CITATION: Chippewas of Saugeen First Nation et al. v. The Attorney General of Canada et al., 2021 ONSC 4181
COURT FILE NOS.: 94-CQ-050872CM and 03-CV-261134CM1
DATE: 20210729

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
THE CHIPPEWAS OF SAUGEEN FIRST NATION and THE CHIPPEWAS OF NAWASH UNCEDED FIRST NATION Plaintiffs	*H. W. Roger Townshend, Renée Pelletier, Cathy Guirguis, Jaclyn C. McNamara, Benjamin Brookwell, Krista Nerland, Scott Franks, Christopher Evans* and *Joel Morales*, for the 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	*Michael Beggs, Michael McCulloch, Barry Ennis, Carole Lindsay, Alexandra Colizza* and *Gary Penner*, for the Defendant The Attorney General of Canada *David J. Feliciant, Peter Lemmond, Richard Ogden, Julia McRandall* and *Jennifer Lepan*, for the Defendant Her Majesty The Queen in Right of Ontario *Tammy Grove-McClement*, for the Defendant The Corporation of The County of Bruce *Jill Dougherty* and *Debra McKenna*, for the Defendant The Corporation of The Township of Georgian Bluffs *Gregory F. Stewart*, for the Defendants The Corporation of The County of Northern Bruce, The Corporation of the Town of South Bruce Peninsula and The Corporation of the Town of Saugeen Shores
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	)	**HEARD:** April 25, 29-30, May 1, 13-16, 22-24, 27-31, June 3-4, 10-11, 21, 28, July 8-10, 12, 15-16, 19, 22-26, Aug. 12-16, 19, 20-21, Sept. 16-18, 30, October 1-4, 7, 11, 21-24, 30-31, Nov. 1, 18-22, 25-26, Dec. 9-11, 16, 2019, Jan. 8, 13-17, 20-22, Feb. 3, 6, 10, 12-13, 18, 20-21, March 3-6, 9-12, April 28-29, October 19-23, 2020, written submissions July 22, 23, 26, 2021

REASONS FOR JUDGMENT

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W. MATHESON J.:

Overview

[1] The plaintiffs in these lawsuits are two First Nations who have, for many years, lived on or near the Bruce Peninsula. They are the Chippewas of Nawash Unceded First Nation and the Saugeen First Nation. These First Nations refer to themselves together as the Saugeen Ojibway Nation or, in this litigation, SON.

[2] In SON's first lawsuit, the Treaty Claim, SON has shown that the pre-Confederation Crown breached its obligations to SON's ancestors in the 1800s.

[3] The Treaty Claim focuses on two treaties that are now known as Treaty 45½ and Treaty 72. Ancestors of SON entered into Treaty 45½ in 1836. In that treaty, they surrendered about 1.5 million acres of land south of the Peninsula. The main benefit that they received, in return, was the Crown's promise to protect their lands on the Peninsula from encroachments by white people. Squatting was already a problem in 1836, and this problem escalated with the non-Indigenous population growth over the following decades. I conclude below that the Crown breached the treaty promise to protect the Peninsula, and in doing so also breached the honour of the Crown.[1]

[4] SON's Treaty Claim also challenges the Crown negotiation process leading up to Treaty 72. SON submits, and I agree, that the principle of the honour of the Crown applies to the negotiation of a treaty. I have found that some of the Crown negotiation conduct in 1854 breached the honour of the Crown.

[5] With respect to Treaty 72 itself, SON does not allege that the Crown breached the treaty. However, SON seeks a declaration that the treaty had no impact on SON traditional harvesting rights except where the surrendered land has been put to an incompatible use. I have granted a declaration about the continuation of SON harvesting rights, based on incompatible land use.

[6] SON further claims that Crown fiduciary duties arose from Treaty 45½. I have not found that there was a fiduciary duty that supplemented the above treaty obligations.

[7] In the second lawsuit, the Aboriginal Title Claim, SON has brought forward a novel legal claim. SON seeks Aboriginal title to the lake bed of a large part of Lake Huron, including about half of Georgian Bay, surrounding the Peninsula. However, SON has not sought Aboriginal title to the Peninsula itself.

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[1] The phrase "the honour of the Crown" refers to the principle that servants of the Crown must conduct themselves with honour in their dealings with First Nations when acting on behalf of the sovereign.

[8] SON are a fishing people. They have an established Aboriginal right to fish in their traditional fishing grounds on both sides of the Peninsula.[2] SON now seeks broader rights to the Great Lakes, beyond those needed for fishing. SON seeks the same Aboriginal title rights to the lake bed that would arise if it were dry land, including the right to control the land. Significantly, this would mean that SON has the right to exclude all other people from that part of Lake Huron and Georgian Bay, including for passage through the area.

[9] I have not found that SON has Aboriginal title to the lake bed. However, SON's claim has been a catalyst for a discussion about important issues concerning the Great Lakes, and the public right of navigation. The outcome might well have been different for other submerged land.

[10] The Attorney General of Canada and Her Majesty the Queen in Right of Ontario are the main defendants to these actions.[3] The remaining defendants are municipalities that currently own certain roads and road allowances on the Peninsula. No breach of any obligation has been alleged against any of the municipal defendants.[4] They have been named as defendants because SON seeks ownership of those roads and road allowances.

[11] Ontario has raised the defences of Crown immunity and laches (unreasonable delay) in response to the Treaty Claim. As well, the municipal defendants have asked to be removed from this litigation altogether. To the extent that these issues need to be addressed now, I have concluded that they do not defeat SON's claims. Some of these issues are better suited to the next phase of this litigation and have therefore been deferred to that phase, if necessary.

[12] These reasons for decision are organized as follows:

Part 1 – Scope of the claims, phasing of the litigation and overview of the evidence

Part 2 – Overarching legal principles that apply to both the Aboriginal Title Claim and the Treaty Claim

Part 3 – Aboriginal Title Claim

Part 4 – Treaty Claim, including the Crown immunity and laches defences

Part 5 – Claim against the municipal defendants

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[2] *R. v. Jones* (1993), 14 O.R. (3d) 421 (Prov. Ct.).
[3] In these reasons, general references to "the defendants" refer to Canada and Ontario only. The issues about the municipal defendants are addressed in a separate section.
[4] All references to the municipal defendants exclude the Corporation of the County of Grey, which entered into a settlement with SON in August 2020.

Part 6 – Orders

Part 1 - Scope of the claims, phasing and overview of the trial evidence

Scope of the Aboriginal Title Claim

[13] In the Aboriginal Title Claim, SON seeks a declaration that they have Aboriginal[5] title to part of Lake Huron and Georgian Bay. That area is shown in light blue on SON's illustrative map, labelled the "Aboriginal Title Claim Area":

[5] SON notes that the terms "Aboriginal" and "Indigenous" are sometimes used interchangeably. When referring to a rights claim, SON generally uses the term "Aboriginal" in keeping with the use of that term in s. 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Both terms have been used by the parties, and I use both terms in these reasons, depending on the context.

[14] The area broadly surrounds not only the Peninsula but also lands that were surrendered in Treaty 45½.[6]

[15] The claim includes two islands: Rabbit Island (also known as Barrier Island) and Chantry Island. Rabbit Island is in Georgian Bay, east of Neyaashiinigmiing.[7] Chantry Island is in Lake Huron, west of Southampton. I address the claim for Aboriginal title to these islands separately in these reasons because it is a claim for Aboriginal title to dry land rather than submerged land.[8]

[16] SON has excluded some land from the Aboriginal Title Claim. All islands surrendered by other treaties are excluded from the claim. Any land "owned by private parties in fee simple" is also excluded. In turn, privately owned submerged land is excluded from the claim. SON submits that there is privately owned submerged land in the Aboriginal Title Claim Area, mentioning various ports and harbours. However, the trial evidence does not include specific information about the location or private ownership of any submerged land in the Aboriginal Title Claim Area.

[17] SON claims the same Aboriginal title rights to the lake bed that would apply if it were dry land, including the right to use and control the land and to reap the benefits flowing from it. I expand on these rights below.

Scope of the Treaty Claim

[18] The Treaty Claim focuses on Treaty 45½ (from 1836) and Treaty 72 (from 1854). SON alleges that the defendants breached fiduciary duties and the honour of the Crown in relation to the Crown's treaty obligations under Treaty 45½. SON submits that the Crown breached the clause in Treaty 45½ requiring that the Crown protect the Peninsula from encroachments by white people.

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[6] Generally, the area at issue in the Aboriginal Title Claim begins at the shoreline of Lake Huron, eleven miles south of Goderich, extends westward into Lake Huron to the Canada-United States boundary, and continues north roughly parallel to the Peninsula. To the north, the area runs through Lake Huron between the Peninsula and Manitoulin Island. To the east, it extends out to the middle of Georgian Bay, and south, ending between Meaford and Collingwood. The light blue area is marked on the map as the "Aboriginal Title Claim Area". In closing submissions, SON decreased the Aboriginal Title Claim Area by removing the triangular part east of the black line running north from the shoreline between Meaford and Collingwood.

[7] Neyaashiinigmiing is also referred to in the trial evidence as the area of Cape Croker, and both names are therefore used in these reasons.

[8] The trial, including SON's written closing submissions, was entirely focused on SON's claim for Aboriginal title to submerged land. I raised the question of islands in oral closing submissions. SON confirmed at that time that their claim also extended to these two islands.

[19] SON further claims that the Crown's conduct in negotiations leading up to Treaty 72 breached Crown fiduciary duties and the honour of the Crown. However, SON does not claim that Treaty 72 is invalid, nor does SON claim that the Crown breached Treaty 72. As SON put it, they seek to reverse the practical effects of Treaty 72 without invalidating the treaty.

[20] In the Treaty Claim, SON seeks equitable compensation, punitive damages and exemplary damages, totaling $90 billion (with some offsets) from each of Canada and Ontario. SON further seeks beneficial ownership of the lands that they surrendered in Treaty 72 that are currently owned by Canada, Ontario or the defendant municipalities. SON's claim for beneficial ownership mainly seeks a constructive trust over those lands.

[21] SON is not seeking beneficial ownership of other land, expressly excluding land owned by "*bona fide* purchasers for value of the legal estate without notice" from the Treaty Claim.

[22] SON also seeks a declaration that Treaty 72 had no impact on any SON traditional harvesting rights, except where the land was put to an incompatible use.

Phase 1 of a two-phase process

[23] This trial is Phase 1 of two phases in these proceedings. Phase 1 focuses on liability, declaratory remedies and high-level defences. Phase 2 focuses on other remedies and defences.

[24] Phase 1 does not include property-specific issues. In turn, SON's claim for beneficial ownership of the many claimed properties is part of Phase 2 because that remedy draws in "all the circumstances" regarding each specific property: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 34. That claim for a constructive trust, and all other property-specific issues, are deferred to Phase 2.

[25] Two issues have been raised in Phase 1 that give rise to a question about whether they should be deferred to Phase 2: the defence of laches and the municipal defendants' request to be removed from the litigation. As discussed below, I have concluded that what remains of the laches defence, and the municipalities' request, should be dealt with in Phase 2, if necessary.

[26] On consent, Phase 2 of this litigation will not take place until after all appeals from this decision are exhausted. Phase 2 is therefore expected to begin after a gap of several years, with another discovery process followed by another trial. However, SON submits that Phase 2 may be unnecessary due to a settlement or an alternative process after Phase 1.

Overview of the evidence

[27] The evidence in this trial includes testimony from more than 50 witnesses, including both non-expert witnesses and expert witnesses, as well as voluminous documentary exhibits.

[28] Numerous members of SON testified, including Chiefs, past Chiefs and Elders. I have adopted the terminology used by SON's counsel, describing the SON members as community

witnesses. Most of the community witnesses testified in person. However, for some, the evidence was admitted through the playing of videos of examinations done many years earlier.[9]

[29] The defendants also called non-expert witnesses.

[30] The parties have generally not challenged the credibility of the non-expert witnesses.[10] I found all of those witnesses sincere and helpful.[11] Any issues about their evidence mainly relate to the impact of their evidence on the issues in this case, as discussed in context below.

[31] The parties put forward expert evidence to prove a substantial part of the factual matrix. The subject matter of the expert evidence is wide-ranging. It includes history (with a variety of focuses and time periods), anthropology (including archaeology, ethnohistory and linguistics, among other areas), geology and American law. All experts testified and were cross-examined. Extensive expert reports and related documents were admitted into evidence on consent.

[32] The parties consented to the expert witnesses, as properly qualified, with one exception.[12] However, some focused issues have been raised by SON and by the defendants regarding parts of the expert evidence. In the attached Schedule A, I describe each expert witness and make any overarching findings about their evidence. I make more specific findings, in context, as the issues come up in these reasons.

[33] The documentary trial evidence includes almost 5,000 exhibits, many of which are hundreds of pages in length. These exhibits include documents not only from the 19th century but also from much earlier and later time periods. Many documents relate to the period during which the Indigenous peoples of the area did not have their own written language. Although there were Indigenous people who spoke English, acted as translators and prepared some documents in English, it remains the case that the documents in the trial record from that time period were usually written by Europeans, mainly the British.

[34] As a result of an Authenticity Agreement, the parties have admitted the authenticity of historical documents and the truth of the contents of those documents subject to the right of any

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[9] Under r. 36 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
[10] There is one narrow exception regarding certain evidence about the burning of documents. Although it was described as a credibility issue, I conclude below that it is a reliability issue.
[11] I have considered the evidence of all of the witnesses, even if their names are not expressly mentioned in these reasons.
[12] SON objected to Dr. von Gernet being accepted as an expert.

party to put forward contrary evidence.[13] The Authenticity Agreement recognizes that I will be weighing the facts in the historical documents in the context of other relevant evidence.[14]

[35] There is prior case law involving SON members.[15] The parties confirmed at trial that any factual findings made in prior cases are not binding in this case and cannot be relied upon as proof of those facts. Neither *res judicata* nor issue estoppel arise from that case law.

[36] Some of the trial hearings took place in SON's communities at Saugeen and Neyaashiinigmiing. In addition, I viewed several locations in the Peninsula area. Due to COVID-19, the last (expert) witness testified from Montreal in a virtual hearing.

[37] In summary, there is an abundant factual record about the historical events that relate to these claims. Many expert and other witnesses testified about aspects of the factual matrix. There are voluminous historical documents in evidence, which have been admitted for the truth of their contents, to be weighed with other evidence. The lengthy factual account below forms my findings of fact bearing in mind all of the evidence, with specific evidentiary issues discussed where needed.

Part 2 - Overarching legal principles

[38] Before addressing the specific claims, I will review some legal principles that apply to both the Aboriginal Title Claim and the Treaty Claim.

Burden of proof and approach to the evidence

[39] SON accepts that they have the burden to prove their claims with cogent evidence on the balance of probabilities: *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911 ("*Mitchell 2001*"), at para. 51, *per* McLachlin C.J.; *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 132, *per* L'Heureux-Dubé J.

[40] This principle "should not be read as imposing upon [A]boriginal claimants the 'next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community'": *Mitchell 2001*, at para. 52, *per* McLachlin C.J., citing *Van der Peet*, at para. 62.

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[13] Under the Authenticity Agreement, historical documents are those created before April 28, 1994, when the Treaty Claim was commenced.

[14] In some instances, SON seeks to rely on facts from articles or reports that have not been admitted under the Authenticity Agreement. Some of those facts are supported by trial evidence. Otherwise, they are not evidence in this trial.

[15] See, e.g., *R. v. Jones.*

[41] The rules of evidence have been adapted to address the special challenges of providing evidence in support of claims such as these. The "requirement that courts interpret and weigh the evidence with a consciousness of the special nature of [A]boriginal claims is critical to the meaningful protection" of Aboriginal and treaty rights: *Mitchell 2001*, at para. 37, *per* McLachlin C.J.; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 84, *per* Lamer C.J. Section 35(1) of the *Constitution Act, 1982* recognizes and protects these rights.

[42] Chief Justice McLachlin described the flexible approach to the rules of evidence in *Mitchell 2001*, at para. 30. Those rules "are animated by broad, flexible principles, applied purposively to promote truth-finding and fairness. The rules of evidence should facilitate justice, not stand in its way."

[43] Further, the evidence, oral or documentary, must be evaluated from the Aboriginal perspective: *R. v. Marshall; R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220 ("*Marshall and Bernard*"), at para. 69, *per* McLachlin C.J. It is imperative that the laws of evidence work to ensure that the Aboriginal perspective is "given due weight by the courts": *Mitchell 2001*, at para. 37, *per* McLachlin C.J., citing *Delgamuukw*, at para. 84, *per* Lamer C.J.

[44] The flexibility of the rules of evidence is not without limits. Chief Justice McLachlin emphasized that the special nature of Aboriginal claims does not negate the operation of general evidentiary principles. "While evidence adduced in support of Aboriginal claims must not be undervalued, neither should it be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law": *Mitchell 2001*, at para. 38.

Oral history

[45] There are special evidentiary rules for oral history evidence. Indigenous peoples, including those involved in the events at issue in this case, did not have a written language at the relevant time. Orally transmitted history is put forward to prove historical facts. Oral histories may offer evidence of ancestral practices, and their significance, for example. No other means of obtaining that evidence may exist: *Mitchell 2001*, at para. 32, *per* McLachlin C.J.

[46] For many Indigenous peoples, oral histories are the only record of their past. In order not to place an "impossible burden of proof" on Indigenous peoples, oral histories must be placed on an equal footing with the historical documents, with which courts are more familiar: *Delgamuukw*, at para. 87. This must be done on a case-by-case basis: *Delgamuukw*, at para. 87.

[47] Putting oral histories on an equal footing with historical documentary evidence means that oral history can be given independent or due weight: *Delgamuukw*, at paras. 87, 98; *Watson v. Canada*, 2020 FC 129, at para. 69.

[48] The evidence presented by Aboriginal claimants should not be undervalued "simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case": *Van der Peet*, at para. 68. However, it should

not "be artificially strained to carry more weight than it can reasonably support": *Mitchell 2001*, at para. 39, *per* McLachlin C.J.

[49] Further, due weight and an equal footing does not mean preferential treatment. There is a spectrum of reliability that applies to oral history as well as to documents. SON acknowledges that the spectrum ranges from "the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities": *Mitchell 2001*, at para. 39, *per* McLachlin C.J.

[50] At trial, the parties and witnesses used various terminology to describe what is called "oral history" in the case law. At trial, the term "oral history" was often used to refer to events that pre-dated the lifetime of the witness, where the term "oral traditions" was used for more recent events. As well, the term "deep time" oral history was sometimes used to describe stories that SON submits include facts from thousands of years ago. I have used the general term "oral history" to encompass all of these phrases.

[51] Oral history evidence must be accepted when the conditions of usefulness and reasonable reliability are fulfilled. As set out by McLachlin C.J.: "Usefulness asks whether the oral history provides evidence that would not otherwise be available or evidence of the [A]boriginal perspective on the right claimed. Reasonable reliability ensures that the witness represents a credible source of the particular people's history": *Marshall and Bernard*, at para. 68.

[52] When considering usefulness, it is important to have regard for the different uses made of this type of evidence. Oral history may refer to events in the past, but may also be stories that are relied on in other ways. In this case, for example, SON relies on stories to explain who they are and to show their spiritual connections to the territory at issue. Some of these stories form part of the Midewin faith and are put forward to show a spiritual connection rather than a factual account. Oral history may also be "recollections of [A]boriginal life" – a witness's account of what he or she learned from deceased individuals within the community concerning genealogy or traditional activities and practices, including land use: *Xeni Gwet'in First Nations v. British Columbia*, 2007 BCSC 1700, [2007] B.C.J. No. 2465 ("*Tsilhqot'in Trial Decision*"), at para. 163; *Delgamuukw*, at paras. 99-101.

[53] Further, even when relied on for some historical fact, oral histories are often not advanced as entirely factual. As put in this trial, a story or account may have an element of "historicity", that is, an element that is put forward as a historical fact, even though other aspects of the same story or account are of a different character. Oral histories may be woven with history, mythology, legend, politics and moral obligations: *Delgamuukw*, at para. 86, citing *Kruger v. The Queen*, [1978] 1 S.C.R. 104, at p. 109; *Mitchell 2001*, at para. 34, *per* McLachlin C.J.

[54] For example, Karl Keeshig, a traditional knowledge holder and Third Degree Midewin[16] from Nawash, testified about certain Anishinaabe stories, including "traditional sacred stories" about Nanabush. He described Nanabush as a name for the Creator, part human, part spirit. Karl Keeshig recounted traditional sacred stories, none of which SON submits are entirely factual. However, SON submits that some of the stories now in evidence have an element of fact or "historicity".

[55] The Supreme Court has cautioned 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 2001*, at para. 34, *per* McLachlin C.J.

[56] Even if oral history is not definitive or precise, it may still be useful: *Delgamuukw*, at para. 101. Similarly, there may be different versions of a story or account, and discrepancies, which will not necessarily diminish the weight of the evidence.

[57] When considering reliability, courts have highlighted differences in the manner of transmission of oral histories. The process the Indigenous group used over time to preserve the story may have an impact on reliability. Formal processes have been used in some instances, as illustrated by the facts in *Delgamuukw*. In that case, the oral history, known as the *adaawk* or *adaawx*, and *kungax*, was formally kept and passed down by designated people who recounted the stories on particular occasions with a process to challenge the accuracy of the stories. A formal process, including steps to check for accuracy, leads to increased reliability: *Benoit v. Canada*, 2003 FCA 236, 228 D.L.R. (4th) 1, at para. 109.

[58] SON did not have a process like *adaaw*x. Randall Kahgee, former Chief of the Saugeen First Nation, testified about a process to gain knowledge from an Elder. However, the evidence put forward as oral history in this trial was mainly not the product of that process. There was little formality that related to the specific evidence SON put forward. In my view, formality is not required, but it enhances reliability.

[59] In final submissions, Canada focused on whether, for each witness, there was evidence that the witness had been recognized by their community as a knowledge keeper. Canada submitted that most of the witnesses had not been recognized as knowledge keepers. I agree that the role of knowledge keeper would be relevant, but in my view its absence is only one factor to consider.

[60] The case law shows that reliability may be enhanced by the role of the person who conveyed the story to the witness, such as an Elder or a storyteller. In contrast, reliability may be weakened where the witness had multiple potential sources from which he or she could have

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[16] Karl Keeshig testified that the Midewin beliefs are a type of faith, analogous to the church for other nations.

learned the story. Examples that apply in this case include information that a witness learned from the study of archival documents or briefings as part of political or litigation-oriented activity: *Watson*, at paras. 73-74. Information learned from those other sources may be admissible in another way, but not as oral history.

[61] I have applied the above principles to make my findings of fact. In doing so, I have given weight to some significant oral history, as set out below.

Evidence of domestic law

[62] At trial, SON and the defendants raised issues about some witnesses, who appeared to be testifying about domestic law.

[63] Evidence of domestic law is normally inadmissible: *Alderville First Nation v. Canada*, 2014 FC 747, [2014] F.C.J. No. 1377, at para. 17, citing: Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *The Law of Evidence in Canada*, 3rd ed. (Markham: LexisNexis, 2009) at p. 832 (currently at para. 12.181) 5th ed. (Toronto: LexisNexis Canada, 2018).

[64] However, in cases such as this, which deal with a great span of history, the court may need help on historical legal matters: *Alderville*, at paras. 46, 55. As a result, I accepted certain experts as qualified to testify about legal history.

[65] Other witnesses also referred to legal matters when discussing historical events at issue. For example, there is considerable evidence about the legal tools that were available to the Crown to protect the Peninsula in the 19th century, after Treaty 45½. Witnesses on both sides of the case referred to those tools in some detail, including statutory powers. Another example is the expert evidence regarding whether or not there was a third treaty reached at the Niagara Congress in 1764. The experts had views on that subject, from the standpoint of their expertise, but were not giving legal opinions.

[66] I permitted witnesses to give evidence that referred to legislation and other legal steps on the understanding that their testimony would be weighed bearing the above evidentiary principles in mind.

Presumption of regularity

[67] Canada relies on the common law presumption of regularity with respect to acts by public officials. There is a common law presumption that public officials have "regularly" performed their official duties. For example, if routine instructions were given, the presumption would be that those instructions were also followed. Here, the most pertinent issue is whether printed notices about squatting were actually posted or published, which I discuss in context below.

[68] Regularity is presumed until the contrary is proven. The party trying to rebut the presumption bears the onus to prove that an irregularity has occurred: *The Law of Evidence in*

Canada, at paras. 4.64-4.66; *Martselos v. Salt River First Nation 195*, 2008 FC 8, [2008] F.C.J. No. 13, at paras. 26-28, aff'd, 2008 FCA 221, [2008] F.C.J. No. 1053.

[69] The presumption of regularity has been applied in cases about Indigenous issues: *LeCaine v. Canada (Registrar of Indian Affairs)*, 2013 SKQB 253, 424 Sask. R. 285, at para. 64, aff'd 2015 SKCA 43, 385 D.L.R. (4th) 694, leave to appeal refused, [2015] S.C.C.A. No. 258; *Peter Ballantyne Cree Nation v. Canada (Attorney General)*, 2016 SKCA 124, 485 Sask. R. 162, at para. 175, leave to appeal refused, [2017] S.C.C.A. No. 95.

[70] The presumption may be of limited utility where a historical record is unclear or contradictory: *Watson*, at paras. 79, 84-86. I conclude that this presumption has a very limited role in this case, where there is affirmative evidence of routine Crown functions that does not show every step in the process, as discussed in context below.

Experts' use of secondary sources

[71] Not all the opinions SON relies on were opinions from a testifying expert. Some come from papers or articles by non-testifying authors. An expert opinion expressed in a secondary source is not proved by simply citing the secondary source: *R. v. Marquard*, [1993] 4 S.C.R. 223, at p. 251; *Cowichan Tribes v. Canada (Attorney General)*, 2020 BCSC 1146, 41 B.C.L.R. (6th) 150, at paras. 17-26. The defendants have therefore raised an issue about opinions expressed in secondary sources.

[72] Canada and Ontario specifically object to some of the opinion evidence SON relies on from papers written by Dr. Victor Lytwyn. Dr. Lytwyn was not an expert witness in this trial. He is a historical geographer who was formerly employed by SON. Dr. Brownlie, an expert historian, and Dr. Driben, an expert anthropologist, cited some of Dr. Lytwyn's papers in their expert reports. However, Dr. Brownlie and Dr. Driben did not adopt all of Dr. Lytwyn's opinions.

[73] The evidentiary record includes many papers, articles and other secondary sources cited by one or more expert witnesses. Many are mentioned in footnotes to expert reports and were marked as exhibits, on consent. However, referring to a publication in an expert report does not incorporate by reference the entire publication: *Cheesman v. Credit Valley Hospital*, 2019 ONSC 5783, at para. 215.

[74] When a testifying expert did not adopt the opinion in a secondary source, I have not treated the secondary source as admissible evidence of that opinion.

Evidence of Indigenous Customary Law

[75] Before the British asserted sovereignty, Indigenous peoples had practices, customs and traditions[17] that are recognized as Indigenous customary laws: *Marshall and Bernard*, at para. 139, *per* Lebel J. (concurring).

[76] The Indigenous perspective on the occupation of land can be gleaned in part, but not exclusively, from those pre-sovereignty systems of Indigenous law: *Marshall and Bernard*, at para. 139, *per* Lebel J. (concurring); *Delgamuukw*, at para. 157.

[77] Expert opinion evidence about the practices, customs and traditions that form those Indigenous customary laws may be necessary to assist the court*: Alderville*, at paras. 46, 55. In this case, there is considerable expert evidence about historical practices, customs and traditions. SON relies largely on Anishinaabe practices, customs and traditions because SON has a shared culture with other Anishinaabe Indigenous peoples.

Constitutional framework

[78] Subsection 35(1) of the *Constitution Act, 1982* provides the constitutional framework through which "the fact that [Aboriginal peoples] lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown" because "when Europeans arrived in North America, [Aboriginal peoples] <u>were already here</u>": *Van der Peet*, at paras. 30-31 (emphasis in the original).

[79] As put by the Supreme Court of Canada, the Aboriginal rights recognized and affirmed by s. 35(1) must be directed towards a reconciliation of the existence of Aboriginal societies with the sovereignty of the Crown: *Van der Peet*, at para. 31.

[80] As discussed below, the starting point for the analysis of a claimed Aboriginal right is to ask whether there is a foundation for such a right at the time of the British assertion of sovereignty (agreed to be 1763 in this case). Whether there is the necessary foundation for the claimed Aboriginal right – here, Aboriginal title – is disputed in this case.

[81] In addition, for Aboriginal rights to be recognized and affirmed by s. 35(1), they must have existed in 1982, at the time of the enactment of the *Constitution Act, 1982*: *Delgamuukw*, at para. 172.

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[17] General references to "practices" in these reasons include practices, customs and traditions.

[82] When an Aboriginal right has been established as of 1982, the right has constitutional status because of s. 35(1): *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256, at para. 119.

[83] Given the constitutional status of Aboriginal rights, governments must justify overriding the wishes of an Aboriginal right-holder. To do so, the government must show the following:

> (1) that it discharged its procedural duty to consult and accommodate;
>
> (2) that its actions were backed by a compelling and substantial objective; and,
>
> (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group: *Tsilhqot'in Nation*, at para. 77, citing *R. v. Sparrow*, [1990] 1 S.C.R. 107.

[84] In keeping with these principles, if SON has Aboriginal title to the Aboriginal Title Claim Area, any incursion on that right must first be justified using the above test. This is important because of the claimed right to exclude all others from that part of Lake Huron and Georgian Bay, as discussed below.

[85] The Aboriginal Title Claim focuses on the time of the British assertion of sovereignty in North America, agreed to be 1763. SON's Treaty Claim focuses on two treaties from a later time, in the 1800s. I have therefore addressed the claims in that order.

Part 3 - Aboriginal Title Claim

[86] In the Aboriginal Title Claim, SON seeks a declaration that SON has Aboriginal title to the lake bed forming part of Lake Huron and Georgian Bay. Aboriginal title is the subcategory of Aboriginal rights that deals with claims for rights to land: *Van der Peet*, at para. 74.

[87] This is a novel claim because SON seeks Aboriginal title to submerged land. The Canadian cases on Aboriginal title have not addressed submerged land.

[88] SON submits that the current test for Aboriginal title to (dry) land should be applied to their claim, specifically the test from *Tsilhqot'in Nation*, rather than considering whether they have established a foundation for this novel Aboriginal right. There is no issue that there may be Aboriginal title to dry land. For dry land, the only issue is whether the test is satisfied.

[89] The *Tsilhqot'in Nation* test is based on occupation of land prior to the British assertion of sovereignty. To ground Aboriginal title, the occupation of the claimed land must have been sufficient, continuous (where present occupation is relied on) and exclusive at that time: *Tsilhqot'in Nation*, at para. 50.

[90] SON acknowledges that the *Tsilhqot'in Nation* test "has developed from, and has only ever been applied to, cases evaluating whether Indigenous groups have Aboriginal title to dry land." Based on the law presented in this case, that is so.

[91] Originally, the *Tsilhqot'in Nation* claim did include some submerged land, but that aspect of the claim was withdrawn before the case was heard at the Supreme Court of Canada: *Tsilhqot'in Nation*, at para. 9. A small part of the claim area had consisted of inland streams, rivers and lakes: *Tsilhqot'in Trial Decision*, at para. 1051.

[92] SON acknowledges that adapting the existing test from *Tsilhqot'in Nation* to their claim has its challenges. Yet SON submits that the only issue is whether they have proved their claim, applying the *Tsilhqot'in Nation* test to the submerged lands. They submit that they have done so.

[93] The defendants do not agree that the test in *Tsilhqot'in Nation* applies. However, they submit that even if it does, SON has not satisfied that test on the evidence in this case. The defendants therefore submit that I may find it unnecessary to decide the novel issue of whether there can be Aboriginal title to submerged land.

[94] I disagree with the suggestion that the novel issue can be avoided. The first question must be whether SON's specific claim gives rise to an Aboriginal right.

[95] There is ample jurisprudence about the required legal steps to determine whether there is an Aboriginal right. As expanded on below, SON must prove that as of 1763 their ancestors had a connection with the submerged land that was of central significance to their distinctive culture. If so, I must consider whether that connection translates into a modern right, and if so, what right. The analysis of this novel issue brings out important questions about the nature of the land. The specific claim area is important – a large part of a Great Lake.

[96] I acknowledge that there is some overlap between this issue and the *Tsilhqot'in Nation* test, but they are not the same. It is therefore also important that, as the trial judge, I make the factual findings needed for both issues.

[97] I therefore first consider the issue of whether there can be Aboriginal title to the claimed submerged land. As expanded on below, I conclude that SON has not proved the required connection to the submerged land in this case. My conclusion relates to the specific area claimed by SON, in the Great Lakes. The outcome could be different for other submerged land, such as inland lakes, rivers and streams. SON's claim area, including a part of Lake Huron up to the international boundary and half of Georgian Bay, gives rise to special challenges discussed below.

[98] I then address the *Tsilhqot'in Nation* test and SON's submission that they have satisfied that test. I conclude that SON has not proved that they sufficiently occupied and controlled that part of the Great Lakes in the period leading up to 1763. The *Tsilhqot'in Nation* test has not been met.

[99] I now turn to the first issue: whether there is an Aboriginal right to title in the claimed lake bed.

Analysis of whether there is an Aboriginal right to title in the lake bed

[100] The Supreme Court of Canada has set out the necessary approach to determine whether there is an Aboriginal right. The claim must be decided on a specific, rather than a general, basis: *R. v. Pamajewon*, [1996] 2 S.C.R. 821, at para. 27.

[101] It is a case-by-case analysis: *Van der Peet*, at para. 69, *per* Lamer C.J.; *Mitchell 2001*, at para. 14, *per* McLachlin C.J., at para. 96, *per* Binnie J.; *Marshall and Bernard*, at para. 20.

[102] Justice Binnie summarized the steps in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535, at para. 46. Although that case was not a claim for Aboriginal title, the following high-level steps still apply:

> 1. The court must identify the precise nature of the First Nation's claim to an Aboriginal right based on the pleadings. If necessary, in light of the evidence, the claim may be refined on terms that are fair to all parties.
>
> 2. The court must determine whether the First Nation has proved, based on the evidence adduced at trial:
>
> (a) the existence of a historical practice, custom or tradition advanced as supporting the claimed right; and,
>
> (b) that this practice, custom or tradition was integral to the distinctive culture of the Aboriginal group.
>
> 3. The court must then determine whether the modern right claimed has a reasonable degree of continuity with the integral historical practice. The historical practices must engage the essential elements of the modern right, though the two need not be exactly the same.

[103] There is no issue that, in this case, the relevant time for the historical practice, custom or tradition is 1763 (the agreed on time of the British assertion of sovereignty).

[104] Before I turn to SON's specific claim, I will review the other legal principles that will guide my findings of fact and legal conclusions.

Aboriginal rights fall along a spectrum

[105] Even though a historical practice may have some connection with land, it does not necessarily lead to Aboriginal title.

[106] Aboriginal rights "fall along a spectrum with respect to their degree of connection with the land": *Delgamuukw*, at para. 138; *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, 443 D.L.R. (4th) 1, at para. 27.

[107] Chief Justice Lamer described this spectrum in *Delgamuukw*, at para. 138, as follows:

> At one end [of the spectrum], there are those [A]boriginal rights which are practices, customs and traditions that are integral to the distinctive [A]boriginal culture of the group claiming the right. However, "the occupation and use of the land" where the activity is taking place is not "sufficient to support a claim of title to the land". Nevertheless, those activities receive constitutional protection.
>
> In the middle, there are activities which, out of necessity, take place on land and indeed might be intimately related to a particular piece of land. Although an [A]boriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity.
>
> At the other end of the spectrum, there is Aboriginal title itself. What [A]boriginal title confers is the right to the land itself. [Emphasis in original; citations omitted.]

[108] This spectrum shows that there may be Aboriginal practices that use the land, yet do not give rise to Aboriginal title. Those practices may give rise to other Aboriginal rights. Fishing is a good example in this case. It may involve some use of land, but it gives rise to a different Aboriginal right – an Aboriginal fishing right. However, in this case, SON claims Aboriginal title – that is, a right to the land itself.

For Aboriginal title, the connection with the land must be of central significance

[109] For Aboriginal title, the Indigenous group's "connection" with the claimed land must be of "central significance to their distinctive culture": *Delgamuukw*, at para. 137, quoting *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 26.

[110] The Aboriginal group must have had the required connection with the claimed land as of the assertion of sovereignty: *Delgamuukw*, at paras. 150-51, *per* Lamer C.J.; *Marshall and Bernard*, at para. 67, *per* McLachlin C.J.

[111] The geographic location of the claimed land is relevant when assessing the Aboriginal group's connection with the land: *Mitchell 2001*, at para. 55. Further, where the claim implicates an international boundary, that also brings a geographic factor into the analysis: *Mitchell 2001*, at para. 60.

[112] Further, the practice, custom or tradition relied upon in a particular case must be independently significant to the Aboriginal group claiming the right. The practice, custom or tradition cannot be simply an incident of another practice of integral significance: *Van der Peet*, at paras. 46-55, 70 and 73; *Marshall and Bernard*, at para. 67, *per* McLachlin C.J. For example, the practice of fishing may not give rise to Aboriginal title: *Marshall and Bernard*, at para. 58, *per* McLachlin C.J.

Translation into a modern legal right

[113] When there is the needed connection with the land, the historical practice must still translate in to a modern, legal right. Chief Justice McLachlin set out important general principles that apply to determine whether a historical practice does translate into a modern, legal right in *Marshall and Bernard*, at para. 48:

- The court must "examine the pre-sovereignty [A]boriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right. The question is whether the [A]boriginal practice at the time of assertion of European sovereignty …translates into a modern legal right, and if so, what right?"

- The court "must consider the pre-sovereignty practice from the perspective of the [A]boriginal people. But in translating it to a common law right, the court must also consider the European perspective; the nature of the right at common law must be examined to determine whether a particular Aboriginal practice fits it."

- "This exercise in translating [A]boriginal practices to modern rights must not be conducted in a formalistic or narrow way. The court should take a generous view of the Aboriginal practice and should not insist on exact conformity to the precise legal parameters of the common law right. The question is whether the practice corresponds to the core concepts of the legal right claimed."

[114] As set out above, the Chief Justice uses the term "translate" to describe the applicable principles. However, the defendants prefer different terminology, from earlier Supreme Court cases. Those cases speak of "incompatibility" with British sovereignty, and whether the practice is "cognizable". As elaborated on below, I conclude that those earlier cases contribute to the meaning of "translate" and therefore the differing terminology does not change the analysis.

[115] With respect to "incompatibility", the defendants rely on *Mitchell 2001*, a case with an international component. In that case, the Supreme Court referred to the principle that Aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless they "were incompatible with the Crown's assertion of sovereignty": at para. 10, *per* McLachlin C.J.

[116] The defendants submit that the focus on incompatibility with the assertion of sovereignty is suited to this case, given that the Great Lakes and the international boundary are at issue.

Mitchell 2001 also involved an international boundary. That case considered the right to bring goods across the St. Lawrence River for the purposes of trade.

[117] In *Mitchell 2001*, the unanimous court dismissed the claim for lack of proof. The majority therefore declined to address the issue of incompatibility with British sovereignty: at para. 64, *per* McLachlin C.J. However, in his concurring decision, Binnie J. expanded on the incompatibility analysis.

[118] Justice Binnie observed that prior to *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, sovereign incompatibility had been given excessive scope and it was therefore a doctrine that had to be applied with caution: at para. 151. He concluded that it continued to be an element in the analysis, but that it would be applied sparingly because most rights claimed do not give rise to legitimate sovereignty issues: at para. 154. However, Binnie J. concluded that the right claimed in that case was incompatible with Canadian sovereignty. Control of a border is an incident of sovereignty, and the state is expected to exercise it in the public interest: *Mitchell 2001*, at paras. 160, 163.

[119] Justice Binnie's discussion in *Mitchell 2001* is still the most detailed discussion of the role of sovereign incompatibility. The issue has come up in later cases but has not been elaborated on in those cases: see, e.g., *R. v. Desautel*, 2021 SCC 17, 456 D.L.R. (4th) 1.

[120] SON submits that the common law criteria for the recognition of local customs should be applied to issues involving incompatibility. SON put forward various cases that deal with local customs ranging from the Irish custom of tanistry[18] to a dispute about ownership of a royal palace: *The Case of Tanistry*, (1608) Davis 28, 80 E.R. 516, reprinted with introduction in [2001] AU Indig. Law Rpr. 37; *Oyekan v. Adele (West Africa)*, [1957] UKPC 13 (26 June 1957) at 3, [1957] 2 All E.R. 785 at p. 788 (P.C.).

[121] SON submits that the common law criteria result in a less exacting standard of reasonableness. This is an over-simplification of what is called "traditional British colonial law": *Mitchell 2001*, at para. 144, *per* Binnie J. Reasonableness is just one aspect of the test for the incorporation of local customs into the common law.

[122] SON accepts that for the local custom to be incorporated into the common law, it must fulfill all of these requirements:

> (l) it must "have been used so long, that the memory of man runneth not to the contrary";

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[18] Under this custom, the "most worthy" male inherited the family estate.

> (2) it must have been "continued";
>
> (3) it must have been "peaceable, and acquiesced in, not subject to contention and dispute";
>
> (4) it must be "reasonable; or, rather taken negatively,…must not be unreasonable";
>
> (5) it must be "certain";
>
> (6) it must be "compulsory"; and
>
> (7) customs must be "consistent with each other".
>
> Sir William Blackstone, *Commentaries on the Laws of England* (Philadelphia: J.B. Lippincott Co., 1893), Vol. 1, at pp. 76-78.

[123] Reasonableness is certainly part of the above test. However, when looking at the entirety of the above test, I do not agree with SON that it is less exacting than incompatibility.

[124] The next term to consider is "cognizable", which arises in *Van der Peet*, at para. 49. The Supreme Court noted that in assessing a claim for the existence of an Aboriginal right, the Aboriginal perspective must be framed in terms that are "cognizable" to the Canadian legal and constitutional structure. This terminology does not add significantly to the discussion in either *Mitchell 2001* or *Marshall and Bernard*. The relevant concepts are already part of the analysis.

[125] I conclude that it is not necessary to pick between the above cases and terminology to address the issues in this case. Asking the question as it was put by the Chief Justice in *Marshall and Bernard* – does the Aboriginal practice "translate" into a modern legal right? – allows for the consideration of compatibility with sovereignty, or whether something is "cognizable", to the extent that those terms draw in relevant considerations.

[126] In order to translate into a modern legal right, the pre-assertion of sovereignty practice must engage the essential elements of the claimed modern right, taking a generous though realistic approach: *Lax Kw'alaams Indian Band*, at para. 46. There must then be reasonable continuity between that connection as of the assertion of sovereignty and the contemporary claim: *Mitchell 2001*, at para. 26, *per* McLachlin C.J., citing *Van der Peet*.

[127] Underlying all these issues is the need for "a sensitive and generous approach to the evidence tendered to establish [A]boriginal rights, be they the right to [Aboriginal] title or lesser rights to fish, hunt or gather": *Marshall and Bernard*, at para. 68, *per* McLachlin C.J.

SON's specific claim

[128] I now consider SON's specific claim. The main issues are the following:

(i) the nature and scope of the claimed right, specifically Aboriginal title to submerged land in Lake Huron and Georgian Bay;

(ii) the potential impact of the claimed right on the public right of navigation; and,

(iii) the significance of the in-water boundaries of the claim area.

The nature and scope of the claimed right

[129] SON must identify the claimed right specifically, not just generally. That process begins with the pleadings: *Lax Kw'alaams Indian Band*, at paras. 40-46; *Mitchell 2001*, at para. 15, *per* McLachlin C.J., citing *Van der Peet*, at para. 5.

[130] In this case, SON claims Aboriginal title. The Statement of Claim defines the specific geographic claim area in Lake Huron and Georgian Bay.

[131] SON claims the same rights to these submerged lands that would be included in Aboriginal title to dry land. It is therefore useful to expand on those rights. The scope of Aboriginal title to dry land is well-established.

[132] Aboriginal title is a *sui generis* (unique) interest in land: *Tsilhqot'in Nation*, at para. 72; *Delgamuukw*, at paras. 111-112, *per* Lamer C.J., at para. 190, *per* LaForest J. It is the unique product of the historical relationship between the Crown and the Aboriginal group in question: *Tsilhqot'in Nation*, at para. 72, *per* McLachlin C.J. As with other Aboriginal rights, it must be understood from both Aboriginal and common law perspectives: *Tsilhqot'in Nation*, at para. 14, *per* McLachlin C.J.; *Delgamuukw*, at para. 112, *per* Lamer C.J., at para. 190, *per* La Forest J.; *Marshall and Bernard*, at paras. 46-48, *per* McLachlin C.J.

[133] Aboriginal title is a collective right to land. All members of a First Nation hold it, not only for the present generation but also for all succeeding generations: *Tsilhqot'in Nation*, at para. 74, *per* McLachlin C.J.; *Delgamuukw*, at para. 115, *per* Lamer C.J. As a result, it cannot be alienated other than to the Crown: *Tsilhqot'in Nation*, at para. 74, *per* McLachlin C.J.; *Delgamuukw*, at para. 113, *per* Lamer C.J.

[134] For dry land, a First Nation with Aboriginal title has the right to use and control the land and to reap the benefits flowing from it: *Tsilhqot'in Nation*, at paras. 2, 70. This includes the right to choose the uses the land can be put to, including using the land in modern ways, provided that the uses are not irreconcilable with the nature of the group's attachment to that land, and the right to enjoy the land's economic fruits: *Tsilhqot'in Nation*, at paras. 75, 88, *per* McLachlin C.J.; *Delgamuukw*, at paras. 111, 117, 124 and 166, *per* Lamer C.J. The Aboriginal titleholder is not limited to historic uses of the land.

[135] Most significantly for this case, Aboriginal title includes the right to exclusive use and occupation of the land: *Tsilhqot'in Nation*, at paras. 67, 88, *per* McLachlin C.J.; *Delgamuukw*, at

paras. 110, 117 and 166, *per* Lamer C.J. As a result, the Aboriginal titleholder has the right to exclude all other people from the land.

[136] In this case, SON claims the right to exclude all other people from a large part of Lake Huron, including about half of Georgian Bay, right up to the international boundary. This right to exclude would apply not only to recreational use, but also to commercial uses and for national defence. Any limitation on Aboriginal title must satisfy the justification test under s. 35(1) of the *Constitution Act, 1982*.

[137] SON submits that some uses of the lake area by other people would be justifiable and that other uses would not be. For example, SON does not agree that the activities normally permitted by the public right of navigation, described below, would be justifiable under s. 35(1). However, SON submits that use for national defence would be easily justifiable. But that use would still have to be justified, and that process begins with advance consultation before actions regarding national defence could be taken.

[138] The nature and scope of the claimed Aboriginal title therefore gives rise to a significant issue about SON's claim for the right to exclude everyone else from the area. The public right of navigation is central to the defendants' objections to the concept of Aboriginal title to a part of the Great Lakes. I therefore discuss the scope of that public right below.

The scope of the public right of navigation

[139] The public right of navigation is an important right. That right provides for reasonable public use of navigable waters.

[140] In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, La Forest J. summarized the common law about the public right of navigation and noted that "if waters are navigable in fact, whether or not the waters are tidal or non-tidal, the public right of navigation exists": at pp. 53-55.

[141] There is sometimes an issue about whether or not the water is navigable: see, e.g., *Middlesex Centre (Municipality) v. MacMillan*, 2016 ONCA 475, 132 O.R. (3d) 497, at paras. 19-21, 35. There is no issue about navigability here – obviously, the Great Lakes are navigable.

[142] The public right of navigation is not a property right. It is a public right of way. Nor is it an absolute right. It must be exercised reasonably, so as not to interfere with the rights of others: *Friends of the Oldman River*, at p. 54.

[143] This public right encompasses a "right of reasonable passage for public purposes" along a waterway, akin to the public right of passage on a highway, and it entitles the public to use the waterway as a means of transportation: *Middlesex Centre*, at para. 17. The public does not have the right to go across private land to get onto or leave a navigable waterway, but must access the waterway from a point of public access: *Middlesex Centre*, at para. 22.

[144] The right does not extend to use for "purely private purposes" or to other uses such as fishing, hunting, irrigation or trapping: *Middlesex Centre*, at para. 17; *Rice Lake Fir Co. Ltd. v. McAllister*, [1925] O.J. No. 150 (C.A.), at p. 5; G.V. La Forest and Associates, *Water Law in Canada: The Atlantic Provinces* (Ottawa: Regional Economic Expansion, 1973), at p. 182. Nor does the right of reasonable passage authorize acts inconsistent with the rights of owners, such as pollution: *Water Law in Canada*, at pp. 182-183.

[145] The public right of navigation is paramount: *Friends of the Oldman River*, at p. 54. However, SON claims Aboriginal title that would foreclose this public right. Given the geographic location of the Aboriginal Title Claim Area, the potential impact on the public right of navigation is important in this case.

The significance of the in-water boundaries of the Aboriginal Title Claim Area

[146] The geographic location of SON's Aboriginal Title Claim Area is important, not simply because of its potential impact on the public right of navigation. In addition, the geographic location must be connected to the historical practices relied upon by SON. In this case, the claim area is not connected to SON's historical practices. Instead, much of the claim area is based on the international boundary, modern agreements and other considerations.[19]

[147] This would not be an issue if SON had chosen an area that is smaller than the area connected to their historical practices. However, here, the in-water boundaries surround an area that is much larger than any SON connection to the claimed land.

[148] The eastern boundary, which runs down the middle of Georgian Bay, is not based on SON's historical traditional use. SON submits that they selected the boundary out of respect for other First Nations, although the interests of other First Nations are not established by evidence.

[149] The southern boundary of the Aboriginal Title Claim Area in Lake Huron is the subject of a 2011 boundary agreement with other First Nations, prompted by this litigation. SON puts forward *Penn v. Lord Baltimore* (1750), 1 Ves. Senn. 444, [1558-1774] All E.R. 99, for the proposition that the boundary reflected in this agreement should be presumed to be an ancient boundary. However, in *Penn*, the parties to the agreement were in a dispute with one another. That is not the case here. The defendants are not parties to the boundary agreement. SON has not proved that the southern boundary in Lake Huron was a relevant boundary in 1763.

[150] Other aspects of the boundaries of the Aboriginal Title Claim Area were selected due to other litigation or claims by other First Nations.

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[19] A 1976 Band Council resolution asserting sovereignty over the Aboriginal Title Claim Area sets out these boundaries.

[151] Finally, the international boundary forms the western border of the Aboriginal Title Claim Area. That international boundary did not exist in the 18th century and is not based on SON traditional practices as of 1763. SON submits that as a practical matter, there was no point in going beyond that boundary since the court could not grant any relief beyond it. That position would be more consequential if SON's traditional use of the area extended at least as far as that boundary, but it does not.

[152] SON further submits that the choice of the international boundary is consistent with United States treaty practice, including treaties that extend to that boundary in three of the Great Lakes. However, those treaties are a small portion of U.S. land cession treaties and were all entered into in the 19th century, well after the relevant time period of 1763. Further, the evidence does not prove that the U.S. had the treaty-making practice suggested by SON.

[153] Mr. Chartrand, an expert ethnohistorian and anthropologist, testified about the U.S. treaties relied on by SON. The following treaties included parts of the Great Lakes: Detroit (1807), Saginaw (1819), Sault Ste. Marie (1820), Washington (1836) and La Pointe (1842). Mr. Chartrand also testified about the many important events that took place in the United States leading up to the time period relevant to these U.S. treaties, well after 1763. I approach his evidence in this area with caution because of the limits on his qualifications. However, much of his evidence about basic events in the United States was confirmed by other experts.

[154] Mr. Chartrand reviewed over 200 U.S. treaties. Twelve of them had boundaries in submerged land. Of those, five treaties addressed an area that extended into the Great Lakes. The remaining treaties in the Great Lakes area ended at the shores of the lakes.

[155] With respect to another U.S. treaty, the 1795 Treaty of Greenville, the issue of whether it extended into Lake Erie was addressed in *Ottawa Tribe of Oklahoma v. Logan*, 541 F. Supp. 2d 971 (N.D. Ohio 2008), at pp. 980-981, aff'd, 577 F.3d 634 (6th Cir. 2009). The District Court found the language of the treaty insufficient to grant part of Lake Erie. The court further noted that the U.S. Supreme Court had held that for navigable waters, there is a strong presumption that a sovereign government, like the United States, would not grant away title to such property.

[156] These themes of the importance of navigable waters and the Great Lakes also arise in British and Canadian common law, discussed below.

[157] The reason for including parts of the Great Lakes in a small number of 19th century U.S. treaties is not clear from the historical evidence. However, there is no question that there were major events preceding those treaties. Those events included the following: the American War of Independence, concluding with the 1783 Treaty of Paris that recognized the United States as an independent country; the Jay Treaty of 1794 between the United States and Great Britain; the Treaty of Greenville of 1795 between the United States and the Wyandot and other Indigenous peoples of the Northwest region of the United States; and, the War of 1812 between the United States and Britain, concluding with the Treaty of Ghent in 1814.

[158] Mr. Chartrand also expressed opinions about the geopolitical factors that could have motivated the U.S. to enter into the treaties relied on by SON. SON has challenged his expertise to give those opinions. Having reviewed the evidence, I find that I need not rely on Mr. Chartrand's opinions about those geopolitical factors. The other evidence about the above events, and changes in U.S. Indigenous policy over the period, amply show that I ought not infer that the few U.S. treaties relied on by SON were motivated by a recognition of Aboriginal title. The evidence also does not show a general U.S. treaty-making practice regarding the Great Lakes or international boundaries. Further, there is ample evidence showing that U.S. treaty-making practices were different from the British practices, both in process and in the constitutional backdrop. I therefore do not find that SON's choice of the U.S. boundary is consistent with U.S. treaty-making practices.

[159] SON's respectful approach to boundaries, and other practical considerations, explain their boundary choices. However, SON must still prove their connection with the land that forms the Aboriginal Title Claim Area, within the chosen boundaries.

SON's distinctive culture

[160] SON must prove a connection with the claimed land that was of central significance to their distinctive culture in 1763. My discussion about SON's culture begins with the Anishinaabe people and their practices, customs and traditions. Members of SON identify as Anishinaabe, both now and in the distant past. SON relies extensively on their Anishinaabe identity.

[161] In addition to identifying as Anishinaabe in 1763, SON had kinship groups called clans. SON members were also part of their local Indigenous groups or bands, which are now called First Nations.

[162] The factual and legal issues in the Aboriginal Title Claim relate to the way that the ancestors of SON made decisions in and before 1763. For the Anishinaabe people, including SON, decisions were made at the band level, as discussed below.

The Anishinaabe people

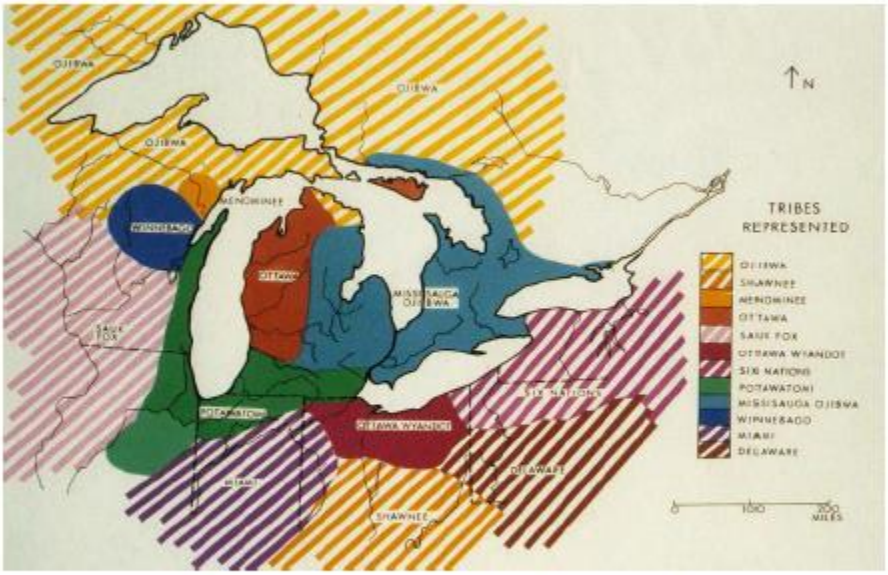
[163] In closing submissions, SON defined "Anishinaabe" as "a term used by many Indigenous groups who lived in the Great Lakes region to describe themselves and their larger cultural community". I accept that definition, which is well-supported by the evidence.

[164] Anishinaabe people are sometimes described as nomadic, but they are more specifically understood as people who had a defined seasonal round of activities and locations, where they would hunt and fish and harvest each year. As well, Anishinaabe people did relocate from time to time, as discussed below.

[165] As Dr. Driben testified, there are between 200 and 250 Anishinaabe Indigenous groups in the United States and Canada, in the Great Lakes region (including the two that are SON).

[166] There were several Indigenous groups that identify as Anishinaabe in the Great Lakes region at the time of the assertion of British sovereignty in 1763. However, not all Indigenous groups in the Great Lakes region were Anishinaabe. Dr. Driben referred to this map, which illustrates various Indigenous groups in the area at that time:

Map 8: Land Use and Occupancy, *c.* 1763



Source: Charles E. Cleland, *Rites of Conquest: The History and Culture of Michigan's Native Americans* (Ann-Arbor, Michigan: University of Michigan Press), Map 4.

[167] This map shows Anishinaabe Indigenous groups, such as the groups described as Mississauga Ojibwa, Ottawa and Pottawatomi,[20] but also Indigenous groups that were not Anishinaabe, such as the Six Nations. The Six Nations were Haudenosaunee, also known as Iroquois. There were other groups such as the Huron-Wendat, the Neutrals and the Tionontati. Conflicts with the Haudenosaunee form part of the history relevant to this case, discussed below.

[168] The division between Anishinaabe and Haudenosaunee is reflected not only in their culture, but also in their language. The Anishinaabe spoke Anishinaabemowin, [21] an Algonquian language. The Haudenosaunee and other groups spoke languages described as Iroquoian.

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[20] Also spelled Potawatomi in the trial evidence.
[21] Other spellings in the trial evidence include Anishnabemowin and Nishnaabemwin.

[169] SON put forward evidence discounting the value of the names of Indigenous groups historically, because the names were a means of Europeans distinguishing between Indigenous groups. However, throughout the trial, SON, the defendants, experts and other witnesses used those names. Names such as Ojibway (and Ojibwe and Ojibwa), Odawa (and Ottawa), Pottawatomi, and Haudenosaunee (and Iroquois) were often used. These names are therefore needed to address the trial evidence, but I have taken care to consider the evidence about the origin and various uses of the names.

[170] The two First Nations that are SON are among the many Indigenous groups that are Anishinaabe. Members of SON identify as Ojibway, but also include members with Ottawa and Pottawatomi descent.

Dodems

[171] The Anishinaabek[22] also have kinship groups called Dodems (or "clans" in English). Dodems are inherited from one's father, and they are named after a symbolic animal, bird or fish. Most of the SON community witnesses named their Dodems in their testimony. For example, Dale Jones testified that he is a member of the Otter clan and Ted Johnston testified that he is a member of the Marten clan. These relationships extend across the Anishinaabe. As Karl Keeshig testified, he is a member of the Wolf clan, which means that all other Anishinaabe people of the Wolf clan are his family, be they in Winnipeg, Wisconsin, Florida or British Columbia.

