Court File No.

COURT OF APPEAL FOR ONTARIO

BETWEEN:

CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and SAUGEEN FIRST NATION

Plaintiffs

(Appellants)

- and –

THE ATTORNEY GENERAL OF CANADA; HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO; THE CORPORATION OF THE COUNTY OF GREY; THE CORPORATION OF THE COUNTY OF BRUCE; THE CORPORATION OF THE MUNICIPALITY OF NORTHERN BRUCE PENINSULA; THE CORPORATION OF THE TOWN OF SOUTH BRUCE PENINSULA; THE CORPORATION OF THE TOWN OF SAUGEEN SHORES and THE CORPORATION OF THE TOWNSHIP OF GEORGIAN BLUFFS

Defendants

(Respondents)

NOTICE OF APPEAL

THE APPELLANTS, Saugeen First Nation and Chippewas of Nawash Unceded First Nation (collectively, the Saugeen Ojibway Nation or "SON") appeal to the Court of Appeal for Ontario from the judgment of The Honourable Justice Wendy Matheson (the "Trial Judge") dated July 29, 2021 made at Toronto, Ontario.

THE APPELLANT ASKS for the following orders:

(a) Setting aside the dismissal of the fiduciary claim;

(b) Granting a declaration that Canada and Ontario (the "Crown") had a fiduciary duty to SON in respect of SON's interests in its lands on the Saugeen (Bruce) Peninsula and that the Crown breached that fiduciary duty;

(c) Costs in this appeal and in the court below; and

(d) Such relief as counsel may advise and this Honourable Court may deem just.

THE GROUNDS OF APPEAL are as follows:

Background

2. The appellants, plaintiffs in the action, are two Anishinaabe First Nations: Saugeen First Nation and Chippewas of Nawash Unceded First Nation. Collectively, they refer to themselves as the Saugeen Ojibway Nation ("SON").

3. SON's claim focuses on two pre-confederation treaties known as Treaty 45 ½ and Treaty 72. SON entered into Treaty 45 ½ with the Crown in 1836. Pursuant to Treaty 45 ½, SON ceded 1.5 million acres of their lands south of Owen Sound to make way for settlement. In exchange, SON received a promise from the Crown to protect the Saugeen (Bruce) Peninsula (the "Peninsula") for SON forever "from the encroachment of whites". In the years that followed, the Crown failed to protect the Peninsula and act diligently to fulfill its promise to SON. In 1854, the Crown pressed for and obtained a surrender of the Peninsula from SON, stating that it would not, and that it could not, protect the Peninsula from squatting and settlement.

4. SON's claim is being heard in phases. The Trial Judge's decision is with respect to Phase 1, wherein SON sought declarations that based on the above, the Crown had a fiduciary duty to SON in respect of its interests in the Peninsula and breached that fiduciary duty by failing to protect the Peninsula.

The Trial Decision

5. The Trial Judge found that the Crown breached its obligations to SON, concluding that the Crown breached the treaty promise to protect the Peninsula, and in doing so breached the honour of the Crown. The Trial Judge also found that some of the Crown's conduct in negotiating Treaty 72 breached its honour.

6. The Trial Judge dismissed SON's claim that the Crown had and breached its fiduciary duty to SON.

The *Ad Hoc* Fiduciary Duty

7. The Trial Judge erred in concluding that the Crown did not owe SON an *ad hoc* fiduciary duty. The Trial Judge made legal errors, or, in the alternative, errors of mixed fact and law, in her characterization of the requirements of an *ad hoc* fiduciary duty as follows:

   (a) The Trial Judge erred in her articulation of the nature of the undertaking required to give rise to an *ad hoc* fiduciary duty and thus erred in her holding that the Crown's promise to protect the Peninsula for SON was insufficient to amount to an undertaking required to ground an *ad hoc* fiduciary duty. The Trial Judge found the Crown made a promise to protect the Peninsula forever from the encroachments of the whites, and that this promise was made to SON, and to no one else. After Treaty 45 ½, the Crown's express undertaking to protect the Peninsula for SON was enhanced by subsequent Crown declarations, such as the 1847 Declaration (Lord Elgin's Declaration, June 29, 1847) and the *Indian Lands Protection Act,* 1850, declared to apply to the Peninsula in 1851. That is sufficient to constitute an undertaking to ground an *ad hoc* fiduciary duty.

