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' REPLY FACTUM

Contents

INTRODUCTION

1. In their responding facta, Canada and Ontario raise issues requiring reply or clarification from SON in the following areas:

(a) SON's spiritual connection and responsibility to SON's territory, and SON's lack of distinction between land and water territory;

(b) The nature of alliances, and how such alliances should be considered within the test for Aboriginal title;

(c) The Pontiac War and SON's capacity to exclude the British;

(d) The existence, extent and impact of the Treaty of Niagara;

(e) Whether an 'all or nothing' approach to territory is appropriate when determining Aboriginal title; and

(f) The distinction (or, as SON argues, lack thereof) between control of resources and control of territory.

2. We have addressed each of these issues below in turn.

3. There are also a number of instances that do not fall into any of the above topics, where Canada or Ontario either misunderstood SON's argument, or, in SON's submission, misstated evidence or caselaw. These are addressed in the final section of this factum.

1. SPIRITUAL CONNECTION AND RESPONSIBILITY

4. At paragraphs 97 and 98 of its factum, Canada takes the position that there is no inconsistency between Justice Matheson's findings about Anishinaabe local control of territory and spiritual relationship with all water. In doing so, Canada misunderstands the distinction between having a spiritual relationship, and having a spiritual responsibility, as well as the nature

of the inconsistency SON has identified in the Trial Judge's reasons. Ontario has a similar misunderstanding at para. 144 of its factum.

5. The Trial Judge found that the Creation Story gave the Anishinaabe overall responsibility to preserve the Earth,[1] including "a belief that they had responsibilities to all water including the water in lakes and rivers in their territories." She further found that SON shared these beliefs.[2] In making this finding, the Trial Judge implicitly found that Anishinaabe territories generally, and SON's territory specifically, included submerged land (i.e. "lakes and rivers *in their territories*").

6. The Trial Judge also found that decisions about territory, including harvesting of resources and who could come and settle on land, were made at the band level.[3] Thus, each band would only have authority to make decisions to exercise this responsibility in their own territory.

7. The evidence at trial was that Anishinaabe bands were the only entity to make decisions about the use and occupancy of their territory, which has remained the same from the 17th century to the present.[4] So, while it may be the case that Anishinaabe, including SON, have a relationship with and responsibilities to care for the whole Earth, including all waters, the Trial Judge's own findings mean that only SON would have the authority to make decisions about their own territory.[5] It follows that the spiritual responsibility in SON's own territory must have been more significant. It is the only place where SON would have had the authority to make decisions to

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[1] Reasons, para 202.
[2] Reasons, para. 219.
[3] Reasons, paras 175, 189, 457, 458 and 467.
[4] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6813, lines 8-16 and p. 6815, line 24 to p. 6816, line 8; See also Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 912, line 5 to p. 915, line 7; Prof. Paul Driben "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 47 [PDF 47].
[5] Reasons, paras 175, 188 and 189, where the Trial Judge found that decisions, including decisions about land use, were made at the band level.

fulfill their responsibility to the water. SON submits that the conclusion made by the Trial Judge, which is repeated by Canada, that SON did not have a particular connection and corresponding responsibilities to the water in their territory is inconsistent with the evidence and the Trial Judge's own findings.[6]

8. A helpful analogy is the responsibility an ecologically minded person might feel about keeping their own neighbourhood clean, versus keeping a city they were visiting clean: in their own neighbourhood, they might feel a positive obligation to take active steps to clean up the neighbourhood and prevent pollution, whereas in a city they were visiting they may only feel a negative obligation not to litter or create more pollution by their presence.

9. At paragraph 12 of its factum, Ontario draws a distinction between the "responsibility to care for and preserve" and the "responsibility to care for and protect the earth and water". Contrary to Ontario's submission, the Trial Judge's reasons refer both to a "responsibility to care for and preserve"[7] and a responsibility "to care for and protect" the water.[8]

10. At paragraph 146 of its factum, Ontario asserts that a number of statements made in SON's factum are conclusions proposed by SON rather than facts found directly in the evidence. To the contrary, those statements are supported by the evidence of community witnesses including Karl

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[6] Reasons, paras 202, 567.
[7] Reasons, paras 198, 199 and 202.
[8] Reasons, para 195.

Keeshig,[9] Marshall Nadjiwan,[10] and Vernon Roote.[11] They are also supported by the expert evidence of Dr. Driben.[12]

11. Ontario incorrectly states at paragraph 17 of its factum that there is no evidence supporting the proposition, found at paragraph 29 of SON's factum, that there "is no substantive distinction between the relationship of the Anishinaabe to land and to water" to the extent that this proposition relates to "territory". In addition to the evidence from community members Vernon Roote and Karl Keeshig cited at paragraphs 29 and 30 of SON's factum supporting the proposition,[13] Vernon Roote also testified about the connection and equality between water, land and air.[14] There was also expert evidence from Dr. Driben[15] and Dr. Reimer[16] and academic work written by Dr. Victor Lytwyn[17] in support of the proposition that Anishinaabe included water spaces, or submerged land, in their territory.

