Court File No. 03-CV-261134CM1

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and SAUGEEN FIRST NATION

Plaintiffs

- and –

THE ATTORNEY GENERAL OF CANADA, and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

****

Court File No. 94-CQ-050872CM

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CHIPPEWAS OF SAUGEEN FIRST NATION and CHIPPEWAS OF NAWASH UNCEDED FIRST NATION

Plaintiffs

- and –

THE ATTORNEY GENERAL OF CANADA; HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO; THE CORPORATION OF THE COUNTY OF GREY; THE CORPORATION OF THE COUNTY OF BRUCE; THE CORPORATION OF THE MUNICIPALITY OF NORTHERN BRUCE PENINSULA; THE CORPORATION OF THE TOWN OF SOUTH BRUCE PENINSULA; THE CORPORATION OF THE TOWN OF SAUGEEN SHORES and THE CORPORATION OF THE TOWNSHIP OF GEORGIAN BLUFFS

Defendants

REPLY SUBMISSIONS OF THE SAUGEEN OJIBWAY NATION

1. CROWN IMMUNITY

Overview

1. Ontario's position is that the Crown in right of Ontario is immune from suit for claims of breach of fiduciary duty based on events which took place prior to the coming into force on September 1, 1963 of the *Proceedings Against the Crown Act, 1962-1963*, SO 1962-63, c. 109 ("PACA"). It is Ontario's position that this includes SON's claim for breach of fiduciary duty in the Treaty action and claims for breach of fiduciary duty through alienation of the claimed land in the Title action (if it occurred prior to September 1, 1963).[1] Ontario asserts immunity insofar as the claims are grounded in breach of fiduciary duty, on the basis of an assertion that such claims cannot be pursued through a petition of right[2] or, in the alternative, cannot be pursued through a *Dyson* procedure.[3]

2. In *Slark*, *Seed*, *Cloud*, *Restoule 2,* and *Barker*[4] (discussed in detail below), Ontario courts have found contrary to Ontario's view. Ontario submits, however, that the Ontario case law is wrong and should not be followed.

3. Canada does not advance the defence of Crown immunity.

4. In reply to Ontario, it is SON's position that none of their claims are barred by PACA. SON submits that the case law in Ontario clearly establishes that claims for breach of fiduciary

[1] Ontario's Closing Submissions, paras 54, 873.
[2] Ontario's Closing Submissions, paras 886, 943.
[3] Ontario's Closing Submissions, paras 964-979.
[4] *Slark (Litigation Guardian of) v Ontario*, [sub nom. *Dolmage v Ontario*] 2010 ONSC 1726, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.) [Ontario's Book of Authorities, Tab 162 and 163]; *Seed v Ontario*, 2012 ONSC 2681[Ontario's Book of Authorities, Tab 160]; *Cloud et al. v Canada (Attorney General)*, (2003) 65 OR (3d) 492 (Div. Ct.) at para 10, rev'd on other grounds (2004) 2004 CanLII 45444 (ON CA [Ontario's Book of Authorities, Tab 31 and 32]); *Restoule v Canada (Attorney General)*, 2020 ONSC 3932 [Ontario's Book of Authorities, Tab 149]; *Barker v Barker*, 2020 ONSC 3746 [Ontario's Book of Authorities, Tab 9].

duty are not excluded from the petition of right regime. SON submits that to the extent that their claims for breach of fiduciary obligations in the Treaty action and the Title action relate to facts existing as of September 1, 1963, they are properly pursued under the fiats granted by Ontario. In the alternative, SON is entitled to the declarations they seek pursuant to the *Dyson* procedure.

5. SON further submits that the doctrine of the honour of the Crown is implicated in the exercise of statutory interpretation of PACA and should otherwise defeat an argument in support of Crown immunity in this case.

History and Evolution of Crown Immunity

6. PACA eliminated some of the procedural and substantive immunities of the Ontario Crown as part of the general legislative intent to expand liability of the Crown. In general terms, PACA abrogates Crown immunity for tort claims prospectively and otherwise preserves the Crown's liability for claims, including contracts, which could have been historically brought by a procedure called petition of right.

> *Restoule v Canada (Attorney General)*, 2020 ONSC 3932 at para 13, Ontario's Book of Authorities, Tab 149.

7. The issue of whether Crown immunity applies in Ontario to equitable claims against the Crown focuses on the extent of Crown immunity before the reform of PACA.

> *Restoule v Canada (Attorney General)*, 2020 ONSC 3932 at para 14, Ontario's Book of Authorities, Tab 149.

8. At common law, the Crown could not be sued. This changed with the introduction of the petition of right, hence the Crown was effectively immune from liability in tort, as Morris and Brongers explain:

> The petition of right developed as the mechanism to allow legal claims against the Crown to be adjudicated. A subject could petition the Crown for permission to have his or her claim adjudicated in the ordinary courts. The Sovereign would consider the petition and, if so inclined, would issue a fiat stating "Let Right Be Done". The petition would then be referred to the Court, which could then grant relief against the Crown. The remedy developed with respect to clams concerning property and came to extend to claims in contract…
>
> The petition of right did not extend to claims in tort... The Crown was effectively immune from liability in tort. While Crown servants could be sued where they had committed a tort in the course of their duties, the Crown could not be held vicariously liable and Crown assets could not be reached.
>
> Michael H Morris and Jan Brongers, *The 2019 Annotated Crown Liability and Proceedings Act* (Toronto: Carswell, 2019) at p.1 [citations omitted], Plaintiffs' Reply Book of Authorities, Tab 72.

9. As Professors Hogg and Monahan (as he then was) note, the existence of Crown immunity did not mean that the King was regarded as above the law. Rather, the maxim that "the King can do no wrong" originally meant that the King was not privileged to commit illegal acts. It never meant that the Crown was free to ignore its obligations with impunity.

> Peter W. Hogg and Patrick J. Monahan, *Liability of the Crown*, 3rd ed (Scarborough: Carswell, 2000) at pp. 1-11 [Hogg & Monahan]. These rules persisted for centuries, but their rationale derives from the feudal principles that the lord could not be sued in his own courts and that the King could do no wrong., Plaintiffs' Reply Book of Authorities, Tab 67.
>
> A. V. Dicey, *Introduction to the Study of the Law of the Constitution, 8th ed.* (London: Macmillan, 1915) at pp. 417-418, Plaintiffs' Reply Book of Authorities, Tab 66.

10. As part of the petition of right procedure, the suppliant/plaintiff was required to secure the permission of the Crown through a fiat. This common law practice continued until 1872 when

Ontario passed a *Petition of Right Act*, 35 Vict., c 13, which was followed by rules of practice governing the procedure.

> *Judicature Act,* RSO 1897, c 51, s. 129, Plaintiffs' Reply Book of Authorities, Tab 56.
>
> *Restoule v Canada (Attorney General)*, 2020 ONSC 3932 at para 29, Ontario's Book of Authorities, Tab 149.

11. In 1950, the Canadian Commissioners for Uniformity of Legislation in Canada prepared a Model Act to expand the liability of the Crown to claims in tort. The *Crown Liability Act*, S.C. 1952-1953, c. 30 expanded the liability of the federal Crown to claims in tort. The Federal legislation still exists today. However, it was renamed the *Crown Liability and Proceedings Act*, (RSC, 1985, c C-50) in 1992. The name was changed to reflect the fact that the Act now deals with Crown proceedings generally, wherever they may be brought and whether in tort, in contract or otherwise. The substantive provisions governing Crown liability in matters such as costs, interest, limitation periods and payment of judgements are now found in Part II of the *Crown Liability and Proceedings Act*. All provinces, except Quebec and British Columbia, adopted the model Act of 1950 to a significant degree. However, there are differences in the legislation from jurisdiction to jurisdiction and care must be taken in reading and applying the jurisprudence.

> Peter W. Hogg and Patrick J. Monahan, *Liability of the Crown*, 3rd ed, (Scarborough: Carswell, 2000) at pp. 8-9, Plaintiffs' Reply Book of Authorities, Tab 67.
>
> *Crown Liability and Proceedings Act*, RSC 1985, c C-50, Plaintiffs' Reply Book of Authorities, Tab 50.

The Relevant PACA Provisions

12. PACA, in force as of September 1, 1963, and later consolidated in 1970, provides:

> 3. Except as provided in section 28, a claim against the Crown that, if this Act had not been passed, might be enforced by petition of right, subject to the grant of a fiat by the Lieutenant Governor, may be enforced as of right by proceedings against the Crown in accordance with this Act without the grant of a fiat by the Lieutenant Governor.
>
> ...
>
> 5. (1) Except as otherwise provided in this Act and notwithstanding section 11 of *The Interpretation Act*, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject,
>
> (a) in respect of a tort committed by any of its servants or agents;
>
> (b) in respect of a breach of the duties that a person owes to his servants or agents by reason of being their employer;
>
> (c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property; and
>
> (d) under any statute, or under any regulation or by-law made or passed under the authority of any statute.
>
> ...
>
> 28. No proceedings shall be brought against the Crown under this Act in respect of any act or omission, transaction, matter or thing occurring or existing before the day on which this Act comes into force.
>
> ...
>
> 29. (1) A claim against the Crown, existing when this Act comes into force that, if this Act had not been

> passed, might have been enforced by petition of right may be proceeded with by petition of right, subject to the grant of a fiat by the Lieutenant Governor as if this Act had not been passed.
>
> *Proceedings Against the Crown Act, 1962-63,* SO 1962-63, c 109, Ontario's Book of Authorities, Tab 224.
>
> *Proceedings Against the Crown Act*, RSO 1970, c 365, Ontario's Book of Authorities, Tab 225.

13. The relevant provisions of this statute were included in the consolidations of 1970, 1980, and 1990, except that ss. 27 and 28 of the 1962-63 Act which became ss. 28 and 29 in the 1970 consolidation (as provided above), and these sections were omitted from the consolidating statutes of 1980 and 1990. Despite this, these sections have been held to remain in force. Section 5 of the Act expressly and specifically abrogated the prohibition of bringing claims against the Crown in tort. Section 5 does not speak to any other category of Crown immunity. Section 28 is a temporal restriction on claims against the Crown, which covers claims for acts or omissions occurring prior to September 1, 1963. Section 29(1) carves out an exception to the s. 28 restriction, permitting claims against the Crown if those claims could have been enforced by petition of right. Unless the claims of the plaintiffs for breach of fiduciary duty fall within the exception in s. 29(1) they - like claims in negligence - will be limited to those that arose on, or after, September 1, 1963.

> *Restoule v Canada (Attorney General),* 2020 ONSC 3932 at paras 21-24 [citations omitted], Ontario's Book of Authorities, Tab 149.

14. In *S.M. v Ontario,* Simmons J.A. held that, "[a]lthough s. 3 of the 1963 Act authorized proceedings against the Crown by way of action for claims that formerly had to proceed by way of petition of right, ss. 27 and 28 of the 1963 Act [now ss. 28 and 29] preserved Crown immunity from action and the petition of right regime with respect to claims that existed on September 1,

1963." Because PACA preserves the petition of right regime with respect to claims existing prior to September 1, 1963, SON was required to obtain fiats, which they have done.[5]

> *S.M v Ontario,* [2003] OJ No 3236 (ONCA) at para 2, Plaintiffs' Reply Book of Authorities, Tab 24.

SON's Position on PACA

15. The application of PACA to claims for breach of fiduciary duty existing before PACA came into force was fully considered by Cullity J. in *Slark.* At issue in *Slark* was whether, by virtue of PACA's s. 29(1) exemption, a class action could be brought based on a claim for breach of fiduciary duty asserted against the Crown by individuals who had suffered abuse at a residential facility for persons with developmental disabilities. Some of the events complained of pre-dated the passage of PACA. Cullity J. held that the fact that a claim for breach of fiduciary duty against the Crown might not have been recognized and enforced by the Courts prior to 1963 was not determinative of the issue of whether the claim for breach of fiduciary duty could be maintained. In this regard, he adopted a different approach than had been adopted by the British Columbia Court of Appeal in the *Richard v British Columbia,* 2009 BCCA 185, which had held that claims for breach of fiduciary duty could not be enforced by petitions of right.

> *Dolmage v Ontario,* 2010 ONSC 1726*,* [also referred to as *Slark (Litigation guardian of) v Ontario,* referred to herein as "*Slark*"], Ontario's Book of Authorities, Tab 162.

16. In *Slark*, Cullity J. conducted a detailed review of the history of Crown immunity and the development of the petition of right regime. He noted:

> In Clode, *The Law and Practice of Petitions of Right* (1887) - to which counsel for the Crown referred - it was accepted that equitable relief by way of a petition of right could be obtained in the Court of Chancery

[5] Exhibits 3910 and 3911.

> in support of a common law right. The learned author was, however, critical of nineteenth-century cases in which this procedure had been permitted in respect of claims in equity, but recognized that a practice of allowing this had developed. Holdsworth refers to this practice without expressing similar doubts (above, at pages 31 - 32) and in Holmested's *Ontario Judicature Act*, 1915, (at page 1395) it was indicated that, despite earlier uncertainty, the procedure was in practice available in this jurisdiction to enforce equitable rights.
>
> In Holmested & Langton, *Ontario Judicature Act* (5th edition, 1940) cases in which petitions of right were available were summarised quite narrowly without distinguishing between common law and equitable rights. The learned authors accepted the possibility that the court might declare that a plaintiff was entitled to restitution - or compensation in lieu of it - for goods or money that had found its way into the hands of the Crown.
>
> Any doubt whether declaratory relief could be granted in respect of equitable rights against the Crown was removed by the landmark decision in *Dyson v. Attorney-General*, [1911] 1 K.B. 410 (C.A.), on which Mr Baert relied. In Dyson it was held that declaratory relief against the Attorney-General - as representing the Crown - could be granted in an exercise of the inherent equitable jurisdiction of the court without recourse to the petition of right procedure and the necessity of a fiat.

Slark at paras 109-111.

17. Cullity J. held that prior to the enactment of PACA, the law continued to evolve, and that in some circumstances declarations were given that a plaintiff was entitled to damages, compensation or restitution from the Crown. Most importantly, he held that s. 29 did not require a plaintiff to prove that a remedy was available prior to the enactment of PACA for it to fall within s. 29. He stated:

> It is, I believe, important that…the exception in section 29 (1) is not conditioned expressly on the pre-September 1963 availability of a declaration for breach of fiduciary duty. It is conditioned on a person having a claim against the Crown that (a) existed on September 1, 1963; and (b) might have been enforced by petition of right if PACA had not been passed.
>
> […]
>
> I see no reason why the second condition – that looks to the availability of a petition of right if PACA had not been enacted – should require the court to go back in time and speculate about whether a court sitting in August, 1963 would, or would not, have granted a petition of right for such a claim in respect of what was then an unknown cause of action. Rather, I believe it is perfectly consistent with the words of section 29(1), more realistic, and more consistent with the evolution of Crown liability as described by Holdsworth - as well the developments in the law governing fiduciary duties since 1963 - to ask what the position would be now if the Act had not been passed.

Slark at paras 115, 119, and 121.

18. Cullity J. noted that the Crown has no immunity from damage for breaches of fiduciary duty that occurred after 1963, and that this was not the result of anything in PACA, stating:

> If it is now the law that claims for damages against the Crown for breaches of fiduciary duty can be made, it must follow that declaratory relief is also available in respect of such breaches. These developments in the law are inconsistent with the maxim that the king can do no wrong, and are not based on any authorization in PACA. **In order to accept the submissions of the Crown, I would have to assume that the developments would not have occurred if the Act had not been passed. Such an assumption would be "regressive" in the sense in which Cory J. used the word and I do not believe I would be justified in making it. I find it inconceivable that the petition of right procedure**

> **and the *Dyson* procedure would not have been adapted to accommodate judicial recognition of the new fiduciary duties of the Crown.** Such a development would be far less momentous than the rejection of Crown immunity for direct liability in tort that has otherwise deprived the rule that the Crown can do no wrong of any continuing influence. **[emphasis added]**

Slark at para 124.

19. Cullity J. thus held that the claim for a declaration that the defendant had breached its fiduciary duty and a declaration that the defendant was liable for damages for breach of fiduciary duty, "fall within the section 29(1) exception to the general prohibition in section 28 of PACA, are not outside the jurisdiction of the court, and are not subject to Crown immunity within the meaning of the proviso in the fiat." That caveat is identical to the one included in the fiats issued in this case. Cullity J. also held that there was no bar with respect to a declaratory relief of entitlement to damages.

Slark at para 125.

20. In denying the leave to appeal the decision in *Slark*, Herman J. endorsed Cullity J.'s analysis of PACA, stating:

> The motion judge concluded that, by virtue of s. 29(1), the question to be asked was whether the claim for a declaration in respect of a breach of fiduciary duty would have been permitted if *PACA* had not been enacted. Furthermore… the question is not whether the claim would have been allowed by a court prior to the enactment of *PACA*, but what the position would now be if *PACA* had not been passed.
>
> In the opinion of the motion judge, there is no reason to treat the law as frozen on August 31, 2003. The parties agree that prior to September 1, 1963 (when *PACA* came into force), a court would not have recognized a claim against the Crown for breach of

> fiduciary duty. The parties also agree that the law since then has evolved and such a claim would be recognized today. Indeed, the Crown does not dispute that the plaintiffs' claim for breach of fiduciary duty post-September 1, 1963 can proceed.
>
> Given the wording of s. 29(1) of *PACA* and the various authorities referred to by the motion judge, it is my opinion that there is no reason to doubt the correctness of the motion judge's approach or his decision, that is, that the question to be asked is whether a court today would recognize such a claim and that the answer to that question is yes.

Dolmage v Ontario, 2010 ONSC 6131 [referred to herein as *Slark CA*] at paras 8-10, Ontario's Book of Authorities, Tab 163.

21. In *Seed v Ontario*, Ontario raised the same arguments that had been rejected in *Slark*. Horkins J. held:

> The defendant argues that there is no fiduciary duty cause of action prior to 1963. This position was argued and rejected in *Slark*. In *Slark* the defendant argued that the Ontario court should follow the approach in *Richard v British Columbia*, 2009 BCCA 185 (CanLII), [2009] B.C.J. No. 854 (C.A.) ("*Richard*") where the court concluded that there could be no claim for damages for breach of fiduciary duty for events that occurred prior to their *Crown Proceedings Act*, S.B.C. 1974, c. 24, s. 17. *Richard* was distinguished in *Slark* and not followed. The defendant does not rely on *Richard* on the motion before this court. It simply argues that the court in *Slark* was wrong and I should decline to follow it. In my view, the result in *Slark* was correct. The issue was thoroughly considered by Cullity J. and Herman J.

Seed v Ontario, 2012 ONSC 2681 at para 100, Ontario's Book of Authorities, Tab 160.

22. The approach set out in *Slark* has subsequently been adopted in Nova Scotia. In *C v Nova Scotia*, the Court ruled the plaintiffs' claim for breach of fiduciary duty was an equitable claim,

and that the ancient petition of right process permitted such claims against the Crown. Specifically, Campbell J. held:

> Mr. D.B.C.'s claim is based on an allegation of a breach of fiduciary duty. That is an equitable claim. The ancient petition of right process permitted such claims against the Crown. Subsection 3(3) of the *Proceedings Against the Crown Act* provides that what could be done before 1951 with consent of the Crown, can now be done without consent. That means that the petition of right that was available and is still available but with no requirement for Crown consent. Section 25(1) abolished other proceedings against the Crown. That means that the old procedures are gone but the substantive rights remain.

> *C v Nova Scotia (Attorney General)*, 2015 NSSC 199 at para 83 [Plaintiffs' Reply Book of Authorities, Tab 3]. See also: Campbell J.'s ruling at note 17 where he states, "It is hardly surprising that claims for breach of fiduciary duty were not addressed in the 1951 legislation. The concept of fiduciary duty itself was not new in the early 1950's but it was based at that time largely on agency law. That involved closed categories of relationships to which fiduciary obligations would attach. That changed substantially in the 1980's. In *M.(K.) v. M.(H.)*, 1992 CanLII 31 (SCC), [1992] 3 S.C.R. 6 at para 73 Justice LaForest said that the "fiduciary principle" in Canadian law really commenced with *Guerin v. Canada* 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335, continuing with *Frame v. Smith*, 1987 CanLII 74 (SCC), [1987] S.C.J. No. 49 and *LAC Minerals Ltd. v. International Corona Resources Ltd,* 1989 CanLII 34 (SCC), [1989] 2 S.C.R. 574. It has grown to become a remedy to enforce government obligations to defined vulnerable groups. As Cullity J. remarked in *Slark*, [*supra*]. at para 117, **"I continued to be unimpressed by the artificiality of asking how equitable claims that were effectively unknown to the law before the decision in Guerin would have been treated had they been considered by a court before 1st September, 1963." [emphasis added].**

23. On appeal, the Nova Scotia Supreme Court noted that the province acknowledged, that, in England, the petition of right process permitted an equitable claim against the Crown, with consent.

Nova Scotia (Attorney General) v Carvery, 2016 NSCA 21 at para 29, Plaintiffs' Reply Book of Authorities, Tab 15.

24. The approach set out in *Slark* was also followed in *Restoule v Canada* (Attorney General), 2020 ONSC 3932 (*"Restoule 2"*). In her decision, Hennessy J. noted that:

> In *Cloud*, a claim for breach of fiduciary duty proceeded on consent, including claims which pre-dated the enactment of the federal *Crown Liability and Proceedings Act* in 1953. The Court of Appeal accepted the conclusion of Cullity J., in dissent at Divisional Court, that the plaintiffs' equitable claim discloses a cause of action for the purposes of class certification. The federal Crown conceded this point at the Court of Appeal.

Restoule v Canada (Attorney General), 2020 ONSC 3932 at para 54 [Ontario's Book of Authorities, Tab 149], referring to *Cloud et al. v Canada* (Attorney General) (2004) 73 OR (3d) 401 (CA), at para 24 [Ontario's Book of Authorities, Tab 32], leave to appeal refused, [2005] SCCA No 50 [Ontario's Book of Authorities, Tab 33].

25. Hennessy J. went on to find that:

> The decisions in *Slark*, *Seed* and *Cloud*, that equitable claims based on facts existing pre-statutory reform against the Crown are not subject to Crown immunity, remain good law at this time. I am not satisfied that these decisions fall within one of the rare exceptions where the court should decline to follow the previously decided law. The reasoning in *Slark*, including the analysis of the pre-1963 status of equitable claims against the Crown, the differences between the Ontario and the British Columbia legislation, and the framing of the question, is robust and the logic sound. I am entitled to adopt, and I do adopt, the reasoning in the *Slark* line of cases.
>
> In this respect, I am guided by the principle of comity, that decisions of judges of coordinate jurisdiction, while not absolutely binding, should be

> followed unless there are compelling reasons that justify departing from the earlier ruling.

Restoule v Canada (Attorney General), 2020 ONSC 3932 at paras 83-84 [Ontario's Book of Authorities, Tab 149], for the principle of comity, Hennessy, J. relied on *R v Chan*, 2019 ONSC 783, at paras 37-39 [Plaintiffs' Reply Book of Authorities, Tab 20]; *R v Scarlett*, 2013 ONSC 562, at para 43, [Plaintiffs' Reply Book of Authorities, Tab 23].

The exception in section 29 (1) applies to SON's claims

26. In *Slark,* Cullity J. determined that the exception in section 29 (1) applies to a claim against the Crown that (a) existed on September 1, 1963; and (b) might have been enforced by petition of right if PACA had not been passed. SON submits that the Crown's breach of fiduciary duty with regard to the Title action and Treaty action meet both this criteria and as such may continue as a petition of right.

27. First, Cullity J. discussed what an "existing" claim is for the purposes of s. 29(1):

> In *S.M.* (at para 47) it was held that the word "claim" in section 29 (1) does not refer to a cause of action. It is to be read in conjunction with section 28 and refers to a "sub-category of act(s) or omission(s), transaction(s), matter(s) or thing(s) occurring or existing before the first day of September, 1963". In para 43 it was said that "the existence of a claim is tied to the event creating the claim". It follows that the claims against the Crown in respect of such matters are claims "existing" on September 1, 1963 within the meaning of section 29(1).

Slark at para 120.

28. Applying the same rationale as set out by Cullity J. in *Slark*, the breach of fiduciary duty claimed in SON's Treaty claim and Title claim would fall within Cullity J.'s contemplation of "claim": a sub-category of act(s) or omission(s), transaction(s), matter(s) or thing(s) occurring or existing before the first day of September, 1963.

29. SON's claims are such that they could be enforced by way of petition of right if PACA had not been passed. While the fiduciary claims against the Crown in cases such as *Slark* were unknown in 1963, the fiduciary relationship between the Crown and Indigenous peoples dates back to the *Royal Proclamation* in 1763. Even if it were unknown in 1963, however, it is well-recognized now. Under *Slark*, this is sufficient for it to have been pursued through the petition of right regime.

30. In the alternative, SON submits that a claim for relief is available to them under a *Dyson* procedure (discussed in more detail below).

SON's Reply to Ontario's Position on PACA

Speculating on what a Court sitting in 1963 would or would not do

31. Ontario's position is that this Court must determine whether, before 1963, the Crown was immune to claims for breach of fiduciary duty. It must ask whether, seen from the present, a court in the past could have heard and determined a claim for breach of fiduciary duty brought by way of petition of right.[6]

32. This point was thoroughly reviewed in the reasons of Cullity J. in *Slark*. In adopting Cullity J.'s reasons in *Restoule 2*, Hennessy J. found:

> In *Slark*, Cullity J. rejected the exercise of speculating "whether a Court sitting in August, 1963 would, or would not, have granted a petition of right for such a claim in respect of what was then an unknown cause of action." He found that it would be artificial to ask how equitable claims that were effectively unknown to the law before the recognition of an enforceable Crown fiduciary duty in *Guerin* would have been treated if they had been considered by a court before 1963. Instead, relying on *Murray*, Cullity J. reasoned that the word "claim" in s. 29(1) of the

[6] Ontario's Closing Submissions, paras 885, 904.

1970 consolidation of PACA, was to be read in conjunction with s. 28 as meaning a sub-category of acts or omissions, etc., occurring or existing before September 1, 1963. Therefore, Cullity J. found that the claims against the Crown in respect of such matters are claims "existing" on September 1, 1963, within the meaning of s. 29(1).

In his reasons in *Slark*, Cullity J. held that the petition of right procedure would have and should develop consistently and in alignment with the judicial recognition of the new fiduciary duties of the Crown, https://www.canlii.org/en/on/onsc/doc/2020/2020onsc3932/2020onsc3932.html?autocompleteStr=Restoule%20v.%20Canada%20(Attorney%20General)%2C%202020%20ONSC%203932&autocompletePos=1 - _ftn41 writing:

> Rather, I believe it is perfectly consistent with the words of section 29(1), more realistic, and more consistent with the evolution of Crown liability as described by Holdsworth—as well as the developments in the law governing fiduciary duties since 1963—to ask what the position would now be in the Act had not been passed."

Cullity J. concluded that by virtue of s. 29(1), the proper question to ask was whether a court today would recognize an equitable claim against the Crown and the answer to that question is yes. Following this logic, Cullity J. found there was no Crown immunity for claims for breaches of fiduciary duty existing or arising prior to September 1963.

Cullity J. based his analysis of PACA on the evolutionary nature of the common law of equitable rights.https://www.canlii.org/en/on/onsc/doc/2020/2020onsc3932/2020onsc3932.html?autocompleteStr=Restoule%20v.%20Canada%20(Attorney%20General)%2C%202020%20ONSC%203932&autocompletePos=1 - _ftn42 The law constantly evolves; statutory law preserves the rolling, evolving process. Fiduciary claims may now be made against the Crown. Even though *Guerin* was only decided in 1984,https://www.canlii.org/en/on/onsc/doc/2020/2

> 020onsc3932/2020onsc3932.html?autocompleteStr=Restoule%20v.%20Canada%20(Attorney%20General)%2C%202020%20ONSC%203932&autocompletePos=1 - _ftn43 one cannot reasonably argue that the Crown's liability for fiduciary claims only arose on that date. What is preserved in 1963 is not a closed list of claims, it is the petition of right process and all that it entails. Anything that might have been brought is preserved. PACA did not freeze the law.
>
> *Restoule v Canada (Attorney General)*, 2020 ONSC 3932 at paras 48-50 [citations omitted], Ontario's Book of Authorities, Tab 149.

33. SON submits that this Court should adopt the reasoning set out in *Slark* and *Restoule 2,* and reject Ontario's position that a court must consider whether, seen from the present, a court in the past could have heard and determined a claim for breach of fiduciary duty brought by way of petition of right.

The British Columbia case law does not apply in Ontario

34. Ontario argues that this Court should follow the British Columbia Court of Appeal in *Arishenkoff v British Columbia*, 2005 BCCA 481 and *Richard v British Columbia*, 2009 BCCA 185 to interpret s. 29(1) of PACA.[7]

35. Ontario accepts that there is an absence of a precise match in the language of the two Acts that prevents the direct application of the British Columbia judicial interpretation to Ontario. However, it maintains that the respective Acts' similarity of purpose and conceptual resemblance point towards a similar result.[8]

36. In the *Richard* case, Saunders J.A. of the British Columbia Court of Appeal posed the question to be answered as follows: was a claim in equity for damages for equitable wrongs one

[7] Ontario's Closing Submissions, paras 889-891.
[8] Ontario's Closing Submissions, para 926.

that was known to the courts of equity prior to August 1, 1974, that is, the date of the British Columbia statute, *Crown Proceedings Act*, S.B.C. 1974, c.24. The Court concluded that such a claim would not have been recognized by a court prior to August, 1974 and that therefore there could be no claim for damages for a breach of fiduciary duty with respect to events that occurred prior to that date.

> *Richard v British Columbia*, 2009 BCCA 185 at para 62, Ontario's Book of Authorities, Tab 151.

37. The British Columbia decisions of *Arishenkoff*, and *Richard*, were considered by Cullity J. and Herman J. in *Slark* and *Slark CA*. In *Restoule 2,* Hennessy J. adopted the analysis of the *Slark* lines of cases and held that:

> Ontario also cites two British Columbia Court of Appeal decisions, *Arishenkoff* and *Richard*, in which the courts take a different approach and arrive at a different conclusion than *Slark* on the question of Crown immunity pre-legislative reform. Ontario submits that the reasoning and result in the British Columbia jurisprudence should be preferred to the *Slark* line of cases.
>
> In *Arishenkoff*, the court was solely focused on tort claims. There is no discussion in *Arishenkoff* of breach of fiduciary duty as included in their conception of torts.
>
> In *Richard*, the British Columbia Court of Appeal relied on and found that it was bound by the decision in *Arishenkoff* to hold that the ratio of *Arishenkoff* applied equally to claims for breach of fiduciary duty. The court in *Richard* found that all claims for wrongs were protected by Crown immunity.
>
> The British Columbia decisions of *Arishenkoff*, and *Richard*, have already been considered in *Slark*. Cullity J. rejected the proposition that the Crown's substantive immunity historically extended

and continues to extend to all claims based on a wrong, including equitable claims.

In his discussion of the decisions in *Arishenkoff* and *Richard* Cullity J. distinguished the Ontario and British Columbia legislation, *Crown Proceeding Act*, S.B.C. 1974, Chap. 24. The British Columbia decisions contain no reference to any statutory provision in British Columbia that mirrors the precise terms of found in s. 29(1) of PACA. Secondly, Cullity J. noted that s. 2 (c) of the British Columbia *Crown Proceeding Act*, which provides that "the Crown is subject to all those liabilities to which it would be liable if it were a person," does not have an equivalent in PACA, which provides for Crown liability in tort (s. 5) and indemnity and contribution (s. 6), as if it were a person.

In the Divisional Court *Slark* decision, Herman J. considered the decision in *Richard* and held that it was not a conflicting decision.https://www.canlii.org/en/on/onsc/doc/2020/2020onsc3932/2020onsc3932.html?autocompleteStr=Restoule%20v.%20Canada%20(Attorney%20General)%2C%202020%20ONSC%203932&autocompletePos=1 - _ftn69 She noted that the different provisions in the two statutes are central to the different results, writing: "There is no difference in principle where the different results stem from the interpretation of different statutes."https://www.canlii.org/en/on/onsc/doc/2020/2020onsc3932/2020onsc3932.html?autocompleteStr=Restoule%20v.%20Canada%20(Attorney%20General)%2C%202020%20ONSC%203932&autocompletePos=1 - _ftn70

I have nothing to add to the analysis of the *Richard* decision other than to say that I adopt the reasons of Cullity and Herman J.J. on this point.

…

When Ontario relies on the reasoning in the decisions of *McFarlane*, *Richard*, *Arishenkoff*, it does not take into consideration that Ontario courts have already distinguished these decisions from applying to

> equitable claims in Ontario. But there is one other important distinction between these cases and the ones before the court. In Stage One, this court found that the Treaty promises created fiduciary obligations within the context of a *sui generis* fiduciary relationship. The above decisions could not possibly apply to claims arising from breaches of solemn promises made as part of treaty-making with Indigenous people. The breach of the promises in the Robinson Huron and Robinson Superior Treaties cannot be considered in the broad and simple concept of a "wrong." The claims allege breaches of express promises on which the signatory First Nations relied when they entered into the Treaties.
>
> *Restoule v Canada (Attorney General)*, 2020 ONSC 3932 at paras 67-73 and 85 [citations omitted], Ontario's Book of Authorities, Tab 149.

38. SON submits that the *Slark* decision is good law in Ontario, particularly in light of Herman J.'s decision to not grant the defendant's leave to appeal. Further, Cullity J. and Hennessy J. are correct in their conclusion that *Arishenkoff* and *Richard* can be distinguished in the analysis of PACA and equitable claims in Ontario.

Jurisdiction to abrogate or abolish a presumptive or establish immunity

39. Ontario's position is that unless Crown immunity is clearly lifted by the legislature, the Crown immunity continues.[9] In support of its argument, Ontario relies on *Canada (Attorney General) v Thouin*, 2017 SCC 46, 2 SCR 184, *Mitchell v Peguis*, [1990] 2 SCR 85, and *Rudolph Wolff & Co v Canada*, [1990] 1 SCR 695. SON submits that these cases do not support the general proposition for which Ontario relies.

40. In *Thouin*, the Supreme Court considered the Crown's obligation to submit to pre-trial discovery in cases in which the Crown is not a party. Historical Crown immunity from these

[9] Ontario's Closing Submissions, para 892-896, 980.

obligations was abrogated by the federal *Crown Liability and Proceedings Act,* R.S.C. 1985, c. C-50, s. 27, in instances where the Crown was a party. However, the language of the Act did not extend to instances where the Crown was not a party. The Court found that historical Crown immunity in cases where the Crown was not a party had not been clearly abrogated. The Court held that it requires clear and unequivocal legislative language to override Crown immunity.

> *Canada (Attorney General) v Thouin,* 2017 SCC 46 at paras 1, 3, 17 27, 20, and 40, Ontario's Book of Authorities, Tab 22.

41. SON submits that the decision in *Thouin* does not address the issues in this case. In this regard, SON relies on the distinctions drawn by Hennessy J. in *Restoule 2.* In *Thouin,* the Supreme Court confronted the issue of the jurisdiction of the court to abrogate existing and admitted Crown immunity in the area of discovery. There is no admitted or existing Crown immunity to breaches of fiduciary duty in this case. The decision in *Thouin* does not determine whether Crown immunity did in the past or does now extend to equitable claims. Hence, the decisions in *Slark*, *Seed*, and *Cloud* are not inconsistent with *Thouin*; the decision in *Thouin* does not cast doubt on the decision in *Slark*.

> *Restoule v Canada (Attorney General)*, 2020 ONSC 3932 at para 78, Ontario's Book of Authorities, Tab 149.

42. In *Mitchell*, an accountant, retained by the bands to negotiate tax rebates with the Manitoba government, requested the Court to garnish settlement funds held by the Crown for the benefit of the First Nation to pay his fees. The Court found that Crown immunity protected the Crown from the garnishment order. SON again relies on the distinctions drawn by Hennessy J. in *Restoule 2*, with respect to this case. Namely,

> *Mitchell* is distinguishable from the present case. The decision focused on statutory interpretation principles where the statute related to Indigenous people. The Court interpreted the *Garnishment Act* of Manitoba in a way that prevented non-natives from interfering with property situated on reserves that inures to Indians, within the meaning of s. 89(1) of the *Indian Act*, R.S.C. 1970, c. I-6, as a result of the Crown's obligations under treaties.
>
> There was no relationship between or promise to the accountant Mitchell from the Crown, no *sui generis* fiduciary relationship, nor any prior relationship between Mitchell and the Crown. *Mitchell* does not provide authority for shielding the provincial Crown from a claim that the Crown is in breach of its fiduciary duty arising out of the promises contained in treaties with the signatory nations.

Restoule v Canada (Attorney General), 2020 ONSC 3932 at paras 62-63 [citations omitted], Ontario's Book of Authorities, Tab 149.

43. In *Rudolph Wolff & Co.*, the issue before the Supreme Court was whether the legislative provisions that give the Federal Court of Canada exclusive jurisdiction over claims against the Federal Crown was consistent with section 15 of the *Canadian Charter of Rights and Freedoms*. Corey J. conducted a brief review of the historical background of actions against the Crown. His focus was on the legislative history that determined in which court claims could be heard against the Federal Crown.

Rudolph Wolff & Co v Canada, [1990] 1 SCR 695 at pages 699-700 and 9-10, Ontario's Book of Authorities, Tab 154.

44. SON submits that that *Rudolph Wolff & Co.* stands for the proposition that general jurisdiction conferred on Canadian courts to hear claims against the Federal Crown comes from the enactment of statutes such as the *Petition of Right Act*, SC 1875, c. 12 and subsequent federal legislation, and that only the Parliament of Canada can enact such statutes with respect to the Federal

Crown. *Rudolph Wolff & Co.*, does not address, however, the availability of remedies against the Crown prior to the enactment of these statutes. Namely, petitions of right to the monarch for redress that could, by fiat, be referred to the courts for determination as early as 1668. Indeed, Corey J. did not canvass the availability of equitable claims against the Crown or whether Crown immunity did in the past or does now extend to equitable claims.

> Peter W Hogg and Patrick Monahan, *Liability of the Crown*, 3rd ed (Scarborough: Carswell, 2000) at p. 5 [Plaintiffs' Reply Book of Authorities, Tab 67]: In 1668, it was held that equitable relief was available against the King on a bill brought in the Court of Exchequer against the Attorney General… The practice of suing the Attorney General for equitable relief fell into disuse until the decision in Dyson v. Attorney General (1910). … The fact that this power had not been exercised between 1841 and 1910, when Dyson was decided, does not mean that no equitable relief was obtained against the Crown during that period; equitable relief was available on a petition of right.

The *Crown Liability and Proceedings Act*

45. It is Ontario's position that the *Crown Liability and Proceedings Act,* S.O. 2019, c. 7, Sched. 17 ("CLPA") – although not generally applicable to these proceedings – plainly signals a legislative intention to keep a substantive difference between pre-1963 and post-1963 claims against the Crown.[10]

46. The CLPA is still relatively new, and so it has only been subject to limited judicial interpretation. However, in *Barker v Barker*, 2020 ONSC 3746, E.M. Morgan J. found that:

> The wording of the statute indicates, however, that Crown immunity applies only to claims in tort, not in equity. Section 11(4) of *CLPA*, which establishes (or reiterates) the immunity, refers only to negligence and the duty to take reasonable care -- i.e. the duty of

[10] Ontario's Closing Submissions, paras 911-914.

> care in negligence. This limited scope is in keeping with the historical development of Crown immunity.
>
> In *Dolmage v Ontario*, 2010 ONSC 1726, Cullity J. traced the history of immunity in some detail. He explained, at paras 76-125, that Crown immunity from claims in tort was historically a construct of the common law courts. Crown immunity legislation in its various historic incarnations, in effect, abolished the judicially created immunity insofar as it was applied to non-policy decisions. However, there was never Crown immunity for claims of breach of fiduciary duty or other claims in equity.
>
> Indeed, in *M(K) v M(H)*, [1992] 3 SCR 6, at para 73, La Forest J. observed that the Canadian development of the "fiduciary principle" as a ground for claiming compensation from the Crown only commenced with *Guerin v Canada*, [1984] 2 SCR 335. Justice Cullity reasoned in *Dolmage*, at para 87, that Crown immunity for a claim of breach of fiduciary duty could therefore not arise from a statutory intervention such as *PACA* that pre-dated it. Other forms of equitable relief against the Crown were always available, without any issue of immunity arising or any waiver of immunity required. "Any doubt whether declaratory relief could be granted in respect of equitable rights against the Crown was removed by the landmark decision in *Dyson v Attorney-General*, [1911] 1 KB 410 (CA) ... [which] held that declaratory relief ... could be granted in an exercise of the inherent equitable jurisdiction of the court without recourse to the petition of right procedure and the necessity of a fiat": *Dolmage*, at para 111.

Barker v Barker, 2020 ONSC 3746 at paras 1271-1273, Ontario's Book of Authorities, Tab 9.

47. SON submits that to the extent that CLPA signals legislative intent about the difference between pre-1963 and post-1963 claims against the Crown, it is to claims in tort, not in equity.

The Clear Wording of PACA

48. Ontario relies on *R.G. v The Hospital for Sick Children*, 2020 ONCA 414 and *Mitchell v Peguis,* [1990] 2 SCR 85 for the proposition that this Court should interpret section 28 of PACA based on the "clear wording" of the section and not seek an interpretation which avoids a result which may not be "ideal".[11]

49. In *RG*, the Ontario Court of Appeal considered s. 28(1) of the *Class Proceedings Act, 1992*, SO 1992, c 6, which governs the suspension and resumption of limitation periods concerning causes of action asserted in class proceedings. That section states:

> **28** (1) Any limitation period applicable to a cause of action asserted in a proceeding under this Act is suspended in favour of a class member on the commencement of the proceeding and, subject to subsection (2), resumes running against the class member when,
>
> (a) the court refuses to certify the proceeding as a class proceeding;
>
> (b) the court makes an order that the cause of action shall not be asserted in the proceeding;
>
> (c) the court makes an order that has the effect of excluding the member from the proceeding;
>
> (d) the member opts out of the class proceeding;
>
> (e) an amendment that has the effect of excluding the member from the class is made to the certification order;
>
> (f) a decertification order is made under section 10;
>
> (g) the proceeding is dismissed without an adjudication on the merits, including for delay under section 29.1 or otherwise;

[11] Ontario's Closing Submissions, paras 917-918.

> (h) the proceeding is abandoned or discontinued with the approval of the court; or
>
> (i) the proceeding is settled with the approval of the court, unless the settlement provides otherwise. 2020, c. 11, Sched. 4, s. 26.

Class Proceedings Act 1992, SO 1992, c 6, Plaintiffs' Reply Book of Authorities, Tab 48.

50. The Court of Appeal found that:

> In our view, s. 28(1) establishes an exhaustive list of circumstances that govern the commencement and suspension of limitation periods in the context of class action proceedings. The provision means what it says: limitation periods are suspended when the respondent asserts a cause of action in a class proceeding and resume only when one of the specific circumstances in paragraphs (a)-(f) of s. 28(1) occurs. The denial of certification is not one of those circumstances. As a result, the suspension of the limitation period remains in place following the denial of certification. This understanding of s. 28(1) was confirmed by this court in *Logan* and has been applied in the trial division. There is no basis to change it now.
>
> Accordingly, the appeal must be dismissed.
>
> We accept that this result is not ideal. It means that the *Limitations Act* has been suspended indefinitely in respect of individual claimants even though the rationale for continuing to toll limitation periods no longer applies once certification has been denied. In particular, the limitation periods remain tolled for strangers to the action, whom counsel for the respondent now seeks to join to the respondent's action.
>
> But this problem is by no means new and it does not result from our decision in this case. Instead, it is the consequence of the clear wording of s. 28(1), which cannot be overcome by the purposive interpretation urged by the appellants. It is a consequence that has

> been clear at least since this court's decision in *Logan* in 2004.
>
> *R.G. v The Hospital for Sick Children*, 2020 ONCA 414 at paras 22-25, Ontario's Book of Authorities, Tab 143.

51. SON submits that principles of statutory interpretation applied in *R.G.* are not applicable in this case as s. 28(1) of the *Class Proceedings Act 1992* and sections 28 and 29(1) of PACA are not analogous provisions. Sections 28 and 29(1) of PACA are not exhaustive lists. Instead, they describe classes of proceedings that might have been enforced by petition of right. The need to apply a purposive interpretation to these provisions is best illustrated by the numerous instances of litigation and judicial analysis of these sections of PACA.

Historic availability of equitable claims against the Crown by petition of right

52. Ontario argues that the fact that some equitable claims could be advanced by petition of right does not mean that all could. Consequently, Ontario submits that the case law does not support the proposition that the Crown did not have substantive immunity from claims for breach of fiduciary duty.[12]

53. The consensus of the scholarly writers is that historically a claim for equitable relief, including for breach of fiduciary duty, could have been pursued by way of petition of right.

> *Restoule v Canada* (Attorney General), 2020 ONSC 3932 at paras 32-37; and para 81 [Ontario's Book of Authorities, Tab 149], citing Walter Clode, *The Law and Practice of Petition of Right* (London: William Clowes and Sons, 1887) [Plaintiffs' Reply Book of Authorities, Tab 80]; W.S. Holdsworth, "The History of Remedies Against the Crown" (1922) 38 L.Q.R. 140 [Plaintiffs' Reply Book of Authorities, Tab 68]; W.S. Holdsworth, *A History of English Law*, 3rd Ed. Vol. 9 (London: Methuen & Co., 1926) [Plaintiffs' Book of Authorities, Tab 69]; Peter Hogg, Patrick Monahan, and Wade Wright, *Liability of the Crown*, 3rd Ed.

[12] Ontario's Closing Submissions, para 952.

(Toronto: Carswell, 2000), [Plaintiffs' Reply Book of Authorities, Tab 67].

54. Hansard, prior to the enactment of PACA, explicitly gives the rationale for the reform: "At the present time, no action in tort can be brought against the Crown…" This statement lends support to the view that the purpose of the Act was to abrogate Crown immunity for claims in tort and that the legislature at the time was not addressing an extended idea of Crown immunity for all wrongs. In addition, the Act also provided that those claims previously pursued by petition of right would henceforth be available without that procedure.

Restoule v Canada (Attorney General), 2020 ONSC 3932 at para 82 [Ontario's Book of Authorities, Tab 149], citing "The Proceedings Against the Crown Act, 1962-63" 1st reading, *Legislature of Ontario Debates*, no. 68 (March 27, 1963) at p. 2272 [Plaintiffs' Reply Book of Authorities, Tab 64], "Bill 127, An Act Respecting Proceedings Against the Crown", 1st reading, *Legislature of Ontario Debates*, 1-24, vol 27 (March 28, 1952) at B-11 (Hon D Porter) [Ontario's Book of Authorities, Tab 215]; "The Proceedings Against the Crown Act, 1962-63" 1st reading, *Legislature of Ontario Debates*, no. 68 (March 27, 1963) at pp. 2272-2273, [Plaintiffs' Reply Book of Authorities, Tab 64].

55. It is true that the Crown's fiduciary obligations to SON are of a significantly different nature to the historic equitable claims canvassed by Ontario at paragraphs 936-951 of its Closing Submissions. Fiduciary claims against the Crown in Canada were only first recognized by the Supreme Court of Canada in 1984 in the *Guerin* decision. In *Guerin,* the Supreme Court articulated the concept of a *sui generis* fiduciary duty owed by the Crown to Indigenous people.

Guerin v The Queen, [1984] 2 SCR 335, Plaintiffs' Book of Authorities, Tab 29.

Restoule v Canada (Attorney General), 2020 ONSC 3932 at paras 37-41, Ontario's Book of Authorities, Tab 149.

56. However, fiduciary duty, grounded in the fiduciary relationship between the Crown and Indigenous peoples, provides the foundation for an equitable claim if breached.

> *Restoule v Canada* (Attorney General), 2020 ONSC 3932 at para 41, Ontario's Book of Authorities, Tab 149.

Dyson Procedure

57. Ontario argues that the declarations which SON seeks regarding breach of fiduciary duty are directly tied to consequential relief in the form of monetary damages against the Crown and the creation, as a remedy, of equitable trust interests over Crown lands. As such, they would not be *Dyson* declarations.[13]

58. In *Restoule 2,* Hennessy J. held that:

> The plaintiffs assert that even if the Crown is historically immune from a claim in equity, they are entitled to seek a declaration pursuant to the *Dyson* procedure. In *Dyson*, the English Court of Appeal determined that the plaintiff could sue the Attorney General for a declaration in an ordinary action without having to proceed by petition of right and without having to obtain a fiat. However, a *Dyson* declaration cannot result in an award of damages directly attaching to the property of the Crown.
>
> The plaintiffs submit that the purpose of any request for a *Dyson* declaration is based on the expectation that the Crown would honour the declaration made in litigation, in which case, the declaration would be seen as the preliminary litigation step to determine rights.
>
> I do not accept the Crown's position that simply because the request for declaratory relief is coupled with a claim for damages that it is somehow tainted. There is no authority for this proposition. In fact, s. 97 of the *Courts of Justice Act*,

[13] Ontario's Closing Submissions, para 965.

> R.S.O. 1990, c. C.43, specifically authorizes the Superior Court to make binding declarations whether or not any consequential relief is or could be claimed.
>
> *Restoule v Canada (Attorney General)*, 2020 ONSC 3932 at paras 98-100 [citations omitted], Ontario's Book of Authorities, Tab 149.

59. SON relies on the reasoning of the court in *Restoule 2* and submits that the fact that the declarations which SON seeks regarding breach of fiduciary duty in Phase 1 of this trial are coupled (if SON is successful) with a claim for damages at Phase 2 of this trial is not a bar to the claims.

Procedural vs Substantive Immunity

60. On January 5, 2007, the Lieutenant Governor of Ontario, issued Royal Fiats to SON for the Title action and the Treaty action.[14] The Royal Fiats each provide (emphasis in originals):

…

> **NOW THEREFORE:**
>
> **LET RIGHT BE DONE in the Action as if it had been commenced as against Her Majesty the Queen in right of Ontario by way of petition of right, without prejudice to the right of the Crown to argue that some or all of the claims asserted in the Action are nevertheless subject to Crown immunity, and to raise any other defence, point of pleading or jurisdictional issue, or take any other position.**

61. Ontario argues that petitions of right are a request to the Crown to permit its common law courts to hear a complaint and even if a plaintiff had brought a claim, with a royal fiat by way of petition of right, the Crown would be immune. The fiat only permits the court to hear the claim,

[14] Royal Fiat, Title Action, Exhibit 3910; Royal Fiat, Treaty Action, Exhibit 3911.

but not to find that the Crown was liable.[15] Ontario notes that the Crown or the Attorney General would typically assert the Crown's substantive immunity after the issuance of a royal fiat by way of pleadings motion or demurrer,[16] which notably – Ontario chose not to do in this case. Instead, it chose to proceed with 26 years of litigation.

62. Ontario seems to consider Crown immunity as something that the Crown can assert, in its unfettered discretion (as a "pure act of grace"), to protect itself from any kind of equitable claim. Ontario suggests that the Crown has unlimited discretion to refuse a fiat, and even if the fiat was granted, could assert substantive immunity.

63. In *Air Canada v B.C. (A.G.)*, which involved a challenge to provincial taxes on airlines, the Supreme Court of Canada held that it had authority to issue a mandamus order compelling the Attorney General to consider the petition of right and advise the Lieutenant Governor to grant the fiat.