[172] Some of the Dodemic identities first noted by Europeans in the early 17th century are still present among SON members today.

Indigenous groups or bands

[173] SON members also identify as part of their particular Indigenous group, now the two First Nations who are the named plaintiffs in this litigation. Historically, these small, local, economic and socio-political Indigenous groups were often called bands. Now, they prefer to be called First Nations.

[174] The historical documents usually speak of these First Nations as bands or tribes. The term "band" was used most frequently in the evidence. These terms also have modern uses. "Band" was and still is a defined term in the *Indian Act*, R.S.C. 1985, c. I-5, s. 2(1). The United States' legal framework uses the term "tribe". SON used both of these terms, in context, during the trial. Similarly, these reasons use "band" and "tribe" and "Indigenous group" to address the historical evidence, not to disregard the modern preference in Canada for the term "First Nation".

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[22] "Anishinaabek" is the plural form of Anishinaabe.

[175] In 1763, these Indigenous groups, or bands, were the decision-making groups. I agree with SON that the band was the central political unit for Anishinaabe people.

[176] Decisions affecting a band were based on consensus, but these decisions did not require unanimity. Everyone in the band could express an opinion, and once a clear view emerged, the Chief would act in keeping with that view. Bands did not have institutions such as the military or the constabulary to force band members to comply.

[177] SON relies on their role in certain wars in their Aboriginal Title Claim. Decisions about going to war were made at the band level. However, even if the band was inclined to participate, individuals were allowed considerable autonomy in deciding whether they would participate. A warrior could decide at any point not to participate at all, or to withdraw. He had the right to leave, even in the middle of combat.

[178] Historically, bands sometimes grouped together for specific reasons. SON relies on their historical participation in an alliance called the Three Fires Confederacy.

Three Fires Confederacy

[179] The Ojibway, Ottawa and Pottawatomi had what Dr. Driben described as a loose association with some political, military and economic objectives. It was called the Three Fires Confederacy or Council. It was an impermanent alliance that was specific to certain issues, conflicts, hostilities and interests. As put by Dr. Driben, the participants would come together as need be, and they would remain as long as required. They would then disperse. Ojibway, Ottawa and Pottawatomi bands did not necessarily take part in the Confederacy. Individual bands took part at different times when it suited their interests.

[180] The Three Fires Confederacy existed mostly in the Upper and Lower Michigan Peninsulas, in the 1600s and 1700s. SON submits that their ancestors were part of that Confederacy.

[181] There is some oral history in this regard, without much evidence about the source of the oral history or how it was passed down from SON's ancestors. Most specifically, Karl Keeshig testified that SON was part of the Confederacy in response to the Beaver Wars (also known as the Iroquois Wars), which took place in the 1600s. Others also said that SON was part of the Confederacy.

[182] Unlike the other community evidence, which related to the distant past, Frank Shawbedees testified in 2002 that he was personally part of the Confederacy. However, the extensive evidence does not support a role for the Confederacy in the 19th or 20th century events that are relevant to SON's claims. Dr. Driben testified that it no longer exists, and he was unable to say if SON took part in any of the Three Fires Confederacy councils in the past. Dr. Reimer is an expert anthropologist and ethnohistorian. She found no references in published sources about any role of the Three Fires Confederacy in SON's Aboriginal Title Claim Area or in any of the territory that was surrendered in either Treaty 45½ or Treaty 72.

[183] Considering all of the evidence, I find that SON's ancestors were part of the Three Fires Confederacy in relation to the Beaver Wars in the 17th century, but not in more recent times or for other events relevant to the case.

[184] Further, the Three Fires Confederacy did not displace local band decision-making about the key events in this case in the 18th and 19th centuries. Membership in the Three Fires Confederacy did not affect the political autonomy of the individual bands within their own territory. I agree with SON that bands within the Three Fires Confederacy were independent and free to act on their own.

[185] At least as of the time of contact with Europeans, the Three Fires Confederacy had no role in decision-making concerning lands or resources within individual bands' local territories. The Indigenous groups that were members of the Three Fires Confederacy did not have to consult with each other or to seek permission for decisions in their own territory. As put by Dr. Driben, it was the band's prerogative to make those decisions.

Other Anishinaabe alliances

[186] Karl Keeshig spoke of an Anishinaabe "nation" arising from the Creation Story, which he connected to Anishinaabe spiritual beliefs and related practices, customs and traditions. However, SON does not submit that there was an Anishinaabe nation that made decisions for them or for all Anishinaabe in the relevant time period. As put by SON, the Anishinaabe people are a nation in the cultural sense, with no corresponding political manifestation.

[187] SON suggests that there was an alliance or co-operative effort among Anishinaabe to take certain steps to control access to the Great Lakes in the 18th century. The evidence does not prove the existence of such an alliance in the 18th or 19th century (or control of all the access points).

[188] Beginning in the 19th century, some Ojibway met periodically in General Councils to discuss matters of shared interest. Chiefs and principal men of various bands met, along with others, sometimes including missionaries and representatives of the Crown. Ancestors of SON took part in at least some of those General Councils, as discussed below. However, I agree with SON that General Councils did not displace band authority to make decisions.

[189] In summary, as put by Dr. Driben, the band was the fundamental decision-making unit and landholding unit and "the most critical organization that you can understand when you're looking at Anishinaabe people". Decisions about land use were made at the band level.

[190] I expand on SON's distinctive culture below, discussing the practices, customs and traditions that SON relies on for their Aboriginal Title Claim.

SON's historical practices, customs or traditions

[191] SON must show that they had a practice, custom or tradition in 1763 that gave rise to a connection with the claimed land that was of central significance to their distinctive culture. For

Aboriginal title, the connection must be with the land. To prove the required connection with the claimed land, SON mainly relies on the Anishinaabek spiritual connection with water and on fishing. Neither activity required substantial use of the land, as discussed below.

[192] This is not a case where the claimants collected plants, minerals or other useful or significant substances from the submerged land. That did not take place. There is some evidence about harvesting wild rice in an inland area, but not in the Aboriginal Title Claim Area. There is also some evidence, especially from Dr. Reimer, from which I infer that certain types of fishing nets had weights or anchors that could sink to the bottom of the lake. Most of that evidence is from the 19th century or later, but some version of the weights could have been used as early as 1763. However, any touching of the lake bed through fishing would have been close to shore at that time, not in the expanse of open water in the Aboriginal Title Claim Area. It was at best a minor use of the claimed lake bed. As well, it was connected to fishing, a different Aboriginal right. Aboriginal title is not needed for that activity.

[193] I do not consider the lack of evidence of actual use of the lake bed to be determinative. An obvious characteristic of submerged land is that it is covered by water and SON submits that the water and lake bed are regarded by them as one. SON is not seeking ownership of the water itself, although SON does seek control of the water and ownership of whatever passes through it, such as fish.

[194] SON's evidence about their connection with what they describe as their water territory is founded on the spiritual connection that Anishinaabe people have with water.

Anishinaabe spiritual connection with water

[195] SON relies on historical practices that involve a sacred responsibility to care for and protect the water, to pray for the water, to conduct ceremonies for the water and to honour the water. SON submits that their practices were based on a connection to water that has subsisted for thousands of years, and that their practices include a right to make decisions about water territory and an obligation to protect the territory for future generations.

[196] SON's closing submissions began with the Creation Story, emphasizing its importance to SON. Karl Keeshig told the Creation Story at trial.[23] Karl Keeshig is a member of SON, a follower of the Midewin faith and a member of the Midewin Lodge. He is a Third Degree Midewin and Lodge Director. As he explained in his testimony, the Midewin Lodge is roughly analogous to a church for followers of the Midewin faith. He testified that the membership of his Midewin Lodge

[23] Karl Keeshig told the Creation Story, except those parts of the story that he explained could not be conveyed in court.

was growing and that all Anishinaabe were welcome there. I found Karl Keeshig's evidence about the Midewin faith deserving of substantial weight.

[197] There is no question that water forms part of the spiritual teachings of the Midewin faith. The Creation Story, which is sacred to the Anishinaabe, is part of those teachings.

[198] As told by Karl Keeshig, the Creation Story begins before the beginning, when the Creator breathed life into his creation of all living things. The creation of humans came last, when the Creator created four people of different races. Although three of those people left the Creator swiftly, the Indigenous person stayed longer because he did not want to leave the Creator (referred to as his Grandfather). Karl Keeshig then referred to the Indigenous person as "Anishinaabe".[24] The Anishinaabe person was then sent through four levels of creation, specifically the Water Level, the Sky Realm, the Earth Level and "Mideaaking" or the realm of the Mide spirit (which relates to the Midewin faith). The Water Level was said to have the most beautiful lake that is the source of water for all creation. The Creator told Anishinaabe to name all in creation, which he did, and gave him responsibility to preserve the Earth for future generations. The Creator also gave the Anishinaabe tobacco as a way to call upon the Creator when needed.[25]

[199] Water was one of the four levels of creation in the Creation Story. Water is therefore significant to Anishinaabe people. The Creation Story also shows that from a spiritual standpoint, the Anishinaabe were given responsibility to care for and preserve the Earth.

[200] Vernon Roote, former Chief of the Chippewas of Nawash Unceded First Nation, testified that it was their job to keep Mother Earth clean, including the land, air and water, which had equal importance. He explained that water was important because it gave them life in childbirth, and by providing food through fish. He said that his people did not look at boundaries because they were all there as part of Mother Earth. That was their belief system. Karl Keeshig testified that when he saw his mother, the Earth, she included the air, the water and the land.

[201] With respect to the significance of water, SON also relies on a speech made to an English trader in 1761, by Chief Minweweh,[26] who was not a member of SON but of the Ojibwas of Mackinac Island.[27] The Chief said as follows: "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

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[24] Karl Keeshig explained that he has also been referred to as Miskogabowut, Wanaybozhoo and Nanabush.

[25] The Creation Story was more extensive as told by Karl Keeshig in court, and I mean no disrespect by shortening it here. This is also the case with other stories and ceremonies that I describe briefly in these reasons.

[26] Also spelled Minewewah, Minnevana and Minavavanna in the trial evidence.

[27] That island is located at the northwest end of Lake Huron, where it joins with Lake Michigan.

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".

[202] Chief Kahgee also spoke about their overall responsibility to land and water, which came from the Creation Story. However, he testified that he regards the responsibility to care for SON territory in particular as specific to SON. I accept his current belief, but it does not extend to a historical practice as of 1763 that was geographically specific to the Aboriginal Title Claim Area. The Creation Story gave the Anishinaabe overall responsibility to preserve the Earth.

[203] Both Dr. Reimer and Dr. Driben opined that it was almost certain that the Anishinaabek included water territories in their band territories in and before 1763. However, this was not a connection with the submerged land. As put by Dr. Driben, from the Anishinaabe perspective, it included the right to use and enjoy the resources, including rights over things that had a value for trade such as fish. The SON connection with fishing is strong, is part of SON's claim for Aboriginal title and is discussed below.

[204] Joanne Keeshig testified about the role Anishinaabe women carry out with respect to water. Like Karl Keeshig, she is a Third Degree Midewin and a member of a Midewin Lodge. She testified about the resurgence of the Midewin Lodge beginning in the 1970s. I found her evidence about her faith deserving of significant weight.

[205] Joanne Keeshig's evidence also spoke of the Creator. The Creator gave Anishinaabe women the primary responsibility to care for water. Anishinaabe women perform water ceremonies. In Joanne Keeshig's view, if the Anishinaabe did not conduct water ceremonies, they would become disconnected from their purpose in life.

[206] The water ceremonies were usually not held on or in the water. The main exception relates to a specific location on the Peninsula, Nochemowenaing,[28] where there were ceremonies on the water. Nochemowenaing means "healing place" and the place included the healing waters and the (dry) land at that location. The dry land is a point that is shown on some maps in evidence.[29] It is on the Georgian Bay side of the Peninsula, in the Hope Bay area. However, the maps do not identify the area of the healing waters.

[207] Nochemowenaing was a very significant place from the Indigenous perspective, both as of 1763 and in more modern times. The waters at Nochemowenaing were and are believed to have healing qualities.

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[28] Different witnesses used different names for this location, including Nochimowanaing, Nochimowanaoing, Naotkamegwanning and Hunter's Point, among others.
[29] E.g., Map 1 in Dr. Williamson's report.

[208] Nochemowenaing is also one of many burial sites on the Peninsula. Substantial archaeological investigations have taken place in the area, revealing historical evidence dating back to the 17th century. The burial places discovered through archaeological investigations at that site were not in the submerged land. However, a 17th century pendant depicting Mishipizheu, a powerful underwater creature, was found at Nochemowenaing.

[209] Karl Keeshig testified that when the Anishinaabe migration reached Nochemowenaing, a great meegis[30] shell surfaced and blessed the land, and it bestowed medicinal properties in the plants. When it went back underwater, it created a great whirlpool, which formed part of the one water ceremony that took place on the water.

[210] Karl Keeshig testified about this ceremony, based on oral history. People seeking healing were put in canoes and would be pushed toward the great whirlpool. And "the whirlpool would do one of two things. It would either take the canoe and end the life of the one that was seeking healing. If that be the case, then it was the Creator's will … But if it pushed them back and it didn't take the canoe, then their time was not done here. And they would retrieve them, do ceremony, and go and pick the medicines, find the medicines that the one that was in need required."

[211] I accept that this ceremony formed part of the Midewin faith in 1763, and was a practice, custom or tradition of the Anishinaabe people, including SON. The ceremony did not continue unchanged into the 20th century, nor does it need to do so.

[212] Joanne Keeshig recounted one modern ceremony, which has been performed since 1994, that includes going out on the water at Nochemowenaing. The ceremony includes preparing two bundles of food and tobacco, one for the land and one for the water. The bundle for the water includes a rock to weigh it down. The women sing songs and paddle out to the whirlpool (the strength of which has now subsided) and place the bundle into the water.

[213] Nochemowenaing continues to be a significant spiritual location for the Anishinaabe people, with respect to both the dry land and the submerged land.

[214] While women perform most water ceremonies, some are performed by men. For example, Marshall Nadjiwan testified that as a pipe carrier he gave prayers and did ceremonies including an annual ceremony at the water's edge to ask for help from the water spirits. He testified that if the water was getting polluted, he had to do the annual ceremony, which could renew the bottom of lakes. As well, some witnesses described the practice of scattering tobacco on the water when fishing, to pay respect to the water and the spirit of the fish. SON described this as the spiritual aspect of fishing. Chief Roote testified that they would also scatter tobacco on the water in a non-

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[30] Also spelled "megis" in the trial evidence.

ceremonial manner, as a way to be aware of the importance and cleanliness of water and to give thanks.

[215] Joanne Keeshig also testified about a recent practice of water walks, beginning in the early 2000s. She first took part in a water walk in 2004 in the State of Michigan. She then took part in a water walk in Ontario a year or two later. She testified about Josephine Mandamin, an Elder from another First Nation, who was walking around Lake Huron, starting at Sault Ste. Marie. Joanne Keeshig joined the water walk after taking part in a water ceremony at Nochemowenaing. She testified that the walk was like a relay, with a man (carrying an eagle staff) and a woman (carrying a pail of water), with tobacco, singing and praying for the water as they walked along the shore. The pair would then hand the water and eagle staff along to the next pair of walkers. She and others had performed the water walk along part of the Lake's perimeter in order to spread awareness about their role and the importance of water.

[216] Water spirits were also an aspect of the Anishinaabe relationship with their environment as of 1763. Karl Keeshig testified that there were water spirits everywhere, and that movements in streams, lakes, whirlpools and eddies were the physical manifestation of the water spirits. He testified that the water spirits are felt more strongly at some locations, including Nochemowenaing.

[217] Exclusivity is an aspect of Aboriginal title. The Anishinaabe spiritual connection with water did not and does not have, as a part of the ceremony or connection, the need for exclusivity.

[218] Focusing on the water ceremonies, the Nochemowenaing water ceremony involved going out on the water at that location. The spiritual aspect of fishing took place on the water. The other water ceremonies addressed in the evidence did not require going out on the water. Nor did the other ceremonies necessarily have to be held at the water's edge or in any specific location. As put by SON's counsel, some ceremonies could be done with tap water away from the shoreline, but others could not. Joanne Keeshig testified, however, that she would think that if they wanted to pray for the water at Bruce Nuclear, they would have to go over there.

[219] Viewing the evidence from the Aboriginal perspective, I find that the Anishinaabe people had a spiritual connection with water in 1763, including a belief that they had responsibilities to all water including the water in lakes and rivers in their territories. In that way, the water formed part of their spiritual beliefs. I infer from the evidence that ancestors of SON embraced those spiritual beliefs as of 1763. For some current SON members, that spiritual connection continues today.

[220] The significant spiritual connection to the water was part of the distinctive culture of all Anishinaabe in the Great Lakes area in 1763 and related to all waters. It extended well beyond SON and the Aboriginal Title Claim Area. Other than for Nochemowenaing, SON has not proved that this aspect of their culture required title to the lake bed in 1763, or does now. Nor does the connection require exclusive use of the water spaces generally or the Aboriginal Title Claim Area in particular. I discuss Nochemowenaing further below.

[221] SON relies on other connections with the claim area to prove their claim to Aboriginal title, mainly through fishing.

Does fishing support a connection with the claimed land?

[222] SON submits that fishing is a core part of SON's identity and supports their claim for Aboriginal title to the Aboriginal Title Claim Area.

[223] The evidence shows that SON's primary relationship to the Aboriginal Title Claim Area is with respect to fishing. I agree, as put by SON, that they are "a fishing people". Both historically and going forward to contemporary times, SON has relied heavily on fishing for sustenance and, at least for some of the time, for trade and commercial purposes. The Aboriginal Title Claim Area includes significant fishing locations, such as at the mouth of the Saugeen River and Colpoy's Bay. The Fishing Islands have also been an important area for SON's fishing, though the islands themselves are not part of the Aboriginal Title Claim Area. The Fishing Islands were surrendered in 1885.

[224] Although important, fishing has a limited connection to the claimed land.

[225] SON's evidence shows that their fishing was mainly in specific locations. SON's evidence includes modern fishing activities, on the basis that today's fishers learned from their relatives and knowledge holders and that today's fishing practices are tied to the past. Even in modern times, fishing is usually close by the Peninsula. It does not extend, to a significant degree, through the majority of the Aboriginal Title Claim Area.

[226] As of 1763, SON ancestors fished from the shore, using small crafts such as canoes or bateaux, and using nets. The offshore geographic reach of fishing as of 1763 was not substantial. Fishing was done in shallow water and using islands as bases.

[227] The outer reaches of the Aboriginal Title Claim Area, well into Lake Huron and in the middle of Georgian Bay, are areas where the water conditions were rough and unsuited to the types of boats used for fishing in and before 1763. As put by SON, canoes and bateaux were small vessels that needed to be brought to shore in the event of bad weather which, on Lake Huron and Georgian Bay, could come very quickly and dangerously. For that reason, both types of boats usually travelled close to the shore even when going long distances.

[228] Similarly, while there was some use of the water for the purposes of travel, it was not substantial and it was mainly close to shore. SON does not rely on travel to show a significant connection between the Aboriginal Title Claim Area and SON's historical practices.

[229] (Robert) Paul Nadjiwan, a former SON Chief (Chippewas of Nawash), testified about the dangerous waters in more contemporary times, recounting when his great grandfather and four other fishermen lost their lives in the journey from Nochemowenaing to Cape Croker, generally going south along the east side of the Peninsula.

[230] Even in contemporary times, SON members do not normally fish in the outer parts of the Aboriginal Title Claim Area, despite having more modern boats and equipment. This is underscored by data SON put forward about their commercial fishing in the Aboriginal Title Claim Area from 1995-2018. Ryan Lauzon, a Fisheries Assessment Biologist, testified about this data and prepared an illustration of the data on a map of the Aboriginal Title Claim Area. Ryan Lauzon is a SON employee who manages the program under which SON keeps track of its commercial fishing. This is part of SON's Substantive Commercial Fishing Agreement with Ontario. That Agreement provides for co-management and includes funding for SON to collect this data. I found Ryan Lauzon knowledgeable about the data he used and found that his map was prepared diligently.

[231] There is no dispute about the veracity of the commercial fishing data itself. However, Ontario disputes the choices made by Ryan Lauzon in illustrating the data on his map, and Ontario gave an alternative illustrative map with different data grouping choices. The impact of the choices made by each side was explored in the evidence, and I found both depictions useful.

[232] Both of the maps show SON's commercial fishing around the Peninsula area. The data is aggregated over the whole period of 1995-2018. In almost all of the Aboriginal Title Claim Area, only SON could fish commercially, and that is the area I have focused on in my findings. Sustenance and ceremonial fishing are not included in the data, but I find on the evidence that the inclusion of those activities would not significantly change the data.

[233] Ryan Lauzon's map shows that for more than a third of the Aboriginal Title Claim Area, there was no commercial fishing at all in the period from 1995-2018. Another large portion of the Aboriginal Title Claim Area had only 1-10 fishing events in each grid section,[31] cumulatively, for the whole period from 1995-2018, averaging at most one event every two to three years.[32] Therefore, there was either no fishing or almost no fishing in the majority of the Aboriginal Title Claim Area, over that lengthy modern time period. Not surprisingly, the map shows concentrated fishing activity in certain specific areas, all of which are much closer to shore. The areas of little or no fishing are mainly in the outer half or more of the Aboriginal Title Claim Area in Lake Huron and Georgian Bay.

[234] SON submits that the Supreme Court of Canada has recognized that evidence of fishing may support a claim for Aboriginal title. That is so. In both *Delgamuukw* and *Tsilhqot'in Nation*, the Supreme Court observed that fishing could provide evidence of occupation, which is part of

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[31] A fishing (or harvesting) event could either be using a small boat or a large one, for a short or long duration. I have taken this into account in reviewing the illustrative maps.

[32] The maps do not illustrate when the fishing events took place, other than that they took place in the period from 1995-2018. They may not have been evenly distributed over that long time period. I have taken this into account.

the test for Aboriginal title to (dry) land: *Delgamuukw*, at para. 149; *Tsilhqot'in Nation*, at paras. 37, 39 and 40. However, the Supreme Court was not discussing claims like this one for title to the lake bed.

[235] The trial evidence shows that some fishing can be and was done from dry land in and around the Peninsula, without actually going out on the water. In addition, Jay "Tattoo" Jones testified about many locations around the shores of the Peninsula that SON has used in contemporary times to launch fishing boats. I infer that many of these locations were used historically as well. These locations ranged from very small to larger, and Jay "Tattoo" Jones testified about the two types of boats usually used: punts and tugs. Punts are better suited to shallow water fishing. Jay "Tattoo" Jones went once to the international boundary, in a tugboat, to see if it was economical to fish out there. He did not go again.

[236] SON's fishing activities are some evidence of occupation of the Peninsula itself (which is not part of the Aboriginal Title Claim Area) and show some use of some locations near the coast. The weight given to these activities depends in part on the nature of the land and the purposes for which it can reasonably be used: *Tsilhqot'in Nation*, at paras. 39-41. Yet the fishing activities are not sufficient to show use of the vast Aboriginal Title Claim Area for fishing in 1763, even bearing in mind the principle that there may not need to be a high amount of activity throughout the area to show occupation of the area.

[237] The abundant evidence about fishing could ground a claim for an Aboriginal right to fish in the geographic locations where fishing was integral to SON in 1763. That right has previously been established[33] and is not sought in this case. As well, fishing was integral in only part of the Aboriginal Title Claim Area.

Other evidence relied upon for a connection to the claimed land

[238] Although not highlighted to the same degree by SON on this issue, SON also relies on other evidence that they put forward in support of their position that they have fulfilled the test in *Tsilhqot'in Nation*. That test focuses on occupation of the Aboriginal Title Claim Area. As discussed further below, SON's occupation of the Aboriginal Title Claim Area was very limited in 1763. There was considerable evidence on other aspects of the *Tsilhqot'in Nation* test as well. Because the parties grouped that evidence under the *Tsilhqot'in Nation* test, I have discussed it below. However, I have considered the entire body of evidence in reaching my decision on central significance.

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[33] *R. v. Jones*.

Central significance to SON's distinctive culture

[239] Having considered all the evidence from the Aboriginal perspective, I conclude that the practices relied on by SON were and are important but they are not sufficiently connected to the claimed land for Aboriginal title.

[240] The spiritual connection to water is very broad, extending to all waters, rather than requiring a connection with the Aboriginal Title Claim Area itself. As explained by Marshall Nadjiwan, all water is sacred, whether it is in SON's territory or not, and water ceremonies gave thanks for the water, in all territories, for all people. And the water ceremonies usually did not require use of the Aboriginal Title Claim Area itself.

[241] Fishing was an important activity for SON's ancestors in 1763, but that evidence provides a foundation for a different Aboriginal right – the Aboriginal right to fish. And with respect to fishing, the connection with the lake bed in 1763 was, at most, incidental to fishing. As well, the area that was significant for fishing was much more geographically limited than the choice of Aboriginal Title Claim Area.

[242] There is then the evidence of occupation put forward for the *Tsilhqot'in Nation* Aboriginal title test, which is discussed below. That evidence does not show a sufficient connection with the claimed land.

[243] Therefore, the traditional practices and the other evidence relied upon do not show the required connection to the land in the Aboriginal Title Claim Area itself. Applying the legal test, I conclude that SON's distinctive culture would not be fundamentally altered without Aboriginal title to that lake bed.

[244] The only potential exception is Nochemowenaing. There was and is a strong spiritual connection with that location, including not only the (dry) land but also some nearby waters. Further, the water area was used in water ceremonies both as of 1763 and more recently. The water in that area is still regarded as having healing powers when in that location.

[245] No map or other trial evidence shows the area of healing waters at Nochemowenaing, including what was historically a whirlpool. However, the evidence does suggest that it is a small area (in comparison to the entire Aboriginal Title Claim Area) in or around Hope Bay.

[246] If there was a claim for Aboriginal title to the submerged land that corresponds with the traditional area of the healing waters at Nochemowenaing, the evidence before me shows the central significance of that area to SON. However, if there were such a claim, I expect that there would be more evidence about the area in order to address all of the matters at issue, both as of 1763 and now, such as boundaries and the impact of the public right of navigation. Unfortunately, the evidence relevant to those matters is very limited.

[247] I return to the spectrum of Aboriginal rights set out by Lamer C.J. in *Delgamuukw*. The spectrum includes practices that are integral to the distinctive Aboriginal culture of the group

claiming the right. However, not all such practices support a claim of title to the land. Where there is insufficient occupation and use of the land where the practice is taking place, other Aboriginal rights may arise, but not Aboriginal title. The spiritual and fishing practices relied upon by SON would fall into that category, assuming the other requirements for an Aboriginal right were met. I conclude that those practices were and are important, but they are not sufficiently connected to the claimed land for Aboriginal title.

Translation into a modern legal right

[248] I now consider the last step in determining whether there is a right to Aboriginal title to the claimed land: whether the historical practices translate into a modern legal right. Although the required central significance has not been established, this step underscores the issues that arise from a claim for Aboriginal title to part of the Great Lakes.

[249] The question is whether the Aboriginal practices put forward by SON translate into a modern legal right, and if so, what right? At this stage, the court must consider the common law perspective.

[250] One of the challenges arising from SON's claim is that at common law, flowing water is incapable of ownership, because it is a common resource: *Water Law in Canada*, at pp. 223-224, 234, citing *McKie v. The K.V.P. Co. Ltd*., [1948] O.R. 398 (H.C.), aff'd [1948] O.W.N. 812 (C.A.), aff'd [1949] 4 D.L.R 497 (S.C.C.).

[251] Although SON has not sought title to the water itself, SON seeks ownership of the contents of the water (e.g., fish) and the right to exclude others from the water above the submerged lands, as well as the ownership of the contents of the submerged lands (e.g., minerals).

[252] Further, the right to control and exclude others from the claimed land is "basic to the notion of title at common law": *Marshall and Bernard*, at para. 64, *per* McLachlin C.J. However, none of the historical practices that SON relies on need exclusivity.

[253] There is then the question of whether, at common law, there is the possibility of ownership of submerged land. As discussed below, the case law put forward by SON shows that the common law has used the concept of ownership for submerged land. However, as that law has been adapted for Canada, there would not be private ownership of the Great Lakes, and any ownership would be subject to the public right of navigation.

Private ownership of submerged land

[254] SON submits that at common law, there can be private ownership of submerged lands, and that ownership and navigation rights can be compatible with one another.

[255] I accept the basic proposition that, in some contexts, the common law has used the concept of private ownership of submerged lands to address disputed rights, such as fishing. However, the common law principles relied upon by SON have been undermined in the context of the Great

Lakes. Further, they do not provide a common law basis for ownership that is not subject to the public right of navigation.

[256] SON relies on a common law presumption known as the *ad medium filum aquae* (in the middle of the stream) presumption: *R. v. Nikal*, [1996] 1 S.C.R. 1013, at para. 63.

[257] Under the presumption, title to submerged land is presumed to remain with the Crown for tidal waters. However, for non-tidal waters, title is presumed to be with the riparian owners: *Keewatin Power Co. v. Kenora (Town)* (1908), 16 O.L.R. 184 (C.A.), at paras. 15-16. For non-tidal rivers, the owner of the adjacent land is presumed to own the riverbed to the mid-point, hence the name *ad medium filum aquae* or "in the middle of the stream". The cases generally dealt with disputes about activities on rivers, such as fishing, logging or passage.

[258] SON submits that this English law applies to non-tidal navigable waters in Ontario and therefore shows that private ownership of submerged lands is part of the common law perspective. However, this English law has repeatedly been called into question in Canada. SON acknowledges that there has been considerable debate about whether the above regime should apply to bodies of water such as the Great Lakes. That is so.

[259] There are several reasons why the *ad medium filum aquae* regime must be approached cautiously when considering Canadian common law. As discussed further below, these are the main difficulties with applying the presumption here:

(i) it is based upon the tidal/non-tidal distinction, which is important in England but which has been rejected in Canada;

(ii) it is based on the geography in England, which is not comparable to Canada and specifically to the Great Lakes;

(iii) it is, in any event, a rebuttable presumption; and,

(iv) for Ontario, it has been removed, at least in part, by statute.

[260] The tidal distinction is the foundation of the English common law. For tidal waters, the presumption is that the Crown owns the sea bed and the foreshore (the land between the high-water mark and the low water mark): *Murphy v. Ryan* (1868), I.R. 2 C.L. 143, at p. 149. The public right of navigation for tidal waters is not an issue since the submerged land is not privately owned.

[261] For non-tidal waters, the presumption is private ownership by the adjacent landowner to the mid-point, but it is subject to the public right of navigation if the waters are navigable: *Caldwell v. McLaren*, [1884] U.K.P.C. 21, at p. 10.

[262] Further, in the context of the public right of navigation, the Supreme Court of Canada has said that the distinction between tidal and non-tidal waters has been abandoned in Canada: *Friends of the Oldman River,* at p. 54, *per* La Forest J.

[263] Thus, this common law does not assist SON's claimed title, which, as SON has framed it, is not subject to the public right of navigation. As well, SON does not claim to be the adjacent landowner with respect to the land boundary of the Aboriginal Title Claim Area.

[264] Further, the Great Lakes have characteristics that are not found in England. In the Court of Appeal for Ontario's decision in *Keewatin Power*, in discussing the presumption, Moss C.J.O. specifically distinguished the Great Lakes, at para. 19:

> In this case we are not dealing with the Great Lakes nor with a river forming part of the international boundary. But in these instances the prima facie presumption would probably be not difficult of rebuttal.

[265] Chief Justice Moss noted that, in a number of instances, judges had strongly favoured the view that the common law rule is inapplicable to the Great Lakes, but there had been no actual decision on the point. He concluded that in the case of the Great Lakes, "rebutting circumstances and conditions would not be far to seek": *Keewatin Power,* at paras. 20, 27.

[266] In *Keewatin Power,* the court applied the presumption to the river in question, saying there was nothing to distinguish it from streams in England. In doing so, the court noted that the question of whether there were circumstances or conditions sufficient to rebut the presumption was a question to be dealt with in the particular case: *Keewatin Power,* at paras. 19, 20 and 26-27.

[267] After *Keewatin Power,* the Ontario legislature passed the *Bed of Navigable Waters Act*, S.O. 1911, c. 6, which made the *ad medium filum aquae* presumption inapplicable to navigable waters in Ontario. There is no issue that the Great Lakes are navigable.

[268] SON questions two Supreme Court decisions that consider the presumption in Canada. In *Nikal*, the accused sought to rely on the *ad medium filum aquae* presumption in a fishing case arising in British Columbia. The court declined to determine whether the presumption would apply to the reserve in question, but, assuming that it did, the court held that the presumption would not be available for two reasons: because the body of water was navigable and because the right to fish in question was severable: at paras. 63-72, *per* Cory J. The presumption had been found not to apply in most parts of Canada because the English rule was "singularly unsuited to the vast non-tidal bodies of water in this country": at para. 72, *per* Cory J. Similarly, in *R. v. Lewis*, [1996] 1 S.C.R. 921, the court held that *at least* in Western Canada, the presumption did not apply to the navigable rivers: at para. 61.

[269] SON seeks to restrict the impact of these cases to Western Canada because they were based in part on different statutory language importing the English common law into those provinces: *R. v. Nikal*, at paras. 65-68; *R. v. Lewis*, at para. 23. However, the underlying commentary about the

differences between Canada and England would be just as significant to rebutting the presumption in Ontario.

[270] The distinction made in *R. v. Nikal* regarding fishing is also relevant here. SON notes that fishing rights, under the presumption, are exclusively the submerged landowner's rights, yet they do not interfere with the right of navigation on non-tidal waters. But it is unnecessary to apply this law to address fishing rights. To the extent that SON has an Aboriginal right to fish, it is a separate right and does not require private ownership of the lake bed.

[271] SON notes that the reasoning in *R. v. Nikal* and *R. v. Lewis* has been criticized by Peggy J. Blair in "No Middle Ground: *Ad Medium Filum Aquae*, Aboriginal Fishing Rights and the Supreme Court of Canada's Decisions in *Nikal* and *Lewis*" (2001) 31:3 R.G.D. 515 at pp. 581-87. Ms. Blair served as counsel to Chief Howard Jones and Francis Nadjiwon, two members of SON, in the *R. v. Jones* case.

[272] SON also submits that most of the Canadian academic commentary on the issue of Aboriginal title to navigable waters supports the proposition that title should be recognized when it can be proven. However, most of the academic papers are about whether there should be exclusive fishing rights or fisheries, not Aboriginal title. Further, those papers that do mention submerged land do not analyze or weigh the impact of the public right of navigation. And an article that comments on *Ahousaht Indian Band and Nation v. Canada (Attorney General)* essentially summarizes the parties' arguments and predates the decisions in that case.[34] Considering the whole collection, there is a small amount of relevant discussion, going each way, that I have taken into account.

[273] I conclude that SON's position, that the claimed Aboriginal title is not qualified by the public right of navigation unless justified under s. 35(1), is inconsistent with the above common law.

Canadian treaties

[274] SON also submits that some Canadian treaties and agreements, both modern and historical, have included title to the beds of navigable waters. However, the evidence does not supply the needed context to fully consider these treaties and agreements.

[275] Although many treaties form part of the trial evidence, the three treaties relied upon for this submission have only been included in SON's book of authorities. I have considered these

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[34] The trial judge declined to decide the claim for Aboriginal title because it was unnecessary to do so: *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2009 BCSC 1494, [2009] B.C.J. No. 2155, at para. 502, rev'd in part 2011 BCCA 237, [2011] B.C.J. No. 913, aff'd 2013 BCCA 300, [2013] 4 C.N.L.R. 31, leave to appeal to S.C.C. refused.

treaties anyway, because the defendants have not challenged the authenticity of the treaties. SON also relies on facts about other treaties found in an article and a report, where those facts have not been proved at trial. I have not considered those facts since they have not been agreed on.

[276] Treaties 215[35] and 179 are dated in 1879 and 1880 respectively, and they are land surrenders by the Wyandot Indians of the Township of Anderdon, Ontario. The treaties have parallel text but refer to different locations, which appear to be nearby one another. Each treaty refers to a surrender by the Wyandot Indians of land, including a parcel of land covered by water. The land is very specifically described, including reference to the "River Detroit". The third treaty, Treaty 119, is from 1871. Under that treaty, the Chippewa Indians of Sarnia surrendered 23 acres of their reserve and also the "water lot" in front of the land.

[277] These treaties certainly appear to include the surrender of navigable submerged lands in the late 19th century in a different part of the province. However, the trial evidence does not provide the required context needed to interpret these treaties and their significance. It is well-established that treaties must be interpreted in their historical context: *R. v. Marshall*, [1999] 3 S.C.R. 456 ("*Marshall No. 1*"), at paras. 9-14, 44, *per* Binnie J. Since these were surrenders to the Crown, there may have been no need to address the public right of navigation.

[278] SON also relies on *An Act for the Settlement of Certain Questions Between the Governments of Canada and Ontario Respecting Indian Lands*, S.C. 1891, c. 5. This Act provided that the Governor in Council, if he or she should see fit, could enter into an agreement with the Government of Ontario in accordance with the terms of the draft of a proposed agreement that was in a schedule to the Act (subject to any modifications agreed on). One paragraph of the draft agreement mentioned that waters within an Indian reserve, including land covered with water, would be deemed to be part of the reserve and not subject to the common right of fishery (at para. 4). SON submits that this draft was "overtaken by later agreements" but the evidence does not explain either the context for the proposed agreement or what happened afterward.

[279] Further, SON relies on modern legislation. The *Labrador Inuit Land Claims Agreement Act*, S.C. 2005, c. 27, incorporates the 2005 Inuit of Labrador Land Claim Agreement. That Agreement states that the Labrador Inuit Settlement Area includes the adjacent tidal waters. However, it also provides that this does not derogate from or interfere with the public right of navigation in navigable waters (at Part 4.15.6).

[280] Overall, the usefulness of this material is very limited.

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[35] Also listed as Treaty 177.

Comparative law

[281] SON also relies on comparative law from the United States, Australia and New Zealand to address concepts of common law ownership of submerged lands and to address the public right of navigation. 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."

[282] However, this comparative law is characterized more by the differences in those legal regimes than by similarities with Canadian law. At most, it shows that SON's Aboriginal title claim is out of step with other jurisdictions.

United States

[283] SON submits that U.S. law supplies useful parallels, both about ownership of submerged land and about the coexistence of that ownership and the public right of navigation. However, having considered the evidence, I conclude that the U.S. law is not helpful to SON. At most, the evidence about U.S. law shows there was at least an implicit recognition that tribes may have had some rights in submerged land before the existence of the United States. Further, some U.S. treaties did deal with submerged land. However, the overarching U.S. legal principles also show the fundamental importance of navigability.

[284] The evidence about U.S. Indian law, as it is called, came from Mr. Greene, a U.S. lawyer. There are some parallels between U.S. Indian Law and Canadian Aboriginal law, but there are many distinctions as well.

[285] In the United States, Aboriginal title is known as a right of occupancy. Courts have also used the terminology that the United States holds the "ultimate title" to the land, while a tribe may retain a "title of occupancy". There is a second type of title called "recognized title", which means that the tribal property has been formally acknowledged by Congress through a treaty or statute. Only "recognized title" gives rise to a compensable property interest. Aboriginal title (or unrecognized title) can be extinguished by Congress without compensation.

[286] Mr. Greene agreed with Mr. Chartrand's evidence about certain U.S. treaties in the Great Lakes area, some of which included some submerged land and others that did not. Further, in Mr. Greene's opinion, where lands include submerged land that is navigable, the title comes with "navigable servitude". This means that the Aboriginal titleholder cannot interrupt or interfere with the United States government's paramount power over navigable waters. This paramount power includes the United States' authority over navigation, flood control, power production and national defence. This is a marked difference between the U.S. law and SON's claim for Aboriginal title.

[287] SON submits that the inclusion of parts of the Great Lakes in a small number of 19th century U.S. treaties amounts to U.S. recognition that those Indigenous peoples had legally recognized Aboriginal title to those submerged lands. However, as discussed above, SON has not proved that the rationale for those treaties was to recognize or confirm Aboriginal title. Mr.

Greene, who is not a historian, was not qualified to testify to the facts giving rise to those treaties, let alone the intentions of the United States when entering into them. At most, those treaties show that in a small number of instances, when the United States was inclined to do so, it chose to enter into treaties that included boundaries in the Great Lakes.

[288] Mr. Greene highlighted the Supreme Court of the United States' decision in *United States v. Holt State Bank*, 270 U.S. 49 (1926), 46 S. Ct. 197, because it dealt with submerged land. A marshy lake was drained in order to sell the land, in an area that was subject to a cession of land that became effective in 1890.

[289] The lake in question was found to be navigable. The Supreme Court emphasized that it was "settled law" in the United States that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as the state may elect, subject to two qualifications: (1) the paramount power of Congress to control such waters for the purposes of navigation and commerce; and (2) where the United States, after acquiring the territory and before the creation of the state, had granted rights in the land by way of performing international obligations, for use or improvement for commerce, or for other public purposes: at pp. 54-55.

[290] The court further observed that the United States "early adopted and constantly has adhered to the policy of regarding land under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency": at p. 55.

[291] The court in *Holt State Bank* held that, under the constitutional principle of equality among states, when Minnesota entered the Union in 1858, the title to the water beds passed to the state unless the title had already been disposed of. The court found that the lake was navigable, giving rise to a heavy burden to meet to show that the land had been reserved by the United States for the tribes before statehood: see also, *Montana v. United States*, 450 U.S. 544 (1981), at pp. 551-552. The burden was not met: at p. 59.

[292] SON singles out three cases where the Ninth Circuit Court of Appeals found that the United States had intended to include title to a riverbed or lake when establishing tribal reservations: *Confederated Salish and Kootenai Tribes v. Namen*, 665 F. 2d 951 (9th Cir. 1982); *Puyallup Indian Tribe v. Port of Tacoma*, 717 F. 2d 1251 (9th Cir. 1983); and *Muckleshoot Indian Tribe v. Trans-Canada Enterprises, Ltd.*, 713 F. 2d 455 (9th Cir. 1983). However, as discussed by Mr. Greene, those cases arose in very specific situations, including treaties, and, in two of the cases, responses made to end hostilities.

[293] Mr. Greene testified that this and the other U.S. law that he put forward shows that, prior to statehood, tribes had Aboriginal title (that is, the right of occupancy) to waterways. However, he opined that "such title must be confirmed and recognized by the United States prior to statehood or title to those navigable waterways would become the property of the State upon statehood" (emphasis added). And as he opined, quoting *Montana*, to show that title to navigable water was

confirmed and recognized by the United States was a heavy burden. It requires a plain intention, definitely declared, stated in clear words.

[294] With respect to the Great Lakes in particular, SON relies on *People v. LeBlanc*, 399 Mich. 31, 248 N.W. 2d 199 (1976). *People v. LeBlanc* was an appeal arising from convictions for unlicensed commercial fishing. The court divided on the issue of whether an 1836 treaty reserved fishing rights to the Chippewa Indians, with the majority finding that the treaty did so.

[295] In the course of deciding the case, the majority discussed what was then called Native or Aboriginal title. They described that title as the "non-treaty possessory rights of American [N]atives to territory which they had continually occupied before the advent of white civilization": at p. 44, citing *Oneida Indian Nation v. Oneida County*, 141 U.S. 661, 667 (1974). The majority found that in the text of the treaty itself, the United States had recognized that there was Aboriginal title to the treaty area. The majority therefore did not need to go further to consider whether Aboriginal title could or should have been recognized in the lake bed, since it had already been agreed to by the government. The judges in dissent would have upheld the convictions.

[296] Overall, this U.S. comparative law shows an approach to Aboriginal title that is tied to the creation of the United States and the principles that applied to land when each state entered the Union. There is an implicit recognition that tribes may have had some rights in submerged land before the existence of the United States. Further, some U.S. treaties did deal with submerged land. However, the overarching U.S. legal principles also show the fundamental importance of navigability. The United States has paramount power over navigable waters. In contrast, SON's claim for Aboriginal title to a portion of the Great Lakes is *not* subject to the public right of navigation.

Australia

[297] SON puts forward Australian law,[36] submitting that there is "no necessary inconsistency" between Crown sovereignty over sea beds and Aboriginal title and interests. Yet SON acknowledges that there are significant distinctions between the Australian and Canadian legal regimes.

[298] The Australian regime for what is called "native title" differs from Canada's Aboriginal title. Native title is the collective name for whatever individual rights a claimant group has established, including rights to hunt and fish. Under this regime, the court can "unbundle" the

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[36] In contrast to the evidence on United States law, SON did not put forward expert evidence on either Australian or New Zealand law. There was no objection to putting forward case law from those jurisdictions. Doing so without an expert, for comparative law purposes, is not unusual with respect to cases from Commonwealth countries.

claimed rights and deal with them individually. This approach is very different from Aboriginal title under Canadian law.

[299] Another fundamental difference arises because the Australian legal regime incorporates significant statutes, most importantly, the *Native Title Act 1993* (Cth), 1993/110. As set out in *The Commonwealth of Australia v. Yarmirr*, [2001] HCA 56, 184 A.L.R. 113, at paras. 323-324, Australia's native title is defined in that Act, and expressly includes the possibility of its application to "land or waters": s. 223(1).

[300] Even under that legislation, and the "unbundling" approach, Australia's High Court has declined to give exclusive rights over submerged lands as part of native title, because of public rights of navigation, fishing and innocent passage.

[301] In *Yarmirr* the claimants sought a declaration of native title in an area that included land, seas and sea beds. The claimants sought native title based on use for the purpose of hunting, fishing and gathering to provide for their sustenance, and for other purposes associated with their cultural, ritual and spiritual obligations, beliefs and practices.

[302] The application judge determined that the relevant native title rights and interests of the claimants included rights such as the following: the right to fish, hunt and gather within the Aboriginal title claim area for the purpose of satisfying their personal, domestic or non-commercial communal needs; the right to observe traditional, cultural, ritual and spiritual laws and customs; the right to have access to the sea and sea bed within the claimed area and visit and protect places within the claimed area that were of cultural or spiritual importance; and, the right to safeguard the cultural and spiritual knowledge of the claimants.

[303] The application judge determined that there could be native title, including to the sea bed, but found that it was non-exclusive.

[304] Both sides appealed. The Commonwealth argued that native title should not be recognized because the common law did not extend to the sea bed. The claimants argued that the claimed rights and interests included a right of exclusion. Both appeals were unsuccessful.

[305] On appeal to the High Court, a nine-judge panel of the court confirmed that native title rights and interests in the sea bed may exist, but common law rights of fishing, navigation and innocent passage mean that those native title rights could only be non-exclusive. The majority considered whether the public rights of navigation, fishing and innocent passage were consistent with a claim of exclusive native title, concluding that they were not: at paras. 94-100.

[306] The claimants had sought to avoid a challenge based on the public rights to navigate and fish and the right of innocent passage: at para. 95. They made their claimed title subject to those rights. The court acknowledged that the claim was qualified in this way. However, in deciding whether exclusive title was established, the court was obliged to consider the "nature and extent of the inconsistency between the asserted native title rights and interests and the relevant common law principles": at para. 97. This gave rise to a "fundamental inconsistency" between exclusive

native title and public common law rights: at para. 98. The majority concluded that the two sets of rights (exclusive native title and public rights of navigation, fishing, and innocent passage) could not "stand together" and it was "not sufficient to attempt to reconcile them by providing that exercise of the native title rights and interests" was "subject to the other public and international rights": at para. 98.

[307] The majority[37] concluded that the assertion of sovereignty is "antithetical" to an exclusive native title: at para. 100.

[308] This decision also shows an essential difference between Canadian and Australian law, arising from the unbundling approach. In Canada, an Aboriginal right to fish, for example, even an exclusive right to fish, could and normally would be addressed as an Aboriginal right. Here, the claimant would not need to prove Aboriginal title to the submerged land where the practice takes place: *Van der Peet*, at para. 74.

[309] Despite some potential advantages under the Australian regime, where the possibility of title to submerged land is accepted by statute, an exclusive native title was rejected due to the public rights of navigation, fishing and innocent passage.

New Zealand

[310] SON submits that Maori customary law, as recognized in New Zealand, is sufficiently analogous to the Canadian law of Aboriginal title that the New Zealand experience can help the court. However, I find that the New Zealand regime is significantly different from Canada, most notably through that country's legislation.

[311] SON relies on *Ngati Apa v. Attorney-General*, [2003] NZCA 117, because the court refused to strike out a claim for Maori title to a sea bed. However, that decision was focused on jurisdiction. The court emphasized that the question of whether the appellants would succeed in showing any customary property in the sea bed remained "conjectural": at paras. 8, 9.

[312] The court in *Ngati Apa* held that the statutory Maori Land Court could investigate a claim that the foreshore and sea bed was Maori customary land under the *Te Ture Whenua Maori Act 1993*. That Act provided that all land in New Zealand had one of six statuses, found in s. 129(1) of the Act. The six possibilities were: Maori customary land; Maori freehold land; general land owned by Maori; general land; Crown land; and Crown land reserved for Maori. The court held that the sea bed and foreshore fell within the definition of "land" for the purposes of s. 129(1) of the Act. The court referred to some Canadian jurisprudence, noting that a range of Aboriginal

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[37] Two dissenting judges would have allowed the Commonwealth's appeal, removing the claim to the sea bed from the claim area altogether. The other dissenting judge would have granted the claimants' appeal.

rights had been recognized in Canada, including exclusive ownership: at para. 31, citing *Delgamuukw*.

[313] The court in *Ngati Apa* did not find that the land claim had been established – that was an issue for the specialized court. The nature and scope of such a claim was also a matter for the specialized court.

[314] The court in *Ngati Apa* noted that the *Native Rights Act 1865*, which created the Native Land Court, had been enacted to remove any doubts about the jurisdiction of the general courts regarding Maori and their property: at para. 32. There was then successive legislation, in 1909, 1931, 1953 and 1993, which addressed the jurisdiction of what was then called the Maori Land Court: at paras. 2, 32. The discussion about the applicable legislation in *Ngati Apa* underscores the significance of the legislative regime to the determination of the issues.

[315] The Maori Land Court did not go ahead to render a decision on the substantive issues, due to intervening legislation. The *Foreshore and Seabed Act, 2004* was passed. It was far-reaching legislation, and much criticized. It was then repealed and replaced by the *Marine and Coastal Area (Takutai Moana) Act 2011*, yet another legislative regime without a parallel in Canada.

[316] SON also relies on *Re Tipene*, [2016] NZHC 3199, yet that case was decided under the above 2011 legislation. That Act expressly provides for ongoing public rights of access, navigation and fishing: *Re Tipene*, at para. 31.[38]

[317] Thus, the New Zealand regime is different from the Canadian regime. It is largely based on statutes that do not have a parallel in Canada, although there is some consideration of the common law. I accept that the New Zealand legal regime recognizes that there could be rights in submerged land, although these and other cases provided to me by the parties do not suggest that there has been a full consideration of the issues with full factual context. Further, and in contrast to SON's claim, the New Zealand legislative regime for marine and coastal claims expressly preserves the public right of navigation.

Whether the connection translates into a modern common law right

[318] I return to the question of whether the historical practices relied on by SON translate into a modern common law right, and if so, which right? Given both the Indigenous and the common law perspectives, I conclude that the nature of SON's connection to the claimed land in Lake Huron and Georgian Bay does not translate into title to that submerged land. Even if SON's ancestors

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[38] For example, s. 27(1) of the Act provides that every person has the right to enter, pass and repass through the marine and coastal area by ship (defined to mean "every description of boat or craft used in navigation"): *Re Tipene*, at para. 31; ss. 9(1), 27(1).

did have the necessary connection with that land, the historical practices do not translate into rights similar to common law ownership of part of the Great Lakes.

[319] I emphasize that I have considered the specific claim area only. As set out above, this claim must be decided on a specific, rather than a general, basis. Focusing on SON's Aboriginal Title Claim Area, there are several reasons why SON's historical practices do not translate into a modern right to title.

[320] To begin with, none of the in-water boundaries of the Aboriginal Title Claim Area reflect an area relevant to the historical practices, customs or traditions of SON's ancestors. Those boundaries are well beyond any actual historical use and are mainly based on modern considerations. SON has not shown any historical use of most of the claim area.

[321] Further, SON's connections to the Aboriginal Title Claim Area relate to the water, rather than to the submerged land. Moving water above submerged land cannot be owned at common law and is, by its nature, fundamentally different from land.

[322] Fishing already has a well-established route for recognition as an Aboriginal right and does not require title to the submerged land in the Aboriginal Title Claim Area.

[323] The location and nature of the specific land is also relevant. In this case, the land forms part of Lake Huron and Georgian Bay. This gives rise to the issue of public access to navigable waters on the Great Lakes. In seeking Aboriginal title, SON seeks the right to control the Aboriginal Title Claim Area and the right to exclude all others from the area. This right conflicts with the common law, under which these navigable waters are subject to the public right of navigation. The Supreme Court of Canada has said that this right is paramount.

[324] Not only the English and Canadian common law, but also the comparative law, shows the importance of the public right of navigation. The comparative law shows that SON's claim is out of step with the importance of this public right, even in the context of Indigenous land claims.

[325] In closing argument, SON proposed a different claim, in the alternative. SON submitted that it was open to the court to define Aboriginal title to submerged lands differently, removing the right to exclude the public for purposes of navigation. Considering that alternative, I must still ask whether the historical practices translate into a modern right, and if so, what right? Control is a core element of title to land. The right to control land and exclude others from using it are "basic to the notion of title at common law": *Marshall and Bernard*, at para. 64, *per* McLachlin C.J.

[326] SON's alternative claim was attempted in *Yarmirr*. I agree with the court's observation in *Yarmirr* that this proposed qualification on Aboriginal title would give rise to a "fundamental inconsistency" between Aboriginal title and common law rights. This alternative does not translate into Aboriginal title to the claimed land.

[327] The location of the claimed land is also relevant because the land extends to the international boundary. SON seeks the right to control the Aboriginal Title Claim Area for all

purposes, including with respect to national defence. In turn, emergency defence measures that require access to that part of Lake Huron would have to be justified before any action is taken. SON submits that national defence would be easily justifiable, but the choice of the Aboriginal Title Claim Area still raises the question of whether recognizing Aboriginal title to submerged land that extends to the international boundary is compatible with Canadian sovereignty. Control of a border is an incident of sovereignty, and the state is expected to exercise it in the public interest: *Mitchell 2001*, at paras. 160-163.

[328] Taking a generous view of the Indigenous practices put forward, I conclude that those practices do not correspond with the core concepts of title to land or water at common law, or with the current conception of Aboriginal title. The issues that arise are not technicalities; they are fundamental conflicts with the concept of title and the rights encompassed in Aboriginal title. The historical practices do not translate into the claimed title to that lake bed in Lake Huron and Georgian Bay.

[329] I note that SON's historical practices may translate into other rights. Although not claimed in this case, the comparative law provides illustrations of rights that better correspond to the historical Indigenous practices that are the foundation of SON's claim. For example, in Australia, the application judge recognized the right to observe traditional, cultural, ritual and spiritual laws and customs, including access to the sea. Despite the differences in the Australian legal regime, this illustrates that there may be other ways to recognize historical spiritual practices such as the water ceremonies at Nochemowenaing.

[330] I conclude that SON has not established that their traditional practices give rise to an Aboriginal right to title to the claimed lake bed. However, I emphasize that this conclusion does not rule out Aboriginal title to submerged land altogether. It is limited to the Aboriginal Title Claim Area itself – a large part of a Great Lake on the international boundary. The outcome could be different for other submerged land with different geographic characteristics, historical practices and context. For example, the impact of the public right of navigation is very significant for this particular area, but that may not be the case for all inland lakes, rivers or streams. Thus, on the novel issue, I leave open the possibility of Aboriginal title to submerged land, although not in this case.

The Tsilhqot'in Nation test

[331] SON's position is that the existing test for Aboriginal title from *Tsilhqot'in Nation* should be applied in this case, rather than the above analysis. Aboriginal title to (dry) land is a recognized Aboriginal right and *Tsilhqot'in Nation* sets out the test that must be satisfied to obtain Aboriginal title. SON submits that their evidence satisfies the test. The defendants disagree. Having considered all the evidence, I conclude below that the test has not been met for the Aboriginal Title Claim Area.

[332] The *Tsilhqot'in Nation* test is based on occupation of the claimed land prior to the assertion of sovereignty in 1763. To ground Aboriginal title, this occupation must have three characteristics:

"It must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive*": *Tsilhqot'in Nation*, at para. 25 (emphasis in the original), see also para. 50.

[333] The general requirements to prove entitlement to Aboriginal title under *Tsilhqot'in Nation* are therefore as follows:

(i) there must be sufficient occupation of the Aboriginal Title Claim Area to establish title as of the assertion of sovereignty in 1763;

(ii) where present occupation of the Aboriginal Title Claim Area is relied on as proof of occupation in 1763, there must be continuity between present and pre-assertion of sovereignty occupation; and,

(iii) the historic occupation as of 1763 must have been exclusive.

[334] SON does not seek Aboriginal title for the Peninsula itself. Given the choice of claim area, SON must show sufficient occupation, continuity and exclusivity for the claimed part of Lake Huron and Georgian Bay.

[335] As put in *Tsilhqot'in Nation*, the "concepts of sufficiency, continuity and exclusivity provide useful lenses through which to view the question of Aboriginal title", however, care must be taken "not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights. Sufficiency, continuity and exclusivity are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established": *Tsilhqot'in Nation*, at para. 32.

[336] However, SON and the defendants have made their submissions on each of the three requirements separately, as was done in *Tsilhqot'in Nation*. In turn, I have considered each requirement, while bearing in mind that they are no more than useful lenses from which to view the question of Aboriginal title.

[337] Before I turn to the evidence, I will review the legal principles that apply to the three parts of the test:

(i) Sufficiency of occupation;

(ii) Continuity; and,

(iii) exclusivity.

Sufficiency of occupation

[338] The question of sufficient occupation must be approached from both the Aboriginal perspective and the common law perspective: *Tsilhqot'in Nation*, at para. 34; *Delgamuukw*, at

para. 147. The requirement of physical occupation must be generously interpreted, taking into account both perspectives: *Delgamuukw*, at para. 156.

[339] The Aboriginal perspective focuses on practices, customs, traditions and laws of the Aboriginal group: *Tsilhqot'in Nation*, at para. 35; *Delgamuukw*, at para. 148.

[340] The common law perspective imports the ideas of possession and control of the lands: *Tsilhqot'in Nation*, at para. 36.

[341] The *Tsilhqot'in Nation* test requires *physical* occupation: at para. 44; see also, *Delgamuukw*, at para. 147. Aboriginal societies "were not strangers to the notions of exclusive physical possession equivalent to common law notions of title. They often exercised such control over their village sites and larger areas of land which they exploited for agriculture, hunting, fishing or gathering. The question is whether the evidence here establishes this sort of possession": *Marshall and Bernard*, at para. 62, *per* McLachlin C.J. (citation omitted); *Delgamuukw*, at para. 156, *per* Lamer C.J.

