

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

**THE CHIPPEWAS OF SAUGEEN FIRST NATION, and
THE CHIPPEWAS OF NAWASH FIRST NATION**

Plaintiffs

- and -

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

Court File No. 03-CV-261134CM1

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THE CHIPPEWAS OF SAUGEEN FIRST NATION**

Plaintiffs

- and -

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

Defendants

OPENING STATEMENT OF THE PLAINTIFFS

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INTRODUCTION

1. There are two actions before this Court. One is an action for Aboriginal title. The Plaintiffs seek recognition of their historic and continuing connection to their territory, which in this case, is their water territory. This connection to the water relates to their economy, their way of life, their culture, and their spirituality.
2. The second action is based on a promise made by the Crown at Treaty 45 ½ in 1836 to protect the Plaintiffs' lands forever. The Plaintiffs say this promise was breached leading up to and during the negotiations of a Treaty 72 in 1854, which had the result of taking much of their remaining territory from them. We say that 18 years is a short "forever".
3. In addition, the Plaintiffs seek an order clarifying that Treaty 72 did not extinguish any harvesting rights they had before that treaty.

FACTUAL BACKGROUND

4. The Saugeen Ojibway Nation ("SON") is made up of two First Nations (the Plaintiffs): the Chippewas of Nawash Unceded First Nation and the Chippewas of Saugeen First Nation. Though the two are now distinct First Nations, they share the same history and ancestry. They are, in other words, a single people. They also share lands and resources throughout their territory – the Saugeen Ojibway Nation Traditional Lands, or "SONTL". (See map at appendix 1)
5. SON people are Anishinaabe, part of the larger Anishinaabek nation. They say they have occupied and had a relationship with SONTL for thousands of years. The issues before this Court are about the relationship – historical and continued – that SON has to these lands and waters. To them, permanently leaving their territory "would mean the same as death". In addition, they have a strong moral obligation to care for the graves of their ancestors, so leaving permanently would also be immoral to them.

6. SON asserts that its traditional territory, or SONTL, consists of the Saugeen (Bruce) Peninsula, about 1.5 million acres of land to the south of it, stretching from Goderich to Collingwood, and the portions of Lake Huron and Georgian Bay offshore of these lands.

7. SON traditional knowledge holders say that this has been their territory forever.

8. The SON was, and still is, a fishing people. Fishing was central to their traditional economy and way of life. Indeed, in *R v Jones* (1993), 14 OR (3d) 421, the Ontario Court (Provincial Division) recognized that SON has an Aboriginal commercial fishing right.

9. The water was and is central to SON's sense of territory, and indeed to their traditional spiritual beliefs. SON members feel a strong moral obligation to care for the water. The water is as important to them, if not more important, than their dry land territory.

10. Among the Anishinaabe, local land use decisions were made at the local level, and Anishinaabe customary law provided procedures for seeking permission to be present in each other's territories. Such permission was given routinely to friendly or allied Anishinaabe persons.

11. When faced with an external threat, however, Anishinaabe groups co-operated to deal with such threat. Before European contact, and for over a century thereafter, SONTL was surrounded by the territories of other allied Anishinaabe people. There will be evidence that the SON, together with their allies, collectively controlled all the access points to Lake Huron/Georgian Bay. It was like their "gated community".

12. The first European to reach Georgian Bay was Champlain, who arrived in 1615. He was met, at the mouth of the French River, by 300 Anishinaabe warriors from all around Georgian Bay. Once Champlain established a diplomatic and trading relationship with the Anishinaabek, he was permitted to continue.

13. In 1648, the Haudenosaunee, an Indigenous people whose homeland was south of Lake Ontario, embarked on military adventures far to the north of their homeland, perhaps going as far as James Bay. They completely dispersed the Huron and Petun who were living near Georgian Bay. It is a matter of dispute to what extent, and for exactly how long, the Anishinaabek in the SONTL were displaced.

14. However, by 1701 at the latest, the Anishinaabek were back in SONTL, having (we say) driven the Haudenosaunee back to the south of Lake Ontario.

15. By 1760, the British had conquered the French in northern North America, and began to move into Lake Huron/Georgian Bay for the first time. They were met in 1761 by Chief Minweweh of the Ojibwas of Mackinac Island who told them:

Englishman, although you have conquered the French, you have not yet conquered us! We are not your slaves. These lakes, these woods and mountains, were left to us by our ancestors. They are our inheritance: and we will part with them to none.

16. The British related to the Anishinaabek in significantly different ways than had the French. The Anishinaabek took offence to this, and, as a result, in 1763, an alliance led by Chief Pontiac besieged or captured numerous British forts, and effectively, for the summer of 1763, kept the British out of Lake Huron/Georgian Bay. In 1763, the British were not in the SONTL.

17. The actions of the Aboriginal alliance under Pontiac alarmed the British, who then enacted the Royal Proclamation of 1763, providing, among other things, for the protection of Indigenous lands.

18. Peaceful relations between the British and the Anishinaabek were restored in 1764 at Niagara, at councils attended by about 2000 Aboriginal people. At that point, (we say) the Anishinaabek agreed to the British re-entering Lake Huron/Georgian Bay, in return for promises of alliance, trade and protection of lands.

19. We also say that for the next 50 years, the British relied on Anishinaabe military and navigational assistance in order to be able to sustain a British presence in Lake Huron/Georgian Bay.

20. It was not until the 1830s that Europeans began to enter the SONTL for purposes beyond trade or mission activity. When European fishermen first entered the SONTL, they leased fisheries from the SON.

21. By 1836, European farmer settlers were beginning to enter the SONTL and the Crown told SON that they could not prevent these settlers from encroaching on SON lands. Therefore, at Treaty 45 ½, the Crown suggested that SON cede their lands south of Owen Sound – approximately 1.5 million acres of rich farm land – to make way for settlement. In exchange, SON received a promise. The Crown made a promise to protect a smaller proportion of their territory – the lands north of Owen Sound on the Saugeen (Bruce) Peninsula (“the Peninsula”) – which the Crown engaged “for ever to protect for you from the encroachments of the whites”.

22. Settlers, however, were soon encroaching on the Peninsula. Although it took some measures “on paper”, there will be evidence that the Crown generally condoned squatting, and even acted in some ways that encouraged it.

23. In 1854, just 18 years after the Crown had promised to protect SON’s lands “for ever”, the Crown again said that they were unable to prevent settlers squatting on SON’s lands, and used SON’s fear of this to, in the Crown representative’s words, “wring from [SON] some assent [to the Treaty] however reluctant”.

24. The result of this was Treaty 72, which ceded most of the Peninsula, leaving only some small reserves.

25. The **day after** Treaty 72, the Crown did what it could have done – and should have done – before breaking its promise: it took steps to protect the lands on the Peninsula. The Crown

negotiator instructed the sheriff to take steps to keep squatters off the Peninsula – something the Crown had said was impossible just one day before.

26. Further, much of the land on the Peninsula was rocky and unsuitable for farming, and the Crown knew this at the time. Demand for the land did not prove to be as high as the Crown had stated, and the SON had feared. **Seventeen years** after the treaty, almost half the Treaty 72 land remained unsold. It was **50 years** before the proportion of unsold land dropped below 3%.

27. SON entered various other treaties dealing with much smaller parcels of land than Treaty 45 ½ and Treaty 72, and dealing with various islands surrounding the Peninsula (see map at Appendix 1). None of these treaties included any part of the beds of Lake Huron or Georgian Bay.

28. By contrast, Aboriginal treaties with US tribes just on the other side of the Great Lakes dealt with territory right up to the middle of the lakes.

ISSUES

29. Based on this history, SON has three claims before this Court.

30. First, SON claims Aboriginal title to the parts of SONTL that we refer to as the Saugeen Ojibway Nation Unceded Traditional Lands – or “SONUTL”. These are the lands that were never subject to any treaty. These lands are covered by the waters of Lake Huron and Georgian Bay. What is required to prove is that SON exclusively occupied the lands in question at the assertion of British sovereignty (1763). In the title claim, SON seeks a declaration of Aboriginal title over the SONUTL. (see map at Appendix 1)

31. Behind the issue of Aboriginal title lies the question of how this relates to the public right of navigation. This is a question of law, and will be dealt with in final argument. SON’s position is that neither Aboriginal title nor the public right of navigation are absolute rights. They can be reconciled, and have been reconciled in other jurisdictions, just as other exclusive

rights such as fee simple ownership to the beds of navigable waters can co-exist with the public right of navigation.

32. Second, SON claims that the Crown breached its fiduciary duty to SON to protect and preserve their territory on the Peninsula. This claim is about the importance of promises. Treaty 72 was the direct result of the Crown breaking its promise to SON.

33. As noted, in 1836, the Crown promised “for ever to protect [the Peninsula] for [SON] from the encroachments of the whites”. We say that this constitutes a fiduciary duty. (see map at Appendix 1).

34. The Crown breached this duty by failing to protect the Peninsula from squatters, by threatening to take the Peninsula without SON’s consent, as well as by saying to SON that there was nothing that could be done to stop the squatters and that surrender was their only option, when, we say, this was not the case.

35. In this regard, SON seeks a declaration that the Crown breached its fiduciary duty to the SON and stained the Honour of the Crown. SON seeks a constructive trust over the lands that were lost in Treaty 72 as a direct result of the Crown’s breaches of its fiduciary duty, that are not in the hands of a *bona fide* purchaser for value without notice, or are in the hands of the Crown. SON also seeks compensation for lands that cannot be made subject to a constructive trust, and compensation for loss of use of the lands subject to Treaty 72 from 1854 to the present.

36. Third and finally, the SON claims that SON’s harvesting rights were not extinguished by Treaty 72. The harvesting rights claim is about what the parties truly intended when Treaty 72 was concluded. Hunting, fishing and other harvesting were so integral to SON’s economy and to their sense of themselves as a people that it is culturally unthinkable that SON would have intended to surrender these rights. In addition, it was in the Crown’s interests that SON continue to support themselves, which they could not have done when Treaty 72 was concluded without traditional harvesting. SON seeks a declaration that Treaty 72 did not extinguish SON’s

harvesting rights, or, in the alternative, rectification of the treaty text to reflect the shared intention that harvesting rights continue after the treaty.

