

SPECIFIC CLAIMS TRIBUNAL

F I L E D	SPECIFIC CLAIMS TRIBUNAL TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES January 3, 2023 Susie Thorsley	D É P O S É
	Ottawa, ON	

B E T W E E N:

SAGAMOK ANISHNAWBEK FIRST NATION

Claimant

v.

HIS MAJESTY THE KING IN RIGHT OF CANADA
As represented by the Minister of Crown-Indigenous Relations

Respondent

DECLARATION OF CLAIM

Pursuant to Rule 41 of the
Specific Claims Tribunal Rules of Practice and Procedure

This Declaration of Claim is filed under the provisions of the *Specific Claims Tribunal Act* and the *Specific Claims Tribunal Rules of Practice and Procedure*.

DATE: December 30, 2022

Susie Thorsley

(Registry Officer)

TO: **HIS MAJESTY THE KING IN THE RIGHT OF CANADA,**
As represented by the Minister of Crown-Indigenous Relations,
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I. Claimant (R.41(a))

1. The “Claim Area”, also known as the” La Cloche Tract”, is depicted on the Map at Schedule “A” and is a tract of land that was patented to the Hudson Bay Company on August 31, 1854, being approximately 5 miles north-south and 2 miles east-west, and approximately 10 square miles or 6400 acres.
2. The Claimant, Sagamok Anishnawbek (“Sagamok”), confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, SC 2008 c 22, [SCTA], as well as an “Aboriginal people” within the meaning of section 35 of the *Constitution Act, 1982*, and a signatory to the Robinson Huron Treaty of 1850 (the “Treaty”).
3. Sagamok people are Anishinaabe or Ojibway and the Claim Area is within their traditional territory, which includes the Spanish River watershed from the north shore of Lake Huron up to the height of land, as well as the islands and waters adjacent to the north shore of Lake Huron.
4. Prior to, and at the time of the 1850 Robinson Treaty, there were at least two traditional Ojibway bands associated with the Spanish River, with separate Chiefs and political structures. One was oriented to Sagamok Point, the north shore of Lake Huron, and western Manitoulin Island, and was identified, post-Treaty, as “Spanish River Division No. 1.” The other was oriented inland, and northward, to Birch Lake and the upper Spanish River watershed, and was identified, post-Treaty, as “Spanish River Division No. 2.”
5. The Robinson Huron Treaty, in the Schedule of Reservations, acknowledges the existence of two Chiefs -- Namassin and Naoquagabo – and their “bands”:

FIFTH—Namassin and Naoquagabo and their **Bands**, a tract of land commencing near Lacloche, at the Hudson Bay Company's boundary; thence

westerly to the mouth of Spanish River; then four miles up the south bank of said river, and across to the place of beginning. [emphasis added]

6. There is also a “Spanish River Division No. 3”. In 1851, various families informed Indian Department officials that they represented the original inhabitants of the Spanish River region and were therefore entitled to a share of the RHT annuities. After a series of petitions, these families were added to the official Spanish River annuity paylists in 1856 and designated by the Indian Department as “Spanish River Division No. 3”. This band lived for most of the year on Manitoulin Island, primarily at Wikwemikong and M’Chigeeng. They also had a separate Chief and distinct political structures.
7. In 1956, Indian Affairs created “Spanish River Division No. 4”. This band was created as an administrative measure to pay families associated primarily with “Spanish River Division No. 2” who were living in the upper Spanish River watershed, generally in and around Biscotasing and Pogamasing.
8. The four bands were amalgamated in 1976. Sagamok is a successor to all former Divisions and as noted above is party to the Robinson Huron Treaty of 1850, as successor to the two bands that signed the Treaty in 1850.
9. Sagamok’s reserve, which was set aside under the Treaty and in error excluded the Claim Area, is located along the north shore of Lake Huron, south and east of the Spanish River, approximately 100 kilometres west of Sudbury. This Reserve was formerly referred to as the Spanish River Indian Reserve No. 5; and the First Nation was known as the Spanish River Band but returned to its traditional name in 1991. Sagamok has a population of approximately 3,190 members, of which, about 1,600 reside on the Sagamok Reserve.

10. The Claim Area is east and immediately adjacent to Sagamok's Reserve and is depicted on the Map at Schedule "A".

II. Conditions Precedent (R. 41(c))

11. The following conditions precedent as set out in s. 16(1) of the *Specific Claims Tribunal Act*, have been fulfilled:

16(1) A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister and

(a) the Minister has notified the First Nation in writing of his or her decision not to negotiate the claim, in whole or in part

12. The Claim was submitted to Canada on or about July 19, 2002, pursuant to the Federal Specific Claims Policy and Process. In a letter dated July 28, 2010, the Claim was rejected by Canada.

III. Claim Limit (SCTA, s. 20(1)(b))

13. Sagamok does not seek compensation in excess of \$150 million.

IV. Grounds (SCTA, s. 14(1))

14. The following are the grounds for the specific claim, as provided for under s. 14 of the *Specific Claims Tribunal Act*:
 - (a) a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;
 - (b) breach of a legal obligation of the Crown under the *Indian Act* or any other legislation — pertaining to Indians or lands reserved for Indians — of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;
 - (c) a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a

fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;

V. Allegations of Fact (R. 41(e))

HISTORICAL CONTEXT: FIRST NATION – CROWN RELATIONS

Nation to Nation Relations

15. Indian Nations including the Anishinaabe of the Upper Great Lakes, which included Sagamok, were already here when Europeans first set foot in North America, organized in societies with their own legal orders, laws, customs, practices, and traditions.
16. According to their customs, practices and traditions (“Anishinaabe law”), title and control over their territory was divided amongst the bands, the main decision-making authority within the Anishinaabe Nation. Bands were led by Ogimaak or Chiefs, but Chiefs did not have arbitrary power. Decisions were by consensus. The Crown understood this. Matters affecting more than one band or the Nation as a whole, such as treaties, were dealt with in general councils. Chiefs and Principal Men participated in treaty negotiations with the authority to refuse or accept the terms of the treaty on behalf of their respective bands in accordance with Anishinaabe law. Under Anishinaabe law, treaties are sacred.
17. Conflicts arose between the French and the British for control, as between each other, over territories in North America, which eventually led to the Seven Years War. Indian Nations participated in that war, as allies of one side or the other. The British eventually prevailed over the French, in part due to the shift in alliance of certain Indian Nations, away from the French, or from the French to the British. The

Treaty of Paris, entered into between the British and the French on February 10, 1763, formalized the end of the Seven Years War.

The Royal Proclamation of 1763

18. Following the defeat of the French in the Seven Years War, Indian Nations were concerned, among other things, about the British intentions regarding their land rights, which culminated in the Pontiac Rebellion. To allay Indian concerns, King George III of Britain issued a Royal Proclamation on October 7, 1763, which among other things, contained provisions to protect the land rights of Indian Nations in North America.
19. By the terms of the *Royal Proclamation of 1763*, R.S.C. 1985, App. II, No. 1 (*“Proclamation”*), lands possessed by Indian Nations in North America are reserved to them unless ceded to the Crown, according to the surrender procedures outlined in the *Proclamation*. The *Royal Proclamation of 1763* also reserves, “under the Crown’s sovereignty, Protection and Dominion, for the Use of the said Indians”, an Indian territory, lying within the interior of British North America. The traditional territory of the Sagamok Anishnawbek, including the Claim Area, lies within the Indian territory reserved by the *Royal Proclamation of 1763*.
20. The *Royal Proclamation of 1763*, which was enacted under royal prerogative with the force of law, was a formulation of the policy adopted by the British Crown to treat First Nation peoples fairly and honourably and to protect them from exploitation in the acquisition of their traditional lands. The terms of the *Proclamation* established the governing principles in which the Crown was obligated to deal honourably with Indian Nations and their lands: first, by making Indian lands inalienable to anyone but the Crown; and second, by establishing a strict procedure for the purchase of Indian lands.

