SCJ Court File.: 94-CQ-50872CM
Court File No. C69831

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 SAUGEEN SHORES and THE CORPORATION OF THE TOWNSHIP OF GEORGIAN BLUFFS

Defendants

(Respondents)

APPELLANTS' FACTUM

Contents

PART I – THE APPEAL

1. The Appellants in this case are two First Nations, the Chippewas of Nawash Unceded First Nation and the Saugeen First Nation.[1] Together they are referred to as the Saugeen Ojibway Nation ("SON") and they are an Anishinaabe people.[2] SON's territory includes the lands of the Saugeen (Bruce) Peninsula ("the Peninsula") and approximately 1.5 million acres of land to the south of the Peninsula, as well as the surrounding waters (see map at Schedule C).[3]

2. This is an appeal from a decision of the Ontario Superior Court. The Trial Judge held that the Crown had breached its obligations to SON pursuant to Treaty 45 ½ of 1836 to protect the Peninsula, and in so doing breached the honour of the Crown.[4] The Trial Judge also held that in the lead up to Treaty 72 in 1854, pressure tactics Crown officials used to attempt to secure a surrender of most of the Peninsula constituted a breach of the honour of the Crown. She issued a declaration that the Crown had breached its honour.[5] The Trial Judge dismissed SON's claim that these actions constituted a breach of the Crown's fiduciary duty to them.

3. SON's claim is being heard in phases. This appeal is with respect to Phase 1,[6] concerning the Crown's liability for breach of fiduciary duty.

PART II – OVERVIEW

4. This appeal is about whether the Crown's express promise to protect the Peninsula for SON against the encroachment of whites forever gave rise to a fiduciary duty to SON.

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[1] Reasons, para 1.
[2] Reasons for Decision, Appeal Book, Tab 4; (also *Saugeen First Nation v Canada*, 2021 ONSC 4181) ["Reasons"] at para 160, 170.
[3] Reasons, para 368, 375, 443. 487, 560-561, 701.
[4] Reasons, para 928,
[5] Reasons, para 1291.
[6] Reasons, paras 23-26; Order of Justice Matheson, 16 January, 2020, Appeal Book, Tab 9.

5. In 1836, Crown officials wanted to secure land for Euro-Canadian settlement in the southern part of what is now Ontario. To achieve this goal, the Crown sought to make a treaty with SON to open some of SON's territory for settlement.[7] In August 1836, the Crown negotiator told SON the Crown could no longer protect SON's full territory from the encroachment of settlers. However, if SON would give up 1.5 million acres of its territory south of the Peninsula, the Crown would protect the remaining 450,000 acres on the Peninsula for SON from "the encroachment of the whites" "for ever".[8] This promise to protect SON's remaining territory was the most important benefit SON was offered in Treaty 45 ½.[9] SON reluctantly accepted the loss of a huge swath of their territory based on the promise that the Crown would protect what remained. [10]

6. The Crown broke this promise. The Trial Judge found the Crown did not do what it could have done and what it ought to have done to protect SON's lands from squatters, timber theft and trespass.[11] As a result, there was substantial encroachment on the Peninsula by the early 1850s.[12] The Trial Judge concluded this constituted a breach of treaty and the honour of the Crown.[13]

7. By the early 1850s, the Crown was determined to seek a surrender of the Peninsula too. In August 1854, frustrated with SON's unwillingness to give up their territory, Indian Superintendent T.G. Anderson told SON that if they did not agree to surrender their reserve lands, the government would not bother to protect them from encroachments; white settlers would settle on their land;

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[7] Reasons, para 690, 709, 759, 762; Report of Dr. Gwen Reimer,Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703 pp. 30, 32.
[8] Reasons, paras 696-702.
[9] Reasons, paras 3, 713,720-721.
[10] Reasons, para 708.
[11] Reasons, paras 850, 908-929.
[12] Reasons, para 790.
[13] Reasons, para 928.

and, the government would take their lands without their consent. He failed to obtain the surrender he sought.[14] After the council, Anderson wrote to his superiors recommending they take the Peninsula without SON's consent.[15] The Trial Judge concluded that Anderson's conduct constituted a breach of the honour of the Crown.[16]

8. Although the Crown did not act on Anderson's recommendation, two months later, Anderson's superior, Superintendent General Laurence Oliphant, came to the Peninsula to (in his own words) "wring" from SON "some assent, however reluctant"[17] to a surrender of the Peninsula. With Anderson's August remarks hanging in the air, Oliphant told SON the government could not stop squatters from encroaching on the Peninsula. Their only option was a surrender. SON, at long last, agreed. The result was Treaty 72, which surrendered the vast majority of the Peninsula.

9. Although Crown officials had told SON there was nothing they could (or would) do to protect against encroachment on the Peninsula, the **day after** Treaty 72 was concluded, Oliphant posted notice prohibiting squatting and directed the local sheriff to remove any squatters located on SON's lands.[18] This was the first time that either of these steps had been taken.[19]

10. SON says the Trial Judge erred when she concluded that no fiduciary duty arose, making key errors in relation to both the *ad hoc* and *sui generis* fiduciary duties:

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[14] Reasons, paras 990-991.
[15] Reasons, para 992.
[16] Reasons, para 1067.
[17] Reasons, paras 1000,1077; Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Laurence Oliphant Report, November 3, 1854, Exhibit 2175, p. 4.
[18] Reasons, para 1016.
[19] Reasons, paras 860-861, 866 and 872-890.

(a) the Trial Judge erred in law or in extricable legal principle by concluding that the undertaking in Treaty 45 ½ was insufficient to ground an *ad hoc* fiduciary duty because it only referred to protecting the Peninsula for SON from the 'encroachment of whites' and did not then forsake the interests of *all* others;

(b) the Trial Judge erred in law or extricable legal principle in concluding that the Crown did not have discretion and control over the protection of the Peninsula because SON was not precluded from taking its own steps to protect the Peninsula. This error was foundational to her conclusions that the Crown had neither *ad hoc* nor *sui generis* fiduciary duties to SON with respect to the Peninsula; and

(c) the Trial Judge misconstrued the legal test for reserve creation, and thus erred in concluding the Peninsula was not set aside as a reserve for SON and in concluding that the Crown did not have a *sui generis* fiduciary duty to SON with respect to the Peninsula.

PART III – FACTS

11. SON's territory is the Peninsula, the lands to the south of the Peninsula, and the waters surrounding it.[20] The Trial Judge found that SON was present on the Peninsula in the years leading up to and at assertion of Crown sovereignty in 1763 – the salient point for the Aboriginal title claim that was joined to this claim.[21]

[20] Reasons, paras 368, 375, 443. 487, 560-561, 701.
[21] Reasons, paras 560-561.

Royal Proclamation

12. The facts that are the subject of the appeal took place in Upper Canada[22] in the early and mid 19th century. The Crown's policy regarding Indigenous lands in British North America was set out in the Royal Proclamation, 1763 ("Royal Proclamation").[23]

13. Recognizing that "frauds and abuses" had been committed by settlers attempting to purchase Indian lands, the Royal Proclamation recognized Indigenous land rights as communal, forbade the purchase or possession of "Indian lands" by private citizens and set out a procedure by which "Indian lands" could be purchased only by the Crown, at a public meeting.[24] The Royal Proclamation enshrined a basic principle that First Nations lands could not be taken without the consent of the First Nation to whom the lands belonged.[25] Its policies applied to the Peninsula in 1836 and in the years that followed. [26]

Treaty 45 ½

14. In the summer of 1836, Lieutenant Governor Bond Head, the colonial official with direct responsibility for "Indian Affairs" in Upper Canada,[27] travelled to Manitoulin Island to attend the distribution of presents to Indigenous peoples.[28] This was a longstanding and important diplomatic

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[22] Reasons, paras 753-755: In 1836, the Peninsula was in Upper Canada. In 1840, the Peninsula was in Canada West. Throughout this argument, we refer to the area as Upper Canada.
[23] Reasons, paras 525, 665. Dr. Gwen Reimer, "Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 14-15.
[24] Reasons, para 662*; The Royal Proclamation*, 1763, No 1, Exhibit 538.
[25] Reasons, para 662; Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72" (2013) Exhibit 4118, p. 13; Evidence of Dr. Gwen Reimer, March 10, 2020, Transcript vol 93, p. 11972, line 3 to p. 1194, line 10.; Evidence of Dr. Gwen Reimer, March 10, 2020, Transcript vol 93, p. 11972, lines 22 -24.
[26] Reasons, paras 662-665, 753.
[27] Reasons, para 681, 683: Only the Governor General for both Upper and Lower Canada was more senior: Evidence of Jean-Pierre Morin, Transcript vol 66, November 26, 2019, p. 8533.
[28] Reasons, paras 689-691, 696.

ritual to strengthen the alliance between the Crown and its Indigenous allies.[29] While there, Bond Head concluded two treaties: Treaty 45 with the Ottawa and Chippewas of Manitoulin Island, and Treaty 45 ½ with SON.[30] Bond Head's objective in making these treaties was to create isolated reserves where Indigenous people could live separate and apart from the white population and continue to pursue their traditional economies, while opening desirable agricultural lands to the south for white settlement. He believed this would benefit both Euro-Canadian settlers and Indigenous peoples.[31]

15. Treaty 45 ½ was concluded on August 9, 1836. Bond Head began the negotiation by telling SON that he could no longer protect their territory from the encroachment of the whites:

> [T]heir Great Father said, he could not protect them in the possession of their land; - that the white men would settle on it, and that if they did not give it up they would lose it.[32]

16. He proposed SON give up their lands and move to Manitoulin Island.[33] SON was under considerable pressure. A missionary at Saugeen, Thomas Hurlburt, emphasized that this threat that they would lose their lands drove SON "to desperation", and that SON "talked strongly of going to war with the white people."[34] Another missionary who was present, John Evans, relayed that SON said they were "ruined but it was no use to say anything more" because the Crown was determined to have their land, and that they were "poor and weak and must submit". Evans said

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[29] Reasons, paras 510, 672-676.
[30] Reasons, paras 689-700.
[31] Reasons, paras 687-690.
[32] Reasons, para 697; Rev. James Evans to the Editor, Christian Guardian, March 24, 1838, Exhibit 1233, p. 2, Column 1 [original], p. 3 [transcript].
[33] Reasons, para 697.
[34] Letter by Thomas Hurlburt, January 1, 1860, Exhibit 2559, p. 2 [original], p.1 [transcript]; See also: Evidence of Prof. Paul McHugh, Transcript vol 69, December 11, 2019, p 8925, lines 4-10 – discussing James Evans, "1836 Mission Tour of Lake Huron," July 19, 1836, Exhibit 1126, which identifies Hurlburt as a missionary to the Saugeen around the time of Treaty 45 ½.

that SON believed "if they did not let [Bond Head] have his own way they would lose [their land] altogether."[35]

17. Still, SON resisted. In response, Bond Head offered a compromise: if SON would give up 1.5 million acres of land in the southern part of their territory, SON would be permitted to retain and remain in the northern part of their territory - the 450,000 acre Peninsula.[36] In exchange for this surrender of a massive portion of their land, he made a promise: that the Crown would protect SON's remaining territory on the Peninsula for them "for ever" from "the encroachment of the whites". SON accepted the deal.[37]

18. Bond Head's account of the speech he made at these proceedings has come to be known as Treaty 45 ½. It states:

> To the Saukings:
>
> My Children:
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> You have heard the proposal I just made to the Chippewas and Ottawas, by which it has been agreed between them and your Great Father that these islands (Manitoulin) on which we are now assembled, should be made, in Council, the property (under Your Great Father's control) of all Indians whom he shall allow to reside on them.
>
> I now propose to you that you should surrender to your Great Father the Sauking Territory you at present occupy, and that you should repair either to this island or **to that part of your territory which lies on the north of Owen Sound,** upon which proper houses shall be built for you, and proper assistance given to enable you to become civilized and to cultivate land, **which your Great Father engages**

[35] Reasons, para 706.
[36] Reasons, paras 699-701.
[37] Reasons, para 708.

