SCJ Court File 03-CV-261134CM1

Court File No. C69830

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)

APPELLANTS' FACTUM

Contents

PART I – THE APPEAL

1. The Appellants 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[1] ("SON"). SON's territory includes the lands of the Saugeen (Bruce) Peninsula (the "Peninsula") and approximately 1.5 million acres of land to the south of the Peninsula,[2] and surrounding waters ("SON Traditional Lands", or "SONTL").

2. SON brought an action in the Ontario Superior Court of Justice for 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. SON's case was heard by the Honourable Justice Wendy Matheson (the "Trial Judge"). The Trial Judge 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.[3] SON seeks an order setting aside the judgment of the Trial Judge and an order for a new trial.

PART II – OVERVIEW

3. SON has a deep spiritual connection to their water territory, and a spiritual responsibility for it. This spiritual connection and responsibility is and was historically vital and foundational to SON's relationship to their territory. SON is and was a fishing people. Fishing was the keystone of their traditional economy, not only for sustenance, but for trade and commerce. Not only did they fish, but SON controlled their fisheries and their fishing grounds. They had trespass laws. They excluded some outsiders from their territory and from their fishing grounds, and permitted

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[1] Reasons for Decision, Appeal Book Tab 4; also *Saugeen First Nation v The Attorney General of Canada*, 2021 ONSC 4181 ("Reasons"), para 1.
[2] Ibid, para 3.
[3] Ibid, paras 97-98.

others to share in it, on conditions including paying rent. To Anishinaabe people, like SON, all these things are acts of possessing, controlling, connecting to, and being responsible for their territory. Through the lens of Anglo-Canadian law, these are like the acts of an owner.

4. The timeline of key events in this Aboriginal title case is as follows: [4]

Date	Event
8000 BC	Ice Age glaciers retreat and human occupation commences in Georgian Bay Area.
1615	First European contact on Georgian Bay. Champlain is met by 300 Odawa warriors. French Missionaries follow. The Trial Judge found continuity of Dodem (clan) identity between those observed near Georgian Bay by the French around the time of contact and present members of SON.[5]
1648-1701	Beaver Wars between the Anishinaabe and Haudenosaunee. By the end of this period the Haudenosaunee had been driven back south of Lake Ontario. The Trial Judge found SON participated in these wars, including in battles on the Peninsula.[6]
1701	Great Peace of Montreal, formally ending the Beaver Wars.
1756-1763	Seven Years War between British and French. British defeated the French.
1760	End of fighting between British and French in North America. British take over French forts.
19 Feb 1763	Treaty of Paris, formally ending the Seven Years War. Date of assertion of British sovereignty over SONTL. The Trial Judge found SON was present on the Peninsula at this point.[7]

[4] If not otherwise referenced, the events in this chart are included in an Agreed Statement of Fact, Exhibit 3925.
[5] Reasons, para 453.
[6] Reasons, para 487.
[7] Reasons, para 561.

May-Oct 1763	Pontiac[8] War: Indigenous allies seize nine of Britain's twelve forts, and place two more of them under prolonged siege.[9]
7 Oct 1763	Royal Proclamation – SONTL is within "Territories reserved as aforesaid for the Use of said Indians" in that Proclamation.
1764	Congress of 2000 Indigenous persons from 19 Indigenous Nations meet the British at Niagara and enter into or renew agreements of alliance.
1830s	First Europeans begin to move into the SONTL. SON leases fishing grounds to European fishermen.
19th century	SON continues to assert fishing rights and rights to control fishing in parts of Lake Huron and Georgian Bay, coming into conflict with the Crown on this issue.[10]
20th century	SON continues to fish and assert their rights to an exclusive fishery in parts of Lake Huron and Georgian Bay.[11]
1993	*R v Jones and Nadjiwon* recognizes SON's right to fish commercially in parts of Lake Huron and Georgian Bay.[12]

5. For SON, this case is about their home. It is a story of resistance. SON has asserted their rights continuously since the time of European contact, using whatever means were realistically available to them. SON has faced barriers in their struggle, including the *Indian Act* regime, Crown legislation that constrained their capacity to fish, the Indian agent system, residential schools, poverty, lack of education, and political disempowerment. SON has worked hard to overcome these barriers and to develop the capacity to pursue this major litigation.

6. This case is also about reconciliation. It is about establishing clear principles to govern a respectful relationship between Indigenous and non-Indigenous peoples regarding water territories

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[8] Also spelled Pondiac. In Reasons, spelled Pontiac.
[9] See below, para 45
[10] See below, paras 62-69.
[11] See below, paras 70-75.
[12] Reasons, para 451.

in this country. In order for that to happen, this Court must address whether Aboriginal title to water spaces is possible in Canadian law, what is required to prove it, and how it relates to public navigation. This Court must determine whether the Trial Judge erred in her determination of those issues with respect to SON's claim.

7. SON submits that the Trial Judge erred regarding key facts in this case and made various legal conceptual errors: she misconstrued the content of Anishinaabe law; she failed to recognize the inter-social nature of the law of Aboriginal title; she failed to use Anishinaabe law to illuminate historical actions of Anishinaabe people; she failed to apply the correct, or any, legal test to the question of whether a treaty was made with the "Western Nations" at Niagara in 1763; she applied the legal test for Aboriginal rights to whether there was an "Aboriginal right to title" while that question should be addressed by the distinct test for the existence of Aboriginal title; she misconstrued the common law concerning navigable waters; she misconstrued how common law and Anishinaabe law should relate to each other; and she dismissed various possible ways of reconciling Aboriginal title and public navigation. SON submits that the result of these errors is that the trial judge developed and applied a framework that makes it virtually impossible for a First Nation to prove Aboriginal title to land under navigable waters: what might be called an "*aqua nullius*" doctrine, despite the firm rejection by Canadian courts of the doctrine of *terra nullius*. SON submits that dry land and submerged land should not be treated in such a fundamentally different way in relation to Aboriginal title.

8. Moreover, SON submits these errors affected the way the Trial Judge weighed the evidence. More specifically, the errors made meant that the Trial Judge simply dismissed certain bundles of evidence as not being probative. Rather than carefully weighing them against other evidence, she threw them off the scales entirely. If this Court decides that such evidence should

be restored to the scales, then SON submits that a new trial is warranted where the evidence may be considered in light of the appropriate principles for evaluating a claim for Aboriginal title.

PART III - FACTS

The Saugeen Ojibway Nation

9. Members of SON are Anishinaabe.[13] That is their core identity and primary self-identifier.[14]

10. In English, members of SON may also identify as being Ojibway, Odawa or Pottawatomi.[15] These are sub-ethnicities of Anishinaabe[16], but these labels are of much less significance to the people themselves than their identity as Anishinaabe.[17]

11. A fundamental feature of Anishinaabe social organization is the Dodem (clan) system. Dodems are inherited from one's father, and are named after a symbolic animal, bird or fish.[18]

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[13] Reasons, para 170.
[14] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6728, line 1 to p. 6729, line 21; Evidence of Karl Keeshig, Transcript vol 3, April 30, 2019, p. 262, lines 12-17; Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6770, line 21 to p. 6771, line 13; Charles Cleland, Rites of Conquest - The History and Culture of Michigan's Native Americans, 1992, Exhibit 4326, pp. 39-40 [PDF 25-26].
[15] Reasons, para 170.
[16] Prof. J. Randolph Valentine, "Linguistic Analysis of the Speech of Chippewas of Nawash and Saugeen First Nations" (2013), Exhibit 3993, pp. 2-4 [PDF 2-4].
[17] Evidence of Karl Keeshig, Transcript vol 3, April 30, 2019, p. 275, lines 11-13; Evidence of Ted Johnston, Transcript vol 4, May 1, 2019, p. 391, line 24 to p. 392, line 5; Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6775, line 12 to p. 6776, line 2; Charles Cleland, Rites of Conquest - The History and Culture of Michigan's Native Americans, 1992, Exhibit 4326, p. 40 (PDF p. 26); See also evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5256, line 25 to p. 5257, line 8; Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6774, line 20 to p. 6775, line 7.
[18] Reasons, para 171.

Marriage between persons of the same Dodem is prohibited,[19] and one is expected to treat a member of the same Dodem as a close relative, even if they had never met before.[20]

12. In anthropological terms, the "band" (now usually called "First Nation") is the central political unit of Anishinaabe society.[21] The term refers to a local group which is politically and economically independent and occupies a territory which is theirs.[22] It is the band that makes the key decisions about use and occupancy of its territory.[23]

13. When the need arose, numbers of local Anishinaabe bands would join together for common political, military or economic objectives. One such alliance which is key to this case was called the Three Fires Confederacy (called such because it included Ojibway, Odawa and Pottawatomi).[24] The Trial Judge found that SON were part of this Confederacy during the Beaver Wars (against the Haudenosaunee) in the 17th century.[25]

14. A keystone of SON's traditional economy was fishing. The Trial Judge found:

> 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.[26]

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[19] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 42-43 [PDF 42-43].
[20] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6766, line 25 to p. 6767 line 9.
[21] Reasons, paras 173 and 175.
[22] Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6759 lines 15 to p. 6760, line 6.
[23] Reasons paras 175 and 185; and see below para 26
[24] Reasons, para 179.
[25] Reasons, para 183.
[26] Reasons, para 223.

15. SON says their territory (SONTL) encompasses the Peninsula, about 1.5 million acres to the south of that, and portions of Lake Huron and Georgian Bay offshore of these lands (see Schedule C, Map 1).[27]

16. The Trial Judge explicitly found that ancestors of SON were present on the Peninsula in 1763.[28] She also found that SON participated in the Beaver Wars (second half of the 17th century), including in battles fought on the Peninsula.[29]

SON's Connections to their Territory

17. SON is deeply connected to their territory at many levels – the spiritual level, the Indigenous legal customary level, and the physical level. As might be expected of a fishing people, the Anishinaabe of the Great Lakes included water spaces as part of their band territories.[30]

SPIRITUAL CONNECTION

18. The evidence at trial established that SON has a deep spiritual connection with their territory.[31] This spiritual connection has its beginnings in SON's creation story. When the Creator

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[27] Reasons, para 13. See also Exhibit P.
[28] Reasons, para 561.
[29] Reasons, para 487.
[30] Reasons, para 203.
[31] See for example, evidence that SON has been on their territory forever: Evidence of Vernon Roote, Transcript vol 6, May 14, 2019, p. 603, lines 16-24; Evidence of Jim Ritchie, Transcript vol 7, May 15, 2019, p. 716, lines 8-16; Rule 36 evidence of Ross Johnston, November 4, 2002, Cross examination, Exhibit 3954, p.8, line 17 to p. 9, line 3; Rule 36 evidence of Donald Keeshig, December 5, 2002, Cross examination, Exhibit 3946, p. 57, lines 6-17; Rule 36 evidence of John Nadjiwon, November 5, 2002, Cross examination, Exhibit 3952, p. 65, lines 13-30, p. 66, lines 1-19; Rule 36 evidence of Frank Shawbedees, December 4, 2002, Cross examination, Exhibit 3948, p. 19, lines 8-23; evidence of connection to specific locations in the territory: Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 467, lines 2-16; Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 468, line 1 to p. 469, line 25; Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 470, line 15 to p. 471, line 12; Evidence of Verne Roote, Transcript vol 5, May 13, 2019, p. 471, line 13 to p. 472, line 7; Evidence of Verne Roote, Transcript vol 5, May 13, 2019, p. 472, lines 8-19; SON is interconnected with the territory: Evidence of Randall Kahgee,

imparted his breath to create the world, he imparted his spirit into his creation and gave it life. For the Anishinaabe, this means that everything that is alive has a part of his breath or spirit within it.[32]

19. In creating all living things, the Creator bestowed on the Anishinaabe the responsibility to care for and protect the earth and water.[33] As Vernon Roote explained in his testimony, it is SON's job to keep Mother Earth clean: "We must keep the air clean and we must keep the water clean as well as the land. It is our belief system, it is how we understand life to be."[34]

20. Although the responsibility to act as a steward for water may have fallen on all Anishinaabe, SON's specific responsibility is tied to its territory. Randall Kahgee testified that the teachings he received from Elders taught him that responsibility to care for SONTL cannot be fulfilled by anyone other than SON.[35]

21. The Trial Judge accepted Randall Kahgee's evidence about SON's responsibility to their territory as reflecting his current belief, but did not find that this belief reflected a historical practice as of 1763, despite his testimony indicating he learned this belief from Elders. The Trial Judge then went on to rely on the Creation Story to reason that the Anishinaabe at large had a

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Transcript vol 9, May 22, 2019, p. 909, line 24 to p. 910, line 11; Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1318, line 15 to p. 1319, line 1.

[32] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 162, lines 16-22 and p. 225, lines 13-17.

[33] Reasons, paras 198-199.

[34] Evidence of Vernon Roote, Transcript Vol 5, May 13, 2019, p. 456, lines 16 to 19; also see p. 456, line 8 to p. 457, line 11.

[35] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 909, line 16 to p. 911 line 11, specifically p. 911, lines 9-11. However, in some cases, there is overlapping shared territory at the edges of the SONTL – see for example Maawn-ji-giig-do-yaang Declaration, February 18, 2011, Exhibit 3983, and Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p 885 line 13 to p 903 line 3, especially p 896 line 6 to p 897 line 3.

responsibility to preserve the Earth.[36] As will be addressed in more detail below, this reflects a misunderstanding of Anishinaabe law and territorial control and responsibility.[37] As such it is an error of law,[38] or alternatively an error of fact.[39]

22. The responsibility bestowed on SON by the Creator extends to how decisions are made respecting their territory, and to the Anishinaabe customary law that applies to SONTL.[40] In the same way that bands were the "central political unit for Anishinaabe people"[41] on matters affecting their territory, the responsibility that flows from SON's spiritual connection to water is similarly tied to its territory. SON's territory is not defined, then, by where their regular physical occupation stopped, but rather where their responsibility to protect and care for territory ended and another band's took hold.[42] To determine boundaries any other way would have the potential of leaving vast sections of territory without a caretaker.

23. SON's relationship with its territory is manifested in many different ways. Water ceremonies have been performed for centuries, mostly by women, to care for the water and maintain connection with it.[43] Pipe carriers also perform ceremonies to request help from the water

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[36] Reasons, para 202.
[37] Below, paras 121 to 124.
[38] As argued below at para 96, an error of Anishinaabe law is an error of law, or alternatively an error of fact.
[39] Unless otherwise stated, errors alleged in the "facts" section of this factum are alleged to be errors of fact, to be judged on standard of being palpable, and, considered collectively, of being overriding.
[40] See for example, testimony about how a overlap agreement was entered into between different Anishinaabe communities: Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 899, line 20 to p. 900, line 12 and p. 911, line 5 to p. 912, line 4.
[41] Reasons, para 175.
[42] Subject, as above, to the possibility of a shared overlap territory.
[43] Reasons, paras 204-212 and 215.

spirits, help with pollution and to renew the lakebeds.[44] Witnesses also described scattering tobacco on the water when fishing to pay respect to the water and the spirit of the fish.[45]

24. The Trial Judge accepted that the spiritual beliefs of the Anishinaabe were shared by SON's ancestors,[46] and found that the Anishinaabe, including SON, had a spiritual connection and responsibility to care for the earth, including the Great Lakes, as of 1763.[47] The evidence showed, and the Trial Judge accepted, that in modern times, SON has shown their continued concern about environmental issues regarding the land in the Peninsula area and waters surrounding the Peninsula.[48] The Trial Judge linked the specific concern regarding environmental issues to a spiritual connection to the whole Earth, rather than a spiritual connection and corresponding responsibility to specific territory, thus erring in fact.[49] In doing so, she did not appear to consider the interaction between band decision making and Anishinaabe spiritual responsibility. This is addressed in more detail below.[50]

25. SON's connection to its territory is so deep, that SON sees itself as inextricably linked to its territory. The members of SON come from their territory in that they were made from it, they come from its earth and water, and it makes them who they are.[51]

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[44] Reasons, para 214.
[45] Reasons, para 214.
[46] Reasons, paras 219 and 568.
[47] Reasons, paras 371 and 567.
[48] Reasons, para 567.
[49] Reasons, para 567.
[50] Below, paras 121 to 124.
[51] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 909, line 24 to p. 910, line 11; Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1318, line 15 to p. 1319, line 1.

ANISHINAABE TRESPASS LAW

26. The Anishinaabe had customary laws concerning trespass. The Trial Judge found that it was the band that exercised control over territory, and that this included control over the resources that could be harvested on the land **and through fishing**, and over who could come and settle on the territory of a band. The Trial Judge also found that this law was shared by SON and that it applied to the Peninsula.[52]

27. Nonetheless, the Trial Judge also found that Anishinaabe customary law did not include controlling "water spaces generally,"[53] thus erring in (Anishinaabe) law[54] or alternatively in fact.

28. However, the evidence about Anishinaabe customary law usually spoke of "territory". Sometimes examples were given of hunting grounds, and sometimes of fishing grounds, but in **no case** did the evidence about Anishinaabe law refer to an explicit exclusion of water spaces.[55]

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[52] Reasons, paras 458 and 467.
[53] Reasons, para 467.
[54] See below, paras 120 and 125-128.
[55] Vidal Anderson Report, December 5, 1849, Exhibit 4329, p. 5, PDF 5, *refers to both "territory" and "hunting grounds"*; Prof. Paul Driben "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 47-8, PDF 47-8, *refers to "territory" and to "land **and water**"*; Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA 500 BC – 1860 AD" (as revised 2019), Exhibit 4576, p. 25, PDF 38, *refers to "hunting or trapping grounds*"; Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 439, line 8 to p. 440, line 10, *refers to "land and resource use"*; Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 912 line 9, to p. 914, line 12, *refers to "territory" and to hunting and **fishing***; History of the Ojebway Indians; with especial reference to their Conversion to Christianity, by Reverend Peter Jones, 1861, Exhibit 2598, p. 39, PDF 46, *refers to "territory"*; Diamond Jenness, The Ojibwa Indians of Parry Island, Their Social and Religious Life, 1935, Exhibit 4327, pp. 4-6, PDF 8-10, *refers to "territory", "land", "hunting territory", "**fishing places**" and "maple groves"*; Charles Cleland, Faith in Paper - The Ethnology and Litigation of Upper Great Lakes Indian Treaties, 2011, Exhibit 4328, p. 22 (PDF p. 24), *refers to "territory"*; Prof. Paul Driben "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 50-52, PDF 50-52 and Evidence of Prof. Paul Driben, Transcript vol 53, October 21, 2019, p. 6796, line 7 to p. 6798, line 1, *refers to the Sault Ste. Marie Ojibway hosting 1450 guests from other Indigenous communities for the*

29. Further, the evidence was clear, and indeed the Trial Judge found, that Anishinaabe of the Great Lakes included water spaces as part of their band territories.[56] There is no substantive distinction between the relationship of the Anishinaabe to land and to water. Vernon Roote testified:

> Q. So how important is the water to you?
>
> A. **Water is important for us here because that's part of our territory**. We sustain our survival through the use of the land by hunting and the use of water by fishing, and that makes our survival of our lives by the importance of having water around us.
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> The territory was something that we looked at in terms of what was included in that Treaty. And my grandparents and other people have always said, "Well, **that water is ours because it's our way of life and our way of survival. We did not give any of that away**."[57] [emphasis added]

30. Karl Keeshig testified:

> All I see is my mother, the earth. **It includes the water** and it includes the land, as you are referring to it. It would be only regarding is [sic] the hand of your mother and ignoring the rest of her, that **there is no difference**. She is mother earth.[58] [emphasis added]

LAND AND WATER USE

31. For the Anishinaabe of the Great Lakes, including SON, fishing was the mainstay of their economy, both for food and for trade. On first observing the fishery, Europeans marvelled at its extent and productivity.[59] As noted above, SON were and are "a fishing people".[60] Both

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*purpose of **fishing** – the situation was managed by the hosts specifying conditions of permission which allowed the fish harvest to be done in an orderly manner*.

[56] Reasons, para 203.

[57] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 459, lines 5-18.

[58] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 222, line 23 to p. 223, line 3.

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

[60] Reasons, para 223.

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.[61]

32. SON asserted control over fishing in specific areas around the Peninsula around 1763 and after.[62] The fishing evidence shows use and occupancy of part of the Claim Area.[63] SON members have fished and continue to fish in the Claim Area for sustenance and for commercial purposes.[64] This evidence shows that SON occupied and continues to occupy the Claim Area in a manner that is consistent with the types of occupation that are practical upon water.

SON's Defence of their Territory

ACCESS TO LAKE HURON/GEORGIAN BAY

33. To properly understand the various instances of SON's defence of their territory, one must keep in mind the alliances Anishinaabe bands made when faced with an external threat. The geography of Lake Huron/Georgian Bay is especially well-suited for several Anishinaabe bands to collectively exercise territorial control in the face of an external threat.[65] As noted by Dr. Gwen Reimer (an expert witness called by Ontario):

> At the time of contact with the French, the Ottawas were an integral part of an elaborate trading network with villages at **three main access points** on Lake Huron: Manitoulin, Michilimackinac and Nottawasaga. Ottawa also maintained a watchful presence **at access points** such as Bkejwanong [Walpole Island] and Bawating [Sault Ste. Marie]. **At each location the Ottawas prevented the free movement of people by the use of force in order to protect valuable hunting and fishing territories**. The Ottawas also secured their place as middlemen by controlling trade routes through northern Lake Huron. Finally, Garrad's (2014) theory that the Petun resided in Ottawa territory "with the continued permission of the Odawas and subject to their stipulations" suggests that the **Ottawa**

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[61] Reasons, para 223.
[62] Reasons, para 452.
[63] Reasons, paras 444 and 452.
[64] Reasons, para 446.
[65] For an illustration of the context, see Appendix C, Map 6, General Map of Great Lakes.