21. In 1763, the British Crown relied on maintaining good relations with First Nations in order to maintain peace and security within those territories it had won from France. Dealings between the British Crown and First Nations were as between sovereign nations and were governed by treaties embodying both British and First Nations laws.
22. Under the edict of the *Royal Proclamation of 1763*, the British Crown set out a treaty process for the purchase of Indian lands by the Crown. According to the *Proclamation*, "if at any time, any of the Indians should be inclined to dispose of the said lands, the same shall be purchased by us, in our name, at some public meeting or assembly of the said Indians, to be held for the purpose" Treaties required there to be consent between the two parties, and the First Nations were to be compensated for any lands or resources "ceded to or purchased by" the British Crown.
23. The recognition of Aboriginal title in the *Proclamation* has been and has remained a policy of the Crown since 1763. It formed a very strong basis for the subsequent treaty-making process and has survived and continues to form the basis for Crown–First Nation relations.
24. The procedures for treaty-making were well established by the turn of the 19th century: they included a blend of First Nation and British customs and usages and were reflected in orders issued by Crown officials. For example, the Dorchester Regulations of 1794, provided that Indian land surrenders required deeds of conveyance; but also that they be made "in public council with great solemnity and ceremony, according to the ancient usages and customs of the Indians". The Regulations also required the presence of the Governor or his designate,

representatives from the Indian Department, and military officers; and that the terms be translated and explained to the Indians.

Treaty of Niagara, 1764

25. Following the *Royal Proclamation of 1763*, the Niagara Treaty Council was called by the Crown in the summer of 1764, to formally announce the terms of the *Proclamation to Indian Nations* and to further quiet Indian unrest in accordance with Indian laws and diplomatic conventions. At the request of the Crown, more than 2,000 First Nations Chiefs representing some twenty-two Indian Nations, including Chiefs from the Anishinaabe of the Upper Great Lakes, attended the Treaty Council at Niagara. The Crown's purpose in calling the Grand Council was to create and renew Indian alliances and at the same time use those alliances to bring Pontiac and others in-line with British interests.
26. The Treaty Council affirmed the pre-existing land rights protection recognized by the *Royal Proclamation of 1763*. Sir William Johnson, the Crown representative, conveyed the provisions of the *Proclamation* respecting Indian lands and committed the Crown to the enforcement of those provisions. The Treaty Council also affirmed the practice of gift-giving, or Indian presents, which was a foundational obligation or diplomatic protocol for establishing relationships under Anishinaabe law. Sir William Johnson, who was well versed in First Nation diplomacy, also bound the Crown to honour this obligation in accordance with Indian laws, traditions and customs.
27. Under the Niagara Treaty, the First Nations in attendance confirmed their attachment as allies to the British Crown. This included the Anishinaabe of the Upper Great Lakes. Indeed, many Anishinaabe warriors – including warriors from what would become the Robinson Huron Treaty territory – later fought as allies of the British Crown in the War of 1812.

Indian Presents

28. Anishinaabe law and diplomatic protocol required on-going renewal of the relationship between the Crown and First Nations. This renewal occurred at public gatherings, where gifts of wampum, silver, food, weapons, furs, tools and clothing were exchanged as symbols of good will and tokens of the military and political alliance. The distribution of "Indian Presents", which was an important part of Anishinaabe law, became part of an annual practice. The Presents were paid for by the Imperial government and not the colonial government, as Royal Bounty in acknowledgement of the fidelity with which the tribes stood by their Great Father the King of Great Britain in various wars.
29. Indian Presents were distributed annually by the Crown to the Anishinaabek, during the summer months, in gatherings at Michilimackinac and Drummond Island (Michigan), Penetanguishene on Georgian Bay and in later years on Manitoulin Island.

Administration of Indian Affairs

30. From the beginning of British rule in North America, the administration of Indian Affairs was the responsibility of the British Imperial Crown and not the colonial government. In 1841, under the *Act of Union*, the Crown surrendered control of land revenues to the colonial government along with the responsibility for certain governmental expenditures. However, Indian Affairs remained an Imperial responsibility, including payment of Indian Presents.
31. The Governor General was responsible for Indian Affairs and reported to the Colonial Secretary in London. By the mid-1840's, Indian Affairs came under the Superintendent General of Indian Affairs, who was the Governor General's Civil

Secretary. At the time of the Robinson Treaties, and in the period leading-up to them, the Governor General was Lord Elgin and Col. Robert Bruce, his brother, was the Superintendent General of Indian Affairs.

32. The administration of Indian Affairs was devolved from the Imperial government to the provincial government in 1860; and with Confederation, in 1867, Indian Affairs came under federal responsibility.

LA CLOCHE TRACT

Use and Occupancy of the La Cloche Tract at the Time of European Contact

33. The La Cloche Tract was an important site for Sagamok, for settlement, subsistence, cultivation, transportation, and trade. The First Nation's use and occupancy of the area predated European contact.
34. La Cloche was a summer village site in the years leading up to and following the arrival of the fur traders, including at the time of the Robinson Huron Treaty. It was also a special site for healing ceremonies and burials.

Pledges by the British Crown to Protect Sagamok Territory

35. After the British prevailed over the French in North America, the British Crown made a number of important undertakings with regard to protecting First Nation land interests, pursuant to which the use and occupation of Indian lands was strictly forbidden unless the lands were first lawfully ceded under British Imperial authority.
36. This pledge was most clearly and forcefully articulated in the *Royal Proclamation of 1763* which recognized the territorial rights of the First Nations and pledged British protection of their territories. The purpose of the *Proclamation* was to "prevent great frauds and abuses" against the Indians, particularly with regard to their lands. It was

to achieve this purpose, by “reserving” lands to First Nations, prohibiting anyone from disturbing them in their possession; and by making Indian lands inalienable to anyone but the Crown. The *Proclamation* forbade anyone from purchasing Indian lands unless and until they had been properly acquired by the Crown from the First Nation. As noted above, it also outlined a procedure for the Crown to obtain the collective consent of First Nations for the surrender of Indian lands. These promises were reiterated and affirmed in the Niagara Treaty of 1764.

37. No map was attached to the *Royal Proclamation of 1763*, but the boundaries mentioned in the text placed the Sagamok traditional territory, including the Claim Area, within area designated as “Lands Reserved for the Indians”.
38. On January 3, 1775, King George III issued additional instructions to Governor Guy Carleton (later Lord Dorchester) which included a strict prohibition against private land purchases of Indian lands by British subjects.
39. On December 26, 1794, Governor General Lord Dorchester (Sir Guy Carleton), wrote to Sir John Johnson, Superintendent General and Inspector General of Indian Affairs, and issued detailed instructions on how to conduct treaties with First Nations. These instructions affirmed many of the procedures and principles contained in the *Royal Proclamation of 1763* but clarified or added important detail which is of particular relevance to the matters at hand. This includes the requirement that all land treaties required surrendered lands to be clearly delineated through sketches or descriptive plans of the territory to be treated for, and also, that the First Nation signatories were to receive a copy, so that “by that means will always be able to ascertain what they have sold and future Uneasiness and Discontents be thereby avoided.”

40. Alexander Vidal, who was sent to Lake Huron and Lake Superior in 1849 as one of the Commissioners appointed by the British colonial government in Canada to investigate the land claims of the Anishinaabe in advance of the Robinson Treaties of 1850, reviewed the *Royal Proclamation of 1763* and associated orders in the preparation of the Vidal Anderson Report.

Sagamok Use and Occupancy of the La Cloche Tract during the Fur Trade Era

41. The French fur traders first appeared in the Lake Huron region in the 1600s. After 1760, the North-West Company (“NWCo”) at first dominated the trade but became locked in bitter competition with the Hudson’s Bay Company (“HBCo”) by the early 1800s. The two Companies merged in 1821 and came under the leadership of George Simpson, who was to preside over the enterprise until his death in 1860.
42. The original NWCo post was at La Cloche Island, between Manitoulin Island and the north shore of Lake Huron, but it later moved west, to the mouth of what became known as the La Cloche River, likely in the 1790s. Under the HBCo, the La Cloche post became headquarters for the Company’s Lake Huron District, which included posts at Mississagi River, Green Lake, Whitefish Lake, French River, Shawanaga, and Sault Ste. Marie.
43. When they first arrived, fur traders at the La Cloche post occupied the lands at the pleasure of the host band, the Sagamok Anishnawbek. Permission was temporary and limited to actual needs of the fur traders for purposes of a fur trade post because it was beneficial to Sagamok. Though contrary to the *Royal Proclamation of 1763*, these kinds of agreements were based on mutual exchanges and reciprocity and were standard practice during the fur trade period.