> **for ever to protect for you from the encroachments of the whites.**[38] [emphasis added]

19. The Trial Judge made several significant findings of fact about Treaty 45 ½. She found:

(a) SON was not pleased or eager to surrender the land south of the Peninsula, but they decided to do so.[39]

(b) The Crown and SON understood that the promise to protect the Peninsula for "you" referred to SON alone.[40] The promise was made to SON and for SON's benefit.

(c) The promise in Treaty 45 ½ to protect the Peninsula from white encroachment meant that the Crown promised to protect the Peninsula from "squatting". This included a broad array of illegal conduct, including cutting and removing timber, trespass, and occupation for the purposes of semi-permanent or permanent settlement.[41]

(d) The promise in Treaty 45 ½ to protect lands for SON extended to the entire Peninsula.[42]

(e) The promise to protect the Peninsula from white encroachment was important to SON and Bond Head knew it.[43] It was the "main benefit" they received for the surrender.[44]

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[38] Reasons, para 700; Treaty 45 ½, August 9, 1836, Exhibit 1128, p. 113; See also: Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 14-16.
[39] Reasons, para 708.
[40] Reasons, paras 731, 745-746.
[41] Reasons, para 718.
[42] Reasons, para 727.
[43] Reasons, para 720.
[44] Reasons, paras 3 and 713.

Senior Crown Officials including the Chief Superintendent of Indian Affairs, were aware of its central significance to SON.[45]

20. In 1836, the King accepted the terms of Treaty 45 ½ as negotiated by Bond Head.[46]

Survey of the Peninsula

21. The Peninsula was set apart as a reserve for SON. The first survey plan was issued by the Surveyor General's Office in June 1837.[47] The dividing line between the land surrendered and the land reserved ran due west from Owen Sound. The notation above the line marked in yellow on the map below states "Boundary Line of the Indian Reserve". The entire Peninsula was marked as an "Indian Reserve".[48]

22. Soon after, SON complained about the southern boundary of their reserve, arguing that the line set out by the surveyor did not accord with what they were promised in Treaty 45 ½.[49] In response to this complaint, a July 1843 Order in Council adjusted the boundary of the reserve further south.[50] The Order in Council referred to the Peninsula as having been reserved to the Saugeen Indians (SON) in Treaty 45 ½, and noted the boundary of the reserve that had been set by

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[45] Reasons, para 722.
[46] Reasons, paras 710-711; Lord Glenelg to Bond Head, October 5, 1836, Exhibit 1146.
[47] Reasons, para 950. Boundary Line of Indian Reserve as Shown on the 1837 Plan of "Bond Head Treaty": "Plan Shewing the Lands purchased by Government from the Indians to be laid out into Townships," J.G. Chewett, Surveyor General's Office, 15 June 1837, Exhibit 1190; J.W. Macaulay, Surveyor General to John Joseph, June 14, 1837, Exhibit 1192.
[48] Reasons, para 950. Boundary Line of Indian Reserve as Shown on the 1837 Plan of "Bond Head Treaty": "Plan Shewing the Lands purchased by Government from the Indians to be laid out into Townships," J.G. Chewett, Surveyor General's Office, 15 June 1837, Exhibit 1190; J.W. Macaulay, Surveyor General to John Joseph, June 14, 1837, Exhibit 1192.
[49] Reasons, para 715; Chief Wahbadick, June 10, 1843, Exhibit 1427.
[50] Reasons, para 715; Order in Council, July 26, 1843, Exhibit 1436; See also: Dr. Gwen Reimer, "Volume 3: Saugeen-Nawash Surrenders No. 45 ½ (1836), No. 67 (1851) and No. 72 (1854)" (as revised 2019), Exhibit 4703, pp. 69-72.

survey.[51] In the years after the Treaty, Crown documents describe the Peninsula as a reserve and SON also described the Peninsula this way.[52]

The 1847 Declaration

23. There is evidence of settler encroachment on the Peninsula beginning in the late 1830s and early 1840s.[53] SON was deeply concerned and complained to the Crown, asking the Crown to give them a written document they could show to squatters seeking to encroach on their territory.[54]

24. In response, the Crown issued the Royal Declaration, 1847, (the "1847 Declaration") which Crown officials called a "deed securing the Saugeen Reserve to the Tribe forever."[55] The 1847 Declaration guaranteed SON's continued possession of the Saugeen Reserve (the Peninsula), and the islands in Lake Huron within seven miles of the shore, unless and until they decided to surrender it to the Crown.[56]

The Crown Fails to Protect the Peninsula

25. Despite its promises in Treaty 45 ½ and despite the 1847 Declaration, the Crown did not protect the Peninsula from squatting, timber theft and other encroachments. The Trial Judge made several findings of fact about this:

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[51] Order in Council, July 26, 1843, Exhibit 1436, pp. 252-3 [original], p. 1-2 [transcript].
[52] See references at Schedule D.
[53] Reasons, paras 808-845.
[54] Reasons, paras 814, 819.
[55] Letter Civil Secretary to T.G. Anderson, 13 April 1847, LAC, RG 10, Vol. 162, no. 2201-2300, pt. 2, p. 94418, Reel C-11500, Exhibit 1666; Dr. Gwen Reimer, Volume 3: Saugeen - Nawash Land Cessions No. 45 1/2 (1836), No. 67 (1851), and No. 72 (1854)" (as revised 2019), Exhibit 4703, p. 106.

[56] Reasons, paras 604, 716, 871; Declaration by Her Majesty in favor of the Ojibway Indians respecting certain Lands on Lake Huron, Exhibit 1674.

(a) Between 1836 and 1854, there was substantial and escalating squatting on the Peninsula.[57] This included trespass, timber theft, and more sustained settlement.[58]

(b) Crown officials, including the Indian Department, were aware of squatting on the Peninsula.[59]

(c) It would not be very difficult for a Crown official, sheriff, or constable to find squatters, for example, to deliver a notice to vacate or to make an arrest.[60]

(d) There were a variety of officials who could have – but did not – assist with the protection of Peninsula from encroachment. These included Indian Department Officials, Commissioners of Crown Lands, and local law enforcement officials like magistrates, sheriffs and constables.[61]

(e) Although enforcement tools were available and were used elsewhere in Upper Canada to address squatting, "the historical record does not show significant use of these sanctions in relation to the Peninsula."[62] Crown officials were sometimes lenient in using their legislative powers to protect the Peninsula.[63] While squatters were prosecuted and convicted elsewhere in Upper Canada, the evidence does not show this happening on the Peninsula.[64]

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[57] Reasons, para 789.
[58] Reasons, paras 811, 843-845.
[59] Reasons, paras 808, 820.
[60] Reasons, para 873.
[61] Reasons, paras 873-889.
[62] Reasons, para 788.
[63] Reasons, para 853.
[64] Reasons, para 877.

(f) The government was not proactive in relation to the protection of the Peninsula.[65] "More was done elsewhere" to stop squatting on Indian lands[66] and more "could and should have been done for SON."[67]

26. The Trial Judge concluded that the Crown did not act diligently to fulfill its solemn promise to protect the Peninsula, breaching Treaty 45 ½ and the honour of the Crown.[68]

Inappropriate Tactics to Secure a Surrender: August 1854

27. In the early 1850s, seeking additional land for Euro-Canadian settlers, the Crown began to press SON for a surrender of the Peninsula. After two to three years of failed attempts to obtain a surrender from SON,[69] in August 1854, Indian Superintendent T.G. Anderson proposed to SON that they surrender the vast majority of the Peninsula, leaving only 34,600 acres out of their then current 450,000 acres for reserves.[70] SON told him they "would not sell an inch."[71] Anderson told them that there was a risk of whites taking possession of their territory if they did not surrender it.[72]

28. SON responded by making a counterproposal that would have allowed them to keep more of their land. Anderson rejected their proposal.[73]

29. To press SON to make a surrender of nearly their entire reserve, Anderson said:

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[65] Reasons, para 809
[66] Reasons, para 809.
[67] Reasons, paras 809, 850 and 921.
[68] Reasons, para 908, 928.
[69] Reasons, paras 973-984
[70] Reasons, para 986-987.
[71] Reasons, para 988.
[72] Reasons, para 988.
[73] Reasons, para 989.

> You complain that the whites not only cut and take your timber from your lands, but that they are commencing to settle upon it, and you cannot prevent them, and **I certainly do not think the Government will take the trouble to help you while you remain thus opposed to your own interest. The Government, as your guardian, have the power to act as it pleases with your reserve, and I will recommend that the whole, excepting the parts marked on the map in red and blue, be surveyed for the good of yourselves and children**.[74] [emphasis added]

30. Anderson's address had two key components. First, he said settlers were coming, and the government would not bother to stop them. Second, he said that if SON did not agree, the government would take their land in any event. In effect, Anderson's message to SON was: you have no choice. You must give up your land, whether you want to or not.[75]

31. Anderson recommended to the government that they should send a surveyor and take control of the Peninsula right away, without the consent of SON.[76] The Crown did not act on Anderson's recommendation. However, no Crown official advised SON that they would not be following through on Anderson's remarks.[77]

32. The Trial Judge concluded Anderson's conduct was "inappropriate" and constituted a breach of the honour of the Crown.[78]

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[74] Reasons, paras 990-991; Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Anderson's address to the Saugeen Ojibway, August 2, 1854, Exhibit 2175, pp. 12-13 [PDF 11-12].
[75] Reasons, para 991-992.
[76] Reasons, para 992; Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Anderson's address to the Saugeen Ojibway, August 2, 1854, Exhibit 2175, p. 12.
[77] Evidence of Prof. Jarvis Brownlie, Transcript vol 30, July 22, 2019, p. 3112, line 15 to p. 3113, line 6; Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11911, line 17 to p. 11912, line 6.
[78] Reasons, para 992, 1291.

Surrender Secured: October 1854

33. In October 1854, the Crown came back to the Peninsula to get a surrender. This time, Laurence Oliphant, who was the Superintendent General of Indian Affairs and Anderson's superior, represented the Crown in the negotiations. In his official report of the treaty council, he described his task as "wring[ing]" from SON "some assent, however reluctant" to a surrender of their reserve.[79]

34. The treaty council began on the evening of October 13, 1854. Oliphant reported that:

> I opened the proceedings by stating to them the reasons which had induced your Excellency to recommend the surrender of so large a portion of their territory. The evidence of their own senses was sufficient to bear me out in the truth of my assertions in reference to the avidity with which the neighbouring lands were taken up by whites. They were compelled to admit that squatters were, even then, locating themselves without permission either from themselves or the department upon the reserve. **I represented the extreme difficulty, if not impossibility, of preventing such unauthorised intrusions.**[80] [emphasis added]

35. SON heard these words about the "impossibility" of protecting of the Peninsula from Oliphant – after two to three years of Crown pressure to obtain a surrender of parts of the Peninsula, and after hearing Anderson's remarks in August 1854 that the government would take their lands without consent. Despite at least one SON Chief expressing opposition to the proposal, within six hours, the deal was done.[81]

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[79] Reasons, para 1000; Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Laurence Oliphant Report, November 3, 1854, Exhibit 2175, p. 4.
[80] Reasons, para 1005-1006; Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Laurence Oliphant Report, November 3, 1854, Exhibit 2175, p. 4.
[81] Reasons, paras 1004-1005, 1008, 1110.

36. Although he had told SON there was nothing the Crown could do to protect their lands from the encroachment of squatters, the **very next day**, Oliphant took steps to do just that. He issued a notice to squatters that they must not settle on the Peninsula,[82] and wrote a letter to the local Sheriff to tell him to 'summarily eject' squatters that were on the "property of the Crown."[83] The Trial Judge concluded that this could have been done before the surrender but it was not.[84]

The Trial Decision

37. The Trial Judge found that the Crown had a treaty obligation to protect the Peninsula, that the Crown could and should have done more than it did to protect it, and that therefore the Crown breached the treaty and breached its honour.[85] The Trial Judge also found that Anderson breached the honour of the Crown by his conduct in August of 1854.