[342] In determining what constitutes sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation: *Tsilhqot'in Nation*, at para. 50. It is "not possible to list every indicia of occupation that might apply in a particular case": *Tsilhqot'in Nation*, at para. 41.

[343] Occupation may be proved in a variety of ways. For dry land, examples have included the construction of dwellings, cultivation, enclosure of fields and regular use of definite tracts of land for hunting, fishing or otherwise exploiting resources: *Tsilhqot'in Nation*, at para. 37; *Delgamuukw*, at para. 149, *per* Lamer C.J., at para. 194, *per* La Forest J.; *Marshall and Bernard*, at paras. 49, 56, *per* McLachlin C.J.

[344] In considering the Aboriginal perspective for the purpose of Aboriginal title, the court must "take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed": *Tsilhqot'in Nation*, at para. 35; *Delgamuukw*, at para. 149, *per* Lamer C.J., at para. 194, *per* La Forest J.; *Marshall and Bernard*, at paras. 49, 56, *per* McLachlin C.J.

[345] "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": *Tsilhqot'in Nation*, at para. 37.

[346] Occupation sufficient to ground Aboriginal title is not confined to specific sites. For example, when considering dry land, occupation extends beyond specific settlement locations to the tracts of land that were regularly used for hunting or fishing over which the group exercised effective control at the time of assertion of European sovereignty: *Tsilhqot'in Nation*, at para. 50.

[347] There must be evidence of "a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group": *Tsilhqot'in Nation*, at para. 38.

[348] Sufficient occupation is a "question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used": *Tsilhqot'in Nation*, at para. 44, citing *Marshall and Bernard*, at para. 66. It is a context-specific inquiry: *Tsilhqot'in Nation*, at para. 37. In considering the evidence, I have taken into account all the circumstances, including the nature of the land – that is, submerged land.

Continuity

[349] Continuity between the past and the present may help an Indigenous group seeking to prove occupation as of 1763. Conclusive evidence of pre-1763 occupation may be difficult to obtain. Instead, an Aboriginal group may provide evidence of present occupation as proof of pre-1763 occupation: *Delgamuukw*, at para. 152, *per* Lamer C.J; *Tsilhqot'in Nation*, at para. 45.

[350] There is no need to prove "an unbroken chain of continuity" between present and prior occupation: *Tsilhqot'in Nation*, at para. 46; *Van der Peet*, at para. 65; *Delgamuukw*, at para. 153, *per* Lamer C.J., at para. 198, *per* La Forest J. Occupation-related use of lands may have been disrupted for a time. Further, a change in the nature of occupation would not ordinarily prevent a claim for Aboriginal title, as long as a substantial connection between the people and the land is maintained: *Delgamuukw*, at para. 154, *per* Lamer C.J.

[351] Continuity simply means that for evidence of present occupation to support an inference of occupation prior to the assertion of sovereignty, the present occupation must be rooted in pre-1763 times: *Tsilhqot'in Nation*, at para. 46.

Exclusivity

[352] The third requirement to establish Aboriginal title under *Tsilhqot'in Nation* is exclusive occupation of the Aboriginal Title Claim Area as of 1763.

[353] This requirement flows from the definition of Aboriginal title itself. Aboriginal title is the right to exclusive use and occupation of land, that is, to the exclusion of all other people: *Delgamuukw*, at para. 155, *per* Lamer C.J.; *Tsilhqot'in Nation*, at para. 47; *Marshall and Bernard*, at para. 57.

[354] Exclusivity is a crucial element needed to establish Aboriginal title: *Delgamuukw*, at para. 159, *per* Lamer C.J.

[355] To show exclusivity, the Aboriginal group must have had "the intention and capacity to retain exclusive control" over the claimed lands at the time of British assertion of sovereignty: *Tsilhqot'in Nation*, at paras. 47-48; *Delgamuukw*, at para. 156; *Marshall and Bernard*, at para. 57, *per* McLachlin C.J. Exclusivity 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: *Tsilhqot'in Nation*, at para. 48.

[356] As with the sufficiency of occupation, the exclusivity requirement must be approached from both the Aboriginal perspective and the common law perspective: *Tsilhqot'in Nation*, at para. 49; *Delgamuukw*, at paras. 156-157, *per* Lamer C.J., *Marshall and Bernard*, at paras. 57, 61, *per* McLachlin C.J.

[357] 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": *Tsilhqot'in Nation*, at para. 48.

[358] Again, evidence may be hard to find. The area may have been sparsely populated, with the result that clashes and the need to exclude strangers seldom, if ever, occurred. Or the people may have been peaceful and have chosen to exercise their control by sharing rather than exclusion. It is therefore important to view the question of exclusion from the Aboriginal perspective and not insist on evidence of overt acts of exclusion when to do so would be unfair: *Marshall and Bernard*, at para. 64, *per* McLachlin C.J.

[359] These principles apply to nomadic and semi-nomadic Aboriginal groups. Whether a nomadic people enjoyed sufficient "physical possession" to give them title to the land is a question of fact, depending on all the circumstances, including the nature of the land and the manner in which it is commonly used. "Not every nomadic passage or use will ground title to land" and in each case "the question is whether a degree of physical occupation or use equivalent to common law title has been made out": *Marshall and Bernard*, at para. 66, *per* McLachlin C.J.; *Delgamuukw*, at para. 149.

[360] The nature of the land claimed and how it was commonly used is therefore significant to this aspect of the test, as well as sufficiency of occupation.

[361] SON relies on evidence from many areas to show occupation and exclusivity.

SON occupation (including continuity) and exclusivity in the claim area

[362] SON begins with evidence in the following areas to show the necessary occupation of the Aboriginal Title Claim Area as of 1763:

(i) SON's perspective and relationship with the Aboriginal Title Claim Area;

(ii) the customary laws that applied to the Aboriginal Title Claim Area and the enforcement of those laws; and,

(iii) fishing in the Aboriginal Title Claim Area.

[363] SON also relies on traditional stories, anthropological evidence and historical evidence about who was present in the area at different points in time, and certain key events in history. SON submits that the evidence shows the required permanent presence and intention to hold and use the Aboriginal Title Claim Area for SON's purposes as of 1763, including control and exclusivity.

[364] The defendants submit that the evidence does not prove sufficient occupation, control or exclusivity.

[365] Ontario concedes that, as of 1763, ancestors of SON were living on the Peninsula and lands to its south, and that they fished and travelled in some of the Aboriginal Title Claim Area. Ontario therefore agrees that there was some use of Lake Huron and Georgian Bay. Ontario submits that the dispute is about the locations, intensity and regularity of that use, which Ontario submits are insufficient to show occupation of the claim area.

[366] Canada submits that SON's ancestors can only be reliably traced back to the early 1820s and only to the Peninsula and other dry land neighbouring the claim area. Canada submits that there is insufficient evidence to prove occupation, even for the Peninsula itself, before that time.

[367] Both Ontario and Canada submit that the evidence does not show the needed control and exclusivity with respect to the Aboriginal Title Claim Area. Both defendants submit that SON had neither the capacity nor the intention to exclude others from that part of Lake Huron and Georgian Bay.

[368] As set out below, I find that there is some evidence of occupation in 1763, albeit mainly of the adjoining Peninsula lands, and use of some of the Aboriginal Claim Area itself, mainly for fishing. However, there was little or no physical use of the majority of the Aboriginal Title Claim Area and physical use is significant under the *Tsilhqot'in Nation* test. Further, SON has not shown exclusive occupation. SON ancestors did not have control or the capacity to control the Aboriginal Title Claim Area in 1763. Again, the main evidence of control related to fishing.

SON's perspective and relationship with the Aboriginal Title Claim Area

[369] I begin with SON's perspective, and then move to the many evidentiary topics SON has put forward in support of their Aboriginal title claim under the *Tsilhqot'in Nation* test.

[370] SON submits that from the Indigenous perspective, SON's spiritual relationship with the land and water shows the needed permanent presence and intention to hold and use the Aboriginal Title Claim Area for SON's purposes. This evidence has been discussed above, and I have concluded that SON has not shown a connection with the claimed area of Lake Huron and Georgian Bay that was of central significance to SON's ancestors in 1763.

[371] The Anishinaabek, including SON, had a spiritual connection with the whole of the Earth, including the water, as of 1763. SON appears to equate this spiritual connection with occupation.

Spiritual connections with the whole Earth or the whole of a territory, land and water, may be relevant to occupation. I find them relevant in this case. But they are not sufficient to show occupation of the claim area for the purpose of Aboriginal title. SON relies on considerable other evidence as well.

[372] SON also has a particular concern about environmental issues in the Peninsula area and the waters surrounding the Peninsula. That concern overlaps with the above spiritual connection and with fishing. The environmental activities highlighted in the evidence are modern activities, not historical traditional practices, yet they show a cultural concern for the well-being of the Earth that I also find relevant to SON's claim for Aboriginal title.

[373] SON further relies on the burial customs of the Anishinaabek, which give rise to a spiritual obligation to protect burial sites. They are sacred sites. As said by Karl Keeshig, customarily the Anishinaabek did not visit burial sites often, but there were some burial ceremonies done at grave sites and it is important that the sites are undisturbed. I find that the Anishinaabek had and have a strong spiritual connection with burial sites, which shows a connection to that land. There are numerous burial sites on the Peninsula itself. However, the burial sites are all on the dry land. They are not in the Aboriginal Title Claim Area.

[374] SON's perspective and relationship with the claim area is informed by all the other evidence. SON relies on evidence in these areas to show occupancy and exclusivity:

- Traditional stories about ancient times, to show presence in the area;
- Linguistics, to show presence in the area;
- Archaeological findings, to show presence in the area;
- Fishing, to show presence in, use of and control of the claimed land;
- Anishinaabe customary laws, to show control;
- Events in the French period, pre-1763, to show control; and,
- Certain conflicts, including the Beaver Wars, the Seven Year's War and Pontiac's[39] War, to show control.

[375] To fulfill the *Tsilhqot'in Nation* test, SON must show a permanent presence and intention to hold and use the claimed part of Lake Huron and Georgian Bay for SON's purposes. However, the evidence discussed below is mainly about the Peninsula and lands to its south, not the claimed

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[39] Also spelled "Pondiac".

parts of Lake Huron and Georgian Bay. I agree that the occupation of dry land, such as the Peninsula, may show occupation of the surrounding water spaces. I therefore find that evidence relevant, but it must still be examined to see if it shows sufficient occupation of the submerged land for Aboriginal title.

[376] As well, Canada has emphasized that SON relies heavily on actions taken by other Indigenous groups, in other locations, to support their claim. This is the case. However, all the evidence must be examined to determine whether SON has shown sufficient occupation and exclusivity to prove Aboriginal title.

Traditional stories about ancient times

[377] The relevant time to consider occupation of the Aboriginal Title Claim Area is 1763. However, SON puts forward traditional stories to show a much longer connection with the general area. SON originally put forward this evidence as part of the Aboriginal perspective, but in final submissions, SON's focus was on showing long-term occupancy in the general area. I have considered this evidence for both topics.

[378] SON submits that its ancestors have been present in their territory forever. SON focuses on a time period that goes back more than 9,000 years. It is not necessary to prove this presence, for many thousands of years, but SON has emphasized this position both in the trial evidence and in their final submissions.

[379] There is some oral history evidence from community members about the Anishinaabe relationship with the Earth that begins with the Creation Story, which has been discussed above. There is also some evidence from community witnesses about being in the area "forever" or for thousands of years, for example. The community witness evidence on this subject is very general, without evidence of practices to preserve an oral history over that length of time. For example, Chief Roote testified that ancestors of SON had been in the area for many centuries and later said that he would estimate it at more than 3,000 years. He did not give a source for this belief, or how it was passed down over that many years, or how it was passed down to him. Frank Shawbedees had more detail about his sources of information, but he was speaking about the entire area of southern Ontario. I accept that the beliefs held by community witnesses about these matters are sincere. However, this evidence is not as reliable as oral history can be, given its foundation. The exception is the Creation Story itself, but it is not about SON's territory or the Aboriginal Title Claim Area only – it speaks of all Anishinaabek and the whole Earth.

[380] SON then focuses on specific traditional stories that SON submits have been passed down for thousands of years, carrying teachings on spirituality, morality and culture. SON relies on these stories to show a long time link to the area, correlating the stories with ancient geological events. However, those connections are very general, and they do not show a connection with the claim area.

[381] Karl Keeshig, Lenore Keeshig and Lenore's father, Donald Keeshig, told the stories that SON focuses on.[40] Lenore Keeshig is a member of the Chippewas of Nawash Unceded First Nation. She testified as a storyteller. She learned stories in childhood from her father. She explained how she became a storyteller later in life, that role, and the significance of stories.

[382] SON submits that certain stories Lenore Keeshig or her father have told are linked to ancient geological events in or around the Aboriginal Title Claim Area, and that they therefore show a connection to the area. These stories are as follows: the story of Nanabush and the Giant Beaver, the story about Nanabush's tears, and the story about a tunnel to Manitoulin Island. SON submits that the geographic location of specific geological events or features, when juxtaposed with these stories, shows an ancient connection to the area.

[383] I have used the name Nanabush in relation to these specific stories because it was most often used in SON's trial evidence. Karl Keeshig testified that the Creator created the first Indigenous man and, although he had no name, in retrospect he has been given several names, including Anishinaabe, Miskogabowut, Wanaybozhoo and Nanabush.

[384] Lenore Keeshig testified that Nanabush stories are very important for Anishinaabe people – they are sacred stories that are used for teaching proper behaviour. She described Nanabush as a trickster teacher, saying that as a result of the stories, the Anishinaabek learned through Nanabush's actions. Karl Keeshig testified that through the Nanabush stories, they learned about the trials and tribulations of life.

[385] I will begin with the story of Nanabush and the Giant Beaver. SON submits that this story can be connected to an ancient geological event – the breach of the Nadoway-Gros Cap Barrier west of Sault Ste. Marie more than 9,000 years ago. That location is not in the Aboriginal Title Claim Area; however, it is just west of Lake Huron.

[386] Lenore Keeshig told the story in court and I have used her wording. She recounted that Nanabush and his grandmother were travelling on the south shore of Lake Superior going towards the place known today as Sault Ste. Marie. They were tracking the giant beaver and had lost the trail so they decided to have some respite. They built a camp there, and stayed for a while. And then they realized that the water level was rising so they broke camp and travelled east to where the water narrowed. There they saw what looked like a giant beaver dam. They thought that the giant beaver was close by so Nanabush left his grandmother in safety and he went to track down the beaver. One night the grandmother heard water splashing, got up to investigate, and could discern the outline of the beaver. She caught the beaver by the tail. She was calling her grandson, but he did not hear her. The beaver could not escape – it tugged and it pulled and it thrashed trying to get out of the woman's trap. Finally, the giant beaver realized that the only way it could escape

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[40] Donald Keeshig's evidence was introduced under r. 36 of the *Rules of Civil Procedure*.

was to destroy its own dam. It pulled apart the dam and finally the dam was breached, and the grandmother had to let the beaver go. Nanabush came back to find that his grandmother was safe. They went to investigate the breaching of the dam and discovered islands where there had been no islands before. Lenore Keeshig testified that the islands are the Thirty Thousand Islands and the Manitoulin archipelago.

[387] Lenore Keeshig acknowledged in a 2006 interview that the person who told her this story may have read it from a book that included a story of Nanabush recounted by Elders at the Rama First Nation in the 1930s.

[388] SON submits that this traditional story has some historicity – that is, SON submits that it includes some historical fact. SON submits that it is related to the breach of the Nadoway-Gros Cap Barrier and therefore shows that ancestors of SON were in that area in the distant past.

[389] Dr. McCarthy, an expert geologist, testified about some historical geological events, including the breach of the Nadoway-Gros Cap Barrier. There is no dispute that about 9,000 years ago, a sediment barrier at the entrance of the St. Mary's River between Nadoway, Michigan and Gros Cap, Ontario was breached. The Barrier was about 28 km west of Sault Ste. Marie.

[390] Dr. McCarthy testified that the breach took place over a period of hours or days. The breach of the Barrier meant that water from what is now Lake Superior rapidly entered the north channel of what is now Lake Huron. The sudden influx of water from Lake Superior flooded the north channel and left the islands that are there today.

[391] SON submits that there are parallels between the Nanabush story and this geological event, including a change in water levels, the destruction of a barrier, and the creation of many islands.

[392] Dr. von Gernet, an expert anthropologist and ethnohistorian, and Dr. Bowman, an expert classicist, testified about approaches to evaluating whether a traditional story has elements of historicity.[41] Each expert approached the issues from the standpoint of their expertise. I have considered this evidence in view of the overarching legal principles applicable to oral history.

[393] The expert evidence provided examples of traditional stories that were reliably connected to historic geological events and other stories that were not, despite the potential that they may have been. As well, while oral traditional stories will preserve things of importance to the culture, that information is not necessarily historical fact, even if it may appear to refer to a historical event. Oral history is also often accretive, adding events or elements over time. Some traditional stories

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[41] Dr. Williamson also commented on oral history, but given the scope of his qualifications (which do not include expertise in assessing oral history), I do not place significant weight on this evidence. Dr. Driben and Dr. Brownlie gave some evidence from the historical perspective, which I have considered.

also serve to explain existing geological features, rather than originating with someone actually seeing the occurrence of a geological event. Those stories could have begun at any point after the feature was present.

[394] I found Dr. Bowman's evidence helpful on the general subject of analyzing traditional stories for historical content. She has considerable expertise in the methodology of inquiry into potential historical information in orally transmitted traditional stories. Further, Dr. Bowman did not purport to be an expert on Anishinaabe oral histories. This underscored her objectivity. Her evidence about methodology overlapped significantly with the evidence of Dr. von Gernet, who has considerable experience with Anishinaabe traditional stories.

[395] Dr. Bowman also considered "geomythology" – an area of study that SON originally raised. Geomythology involves analyzing mythological stories and potential connections with historical geological events and formations. As noted by Dr. Bowman, geomythology is a relatively new discipline. In contrast, scholars in the Classics have well-established approaches to the interpretation of orally transmitted traditional stories, and to the assessment and verification of historical information transmitted in those stories. These approaches have always been necessary for their research. Dr. Bowman opined on best practices to establish the reliability of apparent connections between geological events and oral traditional stories.

[396] Dr. Bowman warned of the danger of assuming that a story has some historicity, resulting in circular reasoning. Corroboration can be important, but I conclude that, at law, it is not a prerequisite to finding that facts have been preserved. Other things to consider include the purpose of the story, how it was transmitted to preserve facts over however many generations, alternative explanations, variations to the story and what is called cultural diffusion (stories that came from other Indigenous groups where there was contact between groups).

[397] Most of the story of Nanabush and the Giant Beaver is not put forward as fact, yet it may still contain some fact. Humans did exist in Ontario at the time of the breach of the Nadoway-Gros Cap Barrier. It is therefore possible that a person or persons saw the events. There was also an animal species called *Castoroides ohioensis* that bore a resemblance to a giant beaver. Two skeletons of that species have been found in Ontario. However, it is believed that this animal did not build dams, and the species is believed to have become extinct in the Great Lakes region around 10,000 years ago, well before the breach of the Nadoway-Gros Cap Barrier.

[398] There are other difficulties with the suggestion that the traditional story is connected to the location and breach of the Nadoway-Gros Cap Barrier. There are traditional stories about floods and giant beavers told by Indigenous groups across North America, not only in Ontario but also in the Pacific Northwest, in Quebec, in New Brunswick and in Nova Scotia. This does give rise to the possibility of cultural diffusion, by which ancestors of SON may have heard the story from other Indigenous groups, rather than from a SON ancestor. And there was little evidence of any particular processes followed to preserve the accuracy of the facts in this traditional story for thousands of years.

[399] The other two stories that SON relies upon for ancient occupation have challenges as well. For both stories, the location was added by a modern storyteller.

[400] SON relies on the story of Nanabush's tears to show that SON's ancestors were familiar with a time when Lake Huron and Georgian Bay were salty. Lenore Keeshig told the Nanabush's tears story. The story is that Nanabush's "favourite nephew died and Nanabush cried, and his tears fell like boulders, like rocks, and he cried so much that his tears turned the water in the bay salty". Dr. McCarthy testified that from approximately 9,000 to 8,200 years ago, Lake Hough (Georgian Bay) was a closed water system and the water was brackish. Dr. McCarthy testified that other bodies of water, such as Lake Michigan and Lake Huron, were likely also brackish.

[401] SON submits that this story is some evidence that their ancestors were in the area many thousands of years ago. However, the location in the story (the "bay") was added by Lenore Keeshig. She heard this story from Rose Nadjiwan, who had heard it from her parents, but who had not given the story any location or time period. Lenore Keeshig admitted that she added the location because of what she knew about Georgian Bay's geological history. She also conceded in a 2006 interview that the story could refer to other locations.

[402] Donald Keeshig told the third story that SON relies upon for ancient occupation. Similar to Lenore Keeshig adding a location to the Nanabush's tears story, Donald Keeshig added the specific location to the third story. He told a story of a man who walked from the Peninsula through a tunnel to see where it went, and who met another man coming from the other direction. Donald Keeshig said that his father's cousin, Lawrence Keeshig, first told him the story. Donald Keeshig testified that he assumed that the tunnel must have gone from Tobermory to Manitoulin Island. He added the location to the story, which originally did not specify that the tunnel went from the Peninsula (at Tobermory) to Manitoulin Island.

[403] Lenore, his daughter, also mentioned the story in her testimony. However, she did not first hear it from her father. She said that when she was discussing geological features called "pop-ups" near Tobermory with a geologist, Dr. Steven Blasco, he mentioned that Donald Keeshig had told this story to him. Dr. Blasco was not called as a witness.

[404] SON submits that this story has a parallel with the geological features called "pop-ups", which are canyon-like features that are now mostly under water. Dr. McCarthy testified that between about 11,000 and 8,000 years ago, the pop-ups would have been on dry land. Her evidence was that people would have been able to walk on dry land between Tobermory and Manitoulin Island at that time, without the need for a tunnel.

[405] Dr. McCarthy further testified that there was dense forest at that time that may have resembled a tree canopy and that it is plausible that cedar trees would have grown from either side of a pop-up. SON submits that if the pop-up had a canopy of trees, it could have resembled a tunnel.

[406] The defendants point out weaknesses in SON's submissions about this story. The evidence does not show a pop-up reaching from Tobermory to Manitoulin Island. Those geographic features are not tunnels. A tree canopy is not mentioned in the story. And the specific location was not part of the traditional story before its modern telling.

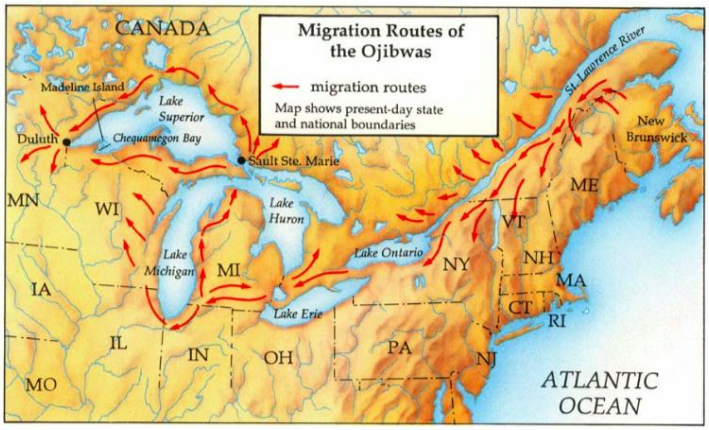
[407] Given the above challenges with the submission that these stories show a connection to ancient times, along with the absence of evidence regarding how these stories were preserved over many thousands of years, these traditional stories do not establish a connection with the Aboriginal Title Claim Area.

[408] There is another traditional story that has geographical components and has more of an established connection with Anishinaabe occupation in what is now Canada. It is known as the Migration Story. The Migration Story is told in a book called *The Mishomis Book: The Voice of the Ojibway* (Minneapolis: University of Minnesota Press, 2010). *The Mishomis Book* is a respected book prepared by Elder Eddie Benton-Banai, who was the Grand Chief of the Three Fires Midewin Lodge. Chief Roote recognized the author as a respected knowledge holder and the book as a valuable resource on the history of the Anishinaabek.

[409] As told by Chief Benton-Banai in *The Mishomis Book*, the Migration Story appears to speak of an actual migration that is inconsistent with the suggestion that SON's ancestors have occupied the area forever. In closing argument, SON submitted that the Migration Story told by Chief Benton-Banai speaks of a "spiritual migration" of the Anishinaabek, not an actual migration. SON disputes that this traditional story recounts historical fact.

[410] The Migration Story speaks of the Anishinaabe being on the east coast of North America and migrating westward, including through the St. Lawrence River and Great Lakes area. That account of the migration is also shown in historical expert material. Dr. Driben provided a map similar to the map in *The Mishomis Book*, illustrating the migration of the Anishinaabek:

Map 1: The Migration
Source: Eileen Lucas, *The Ojibwas* (Brookfield Connecticut: The Millbrook Press, 1994), p. 8.



[411] Due to the recognized importance of Chief Benton-Banai and his book, his traditional story is relevant to the submission that SON's ancestors have been in the Aboriginal Title Claim Area forever. This Migration Story suggests otherwise.

[412] A number of community witnesses tried to dilute the significance of the Migration Story in *The Mishomis Book*, mainly through inadmissible hearsay evidence about the beliefs of Chief Benton-Banai. Chief Benton-Banai did not testify. SON has not proved that his Migration Story was about a spiritual, rather than an actual, migration.

[413] There are other migration stories that also suggest movement of the Anishinaabe people, in contrast with the position that ancestors of SON have been in the Peninsula area forever. One migration story speaks of an eastward migration rather than a westward one. There are others. Dr. von Gernet's view was that most of the migration stories he gathered were not recounting historical fact. Most importantly, SON's challenge to the historicity of Chief Benton-Banai's Migration Story shows that it should not be assumed that traditional stories recount historical facts.

[414] I have taken a broad and generous approach to the oral history and related evidence, rather than being as rigorous as is suggested in the expert evidence. However, SON has not established that these traditional stories were passed down by ancestors over thousands of years. SON need not prove such a lengthy presence in the area in any event. Nor do I need to make a finding of precisely when ancestors of SON arrived in the area. Occupancy need only be shown as of 1763. There is considerable additional evidence relevant to that question.

Linguistics evidence about dialects in the Peninsula area

[415] SON submits that a comparison of Anishinaabemowin dialects in communities surrounding the Peninsula area supports a conclusion that there has been stability in the geographic location of SON for hundreds of years, showing their presence in the area in 1763. I conclude that

this evidence provides some support for SON's occupation in the general area, but not for a specific historical time period.

[416] Dr. Valentine, a linguistics expert, concluded that the language spoken at the current SON communities in the Peninsula area is a mixture of the grammar and vocabulary of two main Ojibway dialects in the area: Odawa/Ottawa and Southeastern. This shows what he described as long-term and stable contacts and relationships surrounding Odawa communities such as Wikwemikong and Walpole Island and Southeastern communities such as Rama and Curve Lake.

[417] Dr. Valentine's opinion is based on about 25 years of work creating an online Anishinaabemowin dictionary and related activities including teaching and writing. This work has included extensive interviews of Anishinaabemowin speakers in many communities, including SON. His work to study and preserve that language and its variants is impressive. For this case, Dr. Valentine analyzed variants in Anishinaabemowin dialects for the SON communities and in other nearby Anishinaabe communities. However, Dr. Valentine himself agreed there were limits on what he, as a linguist, could attest to. Dr. Valentine's expertise does not extend to opining on estimated time periods.

[418] While Dr. Valentine testified that SON has a deep interaction with both the Odawa and Southeastern dialect areas, as a linguist he could not say for how long. He said that as a linguist he did not know. He was invited to give some time estimates during his testimony and gave an uncertain reply. He said: "A couple of centuries, three centuries, four centuries. I don't know. Somewhere in that range. A long time." The range mentioned was not based on Dr. Valentine's established expertise as a linguist. I do not place significant weight on this evidence. I also note that the estimate given does not necessarily include the relevant time, specifically 1763.

[419] Dr. Valentine was also frank to admit that the long-term contact with neighbouring communities that he relied on could occur through social, trade and political relationships, none of which he had studied in order to prepare his report.

[420] Dr. Valentine's work about SON was done in 2012 and his conclusions about linguistics as of that time are deserving of significant weight. I find that his evidence still provides some support for SON's occupation in the general area, when looking at the entirety of the evidence, including the archaeological evidence about the Peninsula area. However, his evidence does not prove when SON's predecessors arrived in the Peninsula area or whether they were there as of 1763.

Archaeological evidence about who occupied the (dry) land nearby the claim area

[421] An array of archaeological[42] expert evidence has been put forward on the subject of whether ancestors of SON occupied the Aboriginal Title Claim Area as of 1763. This expert evidence is mainly about SON's occupation of the dry land in the general area. As set out below, I conclude that the archaeological evidence supports SON's pre-1763 connection with the Peninsula itself, and lands to its south.

[422] SON submits that the archaeological record is consistent with an *in situ* development[43] of an Odawa group, historically known as the Cheveux Relevées, on the Peninsula and the lands due south. SON submits that they developed from that Odawa group. In turn, SON submits that the presence of their ancestors on that dry land leads to their connection with the surrounding submerged land that forms the Aboriginal Title Claim Area.

[423] There are many archaeological sites, in what is now southern Ontario, where artifacts have been found that date back to the Paleo-Indian period that ended about 9,000 years ago. There are also sites with components from more recent archaeological periods, including the period of contact with Europeans in the 17th century, and more recently. Not surprisingly, there are many gaps and uncertainties in the available archaeological evidence since it stretches back over many thousands of years.

[424] Dr. Williamson was SON's main expert witness on the archaeological evidence. He noted that the first appearance of humans in Ontario has not been accurately dated. He testified that it is thought that small bands of hunters arrived sometime after the draining of several large meltwater lakes about 12,500 years ago. There is limited evidence about these nomadic hunters. Further, as put by Dr. Williamson, the Great Lakes region was characterized by a dynamic pre-contact history that featured constantly changing communities and identities, with populations that were continually being renegotiated and redefined through social processes.

[425] In order to prepare his reports, Dr. Williamson conducted research looking for reports of archaeological evidence found in and around the Peninsula and the area south of the Peninsula. All of the sites Dr. Williamson identified are dry land sites, not located in the submerged land that forms the Aboriginal Title Claim Area. On the Peninsula, most of the sites are along the coast.

[426] An archaeological site may vary from small to large. A site may only contain a few artifacts. Further, some of the sites referred to by Dr. Williamson are only possible sites, and they

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[42] Archaeology is a sub-discipline of anthropology, focusing on the study of past cultures including the interpretation of materials found at archaeological sites.

[43] Dr. Williamson defined an *in situ* development as people who developed out of preceding populations without the significant intrusion of other people who would otherwise displace the people who had been there.

have not been investigated in detail. It is therefore not helpful to simply focus on the number of archaeological sites he identified. Moreover, Dr. Williamson noted that sites are often affiliated to a culture based on the location of the site, rather than the other way around. And, in many contexts, it is difficult to determine cultural affiliation. As well, many sites include components from different time periods and components with multiple cultural affiliations.

[427] Although archaeology incorporates scientific findings to the extent that they are available, it is a social science. Archaeologists consider not only available scientific findings but also other materials in reaching theories about the interpretation and significance of archaeological evidence. Precise conclusions are often not available. Even the results of scientific tests may identify only a general time period. Archaeologists will therefore consider not only the available scientific evidence but also historical documents, other information, and various interpretations of what often is incomplete information.

[428] The archaeological evidence suggests that before the arrival of Europeans, there were both Algonquian-speaking and Iroquoian-speaking peoples in the Peninsula area. SON's ancestors were Algonquian-speaking.

[429] There was considerable evidence about a site called the Nodwell site. It is the most completely excavated site from the Late Woodland Period (pre-1615) in Bruce County. The site is located on the coast of Lake Huron, south of the Peninsula. The Nodwell site was excavated in 1969 and 1971 by an archaeologist, J.V. Wright, who studied the site and artifacts. He believed that the site was a mid-14th century Iroquoian site. He reached this conclusion due to an Iroquoian settlement pattern with longhouses, Iroquoian-style ceramics and the use of certain types of chert.[44]

[430] Dr. Williamson considered Wright's opinion and other evidence and concluded that the Nodwell site was likely Odawa, not Iroquoian. Dr. Williamson relied on a doctoral thesis by Dr. Lisa Rankin, as well as work done by Dr. William Fitzgerald, who has represented SON as an archaeological technical advisor but who did not testify at trial. Dr. Williamson relied on Dr. Fitzgerald's paper entitled, "The Cult of Irocentrism and the Evolution of an Ontario Archaeological Myth". The co-author of that paper, Prof. Darlene Johnston, is a SON member and law professor who has previously worked for SON. She testified at trial as a non-expert witness, not on this subject.

[431] Among other things, the above paper pointed to evidence of dog burials at the Nodwell site to support the conclusion that it was an Odawa site. Dr. Williamson described dog burials as a widespread practice shared by many Algonquian speakers, and detailed certain particularities of this practice that were distinctive to the Odawa culture. However, Dr. Williamson also

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[44] Chert is a fine-grained stone similar to flint, and was used by Indigenous peoples for the manufacture of tools.

acknowledged that dog burials were present, although rare, at Neutral, Petun and Huron sites, and that the burial evidence from the Nodwell site did not represent all the distinctive features normally expected from an Odawa dog burial.

[432] Considering all the evidence about this site, I find that the cultural connection to the site – specifically, whether it is Iroquoian or Odawa – is uncertain. At most, the site illustrates the uncertainty that can arise within archaeological investigations.

[433] Dr. Williamson opined about other sites of archaeological significance. He testified that when Europeans first arrived in the early 1600s, some Odawa, or Cheveux Relevées, were living on the Peninsula and on the land south of the Peninsula. All those Odawa were likely forced out in about 1650 by the Haudenosaunee in the Beaver Wars. Dr. Williamson called this the "dispersal". The Indigenous peoples who had been dispersed began to return to what is now southern Ontario in the latter part of the 1600s. SON submits that evidence of pre- and post-dispersal presence at ceremonial sites such as the Nochemowenaing site and the Ne'bwaakahh giizwed ziibi (River Mouth Speaks) site show that the same group of Odawa returned to the Peninsula area specifically. However, the archaeological evidence is not that persuasive. The evidence from the Nochemowenaing site shows that the Odawa were present before the Beaver Wars. However, the archaeological evidence does not show use afterward, until the 19th century.

[434] The River Mouth Speaks site is located at the mouth of the Saugeen River in Southampton, on the north side of the river. The site has complex stratigraphy[45] and, unfortunately, the site has been disturbed by modern activity. Dr. Williamson acknowledged that artifacts may have moved within/about the layers that would otherwise provide a clearer indication of what time periods were represented in the evidence at the site.

[435] In addition to his other work in relation to the case, Dr. Williamson directed a project team that conducted an analysis of a collection of glass beads recovered from the River Mouth Speaks site. An assemblage of 125 glass beads collected from that site was tested to determine the chemical composition of the beads, which was compared to a database of over 4,000 beads in an attempt to determine when they were deposited on the site.

[436] The bead analysis showed beads that dated to just before the dispersal in the Beaver Wars (before and around 1650) and also beads that dated to a later period, into the middle of the second half of the 17th century and beyond. Dr. Williamson concluded that Odawa likely resumed seasonal use of this ceremonial site around the same time the Odawa returned to Manitoulin Island, within a period of about 20 years[46] after dispersal in the Beaver Wars.

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[45] Stratigraphy is the order and position of the layers of archaeological materials in a site.
[46] In the evidence, the time period of approximately 20 years is also referred to as one generation.

[437] Another archaeologist gave expert evidence, Margaret Morden. Ms. Morden focused on the bead analysis and whether Dr. Williamson's reports gave archaeological proof of continuity. Ms. Morden expressed a very high regard for Dr. Williamson. She also raised some potential weaknesses with the bead analysis, not all of which were borne out. As well, Ms. Morden emphasized that as of now, there is no archaeological proof that supports the notion of continuous occupation on the Peninsula. However, she acknowledged that gaps in the archaeological record are expected when dealing with a culture that lived lightly on the ground and moved often. That was the case with the Anishinaabek.

[438] In cross-examination, Ms. Morden agreed that many of the beads found at the River Mouth Speaks site are consistent with sites dated in the time period from 1650 and more recent times, and many dated tightly with sites in the latter half of the 1600s. Ms. Morden agreed that this could suggest that use of the River Mouth Speaks site was resumed within one generation after dispersal. This is consistent with Dr. Williamson's opinion, and the historical evidence about the Beaver Wars that is discussed below, as well as the bead analysis.

[439] The defendants object to the bead analysis, submitting that a broader, more extensive analysis ought to have been done and that there is some unresolved doubt about some aspects of the results and conclusions. Although I have taken these objections into account, I find that the bead analysis contributes to a conclusion that in the period leading up to 1763, Odawa were present on the Peninsula.

[440] The defendants note that there is little historical documentary evidence about events in and around the Peninsula leading up to 1763. That is so. But it does not necessarily mean there was no one there. Further, Dr. Reimer has found some evidence of an Indigenous presence in the general area. There is a 1718 French report of Mississaugas (a name used to describe some Ojibway groups) at Matchedash Bay. This area is on the other side of Georgian Bay, the eastern side. However, this report gives some indication of the general cultural population of the area in the early 18th century. Dr. Reimer also noted other anecdotal evidence about trading posts on the Peninsula, specifically at the Saugeen River, Cape Croker and Owen Sound areas.

[441] I find that the archaeological record is consistent with an Odawa presence on the Peninsula in the period leading up to 1763. As put by Dr. Williamson, presence can be permanent, temporary, intermittent or seasonal. As of 1763, I am satisfied that the Odawa had at least a seasonal presence on the Peninsula, which was part of their seasonal round. However, apart from fishing, this evidence does not show a significant presence in the Aboriginal Title Claim Area itself.

[442] The defendants emphasize that from an archaeological perspective, it should not be assumed that earlier inhabitants of an area were directly ancestral to the people living there today. Evidence is needed to show a link, in this case, between those Odawa and SON. There are challenges with the evidence. Dr. Reimer notes that there is uncertainty about the specific identity of the Cheveux Relevées, with whom SON claims to have a connection. Given the difficult task of producing conclusive evidence from these early times, some flexibility is needed.

[443] In my view, the archaeological evidence supports SON's position that their ancestors were present on the Peninsula and lands to its south in 1763.

Fishing

[444] SON relies on fishing to show both occupation and some control of the Aboriginal Title Claim Area. SON fishing does show some occupation of part of the area, and some control of access to fish.

[445] Fishing took place in a limited part of the Aboriginal Title Claim Area, as discussed above. The outer reaches of the Aboriginal Title Claim Area were not and are not regularly used for fishing. This is not analogous to seasonal hunting, for example, where some areas were used for only short periods, but were part of an annual seasonal round. Here, most of the Aboriginal Title Claim Area was unsuited for the boats used as of 1763 and was not part of an established fishing practice.

[446] SON has put forward considerable evidence about fishing and fisheries after 1763, both to underscore the fishing that took place as of 1763 and to show the continued importance of fishing and initiatives to control access to fishing. The evidence shows that SON's primary relationship to the Aboriginal Title Claim Area, apart from the spiritual connection with water, was and continues to be through fishing. SON members have fished and continue to fish for sustenance and for commercial purposes.

[447] SON does not need to prove Aboriginal title to have an Aboriginal right to fish. Aboriginal title and an Aboriginal right to fish can exist independently: *R. v. Côté*, at para. 38.

[448] SON and ancestors of SON took steps to attempt to control fishing and the use of fisheries, mainly in the 1800s and in more recent times. An 1839 investigation into Indian Affairs reported that SON ancestors asserted "exclusive rights" to the fishing grounds. The significance of fishing was discussed at the treaty council that gave rise to Treaty 45½ in 1836. There are also a few examples in the 1830s and 1840s when ancestors of SON agreed to give leases or licences to Euro-Canadian fishermen to have a fishery or fishing stations. SON ancestors took some steps regarding overfishing, illegal fishing and contraventions of lease terms.

[449] Steps were also taken to establish or re-establish commercial fisheries. By 1850, ancestors of SON no longer wished to lease the Fishing Islands to others and petitioned the government for the full right of occupancy on those islands to be returned to them. Crown actions continued to limit SON's control over fishing. Legislation and other Crown decisions in the mid-19th century opened up the fishery for public tender and required that SON ancestors obtain fishing licences. They took steps in protest, which ranged from petitioning the Queen to damaging the Euro-Canadian fishermen's nets and fishing stations.

[450] In the 20th century, Ontario began to regulate fishing, also through licensing. SON members continued to fish, and to assert the right to fish, including through protest and non-

compliance with the limits of their licences. They would also function as guides for non-Indigenous peoples coming to fish, and they believed they had the exclusive right to do so.

[451] After a period of recovery from overfishing and an infestation of invasive lamprey, SON members resumed significant fishing activities in the later part of the 20th century, both for sustenance and commercially. After the decision in the *R. v. Jones* case in 1993, SON reached a fisheries agreement with Ontario. Further agreements followed. SON commercial fishers now have exclusive commercial fishing rights to an area surrounding the Peninsula. However, the areas in which significant fishing takes place form only a part of the Aboriginal Title Claim Area, as shown on the illustrative map prepared by Ryan Lauzon that is discussed above.

[452] Considering all the fishing evidence, I conclude that fishing shows some use of a part of the Aboriginal Title Claim Area. The evidence also shows that SON has asserted control over fishing after 1763. There is sufficient evidence from which I infer that SON's ancestors tried to control fishing in specific areas around the Peninsula in the period around 1763 as well. However, those attempts were focused on control of fishing or fisheries, not of water spaces more generally.

Other evidence relied upon for occupation

[453] SON submits that Dodems show a connection between SON and the Peninsula area prior to 1763. I agree. Some of the Dodemic identities recorded at around the time of contact with Europeans in or near the Peninsula, including Otter and Bear, are still present among SON members today.

[454] SON relies on other events after 1763 that may provide a basis to draw inferences about occupation in 1763. A map of Lake Huron created in 1788 by Captain Gother Mann, following his navigation of the region, shows an "Indian Settlement" at the head of Owen Sound. This appears to have been an Ojibway community. The 1815 journal of Captain Owen provides several indications of Indigenous activity on both the west and east sides of the Peninsula, including finding "Indians settled" on an island at the mouth of Colpoy's Bay. Dr. Reimer testified that these were likely ancestors of SON. Further, a map made by Lieutenant Bayfield after his 1822 journey noted an "Indian Winter Encampment" at the head of Owen Sound and "Indian Traders" at the mouth of Saugeen River. This map also named "Chief's Point" on the Peninsula and the "Fishing Islands" off the west coast of the Peninsula. By the late 1820s, there were further written records of camps of Indigenous people and traders at the Saugeen River. It is not disputed that by 1836 and Treaty 45½, ancestors of SON were living on the Peninsula.

[455] While the Indigenous communities may have developed over this period, these events support an inference that an Indigenous community was present on the Peninsula and around Owen Sound in 1763.

Customary laws regarding control of territory

[456] SON relies on a series of historical conflicts to show use and occupation as well as control and exclusivity. Those events are best understood within the context of Anishinaabe practices,

customs and traditions regarding band territory. Established practices are now recognized as Indigenous customary laws under the legal principles described above. The evidence about these Anishinaabe practices was primarily given by Dr. Driben, Dr. Reimer and community witnesses.

[457] As discussed below, I find that the Anishinaabe customary law included recognition that a band had some control over the resources that could be harvested on their land and through fishing, and who could come and settle on their land. However, the customary law did not include an intention to hold and control water spaces generally or the claimed portions of Lake Huron and Georgian Bay more specifically.

[458] Dr. Driben approached the issue of customary laws by speaking about the Anishinaabek as a whole, although it was shown in the evidence that there could be local differences. SON's submission is that it should be inferred that as an Anishinaabe community, their ancestors shared those practices, customs and traditions. I have drawn that inference.

[459] Dr. Driben opined that the pre-1763 Anishinaabe custom and practice was that outsiders were required to seek permission to use another band's territory, although the nature, extent and means of granting permission differed depending on the identity of the outsider.[47] People from other bands were not free to simply arrive and settle in a band's territory. Much of the evidence related to harvesting on another band's land or the use of fishing stations or fisheries. Hunting or gathering on someone else's land without permission was seen as trespass. And Dr. Driben opined that all types of trespassers were dealt with through sorcery, combat or diplomacy.

[460] SON submits that the Anishinaabek sometimes agreed to share their territory with non-Anishinaabek Indigenous peoples and sometimes did not. Although I accept that general proposition, it is founded on evidence about land territory, not water territory, with the limited exception of fishing.

[461] The above customs and practices did not extend to excluding people when they were fishing for personal sustenance nor when people were passing through by travelling on the water.

[462] With respect to the Peninsula, Chief Roote gave some oral history from his grandfather about what he described as the time of marauders or travellers – thieves who would "go in the dead of night and steal and things like that". He said that when marauders came around, there would be lookouts on the Peninsula, and if a person who was watching saw something out on the lake, he would communicate that information to the head man. This oral history supports an inference of some control of the Peninsula itself, protecting the inhabitants from thieves, not the surrounding waters. Chief Roote did not connect these events to the period around 1763.

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[47] For example, if the others were Anishinaabek, non-Anishinaabek Indigenous, or European.

[463] In order to show control, SON mainly relies on other actions taken elsewhere in the Great Lakes region, by other Anishinaabe groups, to submit that the above customs and practices existed and would likely have been used to control the Aboriginal Title Claim Area. SON relies on several events in that regard.

[464] SON relies on Chief Minweweh's 1761 speech, saying that they would not part with their lakes, woods and mountains. He was the Chief of an Anishinaabe group located where Lake Huron joins with Lake Michigan. Dr. Hinderaker, an expert historian, testified that to the extent that Chief Minweweh was speaking for people other than himself, it was limited to his own community. He was not speaking for SON. SON also relies on the speech as notice to the British of the Indigenous assertion of territory, yet the speech was not made available until it was included in the trader's book, published in 1809.

[465] SON also relies on events in other areas, well outside the Aboriginal Title Claim Area. In the 17th century, the Kitchispirini Anishinaabe in the Upper Ottawa Valley charged transit fees to Huron traders to use the waterway for the fur trade. In the 18th century, the Minnesota Dakota and Lake Superior Ojibwe went to war over the fisheries at the upper end of Lake Superior and the right to the game of the adjacent woods. Prior to 1731, these Indigenous groups had been allies in a war against the Cree and Assiniboine. As a result of that alliance, the Ojibway hunted on Dakota lands west of the St. Croix River, had access to the fisheries and participated in fur trading through Fort La Pointe, on the south shore of Lake Superior. However, in 1736, the Ojibway left the alliance and attacked the Dakota in what proved to be the first in a series of raids and counterattacks that continued into the 19th century.

[466] More generally, Dr. Driben testified about control of access points to the Great Lakes (none of which are in the Aboriginal Title Claim Area). He initially said that all access points to the Great Lakes were controlled by Anishinaabe, listing certain bands but not including SON. However, it became apparent during his evidence that Dr. Driben had not analyzed any of the bands' capacity to control any access points, let alone their priorities, concerns or use of the areas. He further confirmed that each band would make its own decisions. And he agreed that the bands he mentioned did not act in concert to control access to Lake Huron and Georgian Bay. His evidence did not prove control of the access points that he spoke of.

[467] I find that the Anishinaabe customary law included the recognition that a band had some control over (a) the resources that could be harvested on their land and through fishing, and (b) who could come and settle on their land. Further, I infer that this customary law was shared, at least to some extent, by the Anishinaabe groups in the general area of the Peninsula, when there were such groups present. Further, I find that there was customary law applied on the Peninsula to address theft and trespass on the land. However, the evidence does not demonstrate customary law showing an intention to hold and control water spaces generally, or the claimed portions of Lake Huron and Georgian Bay more specifically.

Specific historical events relied on by SON

[468] To show control of the Aboriginal Title Claim Area, SON also relies on a series of historical events, beginning in the French period, and including the Beaver Wars, the Seven Years' War, Pontiac's War and related events. The defendants dispute the position that SON's role in these events shows control of the Aboriginal Title Claim Area in 1763. Overall, I agree that SON's role in these events does not show that SON had the intention or capacity to control the Aboriginal Title Claim Area.

The French period

[469] Given that the French were the European power in the Great Lakes area leading up to 1763, the relationship between the French and the Indigenous peoples is relevant to the question of whether SON ancestors controlled the Aboriginal Title Claim Area at that time. SON submits that the French sought and required permission for their activities, and that events from the French period showed that SON ancestors had control of the Aboriginal Title Claim Area. These submissions were not established on the evidence.

[470] Dr. Beaulieu and Prof. Morin were the main expert witnesses on the French perspective and the French period in general. Dr. Beaulieu is a historian with considerable expertise on the French period in North America. Prof. Morin is a law professor and legal historian. Prof. Morin noted that Dr. Beaulieu's report was learned, and he agreed with the history recounted by Dr. Beaulieu, but there were areas of disagreement between them.

[471] I found both Dr. Beaulieu and Prof. Morin to be qualified and responsive expert witnesses. However, as between them, Dr. Beaulieu has much more extensive and relevant background and expertise focused on what actually happened in the Great Lakes area during the French period. Prof. Morin's evidence was more focused on legal theory. Where they disagree on significant matters, I prefer the evidence of Dr. Beaulieu.

[472] Prof. Morin's evidence focused on the Law of Nations, opining that French conduct was governed by those legal principles. He relied on the work of a small number of scholars over hundreds of years, and he did not show that there was a French scholar who held the same view of the Law of Nations at the relevant time. Prof. Morin's evidence did not establish that the ideas and theory of the Law of Nations had a significant impact on the issues in this case.

[473] Other experts opined on specific events SON relies on that took place during the French period, such as the Beaver Wars. The evidence of those experts is discussed in context below.

The arrival of the French

[474] The French arrived in North America and established New France in the mid-1500s. France approached Indigenous groups as nations, but this did not extend to France asking for permission to proceed as it did. Dr. Beaulieu and Prof. Morin agree that at that time, France had a long-term goal of establishing the authority of French law over the Indigenous inhabitants of

New France. France's goals were the appropriation of new territory and resources through conquest, and the subjugation of the populations of its acquired territories.

[475] The Charter that Francis I gave to the French officer sieur de Roberval in 1541 showed the nature of the French Imperial plan. The King sent French peoples into the area "for the purposes of discoursing with the said strange peoples, if it can be done, and to dwell in the said lands and countries, there to construct and build towns and forts, temples and churches for the communication of our Holy Catholic Church, and Christian doctrine, to constitute and establish laws in our name, together with officers of justice to make them live according to equity and order, and in the fear and love of God." Roberval was given instructions "to go and come into the said countries, to land and enter into them and put them in our hand, as much by way of amity or friendly agreements, if that may be done, as by force of arms, strong hand, and all hostile means".

[476] SON relies on the arrival of the French explorer Samuel de Champlain at the mouth of the French River[48] in 1615. When Champlain and his expedition party arrived at that location, they were met by about 300 Cheveux Relevées warriors, who were Odawa. This event has a potential connection to SON because the Cheveux Relevées may have been from the southern area of Georgian Bay, even though the encounter with Champlain took place elsewhere. SON submits that these events show that their ancestors asserted some control of that location, on the north east side of Georgian Bay.

[477] The historical record shows that the Cheveux Relevées' head man spoke to Champlain about picking blueberries and their use of dried blueberries. The experts differ on why the Cheveux Relevées were there on that occasion, though it is agreed that they were there for more than just picking blueberries. It is not disputed that Champlain provided the Cheveux Relevées with a gift of an axe, that the encounter was peaceful, and that Champlain continued on his way. There was a custom of gift-giving to establish a relationship.

[478] Dr. Driben testified that the warriors were there to meet Champlain, relying on a master's thesis by Leo Waisberg. However, the thesis provides little support for that proposition. The passage Dr. Driben relied on observed that the reason given by the Cheveux Relevées head man regarding blueberry picking was "strange" since it was raiding season and because the modern practice was that blueberries are normally picked by children, adolescents and women.

[479] Taking a generous approach to the evidence, I find that it still does not establish that the Cheveux Relevées travelled to the French River to meet Champlain, nor that they had control of the waters there or in the Aboriginal Title Claim Area. Nor does the evidence establish that the axe was the price of passage through the area.

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[48] The French River runs into the east side of Georgian Bay and does not overlap with the Aboriginal Title Claim Area.

[480] The Charter of the Company of One Hundred Associates illustrates the French approach in the period. That French association established the first permanent French settlement in New France in 1627, and it continued the same goals expressed in the prior century. The association was led by Samuel de Champlain and included French merchants who were primarily interested in the fur trade. The Charter spoke of civilizing the Indigenous peoples, including instruction in Catholicism, and establishing the Royal authority. It went on to "grant to the said Associates" lands, rivers, seas, ports, harbours and resources in New France, extending from the eastern sea coast and going westward, including the Great Lakes, which were called the freshwater sea, and beyond.

[481] There was warfare in the Great Lakes region from time to time. However, it was not necessarily due to Indigenous customary control of territory or exclusivity of the lakes. Dr. Benn is an expert historian. I accept his evidence that motives for warlike acts also included fulfilling spiritual imperatives, taking land and resources, affirming masculinity and honour, avenging death and capturing prisoners who might serve other purposes. The Beaver Wars and, later on, Pontiac's War, are examples of warfare about specific issues of the time. SON relies on both wars to show that they had some control over the Aboriginal Title Claim Area.

The Beaver Wars

[482] Beginning in about 1649, and for decades, there were conflicts that are often called the Beaver Wars (due to the relationship between the conflicts and the fur trade with France) or the Iroquois Wars. The Beaver Wars caused widespread movement of Indigenous peoples in the Upper Great Lakes area. At the beginning of this time period, the Haudenosaunee (Iroquois or, at that time, the "Five Nations") drove all Huron-Wendat, Tionontati (Petun), and Anishinaabe people out of the area between Lake Ontario and Georgian Bay. The Indigenous peoples living north of Lake Ontario, including any living on or near the Peninsula, were all likely driven out of those lands by the Haudenosaunee. The French fur trade relationship, which was primarily with the Huron-Wendat, was destroyed.

[483] The French perspective during the Beaver Wars underscores the French plan to conquer that began in the prior century. Louis XIV assumed personal rule over France in 1661. In about 1665, Louis XIV sent about 1,200 men to the colony to counter the Haudenosaunee threat and expand French domination. He gave instructions "to expand the Kingdom of God by increasing His own, to establish Christianity among the pagans and to force the barbarians to submit to His dominion, and by the power of his armament to also open a mighty Heavenly harvest for the zealous missionaries, and to His subjects the colonists, the rivers for new discoveries." The French led military expeditions against the Haudenosaunee.

[484] In around 1687, the French and their allies, including some Anishinaabe groups, attacked the Haudenosaunee in Niagara and continued to hound the Haudenosaunee. Oral history also records that Indigenous groups who had been driven out of southern Ontario joined in an offensive alliance and continued to force the Haudenosaunee to the south of Lake Ontario into the 1690s.

[485] Significantly, some battles took place on the Peninsula, for example, at Skull Mound and Red Bay. After the conflict ended, the Indigenous peoples living on the Peninsula were referred to as Ojibway and not Odawa, although this does not preclude the possibility that the same peoples had returned.

[486] Peace negotiations began in the late 17th century. France and its allies negotiated treaties with the Haudenosaunee giving rise to what is known as the Great Peace of Montreal. Some Anishinaabe from the Great Lakes region attended the 1701 conference in Montreal, where a peace treaty between them and the Haudenosaunee was ratified. Other treaties were also entered into around that time, ending the Beaver Wars.

[487] SON relies on the participation of their ancestors in the move to drive the Haudenosaunee out, and the reoccupation of Peninsula land, as an example of the Anishinaabe refusing to share their land. I find that SON ancestors did take part in the Beaver Wars, including in battles fought on the Peninsula. I find that this was an attempt to assert control over the Peninsula itself, in response to the actions of the Haudenosaunee. But the Beaver Wars do not show that SON ancestors had the intention or capacity to control the Aboriginal Title Claim Area in Lake Huron and Georgian Bay.

Other Events in the French Period

[488] SON relies on other events in the French period that took place outside the Aboriginal Title Claim Area and involved other Anishinaabe groups. SON submits that they show that Anishinaabe peoples asserted control. These events do not show the assertion of control.

[489] SON relies on an instance in 1667 when another Indigenous group refused to continue to transport the Jesuit missionary Father Claude Allouez up the French River. I accept Dr. Reimer's evidence that the decision to leave him behind (which took place after the journey began) arose because the Indigenous group did not want to be burdened with an unhelpful and inexperienced person in a canoe, rather than because of a late attempt to control access to territory. This is well-supported by the evidence, including the later events when a member of that Indigenous group returned for Allouez to bring him along.

[490] SON also relies on the destruction of the French vessel Le Griffon in 1679. There is no dispute that the ship sailed by way of Detroit through Lake Huron and into Lake Michigan and then disappeared. Dr. Driben advanced the theory that the ship was attacked and destroyed by the Anishinaabe, but he agreed that the actual events are not known. As attested to by Dr. Reimer, the ship was lost during a time of hostility and it was likely an act of warfare rather than of customary control. The evidence does not show that an Anishinaabe group destroyed that vessel.

[491] In the French period, the French also built forts at strategic locations in the Great Lakes region and travelled freely between them. SON has not shown that France sought permission to do so from SON ancestors or other Anishinaabek.

[492] There were no forts near the Peninsula area and no accounts of interactions in that area. Between 1669 and 1670, two French missionaries journeyed by canoe up the east coast of Lake Huron and along the western coast of the Peninsula. These missionaries would likely have noted any encounters with Indigenous peoples along the coast in their journal and did not do so. There was no record of any exertion of control.

[493] The evidence about the French forts and travel do not show customary control by Anishinaabe in the areas where there were forts. Prof. Morin put forward some examples of interactions about certain forts that SON relies on, but they are interactions between the French and the Haudenosaunee or the Mohawk. The evidence does not support an inference that the relationship between the French and these different Indigenous groups would be the same on the subject of customary law. However, the French forts do show France's assertion of sovereignty and planned military defence of the Great Lakes area more generally.

[494] Outside the context of wars, the historical evidence shows that the French usually did not need to use force to impose their choices on Indigenous peoples. Trade had become an important motivation for peaceful relationships. The Indigenous peoples had come to depend on European trade and European goods. However, the French attacks on the Haudenosaunee in the Beaver Wars show that the French were prepared to wage war (including the use of substantial force) against Indigenous groups that threatened the French use of the Great Lakes system.

[495] Overall, the evidence about the French period does not demonstrate that France generally sought permission for its activities in the Great Lakes area, nor that SON's ancestors had the intention or capacity to control the Aboriginal Title Claim Area.

The Seven Years' War, giving rise to the British assertion of sovereignty

[496] SON does not claim that they took part in the Seven Years' War. However, the British assertion of sovereignty in North America arose from that war. The Seven Years' War therefore provides some context for later events discussed below, such as Pontiac's War.

[497] The Seven Years' War, between France, Britain and other European powers, took place from 1756-1763. It was a conflict focused on global dominance, and it included the British conquest of New France. Some Anishinaabe groups joined as allies of France at the beginning of the conflict, but Indigenous participation lessened as the conflict continued.