44. Throughout the fur trade period, both before and after the Robinson Huron Treaty was concluded, the Sagamok continued to use and occupy the La Cloche Tract, for harvesting fish, wildlife, maple sugar, planting, ceremonies and burying their dead. In fact, La Cloche remained a village site throughout this time. Vidal and Anderson, in their 1849 report, indicated that the Sagamok Anishnawbek lived “about La Cloche River.” The presence of the fur traders did not prevent this continuing use and occupancy.

The Mining Rush and HBCo Attempts to Secure Title at its Posts

45. By the mid-1840s, minerals were discovered in the upper Great Lakes region, which led to a mining rush and an increase of newcomers. The lands north of Huron and Superior were the traditional territories of Anishinaabe peoples, including the Sagamok Anishnawbek. Contrary to the *Royal Proclamation of 1763*, the Province of Canada began issuing licences for mining exploration in the fall of 1845 without the lands being dealt with by treaty.
46. At the time, there was no regulatory framework in place for mining claims, the licences to explore were simply authorized by a series of individual Orders in Council. A regulatory framework evolved gradually, which provided for mining licences and fees for standard tracts of 2 miles front by 5 miles deep – 10 square miles – which could be purchased within two years at a cost per acre.
47. There was a frenzy of staking and speculation, all of it on unceded Anishinaabe lands. Many of the people who applied for these mining licences, or who were employed by the licence holders, would later be directly involved in the Robinson Huron Treaty and events revolving around La Cloche. Alexander Vidal, who was Commissioner in the Vidal Anderson Commission, surveyed the mining locations and the La Cloche Tract; the Treaty Commissioner – William Benjamin Robinson –

was Superintendent of operations at the Bruce Mines. JW Keating, who was an interpreter at the Treaty Council and participated in the surveying of the reserves after the Treaties were signed, acted as an explorer for some of the mining interests, worked at Bruce Mines, and applied for mining licences as well. Another key player was HBCo and its Governor, George Simpson. Although Simpson himself was not directly involved in the Robinson Treaties, HBCo staff was engaged in the preparations for the Treaty Council; they participated in the Treaty Council as witnesses; and HBCo also participated in the distribution of Treaty monies. Governor Simpson was also an investor in the mines, as well as being connected to William Benjamin Robinson.

48. The mining and survey activities along the north shores of Lake Huron and Lake Superior sparked immediate protests by Anishinaabe people who viewed these activities as a violation of Crown obligations. The protests triggered investigations into the claims of the Indians.
49. With respect to one such documented protest, on September 25, 1845, Indian Superintendent TG Anderson commented that the land north of Lake Huron to Sault Ste. Marie belonged to the "Chippewa" who lived on both sides of the lake. In regard to the HBCo, Anderson remarked that their claim was based on permission from the "Indians" to occupy and an assurance from the Government that their claim would be ratified whenever a purchase was made. He indicated that Aboriginal title had "never been extinguished," and he recommended that the government take action to acquire title from the Anishinaabe to promote orderly settlement and development of the area by white settlers.
50. Concerned about securing the land around the company's posts in the face of this mining rush, HBCo Governor Simpson began to petition the Crown to secure HBCo

lands around its posts on the shores of Lakes Superior and Huron, including the La Cloche post. Ironically, his petitions were initially based on HBCo's claims to possessory rights -- possession of the posts and adjoining farms "from time immemorial".

51. Initially, Simpson wanted the HBCo lands "excepted" or "reserved" from mining claims with a view that the lands would eventually be granted to HBCo. The tracts sought, including the La Cloche Tract, had the same dimensions as the mining locations, that is, 2 miles front by 5 miles back, or ten square miles. Commissioner of Crown Lands DB Papineau replied to Simpson on December 12, 1846, and asked for proper surveys to be done, "to define and mark off the boundaries of the lands held in possession by the company," and that maps of the tracts and reports be provided to the government. It is to be noted that the claim for lands at the HBCo posts far exceeded the lands actually used by HBCo around the posts.
52. In 1847-48, Provincial Surveyor Alexander Vidal, received instructions from DB Papineau, Commissioner of Crown Lands, to survey mining locations on the North Shore of Lake Huron. Vidal was in communication with the HBCo and, as a result, HBCo suggested to government that Vidal survey the HBCo lands at the posts while he was surveying the mining locations. Accordingly, on June 25, 1847, he was also instructed to survey the lands in the possession of the HBCo at the Mississagi and La Cloche posts, required as a "reserve", with a view to bringing their application for such "reserves" more definitively to government.
53. The government had been made aware of concerns and interests of the Anishinaabe in the area and the potential for conflict about the surveys (as had Vidal himself). However, when Vidal received his instructions for the 1848 survey season, there was no mention of this. Nor does it appear that any effort was made by either

the Crown or HBCo to consult with or obtain the consent of Sagamok during any part of the survey process. Indeed, Vidal was clearly supportive of HBCo interests and gave no regard whatsoever to Sagamok's interests. His Report provides: "At the La Cloche River no rival claims exist – the Company having been for many years in undisputed possession of the whole of the land they now claim."

54. Alexander Vidal surveyed the Mississagi and La Cloche posts in late August 1848. Purportedly acting solely according to the wish of the HBCo agent, he "surveyed the coast a mile on each side their establishments". Vidal just marked the frontage and projected the sidelines; he did not complete the rear line. The survey did not enclose the 10 square miles (6,400 acres) eventually included within the La Cloche Tract. Upon his return, Vidal made one plan showing both Mississagi and La Cloche.

ROBINSON HURON TREATY

Petitions and Investigations: the Vidal-Anderson Commission, 1849

55. Anishinaabe concerns and petitions over encroachments on their lands resulted in investigations, as aforesaid. One was led by long time Indian Agent TG Anderson in 1848. He considered their claims to Aboriginal title valid and recommended that the government enter into treaty with the Anishinabek of the North Shore. The Commissioner of Crown Lands requested more details on each community and the extent of their lands.
56. As a result, in August 1849, an Order in Council was adopted which appointed Alexander Vidal and TG Anderson to investigate and report on the claims of the Anishinaabek. They were instructed to proceed "to Lakes Huron and Superior to

meet the Indians on their grounds and report fully upon their claims to the executive Government with as little delay as possible.”

57. In providing instructions to Alexander Vidal, Commissioner of Crown Lands JH Price specifically mentioned the retention of reserved lands:

The Government will not be disposed to interfere with any reservations of limited extent which the Indians may be desirous of retaining at the places where they are at present settled or to which they might desire to remove.

58. Vidal and Anderson got a late start - they did not meet at the Sault until September 15, 1849. From there they travelled by steamer to Fort William and travelled back along the north shores of Lakes Superior and Huron by canoe, intending to do their consultations with Anishinaabe First Nations along the way. Their late start affected the adequacy of their consultations, a deficiency which was acknowledged in the Vidal Anderson Report.

59. Nevertheless, the Vidal Anderson Commission made some important findings in the final report, dated December 5, 1849. Most importantly, their Report acknowledged the basis and validity of the Anishinaabe claims to Aboriginal title. They also reported on the territorial division of lands amongst bands and the legal and exclusive nature of that tenure and jurisdiction of individual First Nations in accordance with Anishinaabe legal orders.

60. Vidal and Anderson indicated that only the Chiefs whose band held title to particular tracts of territory could treat with respect to those lands. They identified 22 Chiefs “whose personal sanction and signature it would be necessary to obtain in order to make a treaty that would be generally approved of, and leave no just ground for complaint in future on the part of any band.” Of those 22 Chiefs, Vidal and Anderson only met with 16.

