

Court File No.

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CHIPPEWAS OF SAUGEEN FIRST NATION

Plaintiff
(Respondent)

and

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

Defendants
(Appellants)

NOTICE OF APPEAL

TAKE NOTICE THAT the Defendants (Appellants), the Town of South Bruce Peninsula, the Estate of Barbara Twining (by her Estate Executors, Brenda Joan Rogers and Gary Michael Twining), and Alberta Lemon, appeal to the Court of Appeal for Ontario from the judgment of Vella J. (the “**Trial Judge**”) dated April 3, 2023, made at Toronto (the “**Judgment**”).

THE APPELLANTS ASK:

- (a) that the Judgment be set aside and the action of the Plaintiff (Respondent), the Chippewas of the Saugeen First Nation (“**Saugeen**”) be dismissed;
- (b) in the alternative, that the declarations at paragraphs 696(c) and 696(d) of the Trial Judge’s reasons, which declare that the Disputed Beach (defined below) forms part of Saugeen Indian Reserve No. 29, and that no third party has any interest in the Disputed Beach, be set aside and that this Court order that Saugeen may be entitled to an award in damages against His Majesty the King in right of Canada (as represented by the Attorney General of Canada, or “**Canada**”) for fiduciary breach and breach of the Honour of the Crown in Phase II of this proceeding;
- (c) in the alternative, that the Judgment be set aside and a new Phase I trial ordered;
- (d) that the Appellants be granted their costs in this Court and in the court below; and
- (e) for such further and other relief as this Court deems just.

THE GROUNDS OF APPEAL are as follows:

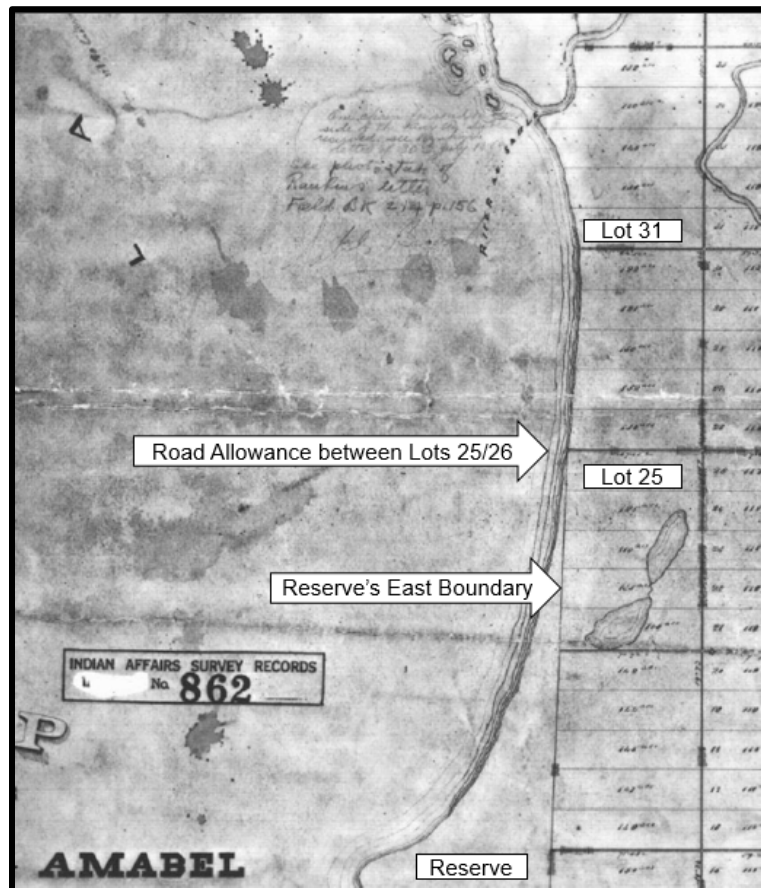
Treaty 72 and the Survey of Saugeen Indian Reserve No. 29

- (a) In 1854, Saugeen and other First Nations entered into Treaty 72 with the Imperial Crown, by which they surrendered land on the Bruce Peninsula in exchange for the proceeds of sale of the ceded and subdivided lands to settlers.
- (b) Saugeen reserved from surrender a block of approximately 10,000 acres along the shore of Lake Huron, known today as Saugeen Indian Reserve No. 29 (the “**Reserve**”). The Reserve’s boundaries are described in Treaty 72 as follows:

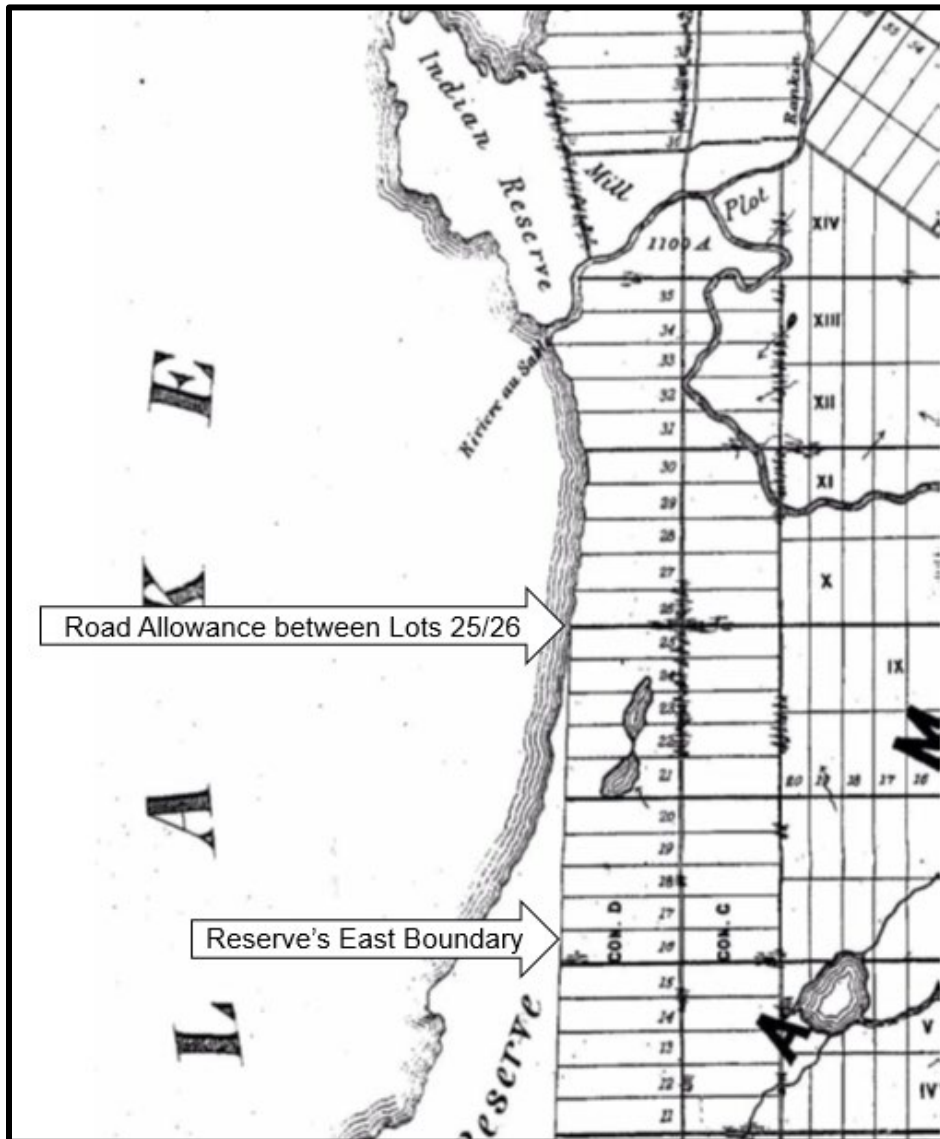
For the benefit of the Saugeen Indians we reserve **all that block of land** bounded west by a straight line running due north from the River Saugeen at the spot where it is entered by a ravine immediately to the west of the village, and over which a bridge has recently been constructed to the shore of Lake Huron; on the south

by the aforesaid northern limit of the lately surrendered strip; **on the east by a line drawn from a spot upon the coast at a distance of about (9½) nine miles and a half from the western boundary aforesaid and running parallel thereto**, until it touches the afore-mentioned northern limit of the recently surrendered strip . . . (Emphasis added.)

- (c) In 1855, the Reserve's boundaries were surveyed by Provincial Land Surveyor Charles Rankin ("**PLS Rankin**"), pursuant to written instructions from the Superintendent of Indian Affairs in order to implement Treaty 72. PLS Rankin recorded his survey in an official plan of survey that was accepted and approved by the Department of Indian Affairs of the Province of Canada in 1856 (the "**Official Survey Plan**").
- (d) The Reserve's east boundary on the Official Survey Plan is depicted where it intersects Lake Huron around the road allowance between Lots 25 and 26 in the neighbouring Township of Amabel. Lots 26 to 31 are shown as bordering Lake Huron.