> *Air Canada v B.C. (A.G.)*, [1986] 2 SCR 539, Plaintiffs' Reply Book of Authorities, Tab 1.

64. SON submits that the Supreme Court's order in *Air Canada* demonstrates that the decision to assert or rely on any Crown immunity is not wholly discretionary but is subject to judicial constraints.

Honour of the Crown and Statutory Interpretation of PACA

65. SON submits that to properly interpret PACA, the principle of honour of the Crown must guide the statutory interpretive exercise.

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[15] Ontario's Closing Submissions, paras 882-884.
[16] Ontario's Closing Submissions, para 942.

66. In *Restoule 2*, Hennessy J. observed that:

> The Supreme Court of Canada has developed the principles of the honour of the Crown and the obligations flowing therefrom to the Indigenous people through its decisions in, among others, *R. v. Sparrow*, *Mitchell*, and *Haida Nation*. The principles and obligations were recognized in the context of treaty and statutory interpretation in *Badger* and *MMF*, where the Court mandated that: "Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown."
>
> … When the honour of the Crown is engaged, it speaks to how the Crown fulfils its obligations to specific Indigenous peoples. …
>
> There can be no doubt that both PACA and the *Limitations Act*, 1990 are legislation which bears on the Crown's Treaty promises to the Anishinaabek…
>
> … Time and again, the honour of the Crown duty is imposed on both the interpretation and implementation of treaties and of statues.
>
> …
>
> It is because "the honour of the Crown is itself a fundamental concept governing treaty interpretation and application,"[167] statutes with such enormous impact upon the enforcement of those promises must also be interpreted according to the duties inherent in the honour of the Crown. Similarly, because the idea of Crown immunity as a response to a treaty claim is repugnant to the Crown's promises, any statutory provision designed to impose Crown immunity must therefore be interpreted with the principle of honour of the Crown at the core. …

Restoule v Canada (Attorney General), 2020 ONSC 3932 at paras 229-232 and 234 [citations omitted], Ontario's Book of Authorities, Tab 149.

67. In *Slark*, in discussing the evolution of the law on scope of declaratory relief against the Crown, Cullity J. held that:

> I believe it is apparent that, prior to the enactment of PACA, the law governing the scope of declaratory relief against the Crown was continuing to evolve in accordance with the principle mentioned by Holdsworth - and that neither the maxim that the king can do no wrong nor the inability to enforce judgments by coercive process against the Crown were sufficient in all cases to preclude declarations that a plaintiff was entitled to damages, compensation or restitution from the Crown.
>
> The old maxim reflected medieval concepts of the monarch as sovereign that were out of place in the 20th century and are even more so today. The gradual erosion of the maxim's influence that had been traced by Holdsworth was – at the very least – vastly accelerated by the enactment of PACA. If, apart from the issue in this case, any vestiges remained, they were effectively abolished by the more recent judicial repudiation of the "regressive" distinction between the direct and vicarious tortious liability of the Crown that appeared to be embedded in the statute. It appears to me to be no less regressive to give the maxim new life by limiting access to justice for newly established causes of action against the state.

Slark at paras 115-116.

68. SON submits that PACA should be interpreted with the principle of maintaining the integrity of the Crown in mind. To interpret PACA as allowing Ontario to assert Crown immunity with unfettered discretion to protect itself from any kind of equitable claim, including more recently established causes of action such as the breach of fiduciary duty as articulated in *Guerin*, is contrary to those principles and reconciliation. The honour of the Crown demands that courts be able to adjudicate on the merits a claim that the Crown has breached fiduciary duties owed to Indigenous peoples, not just when the Crown unilaterally declares it is appropriate to do so.

2. LIMITATIONS AND LACHES

Overview

69. The limitations and laches issues which have been raised are as follows:

(a) Does the doctrine of laches bar any of the remedies sought concerning Treaty 72?

(b) Does the 10-year real property limitation period apply to bar declarations of beneficial ownership sought by SON?

70. There are many issues in this case for which limitations and laches arguments are not advanced:

(a) In relation to a declaration of Aboriginal title, neither Canada[17] nor Ontario[18] relies on limitations. Neither does Canada[19] nor Ontario[20] rely on laches.

(b) In relation to declarations of a breach of fiduciary duty, declarations about the honour of the Crown, and declarations about the impact of Treaty 72 on harvesting rights, neither Canada[21] nor Ontario[22] relies on limitations. Canada makes no submissions on laches on any of these issues, and expressly disavows laches about some of them.[23] Ontario affirms it relies generally on laches, except in relation to Aboriginal title.

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[17] Canada's Closing Submissions, Title, para 727.
[18] Ontario's Closing Submissions, para 1063.
[19] Canada's Closing Submissions, Title, para 728.
[20] Ontario's Closing Submissions, para 984.
[21] Canada's Closing Submissions, Treaty Case, para 1018.
[22] Ontario's Closing Submissions, para 1062.
[23] In relation to declarations about the honour of the Crown, and declarations about the impact of Treaty 72 on harvesting rights, Canada expressly disavows laches. Canada's Closing Submissions, Treaty Case, para 1019.

(c) Canada states that it relies on laches with respect to "damages[24] for the sale of the land pursuant to Treaty 72",[25] but makes no submissions concerning laches in this Phase of this action. SON understands that Canada does not intend to raise laches (in any Phase of this action) as a bar to the remedy of compensation sought, but rather that Canada intends to raise equitable factors in Phase 2 respecting delay that may affect the quantum of compensation for breach of fiduciary duty. SON understands that Canada acknowledges that any ruling by this Court on laches in this Phase is binding on Canada, notwithstanding that Canada made no submissions on laches in this Phase.

71. Ontario relies on limitations in respect of claims for beneficial ownership of lands,[26] and seeks an order to that effect in this phase of the litigation.[27] While this would appear to be a Phase 2 matter as defined in the phasing order of January 16, 2020, SON agrees that it would be convenient and appropriate to resolve this matter in Phase 1, and the parties are discussing an amendment to the phasing order. SON's submissions in relation to limitations in respect of claims for beneficial ownership of lands therefore are included in the Reply Argument, for the Court's assistance should the phasing order be amended.

72. Ontario also argues that a claim in relation to a breach of treaty is barred by a twenty year limitation period for an action on a "specialty", or in the alternative, by a six year limitation period for an action on a contract. As Ontario notes, SON is making no claim for a breach of treaty,

[24] SON does not seek "damages" (except for trespass, which claim was abandoned) in this action: SON seeks equitable compensation.
[25] Canada's Closing Submissions, Treaty Case, para 1019.
[26] Ontario's Closing Submissions, para 1067ff.
[27] Ontario's Closing Submissions, paras 1077-1078.

having chosen instead to frame its action as a claim for breach of fiduciary duty (although the fiduciary duty at issue arose primarily out of a treaty promise). SON declines to reply to a rebuttal of an argument it is not making. However, SON notes that the argument Ontario is making was thoroughly canvassed, and rejected, in *Restoule 2*.[28]

73. SON's reply is set out below, starting with a recitation of relevant evidence regarding the facts leading up to SON launching the Treaty and Title actions.

Facts Relevant to Limitations and Laches

74. In particular, for the 19th century and most of the 20th century, SON faced significant barriers that effectively prevented it from bringing lawsuits in the Canadian courts to assert its rights and to seek redress for the wrongs committed against it by the Crown. It was only as these barriers began to abate in the late 20th century that it became possible for SON to assert its rights. At that point, the political organization of Indigenous peoples expanded and SON began to build its capacity to research and bring forth land claims. As soon as SON was aware of the wrongs committed against it, the legal technology existed to support its claims, and it had the practical capacity to do so, SON entered into negotiations to seek the return of its lands, and, when those processes proved inhospitable, launched the litigation that is before this Court.

75. In this context, SON cannot be said to have delayed in asserting its rights, nor should it be denied justice now based on that argument. Rather, it has been persistent and vigilant in asserting those rights using the mechanisms available to it since European contact, even in the face of significant barriers.

[28] *Restoule v Canada (Attorney General)*, 2020 ONSC 3932, 319 ACWS (3d) 565 at paras 122-200 (*Restoule 2*) [Ontario's Book of Authorities, Tab 149].

SYSTEMIC OBSTACLES TO ASSERTING RIGHTS EFFECTIVELY

76. The overarching systemic obstacle to SON asserting its rights and seeking redress for wrongs were common to all First Nations: the assimilation policy of the Canadian government.

77. The Royal Commission on Aboriginal Peoples (1996) explained the Crown's assimilation policy as follows:

> For the authors of this colonial system… Their national vision was the same for all Aboriginal people, whether men, women or children, 'status' or 'non-status', Indian, and Métis or Inuit. As their homelands were engulfed by the ever expanding Canadian nation, all Aboriginal persons would be expected to abandon their cherished lifeways to become 'civilized' and thus to lose themselves and their culture among the mass of Canadians. This was an unchanging federal determination. The long-serving deputy superintendent general of Indian affairs, Duncan Campbell Scott, assured Parliament in 1920 that "Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question".[29]

78. The Truth and Reconciliation Commission (2015) made a similar point in even stronger terms:

> For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. The establishment and operation of residential schools were a central element of this

[29] Royal Commission on Aboriginal Peoples, Vol 1, Part 1, Chapter 6- Stage Three: Displacement and Assimilation, Exhibit 4133, pp. 181-183; See also, Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 22, 2019, p. 2975, line 14 to p. 2977, line 10.

> policy, which can best be described as "cultural genocide".
>
> *Physical genocide* is the mass killing of the members of a targeted group, and *biological genocide* is the destruction of the group's reproductive capacity. *Cultural genocide* is the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next.
>
> In its dealing with Aboriginal people, Canada did all these things.[30]

79. In this context, Indigenous peoples were dispossessed of their ability to effectively assert legal rights and bring forward claims to seek redress for wrongs. Rather, they were focussed on survival. SON's experience was the same. Alongside this, SON has faced a number of other obstacles in asserting its rights, including socio-economic barriers, such as poverty, lack of access to education and political disempowerment; and a legal regime that made it nearly unthinkable for Indigenous peoples to bring forth legal claims rooted in breach of fiduciary duty or Aboriginal title until the late 20th century.

80. The following barriers are discussed in more detail below:

[30] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada, The Trust and Reconciliation Commission of Canada (2015), Exhibit 4138, p. 1.

(a) The *Indian Act* which regulated almost every aspect of life for First Nations and their members, and included a specific prohibition on raising funds to advance land claims;

(b) Indian Agents, who administered the *Indian Act* on a local level, and had immense powers to control life on reserve;

(c) Residential schools had the effect of disempowering Indigenous peoples;

(d) The socio-economic circumstances faced by Indigenous peoples were a barrier to advancing legal claims about their rights; and

(e) The historical state of the law did not allow for Indigenous rights and claims to be advanced.

(a) The *Indian Act* Regime

81. Over the course of the late 19th and 20th centuries, the *Indian Act* imposed significant constraints on SON's ability to bring forward legal claims to vindicate its rights.[31] Ontario acknowledges the existence of some of these barriers – for example, the provision of the *Indian Act* in place from 1927 to 1951 that effectively prevented First Nations from hiring lawyers[32] – but the system imposed by the *Indian Act* was much more far-reaching in terms of it impact on First Nations' ability to bring forward legal claims. This is discussed in the section below.

[31] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3231, lines 13-25.
[32] Ontario's Closing Submissions, para 1047.

82. The first comprehensive *Indian Act* was passed in 1876 as an amalgamation of existing laws. It was supplemented and added to yearly.[33] As the Royal Commission on Aboriginal Peoples (1996)[34] explained:

> The *Indian Act* of 1876 created an Indian legislative framework that has endured to the present day in essentially the terms in which it was originally drafted. Control over Indian political structures, land holding patterns, and resources and economic development gave Parliament everything it appeared to need to complete the unfinished policies inherited from its colonial predecessors. Indian policy was now clear and was expressed in the alternative by the minister of the interior, David Laird, when the draft act was introduced in Parliament: "[t]he Indians must either be treated as minors or as white men." There was to be no middle road.
>
> In general terms the 1876 act offered little that was different from what had gone before. It was much more complex and detailed however, **covering almost every important aspect of the daily lives of Indians on reserve.** [35] [**emphasis added**]
>
> […]
>
> In subsequent legislation — the *Indian Acts* of 1876 and 1880 and the *Indian Advancement Act* of 1884 — the **federal government took for itself the power to mould, unilaterally, every aspect of life on reserves and to create whatever infrastructure it deemed necessary to achieve the desired end — assimilation through enfranchisement and, as a**

[33] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3226, lines 18-25; Prof. Jarvis Brownlie, Fatherly Eye: Indian Agents, Government Power and Aboriginal Resistance in Ontario 1918-1939*,* Exhibit 4132, p. 34.

[34] Evidence of Prof. Jarvis Brownlie, Transcript vol 23, July 23, 2019, p. 3229, line 19 to p. 3230, line 4: The Royal Commission on Aboriginal Peoples (RCAP) was appointed by Prime Minister Mulroney after the Oka crisis with the mandate to inquire into the history and conditions of Indigenous peoples within Canada and to make recommendations to try to address some of the issues. It released its report in 1996.

[35] Royal Commission on Aboriginal Peoples, Vol 1, Part 2, Chapter 9 – The *Indian Act*, Exhibit 4137, p. 107748.

> **consequence, the eventual disappearance of Indians as distinct peoples.** It could, for example, and did in the ensuing years, control elections and the conduct of band councils, the management of reserve resources and the expenditure of revenues, impose individual land holding through a 'ticket of location' system, and determine the education of Indian children.[36] [**emphasis added**]

Departmental Control over Band Councils

83. The *Indian Act* gave the government tremendous control over the structure and activities of First Nations governments. The Royal Commission on Aboriginal Peoples (1996) has described these provisions, which were put in place in the 1870s and 80s, as a tool to "undermining traditional governance structures"[37] For example, over the years, different iterations of the *Indian Act* provided for the following controls:

(a) Empowering the Governor in Council to impose a system of elected councils on reserves whenever it was deemed "advisable for the good government of a band", and to depose Chiefs and Councillors "on the ground of dishonesty, intemperance, immorality or incompetency", and to declare them incompetent to hold office for up to three years.[38]

> *The Indian Act*, SC 1880, c 28 (43 Vict.), s. 72 [Plaintiffs' Reply Book of Authorities, Tab 62]*; The Indian Act*, SC 1876, c 18 (39 Vict.), s. 62 [Ontario's Book of Authorities, Tab 220]; *An Act further to amend the Indian Act*, SC 1898, c 34 (61 Vict.), s. 9 [Plaintiffs' Reply Book if Authorities, Tab 32]; *Indian Act*, RSC 1906, c 81, s. 96, [Plaintiffs' Reply Book of Authorities, Tab 51].

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[36] Royal Commission on Aboriginal Peoples, Vol 1, Part 1, Chapter 6 – Stage Three: Displacement and Assimilation, Exhibit 4133, p. 180.
[37] Royal Commission on Aboriginal Peoples, Vol 1, Part 2, Chapter 9 – The *Indian Act,* Exhibit 4137, p. 107723.
[38] Royal Commission on Aboriginal Peoples, Vol 1, Part 2, Chapter 9 – The *Indian Act,* Exhibit 4137, p. 107751; Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2109, p. 3233, lines 4-17.

(b) First Nations leaders chosen according to the traditional selection methods in the community were no longer allowed to exercise any powers;[39]

The Indian Act, RSC 1886, c 43 (49 Vict.), s. 75(3), Plaintiffs' Reply Book of Authorities, Tab 63.

(c) The Superintendent General of Indian Affairs was given the power to annul the election of any chief found guilty of "fraud or gross irregularity" in a band council election and to recommend to the governor in council that such a chief be prohibited from standing for election for six years. The provision was used to counter the practice of many bands of holding a sham election to simply appoint or elect their traditional/hereditary leaders.[40]

The Indian Act, 1886, c 28 (43 Vict.), s. 75(4), Plaintiffs' Reply Book of Authorities, Tab 63.

(d) The Governor in Council was also empowered to depose.

84. The new band councils had "very limited powers" and were, over the course of the late 19th and early 20th century, subject to increasingly tight control by the Department of Indian Affairs:[41]

[39] Royal Commission on Aboriginal Peoples, Vol 1, Chapter 9 – The *Indian Act,* Exhibit 4137, p.107751.
[40] Royal Commission on Aboriginal Peoples, Vol 1, Part 2, Chapter 9 – The *Indian Act,* Exhibit 4137, p. 107758.
[41] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 24; Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2109, p. 3232, lines 18-21; P.G. McHugh, Aboriginal Societies and the Common Law, Exhibit 4442, pp. 259-260.

(a) The *Indian Act* gave the Department extensive control over how band funds were spent, including by requiring federal government approval for First Nations people to access their own band funds.

> *An Act Providing for the organisation of the Department of the Secretary of State of Canada and for the management of Indian and Ordnance*, SC 1868, c 42 (31 Vict), s. 11 [Plaintiffs' Reply Book of Authorities, Tab 27]; *The Indian Act*, SC 1876, c 18 (39 Vict.), ss. 11, 58-60 [Ontario's Book of Authorities, Tab 220]; *The Indian Act*, SC 1880, c 28 (43 Vict.), ss. 69-71 [Plaintiffs' Reply Book of Authorities, Tab 62]; *The Indian Act*, RSC 1886, c 43 (49 Vict.), ss. 69-71 [Plaintiffs' Reply Book of Authorities, Tab 63]; *An Act to further amend the Indian Act*, SC 1895, c 35 (58-59 Vict.), s. 2 [Plaintiffs' Reply Book of Authorities, Tab 31]; *An Act further to amend the Indian Act*, SC 1898, c 34 (61 Vict.), s. 6 [Plaintiffs' Reply Book of Authorities, Tab 32]; *An Act to amend the Indian Act*, RSC 1906, c 20 (10-11 Geo. V.), s. 1 [Plaintiffs' Reply Book of Authorities, Tab 33]; *Indian Act*, RSC 1906, c 81, ss. 87-90 [Plaintiffs' Reply Book of Authorities, Tab 51]; *An Act to amend the Indian Act*, SC 1910, c 28 (9-10 Edw. V.), s. 2 [Plaintiffs' Reply Book of Authorities, Tab 34] ; *An Act to amend the Indian Act*, SC 1919, c 56 (9-10 Geo. V.), s. 2 [Plaintiffs' Reply Book of Authorities, Tab 37]; *An Act to amend the Indian Act*, SC 1926-1927 (17 Geo. V.), c 32, s. 1 [Plaintiffs' Reply Book of Authorities, Tab 43]; *An Act to amend the Indian Act*, SC 1924, c 47 (14-15 Geo. V.), s. 5 [Plaintiffs' Reply Book of Authorities, Tab 40]; *An Act to amend the Indian Act*, SC 1918, c 26 (8-9 Geo. V.), s. 4 [Plaintiffs' Reply Book of Authorities, Tab 36]; *Indian Act*, RSC 1927, c 98, ss. 90-95 [Plaintiffs' Reply Book of Authorities, Tab 52]; *An Act to amend the Indian Act*, SC 1936, c 20 (1 Ed. VIII), s. 3 [Plaintiffs' Reply Book of Authorities, Tab 44]; *The Indian Act*, SC 1951, c 29 (15 Geo. VI.), ss. 61-68 [Plaintiffs' Reply Book of Authorities, Tab 61] ; *Indian Act*, SC 1988, c I-6, ss. 61-68 [Plaintiffs' Reply Book of Authorities, Tab 53].

(b) The Royal Commission on Aboriginal Peoples (1996) commented on the use of such controls to impeded First Nations organizing to assert their rights:

> [T]his made it difficult for bands to organize, since they would require the approval of the Indian agent to get access to sufficient funds to travel and meet among themselves. There is considerable evidence of the extent to which Indian affairs officials used their control over band funds to deliberately impede Indian people from meeting for these purposes.

Royal Commission on Aboriginal Peoples, Vol 1, Part 1, Chapter 7 – Stage Four: Negotiation and Renewal – The Role of the Courts at p. 200.

(c) All bylaws, rules and regulations passed at band council meetings were subject to government approval before they could be implemented, giving the Indian Department an effective veto over band council decisions.[42]

Indian Act, RSC 1906, c 81, ss. 97-98, 194 [Plaintiffs' Reply Book of Authorities, Tab 51]*; The Indian Act*, SC 1951, c 29 (15 Geo. VI.), ss. 80-82 [Plaintiffs' Reply Book of Authorities, Tab 61].

(d) From 1910, there was an explicit provision in the *Indian Act* that no contract dealing with Indian Band funds was binding unless approved by the Superintendent General of Indian Affairs.

Indian Act, RSC 1906, c 81, s. 87 [Plaintiffs' Reply Book of Authorities, Tab 51] as amended by *An Act to amend the Indian Act,* SC 1910, c 28 (9-10 Edw. VII.), s. 2 [Plaintiffs' Reply Book of Authorities, Tab 34].

[42] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 24-25.

(e) Starting in 1914, the Superintendent General of Indian Affairs took on an expanded regulation making power that allowed the Department to pass regulations that would override band council bylaws.[43]

> *An Act to amend the Indian Act,* SC 1914, c 35 (4-5 Geo. V.), s. 6 [Plaintiffs' Reply Book of Authorities, Tab 35]*; Indian Act*, RSC 1906, c 81, s. 92 [Plaintiffs' Book of Authorities, Tab 51]*; An Act to amend the Indian Act*, SC 1918, c 26 (8-9 Geo.V.), s. 5 [Plaintiffs' Reply Book of Authorities, Tab 36]*; An Act to amend the Indian Act*, SC 1926-1927, c 32 (17 Geo. V.), s. 2 [Plaintiffs' Reply Book of Authorities, Tab 43]*; Indian Act*, RSC 1927, c 98, s. 95 [Plaintiffs' Reply Book of Authorities, Tab 52].

(f) The Indian Agent was given the power to preside at and direct band council meetings.

> *The Indian Act*, SC 1880, c 28 (43 Vict.), s. 73 [Plaintiffs' Reply Book of Authorities, Tab 62]*; An Act further to amend "The Indian Act,1880"*, SC 1884, c 27 (47 Vict.), s. 9 [Plaintiffs' Reply Book of Authorities, Tab 29]*; The Indian Act*, RSC 1886, c 43 (49 Vict.), ss. 127-128 [Plaintiffs' Reply Book of Authorities, Tab 63]*; Indian Act*, RSC 1906, c 81, ss. 185,187 [Plaintiffs' Reply Book of Authorities, Tab 51]*; Indian Act*, RSC 1927, c 98, ss. 176-178 [Plaintiffs' Reply Book of Authorities, Tab 52]*; The Indian Act*, SC 1951, c 29 (15 Geo. VI.), s. 79 [Plaintiffs' Reply Book of Authorities, Tab 61].

85. The Truth and Reconciliation Commission (2015) summarized the effect of these provisions:

> Canada replaced existing forms of Aboriginal government with relatively **powerless band councils whose decisions it could override and whose leaders it could depose**.[44] [**emphasis added**]

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[43] Royal Commission on Aboriginal Peoples, Vol 1, Part 2, Chapter 9 – The *Indian Act,* Exhibit 4137, p. 107758.

[44] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada, The Trust and Reconciliation Commission of Canada (2015), Exhibit 4138, p. 107853.

86. Prof. Paul McHugh, a legal historian called to testify by Canada, described this as a "legal obliterat[ion]" of the traditional forms of governance in First Nations:[45]

> The band was given limited powers of self-management under the [Indian] Act but these fell far short of self-government. Those curtailed powers were anyway subject to the supervision of Crown officials – its 'agents' who lived on the reserve and practically controlled most if not all of Indian life on behalf of the Minister.[46]

87. Prof. Jarvis Brownlie similarly explained,

> The Band Council system was designed to ensure the Indian Department's control over governance and political and economic decisions on the reserves, and the Indian Department throughout the period up to the beginning of the 1970s remained very resistant to any efforts to raise issues of treaty implementation or unlawful takings of land, any grievances related to treaties and Indigenous rights. And so the Band Council was used as a tool to help suppress discussion of these issues and to help prevent Indigenous people from raising these issues publicly or pressing claims" [47]

88. This system of control over band councils extended to SON.[48] SON members that testified in this trial explained how the Indian Agent was frequently "at odds" with the band council.[49] The Indian Agents working with SON would sometimes refuse to pass along resolutions

[45] P.G. McHugh, Aboriginal Societies and the Common Law, Exhibit 4442, p. 184.
[46] P.G. McHugh, Aboriginal Societies and the Common Law, Exhibit 4442, p. 184.
[47] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3235, line 13 to p. 3236, line 9.
[48] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2109, p. 3235, lines 9-12.
[49] Evidence of Ted Johnston, Transcript vol 4, May 1, 2019, p. 398, line 11 to p. 399, line 5.

and information[50], and tried to discourage people in the community from "caus[ing] trouble" for the Department.[51] The specific role of the Indian Agent is discussed in more detail below.

89. The Department's tight control over band councils persisted through the first half of the 20th century. It not until the 1950s and 60s that the Indian Department began to loosen its control over the elected band councils. [52]

Forced Enfranchisement

90. Another tool the Department used to control the political activities of First Nations was the mandatory enfranchisement provision, which was added to the *Indian Act* in 1876 after voluntary enfranchisement proved to be wholly unappealing to Indigenous populations.[53]

> *The Indian Act*, RSC 1876, c 18 (39 Vict.), s. 86, Ontario's Book of Authorities, Tab 220.

91. Enfranchisement refers to the loss of Indian status:

> Upon enfranchisement, volunteers would no longer be considered 'Indians' and would acquire instead the rights common to ordinary, non-Aboriginal settlers. In addition, they would take a portion of tribal land with them. They and such property would no longer be 'Indian' in the eyes of the law. Reformers saw enfranchisement as a privilege, not something to be acquired lightly.[54]

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[50] Evidence of James Ritchie, Transcript vol 7, May 15, 2019, p. 664, lines 8-24.
[51] Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 749, line 7 to p. 750, line 20.
[52] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2109, p. 3234, line 20 to p. 3235, line 8.
[53] RCAP suggests that just one Indian was enfranchised voluntarily. Royal Commission on Aboriginal Peoples, Vol 1, Part 2, Chapter 9 – The *Indian Act,* Exhibit 4137, p. 107759.
[54] Royal Commission on Aboriginal Peoples, Vol 1, Part 1, Chapter 6 – Stage Three: Displacement and Assimilation, Exhibit 4133, pp.145-146.

92. The provision was removed, and reinserted in various forms over the next 60 years.[55] A weakened version of the compulsory enfranchisement provision persisted even after the 1951 revision to the *Indian Act*: under this provision, the Minister could enfranchise an Indian or a band only upon the advice of a special committee established for that purpose. If the committee found that the person or band was qualified and that enfranchisement was desirable, the person or band in question would be deemed to have applied for enfranchisement.

> *The Indian Act*, SC 1880, c 28 (43 Vict.), s. 99 [Plaintiffs' Reply Book of Authorities, Tab 62]*; An Act further to amend "The Indian Act, 1880"*, SC 1884, c 27 (47 Vict.), s. 16 (repealing and replacing s 99) [Plaintiffs' Reply Book of Authorities, Tab 29]*; An Act to amend the Indian Act*, SC 1919-20 (10-11 Geo. V.), c 50, s. 3 [Plaintiffs' Reply Book of Authorities, Tab 38]*; An Act to amend the Indian Act*, SC 1922, c 26 (12-13 Geo. V), s. 1 [Plaintiffs' Reply Book of Authorities, Tab 39]; *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, SC 1869 (32-33 Vict.), c 6 (32-33 Vict.) [Plaintiffs' Reply Book of Authorities, Tab 28]*; The Indian Act*, SC 1876, c 18 (39 Vict.), s. 3 [Ontario's Book of Authorities, Tab 220]*; The Indian Act*, RSC 1886, c 43 (49 Vict.), ss. 2, 11-12 [Plaintiffs' Reply Book of Authorities, Tab 63]*; Indian Act*, RSC 1906, c 81, ss. 2,14 [Plaintiffs' Reply Book of Authorities, Tab 51]*; Indian Act*, RSC 1927, c 98, ss. 2,14-15 [Plaintiffs' Book if Authorities, Tab 52]*; The Indian Act,* SC 1951, c 29 (15 Geo. VI.), ss. 11-12, 14, 112 [Plaintiffs' Reply Book of Authorities, Tab 61].

93. Involuntary enfranchisement was used by the Indian Department to threaten Indigenous leaders who agitated for the rights of Indigenous peoples, and so had the effect of discouraging or disallowing Indigenous peoples from bringing forward their claims. One notable example is F.O.

[55] Though the involuntary element of the provision was removed in 1880, in 1884, an additional provision was added to remove the right of a band to refuse to consent to enfranchisement or to refuse to allot the required land to the individual being enfranchised. Compulsory enfranchisement was permitted once again in 1920, repealed in 1922, and reintroduced in 1933 – see: Royal Commission on Aboriginal Peoples, Vol 1, Part 2, Chapter 9 – The *Indian Act,* Exhibit 4137, pp 107759-107760.

Loft, who was involved in political organizing among the Haudenosaunee in the 1920s.[56] As the Royal Commission on Aboriginal Peoples (1996) noted:

> It was hazardous in other ways to attempt to organize or to bring legal proceedings against the federal government. This was certainly the experience of F.O Loft, who was defamed by the deputy superintendent general of Indian Affairs, repeatedly investigated by the RCMP at the instigation of Indian Affairs officials, and even threatened with enfranchisement because he proposed to bring a legal action to test the constitutionality of provincial game laws in light of treaty hunting, fishing and trapping guarantees.
>
> Royal Commission on Aboriginal Peoples, Vol 1, Part 1, Chapter 7- Stage Four: Negotiation and Renewal – The Role of the Courts at pp. 200-201.

94. SON submits that such threats would have thus had the effect of silencing complaints and the assertion of Indigenous rights.

95. Enfranchisement was removed from the *Indian Act* in 1985.[57]

Policing, Traditional Culture and Personal Lives

96. Several provisions of the *Indian Act* gave departmental officials tools to punish those it saw as challenging the Indian Department.

97. For example, from 1884 until 1951, the *Indian Act* banned Indigenous ceremonies such as the potlatch. The potlach is a complex ceremony practiced among some West Coast First

[56] In Loft's case, the provision was repealed before the threat could be carried out – see Royal Commission on Aboriginal Peoples, Vol 1, Part 2, Chapter 9 – The *Indian Act,* Exhibit 4137, pp. 107760-107761.
[57] Royal Commission on Aboriginal Peoples, Vol 1, Part 2, Chapter 9 – The *Indian Act,* Exhibit 4137, p. 107791.

Nations that involved giving away possessions, feasting and dancing.[58] Further amendments prohibiting other traditional dances and customs followed in 1895.[59] These prohibitions were put in place to assist with Christianization and "civilization" of the tribes.[60]

> *An Act further to amend "The Indian Act 1880"*, SC 1884, c 27 (47 Vict.), s. 3 [Plaintiffs' Reply Book of Authorities, Tab 29*; The Indian Act*, RSC 1886, c 43 (49 Vict.), s. 114 [Plaintiffs' Reply Book of Authorities, Tab 63]*; Indian Act*, RSC 1906, c 81, s. 149 [Plaintiffs' Reply Book of Authorities, Tab 51*; Indian Act*, RSC 1927, c 98, s. 140 [Plaintiffs' Reply Book of Authorities, Tab 52].

98. As historian Paul Tennant explains, in the early 20th century, this provision was a tool to discourage organizing by Indigenous peoples with a view to bring land claims or asserting their rights:

> Although it had been in place since 1884, the anti-potlatch provision of the *Indian Act*, section 140, had been enforced only sporadically. After Scott became deputy superintendent, it was amended in 1914 and 1918 to expand the definition of prohibited activities and to make prosecution easier. Now the prohibition applied to "any Indian festival, dance or other ceremony of which the giving away or paying or giving back of money of any sort forms a part." **The definition was so broad that it could apply to virtually any gathering organized by Indians themselves, including not only the traditional potlatch but also, in the hands of zealous missionaries or Indian agents, meetings to discuss land claims.** The penalty for violating the potlatch prohibition did not include the option of a fine; it was

[58] Royal Commission on Aboriginal Peoples, Vol 1, Part 2, Chapter 9 – The *Indian Act,* Exhibit 4137, p. 107764.
[59] Royal Commission on Aboriginal Peoples, Vol 1, Part 2, Chapter 9 – The *Indian Act,* Exhibit 4137, p. 107766.
[60] Royal Commission on Aboriginal Peoples, Vol 1, Part 1, Chapter 6 -Stage Three: Displacement and Assimilation, Exhibit 4133, p. 183.

> jailing for at least two months and a maximum of six.[61] [**emphasis added**]

99. In 1927, the *Indian Act* was amended to give the Superintendent General of Indian Affairs the power to regulate the operation of pool rooms, dance halls and other places of amusement on reserves across Canada. This provision was implemented to ensure that Indians "would learn industriousness and would not spend too much time in leisure pursuits" and another example of a provision that could be used by the Indian Department to police and discourage any gatherings of Indigenous peoples.[62]

> *Indian Act*, RSC 1927, c 98, s. 95(g), Plaintiffs' Reply Book of Authorities, Tab 52.
>
> Report of the Royal Commission on Aboriginal Peoples, Vol 1, Part 2: False Assumptions and Failed Relationship, Chapter 8, at p. 270, Plaintiffs' Reply Book of Authorities, Tab 76.

100. The *Indian Act* also gave officials tools to police the personal lives of the First Nations people in their charge. For example, as noted below, the Indian Department could stop payments of annuities or other money. These provisions were intended primarily as a tool to assimilate First Nations people into Euro-Canadian norms, as explained by The Royal Commission on Aboriginal Peoples (1996):

> The *Indian Act* further facilitated the imposition of the government's assimilative will by insisting on conformity with Canadian social mores and providing penalties for non-compliance. Non-Aboriginal concepts of marriage and parenting were

[61] Paul Tennant, Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989 - Chapter 8 - Cut-Offs, Claims Prohibition, and the Allied Tribes, 1916-27 (1990), Exhibit 4140, p. 101; Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3267, lines 11-25.

[62] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 23-24.

> to prevail. The department could, for instance, stop the payment of annuity and interest money of, as well as deprive of any participation in the real property of the band, any Indian who is proved, to the satisfaction of the Superintendent General, guilty of deserting his family, or of conduct justifying his wife and family in separating from him…. [and] may also stop the payment of the annuity…. of any Indian parent of an illegitimate child. [63]

101. Prof. Brownlie explained that they also provided a mechanism for the Indian Department to punish those who were seen as "too outspoken". In his expert report, he cited several examples of First Nations women that were refused aid or assistance as punishment for perceived immoral behaviour, but also often for making complaints or agitating for improved relief. [64]

Ban on Hiring Lawyers and Indigenous Political Organizing

102. At a number of points in its history, the *Indian Act* has contained express provisions designed to block Indigenous land claims and other political organizing.

103. Prof. Brownlie pointed out that as early as 1906, there is evidence of Department officials attempting to forbid the use of band funds for hiring a lawyer.[65] As noted above, from 1910 on, there was an explicit provision in the *Indian Act* that no contract dealing with Indian Band funds was binding unless approved by the Superintendent General of Indian Affairs.

> *Indian Act,* RSC 1906, c 81, s. 87 [Plaintiffs' Reply Book of Authorities, Tab 51] as amended by *An Act to amend the Indian Act*,

[63] Royal Commission on Aboriginal Peoples, Vol 1, Part 1, Chapter 6: Stage Three – Displacement and Assimilation, Exhibit 4133, pp.184-185; See also, Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 46-52.
[64] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 48-50.
[65] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 113-114.

SC 1910, c 28 (9-10 Edw. VII), s. 2 [Plaintiffs' Reply Book of Authorities, Tab 34].

104. In 1927, facing organized and persistent efforts by some First Nations, particularly in British Columbia, to press concerns about land and sovereignty, the Indian Department implemented the most direct barrier to land claims yet: a provision in the *Indian Act* that would prohibit Indians from paying lawyers to pursue claims without government approval.[66] It stated:

> Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from any Indian any payment or contribution or promise of any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offence and liable upon summary conviction for each such offence to a penalty not exceeding 200 dollars and not less than fifty dollars, or to imprisonment for any term not exceeding two months.

Indian Act, RSC 1906, c 81 [Plaintiffs' Reply Book of Authorities, Tab 51] as amended by *An Act to amend the Indian Act*, SC 1926-1927, c 32 (17 Geo. V.), s. 6 [Plaintiffs' Reply Book of Authorities, Tab 43]; *Indian Act*, RSC 1927, c 98, s .141 [Plaintiffs' Reply Book of Authorities, Tab 52], repealed by *The Indian Act*, SC 1951, c 29 (15 Geo. VI.) [Plaintiffs' Reply Book of Authorities, Tab 61].

105. Historian Paul Tennant observed:

> Had [Crown officials] sought merely to prevent outside agitation, the amendment could easily have

[66] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 31, 2019, p. 3264, lines 17-25; See also: Paul Tennant, Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989 - Chapter 8 - Cut-Offs, Claims Prohibition, and the Allied Tribes, 1916-27 (1990), Exhibit 4140, pp. 111-112; Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 20-21.

> been phrased to apply only to persons who were not Indians. But their intent was to prevent all land claims activity and, above all, to block the British Columbia claim from getting to the Judicial Council of the Privy Council. Striking at monetary exchanges, actual or promised, was chosen as the most expedient legal means to this end; monetary support was essential to land claims activities, and monetary exchanges could be identified and proven in court."[67]

106. Tennant concluded that the provision made it impossible for any organization to exist if pursuing land claims was one of its objectives.[68] The Royal Commission on Aboriginal Peoples (1996) agreed, noting that the provision was motivated by "a desire to reduce the effectiveness of Indian leaders…and of Indian organizations" and had the effect of "imped[ing] Indians all across Canada from acquiring legal assistance in prosecuting claims".[69] SON submits that the provision sent a strong message that land claims activities would not be tolerated.

107. Prof. Brownlie discussed the Pottawatomi claim in his evidence, noting that while this claim was an instance where the Indian Department granted permission for legal counsel to represent the Indigenous group in the claim, this was an anomaly for several reasons explained below.

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[67] Paul Tennant, Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989 - Chapter 8 - Cut-Offs, Claims Prohibition, and the Allied Tribes, 1916-27 (1990), Exhibit 4140, pp. 111-112. Officials were concerned about the British Columbia claim reaching the Judicial Council of the Privy Council because of the 1921 ruling that aboriginal title was a pre-existing right that should be presumed as continuing in *Amodu Tijani v The Secretary Southern Provinces* (Nigeria), [1921] 2 AC 399; See discussion at Paul Tennant, Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989 - Chapter 8 - Cut-Offs, Claims Prohibition, and the Allied Tribes, 1916-27 (1990), Exhibit 4140, pp. 101-102.

[68] Paul Tennant, Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989 - Chapter 8 - Cut-Offs, Claims Prohibition, and the Allied Tribes, 1916-27 (1990), Exhibit 4140, pp. 111-112.

[69] Royal Commission on Aboriginal Peoples, Vol 1, Part 2, Chapter 9 – The *Indian Act,* Exhibit 4137, pp. 107770-107771.

108. Starting in the late 19th century, a group of Pottawatomi people originally from the United States and living in Canada pursued a claim against the United States governments for annuity moneys they were owed as a result of a number of treaties made with the U.S. Government.[70]

109. Even though the claim was not against the Canadian government, the Department became heavily involved in the relationship between the Pottawatomi claimants and their legal counsel,[71] and sought to control how the claim was prosecuted and organized, including not allowing the claimants to fire their existing lawyer and instead hire American lawyers that the Pottawatomi claimants believed would be more effective.[72] While the Department made efforts to ensure the lawyers' remuneration was not too high, they also devoted their efforts to ensure that any funds received through the claim should be paid in trust to the Indian Department, rather than to individual claimants.[73] The claim continued for decades without being settled or otherwise resolved.[74]

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[70] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 61-70; Evidence of Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3276, lines 2-14.

[71] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 66.

[72] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 61-62, 65.

[73] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 61-62; C.J. Smith to Supt. Indian Affairs, February 15, 1911, Exhibit 3434. Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3280, line 5 to p. 3281, line 12.

[74] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 65-67.

110. When the ban on hiring lawyers was instituted in 1927, legal counsel for Pottawatomi in Canada had to apply for approval. Approval was granted, but it was noted that "should other similar requests be received, each can be considered on its merits." [75] There was no *pro forma* or automatic approval of such requests.[76]

111. SON submits that this approval does not suggest that requests for approval for legal counsel to advance Indigenous claims – particularly claims against Canada – would have been approved. As Prof. Brownlie points out, "[t]he fact … that the Indian department gave consent to lawyers prosecuting the Potawatomi claim cannot be taken as any indication of its attitude toward claims directed at the Canadian government."[77] It is key to consider that this claim posed no threat to Canada; in fact, if it had been settled and paid, Canada would have stood to gain "since the Pottawatomi it regarded and treated as its "wards" would have received a considerable amount of money", which Canada hoped to have deposited into Indian trust funds.[78]

112. While the provision was ultimately repealed in 1951, the perception that it was illegal to pursue land claims persisted.[79] SON submits that this provision effectively prevented First

[75] Memo by Harold McGill, Director of Indian Affairs, to The Deputy Minister, May 15, 1939, Exhibit 3644, p. 5.
[76] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 68.
[77] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 70.
[78] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 61.
[79] Prof. R. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 70. Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3282, line 25, to p. 3285, line 5; Evidence of Vernon Roote, Transcript vol 6, May 14, 2019, p. 579, lines 4-21.

Nations from launching claims against the government, and served as a chill on potential claims both while it was in force and after it was repealed.

> *Indian Act*, RSC 1906, c 81 [Plaintiffs' Reply Book of Authorities, Tab 51]. as amended by the *Indian Act*, RSC 1927, c 98, s. 141 [Plaintiffs' Reply Book of Authorities, Tab 52].
>
> *The Indian Act*, SC 1951, c 29 (15 Geo. VI.) [Plaintiffs' Reply Book of Authorities, Tab 61].

(b) Indian Agents

113. The front line of departmental control over the activities of First Nations and their elected councils, and the person responsible for operationalizing many *Indian Act* powers on the ground, was the Indian Agent.[80]

114. Indian agents were given extensive control over life on reserve. As the Royal Commission on Aboriginal Peoples (1996) explained: "With their control of local administrative, financial and judicial matters, it is easy to understand how they came to be regarded as all-powerful and as persons of enormous influence in community life on most reserves."[81] They had the power to decide who was entitled to relief, and how much; to distribute treaty payments; to administer band funds; to administer band elections; to preside over band council meetings and break any ties in the votes; and to deal with the estates of the deceased, among many other powers.[82]

115. Prof. McHugh compared the role of the powerful Indian Agents to "czars", and noted that,

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[80] Prof. R. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 39.
[81] Royal Commission on Aboriginal Peoples, Vol 1, Part 2, Chapter 9 – The *Indian Act,* Exhibit 4137, p. 107772.
[82] Royal Commission on Aboriginal Peoples, Vol 1, Part 2, Chapter 9 – The *Indian Act,* Exhibit 4137, pp. 107772-107773.

> in practice the reserves became fiefdoms of federal Indian Agents. The management of Indian Affairs became substantially a matter of the various Agents administering the reserve, its people, and assets under the shell provision of the [Indian] Act.[83]

116. The Indian Agents' control over relief was particularly significant:

> Indian agents were virtually the only route to the benefits the Indian department could provide, including financial aid such as loans and social supports such as "relief," a form of assistance to those in need that usually took the form of food and other necessary goods. Given that municipalities, which handled social assistance for everyone else, refused to provide relief for First Nations people, and that the people could not receive loans from banks because their land and personal goods could not be used as collateral, these roles of the Indian agent were particularly important. Of course, in turn this meant that for most people it was important to cultivate good relations with the Indian agent, in case one might need his help down the road.**[84]**

117. The wide-ranging roles and responsibilities accorded to Indian Agents, combined with the poverty and marginalization of many people living on reserves, gave Indian Agents tremendous power over the First Nations under their charge. As Prof. Brownlie explained,

> The agents ran the schools, the band councils, and the reserve economies. Aboriginal poverty and marginalization strongly reinforced the importance of the agent, who could offer part-time jobs on the reserve, mediation with the dominant society, and access to food rations and relief in time of need.

[83] P.G. McHugh, Aboriginal Societies and the Common Law, Exhibit 4442, p. 184.
[84] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 43-44.

> Given his potential to help those in difficulty, he was not someone to cross lightly.[85]

118. Indian Agents were also central to the justice system on reserve:

> Since 1881, agents had been justices of the peace for reserves under their charge, responsible for offences under the Indian Act and some sections of the Criminal Code. This meant that for minor offences (most often for alcohol consumption) the agent frequently laid the charges himself, investigated them, examined the evidence, pronounced the verdict, and, if applicable, assigned a penalty. For fines of $10 or less, or 30 days in jail, no appeal was permitted. Such a form of justice could hardly have the appearance of impartiality or due process.[86]

119. Prof. McHugh, observed that, over the first half of the 20th century, the power of Indian Agents over the justice system on reserve only grew, with statutory amendments and administrative practices giving Indian Agents additional tools with which to quell any dissent:

> [S]tatutory amendments and administrative practices had increased the powers wielded by the Indian Agents over the reserve. These agents had been justice of the peace since 1881 and their powers were extended significantly in 1884. Not only could they conduct legal proceedings on the reserve but a new offence was created of inciting 'three or more Indians, non-treaty Indians or half-breeds' to breach the peace or make 'threatening demands on a civil servant. **At the time, these measures were aimed at the Cree and Metis people of the prairies and showed the extent to which opposition to governmental control would not be brooked.** The same legislation also prohibited the potlatch and Tamanawas dance, both important cultural ceremonies for western Indians but regarded with

[85] Jarvis Brownlie, Fatherly Eye*:* Indian Agents, Government Power and Aboriginal Resistance in Ontario 1918-1939*,* Exhibit 4132, p. 29.
[86] Jarvis Brownlie, Fatherly Eye*:* Indian Agents, Government Power and Aboriginal Resistance in Ontario 1918-1939*,* Exhibit 4132, pp. 35-36. See also: Royal Commission on Aboriginal Peoples, Vol 1, Chapter 9 – The *Indian Act,* Exhibit 4137, pp. 107761-107762.

> horror by the missionaries. The authority of Indian Agents as justices of the peace was further enhanced in 1894. In addition the 1836 legislation set out the supervisory role of the Agent in band council meetings.[87] [**emphasis added**]

120. In 1933, the authority of Indian Agents was reinforced by an administrative directive requiring that all Indian complaints and inquiries be directed to the Indian Affairs branch through the local agent. As a result, band complaints about agents had to be directed to headquarters in Ottawa by the very agents complained about.[88]

121. The result was that Indian Agents were seen as dictatorial, authoritarian and oppressive figures by the people they were supposed to serve.[89]

122. As set out in an agreed statement of facts, Saugeen and Nawash were assigned separate Indian Agents up until 1958, when the two agencies were consolidated into the Bruce Agency (later renamed the Bruce District). Subsequently, the two First Nations shared one Indian Agent, with the last one being appointed to her position in October 1973.[90]

123. In respect of Indian Agents serving early in and towards the middle of the 20th century, SON members' oral history and testimony certainly confirms that there was the same perception that the Indian Agent was dictatorial and oppressive:

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[87] P.G. McHugh, Aboriginal Societies and the Common Law*,* Exhibit 4442, p. 260.
[88] Royal Commission on Aboriginal Peoples, Vol 1, Part 2, Chapter 9 – The *Indian Act,* Exhibit 4137, p. 107758.
[89] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 53.
[90] Agreed Statement of Facts Regarding Indian Agents, Superintendents, and Officers-in-Charge at Saugeen and Nawash, Exhibit 4551.

(a) John Nadjiwon from the Chippewas of Nawash explained that:

> The Indian agent was more – well being a governmental representative, I guess he had – he had more or less the last say. No matter what we transacted, he would still have the last say and he was looked upon somewhat like a – I guess in a sense maybe a little harsher word probably would like a dictator in a sense because he pretty well controlled the activity of the Reserve. He even had powers to take children away from families and ship them off to residential school, which I was one of them.[91]

(b) Howard Jones, a member of Chippewas of Nawash, explained his own recollection of the Indian Agent as a child growing up on the reserve:

> Well, I do recall certain situations with the Indian agent. Indian agents were very domineering, like, they were like landlords … they claimed full power over the people that they administrated. … they openly would tell people at council or councillors or whatever, that if they made certain resolutions that they would not pass them on [to Indian Affairs] or … you know, "you can make that resolution if you want but it's not going anywhere because I won't send it out. … you're only allowed to do what I tell you you can do." … And I don't think I came through the worst of the times with Indian agents, but I did come through some … recalling now, the events that happened were very, very demeaning situations with Indian agents. Like, they had no problem with walking into your home without being announced, you know, they felt that they had the right to do and go anywheres. They acted like a bad dad. … Like, Dad being in the sense that they felt that they could do anything to you. You know – and didn't have to do anything *for* you.[92]

[91] Rule 36 evidence of John Nadjiwon, September 12, 2002, Examination in Chief, Exhibit 3951, Question 79, pp. 19-20 and November 5, 2002, Cross-Examination, Exhibit 3952, Questions 141-149, pp. 38-40 and Questions 513-518, p. 108.
[92] Howard Jones, interviewed by Jarvis Brownlie, Cape Croker, June 7, 2016, Exhibit 3922, p. 3.

(c) Dale Jones, from the Chippewas of Nawash, explained that it was "always like [the Indian Agent] had his thumb on us".[93]

(d) Ted Johnston, from the Chippewas of Nawash, explained that,

> The Indian Agent was omni-puissant. He had all the power, and he abused that power… There was lots of times that the people would have something, they would take it to Council and –to try to get some solution to it. And at which time he was like, almost like the king here."[94]

(e) James Ritchie, from Saugeen First Nation, explained that the Indian agent was seen as "an oppressor."[95] He explained:

> I'm not going to say it was Communism, what the Indian agent was doing, but it was something like that. Like, it was – they ruled over you. And if you didn't listen to the rules, then, poof, you're gone somewhere, they'd ship you away. Or they'd take you kids and make you shut up, stuff like that.[96]

He further noted the perception that if they stood up to the Indian Agent "I'm pretty sure nothing good would happen to you, that's for sure. If there was any rations given, you wouldn't get any, probably. 'Cause you're a – what would you be called in that day, a renegade or something? You'd be one of them."[97]

As a child, James Ritchie:

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[93] Evidence of Dale Jones, Transcript vol 8, May 16, 2019, p. 850, line 10 to p. 851, line 9.
[94] Evidence of Ted Johnston, Transcript vol 4, May 1, 2019, p. 397, line 11, to p. 398, line 10.
[95] Evidence of Jim Ritchie, Transcript vol 7, May 15, 2019, p. 661, line 4 to line 12.
[96] Jim Ritchie, interviewed by Jarvis Brownlie, Saugeen First Nation, June 2, 2016, Exhibit 3918, p. 4.
[97] Jim Ritchie, interviewed by Jarvis Brownlie, Saugeen First Nation, June 2, 2016, Exhibit 3918, p. 16.