61. The lateness in the season affected the Vidal and Anderson consultation efforts with Sagamok in a significant way. They spent just over 24 hours at La Cloche, around October 24, 1849. Vidal's Diary indicates that they "Sent for the Spanish River Chiefs on our arrival." The Commissioners seemed to be aware that there were at least two bands at Sagamok – their list of bands in Appendix B of the Vidal Anderson Report shows the "Spanish River and La Cloche band," and the map attached to their report shows the traditional territory of the "Spanish River and La Cloche band." Yet, Vidal and Anderson describe them as though they were a single "band", and they situate them within a single traditional territory.
62. The Commissioners also erroneously identify only one Chief at Sagamok and mistakenly name "Penaish seh" (Francois Painassy) as that Chief, giving his residence as "about La Cloche River." "Penaish seh" eventually signed the Robinson Huron Treaty, not as Chief, but as "Principal man" for what would later be described as Spanish River Division No. 2. Although their report notes him as one of the Chiefs "with whom the Commissioners have conversed," it is not clear when or where they may have met with him. Vidal's Diary indicates that the messenger who had been sent for the Spanish River Chiefs "returned at noon only to say that the Spanish River chiefs had gone to the Sault." Therefore, the Commissioners "had a talk with those present." Given the lateness of the season, most of the community members would likely have been out on their hunting grounds.
63. Another of the findings in the Vidal Anderson Report was that there was a general wish among the Chiefs to enter into treaty, "provided they are not required to move from their present places of abode, - their hunting and fishing not interfered with, and that the compensation given to them be a perpetual annuity." They added that the Anishinaabek generally wanted to reserve lands for their own exclusive use, including village sites, areas for cultivation, and fisheries. As aforesaid, Vidal &

Anderson reported that that the “designation or locality” of Sagamok Anishnawbek as “La Cloche & Spanish River, and that their “residence” was “about the La Cloche River.” It is therefore highly unlikely that Sagamok would have wanted to move from their residence about the La Cloche River.

64. A review of the map accompanying their Report shows the territory of the “Spanish River and La Cloche Band,” extending eastward from Nid d’Aigle to La Cloche River, east of the HBCo’s Post. Two mining locations are marked on the Vidal Anderson map – on lands that would become part of the Spanish River Reserve No. 5 – yet the La Cloche Tract is not. The HBCo’s La Cloche post is simply marked, with an “x”, but the Company’s claims are not mentioned nor is the La Cloche Tract, as surveyed by Vidal, marked out.
65. The Vidal Anderson Report makes reference to “a list or description of Reserves which the Chiefs have expressed a wish to make ... intended for places of residence and cultivation...” This list is in Appendix D of their Report, with the heading “Reservations which the Indians wish to make.” For the “La Cloche and Spanish River Band,” it was “A reserve on the banks of the Spanish River, locality not determined upon.” It is likely that the “locality had not been determined upon” because they did not have an opportunity to meet the Sagamok Chief(s) or a significant enough majority of Sagamok members to confirm the consensus of the community on reserve location. However, given that reserves were at the “wish” of the band and the Vidal and Anderson Report indicated that the “Residence” of the “La Cloche and Spanish River Band” was “about La Cloche River,” it is extremely unlikely that they would not have “expressed a wish” for the La Cloche Tract to be part of their reserve.

66. In connection with the identification of proposed reserves, it is also noteworthy that Appendix D of the Vidal Anderson Report refers to three situations in which the Anishinaabek desired to secure lands to other parties, including lands at "... Sault Ste. Marie granted many years ago to the Hudson's Bay Company ... without any regular document..." One would have expected that if Sagamok (and for that matter, the Crown) intended to exclude the La Cloche Tract from their reserve (to secure it to the HBCo), they would have acknowledged granting HBCo a right to occupy the Tract which was after all part of their traditional territory and would have mentioned it specifically to the Commissioners.

The Mica Bay Incident

67. In early November 1849, before Vidal and Anderson were able to issue their Report, an armed party of Anishinaabek and their supporters took over the Quebec Mining Company's mine at Mica Bay on Lake Superior. Unable to tolerate any further encroachments on their lands, the Anishinaabek put a stop to development in their territories in the absence of treaty.

68. Governor General Lord Elgin placed much of the blame for the Mica Bay incident on the previous colonial administration's handling of mining leases in the region and on the inattentiveness of his predecessor, Lord Metcalfe. He cited the fact that licenses had been issued without first resolving Anishinaabe land rights as required by British law and policy, including the *Royal Proclamation of 1763*.

The Treaty Council of 1850

69. In January 1850, William B Robinson was appointed by Order in Council to negotiate a treaty covering the mineral lands on the North Shore. On the same day, Superintendent General of Indian Affairs Robert Bruce sent instructions to

Robinson, authorizing him “on the part of the Government to negotiate with the several Tribes for the adjustment of their claims to the lands in the vicinity of Lakes Superior and Huron or of such portion of them as may be required for mining purposes.” On April 16, 1850, his instructions were made more precise by way of another Order in Council which provided that he was to “negotiate for the extinction of the Indian title to the whole territory on the North and North-Eastern Coasts of Lakes Huron and Superior” if possible.

70. At aged 53, Robinson had already had a long political and business career; he was a member of the ruling class, and had many connections to those who had an interest in the lands and resources of the North Shore that were the object of the Treaty. In fact, Robinson himself had business interests on the North Shore of Lake Huron and had worked as Superintendent of the Montreal Mining Company at Bruce Mines.
71. Robinson used his connections and his influence to assist in the treaty making process, including his relationship with George Simpson of the HBCo. The two men were close personal friends as well as business associates. Robinson was also mindful and supportive of HBCo’s economic and purported property interests within the territory. At the same time, he was dependent in large degree on assistance from the Company in terms of making arrangements for the proposed treaty, and after the Treaty was signed, in administering Treaty payments. In these circumstances, Simpson was able to advance the interests of HBCo through the treaty process.
72. Robinson travelled to Sault Ste Marie in mid-August 1850 and prepared to enter into treaty negotiations with the Anishinaabek. Among other materials, Robinson had in hand the Vidal Anderson Report before and during the treaty negotiations, which he

later said was of “much use.” Between August 18 and September 12, 1850, Robinson engaged in preparations and negotiations for the Robinson Superior and Robinson Huron Treaties at Gros Cap, the Sault, and Garden River. The Superintendent General of Indian Affairs, Col. Robert Bruce was in attendance from August 25 to 30, 1850; and his brother, Governor General Lord Elgin attended from August 30 to September 3, 1850.

73. The Robinson Superior Treaty was signed on September 7, 1850, and the Robinson Huron Treaty was signed on September 9, 1850. Four representatives had their names affixed to the Lake Huron Treaty on behalf of the Sagamok Anishnawbek:

Onomsin (Namassin) signed as Chief of the Spanish River Band and Oningegun as Principal man (to become known as Division No. 1, Sagamok)

Noaquagabo signed as Chief and Francois Painassy as Principal man of the Spanish River Band (to become known as Division No. 2, Birch Lake)

74. Robinson’s diary indicates that he had two copies each of the Superior and Huron Treaties, one copy for the Crown, and only one for all of the Robinson Superior Chiefs and one for all the Robinson Huron Chiefs in attendance. Peau de Chat, one of the Fort William Chiefs, received the copy for the Robinson Superior Chiefs; and Shingwaukonce, the Chief at Garden River, received the copy for the Robinson Huron Chiefs. There is no record in Robinson’s diary or elsewhere to indicate that the Sagamok Chiefs or any of the other signatory Chiefs received their own copy of these Treaties. This was not in conformity with the Dorchester Regulations of 1794, which required that copies of treaties and plans of the territory covered should “be given to the Indians, who by that means will always be able to ascertain what they have sold, and future uneasiness and discontents be thereby avoided.”

75. Apart from Robinson's diary and report, there is no record of the 1850 Treaty Council. JW Keating, who could speak English, French and Anishinaabemowin, was enlisted by Robinson to assist him in the treaty process. Keating assisted in the census and served as one of the interpreters at the Treaty Council; and he also assisted in making cash payments at Manitowaning immediately afterwards. He was also asked by Lt. Col. Bruce, the Deputy Supt of Indian Affairs, to record the speeches of the Chiefs at the Treaty Council. Unfortunately, these records have been lost by the Department of Indian Affairs. Keating later claimed to have also written down the descriptions of the lands to be retained as reserves. These records too would appear to have been lost. There is therefore no known record of what was discussed between Robinson and the Sagamok Anishnawbek Chiefs regarding their reserve.
76. After the Treaty Council, Robinson made the distributions associated with the initial 2000 pound cash payment under the Robinson Huron Treaty. Voucher No. 9 for the Treaty payment of 1850 covers Spanish River. There are 36 names on the list, and another 30 shares were sent back "for other Indians" of the Band. Noaquagabo is head of the list as "Chief at Spanish River," and paid as a Chief, \$25; Namassin is also paid as a Chief, \$25. Shemagow (Shamawgaw) is second on the list and takes home a number of shares to be distributed to absentees. Penaisse and Oninigegun, both of whom signed the Treaty as Principal Men, received regular shares, at \$4 each.
77. After a stop at Penetanguishene, where they took an adhesion to the Lake Huron Treaty, Robinson arrived in Toronto on September 18, 1850 and gave the treaties to Premier Louis - Hippolyte Lafontaine on September 19, 1850. Following the acceptance of Robinson's report by the Executive Council's Committee on Land

Applications, the Robinson Huron and Robinson Superior Treaties were ratified by Order in Council of the Province of Canada on November 12, 1850.

