SCC Court File No.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

(Court Seal)

CHIPPEWAS OF SAUGEEN FIRST NATION

Respondent
(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

Applicants
(Appellants)

MEMORANDUM OF ARGUMENT OF THE APPLICANTS, THE TOWN OF SOUTH BRUCE PENINSULA, THE ESTATE OF BARBARA TWINING (BY HER ESTATE EXECUTORS, BRENDA JOAN ROGERS and GARY MICHAEL TWINING), and ALBERTA LEMON

(Pursuant to Section 40 of the *Supreme Court of Canada Act* and Rule 25 of the *Rules of the Supreme Court of Canada*)

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

Jonathan C. Lisus / Andrew Winton
Zain Naqi / John Carlo Mastrangelo
Tel: 416 598 1744
Fax: 416 598 3730
Email: jlisus@lolg.ca / awinton@lolg.ca
znaqi@lolg.ca / jmastrangelo@lolg.ca

Counsel for the Applicants

ORIGINAL TO: **THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa ON K1A 0J1
Email: Registry-Greffe@scc-csc.ca

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

Nuri G. Frame / Marc E. Gibson
Tel: 416 916 2989
Tel: 416 916 3726
Email: nframe@pstlaw.ca
mgibson@PSTLaw.ca

Counsels for the Respondent, the
Chippewas of the Saugeen First Nation

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

Richard Ogden / Stephanie Figliomeni / Mohamed Salama
Tel: 416 326 4128 / 416 326 4930 /
416 314 2400 / 416 451 3658
Fax: 416 326 4181
Email: richard.ogden@ontario.ca
stephanie.figliomeni@ontario.ca
mohamed.salama@ontario.ca

Counsel for the Respondent, His Majesty the
King in Right of Ontario and The Attorney
General of Ontario

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

Michael Beggs / Janet Brooks / Barry Ennis / Madeline Torrie
Tel: 647 256 0582 / 416 952-6330 / 416 954 2197 / 416 952 6330
Fax: 416 973 2319
Email: michael.beggs@justice.gc.ca
janet.Brooks@justice.gc.ca
barry.ennis@justice.gc.ca
madeline.torrie@justice.gc.ca

Counsel for the Applicants,
His Majesty the King in Right of Canada and
The Attorney General of Canada

TABLE OF CONTENTS

Page No.

PART I - CONCISE OVERVIEW OF THE APPLICANT'S POSITION

1. This application for leave to appeal concerns the first reported decision in Canadian history where a court has vitiated title to fee simple lands, grounded in Crown Patents on which private and municipal landowners have relied for over 170 years, as a "forward-looking" remedy for historical wrongdoing committed by the Crown alone. It is the first reported decision where innocent landowners have been dispossessed in favour of a treaty right under s. 35 of the *Constitution Act, 1982*. And it is the first known instance of the federal government abandoning its longstanding policy that private lands will not be taken to satisfy a historical land claim.

2. This case also exemplifies the dangers of attempting to redress historical wrongs by redrawing settled boundaries, well over a century after they were established and registered in official surveys, plans, and legal instruments. It exposes the pitfalls of a binary, revisionist approach to the resolution of First Nation land claims. And it underscores the risks of imposing novel, judge-made solutions that, while well-intentioned, risk sowing uncertainty and unpredictability at the core of Canada's system of private landholding.

3. In deciding that the Applicants' title should be vitiated as a remedy for the Crown's historical treaty breach, the Trial Judge applied the Ontario Court of Appeal's 25-year-old decision in *Chippewas of Sarnia*, which requires the rights and interests of First Nation plaintiffs and fee simple landowner defendants—both innocent parties—to be weighed against one another to determine whose are more worthy of protection. Neither this Court nor any other appeal court in Canada has endorsed this binary approach to s. 35 land claims over private property.

4. Respectfully, *Chippewas of Sarnia* is out-of-step with important developments in this Court's approach to Indigenous rights, remedies, and reconciliation over the past quarter century, including recent decisions in *Restoule* and *Shot Both Sides*. This proposed appeal is an opportunity for this Court to clarify how competing interests should be accommodated, and what the Crown—as a wrongdoer whose actions have harmed both First Nations and fee simple landowners who trace their title to Crown Patents—must do to achieve meaningful reconciliation for the consequences of its dishonourable conduct. The reconciliation of rights and interests in land between Indigenous and non-Indigenous Canadians is a fundamental issue of Aboriginal law. The Applicants respectfully request that leave be granted.

A. Overview of the Underlying Litigation

5. Sauble Beach is a seven-mile strip of sandy beach on the east side of Lake Huron. It is one of Ontario's most popular summer tourist destinations.

6. Before the trial judgment was issued, stewardship over Sauble Beach was shared between various parties to this action. The Applicants, the Town of South Bruce Peninsula (the "**Town**") and the Lemon and Twining families (together, the "**Families**") held registered title to beach lands north of the road between Lots 25 and 26 in Concession D, known today as Main Street.

7. Sauble Beach was the Town's prized public asset, and an economic driver of the local community. The Town 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.[1]

8. 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**"). Both the Reserve and Chief's Point lie to the west of the Town, along Lake Huron.[2]

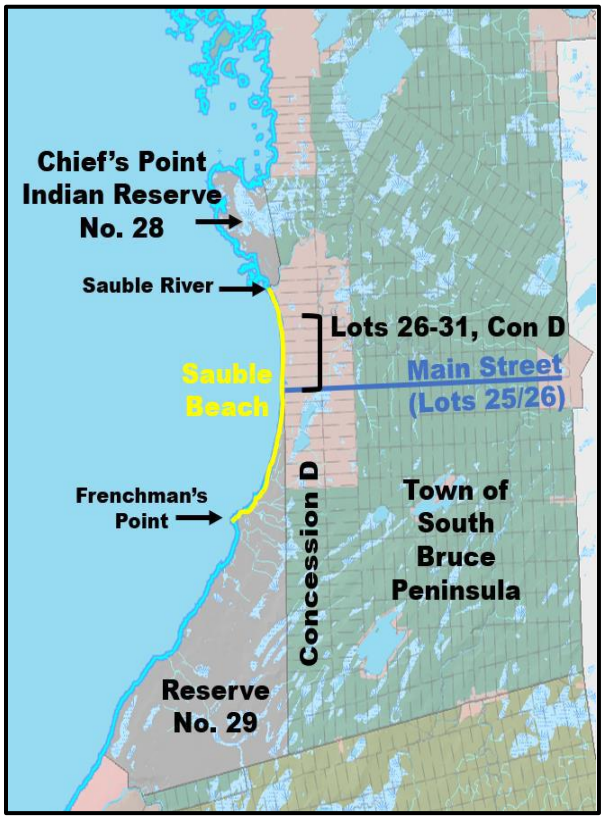

Figure 1 - Map of the Reserve and Neighbouring Town, Highlighting Sauble Beach

9. This litigation 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

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[1] *Chippewas of Saugeen First Nation v. Town of South Bruce Peninsula et al.*, 2023 ONSC 2056 ("**Trial Reasons**"), paras. 527-528, 538-541, 557, 559 & 571 (Application Record ("**AR**"), Tab 2, pp. 115, 116, 119 and 121).