> had a fear of the Indian Agent because at home the old people like my grandfather, grandmother, my mother would always tell us not to talk too much to that guy, the Indian Agent. They said, those guys can take you away, they would say to us. You know, like, they would send your away. So that was where I got my fear from that person, and I always had a fear of those people like that way from when I was growing up.[98]

(f) Walter Johnston from the Chippewas of Nawash, noted that "I remember past Indian agents whose mandate was to control life on the reserve from the womb to the tomb. Life was totally regimented by the Department of Indian Affairs."[99]

124. The Indian Agents exercised considerable control over band council deliberations and decisions.[100] John Nadjiwon of Chippewas of Nawash Unceded First Nation explained that the agent would rewrite the resolutions back in his office after council meetings, and would have councillors sign off on resolutions they had not read by folding over the piece of paper containing the resolution.[101] Vernon Roote, a former Chief of Saugeen First Nation, noted that the Indian Agent did not forward all their complaints and letters to Ottawa.[102] Wilmer Nadjiwon, a former Chief of the Chippewas of Nawash Unceded First Nation, explained how the Indian Agent would control the activities of the band council:

> If the agent said you can't fish there, you can't fish there. You did not dispute the agent. He knows

[98] Evidence of Jim Ritchie, Transcript vol 7, May 15, 2019, p. 661, line 22 to p. 662, line 23.
[99] Jimelda Johnston & Kathleen (Kiki) Delorme, The Elders of Neyaashiingaming, "We Have Spoken" (Owen Sound, Ontario: Stan Brown Printers Ltd., 1992), Exhibit 3880, p. 7.
[100] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 56-57.
[101] Rule 36 evidence of John Nadjiwon, September 12, 2002, Examination in Chief, Exhibit 3951, pp. 20-22.
[102] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 513, lines 17-18; p. 515, line 2 to p. 516, line 8 and p. 516, lines 14-24.

> everything. It wasn't until my time that the agent came into question. I used to spend 5 or 6 meetings a year as an observer at the table. And I thought, what the hell, the council has [no] authority, the agent has the authority. He tells when he wants a motion, how it is to be said, how printed… He gives it to the secretary and he records it, he asks someone to pass it, somebody to second the motion and that's it.[103]

125. Over the course of the trial, this Court heard from a number of witnesses that an Indian Agent had been spotted on more than one occasion burning documents that belonged to the community:

(a) Saugeen member Vernon Roote explained:

> In the middle of the 1950s the Indian Agent, and I'm not exactly sure who it was, I think it was Bouchard; he went about to clean out the basement of the Indian Agency building; and some of the papers that were there he had decided to burn them; and he took them to the local dump that we had here in the community and went about burning some of the paper documents that were in the basement of the agency.
>
> And in doing so a couple of our fellows, James Wesley and Alex Solomon, happened to notice that he had taken an amount of paper to burn and destroy it at the dump.
>
> And when he went there and left, Jim Wesley and Alex Solomon went digging around to see what they could salvage. And they were able to salvage, I believe, three minute books; and those minute books were of different times of course. And I believe those minute books are still within our files within the band office. [104]

[103] Interview with Wilmer Nadjiwon, by Patrick Nadjiwon, June 4, 1991, Exhibit 3879, pp. 5-6.
[104] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 524, line 11 to p. 525, line 8; Evidence of Vernon Roote, Transcript vol 6, May 14, 2019, p. 551, line 22 to p. 553, line 7 and p. 590, line 4 to p. 591, line 22.

(b) James Ritchie from Saugeen First Nation explained that he understood that incidents of burning documents may have occurred at both Saugeen and Cape Croker.[105]

(c) Darlene Johnston from the Chippewas of Nawash testified that documents were burned before the last agent left Cape Croker, including ledger books and letter books.[106] Some of these documents were saved, and were stored in the band office and later in a safe in the land claims office.[107]

(d) Marshall Nadjiwon witnessed the Indian Agent burning documents when he was 14 years old and was painting the windows of the Indian Agency. This was in the early 1960s.[108]

(e) Ted Johnston noted:

> There was a certain person that was the Chief here Wilmer Nadjiwon at one time was here and he happened to be down at the Indian Agency, which is jus the big stone building down the road here. And he seen the Indian Agent out there burning papers, and it was the records of the Council meetings and such, and he was out burning them.[109]

(f) John Nadjiwon testified:

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[105] Evidence of Jim Ritchie, Transcript vol 7, May 15, 2019, p. 667, line 19, to p. 668, line 24.
[106] Letter books are copies of letters that had been sent by the Indian Agent to various people, but most often to the Department of Indian Affairs in Ottawa. Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2307, line 25 to p. 2308, line 6.
[107] Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2263, line 24 to p. 2265, line 2.
[108] Evidence of Marshall Nadjiwon, Transcript vol 22, June 28, 2019, p. 2090, line 9 to p. 2091, line 2.
[109] Evidence of Ted Johnston, Transcript vol 4, May 1, 2019, p. 398, line 11 to p. 399, line 5.

> [T]he Indian agent, like Fred Purser when he left, he burnt everything out in the backyard of what was in that office, and we were quite fortunate to have Mr. Howard Chegahno and Wilmer Nadjiwon pick up some of the books. They were ledger books. They were about maybe 20 inches and they were about - well I'd say four or five inches deep like, and these - what was in those ledger books was the names of the people that were - supposedly bought land on the - on the Peninsula, and when they bought land they paid so much down and after each name there was a blank space and on the top 'balance owing,' and the amount of the balance owing was written.[110]

126. Prof. Brownlie explained that this kind of event would not typically appear in the documentary record. He noted that in spite of variations across community accounts of the incident(s), there are important commonalities in these stories, which illuminate how the community saw the Indian agent:

> It is always the Indian Agent. It is always the burning of books and I think in every case they specify that they are books that record land transactions.
>
> And what that tells you is that a community story has circulated **that gives you insight into the community understandings of their relations with Indian Agents in which the Indian agent was seen as not necessarily trustworthy, as someone who withheld information about land from them, and the fact that they always mention land books, ledgers related to land sales, shows how important those records were to the community.**
>
> One of the problems with this kind of story is that sometimes people discount stories like this because of the inconsistencies on some details, such as when

[110] Rule 36 evidence of John Nadjiwon, September 12, 2002, Examination in Chief, Exhibit 3951, p. 22.

> it happened and who witnessed it, and that would be a great mistake.[111] [**emphasis added**]

127. SON submits that Prof. Brownlie's opinion highlights the value of and role of this evidence: it is clear that SON members perceived the Indian Agent as someone who a) very likely destroyed community documents; and b) was likely to make specific efforts to obstruct their claims.

128. SON further submits that the impact of the domination on the Indian Agent was to make it difficult for the community to research and launch claims. The effect of such tight control over band council activities – and such serious personal ramifications for individuals who fell out of the Indian Agent's good graces – was to practically prevent the community from organizing to assert its rights. This situation persisted until the late 1960s, when the Indian Agent left SON's reserves.[112]

(c) Residential Schools

129. The residential school system has had a significant impact on the ability of Indigenous peoples, including SON, to assert their rights. Designed to assimilate Indigenous children into

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[111] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3205, line 1 to p. 3207, line 19, especially p. 3207, lines 2-19.

[112] Evidence of Jim Ritchie, Transcript vol 7, May 15, 2019, p. 666, line 20 to p. 667, line 2 – *Indian Agent left Saugeen in the late 1960s*; *Indian Agents began to be phased out in the 1960s* - Royal Commission on Aboriginal Peoples, Vol 1, Chapter 9 – The *Indian Act,* Exhibit 4137, p. 107758; Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 33- *Wilmer Nadjiwon expelled the Indian Agent from Cape Croker in 1967. For many years, there was an Indian agent stationed at each of Saugeen and Nawash. In 1958, the two agencies were amalgamated and housed at Saugeen*: Report of the Indian Affairs Branch for the Fiscal Year ended March 31, 1959, Exhibit 4091, p. 82. *However, the agent was likely to have made continued visits to both communities after that date*: Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3247, line 2 to p. 3248, line 1. Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2284, lines 1-5.

mainstream Canadian culture by separating them from their families and communities,[113] residential schools operated in Ontario throughout the 19th century and most of the 20th centuries. Starting in 1894, attendance at the schools was compulsory.[114] No child could be discharged from the school without the approval of the Indian Department.[115] The schools reached peak enrollment in the late 1950s. [116] It was not until 1998 that the last residential school in southern Canada was closed.[117]

130. The conditions in residential schools have been well documented. Children were subject to abuse[118]; received a poor education[119]; were prevented from and punished for speaking their own languages[120]; and were made subject to appalling conditions, including inadequate food[121]

[113] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3251, lines 7-24.
[114] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada, The Trust and Reconciliation Commission of Canada (2015), Exhibit 4138, p. 60.
[115] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada, The Trust and Reconciliation Commission of Canada (2015), Exhibit 4138, p. 61.
[116] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada, The Trust and Reconciliation Commission of Canada (2015), Exhibit 4138, p. 63.
[117] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada, The Trust and Reconciliation Commission of Canada (2015), Exhibit 4138, p. 70.
[118] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada, The Trust and Reconciliation Commission of Canada (2015), Exhibit 4138, pp. 101-110.
[119] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada, The Trust and Reconciliation Commission of Canada (2015), Exhibit 4138, pp. 71-80.
[120] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada, The Trust and Reconciliation Commission of Canada (2015), Exhibit 4138, pp. 80-84.
[121] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada, The Trust and Reconciliation Commission of Canada (2015), Exhibit 4138, pp. 85-90.

and medical care[122], that lead to a high death rate among children who attended.[123] Although parents often attempted to resist by refusing to send their children to the schools, or by refusing to return those children who managed to run away from the residential schools, they faced the risk of legal reprisals for this resistance.[124] An 1894 amendment to the *Indian Act* made parents who did not return truants to residential school subject to prosecution.[125] Government officials would also sometimes deny treaty payments or food rations to parents who tried to keep their children out of schools.[126]

> *An Act further to amend "The Indian Act",* SC 1894, c 32 (57-58 Vict.), s. 11, Plaintiffs' Reply Book of Authorities, Tab 30.

131. SON members attended the Mount Elgin residential school at Muncey and the Spanish Residential School on the north shore of Lake Huron.[127]

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[122] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada, The Trust and Reconciliation Commission of Canada (2015), Exhibit 4138, pp. 90-99.
[123] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada, The Trust and Reconciliation Commission of Canada (2015), Exhibit 4138, pp. 92-93.
[124] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada, The Trust and Reconciliation Commission of Canada (2015), Exhibit 4138, p. 114.
[125] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada, The Trust and Reconciliation Commission of Canada (2015), Exhibit 4138, p. 119.
[126] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada, The Trust and Reconciliation Commission of Canada (2015), Exhibit 4138, p. 115.
[127] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 29-30; Jimelda Johnston & Kathleen (Kiki) Delorme, "The Elders of Neyaashiingaming, 'We Have Spoken'" (Owen Sound, Ontario: Stan Brown Printers Ltd., 1992), Exhibit 3880, for instance at pp. 27, 33, 35, and 41; Evidence of Jim Ritchie, Transcript vol 7, May 15, 2019, p. 661, line 22 to p. 662, line 23; Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3259, line 1 to p. 3261, line 5.

132. One of the many destructive legacies of their experiences has been to disempower them from bringing legal claims against the government. As Prof. Brownlie explained:

> Residential schools had a … huge impact on the ability of the Saugeen Ojibway people to bring land claims and on several fronts. They experienced this very harsh regime that left them often troubled, that left them feeling unjustly treated, that left them afraid of white authorities. They received very poor educations in these institutions….So in many ways they were disempowered, they were left poorly educated, they were trained to obey and not take initiative, and they were deprived of an understanding of their own history and culture which meant it was also not easy for the community to retain its own historical traditions, its own oral history. It wasn't easy for them to pass down the knowledge that their Elders had, which included knowledge about the Treaties and their history of trying to defend their lands and resources.[128]

(d) Socio-economic Barriers

133. SON also faced significant socio-economic barriers that limited their capacity to bring land claims in the Canadian courts.

Poverty

134. A lack of financial resources was a significant factor that limited SON's ability to effectively assert their rights:

> Where Indigenous land rights are concerned, the people who might have asserted the rights in court were unable to do so because they did not understand the legal system, did not have the financial resources to hire lawyers, or were legally prevented from litigating, either by Crown immunity from suit or by discriminatory laws such as the section of the Canadian Indian Act enacted in 1927 that made it an

[128] Evidence of Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3261, line 6 to p. 3262, line 17.

> offence, absent written permission from the Superintendent General of Indian Affairs, for anyone to solicit or receive funds from Indians to pursue any of their claims.[129]

135. Poverty affected SON both individually and collectively. Members of SON often experienced "hard times".[130] Stella Johnston, born in 1926, noted that in her childhood, "There wasn't a lot of money… People were poor."[131] Ross Waulkie, born in 1927, noted that "a lot of times we didn't know where our next meal would come from."[132]

136. SON members also faced discrimination in securing employment, and that reinforced their poverty.[133] SON's poverty in turn reinforced their dependence on relief, which was controlled by the Indian Agent. So, not only did poverty mean that they lacked the resources to dedicate to advancing land claims, but it also served to increase the influence of the Indian Agent in community life, as discussed above.

Little Access to Education

137. Not only did residential schools have a destructive impact as described above, they also failed to provide access to good education. Rather, as described by the Truth and Reconciliation

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[129] Kent McNeil, "Indigenous Rights Litigation, Legal History, and the Role of Experts," Saskatchewan Law Review vol. 77 (2014), pp.181-2 [footnotes omitted] [Plaintiffs' Reply Book of Authorities, Tab 70]; See also: Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 103-105.

[130] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 103-104.

[131] Stella Johnston, in Johnston & Delorme, Elders of Neyaashiingaming, "We Have Spoken", Exhibit 3880, p. 87.

[132] Ross Waukie, in Johnston & Delorme, Elders of Neyaashiingaming, "We Have Spoken", Exhibit 3880, p. 93.

[133] Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 107-108.

Commission (2015), as educational institutions they were failures. Classes were overcrowded; individuals appointed as teachers lacked teaching abilities as priority was placed on religious commitment instead; and rather than just attend as students there to be educated, students were expected to work to support and run the schools, so many residential schools operated on a half day system. [134]

138. Until the second half of the 20th century, very few SON members had access to better education. Outside of residential school, options were for schooling were limited as well. The schooling provided on reserve was limited, and going beyond it involved costs for boarding and transport that were beyond reach for many people.[135] The Department was often reluctant to assist.[136]

139. In this context, it was only in the late 1950s and 60s that more community members began graduating from high school.[137] This access to more adequate education enabled SON members to start to be able to better navigate a foreign judicial system.[138]

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[134] Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada, The Trust and Reconciliation Commission of Canada (2015), Exhibit 4138, pp. 71-74, 77-78.
[135] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 105.
[136] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 105-106; Walter Johnston, in Johnston & Delorme, Elders of Neyaashiingaming, "We Have Spoken", Exhibit 3880, p. 7.
[137] Vernon Roote, interviewed by Jarvis Brownlie, Saugeen First Nation, June 2, 2016, Exhibit 3919, p. 17.
[138] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 105-106.

Political Disempowerment

140. Status Indians were not entitled to vote federally until 1960, and provincially until 1954.[139] Accordingly, they would have had little influence with elected officials. This was another barrier to SON vindicating their rights.[140]

> *An Act to amend the Canada Elections Act,* SC 1960, c 7 (8-9 Elizabeth II), Plaintiffs' Reply Book of Authorities, Tab 47.
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> *An Act to amend the Election Act, 1951,* Ontario Statute 1954, c 25, Plaintiffs' Reply Book of Authorities, Tab 46.

(e) Historical State of the Law

141. The legal technology to bring claims for a declaration of Aboriginal title or for a breach of fiduciary against the Crown did not exist until the late 20th century. As Prof. McHugh observed, the "common law did not have the machinery or the apparatus to intervene" in the relationship between the Crown and Indigenous peoples in the 19th and for most of the 20th century.[141] More succinctly, when asked about the legal technology to pursue Aboriginal title in the 19th and into the 20th century, Prof. McHugh said "Believe me, if Aboriginal people could have sued, they would have sued."[142]

142. Until *Calder* in 1973, the very existence of Aboriginal title was in question.[143] Prior to this period, courts saw Aboriginal rights, as "matters of non-justiciable executive grace, or to the

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[139]See, generally: P.G McHugh, Aboriginal Societies and the Common Law, Exhibit 4442, pp. 262-264.
[140] Evidence of Prof. Paul McHugh, Transcript vol 68, December 10, 2019, p. 8832, line 15 to p. 8833, line 3; P.G McHugh, Aboriginal Societies and the Common Law*,* Exhibit 4442*,* pp. 262-264.
[141] Evidence of Prof. Paul McHugh, Transcript vol 67, December 9, 2019, p. 8627, lines 11-12.
[142] Evidence of Prof. Paul McHugh, Transcript vol 67, December 9, 2019, p. 8642, lines 5-7.
[143] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 101.

extent they had any legal footing, specific statutory conferral"[144] and had largely declined to intervene in the relationship between the Crown and Indigenous peoples.[145] As Prof. McHugh explained, it was only in,

> In the last quarter of the twentieth century [that]…. courts gave legal foundation to tribal peoples' claims to the use and occupation of lands they had occupied since pre-contact times. Until the judicial recognition of common law aboriginal title, the prevailing juridical pattern in these loyalist jurisdictions [Canada, Australia and New Zealand], had largely been one of neglect and indifference toward tribal land claims (both for historical losses and contemporary retention). In a 20-year period, spanning 1973 through 1992, that engrained pattern changed dramatically. This was a 'break through era' during which the aboriginal peoples of North America and Australasia became rights bears-bearing inhabitants of the host common law legal systems. Outsiders – outcasts – were transformed into meaningful legal actors. An important juncture had been reached from which national law took a new direction: the previous (shameful) pattern of legal exclusion was to be replaced by one of inclusion. These judgments began with *Calder* in Canada's Supreme Court (1973)…[146]

143. *Calder* represented an "assertion by the courts of a new role in what until then had been the mostly non-justiciable."[147] However, *Calder* was merely a starting point – "an outset at which

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[144] P.G McHugh, Aboriginal Title: The Modern Jurisprudence of Tribal Lands Rights (Oxford: Oxford University Press, 2011), Exhibit 4443, p. 5.

[145] P.G McHugh, Aboriginal Title: The Modern Jurisprudence of Tribal Lands Rights (Oxford: Oxford University Press, 2011), Exhibit 4443, p. 27. See also, p. 29: *"Until these judgments, the courts had taken a hands-off attitude towards interposition in Crown relations with the tribes on matters related to the enjoyment of their traditional land and resource-related rights. This was essentially a continuation of a legal position that went back to the imperial era…"*

[146] P.G McHugh, Aboriginal Title: The Modern Jurisprudence of Tribal Lands Rights (Oxford: Oxford University Press, 2011), Exhibit 4443, p. 3.

[147] P.G McHugh, Aboriginal Title: The Modern Jurisprudence of Tribal Lands Rights (Oxford: Oxford University Press, 2011), Exhibit 4443, p. 31. See also, p. 68 – *As a doctrine, [aboriginal*

the courts did not describe cogent or fully formed sets of rights so much as announce their willingness to embark on the exercise of building such sets. [It] projected rather than articulated … common law Aboriginal rights." [148] The content and requirements for proof of Aboriginal title were not defined until *Delgamuukw* in 1997, and the first time a specific area of land was declared to be subject to Aboriginal title was in 2014 with *Tsilhqot'in Nation.*

> *Delgamuukw v British Columbia,* [1997] 3 SCR 1010 at paras 116-117, Plaintiff's Book of Authorities, Tab 18.
>
> *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257, Plaintiff's Book of Authorities, Tab 108.
>
> Benjamin Ralston, "Aboriginal Title to Submerge Lands in Canada: Will Tsilhqot'in Sink or Swim," (2016) 8 Indigenous L Bull 22 at p. 22, Plaintiffs' Book of Authorities, Tab 186.

144. There were similar barriers to asserting the breach of fiduciary duty claim. Until 1984, obligations of the Crown to First Nations were generally considered to be a "political trust", and unenforceable by a court. [149] This was indeed the finding of the Federal Court of Appeal in *Guerin.*

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title] was not assembled and presented as such until the very early 1970s; p. 69 – *It was not until the early 1970s that the doctrine of aboriginal title was packaged as such: before then it had not been mustered into a comprehensive set of authorities, principles, and precedents that would enable the courts to intervene in a thoroughgoing manner to take the protection of traditional lands out of the "political" sphere of Crown intendency.*

[148] P.G McHugh, Aboriginal Title: The Modern Jurisprudence of Tribal Lands Rights (Oxford: Oxford University Press, 2011), Exhibit 4443, p. 4. See also: Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 102.

[149] See, generally, Prof. P.G. McHugh, Aboriginal Societies and the Common Law, Exhibit 4442, pp. 135-136 – *Actions of the governor/executive in the 19th century were not justiciable before a court*; p. 155 – "*The legal incapacity of Indians was widely acknowledged in the pre-Confederation period. Indians could sue in respect of their personal rights and property but not individually or collectively in respect of any group rights"*; p. 156 – *"[T]heir forms of political organization were denied juridical standing before the courts of Upper Canada. Their relations with the Crown were rendered "political" in the sense of being non-justiciable or uncognizable in the colonial courts, except through the protective agency of the Governor. The lack of status extended not only to their corporate extended not only to their corporate form but also to individuals claiming rights that*

This changed with the recognition of a legally enforceable fiduciary duty in *Guerin* at the Supreme Court of Canada.[150]

> *R v Guerin*, 1982 CanLII 2971 (FCA) at para 17, Plaintiffs' Reply Book of Authorities, Tab 21.
>
> *Guerin v The Queen*, 1984 CanLII 25 (SCC) [1984] 2 SCR 335, Plaintiffs' Book of Authorities, Tab 29.

145. *Guerin* represented the first judicial recognition that Crown actors may hold a fiduciary obligation in their relations with Indigenous peoples. In *Semiahmoo v. Canada,* the Federal Court of Appeal observed:

> I find it important to bear in mind that it is only in the last approximately fifteen years that Indian bands have been able to exercise the same degree of diligence with respect to their legal rights as might be expected of an ordinary member of society. To be more specific, it was not until the Supreme Court's 1984 decision in Guerin that courts clearly began to recognize a cause of action against the Crown for breach of fiduciary duty in land surrenders.
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> *Semiahmoo v Canada*, [1998] 1 FC 3, 1997 CarswellNat 1316 at para 84, Plaintiffs' Book of Authorities, Tab 99.

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were "aboriginal" in character. In short aboriginal peoples were… disabled from bringing proceedings to protect their customary rights"; p. 214 – *The common law's refusal during this period and into the twentieth century to recognize and draw juridical consequences from any such recognition of native political forms matched the broader processes of colonization then being experienced by aboriginal peoples not only in Australasia and North America but throughout the theatres of British imperial activity : the consistent legal theme was that of the non-justiciability of the government's formal relations with non-Christian peoples: the "higher trust of civilization" vested in the Crown as the gentlemanly embodiment of the British Empire…"*

[150] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 102; *As Professor McHugh explained, "In Guerin (1984), the Supreme Court articulated standards of Crown accountability for the executive management of Indian affairs*": P.G. McHugh, *Aboriginal Societies and the Common Law,* Exhibit 4442, p. 386.

146. Relatedly, it was not until 1997 that Aboriginal oral history was recognized as evidence to be placed on an equal footing with other historical evidence.[151] As Dickson C.J. observed in *Simon,* given that most Indigenous societies "did not keep written records", the failure to recognize oral history imposed "an impossible burden of proof" on Indigenous peoples and "render[ed] nugatory" any rights they might have. In this context bringing claims was made practically much more difficult.

> *Delgamuukw v British Columba*, [1997] 3 SCR 1010 at paras 80-87, [Plaintiffs' Book of Authorities, Tab 18]. *Simon v the Queen,* 1985 CanLII (SCC), [1985] 2 SCR 387 at p. 408, [Plaintiffs' Book of Authorities, Tab 100].

147. The Crown also took specific action that had the effect of insulating itself from potential claims from Indigenous peoples, among others. For example, the doctrine of Crown immunity meant that the Crown generally could not be sued without its express permission until the latter half of the 20th century.[152]

> P.W. Hogg and P.J. Monahan, Liability of the Crown, 3rd ed (Toronto: Carswell, 2000) at pp. 4-9 [Plaintiffs' Reply Book of Authorities, Tab 67].

148. Prof. Kent McNeil explains:

> In the common law, the Crown could not be sued in its own courts without its consent, which is why the Nisga's Nation's claim to Aboriginal title in Calder, supra note 36, was dismissed by the majority of the Supreme Court of Canada (see Foster, "Not O'Meara's Children", note 37 at 70-79. This Crown

[151] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 103.
[152] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 100.

> immunity has been removed by statute in the United Kingdom and Canada (see the Crown Proceedings Act, 1947, (UK), 10 & 11 Geo VI, c.44; Petition of Right Amendment Act, SC 1951,c.33; Crown Proceedings Act, SBC 1974, c.24…)…
>
> Kent McNeil, "Indigenous Rights Litigation, Legal History, and the Role of Experts," Saskatchewan Law Review vol 77 (2014), p.181, fn 41 [Plaintiffs' Reply Book of Authorities, Tab 70].

149. Indeed, Ontario has made detailed submissions of why SON's claim should still be denied on account of the doctrine of Crown immunity. SON's submission in respect of why this Court should not bar SON's claim on that basis is dealt with above.

SON seeks the following findings of fact in respect of barriers to bringing forward a court claim:

150. The *Indian Act*:

(a) Since 1876, the *Indian Act* systematically imposed on Indigenous peoples and limited the power of those councils. Up until at least the mid 20th century, provisions the *Indian Act* vis-à-vis band councils gave the Department extensive controls over the activities of First Nations. This system applied to and affected SON.

(b) Involuntary enfranchisement was available under the *Indian Act,* and in some instances, the Crown threatened to enfranchise Indigenous individuals and leaders who were outspoken or agitated for the rights of Indigenous peoples. The last forms of involuntary enfranchisement were removed from the *Indian Act* in 1985.

(c) For much of the late 19th and the first half of the 20th century, the *Indian Act* gave Department officials the authority to police traditional ceremonies and personal lives of First Nations people. Such authority was often employed against

Indigenous individuals and leaders who were outspoken or agitated for the rights of Indigenous peoples.

(d) During the first half the 20th century, the *Indian Act* contained provisions that restricted Indigenous peoples' ability advance rights claims. For example, in 1910, the *Indian Act* restricted uses of band funds, and from 1927 and 1951, the *Indian Act* imposed a ban on Indigenous peoples hiring lawyers without approval from the Department.

151. Indian Agents:

(a) Between the late 19th century and the 1960s, Indian Agents had and exercised control over nearly all elements of life of Indigenous peoples living on reserves, including control over provision of relief or aid, administration of band funds, band elections, and band council meetings, and control over the justice system on reserve.

(b) Amongst SON members in the middle of the 20th century, there was a perception that you could not disobey the Indian Agent. He was perceived as dictatorial and controlling, and there was a perception they could not leave the reserve (for instance, to pursue employment) without the permission of the Indian Agent.

(c) Among SON members in the middle of the 20th century, it was understood that the Indian Agent had extensive control over the activities of the band council, such as controlling wording or refusing to pass on band council resolutions to the Department.

(d) Among SON members in the middle of the 20th century, it was perceived that the Indian Agent had extensive control over information and documents, and someone that could and did withhold important information and documents from SON (as illustrated by the oral history about an Indian Agent burning records).

152. Residential Schools:

(a) Residential schools operated in Ontario in the late 19th century, and most of the 20th century.

(b) Residential schools were a site of abuse and neglect of Indigenous children, and generally a failure as educational institutions.

(c) Some SON members attended residential schools and were subject to these conditions.

(d) One of the many destructive legacies of residential schools has been to disempower Indigenous peoples, including SON, from bringing legal claims against the government.

153. Socio-economic barriers:

(a) In the late 19th and for the first half of the 20th century, individual members of SON (and the community as a whole) faced conditions of poverty.

(b) Until the second half of the 20th century, very few SON members had access to adequate education to allow them to navigate the Canadian legal system.

154. Historical State of the Law:

(a) Prior to 1973, Aboriginal title was understood by the courts to be a matter of executive discretion and essentially non-justiciable. In 1973, after the Supreme Court of Canada's decision in *Calder v Attorney General of British Columbia,* Aboriginal title was recognized in Canadian law.

(b) It was not until 1997, after the Supreme Court of Canada's decision in *Delgamuukw v British Columbia,* that the elements of Aboriginal title, and how to establish it, were defined in Canadian law.

(c) Until 1984, obligations of the Crown to First Nations were generally considered to be a "political trust", and unenforceable by a Court.

(d) In 1984, after the Supreme Court of Canada's decision in *Guerin v. The Queen,* it was possible to bring a claim for breach of fiduciary duty against the Crown for its conduct in relation to Indigenous lands.

(e) It was only in 1997, with the Supreme Court of Canada's decision in *Delgamuukw v. British Columbia,* that oral history evidence was placed on equal footing with other forms of evidence. Since few Indigenous communities kept their own written records, until this point, Indigenous people were systematically disadvantaged from bringing claims to vindicate their rights, or to complain about historic wrongs against them by Crown officials.

(f) Until the mid 20th century, the Crown insulated itself from claims by way of the doctrine of Crown immunity, which held that the Crown could not be sued without its express permission.

SON'S ASSERTION OF RIGHTS

> *We've always asserted our rights. Sometimes illegally, but – in their words illegal; in our words it's legal, but hunting and fishing is really what we're all about. So I think we've done a good job of maintaining those rights throughout the years, even as not being able to do it, but doing it anyway. Sometimes you get caught, sometimes you don't.*[153]

155. Despite the barriers that prevented SON from advancing their legal claims in a court room, the record demonstrates that SON asserted its rights and claims in the ways that it could.

156. SON members have asserted their rights more or less continuously since European contact. However, for many decades, their rights were ignored by Euro-Canadian settlers and their governments. Due to the barriers noted above, during the late 19th, and most of the 20th centuries, there were essentially no effective methods available to SON to vindicate their rights on a comprehensive scale. Instead, SON resisted encroachments on their rights by simply ignoring the laws that would have interfered with those rights – such as by continuing to hunt and fish throughout their territory, and by using the (flawed) mechanisms that became available to them in the late 20th century. As Jim Ritchie put it: "We never did stop [asserting our rights]…but – who would listen to you? And how do you do it?"[154]

Aboriginal Title Claim: SON's continued use of its land and water territory

157. In SON's Final Argument, SON detailed at length the manner in which its members have continued to access, use and, to the extent possible, control the resources of their territory continuously since before contact with Europeans. This includes the water territories marked in

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[153] Jim Ritchie, Interviewed by Jarvis Brownlie, June 2, 2016, Exhibit 3918, p. 24.
[154] Jim Ritchie, Interviewed by Jarvis Brownlie, June 2, 2016, Exhibit 3918, p. 16, quoted in Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 88-89.

blue, the Treaty 45 ½ territory marked in light green, and the Peninsula marked in yellow on **Exhibit P,** below. SON has done this in the face of military conflict with other Indigenous nations, in the face of European entry into their territory, in the face of Euro-Canadian settlement, in the face of invasive species and habitat destruction, and in the face of attempts by the Crown to seize regulatory control of SON's resources and to exclude SON from the benefit of and from protecting its relationship with its resources.[155]

> Final Argument of the Saugeen Ojibway Nation, paras 262-318, 318-350, 466-469, 476-483, 519-566, 602-608, 628-635

158. SON witnesses testified how SON members have been repeatedly harassed by conservation officials and charged with provincial hunting and fishing offences as they have exercised their rights over the territory.[156] However, for many community members, these laws and regulations were less significant than maintaining SON's long relationship with its territory. For example, Jim Ritchie, a member of the Saugeen First Nation explained that his grandfather continued to fish in the face of pressure from provincial authorities:

> "[T]hey might have wanted us to stop [fishing] but he [my grandfather] wouldn't stop. He didn't listen to them very much. He owned the territory, that's what he told me. It's our land. We don't have to listen to those people, he said. Old school.[157]

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[155] See also: Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 758, line 9 to p. 760, line 20.

[156] Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 753, lines 1-12; p. 754, line 8 to p. 755, line 6; p. 755, line 11, to p. 756, line 13 and p. 764, line 14 to p. 765, line 24; Evidence of Jim Ritchie, Transcript vol 7, May 15, 2019, p. 654, lines 1-9; Evidence of Doran Ritchie, Transcript vol 16, May 31, 2019, p. 1306, lines 8-20; p. 1378, lines 23-25 and p.1379, lines 7-18; Evidence of Dale Jones, Transcript vol 8, May 16, 2019, p. 839, lines 16 to p. 843, line 11; Evidence of Ted Johnston, Transcript vol 4, May 1, 2019, p. 400, line 25 to p. 401, line 16; Evidence of Paul Jones, Transcript vol 27, July 15, 2019, p. 2601, line 11 to p. 2604, line 8.

[157] Evidence of Jim Ritchie, Transcript vol 7, May 15, 2019, p. 654, lines 20-25.

159. Dale Jones from the Chippewas of Nawash made a similar comment about his father:

> My dad said, well, the white man made it illegal for us to believe in what we believe. So, like everything else, we hunt and fish in silence and the same with our beliefs.[158]

160. Or, as Karl Keeshig put it: "You were jailed to practice these things. You were jailed here for hunting off of the reserve, for fishing outside of your boundaries…"[159]

161. In SON's Final Argument, SON has detailed how, since the 1830s, they have regulated their lake fishery and protested encroachments on their fisheries by Euro-Canadian fishermen. Former Chief of the Chippewas of Nawash Unceded First Nation, Howard Jones, explained how the community had sought extensions of its fishing licenses over the years, and how it accepted the more limited licenses it was offered under protest, and also how SON members successfully defended charges for fishing outside Nawash's licences in *R v. Jones and Nadjiwon*.[160]

> Final Argument of the Saugeen Ojibway Nation, paras 274-295, 628-635

162. SON continued exercise of its fishing rights throughout SONUTL, even in the face of prosecution, was SON's way of continuing to assert its ownership of SONUTL. In addition, in

[158] Evidence of Dale Jones, Transcript vol 8, May 16, 2019, p. 846, lines 5-8.
[159] Evidence of Karl Keeshig, Transcript vol 2, April 29, 2019, p. 226, line 21 to p. 227, line 3.
[160] Evidence of Howard Jones, Transcript vol 7, May 15, 2019, p. 767, line 4 to p. 771, line 2; p. 771, line 24 to p. 772, line 11 and p. 777, line 16 to p. 780, line 16; Chief Peter Akiwenzie (Chippewas of Nawash) to Blake Smith (Fish and Wildlife Officer), [undated], Exhibit 3975; Blake Smith (Fish and Wildlife Officer) to Chief Peter Akiwenzie (Chippewas of Nawash), December 30, 1986, Exhibit 3974.

1976, SON issued a Band Council Resolution asserting ownership of all lands, waters, minerals below Lake Huron throughout SONUTL.[161]

163. As noted above, in 1997, the Supreme Court of Canada's ruling in *Delgamuukw* set out the test to be met for an Indigenous group to obtain a declaration of Aboriginal title. SON filed its title claim in 2003.

> Amended Amended Statement of Claim amended October 16, 2014
> Trial Record, Tab 1, (Title Action – Court file 03-CV-261134CM1)

Treaty 72 Claim: Complaints in 19th Century

164. SON raised some issues with Treaty 72 in the years immediately after it was signed – including its failure to capture conditions of actual settlement that they believed would help to increase the value of their lands, issues with the boundary being surveyed, and issues with the slow pace of land sales.[162] However, there were barriers to their ability to bring forward even these grievances. For example, in 1855, SON sent a delegation to Quebec to discuss these issues, but Lord Bury, the Superintendent General of Indian Affairs refused to see them because they did not have a letter of approval from their Indian Agent. In addition, the Department initially denied SON access to their band funds to pay for the trip.[163]

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[161] Band Council Resolution, Chippewas of Nawash and Saugeen Band, Motion 7, July 19, 1976, Exhibit 3810.
[162] See, generally, Dr. Gwen Reimer, "Volume 4: Implementation Issues Related to Surrender No. 72, 1854-1970s" [Revised November 2019], Exhibit 4704, pp. 10-91.
[163] Petition from Saugeen Chiefs, Nawash Chiefs and Principal Men to Sir Edmund Head, June 26, 1855, Exhibit 2254 (Transcript at Exhibit 4801); Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 77; Conrad Vandusen, *The Indian Chief: An Account of the Labours, Losses, Sufferings and Oppression of Ke-Zig-Ko-E-Ne-Ne (David Sawyer*), Exhibit 2658, pp. 54-55.

165. In the early years after Treaty 72 was concluded, SON did not see T.G. Anderson, their Superintendent, as a fair intermediary for their concerns. [164] It is by no means clear that, in this context, they would have brought forward all of their complaints to Anderson.

166. Ontario alleges that SON's complaints about slow land sales suggest that they wanted the treaty implemented, and they submit that these complaints about implementation undermine the current claim that Treaty 72 was the result of being misled by the Crown about their choices.[165] SON disagrees for the following reasons.

167. In the post treaty period, for SON, like many First Nations, poverty was a significant issue.[166] In this context, it was rational for SON to seek to ensure that they received *at least some benefit* for the lands on the Peninsula.[167] SON submits that this does not mean that they were fully satisfied with how the treaty was negotiated, even in those early years. In addition, there is nothing on the record in this trial to suggest that SON was aware that Crown officials had been lying to them about the overwhelming demand of settlers for their lands, nor about the Crown's capacity to take other measures to protect their lands.

168. In fact, a reversal of the treaty was as good as beyond reach in this era. Dr. Reimer testified on cross examination that, in all her time researching treaties between the Crown and Indigenous peoples, she had never come across a case where the Crown had agreed to reverse a

[164] Evidence of Dr. Gwen Reimer, Transcript vol 94, March 11, 2020, p. 12152, lines 5-10.
[165] Ontario's Closing Submissions, paras 1012-1014.
[166] Pennefather Report, September 1856, Exhibit 2494, PDF image 73, 76; William Plummer, Excerpt of Annual report dated December 31, 1876, Exhibit 4849; Evidence of Dr. Gwen Reimer, Transcript vol 94, March 11, 2020, p. 12131, line 14 to p. 12135, line 12.
[167] Evidence of Dr. Gwen Reimer, Transcript vol 94, March 11, 2020, p. 12135, lines 13-24.

land surrender treaty.[168] Prof. Brownlie noted that Crown officials had asked SON many times for a surrender of portions of the Peninsula in the lead up to Treaty 72. The pressure was unrelenting: no matter how many times they refused a surrender, Crown officials always returned to ask again. In the face of this, and in light of what SON had been told was the overwhelming demand for their lands in the mid 19th century, seeking a return of lands just surrendered would have seemed impossible.[169]

169. Canada makes note of SON seeking return of lands for the purposes of hunting reserves in the late 19th century.[170] While they raise this as support for different points, to bolster their position with respect to SON's harvesting rights, SON submits that this is actually evidence that demonstrates one of SON's many efforts to seek the return of lands on the Peninsula, in line with its primary objective which they pursued through any mechanism available to them. This is discussed in more detail below.

Treaty 72 Claim: SON's efforts to collect relevant information

170. By the second half of the 20th century some of the systemic barriers to bringing claims against the Crown discussed above were beginning to abate. But it took decades to overcome over a century of systematic disempowerment, and in some respects this recovery is still in process.

171. The departure of the Indian Agent in the late 1960s was a major factor in allowing SON to begin to bring forth its claims. James Ritchie explained that the community began working to bring forward its claims "after the Indian agent left" when "there was more freedom of the Indian

[168] Evidence of Dr. Gwen Reimer, Transcript vol 94, March 11, 2020, p. 12127, line 18 to p. 12128, line 4.
[169] See Evidence of Prof. Jarvis Brownlie, Transcript vol 33, July 25, 2019, p. 3614, lines 1-5- *the government was aligned with the settlers in interest by mid 19th C.*
[170] Canada's Closing Submissions, Treaty, para 26.

people".[171] James Ritchie explained that in the mid 1970s, SON began being to set a groundwork for the process going forward:

> That's how I'm looking at it. Like if you're going to go somewhere to fight somebody, you need some information, so have to get information to go make your claim, you have to understand what you're doing; you need people that know the law that exists today. So you had to put a process in place how you're going to fight this… you have to get all your ducks in order to go there. So from '76 to '86 to whenever, we had to get our ducks in order, line them up.[172]

172. Around the same time in the mid 1960s, regional and Canada-wide Indigenous organizations as the Union of Ontario Indians and the National Indian Brotherhood were formed.[173] These bodies "started to create more space to talk about land claims and rights."[174] The Union of Ontario Indians, in particular, also provided support to SON by making its lawyer, Paul Williams, available to them to assist with their claims.[175]

173. Buoyed by these developments, SON made attempts to gather information about and seek the return of the unsold surrendered lands and waters in their territory:

[171] Evidence of Jim Ritchie, Transcript vol 7, May 15, 2020, p. 668, line 24 to p. 670, line 14.
[172] Evidence of Jim Ritchie, Transcript vol 7, May 15, 2020, p. 722, lines 9-24.
[173] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p.3320, lines 18-24, and p. 3323, lines 8-18.
[174] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3322, line 12 to p. 3323, line 6.
[175] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3323, line 19 to p. 3324, line 10.

(a) In 1965, motivated by the creation of the Indian Claims Commission, SON sought a list of all lands and waters owned by the band;[176]

(b) In 1966, the Bruce Agency superintendent noted in a letter than the Cape Croker band council had been discussing the ownership of the lakebeds in their territory. The Superintendent wrote, "It is the object of the Cape Croker Council, on being advised of the status of these lakes and bottoms, to reclaim those surrendered and not sold to be under the control of the Band."[177]

(c) In April 1968, SON issued a Joint Council Resolution asking that all unsold surrendered lands, lakes and islands be returned to reserve status.[178]

(d) The Chippewas of Nawash Unceded First Nation reaffirmed this request by way of Band Council Resolution in February 1969.[179]

(e) The Joint Council of SON reiterated the request in August 1973.[180] They also passed a motion resolving that "in the future no surrendered islands, lakes and lands

[176] J.R. Gover to Regional Director, Indian Affairs, Southern Ontario, November 25, 1965, Exhibit 3753. See also: Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 114-115.
[177] F.W. Pursuer to Indian Affairs Branch, November 29, 1966, Exhibit 3756; Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 114-115.
[178] Joint Council Resolution, Motion No. 2. April 2, 1986, Exhibit 3765.
[179] Band Council Resolution No. 3, February 13, 1869, Exhibit 3769; Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2236, line 24 to p. 2237, line 4.
[180] Joint Council of Saugeen Ojibway Nation, Minutes of Special Meeting August 23, 1973, Exhibit 3790.

under Treaty #72 and Treaty #222, be sold without consultation of both bands at a meeting attended by the Chiefs and Councillors of both Bands." [181]

(f) In April 1974, the Joint Council of SON issued a further Joint Council Resolution noting that:

> Whereas owing to delays and non-action by the Department of Indian Affairs and Northern Development regarding joint submissions made by the Band Councils of Cape Croker and Saugeen regarding their intent and desire to have all unsold surrendered land, islands, and lakes revert to reserve status,
>
> It is therefore resolved that the two Band Councils assembled this 3rd day of April, 1974 ascertain from the departmental authorities why no action has been taken, and strongly advise the department that all submissions are to be not ignored that are relative to our intent and desire, as expressed in our submissions by which unsold surrendered land and landing sites revert to reserve status….[182]

(g) In 1976, Paul Williams, counsel to SON, sent a letter reiterating many of these demands and asking that the Department "reaffirm in writing that no lands in the Bruce Peninsula in which the Indian interest remains unsold shall be disposed of by the Department or by any other part of the federal or provincial governments without the consent in writing of the band."[183]

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[181] Joint Council of Saugeen Ojibway Nation, Minutes of Special Meeting August 23, 1973, Exhibit 3790.

[182] Joint Council Resolution, April 3, 1976, Exhibit 3796; Landing sites refers here to shore road allowances. Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2241, lines 8-25.

[183] Paul Williams to C. Mackey Esq. January 28, 1976, Exhibit 3807, p. 2; Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 116.

174. These efforts were unsuccessful. Darlene Johnston is a member of the Chippewas of Nawash Unceded First Nation served as the land claims researcher for SON between 1992 and 2001.[184] In that role, she engaged in archival research and worked with contract researchers; her role involved reviewing historical documents and oral histories, and building a database of historical documents.[185] She confirmed she could not recall coming across any response to these requests for the return of unsold surrendered lands.[186]

175. SON also sought an inventory of the unsold surrendered lands to assist them in seeking the return of those lands and waters. The earliest recorded instance of such a request was made by Chief Peter Nadjiwon of Cape Croker in 1950, who was told that no such inventory was available but could be compiled for them.[187] In spite of repeated requests over the course of the 1960s and 70s, as of 1976, no inventory had been forwarded to them.[188]

176. SON also worked with researchers to assist them in their claims. These researchers faced similar barriers in accessing records held by the Department of Indian Affairs. For example, in 1970, SON sent two researchers, Professors Duran and Duran, to examine records dealing with unsold surrendered lands on the Peninsula. The Department denied their request to examine the

[184] Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2210, lines 7-15.
[185] Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2210, line 16 to p. 2211, line 12.
[186] Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2238, line 1 to p. 2239, line 3; Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2242, lines 1-4.
[187] Paul Williams to C Mackey Esq., January 28, 1976, Exhibit 3807, p. 1; Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 116.
[188] Paul Williams to C Mackey Esq., January 28, 1976, Exhibit 3807, p. 1; Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 116.

records.[189] In 1972, SON authorized Trent University researchers to undertake a study of their rights to the Peninsula. Rather than granting the researchers access to the records, Crown officials suggested that Departmental staff should "extract the required information".[190] Crown officials also suggested that correspondence about this request not be shared with the First Nations.[191]

177. Darlene Johnston testified that she was not aware of any inventory of unsold surrendered lands being forwarded in the 1970s.[192] She served as a summer research student for the First Nations in 1980. She was told by the Indian Department at that time that the inventory was not yet ready, but would be sent to the First Nations when it was prepared.[193]

178. It seems no inventory was forthcoming. In 1982, the Joint Council of SON issued another Band Council Resolution asking the Department of Indian Affairs to prepare maps of the municipalities covered by Treaty 72 that identify the various categories of lands, including unsold surrendered lands.[194]

179. The inventory was sent to the First Nations in January 1991[195] — more than 25 years after it was first requested.

[189] M.J. Jones to Lands Division, Department of Indian Affairs and Northern Development, July 21, 1970, Exhibit 3779.
[190] E.G. Morton to Head Land Titles Section, May 26, 1972, Exhibit 3784.
[191] E.G. Morton to District Supervisor, Bruce District, May 29, 1972, Exhibit 3785.
[192] Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2243, lines 13-16.
[193] Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2244, lines 11-18.
[194] Joint Council Resolution, September 22, 1982, Exhibit 4084; Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2244, line 20 to p. 2245, line 23.
[195] Evidence of Darlene Johnston, Transcript vol 23, July 8, 2019, p. 2245, line 25 to p. 2247, line 12; Hubert Ryan to David McLaren, January 21, 1991, Exhibit 4116.

Treaty 72 Claim: SON's use of available institutional mechanisms

180. For many years, as noted above, the court system and the common law were not hospitable to assertions of Aboriginal rights or to claims that the Crown had breached its duties to Indigenous peoples. However, as institutional mechanisms – such as negotiations through the specific claims process – became available, SON used those mechanisms to the best of its ability to advance its rights.

181. SON began to seek the return of unsold surrendered lands starting in the late 1960s, and they sought to do so through negotiations with Ontario and Canada. However, Canada and Ontario did not engage with SON, citing their need to conclude negotiations about lands and resources, as described by Darlene Johnston:

> [B]asically, Canada said on a number of occasions that they would be happy to respect the bands' wishes and return the unsold lands to them, but they couldn't because it was a matter of constitutional law and jurisdiction. Those lands were vested in Ontario, and so that process went on, like with Canada constantly telling —relatively constant demand by the Saugeen Ojibway … to begin the negotiations and to get documentation so they could get a return of the unsold lands…. And Canada just kept saying, "Well, we can't do anything without Ontario and we're negotiating a revision to the 1924 Indian Lands Agreement"…. [E]ven if we start at 1968 –even though there are demands that were being made earlier – people were just being told every year "oh, in just a few more years we'll have this agreement, we'll have this agreement." But the agreement was never reached until 1986, so that was almost 20 years where people had been trying to get the documentation and to begin negotiations.[196]

[196] Darlene Johnston, Interviewed by Jarvis Brownlie, June 14, 2016, Exhibit 3924, p.3.

182. The negotiations between Canada and Ontario about lands and resources were efforts to resolve confusion and inconvenience arising out of Crown lands and resources belonging to Ontario by virtue of section 109 of the *Constitution Act, 1867,* and from subsequent court decisions interpreting that provision. In an effort to sort out these problems, Canada and Ontario concluded agreements in 1891, 1924 and in 1986.

> *Constitution Act, 1867*, s. 109, Plaintiffs' Book of Authorities, Tab 125.
>
> *St. Catherine's Milling and Lumber Co. v R.* (1888), 14 AC 46, 2 CNLC 541, Plaintiffs' Book of Authorities, Tab 104.
>
> *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands*, SC 1891, c 5 (54-55 Vict), Plaintiffs' Book of Authorities, Tab 121.
>
> *Ontario Mining Co. v. Seybold et al.* (1901), 32 SCR 1, Plaintiffs' Book of Authorities, Tab 58.
>
> *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, SC 1924, c 48 (14-15 Geo V.), Plaintiffs' Reply Book if Authorities, Tab 42.
>
> *An Act of for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, SO 1924, c 15 (14 Geo. V.), Plaintiffs' Reply Book of Authorities, Tab 41.
>
> *Indian Lands Agreement (1986) Act,* SC 1988, c 39*,* Plaintiffs' Reply Book of Authorities, Tab 55.
>
> *An Act to confirm a certain Agreement between the Governments of Canada and Ontario*, SO 1989, c 26, Plaintiffs' Reply Book of Authorities, Tab 45.

183. While Ontario and Canada negotiated over the status of Indian lands, SON explored other avenues to assert its claims. In 1974, Canada established the Office of Native claims within the

Department of Indian Affairs. SON submitted a claim relating to Treaty 45 ½.[197] The process conducted by the Office of Native claims was "extraordinarily slow from the outset", and the Office initially only accepted claims related to lands that had never been subject to treaty. [198] Even once a process was established to deal with treaty claims, treaties signed prior to confederation – such as Treaties 45 ½ and Treaty 72 – were initially ineligible for consideration under that process.[199] Negotiations over the nature of the claim and whether it could be addressed through the existing claims process continued until 1986, when the government rejected SON's claims.[200]

184. SON also attempted to bring their grievances directly to the Governor General, and to proceed with the support of the Indian Commission of Ontario (ICO). Neither process was successful.[201] The ICO proposed non-binding arbitration of SON's claims.[202] This proposal was rejected by the Minister of Indian Affairs in 1986.[203]

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[197] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 122.
[198] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 122.
[199] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 122-123. *Note that this changed in 1991, only after SON's claim had been rejected.*
[200] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 122.
[201] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, p. 124.
[202] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 124-125.
[203] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018),

185. In 1987, SON sought to engage with Canada and Ontario about the return of lands.[204] SON's priority in these negotiations was to secure the return of all unsold surrendered lands, lakes and islands to the ownership of the First Nations.[205]

186. In addition, SON filed a series of lawsuits about the implementation of Treaty 72, which, amongst other things, allege the conveyance of some specific unsold surrendered lands – e.g. McNab Lake – breached the terms of Treaty 72. These actions were filed in the late 1980s and early 1990s. [206]

187. Darlene Johnston testified about the negotiations between SON, Ontario and Canada, and that SON's top priority in these negotiations was "the return of all unsold, surrendered lands and lakes, and islands in those lakes to the ownership of the First Nations."[207] SON received confirmation that lands would not be returned, as noted in a letter from Indian Affairs to SON in 1990:

> … please find enclosed a listing of the unsold surrendered lands on the Bruce Peninsula that we feel should be the subject of negotiations under the 1986 Indian Lands Agreement among the Chippewas of Saugeen, the Chippewas of Nawash and the Province of Ontario. **Please note that any land which is included in these lists and which lies within the boundaries of the proposed national park will not**

Exhibit 4119, p. 125; Bill McKnight, Minister of DIAN to Roberta Jamieson, September 18, 1986, Exhibit 3864.

