Court File No.

COURT OF APPEAL FOR ONTARIO

BETWEEN:

CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and SAUGEEN FIRST NATION

Plaintiffs
(Appellants)

- and –

THE ATTORNEY GENERAL OF CANADA, and
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants
(Respondents)

NOTICE OF APPEAL

THE APPELLANTS, Saugeen First Nation and Chippewas of Nawash Unceded First Nation appeal to the Court of Appeal for Ontario from the judgment of the Honourable Justice Wendy Matheson (the "Trial Judge") dated July 29, 2021 made at Toronto, Ontario.

THE APPELLANTS ASK for orders:

(a) Setting aside the judgment and:
   (i) ordering a new trial; or,
   (ii) in the alternative, remitting the action to the Trial Judge for a judgment, after further evidence and submissions, on the question of Aboriginal title to a portion of the Aboriginal title area claimed;

(b) Costs in this appeal and in the court below; and

(c) Such further relief as counsel may advise and this Honourable Court may deem just.

THE GROUNDS OF APPEAL are as follows:

Background

2. The Appellants, Plaintiffs in the action, are two Anishinaabe First Nations: Saugeen First Nation and Chippewas of Nawash Unceded First Nation. Collectively, they refer to themselves as the Saugeen Ojibway Nation ("SON").

3. At trial, SON sought a declaration of Aboriginal title over a defined territory consisting almost exclusively of submerged land, including parts of Lake Huron and Georgian Bay (the "Claim Area"), or to portions thereof.

The Trial Decision

4. The Trial Judge considered SON's claim of Aboriginal title to submerged land both as a novel Aboriginal right, applying a modified Aboriginal rights test, and by applying the existing test for Aboriginal title.

5. The Trial Judge found that:

   (a) SON was present on the peninsula adjoining the Claim Area at the assertion of British sovereignty in 1763;

   (b) SON was and is a fishing people;

   (c) SON has an important spiritual connection to water;

   (d) SON has and continues to rely heavily on fishing in the Claim Area for sustenance, trade, and commercial purposes;

6. Despite these findings, the Trial Judge ultimately held that SON had not proven Aboriginal title either as a novel Aboriginal right or through the existing test for Aboriginal title, and dismissed the claim.

Inconsistent Findings Respecting Anishinaabe Law

7. The Trial Judge recognized that Anishinaabe law existed, that it was shared by SON, that it was relevant to proving Aboriginal title, and that it included provisions for resource control and for trespass.

8. She failed, however, to fully appreciate Anishinaabe law from an Anishinaabe perspective, which led her to make to inconsistent findings. For example,

   (a) Despite evidence that it was almost certain that Anishinaabek included water territories in their band territories in 1763, the Trial Judge imputed a distinction between SON's dry land territory and water territory. Such a distinction is foreign to Anishinaabe law, and is unsupported by the evidence.

   (b) The Trial Judge found that SON's ancestors exercised control over fishing in parts of the Claim Area, but found that those attempts were focused on control of fishing or fisheries, not of water spaces more generally. This sharp distinction between resource control and territorial control is an error - exclusive use and control of resources is an incident of territorial control, and an indicator thereof.

9. Together, the above errors resulted in an erroneous construction of Anishinaabe law and prevented the Trial Judge from being able to properly consider the Indigenous perspective in her application of the test for Aboriginal title. This error of mixed fact and law was palpable and overriding.

Relationship of Anishinaabe Law and Euro-Canadian Law

10. In addition to failing to properly understand Anishinaabe law, the Trial Judge failed to make the appropriate connections between Anishinaabe law and Euro-Canadian law. The law of Aboriginal rights and Aboriginal title is inter-societal and inter-jurisprudential, and the two legal systems should be interlaced in the determination of Aboriginal title, in order to effect reconciliation of the two societies and legal systems. The Canadian constitution requires this, as does the proper application of the test for Aboriginal title. This type of analysis is completely absent from the Trial Judge's reasons.

