CITATION: *Chippewas of Saugeen First Nation v. Town of South Bruce Peninsula et al*., 2023 ONSC 2056
COURT FILE NO.: 03-CV-253768-CM3
DATE: 20230403

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
CHIPPEWAS OF SAUGEEN FIRST NATION Plaintiff	*Nuri G. Frame, Marc Gibson and Daniel Goudge,* for the plaintiff, Chippewas of Saugeen First Nation
– and –	
THE TOWN OF SOUTH BRUCE PENINSULA, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, THE ATTORNEY GENERAL OF CANADA, BRENDA JOAN ROGERS AND GARY MICHAEL TWINING AS EXECUTORS OF THE ESTATE OF BARBARA TWINING, DAVID DOBSON, ALBERTA LEMON, SAUBLE BEACH DEVELOPMENT CORPORATION, ESTATE OF WILLIAM ELDRIDGE, ESTATE OF CHARLES ALBERT RICHARDS, and THE ATTORNEY GENERAL OF ONTARIO Defendants	*Jonathan C. Lisus, Andrew Winton, John Carlo Mastrangelo, Zain Naqi and David Ionis,* for the Defendant, The Corporation of the Town of South Bruce Peninsula (formerly The Corporation of the Township of Amabel) *Robert Ratcliffe, Richard Ogden, Stephanie Figliomeni and James Shields*, for the Defendants, Her Majesty the Queen in right of Ontario and The Attorney General of Ontario *Michael Beggs, Janet Brooks, Barry Ennis and Madeline Torrie* for the Defendants, Her Majesty The Queen in right of Canada and The Attorney General of Canada *G. Edward Oldfield,* for the defendants, Sauble Beach Development Corporation and David Dobson **HEARD: November 23, 24, 25, 26, 29, 30, December 1, 2, 6, 7, 8, 9, 13, 14, 15, 2021; January 4, 5, 6, 7, 10, 11, 12, 13, May 16, 17, 18, 19, 2022**

VELLA J.

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REASONS FOR JUDGMENT – PHASE 1

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.[1]

[1] In 1854, the Imperial Crown was desperate to secure a surrender of what was known as the Saugeen Peninsula – now known as the Bruce Peninsula – to free up land for settlors and to secure natural resources. The Imperial Crown sought timber, in light of the very recent free trade agreement with the United States, and a water route with a mill site, to process and transport the timber to nearby Southampton. The Imperial Crown had initiated several unsuccessful attempts to secure this surrender from the Chippewas of Saugeen First Nation ("Saugeen") and their neighbours and allies, the Chippewas of Nawash ("Nawash") and the Colpoy Bay Indians (collectively, "Nawash").

[2] Finally, at 1:00 a.m. on October 13, 1854, after approximately six hours of negotiation at a treaty council gathering, the Imperial Crown secured a surrender of the entire Saugeen Peninsula, with the exception of five reserve territories, two of which were for the benefit of Saugeen. The Imperial Crown, Saugeen an Nawash entered Treaty No. 72 ("the Treaty" or "Treaty 72"). It is beyond controversy that Saugeen wanted to preserve as much of the east coast of Lake Huron as possible to allow them to continue with their important fishing activities which benefitted from the beach, part of which is now known as Sauble Beach. The Imperial Crown secured the vast majority of the interior lands on the Saugeen Peninsula for settlement and resource extraction (largely timber) as well as the mouth of the River aux Sable ("Sauble River") for a mill site and a transportation route for the export of timber ultimately to the United States.

[3] At issue is 1) how much of the coastline was reserved to Saugeen under the terms of Treaty 72, and 2) what did Saugeen receive under the final Plan of Survey of Amabel done by Provincial Land Surveyor ("PLS") Charles Rankin in 1856. In particular, is Saugeen entitled to a strip of beach comprised of approximately 1.4 miles at the north end of Indian Reserve 29 ("IR 29") between Lots 26 and 31 (Concession D, Amabel Township), known to Saugeen as *Chi-Gmiinh* and referred to as (north) Sauble Beach, under the Treaty? If so, was it marked as the northern terminus of the east boundary[2] by the Imperial Crown's land surveyor, PLS Rankin? In the alternative, if the northeast angle of this reserve was not properly marked, did PLS Rankin fail to carry out the terms of the Treaty in accordance with the honour of the Crown?

[4] For reasons that will be explained, the north terminus of the east boundary of IR 29, referred to in the Treaty as the "spot upon the coast", was properly identified by PLS Rankin as being located within Lot 31, Concession D, Amabel Township. However, PLS Rankin ultimately

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[1] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage*), 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 1.

[2] The "north terminus" means the end point of the east boundary at the north end, sometimes described as the northeast angle of the reserve.

marked the north terminus of the east boundary in his final Plan of Survey at around the road allowance between Lots 25 and 26, in an exercise of discretion to resolve a latent ambiguity created by the concavity (or inward curve) of Lake Huron's coastline that arose when he could not run a straight line south from Lot 31 on dry land. He therefore excluded the wet sand strip around the coastline, reducing the reserve promised under the Treaty by about 1.4 miles. This exercise of discretion was not commensurate with the honour of the Crown. The Crown's acceptance of the final Plan of Survey and records for deposit with the Crown Lands Department crystallized a breach of fiduciary duty by the Crown owed to Saugeen to faithfully carry out the terms of the Treaty in surveying the boundaries and then to protect and preserve the entirety of its reserve.

[5] The excluded coastline from (and including) Lot 26 to the approximate mid-way point of Lot 31, Concession D, in the Town of South Bruce Peninsula, and lying to the west of Lakeshore Boulevard North, Sauble Beach (the "Disputed Beach"), is reserve land that was never surrendered by Saugeen. The various defences fail.

[6] In the circumstances of this case, reconciliation requires that the Disputed Beach be returned to Saugeen as their unsurrendered reserve land.

THE PROCEEDINGS

[7] Saugeen seeks, *inter alia*, various declarations, including that the Disputed Beach forms part of their unsurrendered reserve land and that Saugeen is entitled to exclusive possession.

[8] Her Majesty The Queen in Right of Canada and the Attorney General of Canada ("Canada") support Saugeen's positions in this lawsuit. Canada admits that it breached its fiduciary duty owed to Saugeen, though on different grounds than those asserted by Saugeen.[3] It denies having engaged in conduct inconsistent with the honour of the Crown.

[9] Her Majesty the Queen in Right of Ontario ("Ontario") denies all allegations made against it and supports the positions of the Town, and the Estate of Barbara Twining, Lemon and Dobson (collectively, "the Landowners"[4]). Ontario submits that if the Disputed Beach constitutes part of Saugeen's reserve, then Canada alone is liable for any resulting breach of fiduciary duty or conduct inconsistent with the honour of the Crown, based on the division of powers under the *Constitution Act, 1867*.[5]

[10] The Landowners resist Saugeen's claims on the basis that Rankin properly marked the north terminus of the east boundary at or around the road allowance between Lots 25 and 26 and assert that, in any event, they have legal title to these lots (the "Disputed Lots") based on their

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[3] Canada admits that it breached its *sui generis* fiduciary duty to Saugeen to preserve and protect Saugeen's legal interest in IR 29, but by failing to preserve its institutional knowledge that would have confirmed that the Disputed Beach forms part of this reserve. It does not admit the specific breaches alleged by Saugeen, however.

[4] The Landowners allege that they hold legal title to lots within the Disputed Beach. Sauble Beach Development Corporation also alleges to be a title holder, but it did not appear at trial.

[5] (U.K.), 30 & 31 Vict., c. 3, s. 91, reprinted in R.S.C. 1985, Appendix II, No. 5.

deeds which derive their root to title from the original patents granted by Canada when the Disputed Lots were originally sold. In the alternative, the Landowners assert various defences in the event the court finds that the Disputed Beach was designated as reserve territory under Treaty 72 and has never been surrendered.

[11] The Attorney General of Ontario appears as the Crown officer in charge of asserting the public interest. In the event that this court finds that the Disputed Beach is part of IR 29, he seeks a declaration that the public has an unfettered right to use the Disputed Beach for recreational purposes.

[12] The Estate of William Eldridge and the Estate of Charles Albert Richards do not contest Saugeen's claim.

[13] This case will proceed in two phases, in accordance with my Order dated October 12, 2012.

[14] Phase one will determine whether or not Saugeen received the full length of coastline along Lake Huron on Sauble Beach, as promised to them under the terms of Treaty 72 and under PLS Rankin's 1855 final Plan of Survey of Amabel. It will also determine the various defences and the counterclaim of the Attorney General of Ontario.

[15] This determination centres, in part, around the location of "the spot upon the coast" as referenced in Treaty 72, and whether that "spot" was altered by PLS Rankin when he and his assistant, George Gould, surveyed the eastern boundary of IR 29 due to the geographic challenges he faced. In particular, Rankin had to deal with the concavity of Lake Huron's coastline at the "spot", when he implemented the Treaty instructions on the ground.

[16] Saugeen asserts that under the terms of Treaty 72, their eastern boundary was intended to end at its northernmost limit of what is now known as Lot 31, at Sauble Beach, rather than approximately 1.4 miles to the south at the road allowance between Lots 25 and 26. Saugeen claims that PLS Rankin in fact marked the boundary's northern terminus at Lot 31 by planting a post during his preliminary traverse but did not draw the boundary's north end due to an inability to physically hand draw the resulting narrow boundary and terminus in some way on the final Plan of Survey. Ontario and the Landowners state that the final Plan of Survey clearly shows the boundary visibly ending at the road allowance between Lots 25 and 26, and this correctly captured the "spot upon the coast" referenced in Treaty 72, since a boundary line between Lots 31 and 25 would either have been under water or on wet land bordering the water's edge.

[17] At stake is the ownership of the Disputed Beach bordering Lake Huron. Competing claims of "ownership" essentially pit Saugeen against its neighbours, the Town of South Bruce Peninsula (formerly Amabel Township) and three private landowners. They also pit two branches of the Crown against one another.

THE ISSUES AND RESULT

[18] The issues to be determined are:

(a) What is the northern terminus of IR 29's east boundary under the terms of Treaty 72, and did that location change as a result of moving the west boundary under a subsequent Order in Council? Related to this issue is where did Rankin's survey place the northern terminus of the east boundary, and why?

(b) Did the Imperial Crown breach its fiduciary duty owed to Saugeen, and/or act in a manner inconsistent with the honour of the Crown, by failing to faithfully mark the boundary and preserve and protect Saugeen's interests in the Disputed Beach as reserve land under the terms of Treaty 72? If so, are Canada and Ontario responsible for the Imperial Crown's breach of fiduciary duty and conduct inconsistent with the honour of the Crown? Further, did Canada and/or Ontario breach their fiduciary duty and/or act dishonourably by failing to protect and preserve Saugeen's reserve land following Confederation?

(c) If IR 29 extends north along the beach of the currently surveyed boundary of IR 29 to include the beach fronting the Disputed Lots, what are the rights of the Landowners? More particularly,

i. What is the interpretation and legal effect of the Crown Patents issued for the Disputed Lots and did they extinguish Saugeen's interest in the Disputed Beach?

ii. Does the doctrine of *bona fide* purchaser for value without notice effectively extinguish Saugeen's quasi-proprietary interest in the Disputed Beach in favour of the Landowners?

iii. Is Saugeen's claim as against the Landowners barred by operation of s. 4 of the *Real Property Limitations Act*,[6] with the effect that Saugeen's interest is extinguished under s. 15 of the Act? In the alternative, is its claim barred by the doctrine of laches?

iv. Is there a public right of use to the Disputed Beach that supersedes Saugeen's exclusive possessory right in its reserve interest?

[19] For the reasons that follow I find:

(a) The Treaty established the boundaries of Saugeen's southern reserve, IR 29.

(b) The Treaty established that the north terminus of the east boundary was at a "spot upon the coast" "about" 9 ½ miles from the Treaty-defined (original) west

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[6] R.S.O. 1990, c. L. 15

boundary, and this spot was not altered by the Copway Road amendment (or change) to the west boundary made after the Treaty.

(c) The Treaty allows for the possibility of a further boundary segment to connect the east and west boundaries at the north end of the reserve by necessary implication.

(d) PLS Rankin properly located the "spot upon the coast" when he initially planted a post within Lot 31 and called it the northeast angle of the Indian reserve on September 4, 1855, though he planted the post further inland from Lake Huron to prevent it from being washed out by the wave action.

(e) In his final survey, however, PLS Rankin fixed the north terminus of the east boundary at the road allowance of Lots 25 and 26 (or just south of that point) rather than within Lot 31. He did this to resolve a latent ambiguity which arose when he was marking the boundary on the ground. Rankin found that in order to run his survey line south in a straight line from the "spot" at Lot 31, he crossed wet sand between Lot 31 and 26 (the Disputed Beach), which he likely deemed to be unusable land to Saugeen. The latent ambiguity arose as a result of the concavity of Lake Huron's coastline which curved inland east to Lot 30 before curving back westward at around Lot 25/26 road allowance.

(f) PLS Rankin had two choices to rectify the latent ambiguity. He could either create a short north boundary to connect the east and west boundaries and move the "spot" slightly inland to his post or he could move the "spot" further south to a point where the east and west boundaries intersected and he could mark the boundary due south on dry land. PLS Rankin chose the second option. He exercised his discretion to resolve the latent ambiguity by moving the "spot upon the coast" south by approximately 1.4 miles, in accordance with acceptable boundary principles of the day as applied to deeds. However, in so doing, he deprived Saugeen of their unsurrendered reserve coastline promised in Treaty 72 (though the movement of the east boundary south resulted in some additional interior lands).

(g) When faced with this ambiguity, PLS Rankin failed to seek further instructions from the Imperial Crown due to the time pressure the Crown imposed on him to finish the survey so that the surrendered lands could be put up for public auction. He also did not alert the Crown to his decision to demarcate the north terminus of the east boundary further south along the coast. Nonetheless, the Crown *de facto* sanctioned Rankin's decision when the Crown Lands Department accepted Rankin's final Plan of Survey and his records for deposit as marking the boundaries of IR 29.

(h) In the course of the subsequent Crown-issued patents, for the lots along the Disputed Beach, along with subsequent surveys and boundary investigations of the east boundary, the Crown did not consider what the Treaty set out as the boundaries of IR 29, but rather replicated Rankin's final Plan of Survey of Amabel, until a re-survey of the northern terminus of the east boundary was commissioned by the

> federal Crown in 1974. At that time, Ontario Land Surveyor ("OLS") and Dominion Land Surveyor ("DLS") Guenter Bellach considered Rankin's field notes regarding the preliminary survey over the Disputed Beach, and the water limits of Lake Huron over a period of time since then. Bellach concluded that Rankin marked the "spot upon the coast" within Lot 31 but decided to exclude the Disputed Beach from the proper reserve description because Rankin must have deemed it to be lacking in value.[7] This eventually spurred the federal Crown to change its position from affirming the east boundary as marked by Rankin on his final Plan of Survey to acknowledging that the north terminus of IR 29, or the "spot upon the coast", as defined by Treaty 72, is within Lot 31. The federal Crown then commenced an action in 1990 to reclaim the Disputed Beach, which was superceded by the present action.

[20] Saugeen did not surrender the Disputed Beach and thus, this beach is Saugeen reserve land. Under the terms of Treaty 72 Saugeen was entitled to have the east boundary of IR 29 extend up to a point along the coastline that is within Lot 31, Concession D, Township of Amabel. PLS Rankin's failure to appropriately mark the north terminus of the east boundary at that location constituted an exercise of judgment that was inconsistent with the honour of the Crown. When the Imperial Crown accepted Rankin's final Plan of Survey that placed the northern terminus of the east boundary at or around the road allowance between Lots 25 and 26 (Hepworth Road), it breached its fiduciary duty rooted in the honour of the Crown. The Imperial and federal Crown acted dishonourably and breached the Crown's fiduciary duty by failing to correctly demarcate the north terminus of the east boundary, and then failing to protect and preserve Saugeen's IR 29 in its entirety.

[21] I also find that Saugeen's claim to the Disputed Beach is not barred, extinguished or defeated by the operation of any of the doctrines or statutes relied upon by Ontario or the Landowners.

[22] Finally, in the circumstances of this case, the Attorney General of Ontario has failed to establish that the public, under the doctrine of dedication or proprietary estoppel, has a right of public access to the Disputed Beach for recreational purposes. The Town similarly has failed to establish that it has any valid claim of unfettered public access to the Disputed Beach.

[23] In the circumstances of this dispute between neighbours, reconciliation will best be achieved by returning the Disputed Beach to Saugeen as reserve land.

[24] For ease of reference and illustrative purposes only, I have appended to these Reasons four archival documents that were entered as exhibits at trial: Oliphant's sketch map appended to his Treaty Report, Rankin's final Plan of Survey of Amabel, Rankin's draft map showing where

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[7] Report on Re-Survey of East limit of Saugeen IR No. 29, OLS and DLS Guenter Bellach

Rankin marked the "spot on the coast" and a zoomed in excerpt from Rankin's draft map. I have added text to these images in red ink for ease of reference only.[8]

THE PARTIES

[25] The Saugeen First Nation is an Indigenous Nation (and Indian Band under the *Indian Act*[9]), comprised of Anishinabek people whose ancestors have lived on the lands currently known as the Bruce Peninsula since time immemorial. They historically lived on what was then identified as Saugeen Peninsula with their historic allies, the Anishinabek people of the Chippewas of Nawash Unceded First Nation.

[26] Canada is a successor to the Imperial Crown as a treaty partner with Saugeen.

[27] Ontario is also a successor to the Imperial Crown and as Saugeen's treaty partner.

[28] The Town of South Bruce Peninsula is the municipal entity in which the Disputed Beach is located. It was incorporated in 1999 as an amalgamation of the Townships of Amabel and Albemarle, the Town of Wiarton and the Village of Hepworth. The Town asserts ownership over a considerable portion of the Disputed Beach by virtue of having purchased quitclaim deeds from individuals in the early 1970s.

[29] The Estate of Barbara Twining is the registered owner in fee simple to part of Lot 26 and asserts that its title includes part of the Disputed Beach. The Estate owns a cottage which is located on the east side of Lakeshore Boulevard North, inland from the Disputed Beach, which fronts the cottage on the west side of that road.

[30] Alberta Lemon is the registered owner in fee simple of part of Lot 26, adjacent to the Twining property, and asserts that her title includes part of the Disputed Beach. She also owns a cottage on the east side of Lakeshore Boulevard North, inland from the Disputed Beach which fronts the cottage on the west side of Lakeshore Boulevard North.

[31] David Dobson is the registered owner in fee simple of part of Lot 26 on the west side of Lakeshore Boulevard North. His business owns and operates a seasonal restaurant on this portion of the Disputed Beach.

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[8] Copies of these exhibits can be found as follows: Oliphant's Treaty Report with the Map appended: LAC, MG11, C.O. Series 41, Vol 595, fo. 292, Reel B-436; Rankin's final Plan of Survey of Amabel Township: NMC 22004, H/2/430/ Amabel [1856]; Rankin's draft map: Toronto Reference Library, Baldwin Room, Rankin Papers, Map of Amabel Township (October 12, 1855).

[9] R.S.C. 1985, c. I-5

ANALYSIS

1. What does Treaty 72 Provide with Respect to the Eastern Reserve Boundary and the "Spot Upon the Coast", and Where did Rankin Place the North Terminus of the East Boundary?

a) The Parties' Positions

[32] Saugeen submits the following about the "spot upon the coast", taken from the language of the Treaty:

a) the "line drawn from a spot upon the coast" that "bounded" the Reserve was intended to be a boundary;

b) the east boundary was intended to start on the coast inland from the water's edge; and

c) the express distance of "about (9 ½) nine miles and a half" to be the "spot upon the coast" was intended to be "about nine miles and a half" on the ground along Lake Huron's coastline from the original Treaty-defined west boundary.

[33] Saugeen submits that "coast" is not an ambiguous term but means a strip of land of indefinite width that extends from the shoreline (water's edge) inland to the first major change in terrain features (e.g., sand dunes or grassy parts of the shoreline). Saugeen relies on the expert evidence of coastal engineer, Dr. Michael Davies, and surveyor, Mr. Izaak de Rijcke, who give a similar definition. Saugeen also references PLS Rankin's own report to then Superintendent of Indian Affairs, T.G. Anderson, dated August 2, 1854 in which he states that Saugeen wanted to reserve "all the coast", meaning at that time an area of approximately 130,000 acres and something more than the water's edge.

[34] Saugeen and Canada point out that the parties intentionally set out a measurement of "about" nine and a half miles along the coastline of Lake Huron in the Treaty. This distance, though approximate, is deliberate. An interpretation that reduces that distance to 8.1 miles of coastline is, in both Saugeen and Canada's submission, not a reasonable interpretation of "about".

[35] The Landowners and Ontario submit that there is ambiguity on the "facial meaning" of the Treaty's description of the east boundary. They reference the starting point of the measurement of the "about (9 ½) nine miles and a half" from the west boundary at Lake Huron and south to the Half Mile Strip "from a spot upon the coast" as being vague.

[36] These defendants posit that the "spot upon the coast" supports various interpretations, including that coast is synonymous with "water's edge" or "lake, edge of"– terms used frequently by Rankin and Gould in their field notes reflecting the survey on the ground of the reserve boundaries. These defendants submit that "water's edge" and "lake, edge of" means either the line between water and land or, in the case of Ontario, the wet sand strip caused by the natural wave action of Lake Huron.

[37] These defendants also point out that the location of the east boundary is tied to the west boundary. Therefore, by reason of a subsequent change to the location of the west boundary (referred to at trial as the Copway Road amendment), the west boundary was no longer "due north" as per the Treaty, but rather ran in a northwesterly direction to Lake Huron. This change had the effect of relocating the southern terminus of the west boundary further south along the coast, creating a longer shoreline portion of the west (Lake Huron) boundary than originally contemplated as the "spot upon the coast". Therefore, the reference to "due north" in the Treaty did not reflect the true common intentions of the Treaty parties and altered the location of the "spot upon the coast" from the text of the Treaty to reflect a "spot" further south. Under this interpretation, the common intentions of how the parties understood the Treaty text is inconsistent with the written words of the Treaty text.

[38] Furthermore, these defendants submit that a reasonable interpretation of the Treaty's description of the east boundary with its northern terminus being about 9 ½ from the "spot upon the coast" was intended by the parties to mean that the northern terminus of the east boundary had to run on dry land in a straight parallel line down to the west boundary at the south end. They say the evidence shows that when Rankin and Gould attempted to run a survey chain line on the ground from the "about" 9 ½ mile point, they ran into the water's edge caused by the concavity of Lake Huron's coastline which the Treaty parties did not anticipate. This required Rankin to choose a northern terminus at a more southerly point of the concavity which, in turn, allowed him to run the survey chain in a straight line south to intersect with the Half Mile Strip and thus "bound" the reserve by choosing a point where the east boundary intersected with the west boundary and did not require a north boundary. They submit that the Treaty precludes the addition of a north boundary because one is not explicitly referenced.

[39] I will proceed to an analysis of Treaty 72 in order to determine what the Treaty promised in relation to the north terminus of the east boundary. This analysis will include a consideration of what Rankin did on the ground when he marked the north terminus of this boundary, since, as will be seen, conduct immediately following the Treaty is relevant to treaty interpretation.

b) The Principles of Treaty Interpretation and the Overarching Principle of Reconciliation

[40] Treaties are not ordinary contracts. They set out in writing the terms of a solemn exchange of promises made between the First Nations and the Crown.[10] Treaty 72 was made by the Imperial Crown prior to the confederation of Canada.

[41] In *R. v. Marshall*, McLachlin J., as she then was, in dissent (but not on this point), sets out how the courts should approach the interpretation of a treaty.[11] Those principles are:

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[10] *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 24, citing *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *Restoule v. Canada*, 2021 ONCA 779, 466 D.L.R. (4th) 2, at paras. 651-652.

[11] [1999] 3 S.C.R. 456, at para. 78. See also *Restoule* at para. 388, quoting the trial judge at 2018 ONSC 7701, at para. 324.

a) Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation;

b) Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories;

c) The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed;

d) In searching for the common intention of the parties, the integrity and honour of the Crown is presumed;

e) In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the treaty parties;

f) The words of the treaty must be given the sense which they would naturally have held for the parties at the time;

g) A technical or contractual interpretation of treaty wording should be avoided;

h) While construing the language generously, courts cannot alter the terms of the treaty by exceeding what is "possible on the language" or realistic;

i) Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context.[12]

[42] In *Marshall*, McLachlin J. emphasized that the words of the treaty clause under consideration must be examined to determine their "facial meaning", noting any "patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences". Through this exercise the possible interpretations will be ascertained. Then, the various interpretations will be considered "against the treaty's historical and cultural backdrop". This latter step may lead to "latent ambiguities" or "alternative interpretations" not evident on its first reading. The court is to "rely on the historical context to determine which comes closest to reflecting the parties' common intention" and will choose "the one which best reconciles the parties' interests".[13]

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[12] *Marshall*, at para. 78 [internal citations omitted].
[13] *Marshall*, at paras. 82-83.

[43] The one-sidedness of the written words chosen by the drafters of the treaty (the representative of the Crown) in terms of understanding the common interests of the Treaty partners was stated plainly in *Marshall*, at para. 14:

> The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown's approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty…, the completeness of any written word (the use, e.g., of context and implied terms to make honourable sense of the treaty arrangement) …, and the interpretation of treaty terms once found to exist. The bottom line is the Court's obligation is to "choose from among the various possible interpretations of the common intention the one which best reconciles" [the treaty parties' respective interests]. [Citations omitted].

[44] In *Restoule*, our Court of Appeal recently applied the *Marshall* test and confirmed that "principles related to common intention, text, context and purpose inform the interpretation of historical treaties". Furthermore, the fact specific nature of treaty interpretation may make some of these principles "more salient than others". The Court of Appeal also stated that the trier of fact must "attend to both the written text of a treaty and the evidence about the context in which it was negotiated" and, the common intention must be that "of both treaty partners, not one alone".[14]

[45] A different way of articulating this approach to ascertain the common intention of the Treaty parties is:

i. scrutinize the written text of the treaty provision in question, within the context of the treaty as a whole;

ii. look to the historical, political and ethnohistorical (cultural) context in which the treaty was negotiated;

iii. review the written record of the treaty negotiations; and

iv. examine the subsequent conduct of the treaty parties, with an emphasis on the conduct close in time to the execution insofar as helpful to determining the respective treaty parties' understanding of the treaty terms.[15]

[46] After going through this exercise, the court is to choose from the available reasonable interpretations the one that reflects the most generous reading of the treaty in favour of the First

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[14] *Restoule*, at paras. 106-108.

[15] *Marshall*, at paras. 4-14, 22-24, 39-40, 78, 115; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at pp. 1045, 1060, 1068–1069; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 76; *Restoule*, at para. 111) *Lac La Ronge Indian Band v. Canada*, 2001 SKCA 109, 206 D.L.R. (4th) 638, at para. 43; *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915, at para. 18.

Nation.[16] Fundamentally, the overarching principle of treaty interpretation is the goal of reconciliation. In the treaty context, as applied to a determination of a First Nation's rights and the corresponding obligations of the Crown, reconciliation has been called the "grand purpose" of section 35 of the *Constitution Act, 1982*.[17] Reconciliation is not fixed at a point of time, but rather reflects the ongoing evolution of the relationships between First Nations with the Crown and non-Indigenous Canadian populations with the ultimate goal of mutual respect, dignity and honour.[18]

[47] Also, the honour of the Crown plays a critical role in treaty interpretation as will be developed later in these Reasons.

[48] Guided by these general principles I will now proceed to the treaty interpretation exercise.

c) The Application of the Treaty Interpretation Principles to Treaty 72

i. <u>The Treaty Text</u>

[49] The passage in Treaty 72 that addresses the description of the two Saugeen reserve boundaries (Indian Reserve 29 and then Chief's Point reserve) reads as follows:

> 1st. For the benefit of the Saugeen Indians we reserve all that block of land **bounded <u>West</u> by a straight line running due north from the river Saugeen at the spot where it is entered by a ravine immediately to the west of the village and over which a bridge has recently been constructed <u>to the shore of Lake Huron</u>. On the South by the aforesaid northern limits of the lately surrendered strip; <u>on the east by a line drawn from a spot upon the coast at a distance of about (9 ½) nine miles and a half from the Western boundary aforesaid and running parallel thereto until it touches the aforementioned northern limits of the recently surrendered strip</u>**; and we wish it to be clearly understood that we wish the Peninsula at the mouth of the Saugeen river to the west of the western boundary aforesaid to be laid out in town & park lots and sold for our benefit without delay, and we also wish it to be understood that our surrender includes that parcel of land, which is in continuation of the strip recently surrendered, to the Saugeen River.

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[16] *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36; *R. v. Badger*, [1996] 1 S.C.R. 771, at paras. 9, 52; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, at para. 64; *Mitchell v. Canada (Ministry of Natural Resources)*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 138; *R. v. Simon*, [1985] 2 S.C.R. 387, at p. 402; *Sioui*, at p. 1035.

[17] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 10.

[18] *Restoule*, at para. 133, citing *Manitoba Metis Federation Inc.*, at para. 71; *Mikisew Cree First Nation*, at para. 1.

> We do also reserve to ourselves that tract of land called Chief's Point, bounded on the East by a line drawn from a spot half a mile up the Sable River and continued in a northerly direction to the Bay and upon all other sides by the Lake. [Emphasis added.][19]

[50] On February 3, 1855, Treaty 72 was confirmed by Order in Council.

[51] The Treaty explicitly describes three reserve boundaries, referenced as "west", "south" and "east". However, implicitly incorporated into the west and south reserve boundaries are Lake Huron's shore (the west boundary is described as going to the shore) and the Saugeen River's north shore (the south boundary is described as the northern limits of the lately surrendered strip or Half Mile Strip) as natural boundary segments.

[52] The west boundary is described in the Treaty as a "straight line running due north from the River Saugeen, at the spot where it is entered by a ravine immediately to the west of the village, and over which a bridge has recently been constructed, to the shore of Lake Huron". It is uncontested that the geographical markers (the ravine and the recently constructed bridge) were readily identifiable to the Treaty parties at the time of treaty formation. The referenced village was Saugeen's primary settlement at the time of Treaty 72 and was labeled in the historical maps as the "Indian Village".

[53] While the south portion of the west boundary is a straight line, the Lake Huron extension of the west boundary follows the coastline as a natural riparian boundary which was clearly not a straight line.

[54] The east boundary is described as "a line drawn from a spot upon the coast at a distance of about (9 ½) nine miles and a half from the western boundary aforesaid, and running parallel thereto until it touches the aforementioned northern limits of the recently surrendered strip". It is uncontested that the "recently surrendered strip" is what is called the Half Mile Strip surrender or Treaty 67 made in 1851 and already surveyed.

[55] The south boundary is a common boundary with the north boundary of the Half Mile Strip from its intersection with the east boundary and extends along the north shore of the Saugeen River to the west boundary.

[56] The parties agree that the reserve as described in Treaty 72 did not produce a square or rectangular piece of land. Rather, it was irregularly shaped due to the two natural boundaries (Lake Huron on the west and Saugeen River on the south). Of most import to the determination of the north terminus of the east boundary is the Lake Huron coastline portion of the boundary.

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[19] Emphasis in bold relates to the passage focused on by the parties at trial, and the emphasis underlined reflects the description relative to the disputed east boundary, and do not appear in the original text.

[57] As Saugeen points out, today there appears to be an implied (but not surveyed) north boundary. Due to the accretions of sand which have widened the beach, there is a small boundary in reality connecting the surveyed north terminus of the east boundary to the west boundary at Lake Huron. If Saugeen is correct that the east boundary under the terms of Treaty 72 was intended to terminate within Lot 31, rather than the road allowance at Lot 25 and 26, then Saugeen submits there would, of necessity caused by the concavity of Lake Huron's coastline in 1854, have been a small north boundary to connect the northern terminus of the east boundary to Lake Huron's coastline at that location as well. Canada accepts this position as making common sense.

ii. The Treaty as a Whole

[58] The subject paragraph in Treaty 72 must also be interpreted within the context of the Treaty as a whole.[20]

[59] The Treaty was made by the Crown with Saugeen and Nawash (identified as the Owen Sound Indians and the Colpoy's Bay Indians in the Treaty). It resulted in the creation of five reserves: two reserves for Saugeen, two reserves for the "Owen Sound Indians" and one reserve for the "Colpoy's Bay Indians".

[60] In the Treaty's descriptions of some of the reserve boundaries, geographical markers are identified, making the start or end point of the boundary more objectively precise. However, in other boundary descriptions, there are no such specifically identified geographical markers, making the starting or ending point of those boundaries objectively less precise.

[61] Also elsewhere in the Treaty, reference is made to a "spot", "shore", "coast" and "ravine", without any clear definition by which to objectively distinguish the use of the various boundary terms. Notably, the Chief's Point reserve also references a boundary "drawn from a spot half a mile up the Sable River". There has been no controversy regarding the Treaty partners' common understanding of the location of this "spot".

[62] None of the reserves created by Treaty 72 are described in metes and bounds.

[63] It is reasonable to assume that where the Treaty uses different words to describe topography, the Treaty parties intended those words to describe different topography or areas of land. Therefore, the Treaty's use of "shore" and "coast" were meant to reference different land types. It is also clear that the boundaries set out in the Treaty included both natural water boundaries (Lake Huron to the west and Saugeen River to the south) and landlocked boundaries. However, shore and coast are words capable of more than one reasonable interpretation.

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[20] *West Moberly First Nations v. British Columbia*, 2020 BCCA 138, 37 B.C.L.R. (6th) 232, at para. 140, leave to appeal ref'd 2020 S.C.C.A. No. 252.

[64] In keeping with the principle that the Treaty text is a starting point and will provide a preliminary, but not necessarily determinative, framework for the historical context inquiry,[21] I will now proceed to consider the historical context with a view to shedding light on the likely common intention of Saugeen and the Imperial Crown.

iii. The Historical and Ethnohistorical Context

[65] The historical context illuminates the route by which the Treaty was arrived at on October 13, 1854. I agree with Saugeen's expert historian, Dr. Heidi Bohaker, that it is an error to determine the intention of the Treaty parties purely from the archival written record. Those records cannot be interpreted in a historical vacuum. The ethnohistory and oral history of Saugeen also contribute to an interpretation of Treaty 72 as part of the broader historical context.

[66] The evidence at trial relating to the historical and ethnohistorical context of Treaty 72's description of IR 29 came primarily from two expert historians and oral history was received from Chief Vernon Roote, a former Chief of Saugeen.

[67] Saugeen's expert historian was Dr. Heidi Bohaker and Ontario's expert historian was Dr. Gwen Reimer. In many significant respects, the expert historians substantially agreed, particularly on the written archival record.

[68] The primary area of disagreement arose from their different conclusions in relation to the common intention of the Treaty parties regarding the intended location of the northern terminus of the east reserve boundary as reflected in Treaty 72. While Dr. Reimer's opinion was based almost exclusively on the written archival record, Dr. Bohaker's opinion also took into account the ethnohistorical context.[22]

[69] In my view, an understanding of Saugeen's perspective at the time of entry into the Treaty in 1854 must include a consideration of their ways, traditions, and culture. This is particularly apt when the written archival record, as many courts have acknowledged, was not written by the Saugeen, but by the other Treaty party – the Imperial Crown in this case. The Saugeen people required an interpreter to understand what was being proposed, to relay their own counter proposals, and ultimately to verbally translate the terms of Treaty 72. The Treaty is written in English and was not translated (in written form) into the Anishinaabemowin language.

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[21] *Marshall*, at para. 5

[22] Ethnohistory is a branch of anthropology which focusses on the history of a people in the context of their culture over the course of centuries.

iv. The Ethnohistorical Context

[70] The ethnohistorical evidence presented by Dr. Bohaker was not seriously challenged by Dr. Reimer who developed her opinion primarily based on the archival record.

[71] Saugeen had a distinct political form of governance and legal tradition. The Anishinabek system of governance relied on the *doodem* identity and the council fire.

[72] The *doodem* identity is a category of kinship in which family groupings are identified by beings that were considered by the Anishinabek as persons, such as the caribou, crane and otter. Persons could not marry members of their same *doodem*.

[73] The *doodem* identity also has relevance to the Anishinabek's system of governance. With respect to the Saugeen, a person from the Caribou *doodem* was historically the chief or "*ogimaa*", reflecting the tradition of the hereditary chief. In addition, the Saugeen people were represented by leadership consisting of a deputy chief (*annikeogimaa*) and the councillors (the *gitchi-Anishinaabek*). These same leaders would typically be the heads of their own smaller family hunting and trapping groups over the winters.

[74] Significantly, Treaty 72 was signed by the leadership of the Saugeen council, some of whom signed with their *doode*m images: John Kaduhgekwini (Caribou), Alexander Madwayosh (Otter), and John Manedoowab (Bear). The Treaty was also signed by the leadership of the Nawash council, also by affixing these signatories' respective *doodem* images to the document.

[75] The council fire refers to the place and seat of decision making. Dr. Bohaker explained that council fires were "deliberative bodies that were constituted and recognized through and by other Anishinaabe councils to have responsibility for the lands, waters and peoples of a particular territory".

[76] The archival record bears out that the Saugeen people continued to practice their traditional system of governance at the time of the formation of Treaty 72 and in the period thereafter.

[77] Also, of particular significance to understanding Saugeen's perspective at the time of Treaty formation was the yearly fishing, hunting, trapping and harvesting activities of the Saugeen people, called the "seasonal rounds".

[78] As people who lived off the land and waters, the Saugeen people would change their locations within their traditional territory by season. Dr. Bohaker described the seasonal rounds as "an integral part" of Anishinaabe governance and as essential to Saugeen's way of life and livelihood.

[79] The smallest political unit was called the *Indinaakonigewin* or winter hunting group. This group was typically comprised of primarily the headman (*gitchi-Anishinaabe*), his brothers, their wives and children, and the wives and children of their sons, reflecting a patrilineal grouping. These groups tended to comprise of about 20 to 40 people and could expand to include other relatives as needed.

[80] During the late fall and winter, these family groupings hunted, trapped, and engaged in spear fishing and ice fishing in their own hunting territories. They processed hides and cooked and dried meat. During the winter, ice fishing was especially important with families catching one to two hundred pounds of fish at a time. The family hunting grounds were located in what is now known as the Grey, Bruce and Huron counties within the Bruce Peninsula.

[81] In the early spring, the Saugeen women engaged in maple sugar gathering and processing. The resulting sugar would be used for eating and trading with each other and settlors.

[82] The Saugeen people began their spring fishing in or around April. They moved from their inland territories to the mouths of the Saugeen and Sauble Rivers to set nets and catch fish that spawned in the spring, including pickerel, pike and sucker.[23]

[83] In June, after the spring fishing was completed, the Saugeen people returned to their council or village site and planted gardens, socialized, and held councils. Their council site, referred to as the "Indian Village" by the Crown, was located on the north shore of the Saugeen River, just inland from Lake Huron and to the east of what became part of Southampton.

[84] Next, the Saugeen people started their summer fishing seasonal round, catching black bass and then in August, lake sturgeon. The late summer also brought the wild rice harvest, which grows in the low-water level areas.

[85] From early to mid-fall, the Saugeen people engaged in further fishing which, Dr. Bohaker noted, was crucial to winter survival. The fish would be smoked and sometimes powdered and mixed with berries for future consumption. The fall fishery brought lake herring and lake trout and, later on, whitefish. The fall fishing season typically ran for about 6 weeks, ending in November.

[86] The main method of fishing for lake herring south along the shoreline of Lake Huron was called seine fishing. Essentially, the men would place nets in the shallow waters of Lake Huron which they entered from the beach. The nets were staked and would capture the herring. The fishers would then bring the nets on to the beach and dry the fish. This beach played a vital role not only in this fishery, but in providing the men with a good exit and landing place for their canoes as contrasted with the rocky cliffs elsewhere along the coast of Lake Huron.

[87] Chief's Point was an important burial place, social meeting area and fishing location, enhanced by the Fishing Islands located across from it.

[88] At the councils held throughout the summer, the winter hunting territories would be discussed, and family groupings would confirm which territory they would use in the coming season. This process was essential for sustainability and safety.

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[23] At the time of the Treaty, the Sauble River was known as the River au Sable or Sable River.

[89] Dr. Bohaker testified that commercial fishing was also important to Saugeen at and around the time of treaty formation. In 1834, Saugeen entered into a lease with the Huron Fishing Company permitting that company to use the Fishing Islands (across from Chief's Point) and receiving rental income in return. Saugeen also and purchased salt for its own fishing activities. However, in October 1850, Saugeen petitioned the Governor General to end the leasing of the Fishing Islands recognizing that Saugeen would earn more from taking over the commercial fishing than it was receiving in rent. Saugeen wrote that it was "in possession of means for carrying on the business with success also we have young men in our tribe who have learned the business of coopering and we can thus be supplied with barrels without any additional expense."[24] While this request was denied, it is evidence that in the time period immediately leading to the Treaty Saugeen was keenly interested in developing the commercial fishery.

[90] An 1851 census conducted by the Province of Canada demonstrates that the Saugeen people continued their seasonal rounds. No one was in the Saugeen Village during January 1852 when the census taker, Hugh Johnson, arrived. The continuation of this practice of seasonal rounds was also documented later on when Superintendent General of Indian Affairs, Laurence Oliphant, and James Ross, M.P.P., arrived in the Saugeen Village on October 12, 1854 to press for a surrender of the Saugeen Peninsula, and had to wait 24 hours for members to return from their fishing activities at the Fishing Islands and Sauble River.