38. However, the Trial Judge concluded that the Crown did not have an *ad hoc* fiduciary duty to SON to protect the Peninsula because:

(a) she concluded that the specification in Treaty 45 ½ that the Crown was to protect the Peninsula from the encroachments of the whites meant that the Crown had not forsaken the interests of *all* others – namely the other Indigenous peoples in Upper Canada – in relation to the Peninsula;[86] and

(b) she concluded that since there were steps which SON could and did take to try to protect the Peninsula, this meant that the Peninsula was not subject to the Crown's

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[82] Reasons, paras 857-867.
[83] Reasons, para 1016. Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Laurence Oliphant Report, October 14, 1854, Exhibit 2175, Sub-enclosure 6, to Enclosure No. 1, p. 15.
[84] Reasons, para 867.
[85] Reasons, paras 908-928.
[86] Reasons, paras 1102-1111.

discretion and control.[87] The decision made note of only one such step: the Trial Judge viewed it as significant that in the 1840s SON invited other Indigenous peoples to come to the Peninsula, in part to help protect their lands.[88]

39. Further, the Trial Judge concluded that the Crown did not have a *sui generis* fiduciary duty to SON to protect the Peninsula because:

(a) in her view the Peninsula had not been officially created as a "reserve", so the fiduciary obligations that would place on the Crown were not engaged;[89] and

(b) she concluded that since there were steps which SON could and did take to try to protect the Peninsula (i.e. inviting other Indigenous peoples to move to the Peninsula), this meant that the Peninsula was not subject to the Crown's discretionary control.[90]

PART IV – ISSUES AND LAW

40. The key issues SON is raising in this appeal are the Trial Judge's errors[91] regarding:

(a) **the nature of an undertaking required to ground an *ad hoc* fiduciary duty:** she erred in law or in extricable legal principle by concluding that the undertaking in Treaty 45

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[87] Reasons, paras 1112-1120.
[88] Reasons, para 744.
[89] Reasons, paras 930-955 and 1124.
[90] Reasons, para 1136.
[91] Most of the errors SON alleges in this case are errors of law or questions of mixed fact and law with an extricable legal question. Where SON alleges errors of this kind, they are specified and explained in more detail below. The standard of review for errors of law or extricable errors of law is correctness. *Housen v Nikolaisen,* 2002 SCC 33, paras 8-10. The case *Teal Cedar Products Ltd. v. British Columbia*, [2017] 1 S.C.R. 688, para 44 explains what precisely an extricable error of law means. The standard of review for errors of fact or of mixed fact and law is whether the trial judge made a palpable and overriding error. *Housen v Nikolaisen,* 2002 SCC 33, paras 33-34. A few such errors are noted below as well.

½ was insufficient because it only referred to protecting SON's interests in the Peninsula from the 'encroachment of whites' and did not then forsake the interests of *all* others;

(b) **the relevance of SON's steps for self-help:** she erred in law or extricable legal principle by concluding the Crown did not have discretion and control over the protection of the Peninsula because SON was not precluded from taking steps to protect the Peninsula itself. This error informed her conclusions that the Crown had neither *ad hoc* nor *sui generis* fiduciary duties; and

(c) **the legal test for reserve creation:** she misconstrued the legal test for reserve creation, and thus erred in concluding the Peninsula was not set aside as a reserve for SON and in concluding that the Crown did not have a *sui generis* fiduciary duty to SON with respect to the Peninsula.

41. If a fiduciary duty (*ad hoc* or *sui generis*) existed, the Trial Judge's findings of fact support the conclusion that it was breached. The Trial Judge's findings in respect of the consequences of a breach are not properly within the scope of Phase 1 or alternatively are irrelevant.

The Fiduciary Concept

42. Fiduciary law is concerned with protecting and supervising certain relationships, such as trustee-*cestui que trust*, executor-beneficiary, solicitor-client, agent-principal, director-corporation, and guardian-ward or parent-child – and also the Crown-Indigenous relationship. Fiduciary relations arise where one party is given, by the structure of the relationship, the discretionary power to affect the vital legal and practical interests of the other. In such circumstances, the beneficiary is entitled to rely on the fiduciary, and the law steps in to protect

this reliance.[92] As the Supreme Court of Canada has explained, "[t]he underlying purpose of fiduciary law may be seen as protecting and reinforcing "the integrity of social institutions and enterprises", recognizing that "not all relationships are characterized by a dynamic of mutual autonomy."[93] The interpretation of when fiduciary duties arise, what they require and how to address their breach, must be interpreted in light of fiduciary law's purpose to protect and supervise the relationship. The protection of the beneficiary is merely ancillary to the purpose of protecting the relationship.[94]

43. This distinctive structure of the fiduciary relationship calls for a distinctive analysis:

> In negligence and contract the parties were taken to be independent and equal actors, concerned primarily with their own self-interest. The essence of a fiduciary relationship, by contrast, was that one party pledged herself to act in the best interests of the other. The freedom of the fiduciary was diminished by the nature of the obligation she had undertaken. **The fiduciary relationship had trust, not self-interest, at its core**.[95] [emphasis added]

44. For this reason, the analysis of whether there has been a breach of fiduciary duty focusses exclusively on the conduct of the fiduciary, without regard to the beneficiary's decision-making and conduct:

> Since the power in fiduciary interactions resides exclusively with the fiduciary, … **there is no need to look beyond the fiduciaries' conduct in order to ensure the integrity of fiduciary relations**… By looking only to the actions of fiduciaries, the fiduciary concept differs from other forms of action, such as contract or tort, which

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[92] *Southwind v Canada*, 2021 SCC 28 at para 60; *Guerin v The Queen,* [1984] 2 SCR 335 at 349.
[93] *Galambos v Perez*, 2009 SCC 48 at para 70.
[94] *Southwind v Canada*, 2021 SCC 28 at para 60, quoting L. I. Rotman, *"Understanding Fiduciary Duties and Relationship Fiduciarity"* (2017), 62 McGill L.J. 975, at pp. 987-88.
[95] *Southwind v Canada*, 2021 SCC 28 at para 71, quoting *AIB Group (UK) plc v Mark Redler & Co. Solicitors*, [2014] UKSC 58, [2015] A.C. 1503, at para 83, which had adopted *Canson Enterprises Ltd. v Boughton & Co.,* [1991] 3 SCR 534 at page 543 per McLachlin J (concurring).

> examine the actions of all parties to the interactions falling within their respective mandates.[96] [emphasis added]

45. Because of the distinctive vulnerability in the relationship, "equity is especially concerned with deterring wrongful conduct."[97] Deterrence plays a much larger role in relationships governed by equity (so fiduciary relationships) than it does in relationships governed by the common law (such as contract or tort).

46. A fiduciary must put the beneficiary's interests before their own, and because the Crown has a duty to act in the best interests of society as a whole, in general it is rare for the Crown to be held to a fiduciary duty.[98] However, it is not rare in the context of the Crown's relationship to Indigenous peoples – the Supreme Court noted that the commitments in the Royal Proclamation constitute an undertaking to act in the best interest of Indigenous beneficiaries.[99] A fiduciary duty arose because the Crown "interposed itself between Indigenous lands and those who want to lease or purchase the land."[100] This fiduciary duty exists to further the socially important relationship between the Crown and Indigenous peoples, which "goes to the very foundation of this country and to the heart of its identity", and is of "fundamental importance."[101]

47. Although the content of the fiduciary duty varies with the context,[102] and indeed not all aspects of the Crown-Indigenous relationship are fiduciary,[103] where the Crown is exercising

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[96] L.I. Rotman*, "Fiduciary Law"*, (Toronto: Carswell, 2005) at pp. 299-303, quote at 299. See also *MacDonald v BMO Trust Company*, 2020 ONSC 93 at para 52.
[97] *Southwind v Canada*, 2021 SCC 28 at para 72.
[98] *Alberta v Elder Advocates of Alberta Society*, [2011] 2 SCR 261 at para 44, and see Reasons, para 1085.
[99] *Alberta v Elder Advocates of Alberta Society*, [2011] 2 SCR 261 at para 48; *Southwind v Canada*, 2021 SCC 28 at para 57; *Guerin v The Queen,* [1984] 2 SCR 335 at 376.
[100] *Southwind v Canada*, 2021 SCC 28 at para 57.
[101] *Southwind v Canada*, 2021 SCC 28 at para 60.
[102] *Southwind v Canada*, 2021 SCC 28 at para 62.
[103] *Southwind v Canada*, 2021 SCC 28 at para 61.

control over a First Nation's land, or over Aboriginal or treaty rights, there is a strong fiduciary duty.[104] This applies whether or not a reserve is located on land within the traditional territory of the First Nation.[105] The duty imposes heavy obligations and does not "melt away when Canada has competing priorities."[106]

The Two Types of Fiduciary Duty

48. Fiduciary relationships have been characterized as either *per se* or *ad hoc. Per se* refers to relationships between particular parties that have been historically recognized as fiduciary in nature (i.e., those listed above at paragraph 42). *Ad hoc* fiduciary relationships refer to those fiduciary relationships that must be established on a case-by-case basis. However, *per se* categories were recognized as such because a number of cases with similar facts passed the *ad hoc* test and were categorized together for convenience, leading to a presumption of a fiduciary relationship in a particular context, which eventually became crystallized into a *per se* category.[107]

49. The Crown-Indigenous relationship has become recognized as a *per se* category, referred to as a *sui generis* duty and arises from the Crown's discretionary control over a specific or cognizable Aboriginal interest. However, a fiduciary obligation between the Crown and Indigenous peoples may also arise where the conditions for an *ad hoc* fiduciary relationship are satisfied — that is, where the Crown has undertaken to exercise its discretionary control over a

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[104] *Southwind v Canada*, 2021 SCC 28 at para 62.
[105] *Southwind v Canada*, 2021 SCC 28 at para 58; *Wewaykum Indian Band v Canada,* 2002 SCC 79, especially paras 77, 88-89.
[106] *Southwind v Canada*, 2021 SCC 28 at para 12.
[107] *Alberta v Elder Advocates of Alberta Society,* [2011] 2 SCR 261 at para 33; L.I. Rotman, *"Fiduciary Law",* (Toronto: Carswell, 2005) at pp. 66-73.

legal or substantial practical interest in the best interests of the alleged beneficiary.[108] Both forms are at issue in this appeal as alternatives.

The *Ad Hoc* Fiduciary Duty

50. The legal test for *ad hoc* fiduciary duty requires:

1) An undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;

2) A defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and,

3) A legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion and control.[109]

51. There is no dispute that the second element of the test was met – existence of a defined class of persons vulnerable to a fiduciary's control.[110] The dispute lies with respect to the first and third elements of the test: (a) whether Treaty 45 ½ constitutes the required undertaking to act in SON's best interests, and (b) whether SON's interest in the Peninsula stood to be adversely affected by the Crown's discretion and control.

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[108] *Williams Lake v Canada,* 2018 SCC 4 at para 44; *Southwind v Canada*, 2021 SCC 28 at paras 59 and 61.
[109] *Alberta v Elder Advocates of Alberta Society*, [2011] 2 SCR 261 at para 36.
[110] Reasons, para 1093.

(A) THE UNDERTAKING

52. For an *ad hoc* fiduciary duty, there must be an undertaking to act in the best interests of the beneficiary, and thus to forsake the interests of others.[111] The undertaking may arise from the relationship between the parties, from a statutory provision, or from an express undertaking.[112]

53. SON submits that the undertaking arose from the nature of the relationship, from statutes and policies flowing from the Royal Proclamation, but most explicitly and emphatically, from Treaty 45 ½: the Crown, addressing SON as "My Children", "**engage[d] for ever to protect [the Peninsula] for you from the encroachments of the whites**".[113] SON submits that it is abundantly clear that this in substance is a "forsaking" of the interests of others. There is no need for any specific words like "forsake" or "loyal" if that substantive meaning is conveyed.[114]

54. The Trial Judge made several findings of fact regarding this promise, specifying that the promise was made to SON in particular, and not to other Indigenous peoples.[115] The promise to protect the Peninsula for SON from the encroachment of whites was the main benefit promised to SON in exchange for their surrender of 1.5 million acres of land.[116]

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[111] *Alberta v Elder Advocates of Alberta Society*, [2011] 2 SCR 261 at paras 30-31.
[112] *Alberta v Elder Advocates of Alberta Society*, [2011] 2 SCR 261 at para 32.
[113] Above, para 18.
[114] *Galambos v Perez*, 2009 SCC 48, at paras. 77, 79; *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, at paras. 31, 32; *Waxman v Waxman*, [2004] OJ No 1765, 2004 CarswellOnt 1715, 2004 CanLII 39040, at para. 512 (ON CA), leave ref'd [2004] SCCA No 291; *Filkow et al v D'Arcy & Deacon LLP*, 2019 MBCA 61, at paras 70-74; *Lehman (Re)*, 2016 BCSC 126, at para 70, aff'd 2016 BCCA 514; *Goruk v. Greater Barrie Chamber of Commerce*, 2021 ONSC 5005, at paras 67-69.
[115] Reasons, paras 731-747, 1103.
[116] Reasons, paras 713, 717-724.

