Court File No. COA-23-CV-0491
Court File No. COA-23-CV-0511

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)

FACTUM OF THE DEFENDANTS (APPELLANTS), THE TOWN OF SOUTH BRUCE PENINSULA, THE ESTATE OF BARBARA TWINING (BY HER EXECUTORS, BRENDA JOAN ROGERS & GARY MICHAEL TWINING) AND ALBERTA LEMON

September 29, 2023

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TABLE OF CONTENTS

Page No.

PART I - OVERVIEW

1. Sauble Beach stretches along seven miles of Lake Huron coastline from Frenchman's Point to the Sauble River. For decades, the beach was shared by the Saugeen First Nation, the Town of South Bruce Peninsula, and private landowners.

2. The northern portion of Sauble Beach lying north of Main Street was owned by the Town and the Lemon, Twining, and Dobson families. The families acquired their lands in the 1940s and 1950s in good faith reliance on official instruments and Crown assurances of title. They forged deep, authentic connections to their lands over four generations. The Town acquired title to its beach lands in the 1970s—when public ownership and stewardship had become essential to health and safety—and dedicated the lands to the public trust. Sauble Beach became the Town's most important asset, embedded in the community's social, economic, and cultural fabric.

3. The southern portion of Sauble Beach is located within Saugeen's Reserve #29. Saugeen and Canada's case at trial was that the Crown survey conducted in 1855 included the beach lands owned by the Town and families within the Reserve, but that the survey was not accurately recorded in official maps and survey plans. The Trial Judge dismissed this theory and found the boundaries were recorded exactly as they had been surveyed and that the Crown Patents issued according to those surveyed boundaries were unambiguous. But she went on to find that the Crown breached its duties to Saugeen in 1855 because the boundaries *ought to have been drawn differently*. The Trial Judge then rewrote those boundaries, dispossessing the Town and families.

4. This is the first decision invalidating title to Crown-patented municipal and privately owned lands to conform to a novel treaty interpretation. It is the first decision in which innocent parties have been entirely dispossessed to remedy historical wrongs committed solely by the Crown. And it is the first decision in which boundaries established nearly 170 years ago have been re-drawn by a court to satisfy a land claim. The implications of the decision are profound.

5. In 1854, the Imperial Crown and Saugeen First Nation entered into Treaty 72, in which Saugeen and two other First Nations ceded the Bruce Peninsula and reserved certain tracts of land. This case concerned the east boundary of Saugeen's Reserve #29. The survey to implement the boundaries began shortly after the Treaty council and was performed by Charles Rankin—a reliable, experienced surveyor who witnessed the signing of the Treaty.

6. According to Treaty 72, the Reserve's east boundary was to be a line drawn south from a "spot upon the coast" of Lake Huron "about" 9 ½ miles from its west boundary. The Treaty contemplated that Rankin would traverse the shore of Lake Huron approximately 9½ miles from the west boundary, mark a "spot upon the coast", and then run a line in a southerly direction from that spot, to create the east boundary. That is precisely the process Rankin followed.

7. However, when Rankin began running the east boundary south from the "spot upon the coast", it became apparent that the concave shape of Lake Huron caused the east boundary to intersect the waters of Lake Huron. He therefore continued south and marked the northeast corner of the Reserve where the line re-emerged on dry land—*i.e.*, what is now Main Street in the Town. And that is where the east boundary between the Reserve and the Town lay for almost 170 years. That boundary was consistently and clearly reflected and affirmed in all maps, surveys, plans, and official instruments. That line was the basis upon which lands were sold at auction, patents issued, and title acquired by good faith purchasers. For decades, the Crown stood by this boundary and repeatedly assured the Town and private landowners of their lawful title.

8. Saugeen and Canada's case at trial was that the disputed beach was always included within its Reserve, as surveyed by Rankin, but that errors had been made in recording the boundary line in official maps. The Trial Judge rejected that theory, but went on to find that Rankin *should have drawn a different boundary* in 1855. She shifted the disputed boundary

further east to encompass the beach and "implied" a new north boundary not found anywhere in the Treaty. This was not what Saugeen or Canada pleaded or asked for, and it was not how their case was presented at trial.

9. No one asked the Trial Judge to rewrite the boundary, and in her reasons, she did not specify where the new east boundary lies on the ground today. The effect of the decision is to cast a cloud over the title of an indeterminate number of non-party landowners, who had no notice that their land would be implicated by the judgment. The decision strikes at the heart of the Crown's guarantee of fee simple granted and assured by Crown patent.

10. The Trial Judge did not direct herself to the stringent "officious bystander" test for implying treaty terms. And she erred in holding that the defendants were not good faith purchasers for value without notice. The re-drawing of lawful boundaries and dispossessing the Town, families, and others is an error in principle and inconsistent with reconciliation.

11. Prior to this judgment, Saugeen, the Town, and families shared Sauble Beach and were each responsible stewards of their properties. They were good neighbours. The principles of reconciliation did not mandate that the "brunt" of the Crown's failure to deliver on Treaty promises be borne by innocent landowners. Equitable compensation from the Crown would meaningfully harmonize Saugeen's ambitions for its community with the Town and families' connections to their lands. Reconciliation does not call for dispossession and disenfranchisement.

12. This case identifies the dangers of redressing historical wrongs by disrupting settled possession and good faith ownership grounded in lawful, registered title. And it highlights the perils of imposing a well-intentioned outcome that introduces great uncertainty and unpredictability in the foundation of our nation's system of private landholding.

13. The Town and families respectfully submit that their appeal should be allowed.

PART II - STATEMENT OF FACTS

14. Sauble Beach is a seven-mile stretch of beach lying between Frenchman's Point and the Sauble River, on the east side of Lake Huron. It is one of Ontario's most popular summer tourist destinations, attracting hundreds of thousands of visitors during the summer months.

15. Before the trial judgment was issued, stewardship over Sauble Beach was shared between the parties to this action. The Appellants, the Town of South Bruce Peninsula (the "**Town**") and the Lemon and Twining families (together, the "**Families**"), held registered title to beach lands lying north of the road allowance between Lots 25 and 26 in Concession D, known today as Main Street. Title to these lands was rooted in Crown Patents and confirmed repeatedly by the federal government in response to inquiries from generations of landowners.

16. Sauble Beach was the Town's prized public asset, a cultural and economic driver of the local community that relies on the vibrant tourism industry surrounding this natural landmark.[1] The Town has maintained the beach as a free, publicly-accessible park since acquiring title in the 1970s. The Families have also formed deep, authentic connections to their lands.[2]

17. The stretch of beach land lying south of Main Street has formed part of the reserve lands of the Respondent, Saugeen First Nation, since Treaty 72 was entered into in 1854. Saugeen is an Indigenous nation with over 2,080 citizens, some of whom reside on Saugeen Indian Reserve No. 29 (the "**Reserve**") and Chief's Point Indian Reserve No. 28 ("**Chief's Point**").[3] Both the Reserve and Chief's Point lie to the west of the Town, along the shore of Lake Huron.

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[1] Reasons, paras. 557, 559 & 571; Transcript, Day 22 (Jan 12), pp. 3261:24-3262:21; pp. 3264:9-23; pp. 3276:24-3278:10; pp. 3378:13-3379:3.
[2] Reasons, paras. 527 & 528, 538-541; Transcript, Day 16 (Jan 4), pp. 2152:6-13; p. 2157:23-2159:3; p. 2165:1-15; Day 17 (Jan 5), p. 2269:1-2270:6; Day 20 (Jan 10), pp. 2842:25-2843:24; pp. 2841:8-2842:18.
[3] Reasons, para. 25; Transcript, Day 9 (Dec 6), pp. 1394:6-1396:16; pp. 1408:13-1409:3; pp. 1415:23-1416:12.

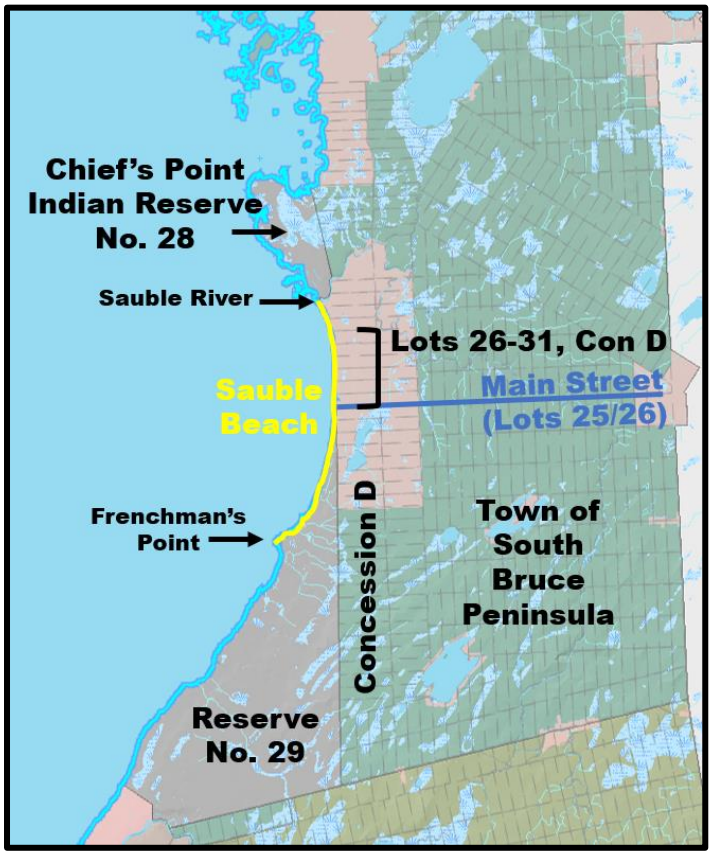

Figure 1 – Map of the Reserve and neighbouring Town of South Bruce Peninsula, highlighting Sauble Beach

18. This action is about the location and northerly extent of the Reserve's east boundary, as set out in Treaty 72 and surveyed in 1855 shortly after the Treaty was signed. Saugeen sought declarations that lands north of Main Street—including parts of Lots 26-31 in Concession D that abut Lake Huron (the "**Disputed Beach**")—are and have always formed part of the Reserve since it was surveyed, and that no third parties have any interest in these lands. Saugeen also claimed fiduciary breaches and dishonourable conduct against the Attorney General of Canada ("**Canada**") and His Majesty the King in right of Ontario ("**Ontario**").

A. Saugeen Enters into Treaty 72 with the Crown in October 1854

19. The decades leading up to Treaty 72 saw tremendous social, political, and economic change. A sharp population increase in Upper Canada, coupled with rampant inflation, caused a boom in demand for land and resources. Facing massive pressure to secure new lands for sale,

the Imperial Crown focussed on obtaining a surrender of the unceded Bruce Peninsula, which was then inhabited by Saugeen and neighbouring First Nations.[4]

20. Saugeen and other First Nations were also feeling the effects of these changes. The booming interest in land caused an increase in squatters on unceded land. At the same time, "the days of hunting, fishing and survival methods were starting to fade" for Saugeen.[5]

21. It was against this backdrop that Saugeen and neighbouring First Nations entered into Treaty 72 with the Crown on October 13, 1854. Treaty 72 memorializes a negotiated agreement for surrender of the Bruce Peninsula, the reservation of five tracts of land for the First Nations, and a financial arrangement to secure their economic future. Ceded lands were to be sold by the Crown, and the proceeds credited to the First Nations' benefit.

22. Negotiations took place at a council convened on October 12 and 13, 1854 by then-Superintendent General of Indian Affairs, Lawrence Oliphant. He was joined by Provincial Land Surveyor Charles Rankin, who signed the Treaty as a witness and would later survey the ceded and reserve lands.[6]

23. The First Nations were represented by chiefs, councillors, and leading men, assisted by interpreters. They were experienced negotiators who had resisted previous overtures for a surrender of the Peninsula. Following negotiations on the night and early morning of October 12 and 13, 1854, they arrived at an accommodation with the Crown and affixed their *doodems* to the Treaty to signify agreement.[7] There is no dispute that Treaty 72 was validly entered into.

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[4] Reasons, paras. 117-134.
[5] Reasons, paras. 126-127, 130 & 132; Transcript, Day 5 (Nov 29), p. 696:6-21; *Saugeen First Nation v. The Attorney General of Canada*, 2021 ONSC 4181 ("***SON* Trial**"), para. 1013, aff'd 2023 ONCA 565.
[6] Reason, paras. 136-138.
[7] Reasons, paras. 138, 140-143; *SON* Trial, at paras. 1019, 1049, and 1064.

B. The Boundaries of Saugeen Indian Reserve #29

24. Treaty 72 sets aside two of the five reserve tracts—the Reserve and Chief's Point—for the benefit of Saugeen. They are described as distinct "block[s] of land" separated by ceded land. Although Saugeen had, in earlier negotiations, proposed to retain the entire Lake Huron shoreline, its leaders did not insist on this at the October 1854 Treaty council.[8]

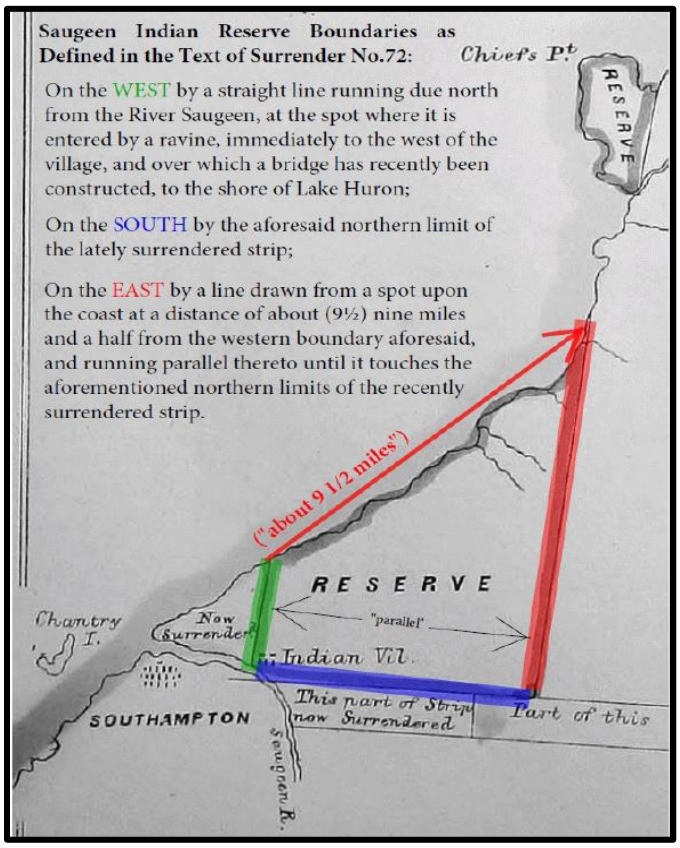

Figure 2 – Illustration of Reserve's Boundaries, Figure 3.7 of Report of G. Reimer, dated August 13, 2021 (Ex. 1911)

25. Treaty 72 describes the Reserve's boundaries as follows. They are shown in Figure 2 on a sketch map Oliphant sent to Governor General Lord Elgin with his report on the Treaty council:

(a) ***the west boundary*** is 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";

[8] Reasons, para. 130; Transcript, Day 3 (Nov 25), p. 417:17-21; Day 5 (Nov 29), pp. 686:3-687:4.

