of specific historic events; and

(i) continuity of patrilineally inherited Dodems.

78. It would therefore be a legal error to weigh each of these classes of evidence individually, without considering their combined effect, much less weigh individually each piece of evidence within each class.

79. An extreme example of the latter approach is the approach of Canada's witnesses about geomythology, who deconstruct and weigh separately each proposed parallel between Anishinaabe myths and ancient geologic events, and disavow the validity of combining pieces of evidence to make inferences when the individual pieces of evidence are insufficient in isolation.[6] Such expert opinion is of no assistance to this Court, since it would lead the Court into legal error.

3. EXPERT DISCIPLINES

80. A number of experts testified in this trial – each providing a perspective from their own discipline. These experts sometimes examined the same events with different lenses, so it is important to explain the methodology of each discipline so that the expert opinion evidence can be properly weighed and integrated.

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[6] See, for example, evidence of Prof. Laurel Bowman, Transcript vol 85, February 18, 2020, p. 10902, lines 12-22; p. 10903, lines 14-24; and p. 10904, lines 10-12.

81. The majority of the experts were qualified within one of the broad fields of anthropology or history, each of which has subdisciplines.

Anthropology and Its Subdisciplines

82. **Anthropology** includes the subdisciplines of archaeology, ethnography, ethnology, ethnohistory and linguistics.[7]

83. **Archaeology** is the study of past cultures[8], interpreting the material culture present in archaeological sites with the assistance of other anthropological insights and the historical record.[9] In his testimony, Dr. Ronald Williamson explained that the use of the historical record is essential to this task:

> Q. To what extent can you understand Indigenous archeological sites without understanding culture and history?
>
> A. I don't believe you can. That is why we employ the documentary record to the state that we do.[10]

84. **Ethnography** involves living with a group of people and participating in daily activities with them and recording one's observations as an account of their culture. It is a descriptive discipline.[11]

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[7] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6724, lines 5-12 and p. 6725, lines 4-5; Evidence of Dr. Gwen Reimer, Transcript vol 83, February 12, 2020, p. 10535, line 11 to p. 10536, line 7; Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5159, lines 8-15.
[8] Evidence of Dr. Gwen Reimer, Transcript vol 83, February 12, 2020, p. 10535, lines 15-18.
[9] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5160, lines 2-5 and p. 5160, line 19 to p. 5161, line 2.
[10] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5161, lines 3-8.
[11] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6724, lines 13-22.

85. **Ethnology** deals with descriptions of cultures.[12] It is a level of analysis which takes recorded observations of cultures (i.e. ethnographic accounts), and analyzes them for trends and patterns.[13]

86. **Ethnohistory** involves interpreting the historical documentary record with the insights gained from ethnology about the behavior of the people in question, and about the rules by which their society operates. There was some variation in the definitions of ethnohistory given by different witnesses, but this was the core to them all.[14]

87. The most significant variation in the definitions of ethnohistory offered by the different experts in this trial was about how important it was for the ethnohistorian to directly observe and participate in the culture in question, as compared to reading ethnography of the culture done by others. For example:

(a) Prof. Driben stated that "fieldwork is essential in ethnohistory", and that "if you're interested in the Indigenous point of view, the insights that you can get from fieldwork are tremendous".[15]

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[12] Evidence of Dr. Gwen Reimer, Transcript vol 83, February 12, 2020, p. 10535, lines 19-22.
[13] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6724, line 10 to p. 6725, line 2.
[14] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6725, lines 4-18; Evidence of Dr. Alexander von Gernet, Transcript vol 52, October 11, 2019, p. 6453, line 12 to p. 6454 line 15; Evidence of Prof. Paul McHugh, Transcript vol 67, December 9, 2019, p. 8592, line 23 to p. 8593, line 12; Evidence of Mr. Jean-Philippe Chartrand, Transcript vol 77, January 20, 2020, p. 9761, lines 2-22; Evidence of Dr. Gwen Reimer, Transcript vol 83, February 12, 2020, p. 10540, line 22 to p. 10541, line 24.
[15] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6725, line 21 to p. 6726, line 7.

(b) Dr. Reimer was of the view that it was important to locate ethnographies based on fieldwork, but not necessary for the ethnohistorian to do fieldwork himself or herself.[16]

88. **Linguistics** is the study of language and its relation to cultures.[17] Linguistics frequently involves interdisciplinary collaboration with other anthropological disciplines.[18]

History

89. Although the discipline of history may be sometimes thought of popularly as an inquiry into what "actually" happened, the reality is more nuanced. Historians often disagree about the interpretation, meaning and significance of events, and even sometimes about the basic facts of what happened in the past. Such disagreements are not treated as a failure of the historical method, but in fact are considered vital to historical scholarship. The Statement on Standards of Professional Conduct of the American Historical Association states:

> Among the core principles of the historical profession that can seem counterintuitive to non-historians is the conviction, very widely if not universally shared among historians since the 19th century, that **practicing history with integrity does not mean having no point of view**. Every work of history articulates a particular, limited perspective on the past. Historians hold this view not because they believe that all interpretations are equally valid, or that nothing can ever be known about the past, or that facts do not matter. Quite the contrary. History would be pointless if such claims were true, since its most basic premise is that within certain limits we can indeed know and make sense of past worlds and former times that now exist only as remembered

[16] Evidence of Dr. Gwen Reimer, Transcript vol 83, February 12, 2020, p. 10538, lines 5-20.
[17] Evidence of Dr. Gwen Reimer, Transcript vol 83, February 12, 2020, p.10535, line 24 to p. 10536, line 1.
[18] Evidence of Prof. Rand Valentine, Transcript vol 10, May 23, 2019, p. 1099, line 15 to p. 1100, line 2.

> traces in the present. But the very nature of our discipline means that **historians also understand that all knowledge is situated in time and place, that all interpretations express a point of view**, and that no mortal mind can ever aspire to omniscience. **Because the record of the past is so fragmentary, absolute historical knowledge is denied us.**
>
> …Everyone who comes to the study of history brings with them a host of identities, experiences, and interests that cannot help but affect the questions they ask of the past and the sources they consult to answer those questions. No single objective or universal account could ever put an end to this endless creative dialogue within and between the past and the present.
>
> For this reason, historians often disagree and argue with each other. **That historians can sometimes differ quite vehemently not just about interpretations but even about the basic facts of what happened in the past is sometimes troubling to non-historians, especially if they imagine that history consists of a universally agreed-upon accounting of stable facts and known certainties.** But universal agreement is not a condition to which historians typically aspire. Instead, we understand that interpretive disagreements are vital to the creative ferment of our profession, and can in fact contribute to some of our most original and valuable insights.[19]

90. Historical methodology also recognizes that the primary sources used are influenced by the perspectives of those who created them. The Statement on Standards of Professional Conduct of the American Historical Association sets out:

> Furthermore, the different peoples whose past lives we seek to understand held views of their lives that were often very different from each other—and from our own. Doing justice to those views means to some

[19] Statement on Standards of Professional Conduct (updated 2019), American Historical Association, Exhibit 4166, p. 3 [first instance of emphasis in original; following instances of emphasis added].

> extent trying (never wholly successfully) to see their worlds through their eyes. This is especially true when people in the past disagreed or came into conflict with each other, since any adequate understanding of their world must somehow encompass their disagreements and competing points of view within a broader context. **Multiple, conflicting perspectives are among the truths of history.**[20]

91. For this reason, a historian should examine different perspectives of events to get a fuller picture of their meaning. As Prof. Brownlie explained:

> So, generally, we ask a series of questions about any written document. We ask who wrote the document, what purpose they wrote the document for. Every document has a purpose. We ask what audience the document was to be directed toward. And we ask what ability the author of the record had to know the things that were recorded in the record.
>
> Another important aspect is to attempt to discover as much evidence as possible on any given event or process and ideally from more than one person, from more than one perspective.
>
> Q. Why is that significant?
>
> A. That's important to obtain as full as possible a view of the matters in question and to attempt to correct for the bias of each document; all documents have biases, and all documents have shortcomings. So you need as many as possible to try to correct for the shortcomings of each one.[21]

92. Other than Prof. Brownlie, who took some oral histories with members of SON in the course of preparing one of his reports, the historian witnesses relied exclusively on written materials. This presents a challenge in the context of this case. The events in question in this

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[20] Statement on Standards of Professional Conduct (updated 2019), American Historical Association, Exhibit 4166, p. 3 [emphasis in original].
[21] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 2967, line 14 to p. 2968 line 8.

litigation involve an interaction between European and Indigenous people, and, in that interaction, historically, only the European people wrote down records of the event, which means that the written records predominantly represent the European perspective.

(a) As Prof. Carl Benn noted:

> …often the records are incomplete, or they're one-sided, you know, you have a literate society and a non-literate society, so the records are going to be misleading.[22]

(b) Similarly, the Court in *Jim Shot Both Sides v Canada* noted:

> The parties entered more than 2 300 exhibits at trial. Most are letters, reports, orders in council, maps, and journal entries dating to the late 1800s. These documents provide Canada's account because representatives of the Crown wrote them. They detail dealings with the Blood Tribe and others. I have tried to keep in mind that in some instances the authors, when writing to their superiors, may have been drafting their reports in a light favourable to themselves. At the relevant time, the Blood Tribe had no written language and wrote no documents that tell their side of the story.
>
> *Jim Shot Both Sides v Canada*, 2019 FC 789 at para 57, Plaintiffs' Book of Authorities, Tab 35.

Synthesis of Evidence

93. The law regarding the treatment of evidence in Indigenous rights cases requires that the Indigenous perspective be given due weight. It follows then that the insights gathered by historians examining documents should be weighed together with the Indigenous perspective. This could be

[22] Evidence of Prof. Carl Benn, Transcript vol 40, August 19, 2019, p. 4643, lines 12-15.

done by integrating the evidence of traditional knowledge holders, and by integrating evidence from ethnologists and ethnohistorians, who directly focus on the Indigenous perspective.

94. In other words, it is not always enough to conclude that "documents speak for themselves". As stated by the Court in *Cowichan Tribes v Canada*:

> I agree with the comments made by Justice Vickers in *Williams* that historical documents do not always speak for themselves and I find it necessary to receive some explanation of the context in which those historical documents were created.

Cowichan Tribes v Canada (Attorney General), 2020 BCSC 917 (CanLII) at para 47, Plaintiffs' Book of Authorities, Tab 17.

95. The interpretation and significance of many events bearing on this trial call for the consideration of historical, traditional knowledge and anthropological evidence, and in some cases, other kinds of evidence such as linguistic and geological evidence. Each discipline has its own lens of looking at reality, and all approaches must be weighed together. As the Court in *Anderson v Canada* said:

> Social science disciplines do not exist in unassailable silos. To the extent that they comprise the study of human society they necessarily overlap. To understand history, therefore, one must have at least some understanding of politics, economics, geography, sociology and more. Each discipline is interrelated with and informs the others.

Anderson v Canada (Attorney General), 2015 NLTD(G) 174, 2015 CanLII 78380 at para 14, Plaintiffs' Book of Authorities, Tab 5.

PART I – FACTS ABOUT THE ANISHINAABE

4. THE SAUGEEN OJIBWAY NATION

Core Identity

96. Members of SON historically referred to and continue to refer to themselves as Anishinaabe. For Anishinaabe people, Anishinaabe is their primary self-identifier,[23] and Anishinaabe self identity has not changed between the 17th century and the present:[24]

(a) Karl Keeshig emphatically explained this in his evidence:

> So those terms ["band" and "tribe"] such as that are somewhat misleading in terms of how Anishinaabe identify themselves. I want to refer back to, again, the Creation Story from whence we come, and the term is "Anishinaabe," all-inclusive.[25]

(b) When Vernon Roote was called to the witness stand, even before taking an oath or stating his English name, he stated his Anishnaabemowin name.[26]

97. The next most significant part of identity, after Anishinaabe, of SON members is their kinship group called a Dodem (or "clan" in English), which is named after a symbolic animal, bird or fish. One's Dodem is inherited from one's father.[27] A number of community witnesses identified their clans – Bear, Otter, Wolf, etc. – when they testified for this Court. For example:

(a) Karl Keeshig asked to elaborate on the oath he was asked to take on the stand, and this included stating his Anishinaabemowin name and clan (Wolf);[28]

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[23] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6728, line 1 to p. 6729, line 21.
[24] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6815, lines 7-18.
[25] Evidence of Karl Keeshig, Transcript vol 3, April 30, 2019, p. 262, lines 12-17.
[26] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 425, lines 1-6.
[27] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 40.
[28] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 143, line 14 to p. 144, line 5.

(b) Vernon Roote named his clan (Bear) at the outset of his testimony;[29] and

(c) Fred Jones[30]and John Nadjiwon[31] identified as members of the Otter clan.

98. As will be discussed below, in the early 17th century, persons identifying with some of these same Dodems - Otter and Bear - were documented as present on Georgian Bay.[32]

See para 471 *(Dodems observed at early contact)*

99. SON members also identify as such or as members of their particular local community, Saugeen or Nawash. For example, Karl Keeshig spoke of "us as Anishinaabe people but also us as the SON community of First Nations in the Saugeen Peninsula" in his elaboration on the oath he was asked to take.[33]

100. These levels of identity are consistent with the anthropological evidence.

(a) Prof. Driben explained:

> Q.…So if at the time of European contact, you ask someone in the Great Lakes who they were, what is your opinion of what they would say?
>
> A. They would say Anishinaabe. If you asked them who they were, they would say they're Anishinaabe. If you asked a person that question.

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[29] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 426, lines 11-15.
[30] Rule 36 evidence of Fred Jones, November 5, 2002, Examination in Chief, Exhibit 3949, p. 4, line 1.
[31] Rule 36 evidence of John Nadjiwon, September 12, 2002, Examination in Chief, Exhibit 3951, p. 5, lines 18-19.
[32]Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 202; Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 15, 17-18, 73-74; Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA 500 BC-1860 AD" (as revised 2019), Exhibit 4576, pp. 82-83.
[33] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 144, lines 6-13.

> Q. Would they give any other identity?
>
> A. They might give you their clan identity as well. …But they would be reticent to give you their personal names. That was not important to them.[34]

(b) Prof. Charles Cleland, a leading scholar of the Anishinaabe, has written:

> If we could have asked an Indian woman living in what is now Michigan in AD 1600 to identify herself, she would probably have answered that she was of the *Anishnabeg* or in the singular *Anishnabe*. This term would indicate her to be an Algonquian speaker who shared that identity with her neighbors who spoke the same or mutually intelligible dialects. Our informant would also tell us that these people shared very similar customs and traditions…
>
> Beyond this identity, our informant would probably make reference to membership in smaller, named groups. One would be a kin group, those who are family by virtue of birth. This family would be defined on the basis of the father's kin identity so that we might be told that our informant was a member of a particular clan. We also might be told of membership in a particular band, a small local economic and social political group…Thus, our informant might tell us that her name was *Binesi-kwe* (Bird Woman) that she was an *Anishnabe*, that she was at the *Migisi* (eagle) clan and belonged to the *We-qua-dong* (Keweenaw Bay) band.[35]

(c) Dr. Reimer agreed that SON members now identify primarily as Anishinaabe.[36]

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[34] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6770, line 21 to p. 6771, line 13.

[35] Charles Cleland, Rites of Conquest - The History and Culture of Michigan's Native Americans, 1992, Exhibit 4326, pp. 39-40. For background on Charles Cleland, see evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6773, lines 4-13.

[36] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11260, line 22 to p. 11261, line 10; See also p. 11261, line 11 to p. 11263, line 3.

The Anishinaabe: Ojibway, Odawa and Pottawatomi

101. There are approximately 300,000 Anishinaabe people, in about 250 communities, generally in the Great Lakes area, on either side of the Canada-US border.[37] The Anishinaabe people have a shared language, social institutions and social structures. As such the Anishinaabe nation is a nation in the cultural sense. However, it has no corresponding political manifestation.[38]

See generally paras 243-254 *(Social Structure of Anishinaabe)*

102. There are sub-ethnicities of the Anishinaabe called the Ojibway, the Odawa and the Pottawatomi. These have recognizable linguistic differences.[39]

103. Many SON members today identify in English as Ojibway and some also identify as coming from Pottawatomi descent,[40] but the specific dialect of the Anishinaabemowin language which they speak is actually closer to the Odawa dialect.

See paras 197-202*(Linguistics)*

See paras 708-713 *(Pottawatomi migration)*

104. There is considerable fluidity in how SON members identify if they use the English names for sub-ethnicities. For example, Prof. Rosamond Vanderburgh wrote a biography of Verna Johnston (a Nawash member) based on a decade of fieldwork with Verna, her family, and other Nawash members.[41] It recounts that Verna's ancestors were Pottawatomi from Wisconsin who

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[37] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6770, lines 7-19.
[38] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6769, lines 10-25.
[39] Prof. J. Randolph Valentine, "Linguistic Analysis of the Speech of Chippewas of Nawash and Saugeen First Nations" (2013), Exhibit 3993, pp. 2-4.
[40] See for example, Rule 36 evidence of Frank Shawbedees, September 13, 2002, Examination in Chief, Exhibit 3947, p. 5, lines 9-13; Rule 36 evidence of John Nadjiwon, September 12, 2002, Examination in Chief, Exhibit 3951, p. 5, lines 13-18.
[41] R.M. Vanderburgh, I Am Nokomis Too: The Biography of Verna Patronella Johnston, 1977, Exhibit 4733, inside back cover (PDF p. 131), and unpaginated introduction (PDF p. 9). See also

moved to near Owen Sound and intermarried with an Odawa group led by Wahbahdick (one of the signatories of Treaty 72).[42] Nonetheless, in English, Verna self-identified as Ojibway.[43]

105. In addition, SON witnesses generally considered Ojibway, Odawa and Pottawatomi all to be one people. For example,

(a) Karl Keeshig said;

> The Pottawatomi are part of this feather, as is the Odawa and the Ojibwe. We are part of the same feather. We are the same people.[44]

(b) Ted Johnston said:

> Q. Do you consider Ojibwe and Odawa and Pottawatomi to be different peoples or the same people?
>
> A. I think they are basically the same people. They spoke a little different dialect of the Ojibwe language, but they did speak. They could understand each other and communicate.[45] [46]

Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11348, line 20 to p. 11349, line 19.

[42] R.M. Vanderburgh, I Am Nokomis Too: The Biography of Verna Patronella Johnston, 1977, Exhibit 4733, p .19 (PDF p. 12) and p. 24 (PDF p. 15); Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11350, line 13 to p. 11351, line 9.

[43] R.M. Vanderburgh, I Am Nokomis Too: The Biography of Verna Patronella Johnston, 1977, Exhibit 4733, unpaginated introduction (PDF p. 9); See also Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p.11349, line 25 to p. 11350, line 2 and p. 11351, lines 10-18.

[44] Evidence of Karl Keeshig, Transcript vol 3, April 30, 2019, p. 275, lines 11-13.

[45] Evidence of Ted Johnston, Transcript vol 4, May 1, 2019, p. 391, line 24 to p. 392, line 5.

[46] See also Rule 36 evidence of Fred Jones, November 5, 2002, Examination in Chief, Exhibit 3949, p. 8, line 18 to p. 9, line 6; Rule 36 evidence of Frank Shawbedees, December 4, 2002, Cross Examination, p. 42, lines 20-28; Rule 36 evidence of Donald Keeshig, September 13, 2002, Examination in Chief, Exhibit 3945, p. 11, line 15 to p. 12, line 27.

106. Prof. Driben also testified that the Ojibway, Odawa and Pottawatomi were properly considered one people, not three.[47] Indeed, Prof. Charles Cleland wrote that such labels had almost no meaning to the Anishinaabe.[48]

107. Anthropologists make some distinctions among Anishinaabe based on modest variances in subsistence patterns and linguistic differences between Ojibway, Odawa and Pottawatomi.[49] Along this line, Dr. Reimer opined that these groups were "distinct nations at the time of first contact with Europeans".[50] However, on cross examination, Dr. Reimer agreed that:

(a) All three groups referred to themselves as Anishinaabe;[51]

(b) All three groups spoke similar dialects or languages;[52]

(c) All three groups shared cultural beliefs;[53]

(d) All three groups had a common system of kinship, inheritance and marriage;[54]

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[47] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6775, line 12 to p. 6776, line 2.
[48] Charles Cleland, Rites of Conquest - The History and Culture of Michigan's Native Americans, 1992, Exhibit 4326, p. 40 (PDF p. 26); See also evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5256, line 25 to p. 5257, line 8; Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6774, line 20 to p. 6775, line 7.
[49] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11242, lines 8-10.
[50] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11240, line 20 to p. 11241, line 2.
[51] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11241, lines 3-5.
[52] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11241, lines 6-8.
[53] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11241, lines 18-24.
[54] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11241, line 25 to p. 11242, line 3.

(e) All three groups shared spiritual beliefs;[55]

(f) Although the Pottawatomi have been described as a "tribe", their proprietary systems and customary rules of territorial control were similar to those of the Ojibway and Odawa, so control was at the village (or band) level;[56]

(g) She may have overstated the degree to which the Pottawatomi subsisted on agriculture – and that they also relied on hunting and fishing;[57]

(h) The primary identity of all these groups is Anishinaabe;[58]

(i) The 19th century political configurations (e.g. Ojibway and Pottawatomi) had almost no meaning to Anishinaabe people;[59] and

(j) SON community witnesses consider that Ojibway, Odawa and Pottawatomi are all one people, and that she has no reason to dispute that.[60]

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[55] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11242, lines 4-7; Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA 500 BC-1860 AD" (as revised 2019), Exhibit 4576, pp. 18-19.
[56] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11249, line 25 to p. 11250, line 2 and p. 11254, lines 1-8.
[57] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11248, lines 14-19.
[58] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11260, lines 3-8, stated with reference to Charles Cleland, Rites of Conquest - The History and Culture of Michigan's Native Americans, 1992, Exhibit 4326, pp. 39-40 (PDF pp. 25-26).
[59] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11260, lines 17-21, stated with reference to Charles Cleland, Rites of Conquest - The History and Culture of Michigan's Native Americans, 1992, Exhibit 4326, p. 40 (PDF p. 26).
[60] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11262, line 19 to p. 11263, line 3.

19th Century Factionalism

108. In her report, Dr. Reimer described "factionalism" at Nawash in the 19th century. She opined that it was defined on various levels including cultural (Ojibway vs Pottawatomi) and religious (Methodist vs Catholic and Anglican) and advanced ideas that it had transformed from a religious denominational conflict to a tribal conflict in the early 1850s (i.e. Ojibway vs. Pottawatomi).[61] However, the Ojibway were closely associated with Methodism[62] and the Pottawatomi with Catholicism or Anglicanism[63], so, SON submits, it is easy to confuse which distinction is predominant. On cross examination, Dr. Reimer agreed that:

(a) She had relied significantly for her conclusions on this matter on a Master's thesis by Sylvia Waukey;[64]

(b) Ms. Waukey described a basis for factionalism in Christian religious denominations;[65]

(c) That the involvement of non-Aboriginal actors (Methodists) was a striking characteristic of factionalism at Nawash;[66]

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[61] Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA 500 BC-1860 AD" (as revised 2019), Exhibit 4576, p. 202.
[62] Sylvia Coral Waukey, The Genesis of Factionalism Among the Indians of the Saugeen Territory. 1843-1857, Exhibit 4730, p.65.
[63] Evidence of Edward (Ted) Johnston, Transcript vol 4, May 1, 2019, p. 393, line 18 to p. 394, line 16; See also Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA 500 BC-1860 AD" (as revised 2019), Exhibit 4576, p. 240.
[64] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11263, lines 4-10.
[65] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11264, lines 17-19.
[66] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11264, lines 20-23 and p.11265, lines 10-23.

(d) It was plausible that Crown government actions contributed to creating and perpetuating factionalism at Nawash;[67] and

(e) Ms. Waukey may have overestimated the role of ethnicity in factionalism due to an error in understanding the relative sizes of different ethnic groups.[68]

109. Based on the above, SON submits that that any factionalism that may have existed at Nawash in the 19th century was primarily a result of religious division fueled by different Christian denominations and by Crown government policies rather than by cultural conflict between Pottawatomi and Ojibway.

Shifting European Names for SON

110. SON is the present manifestation of a local group of Anishinabek that has occupied SONTL for thousands of years (or "forever" in their frame of reference). It has been called a variety of different names by different people at different times. SON says that the identity of this local group has been continuous over thousands of years, in part by genealogical descent and in part by the normal process of political succession, whereby persons join or leave the group in accordance with Anishinaabe customary law.

> Amended Consolidated Reply to the Statements of Defence, para 6
> Trial Record (Title Action – Court file 03-CV-261134CM1), p. 69.

111. In particular, SON says that it, its predecessor groups or their members variously have been called in the historic record Cheveux Relevées, Odawa, Kiskakon, Bear, Nigig, Otter, Loutre, Nipissing, Papinachoix, Ojibway, Chippewa, and various derivatives and variant spellings thereof.

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[67] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11266, line 10 to p. 11267, line 4.
[68] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11269, lines 17-22.

> Amended Amended Amended Statement of Claim, para 10, Supplementary Trial Record (Title Action – Court file 03-CV-261134CM1), pp. 127-128.
>
> Amended Consolidated Reply to the Statements of Defence, para 9(a), Trial Record (Title Action – Court file 03-CV-261134CM1), p 70.

112. All of these names refer to Anishinaabe people who lived in or near SONTL, and, as set out above, "Anishinaabe" was the primary identity of such people.

113. However, this reality has been obscured by shifts in names used by Europeans to refer to Indigenous peoples in the area of Lake Huron/Georgian Bay. Sometimes Europeans used "tribal" names, sometimes Dodem (clan) names, sometimes names based on an observed characteristic, sometimes names used by other Indigenous nations to refer to the groups in question, and sometimes geographic names to refer to the Indigenous people they were meeting.[69] For example:

(a) The first Anishinaabek people of Georgian Bay met by Europeans were first called "Cheveux Relevés" by the French in the early 17th century. These people were identified later as Odawa.[70]

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[69] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 23-27; Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 21, footnote 12; Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6773, line 14 to p. 6774, line 14.

[70] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 23.

(b) By the mid 17th century, the French were calling most or all Anishinaabek of the Great Lakes "Odawa" or "Ottawa".[71] The name "Ojibway" in the 17th century referred only to those living at Sault Ste. Marie,[72] numbering about 150 people.[73]

(c) By the late 17th or early 18th century, the French had narrowed the use of "Odawa" to more specific groups on Georgian Bay,[74] and called some of those groups previously known as Odawa by names such as "Saulteur" and "Mississauga".[75]

(d) When the British became a presence in the region in the 18th century, they began calling Anishinaabek people "Chippewa" or "Ojibway" or "Mississauga".[76]

(e) Today, those people considered to be Ojibway form one of the largest groups of native people in North America,[77] while some of the names of other groups recorded in the 17th century seem to have disappeared.[78]

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[71] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 24-25; Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5257, lines 17-23; see also Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11341, lines 2-7.
[72] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11322, line 25 to p. 11323, line 6.
[73] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11325, lines 1-4.
[74] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 25; Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5257, lines 11-16; p. 5257, lines 24-25; and p. 5258, lines 1-2.
[75] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 25-26.
[76] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 26-27.
[77] Theresa Schenck, "Identifying the Ojibwa" (1994), Exhibit 4628, p 400; See also Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11337, lines 14-18.
[78] Theresa Schenck, "Identifying the Ojibwa" (1994), Exhibit 4628, pp. 401-402.

114. The naming practices by Europeans of Anishinaabe groups has led to an academic debate among scholars about whether there was a massive population explosion (coupled with migration) of the Ojibway and a population collapse (or migration) of others, or whether it is just that the same people originally called something other than Ojibway are now being called Ojibway. For example:

(a) Theresa Schenck has argued that many Anishinaabe groups around Lake Huron which were originally called something else became known as Ojibway;[79] and

(b) Adolf Greenberg and James Morrision make a similar argument in relation to groups north and west of Lake Superior.[80]

115. SON submits that it is more likely that the name Ojibway was transferred to include groups not originally called Ojibway than that there was a massive population and geographical expansion of the Ojibway. Dr. Reimer agreed with this.[81]

116. Although Dr. Reimer attempted in her report to draw bright lines between the Ojibway and the Odawa[82], she admitted on cross examination that there is considerable confusion and uncertainty among scholars about how to distinguish between Ojibway and Odawa.[83]

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[79] Theresa Schenck, "Identifying the Ojibwa" (1994), Exhibit 4628, pp. 401-401; Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11326, lines 3-12.
[80] Adolf Greenberg and James Morrison, "Group Identities in the Boreal Forest: The Origin of the Northern Ojibwa" (1982), Exhibit 4245; Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11335, line 19 to p. 11336, line 16.
[81] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11336, line 24 to p. 11337, line 24.
[82] Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA 500 BC-1860 AD" (as revised 2019), Exhibit 4576, pp. 19-33, 44.
[83] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11358, lines 6-13 and p. 11359, line 22 to p. 11360, line 12.

117. In the result, groups called "Odawa" in the 17th century may well be called "Ojibway" (in English) today.[84]

118. SON submits that the use of different names of Anishinaabe groups in the historical record is not a reliable indicator that they refer to different groups.

Continuity of SON

119. The Defendants challenge the continuity of SON and its predecessors, and even deny that SON existed in the mid 18th century (which is the key timeframe for establishing Aboriginal title).

> Amended Statement of Defence and Crossclaim of the Defendant Her Majesty the Queen in Right of Ontario, para. 21, Trial Record, Action 03-CV-261134CM1, (Tab 2), p. 27.
>
> See also Amended Amended Statement of Defence and Crossclaim of the Attorney General of Canada, paras. 12, Trial Record, Action 03-CV-261134CM1, (Tab 3), p. 48.

120. SON says that their identity has been continuous over thousands of years, in part by genealogical descent and in part by the normal process of political succession, whereby persons join or leave the group in accordance with Anishinaabe customary law. This is approximately the same sense that Canada's identity is continuous from 1867 to the present, although relatively few Canadian citizens are descendants of Canadian citizens in 1867. Following is a summary of evidence supporting this.

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[84] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5258, lines 3-8; Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11347, lines 21-24.

FROM THE DISTANT PAST

121. SON traditional knowledge holders say SONTL has been their territory from ancient times.

See para 205 (*SON's Presence in their Territory*)

122. There is evidence of cultural memory within SON of very ancient geological events. This shows cultural continuity from ancient times to the present.

See paras 410-439 (*Geological Record and Traditional Stories*)

123. There is evidence of use of the same ritual sites for the same ceremonies over centuries. This also shows cultural continuity from ancient times until the 19th century.

See paras 448-450 (*Archaeology*)

124. There is also expert evidence that the 17th century Georgian Bay Odawa arose *in situ* from predecessor groups, showing cultural continuity from ancient times until the 17th century.

See paras 440-446 (*Archaeology*)

125. There is evidence of specific geographic references of locations in or near SONTL in stories which are at the heart of Anishinaabe spiritual traditions.

Below, paras 210-215 (*Traditional stories*)

126. In a fishing prosecution, involving members of SON, the Court made the following finding:

> The undisputed historical evidence led by the defence here has established that for centuries prior to the arrival of European settlers, the Saugeen Ojibway had occupied a vast area of what is now southwestern Ontario, encompassing all of what was known as the Saugeen, now the Bruce Peninsula, and including the area south of Georgian Bay and extending west to the eastern shore of Lake Huron. The Ojibway in that area were involved in a very productive fishery from, as is said, time immemorial. Specifically, the evidence

> established that they made use of numerous fishing stations on both sides of the peninsula, including the islands immediately offshore from the present Saugeen Ojibway reserves located at Cape Croker on the east side and Saugeen on the west. Their fishing was not prosecuted by individual fishermen merely to feed their own families, but rather was a community-based, collective activity in which the benefits were shared amongst the members of the community generally and directed to the subsistence of the group as a whole. Moreover, the Crown concedes, their fishing operation is accurately described as "commercial" in nature. Not only did the native groups trade among themselves, but after the arrival of the Europeans, fish was bartered with the fur traders for what became essential items. The trade developed further with the growing population of settlers and became an essential source of the band's "sustenance". The continuity of the exercise of the right from the very distant past to the present was established.
>
> *R v Jones*, [1993] OJ No 893, at para 44 (Prov Div), Exhibit 3883, p. 130737, Plaintiffs' Book of Authorities, Tab 76.

FROM THE 17TH CENTURY

127. What displacement of Anishinaabe that took place during the Haudenosaunee Wars (discussed later in this argument) in the 17th century was temporary, and the Anishinaabe recommenced some use of the territory in less than one generation.

See paras 453-461 (*return after Haudenosaunee Wars)*

128. Wikwemikong is a core Odawa community and is linked to the 17th century Georgian Bay Odawa. There is linguistic evidence that the Anishinaabemowin language dialects spoken at SON communities most closely resemble the dialect at Wikwemikong. Therefore, SON submits that this shows continuity between the 17th century Georgian Bay Odawa and the present SON.

See para 199 (*Linguistics*)

129. Further, there is expert linguistic evidence that the relation between the dialects of Anishinaabemowin spoken at SON to those of neighbouring Anishinaabe communities reflects a long-term geographic stability, extending over centuries.

See para 200-201 (*Linguistics*)

130. There is local traditional knowledge of the Huron requesting help from the Anishinaabe when the Huron were attacked by the Haudenosaunee in the mid 17th century.

See para 474 (*Haudenosaunee war*)

131. There is also some continuity in Dodemic identity of persons in or near SONTL in the 17th century to today.

See paras 97-98 and 471 (*Dodemic identity)*

132. Anishinaabe customary law regarding burial sites place deeply felt obligations on Anishinaabe persons to the burial sites of their relatives.

See paras 234-242 (*burial customs)*

FROM THE 18TH CENTURY

133. SON admits that significant numbers of Pottawatomi relocated to SONTL in the early 19th century. They became fully accepted and incorporated into the group now known as SON, in accordance with Anishinaabe customary law.

See para 202 (*Linguistics*)

See para 710-712 (*Traditional knowledge that Pottawatomi accepted into SON*)

134. After the influx of Pottawatomi in the early 19th century, of which the Crown was aware, the Crown entered Treaty 72 with SON then constituted. The Crown raised no question of whether or not SON as then constituted was the appropriate group with which to make treaty.[85]

[85] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 68, 100, 123, 165, 167, 195.

135. SON submits that its identity has been continuous since before the assertion of British sovereignty, in part by genealogical descent and in part by the normal process of political succession, whereby persons join or leave the group in accordance with Anishinaabe customary law

SON seeks the following findings of fact with respect to Chapter 4 - The Saugeen Ojibway Nation:

(a) Anishinaabe is the primary self-identifier of members of SON.

(b) While SON members recognize distinctions between the Ojibway, Odawa and Pottawatomi, they treat these distinctions with some fluidity, and consider the Ojibway, Odawa and Pottawatomi to be one people, not three.

(c) Any factionalism that may have existed at Nawash in the 19th century was primarily a result of religious division fueled by different Christian denominations and by Crown government policies rather than by cultural conflict between Pottawatomi and Ojibway.

(d) The use of different names by Europeans of Anishinaabe groups in the historical record is not a reliable indicator that they refer to different groups.

(e) SON's identity has been continuous since before the assertion of British sovereignty, in part by genealogical descent and in part by the normal process of political succession, whereby persons join or leave the group in accordance with Anishinaabe customary law.

5. THE ANISHINAABEMOWIN LANGUAGE

197. Anishinaabemowin is the language of the Anishinaabe. It has many regional dialects, and indeed each community has a distinguishable and unique local variant.[86] The dialects in the individual communities can be organized into regional groupings showing modest differences within the regional group, and greater differences between regional groups.[87]

198. Linguists can determine "genetic" relationships between languages by comparing grammar and vocabulary.[88] Grammar in a language changes much more slowly than vocabulary, allowing linguists to determine historical relationships between communities of speakers.[89]

199. The local dialects spoken at Saugeen and Nawash show significant commonalities with both of the regional dialects known as "southeastern Ojibwe" and "Odawa". This reflects the geographic position of Saugeen and Nawash at the boundary between communities speaking each of these regional dialects.[90] The vocabulary of the local dialects at Saugeen and Nawash is the closest to that of Wikwemikong,[91] which is a core Odawa-speaking community.[92]

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[86] Prof. J. Randolph Valentine, "Linguistic Analysis of the Speech of Chippewas of Nawash and Saugeen Frist Nations" (2013), Exhibit 3993, pp. 2, 10-11.
[87] Prof. J. Randolph Valentine, "Linguistic Analysis of the Speech of Chippewas of Nawash and Saugeen Frist Nations" (2013), Exhibit 3993, pp. 8-9; Evidence of Prof. J. Randolph Valentine, Transcript vol 10, May 23, 2019, p. 1115, line 25 to p. 1116, line 22.
[88] Evidence of Prof. J. Randolph Valentine, Transcript, vol 10, May 23, 2019, p. 1110, line 17 to p. 1111, line 18.
[89] Prof. J. Randolph Valentine, "Linguistic Analysis of the Speech of Chippewas of Nawash and Saugeen Frist Nations" (2013), Exhibit 3993, p 14; Evidence of Prof. J. Randolph Valentine, Transcript vol 10, May 23, 2019, p. 1112, lines 12-25.
[90] Prof. J. Randolph Valentine, "Linguistic Analysis of the Speech of Chippewas of Nawash and Saugeen Frist Nations" (2013), Exhibit 3993, p. 3.
[91] Prof. J. Randolph Valentine, "Linguistic Analysis of the Speech of Chippewas of Nawash and Saugeen Frist Nations" (2013), Exhibit 3993, p. 36.
[92] Prof. J. Randolph Valentine, "Linguistic Analysis of the Speech of Chippewas of Nawash and Saugeen Frist Nations" (2013), Exhibit 3993, p. 4.

200. The relationship of the dialects spoken at Saugeen and Nawash with both the "southeastern Ojibwe" and "Odawa" dialects indicates a long-term stability in the geographic locations of these communities, extending over centuries.[93] As Prof. Valentine testified:

> Q. Can you conclude anything about the histories of Saugeen and Nawash from this linguistic mix?
>
> A. I can conclude that they have deep interaction with both of these dialect areas and it's showing up in this core element of their language.
>
> Q. And for what approximate length of time are we talking?
>
> A. I cannot, as a linguist, you know, I don't have a radiocarbon dating system. But a long time. A couple of centuries, three centuries, four centuries. I don't know. Somewhere in that range. A long time.[94]

201. This conclusion is possible because of the comparison to the dialects of neighbouring communities. Prof. Valentine expressed it this way:

> My conclusion is only that I think really you can think of all my dialectological work as articulating a puzzle. Each piece of a puzzle, right, fits in a particular place?
>
> I think what I conclude here is that Saugeen and Nawash are the puzzle piece that fits in the Bruce Peninsula piece of the puzzle. That's essentially what my whole report concludes.[95]
>
> …
>
> Basically, I just want to say what I've now said many times, that these communities represent what I see as

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[93] Prof. J. Randolph Valentine, "Linguistic Analysis of the Speech of Chippewas of Nawash and Saugeen Frist Nations" (2013), Exhibit 3993, pp. 3, 6, 8-9, 17.
[94] Evidence of Prof. J. Randolph Valentine, Transcript vol 10, May 23, 2019, p. 1125, lines 8-21.
[95] Evidence of Prof. J. Randolph Valentine, Transcript vol 10, May 23, 2019, p. 1127, lines 10-17.

> a transitional area between Odawa and Eastern Ojibwe.
>
> That they fit due to that as a particular place in the puzzle of Ojibwe from Québec all the way to British Columbia.
>
> They fit where you would expect. Their linguistic forms corroborate that fit…[96]

202. Pottawatomi (sometimes thought of as a very distinct dialect of Anishinaabemowin), is a separate, but closely related, language to Anishinaabemowin.[97] There is no detectable trace of the Pottawatomi language in the local dialects spoken at Saugeen and Nawash.[98] This is not inconsistent with Saugeen and Nawash having absorbed significant numbers of Pottawatomi in the 19th century, but could relate to the relative numbers of speakers of each language, or to the relative social status of the different languages.[99] That is, the Pottawatomi seem to have assimilated to the host Ojibwe/Odawa-speaking community. As Prof. Valentine said: "The languages are close enough that over time, the Pottawatomi were absorbed".[100]

SON seeks the following findings of fact in respect of Chapter 5 - The Anishinaabemowin language:

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[96] Evidence of Prof. J. Randolph Valentine, Transcript vol 10, May 23, 2019, p. 1148, lines 7-17.
[97] Prof. J. Randolph Valentine, "Linguistic Analysis of the Speech of Chippewas of Nawash and Saugeen Frist Nations" (2013), Exhibit 3993, pp. 4, 37.
[98] Prof. J. Randolph Valentine, "Linguistic Analysis of the Speech of Chippewas of Nawash and Saugeen Frist Nations" (2013), Exhibit 3993, pp. 4, 6-7, 37.
[99] Prof. J. Randolph Valentine, "Linguistic Analysis of the Speech of Chippewas of Nawash and Saugeen Frist Nations" (2013), Exhibit 3993, pp. 37-38.
[100] Evidence of Prof. J. Randolph Valentine, Transcript vol 10, May 23, 2019, p. 1146, lines 16-17.

(a) Linguistically speaking, the local dialects of Anishinaabemowin spoken at Saugeen and Nawash lie on the boundary between the regional dialects known as "southeastern Ojibwe" and "Odawa".

(b) The vocabulary of the local dialects at Saugeen and Nawash is closest to the Odawa speaking community at Wikwemikong.

(c) The relationship of the dialects spoken at Saugeen and Nawash to the dialects spoken in neighbouring communities indicates a long-term stability in the geographic locations of these communities, extending over centuries.

(d) There is no detectable trace of the Pottawatomi language in the local dialects spoken at Saugeen and Nawash, indicating that the Pottawatomi who joined SON communities were absorbed by these Ojibwe/Odawa speaking communities.

6. THE WORLDVIEW OF THE ANISHINAABE

203. Aboriginal title is a *sui generis* right which must be informed by both common law and Indigenous perspectives. Understanding SON's worldview is essential to properly understand the Indigenous perspective in this case and to assess how that evidence will inform the test for title that SON must meet.

> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 114,
> Plaintiffs' Book of Authorities, Tab 18.

204. Throughout the course of this trial, the Court has heard a great deal of evidence that has shed light on SON's worldview. That evidence has often come from community witnesses themselves, but has also sometimes come from anthropologists and ethnohistorians or from the documentary record. At times, SON's worldview is obvious from the evidence. At other times, their worldview needs context to be properly understood.

SON's Presence in their Territory

205. SON has been in its territory forever. SON community witnesses have very directly stated this.[101]

206. They did not happen there by chance; the Creator placed them there and with that comes great responsibility. The source of this belief is found in the Creation story. The Creation Story is sacred to the Anishinaabe and is the carrier of many teachings.[102] This trial began, on the first day of evidence, with Karl Keeshig's rendition of the Creation Story. Karl Keeshig explained that the Creation Story, in a traditional Anishinaabe setting, would take over seven days of ceremony to impart. There were only certain aspects of the story that he was permitted to share with the Court.[103]

207. Briefly summarized, the Creation Story begins at the beginning before the beginning when everything was dark. In this darkness, a question was asked of the Creator about whether it was time for the children, but before there could be children there had to be a place for them. Next there was a sound, like the sound of a rattle, and with this sound the Creator began to cast his thoughts out, of which there were many. When this was done, the Creator called back his most beautiful thoughts and placed them in front of him. This was creation. Then the first sacred fire was lit, which pushed back the darkness and gave the Creator space to carry out his plan. When all of his creation was in place, he breathed life into his creation and in so doing gave all of his creation

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[101] Evidence of Vernon Roote, Transcript vol 6, May 14, 2019, p. 603, lines 16-24; Evidence of Jim Ritchie, Transcript vol 7, May 15, 2019, p. 716, lines 8-16; Rule 36 evidence of Ross Johnston, November 4, 2002, Cross examination, Exhibit 3954, p.8, line 17 to p. 9, line 3; Rule 36 evidence of Donald Keeshig, December 5, 2002, Cross examination, Exhibit 3946, p. 57, lines 6-17; Rule 36 evidence of John Nadjiwon, November 5, 2002, Cross examination, Exhibit 3952, p. 65, lines 13-30, p. 66, lines 1-19; Rule 36 evidence of Frank Shawbedees, December 4, 2002, Cross examination, Exhibit 3948, p. 19, lines 8-23.
[102] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 155, line 6 to p. 156, line 4.
[103] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 156, lines 7-24.

a heart so that all living things would have a spirit. When he blew his breath into creation it started to move and this is known as when time began. Humans came last. The Creator created the white man, the black man, the yellow man and the red man. He used a meegis shell to blow his breath into the Anishinaabe, who wasn't Anishinaabe at the time, but became Anishinaabe after the Creator's spirit was blown into him. The Creator spent the most time with the Anishinaabe who initially did not want to leave his side. Much responsibility was bestowed upon the Anishinaabe. The Creator sent the Anishinaabe from the Anishinaabe's stopping place through creation's four levels to the earth realm. In coming through the four levels, the Anishinaabe passed through the water level, where it is said there is the most beautiful lake that is the source of water for all creation. In this level lives a Grandmother named Nitawabekwe who sits next to the Creator. The Creator sent the Anishinaabe through all of these levels to the earth realm so that he could get to know all of creation and to give everything a name. The Anishinaabe accepted that responsibility and it was a lot of work but he did not complain. The Creator left the Anishinaabe tobacco that he could use anytime he wanted to speak to the Creator. It was his guarantee that he would be heard. The Creator created all of this to ensure there would be a place for the future children. The Anishinaabe has the responsibility to preserve the earth for the future generations.[104]

208. The significance of this responsibility was well explained by Randall Kahgee, a former Chief of Saugeen First Nation. He said:

> So the first place I start when I think about our overall responsibility to the land and the water is that first comes from the Creator. I understand earlier in these hearings the creation story was shared. And so that inherent responsibility has been given to us by the Creator to not only protect those lands and those waters, but to safeguard those to ensure that our

[104] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 156, line 7 to p. 180, line 6.

> future generations will have a relationship to those lands and waters. Because who we are as Anishinaabe is very much linked to that relationship: Our language, our culture, our ceremonies, and indeed our very identity.[105]

209. Randall Kahgee further clarified that the responsibility to care for SONTL cannot be fulfilled by anyone other than SON.[106] The responsibility bestowed on SON by the Creator extends to how decisions are made respecting the territory, and to the Anishinaabe customary law that applies to SONTL.[107]

See paras 351-374 (*Anishinaabe Territorial Use Customary Law*)

210. Specific locations in and around SONTL are featured in SON's traditional stories. Many of these stories, which have been passed down for generations, are the carriers of teachings on spirituality, morality and culture. As such, the territory of SON is inextricably linked to these teachings.

211. For example, the stories told by Leonore Keeshig and Donald Keeshig are linked to ancient geological events in and around SONTL. These stories demonstrate that SON has stories about the place where they live: SONTL. And it demonstrates that, from their perspective, they have been tied to the landscape for thousands of years.

See paras 414-424 (*Tunnel to Manitoulin and breach of Nadoway barrier*)

See paras 428-439 (*Brackish water, General Principles about Geology and Traditional Stories*)

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[105] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 909, line 24 to p. 910, line 11.
[106] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 911, lines 9-11.
[107] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 899, line 20 to p. 900, line 12 and p. 911, line 5 to p. 912, line 4.

212. Other traditional stories that are sacred to SON feature specific locations in and around SONTL. The Migration Story, for example, which tells the story of a spiritual migration, refers to Nochemowenaing in SONTL as a part of the migration route.[108] Other traditional stories such as the Creation Story and the Flood Story demonstrate the spiritual connection between traditional Anishinaabe and the earth, which involves both seeing the land as a gift from the Creator, and having responsibilities in respect of the earth.[109]

213. Vernon Roote also identified locations throughout SONTL that have specific spiritual meaning to SON. For example:

(a) The southern portion of Inverhuron was used to hunt and fish and has a burial site;[110]

(b) There are a number of sites, including the mouth of the Saugeen River, a burial site on Cove Island on the north end of the Peninsula, and in the Clarksburg area in the south end of Georgian Bay, where the White Dog ceremony – a ceremony for sacrifice, and to honour and ask the Creator to grant a request – was performed;[111]

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[108] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 193, lines 14-23; p. 195, line 17 to p.197, line 3; and p. 217, line 24 to p. 218, line 6; Edward Benton-Banai, The Mishomis Book: The Voice of the Ojibway (1979), Exhibit 3955, pp. 95-102.
[109] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 156, line 5 to p. 180, line 6 - *Creation Story* and p. 181, line 25 to p. 189, line 2 - *Flood Story*; Edward Benton-Banai, The Mishomis Book: The Voice of the Ojibway (1979), Exhibit 3955, pp. 1-4 - *Creation Story* and pp. 29-34 - *Flood Story*.
[110] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 467, lines 2-16.
[111] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 468, line 1 to p. 469, line 25.

(c) Dunks Bay, located at the tip of the Peninsula, is a sacred site where a burial site was found;[112]

(d) Craigleith, located at the base of the Blue Mountain, is a sacred site that was known as a spot to collect medicine;[113] and

(e) Nochemowenaing[114], located in the Hope Bay area, is a well-known site for spiritual reasons.[115]

214. The interconnectedness that SON has with its territory is also reflected in how SON, to this day, relies on and lives off of the land. This was very well articulated by community member Doran Ritchie:

> When the earth was created, the Creator gave us the land and the water, and the air, and all the resources with that. And it's my understanding that through all the resources that area available through Mother Earth from the Creator, everything from the soil, the water, the fish, the fur bay [sic -*bearing*] mammals, the birds, the large animals, both small, and otherwise, were all harvested. Where there was firewood for heat, there was water for drinking, fish for eating, wildlife for eating, the harvesting of medicines, the harvesting of wild plants for eating as well…[116]

215. For SON, their territory is far more than a place where they live. It is who they are.

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[112] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 470, line 15 to p. 471, line 12.
[113] Evidence of Verne Roote, Transcript vol 5, May 13, 2019, p. 471, line 13 to p. 472, line 7.
[114] Rendered variously in the Transcript, including Naotkamegwanning.
[115] Evidence of Verne Roote, Transcript vol 5, May 13, 2019, p. 472, lines 8-19.
[116] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1318, line 15 to p. 1319, line 1.

The Importance of Water

216. From SON's perspective, there is no substantive distinction between their relationship with land and water. The Creator gave SON the responsibility to care for both equally. Water is just as much a gift from the Creator as land, and SON's relationship with its waters is just as rich as with its land. As Vernon Roote noted in his testimony:

> The importance of water is equal to land as equal to air.
>
> One of our teachings, and I will start with that, is that Mother Earth is something that we must cherish as part of our teachings. Mother Earth provides three things to us, that's the land, the water and the air.
>
> And it's our job to keep Mother Earth clean. We must keep the air clean and we must keep the water clean as well as the land. It is our belief system, it is how we understand life to be.
>
> Each river, each bay of water provides life for us, such as the fish that exist within the water, and that is survival for us of food.
>
> But water is also not only important in the area of providing food. We must look at water in a much different way that average citizen doesn't look, and that is we are born with water. We are born out of water.
>
> So there are four types of water in our teachings that we must honour. And the most important one, of course, is birth, where the woman has provided us with life from the water.
>
> And so understanding that one particular teaching we put value to all of the water around. And so all the rivers, all the lakes all the bodies of water are all one within our territory. [117]

[117] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 456, line 8 to p. 457, line 11.

217. Karl Keeshig voiced a similar sentiment:

> All I see is my mother, the earth. It includes the water and it includes the land, as you are referring to it. It would be only regarding is the hand of your mother and ignoring the rest of her, that there is no difference. She is mother earth.[118]

218. In fact, the extent of the importance of water to SON is evident when one considers how prominently it is featured in the Anishinaabe Creation Story. Joanne Keeshig explained:

> And so there were elements that were gathered up throughout all of creation and molded into a sphere, to a round shape. And that shape was then wrapped in water. And when it was time for the earth's children that water was lifted by the spirit to a level above the earth, thus creating what we talk about, waasaygaming, the sacred, shimmering, shining lake where all life flows from.[119]

219. Both Anishinaabe men and women have sacred and specific roles in relation to water. Women have a particularly strong connection and corresponding responsibility to water given that when women carry life, that life is carried in water.[120] This responsibility to care for water has been given to Anishinaabe women by the Creator.[121]

220. Anishinaabe women carry out their responsibility to water in various ways. One of the ways they discharge their responsibility is by performing water ceremonies.[122] Joanne Keeshig described and explained a water ceremony for the Court:

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[118] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 222, line 23 to p. 223, line 3.
[119] Evidence of Joanne Keeshig, Transcript vol 28, July 16, 2019, p. 2714, lines 8-16.
[120] Evidence of Joanne Keeshig, Transcript vol 28, July 16, 2019, p. 2714, line 2 to p. 2717, line 19.
[121] Evidence of Joanne Keeshig, Transcript vol 28, July 16, 2019, p. 2718, lines 3-6.
[122] A water ceremony was conducted at the opening of the trial as a part of the sunrise ceremony at Neyaashiinigmiing, which was attended by the Court.

When we're in ceremony it is women that conduct that particular ceremony. We ensure that the spirit is petitioned.

So usually there will be a grandmother or a speaker of the language who will talk to the Creator, gizhe manidoo, but also will talk to the one who sits with Creator, they call her nitaawbiikwe; and there are other spirits that are there.

And they're talked to so that we can have the blessings upon the water. We need to acknowledge those spirits that are there. It's important that we do that. So the water prayer is offered.

And then in that ceremony you will see that there were women that held copper vessels, and so that's lifting the water. And while they're holding that water they are also praying with individual prayers, their own knowledge about water and asking for the blessings upon that.

And while they're holding that water there is a song or a number of songs that can be sung for the water that raises its vibration so that it – it's higher in terms of, say, positive, okay? So the vibration becomes more positive.

And then when that song is finished you will have seen the women, they would have lifted their vessels four times, like this and to their heart. Again talking about that connection, you know, that we have with that nibi, that most sacred water, the life blood of our mother, the earth. And that is raised to the fourth level of creation.

And then – and then it is lowered to the earth where it is – where it is, where the earth is given then a drink of water.

Once that's been done the water is shared. And it moves in a particular fashion. Our teachings tell us that water never follows backwards; to do so would mean that the Creator then is taking back the promise of gaagiige bimaadiziwin, the forever life for the people.

So when women do this work we try, as much as possible, to emulate that understanding to ensure that

> life will always flow towards the people.[123]

221. Water ceremonies take place all throughout SONTL, often on Lake Huron or Georgian Bay. Women from SON also go to Nochemowenaing to perform their ceremonies.[124]

222. More recently, many Anishinaabe women, including women from SON, have also been honouring their responsibility to water by participating in water walks. Water walks, where Indigenous women carry water and walk around Lake Huron, are intended to bring awareness to the importance and significance of water and to have people understand their own connection to water and to the earth.[125]

223. Men, for their part, also have a responsibility to honour the water. Vernon Roote explained:

> It is also our responsibility to look after the water, to the best of our ability. And that is not to pollute the water and to try to keep in clean as the best way we know how.
>
> The ceremonies, of course, if there are no ceremonies taking place we as individual men need to stop to recognize by offering tobacco into that water from time-to-time. So it's not just specific ceremonial times, but we must constantly be aware of the importance and the cleanliness of the water by giving thanks through tobacco in the water.[126]

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[123] Evidence of Joanne Keeshig, Transcript vol 28, July 16, 2019, p. 2715, line 16 to p. 2717, line 14.
[124] Evidence of Joanne Keeshig, Transcript vol 28, July 16, 2019, p. 2726, lines 4-9.
[125] Evidence of Joanne Keeshig, Transcript vol 28, July 16, 2019, p. 2735, line 8 to p. 2740, line 8.
[126] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 458, line 17 to p. 459, line 4.

224. Like the territory as a whole, the responsibility to care for the water in SONTL does not lie with others. That responsibility rests with SON alone.[127]

225. Some members of SON have additional responsibilities towards water. Marshall Nadjiwan is a pipe carrier. Pipe carriers, such as Marshall Nadjiwan, have special responsibility to the water, which he explained:

> A pipe carrier is one that carries the pipe for his people. He's got to be a humble person.
>
> They were to do prayers for the community. They were to do ceremonies in sweat lodges, tepees, Midewin lodges….[128]
>
> As a pipe carrier, I have to go down to the lake every year and do that ceremony for the water, to ask it to renew itself, because as human beings we're so small.
>
> So I have to ask the water spirits, my Creator, and those four directions to help me. Because I'm only a human being.
>
> If it's getting polluted, I have to do that ceremony for that water, because through that ceremony, it can renew itself. It can renew the bottom of the lakes, because that was the gift I was given…[129]

226. Teachings with respect to water and ceremony have been passed on to current SON members from the generations before them.[130]

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[127] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 911, lines 9-11.
[128] Evidence of Marshall Nadjiwan, Transcript vol 22, June 28, 2019, p. 2096, lines 6-11.
[129] Evidence of Marshall Nadjiwan, Transcript vol 22, June 28, 2019, p. 2120, lines 12-23.
[130] Evidence of Marshall Nadjiwan, Transcript vol 22, June 28, 2019, p. 2102, line 1 to p. 2103, line 25 and p. 2106, line 2 to p. 2107, line 16; Evidence of Joanne Keeshig, Transcript vol 28, July 16, 2019, p. 2712, lines 20-24; p. 2732, line 12; and p. 2772, line 20 to p. 2773, line 2.

227. When the Creator imparted his breath to create the world, he imparted his spirit into his creation and gave it spirit. For the Anishinaabe, this means that everything that is alive has a part of his breath or spirit within it.[131]

228. Ceremonies are a way to petition the spirits. Spirits are petitioned so that they can heal the earth and so that Anishinaabe can fulfill their responsibility to their territories.[132]

229. There are certain locations throughout SONTL where the presence of spirits are felt very strongly and where the spirits can be called upon to heal the sick. SON members have a particular responsibility to attend at those locations to make offerings and conduct ceremony. Nochemowenaing is one such location in SONTL.[133]

230. Water spirits, such as the one present at Nochemowenaing, are present elsewhere throughout SONTL. Karl Keeshig explained:

> And the streams, the lakes, the whirlpool, the eddies, the movements in the water at locales where you see those things, you are seeing the physical manifestation of a spirit.[134]

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[131] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p.162, lines 16-22 and p. 225, lines 13-17.
[132] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 224, line 21 to p. 228, line 12.
[133] Evidence of Joanne Keeshig, Transcript vol 28, July 16, 2019, p. 2726, line 2 to p. 2732, line 8.
[134] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 229, lines 8-11.

231. Ceremonies to gain the favour of these spirits are practiced all throughout SONTL.[135] These ceremonies have also been recorded by early explorers, dating back as early as the 17th century with Nicholas Perot's account of the Anishinaabe honouring the "god of the waters."[136]

SON's Place in the World

232. In the Anishinaabe creation story, the Creator blew his breath into all creation, including plants and animals, and the lands and the waters themselves.[137] Humans are therefore not in a special category of their own, but rather are only one of many different kinds of spirited being. This equality amongst species is the foundation for the tremendous respect and care SON has for its territory and all that lives within it.

233. For the Anishinaabe, the gift of life comes with the responsibility to care for and treat the rest of creation with respect.[138] They held and hold a profound environmental ethic, based on their spiritual beliefs, that require the resources in the natural world be treated with respect, not just as "rightless resources."[139] This is a recurring theme in many of SON's stories and the sentiment was shared repeatedly by community witnesses in their testimony.

Burial Customs

234. Anishinaabek practiced various burial customs over the years, but common to them all was that their graves were "'the dearest thing to an Indian known', which they would on no account

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[135] Evidence of Joanne Keeshig, Transcript vol 28, July 16, 2019, p. 2726, lines 2-9.
[136] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 179-187; Nicolas Perrot, "Memoir on the manners, customs, and religion of the savages of North America", Exhibit 259, pp. 59-60.
[137] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p.162, lines 16-22 and p. 225, lines 13-17.
[138] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 909, line 24 to p. 910, line 11.
[139] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 163, 175-176.

'give up and forsake.'"[140] The living continued to have obligations the dead, and were obliged spiritually to protect burial sites.[141] This is evident in the responses government agents received when requesting Anishinaabe move away from their territory. The Rama chiefs, for example, responded:

> This is our home… it was the home of our fathers around these waters and on these Islands are the Graves of our fathers & Children and when we die we wish to be buried by the side of them.[142]

235. Chief Waywaynosh from Sarnia similarly:

> firmly protested against removing from his present residence on the upper reserve near the Rapids of the St. Clair, saying… That his Relations and Friends were buried near his present residence, and that he hoped the Governor would not insist on his being removed from the place to which HE was so particularly attached.[143]

236. As Prof. Darlene Johnston explained in her paper "Connecting People to Place: Great Lakes Aboriginal History in Cultural Context":

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[140] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 190, 196-197- *quoting Benjamin Armstrong*.
[141] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 190, 196-197; Dr. Gwen Reimer, "Volume 3: Saugeen – Nawash Land Cessions No. 45 ½ (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 38, 54 - *In 1836 SON refused to move to Manitoulin because it would mean leaving the graves of their ancestors*, p. 146 - *in 1854 Rama and Sandy Bay object to relocating to Owen Sound because it would mean leaving the graves of their ancestors*; See also Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 95 - *quoting Father André.*
[142] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 197, quoting T.G. Anderson, "Answer from Rama Indians", Exhibit 2106, pp. 105-106.
[143] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 197, quoting William Jones, "Letter", 1830, Exhibit 986, pp. 2575-2576.

> In Anishinaabe culture, there is an ongoing relationship between the Dead and the Living; between Ancestors and Descendants. It is the obligation of the Living to ensure that their relatives are buried in the proper manner and in the proper place. Failure to perform this duty harms not only the Dead but also the Living. The Dead need to be sheltered and fed, to be visited and feasted. These traditions continue to exhibit powerful continuity.[144]

237. This depth of attachment flowed from the Anishinaabe belief that a person had two souls – one of which left the body at death to journey to a land of happiness, and one of which remained with or near the body.[145] The first Jesuit to fully grasp that Indigenous burial practices arose from their understanding of a diversity of souls within the human body was Father Brebeuf, who wrote:

> Returning from this feast [of the Dead] with a Captain who is very intelligent, and who will some day be very influential in the affairs of the Country, I asked him why they called the bones of the dead *Atisken*. He gave me the best explanation he could, and I gathered from his conversation that many think we have two souls, both of them being divisible and material, and yet both reasonable; the one separates itself from the body at death, yet remains in the Cemetery until the feast of the Dead, - after which it either changes into a Turtledove, or, according to the most comment belief, it goes away to the village of souls. **The other is, as it were, bound to the body, and informs, so to speak, the corpse; it remains in the grave of the dead after the feast, and never leaves it, unless some one bears it again as a child.** He pointed out to me, as proof of this metempsychosis, the perfect resemblance some have to persons deceased. A fine Philosophy, indeed. Such

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[144] Darlene Johnston, "Connecting People to Place: Great Lakes Aboriginal History in Cultural Context" 2004, Exhibit 4338, p. 24, Plaintiffs' Book of Authorities, Tab 177.

[145] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 195-198; Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 11.

> as it is, it shows why they call the bones of the dead, *Atisken*, "the souls." [emphasis added.][146]

238. The care taken for the soul that remains with the body is also reflected in the observations of the Jesuits. Father LeJeune in 1635 described a Feast for the Dead:

> On the twenty-eighth [of September], Father Buteux and I found a band of Savages who were having a feast near the graves of their deceased relatives; they gave them the best part of the banquet, which they threw into the fire; and, **when they were about to go away, a woman broke some twigs and branches from the trees, with which she covered the graves. I asked her why she did this, and she answered that she was sheltering the souls of her dead friends from the heat of the Sun**, which has been very great this Autumn. They reason about the souls of men and their necessities as they do about the body; according to their doctrine, they suppose that our souls have the same needs as our bodies…. [emphasis added.][147]

239. For SON specifically, Vernon Roote explained the significance of burials:

> Graves sites is something that our people respect. And when we think about different sites we honour the spirit that's attached to that, to that site.
>
> Perhaps the uplifting of a site that is found and the ignorance of uprooting the burial site is something that I despise, and that we should honour and respect a burial site wherever that might be. The spiritual connection, that spirit that had used that human form had in – one day needs to have respect; and we give that respect by having our sites looked after.
>
> We don't return to those sites often mainly because the spirit is around us and our belief system. But we

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[146] Darlene Johnston, "Connecting People to Place: Great Lakes Aboriginal History in Cultural Context" 2004, Exhibit 4338, p. 27, quoting *Jesuit Relations*, Volume 10, p. 287, Plaintiffs' Book of Authorities, Tab 177.

[147] Darlene Johnston, "Connecting People to Place: Great Lakes Aboriginal History in Cultural Context" 2004, Exhibit 4338, p. 29, quoting *Jesuit Relations*, Volume 8, pp. 21-23, , Plaintiffs' Book of Authorities, Tab 177.

> do go to the site every once in a while and honour that site because of the spiritual connection that we have.[148]

240. Karl Keeshig testified about the responsibilities the living have to family that have passed on:

> Q….Do you have specific responsibilities in relation to the grave sites of your family who have passed on?
>
> [A] Well, customarily you are not to – you shouldn't be visiting them often, but through purposes of memorial and that kind of thing, a kind of event, you can prepare what we refer to as a spirit dish. It is a feast that you can take to the place of interment or burial, and you can place it there for your loves one. In other communities, they actually build a little house over there for that specific purpose.
>
> But not to be disturbed, not to be disturbed. Our experience of that is someone wanting to bulldoze the grave sites over and gather artifacts of our sacred loved ones. That is our experience.
>
> And so pushed to do something, Anishinaabe would certainly do something. I can only remind you of Oka. I can only remind you of Ipperwash. There are others, events related to burial and grave sites, and those histories aren't very nice.
>
> But Anishinaabe will stand up. We'll stand up for it, for our loved ones.[149]

241. Members of SON conduct ceremonies at burial sites within SONTL to fulfill their responsibility to their ancestors and to their territory. Where burials have been disturbed, they ask for forgiveness for not "respecting the spirit as well as we need to respect the spirit".[150] The fact that members of SON would feel they need to ask for forgiveness for an act they did not commit

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[148] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 474, line 9 to p. 475, line 1.
[149] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 236, line 12 to p. 237, line 10.
[150] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 475, lines 2-11.

(digging up the grave), speaks to the responsibility they feel towards ensuring the protection of their ancestors.

242. This evidence supports the conclusion that the ancestors of SON have continuously occupied SONTL as they would never abandon their dead.

SON seeks the following findings of fact in respect of Chapter 6 - The Worldview of the Anishinaabe:

(a) Traditional knowledge supports the conclusion that SON has been in SONTL forever.

(b) SON has a deep spiritual connection to the lands and waters of SONTL.

(c) Water is a central part of SON's spiritual connection to SONTL.

(d) SON's relationship with water is an important part of their identity.

(e) SON has a responsibility to protect and care for SONUTL.

(f) Members of SON perform specific duties to care for and protect SONUTL, which have been passed down for generations.

(g) The responsibilities SON has to protect and care for its water cannot be fulfilled by others.

(h) SON hold strong obligations to protect, honour, and visit their dead, which they would not willingly give up and abandon.

(i) The above characteristics of SON have existed for hundreds and possibly thousands of years, and were true prior to 1763.

7. THE SOCIAL STRUCTURE OF THE ANISHINAABE

Dodem

243. As discussed above, a fundamental feature of Anishinaabe society is the Dodem or clan (in English) system. Expressions of Caribou, Eagle, Crane, Otter, Beaver, Bear and Catfish Dodem identities in the Great Lakes region are found on documents dating back to 1701 and descriptions of this kind of identification date back to the beginning of the 17th century. Early Europeans described the use of Dodem marks to designate specific people and villages among the Anishinaabe.[151] Linguistic evidence and recorded oral traditions strongly suggest that the use of Dodems by Anishinaabe is much older still.[152] Dodems remain an important part of Anishinaabe society today.[153]

244. For the Anishinaabe, Dodems are descent units from supernatural ancestors.[154] Each Anishinaabe person is a member a Dodem, and named after a symbolic animal, bird or fish. Each Anishinaabe person is associated with the Dodem of his or her father.[155]

245. Dodems strongly influence social structures in Anishinaabe society. For example, marriage between persons of the same Dodem is prohibited.[156] Dodems also serve a social integration function – a person is expected to treat a member of the same Dodem as a close relative,

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[151] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 16-18.
[152] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 17.
[153] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6813, line 17 to p. 6814, line 7.
[154] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p.6764, line 19 to p. 6765 line 4.
[155] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 40.
[156] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 42-43.

with associated obligations of hospitality and sharing (even if they had never before met).[157] In the past, the Dodem system was also a means through which information was shared between Anishinaabe groups.[158]

The Band

246. The central political unit of Anishinaabe society is the local band. The band is a technical term in anthropology, which describes a type of social structure. It means a group of people that are politically and economically independent that occupy an area that is their own and to which they hold proprietary rights.[159]

247. Historically, Anishinaabe bands contained about 50-100 people who occupied discrete territories where they lived off the land.[160] A band is a libertarian society divided into kinship groups.[161] Each kinship group in a band is represented by principal men or heads of families.[162] The chief of a band is the speaker of the consensus of those kinship groups.[163]

248. From an anthropological point of view, the nature and structure of a band is applicable to bands existing in the 17th century up to the present.[164]

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[157] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6766, line 25 to p. 6767 line 9.
[158] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6765, line 15 to p. 6766 line 1.
[159] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6759 lines 15 to p. 6740, line 6.
[160] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 29.
[161] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6760, lines 9-24 and p. 6761, line 19 to p. 6762, line 9.
[162] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6762, lines 10-20.
[163] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6760, lines 9-24 and p. 6761, line 19 to p. 6762, line 9.
[164] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6813, lines 8-16.

249. SON, although now comprised of two First Nations, is the successor to a historic band that occupied SONTL.

See paras 119-120 (*Continuity of SON*)

Alliances

250. When faced with a situation that called for more resources than were available to the band, such as an external incursion by a possibly hostile group, local bands formed alliances with other Anishinaabe bands to protect their lands.[165] The Three Fires Confederacy was such an alliance of Anishinaabe bands of the Upper Great Lakes. Early European accounts estimate that the Three Fires Confederacy included approximately 60,000 persons, located throughout the Great Lakes region.[166]

251. The Three Fires Confederacy was a loose association with political and economic objectives.[167] It was first formed in roughly 1600.[168] SON traditional knowledge holders recall that the Three Fires Confederacy was made up of three core components: the Odawa, the Pottawatomi, and the Ojibway. Each had a role in the Confederacy.[169] They recall that these component parts were the same people – part of the same feather. They were Anishinaabe.[170]

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[165] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6763, lines 2-10.
[166] Prof. Paul Driben "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 24.
[167] Evidence of Dr. Gwen Reimer, Transcript vol 83, February 12, 2020, p.10565, lines 1-21; Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6767, lines 14-18.
[168] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6767, lines 14-18.
[169] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 246, lines 9-14 and p. 247, lines 7-15; Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 433, line 17 to p. 435, line 2.
[170] Evidence of Karl Keeshig, Transcript vol 2, April 30, 2019, p. 275, lines 7-15.

252. Bands within the Three Fires Confederacy were independent and free to act on their own.[171] The Three Fires Confederacy did not have input on natural resource use or the territory of bands within the alliance.[172]

253. Bands of the Three Fires Confederacy undertook joint endeavours and fought against the Haudenosaunee in the 17th century, against the British in the Seven Years War (1756-1763) and in Pondiac's War (1763), and alongside the British in the American Revolutionary War (1775-1783) and the War of 1812-1814.[173] They were a significant military force.

See paras 472-483 (*Haudenosaunee War*)

See para 519-530 (*Pondiac's War*)

See para 625 (*War of 1812*)

254. Today, the relationship between Pottawatomi, Odawa, and Ojibway continues through a spiritual manifestation in the Three Fires Midewin Lodge, which is a society practicing a traditional Anishinaabe faith.[174] Political associations between some Pottawatomi, Odawa, and Ojibway also continued in the 19th century in the form of General Councils[175], and continue today in the form of the Union of Ontario Indians (see paragraph 260).

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[171] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019**,** p. 6767, line 24 to p. 6768, line 12.
[172] Evidence of Dr. Gwen Reimer, Transcript vol 83, February 12, 2020, p.10566, lines 6-15.
[173] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 27.
[174] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 246, lines 5-12; Evidence of Karl Keeshig, Transcript vol 3, April 30, 2019, p. 299, line 22 to p. 300, line 12.
[175] Evidence of Dr. Reimer, Transcript vol 88, March 3, 2020, p. 11273, line 17 to p. 11274, line 11; Dr. Gwen Reimer, "Supplementary Report: Documentation Relevant to the Context and Nature of General Indian Councils in Upper Canada/Canada West" (2020), Exhibit 4709, p. 3.

General Councils

255. General Councils are best characterised as another form of loose alliance – similar to the Three Fires Confederacy – that met on as needed basis.[176]

256. In the mid-19th century, the Ojibway of Upper Canada met periodically in General Councils to discuss matters of shared interest. General Councils did not displace band authority to make decisions.[177] For example, consent or an invitation from SON would still be needed for a General Council to discuss other First Nations relocating into SON territory.[178]

257. Methodist missionaries and Methodist leaders had a significant role at General Councils[179] and Methodist missionaries had a significant influence at these gatherings. For example, Rev. Peter Jones – a leading Anishinaabe Methodist Missionary – had a strong influence at General Councils in which he participated.[180]

258. Dr. Reimer acknowledged that one cannot read the General Council minutes – particularly of the late 1830s and the 1840s – without acknowledging that Methodist influences are evident.[181] For example:

(a) Dr. Reimer wrote:

> That Christian values influenced aspects of the General Council proceedings is clear in the frequent practice of opening each council meeting with singing and prayers, and the drafting of resolutions

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[176] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11274, lines 8-15.
[177] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11272, line 24 to p. 11273, line 4.
[178] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11273, lines 11-16.
[179] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11315, lines 10-16.
[180] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11278, line 17 to p. 11280, line 24.
[181] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11306, lines 6-11.

> and petitions that expressed the benefits of Christianity and civilization to the Indian way of life.[182]

(b) In 1836, a General Council was held at the Narrows, near Orillia.[183] Dr. Reimer acknowledged that there was Methodist influence at the meeting.[184]

(c) In 1840, a General Council was held at the River Credit.[185] Rev. Peter Jones took a leadership role at the meeting,[186] alongside John Sunday, a Methodist missionary, who moved that Joseph Sawyer, the father of a Methodist missionary, be chairman.[187]

(d) In 1846, a General Council was held at Orillia.[188] This particular General Council was called at the request of Indian Affairs to discuss manual labour schools. The first day was taken up explaining the objective and purpose of the Crown with additional speeches made by Methodists.[189] The leadership and the agenda of this General Council was strongly Crown and Methodist missionaries.[190] Indeed, while manual labour schools were in-line with the Methodist agenda, many Anishinaabe

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[182] Dr. Gwen Reimer, "Supplementary Report: Documentation Relevant to the Context and Nature of General Indian Councils in Upper Canada/Canada West" (2020), Exhibit 4709, p. 8.
[183] Council held at the Narrows on the 26th January 1836, at which the Chiefs belonging to the Narrows, Coldwater, River Credit, Rice Lake, Grape Island, Balsom Lake, Sakgeeng, and French River were present, Exhibit 1103.
[184] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11306, lines 6-11.
[185] Minutes of a General Council held at the River Credit commencing on January 16, 1840 to January 24, 1840, Exhibit 1322.
[186] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p.11282, lines 2-10.
[187] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p.11283, lines 19-24.
[188] Minutes of the General Council of Indian Chiefs and Principal Men, held at Orillia, Lake Simcoe Narrows, On Thursday, the 30th, and Friday, the 31st July, 1846, on the Proposed Removal of the Smaller Communities, and the Establishment of Manual Labour Schools, Exhibit 1605.
[189] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11289, line 13 to p. 11200, line 16.
[190] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11291, lines 7-22.

people in the mid-19th century resisted the idea of sending their children away to such schools.[191]

259. Participation by Anishinaabe bands in General Councils varied in the mid-19th century. Indeed, bands who were not interested in proselytization sometimes refused to attend.[192]

260. General Councils morphed into the Union of Ontario Indians in 1946.[193]

A Tribe

261. A tribe is a form of temporary social organization. In a tribe, a temporary leader is chosen to lead a larger group for some specific purpose. Once the task is done, the tribal leader is no longer needed.[194] The Pottawatomi, for example, functioned as a tribe where cooperation between substantial groups of men and women was imperative for agriculture, hunting, fishing, seasonal village relocations, and warfare.[195] The Pottawatomi existed as a tribe from the 1700s to the 1830s.[196]

SON seeks the following findings of fact in respect of Chapter 7 - The Social Structure of the Anishinaabe:

(a) Dodems (or "clans") are significant markers of identity among Anishinaabe. They are descent units that link Anishinaabe to their families, community, and ancestors. Each Anishinaabe person is associated with the Dodem of his or her father. One is

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[191] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11301, lines 15-19.
[192] Minutes of a General Council held at the River Credit, January 16, 1840, Exhibit 1322, p. 5/19
[193] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11275, lines 9-14.
[194] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6778, line 20 to p. 6779, line 11.
[195] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 35.
[196] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6815, lines 19-23.

not permitted to marry a person of the same Dodem. One also has special obligations of hospitality to others of the same Dodem.

(b) The band is the central political unit of Anishinaabe society. A band is a group of people that are politically and economically independent that occupy an area that is their own and to which they hold proprietary rights.

(c) When faced with a situation that called for more resources than were available to the band, such as an external incursion by a possibly hostile group, local bands formed alliances with other Anishinaabe bands to protect their lands. The Three Fires Confederacy was such an alliance of Anishinaabe bands of the upper Great Lakes. Bands within the Three Fires Confederacy were independent and free to act on their own.

(d) General Councils were loose alliances of Anishinaabe bands in southern Ontario that met on as needed basis, primarily in the mid-19th century. General Councils did not displace band authority to make decisions. Methodist missionaries and Methodist leaders had a significant role at these General Councils.

(e) A Tribe is a form of temporary social organization. In a tribe, a temporary leader is chosen to lead a larger group for some specific purpose. Once the task is done, the tribal leader is no longer needed. The Pottawatomi existed as a tribe from the 1700s to the 1830s.

8. AN ANISHINAABE PATTERN OF SUBSISTENCE: LIVING OFF THE LAND AND WATER

262. The seasonal round for the Anishinaabe is "bimaadziwin". Bimaadziwin is the good life, the proper life. It is how the Anishinaabe realize themselves as human beings – by taking resource with a eye toward a cycle of respect and renewal, year after year.[197]

263. Although Europeans, until fairly recently, often thought that the Anishinaabe were "nomadic", in the sense that they were thought to have wandered randomly around, traditionally the Anishinaabe had a defined seasonal round of activities and locations.[198] Historically, in early spring Anishinaabe "bands" congregated at maple sugar grounds. In spring, summer and fall, they tended to congregate at locations where there was especially productive fishing, most notably for times in the spring and fall of fish spawning runs. In winter, they broke into much smaller, family-based hunting groups, and scattered throughout the "band's" territory. Each hunting group had a usual winter territory that they frequented.[199]

264. The subsistence patterns of the Anishinaabe who resided in the Lake Huron and Georgian Bay area during the 17th, 18th, and 19th centuries were a product of the conditions of the human and non-human environments at those different periods of time.[200] For example:

(a) Before trade with Europeans, the Anishinaabe had a subsistence economy[201] -- supporting themselves primarily as hunters and fishermen who supplemented their

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[197] Evidence of Prof. Driben, Transcript vol 54, October 22, 2019, p. 6905, lines 3-10.
[198] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 201-202.
[199] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 218-222.
[200] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 201-202.
[201] Evidence of Prof. Driben, Transcript vol 54, October 22, 2019, p. 6915, lines 1-13.

diet with tubers, berries, wild rice and some crops.[202] Fish, for example, were an important component of the Odawa diet and there is evidence of spring, summer and fall spawning fish species in the archaeological record of SONTL such as at the 10th and 17th century multi-component Hunter site;[203]

(b) In the 1600s, the Anishinaabe got involved in the fur trade during their time out on the land in the winter months, which brought in some market transactions;[204]

(c) In the 1700s, the Anishinaabe were living directly off the land[205] and the water,[206] but started to develop a peripheral market economy. Their way of life was still to live off the land for subsistence, but the market was a way to acquire goods of European manufacture;[207]

(d) In the 1800s, the Anishinaabe continued to live off the land.[208] But, the fur trade was in decline, including in the area of Lake Huron and Georgian Bay,[209] (peaking about 1821).[210] The decline in availability of large game animals meant that the

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[202] Prof. Paul Driben, "An Anthropological Report on Selected Aspects of the Cultural Lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 203.
[203] Dr. Ronald Williamson, "Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, p. 5.
[204] Evidence of Prof. Driben, Transcript vol 54, October 22, 2019, p. 6910, lines 1-5.
[205] Evidence of Prof. Driben, Transcript vol 54, October 22, 2019, p. 6912, lines 3-9.
[206] Prof. Paul Driben, "An Anthropological Report on Selected Aspects of the Cultural Lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 204.
[207] Evidence of Prof. Driben, Transcript vol 54, October 22, 2019, p. 6915, lines 1-22.
[208] Evidence of Prof. Driben, Transcript vol 54, October 22, 2019, p. 6921, lines 12-19.
[209] Evidence of Prof. Driben, Transcript vol 54, October 22, 2019, p. 6922, lines 12-23.
[210] Evidence of Prof. Driben, Transcript vol 54, October 22, 2019, p. 6922, lines 2-9.

> Anishinaabe shifted their subsistence pattern from fur bearers like moose and deer to hare and more fish.[211]

265. In the 1700s and 1800s, the Anishinaabe were travelling hundreds of kilometres throughout their territory to maintain this way of life: hunting, harvesting, and fishing.[212]

266. In the 1850s, the seasonal round was still the way of life of Anishinaabe:

(a) In summer (and sometimes spring and fall), groups of people camped together when there was lots of fish to be caught. This was the primary social time and it was centered around fishing;

(b) Once the weather turned cold, people would start to move. They moved inland taking game and foraging. They separated into smaller units, sometimes one extended family or two extended families and they lived on their trapline or a hunting territory. They lived this way over the winter;

(c) In the spring, they went to the sugar bush and then moved off to the summer village again.[213]

267. For Anishinaabe, like SON, the seasonal round was, and is, not frozen in time. Subsistence patterns adjust to accommodate new opportunities and to face new challenges.

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[211] Evidence of Prof. Driben, Transcript vol 54, October 22, 2019, p. 6922, line 24 to p. 6923, line 9.
[212] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6906, line 16 to p. 6907, line 23.
[213] Evidence of Prof. Driben, Transcript vol 54, October 22, 2019, p. 6901, line 9 to p. 6902, line 24.

268. By the mid-19th Century, the major challenge facing the subsistence pattern of SON was the arrival of ever-increasing numbers of Euro-Canadians to their territory.

SON's Fishery in the 19th Century

269. The following section summarizes SON's historical commercial and subsistence fishing in SONUTL. SON's commercial fishing rights were recognized as being protected Aboriginal rights in *R v. Jones and Nadjiwon.*[214] That is not being relitigated in this trial. Rather, SON seeks findings that its engagement in commercial and subsistence fishing and its relationship with the fishery is evidence of their continued presence, regular use, and occupation of SONUTL.

270. For the Anishinaabe of the Great Lakes, including SON, fishing was the mainstay of their economy, both for food and for trade. On first observing the fishery, Europeans marvelled at its extent and productivity.[215]

271. Between the 1830s and 1850s, as they have been since time immemorial, the Lake Huron and Georgian Bay fisheries were highly valued by SON as subsistence and commercial fisheries. They were SON's most reliable and important source of food in this period.[216] SON's

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[214] *R v Jones and Nadjiwon,* 14 OR (3d) 421, [1993] OJ No. 893, Exhibit 3883, Plaintiffs' Book of Authorities, Tab 76.

[215] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 50-52.

[216] **Primary documents:** Paul Kane, Wanderings of an Artist Among the Indians of Upper Canada, Exhibit 1534, p. 2 - *Kane camped among SON in the summer of 1845 and noted that "the inhabitants subsist principally on fish, which are taken in abundance at the mouth of the river"*; Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019 p. 6927, lines 18-20 - *Paul Kane visited in 1845*; J.B. Macaulay, "Report on Indian Affairs to His Excellency Sir Geo. Arthur," 1839, Exhibit 1297, p. 47/168758 – *"trusting very much to hunting and fishing for their support*"; S.P. Jarvis, Requisition for Fishing Implements for use of Saugeen Indians, March 25, 1840, Exhibit 1335; S.P. Jarvis, Report, July 20, 1838, Exhibit 4826/1250, p. 11 [transcript p. 4] – "*They appeared to me when I visited them to be very poor and miserable, relying almost altogether upon fishing and hunting for support*"; Statement of Metigwob, September 13, 1836, Exhibit 1142, p.2 – *SON would like to repair to the Peninsula because "there are many fish in that place"*; **Expert**

access to these fisheries, and the security of the fisheries from encroachment, was a prominent feature of Treaty 45 ½ where Lt. Gov. Bond Head promised SON the Crown would "remove all the white people who were in the habit of fishing on their grounds".[217] This was reaffirmed in Lord Elgin's Declaration of 1847, which guaranteed to SON the possession of all islands within 7 miles of the shore[218] – echoing the promise to protect the fisheries made by Bond Head at Treaty 45 ½.[219]

272. Indeed, SON exercised exclusive proprietary rights in the fishery surrounding the Peninsula.[220] Over the years, however, and in spite of the efforts of SON, their fisheries on the west side of the Peninsula were subject to a number of unauthorized encroachments by Euro-Canadian settlers. There were several instances where SON agreed to lease fisheries to Euro-Canadian fishermen.

See paras 629 to 630(d) (*Contact With Euro-Canadian Fishermen and Settlers in SONTL*)

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opinion: Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6850, line 20 to p. 6853, line 7 – *SON proprietary rights over fishery in 1830s, Crown recognition of the importance of SON's fishery in this period. "Bond Head acknowledges the critical role that the fishery plays in the life of SON"*; Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, pp. 58-61- *subsistence fishery* and pp. 67-67 – *commercial fishery*. **Academic analysis:** Victor Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nations' Fishing Islands in Lake Huron", in Coexistence: Studies in Ontario- First Nations Relations, Bruce W. Hodgins, Shawn Herd, John S. Milloy (Eds) (1992), Exhibit 4332, p. 85.

[217] Statement of Metigwob, September 13, 1836, Exhibit 1142, p. 3 [original], p. 2 [transcript]; Evidence of Prof. Jarvis Brownlie, July 23, 2019, Transcript vol 31, p. 3297, lines 2-21.

[218] Lord Elgin's Declaration, June 29, 1847, Exhibit 1674.

[219] Statement of Metigwob, September 13, 1836, Exhibit 1142, p. 3 [original], p. 2 [transcript]; Evidence of Prof. Jarvis Brownlie, July 23, 2019, Transcript vol 31, p. 3297, lines 2-21.

[220] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6850, line 20 to p. 6853, line 7; J.B. Macaulay, "Report on Indian Affairs to His Excellency Sir Geo. Arthur," 1839, Exhibit 1297, p. 47/168758– *noting that the Fishing Islands had attracted the notice of white people, who annoy the Indians by "encroaching on what they consider to be their exclusive right*."; Alexander McGregor to John Colborne, September 4, 1832, Exhibit 1027 – *Claiming he has a lease from SON;* Report of the Executive Council of Upper Canada 1839, Exhibit 1300, pp. 69-70 – *notes that Saugeen have asserted rights of exclusive fishery in Lake Huron.*

273. In some instances, those Euro-Canadian fishermen interfered with SON's fishery by going beyond the terms of their leases. SON's resistance to this and assertion of ownership over their fishery is discussed in more detail in a later section.

See paras 630(d) to 634 (*Contact With Euro-Canadian Fishermen and Settlers in SONTL*)

274. In 1854, at the time Treaty 72 was concluded, and in the years that followed, SON continued to rely heavily on fishing the waters of their territory for their livelihood, including both subsistence and commercial fishing operations.[221] In this period, the fishery was "tremendously important to them", both to meet their subsistence needs and also for its commercial value.[222] Access to the fishery was essential to their continued existence.[223]

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[221] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3287, lines 8 to 24; Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, pp. 93-96 – "*...the evidence indicates that after Surrender No 72 families continued to rely on hunting, trapping and particularly fishing to supplement their income and diet."*

[222] Evidence of Prof. Paul Driben, October 23, 2019, Transcript vol 55, p. 6955, line 10 to p. 6957, line 1; Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3186, lines 9-20*;* See also: Ludwig Kribs, October 11, 1854, Exhibit 2144 – *"They are obliged chiefly to live upon fish"*; Report of the Special Commissioners Appointed on the 8th of September, 1856 to Investigate Indian Affairs in Canada [Pennefather Report], (1858), Exhibit 2494, [PDF image 76 – document not paginated] – *"The fisheries, though not equal to those on the western side of the Peninsula, are considerable, and will constitute no inconsiderable part of the means of subsistence available for the band";* Conrad Vandusen Report on the Chippewas of Nawash, in Twenty-Ninth Annual Report on the Missionary Society of the Wesleyan-Methodist Church in Canada*,* (1854), Exhibit 2046, p. xx – *explaining that the families are sometimes absent from Church "on their periodical hunting and fishing excursions"*; L. Oliphant to Lord Elgin, Enclosure No. 1 in Copy of a Despatch from Governor General the Earl of Elgin to the Right Hon. Sir. G. Grey Bart, November 3, 1854, Exhibit 2175, p. 4 – *When Oliphant arrived for the treaty council, the Chiefs were "absent at their fishing grounds*".

[223] Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p. 6956, lines 16-21 – *"It's a question of existence. [The fishery] is their main food source, you know, certainly in the 1850s, along with, you know, other natural products of the land, game, let's say for instance. This is tremendously important to them…"*.

275. After Treaty 72, SON still saw themselves as holding proprietary rights over the fishery and as entitled to fish throughout their waters.[224] The oral history of the community is extensive on this point.[225]

276. Consistent with this belief, SON tried over and over again in the decades that followed to re-establish firm control over the commercial fishery in their territory in the face of government and settler interference.[226] However, SON faced a number of obstacles in developing their commercial fishery so that it could compete with the commercial fishery of Euro-Canadian settlers. The government frequently delayed approval for or refused to approve expenditures that SON wished to make related to the commercial fishery, like nets, salt and boats. For example:

> In the fall of 1851, the commercial fishing operation of the Saugeen Nation was ruined by the late approval of funds for the purchase of salt, an

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[224] Treaty 72 stipulated that "It is understood that no islands are included in this surrender", Exhibit 2145, [PDF image 3].

[225] Evidence of Dale Jones, Transcript vol 8, May 16, 2019, p. 827, line 15 to p. 828, line 7; Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 523, lines 9-17 - *Vernon discusses his grandfather, Alex Roote, telling him he has the right to hunt and fish in the territory. … because those rights were never surrendered and that the Treaty only identified the sale of bush lots* and p. 508, lines 10-17 – "*It has always been my belief that we did not surrender any Aboriginal rights in the Treaty of -- number 72.· And those arguments have come from a line of oral history with other past leaders commenting on the same, where we did not give up any Aboriginal rights; and that the Treaty was only for the sale of land and not for the sale of Aboriginal rights."*; Evidence of Ted Johnston, Transcript vol 4, May 1, 2019, p. 401, line 21 to p. 402, line 1 -*"we understood that we owned the water completely surrounding the peninsula, so wherever the fishing was required, and there was certain areas at certain times of the year that were better than others."*; Evidence of Karl Keeshig, Transcript vol 3, April 30, 2019, p. 287, line 23 to p. 288, line 4 - w*hen asked if he understood the treaties in the territory to have anything to do with hunting or fishing, Karl Keeshig replied "No. If it did, there would be a record of it. Hunting and fishing, I understood that those were not a part of what was signed, is what I understand."*; Evidence of James (Jim) Ritchie, Transcript vol 7, May 15, 2019, p. 682, lines 9-12 - *"We always had those rights, and we still have those rights, hunting and fishing in our territory. That's my view. The government has a different view."*

[226] Victor Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nations' Fishing Islands in Lake Huron", in Coexistence: Studies in Ontario-First Nations Relations, Bruce W. Hodgins, Shawn Herd, John S. Milloy (Eds) (1992), Exhibit 4332, pp. 93-94.

> essential item for preserving fish…. In the fall of 1856, the Department of Indian Affairs declined to issue funds to pay for fish barrels and salt from the Saugeen Nation's trust fund (established after the Treaty of 1854 from sales of their land). In 1857, the government refused to advance funds to the Saugeen people for a sail boat and fish nets. Despite these obstacles, the Saugeen fishermen continued to harvest fish for sale. In 1857, fishermen from Saugeen sold 1000 barrels of fish at five dollars per barrel.
>
> The intrusion of non-Aboriginal commercial fishermen into Saugeen Nation territory disrupted more than the fishery. A significant result was the depletion of the timber resources on the islands and mainland because of the wood used in making barrels.[227]

277. Despite these obstacles, SON continued to harvest fish for sale. In 1857, for instance, the Saugeen sold approximately $5,000 worth of fish.[228]

278. Starting in the mid-1850s, however, a series of Crown decisions marginalized SON and further limited their ability to control their fishery:

(a) In 1853, the government began to open the Fishing Islands to public tender. Unlike prior leasing agreements, which had been contingent upon the consent of SON, the

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[227] Victor Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nations' Fishing Islands in Lake Huron", in Coexistence: Studies in Ontario-First Nations Relations, Bruce W. Hodgins, Shawn Herd, John S. Milloy (Eds) (1992), Exhibit 4332, p. 94; See also: A. Macdonald to T.G Anderson, November 8, 1851, Exhibit 1896, p.310 [PDF pagination p.2]; T.G Anderson to R.T. Pennefather, October 29, 1856, Exhibit 2437, p.477 [PDF pagination p.1] – *transmitting requisition from Saugeen for fish barrels and salt*.

[228] Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, pp. 94-95.

new leasing occurred unilaterally.[229] With this, SON lost one of their key tools for regulating the fishery.

(b) In 1857, the Province of Canada passed the *Fishery Act*.[230] Soon after it was passed, Fishery Overseers began making arrangements with Indian Agents to issue leases for fishing stations used regularly by Indian bands, including at Saugeen, Cape Croker and Colpoy's Bay.[231] SON were now required to purchase a license from the province to use (small portions of)[232] their own fishery. The licenses SON received under the new regime often fell far short of what they had asked for. For example, in 1876, they wrote:

> The License we are sorry to find does not include what we applied for and only differs from the old License by a little extension across the mouth of the Sauble River to Chief's Point, which does not add anything to the value of the old fishing ground. What we asked for was the White Fish Island Station.

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[229] Victor Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nations' Fishing Islands in Lake Huron", in Coexistence: Studies in Ontario- First Nations Relations, Bruce W. Hodgins, Shawn Herd, John S. Milloy (Eds) (1992), Exhibit 4332, pp. 94-95.
[230] *Fishery Act,* 20 Vict Ch, 21, Exhibit 2474.
[231] Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, pp. viii, 83-86.
[232] Fishing License, 1859, Exhibit 2541; Fishing License, 1874, Exhibit 2755 - *Letter: Enclosing fishing license for Saugeen for the season 1874 covering a station from Chief's Point on the North side of the River au Sable to the division line between lots 26 and 25 in Concession D, Amabel*; Saugeen Indians to William Plummer, May 4, 1876, Exhibit 2786 – *explaining that new license does not contain extension they asked for of White Fish Island Station;* Petition from Indians of Cape Croker to Pennefather, Superintendent General of Indian Affairs, November 6, 1863, Exhibit 2630, p. 2 – *Requesting the return of the fishery around their reserve and around White Cloud, Hay and Griffith islands*; Letter from Minister of Marine and Fisheries to E.A. Meredith, Deputy Minister, Department of the Interior, January 11, 1876, Exhibit 2778 – *the Cape Croker Band does not have a license to fish*; Province of Ontario, Special Fishery License, July 10, 1876, Exhibit 2798.

> This Island is one of the group of Fishing Islands which we have never surrendered.
>
> […] We therefore see no reason why the Government should lease any of our Islands and the fishing around them, without first obtaining our consent, more especially when we require it so much for the use of our own people.[233]

279. SON protested these curtailments on their fishery through a variety of measures, from petitioning the Queen to repossess their fishing grounds, to harassing Euro-Canadian fishermen in their waters, to damaging the Euro-Canadian fishermen's nets. In their petition to the Queen, they wrote:

> If we could only have this privilege of all that we should call our own - have the sole management of our lands, our fisheries, and monies, we would be satisfied and we do not see why we cannot be able to do so, while we have persons of our own blood who can do all this, in any respect exactly the same as a white man.[234]

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[233] Saugeen Indians to William Plummer, Superintendent and Commissioner, Indian Affairs, May 4, 1876, Exhibit 2786, p. 1.

[234] Cape Croker Chiefs and Principal Men, Petition to Queen Victoria April 17, 1860, Exhibit 2569, p. 5 [PDF]; See, generally, Victor Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nations' Fishing Islands in Lake Huron", in Coexistence: Studies in Ontario-First Nations Relations, Bruce W. Hodgins, Shawn Herd, John S. Milloy (Eds) (1992), Exhibit 4332, p. 95; Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 111-113.

280. Within a decade, the fishery had been severely damaged by overfishing.[235] By 1861, William Gibbard, the Fisheries Overseer for Lake Huron, commented that the fishery at Saugeen had been "almost destroyed".[236]

281. Nonetheless, in the years that followed SON continued to fish, both for subsistence and sale; to protest incursions on their fishery; and to seek the extension of their fishing grounds under the licensing regime.[237] For example:

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[235] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p.113; Victor Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nations' Fishing Islands in Lake Huron", in Coexistence: Studies in Ontario- First Nations Relations, Bruce W. Hodgins, Shawn Herd, John S. Milloy (Eds) (1992), Exhibit 4332, pp. 95-96.

[236] William Gibbard, "Report on the Fisheries of Lakes Huron and Superior", in Ottawa: Sessional Papers, December 1861, Exhibit 2612, p. 1.

[237] **Primary Sources:** William Plummer, Superintendent and Commissioner, Indian Affairs to Minister, Department of the Interior, May 10, 1876, Exhibit 2786, p. 2; William Plummer, Superintendent and Commissioner, Indian Affairs, to Minister, Department of the Interior, March 9, 1876, Exhibit 2782, not paginated [PDF images 6-7]; Petition of the Cape Croker Indians, November 6, 1863, Exhibit 2630, p. 1104 – *protesting leasing of fishery around their reserve to white people*; Letter from William Bartlett, Visiting Superintendent of Indian Affairs, to William Spragge, Deputy Superintendent of Indian Affairs, September 14 1867, Exhibit 2663, p. 455 – *Regarding Croker Band complaint that white people are fishing in waters reserved for the band;* Petition from Saugeen Chiefs and Principal Men to William Bartlett, Visiting Superintendent of Indian Affairs, March 5, 1866, p. 332, Exhibit 2654 - *Seeking exclusive right to fish at Sauble Bay*; Petition of the Cape Croker Indians, November 6, 1863, Exhibit 2630, p. 1104 – *Noting "a great part of their subsistence and living was derived from their fishing"*; Henry Jones, Writer and Interpreter for the Saugeen Band of Indians, to William Bartlett, Visiting Superintendent of Indian Affairs, November 28, 1865, Exhibit 2647, p.439 – *Saugeen band wishes to repossess some of their old fishing grounds;* F. Lamorandiere, Secretary and Interpreter, Cape Croker to William Plummer, Superintendent and Commissioner, Indian Affairs, February 10, 1876, Exhibit 2780, pp. 1-2 – *Seeking renewal and extension of fishing license;* Department of Marine and Fisheries, Memo re Request of Saugeen Reserve Indians for Seining Privilege, May 16, 1895, Exhibit 3111, p. 1; Waldron Elias, Interpreter Saugeen Reserve, to Alexander McNeill, Member of Parliament, April 26, 1895, Exhibit 3107 – *Seeking the exclusive privilege of fishing in the waters fronting the reserve without license*; J.W. Jermyn, Indian Agent to Hayter Reed, Deputy Superintendent General, Indian Affairs, April 16, 1896, Exhibit 3138, pp. 1-2 – *Expressing opposition to request to grant Indians fishing privileges outside their current limits*; Hayter Reed, Deputy Superintendent General, Indian Affairs, to William Smith, Deputy Minister of Marine and

(a) In an 1863 petition, the Cape Croker Indians noted that they relied heavily on their fishery for subsistence, "until a few years ago the best fishing ground around their own Reserve, as well as White Cloud, Griffith, Hay & Barrier Island, were taken away and leased to the white people, thus doing our people an act of injustice and a great wrong." They sought the return of the fisheries surrounding their islands;[238]

(b) In 1865, the Saugeen Indians made an application for fishing grounds they had previously occupied between Chief's Point and Frenchman's Bay, extending ten miles into the lake;[239]

(c) In 1876, William Plummer, Superintendent and Commissioner of Indian Affairs, reported on the Cape Croker and Saugeen fisheries. He noted the Saugeen Indians had been confined to a single small fishery at Sauble, which was inadequate, and stated that they should be granted the further fisheries they were requesting.[240] This letter indicates both that SON were still fishing, and that they were seeking extensions to the fishing grounds being granted them under the new licensing regime.

Fisheries, April 22 1896, Exhibit 3139 – *Opposed to request to grant fishing licenses outside the reserve to Cape Croker Indians*; William Plummer Superintendent and Commissioner of Indian Affairs, to MacDonald John A, February 19, 1881, Exhibit 2886, p. 1 [transcript]. **Expert Opinion:** Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, pp. 100-102, 113, 116-118, 118-121.

[238] Petition of the Cape Croker Indians, November 6, 1863, Exhibit 2630, p. 1104.

[239] Henry Jones, Writer and Interpreter for the Saugeen Band of Indians, to William Bartlett, Visiting Superintendent of Indian Affairs, November 28, 1865, Exhibit 2647, p. 439 – *Expressing desire of the Saugeen band to repossess some of their old fishing grounds.*

[240] Department of the Interior, March 9, 1876, Exhibit 2782, not paginated [PDF images pp. 6-7].

282. In 1885, SON surrendered the Fishing Islands and Cape Hurd Islands. Since the early 1830s, this area was fished using seine nets from the shore.

See para 629 (*Contact with Euro-Canadian Fishermen and Settlers in SONTL*)

283. However, by the mid-1880s, fishing technology had changed, such that the islands were no longer as essential as they once were to the operation of the commercial fishery.[241] The understanding of SON was that the surrender would not impact their rights to fish in the waters surrounding the islands.[242] For example, in 1894, the Cape Croker (Nawash) Band Council asserted via their Indian Agent that fishing rights had been secured to them during the negotiations for the surrender of the Fishing Islands.[243]

SON's Fishery in the 20th Century

284. Beginning in 1900, Ontario, rather than the Dominion of Canada, became the licensing authority from whom SON had to secure their fishing licenses.[244]

285. Fishing continued to be an important aspect of SON's economy, livelihood and culture throughout the 20th century. SON continued to fish both commercially and for subsistence, to seek

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[241] Victor Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nations' Fishing Islands in Lake Huron", in Coexistence: Studies in Ontario-First Nations Relations, Bruce W. Hodgins, Shawn Herd, John S. Milloy (Eds) (1992), Exhibit 4332, p. 97 - *Changes in Fishing tech*; Prof. Paul Driben, "An Anthropological Report on Selected Aspects of the Cultural Lives of the Saugeen Anishinaabe" (2013) report, Exhibit 4324, p. 113- *Changes in Fishing technology.*

[242] Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, pp.104-105.

[243] Cape Croker Band Council Resolution, February 5, 1894, Exhibit 3085; J.W. Jermyn, Indian Agent, to Hayter Reed, Deputy Superintendent General, Indian Affairs, February 1, 1894, Exhibit 3084.

[244] Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, pp. 106-107, 112-113.

extensions of their fishing grounds, and to protest new curtailments on their fishery.[245] As noted in one letter from an Indian Department official to the Deputy Commissioner of Fisheries, SON was "*a good deal exercised about the curtailment of the old limits*."[246]

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[245] Cape Croker Band Council Resolution, January 3, 1900, Exhibit 3290 – *BCR to renew fishery license*; Cape Croker Band Council Resolution, February 4, 1901, Exhibit 3313 – *BCR to renew fishery license*; Cape Croker Band Council Resolution, August 13, 1902, Exhibit 3322- *"[T]his Band solemnly protests against the diminution or curtailment of their rights and privileges which from time immemorial they have peaceably enjoyed; and to State that the reasons assigned for reducing the area are considered to be at once insufficient, unacceptable and unjustifiable and the Band looks for a restoration of their undoubted rights with as little delay as possible*"; J.D. McLean, Acting Deputy Minister of Indian Affairs, to John McIvor, Indian Agent, August 25, 1902, Exhibit 3323, p. 1 – *Noting receipt of the resolution from the Indians protesting the curtailment of their fishing grounds, but they have not shown they suffer from the contraction. All the Department can do is to represent their case to the Provincial government, who has decided to curtail their fishing limits in fairness to others*; Cape Croker Band Council Resolution, September 15, 1902, Exhibit 3324 – *BCR asking to have Barrier Island restored to them*; Cape Croker Band Council resolution, January 5, 1901, Exhibit 3330 – *BCR to renew fishing license*; MacRae, J.A. (Inspector of Indian Agencies and Reserves) to [Fisheries] May 25, 1904, Exhibit 3337- *The Indians strongly complain of the way they have been treated in respect of the fishery reserve. The area formerly reserved has been greatly encroached upon by white men*; James Campbell, Indian Affairs, to Deputy Superintendent General, June 4, 1903, Exhibit 3339, p.1– *Letter regarding the curtailment of Cape Croker reserve and the complaints by the band. Stating that their fishing limits were curtailed due to complaints by white fishermen.* Cape Croker Band Council Resolution, August 1, 1904, Exhibit 3345 – *BCR re restoration of fishery around White Cloud and other Islands*; Cape Croker Band Council Resolution, March 6, 1905, Exhibit 3348 – *BCR to renew fishing license;* Cape Croker Band Council Resolution, February 5, 1906, Exhibit 3356 - *BCR to renew fishing license*; Cape Croker Band Council Resolution, March 4, 1907, Exhibit 3368 - *BCR to renew fishing license*; Cape Croker Band Council resolution, October 7, 1907, Exhibit 3381 – *BCR to pass a Bylaw to prevent French men from fishing on the Indian Fishing Reserve, also to prevent them from stopping on the Indian ground while fishing, also to notify them to leave the Reserve as soon as possible*; Cape Croker Band Council resolution, February 3, 1908, Exhibit 3384 – *BCR to renew fishing license*; Cape Croker Band Council Resolution, January 4, 1909, Exhibit 3401 – *BCR to renew fishing license*; Cape Croker Band Council Resolution, 1910, Exhibit 3416 – *BCR to renew fishing license;* Nawash Band Council Resolution, Motion No. 8, August 29, 1921, Exhibit 3504, p.2 [transcript], Motion 8 - *Motion that the band wishes to retain all their fishing grounds and that no outsider be allowed to fish on Indian waters*; Statistical Chart of Fish Caught, Georgian Bay, 1945, Exhibit 4028, p.1– *Notes license to Cape Croker Indians*.

[246] Assistant Secretary S. Stewart to Deputy Commissioner of Fisheries, S.T. Bastedo, October 15, 1908, Exhibit 3399.

286. SON's oral history tells the story of a community that continued to fish throughout the early half of the 20th century.[247] As Verna Johnston explained,

> We sold fish. That's what we sold, was fish. We sold a lot of fish. The men used to take it out there with a team of horses and a wagon box. They'd fill it right up and take it to Wiarton to the fish house.[248]

287. In this period, SON continued to assert their ownership over tracts of waters of their territory.[249] SON oral history shows that fishermen fished outside the limits of the limited licenses they were able to secure from Ontario.[250] They appointed their own fisheries overseers to monitor

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[247] Oral History Interview of Verna Johnston, Cape Croker, Interviewer: R. Vanderburgh, July 15, 1974, Exhibit 4144, pp. 3-5 – *extensive discussion of fishing practices from when Verna was a girl into her adulthood and marriage;* Oral History Interview of Walter Johnston, Cape Croker, Interviewer: R. Vanderburgh, July 16, 1974, Exhibit 4145, pp. 32409-32412 [PDF pp. 1-4] – *Walter was born in 1905, and discussed fishing from about age 11 (1916) until mid 1940s – both subsistence and commercial fishing*; Oral History Interview of Henry Johnston, Cape Croker, Interviewer: R. Vanderburgh, July 18, 1974, Exhibit 4146, pp. 3-4 – *born in 1897, learned to fish from his father at age 12, sea lamprey infestation, ice fishing, fishing for subsistence and commercially*; Oral History Interview of Willis Waukey, Cape Croker, Interviewer: R. Vanderburgh, August 15, 1974, Exhibit 4147, pp. 32444-32445 [PDF pp. 3-4] – *born 1905, fishing since he was a young man; subsistence and commercial; discusses period up to 1940s*; Oral History Interview of George Elliott, Cape Croker, Interviewer: R. Vanderburgh, July 7, 1975, Exhibit 4148, pp. 32393, 32595 [PDF pp. 1, 3] – *born 1908; commercial fishing, and taking tourists out to troll.*

[248] Interview of Verna Johnston. Dr. P. Schmalz, Interviews of Elders, Experience '81 Project, Interview Transcript, transcribed by Norma Secord in 1996, Exhibit 3800, p. 2.

[249] Emerton R. District Superintendent, to D. McDonald, Deputy Minister of Game and Fisheries, November 23, 1932, Exhibit 3607 - *Letter regarding request by the Cape Croker band to fish off of the northern part of White Cloud Island. Also stating that "Indians" believe it to be their exclusive right to guide tourists in the waters in question. States that Indians are exceeding the limits of their current license*; David Robertson, Chief Surveyor, Department of Indian Affairs to MacInnes, July 27, 1928, Exhibit 3552 – *Suggests that the Saugeen Band is also asserting exclusive rights to the fishery, based on Treaty;* A.F. MacKenzie, Acting Assistant Deputy and Secretary, Department of Indian Affairs, to David Robertson Indian Agent, August 15, 1929, Exhibit 3562 – *"Saugeen Indians inquiring into rights I am enclosing herewith a copy of a letter received from Mr. L. Ritchie of Chippewa Hill. The department fails to see the need of sending maps or documents to this Indian. Please explain to him that the Indians have riparian owners privileges in the waters bordering the reserve in the same manner as other property owners*."

[250] Evidence of Dale Jones, Transcript vol 8, May 16, 2019, p. 830, line 7 to p. 831, line 20.

the fishery,[251] and asserted the exclusive right to guide tourists seeking to fish in their waters, and exercised this right.[252]

288. In the middle of the 20th century, the fishery around the Peninsula and in SONUTL was decimated by a combination of overfishing and an infestation of non-native sea lamprey. There were very few fish to be caught. This is identified in SON's oral history as a major event that disrupted their ability to harvest fish around their territory.[253] It led to a decline in fishing activity among SON, though even in this period, as Howard Jones explained, the people continued to fish as best they could:

> "There was always a tidbit of fishing happening among our people. Even from … '47 through to the '60s people would always go out maybe once or twice a year and set up a net, or whatever, to check

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[251] Cape Croker Band Council Minutes, October 14, 1907, Exhibit 3382.
[252] Emerton R. District Superintendent, to D. McDonald, Deputy Minister of Game and Fisheries, November 23, 1932, Exhibit 3607 - *Letter regarding request by the Cape Croker band to fish off of the northern part of White Cloud Island. Also stating that "Indians" believe it to be their exclusive right to guide tourists in the waters in question. States that Indians are exceeding the limits of their current license*; Oral Interview of John Nadjiwon by Ed Koenig March 30, 2006, Exhibit 3909, p. 1 –*"We can go back, I guess, late 30s and 50s – those days it was primarily fishing… well in the 40s and shortly thereafter, especially when they would do guiding for non-native people coming to do fishing, we would have boats. You know people would take them out from the dock here, from the government dock to the lighthouse. They would guide them… put them in and take them by boat and guide them. And they would charge them a fee for guiding";* Oral History Interview of George Elliott, Cape Croker, Interviewer: R. Vanderburgh, July 7, 1975, Exhibit 4148, pp. 32393-32595 – *born 1908; commercial fishing, and taking tourists out to troll*.
[253] Interview of Irene Akiwenzie, Dr. P. Schmalz, Interviews of Elders, Experience '81 Project, 1981, Questionnaire, Exhibit 3835, p. 43; Interview of David Solomon, D.O.B 1908, August 14, 1975, Exhibit 4149, p. 3; Interview of Irene Akiwenzie, Dr. P. Schmalz, Interviews of Elders, Experience '81 Project, Interview Transcript, transcribed by Norma Secord, 1996, Exhibit 3836, p. 7; History Interview of Henry Johnston, Cape Croker, Interviewer: R. Vanderburgh, July 18, 1974, Exhibit 4146, pp. 3-4; Oral History Interview of David Solomon, Cape Croker, Interviewer: R. Vanderburgh, August 14, 1975, Exhibit 4149, pp. 32433-32434. **See also:** Kristen Lowitt; David Johnston-Weiser; Ryan Lauzon and Gordon My Hicjey, "On food security and access to fish in SON Nations, Lake Huron, Canada", Exhibit 4322, p. 179; Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6611, lines 6-19.

> to see if there was any fish, or if they were lucky they would catch a fish for their dinner table."[254]

289. SON submits that this demonstrates the strength of their resolve to sustain and preserve their relationship with the fishery.