> **were capable of exerting control over the entry into and use of their territory by outsiders**.[66] [emphasis added]

34. Professor Paul Driben (an expert witness called by SON) gave similar evidence: that all access to the region was by water in the 18th century; that there were six primary access points to Lake Huron/Georgian Bay; that Anishinaabe people controlled all of these; that the Anishinaabe bands at these locations could and did call on each other for assistance in responding to external threats; and that thus the Anishinaabe were "pre-eminent in the region".[67]

35. Despite this, the Trial Judge found that the evidence did not prove Anishinaabe control of access points to Lake Huron/Georgian Bay, and stated that Professor Driben "agreed that the bands he mentioned did not act in concert to control access to Lake Huron and Georgian Bay."[68] On this point, she erred in fact by misapprehending Professor Driben's evidence. What he said was "I don't mean to suggest that they're acting in concert **continually** to control access"[69] [emphasis added]. Rather, he said that in ordinary circumstances bands controlled their own territories,[70] but that they would **come together as need be** (for example when faced with an external threat), and **remain as long as required**.[71] Further, he said that the Anishinaabe would "**fight [for] their territory to the end** because it's so important to them."[72] Professor Driben elaborated on the

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[66] Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA 500 BC-1860 AD" (as revised 2019), Exhibit 4576, pp. 30-31 PDF 43-44.
[67] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 127-132 and 135-139, PDF 127-132 and 135-139; Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6853, line 8 to p. 6854, line 25.
[68] Reasons, para 466
[69] Evidence of Prof. Paul Driben, Transcript vol 56, p. 7198, lines 21-23.
[70] Evidence of Prof. Paul Driben, Transcript vol 55, p. 7107, lines 21-25.
[71] Evidence of Prof. Paul Driben, Transcript vol 55, p. 7111 lines 8-16.
[72] Evidence of Prof. Paul Driben, Transcript vol 55, p. 7022 lines 18-23.

inter-relation of Anishinaabe customs of land control and alliance in the context of the Pontiac War:

> In my opinion, the siege of Fort Detroit, which entailed securing control of the Detroit River, and then using the river to repel and launch attacks against the British, was consistent with Anishinaabe attitudes toward the control of water spaces at the time. As alluded to earlier, Anishinaabe jurisprudence held that those in whose band territories the Detroit River was located were sovereign with respect to deciding who could use and enjoy the portions of the river over which they presided… **Pontiac not only was entitled to defend that portion of the Detroit River over which his own band presided, but also the band territories of his allies. From an Anishinaabe point of view, in other words, Pontiac was both expected and obliged to expel the British**, and using the Detroit River to attack the British, and to repel their advances, was one of the methods Pontiac and his men adopted to achieve that goal.[73]

FIRST CONTACT

36. It is in the context of the above noted geography of Lake Huron/Georgian Bay and Anishinaabe customs of land control and alliance that the first European contact with Indigenous people on Georgian Bay took place. This was with Champlain, who reached the mouth of the French River (i.e. outside the SONTL) in the summer of 1615. He was met there by 300 warriors he called "Cheveux Relevées", who, as the Trial Judge found, were Odawa.[74] The Trial Judge found some members of SON are of Odawa descent.[75] In the 17th century, the French usually referred to any Anishinaabe in the Georgian Bay region as Odawa.[76]

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[73] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 154 PDF 154.
[74] Reasons, para 476.
[75] Reasons, para 170.
[76] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 23-25 [PDF 24-26]; Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5257, line 11 to p. 5258 line 2; see also Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11341, lines 2-7.

37. The evidence is that in 1616, in southern Georgian Bay, within the SONTL, Champlain met some of the **very same people** he had met at the mouth of the French River in 1615.[77]

38. It is undisputed, and it was found by the Trial Judge, that the encounter included the Cheveux Relevées saying that they were "picking blueberries", that Champlain gave them a gift of an axe, and that then Champlain proceeded on his way.[78] The Trial Judge also noted that there was a custom of gift-giving to establish a relationship.[79]

39. There was also expert evidence, from Professor Driben and Dr. Williamson, and supported by a thesis by Leo Waisberg, that picking blueberries was not an activity done by warriors, that the "blueberry" comment was an attempt at humour or evasion, and that, rather, the Cheveux Relevées were there to "investigate this intrusion into territory and to interrogate Champlain."[80] Once Champlain had established a relationship with the Cheveux Relevées by giving them a gift, he was allowed to proceed.[81] Dr. Reimer's evidence was that she agreed that the Cheveux Relevées "were there for more than just blueberry picking".[82]

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[77] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 70 PDF 71; H.P. Biggar, The Works of Samuel de Champlain, Vol III, (Toronto, Champlain Society, 1929), Exhibit 47, p 96-7 PDF 88-9.
[78] Reasons, para 477.
[79] Reasons, para 477.
[80] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6824, lines 12-21 (blueberries) and p. 6824, line 22 to p. 6826, line 5 (Waisberg); L. G. Waisberg, "The Ottawa: Traders of the Upper Great Lakes 1615-1700", September 1977, Exhibit 4336, pp. 32-33 PDF 55-56; Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5304, lines 3-21.
[81] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 57, 64 [PDF 57, 64]; *Voyage of the Sieur de Champlain to New France in the year 1615*, 1929, Exhibit 47, pp. 43-44 PDF 32-33; Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6823, line 24 to p. 6824 line 9.
[82] Evidence of Dr. Gwen Reimer, Transcript vol 88, March 3, 2020, p. 11206, line 21 to p. 11209, line 20.

40. Despite this, the Trial Judge found that SON had not established that the Cheveux Relevées had travelled to the French River to meet Champlain, thus erring in fact.[83]

BEAVER WARS

41. Between about 1649 and 1701, the Anishinaabe were sporadically, but sometimes intensely, in a conflict with the Haudenosaunee known as the Beaver Wars. At the outset of this period, the Haudenosaunee had likely driven most other Indigenous peoples out of what is now southern Ontario.[84]

42. After this, the Anishinaabe began to return to the area and, at least by the late 1660s, had resumed use of the SONTL.[85] By the late 1680s the Anishinaabe shifted their strategy to an offensive one,[86] and, by the turn of the 18th century, had driven the Haudenosaunee from what is now southern Ontario.[87]

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[83] Reasons, para 479.
[84] Reasons, para 482.
[85] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 94-97 [PDF 95-98]; Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA. 500 BC-1860 AD" (as revised 2019), Exhibit 4576, pp. 108-110 [PDF 121-123]; Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5338, lines 5-12.
[86] Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA. 500 BC-1860 AD" (as revised 2019), Exhibit 4576, p. 125 [PDF 138].
[87] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 113-124 and 130 [PDF 114-125 and 131]; Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 80-81 [PDF 80-81]; Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA. 500 BC-1860 AD" (as revised 2019), Exhibit 4576, p. 272 [PDF 285]; Rule 36 evidence of Frank Shawbedeese, December 4, 2002, Cross Examination, p. 19, line 77 to p. 20 line 84 - "*We beat the hell out of them."*; Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 487, line 21 to p. 490, line 6; Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 250, line 11 to p. 252, line 18.

43. The Trial Judge found that SON ancestors took part in the Beaver Wars, including in battles on the Peninsula, and that this was an attempt to control the Peninsula in response to the incursions of the Haudenosaunee.[88]

44. Nonetheless, the Trial Judge found that the Beaver Wars did not demonstrate an intention or capacity to control the water spaces around the Peninsula,[89] thus making an error of fact. She made this finding despite evidence that the Anishinaabe made no distinction between their dry land territory and their water spaces,[90] despite evidence the Haudenosaunee had been driven from the region entirely,[91] some battles having been on or in the water,[92] and despite there being **no** evidence that the Haudenosaunee were left free or able to navigate the water space around the Peninsula at the conclusion of the Beaver Wars.

PONTIAC WAR

45. Shortly after the British had defeated the French in North America, they came into renewed conflict with the Anishinaabe and other Indigenous people, spearheaded by Chief Pontiac. In May of 1763, Chief Pontiac laid siege to Fort Detroit. The British lost control of nine of their 12 forts, and Fort Detroit and Fort Pitt were under siege until fall 1763.[93] At Fort Detroit, the British commander had been ready to abandon the fort when Pontiac proposed peace:

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[88] Reasons, para 487.
[89] Reasons, para 487.
[90] Above, paras 28-30
[91] Above, para 42
[92] Vernon Roote gave evidence that "Red Bay" was so named because of blood in the water from a battle with the Haudenosaunee. He also gave evidence about another battle at the mouth of the Saugeen River. Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 488 lines 7-20 and p. 489 lines 8-16.
[93] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 15-16 and 24-27 [PDF 15-16 and 24-27]; Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen

> On the 12th October, The enemy sued for Peace in a very submissive manner: **at that time I was so circumstanced for want of flour, that I must either abandon my Post, or hear them**.[94]

46. Despite this evidence, the Trial Judge erroneously found that the siege of Detroit "failed" because Pontiac could not prevent the British ships from supplying the fort.[95]

47. The Anishinaabe proposed peace in the fall of 1763 because winter was not a practical season for warfare.[96] Both the British and the First Nations realized that "their conflict was ruinous and neither wanted to maintain it."[97]

48. The British did not re-occupy any of the forts that had been taken by First Nations until after peace had been negotiated with the First Nations at Niagara in 1764.[98]

49. Sir William Johnson was Superintendent of Indian Affairs for the Northern Colonies, and "probably the single most experienced and knowledgeable person in Indian relations that the Crown was aware of in North America."[99] In 1764, he advised the Lords of Trade that:

> **The Indians all know, we cannot be a match for them** in the midst of an extensive, woody Country, where, tho' we may at a large expence [*sic*] convey an army, we can not continue it there, but must

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Anishinaabe" (2013), Exhibit 4324, pp. 82 and 147-154 [PDF 82 and 147-154]; Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1631, line 18 to p. 1632, line 20 and p. 1635, lines 6-10.

[94] Major Henry Gladwin to Sir Jeffery Amherst, November 1, 1763, Exhibit 4025, p. 98 [PDF 1].

[95] Reasons, para 517.

[96] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 27-30 [PDF 27-30]; Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1636, line 1 to p. 1637, line 13.

[97] Evidence of Prof. Eric Hinderaker, Transcript vol 21, June 12, 2019, p. 2041, line 17 to p. 2042, line 3.

[98] Evidence of Mr. Donald Graves (expert witness called by Ontario), Transcript vol 86, February 20, 2020, p. 10947, line 17 to 10948, line 5.

[99] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1570, line 15 to p. 1571, line 2 and p. 1580, lines 10-17; Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, p. 8 [PDF 8].

> leave our small Posts at the end of the Campaign, liable either to be blockaded, surprised, or taken by Treachery.[100]

50. Despite this evidence, the Trial Judge found that the British had "fully demonstrated that they controlled access" to the Great Lakes,[101] making an error of fact.

51. The Trial Judge also found that SON had not established that they took part in the Pontiac War. At trial, SON relied on evidence from Professor Eric Hinderaker who testified that during the Pontiac War, the Anishinaabe were united in purpose to defend their territory and not to permit the British to enter unless on terms acceptable to the Anishinaabe. The Trial Judge found that in reaching this opinion, Professor Hinderaker had "included Anishinaabe groups who refused to take part in the war", that such groups were not necessarily against the British, and that such decisions were made at the band level.[102]

52. The Trial Judge misapprehended Professor Hinderaker's evidence on this point, and thus erred in fact. Professor Hinderaker realized that Anishinaabe bands made such decisions individually, and his report stated that "With very few exceptions, the Great Lakes Anishinaabe were united in their opposition to British power in the region in 1762."[103] His report elaborated on the exceptions: the l'Arbre Croche Odawa who sheltered some British traders from other Anishinaabe groups, which Professor Hinderaker explained as a difference in strategy, not goals;[104] and Chief Wabbicommicot of Credit River (near Toronto) who "stood alone among

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[100] Johnson to the Lords of Trade, August 30, 1764, Exhibit 643, pp. 649-650 PDF 3-4. See also Reasons, para 550.
[101] Reasons, para 546.
[102] Reasons, paras 507 and 516.
[103] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, p. 53 [PDF 53].
[104] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp 55-58 [PDF 55-58].

Anishinaabe leaders in his willingness to accept British power in the region…"[105] He was cross-examined extensively on the point of some Indigenous groups not supporting Pontiac, and at times pointed out that the groups he was being asked about were on the far western edge of the Great Lakes, or were not Anishinaabe, or that the documents he was being referred to probably represented what their authors were told, which is a different question from whether that was accurate or the whole truth.[106] At the end of a lengthy cross-examination on this point, he testified "I still think that the sum of the documentary records suggest that there was a widespread uprising among Anishinaabe peoples against British posts in the summer of 1763".[107]

53. The Trial Judge also conflated evidence about the Anishinaabe and Indigenous people more generally. There is no evidence of support for the British goals in the war by Anishinaabe other than Wabbicommicot and his band. Nor is there **any** evidence of Anishinaabe warriors (as opposed, for example, to warriors from other Indigenous nations) fighting on behalf of the British in military operations. Despite this, the Trial Judge also found that "some [Anishinaabe] **groups** openly sided with the British, providing the British with warriors to help in military operations,"[108] [emphasis added] thus making an error of fact.

TREATY (OR "CONGRESS") OF NIAGARA

54. In an attempt to bring peace to the region after the Pontiac War, and to allow for the safe reoccupation of the western posts, Sir William Johnson invited all of the Great Lakes Indigenous nations to meet at Niagara in the summer of 1764.[109] This attracted nearly 2000 participants, from

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[105] Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, p. 59 [PDF 59].
[106] Evidence of Prof. Eric Hinderaker, Transcript vol 20, June 11, 2019, p. 1838 line 22 to p. 1839 line 1; p. 1858 lines 10-15; p. 1864 lines 16-22; and p 1867 lines 24-25.
[107] Evidence of Prof. Eric Hinderaker, Transcript vol 20, June 11, 2019, p. 1877 lines 18-21.
[108] Reasons, para 515.
[109] Reasons, para 533.

various Indigenous nations throughout the Great Lakes region, and included almost all of what Johnson referred to as the "Western Nations".[110] According to Sir William Johnson, it was "the largest Number of Indians perhaps ever Assembled on any occasion."[111]

55. Johnson's stated intention for the meetings at Niagara was to see peace return to the region by producing a "Treaty of Offensive and Defensive Alliance", in which the British would:

> assure them A Free fair & open Trade, at the principal Posts, & a free intercourse, & passage into our Country, That we will make no Settlements or Encroachments contrary to Treaty, or without their permission. That we will bring to Justice any persons who commit Robberys or Murders on them & that we will protect & aid them against their & our Enemys, & duly observe our Engagements with them.[112]

56. In the summer of 1764, meetings took place over a period of almost one month. Johnson met separately and made separate agreements with different Indigenous nations.[113] The Trial Judge inferred that SON ancestors were probably present at Niagara in the summer of 1764, as part of the "Western nations".[114]

57. There was conflicting expert evidence about the nature of the agreement Johnson made with the Western nations – specifically whether it was a "treaty", as historians understand the term.[115]

58. What is clear is that Niagara was a major and significant event attended by many Chiefs and members of the Western nations; that Johnson spoke on behalf of the British Crown; that

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[110] Reasons, para 534.
[111] Sir W. Johnson to C. Colden, August 23, 1764, Exhibit 641, pp. 511-512 [PDF 2-3]
[112] Sir W. Johnson to Thomas Gage, February 19, 1764, Papers of Sir William Johnson, Exhibit 572, p. 332 [PDF 6].
[113] Reasons, paras 527, 534.
[114] Reasons, para 541.
[115] Reasons, paras 529 and 535-6.

extensive ceremonial protocols (smoking pipe, exchanging wampum belts) were performed; and that an alliance (the "Covenant Chain") was renewed with the Western nations.[116]

59. Key conditions of the alliance were that the Western nations were to treat the British as brothers; to take care of the posts, especially at Michilimakinac; and not to interfere with travel over the lakes and rivers.[117] In return the British would hear any complaints, render justice, rectify mistaken prejudices, and engage in a fair and plentiful trade.[118]

60. The context for this is that since May of 1763 when the Pontiac War began, the British had not re-occupied their forts and posts,[119] and so had not been present on Lake Huron. Thus, both the British and the Western Nations had been deprived of the benefits of trade with each other.

61. The Trial Judge focussed on whether the agreement made with the Western Nations was a treaty or not. She accepted Professor Alain Beaulieu's opinion that it was not, from a historical perspective. She also noted that whether there was a treaty with the Western Nations was also a question of law.[120] However, she made no attempt to apply the facts surrounding the agreement with the Western Nations to the legal test for the existence of a treaty. This is an error of law.

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[116] Reasons, paras 534, 538-9, 545 and 549, and The Papers of Sir W. Johnson, July-August, 1764, Exhibit 4385, pp. 278-312 [PDF 18-52].
[117] The Papers of Sir W. Johnson, July-August, 1764, Exhibit 4385, p. 280 [PDF 20], and Reasons, para. 545.
[118] The Papers of Sir W. Johnson, July-August, 1764, Exhibit 4385, p. 279 and 310 [PDF 19 and 50].
[119] See above, para 48
[120] Reasons, para 529,

RESISTANCE IN THE 19TH CENTURY

62. In the 19th century, as they have been since time immemorial, the Lake Huron and Georgian Bay fisheries were highly valued by SON as subsistence and commercial fisheries. SON took steps in the 1800s to attempt to control fishing and the use of fisheries.[121]

63. The significance of fishing was discussed at the treaty council that gave rise to Treaty 45½ in 1836.[122] At that treaty council, Lt. Gov. Bond Head promised SON that the Crown would "remove all the white people who were in the habit of fishing on their grounds".[123] Three years later, in 1839, an investigation into Indian Affairs reported that SON ancestors asserted "exclusive rights" to the fishing grounds.[124]

64. In the 1830s and 1840s, the ancestors of SON granted leases or licences to Euro-Canadian fishermen.[125] During this time, SON ancestors also took steps regarding overfishing, illegal fishing and contraventions of lease terms.[126]

65. Over the years, however, and in spite of the efforts of SON, their fisheries on the west side of the Peninsula were subject to a number of unauthorized encroachments by Euro-Canadian settlers. In response to petitions by SON, in 1847, Lord Elgin made a declaration that guaranteed

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[121] Reasons, para 448.
[122] Reasons, para 448.
[123] Statement of Metigwob, September 13, 1836, Exhibit 1142, p. 3 [original] [PDF 6], p. 2 [transcript] [PDF 9]; Evidence of Prof. Jarvis Brownlie, July 23, 2019, Transcript vol 31, p. 3297, lines 2-21.
[124] Reasons, para 448.
[125] Reasons, para 448.
[126] Reasons, para 448.

to SON the possession of all islands within seven miles of the shore[127] – echoing the promise to protect the fisheries made by Bond Head at Treaty 45½.[128]

66. In 1854, at the time Treaty 72 was concluded, and in the years that followed, SON continued to rely heavily on fishing the waters of their territory for their livelihood, including both subsistence and commercial fishing operations.[129] In this period, the fishery was "tremendously important to them", both to meet their subsistence needs and also for its commercial value.[130] Access to the fishery was essential to their continued existence.[131] After Treaty 72, SON still saw

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

[128] Statement of Metigwob, September 13, 1836, Exhibit 1142, p. 3 [original] [PDF 6], p. 2 [transcript] [PDF 9]; Evidence of Prof. Jarvis Brownlie, July 23, 2019, Transcript vol 31, p. 3297, lines 2-21.

[129] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3287, lines 8 to 24; Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, pp. 93-96 [PDF 105-108] – "*…the evidence indicates that after Surrender No 72 families continued to rely on hunting, trapping and particularly fishing to supplement their income and diet."*

[130] Evidence of Prof. Paul Driben, October 23, 2019, Transcript vol 55, p. 6955, line 10 to p. 6957, line 1; Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3186, lines 9-20*;* See also: Ludwig Kribs [Kniles on document], October 11, 1854, Exhibit 2144 [PDF 2 (transcript) and 8 (original)]– *"They are obliged chiefly to live upon fish"*; Report of the Special Commissioners Appointed on the 8th of September, 1856 to Investigate Indian Affairs in Canada [Pennefather Report], (1858), Exhibit 2494, [PDF 76 – document not paginated] – *"The fisheries, though not equal to those on the western side of the Peninsula, are considerable, and will constitute no inconsiderable part of the means of subsistence available for the band";* Conrad Vandusen Report on the Chippewas of Nawash, in Twenty-Ninth Annual Report on the Missionary Society of the Wesleyan-Methodist Church in Canada*,* (1854), Exhibit 2046, p. xx [PDF 2]– *explaining that the families are sometimes absent from Church "on their periodical hunting and fishing excursions"*; L. Oliphant to Lord Elgin, Enclosure No. 1 in Copy of a Despatch from Governor General the Earl of Elgin to the Right Hon. Sir. G. Grey Bart, November 3, 1854, Exhibit 2175, p. 4 [PDF 3] – *When Oliphant arrived for the treaty council, the Chiefs were "absent at their fishing grounds*".

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

themselves as holding proprietary rights over the fishery and as entitled to fish throughout their waters.[132] The oral history of the community is extensive on this point.[133]

67. SON tried over and over again to re-establish firm control over the commercial fishery in their territory in the face of government and settler interference.[134] The Crown's actions continued to limit SON's control over fishing.[135] 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. [136] SON took steps in protest, which ranged from petitioning the Queen to damaging the Euro-Canadian fishermen's nets and fishing stations.[137]

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[132] Treaty 72 stipulated that "It is understood that no islands are included in this surrender", Exhibit 2145, [PDF 3].
[133] Evidence of Dale Jones, Transcript vol 8, May 16, 2019, p. 827, line 15 to p. 828, line 7; Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 523, lines 9-17 - *Vernon Roote discusses his grandfather, Alex Roote, telling him he has the right to hunt and fish in the territory. … because those rights were never surrendered and that the Treaty only identified the sale of bush lots* and p. 508, lines 10-17 – "*It has always been my belief that we did not surrender any Aboriginal rights in the Treaty of -- number 72.· And those arguments have come from a line of oral history with other past leaders commenting on the same, where we did not give up any Aboriginal rights; and that the Treaty was only for the sale of land and not for the sale of Aboriginal rights."*; Evidence of Ted Johnston, Transcript vol 4, May 1, 2019, p. 401, line 21 to p. 402, line 1 -*"we understood that we owned the water completely surrounding the peninsula, so wherever the fishing was required, and there was certain areas at certain times of the year that were better than others."*; Evidence of Karl Keeshig, Transcript vol 3, April 30, 2019, p. 287, line 23 to p. 288, line 4 - w*hen asked if he understood the treaties in the territory to have anything to do with hunting or fishing, Karl Keeshig replied "No. If it did, there would be a record of it. Hunting and fishing, I understood that those were not a part of what was signed, is what I understand."*; Evidence of James (Jim) Ritchie, Transcript vol 7, May 15, 2019, p. 682, lines 9-12 - *"We always had those rights, and we still have those rights, hunting and fishing in our territory. That's my view. The government has a different view."*
[134] Reasons, para 449; and Victor Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nations' Fishing Islands in Lake Huron", in Coexistence: Studies in Ontario-First Nations Relations, Bruce W. Hodgins, Shawn Herd, John S. Milloy (Eds) (1992), Exhibit 4332, pp. 93-94 [PDF 14-15].
[135] Reasons, para 449.
[136] Reasons, para 449.
[137] Reasons, para 449.