2. MISUNDERSTANDING OF ALLIANCES

12. In their facta, Canada and Ontario demonstrate a misunderstanding of how alliance relationships work, both with respect to the alliance between the Anishinaabe and the French, and

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[9] Evidence of Karl Keeshig, April 29, 2019, Transcript vol 3, p. 225, lines 11 to 25; p. 227 line 24 to p. 229 line 24; p. 288, line 8 to p. 289, line 7.
[10] Evidence of Marshall Nadjiwan, June 28, 2019, Transcript vol 22, p. 2124, lines 1-10.
[11] Evidence of Vernon Roote, May 13, 2019, Transcript vol 5, p. 456, line 20 to p. 457, line 11.
[12] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 162-163 [PDF 162-163]; 175-176 [PDF 175-176].
[13] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 459, lines 5-18; Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 222, line 23 to p. 223, line 3.
[14] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 456, line 8 to p. 457, line 11.
[15] Prof. Paul Driben "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, p. 90 [PDF 90]; Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6840, lines 1-6 and p. 6841, lines 14-24.
[16] Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, p. 131 [PDF 143].
[17] Victor Lytwyn, "Waterworld: The Aquatic Territory of the Great Lakes First Nations", Exhibit 4142, pp. 14-15 [PDF 2-3].

the Anishinaabe alliance that fought together in Pontiac's war. Canada and Ontario espouse an incorrect narrative that control by force is the only form of control that is valid for the purposes of the Aboriginal title analysis. While control by force is certainly one of the means to establish control for the purpose of Aboriginal title, there are other, equally valid ways to establish control, including through peaceful relations such as granting others permission to use land, and entering into treaties about the land.[18]

13. Canada and Ontario have advanced the argument that the French did not seek permission from the Anishinaabe to build and travel between their forts in the Great Lakes,[19] and Ontario has used the presence of the French ship *Le Griffin* on Lake Huron in the 17th century to suggest that SON lacked the capacity to exclude European vessels.[20]

14. These arguments misunderstand the nature of the relationship between the French and the Anishinaabe, including SON: they were allies.[21] As such, the relationship cannot be viewed as a hostile one, where one party is asserting dominance over the other, but rather as a friendly one where the parties are working together. For that reason, no negative inference can be drawn against SON from French presence in Lake Huron or French movement between their forts in the Great Lakes.

15. The Trial Judge found that SON did not show that the French sought permission from SON or other Anishinaabe to build and travel between forts on the Great Lakes.[22] In SON's submission, even if the French did not seek permission, that is not inconsistent with the fact that from the

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[18] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] SCR 257 at paras 48-49.
[19] Canada's factum, para 104; Ontario's factum, para 66.
[20] Ontario's factum, para 65.
[21] Reasons, paras 484 to 487.
[22] Reasons, paras 491, 495, 577.

Anishinaabe perspective, the French had permission as part of their alliance with the Anishinaabe.[23] The Trial Judge failed to make any findings on this question from the Anishinaabe perspective.

16. There was also evidence that from the French perspective the alliances between the French and the Anishinaabe provided permission to the French to travel in Anishinaabe territory. Professor Morin gave this opinion, stating "[o]verall, I do not see that the French believed they had a right to travel through Aboriginal territories independently of the treaties entered into with their allies."[24] Professor Beaulieu (called as an expert witness by Canada) agreed on cross examination that it was possible that France entered into an alliance with a First Nation where one aspect of the alliance was that the First Nation gave permission to the French to use their land.[25] The trial judge did not address this evidence in her reasons.

17. Commenting on the alliance that exerted control during Pontiac's war, Ontario argues at paragraph 165 (iii) of its factum that if SON needed help to control territory, they did not control it, and it should be the broader group instead that could claim the right. This again reveals a fundamental misunderstanding of how alliances work. On this reasoning, by analogy, France did not control its own territory since they needed help from the Allies to expel the German army in

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[23] Starting with, for example, the encounter between Champlain and the Cheveux Relevées in 1615, described in Appeal factum paras 36 to 39 and 136. See also Evidence of Professor Morin, April 28, 2020, Transcript vol 96, p. 12472, lines 1-6.

[24] Prof. Michel Morin, "Alliances, Peace Treaties and Aboriginal Territories in the Great Lakes Area During the French Regime (1603-1760)" (2017), Exhibit 4929, pp. 52-54 [PDF 52-54]; also see Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12470, line 14, to p. 12472, line 6.

[25] Evidence of Prof. Alain Beaulieu, Transcript vol 63, November 21, 2019, p. 8183, line 21 to p. 8184, line 2. Prof. Beaulieu was clear in his testimony that it was not part of his mandate to determine whether this had happened: Evidence of Prof. Alain Beaulieu, Transcript vol 63, November 21, 2019, p. 8182, line 5 to 23 and p. 8183, line 21 to p. 8184, line 2.

World War II. However, no one suggests, for instance, that the Allies are the proper title holders to France for that reason.

3. THE PONTIAC WAR AND SON CAPACITY TO EXCLUDE

British Presence on Lake Huron

18. Ontario's arguments about British access to Lake Huron rely on hypothetical situations and ignore the reality that the British were largely absent from Lake Huron in 1763, and were entirely absent from the claim area.