37. In this case, Canada and Ontario rely on laches, and Ontario relies on limitations as well. SON will argue that none of their claims are barred by limitations or laches, based on SON not having the practical capacity to launch litigation such as this substantially before these present legal actions were launched. Of particular note is the dominating role played by Indian agents under the *Indian Act*. In fact, it was **illegal** under the *Indian Act* to raise funds to prosecute Indian claims for decades in the 20th century. Further, the state of the law was such that the Treaty 72 claim based on fiduciary duty could not reasonably have been imaginable before the decision of the Supreme Court in *Guerin* in 1984, and the nature, consequences, and requirements for proof of Aboriginal title were unknown before the decision of the Supreme Court in *Delgamuukw* in 1997.

38. The matters that are in issue can be sharpened by noting what is not in issue:

- (a) In neither the Aboriginal title claim nor the Treaty 72 claim are lands claimed which are in the hands of *bona fide* purchasers for value of the legal estate without notice.
- (b) No remedies relating to jurisdiction are being sought. Reference to Anishinaabe customary law will be made, for the purpose of showing the Aboriginal perspective, and as evidence of occupation, both of which purposes have been approved by the Supreme Court of Canada.
- (c) No claims about whether or not the terms of Treaty 72 were fulfilled properly is being made. Indeed, claims in litigation to that effect have been stayed pending the outcome of this litigation.

- (d) An accounting of revenues derived by Canada and Ontario from lands in the Aboriginal title claim area (SONUTL) was pleaded (Aboriginal title action Statement of Claim, paragraph 1(d)), but is not being pursued.
- (e) Relief was pleaded in the Treaty 72 action on the basis that lakes and shores had not been included in the scope of Treaty 72 (the “Boundary Rectification Claim”). The belief of SON corresponding to this remains part of the evidence, and it will factor into the constructive trust remedy requested for breach of fiduciary duty. However, the Boundary Rectification Claim is not being pursued as a separate and independent claim as it was pleaded in paragraph 1 of the Treaty 72 action Statement of Claim.

39. Also of note is that there are matters deferred to later phases of this litigation. The matters of cross-claims, of compensation, and of the availability of a constructive trust for lands other than seven specific parcels of land have been deferred to a Phase 2. The availability of a constructive trust for seven specific parcels of land is to be heard in Phase 1b as “test cases”.

40. The key issues before the Court are:

- Issue 1 – Was there a local group of Anishinaabe people, to which the Plaintiffs are the successor, who exclusively occupied those portions of Lake Huron and Georgian Bay which are included in the area claimed at the time of assertion of British sovereignty (1763)?
- Issue 2 – Is Canadian law able to recognize Aboriginal title to the beds of navigable waters?
- Issue 3 – Did the Crown have a fiduciary duty to protect and respect SON’s rights over the Peninsula by reason of an undertaking made at Treaty 45 ½ in 1836 to “for ever protect [the Peninsula] for you from the encroachments of the whites”?

Issue 4 – Did the Crown breach this duty by failing to protect the Peninsula, and indeed by falsely stating that this was impossible and using that statement as leverage to “wring from” (in the words of the Crown negotiator) SON a surrender of most of the Peninsula at Treaty 72 in 1854?

Issue 5 – Did these events in 1854 stain the honour of the Crown?

Issue 6 – Did Treaty 72 extinguish any traditional harvesting rights that SON may have had prior to 1854?

Issue 7 – (In phase 1b and 2) is a constructive trust on Crown lands available to remedy the above breach of fiduciary duty?

Issue 8 – (In Phase 2) how much compensation should be awarded as an additional remedy?

Issue 9 – Are any of the above claims or remedies barred by limitations or laches?

CHARACTER OF THE EVIDENCE

41. SON seeks to prove its claims by a blend of traditional knowledge evidence, documentary evidence, and expert evidence from academic disciplines such as anthropology, archaeology, linguistics, sociology, geology, history, and law. Appendix 2 sets out the witnesses SON intends to call, what their discipline is, and the general topic of their evidence. How this evidence fits into the issues in SON’s theory of the case is set out below.

42. Especially concerning Aboriginal title, we will be presenting evidence from widely varying sources and perspectives. The full picture can only be assessed by considering the totality of the evidence and how it inter-relates. Considering and weighing each piece of evidence in isolation, or even considering and weighing each class of evidence separately could lead to disregarding evidence that may not be sufficient on its own, but could combine with other evidence to support findings of fact.

43. “Traditional knowledge” is unlike the kind of evidence Courts usually hear. We will see that the Supreme Court of Canada has mandated special principles about how such evidence is to be received and considered.

44. One point to note is that the Anishinaabe worldview is very different from the European worldview. The European concept of “property” does not track well into Anishinaabe thought. Nonetheless, when one examines how Anishinaabe people made decisions about their territory, and in particular how they related to other people entering their territory from the outside, it begins to approximate the rights European legal thought would attribute to an owner of property.

45. As the Court will hear, in the Anishinaabe worldview, humans have equal standing with a wide variety of “other-than-human persons” in the form of animals, forces of nature, and what Westerners would call “supernatural” beings. Because other-than-human persons are much more powerful, humans rely on their support and good-will. This contrast provides some insight into why SON views itself as having a relationship with its lands and waters rather than ownership, and that building relationships with the natural world, including the earth, is fundamental to SON’s worldview.

ISSUE 1 – EXCLUSIVE OCCUPATION AT 1763

46. The onus is on SON to prove that it exclusively occupied the SONUTL at the assertion of British sovereignty. The parties have agreed on February 10, 1763 as the date Britain asserted sovereignty. This was the day that Britain and France signed the Treaty of Paris ending the Seven Years’ War. At the time Britain was absent from the SONUTL except for, at most, a few fur traders.

47. SON intends to call evidence in respect of (A) its relationship with its lands and waters; (B) its use and occupation of SONTL in 1763; (C) the Great Lakes’ First Nations’ assertion of their territorial rights from the 17th to 19th centuries; and (D) its response to the Crowns’ ‘frozen rights-holder’ argument. SON intends to lead evidence through two broad categories of witnesses:

- (i) **Traditional knowledge holders** and **community witnesses** will describe SON's stewardship of its lands and waters. They include witnesses from SON, such as Mr. Karl Keeshig and Mr. Vernon Roote, and include commission (Rule 36) evidence from witnesses from SON that have passed away. Names of some of these witnesses are listed alongside descriptions of evidence. These lists are not meant to be exhaustive and other witnesses (listed in Appendix 2) not specifically named below may also provide evidence on these matters;

- (ii) **Western experts** in history, ethnohistory, archaeology and linguistics will describe the evidence of SON's use and occupation of the claim area around 1763, as well as the Great Lakes Anishinaabek efforts to assert their territorial rights from the 17th to 19th centuries, most notably in Pontiac's War, which broke out just two months after the assertion of British sovereignty. These experts include Dr. Paul Driben, Dr. Ronald Williamson, Dr. Carl Benn, Dr. Eric Hinderaker, and Dr. Rand Valentine.

(a) Evidence of SON's relationship with its lands and waters

48. Mr. Vernon Roote, Mr. Karl Keeshig, Mr. Marshall Nadjiwon and Mr. Fred Jones will describe how SON's relationship with its waters fits into the Anishinaabe worldview. Their evidence will include:

- (a) The relationship between water and all of creation;

- (b) The interconnectedness of its lands and waters;

- (c) The inseparability of the "spiritual" and "secular" aspects of its relationship with the waters; and

- (d) The uniqueness and irreplaceability of SON's relationship with the specific waters in the SONUTL.

49. Mr. Vernon Roote, Mr. Karl Keeshig, Ms. Lenore Keeshig, and Mr. Donald Keeshig will describe SON's deep and spiritual relationship with its lands and waters. Their evidence will include:
- (a) The story of the creation of the Anishinaabek and Turtle Island, and the insights it provides into the Anishinaabek relationship with the natural world;
 - (b) Stories showing how SON relates to events as long ago as 9000 Before Present, such as
 - (i) A story of a great flood caused by Waynaboozhoo's quest to hunt a Great Beaver across the Great Lakes,
 - (ii) A story of how Waynaboozhoo's tears over the death of his nephew made the waters of Georgian Bay salty,
 - (iii) A story describing a time when the Peninsula and Manitoulin Island were connected by land, and
 - (iv) A story of a great migration carrying Midewin teachings across Canada, and how it stopped at spiritual sites in SONTL: Nochemowenaning Bay and Chief's Bluff;
 - (c) Stories of how the Anishinaabek relate to other spirited beings, particularly those associated with water, including:
 - (i) How every body of water has a name and a spirit; and
 - (ii) Specific water spirits and their relationship with the Anishinaabek and women in particular.

50. Mr. Vernon Roote, Mr. Karl Keeshig, Mr. Randall Kahgee, Mr. Frank Shawbedees, Mr. Paul Nadjiwan, Dr. Ron Williamson and Dr. Paul Driben will describe how First Nations governed their territories. Their evidence will touch on:

- (a) The division of territorial jurisdiction among local groups;
- (b) Communicating with and obtaining guidance from the Creator and other spirited beings on matters involving SON's waters;
- (c) Decision-making procedures to permit or prohibit use and access by other groups;
- (d) Protocols for obtaining permission to enter onto and use another group's territory, including
 - (i) What these protocols entailed, such as notification, gift-giving and/or reaching agreement; and
 - (ii) How these protocols differed depending on whether the group seeking permission was Anishinaabek, a non-Anishinaabek First Nation, a neighbour, or Europeans;
- (e) The enforcement of territorial boundaries and protocols against trespassing or encroaching individuals or groups; and
- (f) The role of the Three Fires Confederacy in securing First Nations' occupation of their territories and in decision-making on regional matters, including governance of lands and waters.