[91] Dr. Bohaker's evidence about the seasonal rounds was supported by the oral history evidence given by Chief Vernon Roote. Dr. Reimer also acknowledged the importance of the seasonal rounds to Saugeen's livelihood and culture.

[92] I accept Dr. Bohaker's opinion that, in the years leading up to Treaty 72, the Saugeen people practiced their traditional form of governance and livelihood, including their seasonal rounds. I further accept that fishing was an essential part of the Saugeen people's way of traditional life and livelihood both for sustenance and as a source of income up to (and immediately following) the formation of Treaty 72. This evidence was not challenged by Dr. Reimer except that in her view the fishery was beginning to decline at Lake Huron and thus in importance to Saugeen. Dr. Reiner's opinion was based on the economic importance of the fishery to Saugeen, but not on its importance as a means of subsistence survival to the Saugeen people.

[93] The court also received evidence from Chief Vernon Roote. Some of his evidence was in the nature of oral history and was admitted without objection. Chief Roote is 74 years old. He was Chief of Saugeen for four-year terms in 1985 and 2004. He was a councillor in 1974 and recently re-elected to that position.

[94] Chief Roote's Indigenous name means "Blue Black Heron". He testified that an Indian agent gave him his English name. He was raised on the Saugeen reserve as a child by his

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[24] Ogimaa Mittigwaub to Governor General Elgin dated October 18, 1850.

grandmother. He learned his culture and ceremonies from his grandfather. He is a traditional pipe carrier.

[95] In 1970, Chief Roote began investigating the east boundary issue at the request of Chief and Band Council. He became familiar with some of the federal government record relating to the reserve boundaries through that investigation.

[96] Chief Roote explained the family *doodem* system. He is a member of the Bear *doodem*, which traditionally has the responsibility for the security and protection of the community.

[97] Saugeen's traditional territory went from Goderich, east to Orangeville and north to Georgian Bay, up to Tobermory and the west shore of Lake Huron. There is a sacred burial site located at the mouth of the Saugeen River.

[98] Fishing was an important source of food, as was hunting meat. These were staples for Saugeen. The Fishing Islands and the shallow waters along Sauble Beach had seine nets. Sauble Beach was a particularly useful location to conduct seine fishing, unlike, for example, the Saugeen River, which had fast flowing waters and could not support seine fishing. The Saugeen people also fished the Saugeen River but with a different method.

[99] Chief Roote explained that the broader area of Sauble Beach, including the Disputed Beach, was always of great value to the Saugeen people for fishing. The Saugeen people call the Sauble Beach lake water "*Chi-Gmiinh*" meaning "big" (*Chi*) and "depth of water" (*Gmiinh*).

Summary of Findings Regarding the Ethnohistorical Context of Treaty 72

[100] The Saugeen people lived off the land and the waters. With the change of seasons, the source and locations of their sustenance and livelihood also changed. This is called the seasonal rounds. From the spring through early fall, the Saugeen people fished the rivers and Lake Huron from both the coastline and the islands identified on the early maps in the 1800s as the "Fishing Islands" located in Lake Huron to the north of the Disputed Beach, in the vicinity of Saugeen's northern reserve called Chief's Point. They also harvested plant foods. In the fall they would hunt, and in the winter they would trap as well as ice and spear fish. This is an oversimplification of the seasonal rounds, but the point is that fishing was a major source of sustenance as fish would not only be consumed during the warmer months, but it was also dried and preserved for the winter months when food sources were more scarce.

[101] During the spring months, their fishing largely occurred at the mouths of the Sauble and Saugeen Rivers where nets were set. The Saugeen River is at the south boundary of IR 29 (and forms part of that boundary) and the Sauble River is located between IR 29 and Chief's Point reserve. These were the spawning waters for the fish, and the fish would migrate to Lake Huron once the lake temperatures were warm enough.

[102] Also of note was the type of fishing in which the Saugeen people engaged during the warm weather months. The sandy beach portions of Lake Huron's coastline were pivotal in determining the type of fishing and fish preservation methods used by the Saugeen people. They used seine nets which hung vertically in the shallow waters weighed down by sinker weights. Herring was

the main source of fish caught with the seine nets, and the fishers would drag their catch ashore from the nets. The Saugeen would then take the fish and lay them on the beach to dry. This was a primary activity and a distinct type of fishing done by the Saugeen people in the times leading up to, and immediately following, the formation of Treaty 72.

[103] In my view, at the time of treaty formation, the Saugeen people were still heavily dependent on fishing for their own sustenance and continued to invest in the commercial fishery as a future source of income for their youth, even though the fish stocks were declining. They continued to fish consistent with their traditional ways. Saugeen was diversifying to agriculture as well. On the other hand, as will be seen, the fishery at the time of Treaty formation was not as important to the Crown in terms of attracting settlors as was harvesting the forests and agriculture.

v. The Archival Record

[104] Equally important to the task of treaty interpretation is an understanding of the historical context as recorded from the Imperial Crown's perspective.

[105] At the forefront was the Imperial Crown's persistent and increasingly urgent efforts to colonize the Saugeen Peninsula and open it up to settlor development, and Saugeen's responses to these various efforts.

[106] In this respect, Dr. Bohaker and Dr. Reimer's opinions are substantially the same.

[107] I will first examine the various Imperial Crown-Saugeen relations as influenced by various key events reflected in the archival record from 1836 up to Treaty 72.

(a) The Bond Head Treaty No. 45 ½ of 1836

[108] In the 1830s, the colonial administration of the Imperial Crown began implementing a policy of Indian "civilization", focusing on Manitoulin Island as a prime location to re-settle Indigenous populations. Furthermore, due to hostile policies in the United States, Indigenous peoples from that country sought to relocate to Upper Canada. Meanwhile, settlor populations were starting to increase within the Saugeen Peninsula and were increasingly encroaching on Saugeen's vast unceded traditional territory.

[109] Within this historical context, the Saugeen people agreed to surrender their traditional territory to the south of the Saugeen River in exchange for the Imperial Crown's promise of protection in what is known as the Bond Head Treaty or Treaty No. 45 ½, made on August 9, 1836. Under this Treaty, Saugeen and Nawash surrendered approximately 1.5 million acres of their traditional territory. The surrendered territory became known as Southampton.

[110] The new boundary was drawn as a straight line running east-west from the south tip of Owen Sound to Lake Huron, leaving the northern portion of the Saugeen Peninsula as "Indian" territory and identifying it as such on the maps of the day.

[111] In response to Saugeen's petition of June 1843, advising that the "Indian boundary" ran too far north, cutting off a portion of their territory at the "Indian Village", an Order in Council

dated July 26, 1843 designated a new boundary that carved out from surrender the area around the "Indian Village" comprising about 26,000 acres. The boundary line on Southampton was surveyed by PLS Rankin in 1846 (referred to as the "tongue of land" as it jutted out into Lake Huron bordered on three sides by water) and preserved both Saugeen's village and their cleared fields bordering the north shoreline of the Saugeen River. By this time, the Saugeen had diversified their food sources to include some farmed crops, notably corn. Under this Treaty, Saugeen reserved the entire coastline of Lake Huron north to and including Chief's Point, the mouth of the Sauble River, and the Fishing Islands. More specifically, Saugeen and Nawash retained the entirety of the Saugeen Peninsula north of the boundary established by the Bond Head Treaty.

(b) Royal Proclamation of 1847

[112] On June 29, 1847, Queen Victoria issued a Royal Proclamation. It came as a result of a petition from Saugeen and Nawash requesting assistance in protecting their respective fishing grounds from increasing encroachment by settlors.

[113] This Royal Proclamation expressly acknowledged that the entire Saugeen Peninsula belonged to Saugeen and Nawash, and that it was unceded territory. Through this vehicle, Queen Victoria as the sovereign Crown promised these First Nations that the peninsula would remain theirs, until such time as they wished to surrender it.

(c) Half Mile Strip Treaty No. 67 of 1851

[114] Next, the Saugeen (and Nawash) peoples surrendered a strip of their traditional territory along the north side of the east-west boundary made under the Bond Head Treaty 45 ½ and the 1843 Order in Council. The terms of this surrender were reflected in Treaty No. 67 made on September 2, 1851.

[115] The Imperial Crown wanted this half-mile strip of land primarily for the construction of a road from Owen Sound to Southampton. By this time, Southampton had been surveyed and divided into lots for settlors. As well, the Imperial Crown wanted this additional land to provide more interior land for settlors to purchase.

[116] In exchange for this surrender of approximately 4,800 acres of land, Saugeen and Nawash were to receive the proceeds of sale of the resulting lots to settlors, to be held and invested for their benefit by the Governor General. This Treaty area became known as the "Half Mile Strip", later referenced in Treaty 72 as the "lately surrendered strip" (part of the south boundary).

(d) Free Trade Agreement of 1854 with the United States

[117] Between 1844 and 1854, there was a large increase in the number of settlors arriving in the Saugeen Peninsula. The settlor population nearly doubled in this decade giving rise to great demand for land and ongoing encroachment on the First Nation fisheries and timber resources.

[118] At around the same time, the economies of the Province of Canada were becoming integrated, leading to potential investment opportunities for Americans. Between 1850 and 1851, the Province of Canada began receiving inquiries about purchasing land for a mill site on the

Sauble River in the north region of the Saugeen Peninsula, south of Chief's Point. Such a site would permit the construction of a sawmill for wood and a travel route down to Southampton and across Lake Huron to the United States.

[119] In June 1854, Lord Elgin secured a free trade agreement with the United States. This largely involved the elimination of tariffs on fish and timber and put increased pressure on the Imperial Crown to secure more land from Saugeen and Nawash. Tracts of land were also needed to facilitate the railway construction boom that was occurring in this general timeframe.

[120] The elimination of tariffs on timber, in particular, meant that there was an economic incentive to attracting more settlors to the Saugeen Peninsula. This was the main impetus for the Imperial Crown's desire to obtain a surrender of land around the Sauble River for a mill site at the location of the waterfalls. The resulting economic opportunities arising from increased export was also a prelude to the creation of the two distinct reserves for Saugeen under Treaty 72, and the surrender of an area at the mouth, and to the south, of the Sauble River, as will be seen.

vi. Attempts by the Imperial Crown to Negotiate a Surrender of the Saugeen Peninsula

[121] Between June 1852 and October 1854, the Imperial Crown made a number of attempts to negotiate a surrender of the vast majority of the Saugeen Peninsula. As stated, the impetus for its efforts was to accommodate a growing settlor population and to increase the economic opportunities of this region seen as largely timber, farming, transport and fishing. In exchange, the Imperial Crown offered to extend protection to Saugeen from the increasing encroachment its peoples were facing with respect to their fishing activities and onto its unceded territory.

[122] These attempts were led by Indian Affairs Superintendent T.G. Anderson and made throughout 1853 to the spring of 1854. Both Saugeen Deputy Chief/*Aanikeogimma* Madawayosh and Chief/*Ogimaa* Kedonce rejected Anderson's various proposals for the surrender of the majority of the Saugeen Peninsula.

[123] In July 1854, another proposal for the surrender of land at Sauble River was made by a former Indian Agent, J.W. Keating. However, that too was rejected by Saugeen.

[124] Later, in August 1854, Anderson again inquired as to the willingness of Saugeen and Nawash to surrender the Saugeen Peninsula subject to reserve lands being carved out and guaranteed.

[125] In response, these First Nations stated that they wanted to maintain "all the coast, as far north as Colpoy's Bay (on Georgian Bay) and the Fishing Islands" (across from Chief's Point in Lake Huron).

[126] Throughout the period immediately leading to Treaty 72, the evidence supports the view expressed most vigorously by Dr. Bohaker that Saugeen acted in a manner that demonstrated the commercial and sustenance importance to them of their fishery. This conduct included maintaining control over selecting the most viable leasing agreement for the Fishing Islands with

the private Huron Fishing Company,[25] training their young men to build barrels for salted fish, the process of coopering to prepare for a commercial fishing industry, and devoting "Band" funds to purchase items necessary to sustain commercial fishing. Saugeen continuously resisted attempts to induce them to surrender their peninsula, at the same time they took steps to diversify their economy.

[127] The record demonstrates, for example, in response to one of Anderson's inquiries about terms of a potential surrender, Saugeen and Nawash made plans in 1852 for expenditure of their annuities to modernize and diversify their economic development by subdividing lots for farming, to create a joint stock company to provide the First Nations with control over their own trade, and to build a store that could also provide on reserve banking services. These proposals were rejected by Anderson out of hand. Saugeen also advocated for the establishment of a school for its youth that never materialized.

vii. Summary of the Combined Historical and Ethnohistorical Record Leading to Treaty 72

[128] The historical archival and ethnohistorical evidence, and the testimony of Chief Roote, demonstrates that the Saugeen people were focused on maintaining the Fishing Islands and the coastline of Lake Huron to the greatest extent possible. The coastline of Lake Huron and the Fishing Islands' main utility was to facilitate fishing (both commercial and as sustenance) and, in terms of the coastline, to act as a passageway between the Indian Village to the south and Chief's Point to the north connecting the two communities. The archival record in particular demonstrates that Saugeen was prepared to negotiate terms for some sort of more limited surrender in exchange for "privileges" that would better secure the prosperity of their future generations.

[129] Dr. Bohaker and Dr. Reimer generally agree that Saugeen's objective in the years immediately leading to the Treaty was to preserve as much of the coastline as it could.

[130] In summary, prior to the Treaty of October 13, 1854, Saugeen and Nawash at joint fire councils had not surrendered the vast majority of their traditional territories north of the Saugeen River (and Owen Sound). Saugeen showed a determination to preserve the entire Lake Huron coastline north of the Half Mile Strip as well as the Fishing Islands. That said, by the time of the Treaty council of October 12 and 13, 1854, it was clear that Saugeen was also concerned about its ability to prevent increasing illicit encroachment by settlors on its lands, waters and natural resources. The archival record amply demonstrates that Saugeen raised concerns about "squatters" traversing their territory, illicitly fishing in their waters and taking timber from their land. These concerns co-existed with an interest by Saugeen in generating income from the sale of lots to settlors and diversifying their economy to include some agriculture.

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[25] Saugeen eventually terminated that agreement and successfully petitioned the Lieutenant Governor resulting in the Superintended of Indian Affairs acknowledging in 1844 that these islands had never been ceded by Saugeen.

[131] On the side of the Imperial Crown, it is clear based on the largely uncontested archival historical record leading to the Treaty council, and supported by the expert historians' opinions, that its priority in 1854 was to secure land in and around the Sauble River for several reasons. It sought land along the Sauble River, including at the mouth of the river, for use as a mill site, to open up a water trade route to Southampton and on to the United States for exporting timber, to gain interior lands for transportation routes (railways and roads), and to expand timber harvesting and farming by settlors. The Imperial Crown's top priority was to grow the non-Indigenous settlor population in the northern part of the Saugeen peninsula to colonize it. The Imperial Crown had a great interest in populating the peninsula with settlors to enhance economic prosperity.

[132] It is also noteworthy that in and around this timeframe, the Lake Huron fisheries were declining drastically thereby becoming a less valuable commercial resource from the perspective of the Imperial Crown. The commercial fishery also became less advantageous for Saugeen, though it was still an important food source and generated much needed income to a population for whom income-based work was scarce. On the other hand, agricultural land was seen to be a positive enhancement for attracting settlors to populate the Saugeen Peninsula.

[133] The expert historians essentially agree that this economic reality in the early 1850s drove the eventual designation of two separate reserves, separated by the Sauble River mill site area and transportation passage, for the exclusive use of Saugeen. Dr. Bohaker and Dr. Reimer also agree that the Crown sought to preserve for itself a relatively small area of coastline south of the Sauble River. The issue upon which there is disagreement is the length of short amount of coastline that was ultimately obtained by the Imperial Crown for the mill site and transportation route and therefore part of the surrendered territory under Treaty 72.

[134] The expert historians also agree that the main impetus behind the Imperial Crown's desire to obtain a surrender of the Saugeen Peninsula was economic (to attract settlors). Where they disagree is with respect to Saugeen's motivation for ultimately agreeing to a surrender of the majority of their peninsula, including part of the coastline. Dr. Reimer's opinion is that Saugeen's impetus was purely economic, whereas Dr. Bohaker's opinion is that Saugeen's purpose was more nuanced, consisting of a desire to secure the future economic prosperity of their children and future generations as well as a desire to maintain their traditional ways of living off the land and waters and preserve their connection to the land and surrounding waters.

[135] In my view, Dr. Bohaker's approach to the historical context leading to the Treaty is more reliable than Dr. Reimer's in light of Dr. Bohaker's inclusion of the ethnohistorical context that tells a more well-rounded story about the Saugeen, pre-treaty, than does the archival record which Dr. Reimer placed more emphasis upon. Both historians were careful thoughtful and measured in their testimony, however, where their respective opinions differ in a material way, I favour Dr. Bohaker's opinion. That said, it must be emphasized that much of their opinion was in substantial agreement.

viii. Written Record of the Treaty Negotiations

(a) The Treaty Council – Treaty 72

[136] On June 22, 1854, Laurence Oliphant became the Superintendent General of Indian Affairs for a relatively short period of time.

[137] Superintendent General Oliphant arrived unannounced at Saugeen's Village on October 11, 1854. He intended to hold a treaty council with Saugeen, Nawash and Colpoy's Bay First Nations.[26] However as it was the still fishing season, the Chiefs/*Ogimaas*, Deputy Chiefs/*Annikeogimaa*s, and Councillor/*gitchi-Anishinaabek* were not in the village but at their fishing sites. Upon sending word to come for a treaty council, members of the governing council arrived. A treaty council was held on October 12, 1854, starting at 7:00 p.m. in the village church. By 1:00 a.m. on October 13, 1854, Treaty 72 had been signed.

[138] The First Nations were represented by fourteen chiefs, councillors and leading men. The Crown was represented by Oliphant, who was accompanied by Crown Land Agent Alexander McNabb and PLS Charles Rankin – yes, the very same Rankin responsible for the post-Treaty survey of these boundaries. McNabb and Rankin ultimately signed the Treaty as witnesses. As well, Peter Jacobs, described as an "Indian missionary", acted as an interpreter for the Imperial Crown. It appears that two of the Treaty signatories, David Sawyer and Charles Keeshig, may have served as interpreters on behalf of the First Nations.[27]

[139] By all accounts, Oliphant was eager to make his mark and succeed where his predecessor had repeatedly failed. He was determined to leave the treaty council with a signed treaty.

[140] No minutes of this treaty council were taken. The only contemporaneous written archival record we have describing the negotiations comes from Oliphant in the form of his report concerning the treaty council dated November 3, 1854. With the caveat that the Treaty Report is

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[26] For ease of reference, I am referring to the three groupings of organized Anishinabek peoples by "First Nation". However, at this time no Indian Act administrative bands had been created. The Colpoy's Bay people were treated as part of Nawash for governance purposes. According to Dr. Bohaker, these First Nations had a strong alliance and held joint fire councils. They shared the land and resources in the traditional way, with families having use of specific areas within the traditional territory now known as the Bruce Peninsula.

[27] Jacobs, Sawyer and Keeshig were Indigenous people. Sawyer was a Mississauga from Credit River who had moved to Owen Sound in 1847 and was accepted as a member of Nawash acting as interpreter, teacher and secretary for a time. Jacobs was stationed at Saugeen as a Methodist missionary and was a Mississauga from Rice Lake. Keeshig was educated at Upper Canada College and served as interpreter and secretary at Nawash/Owen Sound from 1851 to 1857.

written from the perspective of Oliphant, the parties accept that it generally sets out the chronology of events of October 13 – 14, 1854.[28]

[141] According to his Treaty Report, Oliphant opened the Council by making his proposal for surrender and why, from the Crown's perspective, it would be mutually beneficial. It appears that *Anikeogimaag* Madwayosh was vocally opposed. However, after a recess to allow the Saugeen and Nawash leaders to discuss Oliphant's proposal, some active discussion ensued from the other leaders asking for increased boundaries for the proposed reserves and the addition of other "privileges".

[142] In his Treaty Report to the Governor General, Oliphant wrote the following description of the discussion following the recess:

> Upon returning to the council I found that the chief, Alexander Madwayosh, had been completely out-voted. Some of the other chiefs now came forward to stipulate for increased limits to their reserves and fresh privileges, in consideration of their readiness to adopt the views of Government. These were discussed *seriatim*; each party finding occasional concessions necessary, until we decided upon the terms of the surrender, as embodied in the document herewith annexed, which I drew out in the presence of the chiefs, and which was afterwards read and explained to them. By 1 o'clock A.M. the signing, sealing and affixing of totems was concluded, and the council broke up.

[143] I accept that this passage sets out the negotiation process and basic elements accurately. There is no evidence to the contrary. Accordingly, I find there was an active negotiation in which each Saugeen and Nawash's concerns for increased limits to their reserves and fresh privileges were discussed one after the other (*seriatum*) and that compromise occurred. I also find that the terms of Treaty 72 were handwritten by Oliphant at the Treaty Council and interpreted and explained to the Indigenous leadership at this Treaty Council. Only after this occurred, did the leadership affix their *doodems* (referred to in the Treaty Report as totems) and was the document witnessed by Rankin and McNabb.

[144] I also find as a fact that PLS Rankin was present throughout the Treaty Council and heard the negotiations and resulting terms of surrender, including the "limits" of the five resulting reserves which included, of course, what became IR 29. As will be seen, Rankin conducted a preliminary traverse for his survey of IR 29 shortly after the Treaty was formed. There is no dispute with respect to these facts or evidence to the contrary.

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[28] As well there is reference to the Treaty Council in Oliphant's memoirs and in a petition of the Saugeen and Nawash dated June 26, 1855, relating to Oliphant's behaviour and promises ostensibly made but not in the text of the Treaty relating to matters other than reserve boundaries.

[145] In addition, I find as a fact that Madwayosh was originally opposed to the surrender proposed by Oliphant but was eventually out-voted or changed his mind. Again, there is no dispute nor is there any evidence to the contrary.

[146] Thus, under the terms of Treaty 72, five reserves were created. Two were for the exclusive use of Saugeen (called IR 29 and Chief's Point), two were for the exclusive use of Nawash (called in Treaty 72 the "Owen Sound Indians") and one reserve was set aside for the Colpoy's Bay Indians.

[147] Important to this analysis, certain islands in each of Lake Huron and Georgian Bay were reserved from surrender, including the Fishing Islands which were reserved for the exclusive use of Saugeen. However, Chantry Island, located near the mouth of the Saugeen River, was surrendered with the stipulation that it would be sold to McNabb (who was the local Indian and Crown Land Agent) with the proceeds of sale to benefit Saugeen. Notably, Saugeen had already agreed to lease this island to McNabb under a 99-year lease in March 1854 by Band Council resolution. This latter Treaty term was confirmed by Order in Council on May 9, 1855 and in January 1856, Letters Patent were issued reserving to the Crown parts of the island as required for a lighthouse, piers and breakwaters.

[148] Also notable, Treaty 72 reflected the first proposed surrender by the Crown in which Saugeen did not reject the concept of two separate reserves separated by the Sauble River. In all prior efforts, Saugeen had resolutely maintained its position for a single large reserve comprised of the entire coastline of Lake Huron north of Southampton and the Half Mile Strip, up to and including Chief's Point. Under this Treaty, Saugeen and Nawash surrendered a further 450,000 acres.

[149] Oliphant's Treaty Report was sent to Governor General Lord Elgin on November 26, 1854.

[150] In his Treaty Report, Oliphant advised that he had "appended a sketch map in which the limits have been defined as accurately as possible without actual survey".[29]

[151] A plain view of Oliphant's map shows a fairly significant gap between the Chief's Point reserve and IR 29; however, it does not have a scale, nor does it purport to be drawn to scale. It does not claim to be an accurate map, much less a survey. Very little, in my view, can be concluded from this sketch map, drawn by a layperson with access to no reliable pre-existing maps of this region other than Bayfield's hydrographic map which is of limited utility given its purpose. The fact there is little evidence to suggest this sketch map was shown to the Indigenous leadership, much less approved by them, further undermines its probative value with respect to determining whether the "spot upon the coast" was intended to be at Lot 31 or Lot 26 (a relatively small distance of 1.4 miles in relation to the subject coastline). A map was shown to the Indigenous leadership at the Treaty Council, but it is uncertain as to whether Oliphant's sketch map was that map. Even

[29] See Appendix 1 for a copy of this sketch map.

if it was, given its lack of scale and accuracy it is of little value in terms of pinpointing the "spot upon the coast" and did not feature in the evidence of the various boundary and survey experts.

[152] As noted by Dr. Reimer, Oliphant's sketch map "shows the North-East point of the Reserve in the vicinity of the fourth stream, which on Bayfield's hydrographic chart is situated near 44 37' latitude. But the text of the Treaty does not suggest that the "spot on the coast" is the mouth of a stream that flows into Lake Huron, nor to any other land or water feature". This is curious since other boundaries do tend to be referenced by way of a geographical marker when available such as the ravine and the newly constructed bridge reference of the west boundary. Dr. Reimer accounts for her description of the Oliphant sketch map on the basis of Oliphant's rudimentary knowledge of the peninsula and the lack of mapping available at that time. This again demonstrates the limited utility of Oliphant's sketch map in defining the "spot upon the coast". Had it meant to be marked by a stream, the Treaty would have said so based on a ready of the Treaty as a whole.

[153] Dr. Reimer adds that nonetheless it is plausible that the spot upon the coast and about 9 ½ miles from the Treaty "were reference points understood by the Saugeen First Nation delegates".[30]

[154] Also of import is the fact that at this time, the Imperial Crown had limited cartographic knowledge of this region. It had yet to survey any of this heretofore unceded Saugeen/Nawash territory and the only map in existence was a hydrographic map prepared by Captain Bayfield in 1822, which depicts the west coastline of Lake Huron from the perspective of water ways and coastline markers aimed at showing economic potential along that coast. Both historians agree that the objective of Bayfield's map was not to survey the land; rather the map's focus was on water navigation routes. This was the only map that depicted the coastline at the time of the Treaty formation.

[155] The surrender was confirmed by Order in Council on February 3, 1855 and registered on February 16, 1855.

[156] The lands reserved by the Saugeen included the site of their council fire (at the Saugeen Village) and their burial ground. In addition, the preservation of much of the coastline together with the Fishing Islands suggests that maintaining fishing activities continued to be a fundamental objective of Saugeen, with the recognition that the Imperial Crown insisted that the coastline at the location of the Sauble River and to the south be surrendered for its own purposes of facilitating a mill, water route and some settlement land around that river.

[157] As evident by the terms of the Treaty, another important objective secured by the Saugeen was the promise that the Imperial Crown would protect their reserve lands from encroachment by settlors, as well as an annual annuity which Saugeen had already demonstrated would be put to securing the prosperity of their future generations. In exchange, the Imperial Crown achieved its objectives of securing the vast majority of the peninsula for settlement purposes, the timber trade,

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[30] Reimer Report, pp. 66-67.

agriculture, transportation routes and the mill site. Notably, the archival record does not support a finding that, at this point in time, the fishing industry at Lake Huron was a significant priority from an economic perspective for the Imperial Crown (commercial or otherwise), as the fishing stocks were experiencing a steep decline.

[158] It is also trite to say that there was no suggestion of the later cottage industry that would eventually make the beachfront an attractive economic feature of the peninsula. Indeed, beaches or sand as an economic interest or commodity are not mentioned at all in the Treaty Report by Oliphant nor by representatives of the Imperial Crown in the context of its attempts to secure surrenders from Saugeen culminating in Treaty 72.

[159] Rather the expert historians agree that both the Treaty and Oliphant's Report confirm that about nine and a half miles of coastline as well as Chief's Point were reserved, and these were Saugeen's traditional and active fishing grounds.

x. Immediate Aftermath of the Treaty

[160] Returning to the principles of treaty interpretation from *Marshall*, the post-treaty conduct of the Treaty parties can be considered insofar as this may contribute to the understanding of the Treaty terms by those parties. However, the closer to the signing of the Treaty the conduct is, the more likely it is to be relevant. This is because, as time marches on, the post-treaty conduct becomes more vulnerable to the interpretation of subsequent Treaty beneficiaries (as opposed to those who signed the Treaty). Notably, Oliphant left his post shortly after Treaty 72 and there is no record of him having been consulted about any boundary disputes raised by Saugeen.

[161] The Court of Appeal in *Restoule*, at para. 108, affirmed that extrinsic evidence may be admissible to assist the trier of fact in ascertaining how the treaty partners understood the Treaty. The court also warned, at para. 154, that post-treaty evidence and evidence of the parties' subsequent conduct must be treated with "extreme caution". At para. 153, the court cited Lamer CJ's caution in *Sioui*, at p. 1060, that "the subsequent conduct which is most indicative of the parties' intent is undoubtedly that which most closely followed the conclusion of the document".[31]

[162] With these principles and cautions in mind, I will first examine the immediate post-treaty conduct of the treaty partners, which is of particular significance to determining the Treaty partners' understanding of the Treaty's description of the east boundary and the reserve boundaries of IR 29 in general. This leads to a consideration of the extrinsic evidence concerning Rankin's preliminary traverse in 1854 and then his formal survey in 1855 - 1856.

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[31] See also para. 155, referring to *Lac La Ronge Indian Band*, at para. 103, reflecting this concern.

(a) Rankin's Preliminary Traverse and Survey

(i) The Historians' Evidence

[163] The most important post-Treaty conduct occurred when PLS Rankin[32] was instructed to undertake a preliminary survey of the reserves and the peninsula as a whole, including the townships, town plots, and farm lots, and then to prepare his official survey. It is important to recall that Rankin was present throughout the Treaty council and was one of the witnesses to sign the Treaty.

[164] Rankin was to "examine the whole tract" in order to recommend "the best method of dividing it into lots". These instructions were formally issued by Oliphant on October 14, 1854. His task was initially to determine the reserve boundaries and to report on the condition of the land that was surrendered, with a view to the sale of those surrendered lots which would financially benefit Saugeen.

(ii) Rankin's Preliminary Traverse – 1854

[165] Rankin began his preliminary traverse in October and November 1854 (before winter made such work impossible). The purpose of the traverse was to walk the boundaries of the reserve as closely as possible to the terms set out by the Treaty for IR 29 and of the surrendered land to be set out in township lots for Amabel Township. There was, as yet no map of the peninsula for Rankin to work from. This traverse was a precursor to the official survey of Amabel Township.

[166] As a surveyor, Rankin was required to keep daily notes of his progress. His "Journal of Preliminary Survey of the Southern portion of the Owen's Sound and Saugeen Peninsula" dated October 14, 1854 sets out his recorded traverse.[33] In his Journal, Rankin recorded that he began his traverse at Saugeen on October 20, 1854, with a view to conducting a "traverse of Lake Huron's shore "from Saugeen to Fishing islands as a first step towards enabling me to project a plan of division".

[167] This initial traverse occurred between October 20 and 27, 1854. According to his Journal, on October 28, 1854, Rankin "planted a post as the S.E. angle of the Chief's Point Reserve" one half mile upriver (from the Sauble River), consistent with the terms of Treaty 72 as regards this reserve.

[168] On October 30, 1854, Rankin returned to Saugeen and began surveying part of the "north bank of Saugeen River" in preparation for surveying town lots for Southampton (the "tongue of

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[32] PLS stands for Provincial Land Surveyor and was a designation under the *Act to Repeal Certain Acts Therein mentioned, and to Make Better Provision for the Admission of Land Surveyors and the Survey of Lands in this Province*, 12 Vict., c. 35 (1849). Province referred to the Province of Canada which resulted from the union of Upper and Lower Canada in 1841. In 1867, the Province of Canada was dissolved upon Confederation.

[33] This Journal is also identified as Field book 322. Field book 387 records the length and direction of each straight line segment of Rankin's traverse between stations.

land"). He then mapped out the "east boundary of the tongue" (the Southampton lots) from November 1 to 3, 1854. This concluded his work on the initial traverse of IR 29.

[169] On November 4, 1854, according to his Journal, Rankin proceeded to Owen Sound and did some preliminary survey work there. From November 27 to December 7, 1854, Rankin undertook the survey "for road to Fishing Islands". He then went to Colpoy's Bay and worked until December 1854, when the snow became too deep to continue his work.

(iii) Rankin's Survey

[170] On April 26, 1855, Rankin received his instructions to conduct the detailed surveys of the reserves made under the Treaty from the newly appointed Superintendent General of Indian Affairs, Lord Bury.[34] These instructions superceded Oliphant's instructions. Rankin's assistant, George Gould, conducted a preliminary survey traverse of IR 29 from May to September 1855, as recorded in his Journal, Fieldbook 322. At the same time, Rankin was instructed to start the official survey of the Southampton town plots to the north of the Saugeen River.

[171] However, Saugeen, upon seeing Gould beginning to mark the west boundary "due north", objected to that trajectory. This is relevant as it potentially relates to the location of the north terminus of the east boundary.

[172] More specifically, Saugeen and Nawash's council passed a band council resolution dated May 5, 1855, expressing dissatisfaction with the survey of the west boundary. The resolution stated that the boundary has been commenced "about four hundreds too far southward, and then not running through our opening, called 'Copway's Road' as expressed and understood by Mr. Oliphant and ourselves, at the time our Treaty was made". Saugeen indicated that this was important because otherwise their village was cut off from the lake. No reference is made to a map having been made at the Treaty by Oliphant. Saugeen asked that the survey stop until it could "confer with the Government on this subject".

[173] When Rankin raised this concern with Superintendent Bury, Bury's initial response was that the Governor General's instructions were to "carry out the survey of this plot in strict accordance with the terms of the Surrender".

[174] In May 1855, the Saugeen and Nawash councils caused a petition to be sent on their behalf requesting a meeting with the Governor General to discuss certain promises they alleged were made by Oliphant at the Treaty Council but not kept. One of the concerns expressed in the petition was that they saw that Rankin had, the prior fall, marked out the wrong location for the west boundary because he ran a marker north from a point just west of the Saugeen village, at a creek that flowed into the Saugeen River. The resulting boundary commencing from that point cut Saugeen off from access to Lake Huron. It also enclosed their corn fields within the boundaries of two park lots, bisected by a planned road allowance for a road that was called Copway Road.

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[34] In 1841, Upper Canada and Lower Canada became the Province of Canada.

This marked boundary also separated Saugeen from the proposed reserve's log homes and shanties that Saugeen had built and were leasing to settlors.

[175] This issue became urgent since Rankin had started the survey process for the Southampton plots north of the Saugeen River along the Treaty-defined west boundary of IR 29. He was under severe pressure from the Imperial Crown to get this survey completed to facilitate the sale of lots to settlors which was targeted for fall**.**

[176] In the petition, these First Nations stated that "[t]hat the wording of the late Treaty is not in accordance with the map laid before the council the night the Treaty was discussed, which we are prepared to show." While the referenced map is no longer in Saugeen's possession, the expert historians agree that it is likely that this issue related to the location of the western boundary.[35]

[177] The First Nations did not receive a response from the Governor General and no meeting was granted.

[178] An incident then occurred when George Gould and his crew, who were assisting PLS Rankin, began their survey of the west boundary bordering the Southampton town plot in May 1855. On May 28, 1855, Gould noted in his field notes that they had to stop their work because of threatened violence from some of "the Indians". Gould sent word to Rankin who arrived 8 days later, on June 5th. Rankin was able to resolve the matter without resort to any military assistance offered by the Imperial Crown. However, this incident shows that the First Nations were aware of, and observing, at least this part of the survey and checking to ensure the survey markers were in accordance with what they believed they were to receive under the Treaty. It must be remembered that Saugeen and Nawash did not receive a physical copy of the Treaty, nor would they have received a copy of Rankin's instructions or his field notes. They could only react as to what they saw was being done on the ground.

[179] However, as a result of the growing tensions over Rankin's marking of these boundaries, and the other unaddressed concerns reflected in the petition, a Grand Council was held on July 19, 1855 between the leadership of Saugeen and Nawash and Lord Bury (then Superintendent General of Indian Affairs) called the Allenford Council. Lord Bury agreed to submit the requested boundary changes for both reserves, noting that it would have to be the Governor General who made the final decision, having accepted the surrender in the first place. After receiving assurances from Bury, the First Nations consented to the respective surveys proceeding.

[180] In the meantime, Rankin was being pressured by Lord Bury to complete his surveys of the various reserves as soon as possible since the Crown wanted the land on the surrendered parts of the peninsula at Lake Huron subdivided into lots to be put up for sale. On August 11, 1855, Rankin

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[35] There was speculation that the referenced map might be Oliphant's sketch map appended to his Treaty Report, and appended to these Reasons. However, if so, that would mean that Saugeen had a duplicate copy of that map which, given the time frame, seems unlikely.

wrote to Lord Bury and forwarded his completed plan of the Southampton town plot bordering the west boundary of IR 29.

[181] Rankin recommended that the west boundary be changed so as to follow Copway Road (which was then a dirt pathway), which would result in a small addition to the coastline of IR 29 to be received by Saugeen. As Rankin was at the Treaty Council it is likely that if he believed that the west boundary agreed to had been misdescribed in the Treaty, he would have said so – he was the surveyor with expertise that the others did not have relating to marking and describing boundaries. Accordingly, it is a reasonable inference that the change requested by Saugeen to the west boundary was not reflective of what had been ultimately agreed to at the Treaty Council. By this time, Oliphant had left his post and there is no evidence suggesting he provided his views. It may well be that Saugeen believed they had asked for the west boundary to follow Copway Road, but it was not reflected in the Treaty, giving rise to a latent ambiguity in this term of the Treaty from the perspective of Saugeen.[36]

[182] Bury accepted Rankin's recommendation, which did not require an amendment to the Treaty. The change to the west boundary of IR 29 was approved by Order in Council, dated September 25, 1855, stating:

> On a Memorandum dated 12th Instant from the Superintendent General of Indian Affairs, submitting certain proposed changes, as shewn in two certain plans, in the shape of the Indian Reserves in the Tract commonly called the Saugeen Peninsula, lately surrendered to the Crown, both changes having been assented to by the Indians in Council; and recommending:
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> …That the Reserve known as the Saugeen Reserve now bounded on the West by a straight line running due north from the River Saugeen at the spot where it is entered by a Ravine immediately to the west of the village, be bounded instead by the Indian path called the Copway Road, which takes a North-Westerly direction, as shown by the red line in the plan. <u>This change will give the Saugeen Indians a small increase of frontage on Lake</u>

[36] Dr. Reimer relied on an 1867 account by the local missionary, Rev. Van Dusen, who wrote that it had been understood by both Oliphant and Saugeen that the southern part of the west boundary should run along Copway Road, and that they believed that Copway Road ran due north and "the Treaty was drawn up accordingly". In Dr. Reimer's opinion, it is "plausible that Oliphant shared the First Nation's understanding that Copway Road was the logical boundary between the Reserve and the ceded lands" in accordance with Van Dusen's later recorded recollection. Under cross-examination, however, Dr. Reimer agreed that in May 1855, when the Crown told Rankin to survey the reserve according to the terms of the Treaty, the Crown understood those terms to accurately reflect what the Treaty parties had agreed to at the Treaty Council. I do not accept Dr. Reimer's opinion in this respect as it is inconsistent with the wording of the Order in Council, and Van Dusen's own memoir is not a reliable source for inferring the Crown's intention at the time of treaty formation.

> Huron, and will not interfere with the town plot now laid out on the tongue of land contained between that lake and the River Saugeen." [Emphasis added].

[183] In this Order in Council, there is no mention of amending or correcting Treaty 72 or referencing any of the other boundaries of IR 29. Indeed, there is no indication in the Order in Council that it is amending the terms of the Treaty at all, but rather, it is only altering the west boundary post-Treaty. The Order in Council does say that the resulting change will result in a small addition to the coastline of the reserve which is shown on the "sketch of alteration to west boundary" attached by Bury dated September 1855. That sketch shows only a small portion of the reserve at and around Saugeen's village at the Saugeen River. The fact that the Order in Council acknowledges an addition to the coastline, as opposed to a replacement of a segment of this coastline boundary, suggests that the north terminus of the east boundary was not altered by this Order in Council. This conclusion is supported by the lack of reference to any amendment to Treaty 72.

[184] Importantly, in Bury's letter responding to Rankin's proposal, Bury agrees that this boundary change will not require Rankin to re-survey the town plots for Southampton, and this amendment was not registered on Southampton's official plan. This factor seemed to be determinative with respect to the Crown's agreement to change this portion of the west boundary.

[185] As noted by Dr. Bohaker, based on the archival record, the Imperial Crown characterized the Copway Road amendment issue as a "misunderstanding" as between the Treaty parties — not as a mutual mistake in the Treaty's description.

[186] The expert historians agree that it was likely the intention of Saugeen when they entered into Treaty 72 that the west boundary would run northwesterly, as opposed to "due north", along Copway Road rather than from the creek next to their village, and that it would intersect with Lake Huron's shore. This position is supported in the archival record.