[204] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 126-128; Evidence of Darlene Johnston, Transcript vol. 23, July 8, 2019, p. 2251, lines 19-25.

[205] Evidence of Darlene Johnston, Transcript vol. 23, July 8, 2019, p. 2253, lines 13-20.

[206] Agreed Statement of Facts, Stayed Litigation, Exhibit 4263 - *Those actions are stayed, pending the outcome of this Treaty 72 claim.*

[207] Evidence of Darlene Johnston, July 8, 2019, p. 2251, line 11 to p. 2254, line 12.

> **be subject of these negotiations.[208]** [**emphasis added**]

188. As Darlene Johnston explained:

> [I]t became clear that the people who had been asking to have their lands returned for decades were now being told that there were no lands that could be returned through the negotiation process that they had waited so long to be established, and that really it was just a question of getting a valuation of the lands they couldn't get back. And that's when it became clear that those negotiations were not going to lead to the result that they'd been demanding since 1968.[209]

189. This was a turning point. Return of lands was the priority for SON and the object of their efforts to engage the Crown by whatever means that were available – that is, filing lawsuits and claims, and pushing for negotiations where that objective could be realized. When it was clear that return of lands would not be available, SON filed its notice of action in the Treaty 72 claim in 1994. When the notice of action in the Treaty 72 claim was filed, the negotiations under these other processes halted.[210]

> Fresh as Amended Statement of Claim amended October 16, 2014, Trial Record, Tab 1, (Treaty Action – Court File No.94-CQ-50872CM).

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[208] Letter to David McLaren (Land Claims Coordinator) from Hubert Ryan (Indian and Northern Affairs), July 21, 1990, Exhibit 4116.
[209] Darlene Johnston, Interviewed by Jarvis Brownlie, June 14, 2016, Exhibit 3924, pp. 7-8.
[210] Evidence of Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3332, lines 3-11; See also: Discussion Paper Regarding First Nation Land Claims, Indian Commission of Ontario, September 24, 1990, Exhibit 4151, p. 102 – *"It is the current general policy of Canada to terminate specific claims negotiations upon the commencement of court proceedings by the claimant. This is contrary to general litigation practice and is unfair to claimants who are forced to place their legal rights in abeyance in favour of negotiations which may prove illusory."*

SON seeks the following findings of fact in respect of its continued efforts to assert their rights and claims:

190. Aboriginal Title Claim:

(a) SON has continued to assert its rights and exercise control over SONUTL through use and exercise of control of fisheries, for example, and even in the face of Crown regulations, prosecution and harassment.

(b) SON issued a band council resolution asserting ownership of all lands, waters and minerals below Lake Huron throughout SONUTL in 1976.

(c) SON filed its Aboriginal title claim in 2003, six years after the nature of Aboriginal title and how it could be proven were first set out by courts (in *Delgamuukw*).

191. Treaty 72 Claim:

(a) SON raised issues immediately following the conclusion of Treaty 72 (1854) including about whether the treaty captured all terms and conditions, about boundaries and about the slow pace of lands sales.

(b) SON faced obstacles in raising those issues, including being denied a meeting in 1855 when they sent a delegation to Quebec because they did not have a letter of approval for their Indian Agent, T.G. Anderson.

(c) In the 1960s and the 1970s, regional and Canada-wide Indigenous organizations were formed. The Union of Ontario Indians provided support to SON for its claims by providing resources for a lawyer.

(d) Starting in the 1960s, SON made consistent efforts to gather information about the surrendered unsold lands, with the objective of seeking their return, ultimately seeking an inventory of these lands. An inventory of these lands was received in 1991.

(e) Starting in the 1960s, SON attempted to engage in negotiations to secure the return of unsold surrendered lands with Ontario and Canada, but negotiations did not begin until the late 1980s.

(f) In the 1990s, Canada confirmed that the lands subject to any negotiations and those lands within the boundaries of the proposed national park would not be returned to SON.

(g) SON filed its Treaty 72 claim in 1994, and negotiations halted.

CANADA'S POSITION ON SON'S HARVESTING RIGHTS

192. Canada argues that Treaty 72 did not preserve any harvesting rights, and also that SON have not defined the specific Aboriginal harvesting rights they are seeking to have affirmed.[211] Ontario submits that SON's harvesting activities would continue after Treaty 72, except where incompatible with occupation and use of the ceded lands by the settlers. Ontario further submits that it is not necessary for SON to define its harvesting rights.[212] SON agrees with the position advanced by Ontario, and provides the following background in respect of why it has, in this action, asked for a declaration that Treaty 72 had no effect on what traditional harvesting rights

[211] Canada's Closing Submissions, Treaty, paras 23, 1004.
[212] Ontario's Closing Submissions, paras 445, 448, 450.

SON had prior to Treaty 72, rather than waiting for instances of specific and concrete harvesting disputes arising between the parties.

193. SON's claim for a declaration that Treaty 72 had no effect on whatever traditional harvesting rights SON had prior to Treaty 72 was added as a pleading amendment after SON first discovered in 2004 that Canada took the position that Treaty 72 surrendered harvesting rights.

194. In October 2004, SON meet with Parks Canada officials. At that meeting, Parks Canada officials told the Chiefs and Councillors present that SON did not have the right to hunt in the proposed national park.[213] SON was shocked and angry to hear this position from Parks Canada and strongly disagreed with it.[214]

195. Immediately after the meeting, Chief Ralph Akiwenzie of Chippewas of Nawash Unceded First Nation and Chief Vernon Roote of Saugeen First Nation sent a letter to the then Minister responsible for Parks Canada, Mr. Stéphane Dion, to object to the position of Parks Canada in regards to hunting in the national park.[215] That letter stated:

> Until now our First Nations have had good relations with park officials, who have respected our hunting rights… It was therefore astounding to us that your officials would unilaterally and categorically inform us that our members would be charged if they exercised their rights in the park. None of the consultations which have been customary in previously dealings and are in fact constitutionally required, have taken place. The position taken by

[213] Evidence of Paul Jones, Transcript vol 27, July 15, 2019, p. 2652, lines 1-9; Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 501, lines 1-15.
[214] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 501, lines 16-20; Evidence of Paul Jones, Transcript vol 27, July 15, 2019, p. 2652, lines 10-17.
[215] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 501, line 22 to p. 503, line 15; Letter to the Honourable Stéphane Dion from Chief Ralph Akiwenzie and Chief Vernon Roote, Exhibit 3958.

> your officials at last week's meeting was a complete surprise to us.[216]

196. On October 27, 2004, Minister Dion wrote back to Chief Roote and Chief Akiwenzie and advised that:

> I understand that at a meeting of your Joint Band Council on October 7, which Parks Canada officials attended, you requested written reasons for the Agency's position on this matter. As you may know, Mr. Gary Penner, the Department of Justice litigator on the Treaty 72 file, has written to your legal counsel, Mr. Roger Townshend, explaining Parks Canada's position in that litigation and its impact on the issue of hunting in Bruce Peninsula National Park.[217]

197. The letter of Mr. Gary Penner to Mr. Roger Townshend referred to by Minister Dion is dated October 15, 2004.[218] In that letter, Mr. Penner wrote:

> The Treaty 72 litigation does not directly engage the issue of hunting and fishing. However, it is Canada's position in the litigation that Treaty 72 is a valid and subsisting Treaty, whereby the First Nations surrendered all of their rights, title and other interests in the Bruce Peninsula except for those lands explicitly reserved to them under the Treaty. Thus, any aboriginal rights that your clients may have had to hunt and fish over the lands that now constitute the Bruce Peninsula National Park were extinguished in 1854, including any treaty rights that might be claimed under Treaty 45 ½.
>
> …
>
> I suggest that you consider whether it might not be better for your clients to consider engaging this issue

[216] Letter to the Honourable Stéphane Dion from Chief Ralph Akiwenzie and Chief Vernon Roote, Exhibit 3958, p.1.
[217] Letter to Chief Vernon Roote and Chief Ralph Akiwenzie from the Honourable Stéphane Dion, dated October 27, 2004, Exhibit 3959, p. 1.
[218] Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 508, line 18 to p. 509, line 17.

> within the existing Treaty 72 litigation by amending the statement of claim. Besides the significant resources required to mount an aboriginal rights/treaty defence to a prosecution, there is also the possibility of conflicting findings of fact and law if the interpretation of Treaty 72 is left to be determined in two separate courts.
>
> Further, there is also the possibility that by not bringing the issue of hunting and fishing rights forward in the existing litigation, you will be met with a *res judicata* defence should your clients wish to pursue this matter once the Treaty 72 litigation is concluded.[219]

Limitations Law

PURPOSES AND INTERPRETATION OF LIMITATIONS

198. An important context behind limitations statutes is that they have developed historically in a piecemeal fashion, despite having apparent purposes that are of broad application. Traditionally, for example, there was no limitation period for breach of fiduciary duty, nor for most equitable causes of action in general. In the late 20th and early 21st centuries, reform initiatives were undertaken to systematize limitation periods. It was not until 2004 that there was any limitation period for breaches of fiduciary duty at all in Ontario. When this legislation was enacted, exceptions were made for proceedings based on existing Aboriginal and treaty rights, and for proceedings based on equitable claims by Indigenous people against the Crown. Such proceedings are to be governed by the previous law, with the result that they are not subject to limitation periods (with the possible exception of constructive trust claims seeking ownership of land). This is likely a key reason for the relatively narrow scope of limitations arguments made.

[219] Letter dated October 15, 2004, from Gary Penner to Roger Townshend, Exhibit 3960, pp. 1-2.

K.M. v H.M., [1992] 3 SCR 6, 1992 CarswellOnt 841 at paras 67 and 85-88, Ontario's Book of Authorities, Tab 79.

McConnell v Huxtable (2013), 113 OR (3d) 727 at paras 22, 63 and 71 (SCJ), [Plaintiffs' Reply Book of Authorities, Tab 13] aff'd 118 OR (3d) 561 (CA) [Ontario's Book of Authorities, Tab 82].

Limitations Act, 2002, SO 2002, c 24, Schedule B, ss 2(1)(e) and 2(1)(f), Ontario's Book of Authorities, Tab 223.

199. The general purposes of limitations statutes have been articulated as including:

(a) peace and repose (being free from concern about being sued);

(b) evidentiary concerns (that evidence would be unavailable);

(c) economic and public interest considerations (i.e. the cost of maintaining records and the economic impact on businesses of uncertainty about their legal liability);

(d) judgmental reasons (i.e. that new standards of liability eventually make it unfair to judge actions of the past by the standards of today); and

(e) encouraging diligence by plaintiffs.

Graeme Mew, *The Law of Limitations*, 3rd ed (Toronto: LexisNexis, 2016) at §1.51 to §1.55, Plaintiffs' Reply Book of Authorities, Tab 71.

K.M. v H.M., [1992] 3 SCR 6, 1992 CarswellOnt 841 at paras 22-24, Ontario's Book of Authorities, Tab 79.

Wewaykum Indian Band v Canada, 2002 SCC 79, [2002] 4 SCR 245 at para 121, Plaintiffs' Book of Authorities, Tab 113.

Pioneer Corp v Godfrey, 2019 SCC 42 at para 47, Plaintiffs' Reply Book of Authorities, Tab 18.

200. While the Supreme Court of Canada has affirmed that the general purposes of limitations can apply to Indigenous claims, it also has pointed out recently that reconciliation is a competing rationale that also weighs in the public interest:

> … many of the policy rationales underlying limitations statutes simply do not apply in an Aboriginal context such as this. Contemporary limitations statutes seek to balance protection of the defendant with fairness to the plaintiffs: *Novak v. Bond*, [1999] 1 S.C.R. 808, at para. 66, *per* McLachlin J. In the Aboriginal context, reconciliation must weigh heavily in the balance…The point is that despite the legitimate policy rationales in favour of statutory limitations periods, in the Aboriginal context, there are unique rationales that must sometimes prevail.

Manitoba Metis Federation Inc v Canada (Attorney General), 2013 SCC 14, [2013] 1 SCR 623 at para 141, Plaintiffs' Book of Authorities, Tab 45.

See also *Restoule v Canada (Attorney General)*, 2020 ONSC 3932 at paras 189-194, Ontario's Book of Authorities, Tab 149.

201. SON submits that barring claims by reason of limitations may not advance the reconciliation of historic grievances.

202. In the context of litigation about Aboriginal rights, the honour of the Crown is also a factor offsetting the traditional general purposes of limitations statutes:

> It is because "the honour of the Crown is itself a fundamental concept governing treaty interpretation and application, statutes with such enormous impact upon the enforcement of those promises [i.e. limitations statutes] must also be interpreted according to the duties inherent in the honour of the Crown.

Restoule v Canada (Attorney General), 2020 ONSC 3932 at paras 229-236, quote at para 234, Ontario's Book of Authorities, Tab 149.

203. For each of the general purposes of limitations statutes noted above, SON submits that there are reasons why the above noted purposes apply less convincingly in the Indigenous context. Indeed, the Ontario legislature has recognized this by exempting proceedings based on treaty or Aboriginal rights or on equitable claims by Indigenous peoples against the Crown from the application of the *Limitations Act, 2002*.

> *Limitations Act, 2002*, SO 2002, c 24, Schedule B, ss 2(1)(e) and 2(1)(f), Ontario's Book of Authorities, Tab 223.

a) Peace and Repose

204. Regarding "peace and repose", the last few decades of history has demonstrated that Indigenous claims will not go away if they are not dealt with on their merits. Rather, matters will remain contentious, and may even result in physical confrontation as they did at Kanesetake (Oka) in 1990 and Ipperwash in 1995.[220] Refusing to deal with Indigenous claims is unlikely to advance reconciliation, peace or repose.

> *Report of the Royal Commission on Aboriginal Peoples*, (Minister of Supply and Services Canada, 1996), Vol. 1, Chapter 1, at pp. 11 [Plaintiffs' Reply Book of Authorities, Tab 74], and Chapter 7, at pp. 196-198 (*regarding Kanesetake (Oka)*), [Plaintiffs' Reply Book of Authorities, Tab 75]; and Vol. 2, Chapter 4, at pp. 418, 513 and 514 (*regarding Ipperwash*), [Plaintiffs' Reply Book of Authorities, Tab 77].

205. Further, the purpose of peace and repose is unpersuasive in situations where a strict interpretation and application of a limitations statute would result in allowing a wrongdoer to escape liability while the victim of injury continues to suffer the consequences.

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[220] Prof. Jarvis Brownlie, "The Long Road to Land Claims: The Historical Development of the Saugeen Ojibway's Capacity to Challenge Governments on Treaty and Land Issues" (2018), Exhibit 4119, pp. 3-4.

> *K.M. v H.M.*, [1992] 3 SCR 6, 1992 CarswellOnt 841 at para 22 *(context of childhood sexual abuse)*. Ontario's Book of Authorities, Tab 79.
>
> *Pioneer Corp v Godfrey*, 2019 SCC 42 at para 47, Plaintiffs' Reply Book of Authorities, Tab 18.

206. This offsetting factor has been noted and has predominated in a case of childhood sexual abuse. The position of First Nations in relation to possible claims against the Crown has been directly analogized to that of victims of childhood sexual abuse:

> Like victims of childhood sexual abuse, the appellants were simply unable to appreciate the fact that when the Crown "suggested" that they surrender their native rights to lands, they might be giving up something of legal value. Moreover, I think that one can draw an analogy between the coercion involved in the concealment of sexual abuse cases and the Crown's failure here to raise the issue of mineral rights when it was discussing the merits of the 1945 surrender. In both cases, the superior party to a fiduciary relationship is playing on the dependence and trust of the disadvantaged party. Finally, it seems to me that much the same thing could be said about the real ability of most of the appellants to take legal action to enforce their rights prior to the 1970s as the Supreme Court said about the social "taboo" against actions of the sort in issue in *M.(K.)*.
>
> *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1993] 3 FC 28 (CA) at para 99*,* Court file A-1240-87 at pp. 35-36, per Isaac CJ (dissenting) [Ontario's Book of Authorities, Tab 13], var'd *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [Plaintiffs' Book of Authorities, Tab 9].

b) Evidentiary Concerns

207. Regarding evidentiary concerns, Indigenous claims rely heavily on written records generated by government officials and filed in government archives. In these actions, for example,

there are thousands of written records housed in a number of different government archives.[221] As acknowledged by the Supreme Court of Canada, many Indigenous societies did not keep written records at the time of contact or sovereignty. Therefore, to the extent that the passage of time causes any prejudice, it is more likely to prejudice the Aboriginal group relying on unwritten recollections, which may fade over time, rather than the Crown.

> *Delgamuukw v British Columbia,* [1997] 3 SCR 1010*,* paras 80-84, Plaintiffs' Book of Authorities, Tab 18.

c) Economic and Public Interest

208. Regarding economic and public interest considerations, the general pattern of the Department of Indian Affairs is to keep written records to refer to going forward.[222] The Indian Affairs record group (LAC RG 10), for example, is the primary holding of all records relating to Indigenous Affairs. It is the second largest collection of records in Library and Archives Canada for government records.[223] Therefore, there is no additional burden of record-keeping placed on the Crown associated with the risk of litigation.

d) Judgmental Reasons

209. Regarding "judgmental reasons" (that there are now new standards of liability), courts have found that the presence of bias and prejudice in the history of Canadian law regarding Aboriginal rights call more for redress and change than for deference to the views of the past. The Supreme Court of Canada has noted that:

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[221] See Dr. Gwen Reimer, Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA. 900 – 1900, Exhibit 4702, pp. 3-4 -*brief summary of the number of documents in these action and their archival locations*.
[222] Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p.3205, lines 13-21.
[223] Evidence of Jean-Pierre Morin, Transcript vol 66, November 26, 2019, p. 8531, line 16 to p. 8532, line 16.

> It should be noted that the language used by Patterson J., illustrated in this passage [from the 1929 decision *R v Syliboy*], reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada. With regard to the substance of Patterson J.'s words, leaving aside for the moment the question of whether treaties are international‑type documents, his conclusions on capacity are not convincing.

Simon v The Queen, [1985] 2 SCR 387 at 399, Plaintiffs' Book of Authorities, Tab 100.

e) Encouraging Diligence

210. Regarding encouraging diligence by plaintiffs, until the late 20th century, Indigenous plaintiffs were practically unable to pursue (and for some years legally prohibited from pursuing) claims against the Crown, so no encouragement to be diligent could possibly have been effective.

> See paras 76-154 *(legal and practical impediments to Indigenous people pursuing their rights).*

INTERNATIONAL COMMITMENTS

211. To the extent possible, statutes should be interpreted in a way consistent with Canada's international commitments, and to respect the values and principles embodied in international law.

> R. Sullivan, *Sullivan on the Construction of Statutes,* 5th ed, (Markham: LexisNexis, 2008) at pp. 538-545, Plaintiffs' Reply Book of Authorities, Tab 79.
>
> *R v Hape*, [2007] 2 SCR 292, 2007 SCC 26 at paras 53-56, Plaintiffs' Reply Book of Authorities, Tab 22.

212. One such international declaration, which Canada fully supports, is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This properly informs statutory interpretation:

> …UNDRIP may be used to inform the interpretation of domestic law. As Justice L'Heureux Dubé stated in *Baker*, values reflected in international instruments, while not having the force of law, may be used to inform the contextual approach to statutory interpretation and judicial review (at paras 70-71). In *Simon*, Justice Scott, then of this Court, similarly concluded that while the Court will favour interpretations of the law embodying UNDRIP's values, the instrument does not create substantive rights. When interpreting Canadian law there is a rebuttable presumption that Canadian legislation is enacted in conformity to Canada's international obligations. Consequently, **when a provision of domestic law can be ascribed more than one meaning, the interpretation that conforms to international agreements that Canada has signed should be favoured**. [emphasis added]

Nunatukavut Community Council Inc v Canada (Attorney General), 2015 FC 981 at para 103, Plaintiffs' Reply Book of Authorities, Tab 16.

> Of particular significance especially in this case is the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), GA Res. 61/295, UN GAOR, 61st Sess., Supp. No 49 Vol III, UN Doc A/61/49 (2007) (the UNDRIP). It outlines the individual and collective rights of Indigenous peoples. In May 2016, Canada endorsed the UNDRIP stating that "Canada is now a full supporter of the Declaration, without qualification.["]

First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (Minister of Indigenous and Northern Affairs Canada), 2018 CHRT 4 at para 72, Plaintiffs' Reply Book of Authorities, Tab 8.

213. UNDRIP provides that:

(a) Indigenous peoples have a right to their lands and territories.

> 1. Indigenous peoples have the right to the lands, territories and resources which they have

> traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

United Nations Declaration on the Rights of Indigenous Peoples, Article 26, Plaintiffs' Reply Book of Authorities, Tab 65.

(b) Indigenous peoples shall not be removed from their territories without their free, prior and informed consent.

> Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

United Nations Declaration on the Rights of Indigenous Peoples, Article 10, Plaintiffs' Reply Book of Authorities, Tab 65.

(c) If dispossessed from their territories, Indigenous peoples have a right to redress for this.

> Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

United Nations Declaration on the Rights of Indigenous Peoples, Article 28(1), Plaintiffs' Reply Book of Authorities, Tab 65.

(d) States shall provide effective mechanisms for such redress.

> States shall provide effective mechanisms for prevention of, and redress for…[a]ny action which has the aim or effect of dispossessing them of their lands, territories or resources.

United Nations Declaration on the Rights of Indigenous Peoples, Article 8 (2) (b), Plaintiffs' Reply Book of Authorities, Tab 65.

(e) Indigenous peoples have a right to enforce their treaties.

> Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

United Nations Declaration on the Rights of Indigenous Peoples, Article 37(1), Plaintiffs' Reply Book of Authorities, Tab 65.

(f) Indigenous peoples have the right to effective remedies for infringement of their rights.

> Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

United Nations Declaration on the Rights of Indigenous Peoples, Article 40, Plaintiffs' Reply Book of Authorities, Tab 65.

214. Some statutory limitations periods – such as the real property limitations period that Ontario suggests should be applied in this case – not only bar a remedy, but also extinguish the

underlying right. Were such statutory limitations applied to extinguish Indigenous land interests, it would not be consistent with a) the right of Indigenous peoples to their lands and territories; b) the right not be removed from their territories without their free, prior and informed consent; c) the right to redress if dispossessed from their territories; and d) the right to effective mechanisms for such redress. Therefore, for this and for all the other reasons above, unless the applicability of the limitation period is inescapable, limitations periods should not be applied to extinguish an Indigenous land interest.

215. Applying statutory limitations to bar a remedy for an infringement of a treaty right or of a duty flowing from a treaty is not consistent with a) the right to enforce treaties; and b) the right to effective remedies for infringement of rights. Therefore, for this and for all the other reasons above, unless such interpretation is inescapable, limitations statutes should not be applied to bar a remedy for an infringement of a treaty right or a duty flowing from a treaty.

REAL PROPERTY LIMITATION PERIODS

216. The action concerning Treaty 72 was commenced on April 28, 1994.

217. The *Limitations Act* (RSO 1990 c L-15) was the Act relating to limitations periods in force at that time.[224]

218. Among other things, the 1990 *Limitations Act* provided, in relation to real property actions:

> No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make

[224] The *Limitations Act, 2002* repealed and replaced most of the 1990 *Limitations Act*. The portions of the 1990 *Limitations Act* which remained in force were renamed the *Real Property Limitations Act*. These changes were implemented by the *Justice Statute Law Amendment Act*, SO 2002 c. 24, Schedule B, s. 26 [Plaintiffs' Reply Book of Authorities, Tab 57]. That latter statute came in force on proclamation, which was January 1, 2004.

> such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.
>
> *Limitations Act*, RSO 1990 c L-15, s 4, Ontario's Book of Authorities, Tab 222.

219. It also provided that at the end of the limitation period, the underlying property right was extinguished.

> *Limitations Act*, RSO 1990 c L-15, s 15, Ontario's Book of Authorities, Tab 222.

220. Predecessor acts contained very similar provisions, which are set out in Schedule B (2) to Ontario's Closing Submissions.

Trustee Exceptions to Limitation Periods

221. Historically, there was no limitation period for property claims against express trustees and some constructive trustees.

> Ontario Law Reform Commission, *Report on Limitation of Actions*, (Toronto: Department of the Attorney General, 1969) at p.53, Plaintiffs' Reply Book of Authorities, Tab 73.
>
> D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed (Toronto: Carswell, 1984) at p.1015, Plaintiffs' Reply Book of Authorities, Tab 81.
>
> *Soar v Ashwell*, [1893] 2 QB 390 (CA)at 394 per Esher MR, at 395 per Bowen LJ, at 405 per Kay LJ, Plaintiffs' Reply Book of Authorities, Tab 25.
>
> *Taylor v Davies* (1919), 51 DLR 75 (PC) at pp. 84-85, Plaintiffs' Reply Book of Authorities, Tab 26.

Egnatios v Leon Estate, 1990 CanLII 8067 (ONSC) at para 42, Plaintiffs' Reply Book of Authorities, Tab 7.

222. Starting in the 19th century, however, limitations statutes provided that trustees could take advantage of limitations periods in some circumstances:

> In an action against a trustee or a person claiming through a trustee, **except where the claim** is founded upon a fraud or fraudulent breach of trust to which the trustee was party or privy, or **is to recover trust property or the proceeds thereof, still retained by the trustee**, or previously received by the trustee and converted to the trustee's use…[the trustee may take advantage of limitation periods that would be applicable were the trustee not a trustee].
>
> [**emphasis added**]

Limitations Act, RSO 1990, c L-15, s 43(2), Ontario's Book of Authorities, Tab 222.

223. This (or very similar) wording has been applied to preclude the trustee of an express trust from benefitting from limitations periods, in the circumstances identified. Courts also decided that this provision should apply to some constructive trustees as well. For this purpose, a distinction arose between constructive trustees who would be treated as express trustees "for the purpose of limitation periods", and those who would not. The latter were called "mere" constructive trustees. It was therefore only "mere" constructive trustees who could take advantage of limitation periods if they still held trust property. The key criterion for a constructive trustee to be treated as an express trustee for limitations purposes is for there to be a pre-existing fiduciary duty, the breach of which caused a constructive trust to arise (as opposed to a constructive trust arising directly from an impugned transaction). The leading case is *Soar v Ashwell*, where Ashwell was a solicitor for an express trust created by a will for the Soar family. Ashwell was given charge of the trust funds to invest them. He later misappropriated some of the money for himself. Twelve years later

the Soar family trustee sued Ashwell (actually Ashwell's estate, Ashwell having died by then). Thus Ashwell was a constructive trustee of the Soar family trust funds, having taken charge of these assets to invest them. When he misappropriated them, he was thus breaching a pre-existing fiduciary duty. The Court decided that Ashwell should be treated as an express trustee for limitations purposes, and not permitted to take advantage of limitation periods.

> …where a person has assumed…to act as a trustee of money or other property **i.e. to act in a fiduciary relation with regard to it**, and has in consequence been in possession of or has exercised command or control over such money or property, **a Court of Equity will impose upon him all the liabilities of an express trustee**…he must discharge himself by accounting to his cestui que trust for all such money or property without regard to lapse of time. [**emphasis added**]

Soar v Ashwell, [1893] 2 QB 390(CA) at 394 per Esher MR. See also at 397 per Bowen LJ and at 405 per Kay LJ.

> The expressions "trust property" and "retained by the trustee" properly apply, not to a case where a person having taken possession of property on his own behalf, is liable to be declared a trustee by the Court; but rather to a case where he originally took possession upon trust for or on behalf of others. **In other words, they refer to cases where a trust arose before the occurrence of the transaction impeached and not to cases where it arises only by reason of that transaction. The exception no doubt applies, not only to an express trustee named in the instrument of trust, but also to those persons who under the rules explained in *Soar v. Ashwell,* *supra***, and other cases are to be treated as being in a like position; but in their Lordships' opinion it does not apply to a mere constructive trustee of the character described in the judgment of Sir William Grant. [**emphasis added**]

Taylor v Davies (1919) 51 DLR 75 (PC) at p. 86, Plaintiffs' Reply Book of Authorities, Tab 27.

> See also: Ontario Law Reform Commission, *Report on Limitation of Actions* (Toronto: Department of the Attorney General, 1969) at p. 53, Plaintiffs' Reply Book of Authorities, Tab 73.
>
> See also: *Egnatios v Leon Estate*, 1990 CanLII 8067 (ONSC) at paras 41-47, Plaintiffs' Reply Book of Authorities, Tab 7.
>
> See also: *Proprietors of Wakatu v AG*, [2017] NZSC 17 at paras 446-454 per Elias CJ, paras 684-686 per Glazebrook J, paras 811-815 per Arnold and O'Regan JJ, and paras 926-935 per William Young J (the latter dissenting, but not on the interpretation of the statute), Plaintiffs' Reply Book of Authorities, Tab 19.

Application of Trustee Exception to Constructive Trust of Lands in Crown Hands

224. SON will argue in Phase 2 that due to the Crown's breach of fiduciary duty, a constructive or resulting trust on the lands subject to Treaty 72 arose immediately upon the conclusion of Treaty 72. For unpatented lands, nothing material has changed since then. For lands which were patented to a *bona fide* purchaser for value of the legal estate without notice of SON's claim, the trust would have become unenforceable. However, if such land subsequently became re-acquired by the Crown, SON will argue that the constructive trust became reinvigorated.

225. If SON succeeds in the argument that a constructive trust should apply to any such lands still (or again) in Crown hands, this trust falls within the trustee exceptions discussed above, and is therefore not barred by the 10-year real property limitation period. The Crown became subject to a fiduciary duty to protect and preserve the lands of the Peninsula by virtue of the promise in Treaty 45 ½ in 1836 and the related creation of the Peninsula as a reserve. The Crown had in that sense "taken charge" of the lands for the benefit of SON, and indeed treated them as "Crown lands" in which the Crown had no beneficial interest, and had put in place some legislation and proclamations that would have enabled it to take protective measures for the Peninsula.[225] Thus

[225] *An Act for the Protection of the Lands of the Crown in this Province from Trespass and Injury*, RSUC 1792-1840 (1839, c 15) s. 1, Exhibit 1301 - treats Indian lands, including unceded Indian

the Crown was "exercising some control" over the Peninsula when the Crown breached its fiduciary duty to SON in 1854, bringing the consequent constructive trust within the *Soar v Ashwell* precedent for being exempt from limitation periods.

226. Any ambiguity on the point of whether SON's case falls within the *Soar v Ashwell* exception to the application of limitation periods should be resolved in favour of an interpretation that does not bar a remedy for an infringement of a treaty right or a duty flowing from a treaty, in order that Canadian law would be consistent with UNDRIP.

See paras 213-215.

227. Ontario notes that *McConnell v Huxtable* applied the real property limitation period to a constructive trust. There are two reasons why this case is distinguishable. First, on its facts, the trust in *McConnell* was declared by the court as a remedy to unjust enrichment in the family law context; there was no fiduciary duty that predated that unjust enrichment. Therefore, the McConnell trust is unlike the *Soar v Ashwell* precedent for the trustee exception. Secondly, when *McConnell* was decided**,** the *Limitations Act, 2002* was in force and the trustee provisions of the 1990 *Limitations Act* had been repealed, replaced by only a provision relating to express trustees. Therefore, the *Soar v Ashwell* exemption was no longer available, and could not have even been considered. SON's present action was commenced when the trustee provisions in the 1990 *Limitations Act* were in full force, which therefore need to be considered and applied.

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lands, as "Crown lands", and provided measures to protect such lands. Additional measures to protect Indian lands, or SON's lands in particular, can be found in *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, S Prov C 1850, c 74, Plaintiffs' Book of Authorities, Tab 119, Exhibit 1784; Proclamation, Nov. 7, 1851, DIAND, Indian Lands Registry System, Document No. 7163-232 D, Exhibit 1895; and Lord Elgin's Declaration, June 29, 1847, Exhibit 1674. See also Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 10-13.

McConnell v Huxtable, 2014 ONCA 86, Ontario's Book of Authorities, Tab 82.

Real Property Limitations Act, RSO 1990, c L.15, s 42, Ontario's Book of Authorities, Tab 227.

Road Allowance Exception to Limitation Periods

228. For lands which are original road allowances, there is another reason that the real property limitation period does not apply.

229. Road allowances became vested in the local municipalities in 1913. Before that date, they were vested in the Ontario Crown.

Consolidated Municipal Act, SO 1903, c 19, s. 599, Plaintiffs' Reply Book of Authorities, Tab 49.

Municipal Act, SO 1913, c 43 (3-4 Geo. V.) s. 433, enacted on July 1, 1913, Plaintiffs' Reply Book of Authorities, Tab 59.

230. Since 1922, the real property limitation provisions have been inapplicable to original road allowances.

> Nothing in sections 1 to 15 applies to any waste or vacant land of the Crown, whether surveyed or not, **nor to lands included in any road allowance heretofore or hereafter surveyed** and laid out or to any lands reserved or set apart or laid out as a public highway where the freehold in any such road allowance or highway is vested in the Crown or in a municipal corporation, commission or other public body, but nothing in this section shall be deemed to affect or prejudice any right, title or interest acquired by any person before the 13th day of June, 1922.

Real Property Limitations Act, RSO 1990, c L15, s. 16. (emphasis added), Ontario's Book of Authorities, Tab 227. This provision was first enacted by *The Limitations Act*, *1922*, SO 1922, c 47, s. 2, Plaintiffs' Reply Book of Authorities, Tab 58.

231. The period between 1913 and 1922 was insufficiently long for the 10-year real property limitation period to bar a claim.

> *Di Cenzo Construction Co Ltd v Glassco*, 1978 CanLII 1472, unpaginated, PDF pp 16-17. (Ont CA) Plaintiffs' Reply Book of Authorities, Tab 6.

232. In relation to the period before 1913, when road allowances were in Crown hands, limitations did not bar a claim for the reasons noted in this chapter regarding lands in the hands of Ontario.

> See paras 221-227 and 234-249.

233. Therefore, the real property limitation period did not bar a claim to beneficial ownership of road allowances, either before 1913, between 1913 and 1922, nor after 1922.

DISCOVERABILITY

234. "[D]iscoverability is a general rule applied to avoid the injustice of precluding an action before the person is able to raise it." It is a rule of statutory construction which is applied to limitations statutes. It does not apply if the statute clearly fixes the time at which a limitation period starts at an event which is unrelated to the knowledge of the plaintiff. However, limitation periods that start when a "cause of action arises" or when "damages are sustained" are subject to discoverability.

> *Peixeiro v Haberman*, [1997] 3 SCR 549 at paras 36-39, Plaintiffs' Reply Book of Authorities, Tab 17.
>
> See also *Pioneer Corp v Godfrey*, 2019 SCC 42 at paras 32-36, Plaintiffs' Reply Book of Authorities, Tab 18.

235. The discoverability principle applies to Ontario real property limitations periods, at least in the event of claims to equitable title.

Chopra v Vincent (2015), 126 OR (3d) 77, 2015 ONSC 3203 at para 10, Plaintiffs' Reply Book of Authorities, Tab 5.

236. The knowledge of the plaintiff required to end the application of the discoverability principle extends beyond mere knowledge of material facts – the plaintiff must have knowledge that the acts were wrong and could form the basis of a viable legal proceeding. For example, in relation to a claim in assault and battery for incest during the plaintiff's childhood, the Supreme Court of Canada noted "in 1975 such proceedings were unthought of and it was therefore reasonable for her not to have started such proceedings."

K.M. v H.M., [1992] 3 SCR 6, CarswellOnt 841 at paras 25-30, quote at para 26 [Ontario's Book of Authorities, Tab 79] quoting with approval from *Stubbings v Webb*, [1991] 3 All ER 949 (CA).

237. As noted above, the position of First Nations in relation to possible claims against the Crown has been directly analogized to that of victims of childhood sexual abuse.

See para 206.

238. It is only quite recently that First Nations "have been able to exercise the same degree of diligence as might be expected of an ordinary member of society". Therefore in such cases the discoverability principle applies, and limitations periods are postponed until "the 'reasonable plaintiff', having obtained the appropriate advice, would regard the facts known to it as showing that a cause of action has 'a reasonable prospect of success'".

Semiahmoo Indian Band v Canada (1997), [1998] 1 FC 3, 1997 CarswellNat 1316, at paras 84-85, Plaintiffs' Book of Authorities, Tab 99.

See also *Chippewas of Sarnia v Canada (AG)*, [1999] OJ 1406 (SCJ), paras 613-641 [Plaintiffs' Reply Book of Authorities, Tab 4], var'd other grounds but with agreement that limitation periods did not bar the claim (2000), 51 OR (3d) 641 (CA) at para 242, Plaintiffs' Book of Authorities, Tab 14.

> See also *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700, para 1319 and 1330 (var'd BCCA and SCC, with no comment on limitations), Plaintiffs' Book of Authorities, Tab 107.

239. SON submits that the systemic obstacles to Indigenous peoples asserting rights effectively (above, paras 76-140) prevented SON from launching major legal actions such as these ones essentially until they did so. Therefore, the discoverability principle, in the context of the lack of ability of First Nations, until recently, to exercise the diligence that might be expected of others, prevents limitations periods from commencing until then.

240. More pointedly, the specific causes of action now relied upon were not recognized as available in a First Nations context until *Guerin* in 1984, and so could not possibly have been discoverable until recently. As summarized by the Federal Court of Appeal in *Semiamhoo:*

> In coming to the conclusion that the 6-year limitation period in subsection 3(4) should not begin to run until on or about 23 May 1989, I find it important to bear in mind that it is only in the last approximately fifteen years that Indian bands have been able to exercise the same degree of diligence with respect to their legal rights as might be expected of an ordinary member of society. To be more specific, it was not until the Supreme Court's 1984 decision in Guerin that courts clearly began to recognize a cause of action against the Crown for breach of fiduciary duty in land surrenders. In Sparrow, the Supreme Court made this observation in the following way:
>
> > For many years, the rights of the Indians to their aboriginal lands-certainly as legal rights-were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of

> commercial enterprises. For fifty years after the publication of Clement's The Law of the Canadian Constitution (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. Thus the Statement of the Government of Canada on Indian Policy (1969), although well meaning, contained the assertion (at p. 11) that "aboriginal claims to land ... are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community."
>
> The Supreme Court further noted that, "[a]s recently as Guerin v. The Queen, [1984] 2 S.C.R. 335, the federal government argued in this Court that any federal obligation was of a political character."
>
> In accordance with paragraph 6(3)(i) of the B.C. Limitation Act, the 6-year limitation period in subsection 3(4) does not start to run until the "reasonable plaintiff", having obtained the appropriate advice, would regard the facts known to it as showing that a cause of action has "a reasonable prospect of success". In my view, until the Guerin decision, it could not be said that the reasonable plaintiff would have viewed the band's cause of action as having "a reasonable prospect of success".

Semiahmoo Indian Band v Canada (1997), [1998] 1 FC 3, 1997 CarswellNat 1316 (CA), at para 84-86, Plaintiffs' Book of Authorities, Tab 99.

See also paras 144-145.

241. Ontario relies on a number of cases about limitations originating in western Canada. As noted above, limitations reform proceeded at different times and in different ways in different provinces. Some of the western cases seem premised on the intuition that it is self-evident that the Crown should not be exposed to liability for breaches of fiduciary duty for an unlimited time.

> See, for example, *Peter Ballantyne Cree Nation v Canada*, 2014 SKQB 327, 2014 CarswellSask 642 at para 77 [Ontario's Book of Authorities, Tab 117], reversed in part but not on this point, 2016 SKCA 124, [2017] 1 WWR 685 [Ontario's Book of Authorities, Tab 115], leave to appeal to SCC ref'd [2017] SCCA No 95, [Ontario's Book of Authorities, Tab 116].

242. SON submits that such cases have to be read with the recognition that the Ontario legislature has made precisely the opposite choice when it comes to statutory limitations, by effectively exempting equitable claims by Indigenous people against the Crown from limitation periods. Rather, in Ontario, the purposes behind limitations statutes are to be addressed through the doctrine of laches instead in this context.

> See paras 198 and 203.

243. In particular, Ontario relies on the case *Peepeekisis Band v Canada (Minister of Indian Affairs and Northern Development)* to argue that developments in the law do not excuse delay. *Peepeekisis* also related to a breach of fiduciary duty of the Crown. The Court noted that it would indeed be "difficult" to resort to the Courts for such a claim before *Guerin* (1984), but observed that even if *Guerin* was taken as the point at which limitations started to run, the action would already be time barred. Thus, there was actually no need for *Peepeekisis* to have addressed the question of the impact of developments in the law. The Court did comment, however, that the Supreme Court of Canada had ruled limitations in such cases started at the discovery of material

facts, referring to the decisions of the Supreme Court of Canada in *Wewaykum* and *Lameman*, and considered that the matter was therefore settled.

> *Peepeekisis Band v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FCA 191 at para 50, Ontario's Book of Authorities, Tab 114.

244. SON submits that *Peepeekisis* misunderstood what had actually been decided in *Wewaykum* and *Lameman*. SON further submits, for the reasons that follow, that these latter cases are distinguishable from this present case.

245. *Wewaykum* was based on an unusual fact situation: two First Nations had claimed each other's reserves based on what was an administrative "ditto mark" error in documents. Both First Nations were aware of this from the 1930s, had thought it appropriate to leave its sister First Nation undisturbed, and had signed declarations disavowing claims to the reserves of the other First Nation. So, from the 1930s, the First Nations had been aware of this technical error; had received independent legal advice about the implications of the error; and had resolved the matter substantively to their satisfaction. The Supreme Court of Canada rejected the claims of both First Nations without relying on limitations, but did address limitations since the matter had been argued extensively. The Court considered the events of the 1930s noted above sufficient to have triggered limitation periods. SON submits that there are no comparable events in SON's history.

> *Wewaykum Indian Band v Canada*, [2002] 4 SCR 245 at paras 32, 41-45, 57-61, 112-113, 129 and 132-133, Plaintiffs' Book of Authorities, Tab 113.

246. *Lameman* dealt with Crown actions in the 1880s and 1890s which led to an Indian reserve surrender. It could not have escaped the First Nations at the time that the reserve had been surrendered, but the Supreme Court did not apply limitation periods starting in the late 19th century

(as it would have if all that mattered was knowledge of material facts). Rather the Court relied on events in the late 1970s, which included the plaintiffs being aware of a claim being advanced by a related First Nation based on the same facts, to trigger the running of the limitation period. The Court also noted that the plaintiffs had filed no evidence in response to the evidence about events in the 1970s. They did not say, for instance, that they did not know in the 1970s of the causes of action they were then pursuing in *Lameman*. The Court therefore felt compelled to infer that the causes of action were discoverable in the 1970s. In the present case, SON has adduced extensive evidence about its capacity to discover and pursue causes of action.

> *Canada (Attorney General) v Lameman*, 2008 SCC 14 at paras 17-18, Ontario's Book of Authorities, Tab 21.

247. SON therefore submits that *Peepeekisis*, and similar cases which followed it,[226] overstated the extent to which *Wewaykum* and *Lameman* had overtaken *Semiahmoo* on this point. SON submits that *Semiahmoo* remains good law, although there are exceptional circumstances in which limitations periods for Indigenous claims may start before the 1980s.

Application of Discoverability to Treaty 72 Action

248. An action for breach of fiduciary duty in the course of entering an Indigenous treaty would not have been considered reasonably viable until the decision of Supreme Court of Canada's decision in *Guerin* in November 1984.

> See paras 144-145.
>
> *Semiahmoo Indian Band v Canada* (1997), [1998] 1 FC 3, 1997 CarswellNat 1316, at para 86, Plaintiffs' Book of Authorities, Tab 99.

[226] E.g. *Watson v Canada*, 2020 FC 129 at paras 370-371 [Plaintiffs' Book of Authorities, Tab 111]; *Goodswimmer v Canada (Attorney General)*, 2017 ABCA 365 [Ontario's Book of Authorities, Tab 54].

249. The Treaty 72 action was launched well within the 10-year real property limitation period of the Supreme Court of Canada's decision in *Guerin*, and therefore is not barred by that limitation period.

SUMMARY OF APPLICATION OF REAL PROPERTY LIMITATION PERIODS TO BENEFICIAL OWNERSHIP OF LANDS

250. The real property limitation period does not bar a declaration of beneficial ownership of lands in the hands of Ontario because:

(a) the trustee exemption prevents it from applying; or, in the alternative,

(b) the cause of action was not discoverable before the *Guerin* case in 1984 and the action was commenced in 1994, within the 10-year limitation period.

251. The real property limitation period does not bar a declaration of beneficial ownership of road allowances because such period does not apply to road allowances.

Laches

252. Laches is an equitable defence available to defend equitable claims. It is flexible and subject to the discretion of the court. It requires balancing the justice or injustice of granting or withholding a remedy.

> *K.M. v H.M.*, [1992] 3 SCR 6, 1992 CarswellOnt 841 at paras 96-98, Ontario's Book of Authorities, Tab 79.
>
> L.I. Rotman, *Fiduciary Law*, (Toronto: Carswell, 2005) at p. 627, Plaintiffs' Book of Authorities, Tab 192.

253. A successful laches defence requires delay plus either a) acquiescence by the plaintiff or b) a prejudicial change of position by the defendant caused by reasonable reliance on the plaintiff's acceptance of the *status quo*.

K.M. v H.M., [1992] 3 SCR 6, 1992 CarswellOnt 841 at para 98 Ontario's Book of Authorities, Tab 79.

ACQUIESCENCE BRANCH

254. The Ontario Court of Appeal has stressed:

> In the case of a claim to aboriginal title, a court must approach the issue of delay with extreme caution and with due regard to the nature of the right at issue. Aboriginal claims often arise from historical grievances. These claims reflect the disadvantages long suffered by aboriginal communities and the failure of our society and our legal system to provide adequate responses. There is a significant risk that denial of claims on grounds of delay will only add insult to injury. It is plainly not the law that aboriginal claims will be defeated on grounds of delay alone. The reason and any explanation for the delay must be carefully considered with due regard to the historically vulnerable position of aboriginal peoples.

Chippewas of Sarnia v Canada (AG) (2000), 51 OR (3d) 641(CA) at para 267, Plaintiffs' Book of Authorities, Tab 14.

255. Acquiescence requires knowledge, capacity and freedom. The historic imbalance of power between Indigenous groups and the Crown means that acquiescence cannot be inferred from delay alone.

Manitoba Metis Federation Inc v Canada (Attorney General), 2013 SCC 14 at para 147, Plaintiffs' Book of Authorities, Tab 45.

256. The knowledge required is not just knowledge of the facts, but knowledge that the facts give rise to a claim. It is unrealistic to suggest that Indigenous groups sat on their rights at times before the courts were prepared to recognize those rights. The test for acquiescence is similar to the limitations test for discoverability.

K.M. v H.M., [1992] 3 SCR 6, 1992 CarswellOnt 841 at paras 100-102, Ontario's Book of Authorities, Tab 79.

Manitoba Metis Federation Inc. v Canada (Attorney General), 2013 SCC 14 at para 149, Plaintiffs' Book of Authorities, Tab 45.

Tsilhqot'in Nation v British Columbia, 2007 BCSC 1700 at para 1330, var'd BCCA and SCC [Plaintiffs' Book of Authorities, Tab 107]. The SCC in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 granted a declaration of Aboriginal title without commenting on laches, which were not argued on appeal, Plaintiffs' Book of Authorities, 108.

257. Ontario relies on the case *Chippewas of Sarnia* concerning laches. It should be noted that the discussion of laches in that case did not break out separately the acquiescence and prejudice branch of laches. It is evident that the existence of *bona fide* purchasers of the land subject to claim was critical to the application of laches in that case. SON submits that the case has little to say about acquiescence in the absence of such prejudice.

> The facts relevant to the defences of laches and acquiescence have already been discussed with respect to the consideration of delay in relation to public law remedies and it is unnecessary to repeat them here. In our view, those facts bring this case squarely within the principles governing laches set out in M. (K.) v. M. (H.), supra. The Chippewas accepted the transfer of their lands and acquiesced in the Cameron transaction. **The landowners altered their position by investing in and improving the lands in reasonable reliance on the Chippewas' acquiescence in the status quo. This is a situation that would be unjust to disturb.**
>
> …
>
> For these reasons, we conclude that established rules governing the availability of public and private law remedies require the court to take into consideration the Chippewas' delay in asserting [their] claim and **the reliance of innocent third parties on the apparent validity of the Cameron patent**. On the facts of this case, it is our view that the Chippewas' delay, **combined with the reliance of the landowners**, is fatal to the claims asserted by the Chippewas.

[emphasis added]

Chippewas of Sarnia v Canada (AG) (2000), 51 OR (3d) 641 (CA) at paras 299 and 310; See also paras 249, 257-9, and 274, Plaintiffs' Book of Authorities, Tab 14.

258. Further, it should be noted that although *Chippewas of Sarnia* dismissed the claims of the Chippewas to lands on which there were *bona fide* purchasers, it did **not** dismiss the Chippewas' claims against the Crown.

> …we repeat here that we do not intend to preclude or limit the right of the Chippewas to proceed with their claim for damages against the Crowns.

Chippewas of Sarnia v Canada (AG) (2000), 51 OR (3d) 641 (CA) at para 275, Plaintiffs' Book of Authorities, Tab 14.

259. SON submits that they lacked the knowledge, the capacity and the freedom that is required to constitute acquiescence in the laches context until quite recently.

260. In relation to knowledge that the Treaty 72 claim would be reasonably viable, SON could not reasonably have assessed the viability of an action for breach of fiduciary duty in the course of taking Treaty 72 until the Supreme Court of Canada's decision in *Guerin* in 1984. One cannot acquiesce to a breach of fiduciary duty if one is unaware, and could not have become aware, that such a cause of action was possible. This present action was launched with 10 years of the date of *Guerin*.

See paras 248-249.

261. In addition to this, as laid out in detail above, until the late 20th century, SON experienced numerous and profound barriers to the effective assertion of their rights. These barriers included the *Indian Act* regime, the Indian agent system, residential schools, poverty, lack of education, and political disempowerment.

See paras 76-140.

262. Also as set out above, SON did attempt to assert their rights more or less continuously since European contact, using whatever means were realistically available to them. It should not be held against them that they did not take steps which plainly would have been futile, such as trying to reverse some of the key effects of Treaty 72 before the late 20th century. Nor should they be expected immediately to have embarked on litigation of the nature of this action once the most debilitating of the above noted barriers began to weaken. It took time, after over a century of systematic disempowerment, to develop the capacity for such major litigation, and to gather the facts and documents needed for such steps.

See paras 155-191.

263. It is therefore submitted that SON should not be taken to have acquiesced to a breach of fiduciary duty.

PREJUDICE BRANCH

264. The underlying purposes behind limitation periods could also possibly be relevant to the weighing required by laches, for example, when there is potential prejudice if witnesses are no longer available. However, as set out above, these purposes apply with somewhat less force in an Indigenous context, and reconciliation must also be weighed in the balance.