Indigenous Perspective

11. The Trial Judge's failure to consider the Anishinaabe perspective permeated other aspects of her decision as well. This led to the following erroneous findings of fact, which, taken together, are palpable and overriding and resulted in her misapplying the legal test for Aboriginal title, by failing to properly consider the Indigenous perspective:

    (a) The Trial Judge failed to interpret the meaning of historical actions of Anishinaabe actors through an Anishinaabe perspective. For example, she failed to see that 300 Anishinaabe warriors meeting a French explorer as an example of monitoring and controlling territory. Instead, the Trial Judge fastened on a humorous and evasive comment the Anishinaabe warriors made – that they were picking blueberries – to find that the purpose of the Anishinaabe at that point was unclear.

    (b) Similarly, the Trial Judge failed to consider how the Anishinaabe would interpret the actions of European actors, from an Anishinaabe perspective. For example, in the same encounter with a French explorer described above, the Trial Judge failed to consider the significance to the Anishinaabe of a gift presented by the French explorer as an act of seeking permission.

(c) The Trial Judge's analysis of the French historical period was done entirely from the French perspective and did not consider the perspective of the Anishinaabe at all. For example, her analysis of the Beaver Wars specifically contemplates the French perspective including French goals, motivations, and their perception of their role in the conflict, but fails to do the same from the Anishinaabe perspective.

(d) The Trial Judge failed to interpret Anishinaabe spirituality, including Anishinaabe relationship and obligations to water, from the Anishinaabe perspective. For example, she dismissed water ceremonies as not representing a connection to the Claim Area where those ceremonies are not required to be done on the water. She also failed to acknowledge the very different relationship between humans and non-humans in Anishinaabe and European perspectives. In Anishinaabe thought, animals and fish, although taken for food, are not simply rightless resources, but beings from whom one can learn.

12. Collectively, these errors silenced the Indigenous perspective in the Trial Judge's application of the test for Aboriginal title.

Test for Aboriginal Title

13. In considering SON's claim for Aboriginal title for water spaces, the Trial Judge erred in law by extensively analyzing and testing what she described as a "novel Aboriginal right", rather than applying the test for Aboriginal title, with modification if necessary. The Trial Judge failed to appreciate that although Aboriginal title is a type of Aboriginal right, there are some significant differences in the legal tests for Aboriginal title and Aboriginal rights, for example in whether the relevant date is the date of first European contact (for Aboriginal rights) or the date of assertion of British sovereignty (for Aboriginal title). The Trial Judge compounded her error in using the test

for Aboriginal rights by applying the test but using the date of assertion of sovereignty as the relevant date, thus misapplying the test.

14. The Trial Judge considered whether SON met the legal test for Aboriginal title, as an alternative. While she correctly stated the test in Canadian law for Aboriginal title, she misapplied the test by applying it too rigidly, holding SON to an extremely high standard, given the nature of the land, and transformed the test such that it is effectively impossible to meet, especially for water spaces. The result of this approach is to institute an implicit doctrine of "*aqua nullius*", despite the rejection by Canadian courts of the doctrine of *terra nullius* as being a Eurocentric legal fiction. This is an error of law, or, alternatively, a palpable and overriding error of mixed fact and law. Examples of this flawed approach include:

(a) The Trial Judge failed to consider instances of Anishinaabe exercising control of their territory generally as contributing to control of the water portions of their territory, despite evidence that the Plaintiffs' water territory formed a part of their traditional territory. Rather, the Trial Judge required such control to be physically exercised on the water. For example, she found that the Beaver Wars (in which the Anishinaabe drove the Haudenosaunee out of what is now Ontario in the late 17th century) were about control of dry land, but not water spaces. This conclusion was reached in the absence of any evidence that the Haudenosaunee were left able to use the water spaces in the Claim Area after they were pushed out of the region.

(b) The Trial Judge found that the evidence of the Beaver Wars was insufficiently close in time to be able to make inferences about the situation at the assertion of British sovereignty in 1763. In fact, the Beaver Wars ended in 1701, which is only 62 years before the date of assertion of British sovereignty.