(b) ***the south boundary*** is the "northern limit of the lately surrendered strip"—*i.e.*, the "Half Mile Strip", a narrow strip of land ceded by the First Nations under Treaty 67 in 1851 for an east/west road to Owen Sound;

(c) ***the east boundary*** is "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 aforementioned northern limits of the recently surrendered strip"; and

(d) although not expressly mentioned in the description, the Reserve's "fourth boundary" was Lake Huron, connecting the Reserve's east and west boundaries.[9]

C. Rankin's Survey of the Ceded Lands and the Reserve

26. In April 1855, Rankin was instructed by the new Superintendent General of Indian Affairs, Lord Bury, to survey and subdivide the south half of the Bruce Peninsula and prepare survey plans for township lots in the ceded lands. Both the Crown and Saugeen wanted these lots brought to market at the earliest opportunity. Rankin understood his survey was integral to implementing Treaty 72. He was by all accounts a diligent, reliable, and careful surveyor. Rankin was present at the Treaty council and had first-hand knowledge of it.[10]

27. In 1855, surveys were carried out using 66-foot "surveyor's chains" to measure distances, and magnetic compasses to determine direction. Wooden posts were used to mark boundary corners and other significant survey points.

28. Rankin was instructed to, and did, keep detailed notes of his survey work in his field books, journals, survey plans, and letters to Crown officials. His records describe the distances and directions of his survey lines, along with the topography he surveyed. Rankin later used notes from his field books to visually plot the various concession lots, reserves, roads, and watercourses in the Bruce Peninsula on maps and plans of survey.[11]

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[9] Reasons, paras. 49-56.
[10] Reasons, paras. 138, 144, 163, 170, 195, 198, and 311.
[11] Instructions from Bury to Rankin, April 26, 1855 (Ex. 337).

D. Saugeen Raised Issues with West Boundary; Resolved in Saugeen's Favour

29. There is no dispute that Saugeen was vigilant in observing Rankin's survey work. When Rankin's crew began running the Reserve's west boundary in May 1855, they were immediately met with forceful opposition from Saugeen leaders, who understood from the Treaty council that the boundary was to run diagonally—not "due north"—along their path to Lake Huron known as the Copway Road. Rankin defused the situation, and the survey was allowed to continue.[12]

30. Saugeen escalated their complaints through a series of letters and meetings with Crown officials.[13] At a council in July 1855, Saugeen Chief Madwayosh explained to Lord Bury and Rankin that "when Mr. Oliphant was up, we told him that what we wished reserved, which he marked on a map; and when the surveyor came up, he did not survey it properly; and our object was to have it corrected."[14]

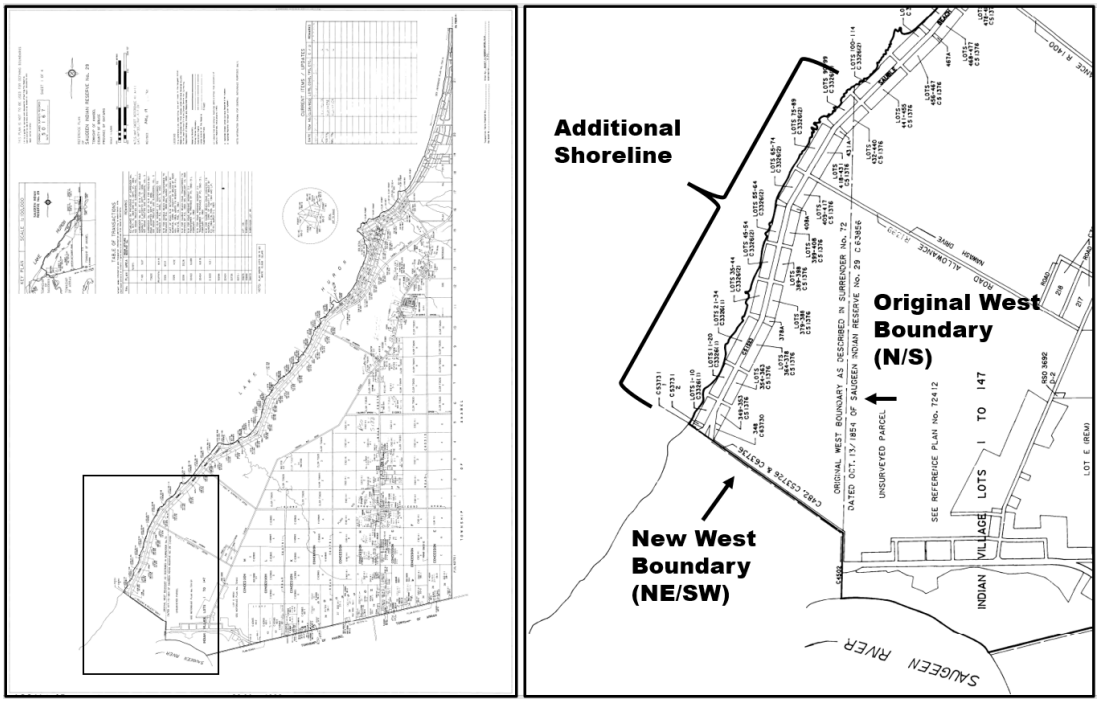

Figure 3 – Illustration of the "Copway Road" Correction (Ex. 1782)

[12] Reasons, paras. 172 & 178.
[13] Reasons, paras. 170-180.
[14] *Northern Advance*, Barrie, C.W. "Grand Council Meeting", August 2, 1855 (Ex 409).

31. Lord Bury agreed to make "alterations" to have the west boundary follow Copway Road in a northwest/southeast direction. Rankin supported this correction, and it was memorialized in an Order-in-Council on September 27, 1855.[15] The result was to add approximately 1.5 miles of shoreline to the Reserve at the south end, as shown in Figure 3 above.[16]

E. Rankin's Survey of the Reserve's East Boundary

32. Rankin conducted his survey of the Reserve's east boundary in September 1855, around the time the Copway Road complaint was being resolved. The first step in his survey of this boundary was to identify the "spot upon the coast"—representing the approximate 9½ mile distance from the Reserve's original ("due north") west boundary—from which he was to run a line south to mark the Reserve's east boundary, in accordance with Treaty 72.[17]

33. At trial, the survey experts agreed that Rankin found the "spot upon the coast" near the water's edge in Lot 31 and marked it with a wooden post that has long since washed away. The main point of disagreement among the survey experts was between two competing theories:

(a) ***Theory #1***: Saugeen's expert surveyor (supported by Canada) opined that Rankin was *able to*, and *did*, establish a boundary south from the "spot upon the coast" in Lot 31 entirely on dry land, and included all land west of this line within the Reserve's boundaries. This theory was put forward in service of Saugeen's claim that the Disputed Beach formed part of the Reserve since it was first surveyed by Rankin in 1855. Saugeen's expert purported to "re-establish" the line that he claimed Rankin ran along dry land in 1855, and the location of the wooden post at Lot 31. He plotted these in a survey plan, and Saugeen asked the Trial Judge to accept it as a faithful recreation of the Reserve's east boundary as surveyed.[18]

(b) ***Theory #2***: The survey experts called by Ontario and the Town opined that Rankin was *unable* to survey any line south from the "spot upon the coast"

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[15] Reasons, paras. 181-182; Report from Bury to Indian Department, August 11, 1855 (Ex. 419) & Letter from Rankin to Bury, August 11, 1855 (Ex. 1784); Order-in-Council, September 27, 1855 (Ex. 442).
[16] See: Transcript, Day 21 (Jan 11), p. 3051:11-3052:21; Day 14 (Dec 14), p. 1998:2-3; and Day 2 (Nov 24), p. 158:4-11.
[17] Reasons, para. 312.
[18] Reasons, paras. 232-256.

without crossing the waters (or wet sand) of Lake Huron due to the concave shape of the shoreline, as illustrated below in Figure 4.[19]

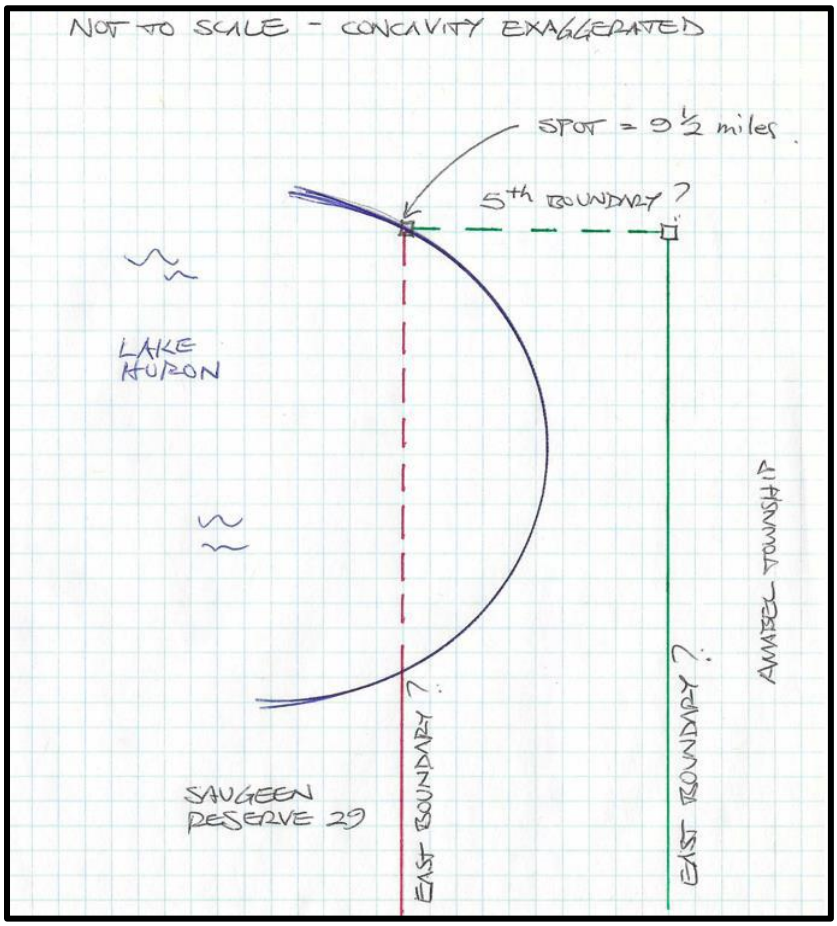

Figure 4 - "Unscaled sketch of Rankin's conundrum in September 1855", Figure 22 of Report of B. Ballantyne, dated August 15, 2021 (Ex. 1920)

34. As detailed below, the Trial Judge rejected Saugeen's and Canada's Theory #1 and accepted Theory #2. She found Rankin could not run a straight line south from the "spot upon the coast" in Lot 31 on dry land owing to the shoreline concavity, and that his line ran along wet sand between Lots 31 and 26, before re-emerging on dry land in Lot 25. Rankin thus marked the Reserve's east boundary around the road allowance between Lots 25 and 26—the northernmost point from which he could run a continuous boundary on dry land south to the Half Mile Strip—as illustrated by Ontario's survey expert, Dr. Brian Ballantyne, in Figure 5:

[19] Reasons, para. 257-309.

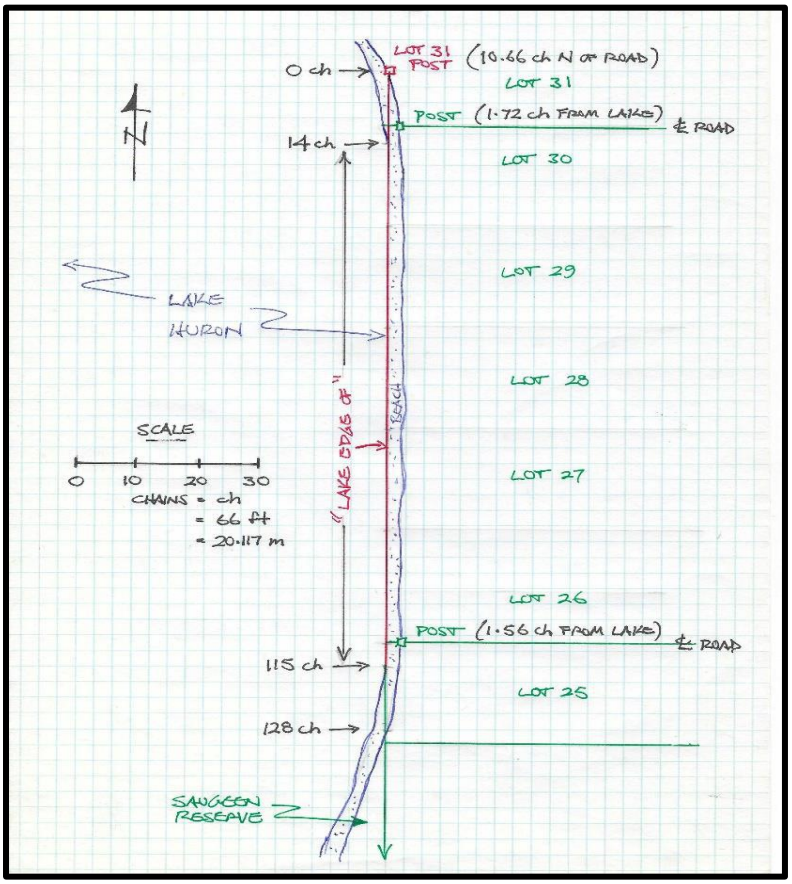

Figure 5 - "Scaled sketch of fieldnotes (Sept 4, 855); Rankin surveyed south from Lot 31 post", Figure 22 of Report of B. Ballantyne, dated August 15, 2021 (Ex. 1920)

35. The concavity of Lake Huron had the effect of reducing the Reserve's frontage on Lake Huron at the north end by about 1.4 miles, although it was offset by the approximately 1.5 miles added via the Copway Road correction on the south end. Accordingly, Rankin's survey of the Reserve provided Saugeen with "about 9 ½ miles" of Lake Huron frontage. This was unchallenged at trial. Indeed, the distance between Copway Road and the original west boundary was greater than the distance of the disputed portion of Sauble Beach by "about 20%".[20] And Dr. Ballantyne estimated a distance of 9.4 miles between Copway Road and monument marking the Reserve's northeast terminus at the road allowance between Lots 25 and 26.[21]

[20] Transcript, Day 21 (Jan 11), pp. 3051:11-3052:21; Stephen A. Fediow, "Expert Opinion on the Survey of the Saugeen First Nation Reserve No. 29 by Charles Rankin, PLS (September 1855)", August 16, 2021 ("**Fediow Report**"), at p. 54 (Ex. 1950).
[21] Transcript, Day 14 (Dec 14), p. 1998:2-3.