[187] As stated, against these boundary disputes raised by Saugeen was the clear pressure placed on Rankin by the Crown to complete his survey of IR 29 so as to meet the deadlines for putting the surrendered land in Amabel Township up for sale.[37]

[188] From August 22 – 31, 1855, Gould travelled from the Half Mile Strip north to Lot 26, Concession D, Amabel Township and surveyed the boundary between Concession C and D north

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[37] As it was, the initial public auction that was scheduled for October 17, 1855, had to be postponed last minute because Rankin had not finished the survey plan of Amabel Township. The proposed spring 1856 public auction was also postponed. On December 29, 1855, Superintendent Bury wrote to Governor General Edmund Head, advising that he was "apprehensive that the department will not be able to proceed with the sale in the spring if the plans be any longer delayed". Finally, the public auctions for the Amabel Township lots were put up for public auction between September 2 and 6, 1856.

to Lot 26. On September 1, 1855, Rankin joined Gould's party to commence "the running of the Eastern boundary of the Saugeen Indian Reserve, in accordance with the treaty".[38]

[189] On September 3, 1855, Rankin and Gould traversed the Sauble River. The survey field notes for Amabel Township (which included IR 29) record that posts were planted at the side road allowances between Lots 25 and 26 and between Lots 30 and 31, Concession D. Rankin purposely omitted planting posts within a chain of Lake Huron's shoreline (contrary to his instructions) because, in his view, posts planted that close to the water's edge would likely be washed away. Therefore Rankin proposed to Indian Affairs that "a reservation of a chain in breadth, to allow all boating people access to the beach"… "should, as usual, be mentioned in the patent".

[190] Dr. Reimer's opinion is that when Gould met with Saugeen council on September 14, 1855 it "is plausible that the Chiefs will, at minimum, have been aware that the East boundary was now surveyed".[39] Dr. Reimer notes, however, that Gould's journal provided little detail about that meeting.

[191] Saugeen's understanding at the time of the Treaty Council was likely that the west boundary would run along the dirt pathway known to them as Copway Road to preserve the direct route to Lake Huron. However, that understanding did not affect where Saugeen and the Imperial Crown understood the "spot upon the coast" to be Saugeen would not have used miles as a unit of measurement at that time – this was a colonial unit of measurement. Saugeen did, however, know the coastline intimately. The terms agreed upon as reflected in the Treaty included the west boundary as was initially surveyed by Gould. Saugeen agreed to the boundary description reflected in the Treaty at the time it was interpreted at the Treaty Council and signed but misunderstood the trajectory of the west boundary. The fact that Rankin, who was a witness to the treaty negotiation and the signing of the Treaty itself, did not state that there was an error in the Treaty description of the west boundary but rather proposed an alteration that would not interfere with his Southampton survey further strengthens this view.

[192] In the alternative if there was a misunderstanding on the part of both Saugeen and Oliphant, then this was a latent ambiguity that was resolved in favour of Saugeen but did not, as will be seen, alter the north terminus of the east boundary, also known as the "spot upon the coast".

[193] The Imperial Crown, as evidenced from Bury's representations resulting in the Order in Council, took the position that the land surrendered had been accurately described in the Treaty, but that an accommodation would be made to alter the west boundary and that this would result in an addition of coastline to the reserve. No reference was made to a corresponding amendment to the east boundary. That this was an after-the-fact accommodation by the Imperial Crown to ensure that Rankin could carry on with his survey of the west boundary in a timely manner is further supported, in my view, by the statement in the Order in Council that such alteration of the boundary would have no impact on the surveyed Southampton town plot. In other words, this proposed

[38] Rankin's Survey Journal, Fieldbook 322
[39] Reimer Report, at p. 92.

change was inconsequential from the perspective of the Crown who, at the time, was anxious that Rankin's survey be completed to facilitate the public auction for the sale of the surrendered lands in Southampton and Amabel.

[194] I find as a fact that, while there was a misunderstanding on the part of Saugeen regarding the location of the west boundary as following along Copway Road to Lake Huron's shore rather than "due north" at the time of signing, nonetheless, the boundary as described in the Treaty is what was what was intended by the Imperial Crown and agreed to by Saugeen. In any event, the subsequent change to the west boundary to follow Copway Road at a northwest angle further south than the Treaty-defined west boundary had no effect on the location of the about 9 ½ miles from a spot upon the coast which distance was still to be measured from the west boundary as described in the Treaty. Otherwise, there would have been no additional coastline received by Saugeen as a result of the Copway Road amendment.

[195] Ultimately, as will be seen in a review of the expert evidence on the survey, Rankin identified the "spot upon the coast" to be located within Lot 31, Concession D, which is about nine and a half miles from the original west boundary as defined by the Treaty. Accordingly, Rankin, who was present at the signing of the Treaty, did not interpret the southerly adjustment to the west boundary as altering the location of the "spot" upon the coast either.

[196] Accordingly, the "spot upon the coast" did not move as a result of the 1855 Order in Council but was to be measured from the original west boundary as described in the Treaty.

ix. The Public Auction

[197] Rankin submitted his survey return to Pennefather, Superintendent General of Indian Affairs on May 26, 1856 which included his final Plan of Survey of Amabel dated 1856.[40] The Imperial Crown's acceptance of the survey was subject to approval by its Crown Lands Department.[41]

[198] The Imperial Crown determined it would proceed with the public auction of the lots surveyed by Rankin for Amabel, Albermarle and Keppel Townships pending the review by the Crown Land examiners. These lots included Lots 26 to 31 along the Disputed Beach.

[199] A map of the lands for public auction was published on July 31, 1856 by the firm of Dennis & Boulton, Surveyors & Land Agents. This map was published "under Authority of the Indian Department of Canada". This map appears to show the Disputed Lots as ending at Lake Huron. However, this map does not purport to be a survey. Rather, it was used as a demonstrative aid for

[40] The Plan of Amabel, it must be remembered, included as part of the survey, IR 29 and Chief's Point reserve.
[41] The Crown Lands Department accepted Rankin's corrected Return of Survey and Plans for deposit on November 20, 1856.

prospective purchasers at the public auction. The map describes the lots as "Wild Lands". Dennis & Boulton's role at this public auction was to act as a land sales agent.

[200] The public auction was conducted in Owen Sound from September 2 to September 6, 1856. Certain of the Disputed Lots (26, 27, and 29) did not sell and were held over to the next auction. The other Disputed Lots (28, 30 and 31) were sold. However, none of the purchasers of the Disputed Lots received the patents for those lots because those sales were ultimately not completed by the original purchasers for various reasons, including, for example, failing to pay the balance of the purchase price.

[201] Rankin was present at this public auction with his field notes, for purposes of answering questions about the lots for sale. There is no evidence, however, concerning what information, if any, he may have given or to whom.

[202] The remainder of the Disputed Lots were sold at a second public auction held in September 1857.

x. Where did Rankin Mark the North Terminus of the East Boundary of the Saugeen Reserve No. 29?

[203] The next section will review the evidence relating to where PLS Rankin surveyed the east boundary of IR 29 and, in particular, that boundary's north terminus (or north east angle) and why.

[204] In short, I find that Rankin placed the north terminus of the east boundary at around the road allowance at Lots 25 and 26, rather than at Lot 31 where he planted a post marking the "spot upon the coast" under Treaty 72. He did this in exercise of his discretion, applying ordinary surveying principles applicable to deeds, to resolve a physical obstacle that he encountered when he marked the Treaty-defined boundary on the ground; namely, the concavity (or inward curve) of Lake Huron's coastline at and south of the "spot". The concavity meant that Rankin could not run the east boundary in a straight line due south to the Half Mile Strip entirely on dry land so he moved the "spot" to a point that was approximately 1.4 miles south of the location established by the Treaty. The 1.4 mile strip of beach is the Disputed Beach.

(a) Introduction and the Parties' Positions

[205] In addition to the historical perspective on Rankin's traverse and final survey, the court received expert evidence from the perspective of boundary and surveying principles.

[206] A brief recap chronology of events to put Rankin's official survey of the Township of Amabel and the east boundary of IR 29 into context is as follows:

a) October 13, 1854: Saugeen and the Crown enter into and sign Treaty 72 in the presence of witnesses, including Rankin;

b) October 20 – 27, 1854: Rankin carries out a preliminary traverse (walk) of Lake Huron from the Saugeen River in the south to the Fishing Islands in the north;

c) October 28, 1854: Rankin plants a post marking the southeast angle of Chief's Point reserve north of Sauble River;

d) October 31 – November 3, 1854: Rankin performs a preliminary survey of the west boundary, and estimates where the "spot upon the coast" about 9 ½ miles from which to commence his survey for the east boundary southward;

e) February 3, 1855: Treaty 72, with the reserve boundaries, is confirmed by Order in Council;

f) April 26, 1855: Rankin receives fresh instructions from Lord Bury to survey the Saugeen Peninsula, including IR 29, in accordance with the terms of Treaty 72;

g) May 1855: Saugeen raises a dispute with Rankin's assistant surveyor, Gould, regarding the location of the west boundary, which Saugeen says was supposed to be at Copway Road (northwesterly) and not "due north" as stipulated in the Treaty. Rankin intervenes and the Crown responds by affirming that the terms of Treaty 72 accurately reflect what was agreed to at the Treaty council and initially takes the position there will be no change in the trajectory of the west boundary;

h) July 19, 1855: the Allenford Council occurs, at which time Lord Bury agrees with Saugeen and Nawash to recommend a change to the west boundary to follow Copway Road which is in a northwesterly direction from the south boundary out to the coastline instead of due north;

i) September 4, 1855: Rankin begins his official survey of the east boundary, starting south from around Lot 31, based on his earlier preliminary survey of the west boundary. Rankin places a post within Lot 31 which is identified in Gould's field notes as "post of Ind Res";

j) September 27, 1855: the Crown formally approves the Copway Road amendment by Order in Council altering the placement of the west boundary;

k) October 12, 1855: Rankin prepares a draft map which shows a post with the notation of northeast angle of IR 29 at around Lot 31 with a thin line drawn south from Lot 31, through Lake Huron (close to the coastline), to Lot 25/26;

l) May 22, 1856: Rankin submits his plans, reports and field notes including his final Survey Plan of Amabel to Indian Affairs which passed it on to the Crown Lands Department for review;

m) June 10, 1856: Commissioner Joseph Cauchon, of the Crown Lands Department, sends Rankin's submissions back to rectify many errors ascertained in the course of review;

n) November 1856: The Commissioner of Crown Lands signs the Return of Survey for the Amabel Township, and it is deposited with Crown Lands Department, including Rankin's final Plan of Survey and field notes.

o) November 1856: Engineers, Ridout and Schreiber, prepare a hydrographic plan that shows a post at Lot 31. The plan labels the post as: "Post marked: N.E. angle of Saugeen Reserve according to Treaty boundary running south". This is the post planted by Rankin during his traverse.

[207] In a nutshell, Saugeen's primary position is that Rankin properly placed the north terminus of the east boundary at Lot 31 in September 1855 and marked it with a post. Saugeen states that Rankin ran his chain line completely on dry land south from Lot 31 to the south boundary at the Half Mile Strip in a straight line, consistent with the testimony of its surveyor expert, Mr. de Rijcke. In other words, Rankin properly marked the boundary as crossing the beachfront of Lots 26 to 31 on dry land as it existed in 1855, but he did not reflect that northern part of the east and west boundaries in any way on the final Plan of Survey. In the alternative, if Rankin was unable to run the line on dry land between Lot 31 and 26, Saugeen submits Rankin wrongly exercised his discretion with the effect of shortening the coastline portion of its reserve contrary to the promise made in the Treaty.

[208] Similar to Saugeen, Canada's position is that Rankin was able to draw the boundary on dry land from Lot 31 to Lot 26 as per the terms of the Treaty. Canada reasons that, based primarily on Rankin's field notes, which it says are more authoritative and precise than the maps and sketches relied upon by the defence experts, Rankin exercised his discretion to create an additional short north boundary connecting the east and west boundaries. This ensured that Saugeen received the "about" nine and a half miles of coastline from Lot 31 to the Treaty-defined west boundary expressed in the Treaty's text rather than arbitrarily shortening the coastline reserve to 8.1 miles. This additional boundary captures the Disputed Beach. Canada adopts Mr. de Rijcke's expert evidence.

[209] Ontario's position is that the Crown had discretion under the Treaty to determine the exact location of the reserve boundaries. Therefore, Rankin had discretion under the Treaty to locate the northern terminus of the east boundary where he did. Ontario relies on the Treaty description of "about" in "about (9 ½) nine and a half miles from a spot upon the coast" as conferring this discretion. Ontario argues there is language in the Treaty vesting discretion in the Crown with respect to locating the boundaries for the Nawash and Colpoy's Bay's reserves as well. The only caveat, says Ontario, is that the exercise of discretion had to be consistent with the terms of the Treaty. Ontario argues the fact that neither Rankin's nor Gould's survey journals state that they could not run the boundary line in accordance with the terms of the Treaty, means they were able to do so. The reason the "spot upon the coast" could be moved to where Rankin ultimately placed it (between Lots 25 and 26) is because the word "about" allowed him to account for latent ambiguities – in this case the concavity of Lake Huron's coastline which, it argues, prevented a straight line being run on dry land from Lot 31 to be run south to Lot 25/26. Ontario relies on the opinion of its expert, Dr. Ballantyne, for this theory based on the resolution of a latent ambiguity.

[210] The basic position of the Landowners is that Saugeen was not guaranteed 9 ½ miles of coastline under the Treaty, and that the spot upon the coast was only a starting point for creating the north terminus of the reserve's east boundary. Furthermore, the Treaty did not create the reserve boundaries but established a process for determining where the north terminus of the east boundary would lie: Rankin exercised his judgment appropriately by placing it at the road

allowance between Lots 25 and 26. Furthermore, Rankin's final Plan of Survey accurately establishes the northeast angle of the east boundary at this road allowance and this is consistent with the Treaty. These defendants rely on Mr. Fediow's opinion confirming that this is the accurate location of the northeast angle of IR 29, consistent with Rankin's final Plan of Survey of Amabel. They submit that Rankin's own field notes and the various maps created in and around this time frame corroborate this requested finding. However, where there is a conflict between the maps and field notes and Rankin's final Plan of Survey, the final Plan of Survey must prevail.

[211] In the alternative, these defendants argue that if Rankin had to exercise discretion in light of encountering a latent ambiguity in the form of the concavity of Lake Huron's coastline, then that discretion was exercised appropriately with the same result – the north terminus of the east boundary of IR 29 is located at the road allowance between Lots 25 and 26, as marked by Rankin on his final Plan of Survey, and is consistent with the terms of the Treaty. These defendants state it matters not whether Dr. Ballantyne's opinion that Rankin ran his line between Lots 31 and 26 on wet sand, or Mr. Fediow's opinion that Rankin ran his line under water between those lots, is the correct one. In either event, Rankin had the right to exercise his judgment to commence the northern end of the east boundary where he did. Furthermore, Saugeen received what it was promised because, with the additional coastline received under the Copway amendment, it received close to 9.5 miles of Lake Huron coastline and some additional interior land as well.

(b) The Shape of the Coastline at the Disputed Beach at and after 1855 – Geomorphology Evidence

[212] Before I turn to the expert survey and boundary evidence, I will briefly address the expert evidence on the configuration of Lake Huron's coastline at around the time of Rankin's preliminary traverse and survey. I do this since the expert survey evidence relied on this evidence to various degrees in forming their respective opinions regarding where it is Rankin likely marked the north terminus of the east boundary and why.

[213] The main objective of this expert evidence was to try to reconstruct the width of the coastline across the Disputed Beach between Lots 25 and 31 at the time of Rankin's survey.

(i) The Expert Witnesses

Michael Davies

[214] Dr. Davies is a civil engineer. His applied science background is as a coastal engineer in the application of geomorphology. He testified on behalf of the Town. He was qualified as an expert in the field of coastal engineering and geomorphology.

[215] Dr. Davies' opinion is that, based on the long-term trends in water levels and other factors at Lake Huron since 1855, it is likely that there has been a significant change in the shape of Lake Huron, particularly at the northern end of it, notably in the concavity of the shoreline. In his opinion, in 1856, the shoreline in and around the Disputed Beach would have been further inland than it is today and likely east of Lakeshore Boulevard North**.**

[216] Dr. Davies concluded that since the 1850's, the shoreline along the Disputed Beach has migrated lakeward or in a westerly direction by:

(a) Between 300 and 440 feet at the north end of Sauble Beach around Lots 33 and 34;

(b) Between 80 and 400 feet around Lots 30 and 31 (the "spot") and

(c) "at least" 60 feet around Lots 25 and 26 and possibly as much as 300 feet.

[217] Of particular significance to the surveying experts, Dr. Davies testified that station 59 of Rankin's traverse (Lot 30) was likely the eastern most point of the inward curve of the Disputed Beach at the time of the traverse in 1854.[42]

[218] Dr. Davies agreed under cross-examination that his analysis and conclusions were based on a long-term perspective of the gradual change in the coastline and were not meant to pinpoint the shape of the coast, water level, or beach width at any single point in time. He explained that over time and since the Treaty, the water levels of Lake Huron have decreased and therefore the coastline has migrated lakeward with the consequence of wider beaches along the Disputed Beach.

[219] Dr. Davies acknowledged that the water level data for Lake Huron prior to 1920 is limited – only one such gauge existed and that was to the south of Sauble Beach at Harbour Beach. Since 1920, water levels have been regularly recorded (annually). He agreed that the lake level data from 1850 to 1900 is therefore less reliable because of the paucity of that data. However, Dr. Davies maintained that he used the most reliable data available from that historical time period.

[220] Notwithstanding the shortcomings of the early lake-level data, Dr. Davies maintained that the evidence over the long term shows that the shape of Lake Huron has changed, reflecting a gradual decrease in water level and resulting in accretion of sand to the beach fronting Lots 25 to 31. Notably, the beach currently in front of the Disputed Lots is much wider now than it was during Rankin's traverse and subsequent survey.

Joseph Desloges

[221] Dr. Desloges testified on behalf of Saugeen. He is a full professor at University of Toronto and a registered professional geoscientist. He was qualified as an expert in the area of geomorphology with a specialty in the geomorphology of rivers and freshwater lakes and their shorelines. He was called to respond to the expert evidence of Mr. Davies.

[222] Dr. Desloges explained that geomorphology is about the study of the earth surface processes and landforms. He is a specialist in rivers and lakes, including the transport of sediment

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[42] The stations are the traverse segments used by Rankin during his survey to mark the various straight chain length points. Each station reflected a change in trajectory of the traverse. Of course, there were no lots designated as of yet. The stations are reflected in Rankin's field notes.

to coastal shorelines. He explained that accretion is the permanent and semi-permanent deposition of sediment.

[223] It is his opinion that it would be virtually impossible to reconstruct the profile of Sauble Beach as it existed in a single year – 1855 – without knowing the relevant water levels at Lake Huron in a reliable or accurate manner. Specifically, it is not possible to be precise about the configuration of the beach at that time, as that exercise would require pinpointing the appearance of the beach in a very narrow timeframe, and because there is a lack of available evidence from that era. Before 1918, there is only one gauge or measurement taken regarding water levels and that measurement of water level was taken at the south end of Lake Huron at Harbour Beach – not near the Disputed Beach**.**

[224] However, his opinion was that the shoreline of the Disputed Beach, aside from accretions of sand that accumulated at the northernmost point of Sauble Beach caused by a man-made jetty, has likely remained in a steady state since Rankin's traverse and survey, meaning that the beach has more or less the same over the course of the long term. That said, Dr. Desloges opined that within the 170 year span, the shoreline has fluctuated from time to time within 50 meters as a result of seasonal factors such as climatic variations (precipitation, temperature, evaporation) affecting the water level of Lake Huron.

[225] A major criticism of Dr. Davies' analysis by Dr. Desloges was that he did not account for the seasonal factors and their impact on water levels in Lake Huron in any given year. This "significantly undermines the degree of certainty" of Dr. Davies' opinion. Furthermore, the monthly lake level observations of Lake Huron from 1855 to 1917 that Dr. Davies' heavily relies upon are based on too limited number of lake level gauges and further undermined by the lack of precision of water measurement given the instruments of the day.

[226] In the end, Dr. Desloges' opinion is that it is not possible to reconstruct the shoreline along the Disputed Beach during Rankin's traverse and survey in a reliable way or with any reasonable degree of certainty.

(ii) Analysis of the Geomorphology Evidence

[227] Overall, I found the expert evidence of Dr. Davies relating to the reconstruction of the shoreline and water levels to be of little assistance to the determination of where Rankin placed the northern terminus of the east boundary. As noted by Dr. Desloges, it is difficult to extrapolate from long-term data what the concavity of the Disputed Beach would likely have been during the time of Rankin's preliminary traverse and survey.

[228] As Dr. Davies testified, his analysis was informed by the long-term trends in the historical data. The data regarding the historical water levels of Lake Huron, critical to a determination of the movement of the shoreline, for the period from 1850 to 1900 was extremely limited and not as reliable as more recent level recordings – even if the Harbour Beach data was the most reliable available to Dr. Davies.

[229] Most notable was Dr. Davies' testimony that the easternmost point of the Disputed Beach, based on Rankin's field notes of his survey and his own analysis, was at station 59 or Lot 30, which was not contested.

[230] I accept that the Disputed Beach is far wider today than it was in 1854-55, based on Rankin's field notes which record his observations and sometimes describe the measurements of the Disputed Beach and immediately south as being narrow. It was not until the 1930's that questions arose from cottagers about who owned the increasingly large beach owing to accretions. However, I accept Dr. Desloges' opinion that the early lake level data relied upon by Dr. Davies is too unreliable and, together with the later data, are not very helpful when trying to pinpoint the width of a beach at a particular location along a large lake's coastline's concavity in a narrow period of time 170 years ago. The lack of reliable water level data relating to Lake Huron in the latter half of the 19th century and the failure to take into account the climatic variations and their impact on water levels over the past 170 years casts significant doubt on Dr. Davies' attempt to have reconstructed the coastline along the Disputed Beach as it would likely have existed in and around 1854-56. I find that his methodology relied on an unsupportable factual basis.

(c) The Expert Witnesses – Survey and Boundaries

[231] The survey and boundary experts agreed that the "about" 9 ½ miles from the "spot upon the coast" as defined by the Treaty fell within the vicinity of Lot 31. Mr. de Rijcke states that the post planted by Rankin within Lot 31 marks that spot and is evidence that he ran the line due south on dry land past the concavity without hitting water. Dr. Ballantyne and Mr. Fediow say that the post was not the exact "spot upon the coast" insofar as it was planted further inland. Their position was that the "spot" was at the natural water boundary of Lake Huron.

(i) Izaak de Rijcke

[232] Mr. de Rijcke testified on behalf of Saugeen. Mr. de Rijcke was qualified as an expert in professional contemporary and historical land surveying in Ontario. He has a designation as an Ontario Land Surveyor, was called to the bar of Ontario in 1983 and became a specialist in real estate law. He has various other qualifications, including having written a textbook in 2016 on the principles of boundary law and has extensive experience in conducting and interpreting surveys.

[233] Mr. de Rijcke's opinion is that Treaty 72 established (i.e., created) the boundaries of IR 29 because it set out in sufficient detail, from the perspective of a surveyor, the markers for plotting the boundary. Rankin's task was to implement the Treaty-defined boundaries on the ground.

[234] It is Mr. de Rijcke's further opinion that Rankin plotted out the west boundary of IR 29 at the Disputed Beach entirely on dry land, and that he did not have to cross into the water at any point to run a straight line south from Lot 31. He contends that this view is supported by a review of Rankin's field notes recording his survey on the ground, chain by chain, and by the working draft survey map created by Rankin reflecting his preliminary traverse. Furthermore, Rankin established the "spot upon the coast" at "about" nine and a half miles from the original (Treaty-defined) west boundary in about the mid-point of Lot 31, inland from the water's edge of Lake

Huron, and marked that spot with a post as recorded in Gould's field notes and labelled by Rankin as the northeast angle of IR 29 on his working draft survey map dated October 12, 1855.

[235] Mr. de Rijcke opined that there was a strip of continuous dry land between the lake and the east boundary at the Disputed Beach that was marked as reserve land by Rankin when he established the east and west boundary of IR 29 in his final Plan of Survey of Amabel in 1855, as submitted and ultimately accepted by the Crown in 1856. He concluded that the surveyors hired subsequent to Rankin to re-establish the east boundary either failed or did not attempt to re-establish the east boundary north of Lot 25 across the Disputed Beach as "run on the ground by Rankin". Furthermore, none of the subsequent boundary investigations, plans, surveys or patents created after 1856 that purport to show, or relate to, the east boundary of IR 29 alter his opinion.

[236] Mr. de Rijcke's task was to "re-establish" the north segment of the east boundary of IR 29.[43] Mr. de Rijcke attempted to physically retrace the disputed segment of the west boundary and the north terminus of the east boundary using Rankin's field notes.

[237] Mr. de Rijcke characterized his methodology as "non-traditional" surveying and acknowledged that the task of re-establishing the boundary was made more difficult because neither of the posts planted by Rankin at Lot 31 or the road allowance between Lots 25 and 26 have survived. Furthermore, the topography Rankin faced in 1855 is not the same as when Mr. de Rijcke carried out his own attempt to re-establish Rankin's boundary in the 1990s. This is significant because Rankin's field notes make frequent reference to the topography as he marked the boundary. However, Mr. de Rijcke relied on the many boundaries Rankin surveyed and monumented in the surrounding township lots in Amabel for guidance.

[238] Mr. de Rijcke used much of the same equipment as would have been used by Rankin and Gould. He painstakingly attempted to physically retrace Rankin's steps between Lots 31 and 25 as reflected in Rankin's detailed field notes.

[239] Mr. de Rijcke explained that, according to his field notes, Rankin's first step was to run a preliminary shore traverse of Lake Huron, because the Saugeen Peninsula had never been accurately surveyed or measured by anyone. Mr. de Rijcke explained that Rankin would have used a heavy chain to plot and measure the course. One inch on Rankin's survey reflects a scale of 10 inches, and one chain is 66 feet long. Eighty chains represent a distance of one mile. Of course, the imperial measurement was used in this time frame.

[240] Mr. de Rijcke's opinion is that Rankin plotted out the "spot upon the coast" at "about" 9 ½ miles from the original Treaty-defined west boundary. Rankin used a surveyor's compass and used the magnetic north as the reference line. While this methodology presents some challenges with accuracy it was acceptable in the historical timeframe.

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[43] "Re-establish" as used by the surveyors means to confirm the boundary line as originally surveyed.

[241] In Mr. de Rijcke's opinion, Rankin's marking of the "spot" was fairly accurate.

[242] The east boundary of IR 29 was then surveyed commencing on September 4, 1855 by Rankin and his crew. Rankin recorded entries in his field book of his observations of the topography, consistent with the practice of the day.[44] In Mr. de Rijcke's opinion, Rankin's field notes are the best evidence of what Rankin did in the course of physically plotting this boundary (as opposed to his Final Plan of Survey).

[243] Recall that Rankin was surveying not only IR 29 and Chief's Point reserves, but also the lots to be sold throughout the surrendered portion of the peninsula. Further recall that Rankin was present at the Treaty Council and witnessed the signing of Treaty 72 so he was presumably very familiar with the terms of the Treaty and the negotiations that led to those terms.

[244] At p. 143 of his Field Book No. 214, Rankin wrote "Indian Boundary West Side of Concession D". This is referring to the west boundary of IR 29 where it intersects with the spot upon the coast and includes the segment along the Disputed Beach. The key entry relevant to the Disputed Beach (focused on by all of the survey experts) is that the total distance of this segment was 101 chains,[45] with the following taken from the field book verbatim:

> On sandy beach, at 14 c to 115 c Lake edge of, at 128 c ascend the little sandy bank from the beach, then low sand hills…

[245] All of these experts agree that the reference to "c" is chains. However, there was much controversy at trial as to what Rankin's reference to "Lake edge of" and then "ascend the little sandy bank from the beach" meant. More specifically, where was Rankin's chain during this segment of the traverse?

[246] Mr. de Rijcke's interpretation of this field book entry is that Rankin approached the edge of Lake Huron, walked on beach or dry land along the lake edge meaning sandy beach, then left the sandy beach to go to the "little sandy bank" which Mr. de Rijcke interprets as sand dunes. He notes that 14 chains is the equivalent of 924 feet, 115 chains is 7590 feet or 1.14 miles, 128 chains is 1.6 miles and 160 chains is two miles.

[247] In other words, Mr. de Rijcke's opinion is that Rankin did not actually enter the water of Lake Huron between Lots 31 and 26 from chain 14 to chain 115 and did not need to in order to plot the west boundary and its intersection with the east boundary at the northern terminus of this reserve. The survey by Rankin was conducted entirely on dry land in a straight line around the concavity of Lake Huron at the Disputed Beach. Mr. de Rijcke testified that his traverse of this

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[44] The field notes themselves were compiled after the Survey but completed from daily scraps of paper made during the survey, likely. Gould spent 22 days, from January 15 to February 5, 1856 compiling the notes into the Field Book which then formed part of Rankin's return.

[45] One chain equals about 66 feet.

same boundary segment along the Disputed Beach re-established the north terminus of the east boundary at Lot 31 where Rankin planted his post.

[248] In support of his opinion, Mr. de Rijcke points to the fact that there is no explicit mention by Rankin at this entry or in Gould's field notes of having ever entered into or crossed the water or having run an offset line (from a boundary running through the water to the dry land). According to Mr. de Rijcke, a qualified surveyor of the day would have been expected to record such a detail explicitly in his field notes. Mr. de Rijcke also observed that in Rankin's field notes elsewhere, Rankin makes it clear when he went into water; therefore, Rankin would have written something like "entered water at 14 c and left water at 115 c" if that was the case.

[249] At p. 143 of his Field Book 214, Rankin documented his measurements and describes the vegetation, soil type and terrain he walked over. Mr. de Rijcke explained that Rankin was recording these observations because he was evaluating the suitability of the soil for farming and settlors' lives, and these were important details in the course of surveying the inland lots of Concession C to the east of Concession D at Amabel.

[250] Gould recorded the existence of the post planted by Rankin as the northeast angle of IR 29 located within Lot 31. The post was planted 1.72 chains from Lake Huron and 10.66 chains north of the Lot 30/31 road allowance.

[251] Mr. de Rijcke testified that it is evident from Rankin's September 4, 1855 journal entry that he only spent the first day with the survey party and ran the first two miles of the east boundary south from what he determined was the northeast angle of IR 29 or the "spot upon the coast". Once they left the beach Rankin left the survey in his assistant Gould's hands. It bears repeating that Gould was not a licensed surveyor, but that Rankin had been authorized to employ assistants to help with the survey. This suggested to Mr. de Rijcke that Rankin anticipated the first leg of this survey of the east boundary would be difficult due to his preliminary traverse of the shore.

[252] Mr. de Rijcke then considered the working draft survey plan prepared by Rankin, dated "Sydenham October 12, 1855" (found in Rankin's working papers but not submitted as part of his Survey Return) which he stated supported his opinion. Mr. de Rijcke highlights the fact that Rankin wrote on to this working copy "NE>Ind. Res." Also visible on this draft map is a faint line that appears to start at the station at the water's edge of Lot 31 and continues through Lake Huron (albeit very close to the shoreline) ending at Lot 25/26 where Rankin records ascending the "little sandy bank from the beach". The road allowance at Lot 25/26 is the official northern terminus of the east boundary of IR 29 as designated by Indian Affairs.

[253] Mr. de Rijcke characterized Rankin's failure to visibly draw the boundary as extending north from Lot 25 to 31 as a "drafting anomaly". He speculated under cross-examination that Rankin's failure to draw a small north boundary to connect the spot upon the coast with the west boundary was perhaps due to an inability to draw a line with a thin enough pencil to illustrate a narrow boundary. However, this answer makes no sense in light of the fact that other boundaries, such as the side road allowances on the final Plan of Survey of Amabel were clearly marked even though they reflected a width of distance smaller than Mr. de Rijcke's estimate of the width of the

shoreline comprising the east boundary at the lake side of Lots 26 – 31. Mr. de Rijcke's explanation was that these sideroad allowances were exaggerated on the Survey by Rankin.

[254] Mr. de Rijcke also speculated that the reason Rankin did not draw the reserve boundary along the Disputed Beach or mark where the various side road allowances along the Disputed Beach ended to the east of the reserve boundary was that it was perhaps "too obvious" to mark. However, that explanation, as noted by Dr. Ballantyne, also makes no sense since the purpose of a final Plan of Survey is to clearly mark *all* boundaries as surveyed including posts to visibly demarcate those locations so that others will be able to plan accordingly.

[255] Under cross-examination, Mr. de Rijcke testified that his estimate of the length of the north boundary Rankin made to attach the post at Lot 31 to the water's edge was 100 to 150 feet in 1885, and approximately 400 – 600 feet of beach today due to accretion, but agreed that there is no line marking such a boundary on Rankin's final plan of survey. Mr. de Rijcke explained that the line was not necessary because Rankin was "clear" that he was running the line from the spot upon the coast. Mr. de Rijcke also testified that the patent to Lot 28, with its express reservation of free access to the waterfront, was a mistake that he has seen often though he ultimately agreed that if this was not a mistake, the reservation was inconsistent with a reserve running along the beach to the west of this lot.

[256] In conclusion, Mr. de Rijcke's opinion is that Rankin's role was to mark on the ground the east boundary of IR 29 as defined by Treaty 72. Furthermore, Rankin did so in 1855 from a spot upon the coast about 9 ½ miles from the original treaty-defined west boundary at Lot 31 and marked this boundary on dry land along the Disputed Beach. He acknowledged that the boundary along the Disputed Beach is not shown on Rankin's final Plan of Survey of Amabel in any way but believes that was a drafting anomaly on Rankin's part.

(ii) Stephen Fediow

[257] Stephen Fediow testified for the Town. He was qualified as an expert in historical surveying, boundary principles focusing on riparian boundaries, and boundary disputes concerning First Nation reserves. His task was to provide an opinion as to where the north terminus of the east boundary was located based on Rankin's final survey.

[258] Mr. Fediow's opinion is that the northern limit of the east boundary of IR 29 is at the monument established by DLS and OLS Nathaniel Low located on the south side of the road allowance between Lots 25 and 26. He observed that this terminus point is shown on Rankin's draft Plan dated October 12, 1855, his final Plan in 1856, and the July 31, 1856 auction map published under the authority of the Indian Department of Canada by Dennis & Boulton, Surveyors and Land Agents. This map was used to advertise and facilitate the public sale of the lots (including the Disputed Lots) surveyed by Rankin.

[259] Mr. Fediow testified that Rankin commenced his survey of the east boundary on September 4, 1855 from "a spot on the sandy beach" starting at the post he planted in Lot 31 – not the "spot upon the coast" referred to in the Treaty which would have been in the same approximate position but on the water's edge of Lake Huron. The Lot 31 post was therefore not a "monument"

representing the commencement of the reserve's boundary, but rather a "witness monument" meaning that it represented where Rankin started his preliminary traverse. Rankin's survey commenced at the spot upon the coast which was, in Fediow's view, at the water's edge of Lake Huron. Due to the concavity of Lake Huron at the Disputed Beach, Rankin had to run his line "across the waters of Lake Huron to the west of the disputed portion of Sauble Beach, before re-emerging onto dry land in the vicinity of the road allowance between Lots 25 & 26".[46] In his opinion, Rankin likely used an offset line from the lake so he did not have to physically walk through the shallow water for the approximately 1.4 miles. This despite the lack of a reference to an offset line in Rankin's field notes or his Report.

[260] Mr. Fediow relied primarily on Rankin's final Survey which does not show any indication of a reserve boundary north of Lot 25, and referenced as secondary evidence Rankin's field notes, draft plan, maps of the day, and subsequent patents and surveys or investigations conducted by surveyors in response to Saugeen's claim that IR 29 was intended to extend past Lot 25 to within Lot 31.

[261] In many respects Mr. Fediow's opinion is consistent with Dr. Ballantyne's opinion. However, he did not consider the latent ambiguity theory that Dr. Ballantyne focused his analysis on.

[262] Mr. Fediow described the "hierarchy of boundary evidence" as providing an analytical approach surveyors use when determining how best to run a boundary on the ground, recognizing that descriptions in deeds often do not reflect the reality on the ground. The elements of this hierarchy are:

(a) Evidence of natural boundaries;

(b) Evidence of original monuments;

(c) Evidence of possession which can reasonably be related back to the time of the original survey; and

(d) Measurements quoted by the original surveyor on a plan or in field notes.

Mr. Fediow acknowledged that one does not apply the above order of the prescribed importance of evidence rigidly as there must be flexibility to allow the surveyor to deal with whatever they are facing on the ground.

[263] In Mr. Fediow's view, Rankin dealt with the obstacle posed by the inward curve of Lake Huron at the Disputed Beach through the hierarchy of evidence framework.

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[46] Fediow report, at p. 61.

[264] Of the four factors, Mr. Fediow agreed that none of the original monuments placed by Rankin remain in existence. Furthermore, evidence of possession was not relevant in the circumstances of this case. What remained from the hierarchy of evidence was therefore the evidence of natural boundaries[47] and the measurements quoted by Rankin in his field notes.[48]

[265] Accordingly, Mr. Fediow focused on the "spot upon the coast" of Lake Huron, which he described as a "shifting" natural boundary. Mr. Fediow reviewed the measurements relative to the topography identified by Rankin in his field notes regarding the segment of the Survey from Lots 31 to 25/26 (above referenced and quoted at para. 244), and the expert evidence of Dr. Davies who testified that it is likely that the beachfront bordering the concavity of Lake Huron at the location of the Disputed Beach has changed since 1885 such that there have been substantial accretions of sand widening the beach. Based on these two factors, Mr. Fediow concluded the value of the "spot upon the coast" stipulated by the Treaty to his task was limited. He was the only survey expert to take this position.

[266] While Mr. Fediow agreed that the "spot upon the coast" was likely in the vicinity of Lot 31 (though not as far inland as Rankin planted the post), his view was that Rankin's task was to start the northern terminus as close to the spot upon the coast as was physically possible. Due to the concavity of the Lake Huron's coastline, the "spot" ended up being at the side road allowance between Lots 25 and 26, where the coastline bends westward from the most eastern point of the concavity. In Mr. Fediow's view, Rankin faithfully followed the terms of the Treaty by placing the northeast angle at "about" 9 ½ miles even though that boundary was only 8.1 miles under the terms of the Treaty. The word "about" vested Rankin, from a surveying perspective, with the discretion to place the boundary where he did. In his opinion, what Rankin did best fit the description of this reserve boundary from the Treaty.

[267] Mr. Fediow did not characterize Rankin's decision as having to resolve a latent ambiguity but rather as being consistent with the hierarchy of boundary evidence.

[268] Under cross-examination, Mr. Fediow's opinion was weakened by the fact that the easternmost part of the concavity of Lake Huron's coastline was north of Lot 26. Therefore, as he agreed, a straight line due south could have physically been run entirely on dry land from a point further north on the Disputed Beach than the side road of Lot 25/26. He further agreed that this placement of the northern terminus of the east boundary would have extended the west boundary beyond the 8.1 mile mark and across part of the Disputed Beach. This placement would also have achieved the intersection of the east boundary with the west boundary at Lake Huron.

[269] Under cross-examination, Mr. Fediow stated that it was likely the Treaty parties believed the "about" 9 ½ mile mark would have been coincident with being able to draw a line on dry land from Lot 31 due south, but it did not work out that way on the ground.

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[47] Fediow Report, at p. 22.
[48] Fediow Report, at p. 26.

[270] Mr. Fediow also agreed that if Rankin had drawn the boundary from the eastern most point in the concavity, as indicated in Dr. Davies' geomorphology report, Saugeen would likely have received about 9 miles of coastline. The easternmost point of the concavity based on Rankin's field notes is around station 59 according to Dr. Davies, and Mr. Fediow marked that station at around the road allowance between Lot 30 and 29.

[271] Mr. Fediow also admitted that Rankin had other options in the exercise of his discretion in determining how to mark this boundary on the ground in a manner consistent with the Treaty, but he chose to run his line south (under water) from Lot 31 to where it reemerged from the water at around the road allowance at Lots 25 and 26 and terminate the east and west boundary there. Mr. Fediow testified that if confronted today with this difficulty, he would have sought further instructions. However, in Rankin's day, time was of the essence to get the survey done, and there was no way to communicate quickly. Had Rankin sought instructions, Mr. Fediow speculated that Rankin would have lost the whole survey season since it was already fall and he had to stop the survey over the winter.

[272] Mr. Fediow further agreed there was no monument post placed at Lots 25/26 to mark the reserve boundary by Rankin. He acknowledged the plans of subdivision do not show the Lots going to the water but rather ending at Huron Lane (now Lakeshore Boulevard North). He ventured that this may be because there was no beach of any note at that time. The latter answer was purely speculative, as the plans of subdivision appear to show land between Huron Lane and Lake Huron.

[273] In re-examination, Mr. Fediow agreed that the Twining deed for part of Lot 26 (April 1947) states that this Lot extends to the westerly limit of Huron Lane at a distance of 60 feet and 2 inches meaning about one acre of the beach. This additional beachfront is not shown on the Davidson plan of subdivision, suggesting to Mr. Fediow that it did not exist at that time and is therefore the product of subsequent accretions.

[274] Mr. Fediow wrote in his report that "we cannot rely upon the location and profile of the Lake Huron shoreline today as evidence of where PLS Rankin surveyed the Reserve's east boundary in September 1855", and instead he focused on determining the likely location and profile based on the "monumented evidence, PLS Rankin's field notes, and the various maps and plans of the Township of Amabel". In so doing, Mr. Fediow discounts the utility of the description contained in the Treaty of "about (9 ½) nine and a half miles" from the spot upon the coast as an important measurement indicator under the hierarchy of survey evidence.

[275] Mr. Fediow strongly disagreed with Mr. de Rijcke's methodology in attempting to re-trace Rankin's steps regarding the survey of the east boundary from Lot 31 to Lot 25.