(c) Even where events of control physically occurred on the water in the Claim Area, the Trial Judge discounted their significance where it could not be established that there was a specific intention to control the water. For example, the Trial Judge:

(i) discounted an Anishinaabe attack on a British survey party travelling on a river during the Pondiac war in 1763 as showing intention to control water space. Instead, she interpreted it as an attack on the British, who just happened to be on the water at the time; and

(ii) discounted the British decision to negotiate their access to forts (by passing through the Upper Great Lakes) after Pondiac's War as evidence of Anishinaabe intent to control water space.

(d) Although the Trial Judge found that SON asserted control over fishing in parts of the Claim Area, she did not consider control of resources to be evidence of control of territory. However, exclusive use and control of resources is an incident of territorial ownership and control, and an indicator thereof. Since the resources (e.g. the fish) move throughout the region, control of resource harvesting and the protection of resources implies control over territory.

(e) Similarly, the Trial Judge repeatedly suggested that evidence of fishing supports an Aboriginal right to fish, rather than Aboriginal title. This ignores the fact that fishing is a use that the Aboriginal title territory is being put to, and is evidence of Aboriginal title.

(f) The Trial Judge implied that a deep connection with the lakebed itself was needed to show title, and that control of the surface was insufficient. This fails to take into account the nature of the land and the uses that the submerged land could realistically have been put to in 1763, which is part of the test for Aboriginal title. It also fails to take into account how control of the surface and resources relate to the lakebed, given the deep ecological

connections between resources such as fish and their environment, especially including the lakebed.

(g) The Trial Judge made the control aspect of the test for Aboriginal title overly strict by essentially comparing British military weapons at the time of assertion of sovereignty to Anishinaabe military weapons. She reasoned that since the British had cannons on their ships, the only effective response to that would be artillery, which Indigenous people did not have. This is contradictory to the evidence – even British officials recognized that they could not defeat Indigenous people militarily in 1763. Further, if the lack of artillery by Indigenous people appropriately rebuts the existence of Aboriginal title, this alone would also make it impossible ever to establish Aboriginal title over navigable water spaces, or over any land.

(h) The Trial Judge concluded that the British "won" the Pondiac war, despite substantial evidence that neither side was able to prevail over the other, and that the British did not enter Lake Huron until after making peace with Indigenous people in 1764 at Niagara.

(i) The Trial Judge paid considerable attention to whether connection to the lakebed was of central significance to SON's culture, despite established law that central significance is subsumed in the test for Aboriginal title, and need not be dealt with separately.

(j) The Trial Judge analyzed and relied on whether SON needed to have Aboriginal title in order to pursue the activities SON wished to pursue on the territory claimed. This is not part of the test for Aboriginal title.

(k) The Trial Judge appears to have required physical occupancy and central significance to the culture of each micro-portion of the Claim Area in order to meet the test for Aboriginal title. This is contrary to the current state of the law on Aboriginal title, which has rejected the "postage stamp" approach in favour of a territorial concept.

15. The Trial Judge also erred when she held that Aboriginal title had been surrendered to Chantry Island. She held this despite the transaction in question being a private transaction without the involvement of the Crown. Therefore, this transaction contravenes the requirements for a valid treaty and is of no effect. Further, no party to the litigation pleaded this transaction, nor relied on it as extinguishing Aboriginal title.

Navigable Waters Law

16. The Trial Judge misconstrued the common law of navigable waters, and its relation to Aboriginal title and to the Canadian constitution. For example:

(a) The Trial Judge treated the common law right of public navigation as "paramount" without considering that Aboriginal title is constitutionally protected and thus also is paramount, and without considering how these two "paramount" rights could interact with each other.

(b) The Trial Judge considered that the exclusive nature of Aboriginal title made it fundamentally inconsistent with the right of public navigation, entirely disregarding the fact that other exclusive rights (such as fee simple title, which can exist to the beds of navigable waters) are able to co-exist with public navigation. She also stated that she was leaving the question of the compatibility of Aboriginal title and public navigation open for another case with different facts. If that is the case, it is a legal error to rely on the "fundamental inconsistency" of Aboriginal title and public navigation.