290. In the late 1950s and early 1960s, the fishery began to recover.[255] SON resumed their fishing in earnest, both for subsistence and for commercial purposes.[256] Howard Jones explained:

> As the fisheries started to come back and the testing by our people of the lake, that the lake started to become healthy again and there was more stocks of fish there, our people started to catch fish and sell them, both through selling through commercial buyers and through peddling fish.[257]

291. In the 1980s, Cape Croker (Nawash) sought extensions to the quotas imposed by Ontario, which limited the amount of fish, species of fish and manner of fishing[258] associated with their provincial fishing licenses. At the time, under Ontario's provincial licensing scheme, a license was issued to the Chief of the First Nation, and individual fishers were designated to fish under that license. The license set the terms for where fish could be caught, what type of fish could be caught, the amount of fish that could be caught, and how those fish could be caught.[259] These

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[254] Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 760, lines 1-8.
[255] Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 760, lines 9-19.
[256] Evidence of Dale Jones, Transcript vol 8, May 16, 2019, p. 829, line 15 to p. 831, line 21 – *Dale Jones also fished with his dad at the time. They fished and hunted together during the 1960s*; Evidence of James Ritchie, Transcript vol 7, May 15, 2019, p. 654, lines 19-23 – *used to fish with his grandfather Oliver Nashkawa as a child in the 50s. He was born 1951*; Evidence of Ted Johnston, Transcript vol 4, May 1, 2019, p. 401, lines 16-25 – *would fish with family when they were kids in the 60s*.
[257] Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 760, lines 15-19, p. 758, lines 14-21.
[258] Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 773, line 10 to p. 774, line 8.
[259] Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 771, line 3 to p. 775, line 7; Ministry of Natural Resources Commercial Fishing License (Cape Croker), Exhibit 3976 –

pleas for larger quotas were not successful,[260] and Cape Croker accepted more meagre licenses "under protest."[261]

292. In the same period, Saugeen had no commercial fishing license at all. They agitated for access to a fishing license, which continued to be denied.[262] For example, on December 3, 1984, the Saugeen First Nation passed this Band Council Resolution:

> Whereas, our land fronts for approximately twenty (20) miles on the Eastern shore of Lake Huron from Southampton to Chief's Point Indian Reserve No. 29.
>
> Whereas, we are denied access to fishing resources adjacent to our lands and the right to fish for food is an inherent right we practice. And we cannot sell our surplus legally.
>
> If we were able to obtain a License, our surpluses of fish could be sold to help the Economic situation on our Reserve.
>
> We have repeatedly have [sic] approached the Department for this License and have always been

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example of a license issued to fishermen at Cape Croker; it specifies the kinds of nets that could be used (gill and trap only); where fish could be caught (delineating a specific area around the Cape Croker reserve); the quantity of fish that could be caught; and the types of fish that were prohibited to be harvested (including fish taken in the closed season, rainbow trout, bass, Atlantic salmon, muskellunge, and undersize lake trout, whitefish, sturgeon and yellow pickerel).

[260] Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 766, line 18 to p. 780, line 16 – *discussing licensing in 80s, fishing beyond limits of license, protests made about this*; Blake Smith to Chief Peter Akiwenzie, December 30, 1986, Exhibit 3974; Chief Peter Akiwenzie to Blake Smith, Exhibit 3975; Letter from Chief Howard Jones to Minister Ralph Tippet, February 1, 1989, Exhibit 3978; Chippewas of Nawash, Band Council Resolution No.555, January 31, 1989, Exhibit 3977; Commercial Fishing License Conditions No. OS1472, December 30, 1986, Exhibit 3976.

[261] Letter from Chief Akiwenzie responding to Blake Smith, Exhibit 3975; Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 768, line 8 to p. 771, line 2.

[262] Evidence of James (Jim) Ritchie, Transcript vol 7, May 15, 2019, p. 677, line 5 to p. 682, line 12; Letter from Chief James Mason requesting license, March 1, 1984, Exhibit 3970; Band Council Resolution, January 5, 1981, Exhibit 3969; Band Council Resolution dated December 3, 1984, Exhibit 3971.

> refused. We believe this is a discriminatory and an unconstitutional practice.[263]

293. In the face of their limited provincial licenses, SON made efforts to fish without attracting the notice of provincial authorities. Dale Jones explained, "My dad said, well, the white man made it illegal for us to believe in what we believe. So, like everything else, we hunt and fish in silence and the same with our beliefs." [264] Nonetheless, in this period, several members of the community who reported fishing outside the small fishing areas granted to them under provincial license, and beyond the fishing quotas authorized under the licenses were charged by provincial authorities.[265]

294. SON submits that in spite of obstacles put in place through Crown regulation and the effect of invasive species, that they preserved their relationship with their fishery. This is evidence of their continued presence, regular use, and occupation of SONUTL.

295. SON further submits that through protest and pressing beyond the limits imposed on them by the Crown, SON have acted as owners of the fishery and sought to preserve their relationship with their water territory.

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[263] Band Council Resolution, Saugeen, December 3, 1984, Exhibit 3971; See also: Evidence of James (Jim) Ritchie, Transcript vol 7, May 15, 2019, p. 680, line 3 to p.682, line 18.
[264] Evidence of Dale Jones, Transcript vol 8, May 16, 2019, p. 846, lines 5-8.
[265] Evidence of Jay "Tattoo" Jones, Transcript vol 14, May 29, 2019, p. 1272, lines 19-23; Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 521, line 1 to p. 522, line 19 - *Vernon discusses the time he was charged for fishing at Willow Creek, out of the territory. Vernon went to court in June 1965. He was charged and fined, and given the option to appeal to Federal court, but didn't have the resources to pursue it*; Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 761, line 21 to p. 766, line 17; Evidence of James (Jim) Ritchie, Transcript vol 7, May 15, 2019, p. 675, line 11 to p. 677, line 4; See also: Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p.226, line 21 to p. 227, line 4 - *Wabanogiizis shares the seven fires prophecy, and noted that in one prophecy it was seen to include being jailed for hunting off of the reserve, fishing outside of boundaries – persecuted to practice rights.*

The Substantive Commercial Fishing Agreement

296. In 1989, two members of SON, including Howard Jones (then Chief of Cape Croker/Nawash), were charged with fishing in excess of their provincial commercial fishing license.[266] Howard Jones and Francis Nadjiwon charges were dismissed on the basis that SON had an Aboriginal right to commercially fish, establishing the rights was exercised from the very distant past to the present.[267]

See para 126 (*Excerpted para. 44 from R v. Jones)*

297. Following this, in 2000, SON reached a fisheries agreement with Ontario, which has been renewed and revised periodically. It is known today as the "Substantive Commercial Fishing Agreement".[268]

298. Pursuant to the Substantive Commercial Fishing Agreement, SON commercial fishers have exclusive commercial fishing rights in the area north of Point Clarke, running through the waters of the entire SONUTL as far east as Craigleith. South of Point Clarke and east of Craigleith are open to SON members for ceremonial and subsistence fishing.[269]

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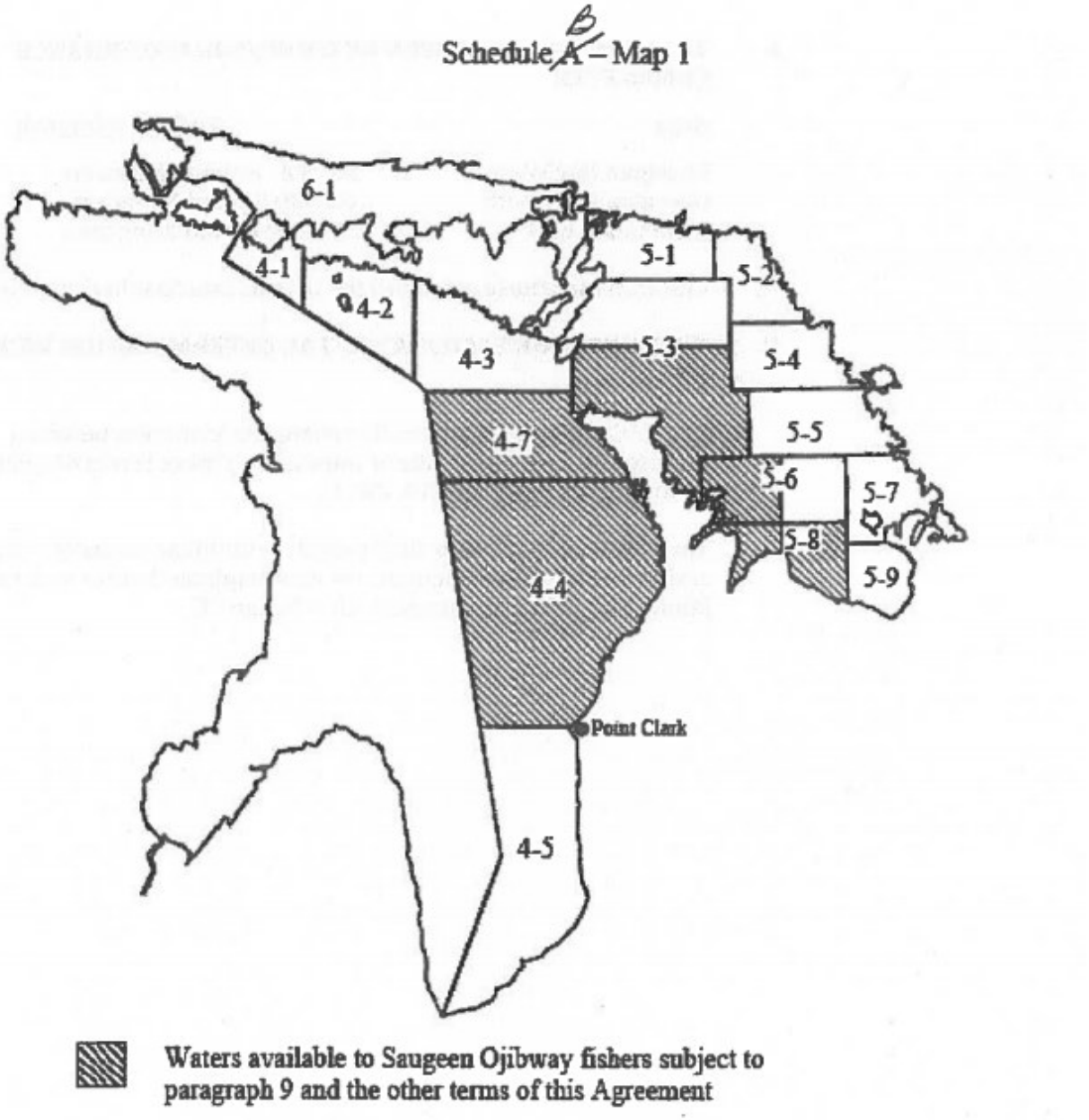
[266] See also: Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 781, line 21 to p. 782, line 5.
[267] *R v Jones*, 14 OR (3d) 421, [1993] OJ No. 893, Exhibit 3883, Plaintiffs' Book of Authorities, Tab 76.
[268] Substantive Commercial Fishing Agreement between SON Nation and the Ministry of Natural Resources and Fisheries, 2013, Exhibit 4523; Amending Agreement to the Substantive Commercial Fishing Agreement between SON Nation and the Ministry of Natural Resources and Fisheries, 2018, Exhibit 4524.
[269] Evidence of Paul Jones, Transcript vol 27, July 15, 2019, p. 2626, line 17 to p. 2640, line 25; Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6614, line 20 to p. 6618, line 17 and p. 6646, line 11 to p. 6650, line 9.

299. The boundaries of this area are illustrated in Exhibit 4523, reproduced below, which was excerpted from the Substantive Commercial Fishing Agreement between SON and the Minister of Natural Resources.[270]



[270] Substantive Commercial Fishing Agreement between SON and MNR (2012), Exhibit 4523, p. 36.

300. Ontario has conceded in this litigation that SON hold an Aboriginal right to fish as set out in *R v Jones*, and that SON's historic use of SONUTL is "consistent with an Aboriginal right to fish".[271]

SON's Fishery Today

301. SON are a fishing people today. This Court heard from community witnesses who testified about their continued use of and reliance on the waters of SONUTL for its rich fishery. Today, they fish pickerel, lake whitefish, chub, perch, pike and trout.[272] Fishing happens year-round, though the type of fish and location changes with the season, and throughout SONUTL.[273]

302. Today's fishers learned how, where and when to fish from their parents, grandparents and traditional knowledge holders.[274] They learned important customs around conservation and

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[271] Ontario's Written Opening, Exhibit I, paras 26, 30.
[272] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1330, lines 20-25; Evidence of Jay "Tattoo" Jones, Transcript vol 14, May 29, 2019, p. 1259, lines 17-21 and p. 1251, lines 9-25; Evidence of Paul Jones, Transcript vol 27, July 15, 2019, p. 2608, line 17 to p. 2610, line 19.
[273] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1331, lines 2-24 and p. 1343, line 25 to p. 1344, line 3 – *Lake Huron side from Stokes Bay to the Miller Lake area excellent for bass and perch fishing*; Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p.761, lines 1-20; Evidence of Jay "Tattoo" Jones, Transcript vol 14, May 29, 2019, p. 1233, lines 4-14 – *tugs go out to the international border*; p. 1251, lines 9-25 – *Tattoo describes being taken to Nottawasaga River as a child with his mom, and then as he grew up and had kids he took his kids there too. They've also perch fished at Collingwood, and at docks around the Cape area, Thornbury, Meaford, Owen Sound, Colpoy's Dock, Big Bay, Goderich*; and p. 1225, lines 5-19 – *Tattoo commercially fished for 37 years, starting at 20 years old;* Evidence of Ted Johnston, Transcript vol 4, May 1, 2019, p. 401, line 21 to p. 402, line 1 –*"We understood that we owned the water completely surrounding the peninsula, so wherever the fishing was required, and there was certain areas at certain times of the year that were better than others."*; Map, SON Commercial Fishery Harvest, 1995-2018, Exhibit 4320.
[274] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1322, lines 17-21; p. 1306, lines 15-20 and p. 1305, lines 8-14 - *"My parents and grandparents told us where to harvest different wild edibles, how to catch a fish, where to swim, how to make a basic trap."*; Evidence of James (Jim) Ritchie, Transcript vol 7, May 15, 2019, p. 653, lines 18-23 - *Jim discusses his time*

taking only what you need.[275] The practices of today's fishers are, in this way, tied to the practices of the past. And today's fishers are teaching the next generation these same practices.[276]

A) COMMERCIAL FISHING

303. SON commercial fishers typically fish by gill net – dropping a wall of netting into the water at a target depth.[277] There are about 30 different SON commercial fishing boats operating in peak fishing season.[278] They are licensed by the Saugeen First Nation and Chippewas of Nawash Unceded First Nation governments.[279]

304. Paul Jones, a commercial fisherman and member of the Chippewas of Nawash Unceded First Nation, annotated a map setting out the locations where he fishes in SONUTL. This is Exhibit

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spent with his grandfather Oliver Nashkawa, fishing and learning everything about "Indian life"; Evidence of Karl Keeshig, Transcript vol 3, April 30, 2019, p. 293, line 22 to p. 294, line 5 – *Karl fished with his grandfather in "these" waters, and helped his grandfather by carrying nets and rowed the boat for him;* Evidence of Ted Johnston, Transcript vol 4, May 1, 2019, p. 402, lines 2-15 – *Ted would help his father and set the net just off the Nochemowenaing point*; Evidence of Dale Jones, May 16, 2019, Transcript vol 8, p. 832, lines 6-13 – *fishing with his father and brothers;* Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 492, line 19 to p. 493, line 14 - *Vernon discusses being taught how to fish at Stoney Creek – "sin ziibiins" at the age of 11. His first fish he got by spearing it. "We were careful not to kill anything too large because it was heavy by the time you got home;* Oral History Interview of Henry Johnston, Cape Croker, Interviewer: R. Vanderburgh, July 18, 1974, Exhibit 4146, pp. 3-4 – *born in 1897, learned to fish from his father at age 12.*

[275] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1320, lines 6-11; Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 494, lines 3-23 – *the traditional basics of fishing, time of year, how and that "conservation" is one of the driving principles* and p. 495, lines 6-12 – *learning the ethics of about fishing/overfishing. Ethics are taught at a young age, and include not overfishing so they can have a future supply of food for us. It was a "natural teaching for us to be careful and work with conservation of animals and fish."*.

[276] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1320, lines 6-15 and p. 1376, lines 16-25.

[277] Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 774, lines 13-18; Evidence of James (Jim) Ritchie, Transcript vol 7, May 15, 2019, p. 689, lines 15-20; Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6630, lines 1-21.

[278] Evidence of Paul Jones, Transcript vol 27, July 15, 2019, p. 2617, line 7 to p. 2618, line 5.

[279] Evidence of Paul Jones, Transcript vol 27, July 15, 2019, p. 2620, line 18 to p. 2621, line 8.

4103, with names of the various fishing locations identified on Exhibit 4104.[280] He covers the entire perimeter of the Peninsula with his nets. He takes his boat out as far as 35 km from shore – or about 20 miles. [281]

305. Ryan Lauzon, the Fisheries Assessment Biologist for the Chippewas of Nawash Unceded First Nation, tracks the fish harvested by SON commercial fishers.[282] He prepared a map of the commercial fishing activity throughout SONUTL by SON commercial fishers since 1995, soon after the decision in *R. v. Jones* recognizing SON's commercial fishing rights. This map, at Exhibit 4320, demonstrates that SON commercial fishers use the vast majority of SONUTL to harvest fish.[283] It does not capture any of the subsistence fishing that happens in SONUTL, nor does it capture ceremonial uses of the waters. [284]

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[280] Paul Jones, Annotated Grey County Map, Exhibit 4103; Paul Jones, Chart indicating the names of numbered references on Exhibit 4103, Exhibit 4104.
[281] Evidence of Paul Jones, Transcript vol 27, July 15, 2019, p. 2610, line 20 to p.2613, line 15 and p. 2615, line 2 to p. 2617, line 6; Paul Jones, Annotated Grey County Map, Exhibit 4103; Paul Jones, Chart indicating the names of numbered references on Exhibit 4103, Exhibit 4104.
[282] Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019 p. 6609, line 6 to p. 6610, line 16 and p. 6621, lines 18-23.
[283] Note: The original map provided by Mr. Lauzon is marked as Exhibit 4320. See Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6647, line 21 to p .6649, line 16.
[284] Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6621, lines 18-23.

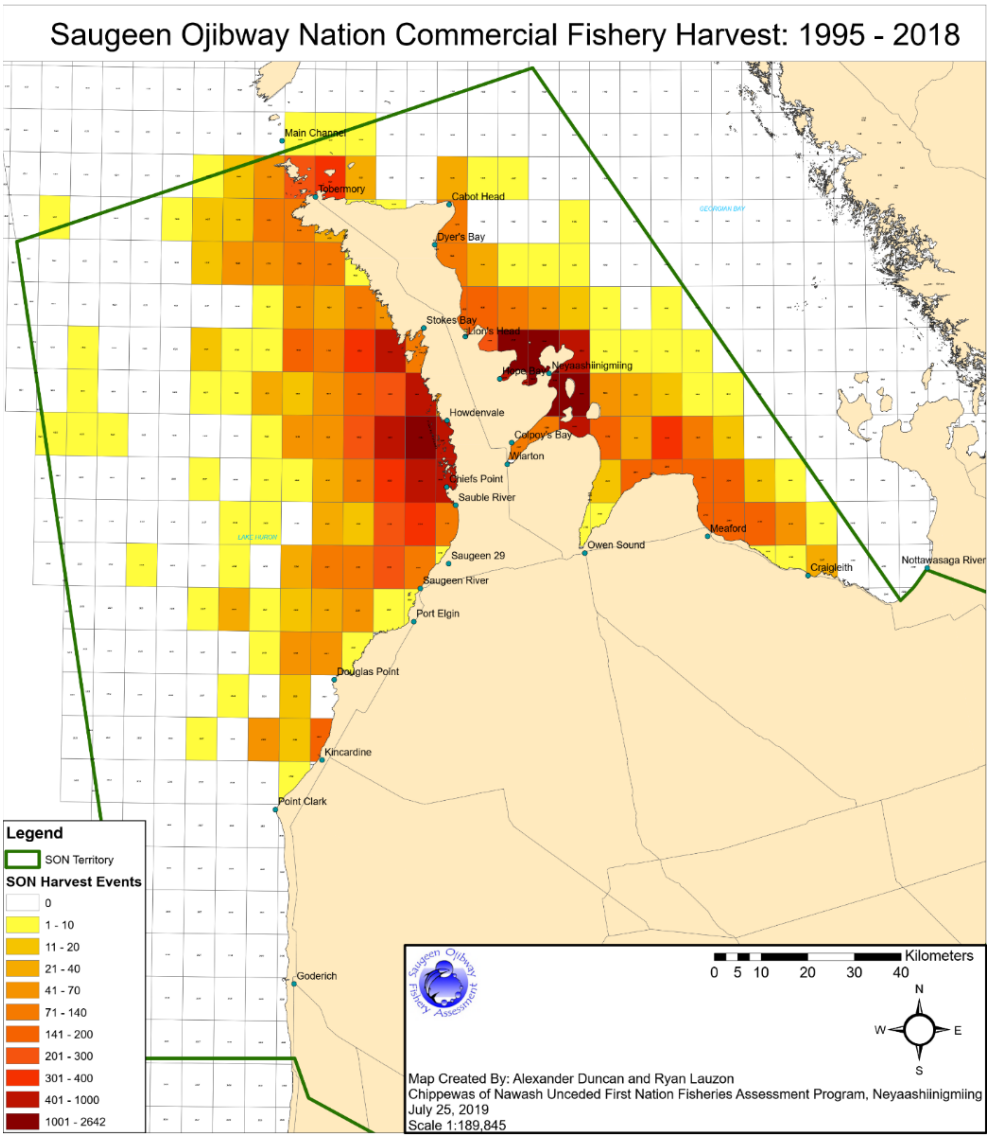

Exhibit 4320 – SON Commercial Fishery Harvest, 1995-2018, Appendix D, Tab 14

306. Prof. Paul Driben, an anthropologist, interpreted this map in his testimony. He explained that a map like this gives an indication of "what the Band territory looks like in terms of use." He also explained that it is common to see the most intensive activity around the village sites (in this case, around the reserves). While it is not an exact representation of how the lake was used for commercial fishing in the past, Prof. Driben confirmed that "it gives an idea of what

happened in the past".[285] In this case, the map is consistent with SON's oral history about how they used their territory (as discussed generally at paragraphs 286, 293, 301-302, and 308). In Prof. Driben's view, the map also aligns well with the documentary record of SON's past use of their water territory for fishing:

> [W]e know from the documentary record that this comports well with use in the past as well, especially when you look at the
>
> shoreline. You see the very, very heavy use. So that this, as I said, gives you an indication of past, through the present.[286]

307. SON submits that their contemporary fishing in SONUTL gives an indication of the scope of their water territory historically.

B) SUBSISTENCE FISHING

308. Fishing for subsistence is also crucial to SON, today as in the past. As Howard Jones explained:

> Fishing has been a livelihood right from time immemorial. For this court case we're talking about the time of the Treaty, since even further back than Treaty 72 to the Treaty of 1854. We were a subsistence [people], hunter-gatherer people, we traded for a lot of sustenance from other people that grew vegetables, that grew other foods … It was our way of life. It was what we knew."[287]

309. Fishing remains central to SON's traditions as Anishinaabek.[288]

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[285] Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p. 6953, line 10 to p. 6955, line 9.
[286] Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p. 6955, lines 2-9.
[287] Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 787, lines 1-10.
[288] Evidence of Dale Jones, Transcript vol 8, May 16, 2019, p. 832, lines 6-13 and p. 826, lines 16-22; Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1306, lines 15-20 and p. 1305, lines 8-14.

310. Karl Keeshig's evidence reiterated this reality. He stated that, "hunting and fishing, as with many activities of the Anishinaabe people … was a spiritual rite; it was a spiritual practice, but a necessary one. … If you are going to adhere to original instruction, when you are going to take from the land or the water or from your Mother or from the gift of creation, that sacred transaction involved the use of your tobacco for what it is that you are seeking."[289]

311. Vernon Roote elaborated on the traditional basis of fishing, and how they inform SON's ethics and other driving principles SON members abide by.[290] He shared that ethics are taught at a young age, and include not overfishing so the community can have a future supply of food. Fishing was a "natural teaching for us to be careful and work with conservation of animals and fish."[291]

312. The evidence of Prof. Driben was that "[a] man had less leeway in forming his cultural identity, but that identity flowed directly from the land as a forager, as a hunter, as a trapper, as a fisher. So that everything the man did as he was growing up encouraged him to pursue these endeavors, and he would form his identity in that way. So at the end of the process, he would say to himself, I am a forager, I am an Anishinaabe."[292] He further states "[fishing] is hugely significant in terms of diet. Hugely, because they could not survive without that in the inland shore fishery. That's why they live there, because of the tremendous abundance of fish. … it is … critical."[293]

313. Fishing is, as it has always been, about more than subsistence: it means the ability to provide and support the community, especially elderly and those unable to harvest. The ability to

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[289] Evidence of Karl Keeshig, Transcript vol 3, April 30, 2019 p. 288, lines 8 to p. 289, line 7.
[290] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019 p. 494, lines 3-23.
[291] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 495, lines 6-12.
[292] Evidence of Prof. Driben, Transcript vol 54, October 22, 2019, p. 6866, lines 3-11.
[293] Evidence of Prof. Driben, Transcript vol 54, October 22, 2019, p. 6901, lines 1-8.

provide for and share with others remains highly prized in the community.[294] SON submits that fishing remains one of the way SON uses and occupies SONUTL.

314. As noted above, Ontario has conceded that SON holds a fishing right in their territory.

C) CEREMONIAL FISHING

315. For SON, fishing also has an important spiritual component. Karl Keeshig explained, "Hunting and fishing, as with many activities of Anishinaabe people, it was a spiritual rite; it was a spiritual practice, but a necessary one." [295]

316. The knowledge passed through the generations about how and where to fish carries with it spiritual lessons about how to harvest in accordance with the spirits, and how good Anishinabek harvesting practices ensure balance with in and with the natural world. [296] Today's fishermen try to abide by their spiritual teachings and by the Creator's instructions regarding fishing and the use of the waters.[297]

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[294] Evidence of Jay "Tattoo" Jones, Transcript vol 14, May 29, 2019, p. 1268, lines 6-11 – *The main goal of fishing with punts or tugs is not necessarily to sell commercially. If anybody in community wants the fish for a feast or otherwise, the tug and punt owners will "more than happily give up fish for them;* Evidence of Prof. Driben, Transcript vol 54, October 22, 2019, p. 6893, lines 4-12.

[295] Evidence of Karl Keeshig, Transcript vol 3, April 30, 2019, p.288, line 5 to p. 290, line 14; See also: Evidence of Prof. Driben, Transcript vol 54, October 22, 2019, p. 6878, lines 7-23 - *When asked about Anishinaabe ethical behaviour being influenced by spirits: "So that they're careful always not to offend the spirits. They're careful not to over hunt, not to over kill, because if they do that then they're going to be punished. They're careful to respect the water because if they don't then the underwater panther can ruin your life, destroy your life, or destroy the life of one of your relatives lives. It's a constant endeavour on the part of the forager not to be offensive to the environment, to respect the environment. Because if you don't then the spirits will turn against you.".*

[296] Evidence of Prof. Driben, Transcript vol 54, October 22, 2019, p. 6878, lines 7-14.

[297] These same commercial fishermen still try to abide by their spiritual teachings and try to continuously abide by the Creator's instructions regarding fishing and the use of the waters. See evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1331, lines 2-24.

317. Before this Court, community members like Doran Ritchie, Karl Keeshig and Paul Jones explained how their worldview and spirituality had been shaped by harvesting on the waters of SONUTL.[298] They also explained how specific spiritual practices, such as laying tobacco, play a role in their fishing for food or ceremonial purposes.[299]

318. SON submits that fishing is one of the manifestations of their spiritual connection to SONUTL.

Hunting, Trapping and Gathering: SON's Harvesting from 1830 to Present

319. In the 17th, 18th, and 19th centuries hunting was a great status activity, and central to the identity of Anishinaabe men.[300] Today, hunting is still the way to achieve high status in the community. It is considered a great achievement and extremely important in Anishinaabe society.[301] For Anishinaabe, if you are no longer allowed to hunt it means you cannot achieve yourself as a person.[302] In short, hunting is absolutely crucial to Anishinaabe culture, past and present.

320. The significance of hunting to SON was expressed by SON community witnesses:

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[298] Evidence of Doran Ritchie, Transcript vol 16, May 31 2019, p. 1318, line 10 to p.1320, line 11 – *relationship of creation to harvesting, what traditional harvesting is, role of Anishinaabe law in governing harvesting*; Evidence of Paul Jones, Transcript vol 27, July 15, 2020, p. 2624, line 13 to p. 2625, line 2 - "…*We're all land bearing beings, but I think that the spirit through the fish and the animals, and that spirit kind of thing, that connection. So to me they're all kind of the same thing where it's how we as being kind of survived or see the connection…"*; Evidence of Karl Keeshig, Transcript vol 3, April 30, 2019, p.288, line 5 to p. 290, line 14.

[299] Evidence of Paul Jones, Transcript vol 27, July 15, 2020, p. 2641, line 17 to p. 2642, line 2.

[300] Prof. Paul Driben, "An Anthropological Report on Selected Aspects of the Cultural Lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 160, 204.

[301] Evidence of Prof. Driben, Transcript vol 54, October 22, 2019, p. 6891, line 13 to p. 6895, line 1.

[302] Evidence of Prof. Driben, Transcript vol 54, October 22, 2019, p. 6932, lines 1-12.

(a) Paul Jones: "I think that hunting is just part of – I always – not to try and romanticize anything, but hunting is very crucial to the Aboriginal people. It's one of those things that shows your connection to the land, your respect."[303]

(b) Paul Nadjiwan: "hunting is absolutely critical… [hunters] are highly regarded and respected because they will share what they have with those who are in need… I couldn't conceive [of no longer being allowed to hunt]."[304]

(c) Howard Jones: "Hunting was very important to us, very important all through my childhood and my life. We hunted as a sustenance. We hunted because we had to."[305]

(d) Karl Keeshig: "In our simpler and better times … the father in those times, his duties were as that of hunter, gatherer. He went out to hunt and to gather and to provide life for his family, including his children. But not just his family. It was often practiced that his bounty was shared throughout the community, a practice that is still known today in this community. They share their bounty of fish and often their wildlife, deer. It is still practiced today. In those days, the hunters executed that duty with pride. It was who they are."[306]

(e) Vernon Roote: "my honour that was given to me to be able to hunt an animal and kill it and then have it for our food consumption was something of an honour that I

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[303] Evidence of Paul Jones, Transcript vol 27, July 15, 2019, p. 2651, lines 1-25.
[304] Evidence of Robert (Paul) Nadjiwan, Transcript vol 17, June 3, 2019, p. 1473, line 20 to p. 1474, line 9.
[305] Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 752, lines 6-13.
[306] Evidence of Karl Keeshig, Transcript vol 3, April 30, 2019, p. 290, line 15, to p. 291, line 23.

received when I was 12 years old… And so that responsibility was given to me and, as I say, I was glad to have that honour at the time."[307]

A) SON DEPENDED ON HARVESTING IN THE MID-19TH CENTURY

321. In the 1830s, 1840s, and 1850s, members of SON depended heavily on hunting for their livelihood and survival.

322. In various official reports, Crown officials noted that SON depended "almost entirely" on hunting and fishing for their support. For example,

(a) S.P. Jarvis' Report (1838): "They appeared to me when I visited them to be very poor and miserable, relying almost altogether upon fishing and hunting for support."[308]

(b) J.B. Macaulay Report (1839): They are "trusting very much to hunting and fishing for their support."[309]

323. Crown officials and missionaries who visited SON in this period noticed that men were absent from the community to hunt:

(a) Alexander McNabb to T.G. Anderson (1852): "I am in receipt of your letter of the 9 Inst enclosing two checks p £12.10 each for Chiefs Alexander Madwayosh, and

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[307] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 492, lines 3-16.
[308] S.P. Jarvis' Report (July 20, 1838), Exhibit 4826, p. 11 [transcript p. 4].
[309] J.B. Macaulay, "Report on Indian Affairs to His Excellency Sir Geo. Arthur" (1839), Exhibit 1297, p. 47.

John Kadahgegwon the latter, I regret to say left for the hunting ground before your letter came to hand."[310]

(b) Conrad Vandusen (1854) noted that the families are sometimes absent from Church "on their periodical hunting and fishing excursions."[311]

324. Prof. Driben, Prof. Brownlie, and Dr. Reimer all confirmed that hunting remained a significant part of SON's subsistence in the 1830s, 1840s, and 1850s.[312]

325. With encouragement from Methodist Missionaries in the 1830s, 1840s, and 1850s, SON began to grow crops such as corn and potatoes. However, SON was still living off the land. This frustrated missionaries who believed that SON's attachment to their hunting and harvesting activities was an obstacle to missionary efforts to promote farming.

326. By the 1850s, in spite of missionary efforts, SON were cultivating very little land:

(a) Charles Rankin (1852), a local land surveyor, wrote to the Commissioner of Crown lands that SON were farming "a trifling quantity of land."[313]

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[310] McNabb to Anderson, November 26, 1852, Exhibit 2036, p. 481.
[311] Conrad Vandusen Report on the Chippewas of Nawash, in Twenty-Ninth Annual Report on the Missionary Society of the Wesleyan-Methodist Church in Canada, 1854, p. xx in Exhibit 2046.
[312] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 233-234; Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3186, lines 9-20; Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA. 500BC-1860 AD" (as revised 2019), Exhibit 4576, p. 230; Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p.11482, lines 14-24.
[313] Charles Rankin to D. Rolph, Commission of Crown Lands, February 24. 1852, Exhibit 1906, p.2; Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11476, lines 11-15.

(b) The Artist, Paul Kane, who visited SON in 1845 noted that "only a small part [of their land] is cultivated."[314]

(c) Superintendent T.G. Anderson, writing to the Superintendent General of Indian Affairs, Col. Bruce, in February 1852, lamented the lack of effort by SON to farm on their lands – noting that it was not providing their full subsistence.[315]

(d) T.G. Anderson, writing in June 1853, remarked that the Owen's Sound Indians did not farm enough to "furnish food to one half of the band".[316]

(e) Ludwig Kribs, a Methodist Missionary stationed at Colpoy's Bay, explained that in October 1854, just two days before Treaty 72 was concluded, SON "together probably do not cultivate above one hundred acres of ground."[317]

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[314] Paul Kane, Wanderings of an Artist Among the Indians of Upper Canada*,* Exhibit 1534, p. 2; Evidence of Prof. Paul Driben, Transcript vol 51, October 22, 2019 p. 6926, line 21 to p. 6927, line 6 and p. 6927, lines 18-20 – *Paul Kane was a famous artist who visited in 1845, and did portraits of Indigenous people: "he traveled into their communities and he did these portraits. He also made ethnographic observations or at least observations that are certainly of interest to anthropologists such as myself. And he mentioned Saugeen in particular[…]*.

[315] T.G Anderson to Bruce, February 13, 1852, Exhibit 4749*;* Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11475, lines 3-7 - *Question: So [Exhibit 4749] suggests that in 1852, the Saugeen aren't subsisting off farming? Answer: Not – it was perhaps supplementing their subsistence, but certainly not providing their full subsistence."*.

[316] Anderson to Unknown, June 16, 1852, Exhibit 1931, p. 115634 [transcript at Exhibit 4750, p. 2]; Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11477, lines 12-16 - *The whole of the Owens Sound band have only sewn amongst them 8 Bushel of Indian Corn, 7 bus. Potatoes 28 Bus. Oats and 4 Bus. of Wheat, which under the most favorable circumstances will not furnish food to one half of the band - The Saugeen band I am told are much worse in this respect. Question: So this is also in 1852, the Saugeen are not doing enough farming to survive, correct? Answer: According to Anderson, that is correct.*

[317] Ludwig Kribs (Missionary, Colpoy's Bay) to Unknown, October 11, 1854, Exhibit 2144, p. 3 [original], p. 2 [transcript] - *Although he also noted that "there is no game to benefit them in that way";* Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11478, lines 14-22 – *interpreting Kribs letter as applying to the Saugeen in general, not just Colpoy's Bay.*

327. As expert anthropologist, Prof. Driben explained, among SON in 1854:

> In terms of subsistence [farming] would be minimal. It would be there, but it wouldn't be – it wouldn't be the way they're subsisting. They're going to be living off the land, they're going to be fishing and hunting. That's what they are doing were doing in 1854. Not going to be, that is what they are doing.[318]

328. As expert historian, Prof. Brownlie noted:

> In 1854 they were doing a lot of hunting and fishing and were reliant on hunting and fishing as a source of food and trade goods. They were doing some farming, but we have multiple sources at the time comment on how small the areas were that they hard cultivating. So hunting and especially fishing were a very significant part of their livelihood and economies.[319]

329. Based on the above, SON submits that in the years leading up to 1854, SON was farming only a limited amount. Harvesting activities were required and heavily relied upon for their livelihood in this period, and Crown officials were aware of the limited extent of SON's farming activities and their continued reliance on harvesting as a mechanism for survival.

B) SON'S HARVESTING AFTER 1854

330. In 1854, SON would have seen giving up hunting as "a catastrophe… it [would] mean your identity is gone, it [would] mean your subsistence is gone. It [would] mean your contact with the spirits are gone. It has so many negative aspects to it that it would be a scenario too ghastly to contemplate."[320]

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[318] Evidence of Prof. Paul Driben, Transcript vol 51, October 22, 2019, p. 6931, lines 1-7.
[319] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3186, lines 9 -20.
[320] Evidence of Prof. Paul Driben, Transcript vol 51, October 22, 2019, p. 6932, lines 1- 12.

331. Because hunting remained so central to their livelihood and culture in 1854, SON expectation was that they would be able to continue hunting after Treaty 72, in spite of the challenges posed by increasing Euro-Canadian settlement.

332. In fact, SON continued to rely "very much" on hunting and fishing for their subsistence in the years immediately following Treaty 72, even in the face of white settlement on the surrendered tract.[321]

333. SON's oral history recalls that:

> They wanted Indians to become farmers, the white people. Indians are not geared to become farmers. They were geared to hunting, fishing, trapping, all this type of thing, than they were to be farmers.[322]

334. As Prof. Driben explained:

> [W]hen ***Crown Treaty Number 72*** was concluded on 13 October 1854, the Saugeen Anishinaabe believed that they would be able to sustain themselves by foraging in their band territory on and around the Bruce Peninsula, on the one hand, and by participating in the emerging market economy of the region, on the other. Since, in tandem, these enterprises provided the Saugeen Anishinaabe with

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[321] Report of the Special Commissioners to Investigate Indian Affairs (1858)**,** Exhibit 2494, (document not paginated) PDF image p. 73 – *refers to Saugeen as "very poor and miserable, trusting very much to hunting and fishing for their support"*; PDF image p. 76 – *The description given of the Saugeen branch of this tribe may be considered as in great measure applying to these Indians also."*; Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11479, lines 12-24 – *interpreting Ex 2494, notes that the government is supporting Saugeen with provisions of food in this period*; and p. 11485, lines 10-15; Census Return of the Indians under the superintendence of T.G. Anderson, August 18, 1857, Exhibit 2481, p. 107 – *"common school is of little use, the Indians absenting themselves from home on their hunting and fishing excursions"*; *describing SON farming operations as "miserable"*; and p.111 - *on the Owen Sound Indians, who "have allowed their farming implements to go to ruin have none of any consequence left… their desire to use them is not urgent";* Prof. Douglas McCalla, "Population Growth and the Search for Land in Upper Canada & Related Questions" (2015), Exhibit 4367, pp. 6-7.

[322] Interview of Verna Johnston. Dr. P. Schmalz, Interviews of Elders, Experience '81 Project, Interview Transcript, transcribed by Norma Secord in 1996, Exhibit 3800, p. 6.

> an adequate standard of living, and were viable at the time, there was no reason for band members to contemplate otherwise.[323]

335. In her testimony, Dr. Reimer discussed a so-called "Indian Declaration"[324] from October, 1856 in which some members of SON suggest that they are willing to give up the hunt.[325] However, as Dr. Reimer admits in her Report, this declaration was opposed by some of the Chiefs,[326] and was motivated by a belief that by adopting farming and obtaining individual title deeds, SON could be protected from further surrenders.[327] In addition, the Declaration was being pushed by missionary Conrad Vandusen, a "highly partisan figure" who was known to press for his own (Methodist) priorities, including promoting agriculture, in SON community affairs.[328]

336. There is evidence that SON continued to hunt well after the so-called "Indian Declaration" was signed, and that they understood hunting would be necessary for their survival into the future. For example, the documentary record demonstrates that SON continued to teach their children hunting and harvesting skills in the years immediately after Treaty 72 and prioritized these skills over participation in Euro-Canadian education. The Census Return of the Indians under the Superintendence of T.G. Anderson, dated August 18, 1857, notes that common school is of little value to SON with the "Indians" absenting themselves from home on their hunting and fishing

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[323] Prof. Paul Driben, "An Anthropological Report on Selected Aspects of the Cultural Lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 233.
[324] Indian Declaration, October 1, 1856, Exhibit 2428.
[325] Evidence of Dr. Gwen Reimer, February 13, 2020, Vol 84, p. 10742, line 2 to p. 10743, line 20.
[326] Chiefs Kegedonce, Tabeguan to Pennefather, October 2, 1856, Exhibit 2429.
[327] Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA. 500BC-1860 AD" (as revised 2019), Exhibit 4576, pp. 97–99.
[328] Carney to Pennefather, October 6, 1856, Exhibit 2430; Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 77; Evidence of Prof. Paul Driben, October 22, 2019, Transcript vol 54, p. 6928, line 21 to p. 6930, line 20 – *Vandusen pushed for farming, Methodist priorities in SON community life.*

excursions and taking their children with them.[329] Dr. Reimer acknowledges in her report that this is evidence of SON members continuing desire to maintain traditional economy, pass on harvesting skills to the next generation.[330]

337. The oral tradition of SON holds that Treaty 72 did not affect their harvesting rights, and that they remain entitled to hunt, harvest and fish throughout their territory. As Vernon Roote explained:

> It has always been my belief that we did not surrender any Aboriginal rights in the Treaty of -- number 72. And those arguments have come from a line of oral history with other past leaders commenting on the same, where we did not give up any Aboriginal rights; and that the Treaty was only for the sale of land and not for the sale of Aboriginal rights.[331]

338. Vernon Roote's understanding is reflected throughout the community:

> **Dale Jones** said: "my father was the Chief he used to say we -- he goes, this is what the -- this is what the white man says we own, but this is what he believed, right? And he didn't believe that, right. He believed that we could still hunt and fish wherever, you know, that was what his belief was in… Because we used to hunt up at the up at Willow Creek, you know, and we'd hunt in between there. And he believed that was our territory always."[332]
>
> **Doran Ritchie** said: "Harvesting is an inherent right that existed well before Crown law and I still observe those rights."[333]
>
> **James (Jim) Ritchie** discussed hearing his grandfather Oliver Nashkawa and his mother's husband, Livingston Ritchie, discuss council-business. They would talk about land rights, and Jim heard

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[329] Census Return of the Indians under the superintendence of T.G. Anderson, August 18, 1857, Exhibit 2481, p. 107

[330] Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA 500 BC-1860 AD" (as revised 2019), Exhibit 4576, p. 233.

[331] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 508, lines 10-17.

[332] Evidence of Dale Jones, Transcript vol 8, May 16, 2019, p. 827, lines 15-22 and p. 828, lines 4-7.

[333] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1330, lines 17-19.

> Livingston say "we could hunt anywhere."[334] As a young boy, he would hunt in the 1836 Treaty 45 ½ , but didn't go all over the area due to their young age. But also on the 54 treaty area.[335]
>
> He remarked that he was told as a child that "We could hunt anywhere we wanted, according to [Livingston] anyway, so we did that."[336]
>
> He affirmed his view that "we always had those rights, and we still have those rights, hunting and fishing in our territory. That's my view. The government has a different view."[337]
>
> **Karl Keeshig**, when asked if he understood the treaties in the territory to have anything to do with hunting or fishing, he replied: "no. If it did, there would be a record of it. Hunting and fishing, I understood that those were not a part of what was signed, is what I understand."[338]
>
> **Ted Johnston** said that deer, moose, ducks, geese, rabbits, raccoons were all hunted in the territory. Members would hunt on the peninsula, understanding that when the treaties were first signed "they could continue to use the lands that were surrendered as they had before they were surrendered. … hunting was usually within a close proximity of where they lived, so if they lived on the reserve here, a lot of the hunting was done on the reserve or just around the periphery of the reserve."[339]
>
> **Vernon Roote** discusses his grandfather, Alex Roote, telling him he has the right to hunt and fish in the territory because "those particular rights were never surrendered and that the Treaty only identified the sale of bush lots."[340]

339. SON submits the so-called "Indian Declaration" is inconsistent with SON oral history and the anthropological evidence that clearly indicates that SON did not intended to give up hunting, nor did they believe hunting had no future in the territory surrendered in Treaty 72.

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[334] Evidence of Jim Ritchie, Transcript vol 7, May 15, 2019, p. 656, lines 1-9.
[335] Evidence of Jim Ritchie, Transcript vol 7, May 15, 2019, p. 658, lines 1-15.
[336] Evidence of Jim Ritchie, Transcript vol 7, May 15, 2019, p. 658, lines 1-15.
[337] Evidence of James (Jim) Ritchie, Transcript vol 7, May 15, 2019, p. 682, lines 9-12.
[338] Evidence of Karl Keeshig, Transcript vol 3, April 30, 2019 p. 287, line 23 to p. 288, line 4.
[339] Evidence of Ted Johnston, Transcript vol 4, May 1, 2019, p. 399, line 22 to p. 400, line 18.
[340] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 523, lines 9-17.

C) SON'S PRESENT DAY HARVESTING

340. Many members of SON continue to hunt and harvest throughout their territory, including both the Peninsula and the lands surrendered in Treaty 45 ½. Set out below is a chart summarizing locations where members of SON hunt, what they hunted there, and which community member gave that evidence.

	Name of Location	**What is hunted there**	**Witness**	**Pinpoint Cite**
1.	Hunting reserves	Hunting generally	Karl Keeshig	Transcript vol 3, April 30, 2019, p. 293, line 22 to p. 294, line 5
2.	Shelbourne, Goderich, Midland	Hunting generally	Robert (Paul) Nadjiwan,	Transcript vol 17, June 3 2019, p. 1461, lines 13-25
3.	Goderich	Walnuts	Robert (Paul) Nadjiwan,	Transcript vol 17, June 3 2019, p. 1462, lines 1-9
4.	Lakes between Colpoy's Bay, Oliphant, Chief's Point, Greenock Swamp	Harvesting generally	Robert (Paul) Nadjiwan	Transcript vol 17, June 3, 2019, p 1463, lines 15-25
5.	MacGregor Point Park, Arthur, Mount Forest	Harvesting generally	Robert (Paul) Nadjiwan	Transcript vol 17, June 3, 2019, p. 1464, lines 1-6
6.	Throughout the territory	Deer, porcupine, grouse, ducks, geese, squirrels, fish	Robert (Paul) Nadjiwan	Transcript vol 17, June 3, 2019, p. 1464, line 21 to p. 1465, line 16
7.	Pretty Valley, Greenock Swamp, Mildmay, Bognor swamp, Walter's Falls	Hunting generally	Robert (Paul) Nadjiwan	Transcript vol 17, June 3 2019, p. 1510, line 20 to p. 1511, line 21
8.	Markdale on Beaver River Valley	Deer	Ted Johnston	Transcript vol 4, May 1, 2019, p. 395, lines 1-8
9.	Near Cape Croker / Neyaashiinigmiing reserve	Deer, moose, ducks, geese, rabbits, raccoons	Ted Johnston	Transcript vol 4, May 1, 2019, p. 399, line 24 to p. 400, line 18

10.	Luther Marsh	Waterfowl, ducks, geese and deer	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1313, lines 16-24
11.	Inverhuron Provincial Park	Harvesting generally	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1313, lines 16-24
12.	Black Creek Provincial Park	Fishing and waterfowl hunting	Doran Ritchie	Transcript vol 16, May 31, 2019, p.1314, lines 22-24
13.	Stokes Bay	Harvests deer, cedar brows, cedar poles, and whitefish. Perch and bass during the summer	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1347, lines 4-17
14.	Upper Andrew Lake	Harvesting generally	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1339, lines 11-20
15.	Miller Lake	Harvesting generally	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 133, line 24 to p. 1340, line 3
16.	Will Creek	Harvesting generally	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 134, lines 15-23
17.	George Lake	Harvesting generally	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1339, line 24
18.	Gilles Lake	Presently and historically used for deer, fish, and medicine gathering. Private land but accessed with permission.	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1340, lines 4-6; 8-11, 17-23
19.	Singing Sands National Park and Will Creek	Brook trout, hunting, and medicine along some portions of shoreline	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1341, line 23
20.	Lindsay Tract	Abundant resources	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1343, lines 16-19
21.	Bruce Peninsula National Park	Mushrooms, medicine, deer and antlers	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1344, line 20 to p.1345, line 1

22.	Pike Bay	Hunting	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1348, lines 13-24
23.	Isaac Lake and Boat Lake	Fishing and Waterfowl Hunting	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1349, lines 11-14
24.	Hope Bay reserve	Medicine and Hunting	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1350, lines 12; 18-19
25.	Isaac Lake, Boat Lake, others in Ex 4005	Waterfowl hunting and fishing	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1355, lines 7-9
26.	Saugeen River – Aaron Lake Area	Harvesting everything – medicines, hunting, fishing	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1356, lines 7-17
27.	Saugeen Reserve	Wild edibles, fish, deer, small game birds (rough grouse), medicines	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1308, lines 17-23
28.	Saugeen River and nearby lakes	Fish, general harvesting, wild rice in nearby lakes, waterfowl hunting	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1309, lines 2-11
29.	West Side of Owen Sound Bay	Fishing, Waterfowl	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1309, lines 12-23
30.	Lake Eugenia in the Grey Highlands	Deer, Medicines, Chert	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1310, lines 18-25
31.	Meaford Tank Range, Balaclava	Deer (wintering area)	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1309, line 25 to p. 1310, line 5
32.	Bells Lake	Waterfowl, hunting, medicines, deer	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1311, lines 1-3
33.	Greenock Swamp, Bruce County	Medicines, deer,	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1311, lines 4-9
34.	Teeswater River	Cold water, brook trout	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1311, lines 10-14
35.	Grey Highlands	Cold water, brook trout	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1311, lines 15-24

36.	Beaver Valley	Deer	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1311, line 25 to p. 1313, line 5
37.	Chesley Lake and Gould Lake	Major flyway for waterfowl from the Peninsula going north or heading south	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1358, lines 23 to p. 1359, line 1
38.	Tara south, a road on Bruce 3 and east	Members have access to/can harvest	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1369, lines 15-18
39.	Owen Sound, south towards Shelburne, near Creemore to Collingwood, and then to Meaford along the shoreline	Abundant with resources: cold water streams with chert outcrops, excellent hunting, and "pretty much everything" else. Area is "fairly left untouched"	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1362, lines 5-24
40.	MacGregor Park	Harvesting generally	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1367, lines 1-9
41.	Saugeen Shores, Chesley	Harvesting generally	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1368, lines 9-21
42.	Teeswater	Waterfowl Hunting – migratory birds	Doran Ritchie	Transcript vol 16, May 31, 2019, p. 1369, lines 6-10
43.	Around territory	Mostly deer	James (Jim) Ritchie	Transcript vol 7, May 15, 2019, p. 683, line 21 to p. 684, line 12
44.	Markdale	Venison or Deer	Howard Jones	Transcript vol 7, May 15, 2019, p. 788, lines 1-5
45.	Near Arran Lake	Wild rice	Vernon Roote	Transcript vol 5, May 13, 2019, p. 498, line 21 to p. 499, line 8
46.	Stoney Creek	Spear fishing	Vernon Roote	Transcript vol 5, May 13, 2019, p. 492, line 19 to p. 493, line 14
47.	Around territory	Medicines	Vernon Roote	Transcript vol 5, May 13, 2019, p. 295, lines 15-25; p. 496, lines 4-14

48.	Zimmerman / Horse Island on the Tobermory-Manitoulin Island Channel	Fish	Donald Keeshig	Rule 36 evidence of Donald Keeshig, December 5, 2002, Cross Examination, Exhibit 3946, p. 108, line 17-20
49.	"All across Georgian Bay"	Any food not available locally	Donald Keeshig	Rule 36 evidence of Donald Keeshig, December 5, 2002, Cross Examination, Exhibit 3946, p. 57, line 21-29
50.	Stoney Creek	Fish, generally	Frank Shawbedees	Rule 36 evidence of Frank Shawbedees, September 13, 2002, Examination in Chief, Exhibit 3947, p. 12, line 27 to p. 13, line 13
51.	Mudhole, off the Lighthouse in Southampton	Perch. Brown trout, big mouth, small mouth, pike. Numbers have dwindled since the introduction of salmon	Frank Shawbedees	Rule 36 evidence of Frank Shawbedees, September 13, 2002, Examination in Chief, Exhibit 3947, p. 17, line 3 - 13
52.	Lake Emmett	Fishing, generally	Ross Johnston	Rule 36 evidence of Ross Johnston, September 12, 2002, Examination in Chief, Exhibit 3953, p. 13, line 22 to p. 13, line 30

341. SON continues to hunt on privately owned lands in SONTL where it is safe to do so – seeking, at times, the agreement of local landowners. SON members take safety precautions when they go hunting in these areas:

(a) Paul Nadjiwan, for example, has firearm safety licences and speaks to local landowners before hunting on private lands.[341] He also avoids hunting near towns,

[341] Evidence of Robert (Paul) Nadjiwan, Transcript vol 17, June 3, 2019, p. 1466, line 19 to p. 1469, line 7 and p. 1471, line 25 to p. 1472, line 21.

where there are many people for safety reasons.[342] He hunts on private property without permission if it is safe to do so.[343] Generally, he does not hunt within 300 feet of houses.[344]

(b) Doran Ritchie explained in his evidence that he a firearm licence to show safety and respect for the gun.[345] He also explained that he has an arrangement with a local farmer, Gary Harron, to hunt and harvest on his property.[346]

342. Today's hunters and harvesters were taught by their parents, uncles, aunts, grandparents and other knowledge-holders who have hunted and harvested in SONTL. This knowledge has been passed down generation to generation since time immemorial. SON community members explained that hunting and harvesting has "always been there".

343. As Doran Ritchie explained:

> Traditional is just an easy word for saying we've done something for a very long time. Since I can remember, you know, these are the beginnings of our story from the Creation story, to the oral history that we grew up on as children about what was right and wrong. So traditional harvesting has always been there. There was no such thing as pharmacies, few hundred years ago. We never had access to doctors…. We had to understand what plants and medicines were out there, if he had a headache of if we took sick to something else, we had to harvest, in case of a long winter, if we didn't have enough firewood, I don't think we would survive, if we didn't have enough meat, we wouldn't survive, if we didn't have enough water, we

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[342] Evidence of Robert (Paul) Nadjiwan, Transcript vol 17, June 3, 2019, p. 1501, lines 3-12.
[343] Evidence of Robert (Paul) Nadjiwan, Transcript vol 17, June 3, 2019, p. 1485, lines 19-23.
[344] Evidence of Robert (Paul) Nadjiwan, Transcript vol 17, June 3, 2019, p. 1504, line 22 to p. 1405, line 4.
[345] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1328, line 16 to p. 1329, line 18.
[346] Map of Harron property annotated by Doran Ritchie, Exhibit 4011; Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p.1370, line 10 to p. 1376, line 8; Evidence of Gary Harron, Transcript vol 6, May 14, 2019, p. 615, line 2 to p. 621, line 11.

> wouldn't survive. So that's a normal every day practice for First Nations. And that's, to my knowledge, been happening for a very long time.[347]

344. Doran Ritchie learned from his community; from people like Vernon Roote, Dave Roote and Ron Roote, and Paul Nadjiwan.[348] His grandfather shared stories for where he went to fish, harvest, or hunt.[349] His parents and grandparents taught him where to harvest wild edibles, how to catch a fish, where to swim, how to make a basic trap.[350]

345. Paul Nadjiwan and Vernon Roote were both taught by their grandfathers where to hunt in SONTL.[351]

346. In turn, today's hunters and harvesters share the knowledge they have received from their parents, uncles, aunts and grandparents with the next generation. They see it as a responsibility to teach the younger generation and share what they have through informal and formal settings.[352]

347. SON has, and continues to, take whatever steps are necessary to maintain this part of their subsistence, culture, and identity.

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[347] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1319, line 7 to p. 1320, line 3.
[348] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1322, lines 17-21.
[349] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1306, lines 15-20.
[350] Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1305, lines 8-14.
[351] Evidence of Robert (Paul) Nadjiwan, Transcript vol 17, June 3, 2019, p. 1461, line 21 to p. 1463, line 9; Evidence of Robert (Paul) Nadjiwan, Transcript vol 17, June 3, 2019, p. 1483, lines 7-17; Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 491, lines 5-23.
[352] Evidence of Robert (Paul) Nadjiwan, Transcript vol 17, June 3, 2019, p. 1474, lines 10-24; Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1376, line 16 to p. 1378, line 6.

SON seeks the following findings of fact in respect of Chapter 8 - An Anishinaabe Pattern of Subsistence: Living Off the Land and Water:

348. SON's Fishery from 1836 to 1900:

(a) SON continued to use the waters of SONUTL for fishing, both for subsistence and commercial purposes from 1836-1900.

(b) To the extent that the fishery was more limited in the later decades of the 19th century, this was because of limits imposed on SON by the Crown through its new licensing regime.

(c) To the extent the fishery was more limited in the later decades of the 19th century, SON protested curtailments of their rights, and sought the restoration of their fishing grounds.

349. SON's Fishery in the 20th Century to Present:

(a) SON continued to use the waters of SONUTL for fishing, both for subsistence and commercial purposes in the 20th century.

(b) To the extent that the fishery was more limited in scope in the 20th century, it was because of limits imposed on SON by the Ontario regulatory regime and the adverse effect on the fishery by invasive species.

(c) In the 20th century, SON protested and sought to press beyond the limits imposed on them by the Crown.

(d) SON continues to fish throughout SONUTL today; this contemporary use gives an indication of the scope of their water territory historically.

(e) Fishing remains one of the ways SON uses and occupies SONUTL, and serves as an indication that the waters of SONUTL are part of their territory.

(f) Fishing is one of the manifestations of SON's spiritual connection to SONUTL.

350. SON's Hunting, Trapping, Gathering from 1830 to the Present:

(a) In the years leading up to 1854, SON was farming only a limited amount. Harvesting activities were required and heavily relied upon for their livelihood in this period.

(b) In the years leading up to 1854, Crown officials were aware of the limited extent of SON's farming activities and their continued reliance on harvesting as a mechanism for survival.

(c) It would have been culturally unthinkable to SON to give up hunting and harvesting after 1854, when Treaty 72 was concluded.

(d) It was the intention of SON on entering Treaty 72 that they would be able to continue hunting and harvesting throughout the tract surrendered; it was also in their cultural and economic interests to continue doing so.

(e) SON continues to hunt and harvest throughout SONTL.

(f) Hunting and harvesting in SONTL remains an integral part of SON's culture and identity.

(g) Continued hunting and harvesting throughout SONTL is not incompatible with present use by non-Indigenous residents.

9. ANISHINAABE TERRITORIAL USE CUSTOMARY LAW

351. It was the Anishinaabe band which made decisions about the use and occupancy of their territory. This custom, among the Anishinaabe, is as binding as law, and so will be referred to as customary law. A report by Alexander Vidal and Thomas Anderson in 1849 noted:

> …long established custom, which among these uncivilized tribes is as binding in its obligations as law in civilized nation, has divided this territory among several bands each independent of the others: each having each its own Chief or Chiefs and possessing exclusive right to and control over its own hunting grounds…[353]

352. Evidence supporting the content of this customary law was given by Prof. Paul Driben,[354] Dr. Gwen Reimer,[355] and community witnesses Vernon Roote[356] and Randall Kahgee.[357] It is also reflected in the writings of Rev. Peter Jones, an Anishinaabe person from Credit River who was a Methodist missionary in the mid 19th century and who wrote a book about his people[358]; the writings of famous anthropologist Diamond Jenness, who did fieldwork in the Georgian Bay are in the early 20th century;[359] a report by Alexander Vidal and Thomas Anderson, who were commissioned by the Crown to find out more information about First Nations on Lake

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[353] Vidal Anderson Report, December 5, 1849, Exhibit 4329, p. 5.
[354] Prof. Paul Driben "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 47.
[355] Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA 500 BC – 1860 AD" (as revised 2019), Exhibit 4576, p. 25 - *"there is general agreement that among Ojibway groups, permission was required before using another's hunting or trapping grounds"*.
[356] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 439, line 8 to p. 440, line 10.
[357] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 912 line 9, to p. 914, line 12.
[358] History of the Ojebway Indians; with especial reference to their Conversion to Christianity, by Reverend Peter Jones, 1861, Exhibit 2598, p. 46; Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6786, lines 3-22 - *giving background about Rev. Peter Jones.*
[359] Diamond Jenness, The Ojibwa Indians of Parry Island, Their Social and Religious Life, 1935, Exhibit 4327, pp. 4-6; Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6781, line 10 to p. 6783, line 1 - *giving background about Diamond Jenness*.

Superior and Lake Huron in 1849;[360] and the writings of Charles Cleland, a leading modern anthropologist of the Anishinaabe.[361] That is, it is reflected by writings speaking about Anishinaabe groups to the north, south, and east of SON, and about the Anishinaabe as a whole.

353. The Anishinaabe custom of bands being the entity to make decisions about the use and occupancy of their territory has remained the same from the 17th century to the present.[362]

354. Persons from outside the local band were thus required by Anishinaabe customary law to seek permission to enter a band's territory. The nature, extent, and means of granting permission differed depending on the identity of the people seeking permission, their purpose in entering the territory, and the proposed extent and length of land use. How the custom of permission applied to other Anishinaabek, non-Anishinaabek Indigenous People, and Europeans is discussed below.

The Custom as it Applied to Other Anishinaabek

355. The ethnohistorical evidence is consistent that if an Anishinaabe group were asked by other Anishinaabek to use their territory, this request would almost always be granted, especially if the request were for temporary use of territory to seek food. A rationale for this was an Anishinaabe group would want to be able to rely on its neighbours and allies, when it in turn was

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[360] Vidal Anderson Report, December 5, 1849, Exhibit 4329, p. 5; Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6788, line 8, to p. 6789, line 16 - *giving background about Vidal and Anderson.*

[361] Charles Cleland, Faith in Paper - The Ethnology and Litigation of Upper Great Lakes Indian Treaties, 2011, Exhibit 4328, p. 22 (PDF p. 24); Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6773, lines 4-13 and p. 6785, lines 6-15 - *giving background about Charles Cleland*.

[362] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6813, lines 8-16 and p. 6815, line 24 to p. 6816, line 8; See also Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 913, line 17 to p. 914, line 9.

in need of resources in another group's territory.[363] Another rationale is that the Anishinaabek feared there might be spiritual consequences if they were not generous with one another.[364] This custom of seeking and granting permission prevailed at least from the mid 17th century until the present.[365] Indeed, SON community witnesses also testified to the same custom.[366]

356. In some cases, large numbers of Anishinaabek could be permitted to use the resources of a host community. The Sault Ste. Marie Ojibway, for example, had an extremely productive fishery in their territory. In the 17th century they hosted about 1450 guests from other Indigenous communities. The situation was managed by the hosts specifying conditions of permission, which permitted the fish harvest to be done in an orderly manner.[367]

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[363] Charles Cleland, Faith in Paper - The Ethnology and Litigation of Upper Great Lakes Indian Treaties, 2011, Exhibit 4328, p. 22 (PDF p.24); Prof. Paul Driben "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 49-50; Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6795, line 5 to p. 6796 line 3; See also Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA 500 BC – 1860 AD" (as revised 2019), Exhibit 4576, p. 25 - *"there is general agreement that among Ojibway groups, permission was required before using another's hunting or trapping grounds".*

[364] Prof. Paul Driben "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 54.

[365] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6795, lines 15-17 and p. 6798, lines 12-20; Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6816, lines 9-17 and p. 6817, lines 6-22.

[366] Evidence of R. Paul Nadjiwan, Transcript vol 17, June 3, 2019, p. 1472, line 22 to p. 1473, line 19; Evidence of Karl Keeshig, Transcript vol 3, April 30, 2019, p. 267, line 21 to p. 268, line 4 and p. 271, line 22 to p. 272 line 21; Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 440, lines 11-25; Evidence of Vernon Roote, Transcript vol 6, May 14, 2019, p. 554, lines 14-19 and p. 555, lines 3-5; Rule 36 Evidence of Fred Jones, November 5, 2002, Examination in Chief, Exhibit 3949, p. 7, line 29 to p. 8, line 6.

[367] Prof. Paul Driben "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 50-52; Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6796, line 7 to p. 6798, line 1.

357. SON, for example, welcomed significant numbers of Pottawatomi from the US into their communities in the mid-19th century. As discussed elsewhere, these people became fully incorporated into SON.

See paras 103-107, 202, (*Identity, Linguistics*)

See paras 710-712 (*Pottawatomi migration*)

358. SON also invited many other Anishinaabek in Upper Canada to join them in the mid 19th century. These invitations were extended at General Councils.[368]

See paras 255-260 (*General Councils)*

359. Examples of such invitations include the following:

(a) at a meeting on 25 June 1845, the Saugeen and Owen Sound Chiefs offered to share their territory with the First Nations present at the meeting. It is recorded that in response:

> The heads of thirteen tribes rose successively, and in very appropriate speeches gave thanks, in the name and on the behalf of their people, to their brethren who had given them so generous an offer.[369]

(b) at a General Council on July 30-31, 1846, other Chiefs observed that Waubutik (a Chief from Owen Sound) was the owner of the place to which it was being proposed

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[368] Prof. Paul Driben "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 76-77 - *Saugeen Anishinaabe were exceptionally hospitable*; Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11272, line 21 to p. 11273, line 16 - *invitation or consent from the Saugeen was required in this context*.

[369] Letter to the Editor, by J. Jones, Christian Guardian, August 27, 1845, Exhibit 1542.

the others would move, and Waubutik responded by saying they would be welcome to come.[370]

360. These invitations occurred at a time of great social change in Upper Canada, and as it happened, few other Anishinaabek (other than some Pottawatomi, as mentioned) accepted SON's invitation, and (other than the Pottawatomi) those who did rarely stayed.[371]

The Custom as it Applied to Non-Anishinaabek Indigenous People

361. Anishinaabek would sometimes agree to share territory with Indigenous people who were not Anishinaabe, and sometimes chose not to agree to share. For example:

(a) The Odawa agreed to share territory near the southern tip of Georgian Bay with the Petun in the 16th and 17th centuries;[372]

(b) The Anishinaabe drove the Haudenosaunee from Georgian Bay and what is now southern Ontario in the late 17th century; and

See paras 472-487 (*Haudenosaunee war*)

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[370] Minutes of the General Council of Indian Chiefs and Principal Men, held at Orillia, Lake Simcoe Narrows, On Thursday, the 30th, and Friday the 31st July, 1846, Exhibit 1605, p. 22.
[371] See, for example, Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 110, 134.
[372] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 47-49; Dr. Ronald Williamson, "Supplementary Report – Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land" (2017), Exhibit 4241, p. 21; Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA 500 BC – 1860 AD" (as revised 2019), Exhibit 4576, pp. 14, 28, 30-31; Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5420, line 19 to p. 5423, line 8; Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2019, p. 11382, line 21 to p. 11383, line 9.

(c) Western Anishinaabe groups sometimes chose to share their territories with the Dakota, and sometime refused to share.[373]

The Custom as it applied to Europeans

362. Anishinaabe leaders expressed their understanding of territorial ownership (which meant that permission was required to enter their territory), in words and deeds, on first encountering Europeans, and at many subsequent occasions. Sometimes they agreed to permit Europeans to enter their territory when it suited them, and sometimes they denied such permission and resisted.[374] Some examples follow.

363. In 1615, Champlain was met by 300 Anishinaabek warriors (including some living near the southern tip of Georgian Bay) at the mouth of the French River when he first entered Georgian Bay. After Champlain gave a gift, thus establishing a trading relationship, he was welcomed to the territory.

See paras 370 (*cultural significance of gift*)

See paras 466-468 (*European Contact on Georgian Bay*).

364. In 1761, Chief Minweweh greeted Alexander Henry, who was the first English person to reach Michilimakinac, with a forceful speech asserting the Anishinaabe understanding of territorial ownership:

> Englishman, although you have conquered the French, you have not yet conquered us! We are not your slaves. These lakes, these woods and mountains, were left to us by our ancestors. They are our inheritance: and we will part with them to none. Your nation supposes that we, like the white people,

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[373] Prof. Paul Driben "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 62.
[374] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 444, lines 5-23.

> cannot live without bread - and pork - and beef! But, you ought to know, that He, the Great Spirit and Master of Life, has provided food for us, in these spacious lakes, and on these woody mountains.[375]

See paras 501-502 (*context of Minweweh speech and response*)

365. Chief Pondiac gave a similar message to Major Robert Rogers when Rogers was on his way to Detroit in 1760: "At first salutation when we met, he demanded my business into his country, and how it happened that I dared to enter it without his leave?".[376]

See paras 503-505 (*Pondiac message to Rogers and response*)

366. These assertions were repeated even more forcefully by the actions of Pondiac and his allies in the Pondiac War in 1763. Prof. Paul Driben's opinion was that "From an Anishinaabe point of view, in other words, Pontiac was both expected and obliged to expel the British…"[377] until or unless the appropriate Anishinaabe bands had given permission to enter their territories to the British.

See paras 519-566 (*Pondiac War*)

367. Most Anishinaabek reached terms of peace with the British at Niagara in 1764, and they agreed that the English could enter the Upper Great Lakes for purposes consistent with alliance, trade and the protection of Indigenous lands.

See paras 574-610 (*Treaty of Niagara*)

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[375] Alexander Henry, Travels and Adventures in Canada and the Indian Territory between 1760 and 1776 by Alexander Henry [1809 edition], Exhibit 476, p. 44.
[376] Robert Rogers, A Concise Account of North America containing A Description of the several British Colonies on that Continent (London: J. Millan, 1765), Exhibit 656, pp. 240-242.
[377] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 154.

368. On numerous occasions in the 18th century after the end of the Pondiac War, various Anishinaabe leaders made similar assertions of territorial ownership. They were making the point that no matter what happens between European powers, the Anishinaabe continued to view their territory as belonging to them.[378] Some of these statements made by Anishinaabe leaders might sound subservient to the British, but read in context, they do not have such meaning. For example:

(a) The use of "Father" to address British leaders was meant in the Anishinaabe perspective, which does not connote subjection, but rather a sense of acting in

(b) support in endeavors one cannot do oneself. It was also used sarcastically and derisively at time.[379]

(c) The expression of being "poor and asking for compassion" in the Anishinaabe perspective does not connote inferiority, but is rather a diplomatic and metaphorical manner of speaking.[380]

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[378] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 67-73; Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6831, line 17 to p. 6832, line 18; See also: Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015 as redacted 2020), Exhibit 4553, pp. 38, 47.

[379] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6832, line 19 to p. 6834 line 9.

[380] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6843, line 10 to p. 6835 line 2.

Consequences of the Custom

369. The request for permission, in the case of other Anishinaabek, would usually be mediated through the clan system. One would first approach a member of the same clan, if possible.[381]

370. When permission was requested, giving a gift was essential to establish a social relationship, without which no other relationship was possible. Generosity was key in establishing such a relationship.

> The person who's coming will give the gift right away because the giving of the gift establishes a relationship and once you have a -- if you don't give the gift, you can't have the relationship. You need that to start things off. And once you have the relationship then you can move forward with different elements of the relationship.
>
> Gift-giving is critical in this society and still is today.[382]

371. Should an outsider or outside group not seek permission, they would be met to determine their intentions, and permission would either be granted or denied. Should outsiders persist in entering territory if permission had been denied, this would be considered a hostile act. Anishinaabek had various means of responding to this: invocation of the supernatural, military resistance, and diplomacy.[383]

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[381] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6799, lines 4-7.
[382] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6799, lines 9-18; See also: Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 64-65; Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p.6823, line 24 to p. 6824, line 9; Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 443, line 13 to p. 444, line 4.
[383] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 79-88; Evidence of Vernon Roote, Transcript,

372. In the case of Europeans, in the early contact years, Europeans were dependent on assistance from Indigenous people to travel away from the St. Lawrence Valley, so if the Anishinaabek did not want a particular person they could simply not co-operate, and that would effectively keep them out of their territory. Father Allouez's experience in the 1660s demonstrates that.[384]

373. In later years, more was needed. Some examples of military resistance include:

(a) In the 17th century, the war with the Haudenosaunee;

See paras 472-487 (*Haudenosaunee conflict*)

(b) In the 18th century, Pondiac's War; and

See paras 519-566 (*Pondiac war*)

(c) In the 19th century, the Mica Bay resistance.[385]

See para 770 (*Indigenous resistance at Mica Bay*)

Conclusion on Anishinaabe Territorial Customary Law Generally

374. Based on the above, SON submits that at least from the time of European contact until the present, Anishinaabe customary law provided and provides that persons from outside the relevant local First Nation were required to seek permission to enter a First Nation's territory and

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vol 5, May 13, 2019, p. 442, line 2 to p. 443, line 12; Evidence of Prof. Paul Driben, Transcript, vol 54, October 22, 2019, p. 6838, line 1 to p. 6839, line 22.

[384] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 58-59; Evidence of Prof. Paul Driben, Transcript, vol 54, October 22, 2019, p. 6826, line 6 to p. 6827, line 13; See also: Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11200, lines 9-15.

[385] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6837, lines 10-25 and p. 6838, lines 12-13; See also: Evidence of Mr. Tyler Wentzell, Transcript vol 65, November 25, 2019, p. 8486, line 20 to p. 8947, line 13.

failure to do would risk being met with deliberate enforcement and consequences. As an Anishinaabe community, SON shared the same customary law.

Inclusion of Water Spaces in Territory

375. The water spaces of territory were and are every bit, perhaps more, central to the territories of Great Lakes Anishinaabe "bands" as were dry land spaces.

(a) Prof. Driben expressed it this way:

> It [i]s almost certain that Anishinaabe have included water in their band territories since time out of mind, and that tenure provided band members with proprietary rights to the use of rivers, lakes, wetlands, and other aqueous terrain, and to the resources within. Nothing in the literature suggests otherwise.[386]

(b) Dr. Reimer explicitly agreed with this particular statement and added that:

> Consistent with this statement, my discussion of Aboriginal use and occupation of the lake claim area in the early historic period (1615-1763) concludes that Ottawa and Ojibway asserted control over trade routes along waterways and sought to protect fisheries in waters within or adjacent to their traditional territories.[387]

(c) Dr. Victor Lytwyn has written:

> The 1701 Montreal Treaty did not diminish the proprietary rights or stewardship responsibilities of First Nations for the terrestrial and aquatic resources within their respective territories. Thus, each First Nation would allow others to take resources as long

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[386] Prof. Paul Driben "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 90; See also: Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6840, lines 1-6 and p. 6841, lines 14-24.
[387] Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, p. 131.

> as the harvest did not threaten to usurp their rights of ownership or endanger their management philosophies. First Nations were also willing to allow European newcomers to travel on their waterways and to obtain sustenance from fishing, but they showed no inclination to give up or sell the lakes which were central to their existence.[388]

376. Vernon Roote also talked about the water as central to what sustained his people:

> Q. So how important is the water to you?
>
> A. Water is important for us here because that's part of our territory. We sustain our survival through the use of the land by hunting and the use of water by fishing, and that makes our survival of our lives by the importance of having water around us.
>
> The territory was something that we looked at in terms of what was included in that Treaty. And my grandparents and other people have always said, "Well, that water is ours because it's our way of life and our way of survival. We did not give any of that away."[389]

377. Numerous community witnesses also explained the unity of land and water in their spiritual perspective, and they expressed the importance of water spaces as flowing from a spiritual obligation to care for the water.

See paras 216-231 (*The importance of water*)

APPLICATION OF ANISHINAABE TERRITORIAL CUSTOMS TO WATER SPACES GENERALLY

378. Until well into the 19th century, water travel was the only practical means of travel in the Upper Great Lakes region. The control of water travel routes and seeking permission to use

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[388] Victor Lytwyn, "Waterworld: The Aquatic Territory of the Great Lakes First Nations", Exhibit 4142, pp. 14-15.
[389] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 459, lines 5-18.

them from the appropriate band, was a frequent feature of the interactions between Anishinaabek and other Indigenous groups, and between Anishinaabek and Europeans. Examples include:

(a) The Kitchesipirini Anishinaabe charged tolls to other Aboriginal peoples wishing to travel through their territory on the Ottawa River in the 17th century;[390]

(b) The destruction of La Salle's sailing vessel, Le Griffon, on Lake Michigan (or perhaps Lake Huron) in the 17th century was, in Prof. Driben's opinion, an act of territorial defence by the Anishinaabek.[391] Dr. Reimer's view was that acts of war do not necessarily reflect customary attitudes towards waterways. However, on cross examination, she admitted that warfare was an attempt to assert control over territory in general, and that she was not saying that the destruction of Le Griffon was not an example of Anishinaabe customary control of territory, just that it was not a very good example of that;[392]

(c) The Anishinaabe-Dakota war in the 18th and 19th centuries was over fisheries;[393]

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[390] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 56; Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6818, line 25 to p. 6819, line 23.
[391] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 92-94; Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6848, line 11 to p. 6849, line 21.
[392] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11203, lines 4-20.
[393] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 81; Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6819, line 24 to p. 6820, line 21.

(d) The Mississauga reached a right of way agreement in 1785 with the Crown (represented by John Collins and W.R. Crawford) which allowed the Crown and settlers use of the passage from Toronto to Georgian Bay via Lake Simcoe;[394] and

(e) In 1863, there was an incident on Manitoulin Island involving Mr. William Gibbard, a fishery overseer. Gibbard was instructed to take possession of Manitoulin Island and its fisheries, for the purpose of leasing the fisheries to non-native fishers. Chiefs and warriors from Manitoulin Island expelled the non-native fishers.[395]

APPLICATION OF ANISHINAABE TERRITORIAL CUSTOMS TO LAKE HURON/GEORGIAN BAY

379. The geography of Lake Huron/Georgian Bay gave ample opportunity for the Anishinaabek to control the territory of the region. Dr. Reimer opined about how this was accomplished in the 17th century:

> At the time of contact with the French, the Ottawas were an integral part of an elaborate trading network with villages at three main access points on Lake Huron: Manitoulin, Michilimackinac and Nottawasaga. Ottawa also maintained a watchful presence at access points such as Bkejwanong [Walpole Island] and Bawating [Sault Ste. Marie]. At each location the Ottawas prevented the free movement of people by the use of force in order to protect valuable hunting and fishing territories. The Ottawas also secured their place as middlemen by controlling trade routes through northern Lake

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[394] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 96-97; Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, pp. 27-28; Evidence of Dr. Gwen Reimer, Transcript vol 83, February 12, 2020, p. 10600, line 24 to p. 10603 line 6.

[395] A.J. Ferguson Blair, Sessional Papers, W.F Whitcher to Mr. Macdougall, August 24, 1863, Exhibit 4301, pp.11-18 (PDF paginated pages).

> Huron. Finally, Garrad's (2014) theory that the Petun resided in Ottawa territory "with the continued permission of the Odawas and subject to their stipulations" suggests that the Ottawa were capable of exerting control over the entry into and use of their territory by outsiders.[396]

380. In 1763, there were no roads in the region, and all access was by water, so the same geographical strategic advantage was available. There were six primary access points to Lake Huron/Georgian Bay – via the French River, the Severn River, the Nottawasaga River, the St Clair River, the St Mary's River (Sault Ste. Marie), and the Straits of Makinac. Anishinaabe people controlled all these points, and were therefore "pre-eminent in the region".[397] SON had close relationships with all of these Anishinaabe "bands", who could and did call on each other for assistance in responding to external threats to territorial integrity.[398] In this way Lake Huron/Georgian Bay was like a gated community of Anishinaabe groups, of which SON was one.

381. This co-operation of allied Anishinaabe groups manifested itself dramatically in the Pondiac War in 1763. Prof. Hinderaker noted:

> Pontiac's War thus became, by necessity, in large part a battle to control the water spaces of the Great Lakes.
>
> …
>
> In 1763, Anishinaabeg peoples controlled all the access points to Lake Huron and Georgian Bay: the St. Claire River north of Detroit, the straits of Michilimackinac, and the St. Mary's River at Sault Ste. Marie, which connected Lake Huron with Lakes

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[396] Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA 500 BC-1860 AD" (as revised 2019), Exhibit 4576, pp. 30-31.
[397] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 127-132; Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6853, line 8 to p. 6854, line 25.
[398] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 135-139.

> Erie, Michigan, and Superior, respectively; and the rivers that connected the lake to its surrounding landscape on the east and south, including the French, the Magnetawan, the Muskoka, the Severn, the Nottawasaga, and the Saugeen. The Anishinaabeg were determined to maintain this control. Thus, Pontiac's call to arms reached beyond the communities most directly connected to the posts that Britain had acquired from France. Warriors came from as far north as Georgian Bay, from the Thames River to the east, and from Saginaw Bay to the west to join Pontiac's coalition; another hundred Ojibwa warriors participated in the attack on Michilimackinac. All were concerned to assert their control over the Great Lakes in response to perceived British aggression and arrogance.
>
> The intent to exclude the British from the water spaces of the Great Lakes, including Lake Huron and Georgian Bay, is evident in the strategies pursued by Pontiac and his followers at Detroit during the summer of 1763.[399]

382. Traditional knowledge of such control of Lake Huron/Georgian Bay remains in SON. For example, Vernon Roote told of personally visiting Anishinaabe communities all around Lake Huron/Georgian Bay and considering himself connected to them.[400] He also recounted traditional knowledge of these communities communicating with one another by smoke signals or runners to alert each other to the presence of intruders ("marauders").[401]

APPLICATION OF ANISHINAABE TERRITORIAL CUSTOMS IN SONTL LOCALLY

383. The Fishing Islands within SON's territory were especially productive for fishing (and still are, despite environmental impacts that affected their productivity at points in the 20th century). On first encountering Euro-Canadian fishermen in SONTL in the 1830s, SON reached

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[399] Prof. Eric Hinderaker, "The Anishinabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 47-49.
[400] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 446, line 10 to p. 453, line 7.
[401] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 453, line 8 to p.454, line 19.

agreements to lease fishing grounds to them. For years, SON continued to assert their rights to their fisheries. This demonstrates the continued importance in the 19th century, and the specific local application, of the customary law of requiring permission to be in another's territory.[402]

See para 628-635 (*contact with Euro-Canadian fishermen and continuing assertions of SON fishing rights*)

Conclusion on Anishinaabe Territorial Use Customary Law and Water Spaces

384. Based on the above, SON submits that Anishinaabe territorial custom of requiring permission to enter a First Nation's territory applies equally to water spaces as to dry land.

SON seeks the following finding of facts in respect of Chapter 9 - Anishinaabe Territorial Use Customary Law:

(a) At least from the time of European contact until the present, Anishinaabe customary law provided and provides that persons from outside the relevant local First Nation were required to seek permission to enter a First Nation's territory and failure to do so would risk being met with deliberate enforcement and consequences.

(b) As an Anishinaabe community, SON shared the same customary law.

(c) Anishinaabe territorial custom of requiring permission to enter a First Nation's territory applies equally to water spaces as to dry land.

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[402] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 99-116.

10. SCOPE OF LAND AND WATER USE IN SONTL

385. SON and their predecessors used the entirety of SONTL since time immemorial. SON's practice did not change after the signing of Treaty 45 ½ and Treaty 72. Today, they continue to use the entirety of SONTL.

Scope of SON's Use of SONTL from the Distant Past to the 19th Century

386. Numerous archaeological sites show Odawa occupation throughout SONTL dating back to the Archaic Period (10,000 to 3,000 BP). These were discussed by Dr. Williamson and identified in his reports, which are discussed in more detail in a later section. The sites are illustrated in the map below.

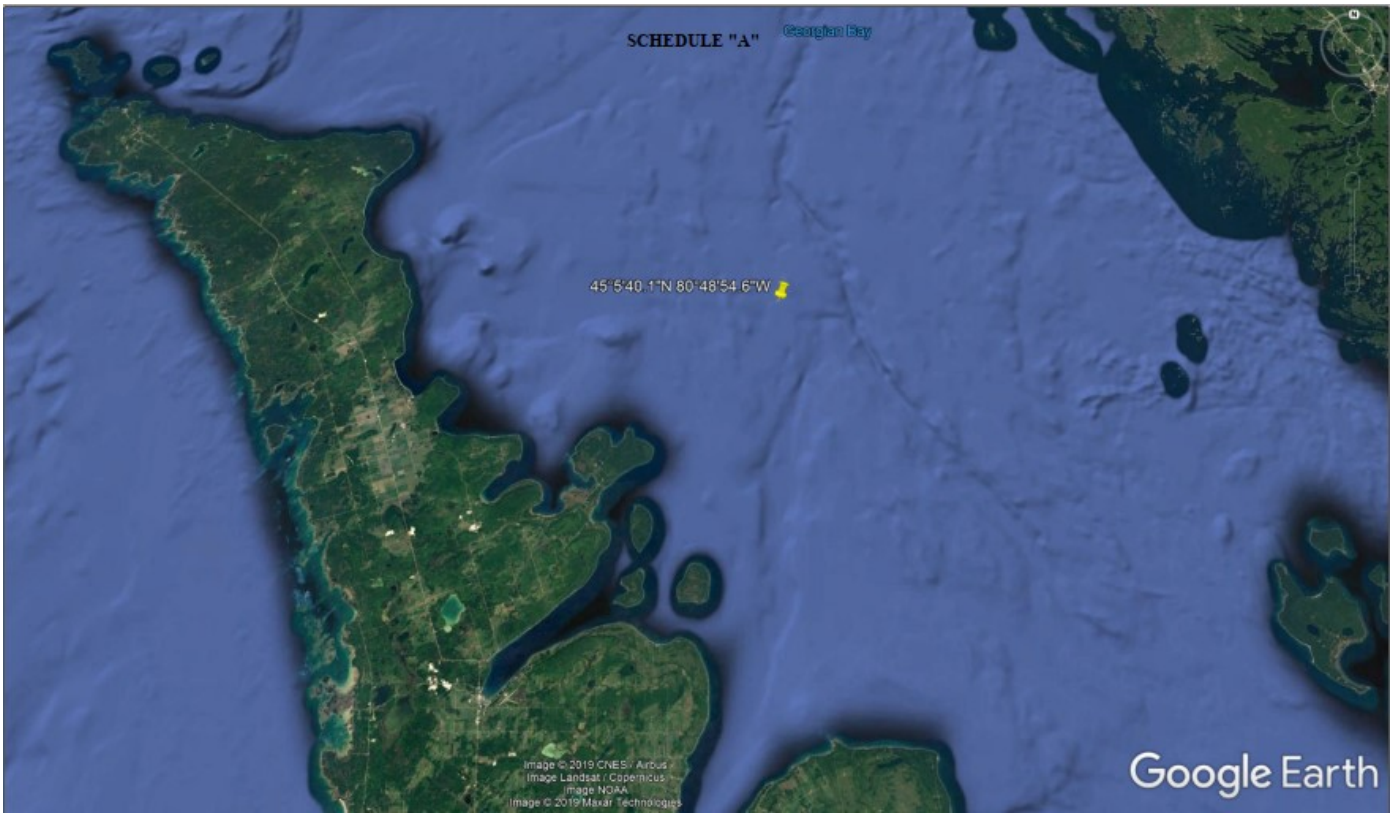
See paras 440-451 (*Archaeology*)

Map 1: Location of Sites Discussed in Text within or near SON Traditional Territory[403], Appendix D, Tab 13

387. While, naturally, waters near shore were and are used more frequently and intensively, SON submits that their predecessors used almost the entire SONUTL.

[403] Dr. Ronald Williamson, "Supplementary Report – Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land" (2017), Exhibit 4241, p. 30.

388. The geography of the Peninsula is such that it is possible to venture quite far out into Georgian Bay and still be in sight of land, thus aiding in navigation. The Bluffs at Neyaashiinigmiing (Cape Croker), for example, are still visible approximately 19.2 km from the shore.[404] Below is a map of that approximate distance from shore in Georgian Bay identified in Exhibit 4235 as Schedule "A" and a picture of the Bluffs at Neyaashiinigmiing from that location, which is identified in Exhibit 4235 as Schedule "B" (*See* Appendix D, Tab 12).



[404] Agreed Statement of Fact Regarding the Visibility of the Bluffs at Neyaashiinigmiing (Cape Croker), Exhibit 4235.

389. Indigenous peoples in the Great Lakes region were skilled in building and navigating birch bark canoes. At the time of first European contact in the 17th century, Indigenous people had well developed water technology, including bark canoes measuring over 30 feet and powered by paddles and sails.[405]

390. The potential for bad weather and water conditions in the Great Lakes made Indigenous people cautious, but certainly did not preclude travel on wide stretches of open water. Early writers agree that canoes – when handled skillfully by Indigenous peoples – were able to cross the vast

[405] Victor Lytwyn, "Waterworld: The Aquatic Territory of the Great Lakes First Nations", Exhibit 4142, p. 14.

expanse of the Great Lakes. The Jesuit missionary Francesco Giuseppe Bressani noted Indigenous people in the region around Lake Huron were expert navigators. He wrote in 1653:

> The somewhat long and dangerous navigation which they conduct, on rivers and enormous lakes, with very distant nations for the beaver trade, is effected in little boats of bark, no thicker than a testone,—holding at the most 8 or 10 persons, but commonly not more than three or four; they maneuver these dexterously, and almost without danger.[406]

391. In 1723, the Jesuit missionary Sébastien Rasles marveled at the skill of Indigenous people in handling canoes in open water. He wrote:

> It is in these canoes made of bark — which has scarcely the thickness of an écu — that they cross the arms of the sea, and sail on the most dangerous rivers, and on lakes from four to five hundred leagues in circumference.[407]

392. In Lake Huron, large canoes have been documented to travel across from Saginaw Bay (Michigan) to Goderich.[408] The use of SONTL continuing into the 19th century is evidenced by SON fishing and harvesting that continued to take place throughout SONTL. This is discussed in more detail at paragraphs 264-283 (*fishing*) and paragraph 319 (*hunting, harvesting and gathering*).

Scope of SON's Use of SONTL After Treaty 45 ½

393. After 1836 and the signing of Treaty 45 ½, use by "Indians" of the Treaty 45 ½ area continued. Documentary sources that demonstrate that use are summarized in an agreed statement

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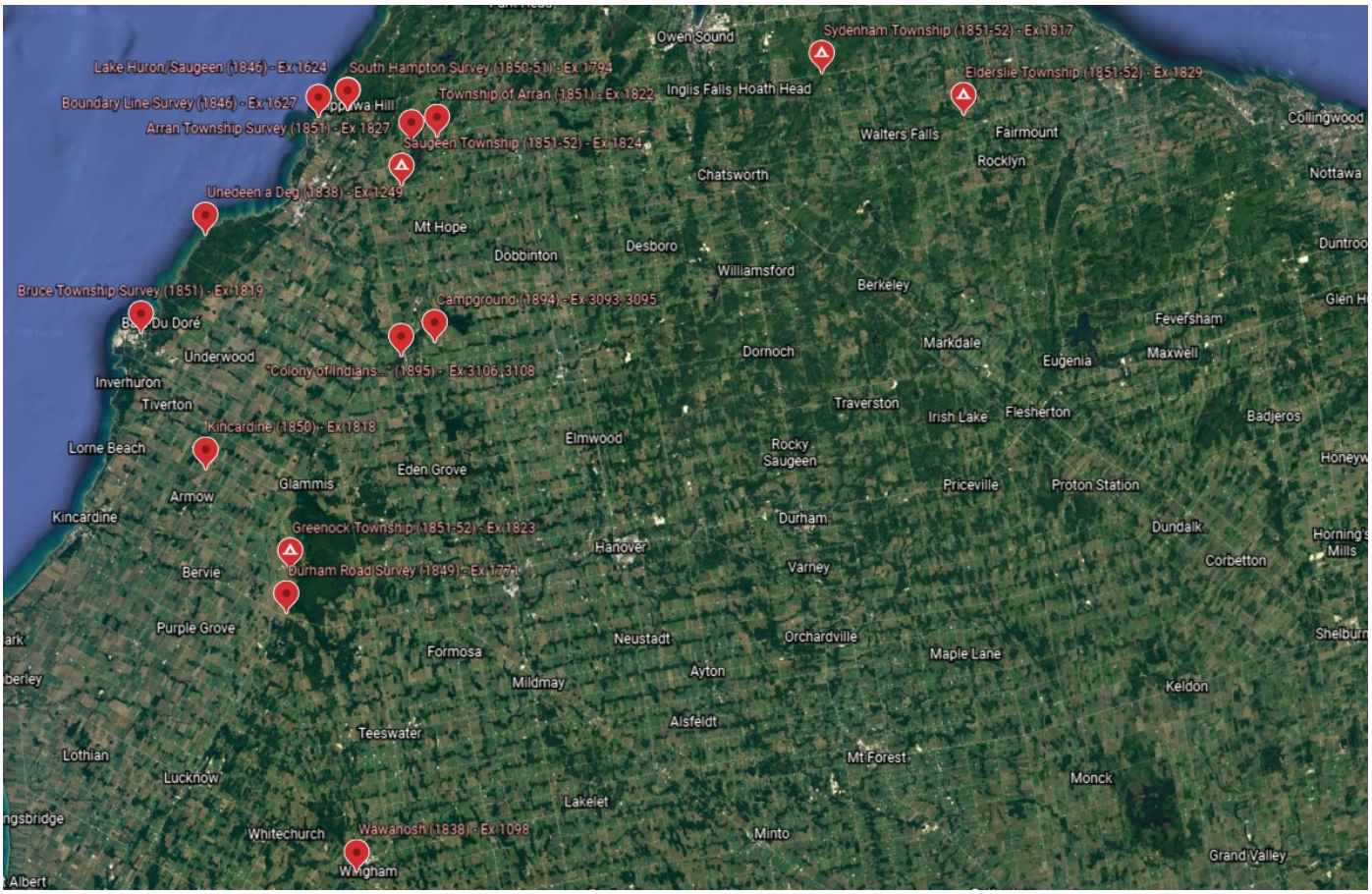
[406] Bressani's Relation, 1653, Chapter 3 - Of The Soil, Food, Dress, and Character of the Barbarians of New France, Exhibit 141, p. 247.
[407] The Jesuit relations and allied documents: travels and explorations of the Jesuit missionaries in New France, 1610-1791, Volume 67, Exhibit 376, p.139.
[408] Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA 500 BC-1860 AD" (as revised 2019), Exhibit 4576, p. 162, note 643.

of fact regarding Indian presence on and use of land south of the Indian line after 1836.[409] To help summarize and illustrate the agreed statement of fact, set out below is a visual aid that plots the approximate location of "Indian presence" on a Google Map. The documentary sources listed in the agreed statement of fact and their corresponding exhibit numbers are summarized in a chart, which accompanies a full-size copy of the illustrative aid at Appendix D, Tab 15.



Scope of SON's Use of SONTL After Treaty 72 and Contemporary Use

394. The scope of SON's use of SONTL pre and post Treaty 72 is dealt with in detail at paragraphs 275-318 *(fishing)* and 321-347 (*hunting, gathering and harvesting*). SON members

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[409] Agreed Statement of Fact Regarding Indian Presence on and Use of Land South of The Indian Line After 1836, Exhibit 3926.

continue to use the entirety of SONTL for harvesting. The animals harvested by SON members include deer, rabbits, grouse, geese, partridge, porcupines, waterfowl, pheasant, wild turkey, coyote, beaver, pike, trout, walleye, whitefish, bass and perch. They also harvest wood, morels, fiddle heads, leeks, wild onions, and wild ginger, among other plants and medicines.[410]

395. Doran Ritchie, a member of Saugeen, provided maps of the areas currently and historically used by SON members for hunting, trapping and other forms of harvesting, which he annotated during his evidence. Full-page copies of those maps are at Appendix D, Tabs 3-8.

396. Paul Nadjiwan, a member of Nawash, also identified the locations that he hunts in SONTL (in green dots on a map) during his testimony.[411] In addition, he identified numerous locations that preserve traditional Anishinaabemowin names (in red dots on a map) within SONTL.[412] Exhibit 4014, which illustrates these locations on a map of the Peninsula can be found at Appendix D, Tab 10.

397. A chart summarizing hunting and harvesting locations used by SON community members, including Paul Nadjiwan and Doran Ritchie, is at paragraph 340. Set out below and at Appendix D, Tab 16 is a visual aid prepared by counsel for SON, which summarizes and illustrates those locations on a Google Map. The map is colour coded by witness and numbered based on the entry number of the above-mentioned chart.

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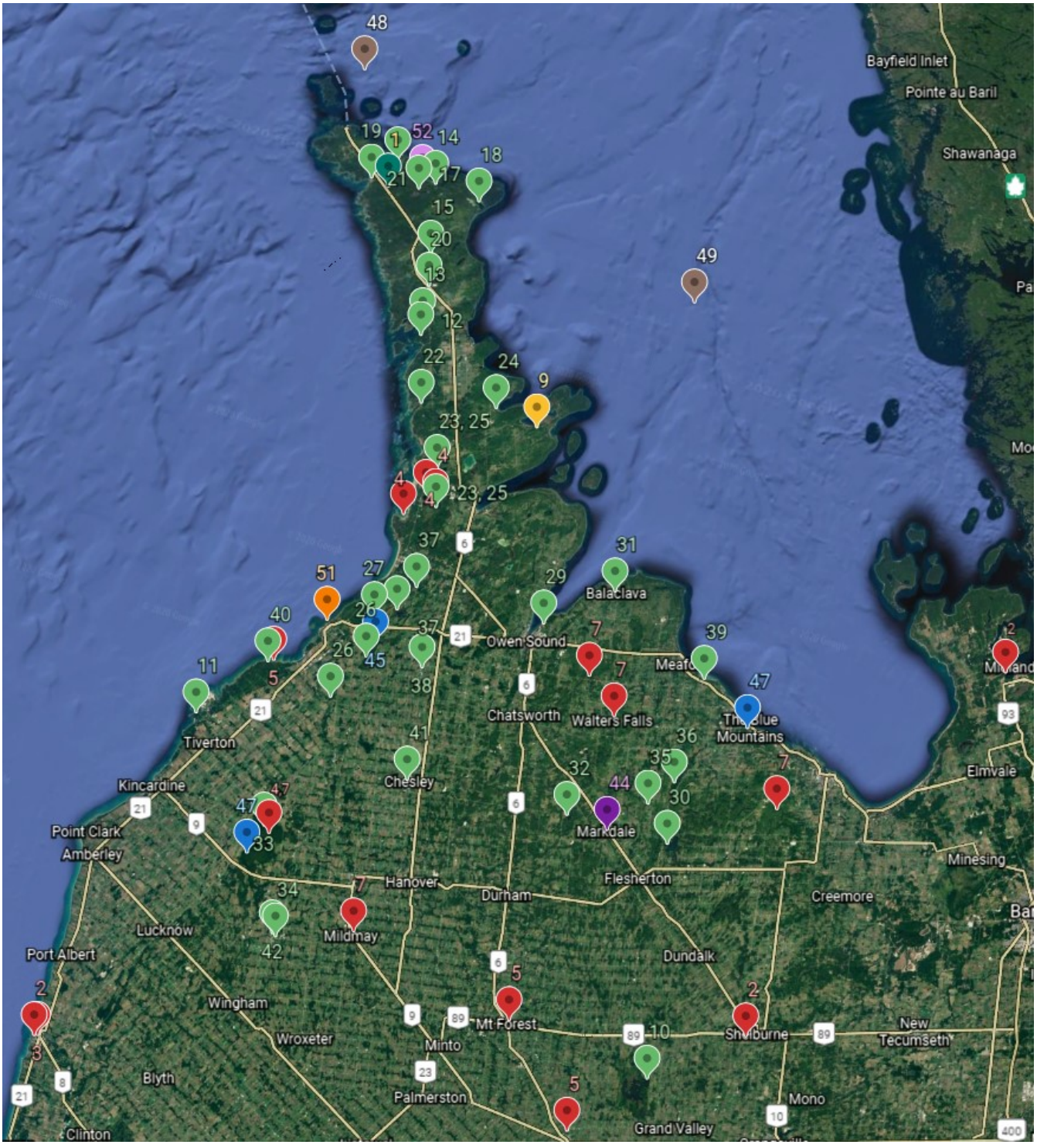
[410] Evidence of Paul Nadjiwan, Transcript vol 17, June 3, 2019, p. 1475, line 21 to p. 1483, line 17; Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1327, lines 3-24; p. 1330, line 3 to p. 1331, line 10; and p. 1331, line 25 to p. 1333, line 5.
[411] Aide Memoire of Paul Nadjiwan, Exhibit 4013, p. 3 - *hunting locations;* Evidence of Robert (Paul) Nadjiwan, Transcript vol 17, p. 1475, line 21 to p. 1483, line 17.
[412] Aide Memoire of Paul Nadjiwan, Exhibit 4013, pp. 1-2 – *place names*.



Doran Ritchie	Donald Keeshig	Karl Keeshig
Howard Jones	Frank Shawbedees	Robert (Paul) Nadjiwan
Vernon Roote	Ross Johnston	Ted Johnston

398. Ryan Lauzon, the Fisheries Assessment Biologist for Nawash, tracks the fish harvested by SON Commercial Fishers.[413] He assisted in preparing the map cited at paragraph 305, which is the commercial fishing activity throughout SONUTL by SON commercial fishers since the 1995, soon after the decision in *R. v. Jones* recognizing SON's commercial fishing rights. A copy of this map can also be found at Appendix D, Tab 14. This map demonstrates that SON commercial fishers use the vast majority of SONUTL to harvest fish.[414] It does not record any of the subsistence fishing that happens in SONUTL, nor does it capture ceremonial uses of the waters.[415]

399. Prof. Driben explained that maps of community members' harvesting patterns can help illuminate patterns of use by SON both currently and in the past. These kinds of maps suggest "that people are still doing things that they did in the past… It's a connection between the past and the present. The activities are less now than they were before, but they still persist in the culture."[416]

400. SON's use of shores throughout SONTL continued until they were no longer compatible with the use put to the land by other users, which was until relatively recently.[417]

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[413] Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019 p. 6609, line 6 to p. 6610, line 16 and p. 6621, lines 18-23.
[414] Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6647, line 21 to p .6649, line 16 and p. 6627, line 21 to p. 6629, line 12.
[415] Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6621, lines 18-23.
[416] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6940, line 24 to p. 6941, line 25.
[417] Rule 36 evidence of Donald Keeshig, September 13, 2002, Examination in Chief, Exhibit 3945, pp. 23-25; Rule 36 evidence of Fred Jones, November 5, 2002, Examination in Chief, p. 11; Rule 36 evidence of Fred Jones, December 5, 2002, Cross examination, Exhibit 3950, p. 37; Rule 36 evidence of Frank Shawbedees, September 13, 2002, Examination in Chief, pp. 12-13, 17; Rule 36 of evidence of John Nadjiwon, September 12, 2002, Examination in Chief, pp. 17-18; Rule 36 evidence of Edward Johnston, September 12, 2002, Examination in Chief, Exhibit 3903, pp. 10-12; and Rule 36 evidence of Ross Johnston, September 12, 2002, Examination in Chief, pp. 13, 15.

Today, however, there remain access points all along the shores of SONTL. In his testimony, Jay "Tattoo" Jones identified 34 locations where he accesses SON's fishery, spanning the entire length of the shores along SONTL.[418]

> Exhibit 3999 - Fishing Access Map Annotated by Jay Jones, Appendix D, Tab 2.

SON seeks the following findings of fact in respect of Chapter 10 - Scope of Land and Water Use in SONTL:

(a) The preservation of traditional Anishinaabemowin names of many locations within SONTL suggests long-term knowledge of these locations.

(b) The past and present use of hunting and harvesting locations identified by SON community members throughout SONTL shows SON's long-term knowledge and use of the land.

(c) The fishing locations identified throughout SONUTL shows SON's ongoing use of SONUTL.

11. SON TERRITORIAL BOUNDARIES

401. The scope of SON's traditional territory, accordingly to traditional knowledge, was set out by Vernon Roote:

> My understanding of the so-called "boundaries" of the Anishinabek of the Sauking Nation is that by starting at a point, we'll say Goderich, it goes both ways at that point; out to the international boundary and into the land of Goderich; and the Goderich area there's a Maitland River watershed, and the watershed is the boundary; and that goes towards the

[418] Evidence of Jay Jones, Transcript vol 14, May 29, 2019, p. 1227, line 1 to p.1249, line 10; Lakebed Claim Map Annotated by Jay Jones, Exhibit 3999.

> east and it comes to the area around the Shelburne, Orangeville area of the Grand River; and then it goes up towards the watershed area of the Beaver River.
>
> And then, of course, from the Beaver River watershed area it goes north into the Georgian Bay; and when it gets up to the tip of the Bruce Peninsula, we know it as the Saugeen Peninsula, it goes around and includes the now-known as Fathom Five Federal Provincial Park, or Federal National Park, and it encompassed those islands and goes around and goes right out to the international border again. That is my understanding of the territory of the Nation.
>
> Q. Does the map to your left, which is Exhibit P, is that consistent with what you just described?
>
> A. Yes, it shows approximately the location of my understanding.[419]

402. Consistent with this, is the scope of the water portion of SON territory that was explicitly set out in a Band Council Resolution in 1976:

> …all Lands, Waters, Minerals, etc., beneath Lake Huron from a point eleven (11) miles below the City of Goderich, Ontario Canada, westerly to the international water boundary between the United States of America and Canada hence north along said boundary, to a point midway between Manitoulin Island, Ontario and the tip of the Bruce Peninsula in Ontario to the easterly point in Georgian Bay midway between the main land and the said Peninsula then south, south east to the main land at Collingwood, Ontario…[420]

403. The inclusion of water spaces in their territory by the Saugeen Ojibway, as set out above, is consistent with anthropological literature on the territorial boundaries of "bands" of the Great Lakes Anishinaabe.

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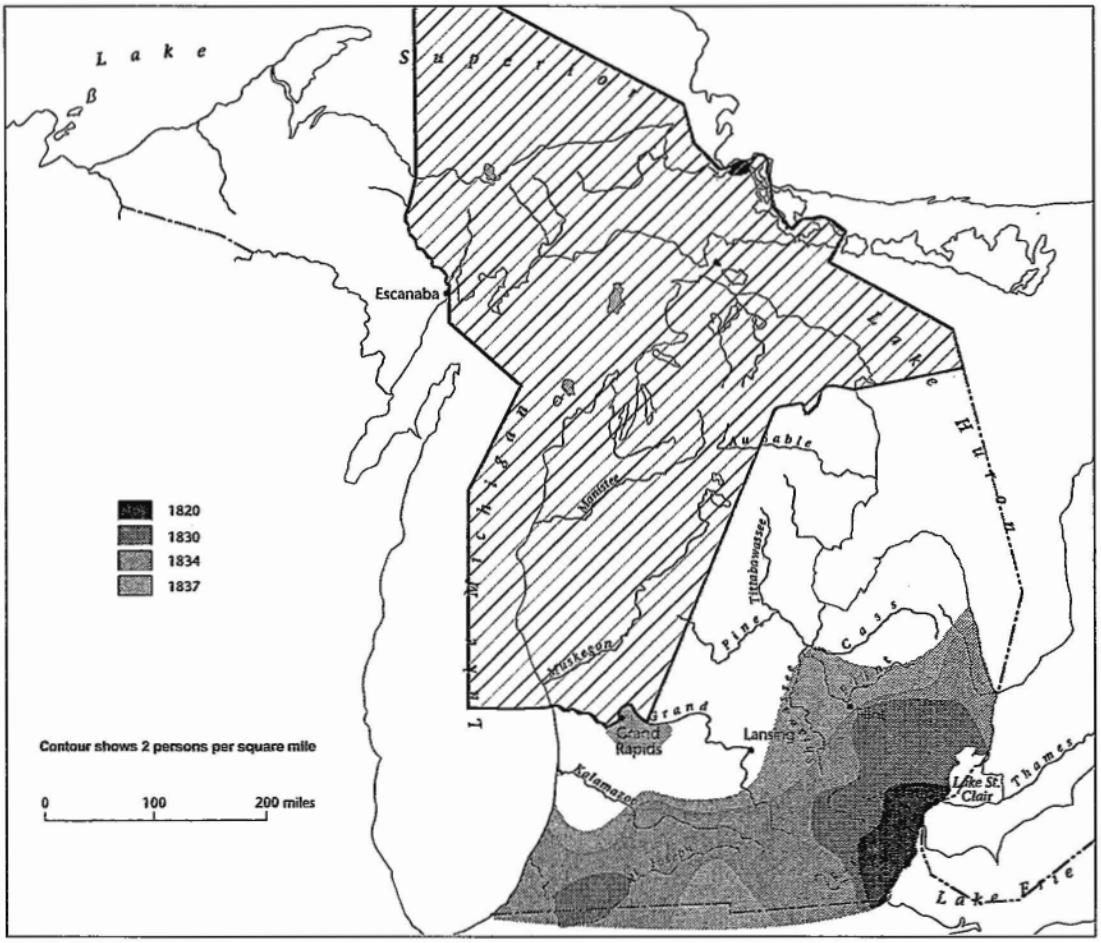
[419] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 461, line 11 to p. 462, line 16.
[420] Band Council Resolution of Chippewas of Nawash Band and Saugeen Indian Band, July 19, 1976, Exhibit 3810.

See paras 375-382 (*water space territorial customs*)

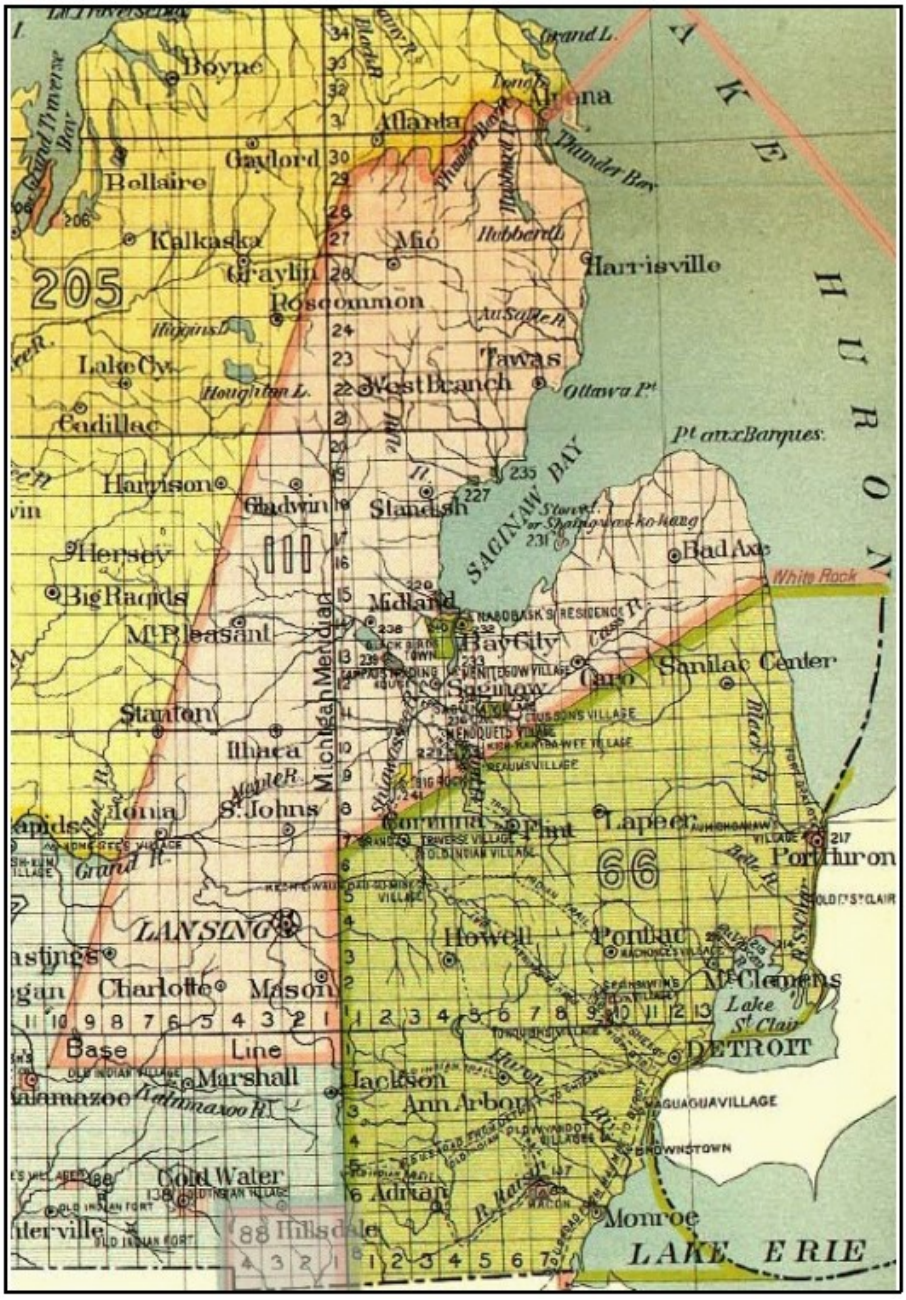
404. It is also consistent with the practice of the U.S. in making Indigenous treaties.[421] For example, the cession made at the Treaty of Washington (1836) includes water boundaries in Lake Superior, Lake Michigan, and Lake Huron, as illustrated by the cross-hatched shaded area below:



Advance of American population in Michigan, 1820-37, and the cession of 1836 (Cleland 2011, Map 3, p.67), cited in Mr. Jean-Philippe Chartrand, "Historical Research on Provisions of American Treaties Including Surrenders of Lake Beds in the Great Lakes" (2015), Exhibit 4513, p. 76.

[421] Mr. Bruce Greene, "Indian Aboriginal Title in the United States: Its Origin and Characteristics, and the Inclusion of Navigable Waterways within its Territory" (2016), Exhibit 4264.

405. The water boundaries of the Treaty of Detroit (1807) and the Treaty of Saginaw (1819) also extend into Lake Huron, as illustrated below:



Map 4. 1819 Saginaw Treaty [Pink] relative to the 1807 Detroit Treaty [Green] (Gulig 2007, Figure 1, p.12; Lake Huron boundaries original; pink highlights added for clarity) cited in Mr. Jean-Philippe Chartrand, "Historical Research on Provisions of American Treaties Including Surrenders of Lake Beds in the Great Lakes" (2015), Exhibit 4513, p. 55.

406. Taken together, the U.S.-Aboriginal Treaties of Detroit (1807), Saginaw (1819), Sault Ste. Marie (1820), Washington (1836), and La Point (1842) cover the entirety of the American side of the straits between the three Upper Great Lakes, and the boundaries of such treaties extend to the Canadian border.[422]

407. While traditionally, Anishinaabek may not have thought of straight lines on a map as defining their territory, it is submitted that the concept of being on the water and knowing to which shore one is closer is a natural "common sense" concept, as is the concept of wanting to respect the territory of First Nations residing on the other side of the water body. If one applies this concept to bodies of water the shape of Lake Huron and Georgian Bay, this results in a boundary of the approximate shape of SONUTL.