[498] The end of the Seven Years' War, for North America, began when Montreal fell in 1760. Britain and France signed Articles of Capitulation in September 1760. The French surrendered New France to Britain. The Articles of Capitulation related only to North America – the War continued elsewhere. The Seven Years' War ended with the Treaty of Paris in 1763, a treaty between Britain, France and Spain that gave further effect to the transfer of New France to Britain.

[499] As discussed by Dr. Benn, at the outbreak of the Seven Years' War, Lake Huron fell within the bounds of lands claimed by France. There was therefore almost no travel in the area by the British before that time. However, the British had a basic understanding of the region both from

French books and maps and from insights offered by French and Indigenous individuals through their interactions with the British over many decades. For example, a century earlier, French maps were published and available in Britain and its colonies, showing Lake Huron and Georgian Bay, including the Peninsula, Manitoulin Island and other features, albeit in a rudimentary way. There were pre-1760 British maps as well, showing the main geographical features including the Peninsula. In the 1760s, the British began to draft more accurate manuscript maps.

[500] After the Capitulation at Montreal in 1760, Indigenous groups accepted British possession of the forts the French had built in the Great Lakes region. The British proceeded to occupy the formerly French forts, including at Detroit. At the beginning of the occupation in 1760, the British expanded their knowledge of the area with the assistance of French and Indigenous people.

[501] In 1761, the British invited many Indigenous groups who were former allies of the French to meet at Detroit. Sir William Johnson met with those groups. At the Congress at Detroit, Great Lakes and Ohio Valley Indigenous groups officially joined into the alliance with the British (the Covenant Chain[49]), concluding with a treaty. As Dr. Hinderaker opined, it is fairly likely that ancestors of SON were there. It is therefore likely that they were brought within the Covenant Chain at that time.

[502] Before 1763, Britain began surveying Lake Huron. Further the Lords of the Board of Trade developed a plan to organize the new territories ceded by France.[50]

[503] Indigenous peoples were not parties to the Treaty of Paris of 1763. Prof. Morin testified that the reference to "dependencies" in the Treaty of Paris of 1763 was a reference to "dependent nations" including Indigenous nations. In the treaty, France renounced New France "in all its parts, and guaranties the whole of it, and with all its dependencies, to the King of Great Britain". The lack of Indigenous involvement in that treaty shows that the French saw no need to treat with any North American Indigenous peoples about its transfer of New France to the British.

Attack on the British, by another Anishinaabe group

[504] SON relies on an attack on a British survey party on the St. Clair River in this time period, to show an Anishinaabe assertion of control over the Great Lakes. However, SON does not assert that their ancestors attacked the British. The warriors were from another Anishinaabe group.

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[49] The Covenant Chain is a diplomatic system, or set of diplomatic practices, that allows for mutual understanding and action.

[50] The Board of Trade was an administrative group created at the end of the 17th century to supervise colonial matters. A group of Lords met in London to review the documents that were coming from the colonies and make recommendations to the Crown.

[505] In May of 1763, a British survey party travelling on that river was attacked by Ojibway warriors who were in the vicinity on land. SON submits that the Indigenous actions were taken for the purpose of controlling the Great Lakes because the Ojibway warriors knew that the British group was a survey party.

[506] There is conflicting evidence from Dr. Hinderaker, an expert historian, and Mr. Graves, an expert military historian, on the question of whether or not the warriors were aware that the British party was a survey party. Considering both expert opinions, the historical records and other evidence, I find that SON has not established that the warriors knew it was a survey party. The attack was part of the initiative to attack the British wherever Indigenous warriors found them, and it was not driven by the nature of that specific British party. The documents describe the attackers' intent "to take up the hatchet against the English" and "to fall upon the English, wherever they found them." Nor has it been established that the warriors attacked with the intent to control an access point to the Great Lakes, rather than as an attack on the British generally.

Pontiac's War

[507] To show control, SON submits that their ancestors actively took part in Pontiac's War, fighting against the British, but the evidence does not show that they did so.

[508] After the British asserted sovereignty in North America, they made significant policy changes. Two of those changes, regarding presents (also called gifts) and regarding trade, provoked what is known as Pontiac's War.

[509] Chief Pontiac was Odawa and was from the Detroit area. Chief Pontiac began his war against the British in May 1763. There were several underlying causes of the war.

[510] The most prominent cause for Pontiac's War was the decision of Commander-in-Chief Jeffery Amherst to stop the annual distribution of presents to Indigenous peoples and to significantly change trade. Under the French regime, gift-giving was a longstanding diplomatic practice that facilitated alliance and trade. Presents were offered for both specific reasons or for more general reasons, such as the beginning or continuation of a relationship. They were not given out of largesse or unfocused generosity on the part of either party. Over time, the reliance of Indigenous peoples on European goods grew, which meant that these presents became an important part of the Anishinaabek economy. The Anishinaabe people had come to depend on those goods, such as the guns and ammunition that they used for hunting.

[511] The departure of the French meant that the Indigenous people had to depend on the British for access to European goods. However, Amherst discontinued gift-giving at what had become British posts and dramatically limited the amount of lead and gunpowder that could be traded to Indigenous peoples.

[512] Another prominent cause for Pontiac's War was a messianic movement that sought a return to traditional Indigenous practices and the termination of relations with Europeans. Neolin was an influential Delaware prophet from the Ohio Valley. He sought to "purify" Indigenous society.

Neolin preached a return to a pre-contact way of life when there was no need for access to European goods such as rifles and ammunition.

[513] Chief Pontiac supported Neolin's message, encouraging Indigenous peoples from the Great Lakes and Ohio areas to take up arms against the British. Chief Pontiac called a council of several Indigenous groups at Detroit in April 1763. After listing a series of grievances against the British, he invoked the teachings of Neolin to "drive off your lands those dogs clothed in red who will do you nothing but harm".

[514] Chief Pontiac started his war with the support of the Odawa and Pottawatomi in the vicinity of Detroit, as well as a Wyandot group. He was later joined by other Indigenous groups including Ojibway from the Thames and Saginaw Ojibway from Lake Superior.

[515] The war was not a coordinated attack on the British by the Anishinaabe in the Great Lakes area. Some groups openly sided with the British, providing the British with warriors to help in military operations. And a significant number of the Indigenous peoples of the Upper Lakes chose not to take part in Pontiac's War, whether or not they opposed it. Those decisions were made at the band level.

[516] SON submits that their ancestors actively took part in Pontiac's War against the British, showing an intention to control their territory. However, the evidence relied upon, primarily from Dr. Hinderaker, does not show that they did so. Dr. Hinderaker said that the Great Lakes Anishinaabe people were against the British, with very few exceptions. However, in reaching that opinion he included the Anishinaabe groups who refused to take part in the war. Those groups were not necessarily against the British and Anishinaabe decision-making about war was done at the band level, not for all Anishinaabe people. I found that his other evidence on this subject was similarly problematic.

[517] Chief Pontiac's military offensive began in May of 1763, starting with the siege of Fort Detroit. The war also included loosely coordinated local revolts. Most of the British forts in the Great Lakes and Ohio River Valley were attacked. Many of the forts were poorly constructed and in disrepair, and most were also undermanned. Nine small forts were taken. The major forts in Detroit and Pittsburgh resisted prolonged sieges. The siege on Fort Detroit failed largely because Pontiac's warriors could not prevent the sloop *Michigan* and the schooner *Huron* from supplying and reinforcing the fort, by water, despite attempts to attack those British vessels.

[518] The British response to Pontiac's War included both the termination of all trade and a military response.

[519] Despite early victories, Pontiac's military offensive lost momentum fairly quickly, both because of the British military response and the British embargo on trade, and because the French would not help in the fight against the British. Most of the leaders of the Indigenous protagonists hoped to fight long enough to make their point, and then to settle a peace. As the summer progressed, the Indigenous protagonists realized that the French were not going to return. They

then became more interested in influencing the terms under which the British reoccupied forts and the terms under which trade would be resumed.

[520] Pontiac's War mainly came to an end at meetings at Niagara and Detroit in 1764. Sir William Johnson met with large numbers of Indigenous groups at Niagara in mid-1764 (the "Niagara Congress"), establishing or reaffirming peace with most if not all of the Indigenous groups who attended the Congress. Following the Niagara Congress, General Bradstreet made peace at Detroit with some remaining Indigenous peoples. Chief Pontiac retreated to Illinois territory and did not take part in the meetings at either Niagara or Detroit. He made peace with Johnson in July of 1766. By then, Chief Pontiac was willing to cede land to the British as long as his people were paid for it and they were left with sufficient hunting grounds.

Royal Proclamation of 1763

[521] Toward the end of Pontiac's War, the British released the Royal Proclamation of 1763.[51] SON submits that Pontiac's War was a partial success because it gave rise to that Royal Proclamation. However, the policies set out in that Proclamation had already been under discussion for years. Before word of Pontiac's War had reached Britain, work was already underway on a British plan for the area that France had ceded. The British released that plan in the Royal Proclamation.

[522] The Royal Proclamation of 1763 set up new colonies including Quebec, East Florida, West Florida and Grenada. It included instructions to set up governments and related matters, and it had a significant section about "Indian Lands". The contents of the Royal Proclamation were going to be released as instructions to the local governors. Ultimately, the document was released as a proclamation to provide reassurance to the Indigenous peoples about British intentions.

[523] The Royal Proclamation of 1763 was drafted by the British, reflecting prior British policy and practice. It was not negotiated with Indigenous peoples. The section on "Indian Lands" began by saying that the several nations or tribes of Indians with whom Britain was connected, and "who live under our protection" should not be "molested or disturbed in the possession of such parts of our dominions and territories as, not having been ceded to or purchased by us, are reserved to them, or any of them, as their hunting grounds".[52] The Royal Proclamation noted that "great frauds and abuses had been committed in purchasing land of the Indians" to the prejudice of the King's interest and to the "great dissatisfaction of the Indians". As a result, the Royal Proclamation set out requirements to be followed before "Indian Land" could be purchased, and prohibited private purchases, among other things.

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[51] Dated October 8, 1763.

[52] The many capital letters in this quotation and other quotations from the Royal Proclamation have been omitted.

[524] As put by Dr. Hinderaker, scholars have vigorously debated the meaning of the Royal Proclamation of 1763. He said that a superficial reading could appear to nullify all Aboriginal claims to the lands in the trans-Appalachian West, since the Indians were granted the "use" of lands under the sovereignty of the Crown. He also described the Royal Proclamation as only a preliminary, provisional statement of Crown policy toward Indigenous peoples, to be refined later. However, neither the text of the Royal Proclamation nor the surrounding context suggests it was preliminary or provisional. As put by Dr. Beaulieu, from a historical standpoint the Royal Proclamation asserted British sovereignty over those lands. It also recognized Indigenous territorial rights, while restricting those rights to use of the lands and restricting the sale of those lands.

[525] The Royal Proclamation was an important step in British land policy. However, Pontiac's War was not the instigator for the Royal Proclamation, except in its release in the form of a proclamation rather than instructions to local governors.

Whether the Niagara Congress showed control

[526] The Niagara Congress of 1764 was a major step in the ending of Pontiac's War. SON relies on the Niagara Congress to show some control over the Aboriginal Title Claim Area. SON submits that the Niagara Congress gave rise to three new treaties (rather than two). SON relies on the third, disputed treaty as evidence that Indigenous groups, including SON, had and exercised control of the Great Lakes by giving the British permission to travel on those lakes. The defendants dispute the suggestion of a third treaty at Niagara, as well as the alleged significance of what did happen, regardless of whether it was a treaty.

[527] As discussed below, I find that the evidence about the Niagara Congress does not show that ancestors of SON had or asserted control over the Great Lakes or the Aboriginal Title Claim Area. Ancestors of SON were probably at the Congress, but the dealings between the British and what were called the Western Nations did not show that those nations controlled the Great Lakes.

[528] Several expert witnesses gave evidence about the Niagara Congress. Most significantly, Dr. Beaulieu did an extensive and detailed review of the primary historical documents as well as some Indigenous oral history, in order to prepare his report on the Niagara Congress and to reach his opinions on that subject. His expertise and research surpassed that of the other expert witnesses.

[529] I find that Dr. Beaulieu's evidence about the Niagara Congress is deserving of more weight than that of the other expert witnesses. Where there is conflicting evidence about the Niagara Congress, related events, and whether there was a third treaty (from a historical perspective), I prefer Dr. Beaulieu's evidence. However, I note that the question of whether or not there was a third treaty is also a question of law, upon which Dr. Beaulieu did not express an opinion. He properly limited his view to that of a historian.

[530] Dr. Beaulieu's extensive work on the Niagara Congress is illustrated by the question of whether the Royal Proclamation of 1763 was read aloud by Johnson at that Congress. It had

previously been assumed that the Royal Proclamation was read aloud, giving it added significance in certain legal decisions. Based on his work, Dr. Beaulieu opined that it had not been read aloud. Mr. Chartrand, after reading Dr. Beaulieu's report and the evidence collected in it, said he was no longer convinced that the Royal Proclamation had been read aloud. He changed his opinion to be consistent with the opinion of Dr. Beaulieu. And SON's main witness on the Niagara Congress, Dr. Hinderaker, testified that he had no opinion about whether or not it had been read aloud. Just before Dr. Hinderaker began his testimony, SON amended their Statement of Claim to withdraw the claim that the Royal Proclamation had been read aloud at the Niagara Congress.

[531] At least two cases in the authorities before me proceeded on the basis that the Royal Proclamation of 1763 was read aloud at the Niagara Congress: *Chippewas of Sarnia v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.); *Keewatin v. Ontario (Minister of Natural Resources)*, 2013 ONCA 158, 114 O.R. (3d) 401, at paras. 167-172, aff'd *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 S.C.R. 447. The *Chippewas of Sarnia* appeal arose from motions for summary judgment. *Keewatin* arose from a trial. The reasons for decision do not explain how the facts regarding the Niagara Congress were found or whether they were disputed. In any event, those factual findings are not binding on me.

[532] On the evidence before me, I find that the Royal Proclamation was not read aloud at the Niagara Congress. However, as described by Dr. Beaulieu, it remains one of the most important documents at the beginning of the British regime in North America.

The Niagara Congress

[533] The steps to organize what became the Niagara Congress began in early 1764. Johnson and Thomas Gage (Amherst's replacement as military Commander in Chief) decided to hold a meeting to make peace with the Indigenous groups that had shown an interest in doing so. Johnson sent spokespersons out to invite Great Lakes Indigenous groups to attend at Niagara in the summer of 1764. Johnson planned to deal with the groups individually to reduce the prospect that the Congress would create or strengthen an Indigenous coalition. His plan was to impose reparations on the Indigenous groups who fought against the British.

[534] The Niagara Congress took place in the summer of 1764. It lasted almost one month. Around 1700 to 2000 Indigenous people attended, from about 20 Indigenous groups. The Indigenous peoples did not comprise a single, unified group. They included: (1) British allies that accompanied Johnson to the Congress; (2) groups that had declared war against the British and were there to make peace (including the Detroit Wyandot – also known as Wendat or Huron-Wendat – and the Seneca); and (3) groups that had not officially participated in Pontiac's War and attended to reaffirm their peaceful relationship with the British. The Congress report called the third group the "Western Nations" or "Western Indians".

[535] There is no dispute that two treaties were concluded at the Niagara Congress, one with the Detroit Wyandot and one with the Seneca who were present. Both groups had waged war against the British. Neither were from the Peninsula area. Nor are they said to be ancestors of SON. The

terms of those treaties were written into documents on which representatives of those Indigenous groups made their marks.

[536] The dispute is whether or not a third, oral treaty was also concluded at the Niagara Congress, with the Western Nations. There is also an issue about whether SON's ancestors attended the Congress and were part of the Western Nations.

[537] Although Johnson wished to identify and punish all Indigenous groups that had fought against the British, he was unable to identify them from among the Western Nations. He had to take a different approach.

[538] The Western Nations comprised about one quarter of the Indigenous people at Niagara. Some of these groups had answered Johnson's invitation, but others attended after they had heard about the upcoming meeting. The Western Nations expressed their willingness to remain peaceful with the British, as had been promised at Detroit in 1761. None of these groups came forward to say that they had fought against the British. Whether they had fought the British or not, Johnson decided to accept their request to remain at peace and deal with them as if they had not taken part in the hostilities.

[539] As put by Dr. Beaulieu, the Niagara Congress was a "great diplomatic meeting". The historical documents from the Niagara Congress include a lengthy list of the Indigenous groups who attended and who spoke. Those documents do not specifically name ancestors of SON. However, SON submits that due to naming inconsistencies, their presence at the Niagara Congress can be shown by their connection with the Odawa, which could have been listed in the documents as Ottawa, and their connection with the Ojibway, which could have been listed as Jibbeways. This provides some evidence that some ancestors of SON may have been there.

[540] SON also relies on evidence from Dr. Hinderaker, who references the journal of a British Fur Trader, Alexander Henry. Henry travelled to the Congress with a Chippewa group from the Sault Ste. Marie area. Their route took them along the eastern shore of Georgian Bay and through the Lake Simcoe area, not through the Peninsula area. Henry noted an absence of Indigenous peoples in those areas because the men had gone to Niagara. Dr. Hinderaker also pointed to general evidence regarding the Ojibway and other large groups. Dr. Hinderaker opined, on what he described as strong circumstantial evidence, that ancestors of SON were probably at the Niagara Congress.

[541] Given the general evidence about who did attend this Congress, and the difficulties associated with proving actual presence at this event centuries ago, I infer that some SON ancestors may have been present. They may, therefore, have been part of the large group called the Western Nations.

[542] However, the evidence does not also establish that ancestors of SON fought the British in Pontiac's War. Many Indigenous groups did not do so and still attended the Niagara Congress.

Since SON has not established that they fought the British in Pontiac's War, that conflict does not show a SON effort to exert control generally, or specifically in the Aboriginal Title Claim Area.

[543] SON relies on the disputed third treaty, with the Western Nations, to show some control. This gives rise to the issue of whether there was a third treaty.

[544] At the Niagara Congress, there were numerous discussions and responses from specific Indigenous people. There were individual meetings involving smaller groups of Indigenous peoples as well as larger, more public meetings. Britain held the balance of power and, in turn, Johnson ran the meetings and demanded terms.

[545] Johnson's talks with the Western Nations were aimed at renewing and strengthening the pre-existing alliance, which had been disturbed by Pontiac's War. Johnson was focused on peace. He required conditions, including that the Western Nations not commit acts of violence against the British or their forts and not interfere with travel over the lakes and rivers. This was a continuation of the alliance established in Detroit in 1761. If the Western Nations complied, Johnson would welcome them back into the alliance.

[546] Johnson was not negotiating for access to the Great Lakes. The British had fully demonstrated that they controlled access. As Johnson said, the Crown had "all the doors". Johnson was negotiating about going to their forts without interference and addressing the Indigenous request to resume trade.

[547] While the Indigenous peoples who fought against the British had some early victories, they did not show the capacity to exclude the British from Lake Huron or Georgian Bay. They did not have the ability to control the lakes. Nor did they set the terms on which the British or traders came back into the area.

[548] The speeches made at Niagara by the Indigenous people representing the Western Nations form part of the written record and are not challenged. Those speeches do not show an assertion of control. The Indigenous people spoke of the difficulties arising from the interruption of trade, which caused poverty and kept them from hunting. The Indigenous speakers asked for trade to be re-established, or at least that they be permitted to do business with the traders at Niagara. Johnson refused to allow trade to resume until peace was achieved with all nations. The British did not officially reopen trade until 1765, although trading at some specific sites was permitted earlier.

[549] On the question of whether there was a treaty with the Western Nations, the defendants rely on a series of letters by Johnson, reporting on the outcome of the Niagara Congress. The documents consistently describe two treaties and one renewal of prior engagements, not three treaties. In an August 22, 1764 letter to Thomas Gage, Johnson referred to the peace treaties reached with the Huron-Wendat and the Seneca. With respect to the Western Nations, Johnson said he "only renew[e]d & strengthened the Covenant Chain with them". On August 23, 1764, in a letter to the Lieutenant-Governor of the New York colony, Johnson again distinguished between the nations that made peace and those that renewed their engagements.

[550] Johnson also prepared a formal report to the Board of Trade dated August 30, 1764. In that report, Johnson spoke of the "treaties of peace with the Hurons of Detroit and the Enemy Senecas", and said that the other nations "only came to renew their engagements." Johnson enclosed copies of the two written treaties. He spoke of the goal of a lasting peace. He spoke of Chief Pontiac having gone to the country near the west end of Lake Erie but desiring peace. Johnson spoke about Britain's demonstration of its power to the Indigenous peoples but also said that they "could not be a match" for the Indigenous peoples' superior abilities in the extensive, woody country. He spoke about advancing the peace by conquering Britain's prejudices and moving forward with generosity, and he set out proposals to move forward. The evidence does not show any motivation for Johnson to say there were only two treaties instead of three.

[551] On September 21, 1764, Thomas Gage sent copies of the two treaties reached by Johnson to Lord Halifax, the Minister in charge of the colonies. Gage also indicated that Johnson "only renewed their alliance" with the Western Nations.

[552] SON relies on a letter Johnson wrote on October 30, 1764 after hearing that Colonel Bradstreet had formed peace treaties with the remaining Odawa, Ojibway, Huron-Wendat, Miami, Pottawatomi, and Mississauga at the Detroit Congress that followed the Niagara Congress. In that letter, Johnson said that "[t]hese people had subscribed to a Treaty with me at Niagara in August last." As Dr. Beaulieu noted, Johnson did enter into a peace treaty with the Huron-Wendat at Niagara. In Dr. Beaulieu's opinion, Johnson had not changed his view about what transpired at Niagara. However, Johnson was trying to convey that Bradstreet had overstepped his duties because Bradstreet had no authority to negotiate with the Indigenous peoples. Dr. Beaulieu gave more weight to the earlier correspondence with the Board of Trade.

[553] SON advances the position that there was a third treaty to suggest that, in 1764, the Western Nations controlled the Great Lakes and that this agreement granted the British permission to use those lakes. However, even if what transpired was a treaty from a legal standpoint, the events and context summarized above does not show that the British were seeking permission, or that permission was needed, for British access to the Great Lakes. I conclude that the events of the Niagara Congress do not support's SON's claim of control of the Great Lakes of the Aboriginal Title Claim Area.

Other evidence regarding the Aboriginal Title Claim Area

[554] There is additional evidence regarding SON's claim of control and exclusivity, which does not assist SON.

[555] The evidence shows that SON's ancestors did not impede non-Indigenous travel on the Great Lakes. Increased settlement through the early and mid-19th century led to increased non-Indigenous use of the Great Lakes. Yet Dr. Reimer found no documentary evidence of complaints by SON's ancestors about, or efforts to prevent, European navigation in the Aboriginal Title Claim Area after the assertion of sovereignty and into the 1800s. The voyage of Gother Mann in 1788 was not interrupted or obstructed. He mapped the Peninsula in some detail. In Captain Owen's journal of his 1815 voyage, there is no indication that he was stopped or obstructed from travelling

further. On the contrary, he noted that the Indigenous people he encountered were helpful. And in Owen's voyage around the Peninsula, he noted several British schooners, which suggests some frequency of travel by the British, without impediments.

[556] SON submits that from 1764 until at least the 1820s, the British relied on their Indigenous allies for assistance in navigating the Great Lakes. Dr. Benn referred to some anecdotal accounts during this period. However, his evidence falls well short of what would be needed to show British reliance for the purpose of navigation. Dr. Benn also opined that British sailors had a long history of travelling into uncharted waters using soundings and other methods to plot their courses. Further, he noted that much of the kind of information the British needed to sail their schooners and other large vessels was not something of interest to Indigenous people, who relied on shallow draught canoes, so it was something that the British had to address themselves. Overall, I find that the British did not need or use significant Indigenous navigation help.

[557] SON also relies on the War of 1812, submitting that the British relied on Indigenous allies to maintain their presence in the Upper Great Lakes. There is no doubt that Indigenous warriors had an important role fighting in support of the British in that war. However, that role did not show that SON's ancestors had the ability to control or exclude others from the Aboriginal Title Claim Area or the Great Lakes more generally. The evidence about the War of 1812 showed the might of the British and American naval ships, armaments and naval forces. The Indigenous forces made important contributions, but there was not a demonstration of power on the water from which it should be inferred that they had the ability to control the Aboriginal Title Claim Area in 1763.

Application of Tsilhqot'in Nation test

[558] As discussed above, the *Tsilhqot'in Nation* test is based on occupation of the claimed land prior to the assertion of sovereignty in 1763. To ground a claim for Aboriginal title, SON must show a permanent presence and intention to hold and use that part of Lake Huron and Georgian Bay for SON's purposes as of that time.

[559] I return to the three useful lenses provided in *Tsilhqot'in Nation*. The occupation by SON's ancestors must be sufficient, it must be continuous (where present occupation is relied upon) and it must be exclusive. As this case has unfolded, the main issues are sufficient occupation and exclusivity. I have considered all of the evidence of traditional practices from the Aboriginal perspective, together with the particular characteristics of SON and of the claimed land. I have taken a generous view of the evidence for the reasons discussed above.

[560] The Aboriginal Title Claim Area must be the focus of the analysis. This case is not a claim for Aboriginal title to the Peninsula itself.[53] However, much of the evidence SON relies upon to

[53] In this section of the reasons, all references to the Peninsula include the land just south of the Peninsula that was later surrendered in Treaty 45½.

show sufficient occupation relates to their use and occupation of the Peninsula. The presence of SON's ancestors on, and their use of, that land as of 1763 is supported by linguistic and archaeological evidence, locations of spiritual importance such as burial grounds, locations of harvesting activities, continuity of Dodems and some community evidence and oral history, as discussed above.

[561] For the purposes of this case, I find that ancestors of SON were present on the Peninsula in the period leading up to 1763. Since there is no claim for Aboriginal title to that area, I need not be more precise about the sufficiency of occupation in any particular location on the Peninsula. Similarly, there is no need to make a finding about precisely when SON ancestors arrived on the Peninsula or how long they may have been there prior to 1763.

[562] SON submits that some of the evidence about their use of the Peninsula supports an inference in favour of occupation of the Aboriginal Title Claim Area as well, particularly regarding fishing. I agree. The Peninsula was the launching point for much fishing, which is relevant. Yet the fishing connection is limited when looking at the entire Aboriginal Title Claim Area – fishing shows use of only part of that area.

[563] There is then the question of what other use of the Aboriginal Title Claim Area could also show occupation. Prior Aboriginal title cases, cited above, have provided examples of uses of dry land that may establish occupation, such as the construction of dwellings, cultivation of land, and regular use of the land for harvesting. There are parallels for submerged land, such as constructing dwellings on the water and harvesting plants and minerals from the lake bed itself. However, those activities did not take place in this case. Travel on the water could also be relevant, but here it was limited and close to shore.

[564] SON has not put forward activities that took place on or in the water in the Aboriginal Title Claim Area to show use and occupation by their ancestors, other than fishing, limited travel and limited use for ceremonies.

[565] I have also considered the differences between dry land and submerged land when reviewing what could show occupation. Submerged land could allow for a presence to be established through regular use of vessels in the area. However, that use is very limited in this case. The vessels used by SON's ancestors were not deployed for the purpose of showing a presence on the water. They were also not capable of proving a presence in the Aboriginal Title Claim Area generally, and especially not in the rough waters toward the middle of Lake Huron and in Georgian Bay. Even today, with much better boating technology, SON has not proved a general or regular presence in the vast Aboriginal Title Claim Area.

[566] The use of the Aboriginal Title Claim Area did not have to be constant or cover all of the area in the same way. The intensity and frequency of the use of the land may vary with the characteristics of the Aboriginal group asserting title. SON's ancestors had a seasonal round and travelled from place to place each year within their territory. However, SON's historical seasonal round did not include use of the Aboriginal Title Claim Area on a regular basis. Apart from fishing

close to shore, and limited travel on the water, again close to shore, the Aboriginal Title Claim Area was not part of the seasonal round. This is not a case where SON's ancestors traditionally used the extensive Aboriginal Title Claim Area, albeit with gaps in time, frequency and location.

[567] SON submits that in addition to fishing, sufficient occupancy is shown by their perspective and relationship with the Aboriginal Title Claim Area. That perspective and relationship is discussed in detail above. All Anishinaabek have a spiritual connection with water and a spiritual responsibility to care for the Earth, including the Great Lakes. They regard the land and water as one. In modern times, SON has shown their continued concern about environmental issues regarding the land in the Peninsula area and the waters surrounding the Peninsula. These more current environmental activities are consistent with their spiritual connection with the Earth, including land, air and water. However, SON's historical traditional practices did not show that their ancestors had a connection with the claimed land that was of central significance to their distinctive culture in 1763.

[568] The defendants note that, in large part, SON relies on the beliefs of the Anishinaabe generally. That is so, but I have concluded that those spiritual beliefs were shared by SON's ancestors.

[569] Perhaps most important when considering the spiritual connection, the *Tsilhqot'in Nation* test requires *physical* occupation. For the most part, the spiritual practices did not require any physical use of the Aboriginal Title Claim Area.

[570] Taking a generous approach to the Indigenous perspective, I have taken the spiritual connection into account since it sometimes included activity on the water, but it did not give rise to significant physical occupation of the Aboriginal Title Claim Area in 1763.

[571] There is also some modern evidence that SON regards the Aboriginal Title Claim Area as its water territory, which I have taken into account. However, the in-water boundaries of the Aboriginal Title Claim Area do not reflect SON's traditional practices in 1763 or now. SON must show that the Aboriginal Title Claim Area was commonly used, and they have not done so.

[572] Under the *Tsilhqot'in Nation* test, SON must also show that their occupation of the Aboriginal Title Claim Area was exclusive. Exclusivity may be shown by proving that others were excluded from the land or only granted access with permission. This brings forward evidence of control. However, incidents of actual exclusion are not required. SON may show that they had the intention and capacity to exclude others. And exclusivity must be in relation to the Aboriginal Title Claim Area, that is, part of Lake Huron and Georgian Bay.

[573] SON relies on the customary laws of the Anishinaabek to show that SON exercised control over their land, including water territory. As the defendants note, this evidence was about Anishinaabe customary law rather than for SON's ancestors in particular. However, I proceed on the basis that SON followed the Anishinaabe customary law in 1763.

[574] Under Anishinaabe customary law, each band exercised some control over the band's own (dry) land territory. The control was at the band level. However, the customary law did not include an intention to hold and control water spaces. Anishinaabe customary law therefore supports a claim for control of land territory, but not for the claim area in Lake Huron and Georgian Bay.

[575] To show control, SON also relies on actions taken in certain conflicts and historical events. The defendants note that SON primarily relies upon actions taken by other Anishinaabe Indigenous groups in other parts of the Great Lakes region, not actions of the ancestors of SON. This is so. However, I have taken that evidence into account to the extent that it reflects a cultural approach that may also apply to SON's ancestors. Nonetheless, the evidence does not approach what would be needed to show that SON's ancestors exclusively occupied the Aboriginal Title Claim Area.

[576] The Beaver Wars were the main event in which SON's ancestors exerted some control, in response to the Haudenosaunee. The evidence is about battles on land and occupation of land. I infer that there was some relationship with the coastal waters as well. That conflict was in the 1600s, long before 1763.

[577] Looking at the French period in general, in the time leading up to 1763, I have found that the French did not seek permission for their activities in the Great Lakes area and SON's ancestors did not have the intention or capacity to control the Great Lakes generally or the Aboriginal Title Claim Area in particular.

[578] Moving to the major conflicts between the British and Indigenous groups that SON relies on, SON's ancestors did not fight the British in Pontiac's War. Nor did the British seek or need permission from SON to freely travel on the Great Lakes before or after that war. The other specific instances put forward also do not show that SON's ancestors had possession of, control of, or the capacity to control the Aboriginal Title Claim Area in or around 1763. The evidence does not demonstrate that any Anishinaabe group controlled the Great Lakes or tried to challenge the British presence on the Great Lakes in or around 1763, apart from the unsuccessful Pontiac's War. Even if SON had taken part in that war, that conflict did not show that Indigenous groups, or SON in particular, intended to or did control the Aboriginal Title Claim Area.

[579] SON submits that there were no challenges to their occupancy of the Aboriginal Title Claim Area in 1763 and asks for an inference of control as a result. The lack of challenges to occupancy may support an inference of an established group's intention and capacity to control: *Tsilhqot'in Nation*, at para. 48. However, the inference does not arise in this case.

[580] For the most part, SON did not use that expanse of Lake Huron and Georgian Bay. There was therefore no need for the French or the British to challenge occupancy of that area. Further, the British were undisturbed when they began to take steps to assert sovereignty in 1761, and the British ultimately developed a permanent naval presence into the Upper Great Lakes. The only effective response to British shipboard cannons was responding artillery, and Indigenous peoples did not have artillery. And where the British occupation was interfered with, such as in Pontiac's War, the British fought, successfully.

[581] SON make a similar submission that because no one else was occupying the Aboriginal Title Claim Area, SON's occupation was exclusive. However, SON must show sufficient occupation regardless of whether anyone else was there.

[582] SON also submits that control of the adjacent land (that is, the Peninsula) allowed for control of the water. I agree that there could have been actions taken from the adjacent land, directed at control of the water spaces, but there is insufficient evidence to conclude that SON took action from that land with the intention of controlling the waters in the Aboriginal Title Claim Area.

[583] The main evidence in this area relates to fishing. SON's ancestors took some steps to gain control, or regain control, of fishing in some locations.

[584] The lens of continuity does not significantly improve SON's claim. Their modern activities do not show occupation of the Aboriginal Title Claim Area now or continuity back to the relevant historical period.

[585] Returning to the *Tsilhqot'in Nation* test, to ground a claim for Aboriginal title there must be sufficient and exclusive occupation of the claimed land as of 1763. SON must show a permanent presence and an intention to hold and use that part of Lake Huron and Georgian Bay for SON's purposes as of that time.

[586] SON must show a strong presence on or over that land. Considering all of the evidence, I find that SON's ancestors did not occupy that part of the Great Lakes, nor did they have the control over it needed to show exclusivity. SON did not have a strong presence on or over that part of Lake Huron and Georgian Bay at the relevant time.

[587] I conclude that the *Tsilhqot'in Nation* test is not satisfied in this case, for this particular Aboriginal Title Claim Area. However, this finding is limited to the Aboriginal Title Claim Area itself. The outcome could be different for other submerged land with different geographic characteristics, historical practices and context. As discussed above, I leave open the possibility that there may be Aboriginal title to submerged land.

[588] SON claimed "joint" Aboriginal title because they are two First Nations. Where Aboriginal groups have a shared exclusive occupation of land, this can result in joint Aboriginal title: *Delgamuukw*, at para. 158. Since SON has not established Aboriginal title in this case, I need not address this request, but I would have granted it to SON if title had been established.

[589] SON also claimed that part of the Aboriginal Title Claim Area is shared with other First Nations with which it has an agreement that could also give rise to joint title. However, if this question of joint title did need to be considered, I would make no finding with respect to the rights of any other First Nation. The evidentiary record is inadequate and other First Nations have not participated in this trial.

Changing the claimed Aboriginal right

[590] SON made two submissions about changing their claimed Aboriginal right, in the alternative to the above claim.

[591] First, in final argument, SON submitted that if the public right of navigation was a barrier to their Aboriginal title claim, I could change the scope of Aboriginal title to be subject to the public right of navigation. I have already addressed that alternative argument, above.

[592] Second, SON asked, in the alternative, for Aboriginal title to "portions" of the Aboriginal Title Claim Area. However, SON did not put forward any alternative portions of the area for me to consider.

[593] The defendants object to changing the claimed Aboriginal right at this stage, including changing the boundaries of the Aboriginal Title Claim Area.

[594] There is some latitude to change a claimed Aboriginal right at a late stage in a proceeding, in limited circumstances. The overarching issue is fairness. In *Lax Kw'alaams Indian Band*, the Supreme Court held that in a civil claim, the characterization of the Aboriginal right may be refined if necessary, in light of the evidence, provided that it is done in a manner that is "fair to all parties": at para. 46, *per* Binnie J.

[595] Here, the question is whether I should change the boundaries of the Aboriginal Title Claim Area to create a smaller area. This was done at the trial level in *Tsilhqot'in Nation*. In that case, the trial judge identified six specific areas within the larger Aboriginal Title claim area and found that the claim for Aboriginal title had been sufficiently proved for those six areas. The new boundaries were described in the trial decision, at para. 959, and referred to significant natural boundaries. It is not clear to what extent those six areas were also defined on maps or otherwise demarcated in the trial evidence or in the submissions of the parties.

[596] In SON's case, no alternative boundaries were put forward in the Statement of Claim, in the evidence or during final submissions. SON did not describe what smaller area could make sense and why. The invitation to change the boundaries is therefore left to guesswork.

[597] I have nonetheless considered the issue, with respect to Nochemowenaing. SON has proved a strong spiritual connection with some submerged land at Nochemowenaing. However, SON has not asked for Aboriginal title with respect to that area in particular. Nor has SON made submissions in support of that choice of area. Further, the area used for water ceremonies is not specifically demarcated in the trial evidence, nor is the area where the water is believed to have healing qualities.

[598] At most, there were general descriptions of the area in the evidence. One of the trial exhibits shows that, as of the early 1990s, there was a proposed subdivision in the Nochemowenaing area. That exhibit shows some aspects of the dry land at that site. Some maps

show the point and the bay very generally, and some land marks, as part of a modern map of the Peninsula as a whole. But the maps do not show the lake bed area of spiritual significance.

[599] I therefore do not have the submissions, or the evidence, with which to define the area, or to conclude that it would be fair to do so at this stage. The defendants have not had an opportunity to raise any specific issues that may arise from any proposed boundaries in that area. I therefore conclude that it would be unfair, in the circumstances, to change the Aboriginal Title Claim Area. It would still be open to SON to pursue a different Aboriginal right to recognize historical spiritual practices, as I mention above.

Aboriginal title to Chantry Island and Rabbit Island

[600] Although not a particular focus of SON's case,[54] there are two islands that form part of the Aboriginal Title Claim Area: Chantry Island and Rabbit Island. SON's counsel confirmed that the other islands within the Aboriginal Title Claim Area are not part of their claim due to the exclusions set out in the Statement of Claim.

[601] Rabbit Island is in Georgian Bay, east of Neyaashiinigmiing. Chantry Island is in Lake Huron, west of Southampton. On one of the current maps, Chantry Island is described as a Bird Sanctuary.

[602] There is no issue that the test in *Tsilhqot'in Nation* applies to the claim for Aboriginal title to these islands.

[603] As discussed above, the *Tsilhqot'in Nation* test is based on occupation of the land prior to the assertion of sovereignty in 1763. To ground Aboriginal title, this occupation must be sufficient, continuous (where present occupation is relied on) and exclusive. The evidence does not satisfy the *Tsilhqot'in Nation* requirements. There is little or no evidence about these islands at the relevant time, specifically 1763. The evidence relates to events in the 19th century and at later dates. Fishing is the main focus. Further, I find below that Chantry Island was surrendered, and is therefore excluded from SON's claim.

[604] On June 29, 1847, Governor General Lord Elgin issued a Declaration (the "1847 Declaration") that spoke of islands in the area. The 1847 Declaration confirmed SON's possession of all islands within seven miles of the Peninsula, which may have included these two islands. Specific evidence of the distance for these islands has not been put forward.

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[54] Because this aspect of the Aboriginal Title Claim was not mentioned in the written closing submissions, I requested and received oral submissions on the subject.

[605] Beginning with Rabbit Island, for the purposes of this claim, I have assumed that the island is within seven miles of the Peninsula.

[606] There is then a group of historical documents showing that the government was leasing, or trying to lease, areas for fishing around Rabbit Island, beginning in the 1850s and continuing into the 1900s.

[607] There are also documents from that period that reflect discussions about SON fishing areas near Rabbit Island. In 1902 correspondence, the Deputy Commissioner of Fisheries decided to "allow Rabbit Island, or the waters adjacent thereto, to be included in the Cape Croker Indians' fishing limits." Later correspondence shows confusion over the scope of the fishing rights in the area because a sketch that set out the Cape Croker fishing grounds, but did not show Rabbit Island, included a boundary that would have bisected the island. That issue was raised in 1903 and 1908. The trial evidence does not show the outcome of this dialogue.

[608] The evidence shows that the area surrounding Rabbit Island was a significant fishing area in the latter part of the 19th century and into the 20th century. Ryan Lauzon's map of modern commercial fishing also shows significant fishing in that general area. Jay "Tattoo" Jones testified extensively about modern fishing. He said that sometimes SON members would take a boat out to Rabbit Island, but they usually stayed in the Sound around Barrow Bay and Hope Bay. He did not say whether they actually went onto the island itself.

[609] I therefore find that the area surrounding Rabbit Island was a significant fishing location by the late-19th century and continues to be today, at least for commercial fishing. However, other than the potential that the island itself was used in relation to fishing, the evidence does not show occupation. The evidence does not show, for example, that structures were built on the island or other indications of use or of occupation of the land itself, then or now. And the evidence begins in the mid-19th century, more than 75 years after the relevant time in 1763. Considering all of the evidence, I conclude that the requirement of sufficient occupation as of 1763 has not been satisfied.

[610] Moving to Chantry Island, it was surrendered and is therefore excluded from SON's claim.

[611] In early 1854, SON ancestors granted a lease over Chantry Island to a Crown Land Agent, Alexander McNabb. Later that year, SON ancestors agreed to sell the island to McNabb. The surrender looked like a private transaction because no Crown representative was present. However, the Chantry Island surrender was confirmed by an Order in Council on May 9, 1855. McNabb was issued Letters Patent that reserved some of the land to the Crown as required for a lighthouse, piers and breakwaters. A copy of the surrender document is in evidence. Dr. Hinderaker testified that he was not familiar with the Chantry Island surrender but he recognized that several of the Chiefs from SON were listed on the surrender document.

[612] SON submits that there is some contradictory evidence, but it is not substantial or persuasive. SON relies on a March 1855 letter from Lord Bury, responding to McNabb, stating that the Governor General had no objection to carrying out the wishes of the Saugeen in respect of

selling McNabb the island on the condition that the proceeds be invested and the interest arising therefrom "be paid to them & their posterity in perpetuity". SON relies on a postscript saying that the Indian Department did not have a copy of the surrender in their office and that it must be sent to them. SON submits that the postscript casts doubt on the surrender. It is insufficient to do so given the other evidence.

[613] Further, there is no direct evidence about SON's occupation or use of this island as of 1763 or around that time. Nor is there evidence about current occupation from which inferences could be drawn. At most, the above evidence about the surrender of the island in and around 1854 shows that SON had rights to that island and could therefore surrender it.

[614] For purposes of the claim to these islands, I have assumed that the Anishinaabe customary laws referred to above would apply to them. However, the evidence does not approach what would be needed to show control and exclusivity in relation to these islands.

[615] The *Tsilhqot'in Nation* test for Aboriginal title has therefore not been satisfied in relation to these two islands, and Chantry Island is excluded from the claim.

[616] In conclusion, the Aboriginal Title Claim is unsuccessful, considering both the novel issue about the lake bed, and applying the existing test to the Aboriginal Title Claim Area.

Part 4 - Treaty Claim

The issues in the Treaty Claim

[617] I now move to the Treaty Claim. SON alleges that the Crown breached Treaty 45½, which required the Crown to protect the Peninsula from encroachments by white people (the "encroachment clause"). SON submits that the treaty breach also gave rise to a breach of fiduciary duty and the honour of the Crown.

[618] For Treaty 72, SON challenges the Crown's process and conduct leading up to that treaty in October 1854, submitting that the Crown did not act honourably and breached fiduciary duties. SON also raises a treaty interpretation issue about the impact of Treaty 72 on harvesting rights. SON does not allege a breach of their harvesting rights, but SON seeks a declaration about the impact of the treaty on those rights. That interpretation issue is addressed separately below.

[619] It is not disputed that ancestors of SON entered into these treaties. Further, SON does not allege that either Treaty 45½ or Treaty 72 is invalid, and does not allege that the defendants breached Treaty 72.

[620] The defendants dispute SON's Treaty Claim. Ontario submits that the Crown took reasonable steps to fulfill the encroachment clause in Treaty 45½ and that the actions of Crown representatives leading up to Treaty 72 were not a breach of any duty. Similarly, Canada submits that the trial evidence does not support a finding that the Crown breached its duties. Ontario also relies on the defences of laches and Crown immunity in response to the Treaty Claim.

[621] As set out below, I conclude that the Crown breached Treaty 45½ and the honour of the Crown, in relation to the Crown's treaty obligation to protect the Peninsula from encroachment. As well, the honour of the Crown was breached in treaty negotiations in August 1854. I have not found a fiduciary duty. The defences of Crown immunity and laches therefore mainly do not need to be addressed.

[622] Before I turn to the specific allegations, I will review the other legal principles that will guide my findings of fact and legal conclusions.

Treaties and treaty interpretation

[623] Treaties are not ordinary contracts. They are a solemn exchange of promises made between the Crown and First Nations: *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 24, citing *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41.

[624] Treaties have been described as analogous to contracts, and contract principles and terminology are sometimes used.[55] However, specific legal principles have been developed for treaty interpretation: *Badger*, at para. 76; *Marshall No. 1*, at paras. 14, 43 and 78.

[625] The words in a treaty "must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction": *Badger*, at para. 52.

[626] With one exception discussed below, the parties do not dispute the legal principles that apply to treaty interpretation. In *Marshall No. 1*, McLachlin J., as she then was, summarized the well-established treaty interpretation principles at para. 78, as follows:

> This Court has set out the principles governing treaty interpretation on many occasions. They include the following
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> 1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: *R. v. Sundown*, [1999] 1 S.C.R 393, at para. 24; *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 78; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1043; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 404. See also: J. [Sákéj] Youngblood Henderson, "Interpreting *Sui Generis* Treaties" (1997), 36 Alta. L. Rev. 46; L. I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the Sparrow Justificatory Test" (1997), 36 Alta. L. Rev. 149.

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[55] Including by SON, in this case.

> 2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the [A]boriginal signatories: *Simon*, *supra*, at p. 402; *Sioui*, *supra*, at p. 1035; *Badger*, *supra*, at para. 52.
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> 3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties [the Aboriginal peoples and the Crown] at the time the treaty was signed: *Sioui*, *supra*, at pp. 1068-69.
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> 4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed: *Badger*, *supra*, at para. 41.
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> 5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties: *Badger*, *supra*, at paras. 52-54; *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 907.
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> 6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time: *Badger*, *supra*, at paras. 53 et seq.; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36.
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> 7. A technical or contractual interpretation of treaty wording should be avoided: *Badger*, *supra*; *Horseman*, *supra*; *Nowegijick*, *supra*.
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> 8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic: *Badger*, *supra*, at para. 76; *Sioui*, *supra*, at p. 1069; *Horseman*, *supra*, at p. 908.
>
> 9. Treaty rights of [A]boriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context: *Sundown*, *supra*, at para. 32; *Simon*, *supra*, at p. 402.

[627] SON accepts this summary, except #6 and #8, which SON submits give too much importance to the text of the treaty. SON notes that the above summary appears in the dissenting reasons for decision in *Marshall No. 1*. Justice McLachlin did reach a different decision than the majority with respect to the treaty at issue in that case. However, she fairly summarized the many

cited decisions on the legal principles that apply to treaty interpretation. This has since been noted by the Supreme Court itself, which has described the above list as "the most frequently cited summary of the relevant interpretive principles, as they have been developed by this Court": *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557, at para. 107.

[628] There is no doubt that the text of the treaty is relevant. As put by Binnie J. for the majority in *Marshall No. 1*, at para. 5: "The starting point for the analysis of the alleged treaty right must be an examination of the specific words used in any written memorandum of its terms." Further, principles #6 and #8 should not be read in isolation. Their relative significance is affected by the other listed principles.

[629] I therefore find the above summary a useful starting point.

[630] It is also well-established that treaties must be interpreted in their historical context, and extrinsic evidence may be used as an aid to interpretation: *Marshall No. 1*, at paras. 9-14, 44, *per* Binnie J.

[631] Evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty: *Marshall No. 1*, at para. 11, *per* Binnie J.; *Delgamuukw*, at para. 87; *Sioui*, at p. 1045.

[632] In *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360 (C.A.), leave to appeal refused, [1981] S.C.C.A No. 377, the Court of Appeal for Ontario spoke about the importance of historical context and the need to be aware of what can and cannot be done to remedy past wrongs. The court concluded that "[a]lthough 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": at para. 8.

[633] The parties rely on post-treaty conduct with respect to interpretative issues in this case. When there is evidence about how the parties understood the terms of the treaty, either before or after the treaty, that evidence may help in giving content to the treaty terms. The post-treaty conduct of the parties may therefore have some relevance: *Marshall No. 1*, at para. 11, citing *R. v. Taylor and Williams*, at para. 20; *Keewatin*, at paras. 167-172.

[634] I received considerable evidence about the context surrounding the treaties at issue. Treaty 45, which was made on the same occasion as Treaty 45½, is particularly important context.

The honour of the Crown

[635] SON relies on the principle known as the honour of the Crown, which applies to treaty obligations. SON submits that the honour of the Crown applies to two key stages of the Treaty Claim:

(i) the implementation of Treaty 45½; and,

(ii) the negotiation of Treaty 72.

[636] The defendants agree, at a general level, that the honour of the Crown is engaged in SON's Treaty Claim. However, they disagree with SON about what was required in the circumstances.

[637] SON submits that the honour of the Crown was breached. The defendants disagree. I conclude below that the honour of the Crown applied to, and was breached, in the implementation of Treaty 45 ½ and in the negotiations leading up to Treaty 72.

[638] The honour of the Crown refers to "the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign": *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 65.

[639] The honour of the Crown 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": *Manitoba Metis Federation*, at para. 66, citing *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 32; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765, at para. 21, *per* Karakatsanis J. The ultimate purpose of the honour of the Crown is to promote the reconciliation of these interests.

[640] The honour of the Crown is always at stake in the Crown's dealings with Indigenous peoples: *Manitoba Metis Federation*, at paras. 68-72; *Mikisew Cree First Nation*, at para. 23, *per* Karakatsanis J.

[641] The honour of the Crown is not a cause of action itself. It "speaks to *how* obligations that attract it must be fulfilled": *Manitoba Metis Federation*, at para. 73 (emphasis in original). This is key. The honour of the Crown speaks to the practices through which the Crown representatives fulfill their obligations.

[642] The honour of the Crown "imposes a heavy obligation" and "not all interactions between the Crown and Aboriginal people engage it": *Manitoba Metis Federation*, at para. 68.

[643] The honour of the Crown has been applied to a number of Crown obligations. The leading case of *Manitoba Metis Federation* arose from statutory obligations in the *Manitoba Act, 1870*, S.C. 1870, c. 3. The Supreme Court concluded that the Crown had not met the standard for honourable dealing by not working diligently to fulfill its statutory promises. The court held that "prompt and equitable implementation of [statutory land grants] was fundamental to the project of reconciliation and the entry of Manitoba into Canada": at para. 99. The court further held that "[a] government sincerely intent on fulfilling the duty that its honour demanded could and should have done better": at para. 128.

[644] The honour of the Crown has also been applied to treaty obligations: *Manitoba Metis Federation*, at para. 73.

[645] Overall, the question is this: "Viewing the Crown's conduct as a whole in the context of the case, did the Crown act with diligence to pursue the fulfillment of the purposes of the obligation?": *Manitoba Metis Federation*, at para. 83.

[646] For treaty fulfillment, the Crown's honour is pledged to diligently carry out its treaty promises: *Manitoba Metis Federation*, at paras. 78-79.

[647] Not every mistake or negligent act brings dishonour to the Crown. Implementation may be imperfect. Nor does the honour of the Crown constitute a "guarantee that the purposes of the promise will be achieved, as circumstances and events may prevent fulfillment, despite the Crown's diligent efforts": *Manitoba Metis Federation*, at para. 82. However, a "persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise": *Manitoba Metis Federation*, at para. 82.

[648] In implementing treaty promises, Crown servants must "seek to perform the obligation in a way that pursues the purpose behind the promise": *Manitoba Metis Federation*, at para. 80. "The Aboriginal group must not be left 'with an empty shell of a treaty promise'": *Manitoba Metis Federation*, at para. 80, citing *Marshall No. 1*, at para. 52.

[649] In *Manitoba Metis Federation*, the Supreme Court concluded that the Crown did not act diligently to implement its statutory obligation because it had a "persistent pattern of inattention": at paras. 108-110. A persistent pattern of inattention may breach the honour of the Crown if it frustrates the purpose of the obligation, particularly if it is not satisfactorily explained: *Manitoba Metis Federation*, at para. 107.

[650] SON's second submission is that the honour of the Crown applies to the negotiation of Treaty 72. SON is not submitting that there was an obligation to negotiate, or to enter into a treaty. Rather, SON submits that once the Crown embarked on that treaty negotiation, the principle of the honour of the Crown applied to the conduct of the negotiation.

[651] There is a dearth of case law about the application of the honour of the Crown to historical treaty negotiations. The issue has come up in a few cases about the duty to consult, which is not at issue here, and statute or federal policy-based modern treaty negotiation: *Luuxhon v. Canada*, (1999), 66 B.C.L.R. (3d) 165 (S.C.); *Nunavik Inuit v. Canada (Minister of Heritage)*, [1999] 1 F.C. 38 (T.D.); and *Haida Nation*.

[652] There are, however, Supreme Court of Canada decisions that suggest that the principle of the honour of the Crown applies to a treaty negotiation, even though that issue was not before the court in those cases. The cases typically refer back to a passage in *Badger*. Treaty negotiation was not at issue in *Badger* either – it was a treaty interpretation case. However, in its discussion about treaty interpretation, the court held that because the honour of the Crown is always involved, it is assumed that the Crown intended to fulfill its promises, and no appearance of "sharp dealing"

should be sanctioned: *Badger*, at para. 41; *Marshall No. 1*, at paras. 49-52; *Sparrow*, at p. 1107, citing *R. v. Agawa* (1988), 65 O.R. (2d) 505 (C.A.).

[653] More recent Supreme Court of Canada cases refer to the above passage from *Badger* more generally, describing it as applying to treaty making and implementation: see, e.g., *Haida Nation*, at para. 19; *Manitoba Metis Federation*, at para. 73; *Mikisew Cree First Nation*, at para. 28; *Marshall No.1*, at paras. 49-50. However, since a treaty negotiation was not at issue in these cases, there has not been an elaboration on what conduct the honour of the Crown may require under the general heading of "treaty making". Sharp dealing would not be proper, but there is no robust discussion of what that would prevent. In my view, it would certainly be a breach of the honour of the Crown to induce an agreement using lies, as SON alleges in this case.

[654] The "duty to consult" law is also instructive since it involves some negotiation. In *Haida Nation*, the Supreme Court noted that good faith is required and sharp dealing is not allowed. However, there is no duty to agree and "hard bargaining" will not offend an Indigenous peoples' right to be consulted: at para. 42.

[655] What constitutes honourable conduct will vary with, and depend heavily on, the circumstances: *Haida Nation*, at paras. 16-18; *Manitoba Metis Federation*, at paras. 73-74; *Mikisew Cree First Nation*, at para. 24. In considering the principle of the honour of the Crown, the court must view the Crown's conduct "in its entirety and in the context of the situation": *Manitoba Metis Federation*, at para. 110.

[656] The course of conduct at issue here took place long before the principle named "the honour of the Crown" developed in the case law and, even today, there is little guidance regarding what it means for a treaty negotiation. However, the principle of the honour of the Crown has been applied to some historical obligations. *Manitoba Metis Federation* involved events beginning around the time of Confederation. *Marshall No. 1* relates to treaties in the 1760s and, at para. 50, the court references similar concepts from an 1895 decision.[56] And the "historical roots" of the principle stem from the assertion of sovereignty: *Haida Nation*, at para. 17. I conclude that the principle can apply to the treaty issues in this case, in the early- to mid-19th century. The need to consider the principle in the full historical context allows for the avoidance of unfairness.

[657] Lastly, SON submits that the principle of the honour of the Crown gave rise to a fiduciary duty in this case. SON relies on the fiduciary duty that arises where the Crown assumes discretionary control over specific Aboriginal interests: *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Manitoba Metis Federation*, at para. 73; *Haida Nation*, at para. 18. The content of this fiduciary

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[56] The dissent in *The Province of Ontario v. The Dominion of Canada and the Province of Quebec; In re Indian Claims* (1895), 25 S.C.R. 434.

duty "may vary to take into account the Crown's other, broader obligations": *Haida Nation*, at para. 18. I address the claimed fiduciary duties separately below.

[658] In summary, I agree that the principle of the honour of the Crown applies to the fulfillment of the terms of Treaty 45½ and the negotiation of Treaty 72. At the relevant time, there were Crown treaty-making protocols that are consistent with the principle of the honour of the Crown. I discuss those protocols below, along with other relevant historical context.

Treaty-making and Crown policy

[659] I begin with treaty making in the time period relevant to Treaty 45½ and Treaty 72, both of which included land surrenders.

[660] The events relevant to this claim begin with the British assertion of sovereignty in 1763, and move forward into the 1800s. The historical documents use different names for the ancestors of SON. SON ancestors were often called the "Saugeen" in the documents and other evidence surrounding these treaties. As well, Treaty 45½ refers to the "Saukings". My references to the Saugeen or Saukings or SON for this time period are all references to SON ancestors.

[661] The process through which Indigenous groups ceded or sold lands in British North America evolved in the period from 1763, when the British asserted sovereignty, to the time of Treaties 45½ and 72. The British also made policy changes leading up to the time of Treaty 45½ that provide the backdrop to that treaty.

[662] British treaty-making protocols began with the Royal Proclamation of 1763. That Proclamation spoke of preventing "frauds and abuses" in private purchases of "Indian Lands" so that Indigenous peoples "may be convinced of our justice". It spoke to the Crown's intent to deal fairly and honourably with Indigenous peoples when negotiating land cessions. In that regard, the Royal Proclamation of 1763 provided as follows:

(i) that land cessions could only be negotiated if the Indigenous group was "inclined" to dispose of lands;

(ii) that only the Crown could purchase Indigenous lands; and,

(iii) that land sales were to be negotiated in a public "meeting or assembly" held for that purpose and led by the Governor or Commander in Chief of the colony.

[663] Shortly after the date of the Royal Proclamation, instructions were issued to Governor Murray, some of which reiterated the protocols contained in the Royal Proclamation. Then, on December 24, 1763, Sir William Johnson, the Indian Affairs Superintendent, declared that the Royal Proclamation be made public and that all concerned obey it.

[664] There was then the *Quebec Act, 1774* (U.K.), R.S.C. 1985, App. II, No. 2, which Canada submits repealed the Royal Proclamation of 1763. Canada relies on the Court of Appeal decision

in *Chippewas of Sarnia* for that submission. However, in that case the court observed, at para. 198, as follows: "whatever the formal legal status of the Royal Proclamation subsequent to the passage of the *Quebec Act, 1774*, the Crown continued to recognize [Indigenous] rights in their land, continued to require that those rights be surrendered only to the Crown on consent, and continued to regard those rights as communal and surrenderable by a public manifestation of the First Nations consent to surrender".