   (b) The Trial Judge erred in holding that no *ad hoc* fiduciary duty arises where a beneficiary has any option for self-help or mitigation of harm in relation to the legal interest the fiduciary has undertaken to protect. There is no requirement that the beneficiary be entirely helpless in order for an *ad hoc* fiduciary duty to arise. For example, in this case, the fact that SON invited other First Nations to join them on their lands (an attempt to help protect those lands against encroachment) does not prevent a fiduciary duty from arising. Further, the particular steps which the Trial

Judge ruled the Crown could and should have done – such as prosecution of trespassers – were steps which only the Crown could have taken.

The *Sui Generis* Fiduciary Duty

8. The Trial Judge erred in holding that the Crown did not owe SON a *sui generis* fiduciary duty, specifically making the following legal errors, or, in the alternative, errors of mixed fact and law:

   (a) The Trial Judge erred in law by misconstruing the legal test for the creation of a reserve, or, in the alternative, erred in mixed law and fact by misapplying the legal test for the creation of a reserve, and by concluding that the Peninsula was not a reserve. In particular:

      (i) the Trial Judge misconstrued the test set in *Ross River Dene Council v. Canada,* 2002 SCC 54, [2002] 2 SCR 816, including by:

         (A) incorrectly suggesting the intention to create a reserve could refer only to an intention to create a reserve under the *Indian Act;*

         (B) incorrectly suggesting that all factors in the *Ross River* test needed to be satisfied at the same moment – that is, when Treaty 45 ½ was concluded in 1836;

         (C) incorrectly suggesting that the test was met only if the Indigenous people did not previously occupy the lands designated as a reserve; and

      (ii) the Trial Judge erred in failing to give weight to evidence about the Indigenous perspective about Lt Governor Francis Bond Head's capacity to bind the Crown, the acceptance of Treaty 45 ½ by Bond Head's superiors, and the numerous official documents in the evidentiary record that refer to

and treated the Peninsula as a reserve, including the Order-in-Council of 1843 establishing boundaries of the reserve on the Peninsula (Order in Council, July 26, 1843) and the 1847 Declaration (Lord Elgin's Declaration, June 29, 1847).

(b) The Trial Judge erred in holding that that there was an insufficient proprietary interest to ground the Crown's *sui generis* duty to SON because she incorrectly concluded the Peninsula was not created as a reserve (see para 8(a)), or in the alternative, she misconstrued the law respecting what is a sufficient proprietary interest to ground the Crown's *sui generis* fiduciary duty. That proprietary interest arises in respect of reserve lands and First Nation lands – that is, those lands that a First Nation uses and/or occupies.

(c) The Trial Judge misconstrued and misstated the legal test for determining whether the Crown had a *sui generis* duty to SON. Specifically:

(i) in respect of the Peninsula, by holding that it was a legal requirement that the Crown had to become the exclusive intermediary in respect of the sale of lands on the Peninsula; and

(ii) by holding that it was a legal requirement that SON needed to be entirely precluded from taking any steps in its own interest, for the *sui generis* fiduciary duty to be established in respect of the Crown's relationship to SON and its obligations to protect SON's rights and interests. More generally, the *sui generis* fiduciary duty does not only arise because of vulnerability, but also because of the special Crown-Indigenous relationship. In the early years of the relationship, it was one of alliance and interdependence.

The Crown's Breach of its Fiduciary Duty

9. In this case, under the *sui generis* and *ad hoc* branches, the fiduciary duty imposes the following obligations on the Crown: loyalty; good faith; full disclosure; the protection and preservation of SON's proprietary interests (or quasi-proprietary) interests, in the Peninsula from exploitation, including exploitation by the Crown itself and also from improvident bargains when it comes to surrenders. The Crown is also obligated to conform to the fiduciary standard of care – that of an ordinary person managing his or her own affairs.

10. The Trial Judge erred in holding that there was no fiduciary duty (based on the grounds set out above). It follows from the findings of fact made by the Trial Judge that, if the Crown held a fiduciary duty to SON in respect of the Peninsula, that duty was breached. Accordingly, the Trial Judge erred in law by finding that there was no breach of fiduciary duty.

