

Court of Appeal File No.  
Superior Court File No. 03-CV-253768-CM3

**COURT OF APPEAL FOR ONTARIO**

BETWEEN:

**CHIPPEWAS OF SAUGEEN FIRST NATION**

Plaintiff

and

**THE TOWN OF SOUTH BRUCE PENINSULA, HIS MAJESTY THE KING IN RIGHT OF ONTARIO, THE ATTORNEY GENERAL OF CANADA, THE ESTATE OF BARBARA TWINING (BY HER EXECUTORS, BRENDA JOAN ROGERS AND GARY MICHAEL TWINING), ALBERTA LEMON, DAVID DOBSON, SAUBLE BEACH DEVELOPMENT CORPORATION, THE ESTATE OF WILLIAM ELDRIDGE, THE ESTATE OF CHARLES ALBERT RICHARDS, and THE ATTORNEY GENERAL OF ONTARIO**

Defendants

(Respondent on Cross-Appeal and Cross-Appellant)

**NOTICE OF CROSS-APPEAL**

**THE RESPONDENT THE ATTORNEY GENERAL OF CANADA CROSS-APPEALS** to the Court of Appeal from the judgment of Justice Vella (the “trial judge”) dated April 3, 2023 made at Toronto (“the judgment”).

**THE ATTORNEY GENERAL OF CANADA ASKS:**

- (a) That the declaration that Canada acted in a manner inconsistent with the honour of the Crown and that Canada breached its fiduciary duty at paragraph 696 (a) and (b) of the judgment be varied as follows:

1. The pre-Confederation Crown breached its fiduciary duty owed to the Saugeen First Nation and acted in a manner that was inconsistent with the honour of the Crown.
2. Post-Confederation, the federal Crown acted in a matter that was inconsistent with the honour of the Crown.
3. Post-Confederation, the federal Crown breached its fiduciary duty owed to the Saugeen First Nation.

(b) For an order that the allocation of responsibility between the federal Crown and the Province of Ontario for the breaches of the pre-Confederation Crown be determined in Phase II of the trial on the basis of a full evidentiary record and submissions by the Attorney General of Canada and His Majesty the King in Right of Ontario as ordered by the trial judge on October 12, 2021 (“Phasing Order”).

(c) In the alternative, for an order that the issue of pre-Confederation liability be returned to the trial judge in Phase I for redetermination on the basis of a full evidentiary record and submissions.

(d) That the Attorney General of Canada be granted their costs of this cross-appeal against His Majesty the King in Right of Ontario.

(e) Such further and other relief as this Honourable Court deems just.

**THE GROUNDS FOR THIS CROSS-APPEAL** are as follows:

- (a) The Attorney General of Canada (“Canada”) supports the declaration that the disputed beach was and always has been part of the reserve promised to the Saugeen First Nation at Treaty in 1854. Canada does not challenge the trial judge’s declaration that the disputed beach is reserve land or declarations regarding the federal Crown’s breaches for post-Confederation conduct.
- (b) The trial judge decided that the federal Crown exclusively inherited the pre-Confederation Crown’s liability without evidence and in the absence of submissions from the affected parties. This is a denial of procedural fairness and a serious error of law. The allocation of liability as between the federal and provincial Crowns is a significant constitutional issue that can only properly be determined on the basis of a full evidentiary record and submissions at Phase II of the trial in accordance with the Phasing Order and the trial judge’s direction to the parties at trial.
- (c) The Phasing Order bifurcated the issues at trial. In Phase I, the issues for determination included whether the disputed beach remained reserve land. Phase I also included the determination of the issue of Crown breaches, but not the allocation of liability as between the federal and provincial Crowns.
- (d) In Phase II, in addition to other matters including damages, the trial judge was to determine the allocation of liability between the federal and provincial

Crowns for any breaches of the pre-Confederation Crown based on the determination of their crossclaim and counterclaim.

- (e) The Statement of Defence, Counterclaim and Crossclaim of Ontario pled *inter alia* that any liability in respect to alleged acts, omissions, or transactions that occurred prior to July 1, 1867 was a liability of the Imperial Crown or the Province of Canada and became a liability of Canada on July 1, 1867.
- (f) In the Statement of Defence and Counterclaim of Canada to the Crossclaim of Ontario, Canada pled, *inter alia*, that Ontario is solely liable in respect of alleged breaches of the Crown prior to July 1, 1867.
- (g) The parties proceeded on the clear understanding that the trial judge in Phase I would not determine the allocation of liability for breaches made by the pre-Confederation Crown as between the federal and provincial Crowns.
- (h) As a matter of procedural fairness and public interest, the Court should have the benefit of a full evidentiary record and submissions from Canada and Ontario prior to making determinations as to the allocation of pre-Confederation liability. The trial judge erred by denying Canada and Ontario this opportunity.

- (i) In the absence of an evidentiary record and submissions, the trial judge committed a reversible legal error in her conclusion that Canada inherited the pre-Confederation Crown's liability.

**THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:**

- (a) Section 6(1)(b) of the *Courts of Justice Act*;  
(b) Rule 61.07 of the Rules of Civil Procedure;  
(c) The judgment appealed from is final; and  
(c) Leave to appeal is not required.

May 11, 2023

**ATTORNEY GENERAL OF CANADA**

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**CHIPPEWAS OF SAUGEEN FIRST NATION**  
Plaintiff

AND

**THE TOWN OF SOUTH BRUCE PENINSULA ET AL.**  
Defendant (Appellant)

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**COURT OF APPEAL FOR ONTARIO**

Proceeding Commenced at Toronto

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