[2] Trial Reasons, para. 25 (AR, Tab 2, p. 21).

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 alleged fiduciary breaches and dishonourable conduct against the Attorney General of Canada ("**Canada**") and His Majesty the King in right of Ontario ("**Ontario**").

B. Saugeen Enters Into Treaty 72; Defines Boundaries of the Reserve

10. On October 13, 1854, Saugeen and neighbouring First Nations entered into Treaty 72 with the Imperial Crown. Treaty 72 memorializes a negotiated agreement for the surrender of the Bruce Peninsula, the reservation of five tracts of lands for the First Nations, and a financial arrangement to secure their economic future. Ceded lands were to be surveyed, subdivided, and sold by the Crown, and the proceeds credited to the First Nations' benefit.

11. Treaty 72 set aside two blocks of land—the Reserve and Chief's Point—for the benefit of Saugeen. The Reserve's boundaries are described as follows, and depicted in Figure 2:

(a) the ***west boundary*** **(green)** is a "straight line running due north from the River Saugeen, at a spot where it is entered by a ravine … to the shore of Lake Huron";

(b) the ***south boundary*** **(blue)** is the "northern limit of the lately surrendered strip"—*i.e.*, the "Half Mile Strip" of land ceded in 1851;

(c) the ***east boundary*** **(red)** 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

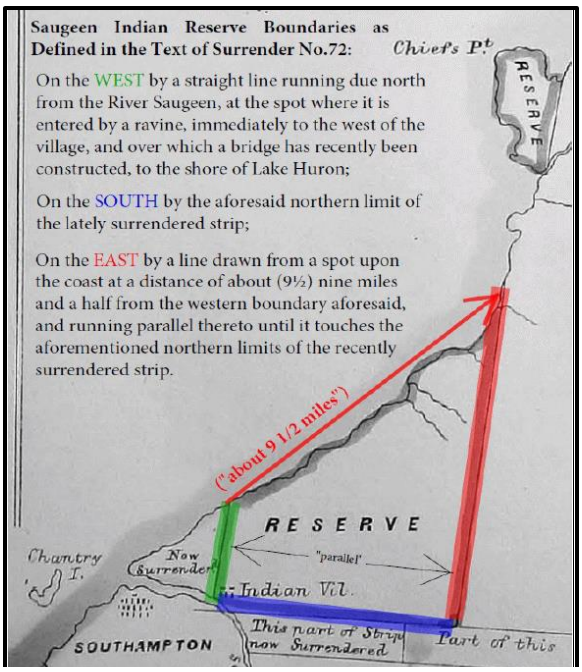

Figure 2: Illustration of Reserve Boundaries, Fig. 3.7 of the Report of G. Reimer, August 13, 2021 (Ex. 1911)

(d) although not expressly mentioned in the Treaty description, the Reserve's "fourth boundary" is Lake Huron, connecting the Reserve's east and west boundaries.[3]

[3] Trial Reasons, paras. 49-56 (AR, Tab 2, pp. 26-27).

C. Rankin's Survey of the Reserve's East Boundary in September 1855

12. In April 1855, the Crown instructed Surveyor Charles Rankin to survey and subdivide the south half of the Bruce Peninsula and prepare survey plans for township lots, so they could be sold at auction and the proceeds credited to Saugeen. Rankin understood his survey was integral to implementing Treaty 72. He was, by all accounts, a diligent, reliable, and careful surveyor.[4]

13. In 1855, surveys were carried out using 66-foot "surveyor chains" to measure distances, and magnetic compasses to determine directions. Wooden posts were used to mark boundary corners and other significant survey points. Rankin also kept detailed notes of his survey work in a field book and journal, which describe the distances of survey lines and the land's topography.

14. Rankin conducted his survey of the Reserve's east boundary in September 1855. His first step was to identify the "spot upon the coast" described in Treaty 72, which represents the location approximately 9½ miles from the Reserve's west boundary, from which Rankin was required to start his survey and run a line due south to mark the Reserve's east boundary.

15. A key issue at trial was how Rankin *actually* surveyed the line south from the "spot upon the coast". His field notes describe the topography of this line as follows:

> On the sandy beach, **at 14 ch to 115 ch Lake, edge of**, at 128 ch ascend the little sandy bank from the beach; then low sand hills at 160 ch to 162 ch …[5]

16. At trial, the survey experts agreed that Rankin found the "spot upon the coast" near the water's edge in Lot 31, but disagreed on whether the line he surveyed south from that spot ran entirely along dry land, or instead intersected the waters of Lake Huron or wet sand of the beach:

(a) **Theory #1**: Saugeen's expert surveyor opined that Rankin was *able to* and *did* establish a boundary line south from the "spot upon the coast" entirely on dry land, and that he included all land west of this line—including the Disputed Beach—within the Reserve's boundaries. Saugeen put forward this survey theory in service of its argument that the Disputed Beach has *always* formed part of the Reserve since the time of survey in 1855. Canada supported Theory #1 at trial.[6]

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[4] Trial Reasons, paras. 138, 144, 163, 170, 195, 198, and 311 (AR, Tab 2, pp. 39, 40, 44, 45, 50 and 71).
[5] Trial Reasons, para. 244 (AR, Tab 2, p. 59), emphasis added.
[6] Trial Reasons, paras. 232-256 (AR, Tab 2, p. 57-61).

(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" without crossing the waters (or wet sand) of Lake Huron, due to the concave shape of the Lake Huron shoreline. This is why Rankin's field notes described intersecting the "Lake, edge of" between 14 chains and 128 chains from his starting point. Theory #2 was visually depicted by Ontario's expert, Dr. Brian Ballantyne, in his expert report at Figure 3.[7]