408. It is therefore submitted that the boundaries as claimed are:

(a) consistent with traditional knowledge as outlined by Vernon Roote;

(b) consistent with SON's explicit assertion of boundaries in 1976;

(c) consistent with the anthropological evidence about Anishinaabe land custom and about how Anishinaabek viewed territory; and

(d) consistent with the practice of the U.S. in making Aboriginal treaties in the Great Lakes region.

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[422] Mr. Jean-Philippe Chartrand, "Historical Research on Provisions of American Treaties including Surrenders of Lake Beds in the Great Lakes" (2015), Exhibit 4513, pp. 82, 99.

409. In addition to this, the following evidence further supports the individual segments of the boundaries as claimed:

(a) The southern boundary of SONUTL has been the subject of an explicit boundary agreement called Maawn-Ji-Giig-Do-Yaang (Gathering to Speak as One) Declaration, February 18, 2011, with Aamjiwnaang First Nation, Kettle and Stony Point First Nation, and Walpole Island First Nation. This was prompted by this litigation and similar litigation by the Walpole Island First Nation, and a desire to resolve the matter directly between the First Nations, and thus not need to be involved in each other's litigation. It can be inferred from this that this represents the ancient customary law of where the boundary was.

> We acknowledge that the Aboriginal title in a strip of lakebed about 22 miles wide, centred on Goderich, and running from the shore of Lake Huron to the international boundary, is shared among us;
>
> This area has historically been for the shared use and benefit of our Anishinabek ancestors, and we will continue that sharing and respect for future generations, in accordance with the core Anishinabek values of kindness, honesty, sharing, and strength.[423]

See para 943 (*legal authority for the inference of ancient boundary*)

[423] Maawn-Ji-Giig-Do-Yaang (Gathering to Speak as One) Declaration, February 18, 2011, Exhibit 3983; See also: Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 892, line 7 to p. 903, line 3 - *for background about the process leading up to the Declaration;* Evidence of Paul Jones, Transcript vol 27, July 15, 2019, p. 2646, lines 2-25.

(b) The western boundary of SONUTL is simply the international boundary at the midpoint of Lake Huron, which thus acknowledges the rights of the First Nations in Michigan.[424]

(c) Certain Manitoulin First Nations have made claims in litigation to the lakebed of Lake Huron (and to islands therein) lying to the north and west of SONUTL. These claims abut the northern boundary of SONUTL at points, but do not overlap with SONUTL.[425]

(d) The northern boundary of SONUTL as claimed is also consistent with the boundary asserted by SONTL in 1874 as being the ship channel outside Cove Island.[426]

(e) The eastern boundary of SONUTL is simply the midpoint of Georgian Bay, which thus acknowledges the rights of the First Nations on the eastern shore of Georgian Bay.[427]

(f) Regarding the southern extremity of the eastern boundary of SONUTL, SON believes that its Aboriginal title territory is as set out in Lettered Exhibit P. However, SON's commercial fishing agreement does not extend east of line of

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[424] Evidence of Jim Ritchie, Transcript vol 7, May 15, 2019, p. 687, line 23 to p. 688, line 9.
[425] Agreed Statement of Facts, Manitoulin Claims, Exhibit 3930.
[426] The Memorial of the Saugeen and Cape Croker Indians, April 8, 1874, Exhibit 274; See also: Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, p. 99 [mistakenly dates the Memorial as 1876]; Cove Island and its relation to SON's claimed territory is illustrated on Ontario's Lakebed Claim Map, Lettered Exhibit N.
[427] Evidence of Paul Jones, Transcript vol 27, July 15, 2019, p. 2699, line 22 to p. 2701, line 7 - *Mr. Jones did not assert personal knowledge of why the boundary line went straight down the middle of Georgian Bay, but that is not surprising since this boundary line was explicitly stated in 1976 at the latest, before Mr. Jones was a member of Council*.

longitude 80° 20’ W,[428] and the territory east of that line is within the area covered by a commercial fishing agreement with the Beausoleil First Nation.[429] SON acknowledges some territorial overlap with Beausoleil east of that line of longitude. To avoid complications, SON does not seek an order from this Court declaring Aboriginal title in respect of territory east of line of longitude 80° 20’ W. For illustrative purposes, an abridged copy of Lettered Exhibit P showing that line of longitude (approximately) is at Appendix D Tab 1.

SON seeks the following findings of fact in respect of Chapter 11 - SON Territorial Boundaries:

(a) The boundaries of the territory claimed are consistent with SON’s traditional knowledge and practices, and consistent with Anishinaabe customs more generally.

(b) The boundaries of the territory claimed are consistent with the practice of the U.S. in making treaties with Anishinaabe people located across Lake Huron from SON, and with U.S. practices in relation to Indigenous treaties in the Upper Great Lakes more generally, which included the waters of the lakes up to the international boundary.

(c) The boundaries of the territory claimed are drawn in a way that acknowledge the rights of neighbouring First Nations.

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[428] Substantive Commercial Fishing Agreement, signed Jan 24, 2013, Feb 21, 2013, and Feb 25, 2013, Exhibit 4523, p. 23 (description of Zone 3).
[429] Evidence of Mark Muschett, Transcript vol 78, Jan 21, 2020, p. 9981, line 20 to p. 9982 line 5.

PART II – CHRONOLOGICAL FACTS

12. THE DISTANT PAST: THE GEOLOGICAL RECORD AND SON TRADITIONAL STORIES

Drainage basin (catchment/ watershed) of the Great Lakes, U.S. Army Corps of Engineers.[430]

410. The geological conditions in and around Lake Huron were different in the past and changed continuously – and sometimes quickly and dramatically – over time.[431]

[430] Prof. Francine McCarthy, "Summary of the Geologic History of the Lake Huron Basin" (2019), Exhibit 3986, p. 1.
[431] Prof. Francine McCarthy, "Summary of the Geologic History of the Lake Huron Basin" (2019), Exhibit 3986, p. 2.

411. The archaeological record shows that SONTL and Manitoulin Island were both occupied over 12,000 years ago.[432]

See paras 441-445 (*Archaeology*)

412. SON traditional knowledge holders say they have been in SONTL forever, which is measured by them in thousands of years.[433]

413. SON submits that when the traditional stories discussed below are juxtaposed with the geological record and taken together, they serve as support for the evidence of SON traditional knowledge holders.

Tunnel to Manitoulin Island

414. At the end of the last ice age (between ~21,000 and 10,000 years ago), the ice sheets that covered much of Ontario gradually retreated, which caused the rock underneath them to rebound up.[434] At the boundary between the very hard ancient Precambrian rocks of the Canadian Shield and the younger Paleozoic bedded rocks in southwestern Ontario, the rebound caused folds to form. These folds are called pop-ups.[435]

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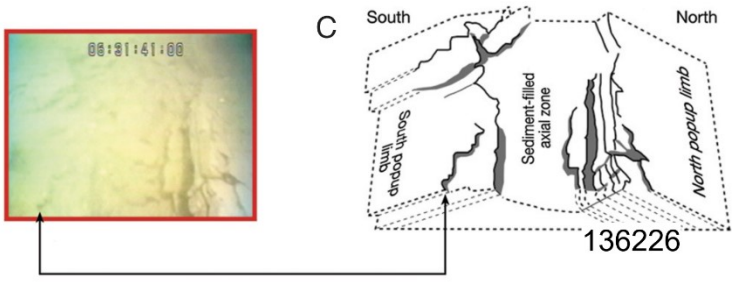
[432] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p.29.
[433] Evidence of Vernon Roote, Transcript vol 6, May 14, 2019, p .603, lines 16-24; Rule 36 evidence of Ross Johnston, November 4, 2002, Cross examination, Exhibit 3954, p.8, line 17 to p. 9, line 3; Rule 36 evidence of Donald Keeshig, December 5, 2002, Cross examination, Exhibit 3946, p. 57, lines 6-17; Rule 36 evidence of John Nadjiwon, November 5, 2002, Cross examination, Exhibit 3952, p. 65, line 14 to p. 66, line18; and Rule 36 evidence of Frank Shawbedees, December 4, 2002, Cross examination, Exhibit 3948, p. 19, lines 8-23.
[434] Prof. Francine McCarthy, "Summary of the Geologic History of the Lake Huron Basin" (2019), Exhibit 3986, p. 2.
[435] Prof. Francine McCarthy, "Summary of the Geologic History of the Lake Huron Basin" (2019), Exhibit 3986, p. 2.

415. Exhibit 3988[436] (reproduced below) is a diagram that illustrates a pop-up. Prof. McCarthy described this particular pop-up as about 1.7 kilometres long with walls on either side. Her evidence was that the rock walls would have been about four metres high.[437]



416. Pop-ups are found all along Georgian Bay. Those pop-ups are now submerged and would have last been visible to the naked eye around 11,500 to 8,000 years ago. At that time, the lake level in the Georgian Bay and Lake Huron basin was much lower.[438] The lower lake level meant that there was a land bridge between Manitoulin Island and the Peninsula.[439]

417. There is no roof to a pop-up. However, the forest that would have existed 8,000 years ago would have been made up of very tall trees with conifer and needle leaves. Those trees would have been thick enough to form a solid canopy.[440] Pop-ups, as calcareous rocks, would have had pine, cedar, tamarack, hemlock, in addition to some broad-leafed trees like oak growing on them much like the trees growing out of the rocks of the Niagara Escarpment today.[441] It was Prof.

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[436] Photo from a submersible with interpretive drawing showing a bedrock popup south of Toronto beneath the lake - the separation of the popup's two limbs across the axial zone is about 20 cm (from Jacobi et al. 2007), Exhibit 3988.
[437] Prof. Francine McCarthy, Transcript vol 9, May 22, 2019, p. 987, lines 4-24 and p.988, lines 2-3.
[438] Prof. Francine McCarthy, Transcript vol 9, May 22, 2019, p. 990, line 19 to p. 992, line 23.
[439] Prof. Francine McCarthy, "Summary of the Geologic History of the Lake Huron Basin" (2019), Exhibit 3986, p. 2.
[440] Prof. Francine McCarthy, Transcript vol 9, May 22, 2019, p. 993, line 1 to p. 994, line 4.
[441] Prof. Francine McCarthy, Transcript vol 9, May 22, 2019, p. 993, line 1 to p. 994, line 4.

McCarthy's evidence that based on the vegetation known to exist at the time, it makes sense to picture pop-ups as canyon-like structures with trees growing out of the cracks in the rock.[442]

418. Donald Keeshig was a member of Nawash. He passed away before the commencement of the trial. His evidence was obtained by way of Rule 36 examinations conducted on September 13, 2002 and December 5, 2002. In those examinations, Donald Keeshig told a traditional story about a person from the Peninsula following a tunnel to see how far it went. The tunnel went on and on and at about halfway, he met a person coming from the other side.[443] The two people exchanged some of the things that they had with them to take back and tell the people where they came from that they had met somebody from the other side.[444] Donald Keeshig learned this story from different people in his community over the years. The first time he heard the story was in the 1960s from his cousin's father, Lawrence Keeshig, who lived next door to Donald Keeshig's family.[445]

419. SON submits that there are parallels in the details of the story and the geological record. At its core, this story recalls a time when someone could walk between the Peninsula and Manitoulin Island, which was possible over 8,000 years ago. The bedrock pop-ups, with a thick canopy of trees growing out of their walls could resemble a "tunnel", as described by Donald Keeshig.

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[442] Prof. Francine McCarthy, Transcript vol 10, May 23, 2019, p. 1092 lines, 1-7 and p. 1094, lines 5-21.
[443] Rule 36 evidence of Donald Keeshig, September 13, 2002, Examination-in-Chief, Exhibit 3945, p. 9, line 2 to p. 11, line 13.
[444] Rule 36 evidence of Donald Keeshig, September 13, 2002, Examination-in-Chief, Exhibit 3945, p. 9, line 2 to p. 11, line 13.
[445] Rule 36 evidence of Donald Keeshig, September 13, 2002, Examination-in-Chief, Exhibit 3945, p. 9, line 2 to p. 11, line 13.

Breach of the Nadoway-Gros Cap Barrier

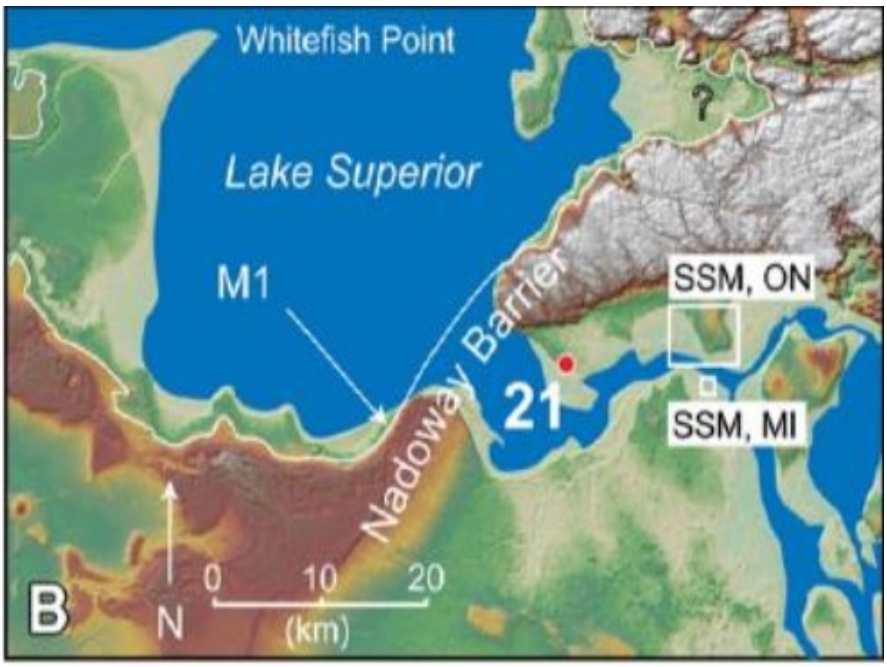

Figure 19b. focusing on region of the Nadoway Barrier across the mouth of the St. Mary's River with locations of sample sites, strandlines/ beaches (M1=Minong, N=Nipissing) and sediment core sites (black-rimmed white squares).[446]

420. 9,100 years ago, a sediment barrier at the entrance of the St. Mary's River between Nadoway, Michigan and Gros Cap, Ontario was suddenly breached. The breach took place over a period of hours or days.[447] The resulting destruction of the barrier meant that water from Lake Superior rapidly entered the north channel of Lake Huron. The sudden influx of water from Lake Superior flooded the north channel, drowned the existing trees and vegetation, and left the islands that we see in the northern channel today.[448]

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[446] Prof. Francine McCarthy, "Summary of the Geologic History of the Lake Huron Basin" (2019), Exhibit 3986, p. 22.
[447] Prof. Francine McCarthy, Transcript vol 9, May 22, 2019, p. 1010, line 23 to p. 1012, line 15.
[448] Prof. Francine McCarthy, "Summary of the Geologic History of the Lake Huron Basin" (2019), Exhibit 3986, p. 3.

421. Sudden flooding in the Lake Huron and Georgian Bay basin is also evidenced by the ancient tree stumps found under the water along the Peninsula today. Presently, those trees are in approximately 35 metres of water.[449]

422. Lenore Keeshig recounted a traditional story about a giant beaver destroying a dam and causing a great flood. Lenore Keeshig was born October 7, 1950.[450] She first heard this story as a child.[451] In the story, Nanabush and his grandmother travelled on the south shore of Lake Superior going toward a place known today as Sault Ste. Marie. The pair were tracking a giant beaver. Somewhere along the way they got lost and decided to have some rest. They built a camp and stayed there for a while. When they realized that the water level was rising near the camp, they travelled east toward where the water narrows. Soon, they came upon what looked like a giant beaver dam. The pair figured that the giant beaver was close so Nanabush left his grandmother and went off by himself to try and track it down. Nanabush's grandmother heard water splashing and when she went to investigate, she was able to see the outline of the giant beaver and so she caught it by the tail and called for her grandson, Nanabush. The beaver could not escape, and it tugged and it pulled and it thrashed trying to get out of the trap. Finally, the beaver realized that the only way it could escape was by destroying its own dam. With the dam breached, the grandmother had to let go of the beaver and it disappeared into the debris. Nanabush came back to find his grandmother and then they went on to investigate the effect of the breached dam and discovered

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[449] Prof. Francine McCarthy, Transcript vol 9, May 22, 2019, p. 1013, lines 3-12 and p. 1018, lines 6-18.
[450] Evidence of Lenore Keeshig, Transcript vol 28, July 16, 2019, p. 2769, lines 17-20.
[451] Evidence of Lenore Keeshig, Transcript vol 28, July 16, 2019, p. 2799, lines 14-18.

islands where there had been no islands before.[452] Lenore Keeshig identified these islands as the 30,000 islands and the Manitoulin Archipelago.[453]

423. There is evidence that giant beavers did once roam North America, as far north as Ontario about 10,000 years ago.[454] The precise date that giant beavers went extinct is uncertain.[455]

424. SON submits that there are several parallels between the giant beaver story and the Nadoway-Gros Cap barrier geological event. The story recounts an event that caused rapid changes in water level in the Lake Huron and Lake Superior basins. A further parallel in the story is the rise in the lake level of Lake Huron (at that time, Lakes Stanley and Hough), which created many islands.

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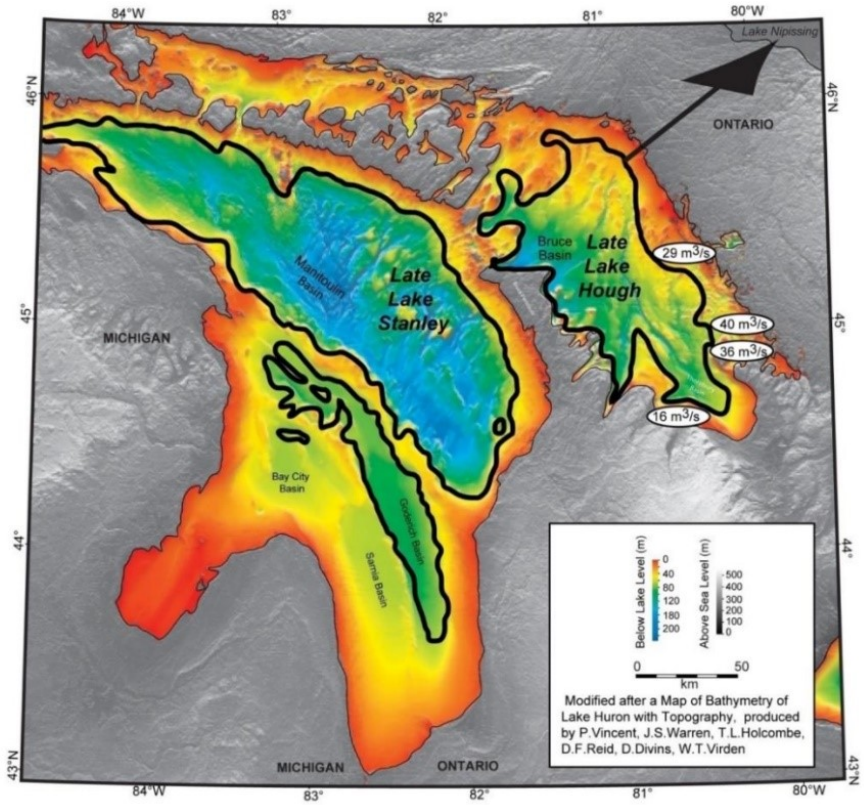
[452] Evidence of Lenore Keeshig, Transcript vol 28, July 16, 2019, p.2799, lines 18-25 and p. 2800, line 7 to p. 2802, line 3.
[453] Evidence of Lenore Keeshig, Transcript vol 28, July 16, 2019, p. 2802, lines 4-9.
[454] Evidence of Dr. Alexander von Gernet, Transcript vol 72, January 13, 2020, p.9335, lines 10-24 and p. 9336, lines 2-11.
[455] Prof. Francine McCarthy, "Summary of the Geologic History of the Lake Huron Basin" (2019), Exhibit 3986, p. 13, figure 10.

Low Lake Levels



Negative water balance (greater evaporation than precipitation) during the Early Holocene drought reduced streamflow coming into Lake Hough by 8200 years ago.[456]

425. After the breach of the Nadoway-Gros Cap barrier, hot, dry conditions followed, which caused water to evaporate from the lake basin that now contains Lake Huron and Georgian Bay. Approximately 9,000 to 8,000 years ago, Late Lake Hough (today – Georgian Bay) and Late Lake Stanley (today – Lake Huron) became hydrologically closed and much of the previous lake basin became dry land as illustrated in Figure 18 of Prof. McCarthy's report, above.[457]

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[456] Prof. Francine McCarthy, "Summary of the Geologic History of the Lake Huron Basin" (2019), Exhibit 3986, p. 20, figure 18.

[457] Prof. Francine McCarthy, "Summary of the Geologic History of the Lake Huron Basin" (2019), Exhibit 3986, p. 3 and p. 20, figure 18; Dr. Francine McCarthy, Transcript vol 9, May 22, 2019, p. 1043, lines 7-19.

426. The W.W. Smiths Gazetteer and Directory of the County of Grey, 1865-6, records a story told by "Indians" that notes that Griffiths Island, White Cloud Island, and Hay Island were once connected to one another and with the Peninsula. The Gazetteer goes on to say that this story was relayed by old Indians who learned it in boyhood from their grandfathers.[458]

427. SON submits that this traditional story is evidence of a cultural memory of a time where the lake level was much lower and there was more dry land around the Peninsula.

Brackish Water

428. The microscopic fossils in sediments from Georgian Bay during its hydrologically closed period indicate brackish waters (~1.5% salt content).[459] That level of salinity is similar to the taste of tears combined with saliva in one's mouth.[460]

429. Lenore Keeshig told the court a traditional story that she heard from her elder, Rose Nadjiwan. Rose Nadjiwan, in turn, had learned the story from her parents. This story was about Nanabush and his favourite nephew. In the story, Nanabush's nephew died. In his grief, Nanabush's tears fell out like boulders and rocks. He cried so much that his tears turned the water in the bay salty.[461]

430. SON submits that this story also tracks closely to the geological record. Namely, a time when the lakes in the Lake Huron and Georgian Bay basin were salty. The story recalls a time

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[458] W.W. Smiths Gazetteer and Directory of the County of Grey, 1865-6, Exhibit 4112, p. 121.
[459] Prof. Francine McCarthy, "Summary of the Geologic History of the Lake Huron Basin" (2019), Exhibit 3986, p. 3.
[460] Prof. Francine McCarthy, Transcript vol 9, May 22, 2019, p. 1023, lines 6-12 and p.1028, lines 6-22.
[461] Evidence of Lenore Keeshig, Transcript vol 28, July 16, 2019, p. 2809, line 18 to p. 2810, line 16 and p. 2811, lines 12-19.

– through a reference to natural processes with which SON's ancestors were likely familiar (i.e., tears to explain salinity) – when the water basin was much different then it is today.

General Principles about Geology and Traditional Stories

431. In general, the details of oral traditions may change, but the general gist of what happened survives.[462]

432. Canada called two witnesses, Prof. Bowman and Dr. von Gernet, to opine on whether the general gist of a traditional story may survive regarding geological events in the distant past.

> Relevance and Weight of the Evidence of Prof. Laurel Bowman, Appendix E, Tab 3.
>
> Relevance and Weight of the Evidence of Dr. von Gernet, Appendix E, Tab 50.

433. Dr. von Gernet conceded in his testimony that geological evidence is an independent form of evidence that can support the theory that a traditional story contains historical origin.[463] He agreed that it is a reasonable assumption that there were human eyewitnesses to early Holocene conditions, species, environment, and geological events because there is archaeological evidence of human occupation of at least parts of Ontario during that period.[464]

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[462] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p.5252, line 11 to p. 5253, line 6; Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2020, p. 3202, line 24 to p. 3209, line 23; Evidence of Prof. Driben, Transcript vol 55, October 23, 2020, p. 7083, line 19 to p.7084, line 2.
[463] Evidence of Dr. Alexander von Gernet, Transcript vol 52, October 11, 2019, p. 6529, lines 1-11; Transcript vol 73, January 14, 2020, p. 9543, line 1 to p. 9544, line 2.
[464] Evidence of Dr. Alexander von Gernet, Transcript vol 73, January 14, 2020, p. 9456, line 20 to p. 9457, line 4.

434. Prof. Bowman, acknowledged that oral traditions may preserve a cultural memory of genuine past events.[465] She also agreed that geology, when calibrated with a third body of data, can assign a likely date to the origin of a traditional story.[466]

435. Prof. Bowman said that to link geological events and myth, the goal is not to establish an absolute connection, but instead to establish that one explanation is far more probable than any of the alternatives.[467] In such an investigation, She conceded that there was no reason why you could not start from a positive assumption – namely that the traditional story preserves historical data.[468]

436. Prof. Bowman cited two examples from her literature review where geological events were reliably connected to oral traditions. She discussed an Indigenous traditional story about a volcanic eruption from the Klamath tribe in the United States and she referred to Australian Indigenous traditional stories regarding sea level change.[469] Prof. Bowman acknowledged that the explanation for the origin of these two examples was that someone likely witnessed the geological events. She concluded that an eyewitness inspiration for the stories was not only possible but was an explanation that had a higher degree of possibility than others.[470]

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[465] Prof. Laurel Bowman, "Geomythology and Oral Tradition: A Guide to Method" (2019), Exhibit 4617, p.10.
[466] Evidence of Prof. Laurel Bowman, Transcript vol 85, February 18, 2020, p. 10857, line 23 to p.10858, line 15.
[467] Evidence of Prof. Laurel Bowman, Transcript vol 85, February 18, 2020, p. 10861, lines 1-7.
[468] Evidence of Prof. Laurel Bowman Transcript vol 85, February 18, 2020, p. 10893, line 22 to p. 10894, line 2.
[469] Prof. Laurel Bowman, "Geomythology and Oral Tradition: A Guide to Method" (2019), Exhibit 4617, pp. 2, 5-6.
[470] Evidence of Prof. Laurel Bowman, Transcript vol 85, February 18, 2020, p.10862, lines 11-20.

437. The Klamath traditional story is about a battle between gods standing on Mt. Shasta and Mt. Mazama, respectively, that ends with the collapse of Mt. Mazama and the creation of Crater Lake. Prof. Bowman thought that this story was connected to a volcanic eruption from 7,500 years ago because:

(a) There are no visual cues today to inspire the story. There is only one mountain and a lake. There is not, for example, a half-melted mountain that would encourage a storyteller to make up the story;

(b) There is geological evidence that there was a mountain that then collapsed as a result of a volcanic implosion;

(c) There is evidence that there were people present before the geological event;

(d) There was a stable population in the area that could transmit the story; and

(e) It was recorded by Europeans early post-contact.[471]

438. The Australian Aboriginal stories are about a large rise in sea levels. Prof. Bowman found these stories to be reliably connected to the historical rise in sea levels between 7,500 and 13,400 years ago because:

(a) The traditional stories were from several widely separated areas of Australia;

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[471] Prof. Laurel Bowman, "Geomythology and Oral Tradition: A Guide to Method" (2019), Exhibit 4617, pp. 2, 5-6; Evidence of Prof. Laurel Bowman, Transcript vol 85, February 18, 2020, p.10825, line 3 to p.10827, line 5.

(b) There was geological evidence of a rise in sea level at the time in question and at no other time; and

(c) There were people present in the area at the time of the geological event and continue to be there after the event.[472]

439. SON submits that the traditional stories explored in this trial have similar hallmarks to the Klamath and Australian examples:

(a) There is geological evidence of natural features and events that are at the heart of SON's traditional stories;

(b) There is archaeological evidence that people were living in the area where the geological events took place at the time of the events and after, up to present day; and

(c) It has been thousands of years since any of the geological events and features could have reasonably been observed.

SON seeks the following findings of fact with respect to Chapter 12 – The Distant Past: Geological Record and SON Traditional Stories:

(a) Taken in total, SON's traditional stories suggest a substantially different physical environment from the one we see today.

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[472] Prof. Laurel Bowman, "Geomythology and Oral Tradition: A Guide to Method" (2019), Exhibit 4617, pp. 20-21; Evidence of Prof. Laurel Bowman, Transcript vol 85, February 18, 2020, p. 10868, line 20 to p.10871, line 12.

(b) The physical environment described in the traditional stories closely resembles events that took place over 8,000 years ago.

(c) The traditional stories – whether they are etiological or containers of historical facts about past geological events – are evidence of a meaningful and deep connection between SON and the water and lands of SONTL.

13. ARCHAEOLOGY

In Situ Development of SON

440. The archaeological record is consistent with an *in situ* development of an "Odawa"[473] group in SONTL in the pre-contact period (prior to 1615). That is, the group located in SONTL which was identified by the French in the post-contact period (post 1615) as Odawa did not migrate into the area, but developed from an Anishinaabe population who had occupied SONTL for millennia before contact with Europeans.[474] The archaeology also supports the conclusion that SON is continuous with the Odawa who developed *in situ*.[475]

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[473] Odawa is placed in quotes here because it is an anachronism in this context – it was a name given to some Anishinaabek by the French around the time of European contact. Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 23, citing Bohaker- *Ojibwa, Odawa and Pottawatomi were names imposed by Europeans, or resulted from misunderstandings by Europeans.*

[474] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 29-68, conclusion at p. 68 - *This analysis is a site by site consideration of archaeological sites in or near SONTL, which is compared to criteria characteristic of Odawa occupation* (see Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 33-35.

[475] Dr. Ronald Williamson, "Supplementary Report - Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land" (2017), Exhibit 4241, pp. 19-22 - *repeated use of a ceremonial site over centuries for the same ceremonial use is a strong indication of ethnic*

See paras 453-461 (*continuity across 1650-1700*)

441. The archaeological periods relevant to properly understanding SON's occupation of SONTL are:

(a) the Paleo-Indian period, from 13,000 B.P. to 9,000 B.P.;[476]

(b) the Early Archaic period, from 10,000 B.P. to 7,000 B.P.;[477]

(c) the Middle Archaic period from 7,000 to 4,000 B.P.;[478]

(d) the Late Archaic period from 4,000 to 3,000 B.P.;[479]

(e) the Early Woodland period from 3,000 to 2,300 B.P.;

(f) the Middle Woodland period from 2,300 to 1,050 B.P.; and

(g) the Late Woodland period from 1,050 to 300 B.P.[480]

442. Evidence of Odawa presence on SONTL in the archaeological record goes beyond the periods listed above and includes evidence dated to the post-contact period, 1615-1648 and later.[481]

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continuity; Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5294, line 17 to p. 5295, line 6. (*"In situ" meaning in place*).

[476] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5261, lines 3-9. *(B.P. is "Before Present")*.

[477] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 30.

[478] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5262, lines 8-11.

[479] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5262, lines 8-11.

[480] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 30.

[481] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 50, 68-70.

443. The earliest signs of human presence on SONTL in the archaeological record date back over 12,000 years ago with five registered Paleo Indian sites. Moving through the archaeological periods, the record of registered sites provides evidence of continuous occupation throughout the entire SONTL. They include the following:

(a) 50 sites having Early to Late Archaic components;

(b) Six Early Woodland sites;

(c) 20 Middle Woodland sites; and

(d) 25 Late Woodland sites.

444. Many of these sites also include components from multiple archaeological periods, indicating use spanning in some cases millennia.[482] There is also evidence of 19th century ceremonial use of some of the archaeological sites in SONTL.[483] For example, the Nochemowenaing site has components that date to the Middle Woodland period, as well as Late Woodland, early contact period (1615-1648), and the 19th century.[484] *Ne'bwaakaah giizwed ziibi* (River Mouth Speaks) has components dating to the Late Archaic, Middle and Late Woodland,

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[482] Dr. Ronald Williamson, "Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, pp. 6-19.
[483] Dr. Ronald Williamson, "Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, pp. 6-19.
[484] Dr. Ronald Williamson, "Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, p. 7.

and into the 19th and early 20th centuries.[485] *Ne'bwaakaah giizwed ziibi* (River Mouth Speaks) is discussed in more detail below.

445. The archaeological sites in SONTL discussed in Dr. Williamson's report are highlighted here:

[485] Dr. Ronald Williamson, "Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, p. 9.

Exhibit 3999, Map 1: Location of Sites Discussed in Text within or near SON Traditional Territory[486], Appendix D, Tab 13.

446. The evidence in this trial has been that the archaeological sites on SONTL were occupied by the same people.[487] This is based on the presence of unique Odawa archaeological signatures, such as evidence of a particular method of ceremonial killing and burying young dogs and other animals, as well as the presence of perforated bear mandibles, chert and certain types of beads.[488] These markers start in the Archaic period, with the presence of chert associated with the Odawa. The same chert type is found in Middle Woodland and Late Woodland period sites, and from the Middle Woodland period onwards there is evidence of Odawa animal ceremonialism.[489] This evidence has not been credibly contradicted.

Relevance and Weight of the Evidence of Ms. Margaret Morden, Appendix E, Tab 33.

Relevance and Weight of the Evidence of Dr. Gwen Reimer, Appendix E, Tab 42.

Relevance and Weight of the Evidence of Dr. Alexander von Gernet, Appendix E, Tab 50.

447. The only sites present in the archaeological record within SONTL that do not belong to the Odawa are a number of Petun (Tionantaté, or Tobacco Nation) [490] sites in the eastern portion

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[486] Dr. Ronald Williamson, "Supplementary Report – Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land" (2017), Exhibit 4241, p. 30; Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5269, lines 15-25.
[487] Dr. Ronald F. Williamson, "Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, pp. 1-2; Evidence of Dr. Ronald Williamson, Transcript vol 43, p. 5294, line 20 to p. 5296, line 7.
[488] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5277, line 22 to p. 5279, line 9.
[489] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5294, line 22 to p. 5295 line 6.
[490] Evidence of Prof. Alain Beaulieu, Transcript vol 63, November 21, 2019, p. 8146, lines 6-10.

of SONTL. The Petun entered SONTL in 16th century and negotiated with the Odawa who agreed to allow the Petun to move into SONTL and to share occupation of part of the territory.[491]

448. The same sites were used for ceremonial purposes over the centuries, which also points to a continuity of people amongst the Odawa sites in SONTL.[492] As Dr. Williamson points out:

> A few of these sites also show extensive reoccupation over centuries, even millennia, which evidence continuity in the people occupying the territory. A number of these sites also feature ceremonial practices that reflect ongoing use of the territory by not only culturally related peoples but also by those intimate enough to have shared information about sacred places over time.[493]

449. Included in these "multi component" sites (sites with evidence of occupation over various periods) that have evidence of repeated ceremonial use is the Nochemowenaing site. Dr. Williamson points out that the site includes over 70 burial features and that none seem to intrude on one another, suggesting a familiarity with the site and its purpose by those occupying it over the generations.[494]

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[491] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 6, 68; Dr. Ronald Williamson, "Supplementary Report - Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land" (2017), Exhibit 4241, pp. 15-17; Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5265, lines 3-8.

[492] Dr. Ronald F. Williamson, "Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, pp. 1-2, 21-22.

[493] Dr. Ronald Williamson, "Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, pp. 1-2.

[494] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5343, line 19 to p. 5344, line 1 and p. 5465, line 15 to p. 5466, line 2.

450. Nochemowenaing is a site that has been well known to SON for as long as anyone can remember and is still visited and used for ceremonial purposes - such as for land and water offerings and pipe ceremonies - by them to this day.[495]

451. Dr. von Gernet suggested that the Odawa did not arise *in situ*.[496] His argument was based on a claim that there is "evidence of discontinuity" in "every culture on the planet".[497] However, Dr. von Gernet did not look at the history of the presence of the Odawa on the Peninsula.[498] Based on the evidence of Dr. Williamson, who did extensively look at the history of the presence of the Odawa on the Peninsula, there is simply no basis to conclude that there was another group that came into SONTL to replace the populations that were there originally. Dr. Williamson's opinion is based on the evidence of occupation during every archaeological period, of Odawa archaeological signatures at many of these sites, and of continuity in ceremonial use. There is also no archaeological evidence in SONTL to support the notion that the original inhabitants of SONTL are not, in fact, linked to the present day group, such as evidence of a mass migration or displacement of people.[499]

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[495] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5343, line 3 to p. 5344, line 1; Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p.196, line 8 to p. 198, line 5; Evidence of Joanne Keeshig, Transcript vol 28, July 16, 2019, p. 2726, line 6 to p. 2732, line 8 and p. 2755, line 20 to p. 2756, line 7 - *land and water offerings*; Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 472, lines 12-19 - *pipe ceremony*; Evidence of R. Paul Nadjiwan, Transcript vol 17, June 3, 2019, p. 1444, line 24 to p. 1446, line 15.

[496] Evidence of Dr. Alexander von Gernet, Transcript vol 73, January 14, 2020, p. 9459, lines 15-17.

[497] Evidence of Dr. Alexander von Gernet, Transcript vol 73, January 14, 2020, p. 9462, lines 14-19.

[498] Evidence of Dr. Alexander von Gernet, Transcript vol 73, January 14, 2020, p. 9562, lines 7-15.

[499] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5294, line 22 to p. 5296, line 7.

452. SON submits the Odawa inhabiting SONTL at the time of European contact developed *in situ*, and are linked to SON.

Presence during and after the Haudenosaunee Conflict

453. Although there may have been a temporary dispersal of the inhabitants of SONTL during the conflict with the Haudenosaunee in the mid to late 17th century, the archaeological evidence demonstrates that if there was a dispersal, reoccupation, or at least use, of SONTL resumed within one generation.[500] There is evidence of the same sites being used for ceremonies prior to the dispersal that were then used, "in the exact same spot, in the exact same manner in the ensuing post-dispersal years."[501] Both the Nochemowenaing site (discussed at paragraphs 449 to 450) and the *Ne'bwaakaah giizwed ziibi* (River Mouth Speaks) site are examples of this.[502]

See para 485 *(evidence of return of the same people)*

454. The *Ne'bwaakaah giizwed ziibi* (River Mouth Speaks) site is located near the mouth of the Saugeen River in Southampton on the north side of the river.[503] The earliest projectile points found on this site date to the Late Archaic-Early Woodland transitional period,[504] and it contains evidence of Middle Woodland and Late Woodland occupation.[505]

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[500] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5357, lines 11-14.
[501] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5342, lines 9-19.
[502] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5343, lines 1 - 10.
[503] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5346, lines 15-19.
[504] Dr. Ronald Williamson, "Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, p. 7.
[505] Dr. Ronald Williamson, "Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, pp. 8-9.

455. There is substantial evidence of occupation of *Ne'bwaakaah giizwed ziibi* (River Mouth Speaks) in the late 17th through mid-19th century. Specific to the use during and following the Haudenosaunee conflict, the site contains three Jesuit rings, which suggest that the site was in use in the second half of the 17th century.[506]

456. Further, 125 glass beads found at the site were tested to determine their chemical composition, and then compared to a database of over 4,000 beads to determine the date they were deposited on the site.[507] Dr. Williamson testified that when these beads are compared to other beads with the same kind of chemistry found in the database, they can be dated to a specific 30 to 50 year period.[508] Characteristics of the beads, such as colouring, can also assist in dating a bead assemblage.[509]

457. The bead analysis conducted on the assemblage found at the *Ne'bwaakaah giizwed ziibi* (River Mouth Speaks) site contains beads that date to just before the dispersal (circa 1650) and also includes beads that date to the middle of the second half of the 17th century.[510] Dr.

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[506] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5347, line 6 to p. 5348, line 6; Dr. Ronald Williamson, "Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, pp. 18-19.

[507] Dr. Ronald Williamson, "Non-Destructive Analysis of the Glass Bead Assemblage from the *Ne'bwaakaah giizwed ziibi* (River Mouth Speaks) site (BdHi-2) Town of Saugeen Shores, Bruce County Ontario" (2017), Exhibit 4240, p. 7; Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5351, lines 7-23 and p. 5352, lines 18-22.

[508] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5350, lines 2-15.

[509] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5350, lines 16-22.

[510] Results of the Glass Bead Chemistry Analyses of the *Ne'bwaakaah giizwed ziibi* (River Mouth Speaks) Site, Exhibit 4250; Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5354, line 23 to p. 5357, line 10; Evidence of Ms. Margaret Morden, Transcript vol 70, December 16, 2019, p. 9179, lines 6-20.

Williamson concluded from this evidence that the Odawa resumed use of this site around the same time the Odawa returned to Manitoulin Island, by the late 1660s or 1670.[511]

458. Although Ms. Morden stated in both her expert report and in her examination in chief that she believed there was a 100-year gap in the archaeological record, she acknowledged during cross examination that the fact that many of the beads collected at the *Ne'bwaakaah giizwed ziibi* (River Mouth Speaks) site dated tightly with sites from the later half of the 17th century suggested that use of the site had resumed within one generation from the dispersal. [512]

459. Ms. Morden also raised some questions in her testimony about the accuracy of the database for dating the beads.[513] However, she acknowledged on cross examination that she does not have experience with the glass bead database,[514] and is not familiar with the sites in the database[515] or how those sites are dated.[516] She ultimately agreed that if the dates of sites were based on the documentary record, and had been accepted by archaeologists working in the field, they should probably be accepted.[517]

> Relevance and Weight of the Evidence of Ms. Margaret Morden, Appendix E, Tab 33.

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[511] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5337, line 17 to p. 5338, line 12 and p. 5357, lines 11-23.
[512] Margaret Morden, "Response to the Dr. Ronald F. Williamson 2017 Report" (2018), Exhibit 4452; Evidence of Ms. Margaret Morden, Transcript vol 70, December 16, 2019, p. 9116, line 16 to p. 9121, line 24 and p. 9179, lines 6-20.
[513] Evidence of Ms. Margaret Morden, Transcript vol 70, December 16, 2019, p. 9120, line 12 to p. 9121, line 24.
[514] Evidence of Ms. Margaret Morden, Transcript vol 70, December 16, 2019, p. 9049, lines 5-12.
[515] Evidence of Ms. Margaret Morden, Transcript vol 70, December 16, 2019, p. 9153, lines 10-13.
[516] Evidence of Ms. Margaret Morden, Transcript vol 70, December 16, 2019, p. 9121, lines 17-21 and p. 9137, line 21 to p. 9138, line 9.
[517] Evidence of Ms. Margaret Morden, Transcript vol 70, December 16, 2019, p. 9149, line 22 to p. 9150, line 4.

460. Dr. Ronald Williamson gave evidence that answers the questions raised by Ms. Morden. He testified that the beads in the database are reliably dated.[518] He explained that part of the process of dating the beads found at *Ne'bwaakaah giizwed ziibi* (River Mouth Speaks) includes comparing the beads to other assemblages, and where the bead chemistry is the same, and the matching sites have a clear documentary record of their occupation, they are used for comparison.[519]

461. Based on this, SON submits that to the extent there was a dispersal of the Odawa from SONTL during the Haudenosaunee conflict, those same Odawa returned by the late 1660s or 1670.

What the Archaeological Record says about SON

462. The location of many of the archaeological sites on SONTL tells us about the way of life of the ancestors of SON. Larger spring and summer settlements in the Archaic periods were located near river mouths and lakeshores in order that its inhabitants could harvest rich aquatic resources, such as fish.[520] Archaeological evidence of camps in the Woodland periods tended to be small and were usually located along Lake Huron and Georgian Bay or along portage routes. Many sites were located near fish spawning locations.[521]

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[518] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5350, lines 2 to 8.
[519] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5351, line 24 to p. 5352, line 17.
[520] Dr. Ronald Williamson, "Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, p. 3.
[521] Dr. Ronald Williamson, "Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, pp. 3, 5.

463. Fish was very clearly an important component of the Odawa diet and there is evidence of spring, summer and fall spawning fish species in the archaeological record of SONTL. For example, there is such evidence at the 10th and 17th century multi-component Hunter site, which is situated on the Saugeen Reserve and inhabited as early as AD 850, or 1170 B.P..[522]

464. Evidence of ceremony in the archaeological record of SONTL also points to the importance of water to SON's ancestors. For example, fish remains are found in ceremonial burials across SONTL, and a 17th century pendant depicting Mishipizheu, the powerful underwater creature, was found at Nochemowenaing.[523]

465. The archaeological record of SONTL also demonstrates that the entire SONTL was being used and was well populated, particularly during the Late Woodland period.[524]

SON seeks the following findings of fact in respect of Chapter 13 - Archaeology:

(a) The Odawa group on SONTL developed *in situ* prior to European contact.

(b) This group is the same group as the Odawa who lived on SONTL following the Haudenosaunee conflict.

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[522] Dr. Ronald Williamson, "Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, pp. 5, 11; Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5299, line 6 to p. 5300, line 12.

[523] Dr. Ronald Williamson, "Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, pp. 9-21.

[524] Dr. Ronald Williamson, "Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, pp. 3-6, 8.

(c) To the extent there was a dispersal of the Odawa from SONTL during the Haudenosaunee conflict, those Odawa returned by the late 1660s or 1670.

(d) SON is continuous with the Odawa who developed *in situ*.

(e) Water has always been important to SON and their ancestors.

14. EUROPEAN CONTACT ON GEORGIAN BAY - 1615

466. The first European to reach Georgian Bay was Champlain, who reached the mouth of the French River in the summer of 1615. He was met there by 300 warriors he called "Cheveux Relevées" (Odawa) who said, with great irony, that they were "picking blueberries". Rather, news of his arrival had preceded him, and he was met with a show of potential great force until his intentions were known.[525]

467. Although Dr. Reimer suggested in her report that the Cheveux Relevées were in fact picking blueberries, she admitted on cross examination that it was equally possible that they were there to meet Champlain and that in any event she would "certainly agree that they were there for more than just blueberry picking".[526]

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[525] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6824, lines 12-21 (blueberries) and p. 6824, line 22 to p. 6826, line 5 (Waisberg); L. G. Waisberg, "The Ottawa: Traders of the Upper Great Lakes 1615-1700", September 1977, Exhibit 4336, pp. 32-33; Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5304, lines 3-21.
[526] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11206, line 21 to p. 11209, line 20.

468. Since Champlain began by giving a gift, a hatchet, this established a relationship, and showed his intentions to be peaceful, and in fact economically beneficial to the Cheveux Relevées. This in turn resulted in him having permission to enter the territory.[527] As Prof. Driben explained:

> He [Champlain] gave them a hatchet and that hatchet was regarded as – it's a symbol and a function – a functionary tool at the same time. But the symbol is, when I give you a gift, what I'm trying to do is establish a relationship with you, from an Anishinaabe point of view. That's their custom. So when Champlain did this he was abiding by their custom. So as soon as he gives them a gift, they receive that as a message that, oh, he wants to establish a relationship with us.[528]

See paras 351-354 and 370-373 (*significance of gift to establishing relationship*).

469. Some of these warriors were from SON, and likely travelled all the way from SONTL to meet Champlain at the mouth of the French River: the next winter, while visiting the Petun near what is now Collingwood (and within SONTL), Champlain visited a nearby Odawa village and met some of the same warriors he had met at the mouth of the French River the summer before.[529] Later Jesuit accounts also locate the Odawa around Georgian Bay.[530]

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[527] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 57, 64; Voyage of the Sievr de Champlain to New France in the year 1615, 1929, Exhibit 47, pp. 43-44; Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 70-71.

[528] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6823, line 24 to p. 6824 line 9.

[529] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)", (2013), Exhibit 4239, pp. 70-71.

[530] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 70-80 and maps in the Appendices.

470. At the time of European contact in the Georgian Bay area, the only occupants of SONTL were the Odawa and (in the eastern part of SONTL) the Petun.[531]

> See para 361(a) (*Petun being in SONTL with the permission of the Odawa*)

471. Some of the Dodemic identities recorded in the early 17th century in or near SONTL included otter and bear.[532] This is significant since these two Dodemic identities are still present among SON today. This suggests continuity of presence of the same people since Dodem identity is inherited from one's father.

> See paras 243-272 (*explanation of Dodem identity*)
>
> See paras 97-98 (*Dodemic continuity – the reference to otter and bear as present Dodems at SON*)

SON seeks the following findings of fact in respect of Chapter 14 - European Contact on Georgian Bay (1615):

(a) In 1615, the Odawa met Champlain with a great show of force and only allowed him entry to the territory once they had established positive relations.

(b) Warriors from SON were part of the group of Odawa who met Champlain in 1615.

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[531] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 83.

[532] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 202; Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 15, 17-18, 73-74; Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA 500 BC-1860 AD" (as revised 2019), Exhibit 4576, pp. 82-83.

(c) At the time of European contact, the only occupants of SONTL were the Odawa and (in the eastern part of SONTL) the Petun.

15. THE CONFLICT WITH THE HAUDENOSAUNEE - 1648-1701

472. In the period 1648-1701, the Indigenous nations in the Great Lakes region were (sporadically, but sometimes intensely) in conflict with the Haudenosaunee.[533] In the Lake Huron and Georgian Bay area, the wars began as inter-tribal warfare between the Haudenosaunee and the Huron-Wendat.[534]

473. Several reasons for the Haudenosaunee invasion of Huronia[535] have been presented over the years. They range from economic theories of war, such as the desire to replace the Huron-Wendat as intermediaries and destroy their competitors in the growing and lucrative fur trade, to non-economic explanations such as the theory that these were traditional "mourning wars" aimed at population replacement, meaning that the goal of the wars was to get people to go and live with their conquering nation, where they would be adopted into that nation to counter population decreases from disease.[536]

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[533] Also referred to as Iroquois: Evidence of Verne Roote, Transcript vol 5, May 13, 2019, p. 487, line 25 to p. 488 line 1 -*"Haudenosaunee" is the Anishinaabe name for the Iroquois, Iroquois is the English name*.

[534] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 83-84. Note that the Huron-Wendat are also referred to as the Huron, Wendat and Wyandott.

[535] "Huronia" was the land of the Huron-Wendat, "bounded by Lake Simcoe to the east and Matchedash and Nottawasaga Bays at the southeastern corner of Georgian Bay to the west." Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 76.

[536] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 101-102; Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5308, line 15 to p. 5309, line 24.

474. SON, who were allied with the Huron-Wendat, have an oral tradition of being called on to assist the Huron-Wendat fight off the Haudenosaunee.[537] The relationship SON had with the Huron-Wendat and the assistance SON provided to this allied nation is a demonstration of the Indigenous custom around control of territory. It is an example of how, although the boundaries of nations were recognized, allied groups could call on each other for assistance in times of need.[538]

Timeline of the Conflict

475. The conflict can be broken down roughly into four time periods:

(a) 1648 to 1652, being the dispersal period. During this time, the Haudenosaunee did manage to disperse the Huron-Wendat and the Tionontaté (Petun). Precisely what happened to the Anishinaabe (Odawa) villages in SONTL is not entirely clear. Although it is generally accepted that the Anishinaabe in southern and central Ontario were displaced, this displacement may not have been total, particularly in the case of the Anishinaabe (Odawa) of SONTL.[539]

(b) 1652 to the late 1660s, the post-dispersal period. This period was characterized by intermittent periods of hostilities and precarious peace throughout the Great Lakes region.[540] Some of the nations that had migrated during the dispersal began to return

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[537] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p.445, line 6 to p. 446, line 2 and p. 486, line 16 to p.489, line 4.
[538] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 445, line 13 to p. 446, line 9.
[539] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 84-85 and 87-90; Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11414, lines 13-24; See also: Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA. 500 BC-1860 AD" (as revised 2019), Exhibit 4576, pp. 95-97.
[540] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 84.

to Lake Huron during this period.[541] Haudenosaunee attacks (and fear of such attacks) continued, and were met with force.[542]

(c) The late 1660s to 1687, the return to Lake Huron continued, with the displaced Anishinaabe going to Manitoulin Island, and the Huron-Wendat going to Michilimackinac. The Anishinaabe (Odawa) also resumed seasonal use of SONTL by at least the late 1660s.[543] The Haudenosaunee established a series of settlements along trade routes on the north shore of Lake Ontario, allowing the Haudenosaunee to control the fur trade in this area in times of peace.[544] The Haudenosaunee continued attacks, which led to retaliatory attacks from the allied Great Lakes nations.[545] Sometime during this period, the allied Great Lakes nations shifted from a defensive to an offensive strategy.[546] This period ended with a massive attack on

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[541] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 93,103-105; Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA. 500 BC-1860 AD" (as revised 2019), Exhibit 4576, pp. 106-108.

[542] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 105-108.

[543] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 94-97; Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA. 500 BC-1860 AD" (as revised 2019), Exhibit 4576, pp. 108-110; Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5338, lines 5-12.

[544] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 97-98; Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA. 500 BC-1860 AD" (as revised 2019), Exhibit 4576, p. 116.

[545] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 108-111.

[546] Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA. 500 BC-1860 AD" (as revised 2019), Exhibit 4576, p. 125.

the Haudenosaunee at Niagara, orchestrated by the French and the allied Great Lakes nations, including the Anishinaabe and Huron-Wendat.[547]

(d) 1687 to 1701, the Haudenosaunee, weakened from war, disease and famine, began to leave their villages on the north shore of Lake Ontario. The northern and western Anishinaabe started to attack the Haudenosaunee and hunt in territory the Haudenosaunee had considered their own. Tensions continued to be quite high and culminated in a series of intense battles between the Anishinaabe and the Haudenosaunee where the Anishinaabe were overwhelmingly successful.[548] Peace was reached in 1701 in Montreal.[549]

476. By the turn of the 18th century, the Anishinaabe had driven the Haudenosaunee back to the Haudenosaunee homeland south of Lake Ontario, and had re-occupied what is now southern Ontario. [550] There is substantial evidence supporting this.

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[547] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 111-112.
[548] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 112-113; See also: Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA. 500 BC-1860 AD" (as revised 2019), Exhibit 4576, pp. 118,136-137.
[549] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 125-126; See also: Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA. 500 BC-1860 AD" (as revised 2019), Exhibit 4576, p. 119.
[550] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 113-124,130; Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 80-81; Rule 36 evidence of Frank Shawbedeese, December 4, 2002, Cross Examination, p. 19, line 77 to p. 20 line 84 - "*We beat the hell out of them."*; Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 487, line 21 to p. 490, line 6; Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 250, line 11 to p. 252, line 18.

477. As Dr. Williamson stated:

> Tensions between the Anishinaabeg and the Iroquois culminated into a series of fierce battles between the two groups that form part of the oral tradition of different Anishinaabeg nations throughout the Great Lakes Region. As Leroy V. Eid (Eid 1979:299) explains, "[t]hese traditional accounts all tell the same story: the Ojibwa and their allies around the turn of the 17th [*sic*] century utterly crushed the Iroquois of the Five Nations".[551]

478. Oral history evidence discussed in Dr. Williamson's report describes battles taking place in SONTL, where the Anishinaabe (Odawa) were successful in forcing the Haudenosaunee out of their territory.[552] One battle, at Saugeen River, was described as follows:

> "[Haudenosaunee] tried to move into the Ojibway territory and that's where the fight started, around the Saugeen River. They tried to move in on the Ojibway, tried to take over the land, something like that. Our people fought back and chased them right out of the country. There was a lot of people killed at that time. That's all I can remember. The Ojibway were victorious."[553]

479. There is also oral history evidence respecting the wars more generally and battles that occurred outside SONTL, as well as depictions of the Anishinaabe victory in material culture.[554]

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[551] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 113.

[552] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 115-121l; Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA. 500 BC-1860 AD" (as revised 2019), Exhibit 4576, pp. 131-135, 273.

[553] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 118 - *quoting Interview of Elgin Mandawoub: Experience '81 Project, 1981.*

[554] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 121-125; Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA. 500 BC-1860 AD" (as revised 2019), Exhibit 4576, pp. 125-131.

In her analysis of the oral histories, as well as written record on this time period, Dr. Reimer concluded that:

> [t]aken together, these oral traditions tell of a massive offensive by Ojibwa, Ottawa, Mississauga and Huron allies to drive the Iroquois out of southern Ontario, often referred to as the 'Ojibway-Iroquois war'… I agree with the general consensus that these oral traditions provide a compelling and methodologically valid explanation for how southern Ontario came to be inhabited by Ojibway peoples by the early 1700s.[555]

480. Some of the key battles by which the Anishinaabe drove out the Haudenosaunee took place in or near SONTL, such as at the mouth of the Saugeen River, at Red Bay, and at the Blue Mountains.[556]

481. The Court heard oral histories from SON community members respecting this period of conflict, and these battles on SONTL.

(a) Verne Roote described SON's role in the wars, and SON coming to the aid of the Huron-Wendat. He gave evidence about a battle with the Haudenosaunee, one at Red Bay, where "legend goes that the water ran red because of the blood", and another at the mouth of Saugeen River.[557]

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[555] Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA. 500 BC-1860 AD" (as revised 2019), Exhibit 4576, p. 272.
[556] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 113-120,130; Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 80-81; Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 487, line 21 to p. 490, line 6; Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 250, line 11 to p. 252, line 18; Rule 36 evidence of Frank Shawbedeese, December 4, 2002, Cross Examination, p. 19, line 77 to p. 20 line 84.
[557] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 487, line 21 to p. 490, line 6.

(b) Karl Keeshig testified about the Haudenosaunee forcing SON out of SONTL, and SON returning to battle the Haudenosaunee and take their "homeland back". He described the battle at Red Bay, and at Skull Mountain, where SON and their allies were ultimately victorious.[558]

(c) In his Rule 36 evidence, Frank Shawbedees testified that in the Iroquois wars, "[w]e beat the hell out of them." He also testified about the Battle of Skull Mound, which took place in the river flats of Saugeen.[559]

482. Dr. Reimer also gave evidence that the Ojibway (Anishinaabe) bands from the Peninsula drove out the Haudenosaunee in the late 1690s.[560]

483. Based on the above, SON submits that SON participated in the conflict with the Haudenosaunee, and successfully drove the Haudenosaunee out of SONTL in the late 1690s.

SONTL was SON's territory before the Conflict

484. As is clear from the above timeline, 1648 to 1701 was not a period of constant fighting, nor did the displacement of Indigenous nations last from the beginning of the fighting until 1701. The Anishinaabe had begun trading with the Haudenosaunee who had established villages on the north shore of Lake Ontario in the 1660s. This illustrates that the Anishinaabe were present in southern Ontario by this time. To the extent that there may have been a displacement of the

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[558] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 249, line 5 to p. 252, line 9.
[559] Rule 36 evidence of Frank Shawbedees, December 4, 2002, Cross Examination, Exhibit 3948, p. 19, line 23 to p. 20, line 20.
[560] Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA. 500 BC-1860 AD" (as revised 2019), Exhibit 4576, p. 179.

Anishinaabe (Odawa) in SONTL, it was temporary, and the Anishinaabe (Odawa) recommenced some use of the territory in less than one generation.[561]

485. There is substantial evidence that the people who returned to SONTL were the same people who were there prior to the dispersal.

(a) The evidence of Verne Roote that SON came to the aid of the Huron-Wendat in the conflict with the Haudenosaunee suggests that SON was on SONTL prior to the dispersal.[562]

(b) Karl Keeshig testified about SON being forced out of SONTL by the Haudenosaunee, and then returning to force them out of the territory.[563]

(c) Prof. Driben's evidence was that the Anishinaabe would return to the same location because "it is a predictable place, it's predictable in terms of – especially in terms of food resources. It's predictable in terms of sacred sites, it's predictable in terms of just general familiarity with the area, the routes to travel, when to go, how to go… so the most effective way is to go back to where you came from, besides which you have a emotional tie to it, it's your place."[564] He also explained that if they were to go elsewhere, it would create difficulty and perhaps conflict with whatever group was already there.[565]

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[561] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 91-100.
[562] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 487, line 18 to p. 488, line 6.
[563] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 249, line 5 to p. 252, line 9.
[564] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6821, line 9 to p. 6822, line 13.
[565] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6822, line 14 to p. 6823, line 3.

(d) Dr. Reimer noted in her evidence that "within a twenty year period, the Ojibway, Ottawa and Petun/Huron all returned at or near their starting points on Lake Huron."[566]

(e) Dr. Williamson explained that the return to the same ceremonial sites, such as the Nochemowenaing site, suggests a familiarity with the site and its purpose. The analysis of the beads and other components found on one site in particular, *Ne'bwaakaah giizwed ziibi* (River Mouth Speaks), demonstrate that the use of this site resumed within one generation following the dispersal.

See paras 448-461 (*Archaeology*)

(f) The spiritual and emotional connection that Anishinaabe, and specifically SON, have to burial sites also supports the conclusion that they would have returned. As explained above, the living continue to have obligations to the dead, and are obliged to protect burial sites. The strength of the connection Anishinaabe have to burial sites, and the ongoing obligations they have, make it highly likely that they would have returned to their original territory – where these burials sites, including Nochemowenaing, were – following the dispersal.

See paras 234-242 (*importance of burials*)
See paras 449-450 (*Nochemowenaing*)

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[566] Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA. 500 BC-1860 AD" (as revised 2019), Exhibit 4576, pp. 97-98.

(g) The linguistic evidence indicates that SON speaks dialects of Anishinaabemowin that are closest to Odawa, suggesting that they are linked to the Odawa who were present on SONTL prior to the conflict with the Haudenosaunee.

See paras 197-202 (*The Anishinaabemowin Language*)

(h) As noted above, there is continuity of some Dodemic identities, such as otter and bear, which were recorded in or near SONTL in the early 17th century and are still present today.

See paras 243-272 (*explanation of Dodem identity*)

See paras 97-98, and 471 (*Dodemic continuity – the reference to otter and bear as present Dodems at SON*)

486. SON submits that they occupied SONTL before the conflict with the Haudenosaunee, and, if SON was displaced at all, returned to SONTL within one generation (or 20 years).

487. The wars with the Haudenosaunee and SON's role in ultimately driving the Haudenosaunee out of SONTL demonstrate SON's intent and capacity to exclude others and control its territory.

The End of the Conflict

488. In the summer of 1701, more than 1000 people from over 30 Indigenous nations gathered at Montreal to ratify a peace treaty that ended the Haudenosaunee wars with the Anishinaabe and the French ("The Great Peace of Montreal" or "The Great Peace of 1701"). As

part of the peace that was established, the Anishinaabe and the Haudenosaunee granted each other reciprocal permission to hunt in each other's territories ("The Dish with One Spoon").[567]

489. From 1701 until 1763 there was no disturbance of the Anishinaabe's occupation, control or use of southern Ontario, including SONTL.[568].

SON seeks the following finding of fact in respect of Chapter 15 - The Conflict with the Haudenosaunee (1648-1701):

(a) SON participated in the conflict with the Haudenosaunee, and successfully drove the Haudenosaunee out of SONTL in the late 1690s.

(b) SON occupied SONTL before the conflict with the Haudenosaunee and, if SON was displaced at all, SON returned to SONTL within one generation (or 20 years).

(c) From 1701 to 1763, there was no disturbance of the Anishinaabe's occupation, control or use of southern Ontario, including SONTL.

16. BRITISH-ANISHINAABE RELATIONS IN THE MID-18TH CENTURY

490. In the mid-18th century, the British predominantly treated Indigenous nations as allies (or enemies), not as subjects, and repeatedly learned the importance of maintaining positive

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[567] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 125-128; Prof. Michel Morin, "Alliances, Peace Treaties and Aboriginal Territories in the Great Lakes Area During the French Regime (1603-1760)" (2017), Exhibit 4929, p. 26.

[568] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 130-137.

diplomatic relations with Indigenous nations, first in the Seven Years War, then again in Pondiac's War.

491. During the mid-18th century, the military power of Indigenous nations was substantial. For example, the shift of Indigenous alliances from the French to the British was a key factor in determining the result of the Seven Years War in North America.[569]

> *R v Sioui*, [1990] 1 SCR 1025 at pages 1052-1055 and 1070, Plaintiffs' Book of Authorities, Tab 85.

492. When the British alienated their Indigenous allies at the commencement of the Seven Years War,[570] it led to military losses. The British defeat at the battle of Monongahela in 1755, in part due to the devastating effect to which the French forces employed their Indigenous allies, prompted a reconsideration of British relations with Indigenous nations.[571] In subsequent years, Britain actively sought to win back the allegiance of its former Indigenous allies, and in 1756 appointed, for the first time, Superintendents of Indian Affairs for the Northern and Southern Colonies to achieve that goal. William Johnson, who had a close relationship with the Mohawks and the Iroquois Confederacy, was appointed to the northern post. Prof. Eric Hinderaker testified that he was "probably the single most experienced and knowledgeable person in Indian relations that the Crown was aware of in the North America".[572]

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[569] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 1-14, 37.
[570] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1576, lines 9-18; Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 7-8.
[571] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1578, line 18 to p. 1579, line 19.
[572] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1570, line 15, to p. 1571, line 2 and p. 1580, lines 10-17; Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 7-8.

493. The authority of these Superintendents superseded that of Britain's individual colonies: they answered to the Crown and the Board of Trade, the Secretaries of State, and, in the colonies, the commander-in-chief of British forces in North America. Johnson was given the military rank of colonel and received instructions from the King himself. All of this demonstrates the importance of Indigenous alliances to Britain at this time: the Imperial government believed these alliances were critical to British interests and fortunes in North America, so much so that responsibility for these alliances had risen to the highest levels of the British government.[573]

494. As the allegiance of Indigenous nations shifted, so did the tide of the war.[574] While Britain regained the confidence of its Indigenous allies, the French began to lose allies, due in part to scarce trade goods and in part to attempts to command Indigenous troops rather than treat them as allies. By 1757, most of the Great Lakes Indigenous nations had shifted from being French allies to a position of neutrality.[575]

495. Around this time, the British also sought to make alliances with the Anishinaabe. In the summer of 1759, George Croghan, William Johnson's deputy, held a series of conferences, meeting with many Indigenous nations including representatives of the Odawa and the Ojibway.

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[573] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1579, line 22 to p. 1580, line 7; p. 1581, lines 15-21 and p. 1585, lines 3-25; Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, p. 9; Letter from Secretary Fox to Sir William Johnson, March 13, 1756, Exhibit 463.
[574] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1587, line 6 to p. 1589, line 10.
[575] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 9-10; Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1575, lines 9-23 and p. 1577, lines 6-13.

He referred to them as "Brethren" and initiated a formal procedure to bury the hatchet and make peace, promising to "brighten & Strengthen the Chain of Friendship" between them.[576]

496. The following year, he and Major Robert Rogers travelled from Fort Pitt to Presque Isle and Detroit. They held a conference with representatives of the Wyandot, Odawa, and Potawatomi Nations, offering them an alliance, free trade, and royal protection.[577]

497. The Seven Years War in North America ended with the Articles of Capitulation, which were signed in 1760 after the fall of Montreal. After 1760, British troops and traders moved into the Upper Great Lakes, taking control of several French forts including Detroit. The Seven Years War officially ended three years later in 1763 with the Treaty of Paris.[578]

498. SON, Canada and Ontario all accept that the Treaty of Paris constitutes the assertion of British sovereignty over SONTL.[579]

499. That said, the Indigenous nations were not made aware of this assertion of sovereignty, and certainly did not accept or acknowledge the British assertion of sovereignty. This is brought into sharp focus by an attempt by Colonel Bradstreet to make a treaty at Detroit in 1764 which employed concepts of the Indigenous parties being "children" or "subjects". This attempt brought

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[576] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, p. 10; George Croghan's Journal, April 3, 1759 to April (30), 1763, Exhibit 472, pp. 336-358.
[577] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 10-11; George Crohan's Journal April 3, 1759 to April (30), 1763, Exhibit 472, p. 377; "Proceedings of an Indian Conference," December 3-5, 1760, Exhibit 485, pp. 205-206; Evidence of Prof. Eric Hinderaker, Transcript vol 20, June 11, 2019, p. 1795, lines 12-14.
[578] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1568, line 13 to p. 1569, line 4 and p. 1590, lines 7-11; Articles of Capitulation of Montreal, 1760, Exhibit 479; Agreed Statement of Fact Regarding Basic Timeline of Events, Exhibit 3925, p. 2.
[579] Agreed Statement of Fact Regarding Basic Timeline of Events, Exhibit 3925, p. 2.

an immediate and unconditional condemnation from Indian Superintendent William Johnson,[580] in which he acknowledged:

> [N]one of the Six Nations, Western Indians &ca. ever declared themselves to be Subjects, or will ever consider themselves in that light whilst they have any Men, or an open Country to retire to, the very Idea of Subjection would fill them with horror.— … [I]t is necessary to observe that no Nation of Indians have any word which can express, or convey the Idea of Subjection, they often say, "we acknowledge the great King to be our Father, we hold him fast by the hand, and we shall do wt. he desires" many such like words of course, for which our People too readily adopt & insert a Word verry [sic] different in signification, and never intended by the Indians without explaining to them what is meant by Subjection.[581]

First Nations' Position on Territorial Ownership

500. As the British began to occupy the formerly French forts following the capitulation of Montreal, the Great Lakes Indigenous nations made their positions on territorial ownership clear.

501. The historical records indicate that the first British person to reach Michilimackinac was Alexander Henry in 1761. On his journey, he was repeatedly told that "the Indians, at Michilimackinac, would not fail to kill [him]…"[582] He was so fearful at the time that he disguised himself as (French) "Canadian" so as to not be recognized as British and made the voyage to Michilimackinac lying about his identity and without being noticed.[583] When he arrived at Michilimackinac, and it was discovered he was British, Chief Minweweh of the Ojibwas of

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[580] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 28, 40-41.
[581] Sir William Johnson to Thomas Gage, October 31, 1764, Exhibit 653, p. 395.
[582] Alexander Henry (The Elder), Travels and Adventures in Canada, Exhibit 476, pp. 33, 34.
[583] Alexander Henry (The Elder), Travels and Adventures in Canada, Exhibit 476, pp. 34, 35, 37.

Mackinac Island declared the Anishinaabe understanding of territorial ownership and control (including over water spaces):

> Englishman, although you have conquered the French, you have not yet conquered us! We are not your slaves. These lakes, these woods and mountains, were left to us by our ancestors. They are our inheritance: and we will part with them to none. Your nation supposes that we, like the white people, cannot live without bread - and pork - and beef! But, you ought to know, that He, the Great Spirit and Master of Life, has provided food for us, in these spacious lakes, and on these woody mountains.[584]

502. In response, Alexander Henry gave a speech, complimenting his hosts' good characters and stating that he "had come to furnish them with necessaries, and that their good treatment of [him] would be an encouragement to others". He then provided them with a present, and agreed to give them a small cask of rum at his departure.[585]

503. In the same time period, Chief Pondiac or his messengers gave a similar message to Major Robert Rogers, who was on his way with his troops to enter lands where the French had previously been. Pondiac insisted that Rogers required his permission to enter the territory.[586] Rogers then stopped his troops, and explained to Pondiac that "it was not with any design against the Indians that I came, but to remove the French out of his country… I at the same time delivered

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[584] Alexander Henry (The Elder), Travels and Adventures in Canada, Exhibit 476, p. 44; Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 65-67, 90.
[585] Alexander Henry (The Elder), Travels and Adventures in Canada, Exhibit 476, p. 46.
[586] Robert Rogers, A Concise Account of North America, Exhibit 656, pp. 240-241; Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 60-61.

him several friendly messages, or belts of wampum…". Rogers and his troops waited over night to get permission from Pondiac before they proceeded.[587]

See paras 351-354 and 362-373 (*use of territory by Europeans*)

504. The presentation of wampum belts is significant because, as Prof. Hinderaker testified,

> The use of wampum belts in covenant chain diplomacy, and diplomacy more generally among First Nations in the northeast, was a way of solemnizing diplomatic agreements, a way of confirming and remembering the commitments that were being made.[588]

505. Prof. Driben highlighted that wampum was important in native diplomacy partly because it provided a common medium of exchange, and an effective method of communication "between tribesmen of colonial America."[589]

506. SON submits that the exchange of wampum belts is an indicator that a binding agreement has been made according to Indigenous, including Anishinaabe, protocols.

The Treaty of Detroit (1761)

507. By 1761, the British had been trying to establish appropriate relations with the Indigenous nations in the Great Lakes for several years. In September 1761, Sir William Johnson convened a meeting of Indigenous nations, with approximately 500 participants, (including

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[587] Robert Rogers, A Concise Account of North America, Exhibit 656, pp. 240-241; Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 60-61.
[588] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1599, lines 12-19.
[589] Prof Paul Driben, "An Anthropological Report on Selected Aspects of the Cultural Lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 61, footnote 105, citing Wilbur R. Jacobs, "Wampum, the Protocol of Indian Diplomacy" (The William and Mary Quarterly, third series, volume 6, number 4, 1949), p. 596.

Odawa, Ojibwa and Pottawatomi) at Detroit, in which the British promised an alliance, free and fair trade, and protection of lands.[590] He specifically assured the Indigenous nations that:

> it is not at present, neither hath it been his Majestys intentions to deprive any Nation of Indians of their Just property by taking possess[io]n of any Lands to which they have a lawfull Claim, farther than for the better promoting of an extensive Commerce.[591]

508. The Indigenous nations ultimately entered into a treaty at Detroit (the Treaty of Detroit), which set the terms for Britain's occupation of the formerly French forts and provided for trade on fair terms between Britain and the Indigenous nations.[592] Johnson made a regulation for trade at the posts with fixed prices, and presented a belt "in order to satisfy [the Indigenous Nations] on the subject of trade."[593] He specifically assured the Indigenous nations that "his Majesty will promote to the utmost an extensive plentifull commerce on the most Equitable terms" and that the First Nations could "entitle themselves thereto" by entering into the alliance. He then presented a belt of 15 rows.[594]

509. The procedure followed in making the Treaty of Detroit is set out below:

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[590] Proceedings of a Treaty Held at Detroit, September 9, 1761, Papers of Sir William Johnson, Exhibit 491, pp. 478, 492, Plaintiffs' Book of Authorities, Tab 139; Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 10-14; Prof. Alain Beaulieu, "The Congress at Niagara in 1764" (2016), Exhibit 4381, pp. 17-25; Evidence of Prof. Beaulieu, Transcript vol 61, November 19, 2019, p. 7927, line 15 to 7929, line 3.

[591] Proceedings of a Treaty Held at Detroit, September 9, 1761, Papers of Sir William Johnson, Exhibit 491, p. 478, Plaintiffs' Book of Authorities, Tab 139.

[592] Proceedings of a Treaty Held at Detroit, September 9, 1761, Papers of Sir William Johnson, Exhibit 491, pp. 485,498, Plaintiffs' Book of Authorities, Tab 139.

[593] Proceedings of a Treaty Held at Detroit, September 9, 1761, Papers of Sir William Johnson, Exhibit 491, p. 498, Plaintiffs' Book of Authorities, Tab 139.

[594] Proceedings of a Treaty Held at Detroit, September 9, 1761, Papers of Sir William Johnson, Exhibit 491, p. 478, Plaintiffs' Book of Authorities, Tab 139.

(a) Johnson and the Indigenous nations smoked a pipe at the beginning;[595]

(b) The Indigenous nations authorized representatives to speak for them;[596]

(c) The Indigenous nations and Johnson made speeches to one another;[597]

(d) Wampum belts were presented;[598]

(e) The Indigenous nations and Johnson addressed each other as Brethren;[599] and

(f) Sometimes the Indigenous speakers asked for time before they gave a response to one of Johnson's speeches to consult with the people on whose behalf they were authorized to speak.[600]

510. Canada's witness Prof. Beaulieu gave evidence that in his opinion the British occupied the formerly French forts in the Great Lakes without the permission of the Indigenous nations, and imposed their continued occupation on the nations as a term of the Treaty of Detroit.[601] Ultimately, though, he conceded in cross examination that:

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[595] Evidence of Prof. Alain Beaulieu, Transcript vol 62, November 20, 2019, p. 7961, line 24 to p. 7962, line 2.
[596] Evidence of Prof. Alain Beaulieu, Transcript vol 62, November 20, 2019, p. 7962, lines 3-5.
[597] Evidence of Prof. Alain Beaulieu, Transcript vol 62, November 20, 2019, p. 7962, lines 6-8.
[598] Evidence of Prof. Alain Beaulieu, Transcript vol 62, November 20, 2019, p. 7962, lines 9-10.
[599] Evidence of Prof. Alain Beaulieu, Transcript vol 62, November 20, 2019, p. 7962, lines 11-13.
[600] Evidence of Prof. Alain Beaulieu, Transcript vol 62, November 20, 2019, p. 7962, line 14 to p. 7963 line 7. This is consistent with Prof. Driben's testimony respecting the phases for Ansihinaabe treaty-making process and coming to a consensus for entering into treaties: See Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p. 6982, line 1 to p. 6985, line 12 and p. 6987, line 18 to p. 6993, line 21.
[601] Prof Alain Beaulieu, "The Congress at Niagara in 1764: The Historical Context and Meaning of the British-Aboriginal Negotiations" (2016), Exhibit 4381, p. 26.

(a) Johnson used language of clemency at Detroit;[602]

(b) It would have been open to the Indigenous nations if they were not happy with the British occupation of the forts to go to war, and this is ultimately what they did in Pondiac's War; and

(c) Although part of the colonial strategy, Johnson would have presented his proposition as though he was asking for authorization, and it would have been implied that if the Indigenous nations had refused, he would have accepted this refusal.[603]

511. The question of whether the British would have unilaterally occupied the forts had the Indigenous nations not agreed to allow them to do so is ultimately a hypothetical one. The British and the Indigenous nations came to an agreement. The British occupation of the forts was not imposed on the Indigenous nations, but rather was part of the treaty entered into at Detroit. There is no dispute that the Indigenous nations were happy about the outcome of the Treaty of Detroit. The Indigenous nations in attendance stated that:

> It gives us great satisfaction to hear that the King has no intentions to deprive us of our Lands (of which we were once very apprehensive) and as to the Troops who are now going to the distant posts, we are well pleased therewith, and hope they will look upon and treat us as Brethren, in which light they shall always be Esteemed by us as we are determined to live on the best terms with them .[604]

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[602] Evidence of Prof. Alain Beaulieu, Transcript vol 61, November 19, 2019, p. 7925, line 20 to p. 7926, line 14.
[603] Evidence of Prof. Alain Beaulieu, Transcript vol 61, November 19, 2019, p. 7940, line 6 to p. 7941, line 25.
[604] Proceedings of a Treaty Held at Detroit, 9 September 1761, Papers of Sir William Johnson, Exhibit 491, p. 485, Plaintiffs' Book of Authorities, Tab 139; Evidence of Prof. Alain Beaulieu, Transcript vol 61, November 19, 2019, p. 7940, line 16 to p. 7941, line 1.

512. But, the Treaty of Detroit was a new and fragile alliance: there were still fears from Britain's new Indigenous allies about the true intentions of the British.[605]

The Assertion of British Sovereignty (1760-1763)

513. The parties all agree that the date of British assertion of sovereignty is 1763.[606] At that time, the British had limited, if any presence, in SONTL:

(a) The British had no ships on Lake Huron in 1763 – they did not succeed in getting a ship onto the lake until 1764.

See paras 530 to 531

(b) They were struggling to maintain their forts in the Upper Great Lakes: they were having trouble getting adequate supplies to their forts to maintain their troops, and had very little control over the territory surrounding the forts.[607] In any event, none of these forts were in close proximity to SONUTL.[608]

Exhibit 4023 – Map of the Great Lakes posts circa 1763, Appendix D, Tab 11.

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[605] Evidence of Prof. Alain Beaulieu, Transcript vol 61, November 19, 2019, p. 7858, lines 17-21.
[606] Agreed Statement of Fact Regarding Basic Timeline of Events, Exhibit 3925, p. 2.
[607] Letter titled "Detroit September the 5th, 1762" from the Amherst papers collection at Library and Archives Canada, Exhibit 4209; Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4511, line 15 to p. 4512, line 11; p. 4522, lines 8-16; p. 4524, lines 3-17; p. 4529, lines 17-23; and pp. 4530-4531.
[608] Evidence of Prof. Eric Hinderaker, Transcript vol 19, p. 1565, lines 2-11; Map of the Great Lakes posts circa 1763, Exhibit 4023.

(c) They were significantly outnumbered by Indigenous warriors; the garrisons were in desperate conditions and couldn't hold out against a serious attack (and ultimately didn't).[609]

(d) Because their primary focus at this time was on communications and supply, they used the same routes the French had used, which kept them on the west side of Lake Huron, outside of SONUTL.[610]

See para 536 (*British military capacity*)

(e) They were relatively new to the Upper Great Lakes, including Lake Huron, and relied on assistance from Indigenous guides and French settlers to navigate.

See para 534 (*British familiarity with waterways in 1763*)
See para 622 (*British reliance of Indigenous allies post 1764*)

(f) There was no European settlement within SONTL in 1763, and this remained the case until Britain's policies shifted following the war of 1812.[611]

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[609] Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4535, line 9 to p. 4536, line 1; Beyond Pontiac's Shadow, Exhibit 4207, p. 134, Table 1.
[610] Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4480, line 11 to p. 4482, line 8.
[611] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 131; Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, p. 5; Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA. 500 BC-1860 AD" (as revised 2019), Exhibit 4576, pp. 146-147; Dr. Gwen Reimer, "Volume 3: Saugeen – Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 18; See also: Norman Robertson, "The History of the County of Bruce and of the minor municipalities therein", 1906, Exhibit 4286, p. 18 - *the earliest settlement in SONTL appears to be in 1818 by a fur trader*.

(g) The Peninsula and the rest of SONTL are not mentioned in the written record during this time period;[612] in fact, there is no evidence of the British, or any Europeans, in SONTL in 1763.[613]

514. All of these factors combined make it highly unlikely the British would have had any presence in SONTL in 1763. Although the British asserted sovereignty over SONTL in 1763, in reality they had no presence on the ground at that point: SONTL was an unknown area to the British at that time and for many decades to follow.[614]

SON seeks the following findings of fact in respect Chapter 16 - British-Anishinaabe Relations in the mid-18th century:

515. Generally:

(a) In the mid-18th century, the British treated Indigenous nations as allies or enemies, not as subjects;

(b) Indigenous nations played a key role in the outcome of the Seven Years War;

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[612] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 130; See also: T. Arthur Davidson, "A New History of the County of Grey and the Many Communities within its Boundaries and the City of Owen Sound", 1972, Exhibit 4287, p. 23 - *it was not until 1815 that the British even entered Georgian Bay*.

[613] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5344, line 2 to 9 - *specifically referring to the absence of the British*.

[614] Evidence of Dr. Gwen Reimer, Transcript vol 83, February 12, 2020, p. 10575, lines 4-14; See also: Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5344, lines 2-9.

(c) During the Seven Years War, the British, who had alienated their Indigenous allies at the beginning of the war, shifted their approach to Indigenous alliances, as the British saw them as critical to British interests and fortunes in North America;

(d) In the mid-18th century, the British sought to make alliances with the Anishinaabe, and made promises respecting free trade and royal protection in an attempt to secure these alliances; and

(e) Indigenous nations, including SON, were not made aware of the British assertion of sovereignty in 1763.

516. First Nations' position on territorial ownership:

(a) As the British began to occupy formerly French forts following the capitulation of Montreal, the Great Lakes Indigenous nations made it clear that they viewed the land and water territory of the Great Lakes as theirs, and that the British would need permission to enter and use the land and water territory;

(b) When these assertions were made, the British did not claim the territory was theirs, and sought permission to use the territory; and

(c) The exchange of wampum belts is an indicator that a binding agreement has been made according to Indigenous, including Anishinaabe, protocols.

517. The Treaty of Detroit (1761):

(a) The Treaty of Detroit set the terms for Britain's occupation of the formerly French forts and provided for trade on fair terms between Britain and the Indigenous nations; and

(b) Following the Treaty of Detroit, Britain's Indigenous allies still had fears about Britain's true intentions with respect to Britain's occupation and use of territory and relationship with the Indigenous nations.

518. The Assertion of British Sovereignty (1760-1763):

(a) In 1763, the British were not present in SONTL.

17. THE PONDIAC WAR (1763)

Causes of the War

519. In 1763, an Indigenous alliance, including the Three Fires Confederacy (of which SON was a part), under Odawa Chief Pondiac fought a war that challenged British assertions of sovereignty in the Great Lakes. There were several underlying causes of the war, including: the loss of the French as a counterweight to the British; the discontinuation of gift-giving; restrictions on trade; fear of new British settlements; and the teachings of the prophet Neolin. These are set out in more detail below.

See paras 250-254 (*explanation of Three Fires Confederacy*)

520. Indigenous nations had prospered in the 18th century by playing the French and British against each other, and the sudden loss of the French as a counterweight to British power caused Indigenous nations to worry about the impact this would have on commerce, both in terms of the availability and the cost of trade goods.[615] As Thomas Gage wrote in 1764:

> They saw us sole Masters of the Country, the Balance of Power broke, and their own Consequence at an End. Instead of being courted by two Nations, a

[615] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 12, 20.

> Profusion of Presents made by both, and two Markets to trade at, they now depend upon one Power.[616]

521. In the summer of 1761, Commander in Chief of the British forces in North America, Sir Jeffrey Amherst, discontinued gift-giving at the western posts.[617] Indigenous people considered these diplomatic "presents" to be due to them, in the nature of rent, in return for allowing the British into their territory, and for entering a trading relationship. These restrictions also were inconsistent with what had been promised earlier (e.g. at Detroit in 1761) by the British.[618] This placed enormous pressures on the influence and authority of the Chiefs among their followers, to whom they redistributed the gifts. The failure to provide gifts to the Anishinaabe in exchange for the use of their territory was considered essentially an act that called for war: the Anishinaabe would not stand for the British using their territory but not maintaining a relationship with them.[619]

> See paras 369-373 (*consequences of not following Anishinaabe customary law)*
>
> See paras 507-508 (*promises made at Treaty of Detroit*)

522. Trade restrictions were also put into place, including forcing Indigenous hunters to come to British posts to trade, rather than allowing traders to travel to their communities, as well as dramatically limiting the amount of lead and gun powder that could be traded to Indigenous peoples. These restrictions had a profound impact on the Indigenous communities who were

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[616] Thomas Gage to Halifax, January 7, 1764, Exhibit 564, pp. 10-11.
[617] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, p. 14.
[618] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, p. 18.
[619] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 18-21; Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 144-146; Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6855, line 16 to p. 6856, line 25.

recovering from years of warfare and privation.[620] The changes the British imposed left a strong sense in the region that "Britain was fundamentally changing the terms of engagement, the terms of alliance that had previously governed both French and British practices in this area."[621]

523. Further, Indigenous nations feared encroachments onto their land and that the British posts might encourage, support and defend new settlements as they had in Fort Pitt, for example.[622]

524. Finally, the Delaware prophet, Neolin, had some influence on select Indigenous groups. Neolin sought to purify Indigenous society by driving the British out of the region. Neolin preached a return to a pre-contact way of life. However, as noted by Prof. Hinderaker and acknowledged by Prof. Beaulieu, while Indigenous nations were broadly aware of Neolin's teachings, there are no examples of Indigenous nations giving up firearms.[623] His teachings were more a rhetorical motivation for Indigenous peoples to drive Europeans out of the continental interior.[624] Prof. Beaulieu also agreed that the Neolin movement alone would not have been

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[620] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 14-15, 21; Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 146.
[621] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1609, line 12 to p.1610, line 19.
[622] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 18, 21-22; Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 81-82; Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1608, line 13 to p. 1609, line 9.
[623] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1618, lines 3-22; Evidence of Prof. Alain Beaulieu, Transcript vol 61, p. 7919, line 21 to p. 7920, line 7.
[624] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 18, 22; Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 146-147; Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1619, lines 1-19; Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6857, line 17 to p. 6859, line 6.

sufficient to cause the war, but that Pondiac used it as a tool to persuade people to follow him in the uprising.[625]

525. As explained above at paragraphs 351 to 354, under Anishinaabe law, bands controlled their territory, and decided who could use and enjoy their land and water territory. Once the Great Lakes Indigenous nations decided that the British were no longer welcome in their waters, "[f]rom an Anishinaabe point of view… Pontiac was both expected and obliged to expel the British"[626] until or unless the appropriate Anishinaabe bands gave permission to the British to enter their territories.

See paras 362-368 (*custom as applied to Europeans*)

Start of the War

526. The war started on May 6, 1763, less than two months after the Treaty of Paris, with an attack on a British survey party. The British were surveying the St. Clair River to determine whether it was possible for a large vessel to sail from Lake Erie into Lake Huron, and if so to map the channel to allow that to happen.[627]

527. St. Clair River Ojibwa warriors attacked the party, killed four members of the party and took five prisoners, and prevented them from passing through the river to Lake Huron.[628]

528. There is conflicting evidence on whether or not the Ojibwe warriors were aware that the British party was a survey party. Prof. Hinderaker gave the opinion that the warriors were

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[625] Evidence of Prof. Alain Beaulieu, Transcript vol 61, p. 7919, lines 8-12 and p. 7920, line 22 to p. 7921, line 4.
[626] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 154.
[627] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1623, lines 10-16.
[628] John Rutherford's Captivity Narrative (January 1, 1763), Exhibit 514, pp. 222-224.

aware it was a survey party,[629] while Mr. Graves gave the opinion that the warriors did not know it was a survey party and were simply attacking because it was a British party.[630] Prof. Hinderaker's evidence should be preferred on this point. There were a number of issues with Mr. Graves credibility generally, and on this point specifically it should be noted that he appeared to be unfamiliar with John Rutherford, a member of the British party that was attacked, and his journal, which is the primary document providing a first hand narrative of this attack.[631]

> Relevance and Weight of the Evidence of Mr. Donald Graves, Appendix E, Tab 9.

529. It is likely that if the warriors knew the British party was a survey party, they would have understood the significance of this and that it was a threat to their territory: there are a number of examples of Indigenous forces disrupting communications lines and objecting to surveyors in the 18th and 19th centuries.[632]

530. Even if Mr. Graves' opinion that the warriors did not know it was a survey party and were simply attacking because it was a British party is accepted, this attack is still significant. It is an example of the Indigenous allies' efforts to control the access points to Lake Huron and thus defend their water territory: they prevented the British from sending a party to Lake Huron through the St. Clair river, which is ultimately the route the British used to get their first ship onto Lake

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[629] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1625, line 20 to p. 1626, line 4.
[630] Mr. Donald Graves, "Comments and Observation on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, p. 6.
[631] Evidence of Mr. Donald Graves, Transcript vol 86, p. 10934, line 4, to p. 10935 line 1; John Rutherford's Captivity Narrative (January 1, 1763), Exhibit 514, pp. 222-224.
[632] Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay, 1760s-1830s" (2016), Exhibit 4195, pp. 15-17; Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 24-25.

Huron in 1764 following the First Nations granting them permission to use the Lake at the Treaty of Niagara.[633]

See paras 603-608 (*permission granting at Niagara*)

British Military Capacity on Lake Huron in 1763

531. The Indigenous allies had great success in excluding the British forces from the Upper Great Lakes. The British were unable to get any ships onto Lake Huron or any of the Upper Great Lakes until after peace had been negotiated in Niagara in 1764.[634] After the Indigenous allies forced the British out of Michilimackinac on Lake Huron and Fort Edward Augustus on Lake Michigan, the British no longer had any military capacity on either lake until the return of peace.[635]

532. Without any ships or military bases on the Upper Great Lakes, including Lake Huron, Lake Michigan and Lake Superior, the only boats that could operate on these lakes were canoes, the largest being around 33 feet long and propelled by paddles,[636] and bateaux, described by Prof. Benn as small crafts usually about 30 feet long, propelled with oars and poles and sometimes a

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[633] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1625, lines 20-25 and p. 1626, lines 1-4; Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6863, line 13, to p. 6864, line 3; See also: Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10937, lines 2-5; p. 10933, lines 22-23; and p. 10946, lines 14-25 - *Mr. Graves acknowledged in his cross examination that the Ojibwe warriors specifically knew that this British party was coming, and that the warriors prevented the survey party from using the waterway. He also confirmed that the British did not have any ships on Lake Huron in 1763, had tried unsuccessfully in 1762, and didn't get a ship onto Lake Huron until October 1764*.

[634] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10946, lines 14-25.

[634] Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay, 1760s-1830s" (2016), Exhibit 4195, pp. 6 ,17; See also: Keith R. Widder, "Beyond Pontiac's Shadow", 2013, Exhibit 4207, p. 133; Johnson to the Lords of Trade, August 30, 1764, Exhibit 643 - *Treaty of Niagara was entered into in the summer of 1764, while the British got their first ship onto Lake Huron in October 1764*.

[635] Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay, 1760s-1830s" (2016), Exhibit 4195, p. 17.

[636] Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4442, line 15, to p. 4443, line 18 and p. 4445, line 1 to p. 4446, line 21.

sail.[637] Prof. Benn gave evidence that there weren't very many bateaux in 1763, and estimated that 95% of the boats on Upper Great Lakes in 1763 were canoes.[638] This was in part because they were the Indigenous vehicle at the time: Indigenous people knew how to make them, and they were made from materials available locally, unlike bateaux.[639]

533. Both canoes and bateaux were small vessels that needed to be brought to shore in the event of bad weather which, on Lake Huron, could come very quickly and dangerously. For that reason, both types of boats travelled close to the shore even when going long distances.[640] Canoes were lighter and easier to portage or bring ashore but could not have artillery mounted on them,[641] while bateaux were more difficult to portage and more limited in where they could be brought ashore, but could have a small swivel gun or very small caliber gun.[642] Both had far less capacity than sailing ships, which were often 50 or 60 feet in length,[643] could carry far larger cargo than bateaux or canoes, and could be armed with artillery pieces.[644] The failure of the British to get sailing ships onto the Upper Great Lakes during Pondiac's War meant they could only use canoes

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[637] Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay, 1760s-1830s" (2016), Exhibit 4195, p. 29; Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4448, line 23 to p. 4451, line 9; Document from Library and Archives Canada titled "A View of the Taking of Quebec, September 13, 1759, post-1761, Exhibit 4198.
[638] Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4447, lines 5-17.
[639] Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4447, line 18 to p. 4448, line 8.
[640] Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4457, line 14 to p. 4458, line 12.
[641] Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4446, line 22 to p. 4447, line 4; p. 4448, lines 9-17.
[642] Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4451, lines 1-9 and p. 4454, line 16 to p. 4457, line 13.
[643] Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4445, line 10 to p. 4446, line 21; p. 4453 line 6 to p. 4454 line 5; and p. 4460, line 24 to p. 4461, line 9.
[644] Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay, 1760s-1830s" (2016), Exhibit 4195, p. 29.

and bateaux in the area. This left them without boats with large weaponry, and without the capacity to move the significantly greater supplies allowed by ships at the time.

534. The British were also at a serious disadvantage when it came to knowledge of the lakes, and navigation. At the outbreak of the Seven Years' War, Lake Huron fell within the bounds of lands claimed by France, and there was almost no British travel in the area. The British did not take over French forts on the Great Lakes until after the fall of Montreal in 1760. They were not secure in their occupation of those forts until after the Treaty of Detroit in 1761, and any security of occupation was lost at the outbreak of Pondiac's War. By 1763 they had only been on the lakes for a few years, compared to the Anishinaabe who had been there for centuries if not millennia.

> See paras 440-461 (*in situ development of SON*);
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> See paras 484-487 (*the same people returned after the Haudenosaunee Wars*)

535. The British relied on assistance from Indigenous guides and French settlers to learn the area. Their knowledge of Lake Huron would have been nowhere near that of the Anishinaabe living on SONTL, and further they had much less knowledge of the east side of Lake Huron and Georgian Bay than the west side, which would have been the route used to get from Detroit to Michilimackinac.[645] Since both bateaux and canoes needed to go ashore in the case of bad weather, which was frequent on Lake Huron, this knowledge of the territory would have been crucial to operating effectively and controlling the water territory in Lake Huron and Georgian Bay.[646]

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[645] Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4480, line 11 to p. 4481, line 15.

[646] Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s" (2016), Exhibit 4195, pp. 51-53; Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4464, lines 19-25 and p. 4465, lines 10-15.

536. Further, at the outbreak of Pondiac's War, the primary focus of the British was on communications and supply, not war. Because of this, they essentially grafted onto pre-existing routes in the Upper Great Lakes rather than exploring more broadly. This meant that they stayed on the west side of Lake Huron, which would have been the route to go between Detroit and Michilimackinac, and away from SONTL.[647]

537. There is no evidence in this trial of the British being present in SONUTL during Pondiac's War or in 1763.

See paras 513-514 (*absence of British at the time*)

Defence of Water Territory

538. The British, the French and the Anishinaabe all understood the enormous strategic value of the water spaces of the Great Lakes for control of the region. Among other factors, this explains why warriors came to support Pondiac from areas far afield from French posts taken over by the British, including, for instance, from Georgian Bay (which at the time was virtually unknown to the British).[648]

539. In part because of the high value placed on water spaces, control of these spaces was a key aspect of Indigenous military strategy in Pondiac's War. The Anishinaabe controlled all the

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[647] Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4480, line 11 to p. 4482, line 8.

[648] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 154, 157; Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s" (2016), Exhibit 4195, pp. 15-16; Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 45-48, 54-55; Evidence of Prof. Eric Hinderaker, Transcript vol 20, June 11, 2019, p. 1875, line 16 to p. 1877, line 21 and p. 1879, line 1 to p. 1893, line 16.

access points to Lake Huron/Georgian Bay in 1763, and their decisions over the course of the war focussed on controlling key water passages in the Upper Great Lakes.

See paras 380-382 (*access points*)

540. The specific Indigenous military actions at Detroit focussed on maintaining control of the water passages (i.e. the St. Clair River and the Detroit River, expanding later to Lake Erie) and thus on attacking British ships.[649]

Objectives of the War

541. The Indigenous allies at the beginning of the war were united in their desire to defend their territory and maintain or create favourable trading relationship, but varied in how they thought these goals would be achieved.[650] Some sought to expel the British from the posts they attacked in the war, and prompt the French to re-enter the war with Britain and return to the Great Lakes. This would have allowed the Indigenous allies to have the French as trading partners, whom they much preferred to the British; the French had never threatened them with geographic displacement, and had sought their agreement in building posts and travelling over their territory.[651]

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[649] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 49-53; Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 151-152, 155-157; Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6860, line 22, to p. 6861, line 9; Evidence of Prof. Carl Benn, Transcript vol 42, August 21, 2019, p. 4968, lines 14-21.

[650] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 53-60.

[651] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 15, 17-18, 22; Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1609, line 12 to p.1610, line 19.

542. Others simply wished to send the British a message, so that they could establish a trading relationship with the British on terms beneficial to Indigenous people. As Prof. Hinderaker notes:

> [M]ost participating leaders and warriors recognized the importance of a robust trade to their economies; as a result, they hoped to fight long enough to make their point, and then settle a peace on something like the terms that had been promised by Croghan, Rogers, and Johnson in the years between 1759 and 1762.[652]

543. By the end of the summer, and in the fall of 1763, it became clear that the French were not going to return to the region. This realization appears to have caused the Indigenous allies initially seeking to have the French return to the Great Lakes to recalibrate their strategy. In order to ensure their continuing access to trade, the Indigenous allies realized that that would have to allow Britain to maintain a presence at the posts.[653]

544. At this point, the Indigenous allies wanted to set the terms by which the British would occupy the trading posts, and enter into the Indigenous allies' territory, rather than force them out altogether. The priority was to ensure territorial integrity and reopen trading ties with Britain so that they could once again have access to trade goods they had come to rely on.[654]

545. This is in line with the evidence given by Prof. Beaulieu, who agreed on cross examination that the Indigenous allies attacking the British meant the end of trade with the British,

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[652] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 29-30.
[653] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1610, line 20 to p.1611, line 18 and p. 1613, lines 13-18.
[654] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1611, lines 19-25 and p. 1613, lines 13-18.

and that they hoped to establish a new link with the French.[655] He also agreed that the Indigenous allies needed trade,[656] and that they had assumed that the French would come back and help them, but had to adjust their strategy when they realized they wouldn't get any help from the French.[657]

546. The evidence suggests that once it became clear that the French would not return, the goals of the Indigenous allies who initially sought to expel the British shifted to focus on creating a relationship with the British that would preserve their territorial rights but also allow for a trading relationship to resume.

547. After receiving word that the French would not be returning to the region, the Indigenous allies were united in the overarching goal of demonstrating the essential vulnerability of Britain's western posts, and impressing upon the British that they occupied these posts only with the permission of the Indigenous Nations that controlled the surrounding territory. In essence, they wished to humble the British, and send the British the message that they would only be able to continue operating in the territory with the support of Indigenous nations.[658]

Occupation of Forts

548. Pondiac and his allies laid siege to Detroit in May 1763 and sent messengers to other Indigenous nations throughout the region to encourage them to attack other British forts. Within a month, the British lost control of nine of their 12 forts, and two others, Forts Pitt and Detroit, were under prolonged siege, which lasted until the end of October 1763. The British commander at

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[655] Evidence of Prof. Alain Beaulieu, Transcript vol 61, November 19, 2019, p. 7918, lines 4-15.
[656] Evidence of Prof. Alain Beaulieu, Transcript vol 61, November 19, 2019, p. 7920, line 9 to p. 7921 line 4.
[657] Evidence of Prof. Alain Beaulieu, Transcript vol 61, November 19, 2019, p. 7917, lines 9-22.
[658] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 17, 29; Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1610, line 20 to p. 1611, line 25 and p. 1613, lines 13-18.

Detroit, Major Henry Gladwin, had been ready to abandon the Fort when Pondiac proposed peace.[659]

549. The only remaining fort, Fort Niagara, was never directly attacked, but the allied Senecas were successful in a battle with the British near the fort.[660]

550. Pondiac proposed peace at Detroit in October 1763, and Gladwin accepted. This was not an admission of defeat on the part of the Great Lakes Anishinaabe who were allied with Pondiac, but the natural end to the siege and an opportunity for them to begin negotiating terms. It was characteristic of Indigenous nations warfare that warriors would return home for the winter, as the winter was not a practical campaign season. By this point, it was clear that the French were not returning, and the objective of the war for the Great Lakes Anishinaabe was to send the British a message. Having achieved this, the need for the siege was no longer there.[661]

551. There is some dispute about the success of the Indigenous allies in the siege. Prof. Hinderaker gave evidence that the fortunes of both the Indigenous nations and the British ebbed and flowed during the course of the siege, with both parties suffering from repeated, costly attacks. He gave evidence that "there was no sense, in [his] mind, that the effort was failing later in the

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[659] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 15-16, 24-27; Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 82, 147-154; Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1631, line 18 to p. 1632, line 20 and p. 1635, lines 6-10; Major Henry Gladwin to Sir Jeffery Amherst, November 1, 1763, Exhibit 4025, pp. 98-99.

[660] Evidence of Prof. Alain Beaulieu, Transcript vol 61, November 19, 2019, p. 7914, line 16 to p. 7915, line 6.

[661] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 27-30; Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1636, line 1 to p. 1637, line 13.

summer."[662] Prof. Driben characterized it as losing the battle, but winning the war: he gave evidence that although in the long-term the Anishinaabe were successful in the war because a relationship was established with the British, in the short term the resistance collapsed because of the independence of the bands, and that when the siege of Detroit was over, the leaders of other bands decided to leave, and the movement kind of 'petered out'.[663]

552. Canada and Ontario's experts, on the other hand, characterized the end of the siege as a shift in momentum. Prof. Beaulieu gave evidence that the Indigenous alliance quickly lost momentum, and that the alliance could not sustain the siege for long periods as the warriors had to leave in the winter to hunt. He opined that the Indigenous alliance was crumbling in the fall of 1763.[664]

553. Prof. Beaulieu's evidence should not be accepted on this point. In discussing the outcome of the war, Prof. Beaulieu relied on the British reoccupation of the forts they had lost to support his idea that the Indigenous allies had lost momentum in the war and the British were regaining dominance.[665] This does not take into account, however, the fact that none of the forts were re-occupied by the British until after peace was negotiated at Niagara in 1764,[666] and thus the British were doing so with the permission of the Great Lakes Anishinaabe.

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[662] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1638, lines 5-20.
[663] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6859 line 11 to p. 6860 line 21.
[664] Prof. Alain Beaulieu, "French, British and Aboriginal Peoples in the Great Lakes Area, 1600-1774" (2015), Exhibit 4380, p. 83; Evidence of Prof. Alain Beaulieu, Transcript vol 61, November 19, 2019, p. 7864, lines 4-22.
[665] Evidence of Prof. Alain Beaulieu, Transcript vol 60, November 18, 2019, p. 7775, lines 2-16; Prof. Alain Beaulieu, "French, British and Aboriginal Peoples in the Great Lakes Area, 1600-1774" (2015), Exhibit 4380, p. 83.
[666] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10947, line 17 to 10948, line 5; Johnson to the Lords of Trade, August 30, 1764, Exhibit 644, p. 305.

> See also: Relevance and Weight of the Evidence of Prof. Alain Beaulieu, Appendix E, Tab 1.

554. Similarly, Mr. Donald Graves also gave the opinion that the momentum in the war had shifted, and that the British were about to come back and "crush" the Indigenous forces.[667] Mr. Graves cites no evidence of this supposed British ability to come back and "crush" the Indigenous forces in 1763 and 1764: the only evidence Mr. Graves cites in his report on this topic is respecting Britain's military strength in the period of peace following the Treaty of Niagara and the end of Pondiac's War on the Upper Great Lakes.[668] This entirely ignores the effect of the Treaty of Niagara and the permission the Anishinaabe granted in that Treaty to the British to enter the Upper Great Lakes. Mr. Graves evidence on this topic also should not be accepted.

> See para 576 (*Mr. Graves' evidence on this topic relating to Treaty of Niagara*)
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> See also: Relevance and Weight of the Evidence of Mr. Donald Graves, Appendix E, Tab 9.

555. Ultimately, regardless of who had momentum at the end of the siege of Detroit, it is clear that both parties to Pondiac's War realized that "their conflict was ruinous and neither wanted to maintain it."[669] By summer of 1764, the British wanted to make peace with the Great Lakes Anishinaabe.

> See paras 574-579 (*British wanted to make peace*)

556. The Indigenous allies had different goals at different times, and each Indigenous nation was ultimately independent – this is clear from the fact that Pondiac and some of the allies

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[667] Evidence of Mr. Donald Graves, Transcript vol 80, February 3, 2020, p. 10327, lines 20-25.
[668] Mr. Donald Graves, "Comments and Observation on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015), Exhibit 4553, pp. 6-17.
[669] Evidence of Prof. Eric Hinderaker, Transcript vol 21, June 12, 2019, p. 2041, line 17 to p. 2042, line 3.

continued the conflict until 1766, whereas most of the Great Lakes Anishinaabe made peace in Niagara in July 1764. This does not take away from that fact that the Anishinaabe allies were able to inflict significant damage to the British, and ultimately achieve their main goals in Pondiac's War, as discussed below at paragraphs 558 to 562.

557. In the result, as explained in detail above, Pondiac's strategy succeeded in blocking the British from entering Lake Huron for much of 1763.[670]

Outcome of the War

558. The Indigenous allies ultimately achieved their goals in Pondiac's War: they sent the British a message, showing them how difficult, if not impossible, it would be for them to maintain the forts without Indigenous support, and successfully altered the trajectory of Britain's occupation of the Great Lakes. This allowed them to set the terms by which the British would occupy the trading posts and enter into the allies' territory through the Treaty of Niagara. The war demonstrated to the British the importance of diplomatic relations with the Anishinaabe, and the high cost of failing to respect these relationships.[671]

See paras 603-609 (*terms at Niagara trade*)

559. In London, advisors to the Crown and the Board of Trade were appalled at the cost of the attacks on the forts, and the vulnerability of the forts. This caused them to take a different approach towards British presence in the Great Lakes.[672] This new approach is reflected in the

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[670] Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s" (2016), Exhibit 4195, p. 17.
[671] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1639, lines 4-22.
[672] See, for example, Egremont to Lords of Trade, May 5, 1763, Exhibit 522, p. 128 - *where Egremont talks about forts being erected with the* ***consent*** *of the Indians.*

Royal Proclamation in the fall of 1763, and the Treaty of Niagara, both of which are discussed in detail at paragraphs 567 to 610.[673]

560. This new approach to Indigenous relations is in line with Canada's evidence on this topic. In Prof Beaulieu's first report, he says:

> Pontiac's uprising had forced the British to reassess their Indian Policy and to drop the intransigent measures applied by Commander-in-Chief Jeffery Amherst in favour of more conciliatory strategies. **This could have been seen as a victory for the Aboriginal peoples**, but it was only a partial one. The uprising's military objective had, in fact, not been achieved: the Aboriginal nations had not chased the British out of the continental interior. [674] [emphasis added]

561. What Prof. Beaulieu characterizes as a 'partial victory' was in fact a complete victory for those in the Indigenous alliance who had never intended to oust the British, but simply wished to send them a message and change the terms of their relationship. For those who did initially wish to have the British leave, the necessity of allowing the British to stay became clear once they realized the French were not coming back: the result of Pondiac's War was a victory for these Indigenous nations as well.

See paras 541-547 (*objectives of the war*)

562. While Pondiac and some of his followers continued the war outside of the Great Lakes until 1766, the vast majority of the Great Lakes Anishinaabe made peace with Britain in 1764 at Niagara. This is detailed below. Most Indigenous nations were happy with the outcome of the war,

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[673] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1639, lines 5-22 and p. 1642, line 19 to p. 1645, line 7; Lords of Trade to Egremont, August 5, 1763, Exhibit 531, p. 152.
[674] Prof. Alain Beaulieu, "French, British and Aboriginal Peoples in the Great Lakes Area, 1600-1774" (2015), Exhibit 4380, p. 90.

as their objective to obtain a negotiated agreement reasserting their territorial control in the Great Lakes, and restore trade, was achieved at Niagara. A relationship was re-established with the British.[675]

See paras 574-610 (*Treaty of Niagara*)

SON and Pondiac's War

563. During Pondiac's War, with the exception of the group led by Wabbicommicot at Credit River, the Great Lakes Anishinaabe were united in their purpose to defend their territory and not allow the British to enter other than on acceptable terms. They may have pursued different strategies (including protecting some British traders from other Anishinaabe), but they had the same goals. It is therefore likely that SON participated in Pondiac's War, or at least supported it.[676]

564. More specifically, there is oral history evidence linking SON to Pondiac's War from the participation of warriors from Georgian Bay in Pondiac's War, and from the continuing memory of Pondiac in the Midewin Lodge tradition.[677] There is also documentary evidence that Anishinaabe from Georgian Bay participated in Pondiac's War.[678]

565. In the result, the Great Lakes Anishinaabe acted with a singleness of purpose in 1763 to control the terms of their relationship with the British. A key feature of the strategy of Pondiac's

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[675] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 17, 29-30; Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6859, line 24 to p. 6860, line 2.
[676] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 53-60; Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1604, lines 13-19.
[677] Evidence of Karl Keeshig, Transcript vol 3, April 30, 2019, p. 283, lines 9-25 and p. 285, lines 4-14.
[678] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 54-55; An Indian Congress – Contemporary Copy, May 26, 1764, Exhibit 591.

alliance was to exclude the British from Lake Huron/Georgian Bay until the British agreed to terms acceptable to the Anishinaabe. Pondiac was the leader of the Indigenous alliance, but the actions he and his allies took were taken on behalf of the larger alliance, and are properly attributed to the Great Lakes Anishinaabe, who were taking collective action to deal with a regional threat to their territories. As with any military alliance, the allies as a whole provided security for one another. The war demonstrated the power of this alliance, and the lengths to which its members, including SON, were willing to go to protect its land and water territory.

566. The actions of Pondiac's alliance in excluding the British from Lake Huron/Georgian Bay thus demonstrate the intent and capacity of the Lake Huron/Georgian Bay Anishinaabe groups to exclude persons who were unwelcome from their territories. SON was one of these groups and SONTL was one of these territories. This is analogous to a gated community which uses a neighbourhood watch system or hires security personnel to protect the perimeter of the community. This would demonstrate the intent and capacity of individual landowners to protect their individual land parcels. It would be inappropriate to view the defence of a perimeter to reflect collective land ownership of the particular people defending the perimeter. In this way Lake Huron/Georgian Bay was like a gated community of Anishinaabe groups, of which SON was one.

SON seeks the following findings of fact in respect of Chapter 17 - Pondiac's War (1763):

(a) The Indigenous allies excluded the British from Lake Huron in 1763.

(b) The British were not present in SONUTL during Pondiac's War or in 1763 at all.

(c) The Anishinaabe controlled all of the access point to Lake Huron/Georgian Bay in 1763.

(d) The Indigenous allies' military actions focused on maintaining control of water passages.

(e) The Indigenous allies had shared goals throughout the conflict of defending their territory and maintaining or creating favourable trading relationships.

(f) By the end of the summer of 1763, the Indigenous allies who had initially sought to expel the French shifted their goals to ensure territorial integrity and reopening trading ties with the British.

(g) The Indigenous allies were successful in achieving the goals set out above in (e) and (f) in Pondiac's War.

(h) SON participated in Pondiac's War as part of the Indigenous alliance.

(i) The Indigenous alliance during Pondiac's War acted together to provide security to all of the Great Lakes Anishinaabe, including SON, to protect and control their land and water territory.

18. THE ROYAL PROCLAMATION (1763)

567. Influenced, in part, by Pondiac's War, and the need to maintain a peaceful relationship with the Indigenous nations in North America, the Crown issued a Royal Proclamation on October 7, 1763.[679]

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[679] Evidence of Prof Alain Beaulieu, Transcript vol 60, November 18, 2019, p. 7765, line 18 to p.7766, line 20; Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 31-32.

