

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

Defendant
(Appellant)

NOTICE OF APPEAL

THE APPELLANT, His Majesty the King in right of Ontario ("**Ontario**"), appeals to the Court of Appeal for Ontario from the judgment of Vella J. ("**Trial Judge**") dated April 3, 2023, made at Toronto ("**Judgment**").

THE APPELLANT ASKS:

- (a) that the Judgment be set aside and the action of the Plaintiff (Respondent), the Chippewas of Saugeen First Nation ("**Saugeen**") be dismissed;
- (b) that no costs be ordered against Ontario in this Court and in the court below; and
- (c) for such further and other relief as this Court deems just.

THE GROUNDS OF APPEAL are as follows:

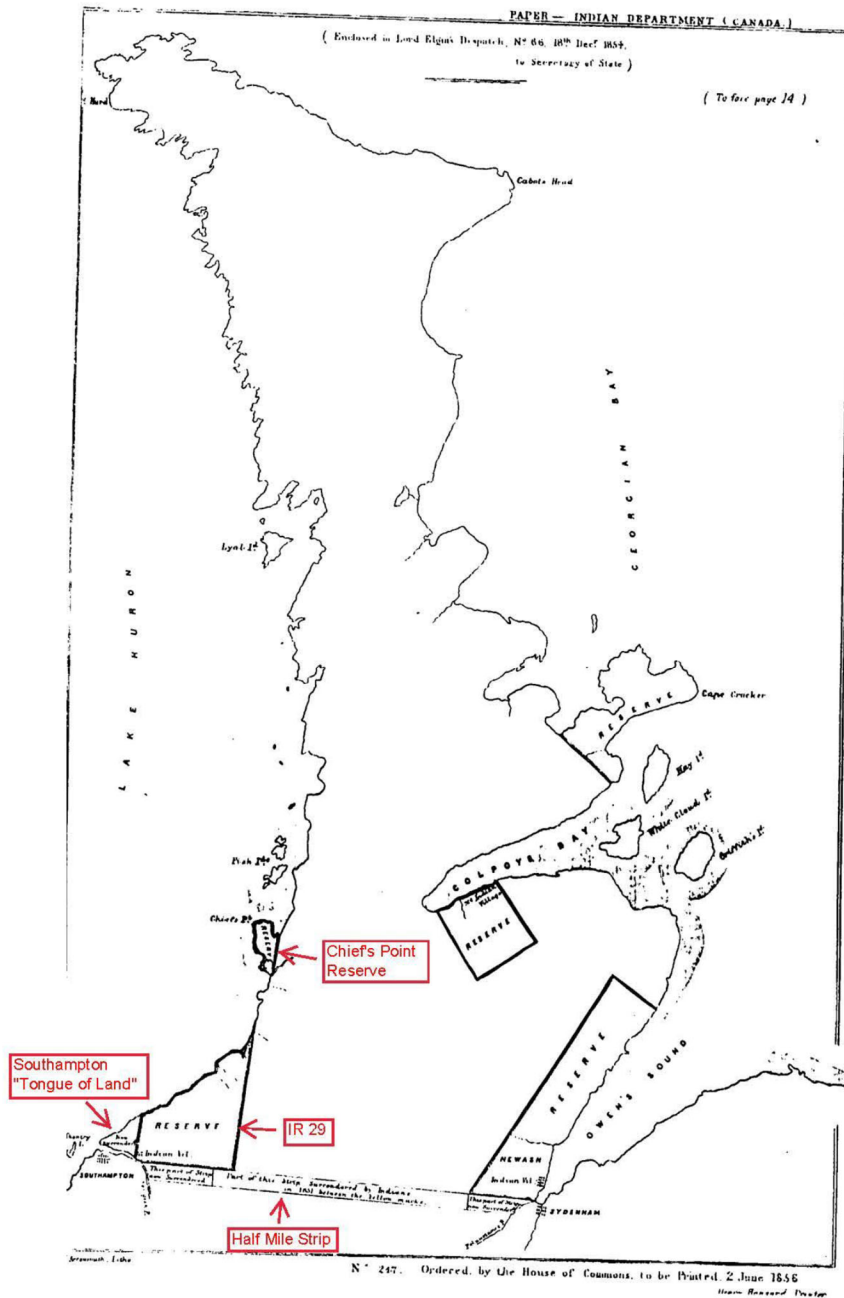
The Reserve Under Treaty 72

1. In October 1854, the Imperial Crown entered into Treaty 72 (“**Treaty**”) with various First Nations, including what is now known as the Chippewas of Saugeen First Nation (“**Saugeen**”). The Treaty reserved from surrender several tracts of land including the one at issue in this appeal (“**Reserve**”). The memorandum recording the Treaty described the Reserve in the following manner:

1st. For the benefit of the Saugeen Indians we reserve all that block of land **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, 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 (9 ½) nine miles and a half from the western boundary aforesaid and running parallel thereto** until it touches the aforementioned northern limit of the recently surrendered strip; 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 and 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.

[emphasis added]

2. At the Treaty Council, Saugeen’s negotiators told the Crown’s negotiator, Superintendent General of Indian Affairs Laurence Oliphant (“**Oliphant**”), what they wanted as reserves. Oliphant then marked those boundaries on a map which he had laid before the Saugeen representatives. After the reserves were marked on that map they were then recorded in a Treaty memorandum. A month later, Oliphant included a sketch map showing these reserves “defined as accurately as was possible without actual survey” in his official report (map shown below as Appendix 1 to the Trial Reasons).



Oliphant Sketch Map Appended to Treaty Report, November 3, 1854

3. The Treaty parties agreed that the eastern boundary of the Reserve would be parallel to the western boundary and would start from a “spot upon the coast ... about (9