19. Further to paragraph 124 of Ontario's factum, even supposing that exclusivity is to be assessed against all others including Europeans, there is no evidence that Europeans were within the SONTL in 1763. SON therefore submits that SON need not show the intent and capacity to exclude some hypothetical European movement into their territory. SON's expulsion of the Haudenosaunee from the SONTL in the late 17th century, plus there being no evidence of anyone but SON in the SONTL in 1763, is sufficient exclusivity.

20. Even looking at Lake Huron more broadly, and not directly in the claim area, Ontario exaggerates British presence. Ontario states at paragraph 7 of its factum that neither SON nor other Anishinaabek could have prevented large or small British sailing vessels from travelling to Lake Huron, at February 10, 1763. This fails to recognize that the Great Lakes Indigenous nations *did*

keep the British off Lake Huron in the summer of 1763.[26] It was only after the Congress (or Treaty) of Niagara in 1764 that the British re-occupied the forts that had been taken during Pontiac's war.[27]

21. Contrary to the statement at paragraph 179 of Ontario's factum, the Trial Judge did not find that the British could access Lake Huron in large vessels and in smaller, armoured boats, in 1763. The passages of the Trial Judge's decision, relied on by Ontario for this proposition, are about the conclusion of Pontiac's war and the intention of the parties in 1764 at Niagara. The Trial Judge does not make a finding that the British could access Lake Huron in 1763. As such, SON maintains that any conclusion that the British controlled the claim area at the relevant time is not based in fact. As noted above, there is no evidence of the British in the claim area in 1763, and in fact, the first documented British presence in the claim area is not until Gother Mann's 1788 exploration.[28]

22. Ontario further misconstrues the Trial Judge's findings when it states, at paragraph 168 of its factum, that the capacity of British bateaux and larger vessels to travel into Lake Huron meant that even in areas close to shore SON could not keep the British out. In addition to their being no British to keep out, at the relevant time in 1763, this statement ignores the evidence that larger

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[26] The Anishinaabe forced the British from nine of their 12 forts, and none of the ones remaining under British control (Fort Detroit and Fort Pitt, which were both under siege, and Fort Niagara) were on Lake Huron: 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 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.

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

[28] Prof. Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s" (2016), Exhibit 4195, pp. 5-7, 22 [PDF 5-7,22].

vessels were ill suited to navigate the waters around the Bruce peninsula and that canoes actually accounted for 95% of the crafts on the water.[29]

Contesting Access vs Controlling Access

23. Ontario makes the argument in its factum at paragraph 121 and elsewhere that the evidence led by SON of Pontiac's war was insufficient to demonstrate an intention and capacity to exclude others from water spaces because the Anishinaabe merely demonstrated an ability to slow down, or contest, British access to Lake Huron (by way of the Detroit River). Ontario argues that in order to satisfy the exclusivity lens of the Aboriginal title test, the Anishinaabe would have needed to prevent British access to the Detroit River all together (since it leads to Lake Huron).

24. By this logic, the British also could not be said to have controlled Lake Huron, as Ontario maintains, since they did not prevent Anishinaabe access to Lake Huron or to the Detroit River.

Anishinaabe Permission to Access Lake Huron

25. At paragraph 72 of its factum, Ontario argues that an effort by the Western Nations to re-set the terms of their alliance with the British does not show intention and capacity to retain exclusive control. Ontario effectively argues that anything short of physical coercive force aimed at the complete removal of others falls short of control. Ontario's perspective ignores the judicially recognized alternative ways of exercising control over territory.

26. To limit intention and capacity to retain exclusive control to physical force is too narrow a reading of the law. In *Tsilhqot'in*, the Court held that exclusivity can be established by proof that others were only allowed access to the territory with permission and that the fact that permission

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[29] Prof. Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s" (2016), Exhibit 4195, pp. 29-30 [PDF 29-30]; Evidence of Prof. Carl Benn, Transcript vol 39, Aug. 16, 2019, p. 4447, line 5 to p. 4448, line 22.

is requested and granted or refused, or that treaties were made with other groups, may show intention and capacity to control territory.[30] SON submits that the Western Nations re-setting the terms of their alliance with the British is exactly the sort of permissive use of territory contemplated by the Court to show intention and capacity to retain exclusive control.[31]

27. Ontario also looks to the fact that the British were freely on the waters around the Fort of Detroit before and after the siege of the fort during Pontiac's war as reason to argue that the Anishinaabe did not have control of Lake Huron.[32] Ontario fails to consider that the British had Anishinaabe permission to access the territory before and after the war, and, in times of peace the Anishinaabe would not have had reason to contest British access. Prior to Pontiac's war the Anishinaabe had entered into a treaty at Detroit in 1761 with the British which provided for the British to have with unimpeded access to the forts.[33] After the siege, the parties made peace at Niagara and the Anishinaabe once again agreed to provide unimpeded access to the Forts.[34]

28. Similarly, at paragraph 36 of its factum, Ontario misconstrues Prof. Hinderaker's evidence as supporting the argument that a lack of Anishinaabe effort to exclude the British from the Great Lakes prior to Pontiac's war meant that the British had control of those water spaces. Although Prof. Hinderaker did acknowledge that the British could move freely in those waters prior to the

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[30] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] SCR 257 at para 48.
[31] While the Trial Judge found that the British were not seeking permission, nor was permission needed for the British to access the Great Lakes (Reasons, para 553), SON is challenging this finding (Appeal Factum, para 59).
[32] Ontario's factum, paras 73 and 173.
[33] Evidence of Prof. Hinderaker, Transcript vol 19, June 10, 2019, p. 1597, line 4 to p. 1599, line 11.
[34] Evidence of Prof. Hinderaker, Transcript vol 19, June 10, 2019, p. 1658, line 17 to p. 1660, line 9.

siege he also added: "I believe it's fair to say there was no effort to exclude them before that point."[35]

29. Ontario also seems to conflate mere British presence on the waters with British control. In doing so, it ignores the fact that the Anishinaabe also had uncontested access to waters before and after the war.