568. The Royal Proclamation of 1763 was the British Crown's first attempt to create a policy with respect to the lands ceded by France and Spain in the Treaty of Paris 1763. As it pertained to North America, the Royal Proclamation 1763 had two broad elements. The first was to organize British colonies where French and Spanish settlements already existed; the colonies of Quebec, East Florida, and West Florida where thereby created. The second element was the protection of the lands and interests of all Indigenous nations living beyond the fall line of the Appalachian Mountains (sometimes referred to as "Indian Country").[680]

569. SONTL (including SONUTL) was included in the area reserved for Indigenous nations under the Royal Proclamation of 1763.[681] British subjects were excluded from this area: the Proclamation forbade the issue of survey warrants or land patents, forbade the purchase or possession of such reserved lands by British subjects (unless they had a special licence from the Imperial Crown), and ordered any non-Indigenous persons occupying such reserved lands to remove themselves.[682]

570. The Royal Proclamation also reserved for Indigenous persons some lands outside such "Indian Country". For example, for lands within colonies, the Royal Proclamation forbade the purchase or possession of "Indian lands" by private citizens and set out a procedure by which "Indian lands" could be purchased by the Crown. Such a purchase was to be achieved at a public

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[680] Dr. Brian Slattery, "The Land Rights of Indigenous Canadian Peoples, Thesis" (1979), Exhibit 4918, pp. 191-203, Plaintiffs' Book of Authorities, Tab 200; Jack M. Sosin, "Whitehall and the Wilderness: The Middle West in British Colonial Policy, 1760-1775" (1961), Exhibit 4072, p. 59; Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, p. 31; Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1653, line 19 to p. 1654, line 3.
[681] Agreed Statement of Fact Basic Timeline, Timeline 1763, Exhibit 3925, p. 2.
[682] *The Royal Proclamation*, 1763, No 1, Exhibit 538, Plaintiffs Book of Authorities, Tab136; Dr. Brian Slattery, "The Land Rights of Indigenous Canadian Peoples, Thesis" (1979), Exhibit 4918, pp. 208-209, and (in more detail) pp. 210-282, Plaintiffs' Book of Authorities, Tab 200.

meeting or assembly of the "Indians" to be held for that purpose by the Governor or Commander in Chief of the appropriate colony. Colonial Governors were forbidden to issue patents or survey warrants without taking these steps.[683] SONTL came into this category of lands when it was included in the Province of Quebec in 1774.[684]

571. While Prof. Beaulieu stated in his report that the Royal Proclamation made the dispossession of Indigenous nations official,[685] he clarified on cross examination that he was describing what he believed to be the British perspective of the Royal Proclamation and he was not offering any of kind of opinion on how it may have affected Indigenous land rights as a matter of law.[686] He conceded that:

> I have never said that the Royal Proclamation effectively dispossessed the Aboriginal from their land. It is a redefinition of their right to the land, the British perspective. I never tried to argue that by the Royal Proclamation the British really took the land of the Aboriginal people. They just defined in a specific way what would be their rights to this land.[687]
>
> and
>
> So I don't want to say that the Royal Proclamation effectively took the land of the Aboriginal people from them.[688]

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[683] *The Royal Proclamation*, 1763, No 1, Exhibit 538, Plaintiffs' Book if Authorities, Tab 136,
[684] A Collection Of The Acts Passed In The Parliament Of Great Britain And Of Other Public Acts Relative to Canada (1824), Exhibit 4440, p.10; Dr. Brian Slattery, "The Land Rights of Indigenous Canadian Peoples, Thesis" (1979), Exhibit 4918, pp. 208-209, and (in more detail) pp. 210-282, Plaintiffs' Book of Authorities, Tab 200; Agreed Statement of Fact Timeline, Timeline 1774, Exhibit 3925, p.2.
[685] Prof. Alain Beaulieu, "French, British and Aboriginal Peoples in the Great Lakes Area, 1600-1774" (2015), Exhibit 4380, p. 86.
[686] Evidence of Prof. Alain Beaulieu, Transcript vol 62, November 20, 2019, p. 7949, line 22 to p. 7951, line 22.
[687] Evidence of Prof. Alain Beaulieu, Transcript vol 62, November 20, 2019, p. 7957, lines 11-19.
[688] Evidence of Prof. Alain Beaulieu, Transcript vol 62, November 20, 2019, p. 7958, lines 21-24.

572. Prof. Beaulieu also acknowledged that the Royal Proclamation was in fact intended to reassure Indigenous people about their land rights and to offer reassurance about their relationship with the British[689] and that the Indigenous nations never would have accepted something that purported to make them subjects.[690] As noted and excerpted above, Sir William Johnson pointed this out when Colonel Bradstreet attempted to make a treaty at Detroit in 1764 which referred to Aboriginal parties as "children" or "subjects", stating that none would "ever declared themselves to be Subjects."[691]

See para 499 *(General British-Anishinaabe Relations in the mid 18th century)*

573. As some academics have put it, the Royal Proclamation of 1763 was a kind of "Bill of Rights" for Indigenous nations. It was a Crown document that, among other things, recognized the legitimacy of Indigenous nations' land rights, and demonstrated the importance of these rights from the British perspective.[692] As Prof. Hinderaker noted, the Royal Proclamation made a "clear commitment to protect First Nation lands from encroachment and to prevent abuses by traders in Indian country"[693].

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[689] Evidence of Prof. Alain Beaulieu, Transcript vol 62, November 20, 2019, p. 7952, lines 15-20; Prof. Alain Beaulieu, "French, British and Aboriginal Peoples in the Great Lakes Area, 1600-1774" (2015), Exhibit 4380, p. 83.
[690] Evidence of Prof. Alain Beaulieu, Transcript vol 62, November 20, 2019, p. 7956, lines 7-15.
[691] Sir William Johnson to Thomas Gage, October 31, 1764, Exhibit 653, p. 395.
[692] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 38-39.
[693] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, p. 43.

SON seeks the following findings of fact in respect of Chapter 18 - Royal Proclamation (1763):

(a) The Royal Proclamation was intended to reassure Indigenous people about their land rights and offer reassurance about their relationship with Britain.

(b) The Royal Proclamation recognized the legitimacy of Indigenous nations' land rights and demonstrated the importance of those rights from the British perspective.

(c) The Royal Proclamation excluded British subjects from SONTL.

19. THE TREATY OF NIAGARA (1764)

574. The Royal Proclamation was one way in which the British Crown attempted to restore relations with Indigenous nations, which had been damaged to the point of war. By 1764, however, the British still needed to take steps to make peace and create alliances with the Indigenous nations in the Great Lakes region. Although Pondiac's Western allies had not immediately resumed their siege of Fort Detroit after the Indigenous warriors had returned home for the winter, the British feared another uprising.[694]

575. This is supported by correspondence from Sir William Johnson to the Lords of Trade[695] discussing the Treaty of Niagara on August 30, 1764. Speaking of the need for peace by way of treaty, Johnson writes:

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[694] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 36-40.

[695] An advisory body who advised the Board of Trade and who recommended policies for overseas trade and colonial policies to the British Crown: Evidence of Dr. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1641, lines 16-21.

> The Indians all know, we cannot be a match for them in the midst of an extensive, woody Country, where, tho' we may at a large expence [*sic*] convey an army, we can not continue it there, but must leave our small Posts at the end of the Campaign, liable either to be blockaded, surprised, or taken by Treachery.[696]

576. Ontario's expert Mr. Graves claimed that the British were not afraid of attacks like those in Pondiac's War from 1763 to 1783 or from 1784 to 1812, but briefly feared such attacks in 1783 and 1784 (the latter, because Indigenous leaders were furious that Britain had betrayed their interests in the 1783 Treaty of Paris with the United States).[697] Mr. Graves' opinion that 1783-1784 was the only period after Pondiac's War when Britain was afraid of being attacked by Indigenous forces is inconsistent with the documentary record, particularly given that Pondiac's War was ongoing in the Upper Great Lakes in 1763 and 1764, and outside the Upper Great Lakes until 1766.[698] Mr. Graves also had general credibility issues including that he was argumentative and refused to agree to reasonable propositions on cross examination. His opinion on this point should be discounted.

> Relevance and Weight of the Evidence of Mr. Donald Graves, Appendix E, Tab 9.

577. In an attempt to bring peace to the region and allow for the safe reoccupation of the western posts, Sir William Johnson invited all of the Great Lakes Indigenous nations to meet at Niagara in the summer of 1764.[699] This attracted nearly 2000 participants, from various Indigenous nations throughout the Great Lakes region, and included almost all of what Johnson refers to as

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[696] Johnson to the Lords of Trade, August 30, 1764, Exhibit 643, pp. 649-650.
[697] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10958, line 22 to p. 10960, line 2.
[698] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 28-29.
[699] Prof. Alain Beaulieu, "The Congress at Niagara in 1764: The Historical Context and Meaning of the British-Aboriginal Negotiations" (2016), Exhibit 4381, pp. 42-43.

the "Western Nations", or the "Great Lakes Nations" broadly.[700] It was, according to Sir William Johnson, "the largest Number of Indians perhaps ever Assembled on any occasion."[701]

578. Johnson's stated intention was to see peace return to the region by producing a "Treaty of Offensive and Defensive Alliance", in which the British would:

> assure them A Free fair & open Trade, at the principal Posts, & a free intercourse, & passage into our Country, That we will make no Settlements or Encroachments contrary to Treaty, or without their permission. That we will bring to Justice any persons who commit Robberys or Murders on them & that we will protect & aid them against their & our Enemys, & duly observe our Engagements with them.[702]

579. Having succeeded in sending a message to the British in Pondiac's War about the need to treat them fairly and respect their land rights, the Indigenous nations arrived in Niagara to set the terms upon which the British could re-enter the territory and to ensure the return of plentiful trade.[703]

The Treaty of Niagara is a Binding Treaty

580. Sir William Johnson had intended to identify and punish those nations who had participated in Pontiac's War. He was successful in identifying a group of Senecas and Wyandots

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[700] Sir W. Johnson to C. Colden, August 23, 1764, Exhibit 641, p. 511; Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1654, line 16 to p. 1655, line 5.
[701] Sir W. Johnson to C. Colden, August 23, 1764, Exhibit 641, p. 514; Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, p. 33; Prof. Eric Hinderaker, "Supplement: The Saugeen Ojibway Nation and the Niagara Treaty of 1764, With Background on British-Aboriginal Treaty Making", Exhibit 4019, pp. 1-3.
[702] Sir W. Johnson to Thomas Gage, February 19, 1764, Papers of Sir William Johnson, Exhibit 572, p. 332.
[703] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, p. 17.

who had participated in the war and imposed severe reprimands on both nations as a condition of renewing the alliance.[704] Seeing this, all other nations present professed that they had not participated in the uprising. Sir William Johnson knew this must have been false but being unable to convince any of the remaining nations to admit their part in Pondiac's War or point to those who had participated, he decided to have the agreement with the remaining nations focus on a renewal and strengthening of the "Covenant Chain".[705] The Covenant Chain was a set of diplomatic practices that developed initially between the Haudenosaunee and the British that was the basis for their alliance, which was ultimately expanded to include other Indigenous nations.[706]

581. That a binding treaty was concluded at Niagara with the Western Nations is not a matter of serious academic debate. It is well accepted by almost all scholars.[707] Canada's witness, Prof Beaulieu, is an outlier in this regard. Prof Beaulieu's evidence on this should not be accepted: even using his own metric, the Treaty of Niagara should be considered a treaty. During his examination, Prof. Beaulieu repeatedly insisted that to understand what had happened at Niagara with the Western Nations, the Court must look to what Johnson said to his superiors following

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[704] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, p. 33.
[705] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 33-36; Prof. Eric Hinderaker, "Supplement Two: A response to Prof. Alain Beaulieu, 'The Congress at Niagara in 1764: The Historical Context and Meaning of the British-Aboriginal Negotiations", Exhibit 4020, pp. 6-9; Sir W. Johnson to T. Gage, 1 September, 1764, Exhibit 645, p. 518-519; Johnson to the Lords of Trade, 30 August 1764, Exhibit 643, p. 648.
[706] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1574, lines 10-23.
[707] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1653, lines 19-24.

Niagara.[708] After Niagara in a letter to the Lords of Trade,[709] Johnson referred to what happened at Niagara with Western Nations as a treaty.[710]

> See also: Relevance and Weight of the Evidence of Prof. Alain Beaulieu, Appendix E, Tab 1.

582. In any event, the fact that a treaty was concluded at Niagara with the Western Nations is supported by the following facts:

(a) Both the Crown and the Western Nations were represented by parties with the capacity to bind them into a treaty relationship, and both the Crown (via Sir William Johnson) and the Western Nations intended to enter into binding obligations with one another at Niagara;

(b) The protocol followed at Niagara is the appropriate protocol for the establishment of a treaty, and was characterized by a measure of solemnity;

(c) The renewal of an alliance is a treaty;

(d) Some nations were present at Niagara that were not present in Detroit, and thus were entering the alliance for the first time;

(e) Johnson was aware that some of the Western Nations participated in Pondiac's War; and

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[708] Evidence of Prof Alain Beaulieu, Transcript vol 62, p. 7975, lines 1-3; p. 7977 lines 6-23; p. 7989 lines 14-17; p. 7992 lines 1-8; p. 7995 line 23 to 7996 line 1; p. 8001, lines 15-20; p. 8024, line 21 to p. 8025 line 5; and p. 8027, lines 2-25.

[709] The Lords of Trade were an advisory body who advised the Board of Trade and who recommended policies for overseas trade and colonial policies to the Crown. See Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1641, lines 16 to 21.

[710] Letter from William Johnson to the Lords of Trade, October 30, 1764, Exhibit 652, p. 674.

(f) Johnson and the Western Nations did in fact make binding commitments to one another at Niagara. All of Johnson's desired treaty terms were met in the treaty with the Western Nations.

583. These facts are explored in detail below.

(A) PARTIES WITH CAPACITY AND INTENT TO BIND

584. Sir William Johnson continued to hold the position of Superintendent for Northern Indians in 1764,[711] and his intentions with respect to entering into treaties at Niagara had the approval of Major General Thomas Gage, the British Commander-in-Chief for North America who had replaced Amherst in November of 1763.[712] Further, Johnson was known to the Anishinaabe as someone with the authority to treat with them, having been the representative for the British present at the Treaty of Detroit.

See paras 492-493 (*Sir William Johnson's position*)

See paras 507-509 (*Johnson's involvement in the Treaty of Detroit*)

585. Sir William Johnson had, and would have been perceived by the Indigenous nations present as having, the authority to bind the Crown.

586. A spokesman from Michilimackinac declared that he spoke on behalf of all the Western Nations, and, having listened to Sir William Johnson's offer of alliance the previous day, the

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[711] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1580, line 8 to p. 1581, line 6.

[712] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 32-33; Sir W. Johnson to T. Gage, February 19, 1974, Exhibit 572.

Nations accepted the offer.[713] He spoke in front of a great number of the Western Nations, and, as discussed below, the proceedings adhered to Anishinaabe treaty-making protocols. As such, the Western Nations present at Niagara had the authority to bind their membership into a treaty with the British Crown.

(B) APPROPRIATE TREATY-MAKING PROTOCOLS AND SOLEMNITY

587. The negotiation process that took place at Niagara is the same process that was followed in making of the Treaty of Detroit three years prior.[714] That is:

(a) Sir William Johnson and the Nations smoked a pipe together;

(b) the Western Nations authorized people to speak for them;

(c) the Western Nations and William Johnson made speeches to one another;

(d) the parties presented wampum belts to one another;

(e) they addressed each other as Brethren; and

(f) sometimes the Indigenous speakers asked for more time before they gave a response to one of Johnson's speeches in order that they could consult with the people for whom they spoke.[715]

588. This procedure is consistent with Prof. Driben's testimony respecting the phases for Ansihinaabe treaty-making protocol: the representative of the Nation would proceed on the basis

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[713] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 35-36; The Papers of Sir W. Johnson, July-August, 1764, Exhibit 4385, pp. 311-313.
[714] Evidence of Prof. Alain Beaulieu, Transcript vol 62, November 20, 2019, p. 7963, lines 8-10.
[715] Niagara and Detroit Proceedings, July-September 1761, Exhibit 491, pp. 468-500; Evidence of Prof. Alain Beaulieu, Transcript vol 62, November 20, 2019, p. 7961, line 21 to p. 7963, line 7.

of consensus in the community. The additional time provided for Indigenous speakers to consult with their communities would have allowed those communities to follow internal procedures to come to a consensus on how to respond to Britain's proposals.[716]

589. At the end of the conference at Niagara the parties made commitments to one another, which are described in detail at paragraphs 603 to 608.

590. Sir William Johnson presented the Western Nations with a large and ornate belt with the year 1764 worked into it. He also presented the Chiefs with medals in order to commemorate the entering into a treaty. As noted above, Sir William Johnson arrived at Niagara with the intention of entering into a treaty: he had the support of Major General Thomas Gage, and had set out the terms he hoped to have reflected in the treaty in his correspondence with Gage.[717] As set out below at paragraphs 606 to 608, the treaty he entered into on Britain's behalf with the Western Nations ultimately met all of these terms. Further, Johnson had brought with him with him treaty medals and a large covenant belt to be handed out at the conclusion of the treaty and he did give these items out.[718]

(C) RENEWAL OF AN ALLIANCE IS A TREATY

591. Some Western Nations entered into the Covenant Chain with the British at Detroit in 1761. This is known as the Treaty of Detroit.[719]

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[716] Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p. 6982, line 1 to p. 6985, line 12 and p. 6987, line 18 to p. 6993, line 21.
[717] Sir W. Johnson to T. Gage, February 19, 1974, Exhibit 572, pp. 330-332.
[718] The Papers of Sir W. Johnson, July- August, 1764, Exhibit 4385, pp. 310-311.
[719] Prof. Alain Beaulieu, "The Congress at Niagara 1764: The Historical Context and Meaning of British-Aboriginal Negotiations" (2016), Exhibit 4381, p. 15.

592. Canada's expert Prof. Beaulieu has described what took place at Niagara as no more than a renewal of the Treaty of Detroit.[720] He pointed to the fact that no war reparations were charged by the British as against the Western Nations to support his position that no treaty was formed with the Western Nations at Niagara.[721]

593. Even if Prof. Beaulieu's position that Niagara was a renewal of the Treaty of Detroit is accepted, there is no reason a renewal of a peace treaty cannot constitute a treaty. This is especially true when the peace has been broken by war, as was the case here.[722]

594. Sir William Johnson appeared to acknowledge that the peace had been interrupted with the Western Nations when he told them at Niagara that Britain would "**once more** receive you into an Alliance"[723] if they agreed to requests that Britain was making of them.

595. The lack of reparation payments in the Treaty of Niagara is in line with Johnson's focus on renewing the Covenant Chain with the Western Nations. In any event, war reparations are also not necessary to make a treaty.

(D) DETROIT AND NIAGARA DID NOT INCLUDE ALL THE SAME NATIONS

596. What happened at Niagara cannot be described as a renewal of the Covenant Chain for all of the Nations present as many of the Nations had not previously been party to the peace treaty at Detroit.

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[720] Prof. Alain Beaulieu, "The Congress at Niagara 1764: The Historical Context and Meaning of British-Aboriginal Negotiations" (2016), Exhibit 4381, p. 41.
[721] Prof. A. Beaulieu, "The Congress at Niagara 1764: The Historical Context and Meaning of British-Aboriginal Negotiations" (2016), Exhibit 4381, p. 80.
[722] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1714, lines 5-7.
[723] The Papers of Sir W. Johnson, July - August, 1764, Exhibit 4385, p. 280 [emphasis added].

597. A comparison of the list of Nations present at both conferences reveals that they are not identical and, in fact, many Nations who were not present at Detroit attended to treat with Sir William Johnson at Niagara.[724] This makes sense, given that the Niagara conference represented up until that point "the largest Number of Indians perhaps ever Assembled on any occasion."[725]

598. The fact that Sir William Johnson was aware that he was treating with some Western Nations for the first time is illustrated in his report to the Lords of Trade, at the conclusion of the Treaty of Niagara. Sir William Johnson reported that with respect to the Western Nations that it had been decided that they "should be **admitted** into the Covenant Chain of Friendship."[726] He uses the language of "admitting" in his official report to the Lords of Trade, rather than "renewal" or even "receiving once more". As noted above, "admitting" into the Covenant Chain of Friendship" is what took place at Detroit in 1761 and there is no question that that constituted a treaty.[727]

(E) THE WESTERN NATIONS AT NIAGARA PARTICIPATED IN THE WAR

599. Although the Western Nations present at Niagara denied having participated in Pondiac's War, Sir William Johnson knew this was not true. In his letter to Thomas Gage, after the conclusion of the Treaty, Sir William Johnson wrote:

> I had Deputys at Niagara from all the Western Nations, except the Powtewatamis, they feared to come down and altho the Ottawas with Pondiac did

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[724] Prof. Alain Beaulieu, "The Congress at Niagara 1764: The Historical Context and Meaning of British-Aboriginal Negotiations" (2016), Exhibit 4381, p. 46; W. Johnson to C Colden, August 23, 1764, Exhibit 641, p. 511; Proceedings of a Treaty Held at Detroit, September 9, 1761, Papers of Sir William Johnson, Exhibit 491, p. 475, Plaintiffs' Book of Authorities, Tab 139.
[725] Sir W. Johnson to C. Colden, August 23, 1764, Exhibit 641, pp. 511-512.
[726] Johnson to the Lords of Trade, 30 August 1764, Exhibit 643, p. 648 [emphasis added].
[727] Prof. Alain Beaulieu, "The Congress at Niagara 1764: The Historical Context and Meaning of British-Aboriginal Negotiations" (2016), Exhibit 4381, p. 15.

> not attend, there were notwithstanding most of the Chiefs of that Nation, from different Quarters, & from Villages the most numerous of any, many whom **undoubtedly** were last year against us…[728]

600. The fact that Sir William Johnson knew many of the Western Nations had fought against the British in the war is also apparent when one looks at the terms of the Treaty of Niagara. Western Nations were asked to:

> Procure Restitution for the Trader's Losses, and to restore to them their Panis, and other Prisoners, now amongst your People.[729]

601. The Western Nations would not have prisoners amongst their people had they not participated in Pondiac's War. Additionally, it is difficult to imagine why Sir William Johnson would seek to impose, and why the Western Nations would agree, to restitution for the Traders if the Western Nations had not been participants in the war.

602. The fact that many of the Western Nations at Niagara had fought alongside Pondiac is also somewhat obvious when one considers both the fact that Pondiac's War has been described by most scholars, including Canada's own expert, Prof. Beaulieu, as a large-scale Indigenous uprising[730] and that Niagara was the largest Indigenous gathering which included almost all of the Western Nations.[731] Someone must have fought in the war. On cross examination, Prof. Beaulieu

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[728] W. Johnson to T. Gage, September 1, 1764, Exhibit 645, pp. 518-519.
[729] The Papers of Sir William Johnson, July- August, 1764, Exhibit 4385, p. 280.
[730] Prof. Alain Beaulieu, "The Congress at Niagara in 1764: The Historical Context and meaning of the British-Aboriginal Negotiations" (2016), Exhibit 4381, p. 39.
[731] Sir W. Johnson to C. Colden, August 23, 1764, Exhibit 641, p. 511; Evidence of Prof Alain Beaulieu, Transcript vol 62, November 20, 2019, p. 8002, lines 4-15.

acknowledged that William Johnson likely knew that some of the Western Nations with whom he was meeting in Niagara had fought with Pondiac in the war.[732]

(F) THE TREATY MET JOHNSON'S PROPOSED TERMS

603. Prior to heading to Niagara, Sir William Johnson had set out in a letter to Thomas Gage some of the terms he hoped to have reflected in a treaty. These included:

(a) surrender of prisoners;

(b) agreeing to an alliance with Britain;

(c) providing Britain with access to all of the (formerly) French posts;

(d) restitution for traders.

(e) an agreement not to engage with Indigenous nations that were still prepared to go to war with the British;

(f) surrender of members of their nations that had been accused of theft or murder; and

(g) renewal of the covenant chain. [733]

604. Sir William Johnson noted in his correspondence that not all of these conditions had to be imposed on all Indigenous nations. The conditions would vary depending on the degree to which each nation was involved in Pondiac's War.[734]

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[732] Evidence of Prof. Alain Beaulieu, Transcript vol 62, November 20, 2019, p. 8006, line 11 to p. 8009, line 20.
[733] Sir W. Johnson to T. Gage, February 19, 1974, Exhibit 572, pp. 330-332.
[734] Sir W. Johnson to T. Gage, February 19, 1974, Exhibit 572, pp. 332-333 and Prof. Alain Beaulieu, "The Congress at Niagara in 1764: The Historical Context and Meaning of the British-Aboriginal Negotiations" (2016), Exhibit 4381, p. 35.

605. In exchange for agreeing to the conditions noted in paragraph 603, Britain was prepared to offer the Western Nations:

(a) free and fair open trade at the principal posts;

(b) the promise that the British will make no settlement or encroachments contrary to Treaty or without their permission;

(c) to bring to justice any person who commits robbery or murder on them;

(d) to help the Western Nations against their enemies and the enemies of the British; and

(e) to duly observe its engagements to the Western Nations.[735]

606. After spending several weeks at Niagara in a conference, an agreement was concluded with the Western Nations that included the terms Sir William Johnson had hoped to see reflected in a Treaty. Most of these terms listed in paragraphs 603 and 605 were explicitly stated and agreed to at Niagara. Those that were not would have been included in the promise to receive the Western Nations "into an alliance once more."[736]

607. Since the Treaty of Niagara arose as a result of Pondiac's War, the goals of the Western Nations at Niagara can be taken from their various goals during the war. This agreement met the

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[735] Sir W. Johnson to T. Gage, February 19, 1974, Exhibit 572, p. 332: Prof. Alain Beaulieu, "The Congress at Niagara in 1764: The Historical Context and Meaning of the British-Aboriginal Negotiations" (2016), Exhibit 4381, p. 35.
[736] The Papers of Sir W. Johnson, July-August, 1764, Exhibit 4385, p. 280.

key goals of the Western Nations: to reassert territorial control in the Great Lakes, and restore trade.[737]

See paras 541-562 (*goals and outcome of Pondiac's War*)

608. It is through the alliance formed at Niagara that Western Nations gave permission to the British to share in their territory and utilize their waters. Providing the British access to all of the formerly French posts and receiving in return free and fair open trade at these posts, necessarily meant that the British had permission to enter the Great Lakes and use the waters. Similarly, aspects of their alliance relationship, including Britain's promise to protect the Western Nations' lands from settlement and encroachments, would also mean that at times, it would be beneficial and necessary for the British to have access to the Upper Great Lakes.

609. Prof. Beaulieu argues that Johnson had decided that the treaties entered into at Niagara would be in writing, and notes that the treaties with the Senecas and the Wyandots were done in writing, whereas the agreement with the Western Nations was unwritten. However, as Prof. Beaulieu acknowledged on cross examination, there are lots of examples of treaties being entered into without any written documents, including the Treaty of Detroit.[738] The fact that the Treaty of Niagara is unwritten does not make the obligations of the parties stemming from that treaty any less binding.

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[737] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 17, 29-30.
[738] Evidence of Prof. Alain Beaulieu, Transcript vol 62, November 20, 2019, p. 8036, line 13 to p. 8038, line 3.

SON was very likely one of the Western Nations at Niagara

610. There is no explicit 18th century source that shows that SON was represented at Niagara in 1764. However, the circumstances are such that it is strongly probable that they attended, for the following reasons:

(a) The 18th century sources are not very specific about detailed geographical locations from where the Indigenous nations came;[739]

(b) The purpose of the meetings at Niagara was to make peace with as many Indigenous nations as possible;[740]

(c) The meetings were widely attended by Indigenous nations, including many who were located much farther from Niagara than the Peninsula;[741]

(d) Chippewas from Lake Huron and Toronto were present;[742]

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[739] Prof. Eric Hinderaker, "Supplement: The Saugeen Ojibway Nation and the Niagara Treaty of 1764, With Background on British-Aboriginal Treaty Making", Exhibit 4019, p. 6.
[740] Prof. Eric Hinderaker, "Supplement: The Saugeen Ojibway Nation and the Niagara Treaty of 1764, with Background on British-Aboriginal Treaty Making", Exhibit 4019, p. 1.
[741] Dr.Eric Hinderaker, "Supplement: The Saugeen Ojibway Nation and the Niagara Treaty of 1764, With Background on British-Aboriginal Treaty Making", Exhibit 4019, pp. 1-3; Evidence of Dr. Eric Hinderacker, Transcript vol 19, June 20, 2019, p. 1549, lines 1-15; Map of the Great Lakes annotated by Prof. Eric Hinderaker, Exhibit 4022; Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p.1559, line 25 to p. 1560, line 10; p.1561, lines 1-12; and p. 1654, line 16 to p. 1655, line 5.
[742] Prof. Eric Hinderaker, "Supplement: The Saugeen Ojibway Nation and the Niagara Treaty of 1764, With Background on British-Aboriginal Treaty Making", Exhibit 4019, p. 3.

(e) Alexander Henry, a British fur trader was passing through Georgian Bay shortly before the meetings at Niagara and he noted that the Indigenous people were largely absent, having already gone to Niagara;[743]

(f) When SON representatives were present, on Manitoulin Island in 1836, the Crown negotiator opened by recalling the Niagara meetings which had taken place 70 years earlier, and noted that this was when those present had first allied themselves with the British;[744] and

(g) Traditional knowledge of the Treaty of Niagara has survived among members of SON.[745]

SON seeks the following findings of fact in respect of Chapter 19 - Treaty of Niagara (1764):

(a) Sir William Johnson had, and would have been perceived by the Indigenous nations present as having, the authority to bind the Crown.

(b) The Western Nations present at Niagara had the authority to bind their membership into a treaty with the British Crown.

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[743] Prof. Eric Hinderaker, "Supplement: The Saugeen Ojibway Nation and the Niagara Treaty of 1764, With Background on British-Aboriginal Treaty Making", Exhibit 4019, pp. 3-4; Alexander Henry (The Elder), Travels and Adventures in Canada, Exhibit 476, pp. 158-159, 164-166, 171.
[744] Prof. Eric Hinderaker, "Supplement: The Saugeen Ojibway Nation and the Niagara Treaty of 1764, With Background on British-Aboriginal Treaty Making", Exhibit 4019, p. 5-6; Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, p. 37.
[745] Evidence of Mr. Karl Keeshig, Transcript vol 3, April 30, 2019, p. 285, line 15 to p. 287, line 5.

(c) Sir William Johnson attended at Niagara with the intent to make binding obligations to the Western Nations at Niagara.

(d) The Western Nations in turn intended to make binding commitments to Johnson;

(e) The proceedings between Johnson and the Western Nations at Niagara were consistent with Anishinaabe treaty-making protocols. The ceremonial protocols followed during the process of concluding the agreement reflected the solemnity with which both sides approached the negotiation process.

(f) Binding obligations were made between Britain and the Western Nations at Niagara and those obligations were as set out in the Final Argument of the Saugeen Ojibway Nation.

(g) Through the Treaty of Niagara, the Western Nations granted the British permission to use their water territories for purposes consistent with facilitating trade, protection of Indigenous territory, and alliance.

(h) SON was present at Niagara and part of the Treaty of Niagara.

20. THE RELATIONSHIP WITH THE BRITISH CROWN POST-1764

611. After granting the British permission to share their territory and utilize their waters for purposes consistent with facilitating trade, protection of Indigenous territory, and alliance, the Anishinaabe welcomed the British into their territory of the Upper Great Lakes. The relationship between the two was an alliance relationship, and the British relied on the Anishinaabe for navigational and military assistance, up until at least the end of the War of 1812.

612. This is discussed in detail below.

Use of Waterways from 1764 to 1815

613. Having reached a satisfactory arrangement with the British at Niagara in 1764, the British entered Lake Huron and, eventually, Georgian Bay with the permission of the Anishinaabe. Indeed, it was in the economic interest of the Anishinaabe to have traders conveniently close by, and allowing government-owned vessels (which were primarily used for transport rather than combat until 1812) access facilitated this: these vessels conveyed Crown presents along with other supplies to maintain the alliance; and their officers allowed merchants to send goods in their surplus cargo spaces, facilitating the operation of the trading economy.[746]

See paras 603-608 (*agreement at Treaty of Niagara*)

614. Agreeing to let the British enter Lake Huron/Georgian Bay and wanting them there for convenience in trade did not mean the Anishinaabe were relinquishing rights to their territories.[747]

See para 608 (*terms of British entry into Lake Huron/Georgian Bay*)

615. Ontario's witness, Mr. Graves gave evidence that the British controlled the Upper Great Lakes from 1764 to 1813, and that there is no evidence of any Indigenous attempt to oppose that control.[748] He acknowledged that the British feared attacks like those in Pondiac's War briefly in

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[746] Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s" (2016), Exhibit 4195, pp. 18, 33.
[747] Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s" (2016), Exhibit 4195, p. 18.
[748] Evidence of Mr. Donald Graves, Transcript vol 80, February 3, 2020, p. 10327, lines 2-5; Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10939, lines 15-20; Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (revised and corrected November 2015, redacted January 2020), Exhibit 4553, p. 16.

1783 and 1784, but claimed they did not fear such attacks from 1763 to 1783 or from 1784 to 1812.[749] In his report, he stated that it was only through their alliances with Britain that the Anishinaabe were able to use the waters of the Upper Great Lakes.[750]

616. On cross examination, however, it became clear that 1764 to 1813 was better characterised as a time of negotiated peace and cooperation between the Indigenous nations of the Upper Great Lakes and the British rather than a time of absolute British control. Specifically, Mr. Graves acknowledged that:

(a) Between 1764 and the period right before the War of 1812 is a period of peace on the Upper Great Lakes;[751]

(b) The use of waterways was part of what was negotiated in Niagara in 1764;[752]

(c) There would be no reason for the Anishinaabe communities to challenge British vessels on the Upper Great Lakes between 1764 and 1812;[753]

(d) There is no evidence of Anishinaabe challenging British presence on the Upper Great Lakes between 1764 and 1812;[754] and

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[749] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10958, line 22 to p. 10960, line 2.
[750] Mr. Donald Graves, "Comments and Observations on the Expert Reports of Prof. Eric Hinderaker and Dr. Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (revised and corrected November 2015, redacted January 2020), Exhibit 4553, pp. 16-17 - *Note that Mr. Graves states in his report that Britain dominated navigation on the Great Lakes from 1763 to 1813, but revised these dates in his testimony*.
[751] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10940, lines 1-9.
[752] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10944, lines 1-5.
[753] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10944, lines 6-11.
[754] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10945, lines 2-6.

(e) No one tried to challenge Anishinaabe presence on the Upper Great Lakes between 1764 and 1812.[755]

617. Further, Mr. Graves's claim that the British only feared attacks like those in Pondiac's War briefly in 1783 and 1784 is inconsistent with the documentary record, and should not be accepted. The British feared attacks like those in Pondiac's War prior to entering into the Treaty of Niagara and subsequently would have known the importance of maintaining their alliance with the Anishinaabe, as set out below.

See paras. 574-576 (*British feared attacks like Pondiac's War*)

Relevance and Weight of the Evidence of Mr. Donald Graves, Appendix E, Tab 9.

618. Ontario's witness, Dr. Reimer also argued in volume 2 of her report, that since there were no objections from Indigenous nations to the British being on the Great Lakes after 1764, they must have acquiesced.[756] However, on cross examination she acknowledged that following the Congress [Treaty] of Niagara there was a period of peace between the British and the Anishinaabe;[757] that trade was an important goal of the Anishinaabe at Niagara in 1764; and that trade resumed after the Congress [Treaty] in 1764.[758] Dr. Reimer agreed that given this, it was reasonable that the Anishinaabe would not object to the British being on the Upper Great Lakes.[759]

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[755] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10945, lines 12-20.
[756] Dr. Gwen D. Reimer, "Volume 2: Aboriginal use and Occupation of the Lake Claim Area, CA. 900-1900" (as revised 2019), Exhibit 4702, pp. 7-8, 32-36, 125.
[757] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11215, lines 9-11.
[758] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11215, lines 12-17.
[759] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11216, line 21 to p. 11217, line 5.

619. The evidence shows that the Anishinaabe consented to the British using the waterways in the Upper Great Lakes from 1764 to 1812, and that the Anishinaabe were not limited in their own use of the Upper Great Lakes.

620. This is in line with what was agreed upon in the Treaty of Niagara: that the British would be allowed access to the enter the Upper Great Lakes for purposes consistent with alliance, trade and the protection of Indigenous lands.

See paras 603-608 (*what was agreed to at Niagara*)

British Reliance on their Indigenous Allies

621. Having re-established an Indigenous alliance in 1764, the British continued to treat the Anishinaabe as allies, not subjects, and went to significant diplomatic lengths to maintain and strengthen the alliance by means of "presents" (which the Anishinaabe considered were due to them, in the nature of rent, in return for allowing the British into their territory).[760]

See para 519-522 (*Causes of Pontiac war*).

R v Sioui, [1990] 1 SCR 1025 at pages 1052-1055, Plaintiffs' Book of Authorities, Tab 85.

622. The British relied on their Indigenous allies for navigational assistance on Lake Huron and Georgian Bay (the latter especially) in the period following the Treaty of Niagara.[761] The first survey of Georgian Bay by the British done until 1788, by Captain Gother Mann, when the British wanted to have a better understanding of the eastern side of Lake Huron and Georgian Bay to create defensive infrastructure "that would meet British defensive needs in a war with the United

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[760] Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s" (2016), Exhibit 4195, pp. 18, 33.
[761] Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s" (2016), Exhibit 4195, pp. 51-63.

States."[762] As Dr. Reimer put it, up until the early 1800s, British officials knew very little outside of the main French forts or British holdings, and "the Saugeen traditional territory and peninsula were part of that unknown area, as far as the British were concerned."[763] It was not until the 1820s that Lieutenant Henry Bayfield produced the first maps of Lake Huron and Georgian Bay that were of sufficient quality to be used for navigation.[764]

623. British military force in the Upper Great Lakes was far from indisputable in the late 18th and early 19th centuries. For example, the British depended heavily on their Indigenous allies for military assistance during the American Revolution and even as late as the War of 1812-1814.[765] As Dr. Reimer, noted in volume 1 of her report, "alliances with First Nations were crucial to the British and their future in Canada" in the American War of Independence and the War of 1812.[766]

624. Mr. Graves acknowledged that the Indian Department in the late 18th and early 19th centuries was more of a military than a civilian organization, and had the purpose of maintaining alliances with various Indigenous nations should they be needed in a future war with the United

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[762] Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4490, line 2, to p. 4494, line 1; Dorchester to Gother Mann, Captain and Commanding Engineer, Instructions May 29, 1788, Exhibit 709, p.3.
[763] Evidence of Dr. Gwen Reimer, Transcript vol 83, February 12, 2020, p. 10575, lines 4-14.
[764] Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4494, line 2, to p. 4495, line 4; Map – Lake Huron Sheet II, 1828, Exhibit 911; and Map – Lake Huron Sheet III, 1822, Exhibit 912.
[765] Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s" (2016), Exhibit 4195, pp. 19-21, 38-46; Evidence of Prof. Carl Benn, Transcript vol 40, p. 4628, line 15 to p. 4634, line 14.
[766] Dr. Gwen D. Reimer, "Volume 1: Aboriginal use and Occupation of Bruce Peninsula and Environs, CA. 500 BC – 1860 AD" (as revised 2019), Exhibit 4576, p. 155.

States.[767] This matches the evidence of Prof. Hinderaker, who gave the opinion that the British were putting resources towards these alliances and making them a priority.[768] Mr. Graves also testified that Indigenous people played an important role in the war in 1812, although his view was that they had a lesser role as the war went on.[769]

625. The contributions of the Indigenous nations, which included SON and the Great Lakes Anishinaabe,[770] to the War of 1812 were significant, and their efficacy in naval actions in particular was notable. Indigenous allies played a key role in the following naval actions on the Upper Great Lakes:

(a) Seizing Mackinac from the Americans on July 17, 1812;[771]

(b) Repulsing the American attempt to re-take Mackinac on August 4, 1814;[772]

(c) Capturing Detroit from the Americans on August 16, 1812;[773]

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[767] Mr. Donald Graves, "Comments and Observations on the Expert Reports of Prof. Eric Hinderaker and Dr. Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (revised and corrected November 2015, redacted January 2020), Exhibit 4553, p. 8.
[768] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1584, line 21 to p. 1585, line 22.
[769] Evidence of Mr. Donald Graves, Transcript vol 80, February 3, 2020, p. 10331, line 23 to p. 10332, line 10.
[770] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11437, line 4 to p. 11438 line 17; Plummer to Laird, June 14, 1874, Exhibit 4746, p. 2 (lists James Nawash from Cape Croker as an Indian still living who fought in the War of 1812 for the British); Native Military Forces in the Great Lakes Theatre, 1812-1815, Compiled by Carl Benn, Exhibit 4218, pp. 2-3; Evidence of Prof. Carl Benn, Transcript vol 41, August 20, 2019, p. 4764, lines 8-13.
[771] Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s" (2016), Exhibit 4195, p. 8; Evidence of Prof. Carl Benn, Transcript vol 40, August 19, 2010, p. 4609, line 3 to p. 4611, line 11.
[772] Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s" (2016), Exhibit 4195, p. 45; Evidence of Prof. Carl Benn, Transcript vol 40, p. 4624, lines 1-25.
[773] Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s" (2016), Exhibit 4195, p. 9; Evidence of Prof. Carl Benn, Transcript vol 40, p. 4616, line 8 to p. 4619, line 7.

(d) Capturing Fort Dearborn (present day Chicago) from the Americans in August 15, 1812;[774]

(e) Re-taking Prairie du Chien on Lake Superior on July 20, 1814;[775]

(f) Seizing the American warships Tigress and Scorpion in Lake Huron in September 1814;[776] and

(g) Assisting the crew of the Nancy in 1814 after the Americans destroyed it in the Nottawasaga River just outside SONTL.[777]

626. The evidence of the Indigenous contribution to these naval actions is uncontradicted.[778]

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[774] Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s" (2016), Exhibit 4195, p. 9; Evidence of Prof. Carl Benn, Transcript vol 40, August 19, 2019, p. 4615, line 6 to p. 4916, line 6.

[775] Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s" (2016), Exhibit 4195, p. 9l Evidence of Prof. Carl Benn, Transcript vol 40, p. 4621, line 6 to p. 4623 line 25.

[776] Evidence of Prof. Carl Benn, Transcript vol 40, August 19, 2019, p. 4595, line 16 to p. 4596 line 24 and p. 4598, line 8 to 4599, line 15; Evidence of Prof. Carl Benn, Transcript vol 42, August 21, 2019, p. 4955, line 14, to p. 4956, line 8; Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s" (2016), Exhibit 4195, pp. 45-46 - *Prof. Benn pointed out that the Indigenous forces did not participate in the capture of the Tigress directly, but guarded the rear of the British force. He was clear when cross examined on this point that we cannot know for certain the reason for this, and could have included a taboo about night action or simply the logistics of coordinating the action (ensuring silence, working with individuals that knew the same language, etc.). Regardless, they still took part in the naval action if in a more limited capacity;* See also: Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay" (2016), Exhibit 4195, p. 10; Evidence of Prof. Carl Benn, Transcript vol 41, August 20, 2019, p. 4908, line 13 to p. 4911, line 16.

[777] Evidence of Prof. Carl Benn, Transcript vol 40, August 19, 2019, p. 4625, line 1 to p. 4626, line 2; Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s" (2016), Exhibit 4195, p. 45.

[778] *Although Mr. Graves discusses the War of 1812, and some of these naval actions, in his testimony, he did not opine on the Indigenous contribution to these actions*. See Evidence of Mr. Donald Graves, Transcript vol 80, February 3, 2020, p. 10332, line 18 to p. 10337, line 24; Mr. Donald E. Graves, "Comments and Observations on the Expert Reports of Prof. Eric Hinderaker

627. Indeed, from 1764 until at least the end of the War of 1812, the British would not have been able to maintain a presence in the Upper Great Lakes without the co-operation and assistance of the Anishinaabe.

SON seeks the following findings of fact in respect of Chapter 20 - The Relationship with the British Crown post-1764:

(a) The Great Lakes Anishinaabe consented to the British using the waterways in the Upper Great Lakes from 1764 to 1812.

(b) The British presence in the Upper Great Lakes was consistent with the permission granted by the Great Lakes Anishinaabe through the Treaty of Niagara to allow access to enter the Upper Great Lakes for purposes consistent with alliance, trade and the protection of Indigenous lands.

(c) The Great Lakes Anishinaabe were not limited in their use of the Upper Great Lakes.

(d) The relationship between the British and the Great Lakes Anishinaabe was an alliance relationship.

(e) The British relied on the Great Lakes Anishinaabe for navigational assistance until at least the 1820s.

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and Dr. Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (revised and corrected November 2015, redacted January 2020), Exhibit 4553, pp. 9-15.

(f) The British relied on the Great Lakes Anishinaabe for military assistance until at least the end of the War of 1812.

(g) Up until at least the end of the War of 1812, the British would not have been able to maintain a presence in the Upper Great Lakes without the co-operation and assistance of the Anishinaabe.

21. CONTACT WITH EURO-CANADIAN FISHERMEN AND SETTLERS IN SONTL

628. It was not until the early 1830s that Euro-Canadians entered SONTL for purposes other than trade. At this time, SON exercised exclusive proprietary rights to the fishery surrounding the Peninsula.[779] At least initially, their ownership was acknowledged by the Crown.[780] For example:

(a) In Treaty 45 ½, the Bond Head acknowledged SON's interest in the fishery and promised that he would "remove all the white people that had been in the habit of fishing on their grounds" without SON's consent;[781]

(b) In 1844, S.P. Jarvis, Chief Superintendent of Indian Affairs, acknowledged that the Fishing Islands belonged to SON and that they had full rights to exclude settlers from those grounds;[782] and

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[779] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6850, line 20 to p. 6853, line 7; J.B. Macaulay, "Report on Indian Affairs to His Excellency Sir Geo. Arthur," 1839, Exhibit 1297, p. 47/168758– *noting that the Fishing Islands had attracted the notice of white people, who annoy the Indians by "encroaching on what they consider to be their exclusive right*."

[780] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 99-116; Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s" (2016), Exhibit 4195, pp. 25-27; Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, pp. 75, 95, 98.

[781] Speech of Metigwob, September 13, 1836, Exhibit 1142, p. 3 [original], p. 2 [transcript].

[782] Jarvis to Higginson, April 15, 1844, Exhibit 1458.

(c) In 1847, the Crown recognized SON's entitlement to the fishery by way of Lord Elgin's Declaration, which recognized and guaranteed SON's historic and ongoing occupation of the islands within 7 miles of the shore around the Peninsula.[783]

629. In addition, when Euro-Canadian fishermen entered SONTL in the early 1830s, they leased fisheries from SON.[784] These fisheries were located in SON's Fishing Islands, on the Lake Huron side of the Peninsula about twenty miles north of the Saugeen River.[785] This part of the fishery depended on landing on the islands for the purpose of using seine nets from the shore, and of curing the fish to preserve them for transport and sale.[786]

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[783] Lord Elgin's Declaration, June 29, 1847, Exhibit 1674, p. 293; Prof. Paul Driben, "An Anthropological Report on Selected Aspects of the Cultural Lives of the Saugeen Ojibway" (2013), Exhibit 4324, p. 101.

[784] See, generally: Prof. Paul Driben, "An Anthropological Report on Selected Aspects of the Cultural Lives of the Saugeen Ojibway" (2013), Exhibit 4324, pp. 105-110; Evidence of Prof. Paul Driben, Transcript vol 54, October 22 2019, p. 6851, line 15 to p. 6853, line 7; Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, p. 36; Alexander McGregor to John Colborne, September 4, 1832, Exhibit 1027; Chiefs Metigwob, Madwayosh and Aissance, Lease of Fishing Islands to the Huron Fishing Company, September 2, 1834, Exhibit 1056; Chief Metigwob, [Received this day from Mr. William Cayley the sum of twelve pounds ten shillings being the first instalment stated in the articles of agreement of this date], April 29, 1845, Exhibit 1521; T. Campbell, Superintendent General of Indian Affairs, to T.G. Anderson, Superintendent of Indian Affairs, September 26, 1848, Exhibit 1725; Victor Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nations' Fishing Islands in Lake Huron", in Coexistence: Studies in Ontario- First Nations Relations, Bruce W. Hodgins, Shawn Herd, John S. Milloy (Eds) (1992), Exhibit 4332, pp. 86-92.

[785] Victor Lytwyn, "The Usurpration of Aboriginal Fishing Rights: A Study of the Saugeen Nations' Fishing Islands in Lake Huron", in Coexistence: Studies in Ontario- First Nations Relations, Bruce W. Hodgins, Shawn Herd, John S. Milloy (Eds) (1992), Exhibit 4332, p. 85.

[786] Victor Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nations' Fishing Islands in Lake Huron", in Coexistence: Studies in Ontario- First Nations Relations, Bruce W. Hodgins, Shawn Herd, John S. Milloy (Eds) (1992), Exhibit 4332, p.86; Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, p. 62.

630. SON entered into these leases with the Euro-Canadian fishermen primarily to retain their control over their fishery and regulate Euro-Canadian use.[787] For example:

(a) In 1832, Alexander McGregor held out that he had obtained a license from SON to occupy a small island on Lake Huron in order to carry out a fishery.[788] When members of SON later complained that he was encroaching on their fishery, McGregor relied on his agreement with SON to explain his actions.[789] His reference to a license demonstrates his understanding, as an early Euro-Canadian fisherman seeking to fish in SONUTL, that the permission of SON was necessary to use the fishery.[790]

(b) In an effort to control McGregor's activities on their fishery, in September 1834, SON agreed to a lease that permitted the Huron Fishing Company to occupy a station on the Fishing Islands for the purpose of fishing in the surrounding waters.[791]

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[787] Victor Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nations' Fishing Islands in Lake Huron", in Coexistence: Studies in Ontario- First Nations Relations, Bruce W. Hodgins, Shawn Herd, John S. Milloy (Eds) (1992), Exhibit 4332, p.88; Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p. 6957, line 2 to p. 6959, line 5; Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6852, line 7 to p. 6853, line 7; Evidence of Prof. Jarvis Brownlie, July 23, 2019, Transcript vol 31, p. 3291, line 9 to p. 3292, line 3.
[788] Alexander McGregor to John Colborne, September 4, 1832, Exhibit 1027.
[789] Peter Jones to James Givins, Chief Superintendent, Indian Department, January 17, 1835, Exhibit 1071, p. 1 [transcript], p. 59033 [original]; Prof. Paul Driben, "An Anthropological Report on Selected Aspects of the Cultural Lives of SON" (2013), Exhibit 4324, pp. 105-107.
[790] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6851, line 18 to p. 6852, line 6.
[791] Chiefs Metigwob, Madwayosh and Aissance, Lease of Fishing Islands to the Huron Fishing Company, September 2, 1834, Exhibit 1056; Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6852, line 7 to p. 6853, line 7; Victor Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nations' Fishing Islands in Lake Huron", in Coexistence:

(c) In 1840, the Huron Fishing Company went out of business. Its assets were taken over by William Cayley. The Saugeen Chiefs initially entered into a lease with Cayley's competitors, and later with Cayley himself.[792] The agreement was completed in 1845.[793]

(d) By 1848, Cayley defaulted on his agreement in with SON. In 1849, the Saugeen Chiefs made another lease agreement with Alexander McDonald and William Kennedy[794]

(e) These leases and SON's ownership of the fishery were generally recognized by the Crown.[795]

Studies in Ontario- First Nations Relations, Bruce W. Hodgins, Shawn Herd, John S. Milloy (Eds) (1992), Exhibit 4332, p.87; J.B. Macaulay, "Report on Indian Affairs to His Excellency Sir Geo. Arthur," 1839, Exhibit 1297, p. 48/168759 – *Indians intended the lease to be year to year*.

[792] Victor Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nations' Fishing Islands in Lake Huron", in Coexistence: Studies in Ontario- First Nations Relations, Bruce W. Hodgins, Shawn Herd, John S. Milloy (Eds) (1992), Exhibit 4332, pp. 90-92; Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 108-110.

[793] Chief Metigwob, [Received this day from Mr. William Cayley the sum of twelve pounds ten shillings being the first instalment stated in the articles of agreement of this date], April 29, 1845, Exhibit 1521.

[794] Victor Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nations' Fishing Islands in Lake Huron", in Coexistence: Studies in Ontario- First Nations Relations, Bruce W. Hodgins, Shawn Herd, John S. Milloy (Eds) (1992), Exhibit 4332, p. 92; Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 108-109.

[795] See, generally: Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 99-110; Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s" (2016), Exhibit 4195, pp. 25-27; Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, pp. 75, 95, 98; Jarvis to Higginson, April 15, 1844, Exhibit 1458.

631. SON explored all options available to them to resist the unauthorized exploitation of their fishing resources. In some instances, when Euro-Canadian fishermen and settlers exceeded leases obtained from SON, SON sought assistance from the Crown to protect their fishery. They repeatedly asked the Crown to assist them with terminating the leases with those that had exceeded their permission and to assist in securing the return of their fisheries. They also took direct action to remove lessees who exceeded the terms of their leases and unauthorized fishers from their territory, and tried to arrange different, more advantageous leasing arrangements. For example:

(a) SON Chiefs intended the 1834 lease with the Huron Fishing Company to be year to year, though the written document – drafted by the Huron Fishing Company – reflects an unlimited term.[796] When SON Chiefs learned that an unlimited license had also been issued by the colonial government, they immediately requested "the revocation of the said license, that they may be enabled to recover possession of the Islands disclaiming any intention to have acquiesced in a permanent lease."[797]

(b) In the fall of 1834, the Huron Fishing Company overfished in the area surrounding the Fishing Islands, prompting SON to ask the Crown to assist them in recovering possession of the islands.[798]

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[796] Chiefs Metigwob, Madwayosh and Aissance, Lease of Fishing Islands to the Huron Fishing Company, September 2, 1834, Exhibit 1056.

[797] J.B. Macaulay, "Report on Indian Affairs to His Excellency Sir Geo. Arthur," 1839, Exhibit 1297, p. 48/168759; Victor Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nations' Fishing Islands in Lake Huron", in Coexistence: Studies in Ontario- First Nations Relations, Bruce W. Hodgins, Shawn Herd, John S. Milloy (Eds) (1992), Exhibit 4332, pp. 87-88.

[798] Victor Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nations' Fishing Islands in Lake Huron", in Coexistence: Studies in Ontario- First Nations Relations, Bruce W. Hodgins, Shawn Herd, John S. Milloy (Eds) (1992), Exhibit 4332, p. 88; Koongwah-wis to Lt.

(c) In 1839, two SON Chiefs travelled to Toronto to complain about the intrusion on their fisheries by Euro-Canadian settlers.[799] The same year, through Chief Superintendent of the Indian Department, Samuel P. Jarvis, they requested that the Huron Fishing Company License be revoked and renewed on more "equitable" terms – including terms that would have limited the Huron Fishing Company's access to a single Island.[800]

(d) In 1844, SON Chiefs complained that the fishing companies with whom SON had made lease arrangements failed to pay the money due under the terms of the lease, but continued to use SON's fishery:

> We unanimously request you to act for us in "Parliament." We wish that something should be done different that there may not be no more trouble respecting our Islands. Ever since the former "Fishing Company" failed of paying the annual rent we have claimed the right to these islands. For it was understand with us when the Islands were "leased" that they were to pay us £25 cy. annually. This last was paid to us five years ago. and yet still we are imposed upon, and people pretend to say that they claim these "Islands".[801]

(e) In 1844, Saugeen Chief Metigwob sent petitions to the Governor General asking for assistance in preventing a company from establishing itself on the Fishing

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Gov of Upper Canada, John Colborne, April 18, 1835, Exhibit 1073; J.B. Macaulay, "Report on Indian Affairs to His Excellency Sir Geo. Arthur," 1839, Exhibit 1297, p. 48/168759; Prof. Paul Driben, "An Anthropological Report on Selected Aspects of the Cultural Lives of SON" (2013), Exhibit 4324, pp. 106-108.

[799] Peter Jones, Missionary to C.A. Hagerman, Attorney General, March 20, 1839, Exhibit 1292.

[800] S.P. Jarvis to John Macaulay, March 27, 1839, Exhibit 1293. See, generally: Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, pp. 64-65.

[801] Chief Metigwob and Chief Madwayosh, to Dunlop, November 25, 1844, Exhibit 1484, p. 1- *It is respecting the "Fishing Islands"*.

Islands, and for assistance re-establishing SON's own possession.[802] The same year, Jarvis reported that boats and schooners from both Canada and the United States continued to frequent the Fishing Islands "to the great annoyance of the Indians who are frequently interfered with by them."[803] As Dr. Reimer explained, "Frustrated, SON took matters into their own hands and forcibly removed several fishermen from the islands."[804] Recounting this incident, Chiefs Metigwob and Madwayosh noted:

> Afterwards, we went to the Island and took the Fishing Ground and placed five men a Company on the Ground namely the Messrs Elliot – Hughes – Taylor & McLean who are left. Mr Cayley's men drove them away from the ground & Prevented them from fishing and the consequence was these men failed in their object & much damage was done to them as well as to us.[805] [emphasis added]

(f) In 1847, SON made another complaint about illegal fishing and squatters on their islands in Lake Huron and Georgian Bay, asking that the government "protect our rights and property."[806]

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[802] List of Petitions sent to the Governor General (1844), Exhibit 1446; Victor Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nations' Fishing Islands in Lake Huron", in Coexistence: Studies in Ontario- First Nations Relations, Bruce W. Hodgins, Shawn Herd, John S. Milloy (Eds) (1992), Exhibit 4332, p. 91.

[803] Letter from Superintendent Jarvis to J.M. Higginson, April 4, 1844, Exhibit 1454, p. 172 [original], p. 1 [transcript].

[804] Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, pp. 65-66.

[805] Chief Metigwob and Chief Madwayosh, to Dunlop, November 25, 1844, Exhibit 1484, pp. 2-3 or pp. 83221-83222 [original], p. 2 [transcript].

[806] David Sawyer to T.G. Anderson and Henwick, October 25, 1847, Exhibit 1682 ; Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, p. 66; See also: Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, p. 64 – *"The*

632. The Crown's protection of SON's interest in the Fishing Islands was lax at best. Although Lord Elgin's Declaration of 1847 guaranteed to SON the possession of all islands within 7 miles of the shore[807] – echoing the promise to protect the fisheries made by Bond Head at Treaty 45 ½[808] - the encroachments continued. For example, in 1848, SON complained about the illegal occupation of their Fishing Islands "by White Men who resort thither for fishing purposes and in doing, which much of their valuable lumber &c is destroyed without their receiving any adequate remuneration for it." [809]

633. By 1850, SON no longer wished to lease their Fishing Islands to others.[810] That year, they petitioned the Crown – again – that they be assisted in retaking the Fishing Islands so that they could operate the commercial fishery themselves, without interference. The Chiefs wrote, "it is necessary we reobtain possession of our Fishing Islands as the proceed of the fisheries would be

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evidence also suggests that the Chiefs were not completely comfortable with these leasing arrangements, and over the years they struggled with the dilemma of earning revenues by leasing the islands to outsiders, or retaining the islands for subsistence and/or development of their own commercial fishery."

[807] Lord Elgin's Declaration, June 29, 1847, Exhibit 1674, p. 293.

[808] Statement of Metigwob, September 13, 1836, Exhibit 1142, p. 3 [original], p. 2 [transcript]; Evidence of Prof. Jarvis Brownlie, July 23, 2019, Transcript vol 31, p. 3297, lines 2-21.

[809] Chief Alexander Madwayosh to T.G. Anderson, December 7, 1848, Exhibit 1732; T.G. Anderson, Superintendent, to T. Campbell, Superintendent General of Indian Affairs, August 4, 1848, Exhibit 1725.

[810] Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, p. 69.

far in advance of the amount paid for them when rented by our white friends."[811] However, the Fishing Islands were not returned to them.[812]

634. Increasingly, from the mid 1850s, the Crown resisted when the Saugeen Ojibway continued to assert rights to and ownership of their fisheries.[813] For example, in 1853, the Crown threw the fishery on the Fishing Islands open to public tender. Unlike prior leasing arrangements, this was not contingent on the approval of SON.[814] However, SON continued to receive proceeds from the leasing of the fishery. The fact that SON continued to receive the proceeds suggests the Crown **still** recognized SON's ownership of the fishery even though the Crown interfered with that ownership.[815] The Crown's interference with SON's control of its fisheries from the mid-19th century onward is discussed in greater detail at paragraphs 276 to 295.

635. The leasing scheme over the fishery, discussed above, shows that SON exercised their rights to the fishery, as owners, by granting permission to Euro-Canadians to use the fisheries on

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[811] Chief Jacob Mittigwaub et al to the Governor General, October 18, 1850, Exhibit 1802, p. 316-317 [original], pp. 1-2 [transcript] – *"At a council held by the chiefs and warriors of the Sahgeeng October 4 It was unanimously agreed that for the benefit of the tribe it is necessary we reobtain possession of our Fishing Islands as the proceed of the Fisheries would be far in advance of the amount paid for them when rented by our white friends*."[sic].

[812] Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, pp. 69-74.

[813] See, generally: Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 111-116; Victor Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nations' Fishing Islands in Lake Huron", in Coexistence: Studies in Ontario- First Nations Relations, Bruce W. Hodgins, Shawn Herd, John S. Milloy (Eds) (1992), Exhibit 4332, pp. 94-95; *Fishery Act,* 20 Vict Ch, 21, Exhibit 2474.

[814] Victor Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nations' Fishing Islands in Lake Huron", in Coexistence: Studies in Ontario- First Nations Relations, Bruce W. Hodgins, Shawn Herd, John S. Milloy (Eds) (1992), Exhibit 4332, pp. 94-95.

[815] Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, pp. 74-75, 95.

the basis of certain conditions.[816] SON did this hoping that a leasing scheme would limit the "intrusion of [unauthorized] strangers".[817]

SON seeks the following findings of fact in respect of Chapter 21 - Contact with Euro-Canadian fishermen and settlers in SONTL:

(a) From 1830 to 1854, SON exercised their rights to the fishery as owners by granting permission via leases to Euro-Canadians to use the fisheries on the basis of certain conditions.

(b) From 1830 to 1854, SON asserted their rights as owners of the fisheries in SONUTL, and others, including the Crown and Euro-Canadian fishermen, shared this understanding, notwithstanding the fact that there were some encroachments on SON's rights.

22. TREATY 45 ½ (1836)

Significance of the Royal Proclamation (1763) for Treaty 45 ½

636. In the period following the war of 1812 to the middle of the 19th century and beyond, colonial officials continued to be guided by the principles of the Royal Proclamation in dealing with Indigenous lands.[818] As the Ontario Court of Appeal noted in *Chippewas of Sarnia*,

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[816] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3291, line 10 to p. 3292, line 1.

[817] T. Campbell, Superintendent General of Indian Affairs, to T.G. Anderson, Superintendent of Indian Affairs, September 26, 1848, Exhibit 1725 – *"I am directed by the Governor General to acknowledge the receipt of your letter of the 16th Ult, stating that the Saugeen Indians complain of the intrusion of strangers upon their fishing Islands and that they wish these islands should be leased…"*.

[818] Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 6-10, 13-14; Lord Dorchester to John Johnson, Additional Instructions, Exhibit 740; Jean-Philippe Chartrand, "Historical Research on Provisions of American Treaties Including Surrenders of Lake Beds in the Great Lakes" (2015), Exhibit 4513, pp. 14-19.

> It is safe to say, however, that those responsible for First Nations relations after 1776 continued to follow the central policies underlying the Royal Proclamation. The historical record is replete with references to the Royal Proclamation and its policies.
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> *Chippewas of Sarnia v Canada (Attorney General),* (2000), 51 OR (3d) 641 at para 58, Plaintiffs' Book of Authorities, Tab 14.

637. The principles set out in the Royal Proclamation governing Indigenous lands were recognized and reaffirmed by a series of instructions issued to colonial governors, including Dorchester's Instructions, issued in 1794. Both Prof. Brownlie and Dr. Reimer characterized Dorchester's Instructions as an effort to ensure compliance with the Royal Proclamation, and to add further detail to some of its provisions.[819] For example, reiterating the principle that lands could only be purchased by the Crown, as set out in the Royal Proclamation, Dorchester's Instructions provided additional detail on which Crown officials had to be present when lands were purchased.[820] The instructions also imposed requirements about how public councils for the surrender of land should be conducted, and insisted that the Crown employ "such Interpreters as best understand the Language of the Nation or Nations treated with" to provide interpretation services at treaty councils.[821]

638. The expert evidence in this trial has been that the Royal Proclamation and the instructions that followed were understood to enshrine a basic standard of voluntariness and consent as a principle of treaty-making from which the Crown was not entitled to depart:

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[819] Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72," (2013), Exhibit 4118, pp. 8-10; Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 11964, line 18 to p. 11965, line 21.
[820] Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72," (2013), Exhibit 4118, pp. 8-10; Lord Dorchester to John Johnson, "Additional Instructions," Exhibit 741, p. 241.
[821] Lord Dorchester to John Johnson, "Additional Instructions," Exhibit 741, pp. 241-242.

(a) Prof. Brownlie expressed the view that the Royal Proclamation enshrined a "principle of consent as a prerequisite for the alienation of Aboriginal land."[822] He was cross examined on this point extensively, including on whether the word "consent" appeared in the document, but did not waver from his view that this was an accurate description of the commitments set out in the Royal Proclamation.[823]

(b) In volume 3 of her report, Dr. Reimer provided a list of treaty-making principles that applied in Upper Canada and guided the Indian Department through to the middle of the 19th century and beyond, against which she assessed Treaty 45 ½, Treaty 67 (the half-mile strip surrender), and Treaty 72. These principles were drawn from the Royal Proclamation, Dorchester's Instructions, and other similar sets of instructions. [824] Dr. Reimer attempted to clarify that she did not intend this to be a strict checklist of requirements for a valid treaty, but merely a "heuristic" to help understand whether a particular treaty reflects what we know of the protocols of treaty-making.[825] However, she also maintained that the principles set out in Royal Proclamation were foundational. In particular, she noted that the principle of voluntariness was a strict requirement from which the Crown understood it could

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[822] Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72" (2013) Exhibit 4118, p. 13.
[823] Evidence of Prof. Jarvis Brownlie, Transcript vol 36, August 13, 2019, p. 3904, line 18 to p. 3917, line 15.
[824] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 6-15.
[825] Evidence of Dr. Gwen Reimer, Transcript vol 83, February 12, 2020, p. 10613, line 22 to p.10618, line 1, and particularly, p. 10614, line 20, to p. 10615, line 2; Dr. Gwen Reimer, "Volume 3: Saugeen-Nawash land Cessions No. 45 ½ (1836), No. 67 (1851) and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 14.

not depart. [826] She further noted that voluntariness would include "informed consent, and that would require a level of honesty by both parties" to a treaty.[827]

(c) Prof. McHugh explained in his report that a principle of "informed consent" underpinned the Crown treaty-making process in Upper Canada.[828] After considerable cross examination on what he meant by this, he finally explained that he meant that a treaty had to be fairly and equitably explained to the First Nation, and that informed consent meant that the Crown was required "to explain what a treaty was doing and the consequences for [the First Nation]" and to get their agreement to the treaty without coercion.[829]

639. The Royal Proclamation continued to govern Crown treaty-making for many years, until the middle of the 19th century and beyond.[830] In the 19th century, when the treaties that are the subject of this case were concluded, there was an expectation among Crown officials that the Royal Proclamation and associated proclamations would be followed.[831] Key officials, including Lt. Gov. Bond Head, understood that the Proclamation and its principles were important to their

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[826] Evidence of Dr. Gwen Reimer, March 10, 2020, Transcript vol 93, p. 11972, line 3 to p. 1194, line 10.
[827] Evidence of Dr. Gwen Reimer, March 10, 2020, Transcript vol 93, p. 11972, lines 22 -24.
[828] Prof. Paul McHugh, "Treaty 45 1/2 (1836), the Crown's 'unremitting solicitude' and the 'forever' promise to the Saugeen Ojibway Nation: a report on British imperial policy and practice in Upper Canada during the 1830s" (2015), Exhibit 4441, p. 28.
[829] Evidence of Prof. Paul McHugh, Transcript vol 68, December 10, 2019, p. 8908, lines 15-22 and p. 8909, lines 13-18.
[830] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 14-15.
[831] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p 11965, line 22 to p. 11966, line 8 and p. 11974, lines 11-24.

work and referred to it frequently.[832] For example, just after Treaty 45 ½ was concluded in August 1836, Chief Superintendent of the Indian Department James Givins wrote to Lt. Col. Napier, a Superintendent of Indian Affairs at Quebec, requesting a copy of the Royal Proclamation for the use of Lt. Gov. Bond Head. Napier sent the Proclamation on Sept 6, 1836, but noted he needed his copy back as soon as possible because he might need to 'refer to this document, at an early period."[833] On cross examination, Dr. Reimer agreed that this suggested that Bond Head saw the Royal Proclamation as important to his work in Upper Canada.[834]

640. Prof. McHugh, who testified extensively on the Royal Proclamation, was an outlier among the experts in this trial. Prof. McHugh's main point seemed to be that the "Crown kept to the procedures iterated in the Proclamation not because of external legal obligation but for reasons of sovereign comportment"[835] – that is, by the internal, structured and hierarchical mechanisms that disciplined how Crown officials acted out their roles.[836] SON submits that regardless of whether the Royal Proclamation would have been understood as enforceable in the courts in the mid 19th century, the crucial points are that it was a commitment, that Crown officials understood

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[832] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 10, 2020, p. 11975, line 21 to p. 11980, line 25; Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 9-10.
[833] Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 9-10; James Givins to Lt. Col. Napier, August 20, 1836, Exhibit 1134 [partial transcript at Exhibit 4815]; Lt. Col. Napier to Chief Superintendent James Givins, September 6, 1836, Exhibit 1141.
[834] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 11975, line 21, to p. 11978, line 20.
[835] Prof. Paul McHugh, "Treaty 45 1/2 (1836), the Crown's 'unremitting solicitude' and the 'forever' promise to the Saugeen Ojibway Nation: a report on British imperial policy and practice in Upper Canada during the 1830s" (2015), Exhibit 4441, p. 87.
[836] Prof. Paul McHugh, "Treaty 45 1/2 (1836), the Crown's 'unremitting solicitude' and the 'forever' promise to the Saugeen Ojibway Nation: a report on British imperial policy and practice in Upper Canada during the 1830s" (2015), Exhibit 4441, p. 57.

it was to be followed, and that it was significant to the Indigenous nations with whom they dealt. On these points, Prof. McHugh's evidence illuminates nothing.

> See also: Relevance and Weight of the Evidence of Prof. Paul McHugh, Appendix E, Tab 32.

641. It is clear that Indigenous people also considered the Royal Proclamation to be a highly significant document – a foundational guarantee of their rights. Senior Crown Officials knew and recognized this. According to the Bagot Commission, a commission appointed in 1842 to review the performance of Indian Affairs and make recommendations about how to reform the Department:[837]

> The subsequent proclamation of His Majesty George III issued in 1763 furnished [the Indians] with a fresh guarantee for the possession of their hunting grounds and the protection of the Crown. This document the Indians look upon as their Charter. They have preserved a copy of it, to the present time, and have referred to it in several occasions in their representations to the Government.[838]

Alliance-building policy to civilization policy

642. After the war of 1812, the significance to Britain of its military alliances with Indigenous peoples declined. Britain adopted a new defence strategy centred on increasing white settlement, particularly along the American border. Rather than being seen as important strategic

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[837] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 89.

[838] Charles Bagot, Report on the Affairs of the Indians in Canada, Sections 1 & 2, [Bagot Commission Report, Sections 1 & 2], 10 October 1842, in *Appendix EEE to the Fourth Volume of the Journals of the Legislative Assembly of the Province of Canada*, 28 November 1844- 29 March 1845 (1st Session, 2nd Provincial Parliament of Canada, 1844-1845), Exhibit 1508, Section 1 at p. 5.

allies, Indigenous peoples came to be seen by the British primarily as obstacles to the success of their push for increased white settlement.[839]

643. Since the 18th century,[840] Britain's military alliance with the Anishinaabe of the Great Lakes had been sustained in part by the annual distribution of presents in accordance with Anishinaabe custom and law.[841] As the military alliances declined in importance in British eyes after the war of 1812, cutting the costs of the Indian Department, including by reducing or eliminating annual presents, became a topic of discussion among colonial officials.[842]

644. In this context, British officials developed a new policy towards Indigenous peoples focused on protection and civilization. Influenced by missionaries and humanitarians in Britain and North America, the policy had three key components: settling Indigenous peoples on reserves; assisting them in adopting agriculture; and providing for their religious improvement by teaching them the Christian faith.[843] The civilization project became the role of the Indian Department as

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[839] Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, p. 5; Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 18.

[840] Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, p. 5; Prof. Paul Driben, "An anthropological report on selected aspects of the cultural lives of the Saugeen Ojibway," (2013), Exhibit 4324, pp 66-73, 144-146; Charles Bagot, Report on the Affairs of the Indians in Canada, Section 3 [Bagot Commission Report, Section 3], 10 October 1842, *in Appendix T to the Sixth Volume of the Journals of the Legislative Assembly of the Province of Canada*, 2 June, 1847-28 July, 1847 (3rd Session, 2nd Provincial Parliament of Canada, 1847), Exhibit 1447 (PDF p.16).

[841] Prof. Paul Driben, "An Anthropological Report on Selected Aspects of the Cultural Lives of the Saugeen Ojibway" (2013), pp. 64-65, 264, 281-282 – *Gift-giving as Anishinaabe custom*.

[842] Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 5, 22-23; James Hughes, Superintendent of Indian Affairs, to Col. Napier, Secretary of Indian Affairs, August 20, 1836, Exhibit 1139, pp. 37403-37404.

[843] Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 5, 22-23; Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 23.

its previous purpose, maintaining military alliances with Indigenous peoples, no longer drove Crown policy.[844]

645. On December 5, 1835, Lord Glenelg, the Colonial Secretary, appointed Sir Francis Bond Head as the Lieutenant Governor of Upper Canada.[845] In the summer of 1836, Bond Head undertook an "inspection tour" of the Indian Settlements in Upper Canada.[846] After this tour, he concluded that Indians could never be taught to farm and the Crown's civilization policy was doomed to failure.[847] In a despatch to Lord Glenelg, Bond Head summarized his views on Indian policy in three succinct points:

> 1st. an attempt to make farmers of the Red men has been generally speaking a complete failure.
>
> 2nd. congregating them for the purpose of civilization has implanted more vices than it has eradicated; and consequently
>
> 3rd. the greatest kindness we can perform towards these intelligent, simple minded people, is to remove and to fortify them as much as possible from all communication with the whites. [848]

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[844] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 2972, lines 6-12.
[845] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 33-35; J.R. Miller, "Compact, Contract, Covenant," Exhibit 4127, p. 106.
[846] Despatch from Sir F.B. Head to Lord Glenelg, November 20, 1836, Exhibit 1154, p. 124.
[847] Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 18-19.
[848] Despatch from Sir F.B. Head to Lord Glenelg, November 20, 1836, Exhibit 1154, p. 125.

646. Bond Head's view was that the best policy for Indigenous peoples was "to induce them […] to retreat before what they may justly call the accursed progress of civilization" into reserves far from white settlement– in other words, a removal policy.[849]

647. Bond Head's preference for "removal" of Indigenous peoples far from white settlement remained a minority opinion in official circles. Among other Crown officials, support for the civilization policy was dominant.[850]

The Events of the Treaty Council

648. Bond Head sought to implement his own unique vision for Indian Affairs at the annual meeting of First Nations held at Manitowaning, Manitoulin Island in August 1836. The purpose of this gathering was the annual distribution of presents. However, Bond Head turned the meeting into a major treaty-making council. SON was among the First Nations present at that treaty council.[851]

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[849] Despatch from Sir F.B. Head to Lord Glenelg, November 20, 1836, Exhibit 1154, p. 126; Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 17-18; J.R. Miller, "Compact, Contract, Covenant: Treaty-Making in Canada," Exhibit 4127, p. 109 – *Compares policy to U.S. removal policy under President Jackson*; John Leslie, Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a corporate memory for the Indian department (March 3 1984), Exhibit 4297, p. 41 – *Bond Head's plan based in part on President Jackson's removal policy*; Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3035, line 18 to p. 3036, line 2; Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3184, lines 14-20 – *identifying J.R. Miller as "prominent" scholar.*

[850] Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 19-20; Ruth Bleasedale, "Manitowaning: An Experiment in Indian Settlement," in Ontario History, Vol LXVI, No 3, Ontario Historical Society, Exhibit 4572, p. 148; Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 40-41; Evidence of Dr. Gwen Reimer, Transcript vol 83, February 12, 2020, p. 10650, line 25 to p.10651, line 12.

[851] Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 14-16; J.R. Miller, "Compact, Contract, Covenant", Exhibit 4127, pp. 106-108.

649. On August 9, 1836, Bond Head began the treaty council by addressing the Ottawa and Chippewa (Ojibway) of Manitoulin:

> My children,
>
> Seventy snow seasons have now passed away since we met in Council at the crooked place (Niagara), at which time and place your Great Father, the King, and the Indians of North America tied their hands together by the wampum of friendship.
>
> Since that period, various circumstances have occurred to separate from your Great Father many of his red children, and as an unavoidable increase of white population as well as the progress of cultivation, have had the natural effect of impoverishing your hunting grounds, it has become necessary that new arrangements should be entered into for the purpose of protecting you from the encroachments of the whites.[852]

650. Bond Head told the Ottawa and Chippewa (Ojibway) of Manitoulin that their "Great Father… has now great difficulty in securing" their land "from the whites, who are hunting to cultivate it." In light of this, he proposed to the Ottawa and Chippewa (Ojibway) proprietors of Manitoulin that they surrender their lands to the Crown to become a general refuge for all First Nations who might wish to relocate there. The Ottawa and Chippewa (Ojibway) of Manitoulin agreed.[853]

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[852] Treaty 45, August 9, 1836, Exhibit 1128, p. 112, Plaintiffs' Book of Authorities, Tab 141; Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 14-16.
[853] Treaty 45, August 9, 1836, Exhibit 1128, Plaintiffs' Book of Authorities, Tab 141.

651. Next, Bond Head turned to SON.[854] Just as he had with the Ottawa and Chippewa (Ojibway) of Manitoulin, he began by noting he could not protect their territory from the encroachment of the whites:

> [T]heir Great Father said, he could not protect them in the possession of their land; - that the white men would settle on it, and that if they did not give it up they would lose it.[855]

652. With this threat hanging in the air, he first asked SON to give up their entire territory and relocate to Manitoulin Island.[856] SON refused. One witness to the proceedings, Reverend Stinson, the General Superintendent of Wesleyan Methodist Missions in Upper Canada[857], described these events in comments to the Secretary of the Methodist Church, Egerton Ryerson:[858]

> Sir Francis wished them to cede the whole of [the Saugeen] Territory to him – they declined – he persuaded and even threatened them – they were inflexible. They told him that they could not live on those islands [Manitoulin] – that they would not go there – that they wanted lands that they could call their own (secured to them) and have houses, and have their children learn to read, and live like the white man.[859]

See also, the account from another witness, Rev. James Evans:

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[854] Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 14-16.
[855] Rev. James Evans to the Editor, Christian Guardian, March 24, 1838, Exhibit 1233, p. 2, Column 1 [original], p. 3 [transcript].
[856] Committee of the Executive Council of Upper Canada to Charles Metcalfe, July 21, 1843, Exhibit 1434, p. 2.
[857] Prof. Paul McHugh, "Treaty 45 1/2 (1836), the Crown's 'unremitting solicitude' and the 'forever' promise to the Saugeen Ojibway Nation: a report on British imperial policy and practice in Upper Canada during the 1830s" (2015), Exhibit 4441, p. 48.
[858] Dr. Gwen Reimer, "Volume 3: Saugeen – Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p 53, footnote 200.
[859] Egerton Ryerson to Lord Glenelg, April 9, 1838, Exhibit 1236, p. 16.

> [T]heir Great Father said, he could not protect them in the possession of their land; - that the white men would settle on it, and that if they did not give it up they would lose it; whereas, if they would surrender it to him, he would assist them in settling on the Munnedoolin Island. After another interview with his Excellency, they returned and said "they were ruined but it was no use to say any thing more, as their Great Father was determined to have their land; - that they were poor and weak and must submit, and that if they did not let him have his own way they would lose it altogether.[860]

653. A missionary at Saugeen, Thomas Hurlburt, emphasized that this threat that they would lose their lands drove SON "to desperation", and that SON 'talked strongly of going to war with the white people, merely for the purpose of putting an end to their own misery."[861]

654. According to Saugeen Chief Metigwob, Bond Head also told SON that if they did not accept his plan, he would "cast them off and never do any thing for them in the way of presents."[862] Presents in this period included essential articles like cloth and thread for clothing, and guns and ammunition to assist with the hunt.[863] The loss of the annual presents was a significant economic threat to SON.[864]

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[860] Rev. James Evans to the Editor, Christian Guardian, March 24, 1838, Exhibit 1233, p. 2, column 1[original], p. 3 [transcript].
[861] Letter by Thomas Hurlburt, January 1, 1860, Exhibit 2559, p. 2 [original], p.1 [transcript]; See also: Evidence of Prof. Paul McHugh, Transcript vol 69, December 11, 2019, p 8925, lines 4-10 – *discussing James Evans, "1836 Mission Tour of Lake Huron," July 19, 1836, Exhibit 1126, which identifies Hurlburt as a missionary to the Saugeen around the time of Treaty 45 ½.*
[862] Speech of Metigwob, September 13, 1836, Exhibit 1142, p. 2 [original], p. 1 [transcript].
[863] Charles Bagot, Report on the Affairs of the Indians in Canada, Section 3 [Bagot Commission Report, Section 3], 10 October 1842, *in Appendix T to the Sixth Volume of the Journals of the Legislative Assembly of the Province of Canada*, 2 June, 1847- 28 July, 1847 (3rd Session, 2nd Provincial Parliament of Canada, 1847), Exhibit 1447, PDF p.17.
[864] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3021, line 8 to p. 3022, line 21.

655. Bond Head then asked SON to remain in the part of their territory north of Owen Sound (that is, the Peninsula), and to surrender the rest of their territory to the south.[865] In exchange, he promised to protect the Peninsula and their fishing grounds from the encroachment of whites, as well as assist them in adapting to an agricultural economy.[866]

656. Bond Head's account of the speech he made at these proceedings has come to be known as Treaty 45 ½. It states:

> To the Saukings:
>
> My Children:
>
> You have heard the proposal I just made to the Chippewas and Ottawas, by which it has been agreed between them and your Great Father that these islands (Manitoulin) on which we are now assembled, should be made, in Council, the property (under Your Great Father's control) of all Indians whom he shall allow to reside on them.
>
> I now propose to you that you should surrender to your Great Father the Sauking Territory you at present occupy, and that you should repair either to this island or **to that part of your territory which lies on the north of Owen Sound,** upon which proper houses shall be built for you, and proper assistance given to enable you to become civilized and to cultivate land, **which your Great Father engages for ever to protect for you from the encroachments of the whites.**[867] [emphasis added].

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[865] Evidence of Prof. Jarvis Brownlie, Transcript vol 36, August 13, 2019, p. 3959, line 7 to p. 3960, line 3; Egerton Ryerson to Lord Glenelg, April 9, 1838, Exhibit 1236, pp. 16-17.
[866] Treaty 45 ½, August 9, 1836, Exhibit 1128, Plaintiffs' Book of Authorities, Tab 141; Statement of Metigwob on the Surrender of the Sahgeeng Territory, September 13, 1836, Six Nations/New Credit Department of Indian Affairs Agency, Filed as No. 123-1836, Exhibit 1142, p. 3 [original], p. 2 [transcript].
[867] Treaty 45 ½, August 9, 1836, Exhibit 1128, p. 113, Plaintiffs' Book of Authorities, Tab 141; See also: Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 14-16.

657. To this, SON agreed very reluctantly.[868] Chief Metigwob, one of the Saugeen Chiefs, expressed that he and the other Chiefs were "over-persuaded".[869] By Treaty 45 ½, SON surrendered 1.5 million acres of land south of the Peninsula – the majority of their territory. They were left with 450,000 acres of land on the Peninsula as their reserve.[870]

658. Bond Head relied on the financial benefit to the Crown of these treaties, and their potential to relieve Euro-Canadians pressure for more land, to persuade the Colonial Secretary to approve these treaties, and they were ratified by the Crown.[871] In his despatches, Bond Head observed:

> [T]here can be no doubt that the Acquisition of their vast and fertile Territory will be hailed with Joy by the whole Province.[872] [*August 1836 Despatch]*
>
> I need hardly observe, that I have thus obtained for His Majesty's Government, from the Indians, an immense Portion of most valuable Land, which will undoubtedly produce, at no remote Period, more than sufficient to defray the whole of the Expenses of the Indians and Indian Department in this Province.[873] *[November 1836 Despatch]*

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[868] Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, p. 15; J.R. Miller, "Chapter 4 - From our lands we receive scarcely anything: The Upper Canadian Treaties, 1818-1862", in Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada, 2009, Ex 4127, p. 108 – *negotiations were "protracted and difficult", agreement of SON was "reluctant"*.

[869] Speech of Metigwob, September 13, 1836, Exhibit 1142, p. 3 [original], p. 3 [transcript].

[870] Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, p. 19.

[871] Bond Head to Lord Glenelg, November 20, 1836, Exhibit 1154, p. 126; Lord Glenelg to Bond Head, October 5, 1836, Exhibit 1146; Lord Glenelg to Bond Head, January 20, 1837, Exhibit 1165; Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 17-21.

[872] Bond Head to Lord Glenelg, August 20, 1836, Exhibit 1136, p. 123.

[873] Bond Head to Lord Glenelg, November 20, 1836, Exhibit 1154, p. 126. Note that the Crown accepted the surrenders, while rejecting Bond Head's arguments about the failure of the

659. The evidence suggests that opening the lands south of the Peninsula for settlement was a major motivation for Bond Head's decision to take, and the Crown's decision to accept, Treaty 45 ½. Colonial Secretary Lord Glenelg, who wrote to Bond Head explaining that the King accepted Treaty 45 ½, expressed some reluctance about Bond Head's views in relation to the civilization policy.[874] When Bond Head presented the surrenders in his Speech from the Throne to open the Upper Canadian Legislative Council and House of Assembly in November of 1836, he emphasized that the surrender was part of a "great scheme to open lands for settlement" but he did not indicate any changes to the Indian Department's policy of civilization.[875]

The Promise to Protect the Peninsula: Scope and Meaning

THE PROMISE TO PROTECT WAS THE MAIN CONSIDERATION

660. In 1836, when Treaty 45 ½ was concluded, SON had a deep connection to their territory, including their territory on the Peninsula.[876] The missionaries who were present at the treaty council observed and commented on this connection in their accounts of Treaty 45 ½:

(a) Rev. Evans observed that "[E]very thing dear, both temporal and spiritual, bound [SON] to the spot."[877] Recounting the events of the treaty council, he wrote:

> The Indians were now called to a Council, and were, as usual, ready to attend. Here the Ottawas and Chippewas, each of whom claimed the Munnedoolin

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civilization policy. Dr. Gwen Reimer, "Volume 3: The Saugeen-Nawash Land Cessions No. 45 ½ (1836), 67 (1851) and 72 (1854)" (as revised 2019), Exhibit 4703, pp. 39-41, 60-62.

[874] Lord Glenelg to Bond Head, October 5, 1836, Exhibit 1146.

[875] Dr. Gwen Reimer, "Volume 3: The Saugeen-Nawash Land Cessions No. 45 ½ (1836), 67 (1851) and 72 (1854)" (as revised 2019), Exhibit 4703, p. 61; Lt Gov. Bond Head, Speech, 8th November 1836, Exhibit 1152, pp. 126-127 [original], pp. 5-6 [PDF Image].

[876] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6891, line 17 to p. 6893, line 23 – *importance of hunting today and in the past*; p. 6899, line 8 to p. 6901, line 8 – *importance of fishing today and in the past and how this applies to SON specifically*; and p. 6901, line 9 to p. 6909, line 14 – *the seasonal round*.

[877] Rev. Evans to the Editor, Christian Guardian, March 24, 1838, Exhibit 1233, p. 3.

> Island, relinquished the same on condition that the Governor should secure it to both and their heirs forever. It was likewise proposed to the Chippewas from Saugeeng that they should relinquish all title to their extensive territory on Lake Huron, retaining only the peninsula between the said lake and Georgiana Bay, the line to commence at the bottom of Owen's Sound, and to extend directly across the peninsula. Thus the Indians again were removed from **the spot dearest to them on earth.**[878] [emphasis added]

According to Dr. Reimer, these comments about the significance of SON's land to SON would also have applied to the Peninsula.[879]

(b) Rev. Stinson, in his comments to Egerton Ryerson, also noted SON's deep connection to their territory:

> Sir Francis then proposed that if they would cede to him the territory joining the Canada Company's Huron Tract, he would secure to them and their children the Territory north of Owen's Sound…. To this proposal the poor Indians did readily accede **with tears in their eyes – their hopes revived, and their countenances beamed with joy.** This was what they wanted – land secured to them from which they could not be removed – on which they would have help to build houses, and settle their families and rest their bones.[880] [emphasis added]

661. This connection to the territory is maintained among members of SON to this day.[881] For example, Randall Kahgee testified as follows:

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[878] Rev. Evans, 1836 Mission Tour of Lake Huron, Exhibit 1126, p. 9/2495.
[879] Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11511, lines 13-16.
[880] Letter from Egerton Ryerson to Lord Glenelg, April 9, 1838, Exhibit 1236, pp. 16-17 [original], p. 4 [transcript]; See also: Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11513, line 5 to p. 11514, line 3.
[881] Evidence of Paul Jones, Transcript vol 27, July 15, 2019, p. 2624, line 13 to p. 2625, line 2; Evidence of Joanne Keeshig, Transcript vol 28, July 16, 2019, p. 2726, lines 2-9; Evidence of Paul

> Q. What groups, other than SON, have responsibilities to care for SON's territory?
>
> A. That responsibility rests with us.[882]

662. And so the promise to protect the lands on the Peninsula was deeply significant to SON.[883] From SON's perspective, it was the most important promise in Treaty 45 ½.[884]

663. Crown officials, too, understood that both the land on the Peninsula and the promise to protect the Peninsula were deeply significant to SON.[885]

664. For example, in 1837, Chief Superintendent of Indian Affairs Samuel P. Jarvis, a senior official in the Indian Department,[886] drafted a schedule summarizing the relevant terms and conditions of the various surrenders of Indian lands that had been made to the Crown between 1820 and July 10, 1837. The entry for Treaty 45 ½ identifies "Protection of King Wm 4th" as the

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Nadjiwan, Transcript vol 17, June 3, 2019, p. 1445 lines 14-25; Transcript vol 17, June 3, 2019, p. 1449, lines 16-22; Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 909, line 2 to p. 910, line 21 – *"Because who we are as Anishinaabe is very much linked to that relationship: Our language, our culture, our ceremonies, and indeed our very identity*".

[882] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 911, lines 9-13.

[883] Evidence of Prof. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11518, line 13 to p. 11520, line 8; Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p. 7008, line 12 to p. 7009, line 25 – *On the main objectives of SON in entering Treaty 45 ½ "I don't think Dr. McHugh has taken into account the close relationship between Anishinaabe and the land that is critical in understanding what they were trying to achieve in 1836… They're trying over and over and over again to maintain themselves on the land that is their place."*

[884] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019 p. 3010, lines 4-17.

[885] Evidence of Paul McHugh, Transcript vol 69, December 11, 2019 p. 8931, line 14 to p. 8932, line 11 - *Bond Head understood both land and promise were important to SON;* Evidence of Paul McHugh, Transcript vol 68, December 10, 2019, p. 8909, line 19 to p. 8912, line 1 – *SON expressed to the Crown the importance of their territory during the negotiations of Treaty 45 ½.*

[886] Matheson, Administrators of Indian Affairs - Historic Sketch, 1935, Exhibit 3615, p. 7; See discussion of this document at Evidence of Jean Pierre Morin, Transcript vol 66, November 26, 2019, p. 8530, line 2 to p. 8536, line 9.

consideration for the surrender. It is the only form of consideration identified on the chart.[887] This suggests that when Jarvis wrote this chart, he understood the promise to protect to be the primary consideration for Treaty 45 ½.[888]

665. No annuity or other monetary compensation was made part of Treaty 45 ½ when it was negotiated. An annuity of £2.10 was added to the agreement in 1840 in response to outcry from the missionary community and in order to bring the agreement into conformity with general Crown practice. But the bargain that SON made in August 1836 did not include any compensation beyond the promise to protect the Peninsula and their fisheries, and assistance with becoming "civilized" on that land.[889] As such, the promise to protect the Peninsula was understood by both SON and the Crown as the main consideration SON received at the conclusion of Treaty 45 ½. Having their remaining land on the Peninsula protected for them in the face of Euro-Canadian settlement was SON's primary interest in entering the treaty.

THE MEANING OF "FOREVER"

666. Treaty 45 ½ states that the Crown promised to protect the land from the encroachment of the whites "for ever".[890]

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[887] S.P. Jarvis, Schedule of Lands situate in the Province of Upper Canada, surrendered to His Majesty by various Tribes of Indians from the year 1820 to the 10th July 1837, Number 8, Exhibit 1198, p. 5.
[888] Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11520, line 9 to p. 11523, line 5.
[889] Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p.11507, line 5 to p.11508, line 7; Dr. Gwen Reimer, "Volume 3: Saugeen-Nawash Land Censsions No. 45 ½ (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 65-67; Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, p. 15; Treaty 45 ½, August 9, 1836, Exhibit 1128, p. 113, Plaintiffs' Book of Authorities, Tab 141.
[890] Treaty 45 ½, August 9, 1836, Exhibit 1128, p. 113, Plaintiffs' Book of Authorities, Tab 141.

667. Bond Head chose his words carefully at that treaty council in order to convince the Indians assembled to accept his proposal. Bond Head chose the word "forever" because he calculated that it would help convince SON to surrender a large swath of their territory.[891] As Prof. Driben put it, for SON, the promise meant a chance to "achieve the goal of establishing a homeland that's going to be there forever. [They had] been there forever and [they] want[ed] to remain there forever."[892]

668. In 1836, the phrase "for ever" translated into Anishnaabemowin would connote approximately the same meaning as what an English speaker would commonly understand as "forever" – eternal and perpetual, without end or ceaseless.[893] Prof. Corbiere described the word as "straightforward" to translate.[894]

669. The accounts of Treaty 45 ½ by the Methodist missionaries who witnessed the proceedings confirm that the promise that SON could hold their lands forever – permanently, without end – was a significant factor in the negotiation of Treaty 45 ½. For example:

(a) Rev. James Evans wrote in his 1838 account of the treaty negotiations:

> "How strange was the conduct of His Excellency! He declares he cannot protect the Saugeens in the possession of their territory but the moment they surrender all that [is worth] possessing to the Crown

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[891] Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11518, lines 13-25*;* Rev. James Evans, "1836 Mission Tour of Lake Huron," entry on August 9, 1836, Exhibit 1126, p.10 – *Rev. Evans, describing the treaty council proceedings, explained that "The speech of His Excellency was well-suited to the idiom of the Indian language and admirably adapted to gain their attention and confidence[…]*.

[892] Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p. 7008, line 12 to p. 7009, line 25.

[893] Prof. Mary Ann Corbiere, "Additional Treaty Translation Issues" (2016), Exhibit 4095, especially at p. 4.

[894] Evidence of Prof. Mary Ann Corbiere, Transcript vol 24, July 9, 2019, p. 2421, lines 11-13.

> – he at once guarantees the peaceful **and permanent** possession of the granite rocks, and bogs of the Northern Peninsula!"[895] [emphasis added]

(b) Egerton Ryerson, reporting on the account of Rev. Stinson, also explained that Bond Head had promised "he would **secure to them [SON] and their children the Territory north of Owen's Sound"** and that "This what was they [SON] wanted, **land secured to them from which they could not be removed** – on which they would have help to build houses and settle their families, and rest their bones…" [896] [emphasis added]

670. According to these eye witness accounts, Bond Head's message to SON was clear: they would have the territory north of Owen Sound "permanently"[897] for "their children".[898] It was land "from which they could not be removed"[899] – in other words, it would be theirs for the long haul. There is no suggestion in the missionary accounts of the treaty negotiation– or any other account– that SON's possession of the Peninsula was understood by the parties to the treaty to be somehow temporary or contingent.

671. Canada's witness, Prof. McHugh, stated that, in his view, the meaning of the word "forever" was not a part of the Crown policy debates following Treaty 45 ½. However, even if the word forever, as Prof. McHugh put it, did not "excit[e] or exercise[e] the actors at this time"[900]

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[895] Rev. James Evans to the Editor, Christian Guardian, March 24, 1838, Exhibit 1233, p. 5 [transcript].
[896] Egerton Ryerson to Lord Glenelg, April 9, 1838, Exhibit 1236, p. 17 [original], p. 4 [transcript].
[897] Rev. James Evans to the Editor, Christian Guardian, March 24, 1838, Exhibit 1233, p. 5 [transcript].
[898] Egerton Ryerson to Lord Glenelg, April 9, 1838, Exhibit 1236, p. 17 [original], p. 4 [transcript].
[899] Egerton Ryerson to Lord Glenelg, April 9, 1838, Exhibit 1236, p. 17 [original], p. 4 [transcript].
[900] Prof. Paul McHugh, "Treaty 45 1/2 (1836), the Crown's 'unremitting solicitude' and the 'forever' promise to the Saugeen Ojibway Nation: a report on British imperial policy and practice in Upper

does not mean the word was understood to have no meaning at all. SON submits the simplest explanation for the lack of debate in official circles over the meaning of the word "forever" is that the meaning was clear: everyone understood the word to mean a very long time.

672. This is not to suggest that Treaty 45 ½ must be interpreted as immutable. But even Prof. McHugh – who was argumentative throughout his testimony (see Relevance and Weight of the Evidence of Prof. Paul McHugh, Appendix E, Tab 32) – agreed that the promise to protect the Peninsula was to last unless and until *SON agreed to surrender it to the Crown.*[901] In line with the Principles of the Royal Proclamation set out above at paragraph 638, if such an agreement to a further surrender were to be reached, it would have been expected that the Crown would be honest throughout the negotiation of the surrender, and not use threats or coercion to press SON into agreement.

673. From an Anishinaabe point of view, treaties formed the foundation of a longstanding relationship that carried rights, responsibilities and privileges for both parties.[902] These relationships were both personal and contractual. It was the responsibility of the participants to

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Canada during the 1830s" (2015), Exhibit 4441, p. 52; Evidence of Prof. Paul McHugh, Transcript vol 68, December 10, 2019, p. 8888, lines 5-23; p. 8885, line 24 to p. 8886, line 20; p. 8887, line 22; p.8888, line 10; and p. 8888, lines 21-23.

[901] Prof. Paul McHugh, "Treaty 45 1/2 (1836), the Crown's 'unremitting solicitude' and the 'forever' promise to the Saugeen Ojibway Nation: a report on British imperial policy and practice in Upper Canada during the 1830s" (2015), Exhibit 4441, p. 30 – *"…there is a clear recognition that the Crown would protect the Saugeen land until they were willing to surrender it to the Crown."*; p. 51 – *surrender means so long as Saugeen wished to retain the land;* p. 52 – *"The evidence I have seen would suggest that the forever promise was taken as meaning 'until such time as the Saugeen might wish to surrender' rather than as entailing a positive Crown obligation to prevent that occurrence."*; and p. 54 – *promise lasts until SON agrees to a surrender.*

[902] Heidi Stark, "Respect, Responsibility and Renewal: Foundations of Anishinaabe Treaty Making with the United States and Canada, American Indian Culture and Research Journal, 34:2 (2010) 145-164, Exhibit 4334, at pp. 151, 153-154, 156.

maintain the integrity of the relationship by 'adhering to the principles of respect, responsibility, and renewal'.[903] Amendment to the relationship required the consent of both sides.[904]

Treaty 45 ½ set aside the Peninsula *for SON*

674. Treaty 45 ½ protected the Peninsula for the benefit of SON. It did not effect a surrender of the Peninsula to the Crown, nor did it reserve the territory for the Ojibway or "Indians" of Upper Canada as a whole.

675. This issue arises as a result of the evidence of Ontario's expert Dr. Reimer. She – and she alone among the witnesses in this trial[905] – maintained that Treaty 45 ½ created a general reserve on the Peninsula. In her report, she relies primarily a single portion of the text of Treaty 45 ½, which refers back to Treaty 45 conducted with the Ottawa and Chippewa (Ojibway) on Manitoulin Island:

> You have heard the proposal I have just made to the Chippewas and Ottawas, by which it has been agreed between them and your Great Father that these islands (Manatoulin), on which we are now assembled should be made, in Council, the property

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[903] Prof. Paul Driben, "A Report on Select Aspects of the Cultural Lives of the Saugeen Ojibway" (2013), Exhibit 4324, at p. 263; Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p. 7010, line 1 to p.7013, line 15.

[904] Heidi Stark, "Respect, Responsibility and Renewal: Foundations of Anishinaabe Treaty Making with the United States and Canada, American Indian Culture and Research Journal*,* 34:2 (2010) 145-164*,* Exhibit 4334, p. 154.

[905] Prof. Brownlie had initially expressed a similar view in the Executive Summary of his Report, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 2, 5. However, he clarified on the stand that, after reviewing the documentary record more closely in the intervening years, he did not believe that it was a term or condition of Treaty 45 ½ to create a general reserve on the Peninsula. Evidence of Prof. Jarvis Brownlie, Transcript vol. 30, July 22, 2019, p. 3066, line 5 to p. 3067, line 19; Evidence of Prof. Jarvis Brownlie, Transcript vol 36, August 13, 2019, p. 3941, line 19 to p. 3946, line 10; See also: Evidence of Prof. Paul McHugh, Transcript vol 68, December 10, 2019, p.8862, lines 7-10 – *Q. Do you agree that Bond Head at Treaty 45 1/2 promised to protect the peninsula from white encroachment for the Saugeen? A. Yes.*

> (under your Great Father's control) of all Indians whom he shall allow to reside on them.
>
> I now propose to you that you should surrender to you Great Father the Sauking Territory you at present occupy and that you should repair either to this island or to that part of your territory which lies North of Owen Sound…

Because Treaty 45 created a general reserve on Manitoulin Island, Dr. Reimer suggests the same was implicitly true of Treaty 45 ½.[906]

676. However, on cross examination, it became clear that this conclusion is not supported by the historical record. The plans of the parties prior to the treaty council; the various accounts of the treaty council; and the parties' behaviour in the years that followed all support the conclusion that Treaty 45 ½ did not have the effect of creating a general reserve on the Peninsula. In fact, when confronted with this evidence of the historical record, Dr. Reimer admitted that Treaty 45 ½ did not formally set aside the Peninsula as a general reserve; as of the conclusion of Treaty 45 ½, a general reserve at Saugeen was merely an idea or proposal. [907] SON submits it was the intention

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[906] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 41-45.

[907] Treaty 45, Treaty 45 ½, August 9, 1836, Exhibit 1128; Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2019, p 11563, line 11 to p. 11565, line 24; See also: Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2019, pp. 11523-11570, especially p. 11527, line 4 to p. 11528, line 15 – *the repetition could be read as simply presenting SON with options*; p. 11528, lines 16-21 – *the promise to protect the lands "for you" is to SON*; p. 11528, line 22 to p. 11529, line 4 – *there is nothing in the treaty to suggest that if other First Nations do not come to Saugeen Territory, the promise to protect will be null and void*; p. 11529, line 14 to p. 11530, line 2 – *prior to 1836, the Crown were planning on Manitoulin, not Saugeen for the site of a general reserve*; p. 11539, lines 17-24 – *Saugeen Ojibway still see the Peninsula as their land after Treaty 45 ½;* p. 11539, line 25 to p. 11542, line 14 - *The Crown invested more heavily in the settlement at Manitoulin*; p. 11542, line 20 to p. 11543, line 2 -*Manitoulin was more formalized as a general reserve than Saugeen*; p. 11548, line 11 to p.11553, line 16 – *Chief Superintendent of Indian Affairs may not have understood that Treaty 45 ½ created a general reserve, though as Chief Superintendent he would be in a position to be well informed about the effect of the Treaty*; p. 11554, line 15 to p. 11556, line 6 – *the 1847 Declaration recognizes SON's possession of the*

of both the Crown and SON at Treaty 45 ½ that the Peninsula become a reserve for SON, not a general reserve set aside for the Anishinaabe or some other group of First Nations more generally.

EVENTS PRIOR TO TREATY 45 ½: THE MANITOULIN GENERAL RESERVE PLAN

677. Starting in 1835, Lt. Gov. Bond Head's predecessor, Lt Gov. John Colborne, established a government-supported settlement on Manitoulin Island. It was a pilot project designed to promote Anglicanism and to serve as a model of "civilized" Indian life in British North America.[908] Bond Head wrote to Lord Glenelg:

> [M]y Predecessor, with a view to civilize and Christianize the Country North of Lake Huron, made arrangements for erecting certain buildings on the Great Manitoulin Island and for delivering on this spot, to the visiting Indians, their Presents for the present year.[909]

678. The Crown took steps to promote the Manitoulin Island General Reserve in the year leading up to Treaties 45 and 45 ½. In 1835, the Indian Department decided to move the annual distribution of presents to Manitoulin as a means to attract First Nations to that location.[910] Over

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Peninsula, does not make that possession contingent on other First Nations coming to the Peninsula; p. 11557, line 15 to p. 11558, line 21 – *the 1851 Proclamation does not make any reference to the Peninsula being a general reserve*; p. 11558, line 22 to p.11563, line 10 – *J.B. Macaulay, Report on Indian Affairs 1839 says that Treaty 45 created a general reserve on Manitoulin; it makes no such claim about the effect of Treaty 45 ½;* and p. 11567, line 3 to p. 11570, line 2 – *During the negotiations in August and October 1854, neither Anderson nor Oliphant behaved as if there was a general reserve on the Peninsula.*

[908] Ruth Bleasedale, "Manitowaning: An Experiment in Indian Settlement," in Ontario History, Vol LXVI, No 3, Ontario Historical Society, Exhibit 4572, p. 148; Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 33; Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 2997, line 7 to p. 2998, line 4.

[909] Bond Head to Lord Glenelg, August 20, 1836, Exhibit 1136, p. 122.

[910] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 27.

the summer of 1835, Indian Superintendent T.G. Anderson visited Indians across Upper Canada, announcing the government's offer to assist First Nations in "becoming civilized" at Manitoulin.[911]

679. There is no evidence to suggest that the Lieutenant Governor or Indian Department officials were considering a similar experiment on the Peninsula in the same period, nor that any similar preparatory steps were taken to prepare for such a settlement on the Peninsula. Manitoulin Island, not SON's territory, was the "focal point" of government efforts towards developing a pilot general reserve prior to Treaties 45 and 45 ½.[912]

680. As noted above at paragraphs 255 to 260, in this period, the Anishinaabe of Upper Canada met periodically in General Council to discuss matters of shared interest.[913] In the mid-19th century, Methodist missionaries had an important influence at these gatherings, to the point that First Nations who were not interested in proselytization sometimes refused to attend these General Councils.[914] For example, at a General Council in 1840, the Minutes state that the "Council Highly disapproved of the Conduct of Kanooching & his people in not attending the council after having been notified to attend the council [three inserted words:] and their saying that they

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[911] T.G. Anderson to Phillpotts, 18 July 1835, Exhibit 1085, see especially p. 14 [original], p. 11 [transcript].
[912] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 34; Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11529, line 14 to p. 11530, line 2.
[913] Dr. Gwen Reimer, "Supplementary Report: Documentation Relevant to the Context and Nature of General Indian Councils in Upper Canada/Canada West" (2020), Exhibit 4709, p. 3.
[914] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6800, lines 8-20; Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11306, lines 8-11 and p. 11315, lines 10-16.

supposed they were sent for in order to be talked to about the worthless Christianity." [emphasis in original].[915]

681. As word spread of the Crown's proposed Manitoulin settlement, there was discussion among the Anishinaabe in attendance at the 1836 General Council about the shortcomings of the Manitoulin plan. They were concerned about the effects of white people settling near their lands, but noted that Manitoulin was too cold, too far from markets, and too scarce in resources for the Ojibway to wish to remove there. They stated that if the government were to recommend them to form one general settlement, they would prefer the Saugeen Territory to Manitoulin Island.[916] This plan was consistent with the goals of the Methodist missionaries who were so influential at their meetings.[917] However, the part of the Saugeen Territory that the Ojibway had in mind for this project was not the Peninsula but the rich farming lands to the south of the Peninsula, adjacent to the Canada Company lands – the lands that were ultimately surrendered as part of Treaty 45 ½.[918]

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[915] Minutes of a General Council held at the River Credit, January 16, 1840, Exhibit 1322, p. 9 [original] p. 5 [transcript].

[916] General Council Minutes, January 28, 1836, Exhibit 1103, pp. 3-4 [original], pp. 2-3 [transcript].

[917] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11295, lines 14-18; Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 29-30.

[918] Prof. Paul McHugh, "Treaty 45 1/2 (1836), the Crown's 'unremitting solicitude' and the 'forever' promise to the Saugeen Ojibway Nation: a report on British imperial policy and practice in Upper Canada during the 1830s" (2015), Exhibit 4441, p. 52 – *"Treaty 45 ½ had scuppered Chief Wawanosh's vision of a peninsular, pan tribal (and evidently Christian) Provincial homeland for those First Nations with nowhere else to go and God on their mind.*"; Rev. James Evans to the Editor, Christian Guardian, March 24, 1838, Exhibit 1233, p. 2 – "*The Indians were confounded at the proposal [that they should surrender their territory]: as the Saugeeng was held by them as a place of retirement for the Chippeway Indians, where they contemplated concentrating themselves at some future period, when they should be called upon to remove from their present scattered locations throughout the Province, and they requested time to consider the subject*."; Wawanosh in Christian Guardian, July 5, 1836, Exhibit 1123; Evidence of Dr. Gwen Reimer, Transcript vol 83, February 12, 2020, p. 10635, line 4 to p. 10638, line 1 – *At issue in Ex 1123 are*

682. There is no evidence that the Crown changed its plans for the settlement on Manitoulin Island or considered creating a comparable settlement in any part of Saugeen Ojibway's territory in response to these discussions among the Ojibway.

ACCOUNTS OF THE TREATY COUNCIL AND THE TEXT OF TREATY 45 ½

683. The accounts by parties to and witnesses of the treaty council for Treaty 45 ½ confirm that, while the idea of Methodist Indians gathering at the Peninsula may have been discussed at the council, it was not understood as a part, term of or condition to Treaty 45 ½.

684. Treaty 45, with the Ottawa and Chippewa (Ojibway) residing on Manitoulin Islands, was intended to establish Manitoulin Island as a general reserve to which Indians from throughout the province would relocate. It is expressly structured as a surrender of Manitoulin Island by the Ottawa and Chippewa (Ojibway) and residing on Manitoulin Islands to the Crown for this purpose because the intention was that they then would be sharing their territory with other First Nations. It states:

> Are you, therefore, the Ottawas and Chippewas, willing to relinquish your respective claims to these islands, and make them the property (under your Great Father's control) of all Indians whom he shall allow to reside on them; if so, affix your marks to this my proposal.[919]

685. There is no comparable provision in Treaty 45 ½. Rather, Treaty 45 ½ is structured as a surrender of land south of Owen Sound, and a reservation of the Peninsula. [920] This is not

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lands south of the Peninsula; Evidence of Prof. Jarvis Brownlie, Transcript vol. 36, August 13, 2019, p. 3933, lines 11-15 – *Exhibits refer to* "*the Saugeen lands. I don't think they specify the peninsula. At this time, the Saugeen still have all of their territory, so this would include all the lands south of the peninsula as well."*

[919] Treaty 45, August 9, 1836, Exhibit 1128, p. 113, Plaintiffs' Book of Authorities, Tab 141.

[920] Treaty 45 ½, August 9, 1836, Exhibit 1128, Plaintiffs' Book of Authorities, Tab 141.

consistent with the creation of a general reserve on the Peninsula like the one created by Treaty 45 on Manitoulin Island.[921]

686. Throughout the rest of the text of Treaty 45 ½, speaking to SON, Bond Head refers to the Peninsula as "your territory" and promises "forever to protect the lands for you."[922] There was consensus among the experts in this trial that the "you" for whom the land was to be protected was intended to be SON, not Indians or Ojibway more generally. This, too, is inconsistent with the creation of a general reserve on the Peninsula.[923]

687. Bond Head's despatches about the treaty council for Treaties 45 and 45 ½ do not reference discussions about or the creation of a general reserve on the Peninsula.[924]

688. Rev. Adam Elliot, Rev. James Evans, and Rev. Joseph Stinson, the missionaries who were present at the treaty council, do not mention in their accounts of the treaty that a general reserve was created on the Saugeen Peninsula by way of Treaty 45 ½.[925] Rev. Evans, in particular, described Treaty 45 ½ as scuppering the Methodist Ojibway idea to create a general reserve on the

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[921] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 33-40; Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11527, lines 8-12; Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3067, lines 10-19.
[922] Treaty 45 ½, August 9, 1836, Exhibit 1128, p. 113, Plaintiffs' Book of Authorities. Tab 141.
[923] Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11528, lines 10-21; Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3009, line 24 to p. 3010, line 3; Evidence of Prof. Paul McHugh, Transcript vol 68, December 10, 2019, p.8862, lines 7-10; Treaty 45 ½, August 9, 1836, Exhibit 1128, Plaintiffs' Book of Authorities, Tab 141.
[924] Bond Head to Lord Glenelg, August 20, 1836, Exhibit 1136; Bond Head to Lord Glenelg, November 20, 1836, Exhibit 1154; Bond Head to Lord Glenelg, August 15, 1837, Exhibit 1208.
[925] Rev. James Evans to the Editor, Christian Guardian, April 18, 1838, Exhibit 1237; Egerton Ryerson to Lord Glenelg, April 9, 1838, Exhibit 1236; Adam Elliot to the Archdeacon of York, June 12, 1838, Exhibit 1246.

"fertile tract of land" south of the Peninsula on the lands that were surrendered,[926] and critiqued the decision of the government to instead remove them to Manitoulin, which he believed was less well-suited to agriculture than the tract surrendered in Treaty 45 ½.

(a) In March 1838, Evans described Treaty 45 ½ this way:

> The Indians were confounded at the proposal [that they should surrender their territory]: as the Saugeeng was held by them as a place of retirement for the Chippeway Indians, where they contemplated concentrating themselves at some future period, when they should be called upon to remove from their present scattered locations throughout the Province, and they requested time to consider the subject. […]
>
> They were advised to endeavor to retain their village, and that part of their lands lying northward, but were at last compelled to surrender their settlement, retaining only, as His Excellency stated, in his despatch to Lord Glenelg, date 20th August, '36, 'that part of their territory which lies north of Owen's Sound". This reserve lies north of their present location, and is almost throughout a barren waste of granite rocks, and undrainable swamps……."[927]

(b) In April 1838, he explained:

> The great object of Wawanosh in retaining possession of this fertile tract of land has been for some years past, to hold it as a reserve for the future settlement of the Indians who are scattered in small parties among the whites; and in a letter addressed "to the Ojibway Indians, scattered in Upper Canada, published in the Guardian in July 1836, he proposed, as chief of the Saugeeng, that all the Ojibways, should resort to this reserve, and become cultivators

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[926] See also: Prof. Paul McHugh, "Treaty 45 1/2 (1836), the Crown's 'unremitting solicitude' and the 'forever' promise to the Saugeen Ojibway Nation: a report on British imperial policy and practice in Upper Canada during the 1830s" (2015), Exhibit 4441, p. 52.

[927] Rev. James Evans, Letter to the Editor of the Christian Guardian, March 24, 1838, Exhibit 1233, p. 1, column 6 – p. 2, column 1 [original], pp. 3-4 [transcript].