51. Mr. Vernon Roote, Mr. Karl Keeshig, Mr. Marshall Nadjiwon, and Ms. Joanne Keeshig will describe SON's responsibilities to its waters. Their evidence will include:

- (a) Stories explaining how the gift of life from the Creator comes with responsibilities to the rest of creation;
 - (b) How to treat the waters with respect through ceremony, caretaking and protection;
 - (c) Protocols to obtain spirit beings' permission and assistance to use waters, such as the White Dog Ceremony, and for giving thanks to them such as offering tobacco;
 - (d) Sharing benefits provided by the waters; and
 - (e) Women's responsibilities to water and what they entail.
52. Mr. Vernon Roote, Mr. Karl Keeshig, Mr. Marshall Nadjiwon, Mr. Jay "Tattoo" Jones, Mr. Paul Jones, Ms. Joanne Keeshig, Mr. Paul Nadjiwan and Mr. Randall Kahgee will describe the ways that SON's historical relationship with its lands and waters have continued into the present. Their evidence will include:
- (a) The continuing role of the waters in SON's way of life, as a source of sustenance, spirituality and belonging;
 - (b) Contemporary spiritual practices surrounding the waters, such as offering tobacco before fishing and other ceremonies;
 - (c) How SON carries out its responsibilities to the waters in the present day;
 - (d) The contemporary exercise of territorial governance, such as:
 - (i) Protocols for accessing and using other First Nation's territories, including treaties and other agreements; and

- (ii) The *Maawn-Ji-Giig-Do-Yaang* (“Gathering to Speak as One”) *Declaration*, which addresses the territorial overlap between SON and neighbouring First Nations to the south.

(b) The historical evidence of SON’s use and occupation of SONTL around 1763

- 53. The archaeological record shows that an Odawa group resided on the Peninsula continuously from at least the 8th century AD. Dr. Ronald Williamson will describe this group’s distinctive features, including:
 - (a) Ceramic styles;
 - (b) The types of chert (a stone similar to flint) used to make tools;
 - (c) Bead styles; and
 - (d) Burial practices, such as the burial of dogs and other small mammals, and the burial of humans in rock crevices or shelters.
- 54. Samuel de Champlain was the first European to make contact with this group, which he did in 1616. He named them the “Cheveux Relevés” because of their unique raised hairstyle.
- 55. Around 1650 the Haudenosaunee¹ briefly displaced at least some of the Cheveux Relevés from the Peninsula. However, by the late 17th century the evidence indicates that the Anishinaabek re-settled SONTL no later than 1700. It includes:
 - (a) Evidence that Anishinaabek returned to Manitoulin Island and surrounding areas later in the 17th century, and may have resumed seasonal use of SONTL;
 - (b) An axe dating to 1700 was found at Boat Lake near the base of the Peninsula;

¹ Also known as the “Iroquois” and, depending on the date, the “Five Nations” or “Six Nations.”

- (c) A French map from 1725 identified a “village of savages” on the east shore of the Peninsula; and
 - (d) An English survey of the Peninsula from 1788 identified Indigenous settlements and islands used for fishing.
56. As described above, SON has a relationship with the specific lands and waters of SONTL, and not lands and waters in general. Western experts, traditional knowledge holders and community witnesses will explain why it was most likely the Odawa group displaced by the Haudenosaunee that returned to SONTL, as opposed to some other Anishinaabe group, as follows:
- (a) Mr. Paul Nadjiwan will demonstrate that the Anishinaabemowin names for certain places in SON’s territory are unrelated to modern English names;
 - (b) Dr. Rand Valentine, a linguist, will testify that SON’s dialect of Anishinaabemowin indicates continuous occupation of SONTL for hundreds of years;
 - (c) Mr. Vernon Roote, Mr. Karl Keeshig, Mr. Donald Keeshig, Mr. Frank Shawbedees, Dr. Williamson and Dr. Driben:
 - (i) Describe how SON continues to observe burial and spiritual practices that pre-date 1650;
 - (ii) Share stories specific to SONTL that pre-date 1650, such as the story of the Midewin migration; and
 - (iii) Share stories about the participation of SON’s ancestors in the Haudenosaunee War.

(c) The Great Lakes First Nations’ assertion of their territorial rights from the 17th to 19th centuries

57. As discussed above, the Anishinaabek divided territory amongst themselves and generally succeeded in resolving territorial matters peacefully. However, they can and did go to war to repel incursions on their territories by others.

58. SON's Western experts, will describe moments in history when the Anishinaabek asserted their right to exclude European visitors from their territories. For example:
- (a) Dr. Williamson will give evidence about
 - (i) Champlain encountering the Cheveux Relevés in 1616, he had to obtain their permission to enter their territory by offering them the gift of a hatchet, and
 - (ii) Alexander Henry being one of the first English traders to travel into the upper Great Lakes, which he did around 1761. At Michilimackinac, the Anishinaabek considered him to be trespassing and openly discussed whether to kill him until some families interceded on his behalf;
 - (b) Dr. Driben and Dr. Benn will give evidence about when settlers started arriving in SONTL in the 1830s, SON insisted that they obtain leases from it to fish in its waters.
59. SON's Western experts will say that SON likely participated in collective efforts to assert First Nations' exclusive control over their territories, including waters. Their evidence will include the following:
- (a) The Three Fires Confederacy collectively controlled entry to Lake Huron by non-Anishinaabek;
 - (b) In the Haudenosaunee War, the Three Fires Confederacy drove the Haudenosaunee out of Lake Huron, Georgian Bay, and southern Ontario and returned it to the Anishinaabek. Dr. Williamson will describe the War, focusing on the military campaign to retake SONTL;
 - (c) Britain won the Seven Years' War largely due to its success in winning the support or neutrality of France's First Nation allies. Dr. Hinderaker will describe how Britain carried out this strategy, focusing on the 1761 Treaty of Detroit, in which Britain made peace with the Great Lakes First Nations by promising not to encroach on their territories;

- (d) After the Seven Years' War ended in North America, Britain quickly alienated the Great Lakes First Nations by, among other things, failing to contain the westward expansion of its American colonies. In May 1763, two months after the Treaty of Paris, the Great Lakes First Nations responded with a massive show of force, and drove Britain out of the upper Great Lakes. Dr. Benn and Dr. Hinderaker will describe "Pondiac's War," focusing on First Nations' strategy of controlling waterways; and
- (e) The War of 1812 demonstrated that the Great Lakes First Nations were still a formidable military power. Dr. Benn will describe the significant role that they played in Britain's successful defence of Canada. In particular, he will tell the story of how the Anishinaabek and British easily defeated American ships sent into Georgian Bay to cut British supply lines.

(d) The Crowns' "frozen rights-holder" argument

60. After the Haudenosaunee War, SON's ancestors continued to occupy the SONTL up to the present day. However, it appears that the Crowns intend to lead evidence suggesting that SON somehow abandoned or lost its Aboriginal title by allowing outsiders to join its community, most notably a group of Pottawatomi refugees from the United States' Indian Removal Policy of the 1830s. It is a very novel proposition that a First Nation's entitlement to Aboriginal title depends on maintaining a static genealogy or culture. SON will discuss this as a matter of law in its final submissions. Out of an abundance of caution, it will also lead evidence from Western experts, traditional knowledge holders and community witnesses demonstrating that there is significant continuity between the identify of its ancestors *circa* 1763 and the contemporary community, as follows:

- (a) Mr. Ted Johnston, Mr. Frank Shawbedees, Mr. John Nadjiwon and Mr. Donald Keeshig will testify that
 - (i) Pottawatomi and other immigrants joined SON with its consent, and did not forcibly displace the existing community, and
 - (ii) Immigrants were expected to and did adopt local cultural norms and practices, to the limited extent that they differed with their own;

- (b) Dr. Williamson will describe that distinctions between Odawa and Pottawatomi “nations” were not very strong, and may have been more important to Europeans than those peoples themselves. Nations were regional identities and not polities, and did not displace overarching social and political structures such as the larger Anishinaabek nation and *dodemag* (“clans”); and
- (c) Dr. Valentine will give evidence about SON’s dialect of Anishinaabemowin, that it shows no Pottawatomi influence.

ISSUE 2 – ABORIGINAL TITLE AND PUBLIC NAVIGATION

61. Although the Anishinaabek divided territory among themselves, the Creator told them to share the land. *Inaakonegewin* (Anishinaabe law) requires the Anishinaabek to be generous toward others, provided that they follow the proper protocols to recognize a group’s territorial jurisdiction and obtain its permission. The Anishinaabek travelled widely through the Great Lakes to enjoy each other’s hospitality, particularly when one group experienced adversity. In the Treaty of Niagara, SON and the other “Western Nations” gave Britain permission to travel on the Great Lakes waterways.

62. The common law public right to travel through navigable waters is an analogous concept. Ironically, the Crowns argue that this is a “paramount” right that forecloses the law from recognizing Aboriginal title to water.

63. There is no dispute that Lake Huron and Georgian Bay are navigable waters. The question of how Aboriginal title interacts with the public right of navigation is a question of law, and will be dealt with in final argument. SON’s position is that neither Aboriginal title nor the public right of navigation are absolute rights. They can be reconciled, and have been reconciled in other jurisdictions, just as other exclusive rights such as fee simple ownership to the beds of navigable waters can co-exist with the public right of navigation.

ISSUES 3 & 4 – TREATY 72 AND THE CROWN’S BREACH OF FIDUCIARY DUTY TO SON

64. In Treaty 45 ½, the Crown made a promise to SON. In exchange for a surrender of 1.5 million acres of rich farm land, the Crown promised to protect SON’s territory on the Peninsula from the encroachment of squatters forever.

65. We say the Crown broke its promise. It broke its promise first when it failed to protect the Peninsula. Rather than using the tools at its disposal to stop squatters from encroaching on SON’s reserve lands– tools it was willing to use at other times and in other places – the Crown instead adopted policies that would encourage squatting. It broke its promise again when Crown officials came back to SON in 1854, just 18 years after Treaty 45 ½ was concluded, saying they could not protect the Peninsula and threatening to take the reserve on the Peninsula without SON’s consent. These were merely pressure tactics. The next day after SON reluctantly surrendered the Peninsula in Treaty 72, Crown officials directed the local sheriff to remove squatters from the newly surrendered territory.