Misunderstandings and Misrepresentations

30. Ontario has misconstrued or misinterpreted the expert evidence of Prof. Hinderaker in a number of instances in its appeal materials.

31. In trying to downplay the role that Pontiac's war had in establishing Anishinaabe control of the Great Lakes, including Lake Huron, Ontario, at paragraph 24 of its factum, states that "the leading scholar called the attacks 'loosely coordinated local revolts'." Ontario cites Fred Anderson as the leading scholar and attributes the accolade to Prof. Hinderaker. However, Prof. Hinderaker acknowledged Fred Anderson as a leading scholar on the topic of the Seven Year's War, *not* Pontiac's War.[36]

32. Ontario's position at paragraph 25 of its factum that "many communities" did not participate in Pontiac's War misconstrues Prof. Hinderaker's evidence which was that although *some* communities did not participate in the uprising, "the Great Lakes Anishinaabeg were nearly

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[35] Evidence of Prof. Hinderaker, Transcript vol 21, June 12, 2019, p. 2042, line 19 to p. 2045, line 9.

[36] Evidence of Prof. Hinderaker, Transcript vol 19, June 10, 2019, p. 1645, lines 12-18; Prof. Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, p. 8 [PDF 8].

unanimous in supporting the larger goals that were being pursued by Pontiac and his followers outside the walls of Detroit in the summer of 1763."[37]

33. Ontario further misconstrues Prof. Hinderaker's evidence by highlighting that the "following year, at the Congress of Niagara, numerous Indigenous communities represented that they had been neutral or supported Britain."[38] Although it may be true that they said that, Prof. Hinderaker testified that historians are of the view that there were communities represented at Niagara who did in fact participate in Pontiac's uprising, but did not admit to doing so in order to avoid sanction.[39]

34. Ontario misconstrues Prof. Hinderaker's evidence on the reasons some First Nations changed their goal during Pontiac's war from excluding the British to controlling the terms of British re-entry to the posts. They cite Prof. Hinderaker as saying that the First Nations changed their goal because they believed or knew that they could not exclude the British. What Prof. Hinderaker actually said was that he thought "both First Nations and British, both parties to the war of – to Pontiac's War, to the various engagements described under that term, came to the conclusion during the course of the summer of 1763 that their conflict was ruinous and neither wanted to maintain it."[40]

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[37] Prof. Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013), Exhibit 4017, pp. 53-54 [PDF 53-54].
[38] Ontario's factum, para 25.
[39] Evidence of Prof. Hinderaker, Transcript vol 20, June 11, 2019, p. 1841, line 6 to p. 1842, line 10.
[40] Evidence of Prof. Hinderaker, Transcript vol 21, June 12, 2019, p. 2041, line 22 to p. 2042, line 3.

35. Ontario states at paragraph 29 of its factum that SON does not challenge the Trial Judge's finding that SON did not establish their participation in the war. SON challenges the factual basis for this finding at paragraph 52 of its appeal factum.

4. THE TREATY OF NIAGARA

Geographic Scope

36. At paragraph 42 of its factum, Ontario describes the affirmation of the Covenant Chain alliance at Niagara in the summer of 1764 as extending the geographic scope of the alliance to "include the Odawas of L'Arbre Croche and the Menominees from La Baye, who had protected British garrisons during the war." Ontario relies on the evidence of Prof. Hinderaker in this regard. Ontario's description of the geographic scope of the Covenant Chain omits that it was extended to all the Western Nations, not just those who protected the British.

37. Prof. Hinderaker explained that William Johnson, the Superintendent of Indian Affairs for the Northern Colonies, wanted to extend the reach of the Covenant Chain to the upper Great Lakes, which Johnson had never visited and where the British remained, in many ways, an unknown ally.[41] Johnson therefore asked that the 23-row wampum belt marked "1764" be made known to all the communities of the upper Great Lakes and kept with the Chippewas of Sault Ste. Marie.[42] Prof. Hinderaker concluded that this geographical extension of the Covenant Chain was an

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[41] Prof. Eric Hinderaker, Second Supplementary Report: A response to Alain Beaulieu, "The Congress at Niagara in 1764: The Historical Context and Meaning of the British-Aboriginal Negotiations", Exhibit 4020, p. 10 [PDF 10].