55. This promise was re-affirmed by the 1847 Declaration,[117] and by an 1851 Proclamation extending to the Peninsula the provisions of a statute intended to protect "Indian Lands."[118]

56. Despite all this, the Trial Judge concluded that the treaty promise made to SON was insufficient to constitute an undertaking because the promise was not a forsaking of the interests of **all** others, since it did not expressly mention protecting the Peninsula from other Indigenous people.[119]

57. With respect, this misses the mark and is an error of law or an extricable error of legal principle because it misconstrues the content of the undertaking required. "All others" must be read in the context of the time when the treaty promise was made. Other Indigenous people were not a threat to SON's territory. SON welcomed them, and in subsequent years repeatedly invited other First Nations to join them on the Peninsula.[120] By contrast, white squatters were indeed a problem.[121]

58. SON submits that it is possible to tailor the undertaking – and thus the scope of the fiduciary duty – to the precise risk being faced. Here, the risk was the encroachments by whites. To find that no duty can arise simply because the fiduciary's undertaking was tailored to respond to a particular risk I would clash with the purpose of the fiduciary concept – to protect relationships of trust and reliance. Protecting beneficiaries in matters where they are vulnerable is key to supporting

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[117] Above, para 24.
[118] *Proclamation placing certain Tracts of Land set apart for Indians under the provisions of the Act*, Vict. 13&14 Ch. 74, November 7, 1851, Exhibit 1894, p. 2; and *An Act for the Protection of the Indians in Upper Canada from Imposition and the Property Occupied or Enjoyed by them from Trespass and Injury*, Vict. 13 & 14, Ch. 74, Exhibit 1784.
[119] Reasons, paras 1101-1111.
[120] Reasons, paras 742-744.
[121] Above, paras 25-26.

their reliance on their fiduciary. There is no need to protect beneficiaries in matters where they are not vulnerable, and this should not interfere with a fiduciary duty tailored to matters where it **is** needed. Where the Crown's fiduciary obligations mattered was in relation to protecting SON's interests from encroachments by whites.

59. The ability to tailor the scope of a fiduciary duty in this way is even clearer in the Crown-Indigenous context. The fiduciary duty arose because the Crown interposed itself between Indigenous people and settlers by means of the Royal Proclamation. In *Alberta v Elder Advocates of Alberta*, the Supreme Court explained that the necessary undertaking for an *ad hoc* fiduciary duty is supplied by the Royal Proclamation.[122] The Royal Proclamation did not expressly state that the Crown would forsake the interests of "all others" or that it would protect Indigenous Nations from one another. Rather, acknowledging that "frauds and abuses" had been committed by settlers against Indigenous lands, it made a series of commitments to address these abuses and protect Indian lands from settlers, including that settlers would not be allowed to purchase unceded lands from Indians directly; and that the Crown would obtain the consent of the Indians to a surrender at a public meeting before any Indian lands could be sold.[123] There is no suggestion that the Royal Proclamation was ever understood to interpose the Crown between Indigenous Nations, but that does not negate that the Royal Proclamation supplies a sufficient undertaking to ground the Crown's fiduciary duty.

60. For all the above reasons, SON submits that Treaty 45 ½ supplies the required undertaking for a fiduciary duty to protect the Peninsula.

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[122] *Alberta v Elder Advocates of Alberta Society*, [2011] 2 SCR 261 at para 48; *Southwind v Canada*, 2021 SCC 28 at para 57.
[123] Above, para 13; *Guerin v. The Queen,* [1984] 2 SCR 335 at 383-384.

(B) BENEFICIARIES MAY RELY ON THEIR FIDUCIARY

61. As noted above, the core of the fiduciary concept is that the beneficiary relies on (and is thus vulnerable to) the actions of fiduciary; the fiduciary, in turn, is obligated to act in the beneficiary's best interests.[124] The fiduciary relationship thus "allows beneficiaries to trust and rely upon their fiduciaries in order to maintain the integrity and vitality of socially and economically important or necessary associations of high trust and confidence."[125] Fiduciary law's purpose is to protect that relationship, and in light of that purpose, it protects the beneficiary's reliance on the fiduciary.

62. A fiduciary relationship does not require a pre-existing vulnerability; instead, vulnerability may arise as a consequence of the relationship itself.[126] Indeed, the Crown-Indigenous fiduciary relationship emerged when Indigenous military capacity was strong, and the Crown was seeking to reduce the potential for conflict between Indigenous peoples and settlers[127] by persuading Indigenous people to rely on the Crown rather their own means to protect their lands.

63. SON submits that the Trial Judge erred in law or in an extricable legal principle in concluding that because the Crown did not preclude SON from taking steps on its own to try to protect the Peninsula, the Crown lacked discretionary control over whether and how to protect the Peninsula. What the Trial Judge meant by 'preclude' is not clear from her reasons. However, whether SON could or did engage in self-help or mitigation of harms is simply irrelevant to whether the fiduciary has discretionary control. As the Supreme Court explained in *Hodgkinson,* "it is simply wrong to focus only on the degree to which a power or discretion to harm another is

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[124] Above, paras 42-43.
[125] Rotman, *Fiduciary Law,* at p. 273.
[126] Rotman, *Fiduciary Law,* at pp. 134, 136-137.
[127] *Southwind v Canada*, 2021 SCC 28 at para 59.

somehow 'unilateral.'… the relative 'degree of vulnerability', if it can be put that way, does not depend on some hypothetical ability to protect oneself from harm, but rather on the nature of the parties' reasonable expectations."[128]

64. SON submits that it was highly reasonable for them to rely on the Crown to protect the Peninsula from white encroachment, for the following reasons:

(a) The Crown had made an explicit treaty promise to do so;[129]

(b) The promise to protect the Peninsula from white encroachment was vitally important to SON,[130] and in fact it was the "main benefit" they had received for the surrender of 1.5 million acres of their territory;[131]

(c) SON accepted this promise after having considered the alternative of going to war;[132] and

(d) The particular steps which the Trial Judge concluded that the Crown could and should have done to protect the Peninsula were things that only the Crown could do: post notices, evict trespassers and squatters, appoint constables, call on sheriffs, and impose penalties.[133]

65. Although SON's ability to protect the Peninsula is not relevant to the existence of a fiduciary duty, it is noteworthy that the one step which the Trial Judge considered SON could and

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[128] *Hodgkinson v Sims*, [1994] 3 SCR 377 at 412-413 per La Forest J.
[129] Reasons, para 700; Treaty 45 ½, August 9, 1836, Exhibit 1128, p. 113.
[130] Reasons, para 720.
[131] Reasons, paras 3 and 713.
[132] Above, para 16.
[133] Reasons, para 921(ii).

did take to protect the Peninsula - to invite other Indigenous people to join them there[134] - did not stop squatting on the Peninsula.[135]

66. To say there can be no fiduciary duty where self-help is not specifically precluded signals that it is preferable for Indigenous people facing encroachment on their lands to use self help rather than to trust and rely on the Crown. In the mid-19th century context, this sometimes meant violence.[136] SON in fact had considered war as an alternative to entering Treaty 45 ½.[137] They chose instead to rely on the treaty promise. Fiduciary law should protect the reliance that SON chose over using violence. Doing otherwise would not properly protect the Crown-Indigenous relationship.

67. For the above reasons, SON submits that their interest in the Peninsula stood to be adversely affected by the Crown's exercise of discretion and control.

CONCLUSION ON *AD-HOC* FIDUCIARY DUTY

68. SON therefore submits that all three elements for an *ad hoc* fiduciary duty are met: the Crown undertook to protect the Peninsula, SON was vulnerable to the Crown's discretion and control, and SON's interest in the Peninsula stood to be adversely affected by the Crown's exercise of discretion and control.

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[134] Reasons, para 744.
[135] Reasons, paras 808-845.
[136] Nancy Wightman, "The Mica Bay Affair: Conflict on the Upper-Lakes Mining Frontier, 1840-1850", Exhibit 4420, see in particular: pp. 197, 201-202; Report of Mr. Tyler Wentzell, "A British Officer's Understanding of Military Aid to Civil Power in 1854" (as redacted 2019), Exhibit 4414, pp. 19-20.
[137] Above, para 16.

The *Sui Generis* Fiduciary Duty

69. A *sui generis* fiduciary duty arises where (1) the Crown undertakes discretionary control over (2) a specific or cognizable Aboriginal interest.[138] The Supreme Court has been clear that a strong *sui generis* fiduciary duty arises where the Crown exercises control over treaty promises,[139] and in relation to reserve lands.[140]

70. As an alternative to an *ad hoc* fiduciary duty, SON says that the Crown had a *sui generis* fiduciary duty in relation the Peninsula, either because:

(a) the Peninsula constituted an Indian reserve; or

(b) the Crown had discretionary control over SON's cognizable Aboriginal interest in the Peninsula; or

(c) the Crown had a fiduciary duty to fulfil its treaty promise to protect the Peninsula.

(A) THE PENINSULA WAS A RESERVE

The Test for Reserve Creation

71. In *Ross River,* the Supreme Court set out the test for determining whether an Indian reserve had been created. The test has four elements:

(a) that the Crown had the intention to create a reserve;

(b) that this intention was possessed by Crown agents holding sufficient authority to bind the Crown;

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[138] *Manitoba Métis Federation Inc. v Canada (Attorney General),* 2013 SCC 14, at para 51
[139] *Southwind v Canada,* 2021 SCC 28 at para 62.
[140] Reasons, para 1124; *Guerin v The Queen,* [1984] 2 SCR 335 at pages 376-382, 385; *Wewaykum Indian Band v Canada,* 2002 SCC 79 at paras 98-104, 86 at *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4 at para 53.

(c) that steps were taken to set apart the land for the benefit of the First Nation; and,

(d) that First Nation concerned accepted the setting apart and made use of the land.[141]

72. In *Ross River*, the reserve at issue was in the Yukon territory and was not the subject of a treaty.[142] The key issue was "the nature of the legal requirements that must be met for the establishment of a reserve as defined in the *Indian Act*."[143] However, this basic framework has since been applied to many other contexts, including where, as in this case, the reserve at issue was created as a condition of a treaty[144] and where the reserve was created prior to the confederation of Canada.[145] It is accepted as the general test for reserve creation.[146]

73. The Trial Judge misconstrued this legal test by misstating the nature of the intention required to create a reserve in the context of this case; by failing to consider the Indigenous perspective on whether key Crown officials would have the authority to bind the Crown; and by incorrectly insisting that the four elements of the test take place at the same time.[147]

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[141] *Ross River Dena Council Band v Canada,* 2002 SCC 54, [2002] 2 SCR 816 at para 67
[142] *Ross River Dena Council Band v Canada,* 2002 SCC 54, [2002] 2 SCR 816 at para 11.
[143] *Ross River Dena Council Band v Canada,* 2002 SCC 54, [2002] 2 SCR 816 at para 30.
[144] *Watson v Canada,* 2020 FC 129; *Canada (AG) v Anishnabe of Wauzhushk Onigum Band,* 2002 CanLII 15761, 2002 CarswellOnt 3212 (ON SC), aff'd 2003 CanLII 13835, 2003 CarswellOnt 4835 (ON CA)*; Jim Shot Both Sides v Canada,* 2019 FC 789 at paras 283-286, rev'd on other grounds in *Canada v Jim Shot Both Sides,* 2022 FCA 20.
[145] *Madawaska Maliseet v Canada,* 2017 SCTC 5.
[146] *Watson v Canada,* 2020 FC 129 at para 268.
[147] Reasons, paras 9, 950.