F. Rankin's Survey Plans Consistently Place Boundary at Lots 25/26

36. The Trial Judge's acceptance of Theory #2 was consistent with Rankin's survey plans. Weeks after completing his survey, Rankin prepared a draft survey plan (the "**1855 Draft Plan**") that shows his line south from the "spot upon the coast"—marked "NE < Ind. Res."—intersecting the edge of Lake Huron between Lots 31 and 26, as illustrated below in Figure 6.

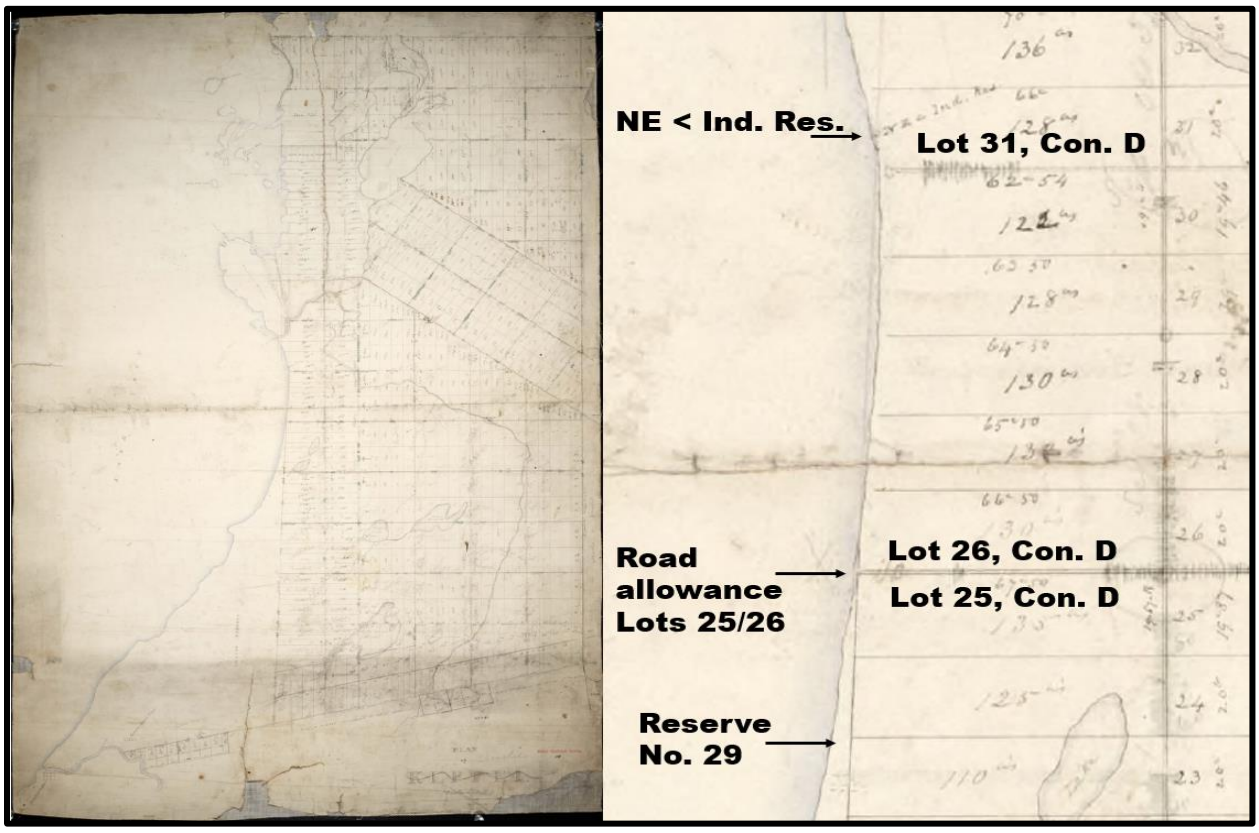

Figure 6 – Draft Plan of Survey of the Township of Amabel, with annotations (Ex. 1780)

37. In May 1856, Rankin finalized his survey plan of the Reserve and Township of Amabel (the "**1856 Final Plan**"), an official document signed by him and stamped with an Indian Affairs Survey Record number.[22] It is the definitive depiction of where Rankin placed the Reserve's east boundary. Consistent with his 1855 Draft Plan, the 1856 Final Plan shows the Reserve's northeast terminus at the road allowance between Lots 25 and 26, as illustrated in Figure 7.

[22] Map of the Township of Amabel, Indian Affairs Survey Records No. 862 (Ex. 587).

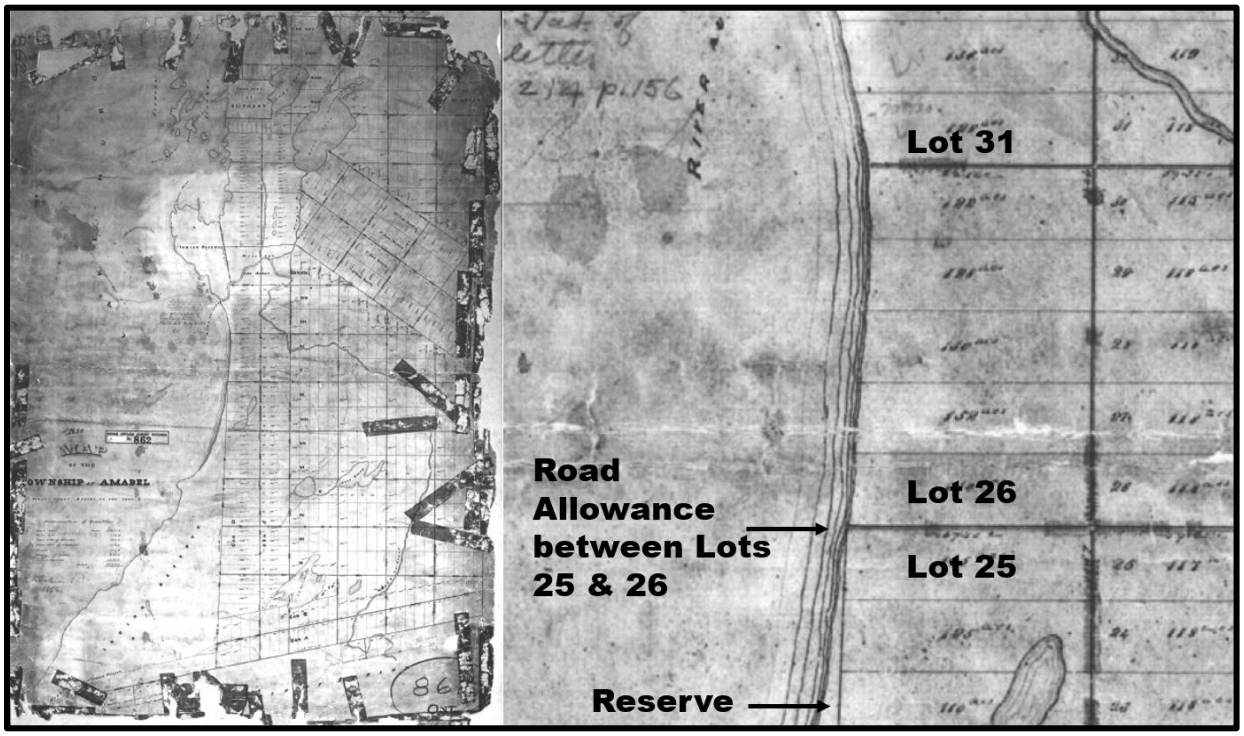

Figure 7 – Final Plan of Survey of the Township of Amabel, with annotations (Ex. 587)

G. Ceded Lands Brought to Market and Patented by the Crown

38. The ceded lands that Rankin surveyed and subdivided were brought to market at public auction in September 1856. Lots were advertised using a map published under the authority of the Indian Department, affixed with the Great Seal (the "**Auction Map**"). Like Rankin's 1855 Draft Plan and 1856 Final Plan, the Auction Map shows the Reserve's east boundary ending at the road allowance between Lots 25 and 26. It makes clear that Lots 26 to 31 were being put up for sale as riparian lots running up to the water's edge of Lake Huron, without any intervening Reserve. Those lots were sold at the September 1856 auction, or shortly thereafter.[23] At trial, Saugeen and Canada denied that lands were auctioned on the basis of these maps.

39. The Department of Indian Affairs issued Crown Patents for these lots in the years and decades that followed. Each patent grants fee simple ownership to lands described by lot and

[23] Reasons, paras. 199-200.

concession number. The Trial Judge found that Rankin's 1856 Final Plan was incorporated by reference into each of the Crown Patents for Lots 26 to 31, and that "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". In her view, "the patents are not ambiguous"; instead, "they purport to convey fee simple to the Disputed Beach to the Patentees of the Disputed Lots" and "form the root of title for the purported ownership of these since subdivided lots".[24]

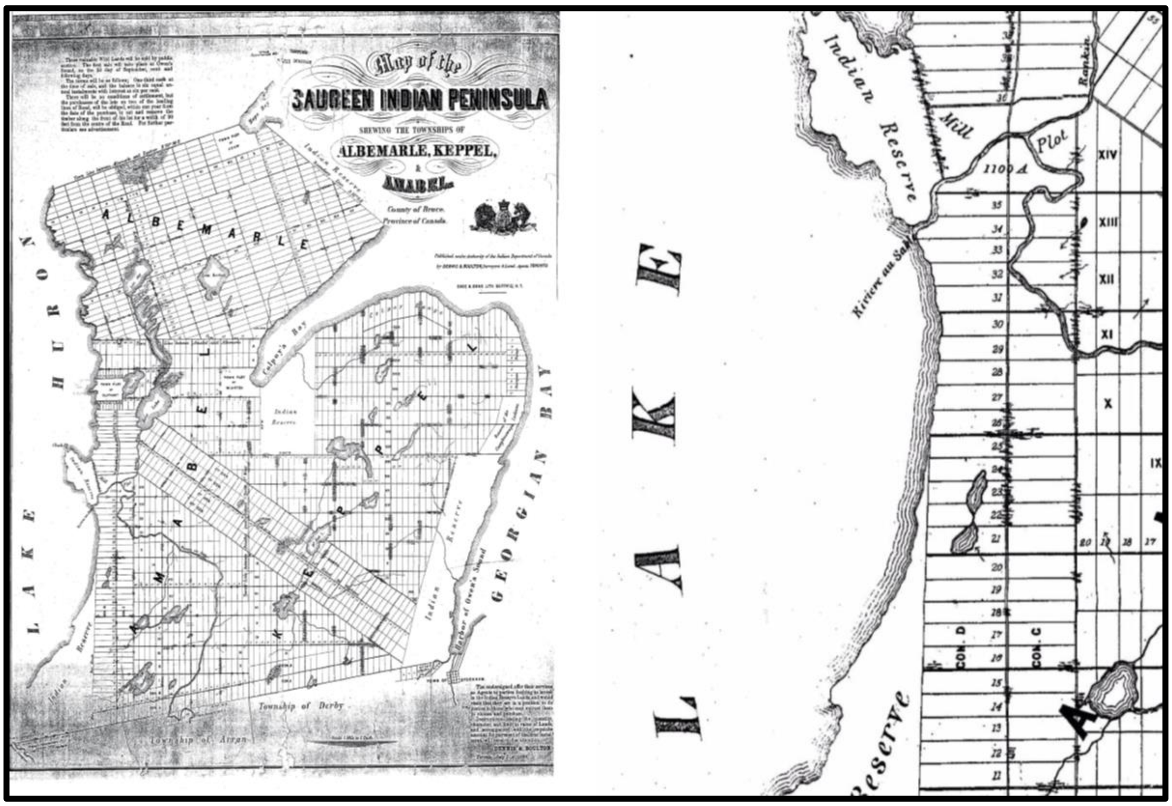

Figure 8 - Dennis & Boulton, Map of the Saugeen Indian Peninsula, shewing the Townships of Albemarle, Keppel and Amabel (the "Auction Map") (Ex. 582)

H. <u>Canada Officials Confirm that Title to Lots 26-31 Extend to the Water's Edge</u>

40. Over several decades, the Lake Huron shoreline around Sauble Beach changed dramatically as a result of sand accretions and receding water levels. While it is difficult to know precisely what the shoreline looked like during Rankin's survey, the Trial Judge found as a fact

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[24] Reasons, paras. 483-486 & 493.

"that the Disputed Beach is far wider today than it was in 1854-55". All survey experts agreed that the width of the beach has likely grown by several hundred feet.[25] This means that the line Rankin ran along wet sand in 1855 would run along dry land today.

41. Owing to these changes, questions emerged in the 1920s about the ownership of Sauble Beach. Over the ensuing decades, various owners of Lots 26 to 31 sought and received assurances from Canada that the Reserve did "not extend opposite the aforesaid lots … and that 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".[26] This is consistent with the longstanding rule at common law that land accretions accrue to the owner of the riparian lot.[27]

I. The Town and Families Acquire Title to the Disputed Beach

42. In the early 1900s, cottagers and seasonal tourists began to frequent Sauble Beach. Tourism accelerated markedly after World War II, with middle class families buying cottages and setting up businesses around this natural landmark.