[42] Prof. Eric Hinderaker, Second Supplementary Report: A response to Alain Beaulieu, "The Congress at Niagara in 1764: The Historical Context and Meaning of the British-Aboriginal Negotiations", Exhibit 4020, p. 10 [PDF 10].

important innovation in the structure of British-First Nations diplomacy in the Great Lakes, and constituted one of the most important achievements at Niagara.[43]

Absence of Complaints After 1764

38. At paragraph 82 of its factum, Ontario points to the absence of documentary evidence of complaints by SON regarding European navigation in the claim area after the assertion of Crown sovereignty and into the 1800s. This statement ignores the events of 1764 and the renewal of the Covenant Chain at Niagara. It also ignores the reality of who was in the claim area during that time period.

39. As noted by the Trial Judge, a condition of renewing the alliance between the Western Nations and the British was that the Western Nations would not commit acts of violence against the British or their forts and would not interfere with travel over the lakes and rivers.[44] The absence of complaints in the years following this agreement does not imply that SON had no desire, intention or capacity to retain exclusive control. Instead, it merely suggests that SON remained – at that time – content with the terms of the agreement reached at Niagara.

40. Further, the reality described by Ontario's expert witness, Dr. Reimer, was that up until the early 1800s, British officials knew very little outside of the main French forts or British holdings, and "the Saugeen traditional territory and peninsula were part of that unknown area, as far as the British were concerned."[45] It was not until the 1820s that Lieutenant Henry Bayfield produced the first maps of Lake Huron and Georgian Bay that were of sufficient quality to be used for

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[43] Prof. Eric Hinderaker, Second Supplementary Report: A response to Alain Beaulieu, "The Congress at Niagara in 1764: The Historical Context and Meaning of the British-Aboriginal Negotiations", Exhibit 4020, p. 10 [PDF 10].
[44] Reasons, para 545.
[45] Evidence of Dr. Gwen Reimer, Transcript vol 83, February 12, 2020, p. 10575, lines 4-14.

navigation.[46] It follows then that there wouldn't have been many Europeans, if any at all, in SON's territory for SON to complain about until at least the 1820s. The lack of documentary evidence of complaints must be viewed in this context.

5. THE ALL OR NOTHING APPROACH TO TERRITORY

41. At paragraphs 23 and 95 of its factum, Canada asserts that the Trial Judge found that "there was no evidence linking the Title Claim Area to the Appellants in 1763." SON submits that this is an unfair interpretation of what the Trial Judge concluded. In her reasons, she found that:

(a) SON was present on the Peninsula adjoining the Claim Area in 1763;[47]

(b) SON had a spiritual connection to the water in the Claim Area;[48]

(c) The submerged land that corresponds with the healing waters at Nochemowenaing was of central significance to SON's distinctive culture;[49]

(d) SON were and still are a "fishing people", and fishing was central to their traditional economy and way of life;[50]

(e) There is sufficient evidence from which to infer that SON's ancestors tried to control fishing in specific areas around the Peninsula in the period around 1763.[51]

42. In her reasons, the Trial Judge applied the *Tsilhqot'in Nation* test to the Claim Area as a whole.[52] She declined to consider an alternative claim to "portions" of the Claim Area.[53] SON

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[46] Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4494, line 2, to p. 4495, line 4; Map – Lake Huron Sheet II, 1828, Exhibit 911; and Map – Lake Huron Sheet III, 1822, Exhibit 912.
[47] Reasons, paras 443 and 561.
[48] Reasons, para 219.
[49] Reasons, para 246.
[50] Reasons, paras 223 and 1218.
[51] Reasons, para 452.
[52] Reasons, paras 585-587.
[53] Reasons, paras 592-597.

submits that Canada's statement repeats the Trial Judge's "all or nothing" proposition: that to prove title the evidence must link SON to the *entire* Claim Area, which is a legal error given the Supreme Court of Canada's clear guidance that requiring proof of Aboriginal title precisely mirroring the claim area is too exacting.[54]

43. Ontario also repeats the Trial Judge's "all or nothing" approach in a slightly different way. At paragraphs 3 and 7 of its factum, Ontario asserts that: "SON's ancestors used little of the title claim area" and SON's relationship to the Claim Area when the Crown asserted sovereignty "was not a relationship of use of all or most resources, occupation of all or most places, and of exclusion and control."

44. SON disagrees with Ontario's characterization of its use of the Claim Area. SON also disagrees that proof of use of all or most of the claim area is a necessary or appropriate requirement for the test to Aboriginal title. As noted above, the Supreme Court of Canada has rejected such a standard. Moreover, the injustice of requiring proof of every part of an Aboriginal title claim area is compounded by the difficulty of such a task. As Justice Kent of the BC Supreme Court succinctly observed:

> It is perhaps worth repeating the comments of Lamer C.J. in *Delgamuukw* where he described the task of producing "definitive and precise evidence of pre-contact [A]boriginal activities on the territory in question" as "next to impossible" and an "almost impossible burden to meet". Some would argue that the burden of proof imposed upon Indigenous title claimants, based as it is on the legitimacy and primacy of asserted colonial sovereignty, is just another insidious example of systemic discrimination.[55]

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[54] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] SCR 257 at para 22. See also *William v British Columbia*, 2012 BCCA 285 at paras 117-126.
[55] *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*., 2022 BCSC 15 at para 287.

45. SON submits that this court should reject an all or nothing perspective in its inquiry as to the appropriate application for the test of Aboriginal title in this case.