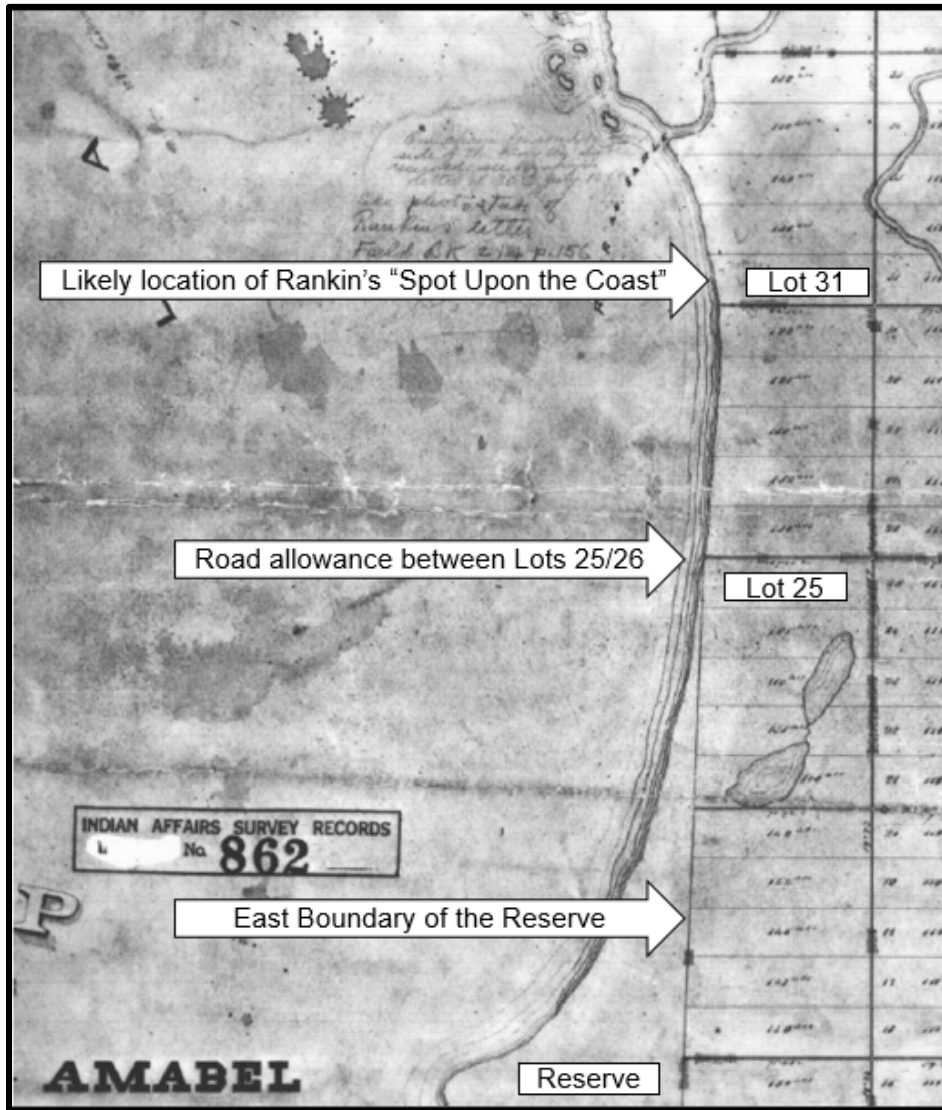
- (e) Following this surrender and survey, the Crown publicly auctioned subdivided lots to settlers in accordance with the Official Survey Plan and an accompanying auction map published under the authority of the Department of Indian Affairs (the “**Official Auction Map**”), and issued Crown Patents to purchasers of these lands, which formed the root of lawful title.
- (f) Like the Official Survey Plan, the Official Auction Map shows the Reserve’s east boundary terminating at its intersection with Lake Huron around the road allowance between Lots 25 and 26.



Saugeen’s Claim Asserting a Treaty Interest in the Disputed Beach

- (g) In 1995, Saugeen commenced this action asserting that a portion of beach land between Lots 26 and 31, Concession D, in the Town of South Bruce Peninsula (the “**Disputed Beach**”), is and has always formed part the Reserve pursuant to the terms of Treaty 72.
- (h) Legal title to the Disputed Beach is validly held by several defendants, including the Town of South Bruce Peninsula (the “**Town**”) and the Lemon and Twining families (the “**Families**”). These lands—known as Sauble Beach—operate as a public park and popular tourist destination that is free for public use.
- (i) Saugeen’s pleaded claim was that the Town, the Families, and other landowners never had lawful title over these lands because they were never surrendered and always formed part of the Reserve since it was first surveyed by PLS Rankin in 1855.
- (j) Saugeen pleaded, led evidence, and argued that the Official Survey Plan and the Official Auction map contained errors that did not accurately reflect the location of the eastern boundary of the Reserve as PLS Rankin surveyed it on the ground. Saugeen’s case was that PLS Rankin accurately surveyed the Reserve’s eastern boundary in accordance with Treaty 72, but failed to accurately record that survey on the Official Survey Plan, and that this error went undetected by Canada. Saugeen and Canada’s position at trial was that the Disputed Beach was never surrendered and that the Town and the Families have been unlawfully encroaching on unceded Reserve land.
- (k) Specifically, Saugeen asserted that PLS Rankin’s survey properly carried out the terms of Treaty 72 because he:
 - (i) correctly located the Reserve’s northwest terminus on the shore of Lake Huron, in what is now Lot 31, Concession D and marked it with a wood post. Saugeen claimed that this wood post—which has since been lost—represents the “spot upon the coast at a distance of about nine miles and a half” from the Reserve’s western boundary, according to the terms of Treaty 72;