[665] Much like *Chippewas of Sarnia*, no one is suggesting here that the above three protocols in the Royal Proclamation of 1763 were no longer part of British land surrender treaty-making practice at the time of Treaty 45½ and Treaty 72. The expert evidence shows that those protocols persisted after the *Quebec Act, 1774* and that the Royal Proclamation of 1763 continued to be an important document. As put by Dr. Reimer, the instructions and standards in the Royal Proclamation and in later land surrender instructions continued to guide the actions of the Indian Department up to and well beyond the SON surrenders of 1836 and 1854. As a result, I conclude that the *Quebec Act, 1774* did not have a practical impact on the relevant treaty-making protocols.

[666] As noted by Dr. Brownlie, adherence to Royal Proclamation protocols was never perfect. Crown officials considered the Royal Proclamation an important guide to their behaviour and tried to follow it. They followed the protocols not because the Crown had an external legal obligation to do so, but because the Crown chose to do so. If a Crown representative did not follow an instruction or protocol, he could face consequences, but it would not necessarily have an impact on the treaty in question.

[667] The next significant step in land surrender treaty-making protocols took place in 1794, when Lord Dorchester issued more instructions. Those instructions arose mainly because land transactions had not always been carefully recorded. The Dorchester instructions were the last treaty-making instructions issued in the relevant time period. The instructions included, for example, the need for an interpreter at the public treaty council and the need for a sketch of the lands in question. The cumulative instructions were guidelines that Crown officials were expected to follow unless to depart from them would be to the advantage of Indigenous peoples.

[668] The terms of land cessions with Indigenous groups changed over time. After the Royal Proclamation of 1763, there were a series of single-payment land purchases. Later, cessions had other forms of compensation, such as annuities.

[669] The administration of the Indian Department evolved as well. It began to change from a military to a civilian administration in the early 1800s, after the War of 1812. The British no longer saw the need to focus on maintaining military alliances with Indigenous groups. Instead, they began to move toward a policy of "protection" and "civilization" of Indigenous peoples. British planners developed this new approach, influenced by humanitarians and missionaries in Britain and North America.

[670] In 1830, Colonial Secretary Sir George Murray ordered an end to the military administration of Indian Affairs and separated the Department into two branches (for Upper and

Lower Canada). In Upper Canada, the Indian Department was put under the control of the civilian government, along with a British policy of gradually introducing the Indigenous peoples in to the "habits of civilized life". This involved establishing Indigenous peoples in "sedentary" communities where they could be "educated, Christianized and trained as farmers". In Dr. Brownlie's opinion, Indigenous peoples were generally agreeable to this approach because they were still free to choose their own path and run their own communities. This changed later in the 1800s, after the events at issue in the case, when the government moved to an assimilation approach that was even more problematic.

[671] The 1830s saw the beginning of increased immigration of Indigenous peoples to Upper Canada from the United States. In the period leading up to 1830, the United States attempted a similar "civilization" approach, which did not progress sufficiently from that government's standpoint. At the same time, there was an increasing demand by settlers for desirable land in the United States. As a result, in 1830 the United States passed the *Removal Act* authorizing the removal of Indigenous peoples from their traditional lands east of the Mississippi River, to the west.

[672] Immigration to Upper Canada was also influenced by treaties and British policies, such as those involving presents. Some of the Indigenous peoples who chose to move, including many Pottawatomi, came at least as far north as Manitoulin Island and areas on and near the Peninsula. Some of the community witnesses testified that they had Pottawatomi ancestors who had come from the United States. When the Pottawatomi arrived in the Peninsula area in the 19th century, there was some discord with SON. However, there were no serious conflicts. Ultimately, the Pottawatomi immigrants were integrated into SON.

[673] In this time of change, the British reevaluated their policy regarding presents. Indigenous peoples had become dependent on presents by the end of the French period in 1763, and presents continued to be important in the 1800s. This led to policy changes in both Canada and the United States, and to the movement of Indigenous peoples to Canada from the United States. Those events also form part of the backdrop to Treaty 45½ in 1836.

[674] After the War of 1812, and through the 1820s, thousands of Indigenous people from the Great Lakes area travelled significant distances to receive presents. Indigenous people living in the United States came to Upper Canada for that purpose.

[675] By the early 1830s, as many as 12,000 Indigenous people were travelling to specific locations for the annual distribution of presents. There were discussions within the British Crown about the substantial cost of presents by that time, as well as other considerations. Although the British considered discontinuing presents altogether, they decided to begin a gradual discontinuance of presents to the "visiting Indians" who came from the United States annually for that purpose. However, the Indigenous people in Upper Canada would still receive presents.

[676] Treaties 45 and 45½ were negotiated on Manitoulin Island in 1836, at a gathering that was planned for the distribution of presents.

Treaties 45 and 45½

[677] SON's Treaty Claim focuses on the encroachment clause in Treaty 45½. The encroachment clause required that the Crown protect the Peninsula from encroachments by white people. In other words, the Crown was obliged to protect the land from squatters. Squatting on Indigenous lands was a problem. Illegal activities ranged from settlers and speculators starting to develop the lands, hoping to secure an advantage when those lands were surrendered and sold, through to squatters stealing resources such as timber. Squatting was escalating at the time.

[678] I begin with these issues about Treaty 45½:

(i) the circumstances giving rise to Treaty 45½, including Treaty 45;

(ii) the significance of the encroachment clause to SON; and,

(iii) the interpretation issues about the scope of the encroachment clause.

[679] After I address the above issues, I will move to the question of whether the Crown fulfilled the promise to protect the Peninsula. I conclude that the Crown did not do so.

(i) Circumstances giving rise to Treaty 45½, including Treaty 45

[680] Treaties 45 and 45½ were negotiated and signed at the same treaty council. Events leading up to that treaty council are relevant to the issues discussed below, including the Crown's plan for Manitoulin Island to become a place for all Indigenous peoples.

[681] In the 1830s, the Lieutenant Governor had direct responsibility for what was then called "Indian Affairs". In 1835, the year before Treaties 45 and 45½, Lieutenant Governor John Colborne approved a plan to establish an Indigenous settlement on Manitoulin Island.

[682] Over the summer of 1835, Indian Superintendent T. G. Anderson visited Indigenous peoples across Upper Canada, announcing the government's offer to establish a "civilization settlement" on Manitoulin Island.

[683] In December 1835, Lord Glenelg (the Colonial Secretary) appointed Sir Francis Bond Head as the Lieutenant Governor of Upper Canada, replacing Colborne. In the course of the transition, Colborne informed Bond Head about the plan for Manitoulin and his views about the importance "of reserving that Island for the Indians solely". Colborne's last act as Lieutenant Governor was to request London's sanction to go ahead with the Manitoulin project.

[684] In early 1836, Anderson wrote to Bond Head informing him about the upcoming distribution of presents, which had been moved to Manitoulin to encourage Indigenous peoples to go there. In his letter, Anderson also mentioned the idea of separating Indigenous peoples from white settlements.

[685] Although the main focus was on Manitoulin, others (mainly missionaries and Ojibway who adhered to Methodism) suggested that Bond Head consider the Peninsula area as a place for the settlement of Indigenous peoples.

[686] Glenelg had also sent Bond Head a dispatch in early 1836. He told Bond Head that a decision on whether to go ahead with the establishment of Indigenous peoples on Manitoulin was not final. However, Bond Head did not receive that dispatch before he left for Manitoulin. In later correspondence, Bond Head said that those instructions reached him too late for him to act on them.

[687] In the summer of 1836, Bond Head visited Manitoulin Island and other Indigenous settlements in Upper Canada. In a later report, he summarized his view after those visits, writing that the attempt to make Indigenous peoples into farmers was "generally speaking a complete Failure". His view was that "congregating them for the Purpose of Civilization" had "implanted many more Vices than it [had] eradicated" and the "greatest Kindness" would be to remove the Indigenous peoples "as much as possible from all Communication with the Whites".

[688] Bond Head recommended that the government abandon civilization experiments and adopt a segregation policy. Bond Head wrote encouraging "the few remaining Indians who are lingering in Upper Canada to retire upon the [Manitoulin] and other Islands in Lake Huron, or elsewhere towards the North-west". According to the Bagot Commission[57] report, discussed below, Bond Head's views "differed" from "most competent authorities" and from accepted policy of the time to encourage and support attempts "to civilize Indian tribes in Canada".

[689] Bond Head arrived at Manitoulin on August 7, 1836, both for the distribution of annual presents and to meet with the assembled Indigenous peoples. Around 1500 or more Indigenous people had arrived at Manitoulin to receive annual presents, including Chiefs and others from SON.

[690] By this time, Bond Head was of the view that the civilization policy had been unsuccessful. He thought that if he could persuade all Indigenous peoples to come together on Manitoulin, they could pursue their traditional economies in that location rather than adapting to the ways of the white population. He was convinced that this would be beneficial both to the Indigenous peoples and the province.

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[57] In anticipation of reforming the Indian Department, the Bagot Commission was "to inquire into the application of the annual grant of money made by the Parliament of the United Kingdom … for the benefit of the Indians residing in or visiting Canada". The Commissioners reported on the "mode of conducting affairs of the Indians" under several headings, including presents, lands, and the department itself, giving opinions and recommendations on those topics.

[691] The distribution of presents took place on or about August 8, 1836. Bond Head called a treaty council on August 9, 1836, and he had private interviews with Chiefs to discuss his proposal for Manitoulin before the treaty council began. That treaty council resulted in two treaties with different Indigenous groups – Treaty 45 about Manitoulin and Treaty 45½ about the Peninsula and lands to its south.

Treaty 45

[692] Bond Head negotiated Treaty 45 first, with the Ottawa and Chippewa (Ojibway) of Manitoulin. Bond Head's view was that Manitoulin and related islands "belonged (under the Crown)" to these Indigenous groups. In a later dispatch to Glenelg, Bond Head explained that it would "therefore be necessary to obtain their Permission before we could avail ourselves of [the land] for the benefit of other Tribes".

[693] In his speech, recorded in the Treaty 45 text, Bond Head referred to both the seventy years that had passed since they had met at the Niagara Congress and to intervening circumstances. He specifically noted that "an unavoidable increase of white population as well as the progress of cultivation, have had the natural effect of impoverishing your hunting grounds". Bond Head said that it had become necessary that new arrangements be made for the purpose of protecting the Indigenous peoples from "the encroachments of the whites".

[694] The Treaty 45 text also recounts Bond Head saying that in all parts of the world, farmers sought uncultivated land as "eagerly" as the Indigenous peoples hunted for game. Bond Head said that if the Indigenous peoples cultivated the land it would then be their "own property" but uncultivated land was different. He said that the Crown, who had protected them, was now having "great difficulty" in securing the land for them from the white people, who were "hunting to cultivate it".

[695] Under Treaty 45, the Crown withdrew its claim to Manitoulin (and surrounding islands). The Ottawa and Chippewas (Ojibway) relinquished their claims as well. Under the treaty, Manitoulin was made a place for settlement of all Indigenous peoples. In return, Manitoulin would be recognized as the "property" of all Indigenous peoples living there, subject to the Crown's control.

Treaty 45½

[696] After the Ottawa and Chippewas (Ojibway) of Manitoulin agreed to Treaty 45, Bond Head negotiated with the Saugeen about the Peninsula and lands to its south.

[697] One missionary, James Evans, recounted that the Saugeen sought advice during the course of negotiations. The Saugeen told Evans that Bond Head had expressed the difficulty in protecting the land from the white people who would settle on it, and that if the Saugeen did not give up the land, they would lose it. Consistent with Manitoulin becoming a place for settlement of all Indigenous peoples, Bond Head proposed that the Saugeen surrender their traditional territory and move to Manitoulin.

[698] Bond Head put forward a draft treaty, which contemplated that the Saugeen move to Manitoulin. That draft included the encroachment clause now at issue. The proposed treaty with the Saugeen said that they should surrender their territory and continued:

> [Y]ou should repair to [Manitoulin], 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 [the King] engages for ever to protect for you from the encroachments of the whites. [Emphasis added to show the "encroachment clause".]

[699] The Saugeen rejected this proposal. Reverend Stinson, the General Superintendent of Wesleyan Methodist Missions in Upper Canada, was present during these events. The Secretary of the Methodist Church, Egerton Ryerson, summarized what Reverend Stinson conveyed to him in a letter to Glenelg:

> [Bond Head] 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. [Emphasis in original.]

[700] After further negotiation, an agreement was reached. Words referring to the Peninsula were added to the draft treaty document, altering its terms, as follows:

> 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[58] to this Island or to that part of your territory, which lies on the North of Owen's Sound,[59] 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. [Emphasis added.]

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[58] The word "either" was inserted into the draft.

[59] The phrase "or to that part of your territory, which lies on the North of Owen's Sound" was written in the side margin and connected with an asterisk.

> ~~So long as the Country you at present occupy shall remain uncultivated, you will have full liberty to consider it as your hunting ground.~~[60]

[701] Unlike Treaty 45, Treaty 45½ included the surrender of considerable lands, shown in light green on SON's illustrative map.[61] That area consisted of about 1.5 million acres of land south of the Peninsula. The remaining SON land, on the Peninsula, consisted of about 450,000 acres.

[702] Bond Head explained the proposed surrender. There was then discussion, the preparation of the final written document and the translation of the treaty. The document was then signed.

[703] Although SON makes no claim about the process leading up to Treaty 45½, SON does criticize that process. Canada submits that the criticisms are irrelevant given that SON does not make a claim in that regard. I agree that the circumstances leading up to Treaty 45½ may be more germane if there was a claimed breach. However, the view of SON's ancestors about the decision to surrender those lands could shed light on the meaning of the encroachment clause and the scope of the duties arising from it. SON submits that the surrender was reluctant, especially given their deep connection with the land. I have therefore considered the process leading up to the treaty.

[704] There are several accounts of the events surrounding the making of Treaty 45½. Those accounts are inconsistent, including with respect to the view of the Saugeen about the surrender. Some suggest that they were happy with the surrender, while others do not.

[705] In his book, *The Emigrant*, Bond Head said that there was a long debate, but in his address to the legislature, he said that SON "cheerfully relinquished" their lands. Reverend Adam Elliott described the Saugeen as "highly pleased". Ryerson summarized Stinson's account in saying that the Saugeen "readily acceded" because the proposal that they accepted 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".

[706] However, in missionary James Evans's account, he relayed that the Saugeen had said that they were "ruined but it was no use to say anything more" because the Crown was determined to have their land, and that they were "poor and weak and must submit". Evans said that the Saugeen believed "if they did not let [Bond Head] have his own way they would lose it altogether". Another missionary also recounted that the Saugeen were intimidated by Bond Head.

[707] There is one account from the Saugeen perspective. A month after the treaty was signed, Saugeen Chief Metigwob made a statement about Treaty 45½ at a General Council. He was a

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[60] This sentence is stroked out in the handwritten treaty document.

[61] The illustrative map is reproduced in Part 1 of these reasons, and the area is labelled "Treaty 45½".

signatory to Treaty 45½. He recounted Bond Head's statements about the inability to stop white people from coming on the land and also recounted Bond Head saying that if they did not comply with his wishes to surrender their land he would cast them off and stop giving them presents. The Chief said that he did not understand many things that Bond Head had said. He mentioned other points discussed during negotiations, and he concluded that he, and his fellow Chiefs were "over persuaded" to sign Treaty 45½. Yet he also recounted that he consulted with his principal men at the treaty council, and they liked the plan because it included an area with many fish. He recounted that Bond Head said the Saugeen owned the islands and he would remove all the white people who were in the habit of fishing in their fishing grounds. Dr. Reimer concluded that Chief Metigwob's report suggested that the Saugeen Chiefs were having second thoughts about the surrender after the treaty.

[708] Considering all of the evidence, I conclude that at the time of the treaty council, the Saugeen were not pleased or eager to surrender the land, but they decided to do so.

[709] Later that year, Bond Head described the surrender under Treaty 45½ as part of a "great scheme to open lands for settlement". He also reported that the surrendered lands from Treaty 45½, as well as from surrenders he had negotiated with other groups, should be more than sufficient to defray the whole of the expenses of the "Indians and Indian Department" for the whole province.

[710] When Bond Head went to Manitoulin in August 1836, he did not have specific instructions to enter into treaties. As a result, the two treaties entered into at that time were provisional and required further authorization from the Crown. Bond Head sent the treaty documents to Glenelg on August 20, 1836, noting that they were not in legal form and explaining that he had thought it advisable that a "short plain Memorandum" be drawn up explaining the arrangements, and that it be signed and witnessed. The treaties were also sanctioned by a wampum belt.

[711] On October 5, 1836, Glenelg wrote to Bond Head that the King had approved Treaty 45½. Further, Glenelg told Bond Head that the policy of civilization should still be pursued.

[712] Treaty 45½ was unusual. Annuities were standard for land surrenders at the time, but Treaty 45½ did not include an annuity provision when it was signed in 1836. That issue was raised after the treaty and addressed in 1840 by the executive order referred to below.

[713] When Treaty 45½ was entered into, the benefits to be received by the Saugeen under the treaty were the building of houses, assistance with cultivation and becoming "civilized" and the promise to protect the Peninsula from encroachment by white people. I find that the encroachment clause was the main benefit at the time.

[714] In 1840, the Executive Council ordered that the Saugeen receive the standard land surrender annuity payment of £2./10s per person per year, in relation to Treaty 45½. Colonial Secretary Russel authorized the payment later that year. The annuity was not to "increase with the Tribe, but to decrease with its diminution".

[715] The treaty also did not include the specific boundaries of the ceded lands, and a survey done afterward did not reflect the Saugeen's understanding of the southern boundary. In 1842, the Saugeen Council petitioned the Governor General about the boundary. In 1843, Saugeen Chief Wahbahdick[62] petitioned the Government and said that the survey line was "not right" and needed to be addressed, among other issues. The Executive Council upheld Chief Wahbahdick's interpretation of the boundary line. A July 1843 Order in Council adjusted the boundary at the base of the Peninsula following the position of the Saugeen.

[716] The metes and bounds of the Saugeen tract, including the islands within seven miles of the mainland of that tract, were confirmed by the 1847 Declaration.

(ii) Scope and importance of the encroachment clause

[717] SON relies heavily on the encroachment clause in Treaty 45½. The defendants do not dispute that the clause applied to a broad range of illegal activities and was important to SON.

[718] In Treaty 45½ the Crown promised to protect the Peninsula from "encroachment", otherwise known as "squatting". Squatting encompassed a broad array of illegal conduct. It included the illegal occupation of lands for the purpose of setting up a semi-permanent or permanent settlement, without authorization to do so. Further, it included cutting and removal of timber, which was an issue on the Peninsula. Squatting was sometimes called "trespass" in the mid-19th century, referring to incidents when people who were not authorized to enter the lands did so to take resources such as timber.

[719] The province brought in legislation in 1839, 1849 and 1850 to respond to squatting, as discussed below. The legislation showed the government's knowledge of the broad range of squatting activities in the relevant time period, including not only unauthorized occupation of what were called "Indian Lands" but also timber cutting, trespass and other types of injury.

[720] There is no doubt that the encroachment clause was important to SON and that Bond Head knew this. Protection of the lands from "encroachment of the whites" was a theme of Bond Head's discussions at the Treaty Council at Manitoulin.

[721] From the Indigenous perspective, the encroachment clause was one of only a few benefits in the treaty when it was made in 1836. SON surrendered about 1.5 million acres of land south of the Peninsula. The absence of any monetary compensation for this major land surrender underscored the importance of the encroachment clause.

[722] In an 1837 schedule of surrenders, Chief Superintendent of Indian Affairs Jarvis listed "protection" as the only form of consideration in the entry for Treaty 45½. Dr. Reimer agreed that

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[62] Also spelled Wahbahdik, Wahbahdic, Wahbadic and Wabatick in the trial evidence.

this showed that Jarvis believed, as of that time, that the promise to protect the Peninsula was the main consideration for the surrender. This is also shown by a record in 1839, in which Jarvis offered the opinion that in the absence of adequate compensation the surrender might be considered invalid, noting that SON only received a gratuity and a promise from Bond Head to protect the Peninsula.

[723] Jarvis was aware of the obligation, and noted that protection was the main consideration for the surrender. In 1839, he wrote to the Lieutenant Governor's office about the promise of protection, noting that "three years have elapsed since the Treaty was entered into" but the promise "up to this day has not been performed". Jarvis said that he did not wish to dictate a course of action, but he made some suggestions including an annuity.

[724] These early comments by Jarvis foreshadowed the lack of proactive Crown steps to protect the Peninsula in the years to come, as discussed below. Before I turn to that issue, I will address some interpretative issues about the scope of the encroachment clause in Treaty 45½.

(iii) Interpretation of the encroachment clause

[725] I address three interpretation issues that relate to the scope of the encroachment clause. The first issue is no longer disputed. SON and the defendants now agree that the clause did not prevent the Saugeen from agreeing to a later surrender of the land on the Peninsula. The 1847 Declaration made this explicit. Among other things, the 1847 Declaration expressly stated that it was within the power of SON to "surrender and yield up all their rights in or out of the Tract of land or lands or any part thereof" to the Crown. There were later surrenders, including Treaty 67 in 1851 and Treaty 72 in 1854.

[726] The second issue relates to the geographic scope of the promise to protect. Ultimately, the defendants did not press the point, so I deal with it very briefly. The issue arose for the first time in the defendants' written closing submissions. Both Canada and Ontario submitted that there was an ambiguity in the encroachment clause, narrowing the impact of the clause. The "which" at the beginning of the clause could either refer back to the Peninsula as a whole ("that part of your territory, which lies on the north of [Owen] Sound") or refer more narrowly to land that SON had cultivated on the Peninsula. Thus, the defendants' position meant that the promise to protect would relate only to cultivated lands.

[727] Canada and Ontario clarified in the oral closing submissions that they are not requesting a ruling that the encroachment clause be interpreted this narrowly. This is not surprising given admissions made in their pleadings. However, given the submissions about the ambiguity, I note that well-established treaty interpretation principles provide that ambiguities should be resolved in favour of SON. Even if the cause was ambiguous, I find that the obligation to protect applied to all of the Peninsula.

[728] The third issue is contested. This issue is whether Treaty 45½, and in particular the encroachment clause, was for the benefit of the Saugeen only, or for all Indigenous peoples.

[729] SON submits that the promise to protect the Peninsula was for the Saugeen only, not for all Ojibway or all Indigenous peoples more generally. SON submits that while Treaty 45 created what SON called a "general reserve" for all Indigenous people on Manitoulin, Treaty 45½ did not do so for the Peninsula. Canada disagrees. However, Ontario submits that Treaty 45½ did deal with the Peninsula in the same way as Treaty 45 dealt with Manitoulin.

[730] As presented to me, SON's term "general reserve" is not a legal term. Counsel used that term to describe the terms of Treaty 45. Specifically, Treaty 45 provided that Manitoulin would be the property of "all Indians" who the Crown allowed to live there, not only the Ottawa and Chippewas (Ojibway) of Manitoulin. In contrast, SON submits that Treaty 45½ did not create a "general reserve" on the Peninsula for "all Indians". I do not find the name "general reserve" is descriptive of the issues. The issues are: (i) who the Crown promised to protect the Peninsula for in Treaty 45½; and, (ii) whether the treaty created a place for all Indigenous peoples on the Peninsula in the same manner as Treaty 45 did for Manitoulin.

[731] I begin with whether the encroachment clause was a treaty promise only for the Saugeen rather than for all Indigenous people who may come to the Peninsula. I conclude that it was a promise to SON only, as submitted by SON.

[732] SON submits when the encroachment clause says, "to protect <u>for you</u> from the encroachments of the whites" (emphasis added), "you" meant the Saugeen. SON submits that to find otherwise would be to narrow SON's rights under the treaty.

[733] Ontario submits that the text of Treaty 45½ and subsequent conduct show that under the treaty, the Peninsula was being held by the Crown for the Saugeen and all other Indigenous peoples in the same manner as had been agreed under Treaty 45.

[734] Ontario suggests that Treaty 45½ incorporated the terms of Treaty 45, since Treaty 45½ begins with the statement "[y]ou have heard the proposal I have just made", and because of the express reference to moving to Manitoulin in Treaty 45½. Although the text about the Saugeen territory was added to the draft treaty text, the reference to Manitoulin remained in Treaty 45½. Ontario further submits that the record of the treaty proceedings does not suggest that Bond Head intended to offer the Saugeen something better than he had just agreed to with the Ottawa and Chippewa (Ojibway). Further, under Treaty 45, all Indigenous peoples who were on Manitoulin, or moved there, would have the same rights.

[735] I agree that at the beginning of Treaty 45½ the text refers back to Treaty 45, but that back-reference does not eliminate the rest of Treaty 45½, which had differing terms.

[736] To begin with, in the text of Treaty 45½, Bond Head, speaking to the Saugeen, referred to the Peninsula as "<u>your</u> territory" and promised "forever to protect the lands for <u>you</u>" (emphasis added). The treaty text supports SON's position. More broadly, there was consensus among the experts who addressed this issue from the historical perspective that the "you" for whom the land

was to be protected was intended to be the Saugeen, not the Ojibway or all Indigenous peoples more generally.

[737] Further, the wording of what became Treaty 45½ changed after negotiations with the Saugeen. The wording about the Peninsula was added after the draft was discussed. Yet the key provision in Treaty 45 – that Manitoulin would be recognized as the "property" of "all Indians" living there – was not added to Treaty 45½ in relation to the Peninsula.

[738] There were other important differences. Unlike Treaty 45, Treaty 45½ included a major land surrender. Although an annuity was granted later on, at the time the treaty was entered into the only benefits the Saugeen were receiving in exchange for the land cession were the promises to build houses, to provide assistance to become civilized and cultivate land, and to protect the Peninsula.

[739] Ontario further submits that according to the text of Treaty 45½, and subsequent conduct, the Saugeen understood that they were agreeing to a surrender of all of the land, including the Peninsula, and that the Crown would hold the Peninsula for all Indigenous peoples in the same manner as had been agreed in Treaty 45. Treaty 45½ does speak of a surrender of all the land, but, again, it does not say that the Peninsula would be recognized as the property of "all Indians" residing there as was said in Treaty 45. Further, there is no issue that another land surrender would be needed before the Peninsula would be ceded to the Crown (as happened in later treaties).

[740] SON and Ontario rely on other pre- and post-Treaty 45½ conduct for their positions.

[741] SON relies on the steps taken by the Crown to establish Manitoulin as a place for all Indigenous peoples, before Treaty 45½, as discussed above. Similar steps were not taken regarding the Peninsula. Further, Bond Head's proposal, as set out in the draft of Treaty 45½, did not include the Peninsula as a place for all Indigenous peoples to go to. It only referred to Manitoulin. As well, the 1847 Declaration recognized SON's possession of the Peninsula, but did not make that possession dependent on other Indigenous peoples coming to the Peninsula.

[742] Ontario notes that there was reference to the possibility of a settlement of Indigenous peoples on the Saugeen lands as early as 1833. As well, after the Crown proposed Manitoulin for an Indigenous settlement, there was a discussion at a General Council in January 1836 about that proposal. The Anishinaabe at the meeting discussed the challenges of Manitoulin, as a cold, distant place with scarce resources. They discussed whether the Saugeen lands would be preferable. This included the large southern portion of good farmlands. For the most part, those lands were surrendered under Treaty 45½.

[743] Ontario relies on other steps taken after the treaty. By 1838, some Ojibway leaders were advocating for the Peninsula as the future home for all Indigenous peoples. In 1840, the General Council of Ojibway Chiefs asked that the Lieutenant Governor reserve land in the vicinity of the Saugeen River as the future home for all Indigenous peoples. At other General Councils in the 1840s, the Saugeen and others expressed an interest in other Indigenous peoples coming to settle

on the Peninsula. Further, the Saugeen agreed to set aside land for Indigenous peoples that they invited to move to the Peninsula, to be made available at no cost to those communities. These later events are not consistent with Treaty 45, under which the Crown controlled who could come and settle on Manitoulin and under which Indigenous people who settled there would receive a property interest under the treaty. Dr. Reimer ultimately agreed that having the Peninsula as a place for all Indigenous peoples was only an idea or proposal.

[744] In the 1840s, the Saugeen did invite other Indigenous peoples to relocate to the Peninsula. The Saugeen invited specific groups, with the objective of establishing the Peninsula as a place of refuge and in order to assemble a sufficient population to establish a manual labour school. This was partly an effort by the Saugeen to protect their lands by increasing the Indigenous population in the area. The Saugeen were also very interested in establishing a manual labour school and needed a sufficient population base to do so. Their efforts to encourage other Indigenous peoples to come to the Peninsula were partially successful, but they were unable to attract enough people to establish the school.

[745] I conclude that Treaty 45½ did not create a place designated for the settlement of all Indigenous peoples comparable to Treaty 45 and Manitoulin Island. In summary:

(i) the Crown's plan prior to Treaty 45½ was to centralize Indigenous peoples at Manitoulin Island, which was reflected in Treaty 45;

(ii) the text of Treaty 45½ is significantly different than Treaty 45 and the differences discussed above are inconsistent with centralizing Indigenous peoples on the Peninsula in the same way as was done for Manitoulin;

(iii) the extensive land surrender in Treaty 45½ was not accompanied by a promised property interest like Treaty 45;

(iv) the Saugeen and Crown officials understood that the promise to protect the Peninsula for "you" referred to the Saugeen;

(v) the steps taken in the years that followed Treaty 45½ were consistent with the interpretation that Treaty 45½ had not already designated the Peninsula as a place for all Indigenous peoples; and,

(vi) neither the Saugeen's interest in having the Peninsula protected from white encroachment, nor the Crown's interest in opening up the surrendered lands to white settlement, were dependent on the Peninsula being a place for all Indigenous peoples.

[746] I do not find Treaty 45½ ambiguous on this issue. But if it is ambiguous, I would resolve that ambiguity in favour of SON.

[747] This does not mean that the other Indigenous people who moved to the Peninsula would not benefit from the fulfillment of the encroachment clause. By settling there, they would benefit from the protection of the Peninsula. And some Indigenous people did relocate to the Peninsula both before and after the treaty. But the treaty promise was made to SON.

[748] Ontario submits that even if it was not a formal condition of Treaty 45½ that the Peninsula become a place for all Indigenous peoples, it was in the interests of the Saugeen and the Crown that other Indigenous peoples move to the Peninsula. This position is amply supported by the evidence discussed above. An increased Indigenous population on the Peninsula would help protect the Peninsula from encroachments by white people.

[749] In summary, I conclude that the encroachment clause applied to the whole Peninsula, whether or not the land was cultivated, and the promise was made to SON.

The protection of the Peninsula between 1836 and 1854

[750] The next issue is whether the Crown fulfilled its obligations under the encroachment clause in the time period following Treaty 45½. The parties agree that the obligation to protect the Peninsula did not continue after Treaty 72. The relevant time period is therefore from 1836 until 1854.

[751] At the time of Treaty 45½, Bond Head reported his view that the Peninsula "can bona fide be fortified against the Encroachments of the Whites" to Glenelg.

[752] The period between Treaty 45½ and Treaty 72 was a time of major change. The governance of British North America changed, including for the Peninsula area. [63] There was rapid population growth. There was a rush for land. Squatting increased. I discuss this period of change below, then the problem of squatting, and then focus on the steps the government did, and did not, take to fulfill the encroachment clause in Treaty 45½.

British governance changes

[753] When the Royal Proclamation of 1763 established the first British provinces, the Peninsula area was not within any of them. Instead, the Peninsula was in the area described as "Indian Lands". The *Quebec Act, 1774* changed Quebec's provincial boundaries. Under that Act, the Peninsula area became part of Quebec. Then, in 1791, Quebec was split into Upper Canada and Lower Canada, and the Peninsula and lands to its south were within Upper Canada: *Constitutional*

[63] In this period of change, references to the Crown exercising authority from England are referred to as the "Imperial Crown". Once there was local colonial or provincial government, it is referred to as the "provincial government" or the "government".

Act, 1791 (U.K.), R.S.C. 1985, App. II, No. 3. As a result, the Peninsula area was within Upper Canada at the time of Treaty 45½ in 1836.

[754] In the 1830s, conflicts arose among settler communities, in both Upper Canada and Lower Canada, as a result of the continued control of those provinces by the Imperial Crown. Rebellions in both Upper Canada and Lower Canada led to the Durham Report[64] in 1839. The Report recommended introducing responsible government for all of the colonies in British North America, as well as improved practices in the disposal of what were known as Crown lands.

[755] In 1840, Upper and Lower Canada were merged into the United Province of Canada, with the Peninsula located in Canada West: *Union Act, 1840* (U.K.), R.S.C. 1985, App II, No. 4. For the purpose of discussing this historical period, I continue to refer to the area as Upper Canada.

[756] After 1841, the provincial government increasingly had more power and autonomy. In 1848-1849, responsible government was established at the provincial level. However, the Imperial Crown kept full authority in some areas, including the military and what was then called Indian Affairs, until the 1860s.

[757] Municipal government also developed in this period. Upper Canada was divided into districts, and counties existed within districts. The Peninsula was part of the London District, then the Huron District. In 1849, that district was divided into three counties, with the Peninsula being part of the County of Waterloo. Then, in 1851, the Peninsula was divided between the smaller counties of the County of Grey and the County of Bruce.

[758] SON submits that steps could have been taken to meet the treaty obligation to protect the Peninsula at all three levels of government: the local level, the provincial level and by the Imperial Crown. I discuss those steps below.

Population growth and the Great Land Rush

[759] The period from the 1830s through to the 1850s was a period of high non-Indigenous population growth. The non-Indigenous population in Upper Canada rose from 374,000 to 952,000 between 1836 and 1851. This mounting population growth continued into the 1850s and was mainly due to high birth rates in settler families and immigration (mostly from Britain).

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[64] The Durham Report is more formally called the *Report on the Affairs of British North America* dated 1839. Lord Durham had been charged with investigating and reporting on the causes of the rebellions.

[760] In contrast, SON did not have a large population in this time period. The estimate used for the Treaty 45½ annuity in 1840 was 500. The 1845 Bagot Commission Report indicated that the SON population was 327.

[761] The period of high immigration in British North America, stretching into the 1850s, formed part of a period of unprecedented migration in several places around the world. These events were called the Great Land Rush.[65]

[762] As put in the trial evidence, the provincial government in British North America could not control the number of immigrants who got on ships headed to North America from overseas. However, immigration was welcome. Accommodating population growth and immigration was a central objective of the provincial government, along with transportation improvements.

[763] The rapidly growing non-Indigenous population led to a corresponding growth in the demand for land. And as settlement expanded, the government sought to continue the process.

[764] As described by Dr. McCalla, an expert in economic history, the demand for land from the growing population, combined with inflation, produced a runaway land boom by the mid-1850s. Committed to development, the government did not attribute rising prices to inflation, instead seeing them as a sign of prosperity. Large price increases fostered a sense of urgency. The height of the boom was in 1854-1855, when about one million acres of land were sold.

[765] Along with the land rush came problems, including land speculation and squatting, discussed in more detail below. These problems were experienced everywhere on the settlement frontier of Upper Canada in the early to mid-1850s. The zone of settlement[66] of lands in Upper Canada was moving northward. Population growth was particularly rapid in newly opening areas with fertile land. Looking specifically at the area surrendered in Treaty 45½, the population of the Huron, Grey and Bruce counties in the area south of the Peninsula totaled about 35,000 in 1851. That population tripled in the next ten years.

[766] The process of surveying and selling lands was time-consuming. After Treaty 45½, the lands surrendered by that treaty were surveyed before sale and sold in a series of sales. It took about 15 years before surveyors reached lands near the boundary line at the south end of the Peninsula.

[767] In the public land auctions, the government sought to have lands go to settlers, rather than speculators, by imposing terms such as a 200 acre purchase limit and settlement-oriented duties to

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[65] Coined by Canadian historian John C. Weaver, *The Great Land Rush and the Making of the Modern World, 1650-1900* (Montreal & Kingston: McGill-Queen's University Press, 2003).
[66] Newcomers would normally seek to settle in newly available lands that were close to existing settlements, creating a wave of settlement across Canada.

be fulfilled before a patent would issue for the land, such as clearing roads. However, these terms did not stop speculation.

[768] Lawrence Oliphant, the Superintendent General of Indian Affairs, travelled to Saugeen in 1854 for the treaty council that resulted in Treaty 72. He passed through Southampton around the time of what became known as the "Big Land Sale". In September 1854, there was a sale of a significant part of the lands that SON had surrendered in Treaty 45½ in 1836.

[769] The Big Land Sale illustrated the problems both with speculation and with squatters. Thousands of potential purchasers attended the sale. The accounts of the sale refer not only to the large number of people and the excitement, but also to problems rising to the level of violence. Lands offered for sale had been surveyed into farm lots, in some cases several years earlier, and, in many cases, pioneers had squatted on those lands. Those squatters wanted their names entered as purchasers of the lands they had been working on. As well, the sale was intended for settlers but later it became apparent that speculators had been able to buy land. There were numerous complaints about the conduct of the sale. An 1858 Report into the conduct of Crown Land Agents found that there were many disputed claims for land, although the Land Agent who conducted the Big Land Sale was cleared of corruption.

[770] The Big Land Sale showed the pressure for land in the Peninsula area, and that there was squatting in the area.

Squatting and the tools available to address squatting

[771] Squatting, especially on what were called "Indian lands", was a common problem in the relevant period.

[772] There were different types of squatters. There were settlers who tried to gain an advantage by being among the first to occupy either newly opened lands, or lands about to be opened, with the plan to use their possession to gain actual title as soon as the land was surveyed and put up for sale. There were squatters who would stay on the land to take the timber, move and repeat the process, essentially stealing timber to sell. There were many variations in between these examples. Some squatters made private arrangements with Indigenous people. Some obtained leases, failed to pay, yet stayed on the land.

[773] The Crown had tools to address squatting, including general offences and, beginning in 1839, more specific legislation. As discussed below, those tools were underused when it came to the Crown protecting the Peninsula.

Available legislation to protect the Peninsula

[774] At the time of Treaty 45½, there were general offences prohibiting disturbing the peace and trespass that could be used to address squatting. Since the late 1700s, there was also an ordinance in place that prohibited settling in any "Indian country" without a written licence. Beginning in 1839, there was more specific legislation. First, there was *An Act for the protection*

of the Lands of the Crown in this Province, from Trespass and Injury, S. Prov. U.C. 1839 (2 Vict.), c. 15 (the "1839 Act"). The Act was introduced to address the issue that these lands had "from time to time been taken possession of by persons having no lawful right or authority so to do" as well as having been "unlawfully entered upon, and the timber, trees, stone and soil, removed therefrom" along with "other injuries" having been "committed thereon".

[775] The preamble of the 1839 Act referred to issues about unlawful activity on "Lands appropriated for the residence of certain Indian Tribes in this Province" among other lands. The stated purpose of the 1839 Act was "to provide by law for the summary removal of persons unlawfully occupying the said Lands, as also to protect the same from future trespass and injury".

[776] The 1839 Act provided for the appointment of Commissioners to receive information and inquire into complaints against any person who was illegally in possession of lands. Where a complaint was proved, a Commissioner could request the person to leave, or else force them to leave. They could face a fine, or jail, if they returned and resumed occupation. Similarly, if a person were found guilty of cutting or removing timber or other materials, they could face a fine, or jail. If the fine was not paid, then the Commissioner was empowered to seize and sell the timber under instruction of the Lieutenant Governor.

[777] Under the 1839 Act, the powers of Commissioners were limited to responding to complaints, rather than taking their own steps to address squatting. Anderson noted this weakness that year, and he questioned whether the Act would provide sufficient protection. This arose in the context of an Alexander McGregor, who was known to be squatting on the Peninsula. McGregor's situation was complicated because he had been given a lease from SON at an early stage, he had a family relationship within SON, and he had been engaged in a long period of commercial fishing and other activities. It appears that there was a complaint by a Saugeen person against McGregor a few years prior to the 1839 Act coming into force, saying that McGregor was encroaching on the fisheries, and requesting that he be driven off the land. After the 1839 Act became available, Anderson could not find anyone to make a complaint against McGregor in order to deploy the powers under the Act. Anderson was asked to comment on the 1839 Act and said that "the [A]ct recently passed, does not produce the desired effect".

[778] In 1840, Anderson once again commented about the inefficiency of the Act, noting that he had sent McGregor "a copy of the Act relating to Squatters, ... passed last Session" but that McGregor "totally disregards it, and continues his unlawful traffic". Anderson concluded that the "circumstances [show] the inefficiency of the late Act of Parliament to protect the Indians" including from squatters. The evidence does not show whether government officials took further steps against McGregor.

[779] There was also uncertainty about the application of the 1839 Act. Despite the broad purpose stated in the preamble, an enacting clause of the 1839 Act confined the authority of Commissioners to certain land, specifically lands "for the cession of which to Her Majesty no agreement hath been made with the tribes occupying the same and who may claim title thereto". Early litigation noted this issue, and a case found that the qualification seemed in effect to almost

nullify the statute: *Little v. Keating*, [1842] O.J. No. 19 (Q.B.); *The Queen v. Strong*, [1850] O.J. No. 236 (Ch.), at para. 43.

[780] The lack of clarity in the statute was addressed in the next Act, in 1849: *An Act to explain and Amend an Act of Parliament of the late Province of Upper-Canada, passed in the second year of Her Majesty's Reign, intituled, "An Act for the protection of the Lands of the Crown in the Province from trespass and injury," and to make further provision for that purpose*, S. Prov. U.C. 1849 (12 Vict.), c. 9 (the "1849 Act"). The 1849 Act was introduced to "explain and amend" the 1839 Act "and to make further provision for the protection of such Lands in that part of this Province".

[781] The 1849 Act expanded the range of lands to which the 1839 Act applied, removing any doubt that the Acts applied to the Peninsula, and gave added enforcement powers to Commissioners. However, the new Act did not change the need for a complaint for action against squatters.

[782] Further legislation came in 1850 – *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*, S. Prov. C. 1850 (14 Vict.), c. 74 (the "1850 Act"). The Act's purposes included providing "more summary and effectual means for the protection of Indians in the unmolested possession and enjoyment of the lands and other property in their possession" by, among other things, giving more powers to Commissioners. The Act prohibited non-Indigenous persons from residing on, settling on, or occupying any lands, roads or road allowances "running through any lands belonging to or occupied by any portion or Tribe of Indians within Upper Canada". The 1850 Act also made it illegal, and set out punishment for, the purchase or contract for sale or lease of that land without the authority and consent of the Crown. Without that consent, the transactions were void. Further provisions included punishment for trespassing to cut trees and remove resources.

[783] The 1850 Act required a proclamation before certain provisions – dealing with unlawful occupation, the removal of trespassers, and related penalties – would apply to specific "Indian Lands". The provisions of the 1850 Act were proclaimed to apply to the Peninsula in 1851.

[784] The 1850 Act still required a complaint before using the Act's enforcement powers, although where a squatter had been removed and then returned, a Commissioner could take steps against that repeat offender without a new complaint.

[785] At least initially, the attitude of some was that the 1850 Act should not be rigorously applied. In 1851, Superintendent General of Indian Affairs, Colonel Bruce, wrote to Anderson, saying that he agreed with Anderson that Commissioners should exercise "caution" and "forbearance" in using powers under the legislation, working up to strict enforcement.

[786] In the period between Treaty 45½ and Treaty 72, there were certainly complaints about squatting on the Peninsula. Some of the complaints were documented and are discussed below. Those complaints show that timber theft was a significant problem, along with other kinds of

squatting. However, no historical records have been found of a warrant being issued, or any person being prosecuted, fined, removed or committed to jail under the 1839, 1849 or 1850 Acts for squatting or related activities on the Peninsula during this period.

[787] I accept Canada's submission that there may have been unreported cases about the Peninsula. However, there are records of enforcement under those Acts in other parts of the province. The historical records show that the powers under the above legislation were used against squatting activity on Walpole Island, on the Grand River Six Nations' lands, and in the County of Essex. Further, the records, and reported cases, indicate that there were some prosecutions and convictions in some of those areas: *Little v. Keating*; *The Queen v. Strong; R. v. Baby*, [1854] O.J. No. 62 (Q.B.); *Jones v. Bain*, [1854] O.J. No. 105 (Q.B.).

[788] The enforcement steps taken under the legislation in other areas of Upper Canada included a wide range of sanctions being applied to squatters. Persons unlawfully on lands were subject to notices of removal from the lands, writs of ejectment and fines. Commissioners seized timber that had been taken without authorization. However, the historical record does not show significant use of these sanctions in relation to the Peninsula.

Extent of squatting

[789] As discussed below, I find that there was substantial squatting, escalating over the time period, including on the Peninsula.

[790] Not surprisingly, actual statistics about the amount of squatting are not available. Squatting was illegal. Dr. McCalla cited Canadian historian John C. Weaver, saying that there "are gaps in knowledge about small squatters on frontiers everywhere".

[791] The 1849 Act showed the government's appreciation that squatting could be an anonymous activity. In that Act, powers were given to Commissioners to issue a "General Notice to Quit" if the identity of the person squatting was unknown. There were also alternatives to personal service of Warrants of Removal and other powers to address challenges in identifying squatters. Further, the 1850 Act showed that there had been "great difficulty" in carrying into effect "the several Acts relating to Indian Lands" because people were giving false names or concealing their names. The Commissioners were therefore allowed to use whatever name was given or known, or to simply describe the person, when enforcing the legislation against them.

[792] Despite the lack of precise figures, there is no doubt that there was squatting on and near the Peninsula between Treaty 45½ and Treaty 72. Superintendent General Oliphant, who negotiated Treaty 72, himself saw instances of squatting on his travels to the Peninsula. On one occasion, he noted that squatting had led to murder. In addition to McGregor, discussed above, there are other anecdotal examples of squatting on or near the Peninsula that are summarized below.

[793] As well, several government reports in the relevant time period spoke of the prevalence of squatting. The practice was widespread.

[794] In the 1839 Durham Report, the Commissioner of Crown Lands and Emigration, Charles Buller wrote that a "very considerable portion of the population consists of squatters; persons, that is, who have settled upon land … without a title". He described squatting in Upper and Lower Canada as arising "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".

[795] Buller continued, that the "habits of the whole population of North America … 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".

[796] In an 1839 submission to the Bagot Commission, Acting Superintendent of Indian Affairs Keating spoke about squatting, and said that he could "speak with some degree of certainty, the experience of the last year having been constantly to prove the many evils resulting from the presence of squatters on the Indian lands".

[797] In 1840, there was an investigation into the "affairs of the Indians" and changes that could usefully be made in the Indian Department. The Executive Council Committee considered several issues, including the course to be adopted regarding squatters on "Indian Land" and the impact of the 1839 Act. The Committee's report[67] discussed the problems of squatters, who were often ignorant of their rights, and spoke of the government distributing notices, which are discussed below. The report recommended the appointment of Commissioners and the use of the enforcement powers under the 1839 Act.

[798] Also in 1840, Indian Superintendent Anderson gave a statement to the Bagot Commission. He said that the "chief difficulty" with preserving uncultivated Indigenous lands for exclusive enjoyment was "their being taken possession of by squatters, more or less, and adventurers cutting timber". He went on to say that uncultivated land in the "settled parts of the Province" could also be considered objectionable since they prevented "settlement by a more industrious white population".

[799] At this time, the Saugeen and the Peninsula were not within Anderson's area for supervision. And Anderson did not claim to know how much squatting was taking place in any event. However, he said that he did not believe the "injury sustained by the Indians from squatters to be so extensive as they imagine". As discussed above, he also acknowledged the weaknesses of the 1839 Act. He said that "laws have been repeatedly enacted to secure to the Indians the exclusive enjoyment of their property, but I am told they do not produce the desired effect; hence amongst the Indians, in some cases at least, the disquieting idea, that these lands do not bona fide belong to them, or that the Government is not their competent guardian, otherwise there could be no difficulty in ejecting and punishing intruders".

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[67] Report of the Executive Council of Upper Canada (1840).

[800] In another submission to the Bagot Commission, in 1843, Chief Superintendent of Indian Affairs Jarvis said that he found Indigenous lands, in all parts of the province, "intruded upon to an alarming extent, the prey of the most unlimited speculation and plunder".

[801] This widely recognized practice of squatting continued into the next decade. As opined by Dr. McCalla, the government encountered intense problems of speculation and squatting everywhere on the settlement frontier in Upper Canada in the early to the mid-1850s.

[802] Although official government policy denied the principle of squatters' rights, there is considerable evidence that as part of its promotion of settlement, the government accepted squatting as part of the settlement process. As outlined above, Buller recognized that unauthorized occupation of lands was a "habit" of the whole population. He also recommended that squatters should be "if not secured in the possession of the land they occupy, at least guaranteed the full benefit of their improvements".

[803] Squatters became so fundamental in the settling of Upper Canada that the usefulness of squatters in opening up a new country was generally admitted. Further, the squatter was popularly regarded as equitably entitled to compensation for his improvements if he did not get the land. Eligible squatters could buy the approved lot at a private sale from the government at a price determined by an inspection and valuation of that lot, instead of at auction. Alternately, the squatter might be compensated for improvements.

[804] Dr. McCalla spoke of "land-hunters" – men intent on nothing more than establishing a presence that could quickly be sold. The process depended on the flow of settlement to give value to the lands involved. Dr. McCalla gave the example of a scenario, common in Upper Canada, where the squatter would develop raw land to the point that it could be sold as a working farm to a settler with capital, and the squatter would therefore get a return from the land.

[805] The Pennefather Report[68] of 1858 came after Treaty 72, but it reflected on squatting before that time. The Report noted "that the sympathies of the Country at large are with the squatters".

[806] Further, the 1856 government advertisement for the sale of the surrendered Saugeen lands after Treaty 72 showed some acceptance of squatting. The advertisement said that people who may have squatted on those lands could receive compensation for their improvements.

[807] In summary, there was considerable squatting in Upper Canada at the relevant time, which was known to the government, and tolerated if not also encouraged. I now move to the evidence

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[68] The Pennefather Commission was tasked with reporting on "the best means of securing the future progress and civilization of the Indian Tribes in Canada" as well as the "best mode of so managing the Indian Property as to secure its full benefit to the Indians, without impeding the settlement of the country".

of squatting on the Peninsula, in other words, encroachments by white people. Under the encroachment clause in Treaty 45½, the Crown had promised to protect the Peninsula from those encroachments.

Squatting on the Peninsula after Treaty 45½

[808] Because squatting was illegal, the full extent of squatting on the Peninsula is not well documented. However, there are historical records about several specific complaints by SON's ancestors, and what was, and was not, done about them. The evidentiary record shows that in the period between Treaties 45½ and 72, there was squatting on the Peninsula and Crown officials were well aware of it.

[809] The defendants agree that there were reported instances of squatting on or near the Peninsula after Treaty 45½. However, they dispute the extent of the squatting and dispute the suggestion that the Crown response was inadequate. Overall, the evidence shows that the government responded to SON complaints, to varying degrees, but was not proactive in relation to the protection of the Peninsula. More was done elsewhere. I conclude that more should have been done for SON.

[810] Specific complaints about squatting in and around the Peninsula began early on, showing that encroachments were already taking place. Ontario submits that the evidence shows a persistent but limited problem of encroachment on the Peninsula prior to Treaty 72, even allowing that not all incidents of trespass or squatting were reported. I disagree. Given the illegal nature of squatting, the reported incidents only show part of the problem.

[811] Ontario further submits that most instances of squatting involved cutting timber rather than longer term occupation. I agree that there were significant problems with timber theft on the Peninsula. Those activities were also encroachments, subject to the encroachment clause, and no less important than other types of squatting.

[812] The reported problems that I detail below are varied. The defendants note that several of the complaints arose from private arrangements and relationships with Indigenous people. Some also arose due to business ventures, such as saw mills. The more public conduct involved in some the complaints may have made the activities more well-known and better documented.

[813] The documented complaints began in 1838. Chief Superintendent of Indian Affairs Jarvis reported that SON leaders strongly objected to white fishermen in their waters – interference that was also affecting Saugeen hunting grounds. At a General Council of Ojibway in 1840, SON told Jarvis about their people "having been repeatedly ordered off from the woods where they had gone to hunt" and that in some instances they "had their venison taken away from them by white men". Jarvis informed the Chiefs that no person had a right to take their venison, and he told them that if anything of the kind occurred again to come and inform him and they would soon have them brought up for it.

[814] In 1843, Chief Wahbahdick wrote on behalf of SON complaining, among other things, that there were white people coming to their lands and trying to settle. He was writing from Big Bay (near Owen Sound) and he asked for a paper to show the white men who were coming there. The Chief referred, among other things, to "a great many white men who come here and want us to give them land and we do not wish to hear them as we do not want any white men on our land".

[815] Jarvis reported Chief Wahbahdick's concerns about the "intrusion of whites on Indian Lands" to the Executive Council. He recommended appointing someone with "Magisterial authority" to address these complaints, saying that in "a part of the country so distant, it is next to impossible to prevent this practice, it can only be done by the appointment of a person armed … with Magisterial authority & employed for that special purpose, in which case he would have to reside among the Indians or upon the Tract and would of course expect to be paid liberally for his services". As Dr. Reimer agreed, the recommended appointment only makes sense if Jarvis believed that there were actual squatters encroaching on the Peninsula, rather than people just coming to inquire about lands and then leaving when they were told that they could not have land. The Chief was speaking about complaints of actual intrusions.

[816] In response, the Committee of the Executive Council agreed that something should be done and said that a magistrate would be appointed once the area was attached to an organized district. The Committee noted that the complaint of the intrusion of white settlers "may be in some measure avoided, by the appointment of magistrates at the village of Sydenham who would endeavour to enforce the law against the trespassers".

[817] The Executive Council Committee went on to say that they were "aware of the very great difficulty which has been found … in all parts of the Province where the Whites and the Indians are settled in close proximity to each other". Despite Jarvis's view that the suggested appointment would be effective, the Committee said that "they apprehend that no very effectual remedy can be found against intrusion upon Indian Lands or against the demoralization of the Indians, but the settlement of the latter in some insular position from which white settlers can be altogether excluded".

[818] Although the government had the authority to appoint Commissioners under the 1839 Act, they did not do so for several years. As outlined below, a magistrate was eventually appointed in the Owen Sound area in 1846, and Commissioners in the area were appointed in the years afterwards.

[819] The 1843 petition from Chief Wahbahdick asked for a copy of Treaty 45½, as well as "a [copy] of the plan of the tract of land sold by us to the Government" and "a written paper" to show the white people who were coming, wanting land. In 1844, after the boundary was agreed as requested by the Saugeen, the Saugeen Chiefs again requested written confirmation of the boundaries "so that there may be no misunderstanding on this point". But it was not until the 1847 Declaration referred to above that the Saugeen were provided with the requested written document.

[820] The evidence shows that the Indian Department knew about actual encroachments on the Peninsula in the 1840s and early 1850s and about the risk of squatters settling on unsurrendered land on the Peninsula.

[821] There was other documented squatting around this time. In early 1846, Anderson was receiving applications from squatters and from settlers. For example, an Aneas Payette, who was Métis, and his Indigenous wife, had been given land without the consent of the band. Anderson ordered them to leave. Payette asked for permission to stay, noting that there were other white and Métis men there as well, but his request was refused on the grounds that the Peninsula was exclusively set apart for the use of SON.

[822] Also in 1846, Anderson wrote to the Civil Secretary about another complaint, asking for a magistrate to be appointed in Owen Sound. He reported that he had "received a communication from the Owen Sound Indians representing that an Indian and his wife had been nearly killed by some of the white settlers in that part of the country". There were other complaints as well. Anderson noted that the Indigenous complainants hoped that a magistrate would be appointed in the Owen Sound Village. Anderson recommended the appointment of a merchant, John Frost, who was appointed shortly thereafter.

[823] Also in 1846, the Saugeen petitioned Elgin about their efforts to attract other Indigenous peoples to the area, asking that the Peninsula and Owen Sound areas be secured to them so "that they may be safe from any further encroachment of the whites".

[824] In September 1850, SON Chiefs wrote to the Crown Land Agent John Clark about timber theft:

> We wish to call your attention to the ways in which parties here are plundering our Lands of Timber, as well as the Government wild Lands, they travel through the woods in every direction in search of pine cutting and, slashing all they can find, … if they are allowed to carry on their [wasteful] practices there will not be a stick of pine left in a few years therefore we request that you will immediately come up and investigate the matter.

[825] The Chiefs said that the people they complained of called themselves the "Saugeny Company". One of them, a William Kennedy, had previously obtained a lease[69] of a fishing island

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[69] There is some evidence that a lease was obtained by Kennedy, directly from SON, in 1849. A lease between SON and Kennedy was not approved by the government until a few years later, although it was subsequently taken away at SON's request, who complained that Kennedy was not paying the stipulated rent.

from SON and had also sought permission from Anderson to cut timber on the Peninsula, but he had not received permission.

[826] The Kennedy events show lenient Crown enforcement. Clark reported the complaint to the Commissioner of Crown Lands. He also supplied information about Kennedy's prior activities. He reported that Kennedy had informed him that he had cut timber the prior winter in anticipation of obtaining a licence. Kennedy told Clark that he could not obtain a licence at that time and Kennedy assured him that he would stop cutting. Instead, he would make barrels from the timber that was already cut, and he would keep account of the Crown dues that he would owe. Kennedy later informed Clark that he had made 1,000 barrels on which he would owe dues. Clark explained that he warned Kennedy that "he was not to infer that I in any degree sanctioned his proceedings" but also noted that if Kennedy had "confined himself to this, he would so far have acted in good faith". Clark commented, however, that it appeared from the Saugeen complaint that Kennedy and his party were "still committing extensive depredations" including on the Peninsula lands. In his report to the Commissioner, Clark requested instructions and noted as follows:

> I have no doubt that the extreme lenity with which the different parties have hitherto been treated, has only encouraged them to further acts of aggression…

[827] This correspondence says nothing about the treaty obligation and nothing about potentially prosecuting Kennedy or others engaged in timber theft. Kennedy was not even asked to forfeit the timber. Clark noted that on "the former occasion" when Kennedy "had incurred heavy legal penalties he was let off for the mere payment of the Crown dues and the costs incurred yet to this he demurred". Clark went on to suggest that timber cutting should be allowed under restrictions, perhaps even by granting Kennedy a license to keep other intruders at bay.

[828] Another issue about squatting and timber theft arose in 1850, also in the context of fishing leases. Clark was instructed to inform a Mr. McDonald that he had no right to take possession of land nor to cut timber in the vicinity of the Saugeen and to warn him "to desist from trespass otherwise he will be liable to prosecution". Given the presumption of regularity, I presume that Clark followed his instructions, but the evidence does not show either compliance on McDonald's part, or any prosecution.

[829] Beginning around 1851, an L. Gleason started building a sawmill on the Peninsula based on an unauthorized agreement with a few individuals from the Colpoy's Bay Band. Gleason did not have the needed permission to cut timber or run the mill, although he claimed that he did and that he was not trespassing. Anderson told Gleason to either leave or he would be prosecuted, but it has not been shown that either took place. Gleason continued to be the subject of timber-cutting and squatting complaints as late as 1856.

[830] In 1852, John McLean was appointed as an Agent for the sale of the land surrendered by the Saugeen and as Commissioner for the protection of the Peninsula. He was stationed in Guelph where he worked for a bank. In September 1852, Anderson wrote to Frost about another complaint

of timber theft, this time about a W. Sutton. Anderson informed Frost that McLean had been appointed a Commissioner "to prevent depredation on the [Peninsula]" and that the Indigenous peoples must apply to him for redress. Anderson said that in the meantime, he thought that the Indigenous people had a right to prevent the removal of the saw logs, and in Frost's capacity of Justice of the Peace if he could render them any service, he would thank Frost to do so.