66. The evidence will show that:

- (a) The Crown had a fiduciary duty to protect and respect SON’s rights over the Peninsula, born out of its promise in Treaty 45 ½ ;
- (b) The Crown breached its fiduciary duty to SON and stained its Honour because:
 - (i) It had the capacity to keep its promise to protect the Peninsula, but it took few meaningful steps to do so, instead allowing squatters to encroach; and
 - (ii) Crown officials threatened to take the Peninsula without SON’s consent and made the false statement that they could not protect the Peninsula to “wring [SON’s] assent” to the surrender in Treaty 72 in order to pressure SON to surrender the Peninsula.

67. As a result, the taking of the Peninsula was the direct result of a breach of the Crown's duty. To remedy that breach, SON is asking for the return of lands on the Peninsula, insofar as some of the lands on the Peninsula can be returned (i.e. those lands not in the hands of third parties).

(a) The Crown's Fiduciary Duty to SON and Promise to Protect the Peninsula

68. The evidence will show that, when it entered into Treaty 45 ½ in 1836, the Crown took on a fiduciary duty to protect the Peninsula for SON:

- (a) The text of Treaty 45 ½ will demonstrate that the Crown made a promise to SON to “for ever protect [the Peninsula] for you from the encroachments of the whites” in exchange for the surrender of 1.5 million acres of rich farming land;
- (b) Dr. Jarvis Brownlie will give evidence about Lt. Governor Francis Bond Head's approach to the securing a surrender in 1836 and the promises the Crown made in Treaty 45 ½. The evidence will also include a despatch sent from Bond Head to the Colonial Secretary, Lord Glenelg, and a speech made some months later by a Chief Metigwob of the Saugeen Ojibway Nation detailing the events of the treaty. This evidence will show that:
 - (i) In 1836, Bond Head approached the First Nations attending at Manitoulin Island for the distribution of their “presents”.² SON was among those First Nations. Bond Head sought the surrender of SON's entire territory, saying that the Crown was no longer able to protect Aboriginal lands from white settlers, and asking SON to re-locate to Manitoulin Island.

² The evidence will show that the giving of gifts was part of the Anishinaabe diplomatic protocol. The British participated in an annual distribution of presents in order to preserve their alliances in the region. This practice was phased out up to or around the mid- 19th century as power dynamics in the Great Lakes shifted and Britain began to treat Indigenous peoples as subjects rather than military allies.

- (ii) SON refused to leave their territory, so instead Bond Head said SON could remain in the part of their territory that lay north of Owen Sound (i.e. the Peninsula) and surrender the rest – 1.5 million acres of rich farm land stretching from south of Goderich to Arthur to Collingwood – in return for promises to assist SON in adapting to an agricultural economy, to protect SON’s fishing grounds, and – crucially – to “for ever protect [the Peninsula] for you from the encroachments of the whites”. SON reluctantly agreed.
- (c) Dr. M.A. Corbiere will give evidence about translation of Treaty 45 ½ from English to Anishinaabemowin. Her evidence will show that SON signatories to Treaty 45 ½ would have understood the promise to protect the Peninsula “for ever” to mean that the Crown would protect the land perpetually and eternally unless the parties came to a free and informed agreement otherwise. She will also explain that SON would have expected the Crown to take whatever measures were logical to protect the lands from being stolen.
- (d) Dr. Brownlie will also give evidence, and the documentary record will show, that the Crown reaffirmed its commitment to protect the Peninsula in 1847, when Governor General Lord Elgin issued a declaration confirming SON’s possession of the lands on the Peninsula.

69. The evidence will also show that the express and direct promise set out in Treaty 45 ½ was made after a number of other Crown commitments to protect Indigenous land rights, including SON’s rights over its lands on the Peninsula:

- (a) Dr. Hinderaker will give evidence that the Royal Proclamation of 1763 constituted a commitment to protect Indigenous lands from the encroachment of squatters. The Royal Proclamation created a binding protocol that guided the Crown’s actions in relation to Indigenous lands. It reserved for Indigenous peoples a wide swath of land outside the boundaries of the existing colonies and

- (i) Forbade the issue of survey warrants or land patents on those reserved lands,
- (ii) Forbade the purchase of the reserved lands by British subjects (unless they had a special permit from the Imperial Crown), and
- (iii) Ordered any non-Indian persons occupying these reserved lands to remove themselves.

SON's territory on the Peninsula was part of the land reserved for "Indians" by the Royal Proclamation.

- (b) Dr. Brownlie will give evidence that the Royal Proclamation continued to be seen by Crown officials in the 19th century as a binding protocol that governed how they should deal with Indigenous lands.
- (c) Dr. Hinderaker will also provide evidence about the Treaty of Niagara, a treaty concluded at a gathering of nearly 2000 Indigenous peoples in the summer of 1764. Participants at Niagara treated with the Crown to restore alliances after Pontiac's uprising, promote trade and protect Indigenous lands.
- (d) Mr. Karl Keeshig and Dr. Hinderaker will give evidence that suggests SON were part of Pontiac's uprising, and participated in the Treaty of Niagara. They were among the beneficiaries of the Crown's promises to protect Indigenous lands.

70. The evidence will also show that SON was vulnerable to the Crown's discretion over whether and how to fulfill its promise to protect the Peninsula, including the following:

- (a) Dr. Brownlie will provide evidence that until the end of the War of 1812, the British predominantly treated Indigenous peoples in the Great Lakes as allies (or enemies), not as subjects. After the War of 1812-1814, the power dynamic shifted. The British, who no longer had the same need for military alliances with Indigenous people, increasingly came to see them as obstacles to settlement and

the exploitation of land. In this context of an increasing power imbalance, the Crown adopted new policies designed to “civilize” Indigenous peoples while getting them out of the way of settlers.

- (b) Dr. Haring will provide evidence, and the documentary record will show, that SON relied on the Crown to protect the Peninsula on its behalf. SON was aware of the encroachment of settlers on the southern portion of the Peninsula and asked for the Crown’s assistance in removing them.

71. This evidence establishes the Crown had a fiduciary duty to SON to protect the Peninsula.

(b) The Crown Breaks Its Promise: Breach of the Duty and Stain on Its Honour

72. The evidence will show that the Crown breached its fiduciary duty to SON and stained its Honour in two ways.

73. First, the Crown broke its promise to SON by failing to protect the Saugeen Peninsula from the encroachment of settlers. This was a choice: the Crown had the capacity to protect the Peninsula, but it decided not to do so.

74. Second, the Crown threatened SON, stated it could not protect the Peninsula and used improper tactics in the negotiation of Treaty 72. These were pressure tactics designed to strong-arm the SON into giving up the vast majority of its remaining territory.

75. The following highlights some of the evidence that establishes the Crown’s breach:

- (a) Dr. Haring will testify that the “demand” for land by squatters on the Peninsula was created by the Crown’s own restrictive land policies, which made it difficult, if not impossible, for persons of little influence who wished to settle lands to obtain land for this purpose. Very large land grants were made to military and

political leaders, local elites and the clergy, leaving little land for ordinary settlers arriving in the territory. This gave rise to an institutionalized system of squatting in Upper Canada/Canada West. Squatting became quasi-legal, and squatters came to expect that they might acquire legal title through their efforts. By 1854, these policies were entrenched in Grey and Bruce counties and had the effect of encouraging squatting on the Peninsula;

- (b) Dr. Haring and Dr. Brownlie will testify that, although the Crown enacted legislation such as *An Act for the Protection of the Lands of the Crown in this Province from Trespass and Injury*, (1839 c. 15) and *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 that gave Crown officials tools to protect Indian lands, the Crown failed to meaningfully enforce these Acts on the ground. The Crown acted neither to prosecute squatters nor to remove them from the Peninsula. This was consistent with Crown policy, which dictated that “Indian” Nations would give way to white settlement;
- (c) Dr. Haring will testify that the result of the Crown’s policy was that squatters encroached on the Peninsula in the 1840s and early 1850s;
- (d) The expert evidence of Dr. Haring and the documentary record will show that the Crown did use the tools at its disposal to address various kinds of civil disturbances in Upper Canada/Canada West when it advanced the Crown’s own interests to do so. For example:
 - (i) The day after SON surrendered the Peninsula in Treaty 72, the Crown ordered the local Sheriff to remove squatters from the Saugeen Peninsula to make way for the sale of the newly surrendered lands – something the Crown had said was impossible the day before, during the treaty negotiations. The evidence for this includes a copy of a letter from Lord Oliphant to Sherriff Schneider setting out directions to this effect;

- (ii) When SON protested the survey of their surrendered territory on the Peninsula, the Crown offered military support to the surveying team. The evidence for this includes a letter from Lord Oliphant to a member of the surveying team offering this support; and
- (iii) In 1849, Crown sent police support to put down an uprising by a group of First Nations people who sought to interfere with copper mining operation at Mica Bay on Lake Superior.

This evidence suggests that the Crown had the power, but not the will, to protect the Peninsula from encroachment. It shows that the Crown broke its promise to SON.

- (e) The expert testimony of Dr. Brownlie and the documentary record will show that Crown falsely stated it was impossible to protect the Peninsula, threatened to take SON's lands without their consent, and used those statements as leverage to "wring" (in the words of the Crown negotiator) from the SON a surrender of most of the Peninsula as part of Treaty 72 in 1854, including:
 - (i) In August 1854, just two months before Treaty 72 was negotiated, T.G. Anderson, Superintendent of Indian Affairs, told SON that the Crown would not "take the trouble to help" with squatters and that he would "recommend that the whole [Peninsula] excepting [a few small reserves] be surveyed and sold" without their consent; and
 - (ii) In October 1854, during the negotiations of Treaty 72, Laurence Oliphant, Superintendent General of Indian Affairs, told SON that it was not possible to protect the Peninsula from squatters and it had to be surrendered for sale.
- (f) Dr. Haring will give evidence that prior to negotiating the surrender in Treaty 72, the Crown knew much of the lands on the Peninsula were unsuitable for farming.