68. In their petition to the Queen, SON wrote:

> If we could only have this privilege of all that we should call our own - have the sole management of our lands, our fisheries, and monies, we would be satisfied and we do not see why we cannot be able to do so, while we have persons of our own blood who can do all this, in any respect exactly the same as a white man.[138]

69. For the remainder of the 19th century, SON continued to fish, both for subsistence and sale; to protest incursions on their fishery; and to seek the extension of their fishing grounds under the licensing regime.[139] For example:

(a) In an 1863 petition, the Cape Croker Indians noted that they relied heavily on their fishery for subsistence, and the petition remarked that "until a few years ago the best fishing ground around their own Reserve, as well as White Cloud, Griffith, Hay & Barrier Island, were taken away and leased to the white people, thus doing our people an act of injustice and a great wrong." They sought the return of the fisheries surrounding their islands;[140]

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[138] Cape Croker Chiefs and Principal Men, Petition to Queen Victoria April 17, 1860, Exhibit 2569, p. 5 [PDF]; See, generally, Victor Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nations' Fishing Islands in Lake Huron", in Coexistence: Studies in Ontario-First Nations Relations, Bruce W. Hodgins, Shawn Herd, John S. Milloy (Eds) (1992), Exhibit 4332, p. 95 [PDF 16]; Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 111-113 [PDF 111-113].

[139] See Schedule C, Tab 7, List of Evidence about late 19th Century Fishing by SON

[140] Petition of the Cape Croker Indians, November 6, 1863, Exhibit 2630, p. 1104 [PDF 2].

(b) In 1865, the Saugeen Indians made an application for fishing grounds they had previously occupied between Chief's Point and Frenchman's Bay, extending ten miles into the lake;[141] and

(c) In 1876, William Plummer, Superintendent and Commissioner of Indian Affairs, reported on the Cape Croker and Saugeen fisheries. He noted the Saugeen Indians had been confined to a single small fishery at Sauble, which was inadequate, and stated that they should be granted the further fisheries they were requesting.[142] This letter indicates both that SON were still fishing, and that they were seeking extensions to the fishing grounds which had been granted to them under the new licensing regime.

RESISTANCE IN THE 20TH CENTURY

70. In the 20th century, Ontario began to regulate fishing, including through licensing.[143] SON members continued to fish, and to assert the right to fish, including through protest and non-compliance with the limits of their licences.[144] They would also function as guides for non-Indigenous peoples coming to fish, and they believed they had the exclusive right to do so.[145] In

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[141] Henry Jones, Writer and Interpreter for the Saugeen Band of Indians, to William Bartlett, Visiting Superintendent of Indian Affairs, November 28, 1865, Exhibit 2647, p. 439 [PDF 2]– *Expressing desire of the Saugeen band to repossess some of their old fishing grounds.*
[142] Department of the Interior, March 9, 1876, Exhibit 2782, [PDF pp. 6-7].
[143] Reasons, para 450.
[144] Reasons, para 450.
[145] Reasons, para 450.

this period, SON continued to assert their ownership over tracts of waters of their territory.[146] SON appointed their own fisheries overseers to monitor the fishery.[147]

71. 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 for commerce.[148]

72. In the 1980s, Cape Croker (Nawash) sought extensions to the quotas imposed by Ontario, which limited the amount of fish, species of fish and manner of fishing[149] associated with their provincial fishing licenses. At the time, under Ontario's provincial licensing scheme, a license was issued to the Chief of the First Nation, and individual fishers were designated to fish under that license. The license set the terms for where fish could be caught, what type of fish could be caught, the amount of fish that could be caught, and how those fish could be caught.[150] Their pleas

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

[147] Cape Croker Band Council Minutes, October 14, 1907, Exhibit 3382.

[148] Reasons, para 451.

[149] Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 773, line 10 to p. 774, line 8.

[150] Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 771, line 3 to p. 775, line 7; Ministry of Natural Resources Commercial Fishing License (Cape Croker), Exhibit 3976 – *example of a license issued to fishermen at Cape Croker; it specifies the kinds of nets that could be used (gill and trap only); where fish could be caught (delineating a specific area around the Cape Croker reserve); the quantity of fish that could be caught; and the types of fish that were prohibited to be harvested (including fish taken in the closed season, rainbow trout, bass, Atlantic salmon, muskellunge, and undersize lake trout, whitefish, sturgeon and yellow pickerel).*

for larger quotas were not successful,[151] and Cape Croker accepted more meagre licenses "under protest."[152]

73. In 1989, two members of SON, including Howard Jones (then Chief of Cape Croker/Nawash), were charged with fishing in excess of their provincial commercial fishing license.[153] In *R. v. Jones*, the charges were dismissed on the basis that SON had an Aboriginal right (and a treaty right) to fish commercially, thus establishing the right was exercised from the very distant past to the present.[154]

74. After the decision in the *R. v. Jones* case in 1993, SON reached a fisheries agreement with Ontario. Further agreements followed.[155] This agreement is known today as the "Substantive Commercial Fishing Agreement".[156] SON commercial fishers now have exclusive commercial fishing rights to an area surrounding the Peninsula.[157] The boundaries of this area are illustrated in

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[151] Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 766, line 18 to p. 780, line 16 – *discussing licensing in 80s, fishing beyond limits of license, protests made about this*; Blake Smith to Chief Peter Akiwenzie, December 30, 1986, Exhibit 3974; Chief Peter Akiwenzie to Blake Smith, Exhibit 3975; Letter from Chief Howard Jones to Minister Ralph Tippet, February 1, 1989, Exhibit 3978; Chippewas of Nawash, Band Council Resolution No.555, January 31, 1989, Exhibit 3977; Commercial Fishing License Conditions No. OS1472, December 30, 1986, Exhibit 3976.
[152] Letter from Chief Akiwenzie responding to Blake Smith, Exhibit 3975; Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 768, line 8 to p. 771, line 2.
[153] See also: Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 781, line 21 to p. 782, line 5.
[154] *R v Jones*, 14 OR (3d) 421, [1993] OJ No. 893, Exhibit 3883.
[155] Reasons, para 451.
[156] Substantive Commercial Fishing Agreement between SON Nation and the Ministry of Natural Resources and Fisheries, 2013, Exhibit 4523; Amending Agreement to the Substantive Commercial Fishing Agreement between SON Nation and the Ministry of Natural Resources and Fisheries, 2018, Exhibit 4524.
[157] Reasons, para 451.

Map 2 in Appendix C.[158] The fishing activities of SON's commercial fishers in the Claim Area pursuant to that agreement are shown on Map 3 in Appendix C.[159]

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

The Trial Decision

76. The Trial Judge considered SON's claim of Aboriginal title to submerged land both as a novel Aboriginal right, and by applying the existing test for Aboriginal title.[160]

77. The Trial Judge found that SON was present on the Peninsula adjoining the Claim Area at the assertion of British sovereignty in 1763[161] and that SON had a spiritual connection to the water in the Claim Area.[162] She also found that the submerged land that corresponds with the traditional area of the healing waters at Nochemowenaing[163] was of central significance to SON's distinctive culture.[164]

78. The Trial Judge found that Anishinaabe customary law included recognition that a band had control over the resources that could be harvested on their land and through fishing, and who

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[158] Excerpt from Substantive Commercial Fishing Agreement between SON and MNR (2012), Exhibit 4523, p. 36 [PDF 36].
[159] Exhibit 4320. Note: The original map provided by Mr. Lauzon is marked as (electronic) Exhibit 4320. The witness made some annotation on the physical copy, which are not relevant to the point for which the map is cited here. See Evidence of Ryan Lauzon, Transcript vol 53, October 21, 2019, p. 6647, line 21 to p .6649, line 16.
[160] Reasons, paras 87-98.
[161] Ibid, paras 443 and 561.
[162] Ibid, para 219.
[163] Nochemowenaing is located in the Hope Bay area. It is a well-known site to SON for spiritual reasons. It is a cite for ceremonies and is described in the Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 472, lines 8-19.
[164] Reasons, para 246.

could come and settle on their land.[165] She also found that SON's ancestors tried to control fishing in specific areas around the Peninsula in the period around 1763[166] and have continued to do so into the present.[167]

79. Despite these findings, the Trial Judge concluded that SON failed to meet the existing test for Aboriginal title and the test to prove a novel Aboriginal right.[168] The Trial Judge further concluded that SON's claim for Aboriginal title and the public right of navigation were inconsistent rights.[169]

PART IV – ISSUES AND LAW

80. The issue in this case is whether the Trial Judge erred in dismissing SON's claim for Aboriginal title, and, if so, what is the appropriate remedy.

The Test for Aboriginal Title

81. Aboriginal title is proven by showing exclusive occupation of territory at the time of the assertion of British sovereignty. To make out a title claim, the Indigenous group asserting title must show that: (1) the territory was occupied prior to the assertion of sovereignty; (2) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation; and (3) at sovereignty, that occupation must have been exclusive.[170] The factors of sufficiency of occupation, continuity and exclusivity are useful lenses

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[165] Ibid, para 457.
[166] Ibid, para 452.
[167] Ibid, para 448-451
[168] Ibid, para 616.
[169] Ibid, para 273.
[170] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para 143.

for examining if Aboriginal title is proven, but need not be applied independently.[171] Rather, inquiries into these areas shed light on whether Aboriginal title is established.[172]

82. The test for Aboriginal title has developed from, and has only ever been applied to, cases evaluating whether Indigenous groups have Aboriginal title to dry land. Adapting the test for Aboriginal title to water territory has its challenges: water, by its inherent nature, does not retain physical evidence in the same manner as land. The burden of proof must therefore be adjusted to account for the nature of the subject in dispute.[173] The court cannot expect to see a comparable evidentiary record for use and occupancy in water territories as it may for land territories.

Exclusivity

83. Exclusivity is to be understood as the intent and capacity to control territory. It can be established by proof that others were excluded from the land, the fact that others were only able to access the land by seeking permission from the claimant group, and even by the lack of challenges to occupancy, which can support an inference of an established group's intention and capacity to control.[174]

84. Occasional trespass or presence with permission does not rebut Aboriginal title. If permission is granted, that reinforces exclusivity, and the assessment of this evidence must be approached from both the common law and Indigenous perspectives.[175]

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[171] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 32.
[172] Ibid.
[173] *Hamlet of Baker Lake v Canada (Indian Affairs and Northern Development)*, 1979 CanLII 2560 (FC) at para 76.
[174] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 48; See also: *R v Marshall; R v Bernard*, [2005] 2 SCR 220 at paras 64-65.
[175] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 49, quoting with approval from *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 157.

Continuity

85. Present occupation may be relied on as proof of pre-sovereignty occupation.[176] Proof of continuity is not a requirement to meet the test for Aboriginal title: rather, it is a tool that can be used if the plaintiff chooses to rely on evidence of present occupation as proof of occupation at the time of the assertion of sovereignty. [177] Where such evidence is relied upon, the Indigenous people claiming Aboriginal title must demonstrate that their occupation has been continuous.[178] For that purpose, it is not required to show an "unbroken chain" of continuity – only that present occupation is "rooted in" occupation prior to the assertion of Crown sovereignty.[179]

Sufficiency of Occupation

86. The sufficiency of occupation to establish Aboriginal title is comparable to the requirements for general occupancy at common law.[180] That is, it is similar to the requirements for establishing possession of land "over which no one else has a present interest or with respect to which title is uncertain."[181] The more onerous standard required to establish adverse possession over land owned by another is not required for proof of Aboriginal title: an Indigenous group need only show that they have "acted in a way that would communicate to third parties that it held the land for its own purposes", and need not show notorious or visible use.[182]

87. The following factors have been applied in assessing the sufficiency of occupation for establishing Aboriginal title:

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[176] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 45-46.
[177] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 45-46.
[178] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at paras 25-26
[179] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 46.
[180] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 40.
[181] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 39.
[182] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 38.

(a) The nature of the land and what types of occupation are practical on it. For example, where marshy land is virtually useless except for shooting, shooting over it may amount to occupation.[183]

(b) The intention to hold and use the land for the group's purposes, which is dependent on the manner of life of the people and the nature of the land. The notion of occupation must reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic.[184]

(c) The laws of the group seeking title.[185]

(d) Whether the acts of occupation can be interpreted to show the land belonged to, or was controlled by, or under the exclusive stewardship of the group in question.[186]

(e) The use of the territory. Aboriginal title may be proven on a territorial basis, meaning Indigenous groups may establish Aboriginal title on the basis of "hunting, fishing, trapping and foraging", depending on the evidence.[187]

The Place of the Indigenous Perspective

88. The Indigenous perspective, including Indigenous customary laws, must be considered throughout the analysis for Aboriginal title.[188] As the Supreme Court of Canada put it in *Tsilhqot'in Nation*, the goal of the analysis is to "faithfully translat[e] … pre-sovereignty Aboriginal interests

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[183] *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 (CanLII), [2005] 2 SCR 220, at para 54.
[184] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 38; See also: *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 149.
[185] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 41.
[186] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at paras 38 and 42.
[187] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 42.
[188] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at paras 32, 34 and 49; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at paras 146-149 and 156-157; *R v Marshall; R v Bernard*, [2005] 2 SCR 220 at paras 45-54 per McLachlin CJC and at paras 127-130, 136 and 138-140 per LeBel.

into equivalent modern legal rights".[189] The Court must not force pre-sovereignty Aboriginal interests "into the square boxes of common law concepts", as to do so would frustrate the goal of recognizing these pre-sovereignty rights as modern legal rights.[190] A culturally sensitive approach is required.[191] The dual perspectives of the common law and of the Aboriginal group bear equal weight in evaluating a claim for Aboriginal title.[192]

89. SON submits that this means more than looking at an Indigenous group's way of life to determine what activities might be used as evidence of occupation.

90. For example, activities, such as fishing, can serve as evidence to support an Indigenous group's occupation of their territory, but the analysis does not end here. The objective is not to simply use the Indigenous perspective to find evidence to import in the common law test.[193] This would force pre-sovereignty Aboriginal interests "into the square boxes of common law concepts".[194]

91. The Indigenous perspective shapes the very concept of Aboriginal title. This is what was meant by Chief Justice McLachlin in *Tsilhqot'in* when she wrote about the need to consider the dual perspectives of the common law and the Aboriginal group in question. When explaining the sufficiency lens, she said:

> [W]hat is required is a culturally sensitive approach to sufficiency of occupation based on the dual perspectives of the Aboriginal group in question — its laws, practices, size, technological ability and the character of the land claimed — and the common law notion of possession as a basis for title. It is not possible to list every indicia

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[189] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 32.
[190] Ibid.
[191] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 42.
[192] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 14.
[193] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at paras 35-37.
[194] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 32.

> of occupation that might apply in a particular case. The common law test for possession — which requires an intention to occupy or hold land for the purposes of the occupant — must be considered alongside the perspective of the Aboriginal group which, depending on its size and manner of living, **might conceive of possession of land in a somewhat different manner than did the common law.** [emphasis added][195]

92. Similarly, the Indigenous perspective, how the specific Indigenous group in question might have conceived of that aspect of title, must be taken into account when the court considers Aboriginal title through the lenses of exclusivity and continuity as well.[196]

93. Properly taking into account the Indigenous perspective means that the test for title needs to be viewed through a lens that accounts for the unique perspective of the claimant group. In order to fully understand the Indigenous perspective, courts must consider the laws of the particular Indigenous group, how the particular Indigenous group in question viewed and views their relationship with the land.

Standards of Review on Appeal

94. The standard of review for questions of law[197] and for questions of mixed fact or law where there is an "extricable" legal question at issue[198] is correctness.

95. An "extricable" legal question exists where the decision-maker, while applying the facts to the legal test, alters the underlying legal test. If the correct test, for example, requires him or her

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[195] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 41.
[196] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 14, 32, 49.
[197] *Housen v Nikolaisen,* 2002 SCC 33 at para 10.
[198] *Housen v Nikolaisen,* 2002 SCC 33 at para 8.

to consider a certain factor and he or she does not, then the decision-maker has in effect applied the wrong law, and so has made an error of law.[199]

96. Indigenous law must be presented through evidence and proven as a fact to be applied by Canadian courts.[200] The same evidentiary requirement exists for courts to consider foreign law.[201] The appropriate standard of review determined by this Court for errors of foreign law is correctness.[202] SON submits that a correctness standard of review should also apply to errors of Indigenous law.

97. To impose a lesser standard of review for Indigenous law is to say that trial courts must get domestic and foreign law *correct*, but only make a reasonable (even if incorrect) determination about Indigenous law. To follow such a path would privilege non-Indigenous legal traditions as *real law* and denigrate Indigenous legal traditions as *mere fact*. Such a result is contrary to guidance from the Supreme Court of Canada, which has said that: "[Indigenous] law should not just be received as evidence that Aboriginal peoples did something in the past on a piece of land. It is more than evidence: it is actually law."[203]

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[199] *Teal Cedar Products Ltd. v. British Columbia*, [2017] 1 S.C.R. 688, para 44, citing *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, para 39.
[200] Kent McNeil, "Indigenous Law, the Common Law, and Pipelines" (April 8, 2021), online: ABlawg, http://ablawg.ca/wpcontent/uploads/2021/04/Blog_KM_Indigenous_Law_Pipelines.pdf
[201] *Grayson Consulting Inc. v Lloyd*, 2019 ONCA 79, at para 38.
[202] *N. v. F.*, 2021 ONCA 614, at para 40 (leave to appeal granted only on the issues on which Lauwers J.A. dissented in the Court of Appeal for Ontario, specifically, whether the trial judge erred in the interpretation and application of ss. 23 and 40 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12, and the relevance thereto of the "best interests of the child" principle: *F. v. N.*, [2021] S.C.C.A. No. 364, heard and reserved on April 12, 2022); *Grayson Consulting Inc. v. Lloyd*, 2019 ONCA 79, at para. 29; and *General Motors Acceptance Corp. of Canada, Ltd. v. Town & Country Chrysler Ltd*, 2007 ONCA 904, at para. 35.
[203] *R. v. Marshall; R. v. Bernard*, 2005 SCC 43, concurring reasons of LeBel and Fish JJ, para 130.

98. The standard of review for questions of mixed fact and law (where there is no “extricable” error of law) and for questions of fact, is whether the judge made a palpable and overriding error.[204]

99. A palpable error means an error that is obvious. [205] Many things can qualify as "palpable," including obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.[206]

100. "Overriding" means an error that affects the outcome of the case.[207] It may be that a particular fact should not have been found because there is no evidence to support it.[208] If this palpably wrong fact is excluded but the outcome stands without it, the error is not "overriding."[209]

101. There may also be situations where a palpable error by itself is not overriding but when seen together with other palpable errors, the outcome of the case can no longer be left to stand.[210]

Errors in the Trial Decision

LAW OF ABORIGINAL TITLE IS INTER-SOCIAL

102. Aboriginal title stems in part from “the relationship between common law and pre-existing systems of aboriginal law.”[211] Aboriginal title must reconcile the Crown’s asserted sovereignty

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[204] *Housen v Nikolaisen,* 2002 SCC 33 at paras 33-34.
[205] *Millennium Pharmaceuticals Inc. v. Teva Canada Limited*, 2019 FCA 273 leave to appeal to SCC refused, para 6, citing *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras. 62, 64-65.
[206] *Ibid*.
[207] *Ibid*.
[208] *Ibid*.
[209] *Ibid*.
[210] *Ibid*.
[211] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para 114.

with the fact that Indigenous communities occupied the land long before that assertion and had and continue to have their own laws governing the land.[212] In essence, the role of the law of Aboriginal title is to effect reconciliation of two societies and two legal systems: in this case between settler Canada and the common law, and SON and Anishinaabe law. These two societies and legal systems must be placed on an even playing field, with neither receiving preferential treatment or greater weight as courts determine Aboriginal title.[213]

103. Aboriginal title claims proceed in common law courts, established by the Crown, and before judges trained in the common law and largely unfamiliar with the laws of the Indigenous group claiming Aboriginal title. In order to truly reconcile the two societies and legal systems, and place common law and Indigenous laws on equal footing, trial judges must ensure that they seriously consider the inter-societal dimension of Aboriginal title. They must make real efforts to understand the laws and perspective of the Indigenous group and how those interact and can be reconciled with the common law in the creation of Aboriginal title.

104. The Trial Judge in this case failed to adequately engage with the inter-societal dimension of Aboriginal title in her decision. She acknowledged that s. 35(1) of the *Constitution Act, 1982* is the framework through which the pre-existence of Aboriginal societies is reconciled with the asserted sovereignty of the Crown,[214] and recounted the basic concepts from the caselaw, including that title must be understood from the Indigenous perspective as well as the common law

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[212] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para 114; *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313, at p. 328, where the Supreme Court explained that "Indian title" means that "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."
[213] Above, at paras 88 to 93; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, at paras 14, 41 and 49.
[214] Reasons, paras 78-79.

perspective.[215] However, with respect, she appeared to make no real attempt to do the work of reconciling the two.

105. The Trial Judge did not appreciate the importance of understanding and reconciling Anishinaabe law with the common law, nor was she able to understand Aboriginal title from the Anishinaabe perspective. This error goes to the core of the legal framework for determining Aboriginal title and, in SON's submission, is subject to a standard of correctness. Her analysis of the test for Aboriginal title is done largely from a common law perspective, which reflects an incorrect interpretation and application of the test itself. In essence, in failing to analyze title through the Anishinaabe perspective, the Trial Judge only completed the common law component of the test.

106. For example, as argued below,[216] the Trial Judge focussed excessively on physical occupation of the claim area, discounting evidence of occupation by way of spiritual connection.