(iii) Brian Ballantyne

[276] Dr. Ballantyne testified on behalf of Ontario. He was qualified as an expert in the area of historical surveying, boundary principles with a focus on riparian rights, boundaries and reserve boundaries. Dr. Ballantyne is not licensed to survey in Ontario but has an undergraduate and graduate degree in surveying. He has many publications, including two textbooks, in the fields of

survey and boundaries and has been qualified as an expert witness in several cases in the areas of surveying and boundary disputes.

[277] His opinion is that the east boundary of IR 29 ends at the intersection of Lake Huron with Lot 25, Concession D, at a distance of 2.84 chains south of the road allowance between Lot 25 and 26 and that this point is the northeast angle of the reserve as surveyed by Rankin and reflected in the final Plan of Survey.

[278] Dr. Ballantyne based his opinion on the archival record and some site visits to Sauble Beach.

[279] Dr. Ballantyne testified that there are many points of agreement between his opinion and that of Mr. de Rijcke.

[280] Dr. Ballantyne agreed that Rankin's primary role was to take the boundary as described in the Treaty and run the lines on the ground as the parties would have intended. He agreed, based on the Treaty and Rankin's instructions, Rankin's role was not to create boundaries but to reflect the intentions of the Treaty parties. However, Dr. Ballantyne testified that the Treaty text vested discretion in Rankin as to where to mark the boundaries on the ground.

[281] Dr. Ballantyne conducted a paper review of Rankin's survey of the northern terminus of the east boundary, including subsequent plans and Rankin's field notes. His overall conclusion is that, based on Rankin's final Plan of Survey of Amabel, as supported by his field notes, Rankin did not mark a boundary north of Lot 25 as forming part of the east boundary. First, the final Survey does not show a boundary at Lots 26 to 31 demarcated in any way, much less as part of an "Indian" reserve boundary. Second, the key field note at p. 143 of Field Book 214, when interpreted in light of how Rankin used those terms in other entries in that Field Book, is best interpreted (from a surveyor's perspective) to mean the following:

a. From the "spot upon the coast" in Lot 31, Rankin walked from 0 chains to 14 chains (a distance of 282 metres) across a (sandy) beach;

b. From 14 chains to 115 chains (a distance of 2,032 metres), the chain left the dry beach and was on the "lake, edge of" meaning either in the shallow water or along the wet sand caused by wave action;

c. Rankin re-entered and crossed the "beach" to 128 chains (a distance of 262 meters); and

d. At chain 128 Rankin left the beach and entered on to a "little sandy bank" (at a distance of 2.5 km south of the post at Lot 31).

[282] Dr. Ballantyne notes that, elsewhere in Rankin's field notes, he specifically wrote "in" the water when he entered the water. The absence of that word suggests that Rankin did not likely enter into the water from chains 14 to 115 when he wrote "Lake, edge of".

[283] Furthermore, Dr. Ballantyne found that Rankin was inconsistent in his use of the term "shore" in his field notes, though he concluded that Rankin generally used "shore" to describe stony terrain and "beach" as sandy terrain. Rankin was also inconsistent in his use of the term "edge" and "Lake edge of" in the field notes. Those terms could mean "an area away from the lake rather than refer to the lake itself".

[284] It is Dr. Ballantyne's opinion that Rankin did not mark any reserve boundary along the Disputed Beach between Lots 26 and 31 and this was intentional. The reason Rankin did not include this section of the coastline (notwithstanding that Lot 31 roughly approximated the "spot upon the coast", though closer to the water's edge) was because Rankin ran into an obstacle on the ground as he attempted to implement the boundary under the terms of the Treaty: namely, due to the unexpected size of the concavity or inward curve of Lake Huron's coastline at Lot 31 south to Lot 26 where the coastline turns eastward and then returns westward, it was physically impossible to run a straight line south on dry land from the Treaty-defined north terminus of the east boundary to intersect with the north terminus of the west boundary at the lake's edge itself. This physical impossibility could not be predicted by the Treaty parties and was therefore a "latent ambiguity". Dr. Ballantyne testified that it was within Rankin's professional discretion as a surveyor to resolve this latent ambiguity.

[285] In Dr. Ballantyne's opinion, Rankin resolved it properly by commencing the boundary at the road allowance between Lots 25 and 26, which is where Rankin crossed the sandy beach from the lake's edge and could be run on dry land south to roughly parallel the Lake Huron/riparian segment of the west boundary to the Half Mile Strip where the south terminus of the east boundary is. Dr. Ballantyne's opinion is that Rankin likely ran his line along the Disputed Beach on wet sand caused by wave action and by Rankin's lack of an entry indicating he was "in" the water.

[286] Dr. Ballantyne observed that pursuant to Bury's survey instructions of April 26, 1855, Rankin's role was to mark the reserve boundaries on the ground as defined by the Treaty and record those lines on his survey. Indeed, this is how Rankin understood his instructions as evidenced by his report when he submitted his final Plan of Survey and records to the Crown Lands Department in which he stated, "I used my best judgment in carrying out this survey with a view to the spirit of the orders and in a way most to the public advantage and to the advantage of the Indians".

[287] Dr. Ballantyne testified, however, that Rankin was vested with some discretion in marking the boundaries. First the survey instructions themselves invited discretion in marking the boundaries of the various reserves such as proposing how the settlements at Saugeen River should best be subdivided. In addition, Dr. Ballantyne's opinion was that Rankin's discretion was "rooted" in the urgency underlying this task as captured by Instruction 25 from Bury: "You will endeavour to conduct this survey with a judicious economy, combining accuracy with dispatch".

[288] Dr. Ballantyne's opinion was that when Rankin was faced with the inward curve of Lake Huron's coastline that prevented him from running the line entirely on dry land, Rankin had two options in exercising his discretion in marking the boundary in accordance with the terms of the Treaty:

(a) He could set boundaries to result in a five-sided parcel with two north-east corners and a short east west boundary between the two corners:

- The first corner would be at the water's edge (wet sand, or the low water mark, according to Dr. Ballantyne) about 9.5 miles from the original west boundary to mark the end of that shoreline boundary along Lake Huron but not mark the start of the east boundary;

- The second corner would be inland from the water's edge and east of Corner 1 to mark the start of the east boundary, but not mark the end of the west (shoreline) boundary.

This would effectively result in the drawing of a short new north boundary to join the two corners together and would have continued the natural riparian border of the west boundary to the spot upon the coast, which in turn would have been posted inland from the edge of Lake Huron.

(b) The second option was to maintain a four-sided parcel with only one north east corner, whose east boundary intersected with Lake Huron in Lot 25, approximately 115 chains or about 1.4 miles south of the spot upon the coast (again, about 9 ½ miles from the original west boundary as prescribed by the Treaty).

[289] Rankin chose the second option, resulting in his marking the boundary south of the "spot".

[290] It is thus Dr. Ballantyne's opinion that Rankin was within his right in exercising his professional judgment to resolve the apparent latent ambiguity that arose from the Treaty text and the acknowledged imprecise Oliphant sketch sent with the Treaty and, when doing so, he was following general surveying principles of the day. This decision resulted in a deprivation to Saugeen of approximately 1.4 miles of the west boundary coastline as a natural water boundary which otherwise would have terminated at Lot 31. By setting the boundary where Rankin did, Dr. Ballantyne testified that the Survey becomes determinative of its location since the final Survey, and not the field notes, is the primary reference source.

[291] In his report, Dr. Ballantyne explains:

> In choosing Option two and in reconciling the Reserve description/sketch with the concave shoreline, Rankin recognized the latent ambiguity in the description. A "latent ambiguity…appears when the words [in the description] are applied to the ground." The ambiguity in the description – as between a physical feature such as Lake Huron and a distance of 9.5 miles – remains hidden until a surveyor starts to set out on the ground the boundaries described. At that time "evidence and facts are encountered which make the reconstruction of the description on the ground impossible without reconciling the conflicting elements of evidence." Such as it was with Rankin as he established the East boundary through survey in 1854-56, so it is with a surveyor as he/she re-establishes the East boundary through survey in 2021. The relevant boundary principle is to "consider the

> best evidence available and re-establish the boundary on the ground in the location where it was first established and not where it was necessarily described".[49]

[292] In Dr. Ballantyne's opinion, Treaty 72 assumed that the reserve parcel was a "pseudo trapezoid, with a more-or-less straight shoreline running from the West boundary in a north-easterly direction to the East Boundary". He opined that Rankin resolved the ambiguity using the established boundary principle of favouring natural features (or physical features) over stated distances, relying on the "hierarchy of boundary evidence".[50]

[293] In his view, the Treaty required that the north terminus of the east boundary intersect with Lake Huron's west boundary at the water's edge, and therefore drawing a short north boundary to tie the inland northeast corner to the lakeside northwest corner was a better option as the Treaty makes no explicit reference to a north boundary.

[294] Dr. Ballantyne's explanation for why Rankin, assuming he encountered a latent ambiguity, did not follow the usual surveying practice of returning to his instructing party for further instructions on how to resolve the ambiguity was the urgency underlying the need to complete the Survey. This explanation makes sense in the historical context of the Crown's urgent desire to put the surrendered land up for sale at public auction and given that the public auction date, after being postponed twice, was September 1856.

[295] Such a request, if made, would have been documented in the archival record, together with the response as it was when the Copway Road proposed amendment to the west boundary was raised. In such a scenario, it is reasonable to assume that the Crown would likely have consulted with its Treaty partners for input as to how to resolve the ambiguity in terms of the reserve boundaries. Instead, according to Dr. Ballantyne, Rankin simply resolved the latent ambiguity on the ground without expressly referencing this in his field notes or in any documentation, likely because of the urgent time constraints imposed on him to complete the Plan of Survey to facilitate the public auction of the lots to be sold**.** This does not explain, however, why there is no mention of this latent ambiguity in the field notes or his report to Pennefather. The only plausible explanation is that this was an exercise of professional discretion used to carry out the instruction, as was implicit in the terms of the Treaty and Bury's instructions, and so no report or note of it was needed.

[296] As Dr. Ballantyne acknowledged, the fact that Rankin's returns were ultimately approved by the Department of Crown Lands without any comment concerning the location of the north terminus of the east boundary (after Rankin was required to fix or explain what Crown Land Commissioner Joseph Cauchon called a "very unusual number of errors" in his field notes) is

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[49] Citing excerpts from Mr. de Rijcke's text, *Principles of Boundary Law*.

[50] Dr. Ballantyne explained that the hierarchy of boundary evidence is a framework used by surveyors to resolve an ambiguity arising from a parcel description or differences contained in a deed between written distances and on the ground distances. It dictates that the surveyor gives more weight to physical indictors of a boundary (such as a water body) than to written measurements such as distances.

tempered by the fact that the Crown Land examiners would not likely have been familiar with the terms of Treaty 72, which was under the jurisdiction of Indian Affairs. This may be a case of the Crown's left hand not knowing what the right hand was doing.

[297] Dr. Ballantyne also points out that, had Rankin intended to mark the spot upon the coast at Lot 31 as a boundary terminus, he would have noted that spot with a monument drawn on his final Plan of Survey. The fact that the strip of land along the coast between Lots 31 and 25 would have been narrow so as to prevent drawing the line on the map, as opined by Mr. de Rijcke, is no excuse, in Dr. Ballantyne's opinion, for a surveyor failing to show that boundary on the final Plan of Survey. It could and would have been done by Rankin if that was the boundary he surveyed. There were techniques at Rankin's disposal to draw narrow or short boundaries.

[298] As well, Dr. Ballantyne notes that not all posts planted by surveyors are boundary posts. The post at Lot 31, while demarcating the approximate location of the spot upon the coast, was just meant to be the starting point of his survey, not the final location of a boundary terminus, as evidenced by the fact it was not shown on the final Plan of Survey of Amabel signed and submitted by Rankin in 1856 together with his returns (including his field notes and maps). A copy of Rankin's return was filed with his report to Superintendent Pennefather on May 22, 1856 and, after correction of some of the errors noted by the Crown Land examiners, was forwarded by Pennefather to Commissioner Cauchon, of the Crown Lands Department, on November 20, 1856. They were ultimately deposited in Crown Lands Survey Records in December 1856 reflecting acceptance of Rankin's Survey of the reserve by the Imperial Crown.[51]

[299] Furthermore, the fact that no mention of Lot 31 is made in Rankin's field notes recorded on September 4, 1885 of the post he planted in that location during his preliminary traverse, suggested to Dr. Ballantyne that the post was not intended to demarcate or monument the marking of the north terminus of the boundary. Such monument posts are always reflected in a surveyor's field notes.

[300] Dr. Ballantyne's main criticism of Mr. de Rijcke's approach was his reliance on Rankin's draft map prepared during his preliminary traverse on which he depicted the post at Lot 31. In Dr. Ballantyne's view, little reliance can be placed on a draft map because it was an "early, incomplete, error-ridden draft" not signed by Rankin and replaced by the official signed final Plan of Survey. It was the custom of the day, and remains the custom today, to treat the final signed Plan of Survey as the authoritative document.

[301] Dr. Ballantyne also rejected Mr. de Rijcke's explanation that the lack of a line demarcating a boundary across the Disputed Beach was merely a drafting anomaly. It is not a plausible explanation given the fact that the other plans drafted by Rankin between 1855 and 1856 contained the same drafting anomaly, the Crown land examiners overlooked this drafting anomaly, and both

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[51] Rankin's Return including his final plan of survey are located in Canada Lands Survey Records for First Nation Reserves, pursuant to s. 3(2) of the *Canada Lands Surveys Act*, RSC 1985, cL-6.

the Superintendent General of Indian Affairs and the Commissioner of Crown lands overlooked the drafting anomaly.

[302] Another of Dr. Ballantyne's main criticisms of Mr. de Rijcke's approach was that, in his opinion, de Rijcke assumed that the north terminus of the east boundary was at Lot 31, as reflected by his terms of reference and the title of his report. Dr. Ballantyne stated that if there was no boundary surveyed to Lot 31 in the first place, as is his opinion, then there can be no re-establishment of the boundary between Lot 31 and Lot 25 pursuant to the surveying standards in place at the time of Mr. de Rijcke's physical re-establishment efforts. In other words, by resorting to the field notes first, and the final approved Plan of Survey of Amabel (which included the reserve) second, Mr. de Rijcke has not actually "re-established" the boundary since the proper procedure is to start with the final Plan of Survey, and then resort to field notes as a secondary source only.

[303] Also, by using the historical surveying equipment, Mr. de Rijcke ran the risk of compounding any inaccuracies already manifested by Rankin's use of that equipment.

[304] Finally, Mr. de Rijcke's method of trying to physically replicate Rankin's movements from his field notes on what, given the passage of time, would have been different topography is not a generally accepted surveying practice.

[305] In summary, Dr. Ballantyne's conclusion is that the post set within Lot 31 was not the exact spot upon the coast since it was set inland about 1.5 – 2 chains (or 30 to 40 metres) from the west boundary. Rather the "spot upon the coast" was located on wet sand, as opposed to sandy beach, within Lot 31.

[306] Faced with a latent ambiguity, Rankin exercised his discretion to resolve it by choosing the option of marking the north terminus of the east boundary south from the "spot" to a point where the boundary line could run entirely on dry land south to the Half Mile Surrender strip. In Dr. Ballantyne's view, this decision was consistent with the terms of the Treaty and reflected the established surveyor principle of Rankin's era that: "Neither the words of a deed, nor the lines and figures of a plan, can absolutely speak for themselves. They must, in some way or other, be applied to the ground".[52] Dr. Ballantyne emphasized that the option chosen by Rankin averted the need to add a fifth boundary at the north end joining the spot to the coast of Lake Huron which, in his view, Treaty 72 does not permit.

[307] On cross-examination, it was suggested to Dr. Ballantyne that the south boundary and the west boundary as drawn by Rankin on the final Survey do not actually intersect either because the north coast of the Saugeen River intervenes and operates as part of the south boundary. This aspect of the boundary is not specifically described in the Treaty text. Dr. Ballantyne was not prepared to accept this proposition because he could not verify if this was the case on the ground and he had

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[52] Citing *Equitable Building and Investment Co. v. Ross* (1886), 5 NZLR 229 (NZ SC).

not investigated this particular boundary intersection. He conceded that Rankin's final Plan of Survey of Amabel shows this Saugeen River segment of the south boundary. He also agreed that today, with the accretions of land under his description of the boundaries, a north boundary would have to be effectively added to ensure the north terminus of the east boundary intersected with Lake Huron, assuming the accretion belonged to Saugeen.

[308] Also, in cross-examination, Dr. Ballantyne acknowledged that his opinion was not without doubt since Rankin was inconsistent in his use of "shore" and "edge" such that "Lake edge" might sometimes refer to an area away from the lake meaning inland from wet sand caused by wave action. Furthermore, the journal and diary entries for September 4, 1855 show that Rankin had surveyed two miles of the "boundary of Saugeen Indian Reserve" and Gould had traversed south from the Sauble River to the "Ind boundary & cont. the Boundary". As well, Rankin's field notes relating to the running of his line south from the post planted at Lot 31 (at a distance of 1.72 chains from the lake) are entitled "Indian Boundary". Finally, according to the field notes, as noted earlier , a post was also planted at the road allowance between Lots 25 and 26 (at a distance of 1.56 chains from the lake).

[309] Dr. Ballantyne also agreed that if the east boundary was to be extended north to Lot 31 today, given the substantial accretion of sand that has occurred since the treaty formation to form a wider beach, the boundary would terminate within Lot 31 at the west edge of what is now known as Lakeshore Boulevard North, approximately 170 metres from the shoreline (compared to the distance of 30 – 40 metres established by Rankin when he planted this post referencing the north east angle of the reserve).

(iv) Conclusion of Expert Survey and Boundary Evidence

[310] I can accept all, none or some of the evidence of these experts.

[311] All of these survey experts agree that PLS Rankin was diligent, reliable and careful in his survey work, and had a good and respected reputation.

[312] All of the survey experts also generally agree that PLS Rankin identified the "spot upon the coast" referenced in Treaty 72 as being a location within Lot 31. This location coincided with station 60 (in Rankin's field notes) of Rankin's shoreline traverse. Where they disagree is whether Rankin marked the northern terminus of the east boundary at that location and neglected to show that segment of the boundary along the Disputed Beach on his final Plan of Survey.

[313] One foundational element of disagreement between Mr. de Rijcke and the defence surveying experts was which of Rankin's documents constitute the primary evidence in attempting to re-establish the east boundary according to Treaty 72. Mr. de Rijcke testified that Rankin's field notes were the primary evidence, and that his maps and final Plan of Survey were secondary. Dr. Ballantyne and Mr. Fediow took the opposite view. In my view, given the nature of this controversy, Rankin's field notes were essential to the determination of what he did on the ground, and particularly the significance of planting a post within Lot 31. However, his field notes do not override his final Plan of Survey and its depiction of the official reserve boundaries.

[314] Furthermore, one of the determinations I must make is not only what was the east boundary as surveyed by Rankin, but also what was the east boundary as created by the Treaty. The answers are not necessarily the same and the treaty interpretation exercise is not constrained by the surveying principles testified about (though they are an important contextual consideration to help understand Rankin's course of action and his rationale).

[315] Another area of disagreement was whether the Treaty "guaranteed" a result – namely, of a reserve that included about 9 ½ miles of coastline measured from the original west boundary or simply set out a process with the size and location of the reserve to be determined by Rankin as surveyor. In my view, the answer lies in the instructions to survey received by Rankin which, in both the case of Oliphant and then his successor Bury, were general but did not set out a process for reserve creation. Most relevant were Bury's instructions delivered in April 1855 which, in material part, read:

> It will be necessary to draw the outlines of the several reservations made under the Treaty…and with that view I enclose for your guidance a copy of the treaty made with the Indians for the surrender of the tract.

While the Treaty did not "guarantee" a result, the Treaty did set out the parameters to be followed by Rankin as best as he could.

[316] As noted by Dr. Ballantyne, the instructions were mostly focused on surveying the surrounding Township of Amabel, which was to be reflected on a survey of both the reserve and the surrounding townships (Amabel, Southampton site north of the Saugeen River, Keppel Township to the east and Oliphant Township to the north, including the towns of Wiarton and Oliphant, as well as Owen Sound). Rankin specifically notes that his instructions were to run "the Eastern boundary of the Saugeen Indian Reserve – in accordance with the treaty", as reflected in his Journal, September 1, 1855. When he delivered his report to Superintendent Pennefather, Rankin again referenced the Treaty.

[317] Overall, I accept both Dr. Ballantyne's and Mr. Fediow's critique of Mr. de Rijcke's attempt to "re-establish" the boundary. Mr. de Rijcke appears to have made the assumption that Rankin had in fact marked the official north terminus of the east boundary at Lot 31. In order to "re-establish" a boundary, the original surveyor must have established the boundary at that location in the first place. The fact that Mr. de Rijcke made this assumption suggests he had already determined the location of the north terminus of the reserve to be at Lot 31 before he commenced his investigation.

[318] More significantly, Mr. de Rijcke's survey methodology was admitted by him to be "non-traditional surveying". It was not done according to current standards, nor is it recognized as a valid or reliable method for re-establishing a boundary. There are too many uncertainties that undermine the likelihood of any accuracy, including using historical compasses and equipment that were less accurate than contemporary equipment, thereby potentially compounding any inaccuracies generated by the equipment used by Rankin. Further, the lack of original monuments at Lot 31 or the road allowance at Lots 25 and 26 from which to gauge the measurements recorded in Rankin's field notes, and the inability to accurately measure the likely width of the Disputed

Beach at the time of Rankin's survey in September 1855, present further complications. I am not persuaded that Mr. de Rijcke's attempt to re-establish the boundary and his methodology are reliable.

[319] The fact that I have rejected Mr. de Rijcke's attempt to re-establish the north terminus of the east boundary does not mean I reject all of Mr. de Rijcke's evidence. Indeed, there is agreement as between Mr. de Rijcke and Dr. Ballantyne, in particular, regarding certain aspects of the evidence. However, of most import, all three experts agreed that Rankin located the "spot upon the coast" on his traverse to be within Lot 31. Mr. de Rijcke opined that the post marked the actual "spot" whereas Dr. Ballantyne and Mr. Fediow concluded that the "spot" was at the water's edge within Lot 31.

[320] All three experts had difficulties accounting for Rankin's rationale in marking the north terminus of the east boundary and how and where he did so. However, overall, I find Dr. Ballantyne's explanations to be more plausible than Mr. de Rijcke's and Mr. Fediow's. Specifically, I did not find convincing Mr. de Rijcke's evidence on the following points: his explanation for Rankin's failure to mark the boundary between Lots 25 and 31 on the final Plan of Survey as resulting from an inability to draw the boundary to scale on the survey; his explanation that the pencil line drawn from Lot 31 to the Lot 25/26 road allowance on Rankin's draft Plan of Survey to be an inexplicable anomaly with no apparent purpose; and his disregard of the fact that the pencil line ended at the location where Rankin's final Plan demonstrated the northern terminus of IR 29 as surveyed by him. The final Plan of Survey's demarcation of the east boundary is replicated in the public auction map and elsewhere to Rankin's likely knowledge (given his role and presence at the public auction in September 1856 when the Disputed Lots were placed for sale) is further evidence that Rankin was satisfied the Disputed Lots were properly described as going to the lake's edge. However, Rankin did not have any role in the preparation or review of the Patents for the Disputed Lots, and there is no evidence to suggest he did.

[321] I did not find Mr. Fediow's evidence persuasive as he was prone to speculation when confronted with anomalies in his evidence.

[322] In my view, however, Dr. Ballantyne's conclusion that the Treaty required the east boundary to intersect with Lake Huron at the water to eliminate the need for a short north boundary is erroneous as I will discuss later in these Reasons.

[323] Where the evidence of these three experts diverges in a material way, I prefer Dr. Ballantyne's evidence. While Rankin's failure to draw attention to the latent ambiguity he encountered in the form of the concavity of Lake Huron's coastline, how he resolved it, as well as his failure to return to his instructing client for instructions is troubling, I accept that Rankin was under urgent time pressures to complete the survey and simply exercised his discretion according to ordinary survey principles applicable to deeds and resolved it on the ground as the most plausible explanation based on the record. This does not mean that I accept that Rankin exercised his discretion appropriately.

(d) Findings: Where did Rankin Mark the North Terminus of the East Boundary?

[324] Based on the evidence, I find:

(a) Rankin was instructed to mark the boundaries as defined by the Treaty on the ground with respect to IR 29 as part of his survey of Amabel Township.

(b) He discovered the concavity of the Lake Huron's coastline on his shore traverse and made the decision to personally conduct the first day of the survey to mark the north terminus of the east boundary (leaving the balance of the east boundary survey to Gould).

(c) He located the "spot upon the coast" within Lot 31 on September 4, 1855 and planted a post further inland (at about 30 – 40 metres or 1.5 to 2.0 chains from the water's edge of Lake Huron) to protect it from being removed by wave action.

(d) The "spot" was measured by Rankin as a distance of about nine and a half miles from the original Treaty-defined west boundary of the reserve. This was consistent with the fact the Copway Road amendment did not alter the location of the "spot". The OIC approving the Copway Road amendment explicitly recognized this change in the west boundary resulted in additional coastline to the reserve, and did not reference the Treaty much less the alteration of any other boundaries.[53]

(e) On September 4, 1855, Rankin started his survey at the "spot upon the coast". His field note reads: "On sandy beach, at 14 ch to 115 ch Lake edge of, at 128 ch ascend the little sandy bank from the beach, then low sand hills…". Based on this field note[54], when read in the context of how Rankin used these terms elsewhere in his field notes, I find that Rankin located the "spot" on wet sand (not in the water) and then ran his chain line south along the concavity of Lake Huron's coastline on wet sand following the coast along the Disputed Beach. This interpretation of the key fieldnote is support by the fact that Rankin did not note in his fieldnotes any change in the topography between Lots 31 and 26 and, elsewhere in his fieldnotes, Rankin wrote he was "in edge of water" at two stations further south of Lot 25 during the course of his survey of the reserve when he did enter the water of Lake Huron. Rankin considered the concavity to be an obstacle, or latent ambiguity, to marking the boundary entirely on dry land south from the "spot".

(f) Rankin had two choices in exercising his professional discretion to resolve this latent ambiguity. He chose to move the "spot" to around the road allowance between Lots 25

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[53] The OIC, approved by the Governor General on September 27, 1855, read in material part: "That the Reserve known as the Saugeen Reserve now bounded on the West by a straight line running due north from the River Saugeen at the spot where it is entered by a ravine immediately to the west of the village, be bounded instead by the Indian path called the Copway Road, which takes a north-westerly direction, as shown by the red line in the plan. This change will give the Saugeen Indians a small increase of frontage on Lake Huron, and will not interfere with the town plot now laid out on the tongue of land [Southampton] contained between the lake and the River Saugeen."
[54] Rankin's Field Book 214, CLSR, p.143

and 26. No post was planted to mark this location as the north terminus of the east boundary because it was too close to the lake.

(g) He resolved the latent ambiguity by resort to the well-established survey framework of the hierarchy of boundary evidence. The hierarchy of boundary evidence was developed as a way to resolve latent ambiguities (discovered by the surveyor when marking boundaries on the ground) relating to deeds and plans.

(h) He failed to go back to the Imperial Crown for instructions contrary to his obligation as a surveyor. He did this in light of the enormous pressure he was under, as reflected in several communications, to complete the survey quickly to facilitate the Imperial Crown's intention to hold a public auction of the surrendered land initially by the fall of 1855.[55] Seeking instructions in the fall of 1855 ran the risk that the survey would be delayed due to the winter season.

[325] The north terminus of the east boundary was therefore surveyed by Rankin to be at around the road allowance between Lot 25 and 26, Concession D, Amabel Township and his final Plan of Survey, as deposited with Crown Lands Department, shows that.

[326] The draft map of Rankin is of little utility in determining where he ultimately placed the east boundary. The field notes of his survey, however, support this interpretation of his final Plan of Survey. The final Plan of Survey of Amabel Township marks the north terminus of the east boundary of IR 29 at the coastline of Lake Huron where it intersects with the west boundary. This location is not the "spot upon the coast" as defined by Treaty 72.

xi. Subsequent Post-Treaty Conduct of the Parties after the Final Plan of Survey of Amabel Township by Rankin

[327] In addition to the 1855 (Copway Road amendment) Order in Council, Rankin's preliminary survey traverse and his final Survey, the next areas of post-Treaty conduct relevant to the Treaty interpretation analysis are the patents issued by the Imperial Crown and then the federal Crown, the early the series of complaints raised by Saugeen and the Crown's responses (including further surveys and boundary investigations) and the early plans of subdivisions.

[328] Before I review these communications, however, I will first address a trace map that received considerable attention at trial.

(a) Trace Map – Boundary Desired by Alexander

[329] In or around May 1856, Rankin referenced in his report on the survey of the southern half of the "Owen's Sound & Saugeen Peninsula" an issue raised by Saugeen relating to the east

[55] Letter of instructions from Superintendent General Bury to PLS Rankin dated April 26, 1855 to survey and divide the surrendered portion of the Saugeen Peninsula which would reflect the boundaries of IR 29.

boundary. In that report, Rankin enclosed a sketch referred to as "Saugeen Indians trace shewing their proposed alterations in the boundary of their Reserve". This trace map appears to have been drafted by Rankin after discussion with "Alexander" – likely Alexander Madwayosh. On the trace map is reflected the east boundary as depicted by the Treaty with the words "Boundary according to Treaty" as a straight line in a due north direction. Beside it is another straight line in a northwest direction with the words "Boundary desired by Alexander". The east boundary as drawn in this trace map is on a northwest angle and intersects with the coast at a point which is further south than the spot upon the coast and indeed south of the road allowance at Lots 25 and 26. Rankin recommended that the proposal be rejected as "unreasonable", and it was not acted upon.

[330] Much was made of this trace map at trial. Ontario and the Landowners contended that this map is evidence that Saugeen's intention when it entered the Treaty was to sacrifice even more coastline than was ultimately surveyed. However, I reject this inference. There is nothing in the archival record to suggest that Madwayosh took the position that the line reflecting the "boundary desired by Alexander" was what Saugeen had thought they had agreed to at the time of Treaty formation. In fact, Rankin characterized the proposed change as an "alteration" to the east boundary. Furthermore, Rankin did not recommend any change based on this trace map. In his return of survey, in which he included this trace map, Rankin wrote in part that this is a "rough trace shewing an alteration which they desire to have made in their Eastern boundary of their Reserve but which, as I think it unreasonable, I cannot recommend". He wrote that he was providing it "at the request of the Saugeen Indians". Had Rankin understood that this was a disputed boundary under the Treaty, he would have said so. Furthermore, and more importantly, if Rankin had understood this request to be in line with what had been agreed to at Treaty formation, it is unlikely he would have called it unreasonable and declined to recommend it.

[331] Accordingly, the "Alexander" trace map is of little probative value in this treaty interpretation analysis. It does not provide evidence of Saugeen's intentions, much less the common intentions of the Treaty parties when they entered into Treaty 72.

(b) The Patents of Lots 26 to 31, Concession D, Amabel Township

[332] Commencing in 1857 through to 1907, the Disputed Lots were sold by the Imperial, and later, federal Crown. Whether or not the Patents for the Disputed Lots provided title to Lake Huron as the natural water boundary or stopped east of the Lake recognizing that the shoreline was reserve land, raised an important issue at trial.

[333] The court received expert evidence on this issue, which will be briefly reviewed now insofar as it relates to post Treaty conduct in the context of treaty interpretation. However, the issue of whether the patents extinguished Saugeen's reserve interest in the disputed beach will be reviewed under the Defences section.

(i) Richard Simison

[334] Richard Simison testified as an expert on the historical patenting of Crown lands. He worked for 35 years as an official at the Indian Department in land research, management and policy. He was one of the last Department officials to draft quitclaim deeds.

[335] Mr. Simison was the only expert qualified to give expert evidence concerning the Crown's policies, practices and procedures in drafting federal Crown Patents.[56]

[336] Mr. Simison's opinion was that the patent for Lot 28 demonstrates an unambiguous intention by the Crown to grant title to Lake Huron as a riparian property. His opinion is that all of the patents issued for Lots 28 (1857), 26 (1896), 27 and 29 (1881), 30 (1899) and the south half of 31 (1907) are for riparian properties, meaning that they border Lake Huron's water's edge, which he says is consistent with Rankin's 1856 final Plan of Survey. Mr. de Rijcke disagreed and testified that the "free access" reservation likely referred to all lots except Lot 28 or was added in error. Mr. Simison's opinion is to be favoured over Mr. de Rijcke's on this point. Mr. Simison is qualified to provide opinion evidence on the federal Crown's policy and practice surrounding drafting of Letters Patent, and Mr. de Rijcke is not.

[337] However, in my view, the Letters Patent (with the possible exception of the 1857 Patent for Lot 28) and plans of subdivisions and subsequent surveys are of little probative value in determining the common intention of the Treaty parties and the terms of Treaty 72 as they relate to the description of the east boundary itself. This is in part due to the passage of time (the second patent was issued in 1881 and the last in 1907), and in part because the subdivision plans cut both ways – they do not show a reserve boundary, but they also do not show that these lots adjacent to the Disputed Beach actually terminate at the water's edge. They are not depicted as riparian lots.

[338] I will return to the issue of the Patents in addressing the Landowners' defence of *bona fides* purchasers for value without notice.

(c) Complaints by Saugeen and Crown Responses – 1877-1888

[339] In reviewing the complaints made by Saugeen and the federal Crown's responses, I am guided by the principle that the further away from the formation of the Treaty the relevant conduct is, the less probative that conduct is to the treaty interpretation exercise.

[340] Saugeen's first documented complaint was made in 1877. It alleged that the north terminus of the east boundary was improperly placed at the road allowance between Lots 25 and 26 and ought to have been at the road allowance between Lots 30 and 31. The historical context of this complaint was the relatively recent passage of the *Fisheries Act* in 1857 and amendments in 1866, which imposed restrictions on Saugeen's ability to fish, including having to pay for fishing licences, and created closed fishing seasons for various species of fish.

[341] As well, in 1876, the Dominion of Canada passed the first iteration of the *Indian Act*. Under the *Indian Act*, the local Indian Agent exercised much control over band information. The band

[56] At trial, Canada tendered Professor Larissa Katz, whom I disqualified on the basis that her proposed opinion evidence related to the domestic law of patents. I provided an oral ruling with my reasons.

had no control over its own funds either. For example, Saugeen did not have access to a copy of Treaty 72 until at least 1948.

[342] On March 1, 1882, the Superintendent responsible for Saugeen, William Plummer, advised the Indian Department that settlors were interfering with Saugeen's fishing rights. His recommendation was that the Department purchase a strip of land that was about one chain wide (66 feet) across Lots 24 – 34, in order to permit Saugeen to fish and use the beach to dry their fish. This suggests that in Plummer's view at least, the beach in front of these lots was not part of IR 29. In any event, Plummer's recommendation was not acted upon.

[343] Prompted by its increasingly difficult ability to fish on its fishing grounds in the manner it did before the passage of the *Fisheries Act*, exacerbated by the encroachments to their fishing by settlors, Saugeen claimed that it possessed an exclusive right to fish in the Sauble River. A number of fishing-related complaints ensued over the next decades tied to Sauble River, Sauble Bay and Sauble Beach. For example, in 1886, Saugeen petitioned Indian Affairs "for the whole of the Sauble Fishing Ground" and later that year Saugeen asked that only members of Saugeen be allowed to fish at Sauble Beach. A band council resolution passed on August 4, 1890 claimed the right to fish on the "lake shore" of Lake Huron from French Bay and the Sauble River. On November 3, 1890, Saugeen passed a band council resolution claiming that the right to fish at Sauble Beach, including the disputed portion of that beach, had been reserved from surrender by Treaty 72.

[344] While these complaints were often framed in terms of Saugeen's fishing rights at the Disputed Beach, it is a reasonable inference that Saugeen was asserting its right not only to the fishing grounds, but also the beach that was an integral part of its fishing activities.

[345] In the early 1900's, Sauble Beach began to see a small population of seasonal cottagers emerge. As that population grew, Saugeen began to assert claims to the Disputed Beach in terms that were unrelated to fishing activities.

[346] On September 2, 1930, Saugeen passed a band council resolution calling for a general meeting "for the purpose of discussing the northern limits of the reserve". The local Indian Agent, Don Robertson, advised Indian Affairs that "there is some dispute with the Indians as to how far up the Sable beach the reserve runs, the Indians claim that the reserve goes to the Sable river which if so would take in some fifty or sixty cottages".

[347] In response to Indian Affairs' advice that the reserve ended at the road allowance between Lots 25 and 26, Saugeen passed a resolution asking for a new survey of the eastern boundary, to be paid for from band funds. This request spawned a number of similar requests by Saugeen for surveys to be done or reviewed over the next decades.

[348] Of note, in 1888, PLS Nathaniel Low surveyed the southern portion of the eastern boundary of IR 29. He surveyed the eastern boundary from the southern boundary up to the road allowance between Lots 20 and 21 only. However, he placed an iron post at the road allowance between Lots 25 and 26. It is not known why he did this. In any event he did not re-survey Rankin's work and his survey stopped south of Lot 26, Concession D, as he was not instructed to re-survey the east

boundary. This iron post appears to have been assumed by some subsequent surveyors to have monumented the northern terminus of the east boundary.

[349] The Low survey did not result in a re-establishment of Rankin's boundary that may have existed north of the Lot 25/26 road allowance. The northern segment covering the Disputed Beach did not form part of his instructions. However, PLS Low concluded in 1888 that Rankin commenced running his line at Lot 31 but excluded the coastline between Lot 31 and the side road of Lots 25/26 because Rankin thought the land comprised of sand unsuitable for farming.

(d) The Subdivisions of Lots 26 to 31

[350] In 1908, Lot 34 (north of the Disputed Beach area) was proposed to be subdivided into quarter-acre cottage lots. At this time, it was the position of Indian Affairs that any accretions of sand (creating a wider beach) beyond the shore road allowance that ran parallel to the shoreline were owned by the Department of Indian Affairs.

[351] In around 1923-26, interest developed in Amabel about the potential subdivision of Lots 25, 26 and 27 as the cottage industry began to grow. J.K. Davidson, treasurer of Amabel and owner of Lot 26, Concession D, along with the owners of Lots 25 and 27, commissioned OLS Archibald to conduct a survey for purposes of the proposed subdivisions. In the course of his survey, Archibald asked Indian Affairs for a plan of the Township of Amabel and the field notes for Lots 25 and 26. Archibald noted that the shoreline road allowance was not on the plan, and that the patents for Lots 26 to 33 had no reservation of land for a road.

[352] The Subdivision Plans (354 for Lot 25, 355 for Lot 26 and 356 for Lot 27) show cottage lots on the east side of what was Huron Street (now Lakeshore Boulevard North) or the high-water mark of the lake side of that road. Subdivision Plan 354 (Lot 25 – the Bannister Subdivision Plan) shows a dotted line indicating the "Easterly limit of the Indian Reserve". That line continued on Plan 355 (the Davidson Subdivision Plan) seemingly separating the Disputed Beach portion of the part lots which are currently owned by Lemon and the Estate of Twining. These subdivisions occurred in 1927.

[353] The significance of these subdivision plans is that they appear to have been relied upon by subsequent owners of the subdivided cottage lots along the Disputed Beach. At the time, the province's general policy concerning shorelines was that it owned the dry land between the water's edge and the high-water mark. As noted by the Ontario Court of Appeal in *Tiny Township v. Bagtallia*,[57] the provincial Crown's position conflicted with the common law authority that provided that the boundary between land and non-tidal waters is the water's edge and the position caused much confusion amongst surveyors about how to locate the high-water mark. The provincial Crown overrode the common law position by amending the *Bed of Navigable Waters Act*[58]. However, in 1951, the amending statute was repealed. In *Walker v. Ontario (Attorney*

[57] 2013 ONCA 274, 305 O.A.C. 372, at paras. 15 – 18.
[58] S.O. 1911 c. 6.

General),[59] the court held that the common law position is that with respect to riparian properties, the title owner owns the property to the water's edge as an ambulatory boundary, including any accretions that accumulate after the property is purchased.

[354] This confusion with the province's assertion of ownership over shoreline may account for the ensuing confusion about whether the north terminus of IR 29's east boundary included the shoreline beach along Lots 26 – 31 in the context of the plans of subdivision that appear to end the subdivided lots at Huron Lane as opposed to the water's edge of Lake Huron.

[355] In any event, OLS Archibald's subdivision plans of survey relating to the disputed lots (Lots 25, 26 and 27) did not include the Disputed Beach to the west of what was known as "Huron Lane" or the shoreline road running along the coast at Sauble Beach. Indeed, none of the subdivision plans[60] relating to Part Lots 25 to 32, Concession D, Amabel, and ranging in time from 1912 to 1945, show any of the cottage lots extending to Lake Huron. Rather the west boundary for these subdivided lots is shown as ending at Huron Lane, or what is now called Lakeshore Boulevard North, which runs between the beach portion of Sauble Beach on the west and the cottages or improved properties on the east.

(e) Subsequent Complaints by Saugeen and Crown Responses: Further surveys and boundary investigations

(i) OLS and DLS White's Survey

[356] In 1931, OLS and DLS White was instructed by Indian Affairs to re-survey the east boundary of IR 29.