43. In 1947, George Croshaw (the Twinings' grandfather) acquired land on the Disputed Beach in Lot 26 to set up a restaurant called the "Beachcomber". He developed deep roots in the area, founded the local Chamber of Commerce, and became known as the "unofficial mayor" of the Town. The next year, Ross and Harold Dobson acquired lands to the north of Mr. Croshaw's land to set up their own restaurant, the "Crowd Inn". And in 1953, Norman McKee (Alberta Lemon's father) bought land next to Mr. Croshaw's land, along with cottages across the street.[28]

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[25] Reasons, para. 230; Dr. Brian Ballantyne, "East Boundary – Chippewas of Saugeen First Nation Reserve 29", August 15, 2021 ("**Ballantyne Report**"), at paras. 119-124 (Ex. 1920); Fediow Report, at paras. 22-23 (Ex. 1950); Transcript, Day 7 (Dec 1), pp. 1074:3-1076:21.
[26] Reasons, para. 519; Letter from Davidson to the Department of Indian Affairs, September 12, 1944 (Ex. 1126); Letter from Allan to Davidson, October 18, 1944 (Ex. 1129); see also Ex. 929, 1039, 1041, 1919, 1891, 1056, 1057, 1821, 1811, 1133, 1136, 1139, 1735 & 1737.
[27] *Duarte v. Ontario*, 2018 ONSC 2612, para. 105; citing *Clarke v. Edmonton (City)*, [1930] S.C.R. 137, at p. 13.
[28] Reasons, paras. 521, 530-531 & 543-545; Transcript, Day 16 (Jan 4), p. 2152:6-13.

44. These lands remained in the Twining, Dobson, and Lemon families for generations until the trial judgment. Mr. Croshaw's lands passed to his daughter, Barbara Twining, and were held in her estate after her death for the benefit of her five children. The Dobson brothers sold their land and business to their son and nephew, David Dobson, who carried on the family business until he was forced to close up in July 2023 as a result of this judgment. Mr. McKee's lands passed to his daughter, Alberta Lemon, now 101 years old, and they were to pass on her death to her eldest son, Rick.[29]

45. At trial, the Families spoke about their deep attachments to the beach lands. Barbara Twining's youngest son, David, described his family's beach lands a "family heirloom". Alberta Lemon testified by video from her nursing home that she has received offers to buy her beach lands, and turned them all down, because "it is not about the money to her".[30] And when asked about his Crowd Inn restaurant, Mr. Dobson broke into tears: "It's meant everything to us. My dad built it, and I met my wife, my friends there—that's all I can really say".[31] The Trial Judge acknowledged these deep attachments, but found they did not carry the same weight as the "cultural connection between [Saugeen] and the land and water".[32]

46. The Town acquired its title to the Disputed Beach by quitclaim deeds in or around 1970, at a time when Saugeen was asserting a claim to these lands. It did so because of the pressing need for municipal stewardship over Sauble Beach. On acquiring these lands, the Town immediately made significant investments in the waterfront and dedicated it to the public trust.[33] In August 1970, the Clerk of Amabel reported "numerous compliments on the Township Council

[29] Reasons, paras. 520-522, 530, 536, 546-547.
[30] Reasons, paras. 527 & 533.
[31] Transcript, Day 17 (Jan 5), p. 2310:2-20; p. 2319:8-15.
[32] Reasons, paras. 594-595.
[33] Reasons, paras. 557-559.

taking the initiative in properly developing the Beach as a public park. Most have said the beach is cleaner this year than they have ever seen it and it is safe for their children and for relaxing."[34]

47. Since then, the Town has invested considerably in new infrastructure and maintenance of the beach, turning it into a prime tourist attraction and one of its main economic engines. On a busy summer day, the Town can see up to 20,000 visitors enjoying the beach.[35]

J. Saugeen Commences Proceedings for Rights over Sauble Beach

48. Saugeen's complaints about its rights over the Disputed Beach have evolved over time. In the late 1800s, Saugeen's claim was framed in terms of fishing rights along the stretch of Disputed Beach, and then later, a suggestion that the entire beach from Frenchman's Point to Chief's Point was reserve land. In the 1930s, its concerns turned to Rankin's survey. Saugeen asserted that "their reserve extended to the Sauble River (past Lot 31) and that, accordingly, cottagers were encroaching on their beach". In the 1950s, Saugeen engaged legal counsel to advance these complaints. The Crown commissioned surveys and investigations throughout this period, but consistently disagreed with Saugeen's claim to any lands north of Lot 25.[36]

49. In the 1970s, the Crown commissioned a new survey report in response to renewed complaints from Saugeen. This report suggested, for the first time, that Rankin may have run his line on dry land and included the Disputed Beach in the Reserve's boundaries more than 100 years prior. Saugeen accepted this survey, but did not file a claim.[37] It was not until 1995 that Saugeen commenced this proceeding, seeking declarations that lands north of Lot 25 have always formed part of its Reserve under Treaty 72, and that no third parties have any interest in

[34] Letter from Lyons to McEachern, August 25, 1970 (Ex. 1362).
[35] Transcript, Day 22 (Jan 12), pp. 3256:11-3257:16.
[36] Reasons, paras. 340-344 & 357-364; Letter from Downs to Indian Affairs, February 25, 1955 (Ex. 1224); Transcript, Day 4 (Nov 26), pp. 537:13-541:25; Saugeen Band Council Minute Book, May 17, 1948 (Ex. 1161); Memo from Baker to Waugh, April 19, 1949 (Ex. 1184).
[37] Reasons, paras. 366-368; Band Council Resolution, October 5, 1976 (Ex. 1447).

those lands. Its pleading did not specify the precise lands over which Saugeen sought these declarations. Saugeen also claimed that the Crown breached fiduciary duties and duties flowing from the honour of the Crown by failing to protect its lands from encroachment by settlers, including the Town and Families.[38]

K. Trial Judge Grants Saugeen's Action, Declares Disputed Beach as Part of Reserve

50. On consent of the parties, this action was divided into two phases. Phase I dealt with Saugeen's claim to the Disputed Beach under Treaty 72 and Rankin's survey, along with various defences raised by the Town, the Families, and Ontario. Phase II will deal with compensatory damages, if any, and the defendants' counterclaims and crossclaims.

51. Phase I was tried over 23 days, beginning on November 23, 2021. The parties called extensive fact and expert evidence, including surveyors, ethnohistorians, coastal geomorphologists, agents of the Federal Government, and a land use economist. Closing argument was heard over four days, beginning on May 16, 2022.

52. The Trial Judge gave reasons for judgment on April 3, 2023, granting declarations that (a) the Disputed Beach forms part of the Reserve; (b) no third parties—including the Town and Families—have any interest in those lands; (c) Canada has acted dishonourably; and (d) Canada has breached fiduciary duties owed to Saugeen. Her decision rests on the following key findings:

(a) Treaty 72 provides a "solemn promise" of a 9½-mile shoreline between the Reserve's east boundary and the original west ("due north") boundary;

(b) Rankin properly located the "spot upon the coast" in Lot 31, and marked it with a post planted 1.5 to 2 chains (99-132 feet) inland, to protect it from waves;

(c) When Rankin began surveying south from the "spot upon the coast", he could not run his line along dry land, owing to the concavity of the Sauble Beach shoreline. The fact that it was "physically impossible to run a straight line south on dry land

[38] Third Fresh As Amended Statement of Claim, para. 1.

from the Treaty-defined north terminus of the east boundary" was a "latent ambiguity" that "could not be predicted by the Treaty parties";[39]

(d) To resolve this "latent ambiguity", Rankin surveyed a line on the wet sand of Sauble Beach from Lot 31 south to Lot 26, before re-emerging on dry land in Lot 25, where he established the Reserve's northeast terminus. This had the effect of shortening the Reserve's frontage on Lake Huron by approximately 1.4 miles at the north end;

(e) Rankin should not have resolved the latent ambiguity as he did. Instead, the *only* "option" available to resolve this latent ambiguity in a manner consistent with Treaty 72 was to move the "spot upon the coast" further inland—specifically, at the spot where he planted his wooden post, approximately 1.5 to 2 chains (99-132 feet) west from the water's edge—and survey a boundary south from that post to the Half Mile Strip entirely on dry land. Doing so would have allowed him to include the Disputed Beach within the Reserve's boundaries;[40]

(f) By moving the "spot upon the coast" 1.5 to 2 chains (99-132 feet) inland, Rankin would have had to imply a "small north boundary" into the Reserve's description in Treaty 72, as illustrated below in Figure 9. In the Trial Judge's view, the implication of this boundary was a "reasonable" and "realistic" solution;[41]

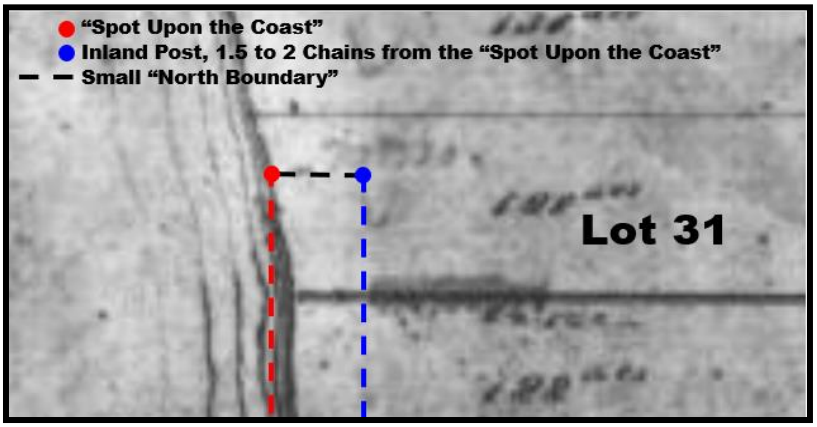

Figure 9 – Illustration of the "small north boundary" (not to scale), Excerpt from 1856 Final Plan (Ex. 587)

(g) Rankin's failure to resolve the latent ambiguity in this way was dishonourable and a breach of the Crown's fiduciary duty to protect Saugeen's reserve lands. 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";[42]

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[39] Reasons, para. 284.
[40] Reasons, para. 402-405.
[41] Reasons, para. 399.
[42] Reasons, para. 19(g).

(h) Canada is liable under s. 91(24) the *Constitution Act, 1867* for the Imperial Crown's breaches. Ontario is not liable for those breaches;

(i) The Town and Families' title to the Disputed Beach traces back to Crown Patents that convey ownership in fee simple up to the water's edge of Lake Huron. Lot 26 to 31 were sold by the Crown as riparian lots, with no intervening Reserve land;

(j) Saugeen's Treaty rights take precedence over the Crown Patents; and

(k) The defences of *bona fide* purchaser, delay, and estoppel raised by the Town, the Families, and Ontario fail.

53. The Trial Judge concluded that "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". However, she rejected Saugeen's core theory that Rankin actually established the Reserve's northeast terminus in Lot 31, and its expert's attempt to "re-establish" the line Rankin surveyed. Instead, she decided this case based on her view of where Rankin *ought to* have placed the Reserve's east boundary—imposing a new boundary untethered from Saugeen's case and its expert evidence—without identifying precisely where that boundary lies on the ground today.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

54. The judgment below rests on four discrete errors:

(a) First, the Trial Judge erred in granting judgment to Saugeen on an unpleaded theory—namely, that the Reserve's boundaries are based on what Rankin *ought to* have done during his survey, and not what he actually *did* on the ground. This was an error in principle;

(b) Second, the Trial Judge erred in implying a "small north boundary" into the terms of Treaty 72, without directing herself to the applicable "officious bystander" test under *Marshall* and *Restoule*. It is undisputed that the standard of review for treaty interpretation is correctness;

(c) Third, the Trial Judge erred in holding that Twining and Lemon Families cannot benefit from the *bona fide* purchaser defence because they inherited their lands from their parents—who themselves were *bona fide* purchasers. This, too, was an error grounded in the misapprehension of the law; and

(d) Fourth, the Trial Judge erred in principle dispossessing the Town and Families as a remedy for the Crown's wrongdoing, despite finding they did nothing wrong.

A. Trial Judge Erred in Granting Judgment on an Unpleaded Theory

(i) Saugeen's Theory: Rankin Gave Effect to Treaty 72 by Including Beach in Reserve

55. Rankin's survey of the Reserve's east boundary was at the core of Saugeen's pleaded case. Saugeen asserted that "[t]he north-east limit of the Reserve extends to a spot on the coast approximately at the mid-point of what is now Lot 31", as "confirmed by a post set by Provincial Land Surveyor Charles Rankin in 1855".[43]

56. At trial, Saugeen presented the theory that Rankin intended to *and did* include the Disputed Beach within the Reserve's boundaries during his survey in September 1855; that these lands have always fallen within the Reserve's boundaries *as surveyed*; that Lots 26 to 31 did not extend to the shore of Lake Huron; that no part of the Disputed Beach was ever patented or sold by the Crown; and that the Town and Families were therefore "encroachers" and never received lawful title to these lands traceable to Crown Patents. Its statement of claim reads:

> 11. When lots in Amabel Township bordering the Reserve were originally patented, the lots were not given a "metes and bounds" description. Instead, the original lot descriptions are very vague. The lots that abut *Chi-Gmiinh* [*i.e.* the Disputed Beach] were identified as Lots 26-31, Concession D.
>
> 12. Third parties, including the purported owners of Lots 26-31, began to encroach on *Chi-Gmiinh* and became a cause of concern for Saugeen First Nation …[44]

57. Saugeen's case was *not*—as the Trial Judge found—that Rankin erred in his survey of the east boundary. It claimed that he surveyed the Reserve's east boundary north to Lot 31 entirely on dry land and delivered on a "solemn promise" of about 9½ miles of coastline. Saugeen alleged it was only subsequent encroachment by settlers that deprived it of the Disputed Beach.

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[43] Saugeen's Fresh As Amended Consolidated Reply to the Statements of Defence and Counterclaims, para. 24.
[44] Third Fresh As Amended Statement of Claim, paras. 11-12, emphasis added.

58. Saugeen relied on the survey opinion of Izaak de Rijcke, who opined that Rankin's survey line ran entirely on dry land. Mr. de Rijcke purported to "re-establish" this line north of Lot 25, which he plotted on a plan of survey appended to his report (highlighted in blue in Figure 10). He concluded that the original survey included the Disputed Beach within the Reserve.