107. Other examples of legal errors in this regard are found in the Trial Judge's exclusivity analysis, which focussed on military strength, and all or nothing control from the perspective of the British. For example, the Trial Judge made findings about the Treaty (or Congress) of Niagara, the respective power dynamics between the British and the Western Nations, and the non-existence of a Treaty with the Western Nations,[217] without any discussion of what the Anishinaabe perspective on what happened at Niagara was, and how the Treaty was and is viewed in Anishinaabe law. This is despite evidence of the Anishinaabe perspective being quite different from what she found: for example, SON member Karl Keeshig testified that he understood from

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[215] Reasons, at paras 335, 338, 339, and 356.
[216] Below, paras 115 to 117.
[217] Above, para 61, and below, paras 140, 153(c), and 155.

his grandfather that the Treaty of Niagara was "the Treaty of Treaties, the end of the unrest that was happening across Turtle Island relative to our relationships with newcomers"[218] and that "out of that Treaty there were conditions related to the land."[219]

108. In her exclusivity analysis, the Trial Judge failed to seriously engage with SON's perspective when addressing SON's argument that there were no challenges to their occupancy, and that they were the only ones present on the Claim Area.[220] She found that "[f]or the most part, SON did not use [the Claim Area portion] of Lake Huron and Georgian Bay. There was therefore no need for the French or the British to challenge occupancy of that area."[221] This again ignores the Anishinaabe perspective on their spiritual connections and obligations to their territory[222] and fails to consider that the converse is also true: without someone unwelcome occupying their territory, there would be no need for SON to externally demonstrate their exclusive occupation of their territory. In doing so, the Trial Judge favours the common law, and settler perspective over the Anishinaabe law and SON's perspective.

109. Some additional examples of the Trial Judge's lack of understanding of the Indigenous perspective are set out below under the headings "Inconsistent Findings About Anishinaabe Law"[223] and "Failure to use Anishinaabe Law to Illuminate Historical Actions."[224]

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[218] Evidence of Karl Keeshig, Transcript vol 3, April 30, 2019, p. 285, lines 20 to 23.
[219] Evidence of Karl Keeshig, Transcript vol 3, April 30, 2019, p. 286, lines 2 to 3.
[220] Reasons, at paras 579-581.
[221] Reasons, at para 580.
[222] Above, paras 18 to 25.
[223] Below, paras 120 to 132.
[224] Below, paras 133 to 136.

"Title" from SON's Perspective

110. The evidence presented at trial showed clearly what "title" means from SON's perspective. SON does not share western conceptions of ownership of territory: rather, they have a relationship with their territory.[225] Although they occupied their land, defended their land, and controlled their land at the time of the Crown's assertion of sovereignty, these were not the only aspects of their relationship with the land that, from their perspective, made it their land.[226]

111. A core component of title, from SON's perspective, is SON's connection to its territory. SON's connection to its territory is so deep that SON members see themselves as inextricably linked to their territory.[227] They come from their territory in that they were made from it, they came from its earth and water.[228] This connection comes with a spiritual responsibility to care for and protect their territory.[229]

112. Title to SON is rooted in this connection. It is not only about the uses to which they put the land or even necessarily about their physical occupation, although those aspects of title are certainly important to SON. Aboriginal title for SON is found in their spiritual responsibility to care for and protect their territory.

113. While the Supreme Court has suggested that the occupation necessary to establish Aboriginal title is physical occupation,[230] the court has also been clear that the perspective of the

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[225] For ease of reference, we will refer to SON's relationship with their territory and the many aspects of that relationship that make the territory theirs as what makes up "title, from SON's perspective".
[226] Above, paras 18 to 25.
[227] Above, paras 18 to 25.
[228] Above, para 25.
[229] Above, paras 19 to 20.
[230] *R v Marshall; R v Bernard*, 2005 SCC 43, at para 56.

Indigenous group must be weighed equally to the common law perspective when evaluating Aboriginal title.[231] Physical occupation is a common law indicium of title but the Indigenous group in question may have other vital indicia of title that the Court must take into account. In order to place common law and Indigenous perspective on equal footing, the Court must consider how an Indigenous group conceived of title and use that to inform the analysis of whether Aboriginal title is established. Where the Indigenous group's title stems from and is bound to other elements, evidence of those other elements must contribute to the Court's consideration of Aboriginal title when looking at it through the sufficiency lens. This is the case here: the importance to SON of their spiritual connection and responsibility to their territory must contribute to the Court's consideration.

114. That is not to say that title can be established with *no* physical occupation, and *solely* based on other elements such as spiritual connection, but rather that the manner in which the Indigenous group conceives of title is equally as important to the analysis as is the common law standard of physical occupation.[232] Viewed this way, evidence of SON's relationship with its territory should be considered akin to a "use" to which the land was put. So, where there is evidence of some physical occupation and a strong spiritual connection, this should all be considered relevant and sufficient evidence demonstrating the sufficiency of occupation to establish title.

115. In her analysis of the claim for title to submerged land as a novel Aboriginal right, the Trial Judge acknowledged the spiritual connection SON had to water in 1763. She dismissed its

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[231] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 14.
[232] Above, paras 88 to 93.

importance in considering whether title was established because she found that Anishinaabe spiritual connection does not require exclusivity.[233]

116. When the Trial Judge analyzed the claim using the test for Aboriginal title, she focused on physical occupation.[234] While she found spiritual connections to be relevant to occupation, she dismissed them as being insufficient to show occupation of the claim area for the purpose of Aboriginal title.[235] The only spiritual connection that she accepted as contributing to establishing title are aspects of that connection that include activity physically on water.[236]

117. In doing this, she failed to properly weigh evidence about spiritual connection, including substantial evidence about water ceremonies conducted on dry land but focussed on the water,[237] simply because it does not fit in the common law conception of title, thus erring in law by favouring common law over the Indigenous perspective. This is contrary to how the Supreme Court has set out the test for title[238] and contrary to the purpose of Aboriginal title: to reconcile the Crown's assertion of sovereignty with the Indigenous societies that have been here for millennia.[239]

118. Further, SON's perspective on title is not incongruous with the common law, given that the extent of physical occupation required by the common law can be quite low depending on the circumstances. For example, simply shooting over land may be sufficient 'physical possession' to establish adverse possession "where marshy land is virtually useless except for shooting."[240] It is

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[233] Reasons, paras 217, 220, and 240.
[234] Reasons, para 341, 368, and 563.
[235] Reasons, para 371.
[236] Reasons, para. 570.
[237] Reasons, paras 204-206, 212-215, 218, and 570.
[238] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at paras 14 and 41.
[239] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para 114.
[240] *R v Marshall; R v Bernard*, 2005 SCC 43, at para 54, citing *Red House Farms (Thorndon) Ltd v Catchpole*, [1977] EGD 798 (Eng CA).

also clear that the occupation required to establish Aboriginal title is less than that required to establish adverse possession.[241] This sets a low bar, even in the common law perspective, for the physical aspect of occupation of lands submerged by water, in the test for Aboriginal title.

119. Title for SON is not about building houses or cultivating land, it is about their relationship to the land: their sacred responsibility to care for and protect their territory. Giving effect to this perspective means looking for evidence of this relationship to determine if it is sufficient to ground title.

INCONSISTENT FINDINGS ABOUT ANISHINAABE LAW

120. In considering the evidence, the Trial Judge made a number of inconsistent findings about Anishinaabe law. These inconsistent findings represent errors of law since errors of Indigenous law are indeed errors of law and since Anishinaabe law should inform not only the evidence, but inform the test for Aboriginal title itself.[242] In the alternative, such inconsistent findings are errors of fact that coloured the Trial Judge's application of the test for Aboriginal title. Some examples follow.

SON'S Responsibility to its Territory

121. The Trial Judge interpreted evidence about the importance of water to SON generally as suggesting that SON did not have particular responsibilities to the water in its territory.[243] This error prevented her from treating evidence of SON's spiritual connection to its water territory as evidence of title.

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[241] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 38.
[242] Above, paras 88-93.
[243] Above, paras 21 and 24.

122. The Trial Judge also misinterpreted the teachings found in the Anishinaabe creation story – that the Creator gave the responsibility of protecting the earth to the Anishinaabe – as suggesting that SON did not have responsibilities to its territory but, rather, responsibility for the whole earth. Using this misinterpretation, she found that this evidence could not go towards proving title.[244]

123. She failed to consider this evidence in concert with the evidence of the role of bands as decision making bodies for their territory. Namely, she failed to consider the affirmations made by community members about the importance of all water and of parts of SON's creation story[245] along side her findings on the role of bands.

124. The Trial Judge correctly found that Anishinaabe as a whole were not a decision-making body.[246] She held that bands were the fundamental decision-making and land holding unit and that decisions about land use were made at the band level.[247] In making these findings she seemed to accept that Anishinaabe bands did not make decisions about all Anishinaabe territory, rather their decision-making powers and responsibilities were confined to their own territory. It is therefore inconsistent to also find that SON, as a local Anishinaabe group, has a spiritual responsibility to all water, rather than to the water in its territory specifically.

Unfounded Distinction Between Dry Land and Water Territories

125. The evidence at trial demonstrated that Anishinaabe law does not distinguish between dry land and water: they are both part of the territory for which SON is responsible.[248]

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[244] Above, para 24.
[245] Above, paras 18 to 25.
[246] Reasons, paras 186 and 188.
[247] Reasons, paras 175 and 189.
[248] Above, paras 18 to 30.

126. The Trial Judge acknowledged this to some extent in finding that it was the band that exercised control over territory, and that this included control over the resources that could be harvested on the land **and through fishing**, and over who could come and settle on the territory of a band.[249] The evidence was consistent that territory included both land and water territory.[250] The Trial Judge also found that this law was shared by SON and that it applied to the Peninsula.[251]

127. Nonetheless, the Trial Judge repeatedly made distinctions between land and water territory in her reasons that are contrary to this aspect of Anishinaabe law. For example:

(a) The Trial Judge found that Anishinaabe law whereby Anishinaabe would sometimes agree to share their territory with non-Anishinaabe Indigenous peoples, and sometimes not, only applied to dry land.[252]

(b) The Trial Judge categorized the Beaver Wars as an attempt to control the Saugeen Peninsula itself, not the Claim Area.[253]

(c) The Trial Judge explicitly found that "the customary law did not include an intention to hold and control water spaces."[254]

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[249] Reasons, paras 458 and 467.
[250] Above, paras 28 to 30.
[251] Reasons, paras 458 and 467.
[252] Reasons, para 467.
[253] Reasons, para 487. The Trial Judge did acknowledge that the Beaver Wars had "some relationship with coastal waters" but did not find there was an attempt to control coastal waters: Reasons, para 576.
[254] Reasons, at para 574.

128. These findings are in clear conflict with Anishinaabe law, and inconsistent with the evidence at trial. They demonstrate the Trial Judge's failure to fully appreciate and consider Anishinaabe law and the Anishinaabe perspective.[255]

Unfounded Distinction Between Resource Control and Territorial Control

129. In her reasons, the Trial Judge repeatedly distinguished between resource control and territorial control. For example:

(a) She found that there was sufficient evidence to infer that SON's ancestors tried to control fishing in specific areas around the Peninsula around 1763, but that "those attempts were focused on control of fishing or fisheries, and not of water spaces more generally."[256]

(b) She found that Anishinaabe customary law included recognition that a band had some control over the resources to be harvested on their land and through fishing, but that "the customary law did not include an intention to hold and control water spaces generally or over the claimed portions of Lake Huron and Georgian Bay more specifically."[257]

130. These findings are inconsistent with the evidence at trial, which demonstrated that under Anishinaabe law all aspects of their territory are interconnected.[258] As the Trial Judge noted in her reasons, some witnesses at trial "described the practice of scattering tobacco on the water when

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[255] See D.B. Littlechild, *Transformation and Re-Formation: First Nations and Water in Canada* (LL.M. thesis, University of Victoria, 2014) at 57-63, [PDF 62-68], especially at 62 [PDF 67], in that case, speaking of Indigenous Cree law. The author concluded that Aboriginal title should follow from water being an integral aspect to land.
[256] Reasons, at para 452.
[257] Reasons, at paras 457 and 467.
[258] Above, paras 18 to 25.

fishing, to pay respect to the water and the spirit of the fish." The tobacco could also be scattered in a non-ceremonial manner, "as a way to be aware of the importance of cleanliness of water and to give thanks."[259] These practices demonstrate that to SON, fishing is not simply a matter of resource extraction, but is inherently connected to the water territory: they are all one.

131. The Trial Judge also heard testimony about how the spirit of the Creator is in everything that is alive.[260] This interconnectedness means that fish are not simply resources without rights, but part of the larger connection with their territory with which the Anishinaabe and SON have a strong spiritual connection.

132. There is therefore no way under Anishinaabe law to separate resources, such as fish, from the territory they reside in: the spirit of the Creator connects the fish and the water. From SON's perspective, then, control of the resources is also inherently related to control of the territory.

FAILURE TO USE ANISHINAABE LAW TO ILLUMINATE HISTORICAL ACTIONS

133. The Trial Judge failed to interpret the actions of Anishinaabe actors in their own frame of reference, including by failing to use Anishinaabe law. This led to misunderstanding of the meaning of historical actions by the Anishinaabe. This is not only an error of law since it failed to heed the directions of the Supreme Court of Canada about considering the Aboriginal perspective at every stage of the test for Aboriginal title,[261] but it is also a basic error of historical methodology, thus leading to errors of fact. According to the American Historical Association:

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

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[259] Reasons, at para 214.
[260] Above, paras 18 to 19
[261] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, at paras 14, 41 and 49.

> **extent trying (never wholly successfully) to see their worlds through their eyes.**[262]

134. Examples of this kind of misunderstanding include:

(a) Champlain was met by **300 Anishinaabe warriors** when he reached the mouth of the French River in 1615. Despite evidence about Anishinaabe trespass law, about strategic access points to Lake Huron/Georgian Bay, about social roles concerning who harvested blueberries, and about where some warriors had come from, the Trial Judge failed to interpret this as a large group of Anishinaabe meeting Champlain at his entry to the region in order to ascertain his intentions, and to expel him if his intentions were not friendly.[263]

(b) Despite finding that SON ancestors took part in the Beaver Wars and that this was an attempt to control the Peninsula; despite evidence that the Anishinaabe drove the Haudenosaunee from the region entirely, that some battles were even on or in the water, and that the Anishinaabe made no distinction between their dry land territory and their water spaces; and despite there being **no** evidence that the Haudenosaunee were left free or able to navigate the water space around the Peninsula, the Trial Judge found that the Beaver Wars were only about control of dry land territory.[264]

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[262] Statement on Standards of Professional Conduct (updated 2019), American Historical Association, Exhibit 4166, PDF 3 [emphasis added].
[263] Above, paras 36-40.
[264] Above, paras 41-44.

135. A similar kind of misunderstanding can arise if there is a failure to consider how Anishinaabe would have understood the actions of Europeans. If this does not take place, Anishinaabe responses to the actions of Europeans are likely to be misunderstood.

136. An example of this would be the flip side of the encounter of Champlain with 300 Anishinaabe warriors. Champlain gave them a gift of an axe. There was evidence, as noted by the Trial Judge of the importance of giving "gifts" in order to establish or continue a relationship.[265] Champlain appeared surprised at the warm response to his "gift,"[266] suggesting he had not fully understood its meaning to the Anishinaabe. The Trial Judge expressed the view that the evidence had not established that the axe was the "price of passage" for Champlain through the territory.[267] With respect, this misses the mark, and fails to consider the Anishinaabe understanding. The gift was not a "price of passage", it was the initiation of a relationship. Once the relationship was established, that is what would result in Champlain being welcome in the territory. Maintaining the relationship would also require continuing mutual obligations, such as trade. The Trial Judge indeed recognized the custom of giving "gifts" (which were mutual obligations, not acts of generosity)[268], but did not take this fully into account in assessing the encounter with Champlain.

FAILURE TO APPLY THE LEGAL TEST FOR A TREATY TO AN AGREEMENT AT NIAGARA

137. The Trial Judge found that in 1764 the Crown's representative, Sir William Johnson, met with large numbers of Indigenous groups at Niagara (the "Niagara Congress"), establishing or reaffirming peace after Pontiac's War with the Indigenous groups who attended the congress.[269]

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[265] Reasons, para 477 and 510.
[266] *Voyage of the Sieur de Champlain to New France in the year 1615*, 1929, Exhibit 47, p. 44 [PDF 33].
[267] Reasons, para 479.
[268] Reasons, para 510.
[269] Reasons, para 520.

SON argued that three treaties were entered into at the Niagara Congress. The respondents took the position that there were only two treaties.[270]

138. The Trial Judge correctly observed that whether there was a third treaty at the Niagara Congress was a question of law.[271] An agreement with an Indigenous party is a treaty if:

(i) both parties have capacity to enter a treaty,

(ii) there was an intention to create obligations,

(iii) mutually binding obligations were made, and

(iv) there was a certain measure of solemnity associated with the agreement.[272]

139. A treaty is not intended to be a highly technical term of art: the word treaty "merely identifies agreements in which the "word of the white man is given, and by which the latter made certain of [Indigenous peoples'] co-operation."[273]

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[270] Reasons, para 526.
[271] Reasons, para 529.
[272] *R v Sioui,* [1990] 1 SCR 1025 at pages 1035-1036.
[273] *R v Sioui,* [1990] 1 SCR 1025 at page 1044. There are also distinctive principles of treaty interpretation, which include:

(a) A treaty represents an exchange of solemn promises between the Crown and First Nations;
(b) The honour of the Crown is always at stake. No sharp dealings will be sanctioned;
(c) Ambiguities or doubtful expressions must be resolved in the favour of the First Nations;
(d) Evidence other than the written text of the treaty must be considered, even in the absence of ambiguity on the face of the written text; and
(e) Treaties were intended to reconcile the goals and interests of the parties to the treaty at the time and should be interpreted in a way consistent with that.

See *R. v. Badger*, [1996] 1 S.C.R. 771 at para 41 and 52 and *Marshall v. R.*, [1999] 3 S.C.R. 456 at paras. 9-14 and 44.

140. The Trial Judge, however, failed to apply the legal test for determining whether there was a third treaty at the Congress of Niagara. Instead, she simply preferred the expert evidence of Canada's expert witness, Dr. Beaulieu, that there was no third treaty made at Niagara.[274] This is an error of law.[275]

FLAWED ANALYSIS OF A NOVEL "ABORIGINAL RIGHT TO TITLE"

141. In considering SON's claim for Aboriginal title for water spaces, the Trial Judge extensively analyzed and tested what she described as a "novel Aboriginal right."[276] In her analysis, the Trial Judge was guided by the three-step analysis from *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56:

> 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.[277]

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[274] Reasons, paras 529 and 549-553.
[275] It also comes to the diametrically opposite conclusion about whether a treaty had been made at Niagara in 1764 as did the Ontario Court of Appeal in *Chippewas of Sarnia Band v Canada (AG)* (2000), 51 OR (3d) 641 at paras 54-56.
[276] Reasons, para 88.
[277] Reasons, para 102.

142. The Trial Judge put particular emphasis on step 2(b): that the Indigenous group's "connection" with the claimed land must be of "central significance to their distinctive culture."[278] Ultimately, she concluded that 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.[279]

143. SON submits that the Trial Judge erred in law by applying the Aboriginal rights test rather than applying the test for Aboriginal title, with modification if necessary. In particular, her reliance on the "central significance" component of the test ignores the clear direction from the Supreme Court of Canada that "Aboriginal title requires proof of exclusive occupation of territory, without any additional need to show that this occupation was culturally integral."[280]

144. The Trial Judge compounded her error in using the test for Aboriginal rights by applying the test but using 1763,[281] the date of assertion of sovereignty, as the relevant date for SON to prove that their ancestors had a connection with the submerged land that was of central significance to their distinctive culture.[282] There is a different date for fixing the origin of Aboriginal rights than for Aboriginal title. In the case of Aboriginal rights, the relevant date is the date of contact.[283]

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[278] Reasons, paras 109, 160, and 191.
[279] Reasons, para 567.
[280] *R v Desautel*, 2021 SCC 17, para 80; See also *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, paras 142 and 151.
[281] Reasons, para 103
[282] Reasons, para 95.
[283] *R v Van der Peet*, [1996] 2 SCR 507 (SCC) at para. 44

In the case of Aboriginal title, the relevant date is the date of sovereignty.[284] The Trial Judge failed to appreciate this distinction and thus not only used the wrong test, but misapplied it as well.

TOO HIGH THRESHOLD IN APPLYING THE TEST FOR ABORIGINAL TITLE

145. SON submits that the Trial Judge applied the test for Aboriginal title in a way that created a threshold that would be practically impossible to meet in relation to water spaces. This amounts to creating an implicit doctrine of *aqua nullius*, despite the rejection of the concept of *terra nullius* in Canadian law.[285] A number of errors led to this effect: errors of failing to take into account the nature of the land; errors about Anishinaabe law; misapprehension of evidence; dismissal of relevant evidence; consideration of irrelevant evidence; and an "all or nothing" approach to the Claim Area. SON alleges numerous individual errors below, and the cumulative effect of these amounted to changing the test for Aboriginal title, thus constituting an extricable error of law.

Failure to Account for Nature of the Land

146. Since in common law, the owner of the soil owns all the way up to the heavens and down to the depths[286], and since flowing water itself cannot be owned,[287] the claim to Aboriginal title to water spaces was framed as a claim to the submerged land. This is a matter of property law theory, and should not be taken to limit the rights of the owner of submerged land, nor how one would go about proving ownership to submerged land.

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[284] See *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, at trial, per Vickers J., at paras. 585 to 602, in which the previous jurisprudence on this point is reviewed; *Delgamuukw* at paras 142 and 145; *R. v. Desautel*, 2021 SCC 17 at para 80.
[285] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, at para 69.
[286] The maxim is *Cujus est solum, ejus est usque ad coelum et ad inferos*
[287] See Reasons, para 250.

147. As noted above, sufficiency of occupation must be assessed in light of the nature of the land and what types of occupation are practical on it.[288] Thus, the practicalities of how water spaces can be used must factor large. The Trial Judge failed to take account of this in a number of ways. SON submits these constitute extricable errors of law.

148. First, she dismissed evidence that it was "almost certain that the Anishinaabek included water territories in their band territories" by reasoning that this was not a connection to the lakebed,[289] despite also noting that use of the lakebed was not required to prove Aboriginal title.[290]

149. The second point, which is related, is that the Trial Judge seems to have thought the Anishinaabe perspective was that ownership was limited to resources such as fish.[291] She repeatedly distinguished between control of resources (especially fish), which she accepted SON had, and control of territory.[292] With respect, this misses an important point. While simply fishing might not demonstrate more than an Aboriginal fishing right, **control** over fishing is different. It indicates an **exclusive** right. At common law, an exclusive fishing right is attached to ownership of the bed of the water, and proving an exclusive fishing right is a way of proving title over the water bed.[293] Having concluded that SON had proven control over their fishery, the Trial Judge ought to have seen this as proof of Aboriginal title.