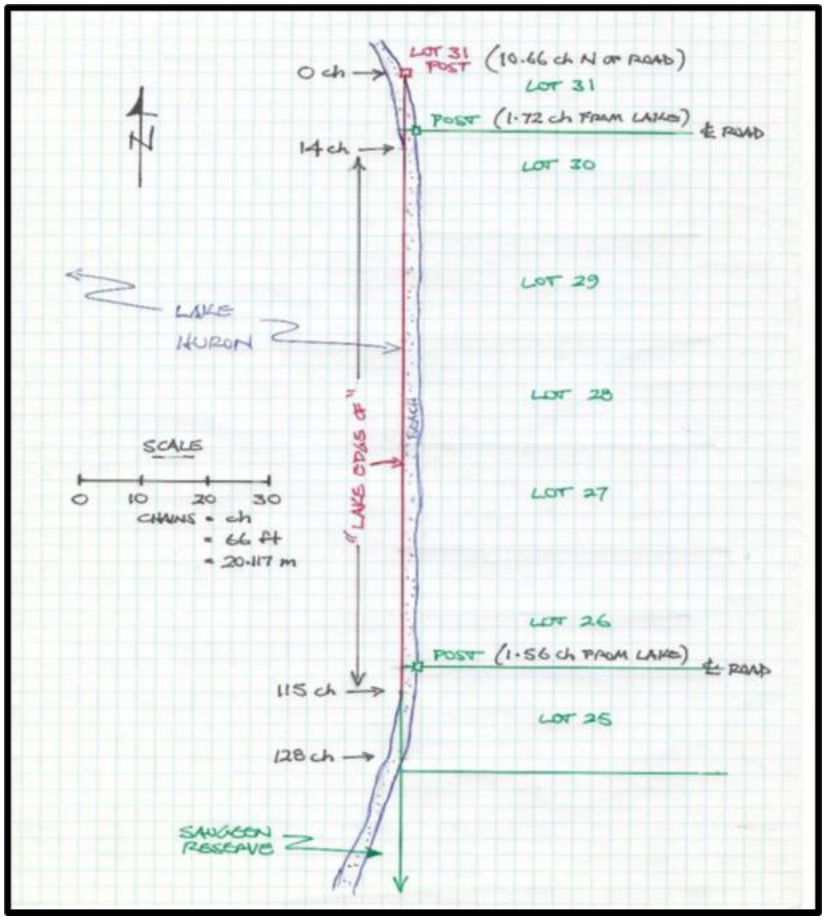

Figure 3 - "Scaled sketch of fieldnotes (Sept 4, 855); Rankin surveyed south from Lot 31 post"
Figure 22 of Report of B. Ballantyne, dated August 15, 2021 (Ex. 1920)

17. As detailed below, the Trial Judge rejected 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 due to the concavity of the shoreline of Lake Huron. His line instead ran along wet sand between Lots 31 and 26—described as "Lake, edge of" in his field notes—before re-emerging onto dry land in Lot 25. Rankin thus marked the Reserve's east boundary around the road allowance

[7] Trial Reasons, para. 257-309 (AR, Tab 2, pp. 61-71).

between Lots 25 and 26, which was the northernmost point from which he could run a continuous boundary on dry land south to the Half Mile Strip.[8]

18. This "accident of geography" had the effect of reducing the Reserve's frontage on Lake Huron *at the north* end by about 1.4 miles. However, separate negotiations between the Crown and Saugeen added about 1.5 miles of shoreline to the Reserve's *south end*.[9] This is known as the "Copway Road" correction. The Reserve has therefore always had over 9½ miles of shoreline.

D. Rankin's Survey Plans Place the Reserve's Northeastern Terminus at Lots 25/26

19. The Trial Judge's acceptance of Theory #2 was consistent with Rankin's survey plans. Weeks after completing his survey, Rankin prepared a draft plan of survey (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 in Figure 4 below.

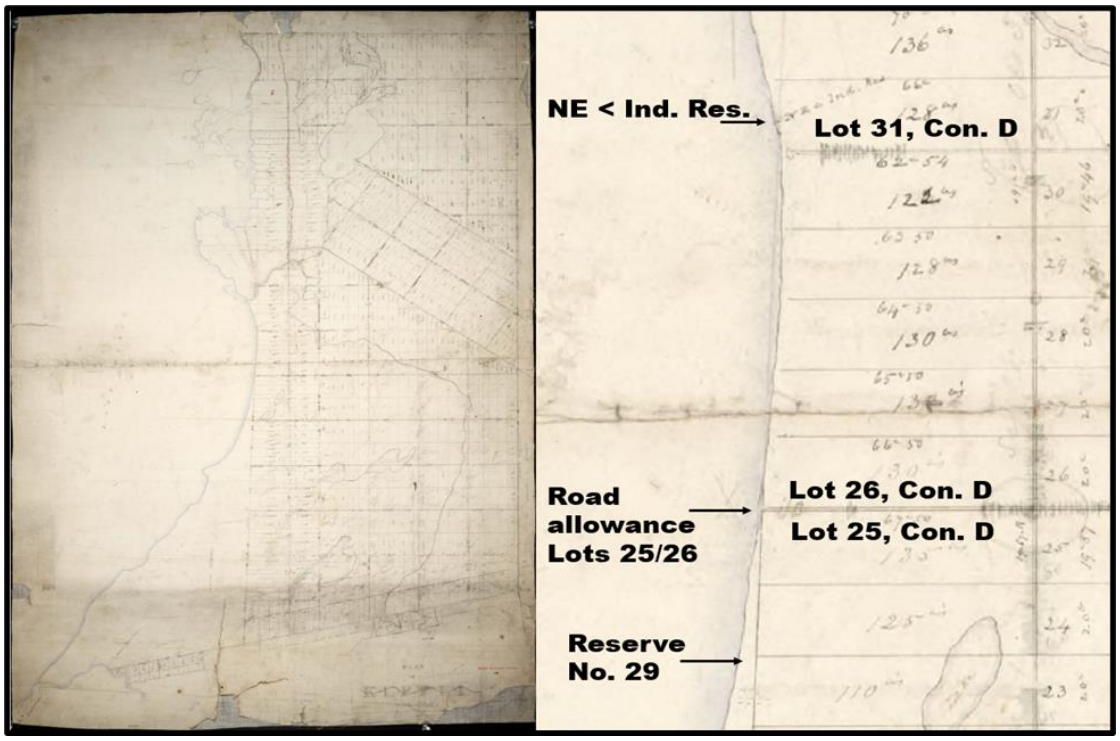

Figure 4 - Draft Plan of Survey of the Township of Amabel, with annotations (Ex. 1780)

20. 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

[8] Trial Reasons, para. 324 (AR, Tab 2, pp. 74-75).
[9] Trial Reasons, paras. 182-183 (AR, Tab 2, pp. 47-48).

Survey Record number. It is the definitive depiction of where Rankin placed the Reserve's east boundary. Consistent with the 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 5.