> of the soil. But the Indians have now been deprived of it, and are informed that it is the desire of the government that they should remove to the Munnedoolin Island, than which no place in British North America could be less adapted to their situation….
>
> I leave anyone to judge whether the Indians would be most benefited by removing to the rich lands of Saugeeng, or to the "admirably adapted" Munnedoolin Island.
>
> Should the Government persevere in following out the present arrangements, and remove the Christian Indians *in deference* to the *opinions* of *His Excellency,* a wound will be given to their religious and civil improvement which will require many years to heal.[928]

689. It is nonetheless likely that there was at least some discussion of other Methodist Ojibway coming to the Peninsula during the treaty council that culminated in Treaty 45 ½. This is confirmed by the speech one of the Saugeen Chiefs, Chief Metigwob, at the River St. Clair month after the treaty was concluded.[929] However, this discussion did not crystallize into a firm or formal commitment or term at the treaty council for Treaty 45 ½.[930]

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[928] Rev. James Evans to the Editor, Christian Guardian, April 18, 1838, Exhibit 1237.

[929] Statement of Metigwob one of the Sahgeeng Chiefs, made in a General Council held at the River St. Clair on the 13th September 1836. Respecting the Surrender of the Sahgeeng Territory to the British Government, Exhibit 1142, p .2 [original], p. 2 [transcript].

[930] Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11562, lines 3-19 – *No formal reserve created, just a proposal*; Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11528, line 22 to p. 11529, line 4: *Q: You would agree with me that there's nothing in the text of Treaty 45 ½ to suggest that if other First Nations don't come to live in Saugeen territory, the territory north of Owen Sound, that the promise to protect those lands from the encroachment of whites would be null and void. A: I agree with you;* Evidence of Prof. Jarvis Brownlie, Transcript vol 36, August 13, 2019, p. 3945, lines 15-19 – *"There are documents saying that the Saugeen Ojibway wished to have other groups move to the territory, but I can't think of any documents that state that that was a condition or term of Treaty 45 ½."*

690. SON submits that for all involved, the general reserve on the Peninsula remained at most an idea and a proposal, not a reality. Neither the Crown nor SON understood the creation of a general reserve on the Peninsula to be a term or condition of Treaty 45 ½.

AFTER THE TREATY COUNCIL – A RESERVE FOR SON ALONE

691. In the years that followed Treaty 45 ½, SON, the Indian Department and other senior Crown Officials continued to treat Manitoulin Island as the only general reserve in operation. The idea of centralization of Indian tribes on the Peninsula was treated as a proposal or an idea to be considered, but not a legal reality.

(a) In August 1837, at the annual distribution of presents at Manitoulin Island, Chief Superintendent of Indian Affairs S.P. Jarvis explained to the assembled Indians that presents to visiting Indians residing in the United States would be discontinued in three years. At the same meeting, he reminded them that they could remove to the general reserve on Manitoulin Island, and would receive presents there. He did not mention anything similar about Saugeen:

> Your Great Father who lives across the Great Salt Lake is your Guardian and Protector, and he only. He has relinquished his Claim to this large and beautiful Island on which we are now assembled, in order that you may have a home of your own quite separate from his White Children. The Soil is good, and the waters which surround the Shores of this Island are abundantly supplied with the finest of Fish.
>
> If you cultivate the Soil with only moderate Industry, and exert yourselves to obtain Fish, you can never want, and your Great Father will continue to bestow annually on all those who permanently reside here or in any Part of his Dominion valuable Presents, and

> will from Time to Time visit you at this Place to behold your Improvements.[931]

(b) In September 1838, Lord Glenelg wrote a despatch to Sir George Arthur, the new Lt. Gov. of Upper Canada, suggesting that Arthur consider setting aside a portion of the "Saugeen Territory" for the benefit of Indian tribes.[932] Although by this point Glenelg had received a series despatches from Bond Head on the subject of the Saugeen and Manitoulin surrenders, at no point did he suggest that a general reserve already existed on the Peninsula.[933]

(c) In his 1839 Report, J.B. Macaulay provided a detailed account of the situation of Indians in Upper Canada. Although he discusses the general reserve on Manitoulin at length, nowhere does he suggest that Treaty 45 ½ created a general reserve on the Saugeen Peninsula.[934]

(d) In June 1839, an Order-in-Council was issued directing the Superintendent of Indian Affairs to "take immediate steps for the transmission of Indian Emigrants [from the United States] to the [Manitoulin] island on which they are to be settled."[935] There is no suggestion that the arriving tribes should be encouraged to go to the

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[931] S.P. Jarvis - First Enclosure in No. 41 - Address of the Chief Superintendent of Indian Affairs to the Indians assembled in General Council at the Great Manitoulin Island, August 4, 1837, Exhibit 1205, pp. 155-156.
[932] Lord Glenelg to George Arthur, September 22, 1838, Exhibit 1276.
[933] Lord Glenelg to George Arthur, September 22, 1838, Exhibit 1276; Bond Head to Lord Glenelg, August 20, 1836, Exhibit 1136; Bond Head to Lord Glenelg, November 20, 1836, Exhibit 1154; Bond Head to Lord Glenelg, August 15, 1837, Exhibit 1208.
[934] J.B. Macaulay, Report on Indian Affairs (1839), Ex 1297, p. 40; Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11560, lines 12-19; Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11561, lines 1-23.
[935] Order in Council, June 30, 1839, Exhibit 1303, p. 3 [original],p. 3 [transcript]; See also p. 2 [original], p. 2 [transcript] Dr. Gwen Reimer, "Volume 3: The Saugeen-Nawash Land Surrenders No 45 ½ (1836), No. 67 (1851) and No. 72 (1854)" (as revised 2019). Exhibit 4703, pp. 61-62.

Saugeen tract in the alternative. The discussion of SON in the document is limited to a discussion of whether an annuity should be granted to them for their surrendered tract. [936]

(e) At an 1840 General Council of the Methodist Ojibway, the assembled Indians agreed to "petition the Governor to extend the Indian Reserve at the Saugeen River for the benefit of all the Indian Tribes who might hereafter wish to emigrate to that place." S.P. Jarvis "said that this subject was under the consideration of the Government." He did not say that such a reserve had already been created, or even that it would be created shortly.[937]

(f) In June 1845, in a letter to T.G. Anderson, J.M. Higginson, the Civil Secretary, noted that he had "of late" received a proposition from the "Saugeen Indians for the formation of a general Indian settlement on a tract of their land." He described the idea of creating a general reserve on the Peninsula as "worthy of consideration". He did not say that such a reserve had already been created, or that it would be created shortly.[938]

(g) In early 1846, T.G. Anderson exchanged letters with Civil Secretary J.M. Higginson in which the two discussed whether to set the Peninsula aside as a reserve on which the Indians could congregate and erect a manual labour school. They noted that that the it was the wish of the Indians that "the tract of land now

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[936] Order in Council, June 30, 1839, Exhibit 1303, p. 4.
[937] Minutes of a General Council held at the River Credit on January 16, 1840, Exhibit 1322, p. 4 [transcript], p. 6 [original].
[938] Higginson to Anderson, August 19, 1845, Exhibit 1543, p. 6-7/228-229 [original], p. 5 [transcript].

occupied by the Chippewas of the Saguin" should be so reserved. It was their view that the best way to do this would be to effect a cession of the Peninsula to the Crown in trust.[939] Almost ten years after the treaty, neither the Indians nor the Crown believed this had yet been done; it was still simply a proposal being discussed.

692. In the years following Treaty 45 ½, Crown officials continued refer to the Peninsula as belonging to SON – not the Government or other Ojibway tribes.[940]

693. The Crown issued two official documents in between 1836 and 1854 which confirmed their understanding that the Peninsula was set aside for SON alone, and not as a general reserve.

(a) On June 29, 1847, Governor General Lord Elgin issued a Declaration confirming SON's possession of the lands on the Peninsula.[941] This Declaration was issued at the request of SON, who asked that "the whole of the Owen Sound and Sahgeeng Territory north of the Surveyed line, now held by the Indians should be permanently secured to them by the Crown, so that they may be safe from any further encroachments of the white people."[942] The Declaration guaranteed the possession of the Peninsula to "the Ojibway Indians commonly known as the Saugeen

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[939] Anderson to J.M Higginson, Civil Secretary, January 27, 1846, Exhibit 1583; J.M. Higginson, Civil Secretary, to T.G. Anderson, February 4, 1846, Exhibit 1587.
[940] J.B. Macaulay, Report on Indian Affairs, Exhibit 1297, p. 47; Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11559, line 18 to p. 11560, line 11 – *Macaulay understood in 1839 that the Peninsula belonged to the Saugeen Ojibway*; Anderson's address to the Saugeen Ojibway, August 2 1854, Exhibit 2175, p. 12 – *refers to the Peninsula as "your lands"*; Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11567, line 5 to p. 11568, line 15.
[941] Lord Elgin's Declaration, June 29, 1847, Exhibit 1674.
[942] Petition from the Saugeen Ojibway to Governor General Lord Elgin, March 25, 1847, Exhibit 1655; See also: Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 10-11.

Indians",[943] and was treated as a deed in favour of SON.[944] There is no suggestion in the Declaration that any other First Nations held or would hold an interest in the Peninsula.[945]

(b) In 1850, the colonial legislature passed *An Act for the Protection of the Indians in Upper Canada from Imposition and the Property Occupied or Enjoyed by them from Trespass and Injury*, Vict. 13 & 14, Ch 74.[946] This Act contained a suite of protections for Indian lands, including prohibitions on squatting on and removing resources from Indian lands, and prohibitions on leases and purchase of Indian lands without prior consent and authority of the Crown. By Proclamation in 1851, the protections set out in this legislation were extended to the Peninsula.[947] In the marginal note, the Proclamation explains that the Peninsula is "Reserved for the occupat'n of the Saugeen and Owen Sound Indians", not for any other First Nations or for First Nations more generally.[948]

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[943] Lord Elgin's Declaration, June 29, 1847, Exhibit 1674 – *"Whereas the Ojibway Indians commonly known as the Saugeen Indians"*.
[944] Letter from Anderson to David Sawyer, August 2, 1847, Exhibit 4827, p. 54 [original], p. 1 [transcript] – *referring to the 1847 declaration as a deed for the Saugeen lands*; Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11556, line 7 to p. 11557, line 14.
[945] Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11554, line 19 to p. 11556, line 6.
[946] *An Act for the Protection of the Indians in Upper Canada from Imposition and the Property Occupied or Enjoyed by them from Trespass and Injury*, Vict. 13 & 14, Ch. 74, Exhibit 1784.
[947] *Proclamation placing certain Tracts of Land set apart for Indians under the provisions of the Act*, Vict. 13&14 Ch. 74, November 7, 1851, Exhibit 1894, p. 2.
[948] Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11557, line 15 to p. 11558, line 18; See also Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 12-13.

694. Thomas W. Luard. the Registrar of Grey County, took the same view that Manitoulin but not the Peninsula had been established as a general reserve.[949]

695. It is also clear that Saugeen Ojibway and other Ojibway who attended the General Councils did not believe that such a general reserve had been created on the Peninsula by Treaty 45 ½. They petitioned for such a reserve to be created for many years after Treaty 45 ½ was concluded.[950] Throughout this period, SON continued to see the Peninsula as "theirs", not as belonging to other First Nations, or the Ojibway or Indigenous peoples more generally. For example, a June 1843 petition, they wrote:

> "We would be thankful to our father if he would send us a coppy [sic] of the written agreement made between our people and our late father Sir Francis Bond Head and also a coppy [sic] of the plan of the tract of land sold by us to the Government at the same time - we would also be [page 2] thankful to our father if he would send us a written paper that we might shew to any white man who attempts to settle upon the Indian land. There is a great many white men who come here and want us to give them land

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[949] Report, n.d (est. December 1839), unsigned (likely Thomas W. Luard), LAC, RG 10, Vol. 72, Reel C-11025, Exhibit 1319, pp. 66772-66782 - *This document identifies Manitoulin, but not Saugeen as a general reserve*; Dr. Gwen Reimer, "Volume 3: Saugeen-Nawash Surrenders No. 45 ½ (1836), No. 67 (1851) and No. 72 (1854)" (as revised 2019), Exhibit 4703, at p. 51, footnote 191 – *According to Reimer, "The placement in the archival file (LAC RG10, Vol.72) and references to this report in correspondence dated December 19, 1839 indicate that the date of this report was December 1839 and that Thomas Luard (Registrar, County of Grey) was the author".*

[950] Minutes of a General Council held at the River Credit on January 16, 1840, Exhibit 1322, p. 4 [transcript], p. 6 [original] – *Where the council "petitions" for the creation of a general reserve*; Minutes of General Council, Speech by Chief Joseph Sawyer, July 31, 1846, Exhibit 1605, p. 16 [original] - *"With regard to the removal of the Indians, I have been anxious to ascertain one point on that subject. If the Government would point out a tract of land that should be secured to the Indians and their posterity for ever, I and my people are ready to go and settle on such tract […]I am in favour of concentrating the Tribes, if possible. We have been living twenty years in the same place, and now the wood is all gone; we cannot get black stones to make fire, as the white people do. There are four little villages of the whites now in sight of our place, which shows the necessity of removal. All that remains now, is to point out the Tract to which our young men should remove, and we are ready to go.*"

> and we do not wish to hear them as we do not want any white men on **our land"**[951] [emphasis added]

696. Although SON ultimately invited other First Nations to join them on in their territory on the Peninsula between 1836 and 1854, this was a matter of hospitality to their brethren, and also an effort to protect their lands from further surrender.[952] It was not related to any condition imposed by Treaty 45 ½.[953]

697. Confronted on cross examination with the historical record after Treaty 45 ½, Dr. Reimer conceded that the notion of a general reserve was "much less formalized" in relation to the Peninsula than Manitoulin Island. As of August 1836, when Treaty 45 ½ was concluded, she agreed that the Peninsula had not been formally created as a general reserve. It was merely a proposal.[954]

698. Dr. Reimer compared the creation of the general reserve to the annuity. She argued that Treaty 45 ½ as concluded at Manitoulin was intended to be provisional, and that both the annuity and general reserve were "fixed and brought into certainty" at a later date.[955] It is clear that the £2.10 annuity to SON was formally guaranteed only in 1840.[956] However, there is no

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[951] Petition from the Saugeen Ojibway, June 10, 1843, Exhibit 1427, pp. 1-2 [original], p. 1 [transcript]; See also: Anderson's address to the Saugeen Ojibway, August 2, 1854, Exhibit 2175, p. 12 [emphasis added] – *"You complain that the whites not only cut and take timber from your lands, but that they are commencing to settle upon it…"***.**

[952] Evidence of Prof. Jarvis Brownlie, Transcript vol 33, July 25, 2019, p. 3523, lines 13-23; Prof. Prof. Paul Driben "A Report on Selected Aspects of the Cultural Lives of the Saugeen Ojibway" (2013), Exhibit 4324, p. 76.

[953] Evidence of Prof. Jarvis Brownlie, Transcript vol 36, August 13, 2019, p. 3945, lines 15-19.

[954] Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11562, lines 3-19.

[955] Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11534, line 24 to p. 11535, line 11 and p. 11507, line 5 to p. 11508, line 7.

[956] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 45; Russell to Arthur, No. 127, September 19, 1840, Exhibit 1365.

document on the record between Treaty 45 ½ (1836) and Treaty 72 (1854) confirming that a general reserve was ever formally created on the Peninsula.

699. There is also evidence from May 1854 of Crown officials discouraging Indigenous families who had originally emigrated from the United States to Manitoulin from moving to the Peninsula. Crown Lands Agent Alexander McNabb wrote to T.G. Anderson in May 1854 that:

> You will be surprised to hear that Ten families (Indian) have joined the Saugeen band from Manitoulin. They are American Indians, emigrated to our side about ten years ago and settled at Manitoulin. I have been asked whether I thought the Dept. would allow them to remain. I said I thought not but would inform you. They should in my opinion be ordered back to the island.
>
> It is only a dodge of ~~this people~~ [one inserted word:] band to hold their lands & not surrender – if they are allowed to act as they like, Manitoulin will soon become depopulated." [957]

700. When confronted with this evidence, Dr. Reimer again explained that Crown officials discouraged this move because the government had invested more in the Manitoulin General Reserve than in the Peninsula, and because Manitoulin was more "formalized" as a general reserve.[958] But this letter was sent in 1854. If the Peninsula was not "formalized" as a general reserve by May 1854, three months prior to Treaty 72, it is difficult to sustain the argument that it was ever formalized at all.

701. On cross examination, Dr. Reimer confirmed that it was possible the reference to the Manitoulin treaty was included in Treaty 45 ½ to present the Saugeen Ojibway with the option of

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[957] McNabb, Crown Lands Agent, to T.G. Anderson, May 18, 1854, Exhibit 2086.
[958] Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11539, line 25 to p. 11543, line 2.

repairing to Manitoulin as an alternative to staying on the Peninsula.[959] This was Bond Head's initial plan – that SON give up all their land and relocate to Manitoulin – before he conceded that they could remain on the Peninsula with the Crown's protection (discussed at paragraphs 648 to 659). In our submission, this is the more plausible reading of the first line of Treaty 45 ½, in light of the historical record:

> You have heard the proposal I have just made to the Chippewas and Ottawas, by which it has been agreed between them and your Great Father that these island (Manatoulin) on which we are now assembled, should be made the property (under your Great Father's control of all the Indians whom he shall allow to reside on them…[960]

SON seeks the following findings of fact in respect of Chapter 22 - Treaty 45 ½ (1836):

702. Significance of the Royal Proclamation (1763):

(a) Crown officials operating between 1836 and 1854 understood that the Royal Proclamation was binding upon them;

(b) Crown officials operating between 1836 and 1854 further understood that the Royal Proclamation bound the Crown to several core principles, including: 1) that land surrenders must be voluntary and uncoerced; and 2) that negotiators must be honest throughout the proceedings; and

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[959] Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11528, lines 1-9.
[960] Treaty 45 ½, Exhibit 1128, p. 113, Plaintiffs' Book of Authorities, Tab 141.

(c) Indigenous peoples in Upper Canada in between 1836 and 1854 understood the Royal Proclamation as a foundational guarantee of their rights to their land.

703. Events of the treaty council:

(a) Lt. Gov. Bond Head asserted to SON that the Crown could not keep Euro-Canadian settlers off SONTL in order to press them to give up a significant amount of their lands (Treaty 45 ½ Lands);

(b) SON was in a position of vulnerability when they entered Treaty 45 ½. This vulnerability was the a result of Bond Head's assertion that Euro-Canadian settlers threatened their occupation of SONTL and that those settlers could not be stopped; and of Bond Head's threats to "cast them off" and discontinue presents if they did not agree to a surrender;

(c) Lt. Gov. Bond Head's initial proposal was that SON give up their entire territory and retire to Manitoulin Island. It was only when they rejected this proposal that he offered to allow them to remain on a reserve on the Peninsula; and

(d) The Crown's primary interests in entering Treaty 45 ½ was to create space for Euro-Canadian settlers by opening up the lands south of the Peninsula to settlement.

704. The Promise to Protect:

(a) The promise to protect the Peninsula was understood by both SON and the Crown as the main consideration SON received at the conclusion of Treaty 45 ½;

(b) Having their remaining land protected for them in the face of Euro-Canadian settlement was SON's primary interest in entering Treaty 45 ½;

(c) The intention of Treaty 45 ½ was that the land be protected for SON for a long time; and

(d) The promise to protect the land for SON was understood to bind the Crown unless and until SON agreed, freely and without coercion, to release the Crown from that promise.

705. Setting aside the Peninsula *for SON:*

(a) Manitoulin Island, not the Peninsula or SON territory more generally, was the focal point of the Crown's plans to create a general reserve prior to Treaty 45 and Treaty 45 ½;

(b) Although SON and other Anishinaabe, with the support of the Methodists suggested they would prefer Saugeen as the site of any such general reserve, they had in mind the portion of SON's territory that was south of the Peninsula;

(c) There is no evidence the Crown took or planned to take SON's preferences into account in their plans for creating a general reserve;

(d) Neither the Crown nor SON understood the creation of a general reserve on the Peninsula to be a term or condition of Treaty 45 ½;

(e) SON, the Indian Department and other senior Crown Officials behaved after Treaty 45 ½ as if Manitoulin Island was the only general reserve that had been created; and

(f) It was intention of both the Crown and SON at Treaty 45 ½ that the Peninsula be protected for SON, not for the Anishinaabe or some other group of First Nations more generally.

23. SURVEY OF SON'S RESERVE ON THE PENINSULA

706. On June 15, 1837, the Surveyor General's Office issued a survey plan showing SON's reserve on the Peninsula. The dividing line between the land surrendered and the land reserved ran due west from Owen Sound.[961] The territory to the north of that line was the Saugeen reserve. The notation above the line marked in yellow on the map below states "Boundary Line of the Indian Reserve". The entire Peninsula was also marked as "Indian Reserve."

[961] Boundary Line of Indian Reserve as Shown on the 1837 Plan of "Bond Head Treaty": "Plan Shewing the Lands purchased by Government from the Indians to be laid out into Townships," J.G. Chewett, Surveyor General's Office, 15 June 1837, Exhibit 1190; J.W. Macaulay, Surveyor General to John Joseph, June 14, 1837, Exhibit 1192.

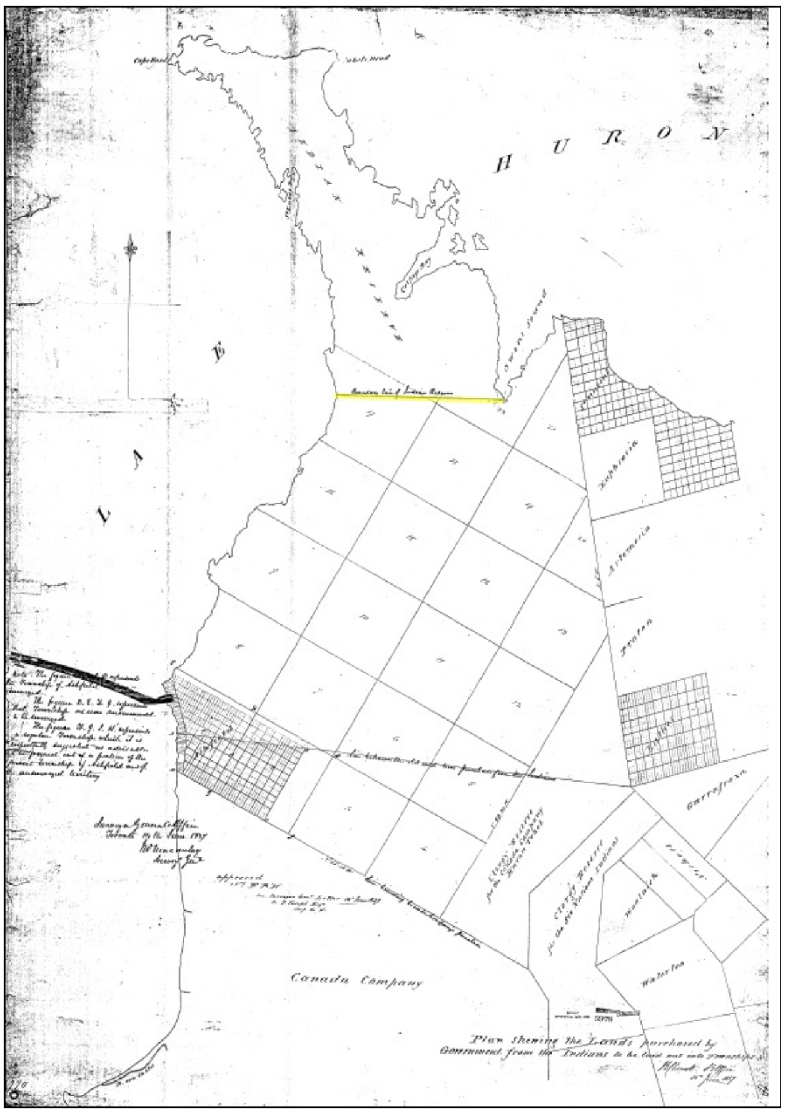

Exhibit 1190: Boundary Line of Indian Reserve as Shown on the 1837 Plan of "Bond Head Treaty": "Plan Shewing the Lands purchased by Government from the Indians to be laid out into Townships," J.G. Chewett, Surveyor General's Office, 15 June 1837. Yellow highlighting added for clarity. See Dr. Gwen Reimer, "Volume 3: Saugeen-Nawash Surrenders No. 45 ½ (1836), No. 67 (1851) and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 69.

707. The survey did not reflect SON's understanding of the full tract that had been reserved to them in Treaty 45 ½, and so SON complained about the boundary.[962] In response to this

[962] Chief Wahbadick, June 10, 1843, Exhibit 1427.

complaint, a July 1843 Order in Council adjusted the boundary of the reserve at the base of the Peninsula so it ran southwest from Owen Sound to the mouth of the Saugeen River, along the Indian portage route between the Saugeen and Owen Sound villages.[963] The Order in Council referred to the Peninsula as having been reserved to the Saugeen Indians in Treaty 45 ½, and noted the original boundary that had been set by the Surveyor General in 1837.[964]

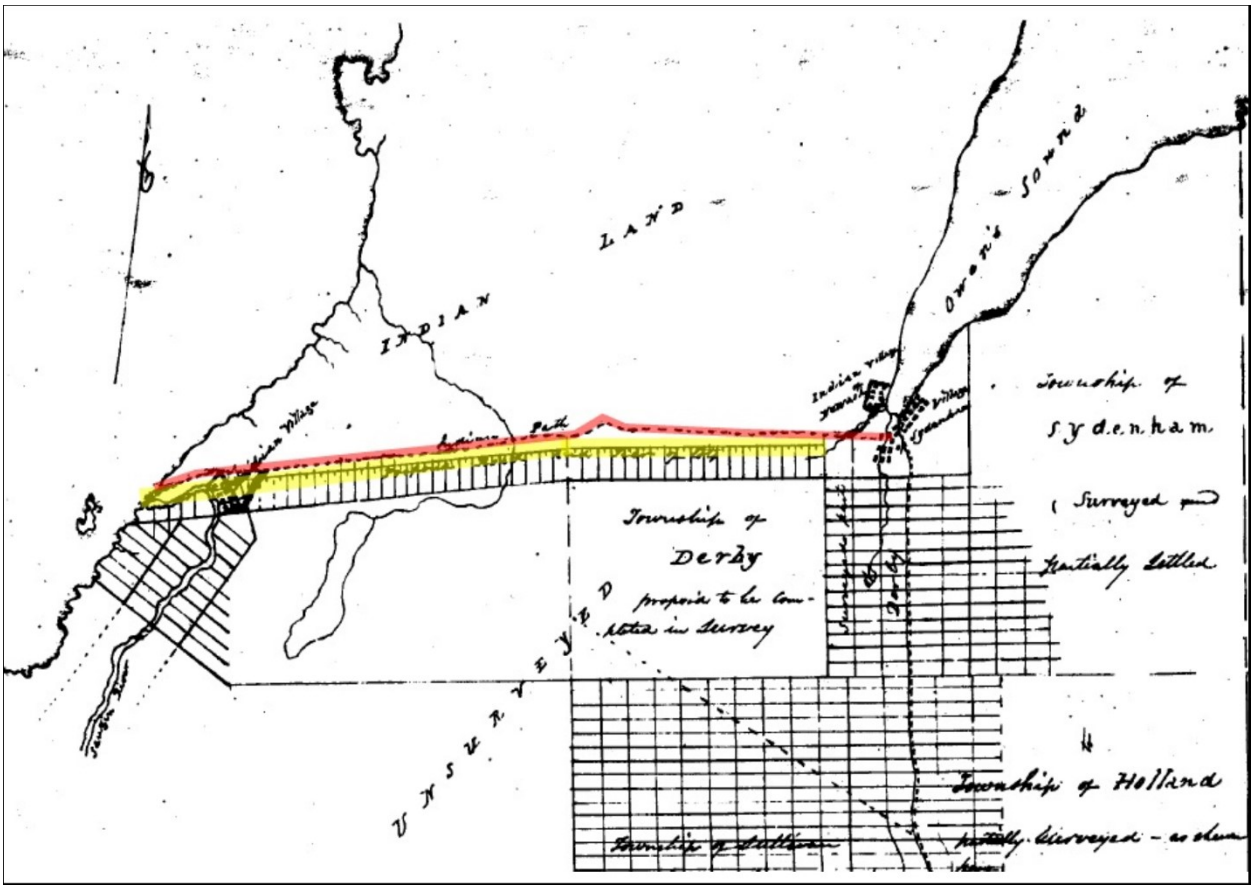

Figure: 1846 Map showing the re-surveyed boundary line of the Saugeen reserve. Sketch by C. Rankin, 22 May 1846, Exhibit 1600. Red and yellow highlight added for clarity. See: Prof. Gwen Reimer, "Volume 3: The Saugeen-Nawash Surrenders No. 45 ½ (1836), No. 67 (1851) and No. 72 (1854)" (as revised 2019), Exhibit 3703, p. 72.

[963] Order in Council, July 26, 1843, Exhibit 1436; See also: Prof. Gwen Reimer, "Volume 3: Saugeen-Nawash Surrenders No. 45 ½ (1836), No. 67 (1851) and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 69-72.
[964] Order in Council, July 26, 1843, Exhibit 1436, pp. 252-3 [original], p. 1-2 [transcript].

SON seeks the following findings of fact in respect of Chapter 23 - Survey of SON's reserve on the Peninsula:

(a) SON's reserve on the Peninsula was marked out by survey no later than July 1837.

(b) In 1843, additional lands were added to that reserve to reflect SON's understanding of the boundary.

24. POTTAWATOMI MIGRATIONS IN THE 1830S AND 1840S

708. In the 1830s, 1840s and some of the 1850s, SON viewed their reserve on the Peninsula as a potential refuge for other Indigenous groups.[965] They made frequent invitations, often at General Council meetings, to other Anishinaabe groups to join them, which was, as discussed above, that it was the Anishinaabe band which made decisions about the use and occupancy of their territory.[966]

See paras 355-360 (*custom re: other Anishinaabek*)

709. Some Anishinaabek that accepted this invitation were Pottawatomi. About 2000 Pottawatomi from Wisconsin, Michigan and Indiana, relocated to Canada West as a result of steps

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[965] Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, p. 21.

[966] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 76-78; See also: Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA 500 BC-1860 AD" (as revised 2019), Exhibit 4576, pp. 180-182.

taken by the U.S. to remove them from their lands. A good number of these settled in SONTL,[967] but they did not outnumber or overwhelm the groups they joined in SONTL.[968]

710. The Pottawatomi that came to SONTL were accepted as new SON members, after some initial issues about adjustment and integration. Many community witnesses testified to this effect.[969]

711. This is consistent with the evidence from community members and anthropological witnesses that the Ojibway, Odawa and Pottawatomi consider themselves to be one people.

See paras 101-107 (*The Anishinaabe*)

712. This is also consistent with the linguistic evidence that the Pottawatomi adopted the language/dialect of community which they joined.

See para 202 (*The Anishinaabemowin Language*)

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[967] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 73-74.

[968] *After a lengthy cross examination about population figures found in various historical documents* - Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, pp. 11445-11460; *Dr. Reimer was asked "…would you agree that the Saugeen were likely not outnumbered by emigrant [should be 'immigrant' from the context] Indians", and she answered "That was my conclusion";* Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11460, lines 7-10.

[969] Evidence of Edward (Ted) Johnston, Transcript vol 4, May 1, 2019, p. 392, line 10 to p. 393 line 2; Rule 36 evidence of Fred Jones, November 5, 2002, Examination in Chief, Exhibit 3949, p. 8, line 18 to p. 9, line 6; Rule 36 evidence of Frank Shawbedees, September 13, 2002, Examination in Chief, Exhibit 3947, p. 8, lines 7-19; Rule 36 evidence of Frank Shawbedees, December 4, 2002, Cross Examination, Exhibit 3948, p. 42, lines 20-28; Rule 36 evidence of John Nadjiwon, November 5, 2002, Cross Examination, Exhibit 3952, p. 9, line 17 to p. 10, line 16; Rule 36 evidence of Donald Keeshig, September 13, 2002, Examination in Chief, Exhibit 3945, p. 11, line 15 to p. 12, line 27; Rule 36 evidence of Donald Keeshig, December 5, 2002, Cross Examination, Exhibit 3946, p. 49, lines 9-16; and p. 50, lines 23-30; Rule 36 evidence of Ross Johnston, September 12, 2002, Examination in Chief, Exhibit 3953, p. 8, line 18 to p. 10, line 21.

713. What conflicts there were stemmed more from Christian denominational differences and Crown government policies than from ethnicity differences. The Pottawatomi tended to be Roman Catholic versus Methodist (the predominant denomination of Christian converts in SONTL at the time of the Pottawatomi migrations), so it gave the appearance that conflicts aligned on ethnic grounds.

See para 108-109 (*Factionalism*)

SON seeks the following finding of fact in respect of Chapter 24 - Pottawatomi Migrations in the 1830s and 1840s:

(a) The Pottawatomi who moved to SONTL in the 1830s and 1840s did not outnumber or overwhelm the groups they joined in SONTL.

(b) These Pottawatomi were accepted as new SON members, after some initial issues about adjustment and integration.

25. BETWEEN THE TREATIES (1836-1854)
"Explosive Colonization" & Squatting

714. In the years leading up to Treaty 72, the Euro-Canadian population was growing in Upper Canada. It was this growth that the Crown points to as the primary reason it needed to seek a surrender of the Peninsula. This growth, however, was a product of Crown policy and flourished with the support of Crown resources. While there was certainly increased settlement and population in Upper Canada, the Crown still had the capacity to direct resources to protect the Peninsula from the encroachment of white settlers pursuant to its promise in Treaty 45 ½. Instead,

Crown officials failed to act and the inaction revealed a *de facto* decision to prioritize the interest of white settlers to secure land on the Peninsula rather than its promise to SON.

715. From 1836 to 1854, Upper Canada (or, after 1840, Canada West – but for simplicity, referred to throughout this argument as "Upper Canada") included the Treaty 45 ½ Lands (the 1.5 million acres of land south of the Peninsula that were subject to Treaty 45 ½, concluded in 1836) and the Peninsula.[970] Upper Canada was divided into districts, and counties existed within districts.[971] In 1849, the Peninsula was part of the District of Huron.[972] The district was divided into three counties in 1849, with the Peninsula being annexed to the County of Waterloo. [973] In 1851, the Peninsula was divided between the County of Grey and the County of Bruce.[974]

716. Between 1826 and 1851, the population of Upper Canada doubled approximately every ten years. Population growth in Upper Canada between 1836 and 1854 was the result of natural growth, but also due to large scale immigration.[975] First the imperial government and later the colonial government played a central role in encouraging this population boom – or "explosive

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[970] Agreed Statement of Facts, Exhibit 3925; *Constitutional Act*, 1791 (UK), RSC 1985 App 2, No 3, Plaintiff's Book of Authorities, Tab 127; *An Act to reunite the Provinces of Upper and Lower Canada, and for the Government of Canada*, 3&4 Vict., c.35 (UK), 23 July 1840.
[971] *An Act for better defining the limits of the Counties and Districts in Upper Canada for erecting certain new Townships, for detaching Townships from some Counties and attaching them to others, and for other purposes relative to the division of Upper Canada into Townships, Counties and Districts* - Cap. VII, Exhibit 1503.
[972] *An Act to attach certain Territory described to the District of Huron for certain purposes*, Cap XLVII, May 23, 1846, Preamble and s. 1, Exhibit 1601.
[973] *An Act to divide the District of Huron in the Province of Canada, and for other purposes therein mentioned*, Cap. XCVI, May 30, 1849, s. 2, Exhibit 1754.
[974] *An Act to make certain alterations in the Territorial Divisions of Upper Canada*, Cap. V, Schedule A, p. 1799, Exhibit 1871.
[975] Prof. Douglas McCalla, "Population Growth and the Search for Land in Upper Canada & Related Questions" (2015), Exhibit 4367, pp. 4-7.

colonization" (as its referred to by author James Belich) through promoting and investing in efforts to attract immigrants to the new colony.[976]

717. Settlement happened in what Prof. Douglas McCalla referred to as "zones".[977] It would be rare for an individual settler to venture far out and alone, without others, without roads, and without other similar supports. People would instead move to locations near existing settlements and settlers.[978] The result was that settlement moved like a wave or line across Upper Canada.[979]

718. Prof. McCalla notes population growth in and around the Peninsula was "especially rapid" because there was fertile land:

> "In 1851, Huron, Grey, and Bruce Counties had a total population of about 35,000; by 1861, their combined population had more than tripled… No other area of the two Canadas experienced this rate of growth in the 1850s."[980]

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[976] Evidence of Prof. Douglas McCalla, Transcript vol 58, October 31, 2019, p. 7528, line 5 to p. 7535, line 9; James Belich, "Replenishing the Earth: The Settler Revolution and the Rise of the Anglo-World, 1783-1939", Excerpts, Exhibit 4353, pp. 182-183; James Belich, "Replenishing the Earth: The Settler Revolution and the Rise of the Anglo-World, 1783-1939", Chapter 8, Exhibit 4370, pp. 281-283; Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 84.

[977] Evidence from Prof. Douglas McCalla, Transcript vol 58, October 31, 2019, p. 7519, line 16 to p. 7522, line 25. See in particular, p. 7522, lines 16-22- *Q. …the zone of settlement is people moved somewhat as a group, right, is that you are not going to find one person going out way far north when they don't have any support system or roads or anything of that sort?...A. Yes, that is extremely accurate and not always recognized in the literature.*"

[978] Evidence of Prof. Sidney Harring, Transcript vol 47, October 1, 2019, p. 5914, line 15 to p. 5918, line 20.

[979] A statement of the satisfactory results which have attended emigration to Upper Canada from the establishment of the Canada Company until the present period, with a general map of the Province, 1842, Exhibit 4371, p. 7.

[980] Prof. Douglas McCalla, "Population Growth and the Search for Land in Upper Canada & Related Questions" (2015), Exhibit 4367, p. 6; See also: Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 78.

719. Movement of this zone of settlement towards the Peninsula was promoted and encouraged by the government. For example, the government gave out free grants along the Garafraxa Road in the 1840s, a colonization road from Garafraxa (near present-day Orangeville) in Wellington County to the southeast of Owen Sound (see Exhibit Q) to Owen Sound. The objective of the land grant scheme was to avoid newcomers remaining at ports of entry and instead, to encourage them to settle further afield. To attract the influx of new settlers towards Owen Sound, the government made the decision to provide free grants of 50 acres of land to newcomers settling along the road.[981]

"Squatting" in Upper Canada and on the Peninsula

720. Even though there are examples of government providing free grants of land to new settlers as noted above, the historical record and secondary literature highlights that it was difficult for individual settlers to acquire lands in Upper Canada between 1836 and 1854.[982] The government process for granting lands to individual settlers was slow, as there were few local agents to make land accessible to small scale settlers. There was also a shortage of available lands since many large grants were made to privileged groups of people or individuals or allocated for fixed purposes (e.g. grants to military officials, school and clergy lands, etc.).[983] This often meant that large tracts of land remained without settlers.

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[981] Evidence of Prof. Douglas McCalla, Transcript vol 58, October 31, 2019, p. 7511, lines 5-23, and p. 7517, lines 14-22; S.B. Harrison, Memorandum, April 15, 1840, Exhibit 1337; Executive Council to George Arthur (Lieutenant Governor Upper Canada), June 16, 1840, Exhibit 1348; Executive Council Report, September 9, 1840, Exhibit 1360; R.B Sullivan (Commissioner of Crown Lands), Notice to Persons desirous of settlement at the Owen's Sound Settlement, November 1, 1840, Exhibit 1373; See also: Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 82.

[982] Prof. Sidney Harring, "Report" (2013), Exhibit 4276, pp. 3-4.

[983] Lillian Gates, "Land Policies of Upper Canada" (1958), Exhibit 4309, p. 288.

721. As a result, 'squatting' was prevalent in Upper Canada between 1836 and 1854. As described in Lord Durham's 1839 Report on Indian Affairs in British North America:

> "In Upper and Lower Canada it has arisen chiefly, if not entirely, from the difficulties often amounting to impossibility, in the way of obtaining land by persons of no influence who desire it for actual settlement … The habits of the whole population of North America, and the laws of the United States, have given a sanction to the practice of squatting, which has been confirmed in this case by the negligence of the Government, or of the non-resident proprietor."[984]

722. The experts that testified about this matter agree that "squatting" included the illegal occupation of lands for the purpose of setting up a semi-permanent or permanent settlement, and it could also include other forms of trespass on lands, such as for cutting timber or taking other resources without authorization to do so.[985] Squatting, trespass, and timber theft all constitute what might be described as "encroachments" on Indian lands.[986]

723. Squatting was widespread in Upper Canada and on unceded Indian lands or lands reserved for Indians. Some notable examples included the Six Nations' Grand River reserve, nearby present-day Brantford. But the problem extended to other Indian lands, including the

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[984] Lord Durham's Report on the Affairs of British North America – Volume III – Appendices, 1839, Appendix B (Report of Charles Buller), Exhibit 1284, pp. 106-107.
[985] Prof. Sidney Harring, "Report" (2013), Exhibit 4276, pp. 9-11; Evidence of Douglas McCalla, Transcript vol 58, October 31, 2019, p. 7457, line 13 to p.7459, line 6; Dr. Gwen Reimer, "Supplementary Report: Documentation Relevant to the Extent of Squatting on the Saugeen Peninsula Reserve Pre-and Post Surrender No. 72 (13 October 1854)" (2019), Exhibit 4708, p. 2.
[986] Evidence of Dr. Gwen Reimer, Transcript vol 90, p. 11580, line 5 to p. 11581, line 3 and p. 11585, lines 3-13 – *Dr. Reimer differentiated in between 'squatting' and trespass for the purpose of timber theft, for example, but agreed in her testimony that both squatting and timber theft were the types of the encroachments.*

Peninsula.[987] There is specific mention of the problem of squatting on the Saugeen reserve – that is, the Peninsula – being reported by T.G. Anderson on February 4, 1840, and noted in the Report on the Affairs of Indians in Canada by Sir Charles Bagot, Governor General of British North America (commonly referred to as the Bagot Commission Report). Upon being asked about the efficiency of Parliamentary acts for the protection of Indian Lands against squatters, T.G. Anderson responds:

> "I am told, there is on the Saugeen Reserve, a Mr. McGregor, who cultivates a farm, cuts timber, has a large fishing establishment, and purchases the Indian presents for whiskey; and in the early part of last summer, he took up a fishing station on an Island about 30 miles to the S.E. of this, where he has a party of men at present; and although I sent him a copy of the Act relating to Squatters, &c, passed last

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[987] See *Royal Proclamation*, Exhibit 538, p. 5 – *re : equivalency between unceded lands and lands reserved for Indians*; Prof. Sidney Harring, "Report" (2013), Exhibit 4276, pp. 12-13; Prof. Sidney Harring, "White Man's Law: Native People in the Nineteenth-Century Canadian Jurisprudence", Chapter 2, (1998), Exhibit 4271, pp. 35-61; Charles Bagot, Report on the Affairs of the Indians in Canada, Section 3 [Bagot Commission Report, Section 3], 10 October 1842, *in Appendix T to the Sixth Volume of the Journals of the Legislative Assembly of the Province of Canada*, 2 June, 1847-28 July, 1847 (3rd Session, 2nd Provincial Parliament of Canada, 1847), Exhibit 1447, PDF pp. 35, 67, 86, 105, 119, and 164; Charles Bagot, Report on the Affairs of the Indians in Canada, Sections 1 & 2, [Bagot Commission Report, Sections 1 & 2], 10 October 1842, *in Appendix EEE to the Fourth Volume of the Journals of the Legislative Assembly of the Province of Canada*, 28 November 1844 - 29 March 1845 (1st Session, 2nd Provincial Parliament of Canada, 1844-1845), Exhibit 1508. PDF pp. 6, 22, 28, 35; Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 93 - *"Trespass and squatting on Crown lands, especially lands reserved for or unceded by Indians, were a common problem both before and after the union in 1841."*; T.G. Anderson to Superior Officer, (1843), Exhibit 4418 - *suggesting appointment of Indigenous constables on Manitoulin Island to deal with white encroachments on the reserve*; Report of the Executive Council of Upper Canada, (1840), Exhibit 1314, pp. 27-52, especially at p. 35-40; S.P Jarvis to Committee of the Executive Council, July 13, 1843, Exhibit 1431, p. 4 [transcript]; Committee of the Executive Council of Upper Canada to Charles Metcalfe, Governor General, July 21, 1843, Exhibit 1434, p. 4 [transcript].

> Session, he totally disregards it, and continues his unlawful traffic."[988]

724. The extent of the issues on the Peninsula is discussed in more detail in this argument at paragraphs 732 to 736.

725. Squatters would clear land and settle, e.g. set up a shelter, farm, cut timber, etc. in the hopes that they would be able to legally settle on lands when it became available. Squatting was a means to get a "head start" on purchasing lands. And, even though it was an illegal activity, squatters did enjoy some recognition of their rights. For instance, squatters often received first opportunity to purchase lands or were paid for the improvements that they made on the lands as squatters – money they could use to buy lands elsewhere.[989]

726. This perception that squatters would get some benefit from pre-emptively occupying lands existed for squatters on lands south of the Peninsula and the Peninsula itself, between the years of 1836 and 1854 when the entirety of Peninsula was still an Indian reserve. For example, individuals that made improvements on lots that they were illegally settling on – that is, squatters – submitted claims to receive payment for these improvements, and the historical record contains

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[988] Charles Bagot, Report on the Affairs of the Indians in Canada, Section 3 [Bagot Commission Report, Section 3], 10 October 1842, *in Appendix T to the Sixth Volume of the Journals of the Legislative Assembly of the Province of Canada*, 2 June, 1847- 28 July, 1847 (3rd Session, 2nd Provincial Parliament of Canada, 1847), Exhibit 1447, PDF p. 164.

[989] Lillian Gates, "Land Policies of Upper Canada" (1958), Exhibit 4280, pp. 289-294; Michelle Vosburgh "Agents of Progress: The Role of Crown Land Agents and Surveyors in the Distribution of Crown Lands in Upper Canada., 1837-1870," Thesis presented to McMaster University, Exhibit 4288, pp. 21-23; Norman Robertson, "The history of the County of Bruce and of the minor municipalities therein", 1906, Exhibit 4286, pp. 67, 69; See also: for example, reports from the 'squatters' commission', created to inquire into lands allocation in Huron and Bruce: Ogle R. Gowan and Morgan Hamilton, First Report of the Commissioners relative to the Counties of Huron and Bruce, 1854-1857, February 4, 1857, Exhibit 4293; Ogle R. Gowan and Morgan Hamilton Final Report of the Commissioners relative to the Counties of Huron and Bruce - Appendix 22 - Sixteenth Volume of the Journals of the Legislative Assembly of the Province of Canada, March 20, 1858, Exhibit 4294.

correspondence from Crown officials approving or recommending the approval of these claims. In other words, squatters on the Peninsula did ultimately receive some benefit for their illegal activity.[990]

727. In some cases, settlers would seek permission from individual members of the Indigenous nations to occupy Indian lands. This was a recognized problem – one that was addressed early on by the legal norms and principles enumerated in the Royal Proclamation in 1763, which extended protections to lands not ceded by or that were reserved to Indians by "strictly forbid[ding] on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of any Lands above reserved, without our especial leave and Licence for that Purpose first obtained."[991] Subsequent policy documents also note that this is a common way in which squatters would dispossess Indigenous peoples from their lands: by seeking permissions and purchasing rights from individuals members of First Nations.[992]

728. There are several examples of this occurring on the Peninsula, two of which are noteworthy:

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[990] Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11642, line 24 to p. 11648, line 13; Evidence of Dr. Gwen Reimer, Transcript vol 91, March 6, 2020, p. 11714, line 2 to p. 11724, line 8; William Bull to Crown Lands Commissioner, March 27, 1854, Exhibit 2704; Robert Bruce to William Bull, April 12, 1854, Exhibit 2079 [transcript at Exhibit 4810]; Advertisement of the Land Sale at Owen Sound, September 2, 1856, from R.T. Pennefather, dated July 18, 1856, **there are several versions of this advertisement added as exhibits in the Record:* Exhibit 2397 (copy); Exhibit 2398 (printed advertisement); Exhibit 2399 (handwritten); Exhibit 4834 (copy); W.R. Bartlett to R. Lewis, August 9, 1856, Exhibit 4835 – *claim for payment for improvements by a squatter*; W.R. Bartlett, August 25, 1856, Exhibit 2416 [transcript at Exhibit 4812]

[991] *The Royal Proclamation*, October 7, 1763, Exhibit 538, p. 5.

[992] Reports on the Executive Council and Indian Department in Upper Canada, 1840, Exhibit 1314, pp. 34-40 (PDF pp. 32-38).

(a) Alexander McNabb was a Crown lands agent in the County of Bruce appointed in 1851.[993] He had several dealings with SON, often trying to secure lands sales or leases to advance his personal ventures. For example, beginning in 1850, he sought to secure licenses to cut timber and a mill site on the Peninsula. His efforts persisted for four years, seeking to pressure SON into making a direct agreement and having the Crown sanction these arrangements.[994] Dr. Reimer noted several times in her report her view that McNabb was in a conflict of interest as a Crown Lands Agent, since he was often in the process of applying for licences to cut timber and lease mill sites on the Peninsula. She notes that he "exploited his position as Crown Land and Indian agent for the Saugeen band by submitting applications to purchase or

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[993] Norman Robertson, The history of the County of Bruce and of the minor municipalities therein, 1906, Exhibit 4286, p. 534 – c*opy of Order in Council appointing McNabb as Crown Lands Agent in 1851*.

[994] October 9, 1850, Letter from S.Y. Chesley to T.G. Anderson Exhibit 1799 - *enclosing an application from Alexander McNabb to lease a mill site at Sauble River, recommending its approval because McNabb is a friend*; Letter from R. Bruce (Superintendent General Indian Affairs) to Alexander McNabb, December 13, 1850, Exhibit 1814; Minutes of General Council at Saugeen, June 24, 1851, Exhibit 1855 [transcript at Exhibit 4786] - *T.G. Anderson asks the Saugeen Ojibway if they will lease or sell land for a mill site on Sauble River and the trees connected to it and they respond 'No'*; Letter from David Sawyer to T.G. Anderson (Superintendent of Indian Affairs), April 8, 1852, Exhibit 1910 - *enclosing a requisition from the Saugeen Ojibway saying they are in very poor circumstances and wish to rent a mill site to a Mr. Hamilton and the water privilege at the mouth of the Sauble River to Mr. McNabb*; Minutes of General Council at Saugeen, August 29, 1853, Exhibit 2012; Letter from R Bruce to T.G. Anderson, October 6, 1853, Exhibit 2021 - *government is reluctant to let Saugeen Ojibway lease the mill on the Sauble River because of the difficulty in enforcing leases and suggested sale is preferred*; Letter from T.G. Anderson to Saugeen Ojibway Chiefs, October 22, 1853, Exhibit 2026 - *T.G. Anderson requests to know whether the Saugeen Ojibway will surrender the 'Au Sable' mill site or "leave it in its present state and get nothing for it"*; Chief Kadahgegwona and Chief Madwayosh to T.G. Anderson, November 9, 1853, Exhibit 2030 - *the Saugeen Ojibway Chiefs indicate they are not desirous of surrendering that portion of their land*; Chief Kegedonce and Chief Sky to T.G Anderson, April 4, 1854, Exhibit 2081 - *Saugeen Ojibway Chiefs are asking whether it is true that Alexander McNabb has a lease for a mill site at Colpoy's Bay*; Reeve and Councillors of the Township of Saugeen to Lord Elgin, Alexander McNabb August 12, 1854, Exhibit 2110 – *McNabb is writing to Lord Elgin as the Reeve of Saugeen petitioning the Crown in support of a surrender of the Peninsula*.

lease prime lots of land from the Saugeen Council, including several instances in 1854."[995]

(b) Leonard Gleason built and operated a mill site on the Peninsula beginning in 1852, on the basis of an agreement reached with a few individuals from the Colpoy's Bay Band. His activities attracted a warning from T.G. Anderson on January 3, 1853, who pointed out to Gleason that he was an illegal occupant.[996] T.G. Anderson wrote to Gleason saying:

> "You say you were hired by John Beatty and Walker Smith. Now these two men have no control or any thing to say in Council of the Indians and besides it is well known to everyone who choose to make enquiry that no Indian has a right to grant any permission of the Kind without leave from the Honble the Superintendent General of Indian Affairs and if you had such leave and presented it to me when you received my letter all would have been right."[997]

The so-called permissions from two individuals not authorized to speak for SON and not representing the will of SON did not sanction Gleason's occupation of the Peninsula. Gleason was therefore a squatter. However, despite the fact that Gleason was squatting on the Peninsula, and there was no evidence he was ever granted permission by the Superintendent General of Indian Affairs in subsequent years,

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[995] Dr. Gwen Reimer, "Volume 3: Saugeen – Nawash Land Cessions No. 45 ½ (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, footnotes 519, 585, 670.
[996] Dr. Gwen Reimer, "Volume 3: Saugeen – Nawash Land Cessions No. 45 ½ (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 114-115.
[997] T.G. Anderson to Leonard Gleason, January 7, 1853, Exhibit 1967 [Transcript at Exhibit 4756].

the record of correspondence reveals he was not removed from the Peninsula. He remained active there until 1857.[998]

729. These kinds of "side agreements" with individual Indigenous people were commonly denounced by Crown officials as being an evil that intruded unlawfully on Indigenous rights and dispossessed them wrongly of their lands.[999] As will be noted below, legislation in place during the relevant times made it clear that such 'permission' did not make occupation of reserve land legal.[1000]

The Historic Law about Encroachments on Indian Lands

730. Encroachments, including squatting and timber theft, on Indian lands were illegal activities between 1836 and 1854. This prohibition was set out in legislation between 1836 and 1854 as follows:

(a) *An Act for the protection of the Lands of the Crown in this Province, from Trespass and Injury*, 1839, Exhibit 1301 (the "1839 Act"), Plaintiffs' Book of Authorities, Tab 118:

(i) The Preamble sets out that the 1839 Act applies to "Lands appropriated for the residence of certain Indian Tribes in this Province" as well as other Crown lands, and is enacted for the purpose "to provide by law for the summary removal of persons unlawfully occupying the said Lands, as also to protect from future trespass and injury" and also provides for the

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[998] Evidence of Dr. Gwen Reimer, Transcript vol 91, March 6, 2020, p. 11744, line 5 to p. 11745, line 7; Leonard Gleason to Command R. Bruce, Superintendent General Indian Affairs, June 4, 1853, Exhibit 4932; Leonard Gleason to R.T. Pennefather, September 22, 1856, Exhibit 4836.
[999] *The Royal Proclamation*, October 7, 1763, Exhibit 538, The Plaintiff's Book of Authorities, Tab 116.
[1000] *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, 1850, Cap. LXXIV, Preamble, Exhibit 1784, Plaintiffs' Book of Authorities, Tab 119.

appointment of Commissioners to receive information and inquire into complaints against any person illegally in possession of such lands;

(ii) Section 2 of the 1839 Act details what a Commissioner can do if it is found and determined that a person is in illegal possession of such lands, including removal of that person from such lands. Section 3 provides that if the person returns, they may be subject to jail or a fine;

(iii) Section 4 of the 1839 Act sets out that it is unlawful to cut and to take timber and resources from such lands, and if someone is found to be guilty of that offence, they can be fined or jailed.

(b) *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury, 1850, Cap. LXXIV,* Exhibit 1784 (the "1850 Act"), Plaintiffs' Book of Authorities, Tab 119:

(i) The Preamble of the 1850 Act sets out that its purpose is to protect Indians enjoyment and possession of their lands:

> "…no purchase or contract for the sale of land in Upper Canada, which may be made of or with the Indians or any of them, shall be valid unless made under the authority and with the consent of Her Majesty, Her Heirs or Successors, attested by an Instrument under the Great Seal of the Province, or under the Privy Seal of the Governor thereof for the time being";

(ii) Section 6 sets out a prohibition on selling liquor to Indians, and section 10 of the 1850 Act sets out it is illegal for non-Indians (unless married to an Indian) to reside upon, settle or occupy Indian Lands;

(iii) Section 12 of the 1850 Act makes it illegal to trespass for cutting trees and thereby causing damage to Indian lands.

731. The provisions of the 1850 Act were proclaimed to apply to the Peninsula in 1851.[1001] The 1839 Act and the 1850 Act will be referred to collectively as the "Indian Land Protection Legislation".

[1001] *Proclamation placing certain tracts of Land set apart for the Indians under the provisions of the Act,* 13&14 Vict. Ch. 74, November 7, 1851, Exhibit 1895.

Encroachments on the Peninsula

732. Since squatting was illegal, the presence of squatters is not documented in the same way as the presence of other settlers might be, such as through census records of residents. There is no readily available inventory of squatters' identities and whereabouts. But, despite this limitation, SON's and Defendants' experts agreed that there were encroachments, such as squatting and timber theft, occurring on the Peninsula between 1836 and 1854. Experts also agreed that letters and complaints from SON were evidence of squatting and timber theft on the Peninsula.[1002]

733. With respect to the encroachments on the Peninsula, there are numerous letters and complaints from SON between 1836 to 1854.

734. In the **1840s**, there is evidence of encroachments on the Peninsula and the Saugeen Ojibway complaining about these intrusions:

(a) On or before 1840, Alexander McGregor was illegally farming and operating businesses on the Peninsula:

(i) McGregor had obtained a fishing licence to use the fishing islands from SON, but they complained about his encroaching on their fishery after his license expired and he continued to fish.[1003]

[1002] Evidence of Prof. Sidney Harring, Transcript vol 47, October 1, 2019, p. 5944, lines 18-22; p. 5945 lines 11-15; and p. 5948, lines 1-4; Evidence of Prof. Douglas McCalla, Transcript vol 58, October 31, 2019, p. 7541, line 1 to p. 7546, line 2; Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11573, line 1 to p. 11579 line 22; See also: John C. Weaver, The Great Land Rush and the Making of the Modern World, 1650-1900, (2003), Exhibit 4364, p. 268; Prof Sidney Harring, "Report", (2013), Exhibit 4276, pp. 15-16; Dr. Gwen Reimer, "Volume 3: Saugeen – Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 110-116.

[1003] Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, ca. 900-1900" (as revised 2019), Exhibit 4702, p. 62.

(ii) In 1840, McGregor was living on the Peninsula, operating a store, farming, cutting timber and fishing, without any licence to do so.[1004]

(iii) As of 1840, McGregor was a squatter that was farming, cutting timber and operating a store on the Peninsula. Despite complaints about McGregor's presence,[1005] and T.G. Anderson's awareness about where he was located, McGregor was never removed or prosecuted.[1006]

(b) In 1843, Chief Wahbahdik (a hereditary Chief of the Owen Sound band) complained about intrusions by white people trying to settle on the Peninsula[1007]:

(i) On June 10, 1843, Chief Wahbahdik sent a letter to the Chief Secretary. complaining that there are a great many white people coming to their lands and trying to settle. He was writing from Big Bay (Owen Sound) and he asked for a paper to show the white men coming there that this is SON's land.[1008]

(ii) On July 13, 1843, Samuel P Jarvis sent a letter to Mr. Parent, Chief of the Executive Council. He reported on the complaints of Chief Wahbahdik about the intrusion of white people upon Indian lands, and Jarvis recommended appointing a magistrate at Owen Sound to address this.[1009]

(iii) In a Report of the Committee of the Executive Council dated July 21, 1843, the Executive Council responded to the complaints of Chief Wahbahdik about "the intrusion of whites settlers – upon their reserve lands" saying that this may be in some measure avoided "by the appointment of magistrates at the village of Sydenham who would endeavor to enforce the law against trespassers."[1010]

[1004] Dr. Gwen Reimer, "Volume 3: Saugeen – Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 110-111.
[1005] Letter from Peter Jones to Col Givins, January 17, 1835, Exhibit 1071 - *with message from Koong-wah-wis, Indian from the "River Sahgeeng at Lake Huron", wishing to "inform his Excellency that a Mr. McGregor is encroaching on the Indian's fisheries, contrary to their wish…"*.
[1006] Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, pp. 11615, lines 5-10; p. 11620, lines 1-25; p. 11621, lines 1-25; and p. 11622, lines 1-10.
[1007] Evidence of Dr. Reimer, Transcript vol 90, March 5, 2020, pp. 11604, line 5 to p. 11615, line 10.
[1008] Letter from Chief Wahbadik to Chief Secretary, June 10, 1843, Exhibit 1427.
[1009] Samuel P. Jarvis, to E. Parent, Clerk Executive Council, July 13, 1843, Exhibit 1431, p. 4.
[1010] Committee of the Executive Council to Charles Metcalfe, July 21, 1843, Exhibit 1434, p. 3.

(c) As a result of SON's petitions for assistance and protection of the Peninsula, the 1847 Declaration was made, re-stating that the Peninsula was protected for SON.[1011]

735. In the **1850s**, there were several complaints from the Saugeen Ojibway regarding timber theft and intrusions on the Peninsula generally and in relation to specific people:[1012]

(a) On September 14, 1850, Chiefs Madwayosh and Mittigwob, sent a letter to John Clark, a Crown Lands Agent complaining "parties here are plundering our Lands of Timber", and requesting "that you will immediately [sic] come up and investigate the matters."[1013]

(b) On September 24, 1850, John Clark forwarded a complaint from SON to J.H. Price, who was a Commissioner of Crown Lands. The complaint was about Mr. Kennedy committing "depredations" on their lands because he is cutting timber to make fish barrels.[1014]

(c) On October 15, 1852, John McLean (a Crown Land Commissioner) wrote to Col. Bruce (Superintendent General of Indian Affairs) about the Indians complaining of

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[1011] Declaration by Her Majesty in favor of the Ojibway Indians respecting certain Lands on Lake Huron, Exhibit 1674.
[1012] See also: Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11586, line 7 to p. 11602, line 2; and p. 11604, lines 1-14; Evidence of Prof. McCalla, Transcript vol 58, October 31, 2019, p. 7546, line 13 to p. 7547, line 10.
[1013] Chiefs Madwayosh and Mittigwob to John Clark, Crown Lands Agent, September 14, 1850, Exhibit 1791.
[1014] John Clark to J.H Price, September 24, 1850, Exhibit 4828.

parties cutting timber on their lands and about squatters, asking what he (McLean) could do in response.[1015]

(d) On October 28, 1852, John McLean sent a letter to a Mr. William Harrison, advising Harrison that McLean has received several letters from the Indians of Owen Sound complaining about Harrison being involved in "the illicit appropriation of timber" from their lands.[1016] On November 18, 1852, McLean wrote again to Harrison advising him of complaints from the Indians of Owen Sound about Harrison committing trespass.[1017]

(e) On March 8, 1854, Anderson reported to Bruce about the tribes under his superintendence, which included SON,[1018] and he referred to the constant complaints about "pillaging of timber and squatting on their lands".[1019]

736. There is also evidence of SON complaining about encroachments on their fishing grounds between 1836 and 1854.

See paras 629-631(f) (*Contact with Euro-Canadian Fishermen and Settlers in SONTL*)

[1015] John McLean to Robert Bruce, Superintendent General Indian Affairs, October 15, 1852, Exhibit 1952.
[1016] John McLean to William Harrison, October 28, 1852, Exhibit 4829.
[1017] John McLean to William Harrison, November 18, 1852, Exhibit 4830.
[1018] Evidence of Dr. Gwen Reimer, Transcript vol 91, March 6, 2020, p. 11737, lines 11-20.
[1019] T.G. Anderson, Superintendent Indian Affairs to Robert Bruce, Superintendent General Indian Affairs, March 8, 1854, Exhibit 2060, p. 12 of original transcript.

SON seeks the following findings of fact in respect of Chapter 25 - Between the Treaties (1836-1854):

737. Population growth and lands settlement in Upper Canada between 1836 and 1854:

(a) Since 1849, the lands known as the Peninsula were part of an organized district or county. Specifically:

(i) In 1849, the Peninsula was part of the County of Waterloo.

(ii) In 1851, the Peninsula was divided between the Counties of Bruce and Grey.

(b) The imperial and colonial governments played a role in encouraging settlement of new immigrants in Upper Canada, through promotion and investment of resources – including for example, providing free grants of land to encourage settlement in a certain direction.

(c) Settlement happened in zones – that is, newcomers would settle in areas close to other settlers and existing settlements, resulting in settlement moving like a wave across Upper Canada.

738. The definition of "squatting", its prevalence in Upper Canada between 1836 and 1854, and in respect of the Peninsula:

(a) Squatting included the illegal occupation of lands for the purpose of setting up a semi-permanent or permanent settlement, and it could also refer to other forms of trespass on lands, such as for cutting timber or taking other resources without authorization to do so.

(b) Encroachments, such as squatting, trespass and timber theft were prevalent in Upper Canada in the mid 19th century on Indian reserves and unceded Indian lands.

(c) Squatting resulted in some benefit – such as squatters getting a head start on settlement of lands before they were opened up for sale, or getting paid out for improvements they had made on lands. This was the case in respect of the Peninsula in the mid 19th century. The effect of this was to encourage squatting on the Peninsula.

739. The historical state of the law regarding encroachments on Indian lands:

(a) The 1839 Act made it illegal to trespass on, cause injury to or illegally possess Indian lands – which included lands reserved for Indians or lands not yet ceded by Indians.

(b) The 1839 Act made it illegal for anyone to cut or take timber from Indian lands.

(c) The 1839 Act provided that offenders could be fined or jailed.

(d) The 1850 Act made it illegal to purchase or contract for sale of Indian lands without the authority and consent of the Crown.

(e) The 1850 Act made it illegal to sell liquor to Indians and to reside upon, settle or occupy Indian lands.

(f) The 1850 Act made it illegal to cut or take timber from Indian lands.

(g) As of 1851, the provisions of the 1850 Act were proclaimed to be in force in respect of the Peninsula.

740. Encroachments on the Peninsula between 1836 and 1854:

(a) There were widespread encroachments on the Peninsula by the early 1850s.

(b) Starting in at least 1840, SON complained about these encroachments to Crown officials.

(c) Senior Crown officials were aware of these encroachments.

26. THE CROWN'S CAPACITY TO PROTECT THE PENINSULA (1836-1854)

741. As mentioned already, the Crown had obligations to protect the Peninsula stemming from the following:

(a) The promise made by the Crown in Treaty 45 ½ to protect the Peninsula for SON from the encroachment of whites; and

(b) The law prohibiting trespass, illegal occupation and settlement, or cutting of timber on Indian lands as set out in the legislation of the day.

742. The promise to protect and the relationship between the Crown and SON created a duty on the Crown to stop encroachments on the Peninsula, as did the legislation that existed to protect Indian lands.

743. In 1854, in the months leading up to the Crown taking the surrender of the Peninsula, Crown officials insisted that the Crown was unable to stop the encroachments and that the only way to secure any benefit for SON was to take a surrender of the Peninsula for sale. Crown officials went on to make threats that the government would take the Peninsula without SON's

consent. Far from acting diligently to do what he could to fulfill the promises to protect the Peninsula set out in Treaty 45 ½, T.G. Anderson told the Saugeen Ojibway that the government would not "take the trouble to help you while you remain thus opposed to your own interest."[1020] These threats are discussed in more detail at paragraphs 799 to 811.

744. The discussion of what the Crown could have done to protect the Peninsula and what the Crown actually did is important in the assessment SON is asking this Court to make about whether the Crown representatives were being honest in the discussions leading up to and pushing for the surrender of the Peninsula in October 1854.

745. SON is asking this Court to find that the Crown could have done more to protect the Peninsula, and that it failed to act in accordance with the standard required of it in keeping its promise to protect the Peninsula. Instead, the Crown prioritized the interests of white settlers over keeping its promise to SON. Its representations that it was not possible to protect the Peninsula were dishonest and meant to induce the surrender of the Peninsula in 1854.

The Capacity to Locate Squatters

746. Encroachments like squatting and timber theft were not activities that could be concealed. As described above, squatting usually involved individuals clearing land, building a shelter and farming. This would take at least one farming season and usually much more, e.g. they would typically be there in a winter season to clear the land and then expect to return to it the following year. Timber thieves would be on the land long enough to cut down trees and haul them away, e.g. about one to two months (October/November, or April/May, depending on the way they

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[1020] Address to the Owen's Sound and Saugeen Indians at the Close of Council at Owen Sound, August 2, 1854, Exhibit 2175, p. 12.

were transporting the timber).[1021] There were several complaints received noting the location and identity of several squatters and timber thieves on the Peninsula, as noted at paragraphs 733 to 736.

747. The consensus of the experts who testified before this Court on the topic was that it would not have been difficult to locate individuals squatting on or stealing timber from the Peninsula. For example, one way to identify and locate squatters and timber thieves on the Peninsula was via the complaints they received from SON that often identified particular individuals and provided information about where that individual could be found squatting on or taking resources unlawfully from the Peninsula.[1022]

The Capacity of the Crown to Enforce

748. The Crown had a variety of mechanisms at its disposal through which it could have responded to these complaints. Throughout the trial, the Court heard evidence regarding these options, which can be described briefly as ranging from: 1) issuing removal notices and warrants, to 2) sending civilian law enforcement to remove or arrest offenders, to 3) seeking military or militia assistance if civilian law enforcement needed help. The Court heard expert evidence that the first two options may have been sufficient, and the third option of seeking military intervention may not have been required. However, as discussed below, the evidence reveals that none of these options were tried. In this section, we first review what the Crown *could have* done, before

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[1021] Prof. Douglas McCalla, Transcript vol 58, October 31, 2019, p. 7522, lines 14-22; p. 7457, line 13 to p. 7459, line 6; and p. 7559, line 9 to p. 7566, line 14.

[1022] Evidence of Prof. Sidney Harring, Transcript vol 47, October 1, 2019, p. 5945, lines 11-15 and p. 5948, lines 1-4; Evidence of Prof. Sidney Harring, Transcript vol 48, October 2, 2019, p. 5970, lines 4-17**;** Evidence of Prof. Douglas McCalla, Transcript vol 58, October 31, 2019, p. 7559, line 9 to p. 7566, line 14; Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8386, line 12 to p. 8387, line 5; Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11586, line 7 to p. 11602, line 2 and p. 11619, line 18 to p. 11620, line 4.

reviewing what was actually done. Again, this is because SON is asking this Court to assess whether the Crown acted in accordance with what was required of it as a fiduciary to SON. That requires looking beyond what the Crown actually did to what it *could have* done.

1) Issuing Removal Notices and Warrants

749. As discussed at paragraph 726, individuals would squat on Indian lands because they thought that they could benefit from it – either by being paid for improvements or by getting a head start to settling on those lands. One effective method to curbing squatting would be to make it clear that no such benefits would flow – as historian John C Weaver (cited by several experts in this trial, including Prof. Sidney Harring and Prof. Douglas McCalla) puts it: "The only feasible weapon against squatting and speculating in Indian territory was a flat, unequivocal refusal to issue any enforceable interest."[1023] Such an unequivocal refusal, making it clear that squatters would never own land unless they vacated, was not enforced on the Peninsula or in Upper Canada.[1024]

750. Apart from issuing a notice prohibiting squatters and timber thieves from ever owning lands in the area where they squatted, the Crown could have issued other notices and warrants pursuant to the Indian Land Protection Legislation, cited above. Commissioners could be appointed and were authorized to issue notices and warrants to prosecute or remove squatters and timber thieves:

(a) In the 1839 Act, the Preamble sets out that the Lieutenant Governor of the Province "from time to time, as he shall deem necessary, to appoint two or more Commissioners … to receive information and to inquire into any complaint" with

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[1023] John C. Weaver, The Great Land Rush, p. 157, Exhibit 4369.
[1024] Evidence of Prof. McCalla, Transcript vol 58, October 31, 2019, p. 7488, line 5 to p. 7489, line 14 and p. 7491, line 14 to p. 7492, line 6.

respect to any person illegally occupying lands protected by the legislation (which includes Indian lands, as noted at paragraph 730), and to inquire into any complaint of someone unlawfully cutting down and taking any timber, trees, stone or soil from such lands. The 1839 Act goes on to provide for the following enforcement measures that can be taken by Commissioners:[1025]

(i) that a Commissioner appointed under this statute could have complaints regarding offences investigated (s 1);

(ii) that Commissioners could give notice and require offenders to leave the lands they are occupying (s 2);

(iii) if the offender did not leave, a warrant could be issued to a sheriff and the sheriff could remove the offender (s 2);

(iv) if the offender returns, he can be put in jail for up to 30 days and fined up to 20 pounds (s 3); and

(v) that Commissioners can also seize timber that has been stolen from Crown or Indian lands (s 3).

(b) Section 10 of the 1850 Act provided that Commissioners that were appointed under previous legislation, including the 1839 Act, were Commissioners for the purpose of exercising powers in the 1850 Act, including the following measures:[1026]

(i) Commissioners could issue warrants to remove offenders (s 10);

(ii) if the offender returned, the Commissioner could direct the arrest of the offender and jail time up to 30 days (s 11); and

(iii) Offenders that took timber from Indian lands would have to forfeit their stolen timber and could be fined and jailed (s 12).

[1025] *An Act Protection of the Lands of the Crown in this Province from Trespass and Injury*, 2 Vict. Cap 15, 1839, Exhibit 1301, Preamble, ss 1-3, Plaintiffs' Book of Authorities, Tab 118.
[1026] *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, 13 & 14 Vict. Cap 74, 1850, Exhibit 1784, ss. 10-12 [pp. 5-6 PDF], Plaintiffs' Book of Authorities, Tab 119.

751. Based on the Indian Land Protection Legislation, SON submits that at any time between 1839 to 1854, the Crown had the resources to employ these measures to stop or at least curb squatting, timber thieving and other encroachments.

752. Commissioners were appointed under the 1839 Act.

(a) T.G. Anderson, the Indian Superintendent for the Saugeen Ojibway Nation, was a Commissioner under for the purposes of the 1850 Act. In 1851, he was appointed as a Commissioner under the 1839 Act.[1027] Therefore, in the years leading up to 1854, T.G. Anderson could have taken steps under the Indian Land Protection Legislation to remove squatters, trespassers and anyone else offending the prohibitions set out in the above statutes by initiating investigations in response to complaints, and issuing notices and warrants to offenders.[1028]

(b) In 1852, John McLean was also appointed as a Commissioner, specifically in respect of the "Saugeen lands".[1029] In 1852, this is a reference to the Peninsula. Therefore, in the years leading up to 1854, John McLean could have taken steps under the Indian Land Protection Legislation to remove squatters, trespassers and anyone else offending the prohibitions set out in the above statutes by initiating

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[1027] Robert Bruce to T.G. Anderson, February 18, 1851, Exhibit 1839 [transcript at Exhibit 4291].
[1028] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11020, lines 4 to p. 11041, line 20.
[1029] Robert Bruce to the Provincial Secretary, October 20, 1852, Exhibit 1955 [transcript at Exhibit 4719] - *asking for a commission to be prepared appointing John McLean as a Commissioner under the Indian Land Protection Legislation*; T.G. Anderson to John Frost, September 17, 1852, Exhibit 1946 [transcript at Exhibit 4720] - *refers to McLean being appointed a commissioner in relation to the Saugeen lands.*

investigations in response to complaints, and issuing notices and warrants to offenders.[1030]

753. So, in the years leading up to 1854, the evidence shows that there were at least two Commissioners that were appointed and able to use the measures set out in the Indian Land Protection Legislation. That included issuing warrants and orders for evictions, which would be enforced by local law enforcement officers – such as by constables, who could execute warrants in the jurisdiction of the Justice of the Peace who granted the warrant.[1031] Also, more commissioners could have been appointed if needed.

2) Civilian Law Enforcement

754. The strength of the local civilian law enforcement was discussed with several experts in this trial. While some of the Defendants' expert witnesses opined about the weaknesses of the local police force, the evidence demonstrates the following:

(a) There were constables appointed and active in the Counties of Bruce and Grey in the years leading up to 1854. As noted at paragraph 715, the Peninsula was at different times under the jurisdiction of different counties. As of 1851, the Peninsula was divided between the Counties of Bruce and Grey, such that

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[1030] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11020, line 4 to p. 11041, line 20.

[1031] Canadian Constables Assistant, August 1852, Exhibit 4900, pp. 1-3; Jan Nickerson, Crime and Punishment, Chapter 6, Exhibit 4407, p. 146; 1851 Magistrates Manual, Exhibit 4408, pp. 181-184; Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11043, line 24 to p. 11044, line 14 and p. 11048 lines 13-17.

constables of those counties could execute warrants and other actions on the Peninsula and on the Indian reserve[1032];

(b) The following chart summarizes the number of constables in Bruce and Grey counties from 1852 to 1854:[1033]

COUNTY	YEAR	# OF CONSTABLES
Bruce County	1852	5
Bruce County	1853	6
Bruce County	1854	15
Grey County	1854	42

(c) While some experts offered opinions about the shortcomings of local law enforcement, the balance of the evidence does not suggest that local constables were unable to act on warrants issued pursuant to the Indian Land Protection Legislation or would not comply with an order to do so. In fact there were consequences for constables who failed to carry out their duties, such as fines or imprisonment.[1034] There is also the evidence of constables in other instances in

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[1032] Agreed Statement of Fact Regarding Constables in Grey and Bruce County, Exhibit 4901; Owen Sound Police Force and Owen Sound Police Commission, "Preserving the Peace: A History of the Owen Sound Police", Ch. 1 & 2, Exhibit 4832, pp. 15-19.

[1033] Quarter Sessions for the County of Grey, April 1854, Exhibit 4819; Quarter Sessions for the County of Grey, June/July 1854, Exhibit 4820; List of Persons to Serve as Constables for the year 1852-1853 appointed by the County General Quarter Sessions of the Peace, April 1852, Exhibit 4823; List of Persons to notified to serves as Constables in and for the United Counties of Huron and Bruce as appointed by the County General Quarter Sessions of the Peace for the year 1853-1854, April 1853, Exhibit 4824; Schedule of the names of persons to serves as Constables in and for the United Counties of Huron and Bruce for the year 1854-1854 and date of oath of office, Exhibit 4825; Agreed Statement of Fact Regarding Constables in Grey and Bruce County, Exhibit 4901.

[1034] Mr. Tyler Wentzell, "A British Officer's Understanding of Military Aid to the Civil Power in 1854" (as redacted 2019), Exhibit 4414, p. 10 - *cited to County and Borough Police Act, 19&20*

> Upper Canada in this same time period (1836-1854) enforcing warrants and evictions against individuals illegally occupying or taking resources from other Indian lands.[1035]

755. If there were not enough constables to carry out warrants or evictions, more constables could have been appointed. Local magistrates (or Justices of the Peace) typically appointed constables in the April session of the General Court of the Quarter Sessions, but they could also appoint more constables if needed at the other sessions.[1036]

756. As noted in paragraph 752, Anderson (a Superintendent of the Indian Department) and McLean were appointed as Commissioners in 1851. The 1850 Act specifies that Commissioners and Superintendents of the Indian Department are also Justices of the Peace.[1037] So, Anderson and McLean, as Commissioners under the 1850 Act, were recognized as Justices of the Peace and

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Vict C 69; Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8392, lines 3-22; Evidence of Mr. Tyler Wentzell, Transcript vol 65, November 25, 2019, p. 8474, lines 1-5; Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11043, line 24 to p. 1104, line 14 and p. 11048, lines 13-17; James Robert Gowan, The Canadian Constables' Assistant: Being the Substance of a Charge to the Grand Jury of the County of Simcoe, at the April Sessions, 1852, James Patton ed (Barrie: JW Young, 1852), Exhibit 4900, p. 7.

[1035] David Thorburn to Laurence Oliphant, November 10, 1854, Exhibit 4721 – *regarding payment of bill of constables – 109 pounds – for removing squatters and trespassers from Six Nations Indian Reserve*; Statement of Account, September 10, 1853, Exhibit 4450 – *for constables' services on the Six Nations Indian Reserve*; Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11071, lines 5 to p. 11072, line 25.

[1036] Agreed Statement of Facts regarding Constables in Grey and Bruce County, Exhibit 4901; James Robert Gowan, The Canadian Constables' Assistant: Being the Substance of a Charge to the Grand Jury of the County of Simcoe, at the April Sessions, 1852, James Patton ed (Barrie: JW Young, 1852), Exhibit 4900, p. 5-6; Janice Nickers, "Crime and Punishment in Upper Canada", Ch. 6, Exhibit 4407. pp. 143-150; Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8392, lines 3-22.

[1037] *An Act for the protection of the Indians in Upper Canada from imposition and the property occupied or enjoyed by them from trespass and injury*, 13 &14 Vict Cap 74, 1850, s 9, Exhibit 1784, Plaintiffs' Book of Authorities, Tab 119 – *Commissioners and Indian Superintendents were Justices of Peace with the County, or United Counties within which they were "resident or employed as such Commissioners*".

could appoint constables at a sitting of the Court of the General Quarter Sessions in either Bruce or Grey.

757. In addition, two Justices of the Peace could also appoint special constables if it was determined more assistance for civilian law enforcement was needed on the spot, as set out in *An Act to Amend the Law relative to the appoint of Special Constables and for the better preservation of the Peace, Statute 10 and 11 Vic Ch 12 July 28, 1847*:

> "That in all cases where it shall be made to appear to any two or more Justices of the Peace of any District, City or Town in this Province, upon the oath of any credible witness, that any tumult, riot or felony has taken place or is continuing, or may be reasonable apprehended in any Parish, Township, Town or place situation with the limits for which the said respective Justices usually act, and such Justices shall be of opinion that the ordinary officers appointed for preserving the peace are not sufficient …any two or more Justices acting for the same limits are hereby authorized to nominate and appoint, by precept in writing under their hands, so many as they shall think fit of the householders or other persons… to act as Special Constables…"[1038]

758. So again, Anderson and McLean, acting together, could have exercised this option of appointing special constables (without having to wait until the General Quarter Sessions) should they have required more assistance with the arrest or removal of squatters and timber thieves from the Peninsula.

[1038] *An Act to Amend the Law relative to the appoint of Special Constables and for the better preservation of the Peace*, Statute 10 and 11 Vict Ch 12, July 28, 1847, Exhibit 4417, Preamble; See also: Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11066, line 13 to p. 11067, line 9; Evidence of Mr. Tyler Wentzell, Transcript vol 65, November 25, 2019, p. 8471, line 20 to p. 8472, line 7.

759. Indeed, there are examples from around the same time period (mid 19th century) where Crown officials did exercise these options to appoint and call on constables, special constables or create local police forces when needed (and when they wanted to):

(a) In 1863, there was an incident on Manitoulin Island involving Mr. William Gibbard, a fishery overseer. Mr. Gibbard was instructed to take possession of Manitoulin Island and its fisheries, for the purpose of leasing the fisheries to non-native fishers. Chiefs and warriors from Manitoulin Island expelled the non-native fishers.[1039] In response, Mr. Gibbard gathered a force of 22 constables to go to Manitoulin to arrest the Indigenous Chiefs and warriors involved in the stand off. In Mr. Gibbard's description of what happened, he notes that he engaged a force of 21 men within two to three days to accompany him to Manitoulin Island:

(i) Eight special constables from Toronto;

(ii) Five constables from Barrie; and

(iii) Eight constables from Collingwood.[1040]

(b) In 1845, a police force of 22 was created to serve on the Williamburg canals, located in what is now Morrisburg Ontario, just west of Cornwall, Ontario. The police force was tasked with preserving order amongst labourers on the canal, and it suggests

[1039] A.J. Ferguson Blair, Sessional Papers, W.F Whitcher to Mr. Macdougall, August 24, 1863, Exhibit 4301, pp.11-18 (PDF paginated pages).
[1040] A.J. Ferguson Blair, Sessional Papers, Mr. Gibbard to Mr. Macdougall, July 27, 1863, Exhibit 4301, pp. 34-36 (PDF paginated pages).

> that at this time, when the Crown wanted to, it was possible to create police forces outside of an urban centre.[1041]

760. Mr. Graves emphatically asserted that even if there were local constables or militia, they would not have been effective against squatters on the Peninsula because they would have been their relatives.[1042] Prof. McCalla also suggested that the sympathies of local constables may have been with squatters, but he says in respect of sheriffs: "I do believe they would have followed a lawful request that man, go and put that man in jail. I believe the sheriff would do that. They had more autonomy."[1043]

761. There is evidence of local constables having enforced warrants against and making arrests of squatters on the Six Nations' Reserve, and seeking payment for their work in 1853 and 1854.[1044] This is near the same time, in Upper Canada, which suggests that any loyalty to fellow Euro-Canadian settlers engaged in squatting was not so pronounced as to prevent civilian law enforcement from acting against them. SON submits that if local constables were carrying out orders and enforcing Indian Land Protection Legislation against squatters and trespassers on the Six Nations' Indian reserve, there is no reason that the situation would have been different in respect of the Peninsula. In addition, there was the option of using the local sheriff to enforce

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[1041] Ruth Bleasdale, "Class Conflict on the Canals of Upper Canada in the 1840s", Exhibit 4722, p. 34; Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11087, line 10 to p. 11089, line 21.
[1042] Evidence of Mr. Donald Graves, Transcript vol 87, February 21, 2020, p. 11144, line 15 to p. 11145, line 12; Transcript vol 86, February 20, 2020, p. 11103, line 12 to p. 11104, line 12; Transcript vol 87, February 20, 2020, p. 11134, line 15 to p. 11138, line 15.
[1043] Evidence of Prof. Douglas McCalla, Transcript vol 58, October 31, 2019, p. 7595, line 19 to p. 7596, line 21.
[1044] David Thorburn, Indian Office, September 10, 1853, Exhibit 4450; David Thorburn to Oliphant Lawrence, November 11, 1854, Exhibit 4721.

Indian Land Protection Legislation, as was done by Laurence Oliphant the day after the surrender.[1045]

762. In addition, it is also worth noting that even if it was the case that Euro-Canadian local constables and militia members were reluctant to act against squatters, the Crown had the option of appointing Indigenous constables and calling on Indigenous peoples to serve as militia members. Indeed, we have the following evidence that clearly points out that this option was considered by Crown officials:

(a) There is evidence that in 1843, T.G. Anderson was recommending the appointment of Indigenous constables on Manitoulin Island as a way to respond to white people intruding on the reserve.[1046]

(b) There is also evidence in 1846 of T.G. Anderson considering forming an Indigenous militia.[1047]

(c) A similar option had been used in the United States and had been considered by senior officials in the Indian Department. The Cherokee Rangers had been empowered in the state of Georgia to remove squatters from Cherokee land. Samuel L Jarvis, Chief Superintendent of Indian Affairs from 1837 to 1845,

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[1045] Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada, L Oliphant to Sheriff Schneider, October 14, 1854, Exhibit 2175, p. 15, Sub-Enclosure 6, to Enclosure in No. 1.
[1046] T.G. Anderson to Superior Officer, 1843, Exhibit 4418.
[1047] Return of Officers propose to fill 10 companies of Indians each sixty strong, Exhibit 4419; Evidence of Mr. Tyler Wentzell, Transcript vol 65, November 25, 2019, p. 8480, line 17 to p. 8481, line 15.

recommended the same be employed in Upper Canada to deal with squatters.[1048]

This recommendation was ultimately adopted by the Bagot Commission:

> "The appointment of one or more of the most intelligent, active and honest Indians in the settlement, to act as Rangers, to watch, and occasionally to inspect the Reserves, and to report any attempt at intrusion to the local Agents, who shall thereupon take steps to remove or put the law in force, against the offender."[1049]

3) Calling for Military or Militia Assistance

763. SON submits that, in order to stop or curb encroachments on the Peninsula, it would not have been necessary to launch a military operation or bring in assistance from armed militia. However, if the Crown had concluded that civilian law enforcement resources were insufficient, the Crown could have requested assistance from the military or militia, and such assistance could and would have been provided.

764. All experts that opined on this matter agreed that the first step in enforcing the law against squatters and timber thieves on Indian lands was civilian law enforcement. If, and only if, the local law enforcement could not handle the situation, would military or militia assistance be sought.[1050] Militia could be called in to assist with – for example – difficult arrests.[1051]

[1048] Prof. Sidney Harring, "Report" (2013), Exhibit 4276, p. 46.
[1049] Charles Bagot, Report on the Affairs of the Indians in Canada, Section 3 [Bagot Commission Report, Section 3], 10 October 1842, in *Appendix T to the Sixth Volume of the Journals of the Legislative Assembly of the Province of Canada*, 2 June, 1847 - 28 July, 1847 (3rd Session, 2nd Provincial Parliament of Canada, 1847), Exhibit 1447, PDF p. 36.
[1050] Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8404, lines 16-22; Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11093, line 15 to p. 11094, line 11.
[1051] William Wylie, "Poverty, Distress and Disease: Labour and the Construction of the Rideau Canal, 1823-32", Exhibit 4413, p. 22; Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8440, line 18 to p. 8441, line 21.

765. But, there is no evidence of civilian law enforcement being called upon to execute such warrants, make arrests or remove squatters and timber thieves in respect of the Peninsula, nor any evidence that they were not strong enough to do so, had they been called upon to do so.

766. Despite no evidence that the militia was ever called upon, several experts expressed views about whether the militia was available to assist with the situation on the Peninsula. At the relevant time, in the years leading up to 1854, when Treaty 72 was concluded, the Militia Act of 1846 was the relevant legislation about the organization and availability of the militia. In 1855, new legislation was passed that governed the militia in Upper Canada. Mr. Graves insisted in his evidence that prior to this legislation and to 1855, there was no militia available in Bruce or Grey counties.[1052]

767. However, SON submits that based on the following, Mr. Graves is incorrect:

(a) Under the 1846 Act, the Governor General had the power to call up men from the ages 18 to 60 years old to train and serve in the militia for any purposes connected to the public purpose. There were consequences – such as being court martialed and fined – for men that refused to show up when called.[1053]

[1052] Evidence of Mr. Donald Graves, Transcript vol 80, February 3, 2020, p. 10347, line 6 to p. 10350, line 7; Evidence of Mr. Donald Graves Transcript vol 87, February 21, 2020, p. 11175, line 15 to p. 11177, line 15 – *refers to Exhibit 4725.*

[1053] *An Act to repeal certain Laws therein mentioned, to provide for better defence of this Province and to regulate the Militia therein*, 9 Vict Cap 28, 1846, Exhibit 1603, ss. 19, 39, and 40; Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11099, lines 19-23.

(b) An 1851 census about the population in Grey and Bruce counties suggests that there were over 900 males between the ages of 18 and 60.[1054]

(c) In response to the Upper Canada Rebellion in the late 1830s, a sizeable force was gathered from several areas around rural Upper Canada. This demonstrates that it was possible for the militia to respond when needed, and also that the response need not come from the county, district, or township in which the disturbance was happening.[1055]

(d) In 1841, the size of the sedentary militia (being drawn from ordinary citizens, males ages 18 to 60 years old) in Upper Canada is noted as being 117,000 men.[1056] Through the 1840s, there was population growth in Upper Canada, meaning that the sedentary militia grew as well. This was put to Mr. Tyler Wentzell, who ultimately agreed that between 1836 and 1854, the militia did have the capacity to engage in a small and temporary mission of up to 150 people, and did have sufficient capacity to deal with matters of internal disturbance.[1057]

[1054] Index to the 1851 Census of Canada West (Ontario): Bruce and Grey Counties, Exhibit 1828: *"Indians" noted as "m" in column labelled "m/f" and noted as number between 18-60 in column labelled "age" = 121; "Whites" noted as "m" in column labelled "m/f" and noted as number between 18-60 in column labelled "age" = 789; "Colored" noted as "m" in column labelled "m/f" and noted as number between 18-60 in column labelled "age" = 10, for a total count of 920.*

[1055] Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8421, line 6 to p. 8425, line 7; J. Mackay Hitsman, Chapter 7, "Safeguarding Canada 1763-1871", (1968), Exhibit 4411, pp. 130-131; *An Act to repeal certain Laws therein mentioned, to provide for better defence of this Province and to regulate the Militia therein*, 9 Vict Cap 28 -1846, Exhibit 1603.

[1056] Ernest J. Chambers, "The Canadian Militia", Ch., 6, Exhibit 4409. p. 61.

[1057] Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8409, line 7 to p. 8410, line 3; p. 8412, line 10 to p. 8413, line 7; p. 8438 lines 11-19; and p. 8443, line 1-7.

768. However, as noted, whether or not the militia was available or had the capacity to assist, there was no evidence that any Crown official had called for the assistance for the militia to assist with arrest or removal of individuals encroaching on the Peninsula between 1836 and 1854.[1058]

769. Similar to the discussion about the availability of the militia, experts opined on the availability of military and feasibility of an expedition to assist with protecting the Peninsula from encroachments. Again though, it is key to point out that there is no evidence that any Crown official called for military assistance to deal with the arrest and/or removal squatters and trespassers on the Peninsula prior to 1854.[1059]

770. However, in respect of the feasibility and availability of the military to provide assistance if they were asked, SON submits the following:

(a) In 1849, military assistance was sent to respond to Indigenous peoples' occupying a mining site at Mica Bay. Mr. Wentzell agreed with the following:

(i) this area was more remote than the Peninsula, as there were less roads there in 1849 and less Euro-Canadian settlers in the area;

(ii) the Crown was able to spare 87 soldiers to put down the Indigenous peoples' resistance to the mining project, and this was at a time when the Crown was in the process of reducing the number of troops in Upper Canada; and

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[1058] Evidence of Mr. Tyler Wentzell, Transcript vol 65, November 25, 2019, p. 8499, line 9 to p. 8500, line 4; Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11095, lines 19-25.

[1059] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11823, line 9 to p. 11824, line 2; Evidence of Mr. Donald Graves, Transcript vol 87, February 21, 2020, p. 11146, line 7 to p. 11148, line 4; Evidence of Mr. Tyler Wentzell, Transcript vol 65, November 25, 2019, p. 8499, line 9 to p. 8501, line 16.

(iii) this example demonstrates that – regardless of feasibility or number of troops in the colony – the Crown could send troops when it was consistent with their priorities to do so.[1060]

(b) In June of 1855, Lord Bury instructed that military assistance be provided to surveyors on the Peninsula when the Saugeen Ojibway were interfering with that work.[1061] Though ultimately the surveyor, Charles Rankin, declined the offer for assistance,[1062] the offer for that assistance came from a high ranking official and at a time when the numbers of troops in Upper Canada was dropping. The number of troops in Upper Canada was, according to Mr. Graves, even lower than what it had been the year before, when Treaty 72 was concluded.[1063]

771. Again, however, the key question, Mr. Wentzell noted, as to whether the military would be sent in to assist in maintaining civil order was whether it was requested. Mr. Wentzell confirmed that an officer would respond to a request by a magistrate for assistance and would have followed orders to provide that assistance. While an officer would exercise his own judgement and decision making about the kind of operation needed to fulfill that order, an officer would not have refused to carry out the order. According to Mr. Wentzell, the most significant factor in determining

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[1060] Nancy Wightman, "The Mica Bay Affair: Conflict on the Upper-Lakes Mining Frontier, 1840-1850", Exhibit 4420, see in particular: pp. 197, 201-202; Evidence of Mr. Tyler Wentzell, Transcript vol 65, November 25, 2019, p. 8484, line 24 to p. 8485, line 24; p. 8490, line 5 to p. 8491, line 14.

[1061] Bury, Superintendent General Indian Affairs, to Tullock, June 16, 1855, Exhibit 2250; The Daily Leader, "Troubles in the Indian Peninsula", June 6, 1855, Exhibit 2246.

[1062] Charles Rankin, Deputy Provincial Surveyor Upper Canada, to Bury, Superintendent General Indian Affairs, June 20, 1855, Exhibit 2251.

[1063] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11120, line 5 to p. 11121, line 14 and p. 11121, line 15 to p. 11126, line 1; Mr. Donald Graves, "Comments and Observations on the Expert Reports of Professor Eric Hinderaker and Doctor Sidney Harring and the Historical Basis of the Plaintiff's Statement of Claim" (2015 as redacted 2020), Exhibit 4553, p. 33 – *"…in October 1853 to 2,467 all ranks in October 1854. Over the next year, approximately 40% of the remainder were transferred until by October 1855, there were only 1,467 officers and men in Canada.*"

whether military aid was sent to the Peninsula in this period was whether a magistrate (such as T.G. Anderson, for example) ever asked for it.[1064]

772. As noted above, there was no evidence that such a request was ever made in respect of the Peninsula prior to 1854.

What did the Crown do to protect the Peninsula prior to October 1854?

773. All of the above touches on what the Crown *could* have done to protect from the Peninsula from squatters and encroachments. But, it is not a summary of what the Crown actually did in advance of October 1854 when Laurence Oliphant arrived at Saugeen to tell SON about "the extreme difficulty, if not impossibility, of preventing such unauthorised intrusions" on the Peninsula, and ultimately "to wring from those it protects, some assent, however reluctant" to a surrender of the Peninsula.

774. The Crown did not refuse unequivocally to allow squatters on the Peninsula to benefit from their improvements *and then follow through on that policy.* In fact, the notice about the first sale of lands on the Peninsula indicated precisely the opposite: "The Department reserves to itself the power to attach to any lot, at the time of sale, the obligation on the part of the purchaser to pay for any improvements which may have been made on such lots by squatters."[1065] The Crown did not issue any warrants, or make any arrests, or remove any squatters. The Crown did not ask for the assistance of constables or special constables, nor did it empower SON to act as rangers to

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[1064] Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8445, line 1 to p. 8447, line 2.

[1065] Advertisement of the Land Sale at Owen Sound, September 2, 1856, from R.T. Pennefather, dated July 18, 1856, **there are several versions of this advertisement added as exhibits in the Record:* Exhibit 2397 (copy); Exhibit 2398 (printed advertisement); Exhibit 2399 (handwritten); Exhibit 4834 (copy).

protect their own territory. The Crown did not ask the sheriff to remove squatters from the Peninsula, at least not until the day after Treaty 72 was signed. The Crown did not call up the militia to address squatting, nor did it ask for assistance from the military. The Crown did not even post a notice warning squatters to remove from the Saugeen reserve that was specific to the Peninsula – again, at least not until after it had the surrender in hand and was protecting its own lands rather than SON's lands.

775. Instead, the Crown demonstrated lenience in its dealing with squatters, urging the exercise of discretion when it came to enforcement of the Indian Land Protection Legislation,[1066] and encouraging squatters to try and resolve complaints by paying for timber they have taken without authorization for instance, or not actually taking any steps that were available to remove them from the Peninsula – allowing them to remain on the Peninsula for several years and until after the surrender.

776. Dr. Gwen Reimer set out a review of what efforts the Crown did make to protect the Peninsula in advance of 1854 in her expert report, which was elaborated on through cross examination as follows:[1067]

(a) Dr. Reimer noted in her report that T.G. Anderson released a public notice to squatters and trespassers on Indian lands on February 2, 1846. On cross

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[1066] See for example, February 26, 1851, Robert Bruce to T.G. Anderson, Exhibit 1842, PDF p. 2 [transcript at Exhibit 4292] - *I [concur] with you in thinking that the powers vested in the Commissioner by the Indians Protection Act should be exercised with caution and [forbearance], and that it will be [more] for the interest of the Indians that advantages, should be taken of the present opportunity to give full publicity to its provisions, particularly those of a public character, then to [carry] them very [rigidly] into effect, provided that ample [distribution] be made to the Indians by parties who have contravened the same*.

[1067] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, section. 4.2.4, pp. 110-115.

examination, Dr. Reimer agreed that there is no evidence that this notice was posted on the Peninsula, and that it – unlike other notices published regarding squatters and trespassers on Indian lands in other areas (e.g. the notice issued by James Givins with respect to the Huron Reserve) was not specific to the Peninsula. She also agreed there was no such notice that was specific to the Peninsula, until the one posted after the Crown obtained the surrender.[1068]

(b) Dr. Reimer referred to actions taken by the Crown in respect of a Mr. Withers, noting in her report that he was prosecuted for trespass on the Peninsula.[1069] However, on cross examination, Dr. Reimer agreed that Mr. Withers was not squatting on the Peninsula, but rather in Kincardine, south of Peninsula. As such, the Crown's measures against Mr. Withers were not efforts to evict him from Indian lands, but rather from Crown lands.[1070]

(c) Dr. Reimer noted in her report that in 1852, Anderson warned Mr. Gleason (an illegal occupant on the Peninsula, cutting timber without permission, discussed at

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[1068] Dr. Gwen Reimer, "Volume 3: Saugeen – Nawash Land Cessions No. 45 ½ (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 122; T.G. Anderson, Notice Indian Lands, February 2, 1846, Exhibit 1586; James Givins, Indian Lands Huron Reserve Public Notice, February 25, 1836, Exhibit 1108; Evidence of Dr. Gwen Reimer, Transcript vol 91, March 6, 2020, p. 11737, line 4 to p. 11740, line 8; Evidence of Prof. McCalla, Transcript vol 58, October 31, 2019, p. 7583, line 25 to p. 7584, line 15; and p. 7586, lines 7-24.

[1069] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 113; Dr. Gwen Reimer, "Supplementary Report: Documentation Relevant to the Extent of Squatting on the Saugeen Peninsula Reserve Pre-and Post Surrender No. 72 (13 October 1854)" (2019), Exhibit 4708, para. 2.1.1, p. 3.

[1070] Evidence of Dr. Gwen Reimer, Transcript vol 91, March 6, 2020, p. 11741, line 8 to p. 11742, line 7; Norman Robertson, "This History of the County of Bruce and of the minor municipalities therein", Exhibit 4286, p. 26.

paragraph 728(b) to either remove from the Peninsula or be prosecuted.[1071] However, on cross examination, Dr. Reimer acknowledged that there was no evidence of his prosecution and removal, and rather that the evidence was that Mr. Gleason still owned a partial interest in a mill on the Peninsula, and in fact remained on the Peninsula until 1857 without any substantive interference in his operations.[1072]

(d) Dr. Reimer referred to the appointment of Mr. John McLean as a Crown lands Commissioner to protect the Peninsula.[1073] On review of several primary records and correspondence in cross examination, Dr. Reimer acknowledged that such records did not include any evidence of McLean prosecuting or removing anyone. Dr. Reimer also admitted that she did not recall reviewing any evidence in her own review of the historical record of McLean ever removing or prosecuting squatters or trespassers on the Peninsula.[1074]

[1071] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 114-115.
[1072] Evidence of Dr. Gwen Reimer, Transcript vol 91, March 6, 2020, p. 11744, line 5 to p. 11745, line 7; T.G. Anderson to Leonard Gleason, January 7, 1853, Exhibit 1967 [transcript at Exhibit 4756]; Leonard Gleason to Command R. Bruce, Superintendent General Indian Affairs, June 4, 1853, Exhibit 4932; Leonard Gleason to R.T. Pennefather, September 22, 1856, Exhibit 4836.
[1073] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 97, 115.
[1074] Evidence of Dr. Gwen Reimer, Transcript vol 91, March 6, 2020, p. 11748, lines 1-13; p. 11756, lines 1-16; and p. 11757, line 7 to p. 11759, line 1; John McLean to William Harrison, November 18, 1852, Exhibit 4830.

777. Additionally, on cross examination, Dr. Reimer confirmed that in her extensive review of the historical record, she did not come across any record of:[1075]

(a) a warrant being issued pursuant to the 1839 Act or the 1850 Act in respect of the Peninsula prior to October 14, 1854;

(b) a person being "committed to gaol" pursuant to the 1839 Act in respect of squatting or trespassing on the Peninsula prior to October 14, 1854;

(c) a person being fined for squatting or taking timber pursuant to the 1839 Act or the 1850 Act in respect of the Peninsula prior to October 14, 1854;

(d) a person being prosecuted pursuant to the 1850 Act for making a lease in respect of the Peninsula (and in contravention of the 1850 Act) prior to October 14, 1854;

(e) a squatter being removed or put in jail pursuant to the 1850 Act in respect of the Peninsula prior to October 14, 1854.

The same was confirmed by other experts.[1076]

[1075] Evidence of Dr. Gwen Reimer, Transcript vol 91, March 6, 2020, p.11765, line 15 to p.11766, line 25; Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11791, line 9 to p. 11794, line 11.

[1076] Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 11094, lines 9-16; Evidence of Prof. Douglas McCalla, Transcript vol 58, October 31, 2019, pp. 7573-7575; pp.7577-7579; and p. 7586, line 18 to p. 7587, line 22; Evidence of Prof. Sidney Harring, Transcript vol 48, October 2, 2019, p. 5995, lines 16-18.

SON seeks the following findings of fact in respect of Chapter 26 - The Crown's capacity to protect the Peninsula (1836-1854):

778. The Crown's capacity to locate squatters on the Peninsula:

(a) Encroachments like squatting and timber theft were not activities that could be concealed easily.

(b) Complaints to the Crown about encroachments on the Peninsula often noted the identity and location of the squatter/trespasser.

(c) Taken together, this meant that the Crown could have located squatters and timber thieves on the Peninsula had it wished to do so.

779. The legal tools available to the Crown:

(a) The Crown could have issued a notice that squatters would not receive any benefit from squatting on lands.

(b) Under the Indian Act Protection Legislation, the following measures were available to the Crown

(i) appointment of two or more Commissioners who could then have done the following:

(A) received complaints and launched investigations into those complaints;

(B) issued notices to offenders and required offenders to leave the lands they were occupying;

(C) issued warrants to sheriffs to remove the offenders, to jail and/or fine offenders and to seize timber taken illegally.

(c) T.G. Anderson was a commissioner that could have taken steps in the years leading up to 1854 to remove squatters, trespassers and any other offenders of the Indian Land Protection Legislation from the Peninsula, including issuing notices and warrants as described.

(d) John McLean was a commissioner that could have taken steps in the years leading up to 1854 to remove squatters, trespassers and any other offenders of the Indian Land Protection Legislation from the Peninsula, including issuing notices and warrants as described.

780. Civilian law enforcement:

(a) There were constables appointed and active in the Counties of Bruce and Grey in the years leading up to 1854. The Peninsula divided between these counties as of 1851.

(b) Constables of those counties had the authority to carry out warrants and execute other legal actions on the Peninsula. In particular, constables could act to execute warrants and arrests under the Indian Land Protection Legislation. They also had the capacity to carry out warrants and conduct arrests.

(c) If there were not enough constables in a county or district, local magistrates or justices of the peace could appoint more. This was typically done at the April session of the Court of Quarter Sessions.

(d) T.G. Anderson and John McLean were justices of the peace (pursuant to the 1850 Act), and they would have been capable of appointing constables at a sitting of the Court of the General Quarter Sessions in Bruce or Grey Counties.

(e) Two justices of the peace could appoint special constables if they determined that more law enforcement assistance was needed.

(f) T.G. Anderson and John McLean, acting together, could have appointed special constables to assist with law enforcement on the Peninsula if needed.

781. Militia or military assistance:

(a) The first step in curbing encroachments on the Peninsula would have been calling on civilian law enforcement, e.g. constables, sheriffs, etc., to execute warrants, arrests and evictions. Only if those actors were overwhelmed by or inadequate to the task would the assistance of the militia or military be sought.

(b) In the years leading up to the surrender of the Peninsula in 1854, the governing law about the militia allowed the Governor General to call up men between the ages of 18-60 for service.

(c) The population of Grey and Bruce counties in 1851 included men between the ages of 18-60.

(d) Based on this and other examples from the mid 19th century of the militia being used to assist the civil power and in times of emergency, e.g. the Upper Canada Rebellion, the militia had the capacity to assist if it had been called up to do so in respect of protecting the Peninsula from encroachments.

(e) A military officer in the mid 19th century would have responded to a request from a magistrate for assistance and would have followed orders to provide that assistance.

(f) Based on this and other examples from the mid 19th century of the military being called in to assist the civil power, e.g. Mica Bay in 1849, to assist land surveyors on the Peninsula in 1855, there was capacity for the military to assist if it had been called in to do so in respect of protecting the Peninsula from encroachments.

782. What the Crown did (and did not) do prior to October 14, 1854:

(a) The Crown did not refuse to give squatters on the Peninsula benefits from their improvements.

(b) The Crown did not issue any notice warning squatters to remove from the Peninsula that was specific to the Saugeen reserve.

(c) The Crown did not issue any warrants for, or make any arrests of, or remove any squatters from the Peninsula.

(d) The Crown did not ask for the assistance of constables or special constables to protect the Peninsula for SON.

(e) The Crown did not ask the sheriff to remove squatters from the Peninsula until after Treaty 72 was signed.

(f) The Crown did not call up the militia or ask for assistance from the military in respect of protecting the Peninsula for SON.

27. PRESSURE FOR THE PENINSULA PRE-OCTOBER 1854

The Crown's Settlement Goals

783. Despite the Crown having several tools and options at its disposal to enforce against squatters, timber thieves and protect against other encroachments on the Peninsula, they did not exhaustively exercise these options. Aside from a handful of letters asking individuals to "settle" with the Indians, or general notices about prohibiting squatting and illegal occupation of Indian lands, there is no evidence that the Crown actively enforced Indian Land Protection Legislation or exercised any other enforcement measures in respect of illegal encroachments on the Peninsula between 1836 and 1854.

784. One of the questions that remains is why the Crown failed to exercise any of these options before seeking a surrender of the Peninsula. SON submits that the answer is that encouraging settlement was a primary Crown objective and squatting was a useful practice for the settlement of the colony. It was a way for the government to settle the frontier for free and in a rapid way. As a result, squatting became 'quasi-legal' – that is, it was not discouraged and, in some ways, ultimately rewarded as noted above.[1077] Lilian Gates noted:

> Squatters became so fundamental in the settling of Upper Canada that "the usefulness of squatters in opening up new country was generally admitted, and, from an early date, the squatter was popularly regarded as equitably entitled to compensation for his improvements if he were dispossessed."[1078]

785. There was little incentive to remove squatters in Upper Canada between 1836 and 1854, since it was a means to advance the Crown's objective at that time to settle the colony. In that

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[1077] Prof. Sidney Harring, "Report" (2013), Exhibit 4276, pp. 6-7; Lillian Gates, Land Policies of Upper Canada, Exhibit 4280, pp. 284-302; Evidence of Prof. Douglas McCalla, Transcript vol 58, October 31, 2019, p. 7460, line 4 to p. 7461, line 2 and p.7480, lines 6-24.
[1078] Lilian Gates, Land Policies of Upper Canada, Exhibit 4280 p. 289.

context, treaties were a tool for removing Indigenous peoples as obstacles in the way of advancing the project of colonization.[1079]

786. Prof. Brownlie testified about three phases of British policy towards Indigenous peoples and their lands: alliance building in the late 18th/early 19th century, civilization policy that begins to govern relations post 1812, and assimilation policy beginning in the 1850s. Underlying each of these policies was advancing British objectives at different points in time. Civilization and assimilation policies advanced the objective of removing Indigenous peoples as obstacles to the exploitation and settlement of lands.[1080]

787. This is what happened in respect of the Peninsula. The Crown broke its promise. Instead of exercising options of enforcement to remove squatters and prevent encroachment, the Crown pushed for sale and surrender of the Peninsula. The evidentiary record shows us that Crown pressure on SON to obtain parts of and then ultimately the whole Peninsula was consistent and sustained for several years leading up to 1854.

The Half Mile Strip (1851)

788. This Court heard evidence about the conclusion of Treaty 67 in 1851. This was a surrender of lands known as "the half-mile strip" (designated in white on Exhibit P, the map referred to by the Plaintiffs throughout the trial as an illustrative aid to depict their claims) in 1851.

Exhibit P – (annotated) – SON Claims Map, Appendix D, Tab 1

[1079] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 2971, line 23 to p. 2972, line 12; p. 2975, line 16 to p. 2977, line 10; and p. 2993, line 23 to p. 2994, line 3

[1080] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 2971, line 23 to p. 2972, line 12 and p. 2975, line 16 to p. 2977, line 10; John Milloy, As Long as the Sun Shines and Water Flows: The Early Indian Acts: Developmental Strategy and Constitutional Change, Ch. 2, Exhibit 4122; John Tobias, As Long as the Sun Shines and Water Flows*:* Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy, Ch. 1, Exhibit 4123.

789. The conclusion of this treaty is an example of how the Crown sought and persisted in obtaining surrenders of lands on the Peninsula when it had the opportunity and occasion to do so. SON submits it also serves as an example of Crown tactics when seeking land surrenders designed to intimidate the Indigenous parties and ultimately obtain Indigenous lands.

790. The events surrounding Treaty 67 can be summarized as follows:

(a) The subject of a road connecting Owen Sound and the Saugeen settlement had been something the Crown was considering as early as 1841.[1081]

(b) And in the 1840s, there are documents to show the Crown was discussing how to go about building the road, including the notion that it would be helpful to have settlers on both sides of the road to keep the road in good repair.[1082]

(c) However, no one suggested that this would require surrender of additional lands from the Saugeen Ojibway until 1851.[1083] T.G. Anderson proposed a surrender to SON for the purposes of building this road for the first time in February 1851. Anderson stated "it is requisite there should be white settlers on both sides of the road, therefore, to accomplish this great object, it is proposed that you should surrender to the Government one Concession of your reserve North of the lines as marked down on the map." Anderson provides no rationale nor is there any evidence indicating why the road could not have been located south of the lands

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[1081] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 117; R.B. Sullivan, Crown Lands Office, to Sam B. Harrison, May 29, 1841, Exhibit 1385.
[1082] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 120.
[1083] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p.120.

he was trying to get the Saugeen Ojibway to surrender – that is, what would have already been Crown lands by virtue of the Treaty 45 ½ surrender.[1084]

(d) In March 1851, both David Sawyer and John Frost, a magistrate from Owen Sound, reported to Anderson that they had spent "two days" trying to convince the Saugeen Ojibway to surrender these lands.[1085] Frost reported to Anderson that the reason Chief Madwayosh gave for refusing the surrender is that his people wished to settle along the road.[1086] In other words, SON wanted to keep their lands for their own use. Anderson wrote to Col. Bruce enclosing Frost's letter, and indicating that instead of leaving this to Frost, Anderson himself would deal with the matter when he visited Owen Sound.[1087]

(e) In June 1851, Anderson asked SON again for the surrender of these lands.[1088] The minutes of this Council are dated June 24, 1851, Anderson asked again whether SON would surrender the half mile strip: "Question: You have been asked by your Great Father to give up a small strip of your land to make a road from here to the Saugeeng village and to be sold for your benefit. [illegible]... I used all the arguments I was [master] of to [ ] purpose". While some of the document is illegible, it seems (and Dr. Gwen Reimer agreed) that Anderson was saying he used all the arguments he had to try and persuade SON to consent to a surrender.

[1084] T.G. Anderson, Superintendent, Indian Affairs, to Saugeen Chiefs, February 23, 1851, Exhibit 1841 - *"it is requisite there should be white settlers on both sides of the road, therefore, to accomplish this great object, it is proposed that you should surrender to the Government one Concession of your reserve North of the line as marked down on the map".*

[1085] David Sawyer to T.G. Anderson, Superintendent, Indian Affairs, March 17, 1851, Exhibit 1844 [Transcript at Exhibit 4761].

[1086] John Frost to T.G. Anderson, March 15, 1851, Exhibit 1843.

[1087] T.G. Anderson to Col. R Bruce, March 23, 1851, Exhibit 1845.

[1088] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 121.