- (g) Both Dr. Brownlie and Dr. Driben will testify, about the Crown's improper tactics during the negotiation of Treaty 72 employed to "wring from [SON] some assent however reluctant". The evidence will also include Lord Oliphant's official report about the treaty negotiations, and Lord Oliphant's memoir, which details the events of the treaty negotiation. Oliphant's improper tactics included:
- (i) Giving very short notice of the treaty meeting in order to prevent SON from discussing the matter in advance;
 - (ii) Meeting privately with a Chief known to be opposed to the treaty just before the treaty council to attempt to sway his views;
 - (iii) Conducting the entire proceedings in a rushed and hurried way, particularly for such a significant matter; and
 - (iv) Failing to dissociate himself from Anderson's threat to take a surrender of the Peninsula with or without consent.

76. This evidence will show that the Crown both put in place policies that would encourage squatting on the Peninsula, and also failed to take meaningful steps within its power to address the encroachment that took place. It will also establish that the Crown used improper tactics, threats and intimidation to pressure SON to surrender the Peninsula. Ultimately, the Crown did not keep its promise to SON of protecting the Peninsula from the encroachment of settlers, which is a breach of its fiduciary duty.

ISSUE 5 – THE HONOUR OF THE CROWN

77. SON's says that the same facts that amount to a breach of fiduciary duty also amount to a stain on the Honour of the Crown.

ISSUE 6 – SON'S HARVESTING RIGHTS

78. Distinct and separate from the claim for breach of fiduciary duty, SON claims that Treaty 72 did not extinguish any of the harvesting rights that SON held prior to 1854.

79. The evidence will show that it was the intention of both the Crown and SON that SON members would continue to harvest traditional resources in the Treaty 72 territory:

- (a) Dr. Driben will give evidence that SON's interests at the time Treaty 72 was concluded were to maintain their communities, culture and economy. This would have meant continuing to hunt and fish. Given the centrality of hunting and fishing to SON's economy and self-identity, both then and now, it would have been inconceivable to SON to be expected to stop hunting and fishing after Treaty 72;
- (b) Dr. Brownlie will testify that, while officials lamented the slow progress of agriculture among SON, as of 1854 the people were in no position to support themselves by agriculture alone and clearly remained actively involved in hunting and fishing for a living. The Crown was aware of this, and intended that SON continued to support themselves through hunting and fishing;
- (c) Dr. Corbiere will give evidence that the Anishinaabemowin translation of "full and complete surrender" set out in Treaty 72 would connote a giving up of lands, but not necessarily a giving up of access to those lands for activities such as hunting, fishing, trapping and gathering that were central to Anishinaabe economy;
- (d) Traditional knowledge holders and community witnesses from SON, including Mr. Karl Keeshig, Mr. Fred Jones, Mr. Ted Johnston, Mr. Ross Johnston and Mr. Paul Nadjiwan, will give evidence that the oral history of SON is that Treaty 72 did not affect their harvesting rights;
- (e) Traditional knowledge holders and community witnesses including Mr. Vernon Roote, Mr. Doran Ritchie, Mr. Paul Nadjiwan, Mr. Jay ("Tattoo") Jones, and Mr. Paul Jones will testify that SON members continue to harvest throughout the SONTL and that this is integral to their identity as Anishinaabe; and

- (f) Mr. Gary Harron, a local farmer who owns lands and operates two farms in Arran-Elderslie, will testify that SON members continue to harvest on his lands. This practice has been taking place for the past 20 years, and he considers SON traditional harvesting to be compatible with farming.

ISSUE 7 – CONSTRUCTIVE TRUST REMEDY

80. SON says that an appropriate remedy for the Crown’s breach of fiduciary duty would be a constructive trust on any lands subject to Treaty 72 for which there is no *bona fide* purchaser for value of the legal estate without notice, or which are now in the hands of the Crown.

81. This will be considered, for a number of specific parcels of land, in Phase 1b of this action, and more comprehensively, in Phase 2.

ISSUE 8 – COMPENSATION

82. SON says that equitable compensation is an appropriate remedy for the Crown’s breach of fiduciary duty in relation to land subject to Treaty 72 for which a constructive trust is not available.

83. SON also says that compensation is an appropriate remedy for the Crown’s breach of fiduciary duty in relation to the loss of use of land subject to Treaty 72 from 1854 to the present.

84. Compensation will be considered in Phase 2 of this action.

ISSUE 9 – LIMITATIONS AND LACHES

85. SON did not delay in bringing its claims forward. The evidence shows that SON asserted their rights – including their title rights to the waters, their issues with the Crown’s failure to protect the Peninsula, and their continued right to harvest on the Peninsula – as best they could over the past century and a half. The evidence also shows they faced many obstacles in doing so.

86. Mr. James Ritchie, Mr. Vernon Roote, Mr. Doran Ritchie, Mr. Paul Jones, Mr. Jay “Tattoo” Jones, Mr. Dale Jones and Mr. Howard Jones, will testify that SON members have

asserted their rights to SONTL as best they could, including by continuing to harvest, hunt and gather throughout SONTL.

87. Dr. Jarvis Brownlie, together with Mr. James Ritchie, Mr. Vernon Roote, Mr. Paul Jones, Mr. Dale Jones, Ms. Darlene Johnston, and Mr. Howard Jones, will testify that SON faced a number of systemic obstacles that prevented them from bringing its claims forward earlier. These obstacles included:

- (a) The *Indian Act*, and the assimilation policy it enshrined, including:
 - (i) the control that the Crown exercised over community governance and band funds, which was used to prevent First Nations from pursuing claims or other grievances against the Crown; and
 - (ii) provisions in place to prevent bands from hiring lawyers to advance their claims;
- (b) The far-reaching control of the Indian agents over community life, which served to undermine First Nations resistance, block organized efforts to address treaties, lands and rights, and inhibit access to information. The Indian Agent serving SON, for example, was seen burning official documents;
- (c) Residential schools, which were a major tool of disempowerment of First Nations and which left survivors psychologically traumatized and with impaired ability to take initiative and be assertive;
- (d) Poverty, which prevented communities from hiring lawyers;
- (e) Lack of education, which made the judicial system opaque, foreign and difficult to navigate; and

- (f) The historical state of the law, such as the doctrine of Crown immunity, which left First Nations without recourse to the Courts.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of April, 2019.

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APPENDIX 1 – MAP



APPENDIX 2 – PLAINTIFFS’ WITNESSES

These witnesses are arranged in what would seem to be a “logical” order, which is the order in which SON would prefer to call them, absent scheduling constraints. As such, reading them in order would progress through issues in a logical or chronological way.

KARL KEESHIG is a member of the Chippewas of Nawash Unceded First Nation. He will talk about the Midewin creation story, flood story and migration story; traditional knowledge about early encounters between the Anishinaabe and Europeans; Anishinaabe spiritual beliefs about the water; spiritual beliefs about burial practices; and the way Anishinaabe people were organized into different groups like confederacies, nations, tribes and clans, and how these related to each other. He also will explain how decisions about access to lands, waters and resources were traditionally made. He will talk about practices and beliefs about hunting and fishing, and about what memory of the treaties has been passed down. His evidence relates to most of the key issues in this litigation.

VERNON ROOTE is a member and former Chief of Saugeen First Nation. His evidence draws on traditional knowledge to explain Anishinaabe governance, political and social structures, decision-making about land and access to lands, and how the Saugeen Ojibway Nation related to other Aboriginal groups, allied or otherwise. He will talk about spiritual responsibilities to the land. He will talk about conflicts with the Iroquois, and about practices and beliefs about hunting and fishing. He also discusses the process by which SON made the decision to sign Treaty 72. His evidence relates to most of the key issues in this litigation.

JOANNE KEESHIG is a member of the Chippewas of Nawash Unceded First Nation. She will talk about the role of Anishinaabe women as protectors of the water. Her evidence relates to the issue of exclusive occupation of territory.

PAUL NADJIWAN is a member and former Chief of the Chippewas of Nawash Unceded First Nation. He will talk about Anishinaabemowin place names throughout the SONTL. He will also talk about hunting practices and the cultural and spiritual significance of hunting. He will also explain the procedures he uses when he wants to hunt in the territories of other

First Nations. His evidence relates primarily to the time depth of SON's connection to its territory, to the exclusive occupation of territory, and to harvesting rights.

DORAN RITCHIE is a member of Saugeen First Nation. He will speak of hunting practices. This evidence goes to issues of the exclusive occupation of territory, and to harvesting rights.

MARSHALL NADJIWON is a member of the Chippewas of Nawash Unceded First Nation. He will be a guide on the viewing. This evidence will be a general orientation to physical aspects of the territory. He will also discuss inseparability of land and water from the Anishinaabe perspective and SON's responsibilities to its waters. This evidence goes to the issue of exclusive occupation of territory.

JAY JONES is a member of the Chippewas of Nawash Unceded First Nation. He will speak about fishing and hunting. This evidence will be a general orientation to physical aspects of the territory, and go to the issue of harvesting rights.

PAUL JONES is a member of the Chippewas of Nawash Unceded First Nation. He will discuss fishing, hunting, and how the SON deals with neighbouring First Nations with abutting or overlapping traditional territories, as well as the barriers that prevented SON from starting this litigation before the 1990s. This evidence goes to the issues of exclusive occupation of territory, harvesting rights, and limitations and laches.

RANDALL KAHGEE is a member and former Chief of Saugeen First Nation. He will discuss a specific agreement with neighbouring First Nations with overlapping traditional territories and the traditional protocols for accessing and using other First Nations's territories. This evidence goes to the issue of exclusive occupation of territory.

PAUL DRIBEN is a retired professor of anthropology from Lakehead University. He will explain, through the lens of anthropology, who the Anishinaabe were, their political structures, and how they used and understood the waters in their territories, and the ways in which the Anishinaabe people exercised control of their territory. He explains some aspects of Anishinaabe spiritual beliefs. Professor Driben's report also explains what how the SON would have perceived their interests in relation to Treaty 72, and what procedures they would

have thought should be followed. His evidence relates to most of the key issues in this litigation.