- (ii) surveyed a line south from this post entirely on dry land down to the Reserve's southern boundary in order to grant Saugeen a single "block of land", as required by the terms of the Treaty; and
 - (iii) included all land lying west of this surveyed line, including the Disputed Beach between Lots 26 and 31, Concession D, as part of the Reserve.
- (l) At trial, Saugeen delivered detailed expert reports from Izaak de Rijcke, who was tendered and accepted as an expert in professional contemporary and historical land surveying in Ontario. Mr. de Rijcke purported to re-establish PLS Rankin's wood post and his surveyed boundary line along the Disputed Beach and his plan of survey depicting this re-established line was admitted into evidence. Saugeen argued that Mr. de Rijcke's survey plan depicts the northernmost boundary of the Reserve as it was surveyed in 1855.
- (m) In support of Saugeen's pleaded case, Mr. de Rijcke testified that the east boundary line surveyed by PLS Rankin, and which Mr. de Rijcke claimed to have retraced, ran entirely along dry land south from the "spot upon the coast" in Lot 31, with beach land to the west of this line. He opined that PLS Rankin's Official Survey Plan contained an error because it showed the Reserve's east boundary terminating at Lake Huron near the road allowance north of Lot 25, and not extending north to Lot 31 on dry land (as depicted below).



- (n) At trial, Saugeen claimed that these Disputed Beach lands were never lawfully surrendered, sold, and patented to third party purchasers because they have always formed part of the continuous block of land that constituted the Reserve. Saugeen also claimed the current title-holders—including the Town and the Families—never had any interest in the Disputed Beach.

- (o) Saugeen alleged that the Town and Families did not hold lawful title that can be traced back to Crown Patents, and that they were encroaching on Reserve land over which they had no interest.

- (p) As against the Crown, Saugeen pleaded breach of fiduciary duty and breaches of duties flowing from the Honour of the Crown by allowing and encouraging encroachment on the Disputed Beach, and failing to protect and preserve Saugeen's interest in these lands.
- (q) Saugeen's action was divided into two phases, with claims, crossclaims, and counterclaims for compensation (among other things) deferred to Phase II.

Court Rejects Saugeen's Theory that the Boundary was Surveyed to Lot 31

- (r) The Trial Judge rejected Saugeen's claim that the Disputed Beach was surveyed within the Reserve's boundaries by PLS Rankin in 1855. She rejected Saugeen's claim that there was a narrow strip of dry land that ran from Lot 31 south to the road allowance between Lots 25 and 26, on what is today the Disputed Beach, and that this strip was not recorded on the Official Survey Plan in error. She rejected Saugeen and Canada's claim that title to this land was never validly granted by Crown Patents. She further rejected the survey boundary presented in Mr. de Rijcke's survey plan, which purported to retrace the line he says PLS Rankin's surveyed south from the "spot upon the coast" in 1855.
- (s) The Trial Judge instead made the following findings of fact:
 - (i) owing to the concavity of the Sauble Beach shoreline, PLS Rankin did not and could not run the Reserve's eastern boundary south from the "spot upon the coast" entirely on dry land. Instead, this surveyed line followed the water's edge—or "wet sand"—along the shore of Lake Huron until approximately the road allowance north of Lot 25;
 - (ii) in 1855, the entire length of the Disputed Beach south from Lot 31 to the road allowance between Lots 25/26 was "wet sand" (*i.e.*, the bed of Lake Huron), which could not be conveyed or included in the Reserve's boundary according to surveying principles;

- (iii) the point at which PLS Rankin could continue his survey of the Reserve's east boundary on dry land, south to the Half Mile Strip (today Highway 21) to form a continuous block of land, was accurately recorded in the Official Survey Plan and Official Auction Map—*i.e.*, at the road allowance between Lots 25 and 26;
- (iv) because the line PLS Rankin surveyed between Lots 26 and 31 ran along wet sand, there was no dry land west of PLS Rankin's east boundary line that could have been included in the Reserve's boundaries. This had the effect of reducing Saugeen's shoreline from "about" 9.5 miles to 8.1 miles on the northeast end, although a greater shoreline distance was added to the Reserve by way of amendment to the western boundary in 1855;
- (v) the Official Survey Plan, and every map subsequent to it, was correct and did not contain an error with respect to the northeast terminus of the Reserve boundary;
- (vi) lands north of Lot 25 were validly sold and patented by the Crown to third parties, including the Disputed Beach, pursuant to the boundaries marked in PLS Rankin's Official Survey Plan;
- (vii) purchasers of Lots 26-31, Concession D, and their successors-in-title (including the Town and the Families), acquired title to the water's edge of Lake Huron. Their lots did not border the Reserve to the west; and
- (viii) The Town and Families were not encroaching on Reserve land.

Disputed Beach Awarded to Saugeen on an Unpleaded and Unargued Theory

- (t) While the Trial Judge's findings of fact support the Appellants' defence, she ruled in favour of Saugeen and voided the Town's and Families' title to the Disputed Beach, on the theory that PLS Rankin *should have* (but did not) include these lands within the boundary of the Reserve.