And the answer was no: "We are not willing on any condition to surrender the strip of land in question."[1089]

(f) Two days later, on June 26, 1851, SON agreed to a surrender of the half mile strip.[1090]

791. There are no documents or other historical records about what happened in those two days. Despite not having any records indicating what happened, Dr. Gwen Reimer asserts: "What appears highly plausible is that in this time a compromise was reached by the parties to greatly reduce the depth of the ceded tract".[1091] Dr. Gwen Reimer acknowledged on cross examination that there was no record or documentation to show that this was the case aside from the assent of SON – which does not detail that they consented because a favourable or acceptable compromise was reached.[1092]

792. There are other important pieces of information to note, which were put to Dr. Gwen Reimer on cross examination:

(a) On the same day that Anderson obtained consent from SON for the surrender for the half mile strip, June 26, 1851, there are minutes from a council held at Owen Sound with the Saugeen and Owen Sound Chiefs, over which Anderson presided

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[1089] General Council Minutes, Saugeen and Owen Sound Chiefs, June 24, 1851, Exhibit 1855 [Transcript at Exhibit 4786]. *Note, in Exhibit 1855, the original "no" by the Saugeen Ojibway is crossed off by Anderson subsequent to obtaining SON's surrender of the half mile strip*, see Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11850, line 17 to p.11851, line 9.

[1090] Surrender, June 26, 1851, Exhibit 1858. *Note: the formal surrender was concluded in September 2, 1851*, (see Treaty No. 67, Exhibit 1878 [transcript at Exhibit 1879]).

[1091] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 122.

[1092] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p.11830, line 18 to p.11831, line 24.

as chair. Charges were brought against Chief J.T. Wahbahdik for drunkenness and against Chief Kegedonce Jones for leaving his place of residence and encouraging indolence and "creating division" among his men – that is, opposing himself to the influence of government and the missionaries.[1093] Whether Chiefs were removed or relieved from their offices, that would be decided by the Indian department and its officials – like Anderson.[1094]

(b) The day after the formal surrender of the half mile strip, there are minutes from a council held at Owen Sound "for the purpose of making inquiries into certain complaints made against the Chief of Saugeen and Owen Sound".[1095] Anderson again presided as chair over this second council dealing with "charges" (as it is described in the document) respecting the Chiefs' behaviours, recording the following exchanges between Anderson, David Sawyer and Chief Kegedonce Jones that provides more information with respect to the Chief's charges that he opposed the government:

> Supt: Peter J Kegedonce, what have you to say?Ans: Well, I leave my people sometimes one or two months. But as to opposing the government, I deny that entirely.
>
> David Sawyer: Did you (Kegedonce) not try to prevent the sale of a strip of land between Owens Sound and Saugeen? - I acknowledge I did so.[1096]

[1093] Minutes of Council Meeting, Owen Sound Chiefs and Councillors, June 26, 1851, Exhibit 1859 [transcript at Exhibit 4791]; Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p.11832, line 1 to p. 11835, line 1.
[1094] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11841, line 10 to p. 11842, line 19 and p. 11845, line 14 to p. 11846, line 8.
[1095] Memo of Council Meeting, Saugeen and Owen Sound Chiefs, September 3, 1851 Exhibit 1881 [transcript at Exhibit 4792].
[1096] Memo of Council Meeting, Saugeen and Owen Sound Chiefs, September 3, 1851, Exhibit 1881, p.111652 [transcript at Exhibit 4792, p. 2].

793. This evidence illustrates that Chief Kegedonce Jones was actually being charged with opposing the half mile strip surrender.[1097]

794. Based on the evidence, SON submits that the following is clear:

(a) SON said no to the surrender twice (and a decisive "no" that they would not agree to a surrender under any circumstances);

(b) Then two key Chiefs were facing charges at councils presided over by Anderson, who either himself or on behalf of the Indian Department could decide whether either Chief was removed for these charges. For Chief Kegedonce Jones, he was facing charges in part because of his opposition to the surrender the government was seeking for the half mile strip;

(c) Then, SON agreed to the surrender.

795. There is no documentary evidence in support of Dr. Gwen Reimer's theory for why SON agreed to Treaty 67 after steadfastly opposing it just two days earlier. Rather, SON submits that there is documentary evidence in support of the theory that the change came as a result of intense Crown pressure put on the Chiefs who opposed the surrender.

796. SON submits this is relevant because it demonstrates a pattern of how the Crown dealt with the Saugeen Ojibway in the mid-19th century: they would not take no for an answer, applying pressure in several ways to obtain a surrender of part of the Peninsula. This pressure continued until ultimately the Crown secured the surrender of most of the Peninsula on October 14, 1854.

[1097] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11841, lines 10-17 and p. 11842, line 22 to p. 11844, line 9.

Other Efforts to Obtain Parts of the Peninsula Prior to October 1854

797. Beginning as early as 1852, there were attempts to secure surrenders or sales of parts of the Peninsula:

(a) On August 18, 1852, Minutes of a General Council at Owen Sound, with the tribes of Owen Sound and Saugeeng assembled, and Anderson in attendance recorded the following exchange about the Crown seeking a part of the Peninsula:

> The Supt: last Spring I suggested to you the benefit you would divine from disposing of a part of your reserve. What have been your reflections on the subject:?
>
> John Johnston from Owen Sound said:
>
> Father – I will say a few words about it. We have considered the subject. It was brought in council and we have talked a great deal about it. We think the six mile square which you proposed we should reserve for each of our Tribe will not be enough for our Children's Children. We believe they will increase in number and become more industrious – this would have been the case now had we listened to the advice of the government long ago. This is the only piece of land of importance that the Indians have and we wish to leave it as it is for the benefit of our children. [1098]

(b) A report form Anderson about the tribes in his superintendence from July 19 to August 25, 1853, recorded the following:

> Supt: To all, on a former occasion I informed you that the Government recommended your ceding this tract of land to be sold for your benefit, reserving at

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[1098] Minutes of General Council at Owen Sound, August 18, 1852, Exhibit 1943 [transcript at Exhibit 4775]; See also: Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3071, line 16 to p. 3075, line 12 and p. 3077, line 1 to p. 3078, line 17.

> the same time an ample quantity for the Indians. What do you think of it now?
>
> Madwayosh, Saugeen Chief: Repeated what had occurred at the Treaty made with Sir Francis Bond Head – then said – we have had repeated Councils of the surrounding Bands of Indians who wish to come and live here and we therefore do not wish to give it up as there is not too much for them and our children.
>
> P Kegedonce – Owen Sound Chief – I wish to answer in a few words. I follow what my Chief has said – We expect Indians from all points of the Compass and wish to keep this reserve for them.[1099]

(c) A letter dated October 22, 1853, from Anderson to the Saugeen Ojibway Chiefs again sought cession of some lands on the Peninsula – particularly mill sites that SON were asking whether they could lease: "…it is therefore desirable that you immediately inform me whether you are disposed to cede a portion of your land as the Government recommends or to lease it in its present state and get nothing for it."[1100] SON did not agree to sell land for any mill sites.

(d) On March 10, 1854, Charles Keeshick wrote a letter to Anderson responding to another proposal from Anderson that SON sell parts of the Peninsula:

> Dear Sir,
>
> I have been explaining to the Indians of this place and of Saugeen the plan you proposed to us in our council last time you were here to sell some of our lands. and giving them my reasons why I wish them also to do

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[1099] T.G. Anderson, "Report of my visit to the various Tribes under my Superintendence between the 19th July and 25th August 1853", July 19 and August 25, 1853, Exhibit 2004; See also: Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3081, line 16 to p. 3084, line 16.
[1100] October 22, 1853, Letter from T.G. Anderson to the Saugeen Ojibway Chiefs, Exhibit 2026; See also: evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3091, line 9 to p. 3092, line 15.

> that. Advised them to sell out soon. The Chief Kegedonce is also wishing the Indians to sell out. Now they (Saugeen and Owen Sound Indians) made up their minds to cede some of their lands. Can the Indians sell the land to any white man they wish? […] I think if the government will give them a good bargain they will sell some of their lands next summer.[1101]

(e) On November 26, 1853, Alexander McNabb wrote to Anderson proposing to get another surrender of lands on the Peninsula.[1102]

(f) Anderson replied to McNabb on December 7, 1853, suggesting what parts of the reserve on the Peninsula might be set aside for SON, in order to secure the surrender of other lands on the Peninsula.[1103]

(g) On May 18, 1854, Alexander McNabb to T.G. Anderson, warned him not to let SON invite Indians from Manitoulin to come reside on the Peninsula because this was just a tactic by the Saugeen Ojibway to "dodge" at surrender on the Peninsula.[1104]

(h) On June 22, 1854, Anderson sent a letter to Oliphant referring to getting a cession of the Saugeen reserve, advising Oliphant that he has "repeatedly endeavoured to

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[1101] March 10, 1854, Letter from Charles Keeshick to T.G. Anderson, Exhibit 2062 [transcript at Exhibit 4776]; See also: Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3092, line 16 to p. 3094, line 12.
[1102] Alexander McNabb to T.G. Anderson, November 26, 1853, Exhibit 2036; See also: Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3084, line 17 to p. 3086, line 17.
[1103] December 7, 1853, Letter from T.G. Anderson to Alexander McNabb, Exhibit 2037; See also: Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3086, line 18 to p. 3088, line 17.
[1104] May 18, 1854, Letter from Alexander McNabb to T.G. Anderson, Exhibit 2086.

effect this desirable object without success."[1105] Oliphant responded to Anderson on June 28, 1854, indicating that the Governor General agrees with Anderson's plan to get the whole Peninsula.[1106]

(i) A letter dated July 11, 1854, from Keating to Anderson reported on a General Council of the Chiefs of Saugeen, in respect of his desire to purchase a square of five miles by 10 miles at the Sauble river, and the Chiefs' response of 'no'. In this letter, Keating referenced a letter that SON received from John McLean (Commissioner for Saugeen lands):

> "A letter of Mr. McLean was directed to Vandusen but addressed to the Indians was brought down by Sawyer of which Keeshick took a copy pretending the warmest friendship for the Indians & **calling upon them to sell their lands for the support of an Industrial School, and also remarking upon the probability if they did not, of some bad Governor succeeding the present good one & taking possession of all the Indian lands – which says he, "He can do, but if you convert them into money he Cannot."**"[1107] [emphasis added]

798. All of these attempts to secure a surrender put increasing pressure over several years on SON, causing them to "feel beleaguered" according to Prof. Brownlie. What happened next was a turning point: in August 1854, "they were faced with a fairly severe threat from Anderson,

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[1105] Letter from T.G. Anderson to Laurence Oliphant, June 22, 1854, Exhibit 2091; See also: Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3094, line 13 to p. 3096, line 21.
[1106] Laurence Oliphant to T.G. Anderson, June 28, 1854, Exhibit 2094 [transcript at Exhibit 4778].
[1107] W. Keating to T.G. Anderson, July 11, 1854, Exhibit 2097.

who was the person supposed to be their protector, the person from the government who was responsible for helping them protect their interests."[1108]

T.G. Anderson's Threats in August 1854

799. In August 1854, T.G. Anderson again sought a surrender from SON in respect of lands on the Peninsula. This time he sought the majority of the Peninsula. Until Anderson's visit in 1854, all previous proposals for sale and surrender were for small portions of the Peninsula.[1109] In response to each of these previous proposals, SON refused to give up any parts of the Peninsula.[1110]

800. Speaking to SON on August 2, 1854, Anderson referred to the encroachments that were occurring on the Peninsula:

> "You complain that the whites not only cut and take your timber from your lands, but that they are commencing to settle upon it, and you cannot prevent them, and I certainly do not think the Government will take the trouble to help you while you remain thus opposed to your own interest. The Government, as your guardian, have the power to act as it please with your reserve, and I will recommend that the whole, excepting the parts marked on the map in red and blue, be surveyed for the good of yourselves and children."[1111]

801. The text of Anderson's statement suggests that Anderson provided them with a map marked in red and blue. That map has not been located.[1112]

[1108] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, p. 3113, line 7 to p. 3115, line 19.
[1109] Dr. Gwen Reimer, Transcript vol 92, March 9, 2020 p. 11888, line 18 to p. 11889, line 18.
[1110] Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11896, lines 19-23.
[1111] Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Anderson's address to the Saugeen Ojibway, August 2, 1854, Exhibit 2175, pp. 12-13.
[1112] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3097, lines 10-12.

802. Anderson's statement was a threat. He threatened that if SON did not surrender their lands, the government would not take the trouble to help them and would take their lands without their consent. He also threatened that if SON did not agree, white settlers would take their land in any event. He made that threat without offering any assistance to deal with squatting or encroachments on the Peninsula in any other fashion.[1113] In effect, Anderson's message to SON was: you have no choice. You must give up your land, whether you want to or not.

803. Dr. Reimer made the assertion during her testimony that SON would not have believed Anderson's threat, arguing that SON had enough "experience" with the Crown to know that despite Anderson's statements, that the government would not take their lands. Dr. Gwen Reimer also admitted that there is nothing in Anderson's report indicating SON did not believe the threat, nor any other explicit statement that says SON did not believe Anderson cited in support her assertion.[1114] There are, however, examples around this same time of First Nations expressing concerns about the Crown breaking faith and taking reserve lands that they have promised to protect (such as the Rama First Nation, which Dr. Reimer agreed would have attended General Councils with SON where such concerns about Crown relations and surrenders were often shared).[1115] There is also evidence that by this point, SON's experience included the exchange with the Crown that resulted in the half-mile strip surrender, where one of their Chiefs was threatened and pressured for failing to agree with the Crown's proposed plan. And ultimately, the end result was that the Crown obtained the lands they wanted in Treaty 67. Based on this evidence

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[1113] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3099, line 6 to p. 3100, line 1; Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11902, lines 10-24.
[1114] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p.11908, line 3 to p.11910, line 2.
[1115] Rama Indians to T. G Anderson, Superintendent Indian Affairs, Exhibit 2106 [Transcript at Exhibit 4782] - *Answers from the Rama Indians*; Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p.11940, line 12 to p. 11950, line 14.

of SON's and other First Nations' experiences of the Crown, and in the absence of evidence to support Dr. Gwen Reimer's take on the matter, SON submits it is more probable that SON did believe Anderson's threats.

804. Prof. Driben also provided his expert anthropological opinion about how SON would have perceived the threat that government would not take the trouble to protect their lands: they would have perceived this as an existential threat.[1116] SON would have known about the removal of other Indigenous peoples from their lands in the mid 19th century – e.g. from the United States as a result of removal policies. SON would have perceived encroachment on the Peninsula by white settlers as negative – a very "serious intrusion" on the territory that SON needed to survive. Prof. Paul Driben opined that SON would have been "terrified" by the statement that the Crown could not protect the Peninsula from settlers, since they knew of the possibility of being overwhelmed.[1117]

805. Prof. Brownlie also discussed this issue, saying that based on his review of the historical record regarding SON and given what was happening in respect of Indigenous lands and peoples in a broader sense, he believed that SON would have felt a great deal of pressure to surrender their lands after hearing Anderson's threats.[1118]

806. Anderson's threats echoed the same information that SON had just heard from John McLean in July 1854, who warned them that if they don't sell their lands, a bad Governor may

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[1116] Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p. 7044, line 16 to p. 7046 line 16; p. 7003, line 22 to p. 7004, line 11, then answer at p. 7006, line 19 to p. 7007, line 20.
[1117] Evidence of Prof. Driben, Transcript vol 55, October 23, 2019, pp. 6975, line 18 to p. 6977, line 15.
[1118] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3107, line 11 to 24, p. 3113, line 7 to p. 3115, line 19.

come and just take possession of all their lands.[1119] Anderson's statement reinforced that message and ultimately, in the words of Dr. Reimer, Anderson resorted to intimidation, threats and warnings to try and get the surrender that he wanted.[1120]

807. SON was sufficiently moved by Anderson's threats to waiver from their resolute "no" and return with a proposal to surrender a smaller portion of the Peninsula. Their counteroffer was, according to Anderson's report, prompted by and as a result of Anderson's statement.[1121] The counterproposal was delivered by David Sawyer, which says:

> "I listened to the Chiefs and warriors last night and understand what they said we want to our Great Father's wishes, as near as we can because I see myself we are not able to manage our own affairs and now we place ourselves in the hands of our Great Father we see the quantity of land to be reserved for ourselves as marked in the map is not large enough therefore we beg our Great Father to increase the quantity to the pencil lines which we have drawn on the map embracing the Fishing Islands and Cape Croker with the tract from the Owens Sound to the head of Colpoy's Bay these are the three reserves marked in pencil we want to keep for ourselves and children on the main land, the Islands we say nothing about as they below to us and we wish to keep them."[1122]

808. While the text indicates that the counterproposal was accompanied by a map, with lines drawn on it by SON, that map is not included with the letter.

[1119] W. Keating to T.G. Anderson, Superintendent, Indian Affairs, July 11, 1854, Exhibit 2097.
[1120] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 157-158.
[1121] Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Anderson's address to the Saugeen Ojibway, August 2, 1854, Exhibit 2175, p. 12.
[1122] David Sawyer to L. Oliphant, Superintendent General, Indian Affairs, August 2, 1854, Exhibit 2105 [transcript at Exhibit 4796].

809. There is another description of the lands that were included in SON's counterproposal: Charles Rankin's letter to Anderson dated August 2, 1854. He describes the lands that SON was willing to part with: 60,000 acres that are in the south of Peninsula, south from a line if drawn from Colpoy's Bay and the Fishing Islands, inland (as they wanted to keep the shores for themselves) and "in a wedge like shape."[1123]

810. Anderson rejected SON's counterproposal, and instead in his report, he recommended to the government send a surveyor and take control of the Peninsula right away, setting out his view that the government had the authority to do so even without the consent of SON.[1124]

811. The Crown did not act on Anderson's recommendation, but, there is also no evidence that any efforts were made by Crown officials to correct Anderson's statement – that is, no Crown official advised SON that they would not be acting on his threats.[1125] Anderson's statement, his threats, warnings and intimidations, were the last words that SON heard from the Crown in respect of the Peninsula prior to Oliphant's arrival in October 1854. And Oliphant arrived with the self-described objective and intent to "wring from those whom it protects [SON], some assent, however reluctant"[1126] to the surrender of the Peninsula, discussed in more detail below.

[1123] C. Rankin, Deputy Provincial Surveyor, Upper Canada, to T.G Anderson, Superintendent, Indian Affairs, August 2, 1854, Exhibit 2104; Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12106, line 16 to p. 12107, line 22; Evidence of Dr. Gwen Reimer, Transcript vol 94, March 11, 2020, p. 12117, line 22 to p. 12118, line 8.

[1124] Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Anderson's address to the Saugeen Ojibway, August 2, 1854, Exhibit 2175, p. 12.

[1125] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3112, line 15 to p. 3113, line 6; Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11911, line 17 to p. 11912, line 6.

[1126] Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Oliphant's report, Exhibit 2175, Enclosure in No. 1, p. 4.

SON seeks the following findings of fact in respect Chapter 27 - Pressure for the Peninsula Pre-October 1854:

812. Crown policy for settlement of the colony:

(a) Settlement of the colony was a primary objective of the Crown, and squatting was useful for advancing that objective.

(b) The Crown's policies in respect of Indigenous peoples, including policies of civilization and assimilation, advanced the objective of the settlement of colony by removing Indigenous peoples as obstacles to such settlement and exploitation of lands through treaties and land surrenders.

813. The Half Mile Strip (1851):

(a) SON stated they were adamantly opposed to a surrender of lands for the construction of a road from Saugeen to Owen Sound. Two days later, SON agreed to Treaty 67. There is no documentary evidence to suggest this was the result of negotiations or compromise.

(b) Anderson as a Superintendent of Indian Affairs had the authority to remove Chiefs from their offices.

(c) On June 26 and September 3, 1851, Anderson presided over meetings hearing complaints against two SON Chiefs. Chief Peter Kegedonce Jones faced charges that included opposition to the government, which included trying to "prevent the sale of a strip of land between Owens Sound and Saugeen".

(d) The surrender for the half mile strip, Treaty 67, was concluded after the Crown pressured SON to secure a surrender of those lands.

814. Other efforts to seek surrenders and/or sales of lands on the Peninsula in the years leading up to 1854:

(a) The evidence shows that as early as 1852, Crown officials were pressuring SON to surrender or sell some or all of the Peninsula, which SON refused.

(b) The evidence confirms that senior Crown officials agreed with the plan to secure a surrender of the entire Peninsula by June 28, 1854.

815. T.G. Anderson's attempts to secure a surrender of the Peninsula in August 1854:

(a) Anderson told SON that the government would not help SON to protect the Peninsula from encroachments.

(b) Anderson told SON that the government had the power to take the Peninsula without SON's consent and that he would be recommending the government do so immediately.

(c) Anderson's statements were threats, meant to intimidate and bully SON into surrendering the Peninsula.

(d) In response to Anderson's threats, SON made a counterproposal for a surrender of a portion of the Peninsula: a 60,000 acre inland wedge, which Anderson refused.

(e) The Crown did not advise SON that they would not be acting on Anderson's threats.

28. TREATY 72: SURRENDER OF THE PENINSULA (1854)

Oliphant's Motivations for Securing a Surrender of the Peninsula

816. Laurence Oliphant was appointed as Superintendent General of Indian Affairs on June 19, 1854,[1127] following a short stint serving as secretary to Lord Elgin in the negotiation of Reciprocity Treaty from March to June 1854. Oliphant was 25 years old when he was appointed to the office of Superintendent of Indian Affairs. He did not have any experience with Indigenous peoples, or with negotiating treaties with Indigenous peoples.[1128]

817. As noted above, very shortly after his appointment as Superintendent of Indian Affairs, Oliphant wrote to Anderson, indicating the Governor General's support for the proposal to obtain a surrender from the Saugeen Ojibway for the whole Peninsula.[1129]

818. In Oliphant's November 3, 1854 report to his superiors, he detailed a plan he had formulated for funding the Indian Agency with the monies of First Nations.[1130] Cutting costs of the Indian department was a long standing goal of the government, and it became more pressing by the mid-19th century.[1131] Oliphant was eager to offer a solution to make the Department self-supporting – one that the evidence suggests he had in mind in advance of his November 3, 1854

[1127] The Canada Gazette, June 24, 1854, Exhibit 4375.
[1128] Oxford Dictionary of National Biography, Laurence Oliphant (1829-1888), Exhibit 4189; Evidence of Dr. Gwen Reimer, Transcript vol 94, March 11, 2020, p. 12163, line 3 to p. 12164 line 11 and p.12221, line 15 to p. 12222, line 5.
[1129] L. Oliphant, Superintendent General, Indian Affairs to T.G Anderson, Superintendent Indian Affairs, June 28, 1854, Exhibit 2094 [transcript at Exhibit 4778].
[1130] Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Laurence Oliphant Report, November 3, 1854, Exhibit 2175, pp. 6-11 (especially p. 9).
[1131] See, for example, Observations re: Proposed Reduction of the Indian Expenditures from R.I. Routh (Commissary General) to Francis Bond Head, July 17 1836, Exhibit 1124; Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 142-144; Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 22-27.

report. Prof. McCalla referred to a letter that Oliphant had written, that was published in a collection by Margaret Oliphant, dated July 7, 1854:

> "However it is not altogether lost, for I have been revolving great projects in my brain. One is to remodel to a great extent the Indian Department, and the whole system upon which the Indian tribes are at present managed. However, it must be done with caution and well matured, as I suspect the Government will not readily assent to my views, which are a little arbitrary and despotic."[1132]

819. Ultimately, Oliphant's pitch was that the Indian Department be funded out of the revenues from sales of Indian lands – and primarily SON's lands on the Peninsula:

> "It is impossible to estimate with any degree of certainty, the extent of the revenue which must accrue to the Indians who are concerned in this surrender; but the most moderate calculation will furnish so large an addition to the present funds of the department to lead to the hope that the period may not be very remote, when the views of the Imperial Government with reference to the maintenance of the Indian Department, and which have of late been so much pressed upon the attention of your Excellency, may be carried into effect…its officers should be paid out of the funds which they administer, while the fact that these tribes are still in a semi-barbarous condition, does not relieve them from what may be termed the natural obligation of bearing pecuniary burdens incidental to the process of self-civilization."[1133]

820. Oliphant proceeded in his November 3, 1854 report to provide an accounting of Indian Department expenditures, and pointed to sourcing those expenditures from the funds of several

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[1132] Margaret Oliphant, Memoir of the Life of Laurence Oliphant and of Alice Oliphant, his wife-America and Canada, Ch. 4, 1891, Exhibit 4851, pp.136-138.
[1133] Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Laurence Oliphant Report, November 3, 1854, Exhibit 2175, Enclosure in No. 1, p. 6.

First Nations, suggesting that each First Nation would contribute a percentage of their monies to fund the Indian Department and it revealed that primarily, he would be relying on revenues from the sale of Saugeen Ojibway lands to put his plan into action.[1134]

821. Oliphant's plan to make the Indian Department self-sustaining was described by his successor as having attracted attention, but ultimately would not have been successful.[1135] However, it suggests that Oliphant believed it was necessary to obtain a surrender of the entire Peninsula – a lesser amount, for example, the 60,000 acres offered by the Saugeen Ojibway in August 1854, would not have been enough to yield the revenues for Oliphant's plan as he described it in his report.[1136]

822. The following chart is a summary of Oliphant's plan, with notes discussed with Prof. McCalla about conversion rates and currency, and the revenues anticipated by Oliphant from the sale of lands on the Peninsula comparing it to sale of a lesser amount of lands (based on Oliphant's estimates and assumptions):

[1134] Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Laurence Oliphant Report, November 3, 1854, p. 9, Sub-enclosure 7, to Enclosure in No. 1, p. 15.
[1135] No. 2 Extract of a Despatch from Governor General Edmund Head to Right Honourable H. Labouchere, Enclosure in No. 2, Lord Bury (Superintendent General) to Sir Edmund Head (Governor General), December 5, 1855, Exhibit 2320, p. 17 (para. 5), p. 21 (para. 38).
[1136] Evidence of Prof. Douglas McCalla, Transcript vol 58, October 31, 2019, p. 7617, lines 2-20.

OLIPHANT'S PROPOSAL TO FUND INDIAN DEPARTMENT – SURRENDER OF THE ENTIRE PENINSULA	
Oliphant's estimated annual amount for running the Indian Department in Upper Canada, to be drawn from Band monies:	£3,470
Oliphant's estimated annual amount required to come from the Saugeen Ojibway's Band monies to be able to meet the required £3,470 contribution to run the Indian Department in Upper Canada:	£1,173
Oliphant's estimate for how much the lands on the Peninsula would sell for:	$450,000 @ value estimate of $1 per acre = (approximate) £100,000[1137]
Oliphant's estimate for how much the Saugeen Ojibway would make in annual interest on the proceeds of the sale:	£6000 @ assumed interest rate of 6% per annum
OLIPHANT'S PROPOSAL TO FUND INDIAN DEPARTMENT – HYPOTHETICAL SURRENDER OF 60,000 ACRES (SAUGEEN OJIBWAY'S OFFER TO ANDERSON – AUGUST 1854)	
Oliphant's estimated annual amount for running the Indian Department in Upper Canada, to be drawn from Band monies:	£3,470
Oliphant's estimated annual amount required to come from the Saugeen Ojibway's Band monies to be able to meet the required £3,470 contribution to run the Indian Department in Upper Canada:	£1,173
Estimates of how much the 60,000 acres on the Peninsula would sell for, per Oliphant's estimate of how much lands on the Peninsula would have sold for:	$60,000 @ value estimate of $1 per acre = (approximate) £15,000 Halifax currency @ conversion rate of approximately $4 = £1 Halifax currency
Oliphant's estimate for how much the Saugeen Ojibway would make in annual interest on the proceeds of the sale:	£800 @ assumed interest rate of 6% per annum[1138]

[1137] Oliphant was likely referring to Halifax currency, which Prof. McCalla testified would be more accurately converted at $4 per £1 Halifax currency (see evidence of Prof. Douglas McCalla, Transcript vol 58, October 31, 2019, p. 7612, line 11 to p. 7613, line 14).

[1138] Evidence of Prof. Douglas McCalla, Transcript vol 58, October 31, 2019, p. 7616, line 5 to p. 7617, line 20.

823. SON submits that what this demonstrates is that Oliphant went into the treaty council in October 1854 believing that nothing less than the Peninsula would do in order to effect the plan he had come up with to fund the Indian Department. Oliphant's belief in the plan fueled his objective and insistence to "wring assent" from SON for a surrender of the Peninsula.

Oliphant's Conduct to Secure a Surrender of the Peninsula

824. Anderson was unsuccessful in securing a surrender of the full Peninsula in August 1854, though his threats had moved SON to offer a partial surrender after years of refusals. About two months later, Oliphant (Anderson's superior, and the Superintendent General of Indian Affairs) set out on September 24, 1854, with the objective of securing a surrender of the entire Peninsula. The parties agree on several of the events leading up to the conclusion of Treaty 72 on October 14, 1854: [1139]

(a) Oliphant set out from Quebec City on September 24, 1854, travelling through Toronto where he was joined by James Ross. They travelled to Guelph, rented a carriage, proceeded to Owen Sound and then on to Saugeen.

(b) Oliphant arrived at Saugeen on October 12, 1854. The Chiefs of the Saugeen band were not there, so he sent messengers to them. He also then sent messengers to the Chiefs of Nawash and Colpoy's Bay bands.

(c) The Chiefs of the Saugeen band returned to their village on the afternoon of October 13, 1854. Oliphant immediately met with Chief Alexander Madwayosh to discuss Oliphant's proposal for a surrender.

[1139] Agreed Statement of Facts Treaty 72 Negotiations, Exhibit 3927.

(d) Shortly after Oliphant's meeting with Chief Madwayosh, the Chiefs of the Nawash band arrived at Saugeen, and Oliphant called a council meeting at the Methodist church in Saugeen at 7 p.m.

(e) Oliphant presented his proposal and debated it with Chief Madwayosh. Oliphant left the treaty council for one hour. When he returned, the Saugeen Ojibway accepted the surrender in principle. Discussion continued on terms. Oliphant drew out the terms and read it out to those present.

(f) The treaty was signed at 1 a.m. on October 14, 1854.

(g) On October 14, 1854, Oliphant travelled to Owen Sound. On the same day, Oliphant issued a notice that no squatters be allowed on the land recently surrendered to the Crown and wrote to Sheriff Schneider:

> "Sir, I have to inform you that, with the exception of certain small reserves, the whole of the Saugeen and Owen Sound Peninsula has been surrendered to the Crown by the Indians. As these lands will be divided into lots and sold by public auction, and it is most desirable that no squatters be allowed to trespass upon them prior to the sale, I am, therefore directed by his Excellency the Governor-General to request your assistance in summarily ejecting any persons who may, in defiance of the notices already issued, intrude upon the property of the Crown."[1140]

825. There are, of course, points of dispute regarding Oliphant's conduct in procuring the surrender of the Peninsula, which are highlighted in this section. Namely, SON submits:

[1140] Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Laurence Oliphant Report, October 14, 1854, Exhibit 2175, Sub-enclosure 6, to Enclosure No. 1, p. 15.

(a) Oliphant bullied SON into a surrender, repeating the threats made by Anderson about how the Crown could not prevent white settlers from taking the Peninsula. This was the reason why SON agreed to the surrender, and it was a lie.

(b) Oliphant employed sharp tactics designed to avoid SON discussing the surrender of the Peninsula prior to or during the treaty council, in an attempt to suppress opposition, and to achieve his objective of obtaining a surrender of the Peninsula.

(A) OLIPHANT LIED TO SON ABOUT THE CROWN'S CAPACITY TO PROTECT

826. Oliphant reported on what he told SON:

> "I opened the proceedings by stating to them the reasons which had induced your Excellency to recommend the surrender of so large a portion of their territory. The evidence of their own senses was sufficient to bear me out in the truth of my assertions in reference to the avidity with which the neighbouring lands were taken up by whites. They were compelled to admit that squatters were, even then, locating themselves without permission either from themselves or the department upon the reserve. I represented the extreme difficulty, if not impossibility, of preventing such unauthorised intrusions."[1141]

827. Dr. Reimer opined that Oliphant employed a different approach than Anderson. But, she agreed that the record does not reflect Oliphant telling SON that Anderson acted incorrectly or that his approach was not sanctioned by the government.[1142]

[1141] Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Laurence Oliphant Report, November 3, 1854, Exhibit 2175, p. 4.
[1142] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11917, line 10 to p. 11919, line 12.

828. What the documentary record shows is that Oliphant's words echoed Anderson: the government cannot protect the Peninsula. Oliphant intention was to (in his words) "wring from those it protects, some assent, however reluctant".[1143] SON heard these words about the inability of the Crown to protect the Peninsula from Oliphant – the Superintendent General of Indian Affairs – after two to three years of Crown pressure to obtain a surrender or sale of parts of the Peninsula (as noted above) and after hearing Anderson's threat in August 1854 that the government would take their lands without consent.

829. The statement by government that they would not or could not protect the Peninsula was the deciding factor for SON in agreeing to the surrender. While experts that opined on this may have expressed different views on the importance of this factor,[1144] SON submits that the evidence confirms it was the deciding factor:

(a) The encroachment of whites on the Peninsula and the alleged inability of the Crown to protect the Peninsula from these encroachments was the primary focus of Oliphant's and other Crown officials' statements to SON. In each interaction, the Crown emphasized the demand from land hungry settlers and the impossibility of the Crown holding them back (and, in Anderson's case, the Crown's unwillingness to do so).

(b) By contrast, there is virtually no mention in Oliphant's report or any accounts of the treaty council of any other reason that was raised for the surrender of the

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[1143] Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Laurence Oliphant Report, November 3, 1854, Exhibit 2175, p. 4.
[1144] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11920, lines 5-25; Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p. 7003, line 22 to p. 7004, line 13; p. 7006, line 19 to p. 7007, line 20; and p. 7048, line 19 to p. 7050, line 14.

Peninsula. Certainly, there is no mention of the reasons that were offered by the Defendants' experts – particularly Dr. Reimer – as reasons for surrender:

(i) Dr. Reimer argued in her report that the Saugeen Ojibway were motivated to enter into the surrender of the Peninsula because they had debts. On cross examination, she conceded that the examples she cited on this point did not actually demonstrate that SON was in debt at the time Treaty 72 was concluded, or were motivated by such debts or financial considerations in deciding to surrender of the Peninsula.[1145] There is no mention of SON raising concerns about debts to Oliphant in October 1854, or of Oliphant raising this as a motivating factor either.[1146] Oliphant focussed solely on the allegation that the Crown could not protect the Peninsula against squatters and land hungry settlers encroaching on the reserve.

(ii) Dr. Reimer also suggested that a motivation for the surrender of the Peninsula was the failure of the so-called general reserve, i.e. that other First Nations did not accept the invitation to come live at the Peninsula. The evidence about the Peninsula not being formally created as a general reserve is discussed at paragraphs 674 to 701. To add to this, the evidence also confirms that the failure of a so-called general reserve was never raised at

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[1145] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 150; Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11859, line 19 to p. 11870, line 3 and p. 11884, line 15 to p. 11885, line 21.

[1146] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11885, line 23, to p. 11886, line 4.

> the negotiation of Treaty 72 in October 1854.[1147] In addition, it is worth noting that the Crown had sent out surveys to First Nations asking whether they would come. They did not receive responses about this until well after the decision was made to obtain the surrender of the Peninsula (June 1854), and in fact, until after Anderson's meeting and in some cases, after Oliphant's securing the surrender in October 1854.[1148]

830. Prof. Driben testified that the threat of settlers taking the Peninsula was the main reason SON agreed to a surrender. In his words, SON was faced with an existential threat and the SON Chiefs agreed to the surrender of the Peninsula (despite not having the opportunity to reach consensus from their communities to do so, discussed further below) under these circumstances:

> "[W]hat Mr. Oliphant did is, he told the Anishinaabe, as least they heard him say: "If you don't agree with this, you will be overrun and wiped out. And there's nothing we're going to do to help you – there's nothing we can do to help you." Under those circumstances when the Chiefs hear that – we know, or at least I know as an ethnologist, at least in my opinion as an ethnologist, that they came there and there was no consensus about what to proceed. But then when they were there, in that brief period of time, without deliberation, without allowing people to speak, and then hearing if you do not agree with this now, you will be obliterated. You will be wiped out. You will be overrun. So under those circumstances, yes, then the Chief would act on his own."[1149]

[1147] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p.11936, lines 12 to p. 11940, line 11; Manitoulin Treaties, 1836 and 1862: The Indian Department and Indian Destiny, 1994, Exhibit 4631, pp. 21, 25-28.

[1148] Evidence of Dr. Gwen Reimer, March 9, 2020, Transcript vol 92 p.11922, line 6 to p. 11927, line 19; T.G. Anderson to Chief Joseph Snake, August 3, 1854, Exhibit 2109, PDF p.2.

[1149] Evidence of Prof. Paul Driben Transcript vol 55, October 23, 2019, p. 7006, line 24 to p. 7007, line 15.

831. In other words, the SON Chiefs were faced with a difficult choice and tried to make the best deal based on the information before them. This is confirmed by Randall Kahgee. In cross examination, Ontario counsel put to former Chief Randall Kahgee a video of a presentation he had made that included comments about Treaty 72, to the effect of "our people, they weren't duped. In fact, they were the savviest of negotiators" that sought to protect their interests.[1150] Randall Kahgee further elaborated on the context of his previous comments that were put to him in his testimony:

> "Yes, I do believe that our ancestors were fully aware of what was important to them and what they needed to protect it and they sought to protect that the best they could. But did they really have a choice when you think about Treaty 72. The Crown told our people, told our ancestors that they couldn't protect the peninsula, and it turns out that wasn't true and that the whole purpose of why we're here today. So I do believe our ancestors knew what they wanted to protect. That is an inherent responsibility with our people. It's intertwined with our Creation Story. Our people will do whatever is necessary to protect and safeguard that relationship and they knew that they wanted to protect…If they were here today, I'd thank them for their sacrifice. We do the best we can with what we have. You look at that in the context of a modern day treaty, they take multiple years and many, many lawyers to negotiate. And you're all trying to get at one thing, certainty. Certainty. What certainty did my people have? None. So there is context to that. And I really do believe it's not like they much of a choice and I believe that's the whole basis of why we're here today, so miigwetch."[1151]

[1150] Randall Kahgee video, Exhibit 3984; Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 946, lines 19-22 and p. 949, lines 1-15.
[1151] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 950, line 10 to p. 951, line 20.

832. The threats and the misrepresentations about the Crown's ability to protect the Peninsula made by Oliphant to SON was what achieved Oliphant's objective of securing the surrender in October 1854.

833. Oliphant told SON that the Peninsula could not be protected – representing the "extreme difficulty, if not impossibility" of protecting the Peninsula from encroachments. SON submits that the evidence indicates that this statement from Oliphant about the impossibility of preventing encroachments on the Peninsula was not just mistaken judgement, it was a lie.[1152]

834. There is no evidence that Oliphant took any steps or directed any steps per the measures that were available to him before October 14, 1854. As noted earlier, there is no evidence that he directed any local law enforcement to take steps under the Indian Lands Protection Legislation, nor any steps to seek assistance from militia or military (the availability of all of these measures was discussed at paragraphs 748 to 772). All experts that were asked about whether there were any such historical records confirmed that they had not located any. What is in the record is that Oliphant takes two very specific steps on October 14, 1854, immediately *after* securing the surrender to protect the lands on the Peninsula:

(a) he issued a notice that no squatters will be allowed on the lands recently surrendered to the Crown (the Peninsula); and

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[1152] See also Evidence of Karl Keeshig, Transcript vol 3, April 30, 2019, p. 287, lines 6-22 - *re: oral histories regarding treaties, that "They lied to us".*

(b) he wrote to Sheriff Schneider, of the County of Grey, for assistance in ejecting squatters from the Peninsula.[1153]

835. There is no reason that either or both of these actions could not have been taken by Oliphant prior to the surrender on October 14, 1854. The Crown had the legal tools available to take either or both of these actions prior to the surrender but they did not do so. The fact that Oliphant took these actions immediately after the treaty demonstrates that he was indeed aware of the measures that were available to remove squatters.

836. Oliphant also told SON that there was high demand for the lands on the Peninsula and presented the situation as one of them not being to hold back the wave of land hungry settlers. However, there is evidence that Crown officials were well aware that most of the Peninsula was not suitable for farming so thus not attractive to settlers.

837. This was specified in Rankin's letter to Anderson dated August 2, 1854, which noted: "Of these 450,000 acres about 190,000 lies [sic] to the south of a line from the middle of the group of Fishing Islands to Colpoy's Bay and about 260,000 to the North of the line, terminating at Cabot Head and Cape Hurd; this latter part probably contains but little that can be cultivated being believed to be very rocky."[1154] This demonstrates that Crown officials (who were working under

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[1153] Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Laurence Oliphant Report, October 14, 1854, Exhibit 2175, Sub-enclosures 5 and 6, to Enclosure No. 1, pp. 14–15.

[1154] C. Rankin, Deputy Provincial Surveyor, Upper Canada to T.G Anderson, Superintendent, Indian Affairs, August 2, 1854, Exhibit 2104.

Oliphant) already had a rough and ready idea of which lands on the Peninsula could not be cultivated.[1155]

838. A newspaper article from September 1, 1854 in the Sarnia Observer noted that a part of the Peninsula "is rocky and of little or no value for agricultural purposes."[1156] This suggests that it was public knowledge that the lands on the Peninsula were not suitable for farming,[1157] which calls into question whether there was actually a high demand for lands on the Peninsula by settlers who were interested in setting up farms.[1158]

839. Subsequent to the surrender, the sale of lands were slow. In other words, the extreme demand for lands on the Peninsula as represented by Oliphant to SON was not real. Land sales started in 1856, for lands in the townships of Keppel and Amabel, which were at the southernmost part of the Peninsula, considered to be some of the best farming lands on the Peninsula. This land sale lasted for five days.[1159] But, thousands of acres in these townships remained unsold – even at the upset price.[1160] The demand was not there just two years after the treaty, and sales remained low. By 1870, 216,074 acres, or 48% of the lands, on the Peninsula still remained unsold. It was

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[1155] Evidence of Prof. Douglas McCalla, Transcript vol 58, October 31, 2019, pp. 7602, line 6 to p. 7603, line 9; Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12031, line 9 to p. 12032, line 10.
[1156] Sarnia Observer Article, September 1, 1854, Exhibit 4376.
[1157] Evidence of Prof. Douglas McCalla, Transcript vol 58, October 31, 2019, p. 7607, lines 4-10, lines 17-20.
[1158] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12033, lines 15-22.
[1159] Dr. Gwen Reimer, "Volume 4: Implementation Issues Related to Surrender No. 72, 1854-1970s" (as revised 2019), Exhibit 4704, pp. 36-37.
[1160] W. Bartlett, Agent, to R. Pennefather, Superintendent General, Indian Affairs, September 6, 1856, Exhibit 2423.

fifty years after Treaty 72 before the proportion of unsold lands subject to Treaty 72 dropped below 3%.[1161]

(B) OLIPHANT'S SHARP TACTICS TO SECURE THE SURRENDER

i) Oliphant did not send advance notice of the treaty council

840. There is no evidence that Oliphant sent advance notice to the Saugeen Ojibway that he was coming to the Peninsula to hold a treaty council.[1162]

841. In his report, Oliphant notes that on his arrival to Saugeen on October 12, 1854, the Chiefs were not there so he dispatched messengers to send for Saugeen, and also had to send for the Chiefs from Nawash and Colpoy's Bay Bands.[1163] The fact that no Chiefs were at Saugeen indicates that none of the Chiefs had advance notice that Oliphant was coming to Saugeen to hold a treaty council; if he had given them such notice, the Saugeen Ojibway Chiefs would have been waiting for Oliphant.[1164]

842. Oliphant passed through Owen Sound, but the fact that he had to send messengers to the Chiefs of Nawash and Colpoy's Bay Bands when he arrived at Saugeen confirms that Oliphant did not take the opportunity he had when he passed through Owen Sound to notify Nawash and Colpoy's Bay of his intentions to hold a treaty council at Saugeen. [1165]

[1161] Dr. Gwen Reimer, "Volume 4: Implementation Issues Related to Surrender No. 72, 1854-1970s" (as revised 2019), Exhibit 4704, pp. 60-61, including Table 3.1 "Unsold Lands on the Saugeen Peninsula, 1870-1934".
[1162] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020 p. 11991, lines 5-25 and p.11995 to p. 11997, line 4.
[1163] Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Laurence Oliphant Report, October 14, 1854, Exhibit 2175, Enclosure in No. 1, p. 4.
[1164] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020 p.11999, lines 10-22; Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p. 7000, lines 4-14;
[1165] Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3117, line 18 to p. 3118, line 4; Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 11997, line 18 to p. 11998, line 7 and p.11998 line 14 to p. 11999, line 4.

843. Providing advance notice is important because: a) it accords with the requirements for treaty making set by the Royal Proclamation and as elaborated in subsequent Crown policy and instructions for treaty making (as discussed at paragraphs 567 to 573 and paragraphs 636 to 641);[1166] b) it accords with Anishinaabe treaty making protocol by giving the community adequate opportunity to follow internal procedures to come to a consensus on how to respond to the Crown's proposals;[1167] and c) advance notice and allowance of time for discussion prior to the treaty council would have allowed the opportunity to the SON Chiefs based at Owen Sound and Saugeen to confer in advance of the treaty council. That opportunity was not afforded, and the evidence confirms that Oliphant acted purposefully to ensure that it was not afforded. Oliphant confirms this in his own report: "Shortly after the chiefs of the other bands arrived, and, anxious not to allow them an opportunity of consulting either among themselves or with Europeans, I called a grand council at 7 p.m. in the church at the Indian village."[1168]

ii) Oliphant ensures that the Saugeen Ojibway do not have the opportunity to consult with one another prior to the treaty council

844. On October 13, 1854, the Chiefs of Saugeen returned to their village. Oliphant immediately met with Chief Madwayosh, because he knew that Chief Madwayosh (a head chief)

[1166] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 2987, lines 5-12 and p. 2988, lines 5-21.

[1167] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p.3141, line 5 to p. 3142, line 12 (esp. p. 3142, lines 7-12); Evidence of Prof Jarvis Brownlie, Transcript vol 31, July 23, 2019, p.3161, line 25 to p. 3164, line 5; Prof. Paul Driben, "An Anthropological Report on Selected Aspects of the Cultural Lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 264-265; Evidence of Prof. Driben, Transcript vol 55, October 23, 2019, p. 6977, line 16 to p. 6985, line 22 and p. 6987, line 18 to p. 6994, line 10; Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p.6999 line 24 to p. 7000 line 3 and p.7000 line 15 to p. 7001 line 2; Evidence of Prof. Paul Driben, Transcript vol 56, October 24, 2019, p. 7257, lines 13-22.

[1168] Evidence of Dr. Gwen Reimer, Transcript vol 93 March 10, 2020, p. 12003, line 12 to p. 12004, line 16.; Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3141, line 5 to p. 3142, line 12 (esp. p. 3142, lines 7-12); Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Oliphant Report, Exhibit 2175, p.4.

was opposed to the surrender. Oliphant makes note of the fact that he purposefully started the treaty council once all the Chiefs arrived at Saugeen, to prevent them from speaking amongst one another. [1169]

845. Chief Madwayosh's opposition to the surrender upon his arrival to Saugeen on October 13, 1854 is significant for the following reasons:

(a) According to Anishinaabe customary decision-making, chiefs would speak according to the consensus of their communities.[1170] If Chief Madwayosh arrived on October 13, 1854, with the position that he was opposed to the surrender, then that means there was no consensus from Saugeen to enter into a surrender of the Peninsula. In fact, what this tells us is that for Saugeen, there was no consensus to agree to a surrender of the entire Peninsula.[1171]

(b) Oliphant's report notes that Chief Madwayosh continued to express this view and dissent respecting surrender of the Peninsula when the treaty council began. Oliphant then diverted the conversation from the "propriety of the surrender"[1172] to

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[1169] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3124, line 2 to p. 3125 line 1; p. 3141, line 5 to p. 3142, line 7; Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12003, line 12 to p. 12005, line 13.
[1170] Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p. 7000, line 21 to p. 7001 line 10; p.7003 line 22 to p.7004 line 3; Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p.3142, lines 7-12; Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p.3163, lines 7-17.
[1171] Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p. 7045 line 20 to p. 7047 line 6; Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3131, lines 5-23; Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p.11983 line 8 to p. 11984, line 7; p. 11985, lines 12-18; and p. 11987, lines 7-25.
[1172] Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Oliphant Report, Exhibit 2175, p. 4; Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p.12006, line 4 to p. 12007, line 19.

which lands would be reserved for the Saugeen Ojibway before leaving them to confer amongst themselves for one hour. That would mean that in only one hour of private council with the other members of the Saugeen Ojibway, they reached consensus to accept the surrender.[1173] Prof. Driben opined on why this was not enough time, even if SON had been presented a similar proposal by Anderson in August 1854:

> Q…could an hour have been a sufficient amount of time for them to reach consensus in these circumstances?
>
> A. Not in my opinion. Not close. Because they have to really build a consensus here or arrive at a consensus. And some were already determined the answer is no. The deliberative process takes time to unfold in Anishinaabe communities, because everybody gets to say their piece. Because that's the way their government works. So you have to go back to the – if a new proposal is made, and it is a radical proposal, you're going to have to go back to the beginning…
>
> Q. However, if it is not a radically new proposal but essentially the same proposal as what was made two and a half months before, and they had been deliberating about it during that time, would that – would it be possible that an hour could be sufficient?
>
> A. Well, in fact, they did sign on to the treaty. So that's a fact to be reckoned with. But I believe that's because they were told by Oliphant that you have face an existential threat here. So the deliberation they're making, from my point of view, what they're

[1173] Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p. 7047, line 16 to p. 7049, line 7; Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p.3132, line 10 to p.3133, line 2 and p.3141, line 5 to p.3142, lines 12 (esp. p.3142, lines 7-12); Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3161, lines 25 to p. 3164, line 5.

> deliberating is between the existential threat and ishkonigan [scraps]."[1174]

iii) Oliphant left the treaty council for only one hour

846. After turning the discussion away from the propriety of the surrender of the Peninsula, Oliphant reported that he left the Chiefs for one hour to discuss the surrender.

847. One hour to discuss the surrender of the Peninsula was far too short. Given that we know that the Chiefs did not arrive on October 13, 1854, with any kind of consensus about a surrender (Chief Madwayosh, representing the views of the Saugeen, was opposed before the council, and continued to express his opposition at the council), this was not enough time to ensure that there was consensus. It certainly was not sufficient for Chief Madwayosh to go back to his people and obtain a consensus and a new mandate from his people to accept the proposal – which is what would have been required by Anishinaabe custom.[1175]

848. In addition, Prof. Brownlie opined that this was not sufficient time in comparison to other treaties. On cross examination, Prof. Brownlie was asked to compare this timing to deliberations for Treaty 9, and a case where one First Nation took only a few hours before agreeing

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[1174] Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p. 7048, line 22 to p. 7050, line 14; Prof. Driben defines "ishkonigan" in his testimony (Transcript vol 55, October 23, 2019, p. 7042, lines 2-17): *Q. And if they, at this time, felt that the agreement was not valid, would they have resorted to diplomatic means such as writing a petition to express their views to that effect? A. No, I think what happened in 1854 is they faced an existential threat. They made a decision and that was the end of it. They were reduced to "ishkonigan", I-S-H-K-O-N-I-G-A-N, which is scraps; that the literal meaning of it. That's the word for "reserve". It is "scraps". They knew they had ishkonigan after this and it was over. And they could tell that not by their own experience, but by the experience of Anishinaabe in general during this period. They were all being concentrated in reserves at this time."*

[1175] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3141, line 5 to p.3142, line 12; Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p.3161, line 25 to p. 3164, line 5; Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p. 7047, line 16 to p. 7049, line 7.

to treaty. Prof. Brownlie pointed out that in that case, the First Nation had been asking for treaty for years, so "they had already decided they wanted to make a treaty years previously, so it was entirely uncontroversial in these communities that they were going to sign a treaty as soon as the government would come and make one with them, and so they didn't need time to deliberate."[1176]

849. Dr. Reimer also opined on the sufficiency of deliberation time in treaty making, noting her opinion that it is more important to determine the extent to which Anishinaabek understood the terms and impact of a surrender treaty, which would be the case if "an examination of the evidence prior to the treaty council reveals the First Nation had been considering the surrender for days, weeks, months or even years before the council. That is, the body of evidence, taken as a whole, may indicate that a high degree of consensus had been reached before the treaty council was assembled."[1177] Although Dr. Gwen Reimer refers to Treaty 72 and the surrender of the Peninsula in the next paragraph of her report, she agreed in cross examination that the evidence demonstrates that SON refused prior Crown attempts to secure surrenders of parts of the Peninsula, and that there was no consensus amongst SON for a surrender prior to the treaty council of October 13, 1854.[1178]

850. In this case, while Anderson had proposed surrender in August 1854, the evidence shows that SON left rejecting that proposal, and returned with a proposal for surrender of an inland wedge of 60,000 acres. And, the evidence of Chief Madwayosh's opposition prior to and during

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[1176] Evidence of Prof. Jarvis Brownlie, Transcript vol 37, August 14, 2019, p. 4216 to p. 4218, line 15; Evidence of Prof. Jarvis Brownlie, Transcript vol 38, August 15, 2019, p. 4333, line 12 to p. 4334, line 17.
[1177] Dr. Gwen Reimer, Documentation Relevant to the Extent of Time Taken by Anishnabeg First Nations at Treaty Councils to Deliberate Terms of Surrender, Supplementary Report, Exhibit 4707, p. 3, para. 4.
[1178] Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 11983, line 8 to p. 11985, line 18 and p. 11987, line 21 to p. 11987, line 25.

the treaty council on October 13, 1854 demonstrates that there he did *not* arrive with a consensus to agree to the surrender being proposed by Oliphant: a surrender of the entire Peninsula save for a few reserves.[1179] That means that the one hour private deliberation was the only available time to reach consensus in accordance with Anishinaabe decision-making protocols with respect to such a major decision. That, according to experts Prof. Brownlie and Prof. Driben, was not sufficient for Anishinaabe decision-making protocols for coming to a consensus around such a major decision.[1180]

851. In Oliphant's report, he does not say why he returns after only one hour, whether he was called back in or whether he decided to return of his own accord. However, in his memoir written about 30 years later, Oliphant writes that he returned at the urging of the interpreter, Peter Jacobs.[1181]

852. During the trial, this Court heard evidence regarding the reliability of Oliphant's memoir.[1182] Prof. Brownlie talked about the need to consider historical documents, such as Oliphant's memoir in light of the purpose for what it was produced. The same applies to Oliphant's report. The latter – though it was also written for the purpose of reporting to and impressing his superiors – is viewed as more reliable since it was written closer to the time of the events being

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[1179] Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Oliphant's report, Exhibit 2175, p. 15 [PDF p.14].
[1180] Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p.6984, lines 16 to p.6985, line 12 and p.6988, line 17 to p.6989 line 3; Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p.7048, line 19 to p.7049 line 7; Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3163, lines 4 to p. 3164, line 5.
[1181] Laurence Oliphant, Moss from a Rolling Stone, 1886, Exhibit 4155, pp. 178-179 (PDF pp. 16-17).
[1182] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3118, line 11 to p. 3120, line 6.

described, for example.[1183] However, it is submitted that where details in the memoir are corroborated by external evidence, including Oliphant's November 1854 report, that it can be relied on.[1184]

853. That is the case when it comes to Peter Jacobs. Peter Jacobs was the interpreter employed in assisting Oliphant in obtaining a surrender of the Peninsula.[1185] In Oliphant's memoir, Oliphant notes that he believes that Peter Jacobs to be "pecuniarily interested" in the surrender of the Peninsula, and he notes that is why Peter Jacobs stays to attend the Chiefs' council when Oliphant left them for one hour to speak alone.[1186]

854. Peter Jacobs was a Methodist teacher, interpreter, and assistant missionary, and he held some influence amongst Methodist converts of the Saugeen Ojibway in the mid 1850s.[1187] Around the time of the conclusion of Treaty 72, Peter Jacobs was in need of money.[1188]

855. Oliphant also noted in his memoir that he took advice from Peter Jacobs about how to conduct the negotiation to best effect.[1189] In addition, receipts for Peter Jacobs' payment did not

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[1183] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3118, line 21 to p. 3120, line 6

[1184] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3118 line 21 to p. 3120, line 6; Evidence of Dr. Gwen Reimer, Transcript vol 93 March 10, 2020 p.12019, lines 11-22.

[1185] Peter Jacobs (Pahtahsega) to S.Y Chesley, Accountant, Indian Department, March 28, 1857, Exhibit 2469; Indian Affairs Province of Canada, Warrant Books 1852-1857, Exhibit 4848, pp. 1, 148; Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 168.

[1186] Laurence Oliphant, Episodes from a Life of Adventure, or Moss from a Rolling Stone, Politics and Indian Affairs in Canada, Ch. 4, 1887, Exhibit 2966, p. 71.

[1187] Donald B Smith, Mississauga Portraits, The Outsider: Peter Jacobs, or Pahtahsega, Ch.4, Exhibit 4125, pp. 107-108, 119; Reimer, Transcript vol 93, March 10, 2020, p. 12017, lines 7-14.

[1188] Donald B Smith, Mississauga Portraits, The Outsider: Peter Jacobs, or Pahtahsega, Ch.4, Exhibit 4125, p. 122.

[1189] Laurence Oliphant, Episodes from a Life of Adventure, or Moss from a Rolling Stone, Politics and Indian Affairs in Canada, Ch. 4, 1887, Exhibit 2966, p. 71; Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p.12019, lines 7-10.

say that he was being paid for interpretation services, but instead for "services rendered Mr. Oliphant in obtaining a surrender of the Peninsula".[1190] Prof. Brownlie commented on the unusual language used to describe Peter Jacobs' services, and opined that this (along with Oliphant's description in his memoir) indicates that Peter Jacobs played more of a role in swaying SON to agree to the Peninsula.[1191]

856. Peter Jacobs was paid £50 for assisting Oliphant in procuring a surrender of the Peninsula. For hours of work he was paid what most interpreters earned in a year of work.[1192] He was paid in 1857, from the Saugeen's land fund – that is, from the proceeds of the sales of their lands.[1193] It is worth noting that the land sales did not begin until the fall of 1856, [1194] so there were no funds in this account until near the time when Jacobs was paid. SON submits that this suggests that Peter Jacobs, the interpreter Oliphant writes 'urged' him to return to the treaty council after one hour, may have had an interest in pushing for the surrender of the Peninsula.

[1190] Peter Jacobs (Pahtahsega) to S.Y Chesley, Accountant, Indian Department, March 28, 1857, Exhibit 2469; Indian Affairs Province of Canada, Warrant Books 1852-1857, Exhibit 4848.
[1191] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3172, lines 11-21.
[1192] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3173, lines 3-21; Extract of Discovery Answers by Canada - Q844 as amended, Exhibit 4352; Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12024, lines 12-25.
[1193] Indian Affairs Province of Canada, Warrant Books 1852-1857, Exhibit 4848; Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12127, lines 7-11.
[1194] Dr. Gwen Reimer, "Volume 4: Implementation Issues Related to Surrender No. 72, 1854-1970s" (as revised 2019), Exhibit 4704, pp. 34-37.

SON seeks the following findings of fact in respect of Chapter 28 - Treaty 72: Surrender of the Peninsula (October 1854):

857. Oliphant's plan to fund the Indian department:

(a) Prior to October 1854, Oliphant had devised a plan for cutting the costs of the Indian Department, and funding its operations with bands' money, including revenue SON was to receive from the sale of its lands

(b) Oliphant's plan relied on securing a surrender of all of the Peninsula (save the reserves he proposed), and using money from the proceeds of the sale of lands on the Peninsula to make the Indian Department "self-sufficient".

(c) Based on the above, SON seeks a finding of fact that Oliphant went into the treaty council of October 13, 1854, with the belief that a surrender of all of the Peninsula (save the reserves he proposed) was required to implement his plan.

858. Suitability of the Peninsula for farming:

(a) Crown officials, including T.G. Anderson, knew that large parts of the Peninsula, particularly the northern half of the Peninsula, were not suitable for agriculture.

(b) Oliphant knew (or should have known given his employees were aware) that large parts of the Peninsula were not suitable for agriculture.

(c) There is evidence that this information was published and therefore was public knowledge.

(d) As such, Oliphant knew (or should have known) that such lands on the Peninsula would not have been in demand by settlers.

(e) The slow pace of land sales after the surrender of the Peninsula suggests that Anderson and Oliphant significant overstated the demand for lands to SON.

(f) Based on the above, SON seeks a finding of fact that at treaty council with SON on October 13, 1854, Oliphant lied to SON about the demand for lands on the Peninsula. In the alternative to finding that Oliphant lied, SON submits that Oliphant failed to take steps to inform himself of what was true and to convey that to SON.

859. Bullying SON into a surrender based on the threat of white settlers:

(a) Neither Oliphant nor any other Crown official distanced themselves from the threats and statements made by Anderson to SON in August 1854 regarding the government taking their land without consent.

(b) At the treaty council with SON on October 13, 1854, there is no evidence that there was discussion about the failure of any so-called general reserve, the failure of other First Nations coming to reside on the Peninsula, or as the result of SON needing money to pay its debts, nor is there any evidence that these factors were ever identified at the treaty council as motivations for or reasons why SON should agree to the treaty.

(c) At the treaty council with SON on October 13, 1854, Oliphant focussed on the threat of white settlers encroaching on the Peninsula. This was the primary reason he suggested SON should be willing to surrender the Peninsula.

(d) At the treaty council with SON on October 13, 1854, Oliphant knew (or ought to have known) that there were measures – for example, writing to the sheriff as he

did the very next day to keep squatters off the Peninsula – that could have been taken to protect the Peninsula.

(e) As of and leading up to the treaty council with SON on October 13, 1854, there is no evidence that Oliphant inquired about what or directed any measures to be taken for the protection of the Peninsula from the encroachment of white settlers. In other words, there is no evidence of Oliphant inquiring into what was possible or not possible in respect of protecting the Peninsula.

(f) Based on the above, SON seeks a finding of fact that at the treaty council with SON on October 13, 1854, Oliphant lied to SON when he said it was almost impossible to protect the Peninsula from encroachment of white settlers. In the alternative, SON submits that Oliphant failed to take steps to inform himself of what was true and to convey that to SON.

860. Oliphant's tactics to secure a surrender:

(a) Oliphant did not send advance notice of the October 13, 1854, treaty council to SON.

(b) Chief Madwayosh was opposed to Oliphant's proposal for surrender for all of the Peninsula (save the reserves Oliphant proposed) prior to and during the treaty council on October 13, 1854. This means that SON did not have consensus prior to and during the treaty council to accept Oliphant's proposal for surrender.

(c) By starting the treaty council immediately upon the arrival of the Chiefs from Owen Sound and Nawash, Oliphant by design ensured that SON did not have an opportunity to speak in advance of the treaty council on October 13, 1854.

(d) SON Chiefs and members present at the treaty council on October 13, 1854, only had approximately one hour to privately discuss Oliphant's proposal.

(e) Based on the above, SON seeks a finding of fact that Oliphant engaged in sharp dealing and aggressive tactics to secure a surrender of the Peninsula.

29. TREATY 72: HARVESTING RIGHTS

SON's Interests

861. SON's key interests at Treaty 72 were to maintain their communities, culture and economy. This meant being able to continue to hunt and fish to support their livelihood, even as they engaged in some limited farming and other aspects of the market economy. As discussed in greater detail above:

(a) Since prior to contact with Europeans, SON has pursued an economic strategy based on the seasonal round – returning to different distinct locations in their territory in accordance with the seasons to harvest resources. In the 1700s and 1800s, they travelled hundreds of kilometers throughout SONTL each year to maintain this way of life.

See paras 262-266 (*An Anishinaabe Pattern of Subsistence – Living Off the Land - bimaadziwin and seasonal round*)

(b) In the early and mid 1850s, SON was cultivating very little land. Harvesting activities, including both fishing and hunting, were essential to their livelihood and, indeed, to their continued existence.

See paras 269-271 (*Fishing is a mainstay of SON diet and economy in mid-19th c*)

See para 274 (*SON continued to rely heavily on fishery after 1854)*

See paras 321-329 (*SON depended on harvesting for livelihood in mid 19th C)*

See paras 330-334 (*SON continued to hunt in years that immediately followed Treaty 72)*

(c) Hunting and fishing were hugely culturally significant in Anishinaabe society in the mid 19th century, as they are today. In 1854, for example, it would have been unthinkable for an Anishinaabe man to give up hunting.

See paras 274 (*Fishing is "tremendously important" in mid 19th C)*

See paras 308-313 (*Ongoing significance of subsistence fishery in SON culture)*

See paras 315-317 (*Ceremonial and spiritual aspects of fishing)*

See paras 319-320, 330-334 (*Cultural significance of hunting historically and today)*

862. SON accordingly understood and intended that Treaty 72 would preserve their rights to harvest over the tract surrendered:

(a) The likely Anishinaabemowin translation of "full and complete surrender" at Treaty 72 would connote a giving up of lands, but not necessarily a giving up of access to those lands for activities such as hunting, fishing, trapping and gathering that were central to Anishinaabe economy and to SON's economy.[1195]

(b) SON's oral history is firm on the point that Treaty 72 did not affect their harvesting rights.

See paras 275, 337-338 (*SON oral history on harvesting rights*)

[1195] Prof. Mary Ann Corbiere, "Treaty Translation Issues" (2013), Exhibit 4094, pp. 3-19, particularly at pp.18-19.

(c) The oral history among SON members is that Treaty 72 did not include the lakes and shores of the Peninsula.[1196] Continued access to lakes and shores is consistent with the objective of maintaining access to resources they hunted and fished.

(d) SON members have consistently acted on the belief that they are entitled to hunt, fish and engage in other forms of harvesting throughout their territory. They have continued to harvest throughout the lands surrendered in Treaty 72 until the present day.

See paras 332, 330-339 *(SON relied on hunting after Treaty 72*)

See paras 340-347 (*SON hunting and harvesting after 1854 to the present)*

See paras 274-295, 301-302, 303-307 *(An Anishinaabe Pattern of Subsistence – Living Off the Land – continued fishing after Treaty 72)*

The Crown's Interests

863. The Crown had an interest in SON continuing to hunt and harvest after 1854. Consistent with its civilization policy, in the middle of the 19th century, the longer-term hope of the Crown was that SON would turn to farming. However, Indian Department officials were well aware that

[1196] Rule 36 evidence of Fred Jones, November 5, 2002, Examination in Chief, Exhibit 3949, pp. 10-11; Rule 36 evidence of Frank Shawbedees, September 13, 2002, Examination in Chief, Exhibit 3947, pp. 9-12; Rule 36 evidence of John Nadjiwon, September 12, 2002, Examination in Chief, Exhibit 3951, pp. 11-12; Rule 36 evidence of Don Keeshig, September 13, 2002, Examination in Chief Exhibit 3945, pp. 21, 25; Evidence of Ted Johnston, Transcript vol 4, May 1, 2019, p. 396, line 24 to p. 397, line 10.

little progress had been made towards this goal, and that the amount of food being farmed was not enough to sustain SON.[1197]

> See para 325-329 (*Limited success of Methodist encouragement to farm)*
>
> See paras 642-644 (*Policy Context for Treaty 45 ½ - civilization policy)*

864. One of the Crown's key interests in Treaty 72 was opening up land for settlement.[1198] However, there was extensive testimony in this trial that continued harvesting is not necessarily incompatible with settlement, discussed in more detail at paragraphs 340 to 341(b). SON continues to this day to hunt on land owned by private land holders, taking appropriate measures to ensure safety. [1199]

865. In mid 19th century, the Crown sought to cut the costs associated with supporting First Nations and the Indian Department operations.[1200] This was another key interest of the Crown at

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[1197] Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, p. 29; Anderson to Bruce, February 13, 1852, Exhibit 4749; Charles Rankin to D. Rolph, Commission of Crown Lands, Exhibit 1906, p. 2; A. McNabb to T.G Anderson, November 26, 1852, Exhibit 2036, p. 481- *"I am in receipt of your letter of the 9 Inst enclosing two checks p £12.10 each for Chiefs Alexander Madwayosh, and John Kadahgegwon the latter, I regret to say left for the hunting ground before you letter came to hand"*; Census Return of the Indians under the superintendence of T.G. Anderson, August 18, 1857, Exhibit 2481, p. 107 – *"common school is of little use, the Indians absenting themselves from home on their hunting and fishing excursions"; describing SON farming operations as "miserable*".

[1198] Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 21-22.

[1199] Map of Harron property annotated by Doran Ritchie, Exhibit 4011; Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p.1370, line 10 to p. 1376, line 8 – *arrangement with Mr Harron, other landowners*; Evidence of Gary Harron, Transcript vol 6, May 14, 2019, p. 615, line 2 to p. 621, line 11.

[1200] Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 24-25,142-144 – *Indian Department was interested in cost cutting measures*; Prof. Jarvis Brownlie, "SON and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 23-27*;* Oliphant to Lord Elgin, November 3, 1854, Exhibit 2175, p. 6.

the time of Treaty 72. In cases where there was insufficient hunting and fishing to get through the winter, the Crown had to provide provisions to support SON. Crown officials were aware that SON could not support themselves without their hunting and fishing activities,[1201] and Crown would not expect SON to give up those activities before farming was fully and successfully established.[1202] In 1854, this was far from the case.

SON seeks the following findings of fact in respect of Chapter 29 - Treaty 72: Harvesting Rights:

(a) It was the intention of SON on entering Treaty 72 that they would be able to continue hunting and harvesting throughout the tract surrendered, and it was in their cultural and economic interests to continue doing so.

(b) The Crown's intention and the Crown's interests when Treaty 72 was concluded was that SON should continue hunting and harvesting over the surrendered tracts.

[1201] Report of the Special Commissioners Appointed on the 8th of September, 1856 to Investigate Indian Affairs in Canada [Pennefather Report], (1858), Exhibit 2494, [PDF image 73 – document not paginated]– *Saugeen had to be supported in the previous winter by the Department;* Richard Carney to S.Y. Chesley, October 31, 1857, Exhibit 2491 – *Charney notes that the Saugeen had waited at home for Chesley and so lost the opportunity to fish. Asking for ten pounds to help them through the winter.*

[1202] Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11484, lines 8-18- *"Q. Okay. I'll put it a different – what I was trying to get at, I'll put a different way. They wouldn't – the Crown would not expect the Saugeen to stop hunting unless they had some other means of supporting themselves? A. I would agree to – if you – to the extent that I think Government officials still saw this as a necessary aspect of SON economy*."

30. CROWN GOVERNMENT ORGANIZATION

866. The British Crown asserted sovereignty over lands including SONTL by virtue of its military defeat of the French in 1759-1760, and by the subsequent Treaty of Paris on February 10, 1763.

See para 513 (*Assertion of British Sovereignty)*

867. By the Royal Proclamation of 1763, SONTL was within the lands set apart as "Indian country". [1203]

The Royal Proclamation, 1763 (UK), RSC 1985 App 2, No 1, Plaintiffs' Book of Authorities, Tab 136.

See para 568 *("Indian Country" as defined above)*

868. In 1774, SONTL was included in the boundaries of the Province of Quebec. However, Imperial authorities continued to be responsible for Indian Affairs.[1204]

The Quebec Act, *1774* (UK), RSC 1985 App 2, No 2, Preamble, Plaintiffs Book of Authorities, Tab 135.

869. In 1791, Quebec was split into Upper Canada and Lower Canada. SONTL was within the boundaries of Upper Canada.[1205]

Constitutional Act, *1791* (UK), RSC 1985 App 2, No 3.

870. In 1840, Upper and Lower Canada were merged into the United Province of Canada, with SONTL within the boundaries of what was called Canada West.[1206]

[1203] Agreed Statement of Facts Basic Timeline, Exhibit 3925, entry for 1763.
[1204] Agreed Statement of Facts Basic Timeline, Exhibit 3925, entry for 1774.
[1205] Agreed Statement of Facts Basic Timeline, Exhibit 3925, entry for 1791.
[1206] Agreed Statement of Facts Basic Timeline, Exhibit 3925, entry for 1840.

Union Act, *1840* (UK), RSC 1985 App 2, No. 4, Preamble, Plaintiffs' Book of Authorities, Tab 137.

871. By 1860, the administration of Indian Affairs in the Province of Canada had been transferred from the Imperial Crown to the United Province of Canada.[1207]

An Act Respecting the Management of Indian Lands and Property, S Prov C 1860, c 151, Plaintiff's Book of Authorities, Tab 120.

872. In 1867, the Province of Canada was split into the Provinces of Ontario and Quebec, which, together with New Brunswick and Nova Scotia, formed a federal union of the Dominion of Canada. SONTL was within the boundaries of Ontario. Legislative responsibility for "Indians, and Lands reserved for the Indians" was assigned to the Dominion of Canada. Lands were stated to belong to the respective Province, "subject to any trusts existing in respect thereof, and to any Interest other than that of the Province in the same". Canada was stated to be liable for the debts and liabilities of each province existing at the union. Ontario and Quebec were stated to be conjointly liable to Canada for any debts over a certain fixed amount.[1208]

Constitution Act, 1867, ss 3, 5-6, 91(24), 109, 111-112, Plaintiffs' Book of Authorities, Tab 125.

SON seeks the following findings of fact in respect of Chapter 30 - Crown Government Organization:

(a) In relation to SONTL, Canada and Ontario are the successors of the British Crown as it existed in 1763 and in 1854.

[1207] Agreed Statement of Facts Basic Timeline, Exhibit 3925, entry for 1860.
[1208] Agreed Statement of Facts Basic Timeline, Exhibit 3925, entry for 1867.

31. LAND HISTORY AFTER 1854

873. Additional portions of SONTL were subject to treaties after Treaty 72: Treaties 331, 79, 80, 82, 93, 213, 214, 222, 223, 225, 226, 416A, 416B and 424.[1209]

874. After the land subject to Treaty 72 was surveyed, the great majority of it was sold at various times to private purchasers.[1210]

875. The speed at which the land sold, however, was quite slow. This did not correspond with the sense of urgency the Crown presented to SON in 1854 when it was trying to persuade SON to surrender the Peninsula so as to avoid the land being lost entirely and without compensation. For example, in 1871, **seventeen years** after Treaty 72, **almost half** the Treaty 72 lands remained unsold. It was **fifty years** after Treaty 72 before the proportion of unsold lands subject to Treaty 72 dropped below 3%.[1211]

876. Most of the land sold after 1867 was sold by the federal Crown. However, some parcels were sold by the Ontario Crown.[1212] In addition, Ontario confirmed sales of land made by the

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[1209] Treaty 331, September 4, 1856, Exhibit 2420, Plaintiffs' Book of Authorities, Tab 144; Treaty 79, February 9, 1857, Exhibit 2462, Plaintiffs' Book of Authorities, Tab 143; Treaty 80, January 16, 1857, Exhibit 2456, Plaintiffs' Book of Authorities, Tab 145; Treaty 82, February 9, 1857, Exhibit 2463, Plaintiffs' Book of Authorities, Tab 146; Treaty 93, August 16, 1861, Exhibit 2607, Plaintiffs' Book of Authorities, Tab 147; Treaty 213, January 14, 1885, Exhibit 2931, Plaintiffs' Book of Authorities, Tab 151; Treaty 214, January 17, 1885, Exhibit 2932, Plaintiffs' Book of Authorities, Tab 152; Treaty 222, October 7, 1885, Exhibit 2950 Plaintiffs' Book of Authorities, Tab 153; Treaty 223, October 15, 1885, Exhibit 2953, Plaintiffs' Book of Authorities, Tab 154; Treaty 225, July 5, 1886, Exhibit 2962, Plaintiffs' Book of Authorities, Tab 155; Treaty 226, July 18, 1886, Exhibit 2961, Plaintiffs' Book of Authorities, Tab 156; Treaty 416A, April 13, 1899, Exhibit 3262, Plaintiffs' Book of Authorities, Tab 157; Treaty 416B, May 15, 1899, Exhibit 3265, Plaintiffs' Book of Authorities, Tab 158; Treaty 424, September 8, 1899, Exhibit 3282, Plaintiffs' Book of Authorities, Tab 159.

[1210] Dr. Gwen Reimer, "Volume 4: Implementation Issues Related to Surrender No. 72, 1854-1970s" (as revised 2019), Exhibit 4704, pp. 32-95.

[1211] Dr. Gwen Reimer, "Volume 4: Implementation Issues Related to Surrender No. 72, 1854-1970s" (as revised 2019), Exhibit 4704, pp. 60-61.

[1212] Agreed Statement of Facts Land Transaction History, Exhibit 3928.

federal Crown which subsequently, in light of Court rulings, were understood to have been *ultra vires*.

> *Indian Lands Act*, *1924*, SO 1924 c 15, reciprocating statute at SC 1924 c 48, Plaintiffs' Book of Authorities, Tab 130.
>
> *St Catherine's Milling and Lumber Co v R* (1888), 14 AC 46, 2 CNLC 541, Plaintiffs' Book of Authorities, Tab 104.
>
> *Ontario Mining Co v Seybold*, [1903] AC 73, 3 CNLC 203, Plaintiffs' Book of Authorities, Tab 58.

877. Some portions of land subject to Treaty 72 remain unpatented to this day.[1213]

878. Some portions of land subject to Treaty 72 which had been patented were subsequently purchased by each of Ontario and Canada.[1214]

879. Some of the lands subject to Treaty 72 which were subsequently purchased by each of Ontario and Canada are riparian, and each of Ontario and Canada uses the shores of such lands for purposes such as for parks.[1215]

880. Road allowances, including shore road allowances, within the lands subject to Treaty 72 were transferred from the (Ontario) Crown to local municipalities by statute in 1913. Municipalities received such land by this statutory provision, and without making any payment for it.[1216]

> *Municipal Act*, SO 1913, c 43, s 433, Plaintiffs' Book of Authorities, Tab 133.

[1213] Agreed Statement of Facts Land Transaction History, Exhibit 3928.
[1214] Agreed Statement of Facts Land Transaction History, Exhibit 3928.
[1215] Agreed Statement of Facts Land Transaction History, Exhibit 3928.
[1216] Agreed Statement of Facts Claim Against Municipal Defendants, Exhibit 3929, para 9.

881. The original surveys of lands subject to Treaty 72 created the townships of Amabel, Albemarle, Eastnor, Lindsay, St. Edmunds, and Keppel, and the towns of Southampton and Wiarton. These became erected into local municipalities. In the late 1990s, these municipalities became restructured.[1217] Pursuant to that restructuring:

(a) The Corporation of the Town of South Bruce Peninsula is the successor to the Corporation of the Township of Amabel, the Corporation of the Township of Albemarle and the Corporation of the Town of Wiarton.

(b) The Corporation of the Municipality of Northern Bruce Peninsula is the successor to the Corporation of the Township of Eastnor, the Corporation of the Township of Lindsay and the Corporation of the Township of St. Edmunds.

(c) The Corporation of the Township of Georgian Bluffs is the successor to the Corporation of the Township of Keppel.

(d) The Corporation of the Town of Saugeen Shores is the successor to the Corporation of the Town of Southampton.

882. Bruce and Grey Counties were established as upper tier municipalities and maintain county road systems. Some of the land on which those county roads are located were set aside as original road allowances. There is no evidence that the Counties made any payment for such original road allowances.

> Statement of Defence of the Corporation of the County of Bruce, para. 14-19, Trial Record Action No. 94-CQ-50872CM, p.414

[1217] Agreed Statement of Facts Claim Against Municipal Defendants, Exhibit 3929, schedule.

Statement of Defence of the Corporation of the County of Grey, para. 10-15, Trial Record Action No. 94-CQ-50872CM, p. 430.

883. Canada and Ontario or their predecessors have alienated to private parties some lands to which SON has never relinquished title, and which would, but for the fact they are owned by private parties, be within the description of lands to which Aboriginal title are claimed in this action.

Ontario's Statement of Defence (title), para. 27 (*semble*), Trial Record Action No. 03-CV-261134CM1, p. 29.

Canada's Statement of Defence (title), para. 56, Trial Record Action No. 03-CV-261134CM1. p. 61.

884. Ontario considers the majority of lands in SONUTL to be its Crown lands, and manages them accordingly, and as well licences others to use some of them for private purposes such as docks, retaining walls, and boat channels.[1218]

885. Canada is the registered owner of certain lands in SONUTL, and uses some them for purposes such as for ports and harbours, and leases or licences some of them to other parties for similar purposes.[1219]

SON seeks the following findings of fact in respect of Chapter 31 – Land History after 1854:

(a) Portions of lands of SONUTL are now being used and managed by each of Canada and Ontario.

[1218] Agreed Statement of Facts Land Transaction History, Exhibit 3928.
[1219] Agreed Statement of Facts Land Transaction History, Exhibit 3928.

(b) After Treaty 72, land subject to the Treaty was sold, but it sold at a slow pace.

(c) Portions of the land subject to Treaty 72 are now in the hands of each of:

(i) Canada;

(ii) Ontario;

(iii) Each of the Municipal Defendants; and

(iv) Various private parties.

PART III - ISSUES

32 TITLE CASE ISSUES

886. SON seeks to prove its Aboriginal title to SONUTL. To do so, SON must show that it exclusively occupied SONUTL prior to the assertion of British sovereignty.

887. The following issues relate to this:

(a) the test for Aboriginal title;

(b) exclusivity of occupation of SONUTL;

(c) continuity of occupation of SONUTL;

(d) sufficiency of occupation of SONUTL;

(e) application of the test for Aboriginal title to joint title holders;

(f) application of the test for Aboriginal title to the beds of navigable waters; and

(g) there is no extinguishment of Aboriginal title to SONUTL.

33. TREATY CASE ISSUES

888. SON seeks to prove that

(a) in 1854, the Crown had a fiduciary duty to protect the Peninsula for SON;

(b) the Crown failed in its duty to protect the Peninsula, and in the course of negotiating and concluding Treaty 72, breached its fiduciary duty to SON and acted dishonourably; and

(c) regardless of whether the Crown breached a duty to SON in the course of negotiating and concluding Treaty 72, the proper interpretation of Treaty 72 is that it had no impact on whatever traditional harvesting rights SON bore at that time.

889. The following issues relate to this:

(a) a fiduciary duty;

(b) a breach of that duty;

(c) the honour of the Crown; and

(d) interpretation of Treaty 72 and whether it had any effect on SON's harvesting rights.

34. CHAIN OF LIABILITY ISSUES

890. SON seeks to prove that duties and liabilities to SON flowed between the various Crown actors involved: the Imperial Crown, the Province of Quebec (as it existed from 1774-1791), the Province of Upper Canada, the United Province of Canada, the Dominion of Canada, and the Province of Ontario.

PART IV – LAW

35. THE LEGAL TEST FOR ABORIGINAL TITLE

891. Aboriginal title is proven by showing exclusive occupation of territory at the time of the assertion of British sovereignty. In order to make out a title claim, the Indigenous group asserting title must show that: (1) the territory was occupied prior to the assertion of sovereignty; (2) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation; and (3) at sovereignty, that occupation must have been exclusive. The factors of sufficiency of occupation, continuity and exclusivity are useful lenses for examining if Aboriginal title is proven, but need not be applied independently. Rather, inquiries into these areas shed light on whether Aboriginal title is established.

> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at paras 30-32, Plaintiffs' Book of Authorities, Tab 108.
>
> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 143-145, Plaintiffs' Book of Authorities, Tab 18.

892. The Indigenous perspective, including Indigenous customary laws, must be considered throughout the analysis. As the Supreme Court of Canada put it in *Tsilhoqot'in Nation*, the goal of the analysis is to "faithfully translat[e] … pre-sovereignty Aboriginal interests into equivalent modern legal rights". The Court must not force pre-sovereignty Aboriginal interests "into the square boxes of common law concepts", as to do so would frustrate the goal of recognizing these pre-sovereignty rights as modern legal rights.

> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at paras 32, 34 and 49, Plaintiffs' Book of Authorities, Tab 108.
>
> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at paras 146-149 and 156-157, Plaintiffs' Book of Authorities, Tab 18.
>
> *R* v *Marshall*; *R* v *Bernard*, [2005] 2 SCR 220 at paras 45-54 per McLachlin CJC and at paras 127-130, 136 and 138-140 per LeBel J, Plaintiffs' Book of Authorities, Tab 79.

Title to Water Territory

893. The test for Aboriginal title has developed from, and has only ever been applied to, cases evaluating whether Indigenous groups have Aboriginal title to dry land. In this case, SON is asking the Court to recognize SON's Aboriginal title to lands under water – SON's title to its water territory.

894. Adapting the test for Aboriginal title to water territory has its challenges: water does not retain physical evidence in the same manner as land. The test, however, does work for water when properly informed by the Indigenous perspective.

> *Hamlet of Baker Lake v Canada (Indian Affairs and Northern Development)*, 1979 CanLII 2560 (FC) at para 76, Plaintiffs' Book of Authorities, Tab 31.
>
> See paras 70-71 *(Evidence Law)*

895. This approach is in line with the existing law on Aboriginal title, which already requires that the Indigenous perspective, including Indigenous customary laws, be considered throughout the analysis and given equal weight. In SON's submission, because of the inherent evidentiary challenges in establishing Aboriginal title to water territory, consideration of the Indigenous perspective becomes especially important.

> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at paras 14, 32, 34 and 49, Plaintiffs' Book of Authorities, Tab 108.
>
> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at paras 81-82, 146-149 and 156-157, Plaintiffs' Book of Authorities, Tab 18.

Indigenous Perspective on Title to Water Territory

896. From SON's perspective, there is no substantive distinction between SON's relationship with land and water territory: both are part of who SON is, and SON has a responsibility to care for both. This responsibility cannot be fulfilled by anyone other than SON.

SON's territory was a gift to SON from the Creator, and SON has a deep spiritual connection to SONTL. With this gift came the responsibility to care for and protect both the land and water. This responsibility of stewardship cannot be discharged by others but belongs exclusively to SON alone. As community member Vernon Roote put it, "[t]he importance of water is equal to land as equal to air."[1220]

> See paras 205-231 (*SON's presence in their territory and importance of water*)
>
> See paras 375-377 (*Inclusion of water spaces in territory*)

897. When viewing Aboriginal title from SON's perspective, if Aboriginal title to land is possible, title to their water territory is equally possible. There is no meaningful distinction between the two in terms of SON's connection to those parts of SONTL, and the obligations and responsibilities SON has to SONTL.

898. This perspective is crucial in understanding how SON occupied SONUTL in 1763, and continues to occupy it to this day. SON members perform ceremonies to honour the water spirits and to fulfill their roles and responsibility as stewards and guardians of SONUTL. SON members have an obligation to perform these ceremonies at specific locations, including Nochemowenaing, where water spirits can be felt particularly strongly. More specifically, viewed from the Indigenous perspective, SON demonstrates its occupation in the following ways:

(a) Women were the primary water caregivers, and carry out their responsibilities in various ways including through the performance of water ceremonies;

> See paras 216-231

[1220] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 456, lines 8-9.

(b) Men also have a responsibility to honour water, keep it clean, and provide offerings of tobacco from time to time. Certain pipe carriers also have the responsibility to care for the waters in SONUTL bestowed on them by the Creator; and

See paras 216-231

(c) SON harvesters also have special practices with respect to SONUTL. Fishing is part of SON's spiritual relationship with SONUTL, not just a sustenance and commercial activity. SON harvesters learn spiritual lessons on how to harvest in accordance with the spirits along with how and where to fish, and they try to fish in accordance with their spiritual teachings and the Creator's instructions regarding fishing and the use of the waters.

See paras 315-318

899. The spiritual connection SON has to SONUTL can also be seen in SON's laws respecting SONTL. SON followed Anishinaabe customary law which provided that local Anishinaabe bands controlled local use of territory, while allowing for collective action of various groups when the Anishinaabe faced an external challenge. This Anishinaabe customary law is based on the responsibilities the Creator has bestowed upon the Anishinaabe to care for and protect their lands and waters.

See paras 250-254 (*Alliances*)

See paras 351-354 (*Anishinaabe customary law*)

See paras 369-373 (*consequences of not following law*)

See para 209 (*Anishinaabe customary law is based on responsibilities from Creator*)

900. Where there is a risk of these laws being broken, and thus a threat to an Anishinaabe group's territory, the Anishinaabe perspective would require that the group act and remove the

threat, either alone or collectively if need be. This is an obligation SON has to SONTL. It is an obligation that stems from the spiritual responsibility SON has to protect and care for its territory and it is a way in which SON exercises control over land and water territory.

> See para 366 *(explanation of Pondiac's obligations from an Anishinaabe perspective)*
>
> See paras 207-209 *(spiritual responsibility)*

901. These are all ways in which SON occupied and continues to occupy SONUTL, from the Indigenous perspective. SON is asking this court to recognize these forms of occupation as demonstrating that they sufficiently occupied SONUTL.

902. The Indigenous perspective is crucial to fairly and appropriately applying the existing test for Aboriginal title in this case. It is more difficult to find physical landmarks of occupation in water, and there were no Europeans on or near SONTL in 1763, so there is no written record of SONUTL's occupation at the time. SON should not be penalized because they were the only ones present in their territory at the relevant period. The evidence of SON's perspective and history should be weighed heavily in assessing whether SON has met the test for Aboriginal title.

Date of Assertion of British Sovereignty

903. For the purposes of this litigation, all parties say that the date of assertion of British sovereignty was 1763 when the British entered into the Treaty of Paris with France.[1221] For the test for Aboriginal title, this is the date at which SON must prove occupation of SONUTL. While the Court can consider evidence of what happened before and after 1763 (and SON will be asking that the Court do so), the function of this evidence is to understand what happened in 1763.

[1221] Agreed Statement of Fact Regarding Basic Timeline of Events, Exhibit 3925, p. 2.

Exclusivity

904. One consideration for the Court in assessing whether the test for Aboriginal title has been met is whether a First Nation had exclusive occupation at the time of sovereignty.

> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 47, Plaintiffs' Book of Authorities, Tab 108.

905. Exclusivity is to be understood as the intent and capacity to control territory.

> **Exclusivity should be understood in the sense of intention and capacity to control the land. The fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation.** Whether a claimant group had the intention and capacity to control the land at the time of sovereignty is a question of fact for the trial judge and depends on various factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question. Exclusivity can be established by proof that others were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group. The fact that permission was requested and granted or refused, or that treaties were made with other groups, may show intention and capacity to control the land. **Even the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control.** [emphasis added]
>
> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 48, Plaintiffs' Book of Authorities, Tab 108.
>
> See also: *R v Marshall; R v Bernard,* [2005] 2 SCR 220 at paras 64-65, Plaintiffs' Book of Authorities, Tab 79.

906. Occasional trespass or presence with permission do not rebut Aboriginal title. If permission is granted, that reinforces exclusivity, and the assessment of this evidence must be approached from both the common law and Indigenous perspectives.

> A consideration of the [A]boriginal perspective may also lead to the conclusion that trespass by other [A]boriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the [A]boriginal group asserting title. For example, the [A]boriginal group asserting the claim to [A]boriginal title may have trespass laws which are proof of exclusive occupation, such that the presence of trespassers does not count as evidence against exclusivity. As well, [A]boriginal laws under which permission may be granted to other [A]boriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation. Indeed, if that permission were the subject of treaties between the [A]boriginal nations in question, those treaties would also form part of the [A]boriginal perspective.
>
> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 49, Plaintiffs' Book of Authorities, Tab 108, quoting with approval from *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 157, Plaintiffs' Book of Authorities, Tab 18.

NO CHALLENGE TO SON'S EXCLUSIVE POSSESSION IN 1763

907. SON had exclusive occupation of SONUTL at the time of the British assertion of sovereignty: there was no one else there, and no groups were challenging SON's occupancy of SON's water territory. As the Supreme Court stated in *Tsilhqot'in*, "the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control." This is the inference that should be made in this case.

> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 48, Plaintiffs' Book of Authorities, Tab 108.

908. There was no European presence in SONUTL in 1763. By 1763, the French had left the Great Lakes area. Any Europeans that had previously been in SONUTL had only ever been there briefly and had been there with the permission of SON (see, for example, Champlain in 1615, who was initially met with a substantial show of force, as outlined above at paragraphs 466 to

470). The evidence demonstrates that the British were simply not present in SONUTL to challenge SON's exclusive occupation of its territory in 1763:

(a) The British had no ships on Lake Huron in 1763;

See para 531

(b) They were struggling to maintain their forts in the Upper Great Lakes, and ultimately lost control of many of them during Pondiac's War. When they did control the forts, they had very little control over the surrounding territory. In any event, none of these forts were in close proximity to SONUTL; and

See para 513 (*little control over surrounding territory, no forts close to SONUTL*)
See paras 548-549 (*British lost control of forts during Pondiac's War*)

Map of the Great Lakes posts circa 1763, Exhibit 4023, Appendix D, Tab 11.

(c) The British had limited navigational abilities, relying on Indigenous guides and French settlers for navigation assistance, and stuck to routes already established by the French to maintain communications and supply to their forts. This kept them on the west side of Lake Huron and outside of SONUTL.

See para 513

909. In order to demonstrate that SON had the capacity and intent to exclude others from its territory, SON need not demonstrate that it could have fended off a hypothetical British invasion. The British in 1763 were no real challenge to SON's exclusive occupation of SONUTL.

910. Beyond the absence of Europeans, there were also no other Indigenous groups challenging SON's exclusive occupation of SONUTL in 1763. The Great Lakes Anishinaabe

(including SON) followed Anishinaabe customary law, which provided that local Anishinaabe groups (of which SON was one) controlled local use of territory, while allowing for collective action of various groups when the Anishinaabe faced an external challenge. Aside from other Great Lakes Anishinaabe who may have been in SONUTL with the permission of SON in accordance with Anishinaabe custom, there were no other Indigenous groups present on SONUTL in 1763.

> See paras 351-361 (*explanation of Anishinaabe Territorial Customary Law, application to other Anishinaabe and non-Anishinaabe Indigenous groups*)
>
> See para 447 (*archaeological evidence re: presence of groups on SONTL*)
>
> This custom received recognition in *R v Shipman*, 2007 ONCA 338 (CanLII), 85 OR (3d) 585, paras 32-35 and generally, Plaintiffs' Book of Authorities, Tab 84.

911. Further, since the territory over which title is claimed in this case is covered by water, SON's occupation of the land adjacent to SONUTL would have significantly impacted SON's capacity to exclude others from SONUTL. In 1763 there were no sailing ships on Lake Huron: all boats that might have been in Lake Huron and Georgian Bay were much smaller and would have required access to the shore, particularly in the event of bad weather, which was frequent in the area. In this sense, SON's control of the land territory also allowed for control of the water territory.

> See paras 531-533 (*boats and bad weather*)

912. SON's exclusive occupation of SONUTL is sufficient to satisfy the exclusivity element of the test for Aboriginal title.

OTHER EVIDENCE OF SON'S INTENT AND CAPACITY TO EXCLUDE

913. It is not merely happenstance that SON had exclusive occupation of SONUTL in 1763: SON took many steps to ensure that they maintained control over SONUTL, both as a community following Anishinaabe customary law and through SON's alliance with other Great Lakes

Anishinaabe. These steps should be considered in assessing SON's intent and capacity to exclude others from SONUTL. As the Supreme Court stated in *Tsilhqot'in*, "the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control." This is the inference that should be made in this case.

> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 48, Plaintiffs' Book of Authorities, Tab 108.

Anishinaabe Customary Laws

914. Intent and capacity to exclude is shown by the content of Anishinaabe customary law in relation to territory. As explained above at paragraphs 899 to 900, SON followed Anishinaabe customary law which provided that local Anishinaabe bands controlled local use of territory, and required outsiders to seek permission to enter a band's territory, while allowing for collective action of various groups when the Anishinaabe faced an external challenge. This applied differently to other Anishinaabek, non-Anishinaabek Indigenous people, and Europeans.

> See paras 250-254 (*Alliances*)
>
> See paras 351-354 (*Anishinaabe customary law*)
>
> See paras 355-368 (*application of customary laws to Anishinaabek, non-Anishinaabek Indigenous, and Europeans*)
>
> See paras 369 -373 (*consequences of not following law*)

915. Persons from outside the local band were required by Anishinaabe customary law to seek permission to enter a band's territory. The nature, extent, and means of granting permission differed depending on the identity of people seeking permission, their purpose in entering the territory, and the proposed extent and length of land use. It also applied differently to other

Anishinaabek, non-Anishinaabek Indigenous people, and Europeans. These laws have remained the same from the 17th century to the present.

See paras 355-368 (*application of customary laws to Anishinaabek, non-Anishinaabek Indigenous, and Europeans*)

916. Examples of SON applying these customary laws to non-Anishinaabek people are:

(a) In 1615, SON met Champlain, the first European to reach Georgian Bay, with a massive show of force, and only allowed him to proceed once he had established a relationship with SON;

See paras 466-469

(b) SON, along with other Anishinaabe living on Lake Huron and Georgian Bay, drove the Haudenosaunee out of the region in the late 17th century;

See paras 476-483

(c) In 1763, SON was aligned with Pondiac and supported the Indigenous allies' efforts to assert territorial control over the Great Lakes, including Lake Huron;

See paras 563-566 *(SON's role in Pondiac's War)*

See paras 519- 566 *(Pondiac's War generally)*

(d) In 1764, SON entered into the Treaty of Niagara, allowing the British access to the Upper Great Lakes, and as part of that SONUTL, for the purposes of their alliance, trade, and the protection of Indigenous lands; and

See paras 603-608 *(terms of Treaty of Niagara)*

(e) In the 1830s and 1840s, Euro-Canadian fishermen entered into leases with SON to allow them to use the fisheries in SONUTL, with SON's permission.

See paras 628-630

917. These laws were also applied to Anishinaabe people. For example, in the mid-19th century, SON extended invitations to other Anishinaabe in Upper Canada to join them.

See paras 355-360

918. SON submits that this evidence is sufficient in demonstrating that SON had the capacity and intent to exclude others from its territory in 1763: the Court can infer from SON's actions in the Haudenosaunee Wars and on first meeting Europeans that, had there been a similar territorial threat to SONUTL in 1763, the response would have been the same.

See paras 466-469 (*first contact with Europeans*)

See paras 478-483 (*battles on SONTL during the Haudenosaunee War*)

919. SON being the only group present in SONUTL, combined with SON's application of Anishinaabe territorial use customary law to control the territory, and SON's show of force in instances where SON's territory was previously threatened, demonstrate SON's intent and capacity to exclude and its corresponding exclusive occupancy of SONUTL in 1763.

The Great Lakes Anishinaabe Intent and Capacity to Exclude

920. While there may not have been a geographically specific threat to SONUTL in 1763, there was a direct threat to the overall Anishinaabe control of the Great Lakes in 1763, including Lake Huron more generally, which ultimately triggered Pondiac's War.

921. The Court can look to the actions of the Great Lakes Anishinaabe in response to this threat, and generally, as evidence of SON's intent and capacity to exclude for the following reasons:

(a) SON was a part of the larger Three Fires Confederacy alliance of Great Lakes Anishinaabe;

(b) Anishinaabe law provided that allied groups would come together in times of war, meaning SON's membership in this alliance gave SON a greater capacity to exclude non-allied forces and those viewed as threats;

(c) The evidence suggests that SON participated in Pondiac's War; and

(d) It is in part thanks to the actions of the allied Great Lakes Anishinaabe Nations in protecting Lake Huron that SON was guaranteed its exclusive occupation of its territory in 1763. Pondiac's alliance acted as a form of security council for SON.

See paras 250-254 (*Three Fires Confederacy*)

See paras 369-373 (*Consequences of breaking rules of Anishinaabe customary law*)

See paras 563-566 *(Pondiac's War and SON's participation*)

922. More specifically, SON relies on the following evidence regarding the Great Lakes Anishinaabe (of which SON was a part) to demonstrate SON's intent and capacity to exclude others from SONUTL:

(a) The geography of Lake Huron/Georgian Bay is such that control of only a few external access points allowed control of the entire lake. SON and allied Anishinaabe groups controlled all the access points to Lake Huron/Georgian Bay. SON submits that controlling access in this way is analogous to fencing land. In this way Lake Huron/Georgian Bay was like a gated community of Anishinaabe groups, of which SON was one;

See paras 379-382

(b) The Great Lakes Anishinaabe clearly articulated it was their territory which the British were entering when the British first entered Lake Huron/Georgian Bay in 1761;

See paras 500-506

(c) During Pondiac's War, the Three Fires Confederacy (of which SON was a part), gained control of many British forts, subjected two of the remaining forts to extended sieges, and kept the British out of Lake Huron and Georgian Bay in 1763;

See paras 548-549

(d) The Great Lakes Anishinaabe agreed to the British entering Lake Huron/Georgian Bay once the British agreed to suitable conditions at the Treaty of Niagara (to which SON was a party) in 1764; and

See paras 603-608

(e) The British relied on Anishinaabe geographical knowledge and military support to maintain a British presence in Lake Huron/Georgian Bay until after the war of 1812-1814, demonstrating the Great Lakes Anishinaabe's continuing control over the area.

See paras 622-627

923. SON's membership in the Three Fires Confederacy, alliance with the other Great Lakes Anishinaabe, and participation in Pondiac's War, demonstrates SON's ability to control SONTL, and shows that, if there had been a geographically specific threat to SONUTL in 1763, SON would have had the ability to protect SONUTL through SON's alliances. Further, it was through this alliance that SON ensured that there was no geographically specific threat to SONUTL in 1763.

The existence of these alliances, and their demonstrated power when called upon, show SON's intention and capacity to exclude others from SONUTL in 1763.

CONCLUSION ON EXCLUSIVITY

924. The evidence all points to SON's exclusive occupation and control of SONUTL in 1763. SON:

(a) was the only group present on SONUTL in 1763;

(b) took steps to ensure that this continued to be the case, and to exercise control over SONUTL; and

(c) was part of a powerful alliance that exerted territorial control over the Great Lakes region.

925. SON submits that any one of these is sufficient to demonstrate intent and capacity to exclude. Taken together, they provide powerful evidence that, viewing Aboriginal title through the lens of exclusivity, SON meets this test for SONUTL.

Continuity of SON on SONUTL

926. Present occupation may be relied on as proof of pre-sovereignty occupation. Proof of continuity is not a requirement to meet the test for Aboriginal title: rather, it is a tool that can be used if the plaintiff chooses to rely on evidence of present occupation as proof of occupation at the time of the assertion of sovereignty. Where such evidence is relied upon, the Indigenous people claiming Aboriginal title must demonstrate that their occupation has been continuous. For that purpose, it is not required to show an "unbroken chain" of continuity – only that present occupation is "rooted in" occupation prior to the assertion of Crown sovereignty.

Tsilhqot'in Nation v British Columbia, 2014 SCC 44, [2014] 2 SCR 257 at paras 25-26, 45-46, Plaintiffs' Book of Authorities, Tab 108.

927. SON's present occupation of its water territory meets this standard. Members of SON continue to perform ceremony and fulfill their stewardship responsibilities for the water in SONUTL. These ceremonies and responsibilities were passed on to members of SON from preceding generations.

See paras 216-231

See paras 896-901

928. SON continues to exercise its fishing rights throughout SONUTL, both commercial and subsistence fishing. Members fish much of SONUTL as their ancestors before them did.

See paras 262-317 *(historic fishing)*

See paras 394-400 *(contemporary fishing)*

929. To the extent that the exercise of SON's fishing rights was more limited in scope in the middle of the 20th century, it was because of limits imposed on SON by the Ontario regulatory regime and the adverse effect on the fishery by invasive species. Despite those imposed limits, the evidence demonstrates that SON persistently asserted its right to continue fishing throughout SONTL.

See paras 275-295

930. The evidence indicates that SON's present-day occupation of SONUTL is rooted in past practices, and supports the conclusion that SON has occupied SONUTL through traditional practices such as water ceremonies as well as through fishing since 1763 up until the present day.

Sufficiency of Occupation of SONUTL

931. The sufficiency of occupation to establish Aboriginal title is comparable to the requirements for general occupancy at common law. That is, it is similar to the requirements for establishing possession of land "over which no one else has a present interest or with respect to which title is uncertain." The more onerous standard required to establish adverse possession over land owned by another is not required for proof of Aboriginal title: SON need only show that they have "acted in a way that would communicate to third parties that it held the land for its own purposes", and need not show notorious or visible use.

> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at paras 38-40, Plaintiffs' Book of Authorities, Tab 108.

932. The Indigenous perspective, including Indigenous laws relating to land, and the Indigenous group's relationship with the land, must be given equal weight to this common law lens.

> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 34, Plaintiffs' Book of Authorities, Tab 108.
>
> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 147-148, Plaintiffs' Book of Authorities, Tab 18.
>
> *R v Marshall; R v Bernard,* [2005] 2 SCR 220 at para 46 per McLachlin CJC and at paras 127, 130, 136 and 138 per LeBel J, Plaintiffs' Book of Authorities, Tab 79.

933. The following factors have been applied in assessing the sufficiency of occupation for establishing Aboriginal title:

(a) The nature of the land and what types of occupation are practical on it.

> Apart from the obvious, such as enclosing, cultivating, mining, building upon, maintaining, and warning trespassers off land, any number of other acts, including cutting trees or grass, fishing in tracts

> of water, and even perambulation, may be relied upon. The weight given to such acts depends partly on the nature of the land, and the purposes for which it can reasonably be used.

Tsilhqot'in Nation v British Columbia, 2014 SCC 44, [2014] 2 SCR 257 at para 39, quoting with approval from Kent McNeil, *Common Law Aboriginal Title*.

See also: *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at paras 35, 37-39, 42, 44, Plaintiffs' Book of Authorities, Tab 108.

See also: *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 149, Plaintiffs' Book of Authorities, Tab 18.

(b) The characteristics of the group seeking title.

> Sufficiency of occupation is a context-specific inquiry. "[O]ccupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" (*Delgamuukw*, at para. 149). **The intensity and frequency of the use may vary with the characteristics of the Aboriginal group asserting title and the character of the land over which title is asserted.** Here, for example, the land, while extensive, was harsh and was capable of supporting only 100 to 1,000 people. The fact that the Aboriginal group was only about 400 people must be considered in the context of the carrying capacity of the land in determining whether regular use of definite tracts of land is made out. [emphasis added.]

Tsilhqot'in Nation v British Columbia, 2014 SCC 44, [2014] 2 SCR 257 at para 37, Plaintiffs' Book of Authorities, Tab 108.

> As just discussed, **the kinds of acts necessary to indicate a permanent presence and intention to hold and use the land for the group's purposes are dependent on the manner of life of the people and the nature of the land**. Cultivated fields, constructed dwelling houses, invested labour, and a consistent presence on parts of the land may be sufficient, but are not essential to establish occupation. The notion of occupation must also

> reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic. [emphasis added.]

Tsilhqot'in Nation v British Columbia, 2014 SCC 44, [2014] 2 SCR 257 at para 38, Plaintiffs' Book of Authorities, Tab 108.

See also: *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 149, Plaintiffs' Book of Authorities, Tab 18.

(c) The laws of the group seeking title.

> I also held that 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.

Delgamuukw v British Columbia, [1997] 3 SCR 1010 at para 148, Plaintiffs' Book of Authorities, Tab 18.

> **In summary, what is required is a culturally sensitive approach to sufficiency of occupation based on the dual perspectives of the Aboriginal group in question — its laws, practices, size, technological ability and the character of the land claimed — and the common law notion of possession as a basis for title.** It is not possible to list every indicia of occupation that might apply in a particular case. The common law test for possession — which requires an intention to occupy or hold land for the purposes of the occupant — must be considered alongside the perspective of the Aboriginal group which, depending on its size and manner of living, might conceive of possession of land in a somewhat different manner than did the common law. [emphasis added.]

Tsilhqot'in Nation v British Columbia, 2014 SCC 44, [2014] 2 SCR 257 at para 41, Plaintiffs' Book of Authorities, Tab 108.

(d) Whether the acts of occupation can be interpreted to show the land belonged to, or was controlled by, or under the exclusive stewardship of the group in question.

> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at paras 38, 42, Plaintiffs' Book of Authorities, Tab 108.

934. Aboriginal title may be proved on a territorial basis. Thus "nomadic and semi-nomadic groups" may establish Aboriginal title on the basis of "hunting, fishing, trapping and foraging", depending on the evidence.

> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at paras 42-44, Plaintiffs' Book of Authorities, Tab 108.
>
> *R v Marshall; R v Bernard,* [2005] 2 SCR 220 at para 66, Plaintiffs' Book of Authorities, Tab 79.

935. For the reasons set out below, SON submits that SON's occupation is "sufficient" to establish Aboriginal title to SONUTL.

EVIDENCE OF SUFFICIENCY SPECIFICALLY ABOUT SON

936. SON has adduced a great deal of evidence to demonstrate that, when viewed through the lens of sufficiency of occupation, SON meets the test for Aboriginal title. This includes evidence of SON's

(a) perspective and relationship with SONUTL;

(b) customary laws applying to SONUTL and the enforcement of these laws; and

(c) fishing in SONUTL.

(a) Evidence of Sufficiency: Indigenous Perspective

937. From the Indigenous perspective, many of the facets of SON's relationship with their water territory, described above at paragraphs 896 to 900, demonstrate the sufficiency of SON's

occupation of SONUTL. SON's responsibility to care for and protect both the land and the water, and SON's members' fulfillment of this responsibility through ceremonies, are the "kinds of acts necessary to indicate a permanent presence and intention to hold and use the [water territory] for the group's purposes." The roles of women, men and pipe carriers in caring for water are an element of SON's customs regarding stewardship and protection of SONUTL.

See paras 205-233

Tsilhqot'in Nation v British Columbia, 2014 SCC 44, [2014] 2 SCR 257 at para 38, Plaintiffs' Book of Authorities, Tab 108.

938. SON's perspectives on their water territory must form the basis for the analysis respecting the sufficiency of SON's occupation of SONUTL in order to follow the culturally sensitive approach called for by the Supreme Court in *Tsilhqotin*. SON's connection to their water territory, behaviour towards it, and perspective on it demonstrate a deep connection with this territory, and show just the type of "permanent presence and intention to hold and use" the territory for SON's purposes that the test for Aboriginal title demands.

Tsilhqot'in Nation v British Columbia, 2014 SCC 44, [2014] 2 SCR 257 at paras 38 and 41, Plaintiffs' Book of Authorities, Tab 108.

(b) Evidence of Sufficiency: Customary Laws

939. The laws of the Indigenous group seeking title can be used as evidence of sufficient occupation.

Delgamuukw v British Columbia, [1997] 3 SCR 1010 at para 148, Plaintiffs' Book of Authorities, Tab 18.

Tsilhqot'in Nation v British Columbia, 2014 SCC 44, [2014] 2 SCR 257 at para 41, Plaintiffs' Book of Authorities, Tab 108.

940. As explained above at paragraphs 899 to 900, SON had customary laws respecting the use of SONUTL by non-SON people. Through these laws, SON exercised control over their

territory, and had spiritual obligations to protect SONUTL from outsiders. These laws form part of SON's occupation of their entire territory.

See paras 209 (*spiritual responsibility*)

See paras 351-354 (*customary laws*)

941. Anishinaabe custom provided that each local group control its own territory. Anishinaabe custom divided the territory between the groups and each had title to its section. The section that belongs to SON is that territory shown in Exhibit P - annotated SON claims map with southeast corner removed, Appendix D, Tab 1. As explained above, SON took many steps to exercise control over SONUTL, both themselves and as part of their alliance with the Great Lakes Anishinaabe.

See para 351 (*customary law*)

See paras 401-409 (*SON's traditional boundaries*)

See paras 913-923 (*examples of control in exclusivity argument*)

Exhibit P – (annotated) – SON Claims Map, Appendix D, Tab 1.

942. The establishment of the boundaries of SONUTL through customary law, and application of Anishinaabe customary law with respect to these boundaries, also speak to sufficiency of occupation. As this Court has also heard, there is a portion of the southernmost section of SON's water territory in Lake Huron that was historically shared with other Anishinaabe First Nations and is the subject of an overlap agreement between SON and three other First Nations.

See para 409

943. A *bona fide*, arm's length boundary adjustment/clarification between adjacent owners is not a new boundary, but is presumed to be a clarification of ancient boundaries.

Penn v Lord Baltimore (1750), 1 Ves. Senn. 444, [1558-1774] All ER 99 at page 1135, Plaintiffs' Book of Authorities, Tab 61.

944. The Maawn Ji Giig Do Yaang Declaration with the Aamjiwnaang, Walpole Island and Kettle and Stony Point First Nations therefore is evidence of the extent of the ancient traditional territory of SON, including a small overlapping section.

See para 409

(c) Evidence of Sufficiency: Fishing

945. Aboriginal title may be proven on a territorial basis, meaning Indigenous groups may establish Aboriginal title on the basis of "hunting, fishing, trapping and foraging", depending on the evidence.

Tsilhqot'in Nation v British Columbia, 2014 SCC 44, [2014] 2 SCR 257 at para 42, Plaintiffs' Book of Authorities, Tab 108.

946. There is evidence of continuous physical occupation of the land territory throughout the entire SONTL over millennia. Much of this evidence specifically points to use of the water territory as well. This is unsurprising, given the interconnectedness of land and water as viewed from the Indigenous perspective and the voluminous evidence of SON as a fishing people: presence on land necessarily meant presence on water.

See paras 216-231 (*importance of water to SON*)

See paras 262-317 (*pattern of subsistence re: fishing*)

See paras 440-450 (*archaeological evidence of occupation*)

See paras 462-465 (*archaeological evidence of importance of water*)

947. There is also evidence of SON's access points from the land to access the fishery, which are numerous and located all along the shores of SONTL. Fishing is possible in much of SONUTL. SON's fishing locations have been passed down through generations. SON's contemporary use of

access points, and SONUTL for fishing purposes, gives us an indication of the scope of their use of the water territory historically.

