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

****

Court File No. 94-CQ-050872CM

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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

SUPPLEMENT TO FINAL ARGUMENT OF THE SAUGEEN OJIBWAY NATION

INTRODUCTION

1. On August 11, 2020, Justice Matheson requested supplementary submissions from SON on two points:

   (a) Para. 29 [of the Final Argument of SON] uses the phrase "in the hands of private parties in fee simple". However, in the course of the trial the phrase "third party purchasers for value without notice" was used. Do the plaintiffs intend a different meaning as between these phrases and, if so, please explain the difference. Also, in the trial that sort of phrase was used in regard to the constructive trust claim, but para. 29 refers to Aboriginal title? Please clarify.

   (b) The Treaty submissions do not set out the terms of Treaty 72 from the plaintiffs' standpoint. Please provide that information.

2. At a Trial Management Conference on August 18, 2020, Justice Matheson requested another supplementary submission from SON concerning why the municipalities were joined to the Treaty Action.

3. The supplementary submissions are set out in the following order:

   (a) Terms of Treaty 72

   (b) Clarification Regarding Private Parties

   (c) Liability of Municipalities

TERMS OF TREATY 72

4. SON submits that Treaty 72[1] included the following terms:

(a) SON agreed to open up lands on the Peninsula ("known as the Saugeen and Owen Sound Indian Reserve") for sale and settlement, except for the following lands:

(i) any islands;

(ii) the parcels of lands they reserved, which lands are approximately described in the text of Treaty 72;

(b) the lands on the Peninsula to be opened up for sale and settlement would be sold by the Crown for the benefit of SON;

(c) SON would receive the proceeds from the sale of those lands on the Peninsula, including the interest of the principal sums arising out of the sale of those lands on the Peninsula, without diminution, to be distributed at regular periods; and

(d) SON's harvesting rights, as they existed at the time that Treaty 72 was concluded, would continue. As elaborated in SON's Final Argument, because nothing was mentioned in Treaty 72 about any restriction or limitation on SON's harvesting rights, SON could continue to harvest throughout the Peninsula.

> See paras 319-347 of the Final Argument of the Saugeen Ojibway Nation, July 27, 2020 (*SON's Harvesting from 1830 to Present*)
>
> See paras 861-865 of the Final Argument of the Saugeen Ojibway Nation (*Treaty 72: Harvesting Rights*)

[1] Treaty 72, 1854, Exhibit 2145.

> See paras 1095-1098 of the Final Argument of the Saugeen Ojibway Nation (*Proper Interpretation of Treaty 72 and SON's Harvesting Rights*)

CLARIFICATION REGARDING PRIVATE PARTIES

Title Action

5. SON's pleadings in the title action specify the territory for which Aboriginal title is claimed, and sets out an explicit exception for:

> Any land which is owned by private parties in fee simple at the time this proceeding is commenced, and remains so owned.

> Amended Amended Amended Statement of Claim, Schedule A, 2nd exception, Supplementary Trial Record, Action 03-CV-261134CM1, Tab 1, p. 140.

6. The order sought by SON concerning Aboriginal title incorporates by reference the definition of the territory claimed as set out in the Statement of Claim.

> Final Argument of SON, para 1254(a).

7. Paragraph 29 in the Overview section of the Final Argument of SON, which mentions lands "in the hands of private parties in fee simple" was intended to refer to the exception noted above: any land which is owned by private parties in fee simple at the time this proceeding was commenced, and remains so owned.

8. This exception is somewhat broader than the concept of "third party purchasers for value without notice" since it could encompass land that was not purchased for value.

Treaty Action

9. SON's pleadings in the Treaty action specified that SON claimed beneficial ownership of five categories of land within the Treaty 72 area, as follows:

(a) lands of which Canada is the legal or registered owner;

Fresh as Amended Statement of Claim, para 2(b), Trial Record, Action 94-CQ-050872CM, Tab 1, p. 4.

(b) lands of which Ontario is the legal or registered owner;

Fresh as Amended Statement of Claim, para 3(b), Trial Record, Action 94-CQ-050872CM, Tab 1, p. 5.

(c) unpatented lands (except those otherwise legally conveyed by Ontario);

Fresh as Amended Statement of Claim, para 3(c), Trial Record, Action 94-CQ-050872CM, Tab 1, p. 5.

(d) unpatented, unconveyed road allowances; and

Fresh as Amended Statement of Claim, para 4(a), Trial Record, Action 94-CQ-050872CM, Tab 1, p. 7.

(e) lands into which may be traced the proceeds of conveyances of road allowances.

Fresh as Amended Statement of Claim, para 4(b), Trial Record, Action 94-CQ-050872CM, Tab 1, p. 7.

10. While this is a matter, in SON's submission, for Phase 2 of this litigation, the claims to beneficial ownership are meant to encompass any of the legal theories of constructive trust, resulting trust, or some *sui generis* equivalent of such.