74. In this case, the creation of the reserve arose out of the Crown's promise to SON in Treaty 45 ½. As such, some of the principles set out by the Supreme Court regarding treaty interpretation are relevant here:[148]

(a) Treaties are sacred agreements, representing an exchange of solemn promises between the Crown and First Nations;

(b) The honour of the Crown is always at stake, so it is always presumed that the Crown intends to fulfil its promises, and indeed the Crown must seek to perform its obligations in a way that pursues the purposes behind the promise so as not to leave the First Nation with an empty shell of a treaty promise;

(c) Any ambiguities or doubtful expressions must be resolved in favour of the First Nation; and

(d) The bottom line of treaty interpretation is to choose from among possible common intentions the one that best reconciles the parties' interests.

75. SON submits the interpretation that best reconciles the interests of the Crown and SON, that presumes the Crown intended to keep its solemn promise to protect the Peninsula for SON against the encroachment of whites, and that considers SON's perspective, is that Treaty 45 ½ created the Peninsula as a reserve for SON.

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[148] *R v Badger*, [1996] 1 SCR 771 at para 41 and 52; *Marshall v R*., [1999] 3 S.C.R. 456 at paras. 9-14 and 44; See also *Simon v The Queen,* [1985] 2 S.C.R. 387 at 400-401; *R v Sioui* 1990 1 SCR 1025 at 1063; *Manitoba Metis Federation Inc. v Canada,* 2013 SCC 14 at para 80.

Intention to Create a Reserve

76. A "reserve" is land that is set apart for the exclusive use and benefit of a First Nation (historically referred to as a 'band'). The key is that the land is for the exclusive use and benefit for the First Nation, and not open for use by 'whites' or settlers. This definition is rooted in the Royal Proclamation policy that Indian lands should be protected from frauds and abuses perpetuated by settlers, and that may only be disposed of by surrender to the Crown with the informed consent of the First Nation.[149] This policy was eventually codified in the *Indian Act* in 1876,[150] and the definition of a reserve has remained substantially unchanged since then: a tract of land that has been set apart for the use and benefit of a band.[151]

77. SON submits that the intention required is the intention to **set lands apart for the exclusive use and benefit of a band**. This shared intention to set apart the Peninsula for SON's exclusive use, protected from the encroachments of "the whites" was expressed by Treaty 45 ½.[152]

78. The Trial Judge, however, focussed on the lack of intention to create a reserve "under the *Indian Act*", with all the consequences about jurisdiction and federal division of powers that would entail.[153] SON submits that this is an anachronism since none of these consequences could possibly apply before Confederation in 1867 or, more likely, before 1876, when the first *Indian Act* was passed. The Trial Judge confused the question of what a reserve is (lands set apart for a band) with

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[149] *Madawaska Maliseet v Canada,* 2017 SCTC 5 at para 352.
[150] *Indian Act,* SC 1876, c. 18, s 6.
[151] *Indian Act*, RSC 1985, c I-5, s 2(1)(a).
[152] Above, paras 17,18,19, 22.
[153] Reasons, paras 937 and 946.

the question of what legal consequences flow from it being a reserve today. The consequence of her logic is that there could be no pre-confederation reserves.[154] This is an error of law.

79. The Trial Judge also observed that there had not been evidence called about the process for reserve creation in the 1830s and 1840s, and she took this as a deficiency.[155] This constitutes an extricable error of legal principle since it presumes such evidence is required. It is true that there was no consistent process for creating a reserve across all places and time periods in Canada's history, and that reserve creation processes varied considerably.[156] However, the Crown's intention may be made clear without resort to considering processes taken in other cases. For example, such intention can certainly be made clear through the solemn promises made in treaty, or the issuing of an Order-in-Council as the Supreme Court noted in *Ross River*:

> It may be that, in some cases, certain political or legal acts performed by the Crown are so definitive or conclusive that it is unnecessary to prove a subjective intent on the part of the Crown to effect a setting apart to create a reserve. For example, **the signing of a treaty** or the issuing of an Order-in-Council are of **such an authoritative nature that the mental requirement or intention would be implicit or presumptive**. [emphasis added][157]

80. In SON's case, Bond Head made a solemn promise to SON in Treaty 45 ½ to protect the Peninsula from the encroachment of whites in 1836 and Treaty 45 ½ was accepted by the King the same year.[158] Then, there were several other steps that demonstrated the Crown's intent to set apart lands for SON's use and benefit, and to protect that land from white settlement:

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[154] *Chippewas of Sarnia Band v Canada (Attorney General),* 2000 CanLII 16991 (ON CA), paras 78, 80: This case dealt with a pre-confederation reserve, created and protected by the promise of the Crown in a treaty concluded in 1827.
[155] Reasons, para 942.
[156] *Ross River Dena Council Band v Canada,* 2002 SCC 54, [2002] 2 SCR 816 at para 43.
[157] *Ross River Dena Council Band v Canada,* 2002 SCC 54, [2002] 2 SCR 816 at para 50.
[158] Reasons at paras 710-711; Lord Glenelg to Bond Head, October 5, 1836, Exhibit 1146.

(a) In 1837, the Surveyor General's office completed **a survey plan** of the boundaries of the new reserve and the territories surrendered, marking the "Indian Reserve" north of the line from Owen's Sound.[159]

(b) In 1843, **the boundary was adjusted by Order in Council** – a definitive act of the Executive Council (Cabinet) of the colony showing it understood a reserve was created and was prepared to adjust its boundary. It expressly noted that the lands were being added to the reserve in response to the "complaint of Wahbadick, one of the Chiefs of the Saugeen Indians, against the Southern boundary line, laid down by the Surveyor General's Department, for the reserve made for the Indians at Owen Sound."[160]

(c) The Crown confirmed its intention in 1847, when Lord Elgin issued **a Royal Declaration** or "deed" to SON confirming its exclusive entitlement to the Peninsula, and setting out the boundaries of its reserve.[161]

81. Official documents that use the word "reserve" to describe the Peninsula are a further indicator of the Crown's and SON's intention to create a reserve.[162] In the years that followed Treaty 45 ½, the Crown, including the key officials responsible for protecting the reserve,[163] and SON Chiefs and leaders[164] repeatedly described the Peninsula as having been reserved for SON

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[159] J.G. Chewett, Surveyor General's Office, "Plan Shewing the lands purchased by Government from the Indians," (1837), Exhibit 1190.
[160] Exhibit 1437, Order in Council dated July 26, 1843, [PDF 2].
[161] Lord Elgin's Declaration, June 29, 1847, Exhibit 1674; Letter from Anderson to David Sawyer, August 2, 1847, Exhibit 4827, p. 54 [original], p. 1 [transcript] – *referring to the 1847 declaration as a deed for the Saugeen lands*; Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11556, line 7 to p. 11557, line 14.
[162] *Atikamekw d'Opitciwan First Nation v. Her Majesty the Queen in Right of Canada*, 2016 SCTC 6 at para 438.
[163] See above, para 22.
[164] See above, para 22.

by Treaty 45½. To give just one example, in 1851, by Proclamation, the Crown extended the protection in *An Act for the Protection of the Indians in Upper Canada from Imposition and the Property Occupied or Enjoyed by them from Trespass and Injury*, Vict. 13 & 14, Ch 74[165] to the Peninsula.[166] The law was designed to give the Crown enhanced powers to remove Euro-Canadian squatters from the Indian lands to which it was proclaimed to apply.[167] In the marginal note, the Proclamation extending the Act to the Peninsula explains that the Peninsula is "Reserved for the occupat'n of the Saugeen and Owen Sound Indians."[168]

Capacity to Bind the Crown

82. The intention to create a reserve must be held by persons able to bind the Crown, or at least by persons who would be reasonably seen to have such authority.[169] From the Indigenous perspective, the key question is whether it was reasonable for a First Nation to believe "in light of the circumstances and the position occupied by the party they were dealing with directly, that they had before them a person capable of binding the British Crown."[170]

83. The Trial Judge erred in law by failing altogether to consider SON's perspective in her analysis of whether Bond Head had the authority to bind the Crown. In accordance with principles

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[165] *An Act for the Protection of the Indians in Upper Canada from Imposition and the Property Occupied or Enjoyed by them from Trespass and Injury*, Vict. 13 & 14, Ch. 74, Exhibit 1784.
[166] *Proclamation placing certain Tracts of Land set apart for Indians under the provisions of the Act*, Vict. 13&14 Ch. 74, November 7, 1851, Exhibit 1894, p. 2.
[167] Reasons, paras 782-785.
[168] Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11557, line 15 to p. 11558, line 18; See also Prof. Jarvis Brownlie, "The Saugeen Ojibway and Treaty 72 (1854)" (2013), Exhibit 4118, pp. 12-13.
[169] *Ross River Dena v Canada,* 2002 SCC 54 at paras 64-66.
[170] *Ross River Dena v Canada,* 2002 SCC at para 64; *Simon v The Queen,* [1985] 2 SCR 387 at 400-401; *R v Sioui* 1990 1 SCR 1025 at 1040-1042.

of treaty interpretation and the law of reserve creation, consideration of SON's perspective is required.

84. From SON's perspective, Bond Head, who made the treaty promise of a reserve on the Peninsula, was highly authoritative. He was the senior official in Upper Canada in charge of the Indian Department, second in authority in the colonies only to the Governor General of Upper and Lower Canada.[171] At the time he promised a reserve to SON, he was presiding over the important diplomatic ritual of the distribution of presents.[172] He represented to SON that he had the power to protect their lands for them. It was reasonable for SON to see him as a person with the authority to create a reserve for them, and to rely on his promise to do so.

85. Taken from the Crown's perspective, too, the intent to create a reserve was held by those with the authority to create a reserve. In concluding otherwise, the Trial Judge relied solely on: 1) the fact that Bond Head did not have instructions from the Colonial Office to make the treaty; and 2) the fact that the treaty was initially provisional.[173] This neglects the key fact that the **King himself** accepted the terms of Treaty 45 ½ in 1836.[174] Any shortcomings in Bond Head's instructions were overcome by this. Either the King accepted Bond Head's exercise of the prerogative power to make treaty and create a reserve, or he exercised the power himself by accepting the treaty, with its promise to protect the Peninsula. Either way, it is clear the intention to create a reserve was held at the highest level, thus fulfilling the "intention" element of the test for reserve creation. It is a palpable and overriding error that the Trial Judge held otherwise.

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[171] Cross Examination of Jean-Paul Morin, November 26, 2019 at p. 8533, lines 5 to 12.
[172] Above, para 14.
[173] Reasons, para 947.
[174] Reasons, paras 710-711; Lord Glenelg to Bond Head, October 5, 1836, Exhibit 1146.

Reserve Set Apart

86. The third branch of the *Ross River* test requires that some step must be taken to "set apart" or demarcate the reserve for the First Nation.[175] The Trial Judge accepted that the Peninsula was surveyed in 1837, and that the boundary was adjusted by Order in Council in 1843 to accord with the understanding of SON.[176] However, she held that this did not satisfy the test because this "setting apart" did not happen in 1836, at the same moment as Treaty 45 ½ was concluded.[177] This is an error of law since there is no requirement that the four elements of the reserve creation process occur at the same moment. In fact, the case law suggests that they often do not:

(a) In *Jim Shot Both Sides,* the plaintiffs were signatories to Treaty 7. The Court concluded that the treaty negotiations and treaty text demonstrated that the Crown had an intention to create a reserve for the Blood Tribe on September 22, 1877, at the time of Treaty,[178] as did an Order-in Council that altered the reserve location somewhat.[179] However, the reserve was formally created in only 1882, after the reserve's boundaries were set by a preliminary survey exercise.[180]

(b) In *Watson v Canada,* an Order in Council approving the selection of the reserves pursuant to Treaty 4 was issued in July 1875.[181] The treaty was concluded in September

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[175] *Ross River Dena v Canada,* 2002 SCC 54 at para 67.
[176] Reasons, para 715-716; J.G. Chewett, Surveyor General's Office, "Plan Shewing the lands purchased by Government from the Indians," (1837), Exhibit 1190. See also: Exhibit 1193. Order in Council dated July 26, 1843, Exhibit 1436 (Duplicate at Exhibit 1437).
[177] Reasons, para 950.
[178] *Jim Shot Both Sides v Canada,* 2019 FC 789 at paras 292-3, 299, rev'd on other grounds in *Canada v Jim Shot Both Sides,* 2022 FCA 20.
[179] *Jim Shot Both Sides v Canada,* 2019 FC 789 at paras 295-297, 299, rev'd on other grounds in *Canada v Jim Shot Both Sides,* 2022 FCA 20.
[180] *Jim Shot Both Sides v Canada,* 2019 FC 789 at 301-326, 340. rev'd on other grounds in *Canada v Jim Shot Both Sides,* 2022 FCA 20.
[181] *Watson v Canada,* 2020 FC 129 at para 108.