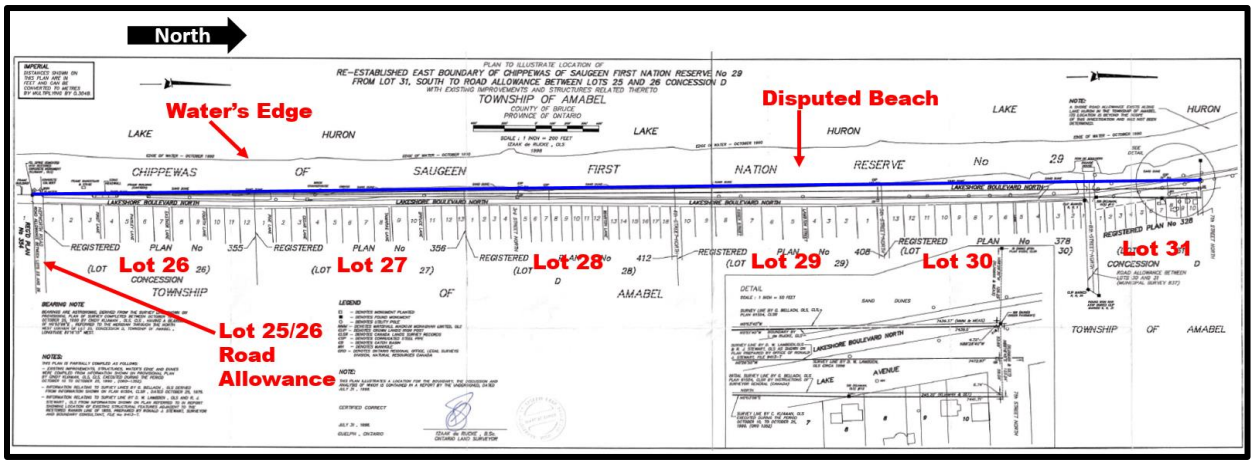

Figure 10 - de Rijcke Plan of Survey, with annotations (Ex. 1900, Appendix 3)

59. In support of Saugeen's and Canada's theory, Mr. de Rijcke opined that Rankin's 1856 Final Plan and all other official Crown maps were erroneous because they showed the Reserve's east boundary terminating at Lot 25. He opined that the Crown Patents for Lots 26 to 31 did not grant title to the edge of Lake Huron because there was Reserve land between these lots and the water's edge.[45] These opinions were foundational to Saugeen's case as pleaded and presented.

(ii) Dr. Ballantyne: Rankin <u>Did Not</u> Include the Disputed Beach in the Reserve

60. Ontario's expert surveyor, Dr. Brian Ballantyne, disputed Mr. de Rijcke's opinion about Rankin's survey and his efforts to "re-establish" it. Dr. Ballantyne accepted that Rankin planted a post at a "spot upon the coast" in Lot 31, but he disagreed that this post marked the Reserve's northeast terminus. In Dr. Ballantyne's view, Mr. de Rijcke's opinion was contradicted by Rankin's field notes, his 1856 Final Plan, and all other official maps, plans, and instruments.[46]

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[45] Reasons, paras. 253-255 & 320.
[46] Reasons, para. 281-282, 300-304, 319 & 323.

61. Dr. Ballantyne opined that Rankin was unable to survey a boundary line south from the "spot upon the coast" because he "ran into an obstacle": due to the "unexpected size of the concavity or inward curve of Lake Huron's coastline" from Lot 31 south to Lot 26, "it was physically impossible" for him to run a straight line south from this spot without intersecting the waters of Lake Huron, as Dr. Ballantyne illustrated above in Figure 4 and 5.[47]

62. Dr. Ballantyne's opinion was supported by Rankin's field notes, which describe the topography Rankin surveyed south from the "spot upon the coast". The field notes state that Rankin commenced his survey "on the sandy beach" in Lot 31, but as he moved south, he soon encountered the "Lake, edge of" between 14 chains (924 feet, or 0.175 miles) and 115 chains (1.4 miles) from his starting point on the sandy beach. He then returned from the "Lake, edge of" to a "little sandy bank" at 128 chains (1.6 miles) before encountering "low sand hills".[48]

63. Dr. Ballantyne opined that "Lake, edge of" in Rankin's field notes refers to *wet sand*, meaning there was no dry land to the west of his line to be included within the Reserve:

> Q. So it's your opinion that they didn't run the line over water; they ran it over wet sand?
>
> A. Wet sand, which is five to ten metres in width and is part of Lake Huron.
>
> Q. So are there -- in your opinion were there waves going up and down over their feet?
>
> A. In my opinion there was a wave about every five or six seconds, based on the three site visits I've done in the 21st century; and a wave about every forty seconds that covered that ten metre strip. [49]

64. The impossibility of surveying a line south from the "spot upon the coast" on dry land presented a "latent ambiguity" between the terms of the Treaty and the shoreline geography. Dr. Ballantyne called this an "accident of geography" unanticipated by the Treaty partners.[50]

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[47] Reasons, para. 284.
[48] Reasons, para. 244.
[49] Transcript, Day 14 (Dec 14), p. 1915:1-13.
[50] Transcript, Day 14 (Dec 14), pp. 1989:18-1989:11.

65. Dr. Ballantyne opined that Rankin resolved this latent ambiguity by giving more weight to Lake Huron as a natural boundary over the distance of "about 9½ miles" in the Treaty text:

> 18. There was a latent ambiguity in the Reserve description when Rankin came to survey the boundaries on the ground, because a line surveyed south from the 9.5 mile location soon intersected Lake Huron. Rankin was faced with the conundrum of accepting the lake or accepting the distance. Rankin resolved the latent ambiguity by putting more weight on the intersection of the East Boundary with the water's edge in Lot 25 and less on the distance of "about" 9.5 miles, and by showing a Reserve parcel that had one north-east corner in Lot 25 (not two) and four sides (not five).[51]

66. Consistent with Rankin's field notes and survey plans, Dr. Ballantyne concluded that Rankin placed the Reserve's northeast terminus at the point where his line left the wet sand and returned to dry land, around the road allowance between Lots 25 and 26 (see Figure 5, above).

(iii) Trial Judge Accepts Dr. Ballantyne' Opinion and Rejects Mr. de Rijcke's

67. The Trial Judge preferred Dr. Ballantyne's evidence over that of Mr. de Rijcke. She:

(a) rejected Mr. de Rijcke's attempts to "re-establish" the line Rankin surveyed in 1855 in his plan of survey (Figure 10, above) because it "was not done according to current standards", and contains "too many uncertainties that undermine the likelihood of any accuracy";[52]

(b) accepted Dr. Ballantyne's opinion that it was impossible for Rankin to survey a boundary line south from his starting point in Lot 31, and that the line he surveyed ran along "wet sand" for the entire stretch of the Disputed Beach. She agreed that there was a "latent ambiguity" between the distance of "about 9½ miles" in the Treaty text and the geographic realities of the Lake Huron shoreline;[53]

(c) accepted that Rankin "fixed the north terminus of the east boundary at the road allowance of Lots 25 and 26", which is where his line re-emerged on dry land;[54]

(d) rejected Mr. de Rijcke's opinion that the term "Lake, edge of" in Rankin's field means "beach or dry land". She preferred Dr. Ballantyne's evidence that Rankin was at the edge of Lake Huron with the waves washing up on his feet;[55] and

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[51] Ballantyne Report, para. 18 (Ex. 1920).
[52] Reasons, paras. 317-318.
[53] Reasons, para. 324(e) & 403.
[54] Reasons, para. 19(e).
[55] Reasons, paras. 244-247, 281-282 & 323.

(e) rejected Mr. de Rijcke's opinion that the Official Survey Plan and all other maps and plans showing the east boundary ending at the road allowance between Lots 25 and 26 are "erroneous", "anomalous", or "illusory".[56]

68. In short, the Trial Judge dismissed Saugeen's claim that Rankin included the Disputed Beach within the Reserve's boundaries. She concluded that the northern terminus of the Reserve's eastern boundary was located at the road allowance between Lots 25 and 26, which is where the terminus point remained until the Trial Judge moved it further north and east.

Figure 11 - The 1856 Final Plan (Ex. 587), the Auction Map (Ex. 582), and the Patent Plan, with annotations (Ex. 620)

69. The Trial Judge went on to conclude that Lots 26 to 31 were always riparian lots that extended to the edge of Lake Huron, as accurately depicted in Rankin's 1856 Final Plan, the Auction Map, and the map used by the Crown to record the issuance of Crown Patents (Figure 11). The Disputed Beach was located within the boundaries of Town and not within the Reserve.

70. The Trial Judge found that the Crown Patents for Lots 26 to 31 granted title to the edge of Lake Huron. They had to be read harmoniously with Rankin's Official Survey Plan, which they

[56] Reasons, para. 320.

incorporated by reference. The Trial Judge rejected Saugeen's pleaded case and concluded that the Crown Patents for Lots 26 to 31 "are not ambiguous, and that their proper construction leads to the conclusion that they purported to convey fee simple to the Disputed Beach to the Patentees of the Disputed Lots". They "form the root of title" held by the Town and Families.[57]

(iv) The Trial Judge Grants Judgment to Saugeen on an Unpleaded Theory

71. The Trial Judge rejected Saugeen's and Canada's theory that Rankin surveyed the Reserve's east boundary south from the "spot upon the coast" in Lot 31 entirely on dry land south from Lot 31 to Lot 26. She rejected the theory that Rankin intended to *and did* include the Disputed Lands within the Reserve's boundaries as part of his survey. She rejected the theory that the Official Survey Plan and all other official maps and plans were erroneous. She rejected the theory that the Crown Patents for Lots 26-31 were "very vague", or that those lots were abutted to the west by the Reserve. And she certainly rejected, as Saugeen pleaded, that the Town and Families never "acquired any proprietary interest, whether legal or equitable, to any portion of the lands to the west of the eastern boundary of the Reserve".[58]

72. The Trial Judge nevertheless granted judgment to Saugeen. She did so on a basis not pleaded by any of the parties, based on what she held Rankin *ought to have done* when confronted by this "accident of geography". Her decision is rooted in a conclusion that Rankin *ought to have* moved his survey line about 1.5 to 2 chains (99 to 132 feet) inland from the "spot upon the coast", so that he could run the survey entirely on dry land. This would have required Rankin to imply a new "small north boundary" to connect the east boundary to the water's edge. The Trial Judge found that this new boundary should be implied into the terms of Treaty 72:

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[57] Reasons, para. 493.
[58] Saugeen's Fresh As Amended Consolidated Reply to the Statements of Defence and Counterclaims, para. 24.

> [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 the west boundary, and terminating at the Half Mile Strip on dry land. From there, Rankin would have been able to mark a straight east boundary, parallel to 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. …

73. This conclusion conflicts with the case Saugeen pleaded and the evidence it presented at trial. Far from alleging that Rankin's survey was conducted in breach of Treaty 72, Saugeen argued that Rankin marked the Reserve's northeast terminus in Lot 31.[59] Mr. de Rijcke was not instructed to, and did not, opine on what Rankin *ought to have done* upon encountering the concave shape of the Sauble Beach shoreline. The question posed to him by Saugeen was clear: "*Where did* Charles Rankin run the East Boundary on the ground in 1855"?[60] Mr. de Rijcke's answer to this question was wholly rejected by the Trial Judge.

74. It was only after Mr. de Rijcke's evidence was discredited on cross-examination that Saugeen's case pivoted. In closing, Saugeen asserted that that Rankin's survey "offers little or no insight into the matters that inform this Court's treaty interpretation analysis". It suggested, for the first time, that Rankin *ought to have* moved his survey further inland, and implied a short north boundary, to resolve the latent ambiguity that Saugeen had argued did not exist.[61]

75. This unpleaded allegation became the centrepiece of the Trial Judge's decision.

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[59] Saugeen's Fresh As Amended Consolidated Reply to the Statements of Defence and Counterclaims, para. 24.
[60] Izaak de Rijcke, "Report on the Re-establishment of the North Segment of the East Boundary, Chippewas of Saugeen First Nation Reserve No. 29" ("**de Rijcke Report**"), May 3, 2021, para. 3(b) (Ex. 1900).
[61] Written Closing Submission of Saugeen, para. 235.

76. Lawsuits must "be decided within the boundaries of the pleadings". "The parties to a legal suit are entitled to have a resolution of their differences on the basis of the issues joined in the pleadings. A finding of liability and resulting damages against the defendant on a basis that was not pleaded cannot stand".[62] In *Rodaro*, this Court commented on the dangers of judgments based on unpleaded theories.[63] The "foundational principle", that cases are to be decided on their pleadings, goes both to concerns of fairness and to the efficacy of the civil litigation process.[64]

77. The Trial Judge did not follow this cardinal rule, which led her to grant a remedy no one asked for. Saugeen asked the Trial Judge to *confirm* the east boundary *as surveyed by Rankin*, which it said was consistent with the Treaty. Saugeen did not ask the Court to rewrite the boundaries, nor tender evidence of a new or different boundary. If the core dispute had been about rewriting the boundary, the parties would have led evidence about where or how a new boundary could or should be re-drawn today. No one led any such evidence because Saugeen's pleaded case and the evidence it led at trial did not contemplate it.

78. By seizing on a last-minute re-casting of the plaintiff's case, the Trial Judge stepped outside the case as pleaded. The consequence—developed below—is that it is impossible to know from her reasons where the Reserve's east boundary lies on the ground today.

(v) Trial Judge Failed to Identify the Location of the New East Boundary

79. Saugeen sought two broad declarations against the Town and Families:

(a) first, "a declaration that the entire portion of valuable fish landing ground fronting on Lake Huron that was reserved from surrender by Saugeen First Nation in Treaty 72 and is known to Saugeen First Nation as 'Chi-Gmiinh', which includes a substantial portion of what is now called Sauble Beach, was and continues to be

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[62] *460635 Ontario Limited v. 1002953 Ontario Inc*., (1999), 127 O.A.C. 48, 1999 CanLII 789 (C.A.), para. 9
[63] *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74, 2002 CanLII 41834 (C.A.), paras. 59-63.
[64] *Bayens v. Kinross Gold Corporation*, 2014 ONCA 901, paras. 84-85.