11. As these remedies lie purely within the scope of equity, SON acknowledges that such remedies could be subject to the defence of *bona fide* purchaser for value of the legal estate without notice ("BFPVLEWN"). Therefore, SON defined the categories of land claimed to exclude any lands for which there was a BFPVLEWN (in SON's view).

12. As a shorthand way of describing the effect of the treaty claim, SON therefore has explained the claim as not encompassing lands where there is "third party purchaser for value

without notice". This was intended to be descriptive and explanatory of the claim as defined more precisely in the Statement of Claim.

LIABILITY OF MUNICIPALITIES

13. SON argues in its written Final Argument that the Crown breached its fiduciary duties to SON leading up to and in the course of concluding Treaty 72. As a result of these breaches, most of the lands on the Peninsula came into Crown hands. SON intends to argue in Phase 2 of this litigation that these breaches gave rise to a constructive trust (or, as noted above, a resulting trust, or some *sui generis* equivalent) through which SON held the beneficial ownership over the lands which had been subject to the surrender clause in Treaty 72.

14. Once a constructive or resulting trust has been established, the trust obligation will follow the legal estate wherever it goes unless the estate passes into the hands of a BFPVLEWN. It does not matter whether the defendant in possession of the trust property is a wrongdoer, nor whether there exists any prior fiduciary relationship between the defendant in possession of trust property and the beneficiary.

> The starting point is that trust property remains trust property, unless the recipient positively establishes the defence that he has acquired a legal interest in the property, in good faith, for value, without notice of the breach or other want of authority on the part of the trustee. The defendant must establish all elements of the defence.

Waters, Gillen and Smith, *Waters' Law of Trusts in Canada*, 4th Ed (2012), pp. 1334 -1335. See also: pp. 483, 504-505, 1340, Plaintiffs' Supplemental Book of Authorities, Tab 5.

See also *Hawker v Hawker* (1969) 3 DLR (3d) 735 , 1969 CanLII 654 (SK QB) at paras 25-26, Plaintiffs' Supplemental Book of Authorities, Tab 3.

> Both the constructive trust and the equitable lien are proprietary remedies. Consequently, it is essential

> that the claimant be able to identify the property to which he claims to be beneficially entitled as a prerequisite to obtaining such relief. In order to do so, it may be necessary for him to "trace" or "follow" such property, or its product, into the hands of the defendant. Hence, as with the case of following property at law, tracing in equity is in reality, a means to a remedy rather than being a remedy in and of itself. It matters not that the defendant is not the actual wrongdoer so long as he is in possession of some property in which the claimant has an equitable right. The only exception to this is the bona fide purchaser for value who has had no notice of the claimant's equitable interest.
>
> … For purposes of the law of restitution in Canada, it is submitted that it is necessary only for a claimant to establish an equitable proprietary interest in the property in question as a prerequisite for an equitable tracing order. This principle is not limited to situations where legal and equitable proprietary interests are divided. Thus, the absolute legal and beneficial owner of the property, such as the victim of a theft, is able to trace that property into its product. No pre-existing fiduciary relationship need be established -- or, for that matter, fictionally imposed in order for the claimant to assert his equitable proprietary rights.
>
> *Central Capital Corp v Clausi*, [1993] OJ No. 930 at para 12, (quoting with approval from P. Maddaugh and J. McCamus, *The Law of Restitution* (Aurora: Canada Law Book, 1990)); aff'd [1994] OJ No. 3891 (CA), Plaintiffs' Supplemental Book of Authorities, Tab 1 and 2.
>
> See also McInnes, M., "Case Comment: Knowing Receipt and the Protection of Trust Property: *Banton v CIBC*" (2002) 81 Can Bar Rev 171 at pp. 176-177, Plaintiffs' Supplemental Book of Authorities, Tab 4.

15. In paragraphs 880-882 of SON's Final Argument, it is explained that the municipalities came into possession of some of the lands alleged to be subject to such a trust, by statutory conveyance, without having paid for such land. Therefore, SON intends to argue in Phase 2 that

the above principle applies here: the conveyance to the municipalities of the road allowances did not terminate SON's beneficial interest in such lands.

16. The issue of the entitlement of SON to beneficial ownership of land (including land held by municipalities) has been deferred to Phase 2 of this litigation.

> Order of Justice Matheson, Entered February 18, 2020, para 2 (b) (iii) and 2 (b) (iv), Second Supplementary Trial Record, Action 03-CV-261134CM1, Tab 2, pp. 4-5.

17. If any of the Defendants (including the municipalities) wish to try to assert the defence of BFPVLEWN, they are free to do so in Phase 2. SON submits that it would be premature to argue such a defence now since it is a response to a remedial claim which SON is not permitted to make until Phase 2. At such time as the Court entertains the merits of a defence of BFPVLEWN on the part of the municipalities, SON will respond to it.

All of which is respectfully submitted. Date: August 26, 2020

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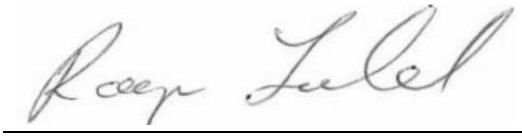

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