Reservations Under the Treaty

78. Unlike the numbered treaties, where the written text provides for a cession of the entire treaty territory and grants back reserves, the Robinson Treaties except reservations from the surrender. The Robinson Huron Treaty provides as follows:

. . . the said Chiefs and Principal men, on behalf of their respective Tribes or Bands, do hereby fully, freely, and voluntarily surrender, cede, grant, and convey unto Her Majesty, her heirs and successors for ever, all their right, title, and interest to, and in the whole of, the territory above described, save and except the reservations set forth in the schedule hereunto annexed; which reservations shall be held and occupied by the said Chiefs and their Tribes in common, for their own use and benefit.

79. There was also provision for lands within the territory, intended as reserve lands, that may have been sold or granted prior to the conclusion of the Treaty:

The parties of the second part also agree, that in case the Government of this Province should before the date of this agreement have sold, or bargained to sell, any mining locations, or other property, on the portions of the Territory hereby reserved for their use; then and in that case such sale, or promise of sale, shall be perfected by the Government, if the parties claiming it shall have fulfilled all the conditions upon which such locations were made, and the amount accruing therefrom shall be paid to the Tribe to whom the Reservation belongs.

80. Of course, the La Cloche Tract does not fall within this category of lands since it had not been sold or promised for sale prior to September 9, 1850. However, given that the La Cloche Tract had been surveyed and there were discussions about its possible sale or grant to HBCo, the Crown, and its Commissioners (including Vidal who did the survey as well as Treaty Commissioner Robinson), ought to have disclosed this fact to Sagamok. There is no indication that this disclosure was made.

81. The Robinson Treaties have no specific formula for reserve quantum or selection. The Vidal Anderson Report and the terms of the Treaty indicate that the overarching principle was First Nation self-selection; and the factors or criteria for reserve land selection included the existing use and occupation of lands and waters for residence and settlement, use or suitability for cultivation and farming, proximity to fisheries and the importance of the location for ceremony and burials.
82. The Lake Huron Treaty contains a list of Reserves to be retained by each signatory community. Number five on that list is Spanish River:
- 5th - Namassin and Naoquagabo and their **bands**, a tract of land commencing **near La Cloche, at the Hudson's Bay Company's boundary**; thence westerly to the mouth of the Spanish River; then four miles up to the south bank of the said river and across to the place of beginning. [emphasis added]
83. This description is noteworthy for two reasons. First, it recognizes that there were two Spanish River Bands associated with the Treaty. Secondly, it incorporates the HBCo boundary into the reserve description albeit ambiguously, even though the boundary itself had no legal status because HBCo had no legal title to the La Cloche Tract. It was this vague description that was the basis for the Crown's exclusion of the Tract from the Sagamok reservation. This, in spite of the fact that the La Cloche Tract was an important settlement site and had many of the criteria for reserves selection, making it highly unlikely that Sagamok would have intended to exclude it from the reserve.
84. The description in the schedule of reserves in the Treaty, particularly given their brevity and vagueness, were only preliminary descriptions or indications, subject to more detailed demarcation in consultation with the Anishinaabek signatories. The survey and confirmation of reserve boundaries was a legal requirement of Crown Policy, as indicated by the Dorchester Regulations, and was therefore an integral

part of the treaty process. This point was insisted upon by the Chiefs, as noted by Robinson in his Report to government:

The Chiefs are desirous that their several reservations should be marked by proper posts or monuments, and I have told them the Govt would probably send someone next spring for that purpose. As I know many of the localities I shall be able to give the necessary information when required.

85. Accordingly, almost all of the reserve descriptions contained in the treaty were revised or amended as a result of consultation and demarcation process with the Chiefs on the ground. The surveyors were instructed to consider the wishes of the Chiefs and make adjustments as required. The Chiefs were for the most part involved in the surveys and marking of boundaries, and they made their views known. A major exception was Sagamok.

DEMARCATIION OF RESERVES: PART OF THE TREATY PROCESS

Protecting the Interests of the Indians: Fixing the True Limits of Reserves and Preventing Encroachments

86. On June 4, 1851, Commissioner of Crown Lands JH Price reported to the Executive Council on the need to survey the reserves. He noted that because the "exact position and extent" of the reserves was not defined in the Treaty a "person in whom the Indians confide" should be appointed to point out the boundaries on the ground, in part to prevent encroachments. On June 14, 1851, the Executive Council approved Price's recommendations and directed that surveys be done to lay out the 1850 Treaty reserves, including explicit mention of the need to "prevent the encroachment of squatters."
87. Commissioner of Crown Lands JH Price issued instructions to JS Dennis, PLS, on July 19, 1851, who was to be accompanied by George Ironside, the Indian Superintendent at Manitowaning. His mandate was to assist Dennis in his work by

informing the Chiefs of Dennis's mission, and by attending where possible during the surveys, "to protect the interests of the Indians." He was also directed to recommend to the Chiefs that they should appoint someone to meet Dennis to assist him in "fixing the true limits" of the reserve.

1851 Survey Season

88. Dennis's first survey season started September 2, 1851, which is when he left Toronto. He met up with Ironside at Manitowaning and they departed from there with the survey crew on September 9, 1851. Dennis did three reserves during the 1851 season. Starting with Point Grondine, they arrived there on September 11th and completed the survey on September 25th, a total of approximately 14 days, which included consultations with Chief Kitcheposskissegun.
89. Then, on September 28, 1851, Dennis moved to Whitefish River Reserve, and after engaging in consultations with Chief Wabekekik, completed the survey on October 25th, for a total of approximately 27 days. After Whitefish River, and it being late in the season, Dennis and his survey crew decided to go back home, doing Henvey Inlet on the way back. They met and engaged in consultations with Chief Wagamake on November 1st and finished the Henvey Inlet survey on November 13th, after which they departed, arriving in Toronto on November 17, 1851. Dennis spent a total of 13 days on the Henvey Inlet demarcation in 1851 and came back in 1852, when he spent an additional day, November 1, 1852.
90. The 1851 surveys were complicated and after significant consultations with the Chiefs of Point Grondine, Whitefish River and Henvey Inlet, major discrepancies in the reserve descriptions and boundaries came to light, which resulted in some adjustments in reserve boundaries. One recurring source of discrepancy in the Robinson Treaty reserves relates to the dimensions of the reserves and the unit of

measurement used to describe them. The treaties uniformly use the term “miles” in describing the reserves. But upon meeting with the Chiefs, it appeared that the French league – approximately three times longer than the mile -- might have been the unit of measurement intended. This issue first arose at Point Grondine and Henvey Inlet and it arose again in the 1852 survey season, at Thessalon, which is discussed below. It was also an issue in the demarcation of other reserves, including the Dokis Reserve and may have been an issue at Sagamok as well.

91. Due to other duties, Ironside was only able to participate in the first two surveys. The complications in the demarcation process led Dennis, in a memo dated March 4, 1852, to insist on a replacement – someone who would undertake the responsibility of consulting with the Anishinaabe in establishing reserve locations, who could speak the language and who had the confidence of the Anishinaabe. WB Keating PLS, applied for the job.

1852 Survey Season

92. Keating had written to SGIA Robert Bruce on November 23, 1851, indicating that he was “present at the Treaty” and wrote down from the Chiefs the very descriptions under which he [Dennis] acts.” He was appointed to assist JS Dennis by John Rolf, Commissioner of Crown Lands, on March 19, 1852, “as an assistant who from his knowledge of the Indian language and from personal intercourse with them People may be enabled to afford valuable assistance in reconciling any difficulties should such arise.”
93. Other members of the 1852 survey party included Charles Unwin, a surveyor, and three chain-bearers -- George Bristow, HC Girdlestone and John Hamilton. In a letter to Rolf on May 29, 1852, Dennis proposed splitting the survey team: he and Keating would work north and westward from the reserves on Georgian Bay towards

the Sault, with Unwin following behind. According to this arrangement, Dennis and Keating would confer with Anishinaabe leadership and community members and “fix the limits of each of the Reserves”; Unwin would follow behind with the survey team and “from the points thus found” draw the outlines of each tract.