> reserved for the sole use and benefit of the Chippewas of Saugeen First Nation … and today forms part of Saugeen Indian Reserve No. 29"; and

(b) second, "a declaration that no third parties have any interest in Chi-Gmiinh".[65]

80. Saugeen's pleading does not identify where *Chi-Gmiinh* is on the ground today. But at trial, Saugeen tied it directly to Rankin's survey and asked the Trial Judge to confirm Mr. de Rijcke's attempt to "re-establish" Rankin's original boundary line.[66] This was the only evidence proffered as to where the boundary should be.

81. The Trial Judge rejected Mr. de Rijcke's plan of survey because, among other things, it was "not done according to current standards" or "recognized as a valid or reliable method for re-establishing a boundary". She dismissed his attempt to relocate Rankin's post in Lot 31, but did so without making any findings as to where that post was placed or where a line running south from it is located on the ground today. Her reasons do not delineate what land north of Lot 25 "was and continues to be reserved for the sole benefit of [Saugeen]". Her declarations offer no meaningful specificity as to the affected lands:

> … (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", <u>which includes a substantial portion of what is now called Sauble Beach</u>, was and continues to be reserved for the sole use and benefit of [Saugeen] and today forms part of [the Reserve];
>
> (d) No third parties have any interest in Chi-Gmiinh, also known as the reserve portion of Sauble Beach.[67]

82. It is impossible to know from the Trial Judge's declarations where she located the eastern limit of the land comprising the "Disputed Beach", "Chi-Gmiinh", or the "reserve portion of Sauble Beach". This is because she imposed a new boundary between the Reserve and the Town, for which there was no evidence in the record.

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[65] Third Fresh As Amended Statement of Claim, para. 1.
[66] de Rijcke Report, Executive Summary.
[67] Reasons, para. 696.

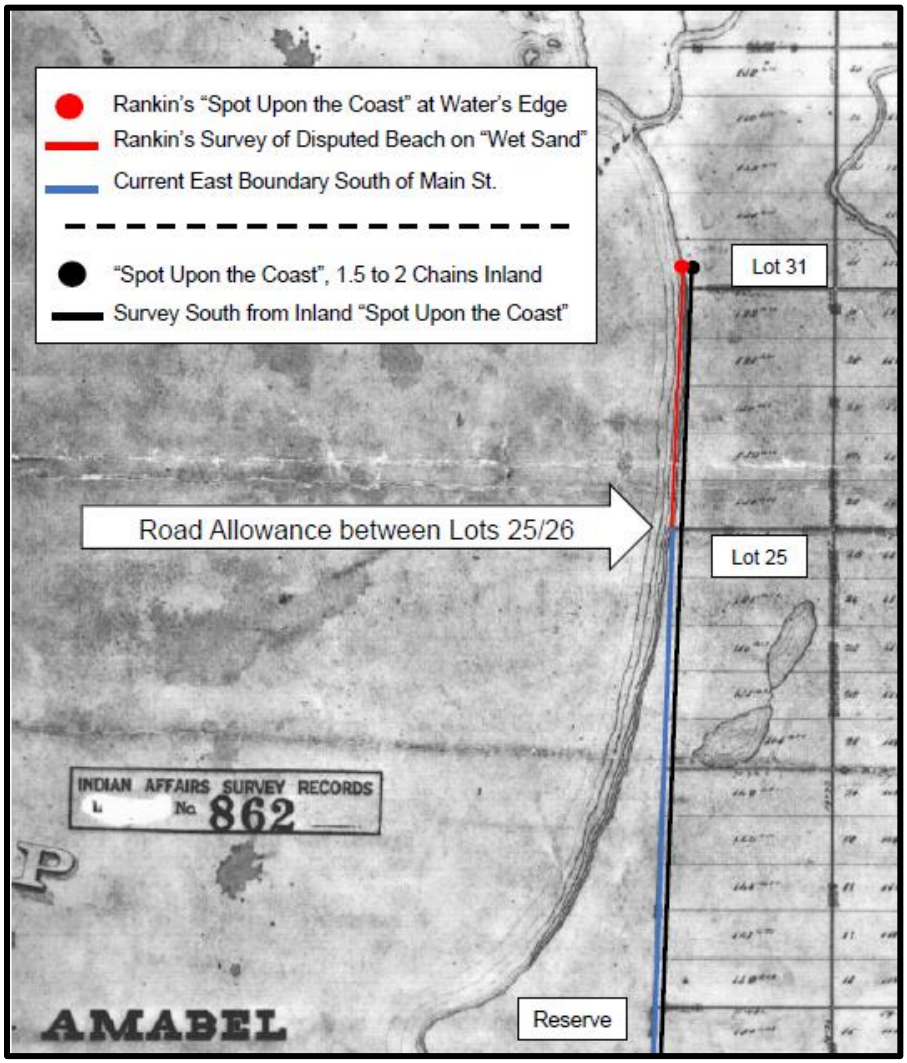

Figure 12 – Illustration of the Reserve's East Boundary per the Trial Judge's Reasons (Not Precisely to Scale)

83. As noted, the only insight as to where the new boundary now lies is the Trial Judge's conclusion that Rankin should have moved his survey line inland by 1.5 to 2 chains (99 to 132 feet) from the "spot upon the coast", wherever it was in 1855. She neither identified the precise location of this "spot" on the ground today, nor how much farther east Rankin should have gone. However, it is clear that the Trial Judge rejected the current line as the boundary's location, because if she had accepted that line as correct, she would have dismissed Saugeen's claim.

84. Presumably, the new boundary will need to be surveyed on the ground so that Saugeen and neighbouring landowners can have certainty as to the boundary of the Reserve. When that

happens, the eastward shifting of the boundary by between 99 to 132 feet will encompass lands further east than present-day Sauble Beach, including property owned by numerous unknown persons beyond the Town and Families, as well as additional Town property such as roads, parkland, and other public spaces. As shown in Figure 12 above, shifting this boundary will likely affect the entire lot fabric from Lot 31 to the southern limit of the Reserve.

85. As a basic principle of fairness, parties whose interests may be impacted by a proceeding have the right to be notified and participate.[68] That did not happen here, because none of the parties asked the Trial Judge to rewrite the boundary. Her failure to decide the case as pleaded and presented will invalidate title held by an indeterminate number of private landowners who had no ability to defend their interests before the Court.

86. It is no answer for Saugeen to say that it never intended to seek land beyond what was owned by the Town and Families. The declaration Saugeen sought, and which the Trial Judge granted, is not limited to these defendants. On its face, the declaration targeted 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."[69] The relief sought was not targeted at specific properties, nor did it refer to land descriptions or other markers in the land titles system. It was a broad declaration to reclaim what Saugeen said was the full extent of its historical Reserve lands against claims by *all* "third parties"—not just the Town and Families.

87. The declaration sought was an *in rem* order that binds and is enforceable against all persons, whether or not they were named in the proceeding. This point was made in *Wilson*,

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[68] *A.(L.L.) v. B.(A.)*, [1995] 4 S.C.R. 563, para. 27; *National Automobile v. Pharma Plus Drugmarts Ltd.*, 2011 ONSC 4188 (Div. Ct.), paras. 70 & 71; *Abrahamovitz v. Berens*, 2018 ONCA 252, para. 44.
[69] Third Fresh As Amended Statement of Claim, para. 1; Reasons, para. 696.

where the West Moberly First Nation sought a declaration as to the location of the west boundary of its reserve under Treaty 8. Relying on the Supreme Court of Canada's decision in *Calder*, the British Columbia Supreme Court held:

> [43] I conclude that the declaration sought … would result in a decision *in rem*, good against all persons, whether or not parties to the action. This makes it important, as a matter of fairness, that those signatories and adherents to Treaty 8, whose interests will be affected by a declaration sought, be given an opportunity to be heard.[70]

88. Far from being a definitive resolution to this dispute, the Trial Judge's decision sows even greater uncertainty within a community that has been affected by this proceeding for over 30 years. After decades of litigation, Saugeen, the Town, and neighbouring landowners are no closer to knowing where the "true" boundary of the Reserve lies on the ground today.

89. The implications of the Trial Judge's decision also go well beyond this case and the unidentified landowners over whom a cloud of title now hangs. There is no precedent for a judge relocating a boundary, nearly two centuries after it was first surveyed—and in so doing, invalidating Crown Patents that have been relied upon by landowners for generations. This Court has warned against precisely such an approach to settled boundaries:

> It is by no means uncommon that we find men whose theoretical education is supposed to make them experts, who think, that when monuments are gone, the only thing to be done is to place new monuments where the old ones should have been, and where they would have been, if they had been placed correctly. This is a serious mistake. The problem is now the same as it was before—to ascertain by the best lights of which the case admits, where the original lines were. The original lines must govern, and the laws under which they were made must govern, because the land was granted, was divided, and has descended to successive owners under the original lines and surveys; it is a question of proprietary right.
>
> The general duty of a surveyor is plain enough. He is not to assume that a line is lost until after he has thoroughly sifted the evidence and found himself unable to trace it. Even then he should hesitate long before doing anything to the disturbance of settled possessions. Occupation, especially if long continued, often affords very satisfactory evidence of the original boundary, when no other is attainable; and the surveyor should enquire when it originated, how and why the lines were then located as they were; and

[70] *Wilson v. British Columbia (Attorney General)*, 2007 BCSC 1324, para. 43; aff'd 2020 BCCA 138, para. 43.

> whether claim of title had always accompanied the possession, and give all the facts due force as evidence. Unfortunately, cases have happened where surveyors have disregarded all evidence of occupation and claim of title, and plunged whole neighbourhoods into quarrels and litigation by assuming to establish lines at points with which the previous occupation does not harmonize.[71]

90. The Trial Judge's willingness to move the boundary line eastward identifies the problems that arise when courts stray from the plaintiff's pleaded case. And that error is compounded by the failure to deliver certainty and finality to the parties and others who may well be affected by the judgment. After seven weeks of trial, 18 witnesses, nearly a dozen experts, and thousands of exhibits, no one can say where the boundary lies on the ground today.

91. As discussed in the next section, the Trial Judge's shifting of the east boundary and implication of a north boundary was not open to her on settled principles of treaty interpretation. This is a reversible error of law that vitiates the proprietary declarations awarded to Saugeen. The proper remedy is one that respects established boundaries and gives Saugeen its alternative pleaded remedy against the only wrongdoer identified by the Court: a sizeable award of equitable compensation payable by Canada, to be quantified in Phase II.

B. Trial Judge Erred by Implying a New "Fifth Boundary" into the Treaty

(i) Overview of the Trial Judge's Interpretive Error

92. Fundamental to the Trial Judge's decision is her conclusion that, when faced with the "latent ambiguity" between the Treaty and the shoreline geography, Rankin's *only* option was to move his survey inland approximately 1.5 to 2 chains from the "spot upon the coast" and imply a "short north boundary" to connect this spot to the water's edge. The Trial Judge held that this new boundary was a "reasonable" and "realistic" under Treaty 72.

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[71] *Nicholson v. Halliday* (2005), 74 O.R. (3d) 81 (C.A.), at para. 35, citing *Kingston v. Highland* (1919), 47 N.B.R. 324, at pp. 329-30, (emphasis added).

93. However, the Trial Judge did not direct herself to the applicable legal test. The "officious bystander" test sets a high bar for implying terms into a treaty. The Trial Judge did not apply this test, nor did she make the necessary findings to support the conclusion of an implied term. She did not find that the Treaty partners would unquestionably have said "unquestionably yes" to a short north boundary to resolve that issue. This is a reversible legal error.

94. The implication of a fifth boundary was not the only solution available to Rankin. The record demonstrates that if Rankin had consulted with and sought further guidance from the Treaty partners—just as he was required to do, and as he had done before—they may have resolved the issue differently. Rankin's failure to raise the issue may ground a breach of fiduciary duty by the Crown and entitle Saugeen to compensation for a lost opportunity to re-negotiate a new boundary or extract other concessions from the Crown. But respectfully, it did not permit the Trial Judge to rewrite boundaries almost 170 years after they were surveyed.

(ii) The Doctrine of Implied Terms and the "Officious Bystander" Test

95. Treaties "constitute a unique type of agreement" that "should be liberally construed". However, courts must be careful not to "alter the terms of the treaty by exceeding what is 'possible on the language' or realistic". "'Generous' rules of interpretation should not be confused with a vague sense of after-the-fact largesse".[72] Because the interpretation of treaties can be of significant precedential, historical, and practical value, this Court has held that a trial judge's interpretation is to be reviewed for correctness.[73]

96. The jurisprudence imposes a stringent test to imply a term into a treaty. In *Restoule*, this Court confirmed that terms may be implied only "on the basis of the presumed intentions of the

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[72] *R. v. Marshall*, [1999] 3 S.C.R. 456, paras. 14 & 78; *R. v. Badger*, [1996] 1 S.C.R. 771, para. 76; *R. Keewatin v. Ontario (Minister of Natural Resources)*, 2013 ONCA 158, at para. 151.
[73] *Restoule v. Canada (Attorney General)*, 2021 ONCA 779 ("***Restoule ONCA***"), para. 410.

parties", and only "where doing so meets the 'officious bystander' test" that applies to the common law of contracts.[74]

97. The officious bystander test is well-established. In *Fairview Donut*, Justice Strathy (as he then was) explained that terms may only be implied where "the parties would say, if questioned, 'of course' that would be understood to be a term of the contract". This is a high bar, grounded in the intentions of the parties at the time the contract was entered into. It is neither an opportunity for historical revisionism, nor "an invitation for a court to revise an agreement to make it accord with what reasonable parties might have done".[75]

98. In *Marshall*, the Supreme Court of Canada applied the "officious bystander" test in finding that a right to hunt, fish, and gather was implied by the Mi'kmaq's treaty right to "bring the products of their hunting, fishing and gathering to a truckhouse to trade":

> The law has long recognized that parties make assumptions when they enter into agreements about certain things that give their arrangements efficacy. Courts will imply a contractual term on the basis of presumed intentions of the parties where it is necessary to assure the efficacy of the contract, e.g., where it meets the "officious bystander test". Here, if the ubiquitous officious bystander had said, "This talk about truckhouses is all very well, but if the Mi'kmaq are to make these promises, will they have the right to hunt and fish to catch something to trade at the truckhouses?", the answer would have to be, having regard to the honour of the Crown, "of course".[76]

99. Underscoring the Supreme Court's decision is the common-sense conclusion that there cannot be a meaningful right to "bring the products of the Mi'kmaq's hunting, fishing and gathering to a truckhouse to trade" unless the Mi'kmaq are permitted to hunt, fish, and gather in the first place. Justice Binnie explained that implying terms can go no farther than to "supply the deficiencies" of the written agreement, entered into centuries ago.[77]

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[74] *Restoule ONCA*, para. 264.
[75] *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252, para. 448; *Jeff Day Hospitality Inc. v. Heritage Conservation Holdings, Canada, Inc.*, 2022 ONCA 201, para. 20.
[76] *Marshall*, para. 43.
[77] *Marshall*, paras. 6 & 43.