6. CONTROL OF RESOURCES / TERRITORY

46. In reference to paragraph 132 of the Appellants' argument, Canada states that the Trial Judge "did not err in distinguishing between fish and the 'territory they reside in' since fish do not reside in a defined water space."[56] With respect, Canada has misconstrued SON's argument, which is that there is no distinction between the control of the resource (the fishery) and control of territory. SON does not make a claim to control over fish, but rather the area where fish are caught.

47. Ontario submits that: "SON did not intend to exclude people from areas close to shore except where the presence of those people interfered with their interest in the fishery."[57] It goes on to say that "assertion of a right to undertake the activity of fishing" does not show a proprietary claim,[58] and evidence that relates to the fishery "does not show assertions of ownership over tracts of water."[59] SON submits that Ontario's argument that SON's use of the fishery is somehow detached from ownership and control of the Claim Area repeats the Trial Judge's error of distinguishing between control of resources, which she accepted SON had, and control of territory.[60]

48. At paragraph 63-64, Ontario argues that the value of the *lakebed* within SON's territory arose after sovereignty. In reply, SON submits that a focus on the lakebed in isolation is misleading. SON's claim is framed – as a matter of property law theory – as a claim to the lakebed

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[56] Canada's factum, para 100.
[57] Ontario's factum, para 7.
[58] Ontario's factum, para 44.
[59] Ontario's factum, para 46.
[60] Reasons, paras 452, 457 and 467.

because water itself cannot be "owned" in Common Law.[61] At Common Law, it is the owner of the soil who owns all the way up to the heavens and down to the depths.[62] The fact that SON's claim is framed as title to the lakebed is a matter of trying to fit into Euro-Canadian legal theory and should not be taken to mean that the lakebed is a specific resource that must have been considered to have independent value.

49. At paragraph 63 and 64, Ontario goes on to argue that Anishinaabe did not understand every resource within the claim area as their "property" and until all resources in the Claim Area are treated as proprietary, title remains conditional and inchoate. Ontario relies on the evidence of Dr. Driben and Dr. Reimer in this regard.

50. In reply to Ontario's argument, it was Dr. Driben's evidence that at trial that the fisheries in the Claim Area *were considered by SON as the property of the band.*[63] It was also Dr. Driben's evidence that Anishinaabe considered aquatic resources other then fish to be their own.[64] Considering the nature of the Claim Area: as water territory, it is unclear what other resource (beyond the lakebed itself) Ontario suggests could be understood as property and was left unclaimed by SON. Even if there was a resource in the Claim Area that was not being treated by SON as owned, that does not mean that SON's sense of territory is somehow incomplete.

51. At paragraph 147 of its factum, Ontario submits that the Trial Judge's distinction between resource control and territorial control is supported by SON's expert, Dr. Driben, and Ontario's

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[61] SON's factum, para 146; see Reasons, para 250.
[62] The maxim is *Cujus est solum, ejus est usque ad coelum et ad inferos*; SON's factum, para 146.
[63] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 115-116 [PDF 115-116].
[64] Prof. Paul Driben, "An Anthropological Report on selected aspects of the cultural lives of the Saugeen Anishinaabe" (2013), Exhibit 4324, pp. 114 [PDF 114].

expert, Dr. Reimer.[65] Dr. Driben said that for Anishinaabe, something is regarded as property when it has a value as a trade good.[66] It was also Dr. Driben's evidence that: "[SON] consider water as part of their territory… and they regard the resources within that, as resources over which they have proprietary rights."[67] Dr. Reimer generally agreed with Dr. Driben's evidence.[68] This evidence does not support the conclusion that SON saw a distinction between resource control and territorial control. Rather, it shows how SON categorized the resources within its territory, which in turn could affected how they chose to exercise control over such resources[69] (i.e., to act against others if proprietary rights are not respected[70]). Dr. Driben's evidence was that Anishinaabe people (like SON) defend their territory against intruders and enemies through war when required.[71]

52. As Ontario observes at paragraph 162 of its factum, the inquiry into the occupation of submerged lands is a contextual one, which "must take into account the nature of the lands claimed."[72] "It is not necessary to show the same exclusive possession as would be required in respect of dry land" as "it is practically impossible to prevent occasional encroachments because the cost of prevention is altogether disproportionate to the value of the land."[73] SON's claim, therefore, must be assessed based on the nature of the land and the types of practical uses upon it

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[65] Citing Ontario's factum, para 63, at footnotes 117 and 118.
[66] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6841, lines 1-8.
[67] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6841, lines 14-24.
[68] Ontario's factum, paragraph 63, at footnote 117
[69] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6840 lines 1-6: water is part of their territory; see SON's factum, paras 26-30.
[70] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6842, lines 24-25 and p. 6843, lines 1-5.
[71] Evidence of Prof. Paul Driben, Transcript vol 54, October 22, 2019, p. 6820, lines 22-25 and p. 6821, lines 1-8.
[72] Ontario's factum, para 162.
[73] Ontario's factum, para 162, citing *Lord Advocate v Young*, (1887) 12 App Cas 544 (HL (Eng)), p. 553; *Nickerson v Canada (Attorney General)*, [2000] NSJ No 176, 185 NSR (2d) 36, para 35 (NSSC); Canadian Encyclopedic Digest, "Waters and Watercourses", II.1.(a), s. 32.