See paras 199-215.

265. If unique property is transferred into the hands of a *bona fide* purchaser for value of the legal estate without notice (BFPVLEWN), or if significant improvements are made to property, these facts can possibly weigh as prejudicial factors to be considered, but mere possession of land by a person in breach of fiduciary duty is not itself a prejudicial factor.

Lindsay Petroleum Co v Hurd, [1874] UKPC 2 (20 January 1874) at 2, LR 5 PC 221 (PC – from Ontario) Plaintiffs' Reply Book of Authorities, Tab 12.

See also *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 at para 111, Plaintiffs' Book of Authorities, Tab 113.

See also L.I. Rotman, *Fiduciary Law*, (Toronto: Carswell, 2005) at p. 629, Plaintiffs' Book of Authorities, Tab 192.

266. SON accepts that it cannot succeed with claims to lands in the hands of a BFPVLEWN. (If there is an issue about whether a BFPVLEWN exists in relation to a specific parcel of land, that will be a matter for Phase 2). Everything that follows relates to lands where no such BFPVLEWN exists.

267. In accordance with the above principles, aside from the intervention of a BFPVLEWN, the typical scope of prejudice in the laches context has been events such as constructing a building on land subject to a constructive trust, or putting resources into advancing some business venture which turns out to be based on a breach of a patent or copyright.

268. SON submits that Ontario has not presented evidence of significant improvements made to any particular lands in the Treaty 72 action (nor would that be within the scope of Phase 1 of this action).

269. Ontario has advanced a number of events as a change of position by the Crown, including surveying land, selling land, re-purchasing land, operating parks and environmental monitoring and protection activities. Ontario has also advanced a number of events that relate only to the

lands claimed as subject to Aboriginal title.[227] Since Ontario is not arguing that laches apply to the Aboriginal title claim, SON submits that such events should be disregarded.

Surveys

270. Surveying a parcel of land is the kind of activity which in principle could constitute an improvement to land and could amount to prejudice were the land found subject to a constructive trust. However, while there is evidence that surveys were done, there is no evidence that the Crown was out-of-pocket for them. Rather, the Crown deducted a 10% management fee from land payments received for just such purposes before forwarding the balance to SON.[228] Therefore, SON submits that land surveys having been done does not constitute prejudice.

Selling and Re-Purchasing Land

271. To constitute prejudice, one's position must somehow be worsened. If a constructive trust arose on October 14, 1854, at that point, the Crown would have had an obligation to return the land to SON. If it sold the land to a BFPVLEWN, this would bar recovery of the land, but substitute an obligation to make compensation for the value of the land. This would not substantially worsen the position of the Crown. If the land were re-purchased, this would again substitute the obligation to make compensation for the value of the land with an obligation to return the land. Again, this would not substantially worsen the position of the Crown. Therefore, SON submits that selling and re-purchasing land does not constitute prejudice.

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[227] Ontario's Closing Submissions, para 1038 states that the Crown "upheld public rights of navigation and fishing, alienated water lots to third parties at different times, and entered into various obligations (through international and subnational treaties/agreements) to private and state parties concerning the management of the Great Lakes."

[228] Gwen Reimer, "Volume 4: Implementation Issues Related to Surrender No. 72, 1854-1970s" (as revised 2019), Exhibit 4704, p. 8, p. 76 fn 276.

Operating Parks

272. There is sparse evidence concerning the operation of provincial parks. The majority of provincial parks on the Peninsula are non-operating, and as such require minimal resources and staff.

> See Relevance and Weight of Ron Gould's Evidence, Plaintiffs' Appendices, Tab E-8, paras 3-5.

273. SON submits that the operation of provincial parks alone (without, for example, the construction of improvements on the land), is little more than the simple possession of land, which, in accordance with *Lindsay Petroleum*, does not amount to prejudice.

> *Lindsay Petroleum Co v Hurd*, [1874] UKPC 2 (20 January 1874) at 2, LR 5 PC 221 (PC – from Ontario), Plaintiffs' Reply Book of Authorities, Tab 13.

Environmental Monitoring and Protection

274. Similarly, environmental monitoring protection in general (without specific evidence of substantial alterations to the land) is little more than simple possession of land, which does not constitute prejudice.

Summary Regarding Application of the Prejudice Branch

275. SON submits that any prejudice alleged does not outweigh the injustice that would be caused to SON by finding their claims barred by laches.

276. Further, Ontario's argument does not analyze separately any possible prejudice that might be caused by different remedies. For instance, SON submits that a simple declaration that the Crown breached its fiduciary duty does not tangibly prejudice Ontario. Some of the kinds of issues raised by Ontario arguably could relate to prejudice in the context of recognition of a constructive trust, but such location specific issues would form part of Phase 2.

277. Finally, in the alternative, should this Court find some *prima facie* prejudice to Ontario, SON submits that for something to truly be prejudicial, it needs to be something that could not be adjusted for in the quantum of compensation. For example, in *Lindsay Petroleum*, the Court ordered a sale of lands rescinded due to some fraudulent activity. The Privy Council thought that any unfairness occasioned by the fact that an oil well had been drilled in the meantime could be adjusted for by an order to account for the profits of the well.

> *Lindsay Petroleum Co v Hurd*, [1874] UKPC 2 (20 January 1874) at 2 and 9, LR 5 PC 221 (PC – from Ontario), Plaintiffs' Reply Book of Authorities, Tab 13.

278. Although the case *Boardman v Phipps* did not discuss laches, the facts of it seem to raise the potential of laches, and the decision made an adjustment aimed at preventing prejudice. In *Boardman*, an estate held a minority interest in poorly managed private company. Boardman was the solicitor for the estate. With knowledge and opportunity gained in this context, Boardman bought a controlling interest in the company and restructured it. The active trustees of the estate were aware of this and were not interested in doing this on behalf of the estate, nor were they capable of doing so without court approval, which was not likely to be forthcoming. Boardman expended a considerable amount of his own time and money researching the company (including travelling to Australia to investigate the company's operations there) and then engaged in a series of complex negotiations allowing him to purchase enough shares to control the company. Under Boardman's management, the company became much more profitable, thus significantly improving the value of the estate's assets. Boardman, of course, also enjoyed substantial profits. The decision of the House of Lords was that Boardman must account to the estate for these profits, since the opportunity to take the actions he did depended on work he had done for the estate. However, both the majority and the dissenting speeches in the House of Lords saw that this was a

rather harsh result in all the circumstances. In the result, Lords Cohen and Hodson said that Boardman should be reimbursed generously for the work he did in researching and turning the company's finances around (Viscount Dilhorne and Lord Upjohn would have ruled Boardman did nothing wrong, and that making him account in equity was unduly harsh).

> *Boardman v Phipps,* [1967] 2 AC 46, [1966] UKHL 2 at 21 per Lord Cohen, at 25-26 per Lord Hodson, at 15 per Viscount Dilhorne (dissenting), and at 38-9 per Lord Upjohn (dissenting), [1966] 3 All ER 721, Plaintiffs' Book of Authorities, Tab 10.

279. SON therefore submits that to the extent that the Crown may have devoted resources to lands on the Peninsula in a way that would amount to *prima facie* prejudice should SON be awarded a remedy (which SON submits Ontario has not shown), any such *prima facie* prejudice could be avoided by making adjustments in the quantum of compensation. For example, SON submits that the proceeds of land sales paid to them historically should offset whatever compensation is otherwise due. That, of course, would be an adjustment that would be made in Phase 2.

3. ORAL HISTORY EVIDENCE

280. In Canada's discussion of oral history,[229] it begins by acknowledging the precedent set in *Delgamuukw* that, "[w]hen dealing with evidence in Aboriginal rights cases, the laws of evidence must be adapted so that the Indigenous perspective on their practices, customs, and traditions, and on their relationship with the land, are given due weight."[230]

281. However, Canada then alleges that under the laws of evidence "oral history or tradition evidence of a less formal nature, without hallmarks of authenticity, may not be given the same weight."[231] Although SON accepts that in some instances oral history evidence may be given less weight, the effect of what Canada and Ontario have argued would be to have a bright line test for what does, and does not, qualify as oral history evidence. This is inconsistent with the case law.

282. Canada extensively relies on the cases *Benoit v Canada* (FCA) and *Lax Kw'alaams Indian Band v Canada (Attorney General) (BCSC)* to make the argument that only certain types of oral history evidence should be given due weight. Canada quotes the British Columbia Supreme Court in *Lax K'walaams Indian Band* which stated that "the directions of the Supreme Court of Canada on how to treat oral histories in the context of Aboriginal cases usually pertain to true *adaawx*"[232], which are oral histories recounted through formal ceremonies and protocols which include having statements affirmed by witnesses.

> *Lax Kw'alaams Indian Band v Canada (Attorney General*), [2008] BCSC 447, paras 37-38, Canada's Book of Authorities, Tab 27.

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[229] SON uses the term "oral history" in the broad sense as explained in SON Final Argument, paras 58-59.
[230] Canada's Closing Submissions, Title, para 12.
[231] Canada's Closing Submissions, Title, para 22.
[232] Canada's Closing Submissions, Title, para 26.

Canada's approach to oral history evidence is too rigid

283. The problem with Canada's approach is that it is taking a homogenous view of Indigenous oral history. Not all Indigenous cultures have practices such as the *adaawx*. Different Indigenous cultures have their own protocols, some less formal than others, for passing down oral history, as described by the testimony of former Chief and member of Saugeen First Nation, Randall Kahgee. This is still oral history evidence and should be given weight.

284. To measure the reliability of all Indigenous oral histories based on their conformity to the traditions and practices of the Gitxsan is to fail to acknowledge the diversity of Indigenous cultures and traditions. To state that one Indigenous community's oral history is not reliable, because is does not involve formal ceremonies or protocols is to conclude the Indigenous perspective must be given due weight only for some Indigenous cultures, while for others, it need not be given due weight. This is contrary to the Supreme Court's decisions in *Tsilhqot'in* and *Delgamuukw*.[233]

285. Canada lists the 20 SON witnesses who testified at the trial or in advance of trial, summarizing how they acquired their knowledge and whether they were formally recognized as knowledge holders in their communities. For 18 of these 20 witnesses, Canada states that "no evidence was offered that [they were] recognized by the community as knowledge holders of oral histories or traditions."[234] SON submits that this conclusion by Canada relies excessively on whether particular specific words about being "recognized by the community" were used in testimony, rather than on the substance of the testimony.

[233] SON Final Argument, para 895.
[234] Canada's Closing Submissions, Title, paras 42-43.

286. In fact, the source of knowledge for SON's community witnesses was made clear in their testimony. Many of them testified about having specific roles in the community, such as being a pipe carrier, a carrier of sacred fire, a storyteller, or members of the Midewin Lodge. Many also testified about receiving knowledge from their grandparents, parents, and Elders. Canada's formulaic approach requiring someone to either be an Elder or recognized in court by community members as a knowledge holder of oral history is inappropriate and not in line with the purpose of oral history evidence. Stories passed down from grandparents or told at a community store should not be dismissed simply because they do not follow elaborate practices similar to the *adaawx* of the Gitxsan.

287. This approach of arguing that the SON community members who carry oral history are not reliable sources of oral history is, in effect, saying that the community has no reliable source of oral history. This approach does not give due weight to the Indigenous perspective and cannot be what was meant by the Supreme Court of Canada in *Delgamuukw*.

Canada's argument that SON witnesses did not offer oral history evidence

288. Finally, SON notes that Canada's claim that SON's community witnesses did not give oral history evidence[235] at this late stage is inappropriate. If the evidence is not oral history evidence, then it would presumably be inadmissible as hearsay, and an objection should have been made at the time the evidence was proffered. Such an objection would have given the witnesses an opportunity to address the specific issue Canada is now raising with their evidence. At the very least, Canada should have raised this issue before the close of SON's case.

[235] Canada's Closing Submissions, Title, para 41.

289. Further, the parties entered into a protocol respecting Elder and community witness evidence. The parties' agreement is reflected in Exhibit R:

> "Questions of the weight of Elder or community witness testimony may be left for later argument, provided that the Elder or community witness is given sufficient notice and opportunity to respond to any questions of weight to be raised, in accordance with the 'rule in Browne v Dunn'."[236]

Ontario takes a rigid approach to oral history

290. Ontario also takes a rigid approach to what oral history evidence can be given weight. While Ontario acknowledges that different Indigenous cultures will have different protocols for passing down oral history,[237] Ontario suggests that Randall Kahgee's testimony provides the protocol for how oral history is passed on in SON.[238] Canada took a similar approach to Randall Kahgee's evidence.[239]

291. As an oral culture, SON has taken care to ensure that their history and traditions were preserved. Randall Kahgee explained that "there is our own way of verifying [oral history] amongst ourselves".[240] In fact, Randall Kahgee's testimony respecting how stories were shared at the community centre provided one example of how stories are verified in SON.[241] To suggest that Randall Kahgee was testifying about the one and only appropriate way to transmit or verify oral history in SON is to take his evidence out of context.

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[236] Exhibit R, Elders' Protocol, p. 7.
[237] Ontario's Closing Submissions, para 62.
[238] Ontario's Closing Submissions, paras 62-64.
[239] Canada's Closing Submissions, Title, paras 31-42.
[240] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 905, lines 9-11.
[241] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 905, line 10 to p. 906, line 23.

292. Randall Kahgee testified that he had learned oral history many times over the years from his grandparents, parents, and Elders in the community.[242] In discussing the sharing of oral history, he gave evidence about how oral history is not "something you just simply ask for" without following the proper protocols.[243] He further explained that, "there are protocols there. Because that knowledge is important, that knowledge is sacred, and you want to do everything to not only respect the Elder but respect the sharing and honour it."[244] He spoke about how Elders might choose to share or not share, or share only part of a story, based on whether the person hearing the story is ready for it: "[s]ometimes they share it with you in pieces and only when you're ready."[245] Then, he spoke about his specific experience:

> My experience is sometimes you will sit with an Elder and they choose to share or they don't share. But when you present yourself to an Elder, and you're seeking that knowledge and that understanding, you do it in a good way. So you bring the asaamaa, the tobacco, and you ask that permission first, to share that information and you might specify why you're seeking that information. How you might seek to protect that information and the Elder will either accept that asaamaa or not, or if they do they might set some conditions and say, well, we are going to share some of it but not all of it. Or they might have other conditions as well. But it's nothing than just willingly given unless they feel you're ready for it.[246]

293. Randall Kahgee's evidence was that there are protocols in place for sharing oral history, and he provided an example of how one might gain knowledge from an elder. These protocols,

[242] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 903, lines 15-23.
[243] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 904, lines 1-3.
[244] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 905, lines 2-6.
[245] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 904, line 25 to p. 905, line 1.
[246] Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 904, lines 4-18.

although perhaps informal compared to those of the *adaawx*, are aimed at insuring that the sanctity and fidelity of oral history is preserved.

294. In their evidence, Elders and community witnesses explained how they came to know the oral history they shared. Many of the witnesses have testified about evidence being passed on to them, from parents and grandparents and Elders and other respected individuals: this is oral history evidence, and Randall Kahgee's testimony demonstrates that there are community processes that operate to ensure these stories are properly shared, honoured and preserved. Just because SON's protocols are not specific and formal as with the *adaawx* does not mean that they are not valuable or significant. Furthermore, there is no bright line test for weighing and assessing oral history evidence. Stories that circulate around the community, for example, should not get discounted simply because there is no evidence of a protocol having been in place for its transmission. These are still the oral history of SON and should be given due weight.

Oral history evidence goes to the Indigenous perspective

295. Even if the Court is to accept the Crowns' position that oral history evidence requires specific *Delgamuukw*-style ceremonies and protocols in order to be considered reliable, and that the oral history of SON are of such a nature that they will be given less weight as oral history evidence, this evidence must still be given weight as going to the Indigenous perspective.

296. For example, the evidence of SON's relationship with water speaks to the Indigenous perspective. Neither Crown has attacked community witness credibility with respect to their own experiences, and this evidence can be relied upon to show, for example, SON's perspective regarding their territory and their responsibilities to their water territory. It is only in consideration of this perspective that the Court can get a sense of the nature of this relationship and these

responsibilities. SON's oral history stories can also be relied on to provide the Indigenous perspective, and provide crucial insight into SON's connection to their territory, how long they have been on their territory, and their connection to water.

4. ARCHAEOLOGY

The Bead Report

297. Both Canada and Ontario[247] have pointed to a misstatement in the Bead report and Dr. Williamson's supplementary report, namely that "the majority of the antimony-white glass bead assemblage dates from the late 17th to mid-18th century",[248] when in fact the bead analysis showed that 18 of the antimony-white beads grouped chemically with beads from the late 17th to mid-18th century, whereas the remaining 51 beads date to later.[249] The correlation of the 18 beads dating to the earlier period is stronger than the correlation of 47 of the 51 remaining beads to the later periods, but 18 beads do not constitute a majority of the total 69 beads.[250] This is all broken down clearly in Dr. Williamson's summary page summarizing the results of the Bead Report (Exhibit 4250).

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[247] Canada's Closing Submissions, Title, para 267; Ontario Closing Submissions, paras 139-141.
[248] Dr. Ronald Williamson, "Non-Destructive Analysis of the Glass Bead Assemblage from the *Ne'bwaakaah giizwed ziibi* (The River Mouth Speaks) site (BdHi-2) Town of Saugeen Shores, Bruce County Ontario" (2017), Exhibit 4240, p. 25; see also Dr. Ronald Williamson, "Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, p. 18.
[249] Dr. Ronald Williamson, "Non-Destructive Analysis of the Glass Bead Assemblage from the *Ne'bwaakaah giizwed ziibi* (The River Mouth Speaks) site (BdHi-2) Town of Saugeen Shores, Bruce County Ontario" (2017), Exhibit 4240, pp. 10, 12; Dr. Ronald Williamson, Results of the Glass Bead Chemistry Analyses of the *Ne'bwaakaah giizwed ziibi* (The River Mouth Speaks) Site, Exhibit 4250.
[250] Dr. Ronald Williamson, Results of the Glass Bead Chemistry Analyses of the *Ne'bwaakaah giizwed ziibi* (River Mouth Speaks) Site, Exhibit 4250; Evidence of Dr. Ronald Williamson, Transcript vol 45, September 18, 2019, p. 5614, line 16 to p. 5615, line 4 (*Stronger association of the 18 than the 47*) and p. 5619, line 16 to p. 5621, line 1.

298. Canada and Ontario have painted the error of referring to 18 beads out of 69 as a "majority" as being a material error that would have somehow impacted Dr. Williamson's conclusions.[251] Saying a majority when Dr. Williamson should have said one third does not at all change his conclusion that there are beads that date to late 17th to mid 18th century. As Dr. Williamson testified, Ne'bwaakaah giizwed ziibi (River Mouth Speaks) is a multi component site.[252] There is not one assemblage in the sense that all of the beads were deposited at the same time. There are multiple assemblages indicating presence over multiple time periods. It matters only that there are some beads that date to sites in the late 17th to mid-18th century. It need not be a majority.

299. Ontario has tried to impugn Dr. Williamson's credibility by essentially arguing that he intentionally misled the court by not including the correction respecting the use of the word 'majority' in his errata, and using his one-page summary in his testimony.[253] To the contrary, Dr. Williamson was clear that he prepared the one-page summary "just to make it a very simple comparison for these beads and then with kind of a concluding statement" - it summarized the data already available in the Bead report.[254] If anything, this one-page summary made the initial misstatement obvious, and provided clarity about what the Bead analysis had shown.

300. Canada and Ontario have tried to use this misstatement, and other, minor errors to argue that glass beads, and the analysis supplied by the glass bead report, is not a reliable way to date the occupation of *Ne'bwaakaah giizwed ziibi* (River Mouth Speaks). This is simply not in line with the evidence of the only archaeologist who gave evidence respecting the site who practices

[251] Canada's Closing Submissions, Title, para 267; Ontario's Closing Submissions, para 141.
[252] Evidence of Dr. Ronald Williamson, Transcript vol 45, September 18, 2019, p. 5621, line 7 to 5623, line 3.
[253] Ontario's Closing Submissions, paras 140-141.
[254] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5353, line 3 to p. 5354, line 19.

archaeology in Southern Ontario, where methods such as stratigraphy are frequently unavailable to date sites:

> Q: To what extent is glass bead dating a reliable way to date archaeological sites?
>
> A: Well, they provide a range of dates for the occupation based on their presence of the sites against other assemblages from other sites that are reliably dated.
>
> Q: And how precise is this technique in archaeological terms?
>
> A: Well, they cannot pin it down to the year or a tight range, but it can within a 30- to 50-year period, if it's being compared to other assemblages that have, for example, the same kind of chemistry.
>
> Even before using the chemistry, for example, assemblages that are dominated by red beads in the pre-dispersal period are known to be a 1640s assemblage. You don't get many of them in the earlier periods. So most people can visually look at an assemblage from the 1640s and see the dominance of these red beads.[255]

301. Further, this evidence makes it clear that contrary to Canada's submissions at paragraphs 270-272 of their closing argument, Dr. Fitzgerald's work on the bead analysis was not the basis on which Dr. Williamson came to his conclusions respecting the beads at *Ne'bwaakaah giizwed ziibi* (River Mouth Speaks): rather, his conclusions were based on the nuclear analysis of the bead chemistry and comparison to the securely dated sites in the bead database.

302. Further, contrary to Canada's submissions at paragraphs 273-277, the date of manufacture, and length of time an object is in circulation for, have little to no impact on the bead analysis:

[255] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5350, lines 2-22.

> Q: How do you get from a bead's chemical composition to the date of its archaeological site?
>
> A: So in the case of many of the comparable sites used in this report, sites that are used to compare the beads from River Mouth Speaks, we have an assemblage of a certain kind of bead from this site, and then we have the same kind of assemblages with the same chemistry found on other sites.
>
> So we're looking at assemblage against assemblage and that allows us to say, if that kind of bead with that kind of chemistry occurs on this site, this site, and this site, then it likely occurs on this site at the same periods as these three. And if these three have a clear documentary record of their occupation then this one can be compared to those.
>
> Q: Are you looking to determine the date a glass bead was manufactured?
>
> A: Not typically. It's important, but we are looking at when the glass bead was deposited at the site.[256]

303. Later, when addressing comments Ms. Morden made in her report respecting the length of time beads may have been in circulation, Dr. Williamson stated:

> Finally, in comparing assemblages against assemblages, it may very well be that other beads were curated for a while longer. But if I have a series of beads here and they come out of this archaeological site and they date to a certain period, as they do in these other dated sites, it really is immaterial whether some beads were curated.
>
> Q: And to what extent does the archaeological record in southern Ontario show glass beads being deposited a long time after they were manufactured?
>
> A: I'm not familiar with that being a problem in dating these sites. The trends that we've talked about here and the assemblages that are represented in this report are compared against dated assemblages. And

[256] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5351, line 25 to p. 5352, line 22.

> so whether a bead of that type may have survived later in some other site may be the case, but we're comparing assemblages on an equal footing.
>
> Q: So, in other words, if a glass bead were deposited a long time after it was manufactured, how would that affect your results?
>
> A: It wouldn't.[257]

304. Dr. Williamson was clear: the date of manufacture and the length of curation of a bead had no impact on the analysis completed in the Bead report. Although Ms. Morden initially believed the beads were being dated based on their date of manufacture, she acknowledged during cross examination that this was not the case.[258]

305. Finally, Canada alleges that "[t]he definition of a comparator "assemblage" is not a matter of science but of an archaeologist's judgement".[259] This is incorrect: the assemblages in the Bead report were determined based initially on their colour, and then on their bead chemistry following testing.[260]

The Reliability of SONTL Archaeological Record

THE RE-INTERPRETATION OF ARCHAEOLOGICAL SITES DOES NOT MEAN ARCHAEOLOGY IS UNRELIABLE

306. Canada argues that the reinterpretation of archaeological sites renders archaeological evidence unreliable, and that there are relatively few archaeological sites in the SONTL.[261] They

[257] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5364, line 4 to p. 5365, line 2.
[258] Evidence of Ms. Margaret Morden, Transcript vol 70, December 16, 2019, p. 9121, lines 13-16; p. 9140, line 21 to p. 9142, line 6 and p. 9144, lines 5-10.
[259] Canada's Closing Submissions, Title, para 283. See also paras 282-284.
[260] Dr. Ronald Williamson, "Non-Destructive Analysis of the Glass Bead Assemblage from the *Ne'bwaakaah giizwed ziibi* (The River Mouth Speaks) site (BdHi-2) Town of Saugeen Shores, Bruce County Ontario" (2017), Exhibit 4240, pp. 7-8; see also Evidence of Dr. Ronald Williamson, Transcript vol 45, September 18, 2019, p. 5621, line 7, to 5623, line 3.
[261] Canada's Closing Submissions, Title, paras 199, 201-211, 212.

further argue that even if the archaeological evidence is accepted, this does not prove continuous occupation of SONTL because even on sites occupied in each archaeological period, there may be hundreds or thousands of years separating the archaeological evidence of occupation.[262] Requiring Indigenous claimants to provide archaeological evidence of consistent occupation over a period of thousands of years would make it essentially impossible to prove Aboriginal title. Such an interpretation of archaeology, and archaeological evidence, is not supported by the evidence presented in this case and ignores Dr. Williamson evidence with respect to cultural continuity.

307. The reinterpretation of the Nodwell site which Canada points to in support of their argument was explained in detail by Dr. Williamson and was based on significant new information coming to light. The Nodwell site is discussed in detail below. Respecting the archaeology of SONTL, Dr. Williamson testified that SONTL is "complete in the sense of a continuum"[263] and

> [t]here's enough there – in places in the world this is the kind of sample one would use to begin to flesh out the cultural history of the area. When you look at the number of sites that are being presented here compared to, for example, the number of sites that were at hand when Wright did his work and created the Iroquois tradition based on a couple dozen sites, you can see that this is a substantial sample that you can still write about the cultural history of the area.[264]

308. Dr. Williamson was clear that the amount of available information now is much better to "flesh out the cultural history of the area" than it was when the Nodwell site was initially

[262] Canada's Closing Submissions, Title, paras 218-226.
[263] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5450, line 25 to p. 5451, line 1.
[264] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5452, line 25 to p. 5453, line 11.

excavated.[265] Given that, it seems unlikely that the evaluation of the sites as Odawa would substantially change in the future. Although Dr. Williamson very reasonably agreed that the evaluation of sites is always subject to revision,[266] this is the case in virtually all disciplines, and does not suggest that archaeological evidence is unreliable.

THERE IS NOT AN ABSENCE OF ARCHAEOLOGICAL EVIDENCE

309. Canada also tries to undermine the archaeological evidence by equating Dr. Williamson's evidence respecting the sparse documentary record on SONTL with his evidence respecting the archaeological record, at paragraph 237 of their Closing Submissions. While the historical record on SONTL is limited prior to 1763, the archaeological record is not. Dr. Williamson testified that although SONTL is not as heavily surveyed as the Greater Toronto Area, there is development happening within SONTL, such as subdivisions, and sites are found every year. There are also areas within SONTL where people have done intensive research.[267] Dr. Williamson provided a map of 21 registered sites within SONTL which he discusses in his 2017 Supplementary Report. Ms. Morden produced a map in her report which demonstrates the density of known archaeological sites in SONTL.[268] This map depicts numerous other sites beyond those highlighted by Dr. Williamson.[269]

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[265] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5452, line 25 to p. 5453, line 11.
[266] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5453, lines 12-13.
[267] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5270, lines 1-20.
[268] Margaret Morden, "Response to the Dr. Ronald Williamson 2017 Report" (2018), Exhibit 4452, p. 29.
[269] Dr. Ronald Williamson, "Supplementary Report: Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, p. 30.

DR. WILLIAMSON DID NOT ASSUME CONTINUITY

310. Canada further misinterprets Dr. Williamson's statement that "Charles A. Bishop argues that it should never be assumed that a group recorded in a given location in the eighteenth century was directly descendant from earlier inhabitants or directly ancestral to people living there today. Evidence is needed to demonstrate a link, or a lack thereof, between groups through time, assuming that identities have not changed and/or are accessible", claiming that this is Dr. Williamson acknowledging the need for a "genealogical connection" between early inhabitants of a given location and it's present day inhabitants.[270] To the contrary, this indicates Dr. Williamson's starting point – that he does not assume that the people on SONTL in the 18th century were descendant from earlier inhabitants and he must look for evidence to establish the connection. The conclusion he reaches, based on all of the archaeological and documentary evidence, is that there is a connection and that they were the same people: the Odawa developed in situ.[271]

LACK OF STRATIGRAPHY ON SONTL SITES IS IRRELEVANT

311. Canada also uses the lack of stratigraphy in sites on SONTL as a reason to doubt Dr. Williamson's conclusions.[272] In doing so, they ignore Dr. Williamson's clear evidence that stratigraphy is not possible for most sites on the Peninsula or in southern Ontario, and that the lack of stratigraphy did not mean that sites in southern Ontario could not be reliably dated – in fact he stated that it had no impact on the results of the analysis of the glass beads found at *Ne'bwaakaah*

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[270] Dr. Ronald Williamson, The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013)," Exhibit 4239, p. 11; Canada's Closing Submissions, Title, para 234.

[271] Dr. Ronald Williamson, "Supplementary Report: Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017) Exhibit 4241, pp. 1-2, 19; Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 68; Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5294, line 20 to 5295, line 14.

[272] Canada's Closing Submissions, Title, paras 214, 263, 264 and 632.

giizwed ziibi (River Mouth Speaks).[273] Ms. Morden's lack of familiarity with dating sites without stratigraphy is entirely consistent with her lack of experience practicing archaeology in southern Ontario.

The Nodwell Site

312. Both Canada and Ontario have misstated the evidence surrounding the Nodwell site, and its identification as an Odawa, rather than Iroquoian, settlement.[274]

313. As Dr. Williamson clearly explained, the initial excavation of the Nodwell site was conducted in the late 1960s and into the early 1970s by J.V. Wright. At the time, there were very few sites identified in the surrounding area, and it was believed that there was a population explosion that meant the Iroquois needed to find a new place to live, which ultimately turned out not to be the case. Wright hypothesized that Nodwell was an Iroquois site, and that they had moved hundreds of kilometres from somewhere within the Iroquoian world to settle there. Wright described this hypothesis, of the Iroquois suddenly appearing and then disappearing, as highly speculative.[275] As Dr. Williamson put it, "this was done at a time when there was like almost no information about the Iroquoian occupations of the north shore area."[276] At the time, there was no

[273] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5357, line 24 to p. 5359, line 7 and p. 5380, line 17 to p. 5384, line 17.
[274] Ontario's Closing Submissions, para 124; Canada's Closing Submissions, Title, paras 201-211.
[275] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5328, line 3 to p. 5330, line 17 and p. 5333, line 22 to p. 5334, line 8; Evidence of Dr. Ronald Williamson, Transcript vol 45, September 18, 2019, p. 5564, lines 1-24.
[276] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5330, lines 15-17.

knowledge of the Odawa living in longhouses, and Wright came to his conclusions without knowing that there was a documentary record that spoke of the Odawa presence in the area.[277]

314. The site was re-examined in the 1990s by Lisa Rankin, who thought the more likely scenario was that the site was occupied by local people, people who lived in the area. Her work also took into account radiocarbon dates that Wright had dismissed, which suggested that the site had been occupied for a much longer period of time than Wright had originally speculated.[278] Following Rankin's work, Dr. William Fitzgerald and Prof. Darlene Johnston prepared a paper going through the reasons Nodwell should be considered an Odawa site.[279]

315. Dr. Williamson also pointed out that in the early 1990s, archaeologists began to see that sites with Iroquoian characteristics were not necessarily Iroquoian settlements, starting with William Fox's work on the Inverhuron-Lucas site. Canada's witness, Dr. von Gernet, also opined on this topic in the context of the Madawaska River, noting the "Iroquoian" character of artifacts found on a site he believed to be Algonkian, noting that "[t]here is little but the geographic location of the site to suggest that the assemblage might properly be associated with Algonkian. This raises a number of issues regarding the reflection of ethnicity in material culture, and/or the relations between Iroquoian- and Algonkian-speaking people in Ontario."[280] While this does not speak directly to the analysis of the Nodwell site, it does demonstrate that identifying sites with "Iroquoian" features as non-Iroquoian sites is not a radical theory done only by those affiliated

[277] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5328, line 21 to p. 5329, line 18.
[278] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5329, line 14 to p. 5331, line 10.
[279] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5331, line 11 to p. 5332, line 15.
[280] Dr. von Gernet, "A Possible Matouweskarini Hunting Camp: Excavation at the Highland Lake site, Renfrew County", 1991, Exhibit 4505, pp. 120, 122, and 123.

with particular Indigenous groups, as both Canada and Ontario try to paint Dr. Fitzgerald and Prof. Darlene Johnston.[281]

316. Canada has also taken Dr. Williamson's comment on cross examination that he has "no problem with Wright having looked at that assemblage and thought it was Iroquoian"[282] out of context. As Dr. Williamson very clearly stated in his examination in chief, "At that time I think it's a conclusion that many archaeologists would have made because so little was known about the area at that time."[283] But, as he explained, new information about the area caused a reconsideration of the site, starting with Rankin, that ultimately has led to the identification of Nodwell as an Odawa site: "it's admittedly slowly making its way through the archaeological community as the fact that this site is likely Odawa."[284] During her cross examination, Dr. Reimer acknowledged that "it appears that the analysis and examination of the Nodwell site has advanced considerably since Wright initially reported on it."[285] This evidence is counter to Canada's unsupported claim at paragraph 211 of its Closing Submissions that the re-evaluation of the Nodwell site as Odawa "does not appear to be accepted by the mainstream of archaeologists."

317. Contrary to Canada and Ontario's claims, Dr. Williamson's conclusions respecting the Nodwell site did not rest primarily on the work of Dr. Fitzgerald and Prof. Johnston: it is clear

[281] Canada's Closing Submissions, Title, paras 206-211; Ontario's Closing Submissions, para 124.
[282] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 18, 2019, p. 5567, lines 1-3; Canada's Closing Submissions, Title, para 204.
[283] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5328, lines 13-15.
[284] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5333, lines 11-14.
[285] Evidence of Dr. Gwen Reimer, Transcript vol 89, March 4, 2020, p. 11382, lines 3-9.

from the level of detail with which he spoke about the site in both of his reports and his testimony that he had considered many sources, including the initial excavation report of Dr. Wright.[286]

Dog Burials

318. Canada and Ontario make much of the fact that the dog burials found at the Nodwell site were not dismembered, disarticulated or bundled in the method that was typical of the Odawa.[287] This ignores the other aspects of the dog burials that are typical of the Odawa – namely the fact that the dogs were very young[288] – as well as the extensive other evidence on the site indicating it is an Odawa site. This includes: an immature black bear skeleton; two passenger pigeons; and copper tools and non-Iroquoian ceramics that Dr. Wright, in his initial report, linked to Algonquian-speaking people.[289]

319. Canada also attacks Dr. Williamson's evidence that ceremonial dog burials, specifically involving young puppies, with their bones cut up and then buried together in a bundle as part of a ceremony, is characteristic of the Odawa.[290] Canada does so by claiming that dog burials and

[286] See, for example: Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5327, line 24 to p. 5337, line 3; Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" Exhibit 4239, pp. 43-45; Dr. Ronald Williamson, "Supplementary Report: Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" Exhibit 4241, pp. 10-11.
[287] Evidence of Dr. Ronald Williamson, Transcript vol 45, September 18, 2019, p. 5569, line 21 to p. 5570, line 5; Canada's Closing Submissions, Title, para 208; Ontario's Closing Submissions, para 124.
[288] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5278, lines 1-8 and p. 5285, lines 10-15; Evidence of Dr. Ronald Williamson, Transcript vol 45, September 18, 2019, p. 5588, lines 9-11; J.V. Wright, "The Nodwell Site", Exhibit 4247, p. 88.
[289] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5288, line 21 to p. 5289, line 23; J. V. Wright, "The Nodwell Site", Exhibit 4247, pp. 88-89, 304-305.
[290] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5278, lines 1-8 and p. 5288, line 21, to p. 5289, line 23; Evidence of Dr. Ronald Williamson, Transcript vol 45, September 18, 2019, p. 5557, lines 5-13.

ceremonies are present in other cultures.[291] What this misses is that Dr. Williamson never claimed all dog burials are unique to the Odawa – rather, he described a specific type of dog burial, and particularly emphasized the use of puppies in their ceremonies, as being uniquely Odawa.[292] Isolating one factor, the use of dogs, without from the rest of Dr. Williamson's evidence as to what markers are uniquely Odawa is inappropriate and misleading.

Feast of the Dead

320. Canada relies on an article by Harold Hickerson to undermine Dr. Williamson's evidence respecting the Feast of the Dead as an indicator of Anishinaabe identity.[293] Canada relied on Hickerson's proposition that the Feast of the Dead was only practiced by Algonquians as a response to particular economic conditions that existed in a particular place for a short period of time. When that was put to Dr. Williamson in cross examination, he responded "I'm not sure I agree with that."[294] There is no reason for this Court to accept Mr. Hickerson's (untested) opinion, from an article published in 1960, over Dr. Williamson's evidence.

Identification of Odawa cultural markers

321. The claim made at paragraph 194 of Canada's Closing Submissions that Dr. Williamson's expert opinion as to the cultural markers for identifying the Odawa in the archaeological record is based "in large part" on the work of Dr. Fitzgerald and Prof. Johnston, and not his own work, is also unsustainable. Dr. Williamson's expert reports respecting the cultural markers for identifying

[291] Canada's Closing Submissions, paras 250-252.
[292] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5278, lines 1-8 and p. 5289, lines 2-21; Evidence of Dr. Ronald Williamson, Transcript vol 45, p. 5588, lines 10-11.
[293] Canada's Closing Submissions, Title, paras 253-257; Harold Hickerson, "Feast of the Dead Among the Seventeenth Century Algonkians of the Upper Great Lakes" (1960) Exhibit 4258, p. 87.
[294] Evidence of Dr. Ronald Williamson, Transcript vol 45, September 18, 2019, p. 5514, line 17 to p. 5515, line 5.

the Odawa cite many different sources, none of which are authored by Dr. Fitzgerald and Prof. Johnston.[295] There is also no basis for the conclusion that Dr. Williamson's evidence on Odawa cultural markers is not based on his own work.

322. Canada also chose to make unsupported attacks on Dr. Williamson's evidence respecting Odawa cultural markers. For example, they made the claim that heterogeneous artifact assemblages are a vague marker and not indicative of a cohesive culture.[296] This is not founded in the evidence: Dr. Williamson's gave evidence "[a]s significant traders in the Upper Great Lakes, Odawa artifact assemblages tended to be heterogeneous… especially their ceramic and chert assemblages."[297] Canada's theory was not put to him in cross-examination. Such unsupported theories should be given no weight.

Inappropriate inference of bias of Dr. William Fitzgerald and Prof. Darlene Johnston

323. The defendant Crowns also repeatedly implied that there was an issue with Dr. Williamson relying on the work of Dr. Fitzgerald, because he has worked closely with SON, and Prof. Darlene Johnston, because she is a member of Chippewas of Nawash Unceded First Nation and has worked as a land claims researcher for SON.[298] As explained above, the claim that Dr. Williamson "relied heavily" on the work of Dr. Fitzgerald and Prof. Johnston is inaccurate. However, Dr. Williamson

[295] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" Exhibit 4239, pp. 33-35; Dr. Ronald Williamson, "Supplementary Report: Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, pp. 4-6.
[296] Canada's Closing Submissions, Title, para 259.
[297] Dr. Ronald Williamson, "Supplementary Report: Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, p. 4.
[298] Canada's Closing Submissions, Title, paras 189-194; Ontario's Closing Submissions, para 124.

does reference their work, and does rely on Dr. Fitzgerald's excavation of *Ne'bwaakaah giizwed ziibi* (River Mouth Speaks).

324. The evidence in this trial has been that excavation reports, and specifically Dr. Fitzgerald's excavation report of *Ne'bwaakaah giizwed ziibi* (River Mouth Speaks), are reliable. As Canada's own witness, Ms. Morden, wrote in reference to the excavation of *Ne'bwaakaah giizwed ziibi* (River Mouth Speaks), "[t]he authors (Williamson et al.) are relying on the information provided them by the excavators and the museum. If the excavators are not being honest, then they have perjured themselves in their reports to the MTCS [Ministry of Tourism, Culture and Sport]. This is highly unlikely."[299] Canada's suggestion that it is in any way problematic for Dr. Williamson to have relied on Dr. Fitzgerald's excavation report respecting *Ne'bwaakaah giizwed ziibi* (River Mouth Speaks) is not only completely unsupported, but contrary to the evidence of their own witness. Further, given the reliability of excavation reports, Canada's suggestion that Dr. Williamson's evidence is less valuable because he was not involved in the original excavation of the sites his reports discuss is misleading.[300]

325. The only evidence before this court respecting Dr. Fitzgerald's qualifications is that he "is considered one of the foremost experts in historic trade objects, including glass beads".[301] There is no evidence that he is biased or unreliable: this is a conclusion Canada and Ontario wish the court to draw based solely on the fact that he has worked regularly with SON, and represented

[299] Ms. Margaret Morden, "Response to the Dr. Ronald F. Williamson 2017 Report" (2018), Exhibit 4452, p. 13; Evidence of Ms. Margaret Morden, Transcript vol 70, December 16, 2019, p. 9151, line 12 to p. 9152, line 4.
[300] Canada Closing Submissions, Title, para 187.
[301] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 69, footnote 10.

them as an archaeological technical advisor.[302] There is also no evidence that archaeologists who work extensively with Indigenous groups are somehow biased; quite the opposite, the Ministry of Culture Standards and Guidelines for Consultant Archaeologists, which provides guidelines for archaeological fieldwork,[303] actually calls for consultation with Indigenous communities during the various stages of archaeological assessment.[304]

326. Similarly, respecting Prof. Darlene Johnston, the suggestion that her work is inherently less reliable because she is a member of Chippewas of Nawash Unceded First Nation and has worked for SON is unsupported by any evidence and should be disregarded.

Consideration of alternative theories

327. Canada claims without evidentiary basis that Dr. Williamson did not consider a number of alternative theories.[305] The first two theories, which Canada calls the "Rogers Theory" and the "Schmalz Theory", were clearly considered by Dr. Williamson, since the articles they are based on are cited in his 2013 report.[306] These papers were published in 1978 and 1991, respectively, and do not provide support for the proposition that SON's development in situ is not generally accepted in the academic community today.

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[302] Canada's Closing Submissions, Title, paras 189, 190, 194.
[303] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5163, line 20 to p. 5164, line 6 and p. 5167, lines 9-18.
[304] Ministry of Culture Standards and Guidelines for Consultant Archaeologists, Exhibit 4237, pp. 14, 20, 46 and 57; Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5167, line 19 to p. 5174, line 4.
[305] Canada's Closing Submissions, Title, paras 313-321.
[306] E.S. Rogers, "Southeastern Ojibwa" Exhibit 3998; Peter S. Schmalz, "The Ojibwa of Southern Ontario" Exhibit 4339; Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, Cited References, pp. 152-153.

328. The third theory Canada claims Dr. Williamson failed to consider is that Manitoulin Island "was a primary locus of Deep Time Indigenous presence."[307] Far from failing to consider it, this theory is entirely in line with Dr. Williamson's evidence. As he testified, he included Manitoulin Island archaeological sites in his report "[b]ecause the documentary record is clear that the Odawa were on Manitoulin Island, as they were in the Bruce Peninsula and parts of Grey and – sorry, Bruce and Grey Counties."[308] This is consistent with his conclusion, that the Odawa developed in situ in SONTL and Manitoulin Island.[309]

329. That said, contrary to Canada's statement at para. 318 of their Closing Submissions (Title), in addition to *Nochemowenaing* (BfHg-3), which has components from the Middle Woodland and Late Woodland periods as well as the 19th century,[310] and *Ne'bwaakaah giizwed ziibi* (River Mouth Speaks, BdHi-2), which has components starting in the Late Archaic/Early Woodland transitional period, and continuing in the Middle Woodland and Late Woodland periods, as well as 19th and 20th centuries,[311] there are six other multi-component sites found in SONTL:[312]

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[307] Canada's Closing Submissions, Title, paras 316-319.
[308] Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5247, lines 6-18.
[309] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 33, 68, and generally.
[310] Dr. Ronald Williamson, "Supplementary Report: Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017) Exhibit 4241, pp.7-8, 12-14, 17-18; Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 54-58.
[311] Dr. Ronald Williamson, "Supplementary Report: Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, pp. 7-10; Southampton Shore Road Archaeology - Limited Stage 3: Testing and Stage 4: Excavation of BdHi-2 - Final Excavation Report, Exhibit 4260.
[312] The locations of these sites are contained in the map on p. 30 of Dr. Williamson's supplementary report: Dr. Ronald Williamson, "Supplementary Report: Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, p. 30.

(a) Knechtel (BbHj-2), which was seasonally used for almost 2000 years and contains components from the Archaic and Middle Woodland periods demonstrating continuous use over these periods;[313]

(b) Inverhuron (BbHj-22), which is a multicomponent fishing site also containing human burials, and which has components dating to both the Archaic and the Middle Woodland periods;[314]

(c) Rocky Ridge (BbHj-16), which was a base camp for hunting mammals and migratory waterfowl with components dating to the Late Archaic and Early Woodland periods;[315]

(d) Hunter (BdHh-5), which has components from the Early Woodland period, as well as the 16th to 17th century;[316]

[313] Dr. Ronald Williamson, "Supplementary Report: Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, pp. 6-7.
[314] Dr. Ronald Williamson, "Supplementary Report: Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, pp. 6-8.
[315] Dr. Ronald Williamson, "Supplementary Report: Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, pp. 6-7.
[316] Dr. Ronald Williamson, "Supplementary Report: Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, pp. 7, 11; Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 45.

(e) Mason (BeHh-6), which has components from the 17th, 18th and 19th centuries;[317] and

(f) Inverhuron-Lucas (BbHj-3), which has components starting in the Early, Middle and Late Woodland periods up to the 17th century.[318]

5. THE FRENCH PERIOD

330. Relying on the evidence of their witness, Prof. Beaulieu, Canada argues that the French established a "hegemony over the Great Lakes system in the late 17th and 18th century prior to the British victory in the Seven Years' War", relying in part on the "French imperial project in the Great Lakes area".[319] Canada's interpretation of what took place during the French period is entirely lacking in any consideration of the Indigenous perspective on interactions with the French, and does not take into account the impact of the French-Anishinaabe alliance on France's ability to maintain a presence on the Great Lakes.[320]

331. Canada's argument rests on the idea that the French did not believe that they needed to ask for permission to use territory of Indigenous Nations. Canada essentially asks this Court to draw the inference that the French therefore would not have asked permission to use territory in the

[317] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 58; Dr. Ronald Williamson, "Supplementary Report: Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, pp. 14-15, 19.
[318] Dr. Ronald Williamson, "Supplementary Report: Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land & Region as Reflected in the Archaeological Record" (2017), Exhibit 4241, pp. 7-8; Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 41.
[319] Canada's Closing Submissions, Title, para 325.
[320] See, for example, Canada's Closing Submissions, Title, paras 345-348, which discuss Champlain's encounters with the Cheveux Relevées in 1615 and 1616 without considering at all how the encounters would have been perceived by the Anishinaabe.

Upper Great Lakes. They say this goes to the Plaintiffs' control over the Great Lakes in the period leading up to the British assertion of sovereignty.[321] In making this argument, Canada relies heavily on the evidence of Prof. Beaulieu.

332. This ignores the fact that Prof. Beaulieu's evidence focussed on how the French perceived their legal rights, rather than how they actually operated on Indigenous territories. As Prof. Beaulieu put it when discussing the 16th century commissions from the King of France, "[t]here is no connection between the intentions, the objectives, the legal framework and necessarily what would be – what the French would have been able to realize on the field."[322]

333. Prof. Beaulieu was not asked to consider whether the French King had jurisdiction over North America,[323] nor whether the French actually sought permission to use First Nations' territories, aside from some examples he used to gain insight into what the French believed.[324] He did not look at what First Nations understood with respect to granting permission to the French to use their territory,[325] nor whether the Great Lakes Anishinaabe generally, or SON specifically, had the capacity to prevent the French from using their lands.[326] As Prof. Beaulieu pointed out, the French may have asked permission to use territory despite believing they were not legally obliged to do so.[327]

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[321] Canada's Closing Submissions, Title, paras 322-325.
[322] Evidence of Prof. Alain Beaulieu, Transcript vol 63, November 21, 2019, p. 8192, line 11 to p. 8193, line 3.
[323] Evidence of Prof. Alain Beaulieu, Transcript vol 63, November 21, 2019, p. 8174, lines 14-18.
[324] Evidence of Prof. Alain Beaulieu, Transcript vol 63, November 21, 2019, p. 8174, line 19 to p. 8175, line 19.
[325] Evidence of Prof. Alain Beaulieu, Transcript vol 63, November 21, 2019, p. 8183, line 21 to p. 8184, line 10.
[326] Evidence of Prof. Alain Beaulieu, Transcript vol 63, November 21, 2019, p. 8177, lines 4-8.
[327] Evidence of Prof. Alain Beaulieu, Transcript vol 63, November 21, 2019, p. 8184, lines 11-17.

334. SON argues the following points in more detail below:

(a) the French would have viewed themselves as obliged to engage with Indigenous nations on a nation-to-nation basis in accordance with the Law of Nations; and

(b) when the French used Indigenous territory, they sought Indigenous consent, albeit not always in advance.

335. Below, SON also addresses misstatements respecting the French period contained in Canada and Ontario's Closing Submissions.

The French Dealing with Indigenous Nations per the Law of Nations

336. Prof. Beaulieu gave evidence that France's legal view during the French period was characterized by their perspective that Indigenous territory was "an empty land, a land that could be taken, that could be possessed, a land in which the French could create their sovereignty, implement their institutions, their forts, their fortifications, where they can grant lands to French people who will settle there, without any preoccupation for the rights of the Aboriginal people on this land."[328] His evidence was based on his review of French legal documents from the 16th century up to the end of the 17th century.[329]

337. This perspective is in direct conflict with the Law of Nations, which suggests that during the French period of colonization, the French would have perceived themselves as being constrained by the Law of Nations.

[328] Evidence of Prof. Alain Beaulieu, Transcript vol 60, November 18, 2019, p. 7745, line 21 to p. 7746, line 3.
[329] Evidence of Prof. Alain Beaulieu, Transcript vol 60, November 18, 2019, p. 7743, line 22 to p. 7745, line 6.

338. Prof. Morin testified that:

> …the Law of Nations is about the relations between Nations essentially who are in peace, and the legal concepts and rules that we need to use to regulate, or at least to understand the situations of war and the situations of peace.
>
> And the best way to have a general understanding of the Law of Nations is the literature produced by the authors, which may appear at first blush to be very normative because it is assumed to be based on human nature, the law of nature, which would be universal, and the same rules that would apply prior to the creation of society and of the law. For instance, that you must keep your promises, you have the right to self-defence.
>
> These universal rules are also the basis of the Law of Nations in dealings between Nations.[330]

339. Prof. Morin explained that in his review of Law of Nations literature, and colonial documents of the French Crown, he could see that "prior to the 19th century, Indigenous peoples were considered independent peoples within treaties and could be entered into at the international level."[331] Prof. Morin also testified about a link between entering into treaties and alliances with Indigenous nations, and Indigenous sovereignty: he explained that if Indigenous peoples were nations, it meant that Treaties were entered into with them because they had the right of self-government, and control over their territory.[332] Prof. Morin pointed to numerous instances in the documentary record supporting this.[333]

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[330] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12430, lines 3-21.
[331] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12407, line 3 to p. 12408, line 8; see also p. 12430, line 22 to p. 12431, line 11.
[332] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12434, line 16 to p. 12435, line 4.
[333] See, for example, Evidence of Prof. Michel Morin, Transcript vol 97, April 29, 2020, p. 12682, lines 7-24; Louis XIV to Count de Frontenac and M. de Champigny, 1695, Exhibit 4941.