94. In a letter dated May 29, 1852, the Commissioner of Crown Lands expressed concerns about this arrangement and asked Dennis to ascertain from Keating “whether it would interfere with the examination of the Reserves he has been instructed to make and also whether the survey of the limits of their lands in his absence would be satisfactory to the Indians”. Rolf asked Dennis to report back. There is no record of Dennis reporting back, but it does appear that he conferred with Keating who thought the arrangement was satisfactory. There is no indication that Keating (or Dennis) consulted with the Anishinaabe in coming to this determination, either generally or with respect to particular surveys in the field, which probably would have been more appropriate. In any event, the arrangement was implemented in 1852.
95. To start the 1852 season, JS Dennis, along with his crew left Toronto on July 16, 1852. They met JW Keating at Penetanguishene the next day and headed together up Georgian Bay. They arrived at Parry Island (Wasauksing) on July 20th. Between July 20 and 29, 1852, the boundaries of the reserves at Parry Island (Wasauksing), Shawanaga (including Naiscoutaing) and Magnetawan were established in consultation with the Chiefs and community members of the respective First Nations. Boundary adjustments were made as a consequence of the consultations, including a purported decision by Wasauksing to reserve Parry Island rather than the mainland reserve described in the Treaty. Dennis and Keating then left instructions for Unwin to complete the surveys. Unwin completed the surveys of

Shawanaga (including Naiscoutaing) and Magnetawan on August 28, 1852 (since it is an island, Parry Island did not need to be surveyed).

96. On August 3-4, 1852 Dennis and Keating went to Manitowaning, where the Lake Huron Chiefs were receiving their annual presents, “in order to consult with and make appointments with Chiefs” for the remaining surveys. There, they met with Shingwaukonce, then proceeded to his First Nation of Garden River where they held a council with the Chief and his band on August 12-16, 1852, approximately five days. They discussed and agreed upon boundaries of the Garden River Reserve. Dennis and Keating then moved on to Thessalon. Approximately two weeks later, Unwin and his crew started the Garden River survey after they finished surveying Shawanaga (including Naiscoutaing) and Magnetawan on August 28th. They finished out the season at Garden River, which they completed surveying November 5th, at which point he returned to Toronto.
97. Between August 18 and September 10, 1852 – approximately 24 days – Dennis and Keating were at Thessalon, where they met with the “Chief Keokouse and his band”. As aforesaid, it came to light in these consultations that a translation error had been made in unit of measurement used in the text of the Treaty – Keating acknowledged that though “mile” was used, the French league was undoubtedly intended. Accordingly, an adjustment was made to account for this error in the reserve boundaries.
98. From September 11-12 until the 17, 1852 Dennis and Keating were at Mississagi – a total of six days. They waited a day or two for Chief Ponekeosh; when he arrived, they engaged in consultations regarding the boundaries of the reserve.
99. According to his May 14, 1853, Report to the Commissioner of Crown Lands, John Rolf, by mid-September, Dennis began to feel “very anxious” about the lateness of

the season and their ability to complete the remainder of the work. Moreover, Dennis and Keating, were convinced of the “the utter worthlessness of the tracts surveyed,” and came “to the conclusion that they were not worth the expense”. This view, combined with the advancing season, forced Dennis and Keating to cut corners and split the survey crew yet again, even though this was “a proceeding not authorized by the instructions.” Under this arrangement, Dennis and Keating, after Mississagi, would carry-on to do the reserves at Serpent River, Spanish River, Nipissing, Dokis and French River; and Arthur Bristow would follow doing the actual surveys.

100. This arrangement was problematic: the consultations with the Chiefs and their bands were inadequate and the attention and quality of the reserve demarcations suffered significantly, particularly for Sagamok. The conduct of the Crown in the demarcation of the Spanish River Reserve violated Crown Policy and fell below the standard of care expected of a fiduciary in a reserve creation process under the Robinson Huron Treaty.
101. Arthur Bristow was hired onto the 1852 survey crew only as a chain-bearer. He was a novice surveyor, having had been appointed as a Provincial Land Surveyor of Upper Canada on April 28, 1851. Upon his arrival in Canada from England, he had studied under Dennis, who described him as "a friend who had accompanied me as a chain-bearer, but principally from a desire to see the country." He was only 25 years old. Bristow was handicapped not only by his lack of experience and lack of familiarity with the Anishinaabe people and the territory, but also by his inability to speak and understand Anishinaabemowin.
102. Dennis and Keating arrived at Serpent River on September 18, 1852 and were there until the 22nd, approximately four days. There were no Indians at the mouth of the river when they arrived, so they hired an Indian guide and went up the river about

15 miles, where they found Chief Windawtegawinini and his band waiting for them. Dennis and Keating fixed the boundaries of the reserve in consultation with the Chief and left on September 22nd. Bristow arrived at Serpent River on September 27th. He picked-up his instructions and hired an Indian guide to point out the boundaries marked out by Dennis and Keating. Bristow completed the survey on October 2nd.

The Demarcation Process at Sagamok

103. On September 22, 1852 after fixing the east boundary of the Serpent River Reserve, Dennis and Keating proceeded up the Spanish River to the portage, then came down to the La Cloche post, arriving in the evening. The following day, on September 23rd, they located the post which Alexander Vidal had planted at the Southwest angle of the area claimed by the HBCo, marked it, and left for Manitowaning. Dennis and Keating probably spent mere hours on the morning of September 23rd at La Cloche because they left to go across to Manitoulin and encamped at Sheguiandah that night – that trip would have taken at least 4-5 hours by canoe. This is a sharp contrast with the amount of time spent for other reserves – a minimum of several days and sometimes many days; sometimes they spent several days just waiting for the Chief; and sometimes they travelled several days into the interior to meet with the Chief and the band.

104. Dennis's report states:

After visiting and marking and confirming Mr Vidal's post at south west angle of HB Comp[any] tract at this place as the East limit of the Reserve to be laid off here, upon which occasion we were attended by the Chief interested, we crossed to Manitowaning.

105. Although the Report says they “were attended by the Chief interested”, it does not suggest any engagement or room for meaningful consultation – Dennis and Keating

went straight to Vidal's survey post. There does not appear to have been any discussions about whether the Vidal survey post was an appropriate boundary for the reserve, or whether the HBCo's claim to the LaCloche Tract was valid or approved by Sagamok. The text and brevity of the Report does not show any effort to protect Sagamok's interests – the settlement site, fisheries, ceremonial sites and burials at La Cloche – which Keating was specifically mandated to do. Nor did Dennis and Keating appear to engage in any consultations about the other boundaries of the reserve. This is to be contrasted with the discussions they held with the Chiefs and band members of other First Nations.

106. The lack of detail provided by Dennis with respect to consultations with Sagamok about the boundary survey is problematic. In contrast to all the other surveys carried out in the 1851 and 1852 seasons, Dennis does not mention the "Chief interested" by name. Nor does Dennis's diary make any mention of meeting with the "Chief interested". Moreover, as we know, there were two Sagamok bands that signed the Treaty, with two separate Chiefs. There is no indication which of the Spanish River Bands the "Chief interested" represented, and no indication of meeting the Chief of the other Spanish River Band.

107. The role, location, interests, and influence of the HBCo at La Cloche also raises serious questions. The influence of HBCo and its Governor, George Simpson, regarding the treaty process and its key players was previously mentioned. More particularly, HBCo's influence was even more pronounced regarding the demarcation of the Spanish River Reserve. Bristow arrived at La Cloche and carried out his survey work from October 4th to October 13th, 1852. Dennis and Keating left survey instructions for Bristow, with Wemyss Simpson (George Simpson's brother-in-law), who was in charge of the HBCo post at La Cloche. It is to be noted that the instructions were not left with the Sagamok Chief or Chiefs. Moreover, according to

Dennis's diary, Bristow met only with Wemyss Simpson, from whom he picked up the instructions that Dennis had left behind. There is no indication in Dennis's or Bristow's report or field notes that Bristow consulted with any Chiefs or band members from Sagamok.