– namely, as submerged lands, occupation is shown through the use and control of the fishery and spiritual connection to the water.

7. OTHER ISSUES

Constitutional Rights

53. Regarding paragraph 53(d) of Canada's factum, SON says that the issue as stated suggests that the Crown could have a treaty right protected by s. 35 of the *Constitution Act, 1982*. While the Crown can gain rights under treaties, it is only the treaty rights of the Aboriginal peoples of Canada which have constitutional protection.[74]

Navigable Waters Issues

54. Paragraphs 64-65 of Canada's factum concern whether the tidal or non-tidal regime in English law should apply to non-tidal navigable waters in Ontario. Canada asserts that the Privy Council's decision in *Caldwell v McLaren* should be interpreted in light of the Ontario High Court of Justice's decision in *Keewatin Power v Kenora (Town)* (*"Keewatin Power* (HCJ)). This argument is ill-founded. *Keewatin Power* (HCJ) was reversed by the Ontario Court of Appeal, with Meredith JA saying that *Caldwell v McLaren* was "directly opposed to the conclusion of the trial Judge [in *Keewatin Power* (HCJ)]."[75] The Ontario Court of Appeal emphatically applied the English rule for non-tidal waters to ownership of the beds of non-tidal navigable waters in Ontario.[76]

55. In reply to paragraph 67 of Canada's factum, it is true that not all submerged lands are subject to the public right of navigation, but the threshold of navigability is so low that only very

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[74] *Constitution Act, 1982*, s. 35(1).
[75] *Keewatin Power Co. v Kenora (Town)* (1908), 16 OLR 184 at p. 200 [PDF 17] (CA).
[76] *Keewatin Power Co. v Kenora (Town)* (1908), 16 OLR 184 at p. 191 [PDF 8] per Moss CJO and at pp. 196 and 200-201 [PDF 13, 17-18] per Meredith JA.

few portions of submerged lands are not navigable. As long as one can float something (even a canoe or a log) on the water (even during the spring melt), if one can get to the water without trespassing, and the water can lead to another accessible location, it is subject to public navigation.[77] If lands not meeting these criteria were the only submerged lands that could be subject to Aboriginal title, that would be a meagre result indeed.

56. Paragraph 160 of Ontario's factum argues that the Trial Judge's application of the law would still leave it possible for a First Nation to prove title to navigable water territory. However, Kent J of the British Columbia Supreme Court took the Trial Judge's decision to imply that there "may be no path to Aboriginal title to submerged lands beneath navigable waterways" without further direction from an appellate court.[78] Later, in its factum at paragraph 218, Ontario also argues for such an impossibility.

57. Paragraph 189 of Ontario's factum cites from Strong CJ's reasons in *Re Provincial Fisheries*. This neglects to state the following:

(a) On appeal to the Privy Council, the decision in *Re Provincial Fisheries* was varied somewhat. Further, the Privy Council found that the extent of Crown ownership of lakes and rivers and what the rights of the public are to them were not necessary for the case, and thus made no comment on those matters.[79]

(b) Strong CJ was writing only for himself and King J in *Re Provincial Fisheries*.[80]

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[77] *Coleman v Ontario,* (March 1,1983) at pp. 9-12 (Ont. HC) [PDF 9-12] (additional cite 27 RPR 107); See also *Canoe Ontario v Reed,* (1989) 69 OR (2d) 494, 1989 CanLII 4237 (HC) and *Middlesex Centre (Municipality) v MacMillan*, 2016 ONCA 475 at para 22.
[78] *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.*, 2022 BCSC 15 at paras 323ff, 331 and 333, quote at para 333.
[79] *Re Provincial Fisheries* [1898] UKPC 29 at p. 2 [PDF 2].
[80] *Re Provincial Fisheries* (1896), 26 SCR 444 at p. 545 [PDF 102].

(c) Taschereau J took pains to point out that *Re Provincial Fisheries* was a reference case, and therefore the answers were advisory only, and were based on previously decided cases, not on what is the law according to the Court's opinion, and that the answers bind no one, not even themselves.[81]

58. Paragraph 200 of Ontario's factum asserts that public access to the fishery was a necessary incident of Crown sovereignty asserted in 1763. First, the authority cited for this is restricted to tidal waters. Second, Ontario's assertion is explicitly rebutted by the Royal Proclamation. The SONTL (including the Aboriginal title claim area) was included in the territories reserved for the Indians by the Royal Proclamation.[82] British subjects (other than those specially licenced) were forbidden to be in such territories.[83]

Three Fires Confederacy

59. In reply to paragraph 21 of Ontario's factum, SON did not assert that the Three Fires Confederacy had a role in "decision-making concerning resources" in local territories[84], but that Three Fires allies would assist in protecting local resources when needed.[85]

SON Licencing Euro-Canadian Fishermen

60. In reply to paragraph 43 of Ontario's factum, the point SON is making is that some Euro-Canadian fishermen sought and received fishing leases or licences from SON.[86] This goes to SON's intent and capacity to control resource access, as late as the 1830s. Whether the Crown