- (u) The Trial Judge reached this conclusion even though she found that the Disputed Beach was actually part of Lake Huron at the time of survey (*i.e.*, wet sand), and is now dry land owing to accretion and a receding shoreline.
- (v) This was not Saugeen's, or any other party's, pleaded theory; in fact, it is contrary to it.
- (w) The Trial Judge found that when PLS Rankin determined it was impossible to run a line south from the "spot upon the coast" along Lots 26-31 without encountering the water's edge of Lake Huron, he ought to have moved his survey of the Reserve's east boundary line inland by 1.5 to 2 chains (*i.e.*, approximately 99-132 feet) so that he could run this boundary line entirely on dry land. The Trial Judge found that PLS Rankin's failure to do so breached the Canada's fiduciary duties and its duties of honourable dealing in respect of Treaty 72.
- (x) The Trial Judge's reasons do not identify the location of the spot that she says PLS Rankin ought to have established the Reserve's northeastern terminus, beyond saying that it was "the approximate mid-way point of Lot 31, Concession D". Nor did she specify how far inland Rankin ought to have moved his survey.
- (y) Despite rejecting Saugeen's claim that:
 - (i) the portion of the Disputed Beach over which the Town and the Families hold fee simple title was not patented and conveyed by the Crown, and
 - (ii) the Town and the Families are unlawfully encroaching on Reserve land,

the Trial Judge decided that the appropriate remedy for Canada's breach of its duties is to invalidate the Crown Patents and the title deeds of the Town and Families as they relate to the Disputed Beach, disregard PLS Rankin's Official Plan of Survey and the Crown's Official Auction Map, and order that the Disputed Beach forms part of Saugeen's Reserve.

- (z) The Trial Judge rejected the Appellants' defence of *bona fide* purchaser and delay, and held that reconciliation in this case requires that the Appellants "bear the brunt" of Canada's breach of its duties to Saugeen.

Trial Judge Erred in Law by Unilaterally Altering the Reserve's East Boundary

- (aa) The Trial Judge committed reversible legal errors by granting Saugeen's action on a theory that was neither pleaded by the Saugeen nor advanced at trial, making findings without an evidentiary foundation, and issuing a remedy that Saugeen did not seek. Specifically:
- (i) the theory that PLS Rankin ought to have moved his survey of the Reserve's east boundary inland by 1.5 to 2 chains when confronted by the concave shape of Sauble Beach, in order to implement the terms of Treaty 72 according to the intention of the parties:
- (1) was not pleaded or advanced at trial by Saugeen;
 - (2) was not the opinion of any of the survey experts who testified at the trial;
 - (3) is inconsistent with evidence at trial that in 1855, Saugeen's leaders sought to alter the Reserve boundary to increase the amount of farmland within the Reserve and decrease the amount of shoreline; and
 - (4) requires the creation of a fifth boundary line not referenced in Treaty 72.
- (ii) the Trial Judge's declarations do not identify the extent of land that she found forms part of the Reserve. Her reasons state only that this land "includes" a portion of Sauble Beach between Lots 26 and "the approximate mid-way point of Lot 31, Concession D". The Trial Judge neither endorsed a plan or survey

that depicts these boundaries, nor identified a monument that can be used to conduct a survey on the ground; and

- (iii) the necessary effect of the Trial Judge's findings is to relocate the Reserve's entire east boundary inland by 1.5-2 chains (99 to 132 feet)—which captures approximately 144 acres of land east of Lakeshore Boulevard and south of Main Street (*i.e.* the road allowance between Lots 25/26)—as shown in the map at **Appendix A**.

This land includes the entirety of the municipality's Lakeshore Boulevard, with its associated subsurface and surface infrastructure, as well as large amounts of land owned privately by non-parties to this action including homes, cottages, and businesses.

- (bb) The Trial Judge's creation of a new east boundary for the Reserve overrides core principles of property and survey law, and has serious implications for the interests of private landowners who had no notice that their lands would be affected by this Judgment.
- (cc) In reaching this result, the Trial Judge ignored the significance of PLS Rankin's Official Survey Plan: to give certainty as to the location of boundaries. The Official Survey Plan was accepted by the Imperial Crown and incorporated into the Crown Patents by reference.
- (dd) The Trial Judge also erred in law by ordering an alteration of an original and true boundary line after confirmation of the Official Survey Plan, without authority and contrary to section 32(1) of the *Canada Lands Surveys Act* and s. 9 of the *Surveys Act*:

Canada Lands Surveys Act, R.S.C. 1985, c. L-6, s. 32 (1): **All boundary lines of roads, streets, lanes, lots, parcels or other authorized subdivisions of Canada Lands that are defined by monuments in surveys made under this Part shall, after confirmation of the plans by the Surveyor General, be the true boundary lines** of those roads, streets, lanes, lots, parcels or other authorized subdivisions, whether or not they are found to contain,

on admeasurement, the exact area or dimensions described or expressed in a plan, letters patent, grant or other instrument affecting those Canada Lands. (Emphasis added.)