1875, and reserves of 128 acres per band member were promised to the First Nations.[182] The Federal Court held that the reserve was created in 1876, after the lands reserved had been surveyed.[183]

(c) In *Wewaykum,* the process of reserve creation began in as early as 1871, with Article 13 of the *British Columbia Terms of Union,* which required lands to be set aside for First Nations and continued through the 1870s and 1880s with the survey of some of the lands used by the First Nations. The process did not formally conclude until 1938, when the lands at issue were transferred by British Columbia to Canada to be set aside as reserves.[184]

87. The "setting apart" element of the test requires simply that the land intended to be reserved be specified in some manner. The crucial element is that the First Nation, Canada and others may know "where persons other than the members of the Band may settle, and where only Band members may settle."[185] This can be done by survey, by map or by fence, among other methods.[186] In SON's case, the Surveyor General's office completed a plan of the new "Indian reserve" in 1837.[187] The boundary was adjusted by Order-in-Council in 1843.[188] These steps were sufficient to delineate the reserve's boundaries.

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[182] *Watson v Canada,* 2020 FC 129 at paras 103-108.
[183] *Watson v Canada,* 2020 FC 129 at paras 267-277.
[184] *Wewaykum v Canada,* 2002 SCC 79 at paras 14-62.
[185] *Jim Shot Both Sides v Canada,* 2019 FC 789 at para 309, rev'd on appeal on other grounds in 2022 FCA 20.
[186] *Jim Shot Both Sides v Canada,*2019 FC 789 at paras 301-326*,* Rev'd on appeal on other grounds in 2022 FCA 20.
[187] Reasons, para 950; J.G. Chewett, Surveyor General's Office, "Plan Shewing the lands purchased by Government from the Indians," (1837), Exhibit 1190.
[188] Reasons, para 950; Order in Council, July 26, 1843.

88. If there were any doubt, the 1847 Declaration[189] confirmed that the lands had been set apart.

Summary: A Reserve was Created

89. For the above reasons, SON submits that the first three elements of the test for reserve creation are met. Regarding the fourth element of the reserve creation test – that the First Nation accepted the lands, the Trial Judge agreed that SON had begun to make use of the lands in a manner that would satisfy this.[190]

90. SON accordingly submits that, applying the correct test for reserve creation, a reserve was created as of the 1837 survey plan, with boundaries adjusted in 1843 by Order-in-Council. In the alternative, a reserve was created no later than 1843, with the Order-in-Council that set the ultimate boundary. In either case, the Peninsula was a reserve when the Crown failed to act to stop white encroachment on it.

91. The Trial Judge recognized the Crown has fiduciary duties in relation to reserve land.[191] This conclusion is beyond dispute in the case law.[192] Therefore SON submits that a *sui generis* fiduciary duty arises directly, based just on the Peninsula having been reserve land.

(B) DISCRETIONARY CONTROL OF AN ABORIGINAL INTEREST

92. In the alternative, even if there was no reserve created on the Peninsula, SON submits a *sui generis* fiduciary duty still applied to the Peninsula. Such a duty will arise where (1) the Crown undertakes discretionary control over (2) a specific or cognizable Aboriginal interest.[193] This test

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[189] Above, para 23.
[190] Reasons, para 951.
[191] Reasons, para 1124.
[192] *Southwind v Canada,* 2021 SCC 28 at para 62-63.
[193] *Manitoba Métis Federation Inc. v Canada (Attorney General),* 2013 SCC 14, at para 51.

was satisfied in respect of the Peninsula as a result of Treaty 45 ½, even if the Peninsula was not a reserve.

93. The Trial Judge was prepared to "assume" that SON had a sufficient interest in the Peninsula based on occupation and use as of 1836 to satisfy the requirement of a "cognizable" interest.[194] This assumption is well-supported by the relevant law on the nature of the interest required to ground a *sui generis* fiduciary duty,[195] by SON's historical occupation of Peninsula[196] and by the 1847 Declaration.[197]

94. The Trial Judge, however, concluded that the Crown did not have discretionary control over how to protect the Peninsula "for the same reasons discussed above in relation to the *ad hoc* fiduciary duty"[198] – that SON was not precluded from taking actions on its own to try to protect the Peninsula. SON submits that this is in error of law or extricable legal principle for the same reasons given above in relation to the *ad hoc* fiduciary duty.[199]

95. The Trial Judge further distinguished cases where a Crown fiduciary duty to a First Nation had been found on the basis that in such cases the Crown was "the exclusive intermediary between the Indigenous group and third parties with respect to the sale of their lands."[200] This idea was expressly rejected by the Supreme Court of Canada in *Williams Lake*:

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[194] Reasons, para 1130.
[195] See: *Guerin v The Queen,* [1984] 2 SCR 335 at page 385; *Williams Lake Indian Band v Canada,* 2018 SCC 4 at para 52, 54; *Wewaykum v Canada,* 2002 SCC 79 at paras 77, 79, 91 and 95; *Southwind v Canada,* 2021 SCC 28 at para 62.
[196] Reasons, paras 1, 368, 375, 443, 487, 560-561.
[197] Reasons, para 716, 741 and Lord Elgin's Declaration of 1847, Exhibit 1674.
[198] Reasons, para 1133.
[199] Above, paras 61-67.
[200] Reasons, para 1134.

> With regard to discretionary control, Canada argues that it was unreasonable for the Tribunal to find a *sui generis* fiduciary obligation for two reasons. First, the Crown's degree of control fell short of the exclusive, trust-like arrangement at issue in *Guerin*. Second, the band was not deprived of the power to protect its own interest using the dispute resolution process contemplated in *Proclamation No. 15*.
>
> I disagree. **First, it was open to the Tribunal to look, not to the particular form or extent of the Crown's discretionary power to affect the beneficiary's interest, but to the vulnerability of that interest to "the risks of [the alleged fiduciary's] misconduct or ineptitude"… Second, the Tribunal's position is consistent with La Forest J.'s observation in *Hodgkinson* that vulnerability sufficient to give rise to a fiduciary duty does not depend on the presence or absence of "some hypothetical ability to protect one's self from harm"**.[201] [emphasis added]

96. The facts in this appeal share common features with *Williams* Lake: in both cases, the Crown made a commitment to not allow encroachment on Indian lands, and this became the foundation of a fiduciary duty. The First Nation was entitled to rely on the Crown to protect their lands, and fiduciary law would guard this reliance. In *Williams Lake,* this commitment was vague and general: it was founded in Proclamation No 15,[202] which offered a general statement applicable to the entire Colony of British Columbia that "Indian settlements" were not available for pre-emption by settlers.[203] In SON's case, the promise is express and specific assumption of the responsibility to protect a defined parcel of SON's lands – it was a treaty promise to protect *the Peninsula from white encroachment for the benefit of SON.* The argument that there was a sufficient discretionary taking of control in this case is therefore even stronger.

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[201] *Williams Lake Indian Band v Canada,* 2018 SCC 4 at para 59-60.
[202] *Williams Lake Indian Band v Canada,* 2018 SCC 4 at paras 61-62.
[203] *Williams Lake Indian Band v Canada,* 2018 SCC 4 at para 10.

(C) FIDUCIARY DUTY AND TREATY PROMISES

97. As noted above, where the Crown is exercising control over a First Nation's land, **or over Aboriginal or treaty rights**, there is a strong fiduciary duty.[204] As a further alternative, SON submits that this applies directly to the Treaty 45 ½ protection promise.

98. The Trial Judge dismissed this argument by saying that if this were true, it would apply to "many, if not all, treaty promises," and that something further would be required for a fiduciary duty.[205] This is contrary to the most recent Aboriginal fiduciary duty pronouncement from the Supreme Court of Canada and is an error of law.[206]

CONCLUSION ON *SUI GENERIS* FIDUCIARY DUTY

99. SON accordingly submits that a *sui generis* fiduciary duty arose in this case in any of three ways:

(a) Treaty 45 ½ or later events created a reserve on the Peninsula. A *sui generis* fiduciary duty arises in relation to First Nations' reserve lands.

(b) In the alternative, even if there was no reserve, the Crown took discretionary control of SON's cognizable interest in the Peninsula, giving rise to a *sui generis* fiduciary duty.

(c) In the further alternative, a *sui generis* fiduciary duty flows directly from the Treaty 45 ½ promise.

Breach of Fiduciary Duty

100. Since the Trial Judge did not find a fiduciary duty, she did not consider whether Crown conduct she identified as breaches of the Crown's honour also constituted breaches of fiduciary

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[204] *Southwind v Canada*, 2021 SCC 28 at para 62, and above, para 47.
[205] Reasons, para 1099.
[206] *Southwind v Canada*, 2021 SCC 28 at para 62.

duty. SON submits that the facts she found would support such a conclusion, and that her failure to find a breach of fiduciary duty is an error of law that flows from her error of not finding a fiduciary duty.

101. The content of a fiduciary duty varies with the nature and importance of the interest being protected.[207] Generally speaking, the Crown-Indigenous fiduciary duty:

> …includes the following obligations of the Crown: loyalty, good faith, full disclosure, and, where reserve land is involved, the protection and preservation of the First Nation's quasi-proprietary interest from exploitation…The standard of care is that of a person of ordinary prudence in managing their own affairs.[208]

102. A fiduciary duty includes a positive obligation to provide all information that is relevant and material to the beneficiary's interests:

> As persons obliged to engage in other-regarding behaviour, fiduciaries should be understood to possess positive duties to provide **full and frank disclosure of all material information** that is pertinent to their beneficiaries' interests and that falls within the fiduciary element(s) of their interactions.[209] [emphasis added]

103. It is important to note that whether or not disclosure of those material facts would have had consequences on the beneficiary's decision is irrelevant. This is illustrated by *MacDonald v BMO Trust Company*. A trust company failed to disclose foreign exchange charges withdrawn from accounts of customers. Although the charges were both reasonable and expected, the Court considered it simply irrelevant whether the customers would have consented to those charges had they been disclosed.[210] A breaching fiduciary is prevented from arguing that the outcome would

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[207] *Southwind v Canada,* 2021 SCC 28 at para 62.
[208] *Southwind v Canada,* 2021 SCC 28 at para 64.
[209] L.I. Rotman, *Fiduciary Law*, (Toronto: Carswell, 2005) at p. 326.
[210] *MacDonald v BMO Trust Company*, 2020 ONSC 93 at para 52.

have been the same even if the material facts had been disclosed.[211] This is tied to the purpose of fiduciary law – to protect fiduciary relationships – and the consequent purpose of fiduciary relief to deter improper conduct. For this reason, where there has been a breach by non-disclosure of material facts, a fiduciary "may not be heard to maintain that disclosure would not have altered the decision to proceed with the transaction."[212]

BREACH OF DILIGENCE AND LOYALTY

104. The Trial Judge concluded that Crown failed to "take more steps or deploy more resources, even at a modest level, to fulfill the treaty promise [to protect the Peninsula],"[213] and that it had not made a diligent effort to do so.[214] The Trial Judge found this amounted to a breach of treaty and of the honour of the Crown.[215]

105. Should this Court conclude that the Crown had a fiduciary duty to SON, SON submits the Crown's failure to act diligently to protect the Peninsula is, in effect, a failure to act with the ordinary prudence of a person managing their own affairs and is thus a breach of the Crown's fiduciary duty.