11. In addition, a fiduciary duty to protect the Peninsula would include a duty of full disclosure about the possibility of doing so. In this case, Laurence Oliphant said that it was impossible to protect the Peninsula from squatters, but, the day after Treaty 72, he instructed the Sherriff to do precisely that. He thus failed to fully disclose relevant information to SON before Treaty 72 was concluded. This constituted a breach of the Crown's fiduciary duty.

The consequences of the Crown's breaches of its fiduciary duty

12. The Trial Judge erred in holding that the conduct of the Crown and its officials leading up to the surrender of the Peninsula in 1854 did not have an impact on SON's decision to surrender the Peninsula. Specifically, the Trial Judge erred in holding the conduct of

Laurence Oliphant in October 1854 had no impact on SON's decision to surrender the Peninsula by failing to adequately consider the impact of Oliphant's comments that he could not protect the Peninsula and surrender was their only option, particularly in light of other similar statements made by other Crown officials, and in light of the resistance Oliphant faced during the negotiations of Treaty 72. This is an error of mixed fact and law, or in the alternative, an error of fact, which constitutes a palpable and overriding error.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

13. An appeal of a final order of a judge of the Superior Court of Justice lies to the Ontario Court of Appeal pursuant to section 6(1)(b) of the *Court of Justices Act,* RSO 1990, c. C-43.

14. The order appealed from is a final order of the Superior Court of Justice, and no appeal lies to the Divisional Court.

15. Leave to appeal is not required.

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Olthuis, Kleer, Townshend LLP
Barristers and Solicitors
250 University Avenue, 8th Floor
Toronto, Ontario M5H 3E5

H.W. Roger Townshend (LSO 34916O)
Cathy Guirguis (LSO 56083S)
Krista Nerland (LSO 67574L)

Tel: (416) 981-9330
Fax: (416) 981-9350

Counsel for the Appellants

TO: **Court of Appeal for Ontario**
130 Queen Street West
Toronto, Ontario M5H 2N5

AND TO: **The Attorney General of Canada**
Department of Justice
120 Adelaide Street West, Suite 400
Toronto, Ontario M5H 1T1
Attn.: Michael Beggs, Carole Lindsay, Michael McCulloch, and Barry Ennis

Tel: (416) 952-4758
Fax: (416) 973-2319

Counsel for the Respondents,
The Attorney General of Canada

AND TO: **Ontario Ministry of the Attorney General**
Crown Law Office – Civil
720 Bay Street, 8th Floor
Toronto, Ontario M7A 2S9
Attn.: David Feliciant, Richard Ogden, and Julia McRandall

Tel: (416) 314-2177
Fax: (416) 326-4181

Counsel for Her Majesty the Queen in Right of Ontario

AND TO: **Donnelly & Murphy Lawyers**
Barristers and Solicitors
18 The Square
Goderich, Ontario N7A 3Y7
Attn.: Gregory Stewart

Tel: (519) 524-2154
Fax: (519) 524-8550

Counsel for the Corporations of the Town of South Bruce Peninsula, The Town of Northern Bruce Peninsula and the Town of Saugeen Shores

AND TO: **Weirfoulds LLP**
Barristers and Solicitors
Toronto-Dominion Centre, 4100-66 Wellington Street West, P.O. Box 35
Toronto, Ontario M5K 1B7
Attn.: Jill Dougherty, Debra McKenna

Tel: (416) 947-5058
Fax: (416) 365-1876

Counsel for the Corporation of the Township of Georgian Bluffs

AND TO: **The Ross Firm**
Professional Corporation
11 Durham Street, P.O. Box 880
Walkerton, Ontario, NOG 2VO
Attn.: Tammy W. Grove-McClement

Tel: (519) 881-3230
Fax: (519) 881-3595

Counsel for the County of Bruce

Chippewas of Nawash Unceded First Nation et al. Appellants	and	The Attorney General of Canada et al. Defendants	Court File No.

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Proceeding commenced at TORONTO

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Olthuis Kleer Townshend, LLP
Barristers and Solicitors
250 University Ave. 8th Floor
Toronto, ON M5H 3E5

H.W. Roger Townshend (LSO 34916O)
Cathy Guirguis (LSO 56083S)
Krista Nerland (LSO 67574L)

Tel: (416) 981-9330
Fax: (416) 981-9350

Counsel for the Appellants