½) nine miles and a half” from the point the western boundary met the shore of Lake Huron. This is recorded in the Treaty memorandum.

4. Following the signing of the Treaty memorandum, Oliphant instructed Provincial Land Surveyor Charles Rankin (“**Rankin**”) to start a survey of the Reserve. Oliphant then left Canada in late 1854. Between May 1855 and September 1855, Rankin and his assistant George Gould (“**Gould**”) surveyed the boundaries of the Reserve on the ground.

5. In May 1855, Saugeen considered that the western boundary was being surveyed in a manner contrary to their agreement with Oliphant. Rankin was surveying the western boundary “due north” rather than along a track known as Copway Road. The “due north” boundary would cut off Saugeen’s immediate access to Lake Huron and remove their valuable corn fields from the Reserve. Saugeen objected and forced the surveyors to stop their work.

6. In May and June 1855, Saugeen made various formal written statements against this survey of the western boundary and unsuccessfully sought a meeting with the Governor General about the matter.

7. In June 1855, the Saugeen leadership including Ogimaa (Chief) Kaduhgegwan and Anikeogimaa (Deputy Chief) Madwayosh met with Rankin. Madwayosh had led the negotiation of the Treaty with Oliphant and spoke again for Saugeen about the boundaries of the Reserve. Rankin recorded what Madwayosh “desired” would be the surveyed reserve boundaries on a surveying trace map (“**Trace Map**”).

8. On the Trace Map the western boundary as Madwayosh “desired” it be surveyed runs in a north-westerly direction rather than “due north”.



9. Rankin also recorded on the Trace Map the boundaries placed according to the text of the Treaty memorandum and as instructed by his superiors. These included a “due north” western boundary, and a parallel, “due north” eastern boundary.

10. Rankin gave the Trace Map to Saugeen in June 1855.

11. The new Superintendent General of Indian Affairs, Lord Bury, travelled to the Bruce Peninsula in July 1855 to meet with Saugeen and to resolve the western boundary dispute. As a result of the meeting, in September 1855 an Order in Council approved an alteration to the formal description of the western boundary so that it would run alongside Copway Road.

12. In early September 1855, Rankin and Gould surveyed the eastern boundary. In accordance with their official survey instructions they did so in a “due north” manner.