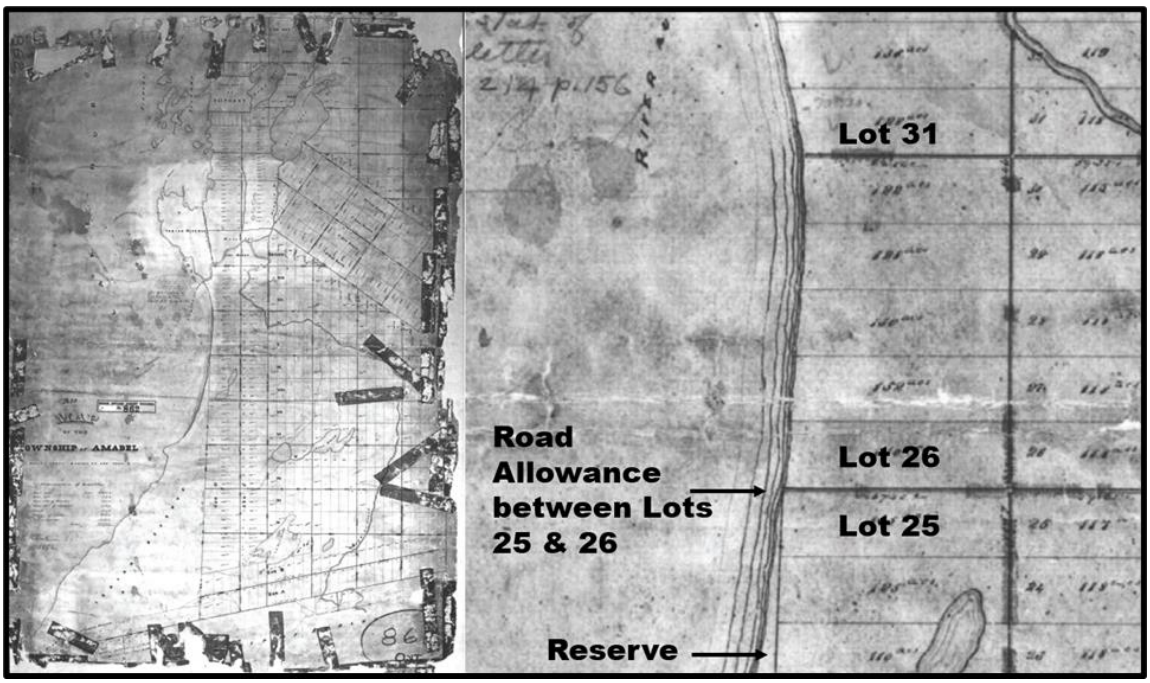

Figure 5 - Final Plan of Survey of the Township of Amabel, with annotations (Ex. 587)

E. Crown brings Ceded Lands to Market; Issues Crown Patents that Guarantee Title

21. In September 1856, the Crown brought to market the lots Rankin subdivided. Lots were advertised using a map published under the authority of the Indian Department, and affixed with the Great Seal (the "**Auction Map**").[10] 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. As shown in Figure 6, the Auction Map makes clear that Lots 26 and 31 were for sale as riparian lots, running to the edge of Lake Huron, without bordering the Reserve.

22. Lots 26-31 were sold at the auction or shortly thereafter, and 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-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

[10] Trial Reasons, paras. 197-202 (AR, Tab 2, pp. 50-51).

Huron as the west natural water boundary without any reference to reserve land as a boundary". In her view, "the patents are not ambiguous", "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".[11]

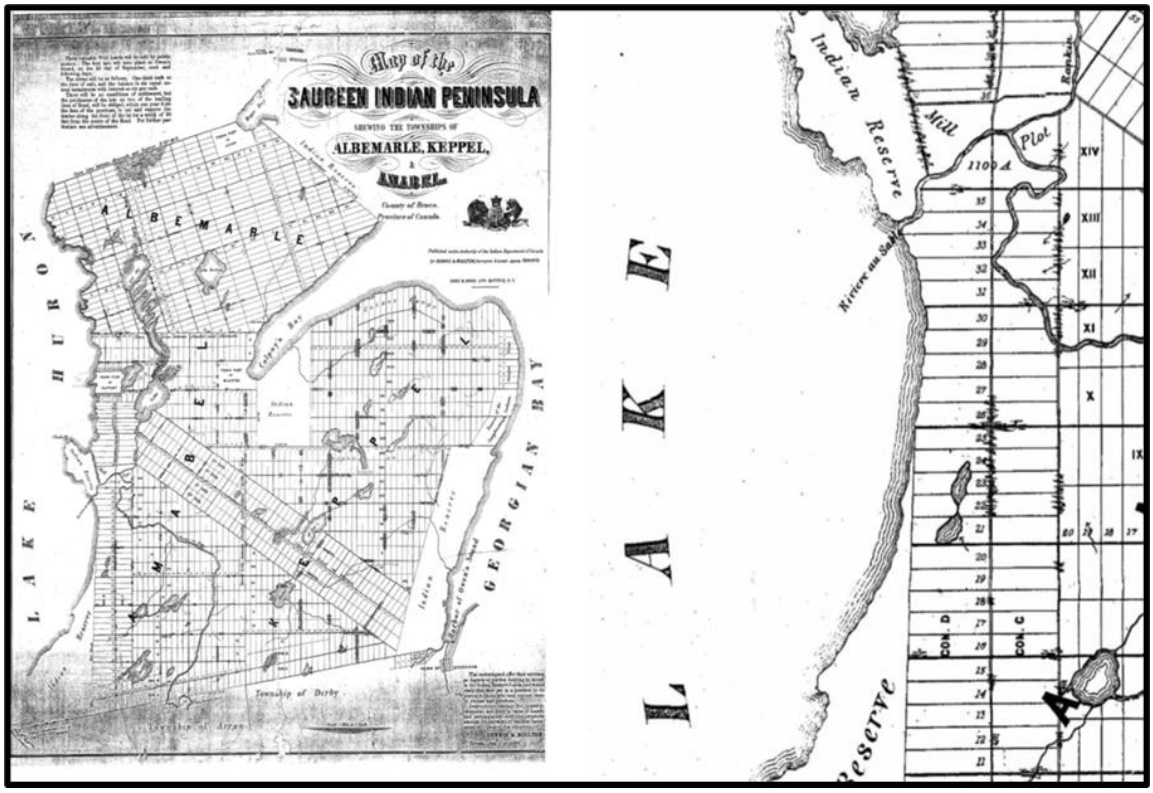

Figure 6 - Dennis & Boulton, Map of the Saugeen Indian Peninsula, shewing the Townships of Albemarle, Keppel and Amabel (the "Auction Map") (Ex. 582)

F. Crown Officials Confirm that Title to Lots 26-31 Extend to the Water's Edge

23. Over the ensuing 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 that "*the Disputed Beach is far wider today than it was in 1854-1855*".[12] All survey experts agreed that the width of the beach has likely grown by several hundred feet. This means the line Rankin ran along wet sand in 1855 from Lots 31 to 26 would run along dry land—not wet sand—today.

[11] Trial Reasons, paras. 483-486 & 493 (AR, Tab 2, pp. 107-108 and 109).
[12] Trial Reasons, para. 230 (AR, Tab 2, p. 57).

24. 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".[13] This is consistent with the longstanding rule at common law that land accretions accrue to the owner of the riparian lot.

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

25. Seasonal tourism at Sauble Beach began in the early 1900s and accelerated after World War II, with middle-class families buying cottages and setting up businesses around this landmark.

26. 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.

27. These lands remained in the Twining, Dobson, and Lemon families until the trial judgment. The Twinings' youngest sibling, David, described his family's beach land as an "heirloom". Alberta Lemon—who was 100 years old at trial, and has since passed—testified that she received offers to purchase the beach land, but declined as "it's not about the money to her".[14] David Dobson continued to carry on his family's "Crowd Inn" business until he was shut down in the summer of 2023, after pronouncement of the trial judgment.