> SON Commercial Fishery Harvest, 1995-2018, Exhibit 4320 – Appendix D, Tab 14.
>
> Fishing Access Map Annotated by Jay Jones, Exhibit 3999 – Appendix D, Tab 2.
>
> See paras 386-392 (*historic access to SONUTL*)
>
> See paras 301-302 (*SON's current fishing passed down through generations*)
>
> See paras 303-307 (*commercial fishing*)
>
> See paras 308-314 (*sustenance fishing*)
>
> See paras 398-400 (*scope of contemporary fishing*)

948. The central nature of SON's use of water territory through fishing has been recognized before. As noted earlier, in a fishing prosecution involving members of SON, the Court made the following finding:

> The undisputed historical evidence led by the defence here has established that for centuries prior to the arrival of European settlers, the Saugeen Ojibway had occupied a vast area of what is now southwestern Ontario, encompassing all of what was known as the Saugeen, now the Bruce Peninsula, and including the area south of Georgian Bay and extending west to the eastern shore of Lake Huron. The Ojibway in that area were involved in a very productive fishery from, as is said, time immemorial. Specifically, the evidence established that they made use of numerous fishing stations on both sides of the peninsula, including the islands immediately offshore from the present Saugeen Ojibway reserves located at Cape Croker on the east side and Saugeen on the west. Their fishing was not prosecuted by individual fishermen merely to feed their own families, but rather was a community-based, collective activity in which the benefits were shared amongst the members of the community generally and directed to the subsistence of the group as a whole. Moreover, the Crown concedes, their fishing operation is accurately described as "commercial" in nature. Not only did the native groups trade among themselves, but after the arrival of the Europeans, fish was bartered with the fur traders for what became

> essential items. The trade developed further with the growing population of settlers and became an essential source of the band's "sustenance". The continuity of the exercise of the right from the very distant past to the present was established.
>
> *R v Jones*, [1993] OJ No 893, at para 44 (Prov Div), Exhibit 3883, Plaintiffs' Book of Authorities, Tab 76.

EVIDENCE OF SUFFICIENCY INVOLVING GREAT LAKES ANISHINAABE

949. Evidence about the Great Lakes Anishinaabe is helpful in understanding how SON occupied SONUTL, and assessing the sufficiency of that occupation both because SON was a part of this alliance but also because it speaks to the Anishinaabe position on ownership of water.

950. For example, and as noted earlier in the argument, the Great Lakes Anishinaabe clearly articulated it was their territory which the British were entering when the British first entered Lake Huron/Georgian Bay in 1761 when Chief Minweweh of the Ojibwas of Mackinac Island declared the Anishinaabe understanding of territorial ownership and control (including over water spaces) upon meeting Alexander Henry:

> Englishman, although you have conquered the French, you have not yet conquered us! We are not your slaves. These lakes, these woods and mountains, were left to us by our ancestors. They are our inheritance: and we will part with them to none. Your nation supposes that we, like the white people, cannot live without bread - and pork - and beef! But, you ought to know, that He, the Great Spirit and Master of Life, has provided food for us, in these spacious lakes, and on these woody mountains.[1222]

951. The evidence also demonstrates the intimate knowledge the Great Lakes Anishinaabe (including SON) had of Lake Huron: the British relied on Anishinaabe geographical knowledge

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[1222] Alexander Henry (The Elder), Travels and Adventures in Canada, Exhibit 476, p. 44; Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 65-67, 90.

and military support to maintain a British presence in Lake Huron until after the war of 1812-1814, demonstrating the Great Lakes Anishinaabe (including SON's) long time use and knowledge of the area (and Britain's lack thereof).

See paras 621-627

CONCLUSION ON SUFFICIENCY

952. Considered together, it is clear that SON "acted in a way that would communicate to third parties that it held the land for its own purposes".

> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 38, Plaintiffs' Book of Authorities, Tab 108.

953. The evidence demonstrates that SON is very much characterized by their connection to their water territory: they heavily rely on the water to fulfill their spiritual and subsistence needs, and in return have responsibilities to the water.

954. Looking at occupation through the Indigenous perspective, SON's obligations to water and connection to SONUTL demonstrate that it was under the exclusive stewardship of SON in 1763 and continues to be today. SON also occupied SONUTL in 1763 through substantial fishing, and by applying Anishinaabe customary laws to SONUTL. In applying those customary laws, SON also exercised control over SONUTL both through SON's actions alone and as part of the Great Lakes Anishinaabe alliance. These actions would have clearly communicated to others that SON held SONUTL for their purposes. Further, SON's occupation of the land territory in 1763 also supports an inference of occupation of the water territory.

955. Considering that the territory in question is water territory, the evidence of SON's occupation of SONUTL suggests that SON occupied SONUTL to the greatest extent possible in 1763. Although waters closer to shore are more frequently used, it is possible to venture quite far out into Georgian Bay and still be in sight of land. Early writers agree that canoes, when handled skillfully by Indigenous peoples, were able to cross the vast expanse of the Great Lakes. On Lake Huron specifically, historically, large canoes were able to cross the lake from Saginaw Bay (Michigan) to Goderich.

See paras 386-392

Joint Title Holders

956. Where Aboriginal groups have a shared exclusive occupation of land, this can result in joint Aboriginal title.

Delgamuukw v British Columbia, [1997] 3 SCR 1010 at para 158, Plaintiffs' Book of Authorities, Tab 18.

957. SON, being comprised of two First Nations, seeks recognition of joint Aboriginal title over SONUTL.

958. As mentioned above, there is also a small strip of territory at the southern edge of SONUTL in Lake Huron, where SON and the Aamjiwnaang First Nation, the Walpole Island First Nation and the Kettle and Stony Point First Nation have recognized each other as joint Aboriginal title holders. Therefore, in relation to that portion of territory, SON seeks recognition as two of several joint Aboriginal title holders.

See para 409(a)

959. On the southern extremity of the eastern boundary of SONUTL, SON maintains that their Aboriginal title territory is as set out in Exhibit P. However, as explained above, SON acknowledges that there is some territorial overlap with Beausoleil First Nation. To avoid complications, SON does not seek an order from this Court declaring Aboriginal title in respect of territory east of line of longitude 80° 20' W.

See para 409(f) (*details of this boundary*)

Exhibit P – (annotated) – SON Claims Map, Appendix D, Tab 1.

36. ABORIGINAL TITLE CAN APPLY TO THE BEDS OF NAVIGABLE WATERS

Overview Regarding Navigable Waters Law

960. At common law, the public holds a right to freely pass over navigable rivers and lakes. This is known as the public right of navigation. One of the issues in this case is the circumstances in which that right arises, and the manner in which it interacts with other rights. The position of the Defendants is that it is not possible, as a matter of pure law, to hold Aboriginal title to the beds of navigable waters, since, as an exclusive right, Aboriginal title would be incompatible with the common law public right of navigation and with Canadian sovereignty. Therefore, they say, Aboriginal title to the beds of navigable waterways did not survive the assertion of British sovereignty or the reception of English common law.

961. This section contains an outline of SON's submissions in response to this position of the Defendants. The detailed argument is contained in the immediately following sections.

962. The Defendants' position incorrectly interprets both Aboriginal title and the common law public right of navigation as absolute and irreconcilable with each other. Neither Aboriginal

title nor the public right of navigation are absolute. There is room to reconcile them, and to provide for appropriate sharing between Aboriginal title holders and the public.

963. For example, fee simple ownership is also an exclusive right, but fee simple ownership of the beds of navigable waters can and does co-exist with the public right of navigation.

964. Nor is the public right of navigation absolute. Limitations were placed on it, for example, by the Royal Proclamation of 1763, which forbade access by British subjects to large areas of territory including navigable waters (and including SONUTL in particular). In present times, navigation is limited by the requirement for boat licences, and the imposition of fees for launching boats or for using locks.

965. How, exactly, Aboriginal title and the public right of navigation can co-exist is different before and after 1982. It is necessary to consider both legal regimes in order to respond to the Defendants' argument that Aboriginal title to beds of navigable waterways did not survive the assertion of British sovereignty or the reception of English common law.

966. Aboriginal interests and customary laws survived the assertion of British sovereignty and were absorbed into the common law as rights.

967. Thus, prior to 1982, Aboriginal title and the public right of navigation were reconciled by Aboriginal title being incorporated into, and protected by the common law, but being subject to limitation or extinguishment by legislation or by treaty. For example, the *International Boundary Waters Treaty Act*, from 1909 on, guaranteed free access to navigable boundary waters (which include SONUTL) for inhabitants of both Canada and the US for the purpose of commerce.

968. After 1982, the appropriate way to reconcile competing rights of this nature is through the doctrine of justified infringement incorporated in the analysis of s. 35 of the *Constitution Act,*

1982. SON submits that this is now the governing principle to reconcile Aboriginal title and the public right of navigation.

969. SON submits that some navigation of water territory subject to Aboriginal title may be properly justified, such as navigation for the purposes of defence, control of international boundaries, and international commerce, but that it has not been established that navigation for purely recreational uses could properly justify infringing Aboriginal title.

970. In the alternative, if this Court considers public navigation always to be of paramount importance, SON submits that the appropriate course of action would be to declare that public navigation is *per se* a justifiable infringement of Aboriginal title. This would permit Aboriginal title to exist together with a full public right of navigation.

971. It would therefore be extreme, unwarranted and unnecessary to refuse to recognize Aboriginal title over the beds of navigable waters at all merely to preserve public navigation. It is not necessary to choose one over the other.

972. SON submits that the argument that recognition of Aboriginal title to the beds of navigable waters is incompatible with Canadian sovereignty inappropriately confuses ownership, access and jurisdiction. It is not necessary for the Crown to own the beds of waterways in order to access them or exercise jurisdiction over them.

Defendants' Position

973. The position of the Defendants is that it is not possible, as a matter of pure law, to hold Aboriginal title to the beds of navigable waters, since that would be incompatible with a common law public right of navigation and with Canadian sovereignty.

> Amended Amended Statement of Defence and Crossclaim of the Attorney General of Canada, paras 4-5, 51, Trial Record, Action 03-CV-261134CM1, pp. 45-46, 59.
>
> Amended Statement of Defence and Crossclaim of the Defendant Her Majesty the Queen in Right of Ontario, para 25, Trial Record, Action 03-CV-261134CM1, p. 29.

974. The argument that Aboriginal title to a lakebed is incompatible with the common law is based on statements by the Supreme Court that courts must take the Indigenous perspective into account, but must do it in terms "cognizable to the Canadian legal and constitutional structure" and in a way that does not "strain" that structure.

> *R v Van der Peet*, [1996] 2 SCR 507 at para 49, Plaintiffs' Book of Authorities, Tab 89.
>
> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 82, Plaintiffs' Book of Authorities, Tab 18.

975. The argument about sovereign incompatibility is based on a concurring judgment of two judges in *Mitchell v. M.N.R.* to the effect that an Aboriginal right may not be recognized if the substance of it would be incompatible with Crown sovereignty. This argument was not endorsed by the majority in *Mitchell v. M.N.R.*.

> *Mitchell v M.N.R,* [2001] 1 SCR 911, 2001 SCC 33 at paras 149-154 and 61-64, Plaintiffs' Book of Authorities, Tab 48.

Legal Position of Aboriginal Title Before 1982

COLONIAL LAWS OF SUCCESSION

976. Aboriginal title arises from the prior occupation of territory by Indigenous peoples. At the assertion of British sovereignty, a general imperial principle of continuity of law and rights applied, so that the common law incorporated and preserved local laws and customs in newly acquired territories, until or unless explicitly changed. In this way, Aboriginal title and rights were

preserved by the common law and thus limited what rights the common law would otherwise accord to the Crown and to European settlers.

> …aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them
>
> *Mitchell v M.N.R,* [2001] 1 SCR 911, 2001 SCC 33 at paras 9-10, Plaintiffs' Book of Authorities, Tab 48.
>
> See also *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 145, Plaintiffs' Book of Authorities, Tab 18.
>
> M.D. Walters, "Aboriginal Rights, *Magna Carta* and the Exclusive Right to Fisheries in the Waters of Upper Canada" (1998), 23 Queen's L.J. 301 at pp.333-343, Plaintiffs' Book of Authorities, Tab 202.

977. This was accomplished by the same mechanism that had historically been applied to the incorporation of pre-common law English local custom into the common law. The criteria for such customs to be recognized by the common law are that:

> (l) it must be immemorial, that is, "used for so long, that the memory of man runneth not to the contrary"; (2) it must have been continued, as of right , though not necessarily in possession; (3) it must have been enjoyed peaceably, and acquiesced in, and not subject to dispute; (4) the custom must be reasonable, or, rather taken negatively, not unreasonable; (5) it must be certain in its incidents and content; (6) though possibly established by consent, the custom must be compulsory, that is, not left to the option of every man whether he will use it or not; and (7) the custom must be consistent with other customs.
>
> Geoffrey S Lester, *The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument* (D Jur Thesis, York University, Graduate Program in Law, 1981) [unpublished] at p. 885. See also at pp. 924-925, Plaintiffs' Book of Authorities, Tab 180.

> See also Blackstone, Sir William, *Commentaries on the Laws of England*, (Oxford: Clarendon Press, 1765-1769), Vol 1, pp. 76-78 Plaintiffs' Book of Authorities, Tab 162.
>
> Ulla Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Portland, OR: Hart Publishing, 2014) at p. 296, Plaintiffs' Book of Authorities, Tab 198.
>
> *Egerton v Harding*, [1974] 3 All ER 689 at page 692 (CA), Plaintiffs' Book of Authorities, Tab 19.

978. An example from the early English context of a custom which did not meet these criteria was the Irish custom of tanistry, under which the "most worthy" male inherits the family estate. This was not accepted as a valid custom because it was uncertain, and because it was unreasonable since it led to socially undesirable behavior among relatives trying to prove they were the most worthy – often, by acts of violence or even by murdering their rivals.

> *The Case of Tanistry*, (1608) Davis 28, 80 ER 516, reprinted with introduction in [2001] AU Indig. Law Rpr. 37, Plaintiffs' Book of Authorities, Tab 105.

979. The idea that customary rights must be "cognizable to the common law" in order to be incorporated into it seems to have originated in a 1919 Privy Council case, *Re Southern Rhodesia*, which said:

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low on the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of rights known to our law and then transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance "richer than all his tribe." On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When they have been studied and

> understood they are no less enforceable than rights arising under English law.
>
> *Re Southern Rhodesia*, [1919] AC 211 at pages 233-234, Plaintiffs' Book of Authorities, Tab 90.

980. However, in that case, the Privy Council had been faced with an extreme situation that they considered to be one of tyranny. The facts before the Court in that case have been summarized as:

> In 1888, Queen Victoria had recognized one Lobengula as the paramount Sovereign of the Mashona and Matabele peoples who occupied most of the territory in question. The difficulty appeared in Lobengula's form of government: he was not a hereditary or dynastic king, nor was he in any meaningful sense chosen by his people; his authority depended upon raw force and fear. Lobengula's rule could, without prejudice, be characterized as that of a capricious tyrant who considered himself unrestrained by laws. He also claimed for himself personal **ownership** of most of his people's property (principally cattle) that he could grant or declare forfeit at his whim.
>
> …
>
> The society of the Matabele and the Mashona peoples was one in which it was not clear that the Native population enjoyed any property rights even under their own laws, except by the principle that the kingdom's wealth was owned by King Lobengula, and the property rights of his subjects (and, indeed, their very lives) were subject to his arbitrary largesse and forfeiture.
>
> Brian Donovan, "Common Law Origins of Aboriginal Entitlements to Land" (2003), 29 Man LJ 289 at paras 36 and 40 [emphasis in original], Plaintiffs' Book of Authorities, Tab 169.
>
> See also *Re Southern Rhodesia*, [1919] AC 211 at pages 214-215 and 221, Plaintiffs' Book of Authorities, Tab 90.

981. Very shortly after *Re Southern Rhodesia*, it was recognized that the facts of that case had been extreme, and that the threshold principle of being "cognizable to the common law" should

be applied very sparingly. In *Amodu Tijani*, Viscount Haldane, for the Privy Council, warned that there was a conscious or unconscious tendency to conceive of native title in terms appropriate only to English law, and that this was a tendency to resist.

> There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.... the Indian title in Canada affords by no means the only illustration of the necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle … Abstract principles fashioned *a priori* are of but little assistance, and are as often as not misleading.

Amodu Tijani v The Secretary Southern Provinces (Nigeria), [1921] UKPC 80 (11 July 1921) at page 3, [additional cite [1921] 2 AC 399 at pages 407-408], Plaintiffs' Book of Authorities, Tab 4.

982. In the case of *Amodu Tijani*, this meant recognizing an indigenous Lagosian law land title which was communal and based on a tribute payable to "White Cap" chiefs in exchange for usufructuary rights. The fact that this was very unlike English property law was not a barrier to this land title becoming incorporated into the common law.

> Brian Donovan, "Common Law Origins of Aboriginal Entitlements to Land" (2003), 29 Man LJ 289 at paras 44-45, Plaintiffs' Book of Authorities, Tab 169.

> *Amodu Tijani v The Secretary Southern Provinces* (Nigeria), [1921] UKPC 80 (11 July 1921) at page 2, [additional cite [1921] 2 AC 399 pages 403-404, Plaintiffs' Book of Authorities, Tab 4.

983. Viscount Haldane's views were echoed later by Lord Denning in *Oyekan v Adele*:

> The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws [in a ceded territory] enabling it compulsorily to acquire

> land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants entitled to compensation who has by native law an interest in it; and that courts will declare the inhabitants entitled to compensation according to their interest, **even though those interests are of a kind unknown to English law**. [emphasis added]
>
> *Oyekan v Adele* (West Africa), [1957] UKPC 13 (26 June 1957) at 3, [1957] 2 All ER 785 at page 788 (PC), Plaintiffs' Book of Authorities, Tab 60.

984. In *Oyekan v Adele*, Lagosian law provided that the title to the royal palace passed to the successor in office of the Oba (King). The office of Oba has not hereditary – a new Oba was appointed by a group of "White Cap" Chiefs. The Privy Council ruled that it was the new Oba who had title to the palace, not the heir of the previous Oba as would be determined by English succession law. The Privy Council ruled that the customary right prevailed **even the face of a Crown grant appearing to be in fee simple** that had been issued to the previous Oba. That is, the owner as determined by Lagosian law prevailed over whom English common law would have considered to have inherited the palace.

> Brian Donovan, "Common Law Origins of Aboriginal Entitlements to Land" (2003), 29 Man LJ 289 at paras 48-51, Plaintiffs' Book of Authorities, Tab 169.
>
> *Oyekan v Adele* (West Africa), [1957] UKPC 13 (26 June 1957) at 2-4, [1957] 2 All ER 785 at pages 787-789 (PC), Plaintiffs' Book of Authorities, Tab 60.

985. The same point that Indigenous customary rights can be cognizable to and protected by the common law without resembling common law rights was made by Berger JA in the Nunavut Court of Appeal:

> A cautionary note is in order. As Chief Justice Finch of the Court of Appeal for British Columbia pointed out in his paper *The Duty to Learn: Taking Account of the Indigenous Legal Orders in Practice*,

> published in November 2012 for The Continuing Legal Education Society of British Columbia, there is a danger that "in retaining and imposing our ideas of what constitutes 'law', according to our training and established habits of mind, we may inadvertently give weight only to those elements of an Aboriginal legal system which are recognized 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.'"
>
> *R v Ippak*, 2018 NUCA 3 (CanLII) at para 85 per Berger JA (concurring), Plaintiffs' Book of Authorities, Tab 75.

986. SON therefore submits that the criterion of being "cognizable" to the common law is not exacting. All manner of Indigenous laws have been and can be incorporated into the common law, despite being quite unlike English common law in content. Examples of customs that Courts have refused to incorporate into the common law have involved extreme facts that were more like autocratic rule or simple domination by the most powerful.

987. Once a custom has been proven, it becomes incorporated into the common law and prevails over the general common law in the locality to which the custom applies.

> Geoffrey S Lester, *The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument* (D Jur Thesis, York University, Graduate Program in Law, 1981) [unpublished] at pp. 885-889, 925, Plaintiffs' Book of Authorities, Tab 180.
>
> Blackstone, Sir William, *Commentaries on the Laws of England*, (Oxford: Clarendon Press, 1765-1769), Vol 1, pp. 74, Plaintiffs' Book of Authorities, Tab 162.
>
> Ulla Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Portland, OR: Hart Publishing, 2014) at pp. 298-299.

> *Egerton v Harding*, [1974] 3 All ER 689 at page 691 (CA), Plaintiffs' Book of Authorities, Tab 19.

988. SON therefore submits that at the assertion of British sovereignty, SON had, under Anishinaabe land custom, a right to use, control, and benefit from portions of Lake Huron and Georgian Bay, and the right to decide whether or not to permit others to enter this area. These rights were preserved by the common law in accordance with the principle of continuity, as a local custom which prevailed over the general common law.

989. New Zealand and Australia have dealt with this issue in the same context of a claim to Aboriginal title to the beds of navigable waters.

(a) The New Zealand Court of Appeal (then the highest Court in N.Z.),[1223] had to deal with such an argument in relation to the foreshore and seabed. The Court ruled that Maori customary law, as incorporated into common law, prevailed over English common law presumptions about the beds of tidal waters.

> For the reasons given below, I consider that in starting with the English common law, unmodified by New Zealand conditions (including Maori customary proprietary interests), and in assuming that the Crown acquired property in the land of New Zealand when it acquired sovereignty (as appears from the passage from the judgment set out at paragraph [7] above), the judgment in the High Court was in error. The transfer of sovereignty did not affect customary property. They are interests preserved by the common law until extinguished in accordance with law.

Ngati Apa v New Zealand (A.G), CA173/01 (19 June 2003), [2003] NZCA 117, [2003] 3 NZLR 643 at para 13 per Elias

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[1223] At the time, there was a possible appeal to the Privy Council, which has since been abolished, and replaced with a an appeal to the Supreme Court of New Zealand; and all the judges that sat on *Ngati Apa* have since been on the Supreme Court of New Zealand. Evidence of Prof. Paul McHugh, Transcript, vol 68, December 10, 2019, p. 8844, line 15 to p. 8845, line 11.

CJ; see also at paras 47, 49, and 86 per Elias C.J., and at paras 184-5, 197, and 204 per Tipping J, Plaintiffs' Book of Authorities, Tab 54.

(b) Australian law, in *The Commonwealth of Australia v Yarmirr*, took a different direction on this issue, involving a partial extinguishment of Aboriginal title in the case of navigable waters. However, as will be explained more fully below, the Australian law doctrine of partial extinguishment of rights by inconsistency with competing common law rights has been rejected by Canadian Courts.

The Commonwealth of Australia v Yarmirr, [2001] HCA 56, 184 ALR 113 at para 42 (HCA), Plaintiffs' Book of Authorities, Tab 106.

See paras 1043-1048 *(coexistence in Australia)*

LIMITATIONS ON ABORIGINAL TITLE PRIOR TO 1982

990. SON therefore submits the right to use, control, and benefit from portions of Lake Huron and Georgian Bay, and the right to decide whether or not to permit others to enter this area survived the assertion of British sovereignty and the reception of English common law. However, from the point of the assertion of British sovereignty until 1982, Aboriginal title was subject to being limited (or even extinguished), by "clear and plain" legislation or by treaties.

991. Indeed, Aboriginal title to the Great Lakes became limited by treaty. Almost immediately after the assertion of British sovereignty, the British and the Great Lakes Anishinaabek reached a treaty at Niagara in 1764 concerning alliance, trade and protection of Aboriginal lands. This necessarily involved the British navigating Lake Huron, so the British presence in Lake Huron from 1764 can be understood as being with the consent of the Anishinaabek, which was given by Treaty. Given the scope of the Treaty of Niagara, the permission given by the Anishinaabek was likely limited to British presence for the purposes of alliance, trade and protection of Aboriginal lands.

Above paras 574-610 *(Treaty of Niagara)*

992. Another historic limitation to SON's Aboriginal title was made by the *International Boundary Waters Treaty Act*, which, from 1909 on, guaranteed free access to navigable boundary waters (which include SONUTL) for inhabitants of both Canada and the US for the purpose of commerce.

International Boundary Waters Treaty Act, RSC 1985 c I-17, s 2 and Schedule 1, Article 1, Plaintiffs' Book of Authorities, Tab 160.

THE RIGHT OF PUBLIC NAVIGATION: SCOPE AND LIMITS

993. The common law right of navigation is a right to freely pass over navigable rivers and lakes. The origin of this common law right and its relevance in North America was discussed by the Privy Council in 1884 in *Caldwell v McLaren*, a case from Ontario. The Privy Council noted that the common law right of navigation had to be established by public use, by dedication of the owner, or by statute. The judgement went on to explain that in England, it was easily presumed that conditions establishing a public right of navigation applied, and that this had become thought of as the default state of affairs. However, the Privy Council noted such presumptions did not have the same force in North America, which was unsettled at the time of the assertion of British sovereignty, so prescription could not exist. At issue in *Caldwell v McLaren* was whether an owner of the bed of a river who had built a mill dam was required to construct the dam in a way that permitted logs to pass over the dam without impediment (i.e. an example of a right of navigation). The Privy Council noted that the status of the public right of navigation in Upper Canada was in great doubt until 1849. At that time a statute was passed making explicit provision that mill dams had to accommodate people wanting to float logs down rivers. The Privy Council then relied on that statute to resolve the case.

> *Caldwell v McLaren* [1884] UKPC 21 (7 April 1884) at pages 11,13, (additional cite 9 App Cas 392 (PC)), Plaintiffs' Book of Authorities, Tab 11.
>
> See also Peggy Blair, "Taken for 'Granted": Aboriginal Title and Public Fishing Rights in Upper Canada" (2000), 92 Ontario History 31 at pages 45-46 (commenting on *Caldwell v McLaren*), Plaintiffs' Book of Authorities, Tab 164.
>
> See also M.D. Walters, "Aboriginal Rights, *Magna Carta* and the Exclusive Right to Fisheries in the Waters of Upper Canada" (1998), 23 Queen's L.J. 301 at page 328, Plaintiffs' Book of Authorities, Tab 202.

994. SON submits that *Caldwell v McLaren* clearly demonstrates that public navigation is not some inherent or quasi-constitutional right. It has to be established by public use, by dedication of the owner, or by statute.

995. Despite this, in *Friends of the Oldman River v Canada*, the Court made statements that suggest that public navigation is a right that is paramount in some way. However, a close examination reveals that: 1) that case was brought by an environmental organization seeking to compel a federal environmental assessment of a dam being built by Alberta, the undertaking of which environmental assessment was being resisted by both Canada and Alberta; 2) the comments that case made about public navigation were made in response to an argument by Alberta that Crown immunity prevented the application of the federal *Navigable Waters Protection Act* (which would trigger a federal environmental assessment) to Alberta.

> *Friends of the Oldman River v Canada*, [1992] 1 SCR 3 at pages 50, 53-55, Plaintiffs' Book of Authorities, Tab 24.

996. Thus, *Friends of the Oldman River* was not about the ownership of the bed of the river. Nor was it about whether a common law right of public navigation had been established in the first place. It did not even refer to *Caldwell v McLaren*, which had dealt with that matter much more directly. As such, the comments *Friends of the Oldman River* about the public right of navigation

are largely *obiter*, and certainly should not be taken to elevate the public right of navigation to a quasi-constitutional status.

997. As noted, a public right of navigation may be established by dedication. Dedication is a doctrine that requires an actual subjective intention of an owner to dedicate; the intention must be carried out; and it must be accepted by the public. All of these can be inferred from open and unobstructed use by the public for a substantial period of time.

> *Gibbs v Grand Bend* (1995), 49 RPR (2d) 157 at paras 109-11 (Ont. CA), Plaintiffs' Book of Authorities, Tab 26.

998. However, it should be noted that after the assertion of British sovereignty in the Great Lakes, the Crown acted in ways inconsistent with the existence of a public right of navigation. The general public was forbidden to enter "Indian Country" (which included SONTL until 1774) by the *Royal Proclamation*. Even after the *Quebec Act*, there was no public right of entry to the territory annexed to Quebec at that time. It was not until the introduction of English law by statute in 1792 that domestic English common law applied at all there. This rebuts any possibility of dedication of a public right of navigation arising at that point, since the public was prohibited from going there.

> Paras 567-573 (*Royal Proclamation*)
>
> Paras 574-610 (*Treaty of Niagara*)
>
> *The Quebec Act*, *1774* (UK), RSC 1985 App 2, No 2, Plaintiffs' Book of Authorities, Tab 135.
>
> M.D. Walters, "Aboriginal Rights, *Magna Carta* and the Exclusive Right to Fisheries in the Waters of Upper Canada" (1998), 23 Queen's L.J. 301 at pages 353-358, Plaintiffs' Book of Authorities, Tab 202.

999. Nor is public navigation now treated in Canadian law as an absolute right that can never be limited. For example, Parliament has passed legislation authorizing the conveyances of

any part of the St. Lawrence Seaway to (not-for-profit) corporations, which may also be authorized to establish and collect fees for the use of the Seaway. Navigation now usually also requires a boat licence, and the payment of fees for launching boats or using locks. Thus, in practice, the public right of navigation has been limited for ordinary regulatory objectives. It should not be treated as some paramount right that could interfere with the recognition of constitutionally protected Aboriginal title and rights.

> *Canada Marine Act*, SC 1998 c 10, ss 80 and 92, Plaintiffs' Book of Authorities, Tab 123.
>
> *Great Lakes Pilotage Tariff Regulations* (SOR/84-253), Schedule 1, Plaintiffs' Book of Authorities, Tab 129.
>
> *Canal Regulations*, CRC 1564, Schedules 6 and 7, Plaintiffs' Book of Authorities, Tab 124.
>
> *Vessels Registry Fees Tariff*, SOR/2002-172, Plaintiffs' Book of Authorities, Tab 138.

CONCLUSION ON THE LEGAL POSITION OF ABORIGINAL TITLE (1763-1982)

1000. It is therefore submitted that from 1763 to 1982 the legal situation was that:

(a) Indigenous customary rights to lakes and lakebeds, where they existed, were preserved and incorporated into the common law as Aboriginal title, and prevailed over the general common law.

(b) This is so even if Aboriginal title over the beds of navigable waters is inconsistent in some ways with the general common law right of navigation.

(c) However, Aboriginal title was subject to limitation (or even extinguishment) by clear and plain legislation or by a treaty.

(d) The Treaty of Niagara and the *International Boundary Waters Treaty Act* did limit the exercise of Aboriginal title over the beds of the Great Lakes.

(e) It is possible that a public right of navigation has been established by dedication in some locations. This is a fact-specific inquiry that will turn on the historical context in each location.

Coexistence and Reconciliation of Rights Post 1982

1001. The legal position changed with the *Constitution Act, 1982.* The purposes of s. 35 of the *Constitution Act, 1982* are to recognize the fact of prior occupation of territory by Indigenous peoples, and to reconcile this fact with the assertion of Crown sovereignty.

> *Constitution Act, 1982*, s 35, Plaintiffs' Book of Authorities, Tab 126.
>
> *R. v Gladstone*, [1996] 2 SCR 723 at para 72, Plaintiffs' Book of Authorities, Tab 74.

1002. To fulfil these purposes, Indigenous perspectives must be considered alongside common law perspectives.

> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 112, Plaintiffs' Book of Authorities, Tab 18.
>
> See also C. Rebecca Brown, *Starboard or Port Tack? Navigating a Course to Recognition and Reconciliation of Aboriginal Title to Ocean Spaces* (LL.M. thesis, U.B.C., 1999, at pp. 60-62, Plaintiffs' Book of Authorities, Tab 167.

1003. The perspective of the Great Lakes Anishinaabe is that water spaces were every bit as central to their territories as were dry land spaces. Further, SON, sometimes in concert with other Anishinaabek of Lake Huron and Georgian Bay, exercised control over water spaces.

(a) Anishinaabe customary laws regarding land use provided that local Anishinaabe groups (of which SON was one) controlled local land use, while allowing for collective action of various groups when the Anishinaabe faced an external challenge.

See paras 351-384

(b) the geography of Lake Huron/Georgian Bay is such that control of only a few external access points allowed control of the entire Lake. SON and allied Anishinaabe groups controlled all the access points to Lake Huron/Georgian Bay.

See paras 379-380

(c) in 1615, SON (together with other Anishinaabe groups on Georgian Bay) met Champlain, the first European to reach Georgian Bay, with a massive show of force, and only allowed him to proceed once he had established a relationship with the Georgian Bay Anishinaabek.

See paras 466-468

(d) Anishinaabe living on Lake Huron and Georgian Bay (which included SON) drove the Haudenosaunee out of the region in the late 17th century

See paras 472-487

(e) The Great Lakes Anishinaabek clearly articulated that the lakes were part of their territory when the British first entered Lake Huron/Georgian Bay in 1761.

See paras 501-502

(f) The Three Fires Confederacy (of which SON was a part), led by Chief Pondiac, gained control of many British forts, and kept the British out of Lake Huron and Georgian Bay in 1763.

See paras 519-566

(g) The Anishinaabe agreed to the British entering Lake Huron/Georgian Bay once the British agreed to suitable conditions at the Treaty of Niagara in 1764.

See paras 574-610

(h) The British relied on Anishinaabe geographical knowledge and military support to maintain a British presence in Lake Huron/Georgian Bay until after the war of 1812-1814.

See paras 622-627

(i) When European fishermen began fishing in SONUTL in the 1830s, they leased fishing grounds from SON.

See paras 628-634

1004. Generally speaking, the perspective of many Indigenous peoples is that dry land and water are viewed in unity. This is a further reason why Aboriginal title to land and waters should be dealt with in similar ways, rather than ruling that it is legally possible for there to be Aboriginal title to dry land, but not over navigable waters.

> *Report of the Royal Commission on Aboriginal Peoples*, (Ottawa: Minister of Supply and Services, 1996 Vol 2 at p. 448, Plaintiffs' Book of Authorities, Tab 189.
>
> See also C. Rebecca Brown, *Starboard or Port Tack? Navigating a Course to Recognition and Reconciliation of Aboriginal Title to Ocean Spaces* (LL.M. thesis, U.B.C., 1999), at p. 8 (22 of 51 asserted Aboriginal claims in B.C. included ocean space), and at pp. 59-152 (examples), Plaintiffs' Book of Authorities, Tab 167.

1005. Although Aboriginal title now enjoys constitutional protection, the Supreme Court of Canada has established the principle that any conflicting rights should be "reconciled", and has established a methodology for reconciling the pre-existing occupation of Indigenous peoples with the sovereignty of the Crown – the doctrine of justified infringement. This methodology is more than equal to the task of reconciling competing Aboriginal and public common law rights (such as fishing or navigation). It would pre-empt this methodology to decide in advance that public

navigation must always and unconditionally prevail, much less to decide that that the need for public navigation prevents even the recognition of an underlying Aboriginal ownership right.

> *Constitution Act, 1982*, s 35, Plaintiffs' Book of Authorities, Tab 126.
>
> *R v Sparrow*, [1990] 1 SCR 1075 at pages 1109-1119, Plaintiffs' Book of Authorities, Tab 86.
>
> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 110-111 and 160-169, Plaintiffs' Book of Authorities, Tab 18.
>
> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at paras 77-88, Plaintiffs' Book of Authorities, Tab 108.

1006. For example, in *R v Gladstone*, the Court recognized an Aboriginal commercial fishing right, which, practically speaking, *prima facie* could amount to an exclusive right, despite the potential impact of that exclusive right on the common law public right of fishing. The Court noted that constitutional Aboriginal rights could indeed impact common law rights. The Court was of the view that the Aboriginal right had been infringed by limitations placed on it by statute and ordered a new trial on the question of whether or not these limitations were justified infringements.

> *R v Gladstone*, [1996] 2 SCR 723 at paras 28, 30, 59, 67 and 82, Plaintiffs' Book of Authorities, Tab 74.
>
> See explanation of *Gladstone* in *Delgamuukw*: "Had the test for justification applied in a strict form in *Gladstone*, the aboriginal right would have amounted to an exclusive right to exploit the fishery on a commercial basis." *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 164, Plaintiffs' Book of Authorities, Tab 18.
>
> See also *Alderville Indian Band v Canada*, 2014 FC 747 at paras 39-40, Plaintiffs' Book of Authorities, Tab 3.

1007. SON submits that the justified infringement method of reconciling competing rights of Aboriginal title and the public right of navigation is preferable to a sovereign incompatibility analysis.

1008. This is consistent with the view expressed by the majority in *Mitchell v M.N.R*. In that case, the Aboriginal right in question was framed by the Court as a right to bring good across the Canada-U.S. boundary at the St. Lawrence River for the purposes of trade. The Court held that right in question had not been proved on the evidence. However, two justices went further and said that such a right could not, as a matter of law, be recognized by a Canadian Court because they were of the view that this was incompatible with Canadian sovereignty. The remaining five justices declined to comment on this, noting that so far, the doctrines of extinguishment, infringement and justification had been affirmed as the appropriate framework for resolving conflicts between Aboriginal rights and competing claims, including claims based on Crown sovereignty.

> *Mitchell v M.N.R,* [2001] 1 SCR 911, 2001 SCC 33 at paras 63-4 per McLachlin CJ, Plaintiffs' Book of Authorities, Tab 48.

1009. Even the two justices in *Mitchell* who relied on sovereign incompatibility acknowledged that it had been given excessive scope in the past, for example when "[t]he assertion of sovereign authority was confused with doctrines of feudal title to deny aboriginal peoples any interest at all in their traditional lands or even in activities related to the use of those lands". They were of the view that it should be applied "sparingly", and gave as an illustration of its proper application that Canadian law could not recognize an Aboriginal right to organize a private army, even if the evidence was that an Aboriginal group had done just that prior to the assertion of British sovereignty.

> *Mitchell v M.N.R,* [2001] 1 SCR 911, 2001 SCC at paras 149-154 per Binnie J, Plaintiffs' Book of Authorities, Tab 48.

1010. The Defendants urge that Aboriginal title to the beds of navigable waters cannot be recognized because that would be incompatible with Crown sovereignty. SON submits that, even if it is appropriate to apply a sovereign incompatibility analysis (rather than a justified infringement analysis) to this question, it would be excessive to conclude that Aboriginal title to the beds of navigable waters threaten Crown sovereignty. Owning the bed of a waterbody is nothing like the threat to public order that would be caused by recognizing an Aboriginal right to organize a private army. SON submits that Aboriginal title to the beds of waterbodies is no more threatening to Crown sovereignty than is private ownership of beds of waterbodies, which is a routine circumstance.

LIMITATIONS ON ABORIGINAL TITLE POST 1982

1011. While Aboriginal title is an exclusive right, which has constitutional protection, the Supreme Court of Canada has made clear that it is not an absolute right. Both provincial and federal governments may infringe Aboriginal rights if the infringement satisfies a "justification" test.

1012. In order to impose its decisions in the face of a *prima facie* infringement of a treaty or Aboriginal right, the Crown has to show that it (1) procedurally consulted and accommodated the Aboriginal community, (2) imposed its decision based on a "compelling and substantial objective", and (3) imposed its decision in a way consistent with its fiduciary obligations.

> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 77, Plaintiffs' Book of Authorities, Tab 108.

1013. In order to show that the Crown's fiduciary obligation has been fulfilled, the Crown must establish that its actions were "proportionate". An action is proportionate where: (1) the infringement of Aboriginal title is *necessary* to achieve the Crown's goals (rational connection), (2) the infringement goes *no further than necessary* to achieve the Crown's goals (minimal

impairment), and (3) the benefits expected from the infringement are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact).

> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 87, Plaintiffs' Book of Authorities, Tab 108.

1014. At the preliminary threshold level of whether or not there is a "compelling and substantial objective" which could possibly justify an infringement of a treaty or Aboriginal right, when the Aboriginal right in question is inherently exclusive (such as Aboriginal title), quite a broad, but not unlimited, range of legislative purposes are considered to be suitable:

> But legitimate government objectives also include "the pursuit of economic and regional fairness" and "the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups" (para. 75). By contrast, measures enacted for relatively unimportant reasons, such as sports fishing without a significant economic component (*Adams*, *supra*) would fail this aspect of the test of justification.

> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 161. See also paras 164-165 and 167, Plaintiffs' Book of Authorities, Tab 18.

> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 83, Plaintiffs' Book of Authorities, Tab 108.

1015. It is therefore submitted that a public right of navigation can easily coexist with Aboriginal title. The justified infringement analysis could apply in a straightforward manner should Canada legislate the relationship of Aboriginal title and the public right of navigation. The precise details of how this reconciliation is to be done will be the outcome of such a "justification" analysis, should Canada choose to advance such an argument. This is the method of analysis applied in *R. v Gladstone*.

> See para 1006 (*explanation of Gladstone*)

1016. Another example is provided by *R. v. Pamajewon*. In that case, the Court decided *on the evidence* that the First Nation in question did not have an Aboriginal right to regulate high stakes gambling. Had the evidence been stronger, it would have been necessary to reconcile the Aboriginal right with the relevant sections of the *Criminal Code*, through the justification analysis.

> *R. v Pamajewon*, [1996] 2 SCR 821 at para 38 per L'Heureux-Dubé J, Plaintiffs' Book of Authorities, Tab 81.

1017. SON accepts that some navigational purposes, such as defence, control of international boundaries, and international commerce are purposes that could possibly justify an infringement of their Aboriginal title, if the particular infringement in question passed the proportionality tests. However, SON submits that public navigation for purely recreational purposes does not even meet the threshold of being the kind of purpose which is sufficiently compelling and substantial to justify an infringement. Nor is such an infringement likely to pass the proportionality tests for justification, since it would not infringe Aboriginal title as little as possible.

1018. In the alternative, should the Crown advance such an argument, it would be open to a Court to consider whether making public navigation (for any purpose) a paramount right was a justified infringement of Aboriginal title.

Crown Ownership Not Needed to Secure Public Navigation

INTRODUCTION

1019. SON submits that whatever scope of public navigation might be a justified infringement of Aboriginal title, it can co-exist with Aboriginal title to the beds of navigable waters.

1020. Crown ownership of the beds of navigable waterways is not needed to secure public navigation. These are separate concepts. To view private ownership of the beds of navigable

waters as a threat to Crown sovereignty confuses the concepts of sovereignty and ownership. Rather, the common law is able to deal with the coexistence of public navigation and private ownership of land covered by water, both for tidal and non-tidal water.

> *Ngati Apa v New Zealand (AG*), CA173/01 (19 June 2003), [2003] NZCA 117, [2003] 3 NZLR 643 at paras 13, 25-26 and 47 per Elias C.J., and at 197 and 204 per Tipping J.

1021. For example, as explained below, fee simple ownership is an "exclusive" right, but it may co-exist, in the case of ownership of the bed of a body of navigable water, with a public right of navigation.[1224] There is no basis for treating Aboriginal title in a fundamentally different way. That would be reading the "exclusivity" of Aboriginal title to be absolute. Since Aboriginal title has constitutional protection, reconciling it with public rights may be somewhat more complex than for fee simple ownership, but that is a necessary part of the process of reconciliation with Indigenous peoples.

THE TIDAL AND NON-TIDAL DISTINCTION

1022. English common law dealt with tidal and non-tidal waters in completely different ways. Further, it conflated the concepts of "tidal" and "navigable". The non-tidal regime applied to non-tidal waters (sometimes, confusingly, called non-navigable waters), even if they were in fact navigable. For non-tidal waters, there was a presumption that a riparian land owner owned to the middle of the body of water, even if the grant of title described the land as ending at the water's edge (the "*ad medium filum*" presumption). From the ownership of the bed would flow ownership of minerals and exclusive fishing rights. For tidal waters there was no such presumption of ownership of the riparian owner, whose title ended at the high-water mark. Instead there was a

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[1224] See also: Evidence of Jennifer Keyes, Transcript, vol 79, January 22, 2020, p. 10118, line 2 to p. 10120 line 2 and p. 10123, lines 11-17.

presumption of Crown ownership of the area between the high-water mark and the low water mark, known as the foreshore, as well as to the seabed. On top of this, there were some restrictions on the Crown ownership aimed at preserving public use of tidal waters.

> *Murphy v Ryan* (1868), I.R. 2 C.L. 143 at pages 148-149 and 152, Plaintiffs' Book of Authorities, Tab 43.
>
> M.D. Walters, "Aboriginal Rights, *Magna Carta* and the Exclusive Right to Fisheries in the Waters of Upper Canada" (1998), 23 Queen's L.J. 301 at pp.313-315, Plaintiffs' Book of Authorities, Tab 202.
>
> D.W. Lambden and I. de Rickje, *Legal Aspects of Surveying Water Boundaries*, (Scarborough: Carswell, 1996) at pp. 1-16, Plaintiffs' Book of Authorities, Tab 179.

1023. There has been considerable legal debate in Canada about whether the tidal or non-tidal common law legal regime should apply to waters such as the Great Lakes which were non-tidal yet navigable in fact. The Ontario cases which dealt directly with that issue are as follows.

(a) *Caldwell v McLaren* (1884) was about the right to float logs down a stream. The Court noted that in England, owners of the soil abutting a stream own ad medium filum, but there may be public right of navigation if established by prescription or dedication. In Upper Canada, the Court noted, prescription or dedication would be rare, and a right at common law to navigate was in great doubt until an 1849 statute which legislated public rights to float logs. Apart from this, submerged land can be owned.

> *Caldwell v McLaren*, [1884] UKPC 21 (7 April 1884) at 10-11, (1884), 9 App Cas 392 at 404-5 (PC), Plaintiffs' Book of Authorities, Tab 11.

(b) In 1908 the matter of ownership of the bed of a navigable waterway was squarely before the Ontario Court of Appeal. The Court ruled that the non-tidal *ad medium*

filum presumption **does** apply to navigable rivers in Ontario, subject to "such public rights of navigation as may exist". The Court noted that contrary views had been expressed before, but not actually decided.

Keewatin Power Co. v Kenora (Town) (1908), 16 OLR 184 at pages 190-191 (CA), Plaintiffs' Book of Authorities, Tab 38.

(c) This was followed by legislation in 1911 making the *ad medium filum* rule inapplicable to navigable waters in Ontario. However, this only removed the presumption that a riparian owner owned to the middle of the waterway – it did not affect other ways by which a person might come into ownership of the bed of a waterway (e.g. by the grant of a waterlot).

Bed of Navigable Waters Act, SO 1911, c.6 (reversing the result of *Keewatin Power Co. v Kenora* in relation to *ad medium filum*), Plaintiffs' Book of Authorities, Tab 122.

(d) In the 1970s, a case called *Walker v Ontario (AG)*, involving lands on the shore of Lake Erie, rejected the idea of using the tidal waters concept of a high-water mark as the limit of a land grant. Instead it established that, barring any express exception, a riparian owner owns to the edge of the water (which is a feature of the non-tidal regime in England).

> It appears to me, therefore, that I am driven to this conclusion, that any Crown patent which indicates that one of the boundaries of the lands granted is to be a boundary of water, then it establishes that boundary as at the water's edge and not upon any bank or high water mark unless, of course, the grant clearly reserves by description or otherwise a space between the lands granted and the water boundary or unless the boundaries of the lot can be so clearly delineated by reference to an original plan of survey as to clearly except or reserve to the Crown a space between the lands granted and the water's edge.

> *Walker v Ontario (Attorney General)*, [1971] OR 151 (HCJ), (1970), 14 DLR (3d) 644 at 673, 1970 CanLII 953, aff'd [1972] 2 OR 558 (CA), aff'd [1975] 1 SCR 78, Plaintiffs' Book of Authorities, Tabs 109 and 110.

1024. The result of these legal developments, SON submits, is that in Ontario, the underlying legal regime applicable to non-tidal navigable waters is the common law of non-tidal waters in England, which, however, has been significantly changed by statute: e.g. an 1849 statute legislated public rights to float logs, and a 1911 statute removed the *ad medium filum* presumption. The idea of applying the common law tidal regime to navigable waters in Ontario was rejected by the Ontario Court of Appeal in *Keewatin Power Co.*, and by the Supreme Court of Canada in *Walker*.

> See generally, D.W. Lambden and I. de Rickje, *Legal Aspects of Surveying Water Boundaries*, (Scarborough: Carswell, 1996) at pp. 1-16, Plaintiffs' Book of Authorities, Tab 179.

1025. There have been cases dealing with the law in western Canada that seem to suggest otherwise. In particular,

(a) *Friends of the Oldman River* suggested that the distinction between tidal and non-tidal waters has been abandoned in Canada. However, as noted above, *Friends of the Oldman River* was not about ownership of the bed of a waterbody, nor about navigation rights. It was about whether a federal environmental assessment was required for a dam being built by Alberta, and the comments that case about public navigation were made in response to an argument by Alberta about Crown immunity. Nor did it mention any of the above Ontario cases which address much more directly issues about whether the tidal or non-tidal regime applied to non-tidal navigable waters. SON therefore submits that these comments should not be read as determinative of the law of Ontario.

See para 995 (*Friends of the Oldman River*).

Friends of the Oldman River v Canada, [1992] 1 SCR 3 at pages 53-54, Plaintiffs' Book of Authorities, Tab 24.

(b) Further, in *R v Nikal*, and *R v Lewis*, in the context of a fishing prosecutions, the Court refused to apply the English non-tidal rules to navigable non-tidal rivers in B.C. However, the Court restricted that ruling to western Canada, noting that the law of Ontario may be different on this point. The Court in *Nikal* also attempted to explain *Keewatin Power Co.* by suggesting that the result was solely a result of the wording of the statute adopting English law that did not provide for adapting English common law to local circumstances. However, the judges in *Keewatin Power Co.* had been emphatic that the common law presumption of *ad medium filum* which they applied **was** appropriate to local circumstances.

R v Nikal, [1996] 1 S.C.R. 1013 at paras 65-71, Plaintiffs' Book of Authorities, Tab 80 and *R v Lewis*, [1996] 1 SCR 921 at paras 55-62, Plaintiffs' Book of Authorities, Tab 77.

Keewatin Power Co. v. Kenora (Town) (1908), 16 OLR 184 at page 191 per Moss CJO and at pages 196 and 200-201 per Meredith JA, Plaintiffs' Book of Authorities, Tab 38.

See also Peggy J. Blair, "No Middle Ground: *Ad Medium Filum Aquae*, Aboriginal Fishing Rights, and the Supreme Court of Canada's Decisions in *Nikal* and *Lewis*" (2001), 31 RGD 515 at pp. 581-7, Plaintiffs' Book of Authorities, Tab 165.

1026. The tidal/non-tidal distinction is significant because there are different presumptions in play, and different statutes in play. Therefore the tidal and non-tidal legal regimes must be analyzed separately. Conflating them has led to the confusion outlined above.

1027. However, for the present purpose of examining the interaction between the rights of the owner of the bed of a waterbody and the rights of the public to navigate, it turns out that, in fact, as will be explained below, in either the tidal or the non-tidal legal regime, it is possible for

the bed of a water body to be privately owned, and for such ownership to co-exist with public rights of navigation.

THE NON-TIDAL REGIME

1028. In the common law regime for non-tidal waters, the bed can be owned by an individual, but the water can still be subject to a right of public navigation (even when the water is referred to as "non-navigable", meaning non-tidal). These rights can coexist easily.

> *Murphy v Ryan* (1868), IR 2 CL 143 at pages 148 and 152, Plaintiffs' Book of Authorities, Tab 53.
>
> *R v Robertson* (1882), 6 SCR 52 at page 115 (per Ritchie, CJ), (the public may have a navigation easement, and this is perfectly consistent with private ownership of the bed.), Plaintiffs' Book of Authorities, Tab 82.
>
> M.D. Walters, "Aboriginal Rights, *Magna Carta* and the Exclusive Right to Fisheries in the Waters of Upper Canada" (1998), 23 Queen's L.J. 301 at p. 314, Plaintiffs' Book of Authorities, Tab 202.
>
> *Keewatin Power Co. v Kenora (Town)* (1908), 16 OLR 184 at page 192 (C.A.), Plaintiffs' Book of Authorities, Tab 38.

THE TIDAL REGIME

1029. In tidal waters, although there is a presumption of Crown ownership, it is still possible for private rights of ownership of the seabed to exist. Such rights could flow either from Crown grant or from prescription or usage.

(a) Proof of an exclusive fishing right is evidence of ownership of the soil beneath where that right is exercised.

> *Attorney General v Emerson*, [1891] AC 649 at pages 655 and 662 (HL), Plaintiffs' Book of Authorities, Tab 6.

(b) It is possible to obtain prescriptive title by adverse possession of the foreshore, and this is not negated by the existence of public rights of navigation or fishing.

Roberts v Swangrove Estates, [2007] EWHC 513, especially at para 45 (Ch), aff'd [2008] EWCA Civ 98, Plaintiffs' Book of Authorities, Tab 94.

(c) Interests in the soil below the low water mark (i.e. the seabed) are possible at common law, including such interests arising from custom and usage.

Ngati Apa v New Zealand (A.G.), CA173/01 (19 June 2003), [2003] NZCA 117, [2003] 3 NZLR 643 at para 51 (per Elias CJ). See also paras 133-135 (per Keith J), Plaintiffs' Book of Authorities, Tab 54.

See also *Kauwaeranga Judgment* (1870) (NZ Native Land Court), reprinted in (1984), 14 VUWLR 227, Plaintiffs' Book of Authorities, Tab 36.

See also M.D. Walters, "Aboriginal Rights, *Magna Carta* and the Exclusive Right to Fisheries in the Waters of Upper Canada" (1998), 23 Queen's L.J. 301 at pp. 314-315, Plaintiffs' Book of Authorities, Tab 202.

See also Lord Chief Justice Hale, *De Jure Maris*, ed. F. Hargreave 1787, reprinted S. Moore (London: Stevens and Hayes, 1888) at pp. 392ff, Plaintiffs' Book of Authorities, Tab 173.

CONCLUSION ON CROWN OWNERSHIP NOT NEEDED TO SECURE PUBLIC NAVIGATION

1030. SON therefore submits that it is possible for the common law to accommodate the concept of private ownership of the beds of navigable water bodies, both of the tidal and non-tidal nature. The ownership of navigable water bodies can be subject to public navigation rights. Such rights are often presumed, but may need to be established by prescription or dedication.

Comparative Coexistence

COEXISTENCE IN CANADIAN JURISPRUDENCE

1031. The test to meet for establishing Aboriginal title is that the Indigenous group exclusively occupied the land prior to the assertion of Crown sovereignty. This may be proved by showing "regular use of definite tracts of land for hunting, **fishing**, or otherwise exploiting its resources" [emphasis added].

Delgamuukw v British Columbia, [1997] 3 SCR 1010 at paras 143 and 149, Plaintiffs' Book of Authorities, Tab 18.

Tsilhqot'in Nation v British Columbia, 2014 SCC 44, [2014] 2 SCR 257 at paras 37-44, Plaintiffs' Book of Authorities, Tab 108.

1032. The modern legal test for navigability is a very low threshold, such that most bodies of water of any consequence can be considered navigable. Even the usefulness of a river or creek at high water seasons for recreational canoe travel or for floating logs can render it navigable.

Coleman v Ontario, (1983) 27 RPR 107 at para 15 (Ont. HC), Plaintiffs' Book of Authorities, Tab 15.

See also *Canoe Ontario v Reed,* (1989) 69 OR (2d) 494 (HC), Plaintiffs' Book of Authorities, Tab 12.

See also *Middlesex Centre (Municipality) v MacMillan*, 2016 ONCA 475, Plaintiffs' Book of Authorities, Tab 46.

1033. It is therefore submitted that if Aboriginal title cannot exist in navigable waters, the statement by the Supreme Court of Canada that Aboriginal title can be proved by showing use of the land for fishing purposes will be robbed of its meaning.

See para 1031

See also: *R. v Van der Peet*, [1996] 2 SCR 507 per McLachlin J (dissenting) at para 275, Plaintiffs' Book of Authorities, Tab 89: "… the Crown took subject to existing aboriginal interests in the lands they traditionally occupied **and their adjacent waters**, even though those interests might not be of a type recognized by British law … the interests which aboriginal peoples had in using the land **and adjacent waters** were to be removed only by solemn treaty … This right to use the land **and adjacent waters** as the people had traditionally done for sustenance may be seen as a fundamental aboriginal right." [emphasis added].

1034. From Aboriginal title to the beds of water bodies would flow rights including mineral rights, an exclusive fishery, and rights to protect the water from pollution or other environmental damage. There is no reason why concerns about public navigation should prevent the recognition of such rights, which routinely coexist with public navigation.

COEXISTENCE IN CANADIAN ABORIGINAL TREATIES

1035. Indigenous interests dealt with by treaties, both historic and modern, have sometimes included title to the beds of navigable waters.

> Treaty #119 (5 May 1871, with the Chippewa Indians of Sarnia), Plaintiffs' Book of Authorities, Tab 148.
>
> Treaty #215 (and #177) (7 May 1879, with the Wyandott Indians of the Township of Anderdon), Plaintiffs' Book of Authorities, Tab 149.
>
> Treaty #179 (27 April 1880, with the Wyandott Indians of the Township of Anderdon), Plaintiffs' Book of Authorities, Tab 150.
>
> See also Peggy J. Blair, "Settling the Fisheries: Pre-Confederation Crown Policy in Upper Canada and the Supreme Court's decisions in *R. v. Nikal* and *Lewis*" (2001) 31 R.G.D. 87 at pp. 110-115, Plaintiffs' Book of Authorities, Tab 166.
>
> See also: *An Act for the Settlement of Certain Questions Between the Governments of Canada and Ontario Respecting Indian Lands*, S.C. 1891 c. 5, Schedule, para 4 (overtaken by later agreements), Plaintiffs' Book of Authorities, Tab 121.
>
> *Report of the Royal Commission on Aboriginal Peop*les, (Ottawa: Minister of Supply and Services, 1996) at pp. 723 (Inuvialuit), 724 (Nunavut), 727 (Yukon Umbrella Agreement), 730 (Sahtu Dene and Métis and Gwich'in), Plaintiffs' Book of Authorities, Tab 190.
>
> *Land Claims Agreement Between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada,* 22 January 2005, (given force of law by *Labrador Inuit Land Claims Agreement Act*, SC 2005 c 27, Plaintiffs' Book of Authorities, Tab 131) at para 4.2.3, Plaintiffs' Book of Authorities, Tab 161.

COEXISTENCE IN NEW ZEALAND

1036. In New Zealand, the Court of Appeal ruled in 1955 that the bed of the Wanganui River (a navigable river), at the time of assertion of Crown sovereignty and of a treaty, was held by the Maoris according to their customs and usages. Since these customs and usages involved exclusive use, this amounted to an exclusive land title.

> *Re the Bed of the Wanganui River*, [1955] NZLR 419 (C.A.) at p. 428 per Hutchison J, pp. 433-434 per Cooke J. and pp. 461-2 per North J. (The Wanganui River is navigable – at pp. 444-5 per F.B. Adams J, dissenting but not on this point.), Plaintiffs' Book of Authorities, Tab 91.

1037. In 2003, the New Zealand Court of Appeal refused to strike out a claim of Maori title to the seabed.[1225] The Court emphasized that the common law preserved private rights that existed prior to the assertion of Crown sovereignty, and warned against confusing sovereignty and ownership.

> *Ngati Apa v New Zealand (A.G.)*, CA173/01 (19 June 2003), [2003] NZCA 117, [2003] 3 NZLR 643 at para 13, 26, 47, 49, 86 per Elias C.J., and 184-5, 197, 204 per Tipping J, Plaintiffs' Book of Authorities, Tab 54.
>
> See also Jacinta Ruru, "Lenses of Comparison across Continents: Understanding Modern Aboriginal Title in *Tsilhqot'in Nation* and *Ngati Apa*," (2015) 48 UBC L Rev 903, Plaintiffs' Book of Authorities, Tab 196.

1038. The result in *Ngati Apa* was reversed legislatively by *The Foreshore and Seabed Act 2004*, which vested the foreshore and seabed in the Crown absolutely.

> *The Foreshore and Seabed Act 2004*, (NZ) 2004/93, Exhibit 4444, s 13, The Plaintiffs' Book of Authorities, Tab 134.

1039. That 2004 legislation attracted much criticism:

(a) While that legislation was still in the planning stages, in 2004, the Waitangi Tribunal[1226] issued a report that followed an urgent inquiry in the Crown's policy

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[1225] See also Paul McHugh, "Treaty 45 1/2 (1836), the Crown's 'unremitting solicitude' and the 'forever' promise to the Saugeen Ojibway Nation: a report on British imperial policy and practice in Upper Canada during the 1830s" (2015), Exhibit 4441, para 1.4; Evidence of Prof. Paul McHugh, Transcript vol 68, December 10, 2019, p. 8849, line 22 to p. 8850, line 11.

[1226] The Waitangi Tribunal is a specialist tribunal in New Zealand to hear claims, historical and contemporary, against the Crown. It is made up of Maori land court judges and others, and hearings

for the foreshore and seabed. The Report concluded that the Crown's policy clearly breached the principles of the Treaty of Waitangi, and failed in terms of wider norms of domestic and international law, especially since it contemplated expropriating Maori property rights and cutting off Maori access to the Courts that might have redressed that expropriation.

The Waitangi Tribunal, Report on the Crown's Foreshore and Seabed Policy, March 4, 2004, Exhibit 4447, pp xi and xiv-xv.

(b) In 2005 the UN Committee on the Elimination of Racial Discrimination issued a decision that concluded that *The Foreshore and Seabed Act 2004* contained discriminatory aspects against the Maori, in that it extinguished the possibility of establishing Maori customary titles over the foreshore and seabed and failed to provide a guaranteed right of redress. The Committee considered this inconsistent with New Zealand's obligations under articles 5 and 6 of the *International Convention on the Elimination of all forms of Racial Discrimination*.

Committee on the Elimination of Racial Discrimination, Decision 1(66), New Zealand Foreshore and Seabed Act, 11 March 2005, Exhibit 4448, para 6.

(c) The UN Special Rapporteur came to a similar conclusion and recommended that *The Foreshore and Seabed Act 2004* should be repealed or amended by the New Zealand Parliament and that the Crown should engage in treaty settlement negotiations with the Maori that would recognize the inherent rights of Maori in the foreshore and seabed.

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are chaired by Maori land court judges. Evidence of Prof. Paul McHugh, Transcript vol 68, December 10, 2019, p. 8853, lines 13-23.

UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavengaen, March 13, 2006, Exhibit 4449, para 92.

(d) In 2009, a New Zealand Ministerial Review Panel was set up to provide independent advice on *The Foreshore and Seabed Act 2004*. That Panel, too, viewed the Act as severely discriminatory against the Maori. The Panel proposed the repeal of the 2004 Act and engagement with Maori and the public about their interests in the foreshore and seabed. It also recommended that new legislation be enacted to reflect the Treaty of Waitangi and to recognise and provide for the interests of the Maori and the public in the foreshore and seabed.

Marine and Coastal Area (Takutai Moana) Act 2011 (NZ) 2011/3, Exhibit 4445, preamble, Plaintiffs' Book of Authorities, Tab 132.

1040. In the result, *The Foreshore and Seabed Act 2004* was repealed in 2011 and new legislation enacted that restored any Maori customary interests that had been extinguished by the 2004 Act.

Marine and Coastal Area (Takutai Moana) Act 2011 (NZ) 2011/3, Exhibit 4445, preamble, and ss 3, 4, 5 and 6, Plaintiffs' Book of Authorities, Tab 132.

1041. A New Zealand court has subsequently recognized Maori customary marine title to a portion of the seabed.

Re Tipene, [2016] NZHC 3119 at paras 1-10, Plaintiffs' Book of Authorities, Tab 92.

1042. SON submits that the following can be concluded from the New Zealand experience:

(a) Common law in New Zealand is able to recognize indigenous customary title in submerged land, including freshwater rivers, the foreshore and the seabed;

(b) A legislative attempt to preclude such title from being recognized legally was found racially discriminatory and inconsistent with international human rights standards and conventions; and

(c) Maori customary law as recognized in New Zealand is sufficiently analogous to the Canadian law of Aboriginal title that the New Zealand experience can assist this Court.

COEXISTENCE IN AUSTRALIA

1043. In Australian law, the content of Aboriginal title (called native title in Australia) and rights are determined by the content of the applicable Aboriginal custom. There is no **necessary** inconsistency between Crown sovereignty over seabeds and Aboriginal title and interests.

> *The Commonwealth of Australia v Yarmirr*, [2001] HCA 56, 184 ALR 113 at paras 9-11, 61 and 76, Plaintiffs' Book of Authorities, Tab 106.

1044. In general, when faced with an inconsistency between Crown rights and Aboriginal rights, the Australian approach to reconciling this conflict is to unpack the bundle of rights which constitute Aboriginal title and to decide if each particular component has been extinguished by virtue of being incompatible with a common law right, rather than to deal with extinguishment as an all-or-nothing matter.

> *Western Australia v Ward,* [2002] HCA 28 at para 82, Plaintiffs' Book of Authorities, Tab 112.
>
> *The Commonwealth of Australia v Yarmirr*, [2001] HCA 56, 184 ALR 113 at para 42, Plaintiffs' Book of Authorities, Tab 106.
>
> See also C. Rebecca Brown and James I. Reynolds, "Aboriginal Title to Sea Spaces: A Comparative Study" (2004) 34:1 UBC L Rev 449 at p. 473, Plaintiffs' Book of Authorities, Tab 168.

1045. Australian Courts have perceived an inconsistency between Crown rights in relation to the seabed and Aboriginal rights if the underlying Aboriginal custom is exclusive in character. In the result, the Australian Courts have recognized a non-exclusive Aboriginal title to portions of the seabed.

> *The Commonwealth of Australia v Yarmirr*, [2001] HCA 56, 184 ALR 113 at paras 76, 98 – 100, Plaintiffs' Book of Authorities, Tab 106.
>
> See also C. Rebecca Brown and James I. Reynolds, "Aboriginal Title to Sea Spaces: A Comparative Study" (2004) 34:1 UBC L Rev 449 at pp. 471-472, Plaintiffs' Book of Authorities, Tab 168.

1046. Nonetheless, in a later case, the High Court of Australia recognized the right of an Aboriginal group to exclude persons from Aboriginal land in the intertidal zone (i.e. the foreshore).

> *Northern Territory of Australia v Arnhem Land Aboriginal Trust*, [2008] HCA 29 at paras 1-8, Plaintiffs' Book of Authorities, Tab 56.

1047. Canadian courts treat extinguishment differently than Australian courts. Rather than unpacking a bundle of rights and considering any that were inconsistent with a common law right to be extinguished, Canadian courts view extinguishment globally, and with a higher onus of proof than in Australian law. As noted above, competing rights are reconciled through the justifiable infringement analysis.

(a) As an illustration, in Australian law, a Crown grant of an inconsistent right extinguishes Aboriginal title.

> *Western Australia v Ward,* [2002] HCA 28 at paras 78-79, Plaintiffs' Book of Authorities, Tab 112.

(b) In Canadian law, extinguishment of Aboriginal title requires "clear and plain" intent, and a grant of a fee simple title is viewed as an infringement of Aboriginal title, which may or may not be justified on the facts.

> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 167 and 180.
>
> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 124, Plaintiffs' Book of Authorities, Tab 108.
>
> See also C. Rebecca Brown and James I. Reynolds, "Aboriginal Title to Sea Spaces: A Comparative Study" (2004) 34:1 UBC L Rev 449 at pp. 470-471**,** Plaintiffs' Book of Authorities, Tab 168.

1048. It is therefore submitted that the Australian law doctrine involving partial extinguishment of rights by inconsistency with competing common law rights is not applicable in Canada.

COEXISTENCE IN THE UNITED STATES

1049. In the United States, the term used for Aboriginal title is "original Indian title" or "Indian right of occupancy." Aboriginal title in the United States is held by "Indians" by virtue of the fact that they were there before there was a Unites Sates of America.[1227]

1050. The rules that govern Aboriginal title in the United States come from the common law.[1228] To prove Aboriginal title, a tribe must show actual, continuous and exclusive use of the claimed lands and waters for a long period of time.[1229]

[1227] Evidence of Mr. Bruce Greene, Transcript vol 46, September 30, 2019, p. 5661, line 18 to p. 5662, line 8.
[1228] Evidence of Mr. Bruce Greene, Transcript vol 46, September 30, 2019, p. 5661, lines 18-25, p. 5662, lines 1-25 and p. 5663, lines 1-3.
[1229] Evidence of Mr. Bruce Greene, Transcript vol 46, September 30, 2019, p.5663, lines 11-20.

1051. In the United States, there is no legal distinction between Aboriginal title to land and to land under water. Tribes can and do have Aboriginal title to both.[1230] Tribes that have Aboriginal title rights in navigable waterways today include, for example:

> *Confederated Salish and Kootenai Tribes v Namen,* 665 F 2d 951 (9th Cir 1982), Exhibit 3842, Plaintiffs' Book of Authorities, Tab 16 – the Confederated Salish & Kootenai Tribes of Flathead Reservation includes the southern half of Flathead Lake, a navigable body of water roughly 26 miles long and up to 5 miles wide.
>
> *Puyallup Indian Tribe v Port of Tacoma,* 717 F 2d 1251 (9th Cir 1983), Exhibit 3852, Plaintiffs' Book of Authorities, Tab 68 – the Puyallup Indian Tribe holds title to the riverbed of part of the Puyallup River.
>
> *Muckleshoot Indian Tribe v Trans-Canada Enters., Ltd.,* 713 F 2d 455 (9th Cir 1983*),* Exhibit 3853, Plaintiffs' Book of Authorities, Tab 52 - the Muckleshoot Reservation includes sections of the White River, including the bed of the river and its waters as well as the land along either bank.

1052. In the United States, Aboriginal title includes the right of full use, possession and enjoyment of the lands and waters claimed – very much like a fee title owner.[1231] Aboriginal title and the rights afforded thereto are no different if the land underwater is below a navigable waterway.[1232] These rights are good against third parties, including the states, but are subject to the paramount powers of the United States Congress.[1233]

[1230] Evidence of Mr. Bruce Greene, Transcript vol 46, September 30, 2019, p.5674, line 25 to p. 5675, line 16 and p. 5682, lines 7-24.
[1231] Evidence of Mr. Bruce Green, Transcript vol 46, September 30, 2019, p.5663, lines 23-25 and p. 5664, lines 1-8.
[1232] Evidence of Mr. Bruce Greene, Transcript vol 46, September 30, 2019, p. 5681, line 24 to p. 5682, line 6.
[1233] Mr. Bruce Greene, "Indian Aboriginal Title in the United States: Its Origin and Characteristics, and the Inclusion of Navigable Waterways Within its Territory" (2016), Exhibit 4264, p. 2.

1053. Tribes with Aboriginal title to navigable waterways have similar rights to those with Aboriginal title to land.[1234] However, all navigable waterways come with navigable servitude, which means that whatever you do as the owner of the bed of a navigable waterway you cannot interrupt or interfere with the United States government's paramount power over navigable waters.[1235] This paramount power encompasses the United States government authority over navigation, flood control, power production and national defence.[1236]

1054. On the specific point of Aboriginal title to the beds of the Great Lakes, the Supreme Court of Michigan has concluded that a Chippewa Tribe originally had Aboriginal title to a portion of Lake Superior.[1237]

> *People v LeBlanc*, 399 Mich 31, 248 NW 2d 199 (1976), Exhibit 3815, at pp. 205-7 and 217 (map), Plaintiffs' Book of Authorities, Tab 62.

COEXISTENCE AS EMBRACED IN ACADEMIC LITERATURE

1055. What Canadian academic literature there is on the issue of Aboriginal title to navigable waters (both tidal and non-tidal), with one exception, supports that Canadian law should recognize such Aboriginal title where it can be proven.

> M.D. Walters, "Aboriginal Rights, *Magna Carta* and the Exclusive Right to Fisheries in the Waters of Upper Canada" (1998), 23 Queen's L.J. 301, conclusion at p. 368. (supports exclusive Aboriginal fishing rights, among other reasons, as flowing from Aboriginal title to the beds of water bodies), Plaintiffs' Book of Authorities, Tab 202.

[1234] Evidence of Mr. Bruce Greene, Transcript vol 46, September 30, 2019, p. 5685, lines 13-21.
[1235] Evidence of Mr. Bruce Greene, Transcript vol 46, September 30, 2019, p. 5687, line 18 to p. 5688, line 7.
[1236] Cohen's Handbook of Federal Indian Law, 2012 Edition, Exhibit 4269, pp. 1025-1026.
[1237] Evidence of Mr. Bruce Greene, Transcript vol 46, September 30, 2019, p. 5703, line 25 to p. 5704, line 14.

Peggy J. Blair, "Solemn Promises and *Solum* Rights: The Saugeen Ojibway Fishing Grounds and *R. v. Jones and Nadjiwon*" (1996-7) 28 Ottawa L. Rev. 125. (supports exclusive Aboriginal fishing rights, among other reasons, as flowing from Aboriginal ownership of the beds of water bodies), Plaintiffs' Book of Authorities, Tab 163.

Peggy Blair, "Taken for 'Granted": Aboriginal Title and Public Fishing Rights in Upper Canada" (2000), 92 Ontario History 31, Plaintiffs' Book of Authorities, Tab 164.

Peggy J. Blair, "Settling the Fisheries: Pre-Confederation Crown Policy in Upper Canada and the Supreme Court's decisions in *R. v. Nikal* and *Lewis*" (2001) 31 RGD 87, Plaintiffs' Book of Authorities, Tab 166.

Peggy J. Blair, "No Middle Ground: *Ad Medium Filum Aquae*, Aboriginal Fishing Rights, and the Supreme Court of Canada's Decisions in *Nikal* and *Lewis*" (2001), 31 RGD 515, Plaintiffs' Book of Authorities, Tab 165.

C. Rebecca Brown, *Starboard or Port Tack? Navigating a Course to Recognition and Reconciliation of Aboriginal Title to Ocean Spaces* (LL.M. thesis, U.B.C., 1999), Plaintiffs' Book of Authorities, Tab 167.

Billy Garton, "The Character of Aboriginal Title to Canada's West Coast Territorial Sea" (1989), UT Fac L Rev 571, Plaintiffs' Book of Authorities, Tab 171.

Douglas C. Harris, "Indian Reserves, Aboriginal Fisheries, and Anglo-Canadian Law", in Property Rights in the Colonial Imagination and Experience: A Colloquium in Comparative Legal History, University of Victoria, Victoria, BC, February 22-24, 2001, Plaintiffs' Book of Authorities, Tab 175.

C. Rebecca Brown and James I. Reynolds, "Aboriginal Title to Sea Spaces: A Comparative Study" (2004) 34:1 UBC L Rev 449 at pp. 453 and 492**,** Plaintiffs' Book of Authorities, Tab 168.

Sarah E. Hamill, "The Public Right to Fish and the Triumph of Colonial and Dispossession in Ireland and Canada" (2017), 50 UBC L Rev 53, Plaintiffs' Book of Authorities, Tab 174.

F. Matthew Kirchner, "Just the Facts! Aboriginal Title and Proof of Occupation after Marshall; Bernard," (2009) CLE BC Aboriginal Law Conference 2009 at pp.16-18, Plaintiffs' Book of Authorities, Tab 178.

Benjamin Ralston, "Aboriginal Title to Submerged Lands in Canada: Will Tsilhqot'in Sink or Swim," (2016) 8 Indigenous L Bull 22, Plaintiffs' Book of Authorities, Tab 186.

Contra: R. Wright, "The Public Right of Fishing, Government Fishing Policy, and Indian Fishing Rights in Upper Canada" (1994), 86 Ontario History 337, Plaintiffs' Book of Authorities, Tab 204.

CONCLUSION ON COEXISTENCE

1056. SON submits that whatever portion of the common law right of public navigation is ruled to be a justified infringement of Aboriginal title, it can co-exist easily with Aboriginal title to the beds of navigable waters. This is supported by common law doctrine regarding navigable waters, by Aboriginal title jurisprudence, by the content of historic and modern Aboriginal treaties, by a comparative analysis with other jurisdictions, and by the great weight of academic literature. Arguments to the contrary inappropriately confuse ownership, access and jurisdiction. It is not necessary for the Crown to own the beds of waterways in order to access them or exercise jurisdiction over them.

37. CONCLUSION ON ABORIGINAL TITLE

1057. SON's position is that their Aboriginal title has never been extinguished. If the Defendants argue to the contrary that will be addressed in a reply argument.

1058. For all the above reasons, it is submitted that SON has Aboriginal title over SONUTL.

38. THE LEGAL TEST FOR DETERMINATION OF A TREATY

1059. An agreement with an Indigenous party is a treaty if:

(i) both parties have capacity to enter a treaty,

(ii) there was an intention to create obligations,

(iii) mutually binding obligations were made, and

(iv) there was a certain measure of solemnity associated with the agreement.

It is not intended to be a highly technical term of art: the word treaty "merely identifies agreements in which the "word of the white man is given, and by which the latter made certain of [Indigenous peoples'] cooperation."

> *R v Sioui,* [1990] 1 SCR 1025 at pages 1035-1036, 1044, Plaintiffs' Book of Authorities, Tab 85.

1060. Treaties are not limited to agreements about the cession of territory.

> *R v Sioui,* [1990] 1 SCR 1025 at pages 1042-1043, Plaintiffs' Book of Authorities, Tab 85.

1061. The broader historical context, including the relationships between the parties, are key factors to assessing whether a treaty has been made. Formalities are of secondary importance. Factors which may assist in determining if the parties intended to make a treaty include:

(a) continuous exercise of a right in the past and at present: that is, where the treaty rights claimed were exercised by the Indigenous group before the treaty was concluded, and where that Indigenous group continued to behave as if they had such a right in the years that followed the treaty, this supports the conclusion that the activity at issue is the subject of a treaty right

(b) the reasons why the Crown made a commitment. In *Taylor and Williams,* for instance, the fact that the Crown entered into the treaty in part to open the land for settlement supported the conclusion that it was in fact a treaty;

(c) the situation prevailing at the time the document was signed, including the circumstances of the Indigenous signatories. For example, in *Taylor and Williams,* the fact that the Indigenous claimants were suffering economically at the time of

the Treaty militated in favour of finding that they had a treaty right to harvest bullfrogs over a tract surrendered;

(d) evidence of relations of mutual respect and esteem between the negotiators; and

(e) the subsequent conduct of the parties, including whether they behaved as if a right had been preserved or guaranteed by the Treaty.

R v Sioui, [1990] 1 SCR 1025 at page 1045, Plaintiffs' Book of Authorities, Tab 85.

R v Taylor and Williams, [1981] OJ No. 3135, 34 OR (2d) 360 (CA) at paras 10-13, 21, 25, Plaintiffs' Book of Authorities, Tab 88.

1062. Applying these principles, documents that on their face seem to guarantee no rights and which are informal and limited in nature have been found to constitute treaties giving rise to substantive treaty rights, such as rights to harvest over surrendered tracts.

See, for instance:

R v Marshall, [1999] 3 SCR 456, Plaintiffs' Book of Authorities, Tab 78, described at paras 1079-1080, 1085(a).

R v Taylor and Williams,[1981] OJ No. 3135, 34 OR (2d) 360 (CA), Plaintiffs' Book of Authorities, Tab 88, described at paras 1082-1084.

R v Sioui,[1990] 1 SCR 1025, Plaintiffs' Book of Authorities, Tab 85, described at paras 1085(c).

Application to The Treaty of Niagara

1063. SON submits that the Treaty of Niagara satisfies the criteria for being a treaty with the Western Nations. The Ontario Court of Appeal came to the same conclusion in *Chippewas of Sarnia.*

Chippewas of Sarnia Band v Canada (Attorney General), 51 OR (3d) 641 at paras 54-56, Plaintiffs' Book of Authorities, Tab 14.

See paras paras 580-610 *(The Treaty of Niagara*)

(i) Capacity

1064. The Supreme Court has prescribed a broad and generous approach to determining whether an agreement is a treaty, including the preliminary question of whether the parties had the capacity to make a treaty. The question of capacity must be approached from the perspective of whether the Indigenous party would have reasonably assumed the Crown representative had such capacity.

R v Sioui, [1990] 1 SCR 1025 at pages 1035-1036,1038,1040, Plaintiffs' Book of Authorities, Tab 85.

1065. Both the Crown and the Western Nations were represented at Niagara by individuals with the capacity to create a binding treaty. As noted above, the Crown was represented by Sir William Johnson, Superintendent of Indian Affairs for the Northern Colonies, who had the support of the British commander in chief for North America, and was known by the First Nations present to be a senior Crown official with the authority to treat with them. The Western Nations were present in large numbers and identified for themselves a representative to share their views and reflect their consensus.

See paras 492-493 *(William Johnson*)

See paras 577 (*Treaty of Niagara - size and purpose of gathering*)

See 584-586 (*Parties with Capacity and Intent to Bind*)

(ii) Intention to Create Binding Relations

1066. Both Johnson and the Western Nations came to Niagara with the intention to create binding obligations. As noted above, motivated by fear of another uprising after Pondiac's War, Johnson's goal was to renew the British alliance relationship with the Western Nations that had been disrupted by the conflict. He came to the treaty council with treaty terms in mind, which he proposed to the Western Nations. The Western Nations hoped to come to an agreement that would

restore free and open trade at the principal posts, and to set the terms on which Britain would enter their territory.

> See paras 574-579 *(Treaty of Niagara - purpose and context*)
>
> See paras 587-590 (*Appropriate Treaty-Making Protocols and Solemnity)*
>
> See paras 594, 599-602 *(Western Nations at Niagara Participated in the War)*
>
> See paras 603-605 *(Treaty met Johnson's Proposed Terms)*
>
> See para 607 *(Objectives of Western Nations*)

(iii) Mutually Binding Obligations were Made

1067. Johnson and the Western Nations concluded an agreement that reflected many of the commitments each side had hoped to make there. The Western Nations agreed to ally themselves with the British, ignore anti-British rumors, and granted the British access to the Upper Great Lakes for purposes consistent with alliance, trade and the protection of Indigenous lands, while Johnson promised to restore trade and to regard the Western Nations as allies. The arrangement was sealed with a wampum belt, a traditional Anishinaabe mechanism for solemnizing diplomatic agreements.

> See paras 589, 603-608 *(Treaty met Johnson's Proposed Terms)*
>
> See paras 504-506 (*Significance of wampum*)
>
> See paras 613, 619- 620 (*Use of Waterways from 1764 to 1815)*
>
> See para 367 (*Territorial Use Customary Laws of Anishinaabe – Terms of Anishinaabe consent to British entry of Upper Great Lakes)*

1068. Following Niagara, the parties behaved as though they had entered into a treaty. For example, in a letter he wrote to the Lords of Trade after Niagara, Johnson referred to what happened at Niagara with Western Nations as a treaty.

See para 581 (*The Treaty of Niagara is a Binding Treaty*)

1069. The parties also fulfilled the obligations they took on: following Niagara, trade reopened, and the Western Nations granted the British access to the forts and the waterways. The parties adhered to these commitments in the years that followed, which further confirms that they were seen by both parties as binding.

See paras 613-620 (*Use of Waterways from 1764 to 1815)*

(iv) The Solemnity of the Events at Niagara

1070. The negotiation process at Niagara followed a number of customary treaty-making protocols that indicated the solemnity of the occasion, including the smoking of a pipe; the exchange of wampum belts; the use of diplomatic terms like "Brethren"; the exchange of formal speeches; and the identification of representatives from among the Indigenous nations present to act as spokespeople. Johnson also presented the Chiefs with medals and a wampum in order to commemorate the treaty. The Western Nations followed traditional Anishinaabe decision-making protocols that govern treaty making treaty-making.

See paras 504-506 *(Significance of wampum*)

See paras 587-590 *(Appropriate Treaty-Making Protocols and Solemnity)*

See paras 843, 845(a), 847 *(Treaty 72 Anishinaabe decision-making, consensus protocols at treaty*)

NOT RELEVANT TO THE LEGAL TEST FOR DETERMINATION OF A TREATY

1071. Prof. Beaulieu made a number of arguments in his testimony about why he believes that the events at Niagara were not a treaty. SON submits that many of his arguments are not relevant to what this Court is called upon to decide. For example:

(a) Prof. Beaulieu took the position that Niagara did not constitute a treaty with the Western Nations, but merely a renewal of the existing alliance that had been forged

at Detroit in 1761. As discussed in greater detail above, SON takes issue with this conclusion, which fails to account for the fact that most of the Western Nations had participated in Pondiac's War against Britain in the meantime, and that Johnson acknowledged he was treating with some of the Western Nations for the first time. Nonetheless, whether a particular agreement between the Crown and Indigenous people is a renewal of a past alliance or an alliance forged for the first time is not part of the test for whether a given agreement constitutes a treaty in Canadian law.

Prof. Alain Beaulieu, "The Congress at Niagara in 1764" (2016), Exhibit 4381, pp. 70-76, 79-81.

See paras 580-581 *(Treaty of Niagara is a Binding Treaty)*

See paras 591-595 (*Renewal of Alliance is a Treaty)*

See paras 599-602 *(Western Nations at Niagara Participated in the War)*

(b) Prof. Beaulieu also made the point that no war reparations were charged by the British as against the Western Nations. As discussed above, this reflects a strategic choice by Johnson to focus on renewing the Covenant Chain with the Western Nations rather than extracting reparations. Johnson was well aware that most of the Western Nations had participated in Pondiac's War. But in any event, war reparations are not a part of the test for whether an agreement constitutes a treaty in Canadian law.

Prof. Alain Beaulieu, "The Congress at Niagara in 1764" (2016), Exhibit 4381, p. 80.

See paras 591-595 *(Renewal of Alliance is a Treaty)*

(c) Prof. Beaulieu also argued there was no treaty with the Western Nations because no written text of a treaty was produced. As discussed above not all treaties are

written, and it is certainly not a requirement in Canadian law that an agreement be committed to writing in order to be found to be a treaty.

See para 609 *(Treaty of Niagara – significance of lack of written text*)

CONCLUSION ON TREATY OF NIAGARA

1072. For these reasons, SON submits that the events at Niagara constituted a treaty between the Western Nations and the British Crown. Since SON was among the Western Nations, it is part of this treaty relationship.

See para 610 (*SON was very likely one of the Western Nations at Niagara)*

Application to Treaty 45 ½ and Treaty 72

1073. It is common ground among the parties that Treaty 45 ½ and Treaty 72 are treaties, so it is not necessary to apply the above criteria and seek findings in respect of these treaties.

39. PRINCIPLES OF TREATY INTERPRETATION

1074. Interpreting the provisions of treaties between the Crown and Indigenous peoples is not like interpreting an ordinary commercial contract. Treaties are the foundation of how the Crown attempted to reconcile the pre-existing sovereignty of Indigenous peoples with the assumed sovereignty of the Crown. A treaty represents an exchange of solemn promises between the Crown and First Nations: as the Supreme Court of Canada put it in *R v Badger,* "it is an agreement whose nature is sacred".

R v Badger, [1996] 1 SCR 771 at para 41, Plaintiffs' Book of Authorities, Tab 70.

Restoule v Canada (Attorney General), 2018 ONSC 7701 at paras 322, 326, 423, Plaintiffs' Book of Authorities, Tab 93.

R v Sundown, [1999] 1 SCR 393 at para 24, Plaintiffs' Book of Authorities, Tab 87 – "Treaties may appear to be no more than

> contracts. Yet they are far more. They are a solemn exchange of promises made by the Crown and various First Nations They often formed the basis for peace and the expansion of European settlement."

1075. This calls for a different interpretive lens – one which pays close attention to the historical context in which the treaty was concluded, and the power dynamics that underpinned the treaty-making process. In *R v Taylor and Williams,* the Ontario Court of Appeal observed that:

> Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect. Although it is not possible to remedy all of what we now perceive as past wrongs in view of the passage of time, nevertheless it is essential and in keeping with established and accepted principles that the courts not create, by a remote, isolated current view of past events, new grievances.
>
> *R v Taylor and Williams*, [1981] OJ No. 3135, 34 OR (2d) 360 (CA) at para 8, Plaintiffs' Book of Authorities, Tab 88.

1076. The honour of the Crown is always at stake in the process of treaty-making and treaty-interpretation. To maintain the honour of the Crown, courts will presume that the Crown behaved in good faith and intended to fulfill its promises, and they will interpret treaties accordingly. Courts will not sanction sharp dealing.

> *R v Badger*, [1996] 1 SCR 771 at para 41, Plaintiffs' Book of Authorities, Tab 70.
>
> *R v Marshall*, [1999] 3 SCR 456 at paras 4, 49-52, Plaintiffs' Book of Authorities, Tab 78.

1077. The principles that have been found to apply to the interpretation of treaties between the Crown and Indigenous groups include:

(a) That it is appropriate and necessary to rely on extrinsic evidence to the treaty text to properly interpret the meaning of a treaty, even in the absence of ambiguity in the treaty text;

(b) That ambiguities and uncertainties in the meaning of a treaty provision should be resolved in favour of the Indigenous treaty partners;

(c) That treaties ought to be interpreted in a way that reconciles the interests of the treaty partners; and,

(d) That narrow, technical readings of treaty promises, particularly those that serve to deprive Indigenous treaty partners from the benefit of the Crown's promises, are to be avoided.

(A) EXTRINSIC EVIDENCE TO THE TREATY TEXT

1078. Evidence other than the written text of the treaty must be considered in the interpretation of a treaty, even in the absence of ambiguity on the face of the written text. This includes oral history evidence and the practices of the Indigenous group before and after the treaty was made, as well as evidence of the reasons that the parties entered into the treaty

> *R v Taylor and Williams*, [1981] OJ No. 3135, 34 OR (2d) 360 (CA) at paras 8, 10-12, Plaintiffs' Book of Authorities, Tab 88.
>
> *R v Marshall*, [1999] 3 SCR 456 at paras 9-14, 44, Plaintiffs' Book of Authorities, Tab 78.

1079. For example, in *R v Marshall,* at issue was the interpretation of a "trade clause" in a peace and friendship treaty with the Mi'kmaq. The provision at issue stated:

> And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck

> houses as shall be appointed or Established by His Majesty's Governor at Lunenbourg or Elsewhere in Nova Scotia or Accadia.
>
> *R v Marshall,* [1999] 3 SCR 456 at para 5, Plaintiffs' Book of Authorities, Tab 78.

1080. The Supreme Court of Canada held that this provision, read in light of all the evidence tendered at trial, gave rise to a treaty right to hunt, fish and gather to trade for "necessaries" (that is, a moderate livelihood). This right exempted the defendant from various *Fisheries Act* regulations under which he had been charged. In coming to this conclusion, the Supreme Court discussed extrinsic evidence about the context in which the treaty was negotiated, concluded and committed to writing, as well as the interests of the parties in concluding the treaty, to properly understand meanings that may not appear on the face of the written text. The Supreme Court directed that it was essential to give equal weight to the "concerns and perspective of the [Indigenous] people" in undertaking this analysis, and to recognize the difficulties that Indigenous peoples may confront in proving their interpretation of the treaty text, such as the fact that Indigenous parties did not "for all practical purposes, have the opportunity to create their own written record of the negotiations" and instead have to rely on oral history and documents drafted by the Crown or other Europeans to establish their interpretation of a treaty.

> *R v Marshall,* [1999] 3 SCR 456 at paras 7, 9-14, 19, 44. See also para 5 and 67, Plaintiffs' Book of Authorities, Tab 78.

(B) AMBIGUITIES RESOLVED IN FAVOUR OF THE INDIGENOUS PARTY

1081. It is a core doctrine of treaty interpretation that treaties should be "liberally construed" and any uncertainties, ambiguities, or doubtful expressions should be resolved in favour of the Indigenous party. A corollary to this is that any limitations which restrict the rights of Indigenous

parties under a treaty should be narrowly construed. This interpretive principle arises in part, out of the context in which historical treaties were made:

> The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction.

R v Badger, [1996] 1 SCR 771 at para 52. See also para 41, Plaintiffs' Book of Authorities, Tab 70.

Simon v The Queen, [1985] 2 SCR 387 at paras 25-31, Plaintiffs' Book of Authorities, Tab 100.

R v Taylor and Williams, [1981] OJ No. 3135, 34 O.R. (2d) 360 (C.A.) at para 20, Plaintiffs' Book of Authorities, Tab 88.

R v Sioui, [1990] 1 SCR 1025 at pages 1035-1036, Plaintiffs' Book of Authorities, Tab 85.

Nowegijick v The Queen, [1983] 1 SCR 29 at page 36, Plaintiffs' Book of Authorities, Tab 57.

1082. For example, in *R v Taylor and Williams,* two men had been charged and convicted of taking bullfrogs during the closed season established under provincial conservation legislation. The issue on appeal was whether they were insulated from this legislation by a treaty right to harvest. The language of the treaty stated:

> And the said Buckquaquet, Pishikinse, Pahtosh, Cahgahkishinse, Cahgagewin and Pininse, as well for themselves as for the Chippewa Nation inhabiting and claiming the said tract of land as above described, do freely, fully and voluntarily surrender

> and convey the same to His Majesty without reservation or limitation in perpetuity.
>
> *R v Taylor and Williams*, [1981] OJ No. 3135, 34 OR (2d) 360 (CA) at paras 5, 1, Plaintiffs' Book of Authorities, Tab 88.

1083. The Court directed that: "If there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but **such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible"** [emphasis added].

> *R v Taylor and Williams*, [1981] OJ No. 3135, 34 OR (2d) 360 (CA) at para 20, Plaintiffs' Book of Authorities, Tab 88.

1084. Applying this reasoning and looking at the extrinsic evidence, the Court of Appeal in *Taylor and Williams* concluded that the defendants had a treaty right to harvest bullfrogs. The Court relied on the fact that the First Nations who were party to the treaty had taken bullfrogs in that region since earliest memory; that their oral tradition recognized this right; and that they had continued to exercise the right without interruption until the present. It also noted that it would have been difficult for the First Nation to survive if their "ancient right to hunt and fish for food was not continued." Taken together with evidence that continued hunting and fishing were discussed by the parties prior to the signature of the treaty, this supported the inference that a construction of the treaty which recognized the harvesting rights of the First Nations was to be preferred, notwithstanding the language of the treaty text.

> *R v Taylor and Williams*, [1981] OJ No. 3135, 34 OR (2d) 360 (CA) at paras 10-22, Plaintiffs' Book of Authorities, Tab 88.

(C) RECONCILE THE GOALS AND INTERESTS OF THE PARTIES

1085. Treaties were intended to reconcile the goals and interests of the parties to the treaty at the time and should be interpreted in a way consistent with that process of reconciliation. This has

translated into giving specific and powerful meanings to what – on their face – seem to be vague references in the text of treaties. For example:

(a) In *R v Marshall,* as noted above, a written provision in a 1760 treaty that stated only that trade should be limited to "truckhouses" was held to give rise to a treaty right to hunt, fish and gather, and to trade the products of those activities for a moderate livelihood. Part of the Court's reasoning was that, in light of the historical record, it was in the British's interests too, to guarantee the Mi'kmaq the right to provide for themselves. This was part of the British strategy to secure peace with the Mi'kmaq. The result is that what reads on its face as a restriction on trade is interpreted as a substantive treaty right to harvest.

R. v Marshall, [1999] 3 SCR 456 at paras 22-25. See also paras 5 and 67, Plaintiffs' Book of Authorities, Tab 78.

(b) In *R v Sundown,* the Supreme Court concluded that the Treaty 6 First Nations' right to hunt, fish and trap included a right to a hunting cabin. The Court came to this conclusion by examining how the Cree in the area had hunted historically and how they hunted in the present. They determined that a hunting cabin was "reasonably incidental" to the kind of expeditionary hunting that the First Nation did, both historically and in the present, and thus fell within the scope of the right.

R v Sundown, [1999] 1 SCR 393 at paras 26-33, Plaintiffs' Book of Authorities, Tab 87.

(c) In *R v Sioui,* the Supreme Court was called upon to determine whether a brief letter from General Murray to the Huron constituted a treaty that could shield a member of the Huron from a regulation preventing the cutting of trees, camping and making fires in a national park. The Court relied heavily on extrinsic evidence about the

historical context to determine that it was in the interests of the British to enter into a solemn agreement to make peace with the Huron. The agreement was accordingly found to constitute a treaty that guaranteed to the Huron the right to carry on their customs and religion in the park.

R v Sioui, [1990] 1 SCR 1025 at pages 1030-31, 1052-1055, 1066-1072 , Plaintiffs' Book of Authorities, Tab 85.

(D) AVOID TECHNICAL/NARROW READINGS OF TREATY TERMS

1086. Courts will avoid narrow or technical readings of treaty provisions that have the effect of substantially depriving Indigenous people of the benefit of Crown promises. This is necessary in order to preserve the honour of the Crown. For example, in *R v. Sioui,* the treaty at issued stated that the Huron tribe "are received upon the same terms with the Canadians, being allowed the free Exercise of their Religion, their Customs, and Liberty of trading with the English". The Court concluded that it was necessary to give this promise a territorial component in order for the promise to have "real value and meaning".

R v Sioui, [1990] 1 SCR 1025 at pages 1031, 1067, Plaintiffs' Book of Authorities, Tab 85.

See also: *R. v Sundown*, [1999] 1 SCR 393*,* Plaintiffs' Book of Authorities, Tab 87, where the Supreme Court of Canada concluded that the express right to hunt included the implied right to build shelters to carry out the hunt. This was necessary to make the right to hunt meaningful, in light of the traditional (and contemporary) expeditionary hunting practices of the Cree of that area.

The Application of Treaty Interpretation Principles

1087. As is clear from the examples set out above, in practice, these interpretation principles have been applied in a way that essentially amounts to rectification of the treaty text – that is, by

supplying the deficiencies in the treaty to give real value and meaning to the agreement, with reference to the interests and objectives of both sides.

> *R v Marshall*, [1999] 3 SCR 456 at paras 5, 43-44, 53-56, Plaintiffs' Books of Authorities, Tab 78.

Proper Interpretation of the Promise to Protect the Peninsula

1088. In Treaty 45 ½, the Crown promised to protect the Peninsula forever for SON from "the encroachment of the whites". One issue in interpreting the scope of the Crown's duties that flow from this promise is the proper interpretation of the phrase "encroachments of the whites". SON submits that the proper interpretation of this phrase is a broad, and encompasses trespass, timber theft, and more permanent forms of squatting.

1089. The evidence in this trial has been that the "encroachments of the whites" included squatting, trespass and timber theft. SON submits that this is how the phrase would have been naturally understood by SON at the time Treaty 45 ½ was concluded. Treaty 45 ½ was made in a context of Euro-Canadian encroachment on SON lands. Bond Head referenced this in his speech to the Saugeen Ojibway. The promise he made was to protect what remained if SON would only let the Euro-Canadian settlers have the rest. There is nothing in the record to suggest that SON would have found more temporary or semi-permanent encroachments – for instance, to steal timber – to be less of an infringement of their rights. In fact, in the years that followed Treaty 45 ½, SON regularly complained not just about more permanent forms of squatting, but also about Euro-Canadian timber thieves encroaching on their lands, or coming to ask about their land, and asked the Crown to assist them in preventing them from doing so. A broad and purposive approach to the interpretation of the promise to protect set out in Treaty 45 ½ (as directed by the Supreme Court of Canada in cases like, *Badger, Nowegijick* and *Simon*) calls for a finding that

"encroachment of whites" included all unauthorized occupation and use of the Peninsula: squatting, trespass and timber theft. Any lesser interpretation would essentially serve to deprive SON a considerable aspect of what was promised to them in Treaty 45 ½."

> See paras 648-665 (*Events of the Treaty Council; The Promise to Protect was the Main Consideration)*
>
> See para 722 *(Squatting in Upper Canada and on the Peninsula)*
>
> See para 732-736 *(Encroachments on the Peninsula)*
>
> *R. v Badger*, [1996] 1 SCR 771 at para 41, 52. Plaintiffs' Book of Authorities, Tab 70.
>
> *Nowegijick v The Queen,* [1983] 1 SCR 29 at page 36, Plaintiffs' Book of Authorities, Tab 57.
>
> *Simon v The Queen*, [1985] 2 SCR 387 at paras 25-31, Plaintiffs' Book of Authorities, Tab 100.

1090. A broad interpretation of the term encroachments to capture trespass, timber theft and squatting also best reconciles the respective interests of the Crown and SON on entering Treaty 45 ½. SON's interest in entering Treaty 45 ½ was to ensure the Peninsula, the only land that remained to them, was protected for their use and benefit. This definition of encroachments accounts for SON's interest in entering the treaty while having *no meaningful impact* on the Crown's primary interest in entering Treaty 45 ½ - that is, relieving the pressure of settlement by opening up the lands south of the Peninsula to Euro-Canadians.

> *R v Marshall,* [1999] 3 SCR 456 at paras 9-14, 44. See also para 5 and 67 (text of treaty which was found to make inapplicable to the defendant various Fisheries Act regulations), Plaintiffs' Book of Authorities, Tab 78.
>
> See paras 660-665 *(The Promise to Protect was the Main Consideration*
>
> See: *R v Taylor and Williams*,[1981] OJ No. 3135, 34 OR (2d) 360 (CA) at para 11, Plaintiffs' Book of Authorities, Tab 88, where a Crown objective of facilitating Euro-Canadian settlement did not

> preclude the finding that the First Nations signatory to a land cession treaty preserved their harvesting rights over the surrendered tract

1091. Finally, to the extent that there is any ambiguity in the phrase "encroachment of the whites", it should be interpreted in a liberal manner that preserves the rights of SON. This favours an interpretation that includes a broad range of encroachments, including various forms of trespass, timber theft and squatting.

> *R v Badger*, [1996] 1 SCR 771 at para 41, 52, Plaintiffs' Book of Authorities, Tab 70.
>
> *Nowegijick v The Queen,* [1983] 1 SCR 29 at page 36, Plaintiffs' Book of Authorities, Tab 57.
>
> *Simon v The Queen*, [1985] 2 SCR 387 at paras 25-31, Plaintiffs' Book of Authorities, Tab 100.

Proper Interpretation of Treaty 45 ½: Creating a Reserve for SON

1092. SON further submits that the correct interpretation of Treaty 45 ½ was that it created a reserve for SON alone, not a general reserve for some larger configuration of Indigenous peoples. We have made detailed factual submissions at paragraphs 674 to 701 on the following points:

(a) The Crown did not come to Treaty 45 ½ with any plan to make a general reserve on the Peninsula. The Crown's plan prior to the treaty was instead to centralize Indigenous people at Manitoulin Island.

(b) Treaty 45 created a general reserve on Manitoulin Island. It is structured as a surrender of Manitoulin Island to the Crown to hold in reserve for those First Nations that would wish to come there. On the other hand, there is no such surrender provision in Treaty 45 ½. The text of Treaty 45 ½ makes no real suggestion that a general reserve was created on the Peninsula. If the Crown's

intent was for the two treaties to have the same effect, they would not have been structured so differently.

(c) Neither the Crown nor SON believed at the time that the creation of a general reserve on the Peninsula was a term or condition of Treaty 45 ½. This is evident from the accounts of observers to the Treaty.

(d) SON and Crown officials instead understood that the promise to protect the Peninsula for "you" referred to SON.

(e) Both SON and Crown officials behaved in the years that followed Treaty 45 ½ as if the Treaty had created a reserve on the Peninsula for SON alone.

See paras 674-701 (*Treaty 45 ½ set aside the Peninsula for SON*)

1093. SON's interest in entering Treaty 45 ½ was to have its remaining land base on the Peninsula protected from white encroachment. The Crown's interest was to open up the portion of SONTL south of the Peninsula to white settlement. Neither turned on creating a general reserve on the Peninsula.

See paras 659, 660-665, 667, 674-701 *(Treaty 45 ½)*

1094. To the extent that there is any ambiguity in the treaty text or historical record– which SON submits there is not – this should be resolved in favour of protecting SON's rights to the Peninsula and limiting the Crown's interference with those rights. That militates against an interpretation of Treaty 45 ½ that would have as its effect the limiting of SON's rights to its reserve in the Peninsula by effecting a surrender of the land for more general settlement, or by setting as any kind of condition on Treaty 45 ½ the creation of a general reserve on that land.

Proper Interpretation of Treaty 72 and SON's Harvesting Rights

1095. Treaty 72 says nothing explicit about affecting traditional harvesting or hunting rights. However, SON has argued above, at paragraphs 861 to 865 and elsewhere, the intentions and interests of both parties to Treaty 72 were that SON members could continue to harvest traditional resources over the territory surrendered in Treaty 72.

> Treaty 72, Exhibit 2175, p 13-14, Plaintiffs' Book of Authorities, Tab 142.
>
> See paras 330- 339 (*SON Harvesting after 1854)*
>
> See paras 861-865 *(SON's Interests; Crown's Interests)*
>
> See paras 319-347 (*Hunting, Trapping and Gathering: SON's Harvesting from 1830 to Present)*

1096. From SON's perspective, it would have been unthinkable that Treaty 72 would have required them to stop harvesting. The translation of "full and complete surrender" in Anishinaabemowin would not necessarily connote that SON was giving up access to the land for traditional purposes as long as this was still compatible with the use of the land by others. There remains a firm belief among SON members that Treaty 72 did not affect harvesting rights. And SON members have acted in accordance with this belief – harvesting throughout SONTL, including the surrendered portions of the Peninsula, until the present day.

> See paras 861-862 (*SON's interests)*
>
> See paras 319-347 (*Hunting, Trapping and Gathering: SON's Harvesting from 1830 to Present*)

1097. It was in neither party's interests at the time for SON to stop harvesting over the tract surrendered. The Crown needed and wanted SON to continue to support themselves during a period (the mid 19th century) in which Crown officials placed a high priority on cutting the costs of the Indian Department. Continued harvesting over the tract surrendered in Treaty 72 was the

only way this objective could be realized. This did not interfere meaningfully with the Crown's objective of settling the Peninsula, since hunting and harvesting is typically compatible with settlers' land uses, up to and including harvesting. SON needed and wanted to continue their traditional way of life, and to ensure their people could make a livelihood.

> See paras 861-*865 (SON's Interests; Crown's Interests)*
>
> See paras 816-823 *(Treaty 72 – Oliphant's Motivations for Securing a Surrender of the Peninsula)*
>
> See: *R v Taylor and Williams*,[1981] OJ No. 3135, 34 OR (2d) 360 (CA) at para 11, Plaintiffs' Book of Authorities, Tab 88, where a Crown objective of facilitating Euro-Canadian settlement did not preclude the finding that the First Nations signatory to a land cession treaty preserved their harvesting rights over the surrendered tract.

1098. SON submits that the correct interpretation of Treaty 72 is that it was not intended to, and did not, affect whatever harvesting rights SON had at the time. To the extent that the written text of Treaty 72 is ambiguous on the issue of harvesting rights, this ambiguity should be resolved in favour of SON and the preservation of its rights, in line with the principles set out in *Badger* and *Nowegijick.*

> *R v Badger*, [1996] 1 SCR 771 at para 41, 52. See also para 41, Plaintiffs' Book of Authorities, Tab 70.
>
> *Nowegijick v The Queen,* [1983] 1 SCR 29 at page 36, Plaintiffs' Book of Authorities, Tab 57.
>
> *Simon v The Queen*, [1985] 2 SCR 387 at paras 25-31, Plaintiffs' Book of Authorities, Tab 100.

40. THE LEGAL TEST FOR CREATION OF A RESERVE

1099. The leading case on the creation of a reserve is *Ross River Dena Council v Canada,* 2002 SCC 54. In it, the Supreme Court of Canada explained the key requirements for reserve creation under the *Indian Act*:

(a) That the Crown had the intention to create a reserve and that this intention was possessed by Crown agents with sufficient authority to bind the Crown;

(b) That steps were taken to set the land apart for the benefit of the First Nation; and

(c) That the First Nation concerned accepted the setting apart and had started to make use of those lands.

Ross River Dena Council v Canada, 2002 SCC 54 at para 67, Plaintiffs' Book of Authorities, Tab 95.

1100. The Supreme Court of Canada was clear in *Ross River* that its reasoning was not universally applicable to all contexts. The issue in that case was what was required to demonstrate a reserve *as defined in the Indian Act* had been created in the Yukon in the 1950s. There was no treaty governing the area of the claimed reserve. The context of reserve creation 1) in Upper Canada; 2) prior to confederation; 3) prior to the enactment of the *Indian Act*[1238]; and 4) in the context of a treaty is sufficiently distinct from the fact pattern in *Ross River* that it is not clear the reasoning set out in the case should apply directly. Nonetheless, the test set out in *Ross River* is met by SON's reserve on the Peninsula.

Ross River Dena Council v Canada, 2002 SCC 54 at paras 41-44, Plaintiffs' Book of Authorities, Tab 95.

Madawaska Maliseet First Nation v Canada, 2017 SCTC 5 at paras 328-340, Plaintiffs' Book of Authorities, Tab 42.

[1238] The first Indian Act was passed in 1876 (*Indian Act,* SC 1876, c 18 (39 Vict)), though there was an 1868 Act predecessor that dealt with some matters that later became part of the Indian Act such as Indian status (*An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands,* S.C. 1868, c. 42 (31 Vict.)).

Application: Treaty 45 ½ Created a reserve on the Peninsula

(A) BOND HEAD HAD THE INTENTION TO CREATE A RESERVE AND THE CAPACITY TO BIND THE CROWN

1101. In *Ross River,* the Supreme Court of Canada noted that concluding a treaty with a First Nation is "such an authoritative nature that the mental requirement or intention would be implicit or presumptive." The intention to create a reserve expressed in the treaty can be general: "it need not be an intention to create a specific reserve with defined boundaries."

> *Ross River Dena Council v Canada,* 2002 SCC 54 at para 50, Plaintiffs' Book of Authorities, Tab 95.
>
> *Jim Shot Both Sides v Canada*, 2019 FC 789 at para 299, and 290-299 more generally, Plaintiffs' Book of Authorities, Tab 35.

1102. The person with the intention to create the reserve must have the authority to bind the Crown. This is assessed in light of what the Indigenous party reasonably would have believed about the Crown representative's capacity.

> *Ross River Dena Council v Canada,* 2002 SCC 54 at paras 64-66, Plaintiffs' Book of Authorities, Tab 95.
>
> *R v Sioui* [1990] 1 SCR 1025 at page 1040, Plaintiffs' Book of Authorities, Tab 85.

1103. SON submits that the Crown's intent to create a reserve on the Peninsula is evident from Treaty 45 ½. At the treaty council, Bond Head promised that if SON would "cede to him the territory joining Canada Company's Huron Tract [south of the Peninsula], he would **secure to them the Territory North of Owen's Sound**."[1239] The treaty text noted that SON could "repair to that part of your territory **which lies on the North of Owen Sound**" if it surrendered the rest and committed to "protect [the Peninsula] for you forever from the encroachments of the

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[1239] Egerton Ryerson to Lord Glenelg, April 9, 1838, Exhibit 1236, pp. 16-17 [emphasis added].

whites".[1240] As noted above at paragraph 686 the "you" for whom the land was to be protected was the Saugeen Ojibway. This was a promise that the land would be held for SON, and SON alone, and that Euro-Canadians would not be entitled to use that land. Treaty 45 ½ was accepted by the King.[1241]

> See paras 651-658 *(The Events of the Treaty Council)*
>
> See paras 660-665 *(The Promise to Protect was the Main Consideration)*
>
> See para 686 (*Accounts of the Treaty Council and the Text of Treaty 45 ½ - promise to protect for SON)*

1104. This intention was reaffirmed by the 1847 Declaration and the 1851 Proclamation.

> See para 693 *(After the Treaty Council – A Reserve for SON Alone)*

(B) STEPS WERE TAKEN TO SET ASIDE THE PENINSULA

1105. There is no requirement that the Crown follow any particular process in order to be found to have taken steps to set aside a reserve. The question is simply whether the land that is to be the reserve was "specified in some manner." For example, a survey plan or map, or a fence can suffice – in short, an action that demonstrates where persons other than members of the First Nation may settle, and where only members of the First Nation may settle.

> *Ross River Dena Council v Canada,* 2002 SCC 54 at para 67, Plaintiffs' Book of Authorities, Tab 95.

[1240] Treaty 45 ½, August 9, 1836, Exhibit 1128, p. 113 [emphasis added], Plaintiffs' Book of Authorities, Tab 141.

[1241] On October 5, 1836, Lord Glenelg, Colonial Secretary, wrote to Bond Head that the King had approved Treaty 45 ½: "I have received your despatch of the 20th of August last, No. 70, reporting an expedition you had made in Person to the Shores of the Lake Huron, and the Arrangements into which you had there entered with the various Tribes of Indians…. I have thought myself not only at liberty, but obliged, to recommend for His Majesty's Sanction the arrangements and compacts into which you have entered; and… the King has been graciously pleased to approve them" Lord Glenelg to Sir Francis Bond Head, October 5, 1836, Exhibit 1146.

Jim Shot Both Sides v Canada, 2019 FC 789 at paras 301-326, Plaintiffs' Book of Authorities, Tab 35.

See also: *Madawaska Maliseet First Nation v Canada,* 2017 SCT 5 at para 362, Plaintiffs' Book of Authorities, Tab 42.

1106. SON submits that Treaty 45 ½ itself completed this function: it specified that the SON reserve would be on the Peninsula North of Owen Sound, and that the land south of Owen Sound would be open to settlement. This delineates where the reserve was and was not. The boundary set out in the treaty promise was confirmed by survey on June 15, 1837, when the Surveyor General's Office prepared a plan showing the new reserve that delineated precisely its boundary line. In the alternative, if Treaty 45 ½ itself did not complete this function, SON submits that the June 1837 survey constituted an action to set aside the Peninsula.

Treaty 45 ½, August 9, 1854 Exhibit 1128, Plaintiffs' Book of Authorities, Tab 141.

See paras 651-658 *(The Events of the Treaty Council)*

See paras 706-707 *(The survey of SON's reserve on the Peninsula)*

See para 1103

1107. This boundary was adjusted in July 1843 in response to complaints from a SON Chief, extending their reserve further south to the mouth of the Saugeen River to reflect SON's understanding of the reserve they had been promised in Treaty 45 ½. The new boundary was confirmed by the 1847 Declaration and the 1851 Proclamation.[1242]

See paras 706-707 *(The survey of SON's reserve on the Peninsula)*

See para 693 *(After the Treaty Council – A Reserve for SON Alone)*

[1242] Lord Elgin's Declaration, June 29, 1847, Exhibit 1674. See first paragraph of the Declaration; 1851 Proclamation, November 7, 1851, Exhibit 1894, p. 2.

(C) SON ACCEPTED AND MADE USE OF THE RESERVE ON THE PENINSULA

1108. The final requirement set out in *Ross River* is that the "First Nation must have accepted the setting apart and must have started to make use of the lands so set apart". It is not required that the First Nation use every part of the reserve, or that they be aware of its precise boundaries in order to satisfy this stage of the test.

> *Ross River Dena Council v Canada,* 2002 SCC 54 at para 67, Plaintiffs' Book of Authorities, Tab 95.
>
> *Jim Shot Both Sides v Canada,* 2019 FC 789 at paras 327- 339, Plaintiffs' Book of Authorities, Tab 35.

1109. The reserved lands on the Peninsula were occupied and used by SON prior to and after Treaty 45 ½.

> See paras 262-350 (*An Anishinaabe Pattern of Subsistence: Living off the land and water)*
>
> See paras 385-400 (*Scope of Land and Water Use in SONTL)*

CONCLUSION ON RESERVE CREATION

1110. SON accordingly submits that a reserve was created on the Peninsula at the time of Treaty 45 ½, on August 9, 1836, or in the alternative, no later than the date of the survey, June 15, 1837. The boundary was adjusted in July 1843 by Order in Council.