13. On September 14, 1855, Gould attended a Saugeen Council meeting with Madwayosh at which they discussed the south-eastern corner of the Reserve. The eastern boundary as surveyed did not include within the Reserve a beaver meadow that was important to Saugeen.

14. On September 18, 1855, Kaduhgegwun and Madwayosh sent a letter to the Crown stating that the survey was not being done to their desire.

15. On March 17, 1856, Saugeen sent a petition, signed by Kaduhgegwun and Madwayosh, to the Indian Department. They said that the south-eastern corner of the Reserve had not been surveyed in accordance with the understanding they had at the time they made the Treaty.

16. In May 1856, Saugeen made a request to the Crown *via* Rankin, in relation to the eastern boundary. They asked that the Crown change the boundary from the “due north” line Rankin had surveyed to the other eastern boundary line shown in the Trace Map.

17. In May 1856, Rankin signed and submitted his official plan of survey. He passed on Saugeen’s request about the eastern boundary but said he did not recommend it.

18. On August 13, 1856, Kaduhgeggun and Madwayosh wrote a petition to the Governor General in which they said the southern boundary was wrongly surveyed. They said that their understanding of the Treaty they had made with Oliphant was that the southern boundary would extend at the south-east a further two and a half miles eastward.

19. During 1856, the Superintendent General of Indian Affairs and the Commissioner of Crown Lands examined and accepted Rankin's official survey plan. The official plan was then filed in the Crown records repository in November 1856 and deposited in the Canada Lands Survey Records. No change was made to the eastern boundary from that which Rankin and Gould had surveyed.

Saugeen's Action and the Trial Decision

20. Saugeen commenced this action in 1995. The action is being tried in two phases. In Phase 1, Saugeen sought a declaration that a substantial portion of what is now known as Sauble Beach was and is part of the Reserve ("**Disputed Beach**"). Saugeen also sought a declaration that no third parties have any interest in the Disputed Beach. Further, Saugeen sought a declaration that the Crown, as represented by Canada and Ontario, breached its fiduciary duty and breached the Honour of the Crown.

21. Phase 2 concerns the quantification of any damages to Saugeen and the parties' various crossclaims and remaining counterclaims. It will not proceed until final determination of Phase 1 including appeals.

22. This appeal is of the Phase 1 judgment. The Phase 1 trial took place between November 2021 and May 2022.

23. In reasons released on April 3, 2023, the Trial Judge interpreted Treaty 72 in a manner which includes the Disputed Beach within the Reserve.
24. As a result, the Trial Judge granted the relief Saugeen sought. She declared that:
- (a) The Disputed Beach was and continues to be reserved for the sole use and benefit of Saugeen and forms part of the Reserve;
 - (b) No third parties have an interest in the Disputed Beach, subject to hearing argument on potential life interests of the private landowner defendants; and
 - (c) Canada acted in a manner that was inconsistent with the Honour of the Crown and breached its fiduciary duty to Saugeen.

The Trial Judge Incorrectly Identified the Treaty Interpretation Test

25. The Trial Judge said the following, which are errors of law:
- (a) That the task is to find the interpretation that favours the Indigenous party's interests, when the law is that a Court must find the interpretation that best reconciles the parties' interests at the time the Treaty was made;
 - (b) That the controlling question is what is required to effect reconciliation, when the law is that a Court must reconcile the parties' interests at the time of Treaty; and
 - (c) That textual evidence is preferred to contextual evidence, when the law is that textual evidence does not necessarily have greater weight.