150. Third, the Trial Judge did accept that presence on the surface of water could show occupation, but thought that SON's presence was too geographically limited.[294] She also rejected

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[288] Above, para 87.
[289] Reasons, para 203.
[290] Reasons, para 193.
[291] Reasons, para 203.
[292] Reasons, paras 452, 457 and 467.
[293] *Attorney General v Emerson*, [1891] AC 649 at 655 and 662.
[294] Reasons, para 565.

evidence about control of territory by means of access points, for reasons which SON submits (above) involve misapprehension of evidence.[295] The combined result of these conclusions constitute an extricable legal error since they led to what amounts to a site-specific or "postage stamp" view of Aboriginal title. This was a concept which was rejected by the Supreme Court of Canada in *Tsilhqot'in Nation*.[296] It is also quite inconsistent with how the Crown now controls, occupies, or uses the area. Canada, for example, does not intercept every vessel crossing the international boundary in the middle of Lake Huron: border control is usually done when a vessel docks at a port-of-entry harbour.

151. Fourth, the Trial Judge repeatedly dismissed evidence of SON's connection to and use of the land as "not requiring title".[297] Whether or not a particular connection to or use of land **requires** having title is just not part of the test for Aboriginal title.

Errors about Anishinaabe Law

152. The errors made by the Trial Judge about Anishinaabe law also had the effect of raising the threshold for proving title beyond what is practically possible to meet: that there was a sharp distinction between dry land and water spaces; that resource control did not demonstrate control of territory; and that SON's spiritual connection was to water in general rather than to the water space of their territory.[298] In addition to these being individual errors as alleged above, these therefore also give rise to an extricable error of law.

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[295] Above, paras 33-35.
[296] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, at para 42.
[297] Reasons, paras 220 (spiritual connection), 243 (generally), 252 (practices don't need exclusivity), 270 (fishing), 322 (fishing), and 447 (fishing).
[298] Above, paras 121-132.

Misapprehension of Evidence

153. Errors of misapprehension of evidence also had the result of raising the threshold for proving title too high. SON submits that each of these are palpable errors of fact, and which, cumulatively, were enough to affect the result. SON submits the following are errors of misapprehension:

(a) the Trial Judge found that the Beaver Wars did not demonstrate an intention or capacity to control the water spaces around the Peninsula, despite evidence that the Haudenosaunee had been driven from the region entirely, some battles even having been on or in the water, and despite there being **no** evidence that the Haudenosaunee navigated the water space around the Peninsula after the conclusion of the Beaver Wars.[299]

(b) The Trial Judge found that the siege of Detroit "failed" because Pontiac could not prevent the British ships from supplying the fort, despite evidence that the British were on the cusp of surrender in the fall of 1763 because of lack of food.[300]

(c) The Trial Judge found that the British had "fully demonstrated that they controlled access" to the Great Lakes during the Pontiac War, despite evidence that the British did not re-occupy any of forts that had been taken by First Nations until after peace had been negotiated with the First Nations at Niagara in 1764, and that the leading British official admitted that they were no match for Indigenous Nations in a wooded country.[301]

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[299] Above, para 44.
[300] Above, paras 45-47.
[301] Above, paras 48-49.

(d) The Trial Judge misapprehended evidence about how widespread Anishinaabe participation was in the Pontiac War,[302] and disregarded the evidence of a SON member about memories (albeit mostly vague) passed down about the War, and including a detailed description of one battle.[303]

Dismissal of Relevant Evidence

154. The Trial Judge's failure to consider relevant evidence were factual errors that also had the result of raising the threshold for proving title too high:

(a) The Trial Judge dismissed evidence even of battles which took place on or in the water as not showing an intention to control water spaces, but as mere coincidence that they just happened to have taken place on the water, both in relation to battles in the Beaver Wars[304] and in the Pontiac War[305].

(b) The Trial Judge dismissed evidence about the Beaver Wars as being too far removed in time from the key date of 1763 to be probative of occupation in 1763.[306] In fact, the Beaver Wars did not reach a conclusion until 1701,[307] just over 60 years before the assertion of British sovereignty. Given that the sweep of evidence in this case spanned 9,000 years,[308] and that there is **no** evidence of any significant change in occupancy between 1701 and 1763, SON submits that the Beaver Wars should have been taken as strongly probative of occupancy in 1763.

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[302] Above, paras 51-53.
[303] Evidence of Karl Keeshig, Transcript vol 3, April 30, 2019, p. 283, line 9 to p. 284 line 2; p. 285, lines 4-14 and p. 361 line 10 to p. 363 line 8.
[304] Above, para 44.
[305] Reasons, para 506.
[306] Reasons, para 576.
[307] Reasons, para 486.
[308] Reasons, para 378.

(c) The Trial Judge dismissed evidence about water ceremonies as not being relevant to Aboriginal title since they often were not held on the water, and so did not "require" title to the lakebed.[309]

Consideration of Irrelevant Evidence

155. The Trial Judge relied on the fact that the British possessed artillery and Indigenous nations did not, to reason, rather hypothetically, that the British controlled Lake Huron in 1763.[310] SON submits that if this is a valid line of reasoning, no Indigenous nation anywhere would be able to establish Aboriginal title. Therefore, this line of reasoning constitutes an extricable error of law. Secondly, this reasoning is contradictory to the evidence that the British were no match for Indigenous nations in wooded country in the mid 18th century, and is thus also an error of fact.[311]

156. The Trial Judge, in applying the *Tsilhqot'in Nation* test, used the "central significance" criterion.[312] As noted above, this forms no part of the Aboriginal title test and is an error of law.[313]

All or Nothing Approach to the Claim Area

157. The Trial Judge noted that fishing evidence usually related to areas "close" to the Peninsula, and that, for a third of the Claim Area, there was no commercial fishing at all in the period 1995-2018.[314] She then applied the *Tsilhqot'in Nation* test to the Claim Area as a whole.[315] She noted that the pleadings made an alternative claim to "portions" of the Claim Area, but

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[309] Reasons, paras 206 and 218- 220, and see Above, para 117.
[310] Reasons, para 580.
[311] Above, para 49
[312] Reasons, paras 370 and 567.
[313] Above, para 143.
[314] Reasons, paras 225-236.
[315] Reasons, paras 585-587.

declined to consider such portions (apart from a very small portion at Nochemowenaing) because SON had not advanced any specific alternative.[316]

158. A somewhat similar situation arose in the *Tsilhqot'in Nation* case. The trial judge in that case thought he was unable to make a declaration of Aboriginal title for part of the area claimed in the pleadings, since the claim was "all or nothing."[317] He did, however, express an opinion as to where he was of the view Aboriginal title had been proven. The BC Court of Appeal disagreed on the pleadings point, noting that a Court may indeed grant a declaration to a lesser area.[318] On further appeal, the Supreme Court of Canada approved this approach to the pleadings, and in fact granted such a declaration.[319]

159. This is especially important in an Aboriginal title case, where "[t]o require proof of Aboriginal title precisely mirroring the claim would be too exacting."[320] Indeed:

> It would be unnecessarily demanding to require the party to plead in the prayer every precise possible variation of the underlying factual dispute that could be ultimately found to be proved. It would be like pleading all the results of the peeling of an onion – in which every single layer generates a slightly different and smaller variation of the one before it.
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> …

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[316] Reasons, paras 592-597.
[317] *William v British Columbia*, 2012 BCCA 285 at para 49, rev'd other grounds, but with approval of the point made by the BCCA about pleadings, *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, at paras 19-23.
[318] *William v British Columbia*, 2012 BCCA 285 at para 112, 114, and 117.
[319] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, at paras 19-23.
[320] *William v British Columbia*, 2012 BCCA 285 at para 118.

> In practice it frequently happens that **it is only after the court has determined the facts** that it will be possible to decide in what terms a declaration should be granted.[321] [emphasis added]

160. SON therefore submits that it was premature to dismiss the possibility of Aboriginal title to portions of the Claim Area without seeking further submissions after the facts were found.

MISPERCEPTION OF THE COMMON LAW REGARDING NAVIGABLE WATERS

Common Law Background

161. English common law deals with tidal and non-tidal waters in completely different ways. Further, it conflates the concepts of "tidal" and "navigable". The non-tidal regime applied to non-tidal waters (sometimes, confusingly, called non-navigable waters, even if they were in fact navigable.)[322] For non-tidal waters, there is a presumption that a riparian landowner owned to the middle of the body of water, even if the grant of title described the land as ending at the water's edge (the "*ad medium filum*" presumption). From the ownership of the bed would flow ownership of minerals and exclusive fishing rights.[323] For tidal waters there is no such presumption of ownership of the riparian owner, whose title ended at the high-water mark. Instead, there is a presumption of Crown ownership of the area between the high-water mark and the low water mark, known as the foreshore, as well as to the seabed.[324]

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[321] *William v British Columbia*, 2012 BCCA 285 at para 113, quoting with approval from *Lau Wing Hong & Others v. Wong Wor Hung & Another*, [2006] 4 HKLRD 671 (H.C.), and from *Zamir & Woolf: The Declaratory Judgment* (3rd ed., 2002), p. 284.

[322] *Murphy v Ryan* (1868), I.R. 2 C.L. 143 at 152; and M.D. Walters, "Aboriginal Rights, Magna Carta and the Exclusive Right to Fisheries in the Waters of Upper Canada" (1998), 23 Queen's L.J. 301 at 314.

[323] *Murphy v Ryan* (1868), I.R. 2 C.L. 143 at 148; and M.D. Walters, "Aboriginal Rights, Magna Carta and the Exclusive Right to Fisheries in the Waters of Upper Canada" (1998), 23 Queen's L.J. 301 at 313-314.

[324] *Murphy v Ryan* (1868), I.R. 2 C.L. 143 at 149; and M.D. Walters, *"Aboriginal Rights, Magna Carta and the Exclusive Right to Fisheries in the Waters of Upper Canada"* (1998), 23 Queen's L.J. 301 at 314-315.

162. There has been considerable legal debate in Canada about whether the tidal or non-tidal English common law legal regime should apply to waters such as the Great Lakes which were non-tidal yet navigable in fact. However, for Ontario cases that dealt directly (as opposed to in *obiter*) with issues of the ownership of the beds of non-tidal yet navigable rivers, it was the non-tidal regime that was applied.[325] This result has since been partly modified by statute.[326]

163. In any event, however, in either the non-tidal regime[327] or the tidal regime,[328] it is possible at common law for the beds of water bodies to be privately owned. Title may even be gained to the beds of tidal waters by prescription.[329] In either the tidal or the non-tidal regime, private ownership of the waterbed co-exists with public navigation.[330]

Errors of the Trial Judge

164. The Trial Judge began by acknowledging that the common law "has used the concept of private ownership of submerged lands" in certain contexts.[331] SON submits that this, while true, falls short of the principles of common law set out above.

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[325] *Caldwell v McLaren*, [1884] UKPC 21 (7 April 1884) at 10-11, (1884), 9 App Cas 392 at 404-5 (PC); *Keewatin Power Co. v Kenora (Town)* (1908), 16 OLR 184 at 190-191 (CA); *Walker v Ontario (Attorney General)*, [1971] OR 151, (1970), 14 DLR (3d) 644 at 673, 1970 CanLII 953 (HCJ), aff'd [1972] 2 OR 558 (CA), aff'd [1975] 1 SCR 78.
[326] For example, *Bed of Navigable Waters Act*, SO 1911, c.6 (reversing the result of *Keewatin Power Co. v Kenora* in relation to *ad medium filum*).
[327] *Murphy v Ryan* (1868), I.R. 2 C.L. 143 at 148 and 152; applied in Canada in *R v Robertson* (1882), 6 SCR 52 at 115 (per Ritchie, CJ), (the public may have a navigation easement, and this is perfectly consistent with private ownership of the bed.)
[328] *Attorney General v Emerson*, [1891] AC 649 at pages 655 and 662 (HL); *Ngati Apa v New Zealand (A.G.)*, CA173/01 (19 June 2003), [2003] NZCA 117, [2003] 3 NZLR 643 at para 51 (per Elias CJ). See also paras 133-135 (per Keith J).
[329] *Roberts v Swangrove Estates*, [2007] EWHC 513 (Ch), especially at para 45, aff'd [2008] EWCA Civ 98.
[330] See below, para 165.
[331] Reasons, para 255.

165. She also reasoned that the tidal/non-tidal distinction has been rejected in Canada,[332] relying on *Friends of the Oldman River*. While *Oldman River* does say that,[333] the context was only in relation to navigability. There was no indication that the entire body of doctrine about tidal and non-tidal waters was to be abandoned. Further, the English rule that case was trying to reject was that "though non-tidal waters may be navigable in fact the public has no right to navigate them". Instead, the rule *Oldman River* adopted was "if waters are navigable in fact, whether or not the waters are tidal or non-tidal, the public right of navigation exists."[334] However, this reasoning, with respect, was based on an error about what was the English common law. In English common law, there **was** a public right of navigation over privately owned non-tidal waters that were navigable in fact:

> According to the well-established principles of the Common Law, the proprietors on either side of a river are presumed to be possessed of the bed and soil of it moietively [each to the middle thread], ... **though the law secures to the community the right of navigation upon the surface of that water**, as a public highway which individuals are forbidden to obstruct...[clarification and emphasis added][335]

166. Thus, the distinction that *Oldman River* purports to reject did not exist in the first place in the context of the public right of navigation. The result put in place by *Oldman River* was in fact the same as the English common law on that point. Thus, the idea that the tidal/non-tidal distinction needed to be abolished is ill-founded.

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[332] Reasons, para 259 and 262.
[333] *Friends of the Oldman River v Canada*, [1992] 1 SCR 3 at 54.
[334] *Friends of the Oldman River v Canada*, [1992] 1 SCR 3 at 54.
[335] *Murphy v Ryan* (1868), I.R. 2 C.L. 143 at 148. See also *Caldwell v McLaren* [1884] UKPC 21 (7 April 1884) at 10-11 (additional cite 9 App Cas 392 (PC)).

167. Compounding this error, the Trial Judge went on to state that the English law concept of private ownership of submerged lands has been called into question.[336] This suggestion goes far beyond issues of navigability, which was all *Oldman River* (which was not a case about title to the bed of the river) had considered.[337]

168. The Trial Judge then stated that because of the way the common law was adapted for Canada "there would not be private ownership of the Great Lakes".[338] There was, in fact, specific evidence in front of her to the contrary,[339] as well as evidence of Canadian treaties with Indigenous groups which involved surrenders of the beds of navigable waters (the Detroit River and the St. Clair River).[340]

169. The Trial Judge also stated that, in relation to tidal waters, "the submerged land is not privately owned."[341] This is contrary to authority[342] and is an error of law.

170. There was considerable discussion at the Court below about the *ad medium filum* presumption. The Trial Judge appeared to think SON was relying on that as a source of title.[343] To clarify, SON is not and was not relying on that presumption as a source of title, but only as an

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[336] Reasons, para 258.
[337] That case was brought by an environmental organization seeking to compel a federal environmental assessment of a dam being built by Alberta, the undertaking of which environmental assessment was being resisted by both Canada and Alberta. The comments that case made about public navigation were made in response to a jurisdictional argument by Alberta that Crown immunity prevented the application of the federal *Navigable Waters Protection Act* to Alberta (which would trigger a federal environmental assessment). *Friends of the Oldman River v Canada*, [1992] 1 SCR 3 at 50, 53-55.
[338] Reasons, para 253.
[339] Evidence of Jennifer Keyes, Transcript, vol 79, January 22, 2020, p. 10116, line 11 to p. 10123, line 17.
[340] Reasons, paras 276-277.
[341] Reasons, para 260.
[342] *Attorney General v Emerson*, [1891] AC 649 at 655 and 662 (HL).
[343] Reasons, paras 256-259.

illustration that the idea of private ownership of the beds of non-tidal waters (which were navigable in fact) was embraced by the common law.

171. SON submits that the Trial Judge's misperceptions about the common law concerning ownership of the beds of navigable waters coloured many of her other conclusions about whether SON had met or could meet the test for proof of Aboriginal title.

MISPERCEPTION OF RELATIONSHIP BETWEEN COMMON LAW AND ABORIGINAL TITLE

172. Aboriginal title arises from the prior occupation of territory by Indigenous peoples. At the assertion of British sovereignty, a general imperial principle of continuity of law and rights applied, so that the common law incorporated and preserved local laws and customs in newly acquired territories, until or unless explicitly changed. In this way, Aboriginal interests and rights were preserved by the common law and thus limited what rights the common law would otherwise accord to the Crown and to European settlers.[344]

173. A key issue in this case is the relationship between Aboriginal title and other common law rights, especially the right of public navigation. The Trial Judge seemed to view the right to exclude others from land as basic to the concept of title, which would therefore come into fundamental conflict with rights of public navigation and the sovereign right to control international borders.[345] Despite seeing this as a fundamental conflict,[346] paradoxically, the Trial

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[344] *Mitchell v M.N.R,* [2001] 1 SCR 911, 2001 SCC 33 at paras 9-10. See also *Egerton v Harding*, [1974] 3 All ER 689 at page 691 (CA),
[345] Reasons, paras 114-125 and 325-328.
[346] Reasons, para 328,

Judge purported to leave open the question whether it would be possible to have Aboriginal title to other submerged land.[347]

174. SON submits that the framework used by the Trial Judge misconceives each of a) the right of public navigation, b) Aboriginal title, and c) how they should interact.

a) Qualifications on Navigability

175. SON submits that the Trial Judge's designation of the right of public navigation as "paramount"[348] obscures the scope, source and meaning of the doctrine. It is not some quasi-constitutional inherent right that trumps all other rights.

176. The origin of this common law right and its relevance in North America was discussed by the Privy Council in 1884 in *Caldwell v McLaren*, a case from Ontario. The Privy Council noted that the common law right of navigation had to be established by public use, by dedication of the owner, or by statute. The judgment went on to explain that in England, it was easily presumed that conditions establishing a public right of navigation applied, and that this had become thought of as the default state of affairs. However, the Privy Council noted such presumptions did not have the same force in North America, which was unsettled at the time of the assertion of British sovereignty, so prescription could not exist.[349] At issue in *Caldwell v McLaren* was whether an owner of the bed of a river who had built a mill dam was required to construct the dam in a way that permitted logs to pass over the dam without impediment (i.e. an example of a right of navigation). The Privy Council noted that the status of the public right of navigation in Upper Canada was in great doubt until 1849. At that time a statute was passed making explicit provision

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[347] Reasons, paras 330 and 587.
[348] Reasons, paras 145 and 323.
[349] *Caldwell v McLaren* [1884] UKPC 21 (7 April 1884) at 11 (additional cite 9 App Cas 392 (PC)).

that mill dams had to accommodate people wanting to float logs down rivers.[350] The Privy Council then decided the case on the basis of statutory (not common law) rights.

177. Nor is public navigation now treated in Canadian law as an absolute right that can never be limited. For example, Parliament has passed legislation authorizing the conveyance of any part of the St. Lawrence Seaway to (not-for-profit) corporations, which may be authorized to establish and collect fees for the use of the Seaway.[351] Navigation now usually also requires a boat licence, and the payment of fees for launching boats or using locks.[352] Thus, in practice, the public right of navigation has been limited for ordinary regulatory objectives. It should not be treated as some paramount right that could prevent the recognition of constitutionally protected Aboriginal title.

b) Qualifications of Aboriginal Title

178. If Aboriginal title is proven, based on exclusive occupation at the time of the assertion of British sovereignty, it is not absolute. From the point of the assertion of British sovereignty until 1982, Aboriginal title, if it was incorporated into the common law, was subject to being limited (or even extinguished), by "clear and plain" legislation or by treaties.[353]

179. SON submits that, in their case, their Aboriginal title was modified by a treaty made with the "Western Nations" at Niagara in 1764 (which the Trial Judge did not recognize as a treaty).[354] SON says at that point their ancestors made a treaty with the British concerning alliance, trade, and the protection of Indigenous lands. This necessarily meant they agreed to the British being

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[350] *Caldwell v McLaren* [1884] UKPC 21 (7 April 1884) at 13, (additional cite 9 App Cas 392 (PC)).
[351] *Canada Marine Act*, SC 1998 c 10, ss 80 and 92.
[352] *Great Lakes Pilotage Tariff Regulations* (SOR/84-253), Schedule 1; *Canal Regulations*, CRC 1564, Schedules 6 and 7; and *Vessels Registry Fees Tariff*, SOR/2002-172.
[353] *R v Sparrow*, [1990] 1 SCR 1075 at 1098-1099.
[354] See above, paras 54-61 and 137-140.

present on Lake Huron and Georgian Bay and being free to navigate those waters. SON is willing to honour that agreement even if Canada does not recognize its existence.

180. Another historic limitation to SON's Aboriginal title was made by the *International Boundary Waters Treaty Act*, which, from 1909 on, guaranteed free access to navigable boundary waters (which includes the Claim Area) for inhabitants of both Canada and the US for the purpose of commerce.[355] SON takes no issue with that legislation.

181. The legal position concerning Aboriginal title changed with the *Constitution Act, 1982*. Section 35 of that Act recognized and affirmed Aboriginal and treaty rights.[356] The purposes of that section are to recognize the fact of prior occupation of territory by Indigenous peoples, and to reconcile this fact with the assertion of Crown sovereignty.[357] This section provides strong protection for Aboriginal rights, including Aboriginal title, and indeed can enable Aboriginal rights to impact common law rights.[358] However, this protection is not absolute, and both provincial and federal governments may infringe Aboriginal title if the infringement satisfies a "justification" test.[359]

c) Means of Reconciling Aboriginal title and Other Common Law Rights

182. SON submits that the most respectful way of reconciling Aboriginal title with other common law rights is by treaty. Indeed, the honour of the Crown **requires** treaty negotiations

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[355] *International Boundary Waters Treaty Act*, RSC 1985 c I-17, s 2 and Schedule 1, Article 1.
[356] *Constitution Act, 1982*, s 35.
[357] *R. v Gladstone*, [1996] 2 SCR 723 at para 72.
[358] *R. v Gladstone*, [1996] 2 SCR 723 at para 67.
[359] *R v Sparrow*, [1990] 1 SCR 1075 at 1109. The most recent statement of the test for justification, as applied to Aboriginal title, is stated in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at paras 77-88.

where they have not yet taken place, for the purpose of just such reconciliation.[360] A treaty could be, and, SON submits, has already been made (at Niagara in 1764) to implement the coexistence of Aboriginal title with public navigation and border control.

183. Failing that, s. 35 of the *Constitution Act, 1982* and court rulings pursuant to it can be used for such reconciliation. That is in fact the **purpose** of s. 35.