100. More recently, in *Restoule*, this Court rejected Ontario's argument that the Robinson Treaties had an implied term that the $4 annuity was to be indexed to inflation. Ontario acknowledged that an indexing clause was not explicit in the language of the treaties, but argued that reading it in would "restore the purchasing power intended by the Treaty partners".

101. For the unanimous panel, Justices Lauwers and Pardu held that the trial judge was correct not to imply an indexing term, and found "no basis to supplant the augmentation clause with a judicially created indexing term which, over 170 years, could produce widely different results, particularly given the various possible formulae for indexation".[78]

(iii) Trial Judge Fails to Apply the "Officious Bystander" Test

102. Despite citing *Marshall* and *Restoule* for other interpretive principles, the Trial Judge did not direct herself to the "officious bystander" test. Instead, she reasoned that implying a "short north boundary" into the Reserve's description under Treaty 72 would have been a "reasonable" and "realistic" solution for Rankin to resolve the latent ambiguity:

> [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).

103. This approach is wrong as a matter of law, and stretches the doctrine of implied terms beyond its proper scope. Unlike the Court in *Restoule*, the Trial Judge did not analyze whether "one single historical phenomenon"—*i.e.*, the addition of a fifth boundary to the terms of Treaty 72—could be "imputed to the minds of [the Treaty partners], to the exclusion of other historical trends, events and practices".[79] Instead she imposed this additional boundary because it

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[78] *Restoule ONCA*, paras. 259-270.
[79] *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701 ("***Restoule ONSC***"), paras. 585-586, aff'd *Restoule ONCA*, paras. 269.

represented what she considered a "reasonable" and "realistic" solution that Rankin *could* have effected on the ground, by himself, to achieve "about" 9½ miles of shoreline.

104. According to the Trial Judge, Rankin was mandated under Treaty 72 to create a fifth north boundary *on his own initiative* while carrying out his survey—without regard for what might have happened had he consulted with and sought instruction from the Treaty partners. She concluded that the *only* option available to uphold the honour of the Crown was for Rankin to unilaterally give effect to the "about" 9½ mile distance by adding an additional boundary:

> [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" 9½ 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 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 9½ 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 9½ miles (the Disputed Beach).

105. But a unilateral solution by Rankin—which the Trial Judge considered "reasonable" and "realistic"—was not the only available option, much less something to which the Treaty partners would have questionably said "of course", had they turned their minds to it. The Trial Judge did not grapple with what the Treaty partners might have said or done, had Rankin presented them with this "accident of geography". A consultation may well have resulted in an entirely different solution. The Trial Judge's decision does not account for this possibility.

106. The record makes clear that consultation among the Treaty partners was needed to address survey issues as they arose. Dr. Ballantyne opined that one of Rankin's important roles

during Treaty implementation was to "consult with the First Nation about boundary grievances". Saugeen's historian, Dr. Bohaker, agreed that implementation of Treaty 72 had to be "worked out on the ground" by both Treaty partners. The Trial Judge found that "[o]ne of [Rankin's] roles was to consult with the Saugeen concerning the boundaries and issues that may arise therein".[80]

107. That is precisely what Rankin did in response to Saugeen's complaint about the direction of the Reserve's west boundary. After extensive consultation with Saugeen and the Crown, Rankin mediated a resolution. The Crown agreed to correct the west boundary to run northwesterly along Copway Road.

108. The Trial Judge did not direct herself to what a similar consultation may have yielded with respect to the Reserve's east boundary, or whether the parties would have said "unquestionably yes" to an implied fifth north boundary. As in *Restoule*, "different considerations could quite possibly [have resulted] in different responses to this claim" beyond the implication of a new boundary.[81] This possibility is manifest in the historical record.

109. Shortly before Rankin finalized his survey returns and deposited them with the Crown Lands department, Saugeen's leadership proposed further alterations to the Reserve's boundaries—and importantly, its east boundary—to include more agricultural land and a wild beaver meadow to the east of the Saugeen Village.[82]

110. Rankin illustrated this request in correspondence to Superintendent General Pennefather on May 22, 1856, in what is referred to as the "Trace Map". It shows the Reserve's east boundary "According to the Treaty", which runs in a north/south direction, along with a diagonal

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[80] Ballantyne Report, para. 208 (Ex. 1920); Transcript, Day 4 (Nov 26), pp. 556:2-569:13; Reasons, para. 397.
[81] *Restoule ONSC*, paras. 597, aff'd *Restoule ONCA*, paras. 263.
[82] Letter from Rankin to Pennefather, May 22, 1856 (Ex. 496); Transcript, Day 8 (Dec 2), p. 1310:7-18.

line depicting the "Boundaries desired by Alexander"—*i.e.*, Saugeen Chief Alexander Madwayosh—running in a northwest/southeast direction, as shown below in Figure 13:

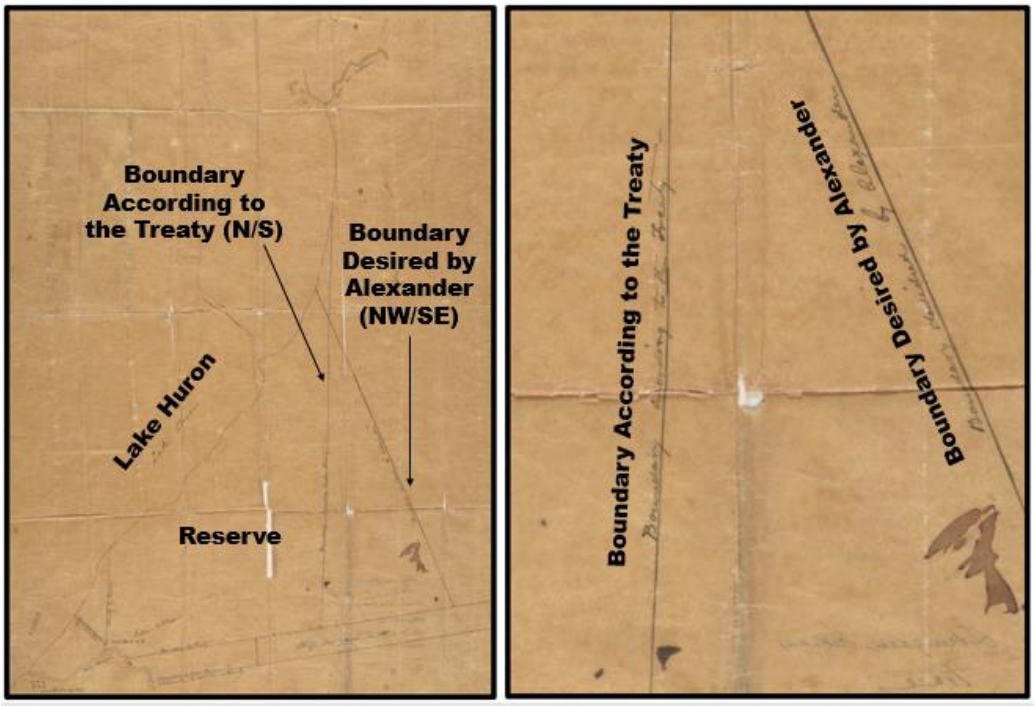

Figure 13 - Tracing Enclosed with Rankin's Letter to Superintendent General, May 22, 1856, with annotations (Ex. 523)

111. Saugeen's expert historian, Dr. Heidi Bohaker, had "no doubt that Rankin had some sort of a conversation with Madwayosh and that resulted in this map".[83] It provides critical evidence of what Saugeen would have asked for in a potential renegotiation of the east boundary—a new boundary line that increased the area of the reserve by altering the angle of the east boundary to take in more farmland in exchange for less beach frontage. It demonstrates that the solution imposed by the Trial Judge was far from a forgone conclusion.

112. The Trial Judge discussed the Trace Map only in passing in her reasons, despite its prominence at trial. While she held that the Trace Map does not shed light on "the common intentions of the Treaty parties when they entered into Treaty 72", she did not consider its

[83] Transcript, Day 5 (Nov 29), p.637:15-640:12.

significance for a potential renegotiation between the parties in response to the concave shoreline.[84] The Trace Map makes clear that there were other concessions or accommodations, apart from an "implied" fifth north boundary, that the Crown could have offered to Saugeen, and which Saugeen may well have accepted. The Trial Judge's reasons mistakenly assume that the north boundary was the *only* "realistic" or "reasonable" outcome. It was not.

113. The Trial Judge's analysis fell short of *Marshall*. There, the Mi'kmaq's treaty right to trade the products of their hunting, fishing, and gathering at truckhouses would have been meaningless without an implicit right to engage in hunting, fishing, and gathering. Justice Binnie held that the failure to imply this term would have "left the Mi'kmaq with an empty shell of a treaty promise".[85] No such finding was made or available here.

(iv) Trial Judge's Erroneous Imposition of Fifth Boundary Led to Remedial Error

114. The Trial Judge's conclusion on the interpretation of Treaty 72—that Rankin ought to have moved his survey inland and implied an additional north boundary—is inseparable from her declaration that the Disputed Beach is and always has formed part of the Reserve. However, if a fifth north boundary was not properly implied under the "officious bystander" test, the declaratory relief she awarded cannot stand. Unless the parties would have said "of course" to this new boundary when confronted with the latent ambiguity, it cannot be said that the parties unequivocally intended to include the Disputed Beach within the Reserve's boundaries.

115. But that does not leave Saugeen without a remedy. While the Trial Judge was not permitted to unilaterally impose a new boundary, it was open to her to grant compensation to Saugeen for Rankin's breach of the Crown's honour in failing to raise the issue that he

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[84] Reasons, para. 331.
[85] *Marshall*, para. 52.

encountered during his survey, or the Crown's breach of fiduciary duties in failing to adequately protect Saugeen's interest in the Reserve. This is consistent with Saugeen's pleaded relief, which seeks "damages for breach of fiduciary duty, breach of duties flowing from the honour of the Crown, and loss of use and occupation of Chi-Gmiinh in the amount $25,000,000".[86]

116. In *Southwind*, Justice Karakatsanis explained that the Crown's fiduciary obligations demand "full disclosure" and, "[i]n the context of a surrender of reserve land", a duty "to manage the process to advance the best interests of the First Nation". If these obligations are breached, "equity compensates the plaintiff for the loss of opportunity caused by the breach, regardless of whether that opportunity could have been foreseen at the time of breach". That is because equity operates "with the benefit of hindsight".[87]

117. The Supreme Court applied these principles in *Southwind* to grant the Lac Seul First Nation equitable compensation against the Crown after it built a hydroelectric project that flooded vast portions of its reserve. Despite warnings, the Crown advanced the project without the consent of Lac Seul and without lawful authorization. The unanimous Court concluded that the appropriate measure of compensation for the Crown's conduct was the value of Lac Seul's "lost opportunity" to negotiate a surrender reflecting "the highest value of the land".[88]

118. That principle carries considerable weight here. Rankin had to make full disclosure to the Saugeen about the concave shoreline, which would likely have led to consultations and renegotiation—just as had occurred with the direction of the Reserve's west boundary. The Crown's failure to disclose and consult means that that Saugeen is entitled to a significant award

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[86] Third Fresh As Amended Statement of Claim, para. 1.
[87] *Southwind v. Canada*, 2021 SCC 28, paras. 64 & 74; see also *Trillium Motor World Ltd. v. Cassels Brock & Blackwell LLP*, 2017 ONCA 544.
[88] *Southwind*, paras. 7 & *120*.

of equitable compensation for its lost opportunity to seek other concessions or accommodations, which are to be quantified in Phase II of this litigation.

119. But Canada's failure cannot ground a proprietary remedy against third party landowners. The decision below rests entirely on one *possible* solution that Rankin *might* have implemented during his survey, requiring him to unilaterally imply a boundary nowhere found in the Treaty and without consulting either Saugeen or the Crown. This approach is wrong in law. The doctrine of implied terms is not an invitation to revisionism. Nor does it allow a trial judge to implement their own sense of what is "realistic" or "reasonable"—especially where doing so disrupts 170 years of reliance by innocent parties on surveys, Crown Patents, and official assurances of title. No court has ever implied terms into a Treaty in this way.

C. Trial Judge Misapprehended the *Bona Fide* Purchaser Defence

120. In addition to their submissions on Rankin's survey, the interpretation of Treaty 72, and the effect of the guarantee of title through Crown Patents, the Town and Families sought equitable protection against Saugeen's claim as *bona fide* purchasers of the Disputed Beach.

121. The Trial Judge accepted that David Dobson was a *bona fide* purchaser of the Crowd Inn, which he bought from his father and uncle, and that none of the Dobsons had notice of Saugeen's claim when he bought the land and restaurant in 1983. But she found the defence did not apply to the Lemons and Twinings—even though they too had no notice of Saugeen's claim—because Alberta Lemon and Barbara Twining did not *buy* their lands like David Dobson did, but rather *inherited* them.[89] Relying on this Court's decision in *Benzie*, the Trial Judge held:

> [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

[89] Reasons, paras. 576-585.

> are disentitled from relying on the defence of *bona fide* purchaser for value without notice.[90]

122. This conclusion was incorrect as a matter of law. It leads to the perverse result that a claimant can simply wait for a current *bona fide* purchaser to die before advancing a claim against the beneficiaries of their estate. It means the *bona fide* purchaser defence is lost whenever a property passes from an estate to its beneficiaries without consideration. That is not the law.