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[81] *Re Provincial Fisheries* (1896), 26 SCR 444 at p. 539 [PDF 96].
[82] Agreed Statement of Fact Basic Timeline, Timeline 1763, Exhibit 3925, p. 2 [PDF 2].
[83] *The Royal Proclamation*, 1763, No 1, Exhibit 538, pp. 127-128 [PDF 5-6]. See also M.D. Walters, "Aboriginal Rights, *Magna Carta* and the Exclusive Right to Fisheries in the Waters of Upper Canada" (1998), 23 Queen's L.J. 301 at pp. 353-355 [PDF 53-55].
[84] As implied by Ontario's factum, para 21.
[85] See SON's factum, para 35.
[86] See SON's factum, para 64.

thought such leases or licences were legally required or were valid is not relevant to that. However, there was also evidence that SON's ownership of the fishery was recognized by some Crown officials in the mid 19th century.[87]

The Proper Test for Aboriginal Title

61. In reply to paragraph 48 of Ontario's factum, to clarify SON's position, it is that the Trial Judge erred in applying the "novel Aboriginal right test". She should have exclusively applied the *Tshilqot'in* test instead, rather than applying both tests.

Ojibway-Odawa Ethnicity

62. In reply to paragraph 53 of Ontario's factum, Ontario appears to suggest that there was a shift in population from Odawa to Ojibway. The Trial Judge did not make any finding of this nature, and there was considerable evidence to the effect that a group may have been referred to as Odawa at one time and Ojibway at another:[88] Witnesses called by both SON and by Ontario agreed with this.[89] The Trial Judge mentioned this uncertainty,[90] but did not attempt to resolve it definitively, noting at one point that the Odawa were present on the Peninsula in the period leading up to 1763,[91] and at another point that after the Beaver Wars (1649-1701),[92] the people living on

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[87] Jarvis to Higginson, April 15, 1844, Exhibit 1458; Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s" (2016), Exhibit 4195, pp. 25-27 [PDF 25-27]; Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, pp. 75 [PDF 87], 95 [PDF 107].

[88] In fact, there was evidence that the **same person** who identified her ancestors as Pottawatomi who joined an Odawa group, also referred to herself as Ojibway. See R.M. Vanderburgh, I Am Nokomis Too: The Biography of Verna Patronella Johnston, 1977, Exhibit 4733, unpaginated introduction [PDF p. 9], p .19 [PDF p. 12] and p. 24 [PDF p. 15]; Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11349 line 25 to p. 11351, line 18.

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

[90] Reasons, para 169.

[91] Reasons, para 439.

[92] See Reasons, paras 482-486.

the Peninsula were referred to as Ojibway not Odawa, but that this did not preclude that they were the same people.[93] At no point did the Trial Judge suggest that there was an Indigenous group other than SON on the peninsula in 1763.

Cross-Lake Travel

63. In relation to paragraph 57 of Ontario's factum, there is evidence from the 19th century of large canoes travelling across Lake Huron from Saginaw Bay (Michigan) to Goderich.[94]

Treaty Interpretation a Matter of Law

64. Ontario argues, at paragraph 75 of its factum, that this Court should not rely on previous conclusions of this Court about the Treaty of Niagara.[95] In *Chippewas of Sarnia*, this Court in fact ruled that the Crown had made a treaty with the First Nations present at Niagara in 1764.[96] This Court has also recently ruled, in *Restoule*, that treaty interpretation is a matter of law, not of mixed fact and law.[97] SON therefore submits that whether a treaty was made at Niagara is a matter of law, already decided, and subject to review on a correctness standard.

Indigenous Law and Common Law

65. Ontario cites no authority for its assertion at paragraph 138 of its factum that giving equal weight to common law and Indigenous law, as required,[98] can actually mean giving "preferential treatment and greater weight to the common law perspective" at some stages of the analysis.

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[93] Reasons, para 485.
[94] Dr. Gwen Reimer, "Volume 1: Aboriginal Use and Occupation of Bruce Peninsula and Environs, CA 500 BC-1860 AD" (as revised 2019), Exhibit 4576, p. 162 [PDF 175], note 643.
[95] See, for example, *Chippewas of Sarnia Band v Canada (Attorney General)*, 51 O.R. (3d) 641 at paras 54-56 (CA).
[96] *Chippewas of Sarnia Band v Canada (Attorney General)*, 51 O.R. (3d) 641 at paras 47, 54-56 (CA).
[97] *Restoule v Canada (Attorney General)*, 2021 ONCA 779 at paras 405-411 per Strathy CJO and Brown JA, and at para 101 per Lauwers JA.
[98] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] SCR 257 at para 14.

Comparative Law - Australia

66. In regard to paragraph 211 of Ontario's factum, Ontario refers to the Australian case *Yarmirr*,[99] without citing it directly.

All of which is respectfully submitted. Date: October 20, 2022

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[99] *Commonwealth of Australia v Yarmirr*, [2001] H.C.A. 56.

SCHEDULE A

AUTHORITIES
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Tsilhqot'in Nation v British Columbia, 2014 SCC 44, [2014] SCR 257
William v British Columbia, 2012 BCCA 285

SCHEDULE B

LEGISLATION INDEX
Constitution Act, 1982, s. 35(1)
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.

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

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Proceeding commenced at Toronto

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