28. The Town acquired title to its portion of the Disputed Beach by quitclaim deeds in the early 1970s, because of the need for municipal stewardship over this tourist attraction. On acquiring its lands, the Town immediately invested in the waterfront and dedicated it to the public trust.[15] The Town has since invested considerably in new infrastructure and maintenance of the beach, turning it into a prime tourist attraction and its main economic engine. Sauble

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[13] Trial Reasons, para. 519 (AR, Tab 2, p. 114).
[14] Trial Reasons, paras. 519-541 (AR, Tab 2, pp. 114-116).
[15] Trial Reasons, para. 559 (AR, Tab 2, p. 119).

Beach is also an integral part of the Town's stormwater management system, and requires regular maintenance by Town employees.

H. Saugeen Commences Proceedings for a Proprietary Interest in the Disputed Beach

29. Saugeen commenced this action in 1995, alleging that the Disputed Beach *always formed part of the Reserve*, and that the Reserve's "north-east limit … 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 [Rankin] in 1855". Saugeen pleads that Lots 26-31 therefore were never riparian lots—and instead "abut[ted]" the Reserve—such that the current owners are "encroaching" on Reserve lands. Saugeen's pleading did not assert that Rankin erred in his survey; rather, its theory was that he correctly included the Disputed Beach within the Reserve's boundaries, and that the Town and Families' Crown Patents never granted title to the water's edge.[16]

30. The Town and Families resisted Saugeen's claim, taking the position that Lots 26-31 were surveyed as running to the water's edge—as shown in every official map and survey plan. They pleaded reliance on the Crown Patents forming their root of title, as well as repeated, written assurances from Crown officials. The Town and Families' position was that Rankin did not err in his survey and he never included the Disputed Beach within the Reserve's boundaries. They also resisted Saugeen's proprietary claim under defences of *bona fide* purchaser and delay.

I. Trial Judge Grants Saugeen's Action; Declares Disputed Beach is Part of Reserve

31. Saugeen's claim was divided in two phases: Phase I dealt with Saugeen's claim to the Disputed Beach under Treaty 72 and the defences raised by the Town, Families, and Ontario. Phase II will deal with damages and the defendants' crossclaims and counterclaims.

32. Phase I was tried over 27 days, beginning in November 2021. The Trial Judge, Justice Vella, rendered judgment in Saugeen's favour on April 3, 2023, granting declarations that the Disputed Beach forms part of the Reserve, that no third parties have any interest in those lands, and that Canada acted dishonourably and breached fiduciary duties owed to Saugeen.

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[16] Saugeen's Fresh As Amended Consolidated Reply to the Statements of Defence and Counterclaims, para. 24 (AR, Tab 10, p. 320); Third Fresh As Amended Statement of Claim, paras. 11-12 (AR, Tab 9, p. 317).

33. As noted above, the Trial Judge did not accept the opinion of Saugeen's survey expert, who opined that Rankin ran the Reserve's east boundary line south from the "spot upon the coast" in Lot 31 *entirely on dry land*, and that the Disputed Beach was always included in his survey of the Reserve. She rejected his assertion that all Rankin's maps and field notes were error-ridden, as well as his attempt to re-enact Rankin's survey of the Reserve's east boundary on dry land today, given the significant geomorphological changes to the shape of the beach.[17]

34. The Trial Judge instead accepted the evidence of Ontario's expert, who opined that Rankin ran his line south from Lot 31 to Lot 26 along *wet sand*—meaning there was no dry land to the west of that line capable of forming part of the Reserve. The Trial Judge described this as a "latent ambiguity" and "accident of geography", since the Treaty's description of the Reserve's boundaries could not be carried out on the ground due to the concavity of the beach land.[18]

35. However, the Trial Judge still ruled in Saugeen's favour. She decided that Rankin *should not* have resolved the "accident of geography" by placing the Reserve's northeast boundary at the spot where his survey line re-emerged onto dry land—*i.e.*, road allowance between Lots 25 and 26. She instead found that what he *ought to have done* was to move his entire survey line inland by 1.5 to 2 chains, which would have allowed him to include the Disputed Beach within the Reserve's east boundary, and deliver to Saugeen the distance of "about (9½) nine miles and a half" of Lake Huron coastline.[19]

36. The Trial Judge found that Rankin's survey, along with the Crown's endorsement of his work, was dishonourable and a breach of the Crown's fiduciary duty to protect Saugeen's Reserve lands. The Crown was the only party found to have committed a legal wrong.[20]

37. While the Trial Judge accepted that the Town and Families had title tracing back to validly issued Crown Patents conveying fee simple ownership up to the water's edge[21], she determined

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[17] Trial Reasons, para. 320 (AR, Tab 2, p. 73).
[18] Trial Reasons, paras. 324(e) & 403 (AR, Tab 2, pp. 74 and 90).
[19] Trial Reasons, paras. 19, 324, and 403-405; see also paras. 372-405 (AR, Tab 2, p. 18-20, 74 and 83-91).
[20] Trial Reasons, paras. 458-470 (AR, Tab 2, pp. 102-104). The Trial Judge's finding that Canada alone inherited the pre-Confederation Crown's liability, and that Ontario is not liable for the pre-Confederation Crown, was overturned on appeal: see *Chippewas of Saugeen First Nation v. South Bruce Peninsula (Town)*, 2024 ONCA 884 ("**Appeal Reasons**"), paras. 262-269 (AR, Tab 7, pp. 291-293).
[21] Trial Reasons, paras. 483-486 & 493 (AR, Tab 2, pp. 107-108 and 109).

that their proprietary rights and interests carry less weight when balanced against Saugeen's Treaty interests. She did not accept their *bona fide* purchaser and delay defences.

38. Despite rejecting Saugeen's theory that Rankin had *always* included the Disputed Beach within the Reserve's boundaries, the Trial Judge nevertheless found that his failure to adjust his survey constituted a breach of Treaty 72, and exercised her remedial discretion to declare that the Disputed Beach now forms part of the Reserve.

J. Court of Appeal Upholds Trial Judgment, Confirms Proprietary Remedy

39. On appeal, the Town and Families argued that the Trial Judge erred by, among other things, deciding Saugeen's claim on a theory neither pleaded nor argued. At trial, Saugeen advanced the theory that the Disputed Beach had always been included within the Reserve's boundaries since Rankin's survey, but that it was not properly recorded in his maps or field notes. The Trial Judge rejected that theory of what Rankin *actually did*, and instead granted judgment on her views regarding what Rankin *should have done* during his survey.

40. The Town and Families also argued that the Trial Judge's finding that Rankin *should have* moved his line 1.5 to 2 chains inland—so that he could run the boundary entirely on dry land—would have the effect of disrupting property rights of non-parties to the action.