Incorrect Application of the Treaty Interpretation Test

26. The Trial Judge did the following, which are errors of law or errors of mixed fact and law resulting from an extricable legal error:

- (a) Preferred textual evidence as to common intention over contextual evidence;
- (b) Failed to identify the correct Saugeen interests at the time of Treaty, which included corn fields and lake access at the western boundary and a beaver meadow at the eastern boundary, and protection of a fishery rather than exclusive possession of the Disputed Beach;
- (c) Described the western boundary “due north” error as a latent ambiguity, when it is a textual error in recording the parties’ plain common intention;
- (d) Adopted an interpretation of the Treaty text which:
 - i. required the eastern boundary to be “due north,” when the text defined the eastern boundary by reference to its distance from the western boundary and as parallel to the western boundary;
 - ii. rested on an implication of a short northern boundary, which has no support in the Treaty text; and
 - iii. required Rankin to have surveyed an implied short northern boundary, when the Treaty gave him discretion in relation to non-specific Treaty boundaries, and he properly exercised his discretion according to the legal and professional standards of the day;
- (e) Failed to reconcile the parties’ interests and instead chose an interpretation that favoured Saugeen’s interests; and
- (f) Failed to choose the interpretation that best reconciled the parties’ interests at the time of Treaty.

Palpable and Overriding Errors of Fact

27. The Trial Judge failed to find:

- (a) That the sketch map Oliphant included in his official report was either the map laid before the Treaty Council or a copy of it;
- (b) That Oliphant and the Saugeen negotiators understood that Copway Road ran northward, and understood and agreed that the western boundary was to be Copway Road;
- (c) That Oliphant as the Crown's representative had this understanding and made this agreement, even though this was the submission at trial of both Crown parties;
- (d) That the text of the Treaty memorandum does not accurately record the agreement reached between Oliphant and the Saugeen negotiators;
- (e) That Rankin had prepared and given the Trace Map to Saugeen in June 1855 in the context of the Copway Road dispute, prior to the survey of the eastern boundary;
- (f) That at some time between June 1855 and May 1856 Saugeen returned the Trace Map to Rankin, with a request that the eastern boundary be surveyed in a manner which would include their beaver meadow within the Reserve;
- (g) That Saugeen had made formal requests to the Crown in March 1856 and August 1856 to extend the southern end of the eastern boundary further eastward, in accordance with their understanding of the eastern boundary as agreed with Oliphant and not as recorded in the Treaty memorandum, and in a manner which reflected that of the Trace Map; and

- (h) Saugeen received and viewed in 1881 and 1888 illustrations showing that the Reserve ended at Lot 25, and did not object.
28. The Trial Judge further erred by finding:
- (a) That Saugeen knew the location of the “spot upon the coast” independently of the Treaty, in the absence of any supporting evidence;
 - (b) That Saugeen knew the location of the “spot upon the coast” independently of the Treaty, in the face of evidence that this “spot” was simply a reference to the point at which the eastern boundary would start, about 9 ½ miles from the western boundary, as estimated from the map laid before the Treaty Council on which Saugeen’s reserves were marked;
 - (c) That Saugeen wrote one petition to the Governor General in May 1855 complaining about the Copway Road error, when in fact Saugeen:
 - i. made a formal Council resolution in May 1855;
 - ii. a petition to the Governor General in May 1855;
 - iii. a petition to Parliament in May 1855; and
 - iv. a further to petition to the Governor General dated June 26, 1855. It was in this latter petition, after Saugeen received the Trace Map, that it said that “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.”
 - (d) That certain evidence (the van Dusen memoir) was reliable evidence when used for proof of statements made by Saugeen about their understanding

of the Treaty agreement but unreliable for proof of the Crown's understanding of the Treaty;

- (e) That Rankin ran the survey line south from the water's edge at Lot 31 and not from a post he had planted 150-200 feet inland, in the absence of any supporting evidence, and in the face of evidence to the contrary; and
- (f) That the eastern boundary of the Reserve according to Treaty 72 is and should be farther east than the line which Rankin ran south from Lot 31.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

- (a) Section 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43;
- (b) The Judgment appealed from is final; and
- (c) Leave to appeal is not required.

May 3, 2023

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CHIPPEWAS OF SAUGEEN FIRST NATION
Plaintiff (Respondent)

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

Court File No.

COURT OF APPEAL FOR ONTARIO
PROCEEDING COMMENCED AT TORONTO

NOTICE OF APPEAL

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