106. Further, the Trial Judge found that "[r]ather than making the protection of the Peninsula the priority in the 1850s, the Crown focused on obtaining the surrender of more land for settlers."[216] In view of the treaty promise, SON submits that this constitutes a breach of loyalty and thus is a breach of fiduciary duty.

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[211] *Southwind v Canada,* 2021 SCC 28 at para 82.
[212] L.I. Rotman, *Fiduciary Law*, (Toronto: Carswell, 2005) at pp. 639-40; *London Loan & Savings Co. v Brickenden*, [1934] 3 DLR 465 (Canada PC) at 469.
[213] Reasons, para 927.
[214] Reasons, para 928, and see above, para 25.
[215] Reasons, para 928.
[216] Reasons, para 907, 922.

ANDERSON'S BREACH: GOOD FAITH AND DISCLOSURE

107. Anderson met with SON in August 1854 to seek a surrender of the Peninsula. When SON refused, Anderson told SON that the government would not take the trouble to help them and that he would be recommending to the government that the Peninsula be sold without SON's agreement.[217] The Trial Judge concluded that Anderson's remarks were inappropriate, and ultimately were a breach of the honour of the Crown.[218]

108. Should this Court conclude that the Crown had a fiduciary duty to SON, it is submitted that Anderson's conduct was a breach of fiduciary duty as well as breach of the Crown's honour. What Anderson proposed would have been contrary to Crown policy as it had existed since the Royal Proclamation.[219] Anderson's conduct therefore constituted a breach of good faith, since he was threatening to do something he knew was not permitted.[220] Also, in the circumstance of seeking a land surrender, the process the Crown was required by its own policy to follow is an important material fact – it tells SON what the Crown may and may not do to seek a surrender, and when SON is entitled to keep its lands. Anderson not only failed to inform SON accurately about the policies of the Royal Proclamation, he misinformed them. Therefore, Anderson's conduct also amounts to a lack of full disclosure of relevant information. Any of these aspects would amount to a breach of fiduciary duty.

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[217] Reasons, para 990-991 and see above, paras 27-32.
[218] Reasons, para 992 and 1291.
[219] Reasons, para 992.
[220] Reasons, paras 665-666, 992; Evidence of Dr. Gwen Reimer, Transcript vol 93, March 10, 2020, p.11981 lines 7-13.

OLIPHANT'S BREACH: DISCLOSURE

109. As noted above, in October 1854, Oliphant understood his task to be "to wring from those whom it protects, some assent, however reluctant" to the surrender of the Peninsula.[221] During the course of a contentious meeting with SON on October 13, 1854, Oliphant "represented the extreme difficulty, if not impossibility" of preventing trespass on the Peninsula by settlers.[222]

110. However, the **very next day**, Oliphant took steps to do precisely what he had just said was impossible. He issued a notice that no squatters would be allowed on the Peninsula, and wrote the sheriff and to surveyor Rankin asking for their assistance in preventing squatting and ejecting squatters trespassing on the Peninsula.[223] These are steps which the Trial Judge found could have and should have been done much earlier to protect the Peninsula.[224]

111. SON therefore submits that Oliphant's statements about the impossibility of protecting the Peninsula were belied by his actions the very next day. At a minimum, his statements are misleading and demonstrate a lack of disclosure of relevant information – the steps that remained available to the Crown to protect the Peninsula.

112. The Trial Judge, however, concluded that Oliphant's statements were not lies because it had not been proven that the steps Oliphant took on October 14 would have been sufficient to stop squatting, and indeed she noted that squatting continued.[225]

113. With respect, this misses an important point, albeit one the Trial Judge did not reach because she found no fiduciary duty. Should this Court conclude that the Crown had a fiduciary

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[221] Reasons, para 1000.
[222] Reasons, paras 1001-1008, quote at 1006.
[223] Reasons, para 1016.
[224] Reasons, paras 867, 888 and 1056.
[225] Reasons, paras 1055-1056.

duty to SON, it follows that this would have included a positive obligation to provide full and frank disclosure.[226]

114. SON submits that Oliphant failed to disclose material facts about additional steps that the Crown could have and should have taken to protect the Peninsula from encroachments, such as the steps he took the very next day. This was a breach of the Crown's duty of disclosure to SON.

115. Whether this would have made a difference to the final result is not relevant. A breaching fiduciary is prevented from arguing that the outcome would have been the same even if the material facts had been disclosed.[227] SON therefore submits that what Oliphant said and did not say in October 1854 amounts to a breach of fiduciary duty. The Trial Judge did not apply a fiduciary standard to Oliphant's conduct, which would constitute an error of law if this Court finds a fiduciary duty existed.

The Consequences of the Breach

PHASING ISSUE

116. The consequence of the Crown's fiduciary breach is not relevant to finding whether there was a breach.[228] However, consequences are generally relevant (although not necessarily determinative)[229] with respect to remedies. In this case, the Trial Judge made two findings about the consequences of impugned Crown conduct:

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[226] Above, para 102.
[227] *Southwind v Canada,* 2021 SCC 28 at para 82.
[228] Above, paras 44 and 115.
[229] It is possible to get a remedy for a breach of fiduciary duty even if there was **no loss**: *Soulos v Korkontzilas*, [1997] 2 SCR 217.

(a) that Anderson's remarks in August 1854 did not have a significant impact on SON's decision to enter into Treaty 72,[230] and

(b) that SON's decision to enter into Treaty 72 was not affected by Oliphant's statements or process.[231]

117. This trial was divided into phases: generally speaking, Phase 1 is about liability and Phase 2 is about remedies. Phase 2 has not commenced, and will not commence until after the conclusion of appeals in Phase 1.[232]

118. SON submits that, in the context of a breach of fiduciary duty, the consequences of impugned actions of a fiduciary, to the extent they are relevant, relate exclusively to remedies. In particular, the findings referred to in paragraph 116 above relate to paragraphs 2(b)(iii), 2(b)(iv), and 2(b)(v) of the Phasing Order – which are matters for Phase 2 of this litigation.[233] Therefore SON seeks an order setting aside those findings as premature in light of the Phasing Order.

SUBSTANTIVE ISSUE

119. In the alternative, should this Court conclude that the above findings about the consequences of impugned actions of the Crown are properly within the scope of Phase 1, SON seeks orders setting these findings aside on the basis of inconsistency with fiduciary law.

120. Both Anderson's and Oliphant's statements involve a lack of disclosure of relevant information, and therefore are breaches of fiduciary duty:

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[230] Reasons, paras 993-994.
[231] Reasons, paras 1000, 1048-1051, 1064, 1078.
[232] Order of Justice Matheson, 16 January, 2020, Appeal Book, Tab 9.
[233] Order of Justice Matheson, 16 January, 2020, Appeal Book, Tab 9.

(a) Anderson told SON that the Crown could take their lands without their agreement. Anderson failed to inform SON accurately about the policies of the Royal Proclamation, and indeed misrepresented what the Crown was permitted to do under those policies. That amounts to a lack of full disclosure of relevant information.

(b) Oliphant went to Treaty 72 with the intent to "wring" SON's assent to the surrender from them. His key means of doing so was to strongly highlight the risk to SON of losing their lands entirely. He told SON it was near impossible to protect their lands, and a surrender was achieved. But Oliphant failed to disclose information about the steps available to protect the Peninsula that could still have been taken by the Crown, and which, in fact, Oliphant did take the very next day.

121. The Crown fiduciary is prevented from arguing that the outcome would have been the same even if there was full disclosure.[234] As a fiduciary, the Crown cannot now be heard to say that such disclosure would have made no difference.

122. Since the Trial Judge did not find a fiduciary duty, she did not consider this aspect of fiduciary law. Therefore, should this Court find that the Crown did owe a fiduciary duty to SON, the findings about the consequences of such non-disclosure would not be consistent with fiduciary law, and should be set aside as errors of law.

PART V – ORDERS SOUGHT

123. The Appellants ask for orders:

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

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[234] Above, para 103.

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

(c) setting aside findings made by the Trial Judge concerning the consequences of Anderson's and Oliphant's impugned actions;

(d) Costs in this appeal and in the court below; and,

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

All of which is respectfully submitted. Date: May 2, 2022

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SCHEDULE A

AUTHORITIES
Alberta v Elder Advocates of Alberta Society, [2011] 2 SCR 261
Atikamekw d'Opitciwan First Nation v. Her Majesty the Queen in Right of Canada, 2016 SCTC 6
Canada (AG) v Anishnabe of Wauzhushk Onigum Band, 2002 CanLII 15761, 2002 CarswellOnt 3212 (ON SC), aff'd 2003 CanLII 13835, 2003 CarswellOnt 4835 (ON CA)
Canada v Jim Shot Both Sides, 2022 FCA 20
Chippewas of Sarnia Band v Canada (Attorney General), 2000 CanLII 16991 (ON CA)
Filkow et al v D'Arcy & Deacon LLP, 2019 MBCA 61
Galambos v Perez, 2009 SCC 48
Goruk v. Greater Barrie Chamber of Commerce, 2021 ONSC 5005
Guerin v The Queen, [1984] 2 SCR 335
Hodgkinson v Sims, [1994] 3 SCR 377
Housen v Nikolaisen, 2002 SCC 33
Jim Shot Both Sides v Canada, 2019 FC 789
Lehman (Re), 2016 BCSC 126, aff'd 2016 BCCA 514
London Loan & Savings Co. v Brickenden, [1934] 3 DLR 465 (Canada PC)
MacDonald v BMO Trust Company, 2020 ONSC 93
Madawaska Maliseet v Canada, 2017 SCTC 5
Manitoba Métis Federation Inc. v Canada (Attorney General), 2013 SCC 14
Marshall v R., [1999] 3 S.C.R. 456
R v Badger, [1996] 1 SCR 771
R v Sioui 1990 1 SCR 1025
Ross River Dena Council Band v Canada, 2002 SCC 54, [2002] 2 SCR 816
Simon v The Queen, [1985] 2 S.C.R. 387
Soulos v Korkontzilas, [1997] 2 SCR 217
Southwind v Canada, 2021 SCC 28
Teal Cedar Products Ltd. v British Columbia, [2017] 1 S.C.R. 688
Watson v Canada, 2020 FC 129

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Wewaykum Indian Band v Canada, 2002 SCC 79
Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development), 2018 SCC 4
SECONDARY SOURCES
Rotman, L.I. *"Fiduciary Law"*, (Toronto: Carswell, 2005)
Rotman, L.I. *"Understanding Fiduciary Duties and Relationship Fiduciarity"* (2017), 62 McGill L.J. 975