LENORE KEESHIG is a member of the Chippewas of Nawash Unceded First Nation. She will recount a number of traditional stories and myths which have been passed down. In final argument, these myths will be juxtaposed with the geologic history of the region, and the argument made that these suggest that a cultural memory of geologic events has been passed down for thousands of years. Her evidence relates to the to the time depth of SON's connection to its territory.

FRANCINE MCCARTHY is a professor of earth sciences (geology) at Brock University. She will outline the geologic history of the Lake Huron basin since the end of the last ice age. In final argument, her evidence will be juxtaposed with the traditional stories and myths, and the argument made that there is a correspondence that suggests that a cultural memory of geologic events has been passed down for thousands of years. Her evidence relates to the time depth of SON's connection to its territory.

RONALD WILLIAMSON is an archaeologist who studies southern Ontario in the period leading up to and just after the Europeans arrived there. He will discuss aspects of Aboriginal ethnic identity and outline archaeological evidence dated over the last 10,000 years. His expert report explains which indigenous groups were present in SON's traditional territory when the Europeans arrived there in the early 17th century. It also addresses the relationship between SON and the Iroquois in the 17th century. His evidence relates to the issues of exclusive occupation of territory at 1763, and time depth of SON's connection to its territory.

RANDOLPH VALENTINE is a Professor of Linguistics at the University of Wisconsin-Madison. His expert report discusses how the dialect of Anishinaabemowin spoken by SON members fits into the larger language family and relates to the dialects at neighbouring First Nations. Evidence of the relationship between languages helps show the relationship among the different groups that speak those languages. From these variations of dialect, he is able to make conclusions about the time depth such communities have been in contact, and about, when new members join a group, how they became incorporated into the group. His evidence relates to the time depth of SON's connection to its territory, and will show that

Pottawatomi people who joined SON in the 1840s became assimilated to SON, and not vice versa.

ERIC HINDERAKER is a Professor of History at the University of Utah. His report addresses the relationship between indigenous peoples and the British Crown in the 18th century, including how the British related to their indigenous allies, indigenous resistance to British assertions of sovereignty, the role of the Royal Proclamation 1763 in British colonial rule, and the strategic importance of water in the relationship between the British and indigenous peoples near Lake Huron and Georgian Bay. His evidence relates to the issues of exclusive occupation, and to fiduciary duty.

CARL BENN is a Professor of History at Ryerson University. His report is a response to some of Ontario's reports. He focuses on military history and discusses strategic aspects of Pontiac's War, and the relative abilities of the Anishinaabe, the English and the Americans to access, navigate, and control access to Lake Huron in the late 18th and early 19th centuries. His evidence relates to the issue of exclusive occupation.

BRUCE GREENE is a U.S. Lawyer. His report is a response to Mr. Chartrand's report (done for Ontario). Mr. Greene will explain how U.S. law has recognized Aboriginal title to portions of the Great Lakes by the United States. His evidence relates to the issue of the capacity of the common law to recognize Aboriginal title to the beds of navigable waters

JARVIS BROWNLIE is a Professor of History at the University of Manitoba. His first report talks about the process by which Treaty 45 ½ and Treaty 72 were negotiated and signed. This report goes to the issues of fiduciary duty to protect the Peninsula and the breach of this fiduciary duty. His second report discusses the barriers that prevented SON from starting this litigation before the 1990s, and includes information gleaned from recent interviews with community members. This second report goes to the issue of limitations and laches.

GARY HARRON is a non-Aboriginal farmer on the Peninsula. He will speak to the compatibility of SON hunting practices and farming. This relates to the issue of whether Treaty 72 extinguished traditional harvesting rights or not.

DALE JONES, HOWARD JONES, JIM RITCHIE, and DARLENE JOHNSTON were SON community members interviewed for Jarvis Brownlie's second report, and will discuss the barriers that prevented SON from starting this litigation before the 1990s. This evidence goes to the issue of limitations and laches.

TED JOHNSTON is a member of the Chippewas of Nawash Unceded First Nation. He will discuss the integration of Pottawatomi into the SON, what accounts of the treaties were passed down, and the role of the Indian agent. This evidence goes to the identity of SON, harvesting rights, and limitations and laches.

RULE 36 EVIDENCE from **DONALD KEESHIG, FRANK SHAWBEDEESE, FRED JONES, JOHN NADJIWON, and ROSS JOHNSTON** will be re-played. Generally, they discuss the integration of Pottawatomi into the SON, what accounts of the treaties were passed down, and the role of the Indian agent. This evidence goes to the identity of SON, harvesting rights, and limitations and laches.

MARY ANN CORBIERE is a Professor in the Department of Native Studies at Laurentian University, and teaches the Anishinaabemowin language. She discusses how Treaties 45 ½ and 72 could or would have been translated into Anishinaabemowin, and how speakers of Anishinaabemowin would have understood such a translation. Her evidence relates to the issues of fiduciary duty and to harvesting rights.

SIDNEY HARRING is a retired Sociologist and Legal Historian from the City University of New York. His report addresses pressure for white settlement of the Saugeen Peninsula between 1836, when the Crown promised to protect the Saugeen Peninsula, and 1854, when Treaty 72 was signed. Professor Haring concludes that the Crown's own neglect and mismanagement—not unstoppable pressure for settlement—is the main reason that the Crown failed to keep its promise to SON to protect their lands. His evidence relates to the issue of breach of fiduciary duty.

MICHEL MORIN is a Legal History Professor at the Université de Montréal. His report is a reply to Dr. Beaulieu's report (for Canada), and Professor Morin's evidence will only be tendered, in reply, if the corresponding portions of Dr. Beaulieu's report are ruled to be relevant and admissible. He would give evidence concerning the attitudes taken by

international law writers, French colonial officials and Aboriginal peoples concerning territorial rights in New France in the period 1534-1760.

APPENDIX 3 – LIST OF ISSUES

1. Was there a local group of Anishinaabe people, to which the Plaintiffs (“SON”) are the successor, who exclusively occupied those portions of Lake Huron and Georgian Bay which are included in the area claimed at the time of assertion of British sovereignty (1763)?
2. Is Canadian law able to recognize Aboriginal title to the beds of navigable waters?
3. Did the Crown have a fiduciary duty to protect and respect SON’s rights over the Saugeen (Bruce) Peninsula by reason of an undertaking made at Treaty 45 ½ in 1836 to “for ever protect [the Peninsula] for you from the encroachments of the whites”?
4. Did the Crown breach this duty by failing to protect the Peninsula, and indeed by falsely stating that this was impossible and using that statement as leverage to “wring from” (in the words of the Crown negotiator) the SON a surrender of most of the Peninsula at Treaty 72 in 1854?
5. Did these events in 1854 stain the honour of the Crown?
6. Did Treaty 72 extinguish any traditional harvesting rights that SON may have had prior to 1854?
7. (In phase 1b and 2) is a constructive trust on Crown lands available to remedy the above breach of fiduciary duty?
8. (In Phase 2) how much compensation should be awarded as an additional remedy?
9. Are any of the above claims or remedies barred by limitations or laches?

APPENDIX 4 – AGREED BASIC TIMELINE

Terms and Abbreviations:

Anishinaabe: the term used by many Indigenous groups living in the Great Lakes region to describe themselves and their larger cultural community. The term is used by various groups that are also known under the names Pottawatomi, Ojibway and Ottawa. The plaintiffs historically referred to and continue to refer to themselves as Anishinaabe. Anishinaabek is the plural form of Anishinaabe. Different groups of Anishinaabe spoke variants of a root language, Anishinaabemowin.

SON = Saugeen Ojibway Nation: the name used by the plaintiffs to refer to themselves collectively.

SON Asserted Traditional Lands: refers to the territory the plaintiffs consider to be their traditional territory

SON Aboriginal Title Claim Area: refers to the territory the plaintiffs claim is subject to their Aboriginal title

8000 BC (approximately) Ice age glaciers retreat and human occupation commences in what is now Georgian Bay area. The Parties differ about the relationship between those people and the Plaintiffs.

1500s First known Petun presence in (the eastern part of) the SON Asserted Traditional Lands, near what is now Collingwood.

1615 Champlain is first European known to have entered Georgian Bay; he was met by 300 Anishinaabe men, who he named “cheveux relevéz” because of their hairstyle.

1648-1701 The Beaver Wars - The Haudenosaunee disperse Petun and Huron from Georgian Bay. The Haudenosaunee are in conflict with Anishinaabek during this period, though there is dispute between the parties about whether the Anishinaabek were fully dispersed from the SON Asserted Traditional Lands. However, by the end of this period, all parties agree that the Haudenosaunee had retreated to south of Great Lakes/St Lawrence River and that Anishinaabek were present in the Upper Great Lakes region.

- 1701 Great Peace of Montreal, formally ending the Beaver Wars.
- 1701-1714 War of the Spanish Succession
- 1744-1748 War of the Austrian Succession
- 1756-1763 Seven Years' War between British and French. Most Anishinaabe groups were allies of French.
- 1760 End of French-British conflict in North America; British occupy several former French forts, including at Detroit.
- 1761 Treaty reached between some Anishinaabe groups and the British at Detroit.
- 1763 Treaty of Paris, formally ending British-French Seven Years War. Assertion of British sovereignty over SON Asserted Traditional Lands (and much other territory).
- 1763 British in military conflict in the southern Great Lakes with Indigenous alliance led by Ottawa Chief Pontiac. This alliance attacks the Fort at Detroit, and a number of other British Forts.
- 1763 Royal Proclamation – SON Asserted Traditional Lands are within the “Territories reserved as aforesaid for the Use of the said Indians”.
- 1764 Large gatherings at Niagara. About 2000 Indigenous persons from about 19 Indigenous Nations, and the British, were present. The parties differ as to whether the result from the gatherings was the Treaty of Niagara.
- 1774 *Quebec Act*; SON Asserted Traditional Lands included in the boundaries of the Province of Quebec.
- 1791 Quebec was split into Upper Canada and Lower Canada. The SON Asserted Traditional Lands were within the boundaries of Upper Canada.
- 1812 War of 1812-1814; most Anishinaabek allied with the British to fight the USA.