41. By reasons dated December 9, 2024, the Ontario Court of Appeal dismissed the Town and Families' appeal. Although the Trial Judge found that "the post which [Rankin] 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", the Court of Appeal found that she did not intend to shift the boundary further eastward, and that the judgment was limited only to the Disputed Beach.[22]

42. While the Court of Appeal agreed with the Trial Judge that Rankin was unable to run a line due south from the "spot upon the coast" entirely on dry land *back in 1855*, it concluded that the Treaty description of "about 9½ miles" of shoreline could be delivered to Saugeen *today*, as a "forward-looking remedy" for the Crown's historical wrongdoing. In other words, although the

[22] Appeal Reasons, paras. 191-194 (AR, Tab 7, p. 261-262).

Disputed Beach could not be given to Saugeen *at the time of the survey* because it was submerged in water, it could be declared part of the Reserve *today*.[23]

43. The effect of the rulings at trial and on appeal is to dispossess the Town and Families of their title, which they acquired lawfully and in good faith. While none of them were found to have committed any legal wrong against Saugeen, the Trial Judge found that they must "bear the brunt" of misconduct committed by the Crown alone.[24]

PART II - CONCISE STATEMENT OF THE QUESTION IN ISSUE

44. This proposed appeal calls on the Court to consider, for the first time, the proper approach to reconciling Indigenous land rights with the rights of private property owners who have relied in good faith on assurances of title, rooted in Crown Patents. Should one set of rights automatically prevail over the other? Should courts decide whether the interests of First Nations or fee simple landowners are more worthy of protection on a case-by-case basis, and if so, why? Is reconciliation advanced by pitting Indigenous and non-Indigenous interests against one another as part of the Court's remedial discretion? And what role must the Crown play in remedying the effect of its own historical wrongdoing on innocent parties who did nothing wrong?

45. The importance of these questions cannot be understated. They strike at the very heart of Canada's constitutional order, and will be increasingly brought into focus as Indigenous land claims over private property work their way through the courts over the next decade. These issues are ripe for determination. Leave to appeal should be granted.

PART III - CONCISE STATEMENT OF ARGUMENT

A. The Supreme Court Should Revisit the Binary Approach in *Chippewas of Sarnia*

46. At its core, the legal issue in this case concerns the courts' power to craft remedies for historical wrongs that *meaningfully* advance reconciliation.

47. In this case, the Trial Judge decided that the appropriate remedy for the Crown's fiduciary breach and dishonourable conduct against Saugeen was an order dispossessing the Town and Families of the land over which they held lawful title. She found that the Town and Families

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[23] Appeal Reasons, paras. 206-226 (AR, Tab 7, pp. 267-277).
[24] Trial Reasons, para. 693 (AR, Tab 2, p. 143).

were not responsible for or in any way complicit in the Crown's misconduct, and rejected Saugeen's assertion that they were "encroaching" on land Rankin included within the Reserve's boundaries during his 1855 survey. Still, in exercising her remedial discretion, the Trial Judge determined that the Town and Families must now "bear the brunt" of the Crown's misdeeds.

48. In coming to that conclusion, the Trial Judge relied on the Ontario Court of Appeal's decision in *Chippewas of Sarnia* from 2000, which is the only appellate decision directly addressing remedies for s. 35 land claims over private property.[25] As discussed below, the Trial Judge did not have the benefit of this Court's decisions in *Restoule* or *Shot Both Sides*.

49. In *Chippewas of Sarnia*, the Ontario Court of Appeal dismissed a First Nation's claim for possession of lands in City of Sarnia, much of which was held by private parties. While the five-judge panel found there was no valid surrender, the Court explained that pre-existing Aboriginal interests in land will not automatically override subsequent interests—including those of *bona fide* purchasers—because "it is a basic principle of our legal system that the right asserted by the complaining party *must be considered in relation to the rights of others*".[26]

50. The approach in *Chippewas of Sarnia* requires judges to resolve the apparent conflict between Aboriginal or Treaty land rights with the rights of private landowners by weighing the legal and equitable interests of these innocent parties against one-another on a "case-by-case" basis. The outcome is binary: possession goes either to the First Nation or the titleholder. Courts are put to the invidious task of deciding whose rights are more worthy of protection—or, to use the Trial Judge's language, who must "bear the brunt" of the Crown's misconduct. There was no room in the Court's analysis for a negotiated outcome:

> [282] Assuming, without deciding, that such an order could be made, an order requiring the Crown to enter negotiations with the Chippewas would be a novel remedy, not readily classified in conventional terms. Such an order would have a mandatory aspect and would require the ongoing involvement and supervision of the court. An order having these features plainly could not be available as of right.

51. Applying this approach, the Court of Appeal in *Chippewas of Sarnia* decided that the First Nation's delay in asserting its rights over the disputed land, and the reliance placed by *bona fide*

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[25] *Chippewas of Sarnia Band v. Canada* (2000), 51 O.R. (3d) 641, 2000 CanLII 16991 (C.A.).
[26] *Chippewas of Sarnia*, para. 264.

purchasers on the apparent validity of their Crown Patent, was "fatal" to the claim. In the present case, the Trial Judge acknowledged that the "Lemon and Twining families have deep sentimental attachment to their properties", but that their interests and those of the Town were "far less in number and magnitude" than those at issue in *Chippewas of Sarnia*, and did not carry the same weight as Saugeen's interests in the Disputed Beach.[27]

52. *Chippewas of Sarnia* was decided 25 years ago. Leave to appeal was denied. And while an increasing number of land claims over private property are progressing through the judicial system, the approach in *Chippewas of Sarnia* was never endorsed by any other appeal court.[28]

53. The reasoning in *Chippewas of Sarnia* has been widely criticized in the academic literature. Professor Malcolm Lavoie described it as "unpersuasive", and Robert Hamilton noted that the Court of Appeal's reluctance to compel negotiation was out-of-step with more recent advances in this Court's jurisprudence, including in *Manitoba Metis* and *Tsilhqot'in*, both of which recognize the power of Crown-led negotiated settlements.[29]

54. Nor does the approach in *Chippewas of Sarnia* yield a satisfying or defensible solution to the problem in this case. Both the Trial Judge and the Court of Appeal agreed that Rankin's survey from Lot 31 to Lot 26 ran along wet sand—*i.e.*, the edge of Lake Huron—meaning there was no dry land west of this line that could form part of the Reserve. In other words, the Disputed Beach was entirely submerged in water at the time of the survey, and therefore was *not capable* of being included in the "block of land" comprising the Reserve in 1855. The "forward-looking" solution imposed today was not available at the time of the survey.[30]

55. Unlike in *Chippewas of Sarnia*, the Trial Judge found that the Crown Patents forming the root of title to the Disputed Beach unquestionably conveyed ownership to the water's edge. The Town and Families' title was never defective, and consistent with the Crown's repeated