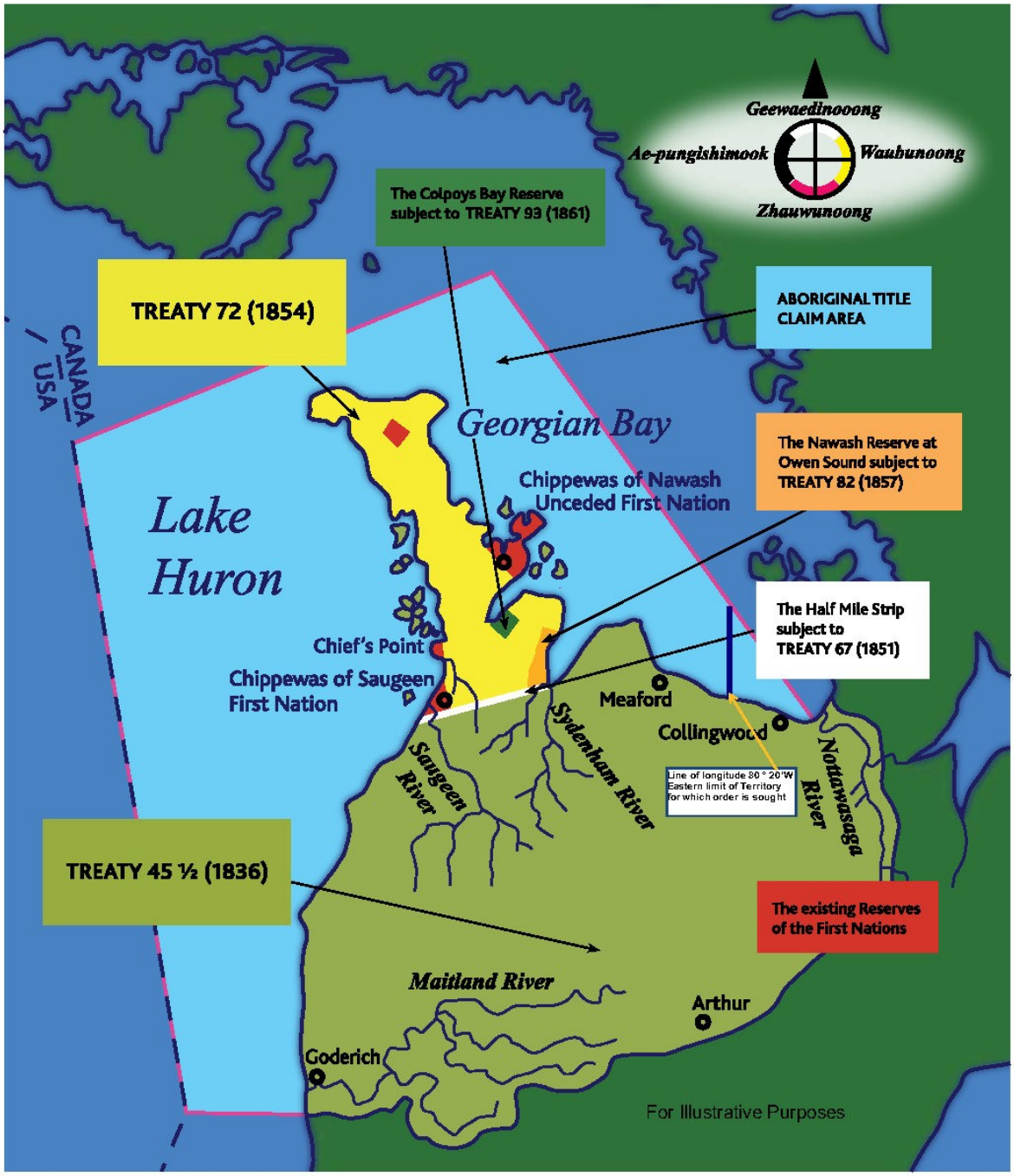
SCHEDULE B

LEGISLATION
***Indian Act,* SC 1876, c. 18, s 6:** *An Act to amend and consolidate the laws respecting Indians* Whereas it is expedient to amend and consolidate the laws respecting Indians: Therefore Her Majesty, by with the advice and consent of the Senate and House of Commons of Canada, enacts as follows: - **Terms** 6. The term "reserve" means any tract or tracts of land set apart by treaty or otherwise for the use of benefit of or granted to a particular band of Indians of which the legal title is in the Crown, but which is unsurrendered, and includes all the trees, wood, timber, soil, stone, minerals, metals or other valuables thereon or therein
***Indian Act*, RSC 1985, c I-5., s 2 (1)(a):** 2 (1) In this Act, **reserve** a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band […]

SCHEDULE C

Map 1 SON Territory

Exhibit P (annotated) – SON claims map with southeast corner removed



SCHEDULE D

Footnote 52: References to the Peninsula as a "Reserve"

Crown References to the Peninsula as a "Reserve"

- Report of a Committee of the Executive Council to the Surveyor General, July 28, 1843, Exhibit 1434;
- T.G. Anderson to Leonard Gleason, June 28, 1852, Exhibit 1396;
- T.G. Anderson to Leonard Gleason, January 7, 1853, Exhibit 1967, Transcript at Exhibit 4756; T.G. Anderson to John Frost, September 17, 1853, Exhibit 1946;
- Bagot Commission Report, Appendix No. 24, Statement of T.G. Anderson, December 20,1839, Exhibit 1447 at PDF 154;
- John Clarke to JJ.H. Price, September 24, 1850, Exhibit 4828;
- T.G. Anderson to Chiefs and Warriors of Saugeen and Owen Sound, February 26, 1851, Exhibit 1851, asking for a surrender of a strip of the reserve to build a road;
- T.G. Anderson, Superintendent of Indian Affairs, to L. Oliphant, Superintendent General of Indian Affairs, August 16, 1854, Exhibit 2120, where Anderson says that the limited land cession proposed by SON would "prevent the sale of the most valuable part of their reserve" and notes that SON "did not advance one good argument why the reserve should not be sold beyond "we don't want to sell our land, "We want to keep it for our children", and that he did not think "their Great Father would permit them to make an arrangement of this Kind by which they would prevent the Sale of the most valuable part of the reserve";
- L. Oliphant, Superintendent General of Indian Affairs to T.G. Anderson, Superintendent of Indian Affairs, June 28 1854, Exhibit 2094, partial transcript at Exhibit 4724, explaining that Lord Elgin thinks it "highly desirable that the Reserve at Saugeen should be surrendered for the Indians for sale";
- Minutes of a General Council, August 18, 1852, Exhibit 1943, asking whether SON wishes to dispose of part of the reserve for sale;
- Colonel Bruce to T.G. Anders, June 6 1853, Exhibit 1994, noting that "Although the time may not yet have arrived for disposing of that part of the Reserve, the day may not be far distant when such an arrangement may be for the advantage of the Indians";
- T.G. Anderson, Superintendent of Indian Affairs to John Frost, September 17,1 852, Exhibit 1946, discussing a Commissioner appointed to prevent squatting on the Saugeen reserve;
- L. Oliphant, Superintendent General of Indian Affairs, to Lord Elgin, November 23, 1854, Exhibit 2160 at p 5, PDF 4– after the surrender of the Peninsula in Treaty 45 ½,

noting that "the intelligence that a large portion of the long coveted Indian reserve was surrendered to the Crown for sale created some sensation" and at p 3 PDF 2 – noting the lands adjacent to thee reserve were full of settlers looking for land.

SON References to the Peninsula as a "Reserve"

- Statement of Chief Metigwob, September 13, 1836, Exhibit 1142 at p. 2, noting that Lt. Gov Bond Head had promised to reserve the Peninsula for them;
- T.G. Anderson, Report of my Visit to the Various Tribes under My Superintendence Between 19th July and 25th August 1853, Exhibit 2004, "We expect Indians from all points of the compass and we wish to keep this reserve for them"; Petition from Saugeen, March 10, 1886 "Many winters ago our forefathers surrendered to their Great Father King George the third a large portion of their territory which had been their hunting grounds from the beginning of time, to make homes for white men and only reserved for themselves a tract of land called the Saugeen Peninsula".

SCHEDULE E

Glossary of Terms

TERM	DEFINITION
Aboriginal	Refers to people that are recognized under section 35 of the *Constitution Act, 1982* - that is, Registered First Nations, non-Registered First Nations, Métis or Inuit people.
Anishinaabe	Term used by many Indigenous groups living in the Great Lakes region to describe themselves and their larger cultural community. The term is used by various groups including those that are also known as Pottawatomi, Ojibway and Ottawa. The Appellants historically referred to and continue to refer to themselves as Anishinaabe.
Band	Under the section 2(1) of the *Indian Act*, means: "a body of Indians (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951, (b) for whose use and benefit in common, moneys are held by Her Majesty, or (c) declared by the Governor in Council to be a band for the purposes of this Act." "Band" also is an anthropological term of art and was used in this way by numerous witnesses. It refers to a local socio-political group of indigenous people. Some bands in the anthropological sense do not meet the definition of "band" in the *Indian Act* sense. Further, bands in the anthropological sense existed long before the *Indian Act* existed. "Band" is also a term often used in historical records. Most Bands (in either sense) now prefer to use the term "First Nation".
Canada West	The portion of the United Province of Canada that was formerly the Province of Upper Canada. The term was used for purposes of administration and did not have constitutional status.
Cape Croker	Name used historically (and sometimes currently) to refer to what is now the Neyaashiinigmiing Reserve of the Chippewas of Nawash Unceded First Nation.
Cape Croker Indians	Name used historically to refer to what is now the Chippewas of Nawash Unceded First Nation. Also known as Owen Sound Band or Owen Sound Indians. After Treaty 72, this band had reserves at both Owen Sound and Cape Croker. However, though the Owen Sound reserve was surrendered in 1857 in Treaty 82. Also known as the Nawash Band or Nawash Indians.
Chippewa	Refers to a sub-group of the Ojibwe, which is itself a sub-ethnicity of the Anishinaabe; known by a number of other names that were given to them by others.
Chippewas of Nawash Unceded First Nation	One the First Nations making up SON.

TERM	DEFINITION
Colpoy's Bay Band	A group Anishinaabe originally from the Lake Huron/Simcoe Band who relocated to SON's territory at SON's invitation after Treaty 45 ½ and before Treaty 72. Their main settlement was at Colpoy's Bay. Although they maintained a reserve there after Treaty 72, this reserve was surrendered in 1861 when most of the band moved to Christian Island. The rest were integrated into Chippewas of Nawash Unceded First Nation.
First Nation	Term used to identify Indigenous or Aboriginal peoples in Canada that are not Inuit or Métis; preferred term for "Band".
Indian	Under the *Indian Act*, refers to a person who is registered as an Indian or entitled to be registered as an Indian under the *Indian Act*; under section 91(24) of the *Constitution Act, 1867*, refers to all Aboriginal peoples including non-status Indians, Inuit and Métis. This has a certain historical meaning but it is not the preferred term.
Indigenous	Refers to people and their descendants who were in Canada prior to colonization; often used interchangeably with the term "Aboriginal".
Nawash Indians or Nawash Band	Name used historically to refer to what is now the Chippewas of Nawash Unceded First Nation. Also known as the Cape Croker Band or Cape Croker Indians, and as the Owen Sound Band or Owen Sound Indians. After Treaty 72, this group had reserves at both Owen Sound and Cape Croker. However, the Owen Sound reserve was surrendered in Treaty 82 (1857).
Odawa/Ottawa	Refers to a sub-ethnicity of Anishinaabe; means 'traders'.
Ojibway/Ojibwe	Refers to a sub-ethnicity of Anishinaabe; includes Chippewa, Mississauga and Saulteaux; known by a number of other names that were given to them by others.
Owen Sound Indians	Name used historically to refer to what is now the Chippewas of Nawash Unceded First Nation. Also known as the Cape Croker Band or Cape Croker Indians. After Treaty 72, this group had reserves at both Owen Sound and Cape Croker. However, the Owen Sound reserve was surrendered in Treaty 82 (1857). Also known as the Nawash Band or Nawash Indians.
Peninsula	Refers to the Bruce (Saugeen) Peninsula, which was between 1836 and 1854 referred to as the Saugeen (or Saukeeng) Reserve.

TERM	DEFINITION
Province of Quebec	The colony created by the Royal Proclamation of 1763; SON's territory, including the Peninsula, was included in the boundaries of the Province of Quebec at that time.
Saugeen First Nation	One the First Nations making up SON.
Saugeen Indians	Term used historically to refer to SON generally, or to refer to what is now the Saugeen First Nation.
Saugeen Ojibway Nation, or SON	Collective comprised of two First Nations: Saugeen First Nation and Chippewas of Nawash Unceded First Nation; name used by the Appellants to refer to themselves collectively, both present day and historically.
Saukings	Term used historically to refer to the Saugeen Indians or SON, including in Treaty 45 ½.
Upper Canada	Province of Canada formed in 1791, in existence until 1841; the Peninsula was included in the boundaries of the Province of Upper Canada.
United Province of Canada	Formed in 1841, in existence until 1867; the Peninsula was included in the boundaries of the United Province of Canada.

The Chippewas of Saugeen First Nation et al. Plaintiffs (Appellants)	and	The Attorney General of Canada and Her Majesty the Queen in Right of Ontario Defendants (Respondents)	SCJ Court File No.: 94-CQ-50872CM Court File No. C69831

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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