- 1832 SON purports to “licence” Alexander McGregor to occupy an island called McGregor’s Fishing Island for fishing purposes.
- 1833 Crown purports to “licence” Alexander McGregor to occupy McGregor’s Fishing Island for fishing purposes.
- 1834 (July) Crown purports to “license” the Huron Fishing Company to occupy the Fishing Islands.
- 1834 (September) SON purports to “lease” the Fishing Islands to the Huron Fishing Company.
- 1836 Treaty 45 ½ is concluded during the distribution of presents at Manitoulin Island. The written text of the Treaty states:

My Children,

You have heard the Proposal I have just made to the Chippewas and Ottawas, by which it has been agreed between them and your Great Father that these Islands (Manatoulin), on which we are now assembled, should be made, in Council the property (under your Great Father’s Control) of all Indians whom he shall allow to reside on them.

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 – inserted] to this Island [or to that part of your territory which lies on the north of Owen’s Sound, - inserted] upon which proper houses shall be built for you, and proper assistance given to enable you to become civilized and to cultivate land which your Great Father engages for ever to protect for you from the encroachments of the whites.

~~As long as the country you at present occupy shall remain uncultivated, you will have full liberty to consider it as your hunting ground.~~

Are you therefore, the Sauking Indians, willing to accede to this arrangement; if so, affix your marks to this my proposal.

- 1840 *Union Act* - Upper and Lower Canada are merged into the United Province of Canada, with the SON Asserted Traditional Lands within the boundaries of what was called Canada West.
- 1847 Declaration by Her Majesty in favour of SON respecting the Saugeen (Bruce) Peninsula and islands within seven miles of its shore. The Declaration is attached as Appendix “B”.
- 1850 *An Act for the Protection of the Indians in Upper Canada from Imposition and the Property Occupied or Enjoyed by them from Trespass and Injury* is passed by the Province of Canada. The Act is attached as Appendix “C”.
- 1851 By proclamation, the 1850 *An Act for the Protection of the Indians in Upper Canada from Imposition and the Property Occupied or Enjoyed by them from Trespass and Injury* is extended to apply to the reserve on the Saugeen (Bruce) Peninsula and offshore islands.
- 1851 Treaty No. 67 effects a surrender of a half-mile strip of land along the southern boundary of the Saugeen (Bruce) Peninsula reserve.
- 1854 Treaty No. 72 effects a surrender of the Saugeen (Bruce) Peninsula, with the exception of several smaller parcels reserved to the SON. The written text of the Treaty is attached as Appendix “D”.
- 1854 and on: Lands in the Treaty 72 area were surveyed. Most of the lands surveyed were sold to private persons.
- 1860 *An Act Respecting the Management of Indian Lands and Property* results in the administration of Indian Affairs in the Province of Canada being fully devolved from Imperial control to provincial control.
- 1867 Confederation; SON Asserted Traditional Lands included in the boundaries of the Province of Ontario.

APPENDIX 5– PLAINTIFFS’ CHART OF ISSUES AND EVIDENCE

<p>Issue #1: Was there a local group of Anishinaabe people, to which the Plaintiffs (“SON”) are the successor, who exclusively occupied those portions of Lake Huron and Georgian Bay which are included in the area claimed (the “SON Unceded Traditional Lands, or “SONUTL”) at the time of assertion of British sovereignty (1763)?</p>	
<p>PROPOSITION</p>	<p>EVIDENCE THAT WILL BE PRESENTED</p>
<p>(A) SON is indivisible from the lands and waters of the SON Traditional Lands (“SONTL”), which includes the SONUTL.</p>	<p>Mr. Vernon Roote, Mr. Karl Keeshig, Mr. Marshall Nadjiwon and Mr. Fred Jones, about how SON and SONTL, including the waters of SONUTL, are indivisible; that there is a close relationship between water and all creation; that the waters and lands are interconnected; that the “spiritual” and “secular” aspects of its relationship with the waters of the SONUTL are inseparable; that SON has a specific and irreplaceable relationship with waters in the SONUTL</p> <p>Mr. Vernon Roote, Mr. Karl Keeshig, Ms. Lenore Keeshig and Mr. Donald Keeshig, about SON’s deep spiritual relationship with its lands and waters; the creation of the Anishinaabek and Turtle Island; stories showing how SON relates to events in its territory from as long as 9000 years ago (such events to be discussed by Dr. Francine McCarthy); and stories showing how the Anishinaabek relate to other spiritual beings, particularly those associated with water (also to be discussed by Dr. Paul Driben).</p> <p>Mr. Vernon Roote, Mr. Karl Keeshig, Mr. Randall Kahgee, Mr. Frank Shawbedeese, Mr. Paul Nadjiwan, Dr. Ron Williamson and Dr. Paul Driben, about how Anishinaabek—including SON—governed their territories; that there was a division of territorial jurisdiction among local groups; about how they communicate with and obtain guidance from the Creator and other spirited beings on matters related to SON’s waters; decision-making procedures to permit or prohibit use and access by other groups; protocols for obtaining permission to enter onto and use another group’s territory; enforcement of territorial boundaries and protocols against trespass by encroaching individuals or groups; and the role of the Three Fires’ confederacy in securing occupation of territory and decision-making in regional matters.</p> <p>Mr. Vernon Roote, Mr. Karl Keeshig, Mr. Marshall Nadjiwon, and Ms. Joanne Keeshig about SON’s responsibilities to its waters, including how these responsibilities arise from the gift of life from the Creator; how to treat the water with respect through ceremony, caretaking and protection; protocols to obtain spirit beings’ permission and assistance to use waters; protocols for sharing benefits provided by waters; and women’s specific responsibilities to water.</p> <p>Mr. Vernon Roote, Mr. Karl Keeshig, Mr. Marshall Nadjiwon, Mr. Jay “Tattoo” Jones, Mr. Paul Jones, Ms. Joanne Keeshig, Mr. Paul Nadjiwan and Mr. Randall Kahgee, about how SON’s historical relationship with its territories continue into the present; how SON carries out its responsibilities to the waters today; and how contemporary communities exercise territorial governance.</p>

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PROPOSITION	EVIDENCE THAT WILL BE PRESENTED
<p>(B) SON used and occupied (and continues to do so) the waters of SONUTL in 1763</p>	<p>It is undisputed that there were no British or Europeans in the SONUTL in 1763 except for, at most, a few traders.</p> <p>Dr. Ron Williamson that an Odawa group has resided on the Peninsula since at least the 8th century; that this group has distinctive features including its burial practices and bead and ceramic styles; that this group was known in the early 17th century as the “Cheveux Relevés”; that this group may have been briefly displaced from the Peninsula to some extent around 1650; and that this group, potentially with other Anishinaabek, re-settled the Peninsula by the end of the 17th century and has been present there since then.</p> <p>Mr. Paul Nadjiwon about Anishinaabemowin place names for certain places in SONTL.</p> <p>Dr. Rand Valentine about SON’s dialect of Anishinaabemowin indicates continuous presence on SONTL for hundreds of years</p> <p>Mr. Vernon Roote, Mr. Karl Keeshig, Mr. Donald Keeshig, and Mr. Frank Shawbedees, and Dr. Ron Williamson and Dr. Paul Driben, that SON continues to observe burial and spiritual practices that predate 1650, that SON has stories pre-dating 1650 about specific sites in SONTL, and that SON has stories about its ancestors’ participation in driving out the Haudenosaunee in the late 17th century.</p> <p>Dr. Carl Benn, Mr. Frank Shawbedeese, Mr. John Nadjiwon, Mr. Donald Keeshig, Mr. Ted Johnston and Mr. Ross Johnston about occupation and use of SONUTL only being possible if one could use the coast of the Peninsula, which was controlled by SON.</p> <p>Dr. Paul Driben about the prominence of fishing by SON around the Saugeen Peninsula in the late 18th century</p> <p>Mr. Paul Jones and Mr. Jay “Tattoo” Jones, and other community witnesses, about present-day fishing and harvesting in SONTL, including the waters of SONUTL.</p>

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PROPOSITION	EVIDENCE THAT WILL BE PRESENTED
(C) SON’s assertions of territorial rights over SONTL, including SONUTL, from the 17 th to 19 th centuries	<p>Dr. Ron Williamson about how when Champlain encountered the Cheveux Relevés in 1616, he had to offer a hatchet as gift to obtain permission to go further into their territory; and statements made at Michilimackinac in 1761 by Anishinaabek that the English had not conquered them and had not taken their lands away from them.</p> <p>Mr. Vernon Roote, Mr. Karl Keeshig, Mr. Frank Shawbedeese, and Dr. Ron Williamson about how the Three Fires Confederacy, including SON drove out the Haudenosaunee from SONTL at the end of the 17th century.</p> <p>Dr. Eric Hinderaker about how Britain’s success in the Seven Years’ War was due largely to its success in winning the support or neutrality of France’s First Nations allies, and how Britain made peace with Great Lakes First Nations by promising not to encroach on their territories in the 1761 Treaty of Detroit.</p> <p>Mr. Karl Keeshig, Dr. Carl Benn and Dr. Eric Hinderaker about how Britain quickly alienated the Great Lakes First Nations after the Seven Years’ War by, among other things, failing to prevent encroachment by the American colonies; how the Great Lakes First Nations responded with a massive show of force, driving Britain out of the upper Great Lakes in Pontiac’s War; how the First Nations’ strategy focused on the control of waterways; and that SON likely participated in Pontiac’s War and the Treaty of Niagara ending hostilities.</p> <p>Dr. Carl Benn about the significant role of the Great Lakes First Nations in the successful defence of Canada in the War of 1812, including how the Anishinaabek and Britain defeated American ships sent to Georgian Bay to cut British supply lines.</p> <p>Dr. Carl Benn and Dr. Paul Driben about SON issuing fishing licences to British settlers as they arrived in the 1830s.</p>