184. Instead of either of these methods of reconciliation, the Trial Judge analyzed the interaction of Aboriginal title with public navigation and border control through the lenses of paramountcy and incompatibility, with the result that she ruled Aboriginal title was not proven at all. In doing so she made numerous errors.

Rejecting Common Law Co-existence

185. By viewing public navigation as "paramount", and Aboriginal title as exclusive in an absolute sense, SON submits that the Trial Judge, as well as falling into errors of common law as argued above,[361] effectively elevated public navigation to a super-constitutional status, allowing it to prevent Aboriginal title from even arising in the first place.

186. This frame of reference confuses ownership and jurisdiction. It is not necessary for the Crown to own land in order for it to legislate to provide for public navigation and border control. Indeed, as noted above, Canada has already done so.[362] Seen this way, title can be "exclusive" without precluding public navigation. This is the same concept that applies to fee simple title – which is also an "exclusive" right yet indeed is subject to the right of public navigation.[363] SON

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[360] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), [2004] 3 SCR 511 at para 20.
[361] Above, paras 175-177, and Reasons, para 252.
[362] Above, para 180
[363] *Murphy v Ryan* (1868), I.R. 2 C.L. 143 at 148.

submits there is no principled reason why the same could not apply to Aboriginal title at common law, although the constitutional protection of Aboriginal title adds another layer of complexity.

187. The view that both navigation rights and Aboriginal title are absolute prevented the Trial Judge from entertaining ideas of Aboriginal title over water spaces co-existing with public navigation rights.

188. First, this seems contradictory to authority: the Supreme Court stated that occupation to prove title may be established in a variety of ways, **including fishing**.[364]

189. Second, the vast weight of Canadian academic commentary supports the idea that Canadian law should recognize Aboriginal title in navigable waters (both tidal and non-tidal) if it can be proven. The Trial Judge dismissed this as being about exclusive fisheries, not Aboriginal title.[365] However, on careful reading, those that are about exclusive fishing rights are about fishing rights **that flow from Aboriginal title**.[366] Further, as noted above, at common law, an exclusive fishing

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[364] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 143 and 149.
[365] Reasons, para 272.
[366] M.D. Walters, *"Aboriginal Rights, Magna Carta and the Exclusive Right to Fisheries in the Waters of Upper Canada"* (1998), 23 Queen's L.J. 301, especially at p. 335, 356 and 368; Peggy Blair, "Taken for 'Granted': Aboriginal Title and Public Fishing Rights in Upper Canada" (2000), 92 Ontario History 31 at pp. 31, 34 and 50; Peggy J. Blair, "Settling the Fisheries: Pre-Confederation Crown Policy in Upper Canada and the Supreme Court's decisions in *R. v. Nikal and Lewis"* (2001) 31 RGD 87 at pp. 120, 122 and 172; Peggy J. Blair, "No Middle Ground: Ad Medium Filum Aquae, Aboriginal Fishing Rights, and the Supreme Court of Canada's Decisions *in Nikal and Lewis"* (2001), 31 RGD 515 at p 596; C. Rebecca Brown, *Starboard or Port Tack? Navigating a Course to Recognition and Reconciliation of Aboriginal Title to Ocean Spaces* (LL.M. thesis, U.B.C., 1999) at pp. 208 and 214; Billy Garton, "The Character of Aboriginal Title to Canada's West Coast Territorial Sea" (1989), UT Fac L Rev 571 at pp. 573-575; C. Rebecca Brown and James I. Reynolds, "Aboriginal Title to Sea Spaces: A Comparative Study" (2004) 34:1 UBC L Rev 449 at pp. 453 and 492; F. Matthew Kirchner, *"*Just the Facts! Aboriginal Title and Proof of Occupation after Marshall; Bernard," (2009) CLE BC Aboriginal Law Conference 2009 at pp.16-18; Benjamin Ralston, "Aboriginal Title to Submerged Lands in Canada: Will Tsilhqot'in Sink or Swim," (2016) 8 Indigenous L Bull 22 at p. 24; D.B. Littlechild,

right is attached to ownership of the bed of the water, and proving an exclusive fishing right is a way of proving title over the water bed.[367]

190. Third, the Trial Judge dismissed the leading New Zealand (NZ) authority about whether the seabed could be Maori customary land (a tenure similar to Canadian Aboriginal title)[368] on the basis that the decision was based in "jurisdiction."[369] That is true in the sense that the Court did not actually weigh evidence and decide whether it had proved any portion of the seabed was Maori customary land. However, the Court of Appeal of NZ (the highest Court in NZ at the time)[370] was required to decide whether, as a matter of law, it was possible for the seabed to be Maori customary land. In doing so, the Court extensively analyzed the British common law of colonial succession regarding the relationship between the common law and Indigenous rights. The Court found, contrary to the arguments of the NZ government, that it was indeed possible for the seabed to be Maori customary land, and specifically warned against confusing sovereignty and ownership[371] – a key error which SON submits the Trial Judge made in relation to the possibility of co-existence of Aboriginal title and navigation. SON submits that the NZ Court's analysis of the British laws

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Transformation and Re-Formation: First Nations and Water in Canada (LL.M. thesis, University of Victoria, 2014) at 57-63, [PDF 62-68], especially at 62 [PDF 67]; Graben, Sari & Morey, Christian, "Aboriginal Title and Controlling Liberalization: Use It Like the Crown" 2019, 52 UBC L Rev. 435 at 469-470.

[367] Above, para 149; and *Attorney General v Emerson*, [1891] AC 649 at 655 and 662.

[368] Jacinta Ruru, "Lenses of Comparison across Continents: Understanding Modern Aboriginal Title in *Tsilhqot'in Nation* and *Ngati Apa*," (2015) 48 UBC L Rev 903 at 905.

[369] Reasons, para 311.

[370] At the time, there was a possible appeal to the Privy Council, which has since been abolished, and replaced with an appeal to the Supreme Court of New Zealand; and all the judges that sat on *Ngati Apa* have since been on the Supreme Court of New Zealand. Evidence of Prof. Paul McHugh, Transcript, vol 68, December 10, 2019, p. 8844, line 15 to p. 8845, line 11.

[371] *Ngati Apa v New Zealand (A.G.*), CA173/01 (19 June 2003), [2003] NZCA 117, [2003] 3 NZLR 643 at para 13, 26, 47, 49, 86 per Elias C.J., and 184-5, 197, 204 per Tipping J; See also Jacinta Ruru, "Lenses of Comparison across Continents: Understanding Modern Aboriginal Title in *Tsilhqot'in Nation* and *Ngati Apa*," (2015) 48 UBC L Rev 903.

of colonial succession about how Indigenous rights can apply to the seabed and prevail over common law presumptions about Crown ownership is highly relevant to the case now at bar.

191. Fourthly, there was evidence that all treaties concluded between the United States and Indigenous nations which bordered Lakes Huron and Superior extended to the US-Canada border in the middle of the lakes.[372] The Trial Judge dismissed this because she was not convinced that this was motivated by a recognition of Aboriginal title.[373] She also dismissed evidence that the Supreme Court of Michigan had ruled that the Treaty of Washington (1836) showed that the United States had recognized Aboriginal title to submerged land, because she thought it was significant that the U.S. had paramount power over navigable waters.[374] With respect, she misconstrued the purpose for which SON was relying on this evidence – it was to show that yet another common law jurisdiction **had been** able to reconcile the concept of Aboriginal title and public navigation – and with reference to the **same lake** at issue as in SON's case.

Rejecting Justified Infringement

192. The Trial Judge rejected applying the concept of justified infringement to the interaction of Aboriginal title and public navigation because, for example, the use of land for purposes of a national defense emergency, supposing it could be a justified infringement, would still require advance consultation in order to be justified.[375] With respect, this overlooks important context. The *National Defense Act* already permits manoeuvres anywhere in Canada.[376] SON takes no

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[372] Treaty of Detroit (1807), Treaty of Saginaw (1819), Treaty of Sault Ste. Marie (1820), Treaty of Washington (1836) and Treaty of La Point (1842); see Mr. Jean-Philippe Chartrand, "Historical Research on Provisions of American Treaties including Surrenders of Lake Beds in the Great Lakes" (2015), Exhibit 4513, pp. 82 and 99 [PDF and 95 and 112]; see also Schedule C, Maps 4 and 5.
[373] Reasons, para 158.
[374] Reasons, paras 294-296.
[375] Reasons, para 137 and 327.
[376] *National Defence Act* (R.S.C., 1985, c. N-5), s. 257.

issue with the *National Defence Act*. If a First Nation having Aboriginal title did take issue with the *National Defence Act* or its application, they could theoretically bring some kind of proceeding. SON submits that this would not stop any required operations from taking place while that proceeding was pending, and that indeed the chances of a necessary military operation not being found justified by a court would be vanishingly small.

193. The Trial Judge also thought that Aboriginal title up to an international boundary would conflict with Canada's control of its border.[377] Again, this confuses ownership and jurisdiction. Owning property up to a border (as sometimes happens in Canada) does not oust Canada's jurisdiction to control its borders. If there was any doubt about this, it could be resolved by adjusting the boundary of any declaration of Aboriginal title to provide unquestioned access to the border for border control purposes. There is no need for the entire claim to Aboriginal title to fail because of a supposed issue at its extremity.

Overreach of Sovereign Incompatibility

194. The Trial Judge relied on a doctrine of sovereign incompatibility and analyzed the claim to Aboriginal title through that lens.[378] She ultimately concluded that Aboriginal title (even with public rights of navigation possibly being justified infringements) was inconsistent with the common law.[379]

195. This method of proceeding is inconsistent with the view expressed by the majority in *Mitchell v M.N.R.* In that case, the Aboriginal right in question was framed by the Court as a right to bring goods across the Canada-U.S. boundary at the St. Lawrence River for the purposes of

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[377] Reasons, para 327.
[378] Reasons, paras 114-125.
[379] Reasons, para 273.

trade. The Court held that right in question had not been proved on the evidence. However, two justices went further and said that such a right could not, as a matter of law, be recognized by a Canadian Court because they were of the view that this was incompatible with Canadian sovereignty. The remaining five justices declined to comment on this, noting that so far, the doctrines of extinguishment, infringement and justification had been affirmed as the appropriate framework for resolving conflicts between Aboriginal rights and competing claims, **including claims based on Crown sovereignty**.[380]

196. Even the two justices in *Mitchell* who relied on sovereign incompatibility acknowledged that it had been given excessive scope in the past, for example when "[t]he assertion of sovereign authority was confused with doctrines of feudal title to deny aboriginal peoples any interest at all in their traditional lands or even in activities related to the use of those lands". They were of the view that it should be applied "sparingly," and gave as an illustration of its proper application that Canadian law could not recognize an Aboriginal right to organize a private army, even if the evidence was that an Aboriginal group had done just that prior to the assertion of British sovereignty.[381]

197. SON submits that, even if it is appropriate to apply a sovereign incompatibility analysis to this question, it would be excessive to conclude that Aboriginal title to the beds of navigable waters threaten Crown sovereignty. Owning the bed of a waterbody is nothing like the threat to public

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[380] *Mitchell v M.N.R,* [2001] 1 SCR 911, 2001 SCC 33 at paras 63-4 per McLachlin CJ.
[381] *Mitchell v M.N.R,* [2001] 1 SCR 911, 2001 SCC at paras 149-154 per Binnie J. See also the critiques of the over-use of the concept of compatibility in *Amodu Tijani v The Secretary Southern Provinces* (Nigeria), [1921] UKPC 80 (11 July 1921) at page 3, [additional cite [1921] 2 AC 399 at pages 407-408]; *Oyekan v Adele* (West Africa), [1957] UKPC 13 (26 June 1957) at 3, [1957] 2 All ER 785 at page 788 (PC); and *R v Ippak*, 2018 NUCA 3 (CanLII) at para 85 per Berger JA (concurring).

order that would be caused by recognizing an Aboriginal right to organize a private army. SON submits that Aboriginal title to the beds of waterbodies is no more threatening to Crown sovereignty than is private ownership of beds of waterbodies, which is a routine circumstance. To the extent that there are concerns about the international border, as above, this could be resolved by adjusting the boundary of any declaration of Aboriginal title.

Rejecting a More Limited Incompatibility Analysis

198. In the alternative, SON submits that if there is a residual concern about navigation and sovereign incompatibility, the Court could resolve this by defining Aboriginal title to submerged lakebeds not to include the right to exclude the public for the purposes of navigation over the water. The remaining rights in the bundle of rights that make up Aboriginal title as it is currently defined in relation to dry land, SON submits, would remain. These would include, for example, mineral rights, an exclusive fishery, the right to decide if structures are built on the lakebed, and rights to protect the water from pollution or other environmental damage.

199. This would be a novel adjustment to the content of Aboriginal title so far. The Trial Judge rejected this idea as giving rise to a fundamental inconsistency since in her view the right to control land and exclude others from it are basic to the notion of title at common law.[382]

200. It is true that, before the assertion of British sovereignty, the historic practices of Anishinaabe control of land (in SON's submission) did not permit the public to navigate freely without permission of the relevant Anishinaabe group. However, if such a right cannot be fully recognized because of issues with public navigation, perhaps the sovereign incompatibility argument could operate to limit Aboriginal title in this way. This would be far closer to fairly

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[382] Reasons, paras 325-326.

reconciling Aboriginal title to other common law rights than the extreme solution of not recognizing Aboriginal title to the beds of navigable waters at all. Further, any "inconsistency" would be no greater than that presented by fee simple title to the beds of navigable waters being subject to the public right of navigation.[383] The Trial Judge could not see this point because she was under a misapprehension of what was the underlying common law in this circumstance.[384] Nor would there be more of an "inconsistency" than the result in *Gibbs v Grand Bend*, where a beach was owned by Gibbs, but subject to a public easement reserved by the land patent, or subject to a dedication to the public of the use (but not the title) of the beach.[385]

Result of These Errors

201. SON submits that many of the Trial Judge's misapprehensions of evidence and failures to appreciate the Indigenous perspective and Anishinaabe law coloured her assessment of other evidence. For example:

(a) The finding that the Cheveux Relevées had not travelled the French River to meet Champlain supported, in turn, her finding that SON's ancestors did not control access to the Claim Area;[386]

(b) The finding that the Beaver Wars were only about dry land territory also led to her finding that SON's ancestors did not control access to the Claim Area;[387]

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[383] See *Murphy v Ryan* (1868), I.R. 2 C.L. 143 at 148.
[384] See above, paras 164-169.
[385] *Gibbs v Grand Bend* (1995), 49 RPR (2d) 157 (Ont CA) at para 89 per Finlayson JA and at paras 99-100 per Brooke JA.
[386] See above paras 36-40, 134(a) and 136.
[387] See above paras 41-44, 134(b) and 153(a).

(c) The finding that the siege of Detroit "failed" led to her finding that the British, not the Anishinaabe, were in control of Lake Huron in 1763.[388]

(d) The finding that SON's spiritual connection to water meant a connection to *all water* supported her finding that SON did not have a spiritual connection or responsibility specifically tied to the Claim Area, which in turn led her to discount such evidence as proof of title;[389] and

(e) The finding that resource control was only about resources (e.g. fish), not about territory, led her to discount such evidence as proof of title.[390]

202. SON also submits that certain legal errors made coloured the Trial Judge's assessment of facts and other conclusions, for example:

(a) The failure to properly consider the Indigenous perspective;[391] and

(b) The finding that there was no Treaty at Niagara led to the conclusion that there was no way that public navigation could be reconciled with Aboriginal title.[392]

203. SON submits that in the circumstances, the factual findings cannot stand. However, given the enormous complexity of the factual issues at hand, it would be impossible for the Court to do justice to the parties by sifting through the record itself and making new factual findings.[393] A new trial is warranted at which the evidence may be considered in light of the appropriate principles for evaluating a claim for Aboriginal title.

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[388] See above paras 45-53, 153(b) and 153(c).
[389] See above paras 21-24 and 121-124.
[390] See above paras 129-132 and 149.
[391] See above, paras 88-93 and 102-119.
[392] See above, paras 54-61 and 137-140.
[393] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para 108.

204. SON further submits that other errors of the Trial Judge should be addressed by this Court, including the Trial Judge's:

(a) Erroneous application of the Aboriginal rights test;[394]

(b) Too high threshold in applying the Aboriginal title test;[395]

(c) Misconstruction of the common law of navigable waters;[396] and

(d) Misconstruction of the relationship between common law and Aboriginal title.[397]

205. The result of the above legal errors is the Trial Judge made it virtually impossible for a First Nation to prove Aboriginal title to land under navigable waters: what might be called an "*aqua nullius*" doctrine. These errors must be corrected by this Court to give guidance to the judge at the new trial.

PART V – ORDER SOUGHT

206. SON seeks the following orders:

(a) An order setting aside the judgment and ordering a new trial; and,

(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.

All of which is respectfully submitted. Date: May 2, 2022

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[394] See above, paras 141-144.
[395] See above, paras 145-160.
[396] See above, paras 161-171.
[397] See above, paras 172-200.

SCHEDULE A

AUTHORITIES
Amodu Tijani v The Secretary Southern Provinces (Nigeria), [1921] UKPC 80
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SCHEDULE B

LEGISLATION INDEX

***Canada Marine Act*, SC 1998 c 10, ss 80 and 92:**

Transfer

80 (1) The Minister may direct the Authority to transfer, on the terms and conditions specified by the Minister, all or part of its property or undertakings to the Minister, any other member of the Queen's Privy Council for Canada, any other person or any body established under an international agreement, and the Authority shall immediately comply.

Transfer by Minister

(2) Where any property or undertaking is transferred to the Minister under subsection (1), the Minister may transfer it to any other member of the Queen's Privy Council for Canada, any other person or any body established under an international agreement.

Federal Real Property and Federal Immovables Act

(3) The *Federal Real Property and Federal Immovables Act* does not apply to a transfer under subsection (1) or (2) unless it is a sale of land to a person or body other than the Minister or any other member of the Queen's Privy Council for Canada.

Surplus Crown Assets Act

(4) The *Surplus Crown Assets Act* does not apply to a transfer under subsection (1) or (2).

Agreements

(5) The Minister may enter into agreements in respect of all or part of the Seaway and the property or undertakings referred to in subsection (1) or (2) and those agreements may be with a not-for-profit corporation that accords a major role to Seaway users, in particular in the way in which directors of the corporation are appointed and in its operations, or, where the Minister considers it appropriate, with any other person or any body established under an international agreement.

Contents of agreements

(6) An agreement may include any terms and conditions that the Minister considers appropriate, including provisions respecting

(a) the transfer of all or part of the property or undertakings referred to in subsection (1) or (2);

(b) the management and operation of all or part of the Seaway or the property or undertakings referred to in subsection (1) or (2);

(c) the construction, maintenance and operation of all or part of the Seaway;

(d) the charging of fees;

(e) the performance and enforcement of obligations under the agreement;

(f) the transfer of officers and employees of the Authority;

(g) the making of financial contributions or grants or the giving of any other financial assistance;

(h) the imposition of additional obligations of financial management; and

(i) where the agreement is with a body referred to in subsection (5), the application of any of the provisions of this Part relating to an agreement with a not-for-profit corporation or other person referred to in that subsection.

Existing rights

(7) A transfer of land under paragraph (6)(a) does not affect a right or interest of any person or body of persons, including an Indian band within the meaning of the *Indian Act*, that existed in the land before the coming into force of this Part.

Termination of agreement

(8) The terms of an agreement with a not-for-profit corporation or other person shall include

(a) a clause providing for the termination of the agreement in the event of the establishment of a body under an international agreement in respect of the Seaway; and

(b) a clause providing for the protection of the rights of privacy of persons affected by the agreement and, in that regard, may include a clause requiring the not-for-profit corporation or other person to obligate itself to provide for privacy protection in its contracts with or in respect of affected persons, including employment contracts and collective agreements.

Authority to carry out agreements

(9) The Minister may take any measures that the Minister considers appropriate to carry out an agreement and to protect the interests or enforce the rights of Her Majesty under an agreement, including, if the agreement so provides, making advances to, and receiving advances from, the person with whom the agreement is made and determining the rates of interest that apply.

Security

(10) The Minister may

(a) accept and hold on behalf of Her Majesty any security granted to Her Majesty under the agreement or any security granted in substitution for it; and

(b) release or realize on any security referred to in paragraph (a).

Obligations

(11) The obligations imposed in respect of a not-for-profit corporation under sections 83 to 89 apply equally to a person who has entered into an agreement under subsection 80(5) to the extent that the agreement so provides.

…

Fees

92 (1) Where an agreement under subsection 80(5) so provides and subject to subsection (2), the person who has entered into the agreement may fix fees that

(a) are for the use of any property under the person's management, any service that the person provides or any right or privilege that the person confers; and

(b) take into account the obligations of the person under the agreement and the aim to provide a revenue sufficient to cover the costs of the management, maintenance and operation of the property and the maintenance of a capital and operating reserve fund.

Fees by international agreement

(2) Where an agreement in respect of fees is entered into by Canada and the United States and is in force, the person who has entered into an agreement under subsection 80(5) shall charge the fees fixed under the international agreement in accordance with the directions of the Governor in Council.

Coming into force of fees

(3) The tariffs of tolls established by the Authority under section 16 of the *St. Lawrence Seaway Authority Act* continue in force until they are repealed by the person who has entered into an agreement under subsection 80(5) and no fee fixed by the person under subsection (1) shall come into force until that repeal.

***Canal Regulations*, CRC 1564, Schedules 6 and 7:**

SCHEDULE VI(ss. 7, 8, 9 and 10)

1 For the purpose of this Schedule,

pleasure craft means a vessel, other than a canoe or skiff that is not equipped for propulsion by sail or mechanical means, that is used exclusively for pleasure and that does not carry persons or goods for hire or reward and includes a vessel chartered or hired for pleasure purposes by or on behalf of the persons carried therein; (*embarcation de plaisance*)

length means

(a) in the case of a registered vessel, the length shown in the certificate of registry, and

(b) in the case of a licensed vessel, the length measured from the fore part of the head of the stem to the after part of the head of the stern post. (*longueur*)

Tolls Payable

2 Tolls payable for pleasure craft not exceeding 24 feet in length for

(a) a permit for passage through a single lock station and for return passage through that lock station, valid during the season of navigation in which it is issued $ 3.00

(b) a daily permit for passage through any number of locks, valid only on the day of issue $ 3.00

(c) a permit for 6 single days, valid on any 6 separate or consecutive days during the season of navigation in which it is issued $ 9.00

(d) a permit for a season of navigation, valid on any day during the season of navigation for which it is issued $ 30.00

3 (1) Tolls payable for pleasure craft more than 24 feet in length and all commercial craft for

(a) a permit for passage through a single lock station and for return of passage through that lock station, valid during the season of navigation in which it is issued $ 4.00

(b) a daily permit for passage through any number of locks, valid only on the day of issue $ 4.00

(c) a permit for 6 single days, valid on any 6 separate or consecutive days during the season of navigation for which it is issued $ 15.00

(2) Tolls payable for pleasure craft more than 24 feet but not more than 40 feet in length for a permit for a season of navigation, valid on any day during the season of navigation for which it is issued $ 50.00

(3) Tolls payable for pleasure craft more than 40 feet in length and all commercial craft for a permit for a season of navigation, valid on any day during the season of navigation for which it is issued $ 80.00

SCHEDULE VII(s. 35)

1 For the purposes of this Schedule, *length* means

(a) in the case of a registered vessel, the length shown in the certificate of registry, and

(b) in the case of a licensed vessel, the length measured from the fore part of the head of the stem to the after part of the head of the stern post.