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[27] *Chippewas of Sarnia*, para. 310; Trial Reasons, paras. 594 & 604 (AR, Tab 2, p. ●).
[28] *Chippewas of Sarnia Band v. Canada*, [2001] S.C.C.A. No. 63.
[29] M. Lavoie, "Aboriginal Title Claims to Private Land and the Legal Relevance of Disruptive Effects" (2018) 83 S.C.L.R. (2d), pp. 129-166; R. Hamilton, "Private Property and Aboriginal Title: What is the Role of Equity in Mediating Conflicting Claims" (2015) U.B.C. Law Review, Vol. 51:2, pp. 379. See also *Manitoba Metis Federation Inc. v. Canada*, 2013 SCC 14, para. 137; and *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, paras. 10, 19 & 118.
[30] Trial Reasons, para. 284, 323 & 403 (AR, Tab 2, p. 66, 73 and 90); Appeal Reasons, para. 29 (AR, Tab 2, p. 21).

assurances, their title lawfully extended to the Disputed Beach lands that emerged on the west side of Lots 26-31 over the intervening 168 years following Rankin's survey.[31]

56. While the Trial Judge rejected Saugeen's theory that the Town and Families *never* had title to the Disputed Beach, she decided that the Crown's historical wrongs should be remedied by declaring that these defendants *no longer* have good title going forward. The Court of Appeal agreed because "the eastern boundary can *now* be run due north to Lot 31 from the existing terminus entirely on dry land"—even though it could not in 1855.[32] Both courts relied on *Chippewas of Sarnia* to justify the dispossession of the Town and Families.

57. This situation was entirely different from *Chippewas of Sarnia*. At the heart of that case was a Crown Patent that was "*apparently* valid" but fundamentally defective because the underlying surrender of land from the First Nation was ineffective and void. The landowners never had good title, but they were successful in their *bona fide* purchaser and laches defence as part of the Court's balancing exercise. The Town and Families are in a different position: the Trial Judge found that the Crown Patents for Lots 26-31 *actually do* "form the root of title for the purported ownership of these since subdivided lots to the Landowners". *Chippewas of Sarnia* provides no justification for vitiating the Town and Families' title today as part of a "forward looking" remedy for historical wrongdoing committed by the Crown alone.

58. Finally, *Chippewas of Sarnia* is silent on what role the Crown must play in accepting responsibility for its misconduct and meaningfully reconciling the interests of the First Nation with those of the private landowners. Requiring judges to decide whose interests more strongly favour possession of the land undermines the goal of reconciliation by pitting innocent parties against one another without regard to the Crown's role in remedying the consequences of its historical wrongs. Reconciliation is not the all-or-nothing concept suggested by the Trial Judge's reasons, but rather a "two-way street" that "attempt[s] to *harmonize* conflicting interests and *achieve balance and compromise*".[33]

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[31] Trial Reasons, paras. 483, 493, 524, 540, 549-552, 555-556, and 560 (AR, Tab 2, pp. 107, 109, 115, 116, 117-119).
[32] Appeal Reasons, para. 223 (AR, Tab 7, p. 275).
[33] *AltaLink Management Ltd. v. Alberta (Utilities Commission)*, 2021 ABCA 342, para. 115.

B. Recent Jurisprudence Charts a New Path for Reconciliation between Innocent Parties

59. This proposed appeal provides an opportunity for this Court to reorient the approach in *Chippewas of Sarnia* in light of important developments in Aboriginal law over the past quarter-century. It invites the Court to clarify the availability of creative and transformative remedies that avoid binary outcomes, and that place primary responsibility on the Crown to meaningfully reconcile the interests of innocent parties for the consequences of its dishonourable conduct.

60. In *Restoule*, this Court considered an action brought by several First Nations for breach of an augmentation clause for annuities in the Robinson-Superior Treaty of 1850. After finding that the Crown breached its historical Treaty obligations, the Court considered the issue of remedy—and specifically, whether the plaintiffs should be limited to declaratory relief or whether the Court should go one step farther and order substantive or coercive remedies against the Crown.[34]

61. The Court unanimously found that a declaration was necessary but not sufficient, since "the Crown *must* provide redress for the conceded breach of its duty". However, it stopped short of ordering a specific compensatory award, and decided instead that it was "appropriate for redress *to be negotiated by the treaty partners*, in a manner that is consistent with reconciliation". The Court directed the Crown to engage in time-bound negotiations, taking into account the various Indigenous and non-Indigenous interests at play, and exercise its discretion to fairly compensate the plaintiff First Nations for the breach of the augmentation clause.[35]

62. The reasons in *Restoule* make clear that courts can impose "the full range of remedies, including damages and other coercive relief" to remedy dishonourable Crown conduct, and that they must take a "purposive approach" to determine the remedy appropriate to the dispute at hand. In that case, Justice Jamal found that "proceeding immediately to a judicially calculated damages award for past breaches" was not appropriate. He instead directed the Crown to negotiate in good faith and exercise its discretion "honourably" and "to do justice to the Anishinaabe treaty partners and Her Majesty's other 'subjects'." In exercising remedial restraint, the Court relied on the following passage from Chief Justice Lamer in *Delgamuukw*:

> … By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. **As was**

[34] *Ontario (Attorney General) v. Restoule*, 2024 SCC 27.
[35] *Restoule*, paras. 271 & 288.

> **said in *Sparrow* … s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place".** Those negotiations should include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. **Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve … a basic purpose of s. 35(1)—"the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown"**. Let us face, it, we are all here to stay.[36] (Emphasis added.)

63. The Court followed this remedial approach in *Shot Both Sides*, which concerned the Crown's breach of Treaty 7 in setting the Blood Tribe's reserve boundaries. Justice O'Bonsawin explained that the "non-coercive nature of declaratory relief can help 'the parties to the dispute to resolve their issues without an excessively hostile or adversarial approach', and can help to restore the honour of the Crown". The "reconciliation process differs from the conflict driven, adversarial litigation process that is often antithetical to meaningful and lasting reconciliation". A declaration on the right and conduct respecting the Treaty was awarded to "guide the parties in the reconciliation process" and "assist with efforts to restore the nation-to-nation relationship".[37]

64. The remedial approach described in *Restoule* and *Shot Both Sides* was recently considered by the New Brunswick Court of King's Bench in *Wolastoqey*, in which the plaintiff First Nations asserted Aboriginal title over 283,204 separate parcels of land in New Brunswick owned by the province as well as dozens of private landowners. The Court granted the private landowners' motion to strike the case as against them for disclosing no reasonable cause of action. Like the Town and Families, the landowners in *Wolastoqey* were innocent of any wrongdoing.[38]

65. In that case, Justice Gregory accepted the private landowners' argument that the plaintiffs cannot claim "private, property law-based remedies directly against private third parties for alleged constitutional breaches by the Crown". She described the plaintiffs' case as "misconceived", because "it is simply untenable at law to draw private party litigants, against whom no private law cause of action has been alleged, *and no direct legal relationship established*, into a constitutional challenge against the Crown".[39]

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[36] *Restoule*, paras. 297, 304-310, citing *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 186.
[37] *Shot Both Sides v. Canada*, 2024 SCC 12, paras. 71-73, see more generally paras. 70-83.
[38] *Wolastoqey Nations v. New Brunswick and Canada, et.al.*, 2024 NBKB 203.
[39] *Wolastoqey*, para. 127.