340. Prof. Morin and Prof. Beaulieu use largely the same documents to support their conclusions. The questions at issue are directly within Prof. Morin's expertise: as Prof. Morin pointed out in his testimony, the question on this issue before the court is "squarely the issue [Prof. Morin has] been working on for so long."[334] SON submits that given this, and given that Prof. Morin is a legal historian, and the question is looking at France's legal obligations in the 16th and 17th centuries, his evidence should be preferred to Prof. Beaulieu's.

341. That said, SON continues to take the position that what the French believed their obligations to be is not a question this Court needs to decide, particularly when their actions were not necessarily aligned with these beliefs. In reality, the French sought permission to use the Great Lakes and build forts and trading posts, and relied heavily on their network of allies to maintain their presence in the Great Lakes.

The French did Seek and Obtain Permission to use the Great Lakes

342. Even if the French did not believe they had a legal duty to ask for permission to use Indigenous lands and waters, they frequently sought Indigenous agreement in any event, both when travelling across territory and when building forts and trading posts.

THE REQUIREMENT TO GIVE PRESENTS TO CROSS TERRITORY

343. Presents needed to be offered by travelers who wanted to cross a territory. Prof. Morin explained in his testimony that examples that are sometimes pointed to as instances where the French refused to offer presents actually provide support for the need to give presents. Those include examples of Father Albanel, and Nicolas Perrot's account of Father Jesuit Jerome l'Allemand:

[334] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12419, lines 21-23.

(a) The documentary record shows that Father Albanel did offer presents, and ultimately relied on his status as a missionary rather than his status as a Frenchman to pass through the territory.[335]

(b) Perrot's account of Father l'Allemand, which included the Chief from the Algonquin on Allumettes Island being jailed for assaulting Father l'Allemand when he failed to offer presents in exchange for safe passage, was written in 1716 when the event was said to have taken place in 1651.[336] A more contemporaneous version of the same story in the Jesuit Relations written in 1638, explains that the assault on Father l'Allemand was because a few days before another Frenchman had caused the death of an Algonquin of the Island and the Chief blamed all French people for this. In this account, the Huron-Wendat with whom Father l'Allemand was travelling offer presents and are able to continue.[337] When the Chief came to Montreal the following year, he was not jailed but rather forgiven as a "good Christian".[338]

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[335] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12441, line 10 to p. 12442, line 17 and p. 12450, line 15 to p. 12454, line 13; "The Jesuit Relations and Allied Documents, Travels and Explorations of the Jesuit Missionaries in New France, 1610-1791" vol LVI, Exhibit 4922, pp. 173,175.

[336] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12456, line 10 to p. 12458, line 8, and p. 12460, line 12 to p. 12462, line 10; Nicolas Perrot, "Memoir on the Manners, Customs, and Religion of the Savages of North America" (1864), Exhibit 259, pp. 177-178.

[337] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12462, line 11 to p. 12463, line 20; The Jesuit Relations and Allied Documents, Travels and Explorations of the Jesuit Missionaries in New France, 1610-1791" vol XIV, Exhibit 4924, pp. 267, 269, 271.

[338] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12465, line 14, to p. 12467, line 4; "The Jesuit Relations and Allied Documents, Travels and Explorations of the Jesuit Missionaries in New France, 1610-1791" vol XVI, Exhibit 4923, p. 211.

344. Prof. Morin also pointed to an example in 1633 of Jesuits being refused passage through Algonquin territory as a result of a conflict between the French and Algonquin in Quebec City. This incident occurred after there had been an official statement that these are French territories and, as Prof. Morin points out, when the Jesuits are refused passage there is no statement from the French that they should be allowed to travel through the territories as it is French territory. Rather, Champlain and the Jesuits accepted that the rivers are closed because the Algonquins of the Island have said so.[339]

345. Prof. Beaulieu had a different view, testifying that the French would not have accepted any limit on their freedom to travel.[340] This view cannot be accepted, in light of the clear examples Prof. Morin has provided that they did, in fact, accept limits to their freedom of movement, and acknowledge the need for presents in exchange for free passage.[341]

346. Canada points to Saint-Lusson's symbolic planting of a French flag at Sault Ste. Marie in 1671 as in illustration of "France's view that they were entitled to travel unmolested throughout the territory."[342] In reality, such symbolic acts of possession were essentially meaningless. The trial judge in *Tsilhqot'in Nation*, when determining the date of assertion of sovereignty, stated:

> I am not persuaded that private adventurers or commissioned officers of His Majesty's Royal Navy, even with their best intentions, can to the degree required by international law, assert sovereignty over

[339] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12467, line 6 to p. 12469, line 23; "The Jesuit Relations and Allied Documents, Travels and Explorations of the Jesuit Missionaries in New France, 1610-1791" vol VI, Exhibit 4925, pp. 7, 9, 11, 13, 15, 17.
[340] Evidence of Prof. Alain Beaulieu, Transcript vol 60, November 18, 2019, p. 7752, lines 6-11; Prof. Alain Beaulieu, "French, British and Aboriginal Peoples in The Great Lakes Area 1600-1774" (2015), Exhibit 4380, pp. 49-54.
[341] See also 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.
[342] Canada's Closing Submissions, paras 331-332.

> vast territories by planting a flag and speaking to the utter silence of the mountains and boreal forests. **They are, in my view, just words blowing in the wind**. [**Emphasis added**]
>
> *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, at para. 596, Plaintiffs' Book of Authorities, Tab 107.

347. This is in line with the evidence of Prof. Morin, who demonstrated that symbolic acts of possession were not taken seriously by European powers or Indigenous nations, and there was no agreement respecting how they operated.[343] As he put it in his testimony:

> So every country was using this argument about symbolic acts of possession and discovery, being the first there, or being the first to put up the standard or write a document that actually laid – they actually walked on the ground.
>
> But there was very little value afforded to these documents by themselves other than settlements begin, or some forts were established in an area. But then how far could you go from a specific settlement of the colonial power to define a territory? There was absolutely no consensus on this.[344]

348. French symbolic acts of possession cannot be relied on to suggest the French believed they could, or did, travel freely in Indigenous territory.

PEACE TREATIES AND ALLIANCES ALLOWED FOR ACCESS TO TERRITORY

349. Prof. Morin also suggested that the Peace Treaties entered into between the French, their allies (including the Anishinaabe), and the Haudenosaunee, from 1665 until 1701, ultimately ending with the Great Peace of Montreal, provided permission for the French to use the territories of the Indigenous nations that were part of the treaties. Once these treaties were entered into, new

[343] Prof. Michel Morin, "Alliances, Peace Treaties and Aboriginal Territories in the Great Lakes Area During the French Regime" (2017), Exhibit 4929, pp. 28-47.
[344] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12438, lines 13-25.

posts were established in the Great Lakes area and presents were offered regularly, allies allowed the French to travel through their territory without requiring gifts from them. These treaties allowed for freedom of circulation between Indigenous nations for hunting purposes, and French expansion westward: they were meeting with Nations who were interested in trading with them.[345] As Prof. Morin explains it,

> the alliance with the gifts that were given created a new environment where there was freedom of circulating. Gifts were offered regularly at the post, not with a specific mention that this would be for travelling through territories but as part of a general alliance where they were mutually advantageous exchanges.[346]

350. Prof. Beaulieu conceded in 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.[347] He was also clear that it was not part of his mandate to determine whether this had happened.[348]

351. Prof. Beaulieu also gave evidence implying that the French likely needed to create these alliances. The French were pragmatic people,[349] and in cross examination, he stated that

> [t]he French knew that they were not so numerous. They knew that they need to conclude alliances with

[345] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12470, line 14, to p. 12472, line 6; Prof. Michel Morin, "Alliances, Peace Treaties and Aboriginal Territories in the Great Lakes Area During the French Regime (1603-1760)" (2017), Exhibit 4929, pp. 53-54.
[346] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12471, line 24, to p. 12472, line 6.
[347] Evidence of Prof. Alain Beaulieu, Transcript vol 63, November 21, 2019, p. 8183, line 21 to p. 8184, line 2.
[348] 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.
[349] Evidence of Prof. Alain Beaulieu, Transcript vol 63, November 21, 2019, p. 8184, line 18, to p. 8185, line 3.

> Aboriginal people. But it does not erase the fact that they considered that this land was the land of the King, and the King did not have a legal obligation to ask the permission before circulating there and building something.[350]

352. Essentially, Prof. Beaulieu did not dispute that there may be cases where permission was granted to the French to use First Nations' territories, he simply contended that the French were under no legal obligation to obtain such permission.[351] This entirely ignores how French behaviour would have been perceived by the Indigenous nations they were interacting with: if the French were seeking permission to use territory, the distinction of whether or not seeking such permission was required by French law would have been unknown and irrelevant to the Indigenous nations from whom they were seeking permission. In any event, as set out above, the Law of Nations would have required France to treat Indigenous nations as sovereign, meaning they would need to obtain some form of permission in order to use their territory.

OBTAINING PERMISSION TO CONSTRUCT FORTS

353. Prof. Beaulieu and Prof. Morin have different interpretations of the events surrounding the establishment of French forts, including Fort Frontenac, Fort Detroit, Fort Niagara and the forts of the Ohio Valley: Prof. Beaulieu argues that these forts are examples demonstrating that "the French believed that they could freely build military infrastructure within the limits of New France, without having to get the agreement of Aboriginal nations."[352] Prof. Morin, however, gave the view that although there was no "legal requirement to secure a formal consent of cession in

[350] Evidence of Prof. Alain Beaulieu, Transcript vol 63, November 21, 2019, p. 8185, lines 4 to 10.
[351] Evidence of Prof. Alain Beaulieu, Transcript vol 63, November 21, 2019, p. 8178, lines 3 to line 24; p. 8184, lines 12-17.
[352] Prof. Alain Beaulieu, "French, British and Aboriginal Peoples in the Great Lakes Area 1600-1774" (2015), Exhibit 4380, p. 78.

advance… tacit consent of at least acquiescence after the fact were necessary for the preservation of peaceful relations with the Haudenosaunee and other allies."[353]

354. In support of his view, Prof. Morin points to the following examples:

(a) Although the French initially intended to expand into the area neighbouring Fort Frédéric, they halted their plans when they received a complaint from the Mohawks and agreed not to expand into the area as long as the British did not settle there.[354]

(b) When the British wanted to settle at Fort des Sables, the Haudenosaunee refused them permission when they requested it, and the French Governor congratulated them for having refused permission to settle in their country: the French Governor had no pretense that the French control the area – the decision was clearly up to the Haudenosaunee.[355]

355. Prof. Morin also provides context and interpretation of the events in the examples used by Prof. Beaulieu: Fort Frontenac, Fort Detroit, Fort Niagara and the forts of the Ohio Valley.

(a) Governor Frontenac advised a large delegation of Haudenosaunee Chiefs while Fort Frontenac was being constructed that the fort would provide them trading goods. Rather than anger or opposition, the Chiefs responded by requesting better

[353] Prof. Michel Morin, "Alliances, Peace Treaties and Aboriginal Territories in the Great Lakes Area During the French Regime (1603-1760)" (2017), Exhibit 4929, p. 10.
[354] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12472, line 15, to p. 12474, line 17; Prof. Michel Morin, "Alliances, Peace Treaties and Aboriginal Territories in the Great Lakes Area During the French Regime (1603-1760)" (2017), Exhibit 4929, pp. 54-56.
[355] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12474, line 18, to p. 12476, line 8; Prof. Michel Morin, "Alliances, Peace Treaties and Aboriginal Territories in the Great Lakes Area During the French Regime (1603-1760)" (2017), Exhibit 4929, pp. 56-59.

trading prices. After receiving confirmation of this, the Chiefs express their support for the fort.[356] SON submits that this is a form of consent and was described as such in Nicolas Perrot's writings.[357]

(b) Contrary to the narrative Canada has presented at paragraphs 380-392 of their Closing Submissions,[358] the French obtained consent for the construction of Fort Detroit by making it a non-negotiable condition of the 1701 Treaty, which settled all outstanding grievances between the French and the Haudenosaunee at the time. Prof. Morin also notes that the French never accepted the area as Haudenosaunee territory, and the allies of the French, including the Odawa, desired that there be a fort at Detroit, so the French did not need to obtain their consent formally.[359]

(c) In the case of Fort Niagara, the French obtained permission from one Nation that was part of Six Nations, but later the Six Nations collectively overruled this authorization, and wanted to send notice to the French that they would not consent to the construction of the fort. This message was never officially sent (although the French were aware of what was happening), and ultimately the fort is built. The written record shows that after the fort was built, the Haudenosaunee considered

[356] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12476, line 10, to p. 12479, line 8; Prof. Michel Morin, "Alliances, Peace Treaties and Aboriginal Territories in the Great Lakes Area During the French Regime (1603-1760)" (2017), Exhibit 4929, pp. 60-66.
[357] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12479, line 9 to p. 12481, line 25; Nicolas Perrot, "Memoir on the Manners, Customs, and Religion of the Savages of North America" (1864), Exhibit 259, pp. 226-227.
[358] Ontario similarly argues that no permission was needed for the construction of Fort Detroit at para 253 of their Closing Submissions.
[359] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12482, line 2 to p. 12485, line 20; Prof. Michel Morin, "Alliances, Peace Treaties and Aboriginal Territories in the Great Lakes Area During the French Regime (1603-1760)" (2017), Exhibit 4929, pp. 66-69.

that they had consented to its construction.[360] Prof. Beaulieu described this as the French trying "to maneuver to get the consent", but being ready to do the same thing without the consent of the Haudenosaunee.[361]

(d) The French distinguished settlement in the Ohio Valley on the basis that (according to the French) it, unlike the regions where Forts Niagara and Frontenac were built, was not historically Haudenosaunee territory, and in fact the French believed they had discovered the area first.[362]

356. Of course, none of these examples are forts within SONTL. They are also all examples of how the French dealt with the Haudenosaunee, with whom the French were not allied. Prof. Morin opined that

> [i]f the French were willing to conceded (over time) that the establishment of forts in [Haudenosaunee] territory required their consent, even if it was obtained after the fact, **it seems obvious that they would adopt the same position with Aboriginal Peoples with whom they traded and who were more reliable allies in time of war**. [Emphasis added.][363]

357. He testified that "you would expect that [the French] would be less willing to go out of their way, if I may put it that way, to assuage [Haudenosaunee] concerns, as opposed to allies

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[360] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12486, line 1 to p. 12487, line 25; Prof. Michel Morin, "Alliances, Peace Treaties and Aboriginal Territories in the Great Lakes Area During the French Regime (1603-1760)" (2017), Exhibit 4929, pp. 69-74.
[361] Evidence of Prof. Alain Beaulieu, Transcript vol 96, November 21, 2019, p. 8181, lines 9-13.
[362] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12488, line 1 to p. 12490, line 7 and p. 12492, line 6 to p. 12493, line 22; Prof. Michel Morin, "Alliances, Peace Treaties and Aboriginal Territories in the Great Lakes Area During the French Regime (1603-1760)" (2017), Exhibit 4929, pp. 74-82.
[363] Prof. Michel Morin, "Alliances, Peace Treaties and Aboriginal Territories in the Great Lakes Area During the French Regime (1603-1760)" (2017), Exhibit 4929, pp. 83-84.

which were reliable warriors and trading partners", and on whom the French depended on far more than the Haudenosaunee.[364]

358. The documentary evidence before the Court supports this conclusion. For example, primary and secondary sources indicate that the Odawa repeatedly requested the French return to the fort at Michilimackinac following the Great Peace of Montreal in 1701.[365] This supports the inference that the French were in the territory of the Great Lakes Anishinaabe at their invitation.

359. This is also in line with the primary purpose of the forts: far from being intended to project sovereign power, the forts were most importantly centres for trade and missionary activities, and allowed the French to maintain their alliances. Prof. Beaulieu similarly testified that the French "forts, the small posts, the forts were not only placed without any utility. It was – they became centres for trade. They also became centres for Aboriginal people."[366] He then went on to explain, "[o]f course we can say that their forts were not well fortified. Of course we can insist on the weakness. But this weakness is not the only point because they were able to organize a network of alliance around them, and those posts, those forts became centres for the alliance with the French."[367]

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[364] Evidence of Prof. Michel Morin, Transcript vol 96, April 28, 2020, p. 12496, lines 15-25.
[365] Letter from Sr. D'Aigremont Denouncing Cadillac Methods, November 14, 1708, Exhibit 4400, p. 447, *"It has been remarked above that all the beaver skins that go to Detroit are taken to the English. It is therefore necessary, in order to prevent that, to stop the savages at Missilimakinac. This can only be done by putting a commandant there with [a] garrison of nearly 30 men, as the Outaois request."*, translation confirmed by Beaulieu to come from a generally reliable source of historical documents, Evidence of Prof. Alain Beaulieu, Transcript vol 64, November 22, 2019, p. 8287, line 18 to p. 8288, line 4; Gilles Havard, "The Great Peace of Montreal, Chapter 9" (1967), Exhibit 4399, p. 172, *"In the following years [after the Montreal Congress] the Odawas would ask again and again for the re-establishment of a garrisoned post at Michilimackinac."*
[366] Evidence of Prof. Alain Beaulieu, Transcript vol 63, November 21, 2019, p. 8205, lines 22-25.
[367] Evidence of Prof. Alain Beaulieu, Transcript vol 63, November 21, 2019, p. 8205, lines 15-21.

360. Similarly, Prof. Hinderaker testified that the support of First Nations was essential to the French establishment of posts in the Great Lakes, and that the posts were essentially missionary outposts and trading centres, which are "activities that were a co-operative enterprise".[368] Contrary to Canada's submissions at para. 378, Prof. Hinderaker's evidence was that France's alliances were the key to their continued use of territory in the Great Lakes: at their essence, the posts were trading centres, which allowed them to maintain their alliances with Indigenous nations. These alliances were the basis on which the French claimed "dominion over a large swath of the interior of the continent."[369] In other words, contrary to Canada's interpretation at para. 378 of their Closing Submissions, any claim of dominion the French had entirely depended on their Indigenous allies.

361. Given that the purpose of the forts was as a co-operative initiative intended to maintain alliances and trade, it would have made little sense for the French to proceed with building them against the wishes for their Indigenous allies.

Misstatements and Misrepresentations

362. Canada has made a number of misstatements about the evidence respecting the French period.

363. At para. 354, Canada has cited the evidence of Prof. Morin for the proposition that "[t]he ferocity of the French attack on the Haudenosaunee confirms that the French were prepared to use extreme force against any Indigenous group that threatened the French use of the Great Lakes system." This proposition was not put to Prof. Morin, nor does the evidence cited support it. The documents put to Prof. Morin all dealt with the French contemplating attacks on the

[368] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1567, lines 4-13.
[369] Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1566, lines 11-19.

Haudenosaunee, not on their allies.[370] There is no evidence suggesting that the French would have used extreme force against their allies, nor is there evidence that if they had they would have been successful. Any success the French had during the Haudenosaunee wars, and during their time in North America, must be understood in the context of their alliances with Indigenous nations, especially the Anishinaabe.

364. In the same paragraph, Canada has exaggerated the evidence given by Prof. Benn, indicating that Prof. Benn testified "how the Indigenous peoples of the area had come to depend on European trade and "gifts" for survival."[371] Prof. Benn was actually testifying about the dependence of Indigenous peoples on trade and gifts for survival in 1812, not during the French period. He then extended his testimony to 1763, when he indicated that they were partially dependent on gifts and trade, and that the failure of the British to provide this was one of the causes of Pondiac's War.[372] Prof. Hinderaker also gave similar evidence that in 1763 Indigenous nations "could have survived [without trade items] but it certainly put significant pressures on them."[373]

MISSTATEMENTS RESPECTING THE HAUDENOSAUNEE WARS AND GREAT PEACE OF MONTREAL (1701)

365. Canada seeks to paint the French as the main driving force behind the victory of the Anishinaabe in the Haudenosaunee wars.[374] In reality, the French were not involved in any of the battles in the Haudenosaunee wars that took place on the Upper Great Lakes, and were certainly

[370] Evidence of Prof. Michel Morin, Transcript vol 97, April 29, 2019, pp. 12681-12686.
[371] Canada's Closing Submissions, citing Evidence of Prof. Carl Benn, Transcript vol 40, August 19, 2019, pp. 4663-4665.
[372] Evidence of Dr. Carl Benn, Transcript vol 39, August 16, 2019, p. 4515, line 3 to p. 4516, line 12; Evidence of Dr. Carl Benn, Transcript vol 40, August 19, 2020, p. 4663, line 20 to p. 4665, line 8.
[373] Evidence of Prof. Eric Hinderaker, Transcript vol 20, June 11, 2019, p. 1811, lines 15-23.
[374] Canada's Closing Submissions, Title, paras 357-364.

not present in any of the battles where the Anishinaabe pushed the Haudenosaunee out of SONTL.[375]

366. Further, Canada argues that France was responsible for the ultimate peace that was reached in Montreal in 1701.[376] However, it is important to note that three treaties were entered into around the same time, all of which led to the end of the Haudenosaunee wars. France was not involved in two of those treaties: one was between the English and the Five Nations, known as the Nanfan Treaty, and another was between the Anishinaabe, Wendat of the Upper Great Lakes and the Iroquois.[377] Dr. Williamson notes that peace negotiations were held between the Anishinaabe, Wendat and Iroquois, starting as early as 1688, "without the involvement of the French and British, much to their dismay".[378] Peace between the Indigenous parties was ultimately reached in 1700, and was renewed five times between 1701 and 1840.[379] The fact that the French were not involved in these negotiations for peace, and the treaties ultimately concluded, demonstrates that contrary to Canada's narrative, they were not the dominant party in the war but simply one of many actors, nor did they impose peace at Montreal on the Anishinaabe.

[375] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5339, line 13 to p. 5340, line 11; Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 113-125.
[376] Canada's Closing Submissions, Title, paras 373-374.
[377] Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5341, line 6 to p. 5342, line 3; Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, pp. 126-128.
[378]Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 127.
[379] Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 128.

6. CONTROL OF WATERWAYS DURING PONDIAC'S WAR

367. Ontario has tried to make a distinction between Indigenous control and contestation of access of water spaces.[380] Ontario's argument confuses "uncontested access" with "control". In so doing, Ontario misinterprets and misapplies Prof. Hinderaker's evidence to suggest that at the time of the assertion of British sovereignty, in February 1763, the "British had access to Lake Huron and the First Nations did not control that water space."[381]

368. Ontario argues that if Pondiac and his allies had controlled access to Lake Huron, they would not have needed to commence the war in the first place.[382] In making this argument, Ontario ignores the context in which the British were on Lake Huron and the Great Lakes in the first place: following the Treaty of Detroit, they were there with the permission of the Great Lakes Indigenous Nations. Pondiac's war marks the end of that permission.

369. Ontario also argues that Prof. Hinderaker gave evidence that during Pondiac's war the Indigenous Nations controlled water spaces by contesting British access to those waters. They argue that Prof. Hinderaker's evidence "demonstrates that at the assertion of sovereignty in February 1763 the British had access to Lake Huron and the First Nations did not control that water space".[383] In making this argument, Ontario confuses uncontested access to a waterway with control of a waterway: just because the British had access to Lake Huron before Pondiac's war (as had been agreed to by the terms of the Treaty of Detroit), does not mean that the British controlled the waterways. Ontario is misinterpreting what Prof. Hinderaker said about the periods where the British had uncontested access to the waters. When the suggestion was put to Prof. Hinderaker that

[380] Ontario Closing Submissions, paras 289-311.
[381] Ontario Closing Submissions, para 301.
[382] Ontario Closing Submissions, para 289.
[383] Ontario Closing Submissions, para. 301.

the British could not be excluded from Lake Huron prior to Pondiac's siege, Prof. Hinderaker testified that "I believe it's fair to say there was no effort to exclude them before that point."[384]

370. Ontario states that "[c]entral to Dr. Hinderaker's conclusion that the British regained uncontested access after the end of the siege is the fact that the British schooner could have sailed up the St. Clair River."[385] This was not at all central to Prof. Hinderaker's conclusion respecting the British regaining uncontested access, nor is it accurate. When asked about his conclusion that the Indigenous Nations controlled all of the access points to Lake Huron in 1763 and, specifically, whether he meant for the whole of 1763, Prof. Hinderaker replied:

> Yeah. I did not mean December 31st, 1763. Although the British had not yet breached the -- had not yet sailed the schooner, that schooner into Lake Huron in 1763.[386]

371. Prof. Hinderaker continued on to explain that it was the end of the siege of Fort Detroit that led to the British once again having uncontested access to the St. Clair River.[387] However, again, uncontested access still would not have given the British control of this waterway. The Anishinaabe did not need a siege to keep the British out of Lake Huron during the winter: as Prof. Benn indicated, "[a]ll these craft – canoes, bateaux, and larger sailing vessels – were vulnerable to the weather, with poor conditions forcing their crews to seek shelter and **with winter closing water transportation completely**" (emphasis added).[388] As noted in SON's closing arguments, it is not

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[384] Evidence of Prof. Eric Hinderaker, Transcript vol 21, June 12, 2019, p. 2045, lines 6-9.
[385] Ontario Closing Submissions, para 300.
[386] Evidence of Prof. Eric Hinderaker, Transcript vol 21, June 12, 2019, p. 2043, lines 17-20.
[387] Evidence of Prof. Eric Hinderaker, Transcript vol 21, June 12, 2019, p. 2043, lines 21-25.
[388] Dr. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760s-1830s" (2016) Exhibit 4195, p. 30; see also Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4524, line 18, to p. 4525, line 3.

until October 1764, after the British received permission from the Great Lakes Anishinaabe to enter Lake Huron, that the British successfully sailed a ship into Lake Huron.[389]

372. Prof. Hinderaker's definition of control in this case was, broadly stated, that "this landscape that was inhabited by Anishinaabe peoples and that they were capable of defending if necessary."[390] In their desire to pinpoint when exactly the Indigenous allies contested access, and when the British enjoyed uncontested access – whether it was February, May or December 1763 - Ontario misses the bigger picture point that when the Indigenous allies decided that the British were no longer welcome on their waterways and land territory, they successfully defended this territory and prevented the British from using and accessing it. In the case of the St. Clair River, this came both from defending the St. Clair River itself when Indigenous allies attacked the British survey party[391] and prevented them from passing through the river, and through the siege of Detroit, which effectively meant British ships were trapped at Detroit if they did not want to abandon the fort.[392]

[389] SON Final Argument, para 531.
[390] Ontario's Closing Submissions, para. 291; Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1699, line 22 to p. 1700, line 1.
[391] John Rutherford's Captivity Narrative (January 1, 1763), Exhibit 514, pp. 222-224.
[392] Evidence of Prof. Eric Hinderaker, Transcript vol 21, June 12, 2019, p. 2000, lines 18-24 - *the addition of two large sailing vessels provided the British with control of the Detroit River outside of the Fort*.

7. JOINT TITLE

373. Canada has taken the position that any declaration of Aboriginal title in this action should exclude the shared strip of the lakebed 22 miles wide centered on Goderich and running from the shore of Lake Huron to the international boundary. They say they take this position because SON seeks a declaration that would affect possible claims by other Indigenous groups.[393]

374. The Supreme Court of Canada has made it clear that joint title can arise from shared exclusivity. As the Court stated in *Delgamuukw* v *British Columbia*:

> I would suggest the requirement of exclusive occupation and the possibility of joint title could be reconciled by recognizing that joint title could arise from shared exclusivity. The meaning of shared exclusivity is well-known to the common law. Exclusive possession is the right to exclude others. Shared exclusive possession is the right to exclude others except those with whom possession is shared. There clearly may be cases in which two aboriginal nations lived on a particular piece of land and recognized each other's entitlement to that land but nobody else's.

Delgamuukw v British Columbia, [1997] 3 SCR 1010 at para 158, Plaintiffs' Book of Authorities, Tab 18.

375. Canada has acknowledged in its written submissions that SON is not asking the Court to grant rights to other First Nations.[394] The declaration SON seeks with respect to the 22 mile strip is for title, but that the title would be shared jointly with any other First Nation who may be able to establish title in the future.[395] The declaration is intended to preserve the rights of other First Nations, without granting those rights in this proceeding.

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[393] Canada's Closing Submissions, Title, para 55.
[394] Canada's Closing Submissions, Title, para 55.
[395] SON's Final Argument, para 1254 (a).

376. To the extent Canada is trying to argue that the declaration sought by SON would affect possible claims by other First Nations because it would prevent them for seeking non-shared exclusive title, those other groups whose traditional territories are within the 22 mile strip have already agreed to share title with SON in the 2011 Maawn-Ji-Giig-Do-Yaang (Gathering to Speak as One) Declaration.[396]

377. Canada also argues that the portion of Lake Huron up to the northern boundary of Treaty 29 is claimed by Walpole Island First Nation in its own claim for Aboriginal title.[397] The Plaintiffs note that claim is not in evidence before this Court and, in any event, Walpole Island First Nation is a signatory to the 2011 Maawn-Ji-Giig-Do-Yaang (Gathering to Speak as One) Declaration.

8. GEOGRAPHIC SCOPE OF THE TREATY 45 ½ PROTECTION PROMISE

378. Canada and Ontario make several arguments that touch on the interpretation of Treaty 45 ½, including in respect of the geographical scope of the promise to protect set out in Treaty 45 ½.

379. Canada argues that the promise to protect in Treaty 45 ½ does not necessarily extend to the whole of the Peninsula. Rather Canada argues that the Court should note that Lt. Governor Bond Head's original intention was not for the promise to apply to the Peninsula itself, and that the text does not explicitly promise to protect the Peninsula. Based on this reading of the texts, Canada argues that the promise was respect to cultivated lands only.[398] However, Canada still acknowledges a fiduciary obligation to protect the Peninsula.[399]

[396] Maawn-Ji-Giig-Do-Yaang Declaration, 2011, Exhibit 3983.
[397] Canada's Closing Submissions, Title, para 56.
[398] Canada's Closing Submissions, Treaty, paras 99, 127-128, 141-142.
[399] Canada's Closing Submissions, Treaty, paras 813, 831.

380. Ontario makes a similar argument that the promise to protect should be narrowly understood. Ontario argues that the meaning of the promises Treaty 45 ½ can only be understood with reference to the terms of Treaty 45. In essence, Ontario's argument is this: the two promises in Treaty 45 ½ should be confined by the "original" text version of Treaty 45 ½ - that is, based on Bond Head's original proposal to remove SON from their territory and to relocate them to Manitoulin. According to Ontario, Bond Head was promising to protect only those lands that SON cultivated on Manitoulin Island. When SON rejected this proposal because they wished to remain on the Peninsula, Ontario argues that the new agreement they reached was limited to the promises made in the Manitoulin proposal that SON rejected, notwithstanding the fact that SON and Bond Head had negotiated an entirely new bargain that would permit them to stay on the Peninsula.[400] Also, Ontario argues that SON would have understood the promise to protect would only extend to what could be protected by British property law.[401]

381. SON submits that the Court should reject such a narrow interpretation on the following basis:

(a) Canada's and Ontario's arguments are inconsistent with their pleadings and answers provided on examination for discovery;

(b) Canada's and Ontario's narrow interpretation is not supported, and often contradicted, by the evidence; and

[400] Ontario's Closing Submissions, paras 573-594.
[401] Ontario's Closing Submissions, para 599.

(c) Canada's and Ontario's narrow interpretation is contrary to principles of treaty interpretation.

a) Inconsistent with Pleadings

382. Canada pleaded that:

> … the Defendant admits that Treaty No. 45½ contained a specific promise that the Crown would protect **the Saugeen Peninsula** from encroachments by whites. [**emphasis added**]
>
> Amended Amended Amended Statement of Defence of the Attorney General of Canada, para 10, Trial Record, Action 94-CQ-50872, (Tab 3), p. 393.

383. Ontario admitted the allegation made in para. 16 of SON's Statement of Claim that:

> … Treaty No. 45½ contained a specific promise that the Crown would protect **the Saugeen Peninsula** from encroachments by whites. [**emphasis added**].
>
> Fresh as Amended Statement of Claim, para 16, Trial Record, Action 94-CQ-50872, (Tab 1), p. 11.
>
> Fresh as Amended Statement of Defence and Crossclaim of Her Majesty the Queen in Right of Ontario, para 5, Trial Record, Action 94-CQ-50872, (Tab 2), p. 368.

384. Canada and Ontario may not rely on an assertion that is contrary to their pleadings. SON objected to Canada asking questions which implied this position on the basis that it was contrary to Canada's pleadings.[402] This was SON's first inkling that the Crown parties may be advancing an argument that the promise to protect was limited to cultivated tracts. There is prejudice to SON in allowing the Crown parties to raise at trial an argument contrary to their pleadings. Had SON known that the Crown would take such a position, it may have impacted the evidence SON called,

[402] Evidence of Prof. Paul McHugh, Transcript vol 68, December 10, 2019, p. 8767, line 3 to p. 8769, line 1, and see p. 8772, lines 8-15.

or other elements of SON's trial strategy. As the Ontario Court of Appeal observed in *Hav-A-Kar Leasing Ltd. v. Vekselshtein*:

> The failure to raise substantive responses to a plaintiff's claims until trial or, worse, until the close of trial, is contrary to the spirit and requirements of the *Rules of Civil Procedure* and the goal of fair contest that underlies those Rules. Such a failure also undermines the important principle that the parties to a civil lawsuit are entitled to have their differences resolved on the basis of the issues joined in the pleadings. I endorse in this regard, the concerns expressed by MacPherson J.A. of this court in *Strong v. M.M.P.* (2000), 2000 CanLII 16831 (ON CA), 50 O.R. (3d) 70 (C.A.), at paras. 33-40.
>
> Thus, in my opinion, where a defence to a civil action is not pleaded and no pleadings amendment is obtained, judges should generally resist the inclination to allow a defendant to raise and rely on the unpleaded defence if trial fairness and the avoidance of prejudice to the plaintiff are to be achieved.
>
> *Hav-A-Kar Leasing Ltd. v. Vekselshtein,* 2012 ONCA 826, at paras 69-70, Plaintiffs' Reply Book of Authorities, Tab 10.
>
> *Rules of Civil Procedure*, RRO 1990, Reg. 194, Rules 25.07(3) and 25.07(4), Plaintiffs' Reply Book of Authorities, Tab 60.

385. In that case, the defendant sought to rely on a defence that was not pleaded. In SON's submission, the Court of Appeal's caution applies even more forcefully if the Defendants' are seeking to rely on an argument that is contrary to their pleadings.

386. In the case of Ontario, such a position is also inconsistent with a discovery admission, which Ontario has taken no steps to amend:

> 89: Do you admit that the Crown had a duty to protect the Peninsula for the use and benefit of the SON due to its (the Crown's) obligations under Treaty 45 ½ ?
>
> A: The Crown was subject to a Treaty obligation under the terms of Treaty 45 ½ to protect **the**

> **Peninsula** from encroachments by "whites" [emphasis added].[403]

b) The Historic Record

387. Canada's and Ontario's argument to narrowly construe the promise to protect is not consistent with the historical record or the evidence heard by this Court. In particular:

(i) The interests of the Saugeen Ojibway, and Lt. Gov Bond Head in entering into Treaty 45 ½ that are reflected in evidence confirm that the promise to protect should be interpreted to apply to the whole Peninsula;

(ii) In the years following the Treaty, actions by both SON and the Crown confirm that the promise to protect should be interpreted to apply to the whole Peninsula; and

(iii) The testimony of expert witnesses to this trial reflects a consensus that from a historical point of view, the promise to protect would have been understood by SON and the Crown as referring to the Peninsula as a whole, not merely in relation to cultivated tracts or village lands.

(I) INTERESTS OF SON AND THE CROWN AT THE CONCLUSION OF TREATY 45½

388. Ontario's argument that the promise to protect should be read narrowly discounts the negotiations that took place between SON and Bond Head after SON rejected Bond Head's initial proposal of removing them to Manitoulin Island.

389. If it was the case that Bond Head's initial intention was to secure an agreement that saw SON surrender all of their territory, move to Manitoulin Island and cultivate settlements there (which is not admitted), that ultimately was not the deal that was struck in Treaty 45 ½. The ultimate agreement set out in Treaty 45 ½ was the product of further negotiation between Bond Head and SON after SON rejected Bond Head's proposal that they should move to Manitoulin Island. It included the promise to protect the Peninsula, and not just cultivated tracts. There is no

[403] Extract of Discovery Answers by Ontario - Q89, Exhibit 4234.

evidentiary basis for restricting what was negotiated and agreed to in Treaty 45 ½ to the terms of Treaty 45, which SON rejected.

390. The back and forth between SON and Bond Head is documented in missionary accounts, cited and discussed in detail in SON's Final Argument at Chapter 22 (particularly paragraphs 660 to 670). The importance of securing the entirety of the Peninsula to SON was central to their agreement to Bond Head's deal as noted by Rev. Stinson in his comments to Egerton Ryerson:

> Sir Francis then proposed that if they would cede to him the territory joining the Canada Company's Huron Tract, **he would secure to them and their children the Territory north of Owen's Sound**… To this proposal the poor Indians did readily accede with tears in their eyes – their hopes revived, and their countenances beamed with joy.[404] [**emphasis added**]

391. In addition, according to Saugeen Chief Metigwob, who was present at the Treaty council, Bond Head explained at the Council that he could not protect the Saugeen Ojibway's full territory from white people who would "come on their lands", *but he could protect the Peninsula*:

> That it would be much better for them to comply with his wishes, as it would be all in vain for them ever to attempt to hold their Territory**, for the white people would come on their lands in spite of all they could do, and they could not be prevented**. Therefore it would be much to their advantage to settle on the Manitoulin Island **or on the point of land he was going to reserve for them.**[405] **[emphasis added]**

392. It is also worth noting that it would have been inconsistent with Bond Head's policy goals and objectives to conclude a treaty that provided special protection for cultivated tracts. Treaty 45

[404] Letter from Egerton Ryerson to Lord Glenelg, April 9, 1838, Exhibit 1236, pp. 16-17 [Transcript of Document - Extract, p. 4].
[405] Speech by Metigwob, September 13, 1836, Exhibit 1142, p. 3; Evidence of Prof. Jarvis Brownlie, August 13, 2019, Transcript vol 36, p. 3961, line 4 to p. 3964, line 1.

½ was Bond Head's project, and he was motivated by his belief that Indigenous people could not be taught to farm and that the best course of action was to remove them to isolated reserves.[406]

393. Ontario mentions in its argument that it was Bond Head's view that English law protected cultivated lands.[407] There is no evidence that SON would have understood or shared this view of English property law. SON submits that an interpretation of Treaty 45 ½ that the promises imported any such understanding or common intention is not supported by the evidence, and it should not be adopted by this Court.

(II) ACTIONS OF SON AND THE CROWN SUBSEQUENT TO TREATY 45 ½

394. Between 1836 and 1854, the Saugeen Ojibway acted on the understanding that the Crown had promised to protect the Peninsula for their benefit. Throughout the years after Treaty 45 ½, the Saugeen Ojibway regularly complained to the Crown that timber thieves and other squatters encroached on the Peninsula.

(a) In June 1843, the Saugeen Ojibway asked Crown officials for a written copy of Treaty 45 ½ that they could show to the "great many white men" who came to their territory seeking land. SON submits that this suggests that they believed Treaty 45 ½ showed the entire Peninsula to be their territory, and that the Crown should assist in protecting it for them. [408]

[406] Despatch from Sir F.B. Head to Lord Glenelg, November 20, 1836, Exhibit 1154, pp. 124- 125; Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 17-19; Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3035, line 18 to p. 3036, line 2.
[407] Ontario's Closing Submissions, para 599.
[408] Petition from Saugeen Ojibway, June 10, 1843, Exhibit 1427.

(b) In August 1854, when T.G. Anderson approached the Saugeen Ojibway for a surrender of the Peninsula, he noted that "You complain that whites not only cut and take your timber from your land, but that they are commencing to settle upon it."[409] SON submits that these complaints reflect SON's understanding that the Crown was obligated to protect their entire reserve on the Peninsula, not merely cultivated tracts.

395. Leading Indian Department Officials and other officials knowledgeable about Indian Affairs shared this understanding. Crown reports and despatches about Treaty 45 ½ in the late 1830s reflect an acknowledgement by Crown officials that the Crown had committed to protect the entire Peninsula for the Saugeen Ojibway.

(a) On August 20, 1836, Lt. Gov Bond Head sent a dispatch to Lord Glenelg, explaining the process by which he had negotiated surrenders from the Ottawas and Chippewas of Manitoulin, and with the Saugeen Ojibway. His account is brief, particularly in relation Treaty 45 ½. The concluding paragraph states:

> I feel confident that the Indians, when settled by us in the Manner I have detailed can bona fide be fortified against the Encroachments of the Whites;

He makes no mention in the despatch of cultivated tracts, noting only that the Saugeen had consented to give up 1.5 million acres of their territory.[410] SON

[409] T.G. Anderson, Address to the Owen's Sound and Saugeen Indians at the Close of a Council at Owen Sound, August 2, 1854, Exhibit 2175, p. 12.
[410] Bond Head to Glenelg, August 20, 1836, Exhibit 1136.

submits the fortification of the Saugeen Ojibway "against the Encroachment of the Whites" was instead in reference to the reserve they occupied on the Peninsula.

(b) In 1837, Chief Superintendent of Indian Affairs – a top official in the Indian Department – Samuel P. Jarvis created a schedule of cessions and surrendered that summarized the relevant terms and conditions of the cessions. He identified the "Protection of King Wm 4th" as the main consideration for Treaty 45 ½. Cultivated lands are not mentioned in his schedule.[411]

(c) In 1839, J.B. Macaulay was tasked with drafting a comprehensive report describing the condition of Indians in Upper Canada. In his report, he summarized the promises in Treaty 45 ½, and characterized the promise to protect as in relation to the entire territory North of Owen Sound.[412]

(d) In 1843, the Report of the Committee of the Executive Council to Charles Metcalfe, referencing SON's complaints of intrusions on their lands mentioned above, referred the clause in Treaty 45 ½ "reserving to them all their land to the North of Owens Sound without any more specific description." It goes on to describe the surveyed areas of the reserve:

> "The Surveyor General, adopted the Southernmost point of the Sound as the commencement of the line, and the said line being prolonged in a due westerly

[411] S.P. Jarvis, Schedule of Lands situate in the Province of Upper Canada, surrendered to His Majesty by various Tribes of Indians from the year 1820 to the 10th July 1837, Number 8, Exhibit 1198, p. 5; Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11522, line 6 to p. 11523, line 5; Prof. Paul McHugh, "Treaty 45 ½ (1836), the Crown's 'unremitting solicitude' and the 'forever' promise to the Saugeen Ojibway Nation: a report on British imperial policy and practice in Upper Canada during the 1830s" (2015), Exhibit 4441, para. 3.33.
[412] J.B. Macaulay, Report on Indian Affairs (1839), Exhibit 1297, pp. 42-43.

> direction to Lake Huron, it would appear that not only all the land north of Owens Sound has been reserved, but also, that all the land to the north of the most southerly point of the Sound has been included – within the said reserve, thus giving the largest interpretation in favour of the Indians, which the treaty of surrender was capable of giving."[413]

396. In the years that followed, the Crown took two additional steps that signalled it understood its obligation to the Saugeen Ojibway as being to protect the entire Peninsula and not just cultivated tracts: 1) the Crown issued the 1847 Declaration confirming the Saugeen Ojibway's possession of the lands on the Peninsula. There is no mention of cultivated tracts in the Declaration[414]. Canada's expert historian Prof. McHugh confirmed that this Declaration "indicated that the Crown would… continue to protect the Saugeen possession and enjoyment of the peninsula, as presumably from the white encroachments referred to in Treaty 45 ½"[415]; and 2) in 1851, the Crown proclaimed that the *An Act for the Protection of the Indians in Upper Canada from Imposition and the Property Occupied or Enjoyed by them from Trespass and Injury*[416] would apply to the entire Peninsula, and not just cultivated lands.[417]

[413] Report of the Committee of the Executive Council to Charles Metcalfe, July 21, 1843, Exhibit 1434. pp. 1-2.
[414] 1847 Declaration, June 29, 1847, Exhibit 1674.
[415] Prof. Paul McHugh, "Treaty 45½ (1836), the Crown's 'unremitting solicitude' and the 'forever' promise to the Saugeen Ojibway Nation: a report on British imperial policy and practice in Upper Canada during the 1830s", Exhibit 4441, para. 3.90.
[416] Vict. 13 & 14, Ch 74, Exhibit 1784.
[417] Proclamation placing certain Tracts of Land set apart for Indians under the provisions of the Act Vict. 13 & 14 Ch. 74, November 7, 1851, Exhibit 1894, p. 2.

(III) EXPERT EVIDENCE CONFIRMS THE ENTIRE PENINSULA WAS THE SUBJECT OF THE PROMISE

397. Expert witnesses who testified about Treaty 45 ½ in this litigation agreed that Bond Head promised to protect the entire Peninsula for the Saugeen Ojibway from encroachments, not just cultivated tracts:

(a) Prof. Brownlie explained that, in his view, the more plausible interpretation is that Bond Head intended to mean that the promise to protect from white encroachment would apply to the entire Peninsula. He also explained that SON likely would have understood the promise as applying to the entire Peninsula, not just cultivated tracts. This was, in Prof. Brownlie's opinion, supported by how the parties behaved in the years following the treaty:

> Question: Is that how Bond Head would have meant it [Treaty 45 ½]?
>
> Answer: I would say the text is ambiguous.
>
> Question: Yes, you have said that, but based on the other information we have about the facts that he gave in relation to Treaty 45 for the surrender and the meaning that attributes to "encroachment of the whites" and the same wording used in Treaty 45, is it likely that Bond Head referred his engagement to protect land to cultivated land?
>
> Answer: It is possible that he meant his language to imply that. That said, if it really was only restricted to cultivated lands, that would essentially be just reserve settlements, which is not how the Treaty was constructed. Cultivated lands would be a small area.
>
> […]
>
> [T]he Treaty – the speech that we call the Treaty text says you shall repair either to the Great Manitoulin Island or to your lands north of Owen Sound, which would appear to signify the peninsula, and that is the area that was always treated as the Treaty territory thereafter.

> So constructing the meaning of this text as restricting the protected lands to cultivated lands doesn't – is not consistent with the way the Treaty territory was treated thereafter by both government officials and the Saugeen Ojibway.[418]
>
> …
>
> Question: So Bond Head meant encroachment caused by unavoidable increase in European population, by the progress of cultivation which leads to loss of hunting, and so when he made his speech to SON and said that the Crown engaged forever to protect land from the encroachment of the whites, it is more likely, isn't it, that he was speaking in relation to land which had been cultivated?
>
> Answer: I don't believe that that is how the Saugeen Ojibway would have understood it.[419]

(b) Prof. McHugh testified that in Treaty 45 ½, Lt. Gov Bond Head promised to protect the Peninsula for the Saugeen Ojibway. Although he noted that as a matter of grammar, the promise might be said to refer back to cultivated lands, he said that how to interpret the presence or absence of a comma was "not an historical question."[420] On cross-examination, he agreed that Bond Head at Treaty 45 ½ promised to protect the Peninsula from white encroachment for the Saugeen.[421] Professor McHugh's report was similarly clear that the "the wording [of Treaty 45 ½] simply promised that the Crown would protect the retained land from white

[418] Evidence of Prof. Jarvis Brownlie, Transcript vol 36, August 13, 2019, p. 3967, line 12 to p. 3968, line 22.
[419] Evidence of Prof. Jarvis Brownlie, Transcript vol 36, August 13, 2019, p. 3967, lines 1-11.
[420] Evidence of Prof. Paul McHugh, Transcript vol 68, December 10, 2019, p. 8774, lines 9, 21, 22-23.
[421] Evidence of Prof. Paul McHugh, Transcript vol 68, December 10, 2019, p. 8774, lines 1-23 - *Question: Do you agree that Bond Head at Treaty 45 ½ promised to protect the peninsula from white encroachment for the Saugeen? Answer: Yes*; Evidence of Prof. Paul McHugh, Transcript vol 68, December 10, 2019, p. 8862, lines 7-10.

encroachments."[422] The retained land was the entire Peninsula, not just cultivated tracts.

(c) In the third volume of her expert report, Dr. Reimer states that Treaty 45 ½ included a promise "To protect the land forever "forever" from non-Aboriginal encroachment." She makes no suggestion that "the land" to be protected by Treaty 45 ½ was merely the cultivated tracts.[423] Instead, on cross-examination, Dr. Reimer expressed her view that the promise to protect against white encroachment set out in Treaty 45 ½ encompassed a promise to protect against timber theft. [424] This is inconsistent with the notion that the promise applies only to cultivated tracts, which, by definition, are cleared of timber for the purposes of farming.

(d) Prof. Driben testified that the Anishinaabe would have understood that Bond Head was undertaking to protect all their land, not just cultivated tracts.[425]

c) Inconsistent with Treaty Interpretation Principles

398. As set out in the Final Argument of the Saugeen Ojibway Nation (at paragraphs 1074-1087), there are unique principles for the interpretation of treaties with Indigenous peoples, including that narrow, technical readings of treaty promises, particularly those that serve to deprive Indigenous treaty partners from the benefit of the Crown's promises, are to be avoided.

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[422] Prof. Paul McHugh, "Treaty 45 ½ (1836), the Crown's 'unremitting solicitude' and the 'forever' promise to the Saugeen Ojibway Nation: a report on British imperial policy and practice in Upper Canada during the 1830s" (2015), Exhibit 4441, para. 3.31.
[423] Dr. Gwen Reimer, "Volume 3: Saugeen – Nawash Land Cessions No. 45 ½ (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 44.
[424] Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11585, lines 1-13.
[425] Evidence of Prof. Paul Driben, Transcript vol 55, October 23, 2019, p. 7068, line 13 to p. 7069, line 23.

399. SON submits that an interpretation that follows Canada's argument about taking literally the words of Treaty 45 ½ result in a narrow and technical reading of the treaty promise. Such a reading should be rejected.

400. The text of Treaty 45 ½ is as follows:

> I now propose to you that you should surrender to your Great Father the Sauking Territory you at present occupy, and that you should repair either to this Island or to that part of your which lies on the north of Owen Sound, upon which proper houses shall be built for you, and proper assistance given to enable you to become civilized and to cultivate land[,] which your Great Father engages for ever to protect you from the encroachments of the whites.[426]

401. Canada's formulation of the words of Treaty 45 ½ in its argument rearranges the text as follows: "… taken literally, the words of Treaty 45 ½ do not promise to protect the Peninsula forever. Rather "your Great Father engages for ever to protect for you" the land "upon which proper Houses shall be built for you, and proper Assistance given to enable you to become civilized and to cultivate…from the Encroachments of the Whites."[427]

402. Canada's construction of the written text highlights an interpretation that the promise to protect the Saugeen Ojibway from white encroachment was in relation to cultivated tracts only. This is an overly technical reading of the written text, which – contrary to the submissions of Ontario and Canada – would result in an interpretation that does not accord with the historical record nor accord with the understanding and intentions of the parties.