[831] Shortly after McLean's appointment, he reported complaints from the "Owen Sound Indians" about parties cutting timber on their lands. He wrote to the Superintendent General of Indian Affairs saying that he had written to the people complained of warning them of the consequences of such illegal conduct, but he also said that he was unaware of the extent of his authority to deal with the complaints. McLean also reported squatting on the recently surrendered lands and requested instructions, saying "I am at a loss how to act and await your instructions as to the proper course to be pursued".

[832] McLean received a reply, referring him to the contents of the 1839, 1849 and 1850 Acts to deal with trespass and timber theft, and suggesting that, to prevent squatting, he give notice that lands would be sold without any consideration for any improvements that had been made.

[833] McLean continued to respond to complaints about timber theft from Indigenous people, including from Owen Sound. A William Harrison had private dealings with some Indigenous people to conduct his activities. McLean informed Harrison that while it appeared that he had not committed a willful breach of the law, he was still trespassing. However, McLean informed Harrison that his case would receive "as favourable a consideration as possible".

[834] There was significant demand for land on the Peninsula in 1854, as shown both by inquiries about land for sale and by continued complaints of squatting. However, the Crown responses to those inquiries did not emphasize that the land was not available. Instead, the responses left open the prospect that the land may become available.

[835] The Indian Department received many requests for land on the Peninsula between January and October 1854. For example, a William Bull wrote in March of 1854 asking whether "any portion of the peninsula tract of land … is open for sale at present and if so what are the terms of settlement, as there are a number of families in this neighbourhood who would like to get land there". If the land was not open for sale, he asked "whether there was anything to prevent individuals from settling on it in anticipation of such sale". He received a reply informing him simply that the lands were not presently open for sale.

[836] Bull sent a similar request in August 1854, asking if settlers could start making improvements on government lands. Oliphant responded, saying, "no arrangement for the sale of these lands have yet been concluded. The Governor General cannot under any circumstances sanction the squatting upon any Indian Lands, or of making improvements until an actual purchase and payment of at least one instalment is made".

[837] In another example earlier in 1854, an agent in Quebec inquired about buying some lands in Upper Canada. He said that "one of the tracts to which my attention has been called is a portion of the Indian Peninsula on Lake Huron ... I have been informed that this tract of Land will Soon be Surrendered to the Government". The government response was that "the part of the Saugeen Peninsula to which you refer has not yet been surrendered by the Indians for sale but your application ... will be duly filed". Similar requests were received by the Indian Department in February, March, April, June, and July, and in each instance the Superintendent General replied that the lands were not yet open for sale.

[838] In March 1854, Anderson responded to questions about Indigenous groups under his superintendence, including SON. He said that there had been constant complaints and squatting on SON lands for many years, to some extent arising from leases given by SON or other dealings between the settlers and band members.

[839] Concerns about squatting intensified as existing Crown lands in the Bruce County region were taken up. Crown officials knew about the increased demand for land in that region and the related, growing potential for unlawful action. This was illustrated in 1851, when Crown Land Agent McNabb was appointed to oversee the sale of already surrendered lands. He reported that "hundreds of persons have gone and settled themselves even before the surveyors have been able to divide the lands into farm lots [and] much difficulty is expected to arise unless these lands are offered for sale and settlement at an early day".

[840] In a letter dated August 14, 1854, before the Big Land Sale at Southampton, McNabb predicted that since the existing Crown lands in Bruce County were "disposed of, I shall not be surprised to see or hear of squatters taking forcible possession of the Peninsula". Oliphant also saw squatting in the context of the Big Land Sale, having travelled through this area on his way to negotiate Treaty 72. In October 1854, he recalled the events of the Treaty 72 council, saying that he had explained to SON "the avidity with which the neighbouring lands were taken up by whites" and that SON was compelled to admit that "squatters were even then locating themselves without permission either from themselves or the Department upon the [Peninsula]".

[841] There is other evidence of squatting, including on land nearby the Peninsula. For example, in December 1848 Clark reported "predations committed on public lands" with respect to cutting timber by a Mr. Withers. By 1849, Withers had built a sawmill in Kincardine, just south of the Peninsula. Actions were taken against Withers, including possibly seizing timber, but he was not prosecuted.

[842] Further, in June 1852, Anderson visited the Owen Sound area and reported that squatters had begun to settle on the Half-Mile Strip[70] before the survey of lots was completed. Indeed, a month earlier he had recommended that "no time should be lost in having a village plot laid out where the Road crosses the Sable [Sauble River]" on the Half-Mile Strip just surrendered by SON. As noted above, McLean was also aware of squatting on these recently surrendered lands

[843] The evidence of squatting, including trespass and timber theft, shows that there were encroachments on and near the Peninsula beginning not long after Treaty 45½ and continuing through the time period. Encroachments on the Peninsula escalated in the 1850s, as the zone of settlement continued to move north.

[844] Considering all of the evidence, I find that there was significant squatting on the Peninsula after Treaty 45½. Given the illegal nature of squatting, I conclude that the above specific evidence is a small part of the illicit activity that was actually going on. The more general government reports better illustrate the extent of squatting across the settlement frontier.

[845] In summary, I find that there were encroachments by white people on the Peninsula after Treaty 45½. SON made complaints from early in the period between Treaty 45½ and Treaty 72. The problems and pressures associated with squatting in that part of the province continued through the time period, and significantly escalated in the 1850s. There were Crown responses to SON's complaints, but there is little to suggest that squatters were removed or penalized in a significant way. The evidence also shows the government's tacit approval of some squatting activities and lenient responses to illegal activities. I now move to the question of what was done, and what could have been done, to protect the Peninsula.

Crown actions that were or could have been taken to protect the Peninsula

[846] The defendants submit that the pre-Confederation Crown took sufficient steps to fulfill the Crown obligation to protect the Peninsula, as required by the encroachment clause in Treaty 45½. The defendants rely on general steps, such as the above provincial legislation, along with the above Crown responses to SON's specific complaints. The defendants also rely on the location of the Peninsula, general notices and government reports.

[847] SON points to the steps that were not taken, and other resources that ought to have been deployed. SON further submits that some government land policies worsened the problem by diminishing the supply of land for settlement.

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[70] The land that became known as the "Half-Mile Strip" was surrendered by SON in 1851 under Treaty 67, as discussed below.

[848] This is not a case where the Crown did nothing to fulfill its obligations. Steps were taken. However, I conclude below that the Crown did not do enough.

[849] I consider the steps that were, or were not, taken to protect the Peninsula, and the other factors raised by the parties, as follows:

(i) the legislation about squatting, which was of some assistance;

(ii) the remote location of Peninsula, which was not of significant assistance;

(iii) general notices against squatting, which were not used in the relevant area and therefore were not of significant assistance;

(iv) government reports, which mainly showed the Crown's awareness of squatting;

(v) enforcement through officials, some of which was done but more of which could have been done;

(vi) the possibility of using the militia or the military, which were not well-suited to the task; and,

(vii) the government land policies, which were not a significant factor.

[850] I conclude that the steps put forward by the defendants show some general government initiatives to address squatting and related activities across Upper Canada. However, those general initiatives were not effective, at least with respect to the Peninsula. The Crown also responded to complaints, to varying degrees. However, there was a lack of specific initiatives focused on fulfilling the treaty obligation itself. More could and should have been done.

(i) Squatting legislation

[851] The defendants rely on the 1839, 1849 and 1850 Acts as government action to protect the Peninsula. I agree that the legislation, discussed above, was of some assistance.

[852] The defendants further submit that this specialized legislation was necessary in order to protect the Peninsula. The legislation did create a more extensive legal framework for enforcement. Under the legislation, government officials were given powers, offences were created and sanctions were available.

[853] The difficulty with the legislation, from the standpoint of the promise to protect the Peninsula, is that it was complaint-driven. It did not mandate proactive steps to protect the Peninsula from squatters. It only went so far in addressing the promise to protect the Peninsula from encroachment. As well, as discussed above, the Crown representatives were sometimes lenient in using the legislative powers to protect the Peninsula.

[854] In addition, there were some general offences that would have been available to address some squatting, providing more options to the Crown. I find that the Crown was not limited to the authority under the above Acts.

(ii) Remote location of the Peninsula

[855] Canada submits that the remote location of the Peninsula itself provided some protection. The Peninsula was a relatively remote location in 1836. However, the location did not provide much protection. Specific complaints of squatting in the area began at least as early as 1838 and escalated over the period leading to the 1850s. By the 1850s, there was considerable squatting in the area. The Big Land Sale just prior to Treaty 72 took place in Southampton just south of the Peninsula. Its location did not hinder thousands of people from going there, seeking land.

[856] I find that the location may have been of some help in the very early part of the lengthy time period between the two treaties, but, overall, it was not a significant barrier to squatting. Further, the Crown knew about the complaints of squatting on the Peninsula, and therefore knew the location was not a significant barrier.

(iii) General notices prohibiting squatting

[857] The defendants rely on general government notices saying that squatting was prohibited, which were posted and published in newspapers. However, that evidence is limited to a few notices between 1836 and 1854 and the evidence relates to other geographic areas. The notices were as follows:

(i) There was a February 1836 notice titled "Indian Lands. Huron Reserve" near "Lake St. Claire". It predates Treaty 45½ and was specifically directed at other lands, which were not near the Peninsula.

(ii) Correspondence in 1844 suggests that Chief Superintendent Jarvis posted a notice regarding all persons settled on "Indian Lands" who did not comply with existing regulations. However, the description of the area in the documents suggests that it was meant for another geographic location. Jarvis referred to the land north of a river being open for sale, which would not have applied to the Peninsula lands.

(iii) In October 1845, there was a handwritten notice regarding "Indian Lands" from the Indian Office in Toronto. It stated that squatters on "Indian Lands" must enter into satisfactory arrangements for the legal possession of the land by January 1, 1846, or they would be prosecuted for cutting and destroying the timber and would be ejected from the land. This was a general notice inasmuch as it did not give a location.

(iv) There is also a notice regarding "Indian Lands" from February 1846 and a draft just before it. This notice is printed and it also shows that it is from Toronto. Its text mainly matches the above 1845 document except that this notice said that squatters

> on "Indian Land" must enter into satisfactory arrangements for the legal possession of the land by April 1, 1846.

[858] Given the presumption of regularity, I am prepared to presume that the notices were in fact published or posted in some relevant locations around the time they are dated. But I must consider whether the presumption extends to any area nearby or on the Peninsula, and I find that it does not do so.

[859] The first two notices relate to other locations so the presumption of regularity does not lead to presumed postings in the Peninsula area. However, the 1845/1846 notices refer generally to "Indian Lands". Considering only their words, they would apply to squatters on the Peninsula. But the other evidence must be considered as well. As of 1845/1846, the land on the Peninsula had not been surrendered. It is therefore unlikely that the Crown would invite squatters to possibly obtain legal possession of unsurrendered lands on the Peninsula in the timeframe contemplated in those notices. The prospect of almost-immediate legal possession is also inconsistent with the obligation to protect the Peninsula.

[860] Taking the evidence as a whole, the presumption of regularity does not go far enough to presume that those notices were intended for the unsurrendered lands on the Peninsula, or that these notices were posted there or nearby. Nor is there other trial evidence that shows they were.

[861] I therefore find that none of the above pre-Treaty 72 notices related to Peninsula lands, nor were they posted in that area.

[862] There are more notices after Treaty 72, commencing with a notice initiated by Oliphant after that treaty was entered into in 1854. Further notices about squatting and removal were issued in advance of land auctions on June 9, June 22, and September 27, 1855 and in early April 1856. These notices related to the land surrendered in Treaty 72. They have more specific references to Peninsula lands, and there is evidence of posting and of newspaper publications in the Owen Sound area.

[863] The defendants rely on other general evidence about notices. The 1840 Report of Committee No. 4 on the Indian Department noted that the government had, "for a long series of years been careful in issuing and distributing in these Districts, Proclamations, emphatically cautioning all persons against trespassing or making such illegal contracts with Indians, either collectively or separately, and warning all parties thereto, that such contracts would never be confirmed or recognized". However, the report goes on to say that this "particularly applies to the Grand River Tract inhabited by the Six Nations Indians". Other references to locations in the report do not suggest that the Peninsula was an area under discussion. For example, the discussion speaks about the Indian hunting grounds being "encircled" by agricultural settlement of Europeans, and "reservations now being completely surrounded by white settlements". That description did not apply to the Peninsula.

[864] There is also a general reference in the Bagot Commission Report of 1845 to the "many" proclamations that had been made "from time to time" against trespass and buying lands from Indians.

[865] These two reports provide some general evidence about efforts made using notices at an early stage. However, given their timing and context, they do not show that notices were posted in or around the Peninsula area in particular, prior to Treaty 72.

[866] Considering all the evidence, I find that there were no general notices published or posted in the Peninsula area between Treaty 45½ and Treaty 72. And even if a few had been published or posted, that would be an unremarkable effort over an almost 20-year time period.

[867] Immediately after Treaty 72, a general notice was published in the Peninsula area. Oliphant directed that there be a notice posted that no squatting was allowed on the newly surrendered land, that anyone trespassing would be prosecuted and punished, and that any improvements made would not be recognized by the government. This was a tool that could have been used much earlier, to protect the Peninsula as required by the encroachment clause.

(iv) Government reports

[868] Canada submits that the various government reports referred to above showed that the government was considering the problem of squatters and how that problem might be addressed as a general matter. That was the case. However, what the reports show is the government's awareness of the problem and its breadth, not steps to protect the Peninsula other than the general legislation.

[869] There were no reports or policies developed in this period that were specific to the Peninsula. However, Canada submits that the 1847 Declaration was a government action that provided some assurance and assistance to SON and that it was a measure with respect to the Peninsula.

[870] The 1847 Declaration was in response to the 1843 petition in which the Saugeen asked the provincial government to provide them with "a piece of paper" delineating their land to show to white people who came wanting land. The Saugeen sought to protect their land and requested formal measures to let everyone else know it was protected. As put in the 1847 Declaration, the Saugeen had "represented that it would be greatly to their advantage" to have what became the Declaration.

[871] The purpose of the 1847 Declaration was to provide the Saugeen with the requested written document to show "white men". It served the Crown's promise to protect the Peninsula. However, it was mainly a response to the Saugeen, who were trying themselves to protect the Peninsula.

(v) Enforcement through officials

[872] There were numerous officials who, between 1836 and 1854, had some authority that allowed for enforcement of available laws against squatting, including unauthorized occupation of land and timber theft. The defendants note that some officials were involved in responding to SON's complaints, as discussed above. SON submits that more could have been done. I agree with SON.

[873] In considering what enforcement steps were or could have been taken, it is important to recognize that squatters were not hard to find if one went looking for them. Activities like clearing land or taking timber took a relatively long time. Squatters would use the same roads and tracks as everyone else. It would not be very difficult for a Crown official, sheriff or constable to find squatters for the purpose of, for example, delivering a notice to vacate or to make an arrest.

[874] There were various government officials who could have assisted with the protection of the Peninsula from encroachments.

[875] Beginning with Superintendents, Jarvis was the Chief Superintendent of Indian Affairs from 1837 to 1845. His responsibilities were then transferred to Anderson. Among other things, their duties and responsibilities included "watch[ing] over the interests of all Indian Tribes", visiting their villages and "protect[ing] their lands from the encroachments of the white inhabitants". These obligations applied to all Indigenous peoples, not just the Saugeen. As discussed above, Jarvis raised the protection obligation early on, but for most of the period between Treaties 45½ and 72, the Crown activities regarding the Peninsula were mainly focused on responding to complaints and giving reports.

[876] Moving to Commissioners, only two were appointed for the area that included the Peninsula during the period between the treaties, although more could have been appointed. Anderson was appointed as a Commissioner in 1851. McLean was appointed as a Commissioner in 1852. Their steps to address squatting, as discussed above, were limited. They did respond to some complaints, yet they did not use all the powers they had under the legislation. Among other things, the Acts authorized the seizure of timber and the issuance of notices or warrants to remove squatters, as well as the ability to take action if the squatters returned. As put by Dr. McCalla, the Acts were rarely enforced and therefore appointments of Commissioners were rarely made – and it would have been better if more had been made.

[877] Canada relies on evidence of enforcement through the appointment of Commissioners elsewhere in Upper Canada, which resulted in prosecutions and convictions in those locations. There is more evidence of enforcement activities in other areas. Yet the evidence does not show prosecutions and convictions for squatting on the Peninsula in the relevant period.

[878] Law enforcement was also available at the county level, in the form of magistrates, sheriffs and constables. As of Treaty 45½, the Peninsula was within the London District in Upper Canada. During the relevant period, it became part of a series of other districts and counties. The Peninsula

was part of two counties as of 1849 and going forward. Therefore, there ought to have been local law enforcement.

[879] There were magistrates in the immediate area. Frost was appointed in 1846 in response to the complaint by the Owen Sound Band[71] about an Indigenous person almost being killed by a white settler, as discussed above. Anderson was appointed as a magistrate in December 1844. Pursuant to the 1850 Act, Anderson and McLean were also considered Justices of the Peace. As Superintendent General of Indian Affairs, Oliphant was also a Justice of the Peace pursuant to the 1850 Act.

[880] Each county had a sheriff. Sheriffs could have been used to eject squatters once the squatters had been given proper notice and had failed to remove themselves.

[881] Canada submits that for most of the time period between the treaties, the counties that included the Peninsula were large and the sheriffs would therefore not be located nearby. The smaller counties of Grey and Bruce did not become separate counties until 1854 and 1867, respectively. Although there is little evidence about the locations of each county sheriff, I accept that the size of a county would have an impact on how much a sheriff could do. Nonetheless, the Peninsula was part of two counties, and some county resources ought to have been available to assist with the protection of the Peninsula. Immediately after Treaty 72, Oliphant directed that the sheriff assist in warning squatters not to trespass on the newly surrendered lands. The same thing could have been done prior to Treaty 72.

[882] Further, a Commissioner could appoint any literate person willing to act to help him if the sheriff was not available, as set out in the 1850 Act. That person would be empowered under the Act to remove a squatter.

[883] There is then the question of whether police or constables could also have been used to protect the Peninsula. At the time there was no provincial police force, and municipal police forces were limited to large urban centres such as Toronto, Montreal and Quebec City. Outside these large centres, the Crown did create specific-purpose police forces, for public works under construction, such as canals. As put by Mr. Graves, those forces were created to police large construction sites, which were regarded as valuable sites for the industry, commerce and agriculture of Upper Canada. Thus, the Crown did sometimes set up police forces when it was consistent with their priorities to do so. This could have been done for the Peninsula.

[884] Local constables could also have been appointed and assisted with local law enforcement. For example, constables could have executed warrants issued under the 1850 Act. Magistrates could also appoint local constables, if needed.

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[71] The historical evidence shows that the Owen Sound Band ultimately became part of SON.

[885] The defendants note that there were challenges in deploying local constables. They only worked part-time and, in frontier settings, they were more likely to sympathize with those looking to expand settlement than those who were opposed to it. Further, potential familial relationships with people against whom they might need to take enforcement measures could make these tasks more difficult. However, constables were used to remove squatters elsewhere in Upper Canada despite those challenges.

[886] Considering all of the evidence, I find that constables could have been effectively used, to a greater extent, for the Peninsula. As well, the expenses for constables, incurred elsewhere, do not suggest an undue burden on resources. Constables were appointed in Bruce and Grey counties in 1852-1854. They were used to address other illegal activity, yet the evidence does not show that they were used with respect to squatting on the Peninsula.

[887] Dr. McHugh testified as an expert legal historian. On the resources issue, and for the province as a whole, Dr. McHugh opined that the enactment of laws "was one thing, however, the policing and resources that were required to make these laws fully effective were beyond the resources of the province of Upper Canada". Yet Dr. McHugh's view was very general and did not satisfactorily address what was needed for the Peninsula in particular. Nor did the evidence show substantial resource barriers in that regard. In Treaty 45½, the Crown had received about 1.5 million acres of land from SON. Dr. McHugh did not explain why some of the funds from the sale of that land could not have been used to protect the Peninsula.

[888] I have taken into account the practical problems associated with a relatively undeveloped area. While there were limitations in local law enforcement, I find that local law enforcement could have provided more assistance, as was done in other parts of the province.

[889] I find that other than the specific legislation, the Crown response to the situation on the Peninsula was reactive, without proactive steps or the deployment of added resources.

[890] Ontario submits that the Crown fairly reconciled SON's interests with broader societal interests and balanced competing demands on limited colonial resources. This has not been demonstrated with respect to the above civilian law enforcement roles. However, Ontario's submission has a stronger foundation when it comes to SON's alternative suggestion that the militia and military ought to have been deployed to protect the Peninsula.

(vi) The Militia and the Military

[891] SON submits that it would not have been necessary to bring in the militia or launch a military operation in order to stop or curb encroachments on the Peninsula. I agree. Civilian law enforcement offered more appropriate tools that were not fully used, as discussed above. This is not a case where those tools were fully deployed and proved unsuccessful. However, SON also submits that if civilian law enforcement was insufficient, the Crown could have obtained assistance from the militia and the military.

[892] I conclude that although steps could have been taken to call up the militia or the military in the relevant time period, neither would have been well-suited to the task. The protection of the Peninsula was a long-term, policing role.

[893] Beginning with the militia, after the War of 1812, the militia had fallen into disuse. However, SON submits that steps could have been taken under later legislation, regarding the organization of the militia: *An Act to repeal certain Laws therein mentioned, to provide for the better defence of this Province, and to regulate the Militia thereof*, S. Prov. C. 1846 (9 Vict.), c. 28 (the "*Militia Act*").

[894] The *Militia Act* gave the Governor General the power to call up men from ages 18 to 60 to train and serve in the militia. There were penalties if men were called up and refused to serve. However, in the relevant period, local citizens were "mustered" perhaps once a year, with their own equipment, and given only a day of training. These men were untrained, undisciplined, ill-equipped local citizens. And as of 1854, militia for Bruce and Grey counties had not yet been organized. It is hard to see why ramping up the militia would be an improvement on local law enforcement.

[895] SON notes that the militia were called upon to help in the Upper Canada Rebellion in the late 1830s. However, that was an armed insurrection, a markedly different kind of conflict, not a law enforcement role over a period of many years.

[896] Moving to the military, the British had a strong reluctance to use the military as a police force. The army was typically deployed against civilians only in response to a major challenge to public order, such as an armed insurrection or serious rioting. Military forces were not well-suited for civilian law enforcement.

[897] SON points to the Mica Bay occupation in 1849, when about 90 soldiers were sent to a mining site that was more remote than the Peninsula, in response to an armed occupation. However, that was a focused conflict, not an open-ended policing role over decades.

[898] Much of the defence evidence about the militia and the military was given based on an assumption about what was needed to protect the Peninsula from encroachments. The assumption was that there would need to be a full-time patrol of the entire southern border of the Peninsula.[72] However, given that squatters were not hard to find, I am not persuaded that there was a need for such a comprehensive patrol. Local law enforcement was available and its use could have been increased. Those steps would not have required a full-time border patrol.

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[72] Called a "*cordon sanitaire*".

[899] Overall, I find that it would have been more apt to use the available local law enforcement roles, and expand their use, rather than embark on an attempt to organize and deploy a local militia force or the military for an indefinite period of service on and near the Peninsula.

(vii) Government land policies

[900] SON further submits that government land policies aggravated the squatting problem by reducing the amount of land available for settlers. However, most of the policies SON relies on pre-dated Treaty 45½ and therefore could not be a breach of the treaty.

[901] In the late 1700s and early 1800s, the Crown implemented various land policies, with different policy objectives. In the 1790s, the Crown set aside about 1/7th of surveyed Crown lands to generate revenue to fund the provincial government. In another initiative, land grants were set up for members of the militia and military to encourage participation in the War of 1812. In the 1820s, the Canada Company was set up as a source of government revenue from the sale of land for settlement. Land was sold to the Canada Company, which was then to sell the land to settlers, and supply capital for things like building roads. And in 1849, one million acres of land in Huron County was set aside to sell and raise money to build a public education system.

[902] The above policy initiatives were driven by other broad policy choices, not to encourage squatting. However, to the extent that the polices meant that there was less land for sale, they could have aggravated squatting. I accept Dr. McCalla's evidence that this impact was partially offset by an active private land market. Settlers could buy land in that way as well.

[903] After these early land policies, the government's main goal became orderly expansion by settlers who would buy the land, live on it, clear it and farm it. This goal was not achieved. Land speculation continued and contributed to squatting, as discussed above.

[904] Overall, I find that land policies were not a significant factor in the analysis of whether the Crown protected the Peninsula after Treaty 45½. They mainly pre-dated the treaty and did not necessarily reduce the available lands for settlement. The main problem was the Crown's tacit acceptance of squatting, which did not serve the obligation to protect the Peninsula.

Squatting escalating in the 1850s due to the pressure for land

[905] Squatting in the Peninsula area escalated significantly in the 1850s, the period leading up to Treaty 72. By then, the zone of settlement was in the Peninsula area and the pressure for land was high. The challenge of protecting the Peninsula had also increased substantially.

[906] The height of the land boom was in 1854-1855. It was a period of high immigration.[73] Population growth was especially rapid in newly opening areas where there was fertile land. The total population of Huron, Grey and Bruce counties tripled between 1851 and 1861. Prices for farmland rose, fostering a sense of urgency among those looking to buy land to farm and those seeking speculative returns. Land auctions just before Treaty 72 featured crowds, conflict and violence. Looking in isolation at the period in 1854, shortly before Treaty 72, it is unlikely that encroachments could have been stopped without taking extreme steps. This difficulty was, at least in part, the product of the Crown's prior lenient approach to squatting.

[907] Rather than making the protection of the Peninsula the priority in the 1850s, the Crown focused on obtaining the surrender of more land for settlers. In the period leading up to Treaty 72, the Crown made several attempts to obtain a surrender of the Peninsula. Those attempts are the backdrop to Treaty 72. I discuss those events below, after I have addressed the question of whether the encroachment clause and the honour of the Crown were breached in the period between the two treaties.

Breach of the encroachment clause and the honour of the Crown

[908] I conclude below that the Crown conduct after Treaty 45½ does not show a sufficiently diligent effort to fulfill the solemn treaty promise to protect the Peninsula. The treaty and the honour of the Crown were breached.

[909] The encroachment clause was a solemn treaty promise. The Crown promised to protect the Peninsula forever from the encroachments of the whites. Those encroachments were broadly known as squatting. The Crown was obliged to fulfill that promise following Treaty 45½ in 1836 until Treaty 72 in 1854.

[910] Given that the honour of the Crown applies to treaty promises, I will address the issues of whether the treaty was breached and whether the honour of the Crown was breached in relation to the treaty promise together. The question is: What did the Crown do to diligently fulfill the treaty obligation to protect the Peninsula, and was it enough?

[911] The Crown knew at the time of Treaty 45½ that the encroachment clause was important to SON. And, although SON was free to enter into new treaties and land surrenders after Treaty 45½, the use of the phrase "for ever" in the encroachment clause also showed the importance of the clause.

[912] SON submits that the treaty promise was breached. SON submits that the Crown could have done a great deal more than what was done, but the Crown instead prioritized the interests of white settlers. However, SON does not submit that perfection was required. Applying the

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[73] Although not known at the time, 1854 was the last year of large-scale immigration.

principle of the honour of the Crown, SON agrees that the fulfilment of a treaty promise may be imperfect.

[913] The defendants submit that the Crown did enough. With respect to what was required, Ontario submits that the treaty obligation required the Crown to pay attention to the problem of squatting and act diligently with the purpose of preventing it. The defendants submit that the Crown did so.

[914] I agree with Ontario's characterization of the Crown's treaty promise as including these two obligations with respect to the Peninsula:

(i) to pay attention to the problem of squatting; and,

(ii) to act diligently with the purpose of preventing it.

[915] On the first obligation, the Crown was well aware of the problems with squatting on the Peninsula and the conditions that fostered those encroachments. The Crown was aware of this from the beginning, at the time of Treaty 45½. This is amply shown by Bond Head's own statements at the treaty council, at which he said that new arrangements were needed to protect the Indigenous peoples from "the encroachments of the whites".

[916] The Crown was also aware of the squatting problem on a general level since squatting was a recognized problem in the "zone of settlement" as that zone moved during the settlement period. The Crown was aware of the problem from reports done from time to time, such as the Durham Report in 1839 and the Bagot Commission Report in 1845. And the Crown was aware from the specific complaints made by SON in the time between Treaty 45½ and Treaty 72.

[917] I find that the Crown did pay attention to problem of squatting. The issue here is whether the Crown did enough to prevent those encroachments on the Peninsula.

[918] The Crown took general steps (such as passing legislation) and reactive steps (in response to complaints). This gives rise to the question of whether those general and reactive steps were sufficient, or whether more proactive steps were needed. In my view, the circumstances required more. If there had been little or no squatting, general steps and reactive steps could have been sufficient. But that is not this case. From early on there was a recognized problem with squatting and it got worse over time. In this case, I find that more proactive steps, focused on the Peninsula, were needed.

[919] To diligently fulfill the treaty promise, the Crown did not need to shut down squatting everywhere. Province-wide initiatives and expenditures were not needed. But there was little proactive effort to fulfill the obligation in the protective clause by specific steps in relation to the Peninsula.

[920] What did the Crown do? These are the main steps relied upon by the defendants:

(i) Some general notices prohibiting squatting were posted or published in other areas. However, this tool, which was readily available, was not used in the Peninsula area until after Treaty 72.

(ii) There were some government reports done that showed the squatting problems, one of which gave rise to legislation, specifically the 1839 Act. However, these reports underscored the Crown's knowledge of the problems rather than any steps taken to address those problems.

(iii) Provincial legislation was put in place, and improved, in the succession of the 1839, 1849 and 1850 Acts. However, that legislation was complaint-driven and was not fully deployed in the Peninsula area. There were also pre-existing laws in place, such as for trespass, which have not been shown to have been used even though they would have applied to at least some of the encroachment activities on the Peninsula.

(iv) There were steps taken in response to complaints. However, these steps did not result in significant penalties or other steps that would deter more squatting. On the contrary, the responses to complaints revealed a lenient approach to squatting in the Peninsula area despite the specific treaty promise to protect the Peninsula.

(v) Some officials had authority to address squatting, specifically Commissioners, sheriffs and constables. And there were magistrates and Justices of the Peace to issue warrants and address prosecutions. The evidence shows that as a general matter these officials were well-intentioned, but little was done except in response to complaints.

[921] There is then the question of what the Crown could have, but did not, do:

(i) The Crown did not focus on how to fulfill the treaty promise. Jarvis raised the issue early on, but the question of how to fulfill the encroachment clause was not a focus of continued Crown discussions. There were internal discussions about other aspects of Treaty 45½. The treaty was approved. An annuity was discussed and added. The boundaries were discussed and agreed on. All these steps are documented. In contrast, the protection of the Peninsula was not singled out for discussion. The absence of significant Crown consideration of how to protect the Peninsula is problematic, given the solemn nature of the treaty promise and given that it became apparent that protection was needed.

(ii) The Crown did not take significant, proactive steps regarding squatting on the Peninsula in particular to diligently fulfill the treaty promise. And, over the years, the complaints showed that the general steps that were taken had not been effective. The evidence shows that it would not have been hard to find the squatters. There were officials with some authority, and more officials could have been appointed.

Notices could have been posted or published periodically. Sheriffs could have been used at least periodically. Constables could have been appointed. A less lenient approach could have been used. Available penalties could have actually been imposed.

(iii) The above tools were available, and they were not used effectively. If available tools had been used, which they could have been, it should not have been necessary or appropriate to use the militia or the military.

[922] Ontario submits the pressures facing the Crown from groups other than SON are relevant context. However, to the extent that there were pressures from the white population for land, the Crown had already committed to protecting the Peninsula from those demands in the encroachment clause. Further, the evidence does not show that the Crown weighed choices regarding the protection of the Peninsula with other competing demands. Lastly, there were law enforcement steps that the Crown took elsewhere in the province, which could have been taken in relation to the Peninsula as well.

[923] It was not until events leading up to Treaty 72 in 1854 that the Crown began a proactive dialogue with SON about squatting, and the discussions were in the context of the Crown seeking the surrender of more land.

[924] Canada submits that SON did not do its part to protect the Peninsula under Treaty 45½. Canada relies on this text from the treaty: "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" (emphasis added). Canada submits that "it was key to the Crown's efforts to protect the land against encroachment that the lands be cultivated by the Saugeen".

[925] More cultivation could have helped with the protection of the Peninsula. There would have been less undeveloped land to encroach on. But I do not agree that the reference to cultivating the land in the treaty diluted the obligation in the encroachment clause or was some sort of precondition to it. Given the applicable treaty interpretation principles, that obligation would have had to be clearly stated in the treaty, and it was not.

[926] Further, SON's ancestors did take proactive steps to protect the Peninsula, although they were not obligated to do so under the treaty. In addition to making complaints and seeking help, they discouraged white people who were seeking land and encouraged other Indigenous people to come to the Peninsula. SON invited other Indigenous peoples to relocate to increase the Indigenous population on the Peninsula. Among other reasons, they did so to protect the land from white encroachment.

[927] The Peninsula area had the benefit of general steps taken for the province as a whole, and those steps were ineffective. The Crown knew about the problem, but it did not take more steps

or deploy more resources, even at a modest level, to fulfill the treaty promise. There was little more done other than responding to complaints, and even that activity tended to be lenient.

[928] I find that the course of Crown conduct after Treaty 45½ does not show that the Crown made a diligent effort to fulfill the solemn treaty promise. I conclude that the encroachment clause and the honour of the Crown were breached.[74]

[929] I note that SON seeks a declaration that the honour of the Crown was breached, not that the treaty was breached. The declaration I have granted below is therefore focused on the breach of the honour of the Crown.

Treaty 45½ did not create a reserve

[930] SON also submits that Treaty 45½ created a reserve, as a matter of law, as of 1836. SON submits that the Crown therefore had added legal duties to protect the Peninsula, beyond the obligations arising from the encroachment clause and the honour of the Crown discussed above.

[931] Canada took no formal position on this issue in written submissions. Ontario submitted that there was no "reserve" of the kind that would attract added duties. Counsel for both defendants responded to my questions in oral argument, submitting that a reserve may have been created, but not as early as 1836. The defendants' positions are connected to their other arguments about the claimed fiduciary duties, which are discussed below.

[932] SON did not advance the claim that Treaty 45½ created a reserve in the Statement of Claim. This may explain why the defendants did not take a formal position. However, the defendants did not object to SON raising this issue in closing submissions. I have therefore addressed the issue, concluding that Treaty 45½ did not create a formal, legal reserve.

[933] The word "reserve" was used often in the historical documents, by witnesses and by the parties in this case. It was often used as a common and convenient name, not as a legal term. It was often used as a name for Indigenous lands, including calling the Peninsula the "Saugeen Reserve", for example. However, at the relevant time that was not always its meaning. For example, the word "reserve" was used in the above 1849 and 1850 Acts to describe Crown and Clergy lands, not Indigenous lands.

[934] The evidence and submissions before me are replete with uses of the word "reserve" in a non-legal sense. However, the position advanced by SON is that Treaty 45½ created a "reserve"

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[74] SON also uses the terminology that there was a "stain" on the honour of the Crown; however, the jurisprudence generally speaks of "breach".

in the formal legal sense, with consequential added legal obligations. SON's position is based on the law developed under the *Indian Act*.

[935] The *Indian Act* was first introduced in 1876, long after Treaty 45½. SON relies on the leading case interpreting the term "reserve" under that Act, specifically *Ross River Dena Council Band v. Canada*, 2002 SCC 54, [2002] 2 S.C.R. 816.

[936] The *Indian Act* has a statutory definition for the term "reserve".[75] That definition is then tied to obligations under the Act. As noted in *Ross River*, the definition in s. 2(1) of "reserve" exists primarily to identify what lands are subject to the terms of the Act: at para. 49. The Act then has a myriad of statutory provisions applicable to "reserves" under that Act. Those statutory provisions include many Crown legal obligations.

[937] Finding that an *Indian Act* "reserve" is created "means finding that the Crown intended that an exhaustive body of federal legislation would apply to regulate the reserve, necessitating a degree of federal administration, control and corresponding duties and costs" that come along with it: *Madawaska Maliseet First Nation v. Canada*, 2017 SCTC 5, at para. 335.

[938] SON acknowledges that it is not clear that the reasoning in *Ross River* should apply here, but SON relies on it and puts forward no alternative test or approach for the relevant time period.

[939] In *Ross River*, the Supreme Court of Canada emphasized that the issue of reserve creation is fact-driven and that each case has to be decided in its particular factual context: at paras. 50, 67. The process of reserve creation in Canada has gone through "many stages and reflects the outcome of a number of administrative and political experiments" – over time, "[p]rocedures and legal techniques" have evolved: *Ross River*, at para. 43. Reserves were created at different times, in different places, and in different ways, throughout the history of Canada. There was no single process for the creation of reserves.

[940] The factual circumstances addressed in *Ross River* are significantly different from this case. *Ross River* dealt with the issue of whether a reserve had been created within the meaning of the *Indian Act*, in the mid-20th century, in the Yukon, and with no treaty. The Treaty Claim here is different in every respect. Unlike *Ross River*, Treaty 45½ and the surrounding circumstances took place in the early 19th century, prior to the enactment of the *Indian Act*, in what is now known as Ontario, with a treaty.

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[75] See s. 2(1): "In this Act… reserve (a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band, and (b) except in subsection 18(2), sections 20 to 25, 28, 37, 38, 42, 44, 46, 48 to 51 and 58 to 60 and the regulations made under any of those provisions, includes designated land."

[941] In *Ross River*, the Supreme Court took a very cautious approach to the definition of a reserve, given the importance of the factual context. The Supreme Court even declined to definitively pronounce on the legal requirements for creating a "reserve" under the *Indian Act*, despite being urged to do so: *Ross River*, at para. 41. Nonetheless, the *Ross River* test has been applied in later cases: see e.g. *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 13; *Watson*, at para. 268; *Jim Shot Both Sides v. Canada*, 2019 FC 789, [2020] 1 F.C.R. 22, at para. 284.

[942] SON does not put forward a definition of what would constitute a legal "reserve" prior to the definition introduced in the *Indian Act*, let alone law or evidence establishing the process for reserve creation at the relevant time and place. In contrast, for example, that sort of evidence was put forward in *Madawaska Maliseet First Nation*, a pre-Confederation decision arising in the Maritimes.

[943] There is therefore considerable uncertainty about not only the legal test for finding the creation of a reserve in the circumstances of this case, but also the legal consequences of such a finding.

[944] Despite these difficulties, SON submits that the *Ross River* test should be applied and is met. The requirements for finding that a "reserve" was created, as set out in *Ross River*, are as follows:

(i) that the Crown had the intention to create a reserve;

(ii) that this intention was possessed by Crown agents holding sufficient authority to bind the Crown;

(iii) that steps were taken to set the land apart for the benefit of the Indigenous group; and,

(iv) that the Indigenous group accepted the setting apart of the land and began making use of those lands: *Ross River*, at para. 67.

[945] If the *Ross River* test for the creation of a reserve applies, the first part of the test requires a finding that Bond Head intended that Treaty 45½ create a reserve when that treaty was agreed upon.

[946] The intention to create a reserve can be general, and it can be presumed: see *Ross River*, at para. 50; *Jim Shot Both Sides*, at para. 299. However, in *Ross River*, the Supreme Court spoke about the sort of evidence that might be expected, noting that there was no evidence that any Crown agents expressed to the Ross River Band, in effect, that "[t]he Crown is now creating a reserve for you, a reserve of the type contemplated under the *Indian Act* and which will be subject to all of the terms of that Act": at para. 71. The Supreme Court found that a "reserve" had not been created within the meaning of the *Indian Act*.

[947] The evidence about Treaty 45½ does not assist SON. On the evidence, I find that Bond Head's intention was limited to entering into the provisional treaty with the specific obligations set out in it. He did not have the intention to take on more obligations than those set out in the treaty itself. On the second part of the test, he did not even have instructions to enter into the treaty when he negotiated and signed Treaty 45½, let alone authority to do so. He himself noted that the treaties signed that day were provisional. He did not have authority to bind the Crown at the time, and the later steps from which approval was obtained do not show an intention to create a reserve.

[948] Submissions were made that Treaty 45, entered into the same day, created a reserve. I have been given no case law suggesting that the legal status of Manitoulin, under Treaty 45, has been determined. Further, I need not decide that issue for this case. The significant differences between the two treaties do not support the submission that Treaty 45½ was intended to have the same effect as Treaty 45 in any event.

[949] Further, the evidence does not support an inference that the parties intended that there be added obligations, beyond the terms of the treaty itself, whatever those may have been before the *Indian Act*.

[950] On the third part of the test, the southern boundary of the Peninsula was not specifically defined until long after Treaty 45½. The first survey was in 1837, followed by adjustments. The boundary was not agreed upon until 1847. That element of the test was not met at the time of Treaty 45½.

[951] The fourth *Ross River* requirement suggests that one criterion for the creation of a reserve is that the Indigenous peoples would not have previously occupied the lands in question. In *Ross River*, the Court was dealing with a village that the band had been moved to: at para. 14. In another case put forward by SON, *Jim Shot Both Sides*, the Federal Court relied on evidence of the Blood Tribe "settling into their new homes": at para. 337. In *Wewaykum*, the court was dealing with "reserves" created outside of any traditional territory. Here, the Saugeen were not moving to new lands. Despite these facts, I would find that the fourth requirement was met, because the Saugeen had also been living on the surrendered lands, and to that extent, they did have to move.

[952] In oral argument, Ontario submitted that while a reserve was not created in 1836, the 1847 Declaration would meet the test to transform the Peninsula into a reserve. By that time, there was agreement on boundaries and there was authority to make the declaration. However, there is no mention in the 1847 Declaration about intending to create a reserve and the surrounding context shows a different purpose. The purpose was to provide the Saugeen with the written document they requested to help them in dealing with white people who were asking for land.

[953] In *Ross River*, the Supreme Court emphasized that the process of reserve creation is fact and context specific. The Supreme Court reviewed the process of "reserve" creation under the *Indian Act* in Northern Canada and the Yukon specifically, noting as follows: "Given the consequences of the creation of a reserve for government authorities, for the bands concerned and for other non-[Indigenous] communities, the process will often call for some political assessment

of the effect, circumstances and opportunity of setting up a reserve, as defined in the *Indian Act*, in a particular location or territory": at para. 60. The circumstances surrounding the negotiation and entering into of Treaty 45½ are a great distance away from any sort of consideration along these lines.

[954] In this trial, there has been an abundance of expert evidence about Treaty 45½. The experts have opined on all manner of historical issues. It is telling that there is no focused expert opinion evidence on how "reserves" were created in the relevant area and time period, or what the intentions, expectations or consequences would have been when a reserve was created. In contrast, in *Madawaska Maliseet First Nation*, there was considerable expert evidence about reserve creation in the late-18th century, in what is now New Brunswick. The evidence before me does not establish whether the Crown had a process for reserve creation in Upper Canada in the early-19th century, or what it was.

[955] Applying SON's submission that the *Ross River* test applies, I conclude that Treaty 45½ did not create a reserve. The treaty council gave rise to Treaty 45½ and its (substantial) treaty obligations, but not a reserve with added obligations. There is not a foundation to apply any other test for reserve creation.

SON's objections to the negotiation process leading to Treaty 72

[956] The next aspect of the Treaty Claim relates to the negotiation process leading up to Treaty 72. There were a series of negotiations leading up to that treaty. SON submits that Crown representatives breached the honour of the Crown on two occasions during those negotiations, once in August of 1854 and again leading up to and during the Treaty 72 treaty council in October 1854. The defendants disagree.

[957] I have concluded that there was a breach of the honour of the Crown in August of 1854.

[958] I will first discuss the series of negotiations leading up to Treaty 72 and then move to the Treaty 72 treaty council.

Negotiations leading up to Treaty 72

[959] In the period leading up to Treaty 72, the Crown made several attempts to obtain a surrender of the Peninsula. By the time of Treaty 72, the Saugeen had significant experience negotiating with the Crown about land surrenders. As put by Chief Kahgee, they were savvy negotiators.

[960] The negotiations between Treaty 45½ and Treaty 72 resulted in one treaty, Treaty 67. Otherwise, SON rejected the Crown's overtures for further land surrenders.

Treaty 67 – the Half-Mile Strip surrendered for a road

[961] Beginning with Treaty 67, in 1851, a negotiation resulted in the surrender of what is called the Half-Mile Strip – a strip of land that ran across the southern part of the Peninsula.[76]

[962] Treaty 67 related to a potential road connecting Owen Sound and the Saugeen settlement. The road had been under consideration for some time. The Crown had been discussing how to go about building the road, including the idea that it would be useful to have settlers on both sides of the road to keep the road in good repair. The Saugeen Chiefs wrote to Anderson in January 1851, saying that the band had assembled in council and considered the issue, resolving to assist in building the road but soliciting government assistance to do so.

[963] In February of 1851, the Commissioner of Crown Lands wrote to the Superintendent General of Indian Affairs, Colonel Bruce, proposing that a strip of land be surrendered for the road. The proposal arose not only because of the perceived need for settlers to maintain the road, but also because of the physical geography. The location of a lake affected the route.

[964] Colonel Bruce directed Anderson to propose a surrender to the Saugeen. Anderson proceeded to do so, proposing to the Saugeen that they surrender land for the road, and informing them that white settlers would be required on both sides of the road to maintain it.

[965] In March 1851, David Sawyer,[77] a missionary from the Credit River Mississauga band, and Frost, a magistrate, spent two days trying to convince the Saugeen Ojibway bands to surrender land for the road. They reported to Anderson that the Chiefs refused, rejecting the proposal, although there was significant support from other band members. Chief Madwayosh indicated that his people wanted to settle along the road.

[966] After not securing a surrender, Frost recommended that another letter be written to the Saugeen about the surrender and Sawyer said the government should write "a stronger letter". Anderson declined. He preferred to let the matter rest until he visited Owen Sound.

[967] A few months later, in June 1851, Anderson went to seek a land surrender for the road. At a General Council on June 24, he asked the Saugeen to give up a small strip of land to be sold for their benefit. He reported afterward that he used all the arguments he could muster to persuade them. The Saugeen responded that they were not willing, on any conditions, to surrender the strip of land in question. The council continued the next day on other topics, including a discussion

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[76] That strip of surrendered lands is shown in white on SON's illustrative map, reproduced above under Part 1.

[77] Also named Ke-zig-ko-e-ne-ne, Kezhigkoenene, Kezhegowinninn.

about building the road. On June 26, the Chiefs indicated that they were willing to surrender a smaller tract of land for the road.

[968] There is no historical record of the substance of the Chiefs' deliberations on this subject, which gave rise to their counterproposal. It is known, however, that the proposed size of the ceded tract of land was smaller than the Crown's proposal.

[969] SON submits that the Saugeen changed their mind because two key Chiefs were facing "charges" at council meetings presided over by Anderson at the same time. SON submits that the charges included the opposition of the surrender of the Half-Mile Strip.

[970] At the council meetings in question, Anderson was addressing complaints made against the Chiefs by other band members, not Crown complaints.

[971] Chief Wahbahdick and Chief Kegedonce Jones had originally been appointed on a temporary basis. Several band members made complaints. Indigenous members of the council asked that the government remove the two Chiefs and appoint others in their place. The complaints were not initiated by the Crown and were addressed through the Band Council process.

[972] SON has not established that the band complaints gave rise to the counterproposal made by SON that became Treaty 67. No breach is alleged regarding Treaty 67. That treaty was concluded in September 1851.

Later negotiations for land surrenders

[973] From 1852 through to the negotiation of Treaty 72 in 1854, there were other negotiations with the Crown about the potential surrender of parts of the Peninsula, none of which resulted in a surrender.

[974] In June 1852, Anderson made a proposal that the Saugeen surrender most of the Peninsula, keeping 36 square miles at each of their three villages (Owen Sound, Saugeen and Colpoy's Bay). Anderson did not push for an immediate response but reported that the Saugeen responded favourably.

[975] At a General Council in August 1852, Anderson asked the Saugeen and Owen Sound Bands for their "reflections" on the land surrender he had proposed in June. In response, the bands said that they had considered the subject and talked a great deal about it, including whether the amount of land would be enough. They concluded that they wished to leave the land as it was for the benefit of their children.

[976] A year later, at a council meeting in August 1853, Anderson proposed that the Peninsula be ceded, with "an ample quantity" of land for SON. At that time, Chief Madwayosh referred to the other bands that wanted to come and live there, concluding that there was "not too much [land] for them and our children". Chief Kegedonce Jones said they expected Indigenous peoples from "all points of the compass".

[977] In October 1853, Anderson wrote to the SON Chiefs, again proposing a cession of some of the lands on the Peninsula, particularly mill sites that the Saugeen were proposing to lease. That proposal also did not result in an agreement.

[978] In November 1853, McNabb wrote to Anderson saying that the Nawash Band was becoming more favourable to a land surrender. McNabb suggested obtaining a surrender to a smaller tract of land. Anderson responded that he had no doubt that the bands would see their interest in a surrender, and he agreed that a smaller tract would be acceptable. However, Anderson saw a contradiction between the information he had received from the bands about not being interested in a cession and the information from McNabb.

[979] In March 1854, Charles Keeshick, an Anishinaabe then from Owen Sound, wrote to Anderson in response to another proposal. He said that the Saugeen were willing to sell some of their land. In reply, Anderson proposed that the Saugeen mark off on a map which parts of the Peninsula they wished to keep, and then inform Anderson that they were willing to cede the remainder.

[980] Also in March 1854, Chief Kegedonce Jones wrote to Anderson to say that he supported the surrender of some land.

[981] In June 1854, Anderson wrote to the newly-appointed Superintendent General of Indian Affairs, Laurence Oliphant, noting his repeated endeavours to get a cession of the Peninsula, without success. Oliphant discussed the Peninsula with Governor General Lord Elgin, who thought that a surrender of the Peninsula was "highly desirable".

[982] In July 1854, a proposal was made at a joint council, for the surrender of a 50-mile square north of the Saugeen river, to be sold to a group of businessmen. The Saugeen and Owen Sound Bands rejected that proposal.

[983] In July 1854, Oliphant asked Anderson to gather information about the First Nations in his area. Questions were proposed in writing to Chippewa bands in Ontario asking, among other things, whether they would move to Owen Sound, and whether they would contribute to a manual labour school on the Saugeen lands (the "Questionnaire").

[984] Responses were received between August 2 and October 13, 1854. The responses of the Chippewa Bands other than the Saugeen and Owen Sound Bands were mostly negative on the subject of moving to the Peninsula and about the school. However, Peter Kegedonce Jones, on behalf of the Owen Sound Band, and David Sawyer, on behalf of the Saugeen Band, responded that they would contribute to a school, and that they had been trying to get other bands to move to the Saugeen lands. They also expressed willingness to make a partial surrender of land.

[985] On August 1 and 2, 1854, Anderson met with the Owen Sound and Saugeen Bands with respect to a surrender of large portions of the Peninsula.

[986] The council began after the Saugeen Band arrived at Owen Sound on August 1. At the council, Anderson asked whether the bands would be prepared to surrender land, to be sold for their benefit.

[987] Anderson brought a map to the council meeting and gave the map to the Saugeen and Owen Sound representatives. His proposed map set out about 34,600 acres for the bands. It is not known if this map still exists. It has not been found.

[988] Anderson later reported that the Saugeen began by saying that they "would not sell an inch" but he suggested to them it was "folly" to retain "so large a tract of land from which they were deriving no advantage" and the "possibility of the whites taking possession of it" among other reasons for a land surrender.

[989] On August 2, after further discussion, the band members said that they wanted an hour to consult amongst themselves without Anderson present. After their private discussion, they returned to the council and made a counterproposal. They proposed a surrender of less land. They drew their proposed partial surrender on the same map, with the surrendered lands to be sold "to the best advantage". Again, this map has not been found.

[990] After the counterproposal was made, Anderson addressed the council, rejecting the counterproposal. Anderson referred to the Saugeen complaints about encroachments on the Peninsula, including people taking timber and settling on their land. Anderson said that the Saugeen could not prevent them and he did not think that the government would "take the trouble to help" while the Indigenous peoples were opposed to their own interest.

[991] In this closing address, Anderson also said he would recommend that the government survey all of the land except the parts marked on his map, and that the land be sold for the benefit of SON. He said that the government had the power to act as it pleased and that he would recommend that "the whole, excepting the parts marked on the map in red and blue, be surveyed and sold for the good of yourselves and children". After Anderson made these remarks, he did not urge the negotiators to go back into private deliberations and reconsider their position. His remarks formed the end of the council.

[992] Anderson's remarks were inappropriate. He essentially said that the Crown would not honour the treaty promise to protect the Peninsula. He further recommended that SON land would be sold without SON's agreement. To do so would have been contrary to Crown policy, which, at least from the time of the Royal Proclamation of 1763, had required obtaining the agreement of the Indigenous group.

[993] SON submits that Anderson's remarks were a threat. The evidence does not show that SON's ancestors interpreted Anderson's remarks as a threat or that they were, in fact, threatened by Anderson's remarks. By that time, the representatives of SON were experienced negotiators. Proposed land surrenders had been refused on prior occasions without the Crown taking unilateral action. And after this failed attempt to get a surrender, the bands continued to advance their

position. A few months later, before Treaty 72, Chief Madwayosh communicated that if the government did not accept what had been offered to Anderson, he would not consent again "to give up a foot". As put by Dr. Brownlie, this was probably a bargaining position. This bargaining step showed that SON had not been threatened or intimidated by Anderson, as does the related evidence.

[994] I find that Anderson's parting remarks in August 1854 were an exercise in bad judgment that did not have adverse consequences for SON. The Crown did not proceed with Anderson's inappropriate remarks or recommendation. SON's ancestors did not make concessions due to Anderson's statements. Anderson was not present at the treaty council that gave rise to Treaty 72 in October 1854 and thus did not take part in that treaty council. His inappropriate statements were not repeated there. Oliphant, who conducted that treaty council, did not proceed unilaterally. He proceeded on the basis that SON's agreement was needed and he obtained SON's agreement to the land surrender. Anderson's parting remarks in August did not have a significant impact on SON's decision to enter into Treaty 72.

The negotiation of Treaty 72

[995] SON also challenges Oliphant's process and conduct before and at the treaty council in October 1854, which led to Treaty 72. SON's issues relate to notice, time for SON's private discussions and whether Oliphant lied about the Crown's ability to stop squatting. As discussed below, Oliphant had a negotiation strategy for the treaty council, but he did not curtail any SON discussions and he did not lie.

[996] There are various historical accounts of the treaty council for Treaty 72. Some are more reliable than others (as is illustrated by the Oliphant report and a later memoir discussed below). I discuss the disputed facts, as necessary, below.

[997] When Oliphant was appointed as Superintendent General of Indian Affairs in early 1854, he did not have significant experience with Indigenous peoples in Upper Canada. Among other activities, Oliphant arranged for the Questionnaire discussed above, collecting information and input from each band in Upper Canada, and visited the bands.

[998] Lord Elgin had instructed Oliphant that it was "highly desirable" that the Peninsula be surrendered for sale. As a result, on September 24, 1854, Oliphant left Quebec City to travel to the Peninsula to negotiate for a land surrender. On arriving at Toronto, he was joined by James Ross MPP. They then travelled to Guelph, rented a carriage there and went ahead to Owen Sound. They travelled from there to the Saugeen village.

[999] The problems associated with squatting were well known at the time. Oliphant saw some of those problems first-hand when he travelled to the Saugeen village to negotiate for a land surrender. In his report after the treaty council, he spoke of the tide of immigration, the search for "wild lands", gangs of squatters, bloodshed and threats by squatters to settle on Indian Lands in

defiance of the government. Although not known at the time, the problems of squatting were at a peak in the Peninsula area in and around 1854.

[1000] In his official report, Oliphant expressed the situation leading up to the treaty council in this way: "So keen was the struggle for land, that a surrender of the territory for the purpose of sale, appeared the only method by which the property of these tribes could be conserved to them. 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, to the adoption of the only means by which this object could be achieved". Despite this statement, Oliphant did not actually use undue pressure at the negotiation, as discussed below.

[1001] Oliphant arrived at the Saugeen village on October 12, 1854. After he arrived, Oliphant sent messengers to the Chiefs of the Saugeen Band, who were at their fishing grounds. Similarly, Oliphant sent messengers to the Chiefs of the Owen Sound and Colpoy's Bay Bands.

[1002] The Chiefs arrived the next day. In the meantime, Oliphant endeavoured to obtain as much information as possible about the best means to secure a surrender and the most satisfactory allotment of the lands.

[1003] By the afternoon of October 13, 1854, the Chiefs of the Saugeen Band had returned to their village to meet with Oliphant. Oliphant expected that the strongest opposition would be from Chief Madwayosh, who was the head Chief. Oliphant immediately met with Chief Madwayosh to discuss his proposal for a land surrender.

[1004] Oliphant had a long meeting with Chief Madwayosh, who left Oliphant with "strong impressions of dissent" in response to Oliphant's proposal. Shortly after that meeting, the other Chiefs arrived at Saugeen.

[1005] At 7 p.m., Oliphant began the treaty council. Many Chiefs and other men from the Saugeen Band, the Owen Sound Band and the Colpoy's Bay Band were present. David Sawyer and Charles Keeshick[78] were also present, as well as Peter Jacobs, who functioned as the translator/interpreter. Apart from Oliphant and Ross, the only other non-Indigenous people present were Charles Rankin (Provincial Land Surveyor) and Alexander McNabb (Crown Land Agent).

[1006] At the outset of the treaty council, Oliphant gave the Crown's reasons for the recommended land surrender. As set out in his later report, he spoke of the "avidity with which the neighbouring lands were taken up by whites". He said "that squatters were, even then, locating themselves without permission" on the Peninsula. He "represented the extreme difficulty, if not impossibility, of preventing such unauthorised intrusion".

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[78] Also spelled Keeshig in the trial evidence.

[1007] At the treaty council, Oliphant went on to explain the advantages that the funds from the sale of the land would provide. Oliphant's view, as expressed in his report, was that the land surrender would be beneficial to both Indigenous peoples and whites. He proposed that the surrendered lands be sold by auction, as the most desirable mode of sale, among other benefits that he put forward.

[1008] At the treaty council, after Oliphant presented his proposal, he debated it with Chief Madwayosh. There were lengthy discussions. Tobacco was consumed. Chief Kegedonce Jones supported the land surrender. Oliphant later reported his impression that the Indigenous point of view, especially from the Owen Sound Band, was turning against Chief Madwayosh. The discussions in council lasted three or more hours.

[1009] Oliphant then left to allow the band members to talk privately. The private discussions lasted for one hour. SON has suggested, but not established, that the band members wanted or needed more time for that private deliberation, as discussed further below.

[1010] When Oliphant returned, the bands had decided to accept the land surrender in principle. Discussions then went ahead on the subject of the sizes of what would be three reserves on the Peninsula. Each of the Chiefs raised various issues for discussion. The treaty terms were put into a document in the presence of the Chiefs. The document was read aloud, translated and explained to the individuals who then signed it. The treaty document was signed at 1 a.m. on October 14, 1854.