66. While Justice Gregory recognized the possibility of possessory remedies for the First Nation plaintiffs, should they prove their Aboriginal title claims at trial, she found that this was not a necessary outcome and rejected the approach followed in *Chippewas of Sarnia*. In her view, *Chippewas of Sarnia* "discloses the very problem of including private parties in Aboriginal title litigation. It mistakenly allows for the pitting of private fee simple title holders *directly* against Aboriginal title holders and contorts legal principles in doing so".[40]

67. Justice Gregory also declined to follow *Chippewas of Sarnia* because it "predates many Supreme Court of Canada decisions from which different directions, legal principles and analyses arise in the context of Aboriginal law". Referring to *Restoule* and *Shot Both Sides*, she held "the approach now directed by the Supreme Court is that declaratory judgments are to be catalysts for negotiation and reconciliation between the Crown and the Aboriginal groups":[41]

> [172] Both *Shot Both Sides* and *Restoule* appear to be refining the role of the courts in Aboriginal rights litigation. Once the "conflict" or the "wrongdoing" …is factually and legally determined, **a reconciliation process is triggered invoking polycentric considerations on the part of the Crown. While a court will, or may, hold a reviewing jurisdiction over this process, and possibly a decision-making jurisdiction should reconciliation break down absolutely, it will be on the Crown to take into consideration the fee simple interests of landholders as part of the process of reconciliation.** (Emphasis added.)

68. Respectfully, the Court of Appeal's approach in *Chippewas of Sarnia* is out-of-step with this refined approach to rights and remedies in Aboriginal litigation, and ignores the Crown's central role in achieving reconciliation between innocent parties. That is particularly relevant in this case, where Canada aligned its position with Saugeen regarding the location of the Reserve's east boundary, but refused to acknowledge *any* breach of duty with respect to the creation of that boundary until after trial. Nor has Canada ever accepted responsibility for the grave consequences of its historical wrongdoing on the Town, the Families, and the local community. Its position in this litigation also runs contrary to longstanding policies in the specific and comprehensive claims processes that third parties' lands will not be taken to satisfy a Treaty claim and that Canada "will not force anyone to sell their lands in any kind of way".[42]

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[40] *Wolastoqey*, para. 165.
[41] *Wolastoqey*, para. 167.
[42] See: Government of Canada, "The Specific Claims Policy and Process Guide" under the heading "Compensation" at para. 8; see also Trial Transcript, Day 10 (Dec. 7), p. 1469:2-8.

69. The pitfalls of the *Chippewas of Sarnia* approach are evident in the decisions below, in which the Trial Judge and Court of Appeal imposed a new boundary in service of a "forward-looking remedy" that disrupts decades of settled possession. It sits uncomfortably with bedrock principles of property rights in Canada that counsel against the *ex-post* rewriting of boundaries.[43]

70. By contrast, a negotiated outcome allows the Crown to craft a solution to the consequences of its historical conduct as it relates to both Saugeen, the Town, the Families, and the myriad of third-party interests. This solution would proactively address issues such as possession of the lands, the location of the boundary line—which has yet to be surveyed—key municipal infrastructure constructed on the beach (including stormwater drains), traffic management, beach stewardship, management of the local tourism economy, and parking revenues. These are core issues to the Town, which developed a vibrant community and economy in good faith reliance on its title. They should be addressed *via* negotiation and reconciliation, not a binary adjudication.

71. Reconciliation lies at the core of this case. The Treaty rights of Saugeen unquestionably carry significant weight and the courts below have found that the Crown's failure to deliver "about 9½ miles" of shoreline demands a remedy. But the Town and Families' title, right, and interest in the Disputed Beach should not be collateral damage in the process of correcting historical wrongs, in which they played no part. Nor should the Crown be permitted to wash its hands of its task of reconciling the interests of these neighbours, only then to resist their claims for compensation in Phase II when it is litigated many years from now.

72. Reconciliation rarely happens in the courtroom, and certainly not when judges are required to make winners and losers out of innocent parties. Leave should be granted so this Court can develop a framework—consistent with *Restoule*, *Shot Both Sides* and *Wolastoqey*—that acknowledges the rights, interests, and perspectives of all stakeholders, Indigenous and non-Indigenous. As the Federal Court of Appeal held in *Coldwater*, reconciliation "looks forward", is "meant to be transformative", and creates "a new attitude where Indigenous peoples and others *work together* to advance our joint welfare with mutual respect and understanding".[44]

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[43] *Nicholson v. Halliday* (2005), 74 O.R. (3d) 81, 2005 CanLII 259 (C.A.).
[44] *Coldwater Indian Band v. Canada*, 2020 FCA 34, para. 49 (emphasis added).

PART IV - ORDER REQUESTED

73. For all the foregoing reasons, the Town and Families ask that leave be granted, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of February, 2025.

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

PART V - TABLE OF AUTHORITIES

No.	Authority	Paragraph Reference
	Jurisprudence	
1.	*Chippewas of Sarnia Band v. Canada* (2000), 51 O.R. (3d) 641, 2000 CanLII 16991 (C.A.), leave refused [2001] S.C.C.A. No. 63.	3-4, 48-59, 66-69
2.	*Manitoba Metis Federation Inc. v. Canada*, 2013 SCC 14	53
3.	*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44	53
4.	*AltaLink Management Ltd. v. Alberta (Utilities Commission)*, 2021 ABCA 342	58
5.	*Ontario (Attorney General) v. Restoule*, 2024 SCC 27	4, 48, 60-62, 64, 67, 72
6.	*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010	62
7.	*Shot Both Sides v. Canada*, 2024 SCC 12	4, 48, 63-64, 67, 72
8.	*Wolastoqey Nations v. New Brunswick and Canada, et.al.*, 2024 NBKB 203	64-67, 72
9.	*Nicholson v. Halliday* (2005), 74 O.R. (3d) 81, 2005 CanLII 259 (C.A.)	69
10.	*Coldwater Indian Band v. Canada*, 2020 FCA 34	72
	Secondary Sources	
11.	M. Lavoie, "Aboriginal Title Claims to Private Land and the Legal Relevance of Disruptive Effects" (2018) 83 S.C.L.R. (2d)	53
12.	R. Hamilton, "Private Property and Aboriginal Title: What is the Role of Equity in Mediating Conflicting Claims" (2015) U.B.C. Law Review, Vol. 51:2	53
13.	Government of Canada, "The Specific Claims Policy and Process Guide" under the heading "Compensation"	68

PART VI - TEXT OF STATUTES, LEGISLATION, RULES, ETC.

N/A