123. In *i Trade*, the Supreme Court explained that "where the [*bona fide* purchaser] defence operates, the pre-existing equitable proprietary rights are stripped away and lost in the transaction by which the defendant acquires its legal proprietary rights". In other words, a *bona fide* purchaser in the chain of title "wipes the slate clean" and protects all subsequent purchasers from pre-existing claims to the property—including those who inherit the property—unless they are "culpably responsible" for the original defect in title.[91] Therefore, if a landowner enjoys equity's protection as a *bona fide* purchaser, the heirs who inherit the property are entitled to raise this defence in the same way.

124. The Trial Judge did not direct herself to these authorities, which were referred to her in closing argument. Instead, she relied exclusively on this Court's decision in *Benzie*, which says nothing about whether the beneficiaries of a *bona fide* purchaser can rely on this defence.[92]

125. *Benzie* does not purport to depart from the Supreme Court's binding authority in *i Trade*. *Benzie* concerned an agreement conferring rights over a family home, which the homeowners had entered into and registered on title. After the homeowners passed away, their heirs argued

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[90] Citing *Benzie v. Hania*, 2012 ONCA 766.
[91] *i Trade Finance v. Bank of Montreal*, 2011 SCC 26, at para. 60, citing L. Smith, *The Law of Tracing* (1997), p. 386; M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (LexisNexis, 2014), Part IX, c. 38, III, C. Successors in Title; *Urban Mechanical Contracting Ltd. v. Zurich*, 2022 ONCA 589, para. 59.
[92] Note that the *bona fide* purchaser argument was advanced and accepted in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.), without any analysis into or finding that landowners whose title traces to the patent at issue in that case were heirs or paid value: see paras. 303-307.

they were not bound by this agreement because they were *bona fide* purchasers for value without notice. Justice Gillese found that this defence did not apply because "[h]eirs do not fall into the category of a bona fide purchaser for value without notice".[93] In other words, the beneficiaries could not rely on an inheritance to resile from an agreement that bound the testators.

126. The Trial Judge applied *Benzie* out of context and transformed it into an incorrect general principle of law. In *Benzie*, the original owners (the parents) were not *bona fide* purchasers for value. Rather, the parents entered into a contract that their children wanted to ignore. This Court rightly held that those children "could not stand in a better position than the estate".[94]

127. That is not what was argued at trial. Alberta Lemon and Barbara Twining were not asking to be put in a "better" position than George Croshaw and Norman McKee, both of whom were unquestionably *bona fide* purchasers of their beach lands without notice of Saugeen's claim.[95] These defendants argued that their parents' purchase "stripped away" any pre-existing rights in their beach lands, and that that the properties were transferred to them on that basis, consistent with *i Trade*. Alberta Lemon and Barbara Twining sought to stand in the *same* position as their parents, not a *better* position, like the children in *Benzie*.

128. The Trial Judge erred in law in misapplying *Benzie* and restricting the *bona fide* purchaser defence in an unprecedented way. Her error warrants this Court's intervention.

D. Trial Judge Erred by Dispossessing Innocent Landowners to Remedy Crown's Breach

129. The Trial Judge could not have granted Saugeen the proprietary relief it sought against the Town and Families unless it was open to her to rewrite the Reserve's boundaries by implying a new north boundary and shifting the east boundary inland. Having erred on those issues, the

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[93] *Benzie*, para. 37.
[94] *Benzie*, para. 37.
[95] Reasons, paras. 519, 521, 524, 528, 530-531 & 540-541.

Trial Judge's award of an *in rem* remedy cannot be sustained. However, even if she had not erred in that way, her chosen remedy was not justified on this record. It did not advance the principle of reconciliation, which is not a zero-sum game or a win-lose concept.

130. The decision below is the first time in Canadian history that a court has dispossessed innocent third parties as a remedy for historical wrongs committed by the Crown alone. The Trial Judge did not find the Town and Families responsible for or in any way complicit in the Crown's fiduciary breaches or dishonourable conduct. Nor were they encroaching on land that Rankin included within the Reserve's boundaries, as alleged by Saugeen. Still, she ordered that they "bear the brunt" of the Crown's misdeeds.[96]

131. In coming to that conclusion, the Trial Judge relied on this Court's decision in *Chippewas of Sarnia* from 2000. She did not have the benefit of this Court's 2023 decision in *Chippewas of Nawash*—released several months after her decision—which gives important guidance on the court's remedial jurisdiction where dispossession of non-Crown lands held by innocent parties is being sought as a remedy for the Crown's breach of treaty rights.

132. In *Chippewas of Sarnia*, this Court endorsed a "case-by-case" review of competing interests to "reconcile aboriginal title and treaty claims with the rights of innocent purchasers":

> The complaining party cannot claim entitlement to the mechanical grant of an automatic remedy without regard to the consequences to the rights of others that might flow by reason of the complaining party's own conduct, including any delay in asserting the claim. It is for this reason that the established principles governing the availability of public law remedies require that, before a remedy is granted, consideration be accorded to the rights and interests of others who may have had every reason to rely upon the apparent validity of the impugned act.[97]

[96] Reasons, para. 693.
[97] *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000) 51 O.R. (3d) 641, 2000 CanLII 16991 (C.A.), paras. 264 & 309.

133. As this Court made clear in *Chippewas of Sarnia*, "[a] Crown patent is accepted by all as the basis for rights to real property and no purchaser would consider it necessary to go behind the patent to determine whether or not it had been validly granted". That is why "courts have for [so] long hesitated to invalidate patents that have created third party reliance".[98]

134. In that case, the Court declined to dispossess landowners, finding that "[t]he interests of innocent third parties who have relied upon the apparent validity of the Cameron patent must prevail to the extent that the Chippewas assert a remedy that either directly or by necessary implication would set aside the Cameron patent." This did not, however, "preclude or limit the right of the Chippewas to proceed with their claim for damages against the Crowns."[99]

135. The owners of Lots 26 to 31 not only relied on the Crown's guarantee of title, they received consistent, unequivocal confirmation from the Crown that the lands of the Reserve did not extend opposite their lots. These assurances were given generation after generation.

136. The Trial Judge distinguished *Chippewas of Sarnia*, placing greater weight on Saugeen's attachment to the Disputed Beach than that of the Town and Families, and finding that the number of interests affected (a handful of landowners here as opposed to 2,000+ landowners in *Chippewas of Sarnia*) rendered an order of dispossession here more palatable:

> [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.

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[98] *Chippewas of Sarnia*, para. 259.
[99] *Chippewas of Sarnia*, para. 275.

137. There are three distinct errors in the Trial Judge's approach.

138. First, her finding that the interests at issue here "are far less in number and magnitude" is incorrect. Having relocated the east boundary of the Reserve, the Trial did not consider how that would impact other potential landowners whose lands abut the pre-existing boundary. That boundary is several miles in length and, on this record, the number of innocent landowners implicated is unknown. Yet there can be little doubt the impact goes beyond these defendants.

139. Second, and in any event, the equities are not determined by counting up the interests in play toward some Archimedean tipping point that warrants the Court's protection. *Chippewas of Sarnia* does not dictate a numbers game. It outlines equitable principles to achieve fairness.

140. Here, a resurvey of the boundary on the ground based on the Trial Judge's solution will reveal not only the *number*, but the *nature* of the interests impacted. Homes, businesses, schools, municipal roads, and other public spaces will be part of that equation. Because she rewrote the boundary when no one asked her to, the Trial Judge did not turn her mind to these indeterminate others—much less the character and quality of their interests. A limited weighing of the interests of Saugeen and the Town and Families is, at best, incomplete and unreliable. The Trial Judge had to look at the *full impact* of her declaration.

141. Third, the Trial Judge did not give sufficient weight to the absence of any wrongdoing by the Town and Families and the effectiveness of a remedy in equitable compensation. The authorities do not dictate an approach to reconciliation grounded in invidious choices or comparisons between who ought to "bear the brunt" of Crown misconduct.

142. The Trial Judge would have benefited from this Court's decision in *Chippewas of Nawash*. In that case, the Saugeen Ojibway Nation ("**SON**") claimed a constructive trust over all municipal roads in the Bruce Peninsula, as a remedy for fiduciary breaches by the Crown in the

lead-up to Treaty 72. This Court declined to grant a proprietary remedy and held that equitable compensation—consistent with the Supreme Court's decision *Southwind*—was appropriate:

(a) The "municipalities were not the Crown, did not breach any fiduciary duties to SON, and, therefore, are innocent of any wrongdoing";[100]

(b) SON has benefitted from the proceeds of the sale of ceded lands. "[I]n fact, its predecessors urged the sale of the lands be undertaken with greater dispatch", because "[l]and sales were booming and prices were rising";[101]

(c) the "remedy claimed is disproportionate to the wrong done";[102]

(d) "a long time has passed" since the Crown's fiduciary breaches, which "transpired over a period of 18 years, from 1836 to 1854. In the intervening time, "[t]he municipalities have relied on the treaty surrender, and the Crown title that followed, to build road infrastructure which covers the land in a network";[103]

(e) "Deterrence of wrongful conduct by the municipalities is not a factor here… [They] are utterly innocent of any wrongdoing";[104] and

(f) "equitable compensation, payable by the Crown, would be an effective remedy". "Quite part from the issue of whether the municipalities can be qualified as *bona fide* purchasers for value without notice, it would be unjust to impose the constructive trust claimed … regardless of whether the Crown failings are characterized as breach of treaty, breach of the honour of the Crown, or breach of fiduciary duties. Equitable compensation is more appropriate".[105]

143. These considerations have equal force here. The Crown's breaches occurred long ago. Since then, lots were sold, proceeds of sale were credited to Saugeen, and innocent third parties took title under Crown Patents. The defendants did nothing wrong, and deterrence is not a factor. An economy and community have developed around the Town's stewardship of Sauble Beach as an open, accessible public asset. While compensation may not be Saugeen's preferred remedy, it is effective, appropriate, and compatible with Saugeen's goals and objectives.

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[100] *Chippewas of Nawash Unceded First Nation v. Canada (Attorney General)*, 2023 ONCA 565, para. 252
[101] *Chippewas of Nawash*, para. 279.
[102] *Chippewas of Nawash*, para. 280.
[103] *Chippewas of Nawash*, para. 289.
[104] *Chippewas of Nawash*, para. 290.
[105] *Chippewas of Nawash*, paras. 292, 297.

144. The Trial Judge's order dispossessing the Town and Families is, respectfully, no more compatible with reconciliation than the result in *Chippewas of Sarnia* or *Chippewas of Nawash*. Prior to this judgment, Saugeen, the Town, and Families shared Sauble Beach and were each responsible stewards over their respective properties. They were good neighbours, whose continued co-existence is preferable to dispossession and disenfranchisement.

145. If the Crown's Treaty promises were not delivered, equitable compensation from the Crown would meaningfully advance Saugeen's ambitions for its community while preserving the Town's economy and identity and the Families' legacies. It is the least intrusive remedy for innocent third parties, and aligns the Crown's wrong with the remedy. It will fulfill the vision and promise of reconciliation recently articulated by the Federal Court of Appeal in *Coldwater*:

> Reconciliation also looks forward. It is meant to be transformative, to create conditions going forward that will prevent recurrence of harm and dysfunctionality but also to promote a constructive relationship, to create a new attitude where Indigenous peoples and all others work together to advance our joint welfare with mutual respect and understanding, always recognizing that while majorities will sometimes prevail and sometimes not, concerns must always be taken on board, considered and rejected only after informed reflection and for good reason. This is a recognition that in the end, we all must live together and get along in a free and democratic society of mutual respect. [106]

PART IV - ORDER REQUESTED

146. The Town and Families respectfully request that the appeal be allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of September, 2023.

Jonathan Lisus / Andrew Winton / Zain Naqi / John Carlo Mastrangelo / David Ionis

[106] *Coldwater Indian Band v. Canada*, 2020 FCA 34, at para. 49, leave to appeal ref'd [2020] S.C.C.A. No. 183.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Saugeen First Nation v. The Attorney General of Canada*, 2021 ONSC 4181 aff'd 2023 ONCA 565
2. *Duarte v. Ontario*, 2018 ONSC 2612
3. *Clarke v. Edmonton (City)*, [1930] S.C.R. 137
4. *460635 Ontario Limited v. 1002953 Ontario Inc*., (1999), 127 O.A.C. 48, 1999 CanLII 789 (C.A.)
5. *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74, 2002 CanLII 41834 (C.A.)
6. *Bayens v. Kinross Gold Corporation*, 2014 ONCA 901
7. *A.(L.L.) v. B.(A.)*, [1995] 4 S.C.R. 563
8. *National Automobile v. Pharma Plus Drugmarts Ltd.*, 2011 ONSC 4188 (Div. Ct.)
9. *Abrahamovitz v. Berens*, 2018 ONCA 252
10. *Wilson v. British Columbia (Attorney General)*, 2007 BCSC 1324, aff'd 2020 BCCA 138
11. *Nicholson v. Halliday* (2005), 74 O.R. (3d) 81 (C.A.)
12. *Kingston v. Highland* (1919), 47 N.B.R. 324
13. *R. v. Marshall*, [1999] 3 S.C.R. 456
14. *R. v. Badger*, [1996] 1 S.C.R. 771
15. *R. Keewatin v. Ontario (Minister of Natural Resources)*, 2013 ONCA 158
16. *Restoule v. Canada (Attorney General)*, 2021 ONCA 779
17. *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252
18. *Jeff Day Hospitality Inc. v. Heritage Conservation Holdings, Canada, Inc.*, 2022 ONCA 201

19. *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701

20. *Southwind v. Canada*, 2021 SCC 28

21. *Trillium Motor World Ltd. v. Cassels Brock & Blackwell LLP*, 2017 ONCA 544

22. *Benzie v. Hania*, 2012 ONCA 766

23. *i Trade Finance v. Bank of Montreal*, 2011 SCC 26

24. M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (LexisNexis, 2014)

25. *Urban Mechanical Contracting Ltd. v. Zurich*, 2022 ONCA 589

26. *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000) 51 O.R. (3d) 641, 2000 CanLII 16991 (C.A.)

27. *Chippewas of Nawash Unceded First Nation v. Canada (Attorney General)*, 2023 ONCA 565

28. *Coldwater Indian Band v. Canada*, 2020 FCA 34, leave to appeal ref'd [2020] S.C.C.A. No. 183

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

N/A

CHIPPEWAS OF SAUGEEN FIRST NATION
Plaintiff (Respondent)

-and-

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

Court File No. COA-23-CV-0491
Court File No. COA-23-CV-0511

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

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