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PROPOSITION	EVIDENCE THAT WILL BE PRESENTED
(D) The Crown’s “frozen rights holder” argument is not supported by the evidence	<p>Mr. Ted Johnston, Mr. Frank Shawbedeese, Mr. John Nadjiwon and Mr. Donald Keeshig, about Pottawatomi refugees being invited into and integrating into the SON community (also discussed by Dr. Paul Driben).</p> <p>Dr. Ron Williamson that distinctions between Odawa and Pottawatomi “nations” were not very strong; that these distinctions were seen as more important by Europeans than by the peoples themselves; and that these distinctions did not displace overarching social and political structures such as the larger Anishinaabek nation and <i>dodemag</i> (“clans”).</p> <p>Dr. Rand Valentine about SON’s dialect of Anishinaabemowin being close to the Odawa dialect. There are no traces of Pottawatomi in SON’s dialect, indicating Pottawatomi assimilation into SON .</p>

Issue #2: Is Canadian law able to recognize Aboriginal title to the beds of navigable waters?	
PROPOSITION	EVIDENCE THAT WILL BE PRESENTED
Canadian law is able to recognize Aboriginal title to beds of navigable waters	This issue is mostly legal argument, but Mr. Bruce Greene will testify that US law recognizes Aboriginal title to the beds of the Great Lakes.
Aboriginal title is not incompatible with public or other rights in respect of SONUTL	N/A – legal argument

Issue #3: Did the Crown have a fiduciary duty to protect and respect SON's rights over the Saugeen (Bruce) Peninsula by reason of an undertaking made at Treaty 45 ½ in 1836 to “for ever protect [the Peninsula] for you from the encroachments of the whites”?	
PROPOSITION	EVIDENCE THAT WILL BE PRESENTED
The Crown had a duty to protect the Peninsula born out of its promise in Treaty 45 ½ in 1836	<p>Text of Treaty 45 ½ about the Crown's promise to SON to “for ever” protect from the encroachment of the “whites”.</p> <p>Dr. Jarvis Brownlie about Lt. Gov. Bond Head's approach to Treaty 45 ½ , Crown's promise to protect the Peninsula in exchange for surrender of 1.5 million acres of rich farm lands, and Crown's reaffirmation of the commitment in 1847.</p> <p>Dr. M.A. Corbiere about translation of Treaty 45 ½ from English to Anishinaabemowin and what SON signatories would have understood about the promise to ‘for ever’ protect the Peninsula.</p>
The Crown had a duty to protect Indigenous lands, including SON's rights over the Peninsula	<p>Dr. Eric Hinderaker and Dr. Jarvis Brownlie about Royal Proclamation of 1763 creating a commitment and binding protocol about protection of Indigenous lands, including SON's lands.</p> <p>Dr. Eric Hinderaker and Mr. Karl Keeshig about Treaty of Niagara in 1764 where participants (including SON) treated to restore alliances after Pontiac's uprising, promote trade and protect Indigenous lands, including SON's lands.</p>
SON was vulnerable to the Crown's discretion over whether and how to keep its promise	<p>Dr. Jarvis Brownlie about change in power dynamics after War of 1812-1814, when British no longer needed military alliances, in context of increasing power imbalance, adopted a policy of “civilizing” Indigenous people to remove them as an obstacle to settlement.</p> <p>Dr. Sidney Haring about SON asking Crown to help remove encroaching settlers from southern portion of the Peninsula.</p>

Issue #4: Did the Crown breach this duty by failing to protect the Peninsula, and indeed by falsely stating that this was impossible and using that statement as leverage to “wring from” (in the words of the Crown negotiator) the SON a surrender of most of the Peninsula at Treaty 72 in 1854?	
PROPOSITION	EVIDENCE THAT WILL BE PRESENTED
The Crown had the capacity to protect the Peninsula and did not do everything it could to protect the Peninsula before seeking a surrender	<p>Dr. Sidney Harring about ‘demand’ for land by squatters on Peninsula being created and legitimized by Crown’s policies; the result of the Crown’s policies being that squatters encroached on the Peninsula in the 1840s and 1850s; that although Crown enacted had tools to protect Indian lands, the Crown failed to meaningfully use these tools; and that the Crown did use those tools in other instances – including to take steps to protect Peninsula the day <i>after</i> SON surrendered the lands in 1854.</p> <p>Dr. Jarvis Brownlie about the Crown enacting measures to protect Indian lands but failing to use them for the Peninsula, and about the documentary record of the Crown saying it was impossible for the Crown to protect the Peninsula.</p>
The Crown falsely stated it could not protect the Peninsula and used threats and improper tactics in negotiating Treaty 72 to pressure SON for a surrender	<p>Dr. Jarvis Brownlie about the documentary record of the Crown threatening take SON’s lands without their consent and using those statements as leverage to obtain SON’s surrender in of the Peninsula via Treaty 72 in 1854.</p> <p>Dr. Jarvis Brownlie and Dr. Paul Driben about the Crown’s improper tactics during the negotiation of Treaty 72.</p>

Issue #5: Did these events in 1854 stain the honour of the Crown?	
PROPOSITION	EVIDENCE THAT WILL BE PRESENTED
The Crown had the capacity to protect the Peninsula and did not do everything it could to protect the Peninsula before seeking a surrender	<p>Dr. Sidney Harring about ‘demand’ for land by squatters on Peninsula being created and legitimized as quasi-legal by Crown’s policies; the result of the Crown’s policies being that squatters encroached on the Peninsula in the 1840s and 1850s; that although Crown enacted measures and had tools to protect Indian lands, the Crown failed to meaningfully enforce via these tools; and that the Crown did use those tools in other instances – including to take steps to protect Peninsula the day <i>after</i> SON surrendered the lands in 1854.</p> <p>Dr. Jarvis Brownlie about the Crown enacting measures to protect Indian lands but failing to use them for the Peninsula, and about the documentary record of the Crown saying it was impossible for the Crown to protect the Peninsula.</p>
The Crown falsely stated it could not protect the Peninsula and used threats and improper tactics in negotiating Treaty 72 to pressure SON for a surrender	<p>Dr. Jarvis Brownlie about the documentary record of the Crown threatening take SON’s lands without their consent and using those statements as leverage to obtain SON’s surrender in of the Peninsula via Treaty 72 in 1854.</p> <p>Dr. Jarvis Brownlie and Dr. Paul Driben about the Crown’s improper tactics during the negotiation of Treaty 72.</p>

Issue #6: Did Treaty 72 extinguish any traditional harvesting rights that SON may have had prior to 1854?	
PROPOSITION	EVIDENCE THAT WILL BE PRESENTED
The intention of the Crown at the time of Treaty 72 was that Treaty 72 would not affect SON's harvesting rights	Dr. Jarvis Brownlie about the slow progress of agriculture amongst the SON, that as of 1854, they remained actively involved and reliant on hunting and fishing for a living; and that the Crown was aware of this.
The intention of SON at the time of Treaty 72 was that Treaty 72 would not affect SON's harvesting rights	<p>Dr. Paul Driben about SON's interests at the time of Treaty 72 were to maintain their communities, culture and economy, including continuing to hunt and fish; that given the centrality of hunting and fishing to SON's economy and self-identity, it would have been inconceivable to SON to be expected to stop hunting and fishing after Treaty 72.</p> <p>Dr. M.A. Corbiere about Anishinaabemowin translation of surrender not including loss of access to lands for activities such as hunting, fishing, trapping and gathering.</p> <p>Mr. Karl Keeshig, Mr. Fred Jones, Mr. Ted Johnston, Mr. Ross Johnston and Mr. Paul Nadjiwan about oral history of SON that Treaty 72 did not affect their harvesting rights in SONTL.</p>
SON continues to hold and exercise its rights throughout SONTL	<p>Mr. Vernon Roote, Mr. Doran Ritchie, Mr. Paul Nadjiwon, Mr. Jay ("Tattoo") Jones, and Mr. Paul Jones about SON's continued harvesting throughout the SONTL.</p> <p>Mr. Gary Harron about SON members continuing to harvest on his farms and privately owned lands for at least the past 20 years.</p>

Issue #7: (In phase 1b and 2) is a constructive trust on Crown lands available to remedy the above breach of fiduciary duty?	
PROPOSITION	EVIDENCE THAT WILL BE PRESENTED
<i>TBD – phase 1b and 2</i>	
Issue #8: (In Phase 2) how much compensation should be awarded as an additional remedy?	
PROPOSITION	EVIDENCE THAT WILL BE PRESENTED
<i>TBD – phase 2</i>	

Issue #9: Are any of SON's claims or remedies barred by limitations or laches?	
PROPOSITION	EVIDENCE THAT WILL BE PRESENTED
SON did not delay in bringing its claims forward, but have always asserted their rights as best they could	Mr. James Ritchie, Mr. Vernon Roote, Mr. Doran Ritchie, Mr. Paul Jones, Mr. Jay "Tattoo" Jones, Mr. Dale Jones, Mr. Howard Jones and Prof. Darlene Johnston about SON members having and continuing to assert their rights to their territory as best they could, including by continuing to harvest, hunt and gather throughout SONTL and asserting their claims through petitions, letters and other means.
SON faced many obstacles in asserting their rights as best they could	Dr. Jarvis Brownlie , together with community witnesses Mr. James Ritchie, Mr. Vernon Roote, Mr. Paul Jones, Mr. Dale Jones, Prof. Darlene Johnston, and Mr. Howard Jones , about SON facing systemic obstacles preventing them from bringing claims earlier – though they tried to in ways that were available. Obstacles included the <i>Indian Act</i> and its policies of control and prohibiting hiring of lawyers, the influence and effect of the Indian agent, residential schools and lack of education, poverty, inaccessibility of documents and the historical state of the law.

Court Files No.: 94-CQ-50872CM
03-CV-261134CM1

THE CHIPPEWAS OF SAUGEEN FIRST NATION and THE
CHIPPEWAS OF NAWASH FIRST NATION
Plaintiffs

-AND-

THE ATTORNEY GENERAL OF CANADA ET AL.

Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding Commenced at Toronto

OPENING STATEMENT OF THE PLAINTIFFS

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