(c) The Trial Judge essentially interpreted the Canadian common law of navigable waters as completely unmoored from the common law of England and other commonwealth countries.

(d) The Trial Judge misconstrued the place in SON's argument of legal doctrines such as *ad medium filum*. SON was not relying on such doctrines directly as a source of Aboriginal title, but to rebut the notion that it was impossible to own the beds of navigable waters.

(e) The Trial Judge relied on a doctrine of sovereign incompatibility as precluding Aboriginal rights in this case. This doctrine was endorsed by Binnie J in *Mitchell v MNR*, [2001] 1 SCR 911, 2001 SCC 33, but the majority in that case did not accept that this was an appropriate doctrine to apply to Aboriginal rights, and refrained from comment on it.

(f) The Trial Judge rejected the idea of using the doctrine of "justified infringement" to reconcile Aboriginal title with, for example, use of the territory for national defence emergencies, on the basis that this would require advance consultation about individual actions by the military. This is an erroneous application of role of consultation in the doctrine of justified infringement, and rather far-fetched to think that a court would require this in such a context.

17. These are pure errors of law and are subject to a standard of review of correctness.

Result of These Errors

18. The above errors coloured the Trial Judge's assessment of facts, making it unclear what findings of fact might have been made absent these errors.

"Portions Thereof" Alternative

19. In the alternative, the Trial Judge failed to fully consider SON's alternative claim for "portions thereof" of the Claim Area. Although she seemed to think it was plausible that Aboriginal title existed at least in one specific area, she said she did not have the evidence or the submissions to

properly define the boundaries of a smaller territory. However, she failed to invite any further evidence or submissions to address this question.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. An appeal of a final order of a judge of the Superior Court of Justice lies to the Ontario Court of Appeal pursuant to section 6(1)(b) of the *Court of Justices Act,* RSO 1990, c. C-43.
2. The order appealed from is a final order of the Superior Court of Justice, and no appeal lies to the Divisional Court.
3. Leave to appeal is not required.

August 27, 2021

Olthuis, Kleer, Townshend LLP
Barristers and Solicitors
250 University Avenue, 8th Floor
Toronto, Ontario M5H 3E5

H.W. Roger Townshend (LSO 34916O)
Renée Pelletier (LSO 46966N)
Jaclyn C. McNamara (LSO 66694B)
Benjamin Brookwell (LSO 67687G)

Tel: (416) 981-9330
Fax: (416) 981-9350

Counsel for the Appellants

TO: **Court of Appeal for Ontario**
130 Queen Street West
Toronto, Ontario M5H 2N5

AND TO: **The Attorney General of Canada**
Department of Justice
120 Adelaide Street West, Suite 400
Toronto, Ontario M5H 1T1
Attn.: Michael Beggs, Carole Lindsay, Michael McCulloch, and Barry Ennis

Counsel for the Respondents,
The Attorney General of Canada

AND TO: **Ontario Ministry of the Attorney General**
Crown Law Office – Civil
720 Bay Street, 8th Floor
Toronto, Ontario M7A 2S9
Attn.: David Feliciant, Richard Ogden, and Julia McRandall

Counsel for Her Majesty the Queen in Right of Ontario

Chippewas of Nawash Unceded First Nation et al. Appellants	and	The Attorney General of Canada et al. Defendants	Court File No.

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at TORONTO

NOTICE OF APPEAL

Olthuis Kleer Townshend, LLP
Barristers and Solicitors
250 University Ave. 8th Floor
Toronto, ON M5H 3E5

H.W. Roger Townshend (LSO 34916O)
Renée Pelletier (LSO 46966N)
Jaclyn C. McNamara (LSO 66694B)
Benjamin Brookwell (LSO 67687G)

Tel: (416) 981-9330
Fax: (416) 981-9350

Counsel for the Appellants