[357] The genesis of White's survey was the complaint by Saugeen in and around 1930 and 1931 to Indian Agent Robertson that their reserve extended to the Sauble River (past Lot 31) and that, accordingly, cottagers were encroaching on their beach. In response, Indian Affairs commissioned White to "re-establish" the east boundary of IR 29. White was an employee of Indian Affairs. White was instructed to determine the location of the east boundary based on Rankin's survey returns (but not based on the Treaty).

[358] In July 1931, OLS White performed a survey to re-establish the east boundary as surveyed by Rankin. On December 15, 1931, OLS White found that PLS Low had correctly re-established Rankin's boundary but again did not conduct an on-the-ground survey north of Lot 25. OLS White relied on Rankin's field notes with respect to the segment of land between Lots 25 and 31. OLS White interpreted Rankin's field notes from the preliminary traverse that the post planted within Lot 31 was intended by Rankin to refer to the south limit of Lot 31 and not the "spot upon the coast" referenced in the Treaty. This was an interpretation that none of the expert surveying witnesses agreed with at trial. Furthermore, OLS White used the high-water mark as Rankin's

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[59] [1971] 1 O.R. 151 (S.C.), aff'd [1972] 2 O.R. 558 (C.A.) and [1975] 1 S.C.R. 78.
[60] In chronological order: Subdivision Plan 328, 354 (Bannister), 355 (Davidson), 356 (Walker), 378, 408 and 412.

definition of the boundary of Lake Huron. This too was an error on the part of OLS White that likely stemmed from the confusion at that time regarding the limit of a property owner's boundary where it abutted a non-tidal water body like Lake Huron. There is no mention of a high or low water mark in Rankin's field notes or reports or in the instructions to survey he received.

[359] White conducted his survey in July 1931 and reported on December 31, 1931 that the 1888 survey by PLS Low had correctly established the eastern boundary terminating at the north end at Lot 25. In or around April 1932, Saugeen advised Indian agent Robertson that they rejected White's survey and conclusion.

[360] Saugeen asked permission to use its own band funds to commission a further survey by a surveyor of their choice. On August 9, 1932, in a letter to Robertson, this request was rejected by Indian Affairs as follows: "another survey would only be a waste of money" in light of OLS White's survey.[61] It must be remembered that Indian Bands at the time were not allowed to use their funds without permission of Indian Affairs.

[361] Subsequent investigations into the survey of the east boundary largely consisted of opinions based on survey work already performed. None of these surveys or boundary investigations considered the terms of the Treaty in defining the boundaries.

[362] In 1948, in response to a further request by Saugeen, the Surveyor General of Canada instructed OLS Baker to conduct a preliminary survey with temporary points set for a subsequent survey. However, once again, OLS Baker did not consider whether the east boundary extended further north than the road allowance at Lots 25 and 26, seemingly assuming Rankin's determination of that location as the northern terminus.

[363] Further paper-based investigations occurred in 1951, 1954 and 1956, each time rejecting Saugeen's repeated claims over the beach north of Lot 25. Notably, in J.C. Boyer's investigation in March 1951, he confirmed that White had appropriately re-established the east boundary as ending at Lot 25, notwithstanding noting some errors in this survey, and White's survey should be the "final settlement of the Indians' claim".[62] As for Rankin's field notes, Boyer's interpretation is that this result was consistent with what Rankin recorded:

> When running the said east boundary in a southerly direction from the post which Mr. Rankin established 10.66 chains north of the south limit of Lot 31, Con. D., he intersected the shoreline of Lake Huron at 14.00 chains and again at 115.00 chains, which would bring the line very near the north boundary of lot 25, Con. D. As this part of the line lies in Lake

[61] Letter dated August 9, 1932 from Secretary of Indian Affairs MacKenzie to Indian Agent Robertson.
[62] J.C. Boyer was employed at the Legal Surveys Branch, Department of Mines and Technical Surveys, Canada and had been instructed by J.D. Bradley of the Department of Mines and Technical Surveys to undertake an investigation of the original survey records from 1855-56 relating to the boundaries of IR 29.

> Huron there would be left no land whatsoever between these chains 14.00 and 115.00 and consequently no portion of the reserve lies east of the line between these points…

[364] In 1959, W.C. Bethune, Chief of Reserves and Trust, wrote in a letter to counsel representing Saugeen dated May 13, 1959 (in response to ongoing assertions by Saugeen of their entitlement to the Disputed Beach), in part:

> [T]he original survey of what now constitutes the Reserve was made by Rankin in 1856. The northerly starting point of the east boundary, as established by Rankin, is located in Lot 31, Concession "D"…
>
> It appears running south on the east boundary from the northerly starting point the line fell below the ordinary high water mark until the line came within the southwest corner of Lot 26. The result is that north of the latter point there was no useable land at the time of Rankin's survey…
>
> Subsequent to Rankin's survey, there may have been an accretion of land to the west of the east boundary. If this is the case, we are of the opinion that title to the accretion is vested in the Crown dominion and not the owners of Lots 26 to 31, inclusive. The extreme west limit of those lots is fixed by the east boundary of the Reserve.

[365] In 1969, in response to a meeting Saugeen had with the Town during which the Town expressed an interest in developing the Disputed Beach, Saugeen requested Indian Affairs to re-survey the eastern boundary.[63] Indian Affairs agreed to do so.

(ii) Bellach's Survey – 1974/75

[366] In 1973, Surveyor Hewett, who was hired by Saugeen and supported by Indian Affairs, conducted a documentary review and concluded the boundary was as nearly correct as it could be, based on the documents. However, he did not conduct a survey. Saugeen was dissatisfied with Hewitt's effort. In 1974, OLS and DLS Guenter Bellach was hired by Indian Affairs to perform the first on-the-ground survey of the east boundary since OLS White's survey in 1931.

[367] Bellach found that the north terminus of the east boundary was monumented by Rankin at the Lot 25/26 sideroad, but that Rankin commenced running his line from Lot 31 south. Bellach concluded that Rankin excluded the shoreline between Lots 26 and 31 because it was too narrow a strip to be considered "valuable enough at the time to create it as a unit of land, it seems".[64] In his Report, Bellach also indicated that, "at that time, it was not the practice to confirm plans of Crown surveys" and therefore the Crown's acceptance of Rankin's survey was considered to be

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[63] This July 1969 Town/First Nation meeting will be further discussed later in these Reasons.
[64] Report on re-survey of East Limit of Saugeen I.R. No. 29, February 18, 1975 – the Bellach report.

final. He concluded that Rankin had decided to "restrict the reserve to 7 ½ miles rather than 9" and that the Crown accepted that decision as "final".

[368] In other words, Bellach found that Rankin ran his survey chain line to Lot 31 but fixed the northern terminus of the eastern boundary at the road allowance between Lots 25 and 26 because the strip of land between Lots 31 and 26 was too narrow to be of any value. Essentially, Bellach advised Canada that Saugeen received far less than the "about (9 ½) nine and a half miles" of the coastline and that the Crown had accepted that decision when it accepted Rankin's survey returns for deposit.

[369] In the early 1980s, Canada engaged Professor David Lambden to prepare a Report for the Deputy Attorney General of Canada for the purpose of anticipated litigation to resolve the location of the east boundary of IR 29.

[370] As a result of Professor Lambden's report, Canada concluded that errors were made in earlier surveys and investigations it had caused to be conducted. Professor Lambden died on June 4, 2021. However, his report was filed as an exhibit.[65] Professor Lambden found that Indian Affairs erroneously "disclaimed the right of title to the beach in front of Lots 26-31 on the grounds that the 'high water mark' of Rankin's survey lay to the east of Rankin's Indian Line".[66] He further found that the northern terminus of the Saugeen reserve was located at a point on the western boundary of Lot 31, and that in 1854 there was a continuous strip of dry, usable, reserve land between Lots 26 and 31. The northern end of the original reserve boundary was therefore established pursuant to the terms of Treaty 72, but was inland several hundred feet from the waters of Lake Huron.

[371] While the Lambden report may explain the reason for the change in Canada's position that the placement of the north terminus of the east boundary by Rankin was wrong, it is hearsay with respect to the opinions relayed, and I attach no weight to the opinions expressed therein.

d) Did Saugeen Receive the Reserve Promised under Treaty 72 When Rankin Altered the Spot upon the Coast in Surveying IR 29?

[372] In *Restoule*, at para. 113, Justices Lauwers and Pardu, writing for the majority of the Court of Appeal, described reconciliation as relates to treaty rights as follows:

> Reconciliation is also the objective of the legal approach to treaty rights and the "overarching purpose" of treaty making and, perforce, treaty promises. Reconciliation underpins the doctrine of the honour of the Crown, which operates as a "constitutional principle." Hence: "The controlling question in all situations is what is required to maintain

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[65] Exhibit 1751, Lambden Report prepared for the Deputy Attorney General of Canada for the purposes of Contemplated Litigation to Resolve the Question of the Eastern Boundary of the Saugeen Indian Reserve, November 30, 1984.
[66] Lambden Report, at p. 21.

> the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake." [Internal citations omitted.]

[373] I now turn to my conclusions with respect to the interpretation of Treaty 72 as relates to the location of the north terminus of the east boundary.

[374] I have reviewed the evidence in relation to the important issue of locating the north terminus of the east boundary of Saugeen's reserve number 29. I will now apply that evidence to the principles of treaty interpretation.

[375] The main controversy at trial was twofold. First, did the Treaty create the reserve boundaries such that Rankin's role was to mark those boundaries on the ground or did it merely set out a process for the creation of the boundary. Second, if the Treaty created IR 29, then where was the location of the north terminus of the east boundary according to the terms of the Treaty?

[376] This was a pre-Confederation treaty. Unlike many post-Confederation treaties, which set out a process for determining reserve creation, this Treaty established the boundaries of IR 29.[67]

[377] The boundaries are sufficiently defined by the text of the Treaty. They are detailed by various objective natural and human-made markers, such as the "ravine" and "newly constructed bridge" and by a measurement of about 9 ½ miles along the coast of Lake Huron. The use of the measurement is an indicator of the Crown's intention of where the "spot" was located as it is unlikely Saugeen would have referred to this Imperial measurement of distance. The reference to a "spot upon the coast" is an indicator of Saugeen's intention of where the "spot" was located given Saugeen's intimate knowledge of the coastline. This is unlike some other treaties (particularly post-Confederation treaties) where the reserve boundaries are expressly to be determined by survey after the Treaty formation is concluded.

[378] Importantly, the lands that were "reserved" from the 1854 surrender were already reserve lands pursuant to Treaty 45 ½ and the 1847 Royal Proclamation. None of the experts took issue with the proposition that Treaty 72 established the boundaries for this reserve.

[379] Treaty terms may be inferred, where warranted, by necessary implication.[68]

[380] While there were no minutes of the Treaty Council made, the Treaty Report of Oliphant to Lord Elgin dated November 3, 1845 reflects the most comprehensive account of the Treaty negotiations. In the Treaty Report, it will be recalled that after taking a break to allow the chiefs/ogimaas, deputy chiefs/aanikeogimaas and councillors/gitchi-anishinaabek to consult

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[67] See e.g., *St. Catharines Milling and Lumber Co. v. R.* (1887), 123 S.C.R. 577 at p. 641; *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.) at paras. 75, 78 and 80. See also *Mikisew Cree*, at paras. 2-3, for an example of a post-Confederation treaty which set out a future process for creating the boundaries of a reserve.

[68] *Marshall*, at para. 43, *Fontaine v. Canada (Attorney General)*, 2014 ONSC 4585, at paras. 87-90, varied 2016 ONCA 241, aff'd 2017 SCC 47.

amongst themselves, Saugeen advocated for "increased limits to their reserves and fresh privileges" which were then discussed "*seriatim*" with each side having to compromise. The boundaries of the reserves were then drawn out in the presence of the Indigenous leadership which may have been the Oliphant sketch map that was appended to his Treaty Report.[69] The only measured distance stipulated in the Treaty relating to IR 29's boundaries is the distance of about nine and a half miles to the "spot upon the coast". This record demonstrates that the reserve boundaries were specifically negotiated and then reflected in the terms of the Treaty. In other words, the Treaty provides for an objective distance between the west boundary where it intersected Lake Huron's shore and the "spot".

[381] Furthermore, based on the archival record, Rankin understood his role was to mark on the ground the Treaty-defined boundaries, and not to create them through a subsequent process.

[382] The historical and ethnohistorical evidence shows, at the time of Treaty formation, Saugeen wanted to reserve as much of the coastline as possible in light of its importance to Saugeen's culture, sustenance (fishing) and commercial economy (fishing). The Imperial Crown's intention at the time of the Treaty was to secure as much of the coastline as was necessary to establish a water transportation route from the Sauble River to Southampton, to transport commodities (notably timber) to the United States pursuant to the recently negotiated free trade agreement. The Imperial Crown also wanted to secure land bordering the Sauble River for a mill site and mill lots to process the timber for transport. It also desired the Lake Huron coastline along the "tongue of land" for its north Southampton town plots. This conclusion is supported by the fact that the Imperial Crown agreed to the Copway Road change in the west boundary because it did not interfere with the Southampton town plots (as surveyed by Rankin) and gave Saugeen some "additional" coastline.

[383] The Imperial Crown was aware that Saugeen desired as much of the coastline as possible, at the time of the Treaty, and the integrity and honour of the Crown is presumed in ensuring the survey respected Saugeen's interests in the coastline.

[384] The cultural and linguistic differences of the Treaty parties must also be considered. Culturally, the Saugeen were a fishing people as demonstrated by the prominence of fishing during the seasonal rounds whereas the Imperial Crown was focused on populating the peninsula with settlors in furtherance of colonization. The Saugeen were literate in Anishinaabemowin while the Imperial Crown's representatives were literate in English. The Treaty was written in English as were all records relating to the Treaty and subsequent survey. While the terms of the Treaty were interpreted verbally into Anishinaabemowin, the written words remained in English.

[385] The words used in the Treaty must be given the sense they would naturally have held by the Treaty Parties. This is not very easy to do when the language of one Treaty party was not spoken by the other, and vice versa. The key words as related to the meaning of the north terminus

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[69] The sketch map is appended to these reasons. I say "may" have been drawn at the Treaty council because there is also evidence in the archival record that Saugeen stated they had the map in question.

of the east boundary are the spot upon the "coast" and the west boundary's reference to "shore" and the intersection point with the "spot". While it is not possible on the evidentiary record to know what Saugeen or the Imperial Crown understood by "coast" and "shore", both historians testified that Saugeen knew where these places were at the time of the Treaty due to Saugeen's intimate knowledge of the coastline. Also important is the fact that the Imperial Crown chose different words to describe the intersection point. Nowhere in the Treaty is it stated that the east and west boundaries terminate at the water's edge of Lake Huron. Rather, the Imperial Crown used words that mean a land base that ultimately abuts the water.

[386] The Treaty text expressly names and describes three boundaries: west, east, and south.[70] However, the Treaty implicitly incorporates two natural water boundary segments: the coast of Lake Huron, bounding the west side of the reserve (to the north), and the Saugeen River, which bounds part of the reserve's south boundary (to the west of the Half Mile Strip). These boundary segments were clearly not intended to be straight lines by the Treaty parties. The remaining three boundary segments appear to be more or less straight lines consisting to the Half Mile Strip boundary, and the segments comprising part of the west boundary leading to the coastline and the east boundary south from the spot upon the coast, as inferred by the use of the term "parallel" in the Treaty. In short, this is an irregularly shaped reserve territory with various boundary segments, some of which follow along natural water boundaries.

[387] In construing the language of the Treaty generously, in favour of Saugeen, the court must adopt an interpretation that does not alter the meaning beyond what is "possible on the language" or realistic. An interpretation of the Treaty's description of the reserve that permits a small north boundary to be marked to join the east and west boundary at the north end of the reserve is both possible on the language and realistic. At the time of the Treaty, the Imperial Crown, based on the Bayfield map, and Saugeen, by virtue of having travelled along the coast of Lake Huron between their Village and Chief's Point since time immemorial, would have known (a) Lake Huron's west coast was not a straight line and (b) it had an inward curve at or around the "spot upon the coast" and south. They may not have known the exact depth of that concave or inward curve, but they knew it was there.

[388] Adopting an interpretation of the Treaty, as was apparently done by Rankin, that was technical and based on principles of boundary law used to construe a deed, is inconsistent with the treaty interpretation principles set out in the *Marshall* test and echoed most recently by our Court of Appeal in *Restoule*.

[389] The east boundary, as defined by the Treaty, is to terminate at its most northern point at a spot upon the coast, known to Saugeen. The "spot" under the Treaty is to intersect with the west boundary (as measured from a distance of about nine and a half miles from the original west

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[70] Dr. Ballantyne described the reserve shape as "quasi trapezoid" and Ontario called the segment of the west boundary running "due north from the river Saugeen at the spot where it is entered by a ravine immediately to the west of the village and over which a bridge has recently been constructed to the shore of Lake Huron" a fourth boundary.

boundary from the perspective of the Imperial Crown) at the "shore" of Lake Huron and to run "parallel thereto until it touches the northern limits" of the Half Mile Strip. By extending a small north boundary, the east boundary could have been run in a straight line roughly parallel with the southern segment of the Treaty-defined west boundary on dry ground.

[390] The most immediate post-treaty conduct, consisting of the Copway Road "amendment" and Rankin's own survey and traverse, supports this view that the "spot" as defined by the Treaty is located within Lot 31.

[391] The Copway Road "amendment" did not change the location of the "spot upon the coast" as evidenced by the recognition of the Crown that this accommodation would result in an increase in coastline to Saugeen's reserve, and the lack of any mention in the Order in Council of any amendment to Treaty 72 or alteration of any of the other Treaty-defined boundaries. This was also Rankin's understanding, given where he placed the "spot" within Lot 31. It bears repeating that Rankin was present at the Treaty council and a witness signatory to it. There is no evidence to suggest that this change in the trajectory of the south portion of the west boundary was an amendment to the Treaty, or that Saugeen surrendered additional coastline as a result of the change in the west boundary. Rather, the description of this segment of the west boundary, when it was run on the ground, was raised by Saugeen as inconsistent with what it believed it agreed to. This is an example of a latent ambiguity in the wording of the Treaty that was effectively resolved by the Imperial Crown in favour of Saugeen without altering the "spot upon the coast".

[392] Rankin located the "spot" 10.66 chains (214.4 metres) north of the road allowance between Lot 30 and Lot 31 as evidenced by his field notes, his draft survey map, and planting a post within Lot 31. This post was identified one year later by Ridout and Schreiber as representing the northeast angle of this reserve. Gould recorded that the Lot 31 post was a "post of Ind Res" when he surveyed the road allowance at Lots 30 and 31 in September 1855.[71] Also in Rankin's draft, October 12, 1855, Plan of Amabel, Rankin identified a post at the approximate location of the post planted by him in Lot 31 which he labelled "NE < Ind. Res.". As noted, the surveying experts agree that the point of Rankin's planting of this post was to locate the "spot upon the coast" in accordance with the Treaty-defined boundary.[72]

[393] The lack of immediate complaint by Saugeen regarding Rankin's ultimately surveyed north terminus at the Lot 25/26 road allowance is likely explained by the fact that Rankin planted a post at Lot 31 on September 4, 1855 during the course of his survey of the east boundary. This post would have been visible to any observers at the time and remained standing at least one year later when it was noted by Ridout and Schreiber. Furthermore, the final Plan of Survey, placing the terminus at the road allowance between Lots 25 and 26, was not provided to Saugeen until many decades later. Rankin's traverse and survey were done on the assumption that the spot upon the

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[71] Field Book 214 at 137 and Field Book 322 at frame 58-59.

[72] As indicated, Mr. de Rijcke's position is that Rankin ran his chain boundary line due south from this post. Dr. Ballantyne and Mr. Fediow's respective positions is that Rankin planted the post about 1.5 – 2 chains inland from the "spot upon the coast" to protect it from being washed away.

coast remained tied to the Treaty definition of the west boundary and not the subsequent boundary change. Therefore, the north terminus of the east boundary was still to be measured from a spot upon the coast about 9 ½ miles from the original west boundary resulting in an increase to the coastline (to the about 9 ½ miles).

[394] Furthermore, the court is left to speculate whether the map drawn at the treaty council was the same as Oliphant's sketch map as appended to the Treaty. The map that was apparently left in possession of Saugeen at the Treaty Council has since been lost. In any event, the sketch map that was drawn by Oliphant and appended to his Treaty Report to Lord Elgin is available but is so inexact (owing to a lack of scale, lack of cartographic knowledge of the peninsula, and Oliphant's lack of skill) that it does not assist in determining the location of the "spot upon the coast". Certainly, the sketch map does not seem to be used by Rankin as determinative in locating the "spot upon the coast" and if it was, then it seems that Rankin understood that the "spot" nonetheless was to be measured at about 9 ½ miles from the Treaty-defined west boundary.

[395] The expert historians agree that Saugeen likely knew where the "spot upon the coast" was, and there is no evidence to suggest that Saugeen wanted the spot upon the coast to be changed at the time of Treaty or immediately thereafter. I am not persuaded that it was Saugeen's intention to have less of the coastline at the north end of their reserve by favouring an interpretation urged by the Landowners and Ontario that the spot was to be further south based on the Copway Road amendment. It is clear on the basis of the archival record that the Crown did not intend for Saugeen to have less coastline at the north end of their reserve or change the "spot upon the coast" as a result of this post-Treaty change in the west boundary.

[396] Accordingly, the common intention of the Treaty parties was that the north terminus was to be the spot upon the coast as they understood it at the time they entered into the Treaty, which was about nine and a half miles from the Treaty-defined west boundary.

[397] Rankin was charged with marking the boundaries created by the Treaty on the ground. One of his roles was to consult with the Saugeen concerning the boundaries and issues that may arise therein. The archival record is clear that Rankin did not consult with his instructing party, the Imperial Crown, or with the other Treaty party, Saugeen, when he decided to relocate the "spot" further south along Lake Huron's coastline.

[398] Rankin apparently did not imply a short north boundary segment by intersecting the northern terminus of the east boundary at the "spot upon the coast" with the west boundary on the "shore" of Lake Huron. This reflected a decision by Rankin to interpret "spot upon the coast" and the west boundary's "shore" of Lake Huron (the words used in the Treaty) as meaning that the two boundaries would intersect at the water's edge, together with the lack of an explicit reference to a north boundary in the Treaty itself. However, had Rankin continued the west boundary north along Lake Huron's shore, as per the Treaty, to about 9 ½ miles from the original west boundary, and then joined it with the "spot upon the coast" at a point slightly inland from the lake, then he would have achieved the common intention of the Treaty parties as reflected by their respective interests at the time of Treaty and resolved the latent ambiguity in a manner consistent with the honour of the Crown.

[399] Implying a small north boundary to connect the east and west boundaries is a reasonable interpretation when the language used in the Treaty is considered. It is also realistic as implying a necessary boundary or, if angled, a boundary segment much like had to be implied with respect to the two water boundaries consisting of part of the west boundary along Lake Huron (which starts inland near the Village and turns in a northerly direction at the coast) and the south boundary along the Saugeen River (which continues in a westerly direction following the Half Mile Strip). Neither of these natural water boundaries are explicitly mentioned in the Treaty description of the reserve boundaries. However, both Treaty parties knew they were implied. I find that the Treaty description required that a north boundary be implied given the concavity of Lake Huron's coastline which was generally known to both Treaty parties, in the same manner as the Lake Huron coastline and Saugeen River shoreline were necessarily implied terms to the Saugeen (IR 29) reserve boundary in the Treaty. This is consistent with Rankin having some limited discretion to make adjustments to the Treaty-defined boundaries if he ran into obstacles on the ground.

[400] The archival record[73] demonstrates that Rankin likely viewed the wet sand at the "Lake, edge of" to be of little or no value, likely because it had no farming potential (at the time of the Treaty, the potential tourist attraction of beaches was not on the radar of the Imperial Crown or Saugeen). However in taking this colonial view of economic value, Rankin neglected to consider the economic and cultural value of the coastline to Saugeen for its fishing endeavours and the inextricable interplay of the waters and the coastline for their fishing activities – most notably seine fishing but also because, as the evidence shows, Sauble Beach was "a gentle place" for canoes to land, unlike the inhospitable cliffs and the rocky waters that were evident at other locations on Lake Huron's coastline. In so doing, Rankin failed to discharge his surveying task and resolve the ambiguity arising from marking the Treaty boundaries on the ground with regard for the best interests of the Saugeen and the common intention of the Treaty parties.

[401] In any event, Rankin's decision to resolve what he viewed as a latent ambiguity, as described by Dr. Ballantyne, was done in a manner that deprived Saugeen of the coastline that the historians agree was a primary objective for Saugeen to preserve when it entered into the Treaty. In other words, the Treaty wording vested a limited amount of discretion in Rankin to make reasonable accommodations to the boundaries marked on the ground providing they were faithful to the Treaty's intent; namely, to provide Saugeen with about 9 ½ miles of coastline from the Treaty-defined west boundary to the spot upon the coast.

[402] Rankin likely relied on the hierarchy of boundary evidence principles applicable to deeds and prioritized the natural water boundary of Lake Huron over the measurement of "about" 9 ½ miles. In doing so, he misinterpreted the Treaty to mean that the intersection of the west and east boundaries at the northernmost point had to be at the water's edge of Lake Huron thereby eliminating the possibility of a north boundary in the event he encountered an obstacle on the ground. He also approached the Treaty-defined boundaries in the wrong manner: by applying the hierarchy of boundary evidence, which is applicable to ordinary deeds, he failed to understand that

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[73] Low in 1888 and later Bethune in 1951.

treaties are not ordinary deeds or contracts and have a specific interpretation framework. That framework required Rankin to resolve the ambiguity in favour of Saugeen which, as the historical and ethnohistorical evidence demonstrated, required a resolution that provided Saugeen about 9 ½ miles of the promised coastline and therefore he was required to choose the option that involved the marking of a short north boundary attaching the west and east boundaries or, using the Treaty language, attaching the "spot" to the "shore" of Lake Huron, rather than choosing the option that deprived Saugeen of coastline in the vicinity of 9 ½ miles (the Disputed Beach).

[403] Therefore, I find that Rankin correctly marked the "spot upon the coast" within the meaning of the Treaty at Lot 31 on wet sand and planted a post about 1.5 to 2 chains away from the wet sand on sandy beach within Lot 31 to avoid it being washed away by the waves. I further find that he ran into a latent ambiguity due to the concavity of Lake Huron's coastline preventing him from marking the east boundary in a straight line south entirely on dry land between Lots 31 and 25. Rankin's interpretation of the Treaty was based on his assumption that its wording did not permit a small north boundary by necessary implication. Even if his interpretation of the Treaty-defined boundary was correct and did not permit a short north boundary to connect the east and west boundaries by necessary implication, he had two choices as a surveyor to resolve the latent ambiguity. One of the options was to add a small north boundary to account for the inward curve of Lake Huron's coastline. This would have achieved the common intention of the Treaty parties at the time of treaty formation.[74] Instead, he chose the option that deprived Saugeen of approximately 1.4 miles of the "about" 9.5 miles of coastline promised under the Treaty, which is not a minor adjustment within the context of about 9.5 miles. This 1.4-mile stretch is the Disputed Beach.

[404] By resolving the latent ambiguity as he did, Rankin did not carry out the survey in a manner consistent with the honour of the Crown, as he deprived Saugeen of what they were promised under the Treaty. Rankin adopted an overly technical interpretation of the Treaty's description of the number of boundaries it described and applied surveying principles that were ill suited to the interpretation of a Treaty as manifestation of the solemn promise of the Crown. Rankin applied the reserve description in the Treaty in a way that was neither liberally construed in favour of Saugeen nor did he resolve the latent ambiguity in favour of Saugeen.

[405] Accordingly, Saugeen was promised a coastline segment of the west boundary that comprised of about nine and a half miles as measured from the original Treaty-defined west boundary to the "spot upon the coast". The reserve boundaries were established by the Treaty. The "spot", in turn, was properly identified by Rankin during his 1855 survey of Amabel Township as being located within Lot 31 on the wet sand. The post which he planted measuring about 1.5 to 2 chains east from the "spot" was an appropriate place to mark the north terminus of the east boundary. From there, Rankin would have been able to mark a straight east boundary, parallel to

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[74] It must be remembered that even if he had adjusted the "spot" to mark the boundary at the most eastward point of the inward curve (likely at around Lot 30), he would have likely run the line on dry land south and Saugeen would have had approximately 9 miles of coastline covering much of the Disputed Beach.

the west boundary, and terminating at the Half Mile Strip on dry land. This would have resulted in a short north boundary, which in the circumstances of the latent ambiguity that arose in the Treaty's description of the "spot upon the coast", was a necessarily implied boundary consistent with the necessarily implied water boundaries and, in addition, was an option available to Rankin in exercising his discretion. In exercising his discretion in the manner he did, Saugeen did not receive the entirety of the reserve coastline it was promised under Treaty 72 when that promise was achievable.

e) Did the Crown Breach its Fiduciary Duty and/or Act in a Manner Inconsistent with the Honour of the Crown?

[406] Saugeen alleges that Canada and Ontario breached their respective fiduciary duties and duties flowing from the honour of the Crown by failing to properly mark the east boundary and then failing to preserve and protect the Disputed Beach as part of its reserve territory.

[407] Canada accepts that it breached its fiduciary duty but frames the breach as a failure to preserve institutional knowledge surrounding PLS Rankin's survey which, Canada alleges, included the Disputed Beach within the reserve's boundary and correctly marked the north terminus of the east boundary within Lot 31 at the "spot upon the coast". Canada states that it did not act in a manner inconsistent with the honour of the Crown because the Treaty was faithfully implemented. This again is premised on the position that Rankin properly marked the boundary to include the Disputed Beach. A loss of institutional knowledge, Canada submits, does not give rise to its dishonour.

[408] Ontario denies it breached any fiduciary duty it may have owed to Saugeen or acted in a manner inconsistent with the honour of the Crown on two grounds. First, Ontario states that the scope of the fiduciary duty in question only extends to the creation, preservation and protection of reserve territory, and those specific responsibilities lie exclusively with the federal Crown under s. 91(24) of the *Constitution Act, 1867*. Second, Ontario submits that only the federal Crown had the relevant information relating to Rankin's survey and therefore the northern terminus of the eastern boundary of IR 29. Thus, Ontario lacked the requisite knowledge to have engaged in a breach of fiduciary duty or dishonourable conduct.

[409] Saugeen replies that Ontario owes fiduciary duties under the Treaty, as the Treaty promises were those of the Imperial Crown, which devolved to both the federal and provincial Crown on the principle that the Crown is indivisible.

xii. Legal Principles

(a) Honour of the Crown

[410] As stated by the Supreme Court of Canada in *Manitoba Metis v. Canada*,[75] the honour of the Crown "is not a cause of action itself; rather it speaks to *how* obligations that attract it must be fulfilled.**"**

[411] The duties flowing from the honour of the Crown arising from Treaty promises and obligations "requires the Crown to endeavour to ensure its obligations are fulfilled".[76] This means Crown servants must seek to perform an obligation of the Crown "in a way that pursues the purpose behind the promise" reflected by the Treaty.[77]

[412] The honour of the Crown gives rise to duties which may result in declaratory relief. While the honour of the Crown is a distinct concept from a Crown-held fiduciary duty, the two concepts can overlap.[78] In relation to a Treaty promise, the honour of the Crown requires that the Crown "(1) take a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfil it".[79]

[413] The "ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty".[80] This is because the concept of the honour of the Crown grew out of a need for the Crown to persuade Indigenous Peoples to surrender traditional territories in exchange for the promise of protection and welfare.[81] Thus, the honour of the Crown imposes a "heavy obligation" on the Crown because it attracts the constitutional principle of reconciliation.[82]

[414] The honour of the Crown gives rise to "different duties in different circumstances".[83] The Supreme Court of Canada, in *Manitoba Metis*, at para. 73, identified four situations in which the honour of the Crown governs its conduct with Indigenous people, three of which apply to this matter:

(a) treaty-making and implementation;

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[75] 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 73.
[76] *Manitoba Metis*, at para. 79
[77] *Manitoba Metis*, at para. 80, citing *Marshall*, at para. 52.
[78] *Manitoba Metis*, at para. 73(1).
[79] *Manitoba Metis*, at paras. 75-76.
[80] *Manitoba Metis*, at para. 66.
[81] *Manitoba Metis*, at para. 66, citing, in part, Professor Brian Slattery, "Understanding Aboriginal Rights", (1987) 66 Can Bar Rev. 727, at p. 753.
[82] *Manitoba Metis*, at paras. 68, 69, 71.
[83] *Manitoba Metis*, at para. 73, citing *Haida Nation*, at paras. 16 and 18.

(b) when the Crown assumes discretionary control over a specific "Aboriginal interest" - in this situation, the honour of the Crown also gives rise to a fiduciary duty ; and

(c) requiring the Crown "to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples".

[415] In the context of Treaty-making and implementation, the honour of the Crown obliges the Crown to "act diligently in pursuit of its solemn obligations and the honourable reconciliation of Crown and Aboriginal interests".[84] Put another way**,** this duty requires the Crown to "act in a way that accomplishes the intended purposes of treaties and solemn promises it makes to Aboriginal peoples".[85]

[416] The Supreme Court in *Manitoba Metis*, at para. 82, cautions however that "not every mistake or negligent act in implementing a constitutional obligation to an Aboriginal people brings dishonour to the Crown", and that an imperfect implementation will not necessarily violate the honour of the Crown. Furthermore, the honour of the Crown does not necessarily guarantee that the solemn obligation can be delivered. On the other hand, a "persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise" may reflect dishonour on the part of the Crown.

[417] In this case, the honour of the Crown is clearly engaged and gives rise to a fiduciary duty. The Imperial Crown made an explicit promise under Treaty 72 to preserve and protect IR 29 from encroachment. Implicit in this promise was that the reserve boundaries would be marked in a manner consistent with what the parties to the Treaty intended and understood when they entered into the Treaty and as reflected in the Treaty. When the Crown unilaterally undertook the responsibility to have the Treaty-defined boundaries marked on the ground, and to preserve and protect the reserve from encroachment, it assumed discretionary control over the implementation of the Treaty and Saugeen's quasi-proprietary interest in its reserve. The Crown also undertook to act in a way that would accomplish the intended purpose of the Treaty as related to the marking of these boundaries.

[418] The Imperial Crown acted in a manner that was contrary to the honour of the Crown by failing to endeavour to ensure that Rankin's survey faithfully followed the Treaty-defined boundaries and that the latent ambiguity was resolved in a manner that preserved the about 9 ½ mile shoreline from the Treaty-defined west boundary to the "spot upon the coast" when that result was achievable under the terms of the Treaty. Rankin was vested with limited discretion to resolve latent ambiguities arising when he was marking the boundary on the ground. The Treaty wording demonstrates that the boundaries, while adequately described, were not exact (e.g.: by using the word "about" in describing the measurement of 9 ½ miles). He relied on the hierarchy of boundary evidence applicable to ordinary deeds, and chose the option that was least advantageous to Saugeen and contrary to the common intentions of the Treaty parties, rather than choosing the option

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[84] *Manitoba Metis*, at paras. 78 - 79.
[85] *Restoule*, at para. 237, citing *Mikisew Cree.*

available to him that would have fulfilled the Treaty promise and the honour of the Crown.[86] In so doing, Rankin was acting as an agent of the Crown.

(b) Sui Generis Fiduciary Duty Principles

[419] Saugeen pleads that the Crown (both levels) owed a *sui generis* fiduciary duty (as opposed to an *ad hoc* fiduciary duty as discussed in *Lac Minerals*)[87] in the circumstances of this matter.

[420] A *sui generis* fiduciary duty arises in the context of the protection of Treaty rights under s. 35(1) of the *Constitution Act, 1982*.[88] As noted, this duty also arises from the honour of the Crown when the Crown has scope for the exercise of discretion which it unilaterally exercises in such a way as to affect (in the context of Crown-Indigenous relationships) the First Nation's practical interests and the First Nation is vulnerable to the exercise of this discretion.[89] When this fiduciary duty is engaged, the court will scrutinize the fiduciary's conduct in discharging its duties.[90]

[421] In relation to Indigenous reserve lands, the Crown's fiduciary duty requires the Crown to fulfil obligations of loyalty, good faith, full disclosure, acting with such diligence as would be exercised by an ordinary person managing their own affairs but with a view to the best interests of the Indigenous beneficiaries, and "the protection and preservation of the band's quasi proprietary interest in the reserve from exploitation".[91] In simplified terms, the First Nation's interest in reserve lands is considered "quasi-proprietary" because the federal Crown remains the registered title owner to the reserve territory. In this way, the federal Crown holds reserve lands designated for the exclusive use by the First Nation.

[422] The *sui generis* fiduciary duty reflects the unique relationship between the Crown and First Nations as a nation to nation relationship. However, this duty does not exist at large. A fiduciary duty must relate to the specific Indigenous interest over which the Crown exercises discretionary control.

[423] In *Southwind*, at para. 63, the Supreme Court stated:

> In a case involving reserve land, the *sui generis* nature of the interest in reserve land informs the fiduciary duty. Reserve land is not a fungible commodity. Instead, reserve

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[86] It is noteworthy that, according to the expert geomorphology evidence, had Rankin marked the north terminus of the east boundary at the easternmost point of the concave coastline, at around Lot 30, the reserve would have extended approximately 9 miles along the coast. However, this potential resolution was not pursued by any of the parties at trial.
[87] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574.
[88] *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 78, citing *R. v. Sparrow*, [1990] 1 S.C.R. 1075.
[89] This is a feature of ad hoc fiduciary relationships but the description applies to this *sui generis* fiduciary relationship as per *Manitoba Metis*, at para. 73(1).
[90] *Wewaykum*, at para. 79.
[91] *Wewaykum*, at para. 86.

> land reflects the essential relationship between Indigenous Peoples and the land … The importance of the interest in reserve land is heightened by the fact that, in many cases such as this one, the reserve land was set aside as part of an obligation that arose out of treaties between the Crown and Indigenous Peoples.

[424] Saugeen's quasi-proprietary interest in IR 29 as defined by the Treaty is the specific Indigenous interest that is engaged in this analysis and attracts the *sui generis* fiduciary duty. The Imperial Crown was obliged to "manage the process to advance the best interests of the First Nation"; in this case that process was the marking of the reserve boundary.[92]

[425] The indicia of a *sui generis* fiduciary duty relative to the implementation of the Treaty's reserve boundaries are met here for the reasons that follow:

(a) The specific legal Indigenous interest is the reserve boundaries of IR 29 created by Treaty 72.[93]

(b) By way of the Treaty, Saugeen placed its trust in the Imperial Crown to protect its interests and promote the welfare of its people,[94] in exchange for surrendering their vast traditional territories and receiving their chosen reserves. The Imperial Crown's commitment included endeavouring to ensure that the reserve boundaries were accurately and faithfully surveyed to capture the entirety of the coastline of Lake Huron promised to Saugeen under the Treaty.[95]

(c) As a result of the Treaty, Saugeen became vulnerable to the exercise of the Crown's discretion over the accurate marking of their reserve boundaries, created by Treaty 72, which did not require Saugeen's approval, and with respect to protection and preservation of the entirety of Saugeen's reserve from encroachment.[96]

[426] Further, the shoreline along Lake Huron for a distance of about 9 ½ miles from "the spot upon the coast" (the "shore" being part of the west boundary as referenced in the Treaty) played

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[92] *Southwind*, at para. 64.
[93] *Southwind*, at para. 58, citing *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746, at para. 163; *Williams Lake*, at paras. 51 – 53.
[94] See the preamble to Treaty 72, which reads, in material part, "We the chiefs, sachems and principal men of the Indian Tribes resident at Saugeen, Owen Sound, confiding in the wisdom and protecting care our Great Mother across the big Lake, and believing that our Good Father, his Excellency the Earl of Elgin and Kincardine, Governor-general of Canada is anxiously desirous to promote those interests which will most largely conduce to the welfare of his Red children, have now….agreed that it will be highly desirable for us to make a full and complete surrender unto the Crown of that peninsula known as the Saugeen and Owen Sound Indian Reserve, subject to certain restrictions and reservations to be hereinafter set forth."
[95] It is clear from the evidence that the Imperial Crown repeatedly told Saugeen that it would not be able to protect their lands from encroachment by settlors if Saugeen did not cooperate by surrendering their peninsula and receiving reserve territories which the Crown would, in turn, protect.
[96] *Williams Lake*, at para. 60.

prominently in all three interests (cultural, sustenance fishing and commercial fishing) of Saugeen, to the knowledge of the Crown.

[427] The resulting fiduciary duty imposes "substantive obligations on how Canada [the Crown] was to exercise its discretion over the reserve land".[97] The fiduciary obligation "requires that the Crown's discretionary control be exercised in accordance with the standard of conduct to which equity holds a fiduciary". As stated, those fiduciary duties include loyalty, good faith and full disclosure.[98] The Crown was also obliged to exercise its discretion according to the heightened standards that are exacted against fiduciaries.[99]

[428] The Crown's fiduciary duty requires that it preserve the Indigenous interest "to the greatest extent practicable", sometimes referred to as minimal impairment.[100] In this case there is no competing public interest that is being advanced by the federal Crown.

[429] The Crown will be liable for the actions of its agents and Crown servants who "must seek to perform" the treaty obligation "in a way that pursues the purpose behind the promise".[101] Rankin acted on behalf of the Crown, as its agent, in marking the boundaries and thus implementing this term of the Treaty.

(c) How and When does the Honour of the Crown Inform The Scope of the Crown's Sui Generis Fiduciary Duty Owed to Indigenous Peoples?