108. It would also appear that Bristow (and Dennis as the lead surveyor) may have committed serious errors in the actual survey at Sagamok. Bristow began his survey at the post Vidal planted in 1848 and marked it as the eastern boundary of the Spanish River Reserve. Bristow then plotted a line due north until it intersected with the Spanish River, where, according to the field notes contained in Dennis's Field Notebook, he planted a post across from an island in the Spanish River. The island shows up as an important feature in the final Plan of the Spanish River IR No. 5, dated May 14, 1853, prepared by Dennis and endorsed by Commissioner of Crown Lands John Rolph. That Plan shows an island in the Spanish River where the boundary meets the river.

109. However, the island does not exist and it does not appear on any other contemporaneous surveys. In 1983, DW Endleman, OLS, CLS, wrote a memorandum on the subject of the eastern boundary of Spanish River Indian Reserve No. 5. He reviewed the field notes of Bristow's 1852 survey (found in JS Dennis's report), and cast doubt on the work undertaken by Bristow, and not just the misplaced island:

The only large island near there is approximately 1200 feet further east. [...] If his [Bristow's] line actually ran to a point on the shore opposite the only large island presently in the river, the line would be approximately 1200 feet east of its present position. [...] I cannot offer any explanation for the island being shown on JS Dennis' field notes and plan in the Spanish River opposite the northerly terminus of his boundary line. There is certainly no island there to-day and the soundings that I took indicate that it is extremely unlikely that there ever was one. The only explanation I can offer regarding the configuration of the shore line of the reserve shown on JS Dennis' plan is that it was prepared from rough surveys and sketches

by Dennis or others at the time since there appear to be a number of differences between features on that plan and the present topographic plans of the area.

110. If, as Endleman suggests, the Spanish River boundaries were fixed not by proper survey, but by “rough surveys and sketches,” obviously this would not meet the standard of care required of a professional surveyor. Nor would it meet the fiduciary standard of care owed by the Crown to the Sagamok Anishnawbek in the reserve creation process under Robinson Huron Treaty.

The Remaining Surveys in 1852

111. After the short shrift given to the Sagamok Reserve, Dennis and Keating went across to Manitoulin and stayed at Sheguiandah on September 23, 1852. From there, they continued eastward, staying at Manitowaning September 26-29, 1852; and then crossed Georgian Bay and entered the French River on October 1st. On their way to Lake Nipissing, while travelling along the French River, Dennis did a (non-instrumental) survey of the river, developing a sketch, which would be used for purposes of compiling the plan of reserves on the French River and Lake Nipissing. On October 4th, Dennis and Keating adjusted the boundaries of the French River (Michequanga's) Reserve and left instructions for Bristow. They arrived at Lake Nipissing on October 5th and spent from October 6-15, 1852, a total of 9 days, in connection with marking the boundaries of the Nipissing Reserve, in consultation with Chief Shabokishick.
112. Following the Nipissing Reserve, Dennis and Keating then moved on to Dokis Reserve on October 15th, where they spent 3 days marking out the boundaries of the reserve in consultation with Chief Dokis and three of his band members. In fixing the boundaries, Chief Dokis mentioned that leagues was the intended unit of measurement rather than miles. The boundaries were adjusted accordingly.

113. After Dokis Reserve, Dennis and Keating continued down the French River and on October 20th they united with Bristow at the French River Reserve. Keating left to go home on October 21st, leaving the rest of the party to finish the survey of the French River Reserve. Between October 31st and November 2nd, they were at Henvey Inlet, meeting the Chief and surveying an addition to the Reserve. Dennis arrived at his home on November 7, 1852.
114. The Batchewana, Wahnapiatae and Whitefish Lake reserves were not surveyed in 1851 or 1852.
115. On January 18, 1853, SGIA Robert Bruce wrote to the Governor General. Enclosed with his letter was a copy of JW Keating's report on the 1852 survey season. He explained that Dennis and Keating had to adjust many of the reserve boundaries during survey at the request of the Chiefs, because the descriptions found in the Treaty did not match what they had intended to reserve. The January 31, 1853, report to the Executive Council of the Province of Canada, recommended confirmation of these boundaries. The Report was approved by Order in Council on the same day. The improper exclusion of the La Cloche Tract from the Sagamok Reserve, which the Claimant submits constituted a breach of fiduciary duty and honour of the Crown, was not corrected through the reserve confirmation.
116. In fact, the Treaty's description of the Spanish River IR No. 5 was amended, but not to correct the improper exclusion of the La Cloche Tract from the Reserve. Moreover, the amendment was done unilaterally by the Commissioner of Crown Lands, and not in consultation with the Sagamok Anishnawbek. On January 18, 1854, the Commissioner of Crown Lands returned the descriptions of the Lake Huron Reserves to the Civil Secretary's office, "examined and corrected". Additions inserted by the Crown Lands Department are underlined in the passage below:

5th Chiefs Namassing & Nokwagabo & their Bands. A tract commencing at a post planted by PLS A Vidal in the year 1848 on the North Shore of Lake Huron about 100 chains westerly of the mouth of the La Cloche River and running due North 350 chains to Spanish River. Thence following said River westerly to Lake Huron and thence following said Lake Shore South Easterly to the place of beginning, containing about 28,000 acres by a rough estimate.

HBCo Acquires the La Cloche Tract in 1854

117. The Crown had an opportunity to correct its breach of fiduciary duty but failed to do so. It continued to be in a position to rectify the breach, but this was foreclosed when it granted the La Cloche Tract to the HBCo in 1854.
118. As aforesaid, the HBCo had been engaged in extensive efforts to secure free land grants around its trading posts in the years leading up to the Treaty. These efforts continued in the years following the Treaty. On February 25, 1851, Commissioner of Crown Lands JH Price wrote to George Simpson about HBCo's petition of 1846 requesting that lands around its posts be "reserved" and requested Simpson to inform him "whether the Company intends to purchase the lands on which its posts are situate."
119. In a letter dated March 11, 1851, Simpson asserted that the HBCo had been occupying the posts in question "since time immemorial" and that this should be "sufficient to entitle them to free grants of the sites of those posts and adjoining farms." However, Simpson modified his request by arguing in the alternative that the HBCo should have a right of pre-emption when the lands were surveyed and opened for settlement, to purchase "such quantity of land at each post as they may require for the purposes of their trade."
120. As time went on HBCo's influence declined and government officials began to question its legal right to such land grants. On January 21, 1854, William Spragge,

Chief Clerk of the Crown Lands Department, prepared a report questioning the merits of the HBCo claims. He noted that there were counter claims around some of the posts, including a tract on the easterly side of the Mississagi River, "... which falls within the reservation claimed by the Indians", under the Robinson Huron Treaty. Spragge recommended that the HBCo be allowed to purchase the land at its posts, "in such cases as no counter claims exist".

121. It is to be noted that the Mississagi counter claim resulted in an adjustment to the HBCo claim to exclude the portion of land reserved by the Treaty. However, no such adjustment was made to the Spanish River Reserve, even though Sagamok had a counter claim to the La Cloche Tract.
122. A Report of a Committee of the Executive Council, dated July 1, 1854, recommended granting the eight tracts of land at its posts to the HBC for a nominal price of fifty pounds. On July 3, 1854, an Order in Council adopted the words of the Executive Committee Report and approved the HBCo a "grant of two miles in front by five miles in depth at each of their other posts, at La Cloche, Mississagi, Batchawana, Michipicoton, Pic (Biigtigong), and Nepigon, by right of pre-emption, they being in occupation with improvements."
123. On August 31, 1854, the Province of Canada issued a Patent for the La Cloche Tract to the HBC. The grant was designated as a Mining Location ("No. 4, Mining"), authorized by the Order in Council of July 3, 1854. It reserved all gold and silver, and all White Pine, to the Crown. Payment was set at £50, which, according to the patent, was consideration not just for the La Cloche Tract, but also for the other seven posts petitioned for.

124. The HBCo head post of the District of Lake Huron was transferred from La Cloche to Sudbury in 1889, and that same year, a recommendation was made to shut down the La Cloche post entirely. The post was closed in 1891.

VI. The Basis in Law on Which the Crown is said to have Failed to Meet or Otherwise Breached a Lawful Obligation

The Royal Proclamation of 1763 and Anishinaabe Law and Jurisdiction

125. The principles of Anishinaabe law were incorporated into the foundation of the longstanding relationship between the Anishinaabek and the British Crown which encompasses, *inter alia* the *Royal Proclamation of 1763*, the Treaty at Niagara, 1764 and the Robinson Huron Treaty of 1850.