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[426] Treaty 45 ½ [Handwritten version], Exhibit 1132; Treaty 45 ½ [Indian Land surrenders, Vol 1], Exhibit 1128. The comma after "land" appears in the typed but not handwritten version.
[427] Canada's Closing Submissions, Treaty, para 128.

403. Based on the above, SON submits that the narrow interpretation of the promise to protect offered by Ontario and Canada be rejected.

9. FIDUCIARY LAW

The Issue

404. SON submits that Ontario has misstated and confused the general structure of fiduciary law, most evidently in paragraphs 481-500 of its Closing Submissions.

405. SON agrees with Ontario's statement at paragraph 490 of its Closing Submissions that Canadian law of fiduciary duty in general and of fiduciary duty to Indigenous peoples has been developing at the same time and in an intertwined way, but disagrees with the way in which Ontario's submissions pull apart those intertwined issues. SON submits that Ontario has incorrectly associated the distinction between *ad hoc* and *sui generis* duties with the distinction between the standard of conduct and the standard of care. Both of these standards operate in both of those kinds of duties.

Types of Fiduciary Duty - Generally

406. As set out in SON's final argument, in fiduciary law generally, fiduciary relationships are categorized as *per se* or *ad hoc*. However, *per se* fiduciary relationships only became so recognized in the first place by virtue of having met the *ad hoc* criteria. The only distinction in general fiduciary law between *ad hoc* and *per se* categories, is that in certain contexts, the law presumes a fiduciary relationship, while outside the *per se* categories, a fiduciary relationship must be proven.

See Final Argument of the Saugeen Ojibway Nation, para 1125.

407. In neither the *ad hoc* nor *per se* contexts does the recognition of a fiduciary duty determine the content of the duty. That must be determined from the particular facts of the situation. Indeed, not all aspects of a fiduciary relationship are even fiduciary. Determining the content of fiduciary duty in any particular context may thus require looking at the reasons why the duty was recognized in the first place.

> The most vital attribute of the fiduciary concept is its emphasis upon the specific characteristics of individual circumstances or what may alternatively be described as its situation-specificity or case-specific empiricism. This is what enables the fiduciary concept to apply its standard of ethics to a wide variety of actors involved in a broad array of circumstances. Concentrating upon the particular conditions in question enables the contextually appropriate application of the broad theory and purpose behind the fiduciary concept.
>
> …
>
> The situation-specific character of the fiduciary concept entails that the law of fiduciaries is not properly implemented without regard for the context within which it is to be applied. This necessarily entails that *a priori* assessments as evidenced by the categorical approach … are completely inappropriate.

L.I. Rotman, "Fiduciary Law", (Toronto: Carswell, 2005) at pp. 280-296 (quote at 280), Plaintiffs' Reply Book of Authorities, Tab 78.

Galambos v Perez, 2009 SCC 48, Plaintiffs' Book of Authorities, Tab 25. (Although there was a solicitor-client relationship, the particular events in question did not come within that.)

Wewaykum Indian Band v Canada, [2002] 4 SCR 245 at para 86, Plaintiffs' Book of Authorities, Tab 113. (Sets out differing content of fiduciary duty depending on whether a reserve had been created.)

The Crown-Indigenous *Sui Generis* Duty

408. SON submits that since the 1980s the Crown-Indigenous relationship has become recognized as new *per se* category of fiduciary relationship, and it has been called *sui generis*. In *Alberta v Elder Advocates of Alberta Society*, the Supreme Court of Canada delineated the test for finding an *ad hoc* fiduciary relationship and explained how the *sui generis* Crown-Indigenous relationship met elements of the *ad hoc* test.

> *Alberta v Elder Advocates of Alberta Society,* [2011] 2 SCR 261 at paras 48-49, Plaintiffs' Book of Authorities, Tab 2.

409. SON therefore submits that it would not be correct to view *ad hoc* and *sui generis* fiduciary duties as entirely different species. Rather, they are different routes to proving a fiduciary duty. In the *sui generis* case, the law makes certain presumptions, making the existence of the duty easier to prove. But once a fiduciary duty is proven, it is still required to determine its specific content. That is to be determined by all the context, not just, or even primarily, the route by which the duty was proven.

Standard of Conduct and Standard of Care

410. Within fiduciary duty generally, there is a standard of conduct and a standard of care. These are general standards which apply to all kinds of fiduciary duties. Contrary to Ontario's suggestion that the standard of conduct and the standard of care are competing standards, and that Canadian law is in the process of determining which will prevail, the standards relate to different kinds of behaviour. The **standard of conduct** relates to loyalty and honesty, and is very strict. A fiduciary, for example, is categorically prohibited from having a conflicting interest or of profiting from the fiduciary relationship. The standard of conduct also encompasses other matters going generally to honesty, good faith and loyalty. As explained by Rotman in *Fiduciary Law*:

> This standard of conduct … requires fiduciaries to act selflessly, with honesty, integrity, fidelity, and in the utmost good faith in the interest of their beneficiaries. This standard of **conduct** is to be distinguished in the standard of **care** required of fiduciaries, which … is a paradigm generic to a variety of nominate relations. [emphasis in original]

L.I. Rotman, "Fiduciary Law", (Toronto: Carswell, 2005) at p. 303, Plaintiffs' Reply Book of Authorities, Tab 78.

Keech v Sandford, (1726), Sel. Cas. Ch. 61, 25 ER 223, Plaintiffs' Book of Authorities, Tab 37.

411. The fiduciary **standard of care** encompasses things which are not matters of loyalty or honesty, but matters of diligence in making discretionary decisions, such as business decisions by directors of a corporation, or decisions by a trustee administering land or assets. This standard required of fiduciaries in such a context is "that of a man of ordinary prudence managing his own affairs".

> In Canada, when a "fiduciary" standard of care has been articulated, it has been analogized to the standard pertaining to trustees, which the Supreme Court of Canada describes in *Fales v Canada Permanent Trust Co.* as "that of a man of ordinary prudence in managing his own affairs." … While the *Fales* case actually concerns the standard of care required of trustees it is may expressly applied as the Canadian standard befitting non-trustee fiduciaries as well.

L.I. Rotman, "Fiduciary Law", (Toronto: Carswell, 2005) at p. 354, Plaintiffs' Reply Book of Authorities, Tab 78.

See Final Argument of the Saugeen Ojibway Nation, para 1178.

412. For the Crown-Indigenous *sui generis* context, some adaptation of the standard of conduct is clearly necessary. The structure of this relationship interposes the Crown between Indigenous people and settlers. Indigenous land can only be surrendered to the Crown. Therefore,

a strict application of the prohibition on self-dealing cannot be sustained. However, this should not mean that entire suite of duties revolving around honesty, good faith and loyalty must be dispensed with. Neither is there any reason why the standard of care duties should not apply to the Crown.

413. In *Wewaykum*, the Supreme Court of Canada articulated how the Crown-Indigenous *sui generis* fiduciary duty had different content in different situations, depending on whether or not a reserve had been created:

> 1. The content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected. It does not provide a general indemnity.
>
> 2. Prior to reserve creation, the Crown exercises a public law function under the Indian Act — which is subject to supervision by the courts exercising public law remedies. At that stage a fiduciary relationship may also arise but, in that respect, the Crown's duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.
>
> 3. Once a reserve is created, the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation.

Wewaykum Indian Band v Canada, [2002] 4 SCR 245 at para 86, Plaintiffs' Book of Authorities, Tab 113.

414. Several points can be drawn from this:

(a) *Wewaykum* set out different contents of the *sui generis* fiduciary duty that would apply in different contexts. The *sui generis* duty does not have a uniform content, independent of context.

(b) The content of the duty includes matters that relate to the standard of conduct (such as loyalty, good faith and full disclosure), and also under the standard of care (acting with ordinary prudence with a view to the best interest of the Indigenous beneficiaries).

(c) Therefore, contrary to Ontario's submissions, the *sui generis* fiduciary duty is not restricted to "standard of care" matters, nor are the standards competing. The standards relate to different kinds of behaviour.

415. In the case before this Court, SON submits that some of the fiduciary duties asserted are governed by the standard of conduct and some by the standard of care. The duty to protect and preserve the Peninsula, for example, is subject to the standard of care of a person of ordinary prudence in managing their own affairs, which provides some scope for a range of judgment about how best to do that. On the other hand, if Oliphant lied to SON about the Crown's ability to protect the Peninsula, that is a matter of the strict standard of conduct. A lie in a fiduciary relationship is a breach of fiduciary duty, and there is no possible excuse for it.

COMPETING DEMANDS

416. *Wewaykum* also speaks of competing demands on the Crown. The Court spoke of having regard to the interests of all affected parties and wearing "many hats". However, the Court

emphasized that this applied at a stage **prior to reserve creation**[428] – which was at a time when the Crown was functioning primarily in a public law context and when its fiduciary duties were classified as "basic".

> *Wewaykum Indian Band v Canada*, [2002] 4 SCR 245 at para 86 and 96, Plaintiffs' Book of Authorities, Tab 113.

417. After reserve creation, *Wewaykum* said that the Crown's fiduciary duty expanded to protecting and preserving the First Nation's interest in the reserve. This kind of duty requires more than merely fairly balancing competing demands, as suggested by Ontario.[429]

> *Wewaykum Indian Band v Canada*, [2002] 4 SCR 245 at para 86 and 98, Plaintiffs' Book of Authorities, Tab 113.
>
> See Final Argument of the Saugeen Ojibway Nation, paras 1193-1194.

418. It is true that there are contexts where competing demands have been considered in relation to fiduciary duties in relation to existing reserves. These have been cases of expropriation (or of a surrender in the shadow of a possible expropriation) when Indian reserve lands are truly needed for public purposes (e.g. roads, canals or other public works), in which case, for example, the *Indian Act* permits expropriation or some equivalent. In such contexts, the structure of the

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[428] And, in the factual situation of the *Wewaykum* case, in relation to lands outside the traditional territory of the First Nations involved.

[429] The authority Ontario cited for this proposition is an article by Robert Flannigan, "The Boundaries of Fiduciary Accountability" (2004) 83 Can Bar Rev 35 (Ontario's Book of Authorities, Tab 204). As the quote in Ontario's footnote 703 "the fiduciary jurisdiction has been hijacked" (p. 65) itself illustrates, Flannigan is of the view that the entire jurisprudence of fiduciary law in the Crown-Indigenous relationship is a doctrinal error. See also the article abstract on p. 35: "A conceptual fog has descended on the fiduciary jurisprudence of the Commonwealth. Judges and commentators in Canada, Australia and England have misunderstood or misdescribed the conventional boundaries. The confusion impairs the principled assignment of fiduciary responsibility. The solution is to refocus fiduciary analysis on its rightful singular concern with opportunism and limited access arrangements." Flannigan must therefore be regarded, by his own admission, as advancing ideas inconsistent with Canadian court rulings.

Crown-Indigenous relationship makes it unavoidable that the Crown must balance competing interests, since the Crown itself must represent the public interest. In such cases, Courts have decided that a fair balancing means that the Crown must take the "minimum interest" in reserve land that would fulfil the public's requirements. Thus, even here, the Crown is limited in what it can do.

> *Osoyoos Indian Band v Oliver (Town),* [2001] 3 SCR 746, 2001 SCC 85 at para 52, Plaintiffs' Book of Authorities, Tab 59.
>
> *Indian Act*, RSC 1985, c I-5, s. 35, Plaintiffs' Reply Book of Authorities, Tab 54.

419. This kind of exceptional case should not to be expanded to suggest that all that is required of the Crown in every case where a *sui generis* fiduciary duty arises is to fairly balance competing interests, as suggested by Ontario. Balancing of interests by the Crown is unavoidable when a First Nation's lands must be expropriated for public purposes, but what constitutes a public purpose is limited by statutes permitting the compulsory taking of lands. Public works such as roads and bridges can be public purposes, but expropriation statutes do not permit the expropriation of lands that the Crown simply decides it would prefer someone else to own. That would amount to an impermissible taking for a private purpose, not a public one.

420. Therefore, contrary to Ontario's submissions, fairly balancing competing interests does not exhaust the Crown's fiduciary duty, even in the *sui generis* context. Were that so, it would be a harsh irony to call the duty fiduciary at all, since then First Nations would have no security in their reserves at all. In the case now before this Court, Ontario's suggestion would amount to saying that, in return for opening up 1.5 million acres of their territory to settlers, all SON got from Treaty 45 ½ was an obligation to fairly balance their interests in the Peninsula with those of settlers. That would be a basic public law duty of the Crown in any event, and so would not really be

anything not already in place. But that is most emphatically not what Bond Head promised: he promised to protect their land forever from the encroachments of the whites.

Application of the Standard of Care and Hindsight

421. Ontario acknowledges that it is the nature of the common law to judge past actions by present standards.[430]

422. Nonetheless, Ontario also asserts that "conduct should not be assessed on a standard informed by hindsight."[431] That proposition is extremely general, and most of the authorities Ontario cited for it come from vastly different contexts to the present case. SON submits that they do not go beyond indicating that the reasonableness of past actions is, generally speaking, to be judged on the basis of what the persons in question knew or could reasonably have known.

(a) *R v Dyck* is a prosecution for sexual exploitation. The Defendant alleged ineffective representation by counsel, and the Court said that whether the trial strategy was reasonable should not be made with the benefit of hindsight. That is, the assessment must be made on the basis of what the trial counsel knew at the time.

R v Dyck, 2019 MBCA 81, [2019] 10 WWR 236, Ontario's Book of Authorities, Tab 128.

(b) *Groia v Law Society of Upper Canada* was a discipline proceeding for professional misconduct by a lawyer. The Court stated that while Groia acted improperly, he could not have known this at the time, since the law of abuse of process was only clarified three years later.

[430] Ontario's Closing Submissions, para 554.
[431] Ontario's Closing Submissions, para 557.

Groia v Law Society of Upper Canada, 2018 SCC 27, [2018] 1 SCR 772, Ontario's Book of Authorities, Tab 56.

(c) *Valard Construction Ltd v Bird Construction Co* was a breach of trust case. The Court noted that the standard to be applied was one of honesty, and reasonable skill and prudence, and that the specific demands of that standard are informed by the facts and circumstances of which the trustee ought reasonably to have known at the material time. Thus, this case is about judging the impugned conduct on the basis of facts known at the time – not ones discovered with hindsight.

Valard Construction Ltd v Bird Construction Co, 2018 SCC 8, [2018] SCR 224, Ontario's Book of Authorities, Tab 181.

(d) *R v Rutledge* was a firearms prosecution where the defendant challenged the legality of a search. The Court noted that the reasonability of a search was to be determined by what the police knew or ought to have known at the time, not how things turned out to be with hindsight.

R v Rutledge, 2017 ONCA 635 (CA), Ontario's Book of Authorities, Tab 141.

(e) *JP v British Columbia (Director of Child, Family and Community Services)* is a child custody case, which resulted in the Court of Appeal ruling that inadmissible expert evidence had resulted in an unfair trial. However, the Court made a comment that the Director's assessment of risk to child had to be judged on facts known at the time.

JP v British Columbia (Director of Child, Family and Community Services), 2017 BCCA 308, [2017] 12 WWR 639, Ontario's Book of Authorities, Tab 70.

(f) *R v Regnier* was a prosecution for assault with a weapon. The defendant alleged ineffective representation by counsel and the Court said that whether the trial strategy was reasonable should not be made with the benefit of hindsight. That is, the assessment must be made on the basis of what the trial counsel knew at the time.

R v Regnier, 2017 SKCA 83, 2017 CarswellSask 512, Ontario's Book of Authorities, Tab 140.

(g) *R v Majeed* is a fraud prosecution in which the defendant raised an argument of unreasonable delay. The Court noted that the Crown had reasonably relied on the previous state of the law about delay.

R v Majeed, 2017 ONSC 3554, [2017] OJ No 3011, Ontario's Book of Authorities, Tab 132.

423. Of the above cases, only *Groia* and *Majeed* involve any change in the law, and they are criminal or quasi-criminal. SON submits that the considerations about changes in the law are very different in the criminal and quasi-criminal context than in the civil context.

424. For the above proposition about hindsight, Ontario also relies on two cases that do involve a Crown-Indigenous fiduciary duty.

(a) *Blueberry River* was about a land surrender. The First Nation wanted to surrender the lands in order to obtain other lands closer to its trap lines. In hindsight, given the decline in trapping and the discovery of oil and gas on the surrendered lands, this did not seem a wise decision. The First Nation sued for breach of fiduciary duty, saying the Crown should not have allowed them to make such a surrender. In that context, the Court held that there was no breach of fiduciary duty since there was no evidence the Crown had tainted the surrender dealings and since the

decision to surrender seemed reasonable at the time. Thus, the issue of hindsight involved what facts the Crown knew or ought to have known at the time.

Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development), [1995] 4 SCR 344 at paras 14 (per Gonthier J) and 32, 35, and 51 (per McLachlin J), Plaintiffs' Book of Authorities, Tab 9.

(b) *Ermineskin* was about large trust funds held by Canada for two First Nations. The money was held in Canada's consolidated revenue fund, and interest paid on it, at rates set by Canada. The First Nations claimed that the money should have been invested in a diversified portfolio. The Court ruled that legislation required the money to be held this way, and that therefore this could not be a breach of fiduciary duty. The Court examined the rates of interest paid and concluded that, at the time the rates were set, they would have been a reasonably prudent choice. Thus, again, the issue of hindsight involved what facts the Crown knew or ought to have known at the time.

Ermineskin Indian Band v Canada, [2009] 1 SCR 222 at paras 132-149, Ontario's Book of Authorities, Tab 43.

425. SON therefore submits that the proposition that "conduct should not be assessed on a standard informed by hindsight" relates only to the reasonableness of conduct being assessed in relation to facts that the person whose conduct in issue knew or could have known. It has not been applied to changes in law outside the criminal or quasi-criminal context.

426. SON is indeed seeking to apply the current law of fiduciary duty to the Crown's conduct in 1854. This would include the modern fiduciary standard of conduct and standard of care, depending on which particular fiduciary duty is at issue. But SON is not seeking to assess the

Crown's compliance with fiduciary standards with reference to facts that were not known or ought to have been known at the time. For example, in relation to the standard of care, SON submits that the Crown knew or ought to have known that it was possible to protect the Peninsula from encroachment. That capacity is not a matter of hindsight. In relation to the standard of conduct, if Oliphant lied to SON about the capacity of the Crown to protect the Peninsula and sought to "wring" SON's assent from them, that is a breach of fiduciary duty which has nothing to do with hindsight.

10. PLEADINGS ISSUE ALLEGED BY CANADA

427. Canada submits that SON has failed to comply with Rule 25.06(8) of the *Rules of Civil Procedure* with respect to SON's submission that Crown officials, including Laurence Oliphant, lied to SON in the course of Treaty 72 negotiations. Canada's position is that SON's submissions on this point are fundamentally unfair to the Defendants and should be given no weight.[432]

428. Rule 25.06(8) states that:

> Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.
>
> *Rules of Civil Procedure*, RRO 1990, Reg 194, R. 25.06(8), Canada's Book of Authorities, Tab 85.

[432] Canada's Closing Submissions, Treaty, paras 32-37.

The Relevant Cause of Action

429. In the Treaty action, SON has pleaded breach of fiduciary duty as its cause of action. It has not pleaded "fraud, misrepresentation, breach of trust, malice or intent", which are different causes of action with different elements and remedies.

430. The extent to which the underlying facts about the conduct of Crown officials may go toward a different cause of action is not relevant. It is not in a plaintiff's, or the court's interest, for the plaintiff to make every possible argument in hopes that one will stick. It is the duty of counsel to assist the court by simplifying and concentrating the proceedings.

> *National Trust Co v Furbacher*, [1994] OJ No 2385 at para 10 [Plaintiffs' Reply Book of Authorities, Tab 14]; citing *Ashmore v Corp of Lloyd's,* [1992] 2 All ER 486 (HL) at 493 [Plaintiffs' Reply Book of Authorities, Tab 2].

431. In this case, SON has accurately chosen their cause of action: breach of fiduciary duty, and has pleaded and argued their case accordingly. SON submits that Rule 25.06(8) does not apply.

If Rule 25.06(8) does apply, then the pleadings contain sufficient particulars

432. In *Kozevah v. Serpent River First Nation,* the court did apply Rule 25.06(8) where the plaintiff alleged a breach of fiduciary duty. In applying the rule, the court found that the plaintiff must properly plead sufficient facts to make out the elements of a breach of fiduciary duty.

> *Kozeyah v Serpent River First Nation,* 2007 CanLII 6236 (ON SC) at para 26, Plaintiffs' Reply Book of Authorities, Tab 11.

433. If this Court finds that Rule 25.06(8) does apply to SON's claim for breach of fiduciary duty, then SON submits that they have pleaded the facts in sufficient detail to support the claim.

434. In the Fresh as Amended Statement of Claim in the Treaty action, SON pleaded:

20. Based on the above facts, or otherwise by operation of law, the Crown had fiduciary duties to respect and protect the rights of the Saugeen Ojibway Nation over the lands of the Saugeen Peninsula, and to deal in utmost good faith with the Saugeen Ojibway Nation concerning any matter affecting those lands, and had duties to diligently and purposefully fulfil the Crown Promises in accordance with the Honour of the Crown.

…

22. In the negotiations leading up to Treaty No. 72 in 1854, the Crown negotiators:

> (c) stated that they were unable and unwilling to protect the Saugeen Peninsula from encroachments by whites, which encroachments were then occurring and were stated to be of concern to the Saugeen Ojibway Nation;

…

23. In so doing, the Crown breached its fiduciary duties to respect and protect the rights of the Saugeen Ojibway Nation over the lands of the Saugeen Peninsula, and to deal in utmost good faith with the Saugeen Ojibway Nation concerning any matter affecting those lands, and stained its Honour in respect of fulfilling the Crown Promises.

24. The Crown breached its duties in the ways set out in paragraphs 22-23A in a high-handed, arrogant and malicious manner, and with deliberate and wilful disregard of the rights of the Saugeen Ojibway Nation. Therefore, the plaintiffs are entitled to punitive and exemplary damages.

…

29. Immediately after Treaty No. 72, the Crown took steps to protect from trespassers the land which had purportedly been surrendered.

Fresh as Amended Statement of Claim, Trial Record (Treaty Action – 94-CQ-50872CM), (Tab 1), pp.13-18.

435. When assessing adequacy, the court must bear in mind the purposes of pleadings:

(a) to define clearly and precisely the questions in controversy between the litigants;

(b) to give fair notice of the precise case which is required to be met and the precise remedies sought; and

(c) to assist the court in its investigations of the truth of the allegations made.

National Trust Co v Furbacher, [1994] OJ No 2385 at para 9,
Plaintiffs' Reply Book of Authorities, Tab 14.

436. In addition, the Supreme Court of Canada in *Tsilhqot'in* set out clear direction that minor defects in pleadings in Indigenous rights cases should be overlooked, in the absence of clear prejudice, for the following reasons: (1) legal principles may be unclear at the outset making it difficult to frame the claim with exactitude; (2) evidence may be uncertain at the outset, but become more expounded, tested and clarified as the trial proceeds; and (3) a technical approach would not achieve the goals of justice for the Indigenous group and its descendants, and reconciliation between the Indigenous group and broader society.

Tsilhqot'in Nation v British Columbia, 2014 SCC 44 at paras 21-23.

437. Based on the above, SON submits that their pleadings provided sufficient particulars to allow Canada to know the case it must meet. Canada has no basis to say that it was taken by surprise by SON's submissions about the conduct of Crown officials leading up to and during Treaty 72.

438. Beyond the pleadings highlighted above, SON made its position clear in their opening statement:

> So when it came to 1854, this is just 18 years after the Crown had promised to protect the territory forever, the Peninsula forever, the Crown again said, "settlers are coming onto your land. We can't keep them out. And, therefore, what you're going to have to do is surrender most of the Peninsula." This would be the yellow on the map, except for some small, small bits of land.
>
> And the Crown negotiator, as he expressed it, what he was trying to do was to ring [sic] from the SON, some ascent [sic] to the Treaty, however, reluctant. So the result of this was Treaty 72, which covered most of the Peninsula, the yellow part of the map.
>
> Now, the next day, the Crown negotiator wrote to the sheriff and said, "we now have a surrender of the Peninsula, keep squatters off." That was the "aha" moment for me in this case. To me it said, **the Crown was deceiving the SON into this treaty.**[433]

439. Over the course of the trial, there has been extensive expert testimony (including experts put forth by the Defendants such as Dr. Reimer, Prof. McCalla and Mr. Graves) and reports presented to this Court that address the subject of the conduct of Crown officials, including Lawrence Oliphant, leading up to and during Treaty 72. Indeed, Canada submits in its Closing Submissions (Treaty) that the evidence rebuts SON's claims about the statements of Crown officials regarding the Crown's capacity to protect the Peninsula from encroachment in 1854.[434]

11. MUNICIPAL DEFENDANTS' POSITION

440. The Municipal Defendants[435] seek to have this action dismissed as against them on the basis that the declaration of beneficial ownership in road allowances which SON seeks cannot be

[433] Opening Statements, Transcript vol 1, April 25, 2019, p. 21, line 15 to p. 22, line 9.
[434] Canada's Closing Submissions, Treaty, paras 32-37.
[435] The Corporation of the County of Bruce, The Corporation of the Municipality of Northern Bruce Peninsula, The Corporation of the Town of South Bruce Peninsula, The Corporation of the Town of Saugeen Shores, and The Corporation of the Township of Georgian Bluffs.

granted against a *bona fide* purchaser for value of the legal estate without notice ("BFPVLEWN"). They seek to show that they are BFPVLEWN's by virtue of the obligations they have in relation to road allowances, and of the expenditures they have incurred in maintaining roads.

441. SON submits that whether the Municipal Defendants are BFPVLEWN's is a defence to one of the remedies SON seeks. The availability of this remedy, and thus any response to it from the Municipal Defendants', belongs in Phase 2 of this litigation.

> Order of Justice Matheson, 16 January, 2020, para 2 (b) (iv), Second Supplementary Trial Record, Tab 7, Action 94-CQ-50872CM.

442. SON thus submits that, in substance, the position of the Municipal Defendants amounts to a motion for summary judgment in Phase 2 – attempted without reference to the test for a summary judgment motion or the consequences of such a motion. Should, however, this Court decide to consider the merits of this issue in this phase of the trial, then SON seeks a finding that the Municipal Defendants are not BFPVLEWN's, and makes the following submissions.

The Municipal Defendants' Onus

443. The onus of proving one is a BFPVLEWN is on the purchaser:

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

Waters, Gillen and Smith, *Waters' Law of Trusts in Canada*, 4th Ed (2012), pp. 1334 -1335. See also: pp. 483, 504-505, 1340, Plaintiffs' Reply Book of Authorities, Tab 82.

Hawker v Hawker (1969) 3 DLR (3d) 735, 1969 CanLII 654 (SK QB) at para 25, Plaintiffs' Reply Book of Authorities, Tab 9.

Maintenance Obligations

444. The Municipal Defendants assert that they immediately assumed the onerous obligations of building, maintaining, improving, and repairing road allowances when those road allowances were transferred to them.[436] However, the Municipal Defendants only have obligations to maintain roads they have "assumed", and a significant amount of road allowances remain unopened and unmaintained. The Municipal Defendants have no maintenance obligations to these unopened road allowances.[437]

445. The Municipal Defendants conceded that they had no obligation to open up and improve any particular road allowance.[438] Instead, they choose whether to do so. If a township decides to open a road allowance for public travel, it passes a by-law "assuming" it for these purposes.[439] It is these **assumed** roads that are subject to a maintenance obligation defined by regulations under the *Municipal Act*.[440]

446. SON submits that maintenance obligations alone are insufficient to constitute value for road allowances, particularly for: (1) unopened road allowances, for which the Municipal Defendants have no maintenance obligations; and (2) road allowances for which the Municipal Defendants only have maintenance obligations because they voluntarily opened those road allowances.

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[436] Municipalities Closing Submissions, para 91.
[437] Evidence of Wendi Hunter, Transcript vol 95, March 12, 2020, p. 12302 lines 4-12; Evidence of Troy Unruh, Transcript vol 95, March 12, 2020, p. 12344 line 24 to p. 12345 line 5.
[438] Municipalities Closing Submissions, para 94.
[439] Evidence of Wendi Hunter, Transcript vol 95, March 12, 2020, p. 12299, lines 17-22.
[440] Evidence of Wendi Hunter, Transcript vol 95, March 12, 2020, p. 12295, lines 11-16-*solid black lines on Exhibit 4896 are opened and maintained roads of Georgian Bluffs.* Evidence of Wendi Hunter, Transcript vol 95, March 12, 2020, p. 12300, line 25 to p. 12301, line 8-*the solid black lines on Exhibit 4896 are the ones subject to maintenance obligations.*

Maintenance Costs

447. While, of course, the Municipal Defendants have paid costs for maintaining some roads, the evidence does not provide any breakdown of which roads have been maintained, and which have not. There are many road allowances which have not been opened or assumed by the Municipal Defendants. For example, Georgian Bluffs has about 225-240 km of unopened or unimproved road allowances[441], compared to 382 km of opened or improved roads.[442] There are also some unopened road allowances which are highly unlikely ever to be opened.[443]

448. Although there are no obligations to maintain unopened road allowances,[444] occasionally a municipality will perform some minimal maintenance when needed or requested by members of the public.[445]

449. There could conceivably be liability in relation to unopened, unassumed roads. Georgian Bluffs, for example, maintains liability insurance for roads, which includes both opened and unopened roads. However, the insurance policy does not break out these items separately.[446] As such, it is impossible to determine what amount, if any, Georgian Bluffs or the other Municipal Defendants pay to maintain insurance on unopened roads.

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[441] Evidence of Wendi Hunter, Transcript vol 95, March 12, 2020, p. 12297, lines 5-8; Evidence of Troy Unruh, Transcript vol 95, March 12, 2020, p. 12333, lines 7-14.
[442] Evidence of Wendi Hunter, Transcript vol 95, March 12, 2020, p. 12297, line 21 to p. 12298 line 3; Evidence of Troy Unruh, Transcript vol 95, March 12, 2020, p. 12333, lines 7-14.
[443] Evidence of Wendi Hunter, Transcript vol 95, March 12, 2020, p. 12329, lines 2-6.
[444] Evidence of Wendi Hunter, Transcript vol 95, March 12, 2020, p. 12302, lines 4-12; Evidence of Troy Unruh, Transcript vol 95, March 12, 2020, p. 12344, line 24 to p. 12345, line 5.
[445] Evidence of Wendi Hunter, Transcript vol 95, March 12, 2020, p. 12302, lines 13-23; Evidence of Troy Unruh, Transcript vol 95, March 12, 2020, p. 12345, lines 5-20.
[446] Evidence of Wendi Hunter, Transcript vol 95, March 12, 2020, p. 12310, lines 12-18.

450. The Municipal Defendants have argued at length about the public rights which they say exist over all road allowances, whether they are opened or not.[447] However, the evidence at trial was that some road allowances are not passable and are not used at all by the public.[448]

Municipal Defendants Have Not Met Their Onus

451. The Municipal Defendants seek to have the action against them dismissed on the basis that they claim to be BFPVLEWN's. In order for this defence to lead to the dismissal of the case against them, the Municipal Defendants would have to show that they are BFPVLEWN's for **every** parcel of land claimed against them. Otherwise the action would have to proceed in relation to any lands for which this was not shown. The Municipal Defendants have not met their onus. Even if maintenance obligations alone can amount to "value" in the context of an asserted BFPVLEWN defence, such obligations only apply to open, assumed road allowances. In relation to maintenance cost actually paid, there are road allowances for which they have never performed any maintenance.

Additional Evidentiary Hurdles

452. Many of the currently open roads on the Peninsula were likely not opened at the time the road allowances were transferred to the Municipal Defendants in 1913. Roads opened after that date and any obligations flowing therefrom would have been voluntarily assumed by the Municipal Defendants. There remains a very real question as to what roads were assumed when, and whether the municipality assuming the road had notice of SON's claim when they did so.

[447] Municipalities' Closing Submissions, paras 68-70.
[448] Evidence of Troy Unruh, Transcript vol 95, March 12, 2020, p. 12352, line 19 to p. 12353, line 3.

453. Further, the evidence is that at least some of the roads were not constructed using municipal funds (or not only municipal funds). As the Municipal Defendants point out: SON contributed funds to the construction of the "main road up the Saugeen Peninsula to its Northern extremity at Tobermory Harbour".[449] The evidence also suggests that other SON funds were spent on the construction and maintenance of roads,[450] but the full details of this are not in evidence at this phase of the action.

454. SON submits that these evidentiary gaps are another reason that the Municipal Defendants have failed to meet their burden to prove that they are BFPVLEWN's.

Availability of Constructive Trust Remedy

455. The Municipal Defendants argue that even if SON is entitled to a remedy as against the Crown, that they are not entitled to a beneficial or proprietary interest in the road allowances or a remedy as against the Municipal Defendants.[451] They base this argument, in part, on the assertion that "[i]t is well-established that an absolute surrender does not create a constructive trust for the benefit of the First Nation".[452]

456. This argument is based on a misunderstanding of the law about the availability of constructive trusts. The Municipal Defendants omitted a portion of the passage from *Guerin* they cited at para. 103 of their closing. This portion makes it clear that the conclusion of the Supreme

[449] Municipalities' Closing Submissions, para 34.
[450] Dr. Gwen Reimer, "Volume 4: Implementation Issues related to Surrender No. 72, 1854-1970s" (2015), Exhibit 4704, pp. 62-68.
[451] Municipalities' Closing Submissions, para 101.
[452] Municipalities' Closing Submissions, para 103.

Court that the surrender did not give rise to a constructive trust was based on the premise that a constructive trust was only available if there was unjust enrichment:

> Nor does surrender give rise to a constructive trust. **As was said by this Court in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 847, "The principle of unjust enrichment lies at the heart of the constructive trust." See also *Rathwell v. Ratherwell*, [1978] 2 S.C.R. 436.** Any similarity between a constructive trust and the Crown's fiduciary obligation to the Indians is limited to the fact that both arise by operation of law; the former is an essentially restitutionary remedy, while the latter is not. In the present case, for example, the Crown has in no way been enriched by the surrender transaction, whether unjustly or otherwise, but the fact that this is so cannot alter either the existence or the nature of the obligation which the Crown owes. [**Emphasis added**]
>
> *Guerin v. The Queen*, [1984] 2 SCR 335, at page 386, Plaintiffs' Book of Authorities, Tab 29.

457. The Supreme Court in *Soulos v Korkonktzilas* has since explicitly rejected this view, confirming that constructive trusts are available and imposed by law in other circumstances as well:

> **The appellants argue that this Court has adopted a view of constructive trust based exclusively on unjust enrichment** in cases such as *Pettkus v. Becker*, [1980] 2 S.C.R. 834. **Therefore, they argue, a constructive trust cannot be imposed in cases like this where the plaintiff can demonstrate no deprivation and corresponding enrichment of the defendant.**
>
> **The history of the law of constructive trust does not support this view. Rather, it suggests that the constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and**

> **probity and prevent them from retaining property which in "good conscience" they should not be permitted to retain.** This served the end, not only of doing justice in the case before the court, but of protecting relationships of trust and the institutions that depend on these relationships. These goals were accomplished by treating the person holding the property as a trustee of it for the wronged person's benefit, even though there was no true trust created by intention. In England, the trust thus created was thought of as a real or "institutional" trust. In the United State and recently in Canada, jurisprudence speaks of the availability of the constructive trust as a remedy; hence the remedial constructive trust. **[Emphasis added]**

Soulos v Korkonktzilas, [1997] 2 SCR 2017, paras 16-17, Plaintiffs' Book of Authorities, Tab 101.

458. It is not clear based on the evidence before the court whether or not the Municipal Defendants were unjustly enriched by receiving the road allowances, nor is SON asserting unjust enrichment as a cause of action. However, the law is clear that regardless of whether they were unjustly enriched, a constructive trust can still be available against them.

459. SON submits that, based on all of the above, this action cannot be dismissed against the Municipal Defendants on this basis.

Other Matters Raised that SON disputes

ARE MUNICIPALITIES "THE CROWN"?

460. The Municipal Defendants argue at paragraph 15 of their closing submissions that they are not the Crown. In SON's view, it is unnecessary for this Court to determine whether or not the Municipal Defendants are the Crown. What is relevant for the purposes of the Treaty action is that SON has not made any claim against the municipalities for breach of fiduciary duty.

BENEFITS TO THE MUNICIPAL DEFENDANTS

461. The Municipal Defendants also claim, at paragraphs 94 and 116 of their closing submissions, that they received no benefit when the road allowances were transferred to them. This is not borne out by the evidence. As indicated in Dr. Reimer's evidence, prior to the transfer of the road allowances to the Municipal Defendants, municipal councillors petitioned for the creation of roads to encourage land sales, and were seeking compensation for lost taxes resulting from inadequate roads and thus fewer land sales.[453] The Municipal Defendants have presumably received substantial amounts of property taxes from increase in local populations and thus ratepayers in their towns, which would not be possible without the construction of roads. The amount of these property taxes is not in evidence, nor have the parties gone through the discovery process for this aspect of the matter, as this is a matter that is properly within Phase 2 of this action.

NOTICE OF SON'S INTERESTS IN ROAD ALLOWANCES

462. The Municipal Defendants assert that at no time prior to 1993, did they receive notice that SON asserted a beneficial ownership in the roads.[454] However, they conceded that they were aware of SON's interest in the roads from August 23, 1957.[455]

463. The documents that SON relies on as constituting notice to the various municipalities are set out in SON's response to the fourth request to admit of the Municipal Defendants.[456] The

[453] Dr. Gwen Reimer, "Volume 4: Implementation Issues related to Surrender No. 72, 1854-1970s" (2015), Exhibit 4704, p. 64.
[454] Closing Submissions of the Municipal Defendants, para 48.
[455] Closing Submissions of the Municipal Defendants, para 48, footnote 59.
[456] Fourth Request to Admit of the Municipal Defendants, Exhibit 3942; August 16, 2018 email from Roger Townshend enclosing attachments incorporated into Fourth Request to Admit of Municipal Defendants; Plaintiff's Response to Fourth Request to Admit of the Municipal Defendants, Exhibit 3944.

documents attached to SON's response to the fourth request to admit of the Municipal Defendants are catalogued in Exhibit C-4 and were made Exhibits 4873-4898 on March 12, 2020.[457]

464. SON submits that these documents show that (some of) the Municipal Defendants had notice of SON's interest in shore road allowances (which are a class of road allowance) at least as early as September 19, 1922 when the solicitor for the Township of Amabel, Wiarton and Albemarle petitioned Canada to release and convey the Indian interests along the west shore of Colpoy's Bay.[458]

All of which is respectfully submitted Date: October 13, 2020

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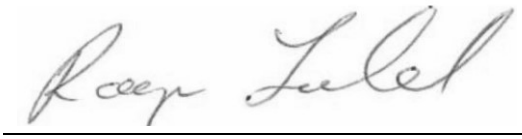

H.W. Roger Townshend

Renée Pelletier

[457] Proposed consent exhibits, March 12, 2019, Exhibit C-4; and Transcript vol 95, March 12, 2019, p. 12272, line 7 to p. 12276, line 21.
[458] Letter from Carlyle (sic) to Stewart, dated September 19, 1922, Exhibit 4873.

Cathy Guirguis

Jaclyn C. McNamara

Benjamin Brookwell

Krista Nerland

APPENDIX 1 - CHART OF MISSTATEMENTS AND CLARIFICATIONS (TITLE CASE)

Row	Location	Topic	Issue	SON Response
1.	Canada, Title, para 60	Claim area and boundaries	Canada points out that no agreement has been reached with First Nations on Manitoulin regarding any potential sharing between them and SON.	There is no need for an agreement as there is no overlap. As Canada points out, the claims abut.
2.	Canada, Title, para 71	Ethnicity	Canada cites Dr. Williamson out of context to suggest that linking contact-era groups to modern counterparts was fraught with difficulty.	Dr. Williamson was commenting on a quote from Charles Cleland to the effect that Anishinaabe people identified themselves first as Anishinaabe, and also by dodem and by location, and observing that 19th century political designations such as Pottawatomi or Ojibwa were of little significance to the Anishinaabe in the contact period (Dr. Ronald Williamson The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763) (2013), Exhibit 4239, pp. 14-15). This does not speak to linkages or continuity of actual groups (as opposed to by what name they may have been identified) over time, nor to modern groups at all.
3.	Canada, Title, para 171	Geomythology	Canada misstates Donald Keeshig's evidence when it says he was the one who added a location to the story about a tunnel to Manitoulin Island.	Donald Keeshig's evidence was that Lawrence Keeshig told him the story and he (Lawrence) identified the tunnel at that time as "up near Tobermory" (Examination in Chief, Donald Keeshig, Exhibit 3945, p. 9).
4.	Canada, Title, para 176	Geomythology	Canada asserts that the Plaintiffs speculate without evidence that trees in a pop-up could have created a tunnel-like effect.	It was Prof. McCarthy's evidence that based on the vegetation known to exist at the time, it makes sense to picture pop-ups as canyon-like structures with trees growing out of the cracks in the rock. Those trees would have been thick enough to form a solid canopy (Evidence of Prof. Francine McCarthy, Transcript vol 9, May 22, 2019, p. 992, line 21 to p. 994, line 4; Transcript vol 10, May 23, 2019, p. 1092 lines, 1-7; and p. 1094, lines 5-21).

Row	Location	Topic	Issue	SON Response
5.	Canada, Title, para 195	Archaeology	Canada misstates Ms. Margaret Morden's qualification as: "an archaeologist with familiarity with the practice of archaeology in Ontario and of archaeological methodology in general" [emphasis added].	Ms. Morden was qualified as "Archaeologist with familiarity in the practice of archaeology and of archaeological methodology in general" (Evidence of Ms. Margaret Morden, Transcript vol 70, December 16, 2019, p. 9067, lines 22-24) [emphasis added].
6.	Canada, Title, paras 223-224	Archaeology	Canada argues that if a site has clear resource potential or is near a portage route it may be used by variety of different groups.	This statement ignores Odawa cultural markers identified by Dr. Williamson at those sites (see SON's Reply Argument paras 312-322). This proposition was also never put to Dr. Williamson, nor does Canada cite any other expert supporting this proposition.
7.	Canada, Title, para 344	Anishinaabe Territorial Use Customary Law	Misstates SON's argument to be that blueberries were out of season when Champlain reached the mouth of the French River in 1615, and that this is rebutted by Champlain's observation.	SON does not argue that blueberries were out of season when Champlain reached the mouth of the French River in 1615.
8.	Canada, Title, paras 369-370	Griffon Incident	Canada de-contextualized a quote from Prof. Driben to say that he thought "we don't know what happened" to the Griffon.	In fact, Prof. Driben said that, according to a particular account of the incident that was put to him, we do not know what happened to the Griffon. He went on to discuss other evidence about the matter (Evidence of Prof. Paul Driben, Transcript, vol 56, October 24, 2019, p. 7184 line 21 to p. 7185 line 11, and pp. 7185-7192).
9.	Canada, Title, para 399	Seven Years War	Canada frames Prof. Hinderaker's expertise as being primarily in the Ohio valley and Boston. This is not a fair statement of Prof. Hinderaker's qualifications.	Prof. Hinderaker's full qualifications are set out in SON's Final Argument, Appendix E, Tab 13. Further, it is of note that Prof. Beaulieu's expertise is primarily in French-Indigenous relations in the 17th century (SON's Final Argument, Appendix E, Tab 1, para. 4).
10.	Canada, Title, para 404	Seven Years War	Canada misstates SON's argument in that they claim SON is saying they participated in the Seven Years' War, and rely on it to demonstrate ability to exclude others.	SON does not rely on the Seven Years' War in demonstrating SON's ability to exclude others from SONTL, nor does SON make any claim about SON's participation in the war.

Row	Location	Topic	Issue	SON Response
11.	Canada, Title, para 416	Seven Years War	Canada claims that Alexander Henry had no problems making his trip to Michilimackinac in 1761.	Alexander Henry's journal, Exhibit 476, documents the difficulties he had travelling to Michilimackinac, including having to disguise himself and lie about his identity (Alexander Henry, "Travels and Adventures in Canada and The Indian Territories between the years 1760 and 1776", Exhibit 476, pages 33-37).
12.	Canada, Title, para 443	Pondiac's War	Canada states that the fort at Niagara resisted the Indigenous siege.	There was no Indigenous siege of the fort at Niagara. (Evidence of Prof. Alain Beaulieu, Transcript vol 61, November 19, 2019, p. 7914, line 16 to p. 7915, line 6)
13.	Canada, Title, para 447(a)	Pondiac's War	Canada claims that the St. Clair River attack is an example of an unsuccessful attempt made by Indigenous warriors to seize British sailing vessels during Pondiac's War.	This is inaccurate. The Indigenous warriors were successful in the St. Clair River attack (John Rutherfurd's Captivity Narrative, Exhibit 514, pp. 225-227).
14.	Canada, Title, para 454	Pondiac's War	Canada says that after the Indigenous attacks in Pondiac's war, the forts that were attacked were quickly reoccupied by British troops.	The forts were only reoccupied after Treaty of Niagara (Evidence of Mr. Donald Graves, Transcript vol 86, February 20, 2020, p. 10947, line 17 to p. 10948, line 5).
15.	Canada, Title, para 465	Pondiac's War	Canada argues that the weight assigned to Prof. Hinderaker's evidence that with "very few exceptions" the Great Lakes Anishinaabe were united in opposition to the British, should be limited because "Professor Hinderaker went so far as to suggest that Chief Wabbicommicot of the Mississauga from Credit River, who actively supported the British, differed only by mode rather than goals from Pondiac."	This is an unfair representation of Prof. Hinderaker's evidence respecting Chief Wabbicommicot. Prof. Hinderaker, in his report, described Wabbicommicot as the only "Anishinaabe leader [who] broke ranks with the other peoples of the Great Lakes to collaborate directly with the British while hostilities were still underway." He went on to detail how Wabbicommicot passed information to the British as "stood alone among Anishinaabe leaders in his willingness to accept British power in the region without, apparently, insisting on clear limits and restraints." He then compared Wabbicommicot to Pondiac only in the sense that both could be seen as doing what they thought necessary in response to the rise in British power. Prof. Hinderaker was clear that Wabbicomicot sided with the British and was alone among the Great Lakes Anishinaabe in doing so (Prof. Eric Hinderaker, "The Anishinaabeg, the British Crown, and Aboriginal Land Rights in the Era of Pontiac's War" (2013),

Row	Location	Topic	Issue	SON Response
				Exhibit 4017, pp. 59-60). Prof. Hinderaker was crossed extensively on this topic and was clear that Wabbicomicot and his followers opposed the attacks and were outliers in this regard (Evidence of Prof. Eric Hinderaker, Transcript vol 20, June 11, 2019, p. 1876, line 6 to p. 1877, line 21).
16.	Canada, Title, para 483	Treaty of Niagara	Canada claims that Prof. Benn stated that he was aware that the Treaty of Niagara was "some matter of controversy."	This statement was not made by Prof. Benn, but by cross-examining counsel. Prof. Benn was not asked to, nor did he, agree with it (Evidence of Prof. Carl Benn, Transcript vol 40, August 19, 2019, p. 4677, lines 8-23).
17.	Canada, Title, paras 483-484	Treaty of Niagara	Canada suggests that Prof. Hinderaker simply accepted that there was scholarly consensus that there was a Treaty of Niagara, whereas Prof. Beaulieu examined the historical evidence.	This is inaccurate – Prof. Hinderaker also did a detailed analysis of the evidence, and wrote a report specifically responding to Prof. Beaulieu's analysis respecting whether there was a Treaty of Niagara (Prof. Eric Hinderaker, "Supplement Two: A response to Alain Beaulieu, 'The Congress at Niagara in 1764: The Historical Context and Meaning of the British-Aboriginal Negotiations', Exhibit 4020).
18.	Canada, Title, para 603	Proper Rights Holder	Canada states: "It is not clear how an agreement created to resolve an overlap in modern litigation supports an inference about 'the ancient customary law of where the boundary was.'"	This ignores the evidence about the process that was undertaken in determining the boundaries of the overlap territory, which included meetings between the Councils of the five communities that are party to the agreement where "the conversation really focused on that particular portion [which is subject to the agreement], and the historical context, as an area being something that we typically would have shared…" (Evidence of Randall Kahgee, Transcript vol 9, May 22, 2019, p. 895, line 8 to 897, line 3).
19.	Canada, Title, para 627	Geomythology	Canada argues that it is a basic error of reasoning to treat the traditional stories told in this trial as independent pieces of scientific data. Canada asserts that this is no basis for the assumption that the stories originated from the same place.	SON submits that the basis for the assumption is that the stories are currently passed on in the same area and the present-day story tellers associate them with geographic features around Lake Huron and Georgian Bay.

Row	Location	Topic	Issue	SON Response
20.	Canada, Title, para 638	Archaeology	Canada claims that the experts "agree that the archaeological record does not indicate any occupation of the Peninsula before 1725 and that the documentary record makes little to no reference to inhabitants of the Peninsula until 1780."	Assuming that what Canada is saying is that following the dispersal during the Haudenosaunee wars there is no archaeological evidence of occupation of the Peninsula before 1725, this ignores the findings of the Bead report (Dr. Ronald Williamson et al, "Non-Destructive Analysis of the Glass Bead Assemblage from the River Mouth Speaks Site (2017), Exhibit 4240) and Dr. Williamson's testimony regarding this report. It also ignores Dr. Williamson's evidence respecting the Jesuit rings found at *Ne'bwaakaah giizwed ziibi* (River Mouth Speaks), which he testified indicate that use of the site resumed in the second half of the 17th century (Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, p. 5348, lines 1-6); and the iron axe with a maker's mark dated around AD 1700 found at the Mason site (Dr. Ronald Williamson, "Supplementary Report - Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land" (2017), Exhibit 4241, p. 19). Further, the documentary record shows settlements on the Peninsula in 1725, which suggests use of the SONTL in the preceding decades (i.e. in the early 18th century) (Dr. Ronald Williamson, "The Archaeology and History of the Saugeen Ojibway Nation Traditional Land & Region (to 1763)" (2013), Exhibit 4239, p. 129; Exhibit 378 (1725 Map); Evidence of Dr. Ronald Williamson, Transcript vol 44, September 17, 2019, 5346, lines 2-10).
21.	Canada, Title, para 656	Capacity to Exclude	Canada claims that "Chief Vernon Roote indicated in his testimony that the Plaintiffs struggled with excluding marauders from the Asserted Traditional Lands prior to contact."	Vernon Roote's evidence respecting marauders is about how watchers throughout the Peninsula would keep lookout to keep the community safe. His evidence does not speak to whether or not there was any struggle to do so. (Evidence of Vernon Roote, Transcript vol 5, May 13, 2019, p. 453, line 8 to p. 454, line 19).