41. THE CROWN'S FIDUCIARY DUTY TO SON

1111. The Treaty 72 claim is rooted in fiduciary duty. SON say that as a result of Treaty 45 ½ and other actions, the Crown took on a fiduciary duty to respect and protect their rights over the Peninsula and breached that duty in the events leading up to Treaty 72.

The Relationship of Law and Equity

1112. Fiduciary duty is an equitable doctrine and is best understood in the context of the distinctive goals and thought patterns of equity. It is, in many ways, a distinct legal system from the ordinary common law system.

> There is still a frontier between Common Law and the Chancery. The training is different, the habit of thought is different, the subjects of jurisdiction are different.

L.I. Rotman, "Fiduciary Law", (Toronto: Carswell, 2005) at p. 226, quoting CK Allen, "Law in the Making", 7th ed., (Oxford: Clarendon Press, 1964) at p. 413, Plaintiffs' Book of Authorities, Tab 192.

> Equity is somewhat of a deductive science. It is interesting to note how often Québec civilians on the Court support judgment positions that are expressly applying one general equitable principle or another.

Donovan WM Waters, "The Reception of Equity in the Supreme Court of Canada (1875-2000)" (2001), 80 Can Bar Rev 620 at p. 690, Plaintiffs' Book of Authorities, Tab 203.

1113. The historic relationship between law and equity has been expressed as common law courts applying the letter of the law, and equity honing the rough edges. Equity, in other words, can operate to correct an unjust result that would be permitted by the ordinary operation of the common law.

Donovan WM Waters, "The Reception of Equity in the Supreme Court of Canada (1875-2000)" (2001), 80 Can Bar Rev 620 at pp. 621-624 and 689-695, Plaintiffs' Book of Authorities, Tab 203.

L.I. Rotman, "The Fusion of Law and Equity: A Canadian Perspective" (2011), at pp. 2 and 3-4, Plaintiffs' Book of Authorities, Tab 193.

1114. This function is threatened if the implications of merging of legal and equitable jurisdictions in a single court – which happened in the 19th century – is misunderstood as leading

to a complete substantive fusion of law and equity as doctrinal systems and modes of thought.[1243] While the same courts now administer law and equity, the two systems retain their distinctive modes of operation and, in the event of a conflict, it is the rules of equity which prevail.

> L.I. Rotman, "Fiduciary Law", (Toronto: Carswell, 2005) at pp. 224-236, Plaintiffs' Book of Authorities, Tab 192.
>
> L.I. Rotman, "The Fusion of Law and Equity: A Canadian Perspective" (2011), at p. 4, Plaintiffs' Book of Authorities, Tab 193.
>
> P.M. Perell (now Justice Perrel), "The Fusion of Law and Equity", (Toronto: Butterworth's, 1990). The entire book is devoted to arguing that 1) law and equity have **not** been completely fused; 2) complete substantive fusion is neither desirable nor possible; and 3) a greater fusion than has been achieved would be desirable. See especially at pp. 1 and 129-137, Plaintiffs' Book of Authorities, Tab 185.
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> *Courts of Justice Act*, RSO 1990, c C.43, as amended, s 96, Plaintiffs' Book of Authorities, Tab 128.

1115. The proper interaction between law and equity has been illustrated recently by the Supreme Court of Canada in *Moore v Sweet*. In that case, Lawrence Moore, while married to Michelle Moore, purchased a life insurance policy, with Michelle designated as beneficiary. Premiums were paid out of their joint bank account. When they separated, they came to an agreement that Michelle would pay the premiums on an ongoing basis, and that she would remain

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[1243] Were law and equity completely fused substantively, it would do away with trusts, which depend on the distinction between a legal and equitable estate. In addition, as noted by Prof. Waters, "Without equity Parliament and the provincial legislatures would have to legislate more often and comprehensively in the private law area, and possibly law reform bodies would be invited to take the place that the courts would no longer have the means of filling. In a country with a civil law inheritance in the form of Québec's private law, it is difficult to see common law Canada moving to eliminate the independent energy that equity principle and doctrine provide. Just what would be the gain?" Donovan WM Waters, "The Reception of Equity in the Supreme Court of Canada (1875-2000)" (2001), 80 Can Bar Rev 620 at p. 691, Plaintiffs' Book of Authorities, Tab 204; Lord Selborne LC, in introducing the *Judicature Act, 1873* (UK), Hansard, 3rd series, vol 214 at p. 319, quoted in L.I. Rotman, "Fiduciary Law", (Toronto: Carswell, 2005) at pp. 226-227, Plaintiffs' Book of Authorities, Tab 192.

the sole beneficiary. Despite this, when Lawrence began living with Risa Sweet, he changed the policy so that Risa was the irrevocable beneficiary. Michelle did not know about this and continued to pay the premiums on the policy until Lawrence's death. The Court was faced with the claims to the proceeds of the policy of two innocent parties: Risa, claiming on the basis of the insurance contract, and on a section of the *Insurance Act*, and Michelle, claiming on the basis of unjust enrichment. There was a split decision at the Ontario Court of Appeal, the dissent explicitly noting that the division on the Court was rooted in the tension between law and equity. The Supreme Court of Canada ruled, 7-2, in favour of Michelle. As the irrevocable beneficiary of the policy, Risa was entitled to the proceeds pursuant to the terms of the insurance contract, and the provisions of the *Insurance Act*. That is, she was the common law owner of the proceeds. Despite this, the Supreme Court ruled that Risa held the proceeds of the policy on constructive trust for Michelle. Thus, Risa was entitled to receive the proceeds of the policy from the insurance company, but not entitled to retain them for herself. There could not be a clearer illustration that the logic of common law and the principles of equity still both operate independently, and that equity can, without changing the actual result of the common law, alter significantly what flows from that result in a practical sense. That is, equity did not invalidate or alter the insurance contract, but intervened to prevent Risa from retaining the proceeds of it for herself.

> *Moore v Sweet*, 2018 SCC 52 at paras 14-15, 73, 93-94, Plaintiffs' Book of Authorities, Tab 51.
>
> *Moore v Sweet*, 2017 ONCA 182 at para 144, per Lauwers, JA (dissenting), Plaintiffs' Book of Authorities, Tab 50.

1116. SON's position about the duality of law and equity precisely parallels the reasoning of the Supreme Court of Canada in *Moore v Sweet*. While not seeking to invalidate Treaty 72, SON does seek equitable remedies which will reverse the practical effects of the treaty to the extent equity will allow. SON seeks this remedy because it is their position that the breach of the Crown's

fiduciary duty resulted in the surrender of the Peninsula in Treaty 72. The particular remedies sought will be the subject of Phase 2 of this litigation.

The Fiduciary Concept

1117. Distinctive to the fiduciary concept is that the beneficiary is especially vulnerable to the actions of another, who is supposed to be acting in the interests of the beneficiary. Therefore, equity monitors such situations to protect and preserve such relationships of trust and confidence. As the Supreme Court of Canada explained in *Galambos v Perez.* "The underlying purpose of fiduciary law may be seen as protecting and reinforcing "the integrity of social institutions and enterprises", recognizing that "not all relationships are characterized by a dynamic of mutual autonomy." Fiduciary law intervenes to offer its protection where one party is given, by the structure of the relationship, the discretionary power to affect the legal or vital practical interests of the other party.

> *Galambos v Perez*, 2009 SCC 48 at para 70, Plaintiffs' Book of Authorities, Tab 25.

1118. As expressed by McLachlin J (as she then was):

> In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently the law seeks a balance between enforcing obligations by awarding compensation and preserving optimum freedom for those involved in the relationship in question, communal or otherwise. **The essence of a fiduciary relationship, by contrast, is that one party pledges itself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged.** [emphasis added]
>
> *Canson Enterprises Ltd. v Boughton & Co.,* [1991] 3 SCR 534 at page 543 per McLachlin J (concurring), Plaintiffs' Book of Authorities, Tab 13.

> McLachlin J was writing for 3 in *Canson*, but it is her judgment that has become influential both in Canada and throughout the common law world. See *AIB Group (UK) Plc v Mark Redler & Co Solicitors*, [2014] UKSC 58 at paras 123-133, Plaintiffs' Book of Authorities, Tab 1; *Huu-ay-aht First Nations v Canada*, 2016 SCT 14 at paras 221-239, Plaintiffs' Book of Authorities, Tab 33; and L.I. Rotman, "The Fusion of Law and Equity: A Canadian Perspective" (2011), Plaintiffs' Book of Authorities, Tab 193.

1119. Careful judicial monitoring of the fiduciary's conduct through an emphasis on deterrence occurs also because – given the fiduciary's relative position of power in relation to the interests of the beneficiary – it is impractical or unfair to expect the beneficiary to be closely monitoring the fiduciary's actions in relation to their interests. Equity accordingly steps in to monitor and protect the fiduciary relationship through strictly enforcing fiduciary duties.

> L.I Rotman, (2017), "Understanding Fiduciary Duties and Relationship Fiduciarity", *McGill Law Journal/Revue de droit de McGill,* 62(4) 974-1042 at p. 984, Plaintiffs' Book of Authorities, Tab 194.
>
> L.I Rotman, "The Vulnerable Position of Fiduciary Doctrine in the Supreme Court of Canada", *Manitoba LJ* Vol 24, No 1, pp. 63-64, Plaintiffs' Book of Authorities, Tab 195.
>
> *Hodgkinson v Simms,* [1994] 3 SCR 377 at pages 420-422, 453, Plaintiffs' Book of Authorities, Tab 32.

1120. In order to do this, equity approaches cases in ways that differ from the common law approach. For example:

(a) Equity punishes not just the actual harms to the beneficiary's interests, but also potential harms and abuses to those interests:

> [I]n certain relationships where one person possesses power over the interests of another which carries with it the potential for abuse, the courts will jealously guard those interests and impose harsh sanctions for any deviation from them.

> This premise, while quite strict, is necessary to maintain the integrity and viability of fiduciary interactions. It accomplishes this by promoting the good faith discharge of one's duty to another and deterring those with authority over the interests of others from using their positions of power or their knowledge for the benefit of persons other than those individuals they are bound to serve. No less prophylactic sanction may provide as immutable and appropriate protection…

L.I. Rotman, "Fiduciary Law", (Toronto: Carswell, 2005) at pp. 61, 57-66, 299-301, Plaintiffs' Book of Authorities, Tab 192.

See also the numerous authorities cited by Prof. Rotman, including, for example, *Potter (Carl B.) Ltd. v Mercantile Bank of Canada,* [1980] 2 SCR 343 at page 352, Plaintiffs' Book of Authorities, Tab 66.

(b) The analysis of whether there has been a breach of a fiduciary duty focuses exclusively on the conduct of the fiduciary, without regard to the beneficiary's decision-making and conduct:[1244]

> Since the power in fiduciary interactions resides exclusively with the fiduciary, whether in unidirectional or reciprocal fiduciary associations, there is no need to look beyond the fiduciaries' conduct in order to ensure the integrity of fiduciary relations. The fiduciaries' manner of fulfilling their obligations dictates whether the integrity of the interaction in question is maintained. This is an objective assessment that measures fiduciaries' actions against the standards imposed by the fiduciary concept. By looking only to the actions of fiduciaries, the fiduciary concept differs from other forms of action, such as contract or tort, which

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[1244] There is a narrow exception to this principle – that well-known principle that equity will not assist a claimant who comes to the Court with unclean hands. However, this principle generally only applies where the claimant seeks to rely on their own misconduct – some form of deceit, fraud, or concealment – in order to establish their claim to relief. If entitlement to equitable relief can be established without reliance on the misconduct, then recovery is generally not barred. See Ellis *Fiduciary Duties in Canada,* looseleaf (Toronto: Carswell, 2009), at pp. 20-42 to 20-45, Plaintiffs' Book of Authorities, Tab 170.

> examine the actions of all parties to the interactions falling within their respective mandates.

L.I. Rotman, "Fiduciary Law", (Toronto: Carswell, 2005) at pp. 299-303, quote at 299, Plaintiffs' Book of Authorities, Tab 192.

(c) It is not an answer to a breach of the fiduciary's duties that the fiduciary acted in good faith (or in the absence of bad faith) as he or she ran afoul of the prescribed standard of conduct.

L.I. Rotman, "Fiduciary Law", (Toronto: Carswell, 2005) at pp. 613-614, 617, Plaintiffs' Book of Authorities, Tab 192.

1121. The structural vulnerability of the beneficiary to the fiduciary's control that justifies the strict, deterrent approach to enforcing fiduciary duties arises also in, and perhaps especially in, the context of the Crown's fiduciary duties to Indigenous people, where the Crown has assumed a "high degree of discretionary control gradually assumed by the Crown over the lives of Aboriginal peoples":

> The fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples.

Wewaykum Indian Band v Canada, [2002] 4 SCR 245 at para 79, Plaintiffs' Book of Authorities, Tab 113.

1122. In fact, it is the very heart of the reason why fiduciary duties may arise in the Crown's relationship with Indigenous peoples:

> This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest Weinrib maintains in his article *The Fiduciary Obligation* (1975), 25 U.T.L.J. 1, at p. 7, that "the hallmark of a fiduciary relation is that the

> relative legal positions are such that one party is at the mercy of the other's discretion"
>
> …
>
> where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

Guerin v The Queen, [1984] 2 SCR 355 at page 384, Plainttiffs' Book of Authorities, Tab 29.

1123. Because of the emphasis on deterring breaches, equity often goes beyond what the common law concept of justice between independent and equal parties would provide in providing remedies for the breach of fiduciary duties. This is illustrated by leading cases of fiduciary breach where there was actually **no economic loss** to the beneficiary, yet the fiduciary was held liable and required to disgorge any benefits he or she received flowing from a breach of duty. For example, in *Soulos v. Korkontzilas*, a real estate broker had purchased a property for himself that his client was trying to purchase, using information gained in the course of representing his client. The client actually suffered no economic loss, due to a decrease in the market value of the property which he had not succeeded in buying. In fact, the client was better off economically because of the broker's actions. Nonetheless, the broker was found to have breached his fiduciary duty and ordered to convey to the property to his client. One reason for this was the deterrent effect of such an order. Another was the recognition that particular assets may have a specific value to the beneficiary that equity should protect:

> Mr. Soulos argues that a constructive trust is required to remedy the deprivation he suffered because of his continuing desire, albeit for non-monetary reasons, to own the particular property in question. No less is required, he asserts, to return the parties to the

> position they would have been in had the breach not occurred. That alone, in my opinion, would be sufficient to persuade a court of equity that the proper remedy for Mr. Korkontzilas' wrongful acquisition of the property is an order that he is bound as a constructive trustee to convey the property to Mr. Soulos.

Soulos v Korkonktzilas, [1997] 2 SCR 2017 at paras 10, 16-17, 33, 42, 46-50, Plaintiffs' Book of Authorities, Tab 101.

See also: *Keech v Sandford* (1726), Sel. Cas. Ch. 61, 25 ER 223 (Eng Ch. Div.), Plaintiffs' Book of Authorities, Tab 37.

See also: L.I. Rotman, *Fiduciary Law*, (Toronto: Carswell, 2005) at p. 58, Plaintiffs' Book of Authorities, Tab 192.

See also: *Mady Development Corp. v. Rossetto*, 2012 ONCA 31 at paras 18-20, Plaintiffs' Book of Authorities, Tab 43.

1124. This reasoning, too, applies in the context of the Crown fiduciary duty in relation to First Nations' reserve lands and Aboriginal title. Simply providing "fair market value" or even alternative lands is not a defence to a breach of fiduciary duty, in part because in the majority of these cases, such lands will have a specific value that must be recognized through equity's special protection. And so, in *Williams Lake*, the Supreme Court of Canada concluded that:

> A breach of fiduciary obligation can be found even where the beneficiary has not proven that the breach resulted in a compensable loss, or has not suffered a loss at all: *Keech v. Sandford* (1726), Sel. Cas. T. King 61, 25 E.R. 223; *Lac La Ronge Band* (S.C.T.), at para. 197. By the same token, the fact that the Crown eventually procured a reserve for the band in the Williams Lake area cannot — as Canada argued, and as the Federal Court of Appeal accepted (at para. 109) — undo the earlier breach of fiduciary duty, although it may reduce the loss that can be said to have flowed from it.

Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development), 2018 SCC 4 at para 49, Plaintiffs' Book of Authorities, Tab 116.

Osoyoos Indian Band v Oliver (Town), [2001] 3 SCR 746, 2001 SCC 85 at para 46, Plaintiffs' Book of Authorities, Tab 59.

See also the justification for the constructive trust remedy ordered in *Semiahmoo Indian Band v Canada,* 1997) [1998] 1 FC 3, 1997 CarswellNat 1316, at paras 89-119, especially paras 95, 99-101, Plaintiffs' Book of Authorities, Tab 99.

Fiduciary Duties

1125. Fiduciary relationships have been characterized as either *per se* or *ad hoc*. *Per se* refers to relationships between particular parties that are historically recognized, such as trustee-*cestui que trust*, executor-beneficiary, solicitor-client, agent-principal, director-corporation, and guardian-ward or parent-child. *Ad hoc* fiduciary relationships refer to those fiduciary relationships that must be established on a case-by-case basis. However, *per se* categories were recognized as such because a number of cases with similar facts passed the *ad hoc* test and were categorized together for convenience, leading to a presumption of a fiduciary relationship in a particular context, which eventually became crystallized into a *per se* category.

Alberta v Elder Advocates of Alberta Society, [2011] 2 SCR 261 at para 33, Plaintiffs' Book of Authorities, Tab 2.

L.I. Rotman, "Fiduciary Law", (Toronto: Carswell, 2005) at pp. 66-73, Plaintiffs' Book of Authorities, Tab 192.

1126. The Crown-Indigenous relationship has become recognized as such a *per se* category. This *per se* relationship is referred to as a *sui generis* fiduciary duty. However, the Crown may also take on a fiduciary duty to an Indigenous group by satisfying the conditions for an *ad hoc* fiduciary duty. Thus, a fiduciary relationship between Crown and an Indigenous group may arise

either from the *sui generis* context or from the particular facts at issue satisfying the general test for an *ad hoc* fiduciary duty.

> *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4, at para 44, Plaintiffs' Book of Authorities, Tab 116.
>
> *Manitoba Métis Federation Inc. v Canada (Attorney General),* 2013 SCC 14 at paras 49-50, Plaintiffs' Book of Authorities, Tab 45.

1127. SON submits that, on both the *ad hoc* and *sui generis* tests, the Crown owed a fiduciary duty to SON to respect and protect their rights over the Peninsula.

THE *AD HOC* FIDUCIARY DUTY

1128. The test for an *ad hoc* fiduciary duty requires:

> (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;
>
> (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and
>
> (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.
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> *Alberta v Elder Advocates of Alberta Society,* [2011] 2 SCR 261 at para 36*,* Plaintiffs' Book of Authorities, Tab 2.

(1) The Undertaking by the Crown Fiduciary

1129. In order to give rise to a fiduciary duty, the alleged fiduciary's undertaking must amount to a "forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary" in relation to the particular interest over to which the fiduciary duty is said to

attach. The undertaking may be found in the relationship of the parties, an imposition by statute, or an express agreement.

> *Alberta v Elder Advocates of Alberta Society,* [2011] 2 SCR 261 at paras 31-32*,* Plaintiffs' Book of Authorities, Tab 2.

1130. While an *ad hoc* fiduciary duty is not often imposed on a government actor, this can be done if an appropriate undertaking is present. In *Alberta v Elder Advocates of Alberta,* the Supreme Court explained, by way of example, that "the necessary undertaking is met with respect to Aboriginal peoples by clear government commitments from the Royal Proclamation, 1763".

> *Alberta v Elder Advocates of Alberta Society,* [2011] 2 SCR 261 at paras 37-48, Plaintiffs' Book of Authorities, Tab 2.

Application: The Undertaking to SON in Treaty 45 1/2

1131. In this case, the required undertaking can be found most explicitly and emphatically in Treaty 45 ½, in which the Crown, addressing SON as "My Children", "engage[d] for ever to protect [the peninsula] for you from the encroachments of the whites". There could not be a clearer "forsaking" of the interests of others. The Treaty identifies to whom the promise is made (the Sauking Indians), the interest to which the undertaking attaches (the Peninsula), what the Crown is undertaking to do (protect the Peninsula from "the encroachment of the whites" for ever), and even specifically identifies that SON's interests in this regard will be preferred to the interests of white settlers. It is an explicit forsaking of the interests of others. SON paid dearly for this undertaking – they agreed to open approximately 1.5 million acres of their territory to settlers.

> Treaty 45 ½, August 9, 1836, Exhibit 1128, p. 113, Plaintiffs' Book of Authorities, Tab 141.

1132. The undertaking in Treaty 45 ½ is to protect the Peninsula from encroachment of the whites for SON, not, for example, to see that SON was compensated in the event the Peninsula was lost to them.

Treaty 45 ½, August 9, 1836, Exhibit 1128, p. 113, Plaintiffs' Book of Authorities, Tab 141.

1133. The undertaking in Treaty 45 ½ was re-affirmed by the Crown twice:

(a) The 1847 Declaration: In the 1847 Declaration, the Crown recognized that the "Saugeen Indians… have for a long time enjoyed and possessed and still do enjoy and possess" the Peninsula, and declared it "our Royal will and pleasure that the said… Indians and their posterity for ever shall possess and enjoy and at all times hereafter continue to possess and enjoy the said Peninsula".[1245] This Declaration was treated by both the Crown as a "deed" in favour of SON to their lands, and was issued on the request of SON as a tool to help protect their lands from encroachment. It was a reaffirmation of the Crown's promise to protect the Peninsula in Treaty 45 ½.

See paras 693(a) (*After the Treaty Council - A Reserve for SON Alone)*

(b) The *Indian Lands Protection Act*, 1850,[1246] declared to apply to the Peninsula by proclamation dated 7 November 1851:[1247] In 1851, the Crown extended a suite of tools to protect Indian reserve lands to the Peninsula. These protections are discussed in detail at paragraphs 730(b) and 750. The Proclamation extending these powers describes the Peninsula as "reserved for the occupation of the Saugeen &

[1245] Lord Elgin's Declaration, June 29, 1847, Exhibit 1674.
[1246] *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury* – 13 & 14 Vict Ch 74, August 10, 1850, Exhibit 1784.
[1247] *Proclamation placing certain Tracts of Land set apart for the Indians under the provisions of the Act* 13&14, Vict Ch. 74, November 7, 1851, Exhibit 1894.

Owen Sound Indians."[1248] This affirms that the undertaking in Treaty 45 ½ had the effect of creating a reserve on the Peninsula for SON, and suggests that the Crown was committing itself to exercise the powers in the 1850 *Indian Land Protection Act* in a manner that protects and preserves SON's occupation of the Peninsula. It also reflects the Crown's intention that SON (and no other group) were to be the beneficiaries of that undertaking.

See paras 730(b) (*The Historic Law about Encroachments on Indian Lands*)

See paras 750 (*Issuing Removal Notices and Warrants*)

See para 693(b) (*After the Treaty Council - A Reserve for SON Alone)*

(2) A Defined Class Vulnerable to the Crown's Control

1134. For an *ad hoc* fiduciary duty to arise, there must exist a "defined person or class of persons" who are "vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them."

> *Alberta v Elder Advocates of Alberta Society,* [2011] 2 SCR 261 at para 33, Plaintiffs' Book of Authorities, Tab 2.

1135. While vulnerability in a broad sense that predates the fiduciary relationship will still be relevant to this stage of the analysis, it is not a necessary condition for a fiduciary relationship to exist. Fiduciary law is instead particularly "concerned with the vulnerability that *results from* the relationship that gives rise to the fiduciary duty", rather than with the respective positions of the parties before they enter into that relationship. That is, the fiduciary duty arises because the nature

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[1248] *Proclamation placing certain Tracts of Land set apart for the Indians under the provisions of the Act,* 13&14 Vict Ch. 74, November 7, 1851, Exhibit 1894, p. 2 [transcript], p. 66 [original].

and structure relationship established between the parties makes the beneficiary vulnerable to the fiduciary.

> *Galambos v Perez,* 2009 SCC 48 at para 68, Plaintiffs' Book of Authorities, Tab 25.
>
> *Norberg v Wynrib,* [1992] 2 SCR 226 at pages 277-278, Plaintiffs' Book of Authorities, Tab 55.

1136. As the Supreme Court of Canada has noted, in the context of Crown-Indigenous relations, the vulnerability that gives rise to fiduciary duties is not rooted in Indigenous people being "weak" or "primitive", but was the result of the Crown having persuaded Indigenous peoples, at a time when they still had considerable military capacity, that their rights would be better protected by reliance on the Crown rather than on self-help.

> *Wewaykum Indian Band v Canada,* [2002] 4 SCR 245 at para 79, Plaintiffs' Book of Authorities, Tab 113.

Application: SON is a defined class vulnerable to the Crown's control over the Peninsula

1137. SON is a defined class of people to whom the undertakings set out in Treaty 45 ½, Lord Elgin's Declaration, and the 1851 Proclamation applying the 1850 *Indian Lands Protection Act* to the Peninsula uniquely applied:

(a) The evidence in this trial, outlined above at paras 674 to 701, was that the Crown promised in Treaty 45 ½ to protect the Peninsula *for SON.*

> See paras 674-701, especially para 686 *(Treaty 45 ½ set aside the Peninsula for SON)*

(b) Lord Elgin's Declaration of 1847 recognizes that the "Ojibway Indians commonly known as the Saugeen Indians" have "for a long time enjoyed and possessed" the

Peninsula, and guarantees their continued enjoyment and possession of the Peninsula going forward. [1249]

See para 693(a) *(Treaty 45 ½ set aside the Peninsula for SON)*

(c) 1851 Proclamation makes clear that the protections set out in the 1850 *Indian Lands Protection Act* are to be applied to the lands "reserved for the occupation of the Owens Sound & Saugeen Indians" – the Peninsula. There is no other group to whom this commitment is made.[1250]

See para 693(b) *(Treaty 45 ½ set aside the Peninsula for SON)*

1138. The promises made at and in Treaty 45 ½ were made to SON specifically, not to some larger aggregation of Indigenous people. Therefore, in SON's submission, the requirement of an undertaking to a defined class is met, regardless of what this Court determines about the parties' intentions to invite other First Nations to reside on the Peninsula after Treaty 45 ½ was concluded.

See paras 674-701, especially para 686 *(Treaty 45 ½ set aside the Peninsula for SON)*

1139. SON was vulnerable to the Crown's discretion about whether and how to protect the Peninsula. Although the Crown was required by its treaty promise to protect the Peninsula, the Crown was left with wide discretion how to go about doing this. As discussed at paragraphs 733-736, SON repeatedly asked for the Crown's assistance in addressing various encroachments by white people on the Peninsula. This demonstrates their reliance on the Crown to fulfill its promise.

See paras 733-736 (*Encroachments on the Peninsula)*

[1249] Lord Elgin's Declaration, June 29, 1847, Exhibit 1674.
[1250] *Proclamation placing certain Tracts of Land set apart for the Indians under the provisions of the Act,* 13&14 Vict Ch. 74, November 7, 1851, Exhibit 1894, p. 2 [transcript], p. 66 [original].

1140. At the same time, the consequences of SON attempting self-help remedies were clear. As discussed above at paragraph 770(a), in 1849, Indigenous peoples occupied a mine site in their territory at Mica Bay that was being developed without their consent. The Crown moved decisively against them, sending in 87 soldiers to put down their resistance. In this climate, SON had little choice but to rely on the Crown's undertaking to protect their lands. They were utterly vulnerable to whether and how the Crown chose to fulfil that undertaking.

See para 770(a) *(Calling for Military or Militia Assistance)*

(3) The Beneficiary's Interest stands to be adversely affected by the Crown's Control

1141. The final stage of the test for an *ad hoc* fiduciary duty is that the interest of the beneficiary that stands to be affected by the fiduciary's acts must be a "specific private law interest to which the person has a pre-existing distinct and complete legal entitlement." This includes interests akin to property rights, such as a First Nation's interest in its reserve.

Alberta v Elder Advocates of Alberta Society, [2011] 2 SCR 261 at para 51, Plaintiffs' Book of Authorities, Tab 2.

Application: SON's interest in their reserve is a specific private law interest

1142. In this case, the "legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control" is SON's interest in the Peninsula.

1143. By way of Treaty 45 ½, the Peninsula was set aside for SON as a reserve. That the Peninsula was constituted as a reserve was confirmed again in 1847, by way of Lord Elgin's Declaration, and by the 1851 Proclamation under the 1850 *Indian Lands Protection Act*. This constitutes a distinct and complete legal entitlement to the Peninsula – that is, to the land itself.

See para 693 *(After the Treaty Council – A Reserve for SON Alone)*

See paras 706-707 *(Survey of SON's Reserve on the Peninsula)*

Conclusion on the *Ad Hoc* Fiduciary Duty

1144. SON submits that the Crown took on a fiduciary duty by way of its undertaking to protect the Peninsula for SON from white encroachment "forever". The scope of this duty and what it includes will be discussed in more detail below.

THE *SUI GENERIS* FIDUCIARY DUTY

1145. In the alternative, the Crown also had a *sui generis* fiduciary duty to SON. A *sui generis* fiduciary duty arises where there is "(1) a specific or cognizable Aboriginal interest, and (2) a Crown undertaking of discretionary control over that interest".

> *Manitoba Métis Federation Inc. v Canada (Attorney General),* 2013 SCC 14, at para 51, Plaintiffs' Book of Authorities, Tab 45.

(1) A Specific or Cognizable Aboriginal Interest

1146. A "specific or cognizable" Aboriginal interest is an interest that that is comparable to a private law interest. That is, the interest must not arise purely out of legislation or executive action; it must be, in a sense, independent of the Crown.

> *Guerin v The Queen,* [1984] 2 SCR 335 at page 385, Plaintiffs' Book of Authorities, Tab 29.

1147. First Nations' interests in reserve lands, in lands subject to Aboriginal title, and in other rights protected under s. 35 of the *Constitution Act, 1982* satisfy the requirement of a "specific or cognizable Aboriginal interest." The Supreme Court of Canada discussed this in detail in *Guerin v. The Queen.* Dickson C.J., writing for the majority, explained that Aboriginal title predates and exists independent from the Crown. This distinguishes it from other kinds of public law rights held against the Crown, which arise purely out of the legislative or administrative actions of the Crown. Unlike those public law rights, Aboriginal title lands are independent of the Crown and in the

nature of private law interests, and are therefore capable of giving rise to fiduciary duties. Because the interest in Indian reserve land is the same as the interest in "aboriginal title in traditional tribal lands", the Court held that both are the kinds of interests to which a fiduciary duty may attach. This has been reaffirmed in subsequent cases.

> 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 AC 401, at pp. 410-11 (the Star Chrome case), Plaintiffs' Book of Authorities, Tab 7. It is worth noting, however, that the reserve in question here was created out of the ancient tribal territory of the Musqueam Band by the unilateral action of the Colony of British Columbia, prior to Confederation.
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> *Guerin v The Queen,* [1984] 2 SCR 335 at pages 376-382, 385, Plaintiffs' Book of Authorities, Tab 29.
>
> *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4 at paras 52-53, Plaintiffs' Book of Authorities, Tab 116.

Application: SON had a cognizable Indian interest in its reserve on the Peninsula

1148. In this case, the "cognizable Indian interest" is the interest of SON in the Peninsula set apart and reserved for SON in 1836. The Peninsula was constituted as a reserve by Treaty 45 ½. This was re-affirmed by the 1847 Declaration and the 1851 Proclamation under the *Indian Lands Protection Act*. Note that while Peninsula was part of SON's traditional territory and SON asserts it had Aboriginal title to the Peninsula – which would, on its own, be enough to satisfy the test for a cognizable Indian interest – a declaration or finding to that effect is not required for finding a "cognizable Indian interest" in the case of reserve lands.

> See para 1143
>
> See paras 401-409 *(SON Territorial Boundaries)*
>
> See para 693 *(After the Treaty Council – A Reserve for SON Alone)*

See paras 706-707 *(Survey of SON's Reserve on the Peninsula)*

1149. SON's interest in the Peninsula is therefore a "cognizable" interest, sufficiently independent of the Crown's public law duties to give rise to a fiduciary duty.

(2) The Crown undertook Discretionary Control over SON's Interest in the Peninsula

1150. A *sui generis* fiduciary duty arises when the Crown "undertakes discretionary control" over the independent Aboriginal interest. As the Supreme Court explained in *Williams Lake,* "The essential requirement is that the alleged fiduciary have scope for the exercise of some discretion or power to affect the beneficiary's interests" [emphasis added]. This is precisely the kind of situation where equity steps in to supervise the actions of the powerful party:

> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v Smith*, 1987 CanLII 74 (SCC), [1987] 2 SCR 99; *Norberg v Wynrib*, 1992 CanLII 65 (SCC), [1992] 2 SCR 226; and *Hodgkinson v Simms*, 1994 CanLII 70 (SCC), [1994] 3 SCR 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.
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> *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para 38, Plaintiffs' Book of Authorities, Tab 9.
>
> *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para 77, Plaintiffs' Book of Authorities, Tab 116.

> *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para 85, Plaintiffs' Book of Authorities, Tab 113.

1151. In determining whether the Crown has undertaken sufficient discretionary control to give rise to a fiduciary duty, one relevant consideration is "the vulnerability of [the beneficiary's] interest to 'the risks of [the alleged fiduciary's] misconduct or ineptitude'".

> *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4 at para 60, Plaintiffs' Book of Authorities, Tab 116.

Application: The Crown assumed discretionary control over the Peninsula in Treaty 45 ½

1152. In this case, the Crown undertook discretionary control over SON's interest in the lands on the Peninsula. The fiduciary character of the Crown's relationship with SON developed over many years, involving the following events:

(a) The assertion of British sovereignty: As the Supreme Court of Canada explained in *Mitchell v M.N.R.,* the Crown's assertion of sovereignty gave rise to a fiduciary relationship between the Crown and Indigenous peoples:

> Long before Europeans explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures. The part of North America we now call Canada was first settled by the French and the British who, from the first days of exploration, claimed sovereignty over the land on behalf of their nations. English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation: see, e.g., the Royal Proclamation of 1763, R.S.C. 1985, App. II, No. 1, and *R. v Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075, at p. 1103. At the same time, however, **the Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown: Sparrow, supra**. **With this assertion arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from**

exploitation, a duty characterized as "fiduciary" in *Guerin v The Queen*, 1984 CanLII 25 (SCC), [1984] 2 SCR 335.

Mitchell v M.N.R., [2001] 1 SCR 911, 2001 SCC 33 at para 9 [emphasis added], Plaintiffs' Book of Authorities, Tab 48.

Tsilhqot'in Nation v British Columbia, 2014 SCC 44 at para 69, Plaintiffs' Book of Authorities, Tab 108.

(b) The Royal Proclamation (1763) and the related binding protocol for the acquisition of Indigenous lands: Through the Royal Proclamation, the Crown interposed itself formally between settlers and Indigenous peoples by imposing a requirement that land could only be surrendered to the Crown. As the Supreme Court of Canada observed in *Guerin*:

> 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. It is still recognized in the surrender provisions of the Indian Act. **The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.**

Guerin v The Queen, [1984] 2 SCR 335, at pages 376, 383-384, Plaintiffs' Book of Authorities, Tab 29.

See paras 567-573 (*The Royal Proclamation 1763)*

R v Sparrow, [1990] 1 SCR 1075 at page 1108, Plaintiffs' Book of Authorities, Tab 86.

Alberta v Elder Advocates of Alberta Society, [2011] 2 SCR 261 at paras 48-51, Plaintiffs' Book of Authorities, Tab 2.

Chippewas of Sarnia Band v Canada (Attorney General) (2000), 51 OR (3d) 641 at paras 53-62, 190-201, Plaintiffs' Book of Authorities, Tab 14.

(c) The Treaty of Niagara (1764): The Ontario Court of Appeal explained in *Chippewas of Sarnia* that the Treaty of Niagara was a "watershed event" 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 treaty recognition to the nation-to-nation relationship between the First Nations and the British Crown, Indian rights in their lands and the process to be followed when Indian lands were surrendered." This, too, gave the Crown discretion in relation to Indian reserve lands and the surrender of those lands.

Chippewas of Sarnia Band v Canada (Attorney General) (2000), 51 OR (3d) 641 51 OR (3d) 641 at paras 54-56, 201, Plaintiffs' Book of Authorities, Tab 14.

See paras 574-610 (*The Treaty of Niagara)*

1153. Treaty 45 ½, however, was the crucial moment when the Crown's fiduciary duty crystallized in relation to the Peninsula. As discussed in greater detail at paragraphs 1134 to 1140, in Treaty 45 ½, the Crown assumed for itself discretionary control over SON's interest in the Peninsula – including how to protect those lands from white encroachment. The manner in which the Crown chose to exercise this power was both crucially important to SON and beyond their control.

See paras 1134-1140 *(A Defined Class Vulnerable to the Crown's Control)*

Conclusion on the *Sui Generis* Fiduciary Duty

1154. SON submits therefore that the Crown became a fiduciary to SON on the *sui generis* branch of fiduciary duties in relation to SON's interest in the Peninsula no later than August 1836, when Treaty 45 ½ was concluded.

CONCLUSION ON THE SOURCE OF CROWN'S FIDUCIARY DUTY

1155. SON accordingly submits that, regardless of whether this Court applies the *ad hoc* or *sui generis* branches of the fiduciary duty test, Treaty 45 ½ was the crucial moment. In concluding that treaty with the Saugeen Ojibway, the Crown took on a fiduciary duty in relation to the lands on the Peninsula.

The Content of the Crown's Fiduciary Duty To SON

1156. Under both the *sui generis* and the *ad hoc* branches of the fiduciary duty test, the specific requirements of the Crown's fiduciary duty to Indigenous peoples depend on the context in which the duty arises, including the nature and importance of the interest being protected, and the nature of the relationship between the parties. The first step in assessing the nature and scope of the Crown's fiduciary duty is accordingly to assess those interests and that relationship.

> *Semiahmoo Indian Band v Canada* (1997) [1998] 1 FC 3, 1997 CarswellNat 1316, at para 37, Plaintiffs' Book of Authorities, Tab 99.
>
> *Wewaykum Indian Band v Canada*, [2002] 4 SCR 245 at para 86, Plaintiffs' Book of Authorities, Tab 113.
>
> *Alberta v Elder Advocates of Alberta Society*, [2011] 2 SCR 261, at para 46, Plaintiffs' Book of Authorities, Tab 2.

THE SPECIFIC DUTIES ARISING OUT OF TREATY 45 ½

1157. The starting point for an analysis of the fiduciary duties that arise in this case is Treaty 45 ½. In it, the Crown promised to protect the Peninsula forever from "encroachment of the whites" for SON. At the simplest level, the question in this case is whether the Crown was bound to do what it expressly promised SON it would do. After SON fulfilled its end of the bargain by giving up its land south of the Peninsula to the Crown to open for Euro-Canadian settlement, was the Crown obligated to keep its promise in relation to the land that remained for SON?

1158. SON submits that this promise was the foundation of a new relationship between the Crown and SON, and a condition of SON's surrender of 1.5 million acres of SONTL south of the Peninsula. In Treaty 45 ½, the Crown took on a particular power and a particular responsibility with regard to the Peninsula. It placed the Crown in the role of protector of SON's remaining lands and explained clearly what the Crown was to protect those lands from: encroachments by white settlers. It also set the parameters for the SON's best interests in relation to the Peninsula.

> See paras 648-659 *(The Events of the Treaty Council)*
>
> See paras 660-673 *(The Promise to Protect the Peninsula: Scope and Meaning)*
>
> See paras 674-701 *(Treaty 45 ½ set aside the Peninsula for SON)*
>
> *Semiahmoo Indian Band v Canada* (1997) [1998] 1 FC 3, 1997 CarswellNat 1316 at para 39, Plaintiffs' Book of Authorities, Tab 99.
>
> *Alberta v Elder Advocates of Alberta Society*, [2011] 2 SCR 261 at paras 33-34, Plaintiffs' Book of Authorities, Tab 2.

1159. As noted above, the promise to protect from encroachment of whites included the promise to protect those lands not just from squatting, but also from trespass and timber theft.

> See paras 1088-1091

1160. Treaty 45 ½ also set aside a portion of SONTL – the Peninsula – as a reserve. The case law says that a First Nation's interest in its reserve is of the highest importance. The evidence in this case confirms that the Peninsula was deeply significant to SON, and the Crown's promise to protect it was the most important consideration for Treaty 45 ½.

> *Southwind v Canada,* 2017 FC 906 at para 224, Plaintiffs' Book of Authorities, Tab 102 (affirmed on appeal in *Southwind v Canada*, 2019 FCA 171, Plaintiffs' Book of Authorities, Tab 103).
>
> See paras 660-665 (*The Promise to Protect was the Main Consideration)*

1161. In *Guerin,* the Supreme Court confronted a similar situation. The Musqueam band agreed to a surrender of a portion of their valuable Vancouver reserve for the purposes of a lease to a golf club. The band had agreed orally to the terms of the lease as part of the discussion of the surrender. Those terms, like the promise to protect the Peninsula in Treaty 45 ½, were understood by the Musqueam to be a condition of the surrender, though in that case, unlike in this one, the conditions were not recorded on the surrender document. The Crown, after taking the surrender, unilaterally deviated from the terms of the surrender by leasing the land to the golf club on terms less advantageous to the Musqueam.

> *Guerin v The Queen,* [1984] 2 SCR 335 at pages 365-371, Plaintiffs' Book of Authorities, Tab 29.

1162. The Supreme Court of Canada found this to be a breach of the Crown's fiduciary duty to the Musqueam. It held the Crown could not ignore the (oral) terms of the surrender to which the band agreed. These terms structured the Crown's discretion to act – they became the "backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured":

> A fiduciary obligation will not, of course, be eliminated by the imposition of conditions that have the effect of restricting the fiduciary's discretion. A failure to adhere to the imposed conditions will simply itself be *a prima facie* breach of the obligation. In the present case both the surrender and the Order in Council accepting the surrender referred to the Crown's leasing the land on the Band's behalf. Prior to the surrender the Band had also been given to understand that a lease was to be entered into with the Shaughnessy Heights Golf Club upon certain terms […]
>
> *Guerin v The Queen*, [1984] 2 SCR 335 at pages 387-388, Plaintiffs' Book of Authorities, Tab 29.

1163. Similarly, in *Jim Shot Both Sides,* one issue that arose was the failure of Canada to make good on treaty promises it made to the Kanai or Blood Tribe. In 1877, by way of Treaty 7,

the Blackfoot Confederacy, including the Siksika (Blackfoot), Kainai (Blood) and Piiklani (Peigan), surrendered a vast swath of territory in southern Alberta in exchange for reserves for each tribe equal to "one square mile for each family of five persons, or in that proportion for larger and smaller families". The Federal Court concluded that Canada had a fiduciary duty to provide a reserve for the Blood Tribe that was equal to that amount of land, arising out of the promise it had made in Treaty 7.

> *Jim Shot Both Sides v Canada,* 2019 FC 789 at paras 3, 7, 366, 369-373, Plaintiffs' Book of Authorities, Tab 35.

1164. In the case at bar, too, the Crown had a fiduciary duty to abide by the terms of the surrender in Treaty 45 ½– including the promise to protect the Peninsula from the encroachment of white settlers. This promise is the "backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured." By making this promise, the Crown committed itself to act in the utmost loyalty to SON with the objective of protecting the Peninsula from encroachment of whites. This means that the Crown was not permitted to prefer other interests to the Saugeen Ojibway's in relation to the protection of the Peninsula. It was required to be honest and forthright with the Saugeen Ojibway.

> *Guerin v The Queen*, [1984] 2 SCR 335 at page 388, Plaintiffs' Book of Authorities, Tab 29.
>
> > Once a fiduciary relationship has been demonstrated to exist, those persons occupying fiduciary positions must adhere to the fiduciary standard of conduct. This standard of conduct… requires fiduciaries to act selflessly, with honestly, integrity, and in the utmost good faith in the interests of their beneficiaries.
>
> L.I Rotman, "Fiduciary Law", (Toronto: Carswell, 2005), p. 303, Plaintiffs' Book of Authorities, Tab 192.
>
> > "Honesty" – Every fiduciary has a duty to act honestly as well as loyally…. For the purposes of equity, honesty means an advertent lack of probity,

> measured according to an objective standard and the actual knowledge of the fiduciary.
>
> Michael Ng, "Fiduciary Duties: Obligations of Loyalty and Faithfulness" [loose-leaf], at p. 10.10, Plaintiffs' Book of Authorities, Tab 184.
>
> *Makwa Sahgaiehcan First Nation v Canada,* 2019 SCT 5 at paras 102-109, 116, 150-156, Plaintiffs' Book of Authorities, Tab 44.

1165. Similarly, the Crown, when asking SON to make decisions in relation to its interest in the Peninsula and its protection from white encroachment, was not permitted to coerce, threaten or bully SON in relation to those interests. Gonthier J. made a similar point in *Blueberry River*, where he cautioned against relying on decisions made by First Nations in relation to their interests when the Crown's behaviour falls short of this standard:

> I should also add that I would be reluctant to give effect to this surrender variation if I thought that the Band's understanding of its terms had been inadequate, **or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention.** [emphasis added]
>
> *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para 14, per Gonthier J, Plaintiffs' Book of Authorities, Tab 9.

1166. Although the Crown as a fiduciary was required to act with honesty and the utmost loyalty and good faith in protecting the Peninsula from encroachment of the whites, it is not held to a standard of perfection in how it executed that task of protecting the lands. Rather, in choosing measures to protect SON's lands from white encroachment and in executing the measures it selected, the Crown was required to act with the ordinary prudence of a person managing their own affairs.

> *Southwind v Canada,* 2017 FC 906 at paras 222, 226-227, Plaintiffs' Book of Authorities, Tab 102 (affirmed on appeal in *Southwind v. Canada*, 2019 FCA 171, Plaintiffs' Book of Authorities, Tab 103).

Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development), [1995] 4 SCR 344 at paras 45-46, 104, Plaintiffs' Book of Authorities, Tab 9.

1167. By suggesting that Treaty 45 ½ gave rise to substantive fiduciary duties to protect and preserve the Peninsula from the encroachment of the whites, SON is not suggesting that Treaty 45 ½ could never be amended. It could, if that were done properly and without any breaches of the Crown's duty - that is, if Crown officials were honest and forthright with SON throughout the process, and did not pressure, coerce or threaten into the surrender. A precondition to such amendment, however, would be that the Crown complied with its fiduciary duties until or unless SON freely agreed to depart from the terms of Treaty 45 ½.

THE DUTIES THAT ATTACH TO RESERVE LAND GENERALLY

1168. In addition to the specific duties that arise as a result of the unique commitments the Crown made to SON in Treaty 45 ½, the case law also articulates a series of fiduciary duties that attach to reserve land generally. These duties do not turn on the content of the promise in Treaty 45 ½, to whom it was made, or what it meant. Instead, they are a constellation of obligations that arise simply because Treaty 45 ½ had the effect of creating a reserve on the Peninsula.

See also, *Wewaykum Indian Band v Canada*, [2002] 4 SCR 245 at paras 86, 98-104, Plaintiffs' Book of Authorities, Tab 113.

1169. The fiduciary duties that have been found to attach to reserve land include:

(a) Duties of loyalty and good faith in the discharge of the fiduciary's mandate;

Wewaykum Indian Band v Canada, [2002] 4 SCR 245 at para 86, Plaintiffs' Book of Authorities, Tab 113.

(b) A duty to provide full, accurate disclosure appropriate to the subject matter;

Wewaykum Indian Band v Canada, [2002] 4 SCR 245 at para 86, Plaintiffs' Book of Authorities, Tab 113.

(c) A duty to act with ordinary prudence with a view to the best interest of the beneficiary; and

Wewaykum Indian Band v Canada, [2002] 4 SCR 245 at para 86, Plaintiffs' Book of Authorities, Tab 113.

(d) A duty to protect and preserve the First Nation's interest in their reserve from exploitation. This duty, unlike the duties sketched out at (a) – (c), which apply more generally, applies only once a reserve has been created.

Wewaykum Indian Band v Canada, [2002] 4 SCR 245 at paras 86, 98-100, Plaintiffs' Book of Authorities, Tab 113.

1170. SON submits that three of these four duties are engaged in this case: **(a)** the duty of loyalty and good faith; **(b)** the duty to act with ordinary prudence with a view to the best interests of the beneficiary; and **(c)** the duty to protect and preserve the First Nation's interest in their reserve from exploitation. They will be discussed in more detail below

1171. As noted above, the case law suggests that a First Nation's interest in its reserve is of the highest importance. For this reason, SON submits that not only do additional duties arise once a reserve is created, but also, the content of each of the duties of loyalty and good faith, to provide disclosure and to act with ordinary prudence, may be more rigorous when applied in relation to reserve land.

Southwind v Canada, 2017 FC 906 at para 224, Plaintiffs' Book of Authorities, Tab 102 (affirmed on appeal at *Southwind v Canada*, 2019 FCA 171, Plaintiffs' Book of Authorities, Tab 103).

Wewaykum Indian Band v Canada, [2002] 4 SCR 245 at para 86, Plaintiffs' Book of Authorities, Tab 113.

Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development), 2018 SCC 4 at paras 52-53, 55, 66, Plaintiffs' Book of Authorities, Tab 116.

(a) The Duty of Good Faith and Loyalty

1172. The Crown, like other fiduciaries, is subject to the core fiduciary duty to act in the utmost loyalty in relation to the beneficiary's interests. This includes the duty to avoid conflicts (the "no conflict" rule) and to refrain from profiting from the fiduciary relationship (the "no profit" rule). It also includes a positive duty to act in good faith – that is, a requirement that the Crown must act in the best interests of the First Nation in relation to their reserve, rather than in pursuit of some other objective or the interests of some other individual or group in relation to the reserve. As the Court explained in Haida Nation, "The duty's fulfillment requires that the Crown act *with reference to the Aboriginal group's best interest* in exercising discretionary control over the specific Aboriginal interest at stake."

> *Haida Nation v British Columbia (Minister of Forests*), 2004 SCC 73 (CanLII), [2004] 3 SCR 511 at para 18, Plaintiffs' Book of Authorities, Tab 30.
>
> Andrew S. Gold "The Fiduciary Duty of Loyalty," in *The Oxford Handbook of Fiduciary Law,* Eds. Evan J. Criddle, Paul B. Miller and Robert H. Sitkoff, May 2019, pp. 386-391, Plaintiffs' Book of Authorities, Tab 172.
>
> *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para 53*,* Plaintiffs' Book of Authorities, Tab 9 – *the Crown must avoid conflict*.
>
> *Guerin v the Queen,* [1984] 2 SCR 335 at pages 388-389 (per Dickson CJ), Plaintiffs' Book of Authorities, Tab 29.
>
> *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4 at para 51, Plaintiffs' Book of Authorities, Tab 116.

1173. For example, in *Williams Lake,* at issue was a historic village site of the Williams Lake Indian Band that was in the process of being set aside as a reserve for the band. Contrary to its policy, rather than completing the process of setting aside the land, the Crown allowed squatters to occupy the village site. The Specific Claims Tribunal concluded that the best interest of the

Williams Lake Indians was in the allotment of the village land as a reserve; and so the Crown was "duty bound to challenge the unlawful pre-emptions [by squatters] where their existence prevented the allotment of reserves". It found both that the Crown failed to act with reference to this interest, and that it did not exercise ordinary prudence in protecting the village lands. Even prior to reserve creation, the Tribunal observed, "Equity does not condone the unlawful acquisition of settlers' interests standing as an impediment to the performance of a fiduciary duty." The majority of the Supreme Court of Canada upheld the Specific Claim Tribunal's reasoning. In SON's submission, the same reasoning applies with even greater force once a reserve has been created.

> *Williams Lake Indian Band v Canada,* 2014 SCTC 3 at paras 319 – 340, especially paras 320, 322, 328, 339, Plaintiffs' Book of Authorities, Tab 115.
>
> *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4 at paras 72, 95-97, Plaintiffs' Book of Authorities, Tab 116.

1174. As part of the duty of loyalty and good faith, the fiduciary also has a duty to be honest with the beneficiary. Although whether a fiduciary has breached this duty is evaluated with reference to what the fiduciary actually knew or how they actually behaved, it is assessed on an objective standard. In *Royal Brunei Airlines Sdn Bhd v Tab,* the House of Lords addressed whether a director of an insolvent travel agent company could be held liable for breaches of fiduciary duty by that travel agent company in circumstances where he knowingly and dishonestly assisted the company in breaching its duties. The House of Lords concluded the third party director's dishonesty gave rise to his or her liability. Lord Nicholls explained what dishonesty means in this context:

> Whatever may be the position in some criminal or other contexts (see, for instance, Reg. v. Ghosh [1982] Q.B. 1053), in the context of the accessory liability principle acting dishonestly, or with a lack

> of probity, which is synonymous, **means simply not acting as an honest person would in the circumstances. This is an objective standard**. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, **honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct.** Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. **However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective.**
>
> In most situations there is little difficulty in identifying how an honest person would behave. **Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless**.

Royal Brunei Airlines Sdn. Bhd v Tan, [1995] 2 A.C. 378 (P.C.) at page 389 [emphasis added], Plaintiffs' Book of Authorities, Tab 97.

International Commercial Bank of Cathay (Canada) v Chen, 2003 BCSC 1616 at paras 25-26, Plaintiffs' Book of Authorities, Tab 34.

Michael Ng, *Fiduciary Duties: Obligations of Loyalty and Faithfulness,* [looseleaf] at p. 10.10, Plaintiffs' Book of Authorities, Tab 184.

1175. *Royal Brunei* dealt with the dishonesty of a director which the Court found gave rise to accessory or third party liability for the company's breach of fiduciary duty. SON submits that the standard of honesty should as high or higher when applied to a fiduciary directly.

> Michael Ng, "Fiduciary Duties: Obligations of Loyalty and Faithfulness", [looseleaf] at p. 10.10, Plaintiffs' Book of Authorities, Tab 184 – *where Royal Brunei was cited to discuss the concept of the fiduciary duty of honesty*.

1176. The duty to act honesty applies to the Crown in its role as a fiduciary in relation to First Nations' lands. In this context, SON submits it can be enough to give rise to a breach if the Crown merely provides information to a First Nation without regard to whether that information is accurate. For example, in *Jim Shot Both Sides,* the Federal Court concluded that the Crown had breached its fiduciary duties to the Blood Tribe by providing misinformation in the relation to the amount of reserve land to which the First Nations were entitled pursuant to Treaty 7. The agent acting for the Crown had failed to take any steps to determine whether the information he was providing was correct. This was part of the context that gave rise to the breach:

> I further find that Canada breached its duty to the Blood Tribe in 1888 when its officials told Red Crow and the others that the reserve as laid out by the 1883 Survey gave them a larger reserve than they were entitled to under the terms of Treaty 7**. First, that statement was wrong based on the population count determined herein. Second, there is no evidence that Pocklington, who made that statement, had made any inquiry to ascertain its truth, or had any direct knowledge that it was accurate. Third, by making the statement, Canada effectively led the Blood Tribe to put aside any thought that it was entitled to more.** That, in part, explains the delay in raising the claim that the Blood Reserve is not as large as it should be.

Jim Shot Both Sides v Canada, 2019 FC 789 at para 378 [emphasis added], Plaintiffs' Book of Authorities, Tab 35.

See also: *Makwa Sahgaiehcan First Nation v Canada,* 2019 SCTC 5 at paras 95-119, 141-159, Plaintiffs' Book of Authorities, Tab 44.

1177. SON submits that, just as it is inconsistent with the duty of good faith and loyalty for a fiduciary to lie to the beneficiary about the interests that are the subject of a fiduciary relationship, so too is it a breach of fiduciary's duties to threaten, bully or coerce a beneficiary to give up the interest that is the subject of the fiduciary relationship. This is so even if an individual fiduciary believes it would be "for the best" for the beneficiary to give up their interest.

L.I. Rotman, "Fiduciary Law", (Toronto: Carswell, 2005) at pp. 613-614, 617, Plaintiffs' Book of Authorities, Tab 192 – *it is no defence to a breach of fiduciary duty that the fiduciary acted in the absence of bad faith.*

(b) The Duty to act with Ordinary Prudence

1178. The Crown fiduciary's duty to act with loyalty in the interests of the First Nation whose reserve it administers is strict. It may not prefer other interests. However, as the Crown uses its discretionary power, it is not held to a standard of perfection in the choices it makes to pursue those interests and execute its mandate. Rather, it is required to meet the standard of care of a person of "ordinary prudence managing [their] own affairs".

Fales v Canada Permanent Trust Co., [1977] 2 SCR 302 at pages 315-316, Plaintiffs' Book of Authorities, Tab 21.

Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development), [1995] 4 SCR 344 at para 104, Plaintiffs' Book of Authorities, Tab 9.

(c) The Duty to Protect Reserve Lands

1179. The Crown is under a fiduciary duty to protect a First Nation's reserve against invasion or destruction. This includes, at the time of surrender, a duty to protect against exploitative bargains with settlers and with the Crown itself. SON submits, however, that this duty to prevent exploitative bargains is not exhaustive of all the duties that arise in relation to reserve lands.

1180. There is no question that the Crown holds fiduciary duties throughout the process of seeking a surrender of a reserve. One duty is to protect reserve lands against *exploitative bargains in the course of a surrender or disposition of reserve lands*. This duty arose in *Blueberry River.* In that case, the First Nation admitted that they had wanted to surrender their reserve in order to obtain other lands closer to their trap lines, and to get a remaining cash sum. They argued that, in the long term, this had not been in their best interests and therefore the Department of Indian Affairs had had a duty to refuse to accept the surrender. In this context, McLachlin J. (as she then was) held that the scope of the Crown's fiduciary duty had to strike a balance between the First Nation's autonomy to make decisions about their reserve and the Crown's obligation to protect it:

> The Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident – a decision that constituted exploitation – the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.

Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development), [1995] 4 SCR 344 at paras 32, 35, Plaintiffs' Book of Authorities, Tab 9.

Makwa Sahgaiehcan First Nation v Canada, 2019 SCTC 5 at para 144, Plaintiffs' Book of Authorities, Tab 44.

1181. This balancing act – giving effect to the Crown's duty to protect without running roughshod over the First Nation's autonomous decision-making authority to decide to what to do with its lands – gave rise to a fiduciary duty to ensure there was no exploitation before accepting the First Nation's decision to surrender reserve land. The Crown's fiduciary duty, in other words, was limited to what was within its own control – preventing an exploitative bargain.

Kent McNeil, "The Crown's Fiduciary Obligations in the Era of Aboriginal Self-Government", *Canadian Bar Review* 88.1 (2009):1-19, pp. 8-9, Plaintiffs' Book of Authorities, Tab 183.

1182. However, there is no indication in *Blueberry River* that this was intended to be a limit on the scope of the Crown's fiduciary duty in relation to reserve lands more generally, including the duties that arise outside the context of a surrender. It was simply the duty that arose during the process of surrender, *on the facts of that case*, where there seems to have been a positive desire to surrender on the part of the First Nation.

1183. In *Wewaykum,* the Supreme Court discussed generally the fiduciary duties that had been found to arise in relation to First Nations lands prior to and after the creation of a reserve. However, the Court was clear in its discussion of the duties that attach to reserve land that it was discussing those duties that arise at the time of surrender or disposition. *Wewaykum* does not say that the duties it enumerates constitute the full universe of duties that attach to reserve land.

> *Wewaykum Indian Band v Canada,* [2002] 4 SCR 245 at paras 98-100, Plaintiffs' Book of Authorities, Tab 113.

1184. To the extent that *Wewaykum* can be read to opine on the duties that may attach to reserve lands more generally, these comments were in *obiter.* The case turned on an administrative "ditto mark" error on the lists kept by Indian Affairs during the process of reserve creation in British Columbia. Two First Nations – the Cape Mudge Band and the Campbell River Band – claimed that as a result of this error that they were each entitled to both their reserve and to the reserve held by the other First Nation. Neither First Nation had ever occupied, or ever been dispossessed from, the other's reserve. The claims were purely for compensation as against the Crown for the administrative error it had made. In addition, both reserves were *outside* the two First Nation's traditional territories. The issue in *Wewaykum,* then, was not the duties that arise in relation to reserve lands, but rather, the scope of the Crown's fiduciary duty in relation to lands: 1) *outside* a First Nation's traditional territory; 2) *prior* to reserve creation; and 3) in relation to a plot of land a First Nation has *never occupied*. The Court was clear about these limits:

> The situation here, unlike Guerin, does not involve the Crown interposing itself between an Indian band and non-Indians with respect to an existing Indian interest in lands. Nor does it involve the Crown as "faithless fiduciary" failing to carry out a mandate conferred by a band with respect to disposition of a band asset. The federal Crown in this case was carrying out various functions imposed by statute or undertaken pursuant to federal-provincial agreements. Its mandate was not the disposition of an existing Indian interest in the subject lands, but the creation of an altogether new interest in lands to which the Indians made no prior claim by way of treaty or aboriginal right.

Wewaykum Indian Band v Canada, [2002] 4 SCR 245 at para 91, see also: paras 1-12, 27-45, Plaintiffs' Book of Authorities, Tab 113.

1185. Subsequent case law has confirmed that the Crown's fiduciary duty in relation to reserves includes a more general obligation to preserve and protect the reserve. In *Jim Shot Both Sides,* for example, the Federal Court concluded that Canada had breached its duty to protect and preserve the Blood Tribe reserve by issuing grazing leases to third parties on lands that formed part of the reserve, and then by "solving" the problem it had created by reducing the size of the Blood reserve. The Court characterized the duty at issue as a duty to "protect and preserve that reserve." It held that Canada breached its duty "by putting the interests of white leaseholders ahead of the Blood Tribe's interests in the land, which it was to preserve and protect."

Jim Shot Both Sides v Canada, 2019 FC 789 at paras 374-377, Plaintiffs' Book of Authorities, Tab 35.

1186. Finally, to the extent that *Wewaykum* governs the general duties that attach to reserve lands, SON submits that protecting a First Nation's interest in a reserve from exploitative bargains includes protecting the First Nation from misinformation, coercion, pressure or other influences that impinge its ability to choose freely and autonomously whether to surrender its reserve lands.

1187. This was recently canvassed in *Makwa Sahgaiehcan First Nation v. Her Majesty the Queen in Right of Canada*. At issue in the case was a surrender taken from the Makwa First Nation reserve. The Crown planned to expropriate lands from the reserve for the railway pursuant to s. 48 of the *Indian Act,* RSC 1927, c 98, but it wanted a further surrender for an adjacent townsite near the railway station. Prior to the surrender, squatters took up lands on the proposed townsite. The Department of Indian Affairs did nothing to stop them. When the Indian Agent took the surrender, the Indian Agent communicated to the First Nation that the railway could expropriate their reserve just as it could land privately held by settlers. The Indian Agent did not explain that a) neither the railway nor Indian Affairs had the power to expropriate the townsite – in fact, a surrender (with the consent of the First Nation) was required; or b) the Crown had to consent to the expropriation for the purposes of the railway, and the Crown would only make such a decision on the recommendation of the Department of Indian Affairs. Instead, he let the First Nation believe that the land for the townsite could be taken from them by the railway directly, and that no one could intercede on their behalf.

> *Makwa Sahgaiehcan First Nation v Canada,* 2019 SCT 5 at paras 85-109, 151, Plaintiffs' Book of Authorities, Tab 44.

1188. The Specific Claims Tribunal found that it was clear to the First Nation that the Department of Indian Affairs would not remove the squatters: "The interest served by the surrender was that of the [railway] and of course the squatters, but it was not to them that the Crown owed its loyalty". It further concluded the Department of Indian Affairs was "determined to obtain a vote in favour of a surrender". In this context, the Specific Claims Tribunal held that the Crown had breached its fiduciary duty the Makwa by accepting an exploitative surrender:

> [T]he acceptance of the surrender… was exploitative in that it was given in circumstances in which the choices available to the Band were to refuse to

> surrender and live with a *de facto* taking of their land or receive money, amount unknown, for it. This tainted the dealings in a manner that made it unsafe to rely on the vote conducted at the meeting held February 9, 1932, as an indication of the Band's understanding and intention.
>
> *Makwa Sahgaiehcan First Nation v Canada*, 2019 SCTC 5 at paras 146, 152, 153, 157, and paras 84-158 generally, Plaintiffs' Book of Authorities, Tab 44.
>
> See also: *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development),* [1995] 4 SCR 344 at para 14, per Gonthier J. (concurring), Plaintiffs' Book of Authorities, Tab 9.

1189. The Federal Court of Appeal came to a similar conclusion in *Semiahmoo Indian Band.* In that case, at issue was a surrender taken of the Semiahmoo First Nation reserve, ostensibly for a customs facility. The Crown took more land than was required for the facility in the first instance, but over the years that followed plans to build the facility were abandoned. The Federal Court of Appeal observed that the First Nation had to, and did, rely on the Crown's representations that the customs facility was required. It also noted that the Semiahmoo First Nation's decision to agree to surrender the land was impacted by the fact that the Band knew the Crown could simply expropriate the lands if it did not consent. In other words, their agreement to the surrender was coerced because they knew the Crown had the power to take the land whether they agreed or not. The Court concluded the bargain struck in the surrender was exploitative. In this circumstance, the Crown had a fiduciary obligation not to accept the surrender. The Court observed: "Even if the land at issue is required for a public purpose, the Crown cannot discharge its fiduciary obligation simply by convincing the Band to accept the surrender, and then using this consent to relieve itself of the responsibility to scrutinize the transaction." It concluded that the acceptance of the surrender was a breach *"*even though the band may have received compensation for the surrendered land somewhere in the neighbourhood of market value."

Semiahmoo Indian Band v Canada, (1997) [1998] 1 FC 3, 1997 CarswellNat 1316 at paras 6, 12, 39-48, Plaintiffs' Book of Authorities, Tab 99.

1190. These cases give an indication of the kind of situations that will be found to constitute an exploitative surrender. First Nations who "trust[] the Crown to provide [them] with information as to [their] options [in relation to a surrender] and their foreseeable consequences" are entitled to expect that the Crown be honest with them about those options and consequences. Where the Crown implies or outright states that a surrender is inevitable or the band has no choice but to agree, this constitutes exploitation. Where the power structure of the surrender is such that a First Nation's power to say no is impinged, this constitutes exploitation. Where the Crown misrepresents options available to a First Nation or seeks to rely on its failure to protect the band's interests to press the First Nation to surrender, this constitutes exploitation. The Crown has a duty not to accept a surrender taken in such circumstances. Significantly, this is a breach even if the band receives compensation "somewhere in the neighbourhood of market value" for the lands surrendered.

Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development), [1995] 4 SCR 344*,* para 39, per McLachlin J, Plaintiffs' Book of Authorities, Tab 9.

Makwa Sahgaiehcan First Nation v Canada, 2019 SCTC 5 at paras 149, and 141-159 generally, Plaintiffs' Book of Authorities, Tab 44.

Semiahmoo Indian Band v Canada, (1997) [1998] 1 FC 3, 1997 CarswellNat 1316 at para 46, Plaintiffs' Book of Authorities, Tab 99.

THE CROWN'S "MANY HATS" IN RELATION TO ITS DUTY TO RESERVE LAND

1191. The Crown is in a unique position as a fiduciary. It has public law obligations to which it must also attend. This has been referred to as the principle that the Crown wears "many hats". As a result, in certain defined circumstances, the Crown, unlike other fiduciaries, may be permitted

to balance competing interests with the interests of its beneficiary without being found to have run afoul of the fiduciary duty of loyalty. However, there are several limitations to this principle.

1192. First, SON submits that the notion that the Crown may balance competing interests has no role in fiduciary duties that arise on the *ad hoc* branch of the test. This principle has not been applied in any case law that addresses an *ad hoc* fiduciary duty. This is for good reason: where there has been an undertaking to forsake the interests of all others in favour of those of the beneficiary, it necessarily overrides conflicting demands from other parties. A requirement to balance the interests of the beneficiary with the demands of others (to wear one of its other "hats" when dealing with the subject matter of the undertaking) is incompatible with forsaking the interests of others. When the Crown makes such an undertaking, it takes off all its hats except the one related to the interests of its beneficiaries. Anything else would rob the undertaking of its meaning.

> *Williams Lake Indian Band v Canada (Aboriginal Affairs and Norther Development)*, 2018 SCC 4 at para 55 per Wagner J, Plaintiffs' Book of Authorities, Tab 116 – *explaining that the many hats principle applies arises in relation to the sui generis duty*.
>
> Distinguishing *Wewaykum Indian Band v Canada*, [2002] 4 SCR 245 at para 96, Plaintiffs' Book of Authorities, Tab 113.

1193. Second, even under the rubric of the *sui generis* fiduciary duty, the Crown is entitled to account for other interests only in defined ways and in defined circumstances. *Wewaykum,* which articulated the idea that the Crown's other "hats" may influence the scope of its fiduciary duties to First Nations, dealt only with the application of the "many hats" principle prior to reserve creation, and outside the territory of the affected bands. In that circumstance, the Supreme Court held it was appropriate to attenuate the scope and content of the Crown's fiduciary duty by considering other interests – including, in that specific case, the interests of the other beneficiary

First Nation. But this does not mean the Crown is entitled in all circumstances to consider or prioritize other interests, no matter what those other interests may be and no matter the nature of the interests of the Indigenous beneficiary, over the interests of the Indigenous beneficiary to whom it owes fiduciary duties. Such a conclusion would empty the fiduciary duty of its meaning.

> See *Wewaykum Indian Band v Canada*, [2002] 4 SCR 245 at paras 3, 77, 95, and 96, Plaintiffs' Book of Authorities, Tab 113.
>
> *Williams Lake Indian Band v Canada (Aboriginl Affairs and Northern Development)*, 2018 SCC 4 at para 55, per Wagner J, Plaintiffs' Book of Authorities, Tab 116 – *explaining that the many hats principle applies prior to the acquisition of a "legal interest" in land that is subject to the reserve creation process.*
>
> S Luk, "Not so Many Hats: The Crown's Fiduciary Obligations to Aboriginal Communities since *Guerin*", 76 Sask. L. Rev. 1" (2013) pp. 21-24, Plaintiffs' Book of Authorities, Tab 181.
>
> See also: *Kitselas First Nation v Her Majesty the Queen in Right of Canada,* 2013 SCTC 1 at paras 103-113, 130-131, Plaintiffs' Book of Authorities, Tab 39.

1194. Once a reserve is created, the Crown is required to put the interests of the First Nation ahead of other interests in the reserve. This requirement is strict. For example, in *Jim Shot Both Sides,* the Federal Court found putting the interests of the white leaseholders ahead of those of the Blood Tribe was a breach of the Crown's fiduciary duty to preserve and protect the reserve.

> *Jim Shot Both Sides v Canada*, 2019 FC 789 at para 377, Plaintiffs' Book of Authorities, Tab 35.

The Crown's One Hat once the Peninsula was set aside as a Reserve

1195. In this case, the Crown took into account the interests of settlers when it took Treaty 45 ½. The surrender of 1.5 million acres of SONTL south of the Peninsula was an accommodation to the interests of settlers in accessing the lands within SON's traditional territory. In exchange for this, the Crown promised to protect the remaining 450,000 acres on the Peninsula for SON

forever. At that point, however, the Crown was not dealing with SON's interest in its reserve.[1251] The reserve on the Peninsula was the outcome of the Crown's balancing of its different hats.

> Treaty 45 ½, August 9, 1836, Exhibit 1128, Plaintiffs' Book of Authorities, Tab 141.
>
> See paras 648-659 (*Events of the Treaty Council*)
>
> See paras 1099-1110 (*The legal test for creation of a reserve)*

1196. Once the promise was made and the reserve created on the Peninsula, SON submits the Crown was not entitled to defer to or further balance with interests of settlers illegally occupying (or wishing to occupy) the Peninsula, or to those taking resources from it. In other words, the Crown's fiduciary duty expanded to a duty of the utmost loyalty: the Crown took off its other hats in relation to the Peninsula, and was required to prioritize the interests of SON in relation to the Peninsula.

> *Wewaykum Indian Band v Canada*, [2002] 4 SCR at paras 86, 104.
>
> *Guerin v The Queen*, [1984] 2 SCR 335 at pages 349-350, per Wilson J (concurring), Plainttiffs' Book of Authorities, Tab 29.
>
> *Williams Lake Indian Band v Canada*, 2014 SCTC 3 at paras 201, 327-328, 338-340, Plaintiffs' Book of Authorities, Tab 115 (rev'd on other grounds on judicial review 2016 FCA 63), aff'd on appeal of judicial review, 2018 SCC 4 at paras 55, 97, per Wagner J, Plaintiffs' Book of Authorities, Tab 116 - *This duty existed in Williams Lake even prior to official creation of a reserve.*
>
> *Southwind v Canada,* 2017 FC 906 at para 226, Plaintiffs' Book of Authorities, Tab 102 (affirmed on appeal in *Southwind v Canada*, 2019 FCA 171, Plaintiffs' Book of Authorities, Tab 103).

[1251] However, unlike in *Wewaykum,* the reserve was created on lands that were part of SONTL. It is not necessary for the purposes of this case to decide whether the attenuated fiduciary duties that were applied in *Wewaykum* should apply to lands within a First Nation's territory prior to reserve creation. For our purposes, the significant point is simply that they were not yet a reserve, and so the Crown had not yet assumed the role in administering those lands.

Proprietors of Wakatu v Attorney General, [2017] NZSC 17 at paras 366, 379, 393, 402, per Elias CJ, (relying heavily on Canadian case law), Plaintiffs' Book of Authorities, Tab 67 - *Crown had a fiduciary duty to set certain lands aside as reserve lands and breached this duty by not doing so*.

42. BREACH OF FIDUCIARY DUTY

1197. Therefore, on either the *ad hoc* or the *sui generis* branches of fiduciary duty, the Crown had at least the following duties:

(a) **The duties arising out of the promise in Treaty 45 ½:** to protect the Peninsula from the encroachment of the whites as it had promised to do, unless and until SON decided freely to surrender it; to put SON's interests ahead of the interests of actual and would-be squatters, settlers, trespassers and timber thieves in relation to the Peninsula; to be honest with SON in relation to SON's interest in the Peninsula; and to act with ordinary prudence in choosing and executing measures to protect the Peninsula from white encroachment.

(b) **The general duties that attach to reserve land, including** the duties to act with the utmost loyalty and good faith in relation to SON's interest in its reserve and in discharging the Crown's mandate with regard to the reserve, including to be honest with SON in relation to its interests in its reserve; to act with the ordinary prudence and diligence of a person managing their own affairs as it executed its mandate in relation to SON's reserve; and to protect and preserve SON's interest in their reserve, including but not limited to a duty to protect SON against exploitative bargains during the process of surrendering the reserve. This duty not to countenance exploitative surrenders includes a duty not to lie or mislead SON to

secure a surrender, and not to accept a surrender of the reserve that is the product of threats, coercion or bullying.

1198. SON submits that the Crown failed to comply with its fiduciary duties, in at least three ways:

(a) By failing to take any meaningful steps to protect the Peninsula from encroachments;

(b) By lying about the Crown's ability to protect the Peninsula from white encroachment as part of an effort to secure a surrender; and

(c) By threatening, bullying and coercing SON into agreeing to the surrender.

(a) Breach of the Duty to Protect the Peninsula from Encroachments

1199. Most fundamentally, the Crown breached its substantive fiduciary duty to protect the Peninsula from white encroachment. This duty has its origins both in the specific undertaking set out in Treaty 45 ½, which promised to protect the Peninsula for SON from white encroachment forever, and in the general duty to preserve and protect reserve land from exploitation.

1200. This breach arises because:

(a) There was in fact white encroachment on the Peninsula between 1836 and 1854. This included timber theft, trespass and squatting, all of which constituted "encroachments" contrary to Treaty 45 ½. By the early 1850s, encroachment on the Peninsula was widespread.

See paras 720-729 *(Squatting in Upper Canada and the Peninsula)*

See paras 730-731 *(Historic Law about Encroachments on the Peninsula*

See paras 732-736 *(Encroachments on the Peninsula)*

(b) These encroachments occurred in part because the Crown had put in place policies that rewarded and incentivized squatting.

See paras 716, 719 (*"Explosive Colonization"& Squatting)*

See paras 720-726 *("Squatting" in Upper Canada and the Peninsula)*

See paras 784-785 (*What the Crown did instead: The Crown's Objective to settle the colony and obtain Indigenous lands)*

(c) Senior Crown officials were aware of encroachments on the Peninsula between 1836 and 1854. The Crown could have located squatters and timber thieves on the Peninsula if it wished to do so.

See paras 733-736 (*Encroachments on the Peninsula)*

See paras 746-747(*The Capacity to Locate Squatters)*

(d) The Crown had a wide range of means at its disposal to combat squatting and timber theft on the Peninsula - from issuing removal notices and warrants, to calling civilian law enforcement to remove or arrest squatters, to deputizing Indigenous constables or militia, to calling in the militia or the military if civilian law enforcement needed help.

See paras 748-772 *(The Capacity of the Crown to Enforce)*

(e) Civilian law enforcement and military were equal to the task of arresting and removing squatters.

See paras 754-762 *(The Capacity of the Crown to Enforce- Civilian Law Enforcement)*

See paras 763-772, especially at para 770(a) (*The Capacity of the Crown to Enforce – Calling for Military or Militia Assistance*)

(f) Nonetheless, Crown officials did not use any of the means at their disposal to address squatting and timber theft. Instead, the Crown was lenient with squatters.

See paras 773-777 *(What did the Crown do to protect the Peninsula prior to October 1854?)*

(g) The Crown accordingly could have done much more to protect the Peninsula, but chose not to do so.

See paras 741-745 *(The Crown's Capacity to Protect the Peninsula)*

See paras 748-772 *(The Capacity of the Crown to Enforce)*

See paras 773-777 *(What did the Crown do to protect the Peninsula prior to October 1854?)*

1201. The pattern of Crown inaction in relation to squatting and timber theft on the Peninsula is both stark and systematic. As noted above, there is no evidence on the record of any warrants being issued, any persons being fined, or any persons being jailed for squatting or taking timber from the Peninsula prior to October 14, 1854, when Treaty 72 was signed. There is no evidence that constables or sheriffs were ever called upon to assist with squatting. Crown officials were instructed not to enforce the Indian Land Protection legislation strictly, and they followed that instruction.

See paras 773-777 *(What did the Crown do to protect the Peninsula prior to October 1854?)*, especially para 775

1202. The starkness of the Crown's disregard for SON's interest in the Peninsula comes into sharp relief when its actions are contrasted against the efforts it made after the Peninsula was surrendered to the Crown on October 14, 1854. It was only after the Crown secured the land on

the Peninsula for white settlers by way of surrender that it suddenly found itself able to access law enforcement resources to address squatting on the Peninsula. As noted above:

(a) The very day after the Treaty, Oliphant wrote to the Grey County Sheriff to seek his assistance with removing squatters from the Peninsula, and ordered a notice posted warning squatters that was, for the first time, specific to Saugeen Lands.

See paras 761, 824(g) 834(b) *(Request to Grey County Sheriff)*

(b) In June 1855, Lord Bury offered military assistance to surveyors on the Peninsula to protect against Indian interference with their work.

See para 770(b) *(Offer to survey party)*

1203. SON submits that this pattern of inaction reflects a decision to prefer the interests of squatters and timber thieves to the interests of SON in relation to the Peninsula. There is no other reasonable explanation for such a systematic refusal to use the tools at the Crown's disposal, nor for the Crown's decision, immediately after it had secured a surrender of the land in Treaty 72, to begin to employ these tools. This is a breach of the Crown's fiduciary duties to protect the Peninsula from white encroachment, to preserve and protect SON's reserve, and to act in the utmost good faith in relation to SON's interests in the Peninsula.

See paras 773-777*(What did the Crown do to protect the Peninsula prior to October 1854?)*

See paras 783-787 *(The Crown's Settlement Goals)*

Jim Shot Both Sides v Canada, 2019 FC 789 at para 377, Plaintiffs' Book of Authorities, Tab 35.

Makwa Sahgaiehcan First Nation v Canada, 2019 SCTC 5 at para 152, Plaintiffs' Book of Authorities, Tab 44.

1204. In the alternative, if this Court concludes that these facts do not support the conclusion that the Crown preferred the interests of settlers, squatters and timber thieves to the interests of SON in relation to the Peninsula, the Crown's behaviour nonetheless represents a sustained pattern of inaction that falls well short of the standard of the "ordinary prudence" of a person managing his or her own affairs. This is evident from the sharp change in the Crown's behaviour the very day after the Peninsula became Crown land rather than SON land. Once the Crown actually was managing its own land rather than land held by SON, it suddenly exercised considerably more prudence and diligence in how it went about protecting the land from squatting.

> See paras 749- 753 *(The Capacity of the Crown to Enforce – Issuing Removal Notices and Warrants)*
>
> See paras 754-762 (*The Capacity of the Crown to Enforce – Civilian Law Enforcement)*
>
> See paras 763-772 (*The Capacity of the Crown to Enforce - Calling for Military or Militia Assistance)*
>
> See paras 773-778 (*What did the Crown do to protect the Peninsula prior to October 1854?)*
>
> See paras 834-835 (*Steps to protect the Peninsula after Treaty 72 concluded)*

(b) The Crown Lied about its Inability to Protect the Peninsula

1205. Second, the Crown breached its fiduciary duty when T.G. Anderson and Oliphant, in the course of seeking a surrender of the Peninsula: 1) lied about the Crown's capacity to protect SON's lands from white encroachment; and 2) suggested, falsely, that the only option that remained was to agree to a surrender so as to receive some compensation for the lands on the Peninsula. As discussed in detail above, it is quite clear that the Crown did have other options to address squatting on the Peninsula, and that Crown officials were aware of those options. Nonetheless, both T.G. Anderson and Oliphant chose to tell SON there was no other option to deal with Euro-Canadian settlement pressure but a surrender. The result of these comments was that

SON was misled by the very officials tasked with protecting their interests in the Peninsula about the options available to them when they agreed to Treaty 72.

> See paras 749-753 *(The Capacity of the Crown to Enforce – Issuing Removal Notices and Warrants)*
>
> See paras 754-762 (*The Capacity of the Crown to Enforce – Civilian Law Enforcement)*
>
> See paras 763-772 (*The Capacity of the Crown to Enforce - Calling for Military or Militia Assistance)*
>
> See paras 834-835 *(Steps to protect the Peninsula after Treaty 72 concluded)*

1206. In addition, Anderson's and Oliphant's comments about the demand for the Peninsula among settlers were, at the very least, overblown. Although SON seems to have believed the statement that the Crown was unable to protect the Peninsula, and although there were enough encroachments taking place to make the threat seem serious, Crown officials knew prior to Treaty 72 that the northern half of the Peninsula was not good farming land and therefore less attractive to potential settlers. But Oliphant and Anderson both nonetheless represented to SON that the demand of Euro-Canadian settlers for lands on the Peninsula was unstoppable.

> See paras 833-838 *(Oliphant lied to SON about the Crown's Capacity Protect)*
>
> See paras 800-802 *(T.G. Anderson's Threats in August 1854)*

1207. That Crown officials misrepresented the demand for lands on the Peninsula was borne out by what happened in the years that followed: those northern lands, which were not well-suited to farming, took decades to sell. The "demand" that Oliphant and Anderson insisted was so overwhelming was, in fact, illusory.

> See para 839 *(Oliphant lied to SON about the Crown's Capacity Protect)*

1208. SON submits that Oliphant's and Anderson's lies, and the Crown's decision to accept the surrender not withstanding their conduct (which was captured in the official reports of the surrender) constitute a breach of the Crown's duty to: a) protect SON against exploitative bargains in the course of seeking a surrender; and b) act in the utmost loyalty and with good faith in the discharge of its mandates. These duties required the Crown to be honest with SON in any matter related to their interest in the Peninsula, including in the process of negotiating a surrender of that interest, and not to accept a surrender where there was reason to doubt whether it reflected the autonomous will of the community.

> *Makwa Sahgaiehcan First Nation v Canada*, 2019 SCTC 5 at paras 141-159, Plaintiffs' Book of Authorities, Tab 44.
>
> See para 1164 *(The Specific Duties Arising out of Treaty 45 ½)*
>
> See paras 1172-1177, especially para 1174-1176 *(Duties that Attach to Reserve Land Generally - The Duty of Good Faith and Loyalty)*
>
> See paras 1186-1190 *(Duties that Attach to Reserve Land Generally – The Duty to Protect Reserve Lands)*

1209. The question of whether SON would have entered Treaty 72 if the officers of the Crown had not lied about their capacity to address Euro-Canadian encroachment on the Peninsula is not relevant to assessing whether the Crown has breached its fiduciary duties to SON. As noted above at paragraph 1120(b), when assessing a breach of fiduciary duty, the emphasis throughout is on the fiduciary's actions. If the fiduciary breaches their duty to act with loyalty and fidelity in the beneficiary's interest, that is enough to give rise to a breach. It calls into question whether the beneficiary's decisions that followed in relation to their interests were free and uncoerced. In this case, the lies of Crown officials give rise to doubt about whether SON's decision to enter Treaty 72 reflected the free and autonomous will of the community. Accepting a surrender made in such circumstances constitutes a breach of the Crown's fiduciary duty.

See para 1120(b) (*The Fiduciary Concept)*

Makwa Sahgaiehcan First Nation v Canada, 2019 SCTC 5 at paras 141-159, Plaintiffs' Book of Authorities, Tab 44.

Jim Shot Both Sides v Canada, 2019 FC 789 at para 378, Plaintiffs' Book of Authorities, Tab 35.

Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development), 2018 SCC 4 at para 48, Plaintiffs' Book of Authorities, Tab 116 – *causation is a matter for remedies, not assessing whether there was a breach*.

(c) The Crown used Coercion, Threats and Bullying

1210. Finally, it was a breach of the Crown's fiduciary to threaten, coerce and bully SON in the course negotiating Treaty 72. As discussed in greater detail above, at two key points in the process of securing Treaty 72, the Crown resorted to threats and bullying in order to "wring from [SON] some assent [to the Treaty] however reluctant":

(a) When Anderson sought a surrender of the Peninsula in August 1854, he threatened: 1. That the government would not take the trouble to deal with squatting on the Saugeen Reserve; 2. That the government would take SON's land whether they consented or not; and 3. That if they did not consent, they would lose their land in any event to white settlers.

See paras 799-811 *(T.G. Anderson's Threats in August 1854)*

(b) When he returned in October 1854, rather that disavowing Anderson's threats, Oliphant echoed his sentiments: "I represented to them the difficulty, if not impossibility of preventing such unauthorized intrusions [by white settlers]." In other words, Oliphant told SON that the Crown could not help them deal with squatters and timber thieves encroaching on the Peninsula. He went onto use a variety of sharp negotiating tactics, including giving SON no notice of the treaty

meeting; timing the meeting so that First Nations did not have time to consult amongst themselves; and conducting the entire proceedings in a rushed and hurried way, even though the decision he was asking them to make was hugely significant to their future as a community.

Oliphant to Lord Elgin, November 3, 1854, Exhibit 2175, pp. 3-4.

See paras 826-839 *(Oliphant lied to SON about the Crown's Capacity to Protect)*

See paras 840-856 (*Oliphant's Tactics to Secure a Surrender)*

1211. SON submits that these tactics had the effect of eliminating SON's ability to freely decide as a community whether to surrender their territory. They were, by design, coercive and dishonourable. By employing these tactics, the Crown breached the following duties:

(a) To deal in the utmost good faith and loyalty with SON regarding the protection of the Peninsula. The threats and bullying that the Crown employed reflected the decision of officials like Anderson and Oliphant to prioritize securing a surrender of the Peninsula for the benefit of Euro-Canadian settlers to the interests of SON in relation to its reserve. This constitutes a breach of the Crown's fiduciary duty to SON.

(b) To protect and preserve SON's reserve from exploitation in the course of a surrender. Where there is evidence that Crown officials seeking a surrender are "determined" to do so, regardless of the wishes of the band, or where there is reason to doubt that the members of the First Nation understood they had a real choice whether to surrender their lands, this will taint the surrender and constitute exploitation. Accepting a surrender in these circumstances is a breach of the Crown's fiduciary duty.

Makwa Sahgaiehcan First Nation v Canada, 2019 SCT 5 at paras 145, 151,153, and 141-159 generally, Plaintiffs' Book of Authorities, Tab 44.

Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development), [1995] 4 SCR 344 at para 14, per Gonthier J, Plaintiffs' Book of Authorities, Tab 9.

See para 1165 *(Specific Duties Arising out of Treaty 45 ½)*

See paras 1172-1177, especially para 1177 (*The Duties that attach to Reserve Land Generally– The Duty of Good Faith and Loyalty)*

See paras 1186-1190 *(The Duties that attach to Reserve Land Generally– The Duty to Protect Reserve Lands)*

Consequences of the Breach

1212. The natural, clear, and intended consequence of the actions and omissions of the Crown which SON submits are breaches of fiduciary duty, is that SON entered into Treaty 72. The result was the alienation of the vast majority of their lands on the Peninsula.

See para 828 *("It therefore became an obligation upon the Indian Department to spare no pains in endeavouring to* ***wring from those whom it protects*** *some assent however reluctant…")*

1213. However, the question of whether SON would have entered into Treaty 72 in any event is not relevant to the assessment of whether the Crown breached its duties to SON. As the Supreme Court explained in *Williams Lake Indian Band,* this goes to the assessment of remedies, not of whether the Crown breached its duties:

> The Crown fulfils its fiduciary obligation by meeting the prescribed standard of conduct, not by delivering a particular result: see *Guerin*, at p. 385 and 388-89; *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9, [2009] 1 SCR 222 at para 57. The extent of the loss, if any, flowing from a breach of fiduciary duty engages questions of causation. Equity addresses such questions under the heading of

> remedy or damages once the existence and breach of a fiduciary obligation have been established.
>
> *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4 at para 48, Plaintiffs' Book of Authorities, Tab 116.

1214. The fact that a beneficiary may have some decision-making involvement in the events that led to the loss does not absolve a fiduciary of breaches of duty. As noted above, equity is not concerned with actions of a beneficiary who has been wronged.[1252] Protecting the integrity of the fiduciary relationship, and deterring its breach, requires a singular focus on the behaviour of the fiduciary when assessing whether a fiduciary duty was breached.

> L.I. Rotman, "Fiduciary Law", (Toronto: Carswell, 2005), pp. 617-618, Plaintiffs' Book of Authorities, Tab 192.
>
> See para 1120(b) *(The Fiduciary Concept)*

1215. For example, in the recent case of *MacDonald v BMO Trust Company*, which dealt with a fiduciary trust company that had failed to disclose profits it was drawing from a markup associated with foreign currency conversions, the Ontario Superior Court observed:

> It is not relevant in that regard for the fiduciary to argue that the principal would have consented to the profit, had he been asked… It is the profit for which the fiduciary must account, rather than any profit over and above a hypothetical level to which his principal may have potentially agreed.
>
> *MacDonald v BMO Trust Company*, 2020 ONSC 93 at para 52, Plaintiffs' Book of Authorities, Tab 41.
>
> *Hodgkinson v Simms*, [1994] 3 SCR 377 at pages 412-413, 432, Plaintiffs' Book of Authorities, Tab 32.

[1252] Unless in extreme cases of "unclean hands". See footnote at para 1120(b).

> *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development*), 2018 SCC 4 at para 60, Plaintiffs' Book of Authorities, Tab 116.

1216. Therefore, SON submits that even if SON agreed (reluctantly) to Treaty 72, had a reasonable understanding of what that meant, and accepted some benefits of the Treaty, that does not absolve the Crown from its breaches of fiduciary duty.

1217. As the Specific Claims Tribunal pointed out in *Huu-Ay-aht First Nations v Canada,* care must be taken not let the unique nature of the Crown-First Nation relationship to lead to an anomalous or inequitable result. It is, for instance, not valid to argue that there has been no breach of fiduciary duty because, if the plaintiff had not suffered a breach of fiduciary duty, the loss would have been inevitable – for instance, because the land would have been taken by squatters and timber thieves anyway. Equity will not countenance a fiduciary asserting that if they had not breached their duties, some other wrong-doer would have simply intervened and similarly taken from the beneficiary what was lost through a breach of the fiduciary duty. Equity holds the fiduciary to a higher standard.

> *Huu-ay-aht First Nations v Canada*, 2016 SCT 14 at para 257, Plaintiffs' Book of Authorities, Tab 33.
>
> *Keech v Sandford (1726),* Sel. Cas. Ch. 61, 25 ER 223 (Eng Ch. Div.), Plaintiffs' Book of Authorities, Tab 37.
>
> *Boardman v Phipps,* [1967] 2 AC 46, [1966] UKHL 2, [1966] 3 All ER 721, Plaintiffs' Book of Authorities, Tab 10.
>
> > The defendant advanced an argument which Bowen LJ, at para 480, likened to a case where "A man knocks me down in Pall Mall, and when I complain that my purse has been taken, the man says, 'Oh, but if I had handed it back again, you would have been robbed over again by somebody else in the adjoining street.'" It is good sense and good law that if a trustee makes an unauthorised disbursement of trust funds, it is no defence to a claim by the beneficiary for the

> trustee to say that if he had not misapplied the funds they would have been stolen by a stranger.

AIB Group (UK) Plc v Mark Redler & Co Solicitors, [2014] UKSC 58 at para 58, Plaintiffs' Book of Authorities, Tab 1.

Conclusion on Breach of Fiduciary Duty

1218. SON therefore submits that the Crown took on itself a fiduciary duty to preserve and protect the Peninsula, to deal in utmost good faith with SON in relation to the Peninsula, and not to accept a surrender of the Peninsula where that surrender was taken in exploitative conditions. The Crown breached this fiduciary duty by failing to protect the Peninsula from squatters, trespassers and timber thieves, and by accepting a surrender notwithstanding the threats Anderson and Oliphant made and the lies they told to "wring some assent" from SON during the negotiation of Treaty 72. The result of these breaches was SON agreed to Treaty 72. The appropriate remedies for these breaches are the subject of Phase 2 of this litigation.

43. THE HONOUR OF THE CROWN

1219. The honour of the Crown is a foundational principle of Canada's constitutional structure. It arises "from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people". It has governed the Crown's relationship with Indigenous people from the assertion of Crown sovereignty forward.

> *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 (CanLII), [2004] 3 SCR 511, paras 16, 18, 32, Plaintiffs' Book of Authorities, Tab 30.
>
> *Manitoba Métis Federation Inc. v Canada (Attorney General),* 2013 SCC 14 at para 66, Plaintiffs' Book of Authorities, Tab 45.

Beckman v Little Salmon/Carmacks First Nation, [2010] SCJ No. 53, [2010] 3 SCR 103 at para 42 (SCC), Plaintiffs' Book of Authorities, Tab 8.

Brian Slattery, "The Aboriginal Constitution," (2014) 67 S.C.R.L. (2d) pp. 320-321, Plaintiffs' Book of Authorities, Tab 201.

1220. As Karakatsanis J. explained in *Mikisew Cree First Nation v Canada:*

> [T]he tension between the Crown's assertion of sovereignty and the pre-existing sovereignty, rights and occupation of Aboriginal peoples **creates a special relationship that requires that the Crown act honourably in its dealings with Aboriginal peoples**. [emphasis added]

Mikisew Cree First Nation v Canada (Governor General in Council), 2018 SCC 40, [2018] 2 SCR 765 at para 21, writing for the majority, Plaintiffs' Book of Authorities, Tab 47.

1221. The honour of the Crown is engaged by those situations involving the reconciliation of Aboriginal rights with Crown sovereignty. To date, the case law has recognized a number of triggers for the honour of the Crown within this broader category, including interpretation of treaty promises and other constitutional obligations to Indigenous peoples, and the interpretation and application of Aboriginal rights and title under s. 35(1) of the *Constitution Act,* 1982. This list is not closed. Where it is engaged, the honour of the Crown imposes a heavy burden.

Manitoba Métis Federation v Canada (Attorney General), 2013 SCC 14 at paras 68-71, Plaintiffs' Book of Authorities, Tab 45.

1222. It is from this "core precept" that many of the Crown's specific obligations to Indigenous peoples arise. The duties that arise depend on the specific context and scenario in which the honour of the Crown is found to be engaged. In *Manitoba Métis Federation,* McLachlin CJ and Karakastanis J. identified four different constellations of duties that had so far been found to arise from the principle of the honour of the Crown:

(a) the honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest;

(b) the honour of the Crown informs the purposive interpretation of s. 35, and therefore gives rise to a duty to consult and accommodate where the Crown contemplates action that may affect a claimed but unproven Aboriginal interest;

(c) the honour of the Crown governs treaty-making and implementation, and imposes a duty to engage in honourable negotiation and to avoid even the appearance of sharp dealing; and,

(d) the honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of a treaty and statutory grants to Indigenous peoples.

> *Manitoba Métis Federation v Canada (Attorney General),* 2013 SCC 14 at para 73, Plaintiffs' Book of Authorities, Tab 45.

1223. In *Manitoba Métis Federation,* the Supreme Court expanded on this list to find that when the Crown implements a solemn constitutional promise to Indigenous peoples, including but not limited to a treaty promise, it must: 1) take a broad and purposive interpretation of its promise ("the duty of purposive interpretation"); and 2) act with diligence to fulfill it ("the duty of diligent fulfilment").

> *Manitoba Métis Federation v Canada (Attorney General),* 2013 SCC 14 at paras 71-72, 75-80, Plaintiffs' Book of Authorities, Tab 45.
>
> Brian Slattery, "The Aboriginal Constitution", (2014) 67 SCLR (2d) at p. 333, Plaintiffs' Book of Authorities, Tab 201.

1224. These twin duties of purposive interpretation and diligent fulfilment arise where the Crown makes an explicit promise to an Indigenous group that is enshrined in the Constitution.

This includes treaty promises, but also other solemn constitutional obligations. Generally, such a promise shares some features a treaty: there is a measure of solemnity in the manner in which the promise is made; the Crown has an intention to create obligations; and the overarching purpose of reconciling Indigenous interests with the Crown's sovereignty. SON submits that these features are not part of the test for whether the honour of the Crown is engaged. Instead, in *Manitoba Métis,* the Supreme Court identified them to justify why some of the obligations that extend to treaties should extend to other constitutional promises to Indigenous people, and to explain why s. 31 of the *Manitoba Act* should engage the honour of the Crown. As such, although these factors are not strict requirements, they can assist in assessing whether an express constitutional promise has been made to an Indigenous group.

> *Manitoba Métis Federation v Canada (Attorney General),* 2013 SCC 14 at paras 70-72, 91-94, Plaintiffs' Book of Authorities, Tab 45.
>
> Brian Slattery, "The Aboriginal Constitution", (2014) 67 SCLR (2d) at p. 333, Plaintiffs' Book of Authorities, Tab 201.

1225. Above, at paragraphs 1127 to 1211, we have set out in detail how the Crown's promise to protect the Peninsula in Treaty 45 ½ gave rise to a fiduciary duty on both the *ad hoc* and *sui generis* branches of the test for a fiduciary duty, and why we say that duty was breached. This fiduciary duty is one result of the honour of the Crown. However, in the alternative, if the Court concludes that the Crown is not liable for these breaches of its fiduciary duties, SON submits that the same conduct gives rise to a breach of the honour of the Crown. [1253] SON submits that three further dimensions of the honour of the Crown are also engaged in this case.

[1253] Although these are separate and distinct from the Crown's fiduciary duty, the facts that engage the Honour of the Crown overlap with the facts that engage the fiduciary duty and that give rise to the breach of fiduciary duty elaborated above.

See paras 1127-1211

1226. The first is the obligation to negotiate in good faith and to avoid even the appearance of sharp dealing in its negotiations with Indigenous peoples during the process of treaty-making. Sharp dealing is a broad term that captures a range of questionable or unethical actions in the course of negotiations, including assorted forms of bad faith, dishonesty and misrepresentation, and coercive behaviour.

> *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 (CanLII), [2004] 3 SCR 511 at para 42, Plaintiffs' Book of Authorities, Tab 30.
>
> *Luuxhon v Canada*, 1999 CanLII 6180 (BCSC) at paras 73-74, Plaintiffs' Book of Authorities, Tab 40.[1254]
>
> *Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd*., 2002 SCC 19 at paras 67-71, affirming 1999 ABQB 479 (CanLII), 246 A.R. 272 at paras 87, 109, *which characterized an attempt to take advantage of a mistake made by another party in signing an agreement as amounting to "sharp practice",* Plaintiffs' Book of Authorities, Tabs 64 and 63.
>
> *R v George*, [1966] 3 CCC 137 at p. 149, [1966] SCR 267 at p. 279, 55 DLR (2d) 386 at pp. 396-7, Cartwright, J. (dissenting), Plaintiffs' Book of Authorities, Tab 73 – *Explains that the honour of the Crown is not upheld where the Crown acts to take away "by unilateral action and without consideration rights solemnly assured to the Indians."* This dissent has been treated positively in subsequent cases, including *R v Batisse,* [1978] OJ No. 3290, 1978 CanLII 1640 (ONSC) at para 25, Plaintiffs' Book of Authorities, Tab 71.
>
> See generally: Martin, Andrew F., and Telfer, Candance, "The Impact of the Honour of the Crown on Ethical Obligations of Government Lawyers: a Duty of Honourable Dealing" Dalhousie Law Journal, Vol 41, No. 2, Fall 2018 at p. 459 – Defines sharp dealing as "engaging without an intention to keep promises, or

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[1254] In *Luuxhon v. Canada*, the failure to make disclosure of relevant factors and negotiating with oblique motives were identified alongside sharp dealing ways the Crown might breach its larger duty of good faith negotiation.

> *otherwise coercing or unilaterally imposing outcomes*", Plaintiffs' Book of Authorities, Tab 182.

1227. The second is the duty to interpret treaty and other solemn constitutional promises broadly and purposively. The Supreme Court of Canada has been clear that such promises must be interpreted "in a manner which gives meaning and substance to the promises made by the Crown". In part, this is about interpreting the promise in a manner consistent with its purpose: "an honourable interpretation of an obligation cannot be a legalistic one that divorces the words from their purpose." SON submits that the understanding of the promise by the Indigenous group to whom it was made is a central consideration in determining what constitutes a purposive interpretation of a treaty or other constitutional promise.

> *Manitoba Métis Federation Inc. v Canada (Attorney General),* 2013 SCC 14 at paras 76-77, Plaintiffs' Book of Authorities, Tab 45.
>
> *R v Marshall,* [1999] 3 SCR 456 at para 52, Plaintiffs' Book of Authorities, Tab 78.

1228. The third is Crown's duty to act diligently to fulfill it promises, including both its treaty promises and its other solemn constitutional promises:

> Crown servants must seek to perform the obligation in a way that pursues the purpose behind the promise. The Aboriginal group must not be left "with an empty shell of a treaty promise."
>
> *Manitoba Métis Federation Inc. v Canada (Attorney General),* 2013 SCC 14 at para 80, and paras 75-80 generally, Plaintiffs' Book of Authorities, Tab 45.

1229. This duty of diligent fulfilment requires the Crown "to endeavour to ensure its obligations are fulfilled". While an occasional incident of negligence may not attract sanction, "a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise" will run afoul of the honour of the Crown.

> *Manitoba Métis Federation Inc. v Canada (Attorney General),* 2013 SCC 14 at paras 79, 82, Plaintiffs' Book of Authorities, Tab 45.

1230. Applying the framework set out in *Manitoba Metis Federation,* SON submits that Crown's conduct in relation to the Peninsula engaged the honour of the Crown at two key points:

(a) The implementation of Treaty 45 ½; and

(b) The negotiation of Treaty 72.

1231. At each stage, the Crown failed to satisfy the obligations imposed upon it by the honour of the Crown.

Treaty 45 ½: The Promise to Protect the Peninsula

1232. The honour of the Crown was engaged in respect of the interpretation and implementation of the Treaty 45 ½ promise to protect the Peninsula from the encroachment of whites forever, as it is with all treaty promises. In this circumstance, the honour of the Crown required the Crown to take a broad and purposive approach to the interpretation of the promise and to act diligently to fulfil it. The Crown was required to act in a way that accomplished the intended benefit conferred on SON via this treaty promise.

> *Manitoba Métis Federation Inc. v Canada (Attorney General),* at paras 75-83, Plaintiffs' Book of Authorities, Tab 45.

1233. The purpose behind the promise in Treaty 45 ½ was the protection of the Peninsula as a reserve for SON. SON's interest in entering the treaty was to have lands protected for them, not merely to receive money for their lands. It was a promise to protect the lands themselves for SON forever.

See paras 660-673 (*The promise to protect the Peninsula: Scope and Meaning)*

See paras 674-701 *(Treaty 45 ½ set aside the Peninsula for SON)*

See paras 1099-1110 (*The Legal Test for Creation of a Reserve)*

1234. The land on the Peninsula was extremely significant to SON when Treaty 45 ½ was concluded. Bond Head, the Crown negotiator, understood this. The land on the Peninsula remains highly significant to SON today.

See paras 205-215 (*SON's Presence in their Territory)*

See paras 234-242 *(Burial Customs)*

See paras 269-283282 *(SON's Fishery in the 19th Century)*

See paras 315-318 *(Ceremonial Fishing)*

See paras 319-329 (*Hunting, Trapping and Gathering: SON's Harvesting from 1830 to Present – SON Depended on Harvesting in the Mid-19th Century)*

See paras 330 -339 (*SON's Harvesting after 1854)*

See paras 340- 347 (*SON's present day harvesting)*

See paras 660-665 (*The Promise to Protect was the Main Consideration)*

1235. When Treaty 45 ½ was concluded, SON gave up most of the lands of SONTL so the Crown could open it up to white settlement – 1.5 million acres of land south of the Peninsula, in exchange for the Crown's promise to protect for them what remained on the Peninsula. The Peninsula was their only refuge. For SON, whose relationship to their territory is "everything" – it is inconceivable that this promise would mean only that they would receive compensation if their lands were sold, in lieu of the Crown taking every measure available to them to make good on the promise to protect. Accordingly, in our submission, it is an unduly technical and legalistic interpretation to suggest that the promise would be satisfied by ensuring that SON received the

proceeds of the sale of the Peninsula. A broad, purposive interpretation of the promise, taking into account the perspectives of SON, is that it attached to the protection of the *land itself.* This is the only interpretation of the promise that is consistent with the honour of the Crown.

> See paras 648-659 (*The Events of the Treaty Council*)
>
> See paras 660-673 (*Promise to Protect the Peninsula: Scope and Meaning*)
>
> See para 686 (*Promise to Protect Peninsula is made to SON*)

1236. The Crown recommitted itself to this promise twice: first, in 1847, when it issued Lord Elgin's Declaration in relation to the Peninsula, and second, in 1851, when it extended by Proclamation the 1850 Indian Lands Protection Act to the Peninsula. SON submits that both documents demonstrate that the Crown understood the Saugeen Ojibway were interested in the protection of the Peninsula from "encroachments of the whites". This was the purpose that SON hoped to achieve by entering Treaty 45 ½.

> See para 693 (*1847 Declaration and 1851 Proclamation*)

1237. The honour of the Crown also required the Crown to act with diligence to protect the Peninsula. As set out in paragraphs 1199 to 1204, the Crown systematically failed to exercise the options that were readily available to it to protect the Peninsula from encroachments by settlers and timber thieves. This constituted a stain on its honour.

> See paras 1199-1204 (*Breach of the Duty to Protect the Peninsula from Encroachments*)
>
> See paras 741-745 (*The Crown's Capacity to Protect the Peninsula*)
>
> See paras 748-772 *(The Capacity of the Crown to Enforce*)
>
> See paras 773-777 (*What did the Crown do to protect the Peninsula prior to October 1854?*)

Manitoba Métis Federation Inc. v Canada (Attorney General) at para 82, Plaintiffs' Book of Authorities, Tab 45.

The Negotiation of Treaty 72: The Duty to Avoid Sharp Dealing

1238. The honour of the Crown was engaged when Crown officials sought the surrender of the Peninsula. The honour of the Crown required the Crown to act honourably in its negotiations seeking the surrender of SON's lands and to avoid sharp dealing and the appearance of sharp dealing.

Manitoba Métis Federation Inc. v Canada (Attorney General) at para 73, Plaintiffs' Book of Authorities, Tab 45.

1239. The Crown breached this obligation throughout the process of securing Treaty 72. Evidence of coercive and dishonest practices during the negotiation process are set out in more detail above, at paragraphs 799 to 811 and 824 to 856. Briefly, they included:

(a) Anderson's threats that the government would not take the trouble to help SON keep squatters and timber thieves off their land, and in fact would take their land whether they consented or not.

See paras 799-811 (*T.G. Anderson's Threats in August 1854*)

(b) The undisputed fact that no Crown official ever dissociated the Crown from Anderson's threats in August 1854. Accordingly, when Oliphant arrived in October 1854 to take Treaty 72, these threats were still hanging in the air.

See para 811

(c) Oliphant's efforts to secure the treaty using lies and threats – namely, by telling SON that the Crown could not protect the land from squatters; and

See paras 826-839, especially at 826-828 (*Oliphant lied to SON about the Crown's Capacity to Protect*)

(d) Oliphant's efforts to prevent SON from consulting amongst themselves in accordance with Anishinaabe decision-making protocols. This was an effort to prevent them from deciding freely and fairly not to accept his proposal. It amounts to a further form of coercion and undue pressure.

See paras 840-856 (*Oliphant's Sharp Tactics to Secure the Surrender*)

1240. Taken individually and together, SON submits that these actions constituted an example of sharp dealing that ran afoul of the honour of the Crown.

Conclusion on the Honour of the Crown

1241. Based on the above, we submit that the Crown breached the duties that flow from the honour of the Crown and, in so doing, stained its honour.

44. DECLARATORY RELIEF

1242. SON has argued above that:

(a) SON has Aboriginal title to SONUTL;

(b) The Crown breached its fiduciary duty SON in the years leading up to and in the course of concluding Treaty 72;

(c) The Crown stained its honour by the actions it took in relation to SON in the years leading up to and in the course of concluding Treaty 72; and

(d) Treaty 72 had no effect on whatever traditional harvesting rights SON had prior to Treaty 72.

1243. Many aspects of the remedies SON seeks in this litigation have been deferred to Phase 2 of this litigation.

Order of Justice Matheson, January 16, 2020 (Phasing order)

1244. The key temporal focus of the events at issue in this litigation has been on 1763 in relation to Aboriginal title, and in the years leading up to 1854 in relation to Treaty 72. At those key points, the Crown was one and undivided.

1245. The responsibilities of the undivided Crown have since devolved to Canada and/or Ontario. The apportionment of any related liability between Canada and Ontario is the subject of Phase 2 of this litigation.

See paras 866-872 *(the chain of events by which responsibility was devolved)*

> *Grassy Narrows First Nation v Ontario (Natural Resources)*, [2014] 2 SCR 447, 2014 SCC 48 at para 35, Plaintiffs' Book of Authorities, Tab 28.
>
> *R v Secretary of State for Foreign and Commonwealth Affairs Ex parte Indian Association of Alberta*, [1982] 2 All ER 118, [1982] QB 892, [1981] 4 CNLR 86 (EWCA Civ), Plaintiffs' Book of Authorities, Tab 83.

1246. At this point SON seeks various declarations set out below. Some are essentially complete remedies, and other are intended to crystallize the findings and rulings of this Court in a way that would enable negotiations between the parties or the conduct of a later phase of this litigation.

1247. A declaration is a discretionary equitable remedy. The criteria are as follows:

> The question must raise a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing has a true interest to oppose the declaration sought.
>
> Lazar Sarna, "Declaratory Judgments", 3rd ed (Toronto: Thomson Carswell, 2007) at p.15, Plaintiffs' Book of Authorities, Tab 197, quoting *Russian Commercial & Industrial Bank v British Bank for Foreign Trade*, [1921] 2 AC 438 (HL) at pages 447-448, Plaintiffs' Book of Authorities, Tab 98.

1248. A declaration is available without a cause of action and may be made regardless of whether any consequential relief is sought.

> *Manitoba Métis Federation Inc. v Canada (Attorney General),* 2013 SCC 14 at para 143, Plaintiffs' Book of Authorities, Tab 45.
>
> *Courts of Justice Act*, RSO 1990 c C 43, s 97, Plaintiffs' Book of Authorities, Tab 128.

1249. A declaration may be the only way to give effect to the honour of the Crown. It is especially appropriate where the principle of reconciliation with Indigenous peoples is engaged.

> *Manitoba Métis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 at para 143, Plaintiffs' Book of Authorities, Tab 45.

1250. It is submitted that the declaration of Aboriginal title sought as set out below is substantively a final vindication of a contested right and therefore meets the general criteria for a declaration.

1251. It is submitted that the declaration sought as set out below interpreting the (lack of) effect of Treaty 72 on harvesting rights will resolve a disputed question about SON's harvesting rights, and thus meets the general criteria for a declaration.

1252. It is submitted that the declaration sought as set out below concerning a breach of fiduciary duty on the part of the Crown will resolve disputed questions of fact and law between the parties, and either end litigation on such matters, or crystallize the findings of this Court in a way that would enable negotiations between the parties or the conduct of a later phase of this litigation. For that reason, it meets the general criteria for a declaration.

1253. In the event that the substantive ruling concerning a breach of fiduciary duty is not granted, but that the Court is satisfied that the honour of the Crown has been stained, it is submitted that the declarations about the honour of the Crown sought as set out below would be the only way to give effect to the honour of the Crown, and are appropriate for that reason.

45. ORDERS SOUGHT

1254. In relation to Aboriginal title, SON seeks the following orders:

(a) A declaration that SON has Aboriginal Title to the Saugeen Ojibway Nation Unceded Traditional Lands (SONUTL), as described in Schedule A of the Statement of Claim (with the exception of that portion of SONUTL east of line of

longitude 80 ° 20’W), or to such portions thereof for which this Court may find the evidence sufficient, subject to sharing the Aboriginal title to a strip of the lakebed about 22 miles wide centred on Goderich, and running from the shore of Lake Huron to the international boundary, jointly with other First Nations who may establish shared title in that area; and

(b) Costs on a substantial indemnity basis.

1255. In relation to Treaty 72, SON seeks the following orders:

(a) A declaration that Treaty 72 had no effect on whatever traditional harvesting rights SON had prior to Treaty 72;

(b) A declaration that the Crown breached its fiduciary duties to SON by failing to protect SON’s lands on the Peninsula in the years and months leading up to Treaty 72 and by its actions in the course of concluding Treaty 72;

(c) A declaration that the Crown has stained its honour by failing to protect SON’s lands on the Peninsula in the years and months leading up to Treaty 72 and by its actions in the course of concluding Treaty 72;

(d) A declaration that this stain still clings to the honour of Canada and of Ontario; and

(e) Costs on a substantial indemnity basis.

All of which is respectfully submitted. Date: July 27, 2020

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