126. The Claimant pleads that the occupation of the La Cloche Tract by HBCo, while illegal under the *Royal Proclamation of 1763*, was permitted under its Anishinaabe laws and jurisdiction. Sagamok did not grant the land to HBCo outright, rather it only allowed HBCo the temporary use of the site, for purposes of fur trade and only what it actually needed for that limited purpose.

Sagamok had a Cognizable Interest in the Claim Area

127. Sagamok Anishnawbek had and has an independent legal and cognizable interest in the Claim Area. It lies within their traditional territory and has been used and occupied by Sagamok since time immemorial, as an important village site and sacred place. The Claim Area is also within the territory reserved as “Indian territory” under the *Royal Proclamation of 1763*. The territory and jurisdiction of the Anishinaabe was recognized by the Vidal-Anderson Commission in 1849.

The Crown Owed Sagamok a Fiduciary Duty

128. Under the *Royal Proclamation*, Indian lands were inalienable to anyone but the Crown. According to *Guerin* and a consistent body of case law since that decision was rendered by the Supreme Court of Canada, this gave rise to a fiduciary obligation on the part of the Crown. Thus, the Claimant pleads that the Crown owed Sagamok a fiduciary obligation to protect its interests regarding the Claim Area.

129. The Supreme Court of Canada, has described the scope and content of this duty as follows in *Wewaykum* (para 97):

. . . a fiduciary duty to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with “ordinary” diligence in what it reasonably regarded as the best interest of the beneficiaries.

The Crown’s Duty was Engaged and Breached Prior to Treaty

130. The duty pre-surrender (pre-Treaty) has been described as the duty to protect the Indians interests from invasion or destruction and to prevent an exploitive bargain. The Court elaborated on this in the *Wewaykum case (para. 100)*, as follows:

Speaking for herself, Ritchie and McIntyre JJ., Wilson J. stated that prior to any disposition the Crown has “a fiduciary obligation to protect and preserve the Bands’ interests from invasion or destruction” (p. 350). . . . Wilson J.’s comments should be taken to mean that ordinary diligence must be used by the Crown to avoid invasion or destruction of the band’s quasi-property interest by an exploitive bargain with third parties or, indeed, exploitation by the Crown itself.

131. The Claimant pleads that, prior to Treaty, the Crown had a duty to prevent HBCo from exploiting the agreement that Sagamok made with the HBCo or its predecessor, to allow it temporary and limited use of the La Cloche Tract. In effect, the Crown allowed the HBCo to leverage its occupancy into full ownership and thereby breached its fiduciary duty. The Crown, acting diligently, ought to have

inquired with Sagamok into the basis of HBCo's occupancy of the La Cloche site. However, it failed to do so and thereby breached its fiduciary duty.

132. The Crown also breached its fiduciary duty pre-Treaty by instructing Vidal to survey the La Cloche Tract without advising or seeking the consent of the Sagamok Anishnawbek beforehand. The Crown had a duty to disclose that it was surveying the Tract, particularly given the implication that this would likely result in the transfer of ownership of the site to HBCo. It failed to do so even though it knew or ought to have known that the La Cloche Tract was an important site for Sagamok for settlement, fishing, burials and ceremonies.

Crown's Fiduciary Duties in the Context of the Treaty Process

133. The Crown's fiduciary duties were also engaged in the context of the Treaty process, particularly in that it involved the surrender (sharing) of interests of Sagamok Anishnawbek in its traditional territory and reserve creation: *Guerin, Ross River and Wewaykum*.
134. In the period leading up to the Robinson Huron Treaty Council, the Crown struck the Vidal Anderson Commission to inquire into the claims of the Anishinaabek and the terms upon which they may be inclined to enter into treaty, including the location and size of lands to be reserved by the various First Nations. The Crown breached its fiduciary duty to the Claimant when Vidal and Anderson failed to take the necessary time to properly consult with the Chiefs and members of the two bands that were predecessors to the Sagamok Anishnawbek, with regard to the lands that they wanted reserved to them. While Vidal and Anderson visited Sagamok, it was very late in the season; they met with very few of the members; and did not meet with both Sagamok Chiefs. As a result, they were unable to determine the locality of the reserve or reserves for Sagamok.

Crown Breaches at the Treaty Council

135. At the Treaty Council in Bawating (Sault Ste. Marie), the Crown committed the following breaches: (a) it failed to disclose the fact that HBCo was trying to get the Crown to grant it title or rights to the La Cloche Tract and that the lands had been surveyed for that purpose; (b) it failed to disclose that the survey of the La Cloche Tract would be used as a boundary for the exclusion of the Tract from the reserve; (c) it failed to diligently engage in consultations with Sagamok Chiefs to properly identify the lands they intended to set aside as reserve; and (d) it failed to act with diligence to protect and preserve Sagamok's interests in the La Cloche Tract from invasion when it drafted a description of the reserve in the text of the Treaty that was either ambiguous or purposely excluded the Tract from the reserve even though the lands ought to have been included given their significance to the Sagamok Anishnawbek. Keating was tasked by the Crown with the job of meeting with the Chiefs to obtain descriptions of the reserves they wanted set aside under the Treaty. However, Keating's record of these meetings with the Chiefs have been lost, which is a failure to act with diligence and is a breach of fiduciary duty.

Crown Breaches in the Demarcation Process

136. The demarcation of reserves was an important part of the Robinson Huron Treaty process. The Crown had an obligation under the Dorchester Regulations and under fiduciary law to ensure that the Treaty territory and the description of lands reserved to Treaty First Nations was properly demarcated, particularly given that the description in the text of the Treaty was ambiguous or incomplete.

137. The survey of the Sagamok reserve undertaken by Dennis, Keating and Bristow in 1852 failed to meet the standard of diligence expected of the Crown in the reserve creation process, in the following ways: (a) Dennis and Keating proceeded in a

fashion that was not authorized by the survey instructions; (b) they failed to engage in meaningful consultations with the Chiefs and members of the two bands that are predecessors to the Sagamok Anishnawbek – Dennis and Keating spend mere hours demarking the boundaries of the Spanish River Reserve, which was grossly inadequate compared to the multiple days spent at other reserves; (c) Dennis and Keating failed to disclose to Sagamok the interests of HBCo in the La Cloche Tract and that they intended to exclude the La Cloche Tract from the reserve; (d) in excluding the la Cloche tract from the reserve, Dennis and Keating favored the interests of HBCo over those of the Sagamok Anishnawbek in the demarcation of the Spanish River Reserve; and (e) Dennis and Keating erred when they delegated Bristow to conduct the survey of Sagamok reserve given his inexperience, which resulted in serious errors in the survey of the Spanish River Reserve.

138. The Crown further breached its Treaty and fiduciary obligations by failing to investigate and correct the deficiencies in the surveying process.

139. The Crown further breached its Treaty and fiduciary obligations by failing to correct the improper exclusion of the La Cloche Tract from the Spanish River Reserve, when it had the opportunity to correct the error prior to the issuance of the patent to the HBCo in 1854.

140. The Crown further breached the Treaty and its fiduciary duty granting a patent over the Claim Area to the HBCo.

VII. Relief Requested

141. The Claimant seeks the following relief:

- (a) An order from the Tribunal declaring that the Sagamok Anishnawbek Claim to the La Cloche Tract is valid;

- (b) An order from the Tribunal declaring that Sagamok is entitled to equitable compensation for all its losses arising from the aforesaid Crown breaches;
- (c) Interest on the compensation;
- (d) Costs; and
- (e) Such other relief or compensation as this Honourable Tribunal deems just.

Dated this 30th day of December, 2022.



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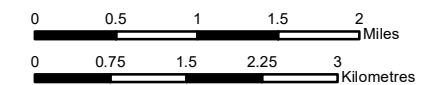
Schedule 'A'
Map of the Claim Area




The Sagamok Reserve and the La Cloche Tract

- The Sagamok Reserve
- La Cloche Tract

Source: Original La Cloche Tract, "Map of the Hudson's Bay Company's Property at La Cloche", Alexander MacDonald, Montreal May 9, 1856



Map Projection: NAD83 UTM Zone 17
 Map and analysis by David Carruthers, PlanLab Ltd.,
 December 13, 2022 Tel: 416-828-0026 Email: david@planlab.ca


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