[430] In *Southwind v. Canada*, the Supreme Court reiterated the concept that a fiduciary duty owed by the Crown to Indigenous peoples "is rooted in the obligation of honourable dealing and in the overarching goal of reconciliation between the Crown and the first inhabitants of Canada".[102]

[431] As stated, the principle of the honour of the Crown is enshrined in s. 35(1) of the *Constitution Act, 1982*, as a constitutional principle.[103] In *Southwind*, at para. 60, the Supreme Court put it thus: "The honour of the Crown – and the *sui generis* fiduciary duty to which it gives rise – is a vital component of the relationship between the Crown and Indigenous Peoples".

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[97] *Southwind*, at para. 97.
[98] *Southwind*, at para. 97, citing Williams Lake, at para. 46.
[99] *Williams Lake*, at para. 46.
[100] *Southwind*, at para. 104.
[101] *Manitoba Metis*, at para. 80.
[102] 2021 SCC 28, 459 D.L.R. (4th) 1, at para. 55, citing *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at paras. 17-18.
[103] *Manitoba Metis*, at para. 66, citing *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24.

[432] In relation to fiduciary duty, the honour of the Crown imposes the "heavy" requirement that the Crown act honourably with Indigenous peoples in carrying out its fiduciary obligations and in a manner which "maintains the integrity of the Crown".[104]

[433] Therefore, if a *sui generis* fiduciary duty that relates to the creation and/or preservation and protection of reserve lands is engaged, then the honour of the Crown will infuse that duty. In other words, the honour of the Crown speaks to how that type of *sui generis* fiduciary obligation is to be fulfilled.[105]

(d) Analysis

[434] The Imperial Crown stood in a relationship of power relative to Saugeen after the surrender by the First Nation of its traditional territory. The Crown exercised discretionary control over how and by whom the reserve boundaries created by Treaty 72 would be marked on the ground. The fiduciary relationship arose between the Imperial Crown and Saugeen by virtue of the Crown's assumption of sovereignty over Saugeen and its promise to protect and preserve reserve land from settlors.[106] The specific interest that was to be carried out in a manner consistent with the honour of the Crown and then safeguarded was the accurate marking of the boundaries, including the northern terminus of the east boundary of IR 29, by the Crown through its surveyor, Rankin. These circumstances, in turn, inform the scope of the fiduciary duty and whether there was a breach and/or the Crown failed in its duty arising from its honour in dealing with Saugeen.

[435] As stated, the Indigenous interests engaged in this case are the official boundary marking, and the protection and preservation of its reserve land. These interests attract a "strong fiduciary duty" associated with the Crown's exercise of control over the marking of the boundaries of the reserve land.[107]

[436] In this case, each of the Imperial and federal Crowns owed a *sui generis* fiduciary duty to preserve and protect Saugeen's interest in IR 29 – the entirety of it.[108] This necessarily included the obligation to ensure that the boundaries were properly marked out to reflect the terms of the Treaty and thus to ensure Saugeen was not deprived of reserve land it was promised in exchange for its surrender of its vast traditional territory. This was necessary so the Crown could deliver on its treaty promise that the reserve land would be protected from encroachment from settlors. The fiduciary duty required the Imperial Crown to act with due diligence with a view to protecting Saugeen's best interest under the Treaty and to consult with Saugeen in the event unforeseen difficulties arose in the process of marking those boundaries on the ground.[109]

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[104] *Manitoba Metis*, at para. 68.
[105] *Manitoba Metis*, at para. 73.
[106] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 S.C.R. 83, at para. 43.
[107] *Southwind*, at para. 62.
[108] *Southwind*, at para. 103; *Wewaykum*, at paras. 86, 100.
[109] *Southwind*, at para. 114.

[437] As I have found, PLS Rankin exercised his discretion to resolve the latent ambiguity (or obstacle on the ground) in a manner that was neither in the best interests of Saugeen nor consistent with the terms and solemn promises of the Treaty. The Imperial Crown appointed Rankin to mark out the reserve boundaries for the purpose of deposit with Crown Lands thereby officially designating the unsurrendered land as reserve land. It had a duty to endeavour to ensure that Rankin carried out this task in accordance with the terms of the Treaty and in a manner that was consistent with the honour of the Crown.

[438] Rankin, however, exercised his discretion in a manner that was inconsistent with the terms of the Treaty and the honour of the Crown. The discretion was exercised in a manner that was not in the best interests of Saugeen for whom the coastline was important to its culture, livelihood and way of life. The result was that the reserve, as promised under the Treaty, was neither protected nor preserved.

[439] By accepting Rankin's decision to place the north terminus of the east boundary at a location that was not consistent with the Treaty-defined location, the Imperial Crown *de facto* accepted Rankin's exercise of discretion in a manner contrary to the honour of the Crown to "diligently pursue implementation of treaty promises".[110] The Imperial Crown failed to endeavour to ensure that Rankin exercised his discretion in a way that brought honour to the Crown.

[440] The Imperial Crown further breached its fiduciary duty by failing to protect and preserve the entirety of the reserve from the ensuing encroachment by settlors.

[441] More specifically, the Crown breached its Treaty promise by unilaterally shortening the agreed upon coastline boundary rather than solving that ambiguity by marking a small northern boundary to join the east boundary's "spot upon the coast" with the west boundary's "shore" of Lake Huron. Given the apparent detailed review that the Crown Lands Department conducted of Rankin's journals, field notes, and Plan of Survey resulting in Rankin making corrections and adjustments, I find that the Crown Lands Department was aware that Rankin located the northern terminus of the eastern boundary at the road allowance between Lots 25 and 26 (known as Hepworth Road), and did not question Rankin about this placement.

[442] It is possible, however, that the Crown Lands examiners did not appreciate that the terms of the Treaty dictated a more northerly terminus point because that was not within their purview – the Treaty was the domain of Indian Affairs. It appears, based on the archival record, that the two branches did not communicate with respect to the Treaty requirements for this survey. But that is not an excuse or justification.

[443] In summary, the Imperial Crown breached its *sui generis* fiduciary duty owed to Saugeen when it failed to act in the best interests of the First Nation by depriving it of the promised coastline as part of IR 29. It did so in two respects: first, by failing to ensure that the reserve boundary was

faithfully marked in accordance with the Treaty, and second, by failing to protect and preserve the Disputed Beach as reserve land. The Crown had two choices available to resolve the latent ambiguity and it chose the one that was least favourable to Saugeen. The Crown also failed to consult with Saugeen either itself or through its agent, Rankin. The Crown acted in a manner inconsistent with its honour in failing to implement the Treaty defined boundaries and this dishonour infused and tainted the Crown's discharge of its *sui generis* fiduciary duty. Its dishonourable conduct was inconsistent with the fiduciary duties of loyalty, good faith and full disclosure.

[444] The federal Crown is liable for the resulting breach of this *sui generis* fiduciary duty and duty to act in a manner consistent with the honour of the Crown. This is because the Imperial Crown's *sui generis* fiduciary duty to protect and preserve reserve lands was assumed by the federal Crown upon Confederation in 1867, as I will discuss below. [111]

[445] For its part, the federal Crown since 1877 was aware of repeated complaints by Saugeen that its reserve boundary extended farther north than Lot 25 and repeated requests for surveys to re-establish that portion of the boundary. While there was some discrepancy in the complaints (some asserted that the boundary should extend to the Sauble River and others that it should extend to in or around Lot 31), they all related to the shortened length of the coastline and Saugeen's fishing grounds and were persistent. This failure is highlighted by the Crown's initial decision in 1932 to deny Saugeen the right to use its own band funds to hire its own surveyor to challenge Rankin's survey.

[446] Many of the surveys and investigations, as previously reviewed, did not properly attempt to examine whether the reserve boundary extended north of Lot 25. Canada relied on only one "on the ground" re-survey by OLS White in 1931. In that survey, White neglected to conduct an on the ground survey north of Lot 25 and relied instead on Rankin's field notes and final Plan of Survey. Canada did not commission another "on the ground" re-survey until OLS Bellach in 1975 (revealing the errors in OLS White's survey). This pattern of neglectful conduct went on for about a century until Canada hired Professor Lambden, following receipt of Bellach's conclusion that Rankin had placed the spot upon the coast within Lot 31 but excluded the Disputed Beach as unusable land.

[447] This conduct demonstrates that Canada did not take prudent steps consistent with a person exercising ordinary diligence over their affairs to ensure the reserve was properly surveyed in accordance with the terms of the Treaty and as required by the honour of the Crown when dealing with reserve interests.

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[111] *Williams Lake*, at para. 127.

[448] Moreover, Canada abandoned its fiduciary duty in its periodic responses to various landowners denouncing any Indigenous reserve interest in the Disputed Beach, which at trial it called boilerplate or form responses.[112]

[449] It appears that Canada was content to have the pre-Bellach re-surveys and investigations performed on the basis of Rankin's survey work without comparing it to the Treaty-defined boundaries, thereby perpetuating Rankin's error. The result is that since the granting of the patents commencing in 1857, settlors have been permitted to encroach upon, and occupy, part of Saugeen's reserve land continuously to the present day. Indeed, when Indian Affairs was asked from time to time whether the Disputed Beach was part of the reserve by private landowners and the Town, it did not assert Saugeen's interest but rather gave assurances that Indian Affairs had no interest in the Disputed Beach.

[450] As a result, settlors and non-Indigenous Canadians have been permitted to encroach upon this part of the reserve territory continuously since the various issuance of Crown Patents to the Disputed Lots, to the exclusion of Saugeen.

[451] The breached fiduciary duty is rooted in the honour of the Crown discussed above. Both the Imperial and federal Crowns are liable for breach of the Crown's fiduciary duty, and have acted in a manner that is inconsistent with the honour of the Crown.

(e) Is the Federal Crown Liable for the Imperial Crown's Dishonourable Conduct and Breach of Fiduciary Duty in the Circumstances of this Matter?

[452] Notwithstanding my finding that the federal Crown independently conducted itself in such a way as to bring dishonour to the Crown, and breached its *sui generis* fiduciary duty to Saugeen, it is important to determine whether the federal Crown also effectively "inherited" liability for the Imperial Crown's failings. I find that the federal Crown is liable for the Imperial Crown's unlawful conduct, for the following reasons.

[453] By way of brief administrative history of Indian Affairs, in 1841, following the union of Upper and Lower Canada, Indian Affairs fell under the responsibility of the Civil Secretary who was the Governor General's secretary and the "permanent head of the colonial civil service". Then, in 1860, the responsibility for Indian Affairs was transferred from the United Kingdom to the Province of Canada, where it was placed under the Crown Lands Department. The Commissioner of Crown Lands also assumed the role of Superintendent of Indian Affairs. Upon Confederation, the responsibility for "Indian" affairs and reserve lands fell to the federal Crown

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[112] As, for example, letter from Enoch Hunter, then the owner of the south half of Lot 31, to the Department of Indian Affairs dated July 26, 1932 and the response dated August 27, 1932 from Indian Lands & Timber stating that the department had no interest in the Disputed Beach forming Hunter's property and similar responses from Indian Affairs to Livingston Huff dated September 14, 1932 relating to Lot 26.

under s. 91(24) of the *Constitution Act, 1867*. The Crown's dishonourable conduct and breach of fiduciary duty continued when Canada assumed constitutional responsibility over reserve lands.

[454] In *Williams Lake*, the Supreme Court of Canada confirmed that Canada will be liable for Treaty breaches committed by the Imperial Crown, including a failure to protect and preserve reserve land promised under a Treaty. While in that case the finding that the Imperial Crown was centered on the statutory meaning of "Crown", in my view, the *ratio* applies to the circumstances at bar where the federal Crown assumed responsibility for the protection and preservation of the reserve which was created under the Imperial Crown's jurisdiction. As noted in Williams Lake, at para 130:

> Within the confines of an administrative scheme designed to remedy historical injustices, treating the Crown as a continuous entity (defined by Canada's fiduciary obligations and, by necessary implication, the specific or cognizable Aboriginal interests in respect of which they were owed) is consistent with an Indigenous perspective on the ongoing fiduciary relationship between Indigenous peoples and the Crown. In *Mitchell v. Peguis Indian Band*, 1990 CanLII 117 (SCC), [1990] 2 S.C.R. 85, Dickson C.J. explained the importance of considering the Aboriginal perspective in interpreting statutory references to the Crown:
>
> > In my opinion, reference to the notion of "aboriginal understanding", which respects the unique culture and history of Canada's aboriginal peoples, is an appropriate part of that approach. In the context of this appeal, the aboriginal understanding of "the Crown" or "Her Majesty" is rooted in pre-Confederation realities. The recent case of *Guerin* took as its fundamental premise the "unique character both of the Indians' interest in land and of <u>their historical relationship with the Crown</u>." (At p. 387, emphasis added.) That relationship began with pre-Confederation contact between the historic occupiers of North American lands (the aboriginal peoples) and the European colonizers (since 1763, "the Crown"), and it is this relationship between aboriginal peoples and the Crown that grounds the distinctive fiduciary obligation on the Crown. On its facts, *Guerin* only dealt with the obligation of the <u>federal</u> Crown arising upon surrender of land by Indians and it is true that, since 1867, the Crown's role has been played, as a matter of the federal division of powers, by Her Majesty in right of Canada, with the *Indian Act* representing a confirmation of the Crown's historic responsibility for the welfare and interests of these peoples. However, the Indians' relationship with the Crown or sovereign has never depended on the particular representatives of the Crown involved. [Emphasis in original; pp. 108-9.]

[455] In my view, the perspective of Indigenous peoples in relation to their dealings with the "Crown" as explained in *Williams* and *Mitchell* applies with equal vigour to civil actions, including Saugeen's. Indigenous peoples did not distinguish between the Imperial Crown, the Province of Canada, or the federal Crown when it comes to asserting Treaty rights and promises in the historical context. This perspective supports an imposition of liability on the federal Crown for the Imperial Crown's failures relating to Treaty promises regarding reserve interests and the related honour of the Crown.

[456] Upon Confederation, the federal Crown under the division of powers set out in the *Constitution Act, 1867* assumed the Imperial Crown's liabilities as related to the protection and preservation of reserve lands. This is consistent with the concept of Crown fiduciary duty and the honour of the Crown being indivisible as between the Imperial Crown and the federal Crown insofar as the Crown's *sui generis* fiduciary relationship with First Nations is concerned.

[457] Therefore, liability for the breach of fiduciary duty and the dishonourable conduct of the Imperial Crown as it pertains to the improper survey of the reserve, the failure to consult with Saugeen, and the subsequent failure to preserve and protect the reserve from encroachment, falls to the federal Crown, Canada, under s. 91(24) of the *Constitution Act, 1867*. The surveying of the reserve was within the Imperial Crown's exclusive domain. Subsequently the responsibility for "Indians" and reserve lands was transferred to the federal Crown.

(f) Conclusion – the Crown Acted in a Manner that was Inconsistent with its Honour and Breached its Fiduciary Duty owed to Saugeen

[458] As was held in *Wewaykum*, at para. 86, "[o]nce a reserve is created, the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation".[113] The Imperial Crown, and then Canada after that, failed to exercise ordinary diligence to ensure that Rankin's final Plan of Survey faithfully represented the on the ground marking of the Treaty-defined east boundary and, later, to reassess Rankin's survey as measured against the Treaty-defined boundaries when Saugeen repeatedly asserted that the boundary stretched across the Disputed Beach. Both Crowns failed to protect and preserve the entirety of IR 29 from encroachment by settlors, and later by non-Indigenous Canadians.

[459] As admitted by Canada, it did not adequately respond to Saugeen's complaints nor treat the obligation to provide about 9 ½ miles of coastline from the Treaty-defined west boundary as a binding Treaty obligation.

[460] However, Canada submitted that the fiduciary duty that is engaged is merely its duty to keep proper records of the boundaries of IR 29. Canada submits that the only breach of fiduciary duty it committed was losing its institutional knowledge of the reserve boundary (having been properly surveyed by Rankin to Lot 31) that led to a misunderstanding on its part as to the proper location of the north terminus of the east boundary. However, this argument is premised on a factual finding that Rankin marked the boundary as extending to Lot 31, even though it is not visibly marked on Rankin's final Survey. As I have found that Rankin did not mark the north terminus of the east boundary at Lot 31 in his final Survey as deposited, this argument must fail.

[461] The fact that the federal Crown has belatedly recognized that it breached its fiduciary duty (albeit on different grounds than I have found) and began to realize in or around 1975 that IR 29 extended to the Disputed Beach up to a point within Lot 31, Concession D, of Amabel (now Bruce)

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[113] *Wewaykum*, at para. 100.

Township, does not in any way release it from responsibility for a breach and for dishonour that has been ongoing since Rankin's final Plan of Survey was accepted for deposit in 1856.

[462] Accordingly, the federal Crown has engaged in conduct that is inconsistent with the honour of the Crown and breached its *sui generis* fiduciary duty owed to Saugeen for failing to protect and preserve the entirety of IR 29 and in particular the Disputed Beach lying across *Chi-Gmiinh*. The federal Crown is also liable for the Imperial Crown's dishonourable conduct and breach of the *sui generis* fiduciary duty it owed to Saugeen at the time of the Treaty's implementation and its failure to preserve and protect the reserve following up to the time of Confederation.

(g) Did Ontario Act in a Manner that was Inconsistent with its Honour and/or Breach any Fiduciary Duty Owed to Saugeen?

[463] Treaty promises are binding not only on the federal Crown, but also on the provincial Crown. Both levels of government "are responsible for fulfilling these promises when acting within the division of powers under the *Constitution Act, 1867*."[114]

[464] Saugeen submits that Ontario owed it a fiduciary duty to protect and preserve the Reserve once it was aware (since at least 1934) of Saugeen's assertion that its reserve extended north of Lot 25. It submits Ontario breached this duty because it became aware and took no steps to rectify or address the problem. In so doing, Ontario also betrayed the honour of the Crown. However, Ontario had no control over the federal Crown's issuance of the Patents to the Disputed Lots and no control over the Disputed Lots thereafter. The Disputed Lots have continuously been held by private Landowners and the Town (and its predecessor) since the federally issued Patents.

[465] This is not a situation like *Grassy Narrows*. In that case, the issue was whether Ontario had the right to take up lands surrendered by the First Nation under the Treaty. The lands in question were under the control of the province, not Canada. Accordingly, Ontario did not require permission from Canada to invoke the taking up clause in the Treaty. Here, the lands in question are not within the control of Ontario. As stated by the Chief Justice of Canada in *Grassy Narrows*, at paras. 4 and 30:

> [4] I conclude that Ontario has the authority to take up lands in the Keewatin area so as to limit the harvesting rights set out in Treaty 3. By virtue of ss. 109, 92A, and 92(5) of the *Constitution Act, 1867*, Ontario alone has the ability to take up Treaty 3 land and regulate it in accordance with the treaty and its obligations under s. 35 of the *Constitution Act, 1982*. A two-step process involving federal approval for provincial taking up was not contemplated by Treaty 3.

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[114] *Grassy Narrows First Nation v. Ontario*, 2014 SCC 48, [2014] 2 S.C.R. 447, at para. 35.

> [30] I agree with the Ontario Court of Appeal that Ontario and only Ontario has the power to take up lands under Treaty 3. This conclusion rests on Canada's constitutional provisions, the interpretation of Treaty 3, and legislation dealing with Treaty 3 lands. First, although Treaty 3 was negotiated by the federal government, it is an agreement between the Ojibway and the Crown. The level of government that exercises or performs the rights and obligations under the treaty is determined by the division of powers in the Constitution. Ontario has exclusive authority under the *Constitution Act, 1867* to take up provincial lands for forestry, mining, settlement, and other exclusively provincial matters.

[466] *Grassy Narrows* stands for the proposition that while both the federal Crown and the provincial Crown owe fiduciary duties to First Nations, the scope of those duties as between the two levels of Crown are determined by the division of powers under the *Constitution Act, 1867*. The same applies with respect to the honour of the Crown – both levels of the Crown must act honourably with the First Nations, but the scope of those duties are similarly determined by the *Constitution Act, 1867*.

[467] However, I agree with Ontario that it did not owe a fiduciary duty to Saugeen to protect and preserve reserve lands after Confederation, consistent with the division of powers. This subject matter is exclusively the domain of Canada under s. 91(24) of the *Constitution Act, 1867*.

[468] Canada's liability for the pre-Confederation breach by the Imperial Crown follows from its assumption of responsibility for "Indians and reserve lands" under s. 91(24) of the *Constitution Act, 1867*.[115] However, the same does not follow for Ontario. Saugeen did not advance any jurisprudence in support of its position that a province is liable for a breach of fiduciary duty grounded in a failure to preserve and protect reserve lands either before or after Confederation.

[469] Similarly, Ontario did not act in a manner inconsistent with the honour of the Crown in relation to Rankin's survey or the subsequent failure to preserve and protect Saugeen's reserve.

[470] Accordingly, Canada is liable for breach of fiduciary duty and failed to discharge its duty arising from the honour of the Crown, caused by Rankin's failure to faithfully mark the east boundary in accordance with Treaty 72, and the ongoing failure to protect and preserve Saugeen's quasi-proprietary interest in IR 29, both prior to and after Confederation; Ontario is not.

THE DEFENCES

2. Did the Patents Extinguish Saugeen's Treaty Right to Land Reserved from Surrender?

a) Interpretation Principles for Patents

[471] Saugeen submits that it is not seeking to invalidate the subject patents, but only to clarify the western boundary of the Disputed Lots. In any event, patents cannot extinguish entitlements

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[115] *Williams Lake*.

to land reserved from surrender under the Treaty. If patents purport to do so, they must be corrected.

[472] The Landowners say the opposite. The Patents vests root of title to their Disputed Lots, and no reserve land interfered with their lots which go to Lake Huron's natural water boundary. In the alternative, if there was reserve land, their title derived from the Patents must prevail.

[473] In the leading case of *Herold Estate v. Canada (Attorney General)*, the Court of Appeal interpreted a patent granted in the late 19th century in light of Treaty obligations. The court set out the fundamental principles for interpretation of a patent:

> [T]he question is not the abstract meaning of its words, but what the parties to the contract are objectively taken to have intended by the words they chose in light of the circumstances – the factual matrix – in which they used them. A court objectively derives the parties' intentions by examining the words to determine what the parties intended, and examining the surrounding circumstances "to deepen [its] understanding of the mutual and objective intentions of the parties as expressed in the words of the contract" [Emphasis added by the Court of Appeal.][116]

[474] Further, in *Herold Estate*, the Court of Appeal references its decision in *Gibbs v. Grand Bend (Village)*,[117] for the proposition that the focus of the court in interpreting a written deed, such as a patent, is to determine the intention of the parties to the deed with a primary emphasis on the language of the Crown grant.

[475] The Court in *Herold Estate*, at para. 55, succinctly summarizes the court's task in interpreting a patent as determining "the objective intentions derived from the language of the Letters Patent in light of the surrounding circumstances".

[476] In that case, the court considered whether Island 27 (which was no longer an island, but attached to dry land at the time of this dispute) was still unsurrendered reserve land or was intended to be included in the land conveyed based on its interpretation of the patent.

[477] The court, at paras. 82-83, affirmed that, in interpreting a Crown Patent, regard must be had to any pre-existing treaty obligations:

> The Crown was under an obligation to ensure the conditions of surrender, which are construed liberally and through the lens of the honour of the Crown, were faithfully carried out: *R. v. Badger*, 1996 CanLII 236 (SCC), [1996] 1 S.C.R. 771, at para. 41; *Guerin v. The Queen*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335, at pp. 376, 382. And the Province

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[116] 2021 ONCA 579, 461 D.L.R. (4th) 683, at para. 42, citing *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 48, 57-58, 60, and *McLean v. Mclean*, 2013 ONCA 788, 118 O.R. (3d) 216 at para. 54.

[117] (1995), 129 D.L.R. (4th) 449.

> was bound by those obligations if it carried out the Crown power to sell: *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 S.C.R. 447, at para. 50.
>
> The fact that the Crown had undertaken separate obligations in connection with islands, and the nature of the obligations, should have shed light on whether a sale of Island 27 was objectively intended by the Province by Letters Patent that referred only to Lot 35. The Crown is not presumed to act in a manner that ignores its duties: *Badger*, at para. 41. The fact that the Letters Patent neither identified Island 27 separately, although surrendered to the Crown in trust and on conditions, nor allocated any of the sale price to Island 27 (a seemingly necessary first step toward investing those proceeds for the benefit of the First Nations as the terms of Treaty 78 required) were facts that were objectively inconsistent with the inference that the reference to Lot 35 was intended to include Island 27.

[478] At para. 87 of *Herold Estate.* the Court concluded:

> Interpreting the Letters Patent to not include the Islands makes sense of their language – both the reference to Lot 35, a property that as depicted was a mainland lot that did not extend beyond the water's edge, and the lack of reference to any islands being included in the conveyance. This interpretation is consistent with the relevant factual matrix at the time of the Letters Patent, namely that Island 27 was physically separate from Lot 35, located beyond the water's edge, had been separately identified, and was the subject of a separate and fundamental set of Crown obligations in favour of the First Nations.

[479] In *Gibbs v. Grand Bend (Village)*,[118] the Court of Appeal reviewed terms of a Crown Patent that reserved beach property from the grant. The Court explained that when there is a reservation in a patent, the grantee in fact obtains full fee simple ownership to the property conveyed, but the grantor has reserved to itself a limited right over that property.

[480] The Court of Appeal also reminded us that extrinsic evidence is only admissible where a latent ambiguity in the patent exists. Latent ambiguity was defined as "one that arises only when the deed is applied to the land it purports to describe".[119] The latent ambiguity is then to be determined by reference to the grantor's intention.[120]

[481] Furthermore, the extrinsic evidence that is admissible to resolve a latent ambiguity with respect to deeds, including patents, must only relate to events and circumstances that occurred prior to the issuance of the patents.

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[118] 26 O.R. (3d) 644.
[119] *Gibbs*, at p. 12.
[120] *Gibbs*, at p. 12.

[482] Finally, of particular import to the case before me, the Court in *Gibbs* at pp. 12-13, affirmed that:

> Where there is a latent ambiguity in a patent and thus extrinsic evidence is admissible to resolve it, evidence of writings previous to and leading to the issue of the patent cannot be referred to as enlarging or controlling the plain words of the patent itself and can be used only for the purpose of reforming the instrument in the event of mistake.[121]

[483] The Crown patents that form the root of title for the Disputed Lots along the Disputed Beach were issued as follows:

(a) Lot 26: January 16, 1896 to John Wesley Huff;

(b) Lot 27: March 29, 1881 to Hector, Lachlan and Hugh McLean;

(c) Lot 28: June 15, 1857 to James Henderson;

(d) Lot 29: March 29, 1881 to Hector, Lachlan and Hugh McLean;

(e) Lot 30: March 21, 1899 to David Warnock; and

(f) South half of Lot 31: August 20, 1907 to Enoch B. Hunter.

[484] Of interest, prior to the issuance of these Patents (which purport to convey the fee simple title to each of the Patentees), each of the lots was originally purchased by other purchasers on September 15, 1857 (Lots 26, 27 and 29) and September 6, 1856 (Lots 28, 30, 31). However, those purchases were not completed in the sense of being validated by way of issuance of a Crown Patent.[122]

[485] The fee simple conveyed to the patentees is described in the patents by lot and concession number. This was confirmed by Mr. Simison as consistent with the usual process of granting patents for this township in this historical timeframe (as opposed to a metes and bounds description). Therefore, as affirmed by *Gibbs*, at para. 51, the Rankin 1856 Plan of Survey of Amabel was incorporated by reference into the patents. As I have found, these lots as reflected on Rankin's Final Survey show Lake Huron as the west natural water boundary without any reference to reserve land as a boundary.

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[121] quoting *Brady v. Sadler* (1890), 17 O.A.R. 365 (C.A.), at p. 370.

[122] This is of note because there is no evidence that the actual patentees had access to, much less reviewed, the public auction map, Rankin's field notes, or any of the other documents available at the public auctions of September 2 – 6, 1856 and in September of 1857.

[486] Therefore, while the patents are silent with respect to the location of the west boundary and do not reference Lake Huron, the boundary is addressed by Rankin's Final Survey which is incorporated by reference into each patent.

[487] Pursuant to *Ontario (Attorney General) v. Walker*, where "one of the boundaries of the lands granted is to be a boundary of water, then it establishes that boundary as at the water's edge and not upon any bank or high-water mark".[123] I disagree with Canada's assertion that in order for such a grant to occur the patent must expressly reference the water's edge as being a boundary. Rankin's survey establishes that the lots to be sold were water boundary lots.

[488] Each of the Patents contain the following pre-printed passages:

> Whereas the Lands hereinafter described are part and parcel of those set apart for the use of the Indians; and Whereas We have thought it fit to authorize the Sale and Disposal of the Lands hereinafter mentioned, in order that the proceeds may be applied to the benefit, support and advantage of all said Indians, in such a manner as We shall be pleased to direct from time to time…
>
> ….saving, excepting and reserving, nevertheless unto Us, Our Heirs and Successors, the free use, passage and enjoyment in, over and upon all navigable waters that shall or may be hereafter found on or under, or be flowing through or upon any part of the said Paracel or Tract of Land hereby granted as aforesaid.

[489] From these passages, it is clear the Crown considered the lands that are the subject of the patents to have been surrendered by Saugeen with the sale proceeds to go to their benefit, as per the terms of the Treaty with respect (only) to lands actually surrendered by Saugeen. I reject Canada's submission that the latter passage relating to navigable waters is only relevant if navigable waters were "present on the parcel". This passage is very relevant as a proper construction of it leads to the conclusion that the water's edge of Lake Huron (a navigable water within the meaning of the *Navigable Waters Act*) borders the subject lots.

[490] The only pre-Confederation patent that was issued was that in relation to Lot 28. It differs from the other patents as follows:

(a) The patent was issued by the Acting Commissioner of Crown Lands, whereas the other patents were issued by the Superintendent General of Indian Affairs;

(b) The patent included a handwritten reservation: "reserving free access to the shore of Lake Huron for all vessels, boats and persons"; and

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[123] [1971] 1 O.R. 151 (H.C.), at p. 673, aff'd [1972] 2 O.R. 558 (C.A.) and [1975] 1 S.C.R. 78.

(c) The name of the First Nation which surrendered the land is not included on this patent.

[491] Canada submits that I should infer from the inclusion of the reservation of free access and the other two above referenced factors and the lack of reference to Lake Huron as a boundary that therefore the lots were not intended to be riparian. I disagree. There is no authority proposed by Canada to support its submission for the interpretation of a patent that incorporates the final Plan of Survey into its terms of reference. To the contrary, there is jurisprudence in which riparian lots have been found to have been established by patents similarly omitting reference to a water boundary but where the plan of survey incorporated by reference into the patent shows a water boundary.[124]

[492] Furthermore, while it is presumed that the Crown would not grant a patent that ignores its treaty obligations, it appears that the Crown did so in this case albeit while operating under a false assumption that this land was effectively surrendered due to Rankin's resolution of the latent ambiguity he encountered on the ground.

[493] Notwithstanding:

a) the peculiarity that only Lot 28, of all the Disputed Lots, had an express reservation of access provision (though it is noteworthy that the patent for Lot 28 also covered a number of lots that are not located on the Disputed Beach),

b) all subsequent patents were issued by Indian Affairs, and not the Commissioner of Lands, and

c) Rankin recommended that an express reservation for shoreline access be "mentioned in the patent" in his letter to Superintendent of Indian Affairs Pennefather on June 20, 1856,

I find that the Patents are not ambiguous, and that their proper construction leads to the conclusion that they purported to convey fee simple in the Disputed Beach to the Patentees of the Disputed Lots. Therefore, these Patents form the root of title for the purported ownership of these since subdivided lots to the Landowners. I therefore did not consider extrinsic evidence in reaching my interpretation of the patents.

[494] However, this does not end the deliberation as to who is entitled to exclusive possession of the Disputed Beach that forms part of the Disputed Lots under the Crown patents. The issue becomes whether the Crown extinguished Saugeen's Treaty right establishing a reserve interest in surrendered land by the act of issuing a patent that purports to convey the reserve interest and/or by statements made by federal government officials from the 1920s to the 1950s telling the owners of the Disputed Lots that Indian Affairs had no interest in the Disputed Beach. If the Treaty right

[124] See e.g., *Becker v. Walgate*, 2020 ONCA 491, at para. 50.

has not been extinguished, then the court must determine whose interest as between Saugeen and the Landowners should prevail.

[495] Saugeen and Canada say the Treaty-protected reserved interest in the Disputed Beach was never extinguished by Canada. Ontario says the Treaty right was extinguished, not by it but by Canada or the Imperial Crown before Confederation. The Landowners agree with Ontario.

[496] The law is clear that for a Treaty right to be extinguished by the Crown, there must be evidence of a "clear and plain intention" on the part of the government to extinguish that right.[125] The burden of proof lies on those parties asserting extinguishment and requires "strict proof of the fact of extinguishment".[126] In *Delgamuukw v. British Columbia*, the Supreme Court described the threshold as "quite high".[127]

[497] In *R. v. Sappier*, the Supreme Court stated that while the intention to extinguish does not need to be explicit, and can be implied, there must be a "clear and plain intention" on the part of the Crown to extinguish the specific Treaty right in question, such as a statutory enactment that evinces that intention.[128] In *Sappier*, the court found that the regulatory scheme restricting forestry did not evince the requisite intention to extinguish the First Nation's Treaty right to harvest trees.

[498] Given that the patents were issued under the Imperial Crown (with respect to Lot 28) and the federal Crown (with respect to the remaining Disputed Lots), who were acting under a misapprehension regarding the correct northern terminus of the east boundary, it cannot be said that the Crown intended to extinguish Saugeen's Treaty right to this portion of its reserve. The Crown did not think it was issuing patents over reserve territory. This also defeats Ontario's submission that the reference to the reservation of free access in the patent for Lot 28 constitutes a plain and clear intention by the Crown to extinguish Saugeen's treaty right to the reserve interest in the Disputed Beach.

[499] The defendant Landowners also rely on the written communications from various federal government officials, in which Indian Affairs disclaimed any interest in the Disputed Beach. For the same reason that the federal Crown was operating under a misapprehension, none of these statements meet the test of a plain and clear intention to extinguish Saugeen's Treaty right. Furthermore, there is no suggestion, much less evidence, that Saugeen ever surrendered the Disputed Beach, nor is there clear statutory language demonstrating that either Crown had unilaterally extinguished Saugeen's reserved interest in the Disputed Beach under the Treaty.[129]).

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[125] *Badger*, at para. 41; *Osoyoos*, at para. 47.
[126] *Badger*, at para. 41.
[127] [1997] 3 S.C.R. 1010, at para. 180
[128] 2006 SCC 54, [2006] 2 S.C.R. 686, at paras. 57-60.
[129] *Hopton v. Pamajewon* (1993), 68 O.A.C. 69 (C.A.), [1993] O.J. No. 2975, at p. 9 (sub. nom. *Skerryvore Ratepayers Assn. v. Shawanga Indian Band).*

[500] Taking a different approach, in *Gibbs*, at p. 18, the Court of Appeal found that in interpreting the reservation clause in the patent it was considering, extrinsic evidence such as "any examination of the views and actions of particular servants of the Crown over the years cannot diminish the nature and extent of the reservation in issue", particularly in a federal system of government. The Court concluded on this issue that estoppel was not available against the Crown in that title dispute.

[501] Furthermore, the Indigenous Treaty right in question is the exclusive possessory right to reserve land. The Crown has, since the Royal Proclamation of 1763, circumscribed its power to take back reserve land, short of a surrender.[130] As Saugeen points out, the common law has prohibited the Crown from extinguishing real property rights by issuance of a patent for centuries, dating back to the *Magna Carta*, 17 John.[131]

[502] Indeed, at the time that the majority of these patents were issued,[132] the *Indian Act* contained provisions that allowed for a Crown patent to be voided, corrected and re-issued to avoid the mistaken granting of reserve land to settlors.[133]

[503] It is helpful to repeat the test for Treaty interpretation, this time from *Badger*, at para. 41, as it extends to extinguishment:

> First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred…. Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. … Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. … **Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights.** [Emphasis added, citations omitted.]

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[130] See *Secretary of State of Canada Act 1868*, s. 6; *Indian Act 1876*, s. 25; *Indian Act 1880*, s. 36; *Indian Act 1886*, s. 38; and *Indian Act 1906*, s. 48.

[131] See also *Attorney-General v. De Keyser's Royal Hotel, Limited*, [1920] AC 508, at p. 569.

[132] The patent for Lot 28 was issued in 1857, predating this legislation, and was granted under the "Great Seal of Our Province of Canada". As per *Sappier*, at para. 58, only the Imperial Crown had the power to extinguish treaty rights pre-Confederation.

[133] See *Secretary of State of Canada Act*, S.C. 1868, c. 42. (31 Vict.), s. 6; *Indian Act*, S.C. 1876, c. 18 (39 Vict.), ss. 39-41; *Indian Act*, S.C. 1880, c. 28, ss. 50-52; *Indian Act*, R.S.C. 1886, c. 43, ss. 50-52; and *Indian Act*, R.S.C. 1906, c. 81, ss. 65, 70.

[504] The patents relating to the Disputed Lots did not operate to extinguish Saugeen's Treaty right to its reserve territory extending to the Disputed Beach, as they do not evince a plain and clear intention by the Crown to extinguish Saugeen's reserve interest in the Disputed Beach. They could not give the Crown never turned its attention to the issue of whether it was intending to extinguish a Treaty right to reserve land.

[505] Ontario and the defendant Landowners have not discharged their burden of proof in demonstrating that the Crown (Imperial or federal) evinced a clear and plain intention to extinguish Saugeen's Treaty right to reserve land that extends across the Disputed Beach.[134] Therefore, Saugeen's Treaty right to its unceded quasi-proprietary interest in the reserve extending to the Disputed Beach exists today.

[506] Furthermore, as Saugeen's Treaty right to its reserved land was not extinguished as at the date that the *Constitution Act, 1982* came into effect, it attracts constitutional protection under s. 35(1) of the *Constitution Act, 1982*, as well.

[507] I will next turn to the defences of the defendant Landowners and the counterclaim of the Attorney General of Ontario to determine whether a declaration that Saugeen has the exclusive right of use and possession of the Disputed Beach should be issued in the circumstances of this case.

3. Are the Defendant Landowners Bona Fide Purchasers for Value without Notice?

a) The Doctrine

[508] The Defendant Landowners assert that they are innocent *bona fide* purchasers for value without notice of the Disputed Beach, and as such their claims of ownership prevail over Saugeen's right of exclusive possession to its reserve territory.

[509] The Court of Appeal in *Chippewas of Sarnia* considered the application of this doctrine in the context of a significant land base, affecting approximately 2,000 home and business owners in the City of Sarnia, that was never formally surrendered but for which a Crown patent was issued to a Malcolm Cameron. However, the court found that the First Nation in that case had full knowledge of the Cameron transaction at the time of the sale, the sale was fashioned through the intervention of Indian Affairs with the active involvement of the Chief and leadership of the First Nation, the sale resulted in proceeds for the benefit of the First Nation (which it also knew at the time), and there was a lack of complaint by the First Nation about this known transaction for 150 years. The Court of Appeal stated that there was not a "whisper" of a complaint until the litigation started. In the meantime, the disputed Cameron land had been developed into part of the City of Sarnia. The court found that the First Nation had actual knowledge of this transaction and had effectively approved it, notwithstanding the lack of a formal surrender.

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[134] *Osoyoos*, at para. 47.

[510] In *Chippewas of Sarnia*, the Court of Appeal, at para. 303, quoted with approval the motion judge's statement that the equitable doctrine of innocent *bona fide* purchaser for value without notice:

> [I]s a fundamental aspect of our real property regime designed to protect the truly innocent purchaser who buys land without any notice of a potential claim be a previous owner … The defence … has been a fundamental element of our law for centuries. It protects the security of title to land acquired without notice of claim. It reflects a basic social value that protects the rights of innocent parties. Based in simple fairness, it provides a strong defence for the truly innocent purchaser.

[511] The Court of Appeal, at para. 309, emphasized the nuanced context of the application of this doctrine when balanced against competing Treaty land claims as follows:

> [T]he need to reconcile aboriginal title and treaty claims with the rights of innocent purchasers, are factors that should be considered on a case-by-case basis. It may well be that where the denial of the [A]boriginal right is substantial or egregious, a rigid application of the good faith purchase for value defence would constitute an unwarranted denial of a fundamental right.

[512] As an equitable doctrine, the court must look at all of the relevant factors and balance interests in a way that will best achieve justice as between the parties.[135]

[513] This doctrine is comprised of three elements. The Landowners, as the parties relying on this equitable defence, must prove:

(a) They are innocent *bona fides* purchasers;

(b) They are purchasers for value;

(c) They did not have notice of Saugeen's claim to the Disputed Beach prior to their purchase of their respective lots.

i. Notice Requirement

[514] For the reasons that follow, I find that the Town had actual notice of Saugeen's claim of entitlement to the Disputed Lots that it acquired by way of quitclaim deeds. However, the remaining defendant Landowners did not have actual notice.

[515] The equitable doctrine of *bona fide* purchaser for value with notice requires that the purchaser be innocent. More specifically, the purchaser must not have had actual notice of the

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[135] *Chippewas of Sarnia*, at para. 297.

party asserting a pre-existing interest in the land. Constructive notice is not sufficient to satisfy this element of the test.[136]

[516] The requisite notice does not require that the purchaser have complete details of the prior agreement, but rather that there be enough information to cause the prospective purchaser, acting reasonably, to make further inquiries into the validity of title of the subject property.[137] It is sufficient that the purchaser lacked actual notice that the vendor did not have "a legitimate claim to title" or was not the "true owner".[138]

[517] The burden lies on the subsequent purchaser to prove that they did not have the requisite notice.[139]

[518] In this case, I have found that the subject Crown patents purported to grant riparian properties to the original patentees. However, the focus of this inquiry is whether the current legal title holders of the Disputed Lots had actual notice that their immediate predecessors in title did not have legal clear title to convey in the first place.