Berthage

2 Berthage payable for any 24-hour period or part thereof for:

(a) vessels other than commercial vessels, 18 feet in length and under $ 2.00

(b) vessels other than commercial vessels, over 18 feet but not exceeding 26 feet in length $ 3.00

(c) vessels other than commercial vessels, over 26 feet but not exceeding 34 feet in length $ 4.00

(d) vessels other than commercial vessels, over 34 feet but not exceeding 42 feet in length $ 5.00

(e) vessels over 42 feet in length and all commercial vessels $ 6.00

Constitution Act, 1982,* s. 35*:

Recognition of existing aboriginal and treaty rights

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of *aboriginal peoples of Canada*

(2) In this Act, *aboriginal peoples of Canada* includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) *treaty rights* includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

***Great Lakes Pilotage Tariff Regulations* (SOR/84-253), Schedule 1:**

SCHEDULE 1(Subparagraphs 3(1)(a)(i) and (ii) and (c)(i) and (ii) and section 4)Pilotage Charges for Areas Other than the Cornwall District or the Port of Churchill, Manitoba
Designated Waters and Contiguous Waters

1 (1) Subject to subsection (2), the basic charge for a passage, other than a movage, through International District No. 1 or any part of it, and its contiguous waters, is $23.18 for each kilometre ($37.30 for each statute mile), plus $497 for each lock transited.

(2) The minimum and maximum basic charges for a through trip through International District No. 1 and its contiguous waters are $1,089 and $4,782, respectively.

(3) The basic charge for a movage in International District No. 1 and its contiguous waters is $1,643.

(4) If a ship, during its passage through the Welland Canal, docks or undocks for any reason other than instructions given by the St. Lawrence Seaway Management Corporation, the basic charge is $72.84 for each kilometre ($117.22 for each statute mile), plus $436 for each lock transited, with a minimum charge of $1,457.

(5) The basic charge, other than that specified in subsection (4), for a pilotage service in International District No. 2 and its contiguous waters set out in column 1 of the following table is set out in column 2:

TABLE

	Column 1	Column 2
Item	Pilotage Service	Basic Charge ($)
1	Through the Welland Canal, if the pilot is changed at Lock 7,	
	(a) for that portion of the passage between the northern limit of the Canal and Lock 7	2,688
	(b) for that portion of the passage between Lock 7 and the southern limit of the Canal	2,688
2	Between Southeast Shoal and Toledo or any point on Lake Erie west of Southeast Shoal	2,874
3	Between points on Lake Erie west of Southeast Shoal	1,697
4	Between Southeast Shoal and the Port Huron Change Point or any point on the St. Clair River, if the pilot is not changed at the Detroit pilot boat	4,999
5	Between Southeast Shoal and Detroit, Windsor or any point on the Detroit River	2,874
6	Between Southeast Shoal and the Detroit pilot boat	2,080
7	Between Toledo or any point on Lake Erie west of Southeast Shoal and the Port Huron Change Point, if the pilot is not changed at the Detroit pilot boat	5,795

8	Between Toledo or any point on Lake Erie west of Southeast Shoal and Detroit, Windsor or any point on the Detroit River	3,732
9	Between Toledo or any point on Lake Erie west of Southeast Shoal and the Detroit pilot boat	2,874
10	Between Detroit, Windsor or any point on the Detroit River and any point on the Detroit River	1,697
11	Between Detroit, Windsor or any point on the Detroit River and the Port Huron Change Point or any point on the St. Clair River	3,762
12	Between the Detroit pilot boat and any point on the St. Clair River	3,762
13	Between the Detroit pilot boat and the Port Huron Change Point	2,920
14	Between points on the St. Clair River	1,697
15	Between the Port Huron Change Point and any point on the St. Clair River	2,080

(6) The basic charge for a pilotage service in International District No. 3 and its contiguous waters set out in column 1 of the following table is set out in column 2:

TABLE

	Column 1	Column 2
Item	Pilotage Service	Basic Charge ($)
1	Trip, other than a movage, between the southern limit of the District and the northern limit of the District or the Algoma Steel Corporation Wharf at Sault Ste. Marie, Ontario	3,968
2	Trip, other than a movage, between the southern limit of the District and Sault Ste. Marie, Michigan, or any point in Sault Ste. Marie, Ontario, other than the Algoma Steel Corporation Wharf at Sault Ste. Marie, Ontario	3,323
3	Trip, other than a movage, between the northern limit of the District and Sault Ste. Marie, Ontario,	1,494

	including the Algoma Steel Corporation Wharf at Sault Ste. Marie, Ontario, or Sault Ste. Marie, Michigan	
4	Movage	1,494

(7) An additional charge of $325 is payable for each embarkation or disembarkation of a licensed pilot at the Detroit pilot boat.

(7.1) An additional charge of $325 is payable for each embarkation or disembarkation of a licensed pilot at the Cape Vincent pilot boat.

(8) An additional charge of $131 is payable for each change of pilot at Lock 7 of the Welland Canal.

(9) An additional charge of $2,750 is payable for each time a pilot is retained on board a ship beyond the boarding point at the end of their assignment, so as to continue the voyage with a second consecutive assignment.

Undesignated Waters and Contiguous Waters

2 (1) Subject to subsections (2) and (3), the basic charge for a pilotage service set out in column 1 of the following table is set out in column 2:

TABLE

	Column 1	Column 2
Item	Pilotage Service	Basic Charge ($)
1	Being present on board, for a six-hour period or part of a six-hour period, in the undesignated waters and contiguous waters of	
	(a) Lake Ontario	1,264
	(b) Lake Erie	1,106
	(c) Lake Huron, Lake Michigan or Lake Superior	797
2	[Repealed, SOR/2020-59, s. 5]	

(2) If a ship with a pilot on board makes a direct transit of the undesignated waters and contiguous waters of Lake Erie between Southeast Shoal and Port Colborne, the basic charges set out in subsection (1) are not chargeable unless

(a) the ship is required by law to have a pilot on board in those waters; or

(b) the pilot provides pilotage services in those waters at the request of the master of the ship.

(3) The basic charge for pilotage services consisting of a lockage and a movage between Buffalo and any point on the Niagara River below the Black Rock Lock is $2,174.

(4) A basic charge of $1,200 is payable for each docking or undocking for the purpose of loading or unloading cargo, stores or bunker fuel or effecting repairs in a compulsory pilotage area in the Great Lakes region.

Detention

3 (1) Subject to subsections (2) and (3), if a pilot is detained for the convenience of a ship at the end of their assignment or during an interruption of the passage of the ship through designated waters or contiguous waters, an additional basic charge of $102 is payable for each hour or part of an hour, including the first hour, that the pilot is detained.

(2) The maximum basic charge payable under subsection (1) for any 24-hour period is $2,448.

(3) No basic charge for the detention of a pilot is payable under this section during an interruption of the passage of a ship

(a) that is caused by ice, weather or traffic, unless the interruption is during the period beginning on December 1 in a year and ending on April 8 in the next year; or

(b) that ends during a period in respect of which a basic charge is set out in item 1 of the table to subsection 2(1).

Delays

4 (1) Subject to subsection (2), if the departure or movage of a ship to which a pilot has been assigned is delayed for the convenience of the ship for more than one hour after the pilot reports for duty at the designated boarding point, a basic charge of $102 is payable for each hour or part of an hour of that delay, including the first hour.

(2) The maximum basic charge payable under subsection (1) for any 24-hour period is $2,448.

Cancellations

5 (1) The following charges are payable each time there is a cancelled order:

(a) a basic charge of $2,113;

(b) a basic charge of $102 for each hour or part of an hour, including the first hour, between the time that the pilot reports for duty at the designated boarding point and the time of the cancellation; and

(c) if the cancelled order occurs after a pilot reports for duty at a designated boarding point, a basic charge in an amount equal to the sum of the travel and other reasonable expenses incurred by the pilot in travelling from their home base to the designated boarding point and from the designated boarding point back to their home base.

(2) The following charges are payable each time there is a cancelled sail:

(a) a basic charge of $2,113; and

(b) if the owner, master or agent of the ship did not communicate to the Authority before the cancelled sail that they wanted to retain the pilot, a basic charge in an amount equal to the sum of the travel and other reasonable expenses incurred by the pilot in travelling from their home base to the designated boarding point and from the designated boarding point back to their home base.

(3) If the owner, master or agent of the ship communicates to the Authority before the cancelled sail that they want to retain the pilot, a new request for the same pilotage services is deemed to be made and accepted at the time of the cancelled sail and additional basic charges are payable in respect of the new request as determined in accordance with

(a) subsection (1), if the new request results in a cancelled order; and

(b) subsection (2), if the new request results in a cancelled sail.

(4) For the purposes of calculating additional basic charges under paragraph (3)(a), the reference to "between the time that the pilot reports for duty at the designated boarding point and the time of the cancellation" in paragraph (1)(b) is to be read as "between the time that the new request referred to in subsection (3) is made and accepted and the time of the cancelled order".

(5) For the purposes of subsections (2) and (3), in the case of a cancelled sail following a new request referred to in subsection (3), the reference to "after a pilot reports for duty at a designated boarding point" in paragraph 2(2)(b) of these Regulations is to be read as "after the new request referred to in subsection 5(3) of Schedule 1 is made and accepted".

Assignment of More than One Pilot

6 If more than one pilot is assigned to a ship, the basic charges set out in this Schedule must be multiplied by the number of pilots assigned.

Slow-Moving Ships

7 (1) If a ship exchanges pilots in accordance with subsection 8.1(1) of the *Great Lakes Pilotage Regulations*, the basic charges set out in this Schedule must be multiplied in accordance with section 6.

(2) If a ship that is required to exchange pilots under subsection 8.1(1) of the *Great Lakes Pilotage Regulations* does not do so because no licensed pilot is available for an exchange, the basic charges set out in this Schedule must be doubled.

(3) Subsections (1) and (2) do not apply in respect of a ship that is required to exchange pilots under subsection 8.1(1) of the *Great Lakes Pilotage Regulations* because the ship was slowed down by ice, weather or traffic.

Overcarriage

8 (1) If a pilot is unable to board a ship at the designated boarding point and must, in order to board it, travel beyond the area for which the pilot's services are requested, a basic charge of $607 is payable for each 24-hour period or part of a 24-hour period during which the pilot is away from the designated boarding point.

(2) If a pilot is carried on a ship beyond the area for which the pilot's services are requested, a basic charge of $607 is payable for each 24-hour period or part of a 24-hour period before the pilot's return to the designated disembarkation point.

(3) In addition to the basic charges set out in subsections (1) and (2), a charge is payable in an amount equal to the sum of the travel and other expenses incurred by a pilot that are directly associated with the requirement to travel to or from a place other than the pilot's designated boarding or disembarkation point.

Request for Pilotage Services — Short Notice

9 If a request for pilotage services is made with less than 12 hours' notice and those services are provided, an additional charge of $3,821 is payable.

Pilot Travel

10 (1) If a pilot must travel to embark on a ship at a location other than one of the designated boarding points at the extremities of a compulsory pilotage area in order to provide pilotage services

(a) during the period beginning on January 1 and ending on March 21 of the same year, a basic charge is payable in an amount equal to the sum of the reasonable travel and other expenses incurred by the pilot in travelling from their residence to the embarking location; or

(b) at other times of the year, a basic charge is payable in an amount equal to the sum of the reasonable travel and other expenses incurred by the pilot in travelling from their home base to the embarking location.

(2) If a pilot must disembark from a ship at a location other than one of the designated disembarkation points at the extremities of a compulsory pilotage area after providing pilotage services

(a) during the period beginning on January 1 and ending on March 21 of the same year, a basic charge is payable in an amount equal to the sum of the reasonable travel and other expenses incurred by the pilot in travelling from the disembarking location to their residence; or

(b) at other times of the year, a basic charge is payable in an amount equal to the sum of the reasonable travel and other expenses incurred by the pilot in travelling from the disembarking location to their home base.

***International Boundary Waters Treaty Act*, RSC 1985 c I-17, s.2 and Schedule 1, Article 1:**

Treaty in schedule confirmed

2 The treaty relating to the boundary waters and to questions arising along the boundary between Canada and the United States made between His Majesty, King Edward VII, and the United States, signed at Washington on January 11, 1909, and the protocol of May 5, 1910, in Schedule 1, are hereby confirmed and sanctioned.

…

SCHEDULE 1

…

ARTICLE I

The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.

***National Defence Act* (RSC, 1985, c N-5), s. 257:**

MANOEUVRES
Authorization by Minister

257 (1) For the purpose of training the Canadian Forces, the Minister may authorize the execution of military exercises or movements, referred to in this section as "manoeuvres", over and on such parts of Canada and during such periods as are specified.

Notice

(2) Notice of manoeuvres shall, by appropriate publication, be given to the inhabitants of any area concerned.

Powers

(3) Units and other elements of the Canadian Forces may execute manoeuvres on and pass over such areas as are specified under subsection (1), stop or control all traffic thereover whether by water, land or air, draw water from such sources as are available, and do all things reasonably necessary for the execution of the manoeuvres.

Interference

(4) Any person who wilfully obstructs or interferes with manoeuvres authorized under this section and any animal, vehicle, vessel or aircraft under the person's control may be

forcibly removed by any constable or by any officer, or by any non-commissioned member on the order of any officer.

Bar of action

(5) No action lies by reason only of the execution of manoeuvres authorized under this section.

***Vessels Registry Fees Tariff, SOR*/2002-172**

PAYMENT OF FEES

1 A free prescribed in this Tariff us payable on application for the serive.

FEES RESPECTING REGISTRATION

2 (1) The fee payable for a service set out in column 1 of the table to this section is the fee set out in column 2

(2) This section does not apply in respect of vessels that are registered in the small vessel register.

TABLE

	Column 1	**Column 2**
Item	Service	Fee ($)
1	For processing an application for the initial registration of a vessel	250
2	If the vessel is not registered within 12 months after the date of the application, for each additional period of 12 months or less until the vessel is registered or the application is cancelled	125
3	For processing an application for the registration of a vessel that was registered in Canada, then registered elsewhere than in Canada and is about to be registered in Canada again and issuing a certificate of registry	250
4	For processing an application for the listing of a bare-boat charter and issuing a certificate of registry, for each six-month period	200
5	With respect to suspending the right of a Canadian vessel to fly the Canadian flag while the vessel is shown on the registry of a foreign country as a bare-boat chartered vessel,	
	(a) for suspending the registration	100
	(b) for reinstating the registration	50

6	For issuing a provisional certification	150
7	For replacing a certificate of registry or provisional certificate	50
8	For amending the Register or a certificate of registry to reflect an alteration to a vessel and issuing a new certificate of registry	100
9	For amending the Register or a certificate of registry to reflect the transfer of the registry of a vessel to a new port of registry and issuing a new certificate of registry	150
10	For issuing a certificate of deletion from the registry	50
11	For amending the Register to reflect a change of ownership of a Canadian vessel or a share in one and issuing a new certificate of registry	150
12	For temporarily recording a vessel that is about to be built or is under construction in Canada	25
13	For registering a mortgage and entering its discharge in the Register	150
14	For amending the Register to reflect the transfer or transmission of a registered mortgage	150
15	5 For recording a change to the priorities of mortgages or for recording a court injunction or order	50
16	For approving a change in the name of a Canadian vessel and issuing a new certificate of registry	250
17	For witnessing a declaration before a registrar who is a commissioner of oaths	10
18	For historical research respecting the Register that requires searching through various information sources other than the computer database, per request, for each vessel listed under the category **(a)** non-active vessel **(b)** active vessel	 10 5
19	For historical research respecting the Register that requires the use of the computer database, for each side of a two-sided printed page	2
20	For issuing transcripts or abstracts of entries in the Register	50

	(a) for each certified copy **(b)** for each uncertified copy	20

3 (1) The fee payable for registering a vessel, a group of small vessels or a fleet in the small vessel register for a five-year period is $50.

(2) Subsection (1) does not apply in respect of pleasure craft.

(3) For the purposes of this section, group of small vessels means two or more vessels of 5 gross tonnage or less that are owned by the same person. SOR/2007-100, s. 2; SOR/2015-99, s. 1.

SERVICES PROVIDED out of HOURS

4 If a service referred to in this Tariff, including the travelling time related to the service, is provided by a registrar during the hours set out in column 1 of an item of the table to this section, the fee payable, in addition to any other fee payable, is the greater of the fee set out in column 2 and the fee set out in column 3 of the item.

TABLE

	Column 1	**Column 2**	**Column 3**
Item	Hours	Fee per Hour or Faction of an Hour ($)	Minimum Fee
1	between 5:00 p.m. and 8:00 a.m. Monday to Friday, other than on a holiday	70	140
2	any hour on a Saturday or holiday	70	210
3	any hour on a Sunday	99	297

REPEAL

5 [Repeal]