Row	Location	Topic	Issue	SON Response
22.	Canada, Title, para 661	Capacity to Exclude	Canada states "with respect to the Haudenosaunee invasion, the oral history evidence regarding the episode is contradicted by the evidence of the Plaintiffs' experts to the effect that the inhabitants of the area were driven off by the Haudenosaunee, and that Anishinaabe people did not settle in the Peninsula until 1725."	See response in point 21 above – the expert evidence is that following the dispersal, Anishinaabe people returned to the Peninsula in the late 17th century. This is entirely consistent with the oral history evidence that SON drove the Haudenosaunee off the SONTL. To the extent that Canada is trying to argue that the evidence has been that use, rather than occupation, resumed in the latter half of the 17th century, and the first evidence of settlement is the 1725 map (Exhibit 378), archaeological evidence demonstrating seasonal use is not inconsistent with the use having been more extensive, and the Peninsula having been reoccupied by SON following their battles with the Haudenosaunee.
23.	Canada, Title, para 690	Navigable Waters	Canada quotes out of context from *Black v Law Society of Alberta* that right to mobility is "fundamental to nationhood".	The case is about Alberta erecting regulatory barriers to Canadian citizens from other provinces working in Alberta. That is the kind of mobility that is "fundamental to nationhood" – there is no suggestion that the right to mobility encompasses a right to pass over property owned by others.
24.	Ontario, para 110	Test for Aboriginal Title	Ontario claims that "Counsel for SON said in their opening submissions that the geologic evidence is not advanced for the purpose of showing the Indigenous perspective on occupation."	This is not an accurate representation of SON's opening submissions. In discussing SON's traditional stories, counsel for SON stated that "what these stories demonstrate is that SON has stories about the place where they live. Stories about them having been in their territory for thousands of years; that is their traditional knowledge, that is their history, that is their perspective" (SON Opening Statement, Transcript vol 1, April 25, 2019, p. 51, lines 8-14).
25.	Ontario, para 135	Arch evidence 1700-1763	Ontario submits that the absence of archaeological evidence between the dispersal of the Odawa and the 19th century indicates that it was not re-occupied in the early 18th century. Furthermore, the name	Nochemowenaing has been subject to specific and targeted investigations, but the site has not been fully excavated. (Williamson Report, Exhibit 4239, pp. 54-58). It is therefore inappropriate to infer that it was not reoccupied in the early 18th century, especially given the evidence that the site includes over

Row	Location	Topic	Issue	SON Response
			itself "Nochemowenaing" is an Ojibway name. Together these facts suggest a break in the cultural connection to the site.	70 burial features and none seem to intrude on one another, suggesting a familiarity with the site and its purpose by those occupying it over the generations (Evidence of Dr. Ronald Williamson, Transcript vol 44,September 17, 2019, p. 5343, line 19 to p. 5344, line 1; Dr. Ronald Williamson, "Supplementary Report - Cultural Continuity in the Occupation of the Saugeen Ojibway Nation Traditional Land" (2017), Exhibit 4241, pp. 17-18).
26.	Ontario, para 154	Use of Claim Area 1763	Ontario's suggests that "the northern part – on land and offshore – was less well-used and less-intensively inhabited by SON at 1763. To some extent this is because that part of the Peninsula is much less hospitable. As such it would less readily support a population living a predominantly traditional Ojibway lifestyle of fishing, hunting, and gathering in a seasonal round. Ontario submits that the northern part of the Peninsula was primarily space to travel through, either to or from Manitoulin Island."	Ontario cites no evidence for the proposition that northern part of the Peninsula is less hospitable. Also, this ignores the evidence of Dr. Williamson that undeveloped areas of SONTL have yet to undergo extensive archaeological surveying (Evidence of Dr. Ronald Williamson, Transcript vol 43, September 16, 2019, p. 5270, lines 1-20).
27.	Ontario, para 188	Pre-sovereignty intent to exclude	Ontario claims that "In the space of fourteen years, without much explanation, Dr. Williamson's own view that the Wellington Site served as a place of negotiation for in-migration changed from a "possibility" based on "largely circumstantial evidence" to an "extreme likelihood".	Dr. Williamson explained in detail why his opinion on the Wellington site had gotten stronger: radiocarbon analysis and Bayesian modelling demonstrated that Wellington predates Barrie, making Wellington the earliest pioneering community in that area. This was then picked up by other archaeologists in work respecting Algonquians interacting with Wendat. (Evidence of Dr. Ronald Williamson, Transcript vol 45, September 18, 2019, p. 5537, line 22, to p. 5539, line 6)
28.	Ontario, para 226	Treaty of Niagara	Ontario takes Prof. Hinderaker's evidence out of context, saying "SON cites to Prof. Hinderaker's testimony, but that evidence was simply that there was a "treaty at	Prof. Hinderaker was very clear in his reports that he believed a treaty was entered into with the Western Nations. His second supplementary report in particular is entirely focussed on Prof. Beaulieu's argument that only two treaties were entered into at

Row	Location	Topic	Issue	SON Response
			Niagara", not specifically a treaty with Western Nations."	Niagara, with the Detroit Wyandots and the Senecas, but not the Western Nations. Prof. Hinderaker clearly concludes that Prof. Beaulieu is incorrect and that the British entered into a treaty with the Western Nations at Niagara (Prof. Eric Hinderaker, "Supplement Two: A response to Alain Beaulieu, 'The Congress at Niagara in 1764: The Historical Context and Meaning of the British-Aboriginal Negotiations'", Exhibit 4020, p. 12).
29.	Ontario, para 226	Treaty of Niagara	On the issue that it is well accepted by scholars that there was a Treaty at Niagara, Ontario says "Dr. Hinderaker did not cite or identify any such scholars, other than Dr. John Borrows who is a member of SON, and whom Dr. Hinderaker acknowledged was not widely known in Dr. Hinderaker's field of the history of colonial diplomatic relations."	This takes Prof. Hinderaker's evidence out of context. In discussing whether Britain made a treaty at Niagara with the Western Nations, Prof. Hinderaker testified that there is "essentially a scholarly consensus on the subject that there was a treaty at Niagara", and that he was unaware of any scholars that agreed with Prof. Beaulieu's argument that there was no treaty (Evidence of Prof. Eric Hinderaker, Transcript vol 19, June 10, 2019, p. 1653, line 1 to p. 1654, line 3). When Prof. Hinderaker was cross examined on this topic, his evidence did not change (Evidence of Prof. Eric Hinderaker, Transcript vol 21, June 12, 2019, p. 2025, lines 6-20).
30.	Ontario, para 227	Treaty of Niagara	In response to the Plaintiffs relying on the Court of Appeal in *Chippewas of Sarnia v Canada (Attorney General)*, [2000] OJ No 4804 for the proposition that a Treaty was made at Niagara, Ontario says "In reliance on the different record in that case, the Court said that a Treaty was made with all the First Nation Chiefs who attended at Niagara, yet even SON only asserts that a Treaty was made with the Anishinaabek Chiefs."	SON has referred to those who entered into the non-written treaty at Niagara as the Western Nations and at times Anishinaabe, but it is true there were a few other Nations in that group. SON is not trying to suggest that Nations that were at Niagara got left out of the Treaty.
31.	Ontario, para 228	Treaty of Niagara	Ontario claims that "SON wrongly states that William Johnson himself described what he had done at Niagara as a Treaty with the	This is an inaccurate representation of Prof. Beaulieu's testimony. In his attempt to explain why he believed Johnson had made a false statement in his letter to the Lords of Trade,

Row	Location	Topic	Issue	SON Response
			Anishinaabek. SON omits reference to the testimony of Dr. Beaulieu who stated that the communities to which Johnson was referring in Exhibit 625 had not been at Niagara".	Prof. Beaulieu stated that "When Johnson said that I have some treaties with the Hurons, that is correct, with some Ottawas and Mississaugas, it is not correct. But we know that the treaty negotiated by Colonel Bradstreet with some Ottawas in the Detroit region, that those were not represented at Niagara in 1764" (Evidence of Prof. Alain Beaulieu, Transcript vol 62, November 20, 2019, p. 8041, line 24 to p. 8042, line 4). Prof. Beaulieu points only to one community that was not at Niagara. This does not make Johnson's statement that some of the Ottawas and Mississaugas at Detroit had entered into a treaty at Niagara false.
32.	Ontario, para 230	Treaty of Niagara	Ontario argues that "[c]onsequently, it is merely speculation to conclude that terms Johnson had proposed to Gage in February 1764, but which were not recorded at Niagara as being agreed with the Anishinaabek, were nevertheless agreed. In this context, the absence of a written record that potential terms were then actually agreed cannot be explained away by the fact that unwritten terms can nevertheless be binding."	Ontario ignores that there is a written record of what was agreed to at Niagara, being the Minutes of Proceedings. The terms set out in Johnson's February 1764 letter to Gage are reflected in these minutes (The papers of Sir William Johnson by Johnson, William, Sir, 1715-1774. Conference with the Indians [copy] July 9-14-, 1764, Volume 11, Exhibit 4385, p. 280).
33.	Ontario, para 259	European Naval Power Before 1763	Ontario claims that Prof. Benn gave evidence that by the mid-18th century, Indigenous peoples in the Great Lakes region were dependent on European goods, without which they would suffer "a great reduction in their standard of living, even to the point of being unable to avoid starvation and other health and life-threatening challenges."	This quote is from Prof. Benn's report, and was with respect to 1812, not the mid-18th century. His evidence specific to 1763 was that Indigenous nations were partially dependent on gifts and trade and that the failure of the British to provide this was one of the causes of Pondiac's War (Prof. Carl Benn. "Historical Questions Related to Lake Huron and Georgian Bay 1760S-1830S" (2016), Exhibit 4195, p. 33, Evidence of Prof. Carl Benn, Transcript vol 39, August 16, 2019, p. 4515, line 3 to p. 4516, line 12; Transcript vol 40, August 19, 2019, p. 4663, line 20 to p. 4665, line 8).

Row	Location	Topic	Issue	SON Response
				Although there was certainly some dependence on European trade goods, including gunpowder and weapons for hunting, in 1763, Prof. Benn is clear that the level of dependence in 1763 was less than it was in 1812, stating: "[t]he need for trade only increased in the decades between the 1760s and the 1810s." (Prof. Carl Benn, "Historical Questions Related to Lake Huron and Georgian Bay 1760S-1830S" (2016), Exhibit 4195, p. 33). His later statement during cross examination that "mid-18th century to 1815, I think these are fundamentally the same across the region" was a broad and general statement not specific to the question of the extent of dependence of Indigenous nations on European trade goods (Evidence of Prof. Carl Benn, Transcript vol 41, August 19, 2019, p. 4805, lines 4-14).
34.	Ontario, para 268	Seven Years' War	Ontario misstates SON's argument in that it claims SON is saying they participated in the Seven Years' War.	SON does not rely on the Seven Years' War in demonstrating SON's ability to exclude others from SONTL, nor does SON make any claim about SON's participation in the war.
35.	Ontario, para 269	Treaty of Detroit	Ontario has relied on Dr. Hinderaker's evidence for the proposition that in Detroit in 1761, "the British made no promise not to deprive First Nations of their property, and the First Nations leaders did not understand the British to have made any such promises not to deprive them of their lands."	This takes Prof. Hinderaker's testimony out of context. Prof. Hinderaker's testimony on this point was that, while Johnson didn't say that Britain will not or would not deprive any Nation of their just property, Johnson was in effect asking permission to occupy the First Nations' lands by entering into a diplomatic conference with the First Nations, and promising not to impinge further than the First Nations' territories had already been impinged upon. Prof. Hinderaker also noted that the First Nations understood that the British had an intention not to deprive them of their lands both in the present and for the foreseeable future (Evidence of Prof. Eric Hinderaker, Transcript vol 20, June 11, 2019, p. 1805, line 8 to p. 1807, line 12).

Row	Location	Topic	Issue	SON Response
36.	Ontario, para 286	Pondiac's War	Ontario quotes Prof. Hinderaker as saying that "this change in goal from exclusion to controlling the terms of re-entry occurred because the First Nations believed, or knew at the time, that they could not exclude the British".	This quote from Prof. Hinderaker is taken out of context. The full exchange was as follows: *Q: And this change in goal from exclusion to controlling the terms of re-entry occurred because the First Nations believed, or knew at that time, that they could not exclude the British, is that correct?* *A: I think that's a fair statement, yes. I think both First Nations and British, both parties to the war of – to Pondiac'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.* (Evidence of Prof. Eric Hinderaker, Transcript vol 21, June 12, 2019, p. 2041, line 17 to p. 2042, line 3).
37.	Ontario, para 393	Extinguishment of Aboriginal Title	Ontario says Aboriginal title was extinguished by the *International Boundaries Water Treaty Act*.	Extinguishment must be "clear and plain". (SON final argument para 1047 (b)) SON submits this Act was insufficiently clear and plain to "extinguish" Aboriginal title, although it is clear and plain enough to give the public rights to navigate over waters for the purpose of commerce, which prevailed over Aboriginal title to that extent. The Act says nothing whatever about the ownership of the beds of the lakes.
38.	Ontario, Appendix B, para 13	US Law	Ontario asserts of that of the 213 ratified treaties made between the U.S.A. and Native American Peoples from 1800 to 1842, only 12 included cessions of land under water.	Ontario's statement ignores Mr. Chartrand's evidence on cross-examination where he admitted that his analysis of US treaties only considered boundaries explicitly in the middle of a water body. He conceded that, in fact, nearly all US treaties he was aware of have water bodies within their boundaries (Evidence of Mr. Jean-Philippe Chartrand, Transcript vol 78, January 21, 2020, p. 9942, line 8 to p. 9943, line 19).
39.	Ontario, Appendix B, para 21	US Law	Ontario identifies that in the Green Bay Treaty with the Menominee, 1831, the Menominee did not surrender water territory,	Mr. Chartrand agreed that the map on page 152 (PDF 101) of Exhibit 4328 depicted the boundaries of the territory of the Menominee as described in the Treaty with the Menominee, 1831, and that there was water inside those boundaries

Row	Location	Topic	Issue	SON Response
			even though they identified waters as being within their territory.	(Evidence of Mr. Jean-Philippe Chartrand, Transcript vol 77, January 20, 2020, p. 9879, line 3 to p. 9881, line 2). SON submits that this is an example of acknowledgement by the US of the Menominee territory including land underwater. At the very least, the US did not dispute the boundaries set out in the Treaty (Treaty with the Menominee, Exhibit 994).
40.	Ontario, Appendix B, para 45	US Law	Ontario submits that US treaties with Native American Tribes that include boundaries out to the international border were motivated by geopolitical factors not American concerns to extinguish Aboriginal title to the lake beds of the Great Lakes.	Mr. Chartrand stated emphatically on cross-examination that he was unable to find direct evidence from either historical documents, historical literature, or ethnohistorical literature explaining why (for geopolitical reasons or otherwise) the boundaries of US treaties extended up to the international border (Evidence of Mr. Jean-Philippe Chartrand, Transcript vol 77, January 22, 2019, p. 9871, lines 15-25). SON submits, therefore, that any conclusion on the US motivation for entering into these treaties amounts to speculation, which should be rejected. In any case, it is SON's position that why the US entered into the treaties is immaterial. What matters is that it is an example of the common law being able to accommodate the existence of Aboriginal title to the land underwater in the Great Lakes.

APPENDIX 2 - CHART OF MISSTATEMENTS AND CLARIFICATIONS (TREATY CASE)

Row	Location	Topic	Issue	SON Response
1.	Canada, Treaty, paras 15, 192-196	Extent of squatting	Canada claims in paragraph 15 that "During the first ten years following Treaty 45 ½, very few complaints of encroachments were made. The physical distance and uninterrupted wilderness of the area provided the best guarantees against encroachment." Paragraphs 192-196 discuss squatting in more detail.	Canada provides no evidence for the proposition that the Peninsula was sufficiently remote that there was no issue with squatting or timber theft between 1836 and 1846. On the contrary, there is evidence that: ❖ SON complained about white men coming to ask for their lands by 1843 (Letter from Chief Wahbadik, June 10, 1843, Exhibit 1427) ❖ By 1847, SON was sufficiently concerned about the encroachment of white settlers on the Peninsula to request a Declaration detailing their rights on the Peninsula (Petition from the Saugeen Ojibway to Governor General Lord Elgin, March 25, 1847, Exhibit 1655;). ❖ The Crown was sufficiently concerned about the encroachment of white settlers on the Peninsula to issue the 1847 Declaration (Exhibit 1674). ❖ What is now Owen Sound was surveyed beginning in 1837, bringing the official "zone of settlement" to the edge of the Peninsula. Settlers arrived prior to 1840. (Davidson, A New History of the County of Grey, Exhibit 4287, pp. 24-25)
2.	Canada, Treaty, para 99	Treaty 45 ½	Canada writes that "According to Professor McHugh, the phrase "getting the other part secured to them" [in Egerton Ryerson's account of Treaty 45 ½] picked up the terminology of the ongoing debate about Crown grants." Canada is suggesting that only the land that the Saugeen cultivated would be subject to the promise to protect.	Prof. McHugh clarified in cross-examination that the promise to protect was in relation to the Peninsula (Evidence of Paul McHugh, Transcript vol 68, December 10, 2019, p. 8862, lines 7-10).

Row	Location	Topic	Issue	SON Response
3.	Canada, Treaty, para 121	Treaty 45 ½	Canada writes that "the text [of Treaty 45 ½] set out no monetary compensation for the surrender. The Crown addressed this almost immediately".	Monetary compensation was not addressed until four years after the surrender, in 1840. (Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 64-67)
4.	Canada, Treaty, para 142	Treaty 45 ½	Canada writes that "it was key to the Crown's efforts to protect the lands against encroachment that the lands should be cultivated by the Saugeen, as stated in the Treaty itself."	Canada provides no citation to the record or any evidence to support this position.
5.	Canada, Treaty, para 165	Squatting/ Encroachment	Canada writes, "The remoteness of the Treaty 72 lands offered some protection in the years immediately following the Treaty 45 ½ surrender".	Canada has cited to a segment of Prof. Sidney Harring's testimony for this proposition (Evidence of Prof. Sidney Harring, Transcript vol 50, October 4, 2019, pp. 6246-6247). While Prof. Harring does agree with the proposition that remoteness offered some protection in 1843, he goes onto clarify that the problem of squatting had reached the Peninsula by that point, and the Saugeen Ojibway were aware of the issue.
6.	Canada, Treaty, para 172	Demand for lands on the Peninsula	Canada writes, "Professor Harring testified that there was some good land and some bad land [on the Saugeen Peninsula]. He did not regard the Crown officials as dishonest in their mistaken belief that most of the lands were suitable for farming."	Evidence from Prof. Harring relied on by Canada does not state that Crown officials like Anderson and Oliphant were not dishonest in their representations of the land. Prof. Harring noted that Rankin had communicated "pretty accurately" to the government that there was a "lot of good land in the southern half of the Peninsula and much less good land in the northern part of the Peninsula." He noted the government was "overly optimistic" in how far north the government could settle Euro-Canadians (Evidence of Prof. Sidney Harring, Transcript vol 48, October 2, 2019, p. 6019, line 6 to p. 6021, line 2). Prof. Harring was not asked, and did not opine, on whether in light of what Rankin told Crown officials, it was dishonest of Crown officials like Oliphant and Anderson to suggest to SON that demand for the entire Peninsula was overwhelming.

Row	Location	Topic	Issue	SON Response
7.	Canada, Treaty, para 198	Measures to address encroachment	Canada writes, "Prior to 1839, there was no colonial legislation safeguarding Indian Lands from encroachment. While actions could be brought in trespass or prosecutions for disturbance of the peace, these proceedings were inefficient and expensive"	Canada cites no evidence to support its claims about the cost and inefficiency of these proceedings.
8.	Canada, Treaty, para 224-225	Measures to address encroachment	Canada questions the applicability of the *An Act for the protection of the lands of the Crown in this Province from trespass and injury* (the 1839 Act) to those lands that have been ceded to the Crown and created as reserves prior to the passage of a statute in 1849 (*An Act to explain and Amend an Act of Parliament of the late Province of Upper Canada, passed in the second year of Her Majesty's Reign, intituled "An Act for the protection of the lands of the Crown in the Province from trespass and injury, and to make further provision for that purpose,* 12 Vict c 9).	The reserve on the Peninsula created by Treaty 45 ½ was not ceded to the government and then created as a reserve; it was unceded Saugeen land which was protected as a reserve by way of Treaty 45 ½. (Note, for instance, the difference in wording between Treaty 45 and Treaty 45 ½, as set out in Exhibit 1128). To the extent that there was a concern affecting the applicability of the 1839 Act to lands that were ceded to the Crown and then created as reserves, this is irrelevant in respect of its application to the Peninsula.
9.	Canada, Treaty, para 343	Measures to address encroachment	Canada writes that "On October 15, 1852, McLean wrote asking for instructions on how to deal with squatters on the surrendered strip of land."	The letter is at Exhibit 1952. There is nothing in this exhibit to suggest that the lands on which SON complained of timber thieves were on the surrendered half-mile strip tract rather than the Peninsula.

Row	Location	Topic	Issue	SON Response
10.	Canada, Treaty, para 376	Measures to address encroachment	Canada writes: "As noted above, there may well be unreported decisions which were not identified by any of the experts. Unless a trespasser appealed their eviction by a Commissioner, there would be no reported case."	Canada cites no expert or other evidence in support of the view that only appealed cases would be reported. This paragraph ignores the fact that there is other evidence that shows law enforcement activities. For example, Exhibit 4721 is a letter dated November 10, 1854, setting out a list of constables and payments owed to them in request of removal of squatters and trespassers from the Six Nations Reserve. Exhibit 4819 is a record of the Quarter Sessions for the County of Grey, dated April 1854, that refers to payment of services for constables carrying out law enforcement activities (see p. 5 of transcript). Exhibit 4821 is record of a list of charges and convictions in Goderich, dated November 1, 1851. In addition, Canada itself at paras. 351-374 details evidence of enforcement actions taken against squatters elsewhere. If there had been similar law enforcement activities *on the Peninsula* in respect of trespass and squatting, it stands to reason that similar evidence would exist.
11.	Canada, Treaty, para 385	Measures to address encroachment	Canada writes, "There are no known instances of squatting or encroachment on the Saugeen Reserve between 1836 and 1854 which were not addressed by Crown Officials."	There is no expert opinion in support of this assertion. SON submits this statement is incorrect. The record details numerous instances of squatting and timber theft on the Peninsula where there is no evidence of any action by Crown officials. For example, in August 1854, Anderson recorded a speech to SON in which he noted that "You complain that the whites not only cut and take timber from your land but are commencing to settle on it." There is no evidence that these complaints were met with action by the Crown (see paras 629-632, 728, 732-736 of SON's Final Argument).
12.	Canada, Treaty, paras 390-396	Measures to address encroachment	Canada is discussing actions taken against the squatter Withers. At para 396, Canada writes that "it appears that at least some of the Withers' depredations were in proximity to the Saugeen Tract".	It is not clear what Canada means by "in proximity." The evidence in this trial was that Withers' activities were south of the Peninsula, on Crown lands near Kincardine (see para 776(b) of SON's Final Argument).

Row	Location	Topic	Issue	SON Response
13.	Canada, Treaty, para 421	Capacity to address encroachment	Canada says that Grey became an independent county in 1854 and Bruce became an independent county only after Treaty 72. "Thus while they were ostensibly within the jurisdiction of local officials, as a pragmatic matter, such officers were unlikely to be available to patrol the boundary." Canada cites to an ASF at Exhibit 3929 at 2.	This cite (Exhibit 3929 at 2) does not say anything about whether the fact that Bruce was part of the United Counties prior to 1856 had any impact on law enforcement. It does not place the creation of Grey as an independent county in 1854. It does not say anything about the availability of local officials to patrol the boundary or undertake other law enforcement functions in light of the structure of the counties.
14.	Canada, Treaty, para 422	Capacity to address encroachment	Canada says "The first Sheriff of Grey County was George Snider who commenced his duties in July 1854. The County of Grey only included a small portion of the overall lands surrendered in Treaty 72." Canada cites to an ASF at Exhibit 3929 at 2.	This cite (Exhibit 3929 at 2) does not say that George Snider was the first Sheriff in Grey. There is also nothing at this cite to indicate the earlier counties of which the Peninsula was a part did not have Sheriffs.
15.	Canada, Treaty, para 430	Capacity to address encroachment	Canada writes: "While Professor Harring opined that squatters would be easily located and identified, this is not consistent with the evidence. Travel through the Peninsula by non-Indigenous persons was difficult."	Canada's claim that Prof. Harring's view is inconsistent with the evidence is not correct (see para. 747 of SON's Final Argument). For example, Prof. McCalla testified as follows: *Question: So if the government was interested in finding a squatter or timber thief on the land, the Crown officials, Commissioners, magistrates, constables operating near the area where they are, let's say the peninsula, would be using the same roads and trails as everyone else to get around; correct?* *Answer: Yes.* *Question: And the same roads and trails relied on by squatters and by folks taking timber?*

Row	Location	Topic	Issue	SON Response
				Answer: Presumably by anybody who is there legally or illegally is probably using the same tracks and roads. *Question: So they wouldn't be very difficult to find, and so you would agree with me that they could be found by a Crown official, Commissioner, magistrate or constable for the purpose, of, say, receiving a notice to vacate or perhaps to be arrested?* *Answer: Yes – well, yes is a good answer.* Evidence of Prof. Douglas McCalla, Transcript vol 58, October 31, 2019, p. 7565, line 19 to p. 7566 line 14
16.	Canada, Treaty, para 433	Capacity to address encroachment	Canada writes: "This example, however [of sending special constables to Manitoulin Island in 1862] is of limited utility. Being confined to a single incident, it sheds no light on the availability of the police to provide ongoing protection on the Peninsula. By contrast, on the Peninsula officers from Toronto, Collingwood, and Barrie, could not be recruited on a permanent basis to patrol the boundary."	Canada has provided no evidence that such constables could not be recruited on a more permanent basis. In any event, it is not clear that a permanent force would be required to address squatting on the Peninsula as opposed to more targeted, short-term missions to arrest and remove squatters. Tyler Wentzell clarified in his cross-examination that he was directed to assume a "cordon sanitaire" was required at the base of the Peninsula. (Evidence of Mr. Tyler Wentzell, Transcript vol 64, November 22, 2019, p. 8374, line 21 to p. 8375, line 11; p. 8377, lines 2-10). No expert independently opined on the necessity of a permanent patrol boundary or a cordon sanitaire to address the arrest and removal of squatters on the Peninsula.
17.	Canada, Treaty, para 465	Capacity to address encroachment	Canada writes, "The Sheriff of Grey County was in fact George Snider, not Schneider. The County of Grey had only been created as part of the United Counties of	This cite does not say anything about the correct spelling of Snider/Schneider.

Row	Location	Topic	Issue	SON Response
			Wellington, Waterloo, and Grey in August 1851." Canada cites to an ASF at Exhibit 3929 at Schedule 2.	
18.	Canada, Treaty, para 466	Capacity to address encroachment	Canada writes, "The minutes of the Quarterly General Sessions for the County of Grey for June 1854 indicate that George Snider did not commence his duties as the first Sheriff of Grey County until July 1854, only two months prior to the surrender of the Peninsula."	Canada cites to Exhibit 4820 (Quarter Session for the County of Grey-June/July 1854 Session). It states, at p. 2 of the transcript: "George Snider Esq Sheriff Co. Grey presented his covenant for the performance of his official duties pursuant to the act 3rd Wm. 4th Chap 8 -for approval". This does not establish when Snider first began acting as Sheriff in Grey County.
19.	Canada, Treaty, para 469	Measures to address encroachment	Canada writes, "Although the letter to Sheriff Snider included an appeal for assistance in ejecting squatters, it was more in the character of notice to the Sheriff that the nature of the land had changed from lands reserved for Indians (pursuant to the 1850 Act, applying to the Peninsula by virtue of the 1851 Proclamation) to lands surrendered to the Crown for sale (to which the 1849 Act applied)."	There is no expert evidence in support of this interpretation of the letter to Sheriff Snider/Schneider
20.	Canada, Treaty, para 471	Measures to address encroachment	Canada writes, "Oliphant's notice to the Sheriff did not vest the Sheriff with the legal authority to take action pursuant to a warrant. Oliphant himself was not a Commissioner."	As Superintendent General of Indian Affairs, Oliphant was a Justice of the Peace under s. 9 of the 1850 Act (Exhibit 1784, s. 9). In this role, he had the capacity to issue warrants to Sheriff directly (Magistrates Manual, 1851, Exhibit 4408, p. 405). Even if the notice did not vest the Sheriff with the authority to make arrests, Oliphant had the power to do this.

Row	Location	Topic	Issue	SON Response
21.	Canada, Treaty, para 517	Half-Mile Strip	Canada writes, regarding the opening of the road on the half-mile strip: "By the time of Treaty 72, the road was opened." Canada cites to Exhibit 2160, Report of L. Oliphant to Lord Elgin, November 3, 1854, p. 5 [PDF image 4].	Canada's cite does not say the road was opened prior to Treaty 72. It references a "trail" between the two reserves, which is in SON's submission likely a reference to the pre-existing Indian portage/trail between the two communities, not to a completed road. This "Indian trail" is referenced in the discussion of Oliphant's journey in October 1854 in Dr. Gwen Reimer's Report "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703 at p. 162, and is shown on the planned sketch of the proposed road prepared by Charles Rankin on June 30, 1851 (Exhibit 1861). According to Norman Robertson, in "The History of the County of Bruce," Exhibit 4286, p. 6, the road on the half-mile strip was not opened until 1866.
22.	Canada, Treaty, paras 565- 581; Ontario, paras 766-768, 770-772	Anderson's threats	Canada and Ontario take the position that Anderson threatened SON only after they had made their counter-proposal.	In his August 16, 1854 Report to Lord Elgin (Exhibit 2175, p. 12), Anderson wrote: *"They at first declared they would not sell an inch, but having pointed out to them the folly of their retaining so large a tract of land, from which they were deriving no advantage, the possibility of the whites taking possession of it, without their deriving half the profit they would from the Government".* This passage suggests that SON responded to Anderson's request for a surrender of the Peninsula with a "no" and this prompted Anderson to make his comments that the government would not assist them in protecting their lands from encroachment. According to Anderson's report, after a long discussion, SON "began to waiver" and, after an hour of private deliberation, came back with their counterproposal. Anderson then told them that he "*did not believe their great father would permit them to make an arrangement of this kind, by which they would prevent the sale of the most valuable part of their reserve."* On cross-examination, Dr. Reimer testified as follows:

Row	Location	Topic	Issue	SON Response
				Question: So according to Anderson's report, his statement – his speech prompts the Saugeen Ojibwe to make a counterproposal, correct? *Answer: Well, the counterproposal was in part a response to the speech. Whether it was in response solely to that speech I'm not certain but, yes, we have his speech and then we have the counterproposal, so chronologically, yes, I agree.* Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11903, lines 11-20. At para 771 of its argument, Ontario suggests this testimony was contrary to Dr. Reimer's expert report. Dr. Reimer's report makes no direct statement regarding chronology, in the same fashion as she does in her cross examination (cited above). Dr. Reimer suggests that SON's counterproposal was made after one day and night of deliberation. She then quotes Anderson's speech. See: Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 156-159. However, this suggestion is somewhat inconsistent with Anderson's report (noted above) where he said he spoke to SON about the "folly of their retaining" their land, and that SON requested leave for one hour to discuss amongst themselves, and then returned with the counterproposal. The ASF as Exhibit 3927 (paras 4-9) does not make any claim about whether the speech Anderson gave on August 2, 1854 was before or after SON's counterproposal. SON's counterproposal is found at Exhibit 2105 (Transcript is Exhibit 4796), as an answer to the fifth question that had been put to them by T.G.

Row	Location	Topic	Issue	SON Response
				Anderson. The date below the counterproposal is August 2, 1854 (at p. 126354 of Exhibit 2105, and transcribed at PDF image 3 of Exhibit 4796). Based on the above, SON submits (in line with Dr. Reimer's testimony before this Court) that SON's counterproposal was made *after* Anderson's speech on August 2, 1854.
23.	Canada, Treaty, para 597	Anderson's threats	Canada writes that Oliphant's "very presence was evidence to them [SON] that the Crown intended to seek their consent, not to act unilaterally."	There is no evidence on the record to suggest that this was how SON understood Oliphant's arrival in October 1854.
24.	Canada, Treaty, para 669	Treaty 72 negotiations	Canada writes, "As the Council meeting began at 7pm, there appears to have been some time prior to the Council meeting for discussion among the Saugeen and Nawash."	Canada cites to Oliphant's report in Exhibit 2160 at pp. 4-5. There is no indication in this report (or otherwise on the record) that suggests that there was time for Saugeen and Nawash to discuss Oliphant's proposal amongst themselves prior to the Council meeting began at 7 pm. In fact, Oliphant's report suggests the opposite: *"Shortly after [his interview with Madwayosh] the chiefs of the other bands arrived, and, anxious not to allow them the opportunity of consulting either among themselves or with Europeans, I called a grand council at 7 p.m.…"* (emphasis added) (Exhibit 2175, p. 4)
25.	Canada, Treaty, paras 686, 690, 926, 927	Peter Jacobs	Canada writes, "If the payment [to Jacobs of £50] was intended as a form of "commission", it likely would have been described as such." Canada also argues that the fact the payment was recorded suggests there was nothing underhanded about it.	There is no expert evidence in support of either inference.

Row	Location	Topic	Issue	SON Response
26.	Canada, Treaty, paras 6, 793, 797	Breach alleged	Canada writes at para. 793, "The Plaintiffs' principal argument in this action is that in the course of negotiating the surrender of the Peninsula in Treaty 72 in 1854, the Crown engaged in conduct, including the very asking for a surrender, that breached fiduciary duties owed to the Plaintiffs and breached the Honour of the Crown."	This misstates SON's position. The breaches SON identifies are: 1. The Crown's failure to protect lands from squatting/encroachment; 2. The Crown's bullying/threats to pressure SON to enter Treaty 72; 3. The Crown's lies and misstatements to induce SON to enter Treaty 72. SON is not saying that Treaty 72 was itself a breach of fiduciary duty; rather, it was the *direct and intended consequence* of the three breaches identified above. However, SON does not allege that merely asking for a surrender is a breach of the Crown's fiduciary duty (SON's Final Argument, para 1167) Also, Canada says a treaty itself cannot be a breach of fiduciary duty. SON notes that *Semiahmoo* ruled that a land surrender was a breach of fiduciary duty. *Semiahmoo Indian Band v Canada (AG)*, [1998] 1 FC 3.
27.	Canada, Treaty, para 849	Content of fiduciary duty	Canada writes, "However, as noted above, the sui generis fiduciary duty does not demand a perfect solution, and a failure to deliver a particular result is not a breach of fiduciary obligations. Rather, it requires, loyalty, good faith, full disclosure, and ordinary diligence."	Canada has cited to paragraph 176 of *Williams Lake Indian Band v Canada,* 2018 SCC 4. This is the dissenting judgement.
28.	Canada, Treaty, para 850	Content of fiduciary duty	Canada writes, "The Crown is not required to have exhausted all avenues that can be imagined. To require otherwise would be both highly speculative and coated with the gloss of hindsight."	Canada has cited to paragraph 173 of *Williams Lake Indian Band v Canada,* 2018 SCC4. This is the dissenting judgement. It expressly critiques the majority view on this point.

Row	Location	Topic	Issue	SON Response
29.	Canada, Treaty, para 858	Content of fiduciary duty	Canada says the Crown endeavoured to protect SON's "legal interest" – either land or the proceeds of its sale.	Bond Head promised to protect the land, not the proceeds of its sale. SON submits that the proceeds of sale are not a "legal interest" in land – they are compensation for the loss of a legal interest in land.
30.	Canada, Treaty, para 867, 911; Ontario, para 454	Breach of Fiduciary Duty	Canada and Ontario articulate the breaches SON alleged based on what is set out in its Statement of Claim	Some of the allegations in the Statement of Claim are not being pursued as standalone breaches of the Crown's fiduciary duty. The breaches SON alleges are as set out in the SON's Final Argument at para 1198.
31.	Canada, Treaty, paras 873-875	Anderson's threats	Canada writes: 873. The Plaintiffs were experienced negotiators and well aware that what Anderson was suggesting was contrary to Crown policy. 874. Moreover, the Plaintiffs were familiar with Anderson and his mannerisms and were capable of interpreting this as an idle threat that would not be acted upon by the Crown.	Canada cites no evidence for these propositions.
32.	Canada, Treaty, para 887	Benefits of Treaty	Canada writes, "Both Anderson and Oliphant did have high expectations of the amount of revenue to be achieved by the surrender, which were reasonable at the time of the negotiations."	Canada has cited to T.G. Anderson's address to the Owen Sound and Saugeen Indians, August 2, 1854, Exhibit 2102. This source contains no information on whether Anderson or Oliphant's views on the amount of revenue to be achieved by way of the surrender were "reasonable".

Row	Location	Topic	Issue	SON Response
33.	Canada, Treaty, para 997	Harvesting Rights	Canada writes, "Oliphant would have been aware of the possibility of expressly reserving hunting and fishing rights in the Treaty."	There is no evidence for this proposition.
34.	Ontario, para 337	Chantry Island	Ontario writes that Chantry Island was ceded in 1854.	There is evidence that contradicts the conclusion that Chantry Island was ceded in 1854, including that no Crown officials signed the so-called treaty and subsequent correspondence in 1855 indicating that no record of the surrender existed. Rather, the evidence suggests that Mr. Alexander McNabb made several attempts to secure Chantry Island for himself through a private transaction. See: ❖ Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p.11484, line 19 to p. 11490, line 23 ❖ Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, pp. 79-80 *(discussion on Chantry Island)* ❖ Correspondence log between McNabb, Drysdale and Chesley, March 13, 1854, Exhibit 4751 ❖ Transcript of and letter from Lord Bury to McNabb, March 2, 1855, Exhibit 4752
35.	Ontario, para 551	Royal Proclamation	Ontario challenges Prof. Brownlie's opinion that historical actors understood that they were bound by the principle of consent enshrined in the Royal Proclamation.	Ontario's critique of Prof. Brownlie's opinion is misleading. For example: ❖ Ontario critiques Prof. Brownlie for maintaining his opinion in part on the basis that the Royal Proclamation did not state any "principles". Ontario's cite to a passage of Prof. Brownlie's passage which does not ask whether the Royal Proclamation contains or enshrines any principles but rather, whether it uses the word principle (Evidence of Prof. Jarvis Brownlie, Transcript vol 36, August 13, 2019, p. 3919, lines 21-25) .

Row	Location	Topic	Issue	SON Response
				❖ Ontario suggests that "Bond Head, in August 1836, was not aware of [the Royal Proclamation's] content prior to Treaty 45 and Treaty 45 ½ councils, and Anderson in August 1854 clearly was not of the view that even "assent" was required". Ontario's cite to Prof. Brownlie's evidence does not support this. Prof. Brownlie agreed that Bond Head asked for a copy of the Royal Proclamation after the Treaty 45 ½ council. He was not asked and did not testify as to whether Bond Head was aware of the contents of the Royal Proclamation prior to the council (Evidence of Prof. Jarvis Brownlie, Transcript vol 36, August 13, 2019, p. 3917, line 16 to p. 3918, line 8). ❖ Nor did Prof. Brownlie agree that Anderson believed "assent" was not required for a treaty. Prof. Brownlie maintained his view that the principles of the Royal Proclamation guided government practice, even though Anderson on this occasion argued to depart from the principle of consent (Evidence of Prof. Jarvis Brownlie, Transcript vol 36 August 13, 2019, p. 3914, line 7 to p. 3917, line 5).
36.	Ontario, para 552	Royal Proclamation	Ontario writes, "When Dr. Brownlie reached his opinion [that historical actors understood they were bound by the Royal Proclamation principle of consent], he was applying his present standard to the past."	Ontario has cited to the cross examination of Prof. Brownlie. In the cited portion of his testimony, Prof. Brownlie noted that: ❖ He did not see a difference between the words "assent" and "consent", nor did he accept that by using the word "assent", the authors of the Royal Proclamation signal that they did not intend to capture "consent" (Evidence of Prof. Jarvis Brownlie, Transcript vol 36, August 13, 2019, p. 3913, lines 3-21); ❖ Government practice pursuant to the Royal Proclamation was to require consent from Indigenous parties when seeking a land surrender, even though Anderson did not use the word "consent" or "principle" in his report about his August 1854 meeting with SON (Evidence of Prof. Jarvis Brownlie, Transcript vol 36, August 13, 2019, p. 3915, line 2 to p. 3917, line 15); ❖ The Dorchester Instructions captured the concept of consent to surrenders, though it did not use the word "consent". (Evidence of

Row	Location	Topic	Issue	SON Response
				Prof. Jarvis Brownlie, Transcript vol 36, August 13, 2019, p. 3921, line 2, to p. 3922, line 7). None of the cited passages support the accusation that Prof. Brownlie has engaged in "presentism". They simply reflect his view that pursuant to the Royal Proclamation, government practice in the 19th century was to seek the consent of Indigenous parties for land surrenders. In addition, it is worth noting that Dr. Reimer, an expert called by Ontario, agreed that the Royal Proclamation enshrined a principle of voluntariness to land surrenders from which Crown officials were not entitled to depart (Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 11972, line 3 to p. 11974, line 10).
37.	Ontario, para 607	Treaty 45 ½	Ontario writes that Treaty 45 ½ is "structured as a surrender by SON of all their territory, with a promise by the Crown to protect the land on the Peninsula"	This is not supported by the evidence. The Peninsula was not ceded to the Crown in Treaty 45 ½. In 1846, Anderson suggested that the Peninsula should be ceded to the Crown in trust, in order to encourage other First Nations to settle there (Exhibit 1583). This confirms that the Peninsula had not been ceded to the Crown in 1836.
38.	Ontario, paras 639, 660-667	Capacity to address encroachment	Ontario writes, at para. 639, that "[i]ncreasingly intense competition for land [prior to treaty 72] led to conflict among settlers and strained the fabric of the public order."	The examples of violence and conflict among squatters cited by Ontario are in counties other than Bruce or Grey. The primary reference to violence in Grey and Bruce is in Oliphant's memoir, which a number of experts in this trial agreed was largely unreliable (see para 852 of SON's Final Argument; Prof. Douglas McCalla, "Population Growth and the Search for Land in Upper Canada & Related Questions," Exhibit 4367, pp. 28-32; Canada's Final Argument, Treaty, paras 603-606; Ontario's Final Argument, para 813).

Row	Location	Topic	Issue	SON Response
39.	Ontario, para 644	Capacity to address encroachment	Ontario writes about how, in their view, the so-called "support from SON community members" for squatting "complicates the picture" – first by making it "less clear that the squatter was taking SON's resources without their permission"; and second, by making it less likely that the Crown would know about people on the Peninsula.	Ontario has not cited any evidence for this opinion.
40.	Ontario, para 673	Capacity to address encroachment	Ontario writes, "Policing resources near the Peninsula largely consisted of part-time constables from the local townships". One of the citations for this proposition is to Dr. Gwen Reimer's Report "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703 at p 98.	Counsel for SON attempted to cross-examine Dr. Reimer on the opinions she expressed on policing resources available on the Peninsula at page 98 of Exhibit 4703. Counsel for Ontario objected on the basis that Dr. Reimer was not an expert in law enforcement, and her opinion was confined to reading a census document. (Evidence of Dr. Gwen Reimer, Transcript vol, 92, March 9, 2020, p. 11794, line 13 to p. 11814, line 12)
41.	Ontario, para 703	Capacity to address encroachment	Ontario writes that "The tone of the notice itself reads as if the notice was meant as a warning rather than a description of enforcement actions that Oliphant actually believed could or world occur. It says: "All persons … will be prosecuted and punished" (emphasis added)."	There is no evidentiary support for Ontario's interpretation of the "tone" of the notice. In fact, the use of terms "will be prosecuted" suggest the opposite of what Ontario is arguing: that this notice does indeed reflect what Oliphant believed "would occur."

Row	Location	Topic	Issue	SON Response
42.	Ontario, para 706	Capacity to address encroachment	Ontario writes that "Oliphant's apparent motivations to provide assistance to Rankin and generally inform potential squatters about the manner of sale raise considerable doubt about the extent to which Oliphant thought the Sheriff would in fact be able to eject trespassers summarily."	There is no evidentiary support for this contention.
43.	Ontario, paras 718, 721	Breach of fiduciary duty claimed	Ontario writes that "In short, SON's case is that the colonial land policy itself was a breach of a fiduciary duty the Crown owed SON to prevent encroachment on the Peninsula."	This misstates SON's position. SON does not allege that colonial land policy was, on its own, a breach of the Crown's fiduciary duty. Rather, SON asserts that the failure to prevent and address encroachment on the Peninsula was a breach of the Crown's fiduciary duty. The Crown parties argue that they could not prevent squatting because it was an unstoppable force. It is relevant context to evaluate this claim to know that, while one branch of the Crown did little to stop or prevent encroachments on the Peninsula, other branches adopted policies that actively encouraged that encroachment.
44.	Ontario, para 742	Breach of fiduciary duty claimed	Ontario writes, "SON wishes the Court to find that Crown efforts to encourage immigration to Upper Canada breached a fiduciary duty owed to SON."	This misstates SON's position. SON does not allege that acts to encourage immigration were, on their own, a breach of the Crown's fiduciary duty. Rather, SON asserts that the failure to prevent and address encroachment on the Peninsula was a breach of the Crown's fiduciary duty. The Crown parties argue that they could not prevent squatting because it was an unstoppable force. It is relevant context to evaluate this claim to know that, while one branch of the Crown did little to stop or prevent encroachments on the Peninsula, other branches adopted policies that actively encouraged that encroachment.
45.	Ontario, para 743	Breach of fiduciary duty claimed	Ontario writes that Prof. Brownlie testified that "the Crown had little control over immigration."	This misrepresents Prof. Brownlie's evidence. Prof. Brownlie in fact testified that the Crown "set up" the immigration system to allow immigrants to act as they pleased because the "Crown wanted to increase population and settlement and that was the whole plan" (Evidence of Prof. Jarvis Brownlie, Transcript vol 36, August 13, 2019, p. 3986, lines 11-19).

Row	Location	Topic	Issue	SON Response
46.	Ontario, para 744	Breach of fiduciary duty claimed	Ontario writes that SON "asserts that a settlement colony was itself a breach of a Crown fiduciary duty."	This is a misstatement of SON's position. SON does not assert that the very existence of a settlement colony is a breach of fiduciary duty.
47.	Ontario, para 791	Breach of fiduciary duty claimed	Ontario writes, "In any event, lack of formal notification to Nawash prior to Oliphant's arrival in Saugeen does not constitute a breach of either the Honour of the Crown or a fiduciary duty"	SON is not claiming this is a standalone breach of the Crown's fiduciary duty, or a stain on its honour. Rather, SON alleges that this was part of how the Crown ensured that SON did not have much time to consult amongst themselves about Oliphant's proposal.
48.	Ontario, para 826	Crown interests in entering Treaty 72	Ontario writes, "Dr. Brownlie accepted that there was a potential for violence against members of SON".	This is a misleading characterization of Prof. Brownlie's testimony. He testified as follows: *Question: So I think as you accepted in your testimony, there was some potential for violence against non-Indigenous settlers -- amongst, I'm sorry, non-Indigenous settlers and also the potential for violence against the SON.· Do you agree that there were those potentials?* *Answer: His account refers to violence by squatters against other squatters, and he doesn't mention a concern about violence against the Saugeen Ojibway, but it is not impossible.* (Evidence of Prof. Jarvis Brownlie, Transcript vol 36, August 13, 2019, p. 3990, lines 8-17)
49.	Ontario, para 844	SON's motivations for entering Treaty 72	Ontario asserts that the SON was willing to give 25,000 acres to the Caughnawaga Mohawks, and 6000 acres to the Credit Mississaugas "before 1854". It suggests that the maps at Exhibits 4866 and 4867 "demonstrate the extent of SON's intention by October 1854 to forego	These claims are inconsistent with the evidence given by Dr. Reimer on cross-examination. In particular, Dr. Reimer admitted that she had made an error in her analysis of the documentary record that had led her to conclude the Credit Mississauga tract could be properly described as approximating 6000 acres. In addition, the record canvassed with Dr. Reimer does not support the conclusion that the Caughnawaga tract would be anywhere near 25,000 acres in size. For example, a petition signed by SON in January 1854 suggests that SON was willing to share just 3600 acres with the Caughnawaga.

Row	Location	Topic	Issue	SON Response
			the full use and potential income of those lands."	See Appendix E, Tab 53 to the Plaintiffs' Final Argument, at paras 11-17; Evidence of Dr. Gwen Reimer, Transcript vol 93 March 10, 2020, p. 12078, line 19 to p. 12087, line 25; Letter from Anderson to Vardon, March 30, 1847, Exhibit 4846; Petition to His Excellency William Rowan, by the Ojibwe Tribe of Indians, January 3, 1854, Exhibit 2048; Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p. 12072, line 3 to p. 12074, line 16.
50.	Ontario, paras 845-846	SON's motivations for entering Treaty 72	Ontario makes several assertions about SON's motivations: • "With the information from Oliphant that other First Nations would not be coming to the Peninsula, including the Credit Mississaugas and Caughnawaga Mohawks, SON had less incentive to retain those lands." • "In agreeing to Treaty 72, SON surrendered land that they understood to be valuable for potential European settlers: land opposite the Fishing Islands for a township; Sauble Falls for a mill; and access to Lake Huron on the northern part of Sauble Beach. Since SON retained the islands it was not crucial to them that	These passages, highlighted in bold, have no support in the evidentiary record. It is not clear on what basis Ontario concludes how significant it was to SON to retain or not retain their lands on the Peninsula.

Row	Location	Topic	Issue	SON Response
			they retained these lands." (emphasis added)	
51.	Ontario para 847	SON's motivations for entering Treaty 72	Ontario writes that, "Dr. Brownlie appeared to accept this [that SON's move from rejecting Anderson's proposal to accepting Oliphant's was reasonable] when he said that, in his opinion, surrendering in Treaty 72 was 'a less reasonable response' than not surrendering."	This is a mischaracterization of Prof. Brownlie's evidence. In the passage cited, he testified as follows: *Question: All right, and yes, and you said that that would be a perfectly reasonable response, I take it, so it is a perfectly reasonable response, though, to do what they did do, which is to agree to the surrender in Treaty 72?* *Answer: I -- well, I don't think that they considered it --* *Question: Well, I am not asking you --* *Answer: -- their preference.* *Question: I am not asking –* *Answer: ·It is not as reasonable. It is not as reasonable because --·* *Question: You have given your opinion on what would have been a perfectly reasonable response for them to do to surrender less. You can give your opinion on whether it would also be a reasonable response to do what they did do, which is agree to surrender the peninsula minus the reserves.* *Answer: That is a less reasonable response in that –* *Question: But still reasonable?* *Answer: It was disadvantageous for them.*

Row	Location	Topic	Issue	SON Response
				(Evidence of Prof. Jarvis Brownlie, Transcript vol 38, August 15, 2019, p. 4328, line 22 to p. 4329, line 19)
52.	Ontario, para 1044	Laches facts	Ontario writes that "Dr. Brownlie also testified that SON made efforts to 'try to protect their land and their waters' after Treaty 72 was signed, including exercising harvesting rights, complaining to government, and engaging with the specific claims process and other litigation. Such testimony is inconsistent with his other evidence that SON was prevented from doing so."	SON submits there is no inconsistency. That SON did the best they could to assert their rights in the face of considerable barriers does not mean that these barriers did not exist, nor that they did not have a serious impact on SON's ability to bring this claim.
53.	Ontario, para 1047	Laches Facts	Ontario claims that Dr. Brownlie did not cite any evidence for his opinion that SON did not know that the ban on hiring lawyers came to an end in 1951.	Prof. Brownlie in fact referred to SON's oral history in reaching this opinion: see Evidence of Prof. Jarvis Brownlie, Transcript vol 31, July 23, 2019, p. 3281, line 13 to p. 3285, line 5; see also SON Reply Argument at para. 112.