(a) Private Landowners

(i) Twining Estate

[519] The late Barbara Twining inherited the Disputed Lot from her father, George Croshaw. Mrs. Twining died in 2014. Her son, David Twining, testified. At the time Croshaw purchased his lands at Sauble Beach, he apparently received a letter dated October 18, 1944 from the Superintendent of Reserves & Trusts to his immediate predecessor in title, Davidson, in which it was confirmed that "the lands of the Saugeen Reserve do not extend opposite the aforesaid lots" and "the Letters Patent which issued for the lots did not provide for a marine allowance along the shore of Lake Huron, the lots extending to the shore". David had seen this letter in the family files many years earlier and came into possession of it after his mother died.

[520] The Disputed Beach portion of the Disputed Lot is currently held by the Estate of Barbara Twining. David and his siblings are the beneficiaries of their mother's estate.

[521] By way of family history, George Croshaw, who had operated a restaurant in Windsor, bought the Beach Comber restaurant in Sauble Beach as an investment. David testified that, Mr. Croshaw bought "the whole block downtown basically" which included the restaurant, three cottages and ten cabins. Mr. Croshaw also built a stone house to live in, and later an arcade and

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[136] *Durrani v. Augier* (2000), 50 O.R. (3d) 353, at para. 61.
[137] *Stella Psarakis Medicine v. Gonnsen*, 2015 ONSC 25, 51 R.P.R. (5th) 77, at para. 22.
[138] *Durrani*, at para. 62.
[139] *Durrani*, at para. 60.

two stores between the restaurant and the stone house. Mr. Croshaw was active in the Sauble Beach business community and helped develop Sauble Beach into a tourist destination.

[522] The current Twining family members have used the property as a recreational property, complete with a cottage, and has always understood that the property included the beach down to the water. The property is comprised of about 630 feet in length and, depending on the depth of the water, approximately 150 to 300 feet in width.

[523] David confirmed that the intention is that he and his two siblings will jointly own the Disputed Lot once his mother's estate is settled. He currently lives in Sauble Beach from about the May 24th long weekend through to either Labour Day or Thanksgiving. The rest of the time he lives in Owen Sound.

[524] The root of title to this property is the 1897 Crown Patent issued to John Wesley Huff by Canada. George Croshaw purchased the lots from John Davidson and this deed references Plan 355. Croshaw died in 1973 and title of certain of the Sauble Beach properties passed to his wife, Rita Croshaw. By deed dated 1977, title to the Disputed Lot passed from George Croshaw's estate to his children, Barbara and Larry Twining.

[525] The only part of the Disputed Lot that is at issue in this litigation is the beachfront – not the arcade, cabins, cottage or stone house which are all located to the east (inland) of Lakeshore Boulevard North. According to David, the Twinings have operated the beachfront as a sand-based parking lot since 2005 to help raise funds to defend this litigation. David testified that his family earns about $4,000 per year from this endeavor.

[526] The beachfront has no improvements on it.

[527] David testified that the beach is viewed as a "family heirloom" and is "priceless" to them.

[528] While there is evidence from Saugeen, which I accept, that the First Nation issued many indications of their claim over the Disputed Beach, that notice (until the meeting with the Town in 1969) was directed to the federal Crown, and not to the private Landowners, including George Croshaw. There was no reason at the time of George Croshaw's purchase of this Disputed Lot that ought to have put him on inquiry as to the legitimacy of the title that Davidson purported to convey to him. Furthermore, there is no evidence suggesting that Croshaw had actual notice of Saugeen's claim of entitlement to the Disputed Beach comprising part of his Lot.

(ii) Lemon Family

[529] Alberta Lemon and her son, Rick, testified. At the time of testimony, Alberta was 98 years old and living in a retirement home from which she testified, virtually.

[530] Alberta Lemon inherited the Disputed Lot in question (referred to as the "Britannia" or the "cabin" and located at 103 Lakeshore Boulevard North) from her father, Norman McKee. The title deed is dated March 1990 and describes the property as a distance of 108.9 feet to the high-water mark of Lake Huron. Norman McKee and his spouse, Beatrice McKee, bought this property

from Lulu Thompson on July 24, 1953. It includes the beachfront property on the west side of Lakeshore Boulevard North, which is comprised of approximately 100 feet of shoreline.

[531] Like the Twining family, Alberta's father bought several properties at Sauble beach, but only one has the beachfront under the deed of title. Altogether, Norman bought four cottage properties and started a cottage rental business in or around 1964.

[532] The Britannia cottage is on the east or inland side of Lakeshore Boulevard North. The Disputed Beach is to the west of Lakeshore Boulevard North. The Lemon family has spent many summers, or parts thereof, at Britannia and celebrated many family occasions there. Alberta still goes to the Britannia whenever her son can take her there. She last visited Britannia on around 5 or 6 occasions in 2021, and she continues to keep the books for it (including any rental fees they received when the property was used as a parking lot or from the Town).

[533] Alberta testified that she would never sell the Britannia as she wants it kept in the family. She inherited this cottage (and another called the Lori Ann) in 1964 when her father passed.

She testified that she has received offers to purchase it in the past and turned them all down for this reason. It is not about the money to her.

[534] The Disputed Beach in front of the Britannia was rented to the Town for the past two years for use by sunbathers during the COVID-19 pandemic to permit social distancing.

[535] The Lemons used the Disputed Beachfront as a parking lot for around 24 years. Before that, they allowed sunbathers to use the beach at will (including to park cars), as long as they "behaved". If the sunbathers became unruly, they would be asked to leave.

[536] Britannia is used as a seasonal recreational property by the Lemons. Rick Lemon will inherit this property under his mother's will.

[537] The beachfront has no improvements on it.

[538] Rick testified that, if his family were to lose the beachfront, it would be "devastating" to all.

[539] Alberta specifically denied in cross-examination ever being apprised by anyone that Saugeen asserted a claim to the beach fronting Britannia. She was also unaware of her father being apprised of such a claim and believes she would have known if he had been.

[540] The root of title for this property is, like for the Twining family, a Crown patent issued by Canada to Huff.

[541] Based on the evidence, there was no reason why Norman McKee, from whom Alberta inherited title to the Disputed Lot, ought to have been put on notice of any reason leading a reasonable person to conclude that Thompson, David, or Huff before that had questionable title to the Disputed Beach comprising part of the Disputed Lot based on the Crown patent. McKee did not have actual notice of Saugeen's claim at the time he purchased this property.

(iii) Dobson

[542] David Dobson, the current owner of the Crowd Inn restaurant, located on part of the Disputed Beach, testified as a witness for the Town though he also delivered a Fresh as Amended Statement of Defence and Counterclaim in these proceedings.[140]

[543] His father Ross, and uncle Harold Dobson, initially leased this property from Davidson and then bought it some months later on August 23, 1948. His uncle served overseas during World War II, and on his return received a grant which was used to purchase what was then an unimproved beach property.

[544] The title deed from Davidson describes the property as one eighth of an acre, Lot 26, Concession D, Amabel Township. It does not describe how far west (to the lake) the property goes. The original Crown patent was also issued by Canada to Huff.

[545] Ross and Harold Dobson built the Crowd Inn restaurant together and operated it jointly until Harold decided to buy and operate a bar in Walkerton. Since 1989, Ross, together with his wife and, now David, operates this seasonal take-out restaurant.

[546] David bought out his uncle's share for $40,000 when he was 21 years old (in or around 1983). He was approximately 60 years old at the time of his testimony.

[547] David then bought out his father's share by way of a vendor take back mortgage of $325,000 in 1989

[548] The Dobsons made capital improvements to the Crowd Inn in the form of cribbing to protect the structure from high water years. David testified that in 2009 and 2010, he made a net profit of $30,000 and $35,000, respectively. He operates the restaurant during the warm weather months with his son, daughter-in-law and wife. For the rest of the year, he works as a library technician and his wife as a school teacher.

[549] Before purchasing this property, his uncle Harold wrote to the Superintendent, Reserves and Trusts, asking whether there was a marine or road allowance along the front of the beach. Superintendent D.J. Allan responded by letter dated June 15, 1948, "confirming the information previously given Mr. Davison [sic] on October 18th, 1944, namely, that the Letter Patent which issued for his property and other lots along Sauble Beach do not provide for a marine allowance along the shore of Lake Huron, the lots extending to the high-water mark".

[550] Subsequently, after reading a report in the newspaper that Saugeen was laying claim to the beach fronting their lot, Harold wrote to his M.P., Ross Whicher, by letter dated September 28, 1968. Whicher inquired and received a response from then Minister of Indian Affairs, Jean

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[140] Dobson withdrew his cross claim against the co-defendants.

Chretien (dated October 15, 1968), which stated that his department had not received any such claim from Saugeen.

[551] Harold Dobson then received a letter dated November 15, 1968, from H.T. Vergette, Head of Land Surveys and Titles Section, stating that his department was unaware of any claim being made by Saugeen to the "lakeshore lands fronting your property" or any "evidence of any continuing Indian interest in Lot 26, concession D, Township of Amabel". Further, Vergette confirmed that the subject Letters Patent "[was] based on Rankin's Plan of Survey in 1856 and that according to that plan "Lot 26, Concession D, extends to the ordinary high water mark of Lake Huron".

[552] The next notice of Saugeen's claim received by the Dobsons was again via newspaper prompting Harold to write a letter dated November 6, 1976 to M.P. Crawford Douglas, insisting that their rights to the beachfront property be protected as "good faith" purchasers. Douglas made inquiries and received a letter dated December 30, 1976 from Warren Allmand, then Minister of Indian and Northern Affairs, advising Douglas to assure his constituents that the department had received no "formal claim to this land" from Saugeen. The letter went on to state, in part,

> that should this matter become a claim against the Government of Canada, the interests of everyone affected by it will be considered. While we are committed to correcting past injustices by meeting our lawful obligations to the Indian people, through the process of resolving claims, we certainly do not intend to be unfair to other Canadians.

[553] David Dobson testified that he does not live in Sauble Beach. He owns another restaurant in the Town called Dobson's Restaurant, but this is not located on any of the Disputed Lots. He allowed dogwalkers to use his beachfront for a daily fee between 2020 and 2021 because, according to him, people without dogs have other areas to go.

[554] David Dobson testified that Saugeen Chief Anoquot's testimony that Saugeen would lease this land back to him to operate the Crowd Inn was not an acceptable outcome. He testified that it was his intention to leave the restaurant to his son and that he had no intention of selling it. On cross-examination, however, he conceded that in an email dated March 10, 2020, sent to various people, he wrote that he wanted to sell his property and get out of the restaurant business but (referring to this lawsuit) "this injustice has handcuffed me, forcing me to run a business that is becoming more demanding to my aging body". Mr. Dobson attempted to explain this email by saying he was under duress when he wrote it, and that at the time he felt that because of this litigation he could not sell the property to his son.

[555] The root of title in this Disputed Beach Lot is again established by the Crown patent.[141] In this case, the Dobsons specifically made inquiries of the Department of Indian Affairs prior to purchasing this property as to any potential right of ways on the beach and were assured that the patent gave good title without any marine or road allowance to the high-water mark. The response

[141] Issued to John Wesley Huff.

was silent as to any claim by Saugeen or any potential reserve territory bordering this lot along the shoreline. Indeed, in response to subsequent inquiries by the Dobsons specifically referencing claims by Saugeen, they were given repeated assurances by Canada that there is no such "formal" claim.

[556] Mr. Dobson's evidence demonstrates that his father and uncle had no actual notice of claim that put into question the title of his lot as a riparian property prior to his ownership or prior to the acquisition by his father and uncle. Whenever such claims came to their attention, via the media, they made inquiries and were given assurances by the federal Crown.

(iv) The Town

[557] The Town is the successor to Amabel Township. Throughout 1970 and 1971, Amabel acquired quitclaim deeds for consideration of $1.00 and other good and valuable consideration to many of the Disputed Lots (north of Lot 25, Concession D) with a view to developing the beach as an economic engine for its businesses as a tourist destination. The quitclaim deeds were acquired from individuals who might have a claim to the Disputed Lots in question.[142] By in or around 1971, the Town, as successor to Amabel, acquired formal title through quitclaim deeds to the beachfront part lots from Lots 26 to 34, Concession D, Amabel Township, too much of the Disputed Beach and beyond, extending about two miles along Sauble Beach west of Huron Lane (now Lakeshore Boulevard North) north from Hepworth Road to Grand Avenue (with the exception of the Twining, Lemon and Dobson Disputed Lots).

[558] The interest in developing Sauble Beach as a tourist destination became serious in the late 1960s and was inspired by the success of Saugeen's development of the southern beach of its reserve as a tourist destination.

[559] Prior to acquiring the quitclaim deeds, Amabel had been limited in its ability to develop this beach; for example, it constructed inadequate public washrooms on the road allowances in the 1950s and 1960s. Once it acquired the beach properties through the quitclaim deeds, the Town dedicated the lands to public beach with free access and invested monies in improvements such as a gatehouse, washrooms, toll gates, fencing, parking areas and grading and levelling.

[560] The Town's root of title to the Lots are in patents issued by the Imperial Crown (Province of Canada) in 1857 to James Henderson regarding Lot 28, Concession D, and by Canada for the balance of the Disputed Lots.

[561] The documentary evidence demonstrates that a meeting was held between Saugeen's Band Council and Amabel Township's Council and the Parks Committee on September 8, 1969. At that meeting, in response to Amabel's announced desire to develop a public beach at the Disputed

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[142] A quitclaim deed is a "deed that conveys a grantor's complete interest or claim in certain real property but that neither warrants nor professes that the title is valid": Black's Law Dictionary, 11th ed (2019).

Beach location, Saugeen advised of its claim that the Disputed Beach was part of its reserve territory. As a result, Amabel agreed that it would postpone any development plans pending a determination of Saugeen's claim.

[562] In a letter dated October 3, 1969, A.D. Cameron, who was the federal Superintendent for the Bruce Indian Agency, wrote to the Regional Superintendent of Economic Development, Ontario, concerning this meeting and stated:

> The only comment I wish to make concerns the outcome of the meeting held September 8th, 1969, regarding the property in question [Sauble Beach Park Project]. It was decided by the Indian Band Council and the Amabel Township Council, and Parks Committee that no development of North Sauble could take place until such time as the Indian Reserve easterly boundary is either re-surveyed or established to everyone's satisfaction. The necessary action has been taken by the Band Council per Resolution No. 26 which has been processed by this office.

[563] Both of the expert historians agreed that Amabel was aware of Saugeen's claim in relation to the Disputed Beach as being part of IR 29 by the date of this September 1969 meeting at the latest.

[564] This meeting and its outcome was also reported in the newspaper, London Free Press, on October 3, 1969, in an article entitled "Beach Plan remains 'high, dry'".

[565] Angela Cathrae testified as the Town's representative. She is the Director of Legislative Services and the Town Clerk, reporting to the Chief Administrative Officer. She has worked for the Town since 2005.

[566] The Town led no evidence with respect to whether it's predecessor, Amabel Township, lacked knowledge of Saugeen's claim that the Disputed Beach constituted part of its reserve, prior to acquiring its quitclaim deeds over the Disputed Lots. This lack of knowledge was highlighted in the cross-examination of Ms. Cathrae concerning a review of some of the quitclaim deeds which, unbeknownst to her, referenced the wrong Plan of Subdivision in the property description.

[567] Furthermore, many of the quitclaim deeds do not expressly reference riparian boundaries. Ms. Cathrae also agreed that she could not say whether Amabel was aware that Saugeen was claiming an interest in these beachfront properties when Amabel acquired them.

[568] Ms. Cathrae stated that the Town has lost the institutional knowledge that Amabel Township had with respect to the circumstances surrounding the quitclaim deeds, and for which the Town is the successor in title (through an amalgamation which occurred on January 1, 1999). She could not say whether or not Amabel believed it was acquiring title to the water's edge. Ms. Cathrae testified she could not speak to what Amabel knew or did not know at the time it acquired the Disputed Lots.

[569] Ms. Cathrae admitted that any investments and developments made by the Town since the commencement of Canada's lawsuit in 1990 were made with the knowledge of Saugeen's claim to the Disputed Beach as forming part of IR 29.

[570] The Town generally relies on Saugeen's failure to bring a formal claim before the court or register a caution on title prior to Amabel's acquisition of the Disputed Lots as establishing its *bona fides* and lack of knowledge of Saugeen's claim

[571] Ms. Cathrae testified that Sauble Beach "means everything" to the Town. She compared it to Niagara Falls without the falls and Wasaga Beach without the beach and stated that it has become a community centre and economic driver for the Town. She stated it is a "landmark" and critical to the Town as a tourist destination.

[572] The Town led no evidence with respect to whether it's predecessor, Amabel Township, lacked knowledge of Saugeen's claim that the Disputed Beach constituted part of its reserve territory, prior to acquiring its quitclaim deeds.

[573] Rather, the Town relies on correspondence and documentation with provincial authorities, notably the conservation authorities Branch of the Department of Energy and Resources Management (a submission for funding to assist with the improvements to the beach being made by the Town) in 1993 and a letter from the Town to the Department of Municipal Affairs dated August 25, 1970. However, neither of these documents refers to Saugeen and/or its claim of exclusive possession to the Disputed Beach. There was no documentary evidence adduced reflecting inquiries made by the Township of Amabel with the federal Crown departments responsible for Indian Affairs or surveys of federal Crown lands.

[574] The Town has failed to discharge its burden to establish that it (through its predecessor) lacked actual notice of Saugeen's claim when it acquired the subject quitclaim deeds over the Disputed Lots traversing the Disputed Beach. Having proceeded to acquire the quitclaim deeds one year after the meeting with Saugeen in which the Town agreed it would take no further steps to develop the Disputed Beach suggests that the Town was not "innocent", either. The Town's predecessor had actual notice of Saugeen's claim of entitlement to the Disputed Beach Lots, and this notice ought to have given rise to concerns about the legitimacy of title prior to acquiring title. Furthermore, the quitclaim deeds are not like ordinary deeds of title. By their nature, they provided no promise to Amabel that it was buying valid and unencumbered title to these Disputed Lots.

[575] The Town's reliance on the defence of *bona fide* purchaser for value without notice fails at this stage of the analysis.

(b) Are the Landowners Purchasers for Value?

(i) Private Landowners

[576] Saugeen challenges the proposition that individuals who acquire an interest in land through inheritance can establish that they are purchasers for value. As such Saugeen submits that Lemon and Twining fail to satisfy this branch of the defence.

[577] Saugeen relies on case law which holds that a "volunteer" cannot satisfy the value element of this defence, relying on cases such as *Bao v. Mok,*[143] and *Oleny Estate v. Great-West Life Assurance Co.*[144] A "volunteer" is someone "who claims an interest in property under a transfer for which he has not given valuable consideration".[145]

[578] Saugeen submits that this volunteer principle should also extend to those who purchase a property interest for nominal consideration.[146] Therefore, the quitclaim deeds acquired by the Town for $1.00 and Dobson's payment of $3.00 plus "natural love and affection" also fail to satisfy the value requirement of this defence.

[579] I do not accept these arguments with respect to Dobson and the Town, however, I do accept them in relation to Twining and Lemon for the following reasons.

[580] The evidence establishes that Dobson assumed a vendor take back mortgage in the sum of $325,000 when he bought out his father's share, and before that $40,000 when he bought his uncle's share of the business. This included the Disputed Beach. Accordingly, Dobson paid valuable consideration for title to this Disputed Lot and satisfies the value element of this test.

[581] In addition to paying nominal monetary consideration, the Town provided Releases to the title holders of the properties under the quitclaim deeds that provided that the Town would assume any and all outstanding liabilities and claims against the subject Disputed Lots. As stated by Ziff, at p. 522, valuable consideration means "some value…in money or money's worth" must be provided by the purchaser. I find that the provision of these releases constitutes valuable consideration beyond a nominal amount in the circumstances of this case and satisfies the value element of this defence.

[582] However, in relation to Twining and Lemon, they acquired title by way of a bequest under Wills.

[583] Saugeen relied on the cases of *Benzie v. Hania,*[147] and *Clayton v. Garrett (Guardian ad litem of).*[148]

[584] In *Benzie*, the issue was whether the heirs of property under a Will were bound to a pre-existing assignment of timber rights in that property. The Court of Appeal ruled that the heirs

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[143] 2019 ONSC 915, at para. 135
[144] 2014 SKCA 47, at para. 66.
[145] *Bao*, at para. 135.
[146] *Glenegl v. Wile*, 2005 NSCA 4, 248 D.L.R. (4th) 427, at para. 23; *Simcoff v. Simcoff*, 2009 MBCA 80, 245 Man. R. (2d) 7, at para. 35; *Collins (Re)*, 2009 CanLII 17348 (Ont. S.C.), at para. 18; and Bruce Ziff, *Principles of Property Law*, 7th ed (Toronto: Thomson Reuters, 2018) at p. 522.
[147] 2012 ONCA 766, 112 O.R. (3d) 481, at para. 37.
[148] 1994 CarswellBC 2343, at para. 36 (WL).

were bound to that agreement. The court, at para. 37, also ruled that heirs are "volunteers" and therefore did not pay valuable consideration for the property:

> But, the question becomes, if Michael's estate conveys the Property to her heirs, will they be bound by the Agreement?...In my view, they would be. As I have explained, the estate would be bound to deal with the Property in accordance with the Agreement. Therefore, the estate would pass title to the Property to the heirs subject to the agreement. Heirs do not fall into the category of a bona fide purchaser for value without notice. Not only do they have actual notice of the Agreement in this case, as heirs they are volunteers in the sense that they give no consideration for title to the Property. [Emphasis added.]

[585] Based on *Benzie*, as Twining and Lemon respectively acquired their title to the Disputed Lots by way of inheritance, they did not pay valuable consideration and hence are disentitled from relying on the defence of *bona fide* purchaser for value without notice.

(c) Balancing of Interests under the Principle of Reconciliation in Guiding the Court's Discretion in Applying this Equitable Doctrine

[586] Only Dobson has established that he has met the constituent elements as a *bona fide* purchaser for value without notice. However, having established these elements does not end the inquiry.

[587] In *Chippewas of Sarnia*, the Court of Appeal held, at para. 309, that "the need to reconcile aboriginal title and treaty claims with the rights of innocent purchasers, are factors that should be considered on a case-by-case basis". In other words, whether the court ought to deny land-based Treaty rights, protected by the *Constitution*, in favour of an innocent purchaser is a matter of exercising discretion based on the consideration of reconciliation. The court went on to state in the same paragraph, "[i]t may well be that where the denial of the aboriginal right is substantial or egregious, a rigid application of the good faith purchaser for value defence would constitute an unwarranted denial of a fundamental right".

[588] A relevant consideration in the exercise of my discretion, and whether a "rigid" application of this equitable defence is warranted, is the fact that Crown patents, while a fundamental aspect of our property regime relied upon as a guarantee of good title, are not foolproof. This is evident in the fact that, at common law, patents could be challenged by way of a writ of *scire facias* as recently as the 19th century.[149]

[589] In addition, there has been legislation first in the Province of Canada and then after Confederation that allowed for the correction, including in a description of the land, to void the patent and issue a corrected patent for reasons including a false survey.[150] These legislative

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[149] *Chippewas of Sarnia*, at para. 250.

[150] See for example, section XVIII of the *Act to amend the Law for the Sale and Settlement of the Public Lands.* Section XIX-XX provided that the Governor in council had power to issue new letters patent where the same land is

provisions were in existence at the time each of the Disputed Lots were patented. While these provisions may not have assisted Saugeen at the time, the fact that there was legislation in place allowing for the correction of erroneous patents in relation to "Indian" land speaks to the fallibility of patents.

[590] Furthermore, in the case at bar, unlike in *Chippewas of Sarnia*, Saugeen have been anything but silent over the past 150 plus years about the First Nation's belief that the Disputed Beach was part of its reserve. Indeed, some of the landowners acknowledged that over the past 50 years, they became aware of Saugeen's claims to the Disputed Beach in a general way.

[591] In addition, the interests of the Landowners, and particularly Dobson, must be balanced against those of Saugeen. On one hand, the interests of the private landowners other than Dobson relate to vacant beach and not their cottages. With respect to Dobson, his interest is in relation to a seasonal take-out restaurant, which as recently as 2020 he was anxious to sell. I do not accept his explanation that he wrote his 2020 email under duress – no evidence of duress was led. I also do not accept his explanation that he only wanted to sell because he could not in good conscience sell the property to his son while the lawsuit was hanging over his head. His email speaks to a general desire to sell the restaurant business and property, not a desire to sell it to his son.

[592] In terms of the Town, while the Town is desirous of having control over the beach to enhance its economic prosperity, it knew that Saugeen was advancing a claim and refused to relinquish it when the Town requested the First Nation do so in 1969. At that same meeting, the Town agreed not to advance any plan to acquire and develop the beach until Saugeen's claim had been resolved. It then turned around and acquired as many quitclaim deeds as it could in direct contradiction to its representation to Saugeen.

[593] Against these interests, is Saugeen's constitutionally protected Treaty right to exclusive possession of its reserve territory – all of it – until otherwise surrendered. The Supreme Court of Canada in *Southwind*,[151] and in *Guerin v. The Queen*,[152] recognized that a reserve interest is one that is entitled to high protection and that its loss cannot be properly compensated by ordinary damages. The Court of Appeal in *Chippewas of Sarnia*, at para. 275, affirmed that a reserve interest is a constitutionally protected right (provided, as in this case it was in existence at the time of the proclamation of s. 35(1) of the *Constitution Act, 1982*).

[594] I acknowledge and accept that the Lemon and Twining families have deep sentimental attachments to their properties. However, those sentimental attachments were largely expressed in terms of family time at their respective cottages and these cottages are not at risk. As for Dobson, while he also expressed a sentimental attachment to his restaurant, it is a seasonal business

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granted to different parties as a result, inter alia, of a "false survey". Similar provisions permitting a cancellation and reissuance of patents are found in the *Indian Act, 1876*, ss. 39-41, Indian Act 1880, ss. 50-52, Indian Act 1906, ss 65 and 70-71.

[151] At para. 63.

[152] [1984] 2 S.C.R. 335, at p. 381.

endeavour, and he operates another restaurant in Sauble Beach. In 2020, he was apparently anxious to sell it.

[595] Balanced against these important attachments is Saugeen's attachment to its own land. This attachment was eloquently expressed by Chief Anoquot. The reason why the Disputed Beach is important is because of the cultural connection between his people and the land and water, which is sacred. Moving to a different location is not an option because of this sacred relationship to their land and water. Our courts have long recognized the deep cultural connection that Indigenous Peoples have with their land, including most recently by the Supreme Court of Canada in *Southwind*, at para. 63.

[596] Chief Anoquot also testified that getting *Chi-Gmiinh* back is a recognition of the Treaty and would honour it. He testified that this would be a step towards reconciliation.

[597] Furthermore, Chief Anoquot testified that if the beach is returned to Saugeen, the First Nation will work with the municipal government and will keep the beach open to the public. Of note, the First Nation's leasing program is the largest land leasing program in Ontario and is an important economic driver for Saugeen. Chief Anoquot spoke of the collaboration between his community and Southampton and Owen Sound, including through the refurbishment of an Amphitheatre. Since the early 1970s, Saugeen has permitted free day visits to its south beach for the public. This evidence was unchallenged.

[598] On the other hand, the defendant Landowners may well have a claim for compensation against the federal Crown.

[599] Chief Anoquot testified that if the Disputed Beach is returned to Saugeen's reserve, it is the intention of the First Nation to maintain public access to the beach – only under the stewardship of the First Nation rather than the Town. This intention was a repetition of the same intention voiced by former Chief Mason to the Township of Amabel, Ontario and Canada in 1976.

[600] Mark Conway was the Town's expert witness who was qualified as a land use planner and land economist with special expertise in the development of public waterfront communities. He opined that if title to the beach were transferred to a non-public entity, there would be a significant disruption to the sense of place because the beach would no longer be a communal asset. He opined that having Saugeen assume management of the beach would result in uncertainty as to how it would be managed in the future, leading to a loss of economic development. However, he testified that he could not quantify that impact.

[601] Also, when challenged under cross-examination, he admitted that he did not consider in his analysis that Indigenous control of the beach might actually prove to make it more attractive for tourism investment. He also admitted that he had not considered other such waterfront projects that are being managed by First Nations. He acknowledged that there were positive examples of well-run waterfront projects by First Nations. He also acknowledged that Saugeen already rents approximately 3000 cottages on its existing (southern) reserve beachfront and lakeshore. In the end, however, Mr. Conway would not say that it was possible Sauble Beach could be better managed by Saugeen than by the Town.

[602] I found Mr. Conway's opinion to be unpersuasive, given his rigidity in maintaining that only by having the beach under the Town's stewardship would it give rise to associated economic prosperity. He did not consider successful, Indigenous-managed waterfront projects and he lacked particulars concerning the likely economic impact if title to the Disputed Beach is returned to Saugeen. Mr. Conway also did not consider the fact that Saugeen was the first to develop its beach and lakeshore into a cottage industry (before the Town), or the economic impact of Saugeen's beach development to the surrounding municipal areas. Implicit in Mr. Conway's analysis was a bias against Indigenous-managed waterfront projects.

[603] I have considered Saugeen's interest in its reserve territory, its connection to the land as part of its cultural identity, its long-standing efforts to have the reserve boundary re-established or re-surveyed and its long-standing assertions that the Disputed Beach is part of their reserve balanced against the claims of the defendant Landowners, including Dobson. Fairness dictates that a rigid application of the doctrine of *bona fide* purchaser without notice would render an injustice in the circumstances of this case.

[604] Unlike the situation in *Chippewas of Sarnia*, the subject patents here were issued on the basis of a survey that was not conducted in accordance with the honour of the Crown. The Crown should not have approved Rankin's survey in which Rankin determined to resolve a latent ambiguity in a manner that prejudiced Saugeen and precluded any consultation with Saugeen regarding this alteration of the northern terminus of the east boundary from what was stipulated in Treaty 72. Unlike the situation in *Chippewas of Sarnia,* the private and Town land interests are far less in number and magnitude. Unlike the situation in *Chippewas of Sarnia*, I find that a denial of Saugeen's constitutionally protected Treaty right to its reserve territory would amount to an egregious and substantial denial.

[605] I therefore conclude that it would be inequitable to apply the defence of *bona fide* purchaser without notice to deprive Saugeen of their reserve interest in the Disputed Beach. Under the overarching principle of reconciliation in the circumstances of this case.

4. Statute of Limitations – Is Saugeen Barred from Advancing Its Claim?

[606] The Defendant Landowners submit that the action is essentially for the recovery of land from them and as such the governing limitation period to have commenced this action is set out in ss. 4 and 15 of the *Limitations Act, 1990*. These defendants note that if the action against them is barred by operation of the limitation period, this will not affect the claims against the Crown which are based in fiduciary duty. [153] The *Limitations Act, 1990* did not set out any fixed limitation period for breach of fiduciary duty, and thus the equitable limitation period defences will apply.

[607] The Defendant Landowners also submit that the *Limitations Act, 1990* does not purport to extinguish a cause of action, but rather merely bars an action from proceeding. Furthermore, the

[153] While Ontario plead the Limitations Act, 1990, Ontario did not advance this defence at trial.

fact that Saugeen has fashioned its remedy in the form of a declaration does not avoid the *Limitations Act* where the substance of what is being requested is the recovery of land.

[608] For the reasons that follow, I find that s. 4 of the *Limitations Act, 1990* setting out a ten-year limitation period for actions claiming recovery of land does not apply to a claim for a return of reserve land. Furthermore, I find that even if this claim amounts to a "recovery of land", the limitation period does not apply since such an application would be tantamount to extinguishing a constitutionally protected Treaty right. Section 15 plainly states that at the expiry of the limitation period in s. 4, the interest in land of the aggrieved party is extinguished. However, this statute does not evince a plain and clear intention on the part of the Legislature to extinguish this "Aboriginal" claim as relates to actions involving reserve land and, therefore, does not apply under this alternative analysis.

[609] The Landowners relied upon the following provisions of the *Limitations Act, 1990*, under Part II Real Property:

> **Limitation where the subject interested**
> s. 4 No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.
>
> **Extinguishment of right at the end of the period of limitation**
>
> s. 15 At the determination of the period limited by this Act to any person for making an entry or distress or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress or action, respectively, might have been made or brought within such period, *is extinguished*.

[610] Of note, by amendment of S.O. 2002, chapter 24, section 26, Parts II and III of the *Limitations Act* (R.S.O. 1990, chapter L 15) were repealed. The remaining portion of the Act (the definitions and Part 1) deals exclusively with real property limitations. To reflect this narrowed scope, the Act was renamed the *Real Property Limitations Act*. The *Limitations Act, 2002*, deals with limitation periods other than those affecting real property.

[611] Of further note, the *Limitations Act, 2002* provides that:

> s. 2(1) This Act applies to claims pursued in court proceedings other than,
>
> (a) proceedings to which the Real Property Limitations Act applies;
>
> (e) proceedings based on the existing aboriginal and treaty rights of the aboriginal peoples of Canada which are recognized and affirmed in section 35 of the Constitution Act, 1982;

> 2(2) Proceedings referred to in clause (1)(e) and (f) are governed by the law that would have been in force with respect to limitation of actions if this Act had not been passed.

[612] As found by the Supreme Court of Canada in *M(K) v. M(H)*,[154] if the *Limitations Act 1990* did not list a cause of action, then no statutory limitation period applies under that statute.

[613] A provincial limitations statute can apply to bar Indigenous claims from proceeding in certain circumstances.[155] In *Wewaykum*, two First Nations made claims to each other's reserve and claimed declaratory relief and equitable compensation from the federal Crown for breach of fiduciary duty. The Court found there was no claim to title based on an existing Aboriginal or Treaty right.

[614] In *Wewaykum*, at paras. 121-122, the Court described statutes of limitation as statutes of repose, referring, in part, to the fact that with the lapse of time witnesses and key historical documents may be lost. This reflects an element of fairness to those who would be defendants and a recognition that it is appropriate that, at some fixed point in time, those potential defendants no longer have to look over their shoulders for potential claims (*Peixero v. Haberman*[156]). At the same time, the Court, at para. 123, recognized that historical grievances should not be ignored.

[615] In *Canada (Attorney General) v. Lameman*,[157] a key determination was whether the particular Indigenous claim in question was captured by the relevant limitations statute. There, the claims relating to damages were found to be captured by the *Limitation of Actions Act* but the claim for accounting of the proceeds of the sale of the First Nation's reserve was not.

[616] I further accept that, as a general principle, statutes of limitation have been interpreted as barring a claim, as opposed to extinguishing causes of action.

a) Analysis

[617] The key consideration for resolution of this issue is a determination of whether or not ss. 4 and 15 of the *Limitations Act, 1990* apply to a claim seeking the return of reserve land which is a Treaty right and has constitutional protection. Furthermore, if the return of reserve land is a "recovery of land" within the meaning of s. 4, would the application of the statute effectively extinguish this interest in reserve land founded in Treaty 72? If so, can a statute effectively extinguish a constitutionally protected Treaty right to reserve land?

[618] In *Restoule*, the Court of Appeal set out a helpful framework for analyzing the scope and ambit of the 1990 *Limitations Act* when applied to Treaty rights. Justice Hourigan, writing for the majority on this point, considered whether the limitation period for breach of contract, specialty or

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[154] [1992] 3 S.C.R. 6, at paras. 69-71. See also *Restoule*, at para. 645.
[155] *Wewaykum*, at p. 79.
[156] 1997 CanLII 325 (SCC), [1997] 3 S.C.R. 549.
[157] 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 12.

action of account applied to a Treaty claim. In finding that these causes of action did not capture a breach of Aboriginal Treaty right, Hourigan J. concluded at para. 662:

> The legislature chose not to reference Aboriginal treaties in the 1990 *Limitations Act,* although it did so in the 2002 *Limitations Act*. This is strongly suggestive of an intention not to impose a limitation period for claims based on a breach of an Aboriginal treaty. Ontario's arguments that the legislature intended to cover Aboriginal treaty claims under the terms "contract" "specialty" or "action of account" are unpersuasive. As discussed above, these claims are distinct in law from one based on a breach of an Aboriginal treaty.

[619] In reaching this conclusion, Hourigan J. undertook a statutory interpretation analysis. I have done the same to determine whether the limitation period for "recovery of land" arising from breach of an Aboriginal treaty right is captured by s. 4 of the 1990 *Limitations Act.*

b) Does s. 4 Apply to Claims Seeking Return of Reserve Land?

[620] The issue is whether ss. 4 and 15 apply to reserve land created by Treaty and protected by s. 35(1) of the *Constitution Act, 1982* where the remedy sought is the recovery of the reserve land from the defendant Landowners. The ancillary issue is whether, by framing the relief as a declaration, the First Nation avoids ss. 4 and 15, assuming those provisions otherwise apply.

[621] Section 4 of the *Limitations Act, 1990* does not expressly impose a limitation period for breach of Treaty rights. Justice Hourigan in *Restoule*, at paras. 645 and 646, found that this was a deliberate choice by the Legislature, having reference to the fact that the Legislature did reference Aboriginal treaty claims in the 2002 *Limitations Act*.

[622] While *Restoule* was dealing with whether a Treaty constituted a contract, specialty or accounting, within the meaning of the 1990 *Limitations Act*, the analysis is equally apt here. In concluding that a Treaty does not constitute a mere contract or a specialty and is a unique form of agreement, the Court emphasized the *sui generis* nature of a Treaty as recognized by the Supreme Court of Canada in many cases.[158] The court also agreed with the motions judge that the plaintiff's claim for equitable compensation was not an action of account.

[623] Reserve land is not the same land interest as is privately or Crown owned land. It arises from a Treaty in which the First Nation surrendered vast traditional territory in exchange for protection from encroachment by settlors onto the unsurrendered land which became its reserve territories.

[624] Reserve land has a *sui generis* nature as well, owing to the fact that legal title to it remains vested in the federal Crown, with a right of exclusive possession reserved to the First Nation under the terms of the Treaty. The jurisprudence has characterized the First Nation's interest in reserve

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[158] See e.g., *Sioui*, *Badger*, *Sundown,* and *Marshall*

land as a quasi-proprietary interest that reflects "an obligation that arose out of treaties between the Crown and Indigenous Peoples" (*Southwin*d, at para. 63).

[625] For these reasons, I find that a claim seeking return of reserve land that was never surrendered is not captured by s. 4 of the *Limitations Act* as "recovery of land". As a result of my finding, it is not necessary to consider whether the framing of the relief as declaratory would avoid the limitation period if it otherwise applied.

c) Does Application of the Limitations Act Extinguish Saugeen's Treaty Interest in IR 29?

[626] Furthermore, and in any event, for the reasons reviewed earlier in the judgment under the law of extinguishment, s. 4 does not evince a clear and plain intention on the part of the Ontario government to extinguish Saugeen's Treaty right to "recover" its full reserve land.[159] Section 15 makes it clear that the effect of barring the proceeding due to the expiry of the limitation period set out in s. 4 results in the aggrieved party's title or interest being extinguished.

[627] There is no indication in the 1990 *Limitations Act* that the provincial Crown intended to extinguish Aboriginal interest in reserve lands arising from a breach of a Treaty entitlement. As noted in *Sappier*, there must be a clear and plain intention on the part of the Crown to extinguish the specific Treaty right in question evident in the subject legislation itself. This requires strict proof of the fact of extinguishment.[160]

[628] In *Chippewas of Sarnia*, the Court of Appeal, at para. 242, upheld the motion judge's finding that Ontario's *Limitations Act* could not be used to effectively extinguish constitutionally protected Treaty rights particularly as relates to reserve territory or Aboriginal title.

[629] The motions judge in *Chippewas of Sarnia*, reversed by the Court of Appeal but not on this point, framed the statutory limitations analysis as follows:

> The right of exclusive possession is at the core of the Indian title of the plaintiffs in the disputed lands. It is also explicitly protected by the works of [the] Treaty…
>
> To bar the possessory remedy, as a practical matter, extinguishes the entire underlying aboriginal title. Even if the Indian title has somehow been "crystalized" into an effective remedy against the Crown for breach of fiduciary duty…the practical result is that the land itself is gone forever just as if the Aboriginal title had been extinguished by valid surrender. The barring of the remedy effectively precludes, forever, Indian use and possession of the land. It effectively destroys forever the very thing that is at the core of Indian title and the very thing that is expressly guaranteed by the words of [the] Treaty…

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[159] *Badger*, at para. 41; *Osoyoos*, at para. 47.
[160] *Badger*, at para. 41.