[1011] SON does not dispute that SON ancestors entered into Treaty 72. Further, SON does not challenge the validity of the treaty and, in contrast with Treaty 45½, does not allege that Treaty 72 was breached.

[1012] The express terms of Treaty 72 are not in dispute:

(i) SON surrendered the Peninsula, except for specific lands reserved for each band (which were described in the text of the treaty) and any islands;

(ii) the Crown was obliged to sell the surrendered lands for the benefit of SON; and,

(iii) SON would receive the "interest of the principal sum arising out the sale" of those lands, to be distributed to SON at regular periods.

[1013] SON's key interests in Treaty 72 were to maintain their communities, culture and economy. They wanted land secured for their people and the financial security that would come from the proceeds from the sale of the surrendered land. As put by Chief Roote, the days of hunting, fishing and survival methods were starting to fade, and the need for money to buy goods was "upon our people".

[1014] The economic reasons for the treaty were highlighted in the years following the treaty, particularly given what turned out to be slow land sales. However, they were not SON's primary

motivation for the treaty, contrary to a suggestion in some evidence. A book called *The Indian Chief* by Conrad Van Dusen suggests that a Crown representative said, at the treaty negotiation, that the Saugeen would "ride in carriages, roll in wealth and fare sumptuously every day" if they surrendered their land, as if SON would be motivated by those things. As discussed by Dr. McCalla, the quote is suspicious. It "does not identify an actual speaker, a place, a time, or an audience; or when, where, and from whom the author heard [the quote]". I find that the evidence does not prove that the statement was made, but even if it was, it would not have impressed SON. As the testimony of the expert and community witnesses in this trial showed, SON's ancestors were not motivated to enter into the treaty by greed, pleasures or riches.

[1015] On the day after the treaty council, Oliphant dealt with some other matters, such as walking with band members along Copway's Road, which was to mark a boundary of one of the reserves, being shown work that had been done to open a road to the Saugeen village, and addressing some individual land purchases. Oliphant then travelled back to Owen Sound.

[1016] On October 14, while in Owen Sound, Oliphant issued a notice that no squatters would be allowed upon the land surrendered in Treaty 72. He also wrote to the sheriff of Grey County, informing him of the surrender and requesting his assistance in "summarily ejecting" any persons who intruded on the surrendered land, then the "property of the Crown". And Oliphant wrote to Rankin asking him to "use every means" in his power to prevent squatting and give any information to the sheriff and to "call upon him summarily to eject all persons thus trespassing".

[1017] Oliphant reported on the treaty negotiations to Elgin in a letter dated November 3, 1854.

[1018] After the lands surrendered under Treaty 72 were surveyed, the lands were sold. By 1870, most of the southern lands had been sold but the more northern lands were selling more slowly. By the beginning of the 1900s, all but about three percent of the surrendered lands had been sold.

Translation of the treaty

[1019] SON submits that their ancestors "mostly" understood Treaty 72. SON was not clear about what was meant by "mostly" when that word was used in the closing submissions. There was considerable trial evidence about the translators (also called interpreters in the trial evidence) at the treaty council. That evidence does not show that there were any translation issues.

[1020] The official translator at the treaty council was Peter Jacobs, an Anishinaabe member of the Credit River Band who served as a missionary at the Saugeen village. SON questions Jacobs's motivations at the treaty council, submitting that he had a pecuniary interest in the outcome and was working for Oliphant. However, SON does not make a specific allegation that Jacobs mistranslated the treaty. Further, the submissions against Jacobs have a weak foundation and are contrary to other accepted evidence about the treaty council.

[1021] To begin with, Jacobs was not the only Indigenous person at the treaty council who could speak both English and Anishinaabemowin. Also taking part were these bilingual Anishinaabek: Peter Jones, Charles Keeshick, John Beaty and David Sawyer. These people were signatories to

Treaty 72. There is no allegation against any of these bilingual band members, or a foundation to say that they were not looking out for SON's interests at the treaty council that gave rise to Treaty 72.

[1022] Most of the Anishinaabe people listed above functioned as translators either before or not long after Treaty 72. David Sawyer was the translator for the 1851 treaty about the Half-Mile Strip. Charles Keeshick functioned as a translator about six months after Treaty 72. He was educated at Upper Canada College and is referred to in the historical record as of "superior character" as a writer and interpreter for the bands. And a year after Treaty 72, John Beaty was appointed interpreter by the bands at a General Council.

[1023] Therefore, there were other Anishinaabe people at the treaty council who were able to translate, and who signed the treaty.

[1024] Dr. Corbiere is an expert in the Anishinaabemowin language. She gave evidence about the translation of Treaty 72. In reaching her opinions, Dr. Corbiere was asked to make certain assumptions about the treaty council that have either been disproved, or not proved, as discussed below. This has had a significant impact on the weight to be given to her opinions.

[1025] Dr. Corbiere was asked to assume that Jacobs was the only person present at the treaty council who was fluent in both languages. That assumption has been disproved. In reaching her opinion, Dr. Corbiere was unaware that there were other Anishinaabe people present at the treaty council who could translate English, other than Jacobs. As it turned out, there were several others.

[1026] In her cross-examination, Dr. Corbiere was taken to some of the evidence about the other Anishinaabe people present who could translate. She was asked if it was reasonable to infer that the presence of three of the above people (Sawyer, Beaty and Keeshick) would act as a safeguard to ensure that the terms of the treaty were properly translated. She disagreed because in 1854 there were no professional training programs for translation. Modern translation courses have developed more sophisticated strategies for translation. Yet the lack of modern, formal training in translation may not mean that the treaty was mistranslated.

[1027] Dr. Corbiere was also asked to assume that Jacobs was given the written treaty and asked to translate it "on the spot", which was not proved. Dr. Corbiere was also asked to assume that Jacobs had not previously been exposed to legal language (in relation to certain words in the treaty), which was not proved. Dr. Corbiere also does not have training in legal language or formal training in translation, yet she is skilled in modern translation.

[1028] Focusing on the evidence about Jacobs, Dr. Brownlie testified that he would not expect Jacobs to translate in a misleading way even if he had been the only person who could translate. And Dr. Brownlie agreed that the others present would provide a check on Jacobs's translation.

[1029] Moving to SON's basis for challenging Jacobs, SON relies on other evidence from Dr. Brownlie on the subject of a pecuniary interest. Dr. Brownlie relied on two sources: Oliphant's memoir and two payment documents from a later time.

[1030] Over 20 years after the treaty council, Oliphant wrote a memoir called *Episodes in a Life of Adventure*. That book had what Dr. Brownlie called "a very colourful account" of the treaty council. Dr. Brownlie observed that the account was designed primarily to sell books and entertain readers, and that "the picture of the Ojibway was much more colourful and exotic, corresponding with colonial racial images of 'the Indian' and stressing conflict".

[1031] The book recounts a story that is nowhere in the contemporaneous accounts of the treaty council. According to the book, during the one hour of private discussion among the Indigenous participants in the treaty council, they got into a fist fight and the "native catechist"[79] advised Oliphant to leave them to it. Dr. Brownlie agreed that since Oliphant did not name Jacobs, it could be that Oliphant did not really remember who he was. The book's description of the fight and related events says that the "native catechist" believed himself to be "pecuniarily interested" and therefore "remained to take part in the melee".

[1032] Oliphant's report after the treaty council in 1854 said nothing about help from Jacobs or Jacobs having a pecuniary interest. It said only that Jacobs was the interpreter. As was made clear by Dr. Brownlie, Dr. McCalla and Dr. Reimer, Oliphant's report on the treaty council is a more credible source than his much later book, which was written to entertain. Dr. McCalla aptly showed the many problems with the later book in his evidence, concluding that the overall tone of the book caused him to discount the whole passage relied upon by SON.

[1033] Even Dr. Brownlie testified that the fist fight in the memoir was "completely fictionalized". Yet Dr. Brownlie relied on that passage in the book to begin to draw conclusions about Jacobs's monetary interest. Dr. Brownlie also relied on two documents from more than two years after the treaty council. There is a brief document showing a payment of £50 to Jacobs, and another brief document acknowledging receipt of the payment. After saying "for services rendered", one document says, "Mr. Oliphant in obtaining a surrender of the Saugeen Peninsula" and the other says "Mr. Oliphant the Superintendent General in procuring a surrender of the Saugeen Peninsula". Dr. Brownlie relied on those two documents to say that Jacobs had a monetary interest in the surrender beyond compensation for his translation services. There is no question that £50 was a large sum if it was for one interpreter engagement only. Yet even Dr. Brownlie agreed that these payment documents are ambiguous. The references to "procuring" or "obtaining" could have been references to Oliphant, not Jacobs.

[1034] In his evidence, Dr. Brownlie did not adequately address either the ambiguous nature of the two brief documents nor the lengthy delay before the payment recorded in them. Dr. Brownlie pointed to some evidence that Jacobs had financial difficulties, but there is also evidence that Jacobs had considerable funds to loan to the Saugeen in 1854. He loaned the Saugeen over £200

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[79] The description of Jacobs as a "native catechist" appears to highlight that he was Indigenous and a missionary.

in that year. Dr. Brownlie was unaware of the historical records showing the loans Jacobs made to the Saugeen, and he concluded that he found the financial information "all a bit mysterious".

[1035] Given the more than two-year delay, the payment could have been for other services as well, as outlined by Dr. McCalla. Further, for Jacobs to have a pecuniary interest at the treaty council, he had to have known about the payment in 1854. The gap of more than two years before payment suggests otherwise.

[1036] I find that the account of the "native catechist" in the memoir was fiction. The evidence does not show any misconduct, mistranslation or pecuniary interest by Jacobs.

[1037] Considering all the evidence, I find that there were no translation problems regarding Treaty 72. The participation of Charles Keeshick, David Sawyer and John Beaty in the treaty council is more than what would be needed to reach this conclusion, particularly in the absence of a specific allegation of mistranslation. I return to this subject in relation to the treaty interpretation issue discussed below.

Treaty 72 negotiation issues

[1038] SON submits that the heart of its case surrounding Treaty 72 is that the Crown breached its duties to SON prior to and at the treaty council, before the treaty was signed. SON alleges that Oliphant used sharp tactics and bullied SON into the land surrender, breaching the honour of the Crown. SON's specific allegations relate to these topics:

(i) whether the Chiefs had sufficient advance notice of the treaty council;

(ii) whether the Chiefs should have had an opportunity to consult with each other before the treaty council began;

(iii) whether the SON private deliberations during the treaty council were long enough; and,

(iv) whether Oliphant lied in his remarks at the treaty council about the Crown's ability to protect the Peninsula.

[1039] With respect to advance notice, the evidence shows that messages were sent out when Oliphant arrived at the Saugeen village and the Chiefs arrived the next day. SON submits that there is no evidence that Oliphant gave any earlier notice that he was coming to the Peninsula to hold a treaty council. SON submits that advance notice is important because it would give SON the time needed to develop a consensus in accordance with Anishinaabek customs and accords with the Crown's treaty making protocols.

[1040] Beginning with the need to develop a consensus, this occasion was another step in what had, by then, been a dialogue that had been ongoing for years. There had been a series of negotiations about surrendering Peninsula lands leading up to October 1854. And just before Oliphant's arrival, Chief Madwayosh had written to Reverend Kribs, suggesting that SON's prior

offer to surrender part of the Peninsula was still open. As put by Dr. Brownlie, Chief Madwayosh was expecting to engage in more bargaining about a surrender. There was ample time for the bands to take whatever steps were needed to develop a consensus over the course of the long dialogue. There was no indication at the time of the treaty council that the Chiefs were unprepared. Given their ability to negotiate, if the Chiefs had needed more time, they would have insisted on it.

[1041] Moving to the question of British treaty protocols, SON has not shown that there was a treaty protocol about the form or manner or timing or even a requirement for notice of a treaty council. Treaty 45½ was negotiated with no advance notice, yet SON does not seek relief in that regard. Treaty protocols did require that there be a public treaty council, and this was done.

[1042] Further, although no written notice forms part of the evidence, SON has not established that Oliphant's arrival was a surprise. While Dr. Brownlie testified that the need to send out messengers when Oliphant arrived seemed to indicate that the Chiefs had not been informed, they could also have known of only a general time of arrival, as noted by Dr. Reimer. The Chiefs were not far away. Fourteen Chiefs and leading men took part in the treaty council. Other people, such as McNabb, were also available at the time. And this followed a public journey by Oliphant to the Saugeen village. Considering all the evidence, I find that the Chiefs were not taken by surprise and were ready to negotiate. Further, there was no breach of treaty making protocols.

[1043] SON further submits that Oliphant should have allowed all the Chiefs to talk amongst themselves before starting the treaty council. Oliphant's strategy was to prevent it. According to his own report, he called the treaty council shortly after the other Chiefs arrived "anxious not to allow them an opportunity of consulting either among themselves or with Europeans". However, SON has not shown that the Chiefs needed or wanted that discussion time. By the time of this treaty council, the issue of a land surrender had already been the subject of discussion on multiple occasions.

[1044] After the treaty council began, the assembled representatives of the bands took part in a lengthy discussion with Oliphant, and then they had a private deliberation. There is no dispute that the private deliberation amongst the band representatives lasted for one hour. SON submits that one hour was insufficient.

[1045] The first difficulty with this submission is that the length of the private deliberation was not curtailed by the Crown. The evidence does not show that the time was shorter than what was wanted or needed. On the prior occasion in August, during a negotiation with Anderson, the record is clear and the Chiefs specifically asked for one hour for private deliberation.

[1046] The experts differ on the issue of whether there was enough time for the private deliberation. Dr. Driben opined that one hour was not long enough to reach a consensus. However, he acknowledged that the bands had prepared for the negotiations with Anderson in August and continued to discuss the matter after that failed negotiation. Dr. Brownlie opined that the time was very short, yet he agreed that there was no normal length of time. Further, in reaching his opinion,

he had been unaware that there were other treaties with even shorter periods of deliberation. In cross-examination, Dr. Brownlie agreed that the time needed would depend on many factors, and it was more likely than not that the SON Chiefs acted within the authority that they had from their bands when they agreed to Treaty 72. Dr. Reimer collected historical evidence on the length of time taken for private deliberations by Anishinaabek in treaty negotiations. I agree with her conclusion that there was no ordinary length or range of times. Nor were there treaty protocols on that subject.

[1047] SON submits that Chief Madwayosh's change of position shows that more advance notice and more private deliberation was needed. However, Chief Madwayosh was willing to surrender some land even before the treaty council was called.

[1048] Further, in the period following the treaty, the evidence shows that SON raised several issues about the treaty but did not make complaints about insufficient time for private discussions. SON filed petitions, sent deputations and took other steps, but SON did not complain that they had been pressured into the treaty or treated unfairly as a result of the treaty council process.

[1049] As shown in the earlier negotiations, SON's ancestors were very able to say no. They were able, savvy negotiators. If they needed more time, and did not get it, they would not concede. Having considered all the evidence, I agree with Dr. Reimer's opinion that SON's ancestors had the strength and character to refuse to participate in the treaty council and to refuse to negotiate on Oliphant's terms. They did not do so.

[1050] Overall, the evidence does not support an inference that more time was needed for private discussions either before or during the treaty council. Discussions were not curtailed. The process Oliphant followed did not have an adverse impact on SON or cause SON to enter into the treaty when they otherwise would not have done so.

[1051] The final issue raised about the treaty council is the allegation that Oliphant lied. During the treaty council, Oliphant spoke of squatters and unauthorized intrusions by white people. SON submits that when Oliphant spoke about the "extreme difficulty, if not impossibility, of preventing such unauthorized intrusions" he was lying. SON further submits that this lie, taken together with Anderson's earlier "threat", was the deciding factor for SON's ancestors when they agreed to Treaty 72. I have already found that the statements made by Anderson did not have an impact on SON's decision to enter into Treaty 72.

[1052] Canada raises a preliminary issue with respect to SON's submission that Oliphant lied. Canada submits that SON has failed to comply with r. 25.06(8) of the *Rules of Civil Procedure*. Canada's position is that SON's submissions are therefore fundamentally unfair to the defendants and should be given no weight.

[1053] Subrule 25.06(8) provides that "[w]here fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars". These are serious allegations, and details are required.

[1054] SON submits that because they have not sued for fraud or any of the other listed causes of action, r. 25.06(8) does not apply. I am not persuaded by this argument. The subrule is not limited to causes of action, given the reference to "intent". However, I agree with SON's alternative argument. The pleading is sufficient. The Statement of Claim refers to statements made by Crown negotiators, alleging a "deliberate and willful disregard of the rights" of SON. In this case, there can be no surprise that the Crown negotiator for Treaty 72 was Oliphant. The pleadings are not ideal, but they are adequate to allow SON to pursue the point.

[1055] To show that Oliphant lied, SON relies on the post-treaty steps taken by him. Oliphant issued a notice that "no squatter will be allowed upon the land recently surrendered". He told Rankin "to use every means in your power to prevent such intrusion" and he asked the sheriff to enforce trespass laws by evicting squatters. And after the first sale of land was postponed in 1855, further notices were published. SON submits that because Oliphant was obviously aware that these steps could be taken, he believed that these steps would be effective, and he lied when he spoke of the "extreme difficulty, if not impossibility, of preventing such unauthorized intrusions".

[1056] There are a number of difficulties with this submission. First, it assumes that these steps alone would have been sufficient to stop squatting in 1854. This has not been proven. Nor has it been shown that Oliphant held that belief at the treaty council. And the squatting did not stop due to the steps taken by Oliphant that day, as shown in the post-treaty squatting evidence. Those steps were tools that could have helped, especially in the long time period leading up to 1854, but by 1854 the squatting problem had become very serious in the area. Oliphant was appointed and arrived earlier that same year. He saw the squatting problems first-hand, as he travelled to the Peninsula, and saw a land surrender as a way to see that SON would receive the value of their land.

[1057] SON further submits that the Crown was well aware that most of the Peninsula was not suitable for farming and that it would therefore not be as hard to hold back squatters. SON submits that this shows that Oliphant's statements about the difficulty in stopping the squatting were wrong. However, even though the lands on the Peninsula were of varying types, there was considerable land that was well-suited to farming – almost 200,000 acres. Those lands were mainly in the southern part of the Peninsula, which would be the area first affected by squatting as the zone of settlement moved north. The squatting evidence showed that this was already taking place.

[1058] SON also takes issue with Oliphant's remarks to the effect that there was a high demand for the lands, yet that too was the situation in 1854. The demand did fall after the treaty, but the decline in immigration, decline in population growth and decline in the demand for land that occurred after the treaty was not known at the time.

[1059] As it turned out, 1854 was the last year of large-scale immigration. The 1861 census showed that there had been an abrupt decline in the rate of population increase in the latter part of the 1850s. The pressure for land peaked around 1855 and fell off after that time.

[1060] The evidence shows that Oliphant saw the pressure for land and the squatting problem first-hand, at an extreme time period, and the evidence supports what he said at the treaty council. This does not excuse the Crown for the treaty breach that may have contributed to the problem, but it has not been shown that Oliphant lied or misrepresented the situation in 1854.

[1061] The land surrendered in Treaty 72 had to be surveyed, and the sale of lands did not begin until 1856, with the southernmost lands. SON complained about the slow pace of the land sales and related slow accounting and receipt of monies from land sales. Further, SON petitioned for a requirement that the lands be sold for actual settlement. That condition had been discussed at the treaty council and the suggestion was that it could greatly increase the value and the sale of the surrendered lands. Other issues were raised, post-treaty. However, SON does not allege a breach of the treaty.

[1062] SON also relies on parts of Oliphant's report after Treaty 72. In that report, in addition to reporting on the treaty council, Oliphant set out a proposed plan for funding the Indian Department. Cutting the costs of that department had been a long-standing goal of the government. His proposal was that each band contribute a percentage of the revenue from the sale of the surrendered lands to meet those costs.

[1063] In his proposal, Oliphant noted that it was impossible to estimate the revenue that would arise from the sale of the surrendered lands, but he was optimistic that it would be enough. Oliphant used a low estimate of the sale price per acre to arrive at a rough estimate of £100,000 as the total revenue. SON submits that this goal and related financial plan was a motivation for the Crown to push for the surrender of the Peninsula, resulting in Treaty 72, but this was not established on the evidence. Further, as detailed by Dr. McCalla, there were several different ways to arrive at that figure. Oliphant did not need the surrender of all or most of the Peninsula to put forward this proposal in 1854.

[1064] Considering all of the evidence, and all of the issues raised by SON in relation to the process leading up to the treaty, I find that Oliphant did not lie or misrepresent the Crown's ability, in October 1854, to stop squatting. I further find that SON's decision to enter into Treaty 72 was not affected by Oliphant's statements or process. SON had shown they were fully capable of saying no, but this time SON reached terms that they agreed on.

[1065] There remains the question of whether the honour of the Crown was, nonetheless, breached, even though there was no impact on SON's agreement to the treaty. I find below that it was breached.

Breach of the honour of the Crown

[1066] The issues about the honour of the Crown relate to the treaty negotiation conduct of both Anderson and Oliphant. I agree with SON's submission that the Crown was obliged to negotiate in good faith. Sharp dealing was not permitted, and this would preclude dishonesty and misrepresentations. Coercive behaviour, which encompasses the use of force and threats, would

also not be permitted. The issue is whether the behaviour complained of was appropriate for a treaty negotiation in the circumstances of this case, or crossed into bad faith or sharp dealing.

[1067] SON begins with the unsuccessful treaty council in August 1854. SON submits that Anderson's parting remarks to SON about proceeding unilaterally, and his subsequent recommendation to Elgin, breached the honour of the Crown. I agree. His remarks were contrary to Treaty 45½ and contrary to long-standing Crown policy. He acted on those remarks by making the recommendation to Elgin, albeit with no effect. Anderson ought not to have made those remarks, or made that recommendation. He breached the honour of the Crown in doing so. As discussed above, his actions did not influence Treaty 72. Yet he did breach the honour of the Crown.

[1068] SON further submits that no Crown official ever dissociated the Crown from Anderson's remarks after the treaty council in August 1854, and that this was also a breach of the honour of the Crown. I agree that the evidence does not show a formal step being taken to expressly reject Anderson's remarks. However, the steps that the Crown did take showed that Anderson's flawed statements and recommendation were not followed. The Crown did not take unilateral steps. Oliphant sought SON's agreement to the land surrender.

[1069] The remaining issues regarding the honour of the Crown relate to Oliphant's conduct before and at the Treaty 72 treaty council.

[1070] First, SON submits that Oliphant's efforts to secure the treaty using lies and threats were a breach of the honour of the Crown. The facts needed to advance that position were not proved. I have concluded that Oliphant did not use lies or threats in the treaty proceedings.

[1071] SON's second submission is that there was inadequate advance notice of the treaty council, breaching the honour of the Crown. The facts needed to advance that position were also not proved. The Crown did not give inadequate advance notice.

[1072] SON's third submission is that Oliphant's efforts to prevent the bands from consulting among themselves prior to the treaty council and to ensure that they only had one hour for discussion during the treaty council breached the honour of the Crown.

[1073] SON has not shown that more time was needed to prepare for the treaty council under Anishinaabe decision-making protocols. Given the protracted nature of the dialogue about a land surrender, there had been a lengthy period for consultation leading up to October 1854. Further, SON has not shown that the Chiefs wanted or needed more time for private discussion, either before or during the treaty council.

[1074] Oliphant did plan to begin the treaty council right after his discussion with Chief Madwayosh. SON does not submit that the meeting with Chief Madwayosh was a breach but SON submits that Oliphant's tactic of foreclosing a broader discussion amongst the Indigenous participants immediately before the treaty council was a breach. In essence, SON submits that Oliphant had a plan to curtail discussion before the treaty council.

[1075] Given that this was a negotiation, and that the negotiation was with able negotiators on behalf of SON, Oliphant's strategy did not go past hard bargaining into sharp dealing. The Chiefs were ready and would not have proceeded unless they had whatever time they needed. Oliphant did not actually curtail their discussion. There was no breach.

[1076] With respect to the private deliberations during the treaty council, Oliphant did not have a strategy to curtail those deliberations, nor were they actually curtailed. The one-hour length of the private deliberations was also not a breach of the honour of the Crown.

[1077] I will also address a passage from Oliphant's report, quoted above, even though SON does not submit that it is a specific incident of sharp dealing. In discussing the squatting problems in his report, Oliphant said that because a surrender was the only way that land could be preserved for SON, it was "the Indian Department's responsibility" to "spare no pains in endeavouring to wring from those whom it protects, some assent, however reluctant" to achieve that objective. That part of the report suggests that Oliphant would have considered the use of undue pressure at the treaty council, if necessary, to secure an agreement. It is not clear that this was Oliphant's plan for the treaty council, given the general reference to the Indian Department. Other parts of the report are in the first person. However, if Oliphant had used pressure at the treaty council, going beyond good faith negotiations, that would have been a breach of the honour of the Crown. He did not do so.

[1078] SON submits that Anderson's closing remarks in August 1854, and Oliphant's alleged lies and other conduct in October 1854, were important reasons why SON agreed to Treaty 72. In turn, SON submits that Crown conduct casts doubt on whether SON's consent was given. However, on the evidence, SON has not established these or other facts that would undermine SON's consent. Nor does SON challenge the validity of Treaty 72.

[1079] I therefore conclude that Anderson breached the honour of the Crown in August of 1854 but Oliphant did not do so in October 1854.

Whether a fiduciary duty arose to supplement the treaty and honour of the Crown

[1080] SON submits that in addition to the treaty obligations in Treaty 45½ and the honour of the Crown, both an *ad hoc* and a *sui generis* fiduciary duty arose between the Crown and SON's ancestors in this case. SON submits that the crux of the alleged fiduciary duties is, again, Treaty 45½ and the honour of the Crown.

[1081] SON's allegations of breach of fiduciary duty entirely overlap with the alleged breaches of Treaty 45½ and the honour of the Crown. In short, the alleged breaches are the Crown's failure to diligently take steps to protect the Peninsula and the Crown's conduct in the negotiations leading up to Treaty 72.

[1082] Both Canada and Ontario dispute the suggestion of an *ad hoc* fiduciary duty but they disagree on whether the facts gave rise to a *sui generis* fiduciary duty. Both defendants submit that even if there was a fiduciary duty, it was not breached.

Fiduciary duties

[1083] The relationship between the Crown and Indigenous peoples is fiduciary in nature: *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 S.C.R. 83, at para. 43. Both an *ad hoc* and a *sui generis* fiduciary duty may arise from that relationship: *Williams Lake Indian Band*, at para. 44.

[1084] However, not all dealings between the Crown and Indigenous peoples are governed by fiduciary obligations: *Manitoba Metis Federation*, at para. 48; *Williams Lake Indian Band*, at para. 51. A fiduciary duty does not exist "at large": *Southwind v. Canada*, 2021 SCC 28, [2021] S.C.J. No. 28, at para. 61, *per* Karakatsanis J., citing *Wewaykum*, at para. 81.

[1085] The Supreme Court of Canada has said that a fiduciary duty – "equity's blunt tool" – must be "reserved for situations that are truly in need of the special protection that equity affords": *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 596, citing *Guerin*, at p. 384.

[1086] The recent Supreme Court of Canada decision in *Southwind* aptly illustrates such a situation. In that case, the Crown unilaterally flooded considerable lands on a reserve in Northern Ontario in the early 1900s, contrary to treaty and *Indian Act* obligations. The Crown did not even attempt to negotiate for the First Nation's consent. The Supreme Court described the resulting damage to the reserve as a tragedy. The issue before the Supreme Court was the assessment of the equitable compensation arising from the breach of a *sui generis* fiduciary duty. The Crown conceded the presence of a fiduciary duty (and its breach).

[1087] SON's claim is very different from *Southwind*. Here, the Crown did seek and obtain SON's consent to Treaty 72. By that treaty, SON surrendered the land that they now seek beneficial ownership of based on the claimed fiduciary duties. SON surrendered that land for sale, with the proceeds going to SON.

[1088] Further, "the special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances": *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 37. "Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship": *Elder Advocates*, at para. 37, quoting *Guerin* at p. 385.

[1089] The imposition of a fiduciary duty opens access to an array of equitable remedies: *Wewaykum*, at para. 94. In the Treaty Claim, SON claims equitable remedies including beneficial ownership of the lands that they surrendered in Treaty 72 that are currently owned by the defendants. As put by SON, they seek to reverse the practical effects of Treaty 72 without invalidating the treaty.

[1090] As discussed below, I conclude that there was no additional fiduciary duty in the circumstances of this case.

Ad hoc fiduciary duty

[1091] SON begins with the submission that there was an *ad hoc* fiduciary duty. An *ad hoc* duty arises where the "general conditions for a private law" fiduciary duty are satisfied: *Williams Lake*, at para. 44; *Manitoba Metis Federation*, at para. 61. Yet SON submits that, in this case, it is rooted in the honour of the Crown. An *ad hoc* fiduciary duty must satisfy the below test, whether or not the honour of the Crown is involved.

[1092] There is no issue about the test for an *ad hoc* fiduciary duty, which requires that the following conditions be met:

(i) there must be an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;

(ii) the beneficiary or beneficiaries must be a defined person or class of persons vulnerable to a fiduciary's control; and,

(iii) there must be a legal or substantial practical interest of the beneficiary or beneficiaries that must stand to be adversely affected by the alleged fiduciary's exercise of discretion or control: *Manitoba Metis Federation*, at para. 50, citing *Elder Advocates*, at para. 36; *Williams Lake Indian Band*, at para. 44.

[1093] Here, the issues relate to the first and third requirements, which I conclude below have not been satisfied. The second requirement is not disputed.

[1094] For the first requirement, there must be an undertaking by the Crown to act in the best interests of the beneficiaries, specifically SON's ancestors. "The fiduciary's undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way" however, the "critical point" is that there must be an "undertaking on the part of the fiduciary to act with loyalty": *Elder Advocates*, at para. 32, quoting *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 77.

[1095] The power retained by the Crown "must be coupled with an undertaking of loyalty to act in the beneficiaries' best interests in the nature of a private law duty": *Manitoba Metis Federation*, at para. 61, citing *Guerin*, at pp. 383-384.

[1096] Where an *ad hoc* fiduciary duty is found to have arisen, the duty is one of "utmost loyalty to the beneficiary": *Williams Lake Indian Band*, at para. 163, *per* Brown J. (dissenting, but not on this point), quoting *Elder Advocates*, at para. 43 (emphasis added).

[1097] SON relies on the encroachment clause in Treaty 45½ to meet this requirement, also submitting that it was affirmed in the 1847 Declaration and the 1850 Act.

[1098] This first requirement presents the first difficulty. A treaty promise to do something for SON is not necessarily enough.[80] The issue is whether the encroachment clause gave rise to the needed undertaking of loyalty.

[1099] SON submits that the encroachment clause was a treaty promise to do something for SON only. Many, if not all, treaty promises could be described in that way. However, to establish an *ad hoc* fiduciary duty, the party asserting the duty must be able to point to a "forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary" in relation to the specific legal interest at stake: *Elder Advocates*, at para. 31; *Manitoba Metis Federation*, at para. 61.

[1100] The question is therefore whether, in 1836 and in relation to the treaty, there was a forsaking of the interests of all others by the Crown.

[1101] Beginning with the words of the treaty, including the encroachment clause, the treaty did not express a duty to act in the best interests of SON, a duty of loyalty to SON exclusively, or a forsaking of the interests of all others.

[1102] SON submits that because the encroachment clause was a promise made to SON to protect the Peninsula from encroachments by white people, it was a promise to prefer SON's interests over those of white people who sought to encroach. This is not a forsaking of the interests of all others.

[1103] Most significantly, there were other Indigenous peoples in the area. In the relevant time period, other Indigenous peoples were either going to the Peninsula on their own initiative (such as the Pottawatomi) or in response to invitations from SON. In this case, SON has emphasized the difference between their rights to the Peninsula and those of other Indigenous peoples. As put by SON, "it was the intention of both the Crown and SON at Treaty 45½ that the Peninsula be protected for SON, not for the Anishinaabe or some other group of First Nations more generally."

[1104] There was some discord between SON and the Pottawatomi arriving in the area in the relevant time period. That discord did not escalate into a substantial conflict between those Indigenous groups. If it had, Treaty 45½ did not go so far as to provide that the Crown had undertaken to disregard the interests of other Indigenous peoples in favour of SON.

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[80] Contrast *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701, 431 D.L.R. (4th) 32, where the treaty promise was more than an agreement to pay an annuity. The treaty included a promise to engage in a process to determine whether annuities should be increased. The promise to engage in a process was key. The court found no competing duty or interest in the performance of that process: at paras. 524-526. Therefore, this decision, which is under appeal, relates to a very different sort of treaty promise.

[1105] The duty must be one of utmost loyalty to the beneficiary. The fiduciary's function "is not to mediate between interests. It is to secure the paramountcy of one side's interests": *Elder Advocates*, at para. 43, quoting P. D. Finn, "The Fiduciary Principle" in T. G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989), at p. 27.

[1106] The overarching principles discussed above also do not support the suggested undertaking. While "it is not impossible to meet the requirement of an undertaking by a government actor, it will be rare": *Elder Advocates*, at para. 48.

[1107] The circumstances surrounding the making of Treaty 45½ also do not supply the needed foundation to infer an undertaking to forsake the interests of all others. Neither the treaty nor the historical evidence about its formation provide the foundation to infer that Bond Head was purporting to give such an undertaking in 1836 in what was, in any event, a provisional treaty. Nor does the post-treaty evidence provide the needed foundation.

[1108] SON's reliance on the 1847 Declaration and the 1850 Act does not resolve this problem. The 1847 Declaration did not transform the treaty promise into the necessary undertaking. Its rationale is discussed above. Neither its words nor the surrounding circumstances amount to the needed forsaking of the interests of all others.

[1109] Moving to the 1850 Act, the Crown "is not normally viewed as a fiduciary in the exercise of its legislative … function": *Guerin*, at p. 385, quoted in *Elder Advocates*, at para. 37. Further, the 1850 Act was not passed for the Peninsula alone. It was yet another attempt at provincial legislation to protect all Indigenous peoples in their "unmolested enjoyment" of their lands.

[1110] SON relies on a proclamation made under the 1850 Act, which was needed to make the Act apply to the Peninsula. However, that process was not an undertaking of loyalty. There had been a problem with the prior legislation because it was not clear which lands the legislation applied to. The 1850 Act resolved that problem by requiring steps be taken to proclaim that the Act applied to specific lands. In 1850-1851, the Act was proclaimed to apply to more than 15 specific areas, one of which was the Peninsula. The broad legislative purpose reflected in the 1850 Act, its provisions and the above proclamations do not establish an undertaking of loyalty to SON's ancestors and no one else.

[1111] The first requirement for an *ad hoc* fiduciary duty is therefore not met. Although I need not go further, there are difficulties with the third requirement that I will discuss briefly.

[1112] The party claiming an *ad hoc* fiduciary duty must show a legal or substantial practical interest of the beneficiaries that must stand to be adversely affected by the alleged fiduciary's exercise of discretionary control: *Elder Advocates*, at para. 34. A high degree of discretionary control is required: *Wewaykum*, at para. 79.

[1113] SON submits that there was the required legal interest for three reasons: because Treaty 45½ created a reserve on the Peninsula (which has not been established); because the 1847 Declaration and 1850 Act enhanced SON's legal interest (which has not been established); and,

because of SON's historic use and occupation of the Peninsula. Historic use and occupation could give rise to a legal interest, and is discussed below.

[1114] SON submits that there was discretion or control because it was up to the Crown to decide how to go about fulfilling the treaty promise made in the encroachment clause. Yet it would often be the case that a party could decide how to go about fulfilling a treaty promise.

[1115] To show discretion or control, SON relies on cases involving the sale of Indigenous lands by the Crown, such as *Guerin*, which may give rise to a *sui generis* fiduciary duty. That jurisprudence arises from the Crown's actions taken after the assertion of sovereignty, by which the Crown foreclosed Indigenous peoples from selling land themselves. Only the Crown could sell Indigenous lands to third parties.

[1116] The significance of that Crown control is underscored in the seminal case, *Guerin*. The Supreme Court held that the "conclusion that the Crown is a fiduciary depends upon the further proposition that the [Indigenous] interest in the land is inalienable except upon surrender to the Crown": at p. 376. An Indigenous group was "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": at p. 376.

[1117] In the cases beginning with *Guerin*, it was the "Crown's intervention as the exclusive intermediary to deal with others … on their behalf" that gave rise to the (*sui generis*) fiduciary duty: *Wewaykum*, at para. 97.

[1118] Unlike *Guerin* and the cases that flowed from it, here the Crown did not assume exclusive control over the protection of the Peninsula. SON could, and did, take steps to protect the Peninsula themselves. SON was certainly not precluded from doing so. Further, SON has not shown that the Crown's choices of how to fulfill that clause would have adversely affected SON's interests. It was the breach of the clause that was the problem.

[1119] As put in *Elder Advocates*, at para. 51, "[i]t is not enough that the alleged fiduciary's acts impact generally on a person's well-being, property or security." There could be a breach of the encroachment clause, as happened here, but that does not mean that the obligation to be fulfilled met the requirements for an *ad hoc* fiduciary duty.

[1120] In summary, I conclude that this is not one of the rare cases in which an *ad hoc* fiduciary duty arises. Nonetheless, the Crown had important treaty obligations flowing from Treaty 45½ and the honour of the Crown.

Sui generis fiduciary duty

[1121] In the Indigenous context, a fiduciary duty may also arise as a result of the Crown assuming discretionary control over specific Aboriginal interests: *Manitoba Metis Federation*, at para. 49; *Haida Nation*, at para. 18. Because this obligation is specific to the relationship between the

Crown and Indigenous peoples, it has been characterized as a *sui generis* fiduciary obligation: *Williams Lake*, at para. 44; *Wewaykum*, at para. 78; *Guerin*, at p. 385; *Sparrow*, at p. 1108.

[1122] For the *sui generis* fiduciary duty, these requirements must be met:

(i) there must be a specific or cognizable Aboriginal interest, and,

(ii) there must be a Crown undertaking of discretionary control over that interest: *Manitoba Metis Federation*, at para. 51; *Wewaykum*, at paras. 79-83; *Haida Nation*, at para. 18.

[1123] The focus is on the particular interest that is the subject matter of the dispute: *Wewaykum*, at para. 83. That interest must be identified with care because the alleged fiduciary obligation is owed in relation to that interest: *Williams Lake*, at para. 52.

[1124] On the first requirement, SON's primary submission is that the specific interest was their interest in the reserve created by Treaty 45½. There is no doubt that the Crown has a *sui generis* fiduciary duty in relation to reserve lands. However, a reserve was not created by that treaty.

[1125] This is not a case akin to the recent decision of *Southwind*, which arose in the context of a reserve in Northern Ontario, created by a treaty in the early 1900s. In *Southwind* there was no issue that the treaty created a reserve. It did so, under the *Indian Act*.

[1126] In oral closing submissions, SON brought forward a second submission regarding the first step of the test for a *sui generis* fiduciary duty. SON submitted that the necessary interest arose because the Peninsula was SON's traditional territory, which SON and their ancestors had used and occupied "since time immemorial".

[1127] SON does not have a recognized Aboriginal title to the Peninsula, nor is recognized title required to show the necessary interest: *Guerin*, at p. 379. However, SON has also not made a claim for Aboriginal title to the Peninsula or sought a declaration that the Peninsula was their traditional territory at the time relevant to the Treaty Claim.

[1128] There was trial evidence regarding SON's use of the Peninsula, which was put forward in support of other issues. In final submissions, there was little focus on occupation of the Peninsula of the comprehensive sort I would expect if this position was being pursued. There is therefore a question about whether the level of SON's occupation of the Peninsula in 1836 provides an adequate foundation for this fiduciary duty.

[1129] Ontario submits that the evidence does not show sufficient occupation. However, Ontario acknowledged in oral closing submissions that the Peninsula was considered part of SON's territory at the time of Treaty 45½ and acknowledged that there was evidence about use of the Peninsula.

[1130] For the purposes of this discussion of a *sui generis* fiduciary duty, I am prepared to assume that SON had a sufficient interest in the Peninsula as of 1836 to satisfy the requirement of a specific legal interest as of that time. There was some evidence of occupation and considerable evidence of use, at least with respect to villages and the locations of harvesting activities. Treaty 45½ itself speaks of the Peninsula as SON territory. I need not, and do not, make any findings about any entitlement to Aboriginal title to that land nor the length of time SON was present on the Peninsula.

[1131] The greater difficulty is the second requirement for the imposition of a *sui generis* fiduciary duty. SON must show that the Crown assumed discretionary control of the Peninsula.

[1132] Again, SON relies on Treaty 45½. SON submits that this treaty was the "crucial moment" when the Crown's fiduciary duty "crystallized" in relation to the Peninsula. SON relies primarily on the unsuccessful argument that the treaty created a reserve. Leaving that argument aside, SON relies on the encroachment clause.

[1133] SON again submits that the encroachment clause was an assumption of discretionary control because the Crown could choose how to fulfill the treaty promise. This is problematic for the same reasons discussed above in relation to the *ad hoc* fiduciary duty.

[1134] In *Guerin* and later cases, the Crown's assumption of discretionary control arose because the Crown became the exclusive intermediary between the Indigenous group and third parties with respect to the sale of their lands.

[1135] Treaty 72 illustrates a situation where the Crown was the exclusive intermediary. Under that treaty, the surrendered lands were to be sold by the Crown, with the proceeds going to SON. SON was not permitted to sell the land directly. Only the Crown could sell the land. Yet there is no alleged duty or breach in that regard, either of the treaty or of any fiduciary duty.

[1136] I am not persuaded that the Crown assumed discretionary control over the Peninsula. The Crown did not preclude SON from taking steps. SON could, and did, take steps to protect the Peninsula themselves. As has been emphasized by the Supreme Court of Canada, the hallmark of a fiduciary relationship is that "one party is at the mercy of the other's discretion": *Guerin*, at p. 384; *Wewaykum*, at para. 80. This is not such a case.

[1137] SON also submits that the honour of the Crown gives rise to a fiduciary duty, relying on *Guerin*, but the above requirements for a *sui generis* fiduciary duty must still be met: *Southwind*, at paras. 60-61.

[1138] Although I do not rely on this factor, it is also significant that SON has not alleged that Treaty 72 is invalid despite the allegations of breach of fiduciary duty and the honour of the Crown in the process leading up to that treaty. SON relies on *Moore v. Sweet*, 2018 SCC 52, [2018] 3 S.C.R. 303, to say that SON can seek to reverse the practical effects of Treaty 72 despite not attacking its validity. Yet that case arises in a different context and on very different facts. It is not analogous.

[1139] The Supreme Court has emphasized that caution must be exercised before imposing a fiduciary obligation: *Wewaykum*, at para. 92. In this case, Treaty 45½ does not give rise to the imposition of a fiduciary duty. The Crown was obliged to fulfill its treaty promise, with honour, and is subject to the consequences for its failure to do so. SON has not shown that there was also a fiduciary duty that supplemented those obligations.

Crown immunity defence

[1140] In response to the claimed fiduciary duties, Ontario put forward the defence of Crown immunity. Ontario submitted that the Crown in right of Ontario is immune from suit for alleged breaches of fiduciary duty that occurred before September 1, 1963, including this claim of breach from the 1800s. Given that I have not found a fiduciary duty, and there are no disputed facts relevant to this defence that must be addressed, I need not address this defence.[81]

Laches defence

[1141] Ontario further submits that SON's Treaty Claim is defeated by the equitable defence of laches, which is based on unreasonable delay. I disagree, as discussed below. SON has shown that the first branch of the laches test has not been met, and the second branch should be deferred to Phase 2 of these proceedings.

[1142] Laches may be raised in Phase 1 of these proceedings if it applies to a cause of action in general, subject to my discretion to defer the issue to Phase 2. Issues that give rise to property-specific considerations are deferred to Phase 2. The other defendants are not raising the laches defence at this stage, although they may do so in Phase 2.

[1143] The first difficulty I have with Ontario's position relates to the declaratory relief sought by SON in the Treaty Claim. SON seeks declarations regarding breaches of the honour of the Crown and treaty interpretation.

[1144] In my view, the defence of laches does not defeat a claim for declaratory relief. This issue arose in *Manitoba Metis Federation*, in relation to declaratory relief arising from a breach of the honour of the Crown. The situation was similar in that the claimed breach of fiduciary duty was dismissed in that case, and a declaration of the breach of the honour of the Crown was granted in the absence of a cause of action.

[1145] In *Manitoba Metis Federation*, the Supreme Court held that a declaration "is available without a cause of action" and is available whether or not any other consequential relief is sought:

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[81] Ontario's position is contrary to two recent decisions of the Ontario Superior Court: *Barker v. Barker*, 2020 ONSC 3746; *Restoule v. Canada (Attorney General)*, 2020 ONSC 3932, 452 D.L.R. (4th) 604. Ontario has appealed both decisions.

at para. 143. Significantly, the Supreme Court held that a declaration based on the breach of the honour of the Crown is not barred by laches: at para. 9.

[1146] Ontario accepts that the defence of laches does not defeat a claim for a declaration of Aboriginal title, based on *Manitoba Metis Federation*, at para. 153. Ontario is therefore not pursuing this defence in the Aboriginal Title Claim. Laches also does not defeat the claim with respect to a declaration of breach of the honour of the Crown, as set out above. No basis has been advanced to reach a different conclusion for the other declaratory relief claimed in the Treaty Claim.

[1147] As a result, while the laches defence may be available for the other remedies that have been sought in the Treaty Claim, laches does not defeat the declaratory relief sought by SON. In turn, it does not defeat the entire Treaty Claim.

[1148] Further, laches is an equitable defence that applies to equitable claims only. The equitable claim in this case, the breach of fiduciary duties, has not been established. Resort to this defence is therefore not needed. However, unlike the Crown immunity defence, there are still some issues that need to be addressed. Considerable evidence was introduced at trial on issues relevant to laches, mainly with respect to the reasonableness of the delay and lack of acquiescence, about which I have made factual findings below. There is also the issue of to what extent this defence should be deferred to Phase 2 in any event.

The two branches of the laches defence

[1149] The equitable doctrine of laches requires that a claim be advanced without undue delay. However, "mere delay is insufficient to trigger laches": *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, at p. 77.

[1150] The additional requirements to establish the laches defence have given rise to two branches of the defence. Laches is a defence to an equitable claim where a plaintiff's delay is unreasonable, and, either:

(i) amounts to acquiescence; or,

(ii) results in circumstances that make the prosecution of the action unreasonable: *M.(K.) v. M.(H.)*, at pp. 77-78, quoting R.P. Meagher, W.M.C. Gummow & J.R.F. Lehane, *Equity: Doctrines and Remedies*, 2nd ed. (Sydney: Butterworths, 1984) at p. 755.

[1151] There is no specific time limit. The circumstances of the case are considered, with the main considerations being any acquiescence on the part of the plaintiff and any resulting change of position by the defendant that arose from reasonable reliance on the plaintiff's acceptance of the status quo: *Manitoba Metis Federation*, at para. 145.

[1152] A century of delay, for example, may not result in a finding of laches: see, e.g., *Manitoba Metis Federation.*

[1153] The defence of laches may be advanced in cases involving treaty obligations and the honour of the Crown. However, the court must carefully consider the explanation for the delay with due regard for the historically vulnerable position of Indigenous peoples: *Chippewas of Sarnia*, at para. 267.

[1154] Each case must be considered in the context of its surrounding circumstances: Graeme Mew, *The Law of Limitations*, 3rd ed. (Toronto: LexisNexis, 2016) at ch. 4, §2.77. Laches must be resolved as a matter of justice as between the parties: *M.(K.) v. M.(H.)*, at p. 78.

First branch – acquiescence/waiver

[1155] The Supreme Court has described the first branch of the laches defence, acquiescence, as requiring conduct that may fairly be regarded as equivalent to waiver: *Wewaykum*, at para. 111. As set out below, I find that SON's course of conduct could not be mistaken for SON waiving the rights that they have pursued in this case.

[1156] The first branch of the laches defence has a significant knowledge requirement. It is not enough that a plaintiff knows of the facts that support a claim in equity. The plaintiff must also know that the facts give rise to the claim (here, the alleged breach of fiduciary duties). The knowledge of one's claim is measured by an objective standard. The question is whether it was reasonable for SON "to be ignorant of [SON's] legal rights" given their knowledge of the underlying facts relevant to a possible legal claim: *M.(K.) v. M.(H.)*, at p. 79.

[1157] Put another way, SON needed to have the knowledge, capacity and freedom to pursue the claim of breach of fiduciary duties: *Manitoba Metis Federation*, at para. 147. The context is important, including the historical injustices suffered by SON and the other barriers to the commencement of litigation.

[1158] An inference of waiver arises when a plaintiff delays bringing a claim after the deprivation of rights has taken place, in the full knowledge of the existence of those rights: *M.(K.) v. M.(H.)*, at p. 78.

[1159] Ontario submits that as of 1854, SON knew, in general terms, the facts giving rise to the Treaty Claim. Ontario submits that by the 1960s SON ought to have pursued litigation, yet this action was not commenced until 1994. Ontario further submits that the timing of certain key legal decisions, such as *Guerin* in 1984, is not a significant factor when considering the reasonableness of the delay.

[1160] SON submits that they lacked the knowledge, capacity and freedom that is needed for acquiescence (or waiver) until recently. SON relies on both specific and systemic barriers to show both that their delay was not unreasonable and that there was no waiver. Having considered all the evidence about those many barriers, I agree.

[1161] Beginning with the period immediately following Treaty 72, Ontario notes that SON's ancestors did put forward some complaints about the treaty. That is so. However, the complaints related to implementation, not pre-Treaty 72 conduct. At the forefront of the complaints was the slow pace of the land sales. There were also issues about the boundaries and issues about the payment of the proceeds of the sales. Those treaty implementation issues are not the basis of SON's Treaty Claim. No breach of Treaty 72 is alleged in this case.

[1162] There was also community evidence about potential problems with the manner in which Treaty 72 was signed and who actually signed it. SON has not relied on that evidence. It could be germane to a challenge to the validity of Treaty 72, but there is no such challenge here. SON does not say that Treaty 72 is invalid. Like the post-treaty complaints, this evidence does not show sufficient knowledge of the equitable claims that have been advanced in this case.

[1163] The equitable claims made in the Treaty Claim are founded on the following: Treaty 45½, what transpired in relation to the encroachment clause, and the treaty negotiation process leading up to Treaty 72. On these subjects, Ontario relies on SON's knowledge of the terms of Treaty 45½, knowledge of squatting, and knowledge of the conduct of Crown representatives at various treaty councils. I am not satisfied that SON's knowledge on those subjects, discussed in detail above, is enough to infer waiver.

[1164] With respect to Treaty 45½ and squatting, SON certainly knew about that treaty, their direct interactions with the Crown and others regarding squatting, and the Crown responses to their complaints. But there was a bigger picture involved, regarding what the Crown did not do to fulfill the treaty obligation to protect the Peninsula. I am not satisfied that SON had enough information about what the Crown could have done about squatting, and did not do, between 1836 and 1854. And by the time of Treaty 72, the Crown was accurately representing to SON that squatting could not be stopped. That is what SON's ancestors knew as of 1854. Ontario has not shown that SON obtained sufficient knowledge of the actual circumstances surrounding squatting at an early stage.

[1165] As for the process issues that were raised in relation to Treaty 72, to the extent that SON seeks declaratory relief in that regard, laches does not defeat those claims. With respect to the breach of the honour of the Crown that has been established in the August 1854 negotiation, there were no adverse consequences for SON. As well, there is still the question of whether SON ought to have known that there was a potential equitable claim arising from those matters before the fiduciary duty law developed much more recently.

[1166] Ontario submits that because SON was able to make some complaints in the 19th century, they had some capacity to pursue this claim. However, this submission does not address the significant systemic barriers impairing SON's ability to actually pursue litigation. Those barriers existed for a very long period of time and have had lasting effects.

[1167] With respect to systemic barriers, SON begins with the *Indian Act* regime that was put in place not long after Treaty 72, in 1876. There is no question that in the late-19th century and well

into the 20th century, iterations of that Act took control away from bands and impaired their ability to pursue their rights.

[1168] The first *Indian Act* has been described as "covering almost every important aspect of the daily lives of Indians on reserve".[82] It gave the government control over the decision-making of bands, significantly ousting traditional governance structures. Over the years, that Act imposed a structure of elected councils in place of traditional forms of governance and gave the Canadian government the power to depose Chiefs and Councillors and annul elections. Further, all bylaws, rules and regulations passed at Band Council meetings were subject to government approval before they could be implemented. The Act also gave the government significant control over how band funds were spent, requiring government approval for bands to access their own funds. And from 1910, the Act provided that no contract dealing with band funds was binding unless approved by the Superintendent of Indian Affairs.

[1169] As put by Dr. McHugh, bands were given limited powers of self-management under the Act. And those curtailed powers were subject to the supervision of Crown officials. Further, from a practical standpoint, the "Indian Agents" who lived on the reserves controlled most, if not all, of Indigenous life, on behalf of the government. The Act gave Indian Agents significant powers over bands, including the power to preside at and direct the Band Council meetings.

[1170] Over the first half of the 20th century, the power of Indian Agents grew along with the statutory amendments to the Act. Indian Agents were also Justices of the Peace and could not only conduct legal proceedings but were also protected by offences of, for example, threatening demands on civil servants. Further, all Indigenous complaints and inquiries regarding "Indian Affairs" had to be directed through the Indian Agents themselves. This has left SON with a lingering concern that not all their historical complaints were actually passed along to the government.

[1171] The evidence before me about Indian Agents is varied. Considering all of the evidence, I accept the SON community witnesses' description of the Indian Agent at their reserve as frequently "at odds" with the Band Council and as someone who tried to discourage people in the community from causing trouble. SON community witnesses found that the Indian Agents they dealt with were authoritarian and oppressive.

[1172] SON called evidence about Indian Agents burning documents. SON submits that these events informed how SON viewed Indian Agents. However, SON does not allege that the burning of documents was an effort to cover up wrongdoing on the part of Crown agents, nor does SON

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[82] *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996), Vol. 1, at p. 256.

allege that the burning of documents has deprived SON of access to records that are necessary for this claim.

[1173] There is conflicting evidence on this subject, but I conclude that it does show how members of SON viewed the Indian Agents they dealt with.

[1174] The most detailed account was given by Marshall Nadjiwan, who testified that he saw an Indian Agent burning documents around 1962. Marshall Nadjiwan was 14 at the time. He was painting the Indian Agent's office. He recounted that some people arrived hurriedly and proceeded to tell the Indian Agent to leave that day and burn everything first. Marshall Nadjiwan testified that after those people left, the Indian Agent put documents into a barrel outside, poured oil on top, lit them and left them to burn. Marshall Nadjiwan testified that he then saved the records and hid them. His father, who was the Chief, was away. But when his father returned a few days later, Marshall gave the documents to him.

[1175] The defendants submit that there are inconsistencies in the evidence about this incident. There was no Indian Agent at that location in 1962. That office had been relocated in 1958. This was raised with Marshall Nadjiwan in his cross-examination. He replied that he and his family did not live in the area in 1958. Further, there was conflicting oral history from another community witness, who had been told about the incident by Marshall Nadjiwan's father. Chief Nadjiwan had said that he was the person who had saved the documents. That was also the Chief's account in his autobiography.

[1176] SON has about 16 boxes of original Indian Office documents. Marshall Nadjiwan testified that those were the documents that he saved, as recounted above. At trial, SON put forward sample pages from those boxes of documents. The sample pages show damage due to mould, but do not show damage by fire. A report by a conservator about the document collection also makes no mention of fire damage. And despite the relationship between those documents and the above incident, the parties all agree that this large collection of documents is irrelevant to Phase 1 of this trial. I have not had an opportunity to see anything but the small number of sample pages.

[1177] There are other accounts of record burning, which also have frailties, and which show that there may be some confusion between the above incident and other events.

[1178] Dr. Brownlie noted that, in spite of variations across community accounts of the incidents, these accounts show how the SON community saw the Indian Agents as not necessarily trustworthy. I agree. There is ample other evidence showing the difficulties SON experienced in dealings with Indian Agents. The Indian Agents did have and use control over SON, and fostered a power imbalance. This control made it more difficult for SON to pursue legal claims. I reach this conclusion without needing to rely on the evidence about the burning of records.

[1179] The *Indian Act* also constrained access to legal assistance. From 1927 to 1951, the Act made it an offence for a lawyer to receive payment from an Indigenous group unless the lawyer

first got permission to do so.[83] The Act effectively prevented Indigenous groups, including SON, from hiring lawyers.

[1180] There were other major systemic obstacles in the 19th and 20th centuries. The pre-Confederation Crown took steps to "civilize" and then "assimilate" Indigenous peoples in the late-19th century, affecting traditional decision-making. Aspects of the *Indian Act* also served that purpose. Further, the tragic residential school system was designed to assimilate Indigenous children into mainstream Canadian culture. Those schools were in place from the late 1800s through to the late 1990s, with enrollment peaking in the 1950s. Members of SON attended two residential schools, where they were disempowered, poorly educated and deprived of their culture. The impact of the residential schools also profoundly affected their families and communities. In addition, SON members more generally faced poverty and additional impediments to accessing education. All of these systemic barriers substantially impaired SON's capability and freedom to advance this legal action.

[1181] Some barriers began to drop away in the 1950s and 1960s, as shown in the legislative changes referred to above. The government's control over Band Councils loosened over time. The Indian Agent regime ended in the late 1960s. More resources became available. Lawyers became available. However, the effects of the above systemic obstacles would take a much longer time to overcome and they continue today.

[1182] Despite the many barriers they faced, members of SON began to take steps to pursue their claims in the 1960s, and going forward from that time. Some periods were more active than others, but this is reasonable given the broader context discussed above. SON sought information from the government about the surrendered lands, they pursued the return of all unsold surrendered lands, they undertook research, and they retained legal counsel. SON experienced difficulties in obtaining access to records and an inventory of lands from the government, but they persisted. SON explored different avenues to assert claims, including the Office of Native Claims that was established in 1974 and taking grievances to the Governor General in 1979. SON continued to pursue negotiations with Canada and Ontario for the return of the unsold lands. SON began

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[83] Section 141 of the *Indian Act*, R.S.C. 1927, c. 98, provided as follows:
Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from any Indian any payment or contribution or promise of any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offence an liable upon summary conviction for each such offence to a penalty not exceeding two hundred dollars and not less than fifty dollars or to imprisonment for any term not exceeding two months.

starting lawsuits in the late 1980s, including actions about Treaty 72 that assert different claims. These many efforts took SON through to the 1990s. This action was commenced in 1994.

[1183] SON also relies on legal developments to explain their delay. For a key example, SON relies on *Guerin* as an important step in the process of being capable to bring this action. Before I address that argument, I return to the first branch of the laches defence. There must be unreasonable delay coupled with acquiescence akin to waiver. I find, on the evidence before me, that the defence based on the first branch has not been established. Yes, it took a very long time, but that is not sufficient to show laches. SON did attempt to assert their rights within a reasonable time, using many different avenues. Their course of conduct was characterized by a range of efforts and persistence as those efforts did not work. I find that SON's course of conduct could not be mistaken for SON waiving the rights that they have pursued in the Treaty Claim.