COMING IN TO FORCE

6 This Tariff comes into force on May 1, 2002

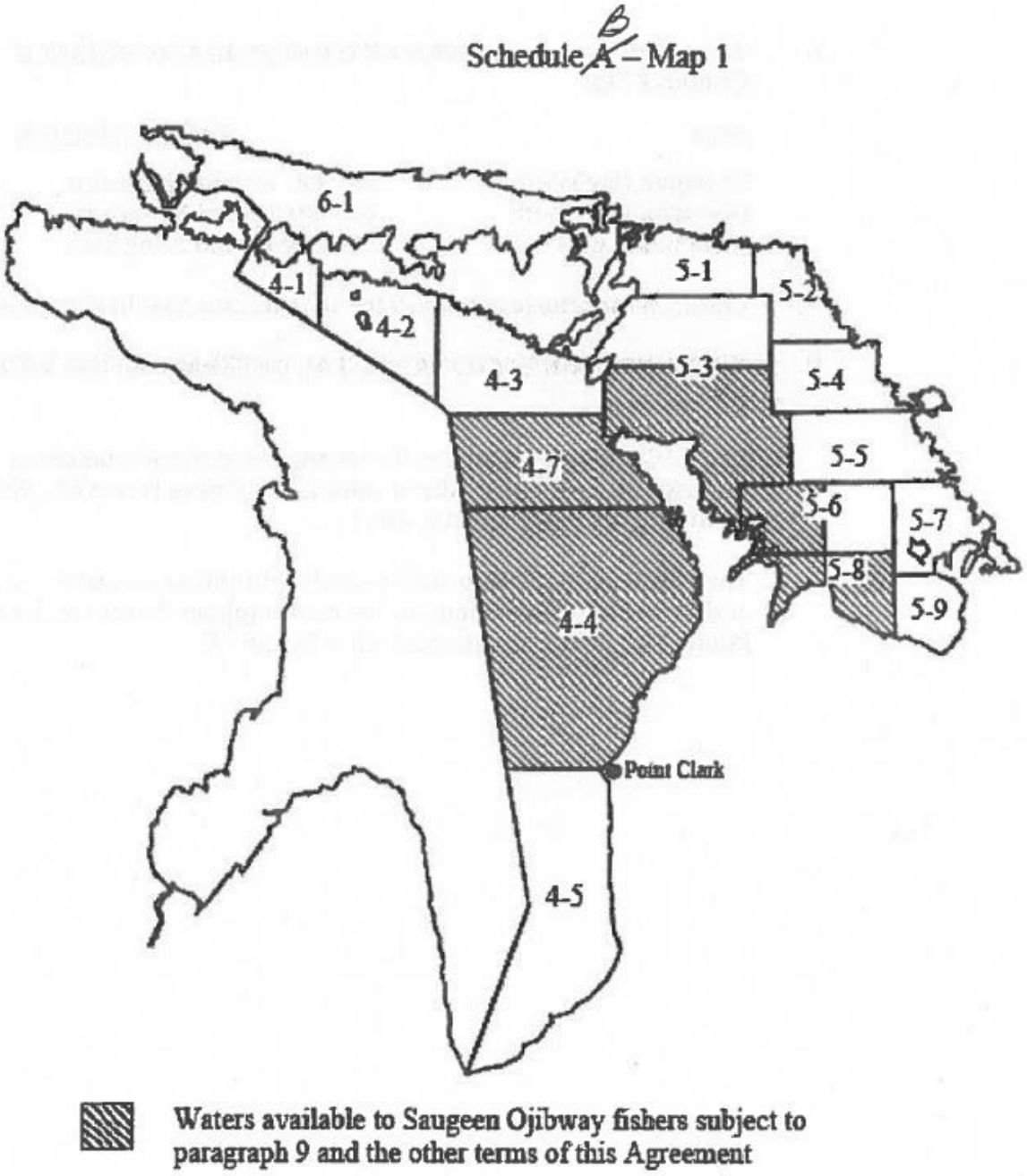
SCHEDULE C

Tab 1: Map 1 SON Territory

Exhibit P (annotated) – SON claims map with southeast corner removed

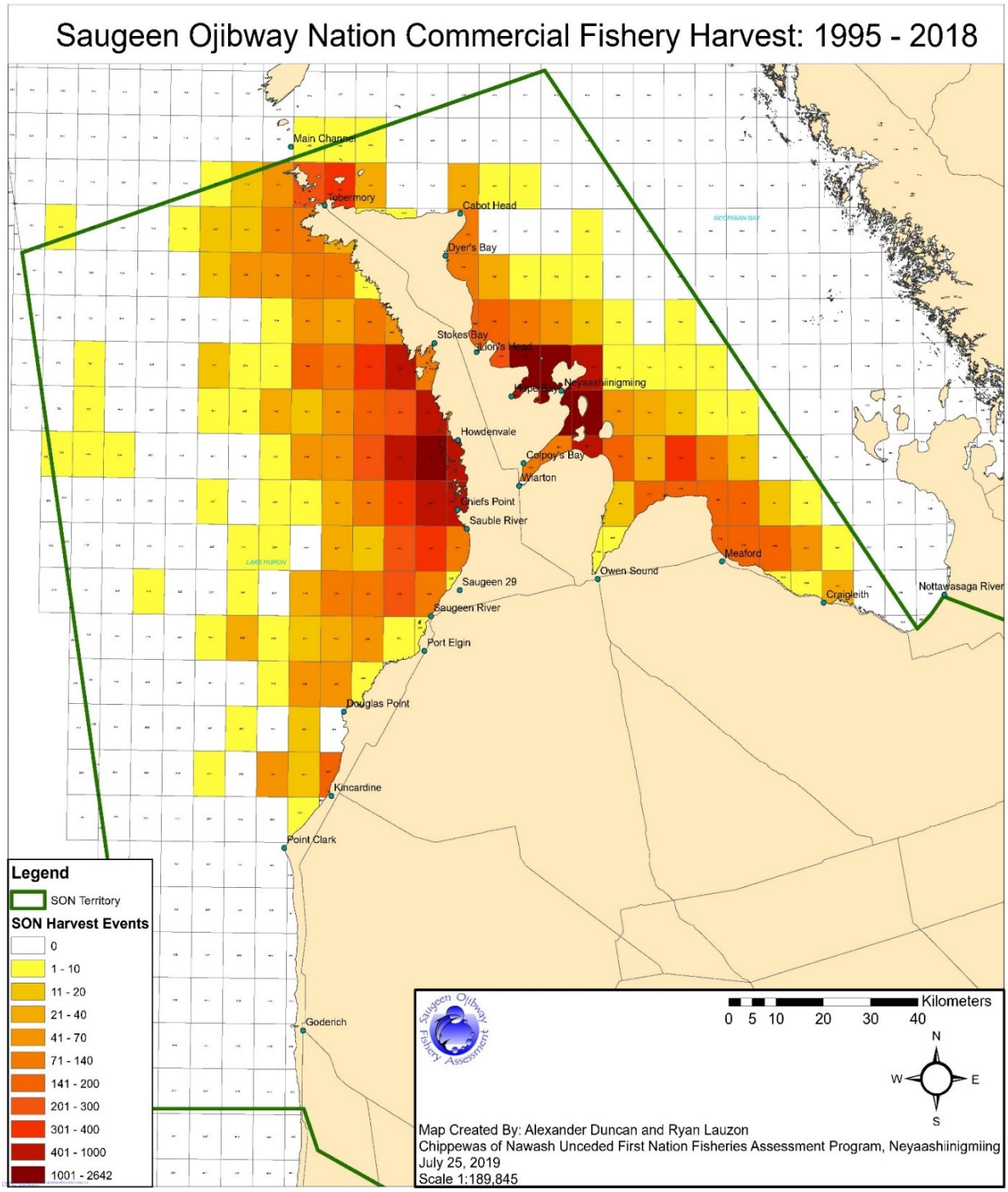
Tab 2: Map 2 Commercial Fish Agreement

Exhibit 4523



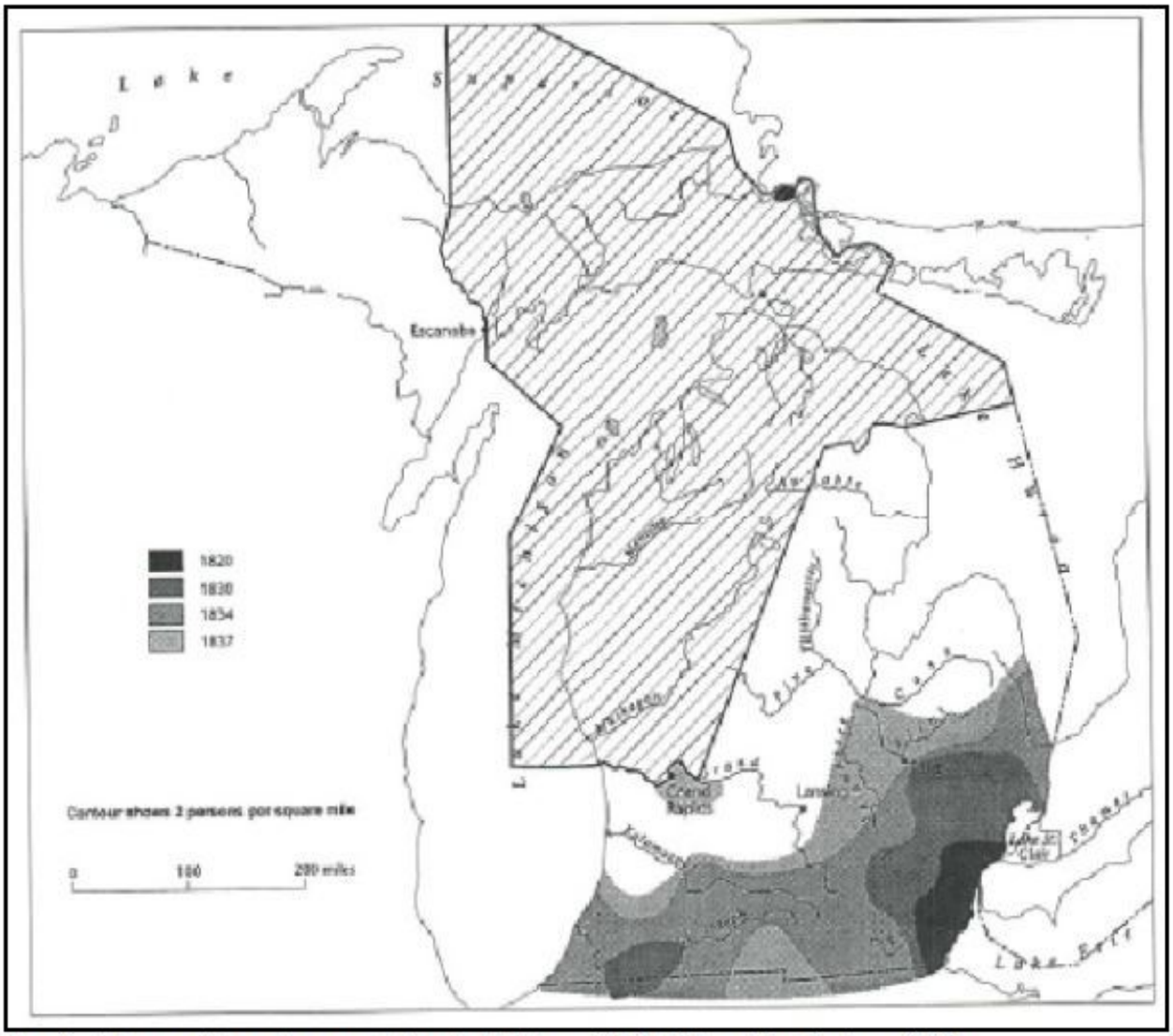
Tab 3: Map 3 Commercial Fish

Exhibit 4320



Tab 4: Map 4 US Treaty Washington (1836)

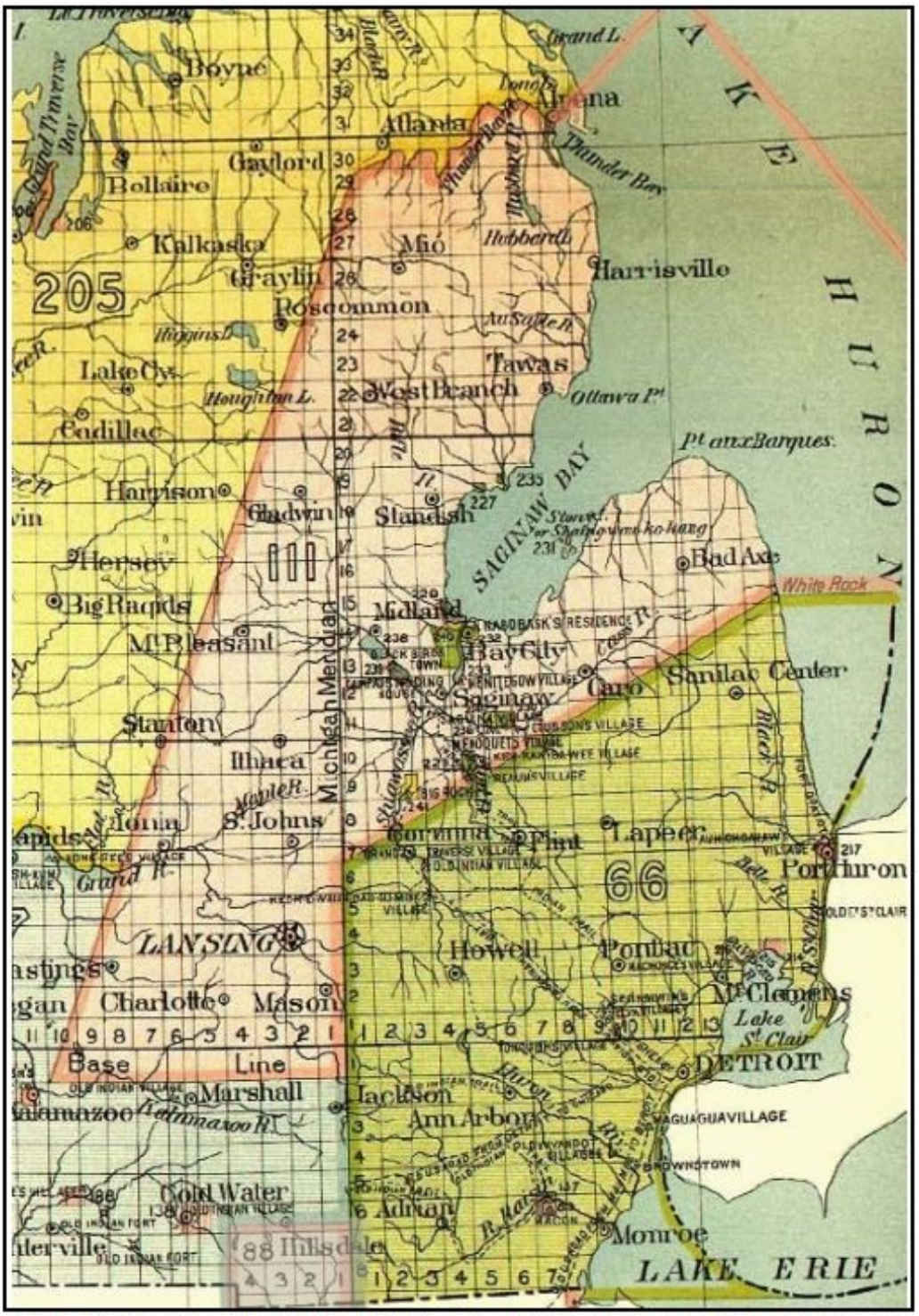
Exhibit 4513



Map 9. Advance of American population in Michigan, 1820-1837, and the Cession of 1836
(Cleland 2011, Map 3, p.67).

Tab 5: Map 5 US Treaties of Saginaw (1819) and Detroit (1807)

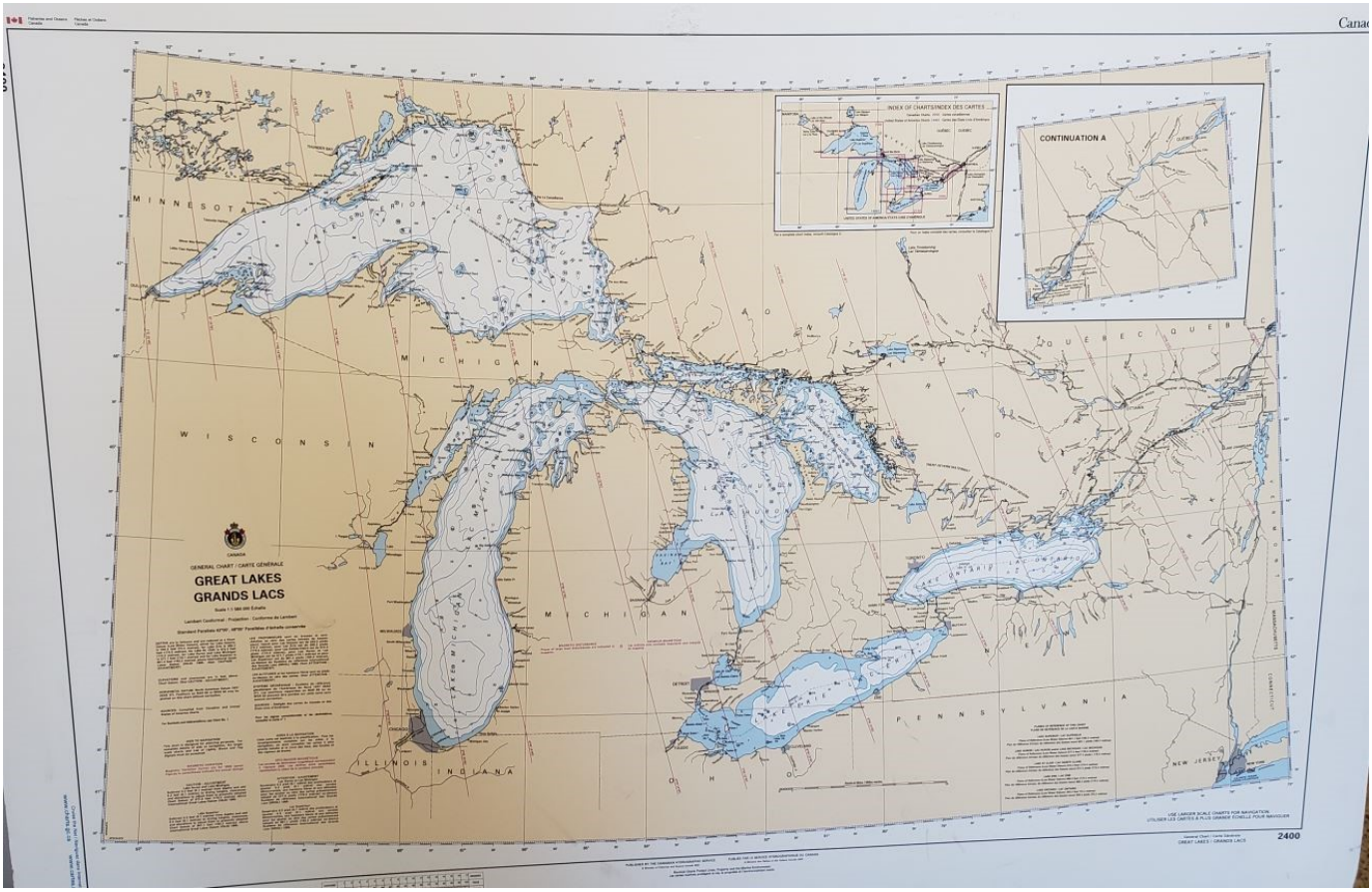
Exhibit 4513



Map 4. 1819 Saginaw Treaty [Pink] relative to the 1807 Detroit Treaty [Green] (Gulig 2007, Figure 1, p.12; Lake Huron boundaries original; pink highlights added for clarity).

Tab 6: Map 6 General Map of Great Lakes

Exhibit W



Tab 7: List of Evidence about late 19th Century Fishing by SON

- William Plummer, Superintendent and Commissioner, Indian Affairs to Minister, Department of the Interior, May 10, 1876, Exhibit 2786, p. 2;

- William Plummer, Superintendent and Commissioner, Indian Affairs, to Minister, Department of the Interior, March 9, 1876, Exhibit 2782, unpaginated [PDF images 6-7];

- Petition of the Cape Croker Indians, November 6, 1863, Exhibit 2630, p. 1104 – *protesting leasing of fishery around their reserve to white people*;

- Letter from William Bartlett, Visiting Superintendent of Indian Affairs, to William Spragge, Deputy Superintendent of Indian Affairs, September 14 1867, Exhibit 2663, p. 455 – *Regarding Croker Band complaint that white people are fishing in waters reserved for the band;*

- Petition from Saugeen Chiefs and Principal Men to William Bartlett, Visiting Superintendent of Indian Affairs, March 5, 1866, p. 332, Exhibit 2654 - *Seeking exclusive right to fish at Sauble Bay*;

- Petition of the Cape Croker Indians, November 6, 1863, Exhibit 2630, p. 1104 – *Noting "a great part of their subsistence and living was derived from their fishing"*;

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

- F. Lamorandiere, Secretary and Interpreter, Cape Croker to William Plummer, Superintendent and Commissioner, Indian Affairs, February 10, 1876, Exhibit 2780, pp. 1-2 – *Seeking renewal and extension of fishing license;*

- Department of Marine and Fisheries, Memo re Request of Saugeen Reserve Indians for Seining Privilege, May 16, 1895, Exhibit 3111, p. 1;

- Waldron Elias, Interpreter Saugeen Reserve, to Alexander McNeill, Member of Parliament, April 26, 1895, Exhibit 3107 – *Seeking the exclusive privilege of fishing in the waters fronting the reserve without license*;

- J.W. Jermyn, Indian Agent to Hayter Reed, Deputy Superintendent General, Indian Affairs, April 16, 1896, Exhibit 3138, pp. 1-2 – *Expressing opposition to request to grant Indians fishing privileges outside their current limits*;

- Hayter Reed, Deputy Superintendent General, Indian Affairs, to William Smith, Deputy Minister of Marine and Fisheries, April 22 1896, Exhibit 3139 – *Opposed to request to grant fishing licenses outside the reserve to Cape Croker Indians*;

- William Plummer Superintendent and Commissioner of Indian Affairs, to MacDonald John A, February 19, 1881, Exhibit 2886, p. 1 [transcript].

- **Expert Opinion:** Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, pp. 100-102, 113, 116-118-121.

SCHEDULE D – GLOSSARY OF TERMS

TERM	DEFINITION
Aboriginal	Refers to people that are recognized under section 35 of the *Constitution Act, 1982* - that is, Registered First Nations, non-Registered First Nations, Métis or Inuit people.
Anishinaabe	Term used by many Indigenous groups living in the Great Lakes region to describe themselves and their larger cultural community. The term is used by various groups including those that are also known as Pottawatomi, Ojibway and Ottawa. The Plaintiffs historically referred to and continue to refer to themselves as Anishinaabe.
Anishinaabek	Plural form of Anishinaabe.
Band	Under the section 2(1) of the *Indian Act*, means: "a body of Indians (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951, (b) for whose use and benefit in common, moneys are held by Her Majesty, or (c) declared by the Governor in Council to be a band for the purposes of this Act." "Band" also is an anthropological term of art and was used in this way by numerous witnesses. It refers to a local socio-political group of indigenous people. Some bands in the anthropological sense do not meet the definition of "band" in the *Indian Act* sense. Further, bands in the anthropological sense existed long before the *Indian Act* existed. "Band" is also a term often used in historical records. Most Bands (in either sense) now prefer to use the term "First Nation".
Dodem	Refers to a kinship group named after a symbolic animal, bird or fish; the most significant identity, after Anishinaabe, of SON members; means 'clans'.
Fishing Islands[398]	A cluster of islands located in the Lake Huron near the western coast of the Peninsula

[398] For visual/approximate location: see V. Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nation's Fishing Islands in Lake Huron" in *Co-Existence? Studies in Ontario-First Nation Relations,* Hodgins et al (ed) (1992), Exhibit 4332, p. 83 [PDF 4].

TERM	DEFINITION
Haudenosaunee	Refers to Iroquoian-speaking people also known as the Iroquois; also referred to as Five Nations before 1722 and Six Nations after 1722; their core traditional homeland is south of Lake Ontario.
Indian	Under the *Indian Act*, refers to a person who is registered as an Indian or entitled to be registered as an Indian under the *Indian Act*; under section 91(24) of the *Constitution Act, 1867*, refers to all Aboriginal peoples including non-status Indians, Inuit and Métis. This has a certain historical meaning but it is not the preferred term.
Indigenous	Refers to people and their descendants who were in Canada prior to colonization; often used interchangeably with the term "Aboriginal".
Michilimackinac	Refers to the area where Lake Michigan flows into Lake Huron, the straits at the mouth of Lake Michigan.
Nation	Refers to people with a shared culture and often a shared language - e.g. the Anishinaabek nation; a First Nation is part of a larger nation.
Odawa/Ottawa	Refers to a sub-ethnicity of Anishinaabe; means 'traders' .
Ojibway/Ojibwe	Refers to a sub-ethnicity of Anishinaabe; includes Chippewa, Mississauga and Saulteaux; known by a number of other names that were given to them by others.
Petun	Refers to Iroquoian-speaking and horticultural people also known as Tionnantate or Tobacco; they resided in “Petunia”, which is east of the Blue Mountains, in the general vicinity of what is now Collingwood, in the early 17th century.
Pottawatomi	Refers to a sub-ethnicity of Anishinaabe; means "People of the Place of Fire", "Keepers of the Council Fire", or "Fire People".
Saugeen Ojibway Nation, or SON	Collective comprised of two First Nations: Saugeen First Nation and Chippewas of Nawash Unceded First Nation; name used by the Plaintiffs to refer to themselves collectively, both present day and historically.
Three Fires Confederacy	Refers to an alliance of Ojibwe, Odawa and Pottawatomi, which, over the years, and as the need arose, had specific political and military manifestations to deal with hostilities that arose in the Great Lakes area or with outside threats, for example.
Traditional Knowledge	Means knowledge and values which have been acquired through experience or observation or have been handed down from one generation to another.

TERM	DEFINITION
Traditional Knowledge Holder	Refers to someone recognized by their community as having Traditional Knowledge; sometimes Traditional Knowledge Holders are referred to as Elders, but not all Traditional Knowledge Holders are advanced in age and vice versa.
Treaty 45½ Lands	Refers to the approximate 1.5 million acres of land that was subject to Treaty 45½, south of the Peninsula.
Treaty 72 Lands	Refers to the approximate 450,000 acres of land that was subject to Treaty 72, north of Owen Sound extending to Tobermory.
Western Nations	The term which Sir William Johnson used to refer to the Indigenous Nations that were resident around the Great Lakes in the mid-18th century. The term included the Great Lakes Anishinaabe.

The Chippewas of Saugeen First Nation, et al. Plaintiffs (Appellants)	and	The Attorney General of Canada, et al. Defendants (Respondents)	SCJ Court File No.: 03-CV-261134CM1 Court File No. C69830

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at Toronto

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