> To bar the remedy of possession is to make hallow the secured right of ownership. To bar the remedy of possession is to destroy the aboriginal title by solemn Crown treaty. Without a remedy against the owners, the aboriginal land title means nothing and the treaty guarantee has no value. Aboriginal title cannot exist as a right in the air without a remedy for its vindication on the ground.
>
> To take away forever the right to regain exclusive possession which is at the core of the Indian title and the treaty protection in these lands is not simply to abrogate or abridge or infringe or suspend or diminish or regulate or circumscribe or abate those rights. To apply s. 4 of the [1990 Limitations Act] to bar the plaintiff's right of recovery to these lands is to extinguish their treaty-protected Indian title in the lands.[161]

[630] Furthermore, Saugeen's Treaty right to its full reserve is protected under s. 35(1) of the *Constitution Act 1982*. As stated in *R. v. Van der Peet*:

> Also, the Crown could extinguish aboriginal rights by legislation prior to 1982, but its intention to do so had to be clear and plain. Therefore, the regulation of an aboriginal activity does not amount to its extinguishment (*Sparrow*, at p. 1097) and legislation necessarily inconsistent with the continued enjoyment of aboriginal rights is not sufficient to meet the test. The "clear and plain" hurdle for extinguishment is, as a result, quite high: see *Simon*, *supra*. The onus of proving extinguishment is on the party alleging it, that is, the Crown. [Emphasis in original.] [162]

[631] Similarly, in *Delgamuukw*, at para. 180, Lamer C.J. (writing for the majority) noted:

> What must be answered, however, is whether the same principle allows provincial laws of general application to extinguish aboriginal rights. I have come to the conclusion that a provincial law of general application could not have this effect, for two reasons. First, a law of general application cannot, by definition, meet the standard which has been set by this Court for the extinguishment of aboriginal rights without being *ultra vires* the province. That standard was laid down in *Sparrow*, *supra*, at p. 1099, as one of "clear and plain" intent. In that decision, the Court drew a distinction between laws which extinguished aboriginal rights, and those which merely regulated them. Although the latter types of laws may have been "necessarily inconsistent" with the continued exercise of aboriginal rights, they could not extinguish those rights. While the requirement of clear and plain intent does not, perhaps, require that the Crown "use language which refers expressly to its extinguishment of aboriginal rights" (*Gladstone*, *supra*, at para. 34), the standard is still quite high. My concern is that the only laws with the sufficiently clear and plain intention to extinguish aboriginal rights would be laws in relation to Indians and Indian lands. As a result, a provincial law could never, *proprio vigore*, extinguish

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[161] 1999 CarswellOnt 1244, at paras. 460-463.
[162] [1996] 2 S.C.R. 507, at para. 133.

aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction.

[632] As a constitutionally protected, Treaty-based reserve land right, the provincial limitations statute cannot defeat it by way of the statute of limitations which is a law of general application.

[633] Saugeen's action is not time-barred nor is the interest in the reserve land extinguished by operation of ss. 4 and 15 of the *Limitations Act, 1990*. While the various defendants pleaded other provisions of the 1990 *Limitations Act*, they were not advanced at trial.

5. Equitable Doctrine of Laches

[634] The Defendant Landowners also submit that Saugeen's claims as against them are barred by the equitable doctrine of laches.[163]

[635] Laches is only available as a defence to equitable claims and relief, including those brought by First Nations, such as for declaratory relief.[164] Mere delay is insufficient to bar a claim in equity or for equitable relief.[165]

[636] The Supreme Court of Canada in *M(K),* at pp. 76-77, set out two branches of the test as follows: (a) the plaintiff must have delayed the commencement of the action, notwithstanding knowledge of the facts necessary to give rise to her claim, such that the delay amounts to waiver of or acquiescence to the wrongful conduct and(b) the defendant must have suffered corresponding prejudice or altered his position in reliance on the acquiescence to his detriment such that it would be unjust to require him to respond or would make the prosecution of the action unreasonable.[166]

[637] In *M(K)*, at p. 77, the court described acquiescence as "after the deprivation of her rights and in the full knowledge of their existence, the plaintiff delays" leading "to an inference that her rights have been waived". The plaintiff must know of the facts that give rise to her claim.

[638] The burden of proof lies on the defendant relying on laches.

a) Has Saugeen Acquiesced to the Wrongful Deprivation of Part of their Reserve?

[639] According to the Landowners, Saugeen was in possession of the requisite facts giving rise to its claim by April 22, 1959, when it caused its lawyers to write a letter to Indian Affairs advising

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[163] Ontario did not advance laches at trial.
[164] *Wewaykum*, at para. 109; *M(K) v. M(H)*.
[165] *M(K)*, at pp. 77-78; *Manitoba Metis*, at para. 146.
[166] See also *Manitoba Metis*, at paras. 145-146.

of its claim that the northern terminus of the east boundary was supposed to have been at a post in Lot 31, Concession D, about 9 ½ miles from the original western boundary.

[640] The Landowners state that the fact that Saugeen relied on Canada to pursue its rights, which did not happen until the issuance of a claim in 1990 by Canada on behalf of Saugeen (subsequently abandoned in favour of the present litigation), does not excuse Saugeen from failing to have launched its own action sooner.

[641] A consideration of Saugeen's actions and whether they amounted to acquiescence must take into account the reality of Saugeen's situation – typical of the Indigenous experience in this country. Saugeen was subject to the colonial powers and decisions of the Imperial Crown and then the federal Crown, framed by the legislation in place from time to time (notably the consecutive versions of the *Indian Act*). Members of the First Nation were not allowed to leave the reserve without permission from the Indian agent – something that still occurred when Chief Roote was a child when his grandfather had to ask permission to leave the reserve to work. They were not allowed to hire a lawyer to represent their interests between 1927 and 1951 under the *Indian Act*. Indeed, Saugeen's only recourse for asserting Treaty rights until 1951 was through their Indian agent to Indian Affairs. The fact that Indian Affairs controlled band funds also handcuffed Saugeen's ability to formally pursue any action to prove its claim. Despite many requests to have the east boundary re-surveyed north of Lot 25, after the White survey of 1931 which failed to reflect an on the ground survey north of Lot 25, the next survey authorized by Canada was not until the one by OLS Bellach in 1974. In between those surveys, Saugeen asked for permission to use its own funds to hire a surveyor and was denied.

[642] My review of the evidence shows that Saugeen was anything but passive with respect to pursuing its reserve claim. Saugeen made numerous complaints about the Disputed Beach to Indian Affairs – some relating to the boundary and others focused on the encroachment of their fishing waters at the Disputed Beach by settlor fishers. The first complaint was in 1877 and related to encroachments and a claim for an exclusive right to fish at the "aux Sable River".[167] In November 1885, Saugeen passed a band council resolution "that the Saugeen Indians be granted by the Department all of Sauble Bay to fish". In March 1886, a band council resolution was passed petitioning Indian Affairs "for the whole of the Sauble Fishing Ground", and a similar band council resolution was passed in October 1886. Band Council resolutions were to be passed on to Indian Affairs under the procedures in place. Notably in a band council resolution passed on August 4, 1890, the First Nation resolved that under the Treaty "no part of the beach was included in the surrender but was reserved". These complaints and assertions continued right through to the commencement of litigation.

[643] The observation in *Reference re First Nations, Inuit and Metis Children, Youth and Families* aptly describes the coercive and restrictive controls imposed on First Nations and

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[167] The complaint was made to Indian Affairs Superintendent and Commissioner Plummer to the Local fishing Office, September 17, 1877.

Indigenous Peoples by reasons of various pieces of legislation, including most prominently, the consecutive iterations of the *Indian Act*:

> Parliament treats Aboriginal peoples like children by taking control of their political structures, their land holding patterns, and their resource and economic development.[168]

[644] More specifically to this case, while Saugeen always believed that their boundary extended north of Lot 25, they were not provided with a copy of the Treaty until at least 1948. Further they were not provided with a copy of Rankin's final Plan of Survey until May 1974. Without these documents, Saugeen could hardly be expected to mount an effective legal case for the recovery of their reserve land.

[645] In short, the Landowners have not demonstrated that Saugeen acquiesced with respect to the erroneous placement of the northern terminus of the east boundary of its reserve.

b) Did any of the Defendant Landowners Change Their Respective Positions to Their Detriment?

[646] The individual Landowners have not presented any evidence that they acted to their detriment under the belief that Saugeen was allegedly content to accept the *status quo*.

[647] Using (without accepting) the Landowner's marker of 1959 as the date by which Saugeen had the necessary facts and ability to advance their claim, the subject Patents were already issued by then. More importantly, Croshaw, from whom Barbara Twining inherited, purchased the Disputed Lot in 1944 and McKee, from whom Alberta Lemon inherited, purchased his Disputed Lot in 1948. While Dobson purchased part of the Disputed Lot and restaurant business from his uncle in or around 1983, and the balance from his father after that, he gave no evidence to the effect that he would not have made those purchases had he known that Saugeen was going to start a lawsuit seeking return of the reserve land.

[648] None of the individual Landowners provided specific evidence about the prejudice they have allegedly suffered in reliance on the *status quo*. While some evidence was led to the effect of building cottages and other structures, this evidence was vague and did not include any statements to the effect that they detrimentally relied upon the *status quo*.

[649] As for the Town, it acquired its Disputed Lots by quitclaim deed after being apprised of Saugeen's claim and after representing that it would wait for the outcome of that claim before taking any steps to develop Sauble Beach. It made investments in developing Sauble Beach as a tourist destination with its eyes wide open to Saugeen's position and contrary to the representation it made to Saugeen.

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[168] 2022 QCCA 185, at para. 81.

[650] The Town did not rely to its detriment on the *status quo* when it acquired the quitclaim deeds and made certain investments in developing the beach. In fact, given the Town's direct knowledge of Saugeen's claim, and its actions in acquiring quitclaim deeds which could only have the effect of thwarting that claim, the Town is not deserving of equitable protection.

[651] Neither the Town nor the private Landowners have proven that they changed their position, to their detriment, in reliance on their belief that Saugeen was content with the *status quo*.

c) The Balance of Justice Favours Permitting Saugeen to Pursue its Claim for Declaratory Relief Against the Defendant Landowners

[652] In *Chippewas of Sarnia*, the Court of Appeal, at para. 267, warned that the court must exercise "extreme caution" before barring a Treaty land claim by reason of the doctrine of laches:

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

[653] At stake in this case is Saugeen's entitlement to its interest in the Disputed Beach as reserve land. This is a constitutionally protected Treaty right. In considering the historical context of this dispute, and the nature of the rights involved, this is not one of those cases in which justice will be done by denying Saugeen's claim for equitable relief under the doctrine of laches. To the contrary, Saugeen's Treaty and constitutionally protected reserve interests must prevail in these circumstances over those of the defendant Landowners, consistent with the high standard which must be met to justify extinguishment of an interest in reserve land.[169] In any event, the defendant Landowners have not discharged their burden of proof in establishing either of the two branches of this equitable doctrine.

[654] As I have indicated before, the Landowners will have an opportunity to seek compensation for any losses they may suffer in Phase II of this litigation.

COUNTERCLAIM OF THE ATTORNEY GENERAL OF ONTARIO AND DEFENCE OF THE TOWN AND ONTARIO

[655] The Attorney General of Ontario seeks a declaration that the Disputed Beach is subject to a public right of recreational use under the doctrine of dedication. By way of background, the

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[169] *Sparrow*, at p. 1099; *Sioui*, at pp. 1061-1063; *Mitchell*, at paras. 10-11.

Attorney General was added as a party to this proceeding in 1996 as the Crown Law Officer charged with the assertion and enforcement of public rights.

[656] Ontario relies on the doctrine of proprietary estoppel to deny Saugeen its full reserve entitlement under Treaty 72 by way of defence.

[657] The Town's position is that its assumption of stewardship over Sauble Beach, together with its investment in capital and other improvements, for the benefit and safety of the public is a public interest that ought to be factored into an equity-based analysis. It did not, however, advance during closing arguments any defence based on the premise that Sauble Beach should be maintained by the Landowners. The Landowners did plead estoppel, however. Accordingly, I will deal with the estoppel argument in the context of Ontario's defence. The estoppel argument was not pressed at trial by the Landowners.

[658] Ontario advances proprietary estoppel but as a substantive defence to Saugeen's claim for a declaration that the public have unfettered and unencumbered access to the Disputed Beach for recreational purposes if it is determined to be reserve land.

Preliminary Objection

[659] In the closing submissions, the Attorney General stated that a "limited declaration of a public right of access for recreational use… would not remove any beneficial ownership which Saugeen may be found to have but would merely restrict Saugeen's capacity to exclude".[170] Furthermore, such a declaration would "ensure preservation of the status quo with respect to public access".[171]

[660] Canada submits that what is really being advocated is the doctrine of dedication, and neither the Attorney General nor Ontario can satisfy this test. Saugeen agrees and raises an objection to the propriety of raising this doctrine, since, in its view, this doctrine was not properly pled and was mentioned for the first time in opening argument by the Attorney General and Ontario.

[661] The Attorney General and Ontario filed a joint Fresh As Amended Statement of Defence, Counterclaim and Cross Claim. At paragraphs 37 to 44, the doctrine of dedication is plead. At paragraphs 48 to 59, and 62, the doctrine of estoppel is plead by way of a defence by Ontario. The Attorney General has specifically sought a declaration that the reserve lands are subject to a right in the public use of them "for recreational purposes and road purposes" and pleads and relies on the defence of Ontario. The problem is that Ontario's defence is premised on traditional estoppel as a shield rather than a sword. Ontario specifically pleads that the Landowners are the ones who relied on the alleged representation or assurance, relied on the expectation of public access to the

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[170] Ontario's Written Closing Submissions, at para. 557. Note that Ontario and the Attorney General of Ontario submitted a joint Written Closing.
[171] Ontario's Written Closing Submissions, at para. 578.

beach to their detriment, their reliance was reasonable, and it would be unfair or unjust to permit Saugeen to assert their interest in their reserve lands, including the right to exclude the public. Ontario's pleading of "estoppel" however is not premised on the public being the aggrieved party.[172] Rather it is premised on the Landowners being the aggrieved parties.

[662] Confounding matters further, it is clear that it is the Attorney General who is purporting to rely on proprietary estoppel, and not Ontario. In Ontario and the Attorney General's jointly filed Written Closing Submissions, all of the submissions relating to proprietary estoppel are asserted under the heading "Counterclaim of the Attorney General". There are no written submissions on the doctrine of proprietary estoppel, or estoppel for that matter, on behalf of Ontario. Furthermore, Ontario did not assert a counterclaim which was necessary as proprietary estoppel would create a property interest. As stated by the Supreme Court of Canada in *Cowper-Smith v. Morgan*,[173] "proprietary estoppel can do what other estoppels cannot – it can found a cause of action". Arguably this form of estoppel might also form a shield insofar as preventing the alleged representor from insisting on enforcement of their legal rights over property, but the argument was not framed this way before me.

[663] The Attorney General sought to buttress the issue of not having named the public as the aggrieved party by stating that the Landowners are members of the public. This does not cure the defect. The failure to plead the correct aggrieved party, namely the "public", as having met the constituent elements of the doctrine of proprietary estoppel is, in my view, fatal to the Attorney General's position. The constituent elements underlying proprietary estoppel as establishing or creating an interest in property and founding a cause of action on behalf of the public are not plead by either the Attorney General or Ontario.[174]

[664] Parties are constrained in what they may argue by their own pleadings.[175] While courts will give a generous reading to pleadings, they will not stretch the pleadings to include defences or claims that have failed to plead facts to support the constituent elements of the claim or defence. To do otherwise leads to trial by ambush. No motion seeking leave to amend the Fresh As Amended Statement of Defence was brought by the Attorney General or Ontario. A real prejudice is evident in this situation because no evidence was led with respect to the public's expectation, the circumstances concerning any alleged representation or assurance made to the public, and the alleged detrimental reliance by the public. Rather, the Defence of Ontario pleads that the aggrieved parties were the defendant Landowners, not the public.

[665] Accordingly, I will proceed to address the doctrine of dedication as founding the Attorney General's request for a declaration that the public has a right of access over the Disputed Beach for recreational use. However, as the issue of proprietary estoppel was fully argued in the closing

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[172] Ontario's Written Closing Submissions, at para. 492.
[173] 2017 SCC 61, [2017] 2 S.C.R. 754, at para. 17.
[174] See *Cowper-Smith*, at paras. 15 and 17.
[175] *Ma v. Abdullah*, 2019 ONSC 6781, at para. 73.

submissions, I will address it in the alternative as it raises important issues about the potential application of this doctrine to encumber reserve lands for public purposes.

6. The Doctrine of Dedication

[666] While the Attorney General reiterated in his Written Closing Submissions that he is requesting a declaration that the Disputed Beach is subject to a public right of recreational use, the Attorney General did not advance substantive arguments under the doctrine of dedication. This is notwithstanding that in the Attorney General's Written Closing Submissions he writes "Ontario [as distinct from the Attorney General] does not advance a public dedication argument; rather Ontario relies on the doctrine of proprietary estoppel". The Attorney General, as stated before, pleads and relies on the doctrine of dedication. However, the balance of the Written Closing Submissions focused on the doctrine of proprietary estoppel only. There were no written submissions on the doctrine of dedication.

[667] Nonetheless, Saugeen fully responded to the doctrine of dedication, so I will briefly review the doctrine. In my view it can be quickly disposed of as having no application to the facts of this case.

[668] The Court of Appeal dealt with the application of this doctrine to reserve lands in *Hopton v. Pamajewon* (sub nom *Skerryvore Ratepayers' Assn. v. Shawanaga Indian Band*).[176] In *Skerryvore*, the plaintiffs sought a declaration that a road which traversed unsurrendered reserve land was a public road and relied on the doctrine of dedication. The Court of Appeal allowed the appeal and denied the Ratepayers' application.

[669] The court set out the two-part test that must be satisfied by the party advancing the claim:

> (a) The party must demonstrate an intention on the part of the owner of the land to dedicate; and
>
> (b) An acceptance by the public of the road as a (public) highway.[177]

[670] The requisite intention to dedicate is a matter of fact and can be inferred from the surrounding circumstances.[178]

[671] The Court distinguished the requisite intention from a good will gesture to allow people to pass along one's property – referred to as the "good neighbour" principle. Such an intention will not satisfy the first branch of the test which requires a specific intention to allow the road to be

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[176] (1993), 16 O.R. (3d) 390 (C.A.).
[177] *Skerryvore* at p. 10. See also *Reed v. Lincoln (Town)* (1974), 6 O.R. (2d) 391 (C.A.), at para. 12; *Sioux Lookout (Municipality) v. Canada (Attorney General)*, 2010 ONCA 867 at para. 260.
[178] *Skerryvore*, at p. 10.

"dedicated" to the public with the intention of vesting an interest in the road to the public for its own use.

[672] The Court of Appeal held that the doctrine of dedication cannot apply to reserve lands because of the *sui generis* nature of a First Nation's interest in its reserve lands, citing *Canadian Pacific Ltd. v. Paul.*[179] The Court stated at p. 13:

> The nature of native title, including the feature of inalienability, is inconsistent with the doctrine of dedication being applicable to unsurrendered land. both treaties and statutes reflect the concern that native land customs might be misconstrued, and in particular, that failure by the Indians to assert proprietary rights against others might result in unintended transfers of those interests. The Royal Proclamation, the Robinson-Huron Treaty and the successive Indian Acts all prohibit the disposition of any part of unsurrendered land except through formal surrender to the Crown.

[673] In *Skerryvore*, the Court also quoted *Nowegijick v. R.*,[180] *R v. Simo*,[181], and *Sioui*,[182] for the "well established principle of interpretation that 'treaties and statutes relating to Indians should be construed liberally and doubtful expressions resolved in favour of the Indians' so that the terms are understood 'in the sense in which they would naturally be understood by the Indians'".

[674] As in *Skerryvore*, at p. 15, I find that Saugeen was entitled to govern themselves "in accordance with a reasonable belief that, in the absence of formal surrender to the Crown pursuant to the applicable treaty and statute law, their interests in their land were fundamentally inalienable". The Court went on to conclude:

> Thus, the common law doctrine of dedication is not applicable to unsurrendered land. Put differently, it can be said that the sui generis nature of Native title renders impossible an inference of an intention to dedicate, i.e., to transfer permanently to the use of the public a previously private right of way.

[675] In my view, the ratio of *Skerryvore* applies equally to this situation, in which the public has used the beach located on reserve lands at will. The doctrine of dedication has no application to public use claims over reserve lands, irrespective of whether the public has built up an expectation of free access. It would be inconsistent with Saugeen's inalienable right to exclusive possession of its reserve land, subject only to surrender, to infer an intention to dedicate. Furthermore, there was no evidence to suggest that Saugeen had the requisite intention to dedicate the Disputed Beach to permanent public use.

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[179] [1988] 2 S.C.R. 654, at p. 677.
[180] [1983] 1 SCR 29, at p. 36.
[181] [1985] 2 S.C.R. 387, at p. 402.
[182] At p. 1031.

7. The Doctrine of Proprietary Estoppel

[676] I have ruled that proprietary estoppel was not plead by the Attorney General, or Ontario for that matter. Therefore, my comments are *obiter* and made in the alternative. In my view, having the benefit of full argument, it is helpful to address this novel claim as it relates to granting the public unfettered right of access to reserve lands for a specific purpose; namely recreational use.

[677] The Attorney General advocates for the creation of such a proprietary interest, in the absence of surrender and in the absence of a negotiated arrangement with Saugeen. The Attorney General defines the public as everyone in the province, including the Town and its population and would-be visitors to Sauble Beach.

[678] The Attorney General advances no jurisprudence in which a court in Canada has created such a proprietary interest in unsurrendered reserve lands where the First Nation opposes the proposed property right.

[679] The Supreme Court of Canada in *Cowper-Smith* sets out the test and places parameters around this equitable doctrine. In that case, Cowper-Smith was induced by his sister, Morgan, to leave his home in England to come to Victoria, British Columbia and care for their "demented" mother with the promise that he would receive the mother's house in return. Under the mother's Will, Cowper-Smith and Morgan would inherit the Estate's assets, including the house, in equal shares. Cowper-Smith gave up his job, family contacts, a long-term lease on the cottage and other tangible benefits and looked after his mother. At their mother's death, Morgan reneged on the promise. The Supreme Court found in those circumstances the remedy of proprietary estoppel was warranted and vested the entire fee simple title in the house with Cowper-Smith, notwithstanding the fact that at the time of the promise Morgan did not control the property. This is a much different fact situation from Saugeen and any alleged representation made by it in relation to public use of Sauble Beach.

[680] The essential components of the doctrine of proprietary estoppel are:

> (a) a representation or assurance is made to the claimant, on the basis of which the claimant expects that they will enjoy some right or benefit over the property;
>
> (b) the claimant relies on that expectation by doing or refraining from doing something, and their reliance is reasonable in all the circumstances; and
>
> (c) the claimant suffers a detriment as a result of their reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on their word.[183]

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[183] *Cowper-Smith*, at para. 15

[681] Proprietary estoppel, as a creature of equity, is a discretionary remedy which, like all estoppels, seeks to avoid "unfairness or injustice that would result to one party if the other were permitted to break her word and insist on her strict legal rights".[184]

[682] While the doctrine of proprietary estoppel has flexibility to meet the demands of justice in any particular case, there are parameters for the judicial exercise of discretion. The aim of the doctrine is to keep "the owner to her word".[185]

[683] The Attorney General's argument is premised on a key submission. The federal Crown made many representations or gave assurances to Landowners and prospective landowners (notably Harold Dobson) over the years to the effect that Saugeen had no interest in the Disputed Beach, and that in so doing the federal Crown was acting as Saugeen's agent such as to make this "representation" or "assurance" binding on Saugeen.

[684] This submission is flawed. The federal Crown did not consult with Saugeen when it made each of these "assurances" to various individuals. In any event, the Supreme Court of Canada in *Guerin*, at pp. 386-7, made it clear that the Crown is not the agent of First Nations (as this term is used in contract law) but rather functions as a fiduciary on behalf of First Nations.

[685] Furthermore, the "promise must be unambiguous and must appear to have been intended to be taken seriously".[186] This means that the representor must have intended to cede a property interest over which it had some actual or imminent interest to convey to the representee. In this case, the federal Crown disavowed any such interest in the Disputed Beach.

[686] Ontario also argued that the fact that the federal Crown did not commence litigation asserting Saugeen's claim to the Disputed Beach as reserve lands in a timely way amounts to an implicit representation that the federal Crown was content to grant the Landowners free access over the Disputed Beach. While representations can be implicit for purposes of proprietary estoppel, in this case the lack of litigation where none was considered in the first place falls short of constituting a clear and unambiguous representation.

[687] In any event, there was no evidence led that the public altered its position to its detriment in the belief that the federal Crown was granting free access to the Disputed Beach, as reserve land, for recreational purposes. There is no evidence whatsoever suggesting that the public would have stayed away from Sauble Beach had they known that Saugeen claimed it as reserve land. Indeed, the evidence led by the Town was clear that the tourist population visiting Sauble Beach has been growing since this lawsuit started (and indeed since the Town, through its predecessor, acquired the quitclaim deeds). This was clear in the evidence led by the Town regarding the

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[184] *Cowper-Smith*, at para. 16.
[185] *Cowper-Smith*, at para. 20.
[186] *Cowper-Smith*, at para. 26.

growing economic prosperity of its business community since the Town took stewardship of the Disputed Beach. It continues to be on an upward trajectory notwithstanding this lawsuit.

[688] Ontario submits that if this court declares the Disputed Beach to be part of IR 29, and issues a declaration that no third party interest over the reserve exists, there is "a prospect of public access being denied in the future". This submission is premised on an assumption that Saugeen will not permit free public access to the Disputed Beach, notwithstanding Chief Anoquot's testimony to the contrary. However, irrespective, the potential of a future detriment is not sufficient to satisfy this branch of the test. Again, no evidence was led to support the contention that the public has or will be prejudiced if the Disputed Beach is returned to Saugeen as reserve lands.

[689] Ontario has failed to discharge its burden of proof to establish the elements of proprietary estoppel.

[690] I am also not persuaded that the doctrine of proprietary estoppel is available to defeat or encumber a First Nation's interest in their reserve land. The *Indian Act* sets out a comprehensive and exhaustive scheme which governs the surrender and encumbrance of reserve land, including creating third-party interests in reserve land such as easements.[187] Where such a legislative scheme exists, it usurps the common law or, in this case, the law of equity. The effect of proprietary estoppel is to create a property interest over land. In the context of reserve lands, this is tantamount to a partial extinguishment of the First Nation's exclusive right to occupy and control its reserve lands. Such a result would also be tantamount to breaching the solemn promise reflected in Treaty 72:

> All which reserves we hereby retain to ourselves and our children in perpetuity.

However, this issue should be left to another day when a more fulsome argument, based on a complete evidentiary record, is made.

CONCLUSION OF PHASE 1 – DISPOSITION – DECLARATORY RELIEF

[691] At trial, Saugeen and their neighbours, the Landowners, each said that compensation was an adequate remedy for the other's loss of property. The Town and the Landowners stated that the *status quo* was to be preferred and that Saugeen should be content with compensation in the event that the Disputed Beach was intended to be part of its reserve.

[692] I have reflected on this exchange. It seems to me that true reconciliation should not automatically mean that the First Nation must sacrifice their right to their established interest in

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[187] See, for example, s. 18(1) (reserves to be held for use and benefit of Indians), and s. 35(1) (Taking of [reserve lands] by local authorities for public purposes): *Indian Act*, R.S.C. 1985, c. I-5 and the predecessor Acts. See also *Osoyoos*; *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654.

reserve land in order to preserve the *status quo*. The *status quo* is, perhaps, what has created such discord as between Indigenous peoples and non-Indigenous Canadians in the first place.

[693] To achieve reconciliation means that the *status quo* must sometimes change. In the process of that change some will bear the brunt. Sometimes the hardship will be borne by Indigenous peoples and First Nations, and sometimes it will be borne by non-Indigenous Canadians. Change can be painful, much less, to echo the words of the Court of Appeal in *Chippewas of Sarnia*, "uncomfortable". However, in this case, change in the *status quo* is required to achieve justice and is the right step towards reconciliation.

[694] The Defendants, save for Canada, expressed doubt in the testimony of Chief Anoquot when he stated that it was Saugeen's intention to keep Sauble Beach open to the public and to work with their municipal government neighbours in enhancing the beach to everyone's mutual benefit. They also expressed doubt in Saugeen's ability to manage Sauble Beach to its best effect.

[695] Perhaps what is required is that the parties – all of them – begin to trust each other. Afterall, the beach is going nowhere whomever assumes stewardship over it.

[696] Accordingly, the following declarations will issue:

(a) Canada acted in a manner that was inconsistent with the honour of the Crown;

(b) Canada breached its fiduciary duty owed to Saugeen;

(c) The entire portion of the valuable fish landing ground fronting on Lake Huron that was reserved from surrender by Saugeen First Nation in Treaty 72 and known to Saugeen First Nation as "*Chi-Gmiinh*", which includes a substantial portion of what is now called Sauble Beach[188], was and continues to be reserved for the sole use and benefit of the Chippewas of Saugeen First Nation and today forms part of Saugeen Indian Reserve No. 29;

(d) No third parties have any interest in *Chi-Gmiinh*, also known as the reserve portion of Sauble Beach

[697] However, in reflecting on the principle that reconciliation must result in fairness and understanding for both Indigenous and non-Indigenous Canadians, I am considering declaring that the current family title owners[189] will have a life interest in the Disputed Beach Lots. This life interest would not extend to the Town or Sauble Beach Development Corporation. This would mean that my declaration is in effect on pronouncement of this judgment, but subject to these life interests with respect to the three Disputed Beach properties. A life interest to Alberta Lemon, David Dobson, and the beneficiaries of Barbara Twining's estate, is intended to honour their attachment to the land and allow the families time to facilitate a smooth transition over to Saugeen.

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[188] Referred to throughout this judgment as the "Disputed Beach".
[189] In relation to current family title owners, I am including the beneficiaries of the Twining Estate.

As this potential remedy was not raised at trial, I am inviting written submissions from the effected parties as to their respective positions on this proposal, which should also include terms to any such life interest, should it be declared. Submissions from the private Landowners are due in 30 days, and responding submissions from Saugeen are due within 30 days thereafter. In the interim, the declaration expressed in para. 696(d) is delayed pending my decision on this last issue.

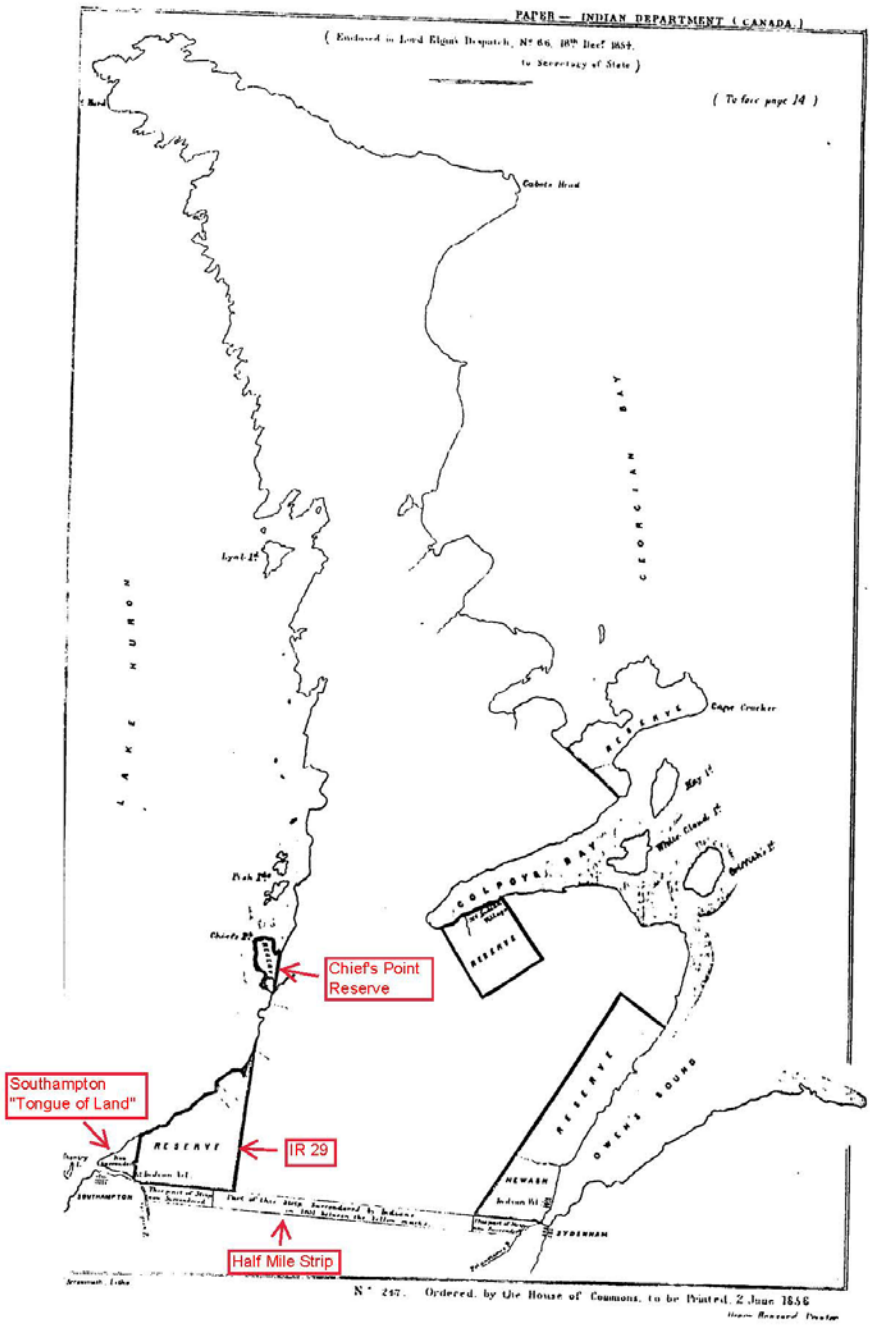
[698] Costs of Phase I are reserved. I will receive written submissions from the parties.

Vella. J.

Justice S. Vella

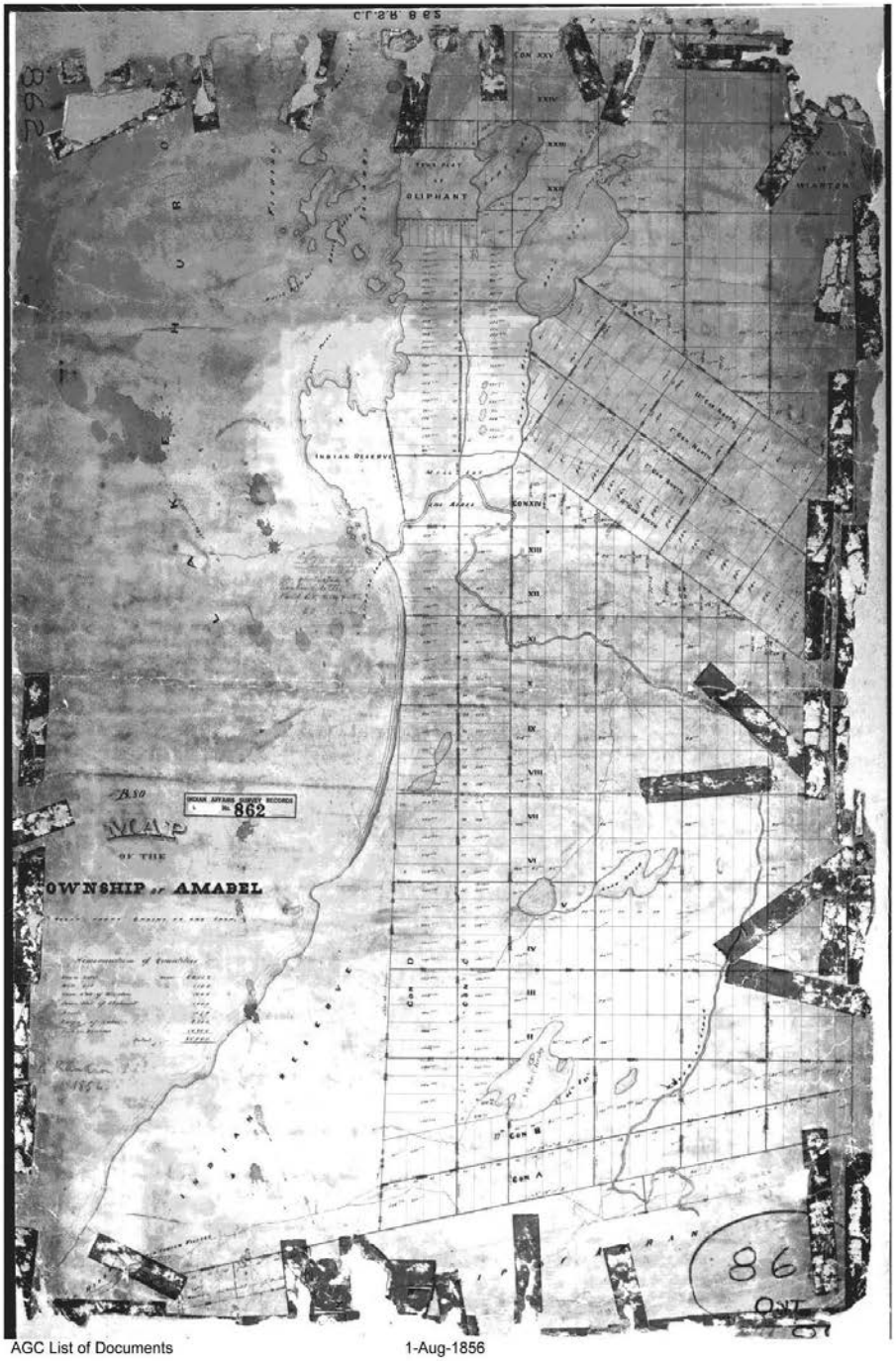
Released: April 03, 2023

APPENDIX 1



Oliphant Sketch Map Appended to Treaty Report, November 3, 1854

APPENDIX 2



AGC List of Documents 1-Aug-1856

Rankin's Final Plan of Survey of Amabel Township (1856)

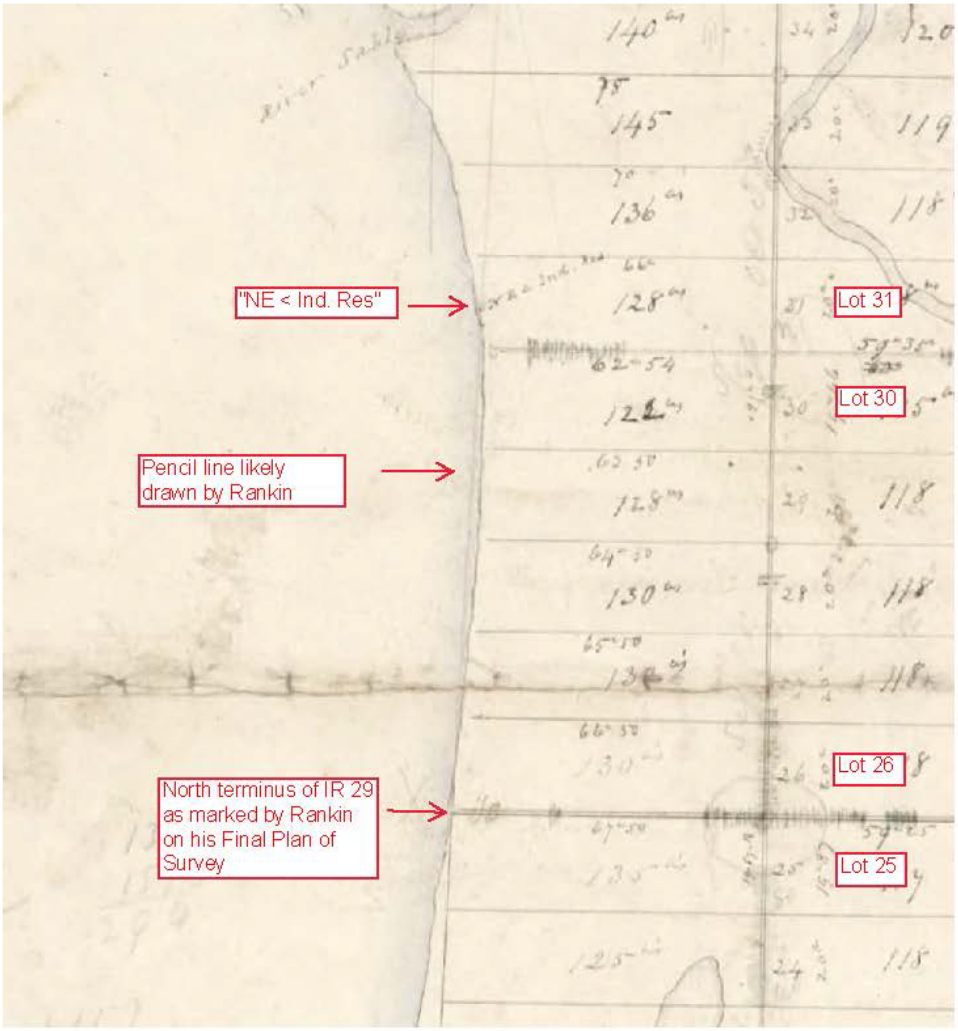
APPENDIX 3

AGC List of Documents

12-Oct-1855

Draft Map - Rankin's Traverse

APPENDIX 4



Excerpt from Draft Map – Rankin's Traverse

CITATION: *Chippewas of Saugeen First Nation v. Town of South Bruce Peninsula et al*., 2023 ONSC 2056
COURT FILE NO.: 03-CV-253768-CM3
DATE: 20230403

ONTARIO

SUPERIOR COURT OF JUSTICE

CHIPPEWAS OF SAUGEEN FIRST NATION

Plaintiff

– and –

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

Defendants

REASONS FOR JUDGMENT

Vella, J.

Released: April 03, 2023