[1184] It is therefore not necessary to rely on the development of the law to defeat the defence of laches. However, I agree with SON that it is relevant context. I will address the issue briefly.

[1185] There is no doubt that the release of the Supreme Court of Canada's decision in *Guerin*, in 1984, was a watershed moment in the development of Aboriginal law. Until that time, a cause of action against the Crown for breach of fiduciary duty in relation to land surrenders had not been recognized. SON submits that it cannot acquiesce to the breach of a duty when they did not know, nor ought they have known, that such a claim was possible. As put in *M.(K.) v. M.(H.)*, at pp. 78-79, it is not enough that the plaintiff knows of the facts that support a claim in equity. The plaintiff must also know that the facts give rise to the equitable claim, measured objectively.

[1186] Ontario disagrees, noting that this type of reliance on *Guerin* has been rejected in the context of a limitations defence: see e.g., *Peepeekisis First Nation v. Canada*, 2013 FCA 191, [2014] 1 C.N.L.R. 306, at para. 50. Yet laches is an equitable defence and therefore allows for more latitude when considering all potentially relevant context. The specific context of the delay is important to the determination of laches.

[1187] I do not hold the view that a litigant can simply wait until someone else establishes a new claim, and then sue, without having to address delay. However, for laches, the legal history may form part of the overall context for a plaintiff's delay. It may inform the question of whether the delay is unreasonable. The legal history does form part of the context of this case, although it is not needed to show the absence of acquiescence or waiver.

[1188] As set out above, if an equitable breach had been established, I would dismiss the laches defence to the extent that it has been advanced under the first branch.

Second branch – reasonable reliance/prejudice

[1189] The second branch of laches requires unreasonable delay resulting in circumstances that make the prosecution of the action unreasonable. Much of the above discussion, about efforts and obstacles, is still relevant to explain the delay. In addition, Ontario must show that SON's delay caused Ontario to alter its position "in reasonable reliance on [SON's] acceptance of the status

quo, or otherwise permitted a situation to arise which it would be unjust to disturb": *M.(K.) v. M.(H.)*, at p. 77.

[1190] Ontario submits that the Crown reasonably relied on SON's acceptance of Treaty 72, and that there would be prejudice if the equitable claims could now be pursued. However, unlike the first branch, these arguments give rise to property-specific considerations. As well, there is a dearth of evidence to support the very general propositions put forward as prejudice. I conclude that this branch is properly addressed in Phase 2.

[1191] To show prejudice, Ontario first relies on the steps taken by the Crown to fulfill its treaty obligations under Treaty 72. The treaty required that the Crown sell the surrendered lands. In turn, Crown surveys were prepared, lands were valued and sold, roads and other transportation routes were put in place, and presumably Crown funds were expended to complete all of these steps. Further, SON was aware of and urged on the land sales.

[1192] I have difficulty with the suggestion that fulfilling these treaty obligations shows prejudice in relation to the lands over which SON claims beneficial ownership. The steps taken by the Crown resulted in most of the surrendered land being sold to third parties, as contemplated by the treaty. And the land that is currently held by third parties is excluded from the Treaty Claim. Only lands that are now owned by the defendants are subject to the Treaty Claim. On the evidence before me, it would only be reasonable to infer that they are the great minority of the surrendered lands. Thus, for most of the surrendered lands, the Crown had to survey and sell the lands in any event.

[1193] Ontario further submits that the funds it used to purchase the lands that it does own could have been put to other purposes. However, the evidence before me does not establish, on a global or individual property basis, that there were significant expenditures made by the Crown in relation to the properties that are at issue. The evidence does not include the purchase price and timing of each purchase or a basis to say that there was any significant impact on other government initiatives due to this use of funds. Further, there is not an adequate evidentiary record from which to draw such an inference.

[1194] Ontario similarly submits that there is prejudice because it purchased some of the Treaty 72 lands for various public purposes and has managed those lands. However, this aspect of the laches defence quickly devolves into a consideration of property-specific issues without sufficient evidence. I do not have evidence showing information about the land purchases, public purposes, types of costs of management or other potentially relevant specifics. These property-specific details are meant for Phase 2 of this litigation.

[1195] The possible exception is parks, about which there was some evidence. There are several provincial parks in the Peninsula area and I accept that at least some of the surrendered lands have been put to that use. Ontario submits that the public interest would be prejudiced if this claim proceeds with respect to parks and that Ontario has taken steps relating to public use and conservation. Parks certainly serve the public in many ways.

[1196] The evidence about parks also shows that there are significant differences between the parks on the Peninsula, the majority of which are non-operating. It is therefore apparent that parks may also give rise to property-specific considerations. And since they do, they ought to be addressed in Phase 2. Canada's parks are being addressed in Phase 2.

[1197] It would be unfair to SON to address property-specific issues now. Examinations for discovery and related steps have not yet taken place. The parties deferred the preparation for Phase 2 (including production of documents, examinations for discovery and the delivery of expert reports), on consent.

[1198] Ontario accepts that there will be other property-specific issues, which would be addressed in Phase 2. Ontario submits that further equitable considerations will apply to individual parcels of Treaty 72 lands that are currently owned by Ontario.

[1199] Laches may only be raised now to the extent that it applies to any of SON's causes of action in general. The defence, as it may apply to the claim of beneficial ownership of specific lands, must await Phase 2. The second branch of the laches defence is better raised in Phase 2, in keeping with the position of Canada.

[1200] In conclusion, if an equitable breach had been established, I would defer the determination of the second branch of the laches defence to Phase 2 in order to incorporate property-specific considerations.

Treaty 72 impact on SON harvesting rights

[1201] SON has also raised a treaty interpretation issue regarding Treaty 72, with respect to Aboriginal rights to harvest. SON submits that, properly interpreted, Treaty 72 had no impact on SON's traditional harvesting rights, except when the surrendered land was (or is) put to a "visible incompatible use".[84]

[1202] In turn, SON submits that where there was (or is) no visible incompatible use of the land, members of SON were (and continue to be) free to harvest (hunt, fish and gather) on the surrendered land even if the land has been sold to third parties.

[1203] SON does not allege that their harvesting has been wrongly curtailed. This is a claim for a declaration of the meaning of the treaty.

[1204] Ontario also submits that any traditional harvesting rights can still be exercised provided that the surrendered lands are not put to a use that is a "visible incompatible" use with the proposed form of harvesting. This position gives rise to the question of what would be a "visible

[84] SON adopted Ontario's position on this issue in closing submissions.

incompatible" use, which Ontario submits is a case-by-case, fact-driven inquiry. Ontario further submits that where any harvesting can be done on surrendered lands, it must be done safely and in accordance with reasonable conservation measures.

[1205] Canada's position is that Treaty 72 extinguished any harvesting rights with respect to the surrendered lands, both by the treaty's express words and as shown by the surrounding context and other relevant considerations. Canada also notes that SON has not sought to establish any Aboriginal rights to harvest in this case. That is so. This is significant because Aboriginal harvesting rights are group-, location- and activity-specific rights. However, I do not see it as necessary to seek formal recognition of every Aboriginal right to harvest in order to raise this treaty interpretation issue.

[1206] As expanded on below, I have concluded that Treaty 72 implicitly provided that the exercise of any SON Aboriginal rights to harvest could continue up until the time that the surrendered land was sold, and after sale as well, provided that the land use was (or is) not an incompatible use.

[1207] The well-established principles of treaty interpretation are discussed above. The goal is to search for the common intention of the parties at the time the treaty was signed. The relevant time is therefore 1854. The promises in the treaty must be placed in their historical and cultural context, to find the common intentions of the parties and the interests that they intended to reconcile at the time. Cultural and linguistic differences must be taken into account.

[1208] The common intention of the parties can be drawn, for example, from other documentation regarding Treaty 72. However, unlike *Taylor and Williams*, harvesting was not mentioned in documents recording what was discussed at the treaty council for Treaty 72.

[1209] There is, however, other important context to consider in order to discern the common intention of the parties in 1854. The starting point is to examine the words of the treaty. I then go on to consider relevant context.

[1210] Treaty 72 states that SON's ancestors agreed that it would be "highly desirable for us to make a full and complete surrender to the Crown of the Peninsula … subject to certain restrictions and reservations".

[1211] The treaty text goes on to set out the "reservations" by describing sections of the Peninsula that would be reserved for the Saugeen, Owen Sound and Colpoy's Bay Bands. The treaty also says that no islands were included in the surrender. There are no other "reservations" or "restrictions" from the "full and complete surrender" stated in the treaty. Harvesting rights are not expressly mentioned. The treaty goes on to address the sale of the surrendered lands and the payment of the proceeds to the three bands.

[1212] The words of the treaty must be given the interpretation that they would naturally have held for the parties at the time. Canada submits that the interpretation of the above text – particularly

the phrase "full and complete surrender" – means what it says. The phrase means that all rights were surrendered, unless excluded by the reservations or restrictions in the treaty.

[1213] Treaty 72 does not include a reservation or restriction indicating that harvesting could continue on the lands surrendered in that treaty. An example of such a provision is found in the draft of Treaty 45½, which contained this clause (that was struck out before the treaty was signed):

> So long as the Country you at present occupy shall remain uncultivated, you will have full liberty to consider it as your hunting ground.

[1214] The Robinson Treaties of 1850 provide another example of treaties that expressly confirmed that fishing and hunting rights were preserved on surrendered lands, until the land was sold.

[1215] With respect to the words of Treaty 72, there was trial evidence about the translation of certain words, including the phrase "full and complete surrender". SON submits that the likely Anishinaabemowin translation of that phrase would connote a giving up of lands, but not necessarily a giving up of access to those lands for harvesting activities. SON relies on Dr. Corbiere's evidence for this position.

[1216] As discussed above, Dr. Corbiere's opinion was based on factual assumptions that she was asked to make that have either been disproved or not proved. Contrary to those assumptions, there was both the time for proper translation and several bilingual Indigenous participants at the treaty council whose presence was of assistance. Further, Dr. Corbiere's review of the historical record was very limited and her answers to questions in cross-examination showed the significance, in her view, of historical context that was outside her knowledge. Lastly, Dr. Corbiere qualified her own opinion repeatedly.

[1217] As a result, I find that the opinion evidence SON relies on does not have an adequate foundation to be given weight. However, I proceed with caution regarding the words of the treaty. Once all relevant considerations are weighed, any uncertainty must be decided in favour of SON in accordance with the principles of treaty interpretation.

[1218] Other relevant context includes the purposes of Treaty 72. SON's ancestors wanted land secured for their people, which was addressed expressly in the treaty. Secondarily, they wanted the financial security that would come from the proceeds from the sale of the surrendered land, which is also set out in the treaty. While harvesting was not mentioned in the historical records recounting the dialogue at the treaty council, it had (and still has) strong cultural connections for SON. Harvesting was also important for sustenance at the time. However, of all the forms of harvesting, fishing was the most significant for SON. As put by SON, they were, and still are, a fishing people, and fishing was central to their traditional economy and way of life. However, fishing was largely unaffected by the Treaty 72 land surrender. Although there was some inland

fishing and some gathering, hunting was the main focus of SON's harvesting activities on the lands that were surrendered in Treaty 72.

[1219] Numerous community witnesses testified about their harvesting activities in and around the Peninsula and the harvesting activities of parents and grandparents, including some oral history. The community evidence and oral history does not establish a consistent practice or understanding about harvesting on the land surrendered in Treaty 72.

[1220] Chief Roote testified that there was a line of oral history with other past leaders that Treaty 72 was only about the "sale of bush lots". He believes that SON did not surrender any harvesting rights and testified that his grandfather had the same belief. Doran Ritchie spoke of hearing that they could hunt anywhere, from his grandfather and stepfather, when they were discussing Band Council business. However, his own practices are different, as discussed below. Two other community witnesses said that their grandfathers had told them that they could hunt wherever they wanted to. There is differing oral history from Fred Jones, who was told by his father, a Chief, and other Elders, that he could hunt anywhere on unoccupied Crown lands, not more generally on all surrendered lands. All of this oral history does not have a strong foundation when considering reliability as of 1854, but I have taken it into account.

[1221] Current practices also vary. The community evidence included evidence about requesting permission before harvesting on private property. For example, Doran Ritchie was one of the main witnesses on harvesting. He testified that he did not hunt on posted[85] private property without asking for permission first, only on Crown lands. If he saw cattle, he would not go on the land. He testified that he had arranged with many farmers to go on their land, including to assist them by hunting beaver. He testified that other SON members also ask for consent to hunt on private property. Chief Paul Nadjiwan has a different practice. He testified that he hunted on private lands when invited to do so by a farmer and also when the land was "very, very isolated" and no one lived there. He testified that he would first seek permission if he saw red marks, one way to indicate no trespassing. This evidence about hunting shows that members of SON do not proceed as if they are free to hunt anywhere.

[1222] The intended use of the lands surrendered in Treaty 72 in 1854 is also relevant context. It is inconsistent with unlimited harvesting rights after that treaty.

[1223] SON has admitted that the land that was surrendered in Treaty 72 was intended for sale, for agricultural purposes. The evidence shows that agricultural purposes – such as clearing, planting and cattle farming – are inconsistent with hunting. For example, Gary Harron is a non-Indigenous local farmer who was called as a witness by SON. He testified about his dealings with

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[85] Doran Ritchie explained that he was referring to signs posted as set out in the trespass legislation.

Doran Ritchie and related matters. Doran Ritchie asked for permission to hunt on the Harron farm, as Harron expected he would do. Harron testified that there were areas of his farm that he specifically did not want exposed to hunting, such as the pastures used by his cattle.

[1224] With respect to the intended use of the surrendered lands, SON's ancestors also wanted actual settlement to occur, not for the land to be sold to absent speculators. This came up both at the treaty council in 1854 and afterward. Like the intended agricultural use, actual settlement also gives rise to land use that is inconsistent with unlimited harvesting.

[1225] The Crown also wanted the land sold for agriculture and settlement to meet the settler demand for land. These uses, intended by both SON and the Crown, inform the common intention of the parties to the treaty.

[1226] There is also significant post-treaty evidence directly from ancestors of SON. That evidence suggests that Treaty 72 was intended to have an impact on hunting. In May 1855, SON petitioned the Governor General about several matters arising from Treaty 72, such as boundaries and a request for a requirement of actual settlement. In that petition, SON referred to having "no more hunting ground" and wanting to turn their attention to cultivating their land. In 1856, SON sent a declaration to the Governor General on a similar subject, saying that they had "disposed of all of our hunting grounds". In an 1886 letter to the Superintendent General, SON spoke of the surrender, which "had been their hunting grounds", and said that hunting had been "destroyed". And, in 1896, SON requested that part of the surrendered lands that remained unsold be reserved for them as a hunting ground.

[1227] Thus, the common intention of the parties that the lands be used for agriculture and settlement did include an impact on harvesting rights.

[1228] Considering all of the evidence about relevant context along with the text of Treaty 72, the treaty did not terminate all harvesting, but implicitly limited the exercise of any such rights. This is shown through not only the treaty itself, but also the purposes of the treaty, the intended uses of the surrendered lands, some of the oral history and the post-treaty SON documents about the impact of the treaty on hunting grounds.

[1229] In that the common intention of the parties in 1854 did include a limitation on harvesting on the surrendered lands, there is then the question of the scope of that limitation. Both Ontario and SON submit that the limitation arises when the surrendered land has been put to a "visible incompatible" use.

[1230] I agree that the notion of "incompatible use" has a role in interpreting Treaty 72, given the intended uses of the surrendered land. The intended uses of farming and settlement would be incompatible with unlimited hunting, for example, as would occupancy generally.

[1231] In *Sioui*, the Supreme Court of Canada implied a threshold for the exercise of Aboriginal rights into a treaty, based on incompatibility. The Supreme Court was addressing Aboriginal rights to camp, cut wood and light campfires. The treaty in question did not expressly limit those rights.

The court concluded that the traditional customs could be exercised in all parts of the territory where they were not "incompatible" with the "occupancy" of that location: at p. 1071. The court observed that this was the most reasonable way of reconciling the competing interests in that case.

[1232] SON's competing interests are focused on the importance of harvesting to the ancestors of SON in 1854. Harvesting was important to SON's ancestors. Community witnesses spoke of the cultural importance of certain harvesting activities today and the historical evidence shows more importance in or around 1854. Further, hunting and fishing were needed for sustenance at that time as well. Although fishing was not significantly affected by the land surrender, hunting was, and the continued importance of hunting and other harvesting form part of the relevant context.

[1233] The treaty parties also knew that it would take time before the surrendered land would be sold. There was a lengthy process by which the land needed to be surveyed into lots, and then sold by auction. For example, the land surrendered in 1836 in Treaty 45½ was still being sold in 1854, 18 years later. Although the land sales for Treaty 72 land took even longer than anticipated, in 1854 SON and the Crown knew it would be many years before the lands were actually sold. And it would not be until after the sales took place that the land would begin to be put to incompatible uses.[86]

[1234] When considering the common intentions of the parties and the interests that they intended to reconcile as of 1854, I find it implicit in Treaty 72 that the limitations on any harvesting rights on each lot of surrendered land did not begin until the particular lot was sold. As it turned out, it took about 50 years before all the lands were sold. I therefore do not find that any harvesting rights were terminated when the treaty was entered into in 1854.

[1235] There is then the question of harvesting after the land was sold. This too is a matter of the common intention of the parties in 1854.

[1236] Ontario submits that the limitation on harvesting rights arises where the land was sold and put to a "visible incompatible" use. SON agrees, emphasizing that the incompatible use must be at the time of the harvesting event in question. In turn, whether there was an incompatible use could change from time to time, as the land use changed.

[1237] Ontario's main submission on the proposed limitation is that the "visible incompatible" threshold would require a case-by-case examination of each and every occasion of harvesting in order to determine whether or not it was permitted. As noted by Ontario, many facts would be needed to ascertain whether, for each harvesting event, there was a "visible incompatible" land use on that day, at that time, with respect to the actual form of harvesting at issue.

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[86] Squatting did continue but it was not a legal use of the land and should not be recognized as a reason to limit harvesting.

[1238] Examples of specific facts include the type of harvesting, the specific location, what was visible at that spot, what the land was being used for at that time, distances from buildings, specific safety precautions that were or were not taken, and so on. As mentioned in the closing submissions, one fence might suggest that a location was incompatible, while another fence would not do so. The type of hunting rifle or other equipment used could change the analysis. And so on. Further, Ontario submitted that each individual set of factual circumstances should be analyzed, as needed, in individual regulatory prosecutions.

[1239] I have a great deal of difficulty with the suggestion that, in 1854, the common intention of the parties was that harvesting might or might not be permitted based on a wide array of entirely individual facts, resulting in a great deal of uncertainty, with any disputes determined afterward, as needed, in regulatory prosecutions.

[1240] I recognize that in *Badger*, at para. 65, the Supreme Court found that the "visible, incompatible use" approach was not unduly vague or unworkable. However, the treaty and the relevant factual context in that case were significantly different. The continuation of harvesting rights was at the forefront of the negotiation for the treaty at issue in *Badger*. Continued hunting and fishing were the chief concerns of the Indigenous groups.

[1241] As set out in *Badger*, at para. 39, in that treaty negotiation, the Indigenous groups had "expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges". The resulting treaty expressly provided that the Indigenous groups "shall have the right to pursue their usual vocations of hunting, trapping and fishing" and that the right to hunt could be exercised "throughout the tract surrendered … saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes".

[1242] Further, in *Badger*, the Commissioners who negotiated the treaty on behalf of the government stated that "over and above" the treaty provision, they "had to solemnly assure [the Indigenous groups] that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it": *Badger*, quoted in para. 39 (emphasis in original).

[1243] The interests that the parties intended to reconcile at the time of Treaty 72 did not place the same overarching priority on harvesting on the surrendered lands, nor was the surrounding context similar.

[1244] As recognized by Lamer J., as he then was, in *Sioui*, at p. 1069, even a generous interpretation of a treaty "must be realistic".

[1245] In response to questions in closing submissions, Ontario submitted that there could be some general factors that could determine compatibility, rather than requiring an individual consideration of the specific facts of each and every harvesting event. This is more realistic, and

general factors do arise from the relevant context of Treaty 72. In that regard, land use that would be incompatible with continued harvesting includes land used for agriculture or farming, any occupied land such as land with any sort of dwelling or other buildings on it, and land with any signage or marks indicating private property. There may be other instances of incompatibility, but at least these general ones are implicit in Treaty 72.

[1246] It has not been established that adding the question of "visibility" is either realistic or reflects the common intention of the parties in 1854. Compatibility should relate to the use of the lot or grouping of lots of land as a whole.

[1247] Given the common intention that the land be used for settlement and farming, and the other relevant context discussed above, a threshold of incompatibility fulfills treaty interpretation principles as applied to the facts regarding Treaty 72. Considering the treaty and relevant context, I find that harvesting could still take place after the land was sold provided the use the land was put to was not incompatible with the proposed form of harvesting.

[1248] I therefore conclude that it is implicit in Treaty 72 that after the surrendered land was sold, harvesting could continue except where the land use was (or is) incompatible with the proposed form of harvesting. Otherwise, permission could be obtained, as is done now by some members of SON. Harvesting was (and is) otherwise not permitted.

[1249] Ontario also submits that any harvesting conducted by SON on surrendered lands must be done safely and in accordance with reasonable conservation measures.

[1250] With respect to safety, no treaty confers a right to put lives in danger: *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915, at para. 35. SON does not submit otherwise. Specific community witnesses testified about the safety measures that they take when hunting and their intentions to hunt safely. I find that it was the common intention of the parties that any harvesting would be done safely.

[1251] With respect to conservation, the evidence shows that at the relevant time, the Anishinaabek, including SON members, had a spiritual responsibility and concern for the well-being of the Earth. That perspective informs the interpretation of the treaty. As well, more recent evidence shows that conservation is important to SON, particularly regarding fish, but also more generally. However, it does not necessarily follow that SON's intention, in 1854, was to comply with all government conservation measures.

[1252] Ontario presented evidence of contemporary conservation measures by calling four witnesses in positions of responsibility for environmental matters in the province.[87] They

[87] The witnesses were Ron Gould, Jennifer Keyes, Mark Muschett and Carolyn O'Neill, all of whom I found knowledgeable, straightforward and helpful.

described significant work being done to preserve the environment in contemporary times, often with Indigenous participation, not resistance. But that does not mean the environment or conservation were common concerns as of 1854. I therefore conclude that Treaty 72 did not impose compliance obligations on SON. There may still be those obligations, but not as a result of the treaty.

[1253] In summary, Treaty 72 implicitly provided that SON members could continue to exercise any Aboriginal rights to harvest on the surrendered lands, up until the time that the land was sold. As discussed above, this took a very long time. After the land was sold, they could continue to exercise any harvesting rights except where the use of that land was (or is) an incompatible use (expanded on above), and whenever there was (or is) harvesting, it had (has) to be done safely.

[1254] I now return to the issue raised by Canada about the lack of a claim for any specific Aboriginal rights regarding harvesting. SON has not claimed, or previously established, any harvesting rights on the lands surrendered in Treaty 72. When claiming an Aboriginal right to harvest, the starting point would be for SON to prove a historical practice, in the specific area, existing before European contact, and then satisfy the test for recognition of the right. SON has not sought the recognition of a harvesting right in this case. For example, SON has not sought to establish an Aboriginal right to hunt in any location. SON's submissions relate to "whatever" Aboriginal rights that they may have to harvest on the surrendered lands. This trial decision does not determine whether there are such rights or what they may be.

[1255] Further, the Treaty Claim applies to Crown lands only and SON did not name any other landowners as defendants to this action. The declaration that I have granted is therefore not binding on other landowners of the surrendered lands.

Part 5 - Municipal defendants

[1256] SON has sued the municipalities in the Treaty Claim because SON seeks beneficial ownership of certain roads and road allowances on lands surrendered in Treaty 72. The municipal defendants currently own those roads and road allowances.

[1257] SON does not allege wrongdoing by the municipal defendants. SON admits that the municipal defendants played no role in the negotiation or signing of the treaties at issue in the Treaty Claim.

[1258] The municipal defendants submit that the claim against them should be dismissed now, regardless of whether there was a breach of fiduciary duty by the Crown. They submit that they are analogous to a "*bona fide* purchaser for value of the legal estate without notice" ("BPV"). BPVs are an exception to SON's Treaty Claim, as set out in the Statement of Claim. That exception recognizes that a claim for beneficial ownership will be unsuccessful against a BPV. As emphasized by the Court of Appeal for Ontario in *Chippewas of Sarnia*, at para. 303, the BPV defence is a fundamental element of the law that "protects the security of title to land acquired without notice of [a] claim".

[1259] SON disputes the position that the municipal defendants are BPVs because they had notice and did not purchase the subject lands "for value" having obtained ownership by way of a 1913 provincial statute.

[1260] SON further submits that this issue should be addressed in Phase 2 of this litigation and that the municipal defendants ought to have brought a motion for summary judgment if they wished to have it adjudicated during Phase 1.

[1261] With respect to the submission that there ought to have been a motion, I disagree. SON had notice of the position and there was trial evidence relevant to it. In the circumstances, a formal motion was unnecessary to make the request in closing submissions. However, there is a significant fairness issue about whether the BPV exception should more properly be addressed in Phase 2, as submitted by SON. It is not expressly part of Phase 1, and property-specific issues have been deferred to Phase 2. As well, if property-specific issues are relevant, SON has not had discovery on those issues since that too has been deferred until Phase 2. If the BPV issue cannot be fully and fairly addressed now, it should await Phase 2.

[1262] With respect to the question of whether the municipal defendants are BPVs, their *bona fides* have not been challenged. There is no wrong alleged against them. The issues are whether they were "purchasers for value" who were "without notice" when they became the owners of the roads and road allowances. I conclude, as discussed below, that the BPV issues cannot fully and fairly be addressed now.

Municipal ownership of roads/road allowances arising from provincial legislation

[1263] After Treaty 72, the Crown had the surrendered lands surveyed and allowances were identified on Crown surveys and set aside for the development of roads. SON expected that the sale and settlement of the surrendered lands would mean that roads would be built, and they were, including roads built to increase access to the lands with a view to expediting sales. SON repeatedly requested steps to increase the pace of the sale of the surrendered lands. As the land was developed, more roads were opened.

[1264] Over the relevant time period, the ownership of road allowances that were shown on Crown surveys was determined by statute. Well before Treaty 72, the "soil and freehold" of roads and highways had been vested in the Crown: *An Act to provide for the laying out, amending and keeping in repair, the Public Highways and Roads in this Province, and to repeal the Laws now in force for that purpose*, S.U.C. 1810, c. 1, s. 35 (the "1810 Act").

[1265] Under s. 12 of the 1810 Act, all original road allowances made by Crown surveyors were deemed to be common and public highways. In turn, road allowances on the Crown surveys of the surrendered land were, by statute, owned by the Crown.

[1266] The *Municipal Institutions Act*, S.U.C. 1858, 22 Vic., c. 99, continued to provide, in s. 301, that the "soil and freehold" of every road or highway was vested in the Crown. However, under

s. 302, the municipalities were given jurisdiction over and possession of the original allowances for roads and highways. The division between ownership and jurisdiction continued until 1913.

[1267] In 1913, title to the roads and road allowances was vested in the municipalities. The *Municipal Act, 1913*, S.O. 1913, c. 43, broadly defined "highways" to include road allowances on Crown surveys[88] and s. 433 provided that "the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities … of which for the time being have jurisdiction over it under the provisions of this Act".

[1268] The municipal defendants rely on the statutory maintenance obligations that were imposed on them to show that they were purchasers for value, as discussed below. The *Municipal Act* of 1913 imposed substantial obligations on the municipalities with respect to the repair of roads, related sewers, sidewalks, crossings, lighting and other matters including liability with respect to repairs: ss. 460-462. Although there have been amendments to the legislation from time to time, the municipalities continue to have maintenance obligations: see e.g., *Municipal Act, 2001*, S.O. 2001, c. 25, ss. 44, 55.

[1269] SON is not alleging that the municipal defendants acted improperly or otherwise breached the above statutory regime as it has applied to those defendants over the relevant time period.

[1270] SON's claim for beneficial ownership of roads and road allowances also includes what are called "shore road allowances". Crown surveyors could also set out those allowances, which run along shores of water bodies. Some shore road allowances are shown on the post-Treaty 72 Crown surveys and are part of SON's claim.[89] When shore road allowances were demarcated on the Crown surveys, title to the shore road allowances also vested in the municipalities under the above legislation. Unfortunately, none of the parties have given focused attention to shore road allowances in the submissions about BPV.

Notice of SON's claim to beneficial ownership

[1271] To be a BPV, each of the municipalities must not have received notice of SON's claim of beneficial ownership before becoming the owner of the property at issue: *i Trade Finance Inc. v.*

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[88] Section 432 defines "highways" broadly to include "all allowances for roads made by the Crown surveyors, all highways laid out or established under the authority of any statute, all roads on which public money has been expended for opening them, or on which statute labour has been usually performed, all roads passing through Indian Lands, all roads dedicated by the owner of the land to public use, and all alterations and deviations of and all bridges over any such allowance for road, highway or road."

[89] Legal descriptions of the claimed lands, which are included in extensive schedules attached to the Statement of Claim, include several shore road allowances.

Bank of Montreal, 2011 SCC 26, [2011] 2 S.C.R. 360, at para. 60. SON has agreed on a collection of documents that they rely on for notice.

[1272] Notice was certainly given in 1993, if not before. By letters dated December 10, 1993, SON counsel wrote to each of the municipal defendants giving notice of a claim of "a beneficial and possessory interest" in lands surrendered by Treaty 72 that had not been sold to private parties. The letters also noted that the claim was inclusive of road allowances and shore road allowances.

[1273] The earliest that notice could have taken place, according to SON's agreed collection of documents, is in 1922. That date is after the municipal defendants became owners in 1913 and is therefore not advance notice of SON's claim. And even the 1922 correspondence only applies to one municipality, the Township of South Bruce, and it is not clearly notice. There is no correspondence until 1957 regarding the Township of Georgian Bluffs, none until 1968 regarding the Township of Saugeen Shores and none until 1993 regarding the Township of North Bruce.

[1274] There are other difficulties with the documents that are relied upon for notice. Most involve only specific land and do not assert a claim for beneficial ownership of the land. Some of the documents assert a monetary claim, not a claim for beneficial ownership of the land. However, given my disposition below, it is not necessary to now determine when proper notice was received by each municipal defendant. It is apparent that the municipal defendants did not have advance notice of the claimed beneficial interest in the roads and road allowances before 1913. To that extent, they qualify as BPVs.

Purchasers for value

[1275] The municipal defendants must show that they were "purchasers for value" for the claimed roads and road allowances. They rely on the substantial maintenance and other obligations they were and are required to fulfill, resulting in significant and ongoing expenditures.

[1276] SON submits that the municipal defendants are more properly characterized as volunteers, rather than purchasers, because they did not pay for the land when it was vested by statute in 1913. However, valuable consideration need not be exchanged on the date of the transfer, nor need it be money: M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham: LexisNexis, 2014), at p. 1567. The municipalities had significant maintenance obligations imposed on them in relation to the roads and road allowances.

[1277] An admission has been made about expenditures on maintenance. SON has admitted that from 1858, when the roads and road allowances first came under the jurisdiction of the municipal defendants, the municipal defendants have expended significant resources building roads and highways and maintaining and repairing them. A party who provides value in exchange for land ought not be viewed as a volunteer: *Benzie v. Hania*, 2012 ONCA 766, 112 O.R. (3d) 481, at para. 37.

[1278] The municipal defendants therefore have a strong foundation for their claimed status as BPVs. However, the above admission only goes so far. At this stage, there is no breakdown of

the expenditures by property, even at a high level. This is significant given the difference between the statutory maintenance obligations for opened roads and the lack of those obligations for unopened road allowances.[90] SON has claimed beneficial ownership of many roads, including both opened and unopened road allowances.

[1279] The statutory maintenance obligations relate only to opened roads. Once a road has been opened, the municipality has an obligation to maintain it: *Municipal Act, 2001*, s. 44. There is no statutory obligation to maintain unopened road allowances.

[1280] Maintenance may be done on unopened roads, but as said in the evidence, it is more *ad hoc*. It is done as needed. In closing submissions, the municipal defendants acknowledged that they have some discretion regarding maintenance on unopened road allowances.

[1281] Three municipal witnesses[91] testified about roads and road allowances, providing general information that shows the types of roads in the Peninsula area and the general nature of the continuing maintenance obligations. There are two provincial highways and many other opened roads, as well as unopened road allowances.

[1282] Within the County of Bruce, there are currently 790 km of opened and paved roads, 140 km of which are located in the Treaty 72 surrendered lands, all of which must be maintained. In the Township of Georgian Bluffs, there are about 380 km of roads that must be maintained, including hard top, asphalt and gravel roads. There are about 240 km of unopened road allowances. There are also some roads that were opened but have since been closed. For example, two roads were recently closed for safety reasons. Those roads were maintained up until they were closed. Information about the number of roads and road allowances in the other municipal defendants' areas was not advanced at trial.

[1283] I accept the municipal evidence that some maintenance is done on unopened road allowances, given the public's right to use those allowances. But the evidence is very general. As noted by SON, there is no breakdown of the maintenance expenditures by road allowance, from

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[90] As illustrated in the testimony of the municipal witnesses, varying terminology is used to describe the different types of road allowances and the resulting maintenance requirements. The term "opening" a road is often used interchangeably with "assuming" the road for maintenance purposes. The term "improved" is also sometimes used. For the issues before me, I use the terms "opened" and "unopened" road allowances to focus on maintenance obligations.

[91] The witnesses were Wendi Hunter and Troy Unruh from the Township of Georgian Bluffs and Miguel Pelletier from the County of Bruce, all of whom I found knowledgeable, straightforward and helpful. The credibility of these witnesses was not challenged. However, SON challenged the relevance and level of detail of their evidence. I accept their evidence but agree that it is very general, which I have taken into account.

which it could be determined whether or not there have been expenditures on all of the claimed unopened road allowances. And there is little evidence about shore road allowances, except to show that some exist and form part of the claim.

[1284] Returning to the opened roads, the municipal defendants had statutory obligations for those roads that they were and are obliged to fulfill. No breach of those statutory obligations is alleged. It would therefore be reasonable to infer that the above general admission, that there were significant expenditures, applies at least to those roads. It would also apply to the roads that had been open and have recently been closed, since there were statutory maintenance obligations while those roads were open. Considering all the evidence, the municipalities have a strong position on BPV, at least for opened roads.

[1285] However, I do not find that SON's high-level admission about expenditures is sufficient to conclude that there has been maintenance on all the unopened road allowances, for which there are no statutory maintenance obligations. The maintenance situation may also be different for shore road allowances, which form part of the claim yet received little attention by the parties. That single admission is not enough. This issue is not comparable to the laches/waiver issue discussed above, where substantial trial evidence was put forward on the relevant historical events, without property-specific issues. It is more comparable to the laches/prejudice issue, which gives rise to property-specific issues and will be addressed in Phase 2 if necessary.

[1286] I therefore conclude that SON's high-level admission about maintenance expenditures is not sufficient to show that the municipal defendants were BPVs for all the claimed roads and road allowances. It is also apparent that there are other property-specific considerations that may arise for the unopened road allowances and shore road allowances, such as access, easements and impacts on property owners beyond the defendants. These matters are more appropriate for Phase 2, if necessary, where the property-specific considerations are to be addressed.

[1287] The municipalities also rely on the public interest. The public (including SON members) have a right of passage whether or not the road allowance has actually been opened: *Monaghan v. Moore* (1996), 31 O.R. (3d) 232 (C.A.), at para. 7. Municipalities hold highways (including roads and road allowances) in trust for the public for purposes such as gaining access to adjacent lands: *Big Point Club v. Lozon*, [1943] O.R. 491 (H.C.), at para. 20; *City of Vancouver v. Burchill*, [1932] S.C.R. 620, at p. 625; *In re J.F. Brown Co. Limited and City of Toronto* (1916), 36 O.L.R. 189, aff'd, 55 S.C.R. 153.

[1288] I expect that the public interest will be a significant factor in response to the claim for beneficial ownership, and it can be raised, if necessary, in Phase 2. However, it does not address the question of whether, on the evidence before me, the municipal defendants are BPVs for all of the claimed land. Other issues have also been raised by the parties, none of which fully address the BPV issue for all of the claimed land at this stage.

[1289] I therefore conclude that the municipal defendants have not established at this juncture that they fall within the exclusion in the Statement of Claim for BPVs, but they may raise that issue again, in Phase 2, if that phase proceeds.

[1290] I recognize that the municipal defendants are in an unusual and difficult situation. SON does not allege that the municipalities have done anything wrong, yet these defendants are swept into long and expensive litigation. In their recent submissions about *Southwind*, the municipalities raise a legal issue about whether SON may pursue an equitable remedy from them in these circumstances. This issue has not previously been raised in this trial, and issues about these remedies are meant for Phase 2, if necessary. In these circumstances, I conclude that it would not be appropriate to bring the issue forward into Phase 1 at this late stage.

Part 6 - Orders

[1291] Based on my findings of fact and analysis, I make the following orders:

(i) a declaration that the pre-Confederation Crown breached the honour of the Crown in relation to the fulfillment of Treaty 45½ after 1836, and at the treaty council in August of 1854;

(ii) a declaration that Treaty 72 implicitly provided that SON members could continue to exercise any Aboriginal rights to harvest on the surrendered lands, up until the time that the land was sold, after which the exercise of any such rights could continue except where the use of that land was (or is) an incompatible use; that incompatible land use includes, at least, land used for agriculture or farming, any occupied land such as land with any sort of dwelling or other buildings on it, and land with any signage or marks indicating private property; that incompatibility relates to a lot or grouping of lots of land as a whole; and, that whenever there was (or is) harvesting, it had (has) to be done safely;

(iii) a declaration that the above orders are not defeated by the defence of laches;

(iv) the dismissal of the claim for breach of fiduciary duty;

(v) the dismissal of the claim for Aboriginal title; and,

(vi) the deferral to Phase 2 of the issue of whether the municipal defendants are excluded from the Treaty Claim under the exception in the Statement of Claim for land held by *bona fide* purchasers for value of the legal estate without notice, subject to any further order regarding that process.

[1292] The parties shall prepare a draft judgment and book a case conference to discuss the draft. As well, if the parties are unable to agree on costs, they shall book a case conference to discuss the process to determine costs. Counsel shall provide me with an update on the status of these two issues, by email, within 30 days of today.

Closing comments

[1293] I made some comments at the end of oral closing submissions that bear repeating now.

[1294] I commend all counsel for the professional and dedicated approach that they took with each other, cooperating extensively in the trial process. That cooperation was a key factor in the orderly progress of this trial. I also commend senior counsel for ensuring that many junior counsel had the opportunity to make submissions and examine witnesses during the trial.

[1295] I thank all the court staff, court reporters, technology support people and others who facilitated the trial process through which thousands of exhibits were used through an electronic database platform, as well as transcripts and other key material. That process was an important choice and worked well. I also thank everyone who facilitated the completion of the trial evidence and final submissions during the COVID-19 pandemic.

[1296] Most importantly, I thank the many people who helped with our hearings in Saugeen and Neyaashiinigmiing. Those hearings required an extraordinary effort by all concerned, including the parties, court staff in Toronto and Owen Sound, and many people from SON. I thank the members of SON, who welcomed us, included us in their traditional ceremonies, and were so important to making the community hearings possible.

Justice W. Matheson

Released: July 29, 2021

Schedule "A" – Expert Witnesses

Each expert witness is described below, including any overarching findings about their evidence.

Expert witnesses called by SON

[1] **Carl Benn**: This expert witness is a professor of history at Ryerson University. He was accepted as a historian with expertise in military history, specifically the military history of the Great Lakes area and the St. Lawrence valley from 1760 to the mid-19th century and the Seven Years' War, with particular expertise in the British naval presence in Eastern Lake Huron and Georgian Bay, and the War of 1812. I found him to be a fair and knowledgeable witness.

[2] **Jarvis Brownlie**: This expert witness is a professor of history at the University of Manitoba. He was accepted as a historian with expertise in Crown-Indigenous relations in what is now Canada in the 19th and 20th centuries, including Crown policy towards Indigenous peoples and their lands in the 19th and 20th centuries, the history of treaty making, the making of Treaties 45½ and 72, colonial regulation and administration of Indigenous peoples, the socioeconomic circumstances of Indigenous peoples and the history of Indigenous rights advocacy and Indigenous activism in the 19th and 20th centuries.

[3] I found Dr. Brownlie to be a well-qualified expert, but there were some weaknesses in his evidence. He was inclined to use strong language when expressing his opinions, especially in his written evidence, and those views were often not justified. He also lacked some basic knowledge about treaty making. Dr. Brownlie tended to assume the role of advocate in support of SON's interests, which is not the role of an expert. Bearing all of this in mind, I have approached his evidence with some caution.

[4] **Mary Ann Corbiere**: This expert witness is a professor in the Department of Indigenous Studies at the University of Sudbury. She was accepted as an expert in the Anishinaabemowin language, including the field of English to Anishinaabemowin/Anishinaabemowin to English translation, and capable of giving opinion evidence on the likely range in meaning, to Anishinaabe people, of English words and phrases when translated into Anishinaabemowin in the 19th century, and on the challenges that confront English-Anishinaabemowin translators. Her academic degrees include a PhD in Theory and Policy Studies in Education, an MBA and a B.Sc. Her expertise in the Anishinaabemowin language is not from formal education, nor need it be.

[5] I found this witness very helpful when testifying about the Anishinaabemowin language and her translation work in the modern context. She has considerable current experience. However, as set out in my ruling on qualifications, she did not review the substantial record of 19th-century documents in English in preparing her opinion about the translation of the English 19th-century treaty documents at issue. As well, Dr. Corbiere was asked to make certain factual assumptions that were either not proved, or disproved, in the trial evidence about Treaty 72. This has had a significant impact on the weight to be given to her opinions.

[6] **Paul Driben**: This expert witness is a retired professor of anthropology from Lakehead University. He was accepted as an anthropologist with expertise in the ethnography, ethnology, and the ethnohistory of the Anishinaabe, including pre- and post-contact Anishinaabe subsistence patterns, cultural traditions, ethnohistory, and social and political organization; Anishinaabe spiritual beliefs, including relationships to land and water and the dead; historical Anishinaabe use, occupancy, and customs concerning decision-making about the use of land and water territory; and the perspective of the Anishinaabe during 19th century treaty-making processes, including Treaty 45½ and Treaty 72.

[7] Dr. Driben's evidence was heavily reliant on his field work with Anishinaabe communities in the later part of the 20th century. He had little background about SON and assumed that general Anishinaabe customary rules applied to individual Anishinaabe communities even though he admitted that it depended on time and place. Ontario objected to his evidence because his methodology was so closely tied to his personal, subjective experience in his modern fieldwork that it could not be tested. I found that Dr. Driben tended to overstate his opinions and use extreme descriptors that were not justified, and that his expertise was based on modern experience. I have taken all of these issues into account, but I do not agree that his evidence is completely unreliable. His evidence also had a foundation, in part, in the testimony of members of SON.

[8] **Bruce Greene**: This expert witness is an American lawyer. He is one of the founders of the Native American Rights Fund and, for most of his career, he has represented Native American Tribes (as they are known in the United States). He was accepted as an expert in U.S. federal Indian law (as it is called in the United States). Mr. Greene was well familiar with the case law that he testified about, including several cases in which he appeared as counsel. I found him knowledgeable in his area of expertise and found that he was endeavouring to assist the court. As noted by the defendants, Mr. Greene's perspectives were informed by a long career helping Native American Tribes. However, I found that taking his evidence as a whole, along with the cases he put forward, allowed for a fair understanding of the legal principles.

[9] **Sidney Harring**: This expert witness is a retired American law professor who also holds a PhD in sociology. He was accepted as a sociologist and legal historian with expertise in the history of the interaction of Indigenous people and common law legal systems, including colonial land policy, land settlement regimes, land settlement practices, land sales, and actual law enforcement in relation to Indigenous lands, in the late-18th and 19th century, in what is now Ontario.

[10] A number of potential weaknesses in Dr. Harring's evidence were identified in the *voir dire* on his qualifications, as set out in the ruling I made when he was tendered as an expert. Unfortunately, several of the issues raised at that stage emerged in his testimony. Having now considered all of his evidence, I conclude that Dr. Harring did not have a sufficient depth of knowledge regarding either SON or the Aboriginal Title Claim Area, nor did he have significant expertise regarding the British Crown, law enforcement or other matters related to this case. His expertise was mainly in urban policing in the United States and with respect to the Haudenosaunee Six Nations in Southern Ontario. In cross-examination, it became apparent that the sources he relied on for the views expressed in his report often did not support those views. As well, he used

doubtful sources, overlooked accepted sources and was inclined to speculate. Unless expressly adopted in these reasons, I find that his opinions are not deserving of significant weight.

[11] **Eric Hinderaker**: This expert witness is a professor of history at the University of Utah. He was accepted as a historian with expertise in the relations between the British and First Nations in the 18th century, including the British practice with respect to issues associated with the territorial expansion of the American colonies, the events leading up to the Seven Years' War in North America and the war itself, the Detroit treaty, Pontiac's War, the Royal Proclamation and the Niagara Congress. He has excellent credentials but in his testimony it became apparent that SON was not the focus of his expertise, and his knowledge of Indigenous peoples from the Peninsula area is sparse. He was also argumentative in part of his evidence and some of his evidence, for example, with respect to Pontiac's War, had a weak foundation. I have taken these weaknesses into account, but I accepted much of his evidence as useful and reliable.

[12] **Francine McCarthy**: This expert witness is a professor of earth sciences at Brock University. She was accepted as a geologist with expertise in the geologic history of the Great Lakes basin from the last Ice Age to the present, including questions about what can be reconstructed from the geologic and fossil record concerning historical lake levels, lake depth, water flow, land forms, and changes to them; climate; and plants and animals found in the Great Lakes region. Most of her evidence is undisputed. I found her to be a knowledgeable and responsive witness.

[13] **Michel Morin**: This expert witness is a professor of law from the Université de Montréal. He was accepted as a legal historian with expertise in the legal relationships between France and First Nations from the 16th to the 18th century, including the Law of Nations and its application to and impact on French practice with respect to First Nations and territory in North America, official grants of authority by the French Crown to colonial administrators from 1541 to 1760, French views on the significance of discovery and symbolic acts of possession, diplomatic negotiations between France and England from 1687 to 1755 regarding respective territorial holdings in North America, and official acts with respect to the boundaries of First Nation's territories. Prof. Morin was called in reply to Canada's witness Dr. Beaulieu. I found him to be a straightforward, responsive expert witness although he does not have the same depth of expertise as Dr. Beaulieu in the relevant historical events, and some of his evidence requires qualifications that affect its weight, as discussed above.

[14] **Randolph Valentine**: This expert witness is a professor of linguistics at the University of Wisconsin. He was accepted as a linguist with expertise in the Anishinaabemowin language and its various dialects spoken in Quebec, Ontario, Manitoba, Saskatchewan, Alberta, Michigan, Wisconsin, Minnesota and Montana, including questions about the Anishinaabemowin dialects spoken by SON, their relationships to the dialects of surrounding communities, and what conclusions can be drawn from these dialectical variants. He was a knowledgeable and responsive witness, and he was frank about the limitations of his expertise.

[15] Canada did not object to the admissibility of Dr. Valentine's evidence, but submits that his evidence should be given less weight because it is novel science (or a novel application of existing science). However, Canada's submissions were founded on the limitations of Dr. Valentine's expertise, including evidence about time periods and other matters. Dr. Valentine did sometimes go beyond his expertise in his testimony, as discussed in context above. Canada did not advance a legal argument that Dr. Valentine's evidence should be excluded altogether, and I am not inclined to do so.

[16] **Ronald Williamson**: This expert witness is an anthropological archaeologist who works as a consultant. He was accepted as an anthropological archaeologist with expertise in the presence of First Nations in the Great Lakes area from the Paleo-Indian Period to the mid-18th century, including certain topics regarding the identities of the Indigenous communities present in the Great Lakes area in the 17th and 18th centuries, the archaeological record of Manitoulin Island, Bruce and Grey Counties and surrounding areas, and archaeological evidence regarding peoples in the Great Lakes area and SON's Aboriginal Title Claim Area from 1615 to 1763. Dr. Williamson's evidence in this case was primarily based on a review of available data and literature rather than on original research or past work. However, I accept his testimony that most archaeological work is done based on reviewing available material, rather than through primary research.

[17] Dr. Williamson's evidence included a report about the analysis of glass beads recovered from a site on the Peninsula known as The River Mouth Speaks. He directed the work for the analysis, which was done by a project team. At trial, Dr. Williamson put forward both a list of errata in that report, and a separate summary. The summary corrected a significant error in that report that was not included in the errata. The defendants submit that this was misleading conduct, which undermines his evidence. I do not find that this oversight undermines Dr. Williamson's evidence in a significant way. Overall, I found that Dr. Williamson was a well-qualified, responsive witness, although some of his stronger rhetoric was not supported by the evidence.

Expert witnesses called by Canada

[18] **Alain Beaulieu**: This expert witness is a professor of history with the Université du Québec à Montréal. He was accepted as a historian with expertise in Indigenous-newcomer relations in New France (as it existed up to 1763) and the early years of the British regime in Canada (to 1774).

[19] SON objected to this witness on several grounds. First, SON submitted that evidence about the French period of occupation, pre-1763, is irrelevant because the views of the French, particularly legal views, are not relevant. SON relies on *R. v. Côté*, [1996] 3 S.C.R. 139, at paras. 51-53, submitting that the Supreme Court of Canada has found that whether a right was recognized under French law was not a factor in the analysis of whether something was an Aboriginal right. However, in *Côté* the court did not say that evidence of French law was necessarily irrelevant. The court found that the failure to recognize an Aboriginal right to fish under French law was insufficient to establish a clear and plain intention to extinguish an Aboriginal right under s. 35(1) of the *Constitution Act, 1982*. That issue does not arise in a similar way in this case. Here, the

French period relates to the issue of control, which is part of the test for Aboriginal title. Despite the objection to this evidence, SON relies on some events in the French period, leading up to 1763, as relevant to the Aboriginal Title Claim.

[20] Dr. Beaulieu gave evidence about other events that were the subject of considerable SON evidence as well. The other main objection by SON relates to Dr. Beaulieu's opinion about the Niagara Congress. SON submits that he was not credible. SON has put forward contrary expert evidence, but I do not find that this disagreement between experts gives rise to an issue of credibility. I found Dr. Beaulieu was a straightforward, highly knowledgeable and responsive expert witness, who was not inclined to change his opinion in cross-examination. Dr. Beaulieu was also a patient witness in view of his health challenges. Special arrangements were made to accommodate him, but his evidence took several days, and in the later part of his testimony his fatigue began to show, including in more repetitive answers. This does not detract from the weight of his testimony.

[21] **Laurel Bowman**: This expert witness is a professor of Greek and Roman studies (also called the Classics) at the University of Victoria. She was accepted as a classicist with special expertise in the methodology of inquiry into the historical content of orally transmitted traditions. Dr. Bowman does not profess to be an expert on Anishinaabe traditional stories. Her relevant expertise is the methodology used to assess the transmission of oral narratives – a methodology that is widely accepted as cross-cultural. SON relies on parallels between geological events from thousands of years ago and traditional stories. Dr. Bowman testified about the methodology for that type of inquiry. She was a fair and straightforward witness.

[22] **Douglas McCalla**: This expert witness is a retired professor of history, focusing on economic history. His teaching career was at the University of Guelph and Trent University. He was accepted as an economic historian with expertise in the social and economic history of 19th-century Upper Canada/Canada West, which extends to social and economic interactions of civilians and the military. I found Dr. McCalla to be a highly qualified expert, particularly in his economic evidence about population, inflation and land issues, and the main historical events in the 19th century. He was also a fair and straightforward witness. I agree with SON that his expertise on military issues is not as strong and I have not given that evidence as much weight.

[23] **Paul McHugh**: This expert witness is a professor of law at the University of Cambridge. He was accepted as an expert legal historian with special expertise in the evolution of the legal principles and policies that affected the conduct of Crown relations with Indigenous peoples in the British Empire in the 18th century and following.

[24] SON submits that Dr. McHugh was argumentative, that he would not make reasonable concessions and SON noted that in a part of his cross-examination Dr. McHugh asked counsel where the questions were leading. SON submits that he was therefore not impartial and that his evidence should be disregarded. Dr. McHugh is a senior and accomplished historian with relevant background and excellent credentials. He was argumentative and unresponsive at times, sometimes with good reason and sometimes not. I have taken this into account in weighing his

evidence, but it does not rise to the level of partiality. He also tended to give long answers that could be difficult to follow. SON disagrees with his opinion and has put forward contrary expert evidence, but that disagreement does not persuade me to disregard Dr. McHugh's evidence altogether. I have, however, approached his evidence with caution.

[25] **Margaret Morden**: This expert witness is an archaeologist, accepted as an expert familiar with the practice of archaeology and archaeological methodology in general. She focused on the bead analysis overseen by Dr. Williamson. SON submits that her evidence should be given little weight because of perceived shortcomings in her knowledge, training and experience, as compared to Dr. Williamson. However, I found Ms. Morden to be a qualified, straightforward and fair witness. She was very knowledgeable in the narrow area of her evidence, specifically testing methodology. She did not profess any expertise about Indigenous peoples.

[26] **Alexander von Gernet**: This expert witness is an anthropologist and ethnohistorian. He was accepted as an expert in those areas, with expertise in the use of archaeological evidence, written documentation and oral histories and traditions to reconstruct past cultures of Indigenous peoples and their history of contact with European newcomers throughout Canada and parts of the United States. One of Dr. von Gernet's two reports was admitted into evidence on consent, recounting Indigenous stories that he had gathered as part of his preparation. Otherwise, SON did not consent to him testifying as an expert. SON submitted that he was biased, among other objections. As set out in my ruling made at the time, SON did not meet their onus to show a realistic concern that Dr. von Gernet was either unwilling or unable to fulfill his duties as an expert to be impartial. I allowed him to testify on the terms set out in my ruling.

[27] I remained alert to the issue of potential bias in Dr. von Gernet's testimony but found him to be a straightforward and impartial expert witness. I did not find that he was advocating for any party's position in his trial testimony. The majority of SON's objections in closing submissions arise because he was not prepared to change his opinion in cross-examination.

[28] **Tyler Wentzell**: This expert witness is a Major, full time, in the Primary Reserves of the Canadian Armed Forces, and has a master's degree in War Studies from the Royal Military College of Canada. He was accepted as a military historian with particular expertise in Canadian military history and the practicalities of military/police cooperation in the 19th and 20th centuries. Mr. Wentzell[92] was a responsive and fair witness. SON notes, and I agree, that his evidence was of a general nature, and based on certain assumptions. I have taken these limitations into account in weighing his evidence.

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[92] He preferred to be called "Mr." rather than Major because he testified in a personal capacity.

Expert witnesses called by Ontario

[29] **Jean-Philippe Chartrand:** This expert witness is an anthropologist and ethnohistorian, who has a consulting practice. He was accepted as an expert on British and American relations with Indigenous peoples in the Upper Great Lakes from the mid-18th century to the mid-19th century, including administrative development and general treaty policies and practices, treaty-making with Native American Tribes in the Great Lakes region generally from 1795-1842 and, in particular, with reference to treaties made in 1807, 1819, 1820, 1831 and 1836 and the intentions and understandings of the United States in making these treaties and related historical events and context. SON does not challenge Mr. Chartrand's work in obtaining and reviewing the U.S. treaties referred to in his report.

[30] Mr. Chartrand also obtained historical documents about these treaties, which are accepted for the truth of their contents under the Authenticity Agreement. The only issues about these historical documents relate to interpretation and inferences and some incomplete correspondence, which I have taken into account.

[31] SON does challenge the depth of Mr. Chartrand's experience in U.S. history and relations between the U.S. and Britain. I agree that his expertise in those areas is limited and I have taken that into account as discussed in context above. SON also disputes some of his evidence about the Royal Proclamation of 1763 and submits his evidence is not credible. I am not persuaded to make an adverse finding about this witness's credibility. He was a responsive and fair witness.

[32] **Ronald Graves:** This expert witness is a military historian. He was accepted as an expert on the military and naval history of the Great Lakes/St. Lawrence region in the 18th and 19th centuries, including in relation to the provision of military aid to the civil power for the purposes of law enforcement and maintaining public order in Upper Canada and Canada West. In his evidence, he showed that he was very knowledgeable, especially in naval and military history, and brought a helpful practical perspective to this evidence. He was frank in describing the scope of his work. His work on squatting was limited, which I have taken into account in weighing his evidence. He also capably reviewed a list of documents from the Statement of Claim from the standpoint of a historian.

[33] Mr. Graves was asked to comment on the reports of Dr. Harring and Dr. Hinderaker. He was complementary of those experts but did not agree with them altogether. SON submits that Mr. Graves was hostile and argumentative in cross-examination. He did have a gruff style and was sometimes argumentative, but I did not find him hostile, or, as SON submits, glib or sarcastic. He had difficulty with the form of some questions and the tendency of counsel to look away, at the real-time transcript, while speaking. I too had difficulty with that practice, as I mentioned at the time. SON made other submissions about Mr. Graves's evidence that go to the weight to be given to specific parts of his evidence and to disagreements between the experts. I have taken all of these matters into account in assessing his evidence.

[34] **Gwen Reimer:** This expert witness is an anthropologist and ethnohistorian. She was accepted as an expert in relation to cultural anthropology and ethnohistory and, in general, on the pre-history, proto-history, and history of SON and ancestors of SON, including its traditional social and economic practices, and the history of Crown and Indigenous relations including the history of treaty making in Ontario. She was also accepted as an expert on the history of the land surrenders and treaties between the Crown and SON's ancestors, the historical background leading up to the making of Treaties 45½, 67 and 72, and the making, signing and implementation of those treaties.

[35] Like many other experts in this trial, Dr. Reimer acknowledged some errors in her work. However, she also changed her opinion about the conduct of Superintendent General of Indian Affairs, Laurence Oliphant in relation to Treaty 72. In preparing for her testimony, Dr. Reimer reviewed her reports and read the trial transcripts for the SON experts. As a result, in three instances, her opinion about Oliphant's conduct was not as negative. I accept Dr. Reimer's evidence that these changes arose on her own initiative, not due to prompting by Ontario. However, in assessing her evidence on those issues, I have considered the original opinions as well as the changed opinions and the explanations for the changes. SON made other submissions about Dr. Reimer's evidence that go to the weight to be given to specific parts of her evidence and to disagreements between the experts, which I have taken into account in assessing her evidence.

[36] Dr. Reimer's expert evidence included many reports on different subject matters. She was frank about the limitations of some of her work, especially in the area of archaeology, and fairly acknowledged the scope of her work and experience. Overall, I found Dr. Reimer was a careful, diligent expert whose evidence is deserving of significant weight.

CITATION: Chippewas of Saugeen First Nation et al. v. The Attorney General of Canada et al., 2021 ONSC 4181
COURT FILE NOS.: 94-CQ-050872CM and 03-CV-261134CM1
DATE: 20210729

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

and

THE ATTORNEY GENERAL OF CANADA, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, ET AL.

REASONS FOR JUDGMENT

Justice Matheson