Surveys Act, R.S.O. 1990, c. S.30, s. 9: Despite section 58, **every line, boundary and corner established by an original survey and shown on the original plan thereof is a true and unalterable line, boundary or corner, as the case may be**, and shall be deemed to be defined by the original posts or blazed trees in the original survey thereof, whether or not the actual measurements between the original posts are the same as shown on the original plan and field notes or mentioned or expressed in any grant or other instrument, and every road allowance, highway, street, lane, walk and common shown on the original plan shall, unless otherwise shown thereon, be deemed to be a public road, highway, street, lane, walk and common, respectively. (Emphasis added.)

- (ee) The Trial Judge’s decision to establish a new east boundary for the Reserve, and her (partial) invalidation of Crown Patents and title deeds issued thereunder, instead of awarding equitable compensation for what she found were breaches on the part of Canada, has profound implications for the resolution of boundary disputes across the country.

Trial Judge Erred in her Interpretation of Treaty 72

- (ff) The Trial Judge erred in her interpretation of Treaty 72 in material respects, contrary to settled interpretive principles, the words of and circumstances surrounding the Treaty, and the evidence adduced at trial.
- (gg) The standard of review for the interpretation of treaties is correctness. In this case, the Trial Judge erred:
 - (i) in finding that Treaty 72 “promises” Saugeen a shoreline of “about (9½) nine miles and a half” in length from the Reserve’s western boundary. Read as a whole and in its proper historical context, Treaty 72 sets out a process for identifying the Reserve’s boundaries on-the-ground and does not contain a guarantee of a precise shoreline distance. All parties’ experts agreed that the

“spot upon the coast” was not tied to a precise geographic feature known to both parties at the time of the Treaty;

- (ii) in distinguishing between the use of the terms “shore” and “coast” in Treaty 72:
 - (1) absent any historical or expert evidence as to the parties’ intentions on the use and meaning of these terms; and
 - (2) contrary to the principle that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction;
- (iii) by implying into Treaty 72 an additional “short north boundary” linking the boundary she found should have been surveyed by PLS Rankin in 1855 to the water’s edge:
 - (1) without any basis in the text, context, or surrounding circumstances of the Treaty; and
 - (2) without applying the test for implying terms into contractual or Treaty promises.

Trial Judge Erred by Dispossessing Landowners to Remedy Canada’s Breach

- (hh) The Trial Judge did not accept Saugeen’s claim that the Disputed Beach was included in the Reserve’s boundaries by PLS Rankin, that these lands were never patented by the Crown to the owners of Lots 26-31, and that the Town and the Families are encroaching on Reserve land.
- (ii) The Trial Judge did not find that either the Town or the Families did anything wrong or behaved unlawfully in any way. She recognized their “deep sentimental attachments to their properties”.

- (jj) Despite finding wrongdoing only on the part of Canada, the Trial Judge held that the remedy for Canada's breach of its duties to the Saugeen should be borne by the Town and Families, all of whom hold lawful title tracing back to Crown Patents, and despite the Families' predecessors in title having purchased their parcels for value without notice.
- (kk) The remedy imposed by the Trial Judge—which invalidates title and extinguishes the Crown Patents to the extent they confirm title to the Disputed Beach—does not follow from the breach of fiduciary duties and duties flowing from the Honour of the Crown that she found were committed by Canada alone, and not by the Town and the Families. It is an error in law to impose a remedy against innocent titleholders for pre-Patent breaches that the titleholders neither committed nor participated in.
- (ll) The Trial Judge's remedy disrupts the foundation of property rights and the accepted approach to resolution of Treaty claims in Canada. The uncontroverted evidence at trial was that Canada's policy is not to expropriate or force the sale of land held by third parties in good faith as a remedy for successful Treaty or boundary claims.
- (mm) The Trial Judge erred in finding that the Families are not *bona fide* purchasers for value without notice because they inherited their lands at no cost from predecessors-in-title, who she held paid valuable consideration for those lands without notice of Saugeen's claim. The authorities are clear that the existence of a *bona fide* purchaser anywhere in the chain of title shields all successors-in-title from a pre-existing claim.
- (nn) The Trial Judge found that the predecessors-in-title to the Twining and Lemon families' lands are *bona fide* purchasers because they paid valuable consideration for their portions of the Disputed Beach, without notice of Saugeen's claim to a pre-existing interest, but incorrectly held that the current owners cannot rely on the defence of purchasers for value without notice because they inherited their lands.
- (oo) Even if the Court had jurisdiction to impose a remedy against the Town and the Families as landowners who committed no wrong against Saugeen, the Trial Judge

failed to appropriately weigh and reconcile the competing interests at stake, and specifically:

- (i) that over 9.5 miles of shoreline along Lake Huron was reserved to Saugeen in 1856 by way of the amendment to the Reserve's west boundary by Order-in-Council, dated September 27, 1855;
 - (ii) the Families and the Sauble Beach community have important economic and social ties to the Disputed Beach land. The Families use the property as a source of retirement income, and a number of businesses along Lakeshore Boulevard rely on foot traffic from the public's free access to Sauble Beach guaranteed by the Town. Both the Town and the Families have contributed to the development of Sauble Beach at considerable expense; and
 - (iii) prior to the Judgment, both Saugeen and the Town shared stewardship over the entirety of Sauble Beach, which extends approximately two miles south and two miles north of Main Street. The effect of the judgment is to extinguish the Town's interest in and stewardship over the Disputed Beach north of Main Street, leading to a result that does not achieve meaningful reconciliation between the important Indigenous and non-Indigenous interests at stake in this dispute. It leads to a one-sided result that is not consonant with objectives of reconciliation.
- (pp) At the end of her reasons, the Trial Judge requested submissions on whether she ought to declare that the Families have a life interest in lands over which they hold title. She offered to consider granting a life interest to the beneficiaries of Barbara Twining's estate (*i.e.* Ms. Twining's five children) and to Alberta Lemon, who turns 100 years old on April 27, 2023
- (qq) The Trial Judge erred in failing to consider whether this life interest should extend to Ms. Lemon's next of kin, Richard Lemon. Her failure to do so represents an inequitable

exercise of her discretion, with the result that the Lemon family's interest in their lands will expire well before that of the Twining family in the absence of any principled basis.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

- (a) section 6(1)(b) of the *Courts of Justice Act*;
- (b) the Judgment appealed from is final; and
- (c) leave to appeal is not required.

April 26, 2023

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Jonathan C. Lisus LSO#: 32952H
jllisus@lolg.ca
Tel: 416 598 7873

Andrew Winton LSO#: 54473I
awinton@lolg.ca
Tel: 416 644 5342

Zain Naqi LSO#: 67870U
znaqi@lolg.ca
Tel: 416 645 3789

John Carlo Mastrangelo LSO#: 76002P
jmastrangelo@lolg.ca
Tel: 416 956 0101

David Ionis LSO#: 79542U
dionis@lolg.ca
Tel: 416 956 0117
Fax: 416 598 3730

Lawyers for the Defendants (Appellants),
The Town of South Bruce Peninsula, The Estate of
Barbara Twining, (By Her Executors, Brenda Joan
Rogers and Gary Michael Twining), and Alberta
Lemon

TO: **PAPE SALTER TEILLETT LLP**
Barristers & Solicitors
546 Euclid Avenue
Toronto ON M6G 2T2

Nuri G. Frame LSO#: 60974J
nframe@pstlaw.ca
Tel: (416) 916-2989 Ext. 1254
Fax: (416) 916-3726

Marc E. Gibson LSO#: 64399M
MGibson@PSTLaw.ca
Tel: 416 855 2649
Fax: 416 916 3726

Lawyers for the Plaintiff (Respondent)

AND TO: **MINISTRY OF ATTORNEY GENERAL**
Crown Law Office - Civil
720 Bay Street, 8th Floor
Toronto ON M7A 2S9

Richard Ogden LSO#: 57534F
richard.ogden@ontario.ca
Tel: (416) 326-4930
Fax: (416) 326-4181

Stephanie Figliomeni LSO#: 65495G
stephanie.figliomeni@ontario.ca
Tel: 416 314 2400
Fax: (416) 326-4181

Lawyers for the Defendants,
Her Majesty the Queen in Right of Ontario and
The Attorney General of Ontario

AND TO: **THE ATTORNEY GENERAL OF CANADA**
Department of Justice, Ontario Regional Office
130 King Street West, Suite 3400
Toronto ON M5X 1K6

Michael Beggs LSO#: 42188G
michael.beggs@justice.g.ca
Tel: 647 256 0582
Fax: 416 973 2319

Janet Brooks LSO#: 23986A
Janet.Brooks@justice.gc.ca
Tel: (416) 952-6330
Fax: (416) 973-4328

Barry Ennis LSO#: 28009U
barry.ennis@justice.gc.ca
Tel: (416) 954-2197
Fax: (416) 973-2319

Madeline Torrie LSO#: 81582H
madeline.torrie@justice.gc.ca
Tel: (416) 952-6330
Fax: (416) 973-4328

Lawyers for the Defendant,
Her Majesty the Queen in Right of Canada and The Attorney General of Canada

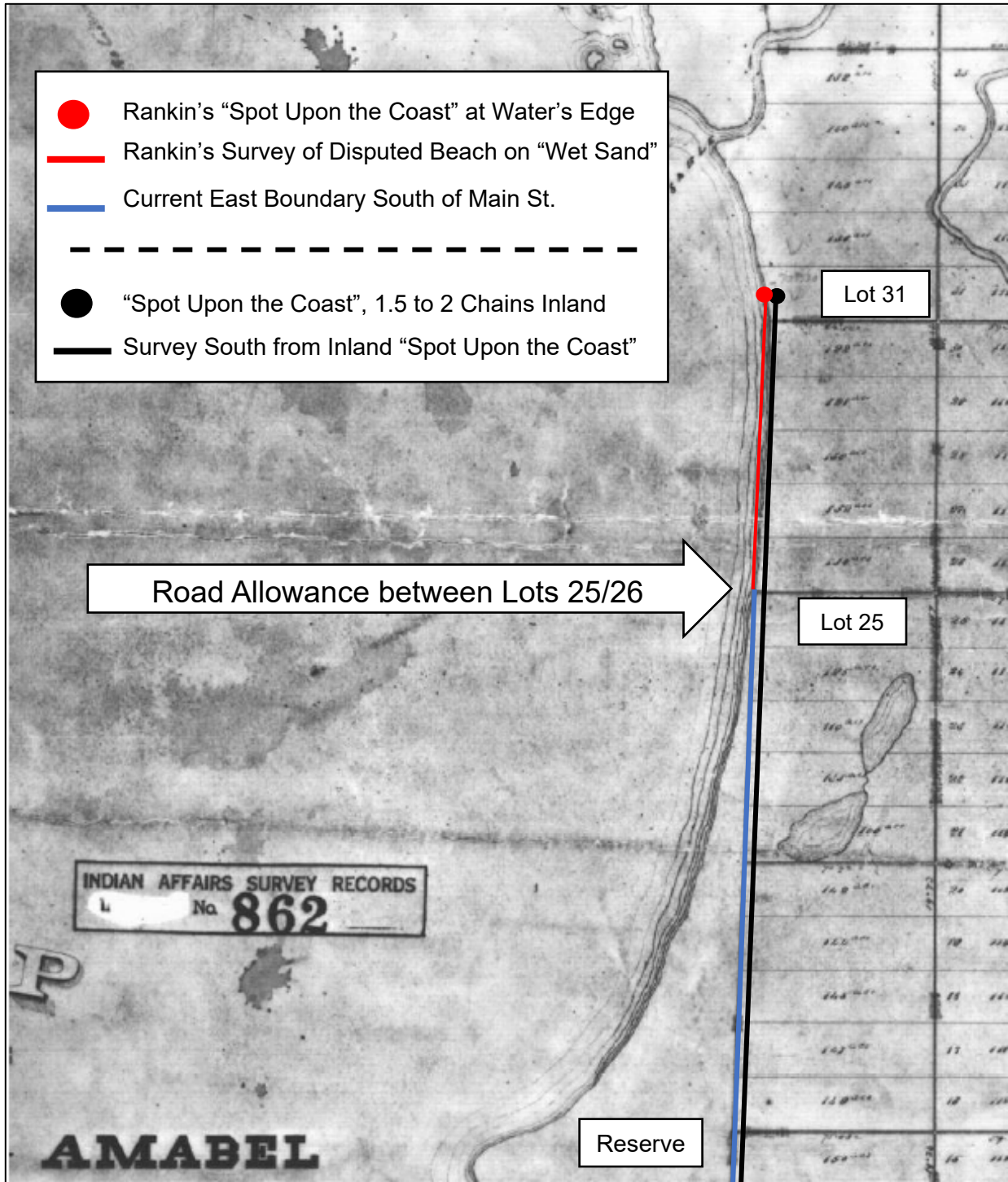
AND TO: **OLDFIELD, GREAVES, D'AGOSTINO & SCRIVEN**
Barristers and Solicitors
172 King Street South
P.O. Box 16580
Waterloo ON N2J 1P8

G. Edward Oldfield LSO#: 24183L
toldfield@watlaw.com
Tel: (519) 576-7200
Fax: (519) 576-0131

Lawyers for the Defendants, Sauble Beach Development Corporation and David
Dobson

APPENDIX A

**Illustration of the Reserve's East Boundary per the Trial Judge's Reasons
(Not Precisely to Scale)**



CHIPPEWAS OF SAUGEEN FIRST NATION
Plaintiff (Respondent)

-and- THE TOWN OF SOUTH BRUCE PENINSULA et al.
Defendants (Appellants)

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LAX O'SULLIVAN LISUS GOTTLIEB LLP
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Jonathan C. Lisus LSO#: 32952H
jlisus@lolg.ca

Tel: 416 598 7873

Andrew Winton LSO#: 54473I
awinton@lolg.ca

Tel: 416 644 5342

Zain Naqi LSO#: 67870U
znaqi@lolg.ca

Tel: 416 645 3789

John Carlo Mastrangelo LSO#: 76002P
jmastrangelo@lolg.ca

Tel: 416 956 0101

David Ionis LSO#: 79542U
dionis@lolg.ca

Tel: 416 956 0117

Email for parties served:

Nuri G. Frame: nframe@pstlaw.ca

Robert Ratcliffe: robert.ratcliffe@ontario.ca

Barry Ennis: barry.ennis@justice.gc.ca

G. Edward Oldfield: toldfield@watlaw.com

Lawyers for the Defendants (Appellants), The Town of South
Bruce Peninsula, The Estate of Barbara Twining, (By Her
Executors, Brenda Joan Rogers and Gary Michael Twining)
and Alberta Lemon